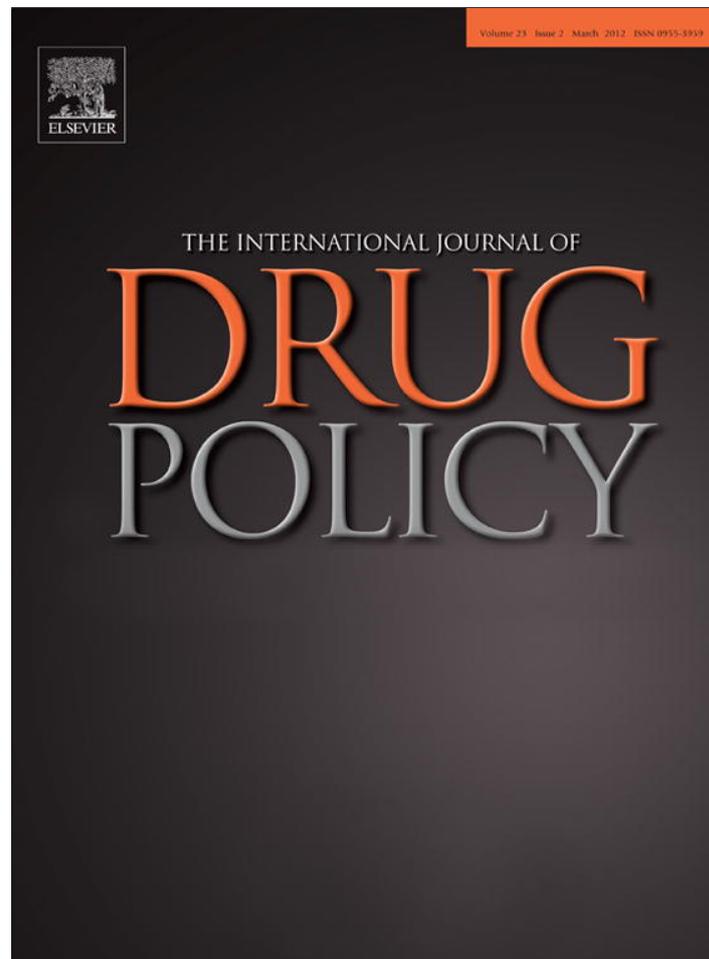


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Policy analysis

Ayahuasca and the process of regulation in Brazil and internationally: Implications and challenges

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ABSTRACT

Background: This paper provides a summary and analysis of the regulation of ayahuasca in Brazil, from its prohibition in the mid-eighties to the recent adoption of CONAD's (*Conselho Nacional de Políticas sobre Drogas*) 2010 Resolution, which established a set of rules, norms and ethical principles to be applied to religious and ritual uses of ayahuasca. Brazil's regulatory process is used as a starting point to explore emerging international regulatory themes as various nations respond to the global expansion of the Santo Daime and UDV (União do Vegetal) ayahuasca religions.

Methods: The text reviews the primary legislative and court documents, academic literature, as well as solicited expert opinions.

Results: Three prominent themes have emerged internationally. The first concerns the scope of international treaties regarding plant-based psychoactive substances, as well as the responsibilities of individual nations to adhere to said treaties. The second concerns the scope of religious liberty and how to determine religious legitimacy. The final theme addresses the potential dangers of ayahuasca to health and public safety.

Conclusion: Over the past 20 years the Brazilian ayahuasca religions have established a global presence, with congregations in the USA, Canada, Japan, South Africa, Australia, and throughout Europe and Latin America. As a result, many nations are faced with the predicament of balancing the interests of these religious minorities with the international "war on drugs." The regulatory process applied in Brazil exemplifies a progressive approach, one which considered issues of anthropology and involved representatives of ayahuasca religions, and which provided a degree of deference to the principle of religious liberty. The Brazilian process has influenced judicial and administrative decisions internationally, and stands as a model worthy of further consideration.

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In the 21st century, many New World countries must grapple with and negotiate conflicts between Western cultural ideals and the values and practices of traditional cultures long displaced by colonialism. One area of contention has been the religious use of psychoactive plants amongst certain indigenous peoples, and amongst subsequent syncretic religious movements. Legal conflicts surrounding the religious use of peyote by American Indians in the USA is a well known example (Feeney, 2007; Long, 2000), but one that has remained confined to North America. A parallel controversy, involving the religious and ritual use of ayahuasca, has recently emerged on a global level, forcing a number of nations to determine how best to balance the religious interests of ayahuasca-using groups against a worldwide war on drugs. The ayahuasca

religions, with origins in Brazil, are modern developments that can be seen as outgrowths of colonialism which combine elements of Amazonian indigenous shamanism with folk Catholicism and other religious traditions. In this paper we present an examination and analysis of how Brazil has responded to the expansion of these groups by attempting to balance Western perceptions of drug use with the evolving religious use of ayahuasca. Using Brazil as a starting point, we aim to provide an understanding of how religious practices involving the use of psychoactive plants are being handled internationally.

