

The Problems with Prince: A Critical Analysis of *Minister of Justice and Constitutional Development v Prince*

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ABSTRACT: Over two years ago, South Africa saw the decriminalisation of the use, possession and cultivation of cannabis by an adult in private in the landmark judgment of *Minister of Justice and Constitutional Development v Prince (Clarke and Others Intervening); National Director of Public Prosecutions v Rubin; National Director of Public Prosecutions v Acton (Prince III)*. This judgment was the culmination of a journey that started in the 1990s. This case note is a critical assessment of that judgment. In it, I argue that some of the characteristics of judicial minimalism can be seen in *Prince III*, namely, incomplete and incoherent reasoning and a focus on the desired outcome. The case note focuses on two main problems in the Court’s reasoning. First, the lack of adequate reasoning around the nature of the right to privacy and an articulation of what being ‘in private’ entails. Second, a limited and incomplete limitations analysis in terms of section 36(1) of the South African Constitution. Both failures contribute to an unsatisfactory outcome which has confused the public, as well as the policing authorities.

KEYWORDS: limitations analysis, right to privacy, s 14 of the Constitution

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I INTRODUCTION

Eighteenth of September 2018 marks what many consider to be a momentous day for South Africa — the Constitutional Court of South Africa (the Court) decriminalised the private use, possession and cultivation of cannabis by an adult for private consumption. The Court held that the criminalisation violated the constitutionally enshrined right to privacy.¹ On the face of it, this is a progressive judgment. However, the aftermath has seen inconsistency in the implementation of the judgment, resulting in continued arrests of adults who use, possess and/or cultivate cannabis in private for private consumption;² and an increased amount of work for the policing and prosecuting authorities.³

This case comment is a critical assessment of the *Prince III* judgment, and how it has contributed to this situation. The overall argument of this case comment is that the Court focused on a particular outcome without providing adequate justification for its conclusions. To do so would have pushed the Court towards broader decriminalisation of the use of cannabis than it was prepared to accept at that stage.⁴

Part II provides the background to *Prince III*. Part III outlines and summarises the *Prince III* judgment. Part IV analyses *Prince III*'s failure in two parts. First, the case comment analyses the Court's failure to provide a thorough analysis of the right to privacy and how this right allows for the use, possession and cultivation of cannabis by an adult for private consumption in private. Second, the case comment shows how the Court failed to conduct an adequate (and sometimes correct) limitations analysis in terms of s 36(1) of the Constitution. I argue that both failures contribute to an unsatisfactory outcome which has confused the public and policing authorities.

¹ *Minister of Justice and Constitutional Development v Prince (Clarke & Others Intervening); National Director of Public Prosecutions v Rubin; National Director of Public Prosecutions v Acton* [2018] ZACC 30; 2018 (6) SA 393 (CC) (*Prince III*).

² R Hopkins 'Dagga Ruling's Grey Areas: Following ConCourt Ruling, SAPS Continues to Arrest People for Possession of Cannabis' *Daily Maverick* (8 October 2018) available at <https://www.dailymaverick.co.za/article/2018-10-08-following-concourt-ruling-saps-continues-to-arrest-people-for-possession-of-cannabis/>. See also J Stone 'SA Cops Are Still Cracking Down on Private Use of Dagga' *2OceansVibe* (9 September 2019) available at <https://www.2oceansvibe.com/2019/09/19/sa-cops-are-still-cracking-down-on-private-use-of-dagga/#ixzz66OR1hima>.

³ Briefing to Justice and Correctional Services Portfolio Committee on the National Prosecuting Authority 2019/20 Annual Performance Plan (9 July 2019) available at <https://pmg.org.za/committee-meeting/28532/>. The National Director of Public Prosecutions reported at this meeting that since the decriminalisation of cannabis, the National Prosecuting Authority's workload had increased tremendously. During the presentation it was suggested that this was because prosecutors now have to make an assessment whether or not a person found to be in possession of cannabis is committing an offence or not. This suggestion is in direct contrast to the presentation by the South African Police Services to the Portfolio Committee on Police which reported a decrease in the number of arrests due to cannabis possession, Briefing to Portfolio Committee on Police on the SAPS 2019/20 Budget: Programme 2, 3, including DPCI, 4 and 5, with the Minister of Police (July 3, 2019) available at <https://pmg.org.za/committee-meeting/28484/>.

⁴ *Prince III* (note 1 above) at para 88.

II BACKGROUND TO *PRINCE III*

A *Prince II* and the aftermath

In the late 1990s, Gareth Anver Prince (Prince) applied to the Law Society of the Cape of Good Hope (as it then was) to register his contract of community service in order to qualify as an attorney. In his application he disclosed that he had two previous criminal convictions for possession of cannabis and that he intended to continue using cannabis as he identified as a Rastafari. The Law Society refused to register his contract of community service as it was of the view that Prince was not a fit and proper person to be admitted as an attorney: he had not only two previous convictions, in addition, he declared his intention to continue breaking the law. According to the Law Society, as long as there was a prohibition on the use and possession of cannabis, Prince would consistently break the law and bring the attorneys' profession into disrepute. Prince unsuccessfully challenged the constitutionality of the Law Society's decision in both the High Court⁵ and the Supreme Court of Appeal⁶ on the grounds that it infringed his rights to freedom of religion, to dignity, to pursue the profession of his choice, and not to be subjected to unfair discrimination.

The matter first came before the Court in 2000 when Prince broadened his constitutional challenge to include a challenge to s 4(b) of the Drugs and Drugs Trafficking Act⁷ (Drugs Act) and s 22A(10) of the Medicines and Related Substances Act⁸ (Medicines Act) on the grounds that they did not exempt from prohibition the use, possession and transportation of cannabis for religious purposes by adult Rastafari. He alleged that these statutory provisions violated the right to privacy. In *Prince I*⁹ the Court held that as the focus of the challenge had been on the decision of the Law Society, there was insufficient information on record to determine the constitutionality of the impugned provisions. After extensive argument, the parties were granted leave to submit further evidence in the form of affidavits. The Court directed Prince to deal, amongst other things, with the circumstances under which Rastafari use cannabis, while the respondents in that matter were directed to respond to Prince's evidence and, in addition, deal with practical problems that could arise from the granting of a religious exemption. Following this, the parties appeared before the Court again, resulting in the *Prince II* judgment.

In a 5:4 split, the Court in *Prince II* dismissed the application.¹⁰ Both the majority and the minority held that the general statutory prohibition on the possession of cannabis was a limitation of the right to freedom of religion. Rastafarianism is a religion, and the use and consumption of cannabis is of great importance to the religion. The statutory prohibition on the possession of cannabis was therefore a limitation of the practical element of this right, that is, the right to manifest one's beliefs.¹¹

According to the majority, a prohibition would not have been overbroad if an exception for religious use (similar to that for medical use) had been practically feasible, which the majority thought it was not. The majority held an exception would be too difficult for the police to

⁵ *Prince v President of the Law Society, Cape of Good Hope and Others* 1998 (8) BCLR 976 (C)

⁶ *Prince v President, Cape Law Society, and Others* 2000 (3) SA 845 (SCA); 2000 (7) BCLR 823 (SCA)

⁷ 140 of 1992.

⁸ 101 of 1965.

⁹ *Prince v President of the Law Society of the Cape of Good Hope & Others* [2000] ZACC 28; 2001 (2) SA 388 (CC); 2001 (2) BCLR 133 (CC) (*Prince I*).

¹⁰ *Prince v President of the Law Society of the Cape of Good Hope* [2002] ZACC 1; 2002 (2) SA 794 (*Prince II*).

¹¹ *Ibid* at para 38.

enforce and would therefore undermine the general prohibition.¹² A permit system for Rastafari would entail financial and administrative costs associated with setting up and implementing such a system. There would also be considerable difficulties in policing the system given the private nature of much religious consumption of cannabis and the absence of an established, formally organised structure for the religion.¹³ According to the minority, the constitutional defect was that the statutory prohibition on the possession of cannabis was overbroad. It was not carefully tailored to constitute a minimal intrusion upon the right to freedom of religion and was thus disproportionate to its purpose. It was constitutionally deficient because it did not allow for the religious use of cannabis that is not necessarily harmful and that can be controlled effectively.¹⁴

Following the outcome of *Prince II*, Prince sought legal recourse from international human rights institutions.¹⁵ First, he approached the African Commission on Human and Peoples' Rights with the complaint that South Africa was in violation of various articles of the African Charter on Human and Peoples' Rights for failing to allow him an exemption. Further, similar to the relief asked for in *Prince II*, he requested that the African Commission grant an exemption for the sacramental use and possession of cannabis. The African Commission found that South Africa had not violated the articles, and rejected the request for the drafting of an exemption.¹⁶ Thereafter, Prince escalated the matter to the United Nations Human Rights Committee, alleging that South Africa violated his rights under various articles in the International Covenant on Civil and Political Rights ('ICCPR'). Unfortunately, again, the Human Rights Committee found that the South African prohibition on cannabis use did not violate the provisions of the ICCPR.¹⁷

B The High Court judgment and the lead up to *Prince III*

Despite these setbacks, in 2013 Prince was back before the South African courts, specifically the Western Cape High Court (the High Court).¹⁸ This time, he challenged the following impugned sections collectively: ss 4(b) and 5(b) of the Drugs Act, read with Part III of Schedule 2 to that Act, and ss 22A(9)(a)(i) and 22A(10) of the Medicines Act read with Schedule 7 of GN R509 of 2003 published in terms of s 22A(2) of the Medicines Act. Section 4(b) prohibits the use or possession of any dependence-producing substance or any undesirable dependence-producing substance unless one or more of the exceptions listed therein applies.

