Freedom of religion v drug traffic control: The Rastafarian, the law, society and the right to smoke the "holy weed"

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"It is every country's duty to protect its peoples against values which threaten their existence . . . It has been said, with justification, that dagga is the assassin of Western civilization" (Van der Merwe 1993:1).[1]

". . . the real issue is a choice between competing visions of the world: one world in which long-haired strangers are free to smoke pot and another world in which free to smoke they are not" (Woolman 1999).

1 INTRODUCTION

The Supreme Court of Appeal[2] – South Africa's highest court for non-constitutional matters[3] – recently had the opportunity to consider whether the prohibition on the use and possession of cannabis sativa (dagga) by Rastafarians constituted an unjustified infringement of their right to freedom of religion.[4] This was an important test case for the court, as it is being perceived as struggling to adapt to the new constitutional dispensation and has been criticised for its reluctance to engage with the Bill of Rights in a meaningful way.[5] The case was therefore of some importance not only for the particular outcome it might produce, but also for the way in which the court engaged with the constitutional issues of the case to reach the said outcome. As such, the SCA's approach towards the jurisprudence generated by the Constitutional Court on the topics of freedom of

1 Dr CD van der Merwe, Minister of Health and Welfare at the time.

2 SCA.

3 See Constitution of the Republic of South Africa Act 108 of 1996 s 168(3). The Constitutional Court is the highest court for constitutional matters (see s 167(3)(a)).

4 *Prince v President of the Law Society of the Cape of Good Hope and Others* 2000 7 BCLR 823 (SCA). The case was an appeal from the Cape High Court decision reported as *Prince v President of the Law Society, Cape of Good Hope and Others* 1998 8 BCLR 976 (C).

5 See for example, Rickard C 2000. This round in the power war to the Constitutional Court. *Sunday Times* 15 March. Before the introduction of the 1993 Constitution, the Appellate Division of the Supreme Court (as the SCA was then called) was the highest court in the land. With the introduction of the constitutional state the SCA has thus been deprived of some of its power and status and, as Rickard argues, this has led to some tension between the Constitutional Court and the SCA with the latter being perceived as being resistant to the Constitution.

religion and the limitation of rights would speak volumes of its commitment to the (not so) new constitutional order based on the values of human dignity, equality and freedom trumpeted in the founding provision of the Constitution as well as in several sections of the Bill of Rights.[6]

In this article I contend that the Supreme Court of Appeal dismally failed this test. It would have perhaps been too much to ask of the judges of the SCA to display an enthusiasm and deep commitment to the constitutional project, but one would have at least hoped that the court would be faithful to the letter of the Constitution. It failed to do even this on at least two counts. First, its approach to the constitutional issues raised in this case demonstrates, at best, an inexcusable ignorance of appropriate Bill of Rights jurisprudence and, at worst, a deep antagonism towards the Bill of Rights and the jurisprudence of the Constitutional Court it is constitutionally bound to apply. Second, even if one overlooks the fact that the court failed to apply the Constitution, it cannot be said that the judges at least adhered to values enshrined in the Constitution. The judgement thus displayed a mindset deeply rooted in the Calvinistic morality espoused by the apartheid state.

2 FREEDOM OF RELIGION AND THE SOUTH AFRICAN BILL OF RIGHTS

Section 15(1) of South Africa's 1996 Constitution provides that "[everyone] has the right to freedom of conscience, religion, thought, belief and opinion", while section 31(1) guarantees for persons belonging to a religious community the right to practice their religion. In *S v Lawrence; S v Negal; S v Solberg*[7] judges of the Constitutional Court provided some guidance on the scope and content of this guarantee of freedom of religion. Borrowing from the Canadian jurisprudence, the plurality opinion of Chaskalson P[8] defined this right, in essence as:

> "the right to *entertain* such religious beliefs as a person chooses, the right to *declare* religious beliefs openly and without fear of hindrance and reprisal, and the right to *manifest* religious belief by worship and practice or by teaching and dissemination."[9]

For Chaskalson P this right primarily entails that people cannot be forced to act or to refrain from acting in a way that would be contrary to their religious beliefs. In other words, he defined the scope and content of section 14(1) (s 15(1) of the 1996 Constitution) narrowly as a guarantee of an absence of religious coercion.[10]

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6 See for example s 1(a), s 3(2)(a), s 7(1)(a) and s 9.

7 1997 10 BCLR 1348 (CC).

8 Three other judges, Langa DP, Ackermann and Kriegler JJ, signed Chaskalson P's opinion, which defined s 14 more restrictively and found no infringement. O'Regan J's opinion, which provided for a more expansive interpretation of s 14 (s 15 of the 1996 Constitution) and found that an infringement did exist, was signed by two other judges, Goldstone R and Madala JJ. Sachs J, supported by Mokgoro J, supported a more expansive interpretation of s 14 but found that although the provisions of the Act did infringe on the s 14 guarantee, this was justifiable in terms of the limitation clause.

9 At 1379 par 92, endorsing a definition of the Canadian Supreme Court in *R v Big M Drug Mart Ltd* (1985) 13 CRR 64 at 97 (my italics).

10 At 1378 par 92.

In contrast, the judgments of O'Regan J and Sachs J – in effect, the majority – provided a slightly broader definition of the right protected in section 14(1). Justice O'Regan endorsed the Chaskalson definition but added the requirement of fairness or equity in religious observance.[11] This means, stated O'Regan J, that not only should the government not coerce individuals to act or refrain from acting in a way contrary to their religion, but also that the state must act even-handedly in relation to different religions. According to Justice O'Regan this requirement of equity constitutes a "rejection of our history, in which Christianity was given favoured status by government in many areas of life regardless of the wide range of religions observed in our society".[12] Sachs J endorsed a similarly broader definition of freedom of religion, arguing that the constitutional guarantee of freedom of religion requires the state to acknowledge different belief systems and their accommodation within a non-hierarchical framework of equality and non-discrimination. In other words, the state may not take sides on questions of religion and may not impose belief, grant privileges or impose disadvantages on adherents of any particular belief, or marginalise people who have different beliefs.[13] Sachs J linked the religious marginalisation of the followers of non-Christian faiths in the past with racial discrimination, social exclusion and political disempowerment:[14]

> "Thus, any endorsement by the State today of Christianity as a privileged religion not only disturbs the general principle of impartiality in relation to matters of belief and opinion, but also serves to activate memories of painful past discrimination and disadvantage based on religious affiliation."[15]

One may therefore deduce from this Constitutional Court judgment that the guarantee of freedom of religion requires the state to allow individuals to entertain,[16] declare[17] and manifest[18] their religion without bias or discrimination against one religious group *vis-à-vis* another. To determine whether such interference occurred, one may look at both the purpose and the effect of the impugned provision. An impugned provision will thus be constitutionally problematic not only when the purpose of the provision is to limit an individual's ability to entertain, declare or manifest her religion, but also where a provision with a "neutral" purpose has an impact on an individual's ability to so exercise her religion.