Political reactions to the expansion of ayahuasca religions are not random, but follow a particular pattern of response. It is important to understand this development since these reactions play an important role in how human and religious rights of non-Western traditions are assessed and shaped in our current global milieu. In order to delineate the main conflicts involved in this expansion, from an anthropological and legal perspective, we have based our research and analysis on a combination of personal interviews

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with individuals involved in the drafting of Brazil's 2010 resolution, a review of policy developments in Brazil and Canada, and legal analysis and review of court cases involving members of the Santo Daime and UDV (União do Vegetal) religions in England, France, Germany, Spain, the Netherlands, and the USA. We have chosen to focus on legal controversies in countries where the debate has been strongest, and aim to provide a substantial foundation for understanding the present phenomenon. The Santo Daime and UDV already have an established presence in approximately 38 countries, and future research may demonstrate further legal intricacies and developments not considered here.

History of ayahuasca regulation in Brazil

Ayahuasca is a psychoactive beverage generally composed of two plants, *Banisteriopsis caapi* and *Psychotria viridis*, the latter of which contains DMT (n,n-dimethyltryptamine), a controlled substance in Brazil (Portaria, 1998) and internationally, under the 1971 United Nations Convention on Psychotropic Substances (CPS). Ayahuasca is traditionally used by diverse indigenous populations of the Amazon, and since the 1930s, has been adopted as a sacrament by several syncretic religious groups in Brazil, including the Santo Daime (Igreja do Culto Eclético da Fluente Luz Universal Patrono Sebastião Mota de Melo, ICEFLU) and the UDV (Centro Espírita Beneficente União do Vegetal) (Labate & MacRae, 2006, 2010; Labate, Rose, & Santos, 2009). Brazil's drug laws do not specify which drugs are forbidden, but leave this designation to the Executive branch of the Federal Government. Drugs are classified by a division of the Ministry of Health, previously called the *Divisão Nacional de Medicamentos* (DIMED, or National Division of Medicines), but renamed in 1999, the *Agência Nacional de Vigilância Sanitária* (ANVISA, or National Health Surveillance Agency). In the absence of explicit legal controls, the Brazilian government has relied on the promulgation of Resolutions by the *Conselho Nacional de Políticas sobre Drogas* (CONAD, or National Council on Drug Policies) to help guide the enforcement of Brazilian drug laws. Control of ayahuasca has been conducted through this regulatory process, most recently culminating in the publication of Resolution n. 1, on January 25, 2010, discussed below.

The first major policy in Brazil concerning ayahuasca was generated in 1985 by DIMED, which categorised *B. caapi* as a forbidden substance (Portaria, 1985). A *Grupo de Trabalho* (GT, or Working Group) was subsequently proposed by The *Conselho Federal de Entorpecentes* (CONFEN, or National Council on Narcotics), CONAD's predecessor, to study the issue further (Resolução, 1985). The next year, at the recommendation of the GT, *B. caapi* was temporarily declassified (Resolução, 1986). After extensive meetings with Brazilian ayahuasca communities, the GT recommended both the permanent declassification of *B. caapi* and authorization of its "ritual and religious use" (Relatório Final, 1987). These recommendations were approved in an official meeting of CONFEN (MacRae, 2008; Silva Sá, 2010). Significantly, the GT never considered removal of DMT, which remains prohibited in Brazil.

Further debate followed in 2002, with Resolution n. 26 (Resolução, 2002), which forbade exportation and use of ayahuasca by individuals under 18 years of age. Additionally, formation of a multidisciplinary group was recommended to establish norms of social control regarding its use. Resolution n. 05 (Resolução, 2004) was issued in 2004 to create the recommended *Grupo Multidisciplinar de Trabalho sobre a Ayahuasca* (GMT or Multidisciplinary Working Group on Ayahuasca), however, two years passed before members of the GMT, including government officials, researchers and representatives from the ayahuasca groups, were elected (MacRae, 2010). The GMT met periodically and produced their Final Report in 2006 (Relatório Final, 2006), which was later included in CONAD's 2010 Resolution.

The 2010 Resolution was adopted in an attempt to establish a deontology of ayahuasca use: a set of rules, norms and ethical principles to be followed. Included were prohibitions on commercial distribution, therapeutic uses, tourism, advertisement, and use of ayahuasca with illicit drugs. Rules regarding transportation of ayahuasca, and the harvesting of wild *B. caapi* and *P. viridis* plants, were established, and the Resolution recommended that groups seek ecological sustainability by planting these species in order to supply their needs. Under this Resolution, the preparation, storage, and use of ayahuasca are also allowed, so long as ultimate use is restricted to religious rituals. Other parameters included establishing guidelines for screening religious initiates, and a suggestion that the various ayahuasca groups form as legal entities and register with CONAD. Finally, the Resolution encouraged future scientific research on the therapeutic potentials of ayahuasca use.

