

Ayahuasca in Church; harmfulness of ayahuasca for public health; limitations on freedom of religion under art. 9.2 EHCR (European Convention on Human Rights) - Ayahuasca apprehension – Case Appeal to High Court LJN: AZ2497- Netherlands - 2007

Rough translation from “Ayahuasca in [A] Kerk; schadelijkheid ayahuasca voor volksgezondheid; beperking vrijheid van godsdienst ex art. 9.2 EVRM”.

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Translation from Dutch by Daniel Waterman

High Court Case nr: LJN: AZ2497, Hoge Raad , 00810/06 B

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Abstract: Ayahuasca in Church; harmfulness of ayahuasca for public health; limitation of freedom of religion as defined under Art. 9.2 European Convention on Human Rights (EVRM). The court has established that the impounded ayahuasca contains DMT. DMT is a scheduled substance under Dutch Opium Law (Lijst I, Opiumwet). The Opium Law lists substances that, amongst others, in compliance with commitments to the convention (United Nations Convention on Psychotropic Substances UNCB) have been established as substances that have been demonstrated to influence consciousness and when used can harm health and society. According to Art. II Opium Law possession of substances on list I is prohibited. This general prohibition aims, amongst others, to protect public health. The courts opinion that the Opium Law's prohibition of the possession of ayahuasca is a measure intended to protect public health is therefore correct. The courts conclusion that this prohibition constitutes a limitation of the freedom of religion necessary in a Democratic society as stated in Art. 9.2. ECHR, is, in the interests of health, incorrect and incomprehensible. That the appellant claims that her use of this substance is not, or is only a very minor risk to public health, does not detract from this conclusion. The circumstances can not lead to the conclusion that the prohibition of Art. II Opium Law should not apply, or should be considered a necessary limitation of Art 9. ECHR. Taking into account Art. 9.2. ECHR, the courts is of the opinion that the restriction of appellants freedom of religion that is a consequence of the possession of ayahuasca is not disproportionate, considering that the use of ayahuasca by appellant is not necessary for her being able to practice her religion. There is no law to prevent the court from basing its verdict on the appellant's claim (I can practice my religion without the use of ayahuasca as well')

Verdict 9th January 2007

Court nr. 00810/06B

AJ/CAW

High Court of the Netherlands

Verdict in appeal against the decision of the Amsterdam Court of 25 January 2006 number RK 2655-05

1 The appealed verdict

The Court has declared the appeal invalid

2 Case in appeal

The case has been brought by the appellant (Verrissimo or his wife). In her name, the solicitor mr. H. K. ter Brake has presented an appeal, that has been included in this verdict. The presiding public prosecutor Bleichrodt has decided to reject the appeal.

3 Judgement of the appeal

3.1 The appeal addresses the rejection by the court of the request for restoration of the substances confiscated (referred to as a liquid similar to ayahuasca) [Comment: the courts appear to be aware here that the ingredients and their proportions in ayahuasca may vary, D.W.]

3.2 The court records:

The appellant remarks: 'With the liquid ayahuasca people can be healed. I can practice my faith without using ayahuasca. Using ayahuasca helps to create a spiritual experience. We have had 8 liters of ayahuasca posted to us from Brazil. One liter of this liquid is enough for 8 people during a work. With 'work' I mean a religious ceremony. There are 4 works each month. The liquid may only be used in the [A] church during ceremonies. It may not be taken home. My husband lives in the Amazon area and practices his religion and treats incurable and terminal patients with amongst others the liquid ayahuasca. He has been doing this for 40 years and it has never led to problems. The liquid can be stored for ten years. In the report of the Ministry of Health the substance is clearly referred to as natural. Ayahuasca contains ingredients of two plants. (...)

The solicitor states:

The point of view of the appellant has already been extensively recorded in the appeal of 14 September 2005. If the court is of the opinion that the substance used in the church ayahuasca is a 'religious liquid' then the confiscated substance must be returned to the appellant. The interest of Freedom of Religion takes precedence over the Opium Law in this case. I request that the court grants the appeal.

The public prosecutor responds:

The records indicate that the liquid ayahuasca contains DMT, DMT is scheduled on list I of the opium law. The Opium Law does not provide for any exceptions, so the liquid may not be returned to the appellant.

