From the Sacrilegious to the Sacramental: A Global Review of Rastafari Cannabis Case Law

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Introduction

"We refuse to be what you wanted us to be, we are what we are, that's the way it's going to be. For you can't educate I for no equal opportunity. . .talking about my freedom, people freedom and liberty" (Marley 1979).

The freedom to practice one's religion is widely regarded as one of the hallmarks of a free society (Ngcobo 2001, p. 25 as cited in Du Plessis 2009, p. 10). Yet, when religious practice is impeded by prohibitive drug laws, there is often an enormous potential for conflict between those executing the practice and the state. Rastafarians across the globe have experienced this conflict firsthand due to their sacramental use of cannabis, a prohibited substance under all three of the UN drug conventions. Rastafarians' use of cannabis forms an integral part of their religion and is believed to bring them closer to their god, who they call Jah (Barrett 1977). Rastafarians consume cannabis in a variety of ways for predominately religious purposes. This chapter will strive to acknowledge the absolute centrality of this practice for Rastafarians, as it is not only firmly intertwined with their religion, but also with their culture, their politics, and, as will be demonstrated, with their very identity. The reverence and wide usage afforded to this sacred, yet prohibited, herb has invited judicial proceedings to determine whether religious freedom or the interests of the state in maintaining an unqualified prohibition of cannabis should prevail.

This chapter will primarily focus on five legal jurisdictions which have considered this issue in varying degrees, as these legal judgments have been reported on the most extensively (see Taylor 1984, 1988; Frank 1990; Loveland 2001; O'Brien 2001; O'Brien and Carter 2002–2003; Edge 2006; Du Plessis 2009; Gibson 2010). The chapter will analyze case law deriving from the USA, England, the

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Commonwealth Caribbean, South Africa, and Italy. Additionally, as Edge (2006) observed regarding the USA, England, and South Africa: All five of the above jurisdictions are pluralist democracies, all are concerned with maintaining drug prohibition, all seek to uphold and respect religious rights, and all five possess religious minorities who use prohibited drugs as a sacrament. Nevertheless, much of the relevant judicial discourse is believed to present a reductionist version of Rastafarianism,[1] in which its beliefs and values are undermined and are reflective of existing judicial preconceptions (O'Brien and Carter 2002–2003). Therefore, prior to comparing different judicial approaches on this issue, this chapter will first offer an overview of the origins of Rastafarianism, the realities of the movement, and its cannabis-related rituals. It will then trace the evolution of Rastafarianism's religious status through the courts before exploring how the respect afforded to Rastafarian cannabis claims has, in many instances, increased, alongside developments in the law relating to the manifestations of religious freedoms in general. When finally analyzing and comparing Rastafari cannabis case law from the five jurisdictions in question, the chapter will thematically consider: the various claims made by states when restricting Rastafari cannabis use; whether the balancing exercise undertaken by courts to resolve this conflict is truly genuine; the difference in treatment afforded to other religious drug use; the potential impact reductionist discourse and majoritarian and pluralist reasoning have on the outcome of these cases; the differing emphases placed upon religious freedom and the UN drug conventions; judicial discrepancies between Rastafari possession and possession with intent to supply cases; and whether the recent Italian decision could be a landmark case for change. By taking the reader through the history of Rastafarianism, and the relevant case law, as well as undertaking a substantial comparative analysis of the case law, it is hoped that this chapter will present a comprehensive review of how judicial interpretations of Rastafarian cannabis use could be changing. Indeed, the extent to which the courts are moving from the sacrilegious to the sacramental will be addressed.

The Roots and Realities of the Rastafarian Movement

The Rastafarian movement is a religious, racial, cultural, and political movement that emerged in the 1930s in Jamaica (Smith et al. 1960). It arose in what was a colonial and predominately Christian country where approximately 98 % of the population were Black descendants of slaves (Chevannes 1994). Thus, in response to a deeply felt displacement by the African Diaspora and to escape the political and cultural legacy of the colonial mindset, Rastafarianism, as it is presently practiced,

[1] To avoid confusion the author will use the term "Rastafarianism" when referring to the religion as an entity. However, it should be acknowledged that the followers of the Rastafari religion would not approve of this terminology, as they reject any form of "ism" (Glazier 2001).

materialized (O'Brien and Carter 2002–2003). Rastafarianism is a messianic movement with its tenets maintaining that Haile Selassie, the late emperor of Ethiopia, is another incarnation of the Judeo-Christian God known by them as Jah (Taylor 1984). In fact, the very term *Rastafari* is derived from Selassie's pre-regnal given name, Tafari, with Ras literally meaning "head" (Cashmore 1979). The deification of Emperor Selassie was taken from the teachings, guidance, and Pan-Africanism of Marcus Garvey, who, for the Rastafarians, foreshadowed the coming of a Black messiah (Taylor 1984). Garvey is widely regarded as the first prophet of the movement and was the founder of the United Negro Improvement Association (UNIA) (Taylor 1984). As perhaps expected, his teachings could be described as Afro-centric, as he abhorred slavery, ardently rejected the Western world, was a firm advocate of Black pride, and believed that repatriation to Ethiopia was the route to salvation (O'Brien and Carter 2002–2003).

The belief in repatriation and the deification of Selassie are possibly the only rigidly defined creeds that the Rastafari have (O'Brien and Carter 2002–2003). It is believed that Garvey prophesized the coming of the Black messiah; his teachings encouraged others to look for his coming and to view God through their own spectacles: "the spectacles of Ethiopia," as opposed to the "White spectacles" engendered through colonialism (Garvey 1967, p. 34). For Garvey, the entire African continent was Ethiopia before the Europeans carved it up (Cashmore 1979). As he famously summarized in the *New York Times* in 1920, "if Europe is for the Europeans, then Africa is for the Black peoples of the world," thus strongly advocating for their return (Garvey 1920, as cited by Cashmore 1979, p. 20). Interestingly, it is from these beliefs that strong Rastafari concepts such as "Zion," a utopian Africa and the true homeland for the Rastafari, and "Babylon," the rest of the world outside of Africa as dominated by the White peoples, first emerged (Ishmahil 2002). It appears that the report of Smith et al. (1960) was accurate in determining that the Rastafarian movement is racial and political, as well as religious. In fact, it has been posited that the movement transcends far beyond Garvey's initial teachings: Although he was an essential social precursor to the movement, his central concern was the relatively pragmatic one of repatriation. Instead, it was the Rastafari themselves who were able to transform their own social universe, supported by Garvey's initial teachings inviting Rastafari to form their own conceptions of reality (Cashmore 1979). As Dennis (1978, n.p. as cited in Cashmore 1979, p. 123) acutely surmised, "Rasta is not a *version* of reality as you say; Ras Tafari is the reality."

