

**THE “WAR ON DRUGS” HAS FAILED: IS DECRIMINALIZATION  
OF DRUG USE A SOLUTION TO THE PROBLEM IN SOUTH  
AFRICA?**

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## Declaration

I, Robyn Fellingham, declare that this research report is my own work. It is being submitted for the degree of Master of Science in Medicine in Bioethics and Health Law at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination at this or any other University.

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## **Abstract**

This research report will engage in the debate surrounding decriminalization of drug use and whether it is a possible solution to the problem of drug use in South Africa. This is a question becoming more prevalent in global discussions regarding drug policy and its efficacy. It is held in the report that when evaluating policy two aspects must be addressed; namely the philosophical justification for the policy and the efficacy of the policy. Regarding criminalization it is found that policy may be justified by the public harm principle but that it does not effectively achieve the purpose of preventing and decreasing drug use and associated burdens. Thus, it is argued that prohibition is a constitutional limitation, but does not necessarily achieve its purpose in the least repressive or most effective way. Finally it is suggested that the solution to the drug problem will be one which addresses the background, particularly socio-economic, to drug use. Decriminalization has the theoretical potential to address this context but further empirical research is required in order to establish evidential grounds for continued discussion.

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## Terms and Definitions

**Drugs** A term of varied usage. In medicine, it refers to any substance with the potential to prevent or cure disease or enhance physical or mental welfare, and in pharmacology to any chemical agent that alters the biochemical physiological processes of tissues or organisms (World Health Organization, 1994: 34).

**Addiction** Repeated use of a psychoactive substance or substances, to the extent that the user (referred to as an addict) is periodically or chronically intoxicated, shows a compulsion to take the preferred substance (or substances), has great difficulty in voluntarily ceasing or modifying substance use, and exhibits determination to obtain psychoactive substances by almost any means (World Health Organization, 1994: 6).

**Abuse** (psychological definition) substance abuse" is "a maladaptive pattern of use manifested by recurrent and significant adverse consequences related to the repeated use of substances. (DSM-IV-TR, 2000: 198).

**Abuse** (legal definition) abuse means the sustained or sporadic excessive use of substances and includes any use of illicit substances and the unlawful use of substances (The Prevention of and Treatment for Substance Abuse Act No. 70 of 2008, section 1) (Act not yet in force)

**Decriminalization** entails that the drug would remain illegal but the penalty of use or possession would be less severe, or overlooked (MacCoun 1993: 498)

**Legalization** entails that drugs would be legal, to use, possess and trade, but that all of the above would be regulated by the government, in the form of mechanisms such as taxation and special licences (MacCoun 1993: 498)

**Harm** the violation of an interest (Feinberg, 1973: 94)

**Demand Reduction** decreasing the demand for substances

**Use Reduction** decreasing the use of substances

**Harm Reduction** decreasing the amount of harm associated with drug use

**South African drug policy** a term used to describe the country's approach to dealing with substance use and abuse including, but not necessarily limited to, documents such as The National Drug Master Plan (2006-2011), and relevant Acts such as The Drugs and Drugs Trafficking Act, No. 140 of 1992, The Prevention and Treatment of Drug Dependency Act, No. 20 of 1992 and The Prevention of and Treatment for Substance Abuse Act, No. 70 of 2008

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## 1. INTRODUCTION

50 years ago the United Nations developed the UN Single Convention on Narcotic Drugs and stated the following in the preamble: The parties were concerned with the “health and welfare of mankind”, they recognised the medical use of narcotic drugs, they recognised that addiction to narcotic drugs constitutes an evil to mankind and is fraught with social and economic dangers to mankind and that the parties were conscious of their duty to prevent and combat this evil. It also goes on to state how the effort would require global measures driven by the same objectives, and that the aim of the convention was to develop an understanding which would limit the use of narcotic drugs to medical and scientific use (United Nations, 1961). 10 years later, the president of the United States, President Nixon coined the term “the war on drugs” and the resulting focus in drug policy became one of repressive measures and criminalization aimed at producers, traffickers and consumers of illegal drugs (Global Commission Report on Drugs Policy, June 2011)

Drug Policy in South Africa follows in the United States vein. A drug offence is conceived of as a criminal offence and the offender is given a criminal record, fined or put in jail. The Drugs and Drugs Trafficking Act (No. 140 of 1992) sets out to enforce legislation that prohibits possession and trafficking of illegal substances, one of which is cannabis. The Prevention of and Treatment for Substance Abuse Act (No. 70 of 2008) is an Act which has been assented to but not yet promulgated. The Act which is currently in force is The Prevention and Treatment of Drug Dependency Act (No. 20 of 1992) which will be repealed once the new Act is promulgated. Act No. 70 of 2008 sets out to formulate the ways in which drug offenders can be rehabilitated. This is important as it shows that perhaps South Africa does not only focus on repressive measures but does attempt to incorporate a humane approach to the problem of substance abuse.

The South African Constitution endorses bodily and psychological integrity, freedom of belief and the right of access to healthcare facilities, all of which would suggest that the citizens of South Africa should be allowed to put whatever they want into their bodies and then have their health looked after by the state (sections 12, 15 and 27). However, the Constitution also makes room for the limitation of some rights (ibid: section 36). The argument for the current policy of criminalization runs along the lines that drug use and resulting abuse constitutes an action that is harmful to one-self and others and so it is the duty

of the state to impede those actions. This is supported by The National Drug Master Plan (2006-2011).

An evaluation of policy requires that two approaches be taken. It must be evaluated from a philosophical perspective in terms of the ethical justification for the policy and whether that is sound; and it must be evaluated from the perspective of the efficacy of the policy as it is applied on the ground. For the purposes of this paper these questions translate thus: 1) What is the justification for drug policy in South Africa? and 2) Is this policy effective in preventing and decreasing drug use? In order for the policy to be called a 'good' policy, it must satisfy both the conditions of philosophical justification as well as efficacy.

In answer to the first question it will be argued that drug policy and the effort to prevent drug use is at least partially motivated by the fact that drug use is harmful, to the individual and society.

The state has taken on the role of protecting its citizens against the ravages of drug use through governance in the form of legislation; through the law. Mill, in his essay entitled *On Liberty* examines the relationship or interaction between authority and liberty insofar as we are thinking about the state and its people. He suggested that the only case in which a good state is justified in interfering with the liberty of citizens is when they act in such a way that will bring about harm to other members of the state (Mill 1860: 9). The state has a duty to protect its members from suffering harm at the hands of other members of the state. This can be translated into the idea that each individual has the right to liberty but no individual may infringe upon another's liberty in exercising their own liberty. It is the duty of the state to ensure that this doesn't occur.

In terms of the "war on drugs" it would appear that the mode of action has been justified in the reasoning that drugs are bad on at least three levels; for the people who take them and become addicted, for those in immediate contact with intoxicated users, and for the well-being and functioning of society in general. Thus it is the duty of the state to intervene and the best and most effective way to do this is by formulating laws which limit the freedom of drug users. This is done by restricting access to drugs by making them illicit and by making the actual action of possessing as well as taking drugs one that can be criminally prosecuted. This exemplifies the application of the link between the philosophical concepts of 'harm' and 'others' and the justification of state interference in individual liberty. The question that arises is whether drug use should be classified as an action which constitutes harm to others

and thus warrants state interference. In order to address this, the concepts of harm and harm to others will be explored. Is harm an emotional, mental or physical concept, or all of the above? What type of action should be constituted as harmful and does drug use always fit into this category? Further, how are ‘others’ to be defined? Is an ‘other’ a close relation, a concerned friend, a dependent, or a distant member of society who inadvertently depends on the proper functioning of the drug user in society?

In addressing the second question the following will be considered:

Bentham, one of the founding fathers of Utilitarianism, declares that: “The general object which all laws have, or ought to have, in common, is to augment the total happiness of the community; and therefore, in the first place, to exclude, as far as may be, everything that tends to subtract from that happiness: in other words, to exclude mischief.”(Bentham, 1781, Chapter XIII: 1). He also goes on to state that punishment is in itself a mischief (ibid). So if we were to weigh up the consequences of an action (drug use) in a manner similar to how a utilitarian would, the drug user would have to take into account the desirable and undesirable consequences of taking the drug. Criminalization of drug use aims to add extra weight to the side of the undesirable consequences and so tip the scale in favour of perceiving the act of taking the drug to be one that will not bring about the most utility.

Does this argument take into account all the necessary ‘consequence affecting factors’? Is criminalization a significant enough threat to prevent drug users from seeking all the pleasurable effects of the drugs they take; is criminalization the most effective way of preventing drug abuse? Bentham also states that punishment should not be inflicted when it is groundless, inefficacious, unprofitable, too expensive, or needless. (ibid: 3)

Recently, (June 2011) a Global Commission met in order to discuss the “war on drugs”. The initial premise of the Commission was that the war on drugs has failed and not only that, but that it has had disastrous consequences on individuals and societies (Global Commission Report on Drugs Policy, 2011: 1). The purpose of the Commission was to openly discuss the successes and failures of the war on drugs and to come up with means by which to achieve progress in dealing with the ravages of drug abuse. In the principles presented in the commission report we come across the ideas that drug policy should be informed by scientific evidence, it should be based on human rights, and it should be a collective global effort which addresses all aspects of the problem and takes into account cultural and societal diversity (ibid).

The essence of the Universal Declaration of Human Rights is that all humans have an inherent dignity and deserve to have that dignity respected and in turn are expected to treat all other humans in the same respectful manner (Universal Declaration of Human Rights, 1948). The argument put forward by the Report of the Global Commission on Drugs Policy is that the current status of the “war on drugs” and the policy incorporated in it doesn’t respect human rights. It marginalizes, criminalizes and stigmatizes drug users (Global Commission Report, 2011:1). The Commission report suggests that in many ways the drug policies of most countries undermine human rights by criminalizing large populations who don’t necessarily deserve to be criminalized and by failing to treat those who are suffering the harms of drug dependence in a humane way. This results in a heavy burden being placed upon both drug users and society.

An example of a policy that tries to incorporate this thinking is the Dutch policy according to which it is not a criminal but a minor offence to be found in possession of cannabis (Dolin, 2001). The aims of the Dutch Policy are to normalize the problem of drug abuse; to cast it as a social problem like other social problems, not as deviant, thus avoiding stigmatization and marginalization and to focus on the public health aspect as well as prevention. In short it was agreed that criminalization of individual drug use was not an appropriate way to address a public health problem. On the other end of the scale, there are countries like Saudi Arabia in which drug offences are punished by something as serious as execution (Nation Master, Drug Statistics, 2002). Is this a solution to drug use?

In a paper in which he examines the psychological effects of drug policy, MacCoun suggests that the debate with regard to criminalization and legalization is not as straightforward as we might think. The paradigm for thinking about the debate appears to be deterrence theory (as spoken about above) but there are many factors excluded by this mode of thinking which may be important insofar as we are considering drug abusers (MacCoun, 1993: 500). If a complete account of all of these factors can be given, then predictions can be made about what the results of criminalization or decriminalization of drug use in the society might be. However, deterrence theory may not necessarily have the effect that we suppose it will (ibid: 508). In fact if the current status of drug abuse is anything to go by we should begin to question its usefulness quite seriously.

Van Niekerk (2011: 1) in a recent paper entitled ‘Is it time to decriminalize drugs?’ makes the point that drug use is at worst a vice, it shouldn’t be considered as a crime, and to punish

those who do abuse drugs, or even those who just use drugs is criminal in itself. This is the ethical issue at stake in the question of the decriminalization debate. Is it ethically acceptable for the state to treat those who take drugs as criminals?

### **Aims, Objectives and Methodology**

The Report aims to provide an answer to the question of whether decriminalization is a solution to the drug problem in South Africa. This will amount to an evaluation of the current policy of criminalization in terms of its justification and its efficacy, as well as some discussion regarding whether decriminalization poses a possible solution to some of the issues raised with current policy. Some of the objectives to be achieved within the broader framework of the above discussion are an account of the “war on drugs” and its presence in South Africa, an overview of South African drug policy, an analysis of J.S Mills’ harm principle and its application to prohibition, and discussion surrounding the principles and recommendations proposed by the Global Commission Report on Drugs Policy 2011 as well as the practicability of implementing these within a South African context.

The Research Report is designed as an ethical legal analysis of a societal problem specifically within the context of South Africa. To this end, in chapter 2, it will reflect on international academic literature surrounding the idea of the “War on Drugs” and drugs policy as well as literature regarding substance use in South Africa. In chapter 3 it will look at statistical evidence regarding drug use in South Africa as well as policy documents in order to determine the extent of the problem and to evaluate the usefulness of current policies. In order to evaluate the problem of drug use and legislation surrounding it, the concept of harm, and harm to others will be utilised. This will involve an evaluation of the link to human rights, policy and state interference as well as the question of how harm should be defined and the extent of it that warrants state interference. All the above will provide grounds from which to look at current South African drug policy and its constitutionality. This policy evaluation will require discussion surrounding a philosophical justification for policy which will be conducted in chapter 4 and in light of the fact that drug policy involves state intervention in order to protect citizens from harm. Is the state justified in intervening in this

particular area? The second question of the efficacy of policy will be dealt with in chapter 5 and will be evaluated on the basis of a recent global commission report and some of the suggestions made regarding respecting the humanity of drug users and effectively dealing with the drug problem. The recommendations of the commission Report will be applied in a South African context.