3.3 The appealed verdict:

Based on article 552a of the Law, those with an interest in a case have the right to appeal in writing against the delay in restoring what was confiscated. The duty to restore according to article 552a may be recognised in cases where the indictment does not conflict with restoration of the confiscated substances, because there is no longer a grounds for the confiscation, or the continuation of confiscation. The confiscated liquid contains DMT, a substance that is listed in the Opium Law. Possession of this substance conflicts with article 2 of the Opium Law, so that the jerry cans with the contents are subject to continued confiscation.

Continued...

3.4 Ayahuasca is thus, according to the appellant, the most important sacrament in the [A] church, of which she is a member. Ayahuasca is used as a method to achieve religious experience and is essential for the practice of the appellants faith. Appellant refers to the verdict of the district court in Amsterdam, dated 21 may 2001 (LJN: AB1739) in which, amongst others, there is consideration for the fact that the [A] church may be regarded as a legitimate church [Literally a church society] and that use of ayahuasca does not produce a significant threat to health. The appellant believes that for this reason, she can appeal to article 9 EVRM [European Convention on Human Rights] and that the confiscated ayahuasca should be restored.

3.5 Consideration

As per Article 9 EVRM everyone has a right to religious freedom. This right extends amongst others to the freedom to practice ones religion in services, in education and in the practical application such as adhering to religious commandments and customs. This freedom cannot be subject to any other constraints than those provided by the laws and necessary in a democratic society in the interests of public safety and to protect the rights of others. The religion practiced by the appellant and in the Amsterdam church [A] is protected by article 9 EVRM.

The report by prof. dr. F. A. de Wolff, that this appeal refers to, details that the use of ayahuasca can have unwanted effects of a mild nature, such as feeling sick, but also more serious symptoms of toxicity such as raised blood pressure and heartbeat. This court accepts these findings and concludes that the use of ayahuasca is a danger to public health.

[Comment, this is quite a remarkable conclusion and contrary to everything reported by expert testimony and completely accepted by the Amsterdam district court in 2001, its a complete reversal of the logic of the arguments of 2001]

The Opium law is intended to prevent harm to public health and society. Based on the stated aims of this law, the prohibition of article 2 of the Opium law may be regarded as a measure necessary in a democratic society to protect public health as stated in article 9 EVRM. The court is of the opinion that this restriction, in relation to the freedom of appellant to practice her faith, is not disproportionate. In forming its opinion, the court takes account the statement by the appellant in the hearing of 14 December 2005, in which she claims that the use of ayahuasca is not necessary for the practice of her religion. The court does not agree with the claim by the appellant that the continuing confiscation is a violation of her religious freedom as meant in article 9 EVRM , and that on this grounds the confiscated ayahuasca must be restored. The court rejects the appeal.

3.4.1. The appellant responds to the courts interpretation of the question whether ayahuasca is a risk to public health. According to the appeal the court has interpreted the report by prof. dr. F. A. de Wolff in a way that is contrary to the interpretation given by this expert. This experts report contains the conclusion that the use of ayahuasca in the [A] church does not constitute a (significant) threat to public health. The court is of the opinion that this verdict does not interpret the law properly, because the definition 'risk to public health' is not about the abstract risk, but about the answer to a concrete question whether the use of ayahuasca by appellant within the [A] church poses a risk to public health and whether the freedom of religion may therefore be restricted.

(I have skipped a section here because it is almost impossible to translate and does not really introduce any new argument.

3.4.3 The appeal cannot lead to return of the goods.

3.5 Finally we address the claim by appellant that the Court has unduly emphasised the claim by the appellant that she can practice her faith without the use of ayahuasca. The court rejects this argument. The court has already judged that the limitations on the appellants freedom of religion are not disproportionate, taking into consideration that appellant can practice her faith without ayahuasca. There is no law that prevents the court from including this statement in its considerations.

3.6 The argument is rejected.

4. Conclusion

Now the appeal has not led to review, and while the High Court sees no grounds for dismissing the appealed conviction, the appeal is rejected.

5 Decision

The High Court dismisses the appeal.

This verdict is given by vice-president G.J.M. Corstens as chairman, and judges W.A.M. van Schendel and J.W. IJssink, in the presence of D.N.I. Gjaltema in a public hearing dated 9th January 2007.

Conclusion

Nr. 00810/06 B

Judge: Mr Bleichrodt

Trial date: 14 November 2006

1: The Court in Amsterdam has rejected the appeal for return of confiscated liquids in its verdict of 25th of January 2006

2: Solicitor H.K. ten Brake, appealed this verdict at the high court.