Accordingly, the movement has been able to embed and diversify, since its tenets are not restrictive in the way that those of more traditional religious creeds might be. Rastafari now have many differing perspectives on Selassie, on Jesus, and on many of the other various elements that together comprise their religion (O'Brien and Carter 2002–2003). For instance, Rastafarians believe both that Selassie is a deity and that Jah is simultaneously inherent in all men (Owens 1973). The religion has been described as an extremely subjective and spiritual one, as its tenets consist of positivity, being in harmony with nature, and the idea that any relationship with Jah does not need to be mediated through an official, but

is a wholly private and individual affair (O'Brien and Carter 2002–2003). As such, the religion has been deemed non-doctrinal, non-hierarchical, fiercely anti-authoritarian, extremely heterogeneous, and multi-faceted in nature (O'Brien and Carter 2002–2003). It is clear why many authorities studying the interplay between the law and Rastafarianism have concluded that the judiciary is often unable to categorize it according to their own narrow, and often socially indoctrinated, theistic conceptions of religion. In actuality, one could surmise that Rastafarianism's non-conformist nature has in some ways pre-determined the outcome of many Rastafarian cases, as the Rastafari ardently reject the moral, political, and social order that the judiciary embodies. A Rastafarian from the UK captures these conflicting realities by noting that:

> The courts speak another language that you don't know about. . . and you've unknowingly given away your rights just by communicating with them, you know? And we naturally can hear fallacy, like. . .we naturally can hear them trying to take away our rights, you have to give it up freely to conform within this system and they ask you if you understand. . .and Rastafari say no we don't understand. (Blessed Barak 2011)

The courts likewise have often failed to understand the reality of the Rastafari, since the case law is largely dominated by issues such as the wearing of dreadlocks and the celebration of cannabis as a sacramental herb (O'Brien and Carter 2002–2003). According to O'Brien and Carter (2002–2003), the judicial preoccupation with just these two issues has produced a reductionist version of Rastafarianism, with the courts historically being all too willing to dismiss the movement; a dismissal that may have been predestined in light of the non-conformist and anti-colonialist origins of the Rastafarian practices.

The ritualistic consumption of cannabis has received the most attention by the courts (Taylor 1984) due to the aforementioned conflict between the right to religious freedom and the perceived necessity of global drug prohibition. However, the Rastafari originally grew cannabis in the 1930s for economic purposes, not religious ones, in order to achieve Black economic self-sufficiency (Chevannes 1994). It was only later that Rastafari activists instructed their members to make "a virtue out of a necessity," as Rastafarians were targeted by the authorities for anti-colonialism under the pretext of their cannabis use (O'Brien and Carter 2002–2003, p. 226). It is therefore evident that even prior to contemplating the herb's religious significance, cannabis was deeply and historically intertwined with the race, politics, and culture of the Rastafari. This gives further credence to the notion that Rastafari cannabis use is more than a religious practice: It is a way of life, and is profoundly central and integral to the identity of Rastafarianism itself (Barratt 1977). Moreover, since Garvey advocated that the Bible should be used to liberate as opposed to domesticate (Gordon 1988), and is thus open to subjective interpretation, Rastafarians have cited several biblical passages as proof of the sanctity of the holy herb.[2] Cannabis is now smoked, eaten, and used as incense by Rastafarians wherever possible and is mandatory at all meetings, rituals, and services for the

[2] See Genesis 1:11, 1:29, 3.18; Psalms 104:14; Proverbs 15:17; Revelation 22.2.

Rastafari who accept this sacramental practice (Barratt 1977). It is thought that its presence enhances the spiritual nature of the movement, as cannabis use is perceived to be the key to understanding the self, the universe, and God (Barratt 1977). Yet, despite the reverence afforded to this herb, Rastafarians are not surprised that its use remains illegal, since its central role in freeing the mind to the truth and away from the "fuckery of colonialism" is something, they reason, that the Babylon system clearly does not want (Edmonds 2003, p. 61).

Furthermore, Edmonds (1998) states that the Rastafari contrast their cannabis use to alcohol and other drugs, which are widely enjoyed and accepted within more conventionalist cultures, as Rastafarians feel they destroy the mind. In fact, many adherents of the Rastafari faith have strict dietary regimes where tobacco in particular is prohibited (Taylor 1984). Interestingly though, much of the expert evidence relating to the dangers of cannabis use assumes that the cannabis consumed would have been mixed with tobacco (Nutt 2012). Such mistakes demonstrate how the courts could err substantially in their balancing exercise concerning the dangers of the drug and its significance to the Rastafari faith, failing to appreciate the wealth of medical, sociological, and religious material available (Walsh 2010). Indeed, I will demonstrate that there has been very little effort from the majority of jurisdictions to accommodate the roots and realities of the Rastafarian religion within their respective legal frameworks.

