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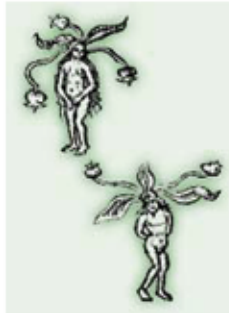
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## Comments on Brazil's 2010 Resolution Regulating Ayahuasca Use

BEATRIZ CAIUBY LABATE

**Abstract** This text provides a summary and analysis of the process of regulation of the use of ayahuasca in Brazil, from its first prohibition in the mid-eighties to its permission for ritual and religious purposes. It reviews the main legislative documents, anthropological literature pertinent to the topic, and expert opinions. Special emphasis is given to understanding the recent 2010 Resolution published by the Brazilian National Council on Policies about Drugs (CONAD), which establishes a “deontology of the use of ayahuasca,” and recommends the application of a set of rules, norms and ethical principles. This resolution does not indicate forms of control or sanctions to be applied in the case of an offense, leaving space for some juridical ambiguity. The paper reflects on current debates evolving out of the 2010 CONAD Resolution, and speculates on possible future implications. It also considers how dialogue between government representatives, researchers from different disciplines, and leaders of the ayahuasca-drinking groups influenced how the decisions were made regarding regulation of ayahuasca. The anthropological argument that native knowledge should be taken into account is a rather compelling one, but a model that is seldom adopted in cases of drug control. Brazilian legislation is pioneering in adopting this path, and the recognition of the right to religious use of ayahuasca has influenced judicial decisions in several countries.

**Key words** Ayahuasca – Santo Daime – União do Vegetal – drug policy – religious drug use – Brazil

### Kommentar zur Regelung des Gebrauchs von Ayahuasca in Brasilien 2010

**Zusammenfassung** Dieser Aufsatz analysiert und fasst den Verlauf der Regulierung des Gebrauchs von Ayahuasca in Brasilien von dessen erstem Verbot Mitte der 1980er Jahre bis zu dessen Erlaubnis für rituelle und religiöse Zwecke zusammen und setzt sich mit den wichtigsten gesetzgebenden Dokumenten, der einschlägiger ethnologischer Literatur und den Sachverständigengutachten auseinander. Besonderes Augenmerk wird auf die letzte Regelung aus dem Jahr 2010 gerichtet, die vom Brasilianischen Nationalrat für Drogenpolitik (CONAD) veröffentlicht wurde und eine „Deontologie über den Gebrauch von Ayahuasca“ festlegt sowie ein Regelwerk, Normen und ethische Prinzipien empfiehlt. Diese Regelung enthält keine Kontrollmechanismen und sieht keine Sanktionen für den Fall eines Verstoßes vor, was zu juristischen Unklarheiten führen mag. Es werden aktuelle Diskussionen referiert, die aus dieser Regelung aus dem Jahr 2010 entstehen und Vermutungen über mögliche zukünftige Auswirkungen aufgestellt. Es wird weiterhin erörtert, auf welche Weise Gespräche zwischen Regierungsvertretern, Wissenschaftlern verschiedener Disziplinen und Führern von Gruppen, die Ayahuasca verwenden, Einfluss auf die Entscheidung zur gesetzlichen Regelung über den Gebrauch von Ayahuasca genommen haben. Die Argumentation aus ethnologischer Sicht, indigenes Wissen in solche Überlegungen einzubeziehen, erscheint recht zwingend, kommt jedoch in Bezug auf Drogenregulierungen eher selten zur Anwendung. Die brasilianische Gesetzgebung nimmt diesbezüglich eine Vorreiterrolle ein. Das Anerkennen des Rechtes, Ayahuasca zu religiösen Zwecken verwenden zu dürfen, hat schon in mehreren Ländern Einfluss auf juristische Entscheidungen genommen.

