A Constitutional Right to *Cannabis*? Grassroots Litigation and Dagga Policy Reform in South Africa

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February 03, 2025

Abstract

South Africa's interaction with *Cannabis sativa* L.—locally known as dagga or ntsangu—spans centuries and reflects the nation's complex history. Early prohibition, influenced by colonial dynamics, set the stage for the apartheid regime's stringent criminalisation of dagga users and growers during the ensuing decades, further enshrined in a 1992 law (two years before the fall of the regime). Following 30 years of strategic litigation, a turning point was reached in 2018 when the Constitutional Court declared that the prohibition of the private use and cultivation of dagga was unconstitutional. This decision paved the way for the 2024 Cannabis for Private Purposes Act, which was enacted exactly 100 years after the first nationwide ban on cannabis in South Africa. This article examines the legal and historical trajectory leading to these developments, the pivotal role of grassroots litigation, and the ongoing legislative challenges that continue to shape South Africa's dagga policy. By reflecting on the unique characteristics of the South African approach, this article contributes to the broader discourse on cannabis legalisation and the interplay between human rights and drug policy.

Background

South Africa is a multicultural nation with centuries of interactions with the dagga plant (also called ntsangu, marijuana, hemp, etc.; scientific name: *Cannabis sativa* L.) in a culturally rich and biodiverse, but also marginalised, region of the globe.

Progressive bans on dagga cultivation, trade, and use during the 19th and 20th centuries, culminated under the apartheid regime with the adoption of stringent crop eradication and user repression policies. On 28 May 2024, South Africa was the first African country to re-legalise the adult use and cultivation of *Cannabis*, after more than a century of prohibition and 30 years after the end of the apartheid (Clarke et al 2021; Du Toit 1976; Grooten 2023; Nkosi 2019).

This historical redress was the result of three decades of strategic litigation by grassroots stakeholders that managed to force the government into reforming. Because the government's mandate to legalise was the direct result of a Constitutional Court order based on the fundamental right to privacy, the new South African dagga law has unique characteristics. These create opportunities to shape a novel, Afrocentric policy approach to dagga in the country.

This article discusses the legal history of ongoing dagga reforms in South Africa, documenting their origins in a series of litigations undertaken by non-State actors. We first review the episodes leading to the very

(South) African creation of *Cannabis* prohibition (from the nineteenth century up to the end of the apartheid régime in 1994), followed by the period of Human Rights-based strategic litigation against various aspects of dagga prohibition that followed the post-apartheid era, up to the Constitutional Court landmark ruling in 2018, and finally discuss the recent and ongoing litigation efforts, and how they are likely to shape future developments in South African dagga legislative and regulatory corpus (2018–Present). In concluding, we explore the implications of the specificities of South African dagga policy reforms, both as an inspirational guidance for policy-makers elsewhere, particularly on the African continent, and as an inspirational strategic precedent for other legalisation efforts elsewhere.

The South African Dagga Law Conundrum

Dagga and Prohibition: African Traditions (Ancient times–1994)

First brought in from Asia by Arab sailor merchants, who started in the first centuries AD to supply South-Eastern African coasts with plants, produce, and species from India (Du Toit, 1976; Duvall, 2019a; 2019b, pp. 72–79), the *Cannabis sativa* L. plant and its uses have been an integral part of local indigenous cultures from time immemorial. Nowadays, dagga remains traditionally cultivated and used by virtually all of the numerous population groups of the country: Khoekhoen ("Hottentots"), Sān ("Bushmen"), Zulu, Xhosa, Pedi, Afrikaners and other people of European descent, people of Asian descent, "coloured" people of mixed-descent, etc. (umZimvubu Farmers Support Network, UFSN 2019; Nkosi 2019).

Besides this presence, South Africa was among the first countries —alongside Brazil— where one population group imposed the prohibition of *Cannabis* on other groups. British settlers, by the late 19th century, disliking their Hindu labourers using *bhang* as a sacrament in the sugar cane fields of the Natal Colony (Wragg et al., 1887; Mills, 2003, p. 161; Ambler, 2022), progressively extended the scope of restrictions and bans amidst anti-dagga public campaigns, in 1891, 1910, until a nationwide prohibition law was approved in 1924 (Clarke et al., 2021, pp. 18–20; Waetjen 2021).

