

RELIGIOUS FREEDOM AND TRANSNATIONALIZATION

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- *The regulation of Brazilian ayahuasca religions •
under United States and Netherlands jurisdiction*

ABSTRACT

This work analyses legal conflicts on the international arena, involving Brazilian religions that use ayahuasca in their worship and provides evidence that the process of legalising these religions and the very right to religious freedom are being encroached upon by the so-called war on drugs. A brief history of ayahuasca in Brazil is presented, as well as the origins of the Brazilian religions that use the substance. The process of regulating the drink for religious ends is analysed, as well as the expansion of these religions into the international arena. Finally, an analysis of comparative law is presented regarding jurisdiction and legislation of the substance, in the United States of America and the Netherlands. The research shows the importance of the global debate concerning international drugs policy and its interrelationship with the obstacles to fulfilling the right to religious freedom.

KEYWORDS

Ayahuasca | Comparative law | Human rights | Religious freedom

1 • Brazilian ayahuasca religions and their regulation

The term “Brazilian ayahuasca religions” is used to designate the Brazilian religions whose rituals are centred around the consumption of ayahuasca, a psychoactive drink made from the combination of two plants: the vine *Banisteriopsis caapi* and the leaves of the bush *Psychotria viridis*.¹ According to believers of these religions, people have deep experiences of self-awareness through the effect caused by ingesting the drink and are able to gain clarity on their problems and difficulties which can lead to a process of change in behaviour.²

There are three religions that use ayahuasca in Brazil: Santo Daime, Barquinha and União do Vegetal.³ These religions⁴ originated in Acre, at the start of the 20th century, when the rubber tappers of Acre met the Peruvian *caboclos*, who already used the drink in their rituals.⁵ The doctrines of these religions are structured around a combination of the Catholic faith, Afro-Brazilian traditions, Kardec spiritism and indigenous traditions and focus on ideas of self-awareness and charity.⁶

The process of regulating the use of the drink for religious purposes in Brazil stretched from 1985 to 2010. During this period there were exhaustive discussions between the state and members of the ayahuasca religions in order to reach a consensus.⁷ In 2004, A Multidisciplinary Working Group (GMT), was formed between state authorities, researchers from a number of different areas of knowledge and representatives from ayahuasca religions. Following the results obtained by the Working Group, the ethics of ayahuasca were stipulated, in other words, a set of norms, principles and duties to be followed by those participating in ayahuasca ceremonies. This set of norms was included in Resolution number 01 of the National Board of Drug Policies (CONAD), in 2010, and has been the regulatory act used regarding the religious use of ayahuasca in Brazil ever since.⁸

2 • International expansion of Brazilian ayahuasca religions and legal problems regarding religious freedom as a human right

At the beginning of the 1970s, a number of people interested in matters related to self-awareness and expanding consciousness started to visit remote regions of the planet in search of spiritual experiences. It was in this context that people from Europe and North America started to visit South America and heard stories of experiences arising from the practice of religious worship using ayahuasca.⁹

Throughout the 1980s Santo Daime¹⁰ and União do Vegetal (UDV)¹¹ became established on international soil which sparked discussions regarding legal disagreements involving the religious use of ayahuasca, as the drink contains the alkaloid, dimethyltryptamine (DMT) in its composition. This substance is widely prohibited in the international community, as set out in the Convention on Psychotropic Substances (CPS) that was ratified by Brazil.

Article 3 [1] of the CPS states that: “[...] a preparation is subject to the same measures of control as the psychotropic substance which it contains.”¹² In this sense, the term “preparation” refers to any mixtures made using one or more than one psychotropic substance, as set out in article 1 of the Convention itself. On the other hand, the Commentary on the Convention made by the United Nations alleged that the list of vetoes did not cover the natural hallucinogens in question, only the chemical substances that constituted the active ingredients contained in them.¹³

Although DMT is classified as a controlled substance, according to the International Narcotics Control Board (INCB), plants containing DMT, psilocybin and other chemical components commonly present in plants used for religious purposes, are not on the list of controlled substances. This also includes substances created by mixing these plants, such as ayahuasca. Therefore, on the basis of this interpretation, ayahuasca could only be prohibited in countries whose national legislation made this specific statement.

