

Comment on the Tobacco Products Control Amendment Bill, 2004

What is most striking about this Bill is that it intends to accentuate the authoritarian nature of the existing legislation. People who smoke have rights and the government should respect and protect those rights. Instead, we find government itself trampling on their rights.

What we have in this Bill is one section of the population ganging up on others that have a habit that the first group dislikes, on the people that manufacture the products used by the out-of-favour group, and on the people that distribute the products. This form of victimisation of people because of their habits is very dangerous. If this were to be extended to excessive eating, many of the people that are ganging up on the smokers would find themselves in trouble with the law.

1. Respect for the rights of citizens

South Africa's Constitution and its Bill of Rights are there to protect the rights of citizens. They are there to protect not only those who are popular with the majority, but also those who are unpopular. The reason is precisely that a majority can do evil if it is allowed to do what it wishes with the minority. In particular, a Constitution is intended to protect citizens from the arbitrary acts of government. In other words, to stop a government from doing what it likes.

A legislator who passionately hates smoking should stop to contemplate the consequences of this Bill before supporting it. There are more important issues at stake than the legislator's hatred of smoking. The most important is the question of respecting the rights and freedoms of citizens. Members of Parliament should use smoking as an example to test themselves and discover whether they really support democracy and the rights of the individual citizen – to live his or her life in peace and freedom without being constantly harassed by her/his elected government to conform to some norm or standard, or to adopt habits that the citizen rejects. This is especially true when the government attempts to compel its citizens to adopt a particular lifestyle.

The Constitution has numerous provisions that are being disrespected in the substance and spirit of the Tobacco laws and this Bill:

1.1 Section 1 of the Constitution states that “the Republic of South Africa is one democratic state founded on the following values:

(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.”

- 1.2 Section 7 (1) of the Constitution says: **“This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.”**
- 1.3 Section 9 (3) requires that: **“The state may not unfairly discriminate against anyone on one or more grounds ...”**
- 1.4 Section 10 of the Constitution stipulates that: **“Everyone has inherent dignity and the right to have their dignity respected and protected.”**

Comment:

The tobacco law strip smokers of their human dignity when it compel them to stand outside buildings throughout the country in order to satisfy their wish to smoke. It also strips them of human rights and freedoms when they are treated as pariahs. Currently these people can stand under cover outside the door of a building. This Bill wishes to force them to stand five metres away. This means standing out in the rain on a rainy day or even in the middle of the street to get five metres away from the nearest doorway. Is this not contrary to their rights to human dignity, human rights and freedoms?

The great 19th century legal scholar F.C. von Savigny described the law of liberty or freedom as “The rule whereby the indivisible border line is fixed within which the being and activity of each individual obtain a secure and free sphere is the law.” This legislation transgresses that borderline and reduces the freedoms promised to the people in the Constitution.

Smokers are being discriminated against because they are smokers, which is in conflict with section 9 (3) of the Constitution. This section may generally be read to outlaw discrimination on the grounds of race, gender, sex etc, but those are merely more common examples of a total prohibition against discrimination. The anti-tobacco legislation discriminates unconstitutionally against smokers, tobacco manufacturers, and tobacco distributors.

2. In defence of the President

The fact that President Thabo Mbeki smokes a pipe is well known. What has not been considered is that every building he enters becomes a public place. It is therefore submitted that when he sits in the study or elsewhere in one of his official residences smoking his pipe, he is committing an offence. Of course this is also true of members of his Cabinet. The only place any of them could legally smoke is in a private residence, a designated and legal smoking area in a restaurant or other building, and in an open place where there is not a gathering.

The problem with the legislation is that it contravenes section 25 (1) of the Constitution, which states that: “No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.” Telling people that they may not allow smoking on their own property deprives them of their rights. An attempt has been made to address the problem by declaring private property to be public property for purposes of the “anti-smoking” laws but this stratagem is contrary to the entire notion of property rights and tends to make all other rights less secure.

However, even if property rights were fully respected, which would mean that property owners would be able to decide for themselves whether or not to allow smoking on their

property, this would not solve the President's problem. The legislation would have to be changed to be more specific regarding the definition of a public place. The President, as a smoker, also has rights and those rights should be respected.

3. People control not tobacco control

Although this is described as a Tobacco Control bill, it is in fact a People Control bill. It sets out to interfere in the way people live their lives. First, tobacco is labelled as an evil substance with the tacit consent of those who use it, many of whom feel guilty about the habit they have acquired. Then invalid claims are made about the detrimental effects of the habit on the people in close proximity to a smoker, the so-called "tacit smoking" effect. Finally, the general distaste that non-smokers have for smoking, fortified by the claims about "tacit smoking", is used to take away some of the freedoms, not only of the smoker but also of the non-smoker.

