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Drug Policy and Global Regulatory Capitalism: The Case of New Psychoactive Substances (NPS)

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Abstract

The recent emergence of vibrant markets in ‘new psychoactive substances’ or ‘legal highs’ has posed significant new challenges for drug policy. These partly concern *what* to do about them but the speed and complexity of change has also raised difficulties for *how* policy responses should be developed. Existing drug policy systems appear too slow and cumbersome to keep up with the pace of change, remaining locked in large part within ‘old’ ways of thinking that centre almost exclusively around the deployment (or not) of the criminal law and its related enforcement apparatus. In this paper, it is argued that we need to rethink the problem through the lens of regulation, in order to learn lessons from other sectors where more agile responses to changing markets and business innovation have often proved possible. By examining examples drawn from these other areas, an alternative policy-making framework can be developed, involving a more flexible mix of state regulation, civil society action and private law mechanisms. This new approach is founded on a recognition of the networked and polycentric character of effective market governance in an era of global regulatory capitalism.

Introduction

Seasoned observers of drug policy have often lamented the repetitive and cyclical nature of drug problems, as supposedly ‘new’ phenomena turn out to be recurrences of wearily familiar issues. From this perspective, a claim of ‘novelty’ can be a way of hiding policy failures by suggesting that something has ‘never been faced before’. But arguably, genuinely novel drug policy problems emerge much less frequently than some policy-makers would have us believe. One example of real novelty was the emergence of HIV amongst injecting drug users in the mid-1980s, although even here, some of the wisest policy commentators at the time noted strong continuities with the past (e.g. Berridge, 1991; Stimson and Lart, 1991). The challenge of HIV was met with varying degrees of speed and effectiveness but certainly governments in some parts of the world proved capable of grasping the nature and scale of policy change required, even if implementation was (as ever) far from straightforward (see Mathers et al, 2010).

Over the last decade, a new phenomenon has been developing which some are now asserting represents an unprecedented challenge for drug policy in the manner of the HIV threat 30 years ago. This is the emergence of vibrant new markets in ‘legal highs’ or ‘new psychoactive substances’ (NPS). According to the United Nations, from a global perspective this is ‘becoming a matter of great concern and a threat to public health’ (UNODC, 2013a:1). Similar anxieties have been expressed by official bodies in the European Union (EMCDDA & Europol, 2013a, b) and by many national governments (e.g. New Zealand Law Commission, 2011; ACMD, 2011). One aspect of these concerns revolves around the substantive policy challenge, that is, *what* to do about the problem. But the rapidity and complexity of change has also raised questions about policy governance, namely, whether the existing domestic and international drug control systems are capable of responding in a timely and effective way. Put bluntly, are the current mechanisms for making drug policy up to the job? In this paper, it will be argued that in order to meet both the substantive and governance challenges, we need to rethink the problem through the lens of regulation (Ritter, 2010; Seddon, 2013).

The first section of the paper describes the basic contours of the problem and reframes it as a regulatory one. The second part reviews how similar regulatory problems have been dealt with more generally, drawing on examples from the fields of e-commerce and consumer protection. The third main section then sketches out how lessons from these examples might be applied to policy-making directed at the NPS problem. In conclusion, it will be suggested that the approach set out in the paper opens up some new possibilities for thinking about how we make drug policy.

Diagnosing the NPS problem

The periodic emergence of new psychoactive substances is not an entirely new phenomenon. Indeed, although some substances have a very long history of human consumption, for example, alcohol or opium, the arrival of new ones (e.g. LSD in the 1940s) or new forms of old favourites (e.g. morphine in the nineteenth century) has always been part of the ongoing story of the human engagement with psychoactive substances (Berridge and Hickman, 2006). Arguably, this has been an accelerating trend throughout the twentieth century and especially in the post-war period: the 1961 UN Single Convention on Narcotic Drugs listed 85 prohibited substances, whilst in 2013 there are approaching 250 banned under the UN Conventions (UNODC, 2013b:59; cf Coulson and Caulkins, 2012). Nevertheless, the claim today is that what is termed the NPS problem is different, to such an extent that we can accurately talk of entering a new phase in the evolution of global drug problems. Broadly speaking, three features of the phenomenon are taken to be novel.

