

# Regulating Adult Use of Cannabis in South Africa: International Law, Foreign Models, and Contextual Realism

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## ABSTRACT

In 2018, South Africa's Constitutional Court held unanimously in *Prince* that the cultivation, possession, and consumption of cannabis in a private place is now no longer a criminal offence. In the same year, the adult use of cannabis was legalised by federal statute in Canada – in line with a trend towards greater legalisation of the substance around the globe. In South Africa, decriminalisation ended years of prohibition under the 'war on drugs', which although backed by UN Convention, had had the distinct flavour (with regard to cannabis at least) of historic race-based prohibition. Four years later, many loose ends remain. For example, the continued prohibition of buying and selling cannabis (outside of non-intoxicating cannabidiol and industrial hemp) appears outdated – and indeed uneconomical – in a region which produces much of the world's cannabis supply. In this article we propose solutions for opening the path to greater commercialisation of cannabis in South Africa, drawing on regulatory models followed in Canada, parts of the United States, and Uruguay. We argue that lessons can also be learnt from the approach to the regulation of alcohol and tobacco, as indeed has been the case in other jurisdictions.

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## I. INTRODUCTION

Cannabis is the most commonly used ‘drug’ across the globe, and across the African continent in particular, where it is estimated that cannabis arrived at least a thousand years ago.<sup>1</sup> Having been illegal for generations in South Africa, a new cannabis industry is today emerging, following a shift towards greater legalization from 2017 onwards. In 2018, following the decision of the Constitutional Court in *Minister of Justice and Constitutional Development v Prince*,<sup>2</sup> South Africa became the first country in Africa to decriminalise cannabis and thereby to provide leeway for private adult use. In the wake of this move, some have hailed the liberalisation of cannabis laws as a potential boon for regional economic development. But despite this, South Africa still lacks a clear adult use legislative model. This is best explained by continuing controversy over the circumstances under which adult use of cannabis should be permitted, as well as competing interests from a variety of stakeholders.

Key to the debate about the legalisation of cannabis is the extent to which it should be legalised. Generally, the legalisation of cannabis for medical purposes, or in the forms of non-intoxicating CBD (cannabidiol) or industrial hemp are less controversial. Adult use of cannabis (which could also include purely recreational use), however, remains under strict regulatory control in most jurisdictions. Despite the prohibition model that is espoused by the international drug treaties, a growing number of countries (which are also signatories to those treaties) have legalised the adult use of cannabis. In 2013, Uruguay became the first country in the world to legalise the sale, cultivation, and distribution of recreational cannabis.<sup>3</sup> In 2018, Canada followed suit and became the second country

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<sup>1</sup> C Duvall “A Brief Agricultural History of Cannabis in Africa, From Prehistory to Canna-Colony” (2019) para 10 available at: <<https://journals.openedition.org/echogeo/17599>>.

<sup>2</sup> *Minister of Justice and Constitutional Development and Others v Prince* ((Clarke and Others Intervening); *National Director of Public Prosecutions and Others v Rubin*; *National Director of Public Prosecutions and Others v Acton* 2018 (6) SA 393 (CC).

<sup>3</sup> Law 19, 172 available at: <<https://www.impo.com.uy/bases/leyes/19172-2013>>. See further: PG Palermo “The Uruguayan Model of Regulating Cannabis – Legal and Geopolitical Questions” (2018) 130 *Zeitschrift für die gesamte Strafrechtswissenschaft* 859.

to formally legalise the cultivation, possession, acquisition, and consumption of cannabis and its by-products.<sup>4</sup> Canada's move represented a particularly significant step due to its standing in the international community and as a G7 member.<sup>5</sup> In both countries, officials and legislators considered the human and financial costs of continuing with criminalisation and decided that the prohibition model was not working.<sup>6</sup>

South Africa is also an active player in international and multilateral relations, having been a permanent member of the G20 since its inception in 1999, and being the only African country with BRICS membership.<sup>7</sup> However, South Africa is heavily reliant on international funders, whose agendas also shape local health policies in ways that are not always aligned with local needs.<sup>8</sup> The ongoing controversy and policy disharmony concerning harm reduction and the health of people who use drugs is one area where this is evident. The post-apartheid government inherited policies entered into by the previous government, including obligations under various UN Conventions on Narcotic Drugs. The continuance and adherence to these prohibitionist instruments was evident in subsequent legal documents, including the Prevention and Treatment of Drug Dependency Act of 2008.<sup>9</sup> More recently, the 2018 *Prince* judgment is a positive indicator of progressive changes taking place at policy level: more needs to now be done to ensure that transformation within the cannabis context has a positive and widespread impact in South Africa's society.

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<sup>4</sup> *Cannabis Act*, SC 2018, c 16.

<sup>5</sup> Canada is a significant economic power: it is a member of the Organization for Economic Co-operation and Development (OECD) and has a major commitment to the international legal order.

<sup>6</sup> Task Force on Cannabis Legalization and Regulation "A Framework for the Legalization and Regulation of Cannabis in Canada: The Final Report of the Task Force on Cannabis Legalization and Regulation" (30 November 2016) available at: <<https://www.canada.ca/en/health-canada/services/drugs-medication/cannabis/laws-regulations/task-force-cannabis-legalization-regulation/framework-legalization-regulation-cannabis-in-canada.html>>.

<sup>7</sup> BRICS is the acronym coined to collectively associate five major emerging market economies: Brazil, Russia, India, China, and South Africa.

<sup>8</sup> A Scheibe, S Shelly & A Versfeld, "Prohibitionist Drug Policy in South Africa – Reasons and Effects" (2020) para 34 available at: <<https://journals.openedition.org/poldev/4007#article-4007>>.

<sup>9</sup> Act 70 of 2008.

In what follows, we briefly explain the current regulatory environment for the adult use of cannabis in South Africa, as well as some of the historical background to this. We then argue that international law should not be seen as a barrier to further legalising adult use in South Africa and we consider some of the leading foreign legalisation models presently in existence. Our ultimate purpose throughout is to propose a progressive approach to the regulation of adult cannabis use in South Africa.

## II. LANDSCAPE OF CANNABIS LAW IN SOUTH AFRICA

### A. Background

Chanock argues that the distinctive treatment meted out by historic cannabis laws was based on the fact that these were primarily intended to target Black people.<sup>10</sup> Indeed, one could argue that the historic enactment of drug prohibition in South Africa was directly tied to concerns about controlling labourers – who were typically people who were classified as Black (in the broad sense).<sup>11</sup> From the first regulatory attempt in 1870,<sup>12</sup> which prohibited cannabis in the Colony of Natal, cannabis prohibition has been tied to concerns that its use undermined the discipline and obedience of South Africa’s labour force and that it ‘inappropriately’ encouraged people of different races to interact through trade.<sup>13</sup>

In 1922, regulations were issued under an amended Customs and Excises Duty Act,<sup>14</sup> which criminalised the possession and use of ‘habit forming drugs’.<sup>15</sup> Under regulation 14, the cultivation, possession, sale, and use of the cannabis plant was prohibited. Following the form of the Transvaal legislation (Ordinance 25 of 1906), the burden of proof of any defence against a charge lay on the accused.<sup>16</sup> This was in marked

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<sup>10</sup> M Chanock, *The Making of South African Legal Culture 1902–1936: Fear, Favour, and Prejudice*, (Cambridge: Cambridge University Press, 2001) at 93 [Chanock].

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

<sup>12</sup> Natal Law 2 of 1870.

<sup>13</sup> P Nkosi, “Dagga and Data: Cannabis, Race, and Policing in Mid-century South Africa, 1932-1960” (2021) 35 *Social History of Alcohol and Drugs: An Inter-Disciplinary Journal* 232, 235 [Nkosi]. See also Chanock, *supra* note 10 at 96.

<sup>14</sup> Customs and Excise Duties Amendment Act 35 of 1922.

<sup>15</sup> Chanock, *supra* note 10 at 94.

<sup>16</sup> *Ibid.*

distinction with the contemporary regulation of alcohol, which was the drug of choice of white people.<sup>17</sup>

In the wake of the fifth session of the League of Nations Advisory Committee on Traffic in Opium and Other Dangerous Drugs, held in May and June of 1923, South Africa, alongside Egypt, was instrumental in ensuring that cannabis was included on the list of prohibited narcotics.<sup>18</sup> Up until this point, the list had been almost entirely concerned with opium and its derivatives.<sup>19</sup> Cannabis was subsequently outlawed internationally in 1925,<sup>20</sup> and wholly criminalised by statute in South Africa in 1928.<sup>21</sup> Concern about the extent of cannabis use in South Africa continued to grow, however, eventually resulting in the enactment of the (notorious) Abuse of Dependence-Producing Substances and Rehabilitation Centres Act in 1971.<sup>22</sup> This Act was replaced by the Drugs and Drug Trafficking Act of 1992,<sup>23</sup> which implemented the United Nations Convention against Illicit Drug Traffic in Narcotic Drugs and Psychotropic substances,<sup>24</sup> and continued to criminalise cannabis.<sup>25</sup>

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<sup>17</sup> *Ibid.*

<sup>18</sup> Chanock, *supra* note 10 at 94. See also Nkosi, *supra* note 13 at 235.

<sup>19</sup> United Nations Office on Drugs and Crime “History of Heroin” (1953) available at: <[https://www.unodc.org/unodc/en/data-and-analysis/bulletin/bulletin\\_1953-01-01\\_2\\_page004.html](https://www.unodc.org/unodc/en/data-and-analysis/bulletin/bulletin_1953-01-01_2_page004.html)>.

<sup>20</sup> D Bewley-Taylor, T Blickman & M Jelsma “The Rise and Decline of Cannabis Prohibition: The History of Cannabis in the UN Drug Control System and Options for Reform” (2014) 10 available at: <[https://www.tni.org/files/download/rise\\_and\\_decline\\_ch1.pdf](https://www.tni.org/files/download/rise_and_decline_ch1.pdf)>.

<sup>21</sup> Medical, Dental and Pharmacy Act 13 of 1928. See also Nkosi, *supra* note 13 at 237.

