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Free Market Foundation Submission

on

Cannabis for Private Purposes Bill

Attention: cannabisbill@parliament.gov.za

Executive Summary

The Rule of Law Project welcomes the Cannabis for Private Purposes Bill as a step by the government in actualising the rights of individuals to decide what goes into their bodies. The substance of the bill, in terms of the penalties it recommends for not complying with its provisions, is misguided. The aim of the bill should be to make it as easy as is possible for citizens to realise their constitutional rights. They ought not be prosecuted for any peaceful behaviour in relation to cannabis usage, whether such behaviour is in compliance with the bill's provisions or not. Avoiding the dire consequences of criminal prosecution for the thousands of people whose trade is contingent on the sale of cannabis to adults should be an imperative of the law on cannabis going forward.

If enacted in its current form, the bill will see, even after the declaration that use of cannabis by adults is legal, individuals still being arrested for possession or use.

The Rule of Law Project contends that the quantities prescribed by the legislation should be raised considerably. This limitation on the allowed quantities of cannabis in grams or plants does not seem to have taken account of the everchanging dynamics of running a business. Since the commercial aspect of the use of cannabis was rightfully added to the scope of the bill, the quantities allowed to be carried in private by adults ought to reflect the commercialisation of cannabis use.

Option 2 has the lowest sentence in terms of length for offences relating to the bill. Ideally, however, there should not be any continued prosecution of adults in relation to cannabis, as it is an exercise of one's rights, just as consuming alcohol is.

Therefore, the Rule of Law Project contends that section 7 of the Cannabis for Private Purposes Bill contain the lowest possible sentences – if any – for offences. The Rule of Law Project also contends that the schedule of the bill indicating quantities of use, should have the permitted grams for use considerably raised to account for the commercial scope of the bill that will see the formalisation of an already existing industry that has its own norms and standards.

Cannabis for Private Purposes Bill Section 7

This provision deals with penalties.

The continued prosecution of adults for deciding what they ingest in private is contrary to the spirit of justice. The prosecution of crimes that have no victims, like the consumption and sale of marijuana, is a perversion of justice. The justification of state force, in the form of detention, prosecution, and imprisonment is that whoever suffers such limitations to their rights, has done the same to another or their property. The possession of more than 600g of cannabis on one's own property, which is an offence as per the bill, does not pass the standard of violating the rights of another, and must therefore be allowed.

The penalties are a limitation on the right to the use of cannabis in private as was outlined by the Constitutional Court in *Minister for Justice and Constitutional Development and Others v Prince* 2018 (6) SA 393 (CC). The state seeks to continue prosecuting people, even after it was said this conduct constitutes an unjustified limitation on the right to privacy. Justice being seen to be done entails that the common man sees a noticeable difference before and after the bill is adopted. If one

can be arrested for possessing cannabis before the bill is passed, and one is still arrested after the bill is passed, general respect for the effectiveness of law as a driver of change for the better will fall.

Not all offences, in the interests of proportionality, necessitate imprisonment. A key element to consider in the limitation of rights, therefore, is section 36(1)(e) of the Constitution. This provision states that less (rights-)restrictive means must be preferred over more restrictive means to achieve a legitimate government purpose. A fine is a less restrictive manner of sanctioning and thus limiting the rights of an individual who commits an offence relating to the bill. A sentence of imprisonment being chosen in addition to a fine violates section 36(1)(e) of the Constitution on its face.

Though the Rule of Law Project supports the option with the lowest possible sentence proposed for section 7 of the bill when the bill is adopted, it is still opposed to the harm that even this option may do to peaceful, particular poor, people. A judge that has not been sensitised to the issue will simply take direction from the legislation. Even with a decreased sentence, the continued imprisonment of individuals for cannabis possession will undermine the general respect for the law, as it would be seen as not having brought about real change.

Section 1A

The bill is a welcome piece of legislation and represents a step in the right direction. The Constitutional Court's judgment was consciously inadequate to address the overall legislative climate which saw the unconstitutional limitation of the right to privacy. Since Parliament makes law, drafting good laws ought to be an imperative. This is the case even if that means going above and beyond what was prescribed by a court order invalidating a certain aspect of legislation and tasking the legislature with remedying the situation.

Parliament is going above and beyond the court order, as reflected in section 1A of the bill. This provision would see the legalisation of commercial activities relating to cannabis, subject to regulation. Section 1A, although welcome, will however only make the situation more complicated if it is enacted in its current form.

This is because, while this bill legalises the trade in cannabis, it delegates the regulation of that trade to a different law to be decided upon in the future.

Since the scope of the bill was expanded to include commercial activities, when the President signs the bill, commercial activities should be permitted. Under the current form of section 1A, there will be a 'promise' of legalised commercial activity that will come later. Inserting 'subject to the enactment of national legislation' in section 1A(1) when permitting commerce in respect to 'recreational cannabis' is unnecessary as in substance, it does nothing since if the bill is passed, that section will not protect entrepreneurs who are operating in the cannabis space from being prosecuted.

The Committee on Justice and Correctional Services should instead permit commercial activities in respect to cannabis subject to no accompanying legislation. However, if there is to be regulation, that regulation should be codified in the present bill, not future legislation. The bill's scope was expanded for this reason, thus delegating the responsibility of legalising recreational cannabis commercial activities to the future is misguided.

It is a waste of resources that we would have legislation permitting something, subject to another yet-to-be-adopted legislation.

