CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 36/00

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| GARRETH ANVER PRINCE | Appellant |
| versus | |
| THE PRESIDENT OF THE LAW SOCIETY OF THE CAPE OF GOOD HOPE | First Respondent |
| THE LAW SOCIETY OF THE CAPE OF GOOD HOPE | Second Respondent |
| THE SECRETARY OF THE LAW SOCIETY OF THE CAPE OF GOOD HOPE | Third Respondent |
| THE MINISTER OF JUSTICE | Fourth Respondent |
| THE ATTORNEY-GENERAL OF THE CAPE OF GOOD HOPE | Fifth Respondent |

Heard on : 17 May 2001

Decided on : 25 January 2002

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JUDGMENT

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NGCOBO J:

*Introduction*

[1] Mr Garreth Prince, the appellant, wishes to become an attorney. He has satisfied all the

academic requirements for admission as such.[1] The only outstanding requirement is a period of community service which he is required to perform in terms of section 2A(a)(ii) of the Attorneys Act.[2] In an application to register his contract of community service with the Law Society of the Cape of Good Hope (the Law Society), the second respondent, as required by section 5(2) of the Attorneys Act,[3] the appellant not only disclosed that he had two previous convictions for possession of cannabis sativa (cannabis)[4] but also expressed his intention to continue using cannabis. He stated that the use of cannabis was inspired by his Rastafari religion.

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1 He has completed the B Iuris and LLB degrees. At the time of the launching of these proceedings he was pursuing, part-time, LLM studies in Labour Law. He has also successfully completed a course with the School for Legal Practice in partial fulfilment of the period of articles of clerkship required in terms of section 2A of the Attorneys Act 53 of 1979.

2 Attorneys Act 53 of 1979.

3 Section 5(2) _provides:_

> "The secretary of the society concerned shall, on payment of the fees prescribed under section 80, examine any articles or contract of service lodged with him and shall, if he is satisfied that the articles are or contract of service is in order and that the council has no objection to the registration thereof, on payment of the fees so prescribed register such articles or contract of service and shall advise the principal and candidate attorney concerned of such registration in writing by certified post."

4 It is also known as "marijuana", "hashish" and "dagga" and the Rastafari call it "ganja" or "The Holy Herb".

[2] The Law Society declined to register his contract of community service. It took the view that a person who, while having two previous convictions for possession of cannabis, declares his intention to continue breaking the law, is not a fit and proper person to be admitted as an attorney.[5] In the view of the Law Society, as long as the prohibition on the use or possession of cannabis remains on the statute books, the appellant will consistently break the law and this will bring the attorneys' profession into disrepute.

[3] Cannabis is a dependence-producing drug, the possession or use of which is prohibited by the law, subject to very few exceptions that do not apply to the appellant. The appellant unsuccessfully challenged the constitutionality of this prohibition, both in the Cape of Good Hope High Court (the High Court)[6] and later in the Supreme Court of Appeal (the SCA).[7] Hence

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5 Section 4A(b)(i) provides:

> "A candidate attorney intending to perform community service shall submit to the secretary of the society of the province in which the community service is to be performed, the following, namely . . . proof to the satisfaction of the society that he . . . is a fit and proper person".

6 Reported as *Prince v President of the Law Society, Cape of Good Hope and Others* 1998 (8) BCLR 976 (C). Initially, the appellant challenged the decision of the Law Society refusing to register his contract of community service.

7 Reported as *Prince v President, Cape Law Society, and Others* 2000 (3) SA 845 (SCA); 2000 (7) BCLR

this appeal.

[4] This appeal concerns the constitutional validity of the prohibition on the use or possession of cannabis when its use or possession is inspired by religion. The appellant does not dispute that the prohibition serves a legitimate government interest. We are therefore not called upon to decide whether cannabis should be legalised or not. The constitutional complaint is that the prohibition is bad because it goes too far, bringing within its scope possession or use required by the Rastafari religion.

[5] The appeal is resisted by the Attorney-General and the Minister of Health. The Law Society and the Minister of Justice abide by the decision of the Court.

*History of litigation*

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823 (SCA).

[6] When the litigation commenced in the High Court, the appellant challenged the constitutionality of the decision of the Law Society, alleging that it infringed his rights to freedom of religion,[8] to dignity,[9] to pursue the profession of his choice,[10] and not to be subjected to unfair discrimination.[11] He sought an order reviewing and setting aside the decision of the Law Society refusing to register his contract of community service and directing the Law Society to register his contract with effect from 15 February 1997. However, by the time the matter reached this Court, the appellant had broadened his constitutional challenge to include a challenge to section 4(b) of the Drugs and Drug Trafficking Act 140 of 1992 (the Drugs Act)[12] and section 22A(10) of the Medicines and Related Substances Control Act 101 of 1965 (the Medicines Act).[13] It is this challenge that led to the intervention of the Minister of Justice, the Minister of Health and the Attorney-General.

[7] This matter first came before this Court in November 2000.[14] As the focus of the challenge had been on the decision of the Law Society, there was insufficient information on record to determine the constitutionality of the impugned provisions. After extensive argument,

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8 Sections 15(1) and 31(1) of the Constitution of the Republic of South Africa Act 108 of 1996.

9 Section 10 of the Constitution.

10 Section 22 of the Constitution.

11 Section 9 of the Constitution.

12 See below n 24.

13 See below n 32.

14 *Prince v President, Cape Law Society, and Others* 2001 (2) SA 388 (CC); 2001 (2) BCLR 133 (CC) (*Prince I*).

the parties were granted leave to submit further evidence in the form of affidavits. The appellant was directed to deal, amongst other things, with the circumstances under which Rastafari use cannabis, while the respondents were directed to respond to appellant's evidence and, in addition, deal with practical problems that may arise from the granting of a religious exemption. On that occasion the Court made an order which, in pertinent part, reads:

> "2. The appellant is granted leave to deliver, on or before 24 January 2001, evidence on affidavit setting out:
>
> (a) how, where, when and by whom cannabis is used within the Rastafari religion in South Africa;
>
> (b) how cannabis is obtained by Rastafari;
>
> (c) whether the Rastafari religion regulates the use and possession of cannabis by its members;
>
> (d) whether there are any internal restrictions on, and supervision of, the use of cannabis by members of the Rastafari religion; and
>
> (e) any other facts relating to the matters set forth in paras [12]-[17] of the judgment.
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> 3. The respondents are granted leave to deliver, on or before 14 February 2001, evidence on affidavit setting out:
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> (a) their response, if any, to the evidence submitted by the appellant;
>
> (b) what practical difficulties, if any, will be encountered if an exemption for the sacramental use of cannabis is allowed; and
>
> (c) how a religious exemption for the personal use of cannabis would differ, in its administration and the overall enforcement of the Drugs and Drug Trafficking Act 140 of 1992 and the Medicines and Related Substances Control Act 101 of 1965, from the medical and scientific exemptions currently to be found in s 4(b) of the Drugs Act and s 22A(10) of the Medicines Act, if at all."[15]

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[15] Id at para 41. The "matters set forth in paras [12]-[17]" were the history of Rastafari religion, its membership, organisational structure and the role played by cannabis in its practice.

[8] Pursuant to that order the parties have submitted a considerable body of additional factual and opinion material.

*Preliminary issues*

[9] Before addressing the merits of the appeal it is necessary to dispose of two preliminary matters. The one is an application by the appellant to have certain material admitted in terms of Rule 30 and the other is an application by the Attorney-General to submit further evidence.

*(a) The Rule 30 application*

[10] Rule 30[16] permits any party on appeal "to canvass factual material which is relevant to the determination of the issues before the Court and which do not specifically appear on the record". However, this is subject to the condition that such facts "are common cause or otherwise incontrovertible" or "are of an official, scientific, technical or statistical nature capable of easy verification." The rule has no application where the facts sought to be canvassed are disputed.[17] A dispute as to facts may, and if genuine usually will, demonstrate that the facts are

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16 Rule 30 reads as follows:

> "(1) Any party to any proceedings before the Court and an *amicus curiae* properly admitted by the Court in any proceedings shall be entitled, in documents lodged with the registrar in terms of these rules, to canvass factual material which is relevant to the determination of the issues before the Court and which do not specifically appear on the record: Provided that such facts—
>
> (a) are common cause or otherwise incontrovertible; or
>
> (b) are of an official, scientific, technical or statistical nature capable of easy verification.
>
> (2) All other parties shall be entitled, within the time allowed by these rules for responding to such document, to admit, deny, controvert or elaborate upon such facts to the extent necessary and appropriate for a proper decision by the Court."

17 *S v Lawrence; S v Negal; S v Solberg* 1997 (4) SA 1176 (CC); 1997 (10) BCLR 1348 (CC) at para 23

not "incontrovertible" or "capable of easy verification". If that be the case, the dispute will in effect render the material inadmissible. Ultimately, the admissibility depends on the nature and the substance of the dispute.

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which dealt with Rule 34, a precursor to Rule 30.

[11] The material which the appellant seeks to have admitted deals with the potential health benefits and risk of cannabis; investigates the non-medical use of cannabis; and includes a comparative analysis of the relative harm caused by cannabis, alcohol and tobacco.[18] Some of its contents are not free from controversy if viewed against the evidence on the effect of cannabis filed on behalf of the Attorney-General. Apart from this, the material is not relevant to the central question in this appeal, namely, whether the impugned provisions are constitutionally invalid by reason of their failure to allow for an exemption for the religious use or possession of cannabis by Rastafari. It follows, therefore, that this material cannot be admitted under Rule 30.

*(b) Application to introduce further evidence on appeal*

[12] In this Court, the appellant applied for and was granted leave to introduce the evidence of Professor Carole Diane Yawney who has written extensively on the cultural and religious practices of the Rastafari.[19] The affidavit of Professor Yawney deals with the nature and practice of the Rastafari religion and the importance of the use of cannabis in that religion. The Attorney-General did not object to the introduction of this affidavit. He was given leave to respond to the

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18 They consist of the 1999 Institute of Medicine Report, the LeDain Commission Report (Canada) of 1972, the World Health Organisation (WHO) Report 1995, and Editorials from two British Journals. The Attorney-General does not object to the admission of the WHO Report but objects to the admission of others on the basis that the information they contain is not uncontroversial and is not capable of easy verification. The two editorials are clearly not covered by Rule 30 and this much was conceded by the appellant.

19 Professor Yawney spent about twenty-seven weeks in this country between 1997 and 2000.

allegations contained in it. He did not challenge its contents as they relate to the Rastafari religion, and the use and the importance of cannabis in that religion.

[13] The Attorney-General seeks leave to introduce five affidavits by American physicians and experts on drugs as a response to the affidavit of Professor Yawney. The appellant's objection to the admission of such material is not without merit. The affidavits that the Attorney-General seeks to introduce deal with the harmful effects of cannabis. They therefore go beyond the allegations made by Professor Yawney. Apart from this, on the evidence of Dr Zabow and Professor Ames, it is common cause that cannabis is a harmful drug and that its harmful effects are cumulative and dose-related. The affidavits sought to be introduced by the Attorney-General do not suggest otherwise. They therefore add nothing. On the contrary some appear to contradict certain aspects of the Attorney-General's case. Indeed it appears from these affidavits that the gateway theory relied upon by the Attorney-General is disputed by other experts. For all these reasons the affidavits sought to be introduced by the Attorney-General should not be received.[20]

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[20] The Attorney-General also suggested that the additional evidence will rebut the evidence of Drs Grinspoon and Erickson. The affidavits of these experts were part of the evidence in the case of the *R v Clay* [1997] OJ No 3333 (QL) (Gen Div), decided by the General Division of the Ontario Court. No leave was sought by the appellant to have these affidavits introduced and they must accordingly be ignored.

[14] With that prelude, I now turn to the merits of the appeal.

*Background to the Rastafari religion*

[15] At the centre of this appeal is a practice of the Rastafari religion that requires its adherents to use cannabis. It is not in dispute that Rastafari is a religion that is protected by sections 15 and 31 of our Constitution. The Rastafari religion has been in existence for more than seventy years. Although it is said to have its origin in Jamaica, its origin is also linked to Ethiopia. It originated as a black consciousness movement seeking to overthrow colonialism and white oppression. Over the years, it has spread to other countries, including our own. It is estimated that there are approximately twelve thousand Rastafari in this country.

[16] While Rastafari generally do not belong to formal organisations, they belong to several duly constituted groups or communities. In addition, they may belong to one of the Houses of Rastafari.[21] Recently, the Rastafari National Council has been formed as an umbrella body to co-ordinate activities, and to look after the interests of the Rastafari, including matters of conduct and discipline. Their places of worship are similarly informal and they are usually designated sacred areas or Tabernacles where communities would come together for the purposes of worship. Church gatherings are presided over by priests, assistant priests or elderlies. According to the evidence, there are about seven priests in this country.

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21 In this country there are four Rastafari houses and one movement, namely, the Nyahbinghi Order, The Universal Movement of Rastafari, The Twelve Tribes of Israel, The Emmanualites (Bobo Dreads), and The Burning Spear Movement.

[17] Rastafari have a moral code which the adherents are required to follow such as the Nazarene Code. The religion promotes universal values such as peace, love, truth, equality, justice and freedom. It acknowledges the Bible as an inspirational and sacred source. Reasoning and meditation are essential elements of the religion. Meditation is an individual contemplative practice while reasoning is a collective activity that serves as a form of communion. One of the essential elements of these activities is the use of cannabis which is used at religious gatherings and in the privacy of the follower's home.

*Cannabis and the Rastafari religion*

[18] There is no genuine dispute that the use of cannabis is central to the Rastafari religion.[22] According to Professor Yawney, to the Rastafari, cannabis or "the herb", as the Rastafari call it, is a sacred God-given plant to be used for the healing of the nation. Rastafari describe their religious experience as "knowing God", "gaining divine wisdom" and "seeing the truth". In the pursuit of their religious experience they seek to gain access to the inspiration provided by Jah Rastafari, the Living God. The use of cannabis is critical to opening one's mind to inspiration because God reveals himself through this medium. It is believed that there is a duty incumbent upon human beings to praise the Creator and that through the use of cannabis one is best able to fulfill this obligation. Thus cannabis is also called incense. The use of cannabis is a sacrament known as Communion which accompanies reasoning.

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22 The Director-General of Health has sought to dispute the centrality of cannabis in the Rastafari religion. This aspect is dealt with later at paras 41-3.

[19] Cannabis is consumed individually by smoking it in the form of an individual cigarette-like "spliff" or by using a water-pipe known as the "chalice". The chalice — a symbol of the Rastafari religion — is passed around to fellow members. The reason for smoking cannabis through a chalice, "is based on the Rastafari belief that the body is a temple and is cleansed from within by the smoke of the cannabis and is also seen as a peace offering to appease the love of God on sinful people". The appellant likened the smoking of cannabis through the chalice to the performance of the Holy Communion. Women and children do not take part in the smoking of the chalice. Cannabis is also burnt as incense. When burnt as incense, cannabis is thrown onto the altar fire or burnt in an incense holder. This practice, he said, was similar to the burning of incense in other religions. Other uses include eating it as part of food, drinking it as a tonic, or bathing in it. Although it is also used for medicinal and culinary purposes, these uses are no less sacred.

[20] There is a highly elaborate protocol surrounding the use of cannabis. The use of the herb as a form of prayer is a most sacred act. There is strict discipline surrounding the use of the herb as it is used to communicate with The Creator. The use of cannabis by the followers of the religion "is to create unity and to assist them in re-establishing their eternal relationship with their Creator". It is not to create an opportunity for casual use of cannabis. Cannabis is used at religious gatherings, ceremonies or in the privacy of one's home where it will not offend others. Rastafari consider themselves to be purist and the use of other intoxicants such as liquor, tobacco or street drugs is prohibited.

[21] It is common cause that the appellant is an adherent of the Rastafari religion. After he had adopted the vow of Nazarene as a symbol of conversion, he started wearing his hair in dreadlocks and observing the dietary commands of the religion. He performs all the rituals prescribed by the religion in accordance with the tenets of his religion and observes the religious ceremonies, including gatherings such as Nyahbinghi, which is similar to a church service.[23] He partakes in the use of cannabis at these ceremonies. He also uses cannabis by either burning it as an incense or smoking, drinking, or eating it in the privacy of his home.

*The relevant statutory provisions*

[23] Nyahbinghi here must be distinguished from the Nyahbinghi House which is one of the houses within the Rastafari (see above n 21).

[22] Cannabis is listed in Part III of Schedule 2 to the Drugs Act as an undesirable dependence-producing substance. Its use or possession is prohibited by section 4(b).[24] The

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[24] Section 4 reads as follows:

> "No person shall use or have in his possession—
>
> (a) . . .
>
> (b) any dangerous dependence-producing substance or any undesirable dependence-producing substance, unless—
>
> (i) he is a patient who has acquired or bought any such substance—
>
> (aa) from a medical practitioner, dentist or practitioner acting in his professional capacity and in accordance with the requirements of the Medicines Act or any regulation made thereunder; or
>
> (bb) from a pharmacist in terms of an oral instruction or a prescription in writing of such medical practitioner, dentist or practitioner,
>
> and uses that substance for medicinal purposes under the care or treatment of the said medical practitioner, dentist or practitioner;
>
> (ii) he has acquired or bought any such substance for medicinal purposes—
>
> (aa) from a medical practitioner, veterinarian, dentist or practitioner acting in his professional capacity and in accordance with the requirements of the Medicines Act or any regulation made thereunder;
>
> (bb) from a pharmacist in terms of an oral instruction or a prescription in writing of such medical practitioner, veterinarian, dentist or practitioner; or
>
> (cc) from a veterinary assistant or veterinary nurse in terms of a prescription in writing of such veterinarian,
>
> with the intent to administer that substance to a patient or animal under the care or treatment of the said medical practitioner, veterinarian, dentist or practitioner;
>
> (iii) he is the Director-General: Welfare who has acquired or bought any such substance in accordance with the requirements of the Medicines Act or any regulation made thereunder;
>
> (iv) he, she or it is a patient, medical practitioner, veterinarian, dentist, practitioner, nurse, midwife, nursing assistant, pharmacist, veterinary assistant, veterinary nurse, manufacturer of, or wholesale dealer in, pharmaceutical products, importer or exporter, or any other person contemplated in the Medicines Act or any regulation made thereunder, who or which has acquired, bought, imported, cultivated, collected or manufactured, or uses or is in possession of, or intends to administer, supply, sell, transmit or export any such substance in accordance with the requirements or conditions of the said Act or regulation, or any permit issued to him, her or it under the said Act or regulation;
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> (v) he is an employee of a pharmacist, manufacturer of, or wholesale dealer in, pharmaceutical products, importer or exporter who has acquired, bought, imported, cultivated, collected or manufactured, or uses or is in possession of, or intends to supply, sell, transmit or export any such substance in the course of his employment and in accordance with the requirements or conditions of the Medicines Act or any regulation made thereunder, or any permit issued to such

stated purpose of the Drugs Act is to prohibit the use or possession of dependence-producing substances and dealing in such substances. A distinction is made between dangerous and undesirable substances. Cannabis falls within the category of undesirable dependence-producing substances. However, this statute recognises that it may be necessary to use this drug in certain circumstances such as for medicinal purposes. Hence, possession for medicinal purposes is exempted under section 4(b) but this exemption is subject to the provisions of the Medicines Act.

[23] Section 22A(10) of the Medicines Act read with Schedule 8 of that Act, also prohibits the use or possession of cannabis except for research or analytical purposes. Its stated purpose is to regulate the registration of medicines and substances. The Medicines Act makes provision for the registration and control of medicines and substances for the protection of the general public. Before any medicine is supplied to the public it must be certified by experts and may only be sold by certain classes of persons. In addition, this statute provides mechanisms for the enforcement of its provisions.[25]

[24] The substances listed in Schedule 8 of the Medicines Act are substantially the same as those listed in Part III of Schedule 2 to the Drugs Act. Seen in this context, the purpose of the prohibition contained in section 22A(10) of the Medicines Act coincides with that of the Drugs Act. Both prohibitions are aimed at prohibiting the use of harmful dependence-producing drugs. Cannabis is the target of both statutes, primarily because it has the potential to cause harm in the

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pharmacist, manufacturer of, or wholesale dealer in, pharmaceutical products, importer or exporter under the said Act or regulation; or

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

form of psychological dependence when consumed regularly and in large doses.