The Evolution of Rastafarianism's Religious Status

As O'Brien and Carter (2002–2003) observe, the distinction between religion, race, and politics for Rastafarians is largely meaningless, since the movement and its belief system intricately entwines all three. Regardless, it is its manifestation as a religious movement that has been the focal point for the judiciary (O'Brien and Carter 2002–2003). O'Brien and Carter (2002–2003) have argued that any claims here are brought on religious grounds since the courts are more likely to be sympathetic to the religious beliefs of Rastafarians, as opposed to their political or racial ideologies. Moreover, they have further postulated that the judicial recognition of Rastafarianism as a religion is beneficial, since it not only invites constitutional protection, but additionally requires the authorities to officially acknowledge its existence. While it is likely that O'Brien and Carter (2002–2003) are correct in their assertion that religious claims are more likely to elicit judicial sympathy, given the movement's historic targeting by the authorities (Edmonds 2003) and the increased protection afforded to minority religions in recent years (Equality and Human Rights Commission 2012), their second assertion is perhaps not entirely accurate. Despite the legal system's general acceptance of the movement's religious status, the political system in the jurisdiction where Rastafarianism actually originates has yet to afford the movement any official religious rights (Wignall 2012). For Wignall (2012), such recognition is long overdue, particularly since it has been 50 years since Jamaica has achieved political independence, and

since other religious minority groups, who have actually incorporated racist teachings, have been afforded official religious rights in Jamaica. However, although this political failure could serve to further reinforce the perceived conflict between Rastafarians and the Babylon system, other political systems, such as that of the UK, have officially recognized Rastafarianism as a religion, through the registration of Rastafari charities (Gibson 2010). Furthermore, as will be shown, the vast majority of legal jurisdictions now readily accept Rastafarianism as a religion, although this was not always the case.

The bulk of Rastafarian religious cases stem from the USA, possibly due to the nation's rich tradition in litigating religious liberties claims (Edge 2006). As such, some of the earliest cases concerning the Rastafari originate here. In a footnote in *United States v. Moore* (1978, para. 79, n2), the court dismissed the Rastafarian movement as a vegetarian sect where its members eat no eggs or milk and fail to cut or wash their hair. The hair reference not only perpetuates the myth that Rastafarians are dirty, but as Taylor (1984) deduces, such a shallow summary of the religion reveals an inherent bias by the courts. This is particularly evident since such references to the religion were only mentioned in testimony involving circumstantial evidence of the defendant's guilt (Taylor 1984). Additionally, in the very same year, a public prosecutor in *People v. Marchese* (1978) dismissed the Rastafarian movement as an "organization," and tried to imply that its members advocated the murder of police officials. In this instance, the appeal court found that there had been prosecutorial misconduct and reversed the defendant's conviction. Such a denial of a fair trial further indicates the clear prejudice to which the Rastafari were once subjected within the US legal system, although at least the appellant court in question acknowledged this. No such acknowledgement, however, was conferred upon the defendant in the Gayle saga, which involves perhaps the greatest amount of discrimination to date regarding the legal recognition of Rastafarianism as a religion. In *Gayle v. Le Fevre* (1980), during a prosecutorial inquiry, the trial judge questioned whether Rastafarians were in fact "animals." As a result, the defendant sought to have his conviction overturned on the grounds of the misconduct of the trial judge. In *Gayle v. Scully* (1985), it was held by a majority that, although the conduct here was offensive, it was not enough to render the entire trial fundamentally unfair. In a vote of dissent, Judge Oakes noted that the defendant could not have had a fair trial due to the "devastating effect" the animal question would have had on a jury, coming as it did from the trial judge (*Gayle v. Scully* 1985, para. 814). Indeed, as Taylor (1988) observed, if similar references to Catholics or Methodists had been made, then there would be little doubt that an appellate court would have found judicial misconduct. This further reveals how Rastafarians have not traditionally occupied a socially accepted plane, and, due to judicial unfamiliarity, they comprised a group that was very likely to be subjected to reflexive human prejudice (Taylor 1984). However, such open prejudice in judicial proceedings had decreased decidedly by the early 1990s. Because of increased judicial familiarity with Rastafarianism and its worldwide growth, its status as a religion was no longer an issue within the US (O'Brien and Carter 2002–2003).

The case of *United States v. Bauer* (1996, para. 1556) dispelled any residual doubts, since the court of appeal in the ninth circuit referred to Rastafariansim's inclusion in Melton's Encyclopedia of American Religions as "among the 1,558 religious groups sufficiently stable and distinctive to be identified as one of the existing religions in this country." However, the US has adopted a rather broad, functional approach when determining which beliefs qualify for religious status (Taylor 1984). As established in *United States v. Seeger* (1965), there is no requirement for a traditional belief in God, only a requirement that the belief should be sincere, meaningful, and occupy a place parallel to that filled by an orthodox belief in God. As such, there is no inquiry into the contents of an individual's beliefs; rather the focus is on the importance of those beliefs in an individual's life (Tribe 1978). This approach is therefore arguably better suited to the diverse, largely non-conformist and unorthodox beliefs shared by Rastafarians. Thus, in the absence of open prejudice, their religious status can be more easily established.

In contrast, the UK and the Caribbean Commonwealth had, until very recently, adopted a narrow, theistic approach to define a movement's religious status. In *Barralet v. Attorney General* (1980), it was held that religion concerns one's relations with God and that it is not sufficient to believe in the platonic concept of the ideal. Although this test was successfully applied in the Cayman Islands case of *Grant v. J. A. Cumber Primary* (1999), it is easy to surmise that the Rastafari religion did not sit well within it. The chief justice was able to conclude that Ras Tafari was the functional equivalent of a Judeo-Christian God and could find evidence of some ritualistic, albeit non-formal, practices of worship. Yet, although Rastafarianism can be made to satisfy the theistic test, such an approach is homogenizing, and is therefore possibly more subtly discriminatory than the apparent prejudice evident in the early US cases. Indeed, by requiring new religions to correspond with traditional Christian modes of worship, the courts were unwilling to accommodate the Rastafari reality, as Rastafarians ardently reject orthodox, colonialist models of worship. Thus, it is unlikely they would have wanted to have been judged by reference to them. Fortunately for the Rastafari though, this approach changed after the UK Human Rights Act 1998. Through incorporating the European Convention on Human Rights (ECHR) (1950) into domestic law, the UK legally recognized a general right to religious freedom (Gibson 2010). Additionally, in the English case of *Williamson* (2005), it was suggested that everyone is entitled to hold whatever beliefs they wish, since such respect runs simultaneously with the respect for human dignity.

