Chapter 17

Plant Psychedelics in the English Courts

Legal Uncertainty, Guinea Pigs, and "Dog Law"

Charlotte Walsh

> Let us declare Nature to be legitimate.
>
> The notion of illegal plants is obnoxious and ridiculous in the first place.
>
> (T. McKenna, 1992, p. 98)

This chapter considers the uncertain legal status of plant psychedelics in the English courts. Their equivocal position stems from the hazy provisions contained within both international and domestic law, further obfuscated by inconsistent prosecutorial application and juridical interpretation. Some of those who have been prosecuted for involvement with plant psychedelics have argued—on occasion successfully—that the law is so unclear that proceedings against them should be stayed as an abuse of process; others contest that their use of these materials is sacramental, or an essential aspect of their cognitive liberty, and, as such, should be protected under Article 9 of the European Convention on Human Rights (ECHR), the right to freedom of religion, thought, and conscience. These cases and the arguments therein are analyzed. A recent development that has been embraced—seemingly to avoid the difficulties of prosecution for full offences involving plant psychedelics under the Misuse of Drugs Act 1971 (MDA)—is the use of incitement charges. It is submitted that this approach exacerbates the lack of legal certainty in this sphere, representing a sort of "dog law," with prosecutors and judges effectively making it up as they go along.

The Roots of the Issue

When ingested by humans—and other animals—certain plants can have a psychedelic effect (see further Schultes, Hofmann, & Ratsch, 2001); the word "psychedelic" translates as "mind manifesting" (Grinspoon & Bakalar, 1979, p. 8). The reason that plants can have such a profound effect on the human brain is due to *Homo sapiens* neurochemistry, the fact that plant "keys" can fit human "locks," owing to co-evolution (see further T. McKenna, 1992). There is evidence of psychedelic plants being ingested from prehistoric societies, through ancient traditional cultures, to the present day, alongside, correspondingly, a long history of suppression of such practices (see further Devereux, 1997).

What is the current legal status of plant psychedelics in England? The answer to this question is complex and variable. The primary piece of domestic drugs legislation is the MDA. Section 2(1)(a) of this act states that "the expression 'controlled drugs' means any substance or product . . . specified in . . . Schedule 2 to this Act." It is rare for a psychedelic plant itself to be listed; however, psychoactive chemicals contained within a number of such plants are. The majority of these constituents are listed within Part 1 of Schedule 2, rendering them Class A drugs, considered to be the most dangerous in the act's three-tier classification system. So, for instance, psilocin (an active alkaloid contained within magic mushrooms), DMT (dimethyltryptamine, a psychoactive found in numerous plant and animals species), and mescaline (a psychedelic compound present in various cacti) are specifically named. As well as being found in nature, all these molecules can be synthesized: where they have been manufactured, they fall squarely within the ambit of the act; where they occur naturally, the situation is more convoluted. For example, only in the case of magic mushrooms is the plant vehicle found within Schedule 2.

In other instances, does it suffice—in terms of guilt under the MDA—to simply be in possession of a plant embodying a scheduled constituent? The answer to this question is complicated

by Schedule 2, Part 1, paragraph 5, which provides that any "preparation or other product" containing a substance specified in Part 1 is also to be treated as a Class A drug. The act itself is silent on the meaning of "preparation" or "product"; however, preparation is defined in a number of international legal instruments. To contextualize, the MDA constitutes the domestic enactment of the UK's international obligations under the system of global prohibition, built upon three key conventions: the 1961 Single Convention on Narcotic Drugs, the 1971 Convention on Psychotropic Substances, and the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. Preparation is defined in Article 1 of the first of these instruments as "a mixture, solid or liquid, containing a drug." Article 1 of the 1971 Convention offers further alternative explanations, with a preparation being either "any solution or mixture, in whatever physical state, containing one or more psychotropic substances" or "one or more psychotropic substances in dosage form." A subsidiary question that arises is whether or not plants that contain a substance listed in Part 1 represents a preparation or product.

Both these questions were addressed in the 1978 House of Lords case *DPP v. Goodchild* ([1978] 1 WLR 578), concerning possession of cannabis. Cannabis is a Class B drug under the MDA; however, its more potent derivative, cannabinol, was at the time contained within Class A. Goodchild, having been found in possession of cannabis, was indicted not only for possession of a drug of Class B, but also of Class A, given that this cannabis naturally contained cannabinol. In quashing Goodchild's conviction for the higher offence, Lord Diplock commented:

> [T]here are some listed drugs which, although they can be synthesised, also occur in the natural state in plants, fungi or animals, and these include some of the most used narcotic drugs. It would not in my view be a natural use of language to say, for instance, that a person was in possession of morphine when what he really had was opium poppy—straw from which whatever morphine content there might be in it had not yet been separated; nor do I think it would be an apt use of language to describe poppy—straw as a "preparation or other product" containing morphine, since this expression is

> inappropriate to something that is found in nature as distinct from something that is manmade.

