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On the record

Interview with Shaun Shelly,
Researcher at the University of
Pretoria and the Policy, Advocacy
and Human Rights lead at TB HIV
Care, South Africa

Anine Kriegler¹

aninek@gmail.com

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In November 2020 Anine Kriegler interviewed Shaun Shelly about recent developments in South African Drug Policy in the wake of the 2018 Constitutional Court judgment decriminalising personal possession of cannabis,¹ and the subsequent Cannabis for Private Purposes Bill.² Shaun is a researcher at the University of Pretoria Department of Family Medicine where he is part of the team implementing a community oriented primary care approach to address drug use in the City of Tshwane.³ He is the founder of the South African Drug Policy Week and is the drug policy lead at TB HIV Care, a non-profit organisation that works to prevent, find, and treat TB, HIV, and other major diseases by targeting interventions to address the needs of populations at risk, such as inmates, sex workers, and people who inject drugs. Shaun is a founding member and chair of the South African Network of People Who Use Drugs and the former Deputy Secretary of the United Nations Vienna NGO Committee on Narcotic Drugs. He sits on various other national and international task teams and advisory boards on drugs.

Anine is a board member of the South African Drug Policy Initiative, a voluntary association that aims to reform South African drug laws, and which submitted an objection to the Bill.

Anine Kriegler (AK): Shaun, you've been described as 'Mr South African Drug Policy'. Please tell us about yourself and the work you do.

Shaun Shelly (SS): First of all, what I do could not be done without a team of dedicated people. At times, I've been the face of it, but other people support the work. I'm immensely grateful to all of them.

The work that I do is multifaceted. I try and immerse myself in a variety of fields that all intersect: drug policy, drug use, the reasons why people use drugs, and society's response to drug use. I do that across multiple platforms, mainly through the three organisations that I have a role in, which are TB HIV Care, who started the initial harm reduction programmes in South Africa⁴ and the University of Pretoria, where we've implemented community-oriented substance use programme, which I think is the way to go in the future. The programme is based on a community oriented primary care approach, which relies heavily on some of the principles of participatory action research, and community involvement as a key priority in responses to various societal issues. When I started at TB HIV Care, I quickly realised the need to include the voice of people who use drugs in policy, and so I established, with some other people, the South African Network of People Who Use Drugs. SANPUD has recently developed a partnership with the National Department of Social Development and is getting more traction in terms of participating in the drug policy debate.

My time is spent between these organisations, trying to coordinate efforts around drug policy in South Africa. Funding and work in the field tends to be very disparate and disconnected, both from the realities on the ground, but also from other disciplines. There's very little multi-disciplinary emphasis when it comes to drug policies – it is either a very biomedical, criminal

justice or social development focus. I see my role as trying to coordinate the national response to drugs, and possibly to contribute to the field, through bringing a more pragmatic and diverse view on drug policy, people who use drugs, and the problems involved with policy and drug use.

AK: What has changed in the South African drug policy context in the last few years?

SS: When I started in this field, which is more than a decade ago, I was seeing no policy response that was meaningful to people who use drugs. The only thing we had in terms of national response was the purely punitive approach. There was no discussion of anything else.

If we take it at face value, there have been significant changes. For example, I never imagined that the Deputy Minister of Social Development would release a statement promoting the decriminalisation of people who use drugs. I never thought that the discussion of the National Drug Master Plan (NDMP) would recognise the need to include the voices of people who use drugs in the policy process. I didn't think that we would have a former Constitutional Court Judge talking about decriminalising people who use drugs. I'm seeing more and more people recognising that what we're doing isn't working and is pretty futile.