Although the objective of the international policies mentioned was to curb the trafficking and use of harmful drugs, these measures have ended up having a negative impact on the right to religious freedom of groups who use plants that alter consciousness in their ceremonies.

This impact has led to a clash with the human rights norms that guarantee religious freedom that are recognised in at least four international treaties: The Universal Declaration of Human Rights (article 18), the International Pact on Civil and Political Rights (article 18), the European Convention on Human Rights (article 9) and the American Convention on Human Rights (article 12).

In spite of the existence of these guarantees, it is possible to apply restrictions regarding exercising the right to religious freedom, in cases where the practice of worship could lead to risk or damage to health, public order or security. Careful examination of the implications is needed.

2.1 - UDV in the United States

On 21 May 1999, in the city of Santa Fé, North American customs control, with officers from the Federal Investigation Department, seized a batch of *hoasca*,¹⁴ destined for the UDV, and threatened to condemn Jeffrey Bronfman (*Mestre* and representative of UDV in the United States) on the grounds of the Controlled Substances Act.¹⁵

A year and a half later, the UDV filed a complaint with the United States Federal Court, seeking legal recognition of their members’ right to use the drink for religious purposes.¹⁶ One of the central points of the current dispute is the Religious Freedom Restoration Act (RFRA). According to Drug Enforcement Administration (DEA), the principal criteria for invoking the RFRA embraces three elements: demonstrating that the application of the Controlled Substances Act causes an impediment (1) that is unnecessarily large (2) to sincere (3) religious practice. Under this law, the government cannot impede the free practice of

a religion, even by means of laws that are generally applicable. The only exception which allows for freedom of this nature to be curtailed is when there is overriding state interest and in this case curtailment must be carried out using the least restrictive means possible.¹⁷

Subsequent to UDV winning in both the trials court and the appeals court, the state demanded a review of the case by the Supreme Court and the request was accepted. Although the government had insisted on the line of argument that no exception should be made regarding application of the Controlled Substance Act, the Supreme Court brought up the case of the Native American Church (NAC), who have used peyote in a ritualistic context for decades and claimed this was similar to the case of UDV.¹⁸

Eventually, the Supreme Court addressed the hermeneutic issue of the CPS, claiming that this treaty does, in fact, prohibit the use of ayahuasca. As such, the Supreme Court ignored the Commentary on the Convention and regarded an interpretation based purely on the text of the treaty to be more appropriate.¹⁹

The Court, therefore, considered ayahuasca to be included in the CPS prohibitions, as the text of the treaty considers substances prohibited therein include any mixtures involving these substances. However, the Supreme Court stated that this fact did not provide sufficient motive to prevent the UDV's religious practice which led to a final decision in favour of religious freedom, based on application of the RFRA.²⁰

The aforementioned decision is interesting from a social and legal point of view, given that in the face of a clash in fundamental rights, the right to religious freedom prevailed, above all given the fact that the United States is one of the pioneering countries concerning the prohibition of drugs.²¹

2.2 - Santo Daime in the Netherlands

In October 1999 a Santo Daime ceremony, organised by the Céu da Santa Maria and Céu dos Ventos churches in the Netherlands was raided by the police.²² The religious leaders were held in custody for four days and the daime that was to be used during the ceremony was confiscated.²³ The police also searched the home of Alida Maria Fränklin-Beentjes, leader of the CEFLU-Luz da Floresta church and confiscated daime found there.²⁴

The national authorities believed this was a criminal organisation disguised as a religious group. The prosecutor's attitude changed when this misunderstanding was cleared up, so much so that the criminal complaint was withdrawn. The churches did not agree as they wanted the Judiciary to take a clear stance confirming their right to religious freedom.²⁵

The case only came to court in 2001, with Geraldine Fijneman, leader of Céu da Santa Maria acting as defendant. The prosecutors argued that the drink being served contained DMT, a prohibited psychoactive substance. The drink was considered to be a "processed substance",²⁶ making it equivalent to its prohibited active ingredient.²⁷

