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An Ancient Medicine in Search of a Novel Legal Paradigm

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Abstract

The internationalization of ayahuasca has occasioned a puzzling dilemma for global policy- and decision-makers as the drink — whose use is protected in countries like Brazil and Peru — reaches foreign jurisdictions where often it is recognized only as a dangerous controlled substance. This study aims to answer two questions: i) what makes ayahuasca different from other controlled substances that have been vigorously repressed by the global drug control regime while ayahuasca persists as a legal grey area in many countries and has been legalized for specific uses in others?, and ii) what kind of normative framework should be adopted in order to regulate use in those countries that have not yet adequately regulated? Case law, regulations, and informal reports from countries around the world were carefully studied for data regarding the stance of countries on the legality of the drink and for the rationale behind decisions where available. Legal Anthropology, Third World Approaches to International Law (TWAIL), and Sociology of Law were drawn upon as a basis for interpretation, particularly the theory of Transconstitutionalism. Findings were that ayahuasca has indeed received unusual treatment at the hands of global decision makers, with penalties for possession, importation, and distribution only nominal where applied at all. This is attributed to both the unique effects of the substance and the timing of its rise to international attention, which coincides with the era of globalization and transnationalism. Data indicated the need for a normative framework based on combining the self-regulating capacity of user groups with the guiding hand of state regulators to achieve mutually-agreeable solutions. Emphasis has been placed on developing bureaucratic frameworks that appear attractive to state authorities so as to enable practical and implementable strategies for permitting legitimate uses within a larger rubric of protecting public health and safety.

Resumo

A internacionalização da ayahuasca tem suscitado um desafiante dilema para responsáveis por políticas e decisões globais, uma vez que a bebida — cujo uso é protegido em países como o Brasil e o Peru — tem adentrado ordens legais estrangeiras nas quais é reconhecida somente como uma substância controlada perigosa. Esse estudo pretende responder duas questões: i) o que torna a ayahuasca diferente de outras substâncias controladas? Especificamente, por que outras substâncias controladas têm sido vigorosamente coibidas pelo sistema global de controle de drogas enquanto a ayahuasca permanece ora enquadrada em um espectro legal cinzento em certos países e ora legalizada para usos específicos em outros?; e b) qual tipo de marco normativo deve ser adotado para reger o uso da ayahuasca em países em que a substância ainda não esteja regulamentada? Estudos de caso, instrumentos normativos e relatórios informais de países ao redor do mundo foram minuciosamente estudados para indicar informações sobre o posicionamento de países sobre a legalidade da bebida e a racionalidade que tem embasado decisões. Utilizaram-se perspectivas e construções teóricas advindas da Antropologia Legal, das Abordagens do Terceiro Mundo sobre o Direito Internacional (TWAIL) e da Sociologia do Direito como base de interpretação, com especial ênfase para a teoria do Transconstitucionalismo. Constatou-se que, de fato, a ayahuasca tem recebido um tratamento excepcional por parte de tomadores de decisão global, de forma que penalidades por sua posse, importação e distribuição, quando aplicadas, têm sido marcadamente brandas. Esse tratamento diferenciado justifica-se tanto pelos efeitos particulares atribuídos à substância quanto pelo momento em que começa a despertar atenção internacional, que coincide com a era de aprofundamento da globalização e do transnacionalismo. Dados indicaram a necessidade de um marco normativo que combine a capacidade de auto-regulação de grupos usuários com a orientação condutora de autoridades reguladoras estatais para que se obtenham soluções mutuamente satisfatórias. Ênfase foi colocada em desenvolver enquadramentos burocráticos que pareçam atrativos para autoridades estatais de forma que se viabilizem estratégicas práticas e aplicáveis que permitam usos legítimos baseados em segurança e na proteção da saúde pública.

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Introduction

Ayahuasca is a preparation of two Amazonian plants which contains dimethyltryptamine (DMT), a substance controlled by both international treaty and the national laws of almost every country in the world. In recent years, the use of ayahuasca has spread beyond the countries of the Amazon and there have been a number of surprising international judicial and administrative rulings in favor of its legality. This is an unusual development for a traditionally repressive global drug control regime, and one which demands explanation. Analogous psychotropic plants and preparations have not enjoyed the same legal successes, including psilocybin-containing mushrooms, ibogaine-containing iboga, mescaline-containing peyote, and coca leaves. Despite those other substances having held significant religious and cultural importance to indigenous peoples of various parts of the world, their use is now either heavily restricted or outright prohibited in almost every country. Why is ayahuasca different? Answering this may help answer the more pressing question of precisely who should be permitted to use it in those countries where its use is deemed permissible, and in what contexts. Only a small handful of countries have yet faced the question definitively, and in the large majority of those the use of ayahuasca remains a legal gray area. The task now at hand for policy- and decision-makers is to try to reconcile the moral, utilitarian, and constitutional permissibility of ayahuasca use with conceptually coherent and culturally inclusive restrictions governing its use. The objective of this doctoral dissertation, therefore, is twofold: first, to provide a theoretical framework to explain a narrow but significant phenomenon within the global drug control regime: the curious treatment by judges and policymakers of the psychotropic drink commonly known as ayahuasca. Second, to use existing case law and administrative proceedings as a baseline from which to think about a normative framework for guiding policy decisions about who should be permitted to use the substance, and in what contexts.

The global war on drugs is well-known for its harsh treatment of substances controlled by international treaty, but somehow ayahuasca stands in a class of its own in terms of both the judicial tolerance afforded to certain classes of users and the nominal penalties visited upon those whom the law considers violators. It appears that the predominantly religious/therapeutic nature of ayahuasca use has occasioned lenience on the part of both lawmakers and enforcers since the drink appeared on the international stage as if from nowhere in the 1980's and began its steady

international expansion beyond the Amazon rainforest. Yet nowhere in the United Nations (UN) Conventions on drug control does it state that a drug like DMT should be treated differently from others; indeed, the internal logic of the Conventions does not presently accommodate that psychoactive compounds might differ from one another in their potential uses and abuses. User groups themselves, however, have demanded that we consider this possibility, and policy- and decision-makers at the national level are already doing so, weighing criminal laws against constitutional freedoms and scientific evidence. The timing of the drink's appearance is also very significant, with changing attitudes about drug control going hand-in-hand with globalization and the emergence of transnational organizations, publics, and flows of information whose growing influence on law, politics, and culture cannot be overstated. It may be that ayahuasca has escaped the same draconian fate suffered by so many other substances native to the Global South partially on account of its relatively late introduction to a dominant Western ideological and cultural framework that is being profoundly changed by the new global reality.

With regard to a normative framework for guiding policy decisions about who should be permitted to use the substance, an understanding of the diverse contents of its use is the first step toward considering what restrictions and exemptions should apply. The unique properties of ayahuasca are not only chemical in nature: they relate also to the more intangible fields of religion, spirituality, and medicine. This intersection of these various fields, however, significantly increases the complexity of the matter. Religious exemptions could exclude many traditional, non-religious indigenous practices such as healing rituals performed by itinerant shamans, for example, while exemptions for 'traditional use' could exclude many religious practices. Medical exemptions would raise questions about the efficacy of traditional or religious models of medicine. The conceptual minefield surrounding such complex sociocultural matters goes hand-in-hand with widespread disagreement among advocates that splinters the field of users and encourages the rise of hegemonic power relations and the adoption of under-inclusive regimes of rights protection. Patterns of ayahuasca use already seen in countries such as Brazil, where its use is permitted in a culturally and religiously inclusive manner, may serve as both an example to be followed and a warning to be heeded for countries and international organizations that have yet to consider the breadth of restrictions to be applied. The experience of numerous other countries around the world is instructive as well. There must be limits on how a controlled substance is used, produced, and distributed, but assuming a departure from a blanket prohibition

approach, limits must be determined through processes of inclusive dialogue and must avoid preference granted on the basis of race, religion, or the superiority of one approach to medicine over another.

At a higher level of abstraction, the multidimensional legal challenges presented globally by ayahuasca offer an opportunity for constructive and open dialogues among international and domestic legal orders with diverging commitments to punitive drug control laws and constitutional rights and freedoms. Such dialogues have already taken place in specific instances, and one hypothesis of this research is that their ongoing occurrence is crucial to the development of adequate frameworks for the regulation of ayahuasca use. The data suggests that ayahuasca has developed into a constitutional legal issue that cannot be disposed of purely by the exercise of national or international drug control systems acting in isolation. Globalization is occasioning the rise of transnational movements and systems whose scope and behaviors extend far beyond the control of traditional state-bound constitutional law and even that of international law, ushering in an age of novel power dynamics between governments, global publics, and transnational norms. The curious case of ayahuasca is entangled at every level of legal ordering, from the international to the local and everything in-between, and stands at an intersection of powerful transnational flows such as religious and economic systems, indigenous movements, and human rights advocacy.

In order to analyze this entanglement in a systematic way, this thesis is divided into six chapters. They are structured in part according to geographic divisions: while the first three explain the international expansion of ayahuasca and the global drug control regime, the remaining chapters adopt a regional approach. The first takes an in-depth look at ayahuasca itself and presents an overview of some of the legal challenges incidental to its expansion beyond the Amazon and into North America and Europe. The second provides a theoretical background for the theory of transconstitutionalism and also situates the global drug control regime within that rubric, examining ayahuasca and the coca leaf as sites of notable deviation from norms. These first two chapters contain content that has been published elsewhere during the course of this PhD, but have been modified for inclusion here and updated to reflect ongoing legal developments. The third chapter briefly examines Third World Approaches to International Law (TWAIL), specifically with regard to international law and the UN Conventions on drug control. The fourth focuses entirely on the history of ayahuasca in Brazil, with special emphasis on the

ongoing legal process that led to legalization for religious use in that country. Progress and controversy are laid out side-by-side, revisiting success stories and anticipating challenges yet to be faced. While other South American countries are also considered, the Brazilian case stands as a paradigmatic model of an attempt to balance freedom of religion with international drug control obligations. The fifth chapter moves on to ayahuasca in North America, where drawn-out legal battles have resulted in several narrow judicial and administrative decisions in favor of allowing religious use. The sixth explains the somewhat different course of events taking place in Europe and Asia, and examines legal outcomes within the context of the national legal orders involved.

Methodology

The strategy of investigation incorporated primary research, secondary academic research with a focus on socio-legal methods, and anthropological participant observation. All accessible legal cases and regulatory information pertaining to ayahuasca were mapped from countries around the world, and an in-depth study was conducted in order to better understand the internal and external logic of these processes. In many cases the only data available on legal incidents was press or NGO reports, but in many others the full documentation could be located. A share of the primary research of international cases and regulatory information was performed in collaboration with other researchers working in the area, and some of this was in conjunction with a nonprofit advocacy organization called the International Center for Ethnobotanical Education, Research, and Service (ICEERS), for which I have become a formal contributor over the course of this work. Their Ayahuasca Defense Fund was established to help finance and carry out legal work on behalf of bona fide religious, therapeutic, and scientific users of ayahuasca prosecuted internationally.

The anthropological element to the research is based on the many opportunities I had to connect with and actually interact with both legal and religious actors in a variety of settings. Informal interviews have constituted a critical source of knowledge and understanding in juridical and religious arenas, which are both inherently adversarial to some degree and thus occasionally resistant to the prying to eyes of outsiders. My formal training in anthropology prepared me to garner important clues over the course of these activities; however, I decided to

forgo a formal anthropological study. This has meant that many doors have necessarily remained closed, and many important details surrounding legal cases and the activities of religious groups remain shrouded in secrecy. Given the perennial danger of legal persecution surrounding controlled substances and the ever-changing priorities and commitments of governments, I deemed the risks posed by a more invasive research approach to outweigh the potential benefit to subjects.

Theoretical Grounds

There are three main theoretical fields drawn upon by this study: academic literature on ayahuasca and drugs in general, constitutional theory, and legal anthropology. An incipient cross-disciplinary academic effort is already underway to examine ayahuasca use in all of its facets. One of the foremost pioneers is Beatriz Cauiby Labate, a Brazilian PhD in anthropology who over the past two decades has almost single-handedly galvanized an academic field out of a patchwork of disjointed research efforts. Since 2010 she has been the co-editor of numerous important English-language books about ayahuasca, and is herself the author of books and articles on the subject. The most important of these for my purposes are the two co-edited volumes: *The Internationalization of Ayahuasca* and *Prohibition, Religious Freedom*, and *Prohibition, Religious Freedom, and Human Rights: Regulating Traditional Drug Use*. Labate has also co-authored important articles on these subjects with Kenneth Tupper, a Canadian Professor of Public Health, and Kevin Feeney, an American Professor of Anthropology who also holds a JD. Their collective thinking, combined with that of other contributors to Labate's edited volumes, constitutes a large part of the theoretical starting point of this project.

The fields of legal anthropology and TWAIL are my frameworks of choice within which to conceptualize certain relationship between ayahuasca users and institutions of national and global governance. Legal anthropology permits analysis of legal norm diffusion resulting from divergence of social realities in local settings from idealized realities envisioned by distant power groups,[1] while TWAIL provides invaluable tools for understanding the historically and culturally contingent nature of legal norms as well as the unequal power relations that such norms often reinforce. My theoretical framework of choice for deriving practical value from this research is

[1] RONALD NIEZEN, PUBLIC JUSTICE AND THE ANTHROPOLOGY OF LAW xi (2010).

transconstitutionalism, which rejects "ultimate normative orders" and embraces "models that offer conditions for an 'interweaving' of the fragments."[2] It is a framework that promotes fostering constructive relations among legal orders, but only though a "willingness to seek out the normative 'findings' of others."[3]

Such findings — fragments — are important because they permit the expression of local perspectives on their own terms. Engagement with legal institutions can tend to indirectly impact the appearance, values, and development of minority groups by incentivizing or even demanding fulfillment of certain categories, tropes, or stereotypes.[4] For example, existing exemptions for religious use of ayahuasca strongly encourage groups to inhabit imposed conceptions of the religious, usually centered around Judeo-Christian typologies hostile to animistic, magical, or New Age perspectives.[5] Exemptions for indigenous use often force traditions to either meet an idealized standard dug up from the past or to become frozen in time like museum pieces as they are codified into law, eschewing the fact that indigenous cultures inhabit a cultural present just as vibrant and changing as anyone's. An interweaving of cultural presents is the widest ultimate outcome of transnational exchange and is becoming the new normal that legal institutions — and indeed societies as a whole — must grapple and come to grips with.

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[2] Marcelo Neves, *Transconstitutionalism: Brief Considerations with Special Reference to Latin America*, *in* CITIZENSHIP AND SOLIDARITY IN THE EUROPEAN UNION: FROM THE CHARTER OF FUNDAMENTAL RIGHTS TO THE CRISIS, THE STATE OF THE ART, 77 EUROCLIO 265, 289 (Silveira et al. eds., 2013).
[3] *Id.*
[4] *See* Niezen, *supra* note 1.
[5] Andrew Dawson, NEW ERA – NEW RELIGIONS: RELIGIOUS TRANSFORMATION IN CONTEMPORARY BRAZIL 1 (2007).

Chapter 1 - Ayahuasca

Policy surrounding banned substances has long been a topic of vigorous debate among decision-makers, and the question of how to account for traditional and religious uses of banned substances has remained one the debate's most conceptually challenging facets. The issue has recently moved to the forefront as a wave of international interest in alternative religions and healing modalities has popularized a psychotropic drink from the Amazon called ayahuasca (a.k.a. Daime, Hoasca), and in so doing sparked controversy over the drink's legal status. Legal debates surrounding ayahuasca use have thus far been characterized by tensions between the dictates of national and international criminal law, indigenous rights, and constitutionally enshrined freedom of religion. Campaigns by various entities to legalize ayahuasca have frequently made their way to national constitutional courts, encountering forums supportive of human rights such as freedom of religion, but also forums wary of unusual and potentially unsafe practices. Efforts toward legalization have met with a remarkable degree of success in light of difficulties faced by advocates of other banned substances such as marijuana and the coca leaf. In most countries the use of ayahuasca remains a legal gray area, with policy yet to be established and important rights claims yet to see their day in court.

Ayahuasca is a decoction prepared most commonly from two plants, *Banisteriopsis caapi* and *Psychotria viridis*, which contain harmala alkaloids and dimethyltryptamine (DMT) respectively. The mixture of plants is crucial because DMT is orally inactive, and therefore the MAO inhibition properties of the harmala alkaloids are required in order to block the DMT's enzymatic degradation before it reaches the brain.[6] The effects of pure extracted DMT taken non-orally are extremely pronounced and differ greatly from those of ayahuasca,[7] lasting for only a matter of minutes, whereas the effects of ayahuasca usually last for at least 3-4 hours. The effects of ayahuasca are similar in some respects to those of other substances in the same pharmacological class such as mescaline and psilocybin, but are also significantly distinct. A particularity of the drink is the vomiting and other forms of physical 'purging' that its use occasions (such as sweating, bowel movements, and yawning), which are widely considered an

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[6] Jordi Riba et al, *Human Pharmacology of Ayahuasca: Subjective and Cardiovascular Effects, Monoamine Metabolite Excretion, and Pharmacokinetics*, 306 THE J. OF PHARMACOLOGY AND EXPERIMENTAL THERAPEUTICS 73, 74 (2003).

[7] Rick Strassman et al., *Dose-response study of N,N-dimethyltryptamine in humans. II. Subjective effects and preliminary results of a new rating scale*, 51 ARCHIVES OF GEN. PSYCHIATRY 98 (1994).

important and even essential part of the ritual experience. Commonly reported psycho-spiritual effects include visions, contact with spirits or divine entities, psychological introspection, and spiritual illumination. The physical purging is considered by many traditions to represent purging at the psycho-spiritual level also. While the experience can be unpleasant at times and certainly does not lend itself readily to recreational uses on account of the multidimensional cleansing it can prompt, it typically ends in feelings of deep healing and catharsis.

Indigenous peoples of the Amazon have used ayahuasca in ritual, divination, and healing applications since pre-Columbian times, and today it is widely used by indigenous folk healers and shamans throughout the Amazon basin in ritual practices commonly referred to under the umbrella term *vegetalismo*.[8] In recent decades it has also become widely used in urban centers by "neo-ayahuasqueros": self-styled shamans, healers, and religious leaders who administer ayahuasca for ostensibly therapeutic or sacramental purposes in ritual settings that differ significantly from those more traditionally found in the rainforest.[9] In Brazil, where the drink has been legal for decades on freedom of religion grounds, its first use beyond indigenous communities was as the religious sacrament for three major religious organizations commonly referred to in the literature as the Brazilian ayahuasca religions: Santo Daime, Centro Espírita e Culto de Oração Casa de Jesus Fonte de Luz (commonly known as Barquinha), and União do Vegetal.[10] These first religious groups from the Amazon regions of Brazil eventually spawned innumerable off shoots, but the most notable of these in terms of size and influence is Santo Daime of the CEFLURIS sect[11] whose heavy overseas expansion places it front and center in the story of ayahuasca's encounter with the rest of the world.

DMT is classified a highly dangerous drug in most nations because it is a Schedule 1 controlled substance under the United Nations 1971 Convention on Psychotropic Substances (CPS).[12] The CPS expanded the scope of the 1961 UN Single Convention on Narcotic Drugs,[13] a

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[8] This term more properly refers specifically to Peruvian traditional practices.

[9] Beatriz Caiuby Labate & Kevin Feeney, *Ayahuasca and the Process of Regulation in Brazil and Internationally: Implications and Challenges*, 23 INT'L J. OF DRUG POL'Y 154, 157 (2012). *See also* Beatriz Caiuby Labate, A Reinvenção do Uso da Ayahuasca nos Centros Urbanos (unpublished Pd.D. dissertation, Universidade Estadual de Campinas) (on file with the Universidade Estadual de Campinas library system).

