Judging Religious Drug Use: The Misuse of the Definition of "Religion"

Russell Sandberg[1]

Apart from where the matter is specifically regulated by a legal instrument, typically by means of an exemption to generally applicable laws criminalizing drug use, the question of whether the use of drugs for religious purpose ought to be allowed is left to prosecutors and judges. This chapter examines the response of the judiciary,[2] focusing not so much upon the decisions made (which have been analyzed in other chapters in this volume)[3] but rather upon the reasoning.

Those seeking to use otherwise illegal substances as part of their religion typically seek in the case of a legal challenge to rely upon freedom of religion provisions found in national constitutions and international treaties. In dealing with such cases, courts and other bodies may take three different approaches. First, they may hold that the claim fails on the basis that there is no interference with the religious right. Second, they may hold that the claim fails on the basis that although there was interference, such interference was legally justified. Third, they may hold that the claim succeeds because it passes both hurdles: there was interference and that such interference was not justified.

Drawing upon diverse contexts, this chapter examines judicial decisions that have taken each of the three approaches. It contends that second and third approaches are preferable to the first on grounds of reasoning. The chapter will explain why, regardless of the actual decision reached (which will depend largely upon the facts of the case), the preferable judicial approach to such claims is to focus on the question of justification rather than interference.[4] This is especially true when the definition of religion is used,[5] either explicitly or implicitly, as the means by which the court decides that the prohibition on drug use does not interfere with the claimant's right to religious freedom.

Approach 1: No Interference

The first approach judges may use is to hold that the drug-user has failed to make his or her claim. It has not been shown that there has been an interference with the claimant's legal right to religious freedom. The claim is therefore excluded at the outset. However, there are various ways in which the interference question can be answered in the negative. One such way is to downplay the religious dimension of the case.

This was also common in English law prior to the enactment of the Human Rights Act 1998, which incorporated the positive right to religious freedom under Article 9 of the European Convention on Human Rights (ECHR) into domestic law. Before that, religious freedom was largely protected as a negative rather than a positive free-

dom under English law ('the starting point of our domestic law is that every citizen has a right to do what he likes, unless restrained by the common law… or by statute')[6] and judges expressed a reluctance to interfere with religious matters.[7] It is not surprising therefore that cases concerning the use of *Cannabis* by Rastafarians have tended not even to specifically identify the defendants as Rastafarians: they were simply treated like any other illegal drug user.

In Poulter's (1998, p. 360) research in this area, he found only three cases in England and Wales in which such defendants had been specifically identified as Rastafarians. The first was n R v. Williams (1979) in which a defendant who brought five kilos of *Cannabis* back from a holiday in Jamaica and who pleaded guilty to charges of drug importation successfully appealed against his sentence and had it reduced from three years' imprisonment to two years' imprisonment. One of the several bases upon which the appeal was argued was that he was a Rastafarian who only intended to sell a small part of the drug to fellow Rastafarians. However, this only formed part of an argument designed to show his good character. The importance of the defendant being a Rastafarian was downplayed by the judge, Cantley J, who held that it remained "a serious case" and was adamant that courts would not regard the smuggling of *Cannabis* by Rastafarians "as a different sort of offence from smuggling drugs into this country for any other illicit reason."

The same principles applied to the possession of *Cannabis* by Rastafarians. This was underlined a the second case, R v. Daudi and Daniels (1982), in which the defendants who were caught with a large quantity of *Cannabis* intending to distribute it to fellow Rastafarians for no commercial motive, pleaded guilty to the criminal charge. In an appeal concerning sentencing, the Court of Appeal, though acknowledging the good work the defendants did in their community, held that the law nevertheless had to be applied even-handedly. Even though the sentence itself (three months' detention and six months' imprisonment) was comparatively low for the crime, the judgment of Griffiths LJ made it clear that the fact that the defendants were Rastafarians did not matter one jot. He held that to say that they were entitled to be treated differently because they were Rastafarians would be "a denial to justice" and there were "no grounds upon which it would be right or indeed fair to the community as a whole, to discriminate in their favour."

