How can the lens of human rights provide a new perspective on drug control and point to different ways of regulating drug consumption?

A thesis submitted to The University of Manchester for the degree of Doctor of Philosophy in the Faculty of Humanities

2015

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The United Nations Declaration on the Right to Development (1986).


The United States Bill of Rights (1791).

List of Abbreviations

2C-B 2,5-dimethoxy-4-bromophenethylamine

1971 Convention

1988 Convention
The United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988)

ACMD Advisory Council on the Misuse of Drugs
AIDS Acquired Immune Deficiency Syndrome
AMA American Medical Association
CAM Complementary and Alternative Medicine
CHR Commission on Human Rights
CND Commission on Narcotic Drugs
COP Conference of Parties
CONAD Conselho Nacional de Politicas sobre Drogas
CSA Controlled Substances Act (1970)
DACA Drug Abuse Control Amendments (1965)
DEA Drug Enforcement Administration
DMT N,N-Dimethyltryptamine
ECHR European Convention on Human Rights (1950)
ECTHR European Court of Human Rights
ECOSOC Economic and Social Council
<table>
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<td>EMCDDA</td>
<td>European Monitoring Centre for Drugs and Drug Addiction</td>
</tr>
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<td>EMDL</td>
<td>Earth Metabolic Design Laboratories</td>
</tr>
<tr>
<td>FCTC</td>
<td>Framework Convention on Tobacco Control</td>
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<tr>
<td>GA</td>
<td>General Assembly</td>
</tr>
<tr>
<td>HEW</td>
<td>United States Department of Health Education and Welfare</td>
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<tr>
<td>HIV</td>
<td>Human Immunodeficiency Virus</td>
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<tr>
<td>HRA</td>
<td>Human Rights Act (1998)</td>
</tr>
<tr>
<td>HRCa</td>
<td>Human Rights Committee</td>
</tr>
<tr>
<td>HRCb</td>
<td>Human Rights Council</td>
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<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights (1966)</td>
</tr>
<tr>
<td>ICESCR</td>
<td>International Covenant on Economic, Social and Cultural Rights (1966)</td>
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<tr>
<td>INCB</td>
<td>International Narcotics Control Board</td>
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<tr>
<td>LSD</td>
<td>Lysergic acid diethylamide</td>
</tr>
<tr>
<td>MAPS</td>
<td>Multi-Disciplinary Association for Psychedelic Studies</td>
</tr>
<tr>
<td>MHRA</td>
<td>Medicines and Healthcare Products Regulatory Agency</td>
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<tr>
<td>MDMA</td>
<td>3,4-MethyleneDioxy-MethAmphetamine</td>
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<tr>
<td>MMAR</td>
<td>Marihuana Medical Access Regulations</td>
</tr>
<tr>
<td>NAC</td>
<td>Native American Church</td>
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<tr>
<td>NGO</td>
<td>Non-Governmental Organisation</td>
</tr>
<tr>
<td>NHS</td>
<td>National Health Service</td>
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<tr>
<td>NPS</td>
<td>New Psychoactive Substances</td>
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<td>OHCHR</td>
<td>Office of the High Commissioner for Human Rights</td>
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<tr>
<td>OSCE</td>
<td>Organisation for Security and Co-operation in Europe</td>
</tr>
<tr>
<td>Acronym</td>
<td>Full Form</td>
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<tr>
<td>PTSD</td>
<td>Post Traumatic Stress Disorder</td>
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<tr>
<td>SSHD</td>
<td>Secretary of State for the Home Department</td>
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<tr>
<td>THC</td>
<td>Tetrahydrocannabinol</td>
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<tr>
<td>UDHR</td>
<td>Universal Declaration of Human Rights (1948)</td>
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<tr>
<td>UDV</td>
<td>União do Vegetal</td>
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<tr>
<td>UK</td>
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<td>UKCSC</td>
<td>United Kingdom Cannabis Social Clubs</td>
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<td>UPR</td>
<td>Universal Periodic Review Procedure</td>
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<td>UN</td>
<td>United Nations</td>
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<tr>
<td>UNAIDS</td>
<td>Joint Nations Programme on HIV/AIDS</td>
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<td>UNESCO</td>
<td>United Nations Educational, Scientific and Cultural Organization</td>
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<td>UNGASS</td>
<td>United Nations GASS</td>
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<tr>
<td>UNODC</td>
<td>United Nations Office on Drugs and Crime</td>
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<tr>
<td>US</td>
<td>United States</td>
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<tr>
<td>WHO</td>
<td>World Health Organization</td>
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Abstract

When exploring the interplay between drug policy and human rights, commentators tend to adopt a harm reductionist approach, and centre their research on rectifying the vast amount of human rights violations carried out in the name of drug control. These violations include the use of the death penalty, the infliction of torture, and the denial of basic healthcare, to name but a few. Though this approach ameliorates some of the worst effects resulting from prohibition, a harm reductionist approach can only ever perpetuate the current regime. The thesis puts forth an alternative human rights perspective, one which explores the human rights of individuals to consume psychoactives, to challenge the moral hegemony of the global drug regime and prohibitionist logic. Part I (Chapters 1-3) comprehensively challenges the value of ‘human rights’ on a philosophical, political, legal and institutional basis- to appreciate their capacity to provide a new perspective on drug control. Part I concludes that: human rights are conceptually broad living instruments, capable of reflecting the complex reality of human psychoactive usage; human rights can better address the State/individual binary which is identified to be at the crux of drug policies and; human rights and drug control regimes are legally compatible. This bona fide human rights perspective is then applied to Part II (Chapters 4-5), which employs health and religious rights as conceptual starting points, to demonstrate how human rights could improve the drug control framework, and how the lens of human rights can point to different ways of regulating drug consumption.

The broader regulatory implications resulting from this unique perspective call for an application of human rights which moves beyond medical and traditional prohibitive paradigms, to integrate broader categorisations such as ‘human flourishing’. This broader perspective accounting for pleasure, well-being and spirituality etc. would more thoroughly appreciate the often interconnected nature, and significance an individual accords their drug use. The thesis also concludes that drug policy is inherently political, and through centring upon the relationship between the State and the individual, a human rights perspective can comprehensively unpack the moral arguments involved. By introducing normative thinking in this sphere, as well as presenting the empirical evidence when weighing up the benefits and harms from psychoactives, a more open-minded, transparent approach to the issue of drug control can be adopted. Analysing (predominately) domestic and international case law which explores the conflict between the human rights and the drug control regimes, finally demonstrates that human rights have a transformative capacity to alter the drug control system, even while operating within the prevailing prohibitionist paradigm. The medical cannabis cases, and the religious exemptions for peyote and ayahuasca particularly demonstrate this, and give credence to the notion that the global regime of drug control is beginning to fall apart. Ultimately, this thesis uses the lens of human rights to provide a new perspective and direction to the issue of drug control.

How can the lens of human rights provide a new perspective on drug control and point to different ways of regulating drug consumption? (Melissa L. Bone, University of Manchester) Thesis submitted for the Degree of Doctor of Philosophy, May 2015.
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Jack held a staunch belief that I would pass with ‘flying colours’. I am unbelievably lucky to have known and loved him.

I did it Kel layyyyyyyyy!
Introduction

‘The human condition is not pre-empted by its past. Human history is not predetermined by its past stages. The fact that something has been the case, even for a long time, is not proof that it will continue to be so. Each moment of history is a junction of tracks leading towards a number of futures. Being at the crossroads is the way human society exists. What appears in retrospect an ‘inevitable’ development began in its time as stepping onto one road among many stretching ahead’ (Bauman, 1988: 89).

The global system of drug prohibition began at the start of the 20th century, as political leaders and governments around the world constructed a regime which criminalised some actions in relation to certain psychoactive substances, excepting for medical and research purposes. Fast forward to the 21st century and the system as a global regime is beginning to fall apart. Levine’s (2003: 145) observations in 2003 are still as pertinent in 2015 regarding the ‘uses and crises’ of global drug prohibition. The international regime is at a crossroads. In order to step ‘onto one road among many…’ (Bauman, 1988: 89) the author will use the lens of human rights to challenge the existing paradigm of ‘drug prohibition’. A human rights perspective will be shown to respond to drug use as a complex human phenomena; one which is capable of generating new thinking in this area and fundamentally reconfiguring the prohibitionist regime.

Levine’s (2003) ‘crises’ and ‘uses’ will initially be explored in order to introduce the reader to the global drug prohibitionist framework and to illuminate the transformations which are taking place in this field. A summary of the existing literature which focuses more specifically on the subject matter of the thesis will then be explored. Given the backdrop to the global prohibitionist regime, a rationale for the author’s research will be provided alongside exposing gaps in the existing literature which explores the interplay between the drug control and human rights regimes. The existing paradigm of ‘drug prohibition’ will be challenged, and fundamental concepts in this sphere pertaining to what a ‘drug’ actually is will be questioned. This should serve to justify the interchangeable discourses the author employs throughout the thesis, and illuminates the research constraints placed on those who operate within restrictive prohibitionist paradigms. The author will finally introduce her research and its overall objectives, limitations and scope when striving to answer the overarching question:
How can the lens of human rights provide a new perspective on drug control and point to different ways of regulating drug consumption?

Levine (ibid) summarises three main ‘crises’ which pose a threat to the international system of drug prohibition: harm reduction initiatives, the growing opposition to punitive drug policies and the cannabis crises. Harm reduction initiatives concern a pragmatic public health movement, which serves to mitigate against the harmful effects from drug use and prohibitionist policies themselves. The movement was borne in response to the growing AIDS epidemic in the 1980s, and this is still a prevalent concern in 2015 (UNODC, 2014). Excluding Africa, one in three of all drug related deaths are from HIV associated with drug use (ibid). The United Nations Office on Drugs and Crime (UNODC), the World Health Organisation (WHO) and the Joint Nations Programme on HIV/AIDS (UNAIDS) devote substantial resources towards reducing the threat posed by this epidemic (WHO, 2012). Such a pragmatic response when combined with the increasing prevalence of other programmes across the globe such as: ‘syringe distribution and exchange, methadone maintenance, injection rooms, prescription heroin, medical use of cannabis, drug education for users, and pill testing at raves’ unintentionally serve to undermine the global prohibitionist regime (Levine, 2003). According to Levine (ibid) such initiatives encourage policy makers to shift policies away from criminalised, coercive and repressive drug control regimes, towards ones which promote tolerance, regulation and public health; thus by default the harshness and the punitive effects of the global prohibitionist system are illuminated (ibid). Goode (1997) additionally observes that the harm reductionist approach is strongly rooted in humanist values. Harm reduction initiatives within this sphere also seek to respect the human rights of users, and actively work to alleviate any human rights violations. Given the subject matter of the thesis, the author will devote more attention to the existing research which explores the interplay between the human rights and drug control systems below.

For now, it is sufficient to offer a much broader introduction to the drug policy field. Levine’s (ibid) second ‘crisis’ for the drug prohibitionist movement relates to the growing opposition to punitive drug policies across the globe. Some States are recognising that punitive, criminalised drug policies are ineffective at reducing drug use, they are expensive and they take scarce resources away from other policing and health activities (Levine, ibid). For instance, the Global Commission on Drug Policy
estimate spiralling enforcement costs of $100 billion per year, despite the fact that drug supply and use is increasing, and drugs are becoming cheaper and stronger (Werb, Kerr and Nosyk, et al, 2013). The drugs trade has been valued at $320 billion and is considered one of the most lucrative illicit markets, constituting around 1% of global GDP (UNODC, 2005). In 2012 it was estimated globally that approximately 243 million people have used an illicit substance in that last year alone. Even the UNODC (2008: 216), the very agency responsible for enforcing global drug prohibition, have recognised several ‘unintended consequences’ resulting from this approach. Three of these specifically relate to enforcement issues, since this strategy does not eliminate drug use, rather users move on to using another substance (substance displacement), and enforcement does not eliminate production, transit and supply, instead it simply shifts it elsewhere (‘the balloon effect’) (ibid). In further support of Levine’s (2003) statement, the UNODC (2008) also recognise that redirecting scarce resources from health to enforcement (policy displacement), is another unintended consequence of prohibition. These ‘unintended consequences’ have facilitated alternative policies worldwide, as some decriminalisation policies redirect enforcement funds, which would have been spent on prosecuting the individual, to the public health sphere (Hughes and Stevens, 2010). Portugal is especially held up as the standard for this regulatory model (ibid), though decriminalisation policies are becoming increasingly prevalent across the globe (Rosmarin and Eastwood, 2012).

Since embarking upon this thesis, some countries and US States have even formed a legalised regulatory market for psychoactives which would otherwise be controlled under the global prohibitionist regime. For example, New Zealand is paving the way to regulate New Psychoactive Substances (NPS); psychoactives which fall outside of the laws relating to the international drug control regime, but mimic the effects of currently prohibited drugs (Wilkins, 2014). Though, New Zealand have amended their Psychoactive Substances Act (2013) as they revoked transitional arrangements which allowed for new psychoactive substances to receive interim approval under the act (Regulatory Impact Statement, 2014). While all currently approved products are now unapproved until they can go through the clinical testing process, the regulatory intention behind the act arguably still stands. The increasing prevalence of these substances in the 21st century (UNODC, 2013), combined with the fact that we are living in the internet age, pose distinct challenges to the overarching goal of prohibition
to reduce the supply and use of certain psychoactives; thereby seriously undermining the current global system (INCB, 2012).

What is more, Levine (2003) correctly identifies diverging cannabis policies to be the third ‘crises’ for the global system of drug prohibition, since this is by far the most used illicit substance worldwide, with conservative estimates of between 119-224 million users (UNODC, 2012). For Levine (2003), it is impossible to prevent its growing de facto legitimacy, which may increasingly become de jure. Indeed, regulatory systems for medicinal cannabis have become increasingly prevalent (Bone and Seddon, 2015). Moreover, as of January 2015, Uruguay has become the first country to fully legalise and regulate cannabis for recreational use along with two other US States: Colorado and Washington (Bone, 2013; Room, 2014). Furthermore, Oregon, Alaska and Washington D.C., have also approved the legalisation of cannabis, although at the time of writing, they have not yet implemented measures to create a fully regulated market (McGreal, 2014). Such regulatory models operate in direct contrast to the global system of drug prohibition and undermine the overarching regime.

Nevertheless, global drug prohibition has its ‘uses’ (Levine, 2003: 145) which arguably justify why the system still stands globally. Levine (ibid) observes that a State’s police and military can be endowed with additional powers to enforce prohibitionist policies, many of which are able to legitimately infringe civil liberties. Political opponents are also united under this system, since a negative view of psychoactives legitimises a further increase in State power (ibid). In a similar vein, this system is thought to have enjoyed widespread support from the United Nations, an extremely influential international agency, who until recently advocated that the overarching goal of drug prohibition was to create ‘a drug free world’ (Arlacchi, 1998; ibid). In 2015 the situation is markedly different as States are now preparing for another UN General Assembly Special Session on Drugs (UNGASS, 2016). Yet, this one promises to constitute a more open and wide ranging debate, to develop more effective responses rooted in public health, human rights and harm reduction (IDPC, 2014). Regardless though, the regime has adopted a discriminatory discourse to articulate a moral ideology which promotes ‘drugs’ as particularly dangerous and destructive (Levine, 2003). While the discourse utilised in this sphere will be unpacked in more detail below, it is worth noting that the ideological commitment to global drug prohibition, promulgated by anti-drug discourses and legal instruments which adopt a dogmatic terminology, serve an
important purpose (Cohen, 2003). Levine (2003) observes that moralising discourses allow States to manipulate individuals to conform to a certain moral and ethical outlook, which can be used to divert attention away from other issues, and to justify State infiltration into an individual’s private sphere (Levine, 2003). Levine (ibid) additionally observes that a commitment to this hegemonic narrative is beneficial for the media, since it is an economic fact that sensationalist, moralist drug reporting increases profits. However, the author contends that the ideological commitment to drug prohibition has economic ‘uses’ which extend beyond media profits, because as noted in Chapter 3, the drivers for the global regime largely centred around the economic interests of powerful nations such as Great Britain and the US. Like Seddon (2013: 5) then, the author agrees that ‘power politics and trade’ are clearly at the heart of drug prohibition. In identifying the criteria believed to be at the crux of this global paradigm, the author contends that this necessitates questions concerning what the goals of drug policy should be. Should drug policy goals be rooted in ‘power politics and trade’ (Seddon, 2013: 5) or should other policy discourses which emphasise public health, human rights and morality prevail?

When promoting human rights as a goal for drug policy the majority of commentators centre their research in the harm reduction sphere. When exploring the interplay between the two global regimes the research largely stresses the vast amount of human right violations carried out in the name of drug control. For instance, The International Harm Reduction Association has produced extensive reports on the use of the death penalty, the use of corporal punishment and the use of disproportionate sentencing practices for drug offences committed throughout the world (Gallahue, 2011; Iakobishvili, 2011; Iakobishvili, 2012). Barratt and Nowak (2009), Barratt, Lines, Schleifer, Elliot, and Bewley-Taylor (2008), the Count the Costs briefings (2012) and Hallam, Werb, Lai, Nougier, Melis, and Curtis, (2012) also provide an extensive list of the human right abuses committed within this sphere. These non-exhaustive lists additionally highlight: the denial of basic health care in this field, the use of arbitrary detention and forced labour, the denial of a fair trial and due process standards, the infliction of torture and ill treatment by authorities, the prevalence of systemic discrimination against users which is often exacerbated further depending upon the individual’s race and/or sex, and the effect of crop eradication programmes which detrimentally impact upon the health, social security and livelihoods of those involved.
It is little wonder then that Professor Paul Hunt (2008: 9), the then UN Special Rapporteur on the Right to Health, acknowledged both the UN drug control and human rights systems to inhabit ‘parallel universes’, since the UN drug control system can evidently operate free from human right constraints, and hence contrary to the basic, fundamental principles of international law.

Thus, for most academics and practitioners examining the interplay between these two systems a more integrative and human rights orientated approach is essential. Barratt et al (2008), along with several other commentators highlighted above, have sought to resolve the current impasse through focussing on ways in which the international bodies regulating the two regimes can co-operate. They believe that through joint-working practices the international drug agencies can: seek to reject the stigmatising language they employ, increase meaningful civil society engagement, abolish any punishment practices which are contrary to human rights, ensure access to treatment and care for problematic users, and improve donor accountability, so that a few powerful western states can no longer influence the operation of oppressive drug control practices (ibid).

Given the level of detail now devoted to securing a more rights-orientated approach, it is perhaps fair to suggest that in many ways Gilmore’s (1996: 356) assertion from the mid-1990s stipulating ‘little has been written about drug use and human rights’ is no longer accurate. In actuality human rights will be shown to have moved increasingly to the forefront of the UN’s legal and ideological agenda (Rehman, 2009). Various UN bodies now recognise the need to incorporate human rights. For instance, in 2007 the United Nations General Assembly (2007) specifically acknowledged that drug control must be carried out in full conformity with human rights, and in 2009 the United Nations High Commissioner for Human Rights, Navanethem Pillay, asserted that ‘individuals who use drugs do not forfeit their human rights’ (United Nations Press Release, 2009: n.p.).

Nevertheless, whilst the aims of these bodies, academic and practitioners are clearly laudable, it is important to note that they all view the tensions between drug control and human rights from a similar, rather fixed perspective. As illustrated, a harm reductionist approach is often recommended to rectify any core human rights violations. Yet, the author posits that researching the interplay between human rights and the drug prohibitionist framework could be unduly restrictive; since this approach is ultimately
compatible with the philosophy with the global system of drug prohibition: a system which seeks to limit the usage of all psychoactives. Though Hunt (2008: 9) stipulates that the two regimes inhabit ‘parallel universes’, by seeking largely to reduce the harms which stem from this system, as detailed above, this conception of human rights arguably legitimises the prohibitionist paradigm. It fails to question the overarching goal of this system; to reduce or eliminate drug use. Thus, a human rights approach informed from a harm reductionist perspective can only ever perpetuate the current regime, even if it ameliorates some of the worst effects resulting from this system. However, human rights are thought to constitute a revolutionary discourse designed to: ‘change entrenched political behaviour, as well as entrenched social behaviour’, hence they are capable of extending beyond the paradigms currently imposed (Brems, 2009: 366). This thesis strives to move past the ‘parallel universes’ the human rights and drug control systems are thought to inhabit, and put forth a multi-faceted outlook to generate new thinking- or rather a ‘multiverse’- one which is unconstrained by the logic of prohibition. Weil (1983: 22-31 paraphrasing Weil, 1972: 191) observes:

‘I often have the suspicion that everything we do in the name of the drug problem is the drug problem. It’s not just the laws but the whole mentality that sees drugs as the problem and tries to fight them. By doing that I think we’ve made it all worse.’

Accordingly, an alternative human rights perspective, one which explores the human rights of individuals to consume psychoactives will be put forth to challenge prohibitionist logic and the moral hegemony of the global regime. The very concept of ‘drugs’ is premised on the basis of moral and political evaluations (Derrida, 1995). In actuality, one of the identifiable ‘uses’ of the system is the moral hegemony used to justify certain measures for social control (Cohen, 2003; Levine, 2003). As well as being an ‘evaluative’ concept, carrying with it a set of moral judgments, Seddon (2010) also observes that the concept is a regulatory construct, invented at the start of the 20th century. The creation of the international prohibitionist regime generated a division between ‘licit’ and ‘illicit’ psychoactives; thereby producing a new categorisation of illicit substances considered to be ‘drugs’. Hence, the question as to what actually is a ‘drug’- is an ontological one- and the answer produced affects all consequent investigative, philosophical and policy considerations on the matter (Seddon, 2010). Tupper (2011: 146), identifies two dominant metaphors existing in this sphere which continue to inform the prohibitionist regime: ‘drugs as malevolent agents’ and ‘drugs
and pathogens'; individuals who consume drugs are bad, sick or both. The prohibitionist regime thereby glosses over the complexities of the human lived experience in a simplistic pharmacological reductionism. An awareness of the regulatory and moralistic construction of ‘drugs’ pervades throughout this thesis. The author employs the terms: ‘drugs’ ‘psychoactives’ and ‘substances’ throughout to ameliorate the licit/illicit divide, and in full awareness of the socio-political ontologies. In fact, these terms are used interchangeably so that any normative distinctions cannot be drawn.

The incapacity of the global system of drug prohibition to fully appreciate drug use as a complex human phenomena, with both benefits and risks attached, is the reason why ‘everything we do in the name of the drugs problem is the drugs problem’ (Weil, 1983: 22-31). A human rights perspective focusing on the rights of users to consume currently controlled psychoactives under the prohibitionist system could appreciate this, potentially transforming the existing paradigm. While research in this area is growing, the focus tends to be on specific human rights and on specific drug using contexts. Some examples the thesis explores (non-exhaustively) include: the human rights of users to consume psychedelics and cannabis for medicinal purposes, the right to methadone maintenance or drug paraphernalia while in a prison, the right to use ayahuasca to promote health and well-being or for religious and spiritual purposes, and the right to consume psychoactives to expand one’s own consciousness. The existing literature largely constitutes philosophical, policy and doctrinal analyses of the case law and policies which expose the conflicts between the two regimes, and fails to more broadly question how the lens of human rights can fundamentally reconfigure the prohibitionist regime. The idea of human rights and their architectural framework is largely accepted without scrutiny. This thesis strives to comprehensively challenge the value of ‘human rights’ on a philosophical, political, legal and institutional basis, to thoroughly appreciate their capacity to provide a new perspective on drug control, and to point to alternative ways of regulating drug consumption.

Chapters 1-3 constitute Part I of the thesis and focus on the first aspect of the research question: How can the lens of human rights provide a new perspective on drug control?

- Chapter 1 will fundamentally question what human rights are, and from where they have originated, before exploring whether the idea of human rights can be
legitimately applied to appreciating the origin and value of human psychoactive consumption. It is thought that such a comprehensive historical, social, political and cultural understanding of human rights and psychoactive consumption is necessary to gauge the complex realities of this phenomenon, and whether a human rights lens is capable of understanding and responding to this.

- Chapter 2 introduces human rights as a conceptually useful tool to address a fundamental issue identified to be at the crux of drug policies: the conflict between the interests of the individual and the interests of the State. This chapter will argue that the typical philosophical positions, be they reformist or prohibitionist, all advocate either increases in individual empowerment or in State control. At its core, drug policy concerns the relationship between the State and the individual. Indeed, discussions on the ‘uses’ of prohibition (above) largely centre upon enhancing State power and diminishing individual control. Chapter 2 will argue that human rights are designed to openly address and reconfigure this binary; facilitating a progressive, open-minded approach to drug control.

- Chapter 3 explores the legal architecture behind the drug control and human rights frameworks from an international and a UK perspective. The chapter demonstrates a broader awareness of the legal and institutional operation of these regimes internationally, regionally and domestically to gauge their nature, function, whether there is room to legally deviate, and whether a hierarchical relationship exists between the two systems. Ultimately Chapter 3 demonstrates that from a purely legal perspective, both regimes are flexible, organic and capable of transforming to most changing circumstances. What is more, both institutionally and legally the international, regional and domestic human rights regime takes precedence over the drug control framework.

Part I of the thesis views human rights as conceptual tools from a philosophical, political and legal perspective and applies this to the drug control framework. This unconstrained exploration will therefore be shown to transform existing prohibitionist paradigms. Part II of the thesis applies the human rights perspective developed in Part I, to the existing conflicts between the drug control and human right regimes.

- Part II is a more applied endeavour, and employs health rights and religious rights as conceptual starting points to cement the arguments and insights gained
in Part I. The ‘Introduction to Part II’ section relays the structure and justifies the primary focus on health (Chapter 4) and religious (Chapter 5) rights.

- Part II will illustrate how human rights can embrace broader conceptions of health and religion to more fully appreciate the complexities of human psychoactive use. However, both the domestic and international case law demonstrates that, for the most part, judiciaries have been constrained by the prohibitionist paradigm and have arbitrarily applied human rights.

- Moreover, the health and religion chapters (Chapters 4 and 5) also reveal the fallibility of human rights, since the case law thoroughly explores how both frameworks work in practice. The moral, philosophical and legal arguments which the case law sections unpack also highlight the potential of the case law to constitute policies relating to drug use as well as being constitutive of them.

- Additionally, broader regulatory implications which could result from the bona fide human rights perspective developed in Part I, and throughout these latter chapters, will be highlighted, to demonstrate how human rights can point to different ways of regulating drug consumption.

The thesis is primarily situated within a UK context, as the author can comprehensively contextualise the research by limiting the geographical scope. However, the thesis recognises that drug policy issues are transnational, and it employs an international comparative approach where relevant. Ultimately the current approach is broken. We are locked in a prohibitionist legal paradigm which perceives the law as the key framework to regulate psychoactive use (Seddon, 2013). This thesis does not disagree. Rather, it contends that the predominant legal framework should not be the criminal law, but the remit of human rights, as they constitute legal instruments capable of: responding to the human condition, balancing conflicts between the State and the individual and they have a high legal and institutional standing. All of which, when applied in practice, could facilitate regulatory regimes which better reflect the complexities of human experience.
Chapter 1: Understanding the origin and value of human rights and psychoactive consumption

In order to gauge how the lens of human rights can provide a new perspective on drug control, it is imperative to firstly consider what human rights actually are, where they originate from, whether they even truly exist, why they are perceived as being so important, why they are criticised and how they are grounded. Such an exploration of the idea of human rights is justifiable to fully contextualise and provide a foundation for the research question. This is particularly important since the vast majority of previous academic engagement on this topic has largely debated our right to drugs from solely a moral and ideological standpoint (see Mill, 1859/2001; Husak, 1992; Van Ree, 1999). Griffin (2008) also notes how the notion of human rights is often commandeered for the exposition of an author’s own moral theory, as opposed to fully exploring the intention and meaning of the term (ibid citing Kant, Mill and Rawls). Hutson (1991) further explicates how a societal fondness for asserting our rights has effectively outrun our ability to analyse them and reach a consensus on their scope and meaning. Accordingly, human rights are being increasingly rendered ‘indeterminate’ or ‘criterionless’, whereby the runaway growth of the extension of the term has made its intention particularly thin (Griffin, 2008: 17). Indeed, the final legal case presented in this thesis which takes the human rights perspective on drug consumption to its zenith, by asserting a human right to use psychoactives under a broad freedom of thought conceptualisation, had its rights-based claims dismissed outright (R v. Hardison, 2005; Knowdrugs, 2011: n.p.). Judge Niblett compelled the defendant to: ‘show me the black letters of the law’ (ibid). Hence, a comprehensive overview of the scope and meaning of the idea of human rights, should go some way to rendering this notion more determinate and fulfilling Judge Niblett’s demands.

Chapter 1 will initially consider what human rights are and from where they have originated (Section 1.1) before introducing the foundations for human rights and critiquing their importance, relevance and place in society with a particular emphasis on the UK (Section 1.2). The chapter then explores how human rights are grounded (Section 1.3), and presents a comprehensive overview on the argument as to whether human rights are a universal or relativist; ‘the universalist challenge’ (Section 1.3.1). The argument that human rights are universal-be it on a foundational or constructionist...
basis - will feed into the final section which focuses on the origin and value of psychoactive consumption (Section 1.4). The author will tie the commonality or ‘universalist’ construction of human rights with the commonality of psychoactive use, to justify why a human rights are a good lens through which to view human psychoactive use. The chapter devotes more attention to the origin and value of human rights, to thoroughly explicate the fact that human rights strive to understand, reflect and respond to the human condition. They are thereby better placed to put forth a new paradigm for regulating psychoactives, one which is not constrained by a narrow cultural, historical, political and economic narrative.

1.1 What are human rights and where have they come from?

The idea of human rights is arguably one of the most pervasive features of our political reality. Certainly for Pogge (2000) and Nickel (2010), the most basic idea of the human rights movement does not relate to the rights themselves, but relates to the regulation of governmental behaviour through international norms. Indeed, we presently have burgeoning global, regional and domestic lists of rights which states are required to protect and enforce (Perry, 1998). Yet, despite their political prominence, the ontological status of a human right remains questionable, since for many there is a common belief that we do not have a clear enough conception of what human rights actually are (Griffin, 2008). Most academics subscribe to the historical notion that human rights are something every person possesses simply by virtue of being human (Donnelly, 2003; Edmunson, 2004; Hunt, 2007; ibid, 2008; Nickel, 2010). Thus, whilst the increased political standing of human rights in the international and domestic sphere is relatively new, the idea of human rights is actually a rather old one, dating back to medieval Christian influences on European culture (Kolakowski, 1990). Accordingly, to fully understand the operation of human rights in their contemporary form, it is necessary to delve deeper and unearth their historical conception, in order to give any real effect to the intention of the term.

The earliest modern conception of human rights is thought to have originated in the 12th or the 13th century under papal rule, where it was determined that property rights, no matter how small, were natural god-given rights conferred upon us all as human beings (Edmunson, 2004). The ensuing dialogue surrounding this decision further developed the idea that human beings were created in God’s own image, and thus were endowed
with an inherent sense of dignity and worth, from which a comprehensive rights system could flow (Griffin, 2008). Conceptual debates at this time additionally made the distinction between objective and subjective rights: the former referring to a sense of rectitude in relation to being right, whereas the latter was subjective, referring to a sense of entitlement that the right-holder has, placing the individual firmly in the foreground (Donnelly, 2003). However, Edmunson (2004) has noted that if the modern conception of rights is subjective and was construed in Europe, then how can one address the issue of historic-cultural relativism and the notion that the modern conception is not universal for all humans? For a more in-depth discussion see Sections 1.2 and 1.3.1. For now though, following Edmunson (ibid), it is important to critically engage in what else makes the concept so distinctive. It is felt that rights have attained such importance because they answer the need people have felt to express themselves in a certain way (ibid). To understand this need it is thought that a further grasp of an intellectual rights-based history is required (ibid).

During the Enlightenment the concept of human rights attained greater prominence, since the construction of human rights as natural rights coincided with questioning the order of the natural world (Griffin, 2008). Indeed, whilst the idea remained that human rights were natural, rooted in a person’s moral nature, and centred on the dignity of the human person (Donnelly, 2003); philosophers began to sever the conception away from its theistic origins (Griffin, 2008). For instance, Hugo Grotius (1646), a Dutch lawyer, regarded humans as inherently social beings imbued with sociability and understanding, which when combined created justice. Accordingly, for him the development of such concepts was sufficiently determinate to have ‘some degree of validity even if we should concede that which cannot be conceded without utmost wickedness, that there is no God...’ (ibid: 13). Grotius further expanded the subjective sphere of rights through acknowledging that the sphere was not just limited to property, but could extend to cover a whole range of an individual’s actions, so that they may enjoy a natural liberty (Edmunson, 2004). This extension arguably expanded the secular vision further, since the notion that individuals could freely enjoy different actions and form their own conceptions of a worthwhile life lends itself to pluralist values. Indeed, Grotius later went on to reject the notion of an ideal political state. In further accordance with such values, it was later conceived by Pufendorf (1672) that rights could not arise without another subsequently coming under obligation to the putative right-holder. This
notion was characterised as the correlativeity of rights and duties, and coincides with the renowned enlightenment thinker John Locke’s philosophy on the relationship between individuals and the State (Edmunson, 2004). For Locke (1690), a man’s natural right to life, liberty and estate could operate to control governments, as they are duty-bound to respect a man’s natural rights; given that the consent of the governed should be the only legitimate basis for forming a government (Edmunson, 2004). Such political concerns about the relationships between people and their governments and between people and each other prevailed throughout the 18th century. This was facilitated through the formulation of documents such as the American Declaration of Independence (1776) and the French Declaration of the Rights of Man and Citizen (1793), which verified both the rights and duties of the individual and the state.

These political concerns are further evidenced within a rights-based context at present, since human rights are protected by the rule of law, the principles of which are considered to be binding upon states (The Universal Declaration of Human Rights, 1948: Preamble) (hereafter the UDHR). Furthermore, treaties often contain derogations where societal interests can take precedence over individual human rights where necessary (The European Convention on Human Rights, 1950: see sub-articles 2(2), 5(1)(a-f), 8(2)-11(2)) (hereafter the ECHR). A far more detailed discussion of the ability on human rights to address the State/individual binary will be explored in Chapter 2. Additionally, Part II of the thesis will thoroughly analyse how the divide operates in practice.

As such, one could deduce that early enlightenment conceptions of human rights have changed very little (Griffin, 2008). Although the French revolution sparked scepticism about human rights and threw the notion into some disarray, the idea of human rights was consolidated and retrenched during the 19th century (Edmunson, 2004). Philosophers at this time were concerned about furthering their own ethical, moral and/or political theories and thus utilised the term in order to do so (Griffin, 2008). These writers were therefore unconcerned with exploring the historical notion of human rights (ibid). Accordingly, whilst the moral theories derived here, such as libertarianism, are somewhat superfluous to the historical notion of rights, such theories have considerable relevance during later discussions where the balance between the maintenance of social order and respect for individual rights will be explored. For now though, in keeping with the historical notion, one can follow Edmunson’s (2004: 12)
observation that the schematic profile of human rights rhetoric resembles ‘a Bactrian camel - it has two humps.’ The first hump appeared in the late 18th century with the enactment of human rights documents (see above), through which the ideas of earlier enlightenment thinkers were articulated (ibid). For Edmunson (ibid) and Griffin (2008) this period and the one preceding it was exploratory, provocative and concerned with finding sense for the term. Hence, why this period has been more prominent throughout this discussion.

The second hump is thought to have begun with the UDHR in 1948, in the aftermath of the Second World War. According to Edmunson (2004) it is unclear whether this period has ended. In fact, some commentators are concerned that the recent continuing prevalence of human rights discourse is becoming increasingly debased, devalued and is being utilised too frequently, without any real concern for the original intention of the term (Glendon, 1991; Griffin, 2008; Nickel, 2010). Despite this turn of events, Perry (1998) maintains that our current conception of the idea of human rights has actually hardly changed at all. He observes how the discourse in several international human right documents consistently refers to ‘the inherent dignity of human beings’ and the notion that we are all members of one ‘family’ (ibid, 1998: 13). For Perry (ibid), the similarities between this discourse and the original theistic conviction that every human being is sacred, means the idea of human rights is ‘ineliminably religious’ and still firmly attached to its theistic origins; as the notion of sacredness and familial ties are embedded in religious cosmology. Therefore, this could suggest that the original intention of the term human rights may not have deviated at all, which ultimately introduces an element of circularity to both the idea and its origin to say the very least.

1.2 Human right foundations and the question of importance

In light of such potential circularity, the idea of human rights has been subjected to penetrating criticism, since some commentators have perceived the concept to be no more than a social construction dreamed up by the west. Perhaps one of the earliest criticisms of natural rights theory was formulated by Jeremy Bentham (1843: 501) who famously declared natural rights to be no more than ‘rhetorical nonsense- nonsense upon stilts’. He was unwilling to assign any sense to the idea of a natural right outside of a legal setting, highlighting the inconsistency and instability within the construct, and a distinct lack of any strong foundations (Edmunson, 2004). Rorty (1999) too has
asserted that we should stop trying to defend the idea of human rights and abandon what he terms ‘human rights foundationalism’. This phrase refers to the attempts to trace human rights and natural rights theory back to their original source. Indeed, both Edmunson (2004) and Griffin (2008) have observed that the only way to reconcile any conflicting opinions about the idea of human rights is to trace the history of rights discourse. However, for Rorty (1999 as cited in Perry, 1998: 37-38) this attempt at rationality is both ‘outmoded’ and ‘futile’, since the premise that human beings have certain inalienable rights through virtue of their humanity alone is nothing more than ‘a moral point of view’, and an ‘acquired taste’ of the west. Perhaps such arguments are why Brown (1999) has noted that everything encompassed in the idea of human rights is subject to controversy. He observes how even the notion that only human beings or homo-sapiens should have rights is in itself contentious, since throughout history some have failed to draw sharp distinctions between humans and other creatures (Donnelly, 2003). For example, Kant contemplated the potential rights of extraterrestrials during the enlightenment (Edmunson, 2004), and even today questions arise as to whether dolphins or chimpanzees are sufficiently sentient to be afforded rights or recognition as a legal ‘persons’ (BBC, 2012a; Nonhuman Rights Project, 2014; n.p.).

Possibly the most contentious argument though is the one Brown (1999) followed on with, as he acknowledged the criticisms attached to the moral idea that rights could be afforded to human beings simply by virtue of their human status. Rorty (1999) asserts that this idea is both historically and culturally contingent and not applicable to all of humanity; particularly to civilisations outside of Europe and America, as they did not have a hand in the conception of rights. He notes how societies that have been untouched by the European enlightenment fail to construe all humans as human beings per se. Rather, these civilisations distinguish themselves as ‘good’ or as ‘true humans’ from their foes who are rendered ‘bad’ or ‘pseudo-humans’, and who thereby fail to satisfy the necessary criteria to be afforded human rights status (ibid: 67). At the time of writing, Rorty (ibid) employed the then current Bosnian genocide as an example to demonstrate how the Serb’s ethnic cleansing of the Bosnian Muslims was not viewed as a human rights violation, as the Muslims were not perceived to be fellow human beings. As well as recognising the cultural contingency present, Rorty (ibid: 68) also acknowledges the notion of rights to be historically contingent since natural rights theory focused on the rights of ‘man’ to the exclusion of women, slaves and people who
were deemed to be ‘not like us’. Hence, for Rorty (ibid), moral choices relating to rights are merely historically or culturally contingent facts of the world. He therefore fails to perceive why membership in a biological species should suffice for membership in a moral community, particularly since many civilisations would deem it too risky to allow their sense of community to extend beyond their immediate family/clan/tribe. Yet, perhaps Rorty fails to appreciate that the world is becoming increasingly globalised, which could allow for the expansion of our community ideals, since it has been suggested that the UDHR is applicable to all nations (Ferreira, 2011).

Moreover, Donnelly (2003) argues that the contentious foundations upon which rights rest are ultimately irrelevant anyway. He recognises that problems of circularity and vulnerability are applicable to all moral concepts and practices and are not just limited to human rights. As such, he observes human rights to ultimately rest upon the social decision to act as though such ‘things’ existed, and then through the social action directed by these rights, to create the world they envision. Therefore, it appears that Donnelly (ibid), much like Perry (1998), perceives human rights to represent a utopian ideal with both moral ideas and political practice being fused together. Perry (ibid) further asserts that it was this ideal that attributed to the creation of the UDHR in the first place to prevent the genocidal atrocities of world war two from ever reoccurring. Although such atrocities have occurred to varying degrees, it is possibly fair to suggest that the concept of human rights has acted as an important safeguard, since when violated they invite legal proceedings to ensure their enforcement. Consequently, in contrast with Rorty (1999), it has been argued that human rights foundationalism, and with it the idea that every human being is sacred, is an essential concept, as it prevents a situation where every culture acts in their own self-interest (Perry, 1998). In his book’s concluding sentence, Edmunson (2004) also recognises the importance of rights as a safeguard, noting that rights can make it possible for people to experiment with their lives, without making mere experiments of others, and to that extent they are to be cherished. Accordingly, a total dismissal of human rights foundationalism could be unwarranted, since it is on the premise that every human is sacred that rights can legitimately act as a safeguard for humankind.

In further support of this counter-argument, both Griffin (2008) and Edmunson (2004) have additionally found human rights foundationalism to serve other practical purposes. They believe the concept helps empower individuals, with Edmunson (ibid) noting that
when aspirations are expressed as entitlements people are psychologically readier to fight for what they perceive to be theirs. Donnelly (2003) too reaffirms that human rights claims are not merely aspirations but rights based demands for change. It has been posited therefore that such empowerment could extend beyond an individual level, as Hunt (2007) observes that it is individual minds that help shape and reshape entire social and cultural contexts via rights discourse. For Hunt (ibid), such deep moral and social shifts are facilitated by the self-evident nature of human rights, since human beings understand and act on their meaning simply because they are distressed if their rights are violated. Arguably then an historical account is necessary to trace the alteration of individual minds and gleam where and when new kinds of understandings and feelings arise. Moreover, to believe that such rights are self-evident by human nature alone suggests the concept of rights is not merely a social construction of the west. Indeed, Wenar (2011) has noted that the idea of human rights rests in the domain of the anthropologist, since even the most rudimentary of communities have rules specifying what individuals ought to and ought not to do. Wenar (ibid) observes how such rules ascribe rights and how the genesis of the concept of a right is simultaneous with the reflective awareness of certain social norms. As such, it appears that certain social norms and social changes do reflect the underlying vision of a human being’s moral nature. This corresponds with the views expressed by Donnelly (2003), Hunt (2007) and Wenar (2011) that human rights have humanity at their source, as they are rooted in a substantive vision of a person’s moral nature, wherever the person may have originated (Donnelly, 2003). Therefore, contrary to Rorty’s assertions, it has been suggested that foundationalism and natural rights theory can go a long way towards preserving the essential universality of a human right, since the idea of rights is entrenched in human nature itself (Donnelly, 1982).

Yet, as discussed previously, ‘human nature is a social project more than a pre social given’ (Donnelly, 2003: 14). From the 18th century to the present, we have been able to view the extension of rights and appreciate how they are now applicable to persons without regard to sex, race or resources (see Article 2 UDHR). Although few would doubt that the expansion of rights protection was a result of moral progress (Edmunson, 2004), Rorty (1999) attributes such changes to our developing sentiments and sympathies instead. Without wishing to debate the difference between these two ideas and consider whether or not they are in fact intertwined, it does appear that the majority
of human rights academics concede that human beings are inherently malleable (Rorty, 1999; Donnelly, 2003; Edmunson, 2004; Hunt, 2004; Wenar; 2011). We are continuously developing our own idea of human rights and it is such developments that may have led to the explosion of rights discourse present now and throughout the latter decades of the 20th century.

Due to the continuing prevalence of rights discourse, human rights are becoming subjected to extravagant formulations and impractical demands, as citizens are increasingly asserting individual or egotistical claims without considering the possibility of burdening others with any corresponding obligations (Glendon, 1991; O’Neill, 1996; Griffin, 2008; Wenar, 2011). Thus, it has been suggested that the original sense of the term human rights has been lost, since an all-encompassing focus on persons as right-holders steers rights away from traditional questions concerning what one ought to do and how one ought to live (O’Neill, 1996). Mary-Ann Glendon (1991; 14), who helped pioneer this argument, further acknowledges how such an insular focus on our individual rights could impede social progress, since abandoning these traditional questions and the correlative nature between rights and duties has promoted ‘mere assertion over reason giving’, inhibiting the possibility of finding common ground. However, Perry (1998) has importantly noted that Glendon’s critique of ‘rights talk’ does not extend beyond American rights discourse, and he thereby suggests that individualistic rights-based saturation has not occurred at an international level. He cites numerous international human rights documents that are explicit about individual responsibilities and duties, and notes that from a communitarian perspective it is for the common good of the community that diverse individual beliefs are upheld (ibid citing Hollenbach, 1994). Fraser (1989) also agrees that rights talk is not inherently individualistic or even bourgeois-liberal or andocentric; rather, it takes on those properties only when society establishes the wrong rights. This is an interesting idea, as it perhaps explains why certain western democracies, namely the USA, have been accused of devaluing our rights through the prevalence of rights discourse, whilst at an international level the intention of rights is thought to stand firm. Perhaps it could be argued that the UK is also guilty of establishing the wrong rights, since the public perception on the importance of human rights is now more questionable than ever before…
The conservative party in the UK have recently proposed to replace the Human Rights Act (1998) (hereafter the HRA) which gives effect in UK law to the ECHR, with a ‘Bill of Rights’ to distance itself from the ‘mission creep’ of the European Court of Human Rights (hereafter the ECtHR) in Strasbourg (Conservative Policy Paper, 2014). Though the operation of this legal architecture will be thoroughly explored in Chapter 3, it is sufficient to argue here that such proposals are a timely, populist response to concerns in the UK relating to how human rights are being interpreted. In the BBC (2012b) documentary ‘Rights Gone Wrong’, the TV presenter Andrew Neil observed that segments of the UK public are becoming increasingly hostile to the whole idea of human rights, as many believe the concept has extended too far and is now more offender orientated than victim orientated. To confirm this perception a UK human rights inquiry found that 42 per cent of the public agreed with the proposition that the ‘only people to benefit from human rights in the UK are criminals and terrorists’, while 40 per cent disagreed (Equality and Human Rights Commission, 2009). The Equality and Human Rights Commission have largely attributed such negative public perceptions to the inaccurate reporting of human rights issues by some UK print media (ibid). It has been asserted that the tabloid press in particular are responsible for utilising the HRA as a vehicle to demonise certain communities and minority groups, and it is thus used only in terms of sensationalist journalism (ibid). In light of such negativity topical human right issues such as giving prisoners the right to vote and granting asylum to known terrorists have sparked much debate and disagreement from the UK public (BBC, 2012b). Indeed, it is precisely these issues which are exemplified in the Conservative Policy Paper (2014) to justify the government’s new proposals.

