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THE UNCONSTITUTIONAL INCARCERATION OF MARY JANE IN ZIMBABWE

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INTRODUCTION

This is a commentary on the legality of cultivating, possessing and using recreational cannabis in Zimbabwe, a drug otherwise colloquially referred to as weed, ganja, mbanje or as is stated in the above title, *'Mary Jane'*.[1] Anyways, cultivating, possessing and using recreational cannabis is currently illegal in Zimbabwe and it shall be argued herein, that the ban is unconstitutional on account of infringing on the right to privacy.

Cognizance should be taken of the fact that, this article will only challenge the *'cannabis laws'* stated herein, as being unconstitutional to the extent that they criminalise the possession, use and cultivation of cannabis in private by an adult for his or her personal consumption.

NATURE & SCOPE OF ILLEGALITY OF CANNABIS

The cannabis plant, prepared cannabis or cannabis resin are classified as dangerous drugs in terms of Section 155 of the Criminal Law (Codification and Reform) Act (Chapter 9:23) (hereinafter simply referred to as *'the Act'*).[2] There are fundamentally two crimes that can be committed in respect of the drug being: the Unlawful dealing in Cannabis; and the Unlawful Possession of Cannabis.

1. Unlawfully dealing in Cannabis

Under Sections 156 (1) (a), (b) and (c) of the Act one cannot, amongst other things, deal in; cultivate, produce or manufacture cannabis; neither can one possess cannabis nor any article or substance used in connection with the production or manufacturing of cannabis for the purpose of dealing in cannabis.

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[1] The Criminal Law (Codification and Reform) Act (Chapter 9:23) 'the Act' defines "cannabis" as the flowering or fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops) from which the resin has not been extracted, by whatever name they may be designated

[2] "cannabis plant" is defined by the Act as the whole or any portion, whether green or dry, of any plant of the genus cannabis also known as "Indian hemp", *bhang, camba, dagga, mbanje or intsangu*, but excluding— (*a*) any fibre extracted from the plant for use as or in the manufacture of cordage, canvas or similar products, or (*b*) any seed which has been crushed, comminuted or otherwise processed in such a manner as to prevent germination, or (*c*) the fixed oil obtained from the seed; and "cannabis resin" as the separated resin, whether crude or purified, obtained from the cannabis plant

The term *"deal in"* in relation to cannabis for the purposes of Section 155 of the Act includes,

> *"… to perform any act, whether as a principal agent, carrier, messenger or otherwise, in connection with the delivery, collection, importation, exportation, trans-shipment, supply, administration, manufacture, cultivation, procurement or transmission…"* of the cannabis (emphasis added).

A careful reading of these provisions will reveal that their very implication is that, an adult cannot cultivate cannabis for, amongst other things, personal consumption in private. The phrase 'dealing in' in the Act includes, "…*to perform any act…in connection with the cultivation of…"* cannabis (my emphasis). Consequently, when the entirety of Section 156 is read with this definition it is wide enough to bar the performance of any activity in connection with the cultivation of cannabis.

Section 156 subsection (d) also instructs that one cannot incite another person to consume cannabis; whilst (e) states it is unlawful, *inter alia*, to procure for any person, or offer to procure cannabis for any person.

For the aforementioned provisions, the article only challenges them to the extent that they prohibit the cultivation, incitement and requesting of cannabis by an adult for purposes of use in privacy. Consequently, elements to do with the importation, exportation, selling, offering or advertising for sale, distributing, delivering, transporting of cannabis are not addressed.

2. Unlawful Possession of Cannabis

Looking at possession and use, Section 157 (1) (a) and (b) of the Act prescribe that, any person who unlawfully acquires or possesses cannabis; or ingests, smokes or otherwise consumes cannabis; or cultivates, produces or manufactures cannabis for his or her own consumption shall be guilty of unlawfully possessing or using it. This whole provision will be challenged as it is more direct to the issue of possession, use and consumption in private by an adult person.

All prohibitions cited above are then reiterated in the Dangerous Drugs Act (Chapter 15:02)[3] and the Dangerous Drugs Regulations, 1975[4], which prohibit any person

[3] See, Section 3 as read with Section 6 of Dangerous Drugs Act (Chapter 15:02)

who is not an authorized or licensed person from acquiring or possessing cannabis, nor can the person supply the same to or procure for another.[5] In addition, no unlicensed person can cultivate cannabis.

INFRINGEMENT ON THE RIGHT TO PRIVACY

In terms of Section 57 of the Constitution of Zimbabwe (Amendment No.20) of 2013, every person has the right to privacy. Commenting on the scope of the right to privacy, Ackermann J in **Bernstein and Others v Bester NO and Others** 1996 (2) SA 751 (CC), interpreted it as follows: *"… In terms of a resolution of the Consultative Assembly of the Council of Europe this right has been defined as follows: 'The right to privacy consists essentially in the right to live one's own life with a minimum of interference..'"*[6]

In further explaining the right, it was stated that, *"A very high level of protection is given to the individual's intimate personal sphere of life and… there is a final untouchable sphere of human freedom that is beyond interference from any public authority. So much so that, in regard to this most intimate core of privacy, no justifiable limitation thereof can take place..."*[7] See also, **Khumalo v Holomisa** [2002] ZACC 12 at paragraph 27 by O'Regan J.