Whilst the cultural defence was subsidiary to Williams and Daudi and Daniels, it came to the fore in the third case: in R v. Dallaway (1983) the principal defence to the charge of possession with intent to supply was that the defendant did not intend to sell the *Cannabis* found but rather intended for fellow Rastafarians to smoke it when they visited him. The appeal was dismissed and the sentence of one year's imprisonment was upheld. These three cases illustrate that prior to the Human Rights Act of 1998, the right to religious freedom was largely irrelevant in criminal cases concerning drug use by Rastafarians. As Sir Robert Megarry V-C noted in 1979, England "is not a country where everything is forbidden except what is expressly permitted; it is a country where everything is permitted except what is expressly forbidden."[8] There was no interference with a right to religious freedom since the fact that drug importation, possession, and supply were expressly forbidden by law was definitive.

The conclusion was reached in the leading New Zealand case of Knowles v. Police (1998) though this concerned customary rather than religious rights. The defendant convicted for the possession of *Cannabis* leaf claimed that she was using the drug in a manner which was customary amongst the Maori. Hammond J held that the appeal was "fruitless": there was no distinct proof that this was a customary right. Moreover, there was no constitutional foundation for the assertion that the "criminal writ does not run to anything in this country which Maori choose to designate as customary." The bottom line was that the law of the State was the law.

It is less likely that the religious dimension of a case can be effectively ignored where there is a constitutional guarantee of freedom of religion. Moreover, where such a positive right has a long history, it is to be expected that the judiciary will be more comfortable in dealing with religious matters. That does not mean, however, that in such jurisdictions courts have not utilized the first approach to hold that prohibiting the use of drugs for religious purposes does not interfere with that person's right to religious freedom. This is well illustrated by the well-known United States case of Employment Division v. Smith (1990), which is discussed by some contributors to this volume.[9]

In Smith, the Supreme Court of the United States held that the Free Exercise Clause permitted the State to prohibit sacramental peyote use, and thus to deny unemployment benefits to persons discharged for such use. The prohibition was not inconsistent with the constitutional guarantee of freedom of religion (Payne & Doe, 2005, p. 543). Scalia J noted that the protection of the free exercise of religion went further than protecting "the right to believe and profess whatever religious doctrine one desires." The clause also protected "the performance of (or abstention from) physical acts":

> It would be true, we think (though no case of ours has involved the point), that a state would be "prohibiting the free exercise [of religion]" if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display.

However, Scalia J held that protection afforded by the free exercise of religion clause did not extend "one large step further" to hold that "an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." If prohibiting the exercise of religion was not the object of the criminal prohibition, but merely the incidental effect of a generally applicable and otherwise valid provision, then the First Amendment has not been offended.

As Peter Edge has noted, "the significance of Smith was not simply that the ban on peyote use for religious purposes was upheld, but that it was done so without requiring a justification by the State of the impact upon the religious defendant" (Edge, 2006a, p. 169). The Supreme Court dealt with the matter on the basis of interference and not justification, simply holding that freedom of religion did not go that far. Despite the religious dimension being central to the case, the reasoning is thus not dissimilar from that of the pre-Human Rights Act case law in England. It is not surprising that the decision proved controversial and, as other contributors to this volume have discussed, that it was not the last word on the matter in that jurisdiction.

Another equally controversial means by which it has been determined that there is no interference with religious freedom is to hold that the claim is not sufficiently "religious" to be protected. By contrast to the means discussed above, this latter approach has the advantage of implying that properly "religious" claims would be protected, but that the claim before the judge does not meet the criteria. The American case of Kuch v. US (1968) shows the attractions of this approach. The claimant contended that she had a constitutional right to take peyote because it was part of her religion, the Neo-American Church of which she was "an ordained minister." Presenting no evidence of her subjective beliefs, Kuch chose to rely on her office in the Church and proof as to the requirements and attitudes of the Church. The sole "duty" of the faithful was "to partake of the sacraments" consisting of marijuana and LSD which were described as the "Host of the Church, not drugs."