Based on our research and interviews, it appears that CONAD's 2010 Resolution could be interpreted in one of two ways. The first interpretation is that the parameters outlined by the Resolution are merely "recommendations," suggesting, but not establishing, mechanisms of control. Essentially, the parameters of use would not be binding until legally implemented, an interpretation supported by a section of the Resolution, quoted below:

3. Regarding the effectiveness of the deontological principles:
 - a. It is suggested that CONAD study the possibility of establishing mechanisms of control of decontextualized and non-ritualistic use of Ayahuasca, having the deontological principles established here as its paradigm, with the effective participation of representatives of the religious entities.
 - b. Institutional support is requested from CONAD for the creation of an institution that is representative of the religious entities formed through free adhesion, for the exercise of social control in the fulfillment of the deontological principles treated here (Resolução, 2010, translation by Christian Frenopoulo).

In the absence of such mechanisms, the established parameters are mainly *moral*, which some might view as representing a less invasive form of social control; however, others might find the lack of enforceability unacceptable.

The second interpretation requires reading the 2010 Resolution against Brazil's drug control law (Lei 11.343, 2006). Under this interpretation, any deviation from the Resolution's parameters would receive sanctions equivalent to those applied to classified drugs like cannabis. This line of interpretation could lead to severe consequences for transgressions, including fines and imprisonment.

Ultimately, there appears to be consensus that Brazilian courts will determine how CONAD's 2010 Resolution will be interpreted. Since judicial decisions are likely to vary from judge to judge, this means that the new Resolution is simply another step in what will continue to be an on-going process, where certain undefined legal aspects end up influencing specific decisions, followed by new phases of regulation.

The Brazilian regulatory process highlights several themes, or concerns, in addressing regulation of religious drug use. These, already reflected in the experiences of the USA and some European countries, will likely be significant for other countries in attempting to reconcile mainstream Western concerns regarding "drug use" with the interests of minority religions. These themes generally fall into three categories: (1) legal concerns, specifically with international obligations under the 1971 United Nations Convention on Psychotropic Substances; (2) concerns with freedom of religion, and the challenges with defining "religion"; and (3) concerns with the biomedical safety of ayahuasca. Each of these will be addressed separately below and discussed within an international context.

1971 United Nations Convention on Psychotropic Substances

Brazil, like the USA and many other countries, is signatory to the U.N. 1971 Convention on Psychotropic Substances (CPS), which lists DMT as a Schedule I controlled substance. Under the CPS (Art. 32[4]), signatory countries may make reservations for “plants growing wild which contain psychotropic substances from “among those” in Schedule I and which are traditionally used by certain small, clearly determined groups in magical or religious rites.” Only a few countries have made use of this provision – Bangladesh (unspecified), Canada (peyote), Mexico (unspecified), Peru (San Pedro and ayahuasca), and the USA (peyote) – but Brazil was not amongst them (CPS, Declarations & Reservations). At the time the Convention went into effect, in 1976, the ayahuasca-using religious groups remained secluded in the remote north of the Brazilian Amazon. There was no national concern regarding these groups until they began to expand throughout Brazil in the early 1980s. Unfortunately, reservations are only allowed at the time of signature, ratification or accession (United Nations, 1976, p. 385). Brazil, having ratified the CPS in 1973, no longer has the option to make such a reservation, which could have helped stabilise Brazilian policy and provide religious groups a degree of insulation against potential political reversals. Discussion of the CPS did not enter Brazil’s dialogical process until recently (Parecer, 2004; Relatório Final, 2006; Resolução, 2010), and was likely mentioned in response to growing international concern about the expansion of ayahuasca religious groups.

Whilst the CPS lists DMT as a controlled substance, it does not explicitly prohibit *P. viridis*, the DMT-containing plant used in ayahuasca preparations. Much of the confusion regarding the scope of the CPS (1971, Art. 3[1]) arises from a provision which states that “a preparation is subject to the same measures of control as the psychotropic substance which it contains.” Whilst the CPS (1971, Art. 1[f]) defines a “preparation” as “any solution or mixture, in whatever physical state, containing one or more psychotropic substances,” the accompanying Commentary on the Convention suggested that beverages or infusions made from plants were excluded from coverage (United Nations, 1976, p. 387). If the interpretation of the Commentary is valid, then it would appear that ayahuasca is not covered by the CPS, as it is a beverage made of two plants. The Commentary, however, failed to specifically address the Convention’s definition of “preparation,” and no further clarification was available until 1988, when the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances was adopted. According to this Convention’s Commentary, a “preparation” of psychotropic substances was to be understood as “the mixing of a given quantity of a drug with one or more other substances (buffers, diluents)” (United Nations, 1998, p. 54).

In 2001, the International Narcotics Control Board (INCB), a quasi-judicial body of the UN drug control system, sought to provide further clarity as to what the CPS prohibits in response to a request made by defendants involved in legal proceedings against the Santo Daime Church in the Netherlands. At issue was whether the prohibition of DMT under the CPS extended to preparations of ayahuasca. In response, Herbert Schaepe, Secretary of the INCB, wrote:

No plants (natural materials) containing DMT are at present controlled under the 1971 Convention on Psychotropic Substances. Consequently, preparations (e.g. decoctions) made of these plants, including ayahuasca, are not under international control and, therefore, not subject to any of the articles of the 1971 Convention (Schaepe, 2001).

