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Axel Klein and Blaine Stothard

The regulating of pleasure – challenges and constraints in developing a new regulatory paradigm

When deliberating on the commerce in tobacco products, adult entertainment, alcohol and other drugs, democratic governments seek to strike a balance. The most important arguments are based on assessments of harms and risks accruing to the individuals in question, and the wider impact on family, community and society. In line with a now well-established ethos of “evidence-based policy”, derived from “evidence-based medicine”, much of the decision-making process consists of weighing up sets of information on medical, psychological and social consequences of use.

The actual limitations to the application of this rational model were neatly exposed ten years ago by a group of scientists working with David Nutt on the production of a harms index for intoxicants (Nutt *et al.*, 2007). Since alcohol and tobacco were considerably more harmful than cannabis and MDMA it followed that the legal status of a substance was not determined by its potential for harm. As the historian Virginia Berridge has suggested, policy grows out of a complex interplay of factors, including the vested interests of different protagonists (Berridge, 2013). We note that nineteenth century opium traders would drape their case against import controlling Chinese authorities in the flag of “free enterprise”. And corruption was so deeply entrenched among alcohol prohibition agents that the US Treasury found it impossible to re-deploy them after the taps began to flow again in 1933 (Okrent, 2010).

Powerful in regime construction as vested interests are, they still need to construe arguments that gain traction with larger sections of the community. The regulatory regimes for intoxicants or commercial sex always involve appeals to morality. In political discussions today this is often underplayed because of wide public disquiet over a moralising nanny state. There is particular resistance against governments interfering with adult decisions that have no immediate effect on third parties.

The justifications for controlling mind altering substances are therefore presented in terms of medical harms, such as overdose, addiction or psychosis.

All too often, though, the mask slips, and policy makers move beyond the utilitarian balance sheet of health harms. The former prime minister Gordon Brown, for example, justified his reclassification of cannabis from Class C to Class B in 2008 as “it’s important to send a message that drug abuse is not acceptable and a criminal offence” (*Evening Standard*, 2009). A few years later the then Home Secretary Theresa May decided to ignore expert advice and ban the innocuous East African stimulant khat because of “broader concerns”.

The attitudes of the delegates that gathered for the construction of the first global drug control protocol at the Hague in 1910 and suitably described as a “Gentleman’s Club”, were entirely paternalistic. Traces of that outlook can still be found in the language of the 1961 Single Convention on Narcotic Drugs, which laid the foundation for the current control system. The preamble to the treaty states that the parties are conscious of their duty to prevent the “evil of drug addiction”. In the Spanish version of the text, Resolution 3 declares the conference’s concern with the “physical and moral health of humanity” (INCB, n.d.).

Activities that are particularly prone to attracting moral censure and paternalist interventions, including those represented in this volume, have a single unifying quality – the pursuit of pleasure. For the moment, the state remains unconcerned by hot cups of milk or intra marital, pro-creative sex. The controlling interest is drawn primarily to pleasurable activities that are clearly divorced from any utilitarian intent.

The recorded history of such interventions reaches deep into biblical times, with Moses arriving at the party from the mountain to turn the music off. Since then the killjoy has been a mainstay of religious practice ranging from the exhortations of Old Testament prophets, Pauline epistles and intermittent episodes of burning – books and people.

Repressive practices were revitalised by the emergence of Puritanism as a political force. In the Dutch town of Delft the municipal authorities issued a ban on ginger bread men in 1607 in order to stamp out idolatrous frivolity. Kindred spirits in the British parliament decided in 1644 to prohibit the celebration of Christmas. The last triumph of puritan iconoclasm is the crusade against alcohol, depicted as inherently evil. Protestant churches mobilise around the Temperance movement that results in the disastrous US experiment of alcohol prohibition.

The 1918-1933 interlude forms a watershed in that it is the last example of religiosity as the driver for social change in western countries. By and large, religion has been replaced by science as a guide for human affairs. Consequently, for most of the twentieth century, interventions are justified in the name of public health.

With regard to the habitual consumption of intoxicating substances, both diagnostic analyses and therapeutic interventions therefore change dramatically. Drunkenness is portrayed as a weakness of will in the nineteenth century that requires changes in the environment and ecology to prevent the drunkard from succumbing to temptation. But in the twentieth century, the condition is re-formulated as a disease that requires therapeutic interventions. Addiction then becomes the standard model for explaining problematic behaviour patterns. Why some people lose control over their alcohol intake, while most people do not, is never convincingly explained. The locus of the disease is located within the individual, possibly owing to the ready experience of “controlled” or occasional drinking in many western countries.