The District Court, noting that although the "dividing line between what is, and what is not, a religion is difficult to draw" and that courts "must be ever careful not to permit their own moral and ethical standards to determine the religious implications of beliefs and practices of others" since religions "now accepted were persecuted, unpopular and condemned at their inception," nevertheless held that the definitional question should "not be avoided for reasons of convenience." Speaking of the "need to develop a sharper line of demarkation [*sic*] between religious activities and personal codes of conduct that lack spiritual import," the Court determined that the Church was not a "genuine" religion within the meaning of the First Amendment. The Church lacked a formal theology but its catechism and handbook stated that members "have the *right* to practice our religion, even if we are a bunch of filthy, drunken bums." The Church had a nationwide membership of 20,000 and was headed by "Chief Boo Hoo." The Court commented that the Catechism and Handbook was "full of goofy nonsense, contradictions, and irreverent expressions": each member carries a "martyrdom record" to reflect their arrests; the Church symbol is a three-eyed toad; the Church key is the bottle opener; the official songs are "Puff, the Magic Dragon" and "Row, Row, Row Your Boat"; and the church motto is "Victory over Horseshit."

The District Court held that Kuch had "totally failed" in her effort to establish that the group was a religion since desire to use and take drugs of its own sake regardless of religious experience was the purpose. The court reached the "inescapable conclusion" that the membership was "mocking established institutions, playing with words and [was] totally irrelevant in any sense of the term." However, the court added that even if the religion was "genuine" then, nevertheless, Kuch's contentions were "without merit": "The Constitution protects the right to have and to express beliefs. It does not blindly afford the same absolute protection to acts done in the name of or under the impetus of religion." Applying the then case law, the Court held that interference would have been justified "for the statutes under which she stands indicted are in aid of a substantial government interest and have a rational and constitutional basis. These laws, enacted to preserve public safety, health and order, will be enforced."

The actual decision in Kuch was unsurprising. However, that decision could have easily been reached on grounds of justification. Indeed, the decision could have been reached on the basis that the defendant's submissions were not genuine. Yet, the de-

cision was reached instead on the basis that the religion itself was not a "genuine" religion for the purposes of freedom of religion, thus creating a category of "not genuine" religions that are outside the protection of the law. This reasoning seems problematic, especially if applied to different facts than that of Kuch. It also seems unnecessary: in place of controversial musings on the question of interference, the case could have been resolved more quickly on straightforward analysis of whether the restriction was justified.

The deliberations of the Human Rights Committee of the United Nations (UN) in MAB, WAT and J-AYT v. Canada (1994) is equally troubling. The case concerned "leading members" or "plenipotentiaries" of the "Assembly of the Church of the Universe," whose beliefs and practices "necessarily involve the care, cultivation, possession, distribution, maintenance, integrity and worship of the 'Sacrament' of the Church," referred to by the claimants as "God's tree of life" but more popularly known as *Cannabis* and marijuana. The claimants were arrested in Canada and subsequently claimed a violation of their human rights, including a claim that the dismissal of their arguments on the basis of perceived frivolousness by the Canadian judiciary breached their human right to a fair and public hearing before an impartial and independent tribunal.

The Human Rights Committee held that the claim was inadmissible. It held that "a belief consisting primarily or exclusively in the worship and distribution of a narcotic drug cannot conceivably be brought within the scope of article 18 of the Covenant (freedom of religion and conscience)." As Paul Taylor (2005, p. 209) has noted, it is difficult to discern from the short decision "whether the beliefs in question were incapable of protection of whether the genuineness of the belief held by the authors was not established." He concludes that the former was the case: "Scepticism concerning the status of the 'belief' itself is hinted at in the use of inverted commas by the Human Rights Committee, coupled with the suggestion that the assertion of 'belief' in this case was no more than a device for legitimising criminal behaviour." As Taylor points out, this is "in spite of the fact that the range of protected beliefs within Article 18 is undoubtedly broad" and has protected fascist and anti-Semitic beliefs.[10] The broad approach is warranted on the basis that such claims can be denied on justification, raising the question of why these drug cases should be dealt with differently.