<sup>22</sup> Abuse of Dependence-Producing Substances and Rehabilitation Centres Act 41 of 1971. For an interesting historical context insight, see the exchange between Prof Ellison Khan and Dr A Bensusan published in the South African Law Journal shortly after the promulgation of this Act: E Khan “Dagga and the Drugs Act” (1972) 89 SALJ 105; A Bensusan “The Use and Effects of Dagga in South Africa – A Medical Assessment” (1972) 89 SALJ 116.

<sup>23</sup> Drugs and Drug Trafficking Act 140 of 1992.

<sup>24</sup> United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (20 December 1988) 1582 UNTS 95.

<sup>25</sup> The link to the 1988 Convention in the 1992 Drugs Act can be seen, for example, in Chapter IV, where the Drugs Act makes provision for “Mutual Assistance in respect of Drug Trafficking” mirroring Article 7 of the 1988 Convention.

The result of this approach was that illicit commercial cannabis farming and trade developed and thrived in South Africa.<sup>26</sup> Despite many attempts at suppression, including through seizure of crops and arrests of those in possession, this market continued to grow.<sup>27</sup> One might explain this on various grounds, such as the role of cannabis in African society, a lack of alternative options for those in the cannabis illicit market to support themselves, and the massive and growing demand for the product by users.<sup>28</sup> The result was a system of laws which were focused on eradicating a crop which had become part of traditional African culture and which was also a vital means of sustenance in otherwise largely economically depressed ‘homeland’ economies.

In the early 2000s, a study by the United Nations concluded that nearly a quarter of the cannabis seizures worldwide between 1999 and 2000 occurred in Southern Africa.<sup>29</sup> In 2000, the large global increase in cannabis seizures was mainly the result of seizures in some African countries, specifically South Africa (718 tons), Malawi (312 tons), and Nigeria (272 tons).<sup>30</sup> Other sources confirm that although much of the South African cannabis output is cultivated in South Africa, a significant amount is also imported from neighbouring countries such as Swaziland, Lesotho, Mozambique and Zimbabwe.<sup>31</sup> A significant amount of the cannabis produced in this region also finds its way to Europe.<sup>32</sup>

### **B. Watershed moment: *Prince* (2018)**

In the *Prince*<sup>33</sup> decision in 2018, the Constitutional Court of South Africa upheld in large part a decision of the Western Cape High Court in Cape Town, which had found that South Africa’s statutory criminalisation

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<sup>26</sup> Nkosi, *supra* note 13 at 258.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid* at 244-258.

<sup>29</sup> United Nations Office for Drug Control and Crime Prevention (UNODCCP) “Global Illicit Drug Trends, 2002” 126 available at: <[https://www.unodc.org/pdf/report\\_2002-06-26\\_1/report\\_2002-06-26\\_1.pdf](https://www.unodc.org/pdf/report_2002-06-26_1/report_2002-06-26_1.pdf)>.

<sup>30</sup> *Ibid* 127.

<sup>31</sup> K Peltzer & S Ramlagan “Cannabis use trends in South Africa” (2007) 13 SA Journal of Psychiatry 126 at 126.

<sup>32</sup> *Ibid.*

<sup>33</sup> *Prince* 2018, *supra* note 2.

of the possession and use of cannabis, which extended to the private use by adults in private places, violated the right to privacy listed in section 7 of the Constitution.<sup>34</sup> The court granted interim relief by reading-in an exception to the impugned provisions in both the 1992 Drugs Act and the 1965 Medicines and Related Substances Act.<sup>35</sup> The result of this was that the use or possession of cannabis in private – and the cultivation of cannabis in a private place, for personal consumption in private – were decriminalised.

The Constitutional Court expressly held that the sale and purchase of cannabis would remain unlawful, however.<sup>36</sup> The court also attempted to provide guidelines on how to determine whether the drug was for personal use or not, in recognition of the difficulty that the reading-in remedy could pose for police officers who found people in possession of cannabis.<sup>37</sup> The court gave Parliament 24 months to cure the constitutional defect, failing which the Court ruled that its reading-in to the legislation would become final.<sup>38</sup> As a result of this judgment, South Africa became the first, and at the time the only, African country to make provision for the personal consumption of cannabis in private.

The hearing in *Prince* in 2018 was the second time that the same applicant, Mr Garreth Prince, had appeared before the Constitutional Court asking for cannabis to be decriminalised in South Africa. Prince is a practising Rastafarian, as well as a legal graduate. In *Prince v President of the Law Society of the Cape of Good Hope*,<sup>39</sup> reported in 2002, Prince (as main applicant) had argued on the basis of the right to freedom of religion for a constitutional exemption for Rastafarians from the prohibition of cannabis. By that stage, Prince had already previously been convicted for possession of cannabis and, as a result, the Cape Law Society had deemed him not fit and proper for a career in law.<sup>40</sup> Prince was clear about his intention to

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<sup>34</sup> *Ibid* para 58.

<sup>35</sup> Act 101 of 1965. See: *Prince 2018* supra note 2 at paras 113-114.

<sup>36</sup> *Prince 2018*, supra note 2 at para 88.

<sup>37</sup> *Ibid* para 110.

<sup>38</sup> *Ibid* para 109.

<sup>39</sup> *Prince v President of the Law Society of the Cape of Good Hope*, 2002 (2) SA 794 (CC).

<sup>40</sup> *Ibid* at para 2.

continue using cannabis if admitted, hence the continuation of the prohibition of this substance was a bar to his career in law.<sup>41</sup>

In 2002, the Constitutional Court was unanimous that the prohibition of cannabis was indeed an infringement of Prince's right to religion.<sup>42</sup> By a majority of five to four, however, the court decided that this limitation (contained in several impugned statutory provisions) was justifiable.<sup>43</sup> The majority pointed to the fact that upholding a constitutional exemption for Rastafarians would make it very difficult to police the remaining cannabis ban, particularly as the evidence established that Prince's own use of cannabis was a mix of both religious and recreational consumption.<sup>44</sup> This practical factor, weighed in the international context of the war on drugs prevailing at the time,<sup>45</sup> was sufficient to maintain the statutory ban. The minority held that it would be possible to craft a narrow exemption for religious use by Rastafarians.<sup>46</sup> They were also influenced by evidence put forward in the application that the risk of harm posed by cannabis was fairly low.<sup>47</sup> In a separate dissent, Sachs J, drew attention in addition to the place of cannabis in traditional African society and the racialised nature of the prohibition of this herb in South Africa in years gone by.<sup>48</sup>

What then had changed between 2002 and 2018? For one thing, the international context: an appendix to the 2018 Prince decision sets out a detailed list of all the jurisdictions where cannabis had been decriminalised up to that point. The list includes countries from all around the world, including those already mentioned in the introduction above and to be discussed further below. This undercut much of the argument about international law obligations and the 'war on drugs'. Another key difference is that in 2018, Prince argued for a general decriminalization of cannabis use on the ground of the right to privacy, rather than a narrow religious exemption for only a small group. The right to be left alone in one's own private home won the unanimous support of the 2018 court,

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<sup>41</sup> *Ibid.*

<sup>42</sup> See paras 44, 111.

<sup>43</sup> *Ibid* at para 141.

<sup>44</sup> *Ibid* at para 142.

<sup>45</sup> *Ibid* at para 116.

<sup>46</sup> *Ibid* at paras 63-70.

<sup>47</sup> *Ibid* at para 61.

<sup>48</sup> *Ibid* at para 153.



which drew (inter alia) on an international precedent from the state of Alaska<sup>49</sup> in the USA, which had already in 1975 upheld the right to use cannabis in a persons' private home based on the right to privacy in both the federal and Alaskan constitutions.<sup>50</sup>

In addition to the privacy argument, the evidence of a leading South African criminologist in the court of first instance had pointed to the limited success of drug prohibitions worldwide, and the fact that policing the cannabis ban in South Africa in particular consumed a lot of State resources with only minimal benefit.<sup>51</sup> This expert evidence was taken into account by the Constitutional Court in partly confirming the High Court's order.<sup>52</sup> Indeed, in the unanimous view of the Constitutional Court in 2018, the limitation imposed on privacy by the prohibition of the private use of cannabis was not justifiable, particularly because this was not the least drastic means of achieving the stated government goals of curbing drug trafficking and promoting public health.<sup>53</sup>

In sum, a changing international climate with regard to cannabis use provided the backdrop for a more practical argument challenging cannabis prohibition. The result was the necessary impetus to open a new era of cannabis regulation in South Africa.

### ***C. Current developments***

Following *Prince*, Parliament was faced with the need to enact clear guidelines for the possession, use, and cultivation of cannabis by adults in South Africa, in order to clear up some of the residual uncertainties which remained. Parliament attempted to meet this deadline through the publication of the Cannabis for Private Purposes Bill in 2020.<sup>54</sup> This

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<sup>49</sup> *Ravin v State of Alaska* 537 P 2d 494 (Alaska Supreme Court, 1975).

<sup>50</sup> *Prince* 2018, supra note 2 at paras 43-57.

<sup>51</sup> This expert report was prepared by Prof Mark Shaw of the University of Cape Town and is discussed in detail in the High Court's judgment: *Prince v Minister of Justice and Others* 2017 (4) SA 299 (WCC) paras 47-63.

<sup>52</sup> *Prince* 2018, supra note 2 at para 61.

<sup>53</sup> *Ibid* at paras 67-94.

