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decriminalisation of unlawful conduct: a South African
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Introduction

Main focus of the paper:

- Judicial decriminalization of certain unlawful conduct by means of human rights law.



South African perspective

- Case on the legalization/decriminalization of private marijuana use – on the basis of the right to privacy. (*Minister of Justice and Constitutional Development and Others v Prince* 2018 6 SA 393 (CC))
 - Constitutional challenge was successful.
- Case on the legalization/decriminalization of prostitution – on the basis of gender discrimination & the right to privacy. (*S v Jordan and Others* 2002 6 SA 642 (CC))
 - Constitutional challenge was unsuccessful.



Desirability of judicial decriminalization

Advantages:

1. Speed with which the law may be altered in order to remove the criminal element of the conduct.
2. Faster protection of rights or vulnerable persons.

Disadvantages:

1. Separation of powers concerns
2. Legal certainty, especially the repercussions of the decriminalization/legalization on other criminal law rules and procedures.
3. Inaction by legislatures following decriminalization/legalization could result in uncertainties to continue for many years.



Conclusion

- Caution should be exercised by courts when considering decriminalization/legalization of conduct.
- Where criminal law rules are very technical and procedurally based, the separation of powers concerns become more evident.
- Some decriminalization actions would require in depth research and analysis, as well as extensive revision of other legal provisions in order to maintain legal certainty.
- Courts should therefore be concerned with investigating the impact of a criminal law provisions on human rights, and declare such provisions unconstitutional if necessary, but leave the details to the legislature to review and amend.