Moreover, there is a marked difference between deciding that the genuineness of the claimant had not been established and the reasoning of Kuch and MAB, WAT and J-AYT that the genuineness of the religion had not been established. As the United Kingdom House of Lords stated in R v. Secretary of State for Education ex parte Williamson (2005):

> When the genuineness of a claimant's professed belief is an issue in the proceedings the court will inquire into and decide this issue as a question of fact. This is a limited inquiry. The court is concerned to ensure an assertion of religious belief is made in good faith … But, emphatically, it is not for the court to embark on an inquiry into the asserted belief and judge its 'validity' by some objective standard such as the source material upon which the claimant founds his belief or the orthodox teaching of the religion in question or the extent to which the claimant's belief conforms to or differs from the views of others professing the same religion. Freedom of religion protects the subjective belief of an individual.

Put another way, "while Courts may be concerned with whether the claim of religious belief was made *in* good faith, they are not concerned whether the religious belief professed is *a* good faith in terms of judging the validity of that faith" (Sandberg, 2008a, p. 214). Rejecting a claim for religious drug use on the basis that the religion professed is not proper seems to take the court outside its proper role.

In Williamson, the House of Lords took what has been hailed as "classic human rights approach" (Langlaude, 2006, p. 345), finding that a ban on corporal punishment in schools did interfere with the religious freedom of the parents who believed that such punishment was part of a good Christian upbringing but that the State's interference was justified. Lord Walker of Gestingthorpe expressly doubted whether it was right for courts, expect in extreme cases,[11] "to impose an evaluative filter" at the stage of identifying whether there was a belief, "especially when religious beliefs are involved." The Williamson approach seems preferable to the reasoning in Kuch and MAB, WAT and J-AYT where a definition of religion was used a "filtering device": a means by which a claim is excluded at the outset.[12] It means that the right or claim is outside legal protection: the right or claim is denied legal protection. In its classical sense, where a filtering device is used there is then no need to look at the merits of the claim since the claim has fallen at the first hurdle. Although the District Court in Kuch did look at the question of justification, the Human Rights Committee in MAB, WAT and J-AYT did not. Moreover, any subsequent decision could simply rely on these decisions as precedent without need for analysis of the merits of the claim. This seems misguided, especially since the same decision could easily be reached by means of the second approach, as will now be discussed.

Approach 2: Interference but Justified

The second judicial approach is to hold that the claim fails on the basis that although there was interference such interference was legally justified. The claim thus passes the first hurdle but falls at the second. The advantage of this approach is that it is at that second stage that the merits of the case need to be carefully considered. In many judgments where the claim fails at the first hurdle for lack of interference, judges may nevertheless go on to discuss these issues but there, such consideration is merely hypothetical. In judgments that follow this second approach, the legal focus is on the question of justification.

Post-Human Rights Act cases on the use of drugs for a religious purpose in England and Wales have taken this approach. The Act has greatly affected the English constitutional heritage, bringing judges more clearly into the political arena and leading to greater litigation (Doe & Sandberg, 2011b). On the face of it, it would appear that Article 9 itself encourages a justification-based approach: whilst Article 9(1) is concerned with whether the right to religious freedom is interfered with, providing an absolute right to freedom of thought, conscience, and religion, and a qualified right to manifest one's religion or belief in worship, teaching, practice, and observance, Article 9(2) is concerned with whether the State's limitation of that second qualified right is justified, stating that the State may only interfere if three tests are met: the limitation must be prescribed by law," have a "legitimate aim" that is stated in the

Article and be "necessary in a democratic society." Analysis of Article 9(2) requires courts to examine whether there is a pressing social need for the limitation and whether the limitation is proportionate to the legitimate aim pursued.[13] The Strasbourg case law increasingly focuses upon Article 9(2) rather than Article 9(1)[14]; however, English courts, in relation to religious dress in particular, have become quite unnecessarily involved with the semantics of Article 9(1) and have been criticized for it.[15] The two English cases concerning religious drug use, however, preceded the cases on religious dress and followed *Williamson* in taking the preferable Strasbourg approach.