The court in the Netherlands ultimately rejected this, finding that interpretations of the CPS by the INCB were not binding (Rechtbank Amsterdam, 2001).

The question of what substances are covered by the CPS was again raised during a legal dispute involving the UDV in the USA (Bronfman, 2007; Bullis, 2008; Meyer, 2005). The UDV also relied on the letter produced by Schaepe, as well as explications in the Commentary, in arguing that ayahuasca was not covered by the CPS. The US Supreme Court disagreed, and evoked similar arguments to the Netherlands court, finding that production of ayahuasca required a sufficient degree of preparation to bring it within the purview of the CPS (Gonzales v. UDV, 2006). The Court, however, found that the U.S. government’s treaty obligation under the CPS was not sufficiently compelling to justify suppressing religious ayahuasca use (Feeney, 2011; Gonzales, 2006). Unlike the USA, the Netherlands and Canada, however, Brazil has accepted this interpretation of the INCB.

Whilst there is international disagreement regarding the applicability of the CPS to ayahuasca, it appears that it is generally the interpretation of individual nations that will be relevant in regulating ayahuasca use, particularly since individual signatories retain the authority to implement national policies more restrictive than those required by the CPS. Article 12 of the CPS (1971), however, requires strict regulations of exports and imports of controlled substances, and incongruent interpretations of the applicability of the CPS to ayahuasca could lead to international disputes.

The issue of importation and exportation is significant because ayahuasca is generally brought or shipped from South America due to difficulty in obtaining or cultivating the ayahuasca vine abroad. In Spain, a request to import daime (the Santo Daime term for ayahuasca), by members of the Santo Daime, was denied because its sacramental use did not qualify for the scientific or medical exemptions outlined by Article 7 of the CPS (López-Pavillard & Casas, in press). However, several countries, including the USA and Canada, have made attempts to address importation issues through regulation and policy development.

To date, regulation of the importation of ayahuasca into the USA has been determined on a case-by-case basis. The UDV, which was importing ayahuasca into the USA from Brazil, received a preliminary injunction in 2006 against enforcement of U.S. drug laws prohibiting importation (Feeney, 2011; Gonzales, 2006). This court victory set the groundwork for negotiations with the U.S. Drug Enforcement Administration (DEA) regarding possession and importation of their sacrament (Sandlin, 2010). In a similar case, involving an Oregon branch of the Santo Daime, the judge outlined procedures to be followed by the Santo Daime and the DEA in order to allow importation and use of ayahuasca and to allow monitoring and regulation by the DEA (Church of the Holy Light of the Queen v. Mukasey, 2009). The scope of these cases is limited, with neither providing definitive legal protection for religious ayahuasca use nationwide; however, these decisions may provide legal precedent for other chapters of the Santo Daime and UDV in the USA, which currently have a presence in approximately twelve and six states respectively.

In 2006, Health Canada, a federal department of the Canadian Government, tentatively approved an exemption for the use of ayahuasca by a branch of the Santo Daime, known as Céu do Montreal, contingent upon documentation from the Brazilian Government allowing its exportation (Office of Controlled Substances, 2008; Tupper, 2011). Brazil has yet to directly address the exportation of ayahuasca, and has not responded to Canada’s request for documentation.

Legal proceedings in Brazil further demonstrate the need for clarity on this issue within Brazil. In 2002, the District Court for the 2nd Region (Acórdão, 2002) decided that an investigation into two Dutch Santo Daime members, who were stopped at the Rio de Janeiro airport trying to take ayahuasca to the Netherlands, should

be closed since ayahuasca is not a prohibited substance in Brazil. Nevertheless, in 2009, Dutch members of Santo Daime flying to Holland were stopped at the Rio de Janeiro airport for the same reason. Federal Police confiscated the ayahuasca and an investigation was opened. Because the case is still in its preliminary stages, no further news was available at the time of publication.

Although some governments are reluctantly accommodating the spread of ayahuasca religions, others, such as Germany and France, have reacted with particular hostility. Whilst nations may interpret the CPS differently, or enact stricter drug laws, issues surrounding importation and exportation are emerging as significant concerns, which will continue to colour the debate about regulation and expansion of ayahuasca use. Brazil may be able to play a role in calming international disputes by developing internal regulations concerning exportation of ayahuasca. Unfortunately, this issue is a significant weakness in CONAD's 2010 Resolution, which provides no guidelines in this area.

Defining religion and religious use

In Brazil, whilst there is no definition of religion in the Federal Constitution, nor in any legal statute, the freedom of belief and worship are generally protected (*Constituição da República, 1988, Arts. 1°, III, 5°, VI*). Providing an appropriate definition of religion is a complex legal and anthropological matter (*Hanegraaff, in press; Sandberg, in press; Walsh, 2010; Weingartner, 2006*) one which inevitably evokes issues of human rights. Despite a lack of any official Constitutional or legislative definition, the sacramental use of ayahuasca was recognised by the Brazilian government, through an historical and extensive administrative and political process, as a genuine cultural and religious practice. The 2010 CONAD Resolution built on this by defining the parameters of what the Brazilian government would recognise as authentic religious use of ayahuasca.