¹² Ibid at para 134.

¹³ Ibid.

¹⁴ Ibid at para 83.

¹⁵ For a more detailed discussion of the proceedings at the African Commission and the United Nations Human Rights Committee, see EC Lubaale & SD Mavundla 'Decriminalisation of Cannabis for Personal Use in South Africa' (2019) 19 *African Human Rights Law Journal* 819.

¹⁶ *Prince v South Africa* (2004) African Human Rights Law Reports (AHRLR) 105 (African Charter on Human and Peoples' Rights (ACHPR 2004)).

¹⁷ *Prince v South Africa* (2007) AHRLR 40 (Human Rights Commission 2007).

¹⁸ *Prince v Minister of Justice and Constitutional Development & Others; Rubin v National Director of Public Prosecutions & Others; Acton 7 Others v National Director of Public Prosecutions & Others* [2017] ZAWCHC 30; 2017 (4) SA 299 (WCC) (High Court judgment).

Section 5(b) prohibits dealing in¹⁹ any dependence-producing substance or any undesirable dependence-producing substance unless one or more of the exceptions listed in that provision applies. Prince's case was consolidated with two other cases, those of Jonathan David Rubin in the one instance, and Jeremy David Acton, Ras Menelek Barend Wentzel and Caro Leona Hennegin in the other (Prince, together with the aforementioned parties will hereinafter collectively be referred to as the respondents).²⁰

Before dealing with the substance of the matter, the High Court (Davis J with Saldanha and Boqwana JJ concurring) first considered whether or not the issues before the High Court were *res judicata*, having previously been disposed of in *Prince II*. Ultimately the High Court judgment held that in *Prince II* the issue was whether or not an exemption for the religious use of cannabis could be granted with regard to the criminalisation of cannabis. However the core of the current issue before the High Court was whether or not the infringement of the right to privacy caused by the impugned provisions was justifiable in terms of s 36 of the Constitution; therefore, the High Court judgment held that the matter was not *res judicata* as it was a broader challenge to that before the Court in *Prince II*.²¹

Turning to the substance of the matter, as noted above, the High Court judgment dealt with the matter on the basis that the case before it was whether or not the infringement of the right to privacy caused by the impugned provisions could be justified in terms of s 36 of the Constitution.²² The case presented added complexity with the respondents alleging a dizzying array of rights violations, including the right to freedom of religion, belief and opinion; the right to freedom of expression; the right to freedom of association; environmental rights; the right to healthcare, food, water and social security rights; language and culture rights; and cultural, religious and linguistic rights. The High Court judgment held that the following paragraph from Prince's founding affidavit brought clarity to the matter:

The substantive questions in this matter are to what extent and in what way government may dictate, regulate or proscribe conduct considered to be harmful as well as what is the threshold the harm must cross in order for government to intervene. Can government legitimately dictate what people eat, drink or smoke in the confines of their own homes or in properly designated places? Privacy concerns dictate and our constitution recognises that there should be an area of autonomy that precludes outsider intervention.²³

As part of its analysis, the High Court judgment considered the right to privacy, drawing on the *locus classicus*, the *Bernstein* case.²⁴ The High Court judgment pronounced that it has become established law, insofar as privacy is concerned, that this right becomes more powerful and deserving of greater protection when more of a person's intimate sphere of life comes under legal regulation.²⁵ The High Court judgment then went on to draw links between the right

¹⁹ 'Dealing in', as defined in the Drugs Act 'includes performing any act in connection with the transshipment, importation, cultivation, collection, manufacture, supply, prescription, administration, sale, transmission or exportation' of a drug. For purposes of *Prince III*, the respondents were seeking the decriminalisation of the purchase and cultivation of cannabis.

²⁰ Rubin, Acton and Wentzel are all members of the Dagga Party.

²¹ High Court judgment (note 18 above) at para 20.

²² *Ibid* at para 11.

²³ *Ibid* at para 20.

²⁴ *Bernstein & Others v Bester NO & Others* [1996] ZACC 2; 1996 (4) BCLR 449 (*Bernstein*).

²⁵ High Court judgment (note 18 above) at para 22.

to privacy and the rights to dignity,²⁶ and freedom.²⁷ Ultimately, the High Court judgment focused on the notion that if privacy was considered to be on a continuum where the intimacy within the home constitutes the inner core, community and state interference is not merited.²⁸

The High Court judgment proceeded to analyse the limitation of the right to privacy by the impugned provisions and outlined this process as follows: once it is established that the infringement of a right is of so serious a nature that it is deserving of constitutional protection, a rigorous and careful process must be undertaken with respect to the justification of the impairment.²⁹ The High Court judgment went on to analyse whether the state had discharged the burden of proving that the impairment of the right to privacy was justifiable in three broad respects.

Firstly, it considered the importance of the purpose of the limitation imposed by the impugned provisions. In doing so it considered the state's main evidence in favour of the limitation: medical evidence of the harm caused by cannabis abuse and the high crime levels associated with cannabis use. The High Court judgment, however, held that the state's evidence had been successfully refuted by that provided in an expert report prepared for the High Court. Accordingly, the High Court concluded that the state had not established that the prevention of harmful and violent criminal conduct was a legitimate purpose for the prohibition imposed by the impugned provisions.³⁰

The High Court then went on to consider the justification for the limitation imposed by the impugned provisions by examining comparative law and the approach of other jurisdictions. The High Court first considered the Canadian case of *R v Malmo Levine*,³¹ in which the majority had held that restrictions (similar to those in the impugned provisions) were not contrary to the provisions of s 7 of the Canadian Charter of Rights and Freedom.³² However, the High Court found the approach of the minority judgment in *R v Malmo Levine*, which applied the harm principle, to be convincing. The principle holds that people should be free to do what they want provided that they do not violate any distinct obligation to others. To that extent the application of the principle of harm in relation to the 'right to privacy located in the context of autonomous individual behaviour within the sanctity of one's home' was clearly applicable to the present dispute.³³

The High Court then went on to consider the *Arriola* case, decided in 2009, where the Argentinian Supreme Court of Justice declared a provision that criminalised the possession of drugs for personal consumption invaded the private sphere of individuals and breached the constitutionally protected right to privacy.³⁴ Finally, the High Court considered the case of *Ravin*,³⁵ which held that the right to privacy as enshrined in the Alaskan Constitution protected

²⁶ Ibid at para 23.

²⁷ Ibid at para 24.

²⁸ Ibid at para 25.

²⁹ Ibid at para 30.

³⁰ Ibid at para 53.

³¹ *R v Malmo-Levine; R v Caine* [2003] SCC 74.

³² High Court judgment (note 18 above) at para 66. Section 7 of the Canadian Charter of Rights and Freedom provides that 'Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice'.

³³ Ibid at paras 69–73 for a fuller excursus of this.

³⁴ Ibid at para 75.

³⁵ *Ravin v State of Alaska* 537 P.2d 494 (*Ravin*).

the right to possess and use marijuana in a purely non-commercial context in homes.³⁶ In considering these judgments, the High Court judgment noted that there has been a significant change in the approach of foreign courts and legislation to the personal consumption of cannabis, specifically that there was an emerging consensus that the criminalisation and possession of cannabis for personal use was no longer effective in preventing harm. Accordingly, foreign jurisdictions were shifting away from the view that such restrictions were justifiable.³⁷

Finally, the High Court considered the evidence put forward by Deputy National Director of Public Prosecutions that the National Prosecuting Authority (NPA) had introduced various forms of alternative dispute resolution and diversion methods in response to offences related to the possession and consumption of cannabis for personal use.³⁸ The High Court judgment held that if the NPA considered diversion to be a more appropriate approach to personal consumption use of cannabis, it strengthened the premise that the state could not justify criminalisation of the personal use and consumption of cannabis, as there were less restrictive means available.³⁹

As a result, the High Court judgment declared the impugned provisions to be unconstitutional and invalid to the extent that they prohibited the use of cannabis by an adult in private dwellings where the possession, purchase or cultivation of cannabis is for personal consumption by an adult.⁴⁰ The High Court suspended the operation of the declarations of invalidity for 24 months to allow Parliament to correct the defects.⁴¹ However, in recognition of the need for interim relief for those who would be criminalised should the impugned provisions remain in effect, the High Court created a legal defence for the use, possession, purchase or cultivation of cannabis in a private dwelling that was for the personal consumption of the adult accused.

