



The right to privacy in the decriminalisation of psilocybin mushrooms in South Africa

SEBASTIAN WILLIAM FOSTER¹

*LLB candidate, Faculty of Law,
Stellenbosch University, South Africa*

<https://orcid.org/0000-0001-5908-6177>

ABSTRACT

This article assesses the right to privacy as a ground for challenging the constitutionality of the criminalisation of psilocybin mushrooms. In doing so, it discusses the right to privacy as found in section 14 of the Constitution of the Republic of South Africa, 1996 (Constitution). Drawing on Constitutional Court case law, the article argues that the right to privacy is a fundamental right that deserves paramount protection, even in instances where individuals engage in illicit activities

¹ I wish to thank Prof. Geo Quinot for his guidance during earlier drafts of this paper. Furthermore, I would like to share my appreciation for David Foster and John Woolner for their support throughout. All arguments and errors remain my own.

within the confines of their personal realm of privacy. Accordingly, the prohibiting laws, notably the Drugs and Drug Trafficking Act 140 of 1992 and the Medicines and Related Substances Act 101 of 1965, do prima facie limit an individual's right to privacy, and therefore an analysis in terms of section 36 of the Constitution is necessary. A section-36 limitations analysis is accordingly presented, through which it is concluded that the nature and importance of the limited right outweighs the importance and purpose of the criminalisation. This paper argues that the current articles of legislation, which criminalise psilocybin mushrooms, are not justifiable, in that they unjustifiably limit the right to privacy. As such, the criminalisation of psilocybin mushrooms falls short of the standards implemented in section 36 of the Constitution and is concluded to be unconstitutional.

Keywords: privacy; psilocybin mushrooms; constitutionality; limitations analysis; constitutional interpretation; drug law reform.

1 INTRODUCTION

Psilocybin mushrooms, commonly known as magic, hallucinogenic, or psychedelic mushrooms, have shared an interconnected history with humanity.² They have been utilised by human beings for millennia for their sacramental, cultural, and therapeutic effects.³ Despite worldwide criminalisation and ostracisation since the 1960s, psilocybin mushrooms – alongside their psychoactive cousins – are experiencing a global renaissance.⁴ With the advent of research offering contemporary evidence of the medicinal, societal, and personal benefits of psilocybin mushrooms,⁵ the public debate about their criminalisation continues to grow. As such, it is becoming ever more pressing to assess whether their criminalisation passes constitutional muster. In South Africa, psilocybin mushrooms are criminalised in terms of the Drugs and Drug Trafficking Act 140 of 1992 (Drugs Act) and the Medicines and Related Substances Act 101 of 1965 (Medicines Act). Following the significant judgment in *Prince v Minister of Justice and Others*⁶ and its confirmation by the South African Constitutional Court in

² Foster SW “Cognitive liberty and the constitutionality of criminalising psilocybin mushrooms in South Africa” *South African Journal on Human Rights* 2023 (forthcoming) at 1.

³ Stamets P *Psilocybin mushrooms of the world* (1996) at 11.

⁴ Lu D “‘Psychedelics renaissance’: New wave of research puts hallucinogenics forward to treat mental health” (25 September 2021) *The Guardian* available at <https://www.theguardian.com/society/2021/sep/26/psychedelics-renaissance-new-wave-of-research-puts-hallucinogenics-forward-to-treat-mental-health> (accessed 15 May 2022).

⁵ O’Brien P “Psilocybin, in 10mg or 25mg doses, has no short- or long-term detrimental effects in healthy people” (04-01-2022) *King’s College London* available at <https://www.kcl.ac.uk/news/psilocybin-in-10mg-or-25mg-doses-has-no-short-or-long-term-detrimental-effects-in-healthy-people> (accessed 15 May 2022).

⁶ *Prince v Minister of Justice and Others* 2017 (4) SA 299 (WCC) (hereafter *Prince 2017*).

THE RIGHT TO PRIVACY IN THE DECRIMINALISATION OF PSILOCYBIN MUSHROOMS

Minister of Justice and Constitutional Development and Others v Prince and Others,⁷ the precedent set in these seminal cases may prove useful in the campaign to decriminalise psilocybin mushrooms. The *Prince* cases have emphasised the importance of the right to privacy as found in section 14 of the Constitution of the Republic of South Africa, 1996 (Constitution). Through inductive reasoning, it can be argued that these judgments, assisted by the influence of other case law, may be applicable in attacking the constitutionality of the criminalisation of psilocybin mushrooms.

This article will argue that the criminalisation of psilocybin mushrooms in South Africa in terms of the Drugs Act and the Medicines Act is unconstitutional insofar as the acts infringe upon the constitutional right to privacy. In doing so, this article will present a concise contextualisation of psilocybin mushrooms and their criminalisation, followed by a discussion on the right to privacy as found in section 14 of the Constitution. It will be concluded that the criminalising legislation does *prima facie* violate the right to privacy, and therefore a limitation analysis, as prescribed by section 36 of the Constitution, will be required to determine if the limitation should fail or be upheld.

2 CONTEXTUALISING PSILOCYBIN MUSHROOMS AND THEIR CRIMINALISATION

This paper requires an historical and modern contextualisation of both psilocybin mushrooms and their criminalisation in South Africa. This is a necessary inclusion since modern society is largely unaware of psilocybin mushrooms and their long history as a result of widespread criminalisation, stigmatisation, and academic censorship since the 1960s and 1970s.⁸ This section, accordingly, will provide a brief understanding of psilocybin mushrooms, as well as discuss their intricate relationship with humanity throughout history. Furthermore, the section examines their international and domestic criminalisation in order to contextualise their fall into societal proscription. It is upon this basis that the arguments of this article find their foundation.

2.1 Understanding psilocybin mushrooms and their relationship with humanity

Psilocybin mushrooms is a collective term for all the species of mushrooms that contain the substance psilocybin. The majority of these species of mushroom form part of the

⁷ *Minister of Justice and Constitutional Development and Others v Prince and Others* 2019 (1) SACR 14 (CC) (hereafter *Prince 2019*). These cases partially decriminalised cannabis in South Africa on the grounds that the Drugs Act and Medicines Act infringed upon the right to privacy.

⁸ Duke S & Gross A (eds) *America's Longest War: Rethinking our tragic crusade against drugs* New York: Open Road Media (2014) at 4.

Psilocybe genus.⁹ Psilocybin is the active chemical and, when ingested, is responsible for allowing the user to experience an altered state of consciousness, commonly referred to as a psychedelic experience or, more colloquially, as a “trip”. This is a result of psilocybin’s being dephosphorylated within the human body to create the bioactive agent psilocin.¹⁰ These mushrooms, as mushrooms, are saprophytes (meaning they grow on plant matter which is dead or decaying),¹¹ and are found on all continents except for Antarctica.¹² There is a large variety of known species of psilocybin mushrooms, all of which contain the active compound psilocybin.

Psilocybin mushrooms have been consumed by humans for millennia. Rock paintings and carvings depicting psilocybin mushrooms have been discovered in the Sahara Desert and Siberia, with those in the former dating as far back as 9000–7000BCE and those in the latter dating between the Stone and Bronze Ages.¹³ In ancient Mesoamerican civilisations, “[h]allucinogenic cactus, plants and mushrooms were used to induce altered states of consciousness in healing rituals and religious ceremonies”, as evidenced by the remains of “mushroom stones” that date to 3000BCE.¹⁴ Research also suggests that ancient South American civilisations predating the Aztecs consumed psilocybin mushrooms in their religious celebrations.¹⁵ As for the Aztecs themselves, they utilised the hallucinogenic fungus, going on to worship psychedelic mushrooms by naming them *teonanacatl*, a term that means “sacred mushroom” or “God’s flesh”.¹⁶ As Van Court et al. attest, there is “unequivocal evidence of the importance of entheogenic fungi including *Psilocybe* species in the Mesoamerican worldview prior to the arrival of the Spanish [inquisition]”.¹⁷

The use of other psychoactive substances has also been documented in the North Americas, with research suggesting that Native Americans made use of the peyote

⁹ Van Court RC et al. “Diversity, biology, and history of psilocybin-containing fungi: Suggestions for research and technological development” (2022) 126(4) *Fungal Biology* 308 at 309.

¹⁰ Van Court et al. (2022) at 308.

¹¹ See Stamets (1996) at 16.

¹² Arce J & Winkelman M “Psychedelics, society, and human evolution” (2021) 12 *Frontiers in Psychology* 1 at 2.

¹³ Samorini G “The oldest representations of hallucinogenic mushrooms in the world (Sahara Desert, 9000 7000 B.P.)” (1992) 2 *Integration: Journal of Mind-Moving Plants and Culture* 69 at 69–78; Miller R *Drugged: The science and culture behind psychotropic drugs* (2014) at 10.

¹⁴ Carod-Artal F “Hallucinogenic drugs in pre-Columbian Mesoamerican cultures” (2015) 30(1) *Neurologia* 42 at 43, wherein the author speaks of the Olmec, Zapotec, Mayan and Aztec ancient civilisations.