Despite negative public and governmental attitudes, these issues arguably illustrate that our conceptions of human rights and when they can be afforded are continuously evolving and expanding. Additionally, they go some way to evidencing the separation of the judiciary from the State in the UK, since politically unpopular human right decisions are nevertheless being made independently of the potentially ideological perceptions of parliamentarians, bureaucrats or an uninformed media. However, whilst there are safeguards in place such as the declaration of incompatibility contained within the Human Rights Act (1998), to ensure the judiciary can ground their decisions independently and objectively (See Chapter 3), as will later be demonstrated legal safeguards can be manipulated to serve the majoritarian aims of the State (See Part II).
Regardless though, Chakrabarti (2014: xii) argues that the impartiality of the judiciary and its independent or unelected nature is essential for the foundations of democracy to guard against majoritarian rule: ‘To elect judges is like nominating a referee from one or other football team. It would ensure that in times of strife and even more routinely, the roar of the crowd rules and Barabbas goes free’. What is more, such divergence of opinion when establishing new rights highlights their organic nature and their dependency upon social construction. Therefore, in order to more accurately determine which rights can be classified as legitimate human rights it is necessary to further explore how this concept is grounded.

1.3 The grounds for human rights

Nickel (2010) observes that when deciding which rights ought to be classified as human rights it is possible to make too much or too little of international human rights documents such as the UDHR or the ECHR. According to Nickel (ibid), one could make too much of such documents if one assumed that by being on an official list a right automatically has its status affirmed as a human right, as this could potentially lead to a fundamentalist position. Yet, one could also easily make too little of such documents by drawing up a new list of important rights and by believing that such an action is a novel idea, thereby dismissing the detailed thought processes and practical wisdom which is found in the choices of rights that went into such official documents (ibid). Therefore, in order to successfully navigate between these two positions this section will proceed by exploring the general criteria deemed necessary for a right to be classified as a human right. For Nickel (ibid), the defining features of human rights that most commentators subscribe to are as follows: rights should have governments as their primary addressees\(^1\); they should ensure that people can have minimally good lives; they should be universal and have high priority, and they should be supported by strong reasons that make plausible their universality and high priority. Additionally, it remains debatable as to whether human rights are absolute; as such this criterion will also be explored.

Since human rights are largely political norms (See Section 2.1), it is accepted that they mainly deal with how governments and institutions should treat their people. Indeed as

\(^1\)Whilst it is possible for human rights to have a horizontal effect in impacting the legal relations between private juristic persons, the subject matter of this thesis dictates that a vertical relationship between the State and its citizenry will be the primary focal point.
Pogge (2000: 47) asserts, ‘to engage human rights, conduct must be in some sense official’. Donnelly (2003: 12) similarly observes the significance of the relationship between governments and the individual here since it is this relationship that has led human rights claims, unlike other claims, to be endowed with a unique ‘last resort’ status, as no higher appeal is available. In light of this human rights are often viewed as a standard for political legitimacy, the UDHR (preamble) for example presents itself as ‘a common standard of achievement for all people and all nations’. Thus, to be afforded human right status a right should operate as an important safeguard in ensuring that the government acts legitimately and protects its people. Additionally, given that human rights should have governments as their primary addressees, a human right should also operate to address the power imbalance between the government and the individual. In truth, it is this unique set up which, as previously noted, empowers and enables individuals to vindicate their rights (Edmunson, 2004; Griffin, 2008); this in turn secures a government’s legitimacy under the enlightenment correlative of rights and duties doctrine. This doctrine will be more thoroughly explored in Chapter 2 when exploring the capacity of human rights to address the fundamental issue to be established at the core of drug policy; the conflict between the interests of the State and the interests of the individual.

Likewise, the debate as to whether any human rights are absolute, and which if any take precedence in case of a conflict will be more thoroughly illuminated in Part II of the thesis, when exposing how human rights and drug policy regimes operate in practice. Generally speaking, while it is largely accepted that human rights as moral rights can never be completely unconditional, since there exists (largely theoretical) utilitarian considerations which prevents such recognition (Perry, 1998), from a practical viewpoint there is good sense in ensuring that some legal human rights are non derogable. Both Perry (1998) and Brems (2009) cite several core human right obligations for governments, including the right not to be subjected to torture, with Perry (ibid) acknowledging their legally absolute status to be a necessity. This is because a non derogable status operates as a safeguard to prevent any potential ‘escape clauses’ for political authorities (ibid: 105). Although, in actuality, the vast majority of rights are not considered to be core rights. Hence, most human rights are not legally absolute and can often be subject to reasonable restrictions in the public interest Cooray, 1996).
For instance, the second subsections in articles 8-11 ECHR all specify that a right may be derogated from if it is deemed to be necessary in a democratic society to protect the public order, societal health, morals, and safety, and/or to protect the rights or freedoms of others. For Hart (1994: 128), the imposition of such restrictions corresponds with a key ‘feature of the human predicament’, as we are incapable of foreseeing or identifying all possible situations involving human right provisions, thus it makes sense to allow for open-ended and derogable rights. Moreover, human rights are generally accepted as being incommensurable, a concept which means that where clashes of value exist, it is not possible to rank and rationally compare competing accommodations (Alder, 2006). Since rights encompass human nature, which in itself arguably comprises of competing and irreconcilable impulses (ibid), it logically follows that human rights themselves will clash. Therefore, whilst Nickel (2010) highlights that human rights should be supported by strong reasons, these reasons can often conflict, particularly where any intrinsic values for an individual are weighed against consequentialist concerns in the public interest. What is more, several commentators acknowledge that when this conflict occurs, a consequentialist perspective tends to dominate the judicial balancing exercise; hence restrictions justified in the public interest largely tend override individual rights (Cooray, 1996; Alder, 2006; Beck, 2009). Since this assertion will be thoroughly scrutinised in Part II, it is sufficient for now just to observe Brem’s (2009) findings that the legal mechanisms in place, such as the proportionality test, are not always successful in maximising human rights protection for the individual. In truth, such safeguards are often arbitrarily applied to conform to the notion that human rights should be minimalist, and should go no further than strictly necessary to achieve their aims.

According to Raz (2010), commentators which subscribe to human rights foundationalism and the traditional account that rights are rooted in human nature itself, often favour a minimalist approach. This is because the traditional doctrine is so conceptually broad it is generally thought that boundaries have to be imposed to guard against human rights inflation (ibid). Therefore, for traditionalists the aim of human rights is to protect minimally good lives for all people, as they are ‘much more concerned with avoiding the terrible than with achieving the best’ (Nickel, 2010: n.p.). Edmunson (2004) is a particularly strong advocate of the minimalist approach, observing that the proliferation of rights has served to debase rights discourse, has
enfeebled the protection offered to core human rights and has facilitated a situation where the general consensus on human rights is becoming less and less clear. Therefore, to potentially avoid the rights revolution from overplaying its hand, Edmunson (ibid) advocates restricting internationally enforceable rights to a minimal list, even potentially excluding some first generation rights, to ensure that an international consensus on the values to be cherished can be reached and enforced.

However, some commentators oppose the idea that human rights should offer mere minimalist protection (Brems, 2009; Raz, 2010), as Brems (2009) explicitly acknowledges the artificial dichotomy inherent in 1st, 2nd, and 3rd generation rights (a concept explored in Chapter 3). Raz (2010) further recognises that rights are continuously expanding and evolving, citing a recent human right to sexual pleasure to evidence his claims. Indeed, if human rights are to represent a truly utopian ideal, as envisaged by Donnelly (2003) where both morality and political practice are fused together, then surely rights should be concerned with achieving the very best? Certainly for Brems (2009), human rights should strive for the horizon as opposed to having governments fixated with the bottom line. Brems (ibid) observes that human rights at present undergo borderline control monitoring, where the sole concern is to minimise rights violations as opposed to recognising areas of best practice as well. For Brems (2009) the technique of progressive realisation, which is employed to maximise economically centred rights depending upon when states have various financial resources, should be extended and applicable to rights in other contexts as well. Brems (2009: 366) believes rights to be a revolutionary discourse aimed to ‘change entrenched political behaviour, as well as entrenched social behaviour’, therefore they are capable of extending beyond the boundaries currently imposed. While the grounds for human rights which centre upon questions of their absoluteness, incommensurability and the need for governments as primary addressee’s will be explored in later chapters, the notion that human rights constitute a revolutionary political discourse holds distinct relevance for this chapter. Indeed, Section 1.4 will point towards the malleable nature of human beings within the context of psychoactive usage, suggesting that the malleable, revolutionary nature of human rights provides a good lens through which to understand and respond to this phenomena. The final ground for human rights when contemplating their potential to provide a new perspective on drug control, debates the ‘universality’ of human rights; a concept which will be thoroughly tied to the
commonality of human drug use. Given the significance of this argument then, the author devotes an entire subsection towards exploring and justifying this ground.

1.3.1 ‘The universalist challenge’

The universalist ground for human rights predates even an enlightenment conception of the term, since the notion that human rights are universal arguably carries remnants of theism. This ground centres upon the assumption that there exists a common humanity, where all human beings are essentially alike and hence should be treated as such. For Parekh (2005) it is accepted that because human beings belong to the same species, they share a set of basic capacities, appetites and needs which can only be meaningfully fulfilled under certain conditions. These conditions which define human well-being and constitute common fundamental interests (ibid) have been legislated for within the human rights sphere, as it is legally accepted at least that human rights are universal (see legal universalism below). Yet, on a metaphysical level there remains much debate about whether rights can ever truly be universal, a debate which Perry (1998: 58) presents as the ‘relativist challenge’. Perry (ibid) considers there to be three components to this challenge, each of which disputes the universality of human rights; they include anthropological relativism, epistemological relativism and cultural relativism. Anthropological relativists maintain that human beings do not have a common nature, rather the deepest level of oneself remains entirely dependent upon how a person is socialised within their own historic period and culture (ibid). Such reasoning lends itself to the well-worn argument employed by relativists, and one which the author has briefly delved into, that human rights are a western conception and must therefore reflect distinctly western values and beliefs (Rorty, 1999; Goodhart, 2005).

However, universalists claim that some social senses, appetites, and needs are shared across all cultures as some needs are not local, but human (Perry, 1998). Perry (ibid) simplifies this contention through acknowledging that some things are good and some things are bad for every human being irrespective of their origin. He cites several atrocities committed during the Bosnian genocide, and recognises a fundamental human desire for various capacities, capabilities and/or virtues including affection, cooperation and the need for a place in society, to demonstrate how the human experience cannot be entirely culture bound. He further draws on a speech given by John Paul II (1993, n.p. as cited in Perry, 1998: 57) to illustrate that a person cannot be exhaustively defined by their culture, since ‘the very progress of cultures demonstrates that there is
something in man which transcends those cultures. This ‘something’ is precisely human nature’. This statement relates back to an earlier point that human beings are essentially malleable, as rights constitute a person’s underlying moral vision and they progress accordingly (Rorty, 1999; Donnelly, 2003; Edmunson, 2004; Hunt, 2004; Wenar, 2011). As an important aside for later, more focused discussions on the rights of substance users, both John Paul II (1993, as cited in Perry, 1998) and Nussburn, 1993) also recognise that a human being’s inherent malleability is a feature of humaneness which exists independently of a person’s society or culture. They therefore implicate that a right may still constitute a human right regardless of whether it is presently recognised by society, as human nature itself dictates its existence. However, a valid criticism of this moral universalist position is expressed by Goodhart (2005) who notes the dangers of conceiving human rights solely in terms of their moral validity, since the west have historically misused supposed universal values to justify racist and imperialist policies. This therefore gives some credence to the relativist position.

However, the second relativist argument, epistemological relativism, is also heavily disputed since any residual concerns about the moral or ‘natural’ universality of human rights can be firmly addressed here. Epistemological relativists assert that human beliefs vary to such an extent that it is impossible to have any productive dialogue between different cultures. Yet, as Goodhart (ibid) notes, this argument incorrectly presumes there to be a high degree of homogeneity between cultures which is not often the case, as various cultures are more pluralistic, and there exists much more internal debate than relativists traditionally account for. Besides, the fact that there is widespread agreement throughout the vast majority of states on the content contained within the International Bill of Rights; comprising of the UDHR, the International Covenant on Civil and Political Rights (1966) (hereafter the ICCPR), and the International Covenant on Economic, Social and Cultural Rights (1966) (hereafter the ICESCR), further dispels these epistemological challenges (Perry, 1998). It also establishes the basis upon which an alternative form to moral or ‘natural’ universalism can be established; as human rights are arguably legally universalistic. Certainly the language contained within the International Bill of Rights supports this argument, as the discourse frequently refers to the; ‘rights of all members of the human family’ (UDHR preamble), ‘all peoples’, ‘every human being’ (Articles 1 and 6, ICCPR), and ‘the right of everyone’ (Article 8, ICESC). Regional human rights documents have also
adopted a universal approach, as the ECHR consistently embraces the rights of ‘everyone’, or else details what ‘no-one’ ought to be subjected to in Articles 2-14. Moreover, the presence of such universalist terminology within globally applicable human right documents offers considerable weight to the notion that human rights have high priority. Through evidencing the wide spread agreement within the international community that human rights are applicable to all, there is support for Cranston’s (1967: as cited in Nickel, 2010: n.p.) claim that human rights are matters of ‘paramount importance’ and that their violation would be ‘a grave affront to justice’. Yet, despite the connection between universalism and a further ground for human rights (their high priority), the final relativist position is arguably correct, although the argument raised can be overcome.

Cultural relativists insist that cultural particularities determine the way human rights are institutionally embodied, and the degree one or another culture gives to a value represented by a human rights provision (Perry, 1998). Whilst this may be the case, as China for example ascribes a different value to the freedom of the press than the UK does, Perry (ibid) still insists that internationally recognised human rights are universal to the extent that they provide a general direction for states to follow. Perhaps the best way to give effect to the universality of human rights then is accept the notion of pluralist universalism, an idea currently gaining ground. Pluralist universalists recognise that universalism and relativism are both incoherent extremes distorting the truth of human nature (Parekh, 2005). Rather, a more accurate account understands that what is good or bad for humans beings in general is not inconsistent with their being diversity and preferred ways of life (Perry, 1998). Parekh (ibid: 286) acutely surmises this position as the ‘relativisation or contextualisation of universal values’. He further observes that using this conception of universalism to ground human rights results in the stimulation of an intercultural dialogue and offers an essential opportunity to delve greater insights into the nature and complexity of universal values. Thus, to ground human rights according to this notion is beneficial to the thesis’s subject matter as pluralist universalism facilitates openness and debate within the human rights field; arguably essential qualities when considering a human right to consume psychoactives. This subsection serves to justify that human rights are universal, whether on a naturalistic or constructionist basis. This argument combined with discussions pertaining to human rights foundationalism and their inherent malleability will be the
focal point for the final section, which seeks to understand the origin and value of psychoactive consumption. By fully contextualising the idea of human rights, it is hoped that this chapter will provide the initial groundwork for why the lens of human rights can improve the drug control framework.

1.4 The origin and value of human psychoactive consumption

There are approximately 4000 plants containing psychoactive substances (Buxton, 2006). Around 60 of these have been consumed throughout history, as humans have ingested naturally-occurring psychoactives since the beginning of civilisation (ibid). Smail (2008) also notes that human beings have consumed psychoactives for millennia. This practice stretches far back into the deep history of human beings, and it is found in most cultures and societies worldwide (ibid). Out of 237 cultures across the globe, Blum (1969) has found only 4 which have no record of intoxicating substance use, since these societies were regarded as so isolated that they were incapable of cultivating psychoactive plants. Weil and Rosen (1983) reiterate this through observing that Inuit’s were unable to grow plant drugs, and thus had to wait for other humans to bring them alcohol. Such observations reinforce the prevalence of human psychoactive use throughout time and geographical space. Smail (ibid) takes a deep historical perspective towards understanding human psychoactive use, since he argues that we can only understand our brain/body behaviour, and ultimately the human condition itself, through delving into the deep history of the brain; a history which extends beyond written texts. For Smail (ibid: 8 citing Geertz, 1973: 68) there is ‘a reciprocally creative relationship between biology and culture’, and he argues that the brain is an obvious device for making the deep past intelligible. The author agrees that in order to truly account for the origin of human psychoactive use and ascribe a value to this phenomena, it is necessary to adopt a long historical narrative. According to Smail (ibid: 202), ‘there is a grandeur in this view of history…We need not dig only in the dusty top soil of the strata that form the history of humanity. The deep past is also our present and our future’. Therefore, in order to free ourselves from constraints of the existing paradigms of the present and the system of drug prohibition, a deep historical perspective facilitates an unconstrained narrative, one which can be applied to the contextualisation of human rights (above), to initiate more lasting solutions. Accordingly, this section will explore the history of human psychoactive usage and it will apply concepts discussed above such as human rights foundationalism and the malleability of rights, to
justify why a human rights perspective is a good lens through which to understand this phenomena. It will then cement this argument through using the idea of pluralist universalism and the commonality of human drug use to evidence the value of psychoactives to humans.

Smail (ibid) observes that the human brain has a history that could be older than humanity itself, since animals after all engage in mood altering activities. He notes that they nibble cat-nip, consume fermented fruit, and like us, some primates such as bonobos engage in the bonding experience and pleasures of recreational sex (ibid). Siegel (2005) writes far more extensively on this topic as he asserts that intoxication with plant drugs and other psychoactives has consistently occurred across time in almost every species throughout history. He substantiates his rather broad claims through devoting several chapters of his book: *Intoxication the Universal Drive for Mind Altering Substances*, to scientifically documenting patterns of intoxication and the drug seeking behaviour of a variety of animal species including: goats, birds, cats, pumas, koalas, mongoose and apes. Siegel (2005: vii) adopts a naturalistic approach by asserting this evidences that intoxication is a natural part of our biology, much like the drives for thirst, hunger and sex; the pursuit of psychoactives functions as a ‘fourth drive’. This argument corresponds with human rights foundationalism and the notion that human rights are entrenched in human nature itself (Donnelly, 1982). Indeed, the anthropological perspective agrees that human rights have humanity at their source as there are certain appetites, social sense and needs which are shared across all cultures, thus some needs are not local, but human (Perry, 1998). Though human rights foundationalism is subject to criticism, it provides support to the notion that human psychoactive usage is a naturalistic phenomenon; demonstrating the capacity of human rights to respond to the human condition.

Prior to the agricultural revolution, Palaeolithic societies acquired a range of mood altering practices including: dance, song and mood altering substances which were often used in a ritualistic context (Smail, 2008). Psychedelic philosophers such as Terrance McKenna (1992), perceived plant-based hallucinogens as having a pivotal role in the development of anthropoid awareness. While this subscribes to the idea that human psychoactive use is a naturalistic, foundational phenomenon, McKenna (ibid: 13) additionally links the way in which humans ingested psychoactives in those eras with more recent psychedelic movements in the 20th century (for more detail see Part
II), observing there to be an ‘archaic revival’. Tupper (2002) confirms McKenna’s (1992) view that plant psychedelics were historically utilised as ‘cognitive tools’ to help humans make sense of the world, and facilitated different types of intelligence. He posits that ancient shamanic practices brought experiential, existential and spiritual intelligence to the fore through the use of these psychoactives (ibid); a view which Moore (2007) and Siegel (2005) confirm to have occurred across human history. Siegel (ibid) refers to the high regard ancient Greeks have had for certain psychoactive plants, and Moore (2007: 357) establishes that the Romantics, (an 18th century forerunner to the psychedelic movement in the 1960s), accorded drugs a valuable position, observing: ‘[d]rugs could take one closer to truth, could reveal, through hedonistic self-exploration, the real, authentic self, buried beneath capitalism and social convention’. The revival of these ancient wisdoms introduce an element of circularity towards understanding the history and the value humans ascribe to the use of psychoactives, and gives credence to the argument that human rights can respond to human drug use as a foundationalist, naturalistic phenomena. Indeed, Part II of the thesis will discuss in far greater detail how certain psychoactives like ayahuasca, peyote, cannabis etc. have been revered and utilised for pleasure, health, well-being, spiritual, religious and for thought expanding purposes on a global scale.

However, the idea that psychoactive use can be solely attributed to our nature as chemical beings is too simplistic a concept for Smail (2008). In keeping with the ideas expressed in human rights discourse, Smail (ibid) posits that culture is a biological phenomenon wired in the brain, and that our neurophysiology adapts to changes in behaviour and customs. This fits well with the notion that human rights are malleable concepts and that ‘human nature is more of a social project than a pre-social given’ (Donnelly, 2003: 14). Notwithstanding the exceptions detailed above, the plant psychoactives which humans ingested in the Neolithic and Palaeolithic eras largely occurred in a remarkably different setting to the way in which most human cultures ingest psychoactives today. Post the agricultural revolution, the advent of ‘civilisation’ and sedentism is thought to have altered our body chemistry given an evolving economy and political systems which were increasingly organised around the delivery of institutions, sets of practices and goods (Smail, 2008). Smail (ibid) observes that the 17th and 18th centuries in particular constitute distinctive time periods in the neuro-history of human beings. According to the historian August Ludwig Schӧzer (d. 1809
as cited by Burke, 1990: 36): ‘the discovery of spirits, the arrival of tobacco, sugar, coffee and tea in Europe have brought about revolutions just as great as, if not greater than, the defeat of the Invincible Armada, the wars of the Spanish Succession, the Paris Peace, etc.’ In fact, in these centuries economies became orientated in large part around the production and circulation of psychoactive substances. According to Smail (2008) advances in the 17th and 18th centuries expose psychotropic profiles which were no longer linked with worldwide geographical regions, rather they became linked to class or status identities, given their increasing availability and cultural integration. What is more, traditional boundaries between using substances as medicines, using them recreationally and abusing them were breaking down (ibid). While our human ancestors are thought to have ingested plant psychedelics, largely to enhance different knowledge bases and to make sense of the world, the development of an increasingly consumerist economy altered the way in which we consume psychoactives.

Consumption is now regarded as being a consequence of society as well as being constitutive of it (Burnett, 1999). Substances such as tea and coffee and even alcohol have undergone many civilising processes, are thought to be ingrained in the collective consciousness, and can be perceived as useful and beneficial; facilitating a common element of sociability and hospitality. Other psychoactives such as sugar are subject to very little restriction since sugar is exploited commercially to fulfil our innate, hedonistic drives in an increasingly global capitalist world (Courtwright, 2002). The reasons why certain psychoactives are prohibited and others are not will be explored more thoroughly in Chapter 3. For now, it is enough to observe that the essence of modern culture allows: ‘sovereign individuals to ransack the world store house, casting aside traditional restraints in the pursuit of self-fulfilment’ (ibid: 206). Though the malleability of human rights suggests that they are capable of responding to changing political, cultural, social and economic paradigms, there is an argument that human technology is evolving faster than our neurophysiology allows (Smail, 2008). The invention of the hypodermic syringe and the safety match have altered our drug using patterns and behaviours (Siegel, 2005). We can now have instantaneous more powerful ‘hits’ or ‘highs’ from psychoactives, a situation which conforms to the consumerist capitalist narrative, but one which Siegel (2005) cautions against. The age of the internet and the advent of new psychoactive substances (NPS’s) has also completely
reconfigured humankind’s relationship with psychoactives, and more recently, the hegemonic narrative of prohibition (Walsh, 2011).

Such technological advances further challenge the simplistic view garnered by the prohibitionist regime that all drugs are the same and are equally dangerous (Babor, Caulkins, Edwards, Fischer, Foxcroft, Humphreys, Obot, Rehm, Reuter, Room, Rossow and Strang, 2010). While evolving technologies also present questions relating to social cohesion and arguably exacerbate the State/individual binary (for more detail see Chapter 2), it is only by understanding human psychoactive use as a complex phenomenon occurring in a vast array of changing social, political, cultural, economic and technological contexts throughout history, that meaningful policy responses can be developed. Although human psychoactive use occurs in a multitude of contexts, the pluralist universalist approach, developed within the milieu of human rights, appreciates this diversity, yet simultaneously recognises that some appetites and behaviours are distinctly human (Perry, 1998). Even though our ancient ancestors may have used psychoactives as cognitive, evolutionary tools, the fact that such use predates humanity, as substances are used by animals for pleasure, substantiates the more westernised hedonistic, pleasure-seeking and consumeristic drug behaviours today. Moreover, the drug using purposes for human-kind in 20th and 21st century are remarkably similar to the purposes expressed by our ancestors. Buxton (2008) expands on Inglis’s (1975) 6 primary drivers for drug use in ancient and modern societies, some of which are discussed above. She notes that psychoactives are used in human societies for pain relief, for physical stimulation, for their cultural, spiritual and religious significance, as a food source, for bartering and financial purposes and for relaxation, recreation and experimentation (ibid). These broad uses arguably coincide with the thesis’s employment of human rights to demonstrate that human kind consumes psychoactives for pleasure, health, well-being, religion, spirituality and for thought expansion purposes to name but a few. Such purposes reveal a commonality amongst human-beings occurring across time and throughout most cultures. As Smail (2008: 199) remarks: ‘we celebrate the diversity of human civilisations, but it is the similarities that are the most startling, the thing that continually reminds us of our common humanity’. It is hoped then that the legalistic, constructionist and naturalistic universality of human rights can serve to understand, reflect, and respond to the complex phenomena that is human psychoactive use.
1.5 Conclusion

This chapter sought to understand the origin and value of human rights and psychoactive consumption to justify why a human rights lens can provide a new perspective on the drug control framework. The majority of the chapter was justifiably devoted towards contextualising human rights and legitimising them as a valid concept. Since they have been subject to much criticism, the author’s exploratory endeavour questioning the idea of human rights, established that: human rights are pluralistically universal (be it on a naturalistic or constructionist basis); they constitute malleable, revolutionary living instruments which are capable of responding to and reflecting changing political, social, cultural, historical and economic narratives; and that they are architecturally designed to address the binary between the State and the individual, - a binary which will be identified to be at the crux of drug policies. Although this chapter only hinted at the conflicts between the State and the individual in relation to human psychoactive usage, and the legal architectural frameworks of the human rights and drug control regimes, Chapters 2 and 3 will more thoroughly explore these issues, to advance the argument that human rights can improve the drug control framework. This chapter ultimately sought to introduce the idea of human rights and apply their origin and value to human psychoactive use. The naturalistic origins of human drug use, combined with evolving malleable contexts for use, and the commonality of use, confirmed that human rights are indeed capable of understanding and appreciating the complex realities of this phenomenon. Human rights instruments are ultimately legal instruments and it is hoped that this chapter echoes a Statement put forth by Hoffman (2004: 1675) when questioning the evolution and expression of the law: ‘the law is not merely a lubricant of market preferences of a collection of arbitrary predilections of the ruling class. It may well reflect our deepest commitments to each other, commitments that are at the heart of our evolved nature as social animals.’
Chapter 2: Understanding how human rights can address the drug policy binary: the conflict between the interests of the State and the interests of the individual

As highlighted in Chapter 1, the consumption of psychoactive substances is a practice which has existed for millennia; it is found in most cultures and societies across the globe (Weil and Rosen, 1983) and stretches far back into the deep history of human beings (Smail, 2008). As a result of this phenomenon a conflict has emerged, one which according to Siegel (2005) pits individual needs in pursuing a strong biological drive for intoxication, against those of societies in striving to maintain order. Siegel (ibid) draws on biological and cultural evidence throughout history to suggest that human beings have an instinctive and universal drive for intoxication, one which operates in a similar fashion to other biological needs such as the drives for sex and food. He calls this pursuit for intoxication the ‘fourth drive’ (ibid). This chapter aims to demonstrate the inherent arbitrariness in the way the conflict between an individual’s ‘fourth drive’ and the State is presented within the drug policy sphere, as the failure to overtly unpack the moral questions raised when pitting a State’s interest against an individual’s has led to restrictive policy regimes. The chapter will identify the dominant philosophical arguments which shape the drug control paradigm, as it is these foundations upon which the current paradigm and the resulting conflict between the State and the individual rests. Indeed, a thorough understanding of the deontological and consequentialist positions arguing for and against the use of psychoactives is essential to appreciate how the binary was constructed, and continues to be maintained through the employment of four standard drug policy proposals. According to Seddon (2010), the term ‘drug’ is a regulatory construct that was created for specific governmental purposes to legitimise a legalistic distinction for different types of psychoactives. The artificiality of the licit/illicit divide has been discussed in the introduction of this thesis, and the limited conceptions of the potential policy proposals which have resulted from this construct will be illuminated in light of the broader regulatory policies put forward in Part II of this thesis.

Prior to this, Chapter 2 will recognise the conceptual difficulties involved in defining what constitutes the ‘State’. The term is contested both across and within a variety of academic disciplines, and as such the author seeks to recognise its contestability, and
unpack the key questions raised when formulating a definition of the ‘State’. Most importantly though, this chapter aims to advance the idea that human rights are a conceptually useful legal tool for questioning what will be exposed as the core conflict within this field: the interests of the State in restricting certain psychoactives, versus the drives of individuals striving to consume them. The chapter will demonstrate that human rights are actually designed to address tensions between the State, societies and individuals through the correlativity of rights and duties, and how this doctrine and the individualistic focus of human rights could reconfigure and address the binary. Moreover, human rights are inherently dynamic, flexible constructs. Chapter 1 has demonstrated their ability to adapt, reflect and even influence societal, cultural and political changes. In light of this, the chapter will ultimately put forth the idea that human rights are capable of transcending the current binary due to their malleable nature, and their increasing institutional, political and legal prominence within the State order.

2.1 Defining ‘the State’

In the realms of political theory the idea of the ‘State’ has been notoriously difficult to define (Robinson, 2013). While the ‘State’ has been studied from many perspectives, according to Jessop (2008: 111) ‘no single theory can completely capture and explain its complexities’. As a leading State theorist, Jessop (ibid: 111-112) articulates some of the key conceptual questions when identifying the remit and the definition of the State:

‘Is the State best defined by its legal form, coercive capacities, institutional composition and boundaries, internal operations and modes of calculation, declared aims, functions for the broader society, or sovereign place in the international system? Is it a thing, a subject, a social relation, or a construct that helps to orient political action? Is Stateness a variable and, if so, what are its central dimensions? What is the relationship between the state and law, the state and politics, the state and civil society, the public and the private, state power and micropower relations? Is the state best studied in isolation; only as part of the political system; or, indeed, in terms of a more general social theory? Do states have institutional, decisional, or operational autonomy and, if so, what are its sources and limits?’

It is clearly difficult, if not impossible to effectively capture all perspectives which theorise and analyse States. Hence, Section 2.1 will broadly introduce the key themes,
ideas and theories on what constitutes the ‘State’, and will focus on why it is necessary to gauge a working definition of the State for this chapter, and throughout the thesis. The sub-section will finally appreciate the nature of the relationships between States, the concept of multi-level governance and the broader field of international relations; so far as it relates to the UK and the relationship with other State-bodies, given the inter-national nature of the global drug prohibitionist paradigm.

Weber’s (1946: 78) celebrated definition defines the modern State as ‘a human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory’. Though this definition has stood the test of time and continues to be used in State theorist literature (See Brenner, Jessop, Jones and MacLeod, 2003; Dunleavy, 2007; Jessop, 2008), it arguably perpetuates the ‘container’ metaphor, which perceives States as spatial entities separated by territorial boundaries (Brenner et al, 2003: 1). For Brenner et al (ibid) the role of the State is changing, and territorially demarcated forms of State power are being restructured in response to a transformed global setting. When considering the controversies in defining the State, Dunleavy (2007: 802) similarly recognises a progressive shift of policy making from national to transnational institutions and concludes that: ‘the age of the unitary nation state commanding strategic resources and acting in a realist mode in international relations may yet prove to be a transitory period in human affairs’. Any challenges posed to the notion of national statehood and the territorial boundaries of States and multi-level governance will be considered in greater detail (particularly in relation to the UK) below. For now, it is sufficient to note that the spatial and temporal horizons of what constitutes a ‘State’ are changing. Indeed, it is arguably an oversimplification to offer the conservative legalistic or geographical definition favoured by Robinson (2013), which distinguishes States from governments; noting that the former are non-physical juridical entities of the international legal system, distinct from governments; who are the legally coercive organisations of people through which State power is employed (ibid). However, if one accepts the emerging structure of ‘multi-level governance’ as the dispersion of authoritative decision making across multiple territorial levels (Hooghe and Marks, 2001), the conceptual boundaries between a State and a government is blurred. Along with changing spatial and territorial boundaries, State theorists point to an array of institutions believed to constitute the State. According to Morris (2011) the State is thought to comprise of an increasingly diverse
array of institutions and organisations including, but not limited to: central
governments, the judiciary, the police, the military, schools and universities, State
bureaucracies, the mass media and agencies charged with controlling information.
Morris (ibid) observes that ‘State’ can be used interchangeably with ‘Government’, that
the growth of private corporations and interest groups have increasingly blurred
boundaries as to what constitutes the State and, (as already alluded to), that the
expansion of institutions and organisations within the global political order such as the
UN and the Council of Europe, has led to a system of States; further increasing the
difficulty in its characterisation.

Such a wide conception conveys the abstract notion that the ‘State’ cannot be defined
by reference to either its institutions or its territorial dimensions alone. Rather, in
keeping with the key conceptual questions Jessop (2008) poses, the State cannot be
reified as standing outside and above society. Instead, the complexities of the State can
be more fully understood through recognising ‘there can be no adequate theory of the
State without a wider theory of society’ (ibid: 111). For Jessop (ibid), the political
system and the State constitute a broader ensemble of social relations, and the State can
only be understood through its embedding within this ensemble. However, appreciating
the State as part of a wider theory of society presents an unfortunate paradox: ‘on the
one hand, it is just one institutional ensemble among others within a social formation;
on the other, it is peculiarly charged with overall responsibility for maintaining the
cohesion of which it is part’ (ibid: 129). Thus, the State is continuously called upon to
resolve society’s problems, and the concept is thereby doomed for failure, since many
problems lie well beyond its control. Dunleavy (2007) likewise points to the false
dichotomy produced when pitting the State against the individual, as it exacer-
brates definitional problems, through a fallacious and overly simplified distinction, which
emphasises some defining State features and de-emphasises others.

Therefore, while the binary presented under a prohibitionist paradigm between the
interests of the State and the interests of the individual, runs the risk of over simplifying
the notion, this binary will nevertheless be employed, since it relates to the fundamental
conflict identified to be at the crux of drug policies. In full appreciation that the State
cannot be understood without a wider theory of society then, the thesis centres its
rationale for defining the State upon the fundamental conflict which pits individual
needs in pursuing a strong biological drive for intoxication, against those of societies
in striving to maintain order (Siegel, 2005: emphasis added). What is more, key State-centred theories such as Marxism and Feminism adopt a political identity through which to understand society, and to ‘portray the kind of society they believe ought, should and even must be brought about’ (Heywood, 1992: 2). Accordingly, these key ideas will be discussed in turn, along with Foucauldian perspectives, since concerns for a moral, fair or good society link back to the State’s responsibility for maintaining social cohesion (Jessop, 2008), and questions relating to State morality more generally. For instance, can a State derive its authority from particular sets of cultural and shared values? While it may be unrealistic to charge the State with an overall responsibility for maintaining social cohesion (ibid), it is arguably necessary to have transparency and to question the assumed cultural shared values a State may have. This chapter will later demonstrate that a human rights lens illuminates this need for transparency. Furthermore, unpacking the notion of shared values will have relevance for Part II of the thesis, as it exposes the homogenising nature of both the drug policy and human rights frameworks, as they largely protect arbitrary conceptualisations of religion, culture, health etc. within the conceptual boundaries of a State. It is therefore imperative to question whether the ‘State’ can ever follow and represent society, or given its position of power, does the State represent distinct interests within society, as opposed to representing society as a whole?

A Marxist perspective perceives the State as either a direct reflection of economic structures and interests, or as a vehicle for political class rule, as directed by those in charge. Unsurprisingly then, the State remains a key factor in class domination (Engels, 1875/1975). Thus, for Marxists the State is thought to represent distinct interests within society, given its position of power, as opposed to representing society as a whole. According to Dunleavy (2007), Marxist State theories generally adopt an organic view of the State, and construe it as having a social function, or some moral purpose human drive which requires its coming into existence. He posits that Marxist influenced work seems to reify the State, and produces a unitary social actor, whose precise inner workings or identification are obscure, but yet massive social influence is often assigned to it. Feminist perspectives on the other hand focus on the structuring of State power in ways that reproduce patriarchy. This perspective tends to adopt a more methodological, individualist view of the State as a set of publically organised designated institutions (ibid). Radical feminist perspectives in particular centre their
analysis upon State institutions and operations such as the gender bias of welfare rules, laws and the courts (MacKinnon, 1989). Again then, the State is thought to represent distinct interests, as opposed to representing society as a whole.

Foucauldian perspectives on the other hand, are interesting in that they perceive that the State has no essence on its own (Foucault, 1991). Foucault (ibid: 103) postulates: ‘maybe the State is no more than a composite reality and a mythologized abstraction.’ Foucault (ibid) undermines the analytical centrality of the State as he failed to perceive power as concentrated within the State, rather he advocated a bottom up approach—concerned with where power is actually exercised—‘it is ubiquitous, immanent in every social relation’ (Jessop, 2008: 120). For Foucault (1980), State power is dispersed, and involves the actual mobilisation of individuals from a microphysics of power perspective, as opposed to primarily focusing on macro politics and the passive targeting of individuals. Thus, State power is part of a wider theory of society, whereby individuals are constitutive of this abstract notion. In his seminal work on ‘governamental’ Foucault (1991) proposes an alternative analysis of political power through arguing that the State has neither the functionality, nor the unity ascribed to it. Rather, what is important ‘is not so much the State-domination of society, but the "governmentalization" of the State’ (Rose and Miller, 1992: 175 citing Foucault, 1979: 20). Rose and Miller (1992) draw upon Foucault’s (1979) idea of ‘governamental’ as the art of government— and argue that Foucault’s analysis of power moves away from a traditional ‘critical’ approach (typified by Marxism), which thinks in terms of State power exercised over individuals and groups. The idea of governmentality is that power over individuals is exercised in multiple sites, in multiple ways, by multiple actors, and cannot be reduced to the State or State agencies (ibid). Thus, Foucauldian perspectives serve as an example of critical analysis which goes well beyond State-centric theories of power. Though Foucault adopts a broad, overarching analysis, by drawing attention to the ubiquity of power, Foucauldian approaches have nevertheless been criticised for ignoring how class/patriarchal relations shape a State’s deployment of power (Jessop, 2008). Regardless, academic engagement with how power is exercised, as opposed to focusing on whom or what exercises it, when considering the significance we bestow on the idea of the State, is persuasive.

When theorising a relationship between international law and international politics, Scott’s (1994) central argument rests upon the notion that ideas have power. According
to Scott (ibid), the dominant paradigm in international relations has been realism; a perspective which deems international law to have no power in its own right, rather international law is dismissed as insignificant to matters of ‘high politics’ (ibid: 313 citing Boyle, 1985: 6-7). However, this power-law dichotomy fails to explain why international law is obeyed even when it goes against the political interests of powerful States (ibid). Scott (1994) offers a convincing argument which perceives international law as an ideology, fulfilling a role within a power structure regardless of whether or not it is true. In order to conceptualise the law as more than a disguise for power relations, we should accept that States reinforce the ideology of international law to maintain their position within the international order (ibid). In basic terms, accepting the ideology of international law legitimises the wielding of international power. For Scott (1994: 325):

‘…the idea of international law is integral to the international distribution of power and that it actually sustains the structure of the international political order. In political terms it does not matter whether or not the ideology is true; it is not the verity of an ideology that matters but its acceptance by international actors as a basis for interaction’.

Ideas are powerful. In a similar vein to a Foucauldian perspective then, where we believe the power resides and how we perceive power to be exercised is what matters. In keeping with previous discussion, the nature of the ‘State’ is changing and State theorists may be unwilling to define it by reference to territorial boundaries or institutions alone. The globalisation age sees transnational, supranational, regional and national negotiations of power, and other factors, such as: the amalgamation of corporations and the private sector into conceptions of the ‘State’ (Bache and Flinders, 2004; See also Bremmer, 2010). Literature on ‘Multi-level governance’ exemplifies the changing spatial and territorial dimensions of the State (Hooghe and Marks, 2001; Bache and Flinders, 2004), and Bache and Flinders (ibid) in particular highlight the value of governance in relation to the British State. Although the authors recognise that the British government is central to policy making, decision making competencies are shared increasingly at varied territorial levels. While multi-level governance focuses on one aspect of the State- the process of government- the concept nevertheless highlights the changing conception of State(s) more generally. Since drug policy is a transnational issue, and the UK is party to various legislative instruments and institutions which seek
to address this issue (for more detail see Chapter 3), it is imperative that conceptualisations of the ‘State’ account for international relations literature along with analysing key theorists, ideas and themes. Notwithstanding, for the most part, Weber’s ‘container metaphor’ will be applied, as the thesis pits the State against the individual (particularly) when analysing case law, and legal judiciaries have territorial dimensions (Robinson, 2013). However, this sub-section broadly introduces some of the key literature concerned with the nature of the State, to demonstrate a broad awareness of the complexities involved, to contextualise any definition in line with wider society, and to identify the key questions raised when formulating a definition. Indeed, questions relating to the interests the ‘State’ represents and the notion of shared values, will be unpacked throughout the chapter.

2.2 Identifying four ‘typical’ philosophical positions the binary which underpins them

Although philosophical perspectives are not always explicit in contemporary debates which argue for or against the use of psychoactives, MacCoun and Reuter (2001) appreciate that such underlying perspectives nevertheless shape the formation of the drug policy paradigm we use today. Therefore, for this chapter to advance the idea that the current paradigm is largely inflexible and rigid, concerned predominately with pitting State interests against individual interests, it is necessary to present the philosophical foundations which guide the current framework and our resulting perceptions of the conflicts. A logical, grounded and rational approach will be evidenced throughout this section, and throughout the rest of this chapter to conform to a rights based perspective; a perspective concerned with finding the natural order of things (Cassirer, 1979). With this in mind, the author has chosen to amalgamate MacCoun and Reuter’s (2001) discussion on the various philosophical underpinnings in the debate, with Goode’s (1997) standard policy proposals which tend to be posited within this sphere: prohibition, legalisation, (full and partial) decriminalisation and/or harm reduction (See Table 1).
Table 1: Amalgamating MacCoun and Reuter’s (2001) philosophical positions with Goode’s (1997) standard policy proposals

<table>
<thead>
<tr>
<th>Philosophical position</th>
<th>Perspective</th>
<th>*Standard Policy Proposal</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legal Moralism</td>
<td>Deontological</td>
<td>Prohibition</td>
</tr>
<tr>
<td>Strict Libertarianism</td>
<td>Deontological</td>
<td>Full Decriminalisation</td>
</tr>
<tr>
<td>Millian Liberalism</td>
<td>Consequentialist</td>
<td>Legalisation/ Partial Decriminalisation</td>
</tr>
<tr>
<td>Legal Paternalism (soft and hard)</td>
<td>Consequentialist</td>
<td>Harm Reduction/ Prohibition</td>
</tr>
</tbody>
</table>

* The ‘standard’ policy proposals are an oversimplification since political outlooks cannot easily be categorised.

The multifaceted nature of political outlooks is evidenced somewhat by the works of three influential 20th century psychedelic advocates, Michell (2005), Evola (2003) and Jünger (2014), as they have all demonstrated various shades of reactionary conservatism. Nevertheless, this section will endeavour to broadly catalogue MacCoun and Reuter’s four ‘typical’ philosophical foundations, since these categories offer a common understanding as to how the current drug policy framework and the resulting dualistic conflict between the State and the individual is constructed. The generality of these positions also lends itself easily to the works of other authors and commentators who have attempted to detail the underlying values which are present when arguing for or against the use of psychoactives. (Richards, 1986; Goode, 1997; Ruggiero, 1999).

MacCoun and Reuter (2001) acknowledge the following positions: legal moralism, strict libertarianism, millian liberalism and legal paternalism (soft and hard), and for clarity they categorise them into deontological and consequentialist perspectives. To ensure a degree of precision and transparency this section will strive to do the same.