In R v. Taylor (2001), a claim by a Rastafarian that his conviction for the possession of *Cannabis* breached his right to religious freedom was refused on the grounds that the limitation upon the defendant's right to manifest his religion or belief could be justified under Article 9(2). It was assumed without comment that Rastafarianism was a religion and that drug-taking constituted a manifestation of the defendant's religion or belief since this had been conceded by the prosecution. The Court of Appeal upheld the "clear and careful" ruling of the Trial Judge who had held "that the European Convention on Human Rights was engaged, but that those rights were qualified by the provisions of Article 9.2" in that the limitations were necessary, had a pressing social need, and there was a "reasonable relationship between the terms employed and the aims pursued." The Court of Appeal moreover decided, given that the contemplated supply was for religious purposes, that the defendant was not engaged in supply for commercial benefit, and, in consideration of additional personal mitigation, the sentence imposed was excessive and a term of five months imprisonment was substituted instead of the original twelve.

In R v. Andrews (2004), a claim by a Rastafarian that his conviction for importing *Cannabis* was incompatible with his Article 9 rights was dismissed, applying Taylor. As Laws LJ stated, although Taylor was concerned with supplying drugs or possession with intent to supply, many of the international treaties cited by the Court of Appeal in that case applied to both possession and importation. Moreover, for the defendant to stress the difference in order to distinguish that decision was "at the least an odd one in the context of a proposed religious defence. Is it to be asserted that a man may use *Cannabis* to manifest his own religious beliefs and principles, but at the same time is it to be accepted that he may not supply his brother to do the same?" The Court of Appeal held that on the assumption that the offence was "capable of having effects which would *prima facie* violate a person's rights under article 9(1) of the European Convention on Human Rights," then it was nevertheless plain that such interference was "well justified as being necessary under Article 9(2) for the protection of public health" on the basis that international treaties provided powerful objective justification for the present prohibition and that the legislature enjoyed an important margin of discretion. An appeal as to sentence was dismissed because the trial judge had had regard to the defendant's motive.

Peter Edge (2006b, p. 85) has commented that although the "result" of the Court of Appeal judgments was "effectively the same" as the approach of the US Supreme Court in Smith, "the English Court of Appeal did engage in a process of scrutiny of the law as enforced against a religious defendant." However, he criticizes Taylor on the basis that this scrutiny was not "very far reaching":

> Rather than making use of medical, sociological, and religious data peculiar to *Cannabis* and to Rastafarians, as suggested by counsel to the defendant, the key issue of proportionality was answered by reference to international legal documents of general application.

This is not untypical (see Sandberg & Catto, 2011): courts and tribunals are seldom interested in social scientific analysis.[16] The scrutiny in both Taylor and Andrews is far more detailed than that of MAB, WAT and J-AYT, for instance. The Court of Appeal's focus on Article 9(2) rather than Article 9(1) is preferable to many recent domestic judgments. Yet, as Edge (2006b, p. 85) points out, a shaper contrast to Smith than Taylor and Andrews can be found in the decision of the Constitutional Court of South Africa in Prince v. President of the Law Society

In Prince the Law Society came to the conclusion that the defendant was not a proper and fit person to become an attorney on the basis that he had two previous convictions for possession of *Cannabis* and also expressed his intention to continue using *Cannabis* as "inspired by his Rastafari religion." The defendant thus challenged the constitutional validity of the prohibition on the use or possession of *Cannabis* when its use or possession is inspired by religion on the basis that the law went too far, bringing within its scope possession or use required by the Rastafari religion; and thus infringing, *inter alia*, his right to religious freedom as secured by Sections 15(1) and 31(1) of the Constitution of the Republic of South Africa Act 1996. The case split the Constitutional Court: five judges dismissed the claim whilst four upheld it. Ngcobo J for the minority, noting that "freedom of religion is probably one of the most important of all human rights," held that there was "no doubt that the existence of the law which effectively punishes the practice of the Rastafari religion" was "a palpable invasion of their dignity" saying "that their religion is not worthy of protection." Although the limitation served an important purpose, given the war on drugs, the fact that there was not an absolute ban on drugs (*Cannabis* being permitted for medical reasons) meant that it could not be said that granting a religious exemption would undermine the purpose of the prohibition. The limitation was not justified.