Thus *Goodchild* confirmed that simply being in possession of psychedelic plants is not enough to bring one within the ambit of the MDA. This situation is mirrored on the international stage, as confirmed by the International Narcotics Control Board, the organ responsible for monitoring the implementation of the UN Drug Conventions:

> Although some active stimulant or hallucinogenic ingredients contained in certain plants are controlled under the 1971 Convention, no plants are currently controlled under that Convention or under the 1988 Convention. Preparations (e.g. decoctions for oral use) made from plants containing those active ingredients are also not under international control. (INCB, 2011, p. 46)

But what of situations where the plants have themselves been prepared in some way, for example, by being dried or powdered? These less clear-cut scenarios have generated a river of case laws over the years.

Bemushroomed, Bothered, and Bewildered

The early cases revolve around magic mushrooms, psychedelic fungi with a long history of use in the Americas (see further Wasson, 1963) and a (presumed) shorter tale of ingestion in Europe, including in England, where the Liberty Cap variant grows naturally (see further Letcher, 2006). Psilocybin-containing mushrooms are not listed in any of the international drug conventions. Prior to 200nd the passage of section 21 of the Drugs Act 200 these fungi were also not contained within the MDA, although their active constituent, psilocin, was: thus, the majority of prosecutions of “myconauts” (Letcher, 1997, p. 90) focused on interpretation of preparation. The leading authority was *Stevens*

([1981] *Crim LR* 568), who had been found in possession of powdered magic mushrooms. The Court of Appeal addressed the question of whether or not these could be described as a preparation, in reference to which Drake J. said the following:

> It was intended that its ordinary and natural meaning should be given to it. What was needed in order that these mushrooms should be prepared is that they ceased to be in their natural growing state and had in some way been altered by the hand of man [*sic*] to make them into a condition in which they could be used.

It is submitted that the court was answering the wrong question here and, as a result, misinterpreted Schedule 2, Part 1, paragraph 5. Paragraph 5 refers to "any preparation": the word "preparation" is clearly being used as a noun, relating to the substance in question, as opposed to as a verb, describing the activities of the individual concerned. While this may seem mere pedantry, it is easier to prove that mushrooms were "prepared" for ingestion than to prove that, as a result, they became a preparation. Further, it is notable that the dictionary definition adopted in *Stevens* failed to take into account the aforementioned elucidations international instruments provide: had these clarifications been applied to the facts in *Stevens*—and subsequent cases—it is doubtful that the court would have ruled as it did, namely, to find Stevens guilty of Class A drug possession by virtue of having powdered magic mushrooms.

The later decision in *Cuncliffe* ([1986] *Crim LR* 547) illustrated that, applying *Stevens,* even the most minimal human intervention could be viewed as bringing the activity within the auspices of paragraph 5: in this instance, unlike in *Stevens,* the mushrooms—while dried—had not been powdered. Cuncliffe was convicted after the jury were given the following summing-up:

> It is only if you can say to yourselves, "We feel sure that what this man did was to arrange for the mushrooms to be dried out in his house to be available for use for drug

> taking"; only if you are satisfied that he did that act of preparation rather than it being just a natural ordinary occurrence on its own, only then can you find this man guilty.

In line with *Stevens,* the word preparation—a noun—was (mis?)construed as referring to a verb, namely, the actions of Cuncliffe.

In another such case, Hodder was prosecuted following the discovery of bagged magic mushrooms in his freezer (*Hodder and Matthews v. DPP* [1990] *Crim LR* 261). While Hodder knew that it was illegal to prepare the mushrooms, he argued that he thought this meant that it was wrong to, for instance, boil or dry them. He contested that bagging did not constitute an act of preparation, as preparation must refer to the mushrooms and not mere packaging; further, he argued that *preservation* of the mushrooms by freezing was not akin to preparation. It was submitted that a distinction needed to be drawn between "preparatory acts" and the question of whether what was in his possession was a preparation. However, at trial, the magistrates were unconvinced and of the opinion that bagging and freezing mushrooms constituted preparation.

The Court of Appeal upheld Hodder's conviction, but—crucially—disagreed with the magistrates' logic. Roch J. did not believe that freezing amounted to preparation, and distinguished this case from both *Stevens* and *Cuncliffe* for the following reason: "There was no evidence that freezing the mushrooms brought them into a suitable state to be consumed. Indeed, the evidence was that they could not be used until they had been defrosted." However, it will be remembered that paragraph 5 refers to both "any preparation or other product." The court relied on this second limb to uphold the convictions:

> The evidence indicates clearly that the appellants were producing packages of frozen mushrooms for use by themselves and others in much the same way that supermarkets produce packaged and frozen vegetables. The calling of such packets of frozen vegetables "products" is an ordinary and natural use of language.

Is this the correct construal of product in the context of the act? It would seem to be yet another misinterpretation by the courts, with paragraph 5 referring to a substance produced during a chemical process, as opposed to an article packaged up for sale.

The net result of the case law on magic mushrooms was that paragraph 5 had been construed increasingly broadly. However, perhaps surprisingly, in spite of *Hodder* being decided in 1990, in the early twenty-first century numerous businesses sprung up—both on and off line—selling magic mushrooms as part of ostensibly legal commercial enterprises. The view seemed to be that selling magic mushrooms still fell outside the ambit of the law so long as the mushrooms were fresh, not frozen (though *Hodder* is arguably much more restrictive than that). The police and prosecution services eventually started to crack down on these sellers, viewing them as making a mockery of prohibition.