The first is the steep trajectory in the rate of emergence of new substances. A recent European report refers to an ‘unprecedented growth in the number, type and availability of new drugs over the past few years’ (EMCDDA & Europol, 2013b:5). According to the EU Early Warning System (EWS), established in 2005 by Council Decision 2005/387/JHA, notifications of new substances increased threefold between 2009 and 2012, from 24 to 73. A similar global picture is described in the UN World Drug Report for 2013, with the number of NPS reported to UNODC increasing by 50% during that same period (UNODC, 2013b:xi).

The second feature concerns the role of the internet in driving this rapid change, largely through providing an accessible and efficient mechanism for global marketing and sales. It has been suggested further that the internet has facilitated access to the scientific literature on chemical synthesis which has allowed ‘amateur’ chemists to stay ahead of the regulators by manipulating chemical structures to evade the law (Griffiths et al, 2013:1701). The internet has also enabled the sharing of information between consumers, with sites like Silk Road hosting several discussion fora and providing mechanisms for buyer feedback and ratings (Van Hout and Bingham, 2013).

The third feature, linked partly to the second, is the transnational nature of these new markets. Although understanding of the structure of NPS markets is currently quite limited, policy documents assert that many of these substances, precursors and cutting agents are being sourced from China and, to a lesser extent, India (e.g. EMCDDA & Europol, 2013a:110; Sumnall et al, 2011), with ‘producer’ activities in consumer countries largely restricted to mixing and packaging rather than synthesis (EMCDDA & Europol, 2013b:27). In other words, it is the increased production capacity in emerging economies that is feeding the pipeline of NPS markets. The resulting trade often spans greater distances than has tended to be the case in recent years for some illicit drugs, yet, at the same time, typically has fewer intermediaries along the supply chain.

The central consequence of these distinctive features of the NPS problem is the growing sense that not only do we not know what to do about it but also that the control apparatus itself is struggling to cope with the level and pace of innovation (Griffiths et al, 2010). In an unusual admission, the UN recently conceded that the international drug control system is ‘floundering [...] under the speed and creativity of the phenomenon’ (UNODC, 2013b:xi). Faced with this challenge, policy thinkers have started to develop new ideas about how to respond. Broadly speaking, these fall into two camps. The first is concerned with finding swifter and more efficient mechanisms for banning those NPS that are dangerous enough to merit prohibition and filtering out those that require less strict regulation (see: Measham et al, 2010; Measham, 2011; Reuter, 2011). A good example of this type of approach is the attempt to develop generic approaches to legislation, where *categories* of substances

(defined by chemical structure) are outlawed rather than individual ones (see discussion by van Amsterdam et al, 2013). The second seeks to use the NPS problem to open up the possibilities for creating alternatives to criminalization as the default position for drug policy (e.g. Winstock and Wilkins, 2011; Hughes and Winstock, 2011). The trend here is for policy development on NPS to become a new site for old debates about drug law reform.

There is much to find in these contributions that is stimulating and illuminating. But in an important respect, they are also perhaps unduly narrow in their framing and understanding of the problem. Stepping back from the battlefields of the ‘war on drugs’, we can observe that in the early twenty-first century, problems associated with e-commerce, transnational trade and rapidly-changing markets are ubiquitous. As regulatory scholars tell us, contemporary capitalism is characterised by more vibrant and globalised markets, coupled with an equally vibrant growth of rules which are increasingly ‘gamed’ for competitive advantage – ‘freer markets, more rules’, as Steven Vogel (1996) once pithily put it. According to Braithwaite (2008) and others (Levi-Faur, 2005), we live now in an era best described as one of global regulatory capitalism.

One distinctive problem which arises within regulatory capitalism is that these increasingly vibrant markets can take on ‘malign’ as well as ‘benign’ forms. As Braithwaite (2005, 2008) observes, markets do not make moral judgments and are just as efficient at producing things that may be judged as socially ‘bad’ as they are at the production of ‘public goods’. From this perspective, the NPS problem is simply one specific instance of a much broader phenomenon connected to the nature of global capitalism in the early twenty-first century. It follows that solutions to the problem are more likely to be found outside the boundaries of conventional drug policy thinking. In the next section, attention turns to considering how the challenges posed by regulatory capitalism are being dealt with more generally, as a step towards developing new ideas about controlling new psychoactive substances.

