Caught in the crossfire: Plant medicines and the Psychoactive Substances Act 2016

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INTRODUCTION

The United Kingdom’s Psychoactive Substances Act 2016 (PSA) is a response to the phenomenon of novel psychoactive substances (NPS). However, given the omission of the word “novel,” from the Act’s title through to the definition of psychoactive substances contained therein, ancient psychoactive plants – herein referred to as plant medicines – are swept into its ambit. This paper scrutinizes the disjoint between the diagnosed problem and this overreaching solution, through analysis of parliamentary debates and related publications leading up to the Act, it is revealed that these were not part of the problem as constructed, and yet have become entangled in this legislative response to it. Results and conclusions: It is argued that the inclusion of these plants breaches Article 9 of the European Convention on Human Rights, which protects both freedom of thought and religion. It is submitted that the Act should thus be amended accordingly. In support of this argument, the arbitrary difference in treatment of the psychoactive substances, alcohol and tobacco – exempted from the reach of the Act – is highlighted, as is the process by which alkyl nitrites (poppers) were also (eventually) excluded from the legislation, making the claim that much of the lucid reasoning underpinning this latter decision could be extrapolated out to plant medicines.

Keywords: Psychoactive Substances Act 2016, plant medicines, new psychoactive substances, human rights, freedom of thought, freedom of religion

THE ANCIENT AND THE NOVEL

The relationship between the human species and psychoactive plants dates back throughout history, present in almost every culture known to have existed, with the two evolutionarily entwined (Doyle, 2011): “People have developed a harmonic relationship with these plants, and frequently they have had a great influence on the human and cultural development of many societies and civilisations” (ICEERS, 2012). A number of such plants – previously used almost exclusively in very particular cultural settings, by indigenous groups in the regions in which they naturally grow – have taken on greater noteworthiness as the processes of globalization, with their attendant technologies of interconnection, have seen their usage spread: to hone in one specific example, ayahuasca is a brew of different plants originating from the Amazonian region, used in shamanic rituals in that area for centuries and increasingly throughout the world (Labate, Cavnar, & Gearin, 2017).

The context in which plant medicines are typically taken in the UK is in ceremony, with a view to therapeutic healing

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and/or spiritual enlightenment, with the two interwoven: such ritualistic use mirrors traditional shamanic practices, to a greater or lesser degree – often entangled with New Age thinking, termed neo-shamanism – with a ceremonial leader (sometimes a visiting indigenous shaman, sometimes not), who typically prepares and distributes the plant medicine, leads the ritual, and holds the space (overseeing the physical, psychological, and spiritual needs of participants), often with attendant helpers (Labate, 2014). Plant medicines are also ingested as sacraments in certain religious ceremonies (Labate & Cavnar, 2014a), along with being used in more psychotherapeutic settings, with the relationship more akin to that of therapist and patient than ceremonial (Labate & Cavnar, 2014b). The lines between these different practices can blur, as the plant medicines are used holistically, to work with the different layers of existence, from the physical body through spiritual realms, encompassing everything in between; what remains consistent is that their deployment almost always takes place in a controlled, guided setting, differing from recreational ingestion of NPS (although this is by no means to deny that therapeutic effects of controlled drugs yet have been molecularly tweaked so as to avoid the strictures of prohibitive drug legislation. While not an entirely new issue, the development and distribution of NPS has exponentially increased in recent years again due to the processes of globalization, as described above. NPS tend to be taken for recreational purposes and (until recently in the UK) were openly sold, both through head shops, and the Internet; these substances are perceived as being bound up with health risks, with antisocial behavior, and much of modern day drug policy has revolved around trying to stem their flow (EMCDDA, 2016).

In the UK, NPS can be brought within the Misuse of Drugs Act (MDA) 1971, whether through individually listing substances or by the use of generic controls that target a molecular family in an attempt to future-proof such prohibitions. This process involves consultation with the Government’s Advisory Body, the Advisory Council on the Misuse of Drugs, who review and report on the drug in question and its capacity to cause social harm before its inclusion in the Misuse of Drugs Act 1971. In 2011, Temporary Class Drug Orders were introduced, allowing for substances to be instantly brought within the Act for a period of up to 1 year, without the need for prior review, following which time – during which an Advisory Council on the Misuse of Drugs assessment will have taken place – they can either be removed from or permanently incorporated within the Misuse of Drugs Act 1971 (ss. 2A, 2B); Temporary Class Drug Orders were a response to the traditional process being viewed as too glacial for the fast moving pace of chemical developments.