A greater portion of the literature referred to in the report is acknowledged to be in favour of decriminalization. This is so as it is difficult to find academic literature supporting criminalization as opposed to decriminalization due to the fact that it has been an accepted policy for a long time. In this sense, the paper is arguing against the accepted position which is that drug use poses a problem to society and that prohibiting use, possession and production of drugs has been perceived as the most appropriate way of addressing this problem. There is certainly strength in such a common sense argument and it is supported by the fact that most countries continue to subscribe to a prohibition policy insofar as drugs are concerned.

However, this is not to say that there is no literature arguing against decriminalization or legalization. Wilson's paper makes the very valid and widely understood point that decriminalization or legalization has the potential to open the floodgates to even more widespread abuse, and that it will then be impossible to contain. This is a noteworthy objection but tends to lead to an impasse in discussion surrounding drugs policy. For this reason it will not be dealt with in this paper. The ethical dilemma is twofold, and the question is as follows: Is it justifiable to limit the individual's rights in regard to drug use, and if it is (on the grounds of preventing harm), is criminalization the most appropriate way of preventing this harm? This leads into a discussion of decriminalization and whether it poses solutions to some of the issues that are raised in light of the abovementioned ethical question.

If it were to be found that drug use does not necessarily constitute a harm to others or that current policy is ineffective in dealing with drug abuse, then this policy would require re-evaluation. This may apply to the abovementioned not yet promulgated Act. Further, perhaps the recommendations of the recent Global Commission Report on Drugs Policy would need to be given some consideration in South Africa.

## **2. DRUG USE AND THE “WAR ON DRUGS”: AN OVERVIEW**

In this chapter an overview will be presented in relation to drug use and the changing nature of society's perception towards drug use using select examples. Drug use is always embedded in a context and one of the purposes of this chapter is to highlight different contexts and the corresponding perceptions of society. It will also cover working definitions of the terms 'drugs', 'substance abuse' and 'addiction' which will be referred to throughout the paper. This will be followed by a discussion of the emergence of the “War on drugs” in America as well as some analysis of the term. South African drug policy is heavily influenced by American drug policy in the sense that the American perspective is reflected in the international conventions (to which South Africa is a signatory) regarding regulation of drugs. The chapter will establish a background from which to begin a discussion surrounding drug use and policy in the context of South Africa

### **2.1 Drug use and perceptions of society towards drug use**

#### 2.1.1 Drugs and their function

According to Hamarneh, it is speculated that poppy originated in the Asia Minor area and found its way into Ancient Egypt before the 18th Dynasty; and that there is little doubt that the ancient people of those areas used poppy as a remedy which would induce pleasure or sleep as well as relieve pain (Hamarneh, 1972: 1). In ancient texts such as the *Illiad* and *Odyssey*, Homer states that upon losing her daughter the character of Demeter takes poppy to sleep and lose consciousness of her grief and Helen of Troy gives poppy to Telemachus and his comrade in order to aid them in forgetting their sorrows (ibid: 2). In the Hippocratic corpus there are references made to the “hypnotic, narcotic and styptic” uses of the drug poppy as well as its therapeutic effects in curing sorrow and passion and causing indifference to ills (ibid: 3).

The World Health Organization defines 'drug' as follows: “A term of varied usage. In medicine, it refers to any substance with the potential to prevent or cure disease or enhance physical or mental welfare, and in pharmacology to any chemical agent that alters the

biochemical physiological processes of tissues or organisms” (World Health Organization, 1994: 34).

There appear to be two ways in which the term is understood; firstly according to its pharmacological make-up and action and secondly according to its function or purpose it is intended to serve in any specific circumstance. Drugs can be used therapeutically, or non-therapeutically, but in both instances their action is the same. For the purposes of this research report the term drug/s will be used to refer to all the substances listed in schedule two of the Drugs and Drugs Trafficking Act, No. 140 of 1992 (see appendix I). The terms ‘drug’ and ‘substance’ will be used interchangeably. The term ‘psychoactive substances’ covers the broad spectrum of drugs that alter mental processes (World Health Organization, 1994: 53).

The question that arises when thinking about developing drug policy which will decrease the burden of drug use is “why do people take drugs?” Drugfreeworld, an Organization involved in prevention of substance abuse, proposes that drug use, specifically among youth, is driven by the need to fit in or adapt to life, to relieve stress or boredom, to escape or relax ([www.drugfreeworld.org](http://www.drugfreeworld.org) The Truth about Drugs). The United Nations Office on Drugs and Crime (UNODC) Country Profile of South Africa suggests that factors such as unemployment, social injustice, the breakdown of traditional family structures and general instability are factors which contribute to the use of illicit drugs because psychoactive substances provide a temporary escape from the harsh reality of everyday life (UNODC, 2002:7). There are a variety of reasons for drug use.

Drug use is a choice made by an individual, though often shaped by external factors. People choose to take drugs in order to change something about their life. It is a decision or action that comes about as a result of an individual’s desires, and the belief that the proposed choice will help them to achieve these desires. This hypothesis can be universalized. Ancient peoples used drugs for non-medicinal purposes for similar reasons that people today use drugs; the ultimate aim being to change something about their lives, or their experience of life. The function of drugs has not changed remarkably over time.

If the proposed function of drugs has remained more or less constant, can the same be said for the perception of society towards drugs, and drug users? Hamarneh suggests that, among ancient Arab cultures, drugs such as poppy and hemp were considered as poisons if not administered for the right reasons and by the right people (Hamarneh, 1972: 228). Someone

knowledgeable in the properties of the drug as well as its consequences and effects would be required to prescribe or administer the drug. Based on this, together with the general view that the drugs were poisons, he thinks it can be surmised that there was no or little spread of abuse of these substances or addiction to them and that their purpose was only therapeutic (ibid). However, the claim that therapeutic use precludes addiction and abuse is certainly not viable in societies today. Evidence suggests that abuse of over the counter substances provided for therapeutic purposes is a growing phenomenon (South African Community Epidemiology Network on Drug Use, 2010).

### 2.1.2 Drug Use, Abuse and Addiction

A clear distinction needs to be drawn between the use and abuse of drugs. Despite the fact that over the counter drugs are not illicit drugs, this does not preclude them from being drugs of abuse. This raises the question of whether illicit drugs are considered abused every time they are used? According to the psychological definition in the DSM-IV-TR the essential feature of "substance abuse" is "a maladaptive pattern of use manifested by recurrent and significant adverse consequences related to the repeated use of substances" (DSM-IV-TR, 2000: 198). It is further stated that abuse should not be used as a synonym for use, misuse and hazardous use, and that the following criteria must be met before the term abuse can be applied:

1. Recurrent substance use resulting in a failure to fulfil major role obligations at work, school or home
2. Recurrent substance use in situations in which it is physically hazardous (for example, driving an automobile while impaired by substance use)
3. Recurrent substance related legal problems
4. Continued substance use despite having persistent or recurrent social or interpersonal problems caused or exacerbated by the effects of the substance (ibid: 199).

It is clear then that licit drugs can be abused, specifically when they are used for purposes other than what they were intended for or used in doses greater or more often than was specified by the healthcare practitioner. Does the converse follow; are illicit drugs always considered abused when used? According to section (1) of The Prevention of and Treatment for Substance Abuse Act No. 70 of 2008, "abuse means the sustained or sporadic excessive

use of substances and includes any use of illicit substances and the unlawful use of substances”. Hence, illicit drugs are always abused when they are used. This is not necessarily so according to the psychological definition in the DSM-IV-TR presented above. It is plausible that an individual may use a substance such as cannabis without meeting any of the above mentioned criteria presented as part of the psychological definition. It is also important to note that there are instances in which the effect of some drugs (such as tobacco and alcohol) is legal. Careful thought is required before a direct association between the terms ‘drugs’ and illegality/criminality is made.

A key concept involved in the differing definitions of abuse is that of addiction. An element of the ‘maladaptive pattern of use’ often arises from the fact that the user is addicted. The World Health Organization (WHO) describes addiction, specifically to psychoactive substances, as “Repeated use of a psychoactive substance or substances, to the extent that the user (referred to as an addict) is periodically or chronically intoxicated, shows a compulsion to take the preferred substance (or substances), has great difficulty in voluntarily ceasing or modifying substance use, and exhibits determination to obtain psychoactive substances by almost any means” (WHO, 1994: 6). Physiological dependence arises as a result of the effect of narcotic substances on the brain, either by mimicking neurotransmitters, or by causing larger amounts of neurotransmitters to be released, or by inhibiting the uptake. The overall result is that the system becomes flooded with these neurotransmitters, which is responsible for the intensified pleasurable sensations associated with drug use. (National Institute on Drug Abuse, 2010). Over time the drug user requires greater stimulation in order to receive the same degree of pleasure, and requires substances to maintain what used to be a normal level of a transmitter such as dopamine (ibid). There is a biological explanation for dependence which needs to be taken into account when the concept of addiction is evaluated. The legal definition of abuse includes the element of addiction but incorporates a much broader understanding of the term ‘abuse’, including the use of illicit substances and uses the term abuse as a synonym for use and misuse as the DSM-IV-TR warns against. The element of compulsion can give some account of why the individual continues to use a substance despite knowing the negative consequences. It is important to recognise that abuse is often partly a result of physiological addiction. For this reason, namely that it gives a better account of the reason for abuse, the psychological definition will be used within the context of the discussion of the substance abuser. The legal definition gives too little credence to the concept of addiction and is too broad in including the use of substances that are illicit.

The dimensions of abuse and addiction seem to play a role in shaping the perception of society towards drug users and are terms which carry negative connotations. But, drug use has not, nor is not, always negatively perceived. Some societies have condoned and even promoted non therapeutic drug use under certain circumstances.

One such culture which promoted drug use for the purpose of intoxication was the South Asian culture. According to Vedic scriptures cannabis (bhang) was sown by the Lord Shiva and so the use of cannabis for the purpose of intoxication became a religiously sanctioned act as early as 1500BCE (Paterson, 2009: 19). Cannabis was also used as a medicine in India and this is how it spread to Arabic culture in which, as has been previously mentioned, drug use was predominantly therapeutic, or the therapeutic use of drugs was considered acceptable. Whether cannabis was valued solely for its medicinal properties or its non-therapeutic properties as well is uncertain, but it became a valuable trading commodity amongst Arab communities. Another people group who continue to value the use of cannabis for religious purposes is the Rastafari.

## **2.2 Emergence of the “War on Drugs”**

Today drugs are a valuable trading commodity but, based on a review of the literature, societies in which drug use is tolerated are a minority. This view is partially reflected in the phrase “the war on drugs” which began in America.

America’s first ‘drug wave’, introduced by Chinese immigrant workers and their opium dens brought about laws banning opium dens and preventing free sale of opium in the late 19<sup>th</sup> century (Drug Enforcement Administration, [deamuseum.org](http://deamuseum.org)). This ban was followed by a change in priorities in American society. The Beatniks and Bohemians, being a movement which sought to react against conformism and materialism through a constant succession of intellectual challenges and new physical experiences, were a culture that advocated experimentation with drugs (Purvis, 1997). Non-therapeutic drug use became fashionable in American society. This highlights the importance of the ability of a culture or society to shape the behaviour of individuals within that society; stigmatization and stereotyping are powerful determinants of an individual’s behaviour.

Although the Beatniks and Bohemians eventually lost their sway over public opinion they left a legacy of increased drug use. This culture and the second wave of drug use was quickly

followed by a US instigated international movement towards addressing the drug problem: the initiation of the “War on drugs”, a phrase coined by President Nixon when he declared drugs as ‘public enemy number one’ (Global Commission Report, 2011: 2).

In 1961 the United Nations held a conference for the adoption of a single convention on narcotic drugs. The motivation for the convention was partly in recognition of the fact that due to increasing globalization there was an increase in illicit trafficking and drug use and that any effort to stem that would require cooperation on a universal level as well as the negative impact of drug use on societies. In the preamble to the 1961 Convention it is stated that the Parties to the conventions are concerned with the health and welfare of mankind and are conscious of their duty to prevent and combat the evil of drug addiction (UN Single Convention on Narcotic Drugs, 1961, preamble).