¹⁵ Boire R “On cognitive liberty” (2001) 2(1) *The Journal of Cognitive Liberties* 7 at 14.

¹⁶ Hofmann A “Teonanácatl and Ololiuqui, two ancient magic drugs of Mexico” (1971) *United Nations: Office on Drugs and Crime* available at https://www.unodc.org/unodc/en/data-and-analysis/bulletin/bulletin_1971-01-01_1_page003.html (accessed 16 December 2021).

¹⁷ See Van Court et al. (2022) at 308.

THE RIGHT TO PRIVACY IN THE DECRIMINALISATION OF PSILOCYBIN MUSHROOMS

cactus as a “sacrament for millennia”.¹⁸ The peyote cactus is known to contain the active hallucinogen, mescaline. In ancient India and amongst the Vedic Indo-Aryans, the hallucinogenic drink – soma – was often used and written about, appearing throughout Sanskrit texts.¹⁹ The same is true for the ancient Greeks, albeit with a brew made from ergot fungus-infected wheat.²⁰ It is from ergot fungus that Albert Hofmann later synthesised Lysergic acid diethylamide. In present times, some non-Western cultures still make use of psychoactive substances “as part of a religious ceremony led by a Shaman”.²¹ The Inuit are the only known culture not to use psychoactive substances, but only due to the fact that no psychoactive substances appear to grow where they traditionally reside.²² Furthermore, Mitchell and Hudson attest that the San people of southern Africa may have also made use of psilocybin mushrooms.²³ It is evident that naturally occurring psychedelics have been used throughout human history and across all humanity-bearing continents. Where humans have walked, psychoactive substances such as psilocybin mushrooms have grown and certainly been consumed for their psychoactive properties.

Additionally, it is of interest to note that the “Stoned Ape” hypothesis, first proposed by the McKenna brothers,²⁴ theorises that the “mysterious” rapid brain growth our ancestors (*homo erectus*) was accelerated by the inclusion of psilocybin mushrooms in their diets. This theory has found traction, with authors presenting evidence to suggest that early hominids did feast on psilocybin mushrooms due to their “widespread availability” on all continents except Antarctica.²⁵ Furthermore, psychoactive substances potentially “have had direct effects on the adaptation of early humans to their environment by enhancing their ability to live in highly social cooperative communities and participate in collaborative activities with shared goals

¹⁸ Marlan D “Beyond cannabis: Psychedelic decriminalisation and social justice” (2019) 23 *Lewis & Clark Law Review* 851 at 866.

¹⁹ See Marlan (2019) at 865.

²⁰ See Marlan (2019) at 865; Sessa B “From sacred plants to psychotherapy: The history and emergence of psychedelics in medicine” (2006) *Royal College of Psychiatrists* available at https://www.rcpsych.ac.uk/docs/default-source/members/sigs/spirituality-spsig/ben-sessa-from-sacred-plants-to-psychotherapy.pdf?sfvrsn=d1bd0269_2 (accessed 29 October 2021).

²¹ See Marlan (2019) at 860–865; see generally Sessa (2006).

²² Pollan M *How to change your mind: The new science of psychedelics* Bungay: Penguin Books (2018) at 13.

²³ Mitchell P & Hudson A “Psychoactive plants and southern African hunter-gatherers: A review of evidence” (2004) 16 *Southern African Humanities* 39 at 39–40. Although the authors’ note scattered evidence on the topic, proof thereof would provide an important historical element that could aid in the decriminalisation of psilocybin mushroom use in South Africa. As per *Prince v Minister of Justice and Others* 2017 (4) SA 299 (WCC) at para 32–34, the local history of the use of the substance may prove important in determining the justification for its criminalisation or otherwise.

²⁴ McKenna T *Food of the gods: A radical history of plants, psychedelics and human evolution* (2021) 16–35.

²⁵ See Arce & Winkelman (2021) at 2.

and intentions”.²⁶ It is, therefore, accurate to state that natural psychedelic substances have co-existed with humans throughout history. The question concerning their criminalisation and stigmatisation is, therefore, a worthy one.

2.2 Understanding psilocybin mushrooms and their effects

The effects of psilocybin mushrooms vary depending on the quality and quantity of the dose taken. Individuals who consume psychoactive substances typically begin to feel the effects of psilocybin within an hour of consumption. These effects commonly last between two and six hours,²⁷ but the duration can vary depending on factors such as how the substance is consumed (all at once or taken in intervals), whether the user consumes the mushrooms on an empty stomach, or if food or liquids are consumed during the experience. It is suggested that psilocybin mushrooms have a two-stage effect on the user. The primary stage is that of psychedelic experiences, which have an effect on the individual’s consciousness, inducing a state of synaesthesia and self-awareness. As Van Amsterdam, Opperhuizen and Van den Brink explain:

“Subjective effects range from intended feelings of relaxation (comparable to those of cannabis), giddiness, uncontrollable laughter, energy, joy, euphoria, visual enhancement (seeing colors brighter), visual disturbances (moving surfaces, waves), to mostly unintended delusions, altered perception of real events, images and faces, or real hallucinations.”²⁸

The same authors note that the first stage can also lead to less positive sensations – referred to as a “bad trip” – with the substance capable of rendering a user:

“[s]everely agitated, confused, extremely anxious, and disoriented with impaired concentration and judgment. Acute psychotic episodes may occur in serious cases, including bizarre and frightening images, severe paranoia and total loss of reality, which may lead to accidents, self-injury or suicide attempts ... Some of these symptoms are probably associated with the use of other controlled substances.”²⁹

Accordingly, the primary stage of psilocybin mushroom use manifests in an array of subjective hallucinogenic occurrences, which may be described as positive or negative depending on certain factors in combination with the user’s subjective comprehension of the experience. As modern research and historical practice seem to confirm, the

²⁶ See Arce & Winkelman (2021) at 2.

²⁷ Van Amsterdam J, Opperhuizen A & Van den Brink W “Harm potential of magic mushroom use: A review” (2011) 59(3) *Regulatory Toxicology and Pharmacology* 423 at 424. See also Foster (forthcoming) at 2–6.

²⁸ Van Amsterdam, Opperhuizen & Van den Brink (2011) at 424.

²⁹ Van Amsterdam, Opperhuizen & Van den Brink (2011) at 425.

THE RIGHT TO PRIVACY IN THE DECRIMINALISATION OF PSILOCYBIN MUSHROOMS

factors which play a highly important role in the experienced effects of substance are set and setting.³⁰ Set and setting are defined by Pollan as:

“[t]he inner and outer environments in which a drug experience takes place: ‘set’ is a term for the mind-set and expectations the person brings to the experiences, and ‘setting’ is the outward circumstances in which [the experience] takes place. Set and setting are particularly influential in the case of psychedelics.”³¹

As Pollan further elucidates, an individual can have considerably different experiences on psilocybin mushrooms solely as a result of where he or she is and what is occurring externally and within his or her mind.³² As such, the importance of set and setting cannot be understated. They have a noteworthy effect predominantly on the primary experience, but also, in part, on the secondary effects of the substance. It is based upon this reality that the safe use of psilocybin mushrooms has, historically, been in planned rituals or ceremonies, and contemporarily, in prepared clinical studies.³³ When users are cognisant of, and take steps to secure, their set and setting prior to going into a psilocybin mushroom experience, the event is significantly more likely to be positive rather than negative.

The secondary-stage effect of psilocybin mushroom use concern the lasting consequences the substance has on the brain, which Calvey notes include “changes in mood and brain function”.³⁴ According to a study on healthy, psychedelic-naïve subjects, the three-month after-effects of a psilocybin session were “enhanced mood, spirituality and outlook on life and self”. The authors of this study indicated that this conclusion “replicates previous findings in healthy volunteers that psilocybin can elicit long-lasting positive changes in behaviour and mood”.³⁵ Furthermore, aside from the evidential increase in positive emotions, it is important to note that research has returned promising results on the long-term effects a psilocybin experience can have on a host of mental-health-related issues, such as addiction, depression, and life-threatening

³⁰ See Van Court et al. (2022) at 314; see Van Amsterdam, Oppenhuizen & Van den Brink (2011) at 425; McElrath K & McEvoy K “Negative experiences on ecstasy: The role of drug, set and setting” (2002) 34(2) *Journal of Psychoactive Drugs* 199 at 200, where the authors discuss set and setting, albeit for 3,4-Methylenedioxymethamphetamine (otherwise referred to as 3,4-MDMA/MDMA or Ecstasy).

³¹ See Pollan (2018) at 422.

³² See Pollan (2018) at 6.

³³ Winkelman MJ “The evolved psychology of psychedelic set and setting: Inferences regarding the roles of shamanism and entheogenic ecopsychology” (2021) 12 *Frontiers in Pharmacology* 1 at 2–3.

³⁴ Calvey T *Psychedelic neuroscience* Cambridge: Academic Press (2018) at 3.