In the American context, Brandeis J called it, *"the right to be let alone."* – see, dissenting judgement in **Olmstead v United States** 277 U.S 438 at p.478.

It is therefore, without question that the aforesaid cannabis laws, inevitably infringe on the right to privacy as a reading of the impugned provisions reveal that an adult cannot possess, use or cultivate cannabis in private for his or her personal consumption.

JUSTIFICATION OF INFRINGEMENT

Having demonstrated that the *'cannabis laws'* infringe on the right to privacy, the next inquiry turns to whether the infringement is justifiable. This is so because,

[4] See, Rhodesia Government Notice No.1111 of 1975 as amended by Statutory Instrument 409 of 1999 otherwise referred to as the Dangerous Drugs (Amendment) Regulations, 1999 (No.4)
[5] See, Section 4 (a) of the Dangerous Drugs Regulations, 1975
[6] See, Bernstein and Others v Bester NO and Others 1996 (2) SA 751 (CC) at paragraph 73
[7] Ibid at paragraph 77

Section 86 (2) of the Constitution permits the limitation of the right to privacy provided that, such a limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom.

In **Woods & Ors v Min of Justice & Ors** 1994 (2) ZLR 195 (S) at 199B-C, 706E-F and 59C-D, it was emphasised that any limitation of a guaranteed right should not be arbitrary or excessive. Chief Justice Gubbay in **Nyambirai v NSSA & Anor** 1995 (2) ZLR 1 (S) at p.13 states that,

"In effect the court will consider three criteria in determining whether or not the limitation is permissible in the sense of not being shown to be arbitrary or excessive. It will ask itself whether:

i)the legislative objective is sufficiently important to justify limiting a fundamental right;
ii)the measures designed to meet the legislative objective are rationally connected to it; and
iii)the means used impair the right or freedom are no more than is necessary to accomplish the objective."[8]

An assessment will thus, be made to see if the cannabis laws herein are in tandem with the above criteria.

a. Whether the purpose of the limitation (the legislative objective) is sufficiently important to justify the banning of recreational cannabis, thereby limiting right to privacy?

Without doubt, there is a sufficiently important justification for banning cannabis. The primary reason behind the limitation is that, it is necessary and in the interests of public safety and public health. This is permissible under the Zimbabwean Constitution. In particular, it would seem that the Government seeks to suppress dependence-producing drugs and trafficking in those drugs, as well as, the reduction

[8] The same factors are reinforced in Section 86 (2) of the Constitution of Zimbabwe (Amendment No.20) of 2013

in crime, prevention of negative effects on driving ability and detrimental neurological, cardiovascular and respiratory effects.

These concerns were rightfully pointed out and accepted as being legitimate reasons in the **Prince v President of the Law Society of the Cape of Good Hope** [2002] ZACC 1 *(Prince II judgement)* at paragraphs 26 and 114 as well as the case of **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 (*Prince III judgement*) at paragraph 64.

b. Whether the cannabis laws are rationally connected to the legislative objective?

In **Ravin v State of Alaska** 537 P.2d 494 *(the Ravin judgement)*, the Supreme Court of Alaska had an opportunity to comment on the criminalization of recreational cannabis *vs* the right to privacy. In that case Rabinowitz CJ said: *"…If governmental restrictions interfere with the individual's right to privacy, we will require that the relationship between means and ends be not merely reasonable but close and substantial."*

The cannabis laws impose a full ban on recreational cannabis for purposes of ensuring public health and safety. *In casu*, it is at least understandable that a ban on cannabis has the likely effect of meeting the legislative objectives.

c. Whether the means used to impair the right to privacy are no more than is necessary to accomplish the legislative objective? (Does it impose greater restrictions on the right to privacy than are necessary to achieve its purpose)

At this juncture, it is important to note that albeit causing harm, it has also been medically established that there is a certain level of consumption that has been proven to not be harmful to a person – see, **Prince II judgement** at paragraph 72.

This fact was taken as being correct or at least unchallenged in the subsequent the **Prince III judgement**, at paragraph 68 wherein the Constitutional Court of South Africa states,

"In Prince II the medical evidence on record was dealt with by Ngcobo J in the minority judgment in, among others, paragraphs 25, 26 and 61. These paragraphs read:

> *"[25] Medical evidence on record indicates that cannabis is a hallucinogen… it is common cause that: the abuse of cannabis is considered harmful because of its psychoactive component, tetrahydrocannabinol (THC); the effects of cannabis are cumulative and dose-related; prolonged heavy use or less frequent use of a more potent preparation is associated with different problems; acute effects are experienced most quickly when it is smoked;* ***present clinical experience suggests that cannabis does not produce physical dependence or abstinence syndrome****… **However, 'one joint of dagga, or even a few joints' will not cause harm**.*
>
> *[26] The harmful effect of cannabis which the prohibition seeks to prevent is the psychological dependence that it has the potential to produce. On the medical evidence on record, there is no indication of the amount of cannabis that must be consumed in order to produce such harm.* ***Nor is there any evidence to indicate whether bathing in it or burning it as an incense poses the risk of harm…***
>
> *[61] On the medical evidence on record there can be no question that uncontrolled consumption of cannabis, especially when it is consumed in large doses poses a risk of harm to the user. An exemption that will allow such consumption of cannabis would undermine the purpose of the prohibition.* ***However, on the medical evidence on record it is equally clear that there is a level of consumption that is safe in that it is unlikely to pose any risk of harm****… **'one joint of dagga or even a few joints' will not cause any harm..."***