I've also seen that South Africa now, for example, is one of a minority of African countries who are actually standing out and saying that we support the rescheduling of cannabis. And that's the South African government's new official position. As recently as 2016 South Africa sided with the Africa Group position, not the Common African Position, at the United Nations Commission on Narcotic Drugs sessions ahead of the United Nations General Assembly Special Session

(UNGASS)⁵ and submitted a very punitive approach to drug use.⁶

So, we have seen significant shifts on one level. However, on another level, we have seen significant problems. The process for selecting the 13 civil society members to serve on the Central Drug Authority Board is a disaster.⁷ The advertising, shortlisting and interview process was pretty useless given that the CDA is organisation that should be at the pinnacle of policy. I don't know how the current recommendations [emanating from the CDA] are going to be able to fulfil the mandate of the NDMP. That process is also highly problematic because there's no representation of people who use drugs or from harm reductionists, despite the fact that this is mandated in the current NDMP.

I am really disappointed that we aren't hearing calls for the decolonisation of drug policy and critical thinking around the origins of drug policy. I think we need activism among black South Africans to reject our current approaches. In a piece I wrote with Simon Howell, I suggest that we are perpetuating a lot of the policing tactics of apartheid through our drug policy. I contrast two quotes. The one is by Robert Sobukwe, explaining how he does not hate the European but he hates the hand that wields the sjambok, this being a symbol of oppression in South Africa. And then a black activist youth leader saying, 'we will sjambok the Nyaope⁸ seller, we will even make our own sjamboks'. And that irony is beyond understanding, and very, very disappointing.

AK: One positive recent development was the Constitutional Court judgement in 2018. Can you tell us about that?

SS: The judgment is absolutely 100% right. Anand Grover, the great Indian legal mind, was in South Africa before the judgment. He said that if the principles of the Constitution are faced, this is what the judgment will say – and

he was absolutely spot on. Very clearly, the argument wasn't about the dangers of the drug, but about the right of people to consume something in a private space. A lot of people have criticised the judgment for not going far enough and not giving a set of clear guidelines. But it wasn't up to the Constitutional Court to do that. We now need people like the national Departments of Health, Social Development and others to start stepping up to the plate. The draft legislation should not purely be a work of the Justice Department or the criminal justice sector.

AK: What have its effects been?

SS: Although there are still a lot of arrests for drugs, we've seen about 152 000 fewer arrests (pre-COVID) in South Africa, and we're seeing even more reductions in arrests reflected in the crime figures for 2020. However, I urge caution in interpreting this in any particular way, because we know that people are still harassed [by the police], and there's still a large number of arrests and confiscations that aren't recorded or reported in the official figures. Drug laws are really used to intimidate, to oppress certain population groups and people. With that tool gone, we must watch out that it isn't replaced by something else. There are still gross miscarriages of justice happening. We have got to be careful of putting too much power in the discretion of policeman or policewoman on the ground because it can be potentially dangerous, although it can also be potentially useful. There needs to be more clarity that police cannot just arrest people for having cannabis on them. And we need to see the courts throwing out more cases.

Of course, everybody was hoping that the draft Bill would bring some clarity. There are some significant problems in the Bill, although in my view these are less than what some people think. My particular concerns are the heavy sentences for people who exceed the limits.

It is really good that the Bill provides for the expungement of previous convictions, which is essential. In fact, if we were a wealthier nation, I would say that there also needs to be compensation paid to people who were incarcerated for cannabis possession.

We have also dodged some bullets, in that the Bill doesn't lay out a clear plan for regulation, as most people had hoped. I think that a bad plan for regulation will cause a lot more problems than merely decriminalising people who use drugs. It is a problem that there is no specific mechanism for people currently involved in the drug trade to actively become part of a formal economy. But if that was too prescriptive, if we move towards a kind of global capitalist system, we could see traditional growers excluded from any future cannabis trade.