The case of *Mardle and Evans (*Gloucester Crown Court, 12/14/2004, unreported) involves the prosecution of defendants caught up in this crackdown and prosecuted for selling fresh magic mushrooms from their shop. They maintained that they had done nothing wrong: before starting to sell these fungi they had contacted the Home Office to enquire about their legal status and, as a result of that communication, were of the opinion that fresh magic mushrooms constituted neither a preparation nor a product. However, the prosecution was being brought on the grounds that the *refrigeration* of the mushrooms by the defendants brought them within the MDA. The defense applied to stay the indictment as an abuse of the process of the court.

The defense's case for abuse of process rested on a number of criteria: first, the apparent acceptance of the executive in allowing the importation of fresh mushrooms, particularly with regard to the fact that Customs had frequently inspected cartons of incoming mushrooms and allowed them through; second, the Home Office Circulars, that stated the legality of selling fresh mushrooms. With reference to these, Miss Recorder Miskin noted that, while the later Circular did express reservations

about whether refrigerating mushrooms constituted either a preparation or a product, "I take the view, the Home Office Circular . . . is a fudge, to put not too fine a point on it. They are being ultra cautious maybe, but I do not think the language is very happy, because everybody is entitled to know exactly what is and what is not a criminal offence." Third, Miss Recorder Miskin made reference to the fact that VAT is a European tax, and that, following European case law (see, for example, *Fischer* [1998] STC 708) there is a powerful argument for saying that if a country imposes VAT on imported items, then they can be taken not to consider commerce in them to be illegal.

Reference was also made to Article 7 of the ECHR, which enshrines the common law principle of the requirement of legal certainty. Under Article 7(1), "no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed." The (later) House of Lords case *R v. Rimmington; R v. Goldstein* ([2005] UKHL 63) helpfully reviews this principle, wherein Lord Bingham summarized the common law as follows:

> There are two guiding principles: no one should be punished under a law unless it is sufficiently clear and certain to enable him to know what conduct is forbidden before he does it; and no one should be punished for any act which was not clearly and ascertainably punishable when the act was done.

In summation, Miss Recorder Miskin's concern was that the executive had been sending out conflicting messages to magic mushroom traders. She concluded: "It seems to me, that following what Lord Diplock said in *Goodchild* that somebody should not be jailed on an ambiguity. . . . I think that proceeding now with this prosecution in this way is an abuse of the process of this court." Two days after the collapse of this trial, clause 21 was added to the Drugs Bill 2005. Now enacted, this provision amends Part 1 of Schedule 2 to include "fungus (of any kind) that contains the drug Psilocin": the effect is that magic mushrooms themselves become a Class A drug (see further Walsh, 2005).

However, numerous other psychedelic plants that contain substances classified as Class A drugs have not been incorporated. In such cases, the legal uncertainty that led to the pre-Drug Act 2005 magic mushroom cases being thrown out as an abuse of process remains, which is why these cases remain so important. Mescaline-containing cacti provide a case in point.

The Prickly Case of Cacti

There is a rich tradition of ingestion of mescaline-containing cacti in the Andes (see further Schultes et al., 2001). Cacti themselves are not listed in either international or domestic instruments of prohibition, although mescaline is a Class A drug under the MDA. Legal uncertainty was raised by the defense in *Sette (*Kingston Crown Court, 03/20/07, unreported), a case involving prosecution for possession of dried mescaline-containing cacti chips with intent to supply. Sette submitted that it would be unfair to try him for the following reasons. First, there was no evidence that such chips amounted to a preparation: the definition adopted in earlier cases was criticized (in line with the previous commentary). Further, due to the fact that the chips were not in a state in which they could be consumed it was argued that they did not even fall within the (overly) broad definition of "preparation" adopted in the magic mushroom precedents:

> [A] distinction may need to be drawn between those naturally growing substances such as mushrooms, which can be consumed without preparation, and those which require some process of extraction. The Peruvian Torch cactus clearly falls into the latter category. In the circumstances the court should apply the law as formulated by Lord Diplock in *Goodchild* to the effect that the dried plants comprise naturally occurring material of which the controlled drug is one of the constituent elements unseparated from the others. Taking this definition as the starting point, the cactus plant material would only become a "preparation" once the constituent element, mescaline, had been

> separated in a way which made it consumable. (*R v. Sette*, 2007, Application for Stay of Count 1 on Indictment, para 22)