3.1 The appeal includes several objections against the court verdict rejecting the request for the return of the ayahuasca.

3.2 Firstly the following concerning the proceedings: In this case against the appellant the ministry of public affairs rejected the appeal relating to the time limit (presumably this refers to the limit on the time they need to reach a verdict on the confiscated ayahuasca). On 22 August 2005 the court did not issue a verdict concerning the confiscated ayahuasca. On 19th of September 2005 appeal was made in name of appellant for return of this ayahuasca.

3.3 The case of 19th September 2005 where this appeal was considered concern the following:

"the appellant remarks: With the liquid ayahuasca people can be healed. I can practice my religion without the use of ayahuasca. Use of ayahuasca helps to have a spiritual experience. We had 8 liters of this liquid ayahuasca sent to us from Brazil by mail. One liter of this liquid is enough for * people during one work. With 'work' I mean religious practice. There are four works in a month. The liquid may only be used in the [A] church during these works. It may

not be taken home. My husband lives in the Amazon area and practices his religion there and treat incurable and terminal patients, with amongst others, ayahuasca. He has done this for forty years and nothing has ever gone wrong. The liquid can be stored for approximately ten years. In the report of the Ministry of Health it is stated very clearly that the substance is natural. Ayahuasca is made from elements of two plants (...)

The counsellor makes two remarks:

The point of view of the appellant has already been extensively recorded in the appeal of 14th September 2005. If the court is of the opinion that the liquid ayahuasca used by the [A] church is a religious liquid, then the confiscated liquid must be returned. The importance of Freedom of Religion takes precedence over the interest represented in the Opium Law. I request that the court honours this appeal.

The public prosecutor responds:

From the files it appears that ayahuasca contains DMT, DMT is a schedule I drug in the Opium Law. Now there are no exceptions named in the Opium Law, so the liquid ayahuasca may not be returned to the appellant."

3.4 The decision that is being appealed concerns the following:

3.3 Background

Based on article 552a of the Law, those with an interest in a case have the right to appeal for return of confiscated goods. Such a return may be admitted if the interests of the case are not in conflict as implied in article 116 because confiscation no longer serves any interest. The confiscated liquid contains DMT which is on schedule I of the Opium Law. Possession conflicts with article 2 of the Opium Law so that the jerrycans with content are subject to (continued) confiscation (withdrawal from the public domain)

3.4 Appeal:

Ayahuasca is according to the appellant the most important sacrament within the [A] church of which she is a member. Ayahuasca is used as a method to have a religious experience and is essential for the practice of the religion of the appellant. Appellant refers to the verdict of the district court in Amsterdam of 22 May 2001 (LJN: AB1739), in which amongst others, consideration is given to the question whether the {a} church can be considered a religious society and whether there are any serious health concerns relating to ayahuasca. Appellant is of the opinion that for this reason she can appeal to article 9 EVRM and so, that for this reason the confiscated liquid must be returned to her.

Under article 9 EVRM everyone has the right to religious freedom. This right includes amongst others the freedom to practice one's religion, its services, in education and in practical sense and in keeping to religious rules. This right cannot be subject to any other limitations than those provided by the law that are necessary in a democratic society in the interests of public safety, to protect order, health or 'good morals' or for the protection of the rights and freedoms of others.

The religion of the appellant and that of the Amsterdam church is protected by article 9 EVRM. In the report of dr. F.A. de Wolff, mentioned in the appeal, is described how effects of an unwelcome nature may be caused by ayahuasca, such as nausea, but also more serious

symptoms of toxicity such as increased blood pressure or heart beat. The court accepts these findings. The use of ayahuasca is therefore a risk to public health. The aim of the Opium Law is to prevent harm to health and harm to society. On grounds of this interests the prohibition of article 2 of the Opium Law may be regarded as a limitation necessary in a democratic society in the interests of public health. The courts is further of the opinion that this limitation, in relation to the freedom of the appellant, is not disproportionate. The court takes into account the deposition of the appellant from the proceedings of 14 december 2005 in which she contradicts the claim that the use of ayahuasca is essential for her practice with the statement that she can practice her religion without it. The claim of the appellant that the continuing confiscation of the liquid is an unnecessary limitation on her freedom of religion is unconvincing and the court rejects the claim.

3.5 Including in this assessment we must emphasise that as a measure we must take into account a conflict of interests between the law art. 552a and the rights of appellant to restitution of the confiscated substance. The legal interest is present if it is not inconceivable that a judge will order the confiscation.