³⁵ See Madsen MK et al. “A single psilocybin dose is associated with long-term increased mindfulness, preceded by a proportional change in neocortical 5-HT_{2A} receptor binding” (2020) 33 *European Neuropsychopharmacology* 71 at 76.

diagnoses.³⁶ This sentiment has been echoed in a meta-analysis of 34 contemporary studies on the long-term outcomes of psilocybin/psychedelic use,³⁷ where the authors concluded that:

“[s]ustained changes in personality/attitudes, depression, spirituality, affect/mood, anxiety, wellbeing, substance use, meditative practices, and mindfulness were documented”. Furthermore, “[m]ystical experiences, connectedness, emotional breakthrough, and increased neural entropy were among the most commonly theorized mechanisms leading to long-term change”.³⁸

Accordingly, it is well-documented that there are, indeed, secondary effects experienced after psilocybin use.

2.3 The criminalisation of psilocybin mushrooms

2.3.1 *International criminalisation*

Psilocybin mushrooms, alongside other psychoactive substances, were criminalised globally as a result of the legitimisation of the war on drugs in the late 1960s and early 1970s. At the time, the civil rights movement and anti-war counterculture were growing in popularity United States (US). These movements posed a major threat to former President Nixon’s presidency – so much so, as former domestic policy chief John Ehrlichman stated, that Nixon’s “two enemies” were “the antiwar left and black people”.³⁹ The Nixon administration’s response was to pass laws which allowed the state to disrupt these communities and arrest their leaders on the grounds of the use and possession of drugs such as, inter alia, psilocybin mushrooms.⁴⁰

After the instatement of “war on drugs” legislation in the US, support from the international community followed. This is evidenced by the passing of three drug-control conventions: the Single Convention on Narcotic Drugs of 1961 (Narcotic Drugs Convention);⁴¹ the Convention of Psychotropic Substances of 1971 (Psychotropic

³⁶ Such as cancer. See Pollan (2018) at 331–390.

³⁷ Aday JS et al. “Long-term effects of psychedelic drugs: A systematic review” (2020) 113 *Neuroscience & Biobehavioural Reviews* 179 at 187.

³⁸ See Aday et al. (2020) at 187.

³⁹ Beres D “Why are psychedelics illegal?” (13-10-2020) *Psychedelic Spotlight* available at <https://psychedelicspotlight.com/why-are-psychedelics-illegal/> (accessed 19 May 2022).

⁴⁰ In 1968, the US Congress passed the Staggers-Dodd Bill (Public Law 90-639) which prohibited the possession of psilocybin on a federal level.

⁴¹ Single Convention on Narcotic Drugs of 1961, as amended by the Protocol amending the Single Convention on Narcotic Drugs, 1961 (adopted 25 March 1972 and entered into force 8 August 1975) 976 UNTS 105.

THE RIGHT TO PRIVACY IN THE DECRIMINALISATION OF PSILOCYBIN MUSHROOMS

Substances Convention);⁴² and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (Illicit Traffic Convention).⁴³ These conventions remain the leading international instruments on the criminalisation of illicit substances.

The Narcotic Drugs Convention was the first commitment by the international community to implement a “coordinated international action” against drug abuse.⁴⁴ It sought to reduce and prevent drug misuse and abuse through two avenues: first, through “limiting the legal supplies of drugs” to the level at which they would be needed for only medical and scientific reasons,⁴⁵ and secondly, through “preventing illicit supplies” of drugs by way of combatting illicit drug trafficking.⁴⁶ The Psychotropic Substances Convention “establishes an international control system for psychotropic substances”.⁴⁷ It is the only convention that specifically mentions psilocybin, listing it as a Schedule I substance, that is, a substance which has high potential for abuse and no recognised medical uses.⁴⁸ Schedule I of the Psychotropic Substances Convention lists the convention’s most restricted substances. Furthermore, this convention – in order to ensure that parties assist each other in preventing illicit trafficking of prohibited substances – created an obligation on bound states to enact domestic legalisation that allows for the “co-ordination of preventive and repressive action against the illicit traffic [of psychotropic substances]”.⁴⁹

This domestic legislation must echo the sentiment of the convention by enforcing any contravention of such legislation deemed to be a serious offence, with offenders facing severe punishment such as imprisonment and deprivation of liberty, as well as other “measures of treatment, education, aftercare, rehabilitation and social reintegration”.⁵⁰

⁴² Convention on Psychotropic Substances (adopted 21 February 1971, entered into force 16 August 1976) 1019 UNTS 175.

⁴³ United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (adopted 20 December 1988, entered into force 11 November 1990) 1582 UNTS 95.

⁴⁴ Anonymous “Single Convention on Narcotic Drugs, 1961” *United Nations: Office on Drugs and Crime* available at <https://www.unodc.org/unodc/en/treaties/single-convention.html?ref=menu> (accessed 24 May 2022).

⁴⁵ Lande A *commentary on the protocol amending the Single Convention on Narcotic Drugs, 1961: Done at Geneva on 25 March 1972* (1976) at 10.

⁴⁶ See Lande (1976) at 10.

⁴⁷ Anonymous “Convention on Psychotropic Substances, 1971” *United Nations: Office on Drugs and Crime* at <https://www.unodc.org/unodc/en/treaties/psychotropics.html> (accessed 24 May 2022).

⁴⁸ Schedule I of the Convention on Psychotropic Substances (adopted 21 February 1971, entered into force 16 August 1976) 1019 UNTS 175.

⁴⁹ Article 21(a) of the Convention on Psychotropic Substances (adopted 21 February 1971, entered into force 16 August 1976) 1019 UNTS 175.

⁵⁰ Article 22(1)(a) and (b) of the Convention on Psychotropic Substances (adopted 21 February 1971, entered into force 16 August 1976) 1019 UNTS 175.

Finally, the Illicit Traffic Convention amounted to a hardening of policy against what was a growing, enormously profitable illegal drug trafficking industry. It sought to eliminate the causes of drug abuse and illegal trafficking by enforcing the preceding conventions and adding further measures through which the international community could prevent drug trafficking as well as money laundering and precursor chemicals diversion. The convention also makes provisions for “international cooperation through ... extradition of drug traffickers, controlled deliveries and transfer of proceedings”.⁵¹

2.3.2 *Criminalisation in South Africa*

The crux of this paper is the analysis of the constitutionality of the Drugs Act and Medicines Act – the two acts which criminalise psilocybin mushrooms. Although both acts criminalise only the “chemical substances which constitute the active principles contained” in the mushroom⁵² psilocybin, by extension this has the effect of criminalising, inter alia, the use, possession, and cultivation of the mushroom itself, which is the vessel for the active chemical.⁵³ The Drugs Act, through sections 4(b) and 5 read with Part III of Schedule 2 of the Drugs Act, criminalises the use, possession and dealing in of psilocybin. In terms of section 1(1) of the Drugs Act, cultivation of mushrooms that contain psilocybin constitutes “dealing in” them. Furthermore, as per the Drugs Act, there remains no possibility of an exception to the legislation to allow adults to use, possess, and cultivate mushrooms containing psilocybin in a private setting.

In terms of section 22A(9)(a)(i), when read with Schedule 7 of the Medicines Act, it is illegal to acquire, use, possess, manufacture or supply psilocybin-containing mushrooms. The Medicines Act makes provision for the director-general to authorise the use of psilocybin mushrooms for educational, analytical or research purposes. There are, however, no provisions that allow for concessions for the adult use of psilocybin mushrooms, which – as with the Drugs Act – may constitute an infringement of an adult’s right to privacy.

3 THE PRIVACY RIGHT – SECTION 14 OF THE CONSTITUTION

To determine if the aforementioned provisions in the Drugs Act and Medicines Act are unconstitutional in terms of the right to privacy, an assessment of the fundamental right to privacy must take place. This analysis will detail the effects of the formulation of section 14 of the Constitution in regard to the general right to privacy. Furthermore,

⁵¹ Anonymous “United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988” *United Nations: Office on Drugs and Crime* at <https://www.unodc.org/unodc/en/treaties/illicit-trafficking.html> (accessed 24 May 2022).

⁵² Lande *A Commentary on the Convention on Psychotropic Substances: Done at Vienna on 21 February 1971* (1976) at 387.

⁵³ See Foster (forthcoming) at 9.

