WE HAVE A PROBLEM – Part 1: a call for a paradigm shift by Casey Hardison

Abstract

I declare a breakdown in Government's handling of their perceived "drug problem". Not that we do not have a "drug problem", we do, it is that we are going about the process of ameliorating the problem in an inept, irrational, irresponsible and unfair manner. If we are committed to experiencing an integrated solution to the "drug problem" then we must initiate a paradigm shift not unlike that which occurred in medicine after the inventions of the microscope and penicillin. This first article of three lays essential groundwork to bootstrap the general interest reader into the process.

Towards Understanding

Those who read my previous article in this journal will be aware that I am primarily interested in the intersection of healing, both psychospiritual and physical, conjunct the consumption of psychoactive drugs. I argue that the therapeutic process, particularly in the realm of drugs and drug addiction, is governed by declarations either made by the sufferer or the healer, including the self-healer ('physician heal thyself'), which are listened by the sufferer with credibility or faith, e.g. "If I could but touch his robe, I will be healed … And Jesus said: your faith in your declaration hath healed you", Mark 5:24-35; or, in the context of this journal, "We are more than one-hundred men and women who have recovered from a seemingly hopeless state of mind". (Alcoholics Anonymous, 1938)

I also argue that as the understanding of declared problems and their interpretations vary according to explanatory models or belief systems so do the modes of therapy. Hence, an individual's or organization's explanatory model or mindset is the single most important factor in the therapeutic or "problem solving" process, although, the process itself is catalysed by a declaration that something is wrong not right, etc. Three conclusions arise:

1. The consumption of psychoactive drugs have been used for millennia with the mental intention of amelioration of perceived dis-ease, be it stress, boredom, social ineptitude, genetic and/or the psychospiritual pathologies of the modern day "dysfunctional" family/society.

2. For some individuals, and regardless of any initial intention of drug use to ameliorate perceived dis-ease, their drug use can get out of hand and lead to harmful effects sufficient to constitute a social problem to themselves and others.

3. From a therapeutic perspective the Government's Drug Strategy can be seen as an attempt to ameliorate the social aspect of the 'drug problem' via politics and law.

The first and third of these conclusions operate at opposing ends of the spectrum, from the individual to the society of which s/he is an integral part. The second conclusion meets in the middle and is the justification for Government's intervention via the third. Here I am primarily concerned with Government's declaration of a 'drug problem' and the actions which arise from it. I declare 'the problem' with Government's declaration of a drug problem lies in their poor understanding and interpretation of 'the problem'. This poor understanding has inevitably led to futile, half-measure intervention strategies.

This is not to say, however, that I have a correct understanding, interpretation or ideal strategy for intervention. What I have is a subjective perspective (and the time) of one who is affected by Government's current drug strategy coupled with a desire to birth a new paradigm which markedly reduces drug harm. It starts with each of us being cognisant of Government's limited justifications for intervention, their limited tool set, our subjective perceptions of 'the problem' and of what we each expect Government to do about 'it', all of which we have created and constitutes our collective explanatory model.

A Governmental Explanatory Model

The sole purpose of Government is to protect the health and welfare of the public and the property which sustains them. Thus, it is the job of Government to facilitate the necessary conversations and provide the resources and tools to intervene effectively and efficiently in any problem which enters the social sphere and drains off precious and limited public resources. And whilst the contours of what constitutes a threat to health and welfare of the social body are difficult to define and competing interests must be balanced carefully, it is exceptionally inefficient for us to expect Government to protect us from every risk of harm, particularly those we voluntarily impose on ourselves, (as is the case with the dangerous or otherwise harmful drugs of this journal's interest), because to do so abrogates personal responsibility and leaves us with the State as parent and a society of metaphorically resentful and unruly teenagers.

Thus, it is vital that justifications offered by Government for intervention are based on sound principles which are neutral, unbiased and generally applicable yet tailorable to the specific needs of the individual, i.e., personal liberty must be balanced with the welfare of the community, relevant factors must be included and irrelevant factors ignored, like cases should be treated alike except where relevant differences justify differential treatment, and the means chosen should be suitable to the end sought to be achieved.

