

Decriminalisation of cannabis for personal use in South Africa

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Summary

In 2002 the South African Constitutional Court was faced with a case challenging the constitutionality of the legislation criminalising cannabis use. The appellant argued that the criminalisation infringed the right to religion. The Court, however, ruled that the legislation did not constitute a constitutional infringement. It is worth noting that the African Commission and the Human Rights Committee previously have dealt with this issue, in particular, the implications of South African legislation on cannabis for international human rights law. Just as the Constitutional Court, the Commission and Committee did not find a violation. In 2017 the Western Cape Division of the High Court of South Africa was faced with another application, this time challenging the constitutionality of the legislation criminalising the personal use of cannabis by adults in the privacy of their home. The Court in this instance declared the prohibition of the use of cannabis by adults in the confines of their private dwellings to be inconsistent with the Constitution of South Africa and declared the provisions to be invalid to that extent. The decision of the High Court was confirmed by the Constitutional Court in 2018, with the latter Court ruling, amongst others, that 'the right to privacy entitles an adult person to use or cultivate or possess cannabis in private for his or her personal consumption'. This decision raises two questions, namely, what inspired the Court in the 2018 case to arrive at a decision different from that of 2002? In light of the fact that South Africa is a party to the three binding

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international drug treaties which, among others, create a presumption upon states to criminalise possession and cultivation for personal use, the second question is what the implications of the 2018 decision are for South Africa's international law obligations. Answering these two questions forms the crux of this article.

Key words: *cannabis; decriminalisation; international law; personal use; Prince; South Africa*

1 Introduction

South Africa, like many states in the world, has made the personal use and possession of cannabis a criminal offence. Cannabis is commonly known as 'dagga' in South Africa,¹ whereas in other countries it is referred to as 'marijuana'. The criminalisation of cannabis use in South Africa was effected through provisions in two Acts of Parliament. These are the Drugs and Drug Trafficking Act 140 of 1992 (Drugs Act) in section 4(b) and the Medicines and Related Substances Control Act 101 of 1965 (Medicines Act) in section 22A(10).² In accordance with these provisions, cannabis is one of the substances prohibited for personal use. Under the international drug treaties instruments (which will be analysed in subsequent parts of the article) there is a general presumption upon states to criminalise possession and cultivation for personal use.

The criminalisation of cannabis has awakened debates on whether or not the use of this substance should constitute a criminal offence. These debates have transcended the academic realm and many have challenged its criminalisation in courts of law. In the context of South Africa, the indiscriminate criminalisation of cannabis use and possession has been challenged not only in the South African courts but also beyond. The argument has time and again been that the criminalisation infringes the right to practise religious beliefs, among others. The decision of 2017, as later confirmed in 2018 by the South African Constitutional Court, however, brought a new perspective to South African jurisprudence. Notably, the laws criminalising cannabis

1 See the National Prosecution Authority of South Africa Annual Report 2014/2015, which refers to issues of cannabis.

2 The prohibition against cannabis is found in Part III where it is listed in Schedule 2 of the Drugs Act as a harmful, unwanted dependence-producing substance. The prohibition on the use or possession of cannabis is effected by sec 4(b). The major aim of the Drugs Act is to proscribe the use and/or possession of dependence-producing substances as well as dealing in such substances. The possession of cannabis for medicinal purposes is allowed as an exemption under sec 4(b). However, this exemption is subject to the stipulated provisions of the Medicines Act. Also, sec 22A(10) of the Medicines Act, read together with sch 8 of the same Act, strictly prohibits the use or possession of cannabis unless it is for research or analytical purposes. The major stated aim of the Medicines Act is to regulate the registration of medicines and substances. As a result, substances listed in sch 8 of the Medicines Act resembles those listed in Part III of sch 2 of the Drugs Act.

were challenged not on the basis of religion, but based on the right to privacy. For the first time, after three prior decisions, the High Court of the Western Cape found a constitutional violation. The Court, declaring, *inter alia*, that the prohibition on the use of cannabis by adults in the confines of their private dwellings is inconsistent with the South African Constitution and that the provisions of the legislation in question were invalid to that extent. The South African Constitutional Court confirmed this ruling, going a step further by expanding the protection of individuals that use cannabis for personal consumption. In this regard the Court categorically ruled that 'the right to privacy entitles an adult person to use, cultivate or possess cannabis in private for his or her personal consumption'.³ In terms of the ruling such protection is not limited to a home or private dwelling.

With this decision, South Africa is the first and, currently, the only African country to make provision for the personal consumption of cannabis in private (also generally referred to as recreational cannabis). The use of cannabis for medicinal and recreational purposes remains illegal in most African countries, including Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, the Central African Republic, Chad, the Democratic Republic of the Congo, Côte d'Ivoire, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Egypt, Gabon, The Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Liberia, Libya, Malawi, Mali, Mauritania, Mauritius, Mozambique, Namibia, Niger, Nigeria, Rwanda, Senegal, Sierra Leone, Sudan, South Sudan, Tanzania, Togo, the Kingdom of Eswatini, Uganda and Tunisia.⁴ In 2017 Lesotho legalised the cultivation of cannabis for medicinal purposes, while in April 2018 Zimbabwe legalised the cultivation of cannabis for medicinal and research purposes.⁵ However, in both these countries the law does not make provision for cannabis for personal consumption. An African country that comes close to the current legal position in South Africa is Morocco. In Morocco the personal consumption of cannabis is tolerated as part of that country's local culture.⁶ However, unlike the position in South Africa, cannabis for personal consumption remains illegal in Morocco and arrests still persist. Morocco currently is having discussions to have the laws on cannabis revised.⁷ However, these discussions are centred on the regulation of cannabis for industrial and medicinal purposes as opposed to personal consumption (recreational cannabis). Generally, therefore, the state of affairs in most African

3 *Minister of Justice and Constitutional Development & Others v Prince; National Director of Public Prosecutions & Others v Rubin; National Director of Public Prosecutions & Others v Acton & Others* [2018] ZACC 30 (*Prince 2* Constitutional Court decision) para 58.

4 Prohibition Partners *The African cannabis report* (2019) 1.

5 As above.

6 As above.

7 As above.

countries makes the legal position established in the South African decision one of its kind in the context of Africa.

A cursory reading of the South African decision may suggest that the judgment is merely another decision on the subject of cannabis use. However, on closer scrutiny deeper issues and questions are revealed. For example, what made the argument in the 2018 case to stand out, with the Court arriving at a decision different from that of previous courts? Also, South Africa ratified three international treaties which, among others, create an obligation upon states to criminalise the possession and cultivation for personal use. This again leaves a number of questions unanswered. In particular, if the 2018 decision is implemented, will South Africa still be in adherence with its international law obligations? To answer these questions this article is divided into two parts. The first part critically analyses the various decisions in which the legislation criminalising cannabis in South Africa has been challenged. It focuses on the 2002 decision of the Constitutional Court, the decision of the African Commission on Human and Peoples' Rights (African Commission), the Human Rights Committee decision, the 2017 decision of the High Court and the 2018 decision of the Constitutional Court. The purpose of this part of the article is to demonstrate how the right to privacy played out in the 2017 and 2018 decisions, leading the courts to find a constitutional infringement, a finding at which the three previous decisions had not arrived. The part concludes that anchoring the argument of infringement in the right to privacy eliminated the barriers that seemed insurmountable in previous decisions. The second part measures the 2018 decision against South Africa's international law obligations. It is concluded that the 2018 decision, although changing the legal regime in South Africa, does not infringe the international drug treaties to which South Africa prescribes.