THE RIGHT TO PRIVACY IN THE DECRIMINALISATION OF PSILOCYBIN MUSHROOMS

case law will be used to help elucidate the extent of a right which has been described as “vague and evanescent, or amorphous and elusive, often meaning strikingly different things to different people”.⁵⁴ This section will conclude that the right to privacy protects adults in their private adventures within a private setting – even in cases where these activities are currently illegal.⁵⁵

The Constitution provides that: “[e]veryone has the right to privacy, which includes the right to not have (a) their person or home searched; (b) their property searched; (c) their possessions seized; or (d) the privacy of their communications infringed”.⁵⁶ As implied by the use of the term “includes”, the right to privacy is not a *numerus clausus*, allowing for arguments to suggest further applications of the right. The structure of section 14 provides for two parts, the first being a “general right to privacy”⁵⁷ and the second being a list of four particular types of infringements of the right. As Currie and De Waal explain, this structural formation has the effect of ensuring that the general right to privacy sets “parameters” over the listed types of infringements.⁵⁸ This means that, although the section speaks directly to protection against person and property searches and seizures as well as infringement of communications, the general right to privacy must be infringed first. For any of the listed rights to be infringed, there must be an infringement of the general right to privacy. All the listed infringements – as well as any further types – are accordingly only protected when confined to the right to privacy.

In the seminal case of *Bernstein and Others v Bester and Others NNO (Bernstein)*,⁵⁹ the court attempted to interpret the right to privacy as it was then formulated in the Interim Constitution of the Republic of South Africa, 1993 (Interim Constitution).⁶⁰ First, Ackermann J, writing for the majority, issued a caution that the then section 13 right ought not to be interpreted in the same manner as privacy is understood in terms of the common law. In terms of South African common law, privacy is a recognised right protected by the *actio iniuriarum* – an action which is considered to be a “single enquiry” test,⁶¹ wherein a determination as to whether an infringement took place is

⁵⁴ Neethling J “The concept of privacy in South African law” (2005) 122(1) *South African Law Journal* 18 at 18.

⁵⁵ *Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Security and Others* 1996 (3) SA 617 (CC), where the court found that the possession of obscene photographic material was protected by the right to privacy.

⁵⁶ Section 14(a)–(d) of the Constitution.

⁵⁷ Currie I & De Waal J *The Bill of Rights Handbook* 6 ed (2013) at 294; the general right to privacy is formulated in section 14 of the Constitution as “Everyone has a right to privacy”.

⁵⁸ See Currie & De Waal (2013) at 295.

⁵⁹ *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC).

⁶⁰ Section 13 of Act 200 of 1993 reads: “Every person shall have the right to his or her personal privacy, which shall include the right not to be subject to searches of his or her person, home or property, the seizure of private possessions or the violation of private communications.”

⁶¹ See Currie & De Waal (2013) at 295.

premised on determining “unlawfulness”.⁶² The constitutional interpretation, however, would cover a larger ambit but be subject to the Constitution’s two-stage limitations analysis.

Secondly, and most importantly (insofar as it links to the aforementioned discussion of the parameters of the right), Ackermann J contended that “the scope of a person's privacy extends *a fortiori* only to those aspects in regard to which a legitimate expectation of privacy can be harboured”.⁶³ Taking examples from Germany, Canada, and the US, the court asserted that the scope of the right to privacy is one that is present to an applicant where there is a subjective expectation of privacy and such an expectation is deemed objectively reasonable in the eyes of society.⁶⁴ It is, therefore, dynamic and mutually limiting: the right to privacy can be seen as a sliding scale between the interests of the individual and the interests of society. The right to privacy, as such, does not relate to “every aspect within [an individual’s] personal knowledge and experience”, but specifically “relates only to the most personal aspects of a person’s existence”.⁶⁵ Accordingly, the protection of the right to privacy will always be stronger in favour of the individual where he or she is within the confines of his or her most private, intimate spheres.

This understanding was reinforced in *Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Security and Others (Case)*,⁶⁶ where the Constitutional Court found the prohibition of pornographic material to be unconstitutional, insofar as it unjustifiably and unreasonably infringed upon the right to personal privacy,⁶⁷ as formulated in section 13 of the Interim Constitution. As Didcott J found for the majority:

“What erotic material I may choose to keep within the privacy of my home, and only for my personal use there, is nobody's business but mine. It is certainly not the business of society or the State. Any ban imposed on my possession of such material for that solitary purpose invades the personal privacy which s[ection] 13 of the interim Constitution (Act 200 of 1993) guarantees that I shall enjoy.”⁶⁸

Although a fundamental issue in *Case* was that of the severity of the invasion of an individual’s privacy⁶⁹ caused by the very broad definition of obscene or indecent

⁶² *Bernstein* (1996) at para 71.

⁶³ *Bernstein* (1996) at para 75.

⁶⁴ *Bernstein* (1996) at paras 75–79.

⁶⁵ *Bernstein* (1996) at para 79.

⁶⁶ *Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Security and Others* 1996 (3) SA 617 (CC).

⁶⁷ *Case* (1996) at para 93.

⁶⁸ *Case* (1996) at para 91.

⁶⁹ Smith N “Policing pornography – *Case v Minister of Safety and Security; Curtis v Minister of Safety and Security 1996*” (1997) 13 *South African Journal on Human Rights* 292 at 293.

THE RIGHT TO PRIVACY IN THE DECRIMINALISATION OF PSILOCYBIN MUSHROOMS

photographic matter in the Indecent or Obscene Photographic Matter Act,⁷⁰ the importance of the emphasis on the scope and principles of the privacy right cannot be denied. To the extent that an individual engages in acts – whether legal or illegal – within the sanctity of his or her private domain, such acts should be regarded as the business of neither the state nor the proverbial neighbour, *unless* such acts fail to meet the section 36 thresholds.

3.1 Does the right to privacy protect illegal conduct in the private realm?

This article has regularly asserted that the right to privacy is a powerful right, one protecting individuals even in cases where their conduct – within their private sanctity – is illegal. In confirming this assertion, it is pertinent to address the comments of Ngcobo J (for the majority) in *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae) (Jordan)*:⁷¹

“I do not accept that a person who commits a crime in private, the nature of which can only be committed in private, can necessarily claim the protection of the privacy clause ... The law should be as concerned with crimes that are committed in private as it is with crimes that are committed in public.”⁷²

As has been stated, it is argued that the right to privacy provides a resilient protection to adults even in instances where their private adventures within a private setting are illegal in nature. The *obiter* of Ngcobo J, however, may insinuate that this cannot be the case and that the law ought to be capable of concerning itself with the illegal acts committed by adults in private settings. These comments by Ngcobo J do not, however, sway the argument sought to be concluded in this paper – that the right to privacy remains an extremely strong defender of adults, despite the legality of their actions. This is evidenced by the rationale presented by the majority in *Jordan*, wherein it was concluded that “even if the right to privacy is implicated [in cases of commercialised sex], it lies at the periphery and not at its inner core”.⁷³ In stating such, Ngcobo J effectively supports the argument placed forward by this paper. As he concludes, commercialised sex work falls outside of the private realm because “the prostitute invites the public generally to come and engage in unlawful conduct in private”.⁷⁴

⁷⁰ Act 37 of 1967, which defined indecent or obscene photographic matter, in section 1, to include “photographic matter or any part thereof depicting, displaying, exhibiting, manifesting, portraying or representing sexual intercourse, licentiousness, lust, homosexuality, lesbianism, masturbation, sexual assault, rape, sodomy, masochism, sadism, sexual bestiality, or anything of a like nature”.

⁷¹ *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae)* 2002 (6) SA 642 (CC).

⁷² See *Jordan* (2002) at para 28.

⁷³ See *Jordan* (2002) at para 29.

⁷⁴ See *Jordan* (2002) at para 28.

Accordingly, privacy could not be raised as commercialised sex work was found to exist outside the private domain.

Appropriately, where illegal acts are conducted in privacy, the right's protection can only be limited insofar as there is a justifiable cause to do so. This rationale was echoed in *De Reuck v Director of Public Prosecution, Witwatersrand Local Division, and Others*.⁷⁵ In this instance, the court found that the possession of child pornography was protected by the right to privacy but that the right could be justifiably limited.⁷⁶ Furthermore, in the matter of *Minister of Police and Others v Kunjana*,⁷⁷ the Constitutional Court again reiterated the import of the right to privacy, in finding that provisions of the Drugs Act which allowed for warrantless search-and-seizures to be an unjustifiable invasion of the privacy right. Although the defendant in this case was reasonably construed to be in possession of, and dealing in, illicit drugs,⁷⁸ evidently an illegal act, the court found that the impugned legislation allowed for a "impermissible violation of the rights to privacy".⁷⁹

Notably, this was due to how the legislation empowered police officials to intrude upon a person's private space, when that individual's "reasonable expectation of privacy is at its apex".⁸⁰ Although the defendant was quite evidently committing criminalised acts within her home, the illegal nature of this conduct did not surmount the unlawful invasion of her privacy. In doing so, the Constitutional Court reaffirmed the strength and importance of the right to privacy in instances where criminal acts are being conducted within the individual's sphere of privacy. Hence, it is correct to state that the right to privacy is a powerful guardian. In certain cases, it provides a protection which evades the grasp of the law, even in instances of adults acting illegally within their private realm. As such, it is reasonable to find that any "intrusion by the law into the private domain [must be] justified",⁸¹ within the bounds of section 36. This understanding perfectly consolidates the ambit of protection afforded by the privacy right.