[10] Beatriz Caiuby Labate et al., *Brazilian Ayahuasca Religions in Perspective*, *in* AYAHUASCA, RITUAL AND RELIGION IN BRAZIL 1 (Beatriz C. Labate & Edward MacRae, eds., 2010).

[11] Centro Eclético da Fluente Luz Universal Raimundo Irineu Serra; recently incorporated into the even larger Santo Daime offshoot group ICEFLU – Igreja do Culto Eclético Fluente Luz Universal.

[12] 1971 Convention on Psychotropic Substances, Feb. 21, 1971,https://www.unodc.org/pdf/convention_1971_en.pdf [hereinafter *1971 Convention*].

revolutionary control regime focused around the criminalization of non-scientific and non-medical possession, cultivation, and trade of three plants and their derivatives: opium, the coca leaf, and marijuana. The 1971 Convention criminalized a wide array of additional substances, particularly the so-called psychedelic drugs such as LSD, psilocybin, mescaline, and DMT. Unlike the 1961 Convention, the CPS was drafted to accommodate the rights of traditional user groups by permitting otherwise prohibited substances to be permanently "reserved" by party states upon ratification of the treaty.[14] The 1961 Convention, in contrast, only permitted "transitional reservations"[15] which established a 15-20 year deadline after which traditional use had to cease. The CPS, like the 1961 Convention before it, does not permit new reservations to ever be made, a feature of the treaty that echoes the design of its predecessor whose explicit aim was to phase out traditional use of prohibited substances. Peru claimed a reservation for ayahuasca, and despite the widespread traditional uses persisting throughout the Amazon basin was the only South American country to do so. While there is strong evidence to suggest that ayahuasca has been used among indigenous and mestizo populations in the Amazon for hundreds if not thousands of years, there is also evidence to suggest that some indigenous uses assumed to be timeless cultural practices are actually the syncretic product of relatively recent intercultural exchange between tribal and ethnic groups.[16] This would challenge the CPS's implicit assumption that traditional use must necessarily be geographically and culturally bounded within a historical narrative.[17]

Historians are already aware that the activities of European colonizers, particularly the horrific Amazonian rubber boom of the late 19th century, render cultural and historical narratives in the region an extremely complex issue.[18] For example, we know that it was precisely such globalizing forces, fueled by international markets, which in effect brought ayahuasca to the

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[13] Single Convention on Narcotic Drugs 1961 (as amended by the 1972 Protocol), Mar. 30, 1961, https://www.unodc.org/pdf/convention_1961_en.pdf [hereinafter *1961 Single Convention*].

[14] *1971 Convention*, *supra* note 12, art. 23(4) (applying to "plants growing wild which contain psychotropic substances . . . which are traditionally used by certain small, clearly determined groups in magical or religious rites").

[15] *1961 Single Convention*, *supra* note 13, art. 49.

[16] Bernd Barbec de Mori, *Tracing hallucinations: Contributing to a Critical Ethnohistory of Ayahuasca Usage in the Peruvian Amazon*, *in* THE INTERNATIONALIZATION OF AYAHUASCA 23 (Beatriz C. Labate & Henril Jungaberle eds., 2011).

[17] Kevin Feeney & Beatriz Caiuby Labate, *The Expansion of Brazilian Ayahuasca Religions: Law, Culture and Locality*, *in* PROHIBITION, RELIGIOUS FREEDOM, AND HUMAN RIGHTS: REGULATING TRADITIONAL DRUG USE 111, 126 (Beatriz C. Labate & Clancy Canvar eds., 2014).

[18] *See* Michael Taussig, SHAMANISM, COLONIALISM, AND THE WILD MAN: A STUDY IN TERROR AND HEALING (1987).

attention of the world beyond the Amazon in the mid-20th century. The Brazilian rubber booms of the first half of the 20th century attracted mestizo laborers from urban centers in Brazil to the Amazon, laborers who later returned back to 'civilization' with knowledge of the drink.[19] Two of these rubber tappers went on to found the two largest and most influential Brazilian ayahuasca religions,[20] which arose in a remote jungle region bordering Peru and Bolivia, situated in the states of Acre and Rondônia. They incorporated a syncretic mix of folk Catholicism, Afro-Brazilian religions, European esotericism, and indigenous shamanism into their rites, holding ayahuasca to be their holy sacrament and its ritual consumption to be central to their religious practice.[21] While elements of these religious influences are main-stream, the mixture of them has been radically innovative. It was not until the 1980s that the movement of these groups to urban centers caught the attention of government authorities, and in 1984 *B. Caapi* was added to Brazil's list of prohibited substances.[22] The União do Vegetal (UDV) took legal action citing the religious nature of its practice, which resulted in the government creating a multidisciplinary study group to evaluate the medical, sociological, and anthropological aspects of the group's sacramental use of ayahuasca. In 1987, the Brazilian Federal Narcotics Council (CONAD) decided upon recommendation from the study group to definitively to exclude *B. Caapi* from the list of prohibited substances, and for the first time recognized the ritual and religious use of ayahuasca as legitimate, basing its decision on the constitutional right to free practice of religion.[23] Decades of debate ensued in Brazil surrounding the scope of this right to use ayahuasca, including over whether protections should be in place for pregnant woman and minors (it was determined that such uses are safe and protected by law[24]). Further proliferation of ayahuasca churches and neo-ayahuasqueros led to a 2010 resolution by CONAD which detailed a set of rules, norms, and ethical principles to be followed.[25] These included a restriction of use to strictly religious applications (as opposed to therapeutic ones), prohibitions on commercial

[19] Feeney & Labate, *supra* note 17, at 114.
[20] *See* Beatriz Caiuby Labate et al., *supra* note 10, at 2-4 (explaining the founding of the three religions).
[21] Feeney & Labate, *supra* note 17, at 114.
[22] Edson Lodi Campos Soares & Cristina Patriota de Moura Soares, *Development and Organizational Goals of the União do Vegetal*, *in* THE INTERNATIONALIZATION OF AYAHUASCA 277, 280-81 (Beatriz C. Labate & Henrik Jungaberle eds., 2011).
[23] Relatório Final das atividades desenvolvidas pelo Grupo de Trabalho (GT), 28 Agosto de 1987 (Braz.); *See also* Ayahuasca Defense Fund, *Country-by-Country: Legal Status Map*, https://www.iceers.org/adf/country-by-country-legal-status-map/ (last visited Feb. 12, 2019) (presenting both general and specific information on the legal status of ayahuasca in various countries).
[24] Resolução n.05, de 04 de novembro de 2004, CONAD (Braz.).
[25] Resolução n.01, de 25 de janeiro de 2010, CONAD (Braz.).

distribution, and a requirement that groups cultivate their own plants, among others.[26] While the detailed 2010 rules have proved quite controversial even among the religious user groups, uncertainty surrounding how the rules are to be enforced has rendered ambiguous their precise legal status. Notably, the legalization process in Brazil has been entirely regulatory and has not involved a single judicial process.

Ayahuasca has moved well beyond its old-world roots in the Amazon and become integrated into the social fabric of modern urban societies. In Brazil alone, where there exists religious diversity on a scale that experts describe as "mesmerizing" and "truly amazing,"[27] there are countless indigenous shamans and neo-ayahuasqueros operating in every major urban center. They head religions movements, operate spiritual healing clinics, and cater to so-called "ayahuasca tourists," foreigners who travel to countries like Brazil and Peru in search of spiritual enlightenment or medical healing. Ayahuasca tourism has prompted in turn a growing international interest in ayahuasca among Western scholars, clinicians, and laypeople. Scientists and clinicians are researching its utility in treating depression, drug addiction, and post-traumatic stress disorder.[28] Laypersons report its usefulness as a powerful psychotherapeutic tool and its potential for evoking religious experiences. The growing international interest in the substance is generating demand for priests, indigenous shamans, and neo-ayahuasqueros from countries throughout the Amazon to travel to foreign countries to conduct healing ceremonies or tend to religious followers. The Brazilian ayahuasca churches, for their part, have opened chapters across every inhabited continent of the world[29] and are the principal actors behind an international process of juridification aimed at transforming rights claims into legal and social legitimacy for those who use ayahuasca as a central part of their religious rites.[30] Research shows that the Santo Daime church alone is operating in at least 43 different countries,[31] and the UDV is present in the United States, Canada, Spain, Portugal, Switzerland, Holland, Australia, Italy and Peru.[32]

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[26] *Id*.
[27] Dawson, *supra* note 5, at 1.
[28] *See* THE THERAPEUTIC USE OF AYAHUASCA (Beatriz C. Labate & Clancy Canvar eds., 2014).
[29] Beatriz Caiuby Labate & Glauber Loures de Assis, *The Religion of the Forest: Reflections on the International Expansion of a Brazilian Ayahuasca Religion*, *in* THE WORLD AYAHUASCA DIASPORA: REINVENTIONS AND CONTROVERSIES 57 (Beatriz C. Labate et al. eds., 2016).
[30] Labate & Feeney, *supra* note 9, at 157-58 (2012).
[31] Labate & Assis, *supra* note 29.
[32] *About Us*, CENTRO ESPÍRITA BENEFICENTE UNIÃO DO VEGETAL, https://udv.org.br/en/about-us/ (last visited Feb. 2, 2020)

As the Brazilian ayahuasca religions spread throughout the world and international demand increases for the services of itinerant shamans and neo-ayahuasqueros, the international legal community now faces the question Brazil faced in 1986. There is objective evidence to suggest that over the past decade there has been a steep upward trend in ayahuasca-related prosecutions across the board worldwide, mostly in Europe. The Ayahuasca Defense Fund (ADF) — a nonprofit organization specializing in legal guidance for those facing ayahuasca-related prosecution — released its numbers for the period 2010-2016, observing 81 incidents brought to its attention during that period of which 72 were in Europe[33] (42 were in Spain alone, a trend which the ADF attributes to a liquid scanner installed at the Madrid Barajas airport[34]). For the preceding period, 1999-2009, the ADF was aware of only 11 incidents worldwide. Piecemeal data from the past five years suggests that the number of incidents of arrest and conviction continue to increase, and several recent Supreme Court decisions in Europe support the inference that a tipping point is close at hand signaling a departure from noncommittal ambiguity on the part of lawmakers in favor of firm action.

Since the year 2000, significant court cases have been undertaken by Santo Daime churches in France, Italy, the Netherlands, Spain, Belgium, and Denmark in response to prosecution of their members in those jurisdictions, and the UDV has fought a major legal battle in the United States. In France, Italy, and Spain, the focus of cases was on the status of ayahuasca under national drug laws. The consensus of judges in those three countries was that ayahuasca does not technically fall under national control because the mixture of plants is not the same as extracted DMT. It helped that the International Narcotics Control Board (INCB), a quasi-judicial body of the United Nations (UN) drug control system, has repeatedly clarified the international law situation by advising that ayahuasca is not under international control or subject to any of the articles of the CPS as a prepared mixtures of two or more plants.[35] Legalization in

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[33] Ayahuasca Defense Fund, *Is the Number of Ayahuasca Legal Incidents Rising?* FACEBOOK (July 7, 2016), https://www.facebook.com/defendayahuasca/posts/977914228991604

[34] Benjamin K. De Loenen, et al., *A Climate for Change: ICEERS and the Challenges of the Globalization of Ayahuasca*, *in* THE WORLD AYAHUASCA DIASPORA: REINVENTIONS AND CONTROVERSIES 223, 227 (Beatriz C. Labate et al. eds., 2016).

[35] Letter from Jonathan Lucas, Secretary of the United Nations International Narcotics Control Board to Benjamin K. De Loenen, Executive Director ICEERS (June 1, 2010), https://www.bialabate.net/wp-content/uploads/2017/07/INCB_confirmation_ICEERS_ayahuasca_preparation_Psychotropic_Substances_2010.pdf (responding to ICEERS inquiry on behalf of two persons facing drug trafficking charges in Chile); A.P., Valencia, 23 febrero, 2016, n. 96/15 (Spain) (deciding a case of importation of controlled substances and referring to INCB advice to Spanish authorities issued Jan 18, 2013); Letter from H. Schaepe, Secretary of the United Nations

France was short-lived, however, because the executive branch reacted to the judicial branch decision by prohibiting the specific plants used to produce ayahuasca, a hereunto unprecedented step which made France the only country in Europe (and perhaps the world) in which ayahuasca is specifically and unambiguously controlled within a drug control instrument.

In other countries like Denmark, the Netherlands, and the United States, constitutional challenges were brought on human rights grounds, specifically freedom of religion. In the United States challenge by the UDV, *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*,[36] the Supreme Court decided that the constitutional right of freedom of religion outweighed health and public safety concerns, treating the UDV's use of ayahuasca as analogous to the Native American Church's legally permissible use of peyote, another indigenous plant medicine containing a CPS Schedule I compound.[37] The United States example thus far represents the only Supreme Court case in the world to have weighed freedom of religion over adherence to drug control laws. In the Netherlands, several initial lower court decisions and even an appellate court decision were decided along these lines, but a 2019 Supreme Court reversed the trend and emphasized public safety concerns. Other attempts in Europe to circumvent drug laws by way of recourse to religious freedom have almost always failed in ayahuasca cases because limitations to religious freedom can be easily justified in the name of public safety, a justification built into to the European Convention on Human Rights.[38] In contrast, regulatory processes in Canada and Switzerland have resulted in exemptions for certain religious groups.

The ultimate challenge posed by the internationalization of ayahuasca is not only whether the substance is legal, but also, if so, how to determine who should be permitted to use it and in which contexts. Some believe that use should be limited only to 'authentic' indigenous use,[39] while others believe it should extend only to religions that meet a certain outward façade. Exemptions on the basis of traditional use — like that granted by Canada and the United States

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International Narcotics Control Board to R. Lousberg, Inspectorate for Health Care of the Ministry of Public Health in the Netherlands (Jan. 17, 2001), http://www.bialabate.net/wp-content/uploads/2008/08/letter_official_position_incb_-regarding_ayahuasca.pdf (responding to Dutch regional Court inquiry pertaining to case against persons for possession of ayahuasca).

[36] Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006) (U.S.)

[37] *Id*. at 433-34.

[38] Convention for the Protection of Human Rights and Fundamental Freedoms, art. 9 (Nov. 4, 1950).

[39] Marlene Dobkin de Rios, *Drug tourism in the Amazon*, 5 ANTHROPOLOGY OF CONSCIOUSNESS 16 (1994).

for Native American use of peyote,[40] and even that reserved by Peru for the religious use of ayahuasca — are fraught with conceptual difficulty because traditions change over time as do groups. Similarly, attempts at defining 'religion' have proved a complicated matter, and yet as an undefined ideal it is widely protected by international law and by many countries' constitutions. So far, the Brazilian ayahuasca religions have been the most successful of the groups campaigning for the legalization of ayahuasca. This probably at least in part owes to their official religious status in Brazil, which may contribute to deference on the part of outsiders on questions of legitimacy.[41] It may also owe to the color of legitimacy conferred by strong elements of Catholicism and familiar doctrinal structures. Several other elements of the ayahuasca religions, such as African magical rights, European Spiritism, and indigenous rituals might be less readily recognized as legitimate religious practices where observed separated from Christian elements and in isolation, and yet ayahuasca is widely used in these isolated ritual contexts too. There is also contention over the religious legitimacy of neo-ayahuasqueros — those who align themselves with neither dominant religious dogmas nor traditional user groups — with some staunchly defending an expanded vision of religious practice, and others pointing to instances of cultural misappropriation, financial opportunism, and unsafe practices.

The religious legitimacy of unconventional healers and spiritual groups is an important issue in view of the rapidly expanding field of users of ayahuasca. At least one expert has suggested that the spread of new religions is one of the "megatrends" of the 21st century.[42] If so, it is a trend that undoubtedly lies on a collision course with any cosmology of human rights underpinned by Eurocentric conceptions of culture, tradition, and religious worship. The legal questions raised by the internationalization of ayahuasca hold tremendous potential as indicators of social change in areas such as religion,[43] as well as of the robustness of religion's legal protections. These questions also open up a unique opportunity for local, national, international, and transnational legal orders to enter into dialogue over the unprecedented transnational phenomenon represented by the internationalization of ayahuasca. The advantage of collaborative legalization processes such as the one undertaken in Brazil — which involved the

[40] *See* Kevin Feeney, *Legal Basis for Religious Peyote Use*, *in* 1 PSYCHEDELIC MEDICINE: NEW EVIDENCE FOR HALLUCINOGENIC SUBSTANCES AS TREATMENTS 233 (Thomas B. Roberts & Michael J. Winkelman eds., 2007) [hereinafter Feeney, *Legal Basis for Religious Peyote Use*].
[41] Labate & Feeney, *supra* note 9, at 158.
[42] SCOTT M. THOMAS, THE GLOBAL RESURGENCE OF RELIGION AND THE TRANSFORMATION OF INTERNATIONAL RELATIONS: THE STRUGGLE FOR THE SOUL OF THE TWENTY-FIRST CENTURY 29 (2005).
[43] Dawson, *supra* note 5, at 3.

state, doctors, social scientists, and representatives of religions themselves — is that they "help in the development and strengthening of mechanisms of cultural regulation within the user groups . . . a process that is usually hindered by repressive drug policy."[44] In other words, clearly defined, local mechanisms of control can help maintain control over who should be permitted to use the substance. This approach has its advantages, but cannot by itself gain the traction required to garner the necessary political and legal support from national and international control regimes. The multidimensional legal challenges presented by ayahuasca offer an opportunity for constructive and open dialogues between legal orders with diverging commitments to punitive drug control laws and constitutional/international rights and freedoms.

[44] Beatriz Caiuby Labate et al., *supra* note 10, at 6.

Chapter 2 - Transconstitutionalism

We are entering an age of unprecedented globalization. According to the systems theory of Luhmann, we have witnessed the emergence of a "World Society," a unified system of global communication processes encompassing all human activities.[45] Within this unified system envisioned by Luhmann, function systems (medicine, economy, religion) have taken over from nations and states as primary organizational units. These function systems operate transnationally, with only the systems of law and politics remaining fixed to spatial boundaries. Transnational function systems are populated by formal and informal organizations, networks, and flows of people, ideas, and decision-making. Whether one prescribes to the systems theory of Luhmann or not, it is undeniable that transnational entities and exchanges exist, are proliferating, and are impacting political and legal systems. The unchecked operations of some transnational forces have proven immensely destabilizing to the operation of individual nation states and world society as a whole, and so it appears that foundational rules and limitations must be established to govern their conduct. Some argue that a global Constitution is the only solution, while others counter that the constitution as a legal instrument has little force beyond the nation state, and instead advocate for increased cooperation and dialogue over constitutional issues between already extant legal orders. The focus of this chapter is the global drug control regime and where it fits into this puzzle. Does drug control exhibit signs of growth, change, or deterioration that reflect larger-scale changes occurring at the level of global constitutional governance? I maintain that it reflects such changes, but definitive outcomes are still far from materialized. Specifically, prohibited substances with traditional and/or religious import have become the site of national, international, and transnational contests over fundamental rights, contests whose politicization of the constitutional appears poised to impose checks and balances on an otherwise notoriously inflexible control regime. The cases of the coca leaf and ayahuasca exemplify this, and will be detailed here in order to further this assertion. They demonstrate fleeting instances of what Marcelo Neves calls "transconstitutionalism," a phenomenon under which constitutional orders of various levels enter into constructive dialogue to learn about one

[45] 1 NIKLAS LUHMANN, WORLD SOCIETY (Rhodes Barrett trans., Stanford University Press 2012) (1997).

another and, ideally, to "rebuild identity based on alterity."[46] The result has been legal outcomes that partially resist the exclusionary tactics of dominant ideologies and power interests.