**Schlagwörter** Ayahuasca – Santo Daime – União do Vegetal – Drogenpolitik – religiöser Drogengebrauch – Brasilien

### Introduction

On January 25, 2010, The Brazilian *Conselho Nacional de Políticas sobre Drogas* (CONAD [National Council on Drug Policies], previously named *Conselho Nacional Anti-Drogas* [National Anti-Drugs Council]), the Government agency responsible for drug-related issues, published Resolution n.01 (Resolução, 2010), a new resolution about ayahuasca. Ayahuasca is a drink usually composed of two plants, *Banisteriopsis caapi* and *Psychotria*

*viridis*, the latter of which contains DMT (N,N-dimethyltryptamine), a substance controlled under the 1971 United Nations Convention on Psychotropic Substances. Pronouncements such as “Ayahuasca is legalized in Brazil” or “Ayahuasca commerce is forbidden by the government” are circulating frenetically and uncritically around the Internet and in the media. It is important to understand what the publication of this document means, to contextualize it within the broader history of the regulation of

the use of ayahuasca in Brazil, and to reflect on its potential intended and unforeseen consequences for ayahuasca drinkers.

The current Brazilian drug control law is n. 11.343, passed in 2006, which supplanted the previous law n. 6.368, enacted in 1976. Since that time, the drug laws themselves have not stated which drugs are forbidden, but leave the designation of controlled substances to the Executive branch of the federal government. In Brazil this classification is done by a branch of the Ministry of Health, previously called the *Divisão Nacional de Medicamentos* (DIMED [National Division of Medicines]), but renamed the *Agência Nacional de Vigilância Sanitária* (ANVISA [National Health Monitoring Agency]) in 1999.

### History of Regulation of the Use of Ayahuasca

In this section the process of regulation of the use of ayahuasca in Brazil is briefly presented (cf. MACRAE 1992, 2008, 2010; GOULART 2004; LABATE 2005). In 1985, DIMED placed *Banisteriopsis caapi* (with parenthetical references to “vine of chinchona or chacrona or mariri,” confusing the *Banisteriopsis* vine and the *Psychotria* leaf) on the list of forbidden products in Brazil through Edict or Decree (*portaria*) n. 02/85. The *Conselho Nacional de Entorpecentes* (CONFEN [National Council on Narcotics]), the government body which was supplanted afterwards by the current CONAD, then proposed the formation of a Multidisciplinary Working Group to study the issue, through Resolution n. 04/85 (Resolução, 1985). It should be remembered that the formation of this group occurred in the period of the Brazilian political re-democratization process after the dictatorship, which lasted from 1964 to 1985. It is difficult to think that such an open approach would have occurred in the previous years. The following year, through Resolution n. 06/86, the vine *Banisteriopsis caapi* was temporarily removed from the list of forbidden substances (Resolução, 1986). In 1987, the CONFEN group presented its final report recommending the removal of *Banisteriopsis caapi* from the list, and allowing its “ritual and religious use” (Relatório Final, 1987). Scientific and experimental uses were not allowed. In 1992, new questions arose, and the previous decision was reaffirmed. Further debate occurred in 2002, with Resolution n. 26/2002 (Resolução, 2002). This document stated that people under 18 years old were not allowed to drink aya-

huasca, and that its exportation was forbidden; it also requested the formation of a new multidisciplinary group to establish norms of social control regarding the use of ayahuasca.

In 2004, the Government issued Resolution n. 05 (Resolução, 2004). Contrary to the previous one, this resolution allowed the use of ayahuasca by pregnant woman and people under 18 years old<sup>1</sup>, affirming that these were private family matters (*poder familiar*), and that the therapeutic possibilities of ayahuasca should be investigated scientifically. It also finally created the *Grupo Multidisciplinar de Trabalho sobre a Ayahuasca* (GMT Ayahuasca [Multidisciplinary Working Group on Ayahuasca]) announced in the previous resolution of 2002. In 2006, representatives of some Brazilian ayahuasca groups were elected in a rather controversial meeting in Rio Branco, Acre, in the Brazilian Amazon (MACRAE, 2008 and 2010), and later met together with representatives of the government and researchers to form the GMT Ayahuasca. This group met periodically in the capital, Brasília, and released their Final Report in 2006 (Relatório Final GMT Ayahuasca, 2006), which has been published only in 2010, after four years, as part of the CONAD Resolution n. 01, 2010.