<sup>54</sup> Bill B19 of 2020. In addition to this stand-alone Bill, the schedules to the 1965 Medicines Act were amended in May 2020, removing cannabis from the (highly restricted) schedule 7 and instead listing tetrahydrocannabinol (THC) as a schedule 6 substance (with exceptions to this listing to give effect to the ruling in *Prince* 2018) and CBD as a schedule 4 substances (with large carveouts listed as schedule 0 - thereby

instrument was later passed by Cabinet in August 2020, after the two-year deadline set by the Constitutional Court had already elapsed. The Bill provides detailed rules on the possession of cannabis by a private user in her home, as well as on other issues such as the private cultivation of the plant. These rules are highly specific with regard to the quantities in which cannabis may be possessed or cultivated,<sup>55</sup> as well as in prescribing the penalties for breaching these rules.<sup>56</sup>

Some elements of this Bill are progressive, such as the generous prescribed quantities for private possession by an adult person.<sup>57</sup> The expungement of criminal records provisions for past cannabis offences will also assist in undoing some of the wrongs of the past.<sup>58</sup> The emphasis on the need to protect children (defined as persons under the age of 18) is also to be welcomed.<sup>59</sup>

The Bill also has stark shortcomings, however. It is decidedly non-commercial in its vision: the only way in which an adult person may lawfully acquire cannabis for her private use is through the charity of another person, who may give to her carefully prescribed quantities of cannabis plant cultivation material, cannabis plants, or dried cannabis – without any exchange of remuneration.<sup>60</sup> It thus fails to go beyond the position of the Constitutional Court with regard to the sale and purchase of cannabis, which could be highly lucrative if permitted. From a criminal law point of view, the penalties for those who exceed the quantities of cannabis allowed for private use are also exceptionally harsh.<sup>61</sup> And finally, from an equality point of view, the Bill perpetuates discrimination against the poor by

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paving the way for the commercial exploitation of this cannabis derivative).

<sup>55</sup> *Ibid* item 2, read with schedules 1-4.

<sup>56</sup> *Ibid* items 3-7, read with schedules 1-4.

<sup>57</sup> *Ibid* item 2. The possession limits in the Bill are as follows: possession of cannabis “in a private place for personal use” – 600g of dried cannabis for one adult, or 1200g for two or more adults; four flowering plants for one adult, eight for two or more adults; an unlimited number of seeds per person. For possession of cannabis “in private in a public place for personal use” – 100g of dried cannabis per person, one flowering plant per person, an unlimited quantity of seeds per person.

<sup>58</sup> *Ibid* item 8.

<sup>59</sup> *Ibid* item 6.

<sup>60</sup> *Ibid* item 2(3).

<sup>61</sup> *Ibid* item 7.

limiting cannabis production and use by those who do not own private land for cultivation or live in larger households with sufficient space to consume cannabis away from children or non-consenting adults.<sup>62</sup>

Moreover, Parliament has been criticised for failing to consult meaningfully with the public before drafting the Bill.<sup>63</sup> This distant approach highlights a deeper underlying problem, namely that the Bill was not drafted based on prior research. As a result, it is not based on evidence-based calculations as to which regulatory approach is best suited to the local context. The Bill also fails to take into account the long-established modes of production, distribution, and use of cannabis in South Africa. To be relevant to South Africa's society and to pave the way for a more progressive approach, the Bill should consider the social context of cannabis alongside its medicinal value and economic potential. This is best derived from academic and scientific research on existing production, trade, and control networks; as well as on the opportunities and risks inherent in legalising cannabis.

Not long after the publication of the Cannabis for Private Purposes Bill, the South African government presented its National Cannabis Master plan for public input in September 2021.<sup>64</sup> The Master Plan was initiated by the Department of Agriculture, Land Reform and Rural Development, and it

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<sup>62</sup> Compare the arguments raised by M Steynvaart, M Wegerif & P Vale "Proposed cannabis law has serious shortcomings and must go back to the drawing board" *Daily Maverick* (10 December 2020) available at: <<https://www.dailymaverick.co.za/article/2020-12-10-proposed-cannabis-law-has-serious-shortcomings-and-must-go-back-to-the-drawing-board/>>.

<sup>63</sup> For example: The Centre for Child Law (CCL) stated that its primary concern was that the Bill failed to address the plight of children who found themselves in a cycle of "drug abuse". Rather than prosecuting such children, the CCL argued that they should be referred to the care and protection system or to a treatment centre. The Cannabis Development Council of South Africa said the Bill in its current form still negatively impacts the rights to equality, dignity, freedom, and privacy, in that the Bill still uses criminal law to regulate cannabis. See generally: Parliament of the Republic of South Africa "Justice Committee Holds Public Hearings on Cannabis for Private Purposes Bill" (3 September 2020) available at: <<https://www.parliament.gov.za/news/justice-committee-holds-public-hearings-cannabis-private-purposes-bill>>.

<sup>64</sup> Department of Agriculture, Land Reform and Rural Development "Draft National Cannabis Master Plan for South Africa". The current (fifth) version of this draft plan is available at: <<https://medicalcannabis.co.za/wp-content/uploads/2021/03/National-Cannabis-Master-Plan-for-South-Africa-Version-5.pdf>>.

details ways in which cannabis can be incorporated into South Africa's business sector. Key objectives of the Master Plan include: setting up an inclusive, sustainable and globally competitive cannabis industry in South Africa; establishing and increasing the capacity of South African farmers to produce 'dagga and hemp'; creating opportunities for the creation of small-and-medium-sized enterprises across the cannabis value chain; and increasing investments in research and technology development to support increased production.<sup>65</sup> This publication does indicate a shift towards greater commercialisation in the local cannabis industry, and answers some of the questions left open by the Cannabis for Private Purposes Bill. The Master Plan does not, however, contain any provisions relating to the legal adult use market, which suggests that this work is to be left entirely to the Cannabis for Private Purposes Bill.

From an inclusion and distributive justice point of view, the Master Plan does not ignore the role of traditional Indigenous cannabis growers, with the vision being to include these persons in the supply chain with the support of the Department of Small Business Development.<sup>66</sup> This form of inclusion may be difficult to sustain, however, once large-scale commercial farmers are also part of the picture.

In sum, the regulation of cannabis in South Africa is receiving the attention of national government. This is a positive development, which is already visible in the sudden commercial availability of cannabis derivatives (particularly CBD-infused products which have been cleared for marketing since 2019).<sup>67</sup> The fine-tuning of the regulatory approach still needs work, however, particularly with regard to the exact circumstances under which adult use of cannabis itself will be permitted. Before turning to potential avenues for such regulation, the hurdle of the UN Drug Conventions to which South Africa remains party must first be overcome.

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<sup>65</sup> *Ibid* at 5.

<sup>66</sup> *Ibid* at 31-32.

<sup>67</sup> CBD has been largely cleared for commercial sale in South Africa since April 2019, following the original temporary amendment to the classification of this substance in the schedules to the Medicines and Related Substances Act 101 of 1965. This change was made permanent by another amendment in May 2020 (as above).

### III. INTERNATIONAL LAW OBLIGATIONS

In motivating for a regulatory model which permits broader adult use of cannabis in South Africa, one must bear in mind the two relevant UN treaties on narcotic drugs. These are the 1961 Single Convention<sup>68</sup> and the subsequent 1988 Convention,<sup>69</sup> both of which South Africa is a signatory to. Article 4(c) of the 1961 Single Convention creates a presumption that the use of cannabis is to be limited to ‘medicinal and scientific’ purposes by state law.<sup>70</sup> As more jurisdictions enact reforms creating legal access to cannabis for purposes beyond the solely medicinal and scientific, tension between the existing UN drug treaties and evolving law and practice in member states continues to grow. We argue in what follows that the key to releasing this tension is article 3(2) of the 1988 Convention, which states that penalisation should be ‘subject to (a party’s) constitutional principles, and the basic concepts of its legal system’.<sup>71</sup>

With regard to the position in South Africa, one could reasonably argue that the 2018 *Prince* decision does not have the effect of legalising the use of cannabis, but rather does no more than create a delineated defence for adults using cannabis. This should not then be in violation of the 1988 Convention. Secondly, the domain in which cannabis may be used is very specific – the ruling referred to private use, suggesting that the use of cannabis in the ‘public domain’ would still constitute an offence. Thirdly, the conduct prescribed is not without limitation, since conduct expressly consists in possession, use, or cultivation. By implication, this means that conduct falling outside of this scope remains criminalised.

Another element that can be garnered from the ruling of the Constitutional Court is that the purpose for which cannabis is cultivated, possessed, or used must be specific – this is strictly limited to ‘personal consumption’. The implication of this stance is that other purposes would remain criminal too.<sup>72</sup> Indeed the Constitutional Court expressly held that

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<sup>68</sup> Single Convention on Narcotic Drugs (30 March 1961) 18 UST 1407, 520 UNTS 151, as amended by the 1972 Protocol Amending the Single Convention on Narcotic Drugs (24 March 1972).

<sup>69</sup> 1988 Convention, *supra* note 24.

<sup>70</sup> 1961 Single Convention, *supra* note 68 at article 4.

<sup>71</sup> 1988 Convention, *supra* note 24 at article 3(2).

<sup>72</sup> E Lubaale & S Mavundla “Decriminalisation of Cannabis for Personal Use in South

the sale and purchase of cannabis (for example) would remain unlawful, as set out above. It can therefore be argued that by taking cognisance of the right to privacy, the Constitutional Court in *Prince* operated within the parameters of the 1988 Convention, which gives parties latitude to accord due regard to their constitutions, a body of law which many countries deem supreme.<sup>73</sup>

With regard to the more prohibitive provisions of the 1961 Single Convention, perhaps these can be understood as designed in the large part to compel states to co-operate in the outlawing and prevention of the international trade in drugs. The obligations of member states with respect to addressing the problem of drug abuse within their own countries could arguably be seen as being of a different character. Article 38 of the Single Convention, ‘Measures Against the Abuse of Drugs’, states:

[t]he Parties shall give special attention to and take all practicable measures for the prevention of abuse of drugs and for the early identification, treatment, education, after-care, rehabilitation and social reintegration of the persons involved and shall coordinate their efforts to these ends[.]’

The Convention notably does not dictate what counts as ‘practicable measures’. Thus, member states may perhaps have leeway to explore other means to achieve the treaty’s purpose.<sup>74</sup> The objective of curbing drug abuse through an alternative system with a narrow path for legal possession and use, where the circumstances of sale are determined and controlled by the government, could possibly be justified in this way under Article 38 of the Single Convention.

The relationship between the obligation in Article 4(c) of the Single Convention, and the obligation to prevent drug abuse and related human

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Africa” (2019) 19 African Human Rights Law Journal 819 at 841.

