

**SAMFORD UNIVERSITY**  
**CUMBERLAND SCHOOL OF LAW**

**FREEDOM OF RELIGION AND PSYCHOACTIVE SUBSTANCES: a**  
**comparative legal study relating to Ayahuasca as a sacrament**

**Náiber Pontes de Almeida**

**(2018)**

**Final thesis**

**Master of Comparative Law (M.C.L.)**

**Professor Michael D. Floyd**

**Cumberland School of Law/Samford University, AL.**

## **Acknowledgements**

To my beloved wife Nilza, who encouraged and supported me to finish this thesis, always comprehensive about the time I could not be present with her.

To my kids Náiber Dias and Ágatha, joy of my heart and soul.

I am grateful to Jair Facundes, dear friend and counselor, who helped me to find the right course, suggesting articles and books to read and ever available with an honest feedback, enriching this work.

I am thankful to Tadeo Feijão, who helped to review this work.

My gratitude to Tribunal Regional Federal da 1ª Região [Brazilian Federal Justice] for giving me support to develop the research necessary to write this thesis.

I am also grateful to Cumberland School of Law, Professor Michael Floyd and Jessica Wolinsky. Professor Floyd was always welcome and open mind, giving me the proper support and encouragement to develop and finish this thesis. Jessica Wolinsky did a tremendous job reviewing my final draft, providing a detailed job which improved the quality of the writing.

And finally, my special thanks goes to UDV, in the name of its scientific commission, who give me access to essential information necessary to finish this work.

## **TABLE OF CONTENTS**

I. INTRODUCTION .....	1
II. PSYCHOACTIVE SUBSTANCES AND AYAHUASCA .....	10
1. Psychoactive Plants and Substances .....	10
2. What is Ayahuasca? .....	15
3. The Pharmacology of Ayahuasca .....	16
4. Traditional and Indigenous Use .....	17
5. Scientific Researches .....	19
5.1 Hoasca Project .....	20
5.2 Long-Term Effects Researches .....	21
5.3 Ayahuasca Use for Adolescents .....	23
5.4 Therapeutic Use .....	24
6. The Effects of Ayahuasca .....	26
III. AYAHUASCA RELIGIONS .....	28
1. The Rising of Ayahuasca Religions in an Urban Context .....	28
2. The União do Vegetal – UDV .....	33
IV. INTERPRETING RELIGIOUS LIBERTY .....	39
1. History of Religious Freedom and the Formation of the American People .....	39
2. Free Exercise Clause and the First Amendment .....	42
3. Freedom of Religion .....	44
4. Roots of Power – Interpreting a Fundamental Right .....	46
5. Human Dignity .....	48
6. The Duty of Integrity and Cohesion .....	50
V. INTERNATIONAL TREATIES AND THE INCB REPORTS .....	55

1. International System of Drug Control and Repression .....	55
2. The INCB Reports .....	60
VI. U.S. SUPREME COURT'S HISTORICAL THINKING ON FREEDOM OF RELIGION .....	64
VII. BRAZILIAN LEGAL AND HISTORICAL ASPECTS .....	83
VIII. CONCLUSION .....	94

## SECTION I

### I. INTRODUCTION

In 1999, the FBI and U.S. Customs and Border Protection [CBP] started a coordinated action against an American branch of an almost unknown Brazilian religion, União do Vegetal [UDV], in order to apprehend a shipment of Ayahuasca [Hoasca],<sup>1</sup> a brew used in religious ceremonies containing a psychoactive substance [DMT] regulated under the Controlled Substances Act (CSA).<sup>2</sup> This event was the beginning of a legal dispute which would take years to resolve. In 2006, however, the U.S. Supreme Court<sup>3</sup> established an historical precedent concerning freedom of religion under the Religious Freedom Restoration Act of 1993 (RFRA).<sup>4</sup>

During the last decade, people have been arrested, prosecuted, or precluded from exercising their faith in the sacramental use of Ayahuasca. In general, government officials, judges, and prosecutors do not have accurate information about what Ayahuasca is, besides its chemical composition. The legal status of Ayahuasca is still under scrutiny, both internationally and on a national level. Legal treatment may vary depending upon the country and the purpose for its use: religious, traditional/indigenous ritual, alternative therapies, personal growth, or other particular uses.<sup>5</sup>

This thesis focuses specifically on the religious use of Ayahuasca, with the rise of a new religiosity in urban areas and its legal treatment nationally and internationally under the fundamental right freedom of religion.

---

<sup>1</sup> Jeffrey Bronfman, *A Luta Pela Liberdade Religiosa da União do Vegetal nos Estados Unidos: um Caso Histórico*, in HOASCA: CIÊNCIA, SOCIEDADE E MEIO AMBIENTE 205, 206 (Joaze Bernardino-Costa Ed., 2011). See also Jeffrey Bronfman, *The Extraordinary Case of the United States versus the União do Vegetal Church*, in VISIONARY PLANT CONSCIOUSNESS: THE SHAMANIC TEACHING OF THE PLANT WORLD 170 (J. P. Harpignies ed., 2007).

<sup>2</sup> 21 U.S.C.S. § 812(c) (1970).

<sup>3</sup> *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).

<sup>4</sup> 42 U.S.C.S. § 2000bb et seq. (1993).

<sup>5</sup> Constanza Sánchez and José Carlos Bouso, *Ayahuasca: From the Amazon to the Global Village*, DRUG POLICY BRIEFING 43, 14 (2015).

In 1948, representatives from most countries assembled in the United Nations. The Universal Declaration of Human Rights (UDHR),<sup>6</sup> a landmark in human history, proclaimed recognition of the inherent dignity<sup>7</sup> of human beings encompassed fundamental freedoms of thought, conscience and religion,<sup>8</sup> rights which forged nations where battles were fought to secure the liberty to choose which religion to practice.<sup>9</sup>

Freedom of religion is a fundamental principle that stands in the U.S. Constitution,<sup>10</sup> the European Convention on Human Rights,<sup>11</sup> Brazil's Constitution<sup>12</sup>, as well as in most of the political constitutions all over the globe.<sup>13</sup> Nevertheless, one can disagree widely about its range, meaning and its application to solve cases, specially the hard ones involving the free exercise clause. There is not a formula to answer those issues and we still disagree about the proper way the government should treat religious claims.<sup>14</sup> Should they be treated differently from nonreligious claims?

To answer this question, “the crucial issue then becomes whether legislatures or courts should create privileged exceptions that are based directly on a person’s religious convictions or rest on some other standard, such as ‘conscience,’ that

---

<sup>6</sup> G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

<sup>7</sup> *Id.* at Preamble.

<sup>8</sup> *Id.* at Article 18 (Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance).

<sup>9</sup> RONALD DOWRKIN, RELIGION WITHOUT GOD 107 (2013).

<sup>10</sup> U.S. Const. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).

<sup>11</sup> *Convention for the Protection of Human Rights and Fundamental Freedoms*, Nov. 4, 1950, 213 U.N.T.S. 222 (ARTICLE 9 Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are 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.).

<sup>12</sup> Constituição Federal [C.F.] [Constitution], art. 5, VI (Braz.) (“freedom of conscience and of belief is inviolable, the free exercise of religious cults being ensured and, under the terms of the law, the protection of places of worship and their rites being guaranteed.”).

<sup>13</sup> DOWRKIN, *supra* note 9, at 105.

<sup>14</sup> KENT GREENAWALT, RELIGION AND THE CONSTITUTION 1 (Princeton University Press eds., 2006).

includes religious convictions but does not distinguish between them and similar nonreligious convictions.”<sup>15</sup>

Should the government allow the religious use of a sacrament that has a hallucinogenic substance, like peyote (mescaline) or Ayahuasca (DMT)?<sup>16</sup>

Are people really free to engage in religious practices and to choose freely their own beliefs, no matter how different those practices and beliefs are? Which way is more conducive to promote harmony in our society? The one that promotes personal autonomy to allow people to make their choices? Or relinquishing the personal in favor of government choices?<sup>17</sup>

As a premise, government [including the judiciary branch] must assess whether someone’s beliefs are fundamental elements of a sincere religion or, on the other hand, a mere way of life.<sup>18</sup>

Constitutional clauses like the free exercise clause are general and vague rules that usually need “bridges,” when a court is called to assess a case, that link the general rule to specific results.<sup>19</sup>

The U.S. Supreme Court has established the strict scrutiny test to address cases that potentially harm a fundamental right, as a standard demanding the government demonstrate the compelling interest they wish to achieve, which harms someone’s fundamental right, cannot be achieved through less intrusive means. Under this compelling interest standard, the burden of the proof lies on the government’s shoulders. It must pass this constitutional test in order to be validated under strict scrutiny of the court.<sup>20</sup>

---

<sup>15</sup> *Id.* at 2.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 3.

<sup>18</sup> *United States v. Meyers*, 906 F. Supp. 1494 (D. Wyo. 1995).

<sup>19</sup> GREENAWALT, *supra* note 14, at 15.

<sup>20</sup> *Id.* at 30.



This thesis explores various areas of knowledge involving fundamental questions related to the use in religious rituals of a substance (Ayahuasca)<sup>21</sup> that contains an alkaloid [DMT] listed in international treaty, the UN 1971 Convention on Psychotropic Substances<sup>22</sup> and national statutes in USA and Brazil<sup>23</sup> as a prohibited psychoactive substance.<sup>24</sup>

The scope of the fundamental right of freedom of religion is examined through personal autonomy, private and public health, the right of children and adolescents, and the right of parents and/or guardians to decide what is better for the family institution.<sup>25</sup>

It is also studied what consequences, or their absence thereof, in the international sphere, the sacramental use of Ayahuasca by several religions, including União do Vegetal [UDV],<sup>26</sup> could have. The commitment nations like the USA and Brazil have assumed to repress the use of psychoactive substances proscribed in international treaties.<sup>27</sup>

Religious freedom, the mother of all freedoms,<sup>28</sup> stimulated the emergence of constitutionalism,<sup>29</sup> and is expressly provided in various international treaties and conventions, as well as in the constitutions of most countries.

---

<sup>21</sup> See more about Ayahuasca in Chapter II.

<sup>22</sup> United Nations Convention on Psychotropic Substances, Feb. 21, 1971, 1019 U.N.T.S. 175.

<sup>23</sup> The DMT is included in the list F2 - Psychotropic Substances, Portaria SVS / MS 344, dated May 12, 1988 and later updates, which lists substances banned in Brazil for criminal repression.

<sup>24</sup> See Federal Controlled Substances Act. 21 U.S.C. §§ 811-812 (1970). See also Lei 11.343, de 23 de Agosto de 2006, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 24.8.2006 (Braz.).

<sup>25</sup> Jair Araújo Facundes, PLURALISMO, DIREITO E AYAHUASCA: AUTODETERMINAÇÃO E LEGITIMAÇÃO DO PODER NO MUNDO DESENCANTADO 14 (Instituto Brasiliense de Direito Público – IDP, 2013), <http://dspace.idp.edu.br:8080/xmlui/handle/123456789/1224>

<sup>26</sup> See more about UDV in Section III.

<sup>27</sup> FACUNDES, *supra* note 25.

<sup>28</sup> John Jr. Witte, *Law, Religion, and Human Rights*, 28 COLUM. HUM. RTS. L. REV. 1, 12 (1996).

<sup>29</sup> NICOLA MATTEUCI, ORGANIZACIÓN DEL PODER Y LIBERTAD. HISTORIA DEL CONSTITUCIONALISMO MODERNO 43, 60 (Editorial Trotta, 1998). See also JOHN RAWLS, O LIBERALISMO POLÍTICO 544, 545 (Álvaro de Vita & Luís Carlos Borges trans., Ática ed., 2011).

Nevertheless, its exercise could be limited to the observance of public security, aiming the protection of public order, health or morality, and the rights and freedoms of other people.<sup>30</sup>

But what is the concept or reach of an open texture legal expression like public order, health, or morality? What moral rules are being addressed? Is there a single, universal moral rule, or is the morality in question the concept of right or wrong of the dominant group or class of a particular community at a given time?

And in constitutions where the free exercise of religion does not provide expressly the possibility to limit this fundamental right in order to secure values like public security, such as the Brazilian constitution, is it lawful to limit the exercise of this fundamental liberty based on protection of public order, health or morality?

Those are questions to be answered when this right is protected, either by the executive branch, when licensing and supervising the exercise of several religions; the legislative branch, when establishing the rules, exemptions and restrictions also; or the judiciary branch, saying whether a restriction imposed on an exercise of religion must cede because the government could not demonstrate a compelling interest in harming someone's free exercise of religion.

Created as a Christian nation, the United States of America now encompasses all sorts of religions and creeds, from Christendom mainstream religions to almost unknown denominations originating far from those lands. These total over 1,000 religious denominations in this plural landscape, where more than two-thirds of the American populations are affiliated.<sup>31</sup>

Over the years, the U.S. Supreme Court has been sewing this intricate fabric so valued by the American people, making use of constitutional tests, [which are far

---

<sup>30</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, Art. 9 (2).

<sup>31</sup> JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 3 (Westview Press eds., 2nd ed. 2005).

from unanimous or even of majority acceptance]. They sometimes have held against religious minorities like Jews, Muslims, and Native Americans, setting the boundaries of the first Amendment to the U.S. Constitution.<sup>32</sup>

In *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*,<sup>33</sup> the U.S. Supreme Court had to set the modern boundaries of the Free Exercise Clause under the Religious Freedom Restoration Act of 1993 (RFRA).<sup>34</sup> The statute provided by Congress (RFRA) raised a sensitive issue: what is religion under the law? Which limits should the executive, legislative and the judiciary branches observe in order to avoid invading the First Amendment rights? What is dogmatic to each faith? And what is a sincere religious practice?

To provide an answer, we must analyze the case law throughout the history of the American nation, through the eyes of the U.S. Supreme Court precedents and the compelling interest test,<sup>35</sup> as well as the statute provided by the legislative branch (RFRA).

This examination will consist of a comparative study with the Brazilian Constitution, laws, and decisions<sup>36</sup> specifically involving the legal use of this psychoactive brew in religious ceremonies. Brazil plays a major role in Ayahuasca international scenario. It is the crib of those religions which use Ayahuasca as sacrament, being the nation where there is the largest number of people following Ayahuasca religions. Besides, Brazil occupies a leading position concerning the legal regulation of the sacramental use of Ayahuasca.

---

<sup>32</sup> *Id.*

<sup>33</sup> 546 U.S. 418.

<sup>34</sup> 42 U.S.C.S. § 2000bb.

<sup>35</sup> *Braunfeld v. Brown*, 366 U.S. 599 (1961); *Sherbert v. Verner*, 374 U.S. 398 (1963); *People v. Woody*, 394 P.2d 813 (1964); *Leary v. United States*, 395 U.S. 6 (1969); *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 485 U.S. 660, 670 (1988) (Smith I); *Commonwealth v. Nissenbaum*, 536 N.E.2d 592 (1989); *Employment Div. v. Smith*, 494 U.S. 872 (1990).

<sup>36</sup> The religious use of Ayahuasca in Brazil started to be regulated in 1985 by a series of decisions which had been taken by the executive branch, resulting later in Congress enacting Law 11.343, in 2006 [article 2]. See also Lei 11.343, de 23 de Agosto de 2006, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 24.8.2006 (Braz.).

In Section II it is presented the religious use of psychoactive plants throughout history up to present time. The concept of hallucination is discussed, in contrast with the use of Ayahuasca as an entheogen - a vehicle which promotes a bond that generates the divine within, enabling to reach an altered state of consciousness. The pharmacology and effects of Ayahuasca, as well as scientific research, are presented to demonstrate that a safe, religious use of this brew is possible and real in UDV experience. It is presented, also, recent studies showing the enormous therapeutic potential of Ayahuasca.

Section III explores the rise of this religious phenomenon, presenting the historical and doctrinal aspects of the four main religions which work with Ayahuasca as a sacrament: Alto Santo, Barquinha, UDV, and Santo Daime. The União do Vegetal – UDV, being the religion responsible for the legal object of this thesis, is presented more deeply. UDV doctrine, fundamentals and beneficent work is showed, pointing out the legal and social recognition achieved in Brazil.

Section IV deals with the difficulties of interpreting the fundamental right to religious liberty. The importance of freedom of religion in the formation of the American nation is presented, bringing to light the thought of some of the Founding Fathers. After the Bill of Rights in the United States [1st amendment to US Constitution] and the Declaration of the Rights of Man and of the Citizen (1789) in France, religious freedom was incorporated in several international documents and the constitutions of different countries. This shaped a new order built on civil liberties as a “mother of many other rights.”<sup>37</sup>

The roots of power are discussed in such a way as to understand the best path in interpreting constitutional clauses and how to solve hard cases. Human dignity is

---

<sup>37</sup> WITTES, *supra* note 28.

presented as an ethical standard, an interpretative vector in order to reach government decisions that promote respect to autonomy and self-determination of the human being.

To address a legal problem the interpreter of the Constitution should search beyond what is written, throughout other branches of knowledge, such as moral and political philosophy, psychology, economy and other important values to get a proper answer. The answer must be argumentatively constructed, able to foment values of integrity and cohesion, promoting justice through a harmonic constitutional solution. However, values of human dignity, respect of legal precedents and the justice of the case are the boundaries to be observed.

In Section V international treaties on psychotropic substances and its interpretation throughout international organizations and its consequences to the legal and political status of several countries are discussed.

Section VI presents the U.S. Supreme Court's historical thinking on freedom of religion. The strict scrutiny test is analyzed when applied in matters of religion. It shows how the U.S. Supreme Court had been applying it to those issues until the paradigmatic case *Employment Div. v. Smith*,<sup>38</sup> which changed the precedent when the Court did not acknowledge the violation of the Free Exercise Clause in an unemployment compensation case where the employees were fired due to the religious use of peyote. The U.S. Supreme Court stated that a general law not intended to target a specific religion was constitutional, regardless of whether it indirectly harmed someone's free exercise of religion.

It is demonstrated how a judicial decision, which does not promote the values of integrity and cohesion, could harm the individual's liberties and how the civil society, through Congress, responded to such aggression by enacting the Religious

---

<sup>38</sup> 494 U.S. 872 (U.S. 1990).

Freedom Restoration Act of 1993 (RFRA).<sup>39</sup> This act set the proper grounds to reestablish the respect for minorities' rights in applying the First Amendment, resulting in the positive outcome when the U.S. Supreme Court decided the case *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*.<sup>40</sup> This case is one of the most important precedents set in freedom of religion by the U.S. Supreme Court.

Section VII studies the Brazilian experience resolving the legal status of Ayahuasca in a religious context through a multidisciplinary dimension, where the medical, sociological and anthropological aspects of the religious use of the tea had to be considered.

---

<sup>39</sup> 42 U.S.C.S. § 2000bb.

<sup>40</sup> 546 U.S. 418.

## SECTION II

### PSYCHOACTIVE SUBSTANCES AND AYAHUASCA

#### 1. PSYCHOACTIVE PLANTS AND SUBSTANCES

The use of psychoactive plants, whether in a primitive or sophisticated and so called modern society, has played an important role in human culture. These plants have been used since immemorial times, probably when man started to gather plants for food.<sup>41</sup>

It is been used for therapeutic, nourishment, and religious purposes. Linking mankind and its god(s), these plants have and continue to serve as a sacred mediator all over the globe in different cultures and backgrounds.<sup>42</sup>

[E]very day most people in most cultures, whether Amazonian Indians or western Europeans, ingest the products of one or more psychoactive plants. Even Mormons, who claim that they do not use “drugs”, have a psychoactive stimulant: Mormon tea (*Ephedra nevadensis*), which contains the very potent alkaloid ephedrine, the model substances for amphetamine.<sup>43</sup>

When someone drinks a simple cup of coffee, he probably does not know that he is drinking a psychoactive beverage, which contains a stimulant (caffeine) that was venerated as a plant of the gods by Sufis and is still a sacred drink in Islam, used during religious rites.<sup>44</sup>

In a technical context, a drug is every single substance able to modify or explore the physiological system or pathological state, which is used with or without intent to benefit the recipient organism.<sup>45</sup> Therefore, even psychoactive substances, which have not been proved to harm organisms, are classified as drugs, only because of their effects on the physiological system.

---

<sup>41</sup> RICHARD EVANS SCHULTES, HALLUCINOGENIC PLANTS foreword (1976).

<sup>42</sup> *Id.* at 7, 9.

<sup>43</sup> CHRISTIAN RATSCH, THE ENCYCLOPEDIA OF PSYCHOACTIVE PLANTS: ETHNOPHARMACOLOGY AND ITS APPLICATIONS 9 (2005).

<sup>44</sup> *Id.* at 9, 175.

<sup>45</sup> SEIZI OGA ET AL., FUNDAMENTOS DE TOXICOLOGIA 5 (3rd ed. 2008).

The ritual use of psychoactive plants is vast. Traditionally, these plants are used by Indians for divination, prophecy, and medicine.<sup>46</sup> Other uses include rites of passage, purification, initiation into secret societies and their cults, mystery cults, meditation, and vision quests.<sup>47</sup> In our modern society, psychoactive plants are also used to achieve an altered state of consciousness, through a mystic or religious experience:<sup>48</sup>

[A] psychedelic experience is a journey to new realms of consciousness. The scope and content of the experience is limitless, but its characteristic features are the transcendence of verbal concepts, of space-time dimensions, and of the ego or identity. Such experiences of enlarged consciousness can occur in a variety of ways: sensory deprivation, yoga exercises, disciplined meditation, religious or aesthetic ecstasies, or spontaneously. Most recently they have become available to anyone through the ingestion of psychedelic drugs such as LSD, psilocybin, mescaline, DMT, etc....

Of course, the drug does not produce the transcendent experience. It merely acts as a chemical key – it opens the mind, frees the nervous system of its ordinary patterns and structures. The nature of the experience depends almost entirely on set and setting. Set denotes the preparation of the individual, including his personality structure and his mood at the time. Setting is physical – the weather, the room’s atmosphere; social – feelings of persons present towards one another; and cultural – prevailing views as to what is real.<sup>49</sup>

Scientific definitions of psychoactive plants are classified pharmacologically into three groups:

- 1) stimulants (coffee, tea, cacao, guaraná, mate, ephedra, khat and coca) – substances that stimulate the mind, but do not effect any changes in perception;
- 2) sedatives, hypnotics, and narcotics (passion fruit, poppy, opium, valerian and hops) – calmatives, sleep-inducing, anxiety-reducing, anesthetizing substances; and
- 3) hallucinogens. The last category includes all substances that produce clear alterations in perception, sensations of space and time and emotional

---

<sup>46</sup> *Id.* at 9.

<sup>47</sup> RATSCH, *supra* note 43, at 12.

<sup>48</sup> *Id.* at 10.

<sup>49</sup> TIMOTHY LEARY ET AL., *THE PSYCHEDELIC EXPERIENCE: MANUAL BASED ON THE TIBETAN BOOK OF THE DEAD* 11 (Carol Publishing Group ed., 1997) (1964).



states. In this way, a hallucinogen is a substance that generates hallucinations.<sup>50</sup>

But what is a hallucination? Early sixteenth century people would define as a wandering mind.<sup>51</sup> Up to present days, we still lack a precise definition of the word “hallucination”, especially because it has been difficult to trace a clear line that sets apart hallucinations, misperceptions and illusions.

Oliver Sacks helps to draw it more clearly, [Quoting William James in his 1890 Principles of Psychology], *a hallucination is a strictly sensational form of consciousness, as good and true a sensation as if there were a real object there. The object happens to be not there, that is all.*<sup>52</sup> As a general rule, hallucination can be defined as a perception of something/someone that is not there physically.<sup>53</sup> The word hallucination involves such a complex sensory and perceptual phenomenon that there are even dictionaries covering only this subject.<sup>54</sup>

In general, people usually associate the term hallucination with a psychopathological condition, which is not proper for several types of experiences. The huge category pharmacologically classified as hallucinogenic plants encompass also plants that literally promotes a bound that generates the divine within, inducing a spiritual experience.

As a result, several publications prefer to use the terms psychoactive, psychedelic, entheogen or visionary substance.<sup>55</sup> I will use the term entheogen herein to refer to the substance that promotes an altered state of consciousness in a religious context.

---

<sup>50</sup> RATSCH, *supra* note 43, at 10.

<sup>51</sup> OLIVER SACKS, HALLUCINATIONS, at IX (First Vintage Books ed. 2013).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> See JAN DIRK BLOM, A DICTIONARY OF HALLUCINATIONS (2010th Ed.) and HALLUCINATIONS: A 3-IN-1 MEDICAL REFERENCE MEDICAL DICTIONARY, BIBLIOGRAPHY & ANNOTATED RESEARCH GUIDE (2004).

<sup>55</sup> RATSCH, *supra* note 43, at 10.

But what motivates someone to drink a tea containing an entheogenic substance in a religious ritual? In a word: transcendence! As human beings living a limited life, we need to sense the beyond, the limitless, in a search for the meaning of life, a proper understanding of the fundamental questions: why are we here? Where did we come from? And to where will we go?

[E]very culture has found such chemical means of transcendence, and at some point the use of such intoxicants becomes institutionalized at a magical or sacramental level.<sup>56</sup> The sacramental use of psychoactive plant substances has a long history and continues to the present day in various shamanic and religious rites around the world.<sup>57</sup>

The Ayahuasca tea, as an entheogen, is a vehicle that literally promotes a bond that “generates the divine within”<sup>58</sup>, inducing a spiritual experience. The motivation to drink this entheogenic tea may vary.

