IN THE HIGH COURT OF JUSTICE **CO/687/2007**
ADMINISTRATIVE COURT
Royal Courts of Justice
Strand
London WC2A 2LL

The Queen on the Application of:

Casey William HARDISON

Petitioner

V

Secretary of State for the HOME DEPARTMENT

Respondent

DRAFT STATEMENT OF CLAIM

> The distinction between legal and illegal substances is not unequivocally based on pharmacology, economic or risk benefit analysis. It is also based in large part on historical and cultural precedents. A classification system that applies to legal as well as illegal substances would be unacceptable to the vast majority of people who use, for example alcohol, responsibly and would conflict with deeply embedded historical tradition and tolerance of consumption of a number of substances that alter mental functioning. – *Her Majesty's Government*, **Cm 6941**, October 13th 2006

Prepared By

Casey William HARDISON

February 18th 2007

Table of Contents: **Page**

I.	**The issue and new evidence in brief**	**2**
II.	**The decision and background in brief**	**3**
III.	**The Misuse of Drugs Act 1971 – The relevant law in England and Wales**	**5**
IV.	**Setting the Stage – Equality under the Rule of Law and the Prohibition of Discrimination**	**9**
V.	**Alcohol and tobacco are traded and used with the same intent as other drugs property – the analogous comparators**	**12**
VI.	**The Misuse of Drugs Act 1971 – as applied – discriminates on at least two grounds**	**13**
VII.	**The Misuse of Drugs Act 1971 engages the *ambit* of several Convention rights**	**15**
VIII.	**The Misuse of Drugs Act 1971 – as applied – manifests a difference in treatment – A statement of alleged violations**	**19**
IX.	**The Government's Justification for the difference of treatment**	**26**
X.	**Details of remedy being sought under CPR Part 54 and HRA 1998**	**33**

Principle Authorities Cited:

- Cm 6941 (2006) *The Government Reply To The Fifth Report From The House Of Commons Science And Technology Committee Session 2005-06* HC 1031 *'Drug classification: making a hash of it?'*. October 13th 2006
- ACMD (2006) *Pathways to Problems: hazardous use of tobacco, alcohol and other drugs by young people in the UK and its implications for policy*, September 14th 2006
- HC 1031 (2006) *Drug classification: making a hash of it?*, House of Commons Science & Technology Committee, Fifth Report of Session 2005-2006, July 31st 2006
- *Stec v United Kingdom* [2006] ECHR 393
- *R(Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37
- *A & Others v SSHD* [2004] UKHL 56
- *Pretty v United Kingdom* [2002] 35 EHRR 1
- *Thlimmenos v Greece* [2000] 31 EHRR 411 para 44
- *Smith and Grady v United Kingdom* [2000] 29 EHRR 493
- *Chassagnou and Others v France* [1999] 29 EHRR 615
- *Wockel v Germany* [1998] 25 EHRR CD156
- *Kokkinakis v Greece* [1994] 17 EHRR 397
- *Niemetz v Germany* [1992] 16 EHRR 97
- *Dudgeon v United Kingdom* [1982] 4 EHRR 149

I. The issue in brief

1. Mr Casey William HARDISON, a United States citizen, makes this submission under Section 7(3) of the Human Rights Act 1998 which gives further effect in domestic law to the rights and freedoms guaranteed under the European Convention for the Protection of Human Rights and Fundamental Freedoms, **Cmd 8969**. Hardison was convicted, March 2005, of six Misuse of Drugs Act 1971 offences and sentenced to 20 years imprisonment.

2. Hardison seeks a review of the SSHD's decision not to review the classification system under the Misuse of Drugs Act 1971 made at page 5, paragraph 12 of the Introduction to **Cm 6941,** *The Government Reply To The Fifth Report From The House Of Commons Science And Technology Committee Session 2005-06* HC 1031 *'Drug classification: making a hash of it?'* [1]

3. This decision is contrary to the recommendation made by the statutorily independent Advisory Council on the Misuse of Drugs in *Pathways to Problems: hazardous use of tobacco, alcohol and other drugs by young people in the UK and its implications for policy*,[2] and contrary to the recommendation made by the Parliamentary Science and Technology Committee report, **HC 1031**, *Drug classification: making a hash of it?*.[3] These three documents provide overwhelming proof that classification decisions are not based on the objective risks drugs pose to society but are based upon an unrecognised form of discrimination as pernicious as racism and sexism yet considerably more perverse due to its unconscious character and near-global social acceptance.

4. **The issue:** Unconscious discrimination has resulted in an interpretation and application of the classification system under the Misuse of Drugs Act 1971 ("the Act") contrary to Article 14 of the European Convention on Human Rights (ECHR), which prohibits discrimination.

   The legitimate aim of the Act is to reduce risks to society from the harmful consumption of drugs. The primary method applied to achieve this aim is the prohibition of property rights. This method, unlike the legitimate aim, is under review by the both the Advisory Council on the Misuse of Drugs (ACMD) and the Secretary of State for the Home Department (SSHD) with changes subject to acceptance by both Houses of Parliament.

   Drugs can be licensed under the Act, along the lines of alcohol and tobacco, if licensing is believed to be a more effective method of achieving the legitimate aim than outright prohibition. Similarly, alcohol and tobacco can be prohibited under the Act if prohibition is believed to be a more effective method of achieving the legitimate aim than licensing. It is the unequal treatment of drugs and those concerned with them that contradicts Article 14.

   Currently the Act classifies drug property in Schedule 2 but excludes the two types of drug property which cause the most harm to society, alcohol and tobacco, and so discriminates on the grounds of property and drug orientation

   Classification decisions ultimately affect the full and free exercise of property rights for Schedule 2 drugs property, i.e., import/export, production, possession, supply, consumption, disposal, etc. Thus, the public are denied the peaceful enjoyment of their possessions via controls on the use of property and deprivations of property without compensation. This falls within the ambit of Article 1 of the First Protocol of the ECHR.

   The regulatory and enforcement measures of the Act further invade the ambits of Article 6, fair trial rights, Article 8, the right to respect for privacy, Article 9, the right to freedom of thought, conscience and religion. The liberty interferences are of such a draconian nature as to constitute degrading treatment and punishment contrary to Article 3. Accordingly, the classification system should be reviewed.

---

[1] HM Government (2006) *The Government Reply to the Fifth Report from the House of Commons Science and Technology Committee Session 2005-06 HC 1031 Drug classification: making a hash of it?* **Cm 6941**, October 13th 2006

[2] Home Office/ ACMD (2006) *Pathways to Problems: hazardous use of tobacco, alcohol and other drugs by young people in the UK and its implications for policy*, September 14th 2006 – www.drugs.gov.uk

[3] HC 1031 (2006) *Drug classification: making a hash of it?*, The House of Commons Science and Technology Committee Session 2005-06, HC 1031, July 31st 2006

II. The decision and background

5. In 2003 Dr. Colin Blakemore, Chief Executive of the Medical Research Council, declared the drug classification system:

> … is antiquated and reflects the prejudice and misconceptions of an era in which drugs were placed in arbitrary categories with notable, often illogical, consequences. The continuous review of the evidence, and the inclusion of legal drugs in the same review, will allow a more sensible and rational classification.[4]

6. On January 19th 2006 – the then Home Secretary Charles Clark announced that he was initiating a review of the ABC classification system:

> The more I have considered these matters, the more concerned I have become about the limitations of our current system. […] I will in the next few weeks publish a consultation paper with suggestions for a review of the drug classification system, on the basis of which I will make proposals in due course.[5]
>
> …evidence must be the core of what we do in this area … we will continue to review the matter on the basis of evidence as it evolves over time … one needs to proceed on the basis of evidence … I want to emphasise to the House the importance of evidence and research on this subject.[6]

7. On July 31st 2006 – the House of Commons Science and Technology Committee Session 2005-06, HC 1031, *Drug classification: making a hash of it?* stated:

> The stated purpose of the classification system is to classify harmfulness so that the penalties for possession and trafficking are proportionate to the harm associated with a particular drug. … A paper authored by experts including Professor Nutt, Chairman of the ACMD Technical Committee, which we have seen in draft form, found no significantly significant correlation between the Class of a drug and its harm score. … the paper asserted that **"The current classification system has evolved in an unsystematic way from somewhat *arbitrary foundations* with seemingly little scientific basis"**. The paper also found that the boundaries between Classes were entirely arbitrary. … One of the most striking findings highlighted in the paper drafted by Professor Nutt and his colleagues was the fact that, on the basis of their assessment of harm, tobacco and alcohol would be ranked as more harmful than LSD and ecstasy (both Class A drugs). … **We have identified significant anomalies in the classification of individual drugs and a regrettable lack of consistency in the rationale used to make classification decisions.**

The 'paper authored by experts including Professor Nutt, Chairman of the ACMD Technical Committee' appears as Appendix 14 to the HC 1031 report and states:

> Our findings raise questions about the validity of the current MDAct classification, despite the fact that this is nominally based on an assessment of risks to users and society. This is especially true in relation to psychedelic type drugs. **They also emphasise that the exclusion of alcohol and tobacco from the MDAct is, from a scientific perspective, arbitrary.** (Ev 116)

The Introduction to HC 1031, *Drug classification: making a hash of it?*, had said:

> [W]e have concluded that the current classification system is not fit for purpose and should be replaced with a more scientifically based scale of harm, decoupled from penalties for possession and trafficking. In light of the serious failings of the ABC classification system that we have identified, **we urge the Home Secretary to honour his predecessor's commitment to review the current system, and to do so without further delay.**

---

[4] *A Scientifically Based Scale of Harm for all Social Drugs* in Beckley Foundation (2003) Society & Drugs: A Rational Perspective, Seminar III, Admiralty Arch, July 15th 2003, proceedings p.80 Available at: www.internationaldrugpolicy.org

[5] *Hansard*, HC Deb, 19 Jan 2006, Col 983

[6] www.publications.parliament.uk/pa/cm200506/cmhansard/vo190106/text/190106w20.htm

8. On September 14th 2006 – The ACMD report, *Pathways to Problems: hazardous use of tobacco, alcohol and other drugs by young people in the UK and its implications for policy*, stated:

> At present, the legal framework for the regulation and control of drugs clearly distinguishes between drugs such as tobacco and alcohol and various other drugs which can be bought and sold legally (subject to various regulations), drugs which are covered by the Misuse of Drugs Act (1971) and drugs which are classes as medicines, some of which are also covered by the Act. **The insights summarized in this chapter indicate that these distinctions are based on historical and cultural factors and lack a consistent and objective basis.** (para 1.13)
>
> **The current system for classifying and controlling drugs in the UK has a number of shortcomings and should be reviewed.** (Key Points, page 18)
>
> As their harmfulness to individuals and society is no less than that of other psychoactive drugs, **tobacco and alcohol should be explicitly included within the terms of reference** of the Advisory Council on the Misuse of Drugs. (Recommendation 1)
>
> **The current arrangements to control the supply of drugs** covered by the Misuse of Drugs Act (1971) **should be reviewed** to determine whether any further cost-effective and politically acceptable measures can be taken to reduce the availability of drugs to young people. (Rec. 13)

9. October 13th 2006 – **Cm 6941,** *The Government Reply to the Fifth Report from the House of Commons Science and Technology Committee Session 2005-06 HC 1031 Drug classification: making a hash of it?* said:

> **The distinction between legal and illegal substances is not unequivocally based on pharmacology, economic or risk benefit analysis**. **It is** also **based in large part on historical and cultural precedents**. A classification system that applies to legal as well as illegal substances would be unacceptable to the vast majority of people who use, for example alcohol, responsibly and would conflict with deeply embedded historical tradition and tolerance of consumption of a number of substances that alter mental functioning (ranging from caffeine to alcohol and tobacco). Legal substances are therefore regulated through other means.
>
> However, the **Government acknowledges that alcohol and tobacco account for more health problems and deaths than illicit drugs** and this is why the Government intervenes in many ways to prevent, minimise and deal with the consequences of the harms caused by these substances through its dedicated Alcohol Harm Reduction Strategy and its smoking/tobacco programme. At the core of this work, which is given considerable resources, is a series of education and communication measures aimed at achieving long term change in attitudes. It is through this that the public continues to be informed in an effective and credible manner.

10. On January 19th 2006 the SSHD created a legitimate expectation that the classification system under the Misuse of Drugs Act 1971 would be reviewed. The House of Commons Science and Technology Committee and the Advisory Council on the Misuse of Drugs have both welcomed that commitment and provided evidence in support.

11. But, on October 13th 2006, in Cm 6941, **"Government … decided not to pursue a review of the classification system at this time".**[7] This is unreasonable given the disproportionate impact classification decisions have on those concerned with drugs proscribed under the 1971 Act.

12. So, in recognition of the fresh formal admissions made by Government in Cm 6941, in which they justify the "distinction between legal and illegal substances" as "based in large part on historical and cultural precedents", a justification which is neither objective nor reasonable, this Court should grant permission to review the decision by the SSHD.