Dried cacti are not in a condition ready for human consumption as a psychotropic substance; indeed, the drying process has taken the cacti one stage further back from being consumable as it would need to be re-hydrated as part of the process involved in making it digestible. Second, it was argued that there was—at the very least—legal uncertainty surrounding the issue of whether dried cactus amounted to a preparation, especially given the existence of a Home Office communiqué assuring Sette that the drying of cacti for the purpose of preservation did not amount to such: it is clear that the principle of legal certainty is not being abided by if an individual is being prosecuted following such an assurance. Or, in the words of the defense, "defendants should not be treated like guinea pigs" (*R v. Sette*, 2007, Application for Stay of Count 1 on Indictment, para 25). Third, feeding into the lack of clarity in the law, it was argued that to treat possession of dried cacti as unlawful would conflict with the policy that its sale attracts VAT liability. In *Einberger v. Hauptzollant Freiburg* (ECJ 02/28/1984), for instance, the European Court of Justice held that no liability to turnover tax arises upon the unlawful supply of narcotic drugs; thus, the fact that tax was routinely being paid on imported dried cacti at the time of Sette's prosecution—though not by Sette himself—suggested that it was not a controlled drug. Having heard these submissions, Recorder Wood ruled:

> In all the circumstances it is my view that the law is not sufficiently clear or certain. That, coupled with Her Majesty's Revenue and Customs' treatment of Peruvian cacti, just persuades me that it would be an abuse of the process for the Crown to be allowed to proceed. . . . Given my ruling I do not think it necessary at this stage to give any definitive ruling on whether there would be . . . sufficient evidence of "preparation" or "product" to go to the jury. (*R v. Sette*, Kingston Crown Court, 03/20/07, unreported)

The collapse of Sette's trial was a cogent factor in a second prosecution involving cacti—this time of the peyote variety—being thrown out as an abuse of process, the case of *Smith and Tate (*Newcastle Crown Court, 02/23/11, unreported). Peyote cacti are traditionally ingested by Native Americans in Central and North America (see further Schultes et al., 2001). In this instance, two students were charged with conspiracy to import a Class A drug, namely, cacti in the form of a fine dust. The fact that the cacti had been powdered was not enough to persuade Judge Wood that it fell within the sweep of the MDA:

> The substance, as I say, is merely a pulverised form of the cactus and there is no evidence that it contains any more mescaline than did the original plant itself. In my judgment, therefore, that is not a preparation or indeed a product within the ordinary and sensible meaning of that word in the context of this Act.

This is an interesting juridical restriction on the meaning of these terms and a different approach to that taken in the earlier magic mushroom cases: it is submitted that Judge Wood applied the law as was originally intended here, with the requirement that the active ingredient be extracted or condensed in some way. Further, he noted the need for legal certainty and that, contrarily, "this particular law is not clear or unequivocal at all, rather the reverse." This legal uncertainty was again exacerbated by the fact that pulverized cacti were being sold openly in numerous shops and, additionally, VAT was routinely levied on such sales. It is worth highlighting that Judge Wood was under no illusion about the fact that the defendants clearly intended to consume the cacti; yet, contrary to the arguments of the prosecution, this intent did not suffice to stop him from staying proceedings as an abuse of process. This represents the correct approach. Either powdered cacti are unlawful or they are not: this does not hinge upon the intentions of defendants as no such distinction exists in law.

Similar arguments were tested at trial in the analogous case of "H" ([2012] EWCA Crim 525), involving prosecution of the defendant for importation and distribution of powdered *Mimosa hostilis,* a

South American tree bark containing the natural psychedelic, DMT. *M. hostilis* is prohibited neither internationally nor domestically, although DMT is listed under Schedule 1 of the 1971 Convention and is a Class A drug under the MDA. Relying on the magic mushroom and cacti cases detailed earlier, the defense argued that the bark itself was not listed within Schedule 2 of the 1971 Act and that there was legal uncertainty regarding whether *M. hostilis* amounted to a "preparation or other product" containing DMT, emphasizing that it was not fit for human consumption as a psychedelic without a process of extraction that required a degree of chemical expertise. Accepting these submissions, the trial judge stayed the relevant counts against "H" as an abuse of process. The prosecution unsuccessfully sought leave to appeal this decision, with the Court of Appeal finding the trial court judge's decision to have been "squarely within the range of conclusions open to him."

Legal Entanglements with a Jungle Vine

Turning now to consider the legal status of ayahuasca, a psychedelic brew historically (and currently) used by diverse indigenous populations of the Amazon:

> [A]yahuasca is a beverage prepared by boiling—or soaking—the bark and stems of *Banisteriopsis caapi* together with various admixture plants . . . most commonly . . . *Psychotria viridis.* One of the components, the bark of *B. caapi*, contains beta-carboline alkaloids, which are potent monoamine oxidase-A (MAO-A) inhibitors; the other component, the leaves of *P. viridis* . . . contains the potent short-acting hallucinogenic agent DMT. DMT is not orally active when ingested by itself, but can be rendered orally active when ingested in the presence of a peripheral MAO inhibitor, such as the beta-carbolines. (McKenna, 1994, p. 112)

Neither the tea nor the plants from which it is comprised are listed in any of the international drug conventions, nor, indeed, in the MDA; however, as noted earlier, DMT is included within the 1971

Convention and is a Class A drug under UK law. Further, both on the international and on domestic stages, a pertinent question is whether ayahuasca constitutes a preparation or product. Notably, when specifically asked about the legal status of ayahuasca in 2001, a representative of the INCB responded: "No plants (natural materials) containing DMT are at present controlled under the 1971 Convention on Psychotropic Substances. Consequently, preparations (eg decoctions) made of these plants, including ayahuasca, are not under international control and, therefore, not subject to any of the articles of the 1971 Convention" (Schaepe, 2001). While not binding, INCB interpretation of the Conventions is persuasive and—at the very least—introduces yet further legal uncertainty into this arena.

