From law to regulation: re-appraising the misuse of Drugs Act 1971

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Abstract

Purpose – The purpose of this paper is to re-appraise the Misuse of Drugs Act 1971 in order to develop alternative and new ideas for drug law reform.

Design/methodology/approach – The approach is to analyse the Act from historical and socio-legal perspectives, drawing on the inter-disciplinary field of regulation studies.

Findings – The Act has its roots in radical counter-cultural reform activism in the 1960s. Its innovative legal structure has enabled a diverse range of policy approaches to be possible over the last 50 years. Future drug law reform efforts need to broaden out from a narrow focus on law and also to engage more seriously with the politics of drug law and policy.

Originality/value – Drawing on the inter-disciplinary field of regulation studies leads to novel insights about the politics and practice of drug law reform.

Keywords History, Regulation, Politics, Law, Drug law reform, Socio-legal

Paper type Research paper

Introduction

It is one of the shibboleths of the drug law reform movement in the UK that the Misuse of Drugs Act 1971 is an outmoded piece of prohibitionist legislation that is not just unfit for purpose but has also been actively harmful. The leading NGO Transform has run a campaign during 2021 to repeal and replace the Act, using the social media hashtag #50YearsOfFailure, arguing that not only has it failed to solve the drug problem, it has also caused considerable collateral damage. And you would struggle to find a drug policy researcher or campaigner who would disagree with this.

I do not wish to argue the contrary position. By any measure, the strategy of prohibition has been a disastrous policy mistake and the 1971 Act has provided the legal framework for this in the UK for the last half-century. Nevertheless, I think there is merit in looking a little more closely at the Act. Specifically, I want to examine it through the lenses of law and regulation. It will be argued that a regulatory perspective, in particular, potentially opens up some different questions for researchers and some different “lines of flight” for reformers.

What do I mean by “regulation”? For many, regulation is about rules and their enforcement. I adopt a much broader definition in which regulation is understood as involving “steering the flow of events” (Braithwaite, 2008, p. 1). The significance of this broader definition will become clear as the argument unfolds but, as will be seen, it hinges on drawing a distinction between law and regulation that is particularly important for thinking differently about drug laws and drug law reform.

The paper begins with a brief critical account of the historical context for the Act’s creation which points towards the need to revise some persistent assumptions about its rationale and purpose. In the main part of the paper, I explore the puzzle presented by this apparent...
gap between the origins of the Act and how it is viewed today. The purpose of engaging with this puzzle is not to question the correctness or legitimacy of critiques of the Act but rather to use this as a way in to rethinking some aspects of the drug law reform enterprise in the early 2020s. In conclusion, I offer some reflections on how that enterprise might productively unfold in the next few years.

Historical origins

The origins of the 1971 Act have come to be buried by so many layers of critique over the course of the last half-century that they long ago disappeared from view. Some may still know that the Act was passed under a Conservative government and perhaps see that political fact as aligning with contemporary perceptions of its regressive nature. But the history of the Act’s creation actually tells a rather different story. This has been explored in more detail elsewhere (Seddon, 2020a, 2021) but here I just sketch what an archaeologist might start to discover as those layers of critique are dug up.

Although prohibitive drug laws obviously have their roots in the early 20th century, the key to understanding the 1971 Act’s creation and foundations is to go back to the 1960s. This is perhaps the most mythologised decade of the post-war period but it was undoubtedly a period of intense social and cultural change that made the “Sixties” a remarkable era (Green, 1999). For our purposes, some of the most important features were the rise of a consumer society, the invention of the concept of the teenager and the emergence of a youth culture centred on music and fashion (Marwick, 2006). All of these elements also shaped a rapid growth in recreational drug-taking, which for the first time in Britain began to extend beyond the narrow fields occupied by musicians and other Bohemians and to spread to a wider population of young people. The new drug scene was dominated by cannabis, closely followed by LSD and amphetamines. In the second half of the decade, a focal point for all of this became a vibrant counter-culture which both incorporated but also transcended mainstream youth culture (Green, 1999). It was characterised by an optimism, even utopianism, that a better and more progressive future was coming. Important social reforms on abortion, divorce and homosexuality added to this sense of change being in the air (Robinson et al., 2017, p. 273).