### Some aspects of this regulation process deserve comment

- The regulation of the religious use of Ayahuasca was carried out by CONAD. This body analyzed the use of ayahuasca and allowed its religious and ritual use, but this did not entail removing DMT from ANVISA’s forbidden products list. *Banisteriopsis* was inserted in this list, and then removed from it, but DMT had already been listed and remained so.
- Brazil is signatory to the 1971 Convention that forbids the use of DMT, but the initial policy discussions in Brazil did not refer to the UN international treaties, nor to its provision allowing states to make exceptions for traditional uses of certain substances (article 32). Brazil did not propose an exception for the indigenous or religious uses of ayahuasca when ratifying the 1971 Convention nor afterwards.
- In 2004, in a report produced by experts to provide CONAD with scientific, scholarly, and technical advice for the elaboration of its future ayahuasca policies (CATC, 2004), a vague mention

- was made of a document from the International Narcotics Control Board (INCB), a quasi-judicial body of the United Nations drug control system. This document, written by Herbert Schaepe, Secretary of the INCB, was produced in response to a request made by defendants in the Santo Daime legal case in the Netherlands (SCHAEPE 2001). It stated, that in its interpretation, neither the natural plants that compose ayahuasca, nor the brew itself can be considered forbidden according to the 1971 UN Convention<sup>2</sup>. This INCB reference was first quoted in the experts' report mentioned above, and again in the text of the 2004 CONAD Resolution itself. It is relevant to note that it was only in 2004 that the Brazilian government made reference to the 1971 UN Convention and its intentions. We could speculate that this reference is the result of international pressure on the Brazilian government due to the expansion of the use of ayahuasca and several legal cases involving Santo Daime and UDV abroad. As previously mentioned, the INCB document itself was a result of the conflicts involved in this expansion. In any case, it is also important to observe that this INCB ruling does not represent a definitive international or universal understanding on the issue. For example, during the UDV's legal proceeding in that country, the government and Supreme Court of the USA did not agree with the INCB's determination that ayahuasca was excluded from the 1971 UN Convention (MEYER 2006). The Canadian government also did not accept the INCB's interpretation (TUPPER 2011).
- The debate in Brazil did not focus much on the biomedical discourse around ayahuasca use. Even though medical scientists were called to participate in the various multidisciplinary working groups, the discussion on whether scientific research had managed to “prove” that ayahuasca is harmless was not predominant. This is in contrast to the approach taken in the UDV and Santo Daime court cases in the USA, where biomedical experts were called to testify and discussed in detail results from scientific research involving the use of ayahuasca and DMT. Even if in the North American context there was a strong biomedical discussion, the final permission to use ayahuasca was granted under another argument; that of freedom of religion (MEYER 2006).
  - The negotiations and decisions made by CONFEN/CONAD were based on an interdisciplinary and dialogical process. The idea that native knowledge and discourse should be taken into account, which is an anthropological argument, is a rare and rather interesting approach to the development of drug control policy.
  - Another issue deserving attention is the relationship between the Brazilian drug laws and CONAD. The entire debate on the use of ayahuasca since 1985 has been conducted independently of consideration of both the 1976 and 2006 drug laws. The Brazilian system adopted a rather ad hoc solution: CONFEN/CONAD discussed the matter, and issued resolutions and opinions (*pareceres*) about it. It is important to clarify that a resolution is not a law. This leads us to the next point, regarding the understanding of the legal status of the new resolution.
  - The CONAD/CONFEN resolutions and the law 11.343/2006 do not define what “religious use” is. It is well known that providing such a definition is quite a complex legal and anthropological matter. There is no definition of religion in the Federal Constitution or in any legal statute in Brazil; this definitional issue has implications far beyond religious ayahuasca use. The absence of a legal definition has not prevented the legal system from dealing with the topic of religion, such as in cases of criminalization of religious discrimination and tax-exemption for religious temples (WEINGARTNER 2006). It is possible to say, in broad terms, that the 2010 CONAD Resolution defined what the “religious” use of ayahuasca is.
  - The process of regulation of the use of ayahuasca in Brazil took place at the level of Government administrative policies, and not as a result of legal court cases, such as was the case of the UDV and Santo Daime in the USA, the Santo Daime in the Netherlands and in several European countries. The Canadian government also took the administrative path, approving “in principle” a legal exemption for the Santo Daime's use of its sacrament in that country (TUPPER 2011).