While purporting to control a substance, the legislation erodes property rights, one of the most important rights of a free society. When a shebeen owner is told that her customers may not smoke on her premises, it is an infringement of her property rights, as is an instruction that she may not display tobacco products in her shebeen, or use a cigarette vending machine to control theft of her cigarette stocks. That shebeen owner will have acquired property rights for the first time after centuries of denial of property rights by the colonial and apartheid regimes only to have those property rights assaulted as soon as they have been acquired.

Let it be remembered that tobacco is not an illegal substance. As the legislation admits, banning smoking is not an option because too many citizens are smokers. Yet we have this legislation that not only persecutes citizens who are smokers, but also those who are not disturbed by smoking or are prepared to tolerate smoking. It says in effect "To you who smoke, we will impose exorbitant taxes on you and make your lives as miserable as possible outside your home. To you who are prepared to tolerate smoking, we deny you the right to do so outside your home. To you who manufacture and distribute the products that smokers use, we deny you the right to advertise or display your products." By what right? What right do those in government believe they have to persecute fellow citizens that have a habit of which they disapprove? That other governments persecute their honest and good citizens for indulging in a legal habit is no reason for the South African government to do the same.

The bill purports to wish to attempt to dissuade young people from taking up smoking. However, we all know that whatever is considered to be for adults only, becomes attractive to children. Where is the evidence that bans on advertising and other stratagems will reduce the incidence of smoking amongst the youth? There are substances that are far more harmful to health, are banned, receive no publicity whatsoever, are prohibitively expensive, and yet are in great demand among the youth. In fact, if children were to smoke tobacco and totally avoid the more injurious substances, they would be healthier. Advertising has a purpose other than attracting people to use tobacco per se; it is intended to persuade people who smoke to use another brand. And here the rights of citizens under section 16 (1) of the Constitution are being eroded, the right to the "freedom of the press and other media" and "freedom to receive or impart information or ideas". In respect of information, the focus is always on the prohibitions on advertising by manufacturers and the detrimental effects on them, the effects on citizen smokers is never discussed. Do they not have a Constitutional right to information on the various tobacco products on the market? Does the government have the right to deny them information on such products by prohibiting advertising of the products?

“But we are protecting their health”, protagonists of these authoritarian measures may say. The response to that claim is, “it is not yours to do”. Just as it is not for government to prohibit restaurants from serving food that may be injurious to people’s health because it is considered fattening, so also is it not for government to deny people the right to suck smoke into their lungs because it may be injurious to their health. Looking after health is an individual and personal matter. An individual can avoid smoking, eat the right foods, exercise, do everything correctly and be less healthy than a person that does all the wrong things. Persecuting people with a smoking habit in all places outside their homes has nothing whatsoever to do with health: it has everything to do with people control. Persecuting people who manufacture, distribute and sell a legal substance called tobacco has nothing to do with health: it has everything to do with people control.

The government of a country with a Constitution that guarantees citizens their freedom has no right to be in the business of people control.

4. An overburdened police force

Government departments keep producing, and Parliament keeps enacting, new law after new law. All these laws are supposed to be enforced and the police are expected to do the job. From all reports they are unable to contain crimes of violence, let alone worry about people smoking in offices. Yet there is a distinct possibility that police, faced with a choice of going after a hijacker or catching smokers who are smoking in a “public place” would choose to go after the smokers rather than the hijackers. If they were to choose soft targets they could remain very busy while totally avoiding dangerous criminals. It would be the rational course to follow. Government departments should therefore not be myopic in their approach, they should think of the wider implications of the legislation they propose, taking into account the most important priorities of the law enforcement agencies and their potential ability to deal with newly-created “soft” crimes.

In the case of tobacco, the legislation is threatening to drive the trade in tobacco products underground, as would definitely happen if tobacco products were to be totally banned. In America when legitimate firms were prevented from dealing in alcohol, the trade was taken over by gangsters, or mobs as they were called. This creates tremendous problems for the police force. The legislation displays a naïve belief that if the legitimate traders are prevented from advertising and displaying tobacco products, cigarettes will no longer be “pushed” amongst young people. Predictably, what will happen is that a trade will develop in dark alleys, with unsavoury characters offering cigarettes for sale to children, and in the process illegitimate traders will get children hooked on substances that are substantially more harmful than cigarettes. It is all too easy for gangsters to “lace” cigarettes with narcotics in order to achieve their purpose without the children initially being aware of what the gangsters are doing. Making tobacco a legal but “illegitimate” substance has dangers that the Department of Health has obviously not considered.