[7] n1 *supra*, Cm 6941 (2006) para 12, page 5

III. The Misuse of Drugs Act 1971 – The relevant law in England and Wales

13. The preamble to the Misuse of Drugs Act 1971 (MDA) reads as follows: "An Act to make new provision with respect to dangerous or otherwise harmful drugs." The intentional use of the inclusive 'drugs' in Section 1(2) juxtaposed the exclusive 'controlled drug' in Section 2(1)(a) suggests that no drug is or could be immune from the scope of the Act.

14. Section 37(2) of the Act, 'Interpretation', states "References in this Act to misusing a drug are references to misusing it by taking it". Thus, possession, supply, production, import and export are *not* forms of 'misuse'.

15. Section 1 clarifies the 'misuse' with which the Act is concerned and conjunct Schedule 1 of the Act creates the Advisory Council on the Misuse of Drugs (ACMD), charging them with a duty to "keep under review" the situation in the United Kingdom with respect to drugs: 1) which are being misused; 2) appear likely to be misused; and 3) the misuse of which is having "harmful effects" or appears "capable of having harmful effects sufficient to constitute a social problem"; above all the ACMD are to "advise the government on measures (whether or not involving changes in the law) which in the opinion of the Council ought to be taken for preventing the misuse of such drugs or dealing with the social problems connected with their misuse", including:

    i. restricting the availability or supervising the arrangements for the production and supply of dangerous or otherwise harmful drugs;
    ii. facilitating advice and treatment for persons affected by the misuse of drugs;
    iii. promoting cooperation between various professional and community services which have a part to play in dealing with social problems related to the misuse of drugs;
    iv. undertaking research designed to promoting a deeper understanding of problem drug use and the social problems connected with the misuse of drugs; and
    v. educating the public about the dangers of misusing drugs and promoting efforts to give publicity to such dangers and thereby minimise drug consumption risks and harms.

a) The Act has a legitimate aim – protection of public health, safety and order

16. The primary legitimate aim of the Act is the reduction of risks to the public, i.e., the protection of public health, safety and order, specifically the limitation, reduction, prevention and possible elimination of *harmful* non-medical *use of all drugs*.

17. The secondary legitimate aims are discernable from the text of the Act:

    i. The classification of drugs should evolve with new objective evidence of risks to the individual and society including the effectiveness of regulations and sanctions to minimise those risks;
    ii. To subject the exercise of property rights in 'controlled drugs' to regulations and sanctions which are proportionate and targeted to the objective risks to the individual and the public.

18. And, because a failure to maintain a dynamic and evolutive approach would seriously undermine the primary and secondary legitimate aims, evidence must include:

    i. Objective evidence of drug risks or harms distinct to the individual and to society;
    ii. Objective baseline for evaluation and feedback in meeting the legitimate aims; and
    iii. Objective evidence of the suitability of regulatory options and their sanctions in achieving the primary legitimate aim of reducing risks or harm to the public when drugs are mis-used.

19. Thus, Schedule 1 constitutes the Advisory Council to be interdisciplinary mandating the service of professionals having relevant and sufficient knowledge in the fields of chemistry, medicine, pharmacology, psychiatry, and the social science and services, showing *prima facie* that classification and regulations are intended to remain unfettered and evolve with scientific evidence and advice.

b) The Classification of Controlled Drugs – Schedule 2

20. The central backbone of the MDA 1971 is the differentiation of 'controlled drugs' specified in Schedule 2 into three Classes from A to C. On this Government has said:

> The three-tier classification was designed to make it possible to control particular drugs according to their comparative harmfulness either to individuals or to society at large when they are misused.[8]

21. According to the 2006 Home Affairs Committee report, HC 1031, *Drug classification: making a hash of it?*, "the United Nations Single Convention on Narcotic Drugs 1961 and its attempts to establish a Convention on Psychotropic Substances (eventually ratified in 1971) formed an important backdrop to the United Kingdom's efforts to rationalise its legislation in this area. James Callahan, the then Home Secretary, told Parliament in 1970 that in developing the classification system the Government had used the UN Single Convention and guidance provided by the World Health Organisation to place drugs: "in the order in which we think they should be classified of harmfulness and danger"." [9]

> The object here is to make, so far as possible, a more sensible differentiation between drugs. It will divide them according to their accepted dangers and harmfulness 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.[10]

22. In Cm 5573 (2002) Government reiterated this commitment to a dynamic and evolutive drug policy and classification based on objective empirical evidence believing this to be necessary for "credibility" and compliance.[11] And, on January 19th 2006, the then Home Secretary, Charles Clarke told the House of Commons that:

> …evidence must be the core of what we do in this area … we will continue to review the matter on the basis of evidence as it evolves over time … I want to emphasise to the House the importance of evidence and research on this subject.[12]

c) Schedule 2 conjunct Schedule 4 sets the penalties for offences under the Act

23. The three Classes within Schedule 2 are linked, via Section 25, to Schedule 4 which sets out the minimum and maximum penalties upon conviction. On this Government said:

> Its fundamental purpose was then and remains today to provide a framework within which criminal penalties are set with reference to the harm caused by a drug and the type of illegal **activity** undertaken in regard to that drug.[13] (Emphasis added)

24. And since the Classes of controlled drugs are directly related to the penalties set out for each MDA offence in Schedule 4, which may range from small fines to life imprisonment, it is essential that the Classes are kept *open* and *unfettered* and that alterations are based in sound unbiased and objective empirical evidence, i.e., the regulation and penalty vis-à-vis a particular drug must be *proportionate* to the objective risks involved, otherwise, "the Courts are placed at a considerable disadvantage, at least on the question of sentence, believing the drugs in question to be more or less harmful that they really are".[14]

---

[8] n3 *supra*, HC 1031 (2006) Appendix 1, Ev 53, Memoranda from the Government, para 1.6
[9] n3 *supra*, HC 1031 (2006) para 6
[10] *Hansard*, House of Commons, Misuse of Drugs Bill 1970 (not passed), March 25th 1970, Vol. 798, col. 1453
[11] HM Government Report (2002) *The Government Reply to the Third Report From the Home Affairs Committee Session 2001-2002* HC *318*, Cm 5573, page 6, July 10th 2002, The Stationary Office Ltd.
[12] www.publications.parliament.uk/pa/cm200506/cmhansard/vo190106/text/190106w20.htm
[13] n1 *supra*, Cm 6941 (2006) Introduction, para 3
[14] Fortson, R (2002) Misuse of Drugs and Drug Trafficking Offences, 4th Ed. Sweet & Maxwell p31

d) The principal prohibitions and offences under the Act

25. Section 3 prohibits unlicensed importation and exportation of controlled drugs. The offence of evading Section 3 prohibitions arises from its combined effect with Section 170 of the Customs and Excise Management Act 1979.

26. Subject to any regulations made under Section 7 – it is unlawful *and* an offence:

    i. to supply, offer to supply, or produce a controlled drug (or to be *concerned* in any of those activities) – Section 4;
    ii. to be in possession, or to possess with intent to supply, a controlled drug – Section 5;
    iii. to cultivate cannabis – Section 6;
    iv. for an occupier or manager of premises knowingly to permit certain drug related activities to take place on those premises – Section 8;
    v. to perform certain activities, relating to opium – Section 9, or drug kits – Section 9A;
    vi. to assist in or induce the commission abroad of an offence punishable under a corresponding law in force in that place – Section 20; and
    vii. to obstruct the exercise of powers of search and seizure, to conceal, or fail to produce, certain documents – Section 23.

e) The powers delegated by the Act to the Secretary of State for the Home Department

27. Section 7 confers power to make regulations licensing activities otherwise made unlawful under the Act. These Regulations[15] identify who may legitimately handle particular controlled drugs, describe the circumstances in which controlled drugs may be produced, supplied, or handled and control the purposes for which a controlled drug may be used.

28. Section 10 confers power to make regulations for preventing misuse of controlled drugs, including: recordkeeping, labelling, transporting, disposal, and regulating the methods, requirements, prohibitions, and data collection for controlled drug prescription to 'addicts'.

29. Section 22 confers power to make regulations for excluding the application of any provision of the Act which creates an offence.

30. Section 23 and 24 confers police power to search, obtain evidence, and arrest if there exists 'reasonable suspicion' that the Act or Regulations are being contravened.

31. Section 25 specifies the mode of prosecution for offences and penalties upon conviction.

f) The Order making powers under the Act and the requirement to consult the ACMD

32. Whilst the Secretary of State for the Home Department (SSHD) is under no obligation to accept Advisory Council advice on classification or their regulatory recommendations but, pursuant to Section 31(3), the Act is maintained by the ACMD as it endures through time by virtue of requiring that, the SSHD to consult the Advisory Council before:

    i. any draft Order is laid before Parliament, under Section 2(5);
    ii. making of any Designation Order under Section 7(4);
    iii. making any Regulation under Sections 7(1), 10(1) or 22; and

33. Pursuant Section 2(2), Her Majesty, by Order in Council, may add or remove substances from Schedule 2 – 'Controlled Drugs'. But, before any recommendation is made by the SSHD to Her Majesty to make and Order in Council, a draft Order must be laid before Parliament, under Section 2(5), and approved by a resolution of each House.

[15] 2001 S.I. 3998, *Dangerous Drugs*, The Misuse of Drugs Regulations 2001

g) The default condition of the Act extinguishes property rights

34. The Sections of the Act which create each offence set the default condition vis-à-vis Schedule 2 drugs property to absolute prohibition. These Sections create absolute or strict liability offences along the legal distinctions of property rights, i.e., production, supply, possession, use related to premises, and use of one drug, opium. **Thus, no drug is 'illegal', only the exercise of property rights vis-à-vis Schedule 2 drugs are illegal.**

35. And, whilst Parliament intended to set the default condition to absolute prohibition, exceptions are to be made through the provisions of the Act specifically granting power for the Secretary of State to make, after consultation with the ACMD, regulations by Statutory Instrument which are "fit for the purpose of making it lawful for persons to do things which … would otherwise be unlawful for them to do". This wording makes clear that Parliament intended the SSHD would employ his or her discretion in an equitable and rational manner after taking proper advice from the ACMD.

36. Thus, Parliament designed an Act which allows regulations to *evolve* and be *flexible*, as they knew, from the moment of manufacture, until the moment of consumption, a drug will change hands countless times and that different considerations will apply at different stages.

37. However, the general method used to achieve the legitimate aim, prohibition, is to deprive all persons concerned with Schedule 2 drugs of the enjoyment of property rights unless they have made previous arrangements with the Secretary of State to retain them. Accordingly, if your desired or possessed drugs property is listed, and you have been able to persuade the SSHD to grant you an exception (s22) or licence (s7), because your activities are not for legitimate scientific research, legitimate medical use, "or other special purposes", then you are deprived of all rights to the peaceful enjoyment of your possessions and you are prohibited, under severe penalties including forfeiture, from using existing lawful possessions to exercise property rights vis-à-vis Schedule 2 drugs.

h) The methods of achieving the legitimate aim are not fettered

38. The methods of achieving the legitimate aim, unlike the legitimate aim, are unfettered except to the Rule of Law and are to be kept "under review" by both the ACMD and the SSHD; yet, the general method used, prohibition of property rights for the general public, has not been reviewed to see if it is achieving the legitimate aim since the Act's inception.

39. The UN drug Conventions not only influenced the initial ranking of harmful drugs in the Acts classification but also strongly influenced the default method applied to achieve the legitimate aim of reducing risks to the public from harmful drug misuse. Article 4(c) of the 1961 *Single Convention* set the 'General Obligations' of signatories as such:

> The parties shall take such legislative and administrative measures as may be necessary:
>
> a. To give effect to and carry out the provisions of this Convention within their own territories;
> b. To co-operate with other States in the execution of the provisions of this Convention; and
> c. Subject to the provisions of this Convention, to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs.

40. Crucially, the Act does not give effect in domestic law to the UN Conventions or any other international Treaties as this would conflict with Parliamentary sovereignty and Article 2(7) of the UN Charter. And, there is no suggestion in the Act that the continuous review of drugs risks, regulations and sanctions is in any way limited by UN drug Conventions. Thus, compliance with the UN drug Conventions cannot be a legitimate aim of the Act, though by Section 1(3) both the ACMD and the SSHD may take them into account.

IV. Setting the Stage – Equality under the Rule of Law and the Prohibition of Discrimination

41. The principle that everyone is entitled to equal treatment by the state, that like cases should be treated alike and different cases should be treated differently, will be found, in one form or another, in most human rights instruments and written constitutions.[16] These vary only in the generality with which they are expressed. But, sadly, this has not always been so.

42. Not until 1772, when Lord Mansfield freed "the black" in the case of *Somersett v Stewart*,[17] did one of the most vital maxims in English Common Law arise and set the stage for the modern case law on equality and discrimination:

He who is subject to English law is entitled to its protection.

43. Yet, when this Common Law principle of 'equal protection' was promulgated, women were still considered chattels to their husbands and fathers; after all, the Judge had said "he". It would take another 150 years before women would get equal suffrage.

44. But, when women got the vote, we still persecuted Jews and incarcerated homosexuals. It took World War II to stop the overt persecution of Jews and those of most other religions, but it took another 60 years to decriminalise homosexuality.