We can take lessons from the formalisation of the taxi industry. The vast majority of people who sell drugs, certainly the ones that we've been speaking to, are not necessarily gang affiliated. But even if they are, without that money coming into impoverished communities, those communities would suffer tremendously. People think that the drug seller in your average community is using that money to buy Mercedeses and BMWs. And that's simply not true. A lot of the money goes into buying school shoes, textbooks and food. Most drug sellers are absolutely expendable to the hierarchy above them. They go to jail or get shot, they just get replaced by somebody else. And in fact, it's in the interests of people higher up the food chain to keep that churn going. We've got to be very careful how we classify people. Putting these arbitrary limits on possession, especially when you've got very heavy sentences behind them, is really problematic because most people are subsistence sellers. They're not out to kill people. They're not out to have people die from their drugs. They're not out to purposely

get school kids addicted. Most of them are just trying to earn a living and survive.

AK: Do you think progress is going to have to be drug by drug through the courts all the way to the top?

SS: I think that initially it might need to be that way. I'm hoping for some windfall of a large amount of money to be able lodge strategic litigation to cover all drugs. The only reason we shouldn't see the same result with all drugs would be because of the dangers or perceived harms of them. It's a difficult thing to articulate but once you understand that drug policy causes far more harms than any drug, it becomes immediately clear that it is in the public interest to decriminalise the use of all drugs.

I'm using the word decriminalisation for a reason. Nobody should ever be criminalised for putting something into their body no matter what. However, I'm less convinced that there shouldn't be restrictions around how people access certain drugs. Regulation in the same way that medicines are regulated is not going to solve all the problems. As drugs become legally regulated, the offenses for trading or consuming unregistered or unregulated drugs are going to increase. We have learned that lesson from the past. People who have previously been supplying these drugs suddenly no longer have a means of earning money. But they are not going to stop just like that. They're still going to have product available.

Another important issue is the idea of 'private spaces.' What is a private space? Poorer people tend not to have spaces that are considered 'private' to consume drugs. Think about who has a private space in the South African context. Who can consume drugs, totally privately? You don't want to be smoking methamphetamine in your house where there's a child around. So you go outside the house, and then you get seen over the fence by

somebody else. Is that a private space, or isn't it? We've got to be very careful around things like that.

In the US-based TV series *The Wire*, there's brilliant commentary on the policing of drugs. It is illegal to consume alcohol in public in Baltimore. Most people will consume it in a lounge or in a bar. But for the urban poorer community, the stoep – the porch in front of the house – is like the lounge. And so they drink alcohol there. But the policeman is offended because he has somebody clearly flouting the law. So people put the alcohol bottle into a brown paper bag. Everybody knows its alcohol. But the cop can now greet the person without feeling offended by the action. What we need is a brown paper bag for drugs.

In a highly regulated market you can only get drugs from a chemist or a doctor who will write a prescription, and prices are controlled. But people are not going to stop buying illicitly. If those purchases of scheduled drugs that are not made through the formal process are highly criminalised, we are not going to see much improvement on the ground. In fact, what we're going to do is we are going to limit who can use what drugs. It becomes prohibition 2.0, a term coined by Julian Buchanan who has done a lot of good work on this issue. That is the kind of problem I foresee. Already we are seeing that cannabis arrests might have been reduced, but in certain communities, they haven't been severely reduced.

AK: Speaking of how much easier it is to get drugs informally, I know of a number of middle-aged people who were moved from alcohol on to cannabis during COVID. People you never would have expected are now regular cannabis users, because they couldn't get alcohol but could order weed via WhatsApp. That has been the impact of just this temporary prohibition. Do you think people might have learned some lessons

from that? Is that something that we can capitalise on?

SS: Yes and no. Good scientists sometimes dropped the science out of their conclusions on the effect of the alcohol ban. The drop in trauma unit admissions comes from multiple factors, the first factor being that people weren't allowed to go out. The second factor was that there were less cars on the road, which is also function of the prohibition on movement. The third factor being heavy policing. Those factors alone will contribute significantly to a reduction in trauma admissions, and if we go and look at countries which didn't ban alcohol, they also had massive reductions in trauma admissions. Researchers can try and adjust for these variables to isolate the effect of the alcohol ban, but it's exceptionally difficult to do and it takes extensive modelling. I don't think we've got enough data to do that at this stage. But what we can say is that a percentage, even quite a high percentage, of the drop in trauma admissions can definitely attributed to alcohol use.