Based on a review of the literature it appears that despite all the money, effort and military assistance poured into controlling and preventing drug production, trafficking and use, drug use is still prevalent among societies around the world. US ‘drug war’ spending amounts to \$15.5 billion in 2010, (\$10.5 billion of which is spent on law enforcement and interdiction) (Fox News 2010 <http://www.foxnews.com/world/2010/05/13/ap-impact-years-trillion-war-drugs-failed-meet-goals/>). It is difficult to determine the total amount spent specifically on the drug problem in South Africa but US aid to Africa , including South Africa has increased from \$ 0.5 Million in 2006 to \$ 7.5 Million in 2010 (Cook & Wyler, 2010: 33). The above concern is encapsulated by the claim “The war on drugs has failed”. The term itself is an interesting one which warrants further discussion in light of the fact that it is a metaphorical term and as such has implications for how the analogy between a war and the collection of anti-drug policies and drug use is approached

### **2.3 Meaning of the term “war on drugs”**

A war implies a winning side and a losing side and the relationship between the two is characterised by a struggle, that is, until the winner and the loser have become clearly defined. While there is undoubtedly a continuous struggle occurring with regard to drug use, the analogy becomes murky when carried further. Who are the potential winners or losers? It is problematic trying to claim that the war is waged by humans on drugs, because there is nothing that the drugs are themselves doing to wage war on us, they are inanimate. Should it

be said that the war is waged on drug-users by non-drug users? This claim does not hold ground either, because how should we decide what winning entails, and what is meant by saying that the war has failed? Are those who use drugs the enemy? And if so, whose enemy are they? To claim a victory in this war all non-drug users would have to unite against all drug-users and presumably find ways to diminish the number of the other. If it is claimed that this war has failed, does that mean that drug users are overpowering non-drug users? This seems a peculiar and incorrect description of how the drug situation is perceived.

The description favoured in the literature is one which portrays the war being between the state and drug traffickers, or organised criminals. What is left vague in this effort to prevent drug use is the position of the individual user. It is not reasonable to include individual drug users in the war against drug traffickers as they are predominantly at the mercy of traffickers as well as physiological addiction.

This situation doesn't appear to be adequately described by the term "the war on drugs". This 'war on drugs' bears very little meaning for the addict as an individual, although it is probable that he will become caught up in it. Whilst the term may be used to refer to the efforts of states to curb international organised drug trafficking (a preferable alternative would be the "war on drug traffickers") it seems to have been appropriated to include the drug user on the street. Somehow he has become a part of this war and it is unknown whether he is the enemy or the victim. This misappropriation of an ill-coined term has not only failed to be useful in describing the situation accurately, but has possibly also been harmful in perpetuating a misinformed perspective of drug use in general. On a superficial level the metaphor describes the current perception towards the problem of drug use as something which should be defeated, however, when the analogy is teased out, the metaphor fails and has resulted in the drug user himself being perceived as an enemy. This is contrary to the compassionate motivation which proposes to underlie drug policy.

The 1961 Convention states its mission as being to protect the health and welfare of mankind. By this does it mean the welfare of the individual or of society at large? If it is assumed that the Convention aims at protecting both society and the individual it must be acknowledged that the two have very different implications for how the drug problem ought to be dealt with. The method used for securing general welfare in theory (ie, drugs are harmful therefore drug use should be prevented, therefore drug use and related activities should be criminalized) is not necessarily going to help the drug addict to break his or her addiction. There may be a

war between states and drug traffickers but insofar as the individual drug addict is concerned the only war is with him or herself. The same reasoning cannot be applied to both of these scenarios. A public policy that will be effective in dealing with a drug problem will be one which is effective in aiding the individual to fight his or her own war against drugs and avoid including individual users in the war against drug traffickers as well as addressing the larger problem of drug trafficking. The policy will need to incorporate different approaches to each of these problems. The merits of legalization with regard to addressing drug trafficking are worthy of discussion however this is not possible within the scope of this paper which will henceforth be concerned with policy insofar as it concerns the individual drug user.

What has been established is that drug use has been a part of human existence for a long time, and the function of drugs has been more or less constant. People use drugs because they believe it will bring about some change in their lives. Perceptions towards drug use have varied over time. In India, intoxication was perceived as an act of worship. However, the current majority perception towards drugs is that they are an evil to mankind. The aspects of abuse and addiction are perceived in a negative light and this perception is encouraged and perpetuated on a global scale especially by the term 'the war on drugs'. It was suggested that this term has played a role in painting the drug user in an overwhelmingly negative light. The struggle to decrease the prevalence of drug use is one that continues in most countries. Finally, it was suggested that the individual drug user needs to be taken into account when considering drug policy. In order to lessen the drug problem, the number of individuals choosing to use drugs must be decreased. The struggle against drug use and the resulting burden will cease to fail when individuals are empowered to refrain from choosing to use drugs

### **3. DRUG USE IN SOUTH AFRICA**

As previously mentioned, the most important question for policy makers to ask is ‘why do people take drugs?’ Currently drugs are negatively perceived and there is a global interest in lessening the prevalence of drug use. This is manifested in the concept of the “war on drugs”- but this term needs to be carefully approached in terms of who or what it is directed at. Drug policy should empower individuals to make drug free choices, not include them in the global war against drug production and trafficking.

In this chapter, a brief history of drug use and policy development in South Africa will be provided, in order to show the impact of the international ‘war on drugs’ in the country. This will be followed by a discussion surrounding current drug use trends and the impact of substance use on the country. The chapter will also include a brief analysis of South Africa’s current drug policy in terms of its punitive elements as well as its preventative elements and approach to treatment. Given this information, the question of whether ‘the war on drugs’ has failed in South Africa will be considered.

#### **3.1 A History of drug use in South Africa**

It is surmised that cannabis made its way into South Africa via Arab trading circles (UNODC Country Profile South Africa, 2002: 11). South Africa’s drug history is constituted mainly by cannabis use. The use of drugs such as heroin and cocaine and other synthetic drugs only became prevalent more recently. This is partly due to the influence of apartheid on the freedom of trade and resulting unavailability of these drugs (Peltzer et al, 2010: 4). Cannabis, once introduced to South Africa, became a popular substance and due to suitable conditions, cannabis cultivation began (Paterson 2009: 24). According to Paterson, ethnographic evidence suggests cultivation amongst tribes was commonplace during the 18<sup>th</sup> and 19<sup>th</sup> centuries but the use of the drug amongst members of society, although acceptable, was closely regulated by the tribal elders and important members of the society. In an interview he uncovered the following:

The adult is able to control himself; he takes a whiff of the pipe or the horn, and he passes spittle through a stick onto the floor, and makes figures; and passes on the horn to his next neighbour; but he does not use it to excess. (Paterson, 2009: 49)

This suggests a time in South Africa's history when cannabis intoxication was not taboo among certain societies. This could be partly due to the fact that there was no stigma of illegality attached to the act of becoming intoxicated and because it was an act regulated by the 'wiser' members of community. Paterson uncovers what could be termed a 'tradition' of cannabis use.

The first available government publication regarding cannabis use is the Natal Indian Immigrants Commission Report, 1887 (IICR); the general claim was that cannabis intoxication was injurious to the constitution of the Indian worker, and incited violent behaviour and so proposed the prohibition of the sale or use of cannabis (IICR cited in Paterson 2009: 43). In the Cape colony, there was a similar concern with reference to coloured workers, and cannabis use was successfully prohibited in 1891 in the Cape setting a standard of prohibition subscribed to in other areas. (Paterson, 2009: 46-47).

Paterson suggests that the concern surrounding cannabis was motivated by a fear of interracial contact rather than an actual concern about the effects of cannabis, because as far as native Africans were concerned, the Report only recommends the banning of trade in cannabis based on its recognition that African natives were selling cannabis to Indian workers and whites (Paterson 2009: 46). It was thought that through this interracial contact, moral degeneration was facilitated.

However, the arguments raised against cannabis use by the Indian worker in the Indian Immigrants Report (worker indolence and violent behaviour) provided the grounds for continued debate surrounding the merit of prohibiting cannabis on a larger scale (ibid).

### **3.2 South African Drug Policy**

Prohibition was generally accepted since the early 18<sup>th</sup> century and national prohibition was legislated in 1992 with the Drugs and Drugs Trafficking Act, No. 140 of 1992. The purpose of the Act is:

To provide for the prohibition of the use or possession of, or the dealing in, drugs and of certain acts relating to the manufacture or supply of certain substances or the acquisition or conversion of the proceeds of certain crimes; for the obligation to report certain information to the police; for the exercise of the powers of entry, search, seizure and detention in specified circumstances; for the recovery of the proceeds of drug trafficking; and for matters connected therewith (Drugs and Drugs Trafficking Act, No. 140 of 1992).

Although the prohibition of drugs came about in response to fears with regard to cannabis it extended to other ‘dangerous dependence producing substances’ listed in Schedule II of the Act. No 140 of 1992 (see appendix I). If one of the reasons which lead to the prohibition specifically of cannabis was the prevention of interracial contact, then it is imperative that the 1992 Act be re-examined. Such a motivation should not be allowed to linger in post-apartheid South African policy, even if it is not the specifically recognised reason for the policy. J.S Mill highlights the importance of ensuring that custom does not become a surreptitious influence on governance, as custom is opinion based and likely to change (Mill, 1860: 5).

This legislation forms part of the county’s use and reduction strategy insofar as drug policy is concerned. The policy also incorporates a demand reduction strategy in the form of measures aimed at the prevention of substance abuse as well a harm reduction strategy (to a limited extent) which provides for treatment of substance abuse. This is legislated in The Prevention of and Treatment for Substance Abuse Act, No. 70 of 2008 which has been assented to but not yet promulgated. The purpose of this Act is:

To provide for a comprehensive national response for the combating of substance abuse; to provide for mechanisms aimed at demand and harm reduction in relations to substance abuse through prevention, early intervention, treatment and re-integration programmes... (The Prevention of and Treatment for Substance Abuse Act, No. 70 of 2008)

It also sets out to establish treatment centres, a Central Drug Authority and to provide for other connected matters. (ibid)

The other piece of documentation worthwhile considering in regard to South Africa’s drug policy is The National Drug Master Plan, (NDMP) 2006-2011 which “sets out the country’s national policies and priorities in the quest to build a drug-free society and to fight substance abuse” (NDMP 2006: 6).

The reason for the Master Plan is as follows:

Sections 10 to 12(1) of Chapter 2 of the Constitution of the Republic of South Africa, grants citizens the right to have their dignity respected and protected, the right to life, and the right to freedom and security.

To realise these rights the South African Government is committed to reducing both the supply of illegal drugs and the demand for them through a wide range of actions and programmes. (NDMP, 2006, chapter 1)

The aim of policy is to protect South African citizen's rights. The aim of the drug policy is to protect the South African citizen from harm caused by others and to an extent from harm to self, but should ensure that the individuals various freedoms are not infringed upon to an unreasonable or unjustifiable extent. In *Prince v The President of the Law Society of the Cape of Good Hope 2002 (2) SA 794 (CC) (Prince v President)*, the constitutionality of cannabis prohibition has been challenged with regard to the use of cannabis for religious purposes. The claim was that general prohibition of cannabis fails to take into account the religious freedoms enshrined in the Constitution, and is for that reason unconstitutional (*Prince v President* at paragraph [96]). The panel of judges were almost equally divided with regard to the concern that prohibition in this particular case was unconstitutional; indicating that debate about the subject is still required. The majority view was that an exemption for religious use of cannabis should not be made. The constitutional rights of the individual to freedom of religion and practising that religion were emphasized in the judgement, as was the importance of the limitation that had been placed on those rights, in other words, the prohibition of cannabis (and other drugs) based on the belief that the use and abuse of cannabis may cause psychological and physical harm, and the need to protect society as a whole from this (*Prince v President* at paragraph [52 – 53]). The core issue highlighted by the case is the importance of allowing the individual sufficient freedom to act autonomously as well as the occasional necessity of restricting that freedom in the name of protecting the interests of society. Sometimes constitutional rights are justifiably limited. This is partially the rationale behind the Master Plan.

South Africa's current drug policy is largely motivated by the concern that substance abuse is not only a danger to the individual but also a danger to society. It impacts everyone, whether directly or indirectly; it is a "social pathology" (Nelson Mandela cited in NDMP, 2006: chapter 1) Substance abuse is an action which can be constituted as a harm to self but the

issue surrounding whether the state is justified in interfering with the behaviour of the individual on these grounds is controversial, and those who advocate interference on these grounds are often accused of legal paternalism which is in contradiction with the South African citizen's constitutional rights. A more promising approach is to claim that substance abuse is perceived as harmful to others and it is the state's duty to protect its citizens which justifies intervention. There are numerous areas of focus mentioned in the Master Plan, some of which are: Crime, youth, poor and vulnerable groups and health, as well as communication and international involvement (ibid: 2). Under each of these areas of focus the Master Plan lays out the involvement of different sectors of society and certain issues related to each of the areas.

### **3.3 Harm reduction in South African drug policy**

The 1999 Master Plan addresses the issues of harm reduction and decriminalization but neither of these are addressed in the 2006 Master Plan. With regard to decriminalization, the 1999 Master Plan acknowledges the debate and that further research needs to be conducted with regard to whether decriminalization is the way forward in South Africa (National Drug Master Plan 1999:19). Decriminalization is not considered by the 2006 Master Plan.