However, a sense remained that the state was chasing its own tail, with each new ban stimulating innovation, the net result being that people – often young people – were increasingly ingesting ever more obscure substances, the acute and chronic health risks of which less and less was known about. Thus, prior to the 2015 general election, there was cross-party support that still something more needed to

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be done about NPS, as evidenced by their warranting a mention in the manifestos of all three of the main political parties: the Conservative Party (2015, p. 59) promised to “create a blanket ban on all new psychoactive substances, protecting young people from exposure to so-called ‘legal highs’,” the Labour Party Manifesto (2015, p. 52) included a commitment “to ban the sale and distribution of dangerous psychoactive substances, so-called ‘legal highs,’” whereas the Liberal Democrats (2015, p. 126) said that they would “clamp down on those who produce and sell unregulated chemical highs.”

Upon coming to power in 2015, the Conservative Government was able to act quickly on this issue as, in 2013, the (Coalition) Government had commissioned the New Psychoactive Substances Review Expert Panel (2014) to scrutinize the existing legislative approach and make recommendations for ways forward, which they duly did. It is noteworthy that, from its title through to its content, the resulting publication – both in its construction of the problem and the proposals made for its resolution – concentrated on new chemicals, with no mention made of ancient plants. The panel reported that “the emergence of NPS has been a ‘game changer’” (p. 52) and in terms of how it was thus believed that the rules of the game needed to be rewritten accordingly, recommended that new legislation was necessitated, with the focus being on those who supply – rather than those who use – NPS. The perceived need to legislate in this area is far from unique to the UK, with a number of countries throughout Europe having innovated diverse legal responses to the phenomenon of NPS in the past few years (EMCDDA, 2016).

**TAKING AIM**

This new legislation came in the form of the PSA. To contextualize, a thumbnail sketch of the English legislative process is offered. Legislation is enacted by Parliament, which consists of three elements: the (elected) House of Commons, the (unlected) House of Lords, and the monarch. Legislative proposals begin as a Bill which must be approved by both Houses and receive Royal Assent from the monarch before becoming an enforceable Act of Parliament. Bills can be introduced in either the Commons or the Lords, and each Bill is given three readings in both Houses before being presented for Royal Assent. After the second reading, there is a committee stage, where a Standing Committee carefully considers each provision in the Bill. Amendments to the Bill can be suggested in either the Lords or the Commons and must be agreed upon by both Houses (Slapper & Kelly, 2017, pp. 157–158).

In laying the Bill that preceded the PSA before the House of Lords, Lord Bates enunciated its aims in no uncertain terms, worth replicating in full as a clear statement of intent: “My Lords, the objective of this Bill is to protect the public. New psychoactive substances are not merely a bit of harmless fun providing an instant buzz. These substances are untested and unknown, with clear evidence of short-term harms and potential long-term adverse consequences. The trade in these substances is quite simply reckless. Those who persecute it have no regard for the welfare of the end user. Indeed, the producers of these substances deliberately seek to evade the controls on drugs by manufacturing products that mimic the effect of controlled drugs. However, in mimicking the effects, these synthetic copies can also replicate the dangers associated with the original drug. It is not just the manufacturers of new psychoactive substances who take this cavalier approach to public safety. Those who sell them are not open and honest about the products that they are marketing. Instead, they seek to absolve themselves of liability by selling the substances in packages labelled ‘not for human consumption’, ‘plant food’, or some other fiction. We should be under no illusion about the harms caused by new psychoactive substances. They have been associated with paranoia, psychosis and seizures, and tragically have led to the death of too many unsuspecting users . . . [W]e found ourselves sucked into a game of cat and mouse: no sooner do the Government ban one substance than another pops up with a new chemical formulation designed to evade the current controls, with the added concern that these new formulations have greater potency. And so the process continues” (HL 9 Jun 2015: col. 735).

This framing of the debate was replicated in the House of Commons, epitomized here in the comments from MP Carolyn Harris: “We can call these things what we like—legal highs, new psychoactive substances, NPSs, lethal highs—but it all amounts to the same thing: a product that is highly dangerous, addictive and readily available on our streets. In my constituency, these horrendous substances are blighting the lives of those taking them, creating havoc for the communities who have to endure the antisocial behaviour associated with them and terrifying the families of those young people who take them. Mothers have told me they fear that the next time their child walks through the door, it could be the last time they see them . . . I urge the House to come together as one to ensure that these sickening and fatal substances are removed from our society once and for all. As a politician, I am extremely concerned about them, but as a mother, I am terrified” (HC 19 Oct 2015: col. 731). The concern in both Houses is manifestly explicitly with NPS, with the vulnerable young people most likely to take them, with the associated antisocial behavior, with sudden deaths: a situation that bears no resemblance to the taking of plant medicines in ceremonial situations.

