

Ayahuasca under International Law: The Santo Daime Churches in the Netherlands

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Ayahuasca: Not Controlled by International Conventions

In the criminal procedure against the Santo Daime churches in the Netherlands, the District Attorney delivered an official letter from the Secretary of the United Nations International Narcotics Control Board, the INCB.¹ The letter answered questions from the Dutch Ministry of Public Health about the use of “ayahuasca” by the Santo Daime churches in the Netherlands and explained:

The above-mentioned issue was consulted by the INCB Secretariat with the Scientific Section and the Legal Advisory Section of the United National International Drug Control Programme (UNDCP). It is our understanding that “ayahuasca” is the common name for a liquid preparation (decoction) for oral use prepared from plants indigenous to the Amazon basin of South America, essentially the stem bark of different species of a jungle vine (*Banisteriopsis sp.*) and the tryptamine-rich plant *Psychotria viridis*. According to the scientific literature, ayahuasca commonly contains a number of psychoactive alkaloids, including DMT which is a substance included in Schedule I of the 1971 Convention on Psychotropic Substances.

The conclusion of the INCB was:

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 same opinion was expressed by the INCB on (preparations of) mushrooms that contain by nature the psychoactive substances psilocin or psilocybin. In 2004 the Board established an *ad hoc* working group to look into this matter anew. After a thorough study and discussion the working group concluded that the opinion expressed on psychoactive mushrooms by the Secretariat in 2001 should remain as it is (Lousberg, 2005).

National Jurisprudence: The Netherlands

Despite this clear explanation by the International Narcotics Control Board, nations like the Netherlands, France, and the United States for example, seem to have a hard time accepting this point of view. After all, it would imply that the individual countries are not compelled by any international treaty to criminalize the use of decoctions of *Psilocybe* mushrooms or ayahuasca or “jurema” (the tea brewed from the roots of the *Mimosa hostilis*).

The Dutch Supreme Court referred to the Convention in the past in its interpretation or explanation of the Dutch legislation on psychotropic substances. As a result, possession or selling of fresh mushrooms was not under control of the Dutch Drug Law, the so-called Opiumwet, for example. However the Court changed its jurisprudence on this matter in a judgment in 1998 (Hoge Raad, 1997; Hoge Raad, 2002). The Dutch Supreme Court decided then that any processing of mushrooms containing psilocybin or psilocin, including simply drying the plants, turns them into a substance that is prohibited by law. This means that the Dutch Supreme Court chose a far more restrictive drug policy on mushrooms and other psychoactive natural substances than the International Convention on Psychotropic Substances requires. It also means that processing of any natural substance containing a hallucinogenic chemical renders its possession or delivery illegal. For Dutch law, such processing would make it equal to the pure psychotropic substance that it contains by nature.

The implication was that from then on you could freely eat a fresh *Psilocybe* mushroom in the Netherlands. Thus the so-called Smart shops kept them fresh in their refrigerators. However, as soon as you bought this mushroom dried or prepared in a cookie, you became punishable. If you sold or delivered this preparation to someone else, you would basically be risking a prison sentence of 8 years. The same applied to using or delivering jurema and ayahuasca after 1998, according to the Dutch Supreme Court. You are allowed to chew the vine of the *Banisteriopsis caapi*, even if you combine it with some leaves of the *Psychotria viridis*. But serving the ayahuasca tea, which is brewed from a mixture of the two plants, in a Santo Daime ritual was clearly seen as a punishable act in the Netherlands since 1998. On December 1, 2008, this confusing policy regarding the hallucinogenic mushroom came to an end by the introduction of this mushroom on the official Schedules of controlled substances of the Dutch Opiumwet. Henceforth, it is prohibited to produce, sell or possess processed as well as fresh hallucinogenic mushrooms in the Netherlands. However, for all other natural products containing hallucinogenic properties like ayahuasca, the described double policy had not changed yet.