In terms of harm reduction the 1999 Master Plan states that it is understood that the primary concern of the philosophy of harm reduction is to reduce the harm associated with drug use rather than eliminating drug use per se; and that given that a drug free society is unlikely to exist, harm reduction policies may evoke controversial methods in the name of rendering the act of substance use 'safer' (NDMP 1999: 19). In the Netherlands a policy of discretion in terms of cannabis is applied as part of a more comprehensive harm reduction plan (MacCoun & Reuter, 1997: 48). They argue that the policy avoids excessive punishment of the casual user and weakens the link between soft and hard drugs (ibid). The 1999 Master Plan can be contrasted with the more recent Master Plan which claims to set out to achieve a 'drug free society' and places a heavy emphasis on demand reduction and use reduction but doesn't seem to pay any attention to harm reduction (NDMP, 2006)

The 2006 Master Plan acknowledges the need to create an environment which is not conducive to drug use as well as to have regulations in place which are directed at reducing

the demand for drugs. It seems-though-to have disregarded the potential usefulness that harm reduction measures could provide. Is this a progression or regression in policy? The arguments put forward by the Global Commission Report would undoubtedly argue in favour of the latter. However, what is the drug situation in South Africa today? Is the practical application of South African drug policy successful in addressing the problem presented by drug abuse? The following will provide some information regarding the current status of drug use in South Africa. Based on this information it will be argued that South Africa does have a heavy drug use burden and that current policy is not adequate to address this problem.

### 3.4 Drug use trends in South Africa

The UNODC Country profile of South Africa describes the drug situation as follows:

South Africa is a society in transition. Drug use correlates strongly with the pressures placed upon social capital by rapid modernization and the decline in traditional social relationships and forms of family structure... Another factor contributing to the *increased prominence* of illicit drug use in South African society is high unemployment. Among the non-White population, social injustice and the weakened family bonds which resulted from decades of apartheid policies have created an environment in which temporary escape from the harsh reality of everyday life is often sought through the consumption of psychoactive substances. (UNODC, 2002: 7 emphasis my own)

It is further suggested in a study regarding illicit drug use in South Africa that changes in the political, economic and social structures have resulted in rendering the population of the country more vulnerable to drug use (Peltzer, Ramlagan, Johnson & Phaswana-Mafuya 2010: 2).

Apartheid played a role in preventing drugs such as heroin and cocaine from being imported into the country; however, upon South Africa's reintegration back into the global community and market, the country has become fertile ground for importing drugs, thereby increasing demand. It is also conveniently geographically located so as to be used as a trans-shipment point (Nation Master UN Stats 2002

<http://www.parl.gc.ca/Content/SEN/Committee/371/ille/library/dolin1-e.htm>).

### 3.4.1. Statistical evidence

It is difficult to determine the prevalence of illicit substance use in South Africa due to the lack of recent national drug use surveys. This is evidenced by the fact that in the World Drug Report (2011) the upper and lower estimates of the number of illicit past year drug users differ by up to 4,000,000 in relation to cannabis and up to 500,000 in relation to other drugs such as cocaine and amphetamines (p.24). This vast variation shows the lack of evidence regarding the severity of substance abuse in the country. According to Peltzer et al (2010), the most comprehensive and recent information on the prevalence of substance use is presented as parts of surveys designed to gather other information, but which include questions about drug use. They used these surveys together with information regarding arrests and incarceration provided by the South African Police Service in order to compile information regarding the prevalence of illicit drug use in South Africa. Their findings were that prevalence rates seem lower than in countries such as the United States of America and Australia by about half in terms of cannabis as well as other drugs such as heroin and cocaine (Peltzer et al, 2010: 9). This may be due to South Africa's fairly recent integration into the global drug market or the difficulty of collecting accurate information due to lack of infrastructure in the country. It might also be claimed that South Africa simply does not have as bad a drug problem as other countries. This may be the case when compared to countries such as the United States, Australia and other European countries. However, when compared to other African countries South Africa does have a drug problem. According to Cook & Wyler South Africa is the largest consumer of illegal drugs and has the largest synthetic drug problem in Africa (2010: 27). However, as previously mentioned, the actual extent of the problem is unknown. According to the South African Police Service Crime Report 2010/2011 drug related crime has increased by 10.2% from 2009/2010 to 2010/2011 (SAPS, 2010: p.4)

The evidence available suggests that the drug problem is one that is sufficiently severe so as to warrant concern and intervention.

Information regarding drug use trends in South Africa can be gleaned from the South African Community Epidemiology Network on Drug Use (SACENDU). SACENDU is a network of researchers, practitioners and policy makers from various sentinel areas in South Africa who meet every six months to provide community-level public health surveillance of alcohol and other drug use trends and consequences through the presentation and discussion of quantitative and qualitative research data (SACENDU 2010:1). The study population

includes admissions to substance abuse treatment centres, which does not provide an accurate sample of the general South African population. Despite this, the network is able to provide valuable descriptive information regarding drug use trends in South Africa.

Pertinent information from the 2010 report includes that first time admission has increased from two thirds to three quarters of all admissions, indicating a greater demand for treatment. This could be attributed to an increase in substance abuse problems, or alternatively, that there is an increased number of individuals who are seeking treatment for their problem. Heroin, over the counter drugs and cocaine have the highest readmission rates, and there has been a general trend showing an increase in heroin/cocaine admissions except for in the Western Cape which displays a large increase in methamphetamine (tik) admissions. Across all sites 74-90% of admissions are male, although a greater percentage of heroin/cocaine admissions are female. 24-47% are employed full time and the average age of admissions ranges from 28-34 with alcohol and cocaine admissions being generally older and cannabis/heroin/methamphetamine admissions being generally younger (SACENDU, 2010: 3-5).

Across most sites alcohol was reported as the primary substance of abuse and the mean age of the admissions for alcohol was 38-40 years. Most admissions under the age of 20 reported cannabis or cannabis/mandrax as their primary substance of abuse except for the Western Cape in which it was found that methamphetamine was the most common substance of abuse. With regard to this particular sub population (cannabis users under the age of 20), the discussion surrounding decriminalization bears particular relevance in that this does not appear to be a group that should be considered as obvious candidates for criminalization. On the contrary, they could be perceived as a vulnerable group and criminalization will only serve to increase that vulnerability. The idea that criminalization has a negative impact on individual users and society will be discussed in chapter 5. With regard to the harder drugs (crack cocaine and heroin) the majority of admissions were white. This could be due to the fact that abuse of these substances is more prevalent in the white population, or that other races don't have adequate access to treatment facilities (ibid).

### 3.4.2 Reasons for drug use

What is seen is a variation in sub populations and their affinity to certain substances. If the general assumption that people use drugs to change something about their lives is held, then it is important to consider the motivating reasons behind drug use. A successful drug policy

will be one which addresses itself to the factors which result in drug use. Socio-economic status together with instability is considered by the UNODC Country Profile to be an influencing factor in substance use (see pg 19). For an example of how socio-economic factors have played a role in a specific South African community see appendix II. (A Case Study: Gangsterism, Drugs and the Cape Flats) While these socio-economic causes of drug use are not particular to South Africa, they are certainly prevalent in South Africa. Other reasons for drug use should also be considered.

The first of these is what will be called social drug use. Some conceptions of what social drug use is, are as follows: ‘people use drugs to enhance their enjoyment, pleasure or fun’, they don’t experience serious drug dependence related problems, their use of drugs doesn’t elicit complaints from others and this can mostly be explained by the fact that they never ‘cross the line’ or, ‘have too much’ ([www.alcoholanddrugabuse.com](http://www.alcoholanddrugabuse.com)). These are the perceptions of the public concerning social drug use posted on an alcohol and drug abuse website.

Another motivating reason for drug use is religion or tradition. An example is the case referred to regarding the use of cannabis for religious reasons. The appellant, a member of the Rastafari religion, upon trying to register his contract of community service with the Law Society of the Cape of Good Hope, was declined on the grounds that he had been convicted of cannabis possession twice before and his stated intention to continue to use. His use of cannabis was inspired by his Rastafari religion (Prince v President at paragraph [1-2]). The traditional or religious use of drugs is recognised by the Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances in saying that measures adopted shall take due account of traditional licit uses, where there is historic evidence of such use (1998, Article 14).

A final reason to be considered is the use of drugs such as cannabis for medical reasons. Recently there has been a focus in the media on the medicinal uses of cannabis in curing or dealing with cannabis. The discussion surrounding cannabis as a cure for cancer entered British Mainstream media through an interview with a young man who has a brain tumour and his father who is a cancer specialist. The young man has begun using cannabis as part of his diet based on anecdotal evidence that it has reduced tumours in other patients. His father is not in agreement with him but acknowledges the need to try anything at this stage of the cancer (Dyer, 2011 [http://www.youtube.com/watch?v=fdhbAmyif\\_Y](http://www.youtube.com/watch?v=fdhbAmyif_Y)).

What is seen is that there are a number of reasons which may play a role in influencing an individual's decision to begin using drugs. While the socio-economic factors seem to be particularly pertinent in South Africa given the discrepancy between the rich and poor and high unemployment rates, social, traditional, religious and medicinal factors should also be considered. Earlier it was submitted that discussions surrounding drug use and drug policy cannot exclude the reasons for drug use. Policy needs to take into account this plethora of motivating reasons and attempt to direct itself to each one. However, the difficulty of doing so must be acknowledged, especially in a country such as South Africa, given its diversity. This is one of the reasons for the blanket prohibition that currently characterizes South Africa's drug policy. Perhaps this is also one of the factors which render's that policy less than efficient.

### **3.5 The “war on drugs” in South Africa**

Has the “war on drugs” failed in South Africa? As has been discussed in the first chapter, the term is misleading and does not adequately describe the situation; but if the question is: ‘does South Africa have a drug problem that impacts negatively on society, and doesn't seem to show improvement?’, then the answer is yes. The Resolutions from the Second Biennial Substance-Abuse Summit held in March of 2011 has in its opening paragraphs the statement that all the parties gathered were offering their support to “help advance all efforts towards combating the scourge of alcohol and substance abuse that is ravaging our communities” (Substance Abuse Summit, 2011). These efforts should be seen as the mechanisms or policies which aim to address the problem of drug use. The general consensus of the leaders of the country seems to be that South Africa does have a drug problem that requires further effort to address it.

The first problem is that the drug problem has not been adequately investigated. From what is known, the conclusion can be drawn based on the increased admission rate to treatment centres, increased drug related crimes, an increase in the use of drugs such as cocaine and heroin and the presumed increased availability of these due to South Africa's reintegration into the global market, and its convenient location as a transshipment point. Perhaps in the case of South Africa, supply has increased demand, which has in turn increased supply.

It may be concluded that the “war on drugs” in South Africa has failed, but that is not enough to say; the question of ‘why’ must be asked. This returns to the notion of the individual who chooses to begin or to continue using drugs. It has been acknowledged that there are a variety of reasons which inspire individuals to use drugs. It is important to acknowledge and empirically explore these reasons, as the most effective way of dealing with the problem of substance abuse and related issues is by preventing drug use to as great an extent as possible.

#### 4. LIBERTY LIMITING PRINCIPLES AND JUSTIFICATION FOR POLICY

What has been shown in previous chapters is that individuals use drugs for a reason, and that reason has a great deal to do with external factors, which shape the individual's existence. . While drug use is the choice of the individual, it is an act that has the potential to affect more than just that individual. It has been argued that based on current drug use trends and other evidence such as drug related crime, South Africa does have a drug problem, thus, the state is required to intervene in order to secure the welfare of its citizens. The motivation for this intervention is often characterised in terms of preventing harm, or protecting rights.

In this chapter the relationship between the state and its citizens will be examined in terms of state interference in individual behaviour, and where that limit ought to be set. Mill's harm principle will be discussed in light of the current policy of criminalization. It will be suggested that the individual harm principle as it stands alone is not sufficient justification. This gives rise to the question of other liberty limiting principles, or justifications for the criminalization of drug use.

The scourge of substance abuse continues to ravage our communities, families and, particularly, our youth; the more so, as it goes hand in hand with poverty, crime, reduced productivity, unemployment, dysfunctional family life, escalation of chronic diseases and premature death. (National Drug Master Plan 2006:1)

The above quote makes it clear that the reasons behind South Africa's current drug policy are largely, although not solely, motivated by the concern that substance abuse is a danger to society. This might be rephrased in the following terms: substance abuse is an action which can be constituted as one which is harmful to others. The government intervenes accordingly, in order to protect the rights of the citizens of its country. This is a principle that is commonly known as the harm principle and is discussed by John S. Mill in an essay entitled *On Liberty* published in 1860. Mill is one of the first political philosophers to engage with the concept of the autonomy of the individual and the limits of state interference in the individual's behaviour. The harm principle has been addressed by subsequent philosophers but the fundamental essence of it remains consistent. Two common objections to the harm principle will be discussed. A close reading of the text reveals that both of these are acknowledged by Mill and will be discussed in the following.

## 4.1 Mill's Harm Principle

Mill's formulation of the harm principle can be stated as follows:

[The] only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical, or moral, is not a sufficient warrant (Mill, 1860: .9).

And

The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right absolute. Over himself, over his own body and mind the individual is sovereign (ibid).

Mill explicitly states that: "this doctrine is meant only to apply to human beings in the maturity of their faculties" (ibid). This highlights the duty of the state towards the individual as well as the duty of the individual towards the state and society of which he is a part of.

In support of decriminalization of drug use the basic argument from a harms based perspective is that using psychoactive substances is the choice of the individual and is a self-regarding action therefore state interference, in the form of the prohibition of drug use, is not justified. Advocates of the current policy of criminalization might claim that substance use is an action which impacts harmfully on others, and is therefore justifiably prohibited in terms of the harm principle. This philosophical concept regarding state interference in individual behaviour is reflected in the National Drug Master Plan as well as international conventions such as the 1961 Convention on Narcotic Substances; addiction to psychoactive substances is "a danger to mankind" and thus warrants state intervention. (United Nations, 1961: 1). The argument turns on the question of the degree of harm caused, how to define that, and the legitimacy of state interference.