<sup>73</sup> It should perhaps be noted that in *Prince 2018* (note 2 above) the ZACC expressly stated that international law obligations were subordinate to the supreme Constitution in any event: see para 82. Compare also the finding of the Supreme Court of Argentina that a statutory prohibition on cannabis was an unconstitutional limitation on private actions which do not harm others: Intercambios Asociacion Civil “The “Arriola” Ruling of the Supreme Court of Argentina on the Possession of Drugs for Personal Consumption” (1 September 2009) available at: <<http://druglawreform.info/en/country-information/latin-america/argentina/item/235-the-arriola-ruling-of-the-supreme-court-of-argentina>>.

<sup>74</sup> D Bewley-Taylor & M Jelsma, “Regime Change: Re-visiting the 1961 Single Convention on Narcotic Drugs” (2012) 23 International Journal of Drug Policy 72.

harms in Article 38, would necessarily have to be read in light of decades of experience with the criminalisation of possession and use as a means of dealing with the harm resulting from drug abuse. Indeed, many states which are party to the drug conventions have acknowledged that traditional criminalisation approaches are ineffective in curbing demand for and use of illicit substances.<sup>75</sup> Rather, these approaches perversely sustain demand for illicitly traded drugs and increase human suffering from the collateral criminal activities and organisations encouraged by a criminalisation approach.<sup>76</sup> In this regard, article 14(4) of the 1988 Convention states:

‘The Parties shall adopt appropriate measures aimed at eliminating or reducing illicit demand for narcotic drugs and psychotropic substances, with a view to reducing human suffering and eliminating financial incentives for illicit traffic.’

In addition, article 3(4)(c) of the 1988 Convention provides:

‘[I]n appropriate cases of a minor nature, the Parties may provide, as alternatives to conviction or punishment, measures such as education, rehabilitation or social reintegration....’

Similarly, article 3(11) of the 1988 Convention:

‘Nothing contained in this article shall affect the principle that the description of the offences to which it refers and of legal defences thereto is reserved to the domestic law of a Party and that such offences shall be prosecuted and punished in conformity with that law.’

Read together, these three provisions reflect a significant amount of discretion for each state party to balance criminal law-based approaches with other methods of addressing the social harms resulting from cannabis.

For a comparative perspective, consider Canada, where the adult recreational use of cannabis was legalised by federal statute in 2018. Canada is a signatory to both the drug treaties and had incorporated the provisions of the Single Convention in its Narcotics Control Act.<sup>77</sup> The only

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<sup>75</sup> For example, the 2016 UN General Assembly Special Session (UNGASS) resulted in an Outcome Document which detailed major differences of opinion and practice between different states regarding the regulation of cannabis markets: United Nations Office on Drugs and Crime “Outcome Document of the 2016 United Nations General Assembly Special Session on the World Drug Problem” (April 2016) 6-8 available at: <<https://www.unodc.org/documents/postungass2016/outcome/V1603301-E.pdf>>.

<sup>76</sup> See for example: “Cannabis Regulation and the UN Drug Treaties: Strategies for Reform” (April 2016) 4 <[http://www.antonioacasella.eu/archila/Cannabis\\_UN-Drug-Treaties-Apr16.pdf](http://www.antonioacasella.eu/archila/Cannabis_UN-Drug-Treaties-Apr16.pdf)>.

<sup>77</sup> *Narcotic Control Act*, RSC 1985, c N-1, as repealed by *Controlled Drugs and Substances*

reservation made by Canada was with respect to the use of peyote by ‘small, clearly determined groups’ under the Psychotropics Convention.<sup>78</sup> Canada’s experience with the failure of criminalisation of possession and use to counter drug abuse is well-documented in the studies and reports underpinning Canada’s new approach to cannabis regulation.<sup>79</sup>

Well prior to federal statutory legalisation in 2018, a minority of the Supreme Court of Canada had already ruled in 2003 in *R v Malmo Levine*; *R v Caine*,<sup>80</sup> and separately in *R v Clay*,<sup>81</sup> that there was a basis for Canada to deviate from statutory criminal penalties for possession and use of cannabis on Charter grounds.<sup>82</sup> In these three cases heard together before the Supreme Court in 2003, the accused in each case challenged the validity of these penalties on the basis of their section 7 right to life, liberty and security of the person. The argument was that the use and possession of cannabis by the accused parties did no harm to others, meaning that for the state to potentially deprive them of their liberty under its criminal law power was a denial of fundamental justice.<sup>83</sup> The majority of the Supreme Court, however, did not accept this absence of proof of harm argument, nor did they find the criminal prohibition to be a denial of fundamental justice.<sup>84</sup> In the majority’s opinion, if there was to be a change in the law it had to be introduced by Parliament.<sup>85</sup>

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Act, SC 1996, c 19.

<sup>78</sup> United Nations Convention on Psychotropic Substances (21 February 1971): accession by Canada (10 September 1988). See: <[https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=VI-16&chapter=6#EndDec](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-16&chapter=6#EndDec)>.

<sup>79</sup> Task Force on Cannabis Legalization and Regulation, *supra* note 6. The Task Force noted that despite various enforcement efforts under the UN treaties, cannabis remains the most widely used illicit substance around the world (*Ibid* page 10).

<sup>80</sup> *R v Malmo-Levine*; *R v Caine*, 2003 SCC 74.

<sup>81</sup> *R v Clay* 2003 SCC 75.

<sup>82</sup> There were three separate dissents in each of these cases, which all held that the prohibition of cannabis contravened section 7 of the Charter.

<sup>83</sup> *Malmo-Levine* (note 80 above) para 90; *Clay*, *supra* note 81 at para 30. It should be noted that the Canadian Charter of Rights and Freedoms does not contain an express right to privacy such as is found in the South African Bill of Rights.

<sup>84</sup> *Malmo-Levine* (note 80 above) para 129, 183; *Clay*, *supra* note 81 at para 3.

<sup>85</sup> *Malmo-Levine* (note 80 above) para 78.



An earlier decision of the Ontario Court of Appeal in *R v Parker* in 2000 had also already ruled that the failure to provide an exemption for the medicinal use of cannabis rendered the statutes prohibiting the substance unconstitutional.<sup>86</sup>

Against the backdrop of these cases, the later federal statute gave legislative effect to Canada's 'constitutional principles' as set out in the Charter of Rights and Freedoms, adapting the law to evolving social circumstances and beliefs.<sup>87</sup> This Canadian approach thus demonstrates the subordination of criminal provisions to the concept of domestic 'constitutional principles' within the meaning of the 1988 Convention. Indeed, it could be argued more generally that the wording of Article 3(2) of the 1988 Convention ('subject to constitutional principles') demonstrates that this is not a peremptory norm.

Once a state has invoked the flexibilities found in the UN Treaties, the next step would be to determine how a nascent cannabis industry would function. As above, this is where South Africa currently finds itself. One of the key elements of a plan for the implementation of legalisation is to determine how cannabis will be supplied, or more specifically, who will be allowed to produce and distribute cannabis. Historically, the answer under prohibition has been no-one. Now that South Africa is looking to incorporate cannabis into South Africa's business sector - as evidenced both in the Cannabis Master Plan of 2021 and in subsequent statements by the Office of the President<sup>88</sup> - it becomes essential to review the policy space between traditional prohibition and (commercial) legalisation. In the next part four we evaluate some possible models for this, using international precedents.

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<sup>86</sup> *R v Parker* [2000] OJ No 2787 (ONCA) at paras 10, 152, 190.

<sup>87</sup> Compare the discussion in B Slattery "A Theory of the Charter" (1987) 25 Osgoode Hall LJ 701 at 719.

<sup>88</sup> President Cyril Ramaphosa: 2022 State of the Nation Address (10 February 2022) available at: <<https://www.gov.za/speeches/president-cyril-ramaphosa-2022-state-nation-address-10-feb-2022-0000>>.

#### IV. REGULATORY MODELS: LESSONS FROM FOREIGN JURISDICTIONS

Room and Ornberg argue that from the perspective of public health and welfare, the basic issue with substances which are attractive but pose a risk of harm is the need to limit that harm.<sup>89</sup> As experience has demonstrated, such substances provide scope for lucrative commercial exploitation. If private actors are permitted to enter this market, the potential for profit is likely to encourage those actors to attempt to grow the pie through various forms of promotion.<sup>90</sup> A public health concern at this point would be to place limits on the new market, such as rules to restrict availability and control promotion, thereby hopefully curbing risky consumption.<sup>91</sup> Room and Ornberg suggest that resultant government regulatory policies are likely to be built on a ‘permit but discourage’ approach.<sup>92</sup> With this in mind, the regulator could either permit private commercial entities to enter the market, but subject to clear restrictions; or the regulator may opt for the manufacture, distribution, or retail of the substance in question to be conducted by the state itself.<sup>93</sup> This in turn suggests three potential models for regulation: a state monopoly, (regulated) private commercial interests, or a mix of both of these. It could also be possible to use different approaches for different segments of the market.

##### A. *State Monopoly Model: Uruguay*

Uruguay is not a country which produces cannabis, rather it is a drug transit and consumer country.<sup>94</sup> When that country legalised cannabis in 2013, the major purpose was to get rid of the organised crime and violence that came along with the illegal drug industry. The state was aiming to

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<sup>89</sup> R Room & J Ornberg, “Government monopoly as an instrument for public health and welfare: Lessons for cannabis from experience with alcohol monopolies” (2019) 74 *International Journal of Drug Policy* 223 at 223.

<sup>90</sup> *Ibid* at 224.

<sup>91</sup> *Ibid*. See also: J Rehm et al “Defining Substance Use Disorders: Do We Really Need More Than Heavy Use?” (2013) 48 *Alcohol and Alcoholism* 633 available at: <<https://academic.oup.com/alcalc/article/48/6/633/444152?login=false>>.

<sup>92</sup> Room & Ornberg, *supra* note 89 at 223.

<sup>93</sup> *Ibid*.