The African Continent: a Playground for Prohibition Experiments

The African continent has the dubious historical distinction of being the focus of the first international drug control treaty: 19 years before the Shanghai Opium Commission, the 1890 *General Act of the Brussels Conference* banned "the abuse of spirituous liquors" for "the native population" in all European colonised regions of West Africa (Ambler, 2022, pp. 196–198; Seddon, 2016, pp. 409–410; Riboulet-Zemouli, 2022, p. 65).

A similar (and regrettable) story repeated a few years later, with *Cannabis* prohibition. Following the 1909 Shanghai Opium Commission, Italy was the first country to suggest —albeit unsuccessfully— an international control of the plant, after the country "became a colonial ruler in a part of Africa [...] which had a problem with cannabis" (Bruun et al., 1975, p. 181).

As the League of Nations was drafting a series of treaties rapidly increasing controls and bans over opium, South Africa took over Italy's role, bringing into fruition the demand for international control over dagga. In 1923 Jan Smuts, Prime Minister of the Union of South Africa —the man who "created the fundament for the later apartheid regime in South Africa while also being a central figure in international cooperation and peacekeeping" (Stensrud, 2022, p. 4)— sent a timely, highly-strategic letter regarding "Indian hemp" to the League of Nations (Clarke et al., 2021, p. 18; Mills, 2003, pp. 160–161). With support from Egypt, on the other side of the continent, the two nations managed to bring *Cannabis sativa* into the spotlight of the League of Nations, as Anna Stensrud (2022) documented (see also: Ambler, 2022; Bruun et al., 1975, pp. 182–183; Carrier, 2022; Nkosi 2019, pp. 14–17). Besides little initial acceptance of British and French powers (Collins, 2020, p. 281; Mills, 2015), the tactical timing of Smuts's letter coupled with a highly-political involvement from Egypt, made of dagga a bargaining chip at the opium table, and resulted in the inclusion of the first

measures on *Cannabis* in an international treaty, the Second International Opium Convention signed in Geneva, 1925 (Leinwand, 1971; Mills, 2015, pp. 161–187; Bourmaud, 2016). As noted by Charles Ambler (2022, p. 198):

> "It was in part the petition of two quasi-colonial African states, Egypt and South Africa, that encouraged the inclusion of cannabis on the list of prohibited drugs in international drug control agreements."

After World War II, in the lead up to the 1961 Single Convention on narcotic drugs, apartheid governments continued the country's international crusade, remaining proactive in efforts to place the Cannabis plant under the strictest levels of control. Notably, the government contributed biased, racist data to the WHO, which extensively relied on them (Bruun et al., 1975, pp. 197–198; Clarke et al., 2021, p. 19, add crimson digest here), leading to the placement of dagga in Schedule IV of the Single Convention —the most stringent level of international control— where the plant remained until 2021 (Riboulet-Zemouli & Krawitz, 2022).

Dagga Prohibition: an Apartheid Policy.

In addition to their proactive foreign efforts, the successive governments —particularly the National Party, in power under different coalitions between 1924 and 1994 who progressively implemented its ideology of Afrikaner nationalism and later apartheid, but also other opposition parties who supported of strict dagga control policies— were characterised by a morbid obsession with dagga prohibition within the country. In 1928, a licensing system was established, with non-compliance resulting in up to six month imprisonment. Smoking paraphernalia also became controlled (Nkosi et al 2020). After the return in power of the National Party in 1948, a committee was instituted to investigate "the dagga evil" (Ambler, 2022, p. 203). In 1955, penalties were increased (Nkosi et al 2020) and in 1965, the Drugs Control Act (today renamed: Medicines and Related Substances Control Act, MRSCA) instituted the basis of the legal system that prevails today.