In retrospect, the counter-culture’s high watermark was probably 1967 (Green, 1999, p. 10) calls it the “echt-Sixties year”). This was also a critical point in the story of the creation of the 1971 Act (Seddon, 2020a). It was in 1967 that drug law reform became a central element within the counter-culture, part of its social utopianism, exemplified by the publication on July 24 of a full-page advertisement in The Times newspaper – paid for and co-signed by The Beatles – calling for radical reform of the laws on cannabis. The same summer, the drugs and human rights NGO Release was born and the National Council on Civil Liberties, today known as Liberty, published a report on “Drugs and Civil Liberties.” But most important of all, in April 1967 a sub-committee of the Advisory Committee on Drug Dependence began a review of cannabis policy, chaired by Barbara Wootton.

Wootton’s sub-committee met 17 times between May 1967 and July 1968, eventually publishing its report in January 1969 [Advisory Committee on Drug Dependence (ACDD), 1968]. The impact of the Wootton Report, as it became known, followed a curious path. Its initiator, Roy Jenkins, who had also supported some of the other social reforms of the time, had moved jobs and his successor as Home Secretary, James Callaghan, took a different view on drug policy. He was scathing about the Report during the parliamentary debate, claiming that the sub-committee had been “over-influenced” by what he referred to as the “lobby in favour of legalising cannabis.” Wootton was reportedly furious at the insinuation and the implied slur on her integrity. Callaghan’s reaction might have been expected to be fatal to the Report but things did not turn out that way. As historian James Mills (2013, pp. 152–153) notes, almost immediately officials behind the scenes were working to smooth things over and began to be taken to draft new legislation very much in line with
Wootton’s recommendations. In June 1970, Labour unexpectedly lost the General Election but the new Conservative government, led by Edward Heath, quickly passed the Misuse of Drugs Act 1971 almost unchanged. The Act incorporated so many of the Report’s recommendations – such as reduced maximum sentences for cannabis offences – that as the Act was passing through Parliament, some observed that Wootton had been vindicated (Mills, 2013, p. 152). Indeed, the Advisory Committee itself was now put on a full statutory footing, with the very first words of the Act in section 1(1) declaring “There shall be constituted […] an Advisory Council on the Misuse of Drugs.”

**Law, regulatory law, regulation**

For those unfamiliar with the historical origins of the 1971 Act, this is probably quite a surprising story. This piece of legislation now widely viewed in terms of #50YearsOfFailure emerged in the context of a counter-cultural movement for drug law reform and an official report denounced at the time as in hock to a cannabis legalisation lobby. How can we make sense of this apparent contradiction? To explore this puzzle, I examine the Act through three overlapping but distinct conceptual lenses: law, regulatory law and regulation.

**Law**

Whatever else it may be, the Misuse of Drugs Act is a piece of statute law passed by the national legislature. Like most statute law (Atiyah, 1985), over time it has become enmeshed within a wider web of law (e.g. case law interpretations of the Act, regulations issued under the Act, links with cross-referring and adjacent statutes, etc.) and so can be best understood as the central hub within a broader legal complex. The sixth edition of Rudi Fortson’s definitive guide to the area for legal practitioners, for example, runs to well over 1,000 pages for precisely this reason. Perhaps this means no more than that drug law reform – once the (not insignificant) socio-political decisions about purpose and goals have been made – will be a highly complex technical exercise that is not really adequately captured by notions of “repeal and reform.” But maybe it also suggests that, even from a legal perspective, focusing so much on the centre of the web in reform efforts may be an unduly narrow approach. The theme of broadening out will be returned to later but for now I want to focus on the content and legal structure of the Act itself.