5. Comment on the content of the Bill

5.1 Preamble

The preamble states, among other things, that “the extent of the effects of smoking on health calls for strong action to deter people from taking up smoking ... and to encourage existing smokers to give up smoking.” It also states that it resolves “to align the health system with the democratic values of the Constitution ... and to

enhance and protect the fundamental rights of citizens by discouraging the use, promotion and advertising of tobacco in order to reduce the incidence of tobacco-related illness and death.”

Comment:

These statements are clear evidence of a type of thinking by government and its officials that erodes the freedoms of citizens when converted into legislation. The Nobel Laureate in economics, Professor Friedrich Hayek, described as a “fatal conceit” the belief of officials that they know better than the citizens what is good for them. This flawed thinking is based on the notion that the government official is the superior individual with greater knowledge and that the citizens are ignoramuses that need to be told how to live their lives. What governments and their officials need to bear in mind is that they hold their positions in order to serve the people that have elected and appointed them, and that they have not been given a licence to dominate the people. Constitutions were invented precisely for the purpose of protecting the people from the ever-present danger that politicians and officials will erode the freedoms of the citizens and that they will misuse the police power of the state and become tyrants.

The Constitutional Court was created in the Constitution to be its guardian and thus the guardian of the people’s rights. We trust that the venerable Court will bear the “salami technique” in mind, that freedoms are cut away in thin slices. The existing Tobacco Control legislation has already taken a thin slice off the freedoms of our citizens and these amendments seek to take another.

The statement that the proposed legislation is intended “to enhance and protect the fundamental rights of citizens” is a fiction. It is a blatant erosion of the rights of consumers, smokers, private property owners, and tobacco manufacturers, distributors and sellers.

5.2 Section 3 (b) – Placing obligations on municipalities

This section is a clear indication of the unworkability of the legislation. The legislation is draconian and impossible to enforce so the Department of Health has included a section to try and force municipalities to do the dirty work of persecuting innocent people, something the police have neglected to do because they have more pressing matters to attend to. Surely the municipal officials also have more pressing matters to attend to than skulking around catching smokers or shopkeepers as school teachers used to do before smoking became so prevalent at schools that they had to give up trying to apprehend culprits. This country has so many serious issues to attend to that placing this obligation on municipal officials, drawing them away from more pressing tasks, displays an appalling lack of appreciation for the country’s most urgent priorities. It is also a further display of the authoritarian bent of the officials in the department. In a true democracy local people take appropriate decisions that are relevant to their circumstances. If it regards itself as a supporter of democracy, the Department of Health should not be using legislation as a weapon against lower levels of government, to force them to do what they clearly do not wish to do.

5.3 Sections 3 (c) and (e) – Obligation to display signs

The requirement that “no smoking” signs should be displayed in every area that has been designated a public place is a huge waste of people’s money. Everywhere that a

member of the public enters has been designated a public place so all members of the public will know that they cannot smoke unless they are out in the open away from a public gathering. If they do not know this, they will also take no notice of signs that are plastered on everything in sight. Or is the real intent of the officials to have the symbols of their power and authority over the people displayed for all to see, no matter that it is an exercise in futility, and no matter what the cost? Every rand that government compels private businesses and taxpayers to spend unproductively is a rand less available for the production of goods and services that people want. This section is unnecessary and should be deleted.

5.4 Section 4 (b) – Prohibition on sponsorship of organisations

This section proposes to prohibit advertising and promotion of all tobacco products, including through sponsorship of any “organisation, event, service, physical establishment, programme, project, bursary, scholarship or any other vehicle of any kind” and also “make any financial contribution to any person in respect of any organisation, event, service, physical establishment, programme, project, bursary, scholarship or any other vehicle of any kind”. As already mentioned in paragraph 3 on people control, this prohibition on advertising is an infringement of the rights of manufacturers, distributors and sellers of a legal product – tobacco – a product that is used by millions of citizens – and this prohibition infringes on their right to information.

It is not only non-smokers that have rights in a democratic country, smokers also have rights, and these rights are being abused. Now the right of organisations that receive money from cigarette companies for good causes are also to be infringed. Even though the prohibition is placed on the tobacco company it may just as well have been a prohibition on the recipients, the innocent victims of the crusade against tobacco. Are contributions to wildlife organisations, orphanages and other good causes to be halted merely to indirectly punish tobacco companies?