The regime's ramped-up use of prohibition during the 1950s and 1960s became a convenient tool for social control and to pressure discriminated ethnic groups (Nkosi 2019). Nkosi et al (2020) show how the landscape of dagga control was progressively altered by exponential increases in seizures and arrests (in the tens of thousands of individuals annually) and by "classical" colonial policing strategies evolving into segregationist ones who saw dagga as "a sign of breakdown between racial and cultural boundaries." (Nkosi et al. 2020, p. 73) during these decades altered, influencing the draconian policies that would culminate in the Abuse of Dependence-producing Substances and Rehabilitation Centres Act (No. 41 of 1971) which allowed extrajudicial detention (Paterson, 2009) and was estimated to result in at least 77.000 incarcerations within its first two years of implementation (Theron, 1974), being the embodiment of what would ensue in the following decades of apartheid prohibition.

The legal drug control environment was finally cemented in the Drugs and Drug Trafficking Act of 1992 (DDTA), two years before the end of the apartheid régime (Clarke et al., 2021, p. 20; State President 1992).

Although representing one of the core racist laws associated with the regime, the 1971/1992 dagga legal environment has remained untouched after 1994 and until today. During the three decades that followed, no step was taken by the South African government to address and reform racist dagga laws, except the adoption of the "Prevention of and Treatment for Substance Abuse Act" in 2008 (Presidency of the Republic of South Africa, 2009), which would in practice have no effect on the dagga situation.

Human Rights-Based Strategic Litigation in the Post-Apartheid Era (1994–2018)

The prohibition of dagga was first challenged in the late 1990s by Gareth Prince (see Table 1), a lawyer of the Rastafari faith who had been barred from practising by the Legal Practice Council due to his use of dagga. This constitutional challenge failed in 2002. Nevertheless, it was taken up again in the Gauteng High Court (Pretoria division) (PHC) by activists Myrtle Clarke and the late Julian Stobbs (the so-called "Dagga

Couple") in 2010, as well as two years later in the Western Cape High Court (WCHC) by Prince with other co-plaintiffs (Clarke et al., 2021, pp. 19–20; Dagga Couple, 2011; Stobbs, 2012; 2017).

Crucially, during the WCHC process, the University of Cape Town's Centre of Criminology was asked by the Court to produce an independent expert analysis, led by Prof. Shaw *et al.* (2016; High Court, 2017) filed by way of an affidavit. The "Shaw Report" criticised the then*National Drug Masterplan* and its three pillars: "demand reduction, supply reduction and a localised version of harm reduction" (Department of Social Development, 2013, p. 4), arguing that the first two pillars were outdated in light of the right to privacy enshrined in the South African constitution, and that they conflicted with the implementation of the third pillar. Quintessential in convincing judges, the Shaw Report also clearly "showed that punitive drug policies do not reduce rates of drug use" while presenting a series of "mechanisms which could be used to reduce drug use without imposing criminal sanctions" (Abdool Karim, 2017).

During the PHC process, Clarke and Stobbs —under the non-governmental organisation they had constituted, "Fields of Green for ALL" (FGA)—- organised a series of expert interventions —including Professor David Nutt, Dr Donald Abrams, Dr Simon Howell, and others — which became known as the "Trial of the Plant" in August 2017 (Clarke, 2017b). Besides failed efforts from the Government to prevent FGA from livestreaming the trial (Clarke, 2017a), the trial received important media coverage and echoed throughout the country's cannabis communities.

While the PHC trial was rendered part-heard (Clarke 2019),11 MC, the sole remaining plaintiff in this case, and co-author of this paper, reserves the right to reinitiate legal proceedings should future litigation concerning constitutional rights related to dagga become strategically warranted. the WCHC case reached the Constitutional Court, in the case *Minister of Justice and Constitutional Development and Others* v *Prince* which would become known as the "Privacy Judgment." There, FGA joined the authors of the Shaw Report as*amicus curiae* (Clarke, 2017d).

Table 1. Chronology of Early Dagga Legislation, and Subsequent Strategic Litigations (South Africa, 1992–2018).