The preamble sets out the overarching purpose of the legislation (“An Act to make new provision with respect to dangerous or otherwise harmful drugs”) and, as already noted, Section 1 then provides for the constitution of the Advisory Council (with further details in Schedule 1). In certain respects, the main body of the Act is quite simply organised, functioning across two connecting mechanisms. First, Section 2, in conjunction with Schedule 2, defines, specifies and categorises what it labels as “controlled drugs.” As set out in Section 2(1)(a), the definition is simple: “any substance or product for the time being specified in Part I, II or III of Schedule 2 of this Act.” In other words, “controlled drugs” are no more or less than those listed as such “for the time being.” Schedule 2 then sets out the familiar specification of substances under Class A, B and C. This could be described as a **taxonomy mechanism**. The second mechanism – primarily provided for by Sections 3 through to 6 and 8 to 9 – then specifies various measures to restrict activities across the supply chains for those substances or products that are classified as “controlled drugs.” This could be described as a **control mechanism**. This is the essence of how the 1971 Act functions, through the intersection of these two mechanisms.

Importantly, Section 7 provides for certain exceptions to the control measures to be introduced “by regulations.” Explicit reference is made to exceptions for doctors, dentists, vets and pharmacists but the section also allows for a much wider range to be made if desired. In effect, this creates a licensing system by turning off the control mechanism in particular circumstances to allow for the lawful possession, supply, production, export or
import of specified “controlled drugs.” Interestingly, the licensing system is itself based on what is in effect a second part of the taxonomy mechanism, with the 2001 Regulations setting out a five-part classification, ranging from Schedule 1 substances which can only be used for research purposes under a Home Office licence, through to Schedule 5 substances which can be obtained “over the counter” without prescription.

The taxonomy mechanism allows for considerable flexibility in the administration of the Act. Substances can be upgraded, downgraded, removed or added by statutory instrument, that is, without the need for primary legislation. The licensing system also creates a space for altering the breadth, depth and range of control, through exemptions and permissions. A further space for flexibility is in law enforcement. What the police choose to prioritise, the guidance they issue for officers “on the ground” about exercising their discretion, and the resources allocated for the policing of different geographical areas and for different policing activities, all shape the actual practices of drug law enforcement.

One point worth emphasising is that it is human behaviour that is controlled by the Act and that when we say a drug is “controlled” or “prohibited” this is a shorthand formulation for that behavioural control. Confusion can arise here, as it is common to think of drug prohibition as an interference with personal property rights in drugs as objects or things. However, lawyers and economists tend to see property not as an object but as a “bundle of rights between persons, often in relation to things” (Miola and Picciotto, 2020, p. 67). What the Act does is interfere with those “rights between persons” in relation to “controlled drugs.” This is another aspect of infringement on personal autonomy which is probably somewhat understated in civil liberties arguments against drug prohibition which tend to focus on issues like privacy.

Viewed through the lens of “law,” then it is arguable that the legal structure of the 1971 Act, in combination with the space for discretion in law enforcement, in fact allows for an extremely wide range of approaches to drug control. This unusually extensive flexibility helps us to make sense of the historical puzzle presented in the previous section. In effect, what has happened over the last 50 years is that this space for adjustments and discretion has proved so large that it has been able to host diverse approaches at different points in time. Mills (2013, pp. 155–185), for example, argues that in relation to cannabis, the first 10 years of the Act’s operation, up to about 1982, was a period of “British compromise,” characterised by a moderate and relatively non-punitivie approach. At a local level, in the 1980s and 1990s, many police services used their discretion to increase significantly rates of cautioning for simple possession offences, not just for cannabis but also for other drugs. In contrast, in more recent times, there has been a tendency for drug control policy to occupy the more coercive corner of that space. Stevens and Measham (2014) have described this process as the operation of the “drug policy ratchet” which they show has, over the last 10–15 years in particular, more often than not led to a tightening of drug control rather than a loosening. This has been primarily through adjustments to the taxonomy mechanism, either by adding to the list of substances defined under the Act as “controlled drugs” or by increasing the severity of available penalties by upgrading a “controlled drug” to a higher Class. The ratchet is made possible by the flexibility offered through the legal structure of the Act but decisions to tighten or loosen it are of course political or policy choices. The importance of politics will be returned to later.

