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Policy analysis

Psychedelics and cognitive liberty: Reimagining drug policy through the prism of human rights

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ABSTRACT

This paper reimagines drug policy – specifically psychedelic drug policy – through the prism of human rights. Challenges to the incumbent prohibitionist paradigm that have been brought from this perspective to date – namely by calling for exemptions from criminalisation on therapeutic or religious grounds – are considered, before the assertion is made that there is a need to go beyond such reified constructs, calling for an end to psychedelic drug prohibitions on the basis of the more fundamental right to cognitive liberty. This central concept is explicated, asserted as being a crucial component of freedom of thought, as enshrined within Article 9 of the European Convention on Human Rights (ECHR). It is argued that the right to cognitive liberty is routinely breached by the existence of the system of drug prohibition in the United Kingdom (UK), as encoded within the Misuse of Drugs Act 1971 (MDA). On this basis, it is proposed that Article 9 could be wielded to challenge the prohibitive system in the courts. This legal argument is supported by a parallel and entwined argument grounded in the political philosophy of classical liberalism: namely, that the state should only deploy the criminal law where an individual's actions demonstrably run a high risk of causing harm to others.

Beyond the courts, it is recommended that this liberal, rights-based approach also inform psychedelic drug policy activism, moving past the current predominant focus on harm reduction, towards a prioritization of benefit maximization. How this might translate in to a different regulatory model for psychedelic drugs, a third way, distinct from the traditional criminal and medical systems of control, is tentatively considered. However, given the dominant political climate in the UK – with its move away from rights and towards a more authoritarian drug policy – the possibility that it is only through underground movements that cognitive liberty will be assured in the foreseeable future is contemplated.

Psychedelics is an overarching term used for a range of substances, be they plant-based or synthetic, which alter consciousness when ingested: "[t]he subjective effects of psychedelics include (but are not limited to) unconstrained, hyperassociative cognition, distorted sensory perception (including synaesthesia and visions of dynamic geometric patterns) and alterations in one's sense of self, time and place" (Tagliazucchi, Carhart-Harris, Leech, Nutt, & Chialvo, 2014). Human beings take psychedelics – and are known to have done so over wide spans of historical time and geographical space – for a multitudinous medley of reasons (Grinspoon & Bakalar, 1997). Many psychedelics are criminalised, both through the global system of drug prohibition and, on the domestic front in the UK, through the Misuse of Drugs Act 1971.

This paper argues for the decriminalisation of psychedelics using human rights instruments: most notably, the ECHR; more specifically, the right to freedom of thought, to cognitive liberty, contained therein. The mechanism through which this might occur is that the courts in the UK are under an obligation to interpret legislation in such a way that it is compatible with human rights obligations under the ECHR, or, where this is not possible, to make a declaration of incompatibility, which will usually result in legislative change (Human Rights Act 1998). The legal arguments put forward along these parameters are supported by – and entwined with – claims that are rooted in the political philosophy of classic liberalism, which itself underpins the ECHR. It is suggested that these lines of reasoning should inform not only defences raised in court, but also the discourse of drug policy activism more broadly.

Whilst the arguments made herein are by no means of necessity restricted to psychedelics, this is where the author's research

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interest lies. To clarify, the author is against drug prohibition *in toto*, though that is not the focus of this paper. However, the edifice of prohibition will not crumble all at once, but rather incrementally, piece by piece, and the pleas presented below are merely one suggested inroad. Many of the assertions articulated within draw their strength from the premise that the harms of taking certain drugs can be scientifically proven to be minimal, the benefits potentially great: a contention that pertains far more readily to the psychedelics than to other genres of prohibited substance, as shall hopefully be demonstrated.

The story so far

It is perhaps because of their particular attributes that, on those rare occasions where drug users subjected to criminal prosecution have sought to challenge the prohibitionist regime in court, this has tended to involve psychedelics. Such defences have been rooted in the rights-based framework as described above: namely, the argument that users' human rights, as purportedly protected by the ECHR, are infringed by the drug prohibitions contained within the MDA, and that the former should take precedence over the latter. These contentions have been almost exclusively constructed around pleas for either therapeutic or religious exemption from prohibition, both because these categorisations genuinely describe defendants' motivations for taking psychedelics, and because there is anticipated protective power attached to them (Walsh, 2010).