Date	**Body**	**Case/Law**
1891	Colonial government	Medical and Pharmacy Act No. 34
1928	Parliament	Medical, Dental and Pharmacy Act No. 13
1948	Department of Social Welfare	Inter- departmental Committee on the Abuse of Dagga
1965	Parliament	Medicines and Related Substances Control Act (MRSCA)
1971	Parliament	Abuse of Dependence-producing Substances and Rehabilitation Centr
1992	Parliament	Drugs and Drug Trafficking Act (DDTA)
2008	Parliament	Prevention of and Treatment for Substance Abuse Act
2002	Constitutional Court	*Prince* v *Law Society*
2011	High Court (Pretoria)	*Dagga Couple* v *State*
31 March 2017	High Court (Western Cape)	*Prince II Judgement*
June–August 2017	High Court (Pretoria)	*Trial of the Plant*
7 November 2017	Constitutional Court	*Constitutional Court hearing*
18 September 2018	Constitutional Court	*Privacy Judgement (Minister of Justice and Constitutional Developm*

The Constitutional Right to Privacy

On 18 September 2018, the Constitutional Court delivered the final "Privacy Judgment," confirming the earlier WCHC ruling and definitively declaring several sections of the 1992 law unconstitutional. Central to the judgement was the "right to privacy," recognised in article 14 of the South African Constitution:

> "Everyone has the right to privacy, which includes the right not to have:
>
> a. their person or home searched;
>
> b. their property searched;
>
> c. their possessions seized; or
>
> d. the privacy of their communications infringed." (South African Government, 1996)

The recognition of the right to privacy —already a cornerstone of the 2017 "Prince Judgement" handed down in the WCHC (2017)—- was confirmed by the Constitutional Court a year later. The 10 judges, chaired by the then Chief Justice of South Africa, Raymond Zondo, overturned the conflicting sections of the DDTA and the MRSCA, after finding them:

> "inconsistent with section 14 of the Constitution to the extent that they criminalise the use or possession in private or cultivation in a private place of cannabis by an adult for his or her own personal consumption in private." (Constitutional Court, 2018)

As noted by the European Union Drugs Agency (EUDA), the ruling came two months after the Constitutional Court of Georgia, and one month before the Supreme Court of Mexico, decided on similar grounds that "that state intervention in the private life of their citizens who wish to (grow and) use cannabis is not always justified" (EUDA, 2019).

Differently from Georgia and Mexico, in a groundbreaking move within the international Cannabis policy reform efforts, the South African Constitutional Court gave 24 months delay to Parliament —up to Septembre 2020— to resolve the issues raised and amend the *Drugs and Drug Trafficking Act*, and the *Medicines Act*.

Challenging Crop Eradication Internationally

Although unrelated to the Privacy Judgment process, another successful litigation effort worth mentioning was undertaken between 2016 and 2018 by the umZimvubu Farmers Support Network (UFSN) in Mpondoland (Eastern Cape province) "to put an end to the aerial eradication of Indigenous cannabis farms" (UFSN 2023).

This non-profit created to benefit "the hundreds of thousands of rural cannabis farmers situated in the Greater uMzimvubu River Basin region" known as the amaMpondo aseQuakeni , who have farmed, used, and traded cannabis for centuries (UFSN 2023). One of the initial goal of the farmers' network was to challenge the Government's aerial eradication of illicit dagga crops using glyphosate —a carcinogenic herbicide— sprayed from helicopters of the South African Police Service (SAPS) "onto cannabis, waterways, farmlands, livestock, homesteads, and people."

In 2018, UFSN submitted a contribution to the periodic review of South Africa by the UN Committee on Economic, Social, and Cultural Rights (CESCR), challenging aerial spraying and broader crop eradication programmes in the context of parallel ongoing policy reforms (UFSN, 2019). After engaging with UFSN and the South African government, the CESCR (2018, pp. 12–13) recommended

> "that the State party suspend such aerial spraying and instead offer alternative development programmes to the affected communities, including the possibility of participating in the medical cannabis market through a licensing programme for small-scale community farmers."

After the Court: Legislative Uncertainty Driving Ongoing Strategic Litigations (2018–Present)

Besides the September 2020 deadline, and in part justified by the situation arising from the COVID-19 pandemic, it took until 2024 for Parliament to implement the court's judgement, with the publishing of the

Cannabis for Private Purposes Act (CfPPA) in the Government Gazette in June 2024 (signed into law by the President of South Africa on 28 May 2024).