Regulatory law

A closely related lens we can use to examine the Act is the concept of regulatory law. We can define regulatory law as those laws that are designed to achieve social goals or, as legal scholar Anthony Ogus (1992, p. 1) puts it, they are a “legal form of social engineering.” Examples include consumer protection and environmental law. Although it is arguable that all law has this regulatory character to some extent, areas that are usually viewed as lying outside this category include many parts of private law, such as contract or trusts, as these
are designed to allow for private actors to order their relationships themselves (Lange, 1998, p. 451).

If we look at the 1971 Act from a regulatory law perspective, we can start to ask questions about the “social goals” it is intended to achieve, how it seeks to do so and with what results. The preamble to the Act, already referred to in the previous section, states that the focus is on “dangerous or otherwise harmful drugs.” Implicitly, the broad goal is to address those dangers and harms. This is an important point, as it establishes that this is an appropriate and relevant measure against which to evaluate the Act.

How does it attempt to do this? As described in the previous section, it does so primarily through the interlocking taxonomy and control mechanisms. The former in effect defines the sources of danger and harm to be targeted and then classifies substances implicitly by levels of harmfulness (in the sense that those in the highest category (Class A) attract the most severe penalties for breaches of control measures). This had been a key recommendation in the Wootton Report. One way of understanding this use of variable penalties is through the logic of deterrence. This logic also underpins the control mechanism which is structured around defining certain activities concerning “controlled drugs” as offences which attract penalties. This underlying logic perhaps points us towards at least one of the drivers for the “drug policy ratchet”: if the control logic is deterrence, then when outcomes are underwhelming, the response will tend to be to increase penalties.

We can also look at these mechanisms in a different way. Although regulatory law is often associated with the growth of the modern administrative state, Ogus (1992) shows that it has a much longer history in English law. He argues that the historical form for regulatory law, going back at least as far as the 1500s, was a prohibition backed by a criminal sanction: do not do X; if you do, the penalty is Y. Early regulatory laws were most often concerned with regulating trading activities for the public good (e.g. preventing contamination of foodstuffs), and this has continued to be a major strand within this type of law. Using sanction-backed prohibitions to regulate trade obviously involves controlling individual behaviour but it does so primarily as a means of introducing “friction” to reduce flows of undesired activity at an aggregate level. This is a form of what Foucault (1978, p. 138) termed “regulatory power,” targeted at the population not at individuals. From this perspective, making it an offence, for example, to “supply or offer to supply a controlled drug to another” (section 4(3)) or to “have a controlled drug in his [sic] possession” (section 5(2)), is a means of reducing levels of these behaviours so that overall at an aggregate level there is less activity involving the targeted substances.

Two further points flow from this. First, if the model is built on reducing the overall quantum of undesired activity (producing, supplying, possessing identified substances), then it is not a very strong criticism to say the drug trade has not been eliminated during the last 50 years. Nor is it necessarily even so to point out that levels of drug use and drug addiction have grown significantly during this period. The correct question – when evaluating the Act on its own terms from the perspective of regulatory law – is whether the “friction” it has introduced into the supply chains for “controlled drugs” has made much difference to behaviours or not. This is a much harder question to answer. For example, without the 1971 Act, would levels of cannabis consumption be higher or lower? A counterfactual of this kind is difficult to evaluate very precisely.