#### **Ambiguities in the current situation**

It is also worth commenting that since 1985, despite the aforementioned policy determinations, there have been a number of grey and foggy legal areas involving the use of ayahuasca in Brazil. We can iden-

tify several problems, such as: child custody battles between divorced parents where the fact that one belongs to an ayahuasca religion is used by the other as a reason for disqualification of parental rights (“Repercute caso,” 2010; “Pai mantém,” 2010; “Negada Reversão,” 2010); foreigners who had a travel visa to visit Brazil denied because they admitted that they planned to participate in ayahuasca rituals in the country; a research scientist accused of “condoning drug use” by stating in a speech that she “liked to take ayahuasca”; Brazilians who were repeatedly detained at airports for carrying ayahuasca out of Brazil; blood donors who had their donations rejected in the city of Rio Branco because the public health system knew they were members of these religions (Carta das Comunidades, 2010), and the difficulties involved in having the Brazilian government issue an official document approving the export of ayahuasca as requested by the Canadian government (TUPPER 2011).

According to information collected during years in the field, some of these problems allegedly come from several internal pressures in Brazil against CONAD's regulation of the use of ayahuasca. Some claim that these pressures are coming from the Foreign Ministry and the Federal Police, perhaps under the influence of the U.S. Drug Enforcement Administration. There are also theories about evangelical church lobbies against the permission to use of ayahuasca, and other international and external pressures.

Regardless of persisting ambiguities in the current context of Brazilian policy and law, some judicial decisions have been made that theoretically can establish precedent in ayahuasca cases. We can cite, for example, the 2002 Decision from the District Court for the 2<sup>nd</sup> Region (ACÓRDÃO 2002), which decided that an investigation (*inquérito*) opened against two Dutch citizens, who were stopped by the Federal Police in the airport of Rio de Janeiro trying to take ayahuasca out of the country to perform Santo Daime rituals in the Netherlands, should be closed, since ayahuasca is not listed as a prohibited substance in Brazil. Nevertheless, in 2009, Dutch members of Santo Daime flying to Holland were stopped in the airport of Rio de Janeiro for the same reason. Federal Police apprehended the Daime, and an investigation was opened. Because the case is still in its preliminary stages, there is no further

news about it at the time of publication of the present text.

### Implications of the 2010 CONAD Resolution

In this section I will try to address the content of the 2010 CONAD resolution, its broader implications, and its specific legal status pertaining to the lack of a law regulating the issue.

It could be said that, on the one hand, that this resolution represents further legitimization and recognition of the religious use of ayahuasca in Brazil (i. e., a guarantee in case a judge or policeman wants to create problems in certain situations); on the other hand, the resolution appears to create more legal obligations and duties for ayahuasca drinkers. Previously, there was just a general recognition of the validity of the “ritual and religious use of ayahuasca.” Now, more precise patterns and rules for these uses are established. This is the opposite of what major Brazilian news media have been announcing: *liberal geral* (“now it is totally free”) (LABATE 2010).