What the section does not make clear is whether there will be differentiation between contributions to organisations with no advertising implications whatsoever and contributions that are a visible form of advertising. Such a differentiation must surely be made so that tobacco companies are not totally prevented from making philanthropic contributions to organisations that are doing good work.

5.5 Section 4 (e) – Hiding tobacco products and conforming with an array of costly requirements

This section prohibits the sale or offer to sell a tobacco product “unless it is hidden from view of the general public at the point of sale except where the sole purpose of the retailer is to sell tobacco products”.

This is a very peculiar requirement and once again it discriminates against smokers in that they are not to be given the opportunity to select products from the range available. It also makes tobacco a clandestine product to be taken out from under a counter like some precious good that is only available to the select few and therefore much more desirable. Most people do not even notice cigarettes displayed on a shelf unless they specifically wish to buy them. Imposing this hardship on retailers and consumers is an unwarranted interference with their constitutional rights. And the way

it is now worded the dedicated tobacconist will be unnecessarily prohibited from selling items that traditionally form part of their trade.

The long list of costly additional requirements imposed on manufacturers and retailers will merely drive up prices and are an unwarranted imposition on smokers.

5.6 Section 8 (c) – Notice period regarding issue of regulations

The word “democracy” means people power. In a properly functioning democracy the people should be given every opportunity to express their views on proposed laws and regulations. The autocratic methods that were used by pre-1994 governments may appear attractive to today’s officials but the events of those years should make them pause. One month is inadequate and the period of three months notice should be retained in the interests of the people in our democratic state.

5.7 Section 9 – Penalties

The intention to impose a punitive 9 900% increase in the penalty for contravention of section 2 (1), from R200 to R20 000, and other lesser but also punitive penalties for other contraventions, leads the observer to seriously question the capabilities of the drafters to deal justly and fairly with the regulation of tobacco-related matters. Bear in mind that “crime” referred to in Section 2 (1) could be some forgetful person smoking in a public place. This wild desire on the part of officials to mete out harsh punishment to anyone who dares to defy or ignore “their” legislation is arrogant in the extreme. In order to view this matter in context, the proposed penalties must be compared with those meted out to people convicted of real crimes such as fraud, theft, manslaughter and the like. Are these penalties not more severe? And has a tendency not developed to impose harsh penalties, especially on firms for failing to observe some bureaucratic requirement? If so, the tendency has no place in a free and democratic society based on the rule of law.

The trend towards hugely excessive fines leads to speculation that:

- (a) The justice system cannot cope with the torrent of legislation that has emanated from government departments and approved by Parliament.
- (b) The police are faced with unprecedented levels of serious violent crime and dare not allow themselves to be distracted by what they would consider as “victimless crime”.
- (c) In response, the drafters of legislation are ratcheting up the fines in an attempt to frighten people into complying, developing statutes that are unjust in the extreme, with fines that are totally disproportionate to the offences – establishing minimum fines that magistrates and judges that recognise how inappropriate they are, have no discretion to reduce.
- (d) The combination of excessive and unenforceable legislation is leading to disrespect for the law and selective prosecution – in other words there is not equality of treatment by the law – prosecutions are decided on the likelihood of the defendant being able to pay a large fine.

If this is an accurate reflection of what is happening in the country it is a matter for grave concern. These penalties, which have the appearance of “bludgeoning people into compliance”, need to be radically reduced.

6. Conclusion

Some people may be puzzled by reference to this legislation as a serious attack on the freedoms of South Africans. People who hate smoking will happily support the legislation, including its most draconian provisions. And they will maintain this stance until the government decides, once it has established a precedent using the easy target of tobacco, that their own habit or addiction, whatever it may be, should be banned in the interests of their health. Only then will they understand that if you wish to retain your own liberty you have to defend the liberty of your worst enemy.

Non-smokers should reconsider their support of the persecution of tobacco users and their suppliers. In giving their support they may very well be jeopardising their own future freedom or that of their children. And Members of Parliament, who should be protectors of freedom and the Constitution, should think carefully before passing this legislation into law. In fact, they should consider repealing the principal Act and should certainly reject these draconian amendments.

Submitted by:

Temba A. Nolutshungu
Director

and

Eustace G. Davie
Director

Free Market Foundation of Southern Africa

P.O. Box 10074
CALEDON SQUARE
7905

P.O. Box 785121
SANDTON
2146

Tel: 021-465-1856
Fax: 021-465-1860
E-Mail: fmf.ct@mweb.co.za

Tel: 011-884-0270
Fax: 011-884-5672
E-mail: fmf@mweb.co.za

Website: www.freemarketfoundation.com

17 November 2003