Fijneman's legal basis was article 9 of the European Convention on Human Rights, that guarantees freedom of thought, conscience and religion, as long as expressions of such do not threaten or cause damage to order, health, public morals or the rights and freedom of others.²⁸

Fijneman successfully demonstrated that the daime churches in the Netherlands were practicing serious religious worship and had been registered since 1995. This led to a legal decision that favoured religious freedom. This success stemmed from the fact that the churches gathered a group of specialists from the areas of Anthropology, Pharmacology and Psychiatry who brought important information to the case and clarified the historical and anthropological history surrounding the religion of Santo Daime. They also demonstrated that the religious use of the drink represents no risk to health.²⁹

Following the decision, the legal practice of Santo Daime was again questioned in other cases which led to three more positive precedents in the years 2009, 2012 and 2015. The outcomes of the three cases were based on the same arguments delivered in 2001, in other words that religious freedom, in these cases, prevails over the supposed risk to public health.

Regarding the decision given in 2015, the prosecutors lodged an appeal, focussing on the decision that led to Santo Daime being prohibited in the Netherlands, going against the established precedents. It is worth stressing that, in the many years that Santo Daime was practiced in the country, the stance of the Public Prosecutor's Office remained inflexible and focussed on the ideal of anti-drugs.³⁰

Consequently, the Amsterdam court of appeal ruled that the measures of control adopted by the church were insufficient in guaranteeing public health, bearing in mind the large increase in the number of members in recent years. For this reason specialist research provided at the 2001 judgment should no longer be taken into account. It also stated that the possibility of appropriate consumption of the drink relied too heavily on the good faith of everybody involved in the religion (official members and guests) and concluded that the practice of Santo Daime was unacceptably dangerous to public health and was in violation of the Opium Law.³¹

Therefore, Santo Daime has been prohibited in the Netherlands since 28 February 2018, which quashes the religious freedom of hundreds of people.³² There is still the possibility of an appeal to the Supreme Court and the European Court of Human Rights.

3 • Conclusion

Based on the cases analysed here, it can be seen that there is still considerable resistance on the part of states in terms of guaranteeing religious freedom and religions founded on the use of substances that alter consciousness. The internationalisation of the model of the punitive drugs policy, imposed principally by the United States is a large obstacle. The

internationalisation of this model has happened largely through the CPS of 1971 and the 1988 Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances. These two Conventions present the idea that the war on drugs is an extremely necessary measure given the damage caused by some narcotic drugs. As such, this model suggests that the only viable solution is the severe punishment of practices involving narcotic drugs.³³

Notwithstanding, this war on drugs has not led to desired results in recent years.³⁴ With this in mind, the adoption of a new model for international drug policy is suggested, one that handles religious practices involving psychotropic drugs from the perspective of public health and not public security.³⁵ It is argued that the perspective of public health would be beneficial to the religions involved in these practices, because although these believers are already protected by the right to religious freedom, this would avoid these spiritual practices being erroneously interpreted as criminal acts, which would facilitate the process of the legalisation, respect and recognition of these religions.

It is also important to mention that, unlike Brazil, the United States and the Netherlands do not accept the idea, based on international norms, that ayahuasca is not prohibited by the CPS, as postulated in the Commentary on the Convention, consequently increasing the obstacles against ayahuasca religions becoming legal.

Bearing in mind the fact that the legal systems analysed here are in so-called democratic societies, it would be pertinent to strengthen the dialogue between the authorities and representatives from ayahuasca religions, in a similar way as happens in Brazil. An interesting measure to be taken in these countries would be regulation of the religious use of the drink through legislation, including the application of the ethical principals of Brazilian ayahuasca religions as a guideline.

In any case, the process of legalising these religions in the international arena is still in the early stages. It is up to the international community, the states and members of these religions to fight for fulfilment of their rights, drawing on protection provided by internal state legislation and international mechanisms for the protection of human rights.

NOTES

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