In the past 10 years there has been an increase in diversified expressions of ayahuasca use in large urban centres in Brazil. Groups making various therapeutic, artistic, and New Age uses of ayahuasca, combining elements of Santo Daime and UDV with other forms of urban spirituality, have developed and earned the label of “neo ayahuasqueros” (*Labate, 2004; Rose, 2010*). Whilst these groups hold less religious legitimacy than more “traditional,” groups, they have recently become increasingly incorporated into the political process. It appears unlikely that these groups will generate much controversy, or have their “religious” nature challenged, so long as their activities remain within the parameters of the 2010 Resolution.

Whilst the ayahuasca debate in Brazil has been dominated mainly by the ayahuasca religions and the emerging neo-ayahuasquero groups, indigenous populations with traditional uses of ayahuasca have recently become involved in this public discourse. Some of these groups are now seeking inclusion in the process to recognise ayahuasca as part of Brazil's cultural heritage (*Espíndola, 2010*). In the last five years there has been a growth in seminar-style ayahuasca ceremonies led by indigenous groups, such as the Kaxinawa and the Yawanawa (*Bressane, 2010; Monteiro, 2010*). This trend has been accompanied by a process of cultural effervescence amongst these peoples, with promotion of large inter-tribal cultural festivals in Acre. Middle-class urban Brazilians and foreigners have also begun attending these local gatherings (*Ortiz, 2010; Schneider, 2009*). Whilst indigenous populations in Brazil have a degree of legally protected autonomy, the expansion of ayahuasca use beyond tribal borders might cause controversy, particularly if groups are seen as profiting through the promotion of ayahuasca ceremonies.

Despite Brazil's collaborative process, the issues of religious authenticity and traditional legitimacy remain sources of

contention between ayahuasca religious groups. One branch of the Santo Daime, the ICEFLU, adopted the sacramental use of *Cannabis*, known as Santa Maria, in the 1970s. This practice brought harsh criticism from other ayahuasca groups who feared that use of *Cannabis* by some would jeopardize the process of ayahuasca regulation in Brazil. Under pressure, ICEFLU officially declared that it would no longer permit the sacramental use of Santa Maria in their ceremonies (*Goulart, 2004; MacRae, 1998, 2006*).

Determining whether psychoactive plant use is religious or not has not been a problem exclusive to the Brazilian ayahuasca situation; analogous cases can be found in disputes over “religious” use of cannabis, peyote, ayahuasca and other psychoactive substances in the USA, the Netherlands, England and elsewhere (*Sandberg, in press; Sullum, 2007; Walsh, 2010*). Whilst the religious and cultural legitimacy of ayahuasca groups in Brazil was determined through a lengthy collaborative and administrative process, their status in other countries have generally been made by courts. When determining a group's religious legitimacy, these courts have generally made distinctions between philosophical and religious belief systems, and have also questioned whether purported drug-using religions are sincere or mere façades to legitimise drug use (*Sandberg, in press*).

In the USA, religious freedom claims are currently litigated under the 1993 *Religious Freedom Restoration Act (RFRA)*. RFRA requires claimants to prove that their religious practices are burdened by government laws or activities, and that the religious practice in question is central to a sincerely held religious belief. After this is shown, the government must then demonstrate a compelling interest in application of the law and additionally show that no less restrictive means, on the religious practices in question, are available. In Europe, protection for freedom of religion was established by Article 9 of the European Convention on Human Rights (*ECHR, 1950*). Regarding this protection, the European Court of Human Rights has declared that:

The right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate (*Manoussakis v. Greece, 1996, §47*).

Once a religion is established as legitimate for purposes of the Convention, religious practices can only be restricted as “necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others” (*ECHR, 1950, Art. 9[2]*).

In the USA, the government conceded the religious nature of the UDV (*Gonzales, 2006; Meyer, 2005*) and Santo Daime (*Church of the Holy Light, 2009*), a frequent practice in U.S. litigation due to the ethics and complexities of determining whether a set of beliefs and practices is truly religious. However, the global expansion of ayahuasca encompasses other ritual uses of ayahuasca which are not as clearly “religious.” One of these uses involves the shamanic practices of various indigenous groups, from whom the Santo Daime and UDV originally adopted their sacrament. Participation in local shamanic ceremonies, or workshops, has become an attraction in countries such as Peru, Ecuador and Colombia, and many of the shamans who lead retreats for foreigners have begun travelling abroad to share their traditions and cultural practices with a wider audience (*Fotiou, 2010; Labate, 2011a*). Whilst Amerindian shamanism is clearly rooted in specific ontological definitions of “nature” and “culture,” and particular metaphysical understandings of the world, it is debatable whether it would be recognised as religious under Western standards, which are informed by the main monotheistic religions of the world: Christianity, Judaism

and Islam. In indigenous communities where shamanism is practised, medical, artistic, and spiritual practices are often thoroughly enmeshed, as opposed to modern Western society which attempts to make distinctions between spheres such as the sacred and the secular.