45. Thus, it can bee seen that equality and human rights norms evolve. And so today, everyone is equally entitled to expect that public authorities will exercise their powers fairly and rationally in the pursuit of legitimate aims in the public interest.

46. Indeed, fairness and rationality are essential components of the Common Law principle of 'equal treatment'. Delivering the Judgment of the Privy Council in *Matadeen v Pointu*, Lord Hoffmann referred to the principle of equal treatment as "one of the building blocks of democracy" stating.

> [T]reating like case alike and unlike cases differently is a general axiom of rational behaviour.[18]

47. Baroness Hale, in *Ghaidan v Godin Mendoza*, expressed the principle of equal treatment thus:

> [Discriminatory treatment] is the reverse of the rational behaviour we expect of government and the state. Power must not be exercised arbitrarily. If distinctions are to be drawn, particularly upon a group basis, it is an important discipline to look for a rational basis for these distinctions.[19]

48. Where differential treatment, due to prejudice or simply the lack of rational consideration, is coupled with the use of power, we speak of arbitrariness, capriciousness, inconstancy, irregularity, unpredictability … We understand that these attributes are wholly irreconcilable with the ideal of the Rule of Law[20] which presupposes the generality of the laws, their plain and even applicability (*in abstracto*) and their uniform application (*in concreto*).

49. Not withstanding the availability – and potentially wider scope – of the Common Law principles of equal protection and equal treatment under the Rule of Law, attention has inevitably shifted in England since the coming into effect of the Human Rights Act 1998 to the more limited yet better defined 'Prohibition of Discrimination' afforded by Article 14 of the European Convention on Human Rights.

---

16 *R(Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37 para 10
17 *Somersett's Case* (1772) 20 St. Tr. 1
18 *Matadeen v Pointu* [1999] AC 98 para 8
19 *Ghaidan v Godin Mendoza* [2004] 2 AC 557 para 132
20 Lord Bingham of Cornhill KG (2006) *The Rule of Law*, Sir David Williams Lecture, House of Lords, November 2006

50. **Article 14** of the **European Convention on Human Rights (ECHR)** provides**:**

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

51. Article 14 is not a free-standing prohibition of discrimination by public authorities. That right is contained in Article 1 of the 12th Protocol to the Convention which the United Kingdom has yet to ratify. Hence, Article 14 is restricted in three important aspects:

a) Article 14 prohibits discrimination only in "the enjoyment of the rights and freedoms set forth in [the] Convention", i.e., Article 14 is not engaged unless the claimant can show that the discrimination complained of falls "within the ambit" [21] of another Convention right.

b) Article 14 prohibits discrimination only on *"any grounds such as"* those enumerated in Article 14 itself; *"any grounds such as"* reflects that the grounds are "illustrative and not exhaustive".[22]

c) Article 14 prohibits only discrimination which does not pursue a "legitimate aim" found in the express limitations of the engaged Convention right and/or where there is no "reasonable relationship of proportionality between the means employed and the aim sought to be realised".[23]

a) Discrimination must be within the ambit of a Convention right

52. It has long been established that in demonstrating he has been the victim of discrimination in relation to a Convention right, Hardison does *not* need to show that a Convention right has been breached. Such a restrictive approach would give no independent scope for the right under Article 14 itself. Instead, the Strasbourg Court has said on many occasions that Article 14 comes into play when "the subject matter of the disadvantage constitutes one of the modalities of the exercise of a right guaranteed", or that the treatment complained of is "linked to the exercise of a right guaranteed".[24]

53. However, some members of the House of Lords in recent controversies such as *R(Carson) v Secretary of State for Work and Pensions*[25] have shown a reluctance to accept a broad view of what treatment falls within the ambit of a Convention right.

54. Nevertheless, these narrow approaches were recently rejected by the Grand Chamber of the European Court of Human Rights in the case of *Stec v United Kingdom* where the Court held that the prohibition against discrimination extends beyond the enjoyment of the rights which the Convention requires each State to guarantee. The Strasbourg Court said:

> **Article 14 also applies to "those additional rights, falling within the scope of any Convention article, for which the State has voluntarily decided to provide".**[26]

55. This brings within the scope of Article 14 any legally enforceable right which a State chooses – though not obliged under any Convention right – to provide any of its citizens, e.g., the "people's rights to make free and informed choices"[27] in the consumption of harmful "[drugs] that alter mental functioning".[28]

---

[21] *Petrovic v Austria* [1998] 33 EHRR 307 para 22 and 28; *Rasmussen v Denmark* [1984] 7 EHRR 371 para 29
[22] *Salgueiro da Silva Mouta v Potrugal* [2001] 31 EHRR 1055 para 28; *Engel and Others v Netherlands* [1976] 1EHRR 647 para 30
[23] *Belgian Linguistic Case* (No. 2) [1968] 1 EHRR 252 para 10; *A & Others v SSHD* [2004] UKHL 56 para 50
[24] *Petrovic v Austria* [1998] 33 EHRR 307 para 22 and 28; *Van De Mussele v Belgium* [1983] 6 EHRR 163 para 43
[25] *R(Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37
[26] *Stec v United Kingdom* [2006] Judgment 12 April 2006, para 53 – referring to Admissibility Judgment, 6 July 2005 para 40
[27] HM Government (1998) *Smoking Kills* White paper, Cm 41, para 1.26, 10thDecember 1998
[28] n1 *supra*, Cm 6941 (2006) page 24

b) Discrimination must be on some ground

56. Article 14 protects against discrimination on "any ground such as [the enumerated grounds] or other status". And though the grounds are "illustrative and not exhaustive",[29] a ground or status has been interpreted as "a personal characteristic…by which persons or groups of persons are distinguished from each other".[30]

57. In *Carson*, Lord Walker articulated "[t]he proposition that not all possible grounds of discrimination are equally potent is not very clearly spelled out in the jurisprudence of the Strasbourg Court".[31] Thus His Lordship reminded us that different grounds for discrimination may require different standards of scrutiny; as, in law, context is everything.

58. Strict scrutiny review, the most intense standard, has been reserved for some grounds such as sex, race, religion and more recently sexual orientation, which are what the US Supreme Court describe as particularly "suspect class[es]", i.e., those classes which are:

> …saddled with such disabilities, or subjected to such a history of purposeful unequal treatment**,** or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.[32]

c) Discrimination is unlawful without an objective and reasonable justification

59. In *R(Carson) v SSWP*, Lord Walker of Gestingthorpe told us why discrimination is unlawful:

> "[D]iscrimination is regarded as particularly objectionable because it disregards fundamental notions of human dignity and equality before the law."[33]

60. Thus, the guiding principle of Article 14 is that people in similar circumstances should not be treated differently. Not every difference in treatment, however, will amount to a violation of Article 14. Instead, it must be established that other persons in an analogous or relevantly similar situation enjoy preferential treatment, and that the State is unable to provide an objective, reasonable and proportionate justification for their distinction.[34]

61. Unlawful discrimination also occurs when the State, without justification, fails to treat differently persons whose situations are significantly different.[35] However, the overwhelming majority of cases brought under Article 14 concern less favourable treatment. Such cases generally raise the closely interrelated questions:[36]

    i. Do the facts fall within the ambit of the other substantive provisions of the Convention?
    ii. Is the chosen comparator in an analogous situation to the complainant's situation?
    iii. Is there a difference of treatment between the complainant and the chosen comparator?
    iv. Is the difference of treatment on "any ground such as" those set out in Article 14?
    v. Does the difference of treatment have an objective and reasonable justification?

62. Due to the extraordinary nature of the alleged discrimination, the answers to these questions will be set out in detail but in an order intended to clear away prejudice and bias.

---

[29] *Salgueiro da Silva Mouta v Portugal* [2001] 31 EHRR 1055 para 28
[30] *Kjeldsen, Busk Madsen and Pedersen v Denmark* [1976] 1 EHRR 711 para 56
[31] *R(Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37 para 55
[32] *San Antonio School District v Rodriguez* (1973) 411 U.S. 1, 29 'the traditional indicia of suspectness'
[33] *R(Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37 para 2
[34] *Rasmussen v Denmark* [1984] 7 EHRR 371 para 38; *Marckx v Belgium* [1979] 2 EHRR 330 para 33
[35] *Thlimmenos v Greece* [2000] 31 EHRR 411 para 44
[36] *Wandsworth London Borough Council v Michalak* [2003] 1 WLR 617 para 625; Rasmussen v Denmark [1984] 7 EHRR 371

V. Alcohol and tobacco are traded and used with the same intent as other drugs property

63. The 8th Edition of Black's Law Dictionary[37] defines 'drug, *n.*':

> **1.** A substance intended for use in the diagnosis, cure, treatment, or prevention of disease. **2.** A natural or synthetic substance that alters one's perception or consciousness.

64. The 'official reference point for drug-related terms', the 2000 UN/WHO '*Demand Reduction: A Glossary of Terms*' defined the term 'drug' as commonly used:

> [T]he term often refers specifically to psychoactive drugs, and often, even more specifically, to illicit drugs. However, caffeine, tobacco, alcohol, and other substances *in common non-medical use* are also drugs in the sense of being taken primarily for their psychoactive effects.[38]

65. In a September 14th 2006 report entitled *'Pathways to Problems: hazardous use of tobacco, alcohol and other drugs by young people in the UK and its implications for policy'*, the ACMD said:

> Psychoactive drugs are used worldwide in the pursuit of pleasure, solace and acceptance. Young people may also be attracted to use them for other, sometimes contradictory reasons – curiosity, rebellion or a desire to belong or escape. Psychoactive drugs all act on certain parts of the brain, altering normal neuro-chemical functions and hence the user's experience. The precise nature of the experience and other consequences will reflect the interaction of the particular drug with the individual's physiology, psychology and current circumstances.[39]

66. The Advisory Council went on to say in *'Pathways to Problems'*:

> At present, the legal framework for the regulation and control of drugs clearly distinguishes between drugs such as tobacco and alcohol …, drugs which are covered by the Misuse of Drugs Act (1971) and drugs which are classed as medicines. **The insights summarised in this chapter indicate that these distinctions are based on historical and cultural factors and lack a consistent and objective basis**.[40]

67. In *'Pathways to Problems'* the ACMD objectively justified the above assertion that the legal distinction between drugs 'in common non-medical use' lacked a rational basis:

- *Legal and 'illegal' drugs are both used with similar intent* – "The worldwide appeal of psychoactive drugs lies largely in the expectation that they will produce desirable effects: generating or enhancing feelings of pleasure or relaxation; diminishing pain, depression, sadness or fatigue; increasing energy or concentration; and facilitating socialisation". (para 1.1)
- *Legal and 'illegal' drugs both act on the brain in the same way* – "the scientific evidence is now clear that nicotine and alcohol have pharmacological actions similar to other psychoactive drugs".(p14)
- *Legal and 'illegal' drugs both have the same potential to cause harm* – alcohol and tobacco's "harmfulness to individuals and society is no less than that of other psychoactive drugs". (para 1.4)
- *Young people disregard the legal distinctions* between "drugs in common use" – "While tobacco, alcohol and other drugs all have differing legal status, many young people do not appear to recognise these distinctions". (para 4.46)

68. Thus, property rights in alcohol, tobacco and other 'drugs in common use' are exercised by mankind with the same intent – to "alter mental functioning"[41] and so 'produce pleasurable and sought-after effects'. Hence, those concerned with psychoactive drugs are in analogous situations although those persons oriented toward Schedule 2 drugs property experience a clear inequality of treatment in the enjoyment of several Convention Rights.

---

[37] Garner, B. ed. (2004) Black's Law Dictionary 8th Ed., Thompson–West
[38] www.unodc.org/pdf/report_2000-11-30_1.pdf (Emphasis added)
[39] n2 *supra*, HO/ACMD (2006) page 18, 'key points'
[40] n2 *supra*, HO/ACMD (2006) para 1.13, (Emphasis added)
[41] n1 *supra*, Cm 6941 (2006) page 24

VI. The Misuse of Drugs Act 1971 – as applied – discriminates on at least two grounds

a) Property – Drugs are property. Drugs "can be seen, weighed, measured, felt, or touched" and are "in any other way perceptible to the senses".[42] Thus, alcohol, tobacco and LSD, indeed, all "substances that alter mental functioning",[43] are property.

69. Schedule 2 of the 1971 Act is the common factor distinguishing 'controlled drugs' from all other drugs property, including alcohol and tobacco. If the drugs property you're concerned with is listed in Schedule 2 your property rights are extinguished.

70. The 1971 Act preamble reads "An Act to make provision with respect to dangerous or otherwise harmful drugs". But, as applied, the Act discriminates between drugs property, not according to harmfulness to the individual or society when used, but instead according to the type of property used by the 'vast majority'. Thus, Schedule 2 excludes alcohol and tobacco even though "Government acknowledges [that they] account for more health problems and deaths than illicit drugs".[44]

71. But, offering respect under the Convention to a person's "interests"[45] in the exercise of property rights in some harmful drug property and not others, based on "historical precedent" and the "cultural preference" of a "vast majority" conjunct the "political vision"[46] of decision makers is arbitrary discrimination on the ground of property.

b) 'Drug Orientation' – a private manifestation of the human personality. Drug orientation should be recognised as a 'suspect class' similar to sexual or religious orientation. Each is a "personal characteristic" that "depend[s] on choice [which is] not immutable".[47]

72. And whilst possibly not as central to the respect accorded sexuality, i.e., the marital bedroom and procreative rights,[48] those oriented towards certain drug property have been "subjected to such a history of purposeful unequal treatment [and] relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process".[49] The unintended consequences of this are far-reaching.