The stated aim of the PSA itself is: “to make provision about psychoactive substances.” This seemingly innocuous statement uncouples drug legislation from the concept of harm, which has traditionally – at least ostensibly – underpinned this area, as embodied within the proclaimed intentions of the Misuse of Drugs Act 1971: “to make new provision with respect to dangerous or otherwise harmful drugs.” Questions can – and have – repeatedly been raised about the deployment of that concept in practice, such as why it is that the legislation omits to include two of the most harmful drugs – alcohol and tobacco – and why a number of psychedelic substances with a low-risk profile are included within Class A of that Act, ostensibly reserved for the most dangerous substances (Nutt, King, & Phillips, 2010). However, the fact that the PSA removes even the charade of drug policy being about reducing harm is alarming: the PSA is thus fundamentally illiberal as, from a liberal perspective, criminalization can only be justified through reference to harm, specifically, harm to others (Mill, 1869).
A BAN ON (ALMOST) EVERYTHING

Section 2 of the PSA defines what is meant by “psychoactive substance”: namely, “any substance which is capable of producing a psychoactive effect in a person who consumes it … if by stimulating or depressing the person’s central nervous system, it affects the person’s mental functioning or emotional state.” The Explanatory Notes that accompany the Act give further insight into the changes to one’s inner landscape that the state hopes to curtail; specifically, anything that may “cause an alteration in the individual’s state of consciousness by producing a range of effects including, but not limited to: hallucinations; changes in alertness, perception of time and space, mood or empathy with others; and drowsiness” (Home Office, 2016, p. 38). It is strongly contended here that this definition brings the PSA into conflict with Article 9 of the European Convention on Human Rights, which protects the right to freedom of thought; indeed, the PSA can be seen as an unmasked threat to cognitive liberty. Those commentators who have long argued that drug policy is as much concerned with controlling mind states as preventing harm – this author among them – appear vindicated, although there is no sweetness in being proved right in this way, in having one’s worst fears confirmed (Boire, 2000; Walsh, 2016).

It seems apt at this point to elucidate the significance of the European Convention on Human Rights to the legislative process in the UK. This Convention has been incorporated into domestic law by the Human Rights Act 1998; under this statute, the Government is obligated to ensure that all new legislation is European Convention on Human Rights compliant, or to acknowledge that it is not and the reasons why they nonetheless intend to proceed with it (Human Rights Act 1998, s. 19). In spite of this, there was no mention of the human rights implications of a blanket ban in the impact assessment that preceded the PSA (Home Office, 2015), and there was little talk of the human rights ramifications of the PSA in Parliament; rather, the view was taken that the offences created therein are modeled around those already existent within the Misuse of Drugs Act 1971 – which, having been in force for 45 years, are viewed as satisfying human rights obligations – therefore requiring no further scrutiny on this front (Lord Bates, HL 30 Jun 2015: col. 1945). Leaving to one side the fact that this author contests that the Misuse of Drugs Act 1971 is not human rights compliant (Walsh, 2010), the PSA diverges considerably from this earlier piece of legislation, going much further (hence why it is viewed by the state as necessary): with its “blanket ban” as against named substances approach; with its lack of any anchor to the crucial concept of harm. To conflate the two pieces of legislation in this way for European Convention on Human Rights compliance purposes is thus an unacceptable abrogation of duty under the Human Rights Act 1998.

Furthermore, with its absence of any kind of threshold, the definition of psychoactivity within section 2 practically covers everything: anything that is taken in through the senses produces an alteration in consciousness, is thus psychoactive, as a commentator in the New Scientist acknowledged in referring to “the mind-bendingly foolish Psychoactive Substances Bill – which would make the smell of flowers illegal” (Swain, 2016a, p. 1287). In a (largely symbolic) protest, MP Paul Flynn raised an Early Day Motion, wherein he described the Bill, with its blanket ban, as “one of the stupidest, most dangerous and unscientific pieces of drugs legislation ever” (EDM 1005, Psychoactive Substances Bill, 2015–2016). The Government defended their approach, with Lord Bates avowing: “we make no apologies for the breadth of the definition. If we were to adopt too narrow a definition, we could, in a few months’ or years’ time, find ourselves having to bring forward further legislation because we were faced with a new generation of harmful substances that escaped the controls provided for in this Bill” (HL 9 Jun 2015: col. 736).