Whilst courts in the USA have been generally squeamish about distinguishing legitimate from illegitimate religions, a number of courts have waded into this territory, proposing potential criteria for distinguishing religious beliefs from beliefs more appropriately viewed as philosophical in nature. In 1968, a U.S. federal court found that a group known as the “Neo-American Church,” which claimed that psychedelic substances were sacraments of the church, was not adequately religious because the group could show no “evidence of a belief in a supreme being, a religious discipline, a ritual, or tenets to guide one’s daily existence” (*United States v. Kuch*, 1968, p. 444). Even if the group had satisfied the court’s religious criteria, the court was unlikely to find the Church’s beliefs sincere, as it found that the group’s motto “Victory over Horseshit,” and other similar tenets, gave the appearance that the group was “mocking established institutions” (*Kuch*, 1968, pp. 444, 445). More recently, a U.S. federal court in Wyoming outlined the following criteria for determining whether a belief system is religious or not: (1) existence of ultimate ideas, addressing fundamental questions of purpose, life and death; (2) metaphysical beliefs; (3) an ethical or moral system; (4) a comprehensive belief system, and; (5) religious accoutrements (*United States v. Meyers*, 1995).

The question of whether shamanism qualifies as a religion for purposes of RFRA in the USA has not yet been litigated, but the outcome of such litigation would likely rely on some court-formulated definition of religion, like those described above. In October 2010, Taita Juan, a Kamentsá Colombian *yagecero* (traditional ayahuasca healer) was arrested for possession of *yagé* (as ayahuasca is called by the Kamentsá) whilst travelling to Oregon to conduct traditional shamanic ayahuasca ceremonies (*Carroll*, 2010; *Rechazan*, 2010). The charges against Taita Juan were eventually dropped, however, and arrangements were made for his deportation (*Maher*, 2010). This may have been a strategic move on the part of the prosecutor to avoid a court battle that might have expanded religious protections to shamanic traditions. As a result, the question of whether different varieties of Amazonian shamanism may qualify for religious protection in the USA remains unanswered.

In Europe, as in the USA, establishing one’s beliefs and practices as legitimately religious is only the first step. Whilst the definition of religion under the ECHR is currently being hashed out in legal cases involving branches of the Santo Daime, there is still a lot of controversy and uncertainty. In France, charges were brought against a branch of the Santo Daime in 1999 for trafficking DMT. Charges were dropped in 2005 after the court determined that natural products containing DMT were not prohibited under French law (*Bourgogne*, in press; *Cour d’appel de Paris*, 2005). In response, the French Government quickly approved a resolution outlawing ayahuasca, and its plant constituents (*Arrêté*, 2005; *Bourgogne*, in press). It is unclear whether the Santo Daime might be successful in asserting a religious defence to the new law since France has a very strict “anti-sect” law, the About-Picard Law, under which ayahuasca use might be determined to be an illegitimate practice (*Hanegraaff*, in press; *Miviludes*, 2010), and thus outside the scope of the ECHR.

The coverage of religious protection under the ECHR may soon be tested against a branch of the Santo Daime in southwest England. In 2010, the branch in question suffered two police raids; ayahuasca was confiscated and several Church members were arrested on suspicion of trafficking DMT (*Peacock*, 2010). The outcome of this case may depend on whether the Church’s activities are recognised as legitimate religious activities.

Religious freedom arguments seeking to protect ritual uses of psychoactives, based on the ECHR, have met with some success. In the Netherlands, for example, the Santo Daime was recognised in a 2001 court case as a legitimate religion under Article 9, and successfully argued that their religious ayahuasca use posed no threat to public safety (*Rechtbank Amsterdam*, 2001; *van den Plas*, in press). Religious use of cannabis was recognised in a British Court as a legitimate religious practice under Article 9, but was ultimately rejected in the interests of “public safety” (*Sandberg*, in press).

In Spain, the establishment of religious legitimacy has involved both an administrative and judicial process. Under Spain’s Organic Law of Religious Liberty (*Ley Orgánica de Libertad Religiosa*, 1980), organisations can request governmental recognition of their religious character, recognition which provides religions with a great degree of autonomy in running and organising their internal affairs (Art. 6). Branches of both the Santo Daime and UDV have completed this process, although not without multiple appeals (*López-Pavillard & Casas*, in press; *Prades*, in press). The Santo Daime was initially denied recognition because the Spanish Ministry of Justice determined that they lacked a sufficient doctrine through which to express religious beliefs and because they lacked clearly defined religious ministers or priests (*López-Pavillard & Casas*, in press). Whilst both Santo Daime and UDV have since been recognised as legitimate religious institutions, neither have been able to obtain permission to import ayahuasca, nor is it clear that a recognised religious status legitimises use of their sacrament (*López-Pavillard & Casas*, in press). Whilst freedom of religion is protected by the *Spanish Constitution* (1978, Art. 16.1), these freedoms can be limited in the interests of public health and morality (*Ley Orgánica de Libertad Religiosa*, 1980, Art. 3), similar to the ECHR.