### 4.1.1 What is harm?

The concept of harm is difficult to clearly define, particularly in a value laden topic such as drug use. For the purposes of the following discussion, harm will be considered as the violation of an interest (Feinberg, 1973: 94). This might encompass physical, emotional, psychological and social interests, perhaps even moral interests. The term, broadly

understood, might be used to describe actions which elicit feelings of moral repulsion, to actions which directly result in an individual suffering physical harm at the hands of an intoxicated person. If the working definition of harm remains so broad, almost any action could be construed as causing harm of some sort, to some person. The concept is difficult as an interest is not something which can readily be objectively defined and may legitimately vary from person to person.

In order to limit the concept of harm there are some further aspects that may be pertinent. These are: the concepts of direct versus indirect harm and actual versus potential or risk of harm. An action is thought to be directly harmful when it in itself constitutes a violation of an interest. This is a narrow conception of harm, but will be subscribed to on the grounds that if the definition is allowed to broaden any further, it becomes extremely difficult to contain. Indirect harm is a wider conception of harm and it occurs when an action initiates a causal chain which results in the violation of an interest. Actual harm should be associated with direct harm. Potential harm should be associated with any action that could begin a causal chain resulting in indirect harm. It must be noted that almost every action could be construed as being potentially harmful as a chain of events will be affected by other unrelated external factors. For this reason, it is only prudent to consider an action to be potentially harmful when there is an almost indubitable certainty that it will lead to harm. This will be further explored in a discussion regarding different substances and their effects.

The spectrum of psychoactive substances and their effects on the individual who uses them is large. A short term effect of cocaine use might be a predisposition to immediate violent or erratic behaviour, whereas a drug such as heroin results in feelings of relaxation and drowsiness (Alcohol and Drug Abuse Research Group-2008, [www.sahealthinfo.org/admodule/htm](http://www.sahealthinfo.org/admodule/htm)). Based on this knowledge it could be argued that cocaine and other drugs like it (stimulants) are more likely to result in immediate harm to others than depressants because of the effect that the drug has on the individual using it; it might incite acts of violence. In other words the act of taking cocaine has a greater potential to cause harm to others than the act of taking a depressant insofar as the question is one of violent behaviour. However, it might be argued that cannabis use is also a potentially harmful act due to its depressant effect on the cognitive functioning of the individual. For example an individual who causes an accident due to impaired alertness and driving ability due to recent use of could also be seen to have caused harm to others through his or her action of using cannabis. What is evident is that in the second case the action of taking a drug has a lower

potential to cause harm because there are other factors which also play a role in bringing about the harmful action. For example the intoxicated individual had to have chosen to drive a car in his or her intoxicated state. On the other hand, there may be individuals who use drugs and seem to avoid initiating these causal chains at all, at least in any way that is clearly distinguishable.

What the above illustrates is that the concept of harm-to-others is difficult to define and can quite easily be stretched to encompass a number of actions, particularly in the murky waters surrounding drug use. For this reason the most beneficial way to understand the concept of the individual harm principle, and harm to others, is by accepting that the action itself has to be what violates the interest of another in order for it to be an action which should be constituted as harmful to others. Following from this, it does not appear that the individual harm principle can be held as sufficient ground for justifying the criminalization of drug use. It is difficult to imagine an instance in which the act of taking drugs is directly harmful to another individual. However, it should be noted that while criminalizing the act of taking a drug such as cannabis is not justifiable in terms of the harm principle, the act of using cannabis and driving is, as it is an action which could result in direct harm to others. Alcohol consumption is not illegal, but driving under the influence of alcohol is.

## **4.2 Other liberty limiting principles**

The fact that the individual harm principle doesn't appear to sufficiently justify prohibiting drug use does not preclude the possibility of alternative liberty limiting principles which could justify prohibition. These will be discussed in terms of two objections to the harm principle as applied to drug use. The first is that drug use impacts others, even though not immediately or directly. This gives rise to the public harm principle. The second is the question of whether a drug user is acting autonomously and gives rise to legal paternalism.

### 4.2.1 Indirectly harmful actions

“No man is isolated” (Mill, 1860: 72). It follows from this that all actions are other-regarding actions, thus any harm that may appear to be impacting only the individual is

impacting on others as well. As previously discussed this seems to be the dominant attitude reflected in policy.

Mill does not promote the idea that individuals should be left to their own devices; rather he emphasises the fact that the individual has a duty to the “society which he enjoys the protection of” (Mill, 1860: 10). This translates into the notion that not only are there actions that an individual ought to refrain from carrying out- those that are harmful to others; but there are also positive actions that an individual should carry out such as sharing the burden of defence, saving a fellow creature’s life and protecting the defenceless against ill-usage (ibid). Mill is particularly concerned about the duty that a parent has to its child, arguing that if one takes on the responsibility of bringing a child into this world, then one is obliged to continue being responsible for ensuring that the child has as good a chance of making a success of its own life as possible (ibid: 95). In South Africa, children’s rights are specifically addressed by the Constitution in section 28. It is quite plausible to imagine a situation in which a parent with a drug habit deprives his or her child of its rights due to his or her addiction, and thus causes harm to the child.

Whilst Mill is particularly concerned with each human beings duty to other human beings, especially children, he does not seem to think that this is a good reason for a policy of prohibition regarding actions which cause this kind of neglect, or failure to fulfil one’s duty to society. He claims that it is the harm to society which is justly punished, but not that which leads to it. A father who fails to provide an education for his child because he is a drug addict should be looked upon with the same disapprobation as a father who neglects to provide for his child in this way because he has lost all his money in a poor investment. The point of Mill’s argument seems to be that when harm has come to society through a substance abuser’s habits, it is the harm that should be the subject of prohibition and retribution, rather than the act which has the potential to cause the harm. A system which punishes X for the reason that it caused Y but does not punish Z which also causes Y is a flawed system. And the best way to avoid this is by directing the prohibition and retribution directly at the occurrence of Y. Drug use may be indirectly responsible for causing harm to society, but there are many other actions which can result in similar harm, such as poor wealth management or gambling. It is not consistent to prohibit drug use and not these other actions based on the harm principle.

The concern that no man is isolated is accommodated by Mill when he acknowledges that one of the undisputed functions of the state is to take precautions against crime being committed (Mill, 1860: 87). This is captured by the public harm principle, according to which the state is justified in limiting the rights of an individual on the grounds that his or her chosen actions will undermine institutional practices and regulatory systems that are in place (Feinberg 1973: 92). This can be compared to a constitutional limitation of a right and is the stance that South Africa has taken in regard to drug policy. This is exemplified in the *Prince v President* case in which the prohibition of cannabis was held to be constitutional despite being a limitation of the rights of certain individuals and groups who profess to use cannabis for reasons that are otherwise constitutionally supported. For this reason, it will be held that in South Africa some version of the public harm principle does provide at least partial justification for the prohibition of cannabis. However, it does not appear that prohibition based on the public harm principle should necessarily be translated into criminalization of individual users. As Mill claims, prohibit the gambling house, but the state is not justified in preventing the individual from gambling. This will be discussed further in chapter 5

#### 4.2.2 Are drug users acting autonomously?

The second point is that which claims that an individual who is acting from an impaired autonomy or irrationally should not be considered as subject to the harm principle and its implications (ibid: 73). We might argue that an individual caught up in substance abuse is not someone who is capable of making that choice autonomously and therefore the state is justified in interfering with that individual's actions. Autonomy is valued as that which allows the individual to make choices which he or she believes to be the best choice for his/herself (Christman, 2001). Thus it is a concept which underlies a great deal of human rights. The harm principle is based on the assumption that what a person chooses is *prima facie* best for them and that no entity apart from the individual can decide what that person desires. The principle would lose its force if it were to be shown that the drug user is not making the choice to use narcotic substances autonomously. Mill argues that the one choice that can be interfered with regardless of whether it is harmful to others or not, is a choice to sell oneself into slavery because that is a choice which strips one of one's own freedom (Mill, 1860: 93). Might we consider the choice to begin taking drug as akin to selling oneself into a

kind of slavery? Does the element of compulsion remove the autonomy from a choice to use drugs?

In response to this it might be argued that drug addicts only come under this compulsion once they have become addicts; they didn't make the initial choice to begin using drugs because of it. Further, just because a decision does not appear to be rational to an observer, this does not entail that the individual does not act autonomously. One of the concerns from the Prince case is the importance of maintaining an open society, in which individuals are free to make their own choices (Prince v President at paragraph [170]). It is plausible that an individual may choose to use drugs while in complete possession of their faculties. To prohibit drug use on the grounds that it cannot be a choice made by an autonomous individual would be detrimental to the freedom that characterizes the South African Constitution which has arisen out of a past in which freedom was very restricted. For this reason impaired autonomy should not be considered a justifiable reason for the blanket prohibition of drug use. Obviously this does not apply to those who are not in the "maturity of their faculties" such as children. To some extent state interference or legal paternalism is justified in the case of minors. For example, smoking under the age of 18 is illegal in South Africa, but it must be noted that the restrictive measures are aimed predominantly at those who sell cigarettes to those under the age of 18. The rights of the individual who is under 18 are restricted by the state but in such a way that avoids criminalizing those individuals. Perhaps this way of thinking should be adopted in terms of re-evaluating drug policy.

What has been established thus far is that Mill's harm principle as it stands alone is not sufficient justification for a policy of criminalization as regards drug use. For the most part the action of using a drug cannot legitimately be constituted as an action which is directly harmful to others. The point was made that no man is isolated and so the individual's actions always impact indirectly on others. This thought gives rise to justification based on a public harm principle which seems to be the basis for the current policy of criminalization in South Africa. It was found that legal paternalism is not sufficient justification for the prohibition of drug use. Freedom is highly valued in South Africa given its history and the right to make one's own decision regardless of whether they appear to be bad decisions or not is enshrined in the Constitution.

The findings of this chapter applied to South African drug policy reveal that while the public harm principle may provide some justification for prohibition, the application of the principle is not necessarily consistent as there are other actions which are detrimental to society and yet have not been prohibited. Further, the importance of autonomy was reinforced. State interference is not justified by legal paternalism. Legal paternalism raises the issue of what Mill terms 'custom' which has been previously mentioned. Policy must be justified apart from society's opinions of particular behaviours. A question to be asked is whether South African drug policy is free of the biases of prevailing opinion. Smoking is thought to be harmful, yet it is legal, within certain parameters. Perhaps a similar approach needs to be considered as far as drug policy is concerned. Finally, even if a policy is justified in terms of principles, the final justification which is sufficient is that the policy is achieving its purpose. The next chapter will address the issue of this final justification. Is drug policy effective in addressing the drug problem in South Africa?

## 5. THE GLOBAL COMMISSION REPORT

In the previous chapter Mill's harm principle was considered in relation to criminalization of drug use. It was found that the individual harm principle does not sufficiently justify a criminalization policy, but that drug use is harmful to society and so state involvement in addressing drug use should not be ruled out. There are other principles which also provide justification for the government creating and enforcing laws. One reason for prohibiting drug use could be found in the public harm principle, and this is a sentiment portrayed in South African drug policy. However, a policy may be justified in principle but it could be ineffective. This renders the justification pointless. A policy should be evaluated from two aspects, its philosophical/ethical justification and its effectiveness. Both are necessary conditions for a good policy. The death penalty may be the most effective way of decreasing the number of murderers in a country; it does not follow from this that such a policy is ethically justified. Conversely, it should not be assumed that because a policy can be ethically justified that it is effective. The effectiveness criterion has to be evaluated based on evidence regarding the results of its implementation. Prohibition, particularly of cannabis, and possibly other substances, is a limitation of an individual's constitutional rights-which may be ethically justified-, but is it a limitation which effectively serves its purpose, in the least repressive way.

The rights in the Bill of Rights may be limited 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 ... less restrictive means to achieve the purpose (Constitution of the Republic of South Africa s (36) (e))

Is the restrictive nature of South African drug policy justified by the fact that it is successfully addressing South Africa's drug problem, or that it is the most likely approach to be successful? Another way of phrasing this could be to ask 'Is criminalization the most appropriate way of dealing with the drug problem in South Africa?'

There has been a global movement towards establishing an answer to this question as it applies internationally. A recent Global Commission met in order to discuss 'drugs policy' and to propose decriminalization, amongst other things, as the way forward in dealing with the drug problem. This chapter will give an overview of the arguments provided by this

Commission Report, contextualize them within South Africa, and attempt an analysis of these arguments.

### 5.1 The Global Commission Report, (2011): An overview

In June of 2011 a Global Commission Meeting was called in order to address the perceived failure of the “war on drugs”, specifically drugs policy, and to develop principles and recommendations which would influence and guide new drug policy making. Commissioners included the former presidents of Mexico, Colombia and Brazil, the former UN General Kofi Annan, Louis Arbour and Richard Branson, a popular, influential figure (Global Commission Report on Drugs Policy, 2011: i). Some of the statements to be found in the executive summary are: “fundamental reforms in national and global drug policies are urgently needed...expenditures on criminalization and repressive measures have clearly failed to effectively curtail production or consumption... repressive efforts invade public health measures...” (ibid: 2). The gist of the report is that prohibition and punishment has brought about great harm. The focus should be on dealing with drug addicts perceived as patients not criminals and that countries should experiment with non-prohibitive policies with regard to some drugs, such as cannabis.