HARMFUL EXEMPTIONS, BENEFICIAL INCLUSIONS

However, there are notable exceptions to the “blanket ban” on psychoactive substances created by section 2, listed under Schedule 1 of the PSA: along with those substances already contained within the Misuse of Drugs Act 1971, medicinal products, caffeine, and food, alcohol and nicotine/tobacco products are exempted. According to the Government’s Explanatory Notes, these latter substances are excluded because they are already controlled through existing legislation (Home Office, 2016). This is fudge, as both alcohol and tobacco are regulated by statute, rather than criminally prohibited, and no satisfactory explanation has been forthcoming as regards why they should be treated so differently. During debate in the Lords, Lord Norton proposed an amendment to remove alcohol from the list of exempted substances; the fact that his act can be read as largely symbolic exemplifies how deeply this nation is steeped in its own cultural soup. Indeed, Lord Norton himself knew his proposed amendment would not succeed, but rather wanted to force Lord Bates to “provide an intellectual justification” for the exclusion of the psychoactive substance alcohol: “The logic of the Bill is, on the face of it, unclear. It seeks to prohibit psychoactive substances that are seen to be harmful, but it then exempts the substance that is the most harmful of all in human, social and economic terms” (HL 30 Jun 2015: col. 1968).

Lord Norton goes on to paint a statistical picture of the harms caused by alcohol, both to those who drink, and to broader society, including, inter alia: the 20,000 deaths a year where alcohol is causally implicated; the 1 million hospital admissions; the 10,000 casualties of drink-driving in the UK in 2012; the involvement of this substance in almost half of all violent incidents; the estimated £21 billion costs in healthcare, crime and lost productivity. As he so succinctly puts it: “Why is one type of misuse apparently culturally acceptable, or at least tolerated, but not the other?” (HL 30 Jun 2015: col. 1968). This disparity in approach – already deeply problematic when contrasting the treatment of alcohol with NPS – becomes ever more so when one considers the plant medicines: substances that there is strong evidence are not only largely harmless, but also actually beneficial, fall under the purview of the Act,
while those that cause the greatest harm are exempted (Labate & Cavnar, 2014b).

Perhaps unsurprisingly, no intellectual justification for the exemption of alcohol was forthcoming, with the most that Lord Bates could muster being that “alcohol has been part of our culture and our society for millennia” (HL 30 Jun 2015: col. 1972), an unacceptable reason for treating the users of divergent preferred mind alterants so differently, and one that could convincingly be argued to breach Article 14 of the European Convention on Human Rights, which provision safeguards individuals in analogous situations from discriminatory differences of treatment where there is no objective and reasonable justification for such discrepancy. As Norman Lamb commented in the Commons, such indefensible disparity of approach can be predicted to “undermine respect for the law” (HC 19 Oct 2015: col. 758). Indeed, this incongruity has long existed, given the failure to include alcohol and tobacco in the Misuse of Drugs Act 1971; the explicit exemption of these psychoactive substances from the PSA merely foregrounds a problem of silent hypocrisy that has long been the backdrop to drug policy, undermining respect for the law for generations.

Lord Bates further commented: “We can all agree that alcohol, when consumed excessively, is a dangerous substance, which is why the sale of alcohol is tightly controlled under existing legislation. However, when used responsibly, alcohol plays an important social part in our communities” (HL 30 Jun 2015: col. 1973). Similarly, plant medicines can be – and much more reliably are – used responsibly; furthermore, they have played – and continue to play – an important social role in the lives of our indigenous ancestors and contemporary peoples, along with increasingly being at the heart of the bonding of tribes of choice through plant medicine ceremonies in the West (Labate, Cavnar, & Gearin, 2017). Lord Bates noted that the Government’s Alcohol Strategy aims at reducing the crime and health problems associated with alcohol “without disproportionate affecting responsible drinkers” (HL 30 Jun 2015: col. 1973): given that the crime and health problems associated with plant medicines are virtually non-existent, this begs the question of why these substances cannot similarly be regulated through education and harm reduction-based measures, rather than through the sledgehammer of the criminal law, thus striking more of an equilibrium between the state’s legitimate interest in public protection and the rights of individuals.