*Medical evidence on the effects of cannabis*

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[25] *Administrator, Cape v Raats Röntgen and Vermeulen (Pty) Ltd* 1992 (1) SA 245 (A).

[25] Medical evidence on record indicates that cannabis is a hallucinogen. Although the medical experts who deposed to affidavits on the harmful effects of cannabis differed in their emphasis,[26] on their evidence it is common cause that: the abuse of cannabis is considered harmful because of its psychoactive component, tetrahydrocannabinol (THC); the effects of cannabis are cumulative and dose-related; prolonged heavy use or less frequent use of a more potent preparation is associated with different problems; acute effects are experienced most quickly when it is smoked; present clinical experience suggests that cannabis does not produce physical dependence or abstinence syndrome; and the excessive use of cannabis will result in a

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[26] Dr Tuvia Zabow, an Associate Professor of Psychiatry at the University of Cape Town, who is also the Head of Forensic Psychiatry Unit at Valkenberg Hospital in Cape Town, who deposed to an affidavit in support of the Attorney-General, emphasised the harmful effects of cannabis. He also added that it is almost inevitable that cannabis will not be taken by itself but abusers of cannabis find it necessary to mix the drug with other substances including nicotine and mandrax. By contrast, and on behalf of the appellant, Dr Frances Rix Ames, an Emeritus Associate Professor of Neurology at the University of Cape Town, who also works at Valkenberg Hospital and who has practised Neurology since 1955 with a special interest in epilepsy and cannabis and who has conducted research into the use and effects of cannabis since 1958, emphasised the medicinal use of cannabis, in particular, for glaucoma, chronic asthmatics and multiple sclerosis.

hypermanic or other psychotic state. However, "one joint of dagga, or even a few joints" will not cause harm.

[26] The harmful effect of cannabis which the prohibition seeks to prevent is the psychological dependence that it has the potential to produce.[27] On the medical evidence on record, there is no indication of the amount of cannabis that must be consumed in order to produce such harm. Nor is there any evidence to indicate whether bathing in it or burning it as an incense poses the risk of harm that the prohibition seeks to prevent. The medical evidence focused on the smoking of cannabis and its harmful effects.

*The contentions of the parties*

[27] The appellant contended that the impugned provisions were unconstitutional to the extent that they failed to provide an exemption applicable to the use or possession of cannabis by Rastafari for bona fide religious purposes. Reduced to its essence the appellant's contention is that the prohibition is constitutionally bad because it does not accommodate the religious use of cannabis. Put simply, the appellant contends that the impugned provisions are overbroad. The

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27 It should be emphasised that in general the evidence of the nature and the extent of the harm caused by cannabis is the subject of a huge medical controversy. See generally Boister "Decriminalising dagga in the new South Africa: Rekindling the debate" 1995 (8) *SA Journal of Criminal Justice* 21 at 26; Paschke "Personal use and possession of dagga: A matter of privacy or prohibition?" 1995 (8) *SA Journal of Criminal Justice* 109 at 112-3. Professor Ames notes that the prohibition on the use or possession of dagga has prevented effective research on the harmful effects of cannabis that is essential to separating the facts from the myths about the harmful effects of cannabis.

appellant's challenge must be viewed against the fact that the two statutes exempt from prohibition uses of cannabis that cannot be said to amount to an abuse of cannabis such as research and medicinal purposes. These uses of cannabis are exempted but are subjected to strict control and regulation.

[28] While accepting that the prohibition limits the appellant's constitutional rights to freedom of religion and those of his fellow Rastafari, the Attorney-General and the Minister of Health nevertheless contended that such prohibition is justifiable in terms of section 36 of the Constitution. They submitted that the prohibition is essential to the war on drugs and is required by our international law obligations.[28] In addition, they contended that a religious exemption allowing Rastafari to use cannabis for religious purposes would be difficult to administer. The evidence they submitted, as well as their argument, focussed on the smoking of cannabis and the practical difficulties that would be encountered in administering any religious exemption. However, they did not submit any evidence to demonstrate the harmful effects of the other uses of cannabis such as bathing in it or burning it as an incense. This was so notwithstanding the specific allegation by the appellant and Professor Yawney that Rastafari use cannabis in different ways including smoking it, burning it as an incense, eating it, bathing in it and drinking it.

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[28] South Africa has ratified the Single Convention on Narcotic Drugs, 1961 as amended by Protocol (1), 1972, and has signed, with reservations, the Convention on Psychotropic Substances, 1971 and the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988.

*The Judgments of the Courts Below*

[29] The High Court found that the prohibition limits the constitutional right of the appellant to practice his religion, but nevertheless concluded that such limitation was justifiable under section 36.[29] It held that an exemption allowing Rastafari to use cannabis would be contrary to the obligations of this country under the relevant International Conventions.[30] In addition, it found that such an exemption would place a burden on the police and the courts, both of which are operating under heavy pressure because of the general crime situation, as it would involve an investigation by the police and the courts into whether the defence based on the Rastafari

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29 *Prince v President of the Law Society, Cape of Good Hope and Others*, above n 6 at 984E-990A.

30 Id at 989A.

religion is genuine.[31] It accordingly dismissed the constitutional challenge.[32]

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31 Id at 989A-B.

32 The High Court assumed without deciding that the prohibition contained in section 4(b) discriminates unfairly against the followers of the Rastafari religion. However, it found that the limitation of the right was justified under the limitations clause. Similarly, while finding that section 4(b) limits the appellant's right to choose his profession protected by section 22, it found that such limitation was nevertheless justifiable under the limitations clause. In addition, and for reasons given by it in regard to section 4(b), the High Court found that section 22A(10) of the Medicines Act, which contains a similar prohibition, is saved

by the limitation clause and therefore constitutional. Section 22A(10) reads as follows:

> "No person shall—
>
> (a) acquire, use, have in his possession, manufacture or import any Schedule 8 substance except for analytical or research purposes and unless a permit for such acquisition, use, possession, manufacture or importation has been issued to him by the Director-General on the recommendation of the council; or
>
> (b) acquire, import, collect, cultivate, keep or export any plant or any portion thereof from which any such substance can be extracted, derived, produced or manufactured, unless a permit to acquire, import, collect, cultivate, keep or export such plant or any portion thereof, has been issued to him by the Director-General on the recommendation of the council."

Cannabis is one of the substances listed in Schedule 8.

[30] The judgment of the SCA focused on "whether there should be an exemption for the use of cannabis by Rastafarians for bona fide religious observance".[33] The SCA found that, having regard to the harmful effects of cannabis, especially when used in large doses, the general ban on the use or possession of cannabis was necessary to prevent the abuse of cannabis by the Rastafari followers and that an effective ban of the abuse of drugs is "a pressing social purpose".[34] In addition, it found that the exemption sought will be impossible to enforce because of the difficulty attendant on attempting to establish whether a person found in possession of cannabis is a Rastafari follower. It concluded that "[t]he alternative prayer cannot be granted in its present form and the available evidence does not enable us to fashion a suitable order with adequate precision."[35] It accordingly dismissed the constitutional challenge.[36]

*The issues for decision*

[31] It is important to emphasise what this case is not about but what it is about. This case is not concerned with a broad challenge to the constitutionality of the prohibition on the use or possession of cannabis. Although this was the form of the main prayer contained in the amendment to the notice of motion in the SCA, the statutory provisions in question were never attacked on the basis that they should be struck down in their entirety.[37] We are not therefore

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33 *Prince v President, Cape Law Society, and Others*, above n 7 at para 9. Hefer JA delivered the majority judgment while Mthiyane AJA (with Zulman JA concurring) delivered a separate judgment concurring in the result.

34 Id at para 12.

35 Id at para 13.

36 It also dealt with non-constitutional challenges and dismissed the appeal.

37 *Prince v President, Cape Law Society, and Others*, above n 7 at para 9.

called upon to decide whether the legislature's general prohibition on the use and possession of cannabis is consistent with the Constitution or not. Equally, we are not called upon to decide whether the use and possession of cannabis should be legalised. Finally, we are not called upon to determine what exemption should be granted to the appellant or to fashion any exemption. What we are called upon to decide is whether the impugned provisions are overbroad.

[32] The SCA construed the alternative prayer as an invitation "to create an exemption through the application of s 36(1)(e) of the Constitution"[38] and as "another way of claiming an exemption not provided for in the legislation and which a court of law cannot provide."[39] Relying upon a passage in the decision of this Court in *S v Lawrence*,[40] the SCA observed that "[i]t may well be that on this ground alone the prayer cannot be granted"[41] but found it unnecessary to come to any firm decision on this issue. The Attorney-General has also approached this appeal on the footing that the appellant is asking this Court to grant the appellant a religious exemption to use, in particular, to smoke cannabis. This, in my view, misconstrues

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38 Id at para 11. The appellant's alternative relief is an order declaring the provisions of section 4(b) of the Drugs Act and section 22A(10) of the Medicines Act to be inconsistent with the Constitution to the extent that they fail to provide an exemption applicable to Rastafari for bona fide religious purpose.

39 Id.

40 Above n 17 at para 80.

41 *Prince v President, Cape Law Society, and Others,* above n 7 at para 11.

the nature of the appellant's constitutional challenge.

[33] The appellant's alternative prayer is not in substance a claim for an exemption in literal terms although this is the form of the alternative prayer. It is a limited challenge to the impugned provisions. The constitutional complaint is that the impugned provisions are overbroad in that the proscription is so wide that its unlimited terms also encompass the use or possession of cannabis by Rastafarians for bona fide religious purposes. The appellant did not therefore come to Court for an order that the scope of the exceptions made by section 4(b) of the Drugs Act and section 22A(10) of the Medicines Act be enlarged. Instead the appellant challenged the prohibitions contained in these provisions. This distinguishes the present case from *S v Lawrence; S v Negal; S v Solberg*,[42] where the appellant in the *Negal* appeal challenged, amongst other things, section 88 of the Liquor Act 27 of 1989 which dealt with the scope of the exception to the prohibition against selling any liquor from a grocery store instead of challenging the provisions of section 40 of that Act which restricted the goods that may be sold on licenced premises.

[34] It was in this context that Chaskalson P said the following:

> "The fallacy in the appellant's argument is that it treats s 88 as the obstacle to grocers selling beer and cider whereas in substance the section deals with the scope of the exception to the prohibition against selling any liquor from a grocery store. If the appellant wishes to challenge the constitutionality of prohibiting grocers from selling beer, cider or any other liquor the challenge should be directed against s 40 and not

42 See above n 17.

against the exception to the prohibition made by ss 87 and 88.

Instead of doing this, the appellant has approached the Court for an order that the scope of the exception made by ss 87 and 88 be enlarged. In effect what the appellant has asked this Court to do is amend the Liquor Act so as to make provision for a 'grocer's wine, beer and cider licence' as an exception to the prohibition imposed by s 40 of the Act. A Court can strike down legislation that is unconstitutional and can sever or read down provisions of legislation that are inconsistent with the Constitution because they are overbroad. It may have to fashion orders to give effect to the rights protected by the Constitution, but what it cannot do is legislate."[43]

[35] In this Court, as in the courts below, this case was approached on the footing that the prohibition contained in the impugned provisions served a legitimate government interest. Indeed there was no suggestion either in the papers or in argument that the objective pursued by the prohibition was not laudable. The constitutional complaint before us is that the prohibition is constitutionally bad because it is overbroad. To put it differently, the complaint is that the legitimate government purpose served by the prohibition could be achieved by less restrictive means. It is that complaint, and it alone, that we are called upon to consider.

[36] The determination of this complaint calls for an enquiry into whether an exemption for the Rastafari religious use of cannabis could be granted, or whether the field of the prohibition could otherwise be limited so as not to trench on the Rastafari religious use of cannabis without undermining the purpose of the prohibition. This is not to suggest that the Court must now

[43] Id at paras 79-80 (footnote omitted).

embark upon the enquiry into whether an exemption should be granted. Nor does such an enquiry require the Court to formulate such an exemption. The purpose of this enquiry is to test the validity of the impugned provisions by determining whether Parliament could have achieved its goal without limiting the constitutional rights to the extent that it did. However, before determining the central question presented in this appeal, it is necessary to determine first whether the prohibition limits the appellant's constitutional right to freedom of religion.

*The right to freedom of religion*

[37] The right to freedom of religion is contained in section 15(1) of the Constitution which provides:

> "Everyone has the right to freedom of conscience, religion, thought, belief and opinion"

and in section 31(1)(a) which provides:

> "Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community . . . to enjoy their culture, practise their religion and use their language".

[38] This Court has on two occasions considered the contents of the right to freedom of religion.[44] On each occasion, it has accepted that the right to freedom of religion at least comprehends: (a) the right to entertain the religious beliefs that one chooses to entertain; (b) the

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[44] First in *S v Lawrence*, above n 17, a case that concerned the right to freedom of religion under the interim Constitution; and second, in *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC); 2000 (10) BCLR 1051 (CC), a case that concerned the right to freedom of religion under sections 15(1) and 31(1)(a) of the Constitution. Unlike the Constitution, the interim Constitution did not contain the equivalent of section 31(1) of the Constitution.

right to announce one's religious beliefs publicly and without fear of reprisal; and (c) the right to manifest such beliefs by worship and practice, teaching and dissemination.[45] Implicit in the right to freedom of religion is the "absence of coercion or restraint." Thus "freedom of religion may be impaired by measures that force people to act or refrain from acting in a manner contrary to their religious beliefs."[46]

[39] Seen in this context, sections 15(1) and 31(1)(a) complement one another. Section 31(1)(a) emphasises and protects the associational nature of cultural, religious and language rights. In the context of religion, it emphasises the protection to be given to members of communities united by religion to practice their religion. It is not necessary to say anything more on the proper scope of section 31(1)(a). For the moment, the question that must now be

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45 The Court cited with approval the *dictum* by Dickson J (as he then was) in *R v Big M Drug Mart Ltd* 18 DLR (4th) 321 at 353; [1985] 1 SCR 295 at 311 in which he said:

> "The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest belief by worship and practice or by teaching and dissemination."

considered is whether the prohibition contained in the impugned provisions limits the appellant's constitutional right to freedom of religion, a question that is considered next.

*Does the prohibition limit the appellant's constitutional rights*

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46 *S v Lawrence*, above n 17 at para 92.

[40] That Rastafari is a religion is not in dispute. It is now widely acknowledged that Rastafari is a form of religion.[47] Nor is it in dispute that the appellant is a genuine follower of that religion. Similarly, it is not in dispute that the use of cannabis is central to the Rastafari religion. Although it is also used for culinary and medicinal purposes, these uses are no less sacred in the context of the religion. The strict discipline and protocol that accompanies the use of cannabis at religious gatherings and ceremonies emphasise the importance of cannabis in the Rastafari religion. All this points to the centrality of cannabis in the practice of Rastafari religion.

[41] In this Court, the Director-General for Health sought to challenge the centrality of the use of cannabis in the Rastafari religion because children and women are excluded from smoking cannabis and the constitutions of the various Houses[48] of the Rastafari religion do not provide that the smoking of cannabis is essential to the religion. He also questioned the sincerity of the appellant's belief in the Rastafari religion.

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47 *In re Chikweche* 1995 (4) SA 284 (ZS) at 288G-289H; *Reed v Faulkner* 842 F2d 960 at 962 (7th Cir 1988); *Crown Suppliers (Property Services Agency) v Dawkins* [1993] ICR 517 at 519-20 (CA); and Taylor "Soul Rebels: The Rastafarians and the Free Exercise Clause" (1984) 72 *Georgetown LJ* 1605.

48 See above n 21.

[42] In the absence of credible evidence to the contrary, the allegations made by the appellant which have not been disputed must be accepted. Apart from this, as a general matter, the Court should not be concerned with questions whether, as a matter of religious doctrine, a particular practice is central to the religion. Religion is a matter of faith and belief. The beliefs that believers hold sacred and thus central to their religious faith may strike non-believers as bizarre, illogical or irrational. Human beings may freely believe in what they cannot prove. Yet, that their beliefs are bizarre, illogical or irrational to others or are incapable of scientific proof, does not detract from the fact that these are religious beliefs for the purposes of enjoying the protection guaranteed by the right to freedom of religion. The believers should not be put to the proof of their beliefs or faith. For this reason, it is undesirable for courts to enter into the debate whether a particular practice is central to a religion unless there is a genuine dispute as to the centrality of the practice.

[43] Here, there is no question about the genuineness of the appellant's religious belief. He has demonstrated that he is a bona fide member of the Rastafari religion and has established that the use of cannabis is central to the practice of the Rastafari religion. The affidavit of Professor Yawney, who has written extensively on the Rastafari religion and its practice, confirms that the use of cannabis is central to this religion. These allegations are not denied and must therefore be accepted.

[44] The prohibition contained in the impugned provisions requires the followers of the Rastafari religion to refrain from using cannabis. But this is contrary to their belief. They are

forced to choose between following their religion or complying with the law. The prohibition on the use or possession of cannabis thus manifestly limits the rights of the Rastafari to practice their religion. What remains to be considered is whether this limitation is justifiable in terms of section 36.

*Is the limitation on the appellant's constitutional rights justifiable*

[45] To pass constitutional muster, the limitation on the constitutional rights must be justifiable in terms of section 36(1) of the Constitution.[49] The limitation analysis requires an enquiry into whether the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. In that enquiry, the relevant considerations include the nature of the right and the scope of its limitation, the purpose,

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[49] Section 36(1) provides:

> "The rights in the Bill of Rights may be limited only in terms of 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—
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> (a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation and its purpose; and
> (e) less restrictive means to achieve the purpose."

importance and the effect of the limitation, and the availability of less restrictive means to achieve that purpose. None of these factors is individually decisive. Nor are they exhaustive of the relevant factors to be considered.[50] These factors together with other relevant factors are to be considered in the overall enquiry. The limitation analysis thus involves the weighing up of competing values and ultimately an assessment based on proportionality.[51]

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50 *S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 104 ; *S v Manamela and Another (Director-General of Justice Intervening)* 2000 (3) SA 1 (CC); 2000 (5) BCLR 491(CC) at paras 33 and 65.

51 Id.

[46] Where, as here, the constitutional complaint is based on the failure of the statutory provisions to accommodate the religious use of cannabis by the Rastafari, the weighing-up and evaluation process must measure the three elements of the government interest, namely, the importance of the limitation; the relationship between the limitation and the underlying purpose of the limitation; and the impact that an exemption for religious reasons would have on the overall purpose of the limitation. The government interest must be balanced against the appellant's claim to the right to freedom of religion which also encompasses three elements: the nature and importance of that right in an open and democratic society based on human dignity, equality and freedom; the importance of the use of cannabis in the Rastafari religion; and the impact of the limitation on the right to practice the religion.[52] In particular, in this case, the proportionality exercise must relate to:

> ". . . whether the failure to accommodate the appellant's religious belief and practice by means of the exemption . . . can be accepted as reasonable and justifiable in an open and democratic society based on human dignity, freedom and equality".[53]

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52 Compare with what the Court said in *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) at para 35.

53 *Christian Education*, above n 44 at para 32.

[47] In weighing up the competing interests in this case, it is necessary to identify accurately the interests that are at stake. The government interest involved here is not the broad interest in regulating the dependence-producing drugs and preventing their abuse as well as trafficking in those drugs. The government interest involved here is a narrow one — the failure to allow a religious exemption for the sacramental use of cannabis. What must be examined in this regard is the interest that the government seeks to promote and the impediment to the achievement of its objectives that would result from the granting of the exemption.[54] Put differently, what must be determined is whether the granting of the religious exemption would undermine the objectives of the prohibition.