The Report (ibid) will be discussed under the following principles:

Table no. 1 Main Principles and Corresponding Recommendations based on the Global Commission Report on Drugs Policy (2011)

Principles	Corresponding Recommendations
Human Rights	<ol style="list-style-type: none"> <li>1. Break the taboo</li> <li>2. Replace the criminalization and punishment of people who use drugs with the offer of health and treatment services to those who need them.</li> <li>3. Challenge rather than reinforce the common misconceptions about drug markets, use and dependence</li> <li>4. Promote alternative sentences for small scale and first time drug users</li> </ol>
Evidence based policy	<ol style="list-style-type: none"> <li>5. Establish better metrics, indicators and goals to measure progress</li> <li>6. Invest more resources in evidence based prevention , with a special focus on youth</li> </ol>
Collective Global effort	<ol style="list-style-type: none"> <li>7. Encourage experimentation by governments with models of legal regulation of drugs that are designed to undermine the power of</li> </ol>

- organized crime
8. Countries that continue to invest mostly in a law enforcement approach should focus their repression on violent crime and drug traffickers

## 5.2 Human Rights

1. *Break the taboo.*
2. *Replace criminalization and punishment of people who use drugs with the offer of health and treatment services to those who need them*
3. *Challenge rather than reinforce the common misconceptions about drug markets, use and dependence.*
4. *Promote alternative sentences for small scale and first time drug users*

These recommendations all speak to the issue of the drug user as an individual who should be perceived as a candidate for intervention in terms of health related matters, not a criminal. J P van Niekerk makes the point that drug use is at worst a vice, not a crime, and that to punish those who abuse drugs is criminal in itself (Van Niekerk 2011: 1). One

of the general suggestions made by the Commission report is that criminalizing drug users does not respect the human rights of the individual who finds themselves in the grip of physiological addiction.

### 5.2.1 Does Criminalization fail to respect Human Rights?

The Human Rights Charter states that individuals are to be awarded rights without distinction (United Nations, Human Rights Charter, article 2). The South African Constitution uses the term 'discrimination'. The concern is that criminalizing drug users often results in denying them other rights such as the right to have their dignity respected and the right of access to healthcare etc. (Constitution of the Republic of South Africa s (9) and (27)). This occurs mostly due to the marginalization that drug users experience due to the stigma of criminality. It is even more difficult to integrate drug users back into society once they have been criminalized.

### 5.2.2 Treatment versus Punishment

If we return to the motivation behind International drug conventions, and presumably South African drug policy which derives from them, it is found that one of the primary reasons for the Convention is the intention of reducing human suffering (United Nations, 1988 article 14.4). The 1961 Convention requires that “parties... shall... take all practicable measures for the prevention of the abuse of drugs and for the early identification, treatment, education, after-care, rehabilitation, and social integration of the persons involved” (United Nations, 1961, article 38). The aim of drug policy is to ‘help’ those who develop substance dependences. Perhaps overzealous persecution in an attempt to gain control of the situation has resulted in negative consequences for the individual user, those surrounding them and the infrastructure of South Africa which is required to deal with a constant influx of ‘criminals’ into the justice system. A paper entitled *From coercion to cohesion: Treating drug dependence through healthcare not punishment* concludes thus:

In responding to the problem of drug use, many countries have introduced severe penalties for drug use and related crimes which have resulted in large numbers of people in prisons... without significant long term impact on drug use, drug dependence, or drug related crime in the community and are in contradiction with human rights. (UNODC 2010:10)

It then goes on to specify ways in which treatment can be presented as an option to drug users instead of criminal justice sanctions. (UNODC 2010: 10-11)

The essence of the argument is that criminalizing those who are substance abusers is unlikely to change the fact that they are substance abusers. Further, the resulting stigmatization acts as an obstacle to drug addicts seeking and being provided with the help they require in order to be integrated back into society. The problem of a criminal community is referred to in the study of the Cape Flats. (see Appendix II)

Is this a recommendation that is applicable or implementable in South Africa? South Africa’s Constitution is based on Human Rights. The actual legislation surrounding substance use appears to be sufficient in directing drug policy towards being human rights orientated. Prevention and treatment are a primary focus in South African drug policy. The Resolutions of the Biennial Substance Abuse Summit which was held in March of 2011 provide support for the view that prevention, treatment and rehabilitation are important factors of dealing with the substance abuse problem. For example, resolution 23 acknowledges the need for the

“Implementation of a continuum of care and a public health approach that provides for prevention, early detection, treatment, rehabilitation and after care services” (2011) However, nothing was mentioned in regard to the damaging stereotype attached to substance abuse. The move seemed to be towards harsher law enforcement measures as will be discussed below; accordingly, substance abusers will remain criminalized, stigmatized and marginalized in South African society. The negative perception of society towards drug users could play a large role in negating the effectiveness of policy that sets out to help these individuals. The act of decriminalization might be one which is useful in changing the perception of society towards drug users. This will result in a more cohesive effort between the state and the community to decrease the burden resulting from drug use.

### 5.3 Evidence based policy

These recommendations speak to the supposed lack of evidence supporting drug policy. Two aspects will be considered in the following: the first being evidence based ranking of harmful substances and secondly the issue of the actual versus the perceived effect that drug policy has on individuals.

5. *Establish better metrics, indicators and goals to measure progress*
6. *Invest more resources in evidenced based prevention, with a special focus on youth.*

#### 5.3.1 Establishing the harmfulness of different substances

In terms of the harmfulness of different substances it has been argued that the classification has been less than scientific. Nutt et al have developed a ‘rational scale’ by which they claim the harmfulness of a substance which has the potential to be abused can be assessed for harm. They specify three categories of harm (physical harm, dependence and social harms) which are then further broken up into long and short term harms (2007: 1047). Based on this scale they go on to rank commonly used drugs such as heroin, cocaine, cannabis, and include licit substances such as alcohol and tobacco. They found that alcohol was ranked 5<sup>th</sup> most harmful and tobacco was ranked at 9<sup>th</sup> whereas cannabis which is an illicit drug was ranked at number

11 (ibid: 1051). This lends support to the concern that the current policy is not based on scientific evidence, given that its purpose is to prevent harm. Should cannabis be as strictly prohibited as cocaine, and if alcohol is ranked 5<sup>th</sup> in terms of its resultant harm, why is it legal whereas cannabis is illegal? Based on this and other evidence, the Global Commission Report suggests experimenting with decriminalization of cannabis. Perhaps in South Africa, a prior step would be to conduct research into the effects of cannabis on the South African population. While it may be so that cannabis is less harmful than cocaine and alcohol, the fact remains that cannabis is one of the most prevalent primary substances of abuse among South Africans (SACENDU 2010:3). Wilson argues that legalization would open the floodgates to widespread abuse and addiction (Wilson, 1990: 24). Perhaps the same concern applies to decriminalization of cannabis in South Africa. Prohibition must have some positive impact on limiting the drug problem in terms of how it restricts the accessibility and availability of substances by rendering them illicit. Here it must be noted that decriminalization does not entail that drugs would become freely available. Decriminalization focuses on lessening the punishment imposed on the individual user but does not rule out the possibility of regulation of drug use. If decriminalization were to be considered in South Africa regulation would be an important aspect of the policy, and one which requires further development.

This brings to light the issue of how drug policy, specifically that of prohibition claims to impact the drug problem apart from affecting the availability and accessibility of drugs.

### 5.3.2 Prohibition as a deterrent

It can be assumed that a large part of the aim of prohibition is to provide a reason for an individual to avoid using drugs, namely that it is a criminal offence. This is based on classical deterrence theory and the rational choice paradigm. Deterrence theory is based on the assumption that human beings are essentially hedonistic-in Bentham's terms- and rational (Bentham, 1781). This means they have the capacity to make choices that will bring about the greatest happiness or utility. Deterrence theory applied to drug policy will take into consideration the amount of pleasure or happiness that drug use brings about in the user and then formulates a penalty which has the potential to bring about a greater measure of unhappiness in order to counter-balance the influence on the individual's choice making (MacCoun 1993: 498). The threat of potential punishment needs to be severe enough to cause the individual to make a choice not to use drugs; the severity of the threat is provided by the

fact that it is a criminal act, and could result in a criminal record, imprisonment or fines. As Wilson reminds us, this threat is coupled with the fact that drugs are far more expensive when they are illegal, and more of a health hazard due to impure substances, adding extra weight to the negative utility of a choice to use drugs (Wilson 1990: 22). Resolution 15 from the Substance Abuse Summit states that it should be “[ensured] that the criminal justice system becomes an effective deterrent for offenders through harsher punishment of drug related offences, including the seizure of assets” (Substance Abuse Summit, 2011: resolution 15)

The rational choice paradigm that is often used to explain and justify drug prohibition policy is called into question by MacCoun. He highlights that deterrence theory is a perceptually based theory; in other words drug policy can only influence drug users’ behaviour by the perception that the drug user has of it, or the perception it creates of itself (MacCoun, 1993: 499). A first time user is not going to be swayed by a policy that he thinks will have no implication on him, or even if it does, is one that he doesn’t care about. This is even more pertinent in the case of the experienced user who has used drugs many times before and never been caught, and is caught up in the addiction of his habit.

MacCoun suggests two questions that are pertinent to conducting research in the area of drug policy and its impact. The first is ‘how accurately do citizens perceive the legal risks?’ The second is concerned with whether this perception, be it accurate or not, plays a significant role in deterring behaviour, particularly with relation to drug use (ibid: 500). These are both important questions within a South African context and bear looking into. Both require empirical research which can be used in further discussion surrounding the usefulness of drug policy.

The rational choice paradigm does not seem to take into account why drug users’ make the choices that they do. A criminalization policy influences factors such as punishment, availability and the price of drugs; but there may be other factors which influence the individual’s decision to initiate drug use as well as to continue. MacCoun suggests that there are psychological factors such as the self-concept, automatic cognitive responses and conditioned responses. (ibid: 502) These all take the choice to use drugs out of the rational choice paradigm and locate it within a realm of unreasoned influences. Also pertinent is the role that the physiological response of dependence plays in causing an individual to keep using drugs despite having an idea of the fact that it is not a habit or action which will be beneficial in the long term. These psychological and physiological factors, for the most part

are more prevalent once drug use has already become a habit; they reinforce the habit and are in turn reinforced by the habit (except for the self-concept which may prevent one from beginning use in the first place). This implies that criminal policy directed at habitual users might not be effective given that it relies on the concept that the user makes a reasoned choice to use drugs. However, the opposite is correct of initiate users who are more likely to make a 'reasoned' choice to use or avoid drugs; a policy which provides reasons not to take drugs may have an effect on them. It can be seen that drug policy may not necessarily have an impact on the individual's choice to use a substance, particularly if that individual is already an addict. One of the conclusions drawn from a study on drug use in Amsterdam and San Francisco was that the difference between drug use trends in the two cities were limited despite having very different policies, and so policies were considered to be less relevant than initially supposed (Reinarman, Cohen & Kaal, 2004:840). It is important to remember the futility of punishment that is groundless, inefficacious, unprofitable, too expensive, or needless (Bentham, 1781, Chapter XIII: 3).

In order to ascertain whether drug policy plays a role in impacting drug choices, consideration needs to be given to the motivation for using a substance, and how those drug choices are made. This area requires empirical research which will be particular to the South African population, and certain sub-groups of the South African population. Once evidence has been provided drug policy should be analysed in terms of how effective it is in deterring the South African population from making a choice to use drugs. If it can be shown that it isn't, then the policy is not fulfilling its purpose in preventing drug use.

In terms of conducting this research, South Africa has an established epidemiological network which provides information regarding treatment centres (SACENDU) and which could incorporate these questions and concerns into their research areas. Resolution 14 of the Biennial Summit proposes the establishment of a cross departmental operations unit; the purpose of which will be to "analyse drug production and trafficking trends, drug use patterns, develop and enforce policies and laws that will improve investigations, arrests, prosecutions and improve the legal framework with regards to confiscation of assets acquired through the proceeds of crime" (Substance Abuse Summit; 2011: resolution 14). The suggestion made by the Global Commission Report and echoed in this paper is that the development of policies should be solidly grounded on the findings from the proposed analyses that are to be undertaken, and should not be solely concerned with improving restrictive and punitive measures. It might be discovered, that prohibition policy has little

impact on drug use trends, and policy that continues to ignore this will continue to be ineffective. Another focus of the Biennial Summit was educating youth with regard to the harmful effects of substance use and abuse. It is strongly recommended that the information presented as a part of this education is based on evidence.