One of the traditional uses of ayahuasca is in Amazonian shamanic healing ceremonies; more recently, such usage has spread beyond the Amazon (see further Tupper, 2009). Peter Aziz, a practitioner in alternative treatment techniques who trained as a shaman in the Amazon and was operating as such in the UK, gave people ayahuasca as part of spiritual rituals aimed at advancing enlightenment and personal development: indeed, at his trial, witnesses who had been involved in these shamanic ceremonies testified to their positive, life-changing effect. Aziz was convicted of producing and supplying a Class A drug (Bristol Crown Court, 8/8/2011, unreported). These proceedings could conceivably have been stayed at the beginning of trial as an abuse of process, with the legal status of ayahuasca potentially falling short of the principles of legal certainty. However, Judge Roach did not appear interested in hearing evidence on whether this concoction represented a preparation or product, treating it rather as though it were in and of itself DMT; further, he disallowed the defense to put issues regarding the concentration levels of DMT in Aziz's tea before the jury. It is arguable that such a brew *might* fall within the reach of the MDA, given that it is ready for human consumption and could plausibly be taken to fall within the auspices of paragraph 5: while international law has not been interpreted as prohibiting ayahuasca use, domestic arrangements can legitimately be more stringent than the global regime.

An alternative line of defense would be to try to engage Article 9 of the ECHR, with its protection of freedom of thought, conscience, and religion, a stratagem that Aziz (unsuccessfully) pursued at trial. Evidence shows that medicinal plants were probably at the origin of much religious and mystical experience:

> Religious use of psychedelic plants is a civil rights issue; its restriction is the repression of a legitimate religious sensibility. In fact, it is not *a* religious sensibility that is being repressed, but *the* religious sensibility, an experience of *religio* based on the plant—human relationships that were in place long before the advent of history. (T. McKenna, 1992, p. xix)

A question that arises is whether or not shamanism—especially a transplanted Westernized version of such—would be deemed to constitute a religion in the UK courts:

> Whilst Amerindian shamanism is clearly rooted in specific ontological definitions of "nature" and "culture," and particular metaphysical understandings of the world, it is debatable whether it would be recognised as religious under Western standards, which are informed by the main monotheistic religions of the world: Christianity, Judaism and Islam. In indigenous communities where shamanism is practiced, medical, artistic, and spiritual practices are often thoroughly enmeshed, as opposed to modern Western society which attempts to make distinctions between spheres such as the sacred and the secular. (Labate & Feeney, 2012, p. 154)

The question of how the courts decide when the freedom of religion limb of Article 9 is engaged was addressed by Lord Nicholls in *R (Williamson & Others) v. Secretary of State for Education & Employment* ([2005] UKHL 15):

> It is necessary first to clarify the court's role in identifying a religious belief calling for protection under Article 9. When the genuineness of a claimant's professed belief is an issue in the proceedings the court will inquire into and decide this issue as a question of

> fact. This is a limited inquiry. The court is concerned to ensure an assertion of religious belief is made in good faith. . . . But, emphatically, it is not for the court to embark on an inquiry into the asserted belief and judge its "validity" by some objective standard. . . . Each individual is at liberty to hold his own religious beliefs, however irrational or inconsistent they may seem to some, however surprising.

Nevertheless, such liberalism may become circumscribed when it comes to the question of whether or not Article 9 protects an individual's right to "manifest" their religious beliefs (such as, for instance, by drinking ayahuasca): while the protection of freedom of religion is absolute, under Article 9(2), freedom to *manifest* one's religion or belief may be curtailed if this is deemed "necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others."

Judge Roach was similarly restrictive in allowing in evidence regarding whether Article 9 had been either engaged or breached in Peter Aziz's case, taking the view that, as ayahuasca *is* DMT, and DMT *is* a Class A drug, even if it were engaged, any breach was proportionate and necessary under the qualifying provision. It is submitted that this approach accords undue consideration to the conditions that need to be satisfied in order to justifiably excuse a breach under Article 9(2). First, there is the requirement that the measure taken is "prescribed by law": given the uncertainty regarding the legal status of ayahuasca, this is a moot point. Second, the restrictions must be "necessary in a democratic society." In *de Freitas v. Permanent Secretary of Agriculture, Fisheries, Land and Housing* ([1999] AC 69), Lord Clyde identified three separate questions that a judge should be satisfied have been addressed in relation to this condition: whether the legislative objective is sufficiently important to justify the limitation; whether the legislative measures designed to meet the objective are rationally connected to it; and, whether the means employed to limit the right or freedom were no more than necessary to accomplish that objective. It is submitted that these matters were insufficiently addressed by Judge Roach.