The 2010 CONAD Resolution tries to establish a “deontology of the use of ayahuasca”: a set of rules, norms, and ethical principles that should be followed. Among them are prohibitions of commercial distribution of ayahuasca, therapeutic uses, tourism, advertisement, use outside religious rituals, and association with illicit drugs. Pregnant woman and children were given permission to partake in rituals (see also: LABATE 2011). Rules regarding transportation of ayahuasca, and the harvesting of wild *Banisteriopsis caapi* and *Psychotria viridis* plants were established, and it was suggested that groups achieve ecological sustainability by planting these species in order to fully supply their needs<sup>3</sup>. Parameters for receiving newcomers were indicated. It was also suggested that the various religious groups form as legal entities, and register themselves at CONAD. Finally, the resolution encourages future scientific research on the therapeutic potentials of the use of ayahuasca.

It is noteworthy that a lot of these issues were raised by the ayahuasca groups themselves, especially the ones that consider themselves more traditional. Even though there were disputes and concessions on all sides during the GMT Ayahuasca process, some of these groups were more successful in inscribing their morality on the “right version” of ayahuasca use into national policy level. Interestingly, the current legal situation has been used by



groups in public and internal discussions as evidence of the “sacred” character of their use of ayahuasca. At the same time, these groups have already appropriated the new resolution in the accusatory dynamics that are characteristic of this field (GOULART 2004; LABATE 2004).

The new resolution states at the end: “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” (CONAD 2010, my translation). As in this case, resolutions do not normally specify punishments and penalties. These are to be found in the law, which, with respect to ayahuasca, still does not exist. Regardless, the new resolution could have been more emphatic in delineating the rights and obligations of the groups, and also might have established which sanctions would be applied in the case of specific offenses. Since this was not the done, there remains a great deal of ambiguity that may lead to further arguments and debates at the judicial level.

The publication of the 2010 CONAD Resolution nevertheless brings concrete effects to the juridical world. This resolution is the most comprehensive and up-to-date legal solution to deal with the topic of ayahuasca use in Brazil. The answers to the question of what would happen if people are caught selling ayahuasca through the internet, or conducting therapeutic workshops, harvesting the vine in protected environmental areas, or using ayahuasca recreationally is still unclear. First, there is the problem of determining whether the resolution’s parameters were violated or not; for example, determining whether the use was religious or not. This is not exclusive to the Brazilian ayahuasca situation; analogous cases can be found, for example, in the disputes over “religious” use of marijuana in USA and UK courts (WALSH 2010). Of course, one could argue that what is religious is “obvious,” and there are certainly exemplary cases; but there are certain situations where this is not so clear. Making these determinations can be especially hard considering the rapid expansion of smaller groups all around Brazil, the hybrid character of some of these groups, and the challenges in establishing the definition of the border between “religion” and “healing” in ayahuasca rituals (LABATE 2004; ROSE 2005, 2010; LABATE & BOUSO, 2011).

For example, someone taking ayahuasca at a rave could claim that this is a “spiritual community” using the plant in a “sacred way,” or someone selling the plant could say that the buyers are members of a church. The second problem would be to stipulate what would happen in cases where these transgressions are confirmed.

I have interviewed several specialists regarding the interpretation of the new resolution; some of them lawyers or judges related to the ayahuasca universe, and some not. There seem to be two main lines of interpretation. One line states that the recommendations made in the resolution are just “recommendations” or “indications”; therefore, there would be no possible sanctions in cases of transgression. The resolution merely suggests mechanisms of control, having no power, in the words of an informant, of “cogent normative force.” This interpretation is strengthened by the fact that the end of the resolution suggests the creation of mechanisms of control. In other words, not much would happen in empirical terms: The problem of not following the parameters established by the resolution would mainly be a *moral* one. This does not mean, however, that it is a non-existing or necessarily weak form of control.<sup>4</sup> If the parameters of use present in the new resolution are implemented, then the recommendations would actually be legally binding.