<sup>94</sup> Palermo, *supra* note 3 at 874.

protect society from the dangers that were inherent in an illegal market, rather than specifically responding to social or activist pressure.<sup>95</sup>

Today, the Uruguayan government controls the entire cannabis production line: determining the price, quality, and production volume.<sup>96</sup> Private companies are, however, permitted to apply for a licence to cultivate cannabis if they meet all the criteria set out in the regulations.<sup>97</sup> Private individuals are permitted to grow up to six female flowering plants at one domicile, or to become a member of a cannabis grow club which is registered as a civic society.<sup>98</sup> The sale of cannabis through a pharmacy is also permitted.<sup>99</sup> Users must be 18 years or older and must be registered in a national database in order for the state to track their consumption.<sup>100</sup>

This state-centric approach is in marked distinction to other similar models in the Netherlands, Colorado, and Washington; as well as the treatment given to other regulated drugs by Uruguay.<sup>101</sup> Indeed, the Uruguayan approach has been criticised for being impractical and unsustainable in daily life.<sup>102</sup> For example, in a country which collects high revenues from tourism, the Uruguayan model does not allow visitors to buy the product in pharmacies or to register as users.<sup>103</sup> The impact of this impracticality can already be seen in the growing grey market that operates somewhere between what is legal and what is illegal.<sup>104</sup>

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<sup>95</sup> J Von Hoffmann “Someone has to be the First: Tracing Uruguay’s Marijuana Legalisation Through Counterfactuals” (2020) 12 *Journal of Politics in Latin America* 17t at 193.

<sup>96</sup> Palermo, *supra* note 3 at 859.

<sup>97</sup> *Ibid* at 879.

<sup>98</sup> *Ibid* at 877-879.

<sup>99</sup> *Ibid*.

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

<sup>101</sup> *Ibid* at 882. See further: Transform “Cannabis Policy in the Netherlands: Moving Forwards not Backwards” (March 2014) 1-3 available at: <<https://www.unodc.org/documents/ungass2016/Contributions/Civil/Transform-Drug-Policy-Foundation/Cannabis-policy-in-the-Netherlands.pdf>>. Colorado “Cannabis” available at: <<https://cannabis.colorado.gov/>>.

<sup>102</sup> Palermo, *supra* note 3 at 882.

<sup>103</sup> *Ibid*.

<sup>104</sup> *Ibid*. Palermo reports that due to the low barriers to entry for consumers and suppliers, up to 70 per cent of the market for cannabis in Uruguay is legal, with the rest comprising a grey market of cannabis which has been legally produced, but illegally sold. The same

One might in fact argue that the Uruguayan system of regulation does not break with the prohibitionist model. Rather, the country keeps prohibition in force, but allows for exceptions where the criminal justice system refrains from intervening if the conduct in question falls within the regulated parameters for the lawful production and procurement of cannabis.<sup>105</sup> This decriminalisation approach is based on a harm reduction policy, which treats soft and hard drugs differently.<sup>106</sup> The underlying distinction between soft and hard drugs is not a moralistic-political one (as used by the international system), but rather a scientific-political one.<sup>107</sup> This latter approach uses chemical, medical, and sociological criteria to evaluate the relationship between the consumption of a drug and its physical, psychological, and social impacts.<sup>108</sup> The result of this distinction is that the cannabis market is tolerated and regulated, while the fight against the trafficking of drugs that are thought to be more dangerous is intensified.<sup>109</sup>

### **B. *Private Commercial Model: United States of America***

Cannabis is the most commonly used illicit ‘drug’ in the United States.<sup>110</sup> Although the United States began to decriminalise and legalise cannabis earlier than most countries, the substance remains illegal at federal level.<sup>111</sup> Instead, the relaxation of cannabis laws has so far been entirely at

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phenomenon of a “grey market” has been observed in the state of Colorado in the USA, which persists despite low barriers to entry for consumers and suppliers, see: Office of the Governor (Colorado) “Marijuana Grey Market” (16 August 2016) <[https://leg.colorado.gov/sites/default/files/images/committees/2016/16marijuana0817marijuana\\_grey\\_market.pdf](https://leg.colorado.gov/sites/default/files/images/committees/2016/16marijuana0817marijuana_grey_market.pdf)>.

<sup>105</sup> Palermo, *supra* note 3 at 860.

<sup>106</sup> *Ibid.*

<sup>107</sup> *Ibid* at 866.

<sup>108</sup> *Ibid.* The regulatory changes in drug policy set out differentiated approaches depending on the substances, quantities, and social factors.

<sup>109</sup> *Ibid*

<sup>110</sup> National Institute on Drug Abuse “Cannabis (Marijuana) Research Report” (2020) 4 available at: <<https://nida.nih.gov/download/1380/marijuana-research-report.pdf?v=d9e67cbd412ae5f340206c1a0d9c2bfd>>.

<sup>111</sup> Congressional Research Service “State Marijuana “Legalization” and Federal Drug Law: A Brief Overview for Congress” (29 March 2020) 3 available at: <<https://sgp.fas.org/crs/misc/LSB10482.pdf>>.

a state level. California was the first state to pass medical cannabis laws in 1996.<sup>112</sup> Subsequently, a number of other states have followed with laws permitting cannabis for medical or adult use purposes.<sup>113</sup> To date, 36 states and the District of Columbia have established medical cannabis laws, including 18 states permitting broader adult use.<sup>114</sup>

The slogan ‘regulate marijuana like alcohol’ has dominated legalisation campaigns in the United States.<sup>115</sup> As a result, most states that have legalised cannabis have followed a private commercial model.<sup>116</sup> This trend has allowed for-profit companies to grow and expand, often to the detriment of smaller boutique operations.<sup>117</sup> Public health advocates have also characterised the legal cannabis industry as adopting strategies similar to the tobacco industry.<sup>118</sup> Furthermore, ‘Big Marijuana’, like the tobacco, alcohol, and opioid industries, has powerful financial incentives to market and sell its product to as many people as possible, regardless of the broader public health and social concerns.<sup>119</sup>

For these reasons, it can be argued that the alcohol model may not be appropriate for the cannabis industry in the United States. For one thing, alcohol regulations are not working well from a public health point of view: the US’s most popular drug after caffeine is linked to nearly 100 000 deaths

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<sup>112</sup> Compassionate Use Act of 1996 (Proposition 215) (California).

<sup>113</sup> T Todd “The Benefits of Marijuana Legalisation and Regulation” (2018) 23 Berkeley Journal of Criminal Law 99, 115-116 available at: <<https://www.bjcl.org/assets/files/23.1-Todd.pdf>>.

<sup>114</sup> National Conference of State Legislatures “State Medical Cannabis Laws” available at: <<https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx>>.

<sup>115</sup> R Barry & S Glantz “Marijuana Regulatory Framework in Four US States: An Analysis Against a Public Health Standard” (2018) 108 American Journal of Public Health 914, 915 available at: <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5993386/pdf/AJPH.2018.304401.pdf>>.

<sup>116</sup> J Caulkins et al *Considering Marijuana Legalization: Insights for Vermont and other Jurisdictions* (2015) 52-53 available at: <[https://www.rand.org/pubs/research\\_reports/RR864.html](https://www.rand.org/pubs/research_reports/RR864.html)>.

<sup>117</sup> T Subritzky, S Lenton & S Pettigrew “Legal Cannabis Industry Adopting Strategies of Tobacco Industry” (2016) 35 Drug and Alcohol Review 511 at 511 available at: <<https://onlinelibrary.wiley.com/doi/pdf/10.1111/dar.12459>>.

<sup>118</sup> *Ibid.*

<sup>119</sup> *Ibid.*

per year.<sup>120</sup> In contrast to this, previous research in the United States found that states that maintained a government-operated monopoly for alcohol kept prices higher, reduced access to youth, and cut overall levels of use – all of which are in the interest of public health.<sup>121</sup> Of course, such an approach would, however, need to be balanced with the potential risks of unduly restricting access to legal cannabis and diverting more people to the illicit market. As a result, the United States is a good example of the dangers inherent in allowing private commercial forces to dominate the legal cannabis market. Public health concerns need to be weighed against the free market approach, especially the dangers inherent in permitting profit maximizing behaviour in this field by private enterprise.

### *C. Mixed State Monopoly and Private Commercial Model: Canada*

The path towards the legalisation of cannabis in Canada was different from that of the United States. From 2000 onwards, Canada began legalising medical cannabis following the Ontario Court of Appeal and then subsequent Supreme Court decisions discussed in part three above. But before full adult use was legislated, the Canadian government created the Task Force on Cannabis Legalisation and Regulation in 2016 to review key challenges concerning the legalisation of the adult use of cannabis and to provide recommendations to the government in advance of drafting the relevant Act.<sup>122</sup> The Task Force discussed possible options for structuring the market in its final report published in December 2016, after receiving inputs from various constituents with an interest in the potential legalisation of recreational cannabis.<sup>123</sup> With respect to wholesale distribution, the Task Force recommended a model that was similar to the prevailing alcohol distribution model.<sup>124</sup> This alcohol model would entail

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<sup>120</sup> G Lopez “A Better Way to Legalise Marijuana” (11 October 2021) available at: <<https://www.vox.com/22716926/marijuana-legalization-how-rand-corporation-report>>.

<sup>121</sup> *Ibid.*

<sup>122</sup> Task Force on Cannabis Legalization and Regulation, *supra* note 6 at 1.

<sup>123</sup> *Ibid* at 51.

<sup>124</sup> *Ibid* at 33.

regulation by the provinces and territories rather than by the federal government.<sup>125</sup>

The subsequent federal Cannabis Act of 2018 permits a controlled commercial model for cannabis: production is licenced at a federal level, with most producers being for-profit and some being publicly traded.<sup>126</sup> The Act also contains general rules regarding the promotion, packaging, and advertising of cannabis products.<sup>127</sup> Individual provinces are responsible for the regulation of retail distribution, allowing each province to control products and prices.<sup>128</sup> As a result of this, there are distinctions across the country as to whether cannabis can be purchased at privately-owned or government-owned physical stores.<sup>129</sup> This means that Canada is an example of a country where there is a mixed regulatory model involving both state monopoly and private commercial interests.