*(a) The nature of the right limited and the scope of limitation*

[48] The right to freedom of religion is probably one of the most important of all human rights. Religious issues are matters of the heart and faith. Religion forms the basis of a relationship between the believer and God or Creator and informs such relationship. It is a means of communicating with God or the Creator. Religious practices are therefore held sacred. In *Christian Education* and in *Prince 1*, we observed:

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54 See the dissenting opinion of Blackmun J in *Employment Division, Department of Human Resources of Oregon, et al. v Smith, et al.* 494 US 872 at 911 (1990).

> "There can be no doubt that the right to freedom of religion, belief and opinion in the open and democratic society contemplated by the Constitution is important. The right to believe or not to believe, and to act or not to act according to his or her beliefs or non-beliefs, is one of the key ingredients of any person's dignity. Yet freedom of religion goes beyond protecting the inviolability of the individual conscience. For many believers, their relationship with God or creation is central to all their activities. It concerns their capacity to relate in an intensely meaningful fashion to their sense of themselves, their community and their universe. For millions in all walks of life, religion provides support and nurture and a framework for individual and social stability and growth. Religious belief has the capacity to awake concepts of self-worth and human dignity which form the cornerstone of human rights. It affects the believer's view of society and founds the distinction between right and wrong. It expresses itself in the affirmation and continuity of powerful traditions that frequently have an ancient character transcending historical epochs and national boundaries."[55]

[49] The right to freedom of religion is especially important for our constitutional democracy which is based on human dignity, equality and freedom. Our society is diverse. It is comprised of men and women of different cultural, social, religious and linguistic backgrounds. Our Constitution recognises this diversity. This is apparent in the recognition of the different languages;[56] the prohibition of discrimination on the grounds of, amongst other things, religion, ethnic and social origin;[57] and the recognition of freedom of religion and worship.[58] The protection of diversity is the hallmark of a free and open society. It is the recognition of the inherent dignity of all human beings. Freedom is an indispensable ingredient of human dignity.

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55 *Christian Education*, above n 44 at para 36; *Prince 1*, above n 14 at para 25 (footnotes omitted).

56 Section 6 of the Constitution.

57 Section 9(3) of the Constitution.

58 Sections 15(1) and 31(1)(a) of the Constitution.

[50] Human dignity is 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. As we observed in *Dawood*[59]:

[59] *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC).

"The value of dignity in our Constitutional framework cannot therefore be doubted. The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. This Court has already acknowledged the importance of the constitutional value of dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhuman or degrading way, and the right to life. Human dignity is also a constitutional value that is of central significance in the limitations analysis. Section 10, however, makes it plain that dignity is not only a *value* fundamental to our Constitution, it is a justiciable and enforceable *right* that must be respected and protected. In many cases, however, where the value of human dignity is offended, the primary constitutional breach occasioned may be of a more specific right such as the right to bodily integrity, the right to equality or the right not to be subjected to slavery, servitude or forced labour."[60]

60 Id at para 35 (footnotes omitted).

[51] The impugned provisions criminalise all use and possession of cannabis except when used for medicinal,[61] analytical or research purposes.[62] They criminalise the use of cannabis by the Rastafari regardless of where, how and why it is used. It matters not that they use it for sacramental purposes as a central part of the practice of their religion. The impugned provisions do not distinguish between the Rastafari who use cannabis for religious purposes and drug abusers. The effect of the prohibition is to state that in the eyes of the legal system all Rastafari are criminals. The stigma thus attached is manifest. Rastafari are at risk of arrest, prosecution and conviction for the offence of possession or use of cannabis. For the appellant, the consequences have gone beyond the stigma of criminal conviction. He is now prevented from practising the profession of his choice. There can be no doubt that the existence of the law which effectively punishes the practice of the Rastafari religion degrades and devalues the followers of the Rastafari religion in our society. It is a palpable invasion of their dignity.[63] It strikes at the very core of their human dignity. It says that their religion is not worthy of protection. The impact of the limitation is profound indeed.

*(b) The importance of the limitation*

[52] Yet, there can be little doubt about the importance of the limitation in the war on drugs. That war serves an important pressing social purpose: the prevention of harm caused by the

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61 Section 4(b) of the Drugs Act, above n 24

62 Section 22A(10) of Medicines Act, above n 32.

63 Compare the observation this Court made in *National Coalition*, above n 52 at para 28, a case concerning the impact of sodomy laws on gay people.

abuse of dependence-producing drugs and the suppression of trafficking in those drugs.[64] The abuse of drugs is harmful to those who abuse them and therefore to society. The government thus has a clear interest in prohibiting the abuse of harmful drugs. Our international obligations too require us to fight that war subject to our Constitution.[65]

[53] The government objective in prohibiting the use and possession of cannabis arises from the belief that its abuse may cause psychological and physical harm. On the evidence of the experts on both sides, it is common cause that cannabis is a harmful drug. However, such harm is cumulative and dose-related. Uncontrolled use of cannabis may lead to the very harm that the legislation seeks to prevent. Effective prevention of the abuse of cannabis and the suppression of trafficking in cannabis are therefore legitimate government goals. The conclusion reached by the courts below in this regard cannot be gainsaid. But does the achievement of these goals require a complete ban on even purely religious uses of cannabis by Rastafari, regardless of how and where it is used?

*Could a religious exemption be granted without undermining the purpose of the prohibition*

[54] The government does not contend that the achievement of its goals requires it to impose

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64 *S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC); 1995 (12) BCLR 1579 (CC) at para 20.

65 See para 72 below which deals with South Africa's international obligations in this regard.

an absolute ban on the use or possession of drugs. Nor was it contended that any and all uses of cannabis in any circumstances are harmful. The use and possession of cannabis for research or analytical purposes under the control of the government can hardly be said to be harmful, let alone an abuse of cannabis. Similarly, the use of cannabis for medicinal purpose under the care and supervision of a medical doctor cannot be said to be harmful. This is so because a medical doctor will control the dosage taken and thus ensure that its use does not cause harm. These uses of cannabis are exempted because they do not undermine the purpose of the prohibition. It follows therefore that if the use of cannabis by the Rastafari is not inherently harmful or if its use can effectively be controlled by the government to prevent harm and trafficking in cannabis, refusal to allow for a religious exemption in these circumstances can hardly be said to be reasonable and justifiable. But, is it so?

[55] Two points need to be made at the outset in this regard. First, it is significant to bear in mind that the Rastafari use cannabis in different circumstances: it may be consumed by smoking it as a cigarette or in a chalice, eating it as part of a meal or drinking it as a tonic, or it may be used in bathing or burnt as an incense at religious ceremonies and gatherings. While it is not obligatory to consume it, it is nevertheless required that it must be used in one form or another. Thus women and children do not partake in the smoking of cannabis. There are also male adherents who do not smoke it. Notwithstanding these different circumstances in which cannabis is used, the focal point of both the evidence as well as the debate in this Court in opposition to the relief sought was the smoking of cannabis which was said to pose a risk of harm when it is consumed regularly and in large doses.

[56] The second point is this: the prohibition proscribes all religious use or possession of cannabis regardless of the circumstances under which it is used or the amount used or how it is used. In this regard, it is significant to note that the evidence of the appellant is that he partakes in the use of cannabis at all religious ceremonies and also uses it in the privacy of his home by burning it as incense, smoking, drinking and eating it. It is clear from his evidence that his use of cannabis is not confined to smoking it. Nor does he suggest that he considers smoking alone to be central to his religion. Thus the case that the state had to meet is how the different uses of cannabis undermines its interest. Indeed in terms of the order made by this Court in *Prince I* the state was directed not only to respond to the evidence of the appellant setting out how cannabis is used in the religion but also indicate the practical difficulties it will encounter if an exemption allowing the sacramental use of cannabis was granted. The response required of the state was thus not confined to smoking cannabis but to all uses of cannabis. It was therefore incumbent upon the government to persuade the Court that such a complete ban on all sacramental uses of cannabis is reasonable and justifiable by, amongst other things, presenting facts and argument in support of the justification of such a ban.

[57] We have recently held that where justification rests on factual and/or policy considerations, the party contending for justification must put such material before the Court. The obligation of government in defending legislation includes not only the submission of legal argument but also placing before the Court the requisite factual material and policy considerations. Failure to do this may in certain cases lead to a finding that the limitation is not

justifiable.[66] And this is such a case. Such facts had to demonstrate that all religious uses of cannabis by Rastafari and in any circumstance pose a risk of harm regardless of how it is used and that a religious exemption cannot be granted without undermining the objective of the statutes. Such facts were necessary in this case because of, first, the constitutional requirement that in limiting the constitutional rights regard must be had to less restrictive means that are available to achieve the purpose of the limitation; and second, the constitutional commitment to tolerance which calls for the accommodation of different religious faiths if this can be done without frustrating the objectives of the government.

66 *Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening* 2001 (4) SA 491 (CC); 2001 (8) BCLR 765 (CC).

[58] There was no evidence that the use of cannabis in bathing or burning it as an incense poses a risk of harm to the user. Indeed there was no suggestion that the burning of cannabis as an incense in a carefully circumscribed ritual context poses any risk of harm. As incense it is either burnt in the altar fire or an incense holder. This is done at religious ceremonies presided over by priests, of which there are seven in the whole country, or by assistant priests or elders. Cannabis is also burnt as an incense in the privacy of one's home as the appellant testified. Burning cannabis as an incense in a ceremonial context under the supervision of a priest is far removed from the irresponsible use of cannabis for recreational purposes or by drug abusers. The burning of incense is not a practice confined to Rastafari, it is performed by other religious faiths. For example, it is a practice deeply rooted in African traditional worship where the burning of *impepho* is essential to communicating with ancestors.[67] Ceremonies at which Rastafari burn cannabis as an incense are very few.[68]

[59] I am unable to agree with the suggestion that burning cannabis as an incense causes harm from inhalation. This is highly speculative and is not borne out by the medical evidence on record. Medical evidence suggests that "prolonged heavy use or less frequent use of more potent

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67 *Impepho* is a herb used to communicate with ancestors and it is especially used by *Izangoma*. See Warren-Brown and Krali "Root Treatment", on the internet at *www.leadership.co.za/issues/1999junjul/articles/healers.html*. Mtetwa "African spirituality in the context of modernity" (1996) 3 *Bulletin for Contextual Theology* (available on the internet at *http://www.hs.unp.ac.za/theology/tonyb.htm*, last accessed on 20 December 2001) draws a compelling parallel between the use of incense *impepho yamaRoma* (Catholic grain incense) by the Anglicans and the Catholics and the use of *impepho yesintu* (helichrysum miconiaetolium) or *frankincense* in African religious worship.

68 In the Rastafari ritual calendar there are about eight "Holy Days" and they are : 7 January (Feast of the Nativity of Christ "Christmas"); 6 February (Berhane Selassie's birthday); 2 March (Battle of Adwa - Victory of Menelik II over the Italian forces); 25 May (All-Africa Day); 23 July (Haile Selassie's birthday); 17 August (Marcus Garvey's birthday) 11 September (Ethiopian New Year); and 2 November (Haile Selassie's coronation).

preparations" poses a risk of harm. If smoking "a few joints" of cannabis poses no risk of harm, it is difficult to see how burning cannabis at a few religious ceremonies and at the altar or in an incense holder can cause the harm suggested. In any event, even if inhalation poses a risk of harm, there is no suggestion that the burning of cannabis as an incense cannot be done in a manner that poses no such risk. Nor is there any suggestion on the evidence that burning cannabis as an incense in an incense holder is intended to induce the psychoactive effect of cannabis.

[60] Just because smoking cannabis is intended to induce a psychoactive state, it does not follow that all the religious uses of cannabis are intended to induce such a state. Indeed, bathing in cannabis can hardly be said to be intended to induce such a state. The same is true of burning it as incense in an incense holder. There is no suggestion that those present are required to draw into their lungs the smoke from incense. What the appellant has said in this regard is that every day must commence with burning incense, whether you smoke it or burn it as an incense matters not.

[61] On the medical evidence on record there can be no question that uncontrolled consumption of cannabis, especially when it is consumed in large doses poses a risk of harm to the user. An exemption that will allow such consumption of cannabis would undermine the purpose of the prohibition. However, on the medical evidence on record it is equally clear that there is a level of consumption that is safe in that it is unlikely to pose any risk of harm. The medical evidence on record is silent on what that level of consumption is. Nor is there any evidence suggesting that it would be impossible to regulate the consumption of cannabis by

restricting its consumption to that safe level. All that the medical evidence on this record tells us is that the effects of cannabis are dose-related and cumulative and that while "prolonged heavy use or less frequent use of a more potent preparation are associated with many different problems", "one joint of dagga or even a few joints" will not cause any harm. Without further information, it is not possible to say whether or not the religious use of cannabis can be allowed without undermining the prohibition.

[62] Cannabis is smoked in a chalice or burnt as incense at Nyahbinghis, which are religious ceremonies. There are very few of these ceremonies in the Rastafari ritual calendar. Because of the importance that Rastafari place on the "holy herb" they prefer to grow cannabis themselves. Growing, harvesting and curing it is considered to be an art. Its preparation for smoking in a chalice follows a special procedure and there is an elaborate protocol that surrounds the use of the chalice. It is smoked at religious gatherings or ceremonies presided over either by a priest, an assistant priest or an elderly. Whether smoking cannabis in a chalice on these few occasions can be described as a "prolonged heavy use or use of a more potent preparation" is not easy to say on the record. However, even if it is, there is no suggestion that its consumption at these few and isolated religious ceremonies cannot be controlled effectively and limited to the consumption of the amount that poses no risk of harm.

[63] Yet the government contended that any exemption would be difficult to administer. In contending that it would be difficult to police any exemption the Attorney-General pointed out certain difficulties including the problem of identifying bona fide Rastafari; the source from which cannabis is to be obtained; and how to safeguard against the abuse of the exemption. Both

the High Court and the SCA also pointed out these difficulties. But what is required is to subject the religious use of cannabis to strict control including the purpose for which it can be acquired; the persons who may acquire it; the sources from which it may be acquired; and the amount that may be lawfully possessed. It is for the legislature to determine the regulation and control to which the religious use of cannabis should be subjected as well as the measures that should be put in place in order to safeguard against the abuse of the exemption. Such regulation and control, whilst directed at enforcing a legitimate government interest, should bear in mind and as far as possible respect the centrality of the different uses of cannabis to the Rastafari religion.

[64] Any exemption to accommodate the religious use of cannabis will of course have to be strictly controlled and regulated by the government. Such control and regulation may include restrictions on the individuals who may be authorised to possess cannabis; the source from which it may be obtained; the amount that can be kept in possession; and the purpose for which it may be used. In addition, conditions necessary to safeguard against using it for some purpose other than that for which the exemption is granted, as well as trafficking in cannabis, may be imposed and these may include the requirement of registration with the relevant authorities; recording the amount purchased and the date of such purchase; and where and how it may be used. Any permit to possess and use cannabis for the purposes of the exemption may have to be issued subject to revocation if the conditions of its issue are violated, such as using cannabis otherwise than for the purpose of burning it as an incense or trafficking in cannabis or having in possession more in amount than the permit allows.

[65] The fallacy in the argument by the Attorney-General is that it is premised on the

assumption that a religious exemption will be granted without the appropriate measures to address the problems raised by him. The practical problems referred to by the Attorney-General and Senior Superintendent Mason, who is the Commander of the South African Narcotics Bureau, as well as those alluded to by the courts below are matters that ought to be dealt with in the legislation that will regulate the exemption. Indeed, as Senior Superintendent Mason suggested in his affidavit, if the exemption were to be allowed

> "It also stands to reason that current legislation contained in the Drugs and Drug Trafficking Act . . . and the Medicines Control and Related Substances Act . . . will have to be amended. New regulations pertaining to the procedures and control will have to be formulated."

[66] There is no suggestion that these problems cannot effectively be regulated. On the contrary, the affidavit of Senior Superintendent Mason, suggests that a permit system coupled with administrative guidelines and infrastructure for the administration of such an exemption may adequately address the practical problems alluded to by the courts below and the Attorney-General. In the context of alluding to the difficulties that will arise from a court-sanctioned exemption, Senior Superintendent Mason says the following:

> "Numerous difficulties are foreseen. For one, what will the financial implication be to the Government to set up and administer an administrative permit system. It should be resolved which government department is to be responsible to administer such a[n] administrative system. The human resource implications [have] to be considered as well as the logistical implications.
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> In this day and age of corruption in South Africa a permit will have to be developed that will be difficult to forge. Guidelines will have to be developed as to the issue of such permits as well as guidelines in respect of permits, the validity of which has expired or

> reported lost. Administrative guidelines will have to be developed as to administrative procedures to administer such a system.
>
> A[n] administrative permit system may be structured similar to that of firearms registration, which is administered by the South African Police Service. This will entail that a dedicated comportment authority will have to be established at a national level to administer the exemption. Personnel will have to be made available on station level to process applications for exemption. Proof of identity by means of identity documents will not suffice as a means of verifying identity. It is foreseen that the fingerprints of applicants will have to be taken and forwarded to the South African Police Criminal Record Centre for processing. A registration system will have to be developed for record and control purposes. Tenders will have to be obtained to print permits. Such permits should not only include personal particulars of the applicant but perhaps a[n] imprint of thumb to verify that the holder of such permit is in fact the person identified upon the permit. A permit should also include some feature so as to make it difficult to forge."

[67] I do not read the above excerpt from the affidavit of Senior Superintendent Mason as suggesting that, with the appropriate statutory amendments and the appropriate administrative infrastructure, it would be difficult to administer a religious exemption. On the contrary, his evidence suggests measures that will have to be adopted in order to administer a religious exemption effectively. And these measures include legislative amendments, regulations pertaining to the procedure and control, and the administrative infrastructure to administer the exemption. Neither the Minister of Health nor the Attorney-General suggested that these measures would be difficult to achieve.

[68] Nowhere does Senior Superintendent Mason suggest that the problems alluded to by the Attorney-General cannot adequately be addressed by appropriate legislation and other measures. Neither the Minister of Health nor the Attorney-General suggested that it would be impossible

to address these problems by appropriate legislation and administrative infrastructure. It must therefore be taken that the control and regulation as well as the administration of the exemption envisaged by Mason is not impossible. The problem is that government has never given consideration to these matters.

[69] The suppression of illicit drugs does not require a blanket ban on the sacramental use of cannabis when such use does not pose a risk of harm. What is required is the regulation of such use in the same manner as the government regulates the exempted uses of drugs, including the more dangerous and addictive drugs, for which there is no doubt a huge illicit market. As the Attorney-General points out in his affidavit, the distribution of cannabis for medicinal purposes is strictly regulated under the Drugs Act.[69] It may be obtained for medicinal purposes only and under the care and supervision of a medical practitioner;[70] there is a specified list of individuals

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69 The Director-General for Health alleges that cannabis has no medicinal value. Professor Ames, on behalf of the appellant, suggests that it has. This suggestion is based on her research which was conducted over more than 43 years. But that is not the point. The Drugs Act contemplates that the prohibited substances, including cannabis, may be exempted for medicinal purposes. What matters is the regulation to which such drugs, including cannabis, are to be subjected for medicinal purposes under the Drugs Act.

70 Subsections 4(b)(i) and (ii) of the Drugs Act.

who may acquire it;[71] such acquisition is subject to the requirements or conditions set out in the Medicines Act or regulations or a permit issued under the Medicines Act;[72] and the source from which it may be obtained is regulated.[73]

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71 Subsections 4(b)(i)-(vi) of the Drugs Act.