The second point is more critical. One of the long-standing features of regulatory law is that the use of criminal sanctions has usually been as a last resort and often used primarily as a threat to increase bargaining power in negotiating outcomes (Hawkins, 2002). As Ogus (1992, p. 18) puts it, the application of the criminal sanction “differs widely from ‘mainstream’ criminal law.” Here, we see a sharp difference with the enforcement and administration of the 1971 Act. Although, as has been argued in this section, it can be usefully viewed as a form of regulatory law, its enforcement has much more closely
resembled practice in “mainstream” criminal law. Critiques of the Act which deplore its punitive orientation and over-reliance on criminalising individuals for private behaviour can therefore be further deepened by developing the argument that there is a disjunction between the Act’s structure and purpose (as regulatory law) and its enforcement (as conventional criminal law). This disjunction is in many respects fundamental to some of the failings of the 1971 Act. Again, this is more a failing of policy and politics than the legislation itself.

**Regulation**

Viewed through the lens of regulation – defined as any activity which “steers the flow of events” – several new aspects of the 1971 Act come into focus, two of which I discuss here. First, it allows us to reframe drug policy as about market regulation (Seddon, 2020b). How best can we regulate the production, manufacture, distribution, sale and consumption of (certain) psychoactive commodities? This helps bring to the surface that drug legislation is only one part of the picture and that in fact regulating drug markets involves multiple actors at multiple levels using diverse tools (including, but not restricted to, legal instruments). This is actually a commonplace finding in regulation studies: when it comes to regulating markets, law is not the only game in town. Non-legal forms of ordering are critical.

A regulation perspective, then, prompts a broadening out of our vision. One of the most influential attempts to conceptualise this broadening is by Hancher and Moran (1989) who used the idea of “regulatory space” to capture this sense of regulation taking place in a space in which there may be multiple regulatory schemes, regimes, actors and influences. Viewed in this way, we can see that the 1971 Act (or, more precisely, the Act together with the wider legal complex of related statutes, statutory instruments and case law) provides an *ex ante* legal institutional framework within which aspects of the supply chains for “controlled drugs” operate. But within what we might call the “drug control regulatory space,” there are many other elements that lie beyond this framework. It follows from this that “prohibition,” rather than being the absence of regulation, is actually just a particular genre of regulatory regime. This runs counter to one of the standard tropes of drug law reform advocacy which typically describes prohibition as leading to unregulated drug markets. Viewed through the lens of regulation, this is simply not the case, as markets and regulation cannot and do not exist without each other. What is actually meant by reformers when they allude to “unregulated markets” is that the usual product quality and consumer safety laws do not apply to “controlled drugs.” This is, of course, true – and is of immense importance from a policy perspective – but is a rather different point analytically.

This question of product safety directs us to a nice example to illustrate what is meant by thinking in terms of regulatory space rather than simply law. Drug checking services – *in situ* real-time forensic testing of drug samples provided by users (e.g. at music festivals or clubs) – originated in California in the 1960s but have been piloted and developed in the UK and several European countries since at least the 1990s (Winstock et al., 2001). In the last decade, they have been most associated in the UK with The Loop, a non-profit social enterprise (Measham, 2020). At one level, the provision developed by The Loop is simply the latest in a long line of innovative harm reduction interventions that include needle exchanges, Drug Consumption Rooms and providing information on safer drug use. But it also tells us something important about the significance of non-legal forms of ordering. Drug checking services in different countries have tended to emerge in, at best, ambiguous relation to drug laws and have often relied on informal agreements with local police about law enforcement. This is also true in the UK, although such services could be permitted under the 1971 Act’s section 7 licensing system. Thinking in terms of market regulation, we can understand drug checking as an intervention to address the product safety issues that arise from the information asymmetry produced when the production, supply and retail levels of the market are criminalised. Information asymmetry is a term used by economists...
to describe situations where a potential purchaser has limited information about the quality of the product on offer and little or no opportunity to test for quality prior to purchase (Akerlof, 1970). In such a scenario, various versions of drug checking have emerged in different parts of the world to ameliorate these asymmetry problems by “steering the flow of events” in safety-enhancing directions. This is typical of the dynamic character of regulatory space – in contrast to the relatively static frameworks of law – where we tend to see organically emerging and continuously evolving eco-systems of regulatory arrangements which often involve diverse occupants of that space.