The judgment did not make any distinction between these three aspects of the right and did not argue that some of these aspects should be afforded greater protection than others.[19] But, of course, South Africa's Bill

11 At 1384–5 par 121–122.
12 1385–8 par 123. See also the judgement of Sachs J at 1395–96 par 148–152 where he provides an account of the ways in which Christian principles were endorsed by legislation and its practices often imposed on all South Africans regardless of their beliefs.
13 At 1395 par 148.
14 1398 par 152.
15 At 1398 par 152.
16 That would imply the right to believe whatever one wants to believe.
17 That would imply the right to propagate one's religion publicly.
18 That would imply the right to practice one's religion through religious gatherings and ceremonies.
19 Contra Freedman 1999:477.

of Rights contains a general limitation clause in section 36 and it might well be that it will be easier to justify a limitation on a religious practice than on the holding or the manifesting of a religious belief. The limitation clause requires a two-stage approach: first the court must interpret the relevant provision of the Bill of Rights to determine whether there was indeed an infringement. Once the court has found an infringement, it must move on to the second stage to determine whether the infringement was not perhaps justified in terms of section 36.[20] The applicant has the duty to demonstrate that there was indeed an infringement of her rights. In the second part of the test, the government – or the party looking to uphold the restriction – will be required to demonstrate that the infringement is justifiable.[21] This second part of the inquiry is usually of a more factual nature and will often require evidence, such as sociological or statistical data, on the impact of the legislative restriction on society.[22] The court must determine whether the limitation of the individual's right was acceptable to an open and democratic society based on human dignity, equality and freedom with reference to all relevant factors including the nature of the right, the purpose of the limitation and whether less onerous means could have been achieved to attain the same purpose.[23] As the Constitutional Court has reiterated this inquiry involves:

> "the weighing up of competing values, and ultimately an assessment based on proportionality . . . The fact that different rights have different implications for democracy, and in the case of our Constitution, for 'an open and democratic society based on freedom and equality [and human dignity]', means that there is no absolute standard which can be laid down for the reasonableness . . ."[24]

What is required from the court is to make a value judgement about the admissibility of the infringement against the background of the values of human dignity, equality and freedom. Whether it is at all possible to talk of a balancing of constitutional values is a moot point,[25] but what is certain

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20 See De Waal, Currie & Erasmus 2000:133 and Woolman 1999:12–2. See also *S v Zuma* 1995 4 BCLR 401 (CC) at 414; *S v Makwanyane* 1995 6 BCLR 665 (CC) at 707D–E; *Ferreira v Levin* 1996 1 BCLR 1 (CC) at 26H–27A.

21 Woolman 1999:12–3; De Waal *et al* 2000:134.

22 See De Waal *et al* 2000:135.

23 S 36 reads as follows:

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including –
   (a) the nature of the right;
   (b) the importance of the purpose of the limitation;
   (c) the nature and extent of the limitation;
   (d) the relation between the limitation and its purpose; and
   (e) less restrictive means to achieve the purpose.

24 *S v Makwanyane* 1995 6 BCLR 665 (CC), par 104.

25 See Woolman 1999:12-54–12-64. Woolman argues that balancing of constitutional values at its best offers terminological confusion and at its worst, it is an impossible undertaking. It will be impossible because there are basically too many possible things that may be balanced against each other. We may therefore manipulate the outcome by choosing what we want to balance.

is that this process requires a value judgement on the part of the court, a judgement that is supposed to be guided by the values enshrined in the Constitution and in the Bill of Rights.[26]

3 THE JUDGMENT

Gareth Prince graduated with an LLB degree from the University of the Western Cape and had satisfied all of the statutory requirements for being admitted as an attorney in terms of the Attorney's Act, except for fulfilling his community service.[27] He entered into a contract of community service with the Legal Aid Clinic at the University of Cape Town and, in terms of section 5 of the Attorneys Act, applied to register this contract with the Law Society of the Cape of Good Hope. However, the Law Society refused to register the applicant's contract because it was not satisfied that the applicant was a "fit and proper" person as required by section 4A(b) of the Attorneys Act. The reason for this decision by the Law Society was that the applicant had twice been convicted for the possession of cannabis and had indicated that he intended to continue using the substance. The society argued that as the possession and use of dagga was prohibited by section 4(b) of the Drug Traffic Control Act,[28] a person who states that his intention is to break this law and continues to do so cannot be regarded as a fit and proper person to have his contract of service registered because his conduct may bring the legal profession into disrepute.[29]

Mr Prince had argued that his intention to continue his possession and use of cannabis was directly related to the fact that he was a practising Rastafarian. Cannabis was regarded by Rastafarians as a "holy herb" that forms an integral part of the Rastafarian religion. It is used for spiritual, medicinal and culinary purposes and is regarded as "the tree of life" by Rastafari followers. At religious ceremonies it is burnt as incense and smoked through a chalice, which is a symbol of the Rastafari religion.[30] On appeal, lawyers for Mr Prince argued that section 4(b) of the Drug Traffic Control Act was unconstitutional in as far as it failed to provide and exemption applicable to the use, possession and transportation of cannabis by a Rastafarian for *bona fide* religious purposes.[31]

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26 Woolman 1999:12-61 argues that the limitation clause places a choice before us – an often unenviable choice – about how we wish the world to look or, put differently, what kind of a world we wish to live in.

27 Act 53 of 1979, s 2A(a)(ii).

28 Act 140 of 1992. As the SCA pointed out, the use and possession of dagga was also prohibited by s 22A(10) of the Medicines and related Substances Control Act 101 of 1965.

29 *Prince v President of the Law Society of the Cape of Good Hope and Others* 2000 7 BCLR 823 (SCA):829–30 par 5.

30 For a detailed version of the facts see *Prince v President of the Law Society, Cape of Good Hope and Others* 1998 8 BCLR 976 (C):978I–980A. The judgment of the Supreme Court of Appeal is curiously silent on many of the salient facts of the case, particularly on the nature of Rastafarianism and the appellant's sincere commitment to his religion.

31 *Prince* 2000 (SCA) par 11. Section 4(b) of the Drug Traffic Control Act already provided for several exceptions to the general prohibition on the use and possession of "dependence producing substances", including dagga, mostly for medical purposes.