[P]ersonality studies have found that people who use Ayahuasca do so for reasons that are related to personal development, the search for psychological wellbeing, and adapting better to their environment. Indeed, these studies reported that Ayahuasca users are people perfectly adapted and integrated in their social, working, and familiar environments and that Ayahuasca is used as a tool for personal and spiritual improvement – findings that are similar to those observed among people who practice meditation or other techniques for personal development and wellbeing.<sup>59</sup>

Sacred plants, also called plants of power, have been used in religious context by several different cultures around the world for thousands of years.<sup>60</sup> They have been used as a sacrament, not for recreational purpose.<sup>61</sup>

---

<sup>56</sup> “The notion of ‘sacrament’ has been used by several researchers of the religious use of psychoactive substances. The term has an explicit relationship with practices and concepts of Christianity, especially the Holy Communion of the Roman Catholic Church, the largest religion in Brazil. It is also consistent with the idea of a structured and ritualized use of ‘sacred’ substances, ideologically deserving legal protection, as opposed to the profane and unregulated use of ‘drugs’.” BEATRIZ CAIUBY LABATE ET AL., BRAZILIAN AYAHUASCA RELIGIONS IN PERSPECTIVE 13, [http://neip.info/novo/wp-content/uploads/2015/04/labate\\_macrae\\_goulart\\_bar\\_perspectives\\_equinox.pdf](http://neip.info/novo/wp-content/uploads/2015/04/labate_macrae_goulart_bar_perspectives_equinox.pdf).

<sup>57</sup> Oliver Sacks, *Altered States: Self-Experiments in Chemistry*, THE NEW YORKER, Aug. 27, 2012, at 40.

<sup>58</sup> RATSCH, *supra* note 43, at 10.

<sup>59</sup> José Carlos Bouso et al., *Ayahuasca Technical Report 2017*, ResearchGate 9-10 (2017), [https://www.researchgate.net/publication/319155936\\_Ayahuasca\\_Technical\\_Report\\_2017](https://www.researchgate.net/publication/319155936_Ayahuasca_Technical_Report_2017).

<sup>60</sup> Jeffrey Bronfman, *The Extraordinary Case of the United States versus the União do Vegetal Church*, in VISIONARY PLANT CONSCIOUSNESS: THE SHAMANIC TEACHING OF THE PLANT WORLD 172 (J. P. Harpignies ed., 2007).

<sup>61</sup> RATSCH, *supra* note 43, at 10.

[T]hey are sacred because within them dwell plant spirits, plant gods ...that are esteemed as the teachers, mothers, ambassadors, and doctores (physicians) of other realities....They also can bring spiritual awakening to healthy people and make possible mystical experiences....They are used not to escape from reality but to recognize true reality.<sup>62</sup>

The use of psychoactive plants in the Americas by Indians has aroused a sentiment of fear from the Europeans since they came to colonize the New World. Shamans were labeled as “magicians” and their gods were demonized as false gods, while their sacred drinks were called “witches” brews.<sup>63</sup> A report from 1620, written by D. Pedro Naborrete de Isla, gives an idea of the cultural persecution against native religious practices during the Mexican Inquisition:

[A]s for the introduction of the use of a plant or root named peyote...for the purpose of uncovering thievery, divinations about other occurrences, and prophesizing future events, this is a superstition which is to be condemned because it is directed against the purity and integrity of our sacred Catholic faith. This is certain, for neither this named plant nor any other possesses the power or intrinsic property of being able to bring about the alleged effects, nor can anything produce the mental images, fantasies or hallucinations that are the basis of the mentioned divinations. In the latter, the influences and workings of the devil, the real cause of this vice, are clear, who first makes use of the innate gullibility of the Indians and their idolatrous tendencies and then strikes down many other people who do not sufficiently fear God and do not possess enough faith.<sup>64</sup>

In America, the Native American Church has been using peyote, a cactus that grows in some parts of Texas and Mexico containing mescaline, a psychoactive substance, since the early 1900s. Although it has been an indigenous tradition for many centuries.<sup>65</sup>

---

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 16.

<sup>64</sup> *Id.*

<sup>65</sup> BRONFMAN, *supra* note 60, at 173.

## 2. WHAT IS AYAHUASCA?

Ayahuasca is a Quechua<sup>66</sup> word used to designate the liana *Banisteriopsis caapi*, a sacred plant native to the Amazon and Orinoco<sup>67</sup> river basins.<sup>68</sup> This also denominates a beverage with psychotropic properties, meaning vine of the soul, vine of the spirits.<sup>69</sup>

The beverage is a brew made from the decoction of the vine *Banisteriopsis caapi*<sup>70</sup> and the leaves of the bush *Psychotria viridis*<sup>71</sup> (chacrana). This combination is currently the most common,<sup>72</sup> although there are ethnographic studies indicating more than 5,000 different recipes of Ayahuasca, a result of the admixture of more than 100 different plants to a base of *B. caapi* vine.<sup>73</sup> There are also preparations using other *Banisteriopsis* species, like *B. martiniana*, *B. muricata*, *B. longialata* and *B. lutea*, instead of *B. caapi*.<sup>74</sup>

The União do Vegetal (UDV) and the main other Brazilian churches that have Ayahuasca as a sacrament, use only *Banisteriopsis caapi* vine, *Psychotria viridis* leaves, water, and fire in the preparation of Ayahuasca.<sup>75</sup>

The origins of this ancient beverage are unknown. However, studies reveal its millenarian use as a sacred drink and medicine by innumerable indigenous

---

<sup>66</sup> “An indigenous language family, with variations spoken by the Quechua peoples, primarily living in the Andes and highlands of South America. Derived from a common ancestral language, it is the most widely spoken language family of indigenous peoples of the Americas, with a total of probably some 8–10 million speakers.” Quechuan languages – Wikipedia, [https://en.wikipedia.org/wiki/Quechuan\\_languages](https://en.wikipedia.org/wiki/Quechuan_languages) (last visited Mar. 22, 2018).

<sup>67</sup> RICHARD EVANS SCHULTES, *THE BOTANY AND CHEMISTRY OF HALLUCINOGENS* (Thomas, 1980).

<sup>68</sup> Jose A. Morales-García et al., *The Alkaloids of Banisteriopsis caapi, the Plant Source of the Amazonian Hallucinogen Ayahuasca, Stimulate Adult Neurogenesis in Vitro*, 1 *Sci Rep.* (2017).

<sup>69</sup> RICHARD EVANS SCHULTES & ALBERT HOFMANN, *PLANTS OF THE GODS.: THEIR SACRED, HEALING, AND HALLUCINOGENIC POWERS* 124 (Healing Arts Press. Eds., 2nd ed., 2001).

<sup>70</sup> UDV call it Mariri. Santo Daime Churches call it Jagube.

<sup>71</sup> Chacrana in UDV and Rainha (Queen) in Santo Daime.

<sup>72</sup> McKenna, DJ, *Clinical Investigations of the Therapeutic Potential of Ayahuasca: Rationale and Regulatory Challenges* 112 *Pharmacology and Therapeutics* (2004).

<sup>73</sup> GARCIA, *supra* note 68, at 2.

<sup>74</sup> Jordi Riba, *HUMAN PHARMACOLOGY OF AYAHUASCA* 5 (Doctoral thesis, Universitat Autònoma de Barcelona, 2003) [http://www.maps.org/research-archive/Ayahuasca/jriba\\_thesis.pdf](http://www.maps.org/research-archive/Ayahuasca/jriba_thesis.pdf).

<sup>75</sup> CENTRO ESPÍRITA BENEFICENTE UNIÃO DO VEGETAL. UNIÃO DO VEGETAL: HOASCA; FUNDAMENTOS E OBJETIVOS 29 (1989).

amazonian groups since immemorial time,<sup>76</sup> as well as by shamans in several parts of South America, and most recently by religious groups in Brazil (UDV and Santo Daime, for example), and present in several other countries.<sup>77</sup>

### 3. THE PHARMACOLOGY OF AYAHUASCA

Ayahuasca is an entheogenic brew made of a remarkable pharmacological association combining a liana that contains harmine, harmaline and tetrahydroharmine (THH), three indole beta-carboline alkaloids, and leaves that contain DMT (N,N-Dimethyltryptamine),<sup>78</sup> a controlled substance under international treaties and national laws (a schedule I<sup>79</sup> substance in USA).<sup>80</sup> The alkaloids of Ayahuasca were initially named telepathine due to the alleged telepathic properties found in its preparation. They were isolated from the liana *Banisteriopsis caapi* and later investigation found them identical to the alkaloid harmine,<sup>81</sup> previously isolated from *Peganum harmala*,<sup>82</sup> also known as Syrian Rue, another plant used as medicine and in religious ceremonies for thousands of years.<sup>83</sup>

What makes this combination singular is that DMT, a monoamine, when orally administered, is degraded in the digestive system (liver and gut) by monoamine oxidase (MAO),<sup>84</sup> not reaching the blood stream. In other words, DMT, when orally taken, is inactive (produces no effect).<sup>85</sup>

Nevertheless, the harmala alkaloids (harmine, harmaline, and tetrahydroharmine) found in *B. caapi* are monoamine oxidase (MAO-A) inhibitors and allow the molecules of DMT (found in the leaves of *Psychotria viridis*) to cross the

---

<sup>76</sup> SCHULTES, *supra* note 69, at 124.

<sup>77</sup> *Id.*

<sup>78</sup> GARCIA, *supra* note 68, at 2.

<sup>79</sup> 21 U.S.C. §§ 811-812.

<sup>80</sup> SCHULTES, *supra* note 69.

<sup>81</sup> RIBA, *supra* note 74, at 10-11.

<sup>82</sup> SCHULTES, *supra* note 69, at 126-27.

<sup>83</sup> Peganum harmala – Wikipedia, [https://en.wikipedia.org/wiki/Peganum\\_harmala](https://en.wikipedia.org/wiki/Peganum_harmala) (last visited Dec. 19, 2017).

<sup>84</sup> MCKENNA, *supra* note 72, at 111.

<sup>85</sup> RIBA, *supra* note 74, at 21.

enzymatic barrier that prevents DMT from reaching the brain. Thus, DMT molecules reach the blood stream and brain cells, enabling the so-called visionary effect of Ayahuasca, providing an altered state of consciousness.<sup>86</sup>

In this process, DMT connects to serotonergic sites in the brain, sometimes involving vivid and complex images experienced by subjects as a new perception of reality.<sup>87</sup>

At some point in the past, someone discovered the combination of these two plants and the visionary effects it produces, through a very sophisticated pharmacological interaction.<sup>88</sup>

#### 4. TRADITIONAL AND INDIGENOUS USE

There are at least 72 Indian groups in the western Amazon that use Ayahuasca<sup>89</sup> and more than 60 given names for the sacred drink.<sup>90</sup> Hoasca, Vegetal or Daime in Brazil, caapi in the vaupés river in Colombia, yajé or yagé in southern Colombia, natema in Ecuador, and pinde along the Pacific coast of Colombia, still other names include soulvine, huni, mariri, santo daime,<sup>91</sup> ramino, kamarampi,<sup>92</sup> and nixi pae.<sup>93</sup>

Ayahuasca preparation varies according to the group involved and the purpose the tea is been prepared for, which can affect the concentration and proportions of the alkaloids.<sup>94</sup>

As a general rule, the preparation is a time-demanding process that uses plant species *Banisteriopsis caapi* vine macerated or pounded and leaves of *Psychotria*

<sup>86</sup> SCHULTES, *supra* note 69, at 127. See also RIBA, *supra* note 74, at 6.

<sup>87</sup> Callaway, J.C et al., *Pharmacokinetics of Hoasca Alkaloids in Healthy Humans*, J. OF ETHNOPHARMACOLOGY, 65 (3): at 244 (1999).

<sup>88</sup> RIBA, *supra* note 74, at 4, 17.

<sup>89</sup> SCHULTES, *supra* note 69, at 232.

<sup>90</sup> RATSCH, *supra* note 43, at 702.

<sup>91</sup> FACUNDES, *supra* note 25, at 14.

<sup>92</sup> Eloi dos Santos Magalhães. “BALANÇOS DE LUZ”: DEVOÇÃO E EXPERIÊNCIA A BORDO DO BARQUINHO SANTA CRUZ 17 (Universidade Federal de Campina Grande, 2013).

<sup>93</sup> RIBA, *supra* note 74, at 3.

<sup>94</sup> MCKENNA, *supra* note 72, at 114.

*viridis* shrub, water, fire and the know-how developed by the members of these religions (or groups).

The result is a decoction which has a strong taste, and presents a purgative effect, eventually causing nausea and vomiting (sometimes diarrhea), a tonic process not considered an intoxication,<sup>95</sup> according to the members of those Ayahuasca religions, that refer to it as a cleansing event.<sup>96</sup> There are Indian groups which prepare it with cold water, resulting in a less concentrated tea with less active compounds.<sup>97</sup>

The preparation of Ayahuasca involves a whole ritual context, full of spiritual symbology, resulting in a sacramental drink, which is a gateway to knowledge,<sup>98</sup> a vehicle that aims to connect the followers of these religions to the sacred, the Divine.<sup>99</sup> In União do Vegetal – UDV, the tea Ayahuasca is drunk to propitiate focus in order to allow the development of the moral, intellectual and spiritual virtues of the human being.<sup>100</sup>

Ayahuasca is used as a tool by shamans and non-shamans to access the ultimate reality. Like a dream, but in a controlled way, through chants, invocation, and ícaros, which modify the body and mind, channels of perception are opened, and enables them to experience the Divine.<sup>101</sup>

Among the Kaxinawá Indians, Ayahuasca, or *nixi pae* as they call the brew, is drunk in order to perceive the secret side of reality.<sup>102</sup> The Ashaninkas drink the

---

<sup>95</sup> CALLAWAY, *supra* note 87, at 252-53.

<sup>96</sup> Relatório Final das Atividades Desenvolvidas pelo Grupo de Trabalho (GT) Designado Pela Resolução/CONFEN n. 04, de 30 de Julho de 1985 [Final report of the activities developed by the Working Group designated by the CONFEN Resolution n. 04, July 30, 1985]. (1987, Aug. 28). Brasília: CONFEN. at 31.

<sup>97</sup> RIBA, *supra* note 74, at 5.

<sup>98</sup> RATSCH, *supra* note 43, at 15.

<sup>99</sup> Nascimento, A.E.S. et AL., *Simbolismo Espiritual: Um Estudo Sobre o Ritual de Preparação do Santo Daime no Cenário Religioso do Centro Eclético Flor do Lótus Iluminado – CEFLI*, [http://www.abq.org.br/cbq/trabalhos\\_aceitos\\_detalhes,11017.html](http://www.abq.org.br/cbq/trabalhos_aceitos_detalhes,11017.html)

<sup>100</sup> RUY FABIANO. MESTRE GABRIEL, O MENSAGEIRO DE DEUS 86 (2012).

<sup>101</sup> Mauro Almeida, *A Ayahuasca e seus Usos*, in O USO RITUAL DA AYAHUASCA 15, 16 (Beatriz Caiuby Labate & Wladimir Sena Araújo Ed., 2009).

<sup>102</sup> Pedro Luz, *O Uso Ameríndio do Caapi*, in O USO RITUAL DA AYAHUASCA 37, 39 (Beatriz Caiuby Labate & Wladimir Sena Araújo Ed., 2009).

*kamarampi* (Ayahuasca) to avoid an imminent death. Their shamans drink it to achieve knowledge to prevent future deaths.<sup>103</sup>

The Indians believe that the visions experienced during the use of Ayahuasca show the real truth, revealed by the plants, that render the essence of things when compared to a transitory and illusory reality perceived in our ordinary reality.<sup>104</sup>

In countries like Peru, Bolivia, Venezuela, Ecuador, and Colombia, the *vegetalistas* (*curanderos* – medicine man) work with psychotropic plants, chants, and diets to deliver a popular medicine, using Ayahuasca as a powerful tool.<sup>105</sup> In their spiritual work “those healers use Ayahuasca to diagnose the magic causes of disease or neutralize the evil magic responsible for certain types of illness.”<sup>106</sup>

## 5. SCIENTIFIC RESEARCHES

During the last years people have been arrested, prosecuted, or precluded from exercising their faith because the sacrament their religion uses contains a psychoactive substance. In general, government officials, judges, and prosecutors do not have accurate information about what Ayahuasca is, beyond the chemical compounds, which erroneously lead them to confuse Ayahuasca, a sacramental beverage, with DMT in its synthetic/purified form.<sup>107</sup>

DMT in its purified form, a synthetic drug obtained in 1931 by Manske,<sup>108</sup> is orally inactive, which required users employ different methods to administer it parenterally.<sup>109</sup> It has a completely different behavior administered intravenously as compared to Ayahuasca (administered orally). The effects of DMT (in its synthetic form) are felt almost immediately after its administration intravenously (around 3-5

---

<sup>103</sup> *Id.* at 47-48.

<sup>104</sup> *Id.* at 63.

<sup>105</sup> Beatriz Caiuby Labate, *A Literatura Brasileira Sobre as Religiões Ayahuasqueiras*, in *O USO RITUAL DA AYAHUASCA* 231, 233 (Beatriz Caiuby Labate & Wladimir Sena Araújo Ed., 2009).

<sup>106</sup> RIBA, *supra* note 74, at 8.

<sup>107</sup> *Id.* at 10.

<sup>108</sup> *Id.* at 17.

<sup>109</sup> MCKENNA, *supra* note 72, at 115.



minutes),<sup>110</sup> while Ayahuasca progressively takes effect usually 35 to 40 minutes after administration.<sup>111</sup> The synthetic drug will have no effect on the organism after one hour of being administered,<sup>112</sup> whereas Ayahuasca, like a wave, slowly and progressively reaches its peak two hours after ingestion, fading its effects and disappearing after four to six hours.<sup>113</sup>

[T]he maximum intensity of the effects of DMT is approximately two times that of Ayahuasca at equivalent doses, which makes the global effects of Ayahuasca much more controllable than pure DMT. In addition, since Ayahuasca is a decoction made with plants there are also other compounds (beta-carbolines) that may modulate the effects and thus make them significantly different from pure DMT.<sup>114</sup>

For this reason, it is paramount to differentiate scientific research involving synthetic DMT (purified form) from scientific studies about Ayahuasca, which contains DMT in its natural form, obtained from a decoction of natural plant species. Findings concerning one are not automatically valid for the other, especially the effects (long-term, adverse, etc). For this reason, “equating a complex cultural practice, such as the ritual use of Ayahuasca, to a single element of the whole (the DMT contained in the drink) is extremely reductionist and misinformed.”<sup>115</sup>

## 5.1 HOASCA PROJECT

In 1993, an international consortium of researchers from Brazil, the United States, and Finland started a study in Manaus, the main city located in the Amazon region of Brazil, with 15 long-term local members of the UDV, to assess psychological

---

<sup>110</sup> RIBA, *supra* note 75, at 18.

<sup>111</sup> MCKENNA, *supra* note 73, at 115.

<sup>112</sup> RIBA, *supra* note 74, at 18.

<sup>113</sup> José Carlos Bouso, et al., TECHNICAL REPORT ABOUT AYAHUASCA 2017 4 (International Center for Ethnobotanical Education Research & Service – ICEERS, 2017), [http://news.iceers.org/wp-content/uploads/2017/08/Ayahuasca\\_Technical\\_Report\\_ICEERS\\_2017\\_ENG.pdf](http://news.iceers.org/wp-content/uploads/2017/08/Ayahuasca_Technical_Report_ICEERS_2017_ENG.pdf).

<sup>114</sup> *Id.* at. 4-5.

<sup>115</sup> Constanza Sánchez & José Carlos Bouso, *Ayahuasca: From the Amazon to the Global Village*, 2 DRUG POLICY BRIEFING, 43 (2015); See also Anderson, B. T., et al., ‘Statement on Ayahuasca’, INTERNATIONAL JOURNAL OF DRUG POLICY 23 (2012) 173, 173.

and biochemical effects of Hoasca (Ayahuasca) in long-term users.<sup>116</sup> The study matched a control group with similar characteristics and no history of Ayahuasca use.

The results of this pioneer study were meaningful and demonstrated that UDV members that had been drinking Ayahuasca as a sacrament for at least ten years, typically two times per month, but rarely more often than four times per month,<sup>117</sup> scored better than control group subjects in several international standardized tests. This demonstrated that a long and continuous history of regular use of Ayahuasca did not cause in the UDV members signs of physical or neuropsychological deterioration, suggesting, on the other side, that “the regular use of *Hoasca* in a ceremonial context seems to increase one’s ability to psychologically adapt to the larger process of life”.<sup>118</sup>

The findings showed that the UDV group performed significantly better than control subjects on neuropsychological tests, with psychiatric diagnostic assessments disclosing a history of recovery from alcohol, depressive, or anxiety disorders after becoming a member of the UDV church.<sup>119</sup> Personality tests described UDV Ayahuasca users as reflective, rigid, loyal, stoic, slow-tempered, frugal, orderly, and persistent, with overall behavior consistent with high social desirability and emotional maturity. The results lead to a clear conclusion, “the ceremonial use of Hoasca as studied within the framework of this research project, is clearly a phenomenon quite distinct from the conventional notion of ‘drug abuse.’”<sup>120</sup>

## 5.2 LONG-TERM EFFECTS RESEARCHES

Another study that assessed long-term effects of Ayahuasca found similar results as in the study above [UDV members]. A group of 127 Ayahuasca users (from

---

<sup>116</sup> Grob, C.S., et al., *Human Psychopharmacology of Hoasca, a Plant Hallucinogen Used in Ritual Context in Brazil*, J. Nerv. Ment. Dis. 184, at 89.

<sup>117</sup> CALLAWAY, *supra* note 87, at 246.

<sup>118</sup> *Id.* at 255.

<sup>119</sup> GROB, *supra* note 116, at 86-94.

<sup>120</sup> *Id.*

CEFLURIS [Santo Daime] and Barquinha),<sup>121</sup> with a history of ritual use of at least 15 years and a minimum frequency of twice a month, matched with a group of 115 controls that were actively practicing a religion without Ayahuasca use, in two moments: one initial assessment; a second one year later.<sup>122</sup> The research studied general psychological well-being, mental health and cognition.

[T]he assessment of the impact of long-term Ayahuasca use on mental health from various perspectives (personality, psychopathology, life attitudes and psychosocial well-being) did not find evidence of pathological alteration in any of the spheres studied. Although Ayahuasca-user subjects differed in some personality traits, differences did not fit with pathological profile. Furthermore, Ayahuasca users showed a lower presence of psychopathological symptoms compared to controls. They performed better in neuropsychological tests, scored higher in spirituality and showed better psychosocial adaptation as reflected by some attitudinal traits such as Purpose in Life and Subjective Well-Being. Overall differences with the control group were still observable at follow-up one year later.<sup>123</sup>

A recent study in Spain with 22 local Ayahuasca users from Santo Daime church, assessed the effects of long-term use of Ayahuasca in brain structures and personality. The research analyzed brain cortical thickness (CT), finding differences among Ayahuasca users and a control group. The findings suggested that regular long-term Ayahuasca use could lead to changes in brain structure related to personality characteristics, reflecting increased religiousness and spirituality (self-transcendence).<sup>124</sup>

[A]yahuasca users in this study had similar scores to the control group of non-users on psychopathological tests and on neuropsychological function, showing that the structural changes possibly associated with Ayahuasca use did not relate to brain toxicity, but to personality changes that simply reflect a “different,” but not pathological, way of being, as has been shown in several previously cited studies (Grob et al., 1996; Barbosa et al., 2009; Barbosa et al., 2016; Bouso et al., 2012; da Silveira et al., 2005; Doering-Silveira et al., 2005b; Halpern et al., 2008). These kinds of brain alterations are also known to be produced through training and practice in numerous activities, such as learning music, and are known as cerebral plasticity – a

---

<sup>121</sup> Ayahuasca churches in Brazil. CEFLURIS has branches throughout South America, USA, Canada, Europe and Japan.

<sup>122</sup> Bouso, J.C., et al., *Personality, Psychopathology, Life Attitudes and Neuropsychological Performance Among Ritual Users of Ayahuasca: A longitudinal Study*, PLOS ONE, at. 2

<sup>123</sup> *Id.* at. 12.

<sup>124</sup> Bouso, J.C., et al., *Long-term use of Psychedelic Drugs is Associated with Differences in Brain Structure and Personality in Humans*. *Eur Neuropsychopharmacol.* 2015 Apr;25(4), at 483-92.

normal phenomenon that occurs in our brains continuously throughout our lives.<sup>125</sup>

### 5.3 AYAHUASCA USE FOR ADOLESCENTS

A group of adolescents from UDV (15 to 19 years old) who consumed Ayahuasca at least 24 times in the two-year period prior to the survey (averaged at least once a month), were tested, along with a control group of adolescents who had never used Ayahuasca, but matched in age, educational, social, and economic profile. The study focused on the long-term effects of Ayahuasca for psychiatric symptomatology.<sup>126</sup>

The results of the research did not find, in most neurological tests, any significant difference between the performance of the young Ayahuasca users and those of the control group. There were no findings that showed a detrimental (toxic or harmful) effect on the neurocognitive functioning of UDV subjects.<sup>127</sup>

In the same study, the psychopathological profile of the adolescents of both groups was considered equivalent, although results were found to be slightly more favorable for young Ayahuasca users regarding anxiety symptoms, body dysmorphic disorders, and Attention Deficit Hyperactivity Disorder (ADHD).<sup>128</sup>

Regarding the qualitative aspect, the research found few differences between the answers given by the two groups. However the data found allowed the researchers to reason that the young people in the UDV group "appeared to be healthy, solicitous, caring and united to their families and their religious partners."<sup>129</sup>

---

<sup>125</sup> BOUSO, *supra* note 113, at 7.

<sup>126</sup> Evelyn Doering-Silveira, et AL., *Ayahuasca na Adolescência: uma Avaliação Neuropsicológica*, in HOASCA: CIÊNCIA, SOCIEDADE E MEIO AMBIENTE 99, 101, 105 (Joaze Bernardino-Costa Ed., 2011).

<sup>127</sup> Evelyn Doering-Silveira, et AL., *Ayahuasca in adolescence: A neuropsychological assessment*, *Journal of Psychoactive Drugs*, 37 (2), at 123-28.