III *PRINCE III* – UNPACKING THE JUDGMENT

Following the High Court's declaration of constitutional invalidity, it was necessary for the Court to confirm this order in accordance with s 167(5) of the Constitution. The state opposed the confirmation of the order of constitutional invalidity and the respondents cross-appealed the High Court's limitation of the extent of the decriminalisation to a private dwelling.⁴²

In its judgment, the Court framed the key issue for determination to be whether 'the prohibition by the impugned provisions of the mere possession, use or cultivation of cannabis by an adult in private for his or her personal consumption in private is inconsistent with the right to privacy provided for in s 14 of the Constitution and, therefore, invalid.'⁴³ Like the High

³⁶ See below for a more robust discussion of *Ravin*.

³⁷ High Court judgment (note 18 above) at para 90.

³⁸ *Ibid* at para 94.

³⁹ *Ibid* at para 106.

⁴⁰ *Ibid* at para 132.

⁴¹ Section 167(5) of the Constitution of the Republic of South Africa, 1996 (Constitution) provides that the Court makes the final decision whether legislation passed by Parliament is unconstitutional, and must confirm any order of invalidity made by a lower court, before that order has any force. Accordingly, the High Court did not have the power to make an order about when the declaration of invalidity with respect to the impugned provisions would come into effect, and related to this, nor did it have any power to suspend the operation of the declaration of invalidity.

⁴² *Prince III* (note 1 above) at para 4.

⁴³ *Ibid* at para 51.

Court, the Court also decided the matter solely on the basis of the right to privacy, despite the respondents seeking leave to cross-appeal against the High Court's failure to declare that the impugned provisions were invalid in terms of the other rights relied on by the respondents.⁴⁴

The respondents argued before the Court that the right to privacy implicated, and was imperative in upholding, other rights, such as the right to human dignity, the right to freedom and security of person and freedom of movement and residence, and that the High Court erred in only permitting the use and possession of cannabis by adults at home. Furthermore, the High Court erred in not recognising that 'our right to human dignity, and our right to freedom of movement, retains a personal "sanctum" as we move in any chosen space, whether public or private or communal, in relation to our private carrying of cannabis on my person (sic) in any place I choose.'⁴⁵ The respondents further argued, as they did in the High Court, that the impugned provisions also violated cannabis users' right to equality in that tobacco and alcohol users enjoyed the right to carry, transport, and freely consume alcohol and tobacco subject to regulation, and that cannabis users should expect the same treatment. In finding that the right to equality was not infringed, the High Court judgment did not rectify the discrimination suffered by the respondents. The Court however held that it was not in the interests of justice to go beyond the right to privacy because the other rights were not properly canvassed in Prince's founding affidavit in the High Court and that more was needed in the affidavit in respect of how the impugned provisions infringed the other rights.⁴⁶

Its starting point for determining this issue was to examine the scope and content of the constitutional right to privacy enshrined in s 14 of the Constitution.⁴⁷ The Court, relying on the seminal case of *Bernstein*,⁴⁸ characterised the right to privacy as a 'right to be left alone', free from governmental intrusion.⁴⁹ The Court further drew attention to the dictum in *Bernstein* that provides that the 'scope of a person's privacy' extends *a fortiori* only to those aspects in which a legitimate expectation of privacy can be harboured.⁵⁰

The Court went on to consider whether a prohibition on the use and possession of cannabis involves a violation of the right to privacy. The Court compared the issue to the situation that arose in the *Case*⁵¹ matter which concerned the keeping of erotic material in one's home. *Case* extended the protection of the right to privacy to encompass the right to keep erotic material in the privacy of one's home, noting that what one keeps in the privacy of one's home is 'nobody's business but mine'.⁵² The only grounds on which such a right could be limited were those in the limitations clause.⁵³ Interestingly, the Court in *Prince III* referenced the corresponding

⁴⁴ Ibid at para 95.

⁴⁵ The Respondent's Application to cross-appeal (on file with the author).

⁴⁶ *Prince III* (note 1 above) at paras 95–97.

⁴⁷ Section 14 protects the right to privacy both generally, and then specifically, through the protection of both home and bodily searches and seizures, the protection of privacy communications.

⁴⁸ *Bernstein* (note 24 above).

⁴⁹ *Prince III* (note 1 above) at para 45.

⁵⁰ Ibid at para 47.

⁵¹ *Case v Minister of Safety and Security; Curtis v Minister of Safety and Security* [1996] ZACC 7; 1996 (3) SA 617 (CC) ('*Case*').

⁵² Ibid at para 91.

⁵³ Ibid at para 97.

American case of *Stanley*⁵⁴ which also considered the right to consume and possess pornography as being protected by the right to privacy.⁵⁵

As an analogy to the issues considered in *Prince III*, the Court relied on the Supreme Court of Alaska's finding in the *Ravin* case. *Ravin* dealt directly with the use, possession and cultivation of cannabis and its relation to the right to privacy.⁵⁶ This was the only case in America to hold that the American constitutional right to privacy protects some level of cannabis use and possession. The Court in *Prince III* emphasised a number of points from the ruling. First, the Supreme Court of Alaska conducted a balancing analysis between *Ravin's* right to privacy and the government's interest in imposing restrictions on cannabis use⁵⁷ and concluded that the Alaskan citizens had a basic right to privacy *in their homes*.⁵⁸ Second, *Ravin* did not encompass protection for the buying or selling of cannabis, or its use or possession in public. It also did not allow for possession of an amount indicative of an intention to sell rather than possession for personal use.⁵⁹

Having considered this foreign law, the Court held that the privacy entitlements articulated in *Case* in respect of the possession of pornography in one's home can be extended to an entitlement by an adult person to use, cultivate or possess cannabis in private for their personal consumption.⁶⁰ Thus, to the extent that the impugned provisions criminalised this cultivation, possession or use of cannabis, they limited the right to privacy.

The Court then went on to conduct a limitations analysis in terms of s 36(1) of the Constitution and attempted to consider the factors listed in s 36(1) of the Constitution separately.⁶¹ The Court chose not to analyse the nature of the right to privacy in the proportionality analysis specifically, instead relying on its more general description of the right conducted earlier in the judgment.⁶² It commenced its analysis by considering the importance of the purpose of the limitation. The Court focused on the interest of the state in the 'protection of the health, safety and psychological well-being of persons affected by the use of cannabis'.⁶³ Relying on its finding in *Prince II*, the Court also noted that the prohibition sought to prevent the abuse and trafficking of dependence-producing drugs.

With respect to the nature and extent of the limitation, the Court held that the impugned provisions were invasive, providing a blanket criminalisation of the cultivation, possession and consumption of cannabis for personal consumption.⁶⁴ However, it noted that the minority in *Prince II* had acknowledged that there was a level of consumption which was not harmful though there was a level of indeterminacy in that regard. Finally, the Court considered the last

⁵⁴ *Stanley v Georgia* 394 U. S. Reports 557 (*Stanley*).

⁵⁵ *Ibid* at page 559.

⁵⁶ *Ravin* (note 35 above).

⁵⁷ *Prince III* (note 1 above) at paras 55–57.

⁵⁸ *Ravin* (note 35 above) at 504. The Supreme Court noted: 'This right to privacy would encompass the possession and ingestion of substances such as marijuana in a purely personal, non-commercial context in the home unless the state can meet its substantial burden and show that proscription of possession of marijuana in the home is supportable by achievement of a legitimate state interest.'

⁵⁹ *Prince III* (note 1 above) at para 56.

⁶⁰ *Ibid* at para 58. In doing this, the Court chose not to delineate the boundaries of 'in private' when an adult person used, possessed or cultivated to cannabis.

⁶¹ *Ibid* at para 59–61.

⁶² *Ibid* at para 62.

⁶³ *Ibid* at para 63.