International Respect for Non-Christian and Nature-oriented Religious Practices

The authors of the Convention on Psychotropic Substances warned against those exact consequences. In a United Nations Conference for the adoption of a protocol on psychotropic substances, the US delegation said that it “was not worth attempting to impose controls on biological substances from which psychotropic substances could be obtained (Records, 1971).” After all, psychotropic substances can be found in a large diversity of living organisms, among which are mushrooms, cacti, fishes, and nuts. Any endeavor to control this could result in the extinction and annihilation of a currently unpredictable diversity of plants and animals and would have unforeseeable consequences for food laws.

The official Commentary on the Convention is crystal-clear on the fact that neither infusions nor the roots of such plants as the *Mimosa hostilis* or *Psilocybe* mushrooms are covered by the Convention. This commentary mentioned explicitly: “Nei-

ther the crown, fruit, mescal button of the peyote cactus nor the roots of the plant *Mimosa hostilis* nor *Psilocybe* mushrooms themselves are included in Schedule I, but only their respective active principals Mescaline, DMT and Psilocybine (Psilocine, Psilotsin)... with the addition: ‘An infusion of the roots of the *Mimosa hostilis* is used (.....) and (.....) beverages made from such mushrooms are used’” (Commentary, 1971).

The fact is that at the time of signing, the Convention offered the individual countries a possibility for reservations with regard to plants growing wild on their territory that were traditionally used by certain small, clearly determined groups in magical or religious rites. For example, the US made such a reservation for peyote, harvested and distributed for use by the Native American Church. Canada did the same. Peru, for another example, made a reservation for ayahuasca as well as for the cactus known as San Pedro (containing mescaline and used by indigenous medicine men or shamans). The Commentary underlines, however, that such reservations have only to be made for a distant future, for the possible occasion that infusions like ayahuasca and jurema or cacti like peyote or San Pedro, or mushroom beverages were ever to be placed on Schedule I of the Convention. In that case, the reservations already in place could give the individual state legislatures the freedom to not criminalize the traditional use of those plants. Peru could then make an official exemption in their drug legislation for the traditional use of for example, ayahuasca. In this respect the official commentary underlines: “It may be pointed out that at the time of this writing (1971) the continued toleration of the use of hallucinogenic substances ... does not ... require reservation.... Schedule I does not list any of the natural hallucinogenic materials in question, but only chemical substances which constitute the active principals contained in them” (Commentary, 1971; 387).

The Jurisprudence of the Supreme Court of the United States on the Handling of Preparations made from Natural Materials

The District Court of New Mexico accepted this interpretation of the Convention in 2002 in a decision dealing with the request by the American branch of the Brazilian religious community União do Vegetal (UDV) to protect their freedom to use hoasca/ayahuasca in their religious ceremonies (Bronfman, 2011).² It decided that the Treaty does not appear to extend to 'Hoasca' (as the UDV calls ayahuasca). The court stated “that it felt appropriate to turn to the Commentary, which makes clear that the scheduling of a hallucinogenic chemical in the Convention does not imply the scheduling of a plant that contains that chemical” (Unpublished Memorandum, Aug. 12, 2002).

Unfortunately the Supreme Court of the United States decided otherwise on February 21, 2006. It ruled then:

The District Court found that the Convention (of 1971) does not cover “hoasca” (...) We do not agree. The Convention provides that “a preparation is subject to the same measures of control as the psychotropic substances which it contains” and defines “preparation” as “any solution or mixture, in whatever physical state, containing one or more psychotropic substances” (...) Hoasca is a “solution or mixture” containing DMT; the fact that it is

made by the simple process of brewing plants in water, as opposed to some more advanced method, does not change that. To the extent the commentary suggests plants themselves are not covered by the Convention, that is of no moment – the UDV seeks to import and use a tea brewed from plants, not the plants themselves, and the tea plainly qualifies as a “preparation” under the Convention (Gonzales v. O Centro Esprita Beneficente União do Vegetal, 2006)

From these examples it may be clear that the national jurisprudence has an unimpeded ability to give a more extensive interpretation of the concept of a “preparation” of a psychotropic substance than the INCB of the United Nations. The decisions of the Dutch as well as the United States Supreme Court illustrate that a “preparation” includes any treatment of natural materials containing a hallucinogenic substance. Defining a natural material as a preparation means that it is seen to be the psychotropic substance that it contains by nature. At the same time, the possessor of it becomes liable to punishment. Consequently, the drying of fresh (and at the time not prohibited) mushrooms was for a long time defined as a criminal act in the Netherlands. Equally, the use and possession of the brewed ayahuasca or jurema tea is defined as a punishable act as well in both the Netherlands and the United States.