#### **5.4 Collective Global effort; taking into account the reality of diversity.**

What is made clear is that despite the call for decriminalization within certain boundaries that is made by the Commission report, drugs are not considered to be ‘good’ for humankind. It must be noted that a careless attitude does not inform the rationale behind the decriminalization. Decriminalization should be perceived as a part of the solution that is

7. *Encourage experimentation by governments with models of legal regulation of drugs that are designed to undermine the power of organized crime.*

8. *Countries that continue to invest mostly in a law-enforcement approach (despite evidence) should focus their repression on violent crime and drug traffickers.*

proposed by the Global Commission Report. Drug trafficking should still be considered as a crime, and drug related crime that affects the community should still be prosecuted. However, it must be acknowledged that

criminalization has a negative impact on the individual and the community and a possible remedy for this is to focus the repressive measures on drug trafficking as opposed to the individual. The issue of drug related crime in South Africa is particularly pressing as highlighted in the case study of the Cape Flats. (See Appendix II) An interesting aside, not within the immediate scope of this paper, is the issue of legalization and the power it might have to undermine the power of illegal drug trade and therefore the influence of drug dealers over individual users amongst other things.

According to the UNODC Country Profile from 2002, the policy of the South African Police Service was to focus specifically on large scale drug ‘busts’ and to turn a blind eye to minor offences involving possession and use of small amounts of cannabis (UNODC, 2002). The above suggests that South Africa has applied de facto decriminalization of cannabis, although to a lesser extent than the Netherlands. However, South Africa plans to continue to maintain and reinforce a law enforcement approach, given that it is stated in the Biennial Resolutions that it must be ensured that the criminal justice system becomes an effective deterrent for

offenders through harsher punishment of drug related offences, including the seizure of assets (Substance Abuse Summit, 2011: resolution 15). It also acknowledges the need to consider extraterritorial jurisdiction regarding drug trafficking (ibid: 18). While these resolutions are useful in dealing with trafficking, it is suggested that a harsher approach towards individual offenders will not have a significant deterrent effect. Punishing individual drug users is unlikely to have any long term impact in helping them to overcome their addiction. As discussed previously the societal drug problem begins with the individual user.

In order to direct the repressive measures at drug trafficking, it is necessary for the effort to be a global one given the porous borders of many countries and international transport. South Africa is a signatory to The United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, which dictates that their involvement is with the international community in terms of curbing drug trafficking. This involvement requires that South Africa remain apprised of the development of new thoughts, conventions and declarations dealing with the drug problem on an international level. A failed drug policy in one country has implications on an international level. It is for this reason that South Africa should not turn a blind eye to the concept of decriminalization but start to conduct research into the area as the 1999 National Drug Master Plan suggested over 12 years ago.

Punishment and prohibition have brought about great harm to society and it is based on this that the Global Commission Report suggests a reconsideration of drug policy at all levels. Policy should be based on human rights, evidence, and should incorporate a public health approach, considering that drug users are in some sense suffering from an illness. Bearing this in mind, the Report suggests decriminalization to lessen the stigmatization of drug abusers; and focusing on a public health approach as opposed to a legal approach. It also recommends that research be conducted into the 'evidence' supporting policy.

This chapter recommends that empirical research be conducted into the harmfulness of different drugs impacting the South Africa population, as well as the perception of policy and its resulting effectiveness in deterring the South African population from drug use. It also suggests that the decriminalization of drugs be considered in order to lessen the stigma attached to drug use. This is particularly relevant to cannabis users in South Africa. Finally this report suggests focussing repressive measures on trafficking, not individual users. This could lead into experimentation with legal regulation of drugs which could diminish the

power of organized crime. A renewed effort in terms of harsher measures directed at individual drug offenders does not seem appropriate, and could be detrimental to the overall effort to 'combat' substance abuse.

## 6. CONCLUSION

Although it has not always been so, at this stage of history drug use presents as a problem to humanity due to the way that it affects the individual and in turn affects the individual's ability to fulfil his or her role in society and thus, others. For this reason there is a global movement towards decreasing the drug problem. This occurs through two different philosophies. The first being a use reduction philosophy in which the aim is to decrease the number of individuals who use drugs. The second is a harm reduction philosophy which acknowledges that it is unlikely that society will ever be drug free and so proposes to minimize the negative impact that drug use has on society. This is often achieved through unconventional measures as it attempts to make drug use a more 'responsible' activity. Decriminalization of drug use falls in the category of harm reduction. The aim of this paper was to establish whether decriminalization of drug use is a solution to the drug problem in South Africa.

It was suggested that in addressing this problem, the most important question to ask is 'why do people use drugs' both generally and specifically, and that effective policy should take into account the answers to this question.

It was established that, according to the literature, policy documents and evidence provided by data from drug use and treatment surveys, crime reports and the World Drug Report, drug use has an increasingly negative impact on society in South Africa. It is a contributing factor to crime, poverty, reduced productivity, unemployment, dysfunctional family life, political instability, the escalation of chronic diseases, injury and death according the National Drug Master Plan. The "war on drugs" has failed in South Africa. This suggests that policy is ineffective, and requires revision.

Drug use trends in South Africa represent a diversity of possible reasons for which individuals choose to use substances in an attempt to change something about their lives, such as socio-economic factors, religion, tradition or even social use. Socio-economic factors are particularly relevant in South Africa, and these are concerns which it is incumbent on the state to address.

Out of concern for the welfare of its citizens the government of South Africa is required to adopt some policy towards the drug problem. The current policy is one of prohibition and

punishment, but also attempts to incorporate elements of prevention and treatment. In this sense South African policy incorporates both use reduction and demand reduction strategies. There is little emphasis on harm reduction strategies, particularly those that make drug use 'safer'. This is problematic as it fails to acknowledge that achieving a drug free society is unlikely. Treatment could be perceived as a non-controversial harm reduction strategy, and is certainly one that South African policy subscribes to in writing, but it is less clear that treatment is readily available to South African citizens who want it.

A principle which is commonly thought to underlie policy surrounding state interference in individual behaviour is the harm principle. It was found that this principle as it stands alone is not sufficient to justify the current criminalization policy in South Africa. This should not be thought to extend to children. Legal paternalism is justified in the case of minors. An example of this is South African legislation regarding smoking. Smoking is not an illegal act, but selling cigarettes to a child is prohibited. This kind of thinking could inform the development of regulation within decriminalization of drug use. There are ways of regulating actions without criminalizing those who carry out those actions. The public harm principle, an extension of the individual harm principle seems to explain South African drug policy. The current policy of prohibition may be justified, in terms of the public harm principle and insofar as it is considered a justifiable limitation of a constitutional right. However, this brings to light the question of the appropriateness of the policy in dealing with the problem. Is the limitation achieving its purpose, and is it the least repressive way of achieving the purpose? Finding a philosophical justification for a policy is not enough to justify the existence of the policy, it must also be effective in achieving its purpose.

Does criminalization effectively address the drug problem? A recent Global Commission meeting found that criminalization is not the most effective way of dealing with the drug situation for the following reasons: the policy does not respect human rights, it is not necessarily evidence based, and it is harmful in that it marginalizes drug users. The commission report advocates a public health response as opposed to a legal response and calls for decriminalization as a part of this response.

It was suggested that the principles and recommendations presented in the Global Commission Report are for the most part relevant to the context of South Africa, especially insofar as they advocate a health centred approach as opposed to a legal approach to individual drug users. This paper argues that decriminalization may play an important role in

changing mind-sets towards drug users and so aid in bringing about a community supported health centred approach, but that a prior step for South Africa would be to conduct research into numerous areas surrounding the decriminalization debate. For example, it must be established how policy affects drug making choices, and a clearer understanding of why certain population groups show an affinity towards certain substances is needed. A policy which is effective in addressing the problem of substance abuse will be informed by an understanding of what causes substance abuse.

It has been suggested in the literature (and is a sentiment echoed in this paper) that a predominant cause of drug use in South Africa is socio-economic factors. The fundamental issue is that in order to deal with the drug problem, an environment needs to be created which is not conducive to substance use and abuse. This environment includes aspects such as education, employment, recreational facilities as well as basic needs such as food, shelter and healthcare being met. An example of where the state has not fulfilled its duty to a community, and the results have reflected this failure, is the Cape Flats-as referred to in the case study. While the Cape Flats are well known for drug and crime problems, the circumstances surrounding these issues are not particular to the Cape Flats. South African Drug Policy acknowledges the need to provide an environment that is not conducive to drug use but it is not clear exactly how the government should meet this need. Instead, the general focus is on strengthening prohibitive measures. It is suggested by this paper that this approach will not be any more successful than it has been in the past as it does not take into account the reasons for drug use; on the contrary-it could be detrimental to the overall effort in the way it continues to marginalize and stigmatize drug users. Hence, the primary recommendation of the paper is that the problem of substance abuse be conceived as one which is a societal problem which is contributed to by socio-economic factors as well as others and perpetuated by the marginalization and stigmatization of substance abusers. This recognition should be followed by a move towards addressing these factors which contribute towards the drug problem. Decriminalization has the potential to be useful insofar as it could free up resources, which could be redirected towards addressing these factors and insofar as it will diminish the stigmatization and marginalization of drug users.

#### Specific Recommendations

- Reconsider the definition of abuse according to Act No. 20 of 2008

- Re-open the discussion regarding harm reduction strategies in South Africa
- Conduct research into particular drug using groups and their reasons for drug use, and choice of drug
- Research the harmful impact of different drugs on the South African population, and develop an evidence based ranking of the harmful drugs in South Africa
- Ascertain through research how South Africans perceive the legal risks of drug use, and how their perceptions of policy affect their behaviour in terms of drug use
- Ensure that ‘substance use and abuse’ education is informed by evidence.
- Avoid the adoption of ‘harsher measures’ towards individual drug users as an immediate short term solution

In answer to the question of whether decriminalization is the solution to the problem in South Africa, the answer is as follows:

Decriminalization is not the solution to the drug problem in South Africa, but it may be a part of the solution. The drug problem is one that comes about as a result of factors which influence individuals to begin using drugs because they believe it is the way to change their lives and then they find that they are unable to break the habit. The solution to the problem in South Africa will be one which sets about to create a social, political and economic environment in which the individual is empowered to make a choice to refrain from substance abuse. Decriminalization may be a part of this solution in that it has the potential to lessen the marginalization of drug users and so bring about a cohesive effort in dealing with the drug problem that impacts all members of society. Criminalizing an individual because he or she uses drugs is unlikely to change the fact that he or she uses drugs.

A purely legal approach to the drug problem cannot be successful; a true solution will address a variety of factors, some of which have been considered in this report. Most importantly, it will involve action on the part of the government, particularly in meeting the health needs of addicts and creating environments that are not conducive to drug use.

The paper has not provided a decisive answer to the question of whether decriminalization is the solution, or even a part of the solution to the drug problem that South Africa has. This is because there is too little empirical research conducted within a South African context with regard to the issue, and because such a claim cannot be made with any certainty until decriminalization has been implemented and proven to be a solution. However,

decriminalization has been posed as a possible theoretical solution to many of the problems that arise out of current policy. It is for this reason that the South African government should start to re-evaluate drug policy, as called upon by the Global Commission held in June 2011 as well as the fact that current policy is not effectively addressing the problem. The concept of decriminalization is one which is being brought to the attention of leaders around the world and as South Africa has its part to play in dealing with the drug problem, the leaders of South Africa should also begin a process of evidence based re-evaluation of the national drug policy and the efficacy of its application.

## Appendix I

### Schedule 2

[Schedule 2 amended by Government Notice No. R.1765 of 1 November 1996, by Government Notice No. R.760 of 11 June 1999 and by Government Notice No. R.521 of 15 June 2001.]

#### PART I

##### *Dependence-Producing Substances*

1. The following substances, namely—

Amobarbital, cyclobarbital and pentobarbital, except preparations and mixtures containing not more than 30 milligrams per minimum recommended or prescribed dose when intended for continued use in asthma or containing not more than 50 milligrams per minimum recommended or prescribed dose when intended for continued use in epilepsy.

Buprenorphine.

Butalbital.

Cathine ((+)-norpseudoephedrine), except preparations and mixtures containing 50 milligrams or less of cathine per dosage unit.

Chlorphentermine.

Diethylpropion (amfepramone).

Flunitrazepam.

Gluthethimide.

Meptazinol.

Pentazocine.

2. Unless expressly excluded, all substances included in this Part include the following:

(a) The salts and esters of the specified substances, where the existence of such salts and esters is possible; and

(b) all preparations and mixtures of the specified substances.

#### PART II

##### *Dangerous Dependence-Producing Substances*

1. The following substances or plants, namely—

Acetorphine.

Acetyldihydrocodeine, except preparations and mixtures containing not more than 20 milligrams of acetyldihydrocodeine per recommended or prescribed dose.

Acetylmethadol.

Alfentanil.

Allylprodine.

Alphacetylmethadol.

Alphameprodine.

Alphamethadol.

Alphaprodine.

Anileridine.

Benzethidine.

Benzphetamine.

Benzylmorphine.

Betacetylmethadol.

Betameprodine.

Betamethadol.

Betaprodine.

Bezitramide.

Butorphanol.

Chlorodyne (Chloroform and Morphine Tincture BP 1980) or any preparation or mixture thereof described as chlorodyne, except preparations and mixtures containing not more than 5,0 per cent of chloro- dyne in combination with other active medicinal substances.

Clonitazene.

