Cannabis legalization: From a criminal issue to a question of public health and human rights?

Justin Trudeau’s election promise to legalize marijuana was motivated by strong public support, and was one of the most popular platform items on the Liberal Party’s election-time website. In policy terms, legalization has is supported by an interplay of public health, criminal justice, and social justice concerns dating back almost 50 years, when the Le Dain Commission made history by recommending the decriminalization of simple possession of marijuana. Many of the reasons in its 1969 report continue to resonate: Criminalization pushes otherwise law-abiding, non-violent people to “engage in crime or at least deal with criminal types”; low levels of prosecution compound the injustice of saddling those who do get caught with a criminal record; it undermines the credibility of drug education to send exaggerated messages about the harms of marijuana; it fosters disrespect for law enforcement among those who see cannabis prohibition as “pervasive and profoundly hostile” given that it is probably not as dangerous as alcohol.

What distinguishes today’s legalization discourse from the decriminalization discussions of the 60s and 70s is the dominance of public health and human rights lenses for viewing both the harms of criminalization the solutions. In its influential Cannabis Policy Framework, for example, the Centre for Addiction and Mental Health treats the disproportionate impact of criminalization on racialized Canadians as discrimination per se, and also as health equity matter, a negative social determinant of health for racialized groups. It was then-Minister of Health Jane Philpott – rather than, say, the Minister of Justice
who made the first public legalization announcement on April 20th, 2016 at the United Nations General Assembly Special Session on Drugs. Philpott promised that legalization would “protect our youth while enhancing public safety”, but also emphasized that a modern approach to drug policy would build on public health-based successes like Insite, Canada’s safe injection site, and that it would “embrace upstream prevention, compassionate treatment, and harm reduction.”

Yet this ostensibly public health - and equity - based project may be hobbled out of the gate. For an approach that is said to treat marijuana as primarily a health issue rather than a criminal one, the regime is shaping up to rely heavily on criminal law enforcement, and often without any clear evidence base in public health or criminological research.

For example, though Bill C-45 lifts many current criminal restrictions and abolishes mandatory minimum sentences for cannabis offences, the new law actually raises maximum penalties for illegal growing or distributing to fourteen years’ incarceration. (This is the same maximum penalty as for aggravated assault of a police officer, or producing child pornography). Yet there is little evidence that long sentences are effective for deterring behaviour, and this approach will likely continue the war on drugs’ disproportionate criminalization of racialized groups.

The contrast with other legally regulated substances with a high burden of disease is notable.

As the Canadian Bar Association has noted, the Cannabis Act’s long prison sentences distinguish it from comparable federal legislation on tobacco and alcohol. The latter both focus on regulatory goals of taking profits away from the black market through economic penalties. Penalties under the Tobacco Act are mainly fines, for example; imprisonment is contemplated for tobacco manufacturers and advertisers, but generally tops out at 2 years. Providing tobacco to a young person attracts only a fine. In the case of alcohol, which is governed federally by the Excise Act, the highest penalty of five years’ incarceration is reserved for fiscal offences.

Provincial legislation is set to narrow the scope of legalization further, and with sometimes substantial penal consequences. Quebec and Manitoba, for example, will ban home growing, even though federal lawmakers would permit it in accordance with the Federal Task Force on Cannabis Legalization and Regulation’s conclusion that carefully regulated home cultivation would reduce harms and limit the growth of the illicit market. Crackdowns on independent dispensaries that have popped up across the country in recent years will continue in Ontario, New Brunswick and Nova Scotia, to protect the provinces’ monopoly on distribution. Penalties, again, will be higher than in other comparable contexts: illegal sale of alcohol in Ontario currently attracts only a maximum of one year in jail – as opposed to cannabis’ two – and also
carries a lower fine. Under brand-new, 2017 Smoke-Free Ontario Act, illegal distribution of tobacco attracts only a fine, no jail time.

Prohibition and enforcement appear to be so central to the emerging regime that that provincial and municipal authorities are already complaining about the substantial new criminal justice costs that legalization will entail.