Deontological arguments claim that certain moral judgments hold regardless of any empirical effects (Alexander and Moore, 2012). Such arguments accord with conventional notions of our morality and are thought to be impervious to policy analysis or research evidence (MacCoun and Reuter, 2001). Legal moralism is considered to be a deontological position as it is prepared to criminalise conduct on the ground that it is
widely believed to be immoral, even though there may be no evidence to suggest such conduct causes harm to the individual or to other members of society (Feinberg, 1984). Of course, there is bound to be much disagreement about the requirements of morality, but according to Stewart (2010) most legal moralists accept the notion that whoever holds political power at that moment may impose the requirements of their morality upon everyone else. It is arguable then that this philosophy is heavily weighted towards the interests of the State in achieving social stability, cohesion and control. Staunch advocates of drug prohibition are often cited to demonstrate this position (See MacCoun and Reuter, 2001: 65-66 citing James Q Wilson and William Bennett), since such people articulate what cognitive anthropologists have identified as *ethics of community* codes (Haidt, Koller and Dias, 1993). These codes dictate one’s duties in society and one’s social roles (ibid), and in this sphere they are regarded as being infringed upon when individuals consume illicit psychoactives. A previous US drug czar William Bennett articulates this typical stance through asserting that drug users make inattentive parents, poor students, unreliable employees etc. – and that they are often involved in criminal activity' (Office of National Drug Control Policy, 1989). Moreover, Goode (1997: 57) recognises that broadly speaking those who hold this viewpoint subscribe to what he terms a ‘legalistic definitions of drugs’. Accordingly, a sharp distinction is often drawn on legal grounds as to what constitutes a ‘drug’. Tobacco, alcohol, and other licit psychoactives would not generally be expected to receive the same level of moral condemnation attached to the illicit. For instance, the former US political authority James Q. Wilson (1995: 160) famously articulated this position stating: ‘Tobacco shortens one's life, cocaine debases it. Nicotine alters one's habits, cocaine alters one's soul.’ Such an observation serves to reinforce the idea espoused by Stewart (2010) that moralists attach their values to the law, and following Scott’s (1994) reasoning; to the ideology of its power, as wielded by the State.

However, moral views on psychoactive use have varied across all cultures and time periods, and prior to the legally constructed drug control framework, civilisations, communities and even certain ideologies held vested interests in exerting some/total control over the use of psychoactives (Courtwright, 2005; Siegel, 2005; Smail, 2008). Again anthropologists have identified this form of legal moralism to be consistent with an *ethics of divinity*, which involves users adhering to moral codes in order to maintain their spiritual integrity (Haidt et al, 1993). Smail (2008) and McKenna (1992) recognise
that even prior to the establishment of organised religion; small communities had been known to restrict the use of psychoactives to ritualistic and/or functional purposes. Hence, it could be argued that even prior to the modern construction of legal moralism, which necessitates agreement with the law and the prevailing political authority, i.e. the State, there existed an interest in maintaining social cohesion and spiritual/body integrity for the collective. Of course, while the current global drug control framework presents far more stringent legal controls via the UN drug conventions (for more detail see Chapter 3), its rather dogmatic outlook which favours total prohibition has been regarded in a rather circular fashion as being akin to religious texts (Cohen, 2003). For instance, the preamble to the Single Convention on Narcotic Drugs (1961) (hereafter the Single Convention), articulates that all illicit psychoactive use outside of a medical/research setting constitutes ‘a serious evil for the individual’ and is ‘fraught with economic and social danger to mankind’. For the author, this hyperbolic preamble accurately surmises the legal moralist position here as constituting a heavy moralising philosophy, which derives its authority predominately from the law and a perceived need to protect State interests. Of course legal moralism is ultimately a deontological position, which means any empirical evidence demonstrating harm for society is not required (MacCoun and Reuter, 2001; Stewart, 2010). There exists a potential circularity here, as the legal moralist position prior to the modern construction of the State would be harder pressed to derive its authority from the law, in line with Stewart’s (2010) view. Thus, when taking a deep historical perspective alongside a more recent conception of legal moralism, circular (mala prohibita versus mala in se) questions arise: does the ‘immorality’ accrue mainly from the fact that a substance is prohibited by the criminal law (and crime is ‘wrong’), or are the ‘debasing’ substances criminalised/forbidden precisely because it is their consumption which is ‘wrong’ regardless of legal status? In any event, advocates of legal moralism, within the drug prohibitionist paradigm, are considered content to rely upon moral perceptions of harm attached to the law and the ruling political power.

While a similar moral resoluteness derives from strict libertarianism, the only other deontological perspective MacCoun and Reuter (2001) identified, it is interesting that this philosophy is located at the exact opposite end of the drug policy spectrum. Indeed, a strict libertarian’s fundamental focus is on the rights of the individual. In direct contrast with the legal moralist approach, strict libertarians believe there should be no
controls, restrictions or legislation affecting psychoactives (exceptions for minors), and that the State should adopt a complete laissez faire attitude to regulation and control (Szasz, 1992; Goode, 1997). Berlin (1969) identifies this stance as negative liberalism (1969), and the leading libertarian in this field Thomas Szasz (1987: 349) clearly expresses this variant: ‘the government as our servant rather than our master- does not have the right to meddle in our private dietary and drug affairs’. This approach communicates a division between an individual’s interests and the State’s, as strict libertarians are typically distrustful of State involvement, and perceive any psychoactive controls to constitute a form of chemical socialism (ibid). Walsh (2014: 218) also rather eloquently paints the picture of prohibition as: ‘the state applying a filter, inducing a kind of psychopharmacological North Korea’. The notion of individual freedom is of paramount concern here, as the strict libertarian would encourage a climate which fosters personal responsibility and accountability over a person’s mental and bodily integrity (Fitzpatrick, 2013). With reference to the current drug policy framework this philosophy is rooted within the full decriminalisation policy proposal, although the terminologies may vary (See Husak and Marneffe, 2005 discussing how to define the various policy proposals). According to Goode (1997) full decriminalisation would entail a total hands off approach from the State, where by no controls are imposed upon any psychoactives, with the only exception here relating to minors. This has been criticised as an unfeasible and unattainable proposal (ibid). Courtwright (2002) in particular acknowledges its impracticality in our present global capitalist market, since even the psychoactives regarded as licit are subject to some level of State and/or corporate regulation (See Chapter 3 for more detail on the tobacco and alcohol regulatory regimes).

Strict libertarians also promote positive liberalism, the second concept on liberty propounded by Berlin (1969). This concept encourages situations where governments create conditions for its citizenry to achieve self-sufficiency and self-realisation (Carter, 2012). This position again demonstrates an individualistic focus as strict libertarians are critical if they believe the State to be encroaching upon an individual’s opportunities, abilities or natural freedoms to choose their own pursuits in life (Zwolinski, 2008). Supporters of this stance believe that individuals have a natural right to consume any substance (Szasz, 1992; Hardison, 2007; 2008) and that every person should be free to determine and act upon their own life plan; what Mill (1859/2001: 74)
has termed ‘experiments in living’. In fact, many commentators support this notion, as there exists a wealth of literature which demonstrates the benefits altered states of consciousness, via the use of psychoactives, can have for the general human experience (See Chapter 1 and Part II for more detail). Accordingly, prohibitionist drug policies are viewed as an infringement upon the basic constitutional rights of individuals to be and to become what they are (Van Ree, 1999). Locke’s (1690) principle of self-ownership which argues that our bodies themselves are property to care for and control as we see fit, is also espoused by some strict libertarians to demonstrate a further infringement upon individual rights within this sphere (Szasz, 1992; Hardison 2007; 2008; Walsh, 2014). While these ideas are powerful ones and act as some sort of counterweight to the legal moralistic rhetoric, Berlin (1969) nonetheless recognises the difficulties in attempting to balance State or societal interests with individual ones, given the responsibility endowed upon the State for maintaining social cohesion (See Jessop, 2008). Berlin’s well-borrowed statement: ‘freedom for the pike is death for the minnows’ (ibid: 171 citing Tawney, 1938: 208), acknowledges the core conflict involved in allowing individuals to adopt a life plan which could impede the freedoms of others. Actually, when considering the interdependent nature of human beings, MacCoun and Reuter (2001) find it difficult to imagine many libertarians in the strictest sense of the term; perceiving most to believe that the law should not tolerate acts which cause serious and direct harm to others. Thus, the consequentialist tradition which is rooted in empirical measurements of the status quo, or in predictions about the likely consequences of policy changes, has been strongly prevalent in contemporary drug debates (See Hughes and Stevens, 2010; 2012; Rosmarin and Eastwood, 2012; Mungroo, Ping and Bone, 2014).

MacCoun and Reuter (2001) discuss two consequentialist philosophies, Millian liberalism and legal paternalism. Millian liberalism, a philosophy deriving its name from prominent utilitarian John Stuart Mill, is largely perceived to encourage the strict libertarian approach of retaining individual natural rights to consume psychoactives: ‘Over himself, over his own body and mind, the individual is sovereign’ (Mill, 1859/2001: 13). Indeed, the only justification for any interference from the State would be to secure its role as preventing harm to others (ibid). This proviso is what makes the philosophy consequentialist, since not causing harm to others necessitates evaluating the empirical consequences of certain acts or rules, i.e. actions relating to psychoactives.
or laws pertaining to this. The focus of this position is largely geared towards legalisation and/or partial decriminalisation proposals. The author has adopted Goode’s (1997) definition of legalisation to mean the legal governmental regulation of all/some psychoactives, and his partial decriminalisation definition to mean decriminalisation for the possession of and/or potential social supply of a substance (See also Rosmarin and Eastwood, 2012). However, as mentioned from the outset it is extremely difficult to compartmentalise political outlooks and their underpinning philosophies. In light of this, Ruggerio (1999) has recognised the inherent flexibility in Mill’s harm principle, observing that the principle could even be interpreted to justify the prohibition of certain psychoactives, precisely because they have been shown to cause harm to others. What is of interest here is that despite the contrasting interpretations of the harm principle, when relying upon empirical measurements of harm both factions arguably still highlight the State versus the individual binary. Numerous UK government drug strategies which support the prohibitionist construct routinely have an individualistic focus, emphasising the harms individuals can cause the State, communities and societies at large via illicit psychoactive use (HM Government, 2008; 2010). Policy reformers on the other hand tend to reverse the emphasis. They largely stress the harms the State has caused to various individuals/societies/environments by continuing to implement the global prohibitionist paradigm; restricting all illicit psychoactives to medical and research purposes only (See The Beckley Foundation, 2012; The Count the Costs briefings, 2012; The Global Commission on Drug Policy, 2013). Since human rights regimes are predominately individualistic, Section 2.3 will explore whether the binary should be reconfigured by reversing the emphasis from the State to the individual and the implications of this. Under a prohibitionists paradigm it is suggested that notions of ‘harm’ are too heavily weighted in favour of the State and perceived societal interests.

Although evaluations of harm are generalisations, they could potentially support MacCoun and Reuter’s (2001) proposition that consequentialist philosophies are rarely free from value judgments. According to them empirical claims may serve as a means to bolster core value based convictions, since deontological positions could potentially affect all aspects of research findings (ibid). Criticisms of the legal paternalist tradition could also support this stance. Legal paternalism is similarly consequentialist and concerns itself with evaluating the harms individuals cause to themselves as well as to
others (ibid). There are varying degrees of paternalism, as with all philosophical outlooks, and these could range from advocating harm reductionist strategies and managing micro level harms to the individual, to overarching prohibitionist strategies in the interests of reducing macro harms to all. Liberals tend to criticise this position as promoting an infantilising culture (Richards, 1986; Fitzpatrick, 2010), and Feinburg (1984) and Ruggerio (1999) additionally note that behind a consequentialist condemnation of illicit drugs for the harms they cause to others, ultimately lies a condemnation of illicit psychoactive use per se. Even harm reductionist approaches which are largely regarded as pragmatic (Goode, 1997), have been known to include underlying ideals, as they ultimately surrender the notion of harm elimination espoused by legal moralists (Hathaway, 2001). Thus, it is arguably important to take deontological perspectives seriously, and to use human rights as a tool to weigh up the moral questions involved when balancing the State’s interests against an individual’s-to improve the drug control framework.

However, it would not be fair to suggest that there exist no impartial cost/benefit empirical analyses in this field. It is the author’s contention that Hughes and Stevens (2012) successfully interpreted research evidence detailing whether Portugal’s decriminalisation strategy in 2001 was a ‘resounding success or a disastrous failure’, as they impartially recognised diverging interpretations of evidence depending upon various researchers’ policy agendas. MacCoun and Reuter (2011: 62) have similarly produced a guide for ‘Agnostics’ when questioning the merits of legalisation/prohibition etc., observing the drug policy debate to have ‘holy war’ like qualities. Yet, even when analysts go deeper and attempt to expose the philosophies or values underpinning contemporary debates, it is worth noting that they themselves are often constrained by the overarching prohibitionist paradigm. For instance, both of these studies readily accept the global legalistic construction of the licit/illicit divide (See Seddon, 2010), and both evaluations of harm fail to encompass any of the pleasures or benefits that could be derived from psychoactives (Bancroft, 2009; Bunton and Coveney, 2011; Bone and Seddon, 2015). Although there are a few researchers who recognise the value in disengaging with some aspects of the paradigm (Holt and Treloar, 2008), most, if not all commentators allude to an inherent conflict between the individual and the State at the core of drug policy, regardless of whether or not the conflict is explicitly addressed. This section has aimed to present and expose how the
philosophies underpinning this debate have helped to perpetuate and construct this binary. In the author’s view, failing to overtly unpack the philosophies intrinsic to the drug policy debate has ultimately led to the rather restrictive and limited conceptions of the policy regimes currently available for psychoactive control. Prohibition, legalisation, (partial or full) decriminalisation and harm reduction all advocate either increases or decreases in individual empowerment or in State control. The remainder of this chapter will therefore discuss how thinking of drug policy in terms of human rights could be conceptually useful to reconfigure and question the binary, by reversing the emphasis to the individual and through unpacking the notion of shared values. This could thereby facilitate a more open-minded regime, one which embraces normative thinking by explicitly addressing the binary’s existence within the drug policy field.

2.3 How human rights can address the State/individual binary

If we are to accept the perpetuating nature of the State/individual binary, whereby an individual’s drive for intoxication is pitted against the interests of the State in maintaining social cohesion, it is important to overtly address its existence, as opposed to relying upon the guise of consequentialism, embraced by prohibitors and reformers alike. MacGregor, Singleton and Trautmann (2014) refer to the prevailing view that the increase of evidence in the policy making process would increase the legitimacy of any decisions made and improve outcomes. Although evidence-based policy is often hailed as the ultimate aspiration for the drug policy field (Lancaster, 2014), this chapter argues that we should not ignore deontological arguments. Nor should we de-politicise drug policy, because in and of itself drug policy is inherently political through its predominant focus on the binary between the State and the individual. Of course, this view does not require human rights to neglect consequentialist philosophies. On the contrary, the correct application of human rights norms requires calling upon relevant, factual and reliable information to guard against parochialism (Buchanan, 2008; for more detail see Part II). Rather, this chapter asserts that human rights can embrace deontological as well as consequentialist perspectives. In doing so, section 2.3 asserts that a human rights perspective can address the conflict between individual and collective interests more effectively, as rights are designed to address this binary through their central focus on the vertical relationship between States and their subjects (Donnelly, 2003; Nickel; 2010; for more detail see Chapter 1).
This sub-section will utilise the correlativity of the rights and duties doctrine to demonstrate how human rights can address the State/individual binary, through providing a balance and openly spelling out and unpacking the moral questions involved. Indeed, most human rights are derogable as they strive to protect and respect individual autonomy, but not in ways that allow for the rights of others to be infringed (Perry, 1998). With this in mind, the rise of individualism will be discussed, since States have legal duties to provide environments whereby human beings can flourish, whilst protecting and respecting the rights of their citizenry to be left alone (Mill, 1859/2001; Bone and Seddon, 2015). The advantages of reversing the emphasis back towards the individual and away from the State in the drug policy sphere will be considered, before highlighting the fundamental questions that discussions on the nature of the State necessitate: Does the State truly represent the interests of society or rather distinct interests within society given its position of power? The section will employ the Devlin hypothesis to demonstrate that ultimately it is morality far more than the evidence which affects societal attitudes. Hence, unpacking the notion of shared values will be shown to challenge the prohibitionist paradigm, since human rights could alter our moral reasoning process if we approached the conflict with a measure of transparency – particularly if we were to accept the benefits psychoactives could have for the collective as well as for the individual. Finally, this section will consider how changing conceptions of the State affects the construction of the binary, and that human rights are dynamic legal instruments capable of reflecting, shaping and constituting our social and political realities.

According to Wenar (2011), the genesis of the concept of a right presupposes that there will be a conflict. To refer back to the pike analogy popularised by Berlin (1969 citing Tawney, 1938); to afford rights to some often necessitates restricting the rights of others. Van Ree (1999) similarly observes that there is no need to establish any right as a legal human right unless there exists potential for its impediment. Additionally, as established in Chapter 1, human rights encompass human nature. Since this in itself is thought to comprise of competing and irreconcilable impulses, it logically follows then that human rights will clash (Alder, 2006). The fact that rights by their very nature appear to pit one set of values or interests against another alludes to their relevance in the drug policy sphere. An important tool which demonstrates how human rights can address the binary between the State and the individual is the correlativity of rights and
duties. This doctrine is so termed because the test of whether one has the ‘right’ to something is often dependent upon whether someone else has a ‘duty’ to provide it (Hohfeld, 1919). Though there are exceptions (See Lyons, 1970), it is generally accepted that the two elements are inseparable. Hence, the doctrine could prove useful to address the inherent State/individual binary present within drug policy.

While human rights can clash on a more horizontal level between individuals—since even rudimentary communities demonstrate their rights and responsibilities through a reflective awareness of certain social norms (Wenar, 2011)—it is the vertical relationship between the State and its citizenry that is often the focal point for the operation of the doctrine in practice. As highlighted in Chapter 1, from the enlightenment onwards, human rights texts centre upon the vertical relationship and the duty of the State to uphold the rights of individuals, so far as they then do not infringe upon the State’s duty to uphold the rights of others. The doctrine thereby supports the notion that human rights should have governments as their primary addressees, as they set the standard for political legitimacy and ensure that the division of power is fairer.

If a similar standard were employed within the drug control field, exploring how State comprised drug policies affect individuals, then perhaps the binary would lessen somewhat; as possible solutions which appreciate the rights and duties of both parties could be employed. What is more, Raz (1984) demonstrates the dynamic aspect of human rights through observing their capacity to generate new duties. He posits that the future cannot be known entirely in advance and as such any cultural, social or moral advances may lead to the creation of new duties based upon an old right (ibid). Raz (ibid) provides the right to political participation as an example of a right which grounded an increasing number of duties, including the duty to disclose reasons behind political decisions as the complexity of bureaucracies within modern States grew. The doctrine is therefore capable of developing alongside changing circumstances, and given this adaptive nature it is arguably well suited to its original purpose of questioning what one ought to do and how one ought to live (O’Neill, 1996). If such questions were to feature at the core of drug policy debates then perhaps this would facilitate a more open and transparent regime. The correlativity of rights and duties arguably facilitate this approach since human rights foster a climate concerned with finding a solution. Specificationists for example believe that even when human rights appear to conflict they are in fact ‘compossible’ (Steiner, 1994). According to Steiner (ibid) all judgments
are solely dependent upon the circumstances of any given situation and thus require a
careful balancing act. Hart (1994) also observes that a key feature of the human
predicament is our inability to foresee all possible solutions which invoke human rights,
hence the doctrine and human rights more generally are necessarily open-ended and
rarely absolute.

However, the doctrine has faced criticism as it presently stands. Glendon (1991)
oberves that human rights are increasingly subject to extravagant formulations and
impractical demands, as citizens are increasingly asserting individual or egotistical
claims without considering the possibility of burdening others with any corresponding
obligations. For Glendon (ibid: 14) such an insular focus on individual human rights
could impede social progress, since abandoning the correlative of duties has promoted
‘mere assertion over reason giving’, thereby inhibiting the possibility of finding any
common ground. Cooray (1985) similarly observes that the growth of interventionist
welfare States has led to a more infantilising culture, as government agencies seem
unconcerned with the need to educate citizens about their duties, and to endow them
with a sense of personal responsibility. Fitzpatrick (2013) highlights that this cultural
shift also appears to be evident within the drug policy realm. He asserts that the
increasing reliance placed upon harm reduction policies combined with an often
paternalistic stance towards prohibition could encourage a more infantile and self-
centred climate (ibid). Libertarians especially advocate increases in personal
responsibility, as they are particular wary of too much State encroachment in an
individual’s private affairs (Goode, 1997). Perhaps then the correlative of the rights
and duties doctrine could be successfully employed within the field of drug control if
the more traditional or original version was applied; a version concerning itself equally
with a commitment to duties. As demonstrated, anthropologists, scientists and
historians have all observed degrees of social control which have been exercised across
time periods and cultures in relation to the use of psychoactives (Goodman, Lovejoy
and Sherratt, 1995; Siegel, 2005; Smail, 2008; Nutt, 2012). They mainly cite instances
of controlled use within ritualistic settings, or cite strictly observed rules on when and
how a substance is taken, so as not to impact detrimentally on the social order (ibid).
Therefore, while it widely is accepted that rights can operate as empowerment tools for
individuals (Donnelly, 2003; Edmunson, 2004; See also Chapter 1), there is no reason
why a renewed commitment to duties towards others cannot engender a similar
response; since an original application of the rights/duties doctrine could have the potential to alter the present culture of drug control. A correctly applied doctrine could impart a greater sense of personal responsibility, and be similarly empowering, as it would mitigate the charge for maintaining social cohesion which is largely placed upon the State (Jessop, 2008); hence alleviating the binary to some degree.

Furthermore, the rise of individualism is not necessarily a bad thing. Rather than alleviating the binary, reversing the emphasis towards individual interests within the drug policy sphere could fundamentally reconfigure it and improve the drug control framework; providing individuals acknowledge their duties in line with correlativity doctrine. ‘Individualism is a belief in the central importance of the individual human being’ (Heywood, 1992: 18). Individualism correlates with the growth of natural rights theories during the enlightenment period, to which we attribute the modern conception of human rights (ibid; See also Chapter 1). The belief in the primacy of the individual is a liberal philosophy- desiring a society whereby individuals are capable of flourishing and developing to their full capacity (ibid). MacCoun and Reuter’s (2001) strict libertarianism and millian liberalism categorisations unpack this commitment to individual freedom. Mill (1859/2001) in particular, demonstrates a primary concern over the limits of power which can be legitimately exercised over the individual. Mill (ibid) perceived the threats to individualism to arise from both society and government. If we are to accept a definition of the State which embraces a wider theory and society, and the government as forming a key State institution, then in line with section 2.1, Mill (ibid) considers the ‘State’ to pose a threat to individual freedom. For Mill (ibid) the pressure to conform within society, and an increasingly interventionist government, together forms ‘a mass of influences hostile to individuality’ (ibid: 68). According to individualists human progress can only occur if we allow for the diversity, spontaneity and originality of individuals, as it is only through developing our potential as human beings that society is developed and is enriched:

‘Human nature is not a machine to be built after a model, and set to do exactly the work prescribed for it, but a tree, which requires to grow and develop itself on all sides, according to the tendency of the inward forces which make it a living thing.’ (ibid: 55).

Thus, for individualists, respecting the diversity of life is beneficial not just for the individual, but for society as a whole to prevent its stagnation, and to guard against the
‘tyranny of the majority’ (ibid: 9). Since the enlightenment’s conception of human rights increasingly understood society from an individualist viewpoint- affording primacy to individual interests and needs- it follows then that human rights are inherently individualistic. This intrinsic focus facilitates the capacity for human rights to reconfigure the binary, and reverse the emphasis away from perceived State interests, since notions of ‘harm’ under a prohibitionist paradigm are heavily weighted in favour of the State, and perceived societal interests. As will be shown throughout Part II of the thesis, when human rights conflict with the drug control framework they expose the benefits that psychoactives can have for the individual; whether the individual is asserting a right to use on health, religious or spiritual grounds or even on the grounds of expanding one’s own consciousness. There exits an increasing amount of literature on the various benefits from the use of controlled psychoactives (Chapkis, 2007; Holt and Treloar, 2008; Reiman, 2008; Bunton and Coveney, 2011; Labate and Cavnar, 2014a; for more detail see Part II). It is perhaps fair to conclude then, that MacCoun and Reuter’s (2001) statement claiming a moral analysis on the benefits of drug use is largely absent from the debate, has lessened somewhat. The author has also written about the benefits cannabis holds for the Rastafari religion from a human rights perspective; thereby identifying the beneficial properties of the drug experience within a more philosophical, deontological and moral remit (Bone, 2014a). Likewise, the same treatment is afforded to discussions concerning the health rights of medicinal cannabis users: the significance individuals’ accord to the drug is morally intrinsic to adequately weighing up their rights against a State’s interests (Bone, 2014b; Bone and Seddon, 2015). Consequentialist arguments are also moving increasingly to the foray. Empirical literature on the medical benefits of cannabis is increasing (Russo, 2007; GW Pharmaceuticals, 2010; Leung, 2011; See also Chapter 4), as is evidence pertaining to the medical and therapeutic benefits of psychedelics (Sessa, 2012; Labate and Cavnar, 2014b; See also Chapters 4 and 5). This research is also increasingly debunking widely shared views on the risks involved when consuming such strictly controlled drugs. Research by Krebs and Johansen (2015) concludes that psychedelics are not linked to psychosis, contrary to the popularised view.

When deontological and consequentialist arguments exploring the benefits of psychoactives and mitigating the risks combine, the societal moral reasoning process could be re-construed. By focussing on the benefits psychoactives can have for the
individual, a human rights lens also exposes the possibility that there are wider benefits for the collective too. To take one specific example, Bone and Seddon (2015) argue that a broader conception of the human right to health, which appreciates internalist views alongside external State-orientated perspectives, can induce a public health approach to the medicinal cannabis issue, which could more effectively balance individual and collective interests. From a broader perspective, it could also be argued that consuming psychoactives for a variety of purposes linked to rights based claims such as health, religion, culture, free thought etc. enhances the richness and diversity of life, in line with individualism, thereby facilitating human progress throughout societies. By reconfiguring the binary to focus on the individual, and in developing this line of reasoning, it is necessary to unpack any assumptions about the shared values a society may have. As highlighted in Section 2.1, fundamental questions which discuss the nature of the State include whether the State can truly represent the interests and values of a society. According to Devlin (1959/1965), States can prohibit acts solely on the basis that they are viewed as morally repugnant by their citizenry, in order to preserve and maintain social cohesion. Yet, when the benefits of drug use are illuminated under a human rights lens, both to the individual to the collective, Devlin’s hypothesis poses a problem. Indeed, the formation of the global human rights regime alone demonstrates the difficulty in construing societal interests so narrowly so as to protect a specific set of moral principles (See Chapter 1). There is no rigid stasis in the history of human civilisation (MacCoun and Reuter, 2001). Accordingly, any construction of the global prohibitionist regime as being fully representative of a State exemplifying the interests and values of a society, is inevitably a fallacy. Human psychoactive use is a far more common and complex phenomenon than is perceived under a prohibitionist paradigm, with benefits as well as risks attached (See also Chapter 1). By reconfiguring the binary to focus on the individual then, human rights reveal the need for transparency when unpacking shared values in weighing up a State’s interest against an individual’s. This perspective embraces normative thinking, as a moral matrix of benefits and harms appreciating internalist, philosophical and/or deontological views should underlie all human rights based assessments when balancing this binary (Hayry, 2004, Tsakyrakis, 2009; Walsh, 2010; Bone and Seddon, 2015).

Finally, as discussed in Chapter 1, human rights reflect the widely transformative nature of human beings. Therefore, they are arguably capable of altering, evolving and
expanding upon our own inner models of reality. This argument corresponds with Brems’ (2009) assertion that human rights are a form of revolutionary discourse, adept at changing entrenched political and social behaviours, and as such can extend well beyond the boundaries currently imposed. Most significantly, any political and social transformations could inevitably alter the relationship between the State and the individual, given the former's role as the prevailing political authority in society (Morris, 2011; See also Section 2.1). Therefore, human rights could operate as dynamic, malleable legal instruments potentially capable of transcending the State/individual divide, especially when accounting for the changing conceptions of the State. As will be thoroughly explored in Chapter 3, there exists an increasing array of institutions, bureaucracies and organisations dedicated to resolving human rights issues, some of which have undergone dramatic legal and political restructuring to afford them a greater international and domestic standing. This increasing presence within the State order could thus serve to transform the conflict between the State and the individual. As highlighted in Section 2.1, the ‘State’ comprises a vast array of organisations including ones which are integral to the formation of the international political order such as the UN and the Council of Europe (Gamble, 2007). Without wishing to disregard Foucauldian perspectives which perceive the State as a complex, fragmented network of relations (Foucault, 1980), they also consider State power to exist in action between this dense net of political and institutional relations (Foucault, 1991). The ubiquity of State power combined with the increasing prominence of human rights regimes could therefore serve to induce a more humanistic, balanced and unifying atmosphere within the global State order. In a similar vein, if we are to accept international law as an ideology which legitimises the wielding of international power (Scott, 1994), then the belief in the increasing legal standing afforded to human rights could serve to change the nature of the relationship between the State and the individual.

2.4 Conclusion

This chapter sought to fully identify and explore how human rights can address a fundamental issue recognised to be at the core of drug policy: the conflict between the interests of the State in restricting certain psychoactives and the individual’s freedom to consume. Prior to exploring the philosophies which underpin the binary, the chapter delved into the conceptual difficulties associated with defining the ‘State’. By highlighting key State theorists, ideas, themes and international relations literature,
Chapter 2 demonstrates an awareness of the complexities involved here, and flags up fundamental questions pertaining to a State’s interests when representing a society. Indeed, by contextualising a definition of the State in line with wider society, and in full appreciation of the need to unpack shared societal values, the chapter exposes four typical philosophical positions and the standard policy proposals which result; all of which advocate either increases or decreases in individual empowerment or in State control (See Table 1). Only the two deontological philosophies explicitly address the existence of the drug policy binary though, as they are either heavily rooted towards the interests of the State in maintaining order and control (legal moralism), or else they advocate individual rights and freedoms to the exclusion of other prominent concerns (strict libertarianism). Yet, on a more implicit basis the consequentialist philosophies (millian liberalism and legal paternalism) were revealed to be rarely free from value judgments. This chapter contents that the failure to overtly unpack the moral questions raised when pitting a State’s interests against an individuals, has led to restrictive policy regimes, and that human rights are best placed to reconfigure and openly address the binary; thus facilitating a more open minded approach to drug control. The correlativity of the rights and duties doctrine embraces normative thinking through its predominant focus on the vertical relationship between the State and the individual, and it is designed to ensure a fairer division of power. The rise of individualism also demonstrates how human rights can successfully reconfigure the binary, as a focus on the benefits psychoactives can have for the individual, exemplifies the diversity richness and progress for societies and the collective more broadly (Mill, 1859/2001). Such considerations could offer a balance to the prohibitionist paradigm, as it is heavily weighted in favour of the State and the perceived ‘harm’ or ‘risks’ associated with controlled psychoactives at present. Finally, as dynamic legal instruments human rights could potentially transcend the State/individual divide as their increased legal and political standing could foster an environment which promotes widespread common understandings, as they are principally concerned with achieving benefits for all parties. These utopian ideals demonstrate the potential human rights can have to alleviate the core conflict identified within the field of drug policy. In order to explore this issue from a more practical perspective, Chapter 3 will survey the legal architecture of both the international and domestic drug control frameworks. The chapter will explore how they relate to one another and it will highlight the increasingly high standing afforded to human rights, before part II more thoroughly engages with how the law operates in
practice when trying to reconcile the two. For now though, it is enough to identify that there is a State/individual binary at the core of drug policy, and that human rights can address and reconfigure it.
Chapter 3: Exploring the legal architecture behind the drug control and human rights frameworks from an international and a UK perspective

To thoroughly appreciate the legal tensions which exist when considering whether or not there is a human right to consume psychoactive substances, it is essential to provide a clear, concise description of the drug control and human rights frameworks. This chapter will examine the nature, function and purpose of the international, regional and domestic systems. It seeks to recognise the influence that international and regional legislation and various institutional bodies have had upon the operation of both systems domestically, and if there is any room to deviate from the existing status quo. In addition, the chapter will indicate whether or not there exists a hierarchical relationship between the systems, and which one, (if any), could take precedence domestically. By exposing the inner workings of the systems at every level, this chapter should thus facilitate a broader awareness of the international, regional and domestic regimes, and in addition, aid a deeper understanding of any subsequent conflicts between the frameworks, since these will be thoroughly explored throughout the second part of the thesis.

3.1 The international human rights framework

Although the notion of human rights is far older than the prohibitionist concept of drug control, (as highlighted in the Introduction and Chapter 1), the international human rights regime as we understand it at present emerged only since 1945 (Bilder, 2004). Prior to World War II it was generally accepted that human right issues were matters of domestic concern and outside of the parameters of international regulation (ibid). However, the League of Nations, the international forerunner to the United Nations, did consider certain Human Rights ideas, since they were included in the 1919 League of Nations Covenant (Bromley, 2008). Though, it was not until the implications of the holocaust and other Nazi denials of human rights that the promotion of human rights became very central to the mind set of world nations, who decided that they should be a core concern of the new United Nations organisation. As such, respect for human rights became one of the three core pillars of the United Nations, alongside the maintenance of peace and security and the development of economic and social
progress, all of which are enshrined within the Charter of the UN (1945) (hereafter the Charter) (Barrett and Nowak, 2009). However, while the Charter is legally binding, comprises the foundational basis of UN, and is ratified by virtually every UN member state, its provisions in relation to human rights are not specific (Steiner, Alston and Goodman, 2008). Hence, in 1945 the Commission on Human Rights (hereafter the CHR) was tasked with drafting the Universal Declaration of Human Rights (1948) (hereafter the UDHR) to give further effect to the Charter’s rights-based aims.

The UDHR is largely considered to be the single most important human rights document in the world, and whilst it is not legally binding, the declaration is deemed to have exerted a strong moral and political force far beyond the hopes of its drafters (Hannum, 2005). In truth, the human rights regime is replete with global treaties, regional conventions and even domestic constitutions that have been inspired by the UDHR; further facilitating the documents status as forming part of customary international law (Rehman, 2009). The UDHR includes an entire gamut of civil, political, economic, social and cultural rights and although this has raised questions in terms of interpretation and scope, this broad nature was purposely designed to achieve a ‘common understanding’ of what rights could mean for all nations’ (See Hannum, 2005 and the Preamble, UDHR). Hannum (2005) explains that the UDHR, like other rights-based instruments was never intended to mandate any particular social order or liberal or democratic ideal within the western hemisphere. Rather it was created to declare a set of rights and obligations for all nations which does not require them to abandon their own philosophical, moral, religious and/or ethical code (ibid). Although it remains hotly contested as to whether human rights are solely a western construct (for more detail see Chapter 1), these facts suggest that the UDHR, and all other human right treaties which were later derived from it, did not intend the international community to conform to one particular rights-based paradigm. It is perhaps for this reason that virtual universal acceptance has been achieved.

Nevertheless, despite the UDHR’s global significance, the fact remains that it is a hortatory, aspirational and recommendatory document as opposed to being binding in any formal sense (Steiner et al, 2008: 152). Thus, the CHR was additionally entrusted to draft a convention to create legally binding human rights obligations on states, and to develop an international supervisory system to monitor state compliance (Nowak, 2005). These latter stages proved slightly more problematic in light of the global
political circumstances existing at the time. The cold war divided nations as some states sought to separate civil and political rights and afford them greater prominence than economic, social and cultural rights (ibid). Two separate treaties with separate monitoring systems were therefore adopted in 1966, and it took an additional ten years before they entered into force. In accordance with the desires of western states, the International Covenant on Civil and Political Rights (1966) (hereafter the ICCPR) was regarded as containing 1st generation rights, since states were under a direct and immediate obligation to ensure their fulfilment from the day the ICCPR entered into force (ibid). An example of the rights incorporated within the ICCPR include: the right to life, liberty, privacy, the right to a fair trial, to freedom of thought, conscience and religion and the right to freedom of expression (See Articles 6, 9, 17, 14, 18 and 19 ICCPR). Currently ratified by 168 member states including the UK (See United Nations Treaty Collection, 2015a), the implementation of the ICCPR is monitored by the Human Rights Committee (hereafter the HRCa). This committee comprises of eighteen independent experts, who are elected on the basis of their expertise (not their nationality). These members oblige state parties to submit regular reports (roughly one every four years) on the domestic implementation of the rights contained within the covenant (ibid). Reports are examined in public and in direct confrontation with high level government representatives, whereby committee members can simultaneously praise and criticise states on the extent to which they are either fulfilling or abandoning their covenant obligations (Nowak, 2005). What is more, the first optional protocol to the ICCPR, entering into force at the same time, allows the committee to consider ‘communications’ from individuals who have alleged to be the victims of human rights abuses (ibid). At present 115 parties have ratified this protocol including the UK (See the United Nations Treaty Collection, 2015b), and Nowak (2005: 195) observes that the HRCa have ‘turned it into a surprisingly effective quasi-judicial individual complaints procedure’. Indeed, whilst the committee’s decisions are not legally binding, they are still argued like judgments, they carry moral and political obligations, and from 1990 onwards, a committee member is designated to oversee and monitor the implementation of the decisions made to encourage state compliance (Rehman, 2009).

In stark contrast with the ICCPR, the International Covenant on Economic Social and Cultural Rights (1966) (hereafter the ICESCR), the other treaty drafted by the CHR and adopted in 1966, was regarded as containing programmatic rights which were not
immediately applicable and enforceable; rather they could be progressively realised when states had the adequate resources to do so (Rehman, 2009). These 2nd and 3rd generation rights include: the right to health, social security, an adequate standard of living, the rights to adequate housing, food, and rights to participate in cultural life, education and self-determination (See articles 12, 9, 11, 15, 13, 1 ICESCR). Unlike the ICCPR, an independent committee of experts tasked with examining state reports and monitoring state compliance was not established until 1985 (ECOSOC Resolution, 1985/17 of 28 May 1985), as this process was previously (and perhaps unsuitably) undertaken by the Economic and Social Council (hereafter ECOSOC); a political body of the UN comprised of State representatives. Once formed the independent Committee on Economic, Social and Cultural Rights adopted a similar state reporting procedure to the HRCa, however an optional protocol allowing complaints from individuals was only very recently adopted in 2008 (General Assembly, 2008/A/RES/63/117 of 10 December 2008). As of April 2015 there were 45 signatories and 20 parties to this protocol, none of which include the UK (see the United Nations Treaty Collection, 2015c). Regardless though, these amendments arguably coincide with Rehman’s (2009) claim that the international human rights regime is increasingly becoming more transparent, participatory and open to those that it is designed to benefit. 164 states including the UK are now party to the ICESCR (See the United Nations Treaty Collection, 2015d), and since advancing the recognition at the Vienna world conference in 1993 that human rights are universal, indivisible, interdependent and interrelated (World Conference on Human Rights, 1993), the separation of the two ideological doctrines dividing the ICCPR and the ICESCR, has largely been abandoned (Nowak, 2005).

This section has predominately centred on the formulation and operation of the UDHR, ICCPR and the ICESCR since these documents together comprise the International Bill of Rights, the core foundation for the international human rights regime. In fact, all other international human right treaties stem from these core documents as the terms of each new treaty inform and add to the interpretation of others; facilitating a rather unique system where by all human right treaties can be read as one coherent body (Barrett, Lines, Schleifer, Elliot, and Bewley-Taylor, 2008). For instance, the International Bill of Rights contains all of the rights found in 7 other core human right treaties, although these centre more specifically on issues such as: the rights of persons
with disabilities, the rights of children, the elimination of racial and gender discrimination, the protection of all persons from enforced disappearance, the protection of the rights of migrant workers and the protection of all persons against torture, cruel or inhumane treatment (See the Office of the High Commissioner for Human Rights, n.d. a). The UK has ratified the vast majority of these core treaties and all them operate in a similar fashion to the ICCPR and the ICESR (See the United Nations Treaty Collection, 2015e). They all have separate, independent committees of experts, a similar state reporting procedure, and with the exception of the committees on enforced disappearances and the rights of the child, they all contain mechanisms to allow complaints to be made from individuals (See the Office of the High Commissioner for Human Rights, n.d. b).

The progression and proliferation of human rights treaties over the past 60 years is also evidenced by a non-exhaustive list of additional human rights instruments featured on the Office of the High Commissioner for Human Rights (hereafter the OHCHR) website (Office of the High Commissioner for Human Rights, n.d. c). These instruments include the United Nations Declaration on the Rights of Indigenous Peoples (2007) and the United Nations Declaration on the Right to Development (1986). While not legally binding, the OHCHR reports such documents to exert an ‘undeniable moral force’ on states (Office of the High Commissioner for Human Rights, 2002: xi). This arguably corresponds to the *sui generis* character and the frequently recognised ‘high standing’ of the international human rights regime (Rehman, 2009). In fact, in recent years it could be posited that the regime has moved increasingly to the forefront of the UN’s legal, institutional and more ‘open’ ideological agenda, as observed previously by Rehman (ibid). In 2006 the CHR (initially tasked with drafting the International Bill of Rights) was replaced by the Human Rights Council (hereafter the HRCb). Previously, the commission reported to ECOSOC, a principal organ of the United Nations comprising of 54 state members which are elected by the General Assembly. It is tasked with establishing commissions in economic and social fields and with promoting human rights (Article 68, the Charter). However, the recently formed HRCb is now directly elected by and reports to the General Assembly itself; the principal political organ of the UN comprising of all 193 member states. As such, former UN-Secretary-General Kofi Annan conceives the rights regime as having a ‘more authoritative position corresponding to the primacy of human rights in the
Charter’ (General Assembly, 2005/UN doc A/592005 of 21 March 2005: 183). Hence, at an institutional level at least, the human rights regime is arguably dominant within the framework of the UN due to the more senior and representative position it has been accorded. What is more, there arguably exists a strong case for the high legal standing afforded to the international human rights regime. Article 103 of the UN Charter (1945) states that ‘in the event of a conflict between obligations…under the present Charter and…obligations under any other international agreement…obligations under the Charter shall prevail’. Notwithstanding the element of circularity within this section, the protection of human rights is mentioned seven times in the Charter, from the preamble, to the purposes of the UN, to the responsibilities of the General Assembly and ECOSOC (See the Preamble, Articles 1, 55, 13(1)b 61(2) Charter of the UN (1945)). Thus, from the outset human rights have been perceived as one of the key purposes and principles of the United Nations, which is further confirmed by the creation of the HRCb.

Although the HRCb is relatively new, special procedure mechanisms are now in place which enables independent experts to work closely with governments, victims, civil society and NGO’s (hereafter Non-Governmental Organisations) on various thematic issues. The HRCb also has a unique Universal Periodic Review Procedure (hereafter UPR), which involves it reviewing the human rights records of all the UN member states, thereby providing potential for even ‘the darkest corners of the world’ to be fairly represented (Office of the High Commissioner of Human Rights, 2008: 1 citing Ban Ki-moon, n.p.). In actuality, the UPR function combined with civil societal engagement by the HRC and the various human right treaty committees cited above, was designed to ensure that this system is open, transparent and promotes a co-operative working environment where constructive dialogue can take place with and between states and with individuals themselves (General Assembly, 2006/A/RES/60/251 of 3 April 2006). Such procedural mechanisms could therefore aid broader rights based discussions. However, the international human rights regime is not the only system facilitating a more open approach and able to address individual concerns. As highlighted previously, regional and domestic systems have been inspired by, and have developed alongside this regime, with Steiner et al (2008) noting human rights law to be complexly intertwined, transformative of internal orders and reciprocally influential at every level. Accordingly, the following section will acknowledge the influence international,
regional and domestic human rights regimes have had upon each other and their function, purpose and operation in the UK.

3.2 The regional and domestic human rights frameworks in the UK

While the international human rights regime will be shown to be consistent with, and influential upon the regional and domestic systems impacting the UK, (particularly in light of UPR and treaty committee reporting mechanisms), that fact remains that individual complaints can only be made if the UK has ratified the treaty in question. In addition, any decisions made are not binding domestically. Therefore, regional and domestic human rights regimes have developed across the globe to better facilitate individuals bringing claims. The European Convention on Human Rights (hereafter the ECHR) was drafted in 1950 by the then newly established Council of Europe, and it entered into force in 1953. The Council of Europe was formed by 10 founding states including the UK, and was created out of a desire to prevent a repetition of the atrocities of World War II (Kerrigan, 2005), in a similar vein to the United Nations organisation. The Equality and Human Rights Commission (2011) report Winston Churchill to have been instrumental in the creation of the ECHR. In his opening speech to the congress of Europe in 1948 he proclaimed that the new Europe ‘must be a positive force, deriving its strength from our sense of common spiritual values’, with the idea of a Charter of Human Rights standing at the very centre of the movement (James, 1974: 7635-9).

Along with Churchill, the Equality and Human Rights Commission (2011) also recognise the British lawyer and politician David Maxwell Fyfe’s significant contribution to drafting the ECHR. They note the UK to be the first country in the Council of Europe to ratify the convention in 1951 (ibid), thus counteracting any common misconceptions that the ECHR is somehow a foreign construction and should not be applicable in the UK (Bilder, 2004). There are now 47 member states in the Council of Europe and all new members are required to ratify the ECHR at the earliest available opportunity (Parliamentary Assembly, 1994). This means that the ECHR is now capable of providing protection to well over 800 million people and according to Dembour (2005: 113) it is ‘often heralded as the greatest achievement of the Council of Europe’.