It is paradoxical to note that the recognition of Santo Daime and UDV as *authentic* religions was, in a certain perspective, easier to achieve in countries such as the USA, Canada and the Netherlands, than in Brazil itself. In their homeland, these groups were initially met with scepticism and suspicion regarding their true intentions, and scrutinised in detail by CONAD, whereas abroad, even though persecuted under national drug laws, their “religious character” was not severely questioned. The foreignness of these religious practices was more likely to be associated with their exogenous origin, which may have provided a degree of deference.

Determining the legitimacy of different religious practices is no easy matter, but some of these international experiences may stand as examples for other countries. The careful study of ayahuasca groups in Brazil, as well as the inclusion of representatives of these groups and of anthropologists familiar with the use of ayahuasca, helped the Brazilian government establish that these religious claims were sincere, and ultimately assisted in the production of guidelines for distinguishing between legitimate and illegitimate religious uses.

Safety of use

In Brazil, medical scientists were called to participate in the original CONFEN investigations and in the development of CONAD’s 2010 Resolution, but the discussion on whether scientific research had managed to “prove” ayahuasca was harmless was not predominant. Instead, Brazil focused on gathering evidence on the effects of ayahuasca through observation, interviews, and anthropological accounts of its use, whilst strongly encouraging further scientific research. This is in contrast to the experience of the UDV and Santo Daime internationally, where the safety of ayahuasca has been a central element in litigation.

In the USA, the government raised the issue of safety as one of its main arguments for denying religious ayahuasca use, stating that

it had a compelling interest in “protecting the health and safety of UDV members” (Gonzales, 2006, p. 426). In support of its case, the government offered evidence that the controlled substance contained in hoasca (as ayahuasca is called by the UDV), DMT, “can cause psychotic reactions, cardiac irregularities, and adverse drug interactions” (Gonzales, 2006, p. 426). However, the UDV was able to introduce equally compelling evidence as to the safety of ayahuasca when used in religious settings. Finding the evidence in equipoise, the Court rejected the U.S. government’s purported interest in protecting the health and safety of UDV members.

A congregation of the Santo Daime in Oregon was also subject to litigation regarding their religious ayahuasca use. The Oregon Santo Daime took a creative approach to the question of ayahuasca’s safety by petitioning the Oregon Board of Pharmacy (OBP) for a religious exemption, in order to bolster their position in court (Haber, *in press*). The OBP found that ceremonial ayahuasca use did not qualify as drug use and therefore did not qualify for regulation by the Board (Haber, *in press*). Whilst the decision of the OBP is limited to the confines of the state of Oregon, such a strategy might be successfully repeated elsewhere.

The issue of health and safety was also significant when the District Court of Amsterdam addressed ayahuasca use by the Santo Daime in the Netherlands. Once the Santo Daime had established itself as a valid religion, for purposes of the ECHR (Rechtbank Amsterdam, 2001), the government had to prove that restricting ayahuasca use was necessary for “the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others” (ECHR, 1950, Art. 9(2)). Because the government was unable to establish that its use posed a sufficient risk to public health and safety, the court found that religious ayahuasca use could not justly be prohibited (Rechtbank Amsterdam, 2001; van den Plas, *in press*). In Germany, however, the mere fact that ayahuasca contained DMT was considered sufficient evidence by a German court to find that it posed a threat to public health, outweighing the religious interests of a local congregation of the Santo Daime (Rohde & Sander, *in press*).

Public health and safety are both considered limiting factors on the free exercise of religion in Spain (Ley Orgánica de Libertad Religiosa, 1980, Art. 3), much as they are under the ECHR (1950, Art. 9[2]). Spanish criminal law, however, is primarily focused on the impacts of trafficking on public health and safety (Ley Orgánica del Código Penal, 1995, Art. 368) rather than on personal use and possession, which are considered protected by the right to privacy (Constitución Española, 1978, Art. 18). Two members of the Santo Daime were charged with importation of illicit drugs, with intent to distribute, for bringing ten litres of ayahuasca into Spain in 2000 (López-Pavillard & Casas, *in press*). An analysis by the National Institute of Toxicology concluded that the DMT content in the confiscated ayahuasca was so low that more than a litre would be needed to produce intoxication based on oral activity of DMT. The toxicologist, however, failed to take into account the potential effects of harmala alkaloids, which are also present in ayahuasca, on DMT. The Judge, based on the erroneous conclusions of the toxicology report, dismissed the charges finding that the DMT levels were too low to prove a threat to public health (Juzgado Central, 2000; Labate, 2005; Riba et al., 2001). In coming to her final decision the judge also considered that the ayahuasca was intended for private consumption by a group of individuals with a history of ayahuasca use, rather than for general distribution (Juzgado Central, 2000). Whilst issues of privacy bode well for ayahuasca-using religions, the introduction of new members to ayahuasca might still be seen as a violation of Spain’s criminal code (López-Pavillard & Casas, *in press*). Legal issues around the CPS and importation also remain significant barriers in Spain.