Regulatory innovation and regulatory capitalism

There is an enduring attachment to the idea that it is states (and supra-state bodies) that have the greatest capacities to regulate effectively and this type of statist thinking certainly prevails much of the time in the world of drug policy. Yet from a regulatory perspective, this is an outmoded and discredited position, both theoretically and empirically (e.g. Ayres and Braithwaite, 1992; Burris et al, 2005; Gunningham, 2009). Indeed, for most regulatory scholars, it is relatively uncontroversial to argue that state-centric ‘command and control’ approaches to regulation are no longer fit for purpose in many contexts. Rather, effective regulatory strategies over the last few decades have increasingly been characterised as decentred from the state (Black, 2001) and involving networks of state and non-state actors making up ‘webs of controls’ (Burris et al, 2005). The idea that the traditional ‘hierarchical application of law’, as Scott (2004:478) terms it, could provide the answer to new regulatory challenges seems increasingly implausible from this perspective.

There remains a tension, however, between these positions which Scott (2004:483) suggests is reflected in the two competing stories that tend to be told about contemporary regulation. The first highlights the difficulties faced in keeping up with the pace of technological and social change and the new policy problems that are thrown up by such transformations. This narrative tends to be associated with conventional definitions of regulation in which the state remains at the heart of things. Much of the policy discourse to date on NPS emphasises this type of perspective, epitomised by the UN admission noted above of how its international system of drug conventions is ‘floundering’. The second story, in contrast, highlights the idea of innovation in regulation and anticipates that approaches can be found that are responsive to the challenges of rapid change. A discourse of regulatory innovation offers the promise of flexibility and agility in the face of an uncertain and, at times, hostile environment. This narrative encapsulates what might be viewed as a more desirable direction for NPS policy.

What, then, does regulatory innovation look like? Scott (2004:488-501) identifies three dimensions or parameters along which it can be developed: *norms*, *monitoring* and *enforcement*. Conventionally, regulatory *norms* are conceived as being defined by detailed rules, usually in the form of legislation. The first move towards innovation is to shift focus away from rules and on to general principles or standards (Braithwaite,

2002; Black, 2010). This is viewed as increasing the sensitivity and responsiveness to rapid changes in the environment, in a way that a rigid system of rules simply cannot. It also tends to open up possibilities for dialogue between regulator and regulatee which, in turn, maximises the potential for flexibility. The decentred nature of regulation alerts us to the diverse range of possible standard-setters, beyond public and state agencies, extending to legal institutions like courts, contractual arrangements between parties up and down supply chains, trade associations, NGOs and so on.

Monitoring of compliance is central to regulatory practice. Innovation here involves pushing responsibility for monitoring further away from state agencies (Scott, 2004:493). The critical question is: who has the greatest stake or interest in detecting non-compliance? In its strongest version, this responsibility is devolved right down to regulatees via a self-regulation regime. At certain points, it can also be held by other gatekeepers. A classic example of this is the provision of credit-processing services where providers have a powerful incentive to monitor transactions and require certain standards to be in place, otherwise they may expose themselves to risk (Scott, 2004:494-5). The enlisting of ‘third parties’ to monitor compliance is potentially a powerful tool for increasing the responsiveness and effectiveness of regulation (see: Grabosky, 1995; Mazerolle and Ransley, 2006).

Regulatory *enforcement* conventionally consists of the application of sanctions for non-compliance, usually administered by state agencies. For a range of reasons, this rarely matches up with effective regulation in practice. In one of the most influential contributions to regulatory scholarship of the last 25 years, Ayres and Braithwaite (1992) set out the case that responsive regulation reserves the strict application of penalties for the apex of a pyramid of options (see also Braithwaite, 2011). The bulk of enforcement activity should actually take place at the bottom of the pyramid, involving persuasion and dialogue, only escalating upwards if compliance is not achieved.