4 PROVING A CONSTITUTIONAL INFRINGEMENT OF THE RIGHT TO PRIVACY

This section will briefly look at the right to privacy to the context of an adult using, possessing and cultivating psilocybin mushrooms in a private setting, in order to show

⁷⁵ *De Reuck v Director of Public Prosecution, Witwatersrand Local Division, and Others* 2004 (1) SA 406 (CC).

⁷⁶ See *De Reuck* (2004) at para 90.

⁷⁷ *Minister of Police and Others v Kunjana* 2016 (2) SACR 473 (CC).

⁷⁸ See *Kunjana* (2016) at para 4.

⁷⁹ See *Kunjana* (2016) at para 33.

⁸⁰ See *Kunjana* (2016) at para 27.

⁸¹ *De Reuck v Director of Public Prosecution, Witwatersrand Local Division, and Others* 2004 (1) SA 406 (CC) at para 90.

THE RIGHT TO PRIVACY IN THE DECRIMINALISATION OF PSILOCYBIN MUSHROOMS

that the provisions of the Drugs Act and Medicines *prima facie* violate an adult's right to privacy. It will do so by showing that the state has limited rights to be "concerned with acts/conduct of individuals performed in the confines of their own homes",⁸² where these adults are capable of consenting to the associated risks of harm. The conclusion of this section will be that a limitation analysis, in terms of section 36 of the Constitution, is necessary. As has been unambiguously adduced by the courts in both *Bernstein and Case*, the right to privacy covers considerable constitutional protection over individuals and their intimate behaviour, the deeper into personal sanctity that an individual goes. As Davis J stated in *Prince 2017*, it is now:

"established law, insofar as privacy is concerned, that this right becomes more powerful and deserving of greater protection the more intimate the personal sphere of the life of a human being which comes into legal play".⁸³

Conversely, the same protection degrades the further into the realm of the public the individual goes, shrinking as the interests of the State and public grow. What is now necessary is to adduce the implications of the right to privacy for the criminalisation of psilocybin mushrooms. What is overwhelmingly apparent in South African case law is how the right to privacy offers a resilient protection to individuals who act within the confines of a private setting. This protection has, on a number of important occasions, protected the commissioning of, as they were or still are, illegal acts – acts such as, inter alia, the possession of pornography,⁸⁴ the possession of child pornography,⁸⁵ the use, possession, and cultivation of cannabis,⁸⁶ homosexuality (sodomy),⁸⁷ and consensual sexual conduct between adolescents.⁸⁸

Accordingly, it is a faultless application of legal rationality to conclude that the use, cultivation, and possession of psilocybin mushrooms are also, despite their criminalisation, sheltered under the protection of the privacy right, within the precincts of an individual's intimate *dominium*. It is appropriate to conclude that the criminalisation of the use, cultivation, and possession psilocybin mushrooms – as provided by the Drugs Act and the Medicines Act – does *prima facie* infringe the right to privacy. The fundamental issue remaining is to determine whether such an infringement is reasonable and justifiable in terms of section 36 of the Constitution.

⁸² See *Prince* (2017) at para 107.

⁸³ See *Prince* (2017) at para 22.

⁸⁴ See *Case* (1996).

⁸⁵ See *De Reuck* (2004).

⁸⁶ See *Prince* (2017) and *Prince* (2019).

⁸⁷ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 (2) SACR 556 (CC).

⁸⁸ *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* 2014 (1) SACR 327 (CC).

5 CONTEXTUALISING SOUTH AFRICAN CONSTITUTIONAL LAW

“Rights are not absolute and can ... be limited.”⁸⁹ Before attempting to execute a section 36 limitations analysis to determine whether the limitations on the right to privacy, occasioned by the criminalising sections of both the Drugs Act and Medicines Act, are justifiable, it is necessary to digress to contextualise the applicable constitutional provisions. Chapter 2 of the Constitution contains the Bill of Rights, a chapter expressly referred to as the “cornerstone of democracy in South Africa” in that it “enshrines the rights of all people in [South Africa] and affirms the democratic values of human dignity, equality and freedom”.⁹⁰ Sections 7(2) and 8(1) of the Constitution reaffirm that the state – “the legislature, the executive, the judiciary and all organs of State”⁹¹ – are bound by the Bill of Rights and must “respect, protect, promote and fulfil the rights in the Bill of Rights”.⁹² Furthermore, natural and juristic persons are also bound by the Bill of Rights, if and where applicable (albeit with the latter being entitled only to the rights applicable to them).⁹³

Additionally – and importantly for the current academic exercise – is that section 7(3) states that “rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill”. This provision emphasises the importance of the limitation clause in section 36 and the roadmap in determining when a derogable right may be limited. It also outlines a difference between a section 36 limitation and an internal limitation, otherwise referred to as an internal or special qualifier. Internal qualifiers are phrases included in a clause that act as an immediate check on a right, limiting the state’s liability in executing the full potential of that right.⁹⁴ Without such internal qualifiers, the state would be obligated to “ensure that everyone within its jurisdiction ultimately receives the [right] in question”, which would lead to an overburdening of the state and its ability to function realistically and sufficiently, especially in the case of socio-economic rights.⁹⁵

6 LIMITATIONS ANALYSIS

In South African constitutional jurisprudence, a two-stage analysis is utilised in determining the hierarchy of rights and their limitations. The first step is to deduce

⁸⁹ De Vos P et al. (eds) *South African constitutional law in Context* (2014) at 347, with the exception of the non-derogable rights found in section 37 of the Constitution.

⁹⁰ Section 7(1) of the Constitution.

⁹¹ Section 8(1) of the Constitution.

⁹² Section 7(2) of the Constitution.

⁹³ Section 8(2) and 8(4) of the Constitution.

⁹⁴ Phrases such as “subject to available resources”, “to have access to”, and “progressive realisation”, constitute internal qualifiers within the Constitution.

⁹⁵ Heyns C & Brand D “Introduction to socio-economic rights in the South African Constitution” (1998) 2(2) *Law, Democracy & Development* 153 at 158.

THE RIGHT TO PRIVACY IN THE DECRIMINALISATION OF PSILOCYBIN MUSHROOMS

whether a *prima facie* infringement of a fundamental right has taken place. Once such a conclusion has been reached, the second step is to determine, with reference to the criteria of section 36 of the Constitution, whether the infringed right has been justifiably limited. Section 36 of the Constitution reads as follows:

“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.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.”

In line with the criteria listed in section 36, this section will present an in-depth limitations analysis to determine if the provisions in the Drugs Act and Medicines Act are “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”.⁹⁶ This is, accordingly, a proportionality exercise. In doing so, it must be deduced whether the nature and importance of the right to privacy outweigh the importance and purpose of the limitations, the criminalising sections of both the Drugs Act and Medicines Act. It must be noted that the Drugs Act and Medicines Act are both laws of general application, insofar as – in their application – they are impersonal, equal, and not arbitrary.⁹⁷ Furthermore, it would be apt to note the remarks of the court in *Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre as Amicus Curiae)*:⁹⁸ “once a limitation has been found to exist, the burden of justification under s 36(1) rests on the party asserting that the limitation is saved by the application of the provisions of the section”. This party, in the current context, is the state.

6.1 The nature and importance of the right to privacy

6.1.1 *The nature of the right to privacy*

⁹⁶ Section 36 of the Constitution.

⁹⁷ See Currie & De Waal (2013) at 156.

⁹⁸ *Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre as Amicus Curiae)* 2001 (4) SA 491 (CC) at para 19.

Naturally, the right to privacy is an elusive intricacy. It is a right which at times is self-evident, and at others, blurred by competing forces. The right is not a limited right, but rather is available to everyone, regardless of their status as a citizen or an adult. Furthermore, the wording of section 14 contains no internal qualifiers, and as such, the right is afforded to everyone automatically and is limitable only in terms of section 36 of the Constitution.

6.1.2 *The importance of the right to privacy*

The importance of the right to privacy is rarely contentious. It is a fundamental right which shares an intertwined existence with a number of other rights in the pursuit of giving rise to an individual's "autonomous identity".⁹⁹ In *Minister of Police and Others v Kunjana*,¹⁰⁰ the court affirmed that the "right to privacy flows from the value placed on human dignity". The court, in *Khumalo v Holomisa and Others*, stated that it is the right to privacy which "serves to foster human dignity",¹⁰¹ noting how it is privacy which affords humans the "sphere of intimacy and autonomy that should be protected from invasion".¹⁰² Privacy extends to the right to freedom and security of the person, as well as bodily and psychological integrity;¹⁰³ as Warren and Brandeis famously said, privacy is "the right to be let alone".¹⁰⁴ This understanding of privacy was echoed by the Supreme Court of Appeal in the 2022 case of *Smuts and Another v Botha*:

"Privacy enables individuals to create barriers and boundaries to protect themselves from unwarranted interference in their lives ... It is an essential way to protect individuals and society against arbitrary and unjustified use of power by reducing what can be known about and done to them."¹⁰⁵

Additionally, the rights of, inter alia, equality; human dignity; freedom of religion, belief and opinion; freedom of expression; freedom of association; children's rights; and the right to information,¹⁰⁶ depend on privacy in one manner or another.¹⁰⁷ If the right to

⁹⁹ See *Bernstein* (1996) at para 65.