Coca leaf and any salt, compound, derivative or preparation of coca leaf, and any salt, compound, derivative or preparation thereof that is chemically equivalent or identical to any of these substances, whether obtained directly or indirectly by extraction from material or substances obtained from plants, or obtained independently by chemical synthesis, or by a combination of extraction and chemical synthesis, except decocainized coca leaf and extractions of coca leaf where such extractions contain no cocaine or ecgonine.

Codeine (methymorphine), except preparations and mixtures containing not more than 20 milligrams of codeine per recommended or prescribed dose.

Codoxime.

Desomorphine.

Dextromoramide.

Dextropropoxyphene, except preparations and mixtures for oral use containing not more than 135 milligrams dextropropoxyphene, calculated as the base, per dosage unit, or with a concentration of not more than 2,5 per cent in undivided preparations.

Diampromide.

Diethylthiambutene.

Difenoxin (or diphenoxylate), except mixtures containing, per dosage unit, not more than 0,5 milligrams of difenoxin, calculated as the base, and a quantity of atropine sulphate equal to at least 5,0 per cent of the quantity of difenoxin, calculated as the base, which is present in the mixture.

Dihydrocodeine, except preparations and mixtures containing not more than 20 milligrams of dihydrocodeine per recommended or prescribed dose.

Dihydroetorphine.

Dihydromorphine.

Dimenoxadol.

Dimepheptanol.

Dimethylthiambutene.

Dioxaphetylbutyrate.

Diphenoxylate, except preparations containing not more than 2,5 milligrams of diphenoxylate, calculated as the base, and not less than 25 micrograms of atropine sulphate per dosage unit.

Dipipanone.

Dronabinol [(-)-transdelta-9-tetrahydrocannabinol].

Drotebanol.

Ecgonine and the esters and derivatives thereof which are convertible to ecgonine and cocaine.

Ethylmethylthiambutene.

Ethylmorphine, except preparations and mixtures containing not more than 20 milligrams of ethylmorphine per recommended or prescribed dose.

Etonitazene.

Etorphine and analogues.

Etoxadine.

Fenproporex.

Fentanyl.

Furethidine.

Hydrocodone (dihydrocodeinone).

Hydromorphanol (14-hydroxydihydromorphine).

Hydromorphone (dihydromorphinone).

Hydroxypethidine.

Isomethadone.

Ketobemidone.

Levomoramide.

Levophenacetylmorphan.

Levorphanol.

Mecloqualone.  
Mefenorex.  
Metazocine.  
Methadone.  
Methadone-intermediate.  
Methorphan, including levomethorphan and racemethorphan, but excluding dextromethorphan.  
Methyldesorphine.  
Methyldihydromorphine.  
Methylphenidate and the derivatives thereof.  
Metopon.  
Moramide-intermediate.  
Morpheridine.  
Morphine, except preparations and mixtures of morphine containing not more than 0,2 per cent of morphine, calculated as anhydrous morphine.  
Morphine methobromide and other pentavalent nitrogen morphine derivatives.  
Morphine-N-oxide and the derivatives thereof.  
Myrophine (myristylbenzylmorphine).  
Nicocodine.  
Nicodicodine.  
Nicomorphine.  
Noracymethadol.  
Norcodeine, except preparations and mixtures containing not more than 20 milligrams norcodeine per recommended or prescribed dose.  
Norlevorphanol.  
Normethadone.  
Normorphine (demethylmorphine or N-demethylated morphine).  
Norpipanone.  
Opium and opiates and any salt, compound, derivative or preparation of opium or opiates, whether obtained directly or indirectly by extraction from material or substances obtained from plants, or obtained independently by chemical synthesis, or by a combination of extraction and chemical synthesis, except mixtures containing not more than 0,2 per cent of morphine, calculated as anhydrous morphine.  
Opium-poppy and poppy straw, whether obtained directly or indirectly by extraction from material or substances obtained from plants, or whether obtained independently by chemical synthesis, or by a combination of extraction and chemical synthesis.  
Oxycodone (14-hydroxydihydrocodeinone or dihydrohydroxycodoneinone).  
Oxymorphone (14-hydroxydihydromorphinone or dihydrohydroxymorphinone).  
Pethidine, pethidine-intermediate A, pethidine-intermediate B and pethidine-intermediate C.  
Phenadoxone.  
Phenampromide.  
Phenazocine.  
Phendimetrazine.  
Phenomorphan.  
Phenoperidine.  
Pholcodine, except preparations and mixtures containing not more than 20 milligrams of pholcodine per recommended or prescribed dose.  
Piminodine.  
Piritramide.  
Proheptazine.  
Propiridine.  
Propiram.  
Racemoramide.  
Racemorphan.  
Remifentanil.  
Secobarbital.

Sufentanil.  
 Thebacon.  
 Thebaine.  
 Tilidine.  
 Trimeperidine.  
 Zipeprol.

2. Unless expressly excluded, all substances or plants included in this Part include the following:

- (a) The isomers of the specified substances or plants, where the existence of such isomers is possible;
- (b) the esters and ethers of the specified substances or plants and of the isomers referred to in subparagraph (a), as well as the isomers of such esters and ethers, where the existence of such esters, ethers and isomers is possible;
- (c) the salts of the specified substances or plants, of the isomers referred to in subparagraph (a) and of the esters, ethers and isomers referred to in subparagraph (b), as well as the isomers of such salts, where the existence of such salts and isomers is possible; and
- (d) all preparations and mixtures of the specified substances or plants and of the isomers, esters, ethers and salts referred to in this paragraph.

### PART III

#### *Undesirable Dependence-Producing Substances*

1. The following substances or plants, namely—

Amphetamine.  
 Brolamfetamine.  
 4-bromo-2,5-dimethoxyphenethylamine (2C-B), (“Nexus”).  
 Bufotenine (N,N-dimethylserotonin).  
 Cannibis (dagga), the whole plant or any portion thereof, except dronabinol [(-)-transdelta-9 tetrahydrocannabinol].  
 Cathinone.  
 Dexamphetamine.  
 Diethyltryptamine [3-(2-(diethylamino)-ethyl)-indole];cb.  
 2,5-dimethoxyamphetamine (DMA).  
 2,5-dimethoxy-4-ethylamphetamine (DOET).  
 (±)-N,□- dimethyl-3,4-(methylenedioxy) phenethylamine (3,4-methylenedioxyamphetamine (MDMA)).  
 3-(1,2-dimethylheptyl)-7,8,9,10-tetrahydro-6,6,9-trimethyl-6*H*-dibenzo [*b*, *d*] pyran-1-ol (DMHP).  
 Dimethyltryptamine [3-(2-(dimethylamino)-ethyl)-indole].  
 Etryptamine (3-(2-aminobutyl)indole).  
 Fenetylline.  
 Fentanyl-analogues:  
 acetyl-alpha-methyl-fentanyl;  
 alpha-methyl-fentanyl;  
 alpha-methyl-fentanyl-acetanilide;  
 alpha-methyl-thio-fentanyl;  
 benzyl-fentanyl;  
 beta-hydroxy-fentanyl;  
 beta-hydroxy-3-methyl-fentanyl;  
 3-methyl-fentanyl and the two isomeric forms thereof, namely,  
 cis-N-(3-methyl-1-(2-phenethyl)-4-piperidyl)propionanilide and trans-N-(3-methyl-1-(2-phenethyl)-4-piperidyl)propionanilide;  
 3-methyl-thio-fentanyl;  
 para-fluoro-fentanyl; and thiofentanyl.  
 Gamma-hydroxybutyrate (GHB).  
 Harmaline (3,4-dihydroharmine).

Harmine [7-methoxy-1-methyl-9H-pyrido (3,4-b)-indole].  
Herion (diacetylmorphine).  
Levamphetamine.  
Levomethamphetamine.  
Lysergide (lysergic acid diethylamide).  
Mescaline (3,4,5-trimethoxyphenethylamine).  
Methamphetamine and methamphetamine racemate.  
Methaqualone, including Mandrax, Isonox, Quaalude, or any other preparation containing methaqualone and known by any other trade name.  
Methcathinone (2-(methylamino)-1-phenylpropan-1-one).  
2-methoxy-4,5-methylenedioxyamphetamine (MMDA).  
4-methylaminorex.  
4-methyl-2,5-dimethoxyamphetamine (DOM) and the derivatives thereof.  
Methylenedioxyamphetamine (MDA):  
N-ethyl-methylenedioxyamphetamine; and  
N-hydroxy-methylenedioxyamphetamine.  
Nabilone.  
Parahexyl.  
Paramethoxyamphetamine (PMA).  
Phencyclidine and the congeners thereof, namely, N-ethyl-1-phenylcyclohexylamine (PCE), 1-(1-phenylcyclohexyl) pyrrolidine (PHP or PCPY) and 1- [1-(2-thienyl) cyclohexyl] piperidine (TCP).  
Pethidine-analogues:  
1-methyl-4-phenyl-4-propionoxy-piperidine (MPPP);  
1-methyl-4-phenyl-1,2,5,6-tetrahydropiperidine (MPTP); and  
1-phenylethyl-4-phenyl-4-acetyloxy-piperidine (PEPAP).  
Phenmetrazine.  
Psilocin (4-hydroxydimethyltryptamine).  
Psilocybin (4-phosphoryloxy-N,N-dimethyltryptamine).  
Tetrahydrocannabinol.  
3,4,5-trimethoxy amphetamine (TMA).

2. Unless expressly excluded, all substances or plants included in this Part include the following:

- (a) The isomers of the specified substances or plants, where the existence of such isomers is possible;
- (b) the esters and ethers of the specified substances or plants and of the isomers referred to in subparagraph (a), as well as the isomers of such esters and ethers, where the existence of such esters, ethers and isomers is possible;
- (c) the salts of the specified substances or plants, of the isomers referred to in subparagraph (a) and of the esters, ethers and isomers referred to in subparagraph (b), as well as the isomers of such salts, where the existence of such salts and isomers is possible; and
- (d) all preparations and mixtures of the specified substances or plants and of the isomers, esters, ethers and salts referred to in this paragraph.

## Appendix II

### **A CASE STUDY: GANGSTERISM, DRUGS AND THE CAPE FLATS**

In order to contextualize the issues of drug use within a South African context, a brief case study of the Cape Flats in the Western Cape will be provided. The Cape Flats, due to the segregation and forced removals imposed by the apartheid regime are described as an area in which the “infrastructure [is] unacceptably poor... schools and hospitals claim severe under-funding and overcrowding [and] communal areas have been left derelict” (Standing, 2003: 2).

A study conducted in 2006 based on census information sought to ascertain a socio-economic hierarchy of suburbs in Cape Town which would identify areas of great need and be used as a guide to inform planning. It used indicators such as low income, low educational attainment, high unemployment, unskilled occupations, informal dwellings, no access to electricity, flush/chemical toilets, potable water and refuse removal and used these to determine a level of living index. Suburbs in the Cape Flats were ranked predominantly in the lowest, and second lowest categories, indicating that they are areas which can be classed, according to the study, as suffering from social deprivation (Romanovsky & Gie, 2006).

It is an area in which local authorities are increasingly turning to punitive measures to attempt to control what has been called an “ungovernable” area (Standing, 2003: 2). This tenet of ungovernability is echoed in recent headlines referring to the area: “Cape Flats residents ask Cele for more police stations” (SABC News 2011), “Another child killed on the Cape Flats” (SABC News 2011), “Gang wreaks havoc at Nyanga school” (IOL News, 2011). Another article goes on to speak of the “battlefield”, a park nearby a school which is utilised by rival gangs, for gang wars (Times Live, 2011). Gangsterism is a known and to some degree, studied, phenomenon in the Cape, particularly the Cape Flats. In an article which addresses methods of dealing with the problem Vetten provides a comprehensive analysis of why both boys and girls join gangs; she suggests that boys do so because it provides entertainment as well as an alternate home, or place of acceptance (Vetten 2000: 4). However, for girls the situation is different. The streets are a dangerous place for girls and so often their affiliation to a gang through a relationship with a gang member provides protection and status which they could not otherwise secure for themselves (ibid). Gangs control organised crime, which is constituted primarily of prostitution and dealing in drugs, arms and other stolen goods (Standing 2003 and Vetten 2000). Here we find the link between gangsterism and drugs. It is

also important to recognise that this organised crime is a major part of the local economy (Standing, 2003: 6). However, recently, the rate of gang induced violence has inspired the community to ask for the help of PAGAD; an Islamist movement, (People Against Gangsterism and Drugs), reflecting their frustration with the police and government in terms of their failure to bring any order to the situation.

The general consensus of media reports on the topic seem to highlight that the government is not meeting the needs of this society, both in terms of dealing with the problem as well as addressing the root of the problem. This brings to the fore the concept that the state has a duty to the people. In the case of the Cape Flats, the state has a duty not only to prevent harm of people through the dealings with the gangs, but also to provide an environment in which gangsterism-and all its implications-is not the social norm. As mentioned above, the Levels of Living Report indicates that areas within the Cape Flats suffer from social deprivation and this deprivation is often accompanied by high levels of violent crime, gangsterism and alcohol and drug abuse. (Romanovsky et al, 2006: 12). In order to address this problem it is acknowledged that the government needs to provide basic services and that recreational and employment opportunities need to be created as part of a socially based crime prevention strategy (ibid).

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