Accepting then, as we must that there is a certain level of consumption that is not harmful, it follows that the blanket ban on recreational cannabis (notwithstanding that

the cannabis possessed, used, cultivated, consumed is unharmful) is excessive and unreasonable.

There is simply, no justification in limiting the possession and/or use of cannabis when there is evidence to suggest that its use or consumption at a certain restricted level is unharmful. A greater restriction would have been placed on the right to privacy than is necessary to achieve the legislative objective.

Further to the above, both the **Prince II and III judgements**, invoke a report published by the World Health Organisation (WHO) on the health and social consequences of non-medical cannabis use. Therein it was advanced that:

> *"The adverse health and social consequences of cannabis use reported by cannabis users who seek treatment for dependence* ***appear to be less severe than those reported by persons dependent on alcohol or opioid****..." – see, World Health Organisation The Health and Social Effects of Nonmedical Cannabis Use (WHO report) page 24 at para 3.1.3.*

Moreover, paragraph 70 of the **Prince III judgement** goes on to reveal that, *"According to WHO data, 16% of countries included in the recent ATLAS survey (Atlas 2015 in press) reported cannabis use as the main reason for people seeking substance abuse treatment. This puts cannabis second only to alcohol as a reason for treatment entry". See, aforesaid WHO report above at page 23 at paragraph 3.1.3.*

As for traffic injury, the same report indicates that, *"The existing evidence points to a small impact of cannabis on traffic injury…. Overall, even though the effect is small compared to the effects of alcohol..." – see report at paragraph 5.1.6.*[9] Following this to its logical conclusion, if recreational cannabis is barred, it also entails alcohol should also be banned if the legitimate government objective is to protect public health and safety. There is no ascertainable rationale behind the discrimination.

[9] See, 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 at paragraph 70

Accordingly, where minimum consumption is prima facie established to be unharmful, it follows that to this extent alone, limited consumption, possession or use of cannabis by an adult person in private cannot be criminalized. Doing so is an unreasonable, arbitrary and unjustifiable infringement on the right to privacy.

CONCLUSION

As was aptly stated in the **Ravin judgement** at page 509, *"The state cannot impose its own notions of morality, propriety, or fashion on individuals when the public has no legitimate interest in the affairs of those individuals..."* Consequently, the Government of Zimbabwe should proceed to decriminalize cannabis and/or legalize it to enable its citizens to enjoy their constitutionally adorned right to privacy.

This is in line with other leading jurisdictions that have either decriminalized or legalized recreational cannabis in one form or another, which include:

Antigua & Barbuda; Argentina; Australia; Barbados (for religious use – Rastafarians); Belgium (up to 3grams ('g') or cultivation of 1 plant); Belize (up to 10g); Bermuda (up to 7g); Bolivia (up to 50g); Chile; Colombia (22g or cultivation of 20 plants); Costa Rica; Croatia; Czech Republic (10g or cultivation of 5 plants); Dominica (up to 10oz); Ecuador (10g); Estonia; Georgia; Israel; Italy; Jamaica (2oz or cultivation of 5 plants; generally legal for Rastafarians); Luxembourg; Malta (3.5g); Mexico; Netherlands (5g or 5 plants when cultivating); Paraguay (10g); Peru; Poland (below 0.2% THC); Portugal (25g of herb or 5g of hashish); Saint Kitts and Nevis (15g); Saint Vincent and the Grenadines (2oz); Slovenia; South Africa; Spain; Switzerland (below 1.0% THC); Trinidad & Tobago (30g or 4plants); United States of America (legalized or decriminalized in at least 31 states and 3 territories) and Uruguay.[10]

In conclusion, the Government of Zimbabwe (the Executive and ultimately the Legislature) should thus, amend and repeal the impugned provisions, in so doing, decriminalizing recreational cannabis. Thereafter, it is pertinent that laws legalizing cannabis must be promulgated in a manner that upholds the right to privacy whilst

[10] https://www.chicagotribune.com/marijuana/sns-tft-liststory-cannabis-laws-around-the-world-20210715-n6bdtyofrnaddj7x4ipiesmxdq-list.html and https://en.wikipedia.org/wiki/Legality_of_cannabis (as accessed on the 10th of August 2021)

balancing public policy interests. Parliament is best positioned to prescribe the level of cultivation, consumption and/or possession permissible.

The views expressed herein are solely the personal views of the writer and do not constitute the views, opinions or conclusions of Scanlen & Holderness or the Partners thereof. In addition, this opinion does not constitute legal advise, should you require specific legal advise kindly contact the writer at chivangat@scanlen.co.zw .