In the Cape High Court Friedman JP had found that given the definition of the scope and content of the right provided by the Constitutional Court (and discussed above) the *impact* of section 4(b) of the Drugs Act was to limit the applicant's freedom to practice his religion. The provision would therefore be unconstitutional unless it could be found to be justifiable in terms of the limitation section in the Constitution.[32] However, in applying section 36, the Court found that the limitation of the applicant's right to freedom of religion was justifiable first, because making an exception for Rastafari would be contrary to South Africa's international law obligations and second, it would place an additional burden on the police and the courts in trying to secure convictions under the Drugs Act.[33] The Supreme Court of Appeal, did not pursue the first line of reasoning in its judgment and, indeed, failed to refer to international law at all.[34] Regarding the second line of reasoning, Hefer JA followed a similar approach to the Cape High Court, although his judgment is notable for its minimalism. The learned judge failed to consider the scope and content of the right to freedom of religion. In fact, not once in the entire judgment did the court refer to section 15, let alone did it quote or analyse the text of this section of the Constitution or the jurisprudence of the Constitutional Court on the matter. Instead, without explicitly stating it, the court seemed to have assumed that the failure of the Drugs Act to provide an exception for the use and possession of cannabis by *bona fide* Rastafarians for religious purposes contravened the guarantee of freedom of religion.[35] Without any discussion of whether this was indeed the case, the court proceeded to consider whether an exception should not be made for Rastafarians in the light of section 36(1)(e) of the Constitution.[36] The court forwarded three arguments why such an exception could not be made in terms of section 36(1)(e).

First, it interpreted the appellant's limitation clause argument as asking the court to introduce an additional exemption in section 4(b), to allow

32 *Prince* 2000 (SCA):984A–B.

33 *Prince* 2000 (SCA):989A–B.

34 There is some disagreement about the efficacy of the international law argument in this case and the relevance of international law obligations in justifying the limitation on the right to freedom of religion has been questioned. See Freedman 1999:483 and Boister 1996:13.

35 This can be assumed only if one interprets the court's reference to the finding of the court *a quo* on this point as an endorsement of its view. See *Prince* 2000 (SCA):831 par 8. However, it is by no means clear that the SCA made such a finding, as it is never stated either directly or indirectly, but the need to discuss such issues are dismissed as "unnecessary" because of the appellant's reliance on the limitation clause. One can only assume that the SCA came to such a conclusion if one accepts that the SCA is familiar with the structure of constitutional review under the 1996 Constitution that requires a two-stage approach to finding an infringement of a provision of the Bill of Rights. I will demonstrate that am not at all convinced that Hefer JA. has any grasp of the way constitutional adjudication should be conducted or, if he does, that he wilfully ignored it in this case.

36 S 36(1)(e) refers to the court's obligation to consider whether "less restrictive means" could have been employed to achieve the same purpose.

Rastafarians to use and possess dagga. The relevant part of the appellant's prayer asked the court to declare:

> "(a) . . . section 4(b) of the Drugs Act and section 22A(10) of the Medicines Act to be inconsistent with the Constitution, to the extent that they fail to provide an exemption application to the use, possession and transportation of cannabis sativa by a Rastafarian for a *bona fide* religious purpose, and accordingly invalid.
>
> (b) Suspending the aforesaid declaration[. . .] of invalidity for a period of twelve (12) months from the date of confirmation of this order by the Constitutional Court to enable Parliament to correct the inconsistencies which have resulted in the declarations of invalidity."

Quoting from the Constitutional Court judgment of Chaskalson P in *S v Lawrence; S v Negal; S v Solberg*[37] Hefer JA stated that acquiescence to such a request in effect would require the Court to enact legislation, something a court of law cannot do.[38]

Secondly, it argued that there are no less restrictive means of suppressing the use of illegal drugs like dagga, apart from a complete ban on its use and possession. The argument proceeded as follows. (1) The prevention of drug *abuse* is a legitimate governmental aim and its effective prohibition is therefore a pressing social purpose. (2) Lifting the ban on a section of the community for a particular purpose (religious use) would leave the door "wide open for abuse". This is because the use of cannabis has caused mental illness and behavioural problems in Rastafarians; there is a likelihood of an influx of neophytes attracted to the Rastafarian faith by the prospect of the practically unfettered use of the prohibited drug; and there is evidence that cannabis is often a stepping stone to the use and eventually the abuse of and dependence on more harmful drugs. The court comments: "one shudders at the thought of the consequences of lifting the ban to Rastafarians themselves and, more importantly, to society generally". Indeed, according to the court, there are "socially harmful consequences, so notorious, [sic] that we need not dwell on them". (3) To protect society as a whole, a complete ban is therefore necessary as a partial exemption for Rastafarians cannot leave society unaffected and adequately protected.[39]

Thirdly, the court argued that it would be impossible to police an order that would allow Rastafarians but not others to use and possess cannabis. It would be impossible for police to prove that an individual caught in the possession of cannabis was indeed a Rastafarian as he or she claimed, and that he or she had possessed and used dagga for the "correct" purpose. We do not know which (or whether any) of the spiritual, inspirational, medicinal and culinary uses Rastafarians make of dagga, according to the appellant, forms part of their religious observance. There is a lack of evidence to know when dagga is used for religious purposes and any exemption is therefore impossible.[40]

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37 *S v Lawrence* 1997 10 BCLR 1348 (CC):1374 par 80.
38 *Prince* 2000 (SCA) par 11.
39 *Prince* 2000 (SCA) par 12.
40 *Prince* 2000 (SCA) par 13.

4 THE RASTAFARIAN RELIGION

Before I embark on a critique of the judgment and attempt to prove why the judgment is wrong, it is important to provide some perspective on the Rastafarian religion. In order to argue that the SCA completely failed to engage with the issue of the importance of the ritualistic smoking of the "Holy Weed" for Rastafarians, it is first necessary to describe the Rastafarian religion.

The word Rastafarian is derived from "Ras", meaning "duke" and "Tafari", the late Emperor Haile Selassie's family name (Barrett 1977:2).[41] Rastafarianism is a millenarian movement which has its origins among the people of Jamaica. Members of the movement worship Haile Selassie, the late Emperor of Ethiopia, and make extensive sacramental use of dagga (Taylor 1984:1605).[42] It is important to note that the Rastafarian movement has its roots in the rebellious communities of former black slaves in the Caribbean island nation of Jamaica (Barrett 1977:21–69). Rastafarianism has strong political roots. It appears to be a syncretic product of numerous groups, all alienated by the inequities of white-dominated Jamaica. The prominent but reluctant father of the movement is Jamaican Pan-Africanist Marcus Garvey, who predicted the coming of a black Messiah (Barrett 1977:76–77).[43] The movement was born when, through some unique interpretations of both the Old and the New Testaments of the Christian Bible, followers identified Haile Selassie as the black Messiah predicted by Garvey. This followed after Selassie assumed the title of "King of Kings, Lord of Lords, Lion of the Tribe of Judah" (Barrett 1977:81–83).[44]

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41 On the Rastafari see generally Murrell, N, Spencer, W, and McFarlane, A. 1991. *Chanting down Babylon: The Rastafari reader;* Campbell, H *Rasta and resistance* (1987); Cashmore, E. 1979. *Rastaman*; Chevannes, B. 1994. *Rastafari: Roots and ideology*; Lincoln, CE (ed). 1974. *The black experience in religion*; Moses, W. 1993. *Black Messiahs and Uncle Toms*; Mulvaney, R and Nelson C 1990. *Rastafari and reggae: A dictionary*; Payne W (ed). 1991. *Directory of African-American religious bodies.*

42 See also Barrett 1977:104.

43 Garvey wrote:
"Whilst our God has no colour, yet it is human to see everything through one's own spectacles. And since the white people have seen their God through white spectacles, we have only now started out (late though it may be) to see our God through our own spectacles . . . We Negroes believe in the God of Ethiopia, the everlasting God – God the Son, God the Holy Ghost, the One God of all Ages. That is the God in whom we believe, but we shall worship him through the spectacles of Ethiopia."
See Garvey, AJ. 1967. *Philosophy and opinions of Marcus Garvey.* 2nd ed:34 as quoted in Barrett 1977:77. Ironically Garvey disputed Haile Selassie's divinity and denied that his own statement regarding a black king supported the Rastafarian beliefs. See White 1983:89 as quoted in Taylor 1984:1605 fn 16.