2.1 Background Theory

There is wide debate over the future of Constitutionalism. Among constitutional scholars adhering to systems theory, the central question has been how to best maintain constitutional checks and balances upon power in a world in which the centrality of the nation state has been replaced by transnational power configurations rooted in function systems. The reach of law has become fragmented, and in some areas remains completely lacking. Some authors advocate for a global constitution rooted in instruments of international law, and some go as far to suggest that the UN charter is already fulfilling this role.[47] Others suggest that the concept of the constitution itself must be brought into line with the new global reality, and argue that new constitutional realities are arising spontaneously within transnational, supranational, and international contexts. Gunther Teubner provides the most extreme version of this view, suggesting that constitutions can exist within a wide variety of transnational regimes, including private and quasi-public ones, while Thornhill suggests that constitutions can be deemed to exist in any public, governing body.[48] Neves maintains the more traditional view that the term constitution refers only to a very specific kind of instrument, one that by its very nature cannot transcend the nation state because it was only within specific modern nation states that law as a function system achieved complete autonomy from politics, the fundamental prerequisite for a formal constitutional. He prefers to focus on constitution-like legal mechanisms in the abstract, and suggests that constitutionalism can in this sense be extended beyond the constitution itself wherever a legal order faces problems of a traditionally constitutional type.[49] In other words:

> Constitutionalism is opening up to spheres beyond the state not exactly owing to the emergence of other (non-state) constitutions but rather because eminently

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[46] Marcelo Neves, *From Constitutionalism to Transconstitutionalism: Beyond Constitutional Nationalism, Cosmopolitan Constitutional Unity and Fragmentary Constitutional Pluralism*, *in* SOCIOLOGICAL CONSTITUTIONALISM 267, 294-95 & n.42 (Paul Blokker & Chris Thornhill eds., 2017).
[47] HAUKE BRUNKHORST, CRITICAL THEORY OF LEGAL REVOLUTIONS: EVOLUTIONARY PERSPECTIVES 427 (2014).
[48] Neves, *supra* note 46; *See also* Chris Thornhill, *Rights and Constituent Power in the Global Constitution*, 10 INT'L J. OF L. IN CONTEXT 357 (2014).
[49] Neves, *supra* note 46, at 293.

> constitutional problems, especially those relating to human rights, intersect simultaneously with several legal orders that entangle with each other in their search for solutions.[50]

This entanglement is what he refers to as transconstitutionalism. Legal orders exist at a various levels of the world legal system — nationally, internationally, supranationally, transnationally, and even at small-scale local levels — and overlaps of jurisdiction as well as conflicts between competing interpretations of constitutional issues such as the substantive content of human rights are commonplace. Transconstitutionalism suggests that issues cutting transversely across these levels should be dealt with on the basis of an

> engagement model. . . whereby all orders would be capable of reconstructing themselves permanently by learning from the experience of other orders concomitantly interested in solutions to the same constitutional legal problems of fundamental or human rights.[51]

The central idea is that legal orders built upon differing values, beliefs, and ideas can collaborate if they are willing to make sincere attempts at understanding the perspective of the other while simultaneously entertaining the possibility that their own perspectives have limitations.[52] This is not to suggest that agreement will always be possible or that the underdog will always get its way. It only suggests that hierarchical models of conflict resolution that operate solely through the power of authority should be replaced by a methodology favoring the construction of "bridges of transition" that lead to collectively acceptable solutions.[53]

Transconstitutionalism aspires to be more than simply an idealized prescription for how the world should work; on the contrary, in the view of Marcelo Neves, "it appears to be a functional requirement and normative claim of today's world society."[54] In other words, world society's plurality of legal orders and the multiplicity of approaches to constitutional matters contained therein both imply and require it. In practice, however, transconstitutionalism is employed quite infrequently, its operation in real-world contexts stymied by socio-political power imbalances that inhibit the emergence of autonomous functional systems and warp the

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[50] Neves, *supra* note 2, at 284.
[51] *Id.* at 283.
[52] *Id.* at 292.
[53] *Id.* at 287.
[54] *Id.* at 265.

proper functioning of legal and political systems.[55] According to Luhmann, perfect functional differentiation occurs where functionally delineated communication systems within the larger communication system — world society — become autonomous and self-regenerating, rendering mute all effort on the part of political actors to deviate from the course dictated by function systems themselves.[56] Where populations lack access to function systems, or simply lack dependency upon them, politics retains an unhealthy and even destructive amount of control over society, including over the legal process, and the expected course of development for function systems is thereby inhibited.[57] In light of these realities, therefore, transconstitutionalism is best described as a blueprint for a constitutional conflict of laws for the future, but a future contingent upon the emergence of political technologies that can effectively grapple with the problems posed by the exclusion of populations from function systems. Paradoxically, as globalization and the process of functional differentiation progresses, populations are becoming excluded from active participation in systems such as politics, law, economy, and education, the result being that power imbalances distort the proper functioning of systems and exclude the possibility for constructive dialogue between groups and between legal orders.[58] This problem of inclusion/exclusion — termed by Teubner the "inclusion paradox of functional differentiation" — is one that was first identified by Luhmann himself[59] On the one hand function systems presuppose the inclusion of the entire world population, with inclusion and exclusion existing only as a natural byproduct of functional differentiation. On the other hand, however, the emergence of function systems out of more archaic dynamics of social stratification and center/periphery relationships can lead to reaction and resistance on the part of preexisting systems, which in turn provokes dynamics of over-inclusion and over-exclusion, particularly in the periphery of world society.[60] Until total assimilation takes place, these dynamics harbor hegemonic and exploitative potentials which actually retard the development of function

[55] Neves, *supra* note 46, at 297-98; *See also* Martti Koskenniemi, *The Politics of International Law 20 Years Later*, 20 EUR. J. OF INT'L L. 7 (2009) (describing the symbolic nature of political discourse); *but cf.* Harold H. Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996) (explaining why countries obey international law).
[56] Luhmann, *supra* note 45, at 92.
[57] Neves, *supra* note 46, at 284-85.
[58] Brunkhorst, *supra* note 47, at 434.
[59] GUNTHER TEUBNER, CONSTITUTIONAL FRAGMENTS: SOCIETAL CONSTITUTIONALISM AND GLOBALIZATION 136 (Gareth Norbury trans., 2012).
[60] *Id.* 136-37; Brunkhorst, *supra* note 47 at 434-36, Luhmann, *supra* note 45, at 87-88; Neves, *supra* note 46, at 283-88.

systems.[61] This exacerbates a more fundamental problem, addressed by Teubner, which is the tendency of function systems to evolve so vigorously and expansionistically that even when functioning normally they tend to provoke such dynamics on their own, especially politics and economics, even to the point of jeopardizing the social conditions underlying their very existence.[62] The problem of inclusion/exclusion is therefore multidimensional, with the ambitions of function systems and the ambitions of human actors at times collaborating and at times conflicting in complex and still not fully understood ways.

The constitution as a legal instrument was revolutionary because it guaranteed legal and political inclusion, thereby guarding against both power asymmetries and the pathological functioning of social systems at the level of the nation state. The reach of its efficacy appears to have important limits, however, both in scope and scale. Its scope appears limited to the territorial socio-political construct for which it was designed: the nation state. The proper functioning of a constitution is contingent upon the complete autonomy of law and its resultant capacity to place limits upon politics through a structural coupling of the two systems, a development which appears to have occurred only within the nation state. According to Luhmann and Neves, this coupling does not have an equivalent at the level of global society,[63] which would imply that we should not expect constitutions to be effective at that level. Furthermore, the scale of constitutional efficacy, even within the nation state context, appears to be a historically contingent phenomenon which formed part of the historical trajectory of only certain culture groups, namely those occupying certain Western states.[64] Just as Luhmann viewed functionally autonomous legal systems as a "European anomaly that might well be weakened with the evolution of global society,"[65] Neves views constitutionalism as a Western anomaly that despite normative expectations of global efficacy has in many regions of the world met with only limited success.[66] The key question, therefore, as posed by Teubner is "will inclusion/exclusion become the meta-code of the 21st century, mediating all other codes, but at the same time

[61] Luhmann, *supra* note 45, at 87-88.
[62] Teubner, *supra* note 59, at Introduction.
[63] Neves, *supra* note 46 at 291, *citing* NIKLAS LUHMANN, LAW AS A SOCIAL SYSTEM 487-88 (trans. 2004) (1993).
[64] Neves, *supra* note 46, at 283-88.
[65] *Id.* at 20-21, *citing* Luhmann, *supra* note 63, at 490.
[66] Neves, *supra* note 46, at 287-88.

undermining functional differentiation itself and dominating other sociopolitical problems through the exclusion of entire population groups?"[67]

Teubner, like Neves, believes that the best response to this problem is neither a global constitution nor a bolstering of nation state institutions, but rather a constitutional conflict of laws to mediate between constitutional fragments formed by the various legal orders of world society. While the two thinkers differ quite dramatically in their chosen ideal methodology with which to proceed, they each touch on important points that should be put in dialogue with one another. As seen above, the primary difference between their thinking lies in the fact that Teubner sees private constitutions spontaneously arising within all sorts of transnational contexts, while Neves views transnational legal orders as not possessing the basic legal structure to support effective constitutions in the true sense. For Neves, transnational orders can participate in constitutionalism only by collaborating with other legal orders to find solutions to constitutional issues vis-à-vis transconstitutionalism. For Teubner, transnational orders actually self-fabricate their own constitutions, being brought into line with the collective good through the same kind of normative force that Harold Koh envisions as being contained within transnational legal process. Koh believes these processes to act as an internalization mechanism whereby states are compelled to fall into line with international law by virtue of the normative force of their interactions with international legal norms.[68] In Teubner's version it is autonomous transnational regimes that fall into line with prevailing international legal norms as a result of pressure from media, public discussion, NGOs, and protest movements.[69] It is naïve, however, to think that the unbridled might of transnational organizations in pursuit of power and profit might be brought into line by public discussion and protest movements. The proposition reminds us that the dangerous propensities of power are notoriously difficult to sublimate, hence the revolutionary nature of the constitution in the first place. There is, however, something important to be taken from the growing politicization of the activities of international, transnational, and supranational institutions.[70] While it is doubtful that growing public awareness and increased lobbying on the part of interest groups will single-handedly solve the coming constitutional

[67] Teubner, *supra* note 59, 137.
[68] Koh, *supra* note 55, at 203 ("In part, actors obey international law as a result of repeated interaction with other governmental and nongovernmental actors in the international system").
[69] Teubner, *supra* note 59, at Ch. 4.
[70] *See* Michael Zürn, Martin Binder & Matthias Ecker-Ehrhardt, *International Authority and it Politicization*, 4 INT'L THEORY 69 (2012).

crisis, growing public resistance against legitimacy-deficient non-state legal authorities — and growing public support for legitimate ones — is likely to promote more balanced transconstitutional dialogues by presenting a much-needed counterbalance to established power interests.

2.2 The Drug Conventions

The international drug control regime as it exists today is a creation of the United Nations, which passed three conventions on drug control in 1961, 1971, and 1988 respectively.[71] The UN Single Convention on Narcotic Drugs of 1961 was a watershed moment, consolidating all previous drug control treaties under a single instrument. The Convention was most notable for its abandonment of the open market ideology underlying previous treaties and adoption of a new prohibitionist ideology, one championed almost single-handedly by the United States, which in 1948 used its new found superpower status following World War II to draft and sponsor the first draft of the instrument using its own vision of how global drug control should operate.[72] Previous drug control treaties, the first of which was the Opium Convention of 1912, had largely focused on reducing and narrowing the trade of opium, the coca leaf, and derivatives such as morphine, heroin, and cocaine. The 1961 convention, in addition to controlling these substances, also placed strict controls on the cannabis flower and its derivatives. The purpose of the 1961 convention was to place a comprehensive set of international controls on both the trade and production of restricted substances, with the express aim of facilitating medical and scientific use and eliminating all traffic and production related to non-medical and non-scientific use. While the convention did not obligate member states to prohibit drug use itself or even possession, limiting itself to the criminalization of trafficking and production, it did obligate member states

[71] *1961 Single Convention*, *supra* note 13; *1971 Convention*, *supra* note 12; UN Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 20, 1988, https://www.unodc.org/pdf/convention_1988_en.pdf.

[72] David Bewley-Taylor & Martin Jelsma, *Regime change: Re-visiting the 1961 Single Convention on Narcotic Drugs*, 23 INT'L J. OF DRUG POL'Y 72, 73-74 (2012). Ironically, the US was also the only country that voted against the 1962 resolution to ratify or accede to the treaty. It was not satisfied with the final result which it viewed as containing too many compromises on the question of absolute prohibition of controlled substances, acceding to the treaty in 1967 only after engaging in extensive diplomatic activity aimed at bolstering the UN drug control framework. *Id.*, at 78. *See also The UN Drug Control Conventions: a Primer*, TRANSNATIONAL INSTITUTE 1-2 (2015), https://www.tni.org/files/publication-downloads/primer_unconventions_24102015.pdf [hereinafter: *UN Drug Control Primer*].

who claimed 'transitional reservations' (which accommodated the traditional use of controlled substances within their borders) to abolish such uses within a set timeframe. Traditional opium use was to disappear within 15 years and traditional coca leaf and marijuana use within 25 years — a clear signal that one of the major implicit goals of the convention was to bring about an end to all use of controlled substances outside of medical and scientific contexts. Drugs favored by Western developed nations such as alcohol, tobacco, and coffee were never slated for discussion, which indicates powerful cultural, perhaps even racial biases underlying the internal logic of the instrument. The UN 1971 Convention on Psychotropic Substances expanded the scope of the 1961 convention to include a wide array of additional substances, particularly so-called psychedelic drugs such as LSD, psilocybin, mescaline, and DMT. The 1971 Convention maintained the same basic control framework, but presented one major deviation from the prohibitionist ethos of the 1961 Convention. Its regulations extend only to controlled chemicals themselves, and not to the plants from which they are derived.[73] This means that traditional users of raw materials are not targeted by the convention (unlike in the case of the opium poppy, the coca leaf, and the cannabis flower), a change which has lessened the impact of the control regime upon societies with histories of traditional use. The UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 was the third and final installment in international drug control, with provisions designed to expand the scope of criminalization and to compel member countries to crack down much harder on drug offenders. It was basically an escalation of the US-led "war on drugs," a rhetorical construct whose real-world legal application has transformed many regions of the world into veritable war zones.[74]

The UN Conventions were ratified by almost every nation in the world, and as a result have strongly determined the course of national domestic law worldwide. They establish an international control body, the International Narcotics Control Board (INCB), which works closely with governments to administer the conventions, and also assign important roles to the Commission on Narcotic Drugs (CND) (established by the Economic and Social Counsel) and the World Health Organization (WHO). The CND is the legislative and policymaking body of the control regime, representing 53 member states, whose role it is to classify and schedule

[73] Commentary on the Convention on Psychotropic Substances, U.N. Doc. E/CN.7/589, at 387 (Feb. 21, 1971).
[74] *See* Martin Jelsma, *The Development of International Drug Control: Lessons Learned and Strategic Challenges for the Future*, Global Commission on Drug Policy , working paper, 2011, https://www.tni.org/files/The%20Development%20of%20International%20Drug%20Control_M.Jelsma2011.pdf

substances based on WHO recommendations.[75] Individual state parties remain free to impose restrictions and penalties that are stricter than those of the conventions,[76] but failure to meet required minimums can result in intervention from the INCB in the form of drug embargoes.[77] Much more importantly, membership is necessary for participation in the trade of drugs with essential medical uses, not to mention the fact that many preferential trade agreements require membership to the conventions, as does ascension to the European Union.[78] In short, countries have little choice but to accept the drug control obligations imposed by international law. The 1961 and 1971 conventions both deferred to the "constitutional, legal, and administrative systems" of member states with regard to required action against illicit traffic and penal provisions, but the 1988 convention abolished this language, enumerating a laundry list of infractions which countries are obliged to recognize as criminal violations. The relationship between international law and national domestic law is rigidly hierarchical, therefore, though in practice there are notable cases in which international law has taken a backseat. These have been seen largely in relation to indigenous and religious groups, whose use of controlled substances has in some cases escaped the scrutiny of state law, and in others actually been supported and protected by it, as in the noteworthy cases of the coca leaf and ayahuasca. Even in the mainstream of so-called modern, urban societies, the drug control regime is being challenged and politicized on numerous fronts, as boldly illustrated by the legalization of marijuana for both medical and recreational use in an ever-growing number of US States, despite the fact that marijuana remains a controlled substance in US federal as well as international law.[79]

Applying our background theory to this fact pattern we immediately note the multilayered legal terrain and the potentially competing constitutional interests at play. Complicating the issue is the fact that various transnational function systems intersect at the issue of drug control, each concerned primarily with its own expansion and always ready to run roughshod over constitutional norms and legal orders that do not suit its own agenda. The situation is complex, and it is far beyond the scope of this paper to postulate which function systems were actually responsible for the emergence of the drug control regime as we know it

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[75] *UN Drug Control Primer*, *supra* note 72, at 11-12.
[76] 1961 Convention, *supra* note, art. 39; 1971 Convention, *supra* note 12, art. 23.
[77] *UN Drug Control Primer*, *supra* note 72, at 13-14.
[78] *Id.* at 22.
[79] Twelve States, the District of Columbia, and two territories have completely legalized as of this writing, with many more states legalized for medical use and/or decriminalized.

today. Very likely it was some combination of medicine, economics, politics, and law. However, as we have already noted in places, the reality of the situation extended beyond that of function systems acting on their own. Partisan political agendas underpinned by cultural and racial biases were also a major factor, agendas which resulted in large-scale exclusion of populations from the very function systems that those agendas purported to be acting on behalf of. The fallout of the global drug control regime has been mass incarceration — especially among minority groups — violence, and political instability in producer countries, and the rise of a massively profitable black market for illicit substances which directly funds transnational criminal organizations. It has also created a critical sparsity of painkilling drugs in the developing world: in 2003, six developed countries accounted for approximately 80% of the total global consumption of morphine for pain relief, while developing countries, representing 80% of the world's population, accounted for just 6%.[80] Much of this exclusionary fallout is paradoxically supported by properly functioning and properly differentiated social systems, hence the "inclusion paradox of functional differentiation" discussed earlier. For instance, the economic system is asserting itself in a completely legitimate way when criminal groups profit from the trade of contraband. As is the legal system asserting itself in a legitimate way by aggressively upholding the drug control conventions in spite of mounting medical, scientific, and social science evidence to suggest that many drugs are not as dangerous as once thought, and that the prohibition system has yet to be successful in reducing supply. Recent criticism against the INCB, for example, has charged it with grossly overstepping its mandate in pursuit of an ever more restrictive, ever more prohibitionist control regime,[81] a development which is likely the simple result of a function system mindlessly carrying out its function according to the inner logic of the instrument that gave it its mandate in the first place. Function systems possess expansionistic tendencies which, if left unchecked, have a tendency to promote social exclusion rather than bridge it. This, along with the political asymmetries that thrive in the exclusion zones, is why the question of constitutional constraints for such forces is such a timely issue.

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[80] Amanda Feilding, *Cannabis and the Psychedelics: Reviewing the UN Drug Conventions*, *in* PROHIBITION, RELIGIOUS FREEDOM, AND HUMAN RIGHTS: REGULATING TRADITIONAL DRUG USE 189, 191 (Beatriz C. Labate & Clancy Canvar eds., 2014).