<sup>128</sup> Da Silveira, D.X., et al., *Ayahuasca in adolescence: A Preliminary Psychiatric Assessment*, *J. OF PSYCHOACTIVE DRUGS*, 37 (2), (2005), at 129-33.

<sup>129</sup> Evelyn Doering-Silveira, et al., 2005a. *Report on Psychoactive Drug Use Among Adolescents Using Ayahuasca Within a Religious Context*, *J. OF PSYCHOACTIVE DRUGS*, 37 (2), at 141-44.

## 5.4 THERAPEUTIC USE

A study conducted by Jose A. Morales-García and other researchers investigated the ability of Ayahuasca to induce neurogenesis *in vitro* using neural progenitor cells from adult mice.<sup>130</sup> The findings showed that harmine, tetrahydroharmine (THH), and harmaline, alkaloids present in Ayahuasca, directly regulate proliferation, migration, and differentiation of neural stem cells and promoted their differentiation into neurons.<sup>131</sup> More deeply, the study demonstrated that the alkaloids present in *B. caapi* have the capacity to regulate the expansion and destination of stem cell populations<sup>132</sup>.

These results open an important door in research for medical treatment in patients with certain conditions such as a brain injury, where the capacity of increased migration is relevant to treat damaged areas where stem cell niches are far from the site damaged<sup>133</sup>. In addition, the alkaloids in Ayahuasca facilitate neurogenesis at multiple levels, acting directly in the proliferation of neurons, increasing the replacement of cells in patients with a pathological condition<sup>134</sup>.

Recent clinical studies on humans who did not respond to conventional treatment for depression, demonstrated rapid and long-lasting antidepressant and anxiolytic<sup>135</sup> effects after drinking Ayahuasca one single time.<sup>136</sup> Preliminary results indicated an almost immediate response with lower depression symptoms that lasted for approximately three weeks.<sup>137</sup>

---

<sup>130</sup> GARCIA, *supra* note 68, at 1-2.

<sup>131</sup> BOUSO, *supra* note 113, at 6.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 9.

<sup>135</sup> Flávia de L. Osório, et al., *Antidepressant Effects of a Single Dose of Ayahuasca in Patients with Recurrent Depression: a Preliminary Report*, Rev. Bras. Psiquiatr. vol.37 no.1 São Paulo Jan./Mar. 2015, at 19.

<sup>136</sup> See GARCIA, *supra* note 68, at 9. See also OSORIO, *supra* note 135, at 13-20. See also Sanches, R. F. et al., *Antidepressant Effects of a Single Dose of Ayahuasca in Patients With Recurrent Depression: A SPECT Study*, J. CLIN. PSYCHOPHARMACOL. 36, 77–81 (2016).

<sup>137</sup> Arran Frood, *Ayahuasca Psychedelic Tested for Depression*, Nature, (Apr. 6, 2015) <https://www.nature.com/news/Ayahuasca-psychedelic-tested-for-depression-1.17252>.

Those studies have demonstrated that Ayahuasca has an anti-addiction property when administered on a regular basis, decreasing addiction to alcohol, cocaine, and opiates.<sup>138</sup>

In 2010, Ayahuasca users were examined for medical and psychosocial problems typically related to regular use and abuse of drugs. The findings suggest that Ayahuasca has a low abuse potential,<sup>139</sup> and its ritual use does not seem to be associated with the harmful psychosocial problems that drugs of abuse typically cause.<sup>140</sup> The results showed that both Ayahuasca-using groups scored significantly lower than their respective controls on the ASI<sup>141</sup> Alcohol Use and Psychiatric Status subscale.<sup>142</sup> In the same study, both Ayahuasca groups had no social problems related with their participation in a church that has Ayahuasca as a sacrament, and its long-term use did not show any impact on the mental health of regular users.<sup>143</sup>

Another study with a U.S. based group that use Ayahuasca regularly in religious rituals did not find evidence of psychopathology when compared with standard data.<sup>144</sup> Like commercial antidepressants, Ayahuasca is able to change the concentration of serotonin in the brain, a neurotransmitter responsible for mood-regulation.<sup>145</sup> Those recent findings evince a therapeutic potential for a huge spectrum of psychiatric and neurologic disorders.<sup>146</sup>

---

<sup>138</sup> GARCIA, *supra* note 68, at 9. See Fábregas, J. M. et al., *Assessment of addiction severity among ritual users of Ayahuasca*, *Drug Alcohol Depend.* 111, 257–261 (2010); See also Thomas, Gerald et al., *Ayahuasca-assisted therapy for addiction: results from a preliminary observational study in Canada*, *Curr. Drug Abuse Rev.* 6, 30–42 (2013).

<sup>139</sup> Fábregas, J. M. et al, *Assessment of addiction severity among ritual users of Ayahuasca*. *Drug Alcohol Dependence*, 111, 257–261 (2010), at 4. See Robert S. Gable, *Risk Assessment of Ritual Use of Oral Dimethyltryptamine(DMT) and Harmala Alkaloids*, 102 *Addiction* 24–34, (2007).

<sup>140</sup> Fábregas, J. M. et al, *Assessment of addiction severity among ritual users of Ayahuasca*. *Drug Alcohol Dependence*, 111, 257–61 (2010), at 4.

<sup>141</sup> *Id.* at 2.

<sup>142</sup> *Id.* at 4.

<sup>143</sup> *Id.* See da Silveira, D.X. et AL., 2005. *Ayahuasca in Adolescence: A Preliminary Psychiatric Assessment*. *J. of Psychoactive Drugs*, 37 (2): 129-33. [Showing similar results in the sense of no psychiatric disorders found].

<sup>144</sup> Halpern, J.H. et al., *Evidence of Health and Safety in American Members of a Religion who use a Hallucinogenic Sacrament*, *Med. Sci. Monit.* 14 (2008).

<sup>145</sup> FROOD, *supra* note 137.

<sup>146</sup> FÁBREGAS, *supra* note 140, at 9.

## 6. THE EFFECTS OF AYAHUASCA

Ayahuasca can temporally modify thought process, emotion, perception and somatic sensations, but the subject does not lose the ability to interact with the surroundings.<sup>147</sup> It promotes an altered state of consciousness, preserving, however, the sense of conscience during the experience. Subjects may experience visions with eyes closed and a large number of thoughts, giving the sensation that thought process is faster.<sup>148</sup>

[T]hese effects can include the sensation of an intimate proximity to God or other spiritual beings; a general intensification of emotions, particularly those of a positive valence (e.g., tranquillity and reverence); a tendency toward introspection; sensations of enhanced lucidity and comprehension.<sup>149</sup>

The effects of Ayahuasca are well tolerated,<sup>150</sup> and studies have neither demonstrated psychological dependence nor physical addictiveness.<sup>151</sup> Research has showed it can be used safely in healthy adults,<sup>152</sup> although it is not recommended “for people with grave psychiatric disorders, particularly those individuals prone to psychosis....there are some cases describing psychiatric symptomatology in ritual contexts, although these cases are rare and their occurrence seems to be below the prevalence of psychiatric problems in the general population.”<sup>153</sup>

---

<sup>147</sup> BOUSO, *supra* note 113, at 5-6.

<sup>148</sup> Bouso, J.C., Fábregas, J.M., Antonijoan, R.M. et al., *Acute Effects of Ayahuasca on Neuropsychological Performance: Differences In Executive Function Between Experienced and Occasional Users*, 230 *Psychopharmacology* 415, 416 (2013).

<sup>149</sup> Anderson, B. T., Labate, B. C., Meyer, M., Tupper, K. W., Barbosa, P. C. R., Grob, C. S., et al., *Statement on Ayahuasca*, 23 (3) *Int. J. of Drug Policy* 173, 173 (2012).

<sup>150</sup> BOUSO, *supra* note 113, at 5.

<sup>151</sup> CALLAWAY, *supra* note 87, at 245.

<sup>152</sup> See McKenna, D.J., *Clinical Investigations of the Therapeutic Potential of Ayahuasca: Rationale and Regulatory Challenges*, *Pharmacology and Therapeutics*, 102 (2): 111-29 (2004). See also Francisco Assis de Sousa Lima & Luís Fernando Tófoli, *An Epidemiological Surveillance System by the UDV: Mental Health Recommendations Concerning the Religious Use of Hoasca*, in *THE INTERNATIONALIZATION OF AYAHUASCA* 185, 195 (Beatriz Caiuby Labate & Henrik Jungaberle, Lit ed., 2011).

<sup>153</sup> BOUSO, *supra* note 113, at 7. See also Francisco Assis de Sousa Lima & Luís Fernando Tófoli, *An Epidemiological Surveillance System by the UDV: Mental Health Recommendations Concerning the Religious Use of Hoasca*, *THE INTERNATIONALIZATION OF AYAHUASCA* 185-99 (Beatriz Caiuby Labate & Henrik Jungaberle, Lit ed., 2011).

Long-term users in abstinence did not show cognitive deficits,<sup>154</sup> and a study with healthy experienced users observed that Ayahuasca does not show a reduced reaction following its repeated use [tolerance].<sup>155</sup> Furthermore, up to the present moment, there is not a single recorded death directly attributed to Ayahuasca use.<sup>156</sup>

---

<sup>154</sup> BOUSO, *supra* note 148, at 415.

<sup>155</sup> See dos Santos, R.G., Grasa, E., Valle, M. et al., *Pharmacology of Ayahuasca Administered in two Repeated Doses*, 219 (4) *Psychopharmacology* 1039-53, (2012).

<sup>156</sup> ANDERSON, *supra* note 149, at 173-175. *See also* GABLE, *supra* note 140.



### SECTION III

#### AYAHUASCA RELIGIONS

##### 1. THE RISING OF AYAHUASCA RELIGIONS IN AN URBAN CONTEXT

The Western Amazon region experienced a great migration in the first decades of the twentieth-century, when workers came from several regions of Brazil (mainly from the northeast) to work in the rubber plantations.<sup>157</sup>

Since 1912,<sup>158</sup> the new Amazonian Eldorado entered in decadence, due to the competition from the rubber plantations in Malaysia. Not until the 1940's they will experience a new flux of migrants, seduced by promises of a better life working in rubber extraction in order to supply the demand for the product during World War II.<sup>159</sup>

The reality faced by those workers was harsher than expected, because they lived within a work regime close to slavery, which led them to migrate to urban areas.<sup>160</sup>

It is in this social context that several religious groups will emerge, developing their rituals, teachings, myths and principles in the urban areas of the Amazon region (mostly in Rio Branco, Acre state and Porto Velho, Rondonia state, Brazil). They will make use of a psychoactive brew, Ayahuasca, as a central<sup>161</sup> element of those new religious traditions,<sup>162</sup> which will expand beyond the Brazilian Amazon forest as Ayahuasca religions grow.<sup>163</sup>

---

<sup>157</sup> EDWARD MACRAE, GUIDED BY THE MOON- SHAMANISM AND THE RITUAL USE OF AYAHUASCA IN THE SANTO DAIME RELIGION IN BRAZIL 47 (1992).

<sup>158</sup> FABIANO, *supra* note 100, at 44

<sup>159</sup> MACRAE, *supra* note 157.

<sup>160</sup> FABIANO, *supra* note 100, at 44-45.

<sup>161</sup> "The idea that Daime and Vegetal [Ayahuasca] are central to the religions is not only a product of intellectual representation of the phenomenon, but is also supported by empirical reality. From the emic perspective, there is an important valorization of the spiritual, divinatory, therapeutic, pedagogical, and other properties of the brew. The consumption of Ayahuasca also appears to function as a form of diacritical sign of the identity for these groups *vis-à-vis* its other religious manifestations (such as Catholicism, Protestantism, Umbanda, Spiritism, religions of Oriental orientation, etc.)." Beatriz Caiuby Labate, Edward MacRae, & Sandra Lucia Goulart, *Brazilian Ayahuasca Religions in Perspective 2*, [http://neip.info/novo/wp-content/uploads/2015/04/labate\\_macrae\\_goulart\\_bar\\_perspectives\\_equinox.pdf](http://neip.info/novo/wp-content/uploads/2015/04/labate_macrae_goulart_bar_perspectives_equinox.pdf).

<sup>162</sup> "Although there is a tradition of Ayahuasca consumption by shamans, rubber tappers, and mestizo healers in several countries of South America, such as Colombia, Bolivia, Peru, Venezuela and Ecuador, the formalization of churches that use the brew only occurs in Brazil". LABATE, *supra* note 161.

<sup>163</sup> BEATRIZ CAIUBY LABATE ET AL., BRAZILIAN AYAHUASCA RELIGIONS IN PERSPECTIVE 1, [http://neip.info/novo/wp-content/uploads/2015/04/labate\\_macrae\\_goulart\\_bar\\_perspectives\\_equinox.pdf](http://neip.info/novo/wp-content/uploads/2015/04/labate_macrae_goulart_bar_perspectives_equinox.pdf).

Raimundo Irineu Serra, or Mestre Irineu, is one of the migrants who came from Maranhão state, Brazil's northeast. He was one who brought the sacred brew to urban areas in Rio Branco, after first having contact with it on the border of Brazil with Peru and Bolivia.<sup>164</sup>

He denominates the brew *Daime*,<sup>165</sup> founding a new religion in 1930 in a rural area of Rio Branco,<sup>166</sup> known as *Alto Santo*, where Mestre Irineu and his followers built a temple. This later gave birth to a new religious organization named "Centro de Iluminação Cristã Luz Universal" – CICLU [Universal Christian Enlightening Center].<sup>167</sup> His mission was claimed to have been received from Our Lady of Conception, identified also as *Queen of the Forest*,<sup>168</sup> who presented him with a series of revelations and lessons.<sup>169</sup>

The worship left by Mestre Irineu encompasses eclectic traditions from Catholic, Esoteric, African, and Indian elements.<sup>170</sup> The doctrines and teachings are transmitted through hymns that communicate principles of harmony, love, truth, and justice.<sup>171</sup> His work was administered only in Rio Branco, Brazil, identified in this thesis as Alto Santo.<sup>172</sup>

In 1945, Daniel Pereira de Matos, Mestre Daniel, a friend and disciple of Mestre Irineu, received a new mission, and founded a new center:<sup>173</sup> *Centro Espírita e Culto de Oração Casa de Jesus Fonte de Luz* [Spiritist Center and Cult of Prayer Jesus

---

<sup>164</sup> MACRAE, *supra* note 157, at 48.

<sup>165</sup> Meaning "Give me", as a supplication, a request for force, light and divine love. See LABATE, *supra* note 168, at 2, 3.

<sup>166</sup> FACUNDES, *supra* note 25, at 29.

<sup>167</sup> MACRAE, *supra* note 157, at 52.

<sup>168</sup> *Id.* at 49.

<sup>169</sup> *Id.* at 53.

<sup>170</sup> Renato Pinto Venâncio & Henrique Carneiro, *As origens históricas do Santo Daime*, in *ÁLCOOL E DROGAS NA HISTÓRIA DO BRASIL* 231, 231, 232 (Beatriz Caiuby Labate & Gustavo Pacheco, Alameda ed., 2005).

<sup>171</sup> MACRAE, *supra* note 157, at 54.

<sup>172</sup> FABIANO, *supra* note 100, at 67.

<sup>173</sup> LABATE, *supra* note 163, at 4. "The Barquinha, whose founder died in 1958, is represented by different groups (called 'centers'), which are autonomous and have idiosyncratic particularities. All have modest membership numbers, and most remain confined to the Acre region – as also occurs with Alto Santo."

Source of Light's House], this gave rise to a second line<sup>174</sup> working with Ayahuasca religiously.<sup>175</sup>

Mestre Daniel's doctrine [Religious line],<sup>176</sup> also known as *Barquinha* [Little Boat], was transmitted through hymns, which reveal Marie and Jesus' doctrine in the form of sung poetry, the sacramental use of Daime (Ayahuasca) and charity, helping the needy, linking elements of Catholic, Afro and Indigenous popular culture.<sup>177</sup>

His revelation consisted of a sacred book received from "beings of light", the "blue book", containing hymns with the doctrine and teachings pertaining to his mission and works to be consecrated to Saint Francis of Assisi.<sup>178</sup>

In 1965, José Gabriel da Costa (Mestre Gabriel) started organizing a third line to work with Ayahuasca in urban areas, the União do Vegetal (or UDV), in the city of Porto Velho, Rondonia, in the Brazilian Amazon region. Later in this thesis more will be explained about this new religion.

In 1974, Sebastião Mota de Melo (Padrinho [Godfather] Sebastião), one of the followers of Raimundo Irineu Serra, created a new line from Alto Santo, which became known as CEFLURIS [Eclectic Center of the Universal Flowing Light Raimundo Irineu Serra] or Santo Daime.<sup>179</sup>

---

<sup>174</sup> *Id.* "Some of the first researchers of this religious phenomenon adopted the Santo Daime term *linha* (line or thread) to designate the Santo Daime, União do Vegetal and Barquinha groups, understanding that the distinction between 'lines' occurs in their mythical narratives, ritual forms and the collection of entities that populate each of their pantheons".

<sup>175</sup> Eloi dos Santos Magalhães. "BALANÇOS DE LUZ": DEVOÇÃO E EXPERIÊNCIA A BORDO DO BARQUINHO SANTA CRUZ 72 (Universidade Federal de Campina Grande, 2013), <http://www.ufcg.edu.br/~ppgcs/wp-content/uploads/2013/05/UNIVERSIDADE-FEDERAL-DE-CAMPINA-GRANDE.pdf>.

<sup>176</sup> In Brazil the main Ayahuasca religions usually refer to their lines as the doctrines and teachings proper to each religion and left by each Mestre who founded the religion.

<sup>177</sup> MAGALHAES, *supra* note 175.

<sup>178</sup> *Id.*

<sup>179</sup> Renato Pinto Venâncio & Henrique Carneiro, *As origens históricas do Santo Daime*, in *ÁLCOOL E DROGAS NA HISTÓRIA DO BRASIL* 231, 231 (Beatriz Caiuby Labate & Gustavo Pacheco, Alameda ed., 2005). "Several subgroups define themselves and are popularly defined as "Santo Daime", claiming to be followers of the teachings of Raimundo Irineu Serra. We can recognize two main strands: some small groups generally identified as Alto Santo, which remain restricted to the state of Acre and the Eclectic Center of the Universal Flowing Light Raimundo Irineu Serra (Cefluris), whose headquarters is located in the community of Céu do Mapiá (Amazon state, Brazil), and has branches in several capitals of

[A]lthough CEFLURIS attributes the same name to the drink (Daime), the same uniforms (clothing), basic symbology, calendar, CEFLURIS has doctrine and rituals different from those professed by Raimundo Irineu Serra, giving rise to several misunderstandings, since the same word - Daime or Santo Daime - began to designate doctrines (Alto Santo and CEFLURIS) with marked differences.<sup>180</sup>

His work started out in a rural area close to Rio Branco, Brazil, called Colonia 5000, attracting not only local peasants, but people from many parts of Brazil, looking for a new way of life, a spiritual path close to nature.<sup>181</sup> From Colonia 5000, CEFLURIS moved into Céu do Mapiá, founding a spiritualist community inside the Amazonian rain forest. It was a completely isolated site, two days away by canoe from the nearest town, Boca do Acre.<sup>182</sup>

[A]fter a time Padrinho Sebastião had built himself a large following of people coming from all over Brazil and even from abroad. Frequently, after a more or less long stay in the region, the visitors would go back home, taking with them their new ideals and spreading, among their colleagues, friends and relatives, news of their newly adopted faith.<sup>183</sup>

Padrinho Sebastião (CEFLURIS), different from the three other Ayahuasca religions (Alto Santo, Barquinha, and UDV), introduced the use of *cannabis* [marijuana] as a sacrament, which he re-named “Santa Maria”, claiming the psychoactive plant “corresponded to the spiritual force of the Virgin Mother, a feminine energy to counterbalance the Daime, or God the Father, a masculine energy.”<sup>184</sup>

The use of *cannabis* has resulted in a series of police actions against CEFLURIS, reaching other groups that did not agree with the use of *cannabis*, and in 1985, resulted in the inclusion of Ayahuasca on the list of proscribed substances, by the

---

Brazil and the world. Cefluris has as patron Sebastião Mota de Melo (Padrinho Sebastião), which is not recognized as a religious leader by the several churches of the Alto Santo.”

<sup>180</sup> FACUNDES, *supra* note 25, at 30.

<sup>181</sup> MACRAE, *supra* note 157, at 61.

<sup>182</sup> *Id.* at. 58, 59.

<sup>183</sup> *Id.* at 61.

<sup>184</sup> *Id.* at. 57.

Brazilian government.<sup>185</sup> This led CEFLURIS “to suspend the use of Cannabis in its official rituals and to recommend its followers to do likewise.”<sup>186</sup>

[M]ore recently, especially since a seminar carried out by the National Anti-Drug Council (CONAD) in 2006, this organization assumed as a distinct doctrine from the one left by Raimundo Irineu Serra, although using the same name Daime. Nowadays, along with the general public, media and academic investigations, Daime refers to the doctrine and practice of CEFLURIS, not to the doctrine created by Raimundo Irineu Serra.<sup>187</sup>

Thus, the religious phenomenon born in Brazil in the early twentieth century, which inaugurated the ritual use of Ayahuasca in urban centers, has four main lines or doctrines, each with its spiritual guide: Alto Santo with Mestre Irineu; Barquinha with Mestre Daniel; União do Vegetal – UDV with Mestre Gabriel; and CEFLURIS, ICECLU, or Santo Daime, with Padrinho Sebastião.

These religious organizations were summoned to participate with the National Anti-Drug Council - CONAD as representatives of the Ayahuasca religions in Brazil.<sup>188</sup> Despite a long history of prejudice and persecution, these religions nowadays enjoy a growing social and political recognition in Brazil, especially in the state of Acre.

[I]n April of 2010, the Legislative Assembly of the state of Acre<sup>189</sup> in Amazonian Brazil recognized the following deceased religious leaders with the honorary title “Citizen of Acre” (Assembleia Legislativa do Estado do Acre 2010): Raimundo Irineu Serra or “Mestre Irineu” (founder of the Santo Daime),<sup>190</sup> Daniel Pereira de Mattos or “Frei Daniel” (founder of the Barquinha), and José Gabriel da Costa or “Mestre Gabriel” (founder of the UDV).<sup>191</sup>

So far only UDV and CEFLURIS (or Santo Daime) have expanded out of Brazil, recognized as traditional Amazonian religious movements.<sup>192</sup>

---

<sup>185</sup> *Id.* at. 57, 58.

<sup>186</sup> *Id.* 58.

<sup>187</sup> FACUNDES, *supra* note 25, at 30.

<sup>188</sup> *Id.*

<sup>189</sup> Corresponding to a State House of Representatives in USA.

<sup>190</sup> In this context, it should be read “Alto Santo” instead of Santo Daime.

<sup>191</sup> Beatriz Caiuby Labate, *Ayahuasca Religions in Acre: Cultural Heritage in the Brazilian Borderlands*.

23 (1) *Anthropology of Consciousness* 88, 87-102 (2012).

<sup>192</sup> *Id.* at 96.

## 2. THE UNIÃO DO VEGETAL - UDV

José Gabriel da Costa was one of thousands of migrants that were enlisted as “Rubber Soldiers” during World War II. As Brazil joined the war, and as part of its war effort, besides sending troops to fight in the Italian front, Brazil was requested to supply rubber for the Allied Forces. Gabriel then migrated from Bahia state, northeast of Brazil, to work in the *seringais* [rubber farms], facing a quasi-slave condition where few survived.<sup>193</sup>

On July 22, 1961, José Gabriel da Costa, or Mestre<sup>194</sup> Gabriel, as he is called by his disciples, created in rubber tapping areas of Brazil (Acre) and Bolivia, the União do Vegetal (or UDV), a Christian Spiritist religion. In 1965, Mestre Gabriel started to organize UDV as a religion in the city of Porto Velho, Rondonia, in the Brazilian Amazon region,<sup>195</sup> as the Centro Espírita Beneficente União do Vegetal (or CEBUDV).

The UDV is a Christian religion which has incorporated Judaic fundamentals absorbed by Christianity.<sup>196</sup> Jesus is revered as the Divine Master, the Savior.<sup>197</sup> The religious ceremonies include recitation of the church [by]laws, invocations, question-and-answer exchanges, religious teachings,<sup>198</sup> and the use of songs as an instrument to transmit religious teachings.<sup>199</sup>

The União do Vegetal is an oral tradition religion, meaning that its teachings are transmitted only orally during regular religious services, without the use of any book.<sup>200</sup>

---

<sup>193</sup> FABIANO, *supra* note 100, at 43-47.

<sup>194</sup> “Master”, meaning religious leader.

<sup>195</sup> Edson Lodi Campos Soares & Cristina Patriota de Moura, *Objetivos da União do Vegetal como Grupo Religioso Brasileiro e Internacional*, in HOASCA: CIÊNCIA, SOCIEDADE E MEIO AMBIENTE 151 (Joaze Bernardino-Costa Ed., 2011).

<sup>196</sup> FABIANO, *supra* note 100, at 170.

<sup>197</sup> *Id.*

<sup>198</sup> Brief for Respondents at 6, *Gonzales v. O Centro Espiritira Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).

<sup>199</sup> FABIANO, *supra* note 100, at 176.

<sup>200</sup> *Id.* at 174.

At the very beginning of its Bylaws,<sup>201</sup> the UDV states clearly its objective of working for the evolution of the human being in the sense of spiritual development, sincerely using a tea called Hoasca as a sacrament,<sup>202</sup> to facilitate mental concentration.