Dembour (ibid) further acknowledges the ECHR to have been inspired by the UDHR, which had been proclaimed two years previously. Yet, the convention possesses a
distinct advantage over the declaration as it created a substantial mechanism of enforcement for individuals, unsurprisingly therefore it does not protect as many rights as its global counterpart (ibid). The ECHR’s predominant focus is on civil and political human rights leaving the European Social Charter (1961) to guarantee the remaining economic and social human rights, and establish any relevant enforcement mechanisms. However, this section will focus solely on the ECHR, since it is these rights which have been incorporated into domestic legislation via the Human Rights Act (1998) (hereafter the HRA). Articles 2 to 14 of the ECHR set out the rights which are protected by the Convention, and over the years this has been supplemented by a number of protocols which have been agreed by the Council of Europe. The UK has ratified two of the protocols which guarantee additional rights such as: the right to protection of property (Protocol 1, Article 1), to education (Protocol 1, Article 2), to free elections (Protocol 1, Article 3) and a commitment to abolish the death penalty in all circumstances (Protocol 13). These rights operate alongside Articles 2-12 and 14 which include (but are not limited to): the right to life, the prohibition of torture, the right to a fair trial, the right to respect for family and private life, the right to freedom of thought conscience and religion and the right to marry (See Articles 2, 3, 6, 8, 9, 12). Many of these rights are qualified rights, and some contain a subsection 2 which allows the UK to restrict the right in question if it is deemed to be necessary in a democratic society to protect public order, societal health, morals, safety, to prevent crime, and/or to protect the rights and freedoms of others (See Articles 8, 9, 10, 11). Of course, striking the balance between protecting the public interest in restricting a human right and facilitating an individual’s interest in asserting the right has always been a difficult and elusive task (See Part II of this thesis for more detail). Since 1959 the European Court of Human Rights (hereafter the ECtHR) has had to manage this role (Bonello, 2005).

The ECtHR was established by virtue of Article 19 of the ECHR. It rules on State or individual applications alleging violations of the rights contained within the ECHR. Since 1998 it has sat as a full time court, individuals can apply to it directly, and it has delivered more than 10,000 judgments which are binding upon the countries concerned (Article 53 ECHR; Bonello, 2005). Whilst this has had a considerable impact in causing governments to alter their legislation and administrative practices, Bonello (ibid) notes that the court has, in many ways, become a victim of its own success. In truth, there are still inadequate structures and resources to cope with the daily flood of applications.
However, in 1996 a Labour consultation paper entitled ‘Bringing rights home’, acknowledged the need to incorporate the ECHR into domestic legislation and the Human Rights Bill soon followed (Home Office, 1997). During the second reading of the Human Rights Bill it was noted that it took approximately 5 years and £30,000 for a human rights claim to reach the ECtHR, after all other domestic remedies had been exhausted (ibid). Thus, the enactment of HRA provided an essential means by which people could more easily assert their rights and secure access to justice within the UK’s judicial system.

The HRA provides a unique UK model for incorporating the ECHR into domestic law, as it is particularly well adapted to meet the UK’s constitutional traditions of maintaining parliamentary sovereignty. Unlike many other jurisdictions, who can strike down any legislation which is incompatible with an often firmly entrenched, codified set of human rights (See the United States Bill of Rights (1791), the Canadian Charter of Rights and Freedoms (1982) and the South African Bill of Rights (1996)), the UK has an uncodified constitutional model where the concept of parliamentary sovereignty is paramount (Dicey, 1885/1959). The celebrated constitutional theorist Dicey recognised that in the UK parliament can alter any law, there is no legal distinction between constitutional and other laws, and no judicial authority can void or strike down an act of parliament or treat it as unconstitutional (ibid). Hence, it is not possible for the UK courts to declare void any legislation which breaches convention rights. In order to adhere to parliamentary sovereignty and simultaneously ensure the effective enforcement of convention rights, Section 3 of the HRA requires the courts to interpret all legislation, whenever enacted, in a way which is compatible with convention rights, ‘so far as it is possible to do so’. This legislative power is largely understood to be the principal remedial measure for the UK courts to enforce convention rights, with Section 4 of the HRA operating as a last resort (Hansard, 1998). Section 4 HRA allows the courts to make a ‘declaration of incompatibility’ if any legislation is deemed to be incompatible with convention rights and cannot be interpreted in line with Section 3. Under Section 10 of the HRA the government then has the power to take remedial action and amend the incompatible legislation if there are ‘compelling reasons’ for doing so. Though, in practice the powers created under Section 4 and Section 10 are utilised less frequently than Section 3, and in any event the individual always has recourse to take their case to the ECtHR as a last resort.
Moreover, Section 2 of the HRA specifically requires the judiciary to ‘take into account’ any judgment from the ECtHR that is of relevance to the case in question. Despite the fact this provision is not powerful enough to create a doctrine of binding precedent for ECtHR judgments, in order for parliamentary sovereignty to be maintained; it still operates to ensure consistency with any decisions made by the ECtHR. Additionally, while the UK courts can choose not to follow European judgments on human rights, the UK government contrastingly is bound under Article 46 ECHR to give effect to the final judgment of the ECtHR to which it is a party. The UK’s domestic human rights system has thus been criticised as embracing someone else’s creation from abroad, with Sir Leigh Lewis, Chairman of the UK Bill of Rights Commission observing: ‘we are struck by the fact that [within Europe] we are unique in neither having our own constitution nor our own bill of rights decided by our own parliament’ (Bowcott, 2012 n.p. citing Sir Leigh Lewis, n.p.). However, not only is this fact mitigated by the UK’s considerable role in the formulation of the ECHR and the Council of Europe, the Equality and Human Rights Commission (2011) also point out that early British legislation such as the Magna Carta, and the works of British enlightenment thinkers such as John Stuart Mill and John Locke, have played an essential role in the formulation of all human rights systems as a whole. Besides, if we are to accept that human rights are by their very nature universal, interdependent, interrelated etc. (World Conference on Human Rights, 1993) then this line of reasoning arguably becomes redundant. What is more, the ECtHR has developed a margin of appreciation doctrine where by it allows the various members of the ECHR to interpret its decisions differently, as the European judges are obliged to take into account any differences in culture, history and philosophy between the European court and the State in question (Dembour, 2005).

This doctrine, combined with the flexibility established in Section 2 of the HRA, affords UK judges an element of freedom to develop their own unique case law and policies pertaining to human rights in the UK. Though the ECHR is often heralded as a living, evolutive instrument, keeping in time with the changing traditions and standards of European society (ibid), the mechanisms cited above also enable the UK to adopt a similar, rather fluid approach. Furthermore, though the UK is constrained to some extent procedurally due to the necessity of maintaining parliamentary sovereignty, the substantial content of the convention rights required to be enforced via the HRA, allows
this domestic system of rights considerable room to grow and develop. For instance, the recent Marriage (Same Sex) Couples Act (2013) introduces same sex marriage in England and Wales. This Act corresponds well to Article 12 and 14 of the ECHR, which provides for the right to marry and freedom from discrimination, despite the fact that legislation allowing for homosexual marriage is not (yet) required by the ECtHR. Indeed, State legislation across the globe varies to a huge extent in relation to homosexuality, and it was only in 1967 that homosexual activity was decriminalised in England and Wales (The Sexual Offences Act, 1967). Hence, human rights regimes are organic and are able to facilitate great social changes within a short space of time. If an act that was once criminalised and deemed to offend public morality and affect public order and safety, is now in the UK at least, legitimised and protected as an essential human right, then perhaps the same protection and recognition could one day be afforded to other currently criminalised activities. While Chapters 1 and 2 highlighted the flexible, malleable spirit of human rights, this chapter more thoroughly demonstrates that the international, regional and domestic human right regimes could also architecturally provide the legal mechanisms to alter such realities.

3.3 The international drug control framework

The international drug control regime was not always dominated by a mandate which called for either commodity control or penal control (Boister, 2001). In fact, prior to 1912 there was only one international document regulating the supply, sale, possession or manufacture of any psychoactive (See the Brussels General Act of 1889-1890 as the first international agreement to limit alcohol consumption). Instead, Western countries largely developed their own separate regulatory regimes for different psychoactives in the 19th and early 20th centuries, in light of the mounting regulation imposed upon pharmacies by the growing medical professions at the time (Braithwaite and Drahos, 2000). Increasing regulatory practices favoured the strong in the chemical industry, as larger companies had the resources to impose adequate manufacturing, safety and quality controls (ibid). As such, large international pharmaceutical companies began to emerge and successfully monopolise and profit from the sale of certain psychoactives (ibid). European pharmaceutical companies commercially manufactured opium, morphine, heroin and cocaine in the 19th century (ibid; McCoy, 1980), and it was this economic control, combined with British economic interests in maintaining their opium trade in China, which led the US to call for the prohibition and suppression of the opium
trade in particular (Braithwaite and Drahos, 2000). Moral reformers were also critical of the fact that British colonial powers purveyed opiates to their poorest dependents and lined imperial coffers through these state run monopolies (McAllister, 2000). In addition, the US wished to strengthen its trading and political relationship with China, and there was also a fear of a potential global ‘contagion’, as many states considered opium addiction to have contributed substantially to the collapse of the Chinese empire (ibid).

Thus, it was economic, geopolitical and moral reasons that led to an international conference on Opium trafficking in Shanghai in 1909, which eventually culminated in the International Opium convention (1912), the very first international drug convention (Bewley-Taylor and Jelsma, 2011). A vigorous social movement at this time predominately led by the Church and women in the US, Australia and the UK also called for the prohibition of alcohol, as well as focussing on other drugs of addiction (Braithwaite and Drahos, 2000). Ultimately though, these efforts failed internationally as alcohol prohibition posed too much of a challenge to entrenched producer interests, to vested State economic interests in taxing this commodity, and because there were too many respectable white drinking men who resented being moralized at by a new women’s movement (ibid). As such, alcohol regimes are still regulated nationally, though there are increasing calls for international legal strategies for alcohol control (Room, 2006; Taylor and. Dhillon, 2012; Room, 2013; Zeigler, 2013). Commentators have written extensively on the tension which exists between the industry wishing to maximise their profits, and the State’s interest in promoting and protecting public health (Jernigan, 2009; McCambridge, 2012; Miller and Harkins, 2010; Lyness and McCambridge, 2014). This tension becomes increasingly complex when powerful alcohol corporations have the capacity to influence national governments (Lyness and McCambridge, 2014). As noted in Chapter 2, corporations are increasingly perceived as an extension of the ‘State’. For instance, in the UK, five major charities receive both alcohol industry funding, and are active in UK alcohol policy processes. Additionally, three of these are industry governmental members of the controversial responsibility deal alcohol network, from which all other public health interests have resigned. Perhaps it is of little surprise then that social scientists are increasingly referring to ‘the corporate capture’ of the alcohol policy environment (Miller and Harkins, 2010: 564).
Tobacco regimes are similarly subject to national regulation as opposed to global prohibition, since powerful US manufacturers and agricultural producers dominated world markets earlier in the 20th century (Braithwaite and Drahos, 2000). However, this regulatory framework is changing, since tobacco regimes are being increasingly subject to the global public health arena; thereby alleviating State tensions between power, politics, trade and public health; since public health is becoming increasingly paramount (Chan, 2013). There now exists the World Health Organization’s Framework Convention on Tobacco Control (hereafter the FCTC) (2003), a living document capable of evolving by its governing body; the Conference of the Parties (hereafter the COP). As of December 2014 the COP is comprised of 179 parties to the FCTC, including the UK (WHO, 2014a). The FCTC strives to control the supply and demand of tobacco products and regulate the marketing and trading of tobacco products in line with public health goals (Chan, 2013). This regulatory framework recognises tobacco consumption constitutes a transnational threat to health, and that governments should therefore adopt the same regulatory scrutiny they place on the safety of food, air, water, industrial chemicals and medicines (ibid). For Chan (ibid), the Director-General of the World Health Organisation, (hereafter the WHO), the enactment of the FCTC ‘was a game changing notion. It gave governments the upper hand in a battle against a powerful and highly profitable industry’ (ibid: n.p.).

For now though, it is sufficient to observe that international prohibitory controls were largely reserved for other substances early in the 20th century, as Buxton (2011) notes four core assumptions upon which the modern international system of drug control is based. In coinciding with the differing regulatory approach to alcohol and tobacco, the first assumption is that some psychoactives, but not all, present a danger to public and individual health and morality (ibid). The second assumption is that all States must work within both their nation territories and collectively to ensure the continued prohibition of certain substances (ibid). The third is that those who participate in the trade of illicit psychoactives as distributors, producers or users are criminals, and the fourth is that source-focused approaches are the most effective means to eliminate trade (ibid). The four fundamentals of contemporary drug policy were first set out at the Shanghai conference (ibid), and have prevailed throughout the 20th century and continue into the 21st. The prohibitory controls developed in the early 20th century began with the moral crusade against opium, which continued to gain ground. A racial
dimension against the Chinese was incorporated here, where even into the 1960s heroin trafficking was construed by some as a communist Chinese strategy to morally degrade the west (Manderson, 1993). Cocaine was likewise viewed in the US as a vice of prostitutes and blacks, and cannabis came to be viewed as a threat from Mexican immigration in the 1920s and 1930s (McAllister, 2000). Although these views were not automatically shared globally, the rise of US hegemony and their global political power during the 20th century facilitated the gradual building of international support for prohibition and criminalisation (Braithwaite and Drahos, 2000). Various international treaties emerged which distinguished between the licit and illicit psychoactive trades, causing a divide in regulatory systems which created the ‘ethical’ pharmaceutical industry on one hand, and the ‘illicit’ drugs regime on the other (See the Geneva Convention (1925); the Geneva Narcotics Manufacturing and Distribution Limitation Convention (1931) /Bangkok Opium Smoking Agreement (1931); the Geneva Trafficking Convention (1936); the Paris Protocol (1948); the New York Opium Protocol (1953)). It is worthy of note that the early drug prohibition system was run by the League of Nations; the forerunner to the UN. This offers support to the notion that there is an institutional or structural tie between the historical development of both the international human rights and international drug control regimes. All of the earlier drug control treaties culminated in the Single Convention on Narcotic drugs (1961) (hereafter the Single Convention), a convention which still dominates today.

The Single Convention was designed to consolidate all of the earlier international drug treaties from 1912 onwards, and charts the first time that the cannabis plant (Cannabis sp.) was specifically prohibited alongside the opium poppy (Papaver somiserum), the coca leaf (Erythroxylum coca) and their derivatives, all inventions of which, at that point, were previously controlled (Bewley-Taylor and Jelsma, 2011). The Single Convention introduced more of a dualist approach to drug control as earlier treaties, while influenced to some extent by the moral hegemony prevailing in the US, were more concerned with the regulation of the licit trade of psychoactives, and in ensuring their availability for medical purposes (McAllister, 2000). According to Boister (2001), the move to an increasingly dualist approach was due to the expansion in the 1950s of illicit drug trafficking, supply, and illicit manufacture in undeveloped regions, alongside the fact that usage patterns of psychoactives were evolving rapidly. Hence, the Preamble of the Single Convention concerned itself with reducing the potential for
addiction through drugs in order to ‘combat…a serious evil for the individual’, while it simultaneously regarded their availability as being ‘indispensable for the relief of pain and suffering’. To give effect to these two positions Article 4(c) requires parties to pursue a single objective in limiting ‘exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs’. As of April 2015 there are 154 parties to the Single convention (United Nations Treaty Collection, 2015f), and each party is required to provide mutual co-operation and assistance in pursing this overarching objective (Fortson, 2011).

To facilitate this common objective, the International Narcotics Control Board (hereafter the INCB) was established by Article 9 of the Single Convention. It functions as an independent, quasi-judicial control organ and is mandated to oversee and support governmental compliance (INCB, n.d.). The INCB has 13 members who are elected by ECOSOC for a period of 5 years (See Article 9, the Single Convention). 10 of its members are elected from a list of persons nominated by governments, and 3 are elected from a list nominated by the WHO, for their medical and/or pharmacological expertise (ibid). The INCB is obligated to administer an estimates system, which limits each nation’s annual production of controlled substances to the estimated amounts needed for medical and scientific purposes (See Article 12, the Single Convention). These powers are far reaching as they extend to all nations regardless of whether they have ratified the convention or not (ibid). Alongside this function the INCB is mandated to enter into a ‘continuing dialogue’ with governments, in a similar manner to the human rights treaty bodies during their periodic review process (See Article 9(5), the Single Convention). Yet, Barratt (2008: 12) observes a distinct difference between the two, as the human rights treaty bodies engage in a ‘constructive dialogue’, thus recognising the need for meaningful engagement with all levels of society, in order to gain an accurate and honest depiction of a situation as it arises. In contrast, the INCB is routinely criticised for failing to engage with civil society, for conducting its negotiations in secret and for only accepting information which is provided by the governments themselves (ibid; Bewley-Taylor and Trace, 2006; Harm Reduction International, 2011; Csete, 2012).

McAllister notes that these working methods resonate with the era in which INCB was formed along with the biases which were prevalent at this time (McAllister, 2012). The board is often portrayed as the ‘guardian’ of a more moralistic, prohibitionist approach
to drug control (Bewley-Taylor and Trace, 2006: 1), ‘challenging any activity which
does not fit with its rigid interpretations of the treaty- and non-responsive to the needs
of member states in a world dramatically changed from that in which the INCB was
established’ (Rolles, 2009: 169). While increasingly direct questions were asked of the
INCB at the 56th session of the Commission on Narcotic Drugs in 2013, often centring
on the human rights abuses committed within this sphere, the board maintained its
previous stance in asserting that human rights were outside of its mandate (The CND
Blog, 2013). The board has the same legal status as the various human right treaty
committees since all of these monitoring bodies have no direct enforcement
mechanisms per se, rather they make recommendations or decisions which can carry
political weight. The INCB is similarly required to report on its findings and to submit
its recommendations to a functional commission established by ECOSOC in 1946, the
Commission on Narcotic Drugs (hereafter the CND) (See Article 9, the Single
Convention).

The CND is the central drug policy making body within the UN system, which reviews
and analyses the global drug control situation (United Nations Office on Drugs and
Crime, n.d. a). Alongside obtaining regular reports from the INCB, the CND is also the
governing body for the United Nations Office on Drugs and Crime’s (hereafter the
UNODC) drug control programme, which finances measures (from predominantly
donor states) to combat the ‘world drug problem’ (ibid). Such financial sway, combined
with the political influence gained from operating as one of ECOSOC’s functional
commissions, allows the CND to have extensive influence in the global drug policy
arena. The commission comprises of 53 states (as opposed to individuals), who are
elected for a four year period (United Nations Office on Drugs and Crime, n.d. b), and
it has previously been criticised for operating on a consensus-based model. It is believed
this framework results in states being nervous about expressing divergent views on drug
policy, leading to many so-called decisions to ‘retreat into generalities’ with states
‘abandoning any serious efforts to take action’ (General Assembly, 2005/A/592005 of
21 March 2005: 159). This working method along with a lack of human rights guidance
from the CND has been a cause for concern for various NGOs, and has culminated in
the International Harm Reduction Association, the Open Society Institute Public Health
Program and Human Rights Watch compiling a list of legal, political and institutional

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reasons as to why the CND is required to adhere to its international human rights obligations (International Harm Reduction Association, n.d.).

What is more, the CND has remained a functional commission of ECOSOC since 1946, unlike the CHR, which has since been abandoned and replaced by a senior UN council, the HRCb. Thus, the international human rights framework should regardless dominate here institutionally as well as legally (pursuant to Article 103 of the Charter) (See Section 3.1 for more detail). Interestingly though, there are now signs to suggest the CND is beginning to acknowledge its human rights obligations and allow for diverging viewpoints. As stated earlier, the INCB faced tough questions from various NGOS at the 56th session of the Commission of Narcotic drugs in 2013 (The CND Blog, 2013). Furthermore, the International Drug Policy Consortium report there to have been a record number of NGOs present at this session, a number of calls for more evidence-based, harm reductionist focused drug polices, and even innovative and diverging policy suggestions (MacPherson, 2013). The CND (2014) further reports widening participation at its 57th session in 2014, and states that the resolution for the United Nations Special Session of the General Assembly on the World Drug Problem in 2016 (hereafter UNGASS 2016) promises to include more open, transparent NGO participation (General Assembly, 2014/GA resolution 57/5). Furthermore, this resolution reiterates yet another General Assembly resolution to uphold the UDHR when considering ‘the world drug problem’; thereby increasing the standing afforded to human rights (ibid: Para 4; See also General Assembly, 1948/A/RES/3/217A (III) of 10 December 1948).

Regardless though, the CND is required to adhere to the 3 UN drug conventions and could be constrained by the haphazard manner in which they have developed. In fact, the CND’s most notable function is to amend the four schedules where substances are placed according to their level of harm and their perceived therapeutic value (Articles 3 and 8 of the Single Convention). Gimenez Corte (2010) offers an interesting overview as to how historical and political influences have largely shaped this scheduling process, although, the WHO retains a considerable advisory input here (Article 3, the Single Convention). Nevertheless, at the most recent 57th session of the CND in 2014, Trace (2014) observed that the INCB performs an unclear and confusing role, as it often raises concerns and opinions regarding the science involved in drug policy, which can influence the scheduling process, despite the fact that this should be the remit of the
WHO by virtue of Article 3 of the Single Convention. For now though, it is enough to observe that the latter two conventions have also largely been shaped by economic, political and historical precedents, which has led several commentators to observe that the conventions are outdated instruments and products of their own time (Bewley-Taylor and Jelsma, 2011; Bewley-Taylor and Jelsma, 2012; Tupper and Labate, 2012). In fact, just the existence of the latter two conventions could support this contention, since the Single convention, as its title suggests, was designed to constitute a ‘single’ sole convention for all present and future international drug related issues (Bewley-Taylor and Jelsma, 2011). However, rather than incorporate new substances within the Single Convention’s amendment procedure, countries instead chose to adopt a new convention to respond to the emerging array of new ‘psychotropic’ substances. The Convention on Psychotropic Substances (1971) (hereafter, the 1971 Convention) schedules largely synthetic psychoactives such as amphetamine-like stimulants, barbiturates and other sedative-inducing substances, and hallucinogens into four schedules according to their perceived harm and therapeutic value. This convention, ratified by 183 parties as of April 2015, therefore appears to operate in much the same way as the Single Convention (See the United Nations Treaty Collection, 2015g). Yet, a Senate of Canada (2002) report notes that tougher controls were placed upon the regulation of the three plants under the Single Convention than the newer mainly synthetic substances, as developed countries wished to retain more freedom over their own vested pharmaceutical interests. Once more then, interests of an economic nature pervaded the regulatory framework of the international drug control system, most notably at a time when many States were drafting their own domestic legislation to respond to these international obligations (See the UK’s Misuse of Drugs Act, 1971; New Zealand’s Misuse of Drugs Act, 1975; the US’s Psychotropic Substances Act, 1978).

Additionally, the titles of the conventions reveal a further discrepancy within the two instruments since the Single Convention includes psychoactives which would not ordinarily be defined as ‘narcotics’- substances which produce a sedative effect (Saunders, 2007). For Giancarlo Arnao (1991) the term was deliberately purged of its scientific meaning and was employed as a legal bureaucratic term in order to legitimise the legal distinction between different types of psychoactives. He goes on to note that the semantics of the conventions, which notably conflate drug use with drug abuse,
reveals the presence of a moral hegemony and a desire for nations to conform to one particular drug control paradigm (ibid). These observations support the idea that drugs are a social construction, created for specific governmental purposes (Seddon, 2010). Derrida (1995: 229) further reiterates this line of reasoning through asserting that: ‘the concept of drugs is a non-scientific concept that is instituted on the basis of moral and political evaluations.’ What is more, the usage of such terms could demonstrate the dated nature of the conventions. For instance, the bureaucratic creation ‘psychotropic’ is not defined in any of the conventions, yet it is now imposed upon a group of substances whose only genuine connection is that they were all consumed within the same era. Hence, one could question the effectiveness of this regime, particularly in relation to the regulation of the new psychoactive substances (hereafter NPS) phenomenon.

The final Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic substances (1988) (hereafter the 1988 Convention) goes some way to recognising the increase in the variety of psychoactives available, as it regulates precursor chemicals to substances controlled by the earlier two treaties (See Article 12 and Tables I and II of the 1988 Convention). However, the predominant focus is on countering increasingly powerful and sophisticated transnational drug trafficking. As of April 2015, the 1988 Convention is ratified by 189 parties (See the United Nations Treaty Collection, 2015h), and while its aims are largely focused on the issue of organised crime, this latter instrument is arguably the most punitive of the three for the individual user. For the first time Article 3(2) requires the possession of substances for personal use to be a criminal offence, prior to this it was debatable as to whether possession alone had to be criminalised. According to Boister (2001), while Article 36(1) of the Single Convention requires parties to ‘punish’ the cultivation, manufacture, preparation, possession etc. of controlled psychoactives, this provision can be viewed in light of its drafting history—which was originally entitled ‘Measures against illicit Traffickers’ (See Commentary on the Single Convention on Narcotic Drugs, 1973: 112). When regarded this way, States could reasonably deviate from penalising possession alone, given the overall nature of the provision. Moreover, both articles consider their provisions to be subject to a parties ‘constitutional limitations/principles’ (See Article 36(1)(a) of the Single Convention and Article 3(2) of the 1988 Convention) and the ‘basic concepts of its legal system’ (ibid).
Thus, nations have had considerable latitude when drafting their own legislation, and it is for this reason, domestic drug polices deviate to a considerable extent across the globe (For a detailed account of policies in Europe see Dorn and Jamieson, 2000; See also Rosmarin and Eastwood, 2012). What is more, the legislative inconsistency both within and between the three conventions has facilitated some civil liberties claims when arguing for a right to consume certain psychoactives (For more detail see Part II). Such legislative inconsistencies include the discrepancy between Article 49 of the Single Convention which calls for the abolition of all quasi-medical/traditional drug use within 15 years or 25 years, and Article 14(2) of the 1988 Convention which requires parties to ‘respect fundamental human rights’ and to ‘take due account of traditional licit uses, where there is historic evidence of such use’. Moreover, Articles 14(1) and 25 state its provisions should not derogate from any obligations under the previous drug control treaties, including the 1961 obligation to abolish traditional drug usage. Finally, Article 32(4) of the 1971 Convention allows parties to make a reservation for plants traditionally used in ‘magical or religious rites’. Several commentators have also considered the latitude afforded to nations on an international scale (Bewley-Taylor, 2012; Bewley-Taylor and Jelsma, 2012; Room, 2012; Room and McKay, 2012).

Indeed, at the time of writing the author can report that Bolivia has been the first party to the Single Convention to successfully withdraw and re-accede with a reservation allowing its citizens to chew the cocoa leaf (Doward, 2013). Therefore, certain provisions, combined with principles of international law, and the fact that the conventions are not self-executing (unlike most human right treaties), have provided states with some room to deviate away from the nature and operation of the international drug control framework. As such, the UK has always been able to retain a measure of flexibility when drafting its own domestic drug-control legislation.

3.4 The domestic drug control framework

The Misuse of Drugs Act (1971) (hereafter the MDA or the Act) is the dominant legislative instrument in the UK designed to control and restrict where necessary ‘dangerous or otherwise harmful drugs’ (See the Long Title, MDA 1971). The Act corresponds to the UK’s treaty commitments under the three UN drug conventions, and coincided with societal changes in relation to the increasing non-medical use of psychoactives (Shiner, 2009). Other UK drug legislation prior to the Act also created an array of criminal offences, which largely conformed to previous international
obligations (See the Dangerous Drugs Act 1920; the Dangerous Drugs Act 1925; the Dangerous Drugs Act 1932; the Dangerous Drugs Act 1951; the Dangerous Drugs Act 1964 and the Dangerous Drugs Act 1965). However, the majority of these were repealed when their provisions were consolidated by the MDA. The overarching purpose of the MDA is similar to that contained in the Single Convention’s preamble, as it seeks to control substances which are ‘capable of having harmful effects sufficient to constitute a social problem’ (Section 1(2) MDA). This phrase is purposely broad to include not just direct, physical or mental harm to the user, but to encompass societal harm as well. In moving the Misuse of Drugs Bill for the second time in the House of Lords, Lord Windlesham classified drug use as a ‘force’ capable of threatening ‘societies existence as a politically, socially or economically viable order’ (Hansard, 1971). Over time various UK drug strategies have emphasised the presence of substance-related harms to the individual, to potential victims, to families and to communities as a whole (Home Office, 1995; HM Government, 2008; HM Government, 2010) (See Chapter 2 for a more detailed discussion on States emphasising the harms individuals can cause communities and societies at large via illicit psychoactive use). Yet, despite such a broad approach, very little recognition has been afforded in the UK to the notion that a criminal conviction or a caution under the MDA could also produce its own harmful effects. Instead, to adequately assess the level of harm a substance is capable of producing, the MDA incorporates its own ABC classification system. When introducing the legislation in 1970 the Home Secretary James Callaghan observed:

‘The object here is to make...a more sensible differentiation between drugs. It will divide them according to their accepted dangers and harmfuleness 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).

While the classification of substances was largely modelled upon the schedules contained within the international conventions at the time (House of Commons Science and Technology Committee, 2006), Callaghan’s observation demonstrates that the MDA was envisaged as a flexible, organic statute where psychoactives could move up and down its classification scale, according to scientific evidence as it emerged. Interestingly, the conventions do not even require the implementation of a domestic classification system (Police Foundation, 2000), and in Europe only the UK, Italy, the
Netherlands and Portugal relate the classification of substances to the maximum criminal penalties which could be imposed (ibid). For instance, the UK makes it a criminal offence to import (Section 3 MDA), export (ibid), produce (Section 4 MDA; See also Section 6 MDA which refers to restrictions on the cultivation of cannabis), supply (ibid), or possess (Section 5 MDA) any of the controlled substances listed in the Act’s schedules. The recent implementation of Section 2A MDA additionally places new psychoactive substances (NPS’s) into a ‘temporary class’ with a view to determine their harmfulness (as inserted by Section 151 and Schedule 17 of the Police Reform and Social Responsibility Act, 2011). In the UK the subsequent penalties which are imposed are designed to correspond with the level of harm perceived under the legislation’s ABC system. Conversely, many other countries leave it to the courts to determine the relative harm of the substances in the sentences which are passed, to avoid arbitrarily applying their domestic legislation (Police Foundation, 2000). Yet, in principle at least, the role of the Advisory Council on the Misuse of Drugs (hereafter the ACMD) serves to mitigate against an arbitrary application of the Act. The ACMD is a non-departmental government body comprising of 23 members with various expertise in law, criminology, pharmacology, toxicology etc. (ACMD, n.d.). Members are required to advise Ministers on the classification of substances alongside reviewing any situation of drug misuse, where again that misuse could have harmful effects sufficient to constitute a social problem (Section 1(2) MDA). Given their expertise and scheduling role, it could be argued that the ACMD are the domestic equivalent to the WHO, as they also provide their political counterpart the CND with scheduling advice and recommendations (Article 3(3) the Single Convention). Additionally, Section 2(5) of the MDA specifies that the Secretary of State cannot amend the scheduling of a substance without consulting the ACMD first, which was presumably intended to help guard against any potential dogmatism on behalf of the State.

The Secretary of State for the Home Department (hereafter the SSHD), has considerable powers under the Act to alter the regulatory measures attached to any of the substances currently controlled. In truth, although the Act is often presented as little more than a list of prohibited substances with various criminal penalties attached, the SSHD actually has the power to:

- Make the possession, supply import, export and production of any of the substances currently controlled, (including the cultivation of cannabis), lawful
if done in accordance with the terms of a license or other authority (Section 7 MDA);

- Exclude the application of any provision of this act which creates an offence via regulations (Section 22 MDA); and

- Make different provisions in relation to different controlled drugs, different classes of persons, different cases or circumstances etc. (Section 31 MDA).

Needless to say then, the Act in theory corresponds well with its flexible evolutive design, and as Walsh (2010) observes: the MDA in its current form actually allows for the implementation of every regulatory model found within Transform’s Blueprint for Regulation, a document which proposes five separate models for legalising and regulating currently controlled psychoactives in the UK (Rolles, 2009). What is more, the Misuse of Drugs Regulations (2001) (hereafter MDR) operate alongside the MDA and document a variety of regulatory mechanisms which could be implemented. To put it simply, ‘what the Misuse of Drugs Act prohibits the Misuse of Drugs Regulations 2001 permits’ (Fortson, 2011: 29). Indeed, Rudi Fortson QC, a practising barrister specialising in drugs law, asserts that the combined effect of these two instruments theoretically allows for the existence of a regulatory mechanism which is as flexible as the will of parliament and Ministers (ibid).

However, the actual application of the MDA has received much criticism, as many commentators argue that it has been arbitrarily applied in practice (Police Foundation, 2000; House of Commons Science and Technology Committee, 2006; Rolles, 2009; Nutt, 2009; Walsh, 2010; Fortson, 2011). In fact, while the Act is deemed to conform to its obligations under the HRA (See Section 19 HRA), Walsh (2010), along with the Drug Equality Alliance (n.d.), question whether the MDA is discriminatorily commandeered as it fails to regulate alcohol and tobacco on the basis of ‘historical and cultural precedents’ (Government Reply to the Fifth Report from the House of Commons Science & Technology, 2006: 24). The UK government have failed to provide any further explanation as to whether this reasoning constitutes a lawful justification for the distinction. For Hardison (2007, 2008) this is particularly problematic in light of the government’s additional recognition that these two substances account for more deaths and health issues than any currently controlled psychoactives, and the overarching concern of the MDA is to reduce such harms. The
MDA could thus be seen as regulating historically contingent taste, in much the same way as the international drug control framework, as their scheduling, inclusion and exclusion of certain psychoactives has also been recognised to be morally, historically and culturally determined (Braithwaite and Drahos, 2000; Gimenez Corte, 2010). Though, it is arguably worth noting that ‘the corporate capture’ of the alcohol policy environment, as mentioned earlier, is indicative of the economic interests which pervade the scheduling agenda too (Miller and Harkins, 2010: 564). Professor Nutt (2009), a former chairman of the ACMD, further highlights the lack of any rational, evidence-based approach to the current classification system. Along with his colleagues he has produced a more systematic, transparent assessment of measuring drug-related harms which has yielded a markedly different classification scale (Nutt, King, Saulsbury, and Blakemore, 2007). In this scale alcohol and tobacco are ranked amongst the most harmful psychoactives and other currently regulated class A substances are ranked amongst the least, and it is largely supported and espoused by drug policy reformers focusing on incorporating a more evidence-based approach. Indeed, Nutt’s scale of harm is perhaps more in line with the application of the Act as originally envisaged by parliament.

Though, for those reformers not wishing to de-politicize drug policy, and to instead consider an alternative relationship between the State and the individual; one which potentially affords the individual more freedoms in the drug policy arena, then there are some ways to deviate from the existing status quo. As previously highlighted, the MDA is an extremely flexible instrument capable of legalising and regulating all currently controlled psychoactives to varying degrees. However, the UK is legally obligated to adhere to international treaty obligations to which it is a party. As such, even though the conventions are not self-executing, the Vienna Convention on the Law of Treaties requires parties to have regard to both the spirit and to the intention of the treaty as a whole (Villiger, 2009). Since the overarching objective of the Single Convention and the two following it is to limit the behaviours of persons with regard to all controlled psychoactives excepting for medical and scientific purposes, it is arguably not legally viable to implement such a policy at present. Although as indicated, some States have incorporated decriminalisation polices which satisfy their obligations under the Vienna Convention, in light of the aforementioned commentary to the Single Convention, and certain provisions which facilitate some room to deviate (See Section 3.3).
Such policies afford more freedom to the individual \textit{de facto} in relation to possessing controlled psychoactives for personal use and/or social supply (Dorn and Jamieson, 2000). Fortson (2011) observes the possibility of devising a scheme under the MDA where the possession of a substance remains ‘unlawful’ by virtue of Section 5(1), but it no longer remains a criminal ‘offence’ under Section 5(2), and instead attracts an administrative sanction in a similar manner to other decriminalisation policies. However, the fact remains that the activity is still deemed unlawful and attracts a sanction. Accordingly, an individual could never truly assert their rights over a controlled psychoactive \textit{de jure}. The final alternative is to openly flout the UN drug conventions which, at the time of writing, Uruguay, Colorado and Washington have done, through creating a fully legalised, regulated cannabis market (Bone, 2013; Room, 2014). Oregon, Alaska and Washington D.C. have also approved the legalisation of cannabis in ballots, although at the time of writing, they have not yet implemented measures to create a fully regulated market (McGreal, 2014). Such strategies could be risky and attract political and/or financial ramifications within the global area. Indeed, the INCB have explicitly voiced its disapproval on Washington, Colorado and Uruguay breaking away from their treaty obligations (The International Drug Policy Consortium, 2013; The INCB, 2013). Yet this fails to deter other countries who are beginning to follow suit (Rough, 2014). Moreover, regardless of any political repercussions, the legal mechanisms stipulated in the MDA, and, potentially bolstered by HRA, could create alternative regulatory regimes for all of the psychoactives currently controlled. During a House of Lords conference in 2014 this author has mentioned that, in relation to cannabis at least, ‘the times they are a changin’ on the global front’ (Bone, 2014b: 31 citing Dylan, 1963: n.p.). For Baroness Meacher, the conference’s key sponsor, the question pertaining to our drug laws has fundamentally changed. She states that we are moving from questioning whether we should reform our drug laws, towards questioning what such reform would entail. (ibid). For this author, the architectural mechanisms are already in place for a human rights lens to legally and institutionally cement effective reform.

3.5 Conclusion

It is clear that the nature, function and purpose of both the international human rights and drug control regimes have impacted upon their operation domestically. The international human rights framework has developed in a rather logical, coherent and
consistent manner, whereby the terms of each new treaty inform and add to the interpretation of others. Accordingly, while the HRA is a relatively recent construction, its successful operation is largely dependent upon a system of human rights established by the ECHR, which in turn was heavily influenced by the creation of the UDHR. Human rights law is therefore arguably intertwined and reciprocally influential at every level (Steiner et al, 2008). Although this international framework is not immune from the sway of political and cultural pressures; a most notable example is the separation of rights contained within the ICCPR and the ICESCR, it nevertheless has continued to evolve in line with other global developments, and with the UN’s increasingly ‘open’ and participatory ideological agenda. Indeed, the working methods of various human rights treaty bodies are often designed to allow for individual complaints, and the recent creation of the UPR operates to ensure that all nations are fairly represented. Moreover, the encouragement for states, NGOs and other interested parties to enter into a ‘constructive dialogue’ with human rights bodies, further supports the high level of transparency which has come to be expected from within this regime. Perhaps the fact that all nations are not required to adhere to one particular rights-based paradigm has also aided the increasingly ‘high standing’ afforded to rights in the international sphere. The UK for instance recognises the ECHR’s margin of appreciation doctrine, which when combined with Section 2 HRA, affords British judges an element of freedom to develop laws unique to the changing standards of British society. Furthermore, as observed earlier, the human rights regime has recently been afforded a higher institutional standing by virtue of the HRC, a replacement for the CHR, where members report directly to the General Assembly itself.

The international drug control framework on the other hand is, in large part, still regulated by the CND which continues to report to ECOSOC, a council with a lower political and institutional standing overall than the General Assembly. Yet, while the CND is not supposed to dominate institutionally, the working methods of this body combined with the INCB, have arguably impacted heavily upon the operation of the UK’s domestic drug control system. In direct contrast with the international human rights regime, the CND’s traditional consensus-based model for decision making, and the INCB’s practice of secret negotiations and complete lack of any human rights accountability, has arguably contributed to the continuance of a regime where moral, historical, political and economic hegemonies dominate. This chapter has
acknowledged the three UN drug conventions to be outdated and inconsistent instruments with an overarching prohibitionist agenda; although some room for manoeuvre has been documented. While the UK could therefore deviate from the existing status quo, it appears to be constrained and heavily influenced by the working practices and drug control-values which dominate internationally. However, the most recent CND sessions and other developments in producer countries, combined with Uruguay, Colorado, Washington, Oregon, Alaska and Washington D.C. openly flouting the UN drug Conventions, suggests that the international drug control framework could be beginning to recognise certain human right concerns and/or allow for some diverging policy agendas. In any event, this chapter is predominately concerned with exploring the legal architecture of the two frameworks. As such, in disregarding other external factors, it is essential to re-affirm that the international human rights regime takes precedence legally over the drug control framework, by virtue of the UN’s Charter obligations. What is more, most human rights instruments are self-executing and the ECHR has actually been incorporated into the UK’s domestic framework by the HRA. Thus, it is arguable that the provisions in this convention should dominate legally over the three UN drug conventions; given their legal status as non-self-executing documents. In light of this, it seems appropriate to ultimately conclude that both the domestic human rights and drug control regimes are regulated by extremely flexible, organic instruments- capable of evolving and adapting to most changing circumstances.
Introduction to Part II: Employing health rights and religious rights to demonstrate how human rights could improve the drug control framework

Part I of this thesis (Chapters 1-3) focusses on the first half of the title: ‘How can the lens of human rights provide a new perspective on drug control’. The overall aim of part II (Chapters 4 and 5) is to cement this ‘human rights orientated perspective’ through developing the conceptual arguments and insights which were gained in part I. Such arguments include the notion that:

- Human rights are conceptually broad living instruments, capable of reflecting the complex reality of human psychoactive usage (Chapter 1);
- Human rights can better address the State/individual binary which is identified to be at the crux of drug policies (Chapter 2) and;
- Human rights and drug control frameworks are legally compatible (Chapter 3).

Part II of the thesis will employ health rights (Chapter 4) and religious rights (Chapter 5) as conceptual starting points in order to cement these arguments. As explained in Chapter 2, throughout history psychoactive use has been either restricted or permitted on the basis of moral codes concerned with social cohesion and/or spiritual integrity; both of which relate to health and religious rights. More importantly, the UN’s drug control framework accords significance to health and religious rights, since the global prohibitionist regime is expressly concerned with limiting psychoactives for medical and scientific uses (See Preamble, Single Convention), and any latitude afforded to States on a human rights basis is predominately concerned with reservations relating to ‘traditional’ or ‘religious’ rights (Article 14(2) the Single Convention; Article 32(4) the 1971 Convention). Walsh (2014) further explains that there exists a tendency for psychoactive consumers to: ‘claim the labels of either religious or therapeutic use when trying to exempt themselves from the prohibitive framework, both because this is a genuine description of their motivations, and because there is believed to be a protective power attached to such categorizations’. As will be demonstrated, most of the case law in practice concerns the infringement of an individual’s religious, health or related rights when the drug control and human rights regimes conflict. Such umbrella categories are therefore useful when exploring how to reconcile the two frameworks,
and how a human rights lens can improve the UK’s drug control framework. However, in light of Chapter 1, the author does not wish to exempt any context for human psychoactive usage; rather Part II will consider how a human rights lens could embrace broader conceptions of health and religion to additionally account for rights to: well-being, privacy, pleasure, culture, spirituality, beliefs, free thought and cognitive liberty. Table 2 sets out the structure of Chapters 4 and 5 in a clear, concise manner.

**Table 2: Structuring Part II of the thesis**

<table>
<thead>
<tr>
<th>Part II</th>
<th>Definitions</th>
<th>Case Law</th>
<th>Regulatory Implications</th>
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<tr>
<td><strong>Chapter 4: Health</strong></td>
<td>4.1 demonstrates the potential of the human rights and drug control frameworks to be legally compatible, <strong>to address the binary between the State and the individual.</strong> and to better understand the complexities associated with psychoactive use. <em>The emphasis here is on the arguments developed in Chapter 2</em></td>
<td>4.2 fully critiques how the drug control and human rights frameworks currently operate practice. This section employs domestic and international case law on health and related rights to analyse how a <em>bona fide</em> human rights perspective could improve the drug control regime.</td>
<td>4.3 puts forward regulatory proposals from a health and related rights perspective to answer how the lens of human rights can point towards different ways of regulating drug consumption.</td>
</tr>
<tr>
<td><strong>Chapter 5: Religion</strong></td>
<td>5.1 demonstrates the potential of the human rights and drug control frameworks to be legally compatible, to address the binary between the State and the individual, and <strong>to better understand the complexities associated with psychoactive use.</strong> 5.2.3 also defines human rights related to religion such as freedom of belief, thought and the notion of cognitive liberty in more detail. <em>The emphasis here is on the arguments developed in Chapter 1</em></td>
<td>5.2 fully critiques how the drug control and human rights frameworks currently operate practice. This section employs domestic and international case law on religious and related rights to analyse how a <em>bona fide</em> human rights perspective could improve the drug control regime.</td>
<td>5.3 puts forward regulatory proposals from a religious and related rights perspective to answer how the lens of human rights can point towards different ways of regulating drug consumption.</td>
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The ‘Definitions’ sections (4.1, 5.1 and 5.2.3) reveal that human rights are capable of embracing much broader interpretations of health and religion, to better respond to the complex reality of human psychoactive usage (see Chapter 1). However, in practice, the human rights and drug control frameworks adopt a hegemonic narrative, protecting (if at all) narrow conceptualisations of human rights to health and religion. In addition, Sections 4.1 and 5.1 are structured differently to enhance the arguments put forth in Part I of the thesis. While both sections reveal the legislative compatibility between the two frameworks (see Chapter 3), section 4.1 emphasises how human rights respond to the State/individual binary, since greater tensions will be shown to exist between the positive and negative duties a State has to an individual in the health sphere (see Chapter 2). Section 5.1 on the other hand, attends more to the hegemonic narrative which pervades the drug control framework, and highlights how human rights have been arbitrarily applied to protect narrow conceptualisations of religion; thus failing to accommodate the complex reality of human drug use (see Chapter 1). Ultimately though, both ‘Definitions’ sections demonstrate the potential of the human rights and drug control frameworks to be legally compatible, to address the binary between the State and the individual, and to better understand the complexities associated with psychoactive use.