73. Many people feel deeply attracted or oriented towards psychoactive drugs and consider the psychosomatic experiences manifested via the consumption of drugs as valuable, essential, and for some, a crucially sacred factor in the development of their 'personality'.[50]

74. In Cm 6941, October 13th 2006, the Government asserted that the "vast majority of people who use" would find the application of the MDA 1971 classification system to their drugs, alcohol and tobacco, "unacceptable", whether "decoupled from penalties" or not.[51] So, in the current application of the Misuse of Drugs Act 1971, we have 'treatment grounded upon a predisposed bias'[52] on the part of a "vast majority", *which includes the decision makers* "determined not to infringe people's right to free and informed choices"[53] in the consumption of certain drug property to which they are oriented, alcohol and tobacco, against a substantial minority of persons oriented towards Schedule 2 drugs property.

---

42 Garner, B ed. (2004) Black's Law Dictionary 8th Ed., Thompson–West p1254 'tangible property'
43 n1 *supra*, Cm 6941 (2006) page 24
44 n1 *supra*, Cm 6941 (2006) page 24
45 *Wockel v Germany* [1998] 25 EHRR CD156 'the interests of other individuals to continue smoking'
46 n1 *supra*, Cm 6941 (2006) page 15 & 24
47 *Francis v Secretary of State for Work and Pensions* [2005] EWCA Civ 1303 para 28; *R(Carson) v SSWP* [2005] UKHL 37 paras 56-57
48 *Griswold v Connecticut* (1965) 381 U.S. 479; 'sacred precincts of the marital bedroom'; *Roe v Wade* (1973) 410 U.S. 113
49 *San Antonio School District v Rodriguez* (1973) 411 U.S. 1, 29 'the traditional indicia of suspectness'
50 *Van Oosterwijk v Belgium* [1979] B 36 Com Rep para 52, EComm HR; *Cf.* van Ree, Erik (1999) Drugs as a human right, *International Journal of Drug Policy* 10 (1999) 89 98
51 n1 *supra*, Cm 6941 (2006) page 24
52 *Smith and Grady v United Kingdom* [2000] 29 EHRR 493 para 121
53 HM Government (1998) *Smoking Kills* White paper, Cm 41, para 1.26, 10th December 1998

c) The suggested review standard – or why these grounds deserve strict scrutiny

75. Mr. Hardison asserts that the nature and extent of the discrimination based on property conjunct drug orientation is substantially similar to the 'suspect classes' of gender, race, illegitimacy, religion and sexual orientation; accordingly, strict scrutiny is required.

76. The first common factor linking all 'suspect classes' under Strasbourg jurisprudence is a gross disrespect for human dignity founded in the dichotomous segregation of an inclusive group into opposites based on stereotypical assumptions of *good*, right and morally acceptable *vs*. morally unacceptable, wrong, bad, dirty, and *evil*.

77. This creates a power group, often the majority in number *and* the decision makers, and a powerless group, often the minority in number. Responsibility for the 'evil of society' is then attributed to the minority relegating them to "a position of political powerlessness". [54]

78. The second common factor is that the 'bad' group acts as a 'scapegoat' for the 'good'; unconsciously, the social exclusion of the 'bad' group is intended to remove the harm, now identified with 'it/them', from the 'good' group. Yet, this method of achieving what may actually be motivated by a legitimate aim is not even theoretically possible.

79. Plus, 'scapegoat' elucidates a relevant etymological connection between the English *pharmacy* and the Greek words *pharmakos* and *pharmakon*.[55] While the Greeks used the word *pharmakon* to designate both healing and toxic drugs, at its origin it appears to have referred primarily to purgative medicaments. This is discernable because of the survival of the Greek *pharmakos* as 'scapegoat' or the one who *must be purged* to make the social body healthy.

80. Today, certain persons oriented toward certain drug property continue to be persecuted as *pharmakos* by the State for exercising property rights in proscribed *pharmakon*. Such gross disrespect is maintained by socially embodied derogatory language: 'addicts', 'dealers' or 'pushers' are 'evil' whereas those dependent on, producing or supplying the equally or more harmful drugs, alcohol and tobacco, get "a peerage or a Queen's award for industry".[56]

81. Drugs have always been a symbol of cultural and individual identity. Islam banned alcohol as a means of distinguishing itself from Christianity which takes the drug as a sacrament.

82. And although drug orientation is "not immutable",[57] drug preference is akin to sexual and religious orientation. Indeed, when the Court delivered judgment in *Dudgeon v United Kingdom* they did not declare that homosexuality was a genetic predisposition, a health matter or simply a preference. Instead, they chose the carefully worded:

> …either he respects the law and refrains from engaging…in prohibited sexual acts to which he is disposed by reason of his homosexual *tendencies*, or he commits such acts and thereby becomes liable to criminal prosecution.[58] (Emphasis added)

83. This phrase is hardly a reference to an 'immutable' personal characteristic "which an individual cannot change".[59] And in 1999, in the case of *Salgueiro da Silva Mouta v Portugal*, Strasbourg declared "sexual orientation…a concept undoubtedly covered by Article 14 of the Convention" [60] transforming 'sexual orientation' into a 'suspect class' entitled to strict scrutiny. Since freedom evolves, these principles should be applied to 'drug orientation'.

---

[54] *San Antonio School District v Rodriguez* (1973) 411 U.S. 1, 29 'the traditional indicia of suspectness'
[55] Szasz, T (1985) Ceremonial Chemistry: *Ritual Persecution of Drugs, Addicts and Pushers*, Florida: Learning Publications
[56] www.publications.parliament.uk/pa/cm200102/cmhansrd/vo091101/debtext/11109-04.htm – Jon O. Jones MP
[57] *Francis v Secretary of State for Work and Pensions* [2005] EWCA Civ 1303 para 28
[58] *Dudgeon v United Kingdom* [1982] 4 EHRR 149 para 41
[59] *R(Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37 para 55-57
[60] *Salgueiro da Silva Mouta v Portugal* [2001] 31 EHRR 1055 para 28

VII. The Misuse of Drugs Act 1971 engages the *ambit* of several Convention rights

a) ECHR Article 8 provides:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the protection of health and morals, or for the protection of the rights and freedoms of others.

84. Article 8 protects the person against arbitrary interferences by public authorities; yet, as with several Articles of the Convention, the rights contained in 8(1) are subject to limitations set out in 8(2). In some cases, the interference may be justifiable. When a person's behaviour *does directly affect* other people, it is, by its very nature, social conduct and so may become amenable to reasonable social and government control. But so long as a person's decision and subsequent conduct do not threaten others with harm a person's actions lie within a protected sphere of human liberty.

85. Liberty's submission to the 2002 Home Affairs Committee, HC-318, *'The Government's Drug Policy: is it working?'* embodied this philosophical and practical reasoning:

> …as part of a free, democratic society individuals should be able to make and carry out informed decisions as to their conduct, free of state interference, or in particular criminal law, unless there are pressing social reasons otherwise. Liberty is of the view that the decision by an individual to take drugs is such a decision and comes within the ambit of personal autonomy and private life. John Stuart Mill argued that the state has no right to intervene to prevent individuals from harming themselves, if no harm was thereby done to the rest of society. Such fundamental rights are recognised by government, both allowing individuals to partake of certain dangerous activities, for example drinking, extreme sports, and also international treaties.[61]

86. Encompassed within *J.S. Mill's* sovereign realm of liberty is:

> …the inward domain of consciousness, in the most comprehensive sense; *liberty of thought* and feeling; absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral or theological. . . liberty of *tastes* and *pursuits*; of framing the plan of our life to suit our own character; of doing as we like, subject to such consequences as may follow: without impediment from our fellow-creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse or wrong.[62]

87. And, in *Pretty v United Kingdom* the Strasbourg Court reflected this philosophy:

> …the ability to conduct one's life in a manner of one's own choosing may also include the opportunity to pursue *activities* perceived to be of a physically or morally harmful or dangerous nature for the individual concerned. […] However, even where the conduct poses a danger to health or, arguably, where it is of a life-threatening nature, the case-law of the Convention institutions has regarded the State's imposition of compulsory or criminal measures as impinging on the private life of the applicant.[63] (Emphasis added)

88. Thus, the 'right to the free and informed choice'[64] in the "consumption of substances that alter mental functioning"[65] constitutes one of the modalities of Article 8.

---

[61] HC 318 (2002) Third Report From the Parliamentary Home Affairs Committee Session 2001-2002, *The Government's Drug Policy: is it working?*, Ev 126-7
[62] Mill, John Stuart, "On Liberty" (1859) p13 (Emphasis added)
[63] *Pretty v United Kingdom* [2002] 35 EHRR 1 para 62
[64] HM Government (1998) *Smoking Kills* White paper, Cm 41, para 1.26, 10th December 1998
[65] n1 *supra*, Cm 6941 (2006) page 24

b) ECHR Article 9 provides:

> 1. Everyone has the right to freedom of thought, conscience and religion; this right includes the freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> 2. Freedom to manifest one's religion shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interest of public safety, for the protection of public order, health and morals, or for the protection of the rights and freedoms of others.

89. Although the Court has said that freedom of thought, conscience, and religion is one of the foundations of a 'democratic society' within the meaning of the Convention; and that the pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it,[66] the Strasbourg Court has mostly left its contours undefined.

90. Thus, Article 9(1) is generally interpreted in light of 'religion and belief' with *only* the accompanying freedom to *manifest* that belief *in public* limited where 'necessary in a democratic society' in pursuit of a legitimate aim.[67]

91. US Supreme Court Justice Benjamin Cardozo stated "freedom of thought …is the matrix, the indispensable condition, of nearly every other form of freedom. With rare aberrations a pervasive recognition of that truth can be traced in our history, political and legal".[68]

92. This is reflected in the Convention; nowhere is it intended for a State to have *any* form of control over, influence upon, or interference in an individual's thoughts or thought processes:

Article 9(2) does <u>not</u> prescribe <u>any</u> interference in thought or thought processes.

93. The 'right to the free and informed choice'[69] in the "consumption of substances that alter mental functioning"[70] constitutes one of the modalities of Article 9 – freedom of thought. But, if the 'substances' you're concerned with is listed in Schedule 2 your property rights are extinguished and with it the ability to alter your mental functioning via such substances.

94. And since what we experience as thought, consciousness, or perception has a physical root in the electrochemical phenomena of the cerebral cortex, psychoactive drugs are a direct and intimate means to "alter mental functioning",[71] i.e., to modify thought.

95. So, to be "practical and effective, not theoretical and illusory"[72], freedom of thought must mean, at minimum, that each person is free to direct their own consciousness including the legal right to autonomous self-determination over their own neurochemistry.[73]

96. Thus categorically, as the organ at the source of all human action, the brain and its cognitive processes demand unique legal consideration in light of an emergent body of data about brain function *and* in anticipation of ever greater precision in understanding and manipulating its processes;[74] accordingly, it is ever so important that this Court anticipate and articulate individual rights *and* responsibilities in relation to unfettered thought, i.e. *Cognitive Liberty*, by beginning to discern its form and affirming the protection of Article 9.

---

66 *Kokkinakis v Greece* [1994] 17 EHRR 397 para 31
67 *Arrowsmith v United Kingdom* [1981] 3 EHRR 218; see Archbald 2007 §16-115
68 *Palko v Connecticut* (1937) 302 U.S. 319, 326-27
69 HM Government (1998) *Smoking Kills* White paper, Cm 41, para 1.26, 10th December 1998
70 n1 *supra*, Cm 6941 (2006) page 24
71 n1 *supra*, Cm 6941 (2006) page 24
72 *Stafford v United Kingdom* [2002] 35 EHRR 32 para 68
73 Boire, Richard G (1999) On Cognitive Liberty, *Journal of Cognitive Liberties*, v1n1: 7-13 www.cognitiveliberty.org
74 Plant, S. (2000) Information War in the Age of Dangerous Substances, *Journal of Cognitive Liberties*, v2n1: 23-43

c) ECHR Protocol 1, Article 1 provides:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

97. In the English speaking world, especially since the seventeenth century, the word *freedom* has meant the inalienable right to *life, liberty & property*, the first two elements resting squarely on the last. As such, a right to own property and not to be arbitrarily deprived of it has traditionally been regarded as a 'fundamental right', answering, in the words of US Supreme Court Justice Oliver Wendell Holmes, "a demand of human nature".[75]

98. Hence today, the archetypal feature of capitalism as a political economic system is the security of private property and a free market, that is, the right of every competent adult to trade in goods and services, subject only to reasonable and proportionate "restrictions upon freedom of contract as are necessary" [76] in the public or 'general interest'.