The second interpretation focuses on the reported inappropriate uses of ayahuasca: Drug control law 11.343/2006 would punish all ayahuasca use that is inconsistent with what is protected by the 2010 CONAD Resolution. Any deviation from what is established in this resolution would receive sanctions equivalent to those applied to illegal drugs such as marijuana, cocaine, and others. This line of interpretation is quite hard, and would likely lead to severe consequences, including fines and imprisonment.

There seems to be a consensus that Brazilian courts will exercise their judicial power and eventually make certain decisions in specific situations. For example, in the case of an accusation of commercial trade in ayahuasca, where the defense alleges the economic transaction was a “religious” one, theoretically it could be possible for a judge to hire an expert to define whether or not that specific context was a religious one based on common scientific principles. These decisions will create precedent for further cases. This means that the new resolution would be another step in a process that is already on course,

where certain undefined legal aspects end up influencing specific decisions, followed by new phases of regulation. It is likely that with the publication of the new resolution more problems will be reported, and the legal activities around this subject will be intensified. It is also plausible that in the future the resolution will be further refined, and new elements of control added to it.

We should remember that, in practical terms, the judicial decisions will likely vary from judge to judge, not only because of the lack of a specific law to regulate the uses of ayahuasca, but also due to each judge's political views towards the topic of psychoactive substance use. Future developments also depend on other broader factors, such as the ability of political groups to lobby against the use of ayahuasca, external pressures from other states in the international community, or the presence of media scandals involving these groups (LABATE 2010; LABATE, ALVES jr., ROSE & LEMOS 2010).

There seems to be a lot of diversity of opinion among the various Brazilian ayahuasca groups regarding what constitutes "abuse" of ayahuasca; for example, if selling ayahuasca to the church's own members is a "commercial" use of ayahuasca or not, or determining if some practices are legitimate at all. There is also quite a variety of interpretations about directions to take in the future. Some would like to see the government control the issue as much as possible, while others would like to see such controls minimized, and the State kept from interfering in these practices. Some have suggested the creation of a Council of Ayahuasca Churches, while others are skeptical about this notion. Regarding jurists, there seems also to be a variety of visions, some being much more optimistic about the current legal status than others. Activists have also expressed different understandings of the new resolution. Some think it should have been more inclusive of the therapeutic uses of ayahuasca, and that it should also regulate the ayahuasca trade between the groups in less moral terms. Others believe this resolution advances the public debate in a significant manner. As is frequently the case in the discussion of drugs, the debate is highly ideological and polarized.

Despite the possibility that this resolution leaves a legal vacuum, the evolution of the ideas expressed in it is certainly part of the fascinating on-going Brazilian historical and political process. The discourse surrounding public policy and ayahuasca use in Bra-

zil has already influenced laws pertaining to the use of ayahuasca in several countries, including Canada, the USA, Italy, France, the Netherlands, Spain, Germany, the UK, Ireland and other places where the use of ayahuasca has been introduced. At this time, there are few parallels in other jurisdictions in the world, and fewer fixed formulas to help contextualize and deal with this phenomenon and its challenges.

## Notes

- (1) For a discussion about pregnant women and children's consumption of ayahuasca, see LABATE 2011.
- (2) His interpretation was later reaffirmed by the INCB in an official reported dated from 2011 (INCB, 2011).
- (3) Later in the same year the government from Acre issued a resolution controlling the harvesting and transportation of the plants that compose ayahuasca (Resolução Conjunta, 2011).
- (4) Note that the use of ayahuasca in combination with the use of illegal drugs, for example *Cannabis*—named "Santa Maria" in some Santo Daime branches (MACRAE 2006)—, would be a crime in itself, which could be punished through article 28 from the previously mentioned drug control law 11343/2006

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