The ‘Case law’ sections (4.2 and 5.2) are the most lengthy, since they fully critique how the drug control and human rights frameworks currently operate practice, and the author analyses how a bona fide human rights perspective can be reconciled here, in order to improve the drug control regime. The case law unpacks the fundamental moral, philosophical and legal arguments involved when considering the human rights of drug users. While the international and domestic drug control regimes have been criticised throughout the thesis, the ‘Case law’ sections additionally reveal the fallibility of human rights, since the sections expose how both frameworks work in practice for the first time. Judicial tests - such as, those which consider whether or not drug use is a legitimate ‘manifestation’ of a religion or a belief (Section 5.1.3), or whether restrictions upon a person’s right to use psychoactives are ‘proportionate’ to the legitimate aim being pursued (Sections 4.2 and 5.2) - will demonstrate how human rights can be arbitrarily applied in practice. The ‘Case law’ sections will consider how the human rights adjudication process can be improved if informed by a bona fide human rights perspective; one which is unconstrained by the politicisation and
criminalisation of the drug control framework. While the thesis predominately uses the UK as an example for how human rights can improve our drug policies, domestic case law will be compared internationally, to highlight any similarities and differences in judicial approaches. The international case law heavily focusses on the US, since they have a rich history in the juridification of human rights claims (especially in the religious liberties field). However, most importantly, the US was the main driving force behind the global system of drug prohibition (See Chapter 3). Other States largely deferred to them given the rise of their global political power throughout the 20th century. Moreover, the US continue to exert considerable pressure, primarily upon producer countries, to fight against their self-proclaimed ‘war on drugs’ (National Public Radio, 2007: n.p. citing Nixon, 1971: n.p.). It is interesting then, that despite such a partisan approach, the US judiciary will be shown to have (at times) respected the health and religious rights of individuals to a far greater extent than the UK; further highlighting the potential compatibility of both the drug control and human rights frameworks. Finally, more thorough comparisons can be drawn here since both the UK and the US constitute western pluralist democracies, and both concerned with maintaining drug prohibition and respecting human rights. However, the author will also demonstrate an appreciation for case law from other jurisdictions where relevant, since the prohibitionist paradigm is transnational and far reaching (See Chapter 3, Section 3.3 for the number of parties to the UN drug conventions).

Part II of the thesis will finally highlight the potential for the case law to influence and constitute policies relating to drug consumption, as well as exploring how regulatory policies (i.e. drug prohibition) influences the case law. Indeed, all of the ideas put forth in the ‘Regulatory Implications from a Health, Religious and Related Human Rights Perspective’ (sections 4.3 and 5.3) have been derived from the arguments and analyses developed from the ‘Case law’ sections above. These final two sections attempt to answer the second half of this thesis’s title: How can the lens of human rights point towards different ways of regulating drug consumption? The ‘Regulatory Implications’ sections will serve as a starting point for how drug policies could develop when informed by a human rights lens in order to maximise the benefits and mitigate the harms, address the conflict between the State and the individual, and respond to the broader conceptualisations of heath and religion which reflect the complexities of lived experience.
Chapter 4: Employing health rights and related human rights to improve the drug control framework

This chapter will centre specifically on the human right to ‘health’. It will initially identify the difficulties associated with defining and understanding this human right, though it will illustrate an appreciation for the complex relationship between the individual and the State, and that health ideals under a human rights lens complement those highlighted within the current drug control framework. This should serve to reinforce the arbitrariness inherent in domestic and international case law as negative health rights in particular are often given short shrift under the current drug control system, despite its capacity to accommodate them. The chapter will then analyse how a strict, inconsistent, and at times hypocritical application of the MDA has resulted in policies which fail to understand human psychoactive consumption in relation to health. Chapter 4 will finally consider how a rights orientated lens could point to new modes of regulation in this sphere, which could facilitate domestic and (where relevant) international drug policies, to value the benefits and risks attached to human psychoactive usage on health grounds, and to better balance the conflicts mentioned above.

4.1 Definitions of ‘health’

The notion of ‘health’ and how one defines what constitutes ‘good health’ is an idea which has been grappled with for centuries. From the Hippocratic Oath (Edelstein, 1943) to the WHO definition (1948), commentators have employed both medicalised (Boorse, 1975) and social constructionist (Freidson, 1970) definitions to varying degrees, in an attempt to clarify how our ‘health’ should best be considered. Medicalised definitions are often deterministic and hold that diseases are invariant to time or place and are universal (Conrad and Barker, 2010). Those who favour a medical model of health are perceived as naturalists, as they consider that health and disease are ubiquitous features of the natural world, and draw on descriptive definitions of health which are based upon biological function (Hamilton, 2010). Social constructionist definitions on the other hand distinguish disease (the biological condition), from illness (the social condition), believing that the meaning and experience of the latter is shaped by social and cultural systems (Eisenberg, 1977). For Coggon (2012) such varied
contextualisation of the notion of health can lead to a crucial tension in substantiating what is ‘good’ for us. For instance, there exist both externalist and internalist views on health; which could invite the medical establishment and/or policy makers to commit to a more medicalised view on what they believe to be good for us, leaving the individual to grapple with a more social constructionist view on what they believe to be good for themselves (ibid). Although this idea is a generalisation, since internalist views can be medicalised (Rose, 2003) and vice versa (See General Comment 14, 2000: Paras 18-29 which detail more specific healthcare measures for different groups of people), the fact remains that health specialists are wary of the determinism present in policy appeals to science and medicine (Coggon, 2012; Sedgwick, 1973). Such distinctions will be explored in greater detail in the Case law and Policy sections considered below (Sections 4.2 and 4.3).

For now though, it is sufficient to establish that this tension could also occur when individuals assert a human right to health, since these rights either manifest as the legal duties a State has to provide us with basic health care (Article 12(1) ICESCR) (duties which tend to conform to a medicalised model centring on the provision of medicine), or else they afford individuals the right to privacy (Article 12 UDHR; Article 8 ECHR; Article 17 ICCPR), and/or the autonomous liberty to live and construct their own lives as they see fit (Mill, 1859/2001). It is for this reason that Coggon commits to a political model when analysing health issues, as he recognises that allocating health responsibilities is always going to be contestable, since key tensions exist between the positive and negative duties a State has in relation to the health of its citizenry. Thus, the relationship between the State’s authority to provide health care for its citizens and to some extent even determine the ‘health’ of its citizenry, is posited against the individual’s right to decide for themselves. While this State/individual binary mimics the one identified in the drug policy sphere, the ‘human right to health’ field perhaps affords a more obvious recognition to this tension, due to the implications associated with a medicalised and/or a social constructionist model. Though, as will be demonstrated, the drug control framework complements health rights legislation, and in principle at least, both are able to accommodate each other. The remainder of this section seeks to evidence the complementary nature of the two frameworks, through documenting thoroughly the positive and negative duties a State has in this sphere,
before concluding with a definition of health which is capable of accommodating both a constructionist and a medicalised viewpoint.

4.1.1 Positive ‘health’ rights under the international human rights and drug control frameworks

The positive legal duties a State has to provide healthcare to its citizenry are most comprehensively documented in Article 12 ICESCR. This article requires State parties to recognise ‘the right of everyone to the enjoyment of the highest attainable standard of physical and mental health’ (Article 12(1) ICESCR). While this human right ideal is consistently legislated for elsewhere,\(^2\) the General Comment accompanying Article 12 more thoroughly details the requirements placed on State parties to the covenant, to which the UK is one. The general comment appreciates that the right to health does not entail the right to be healthy (General Comment 14, 2000: Para 8), rather it requires the State to provide available health care, goods, services, facilities and programmes; including access to essential drugs, as defined by the WHO Action Programme on Essential Drugs (ibid: Para 12(a)). A complementary requirement is that the health care provided is accessible for all within the shortest possible time (ibid, Para 12(b)). Though, the General Comment observes that such obligations can only be fulfilled when States have the adequate resources to do so, and that the right to health is dynamic and subject to change, thus corresponding with difficulties in defining ‘health’, as detailed above. Indeed, ‘the notion of health has undergone substantial changes and has also widened in scope’ (ibid, Para 10). Although this observation perhaps more firmly applies to a medicalised conception of health since the same paragraph refers to the fact that the world populace has increased substantially since 1966, and that formerly unknown diseases are becoming increasingly widespread (ibid; See also Introduction for a discussion on the spread of the HIV/AIDS epidemic which has been partially attributed to the policy of prohibition within the global drug control framework). As an interesting aside, the General Comment specifically targets certain groups such as those with mental disabilities, the terminally ill and indigenous peoples; thereby comprehending the more nuanced obligations a State has in this sphere and potentially

\(^2\) See Article 25(1) UDHR; The ECHR, The European Convention on Social and Medical Assistance; Article 11 The European Social Charter; The United Nations Declaration on the Rights of Disabled persons; The United Nations Declaration on the Use of Scientific and Technological Progress in the Interests of Peace and for the Benefit of Mankind; Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care; The European Convention on Human Rights and Biomedicine; For a more comprehensive list of international and regional legal instruments relevant to health and human rights see The World Health Organisation, 2002.
the more social constructionist aspects of health (ibid, Paras 18–29). The author will return to this point later, particularly regarding the special appreciation a State should have regarding the cultural and traditional practices and medicines for indigenous peoples (ibid, Para 27). Finally, the WHO is firmly intertwined with the drug control framework within the health remit, as the organisation lists the essential drugs a State is required to provide its citizens in Article 12 (ibid, Para 12; WHO, 2013). Methadone and Morphine feature on this list, while also residing in Schedule I of the Single Convention, which provides some of the most stringent regulatory controls (except for those required for substances which additionally reside in schedule IV; such as cannabis and diamorphine) (Article 2, the Single Convention).

However, whilst the controls are stringent, it is essential to remember the dualistic purpose of the Single Convention and those which succeed it as they facilitate commodity control as well as penal control (Boister, 2001). The majority of the Single Convention and the 1971 Convention concern themselves with ensuring that psychoactive substances are available for medical and research purposes (Preamble, Article 2, the Single Convention; Preamble, the 1971 Convention). Various articles throughout the Single Convention refer to an estimates and a statistical returns system where by State parties, in conjunction with the INCB, are required to control substances within a licit regulatory framework, thereby ensuring their availability for the above purposes (Articles 2, 12, 19 and 20, the Single Convention). In addition, the 1971 Convention (Preamble; Resolution II) actively requests the WHO to encourage research on less dangerous amphetamines, and further puts specific regulatory controls in place ranging from licenses (ibid, Article 8), to prescriptions (ibid, Article 9), to warnings on packaging and advertising (ibid, Article 10). Thus, both Conventions recognise a dualistic positive legal duty to protect and encourage the health of a State party’s citizenry, in a similar vein to Article 12, which of course requires the provision of available and accessible health care (General Comment 14, Para 12). While both frameworks recognise the positive legal duties a State should provide its citizenry, to ensure it is fulfilling its health rights obligations, such positive duties at an international level are predominately more externalist, since they necessitate a more objective, encompassing approach. Legislation which focuses on positive rights to available and accessible health care arguably also facilitate the medical model of health, since both frameworks rely on organisations such as the WHO and bureaucracies such as the
INCB, to determine which substances are ‘essential medicines,’ or to advocate the controls and the restrictions relating to their administration (Articles 12, 19 and 20, the Single Convention; WHO, 2013).

4.1.2 Positive ‘health’ rights under the domestic human rights and drug control frameworks

In contrast with the positive legal duty to provide healthcare at an international level, the UK has not specifically legislated for a human right to health care within its domestic legislation.\(^3\) Instead, the UK was the first State in the western world to develop a national provision of health care services through the creation of the National Health Service (hereafter the NHS) in 1948 (NHS Choices, n.d.). Without wishing to disregard the impact any present reforms may have (Kmietowicz, 2012; Ham, Baird, Gregory, Jabbal and Alderwick, 2015), the ideals behind this long term service indicate how seriously the UK takes its health care obligations. The handbook to the 2013 NHS constitution reiterates the core principles, the first and possibly foremost being that it provides ‘a comprehensive service, available to all’ (Department of Health, 2013). The NHS was designed to meet the needs of everyone since it incorporates a ‘wider social duty to promote equality through the services it provides’ (ibid, 14). Such an integral focus on equality through working across organisational boundaries, and in conjunction with local communities and the wider population (ibid, 12), suggests that any domestic obligations to provide health care are well-suited to the universal discourse of human rights, and encompass a more welfarist agenda. In fact, the values of the NHS articulate that its services should extend beyond the provision of clinical care, in order to alleviate distress and to ensure that individuals feel valued and that their concerns are important (ibid, 13). Thus, it is perhaps fair to suggest that the positive duties the NHS provides accommodate a social constructionist definition of health as well as a medicalised one, as the service considers wider social diameters, thereby encapsulating health into the wider category of welfare; a concept which Coggon (2012) advocates given the notion’s political relevance (see above).

The Misuse of Drugs Act 1971 (MDA), as the primary UK legislation restricting and controlling ‘dangerous and otherwise harmful drugs’ arguably also incorporates this

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\(^3\)This statement excludes the Health Act (2009) and the Health and Social Care Act (2012) as both statutes focus on the quality and delivery of NHS service providers, and not the provision of health care per se.
wider definition of health. As highlighted previously the Act’s legislative provisions are extremely flexible, and when read in conjunction with the Misuse of Drugs Regulations (2001) (MDR), they facilitate an array of regulatory possibilities providing they meet the Act’s primary mandate of reviewing substance use which is sufficient to cause ‘a social problem’ (Section 1, MDA). Again, this social aspect is a key concern and requires the ACMD to opine on matters relating to the provision of: substance treatment, rehabilitation, education, research and community service co-operation; thereby indicating that the act has the potential to encompass a broader definition of health in a similar vein to the NHS. For the purposes of completeness, the Medicines Act (1968) (hereafter the MA) is the other principal psychoactive statute which relates to the positive legal duties the UK has to ensure the health of its citizenry. The MA retains a more medicalised function since it relates to the provision and control of medicines for health care purposes. As such, its aims are perhaps more broadly related to the international positive duties placed upon States, as discussed above. However, the overall discussion on the positive duties the UK has internationally and domestically to provide health care, indicates that in theory there exists scope to move beyond its mere provision, to ensure that broader ‘health’ needs are met. Indeed, a comprehensive focus on the positive duties placed upon the UK suggests a potential allowance for an internalist, social constructionist definition of health, as well as a more medicalised one. What is more, both drug control and health legislation are complementary in principle, and on a definitional level, both frameworks have the capacity to work in harmony.

4.1.3 Negative ‘health’ rights under the international human rights and drug control frameworks

The negative legal duties a state has to afford individuals the right to privacy (Article 12 UDHR; Article 8 ECHR; Article 17 ICCPR), and/or the autonomous liberty to live and construct their own lives as they see fit (Mill, 1859/2001) are well documented in the UDHR, the ICCPR, and the ECHR. Such human rights ideals are wide ranging since the right to life (Article 3 UDHR; Article 2 ECHR; Article 6.1 ICCPR), privacy (Article 12 UDHR; Article 8, ECHR; Article 17, ICCPR), human dignity (See Preamble, UDHR) and even the development of personality (Eberle, 2012), could all link back to a more generalised negative human right to health. Indeed, this human right is harder to quantify since it harks back to more abstract enlightenment ideals such as the broader rights to freedom, liberty and autonomy (Hayry, 2004; See also Chapters 1 and 2). Even
the General Comment to Article 12 ICSECR which facilitates a more positive right to health care, recognises that the right to health is closely related to and dependent upon other rights such as: the right to life, human dignity, equality and privacy etc. (General Comment 14, 2000: Para 3). Thus, negative rights to health could perhaps be thought of as entitlements to non-interference by the State (Hayry, 2004), whereby individuals can make their own decisions in relation to their own health, such rights would be subject to the restrictions explored in the liberal doctrine (See Chapter 2 per Mill and Berlin), which can manifest in the limitations contained within human rights legislation. Since these rights are more expansive in their character, the case law has relied on an array of human rights to claim non-interference from the State in relation to an individual’s health (See Section 4.2 for more detail). What is more, due to the broad scope of negative human rights it is arguably less problematic to ascertain whether the right relied upon construes an externalist, internalist, medicalised and/or social constructionist definition of health, since the notion of non-interference on behalf of the State affords a large element of subjectivity to the individual.

The international drug control regime has a similar capacity to recognise the breadth of the negative duties a State has to its citizenry in relation to health. As highlighted previously, the international drug conventions are renowned for their legislative inconsistency in relation to human rights claims (See Chapter 3). As a result there exist several grounds where by negative rights to health could be afforded to the individual within this sphere. For instance, both the Single Convention (Article 36(1)(a)) and the 1988 Convention (Article 3(2)) refer to the fact that their provisions are subject a State party’s constitutional limitations/principles. Since many western constitutions were formulated during the enlightenment period and are based upon the aforementioned liberal values of freedom and personal autonomy, (values which are so readily relied upon when enforcing negative rights), it is possible to accommodate an individual’s negative human right to health. Indeed, Italy has utilised this clause in a more general sense to legitimise its decriminalisation policy for the personal possession of controlled psychoactives on rights to privacy grounds (Rosmarin and Eastwood, 2012). More specifically, the 1988 Convention (Article 14(2)) further requires parties to ‘take due account of traditional licit uses where there is historic evidence of such use’, thus implying an allowance for negative human rights and a potential respect for ‘traditional’ medicinal use.
4.1.4 Negative ‘health’ rights under the domestic human rights and drug control frameworks

The domestic negative health rights the UK has to its citizenry are covered via the ECHR as incorporated into law by the Human Rights Act 1998 (HRA). The case law suggests that the right to privacy and the right to life are utilised in the main, for non-interference from the State in health related matters (Pretty v. United Kingdom; R v Quayle; R v Wales; R v Taylor and another; R v Kenny; Attorney General’s Reference; R v Altham; R (on the application of Nicklinson) v Ministry of Justice; R (on the application of AM) v Director of Public Prosecutions and others). These rights, along with the defence of medical necessity will be further explored in the case law section below. The NHS arguably also accommodates negative health rights as its philosophy ‘aspires to put the patient at the heart of everything it does’ (Department of Health, 2013: 15) and strives to ensure that NHS services are tailored to and co-ordinated around the preferences and needs of patients (ibid). This is further reflected by the new duties placed upon commissioners in the Health and Social Care Act 2012, to stress the importance of involving individuals in their own care and treatment (ibid). Yet, although these principles could be interpreted as respecting patient autonomy and the rights of patients to control their own treatment etc., there nonetheless remains a tension, as with all negative health rights; for the State to protect personal autonomy while simultaneously promoting the welfare of all of its citizenry (Nuffield Council on Bioethics, 2007). While the Nuffield Council on Bioethics recognise that these two values are not mutually exclusive (ibid), in relation to substance use at least, the line becomes increasingly blurred. In actuality, the NHS goes to lengths to promote the health of its people through campaigns aimed at healthy eating, stopping smoking and reducing its citizenry’s alcohol intake (Public Health England, n.d.; 2013). While such frameworks combined with deterrents such as higher taxes etc. highlight and arguably respond to the tension which exists between positive and negative health rights in this sphere (the duty to protect and the right to personal autonomy in consuming these substances), the domestic drug control framework fails to appreciate this binary as it presently stands. For instance, the psychoactives which it currently restricts can be legally distinguished from those which are subject to little or no control under the criminal justice framework: alcohol, sugar and tobacco. While the MDA has the capacity to accommodate negative health rights and to respect personal autonomy in
relation to these controlled substances (See Chapter 3, Section 3.4), in practice the legislation largely fails to afford health rights to users for substances controlled by the MDA.

In way of a generalised conclusion though, this section has demonstrated that both international and domestic human health rights and drug control frameworks are largely compatible at a definitional level. Perhaps surprisingly both of these legislative regimes have the capacity to work in harmony in the UK, as there exists flexibility in all of the key conventions and statutes. The drug conventions are all subject to constitutional limitations, and as previously explicated, the MDA when combined with the MDR, accommodates a whole host of regulatory provisions for psychoactives, which can easily exist without attaching any of the current criminal sanctions. Health rights legislation is also necessarily wide-ranging since human rights are envisaged as flexible, evolutive instruments which evolve in line with societies changing standards and morality (See Chapter 1 for more detail on the origin and value of human rights). What is more, Section 4.1 strives to demonstrate that the core social constructionist and medicalised definitions of what constitutes ones ‘health’ are present within both frameworks. While it is arguably straightforward for negative health rights to contain both values since they call for a more internalist, individualistic response, it is interesting that the positive duties placed upon the UK to promote its citizenry’s health, also facilitate both medicalised and social constructionist definitions. Indeed, both legislative regimes allow for this, and at a domestic level in particular, the NHS’s broader welfarist and patient-centred approach exemplifies this appreciation. The ability of the drug control and health rights paradigms to account for both interpretations of ‘health’ will be shown to be essential throughout the chapter.

In actuality, the author posits that when both the human rights and drug control frameworks operate in unison, they could potentially understand and respond to drug consumption as a complex human phenomenon, thereby altering the drug control framework as this notion can better account for the reality of drug use, and the benefits and risks attached. In light of this, the author favours the employment of the WHO’s (1948/1998) definition of health: ‘Health is a state of complete physical, mental, spiritual and social well-being and not merely the absence of disease or infirmity’. While this definition has been criticised as unrealistic (Huber, André, Green, van der
Horst, Jadad, Kromhout, Leonard, Lorig, Loureiro, van der Meer, Schnabel, Smith, van Weel, Smid, 2011), its sheer breadth and ambition are arguably the reasons it has barely altered since 1948. The definition is well suited to this thesis’s rights-based focus, as it accommodates both positive and negative definitions of health, and it is aspirational and utopian in its aims, thereby complementing human rights ideals. In fact, the definition’s refusal to be constrained by arbitrary considerations of what constitutes ‘health’ further facilitates externalist, internalist, medicalised and social constructionist interpretations. Finally, a rights-based focus on the positive and negative duties the UK has to both protect its citizenry’s health, and to not interfere with an individual’s health choices, have been clearly highlighted and accounted for within all of the international and domestic health and drug control legislation. At a definitional level then, some attempt has been made to outline the existence of both State interests and individual ones within both legislative frameworks. As such, this chapter will strive to develop proposals which could more effectively balance the binary, while simultaneously highlighting the failures of the current drug control regime to do so.

4.2 Case law

When drug policy and human rights legislation conflict in the UK, the case law has historically failed to allow for a broad definition of health which incorporates both a medicalised and a social constructionist definition in a similar vein to the WHO’s definition. Section 4.2 will demonstrate this failure. It will question both the willingness of the UK judiciary, and from a human rights perspective, the appropriateness of incorporating a definition of health which moves beyond mere determinism and encompasses notions of pleasure, well-being, and challenges the ideological status quo. Moreover, to gain an understanding of whether UK judges fail to conduct a reasoned balancing act when weighing individual interests in consuming a psychoactive for health purposes, against State justifications for restricting these rights, legal concepts such as incommensurability will be explored to demonstrate the inherent issues involved when human rights ideals challenge politically sensitive areas. Section 4.2.1 will acknowledge the difficulties involved when balancing these conflicts for both negative and positive health rights, as it will initially explore domestic case law which considers whether the UK has a positive legal duty to provide: permitted smoking spaces, needle exchange programmes and/or methadone maintenance therapy. The section will additionally highlight the failure of UK judges to adequately engage with
an individual’s negative human rights, through centring upon the leading medicinal cannabis case, and rights to non-interference over the medicinal use of the cannabis plant. Both the drug control and health rights regimes will be shown as having the capacity to accommodate such rights, despite the short thrift afforded to them. Section 4.2.2 will go on to analyse international case law for comparison purposes, by highlighting how other jurisdictions, (most notably the US), have responded to the positive and negative legal duties States have in this sphere. Ultimately Section 4.2 will consider whether judiciaries could more effectively address the State/individual binary in this sphere if they were to truly engage with the health rights of users; through incorporating a broader definition of ‘health’.

4.2.1 Domestic case law

The case law concerning the positive duties the UK has to provide psychoactives to its citizenry have a skewed focus towards restricting the rights of individuals who inhabit an institutional setting i.e. a hospital or a prison. While definitive conclusions cannot be drawn as to why this may be the case, the author posits that any infringements are perhaps more potent here, in light of the innate restrictions which are already imposed upon liberties within an institutional setting. Furthermore, as explicated in Chapter 2, the notion of what constitutes an ‘institution’ can be amalgamated into the definition of a ‘State’ (See Chapter 2, Section 2.1). As such, the case law can arguably stress the power dynamic and the existing tensions between the State and the individual to a greater degree. However, despite the lack of case law outside of an institutional setting, this section will nevertheless reveal how a rights lens can illuminate broader issues for the populace, which relate to the positive duties the State has to ensure the provision of psychoactives/ psychoactive paraphernalia for health purposes.

In Shelley v. UK (2008) the claimant sought (unsuccessfully) to argue that the UK government had a greater responsibility for his health than it was accepting. He sought to rely upon various articles of the ECHR to compel prison authorities to provide UK prisons with needle exchange programmes, to reduce the risk of infection from the sharing of syringes. All grounds were rejected and the Strasbourg court noted that an element of personal responsibility should be present, since the risk of infection flows between the prisoners themselves, and is not directly attributable to the prison authorities. This decision operates in stark contrast to an earlier out of court settlement
in 2006, where the Home Office allowed the use of methadone in prisons. The government was informed that Strasbourg would have ruled that not to do so would have been degrading for the prisoners (Daily Mail Reporter, 2011).

While both cases challenged the State for failing to meet its health responsibilities, the opposing outcomes arguably demonstrate the inherent difficulties involved when assessing where responsibility should lie in the provision of health care. A human rights lens necessitates such moral questions including whether addicts can ever be truly autonomous, or whether the maxim holds true that even the addict is never a slave (Seddon, 2010). For instance, Foddy and Savulescu (2010) offer a liberal account of addiction, observing that addicts are autonomous in their addictive behaviour, and that there is a normative bias in popular addiction theories, which in particular, neglect the value of pleasure-seeking behaviours. These observations therefore beg the question do notions of personal responsibility negate the positive duties which are placed upon the UK government? While such questions are put to the judiciary when drug control and human rights frameworks conflict, the MDA’s development in relation to the supply of psychoactive paraphernalia, suggests that the UK is generally adopting a more generous view of the responsibilities it has towards its citizens in this sphere. Until 1986 and the insertion of s9A, which allowed for the supply of hypodermic needles (Shelley v. UK (2008)), it was an offence to supply any object which could be used to administer or prepare a controlled drug (Section 9A MDA.). The Misuse of Drugs (Amendment) (No. 2) Regulations 2003 (the 2003 regulations) further allowed the supply of an array of articles including swabs, citric acid and filters (Section 6A (1) MDR, 2003), providing they are supplied by an authorised practitioner, pharmacist or someone lawfully engaged in the provision of drug treatment services (Section 6A (2) the 2003 regulations). Although the law has not yet changed, the campaign to add foil to this list was also successful as of July 2013 (Release, 2014). While the harm reduction sphere may celebrate such incremental gains on pragmatic grounds, as is consistent with their ideological neutrality (See Chapter 2, Section 2.2.), the fact remains that such legislative changes alters the power dynamic between the State and the individual, and the level of responsibility the State is deemed to have in the lawful provision of psychoactive paraphernalia. These considerations are illuminated when placed under a human rights lens since it brings tensions between the State and the individual to the forefront. While Shelley and the methadone case highlight the challenges posed when
contemplating whether a State fails to meet its health responsibilities, there are also instances when a State could arguably claim too much responsibility over an individual’s health; what libertarians in particular may perceive as the infiltration of the ‘nanny state’ (Macleod, 1965).

Coggon (2012) uses the Rampton smoker’s case (*R (N) v. Secretary of State for Health; R (E) v. Nottinghamshire Healthcare NHS Trust*, 2009) as a useful contrast to demonstrate these tensions. In 2006 the Health Act provided a general ban on smoking in enclosed public spaces. This was generally welcomed as a new regulatory trend (Koh, Joossens and Connolly, 2007), and was justified on ‘harm to others’ reasoning (Coggon, 2012). Arguably, the ban afforded some recognition to privacy rights through allowing citizens to smoke in their own homes and in open spaces; thereby drawing a potential balance between State interests in protecting its citizenry from the harmful effects of smoking, and the individual’s rights to non-interference. Yet, in the Rampton case the exemption allowing patients to smoke in mental health units was terminated, effectively foreclosing the right to smoke to them as an option, since they could not go outside and they were not allowed to smoke inside. The patients argued that their Article 8(1) (ECHR) rights to privacy and family life were breached. In upholding the justification for the ban, the Court of Appeal argued (albeit) *obiter* that under Article 8(2) ‘it is a potentially legitimate aim to restrain a person’s article 8 rights for the protection of [his own] health’ (*R (N) v. Secretary of State for Health; R (E) v. Nottinghamshire Healthcare NHS Trust*, 2009: Para 71). However, along with Sen (2004), Raphael (2000) and Coggon (2012), this author is wary of policies and arguments which seek only to protect plural, externalist conceptions of what is ‘good’ for our health. Raphael (2000) in particular points towards the need for different types of evidence in health promotion. He notes that policy makers should account for the social determinants of health, and that health promotion should be value laden with policies which serve to empower and enable individuals to take control over and improve their health, alongside incorporating the traditional medicalised approach (ibid). This corresponds with the recent duties placed upon NHS commissioners to involve individuals in their own care and treatment (Department of Health, 2013), and the NHS’s wide welfarist agenda (See Section 4.1). Hence, there is room for a more well-rounded approach within health and drug policy spheres, which could positively impact the judicial reasoning process.
In actuality, while the biomedical evidence may point strongly towards the health risks and dangers associated with smoking, this alone should not have resulted in an externalist judgment on how best to protect one’s health, and a total absence of any internalist considerations. As Sen (2004) notes, both internalist and externalist views on health should inform each other in order to gain a more substantial picture. The fact that the patients were in a mental health institution is a social determinant which deserved exploration. Perhaps smoking, while physically harmful, provided these patients with a mental release and the temporary control and empowerment over their own faculties and social surroundings? (Snowden, 2009). If the Court of Appeal allowed for a broader definition of health which incorporated social and mental well-being and an internalist conception of health, then perhaps the reasoning would have been more balanced and engaged with moral rights-based arguments, which were intrinsic to the patients in question? Indeed, a strong externalist conception of health is thought to bring with it ‘a monistic creep’, which could lead to States securing a false scientific legitimacy to enact policies with the view to protecting their citizens, but in actuality they fail to recognise what is good for them (Coggon, 2012: 254). The case for medicinal cannabis is possibly the most contentious issue globally within the fields of health rights and drug control policies. A simple Google (n.d.) search brings up more than 32,000,000 results! Arguably the issue remains so contentious because in contrast with tobacco, there exists an ever increasing array of medicalised evidence, alongside historical evidence, which highlight the biomedical uses and benefits of the cannabis plant (Aldrich, 1997; Russo, 2005; Russo, 2007; Leung, 2011). However, even when individuals would not have to solely rely upon a broader social constructionist definition of health, (as demonstrated above), the UK judiciary have nevertheless adopted a deterministic outlook, and as will be illustrated, base their reasoning upon a policy which secures its legitimacy through stressing the legality of cannabis; to the exclusion of all other considerations.

The medicinal use of cannabis and cannabis based preparations have been well documented both historically and culturally. According to Aldrich (1997) and Russo (2005; 2007), ancient Chinese, Indian, Greek and Roman sources all acknowledge the therapeutic use of cannabis and have noted its capacity to treat a wide array of diseases, and its efficacy for pain relief. Prior to the formation of the modern international system of drug control, Buxton (2008) also observes that the US pharmacopeia recommended
cannabis as a primary treatment for more than 100 illnesses between 1850 and 1937. More recent scientific studies also confirm that active cannabinoids contained in the cannabis plant are useful in the treatment of a variety of medical conditions (Leung, 2011). Indeed, GW Pharmaceuticals (n.d.) have successfully licensed their ‘cannabinoid medicine’ Sativex in 11 countries (including the UK), for the treatment of Multiple sclerosis related spasticity. While Sativex contains the whole plant extract, or (Botanical Drug Substance (BDS)), the company also hold extensive patents which explore the potential therapeutic applications of isolated cannabinoids and the endocannabinoid system (Patent docs, n.d.). A careful inspection of these patents reveals the extensive therapeutic value attributed to cannabis. Of particular note is clause 5 in one patent which extensively lists the cannabinoid cannabigerol, as having the capacity to specifically treat: four types of pain, sixteen types of neurodegenerative diseases, five kinds of ischemic diseases, five types of brain injuries/damage, three types of acquired brain injuries, alongside ‘age related inflammatory or autoimmune disease, cachexia (including related conditions such as AIDS wasting disease, weight loss associated with cancer, chronic obstructive pulmonary disease or infectious diseases such as tuberculosis), nausea and vomiting, glaucoma, movement disorders, rheumatoid arthritis, asthma, allergy, psoriasis, Crohn's disease, systemic lupus erythematosus, diabetes, cancer, osteoporosis, renal ischemia and nephritis’ (GW Pharmaceuticals, 2010: Clause 5). Without wishing to disregard the wealth of research which also evidences the ways in which cannabis can detrimentally impact our health (Hall and Pacula, 2003; Hall and Degenhardt, 2009), the historical and more recent literature alongside the ever increasing pharmaceutical interest, indicates that cannabis usage can conform to a more medicalised conception of health.

In spite of this, the UK’s externalist view on the cannabis plant largely fails to adapt to the increasing amount of biomedical evidence available. This situation is not unlike the one which presented itself when cannabis was first officially reviewed in the UK. In 1893 several officials were specifically recruited to the Indian Hemp Drugs Commission (IHDC), a body tasked with reviewing cannabis, because they held negative views towards this substance (Mills, 2005). While empirical evidence can often bolster core value based convictions (See Chapter 2), domestic, foreign and international judiciaries are all subject to the trias politica principle and the rule of law, which requires impartiality within judgments. A group of cases heard conjointly by the
Court of Appeal illustrates the failure of the judiciary of England and Wales to comply with such a fundamental obligation.

4.2.1.1 Critiquing Quayle

In *R v. Quayle; R v. Wales; R v. Taylor and another; R v. Kenny; Attorney General’s Reference (No2 of 2004)* (2005) (hereafter *Quayle*) the defendants suffered from a range of medical conditions including (but not limited to): phantom-limb pain, Multiple Sclerosis, AIDS and pancreatitis, and they sought to alleviate these by consuming cannabis. The majority of the defendants were convicted at trial under the MDA for either possession, possession with intent to supply, or cultivation. These defendants sought to challenge the legitimacy of their verdicts by claiming that prohibitions on their right to self-medicate conflicted with their human rights enshrined within the ECHR. Conversely, the Attorney-General was also appealing a case whereby one defendant, Mr Ditchfield, was acquitted at trial, as the jury accepted his defence of medical necessity for supplying cannabis to Multiple Sclerosis and cancer sufferers. Several of the defendants were appealing against the decision of their trial judges not to put the defence of medical necessity before a jury, whereas the Attorney General was questioning the Ditchfield ruling, and whether the defence of necessity was available to defendants who intended to supply cannabis to others, for the purposes of alleviating pain. The judges dismissed the defendant’s appeals and answered the Attorney General’s question in the negative. As a matter of legal interpretation the author admits to finding it difficult to disagree with the ruling in relation to the medical necessity arguments. As Rogers (2005) and the judgment assert, the defence of medical necessity is only available in a ‘one off’ emergency circumstance and not where defendants contravene a ‘legislative policy and scheme on a continuing and regular basis’ (*Quayle*: Para. 57). However, this author posits that perhaps too much discussion was devoted to the legitimacy of the medical necessity defence, and that under a broad human rights lens, its applicability would, in any case, be irrelevant.

Arguably the argument posed that the prohibition of cannabis infringed the defendants’ human right to self-medicate or to medicate others deserved further exploration on its own merit. Several human rights could have been put forward here including the employment of broader constitutional rights to life, human dignity and equality before
the law, because as recognised in Section 2.1, they all fall under the remit of health (General Comment 14, 2000). Instead, the defendants chose to rely upon Article 8 in the ECHR which is understandable given its incorporation into UK domestic law via the HRA. Article 8(1) provides that ‘Everyone has the right to respect for his private and family life’. The court considered this provision in relation to the defence of medical necessity; ruling that even if the defence were relevant, it would be limited to immediate sufferers and would not extended to those involved in supply. Leaving aside the issue as to whether the defence of necessity holds any bearing for the moment, this judicial restriction is interesting, as it reflects a desire to defer to the hegemonic medical profession. As Szasz (2003: 66) observes: ‘today in therapeutic societies, only the physician is allowed to dispense “dangerous drugs”. If anyone else does so he is called a “pusher”, and is again condemned and punished regardless of the consequences of his efforts.’ Through engaging with a broader human rights lens one could question the deference to the medical profession here since Csordas and Kleinman (1996) note social control to be an implicit component within the therapeutic process. The authors observe how the paramount issue within therapy is one of control, be it pharmaceutical, political, financial or even social control of the values which are implicit within illness behaviour (ibid).

Yet, where does this position leave individuals who are engaging in self-care and who wish to take greater control over their own health and well-being? Coomber, Oliver and Morris (2003), Jones (2006) and Waldstein (2010) all observe that self-care practices in relation to cannabis use are expanding, and that they take control away from the dominant health care practices, which can result in better health outcomes; since they increase the level of autonomy and self-sufficiency for the individual. Arguably, the Health and Social Care Act, (2012) and the recent NHS constitution value such outcomes as well, since they both advocate patient autonomy and stress the importance of patients having control over their own care and treatment (Department of Health, 2013). What is more, both the international drug control and human rights frameworks contain exemptions which respect the rights of indigenous peoples to acquire control over their own traditional medical practices (Article 32(4), the 1971 Convention; Article 14(2), the 1988 Convention; General Comment 14, 2000: Para 27), thus reflecting an appreciation for healthcare systems which exist outside of western biomedicine, as this practice can demonstrably acquire a privileged status (Giovannini,
Reyes-García, Waldstein, and Heinricha, 2011). Such an approach reveals the potential for both frameworks to alleviate the power imbalance between the ‘professional’s’ or the State’s hegemony over our health care systems, by allowing for alternative, perhaps more internalist views on health as well. By viewing the Quayle judgment through a human rights lens, one could assert that closing down any debate on the rights of two of the defendants to supply cannabis to HIV patients and cancer sufferers through their holistic clinic was perhaps deterministic, and that the issue warranted further exploration. Arguably Coggon’s (2012: 254) ‘monistic creep’ prevailed here as this case mirrors the strong externalist conception of health, identified in the Rampton smokers case.

Furthermore, for the defendants who were in fact self-medicating with cannabis, the Court of Appeal held that their rights to privacy could nevertheless be infringed due to the legitimate derogations contained within Article 8(2) ECHR. This article restricts rights to private and family life where ‘necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health and morals, or for the protection of the rights and freedoms of others.’ However, the court failed to determine whether any of the derogations could apply here, and instead focussed more on questioning the legitimacy of the medical necessity defence (Quayle: Paras 35-58, 71-81). When scrutinised from a human rights perspective though, the defence proves to be superfluous to adequately weighing up the conflicts involved. In actuality, the judicial reasoning process could only ever be conducted superficially, since the defence implies that there exists some wrongdoing on the defendant’s part, which is justified through the necessity of the action. Therefore, the defence fails to adequately challenge the status quo, and whether in fact it is the prohibition of cannabis (as opposed to its use), which is ‘wrong’ through infringing the defendants’ human rights to health. As noted in the judgment, any issues regarding the compatibility of the MDA and the ECHR were not directly raised (ibid: Paras 65-67). Consequently, the judges did not feel in a position to consider: reading down the legislation, qualifying the legislation, or else to declaring it incompatible; hence the Court of Appeal disputerably fell short of truly assessing the defendants’ rights based claims (ibid: Para 66).
If the judgment were to be considered from a human rights perspective, then for Alder (2006), a typical adjudication process would involve judges engaging in consequentialist rather than deontological reasoning. When weighing up State interests in prohibiting cannabis use, Alder (ibid) perceives the balancing exercise to lend itself more easily to a cost/benefit analysis, at the expense of really considering the intrinsic value attached to an individual’s rights. While Alder (2006), Beck (2008) and Tsakyrikis (2009) acknowledge the artificiality which is inherent when balancing incommensurable values in human rights disputes, it is perhaps fair to suggest that in Quayle, even an artificial approach failed to emerge. Even if the judges were unwilling to truly engage with the moral value the defendants attached to their cannabis usage, there was ample room for a more detailed discussion on the biomedical benefits and risks here. There were several instances where the Court of Appeal judgment referred to the expert evidence which was adduced from earlier judgments, concerning the medicinal benefits the defendants’ gained from their cannabis use (Quayle: Paras 2(i), 2(ii), 2(iii), 2(iv), 3(iii), 4(v), 5(iv), 16, 23). Most notably in the author’s view, was the evidence adduced from Dr Reynolds, a fellow at the Royal College of Anaesthetists and a member of the Pain Society, since he firmly concluded the defendant Mr Quayle’s evaluation by stating ‘there is no question in my mind that this patient has taken cannabis with benefit to his chronic symptoms’ (ibid: Para 2(i)).

In spite of this, the judges made no attempt to discuss any of this evidence in relation to the defendants’ Article 8 arguments. Instead, the issue was deferred to parliament. The Court of Appeal believed parliament and the elected government of the day were better placed to determine ‘social, medical and legislative policy’ (ibid: Para 69), because for the court to do so it ‘would involve an evaluation of the medical and scientific evidence’ (ibid), and ‘a greater understanding of the nature and progress of the tests of cannabis which have taken and are taking place’ (ibid). Though, as Buchanan (2008) observes, the correct application of human rights norms should involve drawing upon reliable, factual, and relevant information, to guard against parochialism, and an arbitrarily restricted set of moral values. Unfortunately, the latter approach seems to have arisen in Quayle, since the judges refused to engage with consequentialist reasoning, and consistently referred to the prevailing ‘legislative scheme’ (P. 3634; Paras 54, 67); reflecting a clear parochial desire to maintain the prohibitive status quo. Hence, Alder’s (2006) typical adjudication process was not
forthcoming. Indeed, when the author contemplates the defendants’ rights to health from the preferential biomedical and consequentialist perspective, concerns regarding the legality of cannabis ultimately prevailed.

Though, as noted throughout this chapter, to truly engage with the health rights of the defendants, a broader conception of health is needed. As demonstrated, both the drug control and human rights frameworks are capable of accommodating a social constructionist, internalist conception of health, as well as a more medicalised externalist one. Along with Hayry (2004), Tsakyrakis (2009) and Walsh (2010), the author considers the defendants’ individual values and beliefs to be an intrinsic part of the judicial reasoning process. To interfere with an individual’s health choices without any sound ethical or consequentialist reasoning invites a deterministic response which fails to adequately balance the State/individual binary. If the Court of Appeal allowed for any internalist deliberations at all, then perhaps a bona fide balancing act would have been conducted. Such an act could have considered the benefits of empowering individuals to make their own health choices (See Csordas and Kleinman, 1996; Coomber et al, 2003; Waldstein, 2010; Department of Health, 2013), while also contemplating the notion that if an individual convinces themselves that cannabis is beneficial therapeutically, this goes a long way towards it actually being such (Csordas and Kleinman, 1996). What is more, the judgment implied concern over the idea that the defendants may derive pleasure from their cannabis use, as opposed to it solely relieving them of pain (Quayle: Para 77). Hence, rather than accepting pleasure as a valued, legitimate health outcome (Coveney and Bunton: 2003; Mackenzie, 2011) in line with the WHO’s broad definition of health (encompassing ‘complete well-being’), the notion of pleasure is negated or frowned upon, particularly within the drug policy sphere (Holt and Treloar, 2008). Through employing an arbitrary externalist conception of what it good for our health, policy makers and judges tend to remain ignorant of its significance to the individual (ibid). A human rights approach on the other hand, is capable of facilitating an internalist, social constructionist conception of health, and could go some way towards improving individual health outcomes in this field.
4.2.2 International case law

Nevertheless, the medicinal application of cannabis is gaining traction elsewhere around the globe. At the time of writing 23 US states (and Washington DC)\(^4\) have legalised and regulated medicinal cannabis to varying degrees, along with Canada, the Czech Republic, Israel and several other countries (Rolles and Murkin, 2013). While the regulations will be explored in greater detail in Section 4.3, this section will focus on the judicial reasoning process in the US courts, since the operation of their political and legal system, which incorporates both State and federal law, has facilitated an array of judicial approaches when examining this issue. Though, this has ultimately led to inconsistencies throughout the judicial reasoning process when trying to reconcile domestic and international or State and federal law. Cannabis is placed in Schedule I and IV of the Single Convention, which recognises no medicinal use for the substance. However, at times US judiciaries have been more sympathetic than the UK courts when defendants have argued for its medicinal application.

In *NORML v. DEA* (1977), the National Organization for the Reform of Marijuana Laws (NORML) petitioned the Drug Enforcement Agency (hereafter the DEA) to reschedule cannabis to Schedule V which would facilitate the social and medical acceptance of the drug (See 21 U.S.C.A § 812(b)(5)(A)-(C)). NORML additionally recognised that since this alteration in scheduling would be a huge stretch, they argued that at the very least the substance should be rescheduled into Schedule II along with opium and methadone; thereby accommodating its accepted medical use (albeit) with severe restrictions (ibid). The court held that the Attorney General was bound by the Secretary of Health, Education and Welfare’s medical and scientific evaluations when rescheduling a controlled drug (ibid: Paras 746-47). Though importantly, the court directed the Chief Administrative Judge for the DEA, Judge Young, to refer NORML’s petition to the Secretary of Health, Education and Welfare for review. While Judge Young determined that ‘…there is an accepted safety for use of marijuana under medical supervision. To conclude otherwise, on this record, would be unreasonable, arbitrary and capricious’ (Boire and Feeney, 2006: 26). This recommendation was nevertheless firmly rejected by the DEA’s Administrator, since ‘federal agencies are

not bound by the recommendations of their own administrative law judges’ (ibid). Buchanan’s (2008) parochialist approach clearly materialised here, despite the claim attracting the Judge Young’s sympathy.