72 Subsections 4(b)(iii)-(v) of the Drugs Act.

73 Subsections 4(b)(i)-(vi) of the Drugs Act.

[70] Indeed, under the Medicines Act, medicines and drugs that have potential to cause harm are subjected to much stricter regulation, especially concerning the manner in which they may be dispensed to the public. There are specific provisions indicating how they may be sold or dispensed, by who and to whom. The main control is that these drugs only reach the public under the responsibility of qualified health professionals acting according to prescribed standards. Such professionals are required, for example, to maintain books and records containing all the prescribed particulars of the sale of scheduled substances, including the actual prescription of a medical practitioner, the date of sale and the quantity of medication sold. Possession or use of scheduled substances outside the provisions of the Medicines Act constitutes a criminal offence and gives rise to penalties contained in that statute.[74] There is no suggestion that dispensing cannabis to the seven priests cannot, with necessary adaptations, be subjected to the same or some similar control. Or for that matter, allowing priests to grow a limited number of cannabis plants for religious use.[75] These are mere illustrations of how the problem of the exemption can be regulated. It is for Parliament to craft a workable exemption.

[71] It was also contended that any exemption would run foul of our international obligations. In rejecting the constitutional challenges, both the SCA and the High Court also emphasised our

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74 *Mistry v Interim Medical and Dental Council of South Africa and Others* 1998 (4) SA 1127 (CC) at para 19; 1998 (7) BCLR 880 (CC) at para 12.

75 In Canada, for example, individuals who require cannabis for medical purposes are allowed to possess a limited quantity of cannabis and to grow a limited number of cannabis plants *R v Parker* 49 OR (3d) 481 at 551.

international obligations. Our international obligations in relation to the war on drugs must be put in perspective.

[72] The relevant international instruments are the Single Convention on Narcotic Drugs, 1961 as amended by the 1972 Protocol; the Convention on Psychotropic Substances, 1971;[76] and the Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988. In terms of article 36(1)(a) of the Single Convention, the criminalisation of the listed forms of conduct must take place subject to each Party's "constitutional limitations".[77] Thus, if under our

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[76] The 1971 Convention on Psychotropic Substances does not apply to cannabis.

[77] Article 36(1) reads as follows:

> "Subject to its constitutional limitations, each Party shall adopt such measures as will ensure that cultivation, production, manufacture, extraction, preparation, possession, offering, offering for sale, distribution, purchase, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation and exportation of drugs contrary to the provisions of this Convention, and any other action which in the opinion of such Party may be contrary to the provisions of this Convention, shall be punishable offences when committed intentionally, and that serious offenses shall be liable to

Constitution an exemption for the religious use of cannabis is required, such an exemption would not fall foul of the Single Convention as the implementation of the provisions of the Convention are subject to our Constitution.[78] Similarly, the implementation of the 1988 Convention is made subject to the "constitutional principles" of each Party.[79] It follows that these international

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adequate punishment particularly by imprisonment or other penalties of deprivation of liberty."

78 Boister "Is International Law a Bar to the Decriminalisation of Possession of Dagga for Personal Use in South Africa" (1996) 9 *SA Journal of Criminal Justice* 1 at 3 and Paschke, above n 27 at 125. Boister, in his article, advances a compelling argument for the proposition that article 36 does not apply to the possession of cannabis for personal use. The basis of this view is that the provisions of article 36 are intended to fight the illicit traffic in drugs and not to require the punishment of drug abusers. This view finds support in the commentary by the Secretary General of the United Nations which is based on state practice. However, in view of the conclusion reached on the relation between the Convention and our Constitution, it is not necessary to consider this argument.

79 Article 3(2).

conventions are no bar to an exemption that may be required by our Constitution.

[73] It is true that the granting of a religious exemption for a limited use of cannabis in circumstances that do not pose a risk of harm has certain risks. Such risks involve the use of cannabis for purposes other than those allowed by the exemption and the illegal passing of cannabis lawfully acquired to third parties. However, these risks are inherent in any exemption. They did not preclude the government from allowing exemptions for medicinal, research or analytical purposes. To minimise these risks the government subjected the use of drugs for these purposes to strict control such as restricting persons who may acquire drugs; prescribing the source from which they may be obtained; requiring the recording of the date of sale and the quantity of drugs sold; and making possession or use of drugs outside the statutory provisions subject to criminal penalties. These restrictions minimise the risk of illegal use or trafficking in drugs.

[74] The above analysis illustrates that the prohibition contained in the impugned provisions is too extensive. It encompasses uses that have not been shown either to pose a risk of harm or to be incapable of being subjected to such control and regulation so as not to pose risk of harm. Taking the example of burning cannabis in a few limited religious ceremonies, this has not been shown to pose any risk of harm or to be incapable of being subjected to strict control and regulation. The suggestion that burning cannabis as an incense may cause harm from inhalation, is highly speculative. Apart from this, the available evidence suggests that up to a certain level, even smoking cannabis is not necessarily harmful. This must be viewed against the fact that, in general, the evidence of nature and the extent of harm is a subject of medical controversy. In my

view, a constitutional right cannot be denied on the basis of mere speculation unsupported by conclusive and convincing evidence.

[75] There are two points that must be emphasised. First, the relief sought by the appellant is an order declaring that the impugned provisions are unconstitutional because they are overbroad. It is the duty of this Court to say whether that is so. We must determine what the appellant and other Rastafari are entitled to, consistent with their constitutional rights. The appellant and the adherents of his religion are entitled not to have the practice of their religion proscribed if it can be practised in a manner that does not undermine the government interest. We are not concerned with what would or would not meet the requirement of the Rastafari religion. Nor are we concerned with what would be effective practice of the religion. In my view, it is undesirable for the courts to be concerned with questions as to what, as a matter of religious doctrine, would be an effective practice of a particular religion. That enquiry is irrelevant here where the question is whether the impugned provisions are overbroad.

[76] Second, it is not demeaning to their religion if we find that the manner in which they practice their religion must be limited to conform to the law. Whether this is what they want matters not. Nor is it to underestimate in any way the very special meaning that the use of the "holy herb" has for the self-defining or ethos of the Rastafari religion. As we observed in *Christian Education* and also in *Prince 1*, the balancing exercise requires a degree of reasonable accommodation from all concerned. Rastafari are expected, like all of us, to make suitable adaptations to laws that are found to be constitutional that impact on the practice of their religion. A narrow and a closely defined exemption that is subject to manageable government

supervision does not oblige them "to make an absolute and strenuous choice between obeying a law of the land or following their conscience. They can do both simultaneously."[80]

*The evaluation of proportionality*

[77] In weighing the competing interests and in the evaluation of proportionality, it is necessary to examine closely the relation between the complete ban on the sacramental use or possession of cannabis by the Rastafari and the purpose of the limitation as well as the existence of the less restrictive means to achieve this purpose.[81] The prohibition is ostensibly aimed at the abuse of harmful drugs and trafficking in those drugs. Hence the use for medicinal purposes under the care and supervision of a medical practitioner or for analytical or research purposes are not hit by the prohibition. Yet a sacramental use of cannabis that has not been demonstrated to be harmful, such as the burning of cannabis as an incense, is proscribed. The ban on religious use is so complete that a religious practice that requires followers to bow before a cannabis plant and pray, is hit by the prohibition. That such use of cannabis is not harmful to the health of the followers matters not.

[78] The policy behind the impugned provisions should not be based on the idea that any use

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80 *Christian Education*, above n 44 at para 51.

81 *National Coalition*, above n 52 at para 35.

of cannabis in itself represents an unacceptable risk to the user and society. The policy behind these statutes should recognise that whether or not such a risk exists will depend partly on the circumstances in which it is used and the extent of the use. The prevention and control of the risk of harm caused by abuse of dependence-producing drugs to society and the individual must be made the primary objective of the anti-drug policy in the light of this consideration. Yet in so far as the Rastafari are concerned, the government pursues a policy based upon the assumption that all uses of cannabis by Rastafari and under any circumstances represent an unacceptable risk to society and the individual. This policy ignores the reality that there are various uses of cannabis by the Rastafari, some of which have not been shown to pose any risk of harm and that can be accommodated without undermining the objectives of the prohibition.

[79] In a constitutional democracy like ours that recognises and tolerates diverse religious faiths, tolerance of diversity must be demonstrated by accommodating the practices of all faiths, if this can be done without undermining the legitimate government interest. Thus when Parliament is faced with a religious practice that involves some conduct that runs counter to its objectives, the proper approach under our Constitution is not to proscribe the entire practice but to target only that conduct that runs counter to its objectives, if this can be done without undermining its objectives. This approach is consistent with the constitutional commitment to tolerance and accommodation of different religious faiths implicit in our Constitution. The requirement that less restrictive means must be used in the limitation of constitutional rights is indeed a manifestation of this commitment.

[80] Similarly, when Parliament is faced with the need to proscribe a substance under the

statutes in question, the risk posed to health should not be the only criterion. It must also have regard to other factors such as: various uses to which the substance may be put, especially those that do not pose any risk of harm; the significance of the various uses to society; whether the needs of society can, if necessary, be accommodated without undermining the objectives of the prohibition; and the possibility of acting effectively against the abuse of the substance. These factors no doubt influenced the decision by Parliament to exempt from the general prohibition the possession of drugs, including cannabis, for medicinal, analytical or research purposes.

[81] I accept that the goal of the impugned provisions is to prevent the abuse of dependence-producing drugs and trafficking in those drugs. I also accept that it is a legitimate goal. The question is whether the means employed to achieve that goal are reasonable. In my view, they are not. The fundamental reason why they are not is because they are overbroad. They are ostensibly aimed at the use of dependence-producing drugs that are inherently harmful and trafficking in those drugs. But they are unreasonable in that they also target uses that have not been shown to pose a risk of harm or to be incapable of being subjected to strict regulation and control. The net they cast is so wide that uses that pose no risk of harm and that can effectively be regulated and subjected to government control, like other dangerous drugs, are hit by the prohibition. On that score they are unreasonable and they fall at the first hurdle. This renders it unnecessary to consider whether they are justifiable.[82]

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82 *Coetzee v Government of the Republic of South Africa; Matiso and Others v The Commanding Officer, Port Elizabeth Prison and Others* 1995 (4) SA 631 (CC); 1995 (10) BCLR 1382 (CC) at para 13; *Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Security and Others* 1996 (3) SA 617 (CC); 1996 (5) BCLR 609 (CC) at paras 50-4; and *Mistry v Interim Medical and Dental Council of South Africa and Others*, above n 74 at para 23.

[82] It follows, therefore, that the prohibition contained in the impugned provisions is constitutionally bad because it proscribes the religious use of cannabis even when such use does not threaten the government interest. But it is bad to that extent, and only that extent. In view of this conclusion, it not necessary to consider other constitutional challenges.

*Appropriate remedy*

[83] The constitutional defect in the two statutes is that they are overbroad. They are not carefully tailored to constitute a minimal intrusion upon the right to freedom of religion and they are disproportionate to their purpose. They are constitutionally bad because they do not allow for the religious use of cannabis that is not necessarily harmful and that can be controlled effectively. Ordinarily, the appropriate remedy in these circumstances would be the "reading in" of the appropriate exemption.

[84] However, here the question of how the exemption can be formulated cannot be answered with a sufficient degree of precision on the basis of constitutional analysis. There are a number of questions that will have to be answered in relation to the control and regulation to which such an exemption is to be subjected and these include: who may grant approval for the religious use and possession of cannabis; who may be granted such exemption; the quantity of cannabis that may be possessed by authorised persons; and the legal source of cannabis. In addition, the dispensing of cannabis to authorised persons for religious purposes must be subjected to strict control. Standards must be developed that will govern the conduct of such authorised persons. There are a number of options in relation to these questions. It is the task of the legislature which has the necessary resources to consider such options and make its choice. An attempt by

this Court to craft an exemption may well result in an undue intrusion into the legislative sphere. The crafting of the appropriate exemption must therefore be left to Parliament.

[85] It follows therefore that the appropriate remedy is to declare the provisions of section 4(b) of the Drugs Act and section 22A(10) of the Medicines Act invalid to the extent that they do not allow for an exemption for the religious use, possession and transportation of cannabis by bona fide Rastafari. The prohibition that relates to cannabis can be severed from the other parts of the impugned provisions. These sections are central to the control of a number of dangerous drugs that are set out in the schedules to the two statutes. Therefore a limited notional severance is not inappropriate.

[86] However, a declaration of invalidity that takes immediate effect poses a real danger to society. It would result in an uncontrolled use of cannabis and this will undermine the admittedly legitimate governmental goal of preventing the harmful effects of dependence-producing drugs and trafficking in those drugs. Parliament must therefore be afforded the opportunity to remedy the defects in these two statutes. The declaration of invalidity should therefore be suspended for a period of twelve months for that purpose. The appellant did not contend otherwise.

[87] In his heads of argument, the appellant sought an interim constitutional exemption for himself and all other Rastafari during the period of the suspension of the order of invalidity. The considerations that apply in relation to the "reading in" of an exemption apply equally in regard to the granting of an interim constitutional exemption. Before any exemption is granted it is

necessary not only to determine the conditions under which it may be granted, but also to ensure that an administrative infrastructure that is necessary to manage and administer the exemption is in place. This may include, as Senior Superintendent Mason points out in his affidavit, the administrative infrastructure to manage the permit system and the administrative guidelines to regulate the exemption. Having regard to the number of issues that must still be resolved in relation to the regulation to which the religious use of cannabis must be subjected, it is not appropriate for this Court to grant such an exemption. Parliament must first resolve these issues and determine the conditions that are to govern the granting of a religious exemption.[83] Until these conditions are determined, the granting of an exemption will undermine the objectives of the limitation. It follows therefore that a court-sanctioned exemption is not appropriate.

[88] The appellant has also sought an order directing the Law Society to register his contract of community service. The Law Society declined to register the appellant's contract of community service based on his two previous convictions for possession of cannabis and his declared intention to continue breaking the law. The validity of the decision of the Law Society

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83 Similarly, the alternative relief sought in this regard, namely, staying all prosecutions against Rastafari for possession or use of cannabis and releasing all Rastafari who have been arrested or convicted for use and possession of cannabis cannot be granted. It is not known what class of persons Parliament will determine as authorised persons to possess cannabis for religious purposes. To grant such an order will pre-empt legislative action in circumstances where Parliament is free to legislate to a constitutional minimum.

depends upon whether possession or use of cannabis by persons in the position of the appellant is a criminal offence. As pointed out previously, it cannot be said at this stage whether Parliament will broaden the category of persons who may be authorised to possess and use cannabis for religious purposes to include non-priests such as the appellant. The granting of this relief therefore will pre-empt legislative action. No doubt any further delay is prejudicial to the appellant who is understandably anxious to get on with his life. But until such time as it is determined whether the appellant falls within the category of persons who may lawfully possess cannabis, the obstacle besetting his way to the profession of attorneys remains. The question whether or not the appellant could be regarded as a fit and proper person to be an attorney even if not within such category, was not pursued before us, and I express no view on it.

[89] Finally, there is the question of costs. If the appellant were to succeed, there is no reason why he should be deprived of the costs. The Law Society did not play any active role in this litigation and there is therefore no reason why it should be ordered to pay costs. The Minister of Health only intervened after the proceedings had reached this Court and the liability for costs should reflect this.

[90] In the event, I would have proposed that the following order be made:

(a) The appeal is upheld and the decision of the Supreme Court of Appeal is set aside. The provisions of section 4(b) read with paragraph 1 of Part III of Schedule 2 of the Drugs and Drug Trafficking Act 140 of 1992 and section 22A(10)(a) read with Schedule 8 of the Medicines and Related Substances

Control Act 101 of 1965 are inconsistent with the Constitution to the extent that they prohibit the use or possession of cannabis by Rastafari adherents for bona fide religious purposes and are declared invalid to that extent.

(b) The order of invalidity is suspended for a period of 12 months to afford Parliament the opportunity to remedy the defects in the impugned provisions.

(c) The Minister of Justice, the Minister of Health and the Attorney-General are ordered to pay the costs of this appeal, including the costs incurred in the courts below, except that the Minister of Health is only liable for the costs of the appeal in this Court.

Mokgoro and Sachs JJ and Madlanga AJ concur in the judgment of Ngcobo J.

CHASKALSON CJ, ACKERMANN AND KRIEGLER JJ:

[91] This judgment concerns the second phase of an appeal from the Supreme Court of Appeal (the SCA) to this Court on the constitutionality of the statutory prohibition against the possession and use of cannabis sativa, commonly known in this country as dagga. The matter first came before this Court in November 2000 when, after extensive argument, leave was given for the appellant to deliver further evidence on affidavit and for the Director of Public Prosecutions, the

Western Cape (the DPP) to respond. The judgment containing that order has been reported, as have the judgments of the Cape of Good Hope High Court and the SCA, where the matter was dealt with in the first instance and on appeal.[1] The background to the matter has been fully set out in those three judgments and in the judgment of Ngcobo J in the current proceedings. The briefest of résumés will therefore suffice.

[92] The appellant is an adherent of the Rastafari religion. He wants to gain admission to the attorneys profession but has two convictions for the possession of cannabis.[2] He disclosed these convictions to the Cape Law Society when he applied for his articles to be registered, saying that he was a Rastafari and was required by his religion to use cannabis. He went on to say that notwithstanding the legislation that prohibited such use, he would continue to use cannabis for religious purposes in the future. The Law Society refused to register his articles taking the view that attorneys, as officers of the court, had to obey the law. The appellant then applied to the Cape High Court for that decision to be reviewed and set aside. The appellant failed in the High

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1 The three judgments, in chronological order are *Prince v President of the Law Society, Cape of Good Hope and Others* 1998 (8) BCLR 976 (C); *Prince v President, Cape Law Society, and Others* 2000 (3) SA 845 (SCA); 2000 (7) BCLR 823 (SCA) and *Prince v President, Cape Law Society, and Others* 2001 (2) SA 388 (CC); 2001 (2) BCLR 133 (CC).

2 The possession and use of cannabis are prohibited by two statutory provisions. They are s 4(b) of the Drugs and Drug Trafficking Act 140 of 1992 (the Drugs Act) and s 22A(10) of the Medicines and Related Substances Control Act 101 of 1965 (the Medicines Act), which are quoted in n 24 and 32 of Ngcobo J's judgment.

Court and his appeal to the SCA was dismissed.

[93] When the dispute reached this Court, its focus had ceased to be whether the Law Society's decision was correct. It had become limited to whether the legislation prohibiting the possession and use of cannabis was consistent with the Constitution. The appellant conceded that if the legislation were valid, the Law Society would be entitled to refuse to register his articles of clerkship. The Law Society responded by saying that if the law were to be changed or to be found to be inconsistent with the Constitution, it would have no objection to registering the articles of clerkship entered into by the appellant. The Law Society then withdrew from the proceedings and was not represented in this Court.

[94] The dispute became one between the appellant and the state, represented by the DPP. The primary issue in the appeal to this Court was whether the SCA was correct in holding that the legislation was not inconsistent with the Constitution. In the SCA and again in this Court the challenge to the legislation was not against the criminalisation of the possession and use of cannabis. It was a limited one, namely whether the failure to provide an exception in respect of the use of cannabis for religious purposes by Rastafari, infringed their religious rights under the Constitution.

[95] Because the focus had previously been elsewhere, there was insufficient information on record for the debate as to the feasibility of such an exception, from the point of view of adherents of the Rastafari religion as also from the point of view of those responsible for the enforcement of the country's anti-drug laws, to be properly canvassed. Accordingly, paragraphs

2 and 3 of the order issued by this Court on 12 December 2000 read as follows:

> "2. The appellant is granted leave to deliver, on or before 24 January 2001, evidence on affidavit setting out:
>
> (a) how, where, when and by whom cannabis is used within the Rastafari religion in South Africa;
>
> (b) how cannabis is obtained by Rastafari;
>
> (c) whether the Rastafari religion regulates the use and possession of cannabis by its members;
>
> (d) whether there are any internal restrictions on, and supervision of, the use of cannabis by members of the Rastafari religion; and
>
> (e) any other facts relating to the matters set forth in paras [12]-[17] of the judgment.
>
> 3. The respondents are granted leave to deliver, on or before 14 February 2001, evidence on affidavit setting out:
>
> (a) their response, if any, to the evidence submitted by the appellant;
>
> (b) what practical difficulties, if any, will be encountered if an exemption for the sacramental use of cannabis is allowed; and
>
> (c) how a religious exemption for the personal use of cannabis would differ, in its administration and the overall enforcement of the Drugs and Drug Trafficking Act 140 of 1992 and the Medicines and Related Substances Control Act 101 of 1965, from the medical and scientific exemptions currently to be found in s 4(b) of the Drugs Act and s 22A(10) of the Medicines Act, if at all."[3]

[3] The "matters set forth in paras [12] - [17]" were principally chapter and verse of the Rastafari religion, its

history, theology, membership, organisation and formal structures and of the role played by cannabis in its practices and rituals. As regards the state, substantiation was required of the difficulties anticipated in policing were the proposed exception to be granted.