Such a broad, encompassing approach accommodates the Rastafari. In fact, the vast majority of legal jurisdictions now readily accept Rastafarianism as a religion (O'Brien and Carter 2002–2003). Moreover, this matter has never been in dispute for all of the early and more recent cases to be analyzed later in this paper (Gibson 2010). It is clear, then, that the respect afforded to the legal status of Rastafarianism as a religion has increased and could coincide with general developments in laws relating to religious freedoms. Such developments are also evident as shown below, in the way the courts have addressed the religious manifestations of Rastafarianism, particularly in relation to Rastafarian cannabis use.

The Religious Manifestation of Rastafarianism

Although post-*Williamson* (2005) there can be no limitations in relation to holding a religious belief in the UK and the Commonwealth Caribbean, there remain certain limitations with regards to manifesting one's beliefs (Equality and Human Rights Commission 2012). This restriction is applicable in most legal jurisdictions, because unlike the mere holding of a belief, its actual manifestation requires an action, which thereby obliges states to carefully consider its significance to the religion in question and its potential impact upon society at large. Unfortunately for Rastafarians, the manifestation of their religious beliefs via the sacramental use of cannabis has posed problems, particularly in light of the wide adoption of cannabis by the global counter-culture (O'Brien and Carter 2002–2003). The World Drug Report (United Nations Office on Drugs and Crime 2012) stipulates that cannabis is the world's most widely used illegal drug, and is consumed by approximately 119–224 million users. Not only has this made it difficult for the judiciary to distinguish the true sacramental users from the recreational "charlatans," but the extremely wide usage of cannabis and its illicit status has led the courts to historically treat this issue with some hostility. (For more information on this subject see Brown and see Lander, this volume.) For instance, the government's attorneys in *Grant v. J. A. Cumber Primary* (1999, para. 327–331) argued that, because Rastafarian religious ceremonies involved the use of cannabis, such ceremonies should not be accounted for when determining whether or not the existence of worship had been established. While this reasoning was rejected, consider for a moment the copious distinction between the sacramental use of alcohol in Christian ceremonies and the use of cannabis in Rastafarian ones. It would no doubt be unheard of to ever bring forward this line of argument in the former example, which once again highlights the marginalization that Rastafarians have faced during legal proceedings, even at the elemental and mere definitional stages.

Yet, in order to accurately deduce whether Rastafari cannabis use is a bona fide manifestation of their religion, the US courts have, at least in theory, devised a useful judicial screen for filtering out false claims (O'Brien and Carter 2002–2003). The US judiciary initially tests the sincerity of a defendant's religious beliefs through questioning both their knowledge of the religion and the extent to which the manifestation of these beliefs is religious in nature (O'Brien and Carter 2002–2003). This test has been epistemologically challenging for Rastafarians, as their movement lacks any formal membership and is additionally racial, political, and cultural in nature. Thus, Rastafarians "may be sincere but not sincerely religious" with regards to their cannabis use (O'Brien and Carter 2002–2003, p. 235). Though some commentators advocate that the sincerity test should only be applicable in relation to a defendant's religion (Ahdar and Leigh 2005), Mhango (2008) has suggested that the test should protect Rastafarians irrespective of whether cultural, political or religious factors dominate their claims. While Mhango's broader test would demonstrate a greater level of understanding and respect for Rastafarianism (Gibson 2010), the Rastafari can nevertheless satisfy the

latter aspect of the sincerity test requirements, as their arguments for cannabis manifestation rest on biblical evidence.[3] Regardless, the former requirement to have sufficient knowledge of the religion has caused several cases to fail, since the US courts in both *Robinson v. Foti* (1981) and *Reed v. Faulkner* (1988) remained unconvinced of the defendants' knowledge of Rastafarianism.

The US additionally considers the centrality of the defendant's religious manifestation as a necessary screening device (Taylor 1984). This test has also posed difficulties for Rastafarians, since not all adherents of the faith use cannabis, given the diverse and subjective nature of the religion (Cashmore 1979). Hence, the courts could conclude that, in the absence of any doctrinal mandate to consume cannabis, the practice is not central to their religion. This situation did in fact occur in the case of *Reed v. Faulkner* (1988). The expert evidence in this case concluded that the wearing of dreadlocks was not mandatory, so the practice could not be deemed a central manifestation of Rastafarianism. However, other jurisdictions have managed to successfully address this issue. In *Prince v. The President of the Law Society of the Cape of Good Hope* (2002, para. 42), the Constitutional Court of South Africa held that "religion is a matter of faith and belief... believers should not be put to the proof of their faith and beliefs" since beliefs can be "bizarre, illogical or irrational." Through making this point, Justice Ngcobo respected the conceptual flexibility inherent within religious manifestations, and the notion that it is the individual's perception of the manifestation that should be the focal point. The English courts have similarly demonstrated an enhanced respect for minority religions, through asserting that any "threshold requirements should not be set at a level which would deprive minority beliefs of the protection they are intended to have under the convention" (*Williamson* 2005, para. 23). Yet, although Article 9 (1) of the ECHR can be broadly construed to protect the manifestation of an individual's beliefs (Equality and Human Rights Commission 2012), the English courts have, to date, merely assumed centrality for Rastafarian cannabis claims, as opposed to really considering this issue in any detail (Gibson 2010). Therefore, while it is now less likely that certain legal jurisdictions will limit religious liberties claims at the definitional stage, it is arguable that this is largely extraneous to the Rastafari, as there are other ways to restrict Rastafarian claims to use cannabis. All of the legal jurisdictions to be analyzed below allow derogations from the right to manifest a belief if it is deemed to be in the public interest, etc. Walsh (2010, p. 433) acutely summarizes this situation as follows: "It seems that it is easy to be magnanimous when determining those activities that engage human rights' protection, if one is similarly 'generous' in finding that the same such conduct falls within the derogations." Accordingly, along with the other numerous issues for analysis as outlined in the introduction, justifications for restricting Rastafarian cannabis claims will be considered in detail below.