An example may be useful at this point to clarify what regulatory innovation looks like in specific contexts. Scott (2004) discusses the distinctive challenges posed by online trade or e-commerce. He argues that the need for innovative approaches is particularly acute in that area and goes on to describe a range of more or less novel

approaches which are enabling regulation to keep up with the rapid transformations driven by the continuing expansion and development of e-commerce. Two aspects appear particularly important from Scott's analysis. First, as with trade in general, information is a critical component for regulation (see Howells, 2005). Online activity offers new and extended opportunities for information provision. For example, within eBay, every transaction invites the buyer to review the seller and this information becomes visible to the whole community. A vendor with a string of negative reviews is unlikely to attract future business. In this sense, the 'capacity of markets to regulate behaviour' can be exploited through the particular facilities available online to record and share real-time information about compliance with what are, in effect, regulatory standards or norms (Scott, 2004:501). As we have seen, this is a feature that has been taken up in some online retailing of NPS. The second key aspect is the harnessing of multiple actors in the regulatory endeavour. Rather than top-down legislation and law enforcement being central to the regulation of online trading, there is a complex web of controls applied by 'supra-national governmental and non-governmental organizations, business and consumer groups, and individual firms and consumers' (Scott, 2004:501). In other words, regulatory innovation in this context involves 'networked governance' rather than sovereign-state legal control.

Scott's argument can be broadened out if we look at the related but more general field of consumer protection. Conventionally, this is understood as involving state intervention to protect consumers. The inequality of bargaining power between businesses and individual buyers necessitates a level of governmental interference in the marketplace in order to ensure fairness. But when we adopt Scott's theme of regulatory innovation and decentre the state from view, some rather different possibilities for protecting consumers come into focus. Specifically, as Ramsay (2006) argues, a key site for consumer protection appears at the other end of the telescope, in the private contract of sale itself. Usually seen as the source of the regulatory problem, it is possible to see this as a mechanism through which, in each individual transaction, private actors can adjust reflexively to their environment, via a process of negotiation. This potential reflexivity of private 'contracting practices' opens up the possibility of real responsiveness to a rapidly-changing context that is far more agile and flexible than is possible within conventional approaches to the regulation of consumer markets (Collins, 1999; for a theoretical account of reflexive

law, see Teubner, 1983). Ramsay (2006) emphasises the crucial point that strategies for consumer protection should not be about abandoning the role of the state in favour of private actors but rather seeking to align the two. He gives the example of credit card chargeback policies, which provide remedies to consumers for unauthorised or disputed charges on cards, and argues that consumer groups are more likely to ratchet up standards of protection by working with networks of credit card companies than by concentrating exclusively on lobbying national governments to change the law (2006:26-7).

New approaches to NPS policy-making

We have seen then that the problems presented by the NPS trade need to be understood in the broader context of the range of new challenges associated with global regulatory capitalism at the turn of the twenty-first century. Coping with the speed and scale of these transformations requires strategies for *regulatory innovation*. We can think about this in terms of Scott's (2004) three parameters or components of a regulatory system: *norms*, *monitoring* and *enforcement*.

As noted earlier, regulatory innovation in relation to *norms* or standards often takes the form of moving away from dependence on detailed rules towards reliance on general principles. The theoretical case for principles-based regulation is perhaps most clearly set out by Braithwaite (2002). Part of his argument is that principles allow for exactly the kind of agility and flexibility needed for responding to what he calls 'flux', that is, a rapidly-changing situation or environment. In such a context, attempts to fill emerging regulatory gaps with new rules become counter-productive because of the way rules can be 'gamed':

This problem [of legal game-playing] multiplies as the state enacts more and more rules to plug loopholes opened up by legal entrepreneurs. The thicket of rules we end up with becomes a set of sign-posts that show the legal entrepreneur precisely what they have to steer around to defeat the purposes of the law [...] A smorgasbord of rules engenders a cat and mouse legal drafting culture – of loophole closing and reopening by creative compliance. (Braithwaite, 2002:56-7)

For Braithwaite's 'legal entrepreneur', we can substitute the 'amateur chemist' tweaking chemical structures to evade the latest iteration of drug laws targeted at NPS. The general regulatory solution to this type of problem is to establish a set of principles to act as a guiding framework, so that the 'cat and mouse' game of dancing around the obstacles of specific rules is no longer possible. This of course requires greater clarity of purpose than may be usual within drug policy. As Scott (2004) notes, a further regulatory innovation here is to acknowledge how standard-setting is not simply a matter for law-makers and public agencies (see also Post, 2005). Notably, consumers may play a prominent role in creating standards, not only through their repeated bilateral purchasing transactions but also by sharing information in consumer fora of various kinds. For example, in response to a specific market situation, consumers might believe that consistency and purity of product are the most significant issues to them (see Davies et al, 2010) and therefore post information about these on online fora which, in turn, would have the potential to shape market behaviour and outcomes. Understanding this point marks a radical departure from conventional thinking about drug policy, as it points to how responsiveness to a changing environment is not necessarily about policy-makers becoming more nimble but may depend rather on facilitating information exchange between private market actors.