In the case of *R v Quayle* [2005] 1 WLR 3642, for instance, the Court of Appeal heard a number of challenges to the prohibition of cannabis on therapeutic grounds (Bone & Seddon, 2015). Whilst cannabis has been used as a healing plant in a variety of contexts for millennia (Holland, 2010) – and its medicinal qualities are fast becoming verified by modern science (Armentano, 2014) – it remains a controlled substance in its natural form in the UK; however, a synthetic version of cannabis, Sativex, was developed and is licensed in this country (http://www.gwpharm.com/Sativex.aspx), and medicinal use of cannabis is authorized in a growing number of States internationally (Sznitman & Zolotov, 2015). The appellants in *Quayle* argued, *inter alia*, that the prohibitions on cannabis breached their right to privacy, as protected by Article 8 of the ECHR, through interfering with their ability to self-medicate – or to assist others with self-medicating – with the only substance that brought them palliative relief from a number of different painful conditions.

The Court of Appeal did not make it clear whether they agreed that Article 8 was engaged, though they did point to the potentially legitimate qualifiers in Article 8(2): namely, that this right can be interfered with "in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others". However, the court stopped short of ruling upon whether any – and if so which – of these might apply here, claiming that they lacked the detailed information necessitated in order to make such a decision:

> The court's decision would involve an evaluation of the medical and scientific evidence . . . a greater understanding of the nature and progress of the tests of cannabis which have taken and are taking place, and a recognition that, in certain matters of social, medical and legislative policy, the elected Government of the day and Parliament are entitled to form overall policy views about what is best not just for particular individuals, but for the country as a whole, in relation to which the courts should be cautious before disagreeing. On the material before us, so far as it is appropriate for us to express any view, we would not feel justified in concluding that the present legislative policy and scheme conflict with the Convention (3680–3681).

Thus, importantly, any real deliberation on this issue seems to have been sidestepped, as opposed to definitively decided; nonetheless, the convictions of the appellants were upheld. Ironically, it is submitted that the balancing exercise outlined above is exactly what the courts should have carried out in determining whether or not to apply the qualifiers; instead, an overly cautious approach was taken. If this was considered unavoidable due to a lack of necessary evidence, then any binding decision on this issue should have been viewed as deferred until a more suitable case arose; however, this is not what has happened, with the partial analysis in *Quayle* instead being unjustly read in subsequent cases – such as *Altham* [2006] EWCA Crim 7 – as having closed such arguments down.

With regards to pleas for religious exemptions from prohibition, the leading authority in the UK is *Taylor* [2001] EWCA Crim 2263, which concerned Rastafarian cannabis usage. Religious freedom is protected by Article 9 of the ECHR, which reads: "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom . . . to manifest his religion or belief, in worship, teaching, practice and observance". Through such a lens, prohibition of a plant that doubles as a sacrament can be viewed as religious persecution. Taylor was arrested entering a Rastafarian temple with around 90 grams of cannabis. He admitted that he was intending to supply this to others, for religious purposes, as part of a regular act of worship: smoking cannabis whilst studying the bible is customary for some Rastafarians, who believe this pursuit brings them closer to Jah. At trial, the prosecution conceded that Rastafarianism is a religion and did not contest that Taylor was supplying cannabis for religious purposes: thus, Article 9 was clearly engaged.

However, whilst the protection of freedom of religion is absolute, there are permissible qualifiers under Article 9(2) that apply to the freedom to *manifest* one's religion, "in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others". Accordingly, the court had to answer the questions of whether there was a pressing social need to interfere with Taylor's rights in order to protect the public on one of these grounds, and, further, whether the means adopted constituted a proportionate response.

The view was taken that the fact that cannabis is scheduled under the MDA – and that this Act, in turn, is perceived as being the domestic fulfilment of the UK's international obligations under the various United Nations Drug Conventions that create the system of global prohibition – constituted powerful evidence of a cross-national consensus that an unqualified ban on cannabis is necessary to combat the dangers arising from this psychoactive plant. Detrimentally, by accepting the very existence of the Drug Conventions as determinative of these issues, the court made little use of the medical, sociological or religious material available, either on cannabis or Rastafarianism. This leaves Taylor – and Rastafarians in general – in the unenviable position of having to choose between the expectations of their religion and those of the prohibitionist regime (Gibson, 2010).

This (over) reliance on the Conventions was echoed in the Court of Appeal when refusing leave for Taylor to appeal against his conviction. Here, the judges distinguished between legislation prohibiting conduct *because* it relates to or is motivated by religious belief, and legislation which is of more general application but prohibits, for other reasons, conduct that happens to be encouraged or required by religious beliefs, such as smoking cannabis; further, the question of whether defences should be created for religious usage was seen as being a matter properly the province of the legislature, not the judiciary. It is submitted that this is an overly restrictive approach: it is the *effect* of the prohibitive legislation that matters – namely, its curtailment of sacramental cannabis use – rather than the intention behind it.