During this six year delay between the Court's judgement of unconstitutionality and its order for legislative remedy, strategic litigation led by civil society stakeholders continued in different areas pertaining to dagga policy, in particular: children and youth, labour rights, collective enjoyment of the right to privacy, and the issue of continued repression by SAPS. While some were motivated by the absence of actual change following the 2018 Privacy Judgment, these litigations allowed, in addition to the specific issues they were addressing, to maintain a certain political pressure over Government and Parliament, and helped to shape the law for these cases heard before the approval of the CfPPA.

In addition, frustration around the delays was reinforced by the Government abandoning the work started on the National Cannabis Master Plan, which was meant to be South Africa's "road map" for dagga legalisation (Committee on Justice and Constitutional Development 2021; Department of Agriculture, Land Reform and Rural Development 2021).

Litigation for the Rights of Children (2019–2022)

In 2019, four children were tested positive for dagga at school, and incarcerated for 77 days. When taken to the Gauteng Division High Court, the Centre for Child Law (2022) —a renowned NGO defending the rights of children—- joined the cases as amicus curiae . The case was won at the High Court and confirmed by the Constitutional Court (2022) in September 2022, effectively decriminalising dagga for minors under 18:

> "the judgment is not about whether or not children should be allowed to use or have cannabis in their possession, but rather about the appropriate response to such possession – and whether or not the criminal justice system is the correct forum to deal with children using addictive substances. [...] it establishes and underscores that the criminal justice system is not the correct forum for helping children who use cannabis. Furthermore, the case highlights that the law should not treat children harsher than it does adults for the same offence" (Centre for Child Law 2022)

Litigation for the Rights of Workers (2020–2024)

In April 2020, the multinational company Barloworld Equipment (Pty) Ltd. dismissed Bernadette Enever, one of their employees, on grounds that she tested positive for dagga while at work. Legal arguments centred around impairment while at work (due to dagga use outside of the workplace) and testing methods in this regard. After losing in the Labour Court, Ms Enever appealed to the Labour Court of Appeals in Johannesburg, where she won in April 2024.

On 22 July 2024, the Constitutional Court dismissed a further appeal lodged by Barloworld. This represented a precedent seen as "a beacon of hope for the lowest-paid workers in mining and manufacturing industries, often unjustly targeted by outdated workplace policies" (Henning 2024b). As a consequence:

> "employers need to reconsider their substance abuse policies and ensure that they are drafted in a manner that will not be seen to be infringing unjustifiably on the rights of their employees. A practical approach to this will be required and not an overall reliance on a zero-tolerance policy" (Dube and Machado 2024).

Litigation for the Collective Right to Privacy (2020–present)

One of the unintended shortcomings of the Constitutional Court's privacy judgement was the failure to address the issue of supply beyond the cultivation in private spaces for personal consumption. In practice, because not all users are in a position to grow for their own consumption, the current right to privacy as applied to dagga does not bridge the issue of access and availability for users on the ground.

Inspired by the Cannabis Social Club model first implemented in Spain, and subsequently in a number of countries (e.g. Uruguay, Malta, Germany; Pardal 2023), FGA initiated the "Dagga Private Club" (DPC) project, an adaptation of the model for the South African legal environment post "Privacy Judgment."

After almost two years of operation, on 13 October 2020, one of the first DPCs established in South Africa —"The Haze Club"—- was raided, and its staff arrested on "dealing" charges (Theunissen 2020; Dolley 2021). The Haze Club was a members-only not-for-profit service where private individuals "would send seeds to the club, and the club, in turn, would grow cannabis from those seeds on their behalf" (The Canna Club 2022) while financially contributing to the costs of cultivation.

In July 2023, FGA intervened as amicus curiae once again, this time in the case of The Haze Club (Theunissen 2021), with the aim to obtain clarification from the Constitutional Court on the legality of DPCs as the collective form of exercise of the right to privacy, and facilitate the inclusion of DPCs in the regulatory regime currently being prepared to support the CfPPA (Clarke 2024). The case was before the Supreme Court of Appeal, following a dismissal at the WCHC and leave to appeal being granted (Henning 2022; 2024a) but, for personal reasons, the defendants reached a confidential settlement agreement with the National Prosecuting Authority to drop criminal charges (Clarke, 2024b).

Litigation to "Stop the Cops" (2020–present)

In December 2024, SA's Human Rights Commission began investigating the ongoing oppression of marginalised communities by law enforcement (Parry, 2024) amidst continued legislative uncertainty and proactive SA Police Service (SAPS) activity, including arrests and incarceration of Dagga Private Clubs operators.