2 The *Prince* case: From South African courts to the African Commission; to the Human Rights Committee and back to South African courts

2.1 *Prince v President of the Law Society, Cape of Good Hope*⁸

The facts of this case are that Prince was using dagga, otherwise known as cannabis sativa, for spiritual, medicinal, culinary and ceremonial purposes as a way of manifesting and/or practising his religion as a Rastafarian.⁹ He had successfully completed his legal studies, which enabled him to qualify to be registered as a candidate attorney. However, because he had in the past been convicted of the offence of possessing dagga, his fitness and propriety to be registered as candidate attorney was questioned, particularly in light of the fact

8 *Prince v President, Cape Law Society* 2002 (3) BCLR 231 (CC); 2002 (2) SA 794 (CC).

9 See para 1.

that he indicated that he was not eager to stop his use of dagga for religious purposes. On this account the Cape of Good Hope Law Society rejected his request for registration. In the Law Society's view, registration would bring disrepute upon the attorneys' profession.¹⁰ Mr Prince was not satisfied with this decision. He challenged the constitutionality of the prohibition on the use and possession of cannabis for religious purposes both in the Cape of Good Hope High Court (High Court) and later in the Supreme Court of Appeal (SCA). In both instances he was unsuccessful. His appeal in the SCA was dismissed and he consequently lodged an appeal with the Constitutional Court.

Before the Constitutional Court, Prince still failed to get the Court to find a constitutional infringement on the prohibition on the use and possession of cannabis for religious purposes. Ngcobo J, handing down the majority judgment, ruled as follows:¹¹

The appellant belongs to a minority group. Our Constitution recognises that minority groups may hold their own religious views and enjoins us to tolerate and protect such views. However, the right to freedom of religion is not absolute. While members of a religious community may not determine for themselves which laws they will obey and which they will not, the state should, where it is reasonably possible, seek to avoid putting the believers to a choice between their faith and respect for the law.

In arriving at this decision, the Court noted that it would be impossible for state agencies mandated to enforce the overall statutory prohibition on the use and possession of dagga to make an exception for the use of small quantities for religious purposes without undermining the overall aims of the prohibition.¹²

It is important to note that Prince challenged the prohibition on the use of marijuana within the ambit of the rights to freedom of religion, to dignity, to pursue the profession of one's choice, and not to be subjected to unfair discrimination. Notably, the right to privacy feature nowhere in his argument. He chose the right to freedom of religion and sought an exemption only for followers of the Rastafari religion. In light of this narrow argument, the Court did not venture into addressing the issue whether the use or possession of small quantities of dagga in the privacy of the home was constitutional.¹³ Thus, the Constitutional Court steered clear of the argument for use or personal consumption of cannabis in small quantities. As Prince had chosen to anchor his argument on the infringement of the right to practise religion, the Court's decision was confined to this argument.

10 See para 2.

11 See 87, cited in para 146 of the case.

12 Para 130. The Court observed that 'where there was no carefully controlled chain of legalised supply, it was going to be difficult to see how the island of genuine acquisition and use of cannabis by Rastafarians for the purpose of practising their religion could be distinguished from the surrounding ocean of illegal trafficking and use'.

13 Para 165.

Anchoring the argument within the ambit of religion came with challenges. Notably, it did not pass the limitation clause in section 36 of the South African Constitution. Having exhausted all the judicial avenues in South Africa, Prince sought to look beyond South Africa's judicial borders. He approached the African Commission.

2.2 *Prince v South Africa*¹⁴

Prince brought a complaint before the African Commission alleging a violation of articles 5,¹⁵ 8,¹⁶ 15¹⁷ and 17(2)¹⁸ of the African Charter on Human and Peoples' Rights (African Charter). Prince requested the African Commission to find South Africa in violation of the African Charter for failure to allow him an exemption.¹⁹ In Prince's view, the failure to make such exemption placed him in conflict with the law in so far as the offence of use or possession of cannabis was concerned.²⁰ Although Prince acknowledged that the prohibition served a legitimate purpose, he took the view that it was prejudicial because no exception was made for the sacramental use of cannabis by Rastafari. Prince drew the attention of the Commission to the fact that the Drugs Act and the Medicines Act provided for an exemption for the possession or use of cannabis under exceptional circumstances. Notably, cannabis could be used or possessed for medicinal purposes, in line with the provisions of the Medicines Act, which regulated the registration of medicines and related substances.²¹ Prince, therefore, requested the African Commission to grant him a similar exemption for the sacramental use of cannabis.²² He submitted that a religiously-pluralistic society would be ensured through such reasonable accommodation.²³ The African Commission made several interesting rulings, some of which are worth noting.

In arriving at its decision, the African Commission ruled that although one's freedom to manifest his or her religion or belief can never be attained if there are legal limitations preventing an individual from carrying out actions sanctioned by his or her convictions or beliefs, such freedom did not in itself consist of a general right to act

14 *Prince v South Africa* (2004) AHRLR 105 (ACHPR 2004).

15 See the African Charter on Human and Peoples' Rights of 1981. Art 5 deals with the right to the respect of the dignity inherent in a human being and to the recognition of his or her legal status.

16 As above. Art 8 provides for 'the right to freedom of conscience, the profession and free practice of religion and that no one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms'.

17 As above. Art 15 provides for 'the right to work under equitable and satisfactory conditions, and to receive equal pay for equal work.'

18 As above. Art 17(2) provides for 'the right of every individual to freely take part in the cultural life of his community'.

19 See *Prince v South Africa* (n 14) para 29.

20 Para 40.

21 As above.

22 Para 31.

23 As above.

in line with one's convictions.²⁴ The Commission pointed out that whereas the right to embrace religious convictions should be unqualified, the right to act on those beliefs should not be absolute.²⁵ This is because a persons' right to practise his or her religion in some instances must yield to the interests of society.²⁶ In finding that the limitation was legitimate, the Commission had recourse to article 27(2) which underscores the need to accord due regard to the rights of others in the exercise of the rights guaranteed under the African Charter.²⁷ The Commission was also of the view that the restriction was general in nature.²⁸ The prohibition was not directed at the claimant and Rastafari in general. Rather, it applied to everyone, and this necessarily ruled out the argument that the prohibition was discriminatory.²⁹ Considered together, Prince's request for an exemption for the sacramental use and possession of cannabis on the grounds stipulated in the African Charter was rejected. Dissatisfied with the decision of the Commission, Prince escalated the matter to the United Nations (UN) level, as discussed below.