In *US v. Oakland Cannabis Buyers’ Cooperative* (2001) a similar reasoning process to the NORML and *Quayle* cases emerged. This case also involved the potential applicability of the medical necessity defence for manufacturing and distributing cannabis. The judiciary here were far less accommodating to the co-operative’s stance that medical necessity should be read into the Uniformed Controlled Substances Act 1970 (hereafter the CSA). The court held that the defence: ‘cannot succeed when the legislature…has made a determination of values’ (ibid: Para. 491). Hence, the court deferred to the legality of cannabis and its Schedule I status as definitive, they ignored any medicinal evidence or social constructionist accounts of how a cannabis co-operative system alleviates the hardships faced by patients when trying to access medicinal cannabis. Aggarwal, Carter and Steinborn, (2005) in particular highlight the detrimental health impacts when access to and the delivery of cannabis treatment is so disjointed, given conflicting State policies and federal laws. Thus, a complete deferral to the legislature emphasises that this judiciary behaved in a similar manner to the one in *Quayle*. Pfeifer (2011: 372) acutely surmises that ‘the government has ultimately ignored reason in order to reach this decision’.

Indeed, the judicial method the Supreme Court undertook here operates in stark contrast to the way in which the Supreme Court approached a similar issue in the later case of *Conant v Walters* (2003). In this case the US Supreme Court agreed with an appeal court ruling that threats from the federal government to revoke physicians’ licenses based on their recommendations of medical cannabis for their patients, violated core privacy rights, protected by virtue of the privileged status of the Doctor/patient relationship (Aggarwal et al, 2005). According to the American Medical Association (hereafter the AMA), the physician’s first duty should always be to maintain the patient’s health, and this should not be sacrificed to avoid prosecution by the federal government (Pfeifer, 2011). Moreover, if a physician believes that a law is unjust then the AMA’s *Principles of Medical Ethics* further provides that he/she should work to alter the law (AMA, 2001: Para III). The Doctor/patient relationship therefore acquires a privileged status in the US, as it can be placed above the individual’s duty to conform.
to a State laws, if such laws are perceived as unjust. However, while the Conant v. Walters (2003) decision attempts to balance the binary between the State and the individual by approving this special relationship, confusion is still rife since physicians cannot legally prescribe or provide cannabis to their patients. Instead, Doctors can only recommend it, otherwise they risk violating federal law which prohibits the prescribing of Schedule I substances.

Such legislative inconsistencies at the State and federal level arguably exacerbate inconsistencies for the US judiciary. In Gonzales v. Raich (2005) the Supreme Court concluded that the home grown consumption of cannabis by Raich for the purpose of treating her serious medical conditions, and alleviating her constant pain, would substantially affect interstate commerce ‘in both (the) lawful and unlawful drug markets’ (ibid: Para 19). Despite the fact that Raich was a terminally ill patient, and complied with California’s Compassionate Use Act (1996) when using cannabis, the Supreme Court reasoned that as a schedule I substance, Congress retains the discretionary and explicit power to regulate cannabis, even if it is used for medical purposes. However, as Pfeifer (2011: 374-375) concludes, ‘by focussing on the economic impact of prescribing and growing medical marijuana, rather than the intimate personal choice of a suffering patient, the Court ultimately ignored a terminally ill patient’s autonomy to choose medical treatment that could have preserved his or her life and dignity before death’. While the Court noted the physician’s view that cannabis was the only available substance to treat Raich’s symptoms effectively, and that denying such treatment would: ‘cause Raich excruciating pain and could very well prove fatal’ (Gonzales, 2005: 7), the Court still privileged the US’s economic interests over the rights of the patient and the physician/patient relationship. This decision reveals how the operation of different political systems which incorporate both State and federal law can lead to conflicting policies and judicial decisions internationally.

Indeed, a later appeal court decision contrastingly accorded more weight to State regulations since The California Court of Appeal in City of Garden Grove v. Superior Court (2007) decision ordered the police department in California to give back a defendant’s cannabis stating: ‘because the act is strictly a federal offense, the state has no power to punish…it...as such’ (ibid: 26). Canadian case law has similarly challenged the incompatibility of human rights and drug control legislation and has
exploited regulatory loopholes and inconsistencies at the State and federal level in a similar manner to the US case law. In *R v. Parker* (2000) the Ontario Court of Appeal held that an absolute prohibition on cannabis without any medical exemption violated the defendant’s right to liberty under the Canadian Charter, and it declared the prohibition illegal. Though this aspect of the Canadian legislation was struck down (ibid: Para 198), Canadian applicants further challenged the constitutionality of their drug laws in 2003. In a similar vein to US State’s regulatory systems, medicinal consumers had no legitimate access to cannabis under Canadian Marihuana Medical Access Regulations (hereafter MMAR), despite the *Parker* case and the resulting legal exemption allowing for its use (*Hitzig v. Canada*, 2003). In *Hitzig* the Ontario Superior Court declared that the regulations were unconstitutional. As a consequence, Health Canada are now able to dispense cannabis to medicinal consumers via centralised State run programs. While this point will be developed in Section 4.3 (below), these cases demonstrate how the judicial process can both reflect existing policies and actively constitute drug policies which are shaped from a human rights perspective. Although there are contradictions internationally, the UK reasoning process remains arbitrary and parochialist when considering the negative health rights of medicinal cannabis users throughout. The very least that can be said is that the UK is consistent in committing to this approach (See *Quayle; R v. Altham*, (2006); *R v. John-Lewis*, (2013)).

While the US can be similar to the UK in adopting an externalist conception of health, and deferring to the legislature, the US does have a rich history of juridification, and it is possibly for this reason that it is the only country to legally challenge the scheduling of 3,4-methylamphetamine through the courts. This substance is generally known in scientific and medical circles as MDMA, or else is commonly referred to as ‘ecstasy’ (Silcott and Silcott, 2000). The author has chosen to focus upon the US court hearings which consider the medicinal application and scheduling of this substance, since it provokes an interesting discussion on the positive duties a State has to ensure that any scheduling decisions undergo a rigorous scientific assessment, particularly in light of the substance’s increasingly recognised therapeutic potential (See Section 4.3 for more detail). MDMA was first patented by the German company Merk in 1912, and it has been the drug of choice for psychotherapists for years, most notably in the 1960s (Hammersley, Khan and Ditton, 2002). As discussed thoroughly in Chapter 3, this psychoactive along with other ‘psychotropics’ began to attract the attention of some
States in the 1970s. Subsequently, in 1982 Rick Doblin, the founder of the Multidisciplinary Association for Psychedelic Studies (hereafter MAPS), anticipated that MDMA would soon become a Schedule I substance under the CSA. To avoid this outcome Doblin helped to form the Earth Metabolic Design Laboratories (hereafter the EMDL), a group which consisted of scientific and medical experts who sought to evidence the potential therapeutic application of MDMA (MAPS, n.d.a). Holland (2001) reports that psychiatrists, marriage counsellors and therapists within the psychedelic community at this time were utilising MDMA to enhance the therapeutic process. This group wanted to challenge the DEA’s restrictive scheduling process, since a schedule I substance is subject to stringent regulatory and research constraints, as such scheduling assumes a high potential for abuse and no accepted medical use (21 U.S.C.A § 812(b)(5)(A)-(C)). A thorough discussion on the scheduling process will be discussed in more detail in Section 4.3. For now, it is sufficient to note that several academic witnesses argued MDMA should be placed within schedule III, a less restrictive category which would permit its therapeutic application and ease constraints on research; a viewpoint which continues to be espoused today (Nutt, King and Nichols, 2013; Sessa, 2014; Bone and Seddon, 2015).

The central issues which were raised during the hearings were whether MDMA could have a high potential for abuse, despite the lack of scientific research to evidence this, and how ‘accepted medical use’ should be defined. The DEA agents (typically) referred to its non-medical use as a street drug as definitive evidence of its potential for abuse. They additionally referred to the neurotoxicity of amphetamine, a substance with a similar chemical structure, as further evidence for its potential abuse. Both arguments were lacking, the former particularly presents itself as a straw man, since its un-medicalised categorisation was deemed to be sufficient to overrule any therapeutic potential. As highlighted throughout this chapter the concept of health is wide-ranging and necessitates different types of evidence in health promotion, as opposed to a solely medicalised response (Raphael, 2000). What is more, a catch 22 situation arises, since MDMA is far less likely to be incorporated within this regulatory construct if such stringent regulatory controls are placed upon medicinal research (Nutt et al, 2013). With regards to the latter argument, even governmental witnesses agreed that the closeness of chemical structure did not prove similar abuse potential (MAPS, n.d.b) Though Judge Young, the DEA’s administrative judge, agreed with the EMDL and ruled that
MDMA should be regulated therapeutically, the case ultimately lost on appeal. In the authors’ view these hearings are interesting, since they simultaneously demonstrate a situation whereby the State claims too much and too little responsibility over the welfare of its citizenry. By failing to unpack the scientific evidence which was presented to the DEA, and relying instead upon straw man arguments and ‘contentious’ evidence, the court facilitated a strong externalist conception of health and embraced Coggon’s (2012: 254) ‘monistic creep’. Thus, the court claimed too much responsibility through adopting a deterministic externalist conception of harm, yet they claimed too little by failing to impartially and rationally review the medicinal application of MDMA; as required by the *trias politica* principle and the rule of law.

Overall Section 4.2 sought to highlight various issues within both the domestic and international judicial reasoning process when human rights and drug policy regimes conflict. Through establishing that both regimes can be compatible at a definitional level (See Section 4.1), the failure on the judiciary’s part to engage with the positive and negative health rights the individuals presented is more thoroughly illuminated. For instance, with regards to the positive health rights the individuals asserted, no attempt was made to question the power dynamic between the State and the individual when reviewing the provision or scheduling of certain psychoactives, or the provision of psychoactive paraphernalia. A true human rights approach invites such questions over how much/how little responsibility the State can claim over an individual’s health choices, and it is also able to question the legitimacy of the law through the provisions contained within the human rights regime. Domestically, such an extensive review of the *Quayle* case was conducted when considering negative health rights, because it comprehensively details the failure of the UK judiciary to incorporate a broad definition of health, and to properly engage with an individual’s health rights on both a medicalised and a social constructionist level. What is more, UK judges have used *Quayle* to close down other human rights claims concerning medical cannabis use (See *R v. Altham*; *R v. John Lewis*), despite the fact that the Court of Appeal largely deferred this issue to parliament, and demonstrated a parochial desire to maintain the prohibitive status quo. The US judiciary largely adopts a similar deferential approach. In fact, this international case law highlights an even greater power dynamic, given conflicting State and federal laws in relation to medicinal cannabis. However, the Canadian case law and a small number of US cases demonstrate a judicial capacity to appreciate
psychoactive use as a complex human phenomena; necessitating social constructionist, internalist, medicalised and externalist conceptions of health. According to Beck (2008) judges rarely wish to challenge the executive in politically sensitive areas, as such the judicial response is often morally arbitrary and deeply political. With this in mind, Section 4.3 will discuss the implications a human rights perspective could have for UK drug policies, if they were to better appreciate the health rights of psychoactive users.

4.3 Regulatory implications from a health rights perspective

Section 4.3 will show the way drug control and health legislation are compatible, and how the legal architecture can be altered in order to encourage new ways to conceive of drug policies in this sphere. From the notion of health enhancement and the appreciation of pleasure as a legitimate health outcome, to the advancement of self-care practices in western biomedicine, this section will show the potential implications a health rights approach can have for drug policies, and will point towards regulatory proposals which have potential to both maximise the benefits derived from psychoactives and to minimise the risks. After exploring how the case law can influence drug polices and vice versa (Section 4.3.1), this section will consider how a human rights lens is capable of facilitating much broader regulatory implications, which strive to address the State/individual binary and respond better to the complexities of drug use (Section 4.3.2). All of the regulatory ideas put forward have been derived from the arguments developed through the case law analyses section above, and serve as just a small example of the possible regulatory approaches which could result from a health rights perspective.

4.3.1 Case law which constitutes and is constitutive of regulatory policies

Policy makers and (as evidenced) judges, prefer to demarcate clear regulatory categories for either illicit drugs or licit medicines (Seddon, 2010), any blurring of this boundary challenges the hegemony of prohibition. A human rights lens, capable of evolving in line with our changing conceptions of disease and health, is not constrained by the parochialism identified in drug policies, and can therefore put forward policy suggestions which would more accurately reflect a 21st century medicalised conception of health. A medicalised conception of health will be analysed first when outlining the case law which could influence policies from a health rights perspective. Drug policy
approaches which stem from this conception relate to Buchanan’s (2008) assertion that the goal of policy makers should be to draw from evidence bases and expert opinion. As discussed, this notion of health, which draws upon the deterministic notion that health and disease can be defined through descriptions based upon biological function, should therefore be well suited to Buchanan’s empirically-orientated goals. Unfortunately, whenever health policies happen upon the prohibitionist drug control framework, and vice versa, the resulting policies often fail to draw from the evidence base available.

As discussed above, the focus for the MDMA US court hearings centred upon whether the substance ought to be rescheduled into section III of the CSA in light of the evidence relating to its therapeutic application (MAPS, n.d.a). Though the therapeutic value of MDMA has been legally asserted in the US since the 1980s (ibid), recent years have seen what some scientists term ‘the psychedelic renaissance’ (Sessa, 2012); a resurgence of interest in the therapeutic value of psychedelics and other controlled substances. The term ‘psychedelic’ is derived from the Ancient Greek words psuchē (ψυχή - psyche, ‘mind’) and δηλωση (δηλωση – ‘manifest’), which translates to ‘mind-manifesting’ (Hopkins Tanne, 2004). The term was first coined by Humphreys Osmond in 1957, when he and his contemporaries were first exploring the role of psychedelics in western therapy, and the capacity of these substances to alter one’s perception of reality (ibid). Though early studies showed promise (Sessa, 2012), as highlighted throughout the US trials for MDMA, restrictive scheduling decisions have prevented scientists from fully exploring their therapeutic potential.

In line with a medicalised conception of health, ‘the psychedelic renaissance’ is particularly prevalent in the psychiatry sphere, as certain substances show promise in treating an array of mental conditions including (but not limited to): post-traumatic stress disorder (hereafter PTSD), depression, cluster headaches, end of life anxieties, and substance addictions (Sessa, 2012). Nutt, King and Nichols (2013) thoroughly detail the effects that UN drug scheduling has had on neuroscience research and treatment innovation in both the UK and the US. The UK drug schedules largely reflect the scheduling decisions made in the 1961 and 1971 drug conventions (ibid), despite the fact that these were often made in an informal, vague way, and are based upon political assumptions, as opposed to health-related reasoning (Gimenez-Corte, 2010).
Research has found that MDMA (MAPS, n.d.b), psilocybin (Carhart-Harris, Erritzoe, Williams, Stone, Reed, Colasanti, Tyacke, Leech, Malizia, Murphy, Hobden, Evans, Feilding, Wise and Nutt, 2012) cannabis (Aldrich, 1997; Russo, 2005; Russo, 2007; Leung, 2011), LSD (Carhart-Harris, Kaelen, Whalley, Bolstridge, Fielding and Nutt, 2014) and ayahuasca (Labate and Cavnar, 2014b) could all have considerable therapeutic applications. However, they all\(^5\) reside in Schedule I of the MDR and the CSA; schedules which fail to recognise any medicinal benefits a substance may have, and instead focuses on the level of harm or potential for harm (Fortson, 2011). Much like the situation in the US then, a catch-22 situation arises, as research is severely impeded once substances are categorised as having no medical value. Nutt et al (2013) detail the many impediments involved, some of which include: the financial difficulties associated with obtaining a license, the subjection of any license granted to regular police reviews, clinical research costs (as most schedule I chemicals require custom synthesis and are not easily obtained), stringent storage regulations, and the reluctance of grant giving bodies to invest in clinical research, in light of the substance’s illegal status and the perceived danger.

This situation is unfortunate, and within a UK context, could act contrary to the broader aims of the MDA to prevent individual, societal and sociological harm (Section 1(2) MDA). Taking this argument to its apogee, valuable inroads cannot be made in the fields of research, substance treatment and education; all of which further the advancement of knowledge (a clear benefit to society), because of such stringent controls. In addition, all three fields are listed as key concerns for the ACMD, and are routinely referred to throughout the MDA (Section 1(2) MDA). From a human rights standpoint then, perhaps the duty on States to provide available and accessible healthcare (Article 12, ICESCR), should also extend to ensuring that any unnecessarily arbitrary restrictions placed upon clinical research are removed; in order for a substance’s therapeutic potential to be more fully realised? Indeed, health rights are dynamic, and as flexible revolutionary instruments, human rights should strive to extend beyond the political boundaries currently imposed (Brems, 2009; See Chapter 2 for more detail).

\(^5\)While ayahuasca does not technically reside here, as it is a derivation of natural products and only three plants are subject to international control (see the Single Convention), the fact it contains DMT (a Schedule I controlled substance), causes considerable controversy over its legal status.
When employing a medicalised conception of health, comparisons between the domestic and international cannabis case law also points towards the capricious nature of the scheduling process. Though in the UK and the US cannabis resides in Schedule I (MDR and CSA), which recognises no medicinal value, in Canada the Netherlands, the Czech Republic along with several other countries (European Monitoring Centre for Drugs and Drug Addiction, 2012) (hereafter EMCDDA), cannabis is placed in a less restrictive schedule, to better reflect its accepted medicinal use. In Canada the case law was particularly influential in altering regulatory policies pertaining to medicinal cannabis. As discussed, Canadian case law has facilitated policies which create legal exemptions for its medicinal use (R v. Parker, 2000), and the Canadian judiciary further directed the State to actively create regulations to dispense cannabis to medicinal consumers (Hitzig v. Canada, 2003). Though the US judiciary is continuously encumbered by legislative inconsistencies given the scheduling restrictions at a federal level, in December 2014, President Obama signed a federal spending bill which protects State sanctioned medical cannabis programmes (Halper, 2014). No doubt this will influence US judiciaries and the case law in the future. It is unfortunate then that the UK have failed to adopt even a medicalised conception of health in case law which concerns the health rights of medicinal consumers. Although a special exemption has been made in the UK listing Sativex in Schedule IV MDR (see ‘the 2013 regulations’ and ‘the 2013 order’), the product contains Tetrahydrocannabinol (hereafter THC) (strictly controlled chemical in both the MDR, 2001 (Schedule I) and the Single Convention (Schedule I and Schedule IV)). According to Nutt et al (2013) this hypocrisy was justified on the pharmacologically irrelevant basis that the THC was in an alcoholic solution, and thus is different from other forms of THC. The fact that this legislative inconsistency exists at all, when combined with the various international regulatory provisions for medicinal cannabis, reveals that it is possible to alter the scheduling of tightly controlled psychoactives domestically, without international repercussions. Though a cynic could argue this possibility only feasibly exists to benefit big pharmaceutical companies, given the privileged status of western biomedicine (Giovanni et al, 2011; Also see Bone and Seddon, 2015).

What is more, the Netherlands first allowed the production of pharmaceutical grade cannabis through the company Bedrocan, which was contracted by the Dutch government in 2003 to produce and supply varieties of medicinal cannabis (Bedrocan,
n.d.). This model was unique since consumers can typically purchase their product through the same pharmacy as any other prescription medicine, and in contrast with Sativex and GW Pharmaceuticals, the company can dispense a variety of cannabis strains for an array of medical conditions (ibid). It is perhaps for this reason then, combined with the company’s success in promoting quality control, research, education and patient care, that several other European countries hold import licences too (Hazekamp and Heerdink, 2013). Bedrocan was also licensed in Canada in 2014, to be dispensed through this State’s centralised medicinal cannabis programmes (Bedrocan Canada, 2014). In the field of medical geography, Aggarwal et al (2009) have documented how the division between the access and delivery systems for medicinal cannabis can have detrimental effects on one’s health; thus any international replications of the Dutch model should go some way towards alleviating those concerns. However, the author has noted elsewhere, and throughout this chapter, that it is not enough to promote a medicalised conception of health. Rather, promoting the Dutch pharmacy model, as a possible regulatory policy, should also be accompanied by policies which accept social constructionist conceptions of health; to truly facilitate a more holistic understanding (Bone and Seddon, 2015).

As alluded to throughout the chapter, the conception of health is always context dependent as Sedgwick (1973), Raphael (2000), Sen (2004), and Coggon (2012) all observe that we should be wary of policy appeals to the medical model, since these alienate the concept from its implicit normative background. Raphael (2000) in particular stresses the importance of the social determinants of health, in order for health to be value laden with policies which empower and enable individuals to take control over, and improve their health and well-being. Although the UK judges refused to even entertain the human rights of the defendant’s supplying cannabis to HIV and cancer sufferers in Quayle, in Canada, one of the Ontario Superior Court’s primary criticism’s was directed towards their State’s refusal to legalise cannabis compassion clubs or to create properly regulated distribution centres (Hitzig v. Canada, 2003). These social and compassionate club models have developed on a de-facto basis in Canada and the US (Lucas, 2008; Reiman, 2008). Reiman (2008) observes that these holistic community models can offer more mental, physical and emotional support to medicinal cannabis consumers than a pharmacy or medicalised model alone. For Reiman (2008) the facilities in California which offer social support groups,
counselling and entertainment services, as well as dispensing medicinal cannabis, serve to alleviate depression and facilitate social integration; a significant health outcome given the often compounding health needs of medicinal cannabis consumers (See Bone and Seddon, 2015).

The author has outlined elsewhere how similar regulatory models could develop in the UK if the judiciary and the government were to recognise a social constructionist conception of health (Bone, 2014b; Bone and Seddon, 2015). She posits that the rise of Cannabis Social Clubs in the UK (hereafter UKCSC) could give credence to developing this model therapeutically (UKCSC, 2014). If cannabis were legalised for medicinal use, or otherwise decriminalised, then the UK’s Cannabis Social Clubs could arguably be regulated in a similar way to that of Complementary and Alternative Medicine therapies (hereafter CAM), whereby a grower becomes a licensed medical practitioner who then supplies cannabis to medicinal consumers from a designated venue. The model would operate in a similar way to Spain’s Social club model (Rolles and Murkin, 2013), but on a therapeutic basis. Historically, of course such models have developed underground. It is only through the activism of certain individual’s such as Dennis Peron who pushed for the quasi legal status of cannabis compassionate clubs in the US in the early 1990s which has led to their de-facto legality today (Reiman, 2008; Also see Proposition 215). The changing globalised paradigm for medicinal cannabis, combining medicalised and social constructionist models serves as a small example of how a human rights perspective can reconfigure the hegemonic narrative of prohibition. The following section will explore the broader regulatory implications this could have; beyond traditional notions of health. It will consider how a human rights lens can promote social cohesion through accepting pleasure as a legitimate health outcome, and how a broader conception of health can facilitate feedback loops and human rights to pleasure, well-being and spirituality.

4.3.2 How a human rights lens facilitates broader regulatory implications

As noted in Quayle, pleasure is rarely discussed in a medicalised or a drug control context (Holt and Treloar, 2008). A human rights lens is capable of endorsing the WHO’s (1948/1998) broad definition of health, which encapsulates the notion of health enhancement and well-being, as opposed to merely satisfying itself with reducing illness. With this in mind, pleasure should be deemed a legitimate health criterion, as it
is certainly hard wired in the mammalian brain, and evidence suggests it is essential for mammalian health and well-being (Coveney and Bunton, 2003; MacKenzie, 2011). However, although the pursuit of pleasure should be valued when considering the health rights of psychoactive users, Foddy and Savulescu (2010) observe that pleasure and hedonistic psychoactive usage, could be perceived as a morally selfish activity. While the focus for these authors may be somewhat skewed, given that they discuss pleasure when questioning the concept of drug ‘addiction’, they nevertheless raise the important point that pleasure is often the pursuit of individualistic as opposed to co-operatively orientated goals. Though rights also concern the relationship between the State and the individual, as demonstrated in Part I of the thesis, the familial discourse and universalist nature human rights embrace allow for policy suggestions striving to promote social cohesion, through maximising the benefits and mitigating the risks associated with psychoactive use in society.

The UK government’s drug strategies frequently stipulate the blight that problematic drug users pose to society and to communities in general (HM Government, 2008; HM Government, 2010) (See Chapter 2 for more detail relating to harms States emphasise from individual psychoactive use). Yet, drug policies in the treatment sector which accept the centrality of pleasure in motivating human behaviour have yielded positive results from a harm reductionist standpoint; thereby mitigating wider societal and community costs. For instance, The Chicago Recovery Alliance, a harm reduction organisation in the US, consider drug use to be a legitimate form of pleasure seeking, and they strive to maximise an addict’s pleasure alongside reducing any harms (Scott, 2013). Re-centring pleasure as an explicit harm reduction aim coincides with the organisation’s ‘any positive change philosophy’ (ibid). Scott (2013) observes a notable increase in safer injecting practices when addicts are informed that they will maximise their pleasure through injecting at a certain angle, as opposed to when the organisation solely informed them that injecting at a certain angle will limit the chances of damaging a vein. Such a positive outcome should therefore appeal to the pragmatic rationale of harm reduction. This logic could similarly support arguments in favour of heroin prescribing, particularly where other opioid substitutes have been unsuccessful. Indeed, it is widely acknowledged that methadone was first synthesised in part to mitigate against the ‘high’ derived from heroin, as this was perceived to be undesirable (Dole and Nyswander, 1965). Yet, if one were to theorise a place for pleasure within the
rehabilitation/drug treatment sphere, then perhaps the potential efficacy of maintaining a ‘high’ ought to be considered, particularly since pleasure is thought to motivate many, if not all human actions (Chapkis, 2007; MacKenzie, 2011).

According to Mackenzie (2011: 111) the acceptance of this fact could even lead to the development of ‘non-addictive designer drugs’; which focus on experiencing the pleasures of ‘liking’ as opposed to the addictive compulsions of ‘wanting’. For instance, Ibogaine, a plant psychedelic, has shown promise in treating addictions to opioids, alcohol and cocaine in a single sitting, without lasting side effects such as disrupting the ability to experience pleasure (Alper and Lotsof, 1999). For Mackenzie (2011), public health should move beyond risk management practices which centre on harm, and instead fund neuro-ethical research which appreciate any corresponding pleasures as well. Such an approach would maximise the benefits from psychoactives and minimise the risks, since it could empower citizens to make more fully informed ethical choices between pleasures (ibid). Incorporating the notion of pleasure in drug policies could also promote and advance knowledge in designer psychoactives which could advance pleasures and create altered states of consciousness; without exposing individuals to addictive cravings or other harmful effects (MacKenzie, 2011). Siegel (2005) also supports this idea in order to minimise harms and maximise informed choice for the individual. While this idea may appear utopian, the development of synthetic alcohol to reduce hangovers (Wong, 2013), e-joints to counteract the potential harms from highly concentrated THC in cannabis (Lynch, 2014; Mungroo, Ping and Bone, 2014; Bone and Seddon, 2015) and e-cigarettes to reduce or eliminate tobacco consumption (Biener and Hargraves, 2014), arguably already minimise individual and societal harms, and indirectly accept pleasure as an ethical objective within the public health sphere. Although, the latter statement is somewhat contested in the UK, since e-cigarettes will be regulated by the Medicines and Healthcare Products Regulatory Agency (hereafter the MHRA) as a smoking cessation aid from 2016 (Ash Briefing, 2014). The medicalisation of this product arguably supports Foucault’s (1979) warning to be wary when attempting to identify and classify desires in order to control or regulate them further, as this could breed pathology and resistance. Race (2009: ix) shares similar concerns as he noted: ‘Taking drugs for pleasure would appear to transgress the moral logic of “restoring health” that guarantees their pharmaceutical
legitimacy’. Though, he also perceives that harm reduction should engage with psychoactives in ways which encourage both pleasure and safety (Race, 2008).

Thus, while accepting that pleasure is a legitimate health outcome which promotes social cohesion, any medicalisation of this concept may disrupt the balance between the State and the individual. Rigidly defined taxonomies of pleasure could again alienate the concept from the implicit normative background of health and well-being (Sedgwick; 1973; Raphael, 2000; Sen, 2004; Coggon, 2012). A medicalised externalist conception of health could lead to the medical industrial complex gaining too much power and control over what Waldstein (2013: n.p.) terms an individual’s ‘health sovereignty’. To ensure that internalist and externalist views inform each other, to gain a more inclusive picture of what constitutes one’s health and well-being (Sen, 2004), it is necessary for a human rights lens to embrace externalist, social constructionist conceptions. In actuality, there is an interesting tension within the ‘psychedelic renaissance’ movement between the medicalization of psychedelics within ‘psychiatry’, and their perceived ability to transcend the metaphysical order within ‘psychedelia’ (Sessa, 2014). As Sessa (ibid) observes, psychedelic spirituality usually sits uncomfortably with the incorporation of psychedelics into the pharmacopeia of modern medicine. He notes that his colleagues have to significantly downplay the more ‘cosmic’ components of their work in order to obtain funding, as the medical model is restrictive in pathologising mental states, and is unable to conceive states of ‘bliss, enlightenment or spiritual emergence’ (ibid: 61). This binary is not new. The psychiatrist Grob has coined the term ‘anti-Leary’ to describe the new professional class of psychedelic researchers, in order to distance their work from Leary’s unorthodox, lay man’s ‘research’ in the 1960s (Novak, 1997; Slater, 2012). Although unsatisfied with this position, Sessa too advocates a cautious, conservative introduction of these substances within a medicalised context, in order to secure funding and improve the chances of them infiltrating mainstream consciousness (Sessa, 2014).

However, if a human rights perspective (free from current social and political conditioning) were adopted, then a transpersonal, psychedelic experience could potentially serve to enhance one’s health and wellbeing in line with the WHO’s health definition; which sub-standard therapy paradigms may fail to do. Indeed, the WHO (1948/1998) has only updated its definition of health once since 1948, in order to
incorporate the word ‘spiritual’. The idea of ‘enthoegenic therapy’ and the integration of ‘spirituality’ into our developing conceptions of health and wellbeing will be discussed more thoroughly in Chapter 5. For now, it is sufficient to observe Sessa’s (2014: 61) argument that: ‘Doctors may still have something to learn from the hippies’. Hence, it is arguable that the current medicalised paradigm excludes metaphysical and existential channels of information, which could be necessary to fully embrace the potential health benefits gained from a psychedelic experience. Through challenging the social and political order, a human rights lens could challenge the bio-medical hegemony of psychedelic research, and point towards regulatory models which may seem inconceivable at present. Indeed, while MDMA psychotherapy for PTSD could be a licensed treatment within the next decade (Sessa, 2014), it is difficult to imagine licensed ayahuasca retreats or ibogaine therapy delivered by painted shamans in NHS clinics! Yet, along with Sessa (ibid), this author believes that to be effective psychedelic psychotherapy should embrace all aspects of the ‘healing experience’. Plant psychedelics have been used for their healing properties and to enhance the human condition for thousands of years (See Chapters 1 and 2). Besides, international legislative documents appreciate the value attached to the use of psychedelics for health purposes, particularly if they are used within a ‘traditional’ ‘magical’ ‘indigenous’ or other ‘cultural’ rights based context (Article 32, 1971 Convention).

In light of this rather slanted recognition, health specialists could explore the field of ethnomopharmacology: a discipline which seeks to foster the bond between the natural and social sciences (Leonti and Casu, 2013). This field investigates both the anthropological rationale and the pharmacological basis of the medicinal use of psychoactives in human cultures, and accepts that globalization is accelerating the commodification of local and indigenous knowledge (Posey, 2002). Leonti and Casu (2013) emphasise the existence of ‘feed-back loops’ in this sphere which allow for knowledge transmission between local and global pharmacopeia’s, thereby facilitating a more pluralistic and inter-connected approach to health (ibid). They cite the growing phenomenon of complementary and alternative medicines (aka CAM therapies), as an example of these loops (ibid). The necessity of these feed-back loops has perhaps become more prevalent in recent years. The WHO acknowledge the growing public health threat of anti-biotic resistance in their first global 2014 report, noting the very real possibility of death by common infections and diseases in our post-antibiotic era
To counteract this threat, various studies support the use of CAM therapies such as homeopathy, botanical medicine, vitamins, minerals and hydrotherapy, to encourage a more holistic approach to health (MacKay, 2003). Leonti and Casu (2013) also categorise several well-known food ingredients such as turmeric and ginger as global medical commodities, and acknowledge the considerable increase in the nutraceutical market share within the last few years. Ethnopharmacology arguably blurs the boundaries between ‘food’ ‘drugs’ and ‘medicines’, and while integrating diverse medical systems and constructions of health may be challenging; this should not hinder the attempt (Chotchoungchatchai, Saralamp, Jenjittikul, Pornsiripong and Prathanturarug, 2012). The regulation and knowledge transmission of CAM therapies could therefore act as a foundation to explore the therapeutic application of psychedelics’ and other psychoactives which are typically categorised as ‘illicit’. Indeed, this notion of ‘feedback loops’ will be more thoroughly explored in Chapter 5 to advance the idea that through recognising human drug use occurs in multiple, enmeshed contexts, a human rights lens can facilitate regulatory approaches which better respond to this.

4.4 Conclusion

This chapter sought to demonstrate how a human rights perspective could improve policies which relate to the provision and use of psychoactives from a health rights perspective. It highlights that a human rights lens is capable of embracing a broad conception of health, since both the drug control and health rights legislative frameworks can accommodate medicalised, social constructionist, externalist and internalist conceptions. What is more, both frameworks appreciate the positive and negative health duties a State has to its citizenry in this sphere, and are capable of more fully embracing the WHO’s aspirational definition of health, than is currently done in practice. Indeed, the case law largely fails to address the power dynamic between the State and the individual. A human rights lens exemplifies this dynamic as it necessitates fundamental moral questions concerning how much/how little responsibility the State has to both provide psychoactives for its citizenry, and to respect an individual’s human rights to make their own health choices. Though the case law overwhelmingly seeks to protect plural, externalist notions of what is ‘good’ for our health; international comparisons have been made which highlight the possibility of a more holistic
approach; empowering individuals to take control over their own health and wellbeing. Yet, in general, western biomedical perspectives tend to prevail within both the domestic and international case law and health policies throughout the UK, even though this approach is often supplanted to maintain the doctrine of drug prohibition. ‘Illicit drugs’ and ‘licit medicines’ have been clearly demarcated.

However, a human rights lens is able to blur this regulatory construct, through employing a broad understanding of health. The proposals outlined in Section 4.3 are only possible examples of the regulatory approaches which could emerge if one were to use human rights to challenge the ideological status quo; viewing health and psychoactive usage as a complex human phenomenon. This chapter points towards possible regulatory designs which could result if the State were to embrace a conception which strives towards health enhancement and internalised constructionist notions of what is means to be healthy, alongside accepting the prevailing pluralistic, medicalised stance. While this chapter may pose more regulatory questions than it resolves, it brings us back to the political and moral origins of drug control, and forces us to ask fundamental questions such as: What should society strive to achieve when regulating psychoactives from a health and related human rights perspective? This chapter puts forward an analysis which seeks to better understand and respond to human psychoactive usage, balance the benefits and the risks, and address the binary between the State and the individual.
Chapter 5: Employing religious rights and related human rights to improve the drug control framework

Much like chapter 4 which employed health rights to explore the failures of the UK’s drug control framework, and to highlight the ways in which the case law and policies relating to health and drug consumption could be improved, this chapter utilises human rights to religion and related rights to the same effect. These rights will be analysed conceptually to demonstrate how a human rights lens can alter our perceptions on drug control, and can point towards regulatory approaches which are more contextually attuned and substance specific. Unlike the medical use of psychoactives, which is recognised as a legitimate practice throughout the international drug control regime, religious psychoactive usage can be placed at a considerable disadvantage. Indeed, the regime developed out of a specific homogenizing, patriarchal and colonial worldview. Thus, there exists a particular cultural hegemony throughout international and domestic drug control legislation, which cannot be as easily accommodated from a human rights perspective. Therefore, any conflicts between the State and the individual should serve to exacerbate the regime’s prescription to a distinct worldview. This chapter will explore the inherent difficulties in reconciling religious ideals under a human rights lens with those highlighted within the current drug control framework. It will initially attempt to define human rights to religion and related human rights, before exploring the conflicts pertaining to religious and related drug use within both the UK case law and international case law for comparison purposes. The chapter will reiterate the complex nature of human psychoactive usage, as it will reveal the failure of the human rights and drug control frameworks to appreciate this, and it will consider how the human rights framework could better recognise the often enmeshed contexts of use. The chapter will finally consider how a rights-orientated lens could point to new modes of regulation in this sphere, which are informed from the perspective of religious and related human rights.

5.1 Definitions of ‘religion’ and ‘religious manifestations’

‘Religion’ is notoriously difficult to define, within any context, let alone a legal one. There is no definitive definition of religion in either international or UK legislation, despite the numerous instruments which protect religious rights (Gunn, 2003). Non
legal scholars have considered definitions of religion which are: parochial and have a theological or a confessional basis, to quasi-theological definitions which have a sacred or spiritual basis, to those shaped by western conceptual ideas such as colonialism or philosophical dualism (Martin, 2005). The varieties of religious experience can be so conceptually broad that the eminent philosopher William James considers ‘religion’ to embrace: ‘one’s understanding of the world, of one’s part in it; as such everyone has their own “religion” and the individual in question can be the only true arbiter of what “counts”’ (Walsh, 2014: 212 paraphrasing James, 1961). According to Martin, some scholars even admit defeat in their definitional endeavour for ‘religion’, and argue for its integration into the umbrella category of ‘culture’ instead; posing the then more formidable job of defining ‘culture’ (ibid). Yet, the idea of ‘culture’ is so conceptually broad, that dialogues concerning cultural policy can fail at the extreme. In fact, some participants at a UNESCO discussion concluded that ‘culture permeated the whole social fabric and its role was so pre-eminent…that it might indeed be confused with life itself’ (Tomlinson, 1991: 5). Hulsether (2005: 491) offers a similarly embracing definition which was surmised by his children as ‘the ways of a people’. Such broad conceptualisations pose a definitional challenge since ‘religion’ may then simultaneously refer to almost anything and nothing in particular (ibid).

Hulsether (ibid) asserts that one way to address this challenge is to adopt a grounded approach, which is a fundamental part of the religious studies method. This approach involves analysing the case studies of practices which are conventionally understood as religious, and focusing on the self-understandings of the people involved (ibid). In a similar, more legalistic vein then, Section 5.1 will attempt to ground this definition by analysing the legal instruments which protect religious psychoactive use, and it will assess their compatibility with the drug control framework, in order to gauge a working definition. This thesis accepts that psychoactive usage can be a fundamental part of the human condition, occurring across all times and geographical space (Weil and Rosen, 1983; Siegel, 2005; Smail, 2008), and can therefore constitute ‘the ways of a people’ in the broadest sense of the term. However, it will be noted throughout the chapter that the legislation, case law, policies, scholars and the practitioners which shape the interplay between religious rights and drug policy, tend to focus on specific drug cultures, or rather ‘indigenous’ or ‘traditional’ use; thereby deterring from the general human experience of intoxication (Walton, 2002).
For the sake of coherency, the author will ground legal definitions of religion according to this narrow focus, to better illuminate the dominant cultural hegemony present within the drug control regime. Although, it will appreciate any broader conceptualisations of ‘religion’ where relevant, to further the symbiotic aim of demonstrating how a human rights lens can influence our perspective on drug control, and how the complex reality of human psychoactive usage can shape the flexible, evolutive design of human rights. Though, the full expansive reach of the human rights lens will be considered more thoroughly in the conclusion. As Hulsether (2005: 493) observes, there exists a habit of thinking about cultural difference in ways that emphasize ‘the noble but doomed ways of exotic ‘others’’. In actuality, the protections afforded to religious psychoactive usage will be shown to embrace a particular narrative order, with a focus on ‘othering’. Yet, our increasingly globalized and pluralistic world arguably necessitates a broader conception of what constitutes a religion. As such, this tension will be borne in mind throughout the chapter and related human rights to the freedom of belief, spirituality and thought will be considered, in order to determine whether they have potential to alleviate this tension.

5.1.1 Definitions of ‘religion’ and related rights under the human rights framework

Many international and regional human rights instruments guarantee human rights to religion without explicitly offering a definition of the concept.6 There has only been one major international effort to explain the rights protected under the notion of religion or belief (See the Declaration on the Elimination of all forms of Intolerance and Discrimination Based on Religion or Belief). What is more, many of these international rights guarantee human rights to freedom of thought and belief, thereby expanding the concept in line with James’s broad conceptualisation of religion (Article 18, UDHR; Article 18, 27 ICCPR; Article 9 ECHR). Domestically, the right to religious freedom, thought and belief is protected by Article 9 ECHR (as incorporated by the HRA, 1998). In theory, the notion as to what legally constitutes a ‘religion’ is wide-ranging. This section will explore legal international and domestic definitions of ‘religion’ and their scope. After demonstrating the sheer definitional breadth from an international and a domestic human rights perspective, the section will explore how the UN drug

6See Article 18, UDHR; Article 18, 27 ICCPR; Articles 2, 7-10, 16, 18, 20, 21, 24 and 37, Convention on the Rights of the Child, Articles 1, 4, 5, 7, 8, 10-24, 26-28, 32-42, 44-48, 50, 53, 56, 57, 61- 65, 67, 69, 70, 71, 79, 81 and 82 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; Article 18, African Charter of Peoples Rights; Article 9, ECHR.
conventions and domestic drug policies have narrowed the way in which ‘religions’ are conceived; before conducting a thorough analysis on whether (if at all) psychoactive usage can constitute a bona fide ‘manifestation’ of a religion or a belief both internationally and domestically. It is hoped that such a comprehensive exploration of what constitutes a ‘religion’, a religious ‘manifestation’ or the ‘manifestation’ of a ‘belief’ legally will emphasise the expansive potential of these rights, and how they are often constrained by an externalist, political conception in relation to psychoactive usage. As an important aside, the human right to ‘free thought’ will be shown as capable of expanding such conceptualisations. Though, for the sake of coherency, this human right will be analysed in full during the case law section (See Section 5.2) which takes this idea to its zenith.

While various international instruments recognise that everyone has the right to freedom of religion or belief and to manifest this, the General Comment to Article 18 ICCPR, demonstrates the sheer breadth of this right at an international level. The General Comment stipulates that: ‘Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief’ (HRCa, 1994: Para 2). This broad construction of the terms ‘religion’ and ‘belief’ fits with the conceptual breadth James identified earlier on (Walsh, 2014 citing James, 1961). The General Comment further provides that there are no ‘limitations whatsoever on the freedom…to have or adopt a religion or belief of one’s choice. These freedoms are protected unconditionally…’ (Human Rights Committee, 1994: Para 3). International legislation clearly facilitates an expansive view of what constitutes a religion or a belief, and since the incorporation of the ECHR via the HRA, this is mirrored domestically. Prior to the HRA, 1998 the UK adopted a narrower, theistic approach, perceiving a religion to concern ones relations with God, rather than accepting a belief in the platonic concept (Barralet v. Attorney General, 1980). However, in interpreting Article 9 ECHR, the European Court of Human Rights (ECtHR) recognise that the provision constitutes ‘a precious asset for atheists, agnostics, sceptics and the unconcerned’ (Kokkinakis v. Greece, 1993: Para 31). Bratza (2012) observes that this encompassing approach thereby extends to philosophical beliefs and does not merely offer protection to traditional or long established religions. This is confirmed in the UK case of Williamson (2005), as the court reiterated the ECtHR’s attitude that everyone is entitled to hold whatever beliefs they wish, as such respect runs simultaneously with human
dignity. Such a broad view should therefore serve to answer the criticisms put forward by Bedi (2007), Wright (2007) and Dworkin (2013) at a definitional level at least, that certain religious groupings are afforded preferential treatment. Though, any exemptions some religious groups may be afforded from facially neutral laws, (such as policies pertaining to drug prohibition), relate far more to the actual *manifestation* of their religious practice, and the extent to which this threatens the cultural, political and historical hegemony embedded within the UN drug conventions, as explored below.

**5.1.2 Definitions of ‘religion’ and related rights under the drug control framework**

Although human rights policies are indeed cultural policies given their cultural identity within the western tradition (Boiteux, Peluzio and Souza Alves, 2014), their status as living evolutive instruments and their universalist intent, facilitates their capacity to embrace a broad social constructionist conception of religion, belief, spirituality, culture and free thought. Unfortunately, the conceptual framework to acknowledge these human rights is considerably narrower within the legal international drug control regime, as the UN drug conventions are ‘based in an underlying moralism and pharmacological reductionism’ (Tupper and Labate, 2012: 26). As previously emphasised, human rights to religion, belief, spirituality and free thought are all essentially social constructionist concepts. There is no materialistic basis for these concepts, in contrast with medicalised definitions for the human right to health (See Chapter 4). As such, human rights to religion, belief, spirituality and free thought are more susceptible to political influence, and a subscription to a particular world view. Certainly, for Tupper and Labate (ibid), the conventions are systemic legacies of a patriarchal, colonialist belief that the consumption of ‘exotic’ psychoactive plants, and the medley of motivations behind this, can either be controlled, suppressed or eradicated. The Single Convention (1961: Article 49) in particular called for the eradication of all ‘traditional’ or ‘quasi-traditional’ uses of opium within 15 years, and the cocoa leaf and cannabis within 25 years of it coming into force. As explicated throughout Chapters 1-3, these provisions have their roots in myth and xenophobia, and are based upon moral, geo-political and economic reasoning, as opposed to being based upon any empirical analyses of harm or consequentialist philosophies (Gimez-Corte, 2010; Staples, 2014; See Chapter 3: Section 3.3). From a deontological standpoint though, it is clear that a legal moralist position was espoused, as an arbitrary negative value was attached to any
motivation behind consuming these raw material products. Any definitional basis for what constituted a human right to religion or related rights was therefore irrelevant.