44 This title corresponds with two passages from the Book of Revelation, including Revelation 5:2-5 ("and I saw a strong angel proclaiming with a loud voice: who is worthy to open the book, and loose the seals thereof? And no man in heaven, nor in earth . . . was able to open the book . . . and one of the elders saith unto me, weep not: behold the Lion of the Tribe of Judah . . . hath prevailed to open the book"); and Revelation 19:16 ("and he hath on his vesture . . a name written: King of Kings, Lord of Lords"). For account of the rise and fall of Emperor Selassie, see Kapuchinsky R 1986. *The last emperor.*

The Rastafarian religion consists of six basic beliefs. These beliefs centre on the godliness of Haile Selassie and the superiority of black people that will eventually lead to their ruling the world.[45] Beside these beliefs the Rastafarian's religious identity is established by a number of habits and rituals that are central to the *practice* of the religion (Barrett 1977:137). As Taylor points out (1977:1608), "many of these behaviours are, to non-Rastafarians, highly unusual and even repugnant", but there also exists a high degree of ignorance and misconceptions about the nature of many of these practices. For example, true Rastafarians adhere to a strict regimen of dietary restrictions. They eat only "I-tal" or natural and clean foods (Barrett 1977:140).[46] This excludes meats (especially pork), predatory fishes and lowly crustaceans, dairy products, white flour breads, alcohol, sweets, and salt (Barrett 1977:226). They are also not allowed to use tobacco (Barrett 1977:12). Rastafarians believe that they should remain unshaven (Barrett 1977:137–140) and that they should only wash with pure water as chemically-produced soap is not "I-tal" (Taylor 1984:1609). For the purposes of this paper, the most important practice of the Rastafarian religion is that of the ritualistic use of dagga, which, to Rastafarians, is the high sacrament – very much like Holy Communion is to many Christian churches (White 1983:129; Barrett 1977:128–136).[47] Referring to several passages from the Bible,[48] Rastafarians smoke ganja as often as possible and its use is mandatory at all meetings and services (Barrett 1977:131). At these ritual meetings, called "grounations" or "nyabingi", a short prayer is said before the smoking begins (Barrett 1977:131; White 1983:225).[49] Dagga is a dominant symbol of the Rastafarian religion and, in their view, is absolutely essential to their religious observance. According to Barrett:

> "the real centre of the movement's religiosity is the revelatory dimensions brought about by the impact of the 'holy herb' . . . [it] is the key to new understanding of the self, the universe, and God" (1977:216–217).

For true Rastafarians the smoking of cannabis is therefore not merely something pleasurable to be done with friends. It goes to the heart of their religious identity. Viewed in this light, the prohibition on the use of dagga by Rastafarians constitutes an extreme invasion on their right to freedom of religion.

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45 See Barrett 1977:104 where he lists these beliefs as (1) Haile Selassie is the living God, at least to black people; (2) The black person is the reincarnation of the ancient Israelite; (3) The white person is inferior to the black person; (4) Ethiopia is heaven; (5) The invincible Jah (God) is arranging for the exodus of the faithful back to Ethiopia; and (6) In the near future blacks shall rule the world. See also Taylor 1984:1607–08.

46 According to White (1983:12) these laws are analogous to the dietary laws of Judaism as Rastas draw much of their doctrine and practice from Judaism.

47 Dagga is also referred to by Rastafarians as "ganja" or "holy herb".

48 Eg. Psalms 104:14 ("He causeth the grass to grow for cattle, and herb for the service of man."); Genesis 3:18 (" . . thou shalt eat the herb of the field"); Exodus 10:12 (". . . eat every herb of the land"); Proverbs 15:17 ("Better is a dinner of herb where love is, than a stalled ox and hatred therewith").

49 According to Barrett, the prayer is: "Glory be to the Father and to the maker of creation as it was in the beginning is now and ever shall be world without end: Jah Ras Tafari: Eternal God Selassie I".

5 CRITICISM OF THE JUDGMENT

Although the outcome of the judgment of the SCA in the *Prince* case is not surprising, the reasoning employed by the court is, to say the least, a shocking travesty of constitutional adjudication.[50] For anyone with a passing knowledge of constitutional adjudication, Hefer JA's reasoning regarding the unconstitutionality of the provisions of the Drugs Act must appear at the very least perplexing and at the worst utterly inexplicable. To venture an explanation, I contend that the learned judge's approach to the matter can only be explained in one of two ways. First, the learned judge might lack even the basic knowledge and understanding of the way in which Bill of Rights adjudication should be conducted in terms of South Africa's 1996 Constitution. If this were the case, one would not be able to say that he had acted *mala fide*, but one would nevertheless feel a deep disquiet that a judge of the highest court in the land lacks the knowledge and insight of even the most basic aspects of Bill of Rights jurisprudence. Alternatively, the judgment might not be the result of ignorance, but might be born out of the court's deep distrust of the new constitutional order and hence might be a symptom of the court's unwillingness or reluctance to engage with the complex issues surrounding Bill of Rights adjudication. Although a certain hesitation might be expected on the part of judges embalmed in the traditional and positivistic tradition of parliamentary sovereignty, the complete abdication of its constitutional duty to uphold the law, including the Constitution, would be difficult to condone. Either way, the judgment in my view represents a dereliction of his constitutionally-mandated duty to uphold the Constitution. These are strong words and in order to substantiate my complaint I shall now analyse the various arguments forwarded by Hefer JA in dismissing Mr Prince's claim.

First, by focusing exclusively on the limitation clause argument without even mentioning the relevant provision of the Constitution on which the claim is based, the court completely shied away from its constitutional duty to determine the scope and content of the right and to find whether the impugned provision constituted an infringement of this right. According to the two-stage analysis, a court must first decide whether there was indeed an infringement of the right. Once such a finding has been made, it then has to proceed to ask whether the infringement is nevertheless justified in terms of the limitation clause. This first stage of the inquiry is not a mere formality, but forms an essential part of the inquiry. It is at this stage that the court has to flesh out the vague and general provisions of the Bill of Rights and must apply them to a set of facts. *In casu*, the

50 In all fairness to the court, the obvious practical difficulties presented by the case, did seem to weigh heavily on the court. It is clear that an order allowing for a partial exemption for Rastafarians from the relevant provisions of the Drugs Act would be difficult to police and this fact was evidently uppermost in the minds of the judges who handed down this decision (see par 18 at 833). I thus take less exception to the outcome of the case than to the style and content of the reasoning employed by the court in justifying its decision.