The UDV has, as a symbol of Peace and Human Fraternity, the words “Light”, “Peace”, and “Love”, which foster the improvement of the human being, through the development of moral, intellectual, and spiritual virtues, without distinction of race, political views, religious creed, or nationality.<sup>203</sup>

The União do Vegetal acknowledge other religions as paths leading to God, and thus presents itself as “another tree that sprouts in the Divine Garden to provide mankind,”<sup>204</sup> with a path that reconnects men and women to the Sacred by the faithful practice of good and constant fulfillment of duties.<sup>205</sup>

Through the words of its founder, Mestre Gabriel, UDV members believe that Hoasca tea [Ayahuasca] cause no physical or mental harm, but is a vehicle that facilitates focus, leading the ritual practitioners to an altered [amplified] state of consciousness, where they reach a higher spiritual understanding and perception of life.<sup>206</sup>

As demonstrated in this thesis, up to this moment, there is not any scientific proof that Ayahuasca, when utilized in a religious context, as UDV has been ritually doing, can cause any harm to the health of its users. On the contrary, scientific research studying long-term Ayahuasca users, adolescents, and pregnant women that used Ayahuasca during pregnancy in a religious context, all members of UDV, have shown no detrimental (toxic or harmful) effect to their physical or neurocognitive functioning.

---

<sup>201</sup> Standing Order (Consolidação das Leis). Ed. May, 2017. (circulation restricted to members of UDV).

<sup>202</sup> Ayahuasca, Vegetal, Daime, Yajé, among other names.

<sup>203</sup> SOARES, *supra* note 195, at 151-52.

<sup>204</sup> FABIANO, *supra* note 100, at 20.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 146.

Rather pointing, in some cases, to more favorable results in Ayahuasca users when compared to control groups that do not drink it.

In the União do Vegetal there is a culture spread among its members of respect for the legal authorities and the law,<sup>207</sup> which has allowed recognition by the Brazilian authorities of the seriousness of the work carried out by this religion.<sup>208</sup>

In response to the District Judge of the city of São Roque (São Paulo state), the Prosecutor Jose Roberto Figueiredo Santoro attested that the UDV “has demonstrated its willingness to cooperate with the authorities, in particular with the Public Prosecutor's Office and with the government narcotics control agencies, making available all the information necessary for decision-making and giving access to its facilities for any inquiries.”<sup>209</sup>

Likewise, the Brazilian Parliament<sup>210</sup> held a solemn session in recognition of the work of União do Vegetal in honor of UDV's 50th anniversary,<sup>211</sup> which, since July 22nd, 1999, has received from the Federal Government the status of “Entidade de Utilidade Pública”. This is normally a condition attributed only to not-for-profit organizations, in recognition of relevant services rendered disinterestedly to society.<sup>212</sup>

The practice of goodness is encouraged. “The UDV develops beneficent actions that have attended to more than 80,000 people throughout Brazil. This work is voluntary and carried out by the associates affiliated to the UDV Núcleos, or by regional and local beneficent organizations created specifically for this purpose,”

---

<sup>207</sup> SOARES, *supra* note 195, at 156.

<sup>208</sup> Wolney Queiroz, Parlamento Reverencia os 50 Anos da União do Vegetal [Parliament Celebrates 50 Years of UDV]. Brasília, Brazil, [https://issuu.com/julianeoliveira/docs/separata\\_sess\\_o\\_solene\\_internet2](https://issuu.com/julianeoliveira/docs/separata_sess_o_solene_internet2) (last visited Oct. 19, 2017).

<sup>209</sup> Ofício [Letter] 059/PFDC from Jose Roberto Figueiredo Santoro (Mar. 5, 1999).

<sup>210</sup> House of Representatives.

<sup>211</sup> QUEIROZ, *supra* note 208.

<sup>212</sup> DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 22.7.1999 (Braz.).



providing social, educational, medical, financial, and cultural services in benefit of society.<sup>213</sup>

Those efforts include a project called Luz do Saber [Light of Knowledge], involving literacy and digital inclusion of young people and adults,<sup>214</sup> as well as a one-day social welfare event called “Day of Goodness”, which includes artistic performances, workshops, health advice, training opportunities, and social services, offered in communities that most need those charitable works.<sup>215</sup>

Nature is revered as sacred in the União do Vegetal and has the human being as part of it. Because of that, members of UDV seek to live in harmony and equilibrium with it.<sup>216</sup> In this sense, an important initiative is the Novo Encanto [New Enchantment] Organization, a not-for-profit organization that is the ecological branch of União do Vegetal. Novo Encanto Organization develops projects for environmental preservation and sustainability to implement initiatives preserving important areas of native rainforest and raising environmental awareness.<sup>217</sup>

UDV General Headquarters is located in Brasília-DF (Brazil’s capital), and is currently present in all Brazilian states and main cities, as well as ten different countries,<sup>218</sup> totaling almost twenty thousand members,<sup>219</sup> in 227 Núcleos (Branches) and Authorized Distributions of the Vegetal.<sup>220</sup>

---

<sup>213</sup> *The Practice of Goodness*, <http://udv.org.br/en/initiatives/beneficence/the-practice-of-goodness/> (last visited Jan. 5, 2018).

<sup>214</sup> *Literacy and Digital Inclusion*, <http://udv.org.br/en/initiatives/beneficence/literacy-and-digital-inclusion/> (last visited Jan. 5, 2018).

<sup>215</sup> *Day of Goodness (Dia do Bem)*, <http://udv.org.br/en/initiatives/beneficence/dia-do-bem/> (last visited Jan. 5, 2018).

<sup>216</sup> Paulo Afonso Amato Condé, *Ecologia: Zelo com o Mariri e a Chacrona e a Preservação e Melhoria da Paisagem e do Ambiente*, in HOASCA: CIÊNCIA, SOCIEDADE E MEIO AMBIENTE 267, 267 (Joaze Bernardino-Costa Ed., 2011).

<sup>217</sup> *Novo Encanto (New Enchantment)*, <http://udv.org.br/en/initiatives/preservation-and-environment/new-enchantment/> (last visited Jan. 5, 2018).

<sup>218</sup> United States, Canada, Peru, Portugal, Spain, UK, Switzerland, Italy, Netherlands, and Australia. Updated in July, 2017.

<sup>219</sup> *The UDV today: nearly 20 thousand associates in a small local religious center*. This nomenclature also functions as an identity affirmation element, as we can see in the Jewish synagogues and Moslem mosques.

<sup>220</sup> Beatriz Caiuby Labate, Rosa Melo, Glenn Shepard and Clancy Cavnar, *The UDV Religion, Science, and Academic Research*. 24 (2) *Anthropology of Consciousness* 214, 214-227 (2013).

The expansion of UDV is one of their main mission. “Though the religion was only founded in 1961 and represents a relatively small minority within Brazilian’s religious expressions, UDV has played an outsized role in shaping the broader legal, social, and scientific trajectory of Ayahuasca religiosity in Brazil and throughout the world.”<sup>221</sup>

In 2011, by the time of its 50<sup>th</sup> anniversary, as a symbol of its recognition before the Brazilian government, the UDV received praise from 49 government institutions (municipal and states legislative houses, city halls and a Court House) across the country.<sup>222</sup>

In UDV, only Ayahuasca (brew made from *Banisteriopsis caapi* vine and *Psychotria viridis* leaves) is used as sacrament. No other psychoactive substance or drug which causes chemical dependence is used and through its work of spiritual enlightenment, the use of illicit drugs, alcohol, and tobacco are explicitly disallowed.<sup>223</sup>

The União do Vegetal does not commercialize Ayahuasca, which is used only in religious ceremonies.<sup>224</sup> Production costs are shared between the members, without any profit,<sup>225</sup> and church heads do not receive any financial compensation for

<sup>219</sup> QUEIROZ, *supra* note 208.

<sup>219</sup> SOARES, *supra* note 195, at 160-61.

<sup>219</sup> In fact, UDV is officially contrary to the commercialization of Ayahuasca. See CENTRO ESPÍRITA BENEFICENTE UNIÃO DO VEGETAL. UNIÃO DO VEGETAL: HOASCA; FUNDAMENTOS E OBJETIVOS 17 (1989).

<sup>219</sup> SOARES, *supra* note 195, at 161.

<sup>219</sup> Joaze Bernardino-Costa & Flávio Mesquita da Silva, *Construindo o Mundo da Hoasca: a Organização da União do Vegetal*, in HOASCA: CIÊNCIA, SOCIEDADE E MEIO AMBIENTE 21, 30 (Joaze Bernardino-Costa Ed., 2011). *Brazil and 10 other countries*, <http://udv.org.br/en/blog-en/the-udv-today-nearly-20-thousand-associates-in-brazil-and-10-other-countries/> (last visited Jan. 5, 2018).

<sup>220</sup> For a better understanding of the way UDV is organized, a *Núcleo* (Center) is the one corresponding to a Parish in the organization of the Roman Catholic Church. An Authorized Distribution of the Vegetal is a small local religious center. This nomenclature also functions as an identity affirmation element, as we can see in the Jewish synagogues and Moslem mosques.

<sup>221</sup> Beatriz Caiuby Labate, Rosa Melo, Glenn Shepard and Clancy Cavnar, *The UDV Religion, Science, and Academic Research*. 24 (2) *Anthropology of Consciousness* 214, 214-227 (2013).

<sup>222</sup> QUEIROZ, *supra* note 208.

<sup>223</sup> SOARES, *supra* note 195, at 160-61.

<sup>224</sup> In fact, UDV is officially contrary to the commercialization of Ayahuasca. See CENTRO ESPÍRITA BENEFICENTE UNIÃO DO VEGETAL. UNIÃO DO VEGETAL: HOASCA; FUNDAMENTOS E OBJETIVOS 17 (1989).

<sup>225</sup> SOARES, *supra* note 195, at 161.

their services. As such, only reimbursement for expenses incurred in connection with the performance of their duties is given.<sup>226</sup>

---

<sup>226</sup> Joaze Bernardino-Costa & Flávio Mesquita da Silva, *Construindo o Mundo da Hoasca: a Organização da União do Vegetal*, in HOASCA: CIÊNCIA, SOCIEDADE E MEIO AMBIENTE 21, 30 (Joaze Bernardino-Costa Ed., 2011).

## SECTION IV

### INTERPRETING RELIGIOUS LIBERTY

#### 1. HISTORY OF RELIGIOUS FREEDOM AND THE FORMATION OF THE AMERICAN PEOPLE.

The New World, a new Promised Land, was the beginning of a new nation, formed with the hope of creating a Christian America. Faith was a major concern and an element of union between English colonists that shared the same religion, which helped the settlement, later becoming the thirteen American colonies.

In the sixteenth-century, Dutch Protestants, following Calvinist ideas, were severely repressed by King Philip II, of Spain, also Lord of the Netherlands. The seven northern Dutch provinces started a revolution, establishing a confederation that resembled enormously the American Revolution two centuries later. John Adams would compare the two republics as the history of one seemed like a transcript of the other.<sup>227</sup>

The Union of Utrecht of 1579 included a provision ensuring “freedom of religion, and no one may be persecuted or questioned about his religion,” establishing a haven for religious dissenters from all parts of Europe. Later, some of those Pilgrims would sail to America on the Mayflower and play an important role in the American Revolution.<sup>228</sup>

Meanwhile, England was concerned about the expansion of the Catholic Spain.<sup>229</sup> The Catholic Church was considered a fraudulent faith, “the Whore”, mainly because of the selling of indulgences. Their faithful members were called papists, instead of Christians.<sup>230</sup>

In 1606, King James, in a charter for Virginia, settled the mission: “to promote Christianity to those living ‘in darkness and miserable ignorance of the true

---

<sup>227</sup> JOHN WITTE, JR. RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 13, 14 (Westview Press eds., 2nd ed. 2005).

<sup>228</sup> *Id.*

<sup>229</sup> STEVEN WALDMAN, FOUNDING FAITH 4 (2008).

<sup>230</sup> *Id.* at 4-5.

knowledge and worship of God’.”<sup>231</sup> In the early days of the colony, religiosity was forced by King’s will and any minor offense of the law would warrant a penalty. Settlers who failed to observe the Sabbath for the first time were punished, losing provisions for a week. If a settler failed to observe the sacred law for a third time, the penalty was capital.<sup>232</sup>

In 1620, the *Mayflower* came, sailing to the New Land, carrying the Pilgrims. The majority of them were Puritans dissatisfied with the Church of England. In the eyes of the Puritans, the Church of his Majesty, King of England, was too embroiled with Catholicism and therefore corrupted as well.<sup>233</sup>

In Virginia in 1640, Catholics were not allowed to profess their faith in public, unless they had sworn the oath that recognized the supremacy of the Church of England. Popish priests were supposed to be deported.<sup>234</sup> Puritan clergy and Jews were also precluded. Anglicanism was the legally established religion in the colony.<sup>235</sup>

The Puritans, who had initially taken refuge in Holland, came to Massachusetts and other colonies.<sup>236</sup> They flourished economically and by the time of independence in 1776, “provided the moral and religious background of fully 75% of people”<sup>237</sup> in all thirteen colonies. The Puritans intended from the beginning to found a “Holy Commonwealth” to shape the State under the law of God. Their theology, taken from the French theologian John Calvin, was the creation of a Kingdom of God on earth.<sup>238</sup>

---

<sup>231</sup> *Id.* at 4.

<sup>232</sup> *Id.* at 5.

<sup>233</sup> *Id.* at 7.

<sup>234</sup> *Id.* at 6.

<sup>235</sup> STEVEN WALDMAN, *FOUNDING FAITH* 6 (2008).

<sup>236</sup> Great migration from England started in 1628.

<sup>237</sup> WALDMAN, *supra* note 235, at 7.

<sup>238</sup> *Id.* at 8.

Puritans had an important and profound effect on American psyche, shaping most of the moral rules in early colonial America. However, their Protestantism is seen nowadays as a synonym of intolerance against Catholics and excessive strictness.<sup>239</sup>

In seventeenth-century New England, Quakers, “Christians who believed that each person had to rely for spiritual guidance on the Inner Light more than scripture”,<sup>240</sup> were a common target as their faith was viewed by Puritans as blasphemous. “For the crime of being a Quaker who refused to leave Massachusetts, the punishment on the first offense was usually whipping; on second offense, an ear was cut off. For a third offense, the criminal would be executed.”<sup>241</sup>

The same Puritans that ran away from England to have the right to profess their faith were the ones to execute other settlers due to their religious beliefs.

In the old days in a colony, the general picture was:

[M]ost defined Christianity as being Protestantism, and most discriminated blatantly against Catholics and Jews. Beyond that, there were important differences. The New England colonies – Massachusetts, Connecticut, New Hampshire – were dominated by Puritans and their Congregational churches. They disliked the Anglicans. Virginia, North Carolina, South Carolina, and Georgia were at one point or another dominated by the Church of England. They disliked the Puritans.<sup>242</sup>

Despite several ugly incidents of intolerance, the settlers were people of faith. They were fighting a brutal reality in the first years and from their faith came the strength to overcome the difficulties and the moral values that later influenced the Founding Fathers.<sup>243</sup>

---

<sup>239</sup> BRUCE T. MURRAY, RELIGIOUS LIBERTY IN AMERICA: THE FIRST AMENDMENT IN HISTORICAL AND CONTEMPORARY PERSPECTIVE 8 (2008).

<sup>240</sup> WALDMAN, *supra* note 235, at 10.

<sup>241</sup> *Id.*

<sup>242</sup> *Id.* at 14.

<sup>243</sup> *Id.* at 17.

Then came George Washington, commander of the Continental army in the independence war. He took a different approach. He knew that a union of all creeds and tolerance with others' faith would be fundamental to win the war against Britain and develop over time, liberty as a beacon for all.<sup>244</sup> Washington wrote "we should be very cautious of violating the Rights of Conscience in others, ever considering the God alone is the Judge of the Hearts of men, and to him only in this Case, they are answerable."<sup>245</sup>

## **2. FREE EXERCISE CLAUSE AND THE FIRST AMENDMENT.**

The Colonies won the war and independence from England was declared. A new chapter of history starts to be written under the tension of conflicting views of how the powers of the states and the Union would be balanced.

Meanwhile, the Continental Congress indicated religion would play a major role. The new acts, besides dealing with political, economic, and military matters, dealt with religious considerations and worship. Sunday observance, prayer, morality, repentance for "sins", public worship, thanksgiving, Christian education in the states, attendance at divine services by officers and men of the army, and true religion were some of the subjects addressed. This demonstrated the importance of religion for the formation of the new Nation in God's eyes, but avoided favoritism to any particular Protestant denomination.<sup>246</sup>

In Europe, following the French Revolution, the wind changed direction and with that shift, new ideas were inspired by the enlightenment movement. This brought a new perspective on the relationship between Government and Church, moving toward a clear separation between State and Religion. Those ideas, transplanted from France to the New World by Jefferson, frightened the Federalists.<sup>247</sup>

---

<sup>244</sup> *Id.* at 65.

<sup>245</sup> *Id.*

<sup>246</sup> ANSON PHELPS STOKES, CHURCH AND STATE IN THE UNITED STATES 86 (1975).

<sup>247</sup> *Id.* at 88.

The following passage, in a letter written by President Jefferson to a Presbyterian minister in 1808, shows the vision and influences of the French Revolution and the new approach concerning the relationship between government and religion:

[I] considered the Government of the United States as interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline, or exercises. This results not only from the provision that no law shall be made respecting the establishment or free exercise of religion, but from that also which reserves to the States the powers not delegated to the United States. Certainly, no power to prescribe any religious exercise, or to assume authority in religious discipline, has been delegated to the General Government. It must then rest with the States, as far as it can be in any human authority. But it is only proposed that I should *recommend*, not prescribe a day of fasting and prayer. That is, that I should *indirectly* assume to the United States an authority over religious exercise, which the Constitution has directly precluded them from.... I do not believe for the interest of religion to invite the civil magistrate to direct its exercises, its discipline, or its doctrines; nor of the religious societies, that the General Government should be invested with the power of effecting any uniformity of time or matter among them.... Every religious society has a right to determine for itself the times for these exercises, and the object proper for them, according to their own particular tenets; and this right can never be safer than in their own hands, where the Constitution has deposit it.<sup>248</sup>

The Constitution of the United States has two important provisions that deal directly with religious rights: 1) in the original text of the Constitution religious tests are forbidden as a qualification for public office; and 2) the Bill of Rights provision, which came three years later, bringing the establishment clause and the free exercise clause.<sup>249</sup>

Madison, in May 1789, announced to House of Representatives, his intention to bring a Bill of Rights, “something that would protect the nation against the possible arbitrary acts of Government.”<sup>250</sup> On September 25, 1789, the amendments passed in both houses.<sup>251</sup>

From the historical records of Congress we rescue Madison’s words during the deliberations about the meaning of the language in the first amendment, specifically

---

<sup>248</sup> *Id.*

<sup>249</sup> “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. Const. amend. I (1789).

<sup>250</sup> STOKES, *supra* note 246, at 92.

<sup>251</sup> *Id.* at 93. *See* U.S. CONST. amend. I-X.



concerning the establishment clause: “Mr. Madison said, he apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience.”<sup>252</sup> The concept of the free exercise clause, surprisingly, passed without evoking any debate.<sup>253</sup>

The Bill of Rights preamble<sup>254</sup> expressed the desire manifested by several states in their conventions, that declaratory and restrictive clauses should be added to the Constitution in order to prevent misconstruction or abuse of power.<sup>255</sup>

### 3. FREEDOM OF RELIGION

The liberal revolutions that took place in the 18<sup>th</sup> century were essential to crystallize the recognition of freedom of religion as a fundamental right, an essential component of individual freedom. After the Bill of Rights in the United States (1<sup>st</sup> amendment to US Constitution)<sup>256</sup> and the 1789 Declaration of the Rights of Man and of the Citizen<sup>257</sup> in France, religious freedom was incorporated in several international documents and constitutions of different countries, shaping a new order built on civil liberties.<sup>258</sup>

---

<sup>252</sup> WALDMAN, *supra* note 235, at 147.

<sup>253</sup> *Id.* at 146.

<sup>254</sup> “The Conventions of a number of the States having at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the Government, will best insure the beneficent ends of its institution.” U.S. CONST. pmbl. amend I.

<sup>255</sup> *Id.* at 93.

<sup>256</sup> “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

<sup>257</sup> *France: Declaration of the Right of Man and the Citizen*, 26 Aug 1789, available at:

<http://www.refworld.org/docid/3ae6b52410.html> [accessed 31 December 2017]. Article X – No one may be disturbed for his opinions, even religious ones, provided that their manifestation does not trouble the public order established by the law.

<sup>258</sup> Luís Roberto Barroso, *Legitimidade da Recusa de Transusão de Sangue por Testemunhas de Jeová [Legitimacy of Refusal of Blood Transfusion by Jehovah's Witnesses]*, 11 [N. 42] REVISTA TRIMESTRAL DE DIREITO CIVIL: RTDC 72-73, 49-91 (2010).

The 1948 Universal Declaration of Human Rights,<sup>259</sup> the 1966 International Covenant on Civil and Political Rights,<sup>260</sup> the 1969 American Convention on Human Rights,<sup>261</sup> the 1953 European Convention on Human Rights<sup>262</sup> and the 1981 UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief<sup>263</sup> are examples of this new order.

---

<sup>259</sup> Universal Declaration of Human Rights, *supra* note 6. Article 18. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

<sup>260</sup> *International Covenant on Civil and Political Rights*, Dec. 19, 1966, 999 UNTS 171. Article 18

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

<sup>261</sup> *American Convention on Human Rights*, Nov. 21, 1969, 1144 U.N.T.S. 143.

Article 12. Freedom of Conscience and Religion

1. Everyone has the right to freedom of conscience and of religion. This right includes freedom to maintain or to change one's religion or beliefs, and freedom to profess or disseminate one's religion or beliefs, either individually or together with others, in public or in private.

2. No one shall be subject to restrictions that might impair his freedom to maintain or to change his religion or beliefs.

3. Freedom to manifest one's religion and beliefs may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the rights or freedoms of others.

4. Parents or guardians, as the case may be, have the right to provide for the religious and moral education of their children or wards that is in accord with their own convictions.

<sup>262</sup> *Convention for the Protection of Human Rights and Fundamental Freedoms*, *supra* note 11.

Article 9

Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are 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.

<sup>263</sup> U.N. G.A., *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, 25 Nov. 1981, A/RES/36/55.

Article 4

1. All States shall take effective measures to prevent and eliminate discrimination on the grounds of religion or belief in the recognition, exercise and enjoyment of human rights and fundamental freedoms in all fields of civil, economic, political, social and cultural life.

2. All States shall make all efforts to enact or rescind legislation where necessary to prohibit any such discrimination, and to take all appropriate measures to combat intolerance on the grounds of religion or other beliefs in this matter.

The liberty to have a religion is closely related to the recognition of several other fundamental rights.

[T]he right to religion, Georg Jellinek wrote a century ago, is "the mother of many other rights." For the religious individual, the right to believe leads ineluctably to the rights to assemble, speak, worship, evangelize, educate, parent, travel, or to abstain from the same on the basis of one's beliefs. For the religious association, the right to exist invariably involves rights to corporate property, collective worship, organized charity, parochial education, freedom of press, and autonomy of governance. To ignore religious rights is to overlook the conceptual, if not historical, source of many other individual and associational rights.<sup>264</sup>

The Brazilian Constitution states right to life (article 5, *caput*) and religious freedom (article 5, VI) are fundamental, but its implementation will depend on the scope that the interpreters of the norm will lend to the rule. Thus, the simple constitutional provision of the right to life and religious freedom is not enough to give a proper answer to hard cases. The hard questions still remain.

[W]hether or not the government should intervene in the event that parents (or guardians) prevent a child from receiving a blood transfusion as the ultimate treatment to ensure his or her life; or decide whether (I) the family, for religious reasons, may breach the law requiring minors to attend public school,<sup>265</sup> or (II) if Jews, who preserve the Sabbath as a sacred day in which they do not work, disobey the law that requires the closing of trade on Sundays;<sup>266</sup> or (III) if the same freedom requires that bigamy<sup>267</sup> (by society and government) be respected under religious inspiration.<sup>268</sup>

#### **4. ROOTS OF POWER – INTERPRETING A FUNDAMENTAL RIGHT**

In the following passage, Thomas Paine, in his classic *Rights of Man*, teaches about the roots of power and questions the reasons why a generation should be bound to the choices the previous generations have made. In order to demonstrate that we are bound only to our present choices,

[E]very age and generation must be as free to act for itself, in all cases, as the ages and generation which preceded it. The vanity and presumption of governing beyond the grave, is the most ridiculous and insolent of all tyrannies. Man has no property in man; neither has any generation a

---

<sup>264</sup> WITTE, *supra* note 28.

<sup>265</sup> *Wis. v. Yoder*, 406 U.S. 205 (1972).

<sup>266</sup> *Braunfeld v. Brown*, 366 U.S. 599 (1961).

<sup>267</sup> *Reynolds v. United States*, 98 U.S. 145 (1978).

<sup>268</sup> FACUNDES, *supra* note 25, at 18-19.

property in the generations which are to follow.... Every generation is, and must be, competent to all the purposes which its occasions require. It is the living, and not the dead, that are to be accommodated.... I am contending for the rights of the living, and against their being willed away, and controlled and contracted for, by the manuscript assumed authority of the dead.<sup>269</sup>

The interpretation of constitutional clauses should take in account the choices of the living and not only the original intent of the framers or the original meaning a reasonable person could extract from the Constitution when it was written (i.e. originalism). John Stuart Mill teaches about liberty and tyranny.

[P]rotection, therefore, against the tyranny of the magistrate is not enough: there needs protection also against the tyranny of the prevailing opinion and feeling; against the tendency of society to impose, by other means than civil penalties, its own ideas and practices as rules of conduct on those who dissent from them; to fetter the development, and, if possible, prevent the formation, of any individuality not in harmony with its ways, and compels all characters to fashion themselves upon the model of its own. There is a limit to the legitimate interference of collective opinion with individual independence: and to find that limit, and maintain it against encroachment, is as indispensable to a good condition of human affairs, as protection against political despotism.<sup>270</sup>

This nation has a living constitution that should accommodate minority rights, not only because that was the intent of the Founding Fathers, but also because religious freedom is an open texture clause that has to be interpreted in accordance with the evolving meaning of social relations, which frames a current and plural society, that is essential to promote human dignity.