The majority, however, held that although there was a limitation on the religious rights of Rastafarians, it was justified. Chaskalson CJ noted that "the religious use of *Cannabis* cannot be equated to medical use" since it "would expose Rastafari to the same harm as others are exposed to by using *Cannabis*, depending only on their self discipline to use it in ways that avoid such harm" and the implementation of any religious exemption would itself violate religious freedom. He held that requiring the State to issue a permit to '*bona fide* Rastafari' would, be inconsistent with the freedom of religion. The decision in Prince underscores how controversial, finely tuned, and factually variable decisions concerning religious drug use can be. It also highlights the disadvantages of the first approach: although the "short-cut" of focusing on the question of interference is attractive, it is also a very crude way to exclude the religious defendant. Prince shows not only that the second and third approaches are preferable but also that the difference between the two will often be close.

Approach 3: Interference and Unjustified

The third approach is that taken by the minority in Prince: the court holds that there was interference and that such interference could not be unjustified. The claim succeeds because it passes both hurdles. An example of this approach can be found in the decision of the Supreme Court of California in People v. Woody (1964) in which it was held that the prohibition of *bona fide* use of peyote by a group of Navajos was unconstitutional. There was interference since although the sacramental use of peyote was not compulsory, it was found to be central to the Church's theology. The interference was not justified: expert evidence suggested that peyote caused "no permanent deleterious injury" and Tobriner J noted that the problem of spurious claims was no greater than in other areas.[17]

A more recent example of this third approach can be found in the UDV case,[18] which is discussed at length elsewhere in this volume.[19] The case concerned the drinking of ayahuasca, a sacramental tea which contained a hallucinogen prohibited by the US Federal Government under the Controlled Substances Act. The Government conceded that this practice was a sincere exercise of religion, but sought to prohibit the practice, on the ground that the Act barred all use of the hallucinogen. The UDV sued, relying on the Religious Freedom Restoration Act of 1993, which prohibits the Federal Government from substantially burdening the exercise of religion unless it demonstrated that application of the burden to the person represented the least restrictive means of advancing a compelling interest. The Supreme Court held that this justification test had not been met: as Roberts CJ put it: "the Government has not carried the burden expressly placed on it by Congress in the Religious Freedom Restoration Act."

The Government had argued in part that the Controlled Substances Act itself precluded any consideration of individualized exceptions such as that sought by the UDV by providing that the substances there listed have "a high potential for abuse," "no currently accepted medical use in treatment in the United States" and "a lack of accepted safety for use . . . under medical supervision." The Government argued that there was "no need to assess the particulars of the UDV's use or weigh the impact of an exemption for that specific use, because the Controlled Substances Act serves a compelling purpose and simply admits of no exceptions." The Supreme Court rejected this on the basis that the Religious Freedom Restoration Act and the strict scrutiny test it adopted, contemplated "an inquiry more focused than the Government's categorical approach," the "mere invocation" of the Act "cannot carry the day" particularly since the well-established peyote exception also fatally undermines the Government's broader contention that the Controlled Substances Act establishes a closed regulatory system that admits of no exceptions.