Table 2. Chronology of Strategic Litigation of Dagga Prohibition, and Subsequent Legislation (South Africa, 2018–August 2024).

Date	Body	Case/Law
September 2020	Constitutional Court	*End of the deadline given to Parlia*
1 September 2020	Parliament's Justice & Correctional Services Portfolio Committee	*First version of the CfPPB*
September 2022	Centre for Child Law	*Constitutional Court*
November 2022	High Court (Western Cape)	*Haze Club Case*
November 2023	Parliament	*Final version of the CfPPB*
January 2024	Parliament	*CfPPB approved*
23 April 2024	Labour Court of Appeal	*Barloworld* v *Bernadette Enever*
28 May 2024	President of the Republic of South Africa	*CfPPB assented*
22 July 2024	Constitutional Court	*Rejects Barloworld's appeal*

Conclusion

Besides the landmark, historic, and human rights-based decriminalisation of dagga brought by the Constitutional Court's 2018 judgment, the steps taken by the legislative and executive branches of the South African government (mainly the CfPPA) remain defective. A number of cannabis-related activities remain illegal, in particular trade, creating historical, legal, cultural and enforcement conundrums for users, cultivators and particularly for legacy traders.

A fair, sustainable, and enforceable regulatory environment is needed, to provide legal clarity and certainty (Riboulet-Zemouli 2021). But because of the inertia of the State apparatus to reflect the right of South

Africans to use dagga in law and policy, the constant push of grassroots strategic litigation has been critical to both amend the defects and propose solutions that advance modern and human rights-compliant dagga laws.

Interaction between civil society and the government is a challenging arena in South Africa. Given the success of strategic litigation thus far, it likely that further strategic litigation will arise in order to put an end to pressing issues, such as issues related to the conservation of dagga heritage, trade-related issues, and lingering law enforcement issues, in particular the lack of training around the new laws for the South African Police Service and, ultimately, the resolution of the Trial of the Plant for the remaining plaintiff and co-author of this article. Only then will all the evidence have been heard.

As the evidence for the urgent need for Cannabis and general drug policy reform will continue to be ventilated in South African courts, the efforts and gathering of evidence of civil society organisations have proved invaluable in helping overcome discrimination, barriers to entry, and reconnecting legislative efforts with the realities of this multicultural country while participating in the conservation of South African and African natural and cultural heritage.

With the right for DPCs to operate comes the rights of workers, children and youth and all sectors implicated in policies that extend beyond drugs. Cannabis law reform highlights the importance of aligning legislative efforts with cultural and social realities.

Beyond this specific context, South African developments invite the consideration of conflicts between prohibition and the exercise of the right to privacy, in every jurisdiction where human rights are protected. Because the right to privacy is inferred in the African Charter on Human and Peoples' Rights (Singh and Power 2019; Mavedzenge 2020) this can be of assistance to all Africans in the struggle for sound Cannabis and human rights policies.

List of abbreviations

CESCR Committee on Economic, Social and Cultural Rights

CfPPA Cannabis for Private Purposes Act

DDTA Drugs and Drug Trafficking Act

DPC Dagga Private Club

EUDA European Union Drugs Agency

FGA Fields of Green for ALL, NPC (non-profit company)

MRSCA Medicines and Related Substances Control Act

PHC Pretoria High Court

SAPS South African Police Service

WCHC Western Cape High Court

Declarations

Competing interests.

MC is involved in several litigations mentioned, and is Managing Director of FGA.

Availability of data.

Not applicable. All references accessed 12 August 2024.

Funding.

No funding was provided for this study, undertaken on a volunteer basis by the authors.

Authors' contributions.

MC and KRZ: everything.

Acknowledgements.

We acknowledge the contributions of the late Julian Stobbs, whose work was pivotal and whose death was the result of rampant criminality in South Africa, something we hope the re-legalisation of cannabis will help to counter by freeing up police resources. We also acknowledge the work of all activists and volunteer teams worldwide, both past and present, who have contributed to the shift in the consciousness within everything to do with the *Cannabis sativa* L. plant and cultures.

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