The religious phenomenon represented by the rising of a new religiosity based on a sacrament [Ayahuasca], which contains a scheduled I psychoactive substance, is still hidden by a curtain of ignorance and prejudice, leading some authorities to treat a matter of religiosity as a matter of criminal drug law.

The war on drugs has demanded an enormous amount of government resources with questionable results. “A punitive approach to drug control fundamentally

---

<sup>269</sup> Thomas Paine, *Rights of Man*, THE COMPLETE WRITINGS OF THOMAS PAINE, 241, 251-52 (The Citadel Press ed., 1945).

<sup>270</sup> JOHN STUART MILL, ON LIBERTY 9 (Batoche Books Eds., 2001) (1859).

undermines the relationship between the individual and the State, with so many of its citizens in breach of illogical drug law.”<sup>271</sup>

The UDV, for instance, has a history in Brazil and U.S. of a respectful and responsible religious work, functioning in Brazil for more than five decades and in U.S. for more than one decade without a single record involving misuse of Ayahuasca.<sup>272</sup>

Religious use of psychoactive substances has been part of human history since immemorial time. Although it could seem different and primitive in the eyes of the major religions, the State has an obligation to guarantee the free exercise of religion. Government should promote a respectful relationship with those Ayahuasca religions (and their members), to uphold the principle of human dignity and the rule of law, honor the human autonomy of making the moral fundamental choices, and exercising its capacity for self-determination.

[T]he right to privacy is a fundamental human right enshrined in most international human rights treaties, including the 1948 Universal Declaration of Human Rights and the 1966 International Covenant on Civil and Political Rights. Privacy is the “cornerstone of respect for personal autonomy and human dignity.” The state is only justified in interfering in an individual’s private life if they can demonstrate that the interference is for a legitimate aim—such as preventing risk to others—is proportional, and is necessary.... Fundamentally, this interference undermines the right to privacy, personal autonomy and human dignity.<sup>273</sup>

## 5. HUMAN DIGNITY

After World War II, human dignity was raised to a central position on international treaties, Constitutions, statutes and judicial decisions as an ethical standard in western culture. In Brazil, human dignity is one of the republic’s fundamental

---

<sup>271</sup> The Global Commission on Drug Policy. *Advancing Drug Policy Reform: a New Approach to Decriminalization* 5 (2016), <http://www.globalcommissionondrugs.org/wp-content/uploads/2016/11/GCDP-Report-2016-ENGLISH.pdf>

<sup>272</sup> *Chá Hoasca, Mais do que Inofensivo, Benéfico [Hoasca Tea, More Than Harmless, Beneficial]*, José Roberto Campos de Souza, <http://udv.org.br/blog/cha-hoasca-mais-do-que-inofensivo-benefico/#> (last visited Mar. 23, 2018).

<sup>273</sup> The Global Commission on Drug Policy, *supra* note 280, at 11.

principles,<sup>274</sup> serving as an interpretative vector of legislation as well as a factor for legitimate actions chosen by government.<sup>275</sup>

Human dignity is a polysemic concept, with different dimensions and elements and, although it is not possible to restrict it to a close and determined meaning, some consensus is achievable, from reasoned choices.<sup>276</sup>

[D]ignity as autonomy involves, first and foremost, the capacity for self-determination, the right to decide the course of one's life and to develop one's own personality freely. It means the power to make the relevant moral choices, taking responsibility for the decisions made. Behind the idea of autonomy is a moral subject capable of self-determination, designing life plans and realizing them. Not everything in life, of course, depends on personal choices. There are decisions that the State can legitimately take, in the name of diverse interests and rights. But decisions about one's own life, existential choices about religion, marriage, occupations, and other personal choices that do not violate the rights of others cannot be subtracted from the individual, otherwise their dignity may be violated.... integrates the idea of dignity, the so-called existential minimum, instrumental to the performance of autonomy. In order for a human being to trace and concretize his life plans, by assuming responsibility for them, it is necessary that minimum economic, educational and psychophysical conditions be assured. Besides allowing the effective exercise of the prerogative to choose, the conditions of autonomy serve to avoid that decisions with serious repercussion for the individual are taken capriciously or simply uninformed.<sup>277</sup>

But human dignity also has an heteronymous dimension, linked to values shared by community, with the objective of promoting common good, public interest and morality, working as a limitation on private liberty, and forbidding one to make personal choices that could harm social values. Limiting the freedom to act, “in the heteronymous conception, dignity does not have its central component in freedom, but, on the contrary, it is the dignity that shapes the content and gives limit to freedom.”<sup>278</sup>

In Brazil, the autonomous dimension for human dignity is clearly predominant in the Federal Constitution. After decades of a dictatorial regime,

---

<sup>274</sup> CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] ART. 1 (BRAZ.). Article 1. The Federative Republic of Brazil, formed by the indissoluble union of the states and municipalities and of the Federal District, is a legal democratic state and is founded on: ... III – the dignity of the human person.

<sup>275</sup> BARROSO, *supra* note 258, at 57.

<sup>276</sup> *Id.*

<sup>277</sup> *Id.* at 59-60.

<sup>278</sup> *Id.* at 60-61.

Brazilians were willing to realize civil liberties. In consequence, a vast list of fundamental rights were expressed in the Federal Constitution. This gave prevalence to individual choices, which could only be removed by means of a special argumentative burden, justifying the overcoming of an individual freedom of choice.<sup>279</sup>

Nevertheless, the exercise of this individual choice is not an absolute right, which means it could give way to a heteronymous dimension that privilege values shared by the community in specific cases where there are apparent clashes between fundamental rights.<sup>280</sup>

## 6. THE DUTY OF INTEGRITY AND COHESION

Ronald Dworkin offers a comparison between literature and law, creating a new literature genre, which he names the chain novel, explaining “in this enterprise a group of novelists writes a novel *seriatim*; each novelist in the chain interprets the chapters he has been given in order to write a new chapter, which is then added to what the next novelist receives, and so on.”<sup>281</sup>

In this chain, each writer is responsible for constructing a new part of the already existing structure [the novel], giving to each new chapter the best he could, in order to collaborate for the best result achievable in this collective work. The novelist should take responsibility to continue it as a single and unified novel, without disregarding the previous chapters already constructed by several writers. He should do so in such a way that the result is the best possible novel, a work written by several minds, although it seems to be the work of one single mind.<sup>282</sup>

Dworkin compares the complexity of writing a novel in chain to the complexity of addressing a hard case in court without losing *integrity*.<sup>283</sup> The novelist

---

<sup>279</sup> *Id.* at 63, 65.

<sup>280</sup> *Id.* at 71.

<sup>281</sup> RONALD DWORKIN, *LAW’S EMPIRE* 229 (Belknap Harvard, 1986).

<sup>282</sup> *Id.*

<sup>283</sup> *Id.* at 225-26, 229. “The adjudicative principle of integrity instruct judges to identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author – the community

will have to find a suitable interpretation of the previous chapters, considering a range of possible interpretations, choosing the one that fits best with the work in progress.<sup>284</sup>

The freedom of the writer in judging the best interpretation for the continuity of the novel is subject to questioning. Is he bound to previous interpretations which other authors have done? How far can he go creatively without breaking the chain?<sup>285</sup> Balance seems to be the key.

[J]ust as interpretation within a chain novel is for each interpreter a delicate balance among different types of literary and artistic attitudes, so in law it is a delicate balance among political convictions of different sorts; in law as in literature these must be sufficiently related yet disjoint to allow an overall judgment that trades off an interpretation's success on one type of standard against its failure on another.<sup>286</sup>

In a democracy, there are moments when human rights must be ensured by the judiciary branch, especially those fundamental ones such as religious freedom and freedom of thought, especially when linked to minorities' rights. This is an essential attribution of the Courts, mainly the Supreme Courts, whose missions are to guard the Constitution in democratic countries. But where resides the legitimacy of constitution jurisdiction?

[T]he democratic legitimacy of constitutional jurisdiction has been based on two main grounds: (a) protection of fundamental rights, which correspond to the ethical minimum and reserve of justice of a political community, which cannot be run over by majority political deliberation; and b) protection of the rules of the democratic game and the channels of political participation for everyone.<sup>287</sup>

The rising of a neo-constitutionalism<sup>288</sup> after World War II, marks a new way of viewing and understanding the fundamental rights, a philosophic perspective

---

personified – expressing a coherent conception of justice and fairness.... Law as integrity is .... both the product of and the inspiration for comprehensive interpretation of legal practice. The program it holds out to judges deciding hard cases is essentially, not just contingently, interpretive; law as integrity asks them to continue interpreting the same material that it claims to have successfully interpreted itself. ”

<sup>284</sup> *Id.* at 230-31.

<sup>285</sup> RONALD DWORKIN, *LAW'S EMPIRE* 234 (Belknap Harvard, 1986).

<sup>286</sup> *Id.* at 239.

<sup>287</sup> *Id.* at 36.

<sup>288</sup> Legal and political philosophers as Ronald Dworkin, Robert Alexy, Luigi Ferrajoli and Gustavo Zagrebelsky are exponents of this vision, where they advocate a new understanding of the fundamental rights.



post-positivistic, where fundamental rights are bidding rules which must be ensured due to their normative force.<sup>289</sup>

There are moments when the relation between popular sovereignty and fundamental rights is subjected to tensions. The will of the majority clashes with fundamental rights of minority groups. “More than the right to equal participation, democracy means that the losers in the political process, as well as the minority segments in general, are not helpless and handed over to the very luck.”<sup>290</sup>

To solve this equation, modern societies developed a mechanism to counterbalance the majority power to avoid oppression of minorities, through constitutional jurisdiction and judicial review.<sup>291</sup>

[T]hroughout the twentieth century, the conviction was consolidated that: a) Law is often, not the expression of an immanent justice, but of interests that become dominant at a given moment and place; and (b) in a large number of situations, the solution to legal problems will not be pre-prompt in the legal system. It will have to be constructed argumentatively by the interpreter.<sup>292</sup>

This new post-positivistic vision preaches that the solution for legal problems is not found only [or completely] in the law [legal norm]. The interpreter of the Constitution should search beyond what is written, throughout other branches of knowledge, such as moral and political philosophy, psychology, economy, and other important values to get a proper answer to the legal problem.<sup>293</sup>

Modern legal interpretation implies not only reading the written legal norm, but studying the interaction between the text of the law and reality. This phenomenon has thinned the line between the legislative and judiciary branches. Politics and Law are

---

<sup>289</sup> Luís Roberto Barroso, *A Razão sem Voto: o Supremo Tribunal Federal e o Governo da Maioria* [*Reason Without Vote: The Federal Supreme Court of Brazil and the Rule of the Majority*], 5 REVISTA BRASILEIRA DE POLÍTICAS PÚBLICAS [BRAZILIAN JOURNAL OF PUBLIC POLICY] 28, 23-50 (2015).

<sup>290</sup> *Id.* at 37.

<sup>291</sup> *Id.* at 29.

<sup>292</sup> *Id.* at 29.

<sup>293</sup> *Id.*

closer, which leads the judiciary branch to rule on political issues typically decided by legislators.<sup>294</sup>

[U]nsurprisingly, institutional, social, and interpersonal relationships become entangled in the lurking place of a complex and plural society, without full certainties, secure truths or conciliating consensuses. And in a world in which everything is judicialized, sooner or later, constitutional courts and courts are faced with situations for which there are no easy or ethically simple answers.<sup>295</sup>

In order to answer these hard cases, judges must build a meaning for the legal norm, avoiding the temptation to create a new rule, a self-made rule. The answer must be argumentatively constructed, establishing values of *integrity and cohesion*,<sup>296</sup> promoting justice through a harmonic constitutional solution, where the values of *human dignity, respect of legal precedents, and the justice of the case* are the boundaries to be respected.<sup>297</sup>

But is there only one right answer for each case? Even when the interpreter should address a hard case? If the answer is affirmative, who has the power to validate the given answer as the right one?

The solution to those questions lies in finding the one who has authority to proclaim the truth of the case, in other words, the owner of the truth.<sup>298</sup> But the truth of the case is relative, because it varies with the one empowered to give the last answer. Beyond finding a right answer, we need an answer that promotes *integrity and cohesion*.

Barroso gives a rich example of how difficult it can be to address those cases, when facts are the same, but the way the interpreters interact with them completely varies in such a way that interpretations entirely opposite to each other are valid.

---

<sup>294</sup> Luís Roberto Barroso, *A Razão sem Voto: o Supremo Tribunal Federal e o Governo da Maioria* [*Reason Without Vote: The Federal Supreme Court of Brazil and the Rule of the Majority*], 5 REVISTA BRASILEIRA DE POLÍTICAS PÚBLICAS [BRAZILIAN JOURNAL OF PUBLIC POLICY] 31, 23-50 (2015).

<sup>295</sup> *Id.*

<sup>296</sup> *Id.* at 32.

<sup>297</sup> *Id.* at 33.

<sup>298</sup> *Id.*

[T]wo friends (...) started talking about religion. One of them is an atheist. The other is a religious man. They come to discuss the existence of God. The atheist says, "It's not that I've ever tried to believe it, no. I tried. Still recently, I had lost myself in a snowstorm in a wilderness, I began to freeze, I realized that I was going to die there. Then I knelt on the ground and said very loudly: God, if you exist, get me out of this situation, save my life." Faced with such testimony, the religious one said, "Well, but you were saved, you are here, you should have come to believe." And the atheist responds, "No! God gave no sign. The luck I had is a couple of Eskimos. They rescued me, warmed me and showed me the way back. It is to them that I owe my life."<sup>299</sup>

Although we cannot say there is only one objective right answer for hard cases, it is valid to assume that there is one right subjective answer for those cases, constitutionally suitable, which promotes integrity and cohesion within the legal system. The interpreter "cannot ignore its own previous decisions, as well as the premises it has established in previous cases."<sup>300</sup>

Sometimes the answer, given by the U.S. and Brazil Supreme Courts to address a hard case, does not promote values of integrity and cohesion, ignoring precedents and premises previously crystallized, but generates a social and/or political response, a backlash from civil society and sometimes legislators.<sup>301</sup>

---

<sup>299</sup> Luís Roberto Barroso, *A Razão sem Voto: o Supremo Tribunal Federal e o Governo da Maioria* [*Reason Without Vote: The Federal Supreme Court of Brazil and the Rule of the Majority*], 5 REVISTA BRASILEIRA DE POLÍTICAS PÚBLICAS [BRAZILIAN JOURNAL OF PUBLIC POLICY] 34, 23-50 (2015).

<sup>300</sup> *Id.* at 35.

<sup>301</sup> *Id.* at 42.

## SECTION V

### INTERNATIONAL TREATIES AND THE INCB REPORTS

#### 1. INTERNATIONAL SYSTEM OF DRUG CONTROL AND REPRESSION

Since 1961, an international system of drug control and repression has been established. This system is based on three main international drug control conventions: the Single Convention on Narcotic Drugs of 1961 (amended by the 1972 Protocol),<sup>302</sup> the Convention on Psychotropic Substances of 1971,<sup>303</sup> and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988.<sup>304</sup>

The Single Convention on Narcotic Drugs of 1961 replaced multilateral treaties in a single document, focusing on control and production of narcotic drugs and its raw materials.<sup>305</sup> This convention applies “to plants which are sources of narcotic drugs: the cannabis plant, the opium poppy and the coca bush. However, no other plant is subjected to similar control mechanism”.<sup>306</sup>

The Convention on Psychotropic Substances of 1971 reflected the concern of the nations on public health and social problems resulting from the abuse of certain psychotropic substances. It aimed to prevent and combat abuse of such substances and its illicit traffic, recognizing, in the same document, the importance of the use of psychotropic substances for medical and scientific purposes.<sup>307</sup>

Article 3, paragraph 1 (Convention on Psychotropic Substances) says that a preparation is “subject to the same measures of control as the psychotropic substance

---

<sup>302</sup> U.N. Single Convention on Narcotic Drugs, Aug. 8, 1975 (1961), as amended by the Protocol Amending the Single Convention on Narcotic Drugs, 976 U.N.T.S. 105.

<sup>303</sup> U.N. Convention on Psychotropic Substances, *supra* note 22.

<sup>304</sup> U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 20, 1988, 1582 U.N.T.S. 95.

<sup>305</sup> U.N. Office on Drugs and Crime, *The International Drug Control Conventions* 8 (2013).

<sup>306</sup> SÁNCHEZ, *supra* note 5, at 6.

<sup>307</sup> U.N. Office on Drugs and Crime, *supra* note 305, at 84.

which it contains, and, if it contains more than one such substance, to the measures applicable to the most strictly controlled of those substances”.<sup>308</sup>

This provision could lead to an erroneous conclusion that Ayahuasca, a decoction, is subjected to control. However, “no plants (natural materials) containing DMT is currently 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 subjected to any of the provisions of the 1971 Convention.”<sup>309</sup>

Ayahuasca is a decoction, which means that it is “a method of extraction by boiling herbal or plant material to dissolve the chemicals of the material, which may include stems, roots, bark and rhizomes. Decoction involves first mashing the plant material to allow for maximum dissolution, and then boiling in water to extract oils, volatile organic compounds and other various chemical substances.”<sup>310</sup> In other words, there are no chemical extractions or synthesis of DMT, which make Ayahuasca similar to the plant containing DMT, which deserves the same legal treatment.<sup>311</sup>

The 1971 convention proscribes the substance DMT, not the plant which contains DMT. Although they sound similar, cannot give the same treatment to both, otherwise would be subjected to unreasonable results, e.g., concluding that tomatoes

---

<sup>308</sup> United Nations Convention on Psychotropic Substances, *supra* note 22. [Article 1.f] “Preparation means: (i) Any solution or mixture, in whatever physical state, containing one or more psychotropic substances, or (ii) One or more psychotropic substances in dosage form.” *See also* [Article 3.1].

<sup>309</sup> Letter from Jonathan Lucas, Sec’y of the Bd., UN INCB, to De Loenen, Exec. Dir., ICEERS (Jun. 1, 2010) (on file with the International Center for Ethnobotanical Education, Research and Service – ICEERS), [http://iceers.org/Documents\\_ICEERS\\_site/Letters/INCB/INCB\\_Response\\_Inquiry\\_ICEERS\\_Ayahuasca\\_2010.pdf](http://iceers.org/Documents_ICEERS_site/Letters/INCB/INCB_Response_Inquiry_ICEERS_Ayahuasca_2010.pdf).

<sup>310</sup> *Decoction*, Wikipedia <https://en.wikipedia.org/wiki/Decoction> (last visited Mar. 23, 2018).

<sup>311</sup> Plantaforma, *Estudio Documental La Ayahuasca en España. Informe jurídico y científico* 11, 12. Septiembre 2014. PDA, [http://www.plantaforma.org/wp/wp-content/uploads/PDA\\_INFORME\\_FINAL\\_2014.pdf](http://www.plantaforma.org/wp/wp-content/uploads/PDA_INFORME_FINAL_2014.pdf).

should be prohibited because they have DMT in their composition, or even worse, a human being, because we produce DMT naturally in our body.<sup>312</sup>

[T]his convention does control some of the active ingredients with hallucinogenic effects or stimulants contained in some vegetable species. This is the case, *inter alia*, of mescaline contained in peyote and the San Pedro cactus, of psilocybin and psilocin present in psilocybin mushrooms, cathonine, the agent primarily responsible for the stimulant effect of khat, of THC, a cannabinoid responsible for the psychoactive effect of cannabis, and DMT contained in *P. viridis*.

The majority of these substances are contained in Schedule I of the 1971 Convention, together with synthetic ones such as LSD or MDMA, reserved for the psychotropic substances considered a particularly serious threat to public health and with little or no therapeutic value.

This is why they are subject to especially strict control measures, in compliance with Article 7, in addition to the general limitation, applicable to all the substances the schedules include, which restricts their production, distribution and use to strictly medical and scientific purposes. When the convention was negotiated, the active ingredients were included more due to the alarm caused by recreational use of the substances synthesised in laboratories than to the perception that traditional uses of ritual and religious consumption in non-Western contexts were a problem. However, traditional uses were subordinated to this objective, deemed more important, and were addressed as an exception, limited to certain groups and territories that needed to be protected as a cultural expression and which were not at risk of being expanded and reinvented in other places.<sup>313</sup>

DMT is one of the psychoactive substances subjected to greater controls under Schedule I, but neither of the plants used to prepare Ayahuasca were, nor the preparation [the brew] which contains DMT extracted from the leaves of the bush *P. viridis*, are under international control.

Article 32 (4) made it possible for covenants to make reservations concerning the provisions of Article 7 [prohibition of production, marketing and use, allowing limited medical and scientific purposes], except for the provisions relating to international trade, when Schedule I psychotropic substances present in plants growing wild in their territory “were traditionally used by certain small, clearly determined groups in magical or religious rites.”<sup>314</sup>

---

<sup>312</sup> *Id.* at 13.

<sup>313</sup> SÁNCHEZ, *supra* note 5, at 6-7.

<sup>314</sup> U.N. Convention on Psychotropic Substances, *supra* note 22.

The United States submitted a reservation concerning the traditional use of Peyote, “harvested and distributed for use by the Native American Church in its religious rites”, which contains the psychoactive substance mescaline. Peru also made a reservation specifically mentioning Ayahuasca,<sup>315</sup> which contains DMT, and the San Pedro cactus, which contains mescaline. Although Brazil did not submit a reservation, it will later give a proper legal treatment to Ayahuasca, permitting lawful religious use of it.<sup>316</sup>

[P]lants as such are not, and are also not likely to be, listed in Schedule I, but only some products obtained from plants.... Schedule I does not list any of the natural hallucinogenic materials in question, but only chemical substances which constitute the active principle contained in them. The inclusion in the schedule I of the active principle of a substance does not mean that the substance itself is also included therein if there is a substance clearly distinct from the substance constituting its active principle. This view is in accordance with the traditional understanding of that question in the field of international drug control. Neither the crown (fruit, mescal button) of the Peyote cactus nor the roots of the plant *Mimosa hostiles* nor *Psilocybe* mushrooms themselves are included in Schedule I, but only their respective principles, mescaline, DMT and psilocybine.<sup>317</sup>

Finally, the Adoption of a 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, a clear international response in accordance to the “war on drugs” policy, completed the international legal system responsible for regulating and repressing traffic of narcotic drugs and psychotropic substances, aiming to reinforce and supplement the measures provided in the Single

---

<sup>315</sup> *Id.* “The Secretary-General received, on 29 January 1981, from the Government of Peru the following clarification in respect of the reservation made to article 7:

“The reservation referred to was motivated by the following two wild plant species: Ayahuasca, a liana which grows in the Amazon region and which contains the active element N, N-dimethyltryptamine, and a columnar cactus known as San Pedro, which grows in the desert coastal regions and in the Andean region and contains mescaline. Ayahuasca is used by certain Amazon ethnic groups in magical and religious rites and in rites of initiation into adulthood; San Pedro is used in magical rites by indigenous medicine men or shamans. Because of their psychotropic content, both plant species are included in the reservation option made possible by article 32, paragraph 4, of the Convention.”

<sup>316</sup> See more about this subject in Section VII.

<sup>317</sup> U.N., *Commentary on the Convention on Psychotropic Substances* 385, 387 (1976). Sales n° E.76.XI.5.

Convention on Narcotic Drugs, and the 1971 Convention on Psychotropic Substances.<sup>318</sup>

Article 14 (2) states that parties should take proper measures “to prevent illicit cultivation of and to eradicate plants containing narcotic or psychotropic substances...[the measures] adopted shall respect fundamental human rights and shall take due account of traditional licit uses, where there is historic evidence of such use, as well as the protection of the environment.”<sup>319</sup>

New elements were brought to the equation.

[A]lthough the article was conceived for the cultivation of opium, coca and cannabis, it also affected other traditionally-used plants. In addition to the geographic and cultural limitation of the 1971 Convention, this provision requires “historical evidence” — though it does not clarify how the States Party should define the historical tradition of traditional uses, or how far this must date back in order to be considered traditional. By introducing the concept of “traditional licit uses”, it suggested that there are illicit traditional uses, but it did not clarify how the former differs from the latter. Lastly, the 1988 Convention is couched in terms of respect for human rights and the protection of the environment. Like the 1971 Convention, the 1988 Convention does not include the control of any plant.<sup>320</sup>

The duty to respect fundamental human rights brings directly to the core of the issue the religious use of plants which contain psychoactive substances. As discussed in the previous chapter, freedom of religion is a fundamental human right, essential to human dignity. Its exercise cannot be unduly harmed without a compelling government interest, which will be discussed in the next chapter.

The mere enumeration of a right in an international treaty or convention, in the various national constitutions or statutes laws, does not, by itself, answer questions involving the achievement of certain norms, of fundamental status for the human being.

---

<sup>318</sup> U.N. Office on Drugs and Crime, *The International Drug Control Conventions* 123, 124 (2013).

<sup>319</sup> U.N. Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, *supra* note 304.

<sup>320</sup> SÁNCHEZ, *supra* note 5, at 8.



## 2. THE INCB REPORTS

In 2011, the International Narcotics Control Board (INCB), an independent and quasi-judicial monitoring body for the implementation of the United Nations international drug control conventions, issued its annual report for 2010, where it addressed the subject concerning plant material containing psychoactive substances.<sup>321</sup>

The INCB recognized that no plans are currently controlled under the 1971 Convention on Psychotropic Substances or the 1988 Convention.<sup>322</sup> Therefore, any preparation, such as the decoction for oral use involving those plants, is not under international control.