2.3 *Prince v South Africa*³⁰

Before the Human Rights Committee, Prince alleged that South Africa was in violation of his rights under article 18(1),³¹ article 26³² and article 27³³ of the International Covenant on Civil and Political Rights of 1966 (ICCPR). The facts of the matter are similar to those canvassed by Prince in the earlier forums. He alleged a violation of article 18(1) of ICCPR, and referred to General Comment 22 which underscores the notion that worship 'extends to ritual and ceremonial acts giving direct expression to belief'.³⁴

24 Para 41.

25 As above.

26 As above.

27 Para 43.

28 The African Commission cited the UN Human Rights Committee recommendation in the case *K Singh Bhinder v Canada* (Communication 208/1986). The Committee had upheld limitations against the manner of manifestation of one's religious practice.

29 Para 44.

30 *Prince v South Africa* (2007) AHRLR 40 (HRC 2007).

31 Art 18(1) provides that '[e]veryone shall have the right to freedom of thought, conscience and religion; and that this right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching'.

32 Art 26 provides that '[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

33 Art 27 provides that '[i]n those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language'.

Prince was of the view that by prohibiting the possession or use of cannabis for religious purposes by Rastafari, South Africa was in violation of article 26. This, he said, was as a result of the failure by the respondent to distinguish the Rastafari religion from other religions.³⁵ He further alleged that the failure by the respondent to explore other avenues with a view to finding an effective exception for Rastafari constituted a violation of article 27.³⁶ In considering the matter on its merits, the Human Rights Committee arrived at a decision similar to that of the African Commission. In this regard the Committee stressed that 'freedom to manifest one's religion or beliefs is not absolute and may be subject to limitations'.³⁷ The Committee further observed that the proscription of the use and possession of cannabis, which resulted in the restriction of Prince's freedom to manifest his religion, was prescribed by law, namely, by the Drugs Act and the Medicines Act. In the Committee's view, therefore, the failure to make an exemption for the use of cannabis for religious purposes was a justifiable limitation in terms of article 18(3).³⁸ Against this backdrop, the Committee found no violation of article 18(1).³⁹ The Committee also failed to find a violation of article 27.⁴⁰ With regard to article 26, the Committee took the view that South Africa's failure to make an exemption for Rastafarians could not be said to constitute differential treatment.⁴¹ The Committee ultimately found that South Africa did not breach any articles of ICCPR as alleged by the petitioners.⁴²

With the Human Rights Committee failing to find a violation of ICCPR, the legal issues surrounding the *Prince* case seemed sealed. However, this position lasted only until 31 March 2017 when the South African High Court handed down a decision which, drawing on the previous decisions, could not have been expected. This decision was, in many respects, confirmed by the Constitutional Court in 2018. The overarching question, therefore, arises as to what changed between 2002 and 2018 in terms of the *ratio decidendi* of the courts. The 2017 decision, as confirmed by the Constitutional Court in 2018, therefore, is examined briefly to assess the line of argument that won the day and, more generally, to see how this decision contributes to South African jurisprudence on this subject.⁴³

34 Para 3.1 of the Communication.

35 Para 3.3.

36 Para 3.4.

37 Para 7.2.

38 Art 18(3) provides that '[f]reedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others'.

39 Para 7.3.

40 Para 7.4.

41 Para 7.5.

42 Para 8.

2.4 *Prince v Minister of Justice and Constitutional Development & Others; Rubin v National Director of Prosecutions & Others; Acton & Others (Prince 2)*⁴⁴

Different actors brought applications before the Western Cape High Court. One of the applicants was Prince who approached the Court seeking a declaration to the effect that the legislative provision prohibiting the possession and use of cannabis, as well as the cultivation, purchase and transportation of cannabis for personal or communal consumption be declared invalid. Since his request was similar to two other applications, they were decided together. We are concerned here with Prince's challenge. He challenged provisions of the Drugs Act together with those of the Medicines Act in so far as they related to cannabis consumption and the legislative provisions prohibiting the use and possession of cannabis by adults in the privacy of their homes.⁴⁵ He argued before the High Court that the criminalisation of the possession and use of cannabis in the privacy of adults' own homes as well as incorrectly-designated places (such as Rastafarian churches) was unconstitutional. He alleged that the challenged legislation breached fundamental rights, including freedom of religion and equal dignity.⁴⁶ However, Prince's main challenge against the legislation was that it breached his right to privacy.⁴⁷

What makes the *Prince 2* decision stand out is the manner in which the Court dealt with the issue of the right to privacy. As to whether the Drugs Act and Medicines Act placed undue limitations on the right to privacy, the Court held the following view:⁴⁸

If privacy, as a continuum of rights which starts with an inviolable inner core moving from the private to the public realm where privacy is only remotely implicated by interference, it must follow that those who wish to partake of a small quantity of cannabis in the intimacy of their home do exercise a right to autonomy which, without clear justification, does not merit interference from the outside community or the state.

The Court took a similar view with regard to the cultivation of cannabis in homes for the exclusive purpose of personal consumption.⁴⁹ Turning to the question of the limitation of rights, the Court ruled that rights may be limited in terms of Chapter 2 of the Constitution.⁵⁰ The Court also had recourse to developments in other

43 *Prince v Minister of Justice and Constitutional Development & Others; Rubin v National Director of Prosecutions & Others; Acton & Others* (4153/2012) [2017] ZAWCHC 30; [2017] 2 All SA 864 (WCC); 2017 (4) SA 299 (WCC) (31 March 2017) (*Prince 2* High Court decision).

44 As above.

45 *Prince 2* High Court decision (n 43) para 4(a).

46 *Prince 2* High Court decision para 11.

47 As above.

48 *Prince 2* High Court decision (n 43) para 25.

49 *Prince 2* High Court decision para 26.

50 *Prince 2* High Court decision para 28.

states, which revealed that states are warming up to the idea of decriminalisation and, most importantly, that criminalisation *per se* hardly addresses the harm caused by prescribed drugs such as cannabis.⁵¹ Against this backdrop, the Court ruled that the provisions of the Drugs Act and Medicines Act needed to be narrowly tailored to ensure that they were not overly broad as to undermine guaranteed rights such as the right to privacy.⁵² Ultimately, the Court ruled that the respondents did not discharge the burden of proving that the limitation of the right to privacy was justifiable.⁵³ The Court, however, cautiously noted that the decision did not imply that the Court understated the importance of curbing drug trafficking.⁵⁴ Rather, that the decision was 'only concerned with the conduct of individuals performed in the confines of their own homes'.⁵⁵

The final nail in the coffin in the fight against the criminalisation of dagga for personal use by adults was put by the Constitutional Court in the 2018 confirmatory decision.⁵⁶ The Constitutional Court had the task of either confirming or not confirming the High Court order of constitutional invalidity on the provisions of the impugned legislation as it related to the prohibition of the use of cannabis by adults within the confines of their homes or private dwellings. The Court interpreted the right to privacy as being the right to be left alone.⁵⁷ The Court pointed out that the right to privacy entitled an adult person to use or cultivate or possess cannabis in private for personal consumption.⁵⁸ Thus, the Court confirmed the High Court's decision to the extent that the impugned provisions criminalising the use, cultivation or possession of cannabis limited the right to privacy.⁵⁹ The Constitutional Court further addressed the issue of whether the infringed right to privacy caused by the impugned legislation could be said to be reasonable and justifiable in terms of section 36 of the South African Constitution. In this regard, the Court found the provisions of the impugned legislation to be part of a law of general application. However, on the issue of dealing in cannabis, the Court cautiously noted that such a limitation served a legitimate purpose in light of the chronic challenge of dealing in cannabis in South Africa.⁶⁰ Therefore, the prohibition on dealing in cannabis was found to be a justifiable limitation of the right to privacy.⁶¹ As a result, the Constitutional Court did not confirm the finding of the High Court in this regard.