Alcohol is subject to different levels of regulation across the provinces in Canada.<sup>130</sup> Experience following federal legalisation of cannabis has demonstrated that particular provincial alcohol regulations commonly inform or influence the model with respect to cannabis retail in that province.<sup>131</sup> For example, in the province of Quebec, which is the second most populous province, only the government is allowed to sell cannabis.<sup>132</sup> In Ontario, by contrast, the province began with a model of government monopoly of supply, but then (following a change in provincial leadership)

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<sup>125</sup> *Ibid* at 33.

<sup>126</sup> *Cannabis Act*, S.C. 2018, c 16, Part 3.

<sup>127</sup> *Ibid* at sections 16-28.

<sup>128</sup> Office of the Prime Minister's Chief Science Adviser (New Zealand) "Canada: A Controlled Commercial Model" (7 July 2020) available at: <<https://www.pmcsa.ac.nz/2020/07/07/canada-a-controlled-commercial-model/>>.

<sup>129</sup> *Ibid*.

<sup>130</sup> For example, the composition of various alcoholic drinks is federally regulated: Food and Drug Regulations CRC, c 870, Part B, Division 2 - "Alcoholic Beverages". However, provinces and territories have exclusive control of alcohol sales within their jurisdiction.

<sup>131</sup> B Gibbs, T Reed & S Wride "Cannabis Legalisation - Canada's Experience: A Research Report by Public First" (October 2021) 21 available at: <[https://addictionpolicy.stanford.edu/sites/g/files/sbiybj1106/f/report\\_cannabis\\_in\\_canada\\_public\\_first\\_-\\_october\\_2021.pdf](https://addictionpolicy.stanford.edu/sites/g/files/sbiybj1106/f/report_cannabis_in_canada_public_first_-_october_2021.pdf)>.

<sup>132</sup> (Quebec) *Cannabis Regulation Act* 2018, c 19, s 19, chapter VII available at: <<https://www.legisquebec.gouv.qc.ca/en/document/cs/C-5.3>>.

switched to a system which was primarily private and commercial.<sup>133</sup> This switch was motivated by initial backlogs in the ordering, delivery, and availability of cannabis products in the province, due to the restrictive criteria for obtaining a licence under the previous policy. These strict licensing protocols had resulted in an under-served market, which had proved to the benefit of illicit cannabis suppliers.<sup>134</sup>

From a macro perspective, the Canadian model demonstrates that careful research can lead to legislation capable of effectively regulating a large and diverse country. The Canadian aim of regulating the production, distribution, and sale of adult use cannabis was three-fold: to keep cannabis out of the hands of the youth; to keep profits out of the pockets of criminals; and to protect public health and safety by allowing adults access to legal cannabis.<sup>135</sup> In line with Canada's approach of co-operative federalism, the Cannabis Act devolves many of the commercial aspects of cannabis regulation to the provinces, providing an avenue for adaptability to local conditions. This allows for appropriate regional variations under a federal statutory umbrella of lawful adult use of cannabis. In addition, in order to continue to evaluate the results of the implementation of the Cannabis Act, the federal government of Canada has invested in monitoring and surveillance activities which provide objective information on public knowledge, attitudes, and behaviours around cannabis, as well as allowing for the regular collection of data on the cannabis market.<sup>136</sup>

We now turn to South Africa, and what the discussion of foreign models in this part four might mean for that jurisdiction.

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<sup>133</sup> For the current position, see: (Ontario) Cannabis Control Act, 2017, SO 2017, c 26, Sch 1, section 9 available at: <<https://www.canlii.org/en/on/laws/stat/so-2017-c-26-sch-1/latest/so-2017-c-26-sch-1.html>>. See also: (Ontario) Cannabis Licence Act, 2018, SO 2018, c 12, Sch 2 available at: <<https://www.canlii.org/en/on/laws/stat/so-2018-c-12-sch-2/latest/so-2018-c-12-sch-2.html>>.

<sup>134</sup> Government of Canada "Cannabis Black Market" (15 June 2020) available at: <<https://www.publicsafety.gc.ca/cnt/trnsprnc/brfng-mtrls/prlmntry-bndrs/20200930/026/index-en.aspx>>.

<sup>135</sup> Government of Canada "Cannabis Legalization and Regulation" available at: <<https://www.justice.gc.ca/eng/cj-ijp/cannabis/>>.

<sup>136</sup> United Nations Office on Drugs and Crime "World Drug Report, 2021: Drug Market Trends – Opioids, Cannabis" 32 available at: <[https://www.unodc.org/unodc/en/data-and-analysis/wdr-2021\\_booklet-3.html](https://www.unodc.org/unodc/en/data-and-analysis/wdr-2021_booklet-3.html)>.



## V. PROPOSALS FOR A MODEL FOR ADULT CANNABIS USE IN SOUTH AFRICA

### A. *Economic Context Favours Increased Legalisation*

In light of the current post-Covid economic challenges, the cannabis industry presents an open opportunity for South Africa. Studies by Prohibition Partners indicate that most consumers in Europe and North America either maintained or increased their purchases of cannabis products in the wake of the pandemic.<sup>137</sup> Even though a recent report from the IMF indicated that a global recession may be imminent,<sup>138</sup> there are good data-based reasons to be optimistic about the cannabis market even in such a scenario. This is because research has shown that in times of economic downturn, cannabis consumption increases.<sup>139</sup> In 2020, South African President Cyril Ramaphosa listed several initiatives to be undertaken by government to stimulate the country's sluggish economy.<sup>140</sup> One particular point raised by the President was focused on the future of cannabis in South Africa:

‘This year we will open up and regulate commercial use of hemp products, providing opportunities for small-scale farmers; and formulate policy on the use of cannabis products for medicinal purposes, to build this industry in line with global trends.’<sup>141</sup>

The emphasis on economic impact has also been reiterated under the Cannabis Master Plan, as set out above. A regulatory model which brings about the greater legalisation of cannabis in South Africa could potentially unlock jobs and private investment in the country. In addition, and aside

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<sup>137</sup> S Murphey “Insight: How COVID-19 is Impacting the Cannabis Industry” Prohibition Partners (27 March 2020) available at: <<https://prohibitionpartners.com/2020/03/27/insight-the-coronavirus-pandemic-and-cannabis-consumer-behaviour-ii/>>.

<sup>138</sup> P Barrett et al “After-Effects of the COVID-19 Pandemic: Prospects for medium-term economic damage” International Monetary Fund (30 July 2021) 43 available at: <<https://www.imf.org/en/Publications/WP/Issues/2021/07/30/After-Effects-of-the-COVID-19-Pandemic-Prospects-for-Medium-Term-Economic-Damage462898>>.

<sup>139</sup> Murphey, *supra* note 137.

<sup>140</sup> President Cyril Ramaphosa “2020 State of the Nation Address” available at: <<https://www.gov.za/speeches/president-cyril-ramaphosa-2020-state-nation-address-13-feb-2020-0000>>.

<sup>141</sup> *Ibid.*

from these obvious economic benefits, legalising cannabis would have other positive results, such as: reducing the expenditure of state resources on enforcement of current restrictions; diverting the market away from criminal organisations; increasing tax revenues from the legal cannabis value chain; and promoting safety amongst consumers.

Legalisation nevertheless remains a controversial policy.<sup>142</sup> In this regard, Scheibe and Shelley argue that programmatic responses to drug use and its associated problems are seldom evaluated, and when they are the results are usually inadequate.<sup>143</sup> An evidence-based approach similar to the inquiry of the Canadian Task Force would provide the scientific and socio-economic data needed to develop a regulatory model suitable for South Africa's society. The development of the current Cannabis for Private Purposes Bill, by contrast, has to date been characterized by inefficiency and a lack of public consultation.

### ***B. Which Regulatory Model is Best for South Africa?***

Assuming that South Africa does opt for increased legalisation, should it follow the state monopoly, private commercial, or mix of both model in regulating cannabis? In theory, a state monopoly of the whole production and distribution chain could reduce diversion into the illicit market as in Uruguay. The state would set the price that it considers to best serve the public interest and would ensure that there is no promotion of cannabis products outside of its own channels. The historic data on public monopolies internationally has been mixed, but it is clear from recent decades of alcohol experience in some jurisdictions that a public monopoly could operate as an effective strategy, making the commodity available, but within restrictions which limit the harm.<sup>144</sup>

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<sup>142</sup> Consider the controversy around cannabis grow clubs in South Africa. These clubs are intended to provide safe access to cannabis for those without the time, space, or skills to grow their own product. The club concept treads a careful line around the Constitutional Court's position as set out in *Prince 2018*, the legality of which is currently before the Western Cape High Court. See: Schindlers Attorneys "Media Release: Update regarding the Haze Club & The Grow Club Model" (October 2020) 2 available at: <[https://www.schindlers.co.za/wp-content/uploads/2020/10/SA0098-Schindlers\\_Cannabis-PR-2\\_UPDATE-REGARDING-THE-HAZE-CLUB-THE-GROW-CLUB-MODEL-A1.pdf](https://www.schindlers.co.za/wp-content/uploads/2020/10/SA0098-Schindlers_Cannabis-PR-2_UPDATE-REGARDING-THE-HAZE-CLUB-THE-GROW-CLUB-MODEL-A1.pdf)>.

<sup>143</sup> Scheibe et al, *supra* note 8 at para 39.

<sup>144</sup> Room & Ornberg, *supra* note 89 at 227.