**Federalism and the perpetuation of criminalization**

There are a number of reasons for the paradoxical prominence of criminal law enforcement even under legalization. Recognizing the product as licit where it was once merely tolerated entails some justice system costs even if rates of use remain constant, as expected, after legalization. For example, governments can no longer ignore calls to develop adequate strategies to respond to cannabis-impaired driving like those that have long been in place to combat drinking and driving; these strategies tend to rely heavily on law enforcement. Lawmakers may also be responding to public discomfort with the pace of change. After nearly 100 years of criminalization in Canada and across the world, cannabis continues to attract a stigma distinct from alcohol and tobacco. And legitimate health concerns, particularly related to youth and other vulnerable populations have prompted tough talk in support harsh punishment, even if such measures are unlikely to be effective and risk undermining the equity goals of legalization.

Beyond (and in conjunction with) social, historical, political and technocratic factors, the idiosyncrasies of Canadian federalism also play a role in perpetuating reliance on criminal enforcement-based approaches.

**Federal criminal authority, while broad, is essentially punitive and stigmatizing**

There is some irony in the fact that Parliament’s presumptive source of jurisdictional authority to legalize is the same power it seeks to abdicate – the criminal law. But in fact, the criminal law power is broad. A valid criminal law need only contain a prohibition, a penalty, and pursue a “criminal purpose” – i.e., be directed at something with an “evil or injurious or undesirable effect on the public”. The federal criminal power has been validly used to legislate in relation to such matters as tobacco, food processing, product safety, the environment, firearms, assisted reproduction, and abortion. Outside of the spending power, it is may be Parliament’s most significant power for intervening in health matters.

The substantive limit on the criminal law power was strengthened relatively recently in Reference Re Assisted Human Reproduction Act. In that case, a bare majority of Supreme Court of Canada judges held that a number of the Act’s prohibitions related to assisted reproduction (such as limits on insemination, in vitro fertilization, storing reproductive material in approved facilities, or reimbursement of third parties in accordance with regulations) were not directed at any public harm or evil, but rather were directed at
ordinary clinical practice and medical research. Essentially, the plurality of judges insisted that there was nothing evil or injurious or undesirable about run-of-the-mill assisted reproduction – in other words, it de-stigmatized it. In so doing, it limited the legitimate place of the criminal law in regulating it.

The upshot is that in order to claim jurisdictional authority under the criminal law, Parliament must not only frame its law in the form of a prohibition, but it must, it would seem, direct the law at the negative public health or social consequences of cannabis (as opposed to criminalization itself). Jean Leclair observes that this constitutional reality was not lost on the legislative drafters of Bill C-45: the purpose of the law is to protect public health and public safety, including by “protect[ing] the health of young persons by restricting their access to cannabis”; “protect[ing] young persons and others from inducements to use cannabis; and “deter[ring] illicit activities in relation to cannabis through appropriate sanctions and enforcement measures”. With these purposes, the fact that its key features are prohibitions, and its harsh penalties discussed above, Bill C-45 looks far more like a traditional criminal law than any kind of thorough public health framework to promote the safe and healthy uses of cannabis.

**Provincial regulatory authority as punitive power**

Provinces also have constitutional authority to regulate cannabis punitively. It is relatively uncontroversial that jurisdiction over “property and civil rights in the province” in s. 92(13) and “matters of a merely local or private nature” in s. 92(16) of the Constitution Act, 1867 allow the provinces to regulate both commercial and public health aspects of legal intoxicants -- even to the point of prohibition. Further, section 92(15) provides for “the imposition of punishment by fine, penalty, or imprisonment” as part of a valid provincial regulatory scheme. And though provincial offences can be distinguished from “true crimes” in that they are imposed for public welfare purposes rather than for punishment per se, consequences can be harsh, including substantial prison time. The proliferation of certain regulatory offences and escalation of penalties has, in recent years, been criticized for its effective and disproportionate criminalization of stigmatized populations, but it continues as an accepted means to enforce otherwise valid provincial regulation.

**Jurisdictional conflict and the future of the criminal/public health pivot**

Bill C-45 may rely heavily on prohibition and punishment, but it is nonetheless a substantial liberalization, and aspects of a public health/human rights approach can be detected in its text. Its purposes, for example, also include “reduc[ing] the burden on the criminal justice system in relation to cannabis” and, “provid[ing] access to a quality-controlled supply of cannabis”.