The general means by which Government protects health and welfare is by the regulation of people's behaviour, our behaviour, whether that be the individual citizen or the body corporate. This is principally accomplished by rules and regulations created in the Legislature and enforced with some discretion by the Executive. The Courts are available to serve as the arbiter of what the Legislature's law actually means, to ensure that the Executive is administering and/or enforcing the law fairly, rationally, and within the four corners of the Legislature's laws, and to judge impartially any evidence presented which may show that any person or persons brought before them have transgressed the spirit or letter of the law.

Largely, laws made by the Legislature follow the property rights of commerce: cultivation, production, manufacture, storage, packaging, transportation, trade, possession, and use. These property rights are what we find in the primary toolkit with which Government ameliorates the drug problem, the Misuse of Drugs Act 1971. This Act of Parliament is exceptionally well designed and requires a closer look.

The Beautiful Act

The Misuse of Drugs Act 1971 ("the Act") is the United Kingdom's principal legal framework for the regulation of property rights re "dangerous or otherwise harmful drugs". The Act's title, long title and first two sections describe the legitimate aims of the Act and the legitimate decision making process. The remaining sections describe an integrated framework of regulatory options for achieving the Act's several aims.

For clarity, it is a vital fact that the term "drug", as used by the Act, is not synonymous with the expression "controlled drug", s2(1)(a); thus, "drug" refers to <u>all</u> "dangerous or otherwise harmful drugs" irrespective of their familiarity, acceptability or purposes or modes of use (medical or non-medical, scientific or non-scientific, social or asocial). Similarly, "misuse" applies only to drug consumption, s37(2); thus, "possession", "supply" and "production" are not "misuse" but property rights regulated by the Act. This means the 1971 Act regulates people <u>not</u> drugs.

The Act's primary legitimate aim is to reduce the potential risks to individuals and society from the exercise of property rights in dangerous or otherwise harmful "drugs which are being or appear … likely to be misused and of which the misuse is having or appears … capable of having harmful effects sufficient to constitute a social problem", s1(2). *N.B.* not all drug use has effects sufficient to constitute a social problem.

The Act's secondary legitimate aim is for research, education, regulations, sanctions and drug classification to evolve with evidence of each drug's harm potential, the ability of persons to trade and use them safely, and the efficacy of the chosen means in genuinely meeting the Act's aims of reducing harms caused by problematic drug use and or misuse.

To this end, the Advisory Council on the Misuse of Drugs ("ACMD") is charged under s1(2) of the Misuse of Drugs Act 1971 with a statutory duty to provide government with independent scientific advice concerning evidence of drug harmfulness and "advice on measures (whether or not involving changes in the law) which in the opinion of the Council ought to be taken … for restricting the availability of such drugs or supervising arrangements for their supply"… facilitating "advice" and "treatment" … "promoting cooperation between [stakeholders]" … undertaking "research" designed to promote a deeper understanding of problem drug use … "educating the public about the dangers of misusing such drugs" and other essential measures to minimise drug consumption risks and harms. *N.B.* the Act is not about prohibition of all ludibund use and commerce of controlled drugs; the Act, like all legislation, is about reducing harm and increasing benefit!

Next, as a component of ensuring procedural fairness, proportionality and consistency, the Home Secretary has a statutory duty to consult the ACMD, ss2(5), s7(7) & 31(3), before presenting to both Houses of Parliament for resolution any subordinate legislation proposing "alteration of the law", s1(2), *viz* changes in the Act's schedules, classification system, regulations, sanctions, etc.

Crucially, changes to a controlled drug's classification, such as the recent furore over *Cannabis*, do <u>not</u> affect the regulation of property rights as controlled drug classification, ostensibly ranked according to drug harmfulness in Schedule 2, is directly linked, via s25, only to the sanctions for the contravention of the regulations in Schedule 4 and not (like the Medicines Act 1968) to the regulations made under the Act. Whilst this can aid discretional flexibility, it can lack proportionality.