Lord Bates also placed importance on the £10 billion plus raised each year in alcohol duty, the £38 billion worth of alcoholic beverages sold in the UK in 2011 (HL 30 Jun 2015: col. 1973). Aside from being a naked endorsement of the prioritization of profit, this is a non-argument: not only does the Minister omit to mention the enormous financial costs to the taxpayer of the nation’s favorite drug (while private corporations benefit), but any substance could (and would) have duty levied on it, thus raising money for the state, were it to be brought within a system of regulation: with less harmful – indeed, beneficial – substances, the profits would be even more likely to outweigh the costs (for more on regulation as an alternative approach to prohibition, see Haden, Emerson, & Tupper, 2016).

Voicing his concern at the very suggestion that alcohol might be included within the Act, the Earl of Erroll remarked: “Every society in the world has always had something that allowed them to let their hair down at parties. Introducing the subject of alcohol into this sort of debate always makes me think of the definition of a puritan as someone who has a haunting fear that someone somewhere might be enjoying themselves. I get very worried when we try to cover all these things and try to stop everything” (HL 30 Jun 2015: col. 1971). This author could not agree more, and yet, that is precisely what the PSA attempts to do, bar a couple of culturally favored substances. What is being recommended here is not the puritanical prohibition of alcohol and tobacco but rather the exemption of plant medicines, substances typically taken for much deeper reasons than letting one’s hair down (although this in itself, it is readily acknowledged, is a supremely important part of the human experience): drug policy ought not to be based on the drug preferences of those with power but rather rooted in human rights and a scientifically informed impact assessment.

Indeed, there was some attempt by interested groups to have plant medicines exempted from the PSA through the written evidence submitted to the Public Bill Committee tasked with scrutinizing the legislation, although these pleas were ignored, with no discussion of any depth taking place on such issues in Parliament. Most notably, the International Center for Ethnobotanical Education, Research and Services – a non-profit organization, dedicated to promoting public policy based on scientific evidence and human rights in relation to plant medicines – raised concerns that these substances were being “lumped in with ‘drugs of abuse’ when they do not fit there” and are, indeed, “often taken to break such [addictive] patterns, to stem the spiritual void from which they stem” (Public Bill Committee, 2015, p. 27; for more on the use of plant medicines to overcome addictions, see Talin & Sanabria, 2017).

The International Center for Ethnobotanical Education, Research and Services powerfully concludes: “Equating the ritualistic, religious and therapeutic developmental uses of these plants to the problematic uses of controlled drugs like opiates, cocaine or methamphetamine – or treating the traditional shamans, their disciples and church leaders as ‘drug traffickers’ involved in illegal markets – is misinformed, not based on evidence, and contributes to confusion about the human rights based legitimacy of these practices” (p. 24). Thus, they recommended that an exemption to the PSA should be made for plant medicines “that have a long history of ceremonial uses in different parts of the world, and have known neuropharmacological effects, risks and potential benefits due to extensive scientific research” (p. 26).

Adopting a different tactic, but with a view to achieving similar aims, the Advisory Council on the Misuse of Drugs – curiously excluded from the drafting of the Bill – proposed an alternative definition of “psychoactive substance,” explicitly crafted to omit natural products through a focus on the process of synthesis “by human instigation of at least one chemical reaction” (ACMD, 2015), a definition which, it is worth noting, would also exempt ayahuasca, as no such reaction takes place in the making of the brew. When asked specifically about why the definition in the PSA could not be thus restricted to synthetic substances, Lord Bates...
responded that to do so “would allow producers to take advantage of natural products that have a harmful effect” (HL 23 Jun 2015: col. 1532).

The strength of this rebuttal was doubted by Baroness Molly Meacher, who noted that “there is in fact great value in separating the machinery for botanical substances, which are developed over many years and which can be brought under the Misuse of Drugs Act 1971 if they are dangerous – harmful – from synthetic substances, which need a rather different kind of machinery” (HL 14 Jul 2015: col. 481). She pointed out that “[t]he only botanicals currently used recreationally that might currently pose any concern – I emphasize ‘any’ – are kratom and salvia. However, they are not reported to lead to deaths or public disorder and, if they became more of a concern, they could readily be controlled under the Misuse of Drugs Act 1971” (HL 14 Jul 2015: col. 464). Furthermore, referring to Salvia divinorum, Baroness Hamwee – in a welcome contribution that perhaps came the closest to the concerns of this paper being discussed in Parliament – pointed out: “The second part of that name suggests that there are sacred aspects to that substance, as is the case . . . . [I]t has been in use for centuries. So I question whether it is appropriate to ban such substances now through this mechanism . . . . In the case of a substance that is integral to a religion, like the variety of sage to which I have referred, is there a mechanism for permitting its use in a religious context?” (HL 14 Jul 2015: col. 466).