Examples of Diverging National Legislation on Psychotropic Substances: The Netherlands, the United Kingdom and France in the cases of Mushrooms and Ayahuasca

The member nations of the Convention of 1971 do not only have the right to adopt more strict or severe measures of control in their national jurisprudence; they can also introduce stricter regulations than those provided by the Convention in their legislation. They can do so, if “in its opinion, such measures are desirable or necessary for the protection of the public health and welfare (Convention, 1971).”³ In the Netherlands such measures were until now not deemed necessary or desirable for ayahuasca. But in December 2008, the Netherlands’ Minister of Health introduced legal measures for the prohibition of all known mushrooms containing psychoactive substances, no matter if they were fresh or processed. (Besluit, 2008) With this, the Minister disregarded without any new valid argument the clear advice of its own experts. In 2000 and 2007, a State-nominated commission, the Coordination Centre for the Assessment and Monitoring of new drugs (CAM), carried out a risk assessment on psychotropic mushrooms containing the active substances psilocin and psilocybin. The CAM concluded both times that these mushrooms scored relatively low on the risk scale that this commission used. The risk for public health and order was judged to be minimal. In view of that, the CAM advised that “paddos” (psychoactive mushrooms) do not present any need for a statutory ban (Coordination Centre for the Assessment and Monitoring of New Drugs, 2000; (Coordination Centre for the Assessment and Monitoring of New Drugs, 2007) The Cam had advised the Dutch government similarly before, regarding ayahuasca. Despite the existing up-to-date CAM advice, the Minister of Health decided to criminalize all hallucinogenic mushrooms.

Similar measures were introduced in the United Kingdom in July 2005, when a new legislation was adopted in which the (until that moment) freely salable “magic

mushrooms” were made a Class A drug. This was done by simply inserting a sentence into Part I of Schedule 2 to the British Misuse of Drugs Act: “Fungus (of any kind) which contain Psilocin or an ester of Psilocin (Misuse of Drugs Act, 1971).”

The same happened in France with ayahuasca as the one and only country in the world in which the raw materials that the drink “ayahuasca” is made are of included in the list of controlled substances (Coordination Centre for the Assessment and Monitoring of new drugs, 2000)⁴ The French Minister of Health chose on April 20, 2005 to extend the list of substances classified as narcotics punishable under the French Drug Law with *Banisteriopsis caapi*, *Psychotria viridis* and *Mimosa hostilis*: the plants of which ayahuasca and jurema are brewed (Arrêt, April 20, 2005) This was his Ministerial reaction to a decision of the Paris Court of Appeal on January 13, 2005 to dismiss six members of the French branch of the Santo Daime Church of the criminal charges of having imported the forbidden drug ayahuasca into France and having it delivered to members of the church. The Paris Appeal Court decided, like the United States District Court of New Mexico in 2002, that the ayahuasca tea used by the French Santo Daime churches in their rituals was not a substance in the sense of the Convention or the law. The Court explained more precisely that the process of brewing the tea, the so called “opération de ‘décoction’” was insufficient to place it under the Convention of Vienna an French Drug Law’s rules on isolated chemical substances (in this case DMT) (Arrêt, Jan. 13, 2005). However, the ensuing ministerial decision implied a complete nullification of this positive legal outcome for the churches. So, paradoxically, after having faced a long juridical battle against the government, and having won, within three months the Santo Daime ritual works in France were criminalized anew by a mere ministerial decree.