99. Reflecting this, the Strasbourg Court has repeatedly said that for an individual to show that the protection of Article 1 of the First Protocol is activated, it must be demonstrated that:

    i. the peaceful enjoyment of the applicant's possessions has been interfered with by the State; or
    ii. the applicant has been deprived of possessions by the State; or
    iii. the applicant's possessions have been subjected to control by the State.

100. Once demonstrated, the State must then show that a 'fair balance'[77] has been struck between the public or general interest and the rights or "interests"[78] of the person whose possessions have been the subject of an interference.

101. Whilst a 'fair balance' has been struck in the regulation of alcohol and tobacco, including consumer protection measures, safe places of sale and consumption and safe means of production and commerce, it has not been struck with regards to the drugs property subject to the 1971 Act and to which at least 10.9% of UK citizens[79] are oriented.

102. Recall that possessions, with few exceptions such as bulldogs and Polonium-210, are not harmful until used by humans. The Misuse of Drugs Act 1971 reflects this by justifying the control of drug property *uses* on the premise that the 'misuse' of a particular drug is having or is "capable of having harmful effects sufficient to cause a social problem". And although Government says "alcohol and tobacco account for more health problems and deaths than illicit drugs",[80] 'harmful effects sufficient to cause a social problem', they are excluded from the Act's scope without justification whereas less harmful drugs are included.

103. The *de facto* criminalisation of Schedule 2 drug *use* is a *de facto* expropriation of all meaningful *use*. Simply being 'concerned' with arbitrarily 'controlled drug' property is enough to subject anyone's person, domicile, papers, and effects to unreasonable searches and seizures. These interferences manifest as controls on the use of possessions or deprivations of the peaceful enjoyment of the possession of property.

---

75 *Davis v Mills* (1904) 194 U.S. 451, *per* Justice Oliver Wendell Holmes
76 *National Westminster Bank plc v Morgan* [1985] AC 686 at 708
77 *Chassagnou and Others v France* [1999] 29 EHRR 615 para 75; *Sporrong & Lönnroth v Sweden* [1982] 5 EHRR 35 para 69
78 *Wockel v Germany* [1998] 25 EHRR CD156 'the interests of other individuals to continue smoking'
79 UNODC (2005) UN World Drug Report 2005, www.unodc.org/unodc/world_drug_report.html
80 n1 *supra*, Cm 6941 (2006) page 24

d) ECHR Article 6 provides:

> 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

104. A guiding principle of Article 6 is that there cannot be a fair civil or criminal trial before a court which is, or appears to be, biased against the defendant or litigant. This Court must be concerned with both the subjective and objective elements of independence and impartiality – *including the drug orientation, preferences, tendencies, or vested interests in drug property of those persons who adjudicate this controversy.*

105. Today, the near-universal discrimination and employment of pejorative language, rooted in explanatory beliefs, against persons oriented toward *different* drugs property than the 'vast majority' manifests extremely prejudicial affects and has precluded, thus far, a fair determination by an impartial tribunal of the *rights* and *responsibilities* of those concerned with Schedule 2 drugs.

106. More, the classification of drugs, which underpins this, lacks procedural fairness as there is no judicial oversight or public consultation, simply "historical precedent" conjunct the "cultural preferences" of the "vast majority" *and* the "political vision"[81] or beliefs of the decision makers. These decisions ultimately affect and determine the civil rights and obligations of individuals who are oriented towards Schedule 2 drug property.

107. And so, with deep wisdom, the Strasbourg Court has recognised that discrimination can occur when a general policy or practice has a disproportionate, prejudicial effect or disparate impact on a particular group, even if such an effect was not intended.[82]

108. This 'indirect discrimination'[83] on the grounds of drug orientation and drug property leads to social exclusion, political marginalisation, and personal humiliation and is related to systemic discrimination in which "discrimination is then reinforced by the very exclusion of the disadvantaged group because the exclusion fosters the belief … that the exclusion is the result of 'natural' forces, for example, that women 'just can't do the job"'.[84] Or, any person concerned with or oriented towards certain drugs property is 'deviant',[85] 'evil',[86] 'sick',[87] and therefore unworthy of the full protections of law.

109. When those oriented towards proscribed drugs are professed to be immoral, weak, and prey to an inescapably dangerous 'drug evil', the public may perceive itself as needing to be protected from *it* and, all too often, from those who are concerned with *it*. In such a setting, prohibition, abstinence, compulsory treatment and/or incarceration are perceived as being necessary; and thus persons oriented towards certain drugs need to be controlled, isolated, or confined, either by social-exclusion, self-isolation, or imprisonment (Article 5). These beliefs have lead to the passage and persistence of laws which self-reinforce these beliefs.

110. Accordingly, it is respectfully urged that this Court *affirms* that this case engages the *ambits* of private life, free thought and belief, the peaceful enjoyment of possessions and fair process and then conclusively determine if there exists a reasonable and objective justification for not reviewing the classification system under the 1971 Misuse of Drugs Act.

---

[81] n1 *supra*, Cm 6941 (2006) page 15 & 24
[82] *McShane v United Kingdom* [2002] 35 EHRR 23 para 135, *Hugh Jordan v United Kingdom* [2001] App. No. 24746/95, para 154
[83] *R(Sand Marper) v Chief Constable of South Yorkshire* [2002] EWCA Civ 1275
[84] *CNR v Canada* (Human Rights Commission) [1987] 1 SCR 1114 para 34
[85] www.unodc.org/youthnet/youthnet_youth_drugs.html 'bio-chemical processes that are deviant'
[86] *Cf. Preamble*, UN *Single Convention on Narcotic Drugs* 1961
[87] Drugs Bill 2005 Part 3; *Cf.* www.publications.parliament.gov.uk/pa/jt200405/jtselect/jtrights/47/4706 para 3.22

VIII. The Misuse of Drugs Act 1971 – as applied – manifests a difference in treatment

111. All legislation necessarily places persons, places or things into classes and therefore classification by itself is not a sound basis for regarding legislation as unequal. But it is contrary to the Rule of Law and the fundamental premise of human dignity for Government to regulate or prohibit in an arbitrary or irrational manner manifesting naked preferences in legal distinctions which serve no legitimate aim or public interest.

112. And since a law which is in effect discriminatory may be applied equally to all who fall within its scope, especially where a law uses a suspect or quasi-suspect classification, the Courts should be astute to see that there is as tight a fit as possible between the scope of the legislation and the scope of the professed purpose. Otherwise, there is a danger that, however much it acts in good faith and even if the discrimination is unconscious, the State will sacrifice an unpopular minority for the perceived good of the majority.

113. In principle there are five different possible relationships between the scope of the mischief aimed at by legislation, its purpose, and the scope of the class actually caught by it:[88]

    a) The first is where there is a perfect fit between the purpose to be achieved and the means used to achieve it: this is the ideal to which all legislators aspire.
    b) The second is where there is no fit at all: this kind of measure could be said to lack even a rational connection between the aim sought to be achieved and the means used.
    c) The third type is where the law hits more than the class aimed at. For example if the law is disloyalty by US citizens, but all citizens of Japanese ancestry are detained, the law is overbroad, or over inclusive. This is known as the doctrine of over-breadth and we would recognise it as a classic example of a law which is disproportionate because it goes farther than necessary to achieve its aim.
    d) Less familiar to us is a fourth type of law. This is where the law hits some of its target but not all of it. At first sight this seems not to raise any problem about proportionality at all. It goes no further than necessary; but, it penalises some people and leaves others alone. From an equal treatment perspective, this should raise alarm bells: how have the two groups or pools of persons been defined? Why is the State not prepared to go as far as its stated objectives would dictate it should go? Are there objective and compelling reasons or is it that some are more popular than others? In the example about Japanese internment, the law did not extend to Germans or Italians, yet they too could have been said to have a potential conflict of loyalty during WWII, but only the Japanese were detained without trial.
    e) The fifth type of law appears at first sight to be a contradiction in terms but it is fairly common; it is both under-inclusive and over-inclusive. The Japanese internment example again illustrates this: the law was overbroad because it treated the loyal and the disloyal person of Japanese ancestry in the same way and under-inclusive because it did not apply to others who might have been disloyal as well.

114. Mr. Hardison asserts that the drug classification system as put into effect under the Misuse of Drugs Act 1971 embodies the second *and* fifth type of relationship:

    i. It is a very poor fit; the Act's clear overall aim is "to reduce the harms drugs cause,"[89] yet, as applied, it's achieving the exact opposite, thus, the aims and means are not rationally connected.

    ii. The Act, as applied, is overbroad as it equates persons who use Schedule 2 drugs responsibly, i.e., causing no harm to others, with those persons whose behaviour is harmful to others.

    iii. The Act, as applied, is under-inclusive because it excludes the two drugs, alcohol and tobacco, which Government says "account for more health problems and deaths than illicit drugs".[90]

---

[88] Rabinder Singh QC (2004) Equality: the Neglected Virtue [2004] 2 EHRLR 141 (liberally extracted)
[89] HM Government Report (2002) *The Government Reply to the Third Report From the Home Affairs Committee Session 2001-2002* HC *318*, Cm 5573, page 4, July 10th 2002, The Stationary Office Ltd.
[90] n1 *supra*, Cm 6941 (2006) page 24 combined with paragraph 7 on page 4

a) This difference in treatment is between groups of drug property users

115. Mr Hardison and many like him have been severely punished for exercising property rights vis-à-vis the drug property to which they are oriented whereas the "vast majority", oriented towards the more harmful drug property alcohol and tobacco, are entitled to peaceful enjoyment of possessions, free thought, privacy, freedom of contract, consumer choice *and* public protection via suitable regulation or a free market.[91]

116. This difference in treatment is concisely reflected by Government in Cm 6941:

> **Government acknowledges alcohol and tobacco account for more health problems and deaths than illicit drugs** [but somehow] **it should not be imputed** [by their exclusion from the Act's scope] **that Government takes the harms caused by these drugs any less seriously.**[92]

Excepting, of course, that one does have their house invaded nor get a 20 year sentence for undertaking activities in them. Let alone a criminal indictment. As applied, the Act serves as a public proclamation that persons concerned with Schedule 2 drugs are 'deviant',[93] 'evil',[94] and 'sick',[95] and thus less worthy of the fullest protections of law.[96]

b) This difference of treatment is between *type* of property and not *use* of property

117. The Misuse of Drugs Act 1971 is disproportionate because it singles out drugs by type and not by their use risk modalities. It must be noted that all drugs in 'common use' are capable of producing harm *when used* without respect for *both* their intrinsic properties and their subjective effect on oneself; but, unlike polonium-210, certain dogs breed to be dangerous or *Zyklon B*, drugs are not inherently harmful.

118. This was the common complaint of several applicants to the European Court of Human Rights challenging the Dangerous Dogs Act 1991. They had asserted that the Act discriminated against a certain type of dog, pit bull terriers, irrespective of the character or behaviour of the dog. But in dismissing each application the Commission repeatedly held:

> …that the conviction based on breed rather than past behaviour and the consequent destruction order, being provisions ultimately aimed at eradicating pit bull terriers as a breed from the United Kingdom, are *draconian measures* […] However, the Commission finds that this difference in treatment has an objective and reasonable justification given the fact that this type of dog is bred for fighting and the experience of pit bull terriers in the United Kingdom.[97]

119. And, the Court noted that the Dangerous Dogs Act 1991 had an exemption scheme whereby, subject to conditions provide for by law, persons could *retain possession* of their dangerous dogs. The Misuse of Drugs Act 1971 has similar provision but it disproportionately puts the onus on the individual to establish an exceptional 'legitimate' case before being allowed to exercise any property rights vis-à-vis Schedule 2 drugs.

120. Further, no Schedule 2 drug was 'designed' or intended to be dangerous. Indeed, most drugs 'in common use' from opiates to psychedelics are chosen carefully by man as they are each the safest of that class of drug property and when used reasonably and responsibly, most drugs are as physiologically safe as, if not safer than, alcohol and tobacco.[98]

---

[91] n2 *supra*, HO/ACMD (2006) *'Pathways to Problems'*, paras 1.13 and 1.14
[92] n1 *supra*, Cm 6941 (2006) page 24 conjunct paragraph 7, page 4
[93] www.unodc.org/youthnet/youthnet_youth_drugs.html 'bio-chemical processes that are deviant'
[94] *Cf. Preamble* to the UN *Single Convention on Narcotic Drugs* 1961
[95] Drugs Bill 2005 Part 3; *Cf.* www.publications.parliament.gov.uk/pa/jt200405/jtselect/jtrights/47/4706 para 3.22
[96] Elser, J.R. (2004) *Public Perception of Risk*, Drugs Case Study C, HMOST Foresight Commissioned Report, p53-57
[97] *Bates, Brock, Bullock, Crothers & Foster v United Kingdom* [1996] 21 EHRR CD85, January 16th 1996 (Emphasis added)
[98] n3 *supra*, HC 1031 (2006) Appendix 14 at Ev 110-117, and Ev 8 Q174 *et seq.*

c) This difference of treatment manifests as a failure to distinguish property use risks

121. In *Thlimmenos v Greece*, the Strasbourg Court said:

> The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.[99]

122. Thus, criminal law has to define behaviour very precisely in order to effectively sort out non-dangerous behaviour from dangerous behaviour. But, classification fails to distinguish the relevant differences between differing use risk modes of Schedule 2 drugs property.