⁶⁴ *Ibid* at para 66.

two factors of the limitation's analysis together, namely, the relationship between the limitation and its purpose and the less restrictive means to achieve the purpose. The Court started out by listing the evidence provided by the state's expert witness on the harms of cannabis, highlighting that the expert witness concluded that cannabis had a more harmful effect than tobacco, alcohol and prescription drugs.⁶⁵ However, the Court questioned the validity of the evidence itself. Firstly it highlighted that Ngcobo J in *Prince II* had relied on medical evidence to illustrate that small amounts of cannabis do not harm anyone.⁶⁶ It then went on to quote from a World Health Report and a 2016 position paper from the South African Central Drug Authority to highlight evidence of alcohol being a more dangerous substance than cannabis.⁶⁷ Further, the Court highlighted that *Ravin* (and *Stanley*) illustrated that cannabis use does not cause criminal behaviour.⁶⁸ The Court then drew attention to 33 jurisdictions where possession of cannabis in small quantities had been decriminalised.⁶⁹

The Court concluded that the limitation caused by the impugned provisions on the use and possession in private by an adult for their personal consumption was not reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.⁷⁰ Without any further analysis, it extended this to the cultivation of cannabis in private for personal consumption on the grounds that the prohibition of the performance of any activity related to cultivation was inconsistent with the right to privacy and therefore invalid.⁷¹ The Court defined cultivation in private as being in a private place, for example an enclosure or a place that is not the garden, and the cannabis cultivated must be for use in private by the adult person cultivating the cannabis.⁷²

However, the Court declined to declare provisions prohibiting the purchase of cannabis invalid. In this regard, it held that doing so would be sanctioning dealing in cannabis, which it found to be a serious problem in South Africa.⁷³ It found — without saying more — that a prohibition on dealing was a justifiable limitation on the right to privacy and so declined to confirm the constitutional invalidity of s 22A(10) which dealt with the sale and administration of cannabis.⁷⁴

The Court then declared the remaining impugned provisions to be constitutionally invalid. It declined to make the order of invalidity operational with retrospective effect, and further, suspended the order of invalidity to allow the legislature to pass an amended statute. However, it granted interim relief by reading-in to the statute an exception to the impugned provisions. The exception decriminalised the use or possession of cannabis in private, or the cultivation of cannabis in a private place, for personal consumption in private.⁷⁵ It also proceeded to outline the effect of the reading-in, firstly, that an adult person may use or be in possession of

⁶⁵ Ibid at para 67.

⁶⁶ Ibid at para 68.

⁶⁷ Ibid at para 69.

⁶⁸ Ibid at para 71–75.

⁶⁹ Ibid at para 79.

⁷⁰ Ibid at para 84.

⁷¹ Ibid at para 83–86.

⁷² Ibid at para 85.

⁷³ Ibid at para 87.

⁷⁴ Ibid at para 89–90.

⁷⁵ The reading-in in this instance had the effect of carving out an exception to the impugned provisions which allowed for the personal use, possession and cultivation of cannabis in private.

cannabis in private for their personal consumption. Secondly, the use of cannabis in public or in the presence of children or non-consenting adult persons is not permitted; thirdly, the use or possession of cannabis in private other than by an adult for their personal consumption in private is not permitted; and finally, the cultivation of cannabis by an adult in a private place for their personal consumption in private was no longer a criminal offence.

Recognising the difficulty this could pose for a police officer who finds a person in possession of cannabis, the Court attempted to provide guidelines on how to ascertain whether the drug was for personal consumption or not.⁷⁶ While recognising that this interim reading-in may create some uncertainty, the Court suggested that policing the exception was manageable and no greater a burden than that connected with an offence such as negligent driving.⁷⁷ Parliament had a duty to cure the constitutional defect within 24 months – if it failed to do so, the Court held that its reading-in to the legislation would become final.

IV *PRINCE III*: A CRITICAL ANALYSIS

Having summarised *Prince III*, it was clear that although a unanimous outcome had been reached, there are a number of gaps in the Court's reasoning. This is not a new problem with the Court's jurisprudence. The Court has often been criticised for providing insufficient reasoning for the conclusions it reaches.⁷⁸ South African constitutional law scholars have offered many theories and reasons for the Court's minimal decision-making, some of which are briefly set out below.

Cockrell, in his analysis of the Court's jurisprudence in its first year, described the Court's 'absence of *rigorous* jurisprudence of substantive reasoning'⁷⁹ as 'rainbow jurisprudence'.⁸⁰ Characteristics of this include making broad references to the constitutional values of dignity, equality and freedom and identifying the necessity of substantive reasoning in making decisions,⁸¹ but failing to engage in moral and political reasoning in order to do so.⁸² Currie has classified this as a form of judicial decisional minimalism or more accurately, 'judicious avoidance'⁸³ — a way for the Court to say no more than is necessary to justify an outcome and not deciding things that it does not have to.⁸⁴ Currie posits a number of reasons that would justify this approach: these include that in multi-member panels, it is easier for such panels to agree on the outcome of a case rather than the reasons for it, especially where such reasoning would entail having to go beyond deferring to set rules.⁸⁵

Other authors have characterised the Court as taking a pragmatic approach: issuing decisions that pay heed to the specific facts, without making general pronouncements and allowing it to

⁷⁶ *Prince III* (note 1 above) at paras 113–114.

⁷⁷ *Ibid* at para 117. The Court also provides other examples, such as offences related to stock theft and the sale of liquor by a person who is not the holder of a liquor licence.

⁷⁸ S Woolman 'The Amazing, Vanishing Bill of Rights' (2007) 124 *South African Law Journal* 762.

⁷⁹ A Cockrell 'Rainbow Jurisprudence' (1996) 12 *South African Journal on Human Rights* 1, 11.

⁸⁰ *Ibid*.

⁸¹ *Ibid*.

⁸² *Ibid* at 18.

⁸³ I Currie 'Judicious Avoidance' (1999) 15 *South African Journal on Human Rights* 138, 148.

⁸⁴ *Ibid* at 142. Currie notes that this theory is influenced by the work of Cass Sunstein, see fn 17 at 142.

⁸⁵ *Ibid* at 147–148.

consider the social and political ramifications of a decision.⁸⁶ Whatever the justification for this approach, it has led to a number of problems:⁸⁷ a failure for meaningful predictive principles to be drawn from judgments; it becomes difficult for a party to anticipate what forms of law or conduct are consistent with the Bill of Rights; it undermines other branches complying with the Bill of Rights; and it can undermine the integrity of the legal system in that there is a failure to create coherent jurisprudence.⁸⁸

This case comment argues that some of the characteristics of judicial minimalism can be seen in *Prince III*, namely, incomplete and incoherent reasoning and a focus on the outcome. The reasoning can be seen to be troubling in two specific aspects: the lack of adequate reasoning in relation to the nature and scope of the right to privacy and an articulation of what being ‘in private’ entails; and a limited and incomplete limitations analysis. Arguably, this leads to an insufficiently justified conclusion. In addition, the Court’s limited approach results in a finding that is narrower than what the constitutional rights demanded: a full decriminalisation — which included the dealing and sale of cannabis. I now turn to consider each of these flaws in the reasoning.

A First stage: the lack of development of the right to privacy

Under South African law, a two-stage approach is adopted in relation to constitutional analysis of a right. The first stage involves a rights analysis, and the second stage involves a limitations analysis as required by s 36(1) of the Constitution.⁸⁹ The two-stage analysis is designed specifically to ensure that all competing rights and interests are given the consideration that they deserve.⁹⁰

During the first stage, a court must determine the scope of the right in question through a process of interpretation, and must ask whether or not the right has been infringed by the law under scrutiny.⁹¹ In doing so, a court must determine whether the Bill of Rights protects a particular interest of the applicant, and if so, it must then determine whether the law or conduct in question impairs that interest.⁹² The onus in this regard is on the applicant(s) to show that a right has been infringed.⁹³ It is only after a proper rights analysis has been done and it has been found that the provision infringes the right that a limitations analysis can be undertaken. Here the question is asked whether or not the infringement/limitation of the right in question is permissible in terms of s 36 (1) of the Constitution and the onus is on the respondent to show that the limitation is in fact permissible.⁹⁴ The reason for this two-stage

⁸⁶ M Kende ‘The Fifth Anniversary of the South African Constitutional Court: In Defense of Judicial Pragmatism’ (2002) 26 *Vermont Law Review*. This approach has also been defended by former judges of the Constitutional Court. See K O’Regan ‘Text Matters: Some Reflections on the Forging of a New Constitutional Jurisprudence in South Africa (2012) 75 *The Modern Law Review*.

⁸⁷ Woolman (note 78 above) 785.

⁸⁸ Ibid at 786.

⁸⁹ I Currie & J De Waal *The Bill of Rights Handbook* (6th Ed, 2016) 152–153.

⁹⁰ D Bilchitz ‘How Should Rights Be Limited?’ (2011) 3 *Tydskrif vir die Suid-Afrikaanse Reg/Journal of South African Law* 568, 571.

⁹¹ Currie & De Waal (note 89 above) at 153.

⁹² Ibid at 26.

⁹³ Ibid at 153.