The Protection of Human Rights and Fundamental Freedoms

The Convention on Psychotropic Substances itself does not offer a right of complaint for the individual citizen against these national interpretations of the Convention and national legal adoptions to it. There are no possibilities for appeal to an international authority regarding the above-mentioned interpretations of the Treaty on Psychotropic substances. The only straws to grasp for the convinced ayahuasca drinker are the fundamental human rights that are protected in national constitutions and international treaties like the European Convention for the Protection of Human Rights and Fundamental Freedoms (November 4, 1950) or the United Nations International Covenant on Civil and Political Rights (December 19, 1966). The Santo Daime churches in the Netherlands relied precisely on this European Convention: Article 9, the protection of the freedom of religion. Article 9 of the European Convention is basically similar to Article 18 of the United Nations Treaty on Civil and Political Rights. The Santo Daime churches succeeded, in this way, to legalize their sacrament ayahuasca in the Netherlands (see next section). In its decision of May 21, 2001, the District Court of Amsterdam recognized the fundamental rights of the churches, protected by Article 9 of the European Convention, to celebrate their religious ceremonies with the sacrament ayahuasca. It was the first time in the Netherlands that drug legislation had to give way to stronger constitutional rights (Rechtbank, 2001)⁵

In the United States, the União do Vegetal chose the same path to legalize the use of ayahuasca in its religious ceremonies. When its newly imported ayahuasca was confiscated, the UDV relied on, among other arguments, the U.S. Religious Freedom Restoration Act, which prohibits the government from violating a person's exercise of religion, unless it can demonstrate that the violation represents the least restrictive means of advancing a compelling interest.⁶ The complaint alleged that applying the prohibitions of the drug legislation to the UDV's sacramental use of ayahuasca violates this Act. The District judge of New Mexico, as well as The United States Supreme Court in the aforementioned decisions of 2002 and 2006, concluded in this application that the government had indeed failed to demonstrate a compelling interest justifying the violation of the UDV's sincere religious exercise in barring the UDV's religiously-based sacramental use of ayahuasca.

The Canadian branch of the Santo Daime church was also successful by relying on such a constitutionally granted fundamental right of freedom to practice one's religion.⁷ The Canadian church applied in 2003 to the Minister of Health for a so-called exemption from the prohibitions of the Canadian Controlled Drugs and Substances Act to import, possess, transport, and administer Daime tea for its religious purposes. The Ministry approved this request by letter on July 31, 2006 on the condition that Health Canada would receive notification from the Brazilian authorities that official permission to export the substance was granted (Pieterse, July 31, 2006).

In 2008, the French branch of the Santo Daime church had applied for a similar exemption under French law. At the moment, this church also studies the possibility of filing a complaint to the Human Rights Committee in Geneva against the French government based on the violation of its freedom of religion, protected by Article 18 of the United Nations Covenant on Civil and Political rights.

The Santo Daime Process in the Netherlands

In the Dutch criminal procedure against the Santo Daime church, two church leaders were prosecuted for serving Daime to church members in a religious ceremony in Amsterdam in October 1999. The two leaders were arrested on the scene and imprisoned for four days. The jug of ayahuasca on the altar was confiscated, as well as the *Cannabis* joints that were waiting to be served to the church members during the ritual as the church's second sacrament, "Santa Maria."⁸ The case was only heard in court in March 2001 after the refusal of the churches to accept an offer by the District Attorney to dismiss it. Additionally, the possession of a limited amount of *Cannabis* for individual use is officially not prosecuted in the Netherlands. The churches preferred to have a fundamental answer to the defense of their right to enjoy the freedom of religion during their rituals, specifically the freedom to use ayahuasca during their ceremonies. Dismissal of the case would not mean that the churches could continue their rituals, but only that the two church leaders would not be brought to trial.