It is notable that—on sentencing Peter Aziz to 15 months' imprisonment—Judge Roach expressed his regret at feeling obliged to pass a custodial sentence, remarking that this case was unique and that he accepted wholeheartedly that Aziz had helped a lot of people, alluding to his shamanic role (*R v. Aziz*, Sentencing Hearing, Bristol Crown Court, 9/2/11, unreported). As this conviction is at first instance, it does not provide a definitive answer with regards to the legal status of ayahuasca tea; further, it does little to clarify the position in relation to those found in possession of the constituent plants, or, indeed, who have the concoction itself but for use in the context of a social grouping perhaps more likely to be accorded the recognition of a religion.

Taking a comparative approach, in the United States, both the Santo Daime (*Church of the Holy Light of the Queen v. Mukasey*, 615 F. Supp. 2d 1210 D. Or. 2009) and the Uniao do Vegetal (*Gonzales v. O Centro Espíria Beneficiente União do Vegetal*, 546 U.S. 418 [2006])—another ayahuasca using church—have been afforded permission to drink their psychedelic sacrament: while the courts took the view that ayahuasca was a scheduled substance, the right to religious freedom was here seen to trump the prohibitive ideal (see further Bullis, 2008). Closer to home, a representative of the Santo Daime church in Holland successfully argued that Article 9 was engaged and protected her church's right to use ayahuasca (*Fijneman,* District Court of Amsterdam, Case number: 13/067455–99 May 21, 2001): the Dutch prosecution was unsuccessful in retaliating that Article 9(2) should override this exemption. Public health was seen to be the most pertinent of the qualifiers yet, even here, the prosecution was found to have failed to show how it was threatened by ayahuasca use in such a ritualized setting:

> In view of the above, the Court is of the opinion that in the defendant's case the statutory prohibition against possessing, supplying and distributing DMT, which is based on the Convention, and as a result of which she cannot receive the most important sacrament of her religion during the worship service, constitutes such a serious infringement of her religious freedom that this infringement cannot be regarded as being necessary in a democratic society.

This is, of course, no guarantee that—should Article 9 be successfully engaged in a future case involving religious use of ayahuasca in the UK—the public interest qualifiers in Article 9(2) would not be viewed as taking precedence. The most pertinent domestic forerunner is the case of *R v. Taylor* ([2001] EWCA Crim 2263), involving Rastafarian cannabis use. Taylor was arrested entering a Rastafarian temple with around 90 grams of cannabis. He admitted that he was intending to distribute this to others as part of a regular act of worship: smoking cannabis while studying the Bible is customary for some Rastas, who believe this pursuit brings them closer to Jah. At trial, the prosecution had "conceded" that Rastafarianism is a religion and had not contested that Taylor was supplying cannabis for religious purposes: thus, Article 9 was clearly engaged. However, Article 9(2) was taken to override Taylor's right to manifest his religion through smoking cannabis.

Heavy reliance was placed upon the UK's obligations under the UN Drug Conventions: their very existence was taken as commanding evidence of international agreement that there was a need for a categorical ban on such substances for the sake of the public good. How legally persuasive is this kowtowing to the Conventions? It is worth noting that—unlike the ECHR by virtue of the Human Rights Act 1998—none of the Conventions have been incorporated into the UK's domestic law: on this basis alone, obligations arising out of the ECHR should take precedence in the courts' decision making. Further, the Conventions explicitly allow exemption from enforcement on human rights and constitutional grounds, clearly anticipating limitations such as those demarcated by the ECHR. Given that—as described earlier—exceptions in the name of religious freedom have been made in the United States, the spiritual home of prohibition, the restrictiveness of the global regime should not be overplayed.

An additional reason why the engagement of Article 9(2) in *Taylor* ought not to lead to undue pessimism is that this case did not involve ayahuasca, but rather cannabis, a scheduled plant. Remember, in the case of ayahuasca, this tea is not even considered by global prohibitionists to be

covered by the Conventions. Moreover, a key concern in allowing religious exemptions is that controlled substances will be diverted into the general market, undermining the prohibitive ideal. This is obviously a far greater concern to those in authority in the context of cannabis than as regards a substance such as ayahuasca that will only ever attract minority interest. Indeed, such differentiation between ayahuasca and cannabis is evident in the United States, where—as detailed—usage of the former in a sacred context has been sanctioned, yet repeatedly refused in the case of the latter (see, for example, *Guam v. Guerrero*, 290 F.3d 1210 [9th Cir. 2002]). It is worthy of note that, in order to apply what is ultimately a utilitarian provision such as Article 9(2) fairly, any perceived harms of ayahuasca—or indeed of any psychedelic plant—should be balanced against potential benefits. For many people, ayahuasca is a tool that has helped them with, for instance, issues of addiction, spiritual and emotional healing, or simply their personal evolution: it can catalyze profound effects on people's consciousness, perhaps even shifting their ontological view (see further Tupper, 2008).