123. The Government, by the *de facto* criminalisation of Schedule 2 drug use, says:

> **The message is clear. All drugs are harmful and illegal…All controlled drugs are dangerous and no one should take them.**[100]

124. Use risks of Schedule 2 drugs are thus identified under an extreme precautionary principle with their maximum potential harmfulness irrespective of actual objective risk. Yet, in their clear preferential treatment of alcohol and tobacco users, the Government is effectively able to distinguish, in law, between three particular modes or patterns of drug property use risks:

i. Risks from use which is reasonably safe;
ii. Risks from use which is harmful only to the consumer; and
iii. Risks from use which is sufficient to cause a social problem, i.e., use harmful to others

125. Most people are not engaged in drug property activities or uses that posed significant risks either to them or to society. So, Government, by not suitably distinguishing drug property use risks, has failed to treat differently persons whose situations are significantly different.

i. Reasonably safe use – "the vast majority of people … use … responsibly"[101]

126. The 2006 Rand Europe Technical Report, prepared for the 2006 Science and Technology Select Committee, HC-900, *The Evidence Base for the Classification of Drugs*, noted the prevalence of Schedule 2 drug consumption in the UK:

> Around four million people use illegal drugs each year. Most of these people do not appear to experience harm from their drug use, nor do they cause harm to others as a result of their habit.[102]

127. The above figure is confirmed by Home Office and UNODC annual Schedule 2 drug use statistics as approximately 10.9% of the UK populace, aged 16-59.[103]

128. The same could be said of the users of alcohol and tobacco – most of these people do not appear to experience harm from their drug use, nor do they cause harm to others as a result of their 'habit'; or 'activities' to remove the pejorative.

129. Government – by regulating appropriately – accords 'respect' for the reasonably safe use of alcohol and tobacco. But – by outright prohibition – Government fails to accord this respect for the 'interests' of persons who use other drugs in a reasonably safe manner.

---

[99] *Thlimmenos v Greece* [2000] 31 EHRR 411 para 44
[100] HM Government (2002) *The Government Reply to the Third Report From the Home Affairs Committee Session 2001-2002 HC 318*, Cm 5573, page 6, July 10th 2002, The Stationary Office Ltd.
[101] n1 *supra*, Cm 6941 (2006) page 24
[102] Rand Europe (2006) *'The Evidence Base for the Classification of Drugs'*, www.rand.org/pubs/technical/TR362/index.html
[103] www.unodc.org/unodc/world_drug_report.html

ii. Drug use harmful only to oneself – a matter of private life

130. In *Pretty v United Kingdom* the Court observed that:

> …the ability to conduct one's life in a manner of one's own choosing may also include the opportunity to pursue *activities* perceived to be of a physically or morally harmful or dangerous nature for the individual concerned. […] However, even where the conduct poses a danger to health or, arguably, where it is of a life-threatening nature, the case-law of the Convention institutions has regarded the State's imposition of compulsory or criminal measures as impinging on the private life of the applicant.[104] (Emphasis added)

131. In *Wockel v Germany*[105] an individual petitioned the Government to prohibit smoking in public. The Government considered that it could not support the applicants request for a general prohibition as experience had shown that information on the risks of smoking was more effective than punishment. The applicant then complained to the Strasbourg Court about the lack of effective protection of non-smokers invoking Articles 2, 3, 6, 8, 9, 11 and Protocol 1, Article 2 of the Convention.

132. The Commission, in dismissing *Wockel's* application as manifestly ill-founded, found that:

> …bearing in mind the competing interests of the applicant as a non-smoker and of the *interests* of other individuals to continue smoking and the margin of appreciation left to the national authorities, the absence of a general prohibition on … smoking does not amount to a failure on the part of the German State to ensure the applicants rights. (Emphasis added)

133. Today the United Kingdom has wilfully accorded respect for the non-smoker by a new Act of Parliament prohibiting the activity of smoking tobacco in most enclosed public places, with the notable exception of Parliament, i.e., where many decision makers congregate.

134. In Cm 6941, Government said they use less restrictive means for alcohol and tobacco risks:

> …the classification system under the Misuse of Drugs Act 1971 is not a suitable mechanism for regulating legal substances such as alcohol and tobacco. However, **it should not be imputed that Government takes the harms caused by these drugs any less seriously**. We continue to demonstrate our commitment to reduce these harms through the many interventions we make to prevent, minimise and deal with the consequences caused by misuse through our dedicated Alcohol Harm Reduction Strategy and smoking/tobacco programme.[106]

135. Government, in their alcohol and tobacco strategies, balances the aim of protecting the public health with the aim of upholding individual rights to informed choice with the least restrictions possible, i.e., consumer choice limited only by consumer protection measures:

    a) Prime Minister Tony Blair, in the forward to Government's 2004 *Alcohol Harm Reduction Strategy for England*, said, "it is vital that individuals can make informed and responsible decisions about their own levels of alcohol consumption".[107]

    b) Government's 1998 *Smoking Kills* White paper stated: "**Smoking kills more than 13 people an hour**…**We are not banning smoking**…Government is determined not to infringe upon people's rights to make free and informed choices".[108]

136. It is not shown why this respect is not accorded to otherwise law-abiding persons who cause no harm to others from their exercise of property rights vis-à-vis Schedule 2 drugs.

---

[104] *Pretty v United Kingdom* [2002] 35 EHRR 1 para 62
[105] *Wockel v Germany* [1998] 25 EHRR CD156 'the interests of other individuals to continue smoking'
[106] n1 *supra*, Cm 6941 (2006) page 4, para 7
[107] image.guardian.co.uk/sys-files/documents/2004/03/15/alcoholstrategy.pdf
[108] www.archive.official-documents.co.uk/document/cm41/4177/contents.htm

iii. Drug use harmful to others – subject to other criminal law

137. Discrimination between responsible drug property use and irresponsible or harmful drug property use, i.e., misuse, is a legitimate aim of the Act reflected in its short title. A blanket prohibition of all activities vis-à-vis Schedule 2 drugs property conflicts with this aim.

138. It is axiomatic that *any* drug *use* which places significant demands on the resources of the medical, police and social professions creates a social problem. And, since scientific evidence and the Government both recognise that alcohol and tobacco *use* is capable of manifesting "harmful effects sufficient to constitute a social problem", an obvious question persists: *why are alcohol and tobacco not equally controlled by the Misuse of Drugs Act 1971?*

139. Nevertheless, any drug use, including alcohol or tobacco, which results in harm to others is rightfully addressed by separate sanction generally unrelated to the drug. That is, most *acts* declared to be 'drug related', i.e., murder, poisoning, violence, rape, acquisitive crime, etc, are rationally addressed either by Common Law criminal offences or Acts of Parliament such as the Offences Against the Person Act 1861 or the Public Order Act 1986.

140. If the threats presented by alcohol and tobacco *misuse* can be addressed without infringing the peoples' Convention rights, it has not been shown why similar measures can not adequately address the threats presented by *misuse* of Schedule 2 drugs.

d) Schedule 4 metes out unequal culpability in the objective risks to the public

141. The ACMD declared in *'Pathways to Problems'* that "the harmfulness to individuals and society" [from alcohol and tobacco] is no less than that of other psychoactive drugs"[109] and a month later the "Government acknowledge[d] alcohol and tobacco account for more health problems and deaths than illicit drugs".[110]

142. Yet, those concerned with Schedule 2 drugs are held to be culpable for all downstream effects *possibly* caused by the drugs they are concerned with whereas the alcohol and tobacco industry are not held to be culpable for the choices of autonomous individuals to consume their drug products fully informed as to the harm they are risking themselves.

143. But, culpability normally combines the subjective intention to cause an objective outcome. In relation to unlicensed production, possession and supply of Schedule 2 drugs property, no intention for harm or risk is required and outcome is not based on objective factors but on a subjective risk assessment associated with maximum potential harm. As the Advisory Council said in their 2006 report *'Pathways to Problems: hazardous use of tobacco, alcohol and other drugs by young people in the UK and its implications for policy'*:

> Young people in the UK have little difficulty in obtaining tobacco, alcohol or other drugs, despite a legal framework designed to restrict their access to them. There are age-of-purchase regulations for tobacco and alcohol, a range of licensing laws for the sale and use of alcohol and heavy penalties for the sale and possession of illegal drugs. However, these are flouted by large numbers of young people. While prosecutions for the sale and possession of illegal drugs are common, **prosecutions of vendors of cigarettes or alcohol to underage customers are very rare**.[111]

144. **The bottom line, excluding alcohol and tobacco from Schedule 2 excludes persons who undertake activities with such drugs from the Act's scope and penalties.** But, legal status alone cannot justify a difference in treatment contrary to the Rule of Law.

---

[109] n2 *supra*, HO/ACMD (2006) *'Pathways to Problems'*, Recommendations, page 6
[110] n1 *supra*, Cm 6941 (2006) page 24
[111] n2 *supra*, HO/ACMD (2006) *'Pathways to Problems'*,

e) The difference of treatment manifests as a denial of equal rights and protection

i. The right to autonomy and self-determination

145. Those who undertake activities with respect to alcohol and tobacco have the "right to free and informed choice"[112] in their concerns with "substances that alter mental functioning".[113] Those concerned with Schedule 2 drugs property have no equal right.[114]

ii. The right to 'non-medical' or ludibund use

146. Nowhere in the 'Misuse of Drugs Act 1971' is misuse properly defined. The ACMD explained in *'Pathways to Problems'* that "**Drug misuse** or **substance misuse** is drug-taking which is judged to be inappropriate or dangerous". [115]

147. But, judged by whom and on what standard? According to Section 1(2) the Act is intended to target misuse of drugs which is having or appears "capable of having harmful effects sufficient to constitute a social problem".

148. Yet, upon critical examination, Government's management of Schedule 2 drugs evinces a tautology: 1) some substances are *proscribed* because they are 'misused'; 2) this 'misuse' means 'non-medical use'; and 3) non-medical use means *inappropriate* or *unauthorised use* of *proscribed* substances. This presents 'non-medical use' as *a* semantic key to the difference of treatment between Schedule 2 property users and users of alcohol and tobacco.[116]

149. And since alcohol and tobacco are not generally used for medical or scientific purposes, it would be difficult to objectively justify granting exemptions under the Act for ludibund consumption and commerce of alcohol and tobacco, whilst denying exemptions for the ludibund consumption and commerce of other equally or less harmful drugs, even under the Common Law principles of equal treatment and equal protection extant in 1971. This ultimately may be why alcohol and tobacco were excluded from the scope of the Act.

iii. The right to quality control and appropriate labelling

150. Those who use alcohol and tobacco have regulations protecting them that demand safe production practices, quality control and appropriate labelling.

151. Those who use Schedule 2 drugs have no such processes or practices unless their producers and suppliers self-promote such discipline. And if the self-promoted practices are not adhered to there is nowhere to seek recourse from the Law for fear of prosecution. Thus, it is asserted that, by placing Schedule 2 drugs outside of an established quality control regime for pharmaceuticals and other products 'intended for human consumption', governments are *defaulting* on their responsibility to protect the public welfare.

iv. The right to safe places of consumption and supply

152. Those who use alcohol and tobacco have access to both safe places of consumption and supply. If things go wrong, the Health and Emergency Services are at hand. Those who use Schedule 2 drugs have no such places, there is no legal way for learning and practicing "safe-use" under sanitary conditions, and there is an added disincentive to seeking Health and Emergency Services for fear of prosecution. This further compromises public welfare.

---

[112] HM Government (1998) *Smoking Kills* White paper, Cm 41, para 1.26, 10th December 1998
[113] n1 *supra*, Cm 6941 (2006) page 24
[114] *Stec v United Kingdom* [2006] Judgment 12 April 2006, para 53 – referring to Admissibility Judgment, 6 July 2005 para 40
[115] n2 *supra*, HO/ACMD (2006) *'Pathways to Problems'*, Introduction, page 15
[116] Arnao, Giancarlo (1990) *The Semantics of Prohibition*, International Anti-prohibition League

v. The right to safer alternatives to currently legal drugs property

153. Those who do not want to use the harmful drugs alcohol and tobacco have no lawful substitutes which are safe and effective as most of them have been pre-emptively added to Schedule 2 by catch-all clauses demarcating entire neurochemical pathways.[117]

154. Those drugs which are left to be discovered by fruitful pharmacognosists are of questionable safety and efficacy as they increasing rely on materials newly discovered or unknown to the West; which may be less potent, necessitating increased and more frequent consumption, or combinations of substances which have less history of reasonably safe use.

155. It does not make sense to force the perennial search for psychoactivity farther a field when the drugs property people truly want, as indicated by their continued disregard for the law, are already known to science and have a history of reasonably safe use at least as safe as if not safer than alcohol and tobacco.