[96] Pursuant to that order, the appellant filed a substantial body of additional factual and opinion material, to which the DPP responded in like vein. All of this has been comprehensively dealt with in the careful and detailed judgment of Ngcobo J. The appellant's claim for a "religious exception" is in substance a claim that a general prohibition that fails to take account of the religious freedoms enshrined in the Constitution is, for that reason, inconsistent with the Constitution. As Ngcobo J points out in his judgment,[4] an exemption is a remedy which allows the prohibition to stand, whilst at the same time respecting the religious freedoms.

[97] We have considered the judgment of Ngcobo J and are in general agreement with his analysis of the facts. No purpose would be served by traversing these matters again. We endorse the material finding that Rastafarianism is a religion and that the disputed legislation prohibiting the possession and use of cannabis trenches upon the religious practices of Rastafari. In so far as there are differences between us on material issues, that will appear from this judgment.

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4 At para 36.

[98] We also agree that the disputed material tendered in terms of Rule 30 is not admissible. Rule 30 makes provision for placing factual material before the Court if such facts are "common cause or otherwise incontrovertible", or are of an "official, scientific, technical or statistical nature capable of easy verification". A dispute as to the facts may, and if genuine usually will, demonstrate that they are not "incontrovertible" or "capable of easy verification". Where that is so, and it is in the present matter, the material will be inadmissible. Ultimately, admissibility depends on the nature and substance of the dispute. It is in this sense that the dictum in *S v Lawrence; S v Negal; S v Solberg*,[5] to the effect that the rule has no application to disputed facts, should be understood.

*The use of cannabis by Rastafari*

[99] The appellant states that the casual or recreational use of cannabis is condemned by true Rastafari; true Rastafari use cannabis for religious purposes only. It appears from the evidence, however, that such use for religious purposes could be extensive. According to the appellant cannabis is used at religious gatherings and also at places and times when religious gatherings are not being held. He describes his own use of cannabis as follows:

> "I perform the rituals prescribed by my religion according to the tenets of my religion and observe the religious ceremonies associated with births, marriages and other gatherings such as the Nyabinghi, which is similar to a church service. Cannabis is used as a symbol and I partake of the use of cannabis at these ceremonies. I also use cannabis, by either burning it as incense or smoking, drinking or eating it in private at home as part of my religious observance. The object of using cannabis, by followers of the Rastafari religion, is to create unity and to assist them in re-establishing their eternal relationship

5 1997 (4) SA 1176 (CC); 1997 (10) BCLR 1348 (CC) at paras 22-5.

with their creator. The use of cannabis by the followers of the Rastafari religion is not to create an opportunity for the casual use of cannabis."

[100] The appellant says that he uses about 5 grams of cannabis daily for meditational purposes. Other Rastafari may use more, whilst some may use less. Both the rate and manner of use varies from member to member, although smoking it seems the most common method. The appellant confines his use to smoking, preferring "not to puff the holy herb before work and use(s) it maximum twice per day after work". He acknowledges, however, that as in any religion there are "good" and "bad" adherents and thus some who use cannabis excessively and/or recreationally. Although there is no set norm or generally accepted pattern, such use is condemned by true Rastafari.

[101] Their religious gatherings need not take place in a built up structure or at a particular venue but can be conducted at any place where two or more Rastafari come together in "Jah's" name. The religion does not regulate the use or possession of cannabis by its members nor is there any organisation that could provide internal supervision of their acquiring, transporting, possessing or using it. Indeed, on the evidence there are too few adherents of the religion in the country and they are too thinly spread and loosely associated for truly reliable and informative answers to be possible in response to most of the questions posed in paragraph 2 of this Court's order of 12 December 2000. In any event, it appears to be in the very nature of the religion that there are no formal organisational structures that could compile and maintain hard data of the kind envisaged by the Court's questions.

[102] The appellant's evidence concerning the use of cannabis and its centrality to the practice

of the Rastafari religion is supported by the appellant's expert Professor Yawney whose evidence on this issue was not disputed by the state, and was placed before this Court by consent. According to Professor Yawney, cannabis is consumed by Rastafari because of their belief that it

> " . . . encourages inspiration and insight through the process of sudden illumination. Sociologists would call this a visionary state characterised by the experience of oneness or interconnectedness. Rastafari insist there is a duty incumbent upon them to praise the creator in this way".

[103] Although the use of cannabis is apparently not obligatory, it is clear from the evidence of the appellant and Professor Yawney that its use both as an individual and communal activity, at religious gatherings or elsewhere, is regarded by most Rastafari as an essential part of the religion. The use is extensive and takes different forms, including smoking it, burning it, using it as incense, in the preparation of food and drink, and in bathing.

*Legislation prohibiting the possession and use of cannabis*

[104] The possession and use of cannabis is prohibited by section 4(b) of the Drugs Act and section 22 A(10) of the Medicines Act referred to above.[6] It is an hallucinogen which has an intoxicating effect that is cumulative and dose-related.[7] There are only about ten thousand Rastafarians in South Africa and the legislation is not aimed at them. Its purpose is to protect the general public against the harm caused by the use of drugs. Cannabis is but one of several substances prohibited under this legislation and its prohibition is not peculiar to South Africa.

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6 Above n 2.

7 At para 13 of Ngcobo J's judgment.

The possession and use of cannabis is prohibited in many countries, and it is listed as a prohibited substance in the international instruments referred to by Ngcobo J in his judgment.[8]

8 Above n 28.

[105] Sachs J refers to the history of the prohibition of the use of cannabis in South Africa.[9] Whatever that history might have been,[10] it is not in our view relevant to the constitutionality of the present legislation. The constitutionality of this legislation is derived first from the provisions of the interim Constitution and later of the 1996 Constitution. These constitutions continued in force all law that existed when they were adopted, subject only to consistency with their terms. Save for the argument on the religious exception, which we have dealt with fully in our judgment, it was never suggested that the laws as such were inconsistent with the interim Constitution or the 1996 Constitution. It is also abundantly clear from the attitude adopted by the government in this matter, that it does not consider these laws to be an illegitimate inheritance from the past; it considers them legitimate and necessary provisions of our present criminal law legislation and international obligations.

[106] The then Minister of Justice stated in an affidavit lodged in the High Court proceedings:

> "The provisions of the two Acts have been placed on our statute books for compelling reasons. The need to suppress the illicit use, possession and trafficking in drugs, such as cannabis, is an urgent and pressing one. There is no doubt that the effect of prohibition of the abuse of a legal drug, such as cannabis, which results in severe damage to its users, is a pressing social purpose. The government of the Republic of South Africa simply has to take active steps to suppress the use, possession and trafficking of illicit drugs."

He also stated that,

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9 At paras 151-4 of his judgment.

10 No argument was addressed to us on this issue.

> "Throughout the jurisdictions of the world, the use, possession, acquisition, importation and trafficking in cannabis is regarded as a criminal offence. In South Africa too, it is an offence which is applicable equally to all its citizens."

Although the appellant disputed the allegations made concerning the harm done by users of cannabis, he did not suggest that the prohibition of the use and possession of cannabis had any purpose other than that attested to by the Minister.

[107] The prohibition against the possession and use of cannabis is thus part of a worldwide attempt to curb its distribution, of which the present government is fully supportive. Whether decriminalisation of the possession and use of small quantities of cannabis is a more appropriate response to the problem than criminalisation, was at no stage suggested and is not an issue in this appeal. It is not an issue on which this Court should comment in these proceedings.

[108] In a democratic society the legislature has the power and, where appropriate, the duty to enact legislation prohibiting conduct considered by it to be anti-social and, where necessary, to enforce that prohibition by criminal sanctions. In doing so it must act consistently with the Constitution, but if it does that, courts must enforce the laws whether they agree with them or not.

[109] The question before us, therefore, is not whether we agree with the law prohibiting the possession and use of cannabis. Our views in that regard are irrelevant. The only question is whether the law is inconsistent with the Constitution. The appellant contends that it is because it interferes with his right to freedom of religion and his right to practise his religion. It is to that

question that we now turn.

*Freedom of religion and the criminal law*

[110] Section 15(1) of the Constitution provides that:

> "Everyone has the right to freedom of conscience, religion, thought, belief and opinion."

Section 31 provides that:

> "(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community –
>
> (a) to enjoy their culture, practise their religion and use their language; and
>
> (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.
>
> (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights."

The right of an individual to practise his or her religion is part of the section 15(1) right.[11] The associational right, to practise religion in association with others, is protected by section 31. The appellant relies on his individual right to use cannabis in the privacy of his home and elsewhere, and on his associational right to use cannabis with other Rastafari on appropriate occasions.

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11 *S v Lawrence*, above n 5 at para 100.

[111] We agree with Ngcobo J that the legislation criminalising the use and possession of cannabis limits the religious rights of Rastafari under the Constitution, and that what has to be decided in this case is, whether that limitation is justifiable under section 36 of the Constitution. It is in regard to this question that the respective views of Ngcobo J and ourselves diverge. For the reasons that follow, we do not believe that it is incumbent on the state to devise some form of exception to the general prohibition against the possession or use of cannabis in order to cater for the religious rights of Rastafarians.

[112] Sections 15(1) and 31 of the Constitution are wide-ranging provisions protecting both believers and non-believers, and all religions, large or small, irrespective of their creeds or doctrines. Rastafari are a small and marginalised group. The fact that they are a very small group within the larger South African community is no reason to deprive them of the protection to which they are entitled under the Bill of Rights. On the contrary, their vulnerability as a small and marginalised group means that the Bill of Rights has particular significance for them. The interest protected by sections 15(1) and section 31 is

> " . . . not a statistical one dependent on a counter-balancing of numbers, but a qualitative one based on respect for diversity."[12]

[113] The appellant does not dispute that the legislation prohibiting the possession and use of cannabis by the general public serves a legitimate government purpose. He accepts that it does,

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12 *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC); 2000 (10) BCLR 1051 (CC) at para 25 (footnotes omitted).

but contends that his religion requires him to use cannabis, and that out of respect for the religious rights of himself and other Rastafari, the legislation ought to have made an exception in their favour permitting such use for religious purposes.

[114] In the proportionality analysis required by section 36 of the Constitution,[13] there can be no doubt that the right to freedom of religion and to practise religion are important rights in an open and democratic society based on human dignity, equality and freedom, and that the disputed legislation places a substantial limitation on the religious practices of Rastafari. It must also be accepted that the legislation serves an important governmental purpose in the war against drugs. In substance, the appellant contends that the legislation, though legitimate in its purpose and application to the general public, is overbroad because it has been formulated in a way that

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[13] Section 36 of the Constitution reads as follows:

> "(1) The rights in the Bill of Rights may be limited only in terms of 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 –
>
> (a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation and its purpose; and
> (e) less restrictive means to achieve the purpose.
>
> (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

brings within its purview the use of cannabis by Rastafari that is legitimate and ought not to be prohibited. A challenge to the constitutionality of legislation on the grounds that it is overbroad is in essence a challenge based on the contention that the legitimate government purpose served by the legislation could be achieved by less restrictive means.

[115] In *Christian Education South Africa v Minister of Education*[14] this Court held:

> "The underlying problem in any open and democratic society based on human dignity, equality and freedom in which conscientious and religious freedom has to be regarded with appropriate seriousness, is how far such democracy can and must go in allowing members of religious communities to define for themselves which laws they will obey and which not. Such a society can cohere only if all its participants accept that certain basic norms and standards are binding. Accordingly, believers cannot claim an automatic right to be exempted by their beliefs from the laws of the land. At the same time, the state should, wherever reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law."

14 Above n 12 at para 35 (footnotes omitted).

[116] The unchallenged general prohibition in the disputed legislation against the possession or use of harmful drugs is directed in the first instance to cutting off the supply of such drugs to potential users. It 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. This facilitates the enforcement of the legislation. Persons found in possession of the drug are guilty of an offence, whether they intend to use it for themselves or not, and irrespective of whether its eventual use will indeed be harmful. This method of control is actually prescribed by the 1961 Single Convention on Narcotic Drugs[15] to which South Africa is a party.

[117] The state was not called upon to justify this method of controlling the use of harmful drugs. The validity of the general prohibition against both possession and use was accepted. The case the state was called upon to meet in this Court was that in addition to the medical and research exemptions contained in the legislation, provision should also have been made for the use of cannabis for religious purposes by members of the Rastafari religion.

[118] We are accordingly unable to agree with the significance attached by Ngcobo J to the fact that certain of the uses to which cannabis is put by Rastafari are not harmful. Subject to the limits of self-discipline, the use may or may not be harmful, but that holds also for non-Rastafarians who are prohibited from using or possessing cannabis, even if they use it sparingly and without

15 Article 33.

harming themselves.

*Foreign law*

[119] In the United States of America similar contentions to that raised by the appellant have been rejected by State and Federal Courts. These decisions are referred to in the judgments of the United States Supreme Court in *Employment Division, Department of Human Resources of Oregon v Smith.*[16]

[120] *Smith*'s case concerned the criminal prohibition of an hallucinogenic drug Peyote for sacramental purposes at religious ceremonies of the Native American Church. It is similar in some respects to the case before us for the contention there was that the religious motivation for using Peyote placed the litigants

16 494 US 872 at 917 (1990).

> "...beyond the reach of a criminal law that is not specifically directed at their religious practice, and that is concededly constitutional as applied to those who use the drug for other reasons."[17]

[121] The majority of the Court rejected this contention holding that the right to the free exercise of religion

> "does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his or her religion prescribes (or proscribes)."[18]

To allow this, the majority held,

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17 Id at 878. For criticism of this judgment see Gordon "Free Exercise on the Mountaintop" (1991) 79 *California Law Rev* 91; Laycock "The Remnants of Free Exercise" (1990) *Sup. Ct. Rev* 1; McConnell "Free Exercise Revisionism and the *Smith* Decision" (1990) 57 *U. Chi. L. Rev* 1109, Greene "The Political Balance of the Religion Clauses" (1993) 102 *Yale LJ* 1611. See also *City of Boerne v Flores, Archbishop of San Antonio, et al* 521 US 507 (1997).

18 Id at 879.

"would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind - ranging from compulsory military service . . . to the payment of taxes . . . to health and safety regulations such as manslaughter and child neglect laws, . . . compulsory vaccination laws, . . . drug laws, . . . and traffic laws; . . . to social welfare legislation such as minimum wage laws, . . . child labour laws, . . . animal cruelty laws, . . . environmental protection laws, . . . and laws providing for equality of opportunity for the races . . . . The First Amendment's protection of religious liberty does not require this."[19]

[19] Id at 888-9 (footnotes omitted).

[122] The minority, in an approach that is more consistent with the requirements of our Constitution, took a different view. They agreed that the First Amendment insofar as it applies to the practice of religion, as distinct from belief, is not absolute. It could be subordinated to a general governmental interest in the regulation of conduct, but only if the government were able to justify that "by a compelling state interest and by means narrowly tailored to achieve that interest". One of the minority, O'Connor J, held that notwithstanding this, the state's overriding interest in preventing the physical harm caused by drug use constituted sufficient justification for the interference with religious freedom. However, Blackmun J (with whom Brennan J and Marshall J concurred) reached a different conclusion. He drew attention to the narrow and circumscribed ritual context in which Peyote is used by the Native American Church in its religious ceremonies. The use is isolated and confined to specific ceremonial occasions where it is eaten in a "carefully circumscribed ritual context" closely analogous to the sacramental use of wine by the Roman Catholic Church.[20] According to the evidence in that case the Peyote plant is extremely bitter. Eating it is unpleasant, leading to nausea and other "unpleasant physical manifestations"and. as a result it is seldom used by persons who are not members of the Church. The Church does not sanction the use of Peyote other than on ceremonial occasions and opposes the sale or use of Peyote for non-sacramental purposes. Because of the importance of the ceremonial use of Peyote by the Native American Church a number of States had made provision for such use in their legislation, and it appeared that this had not presented any practical difficulties in the enforcement of their laws prohibiting the possession and use of harmful drugs.

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20 Although Blackmun J, at 913 n 6, limits his analogy to the Roman Catholic Church, it is of course a matter of common knowledge that wine is also used sacramentally in carefully circumscribed contexts by other (if not all the other) Christian denominations.

[123] Blackmun J placed considerable emphasis on the circumscribed and limited though important use made of Peyote in the ceremony and the difference between such use, and the more general religious use of drugs such as cannabis, which had been rejected in other cases. He said:

> "Allowing an exemption for religious Peyote use would not necessarily oblige the State to grant a similar exemption to other religious groups. The unusual circumstances that make the religious use of Peyote compatible with the State's interests in health and safety and in preventing drug trafficking would not apply to other religious claims. Some religions, for example, might not restrict drug use to a limited ceremonial context, as does the Native American Church. Some religious claims, involve drugs such as marijuana and heroin, in which there is a significant illegal traffic, with its attendant greed and violence, so that it would be difficult to grant a religious exemption without seriously compromising law enforcement efforts. That the State might grant an exemption from religious peyote use, but deny other religious claims arising in different circumstances, would not violate the Establishment Clause. Though the State must treat all religions equally, and not favor one over another, this obligation is fulfilled by the uniform application of the 'compelling interest' *test* to all free exercise claims, not by reaching uniform *results* as to all claims."[21]

21 *Smith*, above n 16 at 917-8 (italics in original).

[124] The appellant referred us to a decision of the Supreme Court of Guam[22] in which it was held that an offence, prohibiting the importation of cannabis into Guam, infringed the religious rights of Rastafari under the Organic Act of Guam, which is its Constitution. Guam is a territory subject to the federal law of the United States of America and also to the United States Constitution, but not incorporated into the United States. The case turned on the fact that the government of Guam had placed no evidence before the Court to show that the prohibition served a compelling government interest. The Court held that in the circumstances it was

> " . . . unable to make the evaluation of whether a compelling state interest is embodied in the instant statute or whether that interest is achieved by the least restrictive means."[23]

The decision has been taken on appeal and as it turned on the paucity of the record is of little assistance to us in the present case. Here the state presented evidence relating not only to the individual and societal harm caused by the use of cannabis but also to the importance of maintaining the blanket prohibition on possession in seeking to limit the illegal traffic in cannabis.[24]

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22 *People of Guam v Benny Toves Guerrero* 2000 Guam 26.

23 Id at para 24.

24 In *State of Washington v Balzer* 954 P.2d 931 the Court of Appeals of Washington held that it could take judicial cognisance of the fact that a religious exemption permitting the use of cannabis by Rastafari would

impair the State's ability to enforce the law. It regarded such facts as legislative facts within the knowledge of the Court itself.

[125] The appellant also relied on a decision of the Ontario Appeal Court in *R v Parker*[25] in which it was held that section 4 of the Controlled Drugs and Substances Act 1996 was unconstitutional because it did not provide for access to cannabis for those requiring it for medical treatment. The Act contained a provision authorising the minister of health to grant an exemption for its use under the legislation, but no exemption had been made for cannabis when the prosecution was instituted. During the course of the litigation a protocol was adopted which made provision for the minister of health to grant such permission on application by persons seeking to use cannabis for medical purposes. The protocol was, however, unsatisfactory and left the ultimate decision to the discretion of the Minister.