In short, the Supreme Court held that both tests were met: "the UDV effectively demonstrated that its sincere exercise of religion was substantially burdened, and the Government failed to demonstrate that the application of the burden to the UDV would, more likely than not, be justified by the asserted compelling interests." There was interference and it was not justified. Edge (2006a, p. 176) has commented that the Supreme Court in UDV "rejected the approach in Smith, on the basis of Congressional changes to the tests to be applied, and instead insisted on an approach similar

to Prince," the decision being dependent on the question of justification. He contends that the different decisions in UDV and Prince as to justification are attributable not only to the different factual contexts but also to "the weight the majority give to the need for uniform enforcement" of the exemption: "in Prince a religious exemption for Rastafari is seen as too destructive to enforcement to be justified, in [UDV] such an argument is dismissed as 'the classic rejoinder of bureaucrats throughout history'." Such differences, cultural and legal, are to be expected: the focus upon questions of justification will produce fact-sensitive, culturally-sensitive decisions that may well alter over time and across societies. The general method of the second and third approaches should nevertheless be welcome as preferable to the interference-focus found in the first approach.

Conclusions

This account of judicial reasoning has focused narrowly upon the means by which judges decide claims concerning the religious use of drugs. Discussion of the merits of the decisions discussed is to be found elsewhere in this volume.[20] This chapter has simply sought to argue that the preferable judicial approach to such claims is to focus on the question of justification rather than interference. The high placing of issues concerning religion on the public agenda and the growing unease that religious belief may provide a competing loyalty to that owed to the State means that dismissing religious claims at the first hurdle may appear superficially attractive to judges keen to avoid religious issues.

Such temptation is to be avoided. The approach of the pre-Human Rights Act English case law and the New Zealand High Court in Knowles v Police of ignoring the religious or customary dimension of the claim is unsatisfactory: simply declaring that the law of the land is the law of the land is at best a basic level of tautology. As the Archbishop of Canterbury, Dr Rowan Williams, has argued, it is not only "a very unsatisfactory account of political reality in modern societies; but it is also a problematic basis for thinking of the legal category of citizenship and the nature of human interdependence": "If the law of the land takes no account of what might be for certain agents a proper rationale for behaviour… it fails in a significant way to *communicate* with someone involved in the legal process." (Williams, 2008)[21] Similarly, the curtailment of religious freedom in Smith is to be avoided. Wafer thin distinctions between banning something because of its religious motivation and banning something that is incidentally used in religious practice result in a lack of clarity and unfairness.[22] Such artificial distinctions, though a useful means to dispose of the instant case, prove to be short-lived.[23]

The use of the definition of religion as a means of determining the question of interference, as found in Kuch and AB, WAT and J-AYT, is particularly problematic. The plethora of definitions of religion (Leuba, 1912, p. 339), the culturally-loaded nature of such definitions (Morris, 2006), and the age-old difficultly of managing to craft a definition of religion that is both precise and sufficiently comprehensive (Simmel, 1917), suggests that the avoidance of the definition issue, bemoaned in

Kuch, may be justified, especially where the answer to that the question is "entire answer to the question of the scope of, and limits to, religious liberty."[24]

Moreover, the focus on the question of interference found in the first approach is unnecessary; rather than simply avoiding the religious element, or curtailing it, or saying that it was not "religious," claims can be considered properly and fully under the question of justification with legitimate limitations on the right being routinely justified after the merits of the claim are examined.[25] It is that time for examining the merits of the case that necessitates the second or third approach to religious drug cases rather than the first.

It may appear that courts in varying jurisdictions in response to various factual situations are already moving in this direction. In the United States, as Edge (2006a, p. 176) notes, the two Supreme Court decisions of Smith and UDV "represent two extremes" in relation to "the level of details with which courts engage with the central issue of justification for burdening religious exercise." In South Africa the decision in Prince also focused on the question of justification as underscored by the tightness of the bare majority. In England, the Human Rights Act 1998 has brought the religious dimension to the fore and in the context of the religious use of drugs; at least, domestic courts have followed Strasbourg in focusing on questions of justification rather than interference. This is to be welcomed. However, the fact that more recent English decisions, albeit to do with religious dress than drugs use,[26] have focused on the question of interference, shows the attractions for the judiciary of the first approach.