¹⁰⁰ See *Kunjana* (2016) at para 14.

¹⁰¹ *Khumalo v Holomisa and Others* 2002 (5) SA 401 (CC) at para 27.

¹⁰² See *Khumalo* (2002) at para 27.

¹⁰³ Section 12 of the Constitution; see Foster (forthcoming) at 17, 21, 27–28.

¹⁰⁴ Warren SD & Brandeis LD "The right to privacy" (1890) 4(5) *Harvard Law Review* 193 at 193.

¹⁰⁵ *Smuts and Another v Botha* 2022 (2) SA 425 (SCA) at para 10.

¹⁰⁶ Sections 9, 10, 15, 16, 18, 28, and 32 of the Constitution.

¹⁰⁷ See *Botha* (2022) at para 8 where the court states: "The right to privacy is a fundamental right that is protected under the Constitution. It is the right of a person to be free from intrusion or publicity of information or matters of a personal nature. It is central to the protection of human dignity, and forms the cornerstone of any democratic society. It supports and buttresses other rights, such as the freedoms of expression, information and association." See further Krotoszynski Jr RJ *Privacy revisited: A global perspective on the right to be left alone* New York: Oxford University Press (2016) at 75–114; *Teddy Bear*

THE RIGHT TO PRIVACY IN THE DECRIMINALISATION OF PSILOCYBIN MUSHROOMS

privacy is a fundamental right within the context of the Bill of Rights, it is clearly evident that correctly protecting that right is essential in an open and democratic society. Any limitations of the right to privacy will have the effect of weakening the “moral autonomy of citizens”,¹⁰⁸ an outcome which would contradict the first founding provisions of the Constitution.¹⁰⁹ Without the state-led encouragement of individual autonomy, these constitutional ideals will never be achieved. In fact, a strong argument can be made that the failure of the state to adequately allow for the pursuit of autonomy, through limitations of, inter alia, the right to privacy, would amount to a manifestation of state paternalism.

State paternalism renders adult citizens mere children of the state. By utilising a paternalistic rationale in justifying state decision-making, what in effect happens is a belittling of an autonomous individual’s capacity to act in an autonomous way. It is a case of the state playing “parent” and undermining the maturity of individuals. In explaining this legal phenomenon, Feinberg states:

“The fully voluntary choice or consent of a mature and rational human being concerning matters that affect only his own interests is such a precious thing that no one else (and certainly not the State) has a right to interfere with it simply for the person’s “own good.”¹¹⁰

Paternalistic justifications are no duty of the state in an open and democratic society based upon the founding values of the Constitution. This sentiment is shared by the courts with regard to privacy. Although the limitation of the right is possible, and at times necessary, it must not be done without due regard for the impact such a limitation will have on the autonomy of individuals. This is due to the intricate link between privacy and an individual’s autonomy:

“[It] follows from the animating idea of privacy that a right to make intimate decisions and to have one’s personal autonomy protected is central to individual identity, and one is entitled to make decisions about these concerns without undue interference from the State.”¹¹¹

Accordingly, it is evident that the right to privacy must be protected, especially at its “inviolable inner core”.¹¹² Even in the case of, for example, the adult’s use of illicit

Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another 2014 (1) SACR 327 (CC) at paras 59–64.

¹⁰⁸ See *Prince* (2017) at para 24.

¹⁰⁹ Section 1(a) and (d) of the Constitution.

¹¹⁰ Feinberg J “Legal paternalism” (1971) 1(1) *Canadian Journal of Philosophy* 105 at 111.

¹¹¹ See *Prince* (2017) at para 23.

¹¹² See *Prince* (2017) at para 24.

substances, the state should be circumspect when interfering with such an individual's actions within the walls of his or her private bastion. To do so is to respect and appreciate the innate autonomy of individuals to decide what is best for themselves in their personal, private pursuits, unhindered by paternalistic state intervention which decrees what is best.

Individuals, therefore, should be protected by the right to privacy when following their own private adventures, despite any supposed or actual harm, as long as such activities are confined to their personal sphere and do not directly affect the welfare of others. Accordingly, any legislation which invades this private sanctum dares to do so with the knowledge that it will be piercing what must be an inviolable space. It can only do so in the most deserving of situations, otherwise such legislation would fail to meet the proportionality threshold of section 36 of the Constitution.

6.2 Assessing the justifiability of the criminalising legislation

6.2.1 *The purpose and importance of the criminalising legislation*

As previously stated, the criminalising legislation, the Drugs Act and Medicines Act, criminalises the use, possession, and cultivation of psilocybin mushrooms. The criminalisation is deemed to be necessary for protecting users from the potential harm associated with psilocybin, a substance regarded by the criminalising provisions as an undesirable dependence-producing substance. This section assesses the purpose and importance of the criminalising legislation, in order to deduce whether they warrant a limitation of the right to privacy in the case of psilocybin mushrooms. However, it is also vital to note that it is the state that "is required under this heading to show that there is a substantial State interest which justifies the limitation".¹¹³ It is common cause that the purpose of the criminalising provisions is to ensure that South Africa's approach to illicit substances is "consistent with the international protocol",¹¹⁴ notably the Psychotropic Substances Convention but so too the Illicit Traffic Convention and the Narcotic Drugs Convention. As stated in *Prince v President, Cape Law Society and Others* ("*Prince 2002*"),¹¹⁵ these domestic legislative documents were intended to be a "method of control" through which the state can penalise and police the use, trade, and manufacturing of illicit substances. As Ngcobo J stated, "the goal of the impugned provisions is to prevent the abuse of dependence-producing drugs and trafficking in those drugs".¹¹⁶

¹¹³ See *Prince* (2017) at para 32.

¹¹⁴ *Prince v President, Cape Law Society and Others* 2002 (2) SA 794 (CC) at para 141.

¹¹⁵ See *Prince* (2002) at 141.

¹¹⁶ See *Prince* (2002) at para 81.

THE RIGHT TO PRIVACY IN THE DECRIMINALISATION OF PSILOCYBIN MUSHROOMS

The court in *Prince 2002*, when passing judgment, determined the Drugs Act and Medicines Act to be crucial mechanisms in the war on drugs, with the majority noting that it was:

“abundantly clear from the attitude adopted by the government in this matter that it does not consider these laws to be an illegitimate inheritance from the past; [rather] it considers them legitimate and necessary provisions of our present criminal law legislation and international obligations”.¹¹⁷

Evidently, it is adequate to conclude that the purpose of the criminalising provisions is deeply rooted in creating a mechanism through which South Africa can wage war on drugs and abide by international law obligations. Furthermore, it must be stated that the Drugs Act and Medicines Act do carry significant importance. They represent South Africa’s ammunition in the war on drugs. In doing so, they attempt to uphold important international obligations, as well as to prevent the scourge of illicit drug trafficking and the undisputable harms which stem from such activities. In this regard, the Acts certainly hold fundamental importance. However, the importance and purpose of the criminalising legislation must hold their weight in respect of their effect on the use of psilocybin mushrooms.

6.2.2 *The relationship between the limitation and its purpose*

The effects of the limitation of the right to privacy by the Drugs Act and Medicines Act on the private use, possession, and cultivation of psilocybin mushrooms are patent: they render as criminal all persons who engage in their use, possession, and cultivation. This is the case regardless of where an individual uses, possesses, or cultivates psilocybin mushrooms. Accordingly, the legislation has the authority to pierce the cloak of privacy, afforded to everyone, even when individuals act within the walls of their own homes. This amounts to a severe violation of an individual’s right to privacy, solely in the name of achieving the purposes of the Acts, namely combatting drugs. This manifestly appears contentious, insofar as the power afforded to achieving the purposes of criminalising legislation has the capacity to render ordinary users of psilocybin mushrooms criminals associated with illegal drug trafficking. This has the potential of causing considerably more harm to individuals than the substance itself. All users of psilocybin mushrooms, regardless of whether they act in private and use safe doses, will be stigmatised in the eyes of the law as criminals.¹¹⁸ If this is the desired outcome of the criminalising legislation, then it is correct to state that the laws do have the capacity to achieve this

¹¹⁷ See *Prince* (2002) at para 105.

¹¹⁸ See *Prince* (2002) at para 51, where Ngcobo J made a similar argument about how the criminalisation of cannabis will render all Rastafari criminals in the eyes of the law.

outcome. However, it appears contentious that such an outcome will be a justifiable purpose that warrants such a severe infringement of an individual's privacy.