[126] Subsequent to its decision in *Parker*'s case, the same three judges who decided that case rejected a broader challenge to the criminalisation of the possession of cannabis, holding that such prohibition was "valid in all respects except that [it did] not include an exemption for medical use".[26] A religious exception was not, however, in issue in that case and the judgment

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25 (2000) 188 D.L.R. (4th) 385.

26 *R v Clay* (2000) 188 D.L.R. (4th) 468 at para 52. The case dealt with the provisions of the repealed Narcotics Control Act, 1985, a predecessor to the Controlled Drugs and Substances Act. An appeal against

does not deal with that issue.

[127] The provision of medical exemptions from the prohibition against the possession and use of harmful drugs is necessary for health purposes and is sanctioned by the international conventions. Such exemptions are amenable to control in ways in which a general exemption for religious purposes such as that proposed by the appellant would not be. This is dealt with more fully in paragraph 133 below. *Parker*'s case is therefore not authority for the relief that the appellant claims in this case.

*Section 36 analysis*

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this decision has been noted to the Supreme Court of Canada but as at the date of this judgment, the appeal has not yet been heard.

[128] As stated previously, the approach of the minority of the Court in *Smith*'s case is more consistent with the requirements of our Constitution and our jurisprudence on the limitation of rights, than the approach of the majority. However, as Sachs J pointed out in the *Christian Education* case,[27] our Constitution in dealing with the limitation of rights does not call for the use of different levels of scrutiny, but "expressly contemplates the use of a nuanced and context-sensitive form of balancing" in the section 36 proportionality analysis.

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27 Above n 12 at para 30.

[129] Nevertheless the *Smith* case does demonstrate the difficulty confronting a litigant seeking to be exempted for religious reasons from the provisions of a criminal law of general application. There can be little doubt that even on the strict scrutiny test adopted by the minority in that case, a prohibition of the use of a drug such as cannabis, in the way that Rastafari use it, would not have been permitted.[28] Cannabis, unlike peyote, is a drug in which there is a substantial illicit trade which exists within South Africa and internationally. Moreover, the use to which cannabis is put by Rastafari is not simply the sacramental or symbolic consumption of a small quantity at a religious ceremony. It is used communally and privately, during religious ceremonies when two or more Rastafari come together, and at other times and places. According to his own evidence, the appellant uses cannabis regularly at his home and elsewhere. All that distinguishes his use of cannabis from the general use that is prohibited, is the purpose for which he uses the drug, and the self-discipline that he asserts in not abusing it.

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28 The distinction between the use of Peyote, which is permitted in several states, and the use of cannabis by Rastafari and other religions, which is not permitted has been upheld since *Smith*'s case in *State of Washington v Balzer*, above n 24 at para 73, ["We will not create a constitutional safe harbor for marijuana use because there is no realistic or sensible less restrictive means ... by which to regulate marijuana usage and distribution."]. *McBride v Shawnee County* 71 F. Supp.2d 1098 ["State enforcement of drug laws is severely compromised in the context of a marijuana exemption, but not peyote exemption."].

[130] There is no objective way in which a law enforcement official could distinguish between the use of cannabis for religious purposes and the use of cannabis for recreation. It would be even more difficult, if not impossible, to distinguish objectively between the possession of cannabis for the one or the other of the above purposes. Nor is there any objective way in which a law enforcement official could determine whether a person found in possession of cannabis, who says that it is possessed for religious purposes, is genuine or not. Indeed, in the absence of a carefully controlled chain of permitted supply, it is difficult to imagine how the island of legitimate acquisition and use by Rastafari for the purpose of practicing their religion could be distinguished from the surrounding ocean of illicit trafficking and use.

[131] Cannabis is grown in South Africa and according to the evidence South Africa is one of the major sources from which the world trade in cannabis is supplied. South Africa has an international obligation to curtail that trade and, though its obligation is subject to its Constitution, the fact that it has this obligation and the importance of honouring it, cannot be ignored in the limitations analysis. Moreover, there is an extensive trade in cannabis within South Africa itself. According to the statistics produced by Superintendent Mason, over 80 per cent of all drug convictions are cannabis related, and over 60 per cent of those deal with its unlawful possession.

[132] The right to freedom of religion is a right enjoyed by all persons. The right embraces religions, big and small, new and old. If an exemption in general terms for the possession and use of harmful drugs by persons who do so for religious purposes were to be permitted, the State's ability to enforce its drug legislation would be substantially impaired.

[133] The appellant, appreciating this difficulty, suggested that a permit system be introduced allowing bona fide Rastafari to possess cannabis for religious purposes. In support of this contention he sought an analogy in the provisions of the legislation permitting the use of harmful drugs for medical purposes. The analogy is unsound, however. Permitted use of a prohibited substance for medical purposes is dependent upon a written prescription being issued by a medical practitioner which must limit the use of the drug to particular quantities for a limited period of time, and is subject to ongoing control by the doctor. The drugs have to be approved by the Medicines Control Council[29] and, if they are, they may be stocked by pharmacists, who in turn have to keep registers and observe strict controls as to the way drugs are used.[30] A breach of these requirements could lead to the doctor or pharmacist being struck off the rolls of their professions. Provision is also made for regulatory inspections of the premises of doctors and chemists and of the records kept by them.[31] Cannabis has not been approved as being suitable for medical use and, in fact, there is no medical exemption that permits it to be used for such

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29 Section 15(3)(a) of the Medicines Act.

30 Section 4(b)(i)-(ii) of the Drugs Act.

31 Sections 26 and 28 of the Medicines Act. Section 28(1) of the Medicines Act was held by this Court to be inconsistent with the Constitution in *Mistry v Interim National Medical and Dental Council of SA* 1998 (4) SA 1127 (CC); 1998 (7) BCLR 880 (CC). Provision for regulatory inspections has been made in sections 40-3 of the South African Medicines and Medical Devices Regulatory Authority Act 132 of 1998 which has not yet been brought into force.

purpose.

[134] There would be practical difficulties in enforcing a permit system. These are referred to by Superintendent Mason. They include the financial and administrative problems associated with setting up and implementing any such system, and the difficulties in policing that would follow if permits were issued sanctioning the possession of cannabis for religious purposes.

[135] The Rastafari are not well organised as a religion, either in South Africa or elsewhere. This is apparent from Professor Yawney's affidavit, and also from the appellant's own evidence. Professor Yawney says:

> "Sociologically speaking, Rastafari comprises of several apparently contradictory social tendencies which co-exist in a state of dynamic tension. Rastafari has not imposed a centralised organisation structure on its adherents. It is basically a social network with different nodal points and organised sectors. While most Rastafari do not belong to formal organisations, many belong to several loosely constituted groups. In fact, throughout the course of Rastafari history, many organisations have waxed and waned in prominence."

[136] An attempt has been made to establish formal structures for the religion in South Africa. A Rastafarian National Council was established and its constitution was adopted in December 2000 after the preliminary hearing before this Court. It has no stable history to draw upon, nor is there any assurance that stability will prevail in relation to its affairs in the future. In the light of Professor Yawney's evidence there must at least be some doubt on that score.

[137] According to the appellant most, but not all, Rastafari in South Africa belong to one of four "Houses". However, he himself does not belong to a House, though on occasions he attends their ceremonies. The two larger Houses have "priests"or "elders" but the two smaller Houses do not have any formal structures. The Houses have apparently adopted constitutions, but it is not clear when this was done. Bearing in mind the looseness of the structures and the fact that 10 per cent or more of the Rastafari in South Africa do not belong to a House, the administration and enforcement of a permit system in such circumstances would clearly present many problems.

[138] But more importantly, the religious use of cannabis cannot be equated to medical use. It would expose Rastafari to the same harm as others are exposed to by using cannabis, depending only on their self discipline to use it in ways that avoid such harm. Moreover, to make its use for religious purposes dependent upon a permit issued by the state to "bona fide Rastafari" would, in the circumstances of the present case, be inconsistent with the freedom of religion.[32] It is the essence of that freedom that individuals have a choice that does not depend in any way upon the permission of the executive. If cannabis can be possessed and used for religious purposes, that must be so whether the executive consents or not, and whether the person concerned is a Rastafari or an adherent of some other religion. Quite apart from this objection, such a permit system would not address the law enforcement problems referred to in para 130 above. Ensuring that the use of cannabis fell within the conditions of the permit would depend entirely upon the self-discipline of the holder and would not be amenable to state monitoring or control. There is, of course, the pervading anomaly that permission for Rastafari to possess cannabis is

32 There are obvious problems involved in initially establishing whether or not an applicant qualifies for registration as a person entitled to such religious status and in fixing the scope of the exemption it would allow.

meaningless unless they are allowed to grow it themselves (which presents its own complications) or their suppliers and the original growers are also brought within the exemption (this too presents complications).

[139] The use made of cannabis by Rastafari cannot in the circumstances be sanctioned without impairing the state's ability to enforce its legislation in the interests of the public at large and to honour its international obligation to do so. The failure to make provision for an exemption in respect of the possession and use of cannabis by Rastafari is thus reasonable and justifiable under our Constitution.

[140] In his judgment, Ngcobo J concludes that a limited exemption for the non-harmful use of cannabis could be crafted by the legislature to accommodate the religious needs of Rastafari. Because the appellant's case focussed on the general use of cannabis in which smoking has a prominent role, little attention was given in the evidence to the other uses of cannabis. It was never suggested that permitting other uses, but prohibiting smoking, would enable the appellant to practise his religion. According to Professor Yawney, the importance of cannabis to the practice of the religion is that it "encourages inspiration and insight through the presence of sudden illumination". It is the psycho-active effect of the drug that does this. Whilst smoking is the most potent form of use, it appears that eating and drinking have similar effects. The appellant stresses in his affidavit that children are not entitled to smoke cannabis, but that

> "A mature youth could be introduced to the holy herb in a non-invasive form such as tea [which does not have any psycho-active component in small quantities] or in food in the most minute of quantities on special occasions and under parental supervision."

Whether the inhalation of the smoke from the burning of cannabis as incense would have a similar effect, is not mentioned in the evidence. But unless it does, it would not induce the state of mind necessary for meditation and communication.

[141] Moreover the disputed legislation, consistent with the international protocol, is not formulated so as to penalise only the harmful use of cannabis, as is the case with legislation dealing with liquor. It seeks to prohibit the very possession of cannabis, for this is obviously the most effective way of policing the trade in and use of the drug. This method of control was not disputed save for the religious exemption sought. The question is therefore not whether the non-invasive use of cannabis for religious purposes will cause harm to the users, but whether permission given to Rastafari to possess cannabis will undermine the general prohibition against such possession. We hold that it will.

[142] We are also unable to agree that the granting of a limited exemption for the non-invasive religious use of cannabis under the control of priests is a competent remedy on the evidence that has been placed before us. It would not meet the appellant's religious needs and he is the only party seeking relief from this Court. The Rastafarian Houses are not parties to the litigation and the appellant neither asserts nor has established authority to act on behalf of any person other than himself. There is moreover no evidence to suggest that the granting of such an exemption would satisfy any of the Houses or enable Rastafari to practice their religion in accordance with their beliefs, or that the appellant or other Rastafari would refrain from smoking or consuming

cannabis if such an exemption were to be granted. On the appellant's own evidence cannabis is required by him for the purpose of smoking, and as he told the Law Society and repeated in his affidavits, he intends to continue doing so. His claim was not for a limited exemption for the ceremonial use of cannabis on special occasions. An exception in those terms does not accord to him the religious right that he claims. Nor would a more general exemption for the non-invasive use of cannabis for religious purposes. All that this would do would be to facilitate the possession of cannabis by Rastafari, leaving them free for all practical purposes, to use it as they wish. Policing of the use in such circumstances would be well-nigh impossible. There are, moreover, important concerns relating to cost, the prioritisation of social demands and practical implementation that militate against the granting of such an exemption.[33] The granting of a limited exemption interferes materially with the ability of the state to enforce its legislation, yet, if the use of cannabis were limited to the purpose of the exemption, it would fail to meet the needs of the Rastafari religion.

[143] It follows that we are in agreement with the decision of the Supreme Court of Appeal on this aspect of the case, and would accordingly dismiss the appeal. This is not a case in which it would be appropriate to make any order as to the costs of the proceedings in this Court.

[144] The following order is made:

> The appeal is dismissed. No order is made as to the costs of the appeal to this Court.

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33 *S v Manamela and Another (Director-General of Justice Intervening)* 2000 (3) SA 1 (CC); 2000 (5) BCLR 491 (CC) at paras 34 and 95.

Goldstone and Yacoob JJ concur in the judgment of Chaskalson CJ, Ackermann and Kriegler JJ.

SACHS J:

*Introduction*

[145] Intolerance may come in many forms. At its most spectacular and destructive it involves the use of power to crush beliefs and practices considered alien and threatening. At its more benign it may operate through a set of rigid mainstream norms which do not permit the possibility of alternative forms of conduct. The case before us by no means raises questions of aggressive targeting. The laws[1] criminalizing the use of dagga[2] were not directed at the Rastafari[3] nor were they intended expressly to interfere with their religious observance.

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1 Section 4(b) of the Drugs and Drug Trafficking Act 140 of 1992 and section 22A(10) of the Medicines and Related Substances Control Act 101 of 1965.

2 The Act uses the term "cannabis". I will refer to the substance by its popular South African name "dagga", a word of ancient Khoisan origin - see *A Dictionary of South African English* (Oxford University Press, Oxford 1996) at 176. The Rastafari prefer to use the Jamaican word "ganja" to distinguish their sacred use of the herb from its recreational use by others. Herbst *Identity, Protest and Healing: The Multiple Uses of Marijuana in Rastafari* (Paper at Anthropology Conference, Windhoek 2000) at 7. She adds (at 8) that many have an aversion to the word dagga, possibly because it reminds them of apartheid tensions and brutality.

3 On 2 November 1930 the Prince Regent, Ras Tafari, was crowned Emperor of Ethiopia and invested with his official title Haile Selassie I, King of Kings, Lord of Lords, the all conquering Lion of the Tribe of

Although they appear to be neutral statutes of general application they impact severely,[4] though incidentally, on Rastafari religious practices. Their effect is accordingly said to be the same as if central Rastafari practices were singled out for prohibition. The Rastafari claim that as a religious community they are subject to suppression by the implacable reach of the measures, and as individual believers they are driven to a constitutionally intolerable choice between their faith and the law. Through a test case brought by Mr Prince, law graduate, aspirant attorney and appellant in this matter,[5] a number of them approach this Court for relief.

[146] In *Christian Education*[6] and *Prince 1*[7] this Court underlined the importance of applying the principle of reasonable accommodation when balancing competing interests of the state and of religious communities. It was the search for such an accommodation that guided this Court when in *Prince 1* it referred the present matter back to the parties for further information relevant to the crafting of a possible exemption. The Court observed that in issue was the validity of statutes that served an important public interest, namely, the prevention of drug trafficking and

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Judah. See Poulter *Ethnicity, Law and Human Rights: The English Experience* (Oxford University Press, Oxford 1998) at 336.

> "For the rural poor [of Jamaica], the crowning of an African King who could claim legitimacy from the Bible and from the line of Solomon led to a new deification, replacing the white King of England with a black God and black King."

Campbell *Rasta and Resistance: From Marcus Garvey to Walter Rodney* (Hansib Publishing Ltd, London 1985) quoted in Herbst, above n 2.

4 See para 152 below.

5 After being unsuccessful in the Cape High Court *Prince v President of the Law Society, Cape of Good Hope and others* 1998 (8) BCLR 976 (C) and the Supreme Court of Appeal *Prince v President of the Law Society, Cape of Good Hope and others* 2000 (3) SA 845 (SCA); 2000 (7) BCLR 823 (SCA).

6 *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC); 2000 (10) BCLR 1051 (CC).

7 *Prince v President, Cape Law Society, and Others* 2001 (2) SA 388 (CC); 2001 (2) BCLR 133 (CC). I refer to the judgment given after the first hearing of the appeal in this court as *Prince 1*.

drug abuse, so that a declaration of invalidity would have far-reaching consequences for the administration of justice. At the same time it reaffirmed that the constitutional right to practise one's religion asserted by the appellant was of fundamental importance in an open and democratic society; the constitutional right asserted by the appellant was beyond his own interest - it affected the Rastafari community. The Court added:

> "The Rastafari community is not a powerful one. It is a vulnerable group. It deserves the protection of the law precisely because it is a vulnerable minority. The very fact that Rastafari use cannabis exposes them to social stigmatisation. They are perceived as associated with drug abuse and their community is perceived as providing a haven for drug abusers and gangsters. During argument it was submitted on behalf of the A-G that if a religious exemption in favour of the Rastafari were to be allowed this would lead to an influx of gangsters and other drug abusers into their community. The assumption which this submission makes demonstrates the vulnerability of this group. Our Constitution recognises that minority groups may hold their own religious views and enjoins us to tolerate and protect such views. However, the right to freedom of religion is not absolute. While members of a religious community may not determine for themselves which laws they will obey and which they will not, the State should, where it is reasonably possible, seek to avoid putting the believers to a choice between their faith and respect for the law."[8]

[147] By concluding that the granting even of a limited exemption in favour of the Rastafari would interfere materially with the ability of the state to enforce anti-drug legislation, I believe

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8 Id at para 26.

that the majority judgment effectively, and in my view unnecessarily, subjects the Rastafari community to a choice between their faith and respect for the law. Exemptions from general laws always impose some cost on the state, yet practical inconvenience and disturbance of established majoritarian mind-sets are the price that constitutionalism exacts from government. In my view the majority judgment puts a thumb on the scales in favour of ease of law enforcement, and gives insufficient weight to the impact the measure will have, not only on the fundamental rights of the appellant and his religious community, but on the basic notion of tolerance and respect for diversity that our Constitution demands for and from all in our society.

[148] In my opinion, the judgment of Ngcobo J convincingly shows that appropriate balancing and application of the principle of reasonable accommodation would allow for protection to be given to core sacramental aspects of Rastafari belief and practice without unduly impacting upon the broader campaign against harmful drugs. The most useful approach would appear to involve developing an imaginary continuum, starting with easily-controllable and manifestly-religious use at the one end, and ending with difficult-to-police utilisation that is barely distinguishable from ordinary recreational use, at the other. The example given by Ngcobo J of officially recognised Rastafari dignitaries receiving dagga from state officials for the burning of incense at tabernacles on sacramental occasions, would be at the easily-controllable and manifestly-religious starting point. Such a narrow and closely defined exemption would be subject to manageable state supervision, and would be understood publicly as being intensely and directly related to religious use.[9] One step further along would be to allow designated priests to receive

[9] Public understanding or misunderstanding of what is and what is not religion might be irrelevant when determining whether or not religious rights as envisaged by the Constitution are being infringed. Yet popular perceptions could be pertinent to the question of justification and, more especially to the weighing

dagga for sacramental use, including smoking of a handed-round chalice, at designated places on designated occasions. This too could be easily supervised and be readily appreciated by the public as being analogous to religion as widely practised; indeed, I cannot imagine that any reasonable balancing of the respective interests of the Rastafari and of the state could provide for less. At the other end of the continuum would be the granting of everything that the appellant asks for, including the free use of dagga in the privacy of Rastafari homes. Such use would be extremely difficult to police and would completely blur the distinction in the public mind between smoking for purposes of religion and recreational smoking. It would be for Parliament to work out the best means of securing the operational exemption to which the Rastafari are constitutionally entitled. The result might fall far short of what the Rastafari initially claimed, but at least would cast a flicker of constitutional light into the murky moral catacombs in which they exist and secure to them a modest but meaningful measure of dignity and recognition. The fact that they cannot be given all that they ask for is not a reason for giving them nothing at all.

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of the impact of an exemption on the enforceability of the law.