Before moving on from Article 9, it is worth emphasizing that it is not technically necessary to prove that one's beliefs are religious in order to be afforded its protection, given that this provision embraces not only freedom of religion but also of thought and conscience. Returning once more to Lord Nicholls in *R (Williamson & Others) v. Secretary of State for Education & Employment* ([2005] UKHL 15):

> The atheist, the agnostic, and the sceptic are as much entitled to freedom to hold and manifest their beliefs as the theist. These beliefs are placed on an equal footing for the purpose of this guaranteed freedom. Thus, if its manifestation is to attract protection under Article 9 a non-religious belief, as much as a religious belief, must satisfy the modest threshold requirements implicit in this article. In particular, for its manifestation to be protected by Article 9 a non-religious belief must relate to an aspect of human life or behaviour of comparable importance to that normally found with religious beliefs.

Are the experiences of those who use psychedelic plants outside of a religious context as important to them as other people's religious experiences (be that with or without a psychedelic sacrament)? Do these substances provide answers—or at least glimpses of such—to the metaphysical questions that religions seek to address? Consider this description by Dr. Timothy Leary of his first mushroom experience:

> During the next five hours, I was whirled through an experience which could be described in many extravagant metaphors but which was above all and without question the deepest religious experience of my life. . . . The discovery that the human brain possesses an infinity of potentialities and can operate at unexpected space-time dimensions left me feeling exhilarated, awed, and quite convinced that I had awakened from a long ontological sleep. (Leary, 1964, p. 324)

Despite usage of the word "religious" here, such experiences are unlikely to fall within a framework that is recognized as such, yet are arguably no less valid for that. They could, however, feasibly engage the "freedom of thought" arm of Article 9 and psychedelic plant ingestion be recognized as a protected manifestation of such if the courts were to accept the argument that "freedom of thought includes freedom of both the contents of thinking and the processes of thinking" (Roberts, 1997, p. 141). Freedom of thought, cognitive liberty, is of supreme importance, underpinning all other freedoms:

> 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. (Boire, 1999/2000, p. 13)

However, the likelihood of the courts protecting people's right to ingest psychedelic plants in the interests of cognitive liberty seems slight, especially in the context of the punitive turn recently taken in relation to such substances, to which the last section of this chapter turns.

Inchoate and Incoherent

There appears to be a recent trend toward using a charge of incitement to commit a drug offence—a crime under section 19 of the MDA—to prosecute those involved with plant psychedelics. Its attractiveness to prosecutors seems to stem from two factors: first, the broad and amorphous nature of this provision; second, the difficulties incurred in prosecuting for plants using more traditional routes (largely rooted in the fact that they are not, in fact, controlled drugs). As the case of *Henderson* ([2011] EWCA Crim 2035) demonstrates, bringing incitement charges is a nifty—if suspect—way of plugging the legal loop holes through which those involved with plant psychedelics (and related paraphernalia) could previously slip.

Henderson was convicted by a jury for, inter alia, incitement to cultivate cannabis and to produce Class A drugs, namely mescaline and psilocin. The facts of the case are that two brothers set up a business selling, among other things, the following: cannabis seeds and related products for cultivation; manuals—such as the *Mushroom Cultivator*—along with magic mushroom grow kits; and San Pedro cacti. The prosecution's case was that, by selling all these items concurrently, along with advertising and promoting the products on their website, the brothers were inciting customers to buy and produce substances controlled by the MDA.

Throughout the appeal, Judge Thornton refers to the sale of cannabis seeds, magic mushroom grow kits, and cacti as "the illegal side of the business" and "illegal drugs," yet, commerce in these products is not in fact illegal: as hopefully amply demonstrated earlier, while mescaline is scheduled,

cacti wherein this substance naturally occurs are not; and while cannabis and magic mushrooms are listed within the MDA, their seeds and spores, respectively, are also not. Indeed, if they were, the incitement charge would be unnecessary: Henderson could simply have been prosecuted for supply under the MDA, rather than for the tortuous "offence" of being "involved in inciting the purchase of products which could be used to produce controlled drugs."

Worryingly, given that Judge Thornton's comments mirror the way the situation was portrayed at trial, this severe misrepresentation does not seem to have been challenged by the defense lawyer with the (unsurprisingly unsuccessful) "defense" predominantly being built around proclaimed ignorance as to what was going on, along with blaming everything upon the defendant's errant brother and business partner. Thus, the whole case centered around the issue of how much Henderson knew of what his brother was up to, rather than the actual illegality—or otherwise—of the businesses' activities, the true crux of the matter. Though, even that perhaps takes on less importance in this new climate where a count of incitement is apparently construed as removing the need for the items in question to actually be included under the MDA.

Yet another ominous development in relation to the equitable policing of plant psychedelics is worthy of comment before concluding. In 2010, two interim Anti-Social Behaviour Orders were made against the owner and manager of a chain of headshops in the North West: "The conditions of the ASBOs were that they were not to sell or allow others to sell . . . any product containing DMT" (Merseyside Police/St Helen's Council, 2011, p. 14). By "product containing DMT" the orders were targeting plant materials that naturally have DMT, which—it is hoped by this point in the chapter it is not necessary to explain in detail—are not products under the MDA. Thus, orders from the civil courts are being used to restrict and police activities that are not criminal. The only justification for this would be if use of DMT-containing plant psychedelics was linked with antisocial behavior. No evidence has been forthcoming linking plant psychedelics with disorder on the streets of the North West, which is

much more clearly associated with that psychoactive substance curiously exempt from the MDA: alcohol.