At the heart of the classification system is the differentiation of 'controlled drugs' into three "Classes" from A to C. On this the Home Secretary recently said:

> "The three-tier classification was designed to make it possible to control particular drugs according to their <u>comparative harmfulness</u> either to individuals or to society at large when they are misused". (HCSTC, 2006, emphasis added, *cf.* Nutt et al, 2007)

According to the 2005-2006 Science and Technology Committee report, HC 1031, *Drug classification: making a hash of it?*, "the United Nations Single Convention on Narcotic Drugs 1961 and its attempts to establish a Convention on Psychotropic Substances (eventually ratified in 1971) formed an important backdrop to the United Kingdom's efforts to rationalise its legislation in this area. James Callahan, the then Home Secretary, told Parliament in 1970 that in developing the classification system the Government had used the UN Single Convention and guidance provided by the World Health Organisation to place drugs: "in the order in which we think they should be classified of harmfulness and danger"." (House of Commons, 2006) But, the Rt Hon James Callahan MP went further and elaborated upon the purpose of the new Misuse of Drugs Act and its classification system:

> "The object here is to make, so far as possible, a more sensible differentiation between drugs. It will divide them according to their accepted dangers and harmfulness in the light of current knowledge and it will provide for changes to be made in the classification in the light of new scientific knowledge". (House of Commons, 1970)

From this it can be seen that the drafters of the 1971 Misuse of Drugs Act envisaged a quintessentially flexible and evolutive instrument; nowhere is this more apparent than s31(1)(a), which authorizes the Home Secretary to make different regulations for different classes of drugs, persons or circumstances, and s7, which explicitly enables the Home Secretary to make regulations which allow distinction between the use of and commerce in controlled drugs for ludibund or recreational purposes, ss7(1)-7(2), which "may" be made lawful, and the use of and commerce in controlled drugs for medical, scientific and "other special purposes", s7(3), which "shall" be lawful.

I believe ss1, 7(1)-7(2) conjunct s31(1)(a) make clear Parliament's intention not to fetter the legal discretion of the ACMD or the Home Secretary to the rigid 'prohibitionist' regime of the three United Nations drug Conventions, which each obliges only the Executive branch of Government – subject to its constitutional limitations – to restrict the exercise of property rights in "controlled drugs" to medical and scientific purposes.

Yet, current regulations made by the Home Secretary for non-medical or non-scientific use and commerce of controlled drugs consist of total extinction of property rights – import/export, s3, supply and production, s4, possession, s5, etc. – irrespective of drug classification or evidence of drug harmfulness. This irrationality is the crux of Government's breakdown in reducing drug use harm.

Conscious and Unconscious Distinctions

Governments are familiar with the drugs traditionally used by the electoral majority, alcohol and tobacco, and with the medicinal drugs of Western Biomedicine. Indeed, many Government decision-makers have direct experience of these drugs. This familiarity has lead to consciousness of four types of risk-benefit distinctions applicable to every drug and each requiring different or no intervention by Government:

1. Beneficial use: encourage – *versus* – non-beneficial use: → distinction 2;
2. Reasonably safe use: tolerate – *versus* – unreasonably harmful use: → distinction 3;
3. Unreasonably harmful use resulting in harm to others: legislate against, protect autonomy, promote harm minimisation and provide opportunities for health and emergency services – *versus* – unreasonably harmful use only harming the user: → distinction 4;
4. Unreasonably harmful use harming only the user who is a consenting adult exercising free and fully informed choice: respect autonomy, promote harm minimisation and provide opportunities for health and emergency services – *versus* – unreasonable harmful use only harming the user who is unable to exercise free and fully informed choice, i.e., 'vulnerable groups' – the young, drug dependant users, etc: legislate against, protect autonomy, promote harm minimisation and provide opportunities for health and emergency services.