51 *Prince 2* High Court decision para 90.

52 *Prince 2* High Court decision para 104.

53 *Prince 2* High Court decision para 107.

54 As above.

55 As above.

56 *Prince 2* Constitutional Court decision (n 3).

57 *Prince 2* Constitutional Court decision para 45.

58 *Prince 2* Constitutional Court decision para 58.

59 As above.

60 *Prince 2* Constitutional Court decision (n 3) para 88.

61 As above.

Furthermore, the Constitutional Court did not confirm the High Court's order of invalidity relating to section 22(A)(10) which prohibited the sale and administration of cannabis for any purpose other than medicinal purposes.⁶² However, the Court declared section 40(1)(h) of the Criminal Procedure Act to be constitutionally invalid in that it no longer was a criminal offence for an adult to use or be in possession of cannabis for his or her own personal consumption in private.⁶³ The Court found that the state had failed to show that the limitation of the right to privacy was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. In addition, the Constitutional Court found it fit to extend the use of cannabis from the confines of a home or private dwelling to any private place provided that this is not regarded as a public place.⁶⁴ The Court found that such use or possession of cannabis would be protected if it is for personal consumption by an adult person.⁶⁵

One can gather that human rights could only win the day upon invoking the right to privacy, an approach that did not feature in decisions prior to the *Prince 2* decision. By anchoring the decision in the right to privacy, the Court did not have to labour with creating exemptions for certain categories of individuals. Rather, the exemption for the use of cannabis in the privacy of the home applied to everyone. This, by omission, encompassed Rastafarians such as Prince who, as argued in previous jurisprudence, need to use cannabis for sacramental purposes. The decision is praiseworthy in so far as human rights are concerned. It was contended that the decision underscores the boldness of the Court and its willingness to take 'emotions and moral convictions' out of the human rights debate.⁶⁶

However, no matter how bold the decision was, a number of practical uncertainties arise. If not effectively addressed, these uncertainties have the potential to undermine the contribution to jurisprudence made in the *Prince 2* case. As consistently noted, the Constitutional Court has emphasised that 'the right to privacy entitles an adult person to use or cultivate or possess cannabis in private for his or her personal consumption'.⁶⁷ As far as implementation is concerned, the Constitutional Court ruled as follows:⁶⁸

If a police officer finds a person in possession of cannabis, he or she may only arrest the person if, having regard to all the relevant circumstances,

62 *Prince 2* Constitutional Court decision (n 3) para 90.

63 *Prince 2* Constitutional Court decision para 93.

64 *Prince 2* Constitutional Court decision para 58.

65 *Prince 2* Constitutional Court decision para 100.

66 P de Vos 'Dagga judgment: There are less drastic ways to deal with its harmful effects' *Daily Maverick* 4 May 2017, <https://www.dailymaverick.co.za/opinionista/2017-05-04-dagga-judgment-there-are-less-dramatic-ways-to-deal-with-its-harmful-effects/> (accessed 4 November 2019).

67 *Prince 2* Constitutional Court decision (n 3) para 58.

68 *Prince 2* Constitutional Court decision para 111.

including the quantity of cannabis found in that person's possession, it can be said that there is a reasonable suspicion that a person has committed an offence under section 40(1)(b) or (h) of the Criminal Procedure Act. I think that the references to possession of cannabis, 'for personal use', or 'for personal consumption' help to ensure that we do not have to specify the amount or quantity of cannabis that may be possessed. We only need to say that the amount that may be possessed is an amount for personal consumption.

The implication of the above ruling is that there is no prescription on the amount of cannabis deemed adequate for personal use. A question, therefore, arises as to what quantity is acceptable. On the one hand, by steering clear of prescribing the acceptable amount, each case is dealt with uniquely and decisions of police officers are arrived at on a case-by-case basis. On the other hand, however, such open-endedness, if not addressed, could be abused as it leaves police officers with unfettered discretion. Critical to note at this juncture is the fact that from a criminal justice perspective, individuals must be furnished with sufficient information to enable them to know what is prohibited and what is acceptable. With the current state of affairs, neither police officers nor users are certain of circumstances when the amount of cannabis possessed exceeds the threshold for personal consumption or use. With such uncertainty, issues of legality come into play and these directly impact on the right to a fair trial for those accused.

As already noted, the Court extended the decision of the High Court to the extent that the use or possession of cannabis cannot be restricted to a home or private dwelling. The Court used an example of 'an adult who has cannabis in his or her pocket for his or her personal consumption within the boundaries of a private dwelling or home'.⁶⁹ Such a person is not only protected while in a home or private dwelling, but also upon stepping out of the boundary of a home or private dwelling provided that the cannabis remains in his or her pocket.⁷⁰ Challenges of implementation, however, would arise in differentiating between private and public for purposes of enforcement. Again, since penal laws have to be precise to conform to the principle of legality, this remains an issue that would require further delineation by way of legislation, short of which the fair trial rights of those accused are threatened.

It is also worth noting that the High Court in its decision had declared provisions that prohibited the purchase of cannabis for personal use invalid.⁷¹ Generally, the Court's reasoning in this regard would make sense in that for one to be allowed to use cannabis, access to it has to be envisaged. However, the Constitutional Court did not confirm this part of the High Court ruling. In the Court's view, to confirm such an order would be tantamount to 'sanctioning

69 *Prince 2* Constitutional Court decision para 98.

70 *As above*.

71 *Prince 2* Constitutional Court decision (n 3) paras 87 & 88.

dealing in cannabis'.⁷² This ruling is rather bizarre, especially in light of the fact that not all adult users of cannabis cultivate or plan to cultivate their own plant. This, therefore, implies that this category of users will have to acquire or purchase it somehow. One commentator vividly paints the dilemma by posing the question: How is an adult user of cannabis supposed to acquire the marijuana they're allowed to use in private if they don't buy it from a dealer of some sort (which the Constitutional Court explicitly says is illegal)?⁷³ Even assuming users of cannabis were to cultivate their own plants, chances are high that they would still need to acquire the seed. This seed might have to be purchased. Thus, the seller of the seed would, by definition, fall within the ambit of dealer and as such would be engaged in an illegal act. Moreover, a user who decides to purchase from a seller could also risk being an accomplice in the illegal act of dealing in cannabis and related products such as seeds. Precisely put, to make use of cannabis for personal consumption in private, some users would have to act illegally. This is a real possibility that the Constitutional Court did not explicitly address.