[3] See Genesis 1:11, 1:29, 3.18; Psalms 104:14; Proverbs 15:17; Revelation 22.2.

An Analysis of Rastafari Cannabis Claims and the Justification for Their Restriction

All of the legal jurisdictions to be discussed are able to restrict the manifestation of one's religious beliefs, if it is deemed to be necessary in a democratic society to protect the public order, societal health, morals, and safety, or to protect the rights or freedoms of others. Such consequentialist limitations are expressly articulated by Article 9(2) ECHR, and are often stressed substantially in Rastafarian cannabis case law, to justify the restrictions placed upon Rastafari religious freedom. The first US case to directly address whether a Rastafarian can claim a religious exemption from laws making it a crime to possess and distribute cannabis was *Whyte v. United States* (1984). While the court accepted Rastafarianism as a religion, and the sacramental use of cannabis as a bona fide religious manifestation, the judicial exercise the court undertook in balancing the state interest in regulating cannabis with the needs of a sincere Rastafarian to consume cannabis for religious purposes, was arguably contentious. The court refused to account for any evidence minimizing the dangers from cannabis use. They followed an earlier ruling and held that, "the harm of the particular drug in question is not relevant in determining the degree of protection afforded by the free exercise clause" (*Whyte* 1984, para. 1021). In light of this ruling against the religious rights of Rastafari, one must question the diligence of the court's balancing exercise. The absence of empirical evidence pertaining to the dangers of cannabis implies that the public protection arguments used to counter the defendant's religious claim were inadequately reasoned. In the unreported case of *Forsythe v. DPP* (1997), the Jamaican court adopted a similar, deficient analysis. In this case, the Supreme Court of Jamaica was called upon to consider whether Jamaica's drug laws infringed the defendant's rights under section 21(2) of the Jamaican Constitution (1962) to freely manifest one's religion. The court relied upon derogations contained within section 21(6) to uphold Jamaica's drug laws, as these laws were deemed to be reasonably required to the extent that they protect public health among other state interests. Yet, despite heavy reliance on the derogations, no attempt was made to demonstrate the harmful effects of cannabis and the dangers it posed to public health. The court was instead content to rely upon an earlier dictum that considered the possession of any illegal drug to be per se an offense against public health. Again, such superficial reasoning leads the author to suggest that this case reads as if the judiciary had predetermined its outcome in favor of upholding Jamaica's drug laws. O'Brien and Carter (2002–2003) could possibly concur with this deduction by recognizing that judges hold their own normative values, and that religious safeguards can be manipulated by the courts to serve majoritarian ends.

Furthermore, several commentators in articles unrelated to the Rastafari plight have acknowledged that the judicial balancing exercise can be artificial, particularly with regard to human rights issues. Alder (2006) uses Edmund Burke's philosophy of the "sublime and beautiful" to demonstrate the mutual exclusivity of legal consequentialist reasoning on the one hand, and the intrinsic value of an

individual's rights on the other. For Alder (2006), a consequentialist perspective dominates the judicial balancing exercise, as it lends itself more easily to a cost–benefit analysis at the expense of truly considering the "beautiful," i.e. the intrinsic, moral value of an individual's rights. Beck (2008, p. 240) goes even further in asserting that individual, moral considerations have little place in politically sensitive areas; rather, "in the absence of moral truths... judges make rights and their choices remain political." Unfortunately for the Rastafari, drug policy is one of the most politically sensitive areas there is. Therefore, any deference to the executive under the guise of neutral, seemingly objective language via the derogations is perhaps predictable, although such an approach remains inadequate. The leading UK Rastafari cannabis case of *R v. Taylor* (2001) provides no exception. Since this case will be analyzed in greater detail later, it is sufficient here to once more acknowledge the court's feigned balancing exercise. There was a judicial refusal in this case to look outside of the typical discourse and to carefully analyze the intrinsic value of the defendant's beliefs (i.e. to consider the wealth of medical, sociological, cultural, and historical material on Rastafarianism and on Rastafari cannabis use). Instead, the court relied heavily upon the three UN drug conventions in deciding against the defendant. As Edge (2006) keenly notes, these are international legal documents of general application and should not, therefore, have been accorded the great significance bestowed upon them throughout this judicial reasoning process. To counteract any insufficient judicial reasoning in *Taylor*, Loveland (2001) suggested that Rastafarians should persuade parliament to amend the drug laws of England and Wales in order to accommodate Rastafari religious beliefs. Yet, even Justice Scalia, a US judge who openly embodies majoritarianist principles, acknowledges that this argument is flawed, since legislative and executive branches of government are by their (elected) nature far more accommodating to popular and socially accepted religious practices than they would be to unconventional forms such as Rastafarianism (as cited by O'Brien 2001). The fact that Rastafarianism's country of origin still refuses to recognize its religious status further supports this contention.

Perhaps the solution is simpler. Tsakyrakis (2009) posits that the best way for the courts to adequately engage with the balancing exercise required when weighing a state's interests against an individual's is to really spell out and openly debate the moral considerations involved. For Tsakyrakis (2009), it is the moral arguments that are at the heart of human right disputes, and as shown above, these are often overlooked or masked by neutral language. The South African case of *Prince* (2002) is arguably the first Rastafari cannabis case to directly spell out these moral issues, as two judgments in particular thoroughly analyze the intrinsic value of the defendant's beliefs. This case involved a law graduate who was denied access to the bar in South Africa due to his religious use of cannabis as a practicing Rastafarian. The defendant claimed that this prohibition amounted to a disproportionate infringement on the religious freedom of the Rastafari, and he thus sought a religious exemption from the relevant drug laws. Four of the nine judges agreed with the defendant and the concurring dissenting judgments of Justice Sachs and Justice Ngcobo were particularly strong. Both justices emphasized the importance

of religious rights, with Justice Ngcobo noting that the prohibition of cannabis for the Rastafari religion constitutes "...a palpable invasion of their dignity. It strikes at the very core of their human dignity. It says that their religion is not worthy of protection. The impact of the limitation is very profound indeed" (*Prince* 2002, para. 51).