In contrast, Government and the electoral majority are predominantly unfamiliar with drugs used traditionally by minorities. These make up the bulk of "controlled drugs" found in Schedule 2 of the Act. As a result, Government and the Home Secretary fail to make the above four conscious risk-benefit distinctions focusing instead only on these drugs risks whilst curiously declaring "all drugs are harmful and no-one should use them" (Home Office, 2002a). Yet, this denies the legal distinctions afforded equally harmful but more familiar drugs. Accordingly, Government makes an unjustified distinction:

5. Unfamiliar drugs: proscribe and prohibit – *versus* – equally harmful familiar drugs: protect the taxable market, secure users' rights and depreciate evidence of harm. Here, familiarity leads to acceptability and then to legal status; unfamiliarity creates fear, irrationality and scapegoating – all are grounds for unjustified discrimination and an arbitrary prohibition.

The Root of the Problem

It is the rigid, inflexible yet arbitrary prohibitionist approach embodied in distinction 5 which is at the root of the problem. It's not that prohibition is wrong *per se*, it is that an arbitrary prohibition has the inevitable result of failing adequately to address the threat to public health and safety presented by all harmful drugs. More, it obfuscates and exacerbates actual problems on the ground, diverts resources to inefficient practices, creates crime, clogs the criminal justice system, abrogates human rights, stifles debate and fetters Government's administration of the quintessentially flexible, evolutive and beautifully crafted Misuse of Drugs Act 1971, undermining Parliament's intention to prevent drugs misuse whilst reducing "social problems connected with their misuse", s1(2).

Thus, distinction 5 has lead to whole sections of the Act's harm reduction approach being flatly ignored, even to the point of Government asserting in a September 27th 2007 official response to the Better Regulation Executive ("BRE") that "the basis of our policy of prohibition [is] reflected in the terms of the Misuse of Drugs Act 1971" (BRE, 2007). This means Government does not understand the primary tool bequeathed to them by Parliament, the Act, and/or have allowed their judgment to become so obfuscated by a desire for "A drug-free world" (Arlacchi, 1998), which conclusion 1 above holds is not possible, that they are blind to the Act's aims.

Further, the fundamentally unfair principle of prohibiting only some dangerous or otherwise harmful drugs but not other admittedly dangerous or otherwise harmful drugs, particularly alcohol and tobacco, means that the real aim of Government is not a drug free world but a world free of only some drugs, and in the case of the Misuse of Drugs Act 1971 the drugs sought to be eradicated are those drugs used, traded and preferred by minority cultural groups for a variety of reasons including the amelioration of perceived dis-ease.

Has Government Unconsciously Admitted their Drug Problem?

On September 14th 2006, the ACMD stated in paragraph 1.13 of their report, *Pathways to Problems: hazardous use of tobacco, alcohol and other drugs by young people in the UK and its implications for policy*, that:

> "At present, the legal framework for the regulation and control of drugs clearly distinguishes between drugs such as tobacco and alcohol and various other drugs which can be bought and sold legally (subject to various regulations), drugs which are covered by the Misuse of Drugs Act (1971) and drugs which are classed as medicines, some of which are also covered by the Act. The insights summarised in this chapter indicate that <u>these distinctions are based on historical and cultural factors and lack a consistent and objective basis</u>" (Emphasis added).

I believe this paragraph catalysed a thinly veiled *mea culpa* which appears embodied in five sentences on page 24 of Government's October 13th 2006 Command Paper, Cm 6941, *The Government Reply to the Fifth Report from the House of Commons Science and Technology Committee Session 2005-06 HC 1031 Drug classification: making a hash of it?*:

> "The distinction between legal and illegal substances is not unequivocally based on pharmacology, economic or risk benefit analysis. It is also based in large part on historical and cultural precedents. A classification system that applies to legal as well as illegal substances would be unacceptable to the vast majority of people who use, for example alcohol, responsibly and would conflict with deeply embedded historical tradition and tolerance of consumption of a number of substances that alter mental functioning […]. Legal substances are therefore regulated through other means. However, the Government acknowledges that alcohol and tobacco account for more health problems and deaths than illicit drugs …"

Yet, Government provided no explanation as to how "historical and cultural precedents" or "unacceptab[ility]", distinction 5, are lawful justifications for treating the two drugs, alcohol and tobacco, which they have just acknowledged are the most dangerous in terms of deaths and health problems, as a different case from the "dangerous or otherwise harmful drugs" for which the Misuse of Drugs Act 1971 has jurisdiction. Moreover, no explanation is offered for the three errors of law in the above exposition of Government's explanatory model, which hold:

1. that drugs or "substances" can be "illegal" when it its <u>only</u> the exercise of property rights by persons with respect to controlled drugs that "may", not "shall", be made illegal under the Misuse of Drugs Act 1971, so, in truth, the Act regulates people <u>not</u> drugs; and

2. that the application of the Act's classification system to a drug mandates the extinction of property rights for non-medical and non-scientific purposes; and

3. that Government has the power to exclude two unquestionably harmful drugs from the scope of the Act, thereby exempting (*de facto* and *de jure*) certain individuals or classes of individuals from the application of the principles of a neutral law.

These three errors show that Government does not understand correctly the Misuse of Drugs Act 1971, which regulates their decision-making power, and have not given effect to it.

And lest one considers the admission in Cm 6941 of unequal treatment based on subjective historical and cultural factors as an isolated incident, on September 27th 2007 Government's official response to the Better Regulation Executive stated the following:

> "The Government's policy is to regulate drugs which are classified as illegal or controlled through the 1971 Act and to regulate the use of alcohol and tobacco separately. This policy sensibly recognises that alcohol and tobacco do pose health risks and can have anti-social effects, but recognises also that consumption of alcohol and tobacco is historically embedded in society and that responsible use of alcohol and tobacco is both possible and commonplace" (BRE, 2007).

Contrast the above paragraph with this paragraph from Chapter 5 of the 1997 UN World Drug Report, *The Regulation-Legalization Debate*:

> "The discussion of regulation has inevitably brought alcohol and tobacco into the heart of the debate and highlighted the apparent inconsistency whereby use of some dependence creating drugs is legal and of others is illegal. The cultural and historical justifications offered for this separation may not be credible to the principle targets of today's anti-drug messages – the young" (UNODC, 1997, emphasis added).

Each of these paragraphs concern the "historical and cultural factors" which the statutorily empowered Advisory Council on the Misuse of Drugs reminded Government and the people only last year "lack a consistent and objective basis". Accordingly, Government's drug problem is that they continue to fetter themselves rather than apply their own coherent solution:

> "It is vital that the Government's message to young people is open, honest and credible. Drug laws must accurately reflect the relative harms of different drugs if they are to persuade young people in particular of the dangers of misusing drugs". (Home Office, 2002b)

Equally, if we are committed to our young people and an integrated solution to the drug problem, I say we must each let go of our historical and cultural fetters; they lack credibility and "the times they are a changing" (Dylan, 1963). Nowhere is this more apparent than the extraordinary October 9th 2007 submission by the Chief Constable of North Wales Police, Richard Brunstom QPM, B.Sc., M.Sc., to the Government's 2007 Drug Strategy consultation:

> "If policy on drugs is in future to be pragmatic not moralistic, driven by ethics not dogma, then the current prohibitionist stance will have to be swept away as both unworkable and immoral, to be replaced with an evidenced based unified system (specifically including tobacco and alcohol) aimed at the minimisation of harms to society. This logical, rational and consistent approach will inevitably lead to the legalisation and regulation of all harmful drugs" (Brunstrom, 2007).

A Time for Reflection

I have covered a lot of ground. I started with three general conclusions, used the third to begin analysing Government's explanatory model which is primarily dictated by the tools at hand, their limited justifications for intervention, and the mind state of the majority. I then looked at the primary tool for handling the "drug problem", the Misuse of Drugs Act 1971. I also explored the five distinctions and the three errors of law I say Government makes in administering the Act and illustrated the root of the problem, distinction 5, historical and cultural fettering.

In the next instalment I will look at Government's laudable but largely cosmetic attempt to expand their explanatory model via their Drug Strategy consultation paper, *Drugs: Our Community, Your Say. A Consultation Paper, July 2007*, and begin to delve deeper into Government's use of pejorative language, fudged statistics, and other smoke and mirrors to obfuscate the unconscious bias of a majority dedicated to protecting their dependence on the dangerous or otherwise harmful drugs alcohol and tobacco.

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