In other words, although the plants used for preparation of Ayahuasca contain natural psychoactive ingredients (DMT [N, N-dimethyltryptamine], a chemical substances controlled under the 1971 Convention, present in the leaves of the bush *Psychotria viridis*), the tea itself [Ayahuasca] is not under international control and, therefore, not subjected to any of the provisions of the 1971 Convention.<sup>323</sup>

Nonetheless, the Board raised an alarm about the increased interest in the recreational use of such plant materials, as well as the so-called exploitation by substance abusers of those plants when used outside its “socio-economic context”. This led to an “increased trade, use and abuse of such plant material” in many countries, leading the INCB to recommend that governments should consider, when necessary due to *recreational use or trafficking*, the implementation of national control over such plant materials.<sup>324</sup>

---

<sup>321</sup> U.N. International Narcotics Control Board. (2011). *Report of the International Narcotics Control Board for 2010*. UN Publication sales No. E.11.XI.1.

<sup>322</sup> U.N. Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, *supra* note 304.

<sup>323</sup> U.N., *supra* note 321, at 46. *See also* U.N. International Narcotics Control Board. (2013). Rep. of the International Narcotics Control Board for 2012. UN Publication sales No. E.13.XI.1. at. 46,47.

<sup>324</sup> U.N. International Narcotics Control Board. (2013). Rep. of the International Narcotics Control Board for 2012. UN Publication sales No. E.13.XI.1. at. 46,47.

Although it is not clear if the INCB was targeting the lawful religious use of Ayahuasca by churches like the UDV and Santo Daime, it seems the best interpretation of its reports leads to the conclusion that the recreational use of this psychoactive substance in a non-religious context was the real objective pursued.<sup>325</sup>

The recommendation was issued in the annual reports for 2010 and reiterated in the 2012 report<sup>326</sup>, as well as in special on-line publications in 2013<sup>327</sup>. Since then the INCB has not reinforce the same recommendation in annual reports. Only the report for 2016 included a line about Ayahuasca, once more calling attention to its recreational use by young people, especially in Colombia, without repeating the 2010 and 2012 recommendations governments implementing national control over such plant materials.<sup>328</sup>

Although the INCB did not focus its recommendations on religious use, the confusing scenario its reports generated, especially the report for 2012, which stated “the use of such plant materials for whatever purpose could be unsafe practice”,<sup>329</sup> has the potential to harm lawful religious use of plant materials. The possible deleterious results may concern especially the transportation of plants used for preparation of Ayahuasca and the transportation and/or use of Ayahuasca itself.

---

<sup>325</sup> SÁNCHEZ, *supra* note 5, at 5. “The existence of a ‘market’ for recreational use of Ayahuasca is contested by several experts in different areas. According to them, “To date, no recreational use of Ayahuasca has been documented, in the sense that this is understood as a general substance use in recreational contexts. Undeniably, considering Ayahuasca a drug since it contains DMT is inappropriate, since this is to separate the plant from the practices in which it is used: without Ayahuasca there is no ceremony and without a ceremony, Ayahuasca is not ingested. These are two inseparable aspects just as the ritual wine of the Eucharist would be in a Christian mass. Scientific studies have demonstrated that Ayahuasca does not function neurobiologically like drugs that are abused, and people who take Ayahuasca do not fit with the indicators used to determine patterns of problematic use of other substances.”

<sup>326</sup> U.N., *supra* note 324.

<sup>327</sup> Contribution of the INCB to the High-level Review of the Implementation by Member States of the Political Declaration and Plan of Action on International Cooperation Towards an Integrated and Balanced Strategy to Counter the World Drug Problem, 68-69.

[https://www.incb.org/documents/Publications/ePublication/E-Publication\\_E\\_FINAL.pdf](https://www.incb.org/documents/Publications/ePublication/E-Publication_E_FINAL.pdf)

<sup>328</sup> U.N. International Narcotics Control Board. (2017). *Report of the International Narcotics Control Board for 2016*. UN Publication sales No. E.17.XI.1. at 71.

<sup>329</sup> U.N., *supra* note 324, at 47.

In the last decade, there have been several cases involving the prosecution of persons (and, even in some cases, detention and convictions) related to the transportation and/or use of Ayahuasca<sup>330</sup> in countries like U.S., England, Germany, Netherlands, Italy, Ireland, Spain,<sup>331</sup> Portugal,<sup>332</sup> France,<sup>333</sup> Russia,<sup>334</sup> Chile, and even Brazil.<sup>335</sup>

The INCB recommendation in the 2010/2012 reports caused some uncertainty concerning the legal status in some countries of the plants and Ayahuasca, which led to different treatments even in similar political scenarios.<sup>336</sup> The analysis of the scenario in Brazil show that the “persecution of the Brazilian Ayahuasca religions has been mostly based on misinformed prejudice against the use of psychedelic substances in what are reasonably safe and socially controlled ritual contexts, and which constitute authentic cultural traditions and expressions that must be respected as such.”<sup>337</sup>

Finally, understand that the INCB 2010/2012 recommendations, which were no longer reiterated in the last reports, when talking about “practices that purportedly have spiritual connotations”, were not addressing the religious use by Brazilian Ayahuasca religions like UDV and Santo Daime, which have no similarity with “spiritual tourism”, “initiatory journeys” and shamanic practices.

---

<sup>330</sup> See BEATRIZ CAIUBY LABATE & HENRIK JUNGABERLE, *THE INTERNATIONALIZATION OF AYAHUASCA* (Lit ed., 2011) [for a comprehensive study about Ayahuasca expansion globally].

<sup>331</sup> PLANTAFORMA, *supra* note 311, at 5.

<sup>332</sup> Brian T. Anderson et al., *Statement on Ayahuasca*, 23 (3) Int'l J. of Drug Pol'y 173-75, (2012).

<sup>333</sup> Beatriz Labate & Henrik Jungaberle, *One Hundred Days of Ayahuasca in France: The Story of a Legal Decision*, *THE INTERNATIONALIZATION OF AYAHUASCA* 353 (Lit ed., 2011).

<sup>334</sup> Sputnik, *It's Tea, Not Drugs! Detained Brazilian Healer Appeals to Temer, Putin for Help* (Oct. 20, 2016, 6:59 PM), <https://sputniknews.com/russia/201610201046550988-brazil-healer-arrest/>.

<sup>335</sup> SÁNCHEZ, *supra* note 5, at 3. See also TRF-1, HC 0079526-31.2012.4.01.0000 / AM, Relator: Des. Monica Sifuentes, 26.02.2013, [e-DJF1], 08.03.2013, 580 (Braz.); TRF-2, HC-00230794520024020000, Relator: Des. Ney Fonseca, [DJe], 27.02.2003; J.F., 2ª Vara [SJAC], Inquérito Policial 0004852-98.2015.4.01.3000 [Decision – Regional Federal Appellate Court – First Region – Rio Branco: Criminal Investigation 0004852-98.2015.4.01.3000], Judge Herley Brasil. (2016, Apr. 12). Retrieved from: <http://processual.trf1.jus.br/consultaProcessual/arquivo/abrir.php?tipo=fs&nome=4851bd71239aedda840c91007023e986.pdf&size=597639>

<sup>336</sup> SÁNCHEZ, *supra* note 5, at 3.

<sup>337</sup> ANDERSON, *supra* note 332.

In a scenario lacking of clarity, the INCB reports have the potential to harm the legal religious expressions of those religions in exercise of their liberty. Fortunately, up to this moment, no great damage has been recorded, though the legal and political status of Ayahuasca religious use in several countries remains in a gray zone.

## SECTION VI

### U.S. SUPREME COURT'S HISTORICAL THINKING ON FREEDOM OF RELIGION.

In *Sherbert v. Verner*,<sup>338</sup> the U.S. Supreme Court was called upon to address whether a disqualification for unemployment benefits would impose a burden on the free exercise of religion of a member of the Seventh-day Adventist Church.<sup>339</sup>

Ms. Sherbert was a member of the Seventh-day Adventist Church since 1957. In 1959 when she was hired, the employer was aware of her beliefs, which impose, under her faith, respecting the Sabbath.<sup>340</sup> The Seventh-day Adventist Church, among other creeds (the Jews, for example),<sup>341</sup> interprets the scriptures of the Holy Bible<sup>342</sup> in such a way that the seventh day of the week, Saturday, should be reserved for veneration of God, demanding from believers avoidance of work on Saturdays. There was no doubt about the sincerity of Sherbert's religious beliefs.<sup>343</sup>

Because she was not able to work on Saturdays, due to conscientious scruples,<sup>344</sup> she was fired and requested unemployment compensation benefits under the South Carolina Unemployment Compensation Act.<sup>345</sup> The Employment Security

---

<sup>338</sup> 374 U.S. 398 (1963).

<sup>339</sup> 374 U.S. at 399, 403.

<sup>340</sup> *Id.* at 399.

<sup>341</sup> Jewish Virtual Library, <http://www.jewishvirtuallibrary.org/jsource/Judaism/shabbat.html> (last visited June 28, 2016).

<sup>342</sup> *Genesis* 1-2.

<sup>343</sup> 374 U.S. at 399.

<sup>344</sup> *Id.*

<sup>345</sup> 374 U.S. at 400. The South Carolina Unemployment Compensation Act (S. C. Code, Tit. 68, §§ 68-1 to 68-404) stated the following:

"§ 68-113. Conditions of eligibility for benefits. -- An unemployed insured worker shall be eligible to receive benefits with respect to any week only if the Commission finds that: . . .

"(3) He is able to work and is available for work, but no claimant shall be considered available for work if engaged in self-employment of such nature as to return or promise remuneration in excess of the weekly benefit amounts he would have received if otherwise unemployed over such period of time. . . .

"§ 68-114. Disqualification for benefits. -- Any insured worker shall be ineligible for benefits: . . .

"(2) Discharge for misconduct. -- If the Commission finds that he has been discharged for misconduct connected with his most recent work prior to filing a request for determination of insured status or a request for initiation of a claim series within an established benefit year, with such ineligibility beginning with the effective date of such request, and continuing not less than five nor more than the next twenty-two consecutive weeks (in addition to the waiting period), as determined by the Commission in each case according to the seriousness of the misconduct . . . ."

Commission found Ms. Sherbert was not qualified for receiving the benefits because she failed to comply with state law that established workers could not refuse, without good cause, suitable work when offered, in order to receive unemployment benefits.<sup>346</sup> In fact, Ms. Sherbert sought employment in three other places similar to her previous job and qualification, but found none to be agreeable to her religious restriction.<sup>347</sup>

The Free Exercise Clause stands as a clear and firm barrier against any government injunction in matters of faith. As decided before for the U.S. Supreme Court,

[G]overnment may neither compel affirmation of a repugnant belief; nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities; nor employ the taxing power to inhibit the dissemination of particular religious views. On the other hand, the Court has rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious beliefs or principles, for "even when the action is in accord with one's religious convictions, [it] is not totally free from legislative restrictions". The conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order. See, e. g., *Reynolds v. United States*, 98 U.S. 145; *Jacobson v. Massachusetts*, 197 U.S. 11; *Prince v. Massachusetts*, 321 U.S. 158; *Cleveland v. United States*, 329 U.S. 14.<sup>348</sup>

The Court decided to apply the *strict scrutiny test*, demanding from the government proof of a compelling interest to regulate this subject, in order to justify such limitation on the right of the believer, protected by the First Amendment and made applicable to states by the Fourteenth Amendment.<sup>349</sup> Reaffirming *Braunfeld v.*

---

(3) Failure to accept work. -- (a) If the Commission finds that he has failed, without good cause, (i) either to apply for available suitable work, when so directed by the employment office or the Commission, (ii) to accept available suitable work when offered him by the employment office or the employer or (iii) to return to his customary self-employment (if any) when so directed by the Commission, such ineligibility shall continue for a period of five weeks (the week in which such failure occurred and the next four weeks in addition to the waiting period) as determined by the Commission according to the circumstances in each case . . . .

"(b) In determining whether or not any work is suitable for an individual, the Commission shall consider the degree of risk involved to his health, safety and morals, his physical fitness and prior training, his experience and prior earnings, his length of unemployment and prospects for securing local work in his customary occupation and the distance of the available work from his residence."

<sup>346</sup> 374 U.S. at 401.

<sup>347</sup> *Id.* at 399.

<sup>348</sup> *Id.* at 403.

<sup>349</sup> *Id.*

*Brown*,<sup>350</sup> the Court stated a law should be deemed unconstitutional if it is promotes discrimination between individuals based solely on their religious beliefs or prevents anyone from observing one or all religions, even if the burden is indirect.<sup>351</sup>

In that manner, the Court found the burden imposed on Ms. Sherbert violated her constitutional right to freely exercise her faith. This was mainly because the state, indirectly, was saying she should choose between her faith, or getting a job and being eligible for unemployment compensation benefits.<sup>352</sup> In Justice Brennan's words, "to condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties."<sup>353</sup>

The religious discrimination appears to be even clearer when we see that the remaining religions that chose Sunday as a day to rest, do not suffer any limitation on receiving unemployment compensation benefits, because South Carolina Code, § 64-4,<sup>354</sup> expressly prohibits it.<sup>355</sup>

When concurring, Justice Douglas demonstrated the rich variety of religious practices and how could they sound "strange" upon someone's else faith or lack of it:

[R]eligious scruples of Moslems require them to attend a mosque on Friday and to pray five times daily. Religious scruples of a Sikh require him to carry a regular or a symbolic sword. Religious scruples of a Jehovah's Witness teach him to be a colporteur, going from door to door, from town to town, distributing his religious pamphlets. Religious scruples of a Quaker compel him to refrain from swearing and to affirm instead. Religious scruples of a Buddhist may require him to refrain from partaking of any flesh, even of fish".<sup>356</sup> In his point of view, the Court should stand to protect the rights of the minorities, that could not be compelled to observe secular rules in negation to their particular religious scruples.<sup>357</sup> And adds: "this

---

<sup>350</sup> 366 U.S. 599.

<sup>351</sup> 374 U.S. at 404.

<sup>352</sup> *Id.* at 403.

<sup>353</sup> *Id.* at 406.

<sup>354</sup> "[N]o employee shall be required to work on Sunday . . . who is conscientiously opposed to Sunday work; and if any employee should refuse to work on Sunday on account of conscientious . . . objections he or she shall not jeopardize his or her seniority by such refusal or be discriminated against in any other manner."

<sup>355</sup> 374 U.S. at 406.

<sup>356</sup> *Id.* at 411.

<sup>357</sup> *Id.* at 412.

case is resolvable not in terms of what an individual can demand of government, but solely in terms of what government may not do to an individual in violation of his religious scruples.<sup>358</sup>

Applying the strict scrutiny test, the Court found no evidence of a compelling interest of the state of South Carolina to burden Ms. Sherbert's religious faith which imposes respect of the Sabbath. As ruled in *Thomas v. Collins*,<sup>359</sup> "only the gravest abuses, endangering paramount interests, give occasion for permissible limitation."<sup>360</sup>

In 1964, the California Supreme Court addressed *People v. Woody*, involving the ceremonial use of peyote by a group of Navajos Indians.<sup>361</sup> They were accused of violating the Health and Safety Code due to unauthorized possession of peyote. The Court concluded the religious ceremony was covered under the First Amendment of the Constitution of the United States, affirming that the religious practice did not frustrate a compelling interest of the state to enforce the Health and Safety Code, considering their constitutional right to the free exercise of their religion.

Judge Trobriner, delivering the opinion of the Court, explains the central role peyote plays in their faith and why to prohibit the use of peyote is to remove the theological heart of Peyotism:

[W]hen taken internally by chewing the buttons or drinking a derivative tea, peyote produces several types of hallucinations, depending primarily upon the user. In most subjects it causes extraordinary vision marked by bright and kaleidoscopic colors, geometric patterns, or scenes involving humans or animals. In others it engenders hallucinatory symptoms similar to those produced in cases of schizophrenia, dementia praecox, or paranoia. Beyond its hallucinatory effect, peyote renders for most users a heightened sense of comprehension; it fosters a feeling of friendliness toward other persons.

The "meeting," a ceremony marked by the sacramental use of peyote, composes the cornerstone of the peyote religion... Whole families attend together, although children and young women participate only by their presence. At the meeting the members pray, sing, and make ritual use of drum, fan, eagle bone, whistle, rattle and prayer cigarette, the symbolic

---

<sup>358</sup> *Id.*

<sup>359</sup> 323 U.S. 516, 530

<sup>360</sup> *Id.* at 410.

<sup>361</sup> *People v. Woody*, 394 P.2d 813 (1964).



emblems of their faith. The central event, of course, consists of the use of peyote in quantities sufficient to produce a hallucinatory state.

At an early but fixed stage in the ritual the members pass around a ceremonial bag of peyote buttons. Each adult may take four, the customary number, or take none. The participants chew the buttons, usually with some difficulty because of extreme bitterness; ... By morning the effects of the peyote disappear; the users suffer no aftereffects.

Although peyote serves as a sacramental symbol similar to bread and wine in certain Christian churches, it is more than a sacrament. Peyote constitutes in itself an object of worship; prayers are directed to it much as prayers are devoted to the Holy Ghost. On the other hand, to use peyote for nonreligious purposes is sacrilegious.<sup>362</sup>

Under Oregon law,<sup>363</sup> possessing a “controlled substance” is not legal, unless it has been prescribed by a medical practitioner.<sup>364</sup> The violation of this statutory provision could make the possessors guilty of a Class B felony.<sup>365</sup>

There are records of religious use of peyote in Mexico in the sixteenth century, and in the United States since the latter part of the nineteenth century as a well-established religious tradition among Native Americans. Members of the Native American Church use peyote as the centerpiece of its ceremony and practice, believing the cactus plant is a “teacher” that allows direct contact with God, embodying the Holy Spirit.<sup>366</sup>

In *Employment Div. v. Smith*,<sup>367</sup> two native Americans<sup>368</sup> were fired from their jobs in a private drug rehabilitation organization, because, as members of the Native American Church, they ingested *peyote* as a sacrament. Peyote is derived from the plant *Lophophora williamsii Lemaire*,<sup>369</sup> a small, spineless cactus with psychoactive alkaloids, particularly mescaline,<sup>370</sup> a controlled substance listed on Schedule I of the Federal Controlled Substances Act.<sup>371</sup>

---

<sup>362</sup> *Id.* at 816-18.

<sup>363</sup> Ore. Rev. Stat. § 475.992(4) [1987].

<sup>364</sup> 494 U.S. at 874.

<sup>365</sup> *Id.*

<sup>366</sup> GREENAWALT, *supra* note 14, at 68-69.

<sup>367</sup> 494 U.S. 872 (1990).

<sup>368</sup> Alfred Smith and Galen Black.

<sup>369</sup> 494 U.S. at 874.

<sup>370</sup> *Mescaline*, <https://en.wikipedia.org/wiki/Mescaline> (last visited June 28, 2016).

<sup>371</sup> 21 U.S.C. §§ 811-812 (1970).

Alfred Smith and Galen Black's request for unemployment compensation was denied by the Employment Division. They were considered ineligible due to the cause of discharge: misconduct because of the sacramental use of peyote.<sup>372</sup>

Al Smith was hired in 1982 as a counselor for a private drug rehabilitation organization (ADAPT), mainly because of his years of experience working on the subject. As an ex-alcoholic, he had been sober for 25 years and would appeal to Native and Anglo clients as an example of dignity and confidence.<sup>373</sup>

Although Al Smith had been dismissed from his job because of the use of peyote, alleged by ADAPT as misconduct, considering the work of the agency in rehabilitating alcoholics and drugs addicts, the facts of the case is that peyote had been considered by experts in alcoholism treatment as a valid and useful part of the treatment and sobriety for Native American alcoholics.<sup>374</sup>

Robert Bergman,<sup>375</sup> one of the experts, testified clearly about the good effects peyote have on treatment of alcoholism:

[T]here is no positive correlation between alcoholism and the use of peyote in Native American Church ceremony. On the contrary, there is a great deal of evidence pointing the opposite way – that the use of peyote in ceremonies of the Native American Church helps the participants to control and overcome a problem with alcohol. Whereas the abuse of alcohol leads to terrible effects upon the mental and physical health of the individual and upon surrounding friends and family, it is extremely rare for the use of peyote in a Native American Church ceremony to lead to any such negative effects. The hallucinogenic effect of the drug has generally been exhausted by the time the religious ceremony is complete.<sup>376</sup>

A reasonable question is, if government should grant an exemption for religious use of peyote or Ayahuasca, why not concede an exemption for a religious use of marijuana? Is there a fundamental difference?

---

<sup>372</sup> *Id.*

<sup>373</sup> GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL 94 (2001).

<sup>374</sup> *Id.* at 138.

<sup>375</sup> Former chief of mental-health programs for federal Indian Health Service.

<sup>376</sup> EPP, *supra* note 373, at 138.

Alan Venet and friends founded a commune near Grants Pass, Oregon, in search of health and spiritual enlightenment, which they believed could be achieved through marijuana, an “herb of the field”, according to their interpretation of a passage of *The Everlasting Gospel*. Venet was an ordained minister of the Universal Industrial Church of the New World Comforter, founded in 1947 in California. The church had no special ritual and did not record a list of members. They believed where two or three were congregated, they would worship marijuana, the sacred herb.<sup>377</sup>

Cases like Venet’s were a legitimate concern for the Oregon attorney general’s office, when they decided to seek a *writ of certiorari* in the U.S. Supreme Court. Oregon State was concerned that Smith, as decided by Oregon Supreme Court, could interpret that the State would accept others religious claims for using drugs, like marijuana and hallucinogens,<sup>378</sup> because government could not differentiate religions based on their beliefs, rituals, or organization.<sup>379</sup> This meant that an exemption granted to religious use of peyote could mean any religious claim to use drugs would legitimate an exemption.<sup>380</sup>

Timothy Leary, one of the most prominent icons of psychedelic drugs in the 1960s,<sup>381</sup> was charged with possessing illegally imported marijuana. He claimed to have a religious motivation.<sup>382</sup> As a member of a hindu sect, he used marijuana for religious illumination and meditation. In addition, he argued his right to use it was not limited to religious purposes. In *Leary v. United States*, the Court addressed the issue mainly considering the paramount interest of government in enforcing laws on marijuana,

---

<sup>377</sup> *Id.* at 155

<sup>378</sup> *Id.* at 148

<sup>379</sup> *Id.* at 155

<sup>380</sup> *Id.* at 156

<sup>381</sup> Timothy Leary , Wikipedia, [https://en.wikipedia.org/wiki/Timothy\\_Leary](https://en.wikipedia.org/wiki/Timothy_Leary).

<sup>382</sup> *Leary v. United States*, 395 U.S. 6 (1969).

because an exemption for such a general purpose would render meaningless the anti-marijuana laws.<sup>383</sup>

In Massachusetts in *Commonwealth v. Nissenbaum*, the Supreme Judicial Court addressed an issue involving a couple that was found guilty of possession of marijuana with intent to distribute it unlawfully.<sup>384</sup> Husband and wife were members of the Ethiopian Zion Coptic Church, another church using a usual “sacrament”.

[C]optics regard marijuana (ganja) as the body and blood of Christ and use it as a sacrament. Religious services are not restricted to any specific time of day, to any time of the week, or to any specific place, but are performed three times a day (morning, afternoon, and evening). During religious services, marijuana is mixed with tobacco and smoked in pipes that are passed among the church members. During the religious ceremonies marijuana is distributed to those present who wish to partake (members and nonmembers). It may be, and sometimes is, distributed to children.”<sup>385</sup>

Although the government conceded that the defendants were sincere believers in the principles of the Ethiopian Zion Coptic Church and the use of marijuana was an integral part of that church's religious practices, the Court stated its main concern was not religious beliefs, but conducts or practices claimed to have a religious purpose. And balancing the State's interest in “preventing possession of controlled substances against the burden that statutes criminalizing such activity may impose on the free exercise of religion,” the Court found, as in *Leary*, that the free exercise of defendants religion would render anti-marijuana laws meaningless and unenforceable;<sup>386</sup> and the preservation of public order would prevail when balanced with individual interest in religious freedom.

A closer look at *Smith* and the use of peyote, compared to Venet’s Universal Industrial Church case and the use of marijuana, would set them wide apart from each other. Peyote is used in small quantities and only during religious ceremonies, and was not usually available to strangers and newcomers. On the other side, marijuana was

---

<sup>383</sup> GREENAWALT, *supra* note 14, at 76.

<sup>384</sup> *Commonwealth v. Nissenbaum*, 404 Mass. 575 (1989).

<sup>385</sup> *Id.* at 576.

<sup>386</sup> *Id.* at. 578-79.

available at any time and not only for members of the Universal Industrial Church. Visitors and friends were even invited to join the worship.

Research of a group of more than one thousand people, who were studied over 25 years, suggested that the frequent use of marijuana may increase the risk of psychotic symptoms and even mental illness among users. Another study, involving 535 patients with psychotic symptoms induced by the use of marijuana, suggested that the drug may accelerated the disease progress.<sup>387</sup>

The Native American Church was a force for sobriety and abstinence for ex-alcoholics and drug addicts. “A generation’s experience with the federal peyote exemption suggested that these restrictions were sincere and effectively enforced. There was no real report of problems with peyote intoxication at ceremonies or of sacramental peyote finding its way onto the street”,<sup>388</sup> which demonstrated that their internal controls were effective and able to disassemble any government argument concerning the religious authority to regulate practices.<sup>389</sup>

The Oregon Supreme Court decided that respondents’ sacramental use of peyote was proscribed by Oregon’s controlled substance law,<sup>390</sup> leading the U.S. Supreme Court to consider whether that prohibition is permissible under the Free Exercise Clause.<sup>391</sup>

In other words, the U.S. Supreme Court addressed whether the Free Exercise Clause of the First Amendment “permits the State of Oregon to include religiously inspired peyote use within the reach of its general criminal prohibition on

---

<sup>387</sup> OGA, *supra* note 45, at 443.

<sup>388</sup> *Id.* at 208.