RELIGIOUS DISCRIMINATION

There are such mechanisms: most simply, including the plant medicines within the list of exemptions would suffice. Indeed, this was the suggestion made by Danny Diskin – chair of the Interfaith Alliance, an organization that focuses on the persecution of religious minorities – when he voiced his concerns about the impact of the PSA on religious practices in another submission to the Public Bill Committee (2015, p. 21). Diskin narrowed the focus specifically to ayahuasca and its use in a religious context by certain churches, such as the Uniao de Vegetal and the Santo Daime. He explained that these are established faith communities – rooted in Brazil, now with groups internationally, including in the UK – that use ayahuasca as an essential part of their religious practice, viewing the brew as a sacrament, rather than as a psychoactive substance. Diskin’s evidence foregrounded the scientific research into long-term ayahuasca users in these communities, which has found them to outperform non-ayahuasca users in terms of cognitive ability and positive personality traits (for a comprehensive scientific literature review, see Bouso, 2012). A jurisdictional comparison is also drawn, documenting how a number of countries, both in South America and Europe, along with certain states in the United States, legally safeguard these practices (for a comparative overview of religious exemptions, see Labate & Cavnar, 2014a).

In light of this scientific and comparative evidence, the human rights implications of an outright ban were raised by Diskin, recommending an amendment to exclude the use of ayahuasca in religious contexts from the PSA.

As an important aside, returning to the controversy regarding the legal status of ayahuasca, it is worth noting that if the argument is accepted that it does not rightly fall within the Misuse of Drugs Act 1971, as is assumed by Diskin – it would then most definitely fall within the PSA; however, the constituent plants used to make the brew would not, given that they are not psychoactive when ingested alone. Indeed, interestingly, ayahuasca naturally fits the model that it is predicted chemists will now embrace to avoid the strictures of the PSA: namely, producing substances that are only psychoactive when combined (Fisher, 2016).

The failure to incorporate the Interfaith Alliance’s proposed amendment leaves the PSA open to a human rights challenge in the courts under the second part of Article 9, with its protection of freedom of religion, another mechanism through which use might be permitted in a religious context. Under the aforementioned Human Rights Act 1998, all legislation is required to be read in such a manner that it gives effect to the rights protected under the European Convention on Human Rights (Human Rights Act 1998, s. 3). Where this is found to be impossible – where primary legislation incontrovertibly conflicts with protected rights – the courts may issue a declaration of incompatibility (Human Rights Act 1998, s. 4); it is then up to the legislature to remedy the situation. This process for challenging legislation from a human rights perspective has been successfully deployed in a number of cases [R. (on the application of H.) v Mental Health Review Tribunal for North and East London Region, 2001].

What constitutes religion is broadly construed in the UK, extending well beyond the doctrinal to all manner of spiritual practices [R. (Williamson & Others) v Secretary of State for Education and Employment, 2005]. Given that many of those who use plant medicines experience them as enabling direct experience of the divine – that they have been used throughout human history for this very reason (Forte, 2012) – the fact that ceremonial use of these substances has now been prohibited by the PSA means, it is strongly argued here, that Article 9 is engaged. The right to freedom of religion is absolute; however, the manifestation of such is subject to limitations, as contained within Article 9(2): “Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society 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.” Are plant medicine ceremonies to be seen as manifestations of one’s religion or beliefs, thereby subject to protection (but also, potentially, to limitation). It is submitted that the way in which the right is framed does not quite capture it, being too binary: the use of plant medicines, the inner experiences they catalyze, are the very substrate of belief systems, rather than simply a manifestation of such.

Leaving such finer points aside, in assessing the viability of a potential test case alleging breach of Article 9 by the PSA as regards its prohibition of plant medicines, it is worth considering the (somewhat) analogous cases that have been heard in the past, where the claim was made that the Misuse of Drugs Act 1971 breached this provision through its
banning of specific substances. The two most notable such cases are Taylor (2001) and Aziz (2012): as Aziz applied Taylor, it is the reasoning in this earlier case that shall be focused in on (for more on this case and related issues, see Fortson, 2012; Gibson, 2010). In Taylor, the argument was made that the Misuse of Drugs Act 1971 – by criminalizing the supply of cannabis – unjustifiably breached Taylor’s right to the manifestation of his religious freedom, which, as a Rastafarian, included the practice of sharing cannabis with his fellow believers. This claim was rejected by the courts, both at trial and in refusing leave to appeal: their circular logic was that the fact the state had seen fit to control cannabis under the Misuse of Drugs Act 1971 proved that the prohibition needed to be upheld to protect the public, as per the provisions under Article 9(2).