156. During alcohol prohibition in the United States, many inveterate users were 'accidentally' poisoned by methanol and other solvents – poisonings which would not have occurred had legal controls of purity and concentration been in place – poisonings which ceased to occur once ludibund use of alcohol and its sale for that purpose again became legal and regulated.

157. It has not been shown why the same principle does not apply for Schedule 2 drugs, particularly those in common use. This may fall under Government's ECHR Article 2 duty.

vi. The right to be reasonably secure in their persons, papers and possessions

158. The concept of privacy, encompassing physical and mental integrity as well a person's home and correspondence, embodies the fact that a person belongs to himself and not society as a whole. The search and forfeiture powers under the Act violate this principle.

159. Those who use and trade alcohol and tobacco do not have surveillance teams trailing them simply for their drug activities; unless, the State is investigating another offence, their telephones are not tapped their homes are not invaded; their property is not seized nor are their bank accounts trawled into and frozen. But, for the Schedule 2 drug user or trader:

> …the home-as-castle has become the locked bedroom door, but up against parabolic microphones, heat sensors, and databases; the door cannot stand on its jambs much longer. The implications of the, so-called, 'War on Drugs' for traditional relationships of corporation, state and individual in the West are far-reaching. […] The State has invaded the sovereign territory of the human mind and body as never before. […] What crosses the blood-brain barrier is now open to the same surveillance as what crosses international borders. ***There is a customs in the cranium, a Checkpoint Consciousness.***[118]

160. Yet, presumably, few judges, politicians and executives have set meddling in the homes, bloodstreams and minds of others as deliberate goals in their careers. Nevertheless, these intrusive practices have burgeoned simply because *they are possible.*

161. And so the lives of many otherwise *law-abiding* fully informed and consenting adults' are picked through with a fine-tooth-comb simply for 'being concerned' in Schedule 2 drugs. These people intended no harm to others and hurt no-one. Their purposes are peaceful and motivated by the same motivations as those concerned with alcohol and tobacco.

162. It is not shown why those concerned with alcohol and tobacco are accorded respect for their private life whilst those concerned with Schedule 2 drugs property are not.

---

[117] The Misuse of Drugs Act 1971 (Modification) Order 1977, 1977 S.I. 1243 Section 3(b)

[118] Lenson, David, *On Drugs*. Minneapolis: University of Minnesota Press, (1995), p 191

IX. The Government's Justification for the difference of treatment

163. Government both acknowledged a difference of treatment and provided a justification for it in **Cm 6941**, *The Government Reply to the Fifth Report from the House of Commons Science and Technology Committee Session 2005-06* HC 1031 *Drug classification: making a hash of it?*

164. This justification for the distinction was found in their reply to Recommendation 50 of the House of Commons Science and Technology Committee, HC 1031, which had said:

> **50. In our view, it would be unfeasible to expect a penalty-linked classification system to include tobacco and alcohol but there would be merit in including them in a more scientific scale, decoupled from penalties, to give the public a better sense of the relative harms involved.**[119] (Emphasis preserved)

165. Government **rejected** this recommendation explaining on page 24 of Cm 6941:

> The Government fully agrees that the drug classification system under the Misuse of Drugs Act is not a suitable mechanism for regulating legal substances such as alcohol and tobacco. **The distinction between legal and illegal substances is not unequivocally based on pharmacology, economic or risk benefit analysis**. **It is** also **based in large part on historical and cultural precedents**. A classification system that applies to legal as well as illegal substances would be unacceptable to the vast majority of people who use, for example alcohol, responsibly and would conflict with deeply embedded historical tradition and tolerance of consumption of a number of substances that alter mental functioning (ranging from caffeine to alcohol and tobacco). Legal substances are therefore regulated through other means.
>
> However, the **Government acknowledges that alcohol and tobacco account for more health problems and deaths than illicit drugs** and this is why the Government intervenes in many ways to prevent, minimise and deal with the consequences of the harms caused by these substances through its dedicated Alcohol Harm Reduction Strategy and its smoking/tobacco programme. At the core of this work, which is given considerable resources, is a series of education and communication measures aimed at achieving long term change in attitudes. It is through this that the public continues to be informed in an effective and credible manner.[120] (Emphasis added)

166. This 'justification' or explanation can be separated into at least four components:

a) *The Act is not a suitable mechanism* – "the drug classification system under the Misuse of Drugs Act is not a suitable mechanism for regulating legal substances". This appears to show that Government believes that 'prohibition' is a legitimate aim of the Misuse of Drugs Act 1971 or that prohibition is the only regulatory option available under the Act.

b) *The distinction is not based on objective factors* – "The distinction between legal and illegal substances is not unequivocally based on pharmacology, economic or risk benefit analysis". Government provides no objective evidence which justifies any difference of treatment.

c) *There is a cultural drug preference* – "The distinction between legal and illegal substances is … based in large part on historical and cultural precedents". Equal treatment, referring only to equal prohibition of property rights, "would conflict with deeply embedded historical tradition and tolerance of consumption of a number of substances that *alter mental functioning* (ranging from caffeine to alcohol and tobacco)".

d) *It is unacceptable to prohibit responsible drug use* – Equal treatment, again referring only to equal prohibition of property rights, "would be unacceptable to the vast majority of people who *use*, for example alcohol, *responsibly*".

---

[119] n3 *supra*, HC 1031 (2006) para 106
[120] n1 *supra*, Cm 6941 (2006) page 24

a) The Act is "not a suitable mechanism for regulating legal substances"

167. The Government mind-set appears to hold that prohibition is a legitimate aim of the Act. This cannot be the case as the SSHD is given unfettered discretion to regulate effectively with respect to the legitimate aim of reducing risks to the public from 'dangerous or otherwise harmful drugs'.

168. In fact, the Secretary of State may make, after consultation with the ACMD, regulations by Statutory Instrument which are "fit for the purpose of making it lawful for persons to do things which … would otherwise be unlawful for them to do" (s7) and he "may make provision in relation to different controlled drugs, different classes of persons, different provisions of this Act or other different cases or circumstances" (s31).

169. Accordingly, the regulatory means being applied in an attempt to achieve the legitimate aim of the Act, prohibition of property rights, are to be kept "under review" by both the ACMD and the Secretary of State for the Home Department.

170. Schedule 2 of the 1971 Act is the common factor distinguishing 'controlled drugs' from other drugs property, including alcohol and tobacco. Schedule 2 conjunct the provisions of the Act which create offences manifest the different treatment. Schedule 2 drugs are classified by the criteria Government set out on page 15 of Cm 6941:

> The drug classification system is not a simple measure of medical or social harms caused by drugs. Whilst these measures are at its very core and cannot be overstated, it represents a more complex assessment from a wide range of sources to ensure that any decision to classify or reclassify a drug is as **unbiased** and **objective** as possible.
>
> Decisions are based on 2 broad criteria – (1) scientific knowledge (medical, social scientific, economic, risk assessment) and (2) political and public knowledge (**social values, political vision, historical precedent, cultural preference**). Decisions must take account of scientific knowledge of medical harms, and social and economic evidence, as well as the insight provided by public consultation, and the knowledge and understanding provided by public bodies and Government departments.[121] (Emphasis Added)

171. Thus, it can be seen that Government's classification criteria embodies two tiers with objective and subjective elements respectively. These elements can be finely balance in an equitable manner. However, it can also be seen that Government's justifications for the difference in treatment, if "not unequivocally based" in objective criteria, fall into the second tier, i.e., subjective criteria.

172. The Advisory Council asserts as much in *'Pathways to Problems'*:

> At present, the legal framework for the regulation and control of drugs clearly distinguishes between drugs such as tobacco and alcohol …, drugs which are covered by the Misuse of Drugs Act (1971) and drugs which are classed as medicines. **The insights summarised in this chapter indicate that these distinctions are based on historical and cultural factors and lack a consistent and objective basis**.[122]

173. Hardison asserts that were the SSHD, via Modification Order, to add alcohol and tobacco into Schedule 2, and then conduct a review of all classified drugs in an objective manner consistent with the *Power to Promote Regulatory Principles* in Section 2 of the Legislative and Regulatory Reform Act 2006, all concerned would get 'a better sense of the relative harms involved'. [123] This would return the objective elements and expose the disparity.

---

[121] n1 *supra*, Cm 6941 (2006) page 15
[122] n2 *supra*, HO/ACMD (2006) para 1.13 (Emphasis added)
[123] Legislative and Regulatory Reform Act 2006, c.51

b) "pharmacology, economic or risk benefit analysis"

174. On October 13th 2006, in the last paragraph of Cm 6941:

> **Government acknowledges that alcohol and tobacco account for more health problems and deaths than illicit drugs…**

175. A month earlier, in their Introduction to *'Pathways to Problems'*, the ACMD had said:

> **The scientific evidence is now clear that nicotine and alcohol have pharmacological actions similar to other psychoactive drugs.** Both cause serious health and social problems and there is growing evidence of very strong links between the use of tobacco, alcohol and other drugs. **For the ACMD to *neglect* two of the most harmful psychoactive drugs simply because they have a different legal status no longer seems appropriate.**[124]

176. In this manner, the Advisory Council on the Misuse of Drugs have put their objective foot down and withdrawn support for Government's drug policy 'distinction'. This may have prompted the justification and admissions by Government in Cm 6941, and forced them to rely as they do on the second tiers of their Classification criteria, i.e., subjective criteria.

c) "social values, political vision, historical precedent, cultural preference"

177. The above volte-face by the ACMD in *'Pathways to Problems'* may have its roots in the frank and controversial language which appeared in the 1997 UN World Drug Report in a chapter entitled 'The Regulation-Legalization Debate':

> The discussion of regulation has inevitably brought alcohol and tobacco into the heart of the debate and highlighted the apparent inconsistency whereby use of some dependence creating drugs is legal and of others is illegal. **The cultural and historical justifications offered for this separation may not be credible to the principle targets of today's anti-drug messages – the young.**[125] (Emphasis added)

178. It is in fact, incredible; as supporting a 'cultural drug preference' cannot be a legitimate aim of the Act. Nor can it justify a difference in treatment since it is irrelevant to both the legitimate aim of the act and the restrictions permitted to Convention rights. Moreover, one should not lose sight of the fact that much past discrimination, found to be unlawful, has been based unjustifiably on 'historical precedent' and 'cultural preference'.

179. Support for a 'cultural drug preference' is may be in the interest of a "vast majority",[126] which includes the public and the decision-makers who exercise property rights in those preferred drugs. But, it is not in the "interests"[127] of the approximately 4 million UK citizens who have a preference for or orientation towards Schedule 2 drugs, many of which are known to be significantly less harmful. This manifest difference in treatment leads to the social exclusion of these persons and artificially divides society, constituting anti-social behaviour which itself cannot be in the public interest.

180. And, whilst Government accepts that there exists a "deeply embedded historical tradition and tolerance of consumption of a number of substances that alter mental functioning",[128] no explanation is provided to the 'youth of today' as to why this 'tolerance', a hallmark of a democratic society, has not been extended to other psychoactive drugs even though the National Curriculum requires them to be taught that *alcohol and tobacco are harmful drugs.*

---

[124] n2 *supra*, HO/ACMD (2006) page 14 (Emphasis added)
[125] UNODC (1997) UN World Drug Report 1997, p 198, www.unodc.org/adhoc/world_drug_report_1997/CH5/
[126] n1 *supra*, Cm 6941 (2006) page 24
[127] *Wockel v Germany* [1998] 25 EHRR CD156 'the interests of other individuals to continue smoking'
[128] n1 *supra*, Cm 6941 (2006) page 24

d) It is unacceptable to prohibit responsible drug use

181. In *Thlimmenos v Greece*, the Strasbourg Court said:

> The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.[129]

182. Thus, distinguishing between responsible and irresponsible drug use is a legitimate aim of the Act reflected in its short title, the Misuse of Drugs Act 1971, and so justifies a difference in treatment between modes of drug use, particularly those uses, which according to Section 1(2) of the Act, "have harmful effects sufficient to cause a social problem".

183. As Lord Bingham of Cornhill said in the 'Belmarsh Detainees' case, *A & Others v SSHD*:

> Any discriminatory measure inevitably affects a smaller rather than a larger group, but cannot be justified on the ground that more people would be adversely affected if the measure were applied generally. **What has to be justified is not the measure in issue but the difference in treatment between one person or group and another**. [130] (Emphasis added)

184. So, the fact that the Government 'explanatory model' holds that "A classification system that applies to legal as well as illegal substances would be unacceptable to the vast majority of people who **use** … **responsibly**" cannot be a valid reason which justifies not applying the Misuse of Drugs Act 1971 generally *and* particularly to alcohol and tobacco.

185. And recall that the 2006 Rand Europe Technical Report, prepared for the 2006 Science and Technical Select Committee, HC-900, *The Evidence Base for the Classification of Drugs*, said:

> Around four million people use illegal drugs each year. Most of these people do not appear to experience harm from their drug use, nor do they cause harm to others as a result of their habit.[131]

186. This increasing non-compliance with the blanket prohibition of activities vis-à-vis Schedule 2 drugs demonstrates *in deed* that otherwise law-abiding drug users, "the majority of which do not appear to experience harm from their drug use", find 'prohibition' of activities relating to their 'drugs of choice' unacceptable.