A very different line is taken with the exotic intoxicants that become popular in the course of the twentieth century. Government policies declare the opiates, coca and cannabis as inherently problematic. There is no community-building equivalent to “constructive drinking”, so that all forms of consumption are described as abuse.

The policy intervention developed in the USA and exported across the world has therefore always focused on preventative measures designed to stop these products from becoming available and affordable. As a prophylactic measure this has had partial success, particularly in tightly controlled and highly illiberal societies. The costs, however, as well as the displacement effects and unintended consequences have been exorbitant. The war on drugs, it is widely argued, has long become far more damaging to human health and wellbeing than the drugs themselves. Even modest changes are difficult to arrive at internationally as the UN General Assembly Special Session on Drugs held earlier this year showed. The diversity of interest and moral frameworks that made it so difficult to arrive at an agreement in the first place, now bar the way for change. Arguably global systems are obsolete anyhow given that many countries are now producers of a wide range of substances themselves.

It is therefore at national level, all the more pertinent given recent events, that control and regulation should be debated. There are three aspects that are often neglected and which we hope to highlight. First there should be recognition of diverse social attitudes and lifestyle patterns. There appears to be solid support for excluding tobacco smoking from public spaces, but why are these bans extended to electronic cigarettes? There also appears to be a solid group of functioning consumers of illicit substances who have integrated their drug use into otherwise law-abiding lifestyles. The extraordinary expansion of camming and interactive services are indicative of a significant demand for online adult entertainment (papers by Hubbard *et al.*, 2016; Klein, 2016). The challenge to the regulator is to ensure better safeguarding of the rights of these minorities.

Second, technological developments that have changed the harm ratio must be factored in. The e-cigarette revolution has transformed the risk/reward calculus for tobacco consumers. It is possibly a testimony to the success of the cigarette that in the view of seasoned tobacco control advocates they are synonymous with tobacco products. But the restrictions on the maximum tank size to 2 ml, vaping in public places and nicotine concentration appear to

reactive, rather than thought-through measures to advance public health (Stimson, 2016). They are reminiscent of the morality based interventions, enacted not for effectiveness but because they are deemed to be right. It may of course be part of the collective psychology of a movement that makes a moral judgement on tobacco and the corporations that profit from selling it.

But different policy scenarios are also conceivable. The UK could for instance opt out of the EU Tobacco Directive and ignore these new restrictions. At the risk, of course, of fostering a clandestine e-liquid smuggling trade.

Vaping is also transforming the cannabis scene, and rebranding the cannabis user from a “loser stoner” to a “cool fashionista” (Hakkarainen, 2016). The image transformation flows from a health calculus. By separating out the health damaging tobacco included in traditional joints, heating and not smoking, and only the bud, cannabis consumers are becoming health smart. It follows that the key variable for different health outcomes is not the THC strength but tobacco content of cannabis applications. Ironically, the fact that young people across the UK were known to smoke their cannabis inside large tobacco cigarettes, was considered a health gain for many years. Legal restrictions introduced originally to prevent consumption, then maintained to protect public health, drove up the price for cannabis while tobacco was cheap and provided cover. The cannabis vaper now allows health-damage-free cannabis consumption in public, and places the regulator before new challenges. What is the rationale for prohibiting cannabis vaping?

Which leads to the third point. For whose benefit are the regulations designed.

The challenge is to start moving to a people centred regulated environment that affords better protection to all parties in the pleasure economy. Too often legalistic paradigms prevail that focus on the letter of the law, ignore the reality of systemic infraction, leave large minorities outside or below the law and create new levels of risk (Dupuis *et al.*, 2016).

Consumers have the right to better information about their drug purchases to avoid overdoses and other avoidable harmful consequences. Performers in adult entertainment have a right to safety and decent working conditions that online producers can provide. The grass roots movement of vapers is now on a collision course with tobacco control advocates, who for years maintained that they were representatives for the ordinary smoker and their families. In the triangular relationship, consumer and industry are now aligned against the regulatory authorities.

There are rich opportunities for exploring how the adverse effects created by punitive policies can be rolled back by technological developments and knowledge-based solutions. A window of opportunity has opened where the UK authorities can be bold and innovative. We hope that these contributions to the debate help improve the regulation of pleasure. It is a worthy cause.

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