In terms of the *monitoring* of compliance, there are major challenges for dealing with the trade in NPS. How can we monitor the activities of individual consumers purchasing online through the relative security of the 'dark web' or of 'amateur chemists' operating in a variety of more or less 'hidden' settings? State-led legal controls are simply inadequate for such tasks. One approach to internet purchasing, for example, is to build further on the potential of online consumer fora for information-sharing. This could offer a powerful and responsive mechanism for monitoring compliance with standards of various kinds (cf Norman et al, 2014). Indeed, it is hard to imagine a more efficient method for the rapid dissemination to consumers of new information about things like adverse effects of new products. Regulatory innovation may also centre here on the enlisting of third-party gatekeepers. Crafting an effective regulatory strategy requires imaginative consideration of *all* the actors who have an interest in compliance. The possibilities

are in fact considerable. For instance, insurers could be enlisted to regulate the activities of the ‘amateur chemist’ – discovery of production of unsafe NPS on commercial or domestic premises could be made to invalidate insurance. Enlisting of this kind can be by encouragement or mandated by law (see Ayling et al, 2009:48-71), the latter illustrating how regulatory innovation does not mean denying any involvement for the state but rather broadening out the range of actors who might contribute to the regulatory endeavour. Again, acknowledging the potential role of third-part gatekeepers like insurers is challenging for the usual ways of approaching drug policy-making, yet is essential for addressing the problem of drug policy governance that is posed by the NPS phenomenon.

The question of *enforcement* is perhaps even thornier. For transnational trade, manufacturers, traders and consumers will obviously often be located in different jurisdictions and this makes regulatory enforcement very difficult. And, more fundamentally, we might ask what enforcement means when we decentre the state and move away from the ‘hierarchical application of law’. As Scott’s (2004) analysis of online trading makes clear, innovation in regulatory enforcement involves two steps. First, acknowledging the multiple groups who may have capacities for enforcement in different circumstances. For the NPS trade, as well as enforcement by conventional state or public agencies, under some conditions enforcement may be more effectively achieved by trade associations, consumer groups, third-party gatekeepers or private actors (see Cherney et al, 2006). Second, wherever the capacity for enforcement is located, it should be organised and structured in terms of the responsive regulation model described in the previous section, where dialogue and persuasion are the most commonly-used tools, with the use of criminal sanctions reserved for the rarely and reluctantly reached apex of a pyramid of options (e.g. for a seller who repeatedly fails to adhere to regulatory standards and does not respond positively to escalating attempts to secure compliance) (Ayres and Braithwaite, 1992).

Regulatory innovation developed along these lines will necessitate a fundamental rethinking of the contents of the drug policy toolbox. In the hands of drug policy-makers, the comforting feel of the criminal law tends to make everything look like a prohibition or ban is the ultimate answer, much like Maslow’s proverbial hammer rendering everything a nail to be hit. From a regulatory perspective, however,

criminal law enforcement and criminal sanctions would play a very small role within strategies for regulating the NPS trade. Instead, as I have argued in this section, the emphasis needs to be on understanding regulation as a decentred activity, involving both state and non-state actors in polycentric networks of governance, drawing on a range of tools that extend far beyond formal rules or laws. In this way, a commitment to regulatory innovation, as the best means of addressing the distinctive challenges posed by the NPS problem, requires a profound change in the framing, making and governance of drug policy.