⁹⁴ Ibid at 153. See below for a fuller excursus of what constitutes a limitations analysis.

approach to rights reasoning is that it is necessary to understand the harm to the right and the interests it protects before considering possible reasons for its limitation.⁹⁵

In *Prince III*, the Court concluded that the right to privacy is infringed by laws that criminalise the possession, use and cultivation of cannabis. Had the right been similarly infringed by provisions that criminalised the purchase and dealing in cannabis? The Court had little to say about this latter question. In this comment I attempt to highlight the Court's deficiencies in defining the scope and content of the right to privacy, especially regarding what it means to use, possess and/or cultivate of cannabis in private for personal consumption. In exposing the deficiencies I draw on the jurisprudence and sources that the Court should have relied on to extend its reasoning. This includes arguing that the Court should have potentially relied on the relationship between the right to privacy and other constitutional rights. The aim in doing so is to highlight that *Prince III* does not adequately address the scope of the right to privacy, and so fails to provide a clear delineation of where the protection it offers begins and ends.

1 *An elision between 'at home' and 'in private'*

The High Court judgment defined the scope of the right to privacy implicated in this matter as follows:

If privacy, considered to be analysed 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.⁹⁶

The focus of the High Court judgment was on the privacy of the home. The Court attempted to go beyond the High Court's scope of the protection to include all use 'in private', yet it failed to clearly articulate what 'in private' means. The pornography analogy used by the Court (in *Case*) focuses on the right to be left alone in one's home. Similarly, in its use of the *Ravin* case, it reiterated that the protection afforded by the right to privacy in respect of the use and possession of cannabis was only with respect to privacy within the home. The Court, however, used these cases to provide support for its proposition that the right to privacy provides protection for the individual to possess, use or cultivate cannabis in private *beyond the home as well*. There is no clear justification for why the right to privacy includes protection for such an extended scope. However, I am of the view that a fuller understanding of the right to privacy, drawing from its own jurisprudence, would have given the Court the proper basis to reach this conclusion.

The incongruence in the Court's reasoning and its lack of rootedness in a richer conception of the right to privacy is highlighted later in the judgment when the Court has to craft its interim relief and clarify what it meant by 'use, possession and cultivation in private for personal consumption'.⁹⁷ The Court outlined some guidelines but it did not adequately provide the basis for the guidelines.

Given the Court's rich jurisprudence with respect to the content of the right to privacy, it is unclear why the Court did not engage in a more thorough analysis of the scope of the right. Such analysis would have provided it with the building blocks necessary to adequately justify its

⁹⁵ Bilchitz (note 90 above) 573.

⁹⁶ High Court judgment (note 18 above) at para 25.

⁹⁷ *Prince III* (note 1 above) at para 101.

conclusions. I will now examine the resources the Court had from its previous jurisprudence to clarify the scope and content of the right to privacy and how it applied that to the case at hand.

2 *Reconstructing the Court's reasoning*

The constitutional protection of the right to privacy enshrined in s 14 of the Constitution offers two levels of protection. Section 14 provides as follows:

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.

The first level of protection is a general protection of privacy. The second provides protection against specific infringements of the right to privacy relating to protection of bodily integrity and property, and the protection of informational rights.⁹⁸ Section 39 of the Constitution provides that the content and the scope of the rights enshrined in the Bill of Rights should be interpreted in light of the constitutional values of openness, democracy, human dignity, freedom, and equality — these values animate the entire constitutional enterprise.⁹⁹

At a base level, the right to privacy is understood and articulated as the right to be left alone in one's home, free from intrusions and interference from the state or any party.¹⁰⁰ It is this base concept of the right to privacy which appears to be the minimalist basis upon which the Court founded its reasoning in *Prince III*. However, according to Ackermann J, the seminal case with respect to the constitutional right to privacy — the *Bernstein* case — widens the scope of this protection, describing the right to privacy as being 'amorphous and elusive'¹⁰¹ and not being 'absolute.'¹⁰² As such, it cannot only encompass the right to be left alone in one's home. This is evident in the way that Ackermann J attempted to provide a helpful way to articulate the scope of the right to privacy.¹⁰³

Ackermann J held that the scope of a person's privacy extends only to those aspects in regard to which a legitimate/reasonable expectation of privacy can be harboured.¹⁰⁴ The decision provides guidance as to the extent of this legitimate expectation. According to Ackermann J, privacy interests are stronger the closer the expectation of privacy is to one's inner sanctum.¹⁰⁵ However, as a person moves more into a communal or public realm, the expectation of privacy

⁹⁸ Currie & De Waal (note 89 above) at 294.

⁹⁹ S Woolman & H Botha 'Limitations' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2013) 34-1, 34-17.

¹⁰⁰ Currie & De Waal (note 89 above) at 295.

¹⁰¹ *Bernstein* (note 24 above) at para 65.

¹⁰² *Ibid* at para 67.

¹⁰³ *Ibid*.

¹⁰⁴ *Ibid* at para 71. One of those aspects identified by Ackerman J is the concept of identity (at para 65). Currie & De Waal (note 89 above) at 299 summarise Ackermann J's reasoning as follows: '[P]rivacy is a subjective expectation of privacy that is reasonable; b) it is reasonable to expect privacy in the "inner sanctum", in the "truly personal realm"'. In order to understand when it is reasonable to expect privacy, one must identify the value that privacy is expected to protect. In this instance, the protected 'inner sanctum' helps to achieve a valuable good — one's own autonomous identity.

¹⁰⁵ *Bernstein* (note 24 above) at para 67.

must be balanced against the ‘conflicting rights of the community’.¹⁰⁶ Ackermann J ultimately concluded that not every activity or experience that could notionally count as private deserves constitutional protection. The following quote from *Bernstein* summarises these points:

In the context of privacy this would mean that it is only the inner sanctum of a person, such as his/her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community. This implies that community rights and the rights of fellow members place a corresponding obligation on a citizen, thereby shaping the abstract notion of individualism towards identifying a concrete member of civil society. Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly.¹⁰⁷

Subsequent cases have adopted the conception of the right to privacy as existing along a spectrum. In *Mistry*,¹⁰⁸ the Court characterised the content of the right to privacy as a ‘continuum of privacy rights which may be regarded as starting with a wholly inviolable inner self, moving to a relatively impervious sanctum of the home and personal life and ending in a public realm where privacy would only remotely be implicated’.¹⁰⁹ The Court in *Mistry* held that, to the extent that a statute authorises warrantless entry into private homes and rifling through intimate possessions, such a statute would breach the right to personal privacy.¹¹⁰

In *National Coalition*, the Court highlighted a further element of the right to privacy: the link between privacy and the right to personal autonomy. Ackermann J held that the right to privacy recognises an individual’s right to a sphere of private intimacy and autonomy.¹¹¹ In a separate concurring judgment, Sachs J reiterated that the protection afforded by privacy is related to people, not places.¹¹² He also considered the intertwining of the right to equality and the right to privacy, noting that a single situation can give rise to multiple, overlapping and mutually reinforcing violations of constitutional rights.¹¹³ Sachs J also reinforced autonomy as a central part of privacy, and went further in stating that the state must ‘promote conditions in which personal self-realisation can take place’¹¹⁴. However, Sachs J noted that the right to privacy is not isolated and the context in which this right is enjoyed must be considered: ‘There must be a balancing between respect for an individual’s privacy and respect for social standards’.¹¹⁵

¹⁰⁶ D McQuoid-Mason ‘Privacy’ in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2013) 38-1, 38-21.

¹⁰⁷ *Ibid.* The Court in *Prince III* however only considered this dictum when referencing *National Coalition for Gay and Lesbian Equality v Minister Of Justice* [1998] ZACC 15; 1999 (1) SA 6 (CC)(*National Coalition*) and its discussion of the right to privacy, and not in the context of it being an important articulation of the scope of the protection afforded by the right to privacy.

¹⁰⁸ In *Mistry v Interim National Medical and Dental Council & Others* [1998] ZACC 10; 1998 (4) SA 1127 (CC) (*Mistry*) the Court had to consider the constitutionality of s 28(1) of the Medicines Act which gives inspectors of medicines the authority to enter into and inspect any premises, place, vehicle, vessel or aircraft where such inspectors reasonably believe there are medicines or other substances regulated by the Act, and to seize any medicine or any books, records or documents found in or upon such premises, place, vehicle, vessel or aircraft which appear to afford evidence of a contravention of any provision of the Medicines Act.

¹⁰⁹ *Ibid* at para 27.

¹¹⁰ *Ibid* at para 16. See also McQuoid-Mason (note 106 above) at 38-29.

¹¹¹ *National Coalition* (note 107 above) at para 32.

¹¹² *Ibid* at 116.

¹¹³ *Ibid* at para 114.

¹¹⁴ *Ibid* at para 116.

¹¹⁵ *Ibid* at para 119.