Concluding Remarks

As described in *R v. Rimmington; R v. Goldstein* ([2005] UKHL 63):

> "Jeremy Bentham made a searing criticism of judge-made criminal law, which he called "dog-law": "It is the judges (as we have seen) that make the common law. Do you know how they make it? Just as a man makes laws for his dog. When your dog does anything you want to break him of, you wait till he does it, and then beat him for it. This is the way you make laws for your dog: and this is the way the judges make law for you and me. They won't tell a man beforehand what it is he *should not do*—they won't so much as allow of his being told: they lie by till he has done something which they say he should not *have done*, and then they hang him for it'. The domestic law of England and Wales has set its face firmly against "dog-law."

Not, it would seem, when it comes to plant psychedelics. Home Office advice in relation to Schedule 2, Part 1, paragraph 5 of the MDA is incoherent and inconsistently applied; some prosecutions brought under this provision fail as an abuse of process, while others are allowed to stand. Even in those cases that are ultimately thrown out of court, defendants have suffered invasions of their privacy, demands on their time, and restrictions on their liberty, while, in those cases that succeed, they face potentially lengthy prison sentences for Class A drug offences. Rights-based claims revolving around religious freedom and cognitive liberty are given short shrift. More recently and most worryingly, seemingly to ensure convictions even in the face of such complications, dubious incitement prosecutions that extend the MDA beyond any recognizable boundaries are being advanced, along with questionable use of civil

orders. “Dog law” is no way to educate one’s animal companion, and it is certainly not the route to any semblance of criminal justice.

References

Boire, R. G. (1999/2000). On cognitive liberty (Part I). *Cognitive Liberty*, *1*(1), 7–13.

Bristol Evening Post. (2011). “Shaman” used illegal drug for spiritual rite. *Bristol Evening Post* Wednesday, August 3. Retrieved from http://www.thisisbristol.co.uk/Shaman-used-illegal-drug-spiritual-rite/story-13061098-detail/story.html

Bullis, R. (2008). The “vine of the soul” vs the Controlled Substances Act: Implications of the hoasca case. *Journal of Psychoactive Drugs, 40*(2), 193–199.

Devereux, P. (1997). *The long trip: A prehistory of psychedelia*. Brisbane, Australia: Daily Grail Publishing.

Grinspoon, L., & Bakalar, J. (1979). *Psychedelic drugs reconsidered*. New York, NY: Basic Books.

Labate, B.C., & Feeney, K. (2012). Ayahuasca and the process of regulation in Brazil and internationally: Implications and challenges. *International Journal of Drug Policy, 23*(2), 154–161.

Leary, T. (1964). The religious experience: Its production and interpretation. *Psychedelic Review, 1,* 324–346.

Letcher, A. (2006). *Shroom: A cultural history of the magic mushroom.* London: Faber & Faber.

Letcher, A. (2007). Mad thoughts on mushrooms: Discourse and power in the study of psychedelic consciousness. *Anthropology of Consciousness, 18*(2), 74–97.

McKenna, D. (2004). Clinical investigations of the therapeutic potential of ayahuasca: Rationale and regulatory challenges. *Pharmacology and Therapeutics, 102,* 111–129.

McKenna, T. (1992). *Food of the gods: A radical history of plants, drugs and human evolution*. London: Rider.

Merseyside Police/St Helens Council. (2011). Tackling crime and disorder in St. Helens. Retrieved from http://moderngov.sthelens.gov.uk/(S(ewypt0rz01x1aq55mihwnj55))/mgConvert2PDF.aspx?ID=6035

Ormerod, D. & Fortson, R. (2009). Serious Crime Act 2007: The Part 2 offences. *Criminal Law Review, 6,* 389–414.

Roberts, T. (1997). Academic and religious freedom in the study of the mind. In R. Forte (Ed.), *Entheogens and the future of religion* (pp. 137–151). San Francisco: Council of Spiritual Practices.

Schaepe, H. (2001, January 17). Letter from Herbert Schaepe, Secretary of the United Nations International Narcotics Control Board to R. Lousberg. Inspectorate for Health Care of the Ministry of Public Health in the Netherlands.

Schultes, R., Hofmann, A., & Ratsch, C. (2001). *Plants of the gods: Their sacred, healing and hallucinogenic powers* (2nd ed.). Rochester, VT: Healing Arts Press.

Tupper, K. (2008). The globalization of ayahuasca: Harm reduction or benefit maximization? *International Journal of Drug Policy, 19*(4), 297–303.

Tupper, K. W. (2009). Ayahuasca healing beyond the Amazon: The globalization of a traditional indigenous entheogenic practice. *Global Networks: A Journal of Transnational Affairs*, *9*(1), 117–136.

Walsh, C. (2005, October). Magic mushrooms & the law. *Criminal Law Review*, 773–783.

Walsh, C. (2011). Drugs, the internet and change. *Journal of Psychoactive Drugs, 43*(1), 55–63.

Wasson, G. (1963). The hallucinogenic fungi of Mexico. *Psychedelic Review, I*(1), 27–42.