[81] Kenneth W. Tupper & Beatriz Caiuby Labate, *Plants, Psychoactive Substances and the International Narcotics Control Board: The Control of Nature and the Nature of Control*, 2 HUMAN RIGHTS AND DRUGS 17, 21 (2012); Hallam et al., *Scheduling in the International Drug Control System*, 25 TRANSNATIONAL INSTITUTE SERIES ON LEGISLATIVE REFORM OF DRUG POLICIES 3 (2014), https://www.tni.org/files/download/dlr25_0.pdf ; *UN Drug Control Primer*, *supra* note 72, at 14-15.

The legal and political situation on the ground often appears far from promising in this regard, as Neves anticipated. In the arena of drug control, the transconstitutionalism that should be manifesting vis-à-vis dialogue between legal orders appears stunted by interventions on the part of power interests and out-of-control function systems. The INCB fights at the international level to preserve the existing drug control system to the letter and to expand its reach wherever possible — frequently opposing the recommendations of the WHO instead of implementing them[82] — and many national governments do so at the domestic level. It is always a politically safe bet for political candidates to be tough on drugs, which have been cast in the popular imagination (and by the UN conventions themselves[83]) as synonymous with evil and moral decay. Ironically, this popular conception and the prohibitionist stance it supports actually bolsters the illicit drug trade, which some estimate to be the third most profitable market in the world behind food and oil, generating an approximated $350 billion annually.[84] Prohibition channels these proceeds directly to criminal and terrorist organizations whose illegal enterprises are often a true scourge on society, and whose power and influence over world affairs runs unchecked by constitutional limits. There are also efforts to reform the drug control system, with indigenous groups lobbying for their right to use traditional medicines, religious groups lobbying for the right to use their religious sacraments, user groups lobbying for safe-use facilities and a saner approach to combating addiction, and nation states lobbying for the right to author drug policy that reflects commitments to human rights and public health instead of merely criminal justice. As predicted, however, many conflicting parties, particularly the so-called 'great powers,' still insist on a 'might is right' approach to the issue rather than turning to constructive dialogue that seeks to understand the perspective of the other's constitutional values and to reach a mutually satisfactory solution.

It is telling that the most significant usurpation of the international control regime to date has taken place within the country that both authored the global regime as it exists today and championed it for over six decades, the United States. As soon as cultural norms at home recently changed to accommodate a tolerant perspective on cannabis in many states, the United

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[82] *See* Hallam et al., *supra* note 81 (exploring INCB and CND resistance against WTO recommendations on ketamine, khat, dronabinal, and increased access for Third World countries to painkilling medications).
[83] 1961 Single Convention, *supra* note 13, at Preamble ("The Parties . . . Recognizing that addiction to narcotic drugs constitutes a serious evil for the individual and is fraught with social and economic danger to mankind; Conscious of their duty to prevent and combat this evil . . . hereby agree as follows . . .").
[84] Feilding, *supra* note 80, at 189.

States ignored its international law obligations and permitted those states to legalize the drug for recreational use, suffering no international repercussions for doing so. When other nations attempt this, however, the US is often the first on the scene seeking to impose the letter of the law, and at the barrel of a gun if necessary. Unfortunately, as Neves points out as frequently being the case with the US in particular, dominance of the political system over the legal system permits anti-constitutional practices to develop within the interior of the constitutional state, which in turn permits the migration of such practices to undermine "the normative claim for transconstitutional case solutions," namely in the form of unchecked violations of international law.[85] Brunkhorst notes that:

> Colonialism and imperialism have been illegalized and replaced by an increasingly de-territorialized and flexible formation of hegemony and counter-hegemony. The struggle for hegemony now has to be fought out within the constitutional regimes of world society. Not only states, but peoples and world citizens are legally equalized.[86]

Nations such as Uruguay, Mexico, Colombia, and Guatemala are taking advantage of this equalization and taking significant steps toward challenging the logic behind UN conventions in a collaborative fashion, in some cases in conjunction with influential drug reform NGO's such as the Beckley Foundation.[87] In the words of the former president of Mexico Felipe Calderón, speaking at the United Nations 67th General Assembly:

> Drug consumption in many developed countries is causing violence and thousands of deaths in producer and transit countries . . . the nations suffering most acutely from the devastating effects of this situation are those countries positioned between the Andean zone of production and the principal drugs market: the USA.[88]

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[85] Neves, *supra* note 46, at 296.
[86] Brunkhorst, *supra* note 47, at 432.
[87] President of Guatemala Pérez Molina sponsored the foundation of a Beckley Foundation Latin American Chapter. For more information on the work of the Beckley Foundation see Robin Room & Sarah MacKay, *Roadmaps to Reforming the UN Drug Conventions*, BECKLEY FOUNDATION (Robin Room ed., 2012), http://www.archive.beckleyfoundation.org/wp-content/uploads/2012/12/Roadmaps_to_Reform.pdf (brainstorming various legal possibilities for initiating drug policy reform at the international level). *See also* The Beckley Foundation Public Letter: The Global War on Drugs has Failed, it is Time for a New Approach, BECKLEY FOUNDATION (2013), http://www.beckleyfoundation.org/public-letter (calling for a reexamination of the 1961 Drug Control Convention and signed by over 60 leading world figures, including current and former presidents, Nobel Laureates, and key personalities from the worlds of politics and diplomacy, academia, the arts, and business).
[88] Feilding, *supra* note 80, at 203.

At the same meeting, Guatemalan President Pérez Molina declared that:

> It is [because drug control is a transnational phenomenon] that I raise it in the universal forum of the United Nations . . . We believe that the basic premise of our war against drugs has proved to have serious shortcomings . . . I call on the member states of the United Nations to review the international norms that currently govern our global policies regarding drugs.[89]

These attempts at transconstitutional exchange have met with little traction at the international level, which may explain why some countries risk acting independently of international controls, such as Uruguay and Canada, which in recent years have unilaterally chosen to legalize cannabis and implement a state owned and regulated distribution market for the drug. The open dialogue between constitutional frameworks required by transconstitutionalism is contingent upon not only a willingness to abide by tenants of international law, but also willingness on the part of parties to embrace difference and to turn away from the belief that national and local constitutions must acquiesce to the authority of international law without question or recourse. In spite of the obstacles, however, the growing politicization of the international drug control regime is a novel and important development, one which is putting real pressure on those national and international control bodies whose legitimacy may be perceived as lacking in light of the broad social exclusion their activities occasion. While transconstitutionalism may be far from functioning in a large-scale and inclusive way, and remains stymied by the realities of an "acutely asymmetrical world society,"[90] it is lifting off the ground in some key areas, particularly in those areas that intersect human rights such as indigenous rights and freedom of religion.

2.3 The Coca Leaf

The 1961 scheduling of the coca leaf as a controlled substance has been the source of the most contentious discussion over the impact of the UN Drug Conventions on traditional uses. Traditional preparations of the coca leaf are used regularly by as many as 10 million people

[89] *Id.*
[90] Neves, *supra* note 46, at 298.

throughout South America, mostly indigenous peoples whose documented use of the leaf spans back thousands of years.[91] The leaf is used to manufacture cocaine, but the raw material itself contains only a minute quantity of active alkaloids. Nonetheless, the UN Single Convention on Narcotic Drugs of 1961 places it in the same category of control as cocaine itself. Bolivia is the only South American country to have succeeded in reconciling traditional use of the coca leaf with both national domestic laws and international obligations under the drug conventions. Three more countries have reconciled traditional indigenous use with their domestic laws alone (Argentina, Colombia, and Peru), and many others unofficially tolerate indigenous use of the plant, including Ecuador, Chile, and Brazil.[92] South America is thus in a state of transconstitutional flux over the state of the coca leaf, with competing constitutional orders resting in various states of equilibrium throughout the continent. Bolivia, however, has by far been the most proactive voice in demanding a true transconstitutional dialogue. In 2011 it succeeded in retroactively adding a reservation for the coca leaf to its ratification of the 1961 Convention by becoming the first nation in history to denounce and re-ascend to the treaty as a means of challenging its inflexibility.[93] While on the one hand this strategy was not strictly an example of transconstitutionalism at its best because Bolivia was forced to take unilateral action, it emphasizes the value to transconstitutionalism of politicizing international institutions. Faced with the possibility that more countries may look for workarounds in the treaty language like the one successfully exploited by Bolivia, the international community will likely opt for dialogue in future such cases.

An inquiry into the danger of coca leaves was one of the first drug control measures undertaken by the nascent UN Commission on Narcotic Drugs, with the issue appearing on the agenda in 1946.[94] The questionable circumstances under which it was condemned by the authors of the treaty are clearly perceptible in a statement issued to the press by the head of the official UN fieldwork team sent to Peru in 1949 (a statement issued *prior* to the commencement of research):

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[91] Pien Metaal, *Coca in Debate: The Contradiction and Conflict Between the UN Drug Conventions and the Real World*, *in* PROHIBITION, RELIGIOUS FREEDOM, AND HUMAN RIGHTS: REGULATING TRADITIONAL DRUG USE 25, 36-40 (Beatriz C. Labate & Clancy Canvar eds., 2014).
[92] *Id.* at 37-40.
[93] Reservations can only be added to the treaty at the time of ratification, which means that retroactive reservations are not permissible.
[94] Metaal, *supra* note 91, at 26.

> We believe that the daily, inveterate use of coca leaves by chewing . . . not only is thoroughly noxious and therefore detrimental, but also is the cause of racial degeneration in any centers of population, and of the decadence that visibly shows in numerous Indians—and even in some mestizos—in certain zones of Peru and Bolivia. Our studies will confirm the certainty of our assertions and we hope we can present a rational plan of action . . . to attain the absolute and sure abolition of this pernicious habit.[95]

Unremarkably, the final findings of the fieldwork team reflected its initial bias, and the World Health Organization (WHO) followed suit. To this date, the WHO has declined to revisit its conclusion that the coca leaf is dangerous and addictive, even despite a formal recommendation for further scientific research on the part of the INCB in 1994.[96] Upon the passing of the 1961 Single Convention, Peru and Argentina made formal "transitional reservations"[97] for the coca leaf, but these were later withdrawn under diplomatic pressure.[98] Bolivia had not reserved the coca leaf when it initially acceded to the convention in 1976 because the country was governed by a US-backed dictatorial regime at the time. It would not be until the 1980s and the violent escalation of the US-led war on drugs in South America that serious discussion regarding international regulation of the coca leaf would re-emerge. Peru and Bolivia made formal reservations to the 1988 Convention against Trafficking of Narcotic Drugs and Psychotropic Substances in the hope that this would end prohibition of the ancient practice, but Article 14 of that instrument was clear that the earlier conventions would remain in full force regardless of any new measures taken. Columbia did not submit a reservation but issued a formal statement in favor of traditional use of coca. After years of ongoing attempts on the part of Peru and Bolivia to bring the matter to the attention of the international community, 2005 was a turning point. Peru, which had always allowed for licit coca production under its domestic law, declared coca chewing to be part of its cultural patrimony. In the same year, the Bolivian

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[95] *Id.* at 27.
[96] *Id.* at 31-32.
[97] "Transitional reservations" were built into the 1961 convention for those uses deemed "traditional," but these were only supposed to be a temporary measure, with the use of opium to be abolished within 15 years, the use of coca leaf chewing to be abolished within 25 years, and the use of cannabis to be abolished "as soon as possible, but in any case within 25 years." The 1971 convention permitted specific reservations to be made by countries for substances "traditionally used by certain small, clearly determined groups in magical or religious rites." The 1988 convention stated that measures to prevent illicit cultivation "shall respect fundamental human rights and shall take due account of traditional licit uses, where there is historic evidence of such use."
[98] Metaal, *supra* note 91, at 29.

government adopted coca-chewing as a "national flag for the indigenous cause"[99] and in 2009 Bolivia formally proposed to the UN that the 1961 Single Convention be amended, a move that was endorsed by both the UN Permanent Forum on Indigenous Issues and by all South American countries in a series of Declarations.[100] Specifically, the UN Permanent Forum made reference to the UN Declaration on the Rights of Indigenous People in its recommendation for:

> The amendment or abolishment of the sections of the Convention relating to the custom of chewing coca leaf that are inconsistent with indigenous people's rights to maintain their traditional practices in health and culture enshrined in Articles 11, 24, and 31 of the Declaration.[101]

A US-led "friends of the convention" coalition of 18 member states, including all of the G-8 nations, opposed the amendment on the grounds that amending the convention would undermine the convention's efficacy, which resulted in the proposed amendment being blocked.[102] But Bolivia persisted, and in 2009 included an article in its Constitution stating that: "The State protects the original and ancestral coca leaf as part of the cultural heritage, renewable natural resource of Bolivia's biodiversity, and as a factor of social cohesion. In its natural state, it is not considered a drug."[103] Finally, in 2011 Bolivia withdrew from the 1961 Single Convention and re-acceded, thereby meeting procedural guidelines governing reservations for traditional use, which according to regulations can only be claimed by signatories upon ratifying the treaty. Upon doing this, Bolivia formally declared that:

> The requirement of the Single Convention for the abolition of the coca leaf chewing is incompatible with the Constitution of Bolivia, article 384, which protects coca as a natural and medicinal resource that is part of the country's cultural heritage and establishes that coca in its natural state is not a narcotic drug. The aforementioned requirement also violates indigenous and cultural rights, as

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[99] *Id.* at 38.
[100] *Id.* at 35.
[101] *Id.* at 34.
[102] Martin Jelsma, *Lifting the Ban on Coca Chewing: Bolivia's Proposal to Amend the 1961 Single Convention*, 11 TRANSNATIONAL INSTITUTE SERIES ON LEGISLATIVE REFORM OF DRUG POLICIES 1 (2011), https://www.tni.org/files/download/dlr11.pdf (the US itself proposed many amendments to the 1961 convention, many of which were embodied in a protocol amending the convention issued in 1972).
[103] CONSTITUCIÓN POLÍTICA DEL ESTADO [CONSITUTION] Feb. 7, 2009, art. 384 (Bol.).

well as various international agreements, including the United Nations Declaration on the Rights of Indigenous Peoples.[104]

2.4 Ayahuasca

The story of ayahuasca is perhaps less dramatic in some ways than that of the coca leaf, but no less remarkable in terms of its appeal to transconstitutionalism as a solution to conflict between divergent interests, beliefs, and cultural values. As interest groups have begun to expand internationally and open chapters overseas, the question of the legality of ayahuasca has been posed in a number of divergent and often hostile constitutional venues. It has even been re-examined at the international level by the INCB, which in 2010 and 2012 advised national governments to consider controlling ayahuasca as a dangerous drug even though it appears to fall beyond the scope of the conventions and therefore beyond the mandate of the INCB itself.[105] Perhaps surprisingly, given the fraught experience of coca leaf users, the Brazilian ayahuasca religions have met with some measure of success in representing their interests before various North American and European governments. In turn, some of those governments have chosen to control ayahuasca not by outright criminalizing it, but by limiting its use by reference to principles of freedom of religion. The dialogue has been a somewhat revolutionary one in the context of the global drug control regime because for the first time there is constitutional recognition that controlled drugs can possess legitimate uses that are other than medical, scientific, or strictly indigenous.

[104] U.N Secretary General, Depository Notification dated Jan.10, 2012, Letter from Plurinational State of Bolivia to U.N., C.N.829.2012.TREATIES-28, at 3 (Dec. 28, 2011).
[105] Rep. of the Int'l Narcotics Control Bd., U.N Doc. E/INCB/2012/1, 46-47 & ¶¶ 328-24 (2012); Rep. of the Int'l Narcotics Control Bd., U.N Doc. E/INCB/2010/1, 46-47 ¶¶ 284-87 (2010); *See also* Tupper & Labate, *supra* note 81.

Chapter 3 – The Conventions and Concepts

Third World Approaches to International Law (TWAIL) scholarship has long maintained that the history of international law — and even its present-day functioning — is lacking in voices of the colonized, the dominated, and the marginalized peoples of the world. International law takes on a very different color when viewed from the perspective of the colonized. Its promise as a progressive vehicle of peace, unification, and market efficiency becomes tarnished by the echoes of greed, exploitation, and forced cultural assimilation that so often accompany its narratives. One place in which the critical power of TWAIL perspectives appears particularly well-suited is in relation to the UN Drug Conventions of 1961, 1971, and 1988. These conventions are ratified by virtually every state in the world,[106] and constitute the heart of the global drug control regime. One of this regime's most fundamental premises is that one specific group of mind-altering substances should be normatively and universally embraced as socially acceptable, and that the use of all others should be abolished, by force if necessary. Accordingly, alcohol, tobacco, and coffee — the drugs historically enjoyed most by Europeans and European North Americans — today enjoy a privileged and even celebrated status within the socioeconomic fabric of the modern-day world, whereas plants such as marijuana, the coca leaf, and opium are prime targets in a violent and punitive global war on drugs. In this chapter I wish to consider the prevailing conditions according to which such an overtly Euro-North American attitude toward drug use became a universal norm that shaped the national drug laws of almost every country in the world. These norms proved persuasive even in countries for which they spelled the overnight criminalization of ancient and often widespread cultural practices of social and spiritual importance.

Chinese scholar Congyan Cai summarizes the key tenets of the TWAIL movement aptly and succinctly: "International law is western by nature. From a historical perspective, this nature can be seen to be twofold. First, international law is the product of western civilization and is imprinted with Euro-centrism, Christian ideology, and 'free market' values. Secondly, international law was framed by the conquest and expansion of western great powers."[107]

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[106] *See* Room & MacKay, *supra* note 87.

[107] Congyan Cai, *New Great Powers and International Law in the 21st Century*, 24 EUROPEAN JOURNAL OF INTERNATIONAL LAW, 755, 772 (2013).

Conventional accounts of international law emphasize the idea of Westphalian sovereignty, the concept that sovereign states work together to manage their differences whilst respecting one another's autonomy. Within this system, rational government is the organizing principle of world society, and peoples lacking the capacity to govern themselves according to a sufficiently rational model have become subject to acts of colonization, assimilation, and general 'betterment' at the hands of those who consider themselves more advanced. According to the thinking of the European powers during the age of colonization, it has been the moral duty of the more advanced peoples to protect and guide the lesser ones until such time the lesser become fit to rationally govern their own sovereign states.[108] Ideally, once an entire 'developing' group reaches this pinnacle of organizational development, it earns independence and may begin to pursue its own interests on the even playing field of international law. This widely influential narrative is an echo of the Social Evolutionism understanding of cultural diversity that defined 19th century and early 20th century anthropological thinking, which basically postulated that all societies are on a common evolutionary track and that non-Western European societies were merely waiting to catch up to their evolutionary superiors.

This ontological background constitutes an important influencing factor on the internal logic of the UN drug conventions, international treaties which appeared on the eve of the UN-led campaign for global de-colonization of the early 1960's. On the surface the conventions presume to represent a global consensus on what kinds of drug use should be tolerated, but a surface reading fails to account for the unequal power relations between nations that international law can tend to reinforce. Essential to a proper understanding of the conventions is Anthony Anghie's observation that, "cultural difference precedes and profoundly shapes sovereignty doctrine — whereas the traditional approach asserts that an established sovereignty manages the problem of cultural difference."[109] In other words, international law is not really an even playing field: the system accords more sovereignty to some states than to others depending on their adherence to a certain set of norms rooted in Eurocentric models of morality, value, and the good life. This inequity is sometimes the result of formal mechanisms and sometimes the result of

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[108] Liliana Obregon, *The Civilized and the Uncivilized*, *in* OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW 917, 937-38 (Bardo Fassbender & Anne Peters eds., 2013); MOHAMMED BEDJAOUI, TOWARDS A NEW INTERNATIONAL ECONOMIC ORDER 56 (1979); *See also* John Westlake, *On the Title to Sovereignty*, *in* IMPERIALISM 47, 51 (Philip D. Curtin ed., 1971).