By thoroughly analyzing the impact such laws have on the Rastafari religion, Justice Ngcobo clearly appreciated the intrinsic value of the defendant's beliefs, and recognized that the current law, lacking in any exemption, is unconstitutionally broad. In his dissent, Justice Sachs further highlighted the differences in Justice Ngcobo's reasoning and the reasoning of the majority judgments. He noted that the real difference in the judgments rests on how much trouble the state should be expected to go to accommodate the religious rights of Rastafarians. Through comprehensively detailing the significance of Rastafari religious practices, the dissenting judges' determined that "the Constitution obliges the state to walk the extra mile" (*Prince* 2002, para. 149, per Justice Sachs). It was thought that a carefully crafted exemption would satisfy all parties, as the state could still achieve its aims without totally restricting the religious rights of Rastafarians in the way that absolute prohibition does.

In contrast, the majority judgments were particularly preoccupied with the practical problems associated with administering a religious exemption, given the lack of any organizational structures or rigid doctrines within Rastafarianism. Regardless, all of the judgments demonstrated a keen knowledge of Rastafari life in a way that had not been exhibited previously. Furthermore, the Constitutional Court allowed expert evidence to be adduced which revealed the multitude of ways in which Rastafarians consume cannabis, and additionally acknowledged medical evidence that suggested that cannabis use does not necessarily cause harm (*Prince* 2002, para. 24). While such remarks are in line with current scientific findings (see Taylor et al. 2012), it remains rather unusual to observe any judicial discourse that does not solely accentuate the dangers associated with illicit substances. It is unfortunate, therefore, that this more open approach did not transfer across to the Human Rights Committee in *Prince v. South Africa* (2007). The committee failed to engage with the underlying moral considerations and completely sidestepped the detailed balancing exercise required as they predictably relied upon facially neutral derogations (*Prince* 2007, para. 7.3). Regrettably, in relation to the Rastafari, much of the case law below also follows a similar pattern.

The Difference in Treatment Afforded to Other Religious Drug Use

The predominant focus of this section will be on the USA, given their strong tradition of juridification of religious freedom claims (Edge 2006). Comparisons will be drawn between the judicial "treatment" accorded to peyote use by the Native

American Church (NAC), and that given to the use of cannabis by Rastafarians. In the early case of *Town v. State ex rel. Reno* (1979), the defendant questioned the constitutionality of the prohibition of cannabis as applied to the Ethiopian Zion Coptic Church (EZCC), a religion with "symbiotic ties to Rastafarianism" (Taylor 1984, p. 1620). In deciding against the defendant, the majority distinguished their decision from *People v. Woody* (1964, para. 817); a case where the Californian Supreme Court refused to prohibit the use of peyote in light of its positive force, and its ability to facilitate strong familial bonds for NAC members. Leaving aside this rather rare, constructive drug discourse for a moment, the justification given for the difference in treatment was that the peyote was consumed by adults, and was confined to certain ceremonies far away from the general population.

In contrast, the majority in *Town* were concerned that children as well as adults, members and non-members alike, consumed the cannabis freely and that it was continuously consumed independently of any particular EZCC rituals. However, in his dissent, Justice Boyd observed this distinction to be insufficient, since an exemption could be subject to certain restrictions, and as such, the majority's concerns could have been dealt with less intrusively. Judge Buckley also agreed that an absolute prohibition on the use of cannabis for EZCC members was excessive in the later case of *Olsen v. DEA* (1989). Olsen, a member and priest of the EZCC, repeatedly petitioned the Drug Enforcement Administration (DEA) for an exemption permitting his church's sacramental use of cannabis. The DEA rejected Olsen's petition along with the majority judgments in this case, citing the potential for abuse in relation to the unrestricted usage of cannabis, and the impracticalities of monitoring any proposed restrictions. While it may be difficult to ensure compliance, Judge Buckley maintained in his dissent that the majority had nevertheless failed to apply the standard of strict scrutiny in reviewing an absolute prohibition to be the least restrictive possible measure. There was no detailed judicial consideration of the needs of the EZCC members since Olsen's proposals to restrict the consumption of cannabis to adult members, once a week, during their Saturday evening prayer ritual were easily dismissed (Mazur 1991).

Although it remains questionable whether all of the above restrictions should even be imposed upon the sanctity of the herb for the EZCC and the Rastafari, the fact that members are willing to restrict their usage could somewhat undermine the judicial reasoning in these cases. Furthermore, the perceived unlimited use of cannabis by Rastafarians was one of the three justifications given in *State v. McBride* (1989) for the difference in treatment accorded to the Rastafari and the NAC. The court additionally considered that the abuse of peyote was far less common than the abuse of cannabis, and that the USA has a special duty to respect the integrity of Native Americans. However, because both substances reside in Schedule I of the Controlled Substances Act (CSA) (1970), there should be no reason why the judiciary should treat them any differently if reasoned from a purely legal sense. Hence, the latter two justifications not only expose the superficiality of the CSA; they also highlight the cultural favoritism behind such decisions. In truth, Judge Buckley was particularly concerned with any Establishment clause

implications in *Olsen* (1989, para. 1468), stating that the DEA had created "a clear-cut denominational preference."

Interestingly, the majority judgments in *Employment Division v. Smith* (1990) attempted to eradicate any "denominational preferences" of the type established previously. *Smith* effectively banned religious peyote use for a short while, through employing the logic that as drug laws are facially neutral, they should be generally applicable to everybody without exception. Alongside other academics, McConnell (as cited in O'Brien 2001) was fiercely critical of this decision. He observed that, unlike with sex, gender or race issues, minority religions actually strive to be differentiated, and to not be accorded the same treatment as others.