In court, the prosecutor used the argument that the ayahuasca that the church leaders served during the rituals contained the punishable psychoactive substance DMT. The amount of DMT found in the confiscated brew was, after all, only 0.02%. The tea was considered a processed substance, which made it, according to Dutch juris-

prudence, equal to the punishable substance it contains by nature. From their side, the Santo Daime churches relied on the fundamental right protected by Article 9 of the European Convention to celebrate their religious ceremonies with their holy sacrament ayahuasca.

First of all, the churches could prove that they belonged to a serious religious organization. They were officially registered as a church in the Netherlands since 1995. Moreover, they formed part of the officially recognized Brazilian Santo Daime church Cento Eclético da Fluente Luz Universal Raimundo Irineu Serra (CEFLURIS), which, since the 1990's, has had several international branches in European countries, Japan, Canada, and the U.S.A. Furthermore, a large number of experts, from anthropologists to pharmacologists and psychiatrists, informed the judges as to the historical background of the churches, their ritual use of ayahuasca, and the relationship between the use of psychoactive substances and religious practice in general.

In Holland, however, it is not enough simply to register an organization as a church in order to derive the special legal benefits from this status. Earlier, the Supreme Court refused an appeal for this special status by an organization called *De Zusters van het Klooster Sint Walburga* or "The Sisters of the Nunnery Sint Walburga." This organization was indistinguishable from a simple sex club in the view of the Supreme Court: neither the paying visitors nor the nuns were able to demonstrate any religious intention (Hoge Raad, 1986).⁹

Religious intention or conscience does indeed form a necessary condition to be fulfilled before one can successfully rely on the protection of Article 9 of the European Convention or Article 18 of the United Nations Treaty on Civil and Political Rights. One of the experts for the defense gave a very detailed description of the ceremonies of the CEFLURIS church. The Brazilian anthropologist Edward MacRae explained to the court that: "The hymns of the Church are conceived of as having been received by Mestre Irineu from God and are remarkably similar to the hymns sung in a Catholic Church. They reflect a belief in Jesus Christ as the Savior and speak to all of the traditional Catholic values and social standardsthe Santo Daime works all begin with the Lord's Prayer and the Hail Mary..."

MacRae also informed the court that: "In Brazil several important Catholic leaders recognize the Santo Daime church and have spoken eloquently about its service to environmental and humanitarian issues and it is considered a full partner in inter-religious organizations and conferences in Brazil (MacRae, 2001)"

Those testimonies formed a solid base for the protection of Article 9 of the European Convention. The Dutch court could not deny the explicit and—given its decade long history—even traditional religious character of the Santo Daime church.

Psychoactive Substances and Freedom of Religion

Once the religious character of an organization has been admitted, the protection under Article 9 of the European Convention extends to all the acts or ceremonies with which belief is expressed. A state is not allowed to intervene in the means of expressing one's individual belief. The European Court of Human Rights defined this

rather strictly in 1996 (*Manoussakis and Others v Greece*, 1996). It said: “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.” Moreover, even if the manifestations of someone's belief are not familiar to a certain culture, they must be respected as inherent to the freedom of religion. The CCPR ([International] Covenant on Civil and Religious Rights) of the United Nations expressed this clearly in relation to Article 18 of the Covenant on Civil and Political Rights (the counterpart of Article 9 of the European Convention on Human Rights, ECHR). The CCPR said on this matter:

The freedom to manifest religion or belief in worship (...) encompasses a broad range of acts. The concept of worship extends to ritual and ceremonial acts giving direct expression to belief as well as various practices integral to such acts (...) (it) may include not only ceremonial acts but also such customs as the observance of dietary regulations (etc.).

The Committee observes that the concept of morals derives from many social philosophical and religious traditions; consequently, limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition (CCPR, 1993).