[149] As I see it, the real difference between the majority judgment and that of Ngcobo J relates to how much trouble each feels it is appropriate to expect the state to go to in order to accommodate the religious convictions and practices of what in this case is a rather small and not very popular religious community. I align myself with the position that where there are practices that might fall within a general legal prohibition, but that do not involve any violation of the Bill of Rights,[10] the Constitution obliges the state to walk the extra mile. I accordingly agree with the general approach adopted by Ngcobo J and wish merely to add some observations of a general kind to his meticulous and sensitive analysis of the issues.

[150] The first will deal with the broad historical South African context in which the proportionality exercise in the present case has to be undertaken. The second considers the special responsibility which I believe the courts have when responding to claims by marginalised and disempowered minorities for Bill of Rights protection. The third concerns South Africa's obligations in the context of international conventions dealing with drugs. The fourth

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10 Whether or not a religious practice infringes the Bill of Rights is the basic marker which section 31(2) of the Constitution establishes for limiting the extensive associational rights which section 31(1)(a) emphatically states shall not be denied to religious communities. Thus, practices such as human sacrifice, the immolation of widows or the stoning of adulterers, violate the Bill of Rights and accordingly are not rendered immune to state action simply on the grounds that they are embedded in religious belief. The sacramental use of dagga on the other hand comes nowhere near to infringing the Bill of Rights. Accordingly, the religious rights which the Rastafari have under section 15(1) of the Constitution are strongly reinforced by their associational rights under section 31. As Ngcobo J indicates, their rights to dignity under section 10 are also strongly implicated.

investigates the possibility of developing a notion of limited decriminalization as a half-way house between prohibition and legalization. Finally, I will refer to the special significance of the present matter for the constitutional values of tolerance, openness and respect for diversity.

*The South African context in which the balancing exercise must be undertaken*

[151] In *Christian Education*[11] and *Prince 1*[12] this Court emphasised the importance of contextualising the balancing exercise required by section 36 of the Constitution.[13] Such contextualisation reminds us that although notional and conceptual in character, the weighing of the respective interests at stake does not take place on weightless scales of pure logic pivoted on a friction-free fulcrum of abstract rationality.[14] The balancing has always to be done in the context of a lived and experienced historical, sociological and imaginative reality. Even if for purposes of making its judgment the Court is obliged to classify issues in conceptual terms and

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11 Above n 6 at paras 30-1.

12 Above n 7. It was to obtain more information about the implications of an exemption that the matter was referred back to the parties.

13 Commonly known as the limitations clause, section 36 reads :

> "(1) The rights in the Bill of Rights may be limited only in terms of 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 –
>
> (a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and the extent of the limitation;
> (d) the relation between the limitation and its purpose; and
> (e) less restrictive means to achieve the purpose."

14 Williams & Williams in "Volitionalism and Religious Liberty" (1991) 76 *Cornell Law Review* 769 at 925 point to the difficulties of using the concept of neutrality when considering religious options:

> "This . . .would require some notion of meta-neutrality, some Archimedean point of neutrality, from which to assess the impact, not just of particular government actions, but of whole schemes of government. And, of course, as the scope of government activity grows, larger and larger areas of social life would come within the scheme to be assessed . . . It is far too easy for a legislature to simply offer protection and accommodation only on those issues and in those activities of concern to majority religions."

abstract itself from such reality, it functions with materials drawn from that reality and has to take account of the impact of its judgments on persons living within that reality. Moreover, the Court itself is part of that reality and must engage in a complex process of simultaneously detaching itself from and engaging with it. I believe that in the present matter, history, imagination and mind-set play a particularly significant role, especially with regard to the weight to be given to the various factors in the scales. To begin with, the very problem that is under consideration has to be located in the vast experiential dimensions of faith. As this Court has stated :

> "The right to believe or not to believe, and to act or not to act according to his or her beliefs or non-beliefs, is one of the key ingredients of any person's dignity. Yet freedom of religion goes beyond protecting the inviolability of the individual conscience. For many believers, their relationship with God or creation is central to all their activities. It concerns their capacity to relate in an intensely meaningful fashion to their sense of themselves, their community and their universe. For millions in all walks of life, religion provides support and nurture and a framework for individual and social stability and growth. Religious belief has the capacity to awake concepts of self-worth and human dignity which form the cornerstone of human rights. It affects the believer's view of society and founds the distinction between right and wrong. It expresses itself in the affirmation and continuity of powerful traditions that frequently have an ancient character transcending historical epochs and national boundaries."[15]

[152] The Rastafari faith is of relatively recent origin, but it transcends national boundaries and is deeply rooted in the experience of a vast African diaspora.[16] Dagga is a herb that grew wild in

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15 *Christian Education,* above n 6 at para 36.

16 See generally Herbst, above n 2 and Poulter, above n 3.

Africa and was freely imbibed in the pre-colonial period.[17] Its use in the diaspora today is seen as re-establishing a ruptured Afro-centred mystical communion with the universe.[18] The papers before us indicate that:

17 *A Dictionary of South African English* above n 2 at 176 records a traveller writing in 1670 of a "powerful Root, which they call Dacha, sometimes eating it, other-whiles mingling it with water to drink; either of which ways taken, causeth Ebriety."

18 Poulter, above n 3 at 356 explains that

> "Adherents . . .are enabled more easily to perceive Haile Selassie as the true redeemer and to appreciate their own true identities [through the new level of consciousness induced by the sacramental use of ganja]".

> "As the dominant culture tried to use the Bible to claim the black man was a 'beast of burden' so the Rasta expressed his place in Africa and that the use of the herb was grounded in biblical redemption and deliverance".[19]

South African Rastafari find themselves in the peculiar position of being a diaspora of the diaspora, physically on African soil but as reliant as their brethren abroad on the use of dagga as the instrument for achieving an Afro-centred religious connection with creation. Prohibit the use of dagga, and the mystical connection is destroyed. The affidavit by Prof Yawney highlights the centrality of dagga-use to the practice of the Rastafari religion. She states that:

> "For Rastafari, cannabis or *holy herbs*, commonly known in Jamaica as *ganja*, is a sacred God-given plant to be used for *healing of the nation*. Its consumption is central to Rastafari spiritual practice . . .
>
> In keeping with the practice of knowing Jah!Rastafari as God directly for oneself, the ingestion of herbs encourages inspiration and insight through the process of sudden illumination. Sociologists would call this a visionary state characterized by the

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19 Campbell, above n 3 at 47 (quoted in Herbst, above n 2 at 9).

experience of oneness or interconnectedness."[20]

[20] These statements are confirmed by Herbst, above n 2 at 10 who says:

> "[G]anja's place in Rastafari would appear to be more than justification for smoking an enjoyable drug. As Barrett (1988) states 'the real center of the movement's religiosity is the revelatory dimensions brought about by the impact of the 'holy herb'."

The sense of African spiritual identity which pervades the whole Rastafari world view and is outwardly manifested by the growing of dreadlocks,[21] and the associated sacramental communion achieved through the use of "the holy herb", is accordingly crushed by the total prohibition of dagga-use.[22]

[153] Dagga is rooted both in South African soil and in indigenous South African social practice. In this respect it is significant that the 1988 Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances expressly states that when State parties take measures to prevent illicit cultivation of plants containing narcotic or psychotropic substances:

> "The measures adopted shall respect fundamental human rights and shall take due

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21 For the significance of dreadlocks as a marker of identity see Yawney, annexure to affidavit at 6; Poulter, above n 3 at 346-7.

22 In *Employment Division, Department of Human Resources of Oregon, et al. v Smith et al.* 494 US 872 (1990) Blackmun J, dissenting, pays considerable attention to the significance that the drug peyote has for native Americans. He distinguishes it from marijuana, but I do not believe that read as a whole his judgment is inconsistent with the granting of a narrowly tailored religious exemption in South Africa for the sacramental use by Rastafari of dagga, an indigenous plant which has intense, historically-grounded meaning for members of that community. He states (at 916) that the distribution for use of peyote in religious rituals has nothing to do with the vast and violent traffic in illegal narcotics that plagues the USA. I believe that appropriately controlled supply of dagga for sacramental use by Rastafari would equally do nothing to impede the state's effort to deal with 'the vast and violent traffic in illegal narcotics' in South Africa. See para 154 below.

> account of traditional licit uses, where there is historic evidence of such use, . . . "[Article 14]

The historic evidence of traditional licit use in South Africa is abundant. This has been accepted over the years by our courts where it has been said that:

> ". . . [I]t is general knowledge that some sections of the [African] population have been accustomed for hundreds of years to the use of dagga, both as an intoxicant and in the belief that it has medicinal properties, and do not regard it with the same moral repugnance as do other sections of the population."[23]

[154] For the purposes of balancing, some laws (or parts of laws) will of necessity be more equal than others. Thus, the problems the state might have in enforcing a general ban on heroin might be no different to those it has in interdicting dagga use. Yet in the balancing exercise the impact of the former on law enforcement will weigh by far the more heavily. A retreat on the tiny front of sacramental use by Rastafari of indigenous and long-used dagga might make little if any difference to prosecution of the major battles against cartels importing heroin, cocaine and mandrax. Indeed the "war on drugs" might be better served if instead of seeking out and apprehending Rastafari whose other-worldly use of dagga renders them particularly harmless rather than harmful or harmed, such resources were dedicated to the prohibition of manifestly

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23 *S v Nkosi and Others* 1972 (2) SA 753 (T) at 762A. See also Milton and Cowling *South African Criminal Law and Procedure* Volume III. Statutory Offences (Revision Service 1999) (Juta, Cape Town) F3 at 11. There is serious legal scholarship to substantiate this view. Chanock *The Making of South African Legal Culture 1902-1936 Fear, Favour and Prejudice* (Cambridge University Press, Cambridge 2001) at 69 and 92-6 states that until 1921 dagga was sold openly by mine storekeepers in the towns and grew wild in much of the country. He informs us that only in that year were there serious signs of moral panic focussing around dagga, when South African criminological thinking came to be obsessed with interracial sex, the provision of alcohol by whites to blacks and the reverse flow of dagga. Of particular concern, he notes, was the "camaraderie" which led some to lay aside race and other prejudices with regard to fellow addicts.

harmful drugs.[24]

*The role of the courts in securing reasonable accommodation*

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[24] The dilemmas of enforcing the prohibitions against "soft" and "hard" drugs are not peculiar to South Africa, though they might be intensified by the indigenous character of dagga and its use. In *Drugs and the Law, 1999, Report of the Independent Inquiry into the Misuse of Drugs Act 1971, established by the Police Foundation of the United Kingdom* [which I shall refer to as the Runciman Report] it is said at Chapter 7, para 1 that

> "[b]ecause of the frequent use of discretion by the police and customs, [cannabis] is the drug where there is the widest gap between the law as formulated and the law as practised. Cannabis is also less harmful than the other main illicit drugs, and understood by the public to be so. If our drugs legislation is to be credible, effective and able to support a realistic programme of prevention and education, it has to strike the right balance between cannabis and other drugs".

For the purposes of the present case, it is not necessary to enter into the wider debate as to whether criminalization is the best strategy for dealing with the terrible plague of serious, dependence-producing drugs which afflict our country and cause so much social and personal tragedy.

[155] Limitations analysis under our Constitution is based not on formal or categorical reasoning but on processes of balancing and proportionality as required by section 36.[25] This Court has accordingly rejected the view of the majority in the United States Supreme Court that it is an inevitable outcome of democracy that in a multi-faith society minority religions may find themselves without remedy against burdens imposed upon them by formally neutral laws.[26] Equally, on the other hand, it would not accept as an inevitable outcome of constitutionalism that each and every statutory restriction on religious practice must be invalidated. On the contrary, limitations analysis under section 36 is antithetical to extreme positions which end up setting the irresistible force of democracy and general law enforcement, against the immovable object of constitutionalism and protection of fundamental rights. What it requires is the maximum harmonisation of all the competing considerations, on a principled yet nuanced and flexible case-by-case basis, located in South African reality yet guided by international experience, articulated with appropriate candour and accomplished without losing sight of the ultimate values highlighted by our Constitution. In achieving this balance, this Court may frequently find itself faced with complex problems as to what properly belongs to the discretionary sphere which the

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25 Above n 13.

26 In the *Employment* case, above n 22 at 890 Scalia J for the Court said:

> "It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs."

Blackmun J, dissenting, states (at 908) that the majority concludes "that strict scrutiny of a state law burdening the free exercise of religion is a 'luxury' that a well-ordered society cannot afford . . . and that the repression of minority religions is an 'unavoidable consequence of democratic government." He records his disagreement (at 909) saying:

> "I do not believe the Founders thought their dearly bought freedom from religious persecution a 'luxury', but an essential element of liberty – and they could not have thought religious intolerance 'unavoidable,' for they drafted the Religion Clauses precisely in order to avoid that intolerance."

Constitution allocates to the legislature and the executive, and what falls squarely to be determined by the judiciary.

[156] The search for an appropriate accommodation in this frontier legal territory accordingly imposes a particularly heavy responsibility on the courts to be sensitive to considerations of institutional competence and the separation of powers. Undue judicial adventurism can be as damaging as excessive judicial timidity.[27] On the one hand, there is the temptation to proffer an over-valiant lance in defence of an under-protected group without paying regard to the real difficulties facing law-enforcement agencies. On the other, there is the tendency somnambulistically to sustain the existing system of administration of justice and the mind-set that goes with it, simply because, like Everest, it is there; in the words of Burger CJ, it is necessary to be aware of "requirements of contemporary society exerting a hydraulic insistence on conformity to majoritarian standards."[28] Both extremes need to be avoided.

[157] The hydraulic insistence on conformity could have a particularly negative impact on the Rastafari, who are easily identifiable, subject to prejudice and politically powerless, indeed, precisely the kind of discrete and insular minority whose interests courts abroad [29]and in this

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27 As one commentator observed, Nirvana does not exist, there is no situation in which a perfect, reliable institutional actor reaches the right outcome each time; the judiciary may be hobbled by incredible hubris as to its interpretive hegemony, while the legislature by its very composition, may be limited in its capacity to deliberate in a serious reflective, non-politicized way on the nature and importance of religious freedom. "Religion in Congress and the Courts" (1988) 22 (1) *Harvard Journal of Law & Public Policy* 59 at 63.

28 *Wisconsin v Yoder* 406 US 205 at 217 (1972).

29 Thus according to Tribe *American Constitutional Law* 2nd edition (Foundation Press, New York 1988) at 582 in *United States v Carolene Products Co* 304 US 144 (1938) Justice Stone's famous footnote 4, came to support increased judicial intervention for "discrete and insular minorities" in non-economic affairs. Tribe writes at 129 that "injuries affecting interests shared by all citizens in common, unlike harms visited

country have come jealously to protect. As Ackermann J said in dealing with the analogous situation in which gays and lesbians found themselves:

> "The impact of discrimination on [them] is rendered more serious and their vulnerability increased by the fact that they are a political minority not able on their own to use political power to secure favorable legislation for themselves. They are accordingly almost exclusively reliant on the Bill of Rights for their protection."[30]

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upon insular minorities, ordinarily present the weakest case for judicial intervention".

30 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) at para 25.

In equal measure, because they are politically powerless and unable to secure their position by means of a legislative exemption, the Rastafari are compelled to litigate to invoke their constitutional rights. They experience life as a marginalised group seen to dress and behave strangely, living on the outer reaches rather than in the mainstream of public life. This Court has accepted that: "to understand the 'other' one must try, as far as is humanly possible, to place oneself in the position of the 'other'."[31] The experience of 'other-ness' was expressed by one Rastafari in the following terms:

> "A great deal of misinformation has been spread in order to turn the world against the blessed Rastas. The law criminalizes ganja, the preacher demonises it, politicians depopularise it, doctors give serious warning against it and the whole world is made to believe that ganja smoking is far worse than cigarette smoking.
>
> Today we see numerous people dying from lung cancer because of cigarette smoking and the concomitant nicotine that is known to be deadly. Fights associated with drunkenness are so many they have become a normal way of living nowadays.
>
> However, we never see people fussing and fighting when they burn ganja."[32]

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31 Id at para 22 per Ackermann J.

32 Informant to Herbst, above n 2 at 21.

[158] The Rastafari are accordingly not an established religious group whose interests no legislature would dare ignore. One may compare their position to that of major faiths. Thus, in the period when the racist liquor laws forbade Africans generally to possess liquor, the power of the Christian Church was such that access to communion wine was granted to African congregants (just as in the USA even at the height of prohibition the use of communion wine was exempted).[33] On the other hand, Africans who sought to brew beer as part of traditional religious supplication rites were prosecuted.[34] The difference of treatment lay not in the nature of the activity or exemption, but in the status of the religious groups involved.[35] One must conclude that in the area of claims freely to exercise religion, it is not familiarity, but unfamiliarity, that breeds contempt.[36]

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33 See Stone et al *Constitutional Law* 3 ed (Little, Brown and Company, Boston 1996) at 1608.

34 Chidester *Religions of South Africa* (Routledge, London and New York 1992) states at 235:

> "The freedom to brew beer was not only demanded by public sentiment, but also by a religious way of life that Mpanza [a squatter leader] suggested was simultaneously African and Christian. 'The African when he supplicates his gods, slaughters a goat or sheep,' Mpanza noted, 'brews his traditional beverage'."

35 Similarly all over the world religiously motivated circumcision of infant boys has survived even the most stringent of child protection laws. Powerful religious organizations support it and it has become an everyday and accepted part of the social scene. This suggests that what matters is not the intrinsic nature of the act, but the degree of official acceptance of the actors.

36 Similar, if less violent, tensions exist today in European cities such as Berlin, where apparently neutral laws of general application have been felt by Muslims to impact disproportionately upon them. Thus, girls have been prevented from wearing headscarves at school, muezzin accused of noise pollution even though church bells are permitted to ring and planning permission for mosques refused because of its potential impact on the skyline, in contrast with church steeples which are permitted. Ewing "Legislating Religious Freedom: Muslim Challenges to the Relationship Between 'Church' and 'State' in Germany and France" (2000) Fall *Daedalus* 31 at 35. Referring to a similar problem in the USA, Carter in "Religious Freedom as if Religion Matters: A Tribute to Justice Brennan" (1999) 87 *California Law Review* 1059 states at 1063:

> "[W]hat we are bold to call neutrality means in practice that big religions win and small religions lose . . . [T]he cathedral is not safe [from having a road built across its land] because it is a religious building – it is safe because it is a building valued by a politically powerful constituent group . . . Neutrality is a blueprint for the accidental destruction of religions that lack power."

McConnell "Free Exercise Revisionism and the Smith Decision" (1990) 57 *University of Chicago Law Review* 1109 at 1136 and 1148, states that

> "the courts offer a forum in which the particular infringements of small religions can be

[159] The Rastafari are not unique as a religious group having had to fight against incomprehension and prejudice when seeking protected space for their religious practices in South Africa. Chidester points to the difficulties that all the major non-Protestant religions have encountered :

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> brought to the attention of the authorities and (assuming the judges perform their duties impartially) be given the same sort of hearing that more prominent religions already receive from the political process. . . . The court . . . must engage in the hypothetical exercise of comparing burdens. The degree of protection for religious minorities should be no less than . . . they would provide for the majority."

"Religious traditions with sacred centres outside of the geographical boundaries of [S]outhern Africa have struggled to establish a place in the region . . . . [W]hether in Rome, Mecca, Benares or Jerusalem, these religious traditions recentered themselves in the South African context. However, their efforts to find a place in South Africa have often come into conflict with the laws of the land. An important part of the story of religious pluralism in South Africa, therefore, has been the history of legal conflicts in which religious pluralism has been suppressed by the force of law."[37]

37 Chidester, above n 34 at 148.

In some cases the new religions were deliberately combatted. In others, their implantation and development in South Africa were hindered by apparently neutral measures of general application said to be in the public interest. At times the conflict erupted into the streets.[38] Chidester points out that religious conflict in Cape Town during the 19th century erupted over sanitation programmes, medical care and public health measures. Muslims refused to have their bodies punctured by vaccination or to be confined in an isolation hospital, cut off from family, visits by religious leaders, access to halaal foods or permission to perform Muslim burial rites. The ideology of sanitation came to pervade the imaginations of Cape Town Municipal authorities and the middle class in the 19th century,[39] just as the vision of an orderly, dagga-free world in which the poorer sections of the community knew their place, began to dominate legislative thinking in the 20th.