[109] Anthony Anghie, *The Evolution of International Law: Colonial and Postcolonial Realities*, 27 THIRD WORLD Q. 739, 741-42 (2006).

informal ones, resulting in international norms that do not always reflect the majority of people around the world whose lives they touch. The framework of the underlying Western norms which have so often determined the course of international ones has shifted over the past 400 years: from religion in the 16th and 17th centuries, to politics and government during the Enlightenment, to technology and science during the Industrial Revolutions and the age of colonization, to today's commitments to standards of human rights, international trade, and even drug control. [110] At its foundation, however, the functioning of the framework remains constant: Western interactions with the outside world are based on simple dynamics of cultural difference[111] and the garden-variety contests for ontological hegemony that such dynamics always entail.

Boaventura de Sousa Santos interprets modern Western thinking as operating within a paradigm whose explication may prove instructive here. For Westerners, social reality is divided into two mutually exclusive realms, which de Sousa Santos sees as being separated by an invisible but profoundly deep dividing line. On the Westerner's civilized, modern side of the line there are many additional distinctions, such as that between science and theology, or between the legal and illegal, but "the intensely visible distinctions structuring social reality on this side of the line are grounded on the invisibility of the distinction between this side of the line and the other side of the line."[112] On the other side of the line exists the incomprehensible, the unexplored, the lawless, a realm in which structures that exist on this side of the line (culture, knowledge, law) lose their potency, and run the risk of losing meaning altogether. This cognitive realm has a territorial equivalent: the colonial zone.[113] In the colonial zone anything goes: violence, appropriation, repression, and exploitation. The colonial zone remains invisible and unspeakable on the civilized side of the line, and yet the civilized side of the line cannot exist without it, remains literally contingent upon its existence as a receptacle and hiding place for the unthinkable, unknowable, and unconscionable. From a temporal perspective,

> The present being created [in the colonial zone] is made invisible by its being re-conceptualized as the irreversible past of [the civilized] side of the line. The

[110] *See* Obregon, *supra* note 108.
[111] Anghie, *supra* note 109.
[112] Boaventura de Sousa Santos, *Beyond Abyssal Thinking: From Global Lines to Ecologies of Knowledges*, 30 REVIEW 45, 46 (2007).
[113] *Id.* at 48.

> hegemonic contact converts simultaneity into non-contemporaneity. It makes up pasts to make room for a single homogenous future.[114]

The strange, incomprehensible magical or idolatrous practices of the colonial zone become stamped a relic of the past to be controlled, abolished, and corrected whenever they find their way onto this side of the line.

The UN Single Convention on Narcotic Drugs of 1961 came into existence as a partial consolidation of previous drug control treaties which had regulated opium, the coca leaf, and derivatives such as morphine, cocaine, and heroin. The very first legally binding instrument of international drug control was the Opium Convention of 1912,[115] whose purpose was to curb an opium epidemic in China by strictly regulating the trade of the commodity. From a conventional international law perspective, this treaty was a humanitarian triumph on the part of the great European powers. From a TWAIL perspective, however, it was a bitter irony. 1912 was a landmark year in Chinese history, a moment at which its centuries-old Empire crumbled to make way for a new, Western-style Republic following half a century of violent turmoil and unrest. The source of the troubles was an unparalleled and unprecedented regime of unequal treaties[116] imposed by European colonial powers, often at gunpoint. The first of these unequal treaties resulted from the Opium wars of 1839-42 and 1856-60, over the course of which the British and the French used military force to literally *impose* the opium trade upon China. China had resisted not only the import of opium, but trade with the West in general. The colonial powers used the addictive commodity to invent a mass market, simultaneously forcing their way into the Chinese economy and radically disrupting it by way of the resultant humanitarian catastrophe, an immensely destructive process that within 60 years brought one of the world's greatest powers and most ancient civilizations to its knees.

The International Opium Convention of 1912, therefore, was a humanitarian triumph with a cinematic twist. The great European powers came to China's aid only at the very moment that its Empire lay in ruins at their hands and the country was burdened by so many unequal treaties that, economically speaking, it was already reduced to a mere informal European

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[114] *Id.* at 50.
[115] Hallam et al., *supra* note 81.
[116] Chi-Hua Tang, *China-Europe*, *in* OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW 701, 702 (Bardo Fassbender & Anne Peters eds., 2013).

colony.[117] Nor was the step towards emancipation from the horrors of the opium epidemic a step towards China's emancipation from colonialism. The country's new-found socioeconomic stability was just the next step in a far deeper process of economic and cultural domination mediated through the technology of international law. According to Anthony Angie, such a 'liberate-to-rule' strategy is basically the same type that lies behind the League of Nation's Mandate System and the United Nation's commitment to global decolonization:

> The end of formal colonialism, while extremely significant, did not result in the end of colonial relations. Rather, in the view of Third World societies, colonialism was replaced by neo-colonialism; Third world states continued to play a subordinate role in the international system because they were economically dependent on the West, and the rules of international economic law continued to ensure that this would be the case.[118]

The International Opium Convention of 1925[119] was the second international instrument of drug control, and was notable for what it did not ultimately regulate comprehensively and why: It was the first occasion on which the question of regulating cannabis was presented to the international community. The motion to criminalize was barred by resistance from the British India and French delegates at the conference who, while agreeing on the dangerous and undesirable nature of the drug, dissented for the same basic reason: a perceived inability on the part of imperial powers to properly enforce trade restrictions over vast colonial territories. The British India delegate conceded that limiting use to medical and scientific purposes would be difficult because "there are social and religious customs which naturally have to be considered."[120] The French delegation, on the other hand, noted that regulation would not be practical because "in the Congo, for example, there are several tribes of savages and even cannibals among whom the habit is very prevalent."[121] Both therefore conceded the traditional importance of cannabis use to their colonial constituencies, albeit using varying semantics. The American delegate was in favor of banning cannabis, but his radical views led him to walk out of the conference. He complained that trade restrictions alone were not enough, that only a

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[117] See Ronald Robinson & John Gallagher, *The Imperialism of Free Trade*, 6 THE ECON. HISTORY REV. 1 (1953).
[118] Anghie, *supra* note 109, at 749.
[119] International Opium Convention Geneva, Feb. 19, 1925, https://treaties.un.org/doc/Treaties/1925/02/19250219%2006-36%20AM/Ch_VI_6_6a_6bp.pdf
[120] W. W. WILLOUGHBY, OPIUM AS AN INTERNATIONAL PROBLEM: THE GENEVA CONFERENCES 380 (1925).
[121] *Id.* at 381-82.

complete prohibition on use and production of opium would result in the desired result of eliminating all non-medical and non-scientific use.[122]

Once America rose to the status of global superpower in the decades following the Second World War, it would get its way: its somewhat idiosyncratic prohibitionist attitude toward drug control would become normalized within international law. In 1948 the US drafted and sponsored a resolution to unify all existing drug control treaties under a new control regime.[123] The final result of that initiative, the 1961 Single Convention on Narcotic Drugs, criminalized world-wide all non-scientific and non-medical possession, production, and trade of a new "tripartite axis of UN-anointed 'evil' in the plant kingdom:"[124] opium, marijuana, and the coca leaf, together with their derivatives. Notably, alcohol was not even mentioned by this international law instrument or its official commentary, despite the fact that Islamic law roundly criminalizes its use, and despite the well-recognized health risks and social cost that alcohol use entails. Tobacco was also not discussed, despite its well-known addictive properties. These omissions reflected the still on-going ideological commitment on the part of Western user populations that alcohol and tobacco are somehow something other than drugs. Paradoxically, the US continues to ban alcohol sales in many Indian reservations within the United States, a move perhaps well justified by the almost apocalyptic levels of social disintegration occasioned by alcohol use in those societies. Unfortunately, rather than this state of affairs being taken as a sign of the inherent dangers of alcohol use, it has been widely (albeit dubiously) attributed to racial factors.[125]

It is an open question as to whether the 1960 UN Declaration on the Granting of Independence to Colonial Countries and Peoples factored into support among the great powers for a final consolidation of previous drug control treaties under the strict and persecutory drug control regime of 1961. Under the new 'neocolonial' international order, the former colonies would now become responsible for policing themselves, thereby alleviating the enforcement concerns voiced by the British India and French delegates in 1925. What is clear is that the 1961 Single Convention was designed to eradicate the production of controlled plant materials by explicitly targeting local consumption practices, including those that "for centuries had been

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[122] *Id.* at 460.
[123] David Bewley-Taylor & Martin Jelsma, *supra* note 72, at 73-74.
[124] Tupper & Labate, *supra* note 81, at 17, 21 (2012).
[125] *See* David Rance, The Search for the "Alcogene": Racism in the Construction of Aboriginal Alcoholism (Mar. 27, 2008) (unpublished research paper, McGill University) (on file with author).

embedded in the social, cultural, and religious traditions of many non-Western-states."[126] "Transitional reservations" were built into the convention for those uses deemed "traditional," but these were only to be a temporary measure, with the use of opium to be abolished within 15 years, the use of coca leaf to be abolished within 25 years, and the use of cannabis to be abolished "as soon as possible, but in any case within 25 years."[127] These objectives of the convention are difficult not to interpret as belonging to the wider Western program of progressively transforming "backwards," uncivilized societies into groups that share the social, moral, and intellectual values of the drafters, since there was little discussion of the long-term social or spiritual impact of such measures upon local communities, nor of the applicability of basic human rights such as freedom of religion or freedom to culture. The drafters presumably considered these transitions part of a perfectly natural transition away from the "evil" (to use the language of the convention itself[128]) of exotic mind-altering substances, and toward the enlightened use of drugs that the Western world enjoyed; namely alcohol, tobacco, and coffee.

There were, however, some major concessions made by the West during the drafting of the 1961 convention, which speak to the fact that some non-European states offered stiff opposition. For example, the transitional reservation mechanism was included as a means to win the support of key production centers such as India, Pakistan, Burma, Peru, and Bolivia.[129] Furthermore, cannabis escaped being prohibited outright[130] due to strong opposition from India and Pakistan regarding the traditional use of *bhang*, a preparation made from the leaves of the plant, which is why only the "flowering or fruiting tops" of the plant itself are controlled and not the leaves or seeds. Moreover, other countries objected to the contention that the cannabis has no medicinal or scientific value, citing indigenous medicinal uses.[131] Another illuminating concession was made, though this time not to placate the Third World but to further business interests at home: lobbying by the American company Coca-Cola resulted in the only carve-out for the coca leaf, coca being permitted for use as "a flavouring agent, which shall not contain any alkaloids."[132] Even for a drug considered by the drafters to be completely beyond the pale, a traditional Western use was considered a legitimate one. Initial drafts of the convention

[126] Bewley-Taylor & Jelsma, *supra* note 123, at 72.
[127] *1961 Single Convention*, *supra* note 13, art. 49.
[128] *Id.* at 1.
[129] Bewley-Taylor & Jelsma, *supra* note 123, at 77.
[130] This is to say prohibiting even medicinal and scientific uses.
[131] Bewley-Taylor & Jelsma, *supra* note 123, at 77.
[132] *1961 Single Convention*, *supra* note 13, art. 27.

attempted to incorporate Coca-Cola's interests by using the terminology "medical, scientific, and other legitimate uses" to describe what would be exempted under the treaty, but the carve-out received its own article when several delegations pointed out that traditional uses could also be misconstrued as falling under the legitimate category.[133]

The UN 1971 Convention on Psychotropic Substances expanded the scope of the 1961 convention to include a wide array of additional substances, particularly so-called psychedelic drugs, which the UN had labeled "an increasingly serious problem that could have very dangerous consequences."[134] Again, it was largely the American and European socio-political experiences of these decades — and the mass-media frenzies that surrounded them — that arguably gave rise to these relatively domestic concerns in the first place. The international community, once again, followed suit and codified the Western establishment's response to its own internal controversies into an international norm.[135] The 1971 Convention did, however, present a major deviation from the prohibitionist ethos of the 1961 Convention: Its regulations extend only to chemicals themselves, and not to the plants from which they are derived.[136] This means that the traditional users of raw materials would not be targeted by the convention itself unlike in the case of the opium poppy, the coca leaf, and the cannabis flower, though of course individual state parties remain free to impose restrictions and penalties that are stricter than those of the convention.[137] The 1971 convention even permitted specific reservations to be made by countries for substances "traditionally used by certain small, clearly determined groups in magical or religious rites."[138]

Today, it is within the context of the 1971 Convention accommodations that many traditional users of plant medicines such as peyote, ayahuasca, ibogaine, and magic mushrooms — which contain otherwise prohibited psychotropic chemicals — continue to practice their

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[133] Bewley-Taylor & Jelsma, *supra* note 123, at 78.

[134] Economic and Social Council Res. 1968/1294(XLIV), Urgent control measures for LSD and similar hallucinogenic substances (May 23, 1968).

[135] The international community would later also acquiesce to the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, whose purpose was to combat the illicit drug trade. The trade, since the coming into force of the 1961 Convention, had burgeoned into a multibillion-dollar global enterprise and transformed numerous Third World countries into veritable war zones.

[136] Commentary on the Convention on Psychotropic Substances, U.N. Doc. E/CN.7/589, at 387 (Feb. 21, 1971).

[137] *1971 Convention*, *supra* note 12, art. 23.

[138] *Id.* at art. 32. The reason that reservations are allotted even though plant materials are not criminalized by the convention is explained in the commentary (see note 136). The commentary warns that raw plant materials may be criminalized in the future by amendment to the convention, and that by making reservations preemptively countries safeguard against this possibility.

customs and religious rites in their respective countries of origin (with or without a formal reservation). But even these accommodations have proven inherently problematic from a TWAIL perspective. The idea that cultural practices must be traditional or long-standing in order to be considered legitimate curtails the natural evolution, expansion, and change endemic to cultural practice. It renders "magical and religious rites" to the status of archaic artifact that must remain forever static or else be rendered illegitimate in the eyes of Western culture, whose role it is to make that judgement.[139] Furthermore, the idea that conveyance of legitimacy revolves around a static cultural identifier such as indigeneity is inherently repressive, as it suggests that beliefs and practices should not be considered independently valuable or worthy of protection, and that they represent little more than the symptom of a certain historical trajectory that must not be permitted to "spread" to other times, places, or social contexts.

This, however, is the thinking that guides much of the current global advocacy work surrounding human rights.[140] Anthropologist Ronald Niezen detects an important irony in the fact that publics bent on human rights reform are at once extraordinarily novel and malleable transnational cultural manifestations, and at the same time display a preference for archaic and static models of culture. Anthropologist Sally Engle Mary observes that "human rights relies on an essentialized model of culture [that] does not take advantage of the potential of local cultural practices for change."[141] The example of the 1994 peyote protections in the US are an excellent example of the fruits of such rights lobbying, which were aimed at the protection of indigenous customs rather than the protection of religious freedoms more generally. The result was that religious use of the mescaline-containing peyote cactus is only legally permitted by members of a federally recognized Indian tribe, a rule which flatly excludes all non-Indians from practicing peyote religions, but also many Indians whose tribes for one reason or another lost federal recognition over the years.[142] The historical reality of the traditional peyote religions which grew to prominence in the late 19th century was that they were pan-Indian, spreading quickly from tribe to tribe and supplanting traditional Indian religion and Indian Christianity alike.[143] Thus,

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[139] Tupper & Labate, *supra* note 81, at 26-28.
[140] *See* Niezen, *supra* note 1.
[141] SALLY E. MERRY, HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE 11 (2006), *quoted by* Niezen, *Id.*, at 5.
[142] Feeney, *Legal Basis for Religious Peyote Use*, *supra* note 40, at 237-38.
[143] Ronald Niezen, SPIRIT WARS: NATIVE AMERICAN RELIGIONS IN THE AGE OF SPIRIT BUILDING 142-44 (2000).

there is nothing traditional about them in the 'timeless culture' sense of the word that culture consumers and policymakers favor, and yet this is now what they have become under US law.

In summation, the UN Drug Conventions of 1961, 1971, and 1988 can be read as an international law continuation of hegemonic cultural dynamics which for the past several hundred years have aspired to domination of the globe in the name of Western tastes, values, and politics. Drugs favored by Western countries such as alcohol, tobacco, and coffee have remained a socially-celebrated and widely-traded market commodity, even in spite of evidence suggesting that their overall costs to society far outweigh those of most substances banned by the conventions.[144] It appears that the conventions at their ideological core reflect the values of the United States more than those of any other Western country. However, there are also instances of resistance against the drug conventions by traditional users of banned plant materials, such as with the ritual consumption of ayahuasca in South American, the peyote cactus in North America, and the coca leaf in Bolivia. Unlike the coca leaf which is specifically dealt with by the 1961 convention, peyote and ayahuasca have found protection under the raw plant material exemptions of the 1971 convention (even if the legality of ayahuasca is still hotly contested on account of its being a preparation consisting of two plants rather than one), as well as the traditional use exemption. An important debate being played out in constitutional courts around the world today is the extent to which traditional use exemptions should apply to non-traditional users in cases in which a use itself is traditional. In the case of peyote this question is of the utmost relevance, because the original peyote religions were a pan-Indian phenomenon whose very purpose was the inclusion and assimilation of nontraditional users.[145] The question is also particularly salient to the case of the ayahuasca religions of South America, whose great popularity among an international, largely Western audience has challenged the conventional wisdom of modernity that predicted globalization would result in cultural homogenization, and that this would result from Western practices straightforwardly replacing exotic and outlandish ones.[146] In the case of ayahuasca, we are witnessing a form of reverse colonization which signals a departure from historical trends, one that legal instruments are largely unequipped to deal with

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[144] David J. Nutt et al., *Drug harms in the UK: a Multicriteria Decision Analysis*, 376 LANCET 1558, (2010). *See also* Hallam, *supra* note 81 (discussing resistance by the UN Drug Control body against WHO recommendations against prohibition, and also similar 2007 resistance in the UK by the government against Advisory Council on the Misuse of Drugs (ACMD) recommendations surrounding the safety of Cannabis).
[145] Niezen, *supra* note 143, at 142-44 (2000).
[146] Feeney & Labate, *supra* note 17, at 126.

on account of how these novel circumstances clash with the underlying internal logic of international law itself.

Chapter 4 – Brazil and South America

Official reaction to ayahuasca use in most of South America is characterized by permissiveness, largely on account of long-standing indigenous uses in those countries incorporating areas of the Amazon rain forest. Peru is the only country in which ayahuasca is officially reserved from the 1971 UN Convention on Psychotropic Substances, but this exemption is only for "certain Amazon ethnic groups in magical and religious rites."[147] In 2008, Peru declared ayahuasca a part of the cultural patrimony of the country, affirming in part:

> That the effects produced by ayahuasca, extensively studied because of their complexity, are different from those produced by hallucinogens. A part of this difference consists in the ritual that accompanies its consumption, leading to diverse effects, but always within the confines of a culturally determined boundary, with religious, therapeutic and culturally affirmative purposes.[148]

Use in Peru is currently unregulated for both indigenous and nonindigenous uses, and it would appear that this is also the case in neighboring Bolivia. Neighboring countries Ecuador and Columbia have introduced formal associations tasked with accrediting practitioners as shamans, issuing something akin to medical licenses to practice indigenous medicine.[149] Very little data is available regarding the details of these systems, which deserve further study. Argentina and Chile have seen arrests and prosecutions, and it appears as though these countries do not recognize ayahuasca as a traditional medicine in any way, but so far all prosecutions have resulted in acquittals or very minor convictions.[150] In Chile, a judge issued an acquittal noting that not only were the activities of a neo-shamanic practitioner not a threat to public health, but

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[147] Status of United Nations Treaties, Chapter VI, Section 16: Convention on psychotropic substances, Vienna, 21 February 1971, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-16&chapter=6&clang=_en

[148] National Directorial Resolution, June 24 2008, *Designation as Cultural Patrimony of the Nation Extended to the Knowledge and Traditional Use of Ayahuasca as Practiced by Native American Communities*, no. 836/INC (Peru).