In the Dutch Santo Daime procedure the defense experts could inform the judge as to the historical fact that the use of drugs in a religious setting was not unique at all. The use of psychoactive substances like ayahuasca, the peyote cactus, or psilocybe mushrooms in religious rituals can be traced back to ancient times in human history, the historian S.A.M. Snelders explained to the court.¹⁰ In the western world however, there reigns a chronic lack of understanding of these historical facts, the expert told the court. (Snelders, 2001)

Dr. R. Kranenborg, a scientist of religion at the University of Amsterdam, came to the conclusion that the use of ayahuasca within the ceremonies of the Santo Daime church is essential for the church members' perception or consciousness of God. In other words, drinking the tea was inextricably linked with the worship of the church. (Kranenborg, 2001)

Any Risk to Public Health?

When all this is established, a government that has signed the aforementioned international conventions will only be able to intervene in someone's freedom to manifest one's religion, according to the European Convention, if the limitations are prescribed by law and if they are necessary in a democratic society in the interest of public safety or the protection of public order, health, morals, or the rights and freedom of others. In the criminal procedure against the Dutch Santo Daime churches, the prosecutor stated that the use of ayahuasca was prohibited by Dutch drug law, but he was not able to prove that the use of ayahuasca by the churches implied a danger to public health or morals.

The experts were unanimous in their conclusions that the ritual use of ayahuasca during the worship of the Santo Daime churches did not cause any danger to public health. Professor Dr. F. A. de Wolff testified in court as an expert both for the defense

and for the prosecution. His conclusions on this matter convinced the court. He wrote:

1. Ayahuasca consumption may involve health risks in individual cases;
2. Generally, the information about these risks provided by the Santo Daime church to the participants in their meetings is correct and adequate;
3. The limited availability of ayahuasca and the strictly regulated conditions surrounding the consumption thereof provides protection against abuse on the part of the congregants;
4. In view of points 1-3, as well as the limited scale of the Santo Daime church, it is not plausible, according to current scientific thinking, that ayahuasca consumption constitutes a health hazard. (Wolff, 2001)

Prof. Dr. Charles D. Kaplan of the Department of Psychiatry and Neuropsychology of the University of Maastricht drew even stronger conclusions. He stated in his expert report for the court: "In closing, I would conclude that the use of 'Daime' in a ritual context motivated by a search for spiritual and (mental) health provides an acceptable and minimal risk to public health and, in fact, is likely to provide an unseen benefit for our health system." (Kaplan, 2001)

The experts again were unanimous in their conclusion that, in particular, the social setting in which the use of ayahuasca took place in the ritual worship of the Santo Daime church was sufficient to further reduce any possibly remaining harmful effect of the use of ayahuasca.

The Amsterdam District Court adopted the opinion of the experts in their final decision on the case on May 21, 2001. It was the opinion of the court that the drinking of ayahuasca within the religious and ritual setting of the Santo Daime churches did not involve any considerable risk for public health. Although ayahuasca consumption might involve certain health risks in individual cases, the information provided by the church to participants of the rituals and the regulated conditions surrounding the consumption within the religious community formed, in the opinion of the court, a sufficient safeguard against unacceptable health risks in those cases that the use of the tea had to be advised against.

Worth mentioning in this context is the more detailed research the Court ordered before drawing this conclusion. While arresting the church leaders on October 6, 1999, the police also confiscated several joints containing *Cannabis* which were left on the altar in the Amsterdam church, waiting to be consumed by the participants during the rituals. The Court wanted information regarding any eventual extra risks of combining the use of ayahuasca with *Cannabis*. Prof. J. C. Callaway of the University of Kuopio, Finland, Faculty of Pharmacy, could ease the Court's mind on this matter. He wrote to the Court:

Although, there has been some recent concern in combining marijuana (i.e. drug-Cannabis) with ayahuasca, however there are no scientific studies or reports to support this concern, neither on the basic scientific level nor on the clinical level. For example, there are no known contraindications between dronabinol (synthetic THC, sold as Marinol) and MAO inhibitors or SSRIs. In fact, the anti-emetic effects of marijuana would probably alleviate at least some of the nausea and occasional vomiting often asso-

ciated with the use of ayahuasca, which suggests a palliative effect, rather than a putative toxic effect.(Callaway, 2001)

International constitutional rights, like freedom of belief, have to be respected by national legislation and jurisprudence. The International Convention on Psychotropic Substances itself admits that it cannot intervene with national or international constitutional rights (Article 22a sub 1 of this Convention). This was sufficient reason for the Amsterdam District Court to decide that the prosecution of the possession and delivery of ayahuasca was, in the case of the members of the Santo Daime church, in violation of Article 9 of the European Convention. Although the ayahuasca consumption was the central question, the court, with this decision, did implicitly legalize the religious use of *Cannabis* in the Santo Daime rituals as well.