Constitutional Court had already attempted such an exercise relating to the right of freedom of religion, and the SCA was therefore obliged to interpret and apply the reasoning of the majority of that court. Instead, it completely ignored the Constitutional Court jurisprudence on this issue with a mere assertion that "it is not necessary to deal with all the submissions" put forward by council for the appellant, because the appellant required only that the relevant sections of the Drugs Act be declared invalid in as far as they fail to provide and exemption for the possession and use of dagga by Rastafarians for bona fide religious purposes.[51] Such an assertion is wrong. Either Hefer JA has a complete lack of knowledge and insight into the way constitutional adjudication works, or he wilfully chose not to engage with the complex issue of the scope and content of the right to freedom of expression – perhaps because that would have entailed a detailed discussion of the jurisprudence of the Constitutional Court.

Second, Hefer JA completely misconstrued or misunderstood the nature of the order sought by the appellant or otherwise he failed to understand the nature of the power conferred by the Constitution on the Supreme Court of Appeal. The relevant part of the requested order, quoted in full above, clearly requires the court to declare the section *invalid*, and never requires the court to rewrite the section to include an exemption for Rastafarians as the court claimed. This is made even clearer by section (b) of the prayer which would have allowed for a suspension of the order of invalidity for a period of 12 months to enable Parliament to rewrite the law to include the requisite exemption for Rastafarians. How any reasonably intelligent person could have construed such a request as a demand by the appellant that the court enact legislation that would provide for the requisite exception is beyond comprehension. Another possibility is that such a person has not yet grasped, or is unwilling to accept, the fact that the Supreme Court of Appeal now has a testing power to declare parliamentary legislation invalid when it finds any of the provisions of such legislation to be inconsistent with the Constitution.

Third, Hefer JA completely misconstrued the nature of the limitation clause enquiry. Section 36(1) allows for the limitation of rights by a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. According to the Constitutional Court, the limitation clause requires a court to weigh up competing values, and ultimately to make an assessment based on proportionality.[52] In this weighing up of values, the court is required to take into account "all relevant factors", including the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation, the relation between the limitation and its purpose; and whether less restrictive means are available to achieve the intended purpose. When considering whether the infringement of a right is justifiable or not, it is imperative that a court

51 At par 9.

52 *S v Makwanyane* 1995 6 BCLR 665 par 104, per Chaskalson P.

evaluate *all* relevant factors. At the very least, a court must consider those factors explicitly mentioned in section 36 to determine overall whether the limitation was justified in an open and democratic society based on human dignity equality and freedom. The SCA spectacularly failed to do so. Instead, it appears[53] as if the court had chosen not to engage in any evaluation of the competing interests and not to consider what values lay at the heart of an open and democratic society based on human dignity, equality and freedom. Instead, it merely referred to the importance of the purpose of the impugned provision and to its conclusion that there was no other way of achieving the said purpose. It thus failed to consider the nature of the right of freedom of religion. Is this an important right worth protecting? Is it protected in other foreign jurisdictions and in international human rights instruments? What is the place of religious freedom in a democratic society based on human dignity equality and freedom?[54] On all these questions the SCA remained inexplicably silent. It also failed to ask what the nature and extent of the limitation entails. Did this constitute a severe infringement of the Rastafarian's freedom to practice her religion? How, for example, would the court have viewed the matter if the state had prohibited the use and possession of alcohol, including its use in Christian rituals such as the Holy Communion? Once again: silence. In other words, the SCA failed to weigh up the competing values involved in the limitations inquiry. Instead, its point of departure seems to have been the assumption that the appellant's claim was spurious and proceeded from this assumption to show why the court had come to this conclusion with little or no concern for the constitutional jurisprudence on which it was supposed to base its decision.

Finally, the judgment of Hefer JA relied on highly controversial and contested views about the use and effects of cannabis as if these views were so obvious and generally accepted that no discussion was necessary. In terms of limitation clause jurisprudence, once the applicant has shown that there was indeed an infringement of his or her right, the onus shifts to the state to provide the requisite justification. This will often entail the provision of factual information to assist the court in making a finding on the reasonableness of the limitation. But the SCA did not consider it important to question the very controversial factual assertions of the state in justifying the limitation. It even referred to harmful consequences "so notorious that we need not dwell on them". It thus completely ignored all the evidence and arguments placed before it regarding the relative benign nature of cannabis without even referring to this evidence, and then alluded to its harmful effect without ever clearly stating what such effects might be and what evidence was relied on in making a finding on such effects.

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53 Because the judgment of Hefer JA does not even quote the text of s 36, nor acknowledge the existence of the jurisprudence of the Constitutional Court on s 36, it is difficult to say to what extent the SCA actually engages with this limitation inquiry at all and to what extent the Court is merely putting forward a general policy argument against the claim by the appellant.

54 As I shall argue below, this is a particularly important question as it goes to the heart of the attitude towards religious minorities required by the Constitution.

This was a bit like a judge at a trial for witches during the Middle Ages asserting certain "facts" about the nature of witches and witchcraft that were assumed to be so self-evident that they need not even be questioned. The court asserted that cannabis is often a stepping stone to the use and abuse of and dependence on other more harmful drugs, that a granting of the order would lead to an influx of neophytes to Rastafarian religion and that there are "other socially harmful consequences, so notorious, that we need not dwell on them."[55] The Court came to these conclusions without referring to the overwhelming available evidence that points to the relative benign effects of cannabis use *vis-à-vis* the use of alcohol or tobacco. For example, it did not refer to evidence of Professor Frances Ames, emeritus associate professor of neurology at the University of Cape Town, who had stated in an affidavit to the court that "the use of cannabis is dose-related, the same as the use of alcohol" and that "the use of cannabis apparently does not lead to cognitive impairment", "does not cause violence" and that the assertion that the use of cannabis causes crime "is not supported by existing clinical and scientific data".[56] It also ignored the arguments and evidence on the decriminalisation of cannabis presented in at least five law journal articles.[57] It is clear that the outcome of the case was based on the court's (preconceived) ideas about the harm and undesirability of recreational drugs, including dagga. I shall therefore now turn to the various arguments put forward in this regard.