3.6 The appeal refers to the fact that the court interprets the cited report by dr/ F.A. de Wolff out of its original context and in a different way than the report apparently intends, namely that the use of ayahuasca in the [A] church is a danger to public health. This passage was adopted by the court from the verdict of the district court in Amsterdam of 21 May 2001. That verdict applies to another appellant in which is was proven that she deliberately transported and stored 17.5 liters of ayahuasca. (4) The appellant indicated the following statement:

"... the expert de Wolff comes to the conclusion that the use of ayahuasca can be a risk to public health in individual cases, that the information provided by the [A] church in general is correct and adequate and that the limited availability of ayahuasca and the strictly regulated conditions in which use occurs are a safeguard against misuse. With this in mind the report concludes that in light of the limited size of the [A] church it is not likely that the use of ayahuasca constitutes a threat to public health."

3.7 If I understand correctly the appeal is based on the idea that the report of De Wolff states that the use of ayahuasca as it occurs in the services of the [A] church is not in conflict with public health, so that the verdict of the court, that did not cite the report in its totality demonstrates an incorrect understanding of the law or is incomprehensible.

3.8 Let me begin with the remark that the court was not in any way bound under 3.6 to the conclusions of the expert reports submitted in abovementioned verdict of the district court in Amsterdam. (5)

3.9 From the expert report submitted by drs. H.T.C. van der Laan 27 may 1999 it appears that the confiscated jerrycans contained amongst others dimethylthiambuteen (DMT) . In addition the solution contained harmine and harmaline, substances that activate DMT when it is orally administered. According to the expert DMT may be established as a trip substance, which means it has a hallucinogenic effect.

3.10 This hallucinogenic effect is the reason why DMT is scheduled substance according to the Opium Law, list I.(6) art. 2 which states it is prohibited to possess DMT. The fact that DMT is scheduled means that it is inherently a consciousness altering substance that the law

views as a danger to public health. (7) Exclusively in the national context, without taking into account the question of the violation of art. 9 EVRM, the question seems to be closed. It is up to the legislature to determine limitations. By contrast to the appeal we are of the opinion that the courts interpretation of the law is correct. Now there is a references to a general prohibition of possession of substances, the judge is not authorised to adjust the prohibition to unique circumstances just because in his opinion in those circumstances there is no threat to public health. The court rejects this claim. If the legislature decides that the appellants use of DMT should be permitted it is apparent that it might provide an exception, as per the provisions of art. 8 Opium Law is possible under certain conditions. (8)

3.11 The appeal also refers to the decision by the court that the limitation of the appellants right to freedom of religion may not be considered disproportionate.

3.12 We must emphasise that, as the court has considered the appellants right to freedom fo religion is subject to limitations Art. 9, EVRM which states that legal restrictions are possible if they are necessary in a democratic society for the protection of public health. An example of such a measure is art. 2 Opium Law, in which a number of prohibitions that apply to the schedule I consciousness altering substances.

3.13 The question is, whether, considering the arguments of the appellant concerning the use of ayahuasca during services of her religious society, and regardless of the fact that the law decides against the restoration of the confiscated DMT containing substances, the substances should be returned because the continuing confiscation conflicts with her art. 9 EVRM right of freedom of religion.

3.14 In the appeal the appellant argues that the court has misinterpreted her statement that she can practice her religion without the use of ayahuasca. The appellant claims that ayahuasca is the most important sacrament in the [A] church and that it is essential for the practice of her religion.

3.15 The courts thinking must in my view be understood to concern the question whether the proposed measure is proportionate. The courts verdict based on the appellants claim that drinking ayahuasca is not necessary for practicing her religion is not something the court is capable of testing. The court, this is my impression, is correct in its verdict that the appellants rights are not substantially impeded. We must take into consideration the neutral, not specifically concerned with religion, charcter of the measures proposed by the Opium Law that aim to prevent threats to public health. The continuing confiscation does limit the appellants ability to practice her religion but this limitation is not disproportionate. (10)

It is possible that the use in a small group and under expert guidance, (in which the guide is aware of the medical condition of the user) less or even a negligible risk for medical complications, but the law does not have to take this into consideration with an eye to the risks and a general prohibition. (11)

3.16 It follows that the court rejects the appeal. I have not found any grounds for reversing the courts decision.

The public prosecutor of the High Court of the Netherlands.