South Africa, however, has a very high failure rate among its state-owned enterprises (SOEs).<sup>145</sup> Communications, transport, postal delivery, water, and electricity supply provide well-publicised examples of failed attempts at the provision of public services by the state. It appears unfeasible as a result for cannabis to be supplied to the public in South Africa through a state monopoly. On the other hand, a completely free-market, private-industry model could also pose risks for the country. As argued with regard to the United States above, this model has the tendency to promote increased cannabis consumption, which could be risky given existing high incidences of impaired driving<sup>146</sup> and poverty-induced substance abuse (for example).<sup>147</sup>

The Canadian mixed model of cannabis regulation, which is based on full legalization at national level, but with a combination of state and private sector control determined at provincial level, may thus be the most appropriate for South Africa to follow. Lessons learnt from the Canadian experience highlight key areas which South African policy should pay attention to:

1. **Governments Goals:** The success of legalisation should be measured against the government's objectives. Therefore, it is crucial for the government to clearly define its goals and to have mechanisms in place to monitor and evaluate the results of cannabis legalisation.
2. **Research and Engagement:** The Canadian government took time to assemble a federal task team to help craft a Bill that anticipated and addressed many of the issues that could result from legalisation. Thorough research, engagement, and consultation would result in improved and more comprehensive legislation.
3. **Provincial Co-ordination:** Following the Canadian model would require a split in regulatory competencies between national and provincial governments. For its part, national government will

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<sup>145</sup> N Makgetla "The Crisis at the State-Owned Enterprises" Trade and Industrial Policy Strategies, Policy Brief 1/2020 (23 January 2020) 10-15 available at: <<https://www.tips.org.za/policy-briefs>>.

<sup>146</sup> B Meel "Trends in Fatal Motor Vehicle Accidents in Transkei Region of South Africa" (2007) 47 *Medicine, Science and the Law* 64.

<sup>147</sup> S Kalichman et al, "Associations of poverty, substance use, and HIV transmission risk behaviors in three South African communities" (2006) 62 *Social Science and Medicine* 1641.

need to focus on consistent policy choices, including the establishment of cannabis value chains across the country, and easing movement and possession of product for cannabis users.

4. Illicit Market: Displacing the illegal market will take time. The government should have realistic goals with regard to the persistence of the illicit market when developing cannabis taxation and supply policies. These factors tend to lead to higher prices in legal cannabis products and have contributed to the persistence of illicit cannabis operations in many similarly placed jurisdictions.<sup>148</sup>
5. Impact on the Youth: Edibles and concentrates bring new public health concerns – youth access is a key concern with extracts, edibles, and topicals; as children would be more likely to pick up cannabis-infused sweets as opposed to the usual dried plant. Furthermore, adolescents are more likely to experiment with these new varieties which might enter the market upon legalisation. To reduce these risks, regulators should consider restricting the marketing and advertising of such products and providing consumer education on safe consumption habits.
6. Modest taxation: Canada’s model instituted a modest tax on cannabis. This measure helps to generate revenue. In order to displace the illicit market, however, the price of legal cannabis should be kept low.

### *C. Management of the Cannabis Industry in South Africa: Lessons From Alcohol*

In part four above we discussed the Canadian model of cannabis regulation, which is based on that country’s approach to alcohol. Here we discuss whether South Africa could implement lessons learned in its own jurisdiction from the marketing of alcohol and tobacco.

At the outset of formulating a model approach to cannabis regulation, the Canadian Task Force acknowledged that based on contemporary levels of use and available information on mortality and morbidity, the harms associated with the use of tobacco or alcohol were greater than those

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<sup>148</sup> S Mahamad et al. “Availability, Retail Price and Potency of Legal and Illegal Cannabis in Canada After Recreational Cannabis Legalisation” (2020) 39 Drug and Alcohol Review 337.

associated with the use of cannabis.<sup>149</sup> This was qualified by the fact that the past regulation of all three substances has been inconsistent within the World Health Organisation's (WHO) disease risk ranking and remains inconsistent with known potential for harm.<sup>150</sup>

Although South Africa is not a federal state like Canada, the South African Constitution does assign specific competencies to national, provincial, and local government.<sup>151</sup> It is in this way that responsibility for the regulation of alcohol is in part devolved to provincial governments in South Africa (not unlike the Canadian model).<sup>152</sup> In South Africa, responsibility for economic activities within the liquor industry is divided into three categories: production (manufacturing), distribution, and retail sales.<sup>153</sup> Production and distribution falls within the purview of national government, while retail sales are under the control of provincial governments.<sup>154</sup> There have been marked challenges, including fragmentation in the approach to liquor regulation dating back to the apartheid era.<sup>155</sup> As a result, there were numerous calls from both the Department of Trade and Industry (DTI)<sup>156</sup> and the National Liquor Policy Council (NLPC) to coordinate concurrent jurisdiction to ensure policy consistency, alignment, and harmony.<sup>157</sup>

As with the history of cannabis prohibition, so too the history of liquor regulation in South Africa has been marked by overt racism and social

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<sup>149</sup> Task Force on Cannabis Legalization and Regulation, *supra* note 6 at 16, 51-54.

<sup>150</sup> *Ibid* at 16.

<sup>151</sup> Constitution of the Republic of South Africa, 1996, Chapter 3 read with Schedule 4-5.

<sup>152</sup> Liquor licences are an area of exclusive provincial legislative competence under Schedule 5, Part A of the Constitution of the Republic of South Africa.

<sup>153</sup> Liquor Act 59 of 2003, section 4.

<sup>154</sup> *Ibid* at section 4(1)-(6).

<sup>155</sup> *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill 2000* (1) SA 732 (CC) at para 31.

<sup>156</sup> The Department of Trade and Industry (DTI) was merged with the Department of Economic Development in June 2019 to form the Department of Trade, Industry and Competition (DTIC). When describing the activities of the prior DTI we will continue to use its former title.

<sup>157</sup> Parliamentary Monitoring Group "Draft Liquor Policy: Department of Trade and Industry (DTI) briefing" (10 June 2015) available at: <<https://pmg.org.za/committee-meeting/21058/>>.

control.<sup>158</sup> The manufacture, distribution, sale, and use of liquor after the Union of South Africa came into being in 1910 was regulated by the 1928 Liquor Act<sup>159</sup> and the 1923 Native (Urban Areas) Act<sup>160</sup> (for Africans specifically). These statutes together prohibited the supply of alcohol to Black persons (in the broad sense), as well as the resale of alcohol by Black-owned businesses.<sup>161</sup> Black people were allowed to be in possession of liquor only for medical purposes, for sacramental purposes, or if an exemption was granted.<sup>162</sup> Liquor also acted as a means of social control since it was an offence for a black person to be in possession of liquor outside of the designated areas.<sup>163</sup> In 1989, all alcohol manufacturing, distribution, and trade in South Africa came to be regulated in terms of a new Liquor Act.<sup>164</sup> During this period the economic benefits of the alcohol industry were of greater importance to the governing regime than the social wellbeing of Black South Africans.<sup>165</sup>

Following the election of the ANC government in 1994, a new legislative framework to regulate the liquor industry was planned.<sup>166</sup> This began with the publication by the DTI of a comprehensive policy and Bill to restructure the liquor trade radically.<sup>167</sup> This new policy split the regulation of the alcohol industry between national and provincial spheres of government. The registration of manufacturers and distributors of liquor

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<sup>158</sup> For an interesting historical account of the beer industry in South Africa specifically (which touches on the points of segregated systems of control), see: A Mager *Beer, Sociability, and Masculinity in South Africa* (2010).

<sup>159</sup> Act 30 of 1928.

<sup>160</sup> Act 21 of 1923.

<sup>161</sup> *Ex Parte President RSA* (note 155 above) para 31.

<sup>162</sup> *Ibid.*

<sup>163</sup> *Ibid.* See: Natives Urban Areas Act 21 of 1923, section 19.

<sup>164</sup> Liquor Act 27 of 1989.

<sup>165</sup> Department of Trade and Industry "Final National Liquor Policy" (30 September 2016) 11 available at: <[http://www.thedtic.gov.za/wp-content/uploads/NLA\\_Policy.pdf](http://www.thedtic.gov.za/wp-content/uploads/NLA_Policy.pdf)>.

<sup>166</sup> *Ibid* at para 30.

<sup>167</sup> DTI "Liquor: Policy Document and Bill" (GN 1025 in GG 18153 of 11 July 1997). This policy was aimed at bringing Black business-persons into the industry at all levels, while also intending to reduce the social costs of alcohol and to deal with the problem of unlicensed outlets. In 1998, the Liquor Bill B 131B-98 was tabled in Parliament.

was listed as a power of national government,<sup>168</sup> whereas the licensing of retailers for the sale of alcohol to the public and the imposition of conditions on such sales was a provincial function.<sup>169</sup>

When the Liquor Bill was tabled in Parliament in 1998, however, it was argued to be unconstitutional by the opposition, on the grounds that ‘liquor licences’ appeared in the list of exclusive provincial competencies in schedule 5, part A of the Constitution. The opposition maintained that this excluded the power of national government to legislate on this topic.<sup>170</sup> The Bill was then referred to the Constitutional Court by the State President for a decision on its validity in March 1999. The resultant decision in *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* in November 1999 confirmed the opposition’s position, at least to the extent that national government was not competent to legislate on retail sales (and other issues of local concern such as zoning and trading hours).<sup>171</sup> The registration of manufacturers and distributors of alcohol by the DTI at national level was held to be acceptable, however.<sup>172</sup>

In 2003, following further consultation, a revised Liquor Act was promulgated.<sup>173</sup> This 2003 Liquor Act accommodated the interests of provinces such as the Western Cape, which had passed their own legislation on alcohol.<sup>174</sup> It also paved the way for the transformation of the liquor industry in South Africa.<sup>175</sup> In addition, it contained (among other things) broad restrictions relating to the employment of people who were aged less than 18 years in the liquor trade;<sup>176</sup> prohibitions on the sale of alcohol to individuals aged less than 18;<sup>177</sup> and a provision that states that the Minister

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<sup>168</sup> 1998 Liquor Bill, item 13, read with item 27(a)-(b).

<sup>169</sup> *Ibid*, item 16, read with item 27(c)-(d).

<sup>170</sup> *Ex Parte President RSA* (note 155 above) para 4.

<sup>171</sup> *Ibid* at paras 78-87.

<sup>172</sup> *Ibid* at para 78.

<sup>173</sup> Act 59 of 2003.

<sup>174</sup> DTI “Final National Liquor Policy” (note 165 above) 12.

<sup>175</sup> *Ibid*.

<sup>176</sup> Liquor Act, *supra* note 173 at section 8.