The scope of the current bill does permit for the inclusion of commercial activities in relation to cannabis beyond the use thereof in private. There would therefore be nothing untoward in permitting commercialisation subject to no future legislation.

A key component of actualising the provisions of the bill is the commercial aspect, since the consumption of cannabis in private, in locations like Soweto, Alexandra, and other former black bantustans would not be possible without a commercial market that brings cannabis to the township. The yard sizes in most of these former black areas is too small to allow for private cultivation effectively, therefore, the exercise of their right to consume cannabis in private is contingent on a market of traders who provide it for them.

Annexure A of the bill already outlines the standards of granting a licence for an activity which will not be legal until another law is enacted. When even the standards for licence granting are outlined in this bill, one wonders what the future national legislation will substantively legislate beyond copying and pasting the contents of annexure A of the bill.

Therefore, the Rule of Law Project contends that section 1A be amended and any reference to ‘subject to the enactment of legislation’ be removed, to substantively legalise commercial activities with regards to cannabis the moment the bill is signed into law rather than waiting for another piece of legislation that may take years to be signed into law.

Schedule 3 Amendment

The Rule of Law Project proposes that schedule 3 of the bill be amended to allow for the increases in the prescribed quantity that can be possessed in a private dwelling, in private in a public place, and in private dwelling that has two or more individuals. The current weight limitations seem to be arbitrary as was indicated by Dr Loots, saying she does not have the scientific expertise to justify the reasoning behind the insertion of these exact quantities. The [portfolio committee meeting minutes](#) show that there was no scientific evidence presented to support the clearly arbitrary limitation at 600g for a single adult in private.

The general justification, since the scientific one was not presented, was that the quantities in the schedule were amended to increase the scope of the private use protections after consultations with the public. Yet, quantities like 600g or 1200g are not broad enough to accommodate those who wish to purchase their cannabis in bulk, for private consumption or the myriad of commercial traders who were referred to above, who at more than one time possessing more than 600g of cannabis or four flowering plants.

The Rule of Law, as entrenched in section 1(c) of the Constitution, is a foundational value of the South African state and has as its central tenet the opposition to arbitrariness. Albert Venn Dicey, known for his *Introduction to the Study of the Law of the Constitution*, and considered a father of the concept of the Rule of Law, wrote that the Rule of Law is “the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even wide discretionary authority on the part of the government”.¹

There is no scientific evidence for arbitrarily limiting the quantity of cannabis that can be possessed in private to any amount. The order of the court in *Minister for Justice and Constitutional*

¹ Dicey AV. *Introduction to the Study of the Law of the Constitution*. (1959, 10th edition). 202-203.

Development and Others v Prince did not specify that there be a set amount or quantity. Thus, Parliament cannot say it is limited by the court order. Rather, private use was permitted in general. The quantities must therefore be increased considerably, or the notion that there must be a quantity limit must be abandoned.

There is no limit on the amount of alcohol one can possess in private, and applying such a notion to cannabis is doubly arbitrary, over and above the whimsical quantities themselves. The schedule represents an abuse of the discretion that legislatures have to make laws, since the Rule of Law is dedicated to opposing arbitrary exercises of state power.

As Dicey writes, “the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint”.²

In as much as alcohol can be obtained and possessed in private without limit and rightfully so, the same standard should be applied to cannabis. At the very least, the current quantities in schedule 3 of the Bill should be considerably increased.

Conclusion

The Cannabis for Private Purposes Bill is a welcome piece of legislation in general. The critiques of it offered above should not be construed as an attack on the efforts to make the use of cannabis legal. Rather, they are directed at ensuring the interests of justice and the Rule of Law as foundational principles of the constitutional order are adequately recognised.

The Rule of Law Project submits that the penalty of imprisonment for offences relating to the bill be heavily decreased, but ideally eliminated. Apart from offences relating to children of course, we submit that the penalties in section 7 be decreased and the option resulting in no to minimal prison time be chosen.

It is also submitted that the commercial activities with regards to recreational cannabis be legalised subject to no future legislation. This would mean that when the bill is passed, an integral aspect of private cannabis use by poor South Africans who cannot cultivate their own is not criminalised even after private use is permitted. Thus, section 1A should remove all reference of ‘subject to the enactment of legislation’.

It is also submitted that schedule 3 of the bill, which outlines the quantities for use in private by an adult, be wholly scrapped and an approach similar to alcohol private consumption be adopted. There is no legislation outlining how much beer one is allowed to consume. As such there should be no such provision for cannabis. Alternatively, the quantities in the schedule must be considerably increased to broaden the scope of the private use provisions, and the Minister must have the power to increase only and never decrease the prescribed quantity.

The bill should correct these deficiencies before it is adopted. If corrected, the bill could be a huge boon for South Africa, beyond the imperative of the rights actualised by the bill being exercised legally. The bill’s welcome expanded scope to include commercial activities for recreational activities will be a much-needed boost for the economy. Given the market capitalisation of

² Dicey 184.

commercial recreational cannabis in certain states internationally that have permitted it, the possibilities are endless.

To fully realise the rights which were said to be violated in *Minister for Justice and Constitutional Development and Others v Prince*, it is integral that the aforementioned shortcomings in the bill be addressed. This would ensure that a legislative environment be shaped that would be conducive to growth and the improvement of the living conditions and standards of South Africans. The propositions in this submission should be seriously considered.

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