Langa DP in *Hyundai* also wove the conceptions of privacy as being linked to social interactions and personal autonomy. He stated:

The right [to privacy], however, does not relate solely to the individual within his or her intimate space. Ackermann J [in *Bernstein*] did not state in the above passage that when we move beyond this established ‘intimate core’, we no longer retain a right to privacy in the social capacities in which we act. Thus, when people are in their offices, in their cars or on mobile telephones, they still retain a right to be left alone by the state unless certain conditions are satisfied. Wherever a person has the ability to decide what he or she wishes to disclose to the public and the expectation that such a decision will be respected is reasonable, the right to privacy will come into play.¹¹⁶

In *Magajane*,¹¹⁷ the Court spoke of ‘a series of concentric circles ranging from the core most protected realms of privacy to the outer rings that would yield more readily to the rights of other citizens and the public interest’.¹¹⁸ The Court in that instance had to interpret the right to privacy of an unlicensed business and held that a business’s ‘expectation of privacy will be more attenuated the more the business is public, closely regulated and potentially hazardous to the public’.¹¹⁹

Having briefly explored some of the fundamentals of the Court’s privacy jurisprudence thus far, it is possible to identify how the Court failed to offer a more fulsome description of the right to privacy assessed against the circumstance in *Prince III*. The first step missing from the Court’s analysis of the content of the right to privacy is the failure to deal with the question whether an adult who uses, possesses and cultivates cannabis has a legitimate expectation of privacy. In answering this question, the Court should have determined — consistent with its past jurisprudence — whether the use, possession, cultivation and sale of cannabis falls within the inner sanctum and at which point (if at all) these activities generate a more attenuated interest which must be weighed against the conflicting rights and interests of other citizens and the public interest more generally.

We saw that the Court attempted to draw an analogy between the right to use, possess and cultivate cannabis in private and the right to consume and possess pornography within the home. However, this approach tied privacy to the basic conception of the right to be left alone, specifically in the home.¹²⁰ This displays a limited understanding of privacy as being tied to a specific space, namely the territorial integrity, the sanctity of the home. Yet, the Court in *Prince III* went beyond the High Court judgment and allowed the use, possession or cultivation of cannabis in private beyond the sphere of the home. Since the justification presented by the Court in the judgment did not provide adequate support for this position, on what basis could it have done so?

I would argue that there are two resources that the Court inadequately relied on to support this position.¹²¹ The first relates to the Court’s continuum conception of privacy jurisprudence which would have allowed the Court to argue that the right to privacy extends beyond the

¹¹⁶ *Investigating Directorate: Serious Economic Offences & Others v Hyundai Motor Distributors (Pty) Ltd & Others In re: Hyundai Motor Distributors (Pty) Ltd & Others v Smit NO & Others* [2000] ZACC 12; 2001 (1) SA 545 (CC) at para 16.

¹¹⁷ *Magajane v Chairperson, North West Gambling Board* [2006] ZACC 8; 2006 (5) SA 250 (CC).

¹¹⁸ *Ibid* at para 42.

¹¹⁹ *Ibid* at para 50.

¹²⁰ *Bernstein* (note 24 above) at para 67.

¹²¹ While there are many other resources that the Court inadequately relied on, given the limitations of this case comment, I have decided to focus only on two.

home. However, the strength of the interest becomes more attenuated the closer you move into the public sphere and the more increased social interaction you have. That could have explained, for instance, the distinction between personal use, enjoyment and commercial dealing. The Court, in prior cases such as *Magajane*, envisaged that businesses have a claim to privacy but that because of the transactional nature of their operations the claim is more attenuated. That would have allowed a more principled engagement with whether individuals can claim a right to sell and deal in cannabis as part of their right to privacy.¹²² An adult would have a reduced legitimate expectation of privacy the greater the impact or relationship their use, possession and cultivation of cannabis has on other individuals.

The second dimension that the Court could have utilized would have been the link it drew in its jurisprudence between privacy rights and protecting personal autonomy.¹²³ The Court could have drawn on *Bernstein* and Sachs J's judgment in *National Coalition*, each of which reiterate the link between privacy and autonomy:

In *Bernstein and Others v Bester and Others NNO* Ackermann J pointed out that the scope of privacy had been closely related to the concept of identity and that rights, like the right to privacy, are not based on a notion of the unencumbered self, but on the notion of what is necessary to have one's autonomous identity Viewed this way autonomy must mean far more than the right to occupy an envelope of space in which a socially detached individual can act freely from interference by the state. What is crucial is the nature of the activity, not its site.¹²⁴

Drawing from the above, I argue that personal autonomy permits individuals to make decisions about themselves without interference, especially where this is done with limited or no impact on the lives of others. Accordingly, it could well be argued that an individual can hold a legitimate expectation of privacy with respect to what they ingest in their body irrespective of where that takes place. This linking of recreational cannabis use to personal autonomy has been made in other jurisdictions, with the caveat that there should be no harm caused to others.¹²⁵ In fact, the High Court found convincing the similar argument used by the minority judgment in *R v Malmo-Levine*¹²⁶ and the Court could have affirmed this. It is on the back of this caveat that the Court could have reached the conclusion that a legitimate expectation of protection exists with respect to the ability to use, possess and cultivate cannabis in private for personal consumption.

Having examined the lack of development of the right to privacy and the failure of the Court to draw on developing conceptions of the right to privacy and its own jurisprudence, I

¹²² It may well be that another right would have been better placed to capture the interest in this regard.

¹²³ AD Moore 'Privacy: Its Meaning and Value' (2003) 40 *American Philosophical Quarterly* 215, 218 advocates for the following view: 'A right to privacy can be understood as a right to maintain a certain level of control over the inner spheres of personal information and access to one's body, capacities and powers'. McQuoid-Mason (note 106 above) at 38-22 states: 'Personal autonomy privacy rights permit individuals to make important decisions about their lives without interference by the state.'

¹²⁴ *National Coalition* (note 107 above) at para 117.

¹²⁵ Most recently, the Mexican Supreme Court purported to make this argument. The First Chamber held that the fundamental right to the free development of the personality allows the persons of legal age to decide — without any interference — what kind of recreational activities they wish to carry out and protect all the actions necessary to materialize that choice. See C Ingram 'Mexico's Supreme Court Overturns Country's Ban on Recreational Marijuana' *The Washington Post* (1 November 2018), available at <https://www.washingtonpost.com/business/2018/11/01/mexicos-supreme-court-overturns-countrys-recreational-marijuana-ban/>.

¹²⁶ *R v Malmo-Levine*; *R v Caine* (note 31 above).

will now examine a further failure of the Court to draw on other rights in the Constitution, specifically, the right to dignity.

2 *Potential use of other rights?*

As noted above, despite the respondents averring that a number of their constitutional rights had been infringed, the High Court judgment limited the rights considered to the right to privacy. In the Court, the respondents cross-appealed this, noting that a number of rights were infringed by the impugned provisions, including the right to equality, dignity and freedom. The respondents in their submissions also argued that decisional autonomy is a part of privacy, linking dignity and the right to freedom of movement. This goes to a further missed opportunity of the Court: its sole reliance on privacy being the only right that was infringed.

In *National Coalition*, both the majority of Ackerman J and the minority of Sachs J recognised that rights cannot be considered in isolation, especially within the context of privacy. Ackerman J held that the offence of sodomy was unconstitutional because it breached the rights of equality, dignity and privacy.¹²⁷ Ackerman J dealt with the infringement of each of these rights in turn in his judgment and also noted that ‘in particular circumstances, the rights of equality and dignity are closely related, as are the rights of dignity and privacy’.¹²⁸ Sachs J, in his separate concurrence, noted that ‘a single situation can give rise to multiple, overlapping and mutually reinforcing violations of constitutional rights’.¹²⁹ Sachs J went further to note that in the context of the unconstitutionality of the crime of sodomy, the right to dignity linked the other protections and rights in the Bill of Rights.¹³⁰ The right to dignity is, at least *partly*, about realising individual autonomy, and could have bolstered this dimension of the Court’s reasoning.

The question that might be asked though is whether the failure to consider other rights matters. While it may not have altered the outcome in relation to use, possession and cultivation in private, it may have led to an analysis of the impact of the ban on the sale and dealing in cannabis on other rights. Clearly, the prohibition will increase the frequency with which individuals are criminally prosecuted and sanctioned. However, for some individuals, dealing in cannabis is a source of livelihood and, in a context of widespread unemployment, can have

¹²⁷ *National Coalition* (note 107 above) at para 30.

¹²⁸ *Ibid.*

¹²⁹ *Ibid* at para 114.