<sup>177</sup> *Ibid* section 10.

of Trade and Industry, in consultation with the Minister of Health, may prescribe public health notices to be displayed at points of sale.<sup>178</sup>

In 2016, the DTI proposed fresh amendments to the Liquor Act, which would empower the Minister of Trade and Industry to determine further restrictions and parameters for the advertising and marketing of liquor products.<sup>179</sup> There would also be additional measures aimed at addressing the social and economic consequences of alcohol abuse, such as raising the legal drinking age; restricting the times and days, as well as physical locations, when and where alcohol can be sold; and new duties on retailers to enforce the responsible sale of alcohol.<sup>180</sup> These proposed amendments remain at a draft stage to date, however, perhaps reflecting the fact that this could be argued to be a national encroachment on provincial liquor licensing competency.

What is clear is that there are competing currents in alcohol regulation in South Africa, as well as discrepancies stemming from the earlier apartheid era laws. In this regard, Parry argues that to date, South African alcohol intervention strategies have been fragmented across different departments and levels of government.<sup>181</sup>

Just as with alcohol, cannabis policy in South Africa is the product of competing interests, values, and ideologies. Having a better understanding of these factors would ensure that the process would be more likely to lead to the desired policy outcomes within a shorter timeframe. Meaningful and measurable performance indicators should be established for all aspects of the cannabis market.<sup>182</sup> Monitoring approaches should be used to ensure policy (and any policy changes) are subject to regular review, and there should be broad stakeholder buy-in to ensure that there is flexibility and willingness to adapt existing approaches in light of emerging evidence.<sup>183</sup>

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<sup>178</sup> *Ibid* sections 41.

<sup>179</sup> DTI “Final National Liquor Policy” (note 165 above) 5. See: Liquor Amendment Draft Bill 2016 (GN 1206 in GG 40319 of 30 September 2016).

<sup>180</sup> *Ibid* 5-7.

<sup>181</sup> C Parry “A Review of policy-relevant strategies and interventions to address the burden of alcohol on individuals and society in South Africa” (2005) 8 *African Journal of Psychiatry* 20, 24.

<sup>182</sup> Transform “How to Regulate Cannabis” (May 2014) 45 available at: <<https://www.unodc.org/documents/ungass2016//Contributions/Civil/Transform-Drug-Policy-Foundation/How-to-Regulate-Cannabis-Guide.pdf>>.

<sup>183</sup> *Ibid*.



The proposed reforms in the liquor industry can then be incorporated into a cannabis adult use model, as the aims and objectives illustrated above are also applicable to the nascent cannabis industry. The benefit of incorporating these aims at this stage is that it would foster a pre-emptive approach, which also addresses most public health and social concerns.

#### ***D. Management of the Cannabis Industry in South Africa: Lessons from Tobacco***

Turning now to tobacco: in traditional African societies, both cannabis and tobacco have been subsistence crops for centuries.<sup>184</sup> The plants have similar psychoactive properties and there are also similarities related to their production and consumption.<sup>185</sup> The global, commercialised tobacco industry, however, has a long history of resisting government regulation, engineering tobacco products to be more addictive, and using substantial marketing budgets to expand the sales and profit margins related to its products.<sup>186</sup> Such tactics have had a dire impact on public health and on vulnerable segments of society.<sup>187</sup>

In South Africa, between 1937 and 1996 the Tobacco Board controlled the production and marketing of leaf tobacco through a single channel marketing arrangement.<sup>188</sup> By managing both prices and production volumes, the Tobacco Board helped to make South Africa more self-sufficient in the supply of this substance.<sup>189</sup> The cigarette manufacturing market has also historically been highly concentrated.

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<sup>184</sup> C Duvall “Cannabis and Tobacco in Precolonial and Colonial Africa” in Oxford Research Encyclopedia of African History (2017) 2 available at: <[https://www.researchgate.net/publication/316093678\\_Cannabis\\_and\\_Tobacco\\_in\\_Precolonial\\_and\\_Colonial\\_Africa](https://www.researchgate.net/publication/316093678_Cannabis_and_Tobacco_in_Precolonial_and_Colonial_Africa)>.

<sup>185</sup> *Ibid.*

<sup>186</sup> B Gomis “Cannabis Regulation: Lessons from the Illicit Tobacco Trade” (September 2021) 12 available at: <<https://www.tni.org/files/publication-downloads/tobacco-lessons-for-cannabis-regulation.pdf>>.

<sup>187</sup> *Ibid.*

<sup>188</sup> C Van Walbeek “The Economics of Tobacco Control in South Africa” (unpublished PhD thesis, University of Cape Town, 2005) 8 available at: <[http://www.reep.uct.ac.za/sites/default/files/image\\_tool/images/405/People/Staff\\_research/Corne/van-walbeekcp-the-economics-of-tobacco-control-in-south-africa%20\(1\).pdf](http://www.reep.uct.ac.za/sites/default/files/image_tool/images/405/People/Staff_research/Corne/van-walbeekcp-the-economics-of-tobacco-control-in-south-africa%20(1).pdf)>.

<sup>189</sup> *Ibid* at 7.

There were also opposing forces, however: the medical community worked against tobacco in South Africa, as was the case internationally.<sup>190</sup> These opponents drew attention to the links between smoking and lung cancer, which led both to the banning of tobacco advertising and to an increase in the tobacco excise tax. Both measures used legislation with the aim of reducing tobacco consumption.<sup>191</sup> An unintended side effect of these measures, however, was that the illicit tobacco industry grew and became more resistant to regulation.<sup>192</sup>

We propose that the following lessons from tobacco control can inform a new model for cannabis regulation:

1. Home-growing and other non-profit models: The 2018 *Prince* case supported a grow-it-yourself approach to obtaining a personal supply of cannabis. This non-commercial model is an alternative to the for-profit framework underpinning the tobacco industry, which has led to harmful public health effects and has provided economic incentives for smuggling.<sup>193</sup> Our own position, however, is that a carefully regulated and policed commercial market for cannabis will have positive benefits for many in the value chain, from traditional growers to small business owners to consumers who will enjoy safe access to a quality product. There is also the qualification that home-growing is not an option for those who lack the time, space, or skills to grow their own cannabis.
2. Clear policies and enforcement practices must be at the centre of public health, social justice, human rights, and equitable and inclusive trade: The current legislative frameworks for cannabis product tend to push out the smaller cannabis producers, due to the high costs of setting up a commercial grow operation (particularly in obtaining a license and maintaining certified operations).<sup>194</sup> The present licensing rules may

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<sup>190</sup> *Ibid* at 10-12.

<sup>191</sup> *Ibid*.

<sup>192</sup> *Ibid* at 187.

<sup>193</sup> C Van Walbeek “Case Studies in Illicit Tobacco Trade: South Africa” *Tobacconomics* (2020) available at: <[https://tobacconomics.org/files/research/607/UIC\\_South-Africa-Illicit-Trade-Case-Study-v1.3.pdf](https://tobacconomics.org/files/research/607/UIC_South-Africa-Illicit-Trade-Case-Study-v1.3.pdf)>.

<sup>194</sup> See in this regard the long list of requirements needed in order to obtain a commercial cannabis cultivation licence: South African Health Products Regulatory Authority “Guideline for the Cultivation of Cannabis and Manufacture of Cannabis-Related Pharmaceutical Products for Medicinal and Research Purposes” (November 2017) available at: <<https://www.sahpra.org.za/wp-content/uploads/2021/02/General->

make it difficult for traditional cannabis growers to participate in the legal market and to gain access to private investment. There is a need for consultation with smaller producers to ensure that the right legislative framework is in place to inclusively support all elements of the market.

3. Establish comprehensive and adequately funded monitoring mechanisms: It is extremely challenging to find accurate data on the cultivation and trafficking of cannabis. Innovative ways to monitor the illicit cannabis trade are crucial for mitigating its effects. Cannabis regulation should ensure that all cannabis produced by legal manufacturers is accounted for.
4. Fair trade principles must be the starting point of regulation as international trade develops: Jelsma et al propose a fair(er) trade cannabis model to ensure the development of a rights-based, inclusive, and environmentally sustainable approach to market engagement.<sup>195</sup> The foundational principles of this model include:
  - Producer empowerment and community benefit sharing through more equitable terms of trade;
  - Environmental sustainability standards in relation to the use of energy, water, and agricultural inputs;
  - Labour protections to ensure worker safety, health, and satisfaction; and
  - Democratic control of and participation in decision-making processes, through inclusive business models which incorporate the rights of workers.<sup>196</sup>

## VI. CONCLUSION

Global shifts in cannabis regulation have come to the fore in recent times on account of scientific evidence corroborating both the therapeutic uses of cannabis and the lack of success of the prior prohibitionist model. Many countries, including Canada, Uruguay, Spain, Luxemburg, Germany,

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[guide-to-Medicinal-Cannabis\\_Cultivation-or-Manufacturing.pdf](#)>.

<sup>195</sup> M Jelsma, S Kay & D Bewley-Taylor “Fair(er) Trade Options for the Cannabis Market” (2 March 2019) 17 available at: <<https://www.tni.org/en/publication/fairer-trade-cannabis>>.

<sup>196</sup> *Ibid* at 31.

and the Netherlands have adopted more pragmatic approaches to cannabis regulation.

On the African continent, South Africa is the only country to have decriminalized the adult use of cannabis following the 2018 *Prince* judgment. Further legislative steps, such as the Cannabis for Private Purposes Bill, are on the way. South Africa should enhance these developments by opening the regulatory path to an inclusive and sustainable adult use cannabis industry. Policing resources, which are perennially constrained, could then be allocated to addressing more grievous crimes and to managing the use of the cannabis plant in a more pragmatic manner.

We have shown that increased legalisation of adult use has strong precedents in other countries, particularly G7 member Canada. We argue that elements of the Canadian approach could be adapted for South African use, and that lessons learnt from tobacco and alcohol regulation in South Africa and elsewhere could be implemented in developing a new regulatory approach to cannabis. We have also shown that this proposed model would be in accordance with the current international drug law regime, which has sufficient flexibility to permit signatory states to balance their multilateral commitments with their national priorities. The adult use of cannabis in South Africa has a long history and is intertwined with traditional African culture. It is time to move cannabis regulation into a new inclusive era, which breaks with the prohibitionism of the colonial past.