Considered together, despite the above-mentioned practical challenges, there is no denying that the decision in the *Prince 2* case makes a useful contribution to the jurisprudence on this subject, not only in South Africa but in Africa at large. A question left unresolved, however, is whether the *Prince 2* decision would pass international law muster. The answer to this question forms the crux of the next part of the article.

3 The international drug-treaty regime and *Prince 2*

The overall purpose of the third part of the article is to assess the *Prince 2* decision in light of international law, in particular the treaties on illicit drugs. However, such a task cannot be effectively executed without first understanding the position of international law on cannabis or, more generally, illicit drugs. Understanding the position of international law relating to drugs is pivotal as it sets the stage for understanding the standard against which to measure whether or not South Africa would be operating within the contours of international law if the *Prince 2* decision is confirmed by the Constitutional Court and/or translated into legislation.

The sources of international law are multiple, ranging from international customs and international treaties to general principles of law recognised by civilised nations.⁷⁴ Anyone seeking to establish

72 As above.

73 M Nel 'The dagga ruling: While a step forward isn't very practical', <https://citizen.co.za/talking-point/2011497/the-dagga-ruling-while-a-step-forward-isnt-very-practical/> (accessed 3 November 2019).

74 Art 38 of the Statute of the International Court of Justice. See also M Dixon *A textbook on international law* (2007) 23.

the position of international law on a particular issue would have to refer to one or more of these sources.

On the subject of illicit drugs, the main source of international law are international treaties. Customary international law and other sources of international law generally do not feature here. Therefore it is fair to conclude that the international legal norms on drugs are mainly found in treaties. Presently there are three international treaties devoted to this cause. These are the UN Single Convention on Narcotic Drugs 1961 (as amended by the 1972 Protocol); the UN Convention on Psychotropic Substances 1971; and the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988. South Africa is party to all three the foregoing treaties.⁷⁵ Suffice it to note that the three treaties are not self-executing.⁷⁶ Therefore, state parties to these treaties have to take additional steps to ensure their execution, including the enactment of laws at the domestic level. The South African Drugs Act, a national statute comprehensively addressing the subject of illicit drugs, is a clear indication of South Africa's preparedness to breathe life into the international treaties it willingly signed up to.⁷⁷

In discussing the treaty regime on narcotic and psychotropic substances, it may also be necessary to take into account the position of international law on treaties and ratification or accession thereof. Under the Vienna Convention on the Law of Treaties (Vienna Convention), '[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith'.⁷⁸ Therefore, South Africa, as a party to the three drug treaties is bound to perform them in good faith. Furthermore, under the law of treaties '[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'.⁷⁹ Therefore, South Africa, as a party to the three drug treaties cannot be seen to enact national laws and thereupon rely on them to justify its failure to perform the obligations enshrined in these three international treaties. Moreover, the Vienna Convention mandates South Africa to interpret the above-mentioned drug treaties 'in good faith'.⁸⁰ Therefore, South Africa cannot adopt a biased interpretation of the treaties with a view to circumventing its international obligations under the said treaties.

75 The 1971 Treaty, 27 January 1972; 1988 Treaty, 14 December 1988; Single Convention, 16 November 1971.

76 In this regard, action is required on the part of state parties to take measures at the domestic level to execute the provisions of the conventions. Notable provisions imploring states to take measures at the domestic level include art 36 of the Single Convention; art 21 of the 1971 Convention; and art 3 of the 1988 Convention; all of which mandate parties to adopt measures that make drug use a criminal offence.

77 See generally the South African Drugs and Drug Trafficking Act 140 of 1992.

78 Art 26 of the Vienna Convention on the Law of Treaties 1969 (Vienna Convention).

79 Art 27 Vienna Convention.

80 Art 31 Vienna Convention.

3.1 United Nations Single Convention on Narcotic Drugs 1961

The Single Convention on Narcotic Drugs (Single Convention) derives its name from the history surrounding the previous regimes on drugs treaties. Prior to the adoption of the Single Convention, several other treaties dealt sparsely with the subject of illicit drugs.⁸¹ The Single Convention, though often quoted in discussions pertaining to the genealogy of drug treaties, was not the first of its kind on the subject of illicit drugs. For instance, history demonstrates that treaties devoted to this cause date as far back as 1912.⁸² Between 1912 and 1961 there were up to 123 international instruments addressing the subject of illicit drugs, including the Opium Geneva Convention;⁸³ the Convention for Limiting the Manufacture and Regulating the Distribution of Narcotics;⁸⁴ the Protocol signed at Lake Success, New York;⁸⁵ and the Opium Protocol.⁸⁶ The multiplicity of treaties on this subject was not without challenges. It caused a non-coherent international regime on the subject. This set the pace for a reconsideration of the international framework on illicit drugs. Accordingly, the Single Convention was adopted with a view to consolidating several international instruments, none of which, as it were, dealt comprehensively with the subject of illicit drugs.⁸⁷ The Single Convention was also anchored in the need to streamline control mechanisms pertaining to various drugs.⁸⁸ In the words of some commentators, therefore, 'the old system of treaties was

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- 81 Report on the expert seminar 'International Law and Drug Policy Reform', organised by the Global Drug Policy Observatory (GDPO), Washington DC, 17-18 October 2014 2-3, <https://www.swansea.ac.uk/media/Expert%20Seminar%20Report%20-%20International%20Law%20&%20Drug%20Policy%20Reform.pdf> (accessed 4 November 2019).
- 82 For a history surrounding the development of drug treaties, see generally DR Bewley-Taylor *The United States and international drug control, 1909-1997* (2001); WB McAllister *Drug diplomacy in the twentieth century: An international history* (2000).
- 83 United Nations International Opium Convention, signed at Geneva, Switzerland, on 19 February 1925, as amended by the Protocol signed at Lake Success, New York, on 11 December 1946.
- 84 United Nations Convention for Limiting the Manufacture and Regulating the Distribution of Drugs, signed at Geneva, Switzerland, on 13 July 1931, as amended by the Protocol signed at Lake Success, New York, on 11 December 1946.
- 85 United Nations Protocol, signed at Lake Success, New York, on 11 December 1946, amending the Agreements: Conventions and Protocols on Narcotic Drugs concluded at The Hague, The Netherlands, on 23 January 1912, at Geneva, Switzerland; on 11 and 19 February 1925 and 13 July 1931 at Bangkok, Thailand, on 27 November 1937; and at Geneva, Switzerland, on 26 June 1936.
- 86 United Nations Opium Conference: Protocol and Final Act of 23 June 1953.
- 87 See Introduction to the United Nations Single Convention on Narcotic Drugs 1961 as amended by the 1972 Protocol (Single Convention).
- 88 As above.

superseded in 1961 when the member countries saw the need to start afresh by enacting the Single Convention'.⁸⁹