<sup>389</sup> *Id.* at 209

<sup>390</sup> Employment Div., Dept. of Human Resources of Oregon v. Smith, 485 U.S. 660, 670 (1988) (Smith I).

<sup>391</sup> 494 U.S. at 876.

use of that drug, and thus permits the State to deny unemployment benefits to persons dismissed from their jobs because of such religiously inspired use.”<sup>392</sup>

Justice Scalia delivered the opinion of the Court. According to Justice Scalia, the Free Exercise Clause of the First Amendment, applicable to the States by incorporation into the Fourteenth Amendment,<sup>393</sup> means “the right to believe and profess whatever religious doctrine one desires”,<sup>394</sup> but the exercise of religion also demands from the believers the performance of (or abstention from) physical acts, for instance, absence of some kinds of foods or proselytizing.<sup>395</sup> The states are not allowed to meddle in those issues. Such interventions would be deemed unconstitutional, every time those acts or abstentions are intended only for religious purpose.<sup>396</sup>

For the *Smith* Court, the range of the First Amendment Free Exercise Clause does not allow believers to do (or not do) something proscribed or required by a general law not intended to target a specific religion, solely because his religion requires the performance of an act or forbids it.<sup>397</sup> In order to overcome a generally applicable law due to religious matters, the Court asserted that the Free Exercise Clause should apply in conjunction with other constitutional protections, such as freedom of speech and of the press.<sup>398</sup> The Court expressly refused to apply the *Sherbert* test, in this manner denying the need of a compelling government interest to burden the religious act (or abstention).<sup>399</sup>

---

<sup>392</sup> 494 U.S. at 874.

<sup>393</sup> *Id.* at 877.

<sup>394</sup> *Id.*

<sup>395</sup> *Id.*

<sup>396</sup> *Id.*

<sup>397</sup> 494 U.S. at 878.

<sup>398</sup> *Id.* at 881.

<sup>399</sup> *Id.* at 885.

In the opinion, the Court reasoned they never applied the *Sherbert* test beyond unemployment compensation benefits, and for that reason they could not apply it to a generally applicable criminal law.<sup>400</sup>

The Court raised the argument that objections based on spiritual beliefs could harm the government's ability to enforce a general law targeted to prohibit conduct deleterious to society.<sup>401</sup> The reason was "to make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is "compelling" -- permitting him, by virtue of his beliefs, 'to become a law unto himself,' contradicts both constitutional tradition and common sense."<sup>402</sup>

Justice Scalia reinforced his point of view, stressing that if the compelling interest test is to be applied to those cases, "any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them."<sup>403</sup>

Justice Scalia mentions that an exemption could be permitted by the legislature, but it does not mean it is constitutionally required, or appropriate occasions for its creation can be discerned by the courts. Ironically, he says that leaving those matters to the political process could be said unfair with those religious practices that are minorities, placing them "at a relative disadvantage those religious practices that are not widely engaged in". Time will tell that the Congress would respond and set the exemption protecting the minorities rights by enacting the Religious Freedom Restoration Act of 1993 (RFRA), a clear political response to Smith.<sup>404</sup>

---

<sup>400</sup> *Id.* at 884.

<sup>401</sup> *Id.* at 885.

<sup>402</sup> 494 U.S. at 885.

<sup>403</sup> *Id.* at 888.

<sup>404</sup> *Id.* at 890.

As Justice O'Connor stated, when concurring in *Smith*:<sup>405</sup>

[U]nder our established First Amendment jurisprudence, we have recognized that the freedom to act, unlike the freedom to believe, cannot be absolute. Instead, we have respected both the First Amendment's express textual mandate and the governmental interest in regulation of conduct by requiring the government to justify any substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest.<sup>406</sup>

The history of the American nation as a safe harbor, a bulwark to the ones hoping to profess freely their faith, is so deeply integrated in the soul of those people that civil society started to respond to Smith's case as ruled by the U.S. Supreme Court.

As presented in Section IV, the American nation has a history of respect and accommodation to minority rights. The interpretation of the Free Exercise Clause in a pluralist society, with so many different creeds and traditions, should take in account the evolving meaning of social relations, promoting human dignity as an interpretation vector that will promote social harmony.

The use of psychoactive substances, as said before, has been part of human history since immemorial time. Its religious use could be deemed different and primitive under the eyes of the major religious traditions, but it does not make it less deserving of government protection, who has the constitutional obligation to guarantee the free exercise of religion, furthering human dignity by the autonomy of making moral fundamental choices in life, giving men and women the right to exercise the capacity of self-determination.

As Dworkin teaches,<sup>407</sup> judicial decisions [and I say government decisions in general] when addressing hard cases, should promote the values of integrity and cohesion. Democracies are not the oppression of minority groups by majority power, and "in a large number of situations, the solution to legal problems will not be pre-

---

<sup>405</sup> Joined by Justices Brennan, Marshall and Blackmun.

<sup>406</sup> 494 U.S. at 894.

<sup>407</sup> DWORKIN, *supra* note 285, at 225-26.



prompt in the legal system. It will have to be constructed argumentatively by the interpreter”,<sup>408</sup> throughout other branches of knowledge, such as moral and political philosophy, psychology, economy, and other values important to getting a proper answer to the legal problems.<sup>409</sup>

And when an answer to a hard case is given by the U.S. Supreme Court without promoting values of integrity and cohesion, thus ignoring precedents and premises previously crystallized, a backlash from civil society and sometimes by legislators happens.<sup>410</sup>

It is important to understand that in *Smith* the U.S. Supreme Court rejected the interpretation of the Free Exercise Clause announced in *Sherbert v. Verner*,<sup>411</sup> and stated that judges are not required to become involved in a case-by-case assessment of the religious burdens imposed by facially constitutional laws.

Nevertheless, Congress responded to *Smith* by enacting the *Religious Freedom Restoration Act of 1993 (RFRA)*,<sup>412</sup> rejecting the test established in *Smith* and requiring from the judiciary branch a case-by-case analysis through the compelling interest test.

According to Sec. 3 of the Religious Freedom Restoration Act of 1993,<sup>413</sup> the government shall not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability. However, an exception is recognized whenever the government demonstrates the application of the burden to the person: (1)

---

<sup>408</sup> BARROSO, *supra* note 299, at 29.

<sup>409</sup> *Id.*

<sup>410</sup> *Id.* at 42.

<sup>411</sup> 374 U.S. 398 (1963).

<sup>412</sup> RFRA was enacted to repair the damage *Smith* precedent made in religious liberty jurisprudence. “It was supported by one of the broadest coalitions in recent political history, including Christians, Jews, Muslims, Sikhs, Humanists, and secular civil liberties organizations. Coalition members came from the political left and the political right—the lead sponsors in the Senate were Senator Edward Kennedy, a leading liberal Democrat from Massachusetts, and Senator Orrin Hatch, a leading conservative Republican from Utah.” Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act.*, 73 TEX. L. REV. 209, 210-211 (1994).

<sup>413</sup> 42 U.S.C. § 2000bb-1 (1993).

is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.<sup>414</sup>

RFRA has changed the history of *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*,<sup>415</sup> setting the burden of proof on the government's shoulder, who had to demonstrate [and was not able to do so] a compelling interest.

In *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*,<sup>416</sup> the U.S. Supreme Court had to address a fundamental question about the Freedom of Religion Clause, framing the boundaries of the First Amendment. The Court had to address whether the sacramental use of a tea, brewed from two plants native from the Amazon Rainforest,<sup>417</sup> was protected under the Free Exercise Clause and the Religious Freedom Restoration Act of 1993 (RFRA).<sup>418</sup>

The tea known as Hoasca, Ayahuasca, Daime, Vegetal, among several other names, contains dimethyltryptamine, or DMT,<sup>419</sup> a psychoactive substance regulated under the Controlled Substances Act by the federal government.<sup>420</sup>

The government of the U.S. claimed that the Controlled Substances Act<sup>421</sup> constituted a categorical prohibition for the church to import, distribute, and use a Schedule I controlled substance. Therefore, the government asserted that the

---

<sup>414</sup> *Id.* Free exercise of religion protected

(a) In general. Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) Exception. Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person--

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief. A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

<sup>415</sup> 546 U.S. 418 (2006).

<sup>416</sup> *Id.*

<sup>417</sup> *Id.* at 423.

<sup>418</sup> 103 P.L. 141, 107 Stat. 1488 (1993).

<sup>419</sup> See more about Ayahuasca in Chapter II.

<sup>420</sup> 546 U.S. at 423 (2006).

<sup>421</sup> 21 U.S.C.S. § 801 (1971).

sacramental use of the tea Ayahuasca constituted no exception, even under the Religious Freedom Restoration Act of 1993.<sup>422</sup>

Although the government had recognized that the sacramental use of Ayahuasca by UDV<sup>423</sup> [União do Vegetal or Centro Espirita Beneficente Uniao do Vegetal] members is a sincere exercise of religion,<sup>424</sup> government sought to compel the American branch of the Church to cease engaging in the practice. The government alleged that any use of the tea Ayahuasca was prohibited under the Controlled Substance Act.

In *Employment Div. v. Smith*,<sup>425</sup> the U.S. Supreme Court had affirmed the ability of the government to burden any religious practice by enforcing a general law,<sup>426</sup> thereby sustaining a state law that denied unemployment benefits to drug users, including members of the Native American Church that made sacramental use of peyote. As a general law prohibition (Controlled Substance Act), the government advocated that members of the UDV could not seek an exemption because DMT was proscribed as a Schedule I substance.

The U.S. Supreme Court in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal* granted the government's petition for *certiorari* and had to assess whether the Government has a "compelling interest in the uniform application of the

---

<sup>422</sup> Oral Argument Transcript, 2005 U.S. Trans. LEXIS 48, at 1-2.

<sup>423</sup> O Centro Espirita Beneficente Uniao do Vegetal is known as UDV also.

<sup>424</sup> *United States v. Seeger*, 380 U.S. 163, the Court established that:

[T]he difficulties that have always faced the trier of fact in these cases. We hope that the test that we lay down proves less onerous. .... In such an intensely personal area, of course, the claim of the registrant that his belief is an essential part of a religious faith must be given great weight. The validity of what he believes cannot be questioned. Some theologians, and indeed some examiners, might be tempted to question the existence of the registrant's "Supreme Being" or the truth of his concepts. But these are inquiries foreclosed to Government. As MR. JUSTICE DOUGLAS stated in *United States v. Ballard*, 322 U.S. 78, 86 (1944): "Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others." Local boards and courts in this sense are not free to reject beliefs because they consider them "incomprehensible." Their task is to decide whether the beliefs professed by a registrant are sincerely held and whether they are, in his own scheme of things, religious." But we hasten to emphasize that while the 'truth' of a belief is not open to question, there remains the significant question whether it is 'truly held.' This is the threshold question of sincerity which must be resolved in every case.

<sup>425</sup> 494 U.S. 872 (1990).

<sup>426</sup> 546 U.S. at 424 (2006).

Controlled Substance Act, such that no exception to the ban on use of the hallucinogen can be made to accommodate the sect's sincere religious practice.”<sup>427</sup> The Court unanimously<sup>428</sup> affirmed the judgment of the U.S. Court of Appeals for the Tenth Circuit, ruling that the government had not carried the burden expressly placed by Congress in the Religious Freedom Restoration Act of 1993.<sup>429</sup>

The government pointed to three compelling interests to restrict the sacramental use of Ayahuasca: 1) protecting the health and safety of UDV members; 2) preventing the diversion of the tea from the church to recreational users; 3) and complying with the 1971 United Nations Convention on Psychotropic Substances, a treaty signed by the U.S. and implemented by the Act.<sup>430</sup>

The U.S. Supreme Court found that UDV members “effectively demonstrated that [their] sincere exercise of religion was substantially burdened, and the government failed to demonstrate that the application of the burden to the UDV would, more likely than not, be justified by the asserted compelling interests.”<sup>431</sup>

Chief Justice Roberts, in delivering the opinion of the Court, reasoned that the classification of DMT as one of the controlled substances in Schedule I of Controlled Substance Act, does not authorize the conclusion that Congress has, by that means, considered the supposed harms posed by the particular use of the Ayahuasca tea as a sacrament in a religious work. In other words, the strict scrutiny test imposes a burden upon the government, which could not show a compelling interest in preventing such alleged harms.

In the same manner, Justice Roberts stated that:

[T]he fact that hoasca is covered by the Convention,<sup>432</sup> however, does not automatically mean that the Government has demonstrated a compelling

---

<sup>427</sup> 374 U.S. 398 (1963).

<sup>428</sup> Justice Alito took no part in the consideration or decision of this case.

<sup>429</sup> *Id.* at 423, 439.

<sup>430</sup> 546 U.S. at 426 (2006).

<sup>431</sup> *Id.* at 428.

<sup>432</sup> U.N. Convention on Psychotropic Substances, *supra* note 22.

interest in applying the Controlled Substances Act, which implements the Convention, to the UDV's sacramental use of the tea. At the present stage, it suffices to observe that the Government did not even submit evidence addressing the international consequences of granting an exemption for the UDV. The Government simply submitted two affidavits by State Department officials attesting to the general importance of honoring international obligations and of maintaining the leadership position of the United States in the international war on drugs. We do not doubt the validity of these interests, any more than we doubt the general interest in promoting public health and safety by enforcing the Controlled Substances Act, but under RFRA invocation of such general interests, standing alone, is not enough.<sup>433</sup>

After the 1993 RFRA, the U.S. Supreme Court had to address the case applying the strict scrutiny test. If the government could not show a compelling interest to restrict the sacramental use of Ayahuasca, the exemption had to be granted.

Health issues were alleged by government, but the truth was that the government could not really prove any substantial harm to the health of UDV members.

What are the effects of the use of Ayahuasca among members of the religious groups? Are they destructive, leading to abuse and addiction? Tolerable? Are they beneficial?

Scientific research<sup>434</sup> shows that Ayahuasca effects are well tolerated,<sup>435</sup> and studies have neither demonstrated psychological dependence nor physical addictiveness,<sup>436</sup> indicating it can be used safely in healthy adults.<sup>437</sup>

The UDV has a history in Brazil and U.S. of respectful and responsible religious work, functioning in Brazil for more than five decades and in U.S. for more than one decade without a single record involving misuse of Ayahuasca or harm to health. Studies showed that a long and continuous history of regular use of Ayahuasca did not cause signs of physical or neuropsychological deterioration in the UDV

---

<sup>433</sup> 546 U.S. at 438 (2006).

<sup>434</sup> See Section II.

<sup>435</sup> BOUSO, *supra* note 113, at 5.

<sup>436</sup> CALLAWAY, *supra* note 87, at 245.

<sup>437</sup> MCKENNA, *supra* note 72. See also Francisco Assis de Sousa Lima & Luís Fernando Tófoli, *An Epidemiological Surveillance System by the UDV: Mental Health Recommendations Concerning the Religious Use of Hoasca*, THE INTERNATIONALIZATION OF AYAHUASCA 185, 195 (Beatriz Caiuby Labate & Henrik Jungaberle, Lit ed., 2011).

members, suggesting, on the other side, that “the regular use of *Hoasca* in a ceremonial context seems to increase one’s ability to psychologically adapt to the larger process of life”.<sup>438</sup>

Finally, recent findings revealed that alkaloids present in Ayahuasca directly regulate proliferation, migration and differentiation of neural stem cells and promoted their differentiation into neurons,<sup>439</sup> inducing neurogenesis. Studies also showed an almost immediate response in lower depression symptoms that lasted for approximately three weeks,<sup>440</sup> and an anti-addiction property when administered in a regular basis, decreasing addiction use of alcohol, cocaine, and opioids.<sup>441</sup>

Like peyote, Ayahuasca has a strong taste, and presents a purgative effect. It eventually causes nausea and vomiting (sometimes diarrhea). These effects, according to the members of those Ayahuasca religions, are a tonic process not considered an intoxication,<sup>442</sup> but a cleansing event.<sup>443</sup> Those characteristics, together with the strict control UDV makes regarding the distribution of the sacrament, which is not commercialized, being used only in religious ceremonies,<sup>444</sup> prevents the diversion of the tea from the church to recreational users. There is not a single case in decades in Brazil or the U.S. of diversion of Ayahuasca from UDV to recreational users.

The accommodation of the religious rituals with the use of Ayahuasca by UDV members would not represent a breach of 1971 United Nations Convention on Psychotropic Substances, a treaty signed by the U.S. and also Brazil. First, the reservation made by U.S. concerning the traditional use of peyote, “harvested and

---

<sup>438</sup> CALLAWAY, *supra* note 87, at 255.

<sup>439</sup> MORALES-GARCÍA, *supra* note 68, at 6.

<sup>440</sup> Arran Froid, *Ayahuasca Psychedelic Tested for Depression*, Nature (Apr. 06, 2015), <https://www.nature.com/news/Ayahuasca-psychedelic-tested-for-depression-1.17252>.

<sup>441</sup> MORALES-GARCÍA, *supra* note 68, at 9. *See also* Fábregas, J. M. et al, *Assessment of Addiction Severity Among Ritual Users of Ayahuasca*. *Drug Alcohol Dependence*, 111, 257–261 (2010). *See also* Gerald Thomas et al., *Ayahuasca-Assisted Therapy for Addiction: Results from a Preliminary Observational Study in Canada*, 6 (1) *Curr. Drug Abuse Rev.*, 30-42 (2013).

<sup>442</sup> CALLAWAY, *supra* note 87.

<sup>443</sup> CONFEN, *supra* note 96, at 31.

<sup>444</sup> UNIÃO DO VEGETAL, *supra* note 75, at 17. [In fact, UDV is officially contrary to the commercialization of Ayahuasca. Centro Espírita Beneficente União do Vegetal].

distributed for use by the Native American Church in its religious rites”, shows it is possible to accommodate an exemption grounded in the Free Exercise of Religion. There is not an ontological distinction between an exemption for peyote and for Ayahuasca. Both have a history of religious traditional use for centuries, as a plant teacher, a sacrament.

Besides, “no plants [natural materials] containing DMT is currently 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 subjected to any of the provisions of the 1971 Convention.”<sup>445</sup>

As previously stated,<sup>446</sup> freedom of religion is a fundamental human right, essential to human dignity and its exercise cannot be unduly harmed without a compelling government interest. The mere enumeration of a right in an international treaty or convention, in the various national constitutions or statutes laws, does not, by itself, answer questions involving the achievement of certain norms, of fundamental character for the human being.

---

<sup>445</sup> ICEERS, *supra* note 309.

<sup>446</sup> *See* Section IV.

## SECTION VII

### BRAZILIAN LEGAL AND HISTORICAL ASPECTS

Since the 1930's the sacramental use of Ayahuasca has existed in Rio Branco with Raimundo Irineu Serra (Mestre Irineu), which started the Alto Santo line.<sup>447</sup> Later, Jose Gabriel da Costa (Mestre Gabriel) began the União do Vegetal (UDV) line in Porto Velho (1965). For decades Ayahuasca religions functioned informally without any legal concern about its operation. But events shifted those religious movements toward a more structured and institutionalized one, aiming to obtain recognition and protection for legal functioning as a religion.

In 1967 in Porto Velho, Brazil, Mestre Gabriel was arrested one night without a formal accusation, only because he was distributing Ayahuasca in the religious rituals he was directing. The UDV was not formally registered, but after this event, which is narrated every regular religious session in UDV as “Convicção do Mestre” [conviction of the master],<sup>448</sup> Mestre Gabriel and the UDV disciples decided to register the new religion as Associação Beneficente União do Vegetal [Beneficent Association União do Vegetal]. In 1971, after some harassment from the chief of police, which threatened to close the association, the members decided to register it as the Centro Espírita Beneficente União do Vegetal [Spiritist Beneficent Center União do Vegetal], the current name of this religion, known as UDV or União do Vegetal.<sup>449</sup>

In the following years, the Ayahuasca religions worked in Brazil without any kind of legal embarrassment from the authorities. But, in 1981, a young man named Eder Candido da Silva, affiliated to CEFLURIS,<sup>450</sup> changed this history.<sup>451</sup>

---

<sup>447</sup> See more in Section III.

<sup>448</sup> FABIANO, *supra* note 100, at 135-36.

<sup>449</sup> JOAZE BERNARDINO-COSTA & FLÁVIO MESQUITA DA SILVA, *supra* note 235, at 21, 23. *See also* FACUNDES, *supra* note 25, at 22-29 [Facundes narrates the persecution of Leôncio, the formal successor of Mestre Irineu, faced in the 1970's].

<sup>450</sup> See Section III [3.1 The Rising of Ayahuasca Religions in a Urban Context].

<sup>451</sup> CONFEN, *supra* note 96, at 27.



A police investigation was started after Eder was arrested in Rio Branco, Brazil. He lived in “Colônia Cinco Mil”, a community located in a rural area near Rio Branco, where followers of Sebastião Mota, from CEFLURIS, initiated a fourth religious line to work with Ayahuasca as a sacrament.<sup>452</sup> In Eder’s backpack, the police found marijuana, which led them to search Colonia Cinco Mil, where they found trees, seeds, and leaves of marijuana.

As a result, the federal police initiated a series of investigations involving other Ayahuasca communities, even though none of them used marijuana or any other drug in association with Ayahuasca. The investigations did not reveal a single record that led to the unequivocal demonstration of social damages caused by the use of Ayahuasca in a religious context.<sup>453</sup>

Nevertheless, in 1985, the religious communities, which used Ayahuasca, were targeted by the Brazilian government, which enacted an ordinance<sup>454</sup> listing the DMT [Dimethyltryptamine] and the vine *Banisteriopsis caapi* as proscribed substances. DMT is one of the psychoactive substances scheduled in the United Nations Convention on Psychotropic Substances in 1971 and is found in one of the plants used to prepare Ayahuasca, the bush *Psychotria viridis* [chacruna].<sup>455</sup> The proscription indirectly encompassed Ayahuasca as well, as any product obtained from the plant *Banisteriopsis caapi*, or from its parts, was also prohibited.<sup>456</sup>

---

<sup>452</sup> See Section III [3.1 The Rising of Ayahuasca Religions in a Urban Context].

<sup>453</sup> CONFEN, *supra* note 96, at 27.

<sup>454</sup> Portaria No. 2 DIMED (Divisão Nacional de Vigilância Sanitária de Medicamentos), de 8 de Março de 1985, Diário Oficial da União [D.O.U.] de 13.03.1985 (Braz.).

<sup>455</sup> U.N., *supra* note 22.

<sup>456</sup> Portaria No. 2 DIMED (Divisão Nacional de Vigilância Sanitária de Medicamentos), de 8 de Março de 1985, Diário Oficial da União [D.O.U.] de 13.03.1985 (Braz.).

The ordinance, issued by DIMED, a Brazilian federal executive department responsible for supervising drugs and sanitary surveillance, was poorly based, scientifically and legally inaccurate.<sup>457</sup>

The proscription of the vine *Banisteriopsis caapi*, which does not contain DMT, was accompanied by an explanatory text where the vine was mistaken for the chacruna bush (*Psychotria viridis*), a different plant species containing DMT.<sup>458</sup>

Besides, the DIMED voided the due process of law, listing a new substance without previously hearing the CONFEN (Federal Council of Narcotics),<sup>459</sup> which was responsible for the national policy of narcotics. In 1980, the Brazilian government enacted a National System for the Prevention, Surveillance and Repression of Narcotic Drugs, having CONFEN as its central body. CONFEN was responsible for drawing up plans, exercising normative guidance, general coordination, control and supervision of activities related to trafficking and use of narcotics and substances that determine physical or psychic dependence.<sup>460</sup>

The União do Vegetal requested the Brazilian authorities review this restriction. There was no scientific study proving Ayahuasca was harmful to health and, as noted by Luis Felipe Belmonte dos Santos, UDV's attorney, there was evidence the use of Ayahuasca was beneficial, given the number of União do Vegetal members who had been drinking it regularly for so many years without any relevant incident showing damage to their health.<sup>461</sup>

---

<sup>457</sup> Luís Felipe Belmonte dos Santos, *A Liberação do Chá Hoasca Junto ao CONFEN*, in HOASCA: CIÊNCIA, SOCIEDADE E MEIO AMBIENTE 165, 167-68 (Joaze Bernardino-Costa Ed., 2011).

<sup>458</sup> DOMINGOS BERNARDO G. DA SILVA SÁ, *DROGA – A DICÇÃO: ELEMENTOS PARA UM ESTUDO MULTIDISCIPLINAR DA PSICOATIVIDADE* 150 (2016).

<sup>459</sup> BELMONTE DOS SANTOS, *supra* note 457.

<sup>460</sup> Decreto No. 85.110, de 2 de Setembro de 1980, Diário Oficial da União [D.O.U.] de 4.9.1980 (Braz.).

<sup>461</sup> BELMONTE DOS SANTOS, *supra* note 457, at 166-67.

According to Belmonte dos Santos, the burden of proof rested with the State, not the UDV, to scientifically demonstrate, if they were capable, that the tea was not good for the health of its users.<sup>462</sup>

On June 24, 1985, the União do Vegetal submitted a request to CONFEN, which had the authority to review the decision taken by DIMED, withdrawing the ban on Ayahuasca. As a way of substantiating its request, the UDV required the carrying out of a scientific study, considering the sociological, chemical, pharmacological, anthropological, cultural, and juridical-constitutional aspects, a multidisciplinary study, of Ayahuasca.<sup>463</sup>

The ritual use of Ayahuasca is a rich and complex religious phenomenon. Its examination demands a multidisciplinary approach, where the tea is examined taking in account also the person who is using the sacrament (the set) and the environment where it is administered (setting).