[149] Beatriz Caiuby Labate, *Internationalization of Peruvian Vegetalismo*, *in* AYAHUASCA SHAMANISM IN THE AMAZON AND BEYOND 183, 199 & n.43 (Beatriz C. Labate & Clancy Canvar eds., 2014). For data on Columbia alone, see Leonardo Rodríguez-Pérez, *Legal Status of Ayahuasca (Yagé) in Colombia: Some Considerations from Three Primary Sources*, BIA LABATE BLOG (Nov. 26, 2012), https://www.bialabate.net/news/legal-status-of-ayahuasca-yage-in-colombia-some-considerations-from-three-primary-sources

[150] PODER JUDICIAL 4° Tribunal e Judicio Oral en lo Penal [T.J.O.P.] [criminal trial court] Santiago 20 Marzo 2012, Rit 229-2011 (Chile); for Argentina data as of 2017, see Ayahuasca Defense Fund, *supra* note 23.

that the accused had genuinely helped the numerous people who testified on his behalf.[151] There is little date from other South American countries, but Costa Rica is noteworthy as a local where open ayahuasca use seems to be tolerated for the time being.

The most important South American country in terms of regulation and formal process is Brazil. The primary objective of this chapter, beyond providing a brief summary of the legal process to date in Brazil, is to explore some of the shortcomings of Brazilian regulations, with a particular emphasis on the controversies surrounding the most recent 2010 regulations. This is not intended detract from the fact that Brazil has been a pioneer in ayahuasca policymaking, but rather to constructively point to areas where lessons can be learned by other jurisdictions. Three decades of open dialogue between government actors, scientists, and religious representatives featuring good-faith attempts to understand one another's perspective have culminated in a series of compromises that may not be perfect, but which arguably come closer to a proportional balance of benefits and burdens than anything achieved elsewhere.

Brazil is one of the few countries in the world in which the use of ayahuasca is permitted by law, albeit only for religious use. The legal process by which this legalization came about is an outstanding instance of inclusive and informed policymaking, and is a clear example to be followed with regard to ayahuasca regulation. Underlying its successes, however, lay inconsistencies, deficiencies, and controversies which are bubbling to the surface in the face of recent and widespread proliferation of ayahuasca use and debate at both national and international levels. Thirty years of legalization in Brazil has accompanied the emergence of an incredible plurality of practices involving ayahuasca, but in part this is due to only nominal adherence to juridically-imposed categories of acceptable use. Increasingly elaborate efforts to more reliably regulate use have largely fallen upon deaf ears; partly owing to the controversial nature of some of the regulations, but mostly because no enforcement system has as yet been contemplated in pertinent government resolutions, nor implemented. The lack of an enforcement mechanism confers a somewhat symbolic character to the latest and most comprehensive set of regulations which came into effect in 2010, which continue to serve at least an advisory function for the time being. The legal situation is presently stable and ayahuasca users are not subject to

[151] PODER JUDICIAL 4° Tribunal e Judicio Oral en lo Penal [T.J.O.P.] [criminal trial court] Santiago 20 Marzo 2012, Rit 229-2011 (Chile).

prosecutions at this time, but agency regulations do not carry the same weight as laws passed by congress and are revocable or modifiable at any time at the discretion of the issuing agency.

4.1 Brazil Context and Chronology

Ayahuasca use in Brazil is long-standing and relatively widespread, practiced among indigenous groups; large organized churches; and smaller-scale therapeutic, new-age, and neo-shamanic groups.[152] The indigenous were the first users of the drink (which goes by many names among the tribes of the Amazon), but it is unknown exactly how ancient their practices are.[153] All we know for sure is that in the opening decades of the 20th century, ayahuasca became known to mestizo rubber tappers in the Brazilian states of Acre and Rondônia, and it was there that were born the three oldest and most well-known of the Brazilian ayahuasca religions: the *União do Vegetal* (UDV) and the original *Santo Daime* and *Barquinha* lineages.[154] The turn of the 21st century has witnessed a large-scale increase in modalities of ayahuasca use as knowledge of the drink has moved beyond its roots in the Amazon and spread with increasing velocity throughout urban centers in Brazil and internationally. Today, in a globalized world in which transnational organizations flow freely across national borders, Brazil is best thought of not as the home to any one particular type of ayahuasca use, strictly speaking, but as a central node in a growing global network of shamans, religious devotees, and other ayahuasca users. The importance of the country's progressive legal rules governing the drink matches correspondingly to this central role, proffering to the world's governments a positive example of how to safely steer the drink's social role. In 2008, the three original ayahuasca religions joined forces to apply to have ayahuasca officially recognized as immaterial cultural heritage though the Brazilian Institute of National Historic and Artistic Heritage (*Instituto do Patrimônio Históríco e Artístico National*, IPHAN), and in 2011 the project was joined by additional churches and indigenous group as it undertook the production of a large-scale and still-ongoing National Inventory on Cultural References (*Inventário Nacional de Referências Culturais*, INCR) devised to produce a

[152] Labate & Feeney, *supra* note 9, at 157.
[153] Barbec de Mori, *supra* note 16, at 23.
[154] Labate et al., *supra* note 10, at 1.

detailed cultural map of ayahuasca use in Brazil.[155] Not only does this effort promise to bolster the legitimacy of ayahuasca use in the eyes of both the Brazilian state and the international community, but also to transform the public debate over the drink from one about drug control to one about culture and identity.

DMT is controlled under law n. 11.343/2006, which does not specifically list controlled substances but rather delegates that function to the National Health Monitoring Agency (*Agência National de Vigilância Sanitária*, ANVISA).[156] Brazil did not make a reservation protecting the traditional use of ayahuasca upon its signing of the 1971 Convention on Psychotropic Substances, and presumably the average bureaucrat would not have been aware of the drink's existence at that time because use was still largely limited to remote Amazon regions. However, ayahuasca's appearance in urban centers and even internationally by the 1980's finally attracted the attention of lawmakers,[157] and in the penultimate year of Brazil's military dictatorship, 1984, an order was issued by the Division of Medications (*Divisão de Medicamentos*, DIMED) to place *Banisteriopis caapi* on the Ministry of Health's list of banned substances.[158] It appeared there in 1985[159] on the grounds that it contained the controlled substance DMT[160], and in response the UDV church immediately filed a request with the Federal Council on Intoxicants (*Conselho Federal de Entorpecentes*, CONFED), to have the plant excluded from the list on freedom of religion grounds. The response from the newly democratic government was swift, and by July, 1985, a resolution had been passed by CONFED creating and appointing a special workgroup to "examine the question of the production and consumption of the substances derived from those plants [added to the list of prohibited substances in a manner inconsistent with international lists of a similar nature] in all of their aspects."[161]

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[155] Marcos Vinicius Neves, *Sign of the Times — A New Policy for Ayahuasca in Brazil* (2011), http://www.bialabate.net/wp-content/uploads/2008/08/Marcos_Vinicius_Neves_Sign-of-the-Times_English.pdf ; *See also* Juarez Duarte Bomfim, *Desafios frente as dificuldades e limitações de atender os critérios do Iphan*, JORNAL GRANDE BAHIA, June 11, 2011, https://www.jornalgrandebahia.com.br/2011/06/declarar-ayahuasca-patrimonio-imaterial-da-cultura-brasileira/ (explaining the intricacies of the process in better detail).

[156] Lei No. 11.343, de 23 de Agosto de 2006, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 24.08.2006 (Braz.).

[157] Soares & Soares, *supra* 22, at 280.

[158] *Id.*

[159] Portaria n.02, de 8 de março de 1985, DIMED (Braz.).

[160] This was a mistake, as it is the *Psychotria viridis* leaf that contains DMT. The *Banisteriopis caapi* vine contains harmala alkaloids and acts as an MAO inhibitor in the brew, which stops the body from breaking down the DMT before it reaches the brain.

[161] Resolução n.04, de 30 de Julio de 1985, CONFEN (Braz.). The action was inconsistent with the drugs law of most other countries because raw plant materials were specifically exempted from the 1971 convention.

By early 1986 a temporary suspension had been issued on the inclusion of *Banisteriopis caapi* on the national list,[162] which became permanent upon the publication of the workgroup's seminal findings in 1987.[163] The workgroup, after spending two years conducting research visits to ayahuasca-using communities in many Brazilian states, both within the Amazon and beyond, recognized for the first time the legitimacy of the ritual and religious use of ayahuasca, thus establishing the evidentiary and ideological foundation upon which all subsequent resolutions have built. The workgroup's observations were based not only on expert testimony and visits to centers but also the direct participation of investigators in Santo Daime and UDV ceremonies to obtain first-hand experiences with the drink.[164] The findings of the workgroup were accepted by CONAD in a subsequent meeting.[165] Upon the promulgation of Brazil's post-dictatorship constitution in 1988, the findings became consistent with Brazil's constitutionally enshrined freedoms of conscience, belief, and worship;[166] as well as the guarantee of the state to protect expressions of culture, be they popular, indigenous, or afro-Brazilian.[167]

Accusations and complaints followed the removal of *Banisteriopis caapi* from the list of controlled substances, and several official re-examinations of CONAD's decision were carried out over the following decades. An anonymous complaint in 1989 led to a reopening of the issue and further studies,[168] culminating in the 1992 publication of CONFED's "Ata da 5ª Reunião Ordinária" which ruled that there was no reason to deviate from the conclusions accepted in 1987.[169] It is worth noting that even though the accusations included in the anonymous 1989 complaint were of a malicious, hyperbolic, and even fantastical nature, with almost no basis in reality,[170] the response of those tasked with investigating was to engage with the allegations point-by-point, and to undertake a serious and productive study in partnership with experts and the leaders of ayahuasca-using communities.[171] The inflammatory allegations could easily have

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[162] Resolução n.06, de 04 de fevereiro de 1986, CONFEN (Braz.).
[163] Relatório Final das atividades desenvolvidas pelo Grupo de Trabalho (GT), 28 Agosto de 1987 (Braz.).
[164] Domingos Bernardo Gialluisi da Silva Sá, *Ayahuasca the consciousness of expansion*, *in* AYAHUASCA, RITUAL AND RELIGION IN BRAZIL 161, 173 (Beatriz C. Labate & Edward MacRae eds, 2010) (trans. Christian Frenopoulo).
[165] Labate & Feeney, *supra* note 9, at 155; Resolução n.01, de 25 de janeiro de 2010, CONAD, ¶ 12 (Braz.).
[166] CONSTITUIÇÃO FEDERAL [C.F.][CONSITUTION] art. 5 ¶ VI (Braz.).
[167] *Id.*, at art. 215 §1.
[168] Silva Sá, *supra* note 164, at 175.
[169] Ata da 5ª Reunião Ordinária do Confen, de 2 de junho de 1992, CONFEN (Braz.).
[170] Examples included: LSD is added to the drink, users are addicts who brainwashed by leaders who are former guerilla fighters, users abandon their families and become slave labor for the leaders, etc. Silva Sá, *supra* note 164, at 76.
[171] *Id.*

instigated reactionary behavior on the part of administrators or user groups, but instead led to a positive and productive exercise which actually contributed to, rather than hindered, informed decision-making.

By 2002, CONFED had been transformed into the National Council on Drug Policy (*Conselho National Antidrogas*, CONAD),[172] and another resolution in that year called for a new workgroup to be created. This time official review had been prompted by an array of complaints about the misuse of ayahuasca, including concerns over its use by minors and pregnant women. The new workgroup was to be composed of a large number of various institutions, listed by name, along with representatives of religious groups themselves;[173] but ultimately it was never convened, as the 2002 resolution was issued on the last day in office of President Fernando Henrique Cardoso, and the administration of his successor never implemented it.[174]

In 2004, CONAD approached the Chamber of Technical and Scientific Advisory (*Câmara de Assessoramento Técnico-Científico*, CATC) requesting a new study on the uses of ayahuasca.[175] Numerous anthropologists collaborated with this project, and the final result was a document once again affirming that the religious use must be respected and protected, and recommending that this be "written into law, for purposes including the use by interested persons, that there cannot be restriction, direct or indirect, on the religious practices of communities, based in the prohibition of the ritual use of ayahuasca."[176] The study also issued a reminder that the International Narcotics Control Board (INCB), a quasi-judicial body of the United Nations (UN) drug control system, had in 2001 confirmed that neither the preparation ayahuasca nor the plants composing it are subject to the international drug control treaties.[177]
Use by minors and pregnant women was a major focus, and the recommendation of the study was that both should be permitted because they fall under the purview of the "proper exercise of

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[172] In 2008 renamed again the National Council on Drug Policy (*Conselho National de Políticas sobre Drogas*), but the acronym remained the same, CONAD.
[173] Resolução n.26, de 31 de dezembro de 2002, CONAD (Braz.).
[174] Edward MacRae, *The Development of Brazilian Public Policies on the Religious use of Ayahuasca*, *in* AYAHUASCA, RITUAL AND RELIGION IN BRAZIL 191, 192 (Beatriz C. Labate & Edward MacRae eds, 2010).
[175] Resolução n.01, de 25 de janeiro de 2010, CONAD, ¶ 17 (Braz.).
[176] Parecer da Câmara de Assessoramento Técnico-Científico sobre o uso religioso da Ayahuasca.
[177] Letter from Herbert Schaepe, *supra* note 35 ["No plants (natural materials) containing DMT are presently controlled under the 1971 Convention on Psychotropic Substances. Consequently, preparations (e.g. decoctions) made of these plants, including ayahuasca are not under international control and, therefore, not subject to any of the articles of the 1971 convention"]. The INCB's position was again confirmed in 2010, Letter from Jonathan Lucas, *supra* note 35.

parental powers" clause of the civil code[178], which gives wide latitude to parents to orient and instruct their children in religious matters.

CATC's study was approved by CONAD in late 2004. CONAD's next move was to institute a full-blown multidisciplinary workgroup (*Grupo Multidisiplinar de Trabalho*, GMT) with the explicit aim of elaborating a "document that conveys a deontology of the use of ayahuasca, so as to prevent its inappropriate use."[179] The 2004 resolution was explicit also in terms of how it wanted the process carried out, creating a workgroup of 12 members, consisting of 6 CONAD appointees (in the areas of anthropology, pharmacology/biochemistry, social work, psychology, psychiatry, and law), and 6 representatives of the religious groups themselves. In its own words, CONAD chose this format:

> [c]onsidering the importance of guaranteeing the constitutional right to the exercise of religion and individual decision, and the religious use of ayahuasca, but that such decision must be properly founded on the most ample gambit of information, contributed by professionals of diverse areas of knowledge of the human condition, by the public administrative organs, and by collective experience, collected from diverse segments of civil society.

Indigenous representation, however, was not included. The 2004 resolution also ordered that the GMT's first order of business should be the implementation of a national registry of organizations having adopted the use of ayahuasca as part of their religious practice. The GMT met for six substantive discussions throughout the latter part of 2006, and their final report, published in that same year, was promulgated into law by resolution in 2010.[180] The report included discussion and conclusions regarding the registration of entities; definition of ritual use; commercialization; sustainability of the production of ayahuasca; tourism; therapeutic use; procedures for the reception of new users; and the use of ayahuasca by minors and pregnant women. These were in large part the same issues addressed by the "Charter of Principles" drawn up at a meeting of religious groups at the First Seminar of the Ayahuasca Entities, which took place in the Amazon state of Acre in 1991.[181] It also made formal proposals regarding further

[178] CÓDIGO CIVIL [C.C.] [CIVIL CODE] art. 1.634 (Braz.).
[179] Resolução n.05, de 04 de novembro de 2004, CONAD (Braz.).
[180] Resolução n.01, de 25 de janeiro de 2010, CONAD, ¶ 8 (Braz.).
[181] *Id.*, at ¶ 21.

research on the therapeutic use of ayahuasca, environmental issues and transport, and implementation of the deontological principles arrived upon in the report. Exportation was an issue that remained notably absent from the discussions, a point which will be elaborated upon below. According to one of the CONAD appointees in the field of anthropology, Edward MacRae, the debates of that took place surrounding both the 2004 CATC report and the subsequent 2006 report by the GMT mandated by the 2004 resolution evinced goodwill on the part of almost all the participants in the process, and a genuine commitment to normalizing the right to religion of ayahuasca users.[182]

The regulations set out by the 2010 deontology carry the force of law because CONAD is the branch of the Ministry of Justice directly tasked with promulgating and managing drug control norms on behalf of the Executive Power. An important point to underscore, however, is that regulations, unlike laws, can be repealed, replaced, or modified by the issuing agency with a minimum of formality. This implies a dimension of instability that one would not find with a Supreme Court decision or a law passed by congress, for example. CONAD is an organ of the National System of Public Policy on Drugs (*Sistema Nacional de Políticas Públicas sobre Drogas*, SISNAD), a larger body which is tasked specifically with observing the orientations and norms handed up from CONAD.[183] SISNAD accomplishes this through coordination with the National Secretariat of Counter-Drug Policy (*Secretaria Nacional de Políticas Antidrogas*, SENAD) and the Federal Police. The principal difficulty with the 2010 regulations is that the GMT's proposals with regard to enforcement mechanisms have fallen upon deaf ears within the agencies tasked with implementation, and further discussion of enforcement possibilities appears nowhere on the horizon. As a result, the elaborate deontology of use, for all its careful egalitarianism and good intentions, in fact has no teeth. It seems unlikely that it was intended by CONAD to be purely advisory in nature, but at the same time there is little likelihood of it having a real-world impact without the existence of a body tasked with doling out penalties for non-compliance, or at the very least with bringing violations to the attention of the federal police. Even if there were such a body, penalties have not yet been defined and therefore it would be difficult to prosecute violators; in fact, we are unaware of any prosecutions to have taken place on the basis of noncompliance with any of the CONFED or CONAD ayahuasca resolutions.

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[182] MacRae, *supra* note 174, at 199.

[183] Decreto No. 5.912/06, de 27 setembro de 2006 (Braz.); Lei No. 11.343, de 23 de Agosto de 2006, DIÁRIO OFICIAL DA UNIÄO [D.O.U.] de 24.08.2006 (Braz.).

In addition to such high-level structural deficiencies to the 2010 Resolution, there are also important challenges and controversies to be discussed with regard to the deontology's content. While the value of the input of religious groups in the decision-making process is obvious, the full implications of the input of certain groups, or lack-thereof, can only be understood through a deeper understanding of the relationship between Brazil's various ayahuasca-using communities. Their beliefs and values are frequently divergent and sometimes in direct conflict; after all, while it is true that religious groups are united in their advocacy of the freedom to use ayahuasca, this is rather a superficial link as far as religious dogma is concerned.[184] Reports indicate that the religious representatives appointed to the GMT cooperated in their task with a relative minimum of disagreement, but a representative of one of the groups dropped out of the process on account of displeasure at seeing another certain group represented in the proceedings.[185] Ironically, the recused group was one of the smallest groups albeit one of the original ones, and the offender was of the biggest although a relative newcomer to the scene — a noteworthy scenario because it illustrates the danger of secular doctrine potentially standing in the way of solutions geared toward the larger community. It is unquestionable that the religious groups left a major mark on the regulations as they now stand, but one of the committee's final recommendations was a separate workgroup to devise separate controls for decontextualized and non-ritualistic uses.[186] The following sections flesh-out some of the more controversial provisions in the 2010 resolution, which address key issues that remain salient even beyond the Brazilian context.