On March 26, 2009, this fundamental decision of the Amsterdam District Court was confirmed by the District Court of Haarlem, when a member of the Santo Daime church in Amsterdam was brought before the court on suspicion of having imported into the Netherlands five bags of ayahuasca, ritually prepared in Brazil. The charge was import of a quantity of a material containing DMT, a substance as referred to in list 1 pertaining to the Opiumwet, punishable with a prison sentence of *12 years*. In his defense the accused put forward that the ayahuasca tea destined for the Santo Daime church in Amsterdam can only be prepared in Brazil in a ritual manner and that exactly this way the tea is prepared in Brazil is an inextricable part of the worship services of the church. The court honored this defense with the following decision:

The accused (--) has stated during the court hearing that he is a member of the Santo Daime Church in Amsterdam. Also it became apparent during the court hearing that the ayahuasca tea that is consumed in the context of religious performances can only be ritually prepared in Brazil and given that process and the rituals related to it, there is no alternative in the Netherlands. The import of ayahuasca tea from Brazil is therefore of the essence for the members of the Amsterdam Santo Daime Church in order to be able to practise their religion... (--)

-- the Court arrived at the opinion that in the case of the accused, the prohibition given by law and based on the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances to import DMT, forms such an infringement of the freedom of religion that this infringement cannot be considered necessary in a democratic society, now that DMT forms a part of the holy ayahuasca tea that is only prepared in Brazil and forms an essential part of the religious conviction for the members of the Santo Daime Church, as a consequence of which prohibition the Santo Daime Church cannot receive its most important sacrament within its religious conviction during the worship service.

Further in this case a weighing-up of the interests must be made between on the one hand the interests of the accused and the other members of the Santo Daime Church that no infringement is made regarding their right to freedom of religion, guaranteed by the ECHR, and on the other hand the interest of the State to meet its obligation arising from the Convention to prohibit DMT. Given the great weight that should be attached to the freedom of religion and the circumstance that, as is considered above, the import of the ayahuasca tea is assured with safeguards and that no notable health risks are attached to the ritual consumption of the ayahuasca tea within the closed gatherings of the church community, the Court is of the opinion that the protection of freedom of religion must be granted a

greater weight in this case. As a result of this, article 2 of the Opium Act should in this case not apply. (District Court Haarlem v. Santo Daime Holland, 2009)¹¹

The appeal lodged by the prosecutor against this judgement is still pending.

Conclusion: The Convinced Drinker or Towards a Wider Paradigm of Drug Regulation

In various Western countries the Santo Daime churches have been able to successfully rely on their fundamental right to freely manifest their religion so far. In other jurisdictions where this sacramental use of ayahuasca by the churches is still prohibited, complaints are prepared to be submitted to international judicial institutions like the United Nations Human Rights Committee.

But what significance has the legal admission of the religious use of ayahuasca for otherwise convinced users of ayahuasca or, for example, the question of the use of psychoactive mushrooms? In the past we saw some experimental procedures based not only on the freedom of religion, but also on the freedom of thought and conscience protected by national constitutions and international treaties. For example, why should the ritual use of psychoactive mushrooms or ayahuasca in a quest for spiritual development (not undertaken within any registered religious organization) not be protected by Article 9 of the European Convention or by Article 18 of the United Nations Covenant on Civil and Political Rights?