Still, I think we've got to be careful to see the hidden negative consequences too. For example, one person I know who was so desperate for alcohol, and had previously been living on the street before moving to a shelter during lockdown, went out and bought methylated spirits and died. People tried to synthesise their own alcohol. A lot of people were criminalised for buying alcohol and cigarettes illegally. There was also the absolutely senseless banning of vaping products -- vaping is an excellent form of harm reduction, despite what the Americans will have us believe. If people choose to smoke even though they know what the dangers are, they should be allowed to smoke. What shouldn't be allowed to happen is the advertising of cigarettes, especially as a lifestyle product – you know, like those old Peter Stuyvesant ads and even the current alcohol

advertises for brands like Johnnie Walker – that make it into an aspirational kind of thing.

What was interesting is that a lot of people who converted to purchasing off the unregulated market suddenly felt like criminals. There were interviews with people who said that they felt like they had to sneak around, that they felt guilty, or felt dirty, and they didn't know what quality of product they were getting. Welcome to the world of people who use unregulated drugs! So I think we can capitalise on that. There is a science forum coming up and hopefully this can be discussed in a section on harm reduction because I think there are valuable lessons to be learned. One of the lessons is that you can restrict the purchase of something, but people are still going to consume it. No matter what, they're going to find a way of doing it. That's the biggest lesson. I also think that the whole concept of telling people what they can consume is fatally flawed and punitive and very much reminiscent of a nanny state.

AK: What about the harm reduction services that you offer? Did COVID give that quite a knock?

SS: Actually, in some ways, those improved. In eThekweni, previously, we had this spurious challenge to the needle and syringe programmes. They tried to close it down using the argument that it was a scheduled trade and that we hadn't applied for the necessary licenses. It was ridiculous to sit in a meeting with people from the KZN Department of Health and show them a signed memorandum of understanding or signed agreement authorising the services and they replied that the signatory wasn't authorised to sign the MOU, or that we should have spoken to a different person or to hear them deny knowing anything about the agreement. The office of the Premier actually participated in the launch of the programme, and then they made up the bylaw about the

programme being a scheduled trade when it's clearly not a scheduled trade at all. The scheduled trade bylaws were intended to restrict the use of certain chemicals by panel beaters and spray painters and those kinds of industries. It's just absolutely ridiculous. Finally the new Deputy Mayor saw the value of the programme and after some interventions from my colleague Professor Monique Marks, she started making moves towards allowing the programme to restart. Then COVID highlighted the need for opioid substitution therapy and better responses to people who use drugs. So what resulted in Durban was the reopening of the programmes, the affirmation of the programmes, a determined effort to contribute towards programmes and the establishment of the Belhaven centre for homeless people who use drugs, which is really a good step forward.⁹

In the city of Tshwane, or Pretoria, it was also very positive. There was involvement of people who use drugs in the process. In fact, the disaster management report acknowledged that opioid substitution therapy had played a significant beneficial role in managing the needs of homeless people who use drugs. The role of peers of people who use drugs in assisting and administering opioid substitution therapy was acknowledged and recognised. Similarly, in eThekweni, we saw a significant shift in attitudes among law enforcement agencies towards people who use drugs because they were working alongside them. The community of people who use drugs did some of the administrative tasks with them during Covid. And in fact, Monique Marks, Michael Wilson and myself have written a paper about that, which will be published soon. I don't think it's going to be that popular a paper among some people, but we were able to demonstrate, through a series of interviews, shifting attitudes among police about people who use drugs.