This argument, weak in relation to cannabis and the Misuse of Drugs Act 1971, is entirely unsustainable in relation to the plant medicines and the PSA: given that the plant medicines are not named under the Act, that they received practically no mention throughout the legislative process and most significantly that the statute is not rooted in the harm principle, the assumption cannot be drawn that their prohibition is necessary to protect the public in any of the ways delineated by Article 9(2). To reiterate this point, which cannot be emphasized strongly enough: the qualifications are rooted in a presupposition of harm; the PSA is not. Before justifiably engaging Article 9(2), the courts would need to engage with an extensive risk/benefit analysis, rooted in empirical evidence, as presented by the prosecution and defense: it is strongly suggested that, were this to happen, the likely outcome would be that it is not acceptable to infringe upon the religious rights of those involved in plant medicine ceremonies through recourse to this provision, given that – as has been evidenced throughout – these practices typically bring great benefits to participants, while simultaneously carrying minimal risks to society. Indeed, again, the binary here is false: society is made up of individuals, thus profiting from the benefits they receive.

The other main argument that was relied upon to “justify” interfering with Taylor’s religious freedom was that it was necessary for the UK to uphold the prohibition concerning cannabis to satisfy its international obligations under the global system of drug control, specifically the United Nations Single Convention on Narcotic Drugs (1961), which explicitly prohibits cannabis. This argument collapses in relation to the plant medicines, which – as discussed in opening – are not included within any of the Drug Conventions: even if they were, these instruments allow for exemptions for constitutional reasons, such as the protection of religious freedom. As such, the previously mentioned dispensations for the religious use of ayahuasca by certain churches in a number of countries throughout the world have not been judged to be problematic in this respect.

Regardless, the only religious implications of the PSA that were given any weight were the concerns that the incense wafted in Church of England services might be prohibited as a psychoactive. In their written evidence submitted to the Home Affairs Committee’s (2015) inquiry into psychoactive substances, the Association of English Cathedrals stated that: “Incense has been used for worship purposes for millennia, and by the Christian church since its foundation . . . Incense is used to enhance the worship experience, and no longer being able to use it would have an adverse impact on the conduct of worship.” Thus, interestingly, rather than attempting to deny the psychoactivity of incense, the church was asking for an exemption.

In response, the Government offered an assurance that incense did not fall under the PSA due to the fact that the offenses involving psychoactive substances that it creates – production, supply, and so forth – require proof of fault: namely, that the individual concerned knew (or was reckless as to whether) the substance is likely to be consumed for its psychoactive effects (Davies, 2015). Again, this is false: the religious use of incense intentionally works with the fact that it is mildly psychoactive, as church services – and the often elaborate environments in which they are held – are purposefully an assault on all of the senses, designed to transport one out of quotidian consciousness, helping to stimulate belief in a higher power ( Viladesau, 2014). Religious discrimination appears to be in play here, with cultural blindness leading to the practices of the Church of England not even being viewed as falling under the Act, while other sacred ceremonies are outlawed.

THE RELAXED APPROACH TO POPPERS

Along with incense, the other substances reconceptualized so as not to fall within the parameters of the PSA were alkyl nitrites – popularly known as poppers – and the story of how this came to pass is instructive. Poppers, along with producing an instant high, have a muscle-relaxing effect: as such, they are a popular sex aid, particularly among gay men. There are many parallels that can be drawn between the points that were debated at length in Parliament in the (successful) attempt to have these substances excluded from the PSA and similar (arguably stronger) claims that could have been made (but largely were not) in relation to the plant medicines. Consider, for instance, the following: “Poppers are not a new drug that has recently appeared on the market and that we know nothing about . . . [T]hey were first created in the 19th century, so they are not a new chemical compound that has been synthetically produced to mimic the effects of already banned substances. There is a good argument to be made that poppers are not only relatively harmless, but are not the sort of ‘new’ psychoactive substance that the Bill is intended to deal with” (MP Lyn Brown, HC 20 Jan 2016: col. 1449). All of which is even more true of the plant medicines, which have never been created, other than by the processes of evolution.