The second feature that we can start to see very clearly when we look through the lens of regulation concerns the vexed question of the politics of drug laws and drug policy. Typically, politics and ideology are decried by drug law reformers, and indeed by harm reduction practitioners, as getting in the way of more rational and scientific approaches to policy and practice. The website for David Nutt’s organisation, Drug Science, for example, describes its mission as providing an “evidence base free from political or commercial influence, creating the foundation for sensible and effective drug laws.” The idea of regulatory space suggests this attempted evasion of politics may be misguided. As soon as we move away from thinking that the heart of the matter concerns rules and their enforcement, where the reformer’s task is to create better rules and better enforcement strategies, a rather different picture takes shape. If the principal unit of analysis is regulatory space, then regulatory policy needs to address the totality of relations within that space. A key question then becomes: what is the desired end-state of affairs for that space? This is, of course, an ineluctably political question. Rather than evading politics and ideology, the regulation lens therefore suggests we need to confront it directly and explicitly, taking politics seriously instead of pretending it is an undesirable diversion. We need to ask what exactly is at stake when drug laws become a matter of political contestation? What is it that causes the “heating up” of drug policy debates? Asking these questions brings to the surface the ways in which drug laws are entangled with profound questions of power, authority, rights, citizenship, freedom, democracy and so on. In other words, rather than being a trivial distraction, the politics of drug policy is actually deeply important. Wishing it away in the name of “science” is a mistake.

Conclusion

At the start of this paper, a puzzle was presented: how has a piece of legislation that was born in part out of a counter-cultural moment come to be viewed 50 years later as a regressive failure? The answer that has been developed here is that the structure of the 1971 Act has allowed a highly distinctive and extensive degree of flexibility which has meant it has been able to accommodate at different points in time widely varying types of policy. The more interesting question then becomes about what has driven such variance in policy over time. Here, we see the centrality of politics and political culture to understanding what shapes policy change (for a theoretical elaboration of this point; Seddon, 2011).

What are some of the implications of this argument? By way of conclusion, I suggest there are two challenges to conventional thinking about the drug law reform enterprise. First, the #50YearsOfFailure campaign has been predicated on the overriding importance of law reform. Specifically, reforming or repealing the 1971 Act has been seen as essential. For at least two reasons, this seems over-stated. As we have seen, the literature on regulation tells us that law is often only a bit-part player in the regulation of markets. It is the wider policy space that is of more importance. Further, we have also seen that the legal structure of the Act has sufficient flexibility that it could arguably accommodate quite radically progressive forms of drug policy (by using the ability to downgrade or de-list substances, together with the licensing system). To be clear, I am not arguing that the Act should not be reformed or even repealed, simply that placing scrapping the Act at the heart of advocacy for change risks missing the centre of the target.
A second challenge to conventional thinking concerns the place of politics in drug law and policy reform. Politics and ideology have become dirty words in the reform debate, associated with regressive and conservative ideas about drugs and drug users. But it has been argued here that in fact the political dimensions of drug policy are deeply important. Indeed, I would go further and claim that it will only be through embracing (rather than denying or lamenting) the intertwining of politics and drug policy that more productive ways forward will be found.

This last point about politics is perhaps controversial, and is certainly at odds with accepted wisdom in the reform movement. Let me give an example to suggest why it may be of practical importance. It has long been recognised that drug laws have become engines for racial injustice. As many have argued, racism has been hardwired into the prohibition system from its earliest origins, and this has been sustained so effectively in practice partly by the large space for police discretion in law enforcement (Shiner et al., 2018). But it is hard to see how science and evidence will provide a pathway out of this. This is an inescapably political matter. Progress if it is ever to come will depend on the forging of an emancipatory politics that directly engages with deep questions about colonialism, state violence, systemic racism and inequalities. We will need more politics, not more evidence.

References


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