[A]yahuasca is a psychodysleptic, a hallucinogen. It is, however, precisely the multidisciplinary analysis of the issue posed by the União do Vegetal that must be faced, a confrontation that extends to terms whose acceptance or rejection has consolidated over the years, as if its contents were perfectly known and its veracity irreproachable. It is indispensable, therefore, the criticism to another absolutization, to the inveterate logocentrism like hallucinogen, chemical dependency, etc.... In fact, it is not possible to take for examination only a part of the reality in which the uses of psychoactive agents are involved, under penalty of absolutizing the value of the product, in detriment of the centrality of the human person.... The well-known trilogy on which the discussion on psychoactivity is based - the person, the environment and the product - makes clear the multifaceted nature of the aforementioned theme, requiring a balanced examination of the cost/benefit ratio of the factors involved in the composition of possible conflicts.<sup>464</sup>

It is the set (the person) and setting (the environment)<sup>465</sup> a major component in order to assess any issue involving a psychoactive substance, because the “preparation of the individual, including his personality structure and his mood at the

---

<sup>462</sup> *Id.*

<sup>463</sup> *Id.* at 167-68.

<sup>464</sup> DA SILVA SÁ, *supra* note 458, at 151.

<sup>465</sup> *See supra* note 49.

time” matters, as well as factors like social and cultural aspects involved, not only the single question whether a chemical substance is present in a tea.<sup>466</sup>

The studies were fundamental to assess the real risks involved in using Ayahuasca in religious rituals, but “at that time there were no studies on the subject and no knowledge of the authorities, as it is nowadays. There was the prohibition, the prejudice of a large part of society, and a small number of people who believed in the cause they were defending.”<sup>467</sup>

As an initial response to UDV’s petition, the CONFEN created a Working Group (WG) to study Ayahuasca under a multidisciplinary dimension, where the medical, sociological, and anthropological aspects of the religious use of the tea had to be considered.<sup>468</sup>

The WG had a multidisciplinary composition, with representatives of the Ministries of Finance, Social Security and Social Assistance, DIMED, the Brazilian Medical Association and the Federal Police, with the assistance of a sociologist, philosopher, theologian, psychiatrist, psychologist, and anthropologist.<sup>469</sup>

The initial work consisted of the visit of members of the WG to the state of Acre, where, for decades, groups had been using Ayahuasca in a religious context.

In a preliminary opinion, approved unanimously by its members and CONFEN, the WG stated that the use of Ayahuasca in these communities had been done for decades without any social harm being detected. Additionally, within these communities users of Ayahuasca were found to have moral and ethical standards of behavior similar to those existing in society at large, sometimes rigidly implemented. The preliminary report led the CONFEN to decide by unanimous vote a temporary

---

<sup>466</sup> LEARY, *supra* note 49, at 11.

<sup>467</sup> BELMONTE DOS SANTOS, *supra* note 457, at 169-70.

<sup>468</sup> *Id.* at 168-69.

<sup>469</sup> CONFEN, *supra* note 96.

suspension of the "Banisteriopsis Caapi" of the list of banned substances. This was a first victory for the Ayahuasca religions.<sup>470</sup>

In the same document, CONFEN acknowledged the need to implement further studies of sociological, anthropological, medical, chemical, and public health nature, considering that, up to that moment, there were not conclusive studies on the ritual use of Ayahuasca.<sup>471</sup>

On August 28, 1987, the WG designated by CONFEN, presented a final report of the activities carried out. Using a multidisciplinary approach, the WG sought to develop activities aimed at understanding the sociological, anthropological, chemical, medical, and health aspects in general of the ritual use of Ayahuasca, with several visits to communities of users, including accompanying the preparation of the sacred tea, which took place in these religions in special ceremonies with a high symbolic-religious significance.<sup>472</sup>

The WG acknowledged that all Ayahuasca religious groups accompanied, were aimed at the search for the sacred and for self-knowledge, thereby excluding the preconceived conception that the ritual use of Ayahuasca is a "hallucination", understood here in its sense of raving or mental insanity.

In the final report, the WG said that it is not its job to assess whether the search for the sacred and for self-knowledge, as carried out by those religions, constitutes illusion, reverie or fantasy. The WG found that drink users do not, in general, present any deviation from social behavior, appearing to be quiet and happy people, who seek happiness in an orderly and hard-working context.<sup>473</sup> Thus, the final

---

<sup>470</sup> Resolução No. 6, de 4 de Fevereiro de 1986, Conselho Federal de Entorpecentes [Federal Narcotics Council] Diário Oficial da União [D.O.U.] de 5.2.1986 (Braz.).

<sup>471</sup> *Id.* See also Luís Felipe Belmonte dos Santos, *A Liberação do Chá Hoasca Junto ao CONFEN*, in HOASCA: CIÊNCIA, SOCIEDADE E MEIO AMBIENTE 165, 167 (Joaze Bernardino-Costa Ed., 2011).

<sup>472</sup> CONFEN, *supra* note 96, at 18.

<sup>473</sup> *Id.* at 29.

report recommended to CONFEN that the species used in the preparation of Ayahuasca be excluded from the lists of banned plant substances.<sup>474</sup>

The government decided to provisionally exclude the plants used in the preparation of Ayahuasca from the list of prohibited substances. But later, a new issue came to be examined by Brazilian administrative bodies involving the religious use of Ayahuasca: the participation of pregnant women and children under eighteen years in religious rituals with the use of Ayahuasca as a sacrament.

In 1997, ten years after the final report of the WG was released, a letter from the Judge of the Child and Youth Court of the city of Boa Vista, questioning whether the use of Ayahuasca is harmful to the health of adolescents, led the Federal Council of Narcotics – CONFEN to reopen the case. Without any previous scientific study,<sup>475</sup> CONFEN approved a recommendation to avoid the use of the tea in religious rituals for children under the age of eighteen, even if accompanied by parents or guardians, regardless of dosage or ceremony.<sup>476</sup>

In a quick response, the União do Vegetal filed a petition with the Federal Prosecutor's Office requesting the initiation of a procedure [civil inquiry] to review CONFEN's recommendation, thus seeking the protection of the right to religious freedom of its members and their children, with recognition of the right to family integration.<sup>477</sup>

In 1998, CONFEN was abolished, giving way to the National Anti-Drug Council (CONAD), an organ directly linked to the Presidency of the Republic, which assumed the responsibilities previously assigned to CONFEN.<sup>478</sup>

---

<sup>474</sup> *Id.* at 33.

<sup>475</sup> Marisa Mendes Machado, *A Ação da UDV no CONFEN e no CONAD*, in HOASCA: CIÊNCIA, SOCIEDADE E MEIO AMBIENTE 173, 173 (Joaze Bernardino-Costa Ed., 2011).

<sup>476</sup> Ata de Reunião e Parecer CONFEN de 16.05.1997.

<sup>477</sup> MACHADO, *supra* note 475, at 175.

<sup>478</sup> Decreto No. 2.632, de 19 de Junho de 1998, Diário Oficial da União [D.O.U.] de 22.6.1998, republicado no D.O.U. de 25.6.1998 (Braz.).

In 1999, in order to scientifically demonstrate that the use of Ayahuasca in religious context by adolescents of the UDV as safe, the União do Vegetal hosted applications for scientific research proposed by the University of California at Los Angeles (UCLA). This project became known as "Hoasca na Adolescência" [Hoasca in Adolescence], led by professor Charles S. Grob, who investigated the psychiatric, psychosocial, neuropsychological, developmental, and medical status of adolescents with Ayahuasca exposure.<sup>479</sup>

As seen in Section II, the investigation results did not show any detrimental (toxic or harmful) effect on the neurocognitive functioning of UDV subjects,<sup>480</sup> relevant scientific proof for CONAD, through Resolution No. 5 CONAD, dated 04/11/2004, addressed the issue of the participation of children and pregnant women in religious rituals using Ayahuasca.

CONAD affirmed the duty and right of parents to "guide the child in relation to the exercise of his rights in a manner consistent with the evolution of his capacity, including the freedom to profess one's own religion and one's own beliefs,"<sup>481</sup> a fundamental right of the child, object of an international convention [UN Convention on the Rights of the Child],<sup>482</sup> acknowledging also the right of pregnant women to freely decide to take part in those religious ceremonies.

CONAD approved a new study, mentioning in its reasoning the previous studies already approved in the CONFEN/CONAD, as well as the International

---

<sup>479</sup> See Section II (2. 5.3 Ayahuasca Use for Adolescents).

<sup>480</sup> Evelyn Doering-Silveira, et AL., *Ayahuasca in Adolescence: A Neuropsychological Assessment*, J. of Psychoactive Drugs, 37 (2), at 123-28.

<sup>481</sup> Resolução No. 5, de 4 de Novembro de 2004, Conselho Nacional Antidrogras [National Anti-Drug Council] Diário Oficial da União [D.O.U.] de 8.11.2004 (Braz.).

<sup>482</sup> U.N. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

Article 14

1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.
2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.

Narcotics Control Board (INCB) manifestation informing Ayahuasca was not controlled under the 1971 Convention on Psychotropic Substances or the 1988 Convention. The Resolution No. 5 CONAD, dated April 11, 2004, established a multidisciplinary working group, with the specific objective of surveying and monitoring the religious use of Ayahuasca and its experimental use for therapeutic purposes. In this official document, the Brazilian government recognized that “the administrative and social control of the religious use of Ayahuasca can only be structured, adequately, with the help of knowledge held by groups of users.”<sup>483</sup>

Differently from U.S., the Brazilian solution was held in a multidisciplinary manner, with the participation of the government, specialists in different areas of knowledge [the several workgroups had in its composition specialist from areas of anthropology, pharmacology, biochemistry, social sciences, psychiatry, legal], and the important recognition of previous history of religious use of Ayahuasca by those religions without social harm to society.

The studies suggested that “the regular use of *Hoasca* in a ceremonial context seems to increase one’s ability to psychologically adapt to the larger process of life”,<sup>484</sup> stating that “the ceremonial use of *Hoasca* as studied within the framework of this research project, is clearly a phenomenon quite distinct from the conventional notion of ‘drug abuse’”.<sup>485</sup>

In 2006, Brazil enacted a new law on drugs [Law 11,343],<sup>486</sup> a statute more progressive than the previous one, choosing a different treatment to deal with drugs, especially concerning users, which no longer were submitted to incarceration.

Although the chemical substance DMT is considered a scheduled substance in Brazil,<sup>487</sup> the plants [*Banisteriopsis caapi* and *Psychotria viridis*] or the Ayahuasca

---

<sup>483</sup> Resolução No. 5, de 4 de Novembro de 2004, Conselho Nacional Antidrogras [National Anti-Drug Council] Diário Oficial da União [D.O.U.] de 8.11.2004 (Braz.).

<sup>484</sup> CALLAWAY, *supra* note 87, at 255.

<sup>485</sup> GROB, *supra* note 116, at 86-94.

<sup>486</sup> Lei No. 13.343, de 23 de Agosto de 2006, Diário Oficial da União [D.O.U.] de 24.8.2006 (Braz.).



tea, are not listed as proscribed substances. Law 11,343 expressly recognizes [article 2]<sup>488</sup> the possibility of exemption in the case of legal authorization or regulation, as well as what is established in the Vienna Convention on Psychotropic Substances of 1971, regarding strictly ritualistic-religious use of psychotropic plants, giving a legal protection/recognition to the religious use of Ayahuasca in Brazil.

[T]he creation of a ‘National System for Public Policies on Drugs’ is considered to be the greatest advance of the new legislation, and is based on the principles proclaimed in article four of the new law, such as: respect ‘for the fundamental rights of the individual, especially in regard to autonomy and freedom,’ ‘to diversity and the particular aspects of existing populations,’ and ‘the promotion of the ethical and cultural values and citizenship of the Brazilian people,’ among others. In article 19 of the same text, the guiding principles for the prevention of the unlawful use of drugs are listed, including ‘the strengthening of individual autonomy and responsibility in regard to the unlawful use of drugs’ (paragraph III).<sup>489</sup>

In 2010, the Brazilian government enacted Ordinance No. 1, by CONAD [Brazilian National Council on Drug Policies], approving the final report by Multidisciplinary Working Group (GMT). The regulation represented a legal framework on norms and procedures compatible with the religious use of Ayahuasca, involving rules about commercialization (which is proscribed), production sustainability, religious tourism, advertizing, therapeutic use, internal organization of religious groups using Ayahuasca, proceedings involving newcomers, use of Ayahuasca by minors and pregnant women, and ethical principles.<sup>490</sup>

---

<sup>487</sup> The DMT is included in the list F2 - Psychotropic Substances, Portaria [Decree] SVS / MS 344, dated May 12, 1998 and later updates, which lists substances banned in Brazil for criminal repression.

<sup>488</sup> “Article 2. Drugs are prohibited throughout the national territory, as well as the planting, cultivation, harvesting and exploitation of plants and substrates from which drugs may be extracted or produced, subject to the possibility of legal or regulatory authorization, as well as which establishes the Vienna Convention on Psychotropic Substances of 1971 concerning strictly ritualistic-religious plants.” Lei 11.343, de 23 de Agosto de 2006, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 24.8.2006 (Braz.).

<sup>489</sup> Luciana Boiteux, *The New Brazilian Law on Drugs and the Religious Uses of Ayahuasca: Legal and Anthropological Aspects*, THE INTERNATIONALIZATION OF AYAHUASCA 263, 263-75 (Beatriz Caiuby Labate & Henrik Jungaberle, Lit ed., 2011).

<sup>490</sup> Resolução No. 1 CONAD (Conselho Nacional de Políticas Sobre Drogas), de 25 de Janeiro de 2010, Diário Oficial da União [D.O.U.] de 26.01.2010 (Braz.).

The Brazilian regulation of the religious use of Ayahuasca should be presented as a positive example to follow.<sup>491</sup> Although still presenting some points to be improved, Brazilian authorities had an open minded look at this complex phenomenon and decided to answer the hard question involving the balance of the rights to privacy and freedom of religion with the legitimate concern by the government of use of a psychoactive substance in religious rituals.

The government recognized the right to self-determination to individuals in choosing their religion, in order to promote human dignity, respecting through a long-term administrative process the chain of decisions already taken previously by COFEN and CONAD, enacting a statute law recognizing those religious practices and giving a safer scenario to the members of those Ayahuasca creeds. In general, this process is working well, and the religions which use Ayahuasca as a sacrament in Brazil are progressively obtaining greater recognition and respect from authorities and society.

---

<sup>491</sup> See *supra* note 488.

## VIII

### CONCLUSION

The goal of this thesis has been to study the fundamental right to freedom of religion concerning the religious use of a sacrament [Ayahuasca], which contains in its composition a Schedule I psychoactive substance [DMT] regulated under the Controlled Substances Act (CSA).

In the last decades, Brazil has been the cradle of a new phenomenon: the rising of a new religiosity in urban areas under a Christian tradition, using Ayahuasca as sacrament. This poses questions about its legal treatment nationally and internationally, because of Ayahuasca composition.

Religions like União do Vegetal and Santo Daime started to expand beyond Brazilian borders, facing a scenario of uncertainty regarding the right to the free exercise of their religious rituals.

This thesis provides an overview of the historical use of psychoactive plants religiously. Ayahuasca was presented as a sacred brew used in religious rituals by Amazonian religions as a vehicle to access an altered state of consciousness. Scientific research presented, showing a safe religious use of this brew and its enormous therapeutic potential.

The history of religious freedom and the formation of the American people were studied. A promised land, where settlers were free to profess their faith, is the usual image we picture about the formation of the American nation. Although, as we pointed out in Section IV, intolerance and harshness were the tonic during the colony years.

The first colonies initially concentrated people of the same faith. Church of England in Virginia, Puritans in Massachusetts, were in their way trying to build their home based in religious values in a close relation to the state. Jews, Catholics, Quakers

and other minorities creeds were not welcome and had to deal with intolerance since the beginning, as well as Anglicans in “Puritans’ land” and vice-versa.

During this process, the puritans were the majority and provided the new nation with a strict code of morality, based in their faith to found a “Holy Commonwealth” in the New World. From their faith came the strength to overcome the difficulties and the moral values that later influenced the Founding Fathers, as Washington, who first was able to promote the values of tolerance and respect of conscience.

A new perspective shows up after the independence and a clear separation between Church and government was needed. The Establishment clause and the Free Exercise Clause came with the first Amendment to the United States Constitution, setting the new parameters: no law shall be made respecting the establishment or free exercise of religion. The Founding Fathers knew that prosperity and freedom of religion were tied together.

The amplitude of those words are still echoing nowadays, as the U.S. Supreme Court has been called to address issues involving the separation between church and state and the right to exercise freely ones beliefs. Those values, established in the Bills of Rights, are deep merged in the blood of American people’s formation.

What is religion under the law? Which limits should the government and the Judiciary branch observe in order to avoid invading precisely the First Amendment rights as well as what is dogmatic to each faith and sincere religious practice? Which test should be applied in order to better address those hard cases?

To answer those questions, the U.S. Supreme Court has been navigating through turbulent waters, resolving disputes that hatch from the core of the believers and the sincere profession of their faith and sets a tense relation with government.

We live in a different world from the colonial days, from post-independence days and even from few decades ago when some precedents were set by the U.S. Supreme Court concerning the Free Exercise Clause.

But we still believe in the promotion of liberty, including the freedom to have a different religion, that could sound strange upon the eyes of the mainstream religions nowadays, as well as some practices from those same mainstream religion on the colony days could sound strange, harsh, cruel and non-Christian for the most part of the Christians of those days.

In *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*,<sup>492</sup> we can identify those elements: a minority Christian religion that has a non-traditional worship, using as a sacrament a tea that contains a psychoactive substance (DMT) regulated under the Controlled Substances Act by Federal government and deemed hallucinogenic.

Despite recognizing that UDV members have a sincere exercise of religion, government was willing to stop the drinking of the sacred tea, alleging violation of domestic and international drug control laws; public health; and the risk of diversion of the tea for recreational purpose. The Court found no proof of a compelling interest to burden UDV members' beliefs.

*Employment Div. v. Smith*,<sup>493</sup> played an important role in the outcome of UDV case, mainly because it demanded a huge response from civil society,<sup>494</sup> through Congress, that clearly said to the U.S. Supreme Court that they were wrong in *Smith*.

---

<sup>492</sup> 546 U.S. 418 (2006).

<sup>493</sup> 494 U.S. 872 (1990).

<sup>494</sup> "The Coalition for the Free Exercise of Religion included: Agudath Israel of America; American Association of Christian Schools; American Civil Liberties Union; American Conference on Religious Movements; American Humanist Association; American Jewish Committee; American Jewish Congress; American Muslim Council; Americans for Democratic Action; Americans for Religious Liberty; Americans United for Separation of Church and State; Anti-Defamation League; Association of Christian Schools International; Association on American Indian Affairs; Baptist Joint Committee on Public Affairs; B'nai B'rith; Central Conference of American Rabbis; Christian Church (Disciples of Christ); Christian College Coalition; Christian Legal Society; Christian Life Commission of the Southern Baptist Convention; Christian Science Committee on Publication; Church of the Brethren; Church of Jesus Christ

The Congress enacted the *Religious Freedom Restoration Act of 1993* (RFRA) as a response to *Smith*, demanding expressly that the Government was bounded to demonstrate a compelling interest in order to burden a person's exercise of religion, even if the burden derived from a rule of general applicability, making the U.S. Supreme Court return to the compelling interest test used in *Sherbert* as a rule of thumb in free exercise of religion subjects.

In addition, a legal exemption was provided in the Controlled Substance Act, in order to accommodate the religious use of peyote by members of the Native American Church.

An exemption for the use of a psychoactive substance (mescaline or DMT) in religious ceremonies, places a question about the fairness of that exemption when compared to other groups that want to use the same proscribed substance for recreational purposes.

The California Supreme Court in *People v. Woody*<sup>495</sup> gives some guidance in order to address the issue. To the ones that use Peyote in religious ceremonies, it is a sacrament, a vehicle that enables to experience the Deity, and its use is at the core of the worship of the Native American Church, that do not allows

---

of Latter-day Saints; Church of Scientology International; Coalitions for America; Concerned Women for America; Council of Jewish Federations; Council on Religious Freedom; Episcopal Church; Evangelical Lutheran Church in America; Federation of Reconstructionist Congregations and Havurot; First Liberty Institute; Friends Committee on National Legislation; General Conference of Seventh-day Adventists; Guru Gobind Singh Foundation; Hadassah, The Women's Zionist Organization of America, Inc.; Home School Legal Defense Association; House of Bishops of the Episcopal Church; International Institute for Religious Freedom; Japanese American Citizens League; Jesuit Social Ministries, National Office; Justice Fellowship; Mennonite Central Committee U.S.; NA'AMAT USA; National Association of Evangelicals; National Council of Churches; National Council of Jewish Women; National Drug Strategy Network; National Federation of Temple Sisterhoods; National Islamic Prison Foundation; National Jewish Commission on Law and Public Affairs; National Jewish Community Relations Advisory Council; National Sikh Center; Native American Church of North America; North American Council for Muslim Women; People for the American Way Action Fund; Presbyterian Church (USA), Social Justice and Peacemaking Unit; Rabbinical Council of America; Traditional Values Coalition; Union of American Hebrew Congregations; Union of Orthodox Jewish Congregations of America; Unitarian Universalist Association of Congregations; United Church of Christ, Office for Church in Society; United Methodist Church, Board of Church and Society; United Synagogue of Conservative Judaism." " Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act.*, 73 TEX. L. REV. 209, 210-11 (1994).

<sup>495</sup> *Id.*

members to use it out of church services. Those characteristics place the religious use of peyote in a different level when compared to groups that could want to use it only for recreational use. In one hand, we are talking about a fundamental right that enables people to make a direct link with God, to profess their faith. In the other hand, a mere way of life. Therefore, the exemption for religious use is not unfair to potential recreational users.<sup>496</sup>

*Employment Div. v. Smith* and *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal* are paradigmatic cases in the U.S. Supreme Court history in freedom of religion, as they demonstrate the evolution of the jurisprudence in this subject, showing the path to a more tolerant world, where human dignity is a paramount value, an ethical standard, an interpretative vector in order to reach government decisions that promote the respect to autonomy and self-determination of the human being.

In the same track, the Brazilian experience regulating the religious use of Ayahuasca was presented, facing a multidisciplinary dimension, where the medical, sociological and anthropological aspects of the religious use of the tea were considered through administrative decisions and legislation, a path where the importance of the positive results found in the members of those religions concerning the complex phenomenon of adapting to social life were recognized and considered.

The Brazilian response in this matter is seen as a positive example of respect to minorities' rights, considering the actual scenario where the fundamental right to freedom of religion is respected, giving recognition and protection to religious services of Ayahuasca religions in Brazil.

Nevertheless, internationally the legal status of Ayahuasca continues to raise questions and the legitimate right to freely exercise ones religion continues to be threatened.

---

<sup>496</sup> GREENAWALT, *supra* note 14, at 69, 70.

The interpreter of the Constitution, in order to solve hard cases involving the fundamental right to freedom of religion should search beyond what is written in the law [legal norm]. Religiosity is a too complex and important phenomenon that needs to be understood throughout other branches of knowledge, especially when the legal problem involves the use of a sacred tea which contains in its composition a psychoactive substance. Medical, sociological and anthropological aspects of the religious use of the tea, as well as moral and political philosophy, psychology, economy and other values should be weighed. Values of integrity and cohesion should be promoted in order to find a right answer to those legal problems, an answer that should be argumentatively constructed, with the respect of legal precedents.

When comparing the answers that Brazil and U.S. gave to religious use of Ayahuasca, we can identify differences and similarities. U.S. government was not able to settle an administrative agreement with UDV in order to accommodate UDV member's right to exercise their religion freely, which forced UDV to a long and expensive judicial litigation. For the other hand, Brazilian government was able to settle an administrative agreement, in a multidisciplinary approach, where the medical, sociological and anthropological aspects of the religious use of the tea were considered.

In Brazil we can identify a legal scenario more stable, where religious practices of Ayahuasca creeds are protected by Constitution, stature law,<sup>497</sup> and government ordinance.<sup>498</sup> The regulation involves rules about commercialization (which is proscribed), production sustainability, religious tourism, advertizing, therapeutic use, internal organization of religious groups using Ayahuasca, proceedings involving newcomers, and the use of Ayahuasca by minors and pregnant women.

---

<sup>497</sup> Lei 11.343, de 23 de Agosto de 2006, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 24.8.2006 (Braz.).

<sup>498</sup> Resolução No. 1 CONAD (Conselho Nacional de Políticas Sobre Drogas), de 25 de Janeiro de 2010, Diário Oficial da União [D.O.U.] de 26.01.2010 (Braz.).



In U.S. the legal scenario still demands an individual approach. There is not a general government regulation and the protection of Ayahuasca religions is still supported only by Constitution, with a general clause proving free exercise of religion. Although *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal* is a strong and historical precedent, U.S. government still demands from other Ayahuasca religions a case by case analysis to grant an exemption to manufacture, distribute, store, import, and transport Ayahuasca, under DEA supervision.<sup>499</sup>

In both countries, authorities recognized the right to self-determination to individuals in choosing their religion, in order to promote human dignity, respecting previous decisions already taken (administrative branch in Brazil and judicial branch in U.S.), allowing the free exercise of minority religions.

---

<sup>499</sup> See *Church of the Holy Light of the Queen v. Mukasey*, 615 F. Supp. 2d 1210; See also *Church of the Holy Light of the Queen v. Holder*, 443 Fed. Appx. 302; See also UDV agreement with U.S. government, [http://www.bialabate.net/wp-content/uploads/2010/07/UDV\\_Settlement\\_Agreement\\_DEA\\_20101.pdf](http://www.bialabate.net/wp-content/uploads/2010/07/UDV_Settlement_Agreement_DEA_20101.pdf) (last visited Mar. 27, 2018). Cf. Beatriz Caiuby Labate, *Paradoxes of Ayahuasca Expansion: the UDV-DEA Agreement and the Limits of Freedom of Religion*. DRUGS EDU. PREV. POL., 19(1): at 19–26 (2012) (raises concern about the agreement and the respect for human rights, religious freedom and cognitive liberty).