6 DAGGA AS AN UNLAWFUL SUBSTANCE

In *S v Bhulwana; S v Gwadiso*[58] the Constitutional Court per O'Regan J confirmed that the state had an interest in the effective prohibition of the *abuse* of illegal drugs. However, she also implied that there was a difference between recreational drugs that resulted in severe damage to the user and other drugs that are less harmful, the prohibition of the abuse of the former being a more important concern that might justify more severe infringements on the rights of individuals than the latter.[59] To consider whether Rastafarians should have the right to partake in their religious ceremonies which happen to include the use of dagga, it is therefore imperative to consider the harmful effects of cannabis both on individuals and on society. For the stated aim of the prohibition on the possession, use and distribution of (some) recreational drugs like dagga, is usually, first, to protect individual members of society from the ravages of such drugs and, second, to protect society as a whole from the consequences of the abuse of recreational drugs. The implication is that individuals in society itself are seen as weak and powerless to resist the temptations inherent in such dangerous substances (Leuw & Marshall 1994:xiv).[60]

55 At par 12.
56 Affidavit quoted by the Friedman JP in *Prince* 1998 (C):988F–H.
57 Boister 1995; Boister 1996; Freedman 1999; Lötter 1999; Paschke 1995.
58 1995 12 BCLR 1579.
59 1995 12 BCLR 1579 par 20.
60 See also Lötter 1999:185.

In this view, recreational drugs like dagga are harmful or even dangerous to individuals who have to be protected from such substances by the nanny state. Much of the debate on the criminalisation of dagga thus revolves around the actual or purported harmful effects of the drug. However, it is difficult to make an accurate determination of the extent to which recreational drugs pose a threat to individuals and to society as a whole. There are two sets of reasons for this.

Firstly, it is almost impossible to avoid the double standards that operate in the appraisal of the health effects of using dagga (Hall *et al* 1995a). In South Africa this double standard is deeply entrenched and is the result of what I shall refer to as "pharmaceutical Calvinism". Within this paradigm it is assumed that the use of drugs for recreational purposes – as opposed to medical ones – is morally tainted, much like watching movies or dancing was seen as morally tainted in places like Potchefstroom during the apartheid era. From this paradigm it is assumed that individuals who use drugs recreationally are somehow morally weak and thus pose an inherent threat to the so-called "moral fabric" of society. Within this paradigm, exceptions are made for recreational substances with a long history of acceptance within Western culture, recreational drugs such as alcohol and tobacco.[61] But these exceptions apart, strong moral censure still meets the recreational drug user.

Secondly, there are methodological problems with making an accurate appraisal of the dangers associated with the use of cannabis. (1) It is necessary, but difficult, to make causal inferences about the connection between cannabis use and the adverse health and psychological consequences. (2) It is difficult to make quantification of the seriousness of the risk of dagga use for users in the broader community. (3) Any appraisal can only have value if it is made within the framework of a comparative analysis with other recreational drugs in Western society such as alcohol and tobacco, but making such an appraisal is not without difficulty (Hall *et al* 1995a).

Despite these difficulties, I shall attempt to catalogue and evaluate the various dangers associated with the recreational drug under discussion, comparing it to the dangers associated with the other, legally available recreational drugs – alcohol and tobacco. In doing so I shall divide the potential danger associated with the use of dagga into three categories: harmful for medical reasons; socially harmful; and harmful for political reasons (Boister 1995:26–30).

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61 There are other reasons why tobacco and alcohol largely escape legal censure. Most notably, it is the product of our colonial history. These substances were instrumental in the gradual colonisation of Africa as they assisted the colonisers in linking local populations to the colonial-capitalist system. Because tobacco and alcohol are so addictive, they often created dependence in newly-colonised subjects that could only be satisfied by selling one's labour in the colonial economy. Although by far not the only way in which local populations were enslaved to the capitalist machine, substances like tobacco and alcohol played at least some role in weaning some locals away from their subsistence existence and recruiting them as cheap labour for the colonial economy.

6.1 Medical harm

There is no evidence to suggest that the moderate use of dagga is harmful to the individual or that it leads to physical or mental dependency (Plant 1987:19–20).[62] Even regarding heavy users, there is no scientifically verifiable data to prove that dagga leads to physical or mental dependency (Grinspoon & Bakalar 1977:267). There is no confirmed case of human deaths from cannabis poisoning in the world medical literature (Hall 1995b:1). According to Fortson (1992:328) there is much evidence that cannabis will accentuate pre-existing moods of happiness or tension which may, in turn, be linked to the prevailing environment. He claims that it "is probable that the drug is not addictive and the evidence of physical or mental harm resulting from its use is equivocal". However, other researchers suggest that the heavy use of cannabis "severely affects the social perceptions of the user" because it results in the avoidance of problems, which leads to "drug-induced arrested development" (Inciardi & McBride 1990:290–291). Sometimes unpleasant experiences, even hallucinations, do arise from dagga use that may cause long-term emotional disturbances and, some argue, psychoses (Plant 1987:20). However, as the World Health Organisation study by Hall *et al* points out (1995b:6–7), it is difficult to study the possibility of dagga-induced psychoses because of the rarity of such psychoses and the near impossibility of distinguishing them from schizophrenia and manic-depressive psychoses occurring in individuals who happen to also use dagga.[63] While one study has linked dagga use to brain damage, the validity of this study has been questioned[64] and since then a number of other studies using more sophisticated methods of investigation have consistently failed to demonstrate evidence of structural change in the brains of heavy, long term dagga users (Hall 1995b:6). In other words, some evidence exists that the long-term heavy use of dagga may be harmful to individuals, but the extent of such harm is not clear. The absence of conclusive scientific proof of the seriously harmful consequences of the prolonged use of dagga seems to make it difficult if not impossible to take a dogmatic view of the subject.[65]

Perhaps a more useful way of evaluating the health risks posed by cannabis use is by comparing it to the risks of other legal recreational drugs such as alcohol and tobacco. This is exactly what a report, prepared for the WHO by Wayne Hall *et al* (1995a–d), set out to do. It concluded that the major health risks of dagga users are most likely to be experienced by those who smoke dagga daily over a period of years (Hall *et al* 1995d). But overall most of these risks are small to moderate in size. "In aggregate they are unlikely to produce public health problems comparable in scale to those currently produced by alcohol and tobacco." (Hall *et al* 1995d:4). The report concludes:

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62 Plant states "it is clear that large numbers of [dagga] smokers use the drug only intermittently and that they do so without apparent harm". See also Paschke 1995:110.

63 See also generally Ghodse A 1986. Cannabis psychosis. *British Journal of Addiction*, 81:473–478.

64 See Paschke 1995:113; Boister 1995:27; Schankula 1993:2.

65 Rycroft 1975:69 as quoted in Boister 1995:27.

> "On existing patterns of use, cannabis poses a much less serious public health problem than is currently posed by alcohol and tobacco in Western societies. This is no cause for complacency, however, as the public health significance of alcohol and tobacco are major . . ." (Hall *et al* 1995e:1).