The Single Convention is a relatively bulky treaty comprising 51 articles and four schedules. The Convention affirms the need to compress the previous treaties on drugs into a single regime, with the introduction of this Convention making this aim explicit.⁹⁰ As this article specifically addresses cannabis, in discussing the parameters of the Single Convention much (but not exclusive) emphasis is placed on the Convention's provisions on cannabis. Under this Convention, the term 'cannabis' is described as a flowering plant.⁹¹ 'Cannabis plant' in terms of the Single Convention 'means any plant of the genus cannabis', while 'cannabis resin' means 'the separated resin, whether crude or purified, obtained from the cannabis plant'.⁹² The Single Convention makes use of the term 'cultivation' in various articles. Cultivation for purposes of the Single Convention means the cultivation of several drugs, including the cannabis plant.⁹³

The Single Convention contemplates a number of controls to regulate illicit drugs. These include limiting 'exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs', prohibiting the exportation of drugs to any country or territory and licensing the manufacture of drugs.⁹⁴ This Convention's control regime is schedule-based. There are four schedules appended to the Single Convention, each containing a list of drugs. Various drugs are subject to different control mechanisms depending on the schedule under which they are categorised or listed. Cannabis is listed in both schedule I and schedule IV of the Single Convention. In terms of article 2 of the Single Convention, drugs listed under schedule I are subject to all the control measures listed in the Convention which, as already alluded to, include limiting cannabis use 'exclusively to medical and scientific purposes'. The drugs falling within the ambit of schedule IV are subject to controls similar to those in schedule I.⁹⁵ However, the difference between drugs under schedule I and IV is that the drugs falling under the latter schedule are subject to additional regulation such as a requirement of adoption of special measures, cognisant of the dangerous properties of these drugs.⁹⁶ In addition to the schedule-based regulatory system, the Convention makes specific provision for the regulation of cannabis. Under article 28, the Single

89 New York City Bar 'The international drug control treaties: How important are they to US drug reform?' (2012), https://www2.nycbar.org/pdf/report/uploads/3_20072283-InternationalDrugControlTreaties.pdf (accessed 4 November 2019).

90 Introduction Single Convention (n 87).

91 Art 1(1)(b) Single Convention (n 87).

92 Art 1(1)(c) and art 1(1)(d) Single Convention respectively.

93 Art 1(1)(i) Single Convention.

94 Arts 4(c), 29 and 31 Single Convention.

95 Art 2(5) Single Convention.

96 As above.

Convention does not apply to 'the cultivation of the cannabis plant exclusively for industrial purposes (fibre and seed) or horticultural purposes'.

The Convention could not be more emphatic. State parties are to enact legislation necessary 'to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs [including cannabis]'.⁹⁷ The Convention also has in place a provision instructing state parties to penalise any conduct that is contrary to the Single Convention.⁹⁸ To underscore the seriousness of crimes relating to illicit drugs, the Convention adds, albeit with some equivocation,⁹⁹ that 'serious offences shall be liable to adequate punishment particularly by imprisonment or other penalties of deprivation of liberty'.¹⁰⁰ A textual reading of article 2 in light of the schedules applicable suggests that the purpose of the Single Convention is to limit the use of cannabis to 'medical and scientific purposes'. Although in terms of article 28 of the Convention the cultivation of cannabis for industrial purposes is not subject to the Convention's controls, parties are still under an obligation to adopt measures necessary to control the misuse of cannabis. Article 33 of the Single Convention goes a step further by underscoring that 'the parties shall not permit possession of [cannabis] except under legal authority'.

3.2 United Nations Convention on Psychotropic Substances (1971)

The Psychotropic Substances Convention was adopted ten years after the Single Convention. This Convention expands the catalogue of drugs subject to regulation under international law to include synthetic and psychotropic substances. This Convention was born out of concerns that 'the public and social problems resulting from the abuse of certain psychotropic substances' were not covered by the Single Convention.¹⁰¹ The UN, therefore, deemed it fit to have in place 'rigorous measures necessary to restrict the use of such substances to legitimate purposes'.¹⁰² In doing this, however, the UN was alive to the fact that 'the use of psychotropic substances for medical and scientific purposes is indispensable and that their availability for such purposes should not be unduly restricted'.¹⁰³ For

97 Art 4(c) Single Convention.

98 Art 36(1)(a) Single Convention.

99 Art 36(1)(b) provides that '[n]otwithstanding the preceding subparagraph, when abusers of drugs have committed such offences, the parties may provide, either as an alternative to conviction or punishment or in addition to conviction or punishment, that such abusers shall undergo measures of treatment, education, after-care, rehabilitation and social reintegration in conformity with paragraph 1 of article 38'.

100 Art 36(1)(a) Single Convention.

101 See Preamble to 1971 Convention.

102 As above.

103 As above.

these and several other reasons beyond the scope of the present discussion, the UN deemed it appropriate to have in place an international convention fully devoted to the regulation of synthetic and psychotropic substances. It is against this backdrop that the 1971 Convention was adopted. As the schedules to the Single Convention mainly encompassed plant-based drugs such as cannabis, coca, cocaine, and so forth, the 1971 Convention expanded the catalogue by encompassing within its four schedules synthetic and psychotropic drugs.¹⁰⁴ Under article 1 of the 1971 Convention, psychotropic substances mean 'any substance, natural or synthetic, or any natural material in schedules [I to IV]'. A perusal of the four schedules to the 1971 Convention indicates that these substances include bromamfetamine, tenamfetamine, pyrovalerone, methylphenobarbital, butalbital, pentobarbital, amphetamine and methylphenidate.

The 1971 Convention has 33 articles and, as is the case for the Single Convention, the 1971 Convention organises its control regime through schedules. There are four schedules to this Convention and the drugs falling within the ambit of the various schedules are subject to varying regulation regimes in terms of article 2 of the 1971 Convention. This Convention is very similar to the Single Convention in terms of its control regime and, specifically, in regard to its object and purpose. Besides the fact that it is fully devoted to the regulation of synthetic and psychotropic substances, it also demands of state parties to limit the use of scheduled drugs to medical and scientific purposes.¹⁰⁵ Just as the Single Convention, state parties are mandated not to permit the possession of scheduled drugs except under legal authority.¹⁰⁶ The Convention encompasses aspects of criminalisation, directing state parties to 'treat as a punishable offence, when committed intentionally, any action contrary to a law or regulation adopted in pursuance of its obligations under this Convention'.¹⁰⁷ Offences pertaining to the contravention are to be taken seriously, as evidenced by the wording of the Convention, namely, that state parties are to 'ensure that serious offences shall be liable to adequate punishment, particularly by imprisonment or other penalty of deprivation of liberty'.¹⁰⁸

In underscoring the seriousness of offences arising from the contravention of the Convention, the 1971 Convention does not lose sight of other measures relevant in preventing the commission of crimes relating to scheduled drugs. In this regard, the Convention underscores that measures such as treatment, education, after-care, rehabilitation and social reintegration can be availed to drug abusers.¹⁰⁹ The implication of the foregoing allowance is that

104 See the four schedules to the 1971 Convention.

105 See art 5(2) of the 1971 Convention.

106 Art 5(3) 1971 Convention.

107 Art 22(1) 1971 Convention.

108 As above.

109 Art 22(2) 1971 Convention.

although a state may criminalise the manner in which the crime is dealt with by the criminal justice system it does not always have to result in incarceration. This exemplifies the strategy that several states are adopting.¹¹⁰ They still criminalise conduct that contravenes the Convention, but steer clear of invoking imprisonment. Rather, they focus on the other measures permitted by the 1971 Convention which, among others, include rehabilitation and treatment. However, as will be discussed briefly in one of the subsequent parts, the foregoing measures are to be taken with a pinch of salt because of the risk they pose to internationally-guaranteed human rights and freedoms.