However, the creation and implementation of the latter two drug treaties incorporate a more cultural relativist position, as they acknowledge the existence of a human right to religion and culture for a small minority of people. The 1971 Convention (Article 32(4)) allows State parties to make a reservation for plants ‘which are traditionally used by certain small, clearly determined groups in magical or religious rites…’. In a similar vein, the 1988 Convention (Article 14(2)) requires parties to ‘respect fundamental rights’, and ‘take due account of traditional illicit uses where there is historical evidence for such use…’ While these provisions recognise religious contexts for use, there is little attempt made to define these contexts. Instead, the word ‘traditions’ was criticised in negotiations regarding the content of Article 14 (Commentary on the 1988 Convention, 1988). The Official Commentary on the 1988 Convention observes the criticisms put forward by the intergovernmental expert group, responsible for examining a draft of this provision in 1987, as they noted that ‘traditions’ are often subject to change (ibid: 295). Tupper and Labate (2012) are similarly critical of Article 14, through observing that cultural practices are not isolated, static and they do not necessarily originate from a pure origin. Hence, the drafters’ assumption of this reality is unnecessarily homogenizing, as it fails to appreciate the evolution of such practices, and the human rights of those who partake in them, in our increasingly globalised, pluralistic and transnational world (ibid).

Additionally, the preoccupation with ‘traditional’ psychoactive use emphasises the tendency as observed earlier by Hulsether (2005: 493) to focus on ‘exotic others’. The UN drug conventions reflect this stance through protecting ‘small, clearly determined groups’ which embrace this particular narrative order (Article 32(4) the 1971 Convention). However, all drug use is cultural since psychoactive consumption stretches back into deep history and occurs across most cultures (Siegel, 2005; Smail, 2008). As Derrida (1995: 229) frankly points out: ‘there are no drugs in nature’. Rather, the use and regulation of all psychoactives are embedded within a particular cultural, historical and political paradigm (ibid; Seddon, 2010; See Chapters 1 and 2). As emphasised in part I of the thesis, law has no ontological reality. The International Law Commission (Koskenniemi, 2006: Para 120) reiterate this stance through asserting that; ‘no rule, treaty or custom, no matter how special its subject matter…applies in a
vacuum’. Since the drug conventions are the product of political compromise, there exists a safe guard clause within Article 3(2) of the 1988 Convention to prevent conflicts with a parties’ constitutional principles or human rights obligations (See Chapter 3 for more detail). Boiteux et al (2014) observe that the existence of an escape clause is quite rare in international law, as it can act in contrast to Article 27 of the Vienna Convention on the Law on Treaties, which encourages State compliance. Arguably this rare room for deviation exists in part because the Conventions’ homogenising division between illicit/licit psychoactives, fails to appreciate the human rights of citizens in countries which subscribe to different religious contexts for drug use. Furthermore, the escape clause’s generalist application means that there is some room to protect a broader conception of human rights to religion, belief and free thought under the existing regime. Though, in practice the UK has failed to interpret the Conventions liberally, since the MDA likewise regulates historically and culturally contingent taste. Indeed, the government’s failure to incorporate alcohol and tobacco into the prohibitive drug control framework is admittedly due to ‘historical and cultural precedents’ (House of Commons, 2006: 24).

Though the international and domestic human rights and drug control legal frameworks are capable of embracing a broad definition of ‘religion’ and any related rights to ‘belief’ ‘spiritual and/or ‘free thought’, the analysis above demonstrates that drug control legislation is more restrictive in the way it conceptualises religious or ‘traditional’ drug use. Additionally, though the right to have a religion or a belief constitute absolute rights, the right to manifest these is qualified via the limitations contained within Article 9(2) ECHR). Hence, except where it is explicitly legislated for, the question of whether psychoactive use constitutes a legitimate ‘manifestation’ of a religion or a belief is left to the judiciary. It is worth noting at this point that the human right to freedom of thought is protected as an absolute right, and is therefore not subject to legal qualifiers in the same way rights to manifest a religion or a belief are. Similarly, the human right to culture is intertwined with the notion of cultural practices. Therefore, the author’s final definitional endeavour is restricted to analysing what constitutes a legitimate manifestation of a religion or a belief.
5.1.3 Psychoactive usage as the ‘manifestation’ of a religion or a belief

Prior to the HRA, the UK judiciary were reluctant to consider whether drug use retained any religious legitimacy. Instead, the English courts would historically protect religious freedom as a negative freedom. Accordingly, Sandberg (2011) observes that individuals were free to manifest their beliefs and their religion as they wished, unless such a manifestation were restrained by common law or statute. It is unsurprising then, that early Rastafari cases (comprising the bulk of religious drug use cases in the UK), failed to accord any weight to the defendants religion. The author has noted elsewhere that in R v. Williams (1979), R v. Daudi and Daniels (1982) and R v. Dalloway (1983) the judges were more preoccupied with possession versus supply issues (Bone, 2014a). Poulter (1998) further concludes that prior to the HRA these were the only three cases whereby the defendants were actually recognised as Rastafarians. However, in all three, the defendants’ religious status was deemed to be irrelevant, because the fact that cannabis possession or supply was expressly prohibited by law was regarded as definitive (ibid). Thus, there was no interference with these defendants’ human rights to manifest their religion. For Sandberg (2011), this judicial reasoning process is unfortunate at the definitional stage, since the same outcome could be reached on a more expansive view of religion etc. He argues that the judicial focus should not be on whether the defendants’ right to manifest their religion has been interfered with (ibid). Rather, for the most part, they should accept drug use as a legitimate ‘manifestation’ of a religion, belief etc. and focus their attention upon whether any interference with this right is justified (see Section 5.2 for more detail).

Nevertheless, the UK courts are more accommodating at the definitional stage post the HRA. The test for whether drug use can constitute a legitimate manifestation of a religion is broader now. The ECtHR has repeatedly stated that a State is not entitled to assess the legitimacy of any religious views, or the way in which these are manifested (See, for example, Hasan and Chaush v. Bulgaria (2002): Para 78; Metropolitan Church of Bessarabia v. Moldova (2002): Paras 117 and 123; Sahin v. Turkey (2007) Para 107). R (Williamson) v. Secretary of State for Education and Employment (2005) (hereafter Williamson (2005)) is the key UK case to assess what constitutes a legitimate ‘manifestation’ post the HRA. As explained earlier, though the holding of any religious belief is protected, its manifestation must satisfy ‘some modest, objective minimum requirements’ (ibid, per Lord Nichols: Para 23). The belief must: ‘be consistent with
basic standards of human dignity or integrity...possess an adequate degree of seriousness and importance...be a belief on a fundamental problem...be coherent...and capable of being understood’ (ibid). The test is undoubtedly broad since Lord Nicholls adds that ‘these threshold requirements should not be set at a level which would deprive minority beliefs of the protection they are intended to have under the convention…’ (ibid). Recent cases corroborate this expansive view since in R v. Taylor, (2001) R v. Andrews (2004) and R v. Aziz (2012) it was assumed from the outset that the defendants’ drug use constituted legitimate manifestations of their religions.

This test is arguably broader than the sincerity and centrality tests adopted in the US. The sincerity requirement tests the knowledge of the defendant’s beliefs and the extent to which the manifestation is religious in nature, whereas the centrality test requires the manifestation to be central to the defendant’s religion (Bone, 2014a). The author has highlighted that these tests can discriminate against minority religions, and those who do not subscribe to an orthodox, westernised conception of religion (ibid). For instance, these tests are epistemologically challenging for the Rastafari as their movement is racial, cultural and political in nature, and is not solely religious (ibid). Not all of the Rastafari consume cannabis as a religious sacrament either. Hence, its member’s claims could well fail at the definitional stage in the US (See Robinson v. Foti (1981); Reed v. Faulkner (1988)). Accordingly, while the US has the strongest juridification of religious freedom claims (see Section 5.2 below), its manifestation tests are more stringent than the UK’s post the HRA. Indeed, recent ECtHR judgments have protected religious practices that are not proscribed by the religion or central tenants of it, such as a Buddhists decision to adhere to a strict diet (Jakobski v. Poland, 2010). Previously, the court would only protect manifestations required by the religion or philosophical belief. In Williamson (2005: 57) Lord Walker additionally doubted whether it was correct for the courts ‘to impose an evaluative filter’ at the definitional stage, since excluding a claim at the outset prevents the courts from truly engaging with the merits of a case.

Furthermore, although the definitional test applies to drug use which constitutes a manifestation of a religion or a belief; only the former manifestation is really accommodated by the courts in relation to drug use at present. While it is unnecessary in theory to warp drug use experiences into a form which approximates those of recognised religions, in practice judiciaries are reluctant to consider manifestations
outside of an orthodox religious context. Though Lord Nicholls (Williamson, 2005: Para 24) explains that for a belief which is not religious to be protected by Article 9: ‘it must relate to an aspect of human life or behaviour of comparable importance to that normally found with religious beliefs’, to the author’s knowledge there have been no UK cases which consider the right to consume drugs as a genuine belief or a philosophy. However, in the US two notable cases involved defendants who argued their drug use constituted a legitimate religious manifestation, despite the case facts indicating that the manifestations were of a more or secular nature; involving a particular belief or philosophy (Leary v. US, 1967; US v. Kuch, 1968). It was thought that religious claims would be more successful here (Lander, 2014; See Section 5.2.3 below for more detail).

Historically, the courts have been unduly restrictive, holding not only for the drug use to be: ‘religiously important to its user but also an essential part of a traditional rite or communal significance’ (Bakalar and Grinspoon, 1984). Bakalar and Grinspoon, (1984: 32) continue with an analogy: ‘It is as though mountain climbing were regarded as generally so dangerous and useless that climbers would be fined and jailed unless they could prove they were making a pilgrimage to a holy site on the peak certified by an established church’.

Such a restrictive approach fails to reflect the complexity of human drug use. For instance, Labate and Feeney (2012) note that shamanic drug use practices are rooted in ontological definitions of nature and culture, as opposed to being recognised as religious under western standards. Moreover, such practices are medically, artistically, culturally and spiritually enmeshed (ibid). Therefore, it is difficult to isolate a specific context for use. Since conceptualisations for religion, culture etc. are so wide-ranging, this issue is problematic at the definitional stage. Perhaps suggestions similar to Mhango’s (2008): that manifestation tests should protect the Rastafari irrespective of whether political, cultural or religious factors dominate their claims, should be utilised throughout this area. In truth, any legal definition for religion invites the courts to consider a plethora of issues, and even the entire answer to the scope and limits of religious liberty (Adhar and Leigh, 2005). Thus, avoidance of this issue may well be justified. Finally, since both human rights and drug control frameworks are capable of embracing broad conceptualisations of religion, belief, etc., the question of whether the drug use is justified should arguably be what constitutes the prime judicial focus, as explored below.
5.2 Case law

While Section 5.1 demonstrated that both the human rights and drug control frameworks are capable of embracing broad definitions of religion and belief in relation to psychoactive usage, in practice only certain drug use was legitimised on this basis. The diverse employment of various manifestation tests demonstrates that while human rights are legally and philosophically designed to have universal applicability (for more detail see Chapter 1), they retain a perennial weakness through their westernised, culturally bound conceptions of religion. The UN drug conventions further exacerbate this weakness, because for drug use to be accepted on the above grounds, use should be ‘traditional’ (Article 32(4) the 1971 Convention; Article 14(2) the 1988 Convention). Thus, a bias is revealed in favour of those who conform to the exotic ‘other’ narrative order. Much of the case law conforms to this narrower perspective, as preferential treatment is afforded to particular cultural drug use and to ‘small clearly determined groups’ (Article 32(4) the 1971 Convention), such as the Native American Church (hereafter the NAC). Though, this section will predominately focus on the domestic case law, and it will analyse the reasoning process of the UK’s judiciary when weighing an individual’s human rights to freedom of religion, belief, thought etc., against the interests of the State. In a similar manner to Chapter 4, this section will highlight the failure of the UK judiciary to adequately balance the binary between the State and the individual, and it will emphasise the legal compatibility of the human rights and drug control frameworks, if a broader conception of religion, belief, free thought etc. were to be adopted.

This section will also utilise case law from other jurisdictions to further emphasise the fact that religion, belief, and free thought are ultimately socially construed. The diversity in global judicial approaches (notably in the US), reflects these cultural and political differences, and reiterates that the interpretations and meanings afforded to psychoactive usage are contextual social constructions. This argument should serve to undermine the narrow approach adopted in the UK, and it will also question why some drug use is accorded protection on religious grounds, but not all. Much like the manifestation tests, which protect some religious drug use at the definitional level, judicial tests at the balancing stage will be explored here. After analysing and comparing domestic and international case law concerning predominately religious drug use, this section will appreciate the often entangled complex nature of human
psychoactive usage, through outlining the case law which fails to conform to an orthodox conception of religion. This section will highlight the failings of the UK and international judiciaries to appreciate this. It aims to demonstrate how a human rights lens can improve the judicial reasoning process through utilising broader human rights to freedom of belief, thought and the notion of cognitive liberty, before going on to consider the policy implications this could have from a religious and other related human rights perspective

5.2.1 Domestic religious case law

To date there is no domestic case law which centres on the human right to use psychoactives to manifest a heartfelt ‘belief’. While it will be noted throughout Section 5.2 that other jurisdictions have implicitly or explicitly analysed these issues (People v. Woody (1964) Leary v. US (1967); Kush v. US (1968); MAB, WAT, J-AYT v. Canada (1994)), the UK has focused upon the more orthodox ‘religion’ component of Article 9 ECHR. The author has extensively focussed elsewhere on the fact that the most relevant UK case law frequently concerns the human rights of the Rastafari to consume cannabis as a religious sacrament (See Bone, 2014a for more detail). Similarly to the Quayle case in the previous chapter, the UK judiciary have a leading case on religious drug use which is largely deferred to in subsequent cases, despite the fact that that the judicial reasoning process here was arguably lacking. R v. Taylor (2001) (hereafter Taylor) is the leading case on the conflict between religious human rights and the drug control framework: it has had far reaching consequences for all succeeding cases, and for a case concerning connected rights to freedom of thought (R v. Hardison; See Section 5.2.3). For this reason then, much like Quayle, Taylor will be analysed in full.

5.2.1.1 Critiquing Taylor

Taylor was one of the first cases post the HRA to consider the tensions between religious freedom and the global drug prohibitionist framework. The defendant was searched by the police when approaching a Rastafari temple and was found to be possessing roughly 90g of cannabis. He argued that he was a practicing Rastafarian and admitted his intention to supply it to other Rastafari for religious purposes. Literature on the Rastafari movement indicates that their cannabis use is much more than a religious practice. Rather, it is bound up with their race, culture, politics and it is integral to the identity of Rastafarianism itself (Barratt, 1977; O’Brien and Carter 2002-2003;
Bone, 2014a). However, Taylor’s claim centred solely upon the religious component. The possible reasons for this will be explored in greater detail below. Upon arrest Taylor stated ‘I’m a Rasta, it’s part of my religion’ (2001: Para 5) and at trial he argued that his actions should be interpreted as a manifestation of his religion under Article 9(1) ECHR. Thus, any criminal proceedings against him were required to be justified under Article 9(2). There were no definitional issues at trial as the prosecution conceded that Rastafarianism was a religion and perhaps more surprisingly, that the cannabis was ‘destined for use in connection with Rastafarian religious purposes’ (2001: Para. 4). Such progression at the definitional stage in the UK is discussed briefly in Section 5.1, and is outlined thoroughly by the author elsewhere (Bone, 2014a). Needless to say then, Article 9(1) was engaged, but the court held that that Taylor’s rights were qualified by the provisions of Article 9(2). As with Quayle, the legality of cannabis remained a central concern, as deference was made to the UN drug conventions, to the exclusion of all other considerations specific to Rastafarianism.

The limitations contained in Article 9(2) are identical to those in Article 8(2), and the court considered whether either Article could be relied upon here. Rose LJ articulated the reasoning process of the trial judge through noting that the limitations on cannabis supply are ‘prescribed by law’ since they are imposed via the MDA, 1971. Of crucial importance then was whether the limitations were ‘necessary’ and ‘proportionate’ to the perusal of the legitimate aims contained within in the limitations. The judge relied heavily on the UN drug conventions as evidence that the total prohibition of cannabis was necessary and proportionate, in order to ‘combat public health and public safety dangers’ (ibid: Para 14). However, the very existence of the UN drug conventions was enough to substantiate this claim. The prosecution drew the courts attention to United States v. Whyte (1984: 1021) where it was accepted that the court should not take into account ‘evidence minimising the dangers from marijuana abuse’, since to do would usurp the legislature who have seen fit to ‘control a substance on a rational basis’ (ibid). Like Quayle the judge was keen to defer any conflicts with a defendant’s human rights to parliament, since the granting of any religious defence was perceived as the province of the legislature and not the courts (2001: Para 27). While predictable, this approach was unfortunate since the Crown Court, and later Rose LJ in the Court of Appeal,

\[7\] To avoid confusion the author will employ the term ‘Rastafarianism’ when referring to the religion as a whole. However, it should be recognised that the followers of the Rastafari religion would not approve of this terminology, since they reject any form of ‘ism’ (Glazier, 2001).
refused to explore any evidence relating to the significance cannabis held for the individual and for the Rastafarian religion in general, as well as the impact of cannabis on health. Mr Owen Davies QC, acting on behalf of Taylor, argued that the courts justification process was not ‘necessary’ or ‘proportionate’ as they refused to analyse this evidence. He relied upon case law from other jurisdictions which more adequately engaged with the binary between the State and the individual, as these judiciaries allowed expert evidence to be adduced pertaining to the religious and cultural significance psychoactives could have for the individual and their religion (See below for People v. Woody, 1964; Prince, 2002).

Buchanan’s (2008) critique of a parochialist approach applies here because by failing to consider the wealth of historical, religious, medical or sociological material on Rastafarianism, the key issue of proportionality was instead determined ‘by reference to international legal documents of general application’ (Edge, 2006: 85). As detailed in Chapter 4, the balancing conceit favours a consequentialist approach, since this lends itself far more easily to a cost/benefit analysis, at the expense of engaging with the intrinsic value attached to an individual’s human rights (Alder, 2006). Though, for Tsakyrakis (2009), the principle of proportionality merely pretends to be rational, objective and extraneous to moral reasoning. He puts forward a compelling argument that the proportionality test rests upon the illusory assumption that conflicts of values can be reduced to issues of ‘degree’ or ‘intensity’, and that these concepts can be measured via a common metric (ibid: 474). In fact, an earlier debate between Habermas (1996) and Alexy (2003) led both parties to conclude that the human rights adjudication process concerns itself with whether something is adequate, inadequate, appropriate, intensive or far-reaching, as opposed to determining whether something is right or wrong in itself. Thus, human rights are transformed into something which appears to be quantifiable, but in reality cloaks the evaluative questions that a human rights approach entails. As thoroughly discussed in Chapter 1, human rights are rooted in human nature and this often comprises of competing and irreconcilable impulses, such as the desire for sociability (which feeds into the State’s interests), against the need for autonomy (an individual’s interest) (Alder, 2006). Articles 8-11 ECHR are especially concerned with the expressive values of an individual, and with their very sense of self-identity (ibid). Alder (ibid: 8) observes how the rational consequentialist approach can crush the subjective experience and identity of the individual, through citing Sedley
LJ’s assertion that: ‘if a balancing exercise between a human right and the public interest is taken seriously, in a majoritarian democracy the public interest would always win’. It is arguably easier to discern then why the decision in Taylor was made solely by reference to public interest concerns, which were substantiated via the existence of the UN drug conventions.

Yet, Beck (2008: 224) acknowledges that the very appeal to consequences during the judicial balancing exercise between a human right and a limitation is in itself contentious, since: ‘rights by their nature are designed to trump consequentialist, utilitarian or majoritarian considerations’. This ‘rights as trumps’ observation feeds into Tsakyrakis’s (2009) argument that a bona fide adjudication process involves a thorough understanding of what one values about the human right in question, and contextualising this alongside other moral and political values. Hence, the moral issues should be openly spelled out, weighed up and engaged with from a deontological, normative stand point as well. Instead, the proportionality principle can invite the courts ‘to make value judgments behind the veil of legal objectivity’ (Beck, 2008: 237). Indeed, it is somewhat ironic that the legal provisions Rose LJ relied upon in Taylor (most notably Article 36(1)(a) of the Single Convention and Article 3(2) of the 1988 convention) could easily have been interpreted so as to find for the defendant. As mentioned previously, while these provisions criminalise our actions relating to the consumption of certain psychoactives, they are subject to a State parties ‘constitutional limitations/principles’ and to ‘the basic concept of its legal system’ ibid). It is this rare room for deviation that has in fact allowed other jurisdictions to find for the defendant, and for their human rights to religion and culture (Boiteux et al, 2014).

However, a more typical human rights adjudication process arose in Taylor, since the judge drew clear inferences from the UK’s subscription to the UN drug conventions, to concoct what Walsh (2010) views as ‘a worst case scenario’, through relying upon vague ‘public health and safety’ stipulations, in order to justify an expansive reading of the limitations contained in Article 9(2). Furthermore, the Court of Appeal accepted the prosecution’s argument _per curiam_ which drew its reasoning from the US case of _Employment Division v. Smith_ (1990). This case held that a distinction could be drawn between: ‘legislation prohibiting conduct because it relates to or is motivated by religious belief and legislation which is of general application but prohibits, for other reasons, conduct which happens to be encouraged or required by religious belief’ (See
Though endorsed by some (See Wright, 2007), this reasoning has been repeatedly criticised. McConnell (as cited in O'Brien, 2001) is especially critical of this logic which perceives drug laws to be facially neutral, hence they should apply to everyone without exception. He notes that unlike with race, sex or gender issues, minority religions actually strive to be different and to not be accorded the same treatment as others (ibid). Leaving aside the much thornier issue of why some religions, cultures or belief structures ought to be accorded protection from facially neutral drug laws and others ought not to for the moment, criticisms of the Smith logic should still carry some weight. Indeed, whether drug laws can ever be neutral when they engender incommensurable values such as public health or safety concerns and rights to religious freedom or privacy, remains to be seen. If judiciaries accept this logic then it arguably obfuscates key justificatory issues, and gives credence to Stuntstein’s (1996: 1) claim that judges make ‘incompletely theorized agreements’’ in order to avoid taking sides on social controversies. Yet, as Waldron (1996) and Beck (2008) observe, by failing to address any underlying incommensurables, judiciaries may trivialise the idea of human rights, which destroys their moral force.

Not only did Rose LJ defer any normative questions to the legislature in Taylor, but he also refused to answer definitively on whether a different outcome could have been reached if the case concerned the possession of cannabis as opposed to its supply. He only stated that such an occurrence ‘raises different considerations’ (ibid: Para 17). This vague approach, combined with the lacking normative foundation in the judicial reasoning process is regrettable. Especially, since Taylor has become a key authority for UK cases which consider the conflict between religious freedom and prohibitionist drug polices, and any connected human rights to freedom of thought (See R v. Andrews, 2004; R v. Hardison, 2005; R v. Aziz, 2012; R v. John Lewis, 2013). Although, one way in which the judge perhaps alleviated the binary between the State and the individual and engaged with the moral dilemma within this case, was by ruling that the defendant’s original 12 month long sentence was ‘significantly too long’ (Taylor, 2001: 34). As well as looking at the defendant’s personal circumstances, Rose LJ highlighted that the supply was for religious purposes as opposed to commercial ones, to justify substituting Taylor’s custodial sentence to 5 months. While this possibly stands as a very small concession to the defendant’s religious rights, this mitigation is nevertheless more accommodating to the defendant than domestic Rastafari cannabis cases prior to the
enactment of the HRA. In *R v. Williams* (1979), *R v. Daudi and Daniels* (1982) and *R v. Dalloway* (1983) the judges all downplayed the religious element, or else made it clear that they would not discriminate in favour of the defendant’s religion. In fact, post the HRA, the Court of Appeal in *R v. Andrews* (2004) and *R v. John-Lewis* (2013) both considered Rose LJ’s reasoning during sentencing. While this consideration was accepted in the latter case and the defendant’s sentence was reduced, in the former case the defendant’s religious motive was held not to apply, given his more serious offence of cannabis importation. The author has alluded elsewhere to the judicial pre-occupation with possession verses supply issues in these cases (Bone, 2014a). Such pre-occupation with possession, supply or importation arguably demonstrates a more rational basis for ruling in favour of the State, given their concerns relating to public safety, health etc., than merely deferring to the legality of a substance does. The following international cases are also dominated by such issues. More importantly, some of these cases also undermine the UK’s judicial reasoning process through their comprehensive analysis and recognition of the individual’s human rights arguments, and through the judicial refusal to defer solely to the UN drug conventions.

5.2.2 International religious case law

In 2012 the Italian Supreme court (Judgment no. 14876) upheld an earlier ruling which quashed a Rastafari defendant’s conviction for possessing approximately 97g of cannabis with the intent to supply it to others. Though, a cynic may argue that this landmark ruling, the only case to date to find in favour of a Rastafari defendant, could have more to do with rectifying the lower courts substantial failure to acknowledge the defendant’s religion, the higher courts did consider the underlying incommensurables, and the moral values of the case, through finding for the individual (Bone, 2014a). While it is somewhat regrettable that most of the judicial attention was devoted to possession/supply issues, as it detracts attention away from the broader tension between religious rights and drug prohibition, this focal point is nevertheless preferable to deferring straight to the legislature, or else compiling an ‘incompletely theorized argument’ (See the *Taylor* analysis above). Although the judicial focus on possession/supply/importation will be shown to be superficial in the religious liberties sphere (see below), any involvement with these issues, at the very least, demonstrates a willingness to more rationally balance the level of harm an individual could pose to a
State’s interests. Hence, such deliberations superficially stimulate the more evaluative questions a human rights approach engenders.

One case which considered these issues, but did not devote the same ample space to them, was the South African case of *Prince v. The President of the Law Society of the Cape of Good Hope* (2002) (hereafter *Prince*). Four of the nine judges agreed with the law graduate defendant that denying him access to the bar because of his religious cannabis use, amounted to a disproportionate infringement on the religious freedom of the Rastafari. When exploring whether the Rastafari ought to be exempted from drug laws prohibiting cannabis, the judgements demonstrated a keen knowledge of the Rastafari way of life in a way that had not been seen previously. The Constitutional Court explored the many ways in which the Rastafari consume cannabis, and appreciated medical evidence which suggested that cannabis use does not necessarily cause harm (*Prince*, 2002: Para. 24). As highlighted within Chapter 4, it is unusual to examine judicial discourse which does not solely accentuate the dangers an illicit psychoactive poses. This more open approach was embraced by two Justices in particular; Justice Sachs and Justice Ngcobo, as their dissenting judgments were especially strong. These Justices focused on the value of the human right in question. Hence, they favoured Tsakyrakis’s (2009) normative approach; an approach which was so lacking in *Taylor*. For this reason it is worth repeating Justice Ngcobo’s observation pertaining to the effect cannabis prohibition has for the Rastafari religion. For him, this total restriction constitutes ‘...a palpable invasion of their dignity. It strikes at the very core of their human dignity. It says that their religion is not worthy of protection. The impact of the limitation is very profound indeed’ (*Prince*, 2002: Para. 51). Justice Ngcobo clearly spelled out the moral issues through recognising the significance cannabis holds for the Rastafari and their religious practices. Justice Sachs added that the real difference between the dissenting judgments and the majority rests on how much trouble the State ought to go to in order to accommodate the religious rights of the Rastafari. He determined that: ‘the constitution obliges the state to walk the extra mile’ (ibid: Para. 149). The binary between the State and the individual was clearly addressed here, and the Justices openly and comprehensively detailed the moral values at issue. Therefore, the author posits that *Prince* should serve as an example to judiciaries across the globe of how to employ a human rights lens to more adequately balance the conflicts and any incommensurables between the State and the individual.
While the *Prince* decision undermines the reasoning in *Taylor*, as the judgment placed very little emphasis on the existence of the UN drug conventions in comparison with the other issues explored above, the majority judgments were largely concerned with the hypothetical difficulties a religious legal exemption could pose. The judges demonstrated an understanding of Rastafari culture through recognizing the lack of any rigid doctrines or organisational structures within Rastafarianism, given the movement’s rejection of colonialist, hierarchical attitudes (Bone, 2014a). However, it was this understanding which raised practical concerns with regards to enforcing a legal exemption. Consequently, this became the primary justification for interfering with the law graduate’s human rights. Arguably, such concerns are irrelevant if the judges were to carefully craft an exemption; though of course posing restrictions on the sanctity of cannabis for the Rastafari necessitates further moral questions. Regardless, in the US the Native American Church (NAC) hold a legal exemption which allows them to consume peyote, a substance residing in Schedule I of the CSA (1970) (21 C.F.R. § 1307.31 (1990)). The operation of this legal exemption will be more thoroughly explored in Section 5.3 below.

Several US cases including *Olsen v. DEA* (1989), *State v. McBride* (1989) and *Smith* (1990) analyse why preferential treatment is afforded to the NAC here, since both cannabis and peyote reside in Schedule I of the CSA, and both groups attach religious and/or cultural significance to these substances. The dissenting judgments in these cases highlights the cultural favouritism behind these decisions (Bone, 2014a). Judge Blackburn’s dissent in *Smith* (1990) is particularly noteworthy for its unfavourable comparisons. He stated that peyote use by the NAC in a closed ritual setting was ‘far removed from the irresponsible and unrestricted use of unlawful drugs’ (ibid: Para 913). The implication that peyote use is not unlawful, irresponsible, or recreational suggests that Rastafarianism was viewed as no more than a yardstick through which to assess the reasonableness of other religious liberties claims. The contrasting judicial discourse in *People v. Woody* (1964: Para 721), an early US case exemplifies this cultural preference. The court found that peyote use was at the ‘theological heart of the defendant’s religious practices’, facilitating ‘familial and social bonds’ through allowing NAC worshippers to ‘experience the deity’. This rare example of positive judicial discourse, contemplating the religious and cultural benefits peyote use holds for the NAC, yet again reiterates Hulsether’s (2005: 493) observation that cultural
difference is perceived and afforded to ‘the noble but doomed ways of exotic others’. One of the ways the US judiciary justifies this stance is to emphasise the special duty the US has to protect the integrity of Native Americans (State v. McBride (1989)). As previously highlighted, much like with the existence of the UN drug conventions, judicial decisions are clearly shaped by a particular cultural, historical and political paradigm.

Indeed, this potentially forms a key explanation as to why the US Supreme Court in the later case of Gonzales v. O Centro Espírito Beneficente Uniao do Vegetal (2006) (hereafter Gonzales) allowed members of a New Mexican branch of a Brazilian church, the União do Vegetal (hereafter the UDV), to hold an exemption permitting them to consume ayahuasca tea, a psychoactive brew containing the controlled compound DMT. At the time this psychoactive and its religious/cultural elements were relatively unfamiliar in the western world. Labate and Feeney (2012) observe that the foreignness of this religious practice may have provided a degree of deference to the principle of religious liberty. They further observe that there would have been less concern of diversion into the illicit market than with cannabis here (ibid), since cannabis is the most widely used illicit drug by the global counterculture (UNODC, 2012). This serves as another reason for the differential treatment between the Rastafari and the NAC (See State v. McBride, 1989), despite the fact that this logic fails to value or appreciate the significance of the human right to religion within a broader context (Tsakyrakis, 2009).

In any event, the restrictions contained within the Gonzales (2006) injunction, as discussed in Section 5.3, serve to counter such diversion arguments and the implications this has for health and safety etc. Thus, the binary between the State and the UDV is balanced more fairly since both parties’ interests have been effected.

Wright (2007) disagrees with the US Supreme court’s verdict, through arguing that if similar groups gained a religious exemption, then this could seriously undermine the operation of the US’s facially neutral drug laws. Wright (2007: 1002) was no doubt correct in her assertions that such decisions would have a cumulative impact upon precedent, because if many other related groups were to receive exemptions- this could potentially eviscerate the CSA- a US statute containing provisions similar to the UK’s MDA 1971. Her reasoning rests on the assumption that prohibitionist drug laws are undermined if judiciaries can declare psychoactive usage to be safe in some contexts, but not in others (ibid). But for the author, legal acknowledgment which fully
contextualises psychoactive usage, is exactly why Gonzales decision should stand. Although the author fundamentally disagrees with Wright (2007) on the outcome of Gonzales (2006), her impassioned argument rests upon the same shared belief in the potential of case law to effect change and/or influence drug policies. Recent cases in the UK, the Netherlands, Italy, Spain and France have all considered the religious rights of the Santo Daime (another Brazilian religion organised around the consumption of ayahuasca) and/or the UDV to consume this psychoactive; thus substantiating Wright’s (2007) predictions. Ayahuasca is a psychedelic brew made out of the Banisteriopsis caapi vine and it is often combined with other plants which contain the psychoactive DMT compound (For more detail See Chapter 4, Section 4.3.1). Unsurprisingly, the UK has yet to find in favour of an ayahuasca using defendant, as it applied the reasoning discussed in Taylor to R v. Aziz (2012), to hold that the limitations contained within article 9(2) effectively restricted the defendant’s human rights. Though, the UK takes a more punitive approach, the fact that these cases have been heard at all in Europe gives credence to the argument that human psychoactive usage is occurring in an ever increasing globalised context (Courtwright, 2002). The internationalisation of ayahuasca in particular has been a topical subject within the drug policy sphere in recent years (See Tupper, 2008; Labate and Jungaberle, 2011; The World Ayahuasca Conference, 2014), as has the acknowledgement that ayahuasca usage extends beyond a religious setting, as it is enmeshed within an encompassing medicinal, spiritual and cultural context as well (Labate and Feeney, 2012; Blainey, 2015).

Although the author has focussed extensively on religious rights to use cannabis, ayahuasca and to a lesser extent peyote, a reminder should be made at this point that these substances serve only to demonstrate the author’s central aim of highlighting how a human rights lens can improve the drug control framework. The case law analysis has thus far focused on drug use which could be protected under the auspices of religious freedom, since as explained in Section 5.1, the human right to religion is typically protected more than human rights to manifest a ‘belief’, a philosophy, or human rights to freedom of thought. This perennial weakness within the human rights framework is the reason why some cases brought legal action, or else compiled their defence on religious grounds, when the case facts suggest that their psychoactive usage was mandated by a much broader conception of ‘religion’ than is currently applied in practice. In fact, human rights to manifest a belief or a philosophy, or rights to freedom...
of thought could all be applicable to the following cases, as well as employing a broader conception of what should constitute religious freedom in relation to psychoactive use.

5.2.3 Beyond religious freedom: Case law which enmeshes human rights to freedom of belief, freedom of thought and the notion of cognitive liberty

As previously explicated, the UK Williamson (2005) case notes that primary regard should be had for the subjective experience the individual attaches to their religion, as opposed to opting for any externalist conception of how religions should be conceived. Dworkin (2013: 110-116) in particular takes umbrage with the judicial preference for theistic religions, as he considers that it is difficult, nigh on impossible, to find a principled basis for confining a human right to a theistic religion. He argues for a more general right to ‘ethical independence’ whereby people are free to express and act upon profound convictions, which can be limited by the government to prevent harm (ibid: 130-131). Though freedom of religion jurisprudence is aware of the dilemma posed between being either too exclusionary, or else expanding the concept beyond any workable scope (Horwitz, 2014), Dworkin’s expansion of religion should nevertheless be welcomed within the drug policy sphere, especially, if we are to accept that religious rights to consume psychoactives are enmeshed with rights to health, cultural rights, and rights to manifest beliefs or human rights to free thought. The globalisation of shamanic practices in particular is a game changer, as it poses problems for contemporary human rights and drug policy laws. The Organisation for Security and Co-operation in Europe (hereafter, the OSCE), to which the UK is a party, is the largest regional security organisation which encompasses environmental, economic, politico-military, and human aspects (OSCE, n.d.). While any decisions made are not legally binding, the organisation runs on a political consensus (ibid). The OSCE have recently recognised issues pertaining to the globalisation of shamanic practices through hosting an event in conjunction with SOTERIA International, an organisation which promotes spiritual human rights. This event asks: ‘Does European law violate the rights of shamans?’ and ‘Are contemporary laws still based in an out dated separation of body and soul, science and religion?’ (SOTERIA International, 2014: n.p.).

So far this thesis has demonstrated that human rights predominantly afford protection to a more arbitrary conception of religion, a more externalist conception of health, and the rights of small, often historically vulnerable, established groups within the drug
policy sphere. Yet, the complex reality of human drug use calls for the human rights framework to adapt the protections it can afford to the individual here. For instance, Blainey (2015: 287) observes that the Santo Daime consider ayahuasca use as a form of ‘entheogenic therapy’. The definition of an entheogen is to generate ‘the divine within’ (Oxford Dictionaries, n.d.: n.p.). Accordingly, this form of therapy is thought to interweave health, spirituality, religion and culture, as shamanic traditions in particular regard life as a whole, and consume psychoactives in a way which engenders a dialogue between spiritual and medical-scientific health and knowledge. Ayahuasca is just one of the many psychoactives that is consumed within these indigenous and newer syncretic settings (See Labate and MacRae, 2010; Labate and Jungaberle, 2011; Blainey 2013). Others (non-exhaustively) include: cannabis, psilocybin, peyote and the iboga root (See McKenna, 1992; Blainey, 2014). As alluded to previously, the consumption of cannabis by the Rastafari serves a similar entheogenic purpose to that of older ancient Hindu and Buddhist traditions (Barratt, 1977). Indeed, a more recent UK Rastafari case, R v. John-Lewis (2013), centred upon the defendant’s medicinal use of cannabis as well as his religious use. However, any entheogenic approaches which cater for enmeshed and multiple contexts of use, clearly conflict with mainstream Euro-American laws which, in practice, generally afford protection to isolated, arbitrary contexts of use. Narrow conceptions of religion have been elevated here, since human rights fail to uphold their interdependent, interrelated and indivisible goals (World Conference on Human Rights, 1993; See also Chapter 3).

The UN’s Human Rights Committee in MAB, WAT, J-AYT v. Canada (1994) demonstrates the fallibility of human rights, as they are applied internationally within the drug policy field. This case involved leaders of the ‘Assembly of the Church of the Universe’ whose beliefs involved worshipping and consuming cannabis as the ‘sacrament’ of the church. The Committee refused to accept the worshipping of cannabis as a philosophical belief at a basic definitional level, noting that: ‘a belief consisting primarily or exclusively in the worship and distribution of a narcotic drug cannot conceivably be brought within the scope of Article 18 ICCPR’ (ibid: Para 4.2). Taylor (2005) finds this decision troubling since it appears that the Committee concluded the belief in question was incapable of protection, as opposed to questioning the genuineness of the defendant’s beliefs. Scepticism over the belief could be inferred through the use of inverted commas, coupled with the argument that the ‘belief’ was no
more than a device for legitimising criminal behaviour (ibid). Though as Sandberg (2011) notes when reiterating the analysis in Williamson (2005): it is not for the courts to judge the validity of a faith, rather they should concern themselves with whether the belief was made in good faith, or better yet conduct a straightforward analysis as to whether the restriction of a belief (religious or not), is justified. Given the increasing infiltration of certain psychoactives into the mainstream westernised conscience (See above and for more detail see Section 5.3), it is arguably more prudent that such cases satisfy the definitional stages outright. Consequently, judicial efforts can then focus on analysing the fundamental moral issues such cases produce.

The much earlier case of Kuch v. US (1968) elicits such issues given the provocative facts of the case. The defendant was indicted for obtaining and transferring cannabis and for the unlawful sale, delivery and possession of LSD. She argued that she was an ordained minister of the Neo-American Church, an incorporated religion in the New York State, which advocated the use of psychedelics as a spiritual endeavour. The consumption of psychedelics were regarded as sacramental foods and as manifestations of ‘the grace of god’, and as such it was contended that they should belong to everyone (ibid: Para 443). Given the centrality of the Churches practice, one prong of the US’s manifestation test is clearly satisfied. However, the churches motto was ‘victory over horseshit’; its official hymns were ‘puff the magic dragon’ and ‘row row row your boat’; it was headed by Chief Boo Hoo and its symbol was a three-eyed toad (ibid: 444-445). Accordingly, the Judge felt the Church was mocking established institutions, and he declined to accept it as a religion within the context of the first amendment (ibid: 445). Judge Gesell situated his reasoning at the time through commenting that ‘A nihilistic, agnostic and anti-establishment attitude exists’. The late 1960s was historically a time of great social and political change given the rise of the counterculture, the proliferation of civil rights movements, and the growing demands for individual freedom. The author contends that cases like Kuch therefore exemplify the partisan approach between the State and the individual to the greatest degree. While the Kuch case produces key moral and philosophical questions such as what can constitute a bona fide belief system, such issues run deeper since the human right to freedom of expression (Article 19 UDHR; Article 10 ECHR) could arguably have been utilised here, to secure rights of defendant’s like Kuch to actually throw down the gauntlet and legitimately mock these established institutions. Arguably, it is through
testing or ‘mocking’ the status quo that broader conflicts between the State and the individual can be more clearly illuminated.

It is perhaps unfortunate then that the prominent psychedelic advocate, Dr Timothy Leary, failed to draw upon either his membership in the Neo-American Church, or on his own religion, the ‘League of Spiritual Discovery’, when conducting his defence for the possession and trafficking of cannabis in 1967. These actions were deemed to be a federal offence at the time under the Marihuana Tax Act, (1937). Leary sought to base his defence on a more established conception of religion, and the then recent People v. Woody (1964) ruling, through arguing that as a practicing Hindu the cannabis was used as a spiritual tenet of his religion. This attempt to warp the consumption of psychedelics into an act endorsed by a well-known religion, reiterates the failure of the human rights system to fully appreciate psychoactive usage as part of a broader non-theistic belief system, or as the manifestation of a philosophy; in line with James’s (1961) or Dworkin’s (2013) broader conception. Though there has been progression at the definitional stage for secular belief systems (See Williamson, 2005; Hanes, 2007), any resulting judicial balancing act can potentially be even more politically charged and transparent, as demonstrated below.

As well as the religious challenges, Leary’s legal team additionally put forth a more secular argument that as an expert on various psychoactives, Leary was entitled to experiment as he saw fit (Lander, 2014). The discourse embraced here facilitated a broader notion of religion: ‘as a matter of political morality and philosophical depth’ (Dworkin, 2013: 109). When commenting on the case Leary declared his motives to be ‘clearly spiritual, interior and not ulterior’ (Conners, 2010: 216-217). He passionately observed that: ‘Liberty was at stake here, freedom to access your own body and brain, a right I believe was protected by the Constitution…’ (Leary, 1990: 239). For Boire (2000), a major proponent of cognitive liberty, any prohibition on the formation of certain mind states, which are engendered by the use of psychoactives, effectively strangles the free mind itself. Thus, ‘free expression is made meaningless’ (ibid: 11). For Boire (1999/2000; 2000; 2003a 2003b), the freedom of thought is intrinsic to all other rights. Boire (1999/2000: 12) describes the concept of cognitive liberty, which is underpinned by the freedom of thought, as follows:
'The right to control one’s own consciousness is the quintessence of freedom. If freedom is to mean anything, it must mean that each person has an inviolable right to think for him or herself. It must mean, at a minimum that each person is free to direct one’s own consciousness; one’s own underlying mental processes, and one’s beliefs, opinions and worldview. This is self-evident and axiomatic.’

When commenting on the operation of the US legal system, Boire (2003b) notes that the first amendment, which protects rights to free speech, the free exercise of religion, free association, free press etc. are all moot if the necessary mentation or thought processes which underlies these actions is constrained by the government. Indeed, through prohibiting the ‘freedom to think as you will and speak as you think’ (Boire, 2003b citing Justice Brandeis in Whitney v. California (1927)), all other forms of freedom are lost since ‘…freedom of thought…is the matrix, the indispensable condition, of nearly every other form of freedom’ (Boire, 2003b citing Justice Cardozo in Palko v. Connecticut (1937)). Thus, by failing to rely upon his own conception of religion, and the (in)famous ‘tune on tune in drop out’ mantra, the case of Leary v. US (1967) exemplifies a preference for certain, more conventional, constructions of rights and freedoms over others. Leary (1983: 253) himself was disappointed in the way in which his mantra was predominately construed to mean: ‘get stoned and abandon all constructive activity’, since its original conception had distinctly religious undertones. According to Leary (1983) the mantra was concerned with finding the deepest nature of things, through embracing various levels of consciousness and interacting harmoniously with the world (ibid).

Regardless, the court utilised this mantra and the resulting sensationalist discourse from the media, to emphasise the dangerous infiltration of the psychedelic counter-culture (Leary v. US, 1967). The fact that Leary was originally sentenced to 30 years imprisonment and $30,000 fine for less than half an ounce of cannabis, highlights the substantial threat the State felt by this movement. This threat fostered the political environment necessary to cement the Single Convention, and it paved the way for the two subsequent drug conventions; thus producing domestic legislation across the globe to fully give effect to them (Fortson, 2011). Although Leary’s conviction was eventually overturned on the unrelated argument that the Marijuana Tax Act (1937) was unconstitutional, this ruling paved the way for the formation of the CSA; a piece of US domestic legislation which mirrors much of the international drug control
framework and the MDA, 1971. This case and its subsequent appeal was heard at the very precipice of Nixon’s ‘War on drugs’ (National Public Radio: 2007: n.p.). It therefore demonstrates the partisan approach between the State and the individual at its extreme; which in the author’s view highlights some of the core moral and philosophical issues to their greatest degree. This demarcation is further exacerbated by the secular arguments Leary’s legal team put forward since they allude to the notion of cognitive liberty and freedom of thought. If we are to accept that the fulfilment all other rights and freedoms are premised on this idea, then this notion clearly takes the binary between the State and the individual to its zenith; by questioning what it means to be truly free.