From the available evidence, there thus seems no logical reason why the purported harm of dagga use to the individual could justify the criminalisation of its use. The use of alcohol, tobacco, red meat and soft drinks, amongst others, also cause harm to its users, but their use is not criminalised (Pashke 1995:112). This seems to suggest that the medical harm of dagga to individual users is not the main reason for its prohibition. If it had been the case, the use of alcohol and tobacco, amongst other products, would also have been prohibited by the state. It thus appears that the dispute about the harmful potential of dagga is really about its capacity to cause social harm. It is to this aspect that I shall now turn.

6.2 Social harm

It is generally accepted that the use of dagga causes social damage (Boister 1995:27; Paschke 1995:113), but it seems impossible to quantify this harm. Several possible harmful consequences of the use of dagga have been identified.

First, it is argued that individuals who use dagga may be dangerous and may cause harm to others (Boister 1995:27; Paschke 1995:113). For example, individuals who drive a car or operate machinery under the influence of dagga may expose themselves and others to danger (Hall *et al* 1995c:1). This is, of course, true, but cannot be sustained as a reason for the prohibition of its use, as alcohol causes carnage on the roads and yet it is not prohibited (Boister 1995:27). Apart from these examples there is no evidence of other threats to the safety of individuals caused by dagga. Although it has been asserted that cannabis causes violence (Inciardi & McBride 1990:71), South African courts have rejected this assertion[66] and have reiterated that recreational drugs are seldom if ever referred to in criminal courts as the cause of assault or murder. As Van den Heever J stated in *S v Serumala*:

> "Ondervinding leer dat alkoholverslaafdes waarskynlik meer skadelik is vir die gemeenskap as wat persone is wat verslaaf is aan die gelysde dwelmstowwe. In the strafhof dui die getuienis male sonder tal daarop dat drank die oorsaak was dat een persoon 'n ander aangerand of selfs gedood het. Ander dwelmstowwe word selde indien ooit as aanleidingsfaktor tot misdaadpleging genoem. So ook is drankmisbruik die oorsaak van baie egskeidings, gebruik van ander stowwe word min van gehoor as oorsaaklike faktor."[67]

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66 *S v Phillips* 1985 2 SA 727 (N). In this case the famous Charmaine Phillips who had gone on a murder spree with her boyfriend Johan Grundling, had pleaded not guilty to murder and had based her plea at least partly on the fact that she and Grundling had been smoking dagga. The state then led expert evidence to prove that dagga did not make the accused violent.

67 1978 4 SA 811 (NC) at 815C–F. "Experience teaches us that alcohol addicts are usually more harmful to society than those addicted to the relevant listed drugs. In the criminal courts, the evidence shows more often than not that alcohol was the cause for one person

[continued on next page]

This view was endorsed by the study conducted for the WHO. This study claims that while the use of alcohol is strongly associated with aggressive and violent behaviour, there is little to suggest that there is a causal relationship of cannabis use to aggression or violence (Hall *et al* 1995c:2).

Second, it is often asserted that the use of dagga encourages crime, but no reliable evidence exists of a link between dagga use and crime (Grinspoon & Bakalar 1977:371). Despite the lack of any evidence, a 1966 report by the Department of Social Welfare and Pensions stated that the use of drugs have an effect on a person's criminal tendencies in that these tendencies which might usually be controlled find expression under the influence of dagga while dagga smokers are also more susceptible to suggestion. The veracity of this report prepared by the apartheid government is somewhat discredited by wayward assertions such as that the use of dagga "may account for the massacres of the Voortrekkers and the Mau-Mau acts of violence."[68] Although a survey has found that dagga users had a higher incidence of criminal conviction than non-users, Le Roux discounted this by arguing that rather than the cause, the smoking of dagga may be but the symptom of the adoption of a different system of values (Le Roux & Botha:22). It is, of course, ironic, that the fact that the possession, use and distribution of dagga is illegal, may itself contribute to a rise in crime as it creates a criminal underworld to satisfy the needs of dagga smokers. This underworld often becomes well organised and move on to other forms of crime from the power base established by their profits gained from the illegal dealing in dagga and other drugs.

Lastly, it is often argued that dagga serves as a gateway to a new and devastating lifestyle and thus users soon find themselves on the "slippery slope" to the use of more dangerous drugs.[69] However, as Grinspoon and Bakalar (1977:372) point out, there is no evidence that any property of dagga produces a peculiar susceptibility to harder drugs. If there is any link between the use of cannabis and the use of harder drugs, it might well be related to the fact that because of the prohibition on the use of dagga, dagga users are forced to buy dagga from criminals who might well introduce them to harder drugs. As Boister points out, if users could buy dagga lawfully, they would not have contact with criminals trying to get them to buy more dangerous drugs (1995:28).

If it is agreed that the use of dagga does cause some social harm, then it might be argued that the state has a legitimate interest in controlling the use of this substance. However, this does not mean that the state should prohibit its use. As South African courts have pointed out, the use of alcohol seems to be socially far more harmful than the use of dagga, yet the use of alcohol is not prohibited. There seems no logical reason why the use of alcohol is regulated but not prohibited, while the use of dagga is

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assaulting or even killing another person. Other drugs are seldom mentioned as the cause of violent crimes. At the same time alcohol is the cause of many divorces while the use of other drugs are seldom mentioned in this regard." (Translation by the author.)

68 *The dagga problem*, quoted by Rycroft 1975:55.

69 Schankula (1993:4) explains "[s]ince they have already broken the law by using cannabis, many [dagga users] are more likely to be receptive to try other illegal drugs".

completely outlawed unless other factors play a role in the criminalisation of dagga use. Recall that the SCA referred to other socially harmful consequences of dagga use "so notorious that we need not dwell on them". I contend that on the available medical and statistical evidence, it is only these unmentioned (and in the eyes of the court perhaps unmentionable) consequences of dagga use that could possible justify its prohibition. But what are these unspoken but obviously deeply held beliefs about the consequences of dagga use, at play in this case? It is to this question that I shall now turn.