Be that as it may, South Africa, having signed up to the drugs treaties, including the 1971 Convention, remains bound by these treaties despite the criticism levelled against them. As the 1971 Convention currently stands, there is a presumption for South Africa to limit the use of the drugs scheduled under this Convention exclusively to medicinal or scientific purposes. It is pertinent to note, however, that although South Africa is a party to the 1971 Convention, this Convention does not specifically address cannabis, the drug with which the *Prince 2* case deals. Therefore, if South Africa is to assess whether or not it will have lived up to international obligations by effecting the *Prince 2* case, the 1971 Convention should be the least of its worries, let alone have it feature in such assessment. Having drawn this conclusion, therefore, for purposes of this article, a further examination of this Convention is unnecessary since it does not speak to the cannabis issue as encapsulated in the *Prince 2* case.

3.3 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988

Even after the adoption of the Single Convention and the 1971 Convention, there still was a 'rising trend in the illicit production of demand for and traffic in narcotic and psychotropic substances'.¹¹¹ There also was a concern that children were gradually becoming victims in the various activities of the drug market.¹¹² The illicit trafficking of drugs also brought with it several other criminal activities that needed to be addressed, such as drug-related money

110 Eg, Portugal passed Law 30/2000, which decriminalised the personal use and, as an entry point, made it explicit that that offenders are diverted to treatment sessions, asked to pay a fine or required to attend education classes. In Brazil the possession of illicit drugs for personal consumption remains a criminal offence in terms of art 28 of Law 11.343 of 2006. However, it is not penalised with imprisonment. Rather, offenders are required to take part in programmes such as education on drugs, rehabilitation, community service, and so forth. See also commentary of G Greenwald 'Drug decriminalisation in Portugal – Lessons for creating fair and successful drug policies' (CATO Institute, Washington DC 2009) 2.

111 Preamble to 1988 Convention.

112 As above.

laundering.¹¹³ Illicit drug trafficking was steadily turning into an international criminal activity.¹¹⁴ By 1988 the UN had determined that illicit drug trafficking demanded 'urgent attention and the highest priority'.¹¹⁵ For these and several other reasons beyond the scope of this discussion, the adoption of an international convention devoted to the challenges identified became inevitable.

The 1988 Convention consists of 34 articles. It also comprises two tables. The term 'table' as used in the 1988 Convention is analogous to the term 'schedule' as used in the Single Convention and the 1971 Convention.¹¹⁶ The two tables appended to the 1988 Convention consist of 'amendments made by the Commission on Narcotic Drugs in Force as of 23 November 1992'.¹¹⁷ Some of the substances listed in these two tables are ephedrine, acetone, safrole, piperidine and potassium permanganate.¹¹⁸ Salient in the 1988 Convention is the emphasis placed on criminalisation.¹¹⁹ There is a presumption for states to 'adopt such measures as may be necessary to establish as criminal offences under [their] its domestic law[s]'.¹²⁰ The conduct envisaged by the Convention includes

the production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic substance contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention.¹²¹

Of particular relevance for the present discussion are provisions relating to cannabis. In terms of article 3(2) of the 1988 Convention,

subject to its constitutional principles and the basic concepts of its legal system, each party shall adopt such measures as may be necessary to establish as a criminal offence under its domestic law, when committed intentionally, the possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention.

It is important to note that cannabis is one of the substances that fall within the ambit of drugs listed under the 1961 (Single) Convention. Therefore, there is a general presumption that the possession, purchase or cultivation of cannabis for personal consumption are not acceptable. States desirous of circumventing the article 3(2) obligations could be tempted to adopt a flexible interpretation, one

113 As above.

114 As above.

115 As above.

116 See the section on tables under the 1988 Convention.

117 See Annex of tables to the 1988 Convention.

118 As above.

119 See eg Preamble and art 3 of the 1988 Convention.

120 Art 3(1) 1988 Convention.

121 As above.

that legalises the use of cannabis generally. Such an approach may, however, not withstand logical muster. Note should be taken of the wording of article 3(2), in particular, the use of the word 'shall', which connotes the mandatory nature of the obligation. Moreover, a UN commentary on article 3(2) suggests that an interpretation that has the effect of legalising the possession, purchase or cultivation of cannabis for personal consumption would crumble. According to this commentary, the penalisation envisaged in article 3(2) of the 1988 Convention 'amounts in fact also to penalisation of personal consumption'.¹²² It can, therefore, be garnered that article 3(2), in unambiguous terms, creates a presumption upon states to criminalise possession and cultivation for personal use. However, sight should not be lost of the opening statement to article 3(2) which subjects the subsequent part of the article to a state's 'constitutional principles and the basic concepts of its legal system'. The implication of this opening statement is discussed in detail in the next part of the article.

3.4 *Prince 2* in light of the international drug treaties

It would be an arduous task to assess *Prince 2* in light of international law without making reference to some of the salient issues noted in the first part. At the risk of falling into the trap of repetition, therefore, some rulings salient in this case are re-echoed to aid logical construal. In this case, Zondo ACJ ruled, *inter alia*, that the provisions of the Drugs Act and the Medicine Act in question are invalid because 'the right to privacy entitles an adult person to use or cultivate or possess cannabis in private for his or her personal consumption'.¹²³ In handing down the *Prince 2* decision, the Constitutional Court emphasised that the ruling is subject to, among others, legislative amendment and confirmation by the highest court of the land, the Constitutional Court.¹²⁴ Thus, it would be necessary to assess whether legislative changes, if effected, would be in alignment with the international legal regime comprehensively set out.

In terms of the Single Convention there is a general presumption for parties to make the production, trade, and possession of illicit substances for non-scientific and non-medicinal purposes a punishable offence. In accordance with the 1988 Convention, there is also a presumption that the possession, purchase or cultivation of cannabis for personal consumption are to constitute a criminal offence under domestic law. What then would be the implications of these

122 United Nations (1998) Commentary on the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988, done at Vienna, Austria, on 20 December 1988; New York: United Nations Publications E/CN.7/590/80. For a contrary view, however, see generally N Boister *Penal aspects of the UN drug conventions* (2001). Boister is of the opinion that no such obligation under the international conventions rests upon states parties to criminalise drug possession for personal consumption.