One line of objection to the type of regulatory approach outlined here is that it rests on the assumption that NPS are simply consumer products like any other. As Babor et al (2010) have powerfully argued in relation to alcohol, the unique potential for harms associated with intoxication, toxicity or dependence may be viewed as casting significant doubt on that assumption. But even if we accept that NPS, like alcohol, are ‘no ordinary commodity’, we cannot escape the implications of the brute fact that they *are* commodities which circulate within transnational networks – that is, they are produced and exchanged within markets. Their ‘extra-ordinariness’ simply means that we need to craft tailored regulatory strategies which take this distinctive nature into account, just as we already do with food, medicines, alcohol, tobacco and so on.

Conclusions

A recent press release from the European Commission proudly announced that it was ‘proposing strong EU legislation on new psychoactive substances so that the EU can provide a faster and more effective response, including the ability to immediately remove harmful substances from the market on a temporary basis’ (European Commission, 2013). ‘Faster’ turns out to refer to the shortening of the process for permanently banning a substance, from two years to ten months, whilst removal from the market is a somewhat misleading euphemism for temporary criminalization. It should be evident from the preceding discussion that the Commission’s thinking is some distance from ‘regulatory innovation’: top-down, state-centric and law-focused. We might draw from this the pessimistic conclusion that both the substantive and governance challenges for drug policy that are presented by the NPS problem are not

yet fully understood by European policy-makers, as they remain locked in an outdated paradigm.

But criticising EU policy-making for being cumbersome and bureaucratic is perhaps too easy a sport. What of approaches considered more effective and imaginative? According to many commentators (e.g Winstock and Wilkins, 2011), the policy recently developed in New Zealand is more positive. In a nutshell, their newly-enacted Psychoactive Substances Act 2013 provides that new psychoactive substances can be licensed for sale, provided that they can be clinically proven to be ‘low risk’. This reverses the usual presumption of dangerousness and offers an opportunity for the level of control to be better calibrated with the level of risk. It remains to be seen how effective this policy turns out to be but it clearly has some promise. However, there are also some grounds for scepticism, based on the analysis presented in this paper. Stripping it down to its core, the New Zealand approach remains tied to a hierarchical state-centric regime where the central question is still whether or not we should use the criminal law to regulate the supply of a given ‘new’ substance. Can such an approach be responsive enough to cope with the ‘flux’ that surrounds the NPS trade? Or will a more innovative regulatory strategy eventually be needed, as has been argued here?

The New Zealand model is also undoubtedly going to raise in a particular form a matter which has tended to remain in the background in policy debates. One of the drivers for the NPS trade has obviously been the current system of prohibition itself. Perhaps the clearest example of this is the market in synthetic cannabinoids which owes its existence almost entirely to producers seeking to exploit demand in the illicit cannabis market by providing a legal alternative. In other words, there is a dynamic within drug markets which is strongly shaped by the contours of the regulatory system. We can expect, then, that this dynamic will change as the balance of that system is altered. Regulatory design needs to understand the ways in which it is constitutive of the markets it seeks to control (Seddon, 2013; Shearing, 1993). As new approaches like the New Zealand model are implemented, the NPS phenomenon, and the policy problems it presents, will change.

A wider question for drug policy governance, which the NPS problem has brought into particularly sharp relief, concerns the importance of thinking more deeply about regulatory categories. As Schwitters et al (2007) observe in their study of the European regulation of food supplements, one of the most crucial components of regulatory design is the categorisation of any new substance, a process they term 'product-description'. Defining the market goes hand in hand with shaping the regulatory strategy (see Hyde, 2013). We must acknowledge here that the term 'drug' is itself not a neutral or scientific descriptor but rather a regulatory category (Seddon, 2010; cf Corazza et al, 2013). If we describe NPS as 'drugs', we are making implicit assumptions about what they are, how they will be used and the range of regulatory possibilities. To meet the new challenges presented by the NPS problem, we need to loosen our attachment to the 'drug' label and think more imaginatively. More broadly, it may be that this will also be the key to successful drug policy reform in the future. Perhaps it will be the day when we no longer speak of *drug* policy that will truly mark the beginning of a new era.

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Highlights

- The trade in New Psychoactive Substances is presenting novel policy challenges.
- These challenges are best understood and approached from a regulatory perspective, as a specific example of more general problems presented by global regulatory capitalism.
- To respond to the level and speed of innovation in NPS markets, regulatory innovation is required.
- Lessons from other sectors indicate that a more flexible mix of state regulation, civil society action and private law mechanisms is needed.