In a lot of my discussions, the people that make the most compelling arguments for decriminalisation are the ‘thinking’ police officers. They realise the futility of the current environment. They’ve seen it happen time and time again – you arrest someone today, he’s out tomorrow, because they can’t prosecute him. Or certainly he’s replaced the next day. It’s like we’re arresting the guys who go to Kentucky Fried Chicken, buy the chicken and then go to the community to sell it. We’re not even touching the franchise holder or the person who invented the secret recipe. Those people are just untouched. So, law enforcement are often strong allies of decriminalisation at certain levels. Of course, the criminalisation of people use drugs provides plenty of earning opportunities for corrupt people. And so in Khayelitsha I’ve heard that they refer to people who use drugs as ‘ATMs’ and dealers’ locations, or places where people go to use drugs as ‘spaza shops’, because regularly people pay bribes to police officers to avoid arrest. It is a futile process.

AK: What do you think’s going to happen in the next couple of years?

SS: What I think’s going to happen and what I hope is going to happen are likely two very different things.

The worst-case scenario is that there’s going to be a significant backlash against the decriminalisation of cannabis. We could see certain politicians blame foreigners on the influx of drugs and blame drugs for the shortfalls in government service delivery. They will blame drugs for violence against women and children. As usual, drugs will become the catch-all, the scapegoat for everything, and it will extend to the foreigners who are thought to be bringing the drugs in. But supply is purely a function of demand. If a drug is unknown to a community, people might be able to find other ways of dealing with their issues than by using drugs. But once the drug is introduced into a

community, you can’t just remove it because the people there will compensate for it in one way or another. And yet the problem gets framed as the fault of the Tanzanian who’s bringing a few grams of heroin across land, or the fault of the Nigerians who are stereotyped as all being drug dealers. I think that will fuel violence against foreign nationals and against people who use drugs. It will strengthen the rhetoric around the war on drugs. We could end up going down the same route as the Philippines [which has seen widespread extra-judicial killings of people suspected of drug crimes]. Also, if the current political landscape starts getting significant funding, due to the vast value chain that is found in the criminalised distribution of drugs, like we’ve seen in places like Tanzania, then it will be difficult to see a lot of progress. We will see an over emphasis on the harms of drugs and on the use of militarised police to get further training from the DEA [United States Drug Enforcement Administration]. The Russia-Africa Anti-Drugs Dialogue¹⁰ will have increased influence. I hope we don’t go in that direction. I think there are enough indications that we won’t.

The best-case scenario would be that the CDA becomes a totally independent body with sensible, informed, progressive people appointed to it. I hope to see politicians joining the call to decriminalise people who use drugs. And as changes happen at community level, through well-implemented programmes and responses, I think that we would see communities beginning to buy into decriminalisation. But you need to have examples to show that it works before people will buy into the idea. Examples like the city of Tshwane that is funding of harm reduction programmes are exceptionally valuable -- it is the first city in Africa to actually do that. While we know that the data about outcomes of those programmes can shift minds, we need personal connection and narratives to shift hearts. If that happens, I think we will see money diverted

from the criminal justice system towards social and psychosocial interventions. And conceivably, if that's the scenario, in about five years, we'd see Constitutional Court challenges, and in 15 years, the decriminalisation of all drug use and people who use drugs. That's the best-case scenario, but I think that that is optimistic. I'm hoping that I'm wrong – I'm hoping that there are bifurcation points that we reach where things will tip suddenly.

Other useful approaches would be a move away from incarcerating people toward a totally different form of justice system that relies less heavily on our very unhelpful prison system. Because prison just breeds more violence. It breeds gangsterism. It breeds more problems, especially for early offenders and first-time offenders. I think that the solution is often worse than the problem itself. Somebody is arrested for shoplifting and spending two weeks in remand virtually guarantees that they will turn into a criminal for the rest of their life. The evidence is clear. We need to move away from that. If we start recognising that all laws have to align with the Constitution, we might see a shift in drug policy.