4.2 Religious vs. Therapeutic Use

The most fundamental question asked of the GMT — the one most straightforwardly positioned to separate proper from improper use — was: what exactly constitutes religious use? In a highly plural society like Brazil's this is more than a purely academic question. Brazil is a country where indigenous peoples, descendants of African slaves, and descendants of European immigrants have lived and worshiped side-by-side for centuries, and their interactions have led to the evolution of a rich diversity of religious beliefs and practices. The response of the GMT to the question was a circular one, explaining that the entities that use ayahuasca, and their beliefs

[184] *See* MacRae, *supra* note 174.
[185] *Id.* at 199.
[186] Resolução n.01, de 25 de janeiro de 2010, CONAD, Proposals ¶ 1 (Braz.).

and practices, should themselves be the standard for determining correct religious use; and conversely, concrete examples of non-religious use would help identify non-religious use. In spite of the lack of definition to this model, the GMT maintained that proper identification of religious use is important as a preventative to undesirable practices and "will allow the freedom of belief contemplated in the Federal Constitution to be securely protected."[187] The only concrete criteria set out in the section were that the proper religious use *i*) is not associated with illicit psychoactive substances, and *ii*) does not take place outside of a ritualistic environment.

On one hand, the lack of an affirmative definition of religion is a weakness in the sense that examples of nonreligious use are expected to speak for themselves, which weakens overall protection of religious freedom by leaving the final determination up to the court of public opinion. On the other, it is a strength of the document, because nothing is affirmatively disqualified either. As long as political forces remain favorable, the deontology's circular definition of religion provides a neat loophole for groups that are otherwise denied the protection on the basis of other rules, namely the therapeutic use rule, which disqualifies any "activity or process oriented towards healing, maintenance or development of health."[188] Many of Brazil's indigenous users are effectively outlawed from their traditional practices by the 'therapeutic use' metric because they traditionally believe that ayahuasca is a medicine that heals. This dilemma extends to all practitioners of South American *vegetalismo* as well as many neo-shamanic and new age practitioners, who practice within a decidedly ritual setting but not necessarily a strictly religious one. The therapeutic use rule exempts only religious practitioners, stating that:

> Traditionally, some denominations possess healing rituals in which Ayahuasca is used, inserted within the context of faith. The therapeutic use that is traditionally attributed to Ayahuasca in religious rituals is not therapy in the sense defined above, constituting an act of faith and, thus, the state may not interfere in the behavior of individuals, groups or entities that make use of the drink, in a strictly religious context. Those who use the drink outside of a religious context are in another condition. This is not related with religious use, and such a practice is not recognized as legitimate by CONAD, which has solely authorized the use of the substance in religious rituals.[189]

[187] *Id.*, at ¶ 23.
[188] *Id.*, at ¶ 35.
[189] *Id.*, at ¶ 36.

In other words, uses are unacceptable if they posit "a necessary cause and effect relationship between use of Ayahuasca and healing or the solution of problems."[190] The loophole is that traditional indigenous users can make the claim that their uses are strictly religious. While an anthropologist of religion would likely support this characterization, others may view it as a stretch and argue that traditional indigenous beliefs surrounding shamanism and healing magic would fall closer to the category of folk medicine to than religious convictions in the Judeo-Christian sense. Ritual uses that cannot be designated as 'traditional' inhabit even more of a gray area, such as neo-shamanism, a field which encapsulates a dizzying range of idiosyncratic belief systems, philosophies, and practices. To complicate matters further, there are white persons who practice traditional shamanism and indigenous persons who practice neo-shamanism, and it is a thorny question how far stereotypes can migrate cross-racially before they lose legal relevance.

It is obvious, however, that the exemption quoted above is targeted directly at the ayahuasca religions represented by members on the GMT, as demonstrated clearly by the choice of the word "denominations." At first blush this seems unfair because it gives the appearance of an attempt to secure the right to certain forms of use for some at the expense of others. While some therapeutic uses are undeniably integral to the religious practices of those religious organizations represented on the GMT, at a substantive level such practices are indistinguishable from a wider range of healing practices that differ principally in that they do not take place within the setting of a church. In this sense, the exemption is reminiscent of the coca leaf carve-out added to the 1961 UN Single Convention on Narcotic Drugs to protect the interests of Coca-Cola, which successfully lobbied to maintain the right to continue using the leaf as a flavoring agent in spite of an international treaty consensus that the coca plant is an evil scourge on society that should be completely annihilated.[191] On the other hand, the exemption sets up a rubric which permits therapeutic use within a broadly ambiguous setting whose core nature remains undefined by the document, and thus the document's circular definition of religion helps place a wide range of groups and practitioners back in contention for protection, while still presumably excluding certain other 'you know it when you see it' therapeutic uses. Nor does the regulation outright prohibit these either, with non-religious therapeutic uses to remain banned only "until efficacy is

[190] *Id.*, at ¶ 39.
[191] *1961 Single Convention*, *supra* note 13, art. 27. *See also* Bewley-Taylor & Jelsma, *supra* note 72, at 78.

proven through scientific research carried out in research centers associated with academic institutions, following scientific methodologies."[192]

Loopholes harbor significant potential for abuse by those who would use ayahuasca irresponsibly (as well by those in power who would use the regulations irresponsibly), and so this opening could significantly detract from the effectiveness of the deontology. It may not be possible, however, to deal with the dilemma of definitions more directly, as any explicit definition would be necessarily exclusive to at least some legitimate religious practices, and the very purpose of the exercise is to protect against exclusion on religious grounds. The bottom line may be that as long as public health and safety remains unendangered by the permissiveness of the regulations (as it has for the past 30 years of legalization), it remains better to err on the side of under-regulation than to overburden religious freedom. The door remains open for therapeutic uses that can be legitimated by serious scientific evidence, and closed (at least in principle) to potentially dangerous uses that encourage the unlicensed practice of medicine.

4.3 Indigenous Issues

It is noted with concern that the 2010 deontology makes no specific reference to Brazil's indigenous peoples or their uses of ayahuasca, even after it notes the importance of "ratifying the legitimacy of the religious use of ayahuasca as a rich and ancestral cultural manifestation which, precisely because of its historical, anthropological and social value, merits the protection of the state."[193] The document invokes indigenous history and culture for the purposes of legitimizing uses derived from native practices, but then goes on to ignore that these people are still very much present and still using ayahuasca in ways that are not so obviously recognizable as religious. The document delineates a set of norms that, at best, disadvantages indigenous peoples, and, at worst, effectively outlaws their traditional use of ayahuasca, as discussed above. It is also noteworthy that the participation and input of indigenous peoples was not sought out by CONAD when putting together the GMT. This exclusionary theme was also repeated when the three original Brazilian ayahuasca religions applied to have ayahuasca recognized as Brazilian immaterial cultural heritage, which they did without seeking the support or input of any

[192] Resolução n.01, de 25 de janeiro de 2010, CONAD, ¶ 28 (Braz.).
[193] *Id.*, at ¶ 24.

indigenous groups. In fact, several of these groups, upon learning from third parties that such a process was taking place in Brazil, requested meetings with representatives of the Brazilian Ministry of culture in order to officially request inclusion.[194]

At first glance one might think the indigenous peoples have been the victims of a coordinated conspiracy perpetrated by the ayahuasca religions and by the government at large, but an alternative explanation is that they are the least powerful players in a complex and rather acrimonious game involving a wide group marginalized sects struggling for survival. MacRae compares the situation to that which once faced the Afro-Brazilian religions from 1890 until the mid-20th century, when sorcery was still a criminal offense in Brazil and state persecution was the norm.[195] Groups struggled and competed ferociously with one another to prove to outsiders their cultural authenticity, and routinely attacked one another with accusations of inauthenticity and financial exploitation of followers. The scene is reminiscent of exchanges between the ayahuasca-using communities in Brazil of the present day. Rivalries between the ayahuasca religions themselves are rife and longstanding, especially between the three 'traditional' churches—the UDV, Santo Daime of the Alto Santo sect, and Barquinha—and the younger groups the traditionalists refer to as 'eclectic,' such as Santo Daime of the CEFLURIS sect and other neo-ayahuasquero groups. Claims of originality and exclusive authenticity co-exist side-by-side with accusations of defilement of tradition, and both are common currency as much in relations between churches as in relations between churches and the indigenous peoples.[196]

In 2016, more than 15 indigenous ethnic groups came together side-by-side with representatives from all the major ayahuasca religions and an international assembly of scientists for the "II World Ayahuasca Conference," an event which tested the boundaries of the relationships between these groups. The indigenous groups took shots at the ayahuasca religions, the ayahuasca religions made alliances and picked fights among one another and took shots at the indigenous, and virtually everybody displayed displeasure and hostility towards the academics hosting the event.[197] Most remarkable was the intense air of competition that all of this occasioned, and of course the limited resource they were competing for was legitimacy not

[194] Sandra Lucia Goulart & Beatriz Caiuby Labate, *Da Amazônia ao Norte Global e de Volta: As Várias Ayahuascas da II Conferência Mundial da Ayahuasca*, NÚCLEO DE ESTUDOS INTERDISCIPLINARES SOBRE PSICOATIVOS 18-19, http://neip.info/novo/wp-content/uploads/2017/07/Goulart_Labate_Amazonia_ao_Norte_Global_ALA_2017.pdf
[195] MacRae, *supra* note 174, at 192-93.
[196] Goulart & Labate, *supra* note 194, at 9-16.
[197] *Id.*; these are also my personal observations made at the conference, where tensions played out on a daily basis in public forums.

in the eyes of each other, but legal legitimacy in the eyes of a state whose official favor remains precarious and ill-defined.

4.4 Commercial Use

Several other important issues addressed by the 2010 deontology include the commercialization of ayahuasca and the planting requirement. Commercialization ties into the rivalries described at the end of the preceding section, where groups have traditionally used accusations of monetizing the drink as evidence of defilement of the holy sacrament and a deficit of spiritual authority.[198] The most common pattern is complaints from traditionalist churches against the more expansionistic churches like CELFLURIS and indigenous peoples. The regulations read:

> [. . .] [T]he plantation, preparation and administration with the objective of obtaining profit is incompatible with the religious use that the entities recognize as legitimate and responsible. . . . Whosoever sells ayahuasca does not practice an act of faith, but commerce, and contradicts and assaults the legitimacy of the traditional use consecrated by the religious entities.[199]

The expansionistic churches and indigenous peoples (and, in practice, most small neo-ayahuascero groups) usually charge a fee for participation in rituals or therapies, whereas more established churches rely on their stable memberships for donations and contributions, which is explicitly permitted under the regulations.[200] The fee-charging entities make the claim that fees are necessary to cover expenses and in order for priests, shamans, and facilitators to earn a fair living. Most smaller organizations and itinerant practitioners such as indigenous shamans do not have access to large congregations, and thus compared to long-standing and established organizations are at a structural disadvantage in terms of financing their operations as the regulations require. Like the therapeutic use provision, the commercial use provision addresses a crucially important issue, but is specifically tailored to protect established churches.

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[198] *Id.* at 9-16; MacRae, *supra* note 174, at 199.
[199] Resolução n.01 de 25 de janeiro de 2010, CONAD, ¶ 25-26 (Braz.).
[200] *Id.*, at ¶ 27-28.

The same is true with the planting requirement, which requires that all religious entities seek self-sustainability in terms of cultivation of the plants necessary for the manufacture of ayahuasca.[201] Self-sustainability is crucially important in terms of protecting the species from the danger of over-harvesting, but the rules create a catch-22 with regard to how an entity should navigate the situation if, again, it is not already established. On the one hand, there is a provision which allows that plant materials or even the prepared tea itself may be obtained from outside sources, but sources must not charge more than the true cost of the drink, nor "dedicate themselves, whether exclusively or in a major part, to the supply of third parties."[202] This implies that a religious entity just starting out, without access to arable land, or far from the Amazon must depend on third parties for supply, but third parties are not permitted to make a business out of supplying or even to dedicate themselves in major part to supplying at cost. This means that most sanctioned suppliers would be established churches themselves, because for anyone else there would be little incentive to produce a supply that cannot turn a profit. With wild-sourced supplies becoming more and more impacted as domestic and global consumption peaks, limitations set on profit from production means that supply will remain steady or decrease while demand explodes. Ironically, the very regulations put in place to guard against profiteering will over time create a commodity so valuable that it will fall to the black market to meet the demand, and this has even entailed the robbing of church-run plantations.[203]

The regulations on commercialization and planting are necessary and timely; however, the 2010 rules seem to disproportionately favor the large, established ayahuasca churches. This is unsurprising given that the religious representatives on the GMT that drafted them were explicitly allowed by CONAD to have equal input in debates as the social scientists.[204] The reality on the ground in Brazil is that ayahuasca is being used by a great plurality of sincere religious entities as well as traditional healers and neo-ayahuasqueros, and in order for regulations to be effective they must remain impartial to doctrinal debates while fully embracing the magnitude and complexity of the field of users.

4.5 Exportation

[201] *Id.*, at ¶ 29-30.
[202] *Id.*, at ¶ 29.
[203] Telephone interview with Louis Fernando Nobre, senior member of CEFLURIS based in Mapiá, Brazil (Aug, 17, 2018).
[204] MacRae, *supra* note 174, at 199.

The issue of the international exportation of ayahuasca remains one of the most conspicuous legal gray-areas in the resolutions promulgated thus far. The general consensus among user groups appears to be that there is no regulation in this area, and therefore no official channel by which to certify the legal permissibility of the drink's transport beyond the borders of Brazil. Indeed, the topic is mentioned within only one of CONAD's Resolutions, that of 2002, which it was noted that religious entities were aware of a prohibition on the export of ayahuasca instituted on the basis of the strict regionality of the drink's religious use and Brazil's commitment to international treaties.[205] The 2002 mention of the illegality of export has led to confusion among user groups and administrators alike, and should be clarified. CONAD's resolutions each consist of two parts: a list of considerations pertinent to an action or decision to be taken, and the actual resolutions they bear upon. The note regarding exportation was merely a consideration, which does not in and of itself carry the weight of law (in contrast to the resolution that a workgroup be created to establish norms surrounding the use of ayahuasca, for example, which passed into law with the 2002 Resolution). It is not clear from the 2002 Resolution itself what the source of this understanding on the prohibition on export might have been; indeed, it may have been something merely discussed informally in the deliberations leading up to the Resolution's promulgation.

The matter of international export was discussed during deliberations of the multidisciplinary workgroup of 2004-2006, but remained absent from the workgroup report, reportedly on account of CONAD considering the issue beyond its mandate.[206] One participant of the multidisciplinary group recalls that the issue was intentionally avoided during talks in order to focus on the more salient issue of tracing out parameters for the ritual use of ayahuasca, which would then theoretically safeguard any export falling within those parameters.[207] Another participant, however, recalls the CEFLURIS representative raising the issue orally upon submission of the final report to the agency,[208] an indication that for at least one of the more internationally-focused organizations involved in the workgroup process, avoidance of the issue remained a live concern. The workgroup committee members were later informed that the issue

[205] Resolução n.26, de 31 de dezembro de 2002, CONAD (Braz.).
[206] MacRae, *supra* note 174, at 201.
[207] Email from Jair Araújo Facundes to Juan Scuro (July 23, 2018, 13:46 ACT).
[208] MacRae, *supra* note 174, at 201.

had been remitted to ANVISA for further review,[209] though to date it appears that no unique accommodation for export has been put in place.[210]

A recent Uruguayan case raised questions over ANVISA's position on this issue. In 2009, 30 liters of ayahuasca was confiscated en route from Brazil to a Santo Daime sect in Uruguay. Reports indicate that the Uruguayan Ministry of health contacted a representative of ANVISA regarding the issue of the legality of exportation, and was informed that the exportation of ayahuasca from Brazil is prohibited under the CONAD Resolutions.[211] Given that ANVISA was delegated authority over this issue, it seems unusual that its agents would reference another agency's resolutions, and this suggests that ANVISA has not yet addressed the issue independently. Unfortunately, since source documents pertaining to the Uruguayan have not yet been made public, the precise details of ANVISA's involvement remain unknown. A senior member of CEFLURIS, based in Mapía, confirmed suspicions regarding ANVISA's regulatory inaction, claiming to be unaware of any prohibition on export, or any formal channel by which to export ayahuasca in an officially-sanctioned manner that differs from that required for any other export.[212] According to this church member, the most important consideration regarding export under the current regulatory regime is the import requirements and restrictions of the destination country. Coincidentally, this is also what ANVISA agents currently inform both individuals and institutions over the phone on its support line.[213]

At present, in part due to restrictions on the transport of liquids by mail, the most straightforward and accessible method of international export (especially to countries where the church's activities are not officially condoned) is inside the checked baggage of travelers on commercial airlines, and this is the method currently adopted by one of the largest ayahuasca-using communities, CEFLURIS.[214] This method, completely lacking official documentation, has led to the harassment and even arrest of church members by airport authorities in Brazil. Another major ayahuasca church, the UDV, reported publically by blog in 2010 that it is shipping in vacuum sealed stainless steel drum with the capacity of 20 liters. It claims to have received

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[209] *Id.*
[210] Advice received on call to ANVISA regarding both personal and institutional export, Aug. 17, 2018.
[211] Email from Juan Scuro to Jair Araújo Facundes (July 20, 2018, 06:16 GMT).
[212] Telephone interview with Louis Fernando Nobre, senior member of CEFLURIS based in Mapiá, Brazil (Aug, 17, 2018).
[213] Advice received on call to ANVISA regarding both personal and institutional export, Aug. 17, 2018.
[214] Telephone interview with Louis Fernando Nobre, senior member of CEFLURIS based in Mapiá, Brazil (Aug, 17, 2018).

authorization to ship under these conditions even on international flights, in accordance with the National Agency of Civil Aviation (*Agência Nacional de Aviação Civil*, ANAC).[215]

[215] *União do Vegetal está aperfeiçoando critérios para transporte de Vegetal*, CENTRO ESPÍRITA BENEFICENTE UNIÃO DO VEGETAL BLOG (Dec. 10, 2010), http://udv.org.br/blog/4952-2/

Chapter 5 – Canada and the United States

Canada and the United States are both countries which have witnessed the legalization of ayahuasca on the basis of constitutional freedom of religion claims. Canada in particular underwent a process very similar to that of Brazil, with a long and drawn-out administrative decision which circumvented the need for a constitutional challenge to Canada's Controlled Drugs and Substances Act (CDSA).[216] The most important difference was that Brazil's process resulted in ayahuasca becoming legalized for *all* religious use, but in Canada legality has been doled out in the form of case-by-case exemptions for specific religious organizations, made at the revocable discretion of the Minister of Health. As of 2017, exemption under strict guidelines was granted to the União do Vegetal (UDV) and a Santo Daime church called Céu do Montréal,[217] and further exemptions have been made since that time.[218] The Canadian process was undertaken by an internal government agency and therefore lacks transparency, in direct contrast to the US process which was judicial in nature and completely transparent at every stage. The United States underwent a series of litigations that resulted in the UDV being granted the federal right to use ayahuasca for religious purposes by the Supreme Court in 2006, and a Santo Daime church being granted the same right in Oregon by a Federal District Court in 2009. In both cases the judicial decisions were very narrow and extended only to the specific organizations involved, however the legal precedent set by the 2006 UDV Supreme Court case has carried tremendous weight for freedom of religion law in general and forced the Drug Enforcement Agency (DEA) to take seriously requests for religious exemptions from the Controlled Substances Act (CSA).[219] The 2009 Santo Daime case, for its part, appears to have obviated the need for further legal action on the part of the Brazilian ayahuasca religions for them to receive exemptions from the DEA.