While such arguments were only alluded to in Leary v. US (1967), the UK case of R v. Hardison (2005) attempted to thoroughly examine and unpack these concepts. Hardison was charged under the MDA for producing and supplying MDMA, DMT, 2C-B, LSD and mescaline. He sought to argue that his right to freedom of thought was infringed by the MDA, and as such it should be read in such a way to make it compatible with the ECHR, otherwise a declaration of incompatibility was required (Section 4, HRA). He relied heavily upon Boire’s work when constructing this defence, and he was influenced by the Center for Cognitive Liberty and Ethics (http://www.cognitiveliberty.org/). Hardison argued that the prohibition of these substances was based upon an incomplete understanding of human nature, as humans have consumed a variety of psychoactives since the dawn of time (For more detail see Chapter 1). Employing Boire’s (2000: Para 7) reasoning, Hardison sought to assert that such laws ‘manipulate consciousness at it’s very roots’, since certain mental landscapes are effectively off limits through our inability to legally use certain psychoactives to access them. Walsh (2014: 218) eloquently surmises this restriction by equating the situation to States: ‘inducing a kind of psychopharmacological North Korea’. Indeed, by asserting that our brain is no longer ours to control (Russell, 1998), the cognitive liberty argument and rights to freedom of thought move more powerfully beyond human rights to religious freedom, beliefs or culture, since this notion ultimately seeks to maximise everyone’s autonomy; as opposed to offering exemptions for a select few. It is arguably for this reason Walsh (2014) considers the cognitive liberty argument to be one which threatens the very structure of global prohibition, since it moves beyond protecting arbitrary categorisations of therapeutic or religious drug use. Accordingly,
the philosophical and/or political matters this case produced merited a thorough analysis.

However, somewhat predictably, Judge Niblett rejected Hardison’s logic and his Article 9 claim which incorporates the freedom of thought, as he considered that the court was bound by *Taylor*, despite that fact that the judicial reasoning process was arguably lacking here (See Section 5.2.1.1). Judge Niblett believed Hardison’s arguments went beyond his judicial remit:

‘I am the judge of the law. It is no part of my function, or any court’s function, to engage in philosophical or political debate, or to make decisions based upon arguments relating to the efficacy, or otherwise, of any particular enactment of the legislature. Nor is it my function to make moral judgments one way or the other’ (Judge Niblett as cited in *R v. Hardison*, Lewes Crown Court, January 2005, unreported).

Though to find for Hardison on these grounds may well have conflicted with the principle of parliamentary sovereignty and stretched the very limits of the court’s powers, the failure to engage in any moral or philosophical debate is contrary to the *trias politica* principle and the rule of law. While the UK judiciary have no power to strike down primary legislation, at the very least Judge Niblett could have openly spelled out the moral issues and values associated with the freedom of thought argument; and thus contextualised these in line with the arguments put forth by Alder (2006), Beck (2008), Buchanan (2008) and Tsakyrakis (2009), as highlighted throughout Chapters 4 and 5. For Walsh (2014: 224) the typical judicial ‘worst case scenario’ constructions to justify engaging the qualifications specified in Article 9(2), hollows out the protection that Article 9 should afford. She considers the usual argument that all psychoactives are criminogenic, and thus pose public safety and health dangers to be especially fallible where psychedelics are concerned (ibid). Psychedelics are often excluded from screenings at various points in the criminal justice system (unlike other Class A drugs), and Nutt et al’s (2010) prominent matrix of harm reveals the highest discrepancy between the harms posed by psychedelics to the individual and society, and their criminal classification. Hence, it is worthwhile suggesting that the judiciary should examine any case whereby human rights ideals conflict with drug policies according to their own unique merits. The dissenting judgments in *Prince* (2002) revealed an appreciation for this conflict, since the central question posed was
how much trouble the State was expected to go to in order to accommodate the human rights of psychoactive users (ibid: Para. 149).

If Judge Niblett were to likewise address such questions, then as previously explicated, the cognitive liberty argument takes this conflict to its zenith. As Walsh (2014) observes, through limiting our choices, drug prohibition laws close off our capacity to experience certain mind states, which then limits who we can become. The Buddha (translated by Müller and Fausböll, 1881: 3) eloquently confirms: ‘All we are is the result of what we have thought. The mind is everything. What we think we become’. Such a profound conviction from a prominent religious figure no doubt introduces an element of circularity to this discussion. Indeed, if religion is to truly embrace: ‘one’s understanding of the world, of one’s part in it’ (Walsh, 2014: 212 paraphrasing James, 1961), then surely this should encompass the ability to access certain knowledge as is engendered through varying states of consciousness? Though Section 4.2 ultimately demonstrates it is more pragmatic to argue for the freedom of religion limb in Article 9, many of the cases discussed highlight that the posited divisions between religion, belief, free thought, spirituality, cultural practices and health, do not reflect the complexity of lived experience. Only the notion of cognitive liberty gives credence to the complexity of human psychoactive usage, but defendants have been reluctant to place such arguments before the court, given the short thrift which is afforded to them.

While international judiciaries have been more willing to consider the conflict between the State and the individual when drug laws conflict with human rights, more often than not, a hegemonic narrative and a commitment to arbitrary conceptualisation of religion prevails here. The UK largely fail to address this binary, deferring instead to the international drug conventions. This section has sought to emphasise the failings of both the international and domestic judiciaries, and illustrates how human rights, (most notably the right to freedom of thought), could be utilised to better appreciate the enmeshed contexts of use and broader conceptualisations of religion etc. What is more, the author posits that a bona fide adjudication process also entails adequately weighing up the benefits which can be derived from psychoactives; as opposed to solely accentuating their harms. Though positive judicial discourse can be found in a few cases like People v. Woody (1964) and Prince (2002), for the most part any of the benefits derived were ignored. Accordingly, any legitimate balancing exercise requires the courts to recognise the positive impact psychoactive usage can have. Tupper’s (2002;
work in particular illustrates the way in which psychedelics can be used as ‘cognitive tools’, or else he stresses the importance of pleasure from psychoactive usage, and the notion of ‘benefit maximisation’. These concepts were explored in Section 4.3 concerning the regulatory implications from a health rights perspective, and they will be thoroughly documented in the latter section of this chapter; which considers the regulatory implications from a religious and related human rights perspective.

5.3 Regulatory implications from a religious and related human rights perspective

Much like Section 4.3, this section will initially explore how the case law has influenced drug policies relating to the provision of certain psychoactives for religious purposes, and it will consider how a bona fide human rights perspective could improve the regulatory exemptions which currently exist (See Section 5.3.1). It will also emphasise the hypocrisy in the judicial decisions which allow for protections to be afforded to certain religious drug use but not others. Section 5.3.1 will additionally note how the regulatory exemptions can be formed from a narrow conceptualisation of a religious practice, when in reality they are capable of reflecting the complexities of human lived experience. Section 5.3.2 will go on to consider how a human rights lens is capable of accommodating much broader regulatory implications, and it will use the notion of cognitive liberty to demonstrate how the perspective of human rights is capable of maximising everyone’s autonomy, addressing the State/individual binary, and emphasising the benefits and mitigating the risks associated with psychoactive use. The chapter will offer a more comprehensive understanding of how ‘feedback loops’ (introduced in Chapter 4), could be utilised to alter the arbitrary prohibitionist framework. This section will ultimately serve as a small example of the regulatory implications resulting from a more holistic understanding of human psychoactive use.

5.3.1 Case law which constitutes and is constitutive of regulatory policies

Successful human rights case law which has facilitated and contributed towards the creation of regulatory exemptions on religious grounds, primarily concern the use of peyote and ayahuasca. Ayahuasca in particular is interesting, to the extent that the principle of religious liberty and the case law has influenced regulatory policies here across the globe. A Peyote exemption on the other hand is largely confined to American Indians and to the NAC members in the US (Feeney, 2014). This exemption will be explored first in order to compare and contrast how a religious exemption can operate
in an isolated setting, at the height of the so called ‘war on drugs’. The ayahuasca exemptions in contrast are a relatively recent phenomena, occurring on a global level. Therefore, these will be explored in order to gauge whether any of the policies could apply to other psychoactives (i.e. cannabis) used in a religious setting or a related context.

The American Indians first received a federal exemption for their use of peyote in 1965, only one year after the Single Convention first entered into force. Thus, at a time when the US were feeling most threatened by the use of mind-altering psychoactives, Congress nevertheless recognised that an exemption was required, due in part to the People v. Woody (1964) ruling and the free exercise of religion clause of the first amendment. As previously discussed, the UN also exempts certain plants used traditionally for ‘magical or religious rites’ (Article 32, the 1971 Convention), thus recognising relatively early on in the formation of the global prohibitionist regime, the significance certain psychoactives attain in a religious setting. Though peyote is not scheduled internationally, the Drug Abuse Control Amendments (hereafter the DACA) in 1965 required the US Department of Health Education and Welfare (hereafter the HEW) to promulgate an exemption. The wording employed was broad and ambiguous referring vaguely to members of the NAC; this became a point of contention in subsequent legal disputes (Feeney, 2014). For years the case law has been preoccupied with the limits of the exemption, as the DEA have consistently interpreted the it to be limited to members of federally recognised tribes who can claim a minimum of 25% Indian blood (Peyote Way Church of God v. Smith, 1983; Peyote Way Church of God v. Thornburgh, 1991; United States v. Boyll, 1991; United States v. Warner, 1984). Several commentators voiced concern and were critical of the judiciaries’ application of this rule, observing the link between biology and culture to be a racist notion, excluding many ‘cultural’ Indians who may have historical, cultural or religious ties to the NAC (Russell, 2005; Spruhan, 2006; Feeney, 2014).

Though these criticisms have been mitigated somewhat through the enactment of the Religious Freedom Restoration Act (hereafter the RFRA) (1993) and the American Indian Religious Freedom Act Amendments of 1994 (hereafter the AIRFAA), it is interesting that the US governments and the courts have traditionally placed such emphasis on whether an individual meets the (previously unduly arbitrary) criteria to afford them a religious exemption. The tone set by such a precedent is arguably
reflective of the judicial preoccupation with definitional tests, as opposed to focusing on the crux of the issue: whether interference with an individual’s religious or any related human rights is justified. Indeed, the actual exemption itself allows for the effectively unlimited use of peyote, since the only restrictions relate to its manufacture (the CSA (21 C.F.R. § 1307.31 [1990])). Perhaps judicial discussions should have likewise focused on the crux of the matter and the nature of the exemption itself? However, the somewhat surprising judicial acceptance of the broad nature of the NAC’s religion is possibly why the regulatory exemption is so unrestricted. For instance, the US judiciaries and the government noted very early on that American Indians regard ‘peyote as a deity’ (DACA Hearings, 1970) and that the plant carries ‘a positive force’ capable of strengthening ‘strong familial bonds’ (People v. Woody, 1964: 817). Thus, the discourse adopts an unusual spiritual quality, which mirrors the reality of the NAC’s peyote usage. The UK in contrast has no religious exemptions for psychoactive use, and the UK typically fails to differentiate or afford protection to any minority group seeking to use psychoactives in a rights based context (See Andrews, 2004; Quayle, 2005; Altham, 2006; Taylor, 2001; Also see Home Office ban on Khat: Birrell, 2014). The author has documented elsewhere that the UK is at the very least consistent in committing to this narrow approach (Bone, 2014b; Bone and Seddon, 2015; See also Chapter 4).

The fact that any minority group is awarded a regulatory exemption on a religious basis harks back to the fundamental dilemma exposed throughout this chapter and within religious jurisprudence: why are some individuals afforded rights to consume psychoactives for religious or related purposes and not others, particularly if just as much significance is accorded to their use (Walsh, 2014)? This dilemma is illuminated in the ayahuasca cases, since its use in a religious, cultural, spiritual, therapeutic or otherwise purposeful context has expanded on a global level. As previously discussed, the Gonzales (2006) case in the US was a game changer as it set a precedent for a largely unknown non-theistic ‘religion’ to successfully rely upon the RFRA to assert their rights to consume ayahuasca, leaving the courts to balance the individual interests against a State’s when determining the level of harm caused by a controlled drug on a case by case basis (via the Compelling Interest test) (Wright, 2007). Unlike with the American Indians, there was no ‘special duty’ to the UDV (State v. McBride, 1989), and no sensitivities or allowances in light of a previously conflicting historical, cultural
or political paradigm. Though, as discussed the foreignness of the UDV’s practice may have afforded an element of protection (Labate and Feeney, 2012). The UDV and the DEA finally reached an agreement on the handling of an exemption in July 2010 which defined how ayahuasca for UDV ceremonies in the US must be handled (O Centro Espirita Beneficiente Uniao do Vegetal v. Holder, 2010). In very general terms, the injunction stipulates that the UDV must import its tea properly, its use must be limited to church members, susceptible members must be warned about the effects of the drug, and if the government believe that the substance could negatively affect church members- or that the DMT levels were too high- then they could apply for an ‘expedited determination’ as to whether the churches’ license should be suspended or removed (ibid). The author posits that these restrictions serve to balance the binary between the State and the UDV more fairly, since both parties’ interests have been effected. Arguably the restrictions answer health and safety, public health, public order concerns; those which, in a UK context, would be articulated under Article 9(2) ECHR. Such regulations also emphasise the correlativity of the rights and duties doctrine- a doctrine often forgotten in practice given the rise of individualism- but it is nevertheless capable of alleviating or reconfiguring the binary, as discussed in Chapter 2.

While the UK again gave short thrift to the ayahuasca challenge presented by the defendant in Aziz (2012), the European situation highlights a much sketchier regulatory picture. Feeney and Labate (2013) observe there to be a ‘patchwork of regulatory schemes’ throughout Europe. Since the 1980s variations of Brazilian ayahuasca religions such as the Santo Daime of the UDV have appeared in Europe. Though ayahuasca religious use has been accepted in some countries such as Spain and the Netherlands, as it was not deemed to pose a sufficient risk to public health and safety, and Spain have well-developed privacy laws, in Germany (much like the UK), the fact it contained DMT, was sufficient evidence that ayahuasca posed a public health threat (Labate and Feeney, 2012). According to Labate and Feeney (ibid), these courts (including the UK) would have benefited from undertaking a bio-psychosocial approach, because the unique social setting in which ayahuasca is consumed, calls for soliciting input from affected groups, as well as emphasising anthropological considerations when weighing up ‘harm’. Indeed, this informed CONAD’s (Conselho Nacional de Politicas sobre Drogas) Resolution to regulate ayahuasca use in Brazil (Resolucao n. 01, 2010). The rules norms and ethical principles are mainly moral,
emphasising a less invasive form of social control (ibid). Although, there are prohibitions on commercial distribution, tourism, advertisement and the therapeutic use of ayahuasca mitigate against harms (ibid). While these regulations are largely based on a contextualised understanding of ayahuasca use, the regulations apply only to religious rituals, which suggest a lack of appreciation for the enmeshed contexts for ayahuasca use, as previously discussed (See Section 5.2.3). In fact, the religious recognition for this practice has been hotly contested across Europe in particular (Feeney and Labate, 2013), since its shamanic nature has led several jurisdictions (most notably France- see the About-Picard Law, 2001) to question its religious status.

For the purpose of completeness, the legal recognition of the Rastafari religion has rarely been questioned in recent years (Bone, 2014a). Yet, in stark contrast there are no codified regulatory exemptions in relation to their religious cannabis use. While the author has explored the difference in the judicial treatment accorded to the Rastafari elsewhere (ibid), in relation to regulatory policies, Feeney (2014) argues that the lack of any religious exemption is due to the fact that cannabis is a highly marketable commodity. In fact, reflecting back on the health case law, one of the primary reasons *Raich’s* (2005) claim to use cannabis medicinally failed was due to the economic ramifications at federal level, if States allowed individuals to cultivate their own cannabis. The popularity of this drug emphasises that in practice it is not religious or any related human rights based concerns which influence regulatory exemptions. Rather, a particular historical, cultural and political paradigm is always in play, and as noted in Chapter 3, the global prohibitionist regime is shaped in large part by vested economic interests. A human rights lens arguably sheds light on this state of affairs as it is contrastingly concerned with human beings and understanding and responding to the human condition. Accordingly, much broader regulatory implications can result once State’s acknowledge the existence of the State/individual binary and appreciate the often enmeshed contexts for use.

### 5.3.2 How a human rights lens facilitates broader regulatory implications

If we are to accept psychoactive usage as a complex human phenomenon, then it follows that regulatory policies should be similarly broad when responding to the human condition from a rights orientated perspective. As previously explained, the notion of cognitive liberty gives credence to this complexity, as it does not create
divisions between religion, belief, spirituality, pleasure, culture and health, which arbitrary conceptualisations of human rights can foster. If one were to accept a human right to consume psychoactives under the freedom of thought limb of Article 9, then more inventive regulatory policies could emerge, ones which are not tied to the criminal law and the global prohibitionist regime and which instead seek to maximise everyone’s autonomy. Although of course, in keeping with the need for social cohesion, any regulatory policies would need to embrace the correlative of the rights and duties doctrine in a way which maximises the benefits derived from psychoactives and minimises the risks. While the regulatory exemptions facilitated by the case law seek to effect this through alleviating the binary between the State and the individual, for the most part, the case law repeatedly ignores the positive impacts or any benefits which can be derived from using psychoactives. Accordingly, this section will initially discuss how regulatory policies could be shaped around the concept of ‘benefit maximisation’ to better respond to the complex reality of drug use.

Tupper (2008: 297) first coined the term ‘benefit maximisation’ when questioning ‘the social construction of ayahuasca as a medicine, a sacrament and a “plant teacher”’ in an increasingly globalised context. Though harm reduction comprises as standard and useful philosophical standpoint within the drug policy sphere (see Chapter 2), Tupper (2008) argues that the globalization of this substance and its medicinal, cultural and spiritual usage warrants a re-framing of policy agendas, in order for them to accept the corollary concept of ‘benefit maximisation’. As noted in the introduction, while the westernised concept of a ‘drug’ is premised upon a rationalist/positivist ontology which constructs psychoactives as chemicals, and their effects as merely mechanistic (Reinarman and Levine, 1997) indigenous and shamanic conceptualisations of ayahuasca challenge this pharmacological determinism. These conceptualisations regard such substances as ‘tools- ancient technologies for altering consciousness’ (Tupper, 2008: 301). According to Tupper (ibid), the tool metaphor better accounts for benefits and not just the risks associated which ayahuasca, which would be a harm reductionist’s sole focal point. He notes that in order to move beyond a traditional harm reductionist approach which could involve: controlling the set and setting, discouraging individuals with underlying psychiatric disorders, or from engaging in risky activities while ingesting the brew etc. a benefit maximisation approach would involve facilitating legitimate access to ayahuasca in ceremonial settings. While the human
rights case law has facilitated a regulatory exemption in Gonzales, which seeks to maximise the benefits derived by ensuring the drug conforms to a specified purity, combined with the CONAD’s resolution which researches and contextualises social and anthropological contexts of use, most jurisdictions fail to give credence to the ‘tool’ metaphor. Thereby they operate within a narrow metaphysical and sociological plane of harm.

Tupper’s cognitive tool metaphor and the notion of benefit maximisation arguably feed into other psychoactives capable of altering one’s consciousness. Blainey (2013) notes that ayahuasca and other psychedelics unlock solutions to psychophysical and existential problems in people’s lives. In repeating an analogy originally offered by Watts (1965: 25-26) and Grof (1976: 32-33), Richards (2005: 378) renders psychedelics as akin to microscopes or telescopes, believing them to be ‘tools’ to access otherwise inaccessible domains of existence. Blainey (2015: 295) coins the term ‘suiscope’ (Latin sui- [“oneself”] and Greek – Skopein [“to look at”]) to best categorise the usage of psychedelics in this way. While Chapter 4 has noted the therapeutic value attached to such substances, this chapter thoroughly enmeshes the medicinal model given the potential for these practices to ‘cure at the psychospiritual level rather than through the mechanisms of physiology’ (ibid: 294). The freedom of thought limb within Article 9 ECHR, clearly holds a relevance in the formation of regulatory polices informed through a human rights lens. For Blainey (2015), ethnographic and anthropological evidence ought to be considered when constructing government controls over such substances which have been introduced in Euro-American culture.

Of course, the concept of benefit maximisation extends beyond the enmeshed contexts for psychedelic usage in a traditional or a syncretic setting. While the author, Tupper (2008), Richards (2005) and Blainey (2015) recognise that controls and restrictions ought to be in place to prevent abuse, in a similar vein to those contained in the Gonzales exemption (2010) or the CONAD Resolution (2010), conceptualising psychoactives as ‘tools’ necessitates a broad re-framing of regulatory regimes to enhance ‘benefits’ as an outcome. To reiterate the importance of ‘pleasure’ once more then, Ritter (2014) acknowledges that the notion of pleasure is marginalised particularly in relation to new regulatory systems for New Psychoactive Substances (NPS). Current regulatory regimes fail to balance a risk profile against a benefit profile; facilitating regimes which are ill-suited to their task as they ignore one half of the equation- ‘efficacy or benefit’
Ritter (ibid) further cites Reuter (2011: 4) to argue that: “unless the public can be persuaded to view the pleasures or other benefits from these substances as potential gains to society” it is unlikely that regulatory schemes will be able to resolve the bias of decision-makers towards prohibition’. A human rights lens which responds to the internalist, social constructionist accounts of the individual is capable of bringing pleasure into public debates and policy analyses, which for Ritter (2014) and more topical regulatory contexts, is essential to ensure their efficacy.

This discussion demonstrates how a human rights lens can move beyond narrow conceptualisations of religion, and in incorporating the freedom of thought limb, regulatory ideas can result which maximise benefits and freedoms for all, rather than for an isolated few. As observed in Chapter 2, the fundamental reasoning behind why certain psychoactives are restricted or prohibited rests upon a societies’ morality and deontological reasoning, as opposed to being primarily based upon empirical measures of harm. Several commentators have noted that it is our cultural norms, our shared values and our culturally shaped emotions which substantially impact the domain of morality and the process of moral judgment (Haidt, Koller and Dias, 1993; Courtwright, 2002; Smail, 2008; See also Devlin (1959/1965). Accordingly, if regulatory regimes could be devised which impact our culture and our moral codes, such as acknowledging the benefits derived from substances as constituting potential gains to society, then policy makers would have more freedom to move beyond prohibitionist constructs. Indeed, a human rights lens, capable of responding to our changing conceptions of morality, has been shown to acknowledge both the efficacy of pleasure and the value attached to psychoactives as ‘cognitive tools’ (See above). Another way human rights can facilitate broader regulatory changes through potentially altering our morality and cultural perceptions of certain psychoactives, would be to incorporate ‘feedback loops’ into regulatory policies, in a similar manner to those discussed in Chapter 4 (See Leonti and Casu, 2013).

Just as ‘feedback loops’ can facilitate a more interconnected approach to health through embracing the field of ethnopharmacology, this concept can also appreciate that knowledge transmission is essential to attend to ‘moral experience, social relationships and culture at every level of scale’ (Feierman, Kleinman, Stewart, Farmer and Das, 2010: 126). According to Feierman et al (ibid) the challenge for global health is to make local knowledge salient and viable in public policies, since the present institutional
system acts as a barrier in the facilitation of local-global communication about values and implementation. For these authors, those with less power struggle to communicate their ideas in relation to health and well-being; detrimentally impacting knowledge flows in the global health arena (ibid). As previously explained, indigenous health and well-being and shamanic practices in particular are not as linear as western medicine, and incorporate broader notions of religion, the expansion of consciousness and spirituality into the healing experience too (Colomeda and Wenzel, 2000; Blainey, 2015). If a human rights perspective is to accept broader more enmeshed contexts for human psychoactive usage, then like Tupper (2008), Feierman et al (2010) and Blainey (2015), this author calls for more anthropological, ethnographical, qualitative and social sciences related approaches in order to inform drug policies, which respond to the human condition. Thereby, moving beyond arbitrary regulatory regimes and towards the broader category of ‘human flourishing’ (See Conclusion).

Though global alcohol and tobacco policies demonstrate the complexities of regulatory design, one could use the tobacco model in particular (FCTC) to demonstrate how regulatory policies can be socially cohesive at a global level, to ultimately promote public health goals. In order to put forth a new paradigm for regulating psychoactives, Seddon (2013) posits that policies ought to fundamentally question their goals. Though social scientists are considered to rarely engage in normative thinking (Braithwaite, 2000), a human rights perspective capable of: reflecting and constituting changing conceptions of morality, questioning what one ought to do and how one ought to live (O’Neill, 1996), dismantling the State/individual binary and understanding the human condition, can arguably build ‘serious normative thinking into our regulatory design right from the start’ (Seddon, 2013: 17). Much like the author then, Seddon (ibid: 17 citing Braithwaite, 2008: 199-207) notes that such designs should engage: ‘in a proper dialogue with citizens so that policy is the transparent outcome of deep contestation within deliberative democracies’. ‘Feedback loops’ would facilitate this regulatory goal and would embrace the universalist discourse of human rights which proposes that: ‘no-one is independent, no-one is superior and no-one has more rights than others’ (Colomeda and Wenzel, 2000: 254 citing Bretherton, 1996). Employing religious rights as conceptual starting points then, demonstrates how a human rights lens can respond to the complexities of psychoactive usage and related rights to health, spirituality,
culture, thought etc. which leads to potential policies with clear goals: to maximise the benefits and freedoms for all, and minimise the risks.

5.4 Conclusion

This chapter sought to demonstrate how religious rights could be used as conceptual starting points to improve the drug control framework in relation to the use of psychoactives. While a human rights lens can embrace a broad conception of religion, and related human rights to belief, spirituality, health and well-being, culture and thought; in practice the definitional tests and the case law demonstrate that human rights are often applied arbitrarily; serving only to protect the religious rights of an isolated few. Despite the compatibility of both the human rights and the drug control frameworks, a hegemonic narrative is found to pervade the drug control sphere, since the legislative texts and the case law conform to a particular cultural, historical, economic and political narrative, with a focus on ‘othering’ (Hulsether, 2005). Domestically, an even narrower approach is adopted since, (to the author’s knowledge), the UK judiciary has never found for an individual’s rights to use psychoactives on a religious basis. This state of affairs becomes even more severe when analysing case law which enmeshes human rights to spirituality, the freedom of belief, the freedom of thought and the notion of cognitive liberty. Both the international and domestic jurisdictions are largely unwilling to consider a broader context for human drug use. Through largely failing to conduct a bona fide adjudication process, judiciaries also fail to appreciate the benefits derived from psychoactives, as well as acknowledging the potential harms to society; which perpetuates the State/individual binary. The arguments put forth in the case law section informed potential regulatory policies which could result if State’s responded to a more holistic understanding of human drug use. The regulatory implications section analysed how current regulatory exemptions operated, as well as proposing new regulatory models which moved beyond the prohibitionist framework: recognising the benefits psychoactives could have in society and the often enmeshed contexts of use. Indeed, human rights to health and well-being can easily be embroiled in a religious rights context, since a human rights perspective is capable of responding to the complex phenomenon of human psychoactive use; though in practice this is rarely the case.
Conclusion

The thesis concludes that human rights can provide a new perspective on drug control and they can point to different ways of regulating drug consumption. Chapter 1 contextualises human rights and legitimises them as a valid concept, a feat which most researchers exploring the interplay between the human rights and drug control regimes fail to do. The conclusions drawn that human rights are pluralistically universal, malleable instruments capable of responding to human nature as a ‘social project more than a pre-social given’ (Donnelly, 2003: 14), substantiates their application to human psychoactive use. Indeed, the exploration of the origin and value of human drug use facilitates deeper insights into how social, cultural, political, economic and historic influences affect how we consume psychoactives. When this argument is combined with the commonality of human drug use across time and geographical space, a more convincing argument can be made that a human rights lens can reflect the complexities of lived experience. Chapters 4 and 5 cement this argument. When read in conjunction with the drug control framework, these ‘definitions’ sections (4.1, 5.1 and 5.2.3) demonstrate that human rights are capable of facilitating broader conceptions of health and religion to (non-exhaustively) include rights to: privacy, well-being, pleasure, spirituality, freedom of belief and freedom of thought. However, in practice judiciaries tend to conform to the hegemonic narrative which pervades the drug control framework. International jurisdictions such as the US largely protect narrower conceptions of health and religion (if at all), and the UK consistently fails to uphold any individual rights-based claims.

Through identifying a fundamental conflict between the State and the individual, Chapter 2 illustrates how a human rights lens could address this binary in the drug control sphere. The correlativity of the rights and duties doctrine and the dynamic, malleable nature of human rights suggest that the conflict could be alleviated. Although, it was contended that a prohibitionist paradigm emphasises the harms individuals can cause to societies, while a human rights perspective reverses the emphasis towards the individual. Thus, the binary between the State and the individual is not always alleviated under a human rights lens, rather the focus could be reconfigured. Part II of the thesis reinforces the arguments in Chapter 2, through acknowledging that much like with deontological philosophies, consequentialist ones are rarely free from value
judgments. While the case law in Chapters 4 and 5 should concern itself with empirical measures of benefit/harm, as well as deontological issues pertaining to the significance an individual accords their drug use, for the most part judiciaries fail to account for either a consequentialist or deontological reasoning process. Instead they defer the issue to parliament or an otherwise prevailing State institution, privileging the perceived interests of the State. However, these latter chapters containing the moral, philosophical and legal arguments put forth by Alder (2006), Beck (2008) and Tsakyrakis (2009) in particular, illustrate that human rights are architecturally designed to balance the incommensurable values between the State and the individual, and a few international cases even comprehensively spell out the moral issues, to more adequately balance or else reconfigure this conflict (See Conant v. Walters, 2003; Parker, 2000; Hitzig, 2003; Prince, 2002; Gonzales, 2006; People v. Woody, 1964). Thus, a human rights perspective is capable of alleviating or reconfiguring the binary identified to be at the crux of drug policies, in practice as well as in theory, even if the majority of the international case law, and all of the domestic case law fail to do so.

When exploring the legal architecture behind the drug control and human rights frameworks, Chapter 3 exposes the inner workings of both systems at an international, regional and domestic level. This chapter recognises that both systems are flexible and organic, capable of adapting to most changing circumstances under the existing legislative framework. What is more, Chapter 3 establishes a hierarchical relationship between the two systems, and acknowledges that in the event of a conflict, the human rights regime should take precedence legally and institutionally. While some international jurisdictions (see the case law above) have given effect to this by privileging human rights laws above the prohibitionist system, the UK has unfailingly shown deference to the UN drug conventions in the case law which constitutes the precedent for when the drug control and human rights regimes conflict (See Quayle, 2005; Taylor, 2001). This is despite the fact that the ECHR, as directly incorporated into domestic legislation via the HRA, should take precedence legally. Hence, the mechanisms are in place for human rights to alter the drug control framework. Though, this has not yet happened in the UK in practice. What is more, Chapter 3 additionally illuminates that economic interests were historically one of the main drivers in the formation of the drug control regime (See Chapter 3, Section 3.3). Chapters 4 and 5 cement this view. Indeed, the religious or health rights of cannabis users were given a
shorter thrift when compared with their ayahuasca or peyote using counterparts. This was due in part to the economic ramifications of exempting a highly marketable psychoactive (See Raich (2005); Feeney, 2014). The thesis confirms that ‘power politics and trade’ tend to dominate the prohibitionist paradigm, as identified by Seddon (2013: 5) in the Introduction. However, by revealing the flexible, organic nature of the two systems, Chapter 3, when integrated with Chapters 1 and 2, highlights how a bona fide human rights perspective can alter the drug control regime. Human rights are capable of responding to the complex phenomenon of human psychoactive use, and they have the capacity to transcend the State/individual binary because of their malleable nature and flexible legal architecture. Therefore, the thesis has regardless met its primary aim- to explore how the lens of human rights can provide a new perspective on drug control.

The secondary aim- to demonstrate how the lens of human rights can point to different ways of regulating drug consumption- has also been met. Chapters 4 and 5 use the broad conceptualisations of human rights put forward in the definitions sections (4.1, 5.1 and 5.2.3), and the human rights arguments put forth in the case law sections (4.2 and 5.2), to advance regulatory policies which reflect and respond to the complexities of human psychoactive use. Some of the regulatory ideas were informed and developed through the case law, as well as the case law reflecting existing regulatory policies in this sphere. This thereby demonstrates the judicial potential to actually inform policy as well as merely reflect existing policies. For instance, the Canadian government responded to the judicial call to create legal exemptions for medicinal cannabis use, to account for the health rights of users (Parker, 2000), and to later improve upon the system put in place (Hitzig, 2003). Similarly, the People v. Woody (1964) ruling contributed towards the creation of a federal exemption for American Indians to consume peyote. More recently, the Gonzales (2006) decision in the US created a ripple effect worldwide, since it set a precedent for a non-theistic religion to be accorded a religious exemption for their ayahuasca use, facilitating a patchwork of regulatory schemes throughout Europe and beyond (Feeney and Labate, 2013). There is little doubt then that the judicial limb does have a strong potential to influence drug policies in western, pluralist democracies.
Although, this thesis does have its shortcomings since an analysis of existing case law primarily focuses upon human rights to consume cannabis and certain psychedelics such as peyote and ayahuasca. However, it is these psychoactives which dominate the case law when the drug control and human rights regimes conflict. Hence, the thesis is constrained to a certain extent by considering the psychoactives which expose the conflict between the two systems, since the research serves to offer a mere snapshot of how the regimes operate and what a _bona fide_ human rights perspective can offer to this sphere. Yet, Chapters 4 and 5 do move beyond the standard psychoactives which are explored in this sphere when possible. Chapter 4 takes the moral-rights based arguments to their zenith by questioning whether individuals have a human right to smoke cigarettes under an internalist, social constructionist conception of health, despite the well-documented empirical harm. It also considers whether the UK has a legal duty to provide paraphernalia for addicts, and methadone maintenance programmes, in order to question the extent of a State’s duties in this area. Heroin is also considered in Chapter 4, to advance arguments relating to the human right to pleasure, and to explore how to more effectively balance the risks and harms associated with using this psychoactive (See Scott, 2013 on safer injecting practices). Regulatory regimes for licit psychoactives, such as sugar, alcohol, tobacco and NPS’s are also explored for comparison purposes within the thesis, most notably in Chapters 1 and 3. Additionally, both Chapters 4 and 5 strive to anticipate how the case law might develop in the future, since discussions pertaining to the religious and therapeutic use of MDMA, LSD and psilocybin account for the growing psychedelic renaissance movement (Sessa, 2012). Moreover, the dominant focus on certain psychoactives (i.e. cannabis) over others, should not restrict the significance of the research findings, because as detailed below, the thesis advances conceptual arguments which are applicable to the drug policy sphere more broadly. In effect then, the psychoactives employed serve as examples for how a _bona fide_ human rights perspective can alter the drug control framework.

A further shortcoming relates to the analysis and exploration of the UK and predominantly US legal systems, thus the thesis is constrained by a Eurocentric narrative. However, as noted above, the two parts of the research question serve to offer a mere snapshot of what a _bona fide_ human rights perspective can offer to this sphere. The research therefore remains significant and original, because to the author’s
knowledge, no one has yet moved past the ‘parallel universes’ the human rights and drug control systems are thought to inhabit, when comprehensively exploring the philosophical, legal, political or institutional interplay between the two systems. The thesis additionally puts forward a multi-faceted outlook, or a ‘multiverse’ unconstrained by prohibitionist logic. Even when commentators move beyond traditional prohibitive paradigms to explore the human rights of users to consume psychoactives, this largely focuses on specific human rights and specific drug using contexts. The existing literature has not yet comprehensively advanced conceptual arguments to demonstrate how a human rights lens can improve the drug control framework more broadly, and further used these to develop far-reaching regulatory proposals. The arguments are summarised as follows:

- Human rights are conceptually broad living instruments, capable of reflecting the complex commonalities of human psychoactive use (Chapter 1)
- Human rights can better address the State/individual binary which is identified to be at the crux of drug policies (Chapter 2) and;
- Human rights and drug control frameworks are legally compatible (Chapter 3).

The broader regulatory implications resulting from this unique perspective include the idea that notions of pleasure, well-being and spirituality should inform regulatory policies, along with recognising that the concept of ‘benefit maximisation’ could better respond to the complex reality of human drug use (Tupper, 2008: 297). Regulatory policies which recognise the potential gains psychoactives could have for individuals and society, as opposed to solely focusing on the risks, would allow policy makers more freedom to move beyond prohibitionist constructs. In an increasingly globalised world, the author also puts forth the idea of ‘feedback loops’ and explores the discipline of ethnopharmacology, to inform drug policies which respond to the human condition and move towards a broader category of ‘human flourishing’. Arguably, a key failing of the human rights regime, as it presently operates, is the refusal of judiciaries and law makers to move beyond arbitrary conceptualisations of human rights to ‘health’ and ‘religion’. Such posited divisions between religion, spirituality, health, free thought and well-being are not reflective of the complexity of lived experience. This finding is significant and original since past research has been more accepting of the human rights framework, rather than questioning the impact of these posited divisions (Barrett, Lines,
Schleifer, Elliot, and Bewley-Taylor, 2008; Hunt, 2008). However, organisations and researchers are beginning to recognise the unhelpful, narrow conceptualisations of human rights in this sphere. SOTERIA International, an organisation promoting spiritual human rights, have recently questioned the ability of contemporary human rights laws to respond to shamanic practices in particular, which fully integrate health, religion and spirituality (SOTERIA International, 2014).

Moreover, the thesis, emphasises the importance of accounting for the unique ‘roots and realities’ of an individual’s religion, which is also documented elsewhere (See Bone, 2014a: 90). Hence, judicial decisions which fully appreciate the interconnected nature of an individual’s drug use, and its significance to a person’s very identity will better respond to psychoactive use as part of the human condition (ibid). The Prince (2002) case, the Italian decision, the Gonzales (2006) case, the NAC peyote cases and the ayahuasca CONAD regulations in Brazil, serve as some examples for moving beyond mere health and religious categorisations, to broadly contextualise the substances, and more fully appreciate the interconnected significance accorded to them.

In a similar vein, Chapter 4 more extensively considers the human rights of medicinal cannabis users, and argues that human rights are capable of advancing a more holistic understanding of health to incorporate notions of well-being and pleasure (Also see Bone, 2014b; Bone and Seddon, 2015). In fact, Bone and Seddon (2015) build upon the argument initially put forth in Chapter 4: that a bona fide human rights perspective could improve on existing regulatory policies, since it can embrace wider social constructionist, internalist accounts of health. The authors suggest that this perspective could have important implications for other fields, including the remit of public health (Bone and Seddon, 2015). The thesis also makes this claim through accepting the importance of pleasure as an ethical objective within the public health sphere, to alleviate the risks and maximise the benefits associated with psychoactive use (See Chapter 4 per MacKenzie, 2011; Scott, 2013; Wong, 2013; Lynch, 2014; ibid). Chapter 4 additionally posits a potential UK Cannabis Social Club regulatory model, which could be used to develop a public health policy to reflect the compassionate club models in the US and Canada (See Lucas, 2008; Reiman, 2008). The advantages of using this model to respond to the often complex, multi-faceted needs of medicinal cannabis users is also documented elsewhere (Bone, 2014b; Bone and Seddon, 2015). The thesis (and the potential arguments developed from it) therefore has broader implications if
researchers were to move beyond arbitrary categorisations of human rights. Further research in this area could attempt to understand the often interconnected significance an individual accords their drug use, to facilitate an application of human rights which moves beyond traditional and medical prohibitive paradigms, integrating broader categorisations such as ‘human flourishing’.

Another implication resulting from the thesis relates to the argument that in order to alleviate or reconfigure the binary between the State and the individual, judiciaries should appreciate the internalist, social constructionist views relating to an individual’s health, religion, beliefs etc., as well as the prevailing externalist stance. The case law has demonstrated that judges, especially in the UK, defer to a State’s interest in restricting certain psychoactives. It further demonstrates that a human rights adjudication process typically involves consequentialist as opposed to deontological reasoning, if any bona fide reasoning process is conducted at all (Quayle, 2005; Alder, 2006). According to Alder (ibid), a consequentialist perspective prevails in the human rights sphere since this lends itself far more easily to a cost/benefit analysis, at the expense of really considering the intrinsic value attached to an individual’s human rights. Likewise, evidence-based policy is often hailed as the ultimate aspiration for the drug policy field (Lancaster, 2014). MacGregor, Singleton and Trautman (2014) refer to the prevailing view that the increase of evidence in the policy making process would increase the legitimacy of any decisions made and improve outcomes. The thesis challenges the prevailing reform position, and supports MacCoun and Reuter’s (2001) convincing assertion that the consequentialist philosophies underpinning drug policy debates are rarely free from value judgments. In fact, empirical claims may serve as a means to bolster core value based convictions (ibid). Despite the overwhelming evidence from the reform camp documenting the failings of the prohibitionist regime, the status quo still remains. The author questions why this is in light of such evidence, including empirical matrices of harm (Nutt, King, Saulsbury and Blakemore, 2007). One reason is arguably the failure of social scientists in particular to take normative thinking - questioning the way the world ought to be - very seriously (Braithwaite, 2000).

However, the bona fide human rights perspective developed throughout this thesis accepts that deontological reasoning which openly spells out and weighs up the moral
questions involved - when balancing an individual’s rights against the State’s - is necessary to improve the drug control framework. After all, drug policy is politics. Fundamentally, drug policy centres upon the relationship between the State and the individual, thus drug policy is deeply political. It is only through comprehensively unpacking the moral arguments, as well presenting the empirical evidence, that a more balanced, thorough perspective can be attained. Chapter 2 especially highlights the need to unpack the shared values a State has when restricting psychoactives on the premise of representing perceived societal interests and values. The philosophical positions and standard policy proposals pitted in this sphere: prohibition, legalisation, (full and partial) decriminalisation and/or harm reduction (See Table 1), all advocate either increases or decreases in individual empowerment or in State control. A human rights lens questions the failure to overtly unpack the moral questions raised when pitting the State against the individual, and demonstrates an ability to reconfigure and openly address this political, moral boundary. The question as to whether a State can truly represent the interests of society, or rather distinct interests within society given its position of power is also considered. The increase of governance literature within the drug policy context highlights the need for transparency, as well as accountability (MacGregor et al, 2014). Further research could therefore combine governance literature exploring how drug policies are controlled, directed or else held to account, with the capacity of human rights to address the State/individual binary through: the correlativity of the rights and duties doctrine, the rise of individualism and through their dynamic nature as legal instruments, capable of transcending the State/individual divide. Human rights could therefore ‘marry the goals of transparency and democratic accountability with respect for logic and evidence’ as MacGregor et al (ibid: 934) view this as a challenge for proponents of good governance. Roberts (2014) spells out the complexity in the relationship between evidence and the policy process, and notes the difficulties in reconciling democracy and inclusiveness with the utilisation of knowledge and expertise. Since drug policy issues are normative and inherently political, a more nuanced understanding of the relationship between politics, engagement and evidence needs to be developed than the typical ‘evidence-based policy’ espoused at present (ibid). A human rights lens capable of transcending the ‘objective’ evidence utilised in drug policy could therefore reconcile democracy and expertise, by openly addressing the relative weight accorded to different types of benefit and harm within both a consequentialist and a deontological remit.
An additional direction for further research could also be to use the author’s human rights perspective to develop a moral matrix of benefit and harm in the drug control sphere. Haidt (2012), a professor of social psychology, has written extensively on this issue. Haidt (ibid) has developed a moral foundations theory, or moral matrices, which apply moral psychology to political divisions, to try and understand how we perceive the world, and make moral and political judgments. Haidt and his colleagues have developed five moral foundations (and recognise other ‘foundationhood’ candidates such as liberty/oppression), through which to measure our political, moral values and beliefs (Dobolyi, 2013). These foundations include: care/harm, fairness/cheating, loyalty/betrayal, authority/subversion and sanctity/degradation. Haidt (2012) found that different political ‘cultures’ i.e. liberals/conservatives, create a morality by relying up the matrices to differing degrees. Haidt (ibid) posits that through illuminating these matrices, and targeting the emotional appeals which activate them, we can step outside and appreciate other moral matrices to facilitate a more co-operative, understanding approach to partisan political issues. Accordingly, as a deeply political issue, drug policy could potentially benefit if further research applied Haidt’s (2012) moral schematic. Haidt’s (ibid) matrices could therefore assess the differing views on benefits/harms from psychoactives, in order to facilitate a more open-minded, transparent approach.

Finally, one of the most interesting implications resulting from the thesis, concerns the fact that a human rights lens can fundamentally provide a new perspective on drug control, even while operating within the prevailing prohibitionist paradigm. Hence, a human rights lens has a transformative capacity to alter the drug control system as it presently stands from the inside out. The ayahuasca and medical cannabis cases especially evidence the potential for human rights to do this. However, in the UK, the judiciary is constrained by the criminalising underpinnings of the drug control regime, as they have been unwilling to adopt a braver stance and question this criminogenic ontology. Further doctrinal research could explore whether this situation uniquely applies to the drug control sphere, or whether criminalisation acts a barrier for the UK judiciary when assessing an individual’s human rights claims in other legal areas, especially in comparison with other jurisdictions. As articulated by Chakrabarti (2014), the impartiality of the judiciary and its independent or unelected nature is essential for
the foundations of democracy to guard against majoritarian rule. Accordingly, the UK judiciary should strive to move beyond such restraints when fulfilling its impartial role. Though, this is unlikely to happen given the politicisation of the drug control regime. Fortunately, the political outlook is changing. Legalised regulatory regimes for cannabis and new psychoactive substances are developing worldwide (Bone, 2013; Wilkins, 2014; McGreal, 2014; Room, 2014) alongside changing societal perceptions for psychoactives which are moving beyond the malevolent agents/pathogens metaphors (Tupper, 2011: 146). From Oprah (Winter, 2011) to the Daily Mail (Hodgekiss, 2014), the media reflects and responds to changing public perceptions through acknowledging the possible benefits and gains currently controlled psychoactives such as ecstasy and cannabis can have. At a recent cannabis reform conference hosted by the House of Lords, Baroness Meacher was also reported by the author as stating: ‘the question is no longer whether or not we should reform the cannabis laws. Rather, the question is what would such reform entail? (Bone, 2014b: 31). Reform is inevitable, and the momentum to dismantle the prohibitionist framework is gaining ground. According to Siegel (2005: 9): ‘governments search for direction in controlling an overwhelming number of chemical reactions that keep flowing through our lives and bodies politic.’ Ultimately, this thesis offers a new perspective through using the lens of human rights to provide that direction.
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