In reality, I think that we are going to continue to see a schizophrenic policy landscape. We are going to see some very progressive strategies and some things that are problematic. One big concern is that we are going to see the over-pathologisation of people who use drugs and a purely medical response. That is very unhelpful. In fact, a little while ago, the Czech Republic wanted to move the entire drug response to the health system. I was one of many people around the world who suggested they should not do that. If we look at the principles of prohibition, it has aimed to exclude people, to 'other' them, to remove their levels of autonomy and choice, and stop them from participating in society as a whole. And pathologisation can do exactly the same thing. Personally, I would

rather have a five-year jail sentence for drug use than be told I've got a lifelong disease of the brain, which renders me unable to make good and conscious decisions about my future. That's a very dangerous place to go. The United States are pushing that, and a lot of people think it's progressive, but mental health carries even more stigma than drug use. If we move in that direction, we are going to see huge social costs and a reliance on things like rehabilitation programmes, which have very little data to support them, which will be a problem.

I would like to add a final comment because what I have mainly discussed is a lot of problems, but there are solutions. The solution is to move funding out of criminal justice to initially decriminalise and depenalise the use of drugs *de facto* and then move towards *de jure* depenalisation and decriminalisation, through the mechanism of aligning drug policy with the Constitutional Court judgment and the Constitution of South Africa. We should divert that money and put it into community-based responses – not to drug use, but to the problems in communities. We should focus on the prevention of the development of drug dependence, not drug use. We need to make that happen amongst an older cohort of people and ensure people are not starting to use at 11 and 12 years old as is common in South Africa. We should provide children with other sources of meaning and purpose. Instead of trying to dismantle gangs, we need to foster a move towards pro-social gangs. That's going to be very difficult, unless we've diverted funding into those kinds of programmes and we stop arresting and incarcerating everyone.

For me, the decriminalisation of drugs is a no-brainer. I would move very cautiously towards legal regulation, bearing in mind the problems that I've raised with that previously, and I would focus a lot on economic stability within communities and finding ways that people can find meaning and purpose in life outside the use of drugs.



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Notes

- 1 *Minister of Justice and Constitutional Development and Others v Prince; National Director of Public Prosecutions and Others v Rubin; National Director of Public Prosecutions and Others v Acton and Others* [2018] ZACC 30.
- 2 *Cannabis for Private Purposes Bill* [B19 – 2020], www.gov.za/documents/cannabis-private-purposes-bill-b19-2020-1-sep-2020-0000 (accessed 23 November 2020).
- 3 For more information on the University of Pretoria Community Oriented Primary Care research unit see www.up.ac.za/family-medicine/article/2081293/up-copc-research-unit (accessed 26 November 2020).
- 4 Funded by the United States Centers for Disease Control and Prevention (CDC) and the United States President's Emergency Plan for AIDS Relief (PEPFAR).
- 5 AVERT, Civil society left disappointed by UNGASS on drugs, 26 April 2016, www.avert.org/news/civil-society-left-disappointed-ungass-drugs (accessed 26 November 2020).
- 6 See S Shelly, UNGASS statements by South Africa: Country statement and AU statement, www.sadrugpolicyweek.com/news/ungass-statements-by-south-africa-the-african-union-and-sudan (accessed 26 November 2020).
- 7 Department of Social Development briefing to parliament on the National Drug Master Plan and challenges in filling the vacancies on the Central Drug Authority's Board, accessed at <https://pmg.org.za/committee-meeting/30869/> (accessed 03 December 2020).
- 8 Nyaope is a primarily heroin-based drug, with a variety of other substances added as active or bulking agents. See PM Mthembi, EM Mwenesongole and MD Cole, Chemical profiling of the street cocktail drug 'nyaope' in South Africa using GC–MS I: Stability studies of components of 'nyaope' in organic solvents, *Forensic Science International*, 292, 2018, <https://doi.org/10.1016/j.forsciint.2018.08.001>.
- 9 K Singh, 13 May 2020, City sets up centre to help the homeless beyond Covid-19, *IOL*, www.iol.co.za/mercury/news/city-sets-up-centre-to-help-the-homeless-beyond-covid-19-47888665 (accessed 26 November 2020).
- 10 South African Police Service, *Russia-Africa Anti-Drugs Dialogue*, www.saps.gov.za/raadd/index.php (accessed 26 November 2020).