6.3 Justifiability assessment and possible less restrictive measures

The scales at hand hold two weights. One pan holds the mass of an individual's right to privacy – a right deeply linked to other fundamental rights such as dignity, freedom, integrity, and expression; the other holds the heft of the state's interest in pursuing the war on drugs by unconditionally criminalising, inter alia, the use, possession, and cultivation of psilocybin mushrooms. The right to privacy is undoubtedly and comprehensively violated by the criminalising provisions. This is done in an unjustifiable manner, and premised on dated views on the harm of drugs such as psychoactive substances and an antiquated approach to regulating drug use.

The supposed harms of psilocybin mushroom use are becoming ever clearer. Research into the use of psilocybin mushrooms is continuing to show positive results, disproving the commonly held beliefs about the hallucinogenic substance. Psilocybin mushrooms have been used, with positive results, in treating patients with addiction to nicotine and alcohol.¹¹⁹ Evidence suggests that, instead of being a substance that produces unwanted mental effects, psilocybin mushrooms produce “antidepressant and anti-addictive effects”.¹²⁰ The use of psilocybin mushrooms is also showing favourable results in the treatment of other mental-health-related disorders. The substance has shown positive results in patients who suffer from anxiety, treatment-resistant depression, existential distress in cases of terminal cancer, post-traumatic stress disorder, and obsessive-compulsive disorder, and ultimately, is deemed to have no detrimental effects on healthy adults.¹²¹ Psilocybin mushrooms have also been found not to produce dependence, nor leave users with symptoms of withdrawal.¹²² Furthermore, there is no known case of a lethal overdose due to psilocybin mushrooms, and toxicity is limited to the duration of the state of intoxication.¹²³ Ultimately, with the weakening of state restrictions on the study of psilocybin mushroom use, more

¹¹⁹ Johnson MW, Garcia-Romeu A & Griffiths RR “Long-term follow-up of psilocybin-facilitated smoking cessation” (2017) 43(1) *The American Journal of Drug and Alcohol Abuse* 55 at 55–60; Johnson MW et al. “Classic psychedelics: An integrative review of epidemiology, therapeutics, mystical experience, and brain network function” (2018) 197 *Pharmacology & Therapeutics* 83 at 85; see Pollan (2018) at 358–374.

¹²⁰ See Calvey (2018) at 3.

¹²¹ Nutt D “Psilocybin for anxiety and depression in cancer care? Lessons from the past and prospects for the future” (2016) 30(12) *Journal of Psychopharmacology* 1163 at 1163; Rucker JJ et al. “The effects of psilocybin on cognitive and emotional functions in healthy participants: Results from a phase 1, randomised, placebo-controlled trial involving simultaneous psilocybin administration and preparation” (2022) 36(1) *Journal of Psychopharmacology* 114 at 115, 123.

¹²² Halpern J et al. (eds) *Addiction Medicine: Science and Practice* New York: Springer (2010) 1083 at 1089.

¹²³ See Halpern et al. (2010) at 1089.

THE RIGHT TO PRIVACY IN THE DECRIMINALISATION OF PSILOCYBIN MUSHROOMS

evidence is coming to light that requires a contemporary cultural reassessment of the stigmatised fungus. As I have previously argued:

“The criminalisation [of psilocybin mushrooms] is still heavily linked to reasons dissociated with the reality presented by scientific evidence. The war on drugs agenda remains an unpersuasive, yet persistent, justification to uphold the prohibition, despite the evidence suggesting that psilocybin mushrooms are not toxic and deadly to the user or society, but could rather be beneficial if utilised correctly.”¹²⁴

It seems a foregone conclusion that further research into psilocybin mushrooms is necessary to fully comprehend their uses and dangers. It would then appear counterintuitive for the state to vehemently support continued criminalisation on the back of political decisions made over half a century ago. It would be a wise decision to invest in adequate and meaningful research in order to provide the legislature with the material necessary to make an informed decision.

Furthermore, the ability of individuals to consent to the risk of harm must be protected. This is in accordance with the principle of *volenti non fit injuria*. To allow individuals this capacity with regard to dangerous and harmful activities, such as deep-water diving, skiing, or skydiving, to name but a few, but not to provide them the same capacity with regard to the private use of psychoactive substances, appears nonsensical. It suggests that the prohibition of the latter has an ulterior motive, arguably due to the stigma associated with drugs, which is not the case regarding the dangerous activities mentioned. A more apposite argument could be made regarding the freedom of individuals to engage in dangerous and harmful substance use by drinking alcohol. Alcohol was noted by the South African Central Drug Authority (quoted by the court in *Prince 2019*) as “the substance that causes the most individual and societal harm”.¹²⁵ It is accordingly fitting to advocate for the expression of independent autonomy and allow individuals to consent to the risks of harm.

Lastly, it is accepted that the criminalising legislation has considerable importance in achieving its purpose. However, as was mentioned by Ngcobo J in *Prince 2002*:

“[t]he net they cast is so wide that uses that pose no risk of harm and that can effectively be regulated and subjected to government control, like other dangerous drugs, are hit by the prohibition”.¹²⁶

¹²⁴ See Foster (forthcoming) at 27.

¹²⁵ See *Prince* (2019) at para 78.

¹²⁶ See *Prince* (2002) at para 81.

As the legislation currently stands, its ambit is so unconditional that it can be compared to a trawler net – although it may achieve its intended purposes, it also catches far more than it ought to, producing a damaging effect upon society by criminalising moderate, safe use, and perpetuating the current stigmatisation of psychoactive substances. It therefore seems reasonable to deduce that there is a disjuncture in the criminalising legislation’s purpose of preventing societal harms and the harms it causes by rendering all users of psilocybin mushrooms criminals. The limitation does provide the state with the perfect weapon in fighting the war on drugs. However, the extent to which the provisions allow the state to go seems largely disproportionate to what is reasonable and justifiable in terms of the Constitution. Such an aggressive limitation of an individual’s privacy may cause more harm than the harm associated with the private use, possession, and cultivation of psilocybin mushrooms. It should therefore be determined that an individual’s right to privacy outweighs the limiting provisions, since the use, possession, and cultivation of psilocybin mushrooms fall within the inviolable bounds of privacy afforded to an individual. In other words, an individual’s right to use, possess, and cultivate psilocybin mushrooms in the privacy of his or her own home, dwelling or area must render the limitations of the Drugs Act and Medicines Act unjustifiable in a democratic society based on human dignity, equality, and freedom. However, in the absence of sufficient scientific evidence, and although the right to privacy is applicable to everyone, the right will be justifiably limited with regard to minors. This echoes Davis J’s sentiment in *Prince 2017*: “Children must be protected from any harm caused by exposure to drugs.”¹²⁷ Nevertheless, the criminalisation of the adult use, possession, and cultivation of psilocybin mushrooms, within the realms of privacy, fails to surpass the threshold set in section 36 of the Constitution.

7 CONCLUSION

Psilocybin mushrooms have shared an intimate relationship with humanity. For millennia, human beings have made use of psychedelic substances of all kinds, not just mushrooms containing psilocybin. However, the effects of the war on drugs and the resultant international sentiment have led to global stigmatisation of the mind-altering fungus and its hallucinogenic cousins. As a result of political decisions made during the 1960s, research into psilocybin mushrooms has been hampered, limiting academic knowledge about both the potential positive and negative effects. Arguably, as the world embraces a renaissance of psychoactive substances, the time to afford these substances another opportunity is now. Consequently, it is essential that an assessment of their criminalisation takes place, in order to begin a process of decriminalisation and drug-law reform.

This article has investigated the extent of the right to privacy as found in section 14 of the Constitution. Having considered the Constitutional Court’s judgments in both

¹²⁷ See *Prince* (2017) at para 107 & *Prince* (2019).

THE RIGHT TO PRIVACY IN THE DECRIMINALISATION OF PSILOCYBIN MUSHROOMS

Bernstein and *Case*, it is evident that the right to privacy is a powerful right which is heavily protected in South African constitutional jurisprudence. As noted in *Bernstein*, the right to privacy protects those who have a legitimate expectation of privacy, especially within their most personal spheres of life. Additionally, *Case* confirmed that any intrusion upon an individual's realm of privacy – even in the cases where such an individual is engaging in prohibited behaviour – must be justified in terms of the Constitution's limitation-of-rights clause.¹²⁸

This article has assessed the criminalisation of psilocybin mushrooms, particularly within the South African legal context. Having provided an overview as to how their criminalisation came about, it discussed the criminalising legislation, namely the Drugs Act and Medicines Act, elucidating how these acts criminalise, inter alia, the use, possession, and consumption of psilocybin mushrooms. It has been argued that these criminalising provisions unjustifiably limit an individual's right to privacy, to the extent that they provide no exception for the adult use, possession, and cultivation of psychoactive substances within the privacy of one's inviolable domain. The paper has assessed the right to privacy as utilised in the seminal cases of *Prince 2017* and *Prince 2019*. It has used inductive reasoning and further academic arguments to deduce that the right to privacy would outweigh the criminalising provisions when challenged in terms of section 36 of the Constitution.

¹²⁸ Section 36 of the Constitution.