Yet, although the majoritarian reasoning here was flawed, the more liberal, pluralist approach attempted by Judge Blackburn in *Smith* only served to castigate the Rastafarians further (O'Brien and Carter 2002–2003). In his dissent, Judge Blackburn seized upon the discourse utilized in *People v. Woody* (1964) to highlight the positive uses of peyote. In furtherance of these religious claims, he also unfavorably compared Rastafari cannabis use with peyotism, asserting that peyote use by the NAC in a confined ritual was "far removed from the irresponsible and unrestricted recreational use of unlawful drugs" (*Smith* 1990, para. 913).

In deep contrast, it is worth noting that peyotism was therefore not implicated as being unlawful, despite peyote's Schedule I status, and its use was not deemed irresponsible or recreational, despite the fact that both groups consume their respective substances for predominately religious purposes. Furthermore, the implicated restrictions placed upon the use of peyote for the NAC remain questionable, since a legislative exemption means that their usage is legally effectively unlimited in the Uniform Controlled Substances Act (21 C.F.R. § 1307.31 [1990]). (For more information on the NAC, see Feeney, this volume.) The presence of this flawed discourse demonstrates that even a more pluralist approach has offered little benefit to Rastafarians. In *Smith*, Rastafarianism was viewed as marginal, and as offering no more than a helpful yardstick for evaluating the reasonableness of other religious freedom claims. However, it could be fair to assume that Western jurisdictions are becoming ever more pluralistic and, in religious terms, divided (Crammer 2010). For instance, the Equality and Human Rights Commission (2012) acknowledges that religious issues are increasingly coming to the forefront post the UK's Human Rights Act (HRA) (1998). Nevertheless, as will be shown, some jurisdictions have responded more favorably than others to these developments.

The Differing Emphases Placed Upon Religious Freedom and the UN Drug Conventions

R v Taylor (2001) was one of the first cases after the HRA to explicitly address the tension between religious freedom and global drug prohibition in England. Taylor was searched by police when approaching a Rastafarian temple, and was found to

be in possession of approximately 90 g of cannabis. He indicated that he was a practicing Rastafarian, and during questioning he further explained that the cannabis had been prepared for an act of worship at the temple. At the trial he effectively argued that his actions should be interpreted as a manifestation of his religion under Article 9(1) ECHR, and henceforth any criminal proceedings against him ought to be justified under Article 9(2) ECHR. As noted previously, although the court agreed that Article 9(1) was implicated, they justified the criminal proceedings and the absolute prohibition of cannabis by reference to the derogations contained in article 9(2) ECHR; as aided by a reliance on the UN drug conventions to the exclusion of all other considerations specific to Rastafarianism.

Arguably, such a partisan approach has affected not just the reasonableness of the *Taylor* decision, but possibly all of the other relevant cases that have followed it. In truth, not only has a later Rastafari cannabis case endorsed *Taylor* (see *R v. Andrews* 2004), but so have cases which examine the broader tensions between individual human rights and global drug prohibition, such as *Hardison* (2005). (For further detail see Walsh, this volume.) Accordingly, in light of such questionable reasoning, *Taylor's* far-reaching effects could be deemed problematic. In any event, several authors throughout this book have suggested that excessive deference to the UN drug conventions in relation to certain human right concerns is largely unnecessary (see Metaal; Feeney and Labate; Feilding, this volume). In relation to *Taylor*, Walsh (2010) has further observed that an overreliance on the UN drug conventions should not be legally persuasive. Unlike the ECHR, the conventions have not been incorporated into UK domestic law, and thus they should not take precedence (Walsh 2010). Besides, the conventions are not as restrictive as the *Taylor* decision might lead one to believe. Article 36(1)(a) of the Single Convention on Narcotic Drugs 1961 specifies that its provisions are subject to a jurisdiction's "constitutional limitations." This provision is therefore presumably applicable to issues of domestic significance, such as religious freedom.

The USA in particular has historically placed more emphasis upon religious freedom than the conventions in matters relating to the NAC. More recently, in the case of *Gonzales v. O Centro Espiríta Beneficente União do Vegetal* (2006), a US court allowed a religious exemption for a New Mexican branch of a Brazilian church, so that its members could continue to consume ayahuasca tea, a sacramental brew containing the controlled substance DMT. Given the generally unfamiliar nature of the religion, this case could further emphasize Crammer's (2010) assertions that Western jurisdictions are becoming more pluralist. Moreover, in choosing to uphold religious freedom, this US decision, combined with those pertaining to the NAC, somewhat undermines the significance bestowed upon the UN conventions, and the perceived necessity of absolute prohibition in *Taylor*.

The South African *Prince* case also goes some way to undermine the reasoning in Taylor. Although the majority saw their conclusions as being in line with the conventions, far more attention was focused on the nature of Rastafarianism, particularly on the fact that Rastafarian cannabis use is typically unlimited and thus it would be difficult to regulate. This judicial focus on the amount and quantity of cannabis consumed is not unique and will be considered in more detail below.

Possession Versus Possession with Intent to Supply

With the possible exception of the US (see *Whyte* 1984, para. 1021), all of the other jurisdictions mentioned have placed emphasis on whether a Rastafarian defendant was merely possessing the cannabis for his or her own personal use, or whether they additionally intended to supply others. The English and Italian jurisdictions, in particular, have wholly engaged with this issue. In the English case of *R v. Williamson* (1979), a Rastafarian imported cannabis from Jamaica and was given a more lenient sentence in light of both his religion and his intention to distribute cannabis among Rastafarians only. Similar case facts can be found in *R v. Daudi and Daniels* (1982), as the two Rastafari defendants had no commercial motive, only an intention to supply cannabis to fellow Rastafarians.