Whilst safety of use and public safety appear to be lumped together under the ECHR, a distinction between these categories is

made in the USA. A major argument, raised by the U.S. government against ayahuasca use by the UDV, was that allowing religious use would compromise enforcement of U.S. drug laws, and therefore pose a threat to public safety. Specifically, the government cited a growing interest in DMT and “a general rise in the illicit use of hallucinogens” (Gonzales, 2006, p. 426) to support its contention that a religious exemption for ayahuasca would lead to diversion and increased interest in the drug on the black market. However, citing a lack of illicit trade in ayahuasca, and an absence of previous diversion problems with the UDV, the court found it unlikely that ayahuasca would be diverted to the black market and that diversion was not sufficiently compelling to override the UDV’s religious claim under RFRA (Gonzales, 2006).

The issue of diversion, as a public safety concern, is one that has been used in the USA to allow religious protection for some drugs whilst denying it for others. To illustrate, many individuals have brought claims seeking legal exemptions for religious use of cannabis, each of which have been denied (*Guam v. Guerrero*, 2002; *Leary v. United States*, 1967; *Olsen v. Drug Enforcement Administration*, 1989; *United States v. Rush*, 1984). These claims often relied on assertions that, if religious exemptions can be made for peyote, then an exemption must also be made for religious cannabis use. The distinction that is generally made between peyote and cannabis is based specifically on the U.S. government’s purported interest in preventing diversion of illicit substances to the black market.

A prime example of this distinction was made in a 1989 case where the U.S. Drug Enforcement Administration (DEA) denied a petition seeking a religious exemption for the use of cannabis. The DEA set forth two reasons for its denial, both based on issues of drug control. The primary distinguishing factor, the DEA purported, was that “the actual abuse and availability of marijuana in the United States is many times more pervasive... than that of peyote,” and that allowing an exemption for cannabis would significantly compromise the government’s ability to enforce drug laws (Olsen, 1989, p. 1463). Secondly, the DEA noted that the petitioner’s religion “advocates the continuous use of marijuana... while the Native American Church’s use of peyote is isolated to specific ceremonial occasions” (Olsen, 1989, p. 1467). It is important to note that the DEA did not challenge the legitimacy of the asserted religious use in this case but rather argued that the Church’s continuous use of cannabis, a substance widely abused and widely available, would make it difficult for the government to monitor and regulate the group’s religious use whilst simultaneously ensuring public safety.

Although considerations of safety may not have predominated during the drafting of CONAD’s 2010 Resolution, the prohibition of ayahuasca use by those under 18 years of age, under a previous but now defunct resolution, the on-going debate regarding ayahuasca use by pregnant women (Labate, 2011b), and the promotion of further scientific research under the current Resolution, all indicate that considerations of health and safety are important elements to the debate in Brazil. Whilst there has been an increase in scientific research on the health consequences of ayahuasca (Labate & Cavnar, 2010; Labate et al., 2009), safety considerations will undoubtedly continue to be a point of contention and concern at the international level.

Conclusion

In this paper we have attempted to outline the primary issues that have framed the international debate regarding the expansion of the ayahuasca religions. Interpretations of the CPS have varied by country. On one side, the acute focus on particular psychoactive compounds ignores the fact that these compounds are not traditionally used in isolation but in plant-based preparations

and in specific contexts. On the other side, whilst the CPS has allowed for some countries to make exceptions for traditional uses of psychoactive plants, the exemption takes the highly questionable position that certain religious practices can only be legal in their country of origin. Clear legal definitions of religion have been generally elusive, and those that have been entertained are substantially influenced by Western notions, based on a Judeo-Christian model, which may exclude traditional modalities such as ayahuasca shamanism, a deep-rooted practice amongst indigenous and mestizo Amazonians. Further, the issue of harm and safety has also been a substantial political consideration; one that often carries the day, even without scientific evidence to support claims of danger. Whilst courts have frequently sided with the opinion of health and pharmacology experts, there has been little reflection on why some compounds were included in the CPS in the first place.

A new convention to specifically address the religious use of psychoactive plants is improbable, and regulation will likely continue to be determined on a national basis. As we have discussed, there is currently no scientific evidence that ayahuasca is dangerous when used within a ceremonial context. Whilst more studies are needed on the short and long-term effects of ayahuasca, a reductionist bio-medical approach will not be sufficient to provide a complete understanding of these religions and the full implications of ayahuasca use. The unique social settings within which ayahuasca is used require a bio-psychosocial approach which can account for these contextual factors. Major questions also remain regarding the criterion used by governments to declare substances harmful. Without appropriate safeguards and standards it may become unclear whether a government is acting on behalf of public safety or in a way that is ethnically or religiously prosecutorial.

As our global community becomes increasingly transnational, governments from around the world will need to grapple with these issues and ultimately rise to the occasion of finding fair ways to deal with practices that will not always coincide with conventional Western values. With few parallels in other jurisdictions, and fewer fixed formulas to help contextualise and deal with the expansion of the ayahuasca religions and their related challenges, we propose that Brazil's regulatory approach, which included the solicitation of input from affected groups as well as an emphasis on anthropological considerations, presents an alternative model of how an international war on drugs can be balanced against the interests of minority religious groups.

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