¹³⁰ *Ibid* at para 120. The applicants in *National Coalition* had argued that the criminalisation of sodomy infringed the rights to privacy, equality and dignity. In *Prince III*, the respondents also made the argument that the criminalisation of the private use of cannabis violated the right to equality (s 9 of the Constitution). This argument was made with reference to an essay written by Paul-Michael Keichel, a law student at Rhodes University in 2009, entitled ‘A Critical Analysis of *Prince* and an Objective Justification for the Decriminalisation of Marijuana in South Africa’. Keichel argued that a stronger basis for decriminalisation is to apply the test for unfair discrimination emanating from *Harksen v Lane NO* [1997] ZACC 12; 1998 (1) SA 300 (CC). With reference to two legal drugs, alcohol and tobacco, Keichel applies the *Harksen Test* to the prohibition of the recreational use of cannabis. He found that at the first level, recreational cannabis users are treated differently to recreational tobacco and alcohol users since the former are criminalised and the latter are not. Thus, according to Keichel, the prohibition of cannabis would only be legitimate if the state also prohibited tobacco and alcohol. Based on this, recreational use of cannabis should be decriminalised (i.e., s 4 of the Drugs Act should be declared unconstitutional). At the second level of the *Harksen Test*, Keichel argues that even if one assumes that there is a legitimate objective for the prohibition, it must be asked whether criminalising cannabis use achieves what it is designed to do. Keichel argues that a strong case can be made that cannabis is at the very least comparable if not less harmful than alcohol and tobacco. Accordingly, it should be decriminalised.

an effect not only on the right to freedom of occupation but also access to housing, food and other socio-economic rights. An example of this is found in the case of cannabis growers in Pondoland in rural Eastern Cape, an area which has remained economically underdeveloped.¹³¹ Families in this area have grown and sold cannabis for generations, and as a result, have been subject to police persecution in various forms.¹³² With the decriminalisation of the cultivation of cannabis for personal use but the continued criminalisation of the sale and dealing in cannabis, there are concerns amongst the community that their livelihood may continue to be impacted as people may be more likely to grow their own cannabis. The limited rights framework used in *Prince III* meant that the Court was able to avoid important issues that were before it and were therefore not adequately addressed.

I have thus far sought to show how the Court failed to adequately analyse the infringement of rights that the existing criminal law relating to cannabis involved. I now turn to the second prong of my critique: the failure to conduct an adequate limitations analysis.

B Second stage: inadequate limitations analysis

As noted above, in order to pass constitutional muster, a limitation — in this instance the impugned provisions — must meet the requirements of s 36(1) of the Constitution. Section 36(1) of the Constitution provides as follows:

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

In *S v Makwanyane*¹³³ the Court noted that the test prescribed by the limitations clause in the Interim Constitution¹³⁴ (which closely mirrors s 36(1) of the final Constitution) was essentially a proportionality test and involved a balancing of interests:

The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. This is implicit in the provisions of section 33(1). The fact that different rights have different implications for democracy, and in the case of our Constitution, for ‘an open and democratic society based on freedom and equality’, means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case by case basis. This is inherent in the requirement of proportionality, which calls for the balancing of

¹³¹ F Pearce ‘How a Proposed Strip Mine Brought Conflict to South Africa’s Wild Coast’ *Yale Environment* 360 (13 March 2017), available at <https://e360.yale.edu/features/titanium-mine-conflict-south-africa-pondoland-rhadebe-caruso>.

¹³² C Clark ‘Legalisation is Killing Our Market, Say Small-Scale Dagga Growers’ *GroundUp* (4 October 2019), available at <https://www.groundup.org.za/article/small-scale-cannabis-growers-say-legalisation-killing-demand/>; and C Clark “People feel betrayed”: Small-Scale Dagga Growers Fear Exclusion from Legal Trade’ *GroundUp* (14 October 2019), available at <https://www.groundup.org.za/article/people-feel-betrayed-small-scale-dagga-growers-fear-exclusion-legal-trade/>. GroundUp undertook a two-part series on Pondoland cannabis growers.

¹³³ *S v Makwanyane & Another* [1995] ZACC 3; 1995 (3) SA 391.

¹³⁴ The Interim Constitution has been repealed.

different interests. In the balancing process the relevant considerations will include the nature of the right that is limited and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy and, particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question.¹³⁵ (Footnotes omitted.)

As summarised subsequently in *S v Bulwana*,¹³⁶ when conducting a proportionality assessment, a court must place ‘the purpose, effects and importance of the infringing legislation on one side of the scales and the nature and effect of the infringement caused by the legislation on the other. The more substantial the inroad into fundamental rights, the more persuasive the grounds of justification must be.’¹³⁷

Courts have however recognised that the factors listed in s 36(1) are not exhaustive, and that the Court must conduct a holistic proportionality assessment involving the weighing up of competing rights, values and interests.¹³⁸ However, when conducting a limitations analysis, the Court increasingly has considered each of the factors separately, and in many instances not undertaken a global, holistic proportionality analysis.¹³⁹ Arguably, a proportionality analysis must involve both a focus on individual factors, as well as an holistic assessment. The limitation test prescribed by s 36(1) requires an assessment of whether a law that restricts a fundamental right does so for reasons that are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. In addition, the assessment must determine whether the law is reasonable in that it does not invade rights any further than it needs to in order to achieve its purpose. To satisfy this test, the harm done by the law, that is, the infringement of fundamental right must be proportional to the purpose it is designed to achieve.¹⁴⁰ While considering each of the factors separately allows a court to consider vital features of each factor, an holistic proportionality analysis will sum the relevant factors on either side of the scales.

In this part of the comment, I argue that in *Prince III*, the Court failed properly to address and distinguish a number of the most important factors and that this, ultimately, both affected the outcome of the case negatively as well as its ability to provide guidance on important matters relating to drug policy for the future.

¹³⁵ Ibid at para 104.

¹³⁶ *S v Bulwana, S v Gwadiso* [1995] ZACC 11; 1996 (1) SA 388 (CC).

¹³⁷ Ibid at para 18.

¹³⁸ See *Prince II* (note 10) at para 45. See also Bilchitz (note 88 above) and I Currie ‘Balancing and the Limitation of Rights in the South African Constitution’ (2010) 25 *South African Public Law* 408. In *National Coalition* (note 107 above), the Court held at para 35 that: ‘The balancing of different interests must still take place. On the one hand there is the right infringed; its nature; its importance in an open and democratic society based on human dignity, equality and freedom; and the nature and extent of the limitation. On the other hand, there is the importance of the purpose of the limitation. In the balancing process and in the evaluation of proportionality one is enjoined to consider the relation between the limitation and its purpose as well as the existence of less restrictive means to achieve this purpose.’

¹³⁹ See for example, *Mlungwana v S* [2018] ZACC 45; 2019 (1) SACR 429 (CC) at paras 57–100; and *Nandutu & Others v Minister of Home Affairs & Others* [2019] ZACC 24; 2019 (5) SA 325 (CC) at paras 70–79.

¹⁴⁰ Currie & De Waal (note 89 above) at 153.

1 *Section 36(1)(c): the nature and extent of the limitation*

I first want to consider the Court's approach to determining the nature of the extent of the limitation of the right. The Court held that the limitation of the right to privacy in this case was quite invasive.¹⁴¹ Unfortunately, it did not provide reasons for why it was invasive.

Woolman et al note that the consideration of the nature and extent of the limitation 'lies at the core of the approach to balancing and to proportionality'¹⁴², and further, that there are five factors that a court assesses when considering the nature and extent of a limitation.¹⁴³ In analysing the nature and extent of the limitation imposed by the impugned provision, the Court ought to have considered two of those factors which could have strengthened its case for unconstitutionality. First, the Court should have considered whether the limitation affects the core values underlying the particular right in question, that is, the right to privacy. Had it outlined the parameters of the right to privacy clearly, and specifically identified the right to autonomy, and the right to do with one's body as one wishes free from state interference (especially where such activity is not harmful) at the core of the right to privacy,¹⁴⁴ the Court could have shown why there was a significant burden on the state to justify the criminal provisions under scrutiny.

Second, the respondents provided the Court with anecdotal evidence of the effect of the impugned provisions on their lives, including constant search and seizures, and deprivation of liberty in the form of incarceration.¹⁴⁵ These anecdotal pieces of evidence provided the opportunity to assess the full impact of the criminal prohibition. Having ignored this evidence, the Court failed to consider the disproportionate means of punishment caused by the impugned provisions. They have resulted in criminal records for possession of small amounts of cannabis that were not harmful, and in the case of Prince himself, deprived him of the vocation of his choice.¹⁴⁶ Had the Court engaged in an analysis of the real effects of the impugned provisions on the lives of those affected, it would then have recognised the real harms caused to people by the provisions.¹⁴⁷

It also failed to consider the impact of the prohibition on the sale and dealing in cannabis on the lives of individuals — if there were a *prima facie* violation of individual rights in this regard, arguably, such criminalisation too could have significant negative impacts on individuals through preventing them from exercising an occupation and, in some cases, earning a livelihood that enabled them to realise some of their socio-economic needs.

¹⁴¹ *Prince III* (note 1 above) at para 66.

¹⁴² Woolman & Botha (note 99 above) at 34-79.