These novel federal drug policy objectives are at the centre of the jurisdictional dispute that is currently brewing in light of Quebec and Manitoba’s plans to prohibit personal cultivation altogether.
The Minister of Justice recently echoed a 2017 Justice Department memo position that doctrine of federal paramountcy may render the provinces’ plans inoperative if they frustrate these very purposes. In a similar dispute in Rothmans, Benson & Hedges Inc v Saskatchewan, the Supreme Court concluded that a provincial ban on tobacco displays did nothing to frustrate the purposes of a federal tobacco law which permitted such displays. On the contrary: both laws shared the aim of restricting tobacco promotion in service of public health. With Bill C-45’s novel objectives of ensuring access to cannabis and limiting the burden on the criminal justice system, however, the claim of frustration of purpose would appear more viable.

A more substantial obstacle to federal paramountcy is the Court’s reasoning in Rothmans that Parliament could not have meant to create any positive right to display tobacco products. Provisions enacted pursuant to the criminal law power are “essentially prohibitory”, and as such “do not ordinarily create freestanding rights that limit the ability of the provinces to legislate in the area more strictly than Parliament.”

The federal government might seize on the word “ordinarily” and argue that although the Cannabis Act, as criminal law, is generally prohibitive, its purposes require that Parliament delimit the outside boundaries of prohibition. Yet judges of the Supreme Court have been willing to uphold facilitative provisions under the criminal law power – such as those providing for enforcement, warrants, or even information management – only where have been in service of, or “ancillary to” other valid prohibitions. Moreover, it is not clear that Parliament has actually created any positive right to have or exchange cannabis in this law. While certain objectives of the Cannabis Act in s. 7 are facilitative, the possession, distribution and promotion provisions themselves are framed in terms of prohibition, mirroring federal criminal tobacco legislation, and consistent with the requirement that criminal laws pursue their goals through prohibition and penalty.

Another possibility, left open in R v Malmo-Levine, is to ground federal authority over cannabis in the “peace, order and good government” clause in s. 91 of the Constitution Act, which permits regulation of matters of national concern. Locating federal power here rather than in the criminal law would – consistent with the discourse in support of legalization – shift the perceived source of mischief from the cannabis alone to the sequelae of the drug war. This would chart a novel course in Canadian constitutional law and constitute a forceful jurisdictional claim in support harm reduction as a positive alternative to prohibition.

Alternatively, it can be argued that the provincial ban on personal cultivation is really criminal prohibition in disguise, and therefore beyond provincial legislative authority. In R v Morgentaler (1993), the Supreme Court concluded that Nova Scotia’s law restricting abortions to hospitals was not, as the province had claimed, about ensuring quality medical services, but was really
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aimed at prohibiting and punishing clinic abortions as socially undesirable conduct. The new ban addressed a matter traditionally treated as criminal, in fact substantially reproducing the federal abortion prohibitions that had recently been struck down by the Supreme Court for violating pregnant women’s Charter rights. Its timing — soon after Henry Morgentaler announced his plans to open an abortion clinic in the province — suggested a targeted plan to rid the province of this clinic. Finally, the province’s empirical claims about protecting health were found to be spurious. Clinic abortions in no way undermined quality of care.

Similar to Morgentaler, the home cultivation ban would reproduce a defunct criminal law, in direct response to federal withdrawal. The validity of the provincial law would come down to whether the provinces can convincingly claim health or local order as a basis for the home grow restriction. So far, Quebec’s public health minister has referred only to Quebecers wanting to take a conservative approach to cannabis legalization. If courts see the home grow ban as a primarily a manifestation of stigma or unspecified discomfort with legalization, the law might be seen as directed at public morals rather than health, and the colourability claim might gain traction. This will in turn depend on judicial receptiveness to claims about risks and dangers that attend home growing.

Conclusion

Canadian federalism — through the presumptive location of the Cannabis Act in the criminal law power, and through growing punitive regulatory capacity — has played a role in maintaining the primacy of prohibition, punishment and stigma even under legalization. Future jurisdictional disputes may channel and test lawmakers’ commitment — and courts’ receptiveness — to a new approach grounded in public health and equity. Locating the Cannabis Act within the power over peace, order and good government, for example, would allow Parliament to more explicitly acknowledge what it means to withdraw from, and repair the damage left by, a war on drugs. Provinces seeking to avoid claims of stepping into criminal jurisdiction may be required to better separate stigma from evidence-based policy. Judges’ receptiveness to such claims will test their own attitudes about the harms of cannabis and of the drug war itself. Monitor these disputes closely.