BIBLIOGRAPHY**Books**

Currie I & De Waal J *The Bill of Rights handbook* 6 ed Cape Town: Juta & Co Ltd (2013)

Calvey T *Psychedelic neuroscience* Cambridge: Academic Press (2018)

De Vos P et al. *South African Constitutional Law in context* Cape Town: Oxford University Press (2014)

Duke S & Gross A *America's longest war: Rethinking our tragic crusade against drugs* New York: Open Road Media (2014)

Krotoszynski Jr RJ *Privacy revisited: A global perspective on the right to be left alone* New York: Oxford University Press (2016)

Lande A *Commentary on the Convention on Psychotropic Substances: Done at Vienna on 21 February 1971* New York: United Nations (1976)

Lande A *Commentary on the Protocol Amending the Single Convention on Narcotic Drugs, 1961: Done at Geneva on 25 March 1972* New York: United Nations (1976)

McKenna T *Food of the gods: A radical history of plants, psychedelics and human evolution* London: Rider (2021)

Miller R *Drugged: The science and culture behind psychotropic drugs* New York: Oxford University Press (2014)

Pollan M *How to change your mind: The new science of psychedelics* Bungay: Penguin Books (2018)

Stamets P *Psilocybin mushrooms of the world* Berkeley: Ten Speed Press (1996)

Chapters in books

Halpern J et al. "Hallucinogens" in Johnson B (ed) *Addiction medicine: Science and practice* (2010) New York: Springer 1083–1098

Journal articles

Aday JS et al. "Long-term effects of psychedelic drugs: A systematic review" (2020) 113 *Neuroscience & Biobehavioural Reviews* 179–189

THE RIGHT TO PRIVACY IN THE DECRIMINALISATION OF PSILOCYBIN MUSHROOMS

Arce J & Winkelman M “Psychedelics, society, and human evolution” (2021) 12 *Frontiers in Psychology* 1–26

Boire R “On cognitive liberty (Part 1)” (2001) 2(1) *The Journal of Cognitive Liberties* 7–22

Carod-Artal F “Hallucinogenic drugs in pre-Columbian Mesoamerican cultures” (2015) 30(1) *Neurologia* 42–49

Feinberg J “Legal paternalism” (1971) 1(1) *Canadian Journal of Philosophy* 105–124

Foster SW “Cognitive liberty and the constitutionality of criminalising psilocybin mushrooms in South Africa” *South African Journal on Human Rights* 2023 (forthcoming)

Johnson MW, Garcia-Romeu A & Griffiths RR “Long-term follow-up of psilocybin-facilitated smoking cessation” (2017) 43(1) *The American Journal of Drug and Alcohol Abuse* 55–60

Johnson MW et al. “Classic psychedelics: An integrative review of epidemiology, therapeutics, mystical experience, and brain network function” (2018) 197 *Pharmacology & Therapeutics* 83–102

Heyns C & Brand D “Introduction to socio-economic rights in the South African Constitution” (1998) 2(2) *Law, Democracy & Development* 153–167

Madsen MK et al. “A single psilocybin dose is associated with long-term increased mindfulness, preceded by a proportional change in neocortical 5-HT_{2A} receptor binding” (2020) 33 *European Neuropsychopharmacology* 71–80

Marlan D “Beyond cannabis: Psychedelic decriminalisation and social justice” (2019) 23 *Lewis & Clark Law Review* 851–892

McElrath K & McEvoy K “Negative experiences on ecstasy: The role of drug, set and setting” (2002) 34(2) *Journal of Psychoactive Drugs* 199–208

Mitchell P & Hudson A “Psychoactive plants and southern African hunter-gatherers: A review of evidence” (2004) 16 *Southern African Humanities* 39–57

Neethling J “The concept of privacy in South African law” (2005) 122(1) *South African Law Journal* 18–28

Nutt D “Psilocybin for anxiety and depression in cancer care? Lessons from the past and prospects for the future” (2016) 30(12) *Journal of Psychopharmacology* 1163–1164

Rucker JJ et al. “The effects of psilocybin on cognitive and emotional functions in healthy participants: Results from a phase 1, randomised, placebo-controlled trial involving

simultaneous psilocybin administration and preparation” (2022) 36(1) *Journal of Psychopharmacology* 114–124

Samorini G “The oldest representations of hallucinogenic mushrooms in the world (Sahara Desert, 9000–7000 B.P.)” (1992) 2 *Integration: Journal of Mind-moving Plants and Culture* 69–78

Smith N “Policing pornography – *Case v Minister of Safety and Security; Curtis v Minister of Safety and Security 1996*” (1997) 13 *South African Journal on Human Rights* 292–303

Van Court RC et al. “Diversity, biology, and history of psilocybin-containing fungi: Suggestions for research and technological development” (2022) 126(4) *Fungal Biology* 308–319

Van Amsterdam J, Opperhuizen A & Van den Brink W “Harm potential of magic mushroom use: A review” (2011) 59(3) *Regulatory Toxicology and Pharmacology* 423–429

Warren SD & Brandeis LD “The right to privacy” (1890) 4(5) *Harvard Law Review* 193–220

Winkelman MJ “The evolved psychology of psychedelic set and setting: Inferences regarding the roles of shamanism and entheogenic ecopsychology” (2021) 12 *Frontiers in Pharmacology* 1–21

Constitutions

Constitution of the Republic of South Africa Act, 1996

Legislation

Drugs and Drug Trafficking Act 140 of 1992

Indecent or Obscene Photographic Matter Act 37 of 1967

Interim Constitution of the Republic of South Africa, Act 200 of 1993

Medicines and Related Substances Act 101 of 1965

Case law

Bernstein and Others v Bester and Others NNO 1996 (2) SA 751 (CC)

Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Security and Others 1996 (3) SA 617 (CC)

THE RIGHT TO PRIVACY IN THE DECRIMINALISATION OF PSILOCYBIN MUSHROOMS

De Reuck v Director of Public Prosecution, Witwatersrand Local Division, and Others 2004 (1) SA 406 (CC)

Khumalo v Holomisa and Others 2002 (5) SA 401 (CC)

Minister of Justice and Constitutional Development and Others v Prince and Others 2019 (1) SACR 14 (CC)

Minister of Police and Others v Kunjana 2016 (2) SACR 473 (CC)

Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre as Amicus Curiae) 2001 (4) SA 491 (CC)

National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others 1998 (2) SACR 556 (CC)

Prince v Minister of Justice and Others 2017 (4) SA 299 (WCC)

Prince v President, Cape Law Society and Others 2002 (2) SA 794 (CC)

S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae) 2002 (6) SA 642 (CC)

Smuts and Another v Botha 2022 (2) SA 425 (SCA)

Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another 2014 (1) SACR 327 (CC)

International instruments

Convention on Psychotropic Substances (adopted 21 February 1971, entered into force 16 August 1976) 1019 UNTS 175

Single Convention on Narcotic Drugs of 1961, as amended by the Protocol amending the Single Convention on Narcotic Drugs, 1961 (adopted 25 March 1972, entered into force 8 August 1975) 976 UNTS 105

United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (adopted 20 December 1988, entered into force 11 November 1990) 1582 UNTS 95

Internet sources

Anonymous "Convention on psychotropic substances, 1971" *United Nations: Office on Drugs and Crime* available at <https://www.unodc.org/unodc/en/treaties/psychotropics.html> (accessed 04 January 2023)

Beres D "Why are psychedelics illegal?" (13-10-2020) *Psychedelic Spotlight* available at <https://psychedelicspotlight.com/why-are-psychedelics-illegal/> (accessed 04 January 2023)

Hofmann A "Teonanácatl and Ololiuqui, two ancient magic drugs of Mexico" (01-01-1971) *United Nations: Office on Drugs and Crime* available at https://www.unodc.org/unodc/en/data-and-analysis/bulletin/bulletin_1971-01-01_1_page003.html (accessed 29 October 2021)

Lu D "'Psychedelics renaissance': New wave of research puts hallucinogenics forward to treat mental health" (25-09-2021) *The Guardian* available at <https://www.theguardian.com/society/2021/sep/26/psychedelics-renaissance-new-wave-of-research-puts-hallucinogenics-forward-to-treat-mental-health> (accessed 29 October 2021)

O'Brien P "Psilocybin, in 10mg or 25mg doses, has no short- or long-term detrimental effects in healthy people" (04-01-2022) *King's College London* available at <https://www.kcl.ac.uk/news/psilocybin-in-10mg-or-25mg-doses-has-no-short-or-long-term-detrimental-effects-in-healthy-people> (accessed 29 October 2021)

Sessa B "From sacred plants to psychotherapy: The history and re-emergence of psychedelics in medicine" (2006) *Royal College of Psychiatrists* available at https://www.rcpsych.ac.uk/docs/default-source/members/sigs/spirituality-spsig/ben-sessa-from-sacred-plants-to-psychotherapy.pdf?sfvrsn=d1bd0269_2 (accessed 29 October 2021)