Article 8 of the European Convention and Article 17 of the United Nations Covenant on Civil and Political Rights could also form a base for such a procedure. These protect the right of everyone in “respect for his privacy and family life.” In 1990, in Germany, the District Court of Lübeck declared the prohibition of *Cannabis* unconstitutional precisely due to this kind of violation of civilian rights (Lübeck, October 1st, 1990; *Cannabis* Decision, Mar. 9, 1994).¹² The court called the prohibition of *Cannabis* use in violation of the principle of equality. The district court argued that it is an undisputed scientific fact, for example, that the use of alcohol or nicotine is a much bigger health risk for someone than the use of *Cannabis*. Despite this fact, it is only *Cannabis* that is officially prohibited by law. The District court argued that the constitutional right of self-determination and free development of personality includes the constitutional “right of intoxication,” of *being high*. According to this District Court of Lübeck, the search for intoxication should be considered a fundamental human desire that is constitutionally protected. Nevertheless, the Federal Constitutional Court of Germany in 1994 ended up not accepting this far-reaching decision of the Lower Court of Lübeck.

The Constitutional Court of Colombia used a similar argumentation in 1994 by declaring the criminalization of the use of drugs unconstitutional. Article 16 of the Colombian constitution consecrated the right to free development of personality. According to the Colombian Constitutional Court in 1994: “If the right of the free development of personality has some meaning within our system, it is necessary to conclude that (...) the norms that make the consumption of drugs a crime are clearly unconstitutional (Supreme Court of Colombia, May 5, 1994)”

We can conclude that the International Convention on psychotropic substances (1971) itself offers full opportunity for the use and selling of natural materials, plants or animals which by nature contain hallucinogenic substances. When a safe social setting is guaranteed, or risk for public health and public order is otherwise minimized, limitations by the government of the use of hallucinogenic substances should be defined as contrary to constitutional rights, such as the freedom to manifest one's religion or personal conscience and self-determination and respect for one's private life. The road to get this claim rewarded will however be a long one.

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- 1 The International Narcotics Control Board (INCB) is considered the independent and quasi-judicial control organ monitoring the implementation of the United Nations drug control conventions (www.incb.org).
 - 2 For this topic refer to the article by Jeffrey Bronfman in this volume, "The early history of the UDV in the United States, and the foundation of American law."
 - 3 See article 23 of the Convention on Psychotropic Substances of 1971.
 - 4 For a discussion of this, see the article by Ghislaine Bourgogne, "France and the prohibition of the use of ayahuasca: History of a legal decision" in this volume.
 - 5 The defense lawyer in this case was Adèle van der Plas, author of this chapter.
 - 6 For further discussion on this topic, see Jeffrey Bronfman, "The early history of the UDV in the United States, and the foundation of American law" in this volume.
 - 7 See also Kenneth Tupper, "Ayahuasca in Canada: Sociological phenomenon and policy issue" in this volume.
 - 8 The use of Cannabis sativa as a sacrament—named Santa Maria in the context of Cefluris—is freely adopted in the Santo Daime rituals in Netherlands, unlike in Brazil, where the Santo Daime leaders have officially prohibited its use due to the pressures of the regulation process of the use of ayahuasca in this country (where Cannabis use is forbidden by law).
 - 9 For a discussion on the definition of "religion" in legal discourse, see also Wouter J. Hanegraaff, "Ayahuasca groups and networks in the Netherlands: A challenge to the contemporary study of religion" and Russell Sandberg, "Judging religious drug use: The misuse of the definition of 'religion'" in this volume.
 - 10 For a reflection on the topic of the age of ayahuasca use, see Bernd Brabec de Mori, "Tracing hallucinations: Contributing to an ethnohistory of ayawaska usage in the Peruvian Amazon," in this volume.
 - 11 The defense lawyer in this case was Adèle van der Plas, author of this chapter.
 - 12 Refer to the decision of the German District court Lübeck (October 1st, 1990; § 29 in relation to the German law on the control of psychoactive substances, BtMG) and the decision of the Federal Constitutional court of Germany ("Cannabis decision") on March 9th 1994 (BVerfGE 90, 145 - Cannabis).