While the English court recognized their good character, diverging from *Williamson*, they refused to mitigate the defendants' sentences, citing the seriousness of supplying and distributing cannabis to rationalize the lack of any differential treatment. The same outcome followed a year later in *R v. Dalloway* (1983), further highlighting the distinction between the increased judicial focus on s5(3) of the Misuse of Drugs Act (MDA) 1971 concerning supply, and s5(1) concerning possession. As observed by Gibson (2010), these cases not only reveal a lack of coherence in the degree of moral culpability attached to Rastafarian cannabis use, but the judicial preoccupation with possession versus supply also distances the law from any rights-based discourse; the presence of which could have highlighted arguments in favor of an exemption. Even after the HRA, Rose L. J. in *Taylor* continued to focus on the fact that the defendant was supplying cannabis to other Rastafarians in the temple. He additionally left open the possibility for a different outcome if the defendant was charged under s5(1) only, noting that such an occurrence "raises different considerations" (*Taylor* 2001, para. 17).

However, it is the author's contention that possession versus supply issues are largely superficial in the religious liberties field, serving only to detract attention away from the broader tension between religious human rights and global drug prohibition. Besides, judiciaries could ironically resolve their concerns through providing a carefully crafted religious exemption to both enable and potentially limit the confines of Rastafari cannabis use. Moreover, the US has highlighted that there are actually very few real concerns in practice, since their NAC exemption is effectively unlimited: The only requirement for an NAC member who manufactures or distributes peyote is registration (21 C.F.R. § 1307.31 [1990]). While this further supports the idea that possession or supply matters little to sincere adherents of the faith when considering true respect for religious rights, the only case at present to decide in favor of a Rastafarian was also preoccupied with such issues.

A Landmark Case for Change?

In 2002, the Italian Court of Terni convicted a Rastafarian defendant of unlawfully possessing cannabis with intent to supply. He was given a 16 month prison sentence and a €4000 fine, which was upheld by the Appeal Court of Perugia. This decision was later reversed by the Italian Supreme Court (Judgment No. 28720) in 2008, as the lower courts had not considered the defendant's conduct prior to his arrest or his religious beliefs. When confronted by the police, the defendant handed over approximately 97 g of loosely packed cannabis straight away. He also claimed to be a Rastafarian and that the cannabis was for his own personal and private use. In light of these additional factors, the Supreme Court referred the case to the Court of Appeal in Florence. This Court allowed two documents to be adduced by the defendant's solicitor, the first of which detailed his religious beliefs and the second made reference to his good character (Il mio diritto 2012).

In the former document, the solicitor impressed upon the court the affect an absolute cannabis prohibition has upon his client's religious beliefs. He additionally justified the large amount of cannabis found by reference to the fact that Rastafarians typically smoke around 10 g per day to bring them closer to Jah. Furthermore, since the cannabis was not divided, and the police found no tools to suggest that the defendant intended to supply it to others, the court was willing to conclude that the cannabis was solely for the defendant's own personal consumption. The public prosecutor appealed against this decision to the Italian Supreme Court, stating that it was unreasonable to assume the cannabis was for personal consumption simply because it was not divided. In 2012, the Supreme Court upheld the Florence decision, and in quashing the defendant's conviction, they ruled that the Florence decision was logically and coherently reasoned (Judgment no. 14876).

Yet, although this case is no doubt a landmark in Rastafari cannabis case law, it is perhaps unfortunate that such emphasis was placed upon possession versus supply issues in all of the judgments and case reports (Il mio diritto 2012). Some cynics may also attribute this decision to a higher court requirement to rectify legal technicalities, since the lower courts erred substantially in failing to appreciate the defendant's religion. Nevertheless, the higher courts did debate the tensions surrounding religious freedom and global drug prohibition, and, ultimately, they did decide in favor of upholding a Rastafarians religious right to consume cannabis.

Concluding Remarks

When surveying an overview of the Rastafari journey through the courts, it is evident that there has been some real progress. The courts have moved on from the blatantly discriminatory discourse present in the late 1970s and early 1980s, where even the definitional elements to establish Rastafarianism as a religion, and the associated cannabis use as a bona fide religious manifestation, could not be

easily satisfied. Both developments in the law relating to religious freedom and the growth of Rastafarianism worldwide have contributed to this progress. Nonetheless, subtle discrimination is arguably still rife amongst the US, English, and Commonwealth Caribbean judiciaries, since there is often manipulative and artificial reasoning employed when weighing a Rastafarian's religious right to use cannabis. In truth, almost 30 years ago, Taylor (1984) predicted that the courts would continue to defer to state interests, and cite enforcement problems to justify an absolute prohibition of the Rastafari herbal sacrament.

Yet, as Frank (1990) asserts, in free societies, people should be prevented from surrendering their constitutional freedoms, in the same way that governments should be prevented from undermining those freedoms through faulty legislation or judicial interpretations. To justify the restrictions placed upon the Rastafari, the aforementioned judiciaries have largely and superficially fixated on: potential enforcement and possession versus supply issues; differentiating between more socially acceptable religions; the UN drug conventions; and a perceived need to defer to constitutional derogations, at the expense of engaging in any genuine sense with the intrinsic value of Rastafarian cannabis use. Indeed, as previously established, this usage is integral to a Rastafarian's very identity, given the religion's non-conformist, anti-colonialist origins and its integrated racial, political, and cultural dimensions. Accordingly, the weight afforded to more orthodox judicial constructs detracts attention away from the real tension between religious human rights and global drug prohibition. As Crammer (2010) observes, in an era of heightened human rights and religious pluralism, legal systems are increasingly required to handle the problems of accommodating religious freedom, while simultaneously holding together society at large. It is therefore essential that all of the judiciaries concerned begin to thoroughly appreciate the significance of cannabis to the Rastafari in a way similar to that of the Italian and South African courts.

The dissenting judgments in *Prince*, and the higher court's analysis in the Italian decision, revealed a legitimate attempt to accommodate the Rastafari reality within their respective legal frameworks. Thus, it could be posited that sincere progress is being made to genuinely move the case law forward from the sacrilegious to the sacramental, despite there being considerable room for improvement; subtle discrimination still exists for the majority of jurisdictions discussed. Nevertheless, if progress can be made in spite of the prejudice, marginalization, and hostility that has historically surrounded Rastafarianism, then perhaps there is hope; not just for the future of this movement, but for an appreciation of human rights in this field more generally.

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