This comparative study has not sought to argue for uniformity of decisions, which will of course be dependent upon individual facts and individual political, social, and legal cultures. It has not even argued for cross-citation of cases from one jurisdiction to another.[27] Instead, this chapter has argued for a realistic, achievable, and basic result: the homogenisation of judicial approaches so that claims are considered in relation to interference and justification, with the prime focus being upon the question of justification. The most recent decisions in this context may show a welcome shift towards this approach but, in an era of an ever-changing interface between law and religion,[28] complacency is to be avoided.

---

1 I am grateful to Frank Cranmer for his comments on an earlier draft of this chapter. I am also indebted to several scholars across the globe who have responded to my queries concerning the legal position in their jurisdictions.

2 For a discussion of the pre-trial discretion, see Poulter (1998, p. 362-363).

3 For a fuller and excellent discussion see Edge (2006a, p. 165-177).

4 For a similar argument in relation to religious dress, see Hill and Sandberg (2007).

5 For a general analysis of the problem and effect of legal definitions of religion, see Sandberg (2011, Chapter 3); see also Sandberg (2008b).

6 AG v. Guardian Newspapers Ltd (No 2) [1990]

7 R v. Registrar General, ex parte Segerdal [1970]

8 Malone v. Metropolitan Police Commissioner [1979]

9 Cf. Harber, Roy and Bronfman, Jeffrey, in this volume.

10 MA v. Italy (1984); Ross v. Canada (2001).
11 Lord Walker noted that, "Only in clear and extreme cases can a claim to religious belief be disregarded entirely" and gave the example of Wicca citing a European Commission decision (X v. United Kingdom).. For a critique of why Wicca "was not the best example to select" see Ahdar & Leigh (2005, p. 112, fn 83).
12 Hill and Sandberg (2007, p. 488, 496) have contended that the Kuch approach "effectively assesses the legitimacy of a religious belief and crudely manipulates its definition of religion."
13 See Serif v. Greece (2001)
14 Sahin v. Turkey (2005); Thlimmenos v. Greece (2001). See Knights (2007) and Sandberg (2009)
15 A number of cases have been brought by litigants who have been prevented from wearing religious dress or symbols at school or at work. In almost all of these cases, the English courts have upheld these prohibitions. In most cases, the courts have done this by focusing upon the question of interference. Put simply, the courts have held that the bans on wearing religious dress and symbols have not interfered with the litigant's religious rights because there are other means open to them if they want to manifest their religion. They are able to change schools or resign from their jobs. See Hill and Sandberg (2006); Hill and Sandberg (2007); Sandberg (2008) and Knights (2007).
16 In Eweida v. British Airways (2007), for example, the Employment Tribunal narrowly interpreted material provided by the counsel as to the relationship between religion, law and society: see paragraph 5.9.
17 For a fuller discussion see Poulter (1998, p. 370-372).
18 Supreme Court of the United States (2006)
19 See Bronfman; Haber; van de Plas; in this volume, See also www.udvusa.com
20 See also Edge (2006).
21 Also available at http://www.archbishopofcanterbury.org/1575. See, further, Sandberg (2010).
22 See the criticisms of the similar distinction drawn in the Strasbourg case law between acts that manifest religion (which are protected) and acts motivated by religion (which are not protected) by Edge (1996, p. 45-46)
23 See the developments in US law post-Smith. In the European context, for developments in relation to the manifestation-motivation requirement, see the discussion of Knudsen v. Norway (1985), C v. UK (1983) and Hasan and Chaush v. Bulgaria (2002) by Knights (2007, p. 44).
24 Ahdar & Leigh (2005, p. 111). See the article by Wouter J. Hanegraaff in this volume, for an attempt to build a working definition of "religion" for legal purposes.
25 For elucidation of this argument see Hill & Sandberg (2007, p. 488); Sandberg (2008a, p. 124, 213).
26 R (on the application of Begum) v Headteacher and Governors of Denbigh High School [2006]; R on the application of X) v Y School [2006]; R (on the Application of Playfoot (A Child) v Millais School Governing Body [2007].
27 For such an argument see Edge (2006a, p. 176).
28 See generally Sandberg (2010) and the essays in Doe and Sandberg (2011).