Pivotal to the U-turn on poppers was the role played by MP Crispin Blunt, who “outed” himself as a poppers user in Parliament, stating: “Sometimes a measure is proposed that becomes personal to oneself and one realizes that the Government are about to do something fantastically stupid. In such circumstances, one has a duty to speak up” (HC 20 Jan 2016: col. 1456). While Blunt’s courage is commended, all that is really being said here is that he gains benefit from taking these psychoactive substances and wants to be able to carry on doing so: the same is true for those who attend plant medicine ceremonies and again
it bears repeating, drug policy ought not to be based on the drug preferences of those with power but rather rooted in human rights and a scientifically informed impact assessment.

Indeed, the parliamentary debate surrounding poppers was an almost unprecedented sterling example of the latter: “[w]hen we are talking about risks . . . it is important that we do not start banning things on the basis of one or two incidents. There has to be a significant risk of significant harm to a significant number of people, otherwise we would be banning cigarettes and alcohol tomorrow” (MP Mike Freer, HC 20 Jan 2016: col. 1460). Leaving aside the obvious point that the risks of cigarettes and alcohol are somewhat more significant than “one or two incidents,” the need to consider the rare adverse incidents involving certain psychoactives in their broader context is an important one, particularly relevant to the plant medicines, where – on the very occasional instance when things go dramatically wrong – a disproportionate amount of negative press is garnered, with prohibition then viewed as vindicated (Dunn, 2016).

Admirably, the discussion went beyond debating the risks of poppers, encompassing consideration of the risks of prohibiting poppers, as is necessary when carrying out a valid impact assessment, although, again, this almost never takes place in practice when it comes to the formulation of UK drug policy. For instance, the Home Affairs Select Committee (2015, p. 65) discussed evidence received from the National AIDS Trust, who were “concerned that a ban on the sale of alkyl nitrites would not end their use, but simply drive retail and use ‘underground.’” It argued that this would take the use of alkyl nitrites outside any regulatory regime which might successfully protect gay men from particular compounds, leading to an increased risk of health harms, and even possibly deaths. In addition, if the sale of ‘poppers’ is displaced to drug dealers, there could be a further risk of migration to the use of other drugs.” All of which is indisputable, along with being equally true for every psychoactive substance.

A comprehensive impact assessment also needs to weigh risks against benefits. The ability of poppers to enhance sexual pleasure was discussed in Parliament as a positive; again, a welcome acknowledgment in drug policy debate, where the capacity of drugs to bring pleasure, alongside recognition of the importance of this, is rarely (if ever) acknowledged. The point was made that: “If people want their relationship to be as intimate as possible and poppers facilitate that, they are an important element in the emotional wellbeing of that couple. Therefore, if we are talking about the medicinal benefits, we have to include the emotional and mental health benefits that the use of poppers in a relationship can bring” (MP Mike Freer, HC 20 Jan 2016: col. 1460). This heartening focus on wide-ranging benefits could equally have been extended to plant medicines.

In their review of alkyl nitrates, commissioned in response to this issue being heavily debated in Parliament, the Advisory Council on the Misuse of Drugs concluded that poppers were not actually psychoactive, increasing blood flow to the brain, yet not crossing the blood–brain barrier (ACMD, 2016): given that poppers indisputably get you high, this smacks of sophistry – the use of clever but false arguments to achieve a desired result – albeit with an admirable intention and outcome. The Advisory Council on the Misuse of Drugs also emphasized that poppers were not seen to be capable of having harmful effects sufficient to constitute a social problem: regardless of the veracity of this claim, it is irrelevant under the terms of the PSA (the predominant reason why this piece of legislation is so objectionable). Again, a similar such an assertion can be made in relation to plant medicines, which no one could convincingly describe as constituting a social problem. As a result of these deliberations, poppers are exempted from the PSA: “[t]he circle deftly squared, another popular drug falls outside the UK’s increasingly threadbare blanket ban on drugs” (Swain, 2016b).

CONCLUDING REMARKS

The plant medicines have been caught in the crossfire of the PSA: ancient sacraments, swept up in the panic about NPS. Their inclusion in this regime – unjustified and unjustifiable – is not rooted in an empirical assessment of their (minimal) risks of harm, ignores their potential for benefit, and can be seen to breach human rights obligations under the European Convention on Human Rights, most notably the protection by Article 9 of freedom of thought and religion. The central argument here is that plant medicines should be excluded from the PSA, whether through changing the definition of “psychoactive substances” therein, or through listing them within the exemptions.

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