187. In *'Pathways to Problems'* the ACMD recognised that all must cease ignoring this social reality:

> The mechanisms of action of psychoactive drugs cannot in themselves explain the huge worldwide increase in their use over the past 40 years. **Attitudinal, cultural and economic changes may provide at least a partial explanation.** […] To better understand this phenomenon, we need to look at the changing nature of prevailing attitudes and values. [132]

188. Just as the global consensus required to create and sustain an alcohol prohibition regime could not be attained, it is submitted that the same has occurred here.[133] **The prevailing norm is moving towards equality, with alcohol and tobacco requiring more regulation and other drugs 'in common use' requiring a less draconian stance.**

189. Accordingly, it is asserted that a consensus amongst the UK population does not exist which justifies 'unacceptability' by a vast majority as a reason for not equitably regulating, distinguishing and communicating drug property *use risks* for all drugs.

---

[129] *Thlimmenos v Greece* [2000] 31 EHRR 411 para 44
[130] *A & Others v SSHD* [2004] UKHL 56 para 68
[131] Rand Europe (2006) *'The Evidence Base for the Classification of Drugs'*, www.rand.org/pubs/technical/TR362/index.html
[132] n2 *supra*, HO/ACMD (2006) 'Key points' p18
[133] Nadelmann, Ethan A (1990) Global Prohibition Regimes: The Evolution of Norms in International Society, *Int'l Organization*, Vol. 44, No. 4 , 479-526, 510

e) Political vision and the fettering of Executive discretion – a fifth justification

190. The UN Conventions set up an exceptional system of international drug control and whilst the Misuse of Drugs Act 1971 does not explicitly empower the UN Conventions, in Cm 6941, Government leaned on them as another justification for the difference in treatment:

> It has always been the position of the UK Government that the United Nations Conventions, to which the UK is a signatory, do not pose a significant barrier to a change in the system by which drugs are controlled in this country. **However, the Government is not free to legislate entirely as it pleases. It must do so within the parameters set by the Conventions.**[134]

i. On fettered discretion

191. The well known case of *Redereaktiebolaget Amphitrite v The King* established the proposition that the Crown cannot by contract fetter its future executive action. It was said:

> …it is not competent for the Government to fetter its future executive action, which must necessarily be determined by the needs of the community when the question arises. It cannot by contract hamper its freedom of action in matters which concern the welfare of the State.[135]

192. Thus, the public interest requires that neither the Government nor a public authority can, by contract or treaty, disable itself or its officers from performing a statutory duty or from exercising a discretionary power conferred by or under statute by binding itself or its officer not to perform a duty or to exercise the discretion in a particular way in the future.

ii. On political vision – the UN Conventions and the law of Treaties

193. The political vision of the UK may be found in the final proclamation of the 1998 20th United Nations General Assembly Special Session: "A Drug Free World, We Can Do it".[136] This is certainly not what they meant, however, as they make no mention of alcohol and tobacco. Nevertheless, the prohibitionist character of the 1961 Single UN Convention is beyond doubt as. Article 36(1)(a) states that:

> **Subject to its constitutional limitations**, each Party shall adopt such measures as will ensure that *cultivation, production, manufacture, extraction, preparation, possession, offering, offering for sale, distribution, purchase, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation and exportation* of drugs contrary to the provisions of this Convention, *and any other action* which in the opinion of such Party may be contrary to the provisions of this Convention, shall be **punishable offences** when committed intentionally, and that serious offences shall be liable to adequate punishment particularly by imprisonment or other penalties of **deprivation of liberty**. (Emphasis added)

194. But, Lord Templeman, in the case of *JH Rayner (Mincing Lane) Ltd v DTT*, said:

> The Government may negotiate, conclude, construe, observe, breach, repudiate or terminate a Treaty. Parliament may alter laws of the United Kingdom. The courts must enforce those laws; **judges have no power to grant specific performance of a Treaty** … **or misconstrue legislation to enforce a Treaty** … A treaty to which Her Majesty's Government is a party does not alter the law of the United Kingdom … So far as individuals are concerned, it is *res inter alios acta* from which they cannot derive rights and by which they cannot be deprived of rights or subjected to obligations; and it is outside the purview of the court … because, as a source of rights and obligations, **it is irrelevant**.[137]

---

[134] n1 *supra*, Cm 6941 (2006) page 5

[135] *Redereaktiebolaget Amphitrite v The King* (1921) 3 KB 500 at 503 *Cf.* Article 2(7), UN *Charter*

[136] Arlacchi, P. (1998) Closing statement to the 20th UN General Assembly Special Session, New York, June 10th, 1998 *see:* www.unodc.org/pdf/report_1999-01-01_1.pdf at p.39

[137] *JH Rayner (Mincing Lane) Ltd v DTT* [1990] 2 AC 418 (HL) para 476, 500

195. Thus, the UN Conventions, like all unincorporated treaties, are only relevant to the interpretation of domestic legislation if there is some ambiguity. There appears to be no such ambiguity in the Misuse of Drugs Act 1971; and even if there were, the influence of the UN Conventions, which sustain the hitherto unjustified discrimination, would still be constrained by over-riding human rights treaties, International norms and constitutional principles which contradict such discrimination and holds all equal before the law.

196. Explicitly, Article 36(1)(a) of the Single Convention on Narcotic Drugs 1961 provides that the UN Conventions are 'subject to [the United Kingdom's] constitutional limitations'. This clause is repeated throughout the three relevant UN Conventions. And crucially, Article 14(2) of the 1988 UN Convention states:

'The measures adopted shall respect fundamental human rights…'

197. And more decisively, the Political Declaration of the 1998 20th United Nations General Assembly Special Session states that drug strategies require an:

> "integrated and balanced approach *in full conformity* with the purposes and principles of the Charter of the United Nations and international law, and particularly with full respect for the sovereignty and territorial integrity of States, the principle of non-intervention in the internal affairs of States and all human rights and fundamental freedoms".[138] (Emphasis added)

198. Article 1 of the Charter of the United Nations provides that its 'purposes' are:

> To maintain international peace and security … To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace … [by] **promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction** ... To be a center for harmonizing the actions of nations in the attainment of these common ends.

199. And, Article 2(7) of the UN Charter says:

> **Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state.**

200. Article 2 of the Universal Declaration on Human Rights (UDHR) provides:

> **Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.**

UDHR Article 7 provides:

> **All are equal before the law and are entitled without any discrimination to equal protection of the law.**

201. As can be seen the entire International order is built on the foundations of the Rule of Law which demands equal rights and equal protection for all and upholds the principle of State sovereignty. Exceptions to this are to be made only for genuine objective and reasonable causes in the public, national or global interest.

202. Hardison asserts that the difference in treatment between groups of drug users and not between objective drug use risks, and that the exclusion of the harmful drugs alcohol and tobacco from the scope of an "Act to make new provision with respect to dangerous or otherwise harmful drugs", cannot be in the public, national or global interest.

[138] UN General Assembly A/RES/S-20/2, June 10th 1998, www.un.org/ga/20special/poldecla.htm

X. The difference of treatment is of such a draconian nature as to violate Article 3

203. ECHR Article 3 provides:

> No one shall be subject to torture or to inhumane or degrading treatment or punishment.

204. Article 3 is the only Article of the Convention in which there are no qualifications, exceptions or restrictions to the rights guaranteed. Article 3 prohibits in absolute terms torture or *inhumane* or *degrading treatment* or *punishment*, *irrespective of the victim's conduct.*[139] Thus, an individual's actions are irrelevant.

205. Discrimination has provided the grounds for a finding of degrading treatment.[140] The discriminatorily classified drugs in Schedule 2 conjunct the other provisions of the Act which create offences, in its current application, manifest the disparate impact. The difference of treatment complained of denotes contempt for human dignity and lack of respect for the personality of those concerned with Schedule 2 drugs as it is implemented in a manner designed to humiliate, debase and demean so as to deter such future conduct.

206. The Government asserts that the "vast majority" would find the application of the MDA 1971 classification system to their drugs, alcohol and tobacco, unacceptable", whether 'decoupled from penalties' or not. Thus, the difference of treatment is 'grounded upon a predisposed bias' on the part of a "vast majority" dedicated to defending their drug property rights to the detriment of other persons oriented towards Schedule 2 drugs.

207. In *Smith and Grady v United Kingdom*,[141] the Court noted it would not exclude the possibility that treatment "grounded upon a predisposed bias on the part of a heterosexual majority against a homosexual minority" could, in principle, fall within the scope of Article 3. As such, *Smith and Grady's* logic can be rewritten here: 'treatment grounded upon a predisposed bias on the part of a "vast majority" against a *minority* who engage in activities with Schedule 2 drugs – could, in principle, fall within the scope of Article 3'.

208. Using the *Dudgeon v United Kingdom* analogy, "the maintenance in force of the impugned legislation constitutes a continuing interference with the applicant's right to respect for his private life"…"such justifications as there are for retaining the law in force … are outweighed by the detrimental effects which the very existence of the legislative provisions in question can have on the life of a person" [142] such as Mr Hardison.

209. Further, because the term 'inhumane' when used in relation to 'punishment' has the same meaning as it does in connection with 'treatment', the Strasbourg Court has held a sentence may constitute "inhumane punishment if it is wholly unjustified or disproportionate to the gravity of the crime committed".[143]

210. The ACMD said in *'Pathways to Problems'* that the harmfulness to individuals and society from alcohol and tobacco "is no less than that of other psychoactive drugs".[144] Thus it makes no sense to grant a "peerage or a Queen's award for industry"[145] to those who sell alcohol and tobacco and grant a 20 year sentence to someone who commits identical acts with Schedule 2 drugs. If, as Government acknowledges, "alcohol and tobacco account for more health problems and deaths that illicit drugs", can a sentence of twenty years for less harmful drugs be proportionate to the gravity of the actions?

---

[139] *Chahal v United Kingdom* [1997] 23 EHRR 413 para 80
[140] *East African Asians* [1981] 3 EHRR 76; a discriminatory application of legislation that constituted an affront to dignity
[141] Smith and Grady v United Kingdom [2000] 29 EHRR 493 para 121
[142] *Dudgeon v United Kingdom,* [1982] 4 EHRR 149 para 60
[143] *Soering v United Kingdom* [1989] 11 EHRR 439 para 89; See also n9 *supra*
[144] n2 *supra*, HO/ACMD (2006) para 1.4
[145] www.publications.parliament.uk/pa/cm200102/cmhansrd/vo091101/debtext/11109-04.htm – Jon O. Jones MP

XI. Details of Remedy being sought under CPR Part 54 and the Human Rights Act 1998

211. Having elucidated the difference of treatment between groups of drug users which arise from the interpretation and application of the classification system and shown that no rational justification exists for this disparity; and also having shown that in managing drug classification under the Act Government has placed insufficient importance on the "interests"[146] of individuals to property rights in Schedule 2 drugs, it is irrational not to review the classification system under the Misuse of Drugs Act 1971.

212. This is especially so given the legitimate expectation created by the former SSHD to publish a consultation paper with "suggestions for a review of the drug classification system", with or without the exhortation in Section 3 of the Human Rights Act 1998 to interpret and apply legislation consistent with the rights and freedoms enumerated in the ECHR.

213. Thus, it is requested that this Court:

    a) Grant a Quashing Order for the decision of October 13th 2006 in paragraph 12 of page 5 of Cm 6941 and remit the matter to the SSHD under CPR 54.19(2)(b) directing him to reconsider his decision and reach a new decision consistent with the Human Rights Act 1998 and the *Power to Promote Regulatory Principles* in Section 2 of the Legislative and Regulatory Reform Act 2006.

    b) Grant a Mandatory Order compelling the SSHD to exercise the discretion delegated to him under the Misuse of Drugs Act 1971 in accordance with the Human Rights Act 1998. This includes directing the SSHD:

        i. to equitable add alcohol and tobacco to Schedule 2 of the 1971 Act;
        ii. to conduct a full public consultation consistent with Government's classification criteria set out in Cm 6941 at page 15; and
        iii. to conduct a full review of the current implementation of the regulations made under the Act vis-à-vis Schedule 2 drugs so as to identify and remove the offending disproportionate restrictions which give rise to the current adverse impact on those who have interests in Schedule 2 drugs.

214. If the SSHD is unwilling to add alcohol and tobacco, and other drugs which "alter mental functioning", [147] to Schedule 2 of the Act then a declaration that the Misuse of Drugs Act 1971, as applied, is incompatible with the Human Rights Act 1998 is sought under Section 4 of the 1998 Act.

215. An Order for costs will also be sought and will be detailed in the perfected skeleton.

– *vitam impendre vero, fiat lux!*

Signed …….
Casey William HARDISON – POWd (Civ)

Dated …….

[146] *Wockel v Germany* [1998] 25 EHRR CD156 'the interests of other individuals to continue smoking'
[147] n1 *supra*, Cm 6941 (2006) page 24