[160] One cannot imagine in South Africa today any legislative authority passing or sustaining laws which suppressed central beliefs and practices of Christianity, Islam, Hinduism and Judaism.[40] These are well-organized religions, capable of mounting strong lobbies and in a

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38 According to Chidester, id at 163:

> "The Municipal closing of a Muslim sacred site [under the Public Health Act 1883] resulted in a mass demonstration of protest . . . that was subdued by police action. Described as the 'riot of the Malays' in the local press, this protest was the culmination of years of conflict between the Muslim community and the Cape Town Municipal authorities over issues of religion, law and public health."

39 Chidester, id at 164 comments that sanitation represented the promise of a new urban world, cleansing the city of the twin evils of disease and crime that threatened urban purity, law and order.

40 More generally, Sieghart reminds us that few of the major human religions have not at one time or another suffered persecution, or themselves persecuted – through the authority of a State in which they have become established – the members of other religions, or heretics within their own fold.

> "For a substantial proportion of the worst atrocities perpetrated in recorded history, the

position materially to affect the outcome of elections. They are not driven to seek constitutional protection from the courts. A threat to the freedom of one would be seen as a threat to the freedom of all. The Rastafari, on the other hand, are not only in conflict with the public authorities, they are isolated from mainstream religious groups. Inter-denominational solidarity in relation to what would be seen as the distinctly odd practices of the provocative and non-recognised Rastafari religion, would be more likely to express itself as a commonality of opposition than as a concertation of support. Indeed, the Rastafari might receive more tolerance from non-believers to whom all religions are equally strange, than from members of well-established confessions, who might have difficulty in taking the Rastafari belief system seriously as a religion at all.

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> ostensible justification has been the alleged need for the dominance or maintenance of one belief system rather than another. This is not the place to recite a catalogue of religious persecutions over the ages, let alone to describe the iniquities perpetrated either by, or against, any particular religious group. Suffice it to recall that the movement for 'freedom of belief' precedes every other in the history of the struggle for human rights and fundamental freedoms".

*The International Law of Human Rights* (Clarendon Press, Oxford 1983) at 324.

[161] Part of the problem lies in the fact that, as has historically been the case with many non-conformist or dissident religions, Rastafari identify themselves by their withdrawal from and opposition to what they regard as the corrupt temporal and spiritual power of Babylon.[41] If pressed to an extreme, no accommodation between the "allegedly corrupt" state and the "manifestly defiant" religious dissident would be possible. The balancing which our Constitution requires, however, avoids polarised positions and calls for a reasonable measure of give-and-take from all sides.[42]

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41 Poulter, above n 3 at 339 observes that the oppressive society against which Rastafari struggle is referred to as Babylon. This notion is derived from Psalm 137 in which the Israelites are revealed as captives in exile.

> "By the rivers of Babylon, there we sat down, yea, we wept, when we remembered Zion."

42 As an example in a different context Chidester, above n 34 at 166-7 cites Muslim leaders as acknowledging in the 1920s and 1930s that because they were not living in an Islamic state they should accommodate themselves to minority status and not resist the government as long as they were allowed to perform the basic requirements of their faith – daily prayer, the poor tax and pilgrimage to Mecca.

[162] In the present matter certain Rastafari, through the agency of Mr Prince, have approached the courts for relief.[43] To that extent they have accommodated themselves to the institutions of the state.[44] They have presented their arguments with dignity, if not always with consistency or precision. A feature of the relationship between themselves and the state is its arms-length and antagonistic character. The Rastafari have been disdainful of those whom they consider to be agents of Babylon. For its part, the state has adopted a position of generalised hostility towards a group who draw attention to themselves with their dreadlocks and dress, declare their intention to defy the law, and then complain when they are arrested. In answer to a question from the Bench, counsel for the Attorney General indicated that he was not aware of any attempt having been made to contact any Rastafari to see if a reasonable exemption could be worked out with them. I believe that the bringing of court proceedings to determine the constitutional rights of Rastafari represents an important step in the process of accommodation and mutual recognition.[45]

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43 Other Rastafari might well have adopted different legal strategies and we cannot assume that all Rastafari will identify themselves with Mr Prince's application.

44 As Carter, above n 36 at 1066, wryly observes:

> ". . . To file a lawsuit before a judge is the analytical equivalent of asking state permission to exercise a constitutional right."

45 Its conciliatory spirit is consistent with Proverbs 15:17

> "Better is a dinner of herb where love is, than a stalled ox and hatred therewith."

Genesis 1:11-12

> "[H]erb is the healing of the nation . . . ."

[163] Whatever the views of individual Ministers might be, Parliament has not exercised a legislative discretion expressly and consciously to limit the constitutionally protected rights of the Rastafari by refusing them an exemption.[46] To my mind, this factor, taken in conjunction with the vulnerability and powerlessness of the Rastafari and the degree of prejudice to which they are subject, coupled with the extreme impact the general prohibition has on their religious rights and freedoms, linked to the marginal effect a carefully managed exemption would have on the "war on drugs",[47] and taking cognisance of the place that dagga has in the panoply of drugs

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46 In this respect the position is substantially different from that in the *Christian Education* matter, where this Court refused to order a religious exemption so as to permit teachers at Christian Education Schools to apply corporal punishment. In that case, the Christian Education Schools had made full representations to Parliament and been turned down. In the present matter Parliament has not been involved. It is appropriate at this stage to mention two further distinctions between this case and *Christian Education*. Firstly, in that case the imposition of corporal punishment directly affected the rights of children to be free from violence and secondly, the limitation of the parents' rights applied only to their entrusting corporal punishment to teachers and left untouched the rights of parents to maintain the core of their beliefs by imposing corporal correction in the home. In the present matter children would not be directly affected by the claimed exemption, and the prohibition leaves no space at all for the central and defining feature of Rastafari belief and practice.

47 Along with Blackmun J in *Smith*, above n 22, I put the phrase "war on drugs" in inverted commas. We have wars on poverty, crime, terrorism and HIV/Aids" just to mention a few major social evils. Connoting as it does the imagery of total onslaught, the terminology of relentless bellicosity jars against the balancing and proportionality that constitutionalism requires.

designated as dangerous, imposes a clear duty on the courts to intervene so as to guarantee the Rastafari a reasonable and manageable measure of space within which to exercise their individual and associational rights. For reasons which will follow I believe that such space can comfortably be achieved by a process of appropriately targeted exemption. In this respect it is necessary to look at the international conventions dealing with drugs.

*The international conventions and religious exemption*

[164] I accordingly turn to the contention that South Africa's adherence to international conventions[48] obliges it to penalise the use of dagga even for religious purposes. My understanding of the conventions suggests just the opposite. I have already referred to the fact that Article 14 of the 1988 Convention states that when state parties take measures to prevent illicit cultivation of plants containing narcotic or psychotropic substances the measures adopted shall respect fundamental human rights and take due account of traditional licit uses.[49] In its 1992 Report the International Narcotic Control Board (INCB)[50] goes considerably further. Under the heading: "*Decriminalisation*" it points out that:[51]

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48 The Single Convention on Narcotic Drugs (1961) as amended by the 1972 Protocol; The Convention on Psychotropic Substances (1971); and The Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988).

49 See para 153 above.

50 The INCB describes itself in its annual reports as an independent and quasi-judicial control organ for the implementation of the United Nations drug Conventions, established in 1968 by the Single Convention on Narcotic Drugs of 1961. It consists of 13 members elected by the Economic and Social Council (ECOSOC) and its work is financed by the United Nations.

51 Cited in section B of the Report on Cannabis prepared for the Minister of Health and included in the documentation submitted to this Court by the Law Society of the Cape of Good Hope. It should be pointed out that the report of the INCB for 1999 takes a much harder position on access to cannabis, pointing to the fact that very potent varieties are now being produced. Press release no. 7, 23 February 2000.

"15. *None of the* [*international*] *conventions* require[s] *illicit drug consumption per se to be established as a* [*criminal*] *offence.* Instead the conventions deal with illicit drug consumption indirectly in their provisions on activities such as the cultivation, purchase or possession of illicit drugs. In so far as these activities are engaged in for the purpose of non-medical personal consumption:

(a) *Parties* to the 1961 Convention and the 1971 Convention may take the view that they *are not required to establish such activities as criminal offences under law*. The basis for this view appears to be that, since obligations relating to penal provisions appear among articles relating to illicit traffic, the obligations only apply to cultivation, purchase or possession for the purpose of illicit trafficking;

(b) *Unless to do so would be contrary to the constitutional principles* and basic concepts of their legal systems, *only the 1988 Convention clearly requires parties to establish as criminal offences* under law the *possession*,[52] purchase or cultivation of controlled drugs *for the purpose of non-medical personal consumption;*

(c) *None of the conventions requires a party to convict or punish drug abusers who commit such offences even when they have been established as punishable offences*. The party may choose to deal with drug abusers through alternative non-penal measures involving treatment, education, after-care, rehabilitation or social reintegration." [My emphasis.]

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52 It could be argued that possession in this context implies physical control for the purposes of trafficking and would not include having in one's possession small quantities for personal consumption. For purposes of argument, I will assume, however, that even momentary holding of a chalice containing dagga would constitute possession as envisaged by the 1988 Convention.

[165] It has been suggested that decriminalisation[53] appears to have the best prospects of success in dealing with the general prohibition on the use of dagga in South Africa because it draws on the strengths and dilutes the weaknesses of the two extreme positions, namely, prohibition and legalisation.[54] In the present case it is not necessary to consider whether or not decriminalisation should be applied generally to possession and use of small quantities of dagga for personal consumption. The only issue before us is whether a measure of limited decriminalisation in appropriately controlled circumstances could effectively balance the particular interests at stake, namely, sacramental use of dagga by the Rastafari and general enforcement of the prohibition against dagga by the state.

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53 Also referred to as "de-emphasizing policing of abuse". Boister in "Decriminalising dagga in the new South Africa: Rekindling the debate" (1995) 8 *SA Journal of Criminal Justice* 21 at 32. This is in effect what the Runciman Enquiry set up in the United Kingdom by the Police Foundation, recommended in its report on cannabis, where it stated that the law bore most heavily on young people in the streets of inner cities who are also more likely to be poor and members of minority ethnic communities, so its enforcement created more harm than the drug itself. Above n 24 at paras 75-7.

54 Boister in "Drugs and the Law: Prohibition versus Legalisation" (1999) 12 *SA Journal of Criminal Justice* 1 at 11. Lötter in "The decriminalization of cannabis: Hallucination or reality" (1999) 12 *SA Journal of Criminal Justice* 185 at 190 indicates that

> "[d]ecriminalization has been defined as 'those processes by which the competence of the penal system to apply sanctions as a reaction to a certain form of conduct is withdrawn in respect of that conduct.' (See The European Commission on Crime. Council of Europe 1980 *Report on Decriminalization*.) . . . When conduct is decriminalized, the criminal sanction and, consequently, the penal section attached to the conduct is removed. This indicates that a person will not be prosecuted by the state for that conduct. It does not necessarily make such conduct socially, morally or legally acceptable.
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> *De iure* decriminalization should be distinguished from *de facto* decriminalization. *De iure* decriminalization is the result of formal legal action whilst *de facto* decriminalization is the result of informal screening and diversionary programmes initiated and controlled by police departments, prosecutors, courts, correctional institutions or two or more of these groups acting in concert . . . Although legalisation and decriminalization are frequently used as synonyms they are not synonyms. If drugs are legalised illegal drugs will become legal. Decriminalization implies that the drug itself remains illegal but that the use and to a lesser extent the possession thereof are no longer prosecuted as crime." (Footnotes omitted).

[166] Although the term decriminalisation was not used, the concept appears to have enabled the German courts to deal with the constitutionality of restrictions on the personal consumption of small amounts of marijuana. The German Constitutional Court held:

> "Depending on the characteristics and effects of the drug, the amount involved in the specific case, the nature of the relevant infringement, and all the other relevant facts, the danger posed to the protected public interests may be so slight that the considerations of general prevention which justify a general threat of criminal penalties may lose their force. In such case, having due regard to the right of the affected individual to freedom, the individual guilt of the defendant and the related considerations of criminal policy which aim at the prevention in the case of the specific individual, the punishment constitutes a disproportionate and therefore unconstitutional sanction."[55]

[167] The Court pointed out further that in the case of occasional personal use of a small amount of cannabis, the extent of individual culpability and the threat to other legal interests emanating from the individual act may be petty.

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55 BverfGE 90, 145 (185).

> This means that the authorities responsible for enforcing the law, in particular the Public Prosecutors, who until the offender is charged have absolute control over the proceedings, must refrain from prosecuting the offences according to S 153 and 153(a) of the Criminal Procedure Act in light of the requirement of proportionality in the narrower sense. . . . [I]f the offence involves danger to third parties . . . and is likely to encourage others to imitate the offence, then there may be sufficient culpability and a public interest in prosecution. In this respect, the provisions of the Narcotics Act provides sufficient opportunities to give due consideration to limited wrongfulness and culpability in individual cases.[56]

[168] It was this reasoning which led the Federal Administrative Court[57] to reject an appeal by a Rastafari against a refusal by the authorities to grant him a permit to grow marijuana for personal use. The Court held that the objective of getting the permit was to further the appellant's campaign to legalise possession and use of marijuana and not to protect his own personal use of the substance, which was already safeguarded by the Constitutional Court decision. The Court held that "the differentiating sanction possibilities of [the] criminal law provides a basis to comply with the reasonable requests of the applicant, as well as society's

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56 Id at para 190.

57 BverwG AZ 3 (20/00).

demands for protection."[58]

[58] Translation by Professor Johan Scott, University of Pretoria.

[169] There would appear to be many ways in which decriminalisation of the possession and use of dagga in small quantities by Rastafari for sacramental purposes could be achieved in South Africa. They could include a legislative amendment of the substantive offence to create an express religious exemption; use of the powers under the Medicines Act to grant permits[59] to Rastafari priests to possess and use dagga for sacramental purposes; or a legislatively authorized direction to prosecuting authorities to use their discretion not to prosecute the possession and use of dagga for sacramental purposes.[60] The particular choice would fall appropriately within the

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59 Section 22A(10)(a-b) provides that a permit issued by the Director-General: Health would allow the use, possession, cultivation, etc. of cannabis for analytical or research purposes.

60 We were informed during argument that the prosecutorial practice in the Western Cape was to allow first offenders in possession of small quantities of dagga to pay small fines. As an example of what amounts to de facto decriminalisation in England Poulter above n3 at 362 points out:

> "In many instances [the police] are aware of well-established patterns of consumption and small-scale distribution of cannabis at particular locations and elect to ignore the situation. Not unnaturally, they prefer to devote scarce resources to more important tasks. Even where they do apprehend someone who has been breaking the law, they

discretion of Parliament, which would have the opportunity of receiving input from all the interested parties, including the Rastafari, in working out the terms of an operational exemption which would cure the overbreadth in the legislation as established in the judgment of Ngcobo J.

*Conclusion*

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commonly choose to administer a formal 'caution' rather than institute criminal proceedings."

[170] In conclusion I wish to say that this case illustrates why the principle of reasonable accommodation is so important. The appellant has shown himself to be a person of principle, willing to sacrifice his career and material interests in pursuance of his beliefs.[61] An inflexible application of the law that compels him to choose between his conscience and his career threatens to impoverish not only himself but all of South Africa and to dilute its burgeoning vision of an open democracy. Given our dictatorial past in which those in power sought incessantly to command the behaviour, beliefs and taste of all in society, it is no accident that the right to be different has emerged as one of the most treasured aspects of our new constitutional

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61 It should be noted that the Law Society has indicated that it will abide the decision of the Court on the question of whether Mr Prince has a constitutionally protected right to exemption from the anti-dagga laws. This Court has not been called upon to decide whether or not the fact that he proposes as part of his religion to continue using dagga in defiance of the law, would in itself render him an unfit person to be an attorney. I will accordingly not engage with the merits of the Law Society's refusal to register his community service articles, save to observe that the legal profession has never suffered from having persons of honour and integrity in its ranks; it has, however, deeply impoverished itself by excluding persons of such calibre because their beliefs brought them into conflict with the law. Thus, F.E.T. Krause was disbarred for his support for the Boer Cause in the Transvaal. He went on to become a prominent judge. M.K. Gandhi was expelled from his Inn in London because of his stand in defying laws that he regarded as unjust. The Law Society of the Transvaal sought to disbar Nelson Mandela after his conviction under repressive political statutes. The continued exclusion of Bram Fischer's name from the roll of advocates, and that of Shun Chetty and Julius Baker from the roll of attorneys, has brought no credit to the legal system in South Africa. Cabinet has approved the Restoration of Enrolment of Certain Legal Practitioners Bill (Business Day 29 November 2001). Even the majority judgment in the *Employment* case, above n 22 at 884, while rejecting the balancing test as far as requiring a legislative exemption was concerned, went on to say that exceptions could be made when cases could be individualised.

order. Some problems might by their very nature contain intractable elements. Thus, no amount of formal constitutional analysis can in itself resolve the problem of balancing matters of faith against matters of public interest. Yet faith and public interest overlap and intertwine in the need to protect tolerance as a constitutional virtue and respect for diversity and openness as a constitutional principle. Religious tolerance is accordingly not only important to those individuals who are saved from having to make excruciating choices between their beliefs and the law. It is deeply meaningful to all of us because religion and belief matter, and because living in an open society matters.

[171] The central issue in this case has accordingly not been whether or not we approve or disapprove of the use of dagga, or whether we are believers or non-believers, or followers of this particular denomination or that. Indeed, in the present case the clarion call of tolerance could resonate with particular force for those of us who may in fact be quite puritan about the use of dagga and who, though respectful of all faiths, might not be adherents of any religion at all, let alone sympathetic to the tenets of Rastafari belief and practice. The call echoes for all who see reasonable accommodation of difference not simply as a matter of astute jurisprudential technique which facilitates settlement of disputes, but as a question of principle central to the whole constitutional enterprise. In *Christian Education* this Court held that a number of provisions in the Constitution affirmed

> "[t]he right of people to be who they [were] without being forced to subordinate themselves to the cultural and religious norms of others, and highlight the importance of individuals and communities being able to enjoy what has been called the 'right to be different'. In each case, space [had] been found for members of communities to depart from a general norm. These provisions collectively and separately acknowledged the

> rich tapestry constituted by civil society, indicating in particular that language, culture and religion constitute a strong weave in the overall pattern."[62]

The Court went on to say

62 Above n 6 at para 2 (footnotes omitted).

> "It might well be that in the envisaged pluralistic society members of large groups can more easily rely on the legislative process than can those belonging to smaller ones, so that the latter might be specially reliant on constitutional protection, particularly if they express their beliefs in a way that the majority regard as unusual, bizarre or even threatening. Nevertheless, the interest protected by section 31 is not a statistical one dependent on a counter-balancing of numbers, but a qualitative one based on respect for diversity."[63]

[172] The above passage is directly relevant to the situation in which the Rastafari find themselves. The test of tolerance as envisaged by the Bill of Rights comes not in accepting what is familiar and easily accommodated, but in giving reasonable space to what is "unusual, bizarre or even threatening".

[173] Subject to the above complementary observations, I record my concurrence with the judgment and order of Ngcobo J.

Mokgoro J concurs in the judgment of Sachs J.

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63 Id at para 25 (footnotes omitted).

For the appellant: JL Abel instructed by Dison Ndlovu Attorneys, Johannesburg.

For the fourth respondent: VVW Duba instructed by the State Attorney, Pretoria.

For the fifth respondent: J Slabbert on behalf of the Director of Public Prosecutions.