123 See *Prince 2* Constitutional Court decision (n 3) para 58.

124 *Prince 2* Constitutional Court decision para 129(12).

obligations for the 2018 Constitutional Court's ruling? The answer to this question will depend on the scope and meaning of the *Prince 2* judgment. A few salient points may be deduced from the ruling quoted above. First, the High Court's ruling (as confirmed by the Constitutional Court) addresses a specific category of individuals, in this case adults. It follows rationally that children are not envisaged in so far as this decision is concerned. Second, the domain in which cannabis is used is another salient issue that stands to be taken note of. The ruling in very clear terms makes reference to private use, suggesting that the use of cannabis in the 'public domain' still constitutes an offence. Third, the conduct proscribed is not without limitation. Such conduct includes possession, use or cultivation. It would reasonably follow that conduct falling outside the scope of the foregoing list remains criminalised. Activities other than those enumerated, such as the production, purchase, manufacture, extraction or preparation, remain criminal. Another element that can be garnered from the ruling of the Court is that the purpose for which cannabis is cultivated, possessed or used is specific. It is strictly limited to 'personal consumption'. The implication of this position is that other purposes, such as sale and distribution, remain criminal. The question then is whether South Africa can allow the private use of cannabis while at the same time adhering to its international obligations.

It is important to engage with some commentaries on this decision. After the *Prince 2* decision had been handed down there was jubilation, particularly among dagga users. To some, the assumption was that by virtue of the *Prince 2* decision the use of cannabis had been legalised.¹²⁵ Some commentators tried to place the *Prince 2* decision in proper perspective, but not many have addressed the gist of the decision. Acton, the leader of the Dagga Party, made it explicit that the decision was about the home and not about public possession and consumption.¹²⁶ Prince, one of the applicants in the *Prince 2* decision, interpreted the decision as follows: 'What this means is that South Africans can use cannabis in their homes.'¹²⁷ Despite such clarity, some questions remain. For example, what are the parameters of possession for personal consumption in private? According to the High Court judgment, as confirmed by the Constitutional Court, the right to possess or cultivate cannabis in private can be used as a defence to a charge. As consistently noted in

125 See eg 'Personal cannabis use legalised in South Africa', <https://fieldsofgreenforall.org.za/personal-cannabis-use-legalised-in-south-africa/> (accessed 4 November 2019); S Scissor 'Cannabis was just legalised in South Africa for personal use' 31 March 2017, <https://btl.co.za/cannabis-just-legalised-south-africa-personal-use/> (accessed 4 November 2019).

126 J Evans 'How the Western Cape High Court dagga judgment applies to you' *Daily Maverick* 31 March 2017, <https://www.dailymaverick.co.za/article/2017-03-31-how-the-western-cape-high-court-dagga-judgment-applies-to-you/#.WapwYVO L4g> (accessed 4 November 2019).

127 As above.

the first part of this article, this suggests that the possession, cultivation or use of cannabis remains prohibited. The only difference now is that a person charged can raise a defence to the effect that such possession, use or cultivation is for personal consumption in private.¹²⁸ Therefore, a person may still be arrested or even charged. Contrary to the views of commentaries, the possession, cultivation, use or consumption of cannabis in private has not been legalised.

What then are the implications of this position for international law? It is reiterated that the Single Convention creates a presumption that the use of cannabis is to be limited to medicinal and scientific purposes. Measuring the *Prince 2* decision against this mandate, it would appear that the decision transgresses the Single Convention because of the presumption that the use of cannabis is to be limited to medicinal and scientific purposes. However, the Single Convention has to be read together with the 1988 Convention and, arguably, the 2018 decision is not in violation with the 1988 Convention. Notably, the *Prince 2* decision, if meticulously interpreted, does not have the effect of legalising the use of cannabis. The use of cannabis, as consistently noted, remains illegal. The decision does no more than create a defence for an individual using cannabis. The Court's stance in this regard seems defensible since the 1988 Convention, unmistakably, states that penalisation should be 'subject to [a party's] constitutional principles and the basic concepts of its legal system'.¹²⁹ It may, therefore, be argued that by being alive to the right to privacy, the Constitutional Court in the *Prince 2* case operated within the parameters of the 1988 Convention which gives parties some latitude to accord due regard to their constitutions, a body of law that most, if not all, countries deem supreme. Therefore, it is submitted that should the 2018 Constitutional Court decision be given effect through legislation, it would be in accordance with international law.

The stance taken by the Court in the *Prince 2* case is not unique to South Africa. As noted in the introduction, none of the African states has adopted an approach similar to that of South Africa. However, beyond Africa, several states have set the trend for decriminalisation, with some of them having inspired the decision in the *Prince 2* case.¹³⁰ In Argentina, the Supreme Court unanimously held that article 14(2) of the National Drug Law of 1989 was unconstitutional to the extent that it violated article 19 of the Constitution, which affords protection to private actions that do not harm others.¹³¹ In Mexico, a number of provisions of the law regulating drugs were amended in 2009.¹³² The amendment, among others, precludes the

128 *Prince 2* Constitutional Court decision (n 3) paras 113 & 114.

129 Art 3(2) 1988 Convention.

130 See reference to the practice in states such as Colorado, Mexico and Argentina in *Prince 2* High Court decision (n 43) paras 55-57 & 64-90.

131 *Fallo Arriola* case (2009), <http://druglawreform.info/en/country-information/latin-america/argentina/item/235-the-arriola-ruling-of-the-supreme-court-of-argentina> (accessed 4 November 2019).

public prosecutor from prosecuting consumers for unauthorised possession of substances deemed to be for personal use.¹³³ The provision, however, does not stop law-enforcement officers from arresting users for purposes of conducting investigations and an assessment of whether or not their use falls within the ambit of the exception. The law on the regulation of drugs in Chile provides that the possession of small amounts of drugs for personal use is not punishable.¹³⁴ Considered together, the approach adopted by all the foregoing countries, as in the case of South Africa, suggests that the use of drugs such as cannabis remains unlawful. The approach of these countries arguably is not at odds with international drug laws.

4 Conclusion

The *Prince 2* decision is not just another decision handed down in 2017 and confirmed in 2018, but is one that raises a number of issues. Two of these issues have formed the crux of this article. The article underscored the role that the argument on the right to privacy played in seeing to it that adults desirous of using cannabis receive some remedy. The article also critically engaged with the practical challenges of implementing the decision, all of which could be remedied by appropriate legislative drafting. The analysis revealed that the *Prince 2* decision, on face value, appears to undermine South Africa's international obligations. On closer scrutiny, however, it is established that the decision was carefully crafted as to ensure that it falls within the parameters of the three drug treaties to which South Africa is party. With the practical challenges of implementing the decision, as highlighted in the first part of the article, it remains to be seen how the implementation of the decision will play out.

132 See specifically the 2009 amendments to arts 477, 478, 479 and 480 of the General Health Law of Mexico.

133 As above.

134 Art 4 of Law 20.000 of 2005 of Chile.