¹⁴³ Woolman & Botha (note 99 above) at 34-79–34-83 note that there are five factors that the Court considers when considering the nature and extent of a limitation: 1) whether the limitation affects the core values underlying a particular right; 2) an assessment of the actual impact of the limitation on those deleteriously affected by it; 3) the social position of individuals or a group concerned; 4) whether the limitation is permanent or temporary, and whether it amounts to a complete or a partial denial of the right in question; and 5) whether the limitation is narrowly tailored to achieve its objective.

¹⁴⁴ See above at part IVA.

¹⁴⁵ Respondents' application to cross-appeal (On file with the author).

¹⁴⁶ G Whittles 'Gareth Prince is Still Burning to be a Lawyer' *Mail & Guardian* (21 September 2018), available at <https://mg.co.za/article/2018-09-21-00-gareth-prince-is-still-burning-to-be-a-lawyer>.

¹⁴⁷ See also E Blumenson & E Nilsen (2010) 'Liberty Lost: The Moral Case for Marijuana Law Reform' (2010) 85 *Indiana Law Journal* 279, 289–291.

2 Section 36(1)(b): the importance of the purpose of the limitation

When identifying the importance of the purpose of the limitation, the Court held that the purpose of the impugned provisions was to reduce the harm of a dependence-producing substance.¹⁴⁸ The Court also alluded to the High Court's consideration of the criminalisation of cannabis being linked to a history 'replete with racism',¹⁴⁹ but did not develop the analysis in this regard. Arguably, this was a failure by the Court fully to contextualise the criminalisation of cannabis and its impact on black South Africans especially. The Court, like the High Court judgment, merely quoted from a portion of the judgment *S v Nkosi*,¹⁵⁰ where the court in that instance recognised that cannabis had been used by black South Africans for a variety of reasons, including for food and medicinal reasons.¹⁵¹ The quote, however, suggested that cannabis has a history of racially disparate use and enforcement. Neither the High Court nor the Court, however, drew on the history of the criminalisation of cannabis in South Africa which had its roots in colonial and apartheid methods of subjugation of black South Africans.¹⁵²

Indeed, if part of the goal of criminalisation was to further subjugate black South Africans, and this prohibition was part of the racist architecture of the apartheid state, then, it would have raised significant questions about the very legitimacy of these provisions now.

3 Sections 36(1)(d) and (e) of the Constitution — the relation between the limitation and its purpose and the less restrictive means to achieve this purpose

Section 36(1)(d) and (e) of the Constitution requires an evaluation of two separate issues. Section 36(1)(d) requires an evaluation of whether or not the means employed — that is, the operation of the impugned provisions — are rationally connected to, or capable of fulfilling the purpose of the limitation.¹⁵³ This is often referred to as the 'suitability' test¹⁵⁴ or 'rational connection'¹⁵⁵ test in other jurisdictions. Section 36(1)(e) requires a different enquiry. Assuming that there is a rational connection between the means employed and the objective, the Court will then consider whether there is a less restrictive, alternative means, to achieve the purpose. This dimension of proportionality is often referred to as the 'necessity'¹⁵⁶ test or 'minimum impairment'¹⁵⁷ enquiry. Unfortunately, in this case, the Court did not distinguish its reasoning in relation to these distinct tests and, instead, conflated the two. That, in turn, lead to a significant lack of clarity in its reasoning.

Having previously identified the main purpose of the impugned provisions to be the prevention or reduction in harm caused by dependence-producing drugs, the Court outlined evidence presented by the state of the harm caused by cannabis, including psychological and physical harm. The Court then went on to refute this evidence by noting the dictum from

¹⁴⁸ *Prince III* (note 1 above) at paras 63–64.

¹⁴⁹ *Ibid* at para 65.

¹⁵⁰ *S v Nkosi & Others* 1972 (2) SA 753 (T).

¹⁵¹ *Ibid* at 762A–B.

¹⁵² T Waetjen 'South African Court Frees Cannabis from Colonial and Apartheid Past' *The Conversation* (23 September 2018). It is beyond the scope of this case comment to critically engage with the methods employed by the colonial and apartheid forces. For a fuller discussion of this, see H Crampton *Dagga: A Short History* (2015).

¹⁵³ Woolman & Botha (note 99 above) at 34–84.

¹⁵⁴ R Alexy *A Theory of Constitutional Rights* (1986) (trans J Rivers, 2002) 68–69.

¹⁵⁵ *R v Oakes*, [1986] 1 S.C.R. 103 at para 10 (*Oakes*).

¹⁵⁶ Alexy (note 154 above) at 68.

¹⁵⁷ *Oakes* (note 155 above) at para 70.

the minority in *Prince II* that there is a level of consumption of cannabis that is safe and that is unlikely to pose any risk of harm.¹⁵⁸ Further, the Court was also quick to point out sources indicating that the consequences of cannabis use are often less severe than in relation to those addicted to alcohol and opioids which are not prohibited by criminal law.¹⁵⁹ This led the Court to the conclusion — drawing on *Ravin* and *Prince II* — that the limitation was over-broad. While it achieved its (legitimate) goal of preventing the abuse and trafficking of dependence-producing drugs, the limitation was so broad as to prohibit the use of cannabis that was not harmful, and accordingly this was not reasonable.¹⁶⁰

It is unclear, however, why this reasoning does not also apply to decriminalising the purchase and sale of cannabis, if there exists a level of cannabis use that is not harmful. As such, allowing the purchase of such an amount of cannabis would not affect the purpose of the state — it would simply justify the regulation of the cannabis industry in the same way that there exists extensive regulation in the sale and purchase of alcohol. Indeed, the position of the Court is strange in that cultivation of cannabis is likely only to be possible for a limited number of South Africans. Prohibiting the purchase and dealing in cannabis would thus effectively prevent many people from choosing to utilise cannabis. It remains unclear why the Court chose to retain the prohibition on purchase and dealing in cannabis. It simply stated that '[d]ealing in cannabis is a serious problem in this country and the prohibition of dealing in cannabis is a justifiable limitation of the right to privacy'.¹⁶¹ This is ultimately an assertion without a justification and its reasoning in this regard is inadequate.

The Court also failed to adequately consider whether there are less restrictive means that could be adopted in relation to the purchase and dealing in cannabis (or for that matter measures short of criminalization in relation to private use). What is missing is a recognition of the serious harm caused by incarcerating people involved in the sale or purchase of cannabis. A proper consideration of alternatives to criminalisation could also have recognised the legitimate interest of the state in preventing the harms drugs can cause and allowed the legislature the room to consider measures such as mandatory drug treatment¹⁶² and increased preventative drug education in school.¹⁶³

The conflation of factors in the proportionality enquiry is not only important for purposes of academic rigour — it also has real consequences when the Court then fails to distinguish between or identify important issues that require consideration. Does criminalisation contribute towards reducing drug dependency or usage? The Court did not engage with this enquiry. What alternatives exist to criminalisation? There is hardly any consideration of this matter. Is there a good reason to distinguish between personal cultivation and the sale of cannabis? The Court suggested so but did not provide proper reasoning. These questions highlight that the Court missed opportunities to engage with important substantive questions that have a

¹⁵⁸ It is interesting to note that the Court in *Prince III* adopted much of the reasoning provided by the minority judgment in *Prince II* in reaching its outcome. In doing so, the Court distanced itself from the majority in *Prince II* without actually overruling *Prince II*. Unfortunately, it falls beyond the scope of this case comment to fully canvas this issue.

¹⁵⁹ *Prince III* (note 1 above) at para 69.

¹⁶⁰ *Prince II* (note 10 above) at paras 81–82.

¹⁶¹ *Prince III* (note 1 above) at para 87.

¹⁶² High Court judgment (note 18 above) at para 57.

¹⁶³ *Ibid* at para 61.

significant impact on individual lives. It also, of course, would then have offered a stronger justification for its preferred outcome.

V CONCLUSION

In this case comment, I have argued that the Court failed to conduct an adequate rights analysis and the limitations analysis under s 36(1) of the Constitution. While we are left with an outcome that appears consistent with a trend across the world to decriminalise the private consumption of cannabis, sadly, the actual reasoning of the Court in getting there was disappointing. I have argued that this has resulted in too narrow an outcome with a failure adequately to justify why a criminal prohibition on the purchase and sale of cannabis remained acceptable, with the serious impact it has on many lives. It, too, often failed adequately to engage with central questions that arise in relation to drug policy and could have provided a leading precedent globally. Most worryingly, the lack of adequate reasoning eroded one of the underpinnings of our constitutional democracy, namely, the creation of a culture of justification.¹⁶⁴

¹⁶⁴ E Mureinik 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 31, 32. In this seminal article, Mureinik posits the Constitution as a bridge from a culture of authority under the Apartheid regime to a culture of justification: 'a culture in which every exercise of power is expected to be justified.'