6.3 Other factors

In the absence of any conclusive reasons for the prohibition of the use and possession of dagga, it is clear that other factors play a role in the continued criminalisation of dagga. As there is no logical reason why potentially dangerous substances such as alcohol and tobacco should be freely available in South Africa while dagga is not, its prohibition must be ascribed to an often unspoken set of assumptions about the nature of dagga use and its place in the society – assumptions deeply influenced by matters of convention, culture and economics.[70] I have already pointed out that the debate about the criminalisation of dagga occurs within a paradigm of pharmaceutical Calvinism and that the attitudes associated with such a paradigm are furthermore linked to the colonial project. At the heart of the attitude towards dagga seems to be a deep-seated fear of the effect of this substance on so called moral values upheld by the apartheid state. This is no surprise when one keeps in mind that the use of dagga has a long history in South Africa. In fact, unlike many other recreational drugs, dagga is a homegrown product. Researchers claim that dagga played an important role in indigenous African culture for recreational, religious and medicinal purposes for centuries although its use had been strictly regulated.[71] Its possession and use was first criminalised by the state in 1928[72] but despite this and subsequent acts, all available evidence show that its use today is widespread (Boister 1995:29).[73]

This view is supported by Rycroft, who argues that one of the main purposes of the 1971 Drugs Act was the preservation of the Western rationalist morality against the perceived threat of an indigenous indulgence in purely sensory experience (1975:2). The Calvinist political morality espoused by the apartheid government produced this Act. At a time when the ideology of the *laager* dictated a view of white (Afrikaans-speaking) people as the last bastion against the barbaric black hordes of Africa, the widespread use of dagga by black South Africans was obviously seen as a dire threat to the Calvinist morality espoused by the government of the day. In a country where whites had to be ever vigilant to ensure the maintenance of so-called "Western standards" of morality and of Western

70 See Wisotsky S 1990. *Beyond the war on drugs*:185.
71 Du Toit 1980. *Cannabis in Africa*:11-13, quoted in Milton & Cowling 1988 F3:1.
72 Medical, Dental and Pharmacy Act 13 of 1928 ss 61-72.
73 See also Van den Bergh 1993:13.

civilization itself, dagga was seen as the serpent in the garden of Eden, ever ready to entice the youth and other weaklings easily corrupted by vice and immorality. Thus, when piloting the 1971 Act through Parliament, the Minister of Social Welfare and Pensions at the time, Dr Connie Mulder said:

> "When . . . our very existence is endangered by an evil which is often as elusive as the wind . . . we are justified in taking measures which are commensurate with those available to us when the security of the State is at stake. If we fail to do so when it is necessary we might very well before long be fighting for our very existence."[74]

Today, such views might seem almost quaint, because, as Boister points out, the criminalisation of dagga clearly reflects the government morality of the pre-democratic South Africa (Boister 1995:31). Yet, traces of this attitude still prevail and is reflected in the relevant provisions of the Drugs Act and, evidently, also in the views of some of the judges of the Supreme Court of Appeal. This attitude dovetails neatly with another often unspoken but deeply held belief amongst those who adhere to the traditional pre-constitutional, Eurocentric world view about the nature of religion itself. As Justice Sachs of the Constitutional Court has shown, the apartheid government endorsed a specific Christian world view and enforced this morality on all its citizens. In this view, a religion like Rastafarianism would, at the very least, be viewed with suspicion and at worst as part of the dangerous onslaught on Western civilization itself. While the Constitution now requires the state to accommodate various religions in a non-hierarchical way, the beliefs about the morally superior nature of Christianity obviously linger on among justices of the SCA and others. I thus contend that these unspoken values played a decisive role in the SCA's handling of the case. The question is whether such an attitude justifies the limitation on the rights of Rastafarians to practice their religion.

7 FREEDOM OF RELIGION V DRUG TRAFFIC CONTROL

The case of Gareth Prince appears to be a difficult one for any court to deal with, as it touches on a highly emotive issue of public concern, namely the way in which the state should deal with the potential use and abuse of recreational drugs. The SCA obviously found the idea of sanctioning the use of cannabis by Rastafarians a disturbing and probably preposterous notion. One commentator explained that to judges this must have seemed like a request to endorse a world view in which long-haired strangers are free to smoke dagga (Woolman 1999:), one that clashes directly with the dominant one in which balding, wine and whisky-drinking justices can identify the evils of recreational drugs without even having to mention them. Viewed from such a perspective, one may well have sympathy with the outcome of its decision, if not with the reasoning employed to get to that decision. However, I contend that such sympathy would be misplaced, as it would be misconstruing the very nature of what this case is about.

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74 *House of Assembly Debates* 3–7 May 1971 col. 5958.

The fundamental fallacy that informs such a vision is that this case is primarily about the right of Rastafarians to smoke dagga. This case, I contend, is just as little about the right to smoke dagga as the case of *National Coalition for Gay and Lesbian Equality v Minister of Justice*[75] was about the right to engage in homosexual sodomy. In that case the justices of the Constitutional Court agreed that a law prohibiting sodomy – an act deemed to be morally reprehensible by a majority of individuals in our society – does more than merely criminalise a sexual act. It sends a message that an individual whose very identity is linked to the act of sodomy (either symbolically or practically) is somehow less worthy of equal concern and respect than those whose identity is linked to heterosexual sexual activity.[76] The judgment of Sachs J in that case stressed that our Constitution requires an acceptance of difference not a denial of difference.[77] This view was reiterated in relation to freedom of religion, when Sachs J, in the *Lawrence* decision, stressed that given our history of the marginalisation of non-Christian religions, the state has a duty to accommodate religions in a non-hierarchical way.[78]

I therefore contend that the Bill of Rights, as interpreted by the Constitutional Court, requires judges – even judges from the SCA – to rethink the (often hidden) traditional views and assumptions with which they approach difficult issues such as the one under discussion. Ours is a transformative Constitution,[79] a Constitution that places a duty on judges to rethink their world, to take responsibility for creating, through constitutional interpretation, this new world that will be different from the apartheid world we lived in. This, in turn, requires judges to try and identify the ways in which individuals and groups have been marginalised in the past – to think *the other* – and to interpret the provisions of the Constitution in ways that will prevent the further marginalisation and oppression of such individuals or groups.[80] This, the Supreme Court of Appeal singularly failed to do in this case.

But what would have been required? I contend that any serious and honest engagement with the issue of whether the prohibition on the use of dagga constituted an infringement of the rights of Rastafarians would have had to rethink two important, often unstated assumptions: that Rastafarians are dirty, pot smoking, dreadlocked individuals somehow less worthy of equal respect and concern; and that the smoking of dagga is an activity that threatens the moral fabric of society. To do this would have required of the court to take account of the kind of submissions I have presented in this paper, something which it did not do.

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75 1998 12 BCLR 1517 (CC).

76 See generally De Vos P 1998. Sexual orientation and the right to equality in the South African Constitution: *National Coalition for gay and lesbian equality v Minister of Justice and Others*. BCLR 12:1517.

77 Para 132.

78 See text accompanying fn 9–19.

79 See Klare 1998:155.

80 See Cornell 1993; Minow 1987:33.

8 CONCLUSION

In our society one will obviously find many different views on the use of dagga, on Rastafarians, and on the religion they adhere to. Many of these views would be extremely unfavourable and even hostile. Life must be hard for Rastafarians in South Africa as they are a small and often misunderstood minority. In addition, their most sacred rite, the rite on which their religious identity is based, is prohibited by the state. In other words, they are made criminals by the state merely because they adhere to their religion.

Our Constitution has been interpreted by the Constitutional Court as a document that should usually come to the aid of such vulnerable and unpopular minority groups. Sadly the unwillingness or inability of the Supreme Court of Appeal to even engage with the relevant constitutional jurisprudence has deprived Rastafarians of the potential protection of our transformative Constitution. Only the Constitutional Court itself can now rectify the situation.

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