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[216] Controlled Drugs and Substances Act, S.C. 1996, c. 19 (Can.).
[217] Beatriz Labate, *The Santo Daime and UDV receive exemption to use ayahuasca in Canada*, BEATRIZ LABATE BLOG (June 9, 2017), https://www.bialabate.net/news/the-santo-daime-and-the-udv-receive-religious-exemption-to-use-ayahuasca-in-canada ; Jessica Rochester, *How our Santo Daime Church Received Religious Exemption to Use Ayahuasca in Canada*, CHACRUNA INSTITUTE FOR PSYCHEDELIC PLANT MEDICINES (July 17, 2017), https://chacruna.net/how-ayahuasca-church-received-religious-exemption-canada/ ; *Uso do vegetal é liberado no Canadá*, CENTRO ESPÍRITA BENEFICIENTE UNIÃO DO VEGETAL BLOG (June 8, 2017), https://udv.org.br/blog/uso-do-vegetal-e-liberado-no-canada/
[218] Ayahuasca Defense Fund, *supra* note 23.
[219] The Controlled Substances Act of 1970, 21 U.S.C. §§ 801-971 (2018) (U.S.).

Critical to emphasize here is that only the Brazilian ayahuasca religions have received traction in their efforts to legitimize use of the drink in North America, while those practicing so-called *vegetalismo* or other forms of traditional and/or ritual use have little recourse but to keep breaking the law. The wide extent to which such groups are operating semi-secretly in both Canada and the US points to the possibility of future legal challenges, but in light of the cases already litigated and the unfavorable outcomes they presented for the DEA, prosecutions may be avoided for the time being to avoid further constitutional challenges and risk of further erosion of the CSA. Canada, having closely monitored developments in the US before taking action, chose to avoid litigation and centralize the exemption process at the administrative level right from the start, presumably fearing the potential outcome of constitutional challenges at home.

5.1 CANADA

DMT, harmalol, and harmaline[220] are controlled by Schedule III of the CDSA, and Canadian law goes one step further than the 1971 UN Convention by stating that anything that contains a controlled substance — even in a natural state such as a plant — is also controlled.[221] As a result of the narrowly tailored manner in which legality of ayahuasca occurred in Canada — by means of an internal administrative process — there is little to report in terms of controversies of use or conceptual schism as in the case of Brazil, as the relative lack of transparency to the government's internal deliberation process makes such observations difficult. The government's initial deliberations appear to have weighed heavily on decisions already made in Brazil regarding what constitutes a legitimate ayahuasca religion,[222] a point which emphasizes the importance of the normative frameworks already developed in Brazil and the international importance of the continuing debates taking place there.

The original petition for an exemption from the CDSA was made in 2001 by the leader of the Céu do Montréal church, which at that time was a branch of the CEFLURIS Santo Daime sect of Brazil. The petition followed a seizure in 2000 by the Canada Customs and Revenue

[220] Harmala alkaloids are not prohibited under the UN drug conventions, but Canada has chosen to control them.
[221] Controlled Drugs and Substances Act, S.C. 1996, c. 19, art. 2 §2 (Can.); the 1971 Convention does not control plants themselves, only preparations.
[222] Issue Analysis Summary (DRAFT): Exemption under Section 56 of the Controlled Drugs and Substances Act (Public Interest) Regarding the Use of Daime Tea for Religious Purpose, OFFICE OF CONTROLLED SUBSTANCES 375, 382-84 (Feb., 2008) (Health Canada Access to Information documents) (Can.) [hereinafter *Issue Analysis Summary*].

agency of a shipment of the tea from Brazil to the church, at which time the Royal Canadian Mounted Police (RCMP) tested the substance positive for DMT and harmala alkaloids. The RCMP informed the church that possession of the substance was an offense under the CDSA and that "any further attempts to import it or distribute it in ceremonies could result in criminal charges of trafficking a controlled substance."[223] Up until this point the church had been importing the tea without issue since the branch's inception in 1996. In 2001, at the RCMP's advice, the Céu do Montréal applied for a Section 56 exemption to the CDSA, a special loophole stitched into Canada's drug control instrument which empowers the federal Minister of Health to give special allowance for the import, possession, and distribution of otherwise illegal drugs. The petition languished for five years, probably in part because of a widely publicized 2001 incident in which an elderly woman died in Ontario after supposedly drinking ayahuasca during a ceremony conducted by an Ecuadorian shaman.[224] The shaman had in fact administered a traditional brew called *natem*, a mixture of harmaline and nicotine, and the death was ruled to have been caused by acute nicotine poisoning. Media voices at the time, however, reported that ayahuasca had been administered and thus public opinion was negatively affected, as was presumably the position of the Health Canada committee reviewing Céu do Montréal's petition. This is evidenced by a Health Canada document dated seven years later which erroneously observed that "there has been an incident of a death in Canada as a result of the ceremonial use of Daime tea."[225] The shaman was charged with Trafficking a Controlled Substance and Administering a Noxious Substance, pled guilty, and served a one year term of community service in the Native Reservation where the death occurred, a light sentence which undoubtedly took into account that the brew was administered in the context of a Native American healing ritual.

The trial of the Ecuadorian shaman took place in 2002, but it was not until 2006 that Health Canada contacted the Céu do Montréal by letter and shared the results of the church's

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[223] Kenneth W. Tupper, *Ayahuasca in Canada: Cultural Phenomenon and Policy Issue*, *in* THE INTERNATIONALIZATION OF AYAHUASCA 319, 322 (Beatriz C. Labate & Henril Jungaberle eds., 2011).

[224] The case of Shuar healer Juan Uyunkar; Kenneth W. Tupper, Ayahuasca, Etheogenic Education & Public Policy 188-89 (Apr. 2011) (unpublished Ph.D. dissertation, University of British Columbia) (on file with the University of British Columbia Library system) [hereinafter *Dissertation*]; *Issue Analysis Summary*, supra note 222, at 388-89.

[225] *Issue Analysis Summary*, *supra* note 222, at 388-89. Even after almost eight years of deliberations the Ministry appeared to have still remained ignorant that the term Daime tea refers exclusively to the sacrament used by the Santo Daime sects, which never incorporates nicotine.

2001 petition: the Ministry's decision was that the church was "in principle"[226] eligible for the requested Section 56 exemption on public interest grounds, however such approval was contingent upon documentation from the Brazilian drug control agency CONAD permitting the export of the drink from Brazil.[227] The timing followed closely the 2006 Supreme Court decision in the US conveying the UDV the right to use their sacrament in that country, and is likely that administrators in Canada were waiting for the outcome of the US case before proceeding with their own deliberations.[228] As discussed in some detail in Chapter 3, CONAD has still never directly addressed the question of exportation, which means that standard exportation procedures apply: i.e. the furnishment of documented permission to import from a destination country. In other words, Health Canada initiated a Catch-22 dilemma in which Canada would not permit import without export documentation, knowing that Brazil would not permit export without import documentation. Further developments did not appear until 2012 at which time a subsequent letter was received from Health Canada denying the Section 56 request even in spite of the previous conditional approval, a move which the church itself attributes to a very conservative government holding power at this time.[229] Efforts to appeal this decision were not renewed until a Liberal government was elected in 2015, at which time the Céu do Montréal joined forces with the UDV and reapplied to Health Canada for the same exemption on the same grounds, opting for a strategy of educating the appropriate government departments rather than litigating.[230] This approach was finally successful, and in 2017 both the Céu do Montréal and UDV received the exemptions that Céu do Montréal had patiently fought 17 years to obtain. The exemption was for 2 years and is renewable. As of 2019, three additional Santo Daime churches have received exemptions.[231]

Before examining in more detail Canada's Section 56 exemption, which is worthy of detailed discussion in its own right, it is worthwhile to make several comments on the process of legalization itself and to examine the overall posture of Health Canada. The agency's reaction to the subject of religious ayahuasca use is reflected by the tumultuous timeline described, and appears to have been complicated by internal agency conflict which climaxed with the first "in

[226] Tupper, *Dissertation*, *supra* note 224, at 186.
[227] *Issue Analysis Summary*, *supra* note 222, at 389 (Feb., 2008).
[228] Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. (2006) (U.S.).
[229] Rochester, *supra* note 217.
[230] *Id.*
[231] Ceu da Divina Luz do Montreal, the Église Santo Daime Céu do Vale de Vida in Val-David, Que., and the Ceu de Toronto. *See* Ayahuasca Defense Fund, *supra* note 23.

principle" exemption granted in 2006. It is impossible to know for sure whether the Catch-22 of the exemption was intentional or not, but it seems likely that the agency would have anticipated the import/export dilemma after having made even cursory inquiries with Brazilian customs. The move appears to have been an attempt to placate the church at a conceptual or sentimental level, while still maintaining adherence to the inner logic of the international drug control conventions and the CDSA. It offered a token peace offering to the church while effectively denying an exemption, and simultaneously closed the door to any constitutional law challenge that might threaten to erode the CDSA or the power invested in the Ministry of health to grant exemptions to it.

5.1.1 2008 Issue Analysis Summary

Canada's administrative process within Health Canada's Office of Controlled Substances was secretive compared to the transparency of Brazil's administrative proceedings, but much can be gleaned from a 21 page "Issue Analysis Summary" drafted in 2007, and updated in 2008. The document's purpose was to "form the basis on which the decision as to whether it is appropriate for the Minister of health to issue an exemption under Section 56."[232] The Issue Analysis of course only pertains to the first petition decided in 2006, and does not shed any light on what may have contributed to the subsequent rejection and then final acceptance of future petitions, but still holds important clues. The lengthy "Context" section opens first and foremost with a brief subsection entitled *Freedom of Religion* (even before a description of the tea itself), which declares that the freedom of religion is enshrined in the Canadian Charter of Rights and Freedoms. It goes on to qualify this declaration by stating that:

> As with all rights under the charter, however, freedom of religion is subject to limitations as can be justified in a free and democratic society. Freedom of religion also exists within a matrix of other, sometimes competing rights, such as the right to live in a peaceful society, etc.[233]

The prominence of the subsection hints at the importance of the choice of words it employs and the significance of the specific example it furnishes, betraying that the Health

[232] *Issue Analysis Summary*, *supra* note 222, at §2.
[233] *Id.*, at §3.

Canada's foremost concern may not have been health dangers posed by ayahuasca but rather the more ideological concern that loosening restraints on a controlled substance might in and of itself pose a danger to the peacefulness of Canadian society. The fact that the Ministry's position on the subject swung back and forth like a pendulum with changing governments for almost 2 decades before it committed to concrete action confirms that something more profoundly political than simple health concerns was at play in the deliberation process. Nor is it a coincidence that the final approval in 2017 was made by the same liberal government whose election platform included the legalization of marijuana, a promise which it delivered to the House of Commons with the Cannabis Act in November, 2017, only 6 months after granting Céu do Montréal's exemption.

The political undertones of Health Canada's Issue Analysis continue with repeated comparisons of DMT to LSD, introducing it as a "powerful psychedelic agent, not unlike LSD,"[234] but also admitting that "perceptions of the external environment are not usually as greatly affected as with other hallucinogens, and delusions and feelings of unreality generally do not occur."[235] Under the *Dependence Potential* section, the Analysis further points out that "Evidence suggests that DMT does not produce cross-tolerance with LSD," and indeed LSD is the sole point of cross-reference by which the document attempts to shed light on the unique effects of DMT.[236] The preoccupation with LSD is directly connected to the preoccupation with "peacefulness" discussed above, keeping in mind that LSD was a highly politicized substance during the 1960s and 70s in North America and Europe, becoming synonymous with counterculture, the violent civil rights movement of the US, and society's turn away from mainstream Christianity to spiritual and religious experimentalism. Hence the importance of highlighting "the right to live in a peaceful society," even though by the committee's own admission, DMT and LSD do not appear to be objectively very similar at all. It is likely that the specter of any hallucinogenic drug would be viewed as provocative by North American authorities in light of the prominent role played by LSD in the counterculture revolution of the 1960s and 70s, and indeed it appears to have instigated serious concerns and reservations on the part of Health Canada's committee. The popular imaginations of Canada, the US, and even Europe share these culturally-specific drug references, but countries like Brazil remained on the

[234] *Id.*, at 377.
[235] *Id.*, at 378-79.
[236] *Id.*

periphery of such events as they were happening, even if in practice all countries eventually came to share in a unified set of anti-drug policy preoccupations through the functioning of international law. In more recent years, international law has rebounded back from the periphery with content that now challenges prevailing cultural wisdoms in places such as North America, and Health Canada's Issue Analysis is a glowing example of this. It is a document in which Canadian cultural preoccupations over dangerous drugs collide with an alien religious system whose legitimacy is overwhelming, even by Canadian culture's own standards. The document reads:

> The Santo Daime religion is a Christian syncretic religion originating in Brazil, where [the mother church] is officially recognized by the Brazilian government. [. . .] The ritual drinking of the sacramental Daime tea [. . .] is analogous to the Christian Eucharist and the consumption of peyote (mescaline) as a sacramental ritual of the Native American Church.[237]

Here the looming specter of LSD and concomitant counterculture chaos clashes with the inherent respectability of the Christian Eucharist. It becomes clear that Canada's Catch-22 policy decision was the outward manifestation of a Catch-22 meeting of conceptual worlds, occasioned by a transnational flow from South to North — from periphery to the center — and a constitutional clash between the dictates of national drug policy and the edicts of a powerful religious organization from abroad. Indeed, the international and transnational nature of the event are reflected in subsequent sections of the Issue Analysis itself, which goes on to carefully consider both Canada's obligations under international law as well as decisions rendered in other jurisdictions,[238] conceding that prior rulings in the USA and the Netherlands permitting religious ayahuasca use should be considered important precedent with regard to assessing risk to public health and safety.[239]

The committee put forward in the Issue Analysis four possible courses of action: (1) Issue the exemption, (2) Refuse the exemption, (3) Exclude ayahuasca from Schedule III of the CDSA, or (4) Create fresh regulations to specifically govern ayahuasca. Courses (3) and (4) were dismissed out of hand on the grounds that total legalization would result in a potentially

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[237] *Id.*, at 382.
[238] *Id.*, at §7.
[239] *Id.*, at 386.

dangerous substance becoming freely available to all Canadians, and that furthermore, targeted regulations are unfeasible based on the small number of users. It is worthy of note that this rationale is at odds with the government's treatment of Peyote — the traditional sacrament of various native North American indigenous groups which contains mescaline, a schedule III controlled substance — which was simply excluded from the CDSA in order to avoid impeding religious practice.[240]

In its examination of the pros and cons of courses (1) and (2), the committee weighed the possibility of legal action, categorizing avoidance of further legal action by the church on freedom of religion grounds as a pro, and as a con the legal action that may arise from refusal. An earlier draft version of the document included the observation that "from the content and tone of the application submitted by Mr. C. Ruby on behalf of Céu do Montreal, it is quite clear that a Charter [of Rights and Freedoms] challenge would follow a decision to deny an exemption."[241] Furthermore, one of only two redactions to the text appears in a section discussing the cons of legal action arising from refusal, reading: "a decision to refuse may result in a legal challenge [redacted text]."[242] While we can only guess what the redacted text may have read, it is reasonable to guess that it touched on the dangers of handing over regulatory power to the courts which might diminish the power of the CDSA and even open floodgates to similar legal claims relating to other substances. Whatever it read, it was candid and embarrassing enough to be redacted. Herein lies another difference from the regulatory process in Brazil, which, while similarly conducted completely outside the courts, was not spurred by the threat of judicial action on constitutional grounds. In this respect the Canadian conversation stands as a distinctly different flavor of transconstitutionalism than that which took place in Brazil a few decades earlier, and betrays the threat of what Luhmann might refer to as a religion function system vying with the political one for constitutional control vis-à-vis the legal system. The motivations of Health Canada appear not to have been to foster a constructive dialogue for its own sake, but rather to prevent a greater erosion of power to the political function system than necessary — a testament not so much to the efficacy of transconstitutionalism but to the growing power of transnational systems. It is likely that the exclusion of peyote from the CDSA was undertaken

[240] Controlled Drugs and Substances Act, S.C. 1996, c. 19, Schedule III (Can.) Peyote is specifically excluded by name and thus the exclusion does not extend to other mescaline-containing cacti.
[241] Tupper, *Dissertation*, *supra* note 224, at 183.
[242] *Issue Analysis Summary*, *supra* note 222, at §5.

with a similar motivation: to avoid constitutional litigation of the kind that occurred earlier in the US. Controversies in the US over peyote led to a series of constitutional contests which ultimately resulted in sweeping statutory changes, directly facilitating the 2006 UDV victory in the Supreme Court which effectively granted the Brazilian ayahuasca religions the right to their sacrament in that country, as discussed below.

5.1.2 Section 56 Exemption

Section 56 of the Canadian Controlled Drugs and Substances Act is a unique and fascinating feature of Canada's drug control policy, and has been the site of a number of notable policy challenges. The section reads:

> The Minister may, on such terms and conditions as the Minister deems necessary, exempt any person or class of persons or any controlled substance or precursor or any class thereof from the application of all or any of the provisions of this Act or the regulations if, in the opinion of the Minister, the exemption is necessary for a medical or scientific purpose or is otherwise in the public interest.[243]

Medical and scientific exemptions fit within the logic of the UN's drug control regime, and providing a mechanism of access to them is consistent with Canada's commitments to the conventions. The "otherwise in the public interest" provision goes beyond these commitments and is what makes the Section so unique, creating a loophole by which the government can deal with controlled substances as it sees fit on a case-by-case basis. Exemptions can include both individual and "class exemptions," which forgo the need for case-by-case analysis in certain scenarios including the provision of substances to law enforcement for training purposes or allowing pharmacists to dispose of expired drugs.[244] Individuals have petitioned Health Canada under Section 56 for the right to use controlled substances other than ayahuasca, on both religious and cultural grounds. A petition for the use of the stimulant khat was submitted about the same time as the Santo Daime petition, and the two substances were considered jointly in Health Canada's managerial executive meetings.[245] The khat request was ultimately declined,

[243] Controlled Drugs and Substances Act, S.C. 1996, c. 19 §56 (Can.).
[244] Tupper, *Dissertation*, *supra* note 224, at 171.
[245] *Id.*, at 172.

however, on public safety grounds. Two petitions were also made for the religious use of cannabis, one in 2006 and another in 2009,[246] but these were summarily dismissed, presumably on account of doubts that cannabis use actually constitutes a legitimate religious practice.

Scientific exemptions serviced by Section 56 are mainly for researchers conducting tests that require access to controlled substances, but notably have also been used for research at supervised injection sites as well as by the administrators of such sites to ensure that injections remain protected by law. A famous Canadian researcher was intervened upon by Health Canada in 2011 while conducting a clinical trial using ayahuasca to treat addiction, and was officially advised to cease activities and seek Section 56 exemption in order to avoid prosecution.[247]

Medical exemptions are principally geared towards providing physicians with access to otherwise controlled substances such as benzodiazepines and methadone.[248] The most relevant of the medical exemptions to the present discussion were those for medical cannabis granted in the late 1990's and early 2000's, which opened the path for private citizens to directly petition the government for access to otherwise controlled medicine. It all began in 1997 when a man suffering from AIDS wrote to the Prime Minister, the Minister of Health, and the Minister of Justice for permission to use cannabis legally on compassionate grounds to combat the side effects of other drugs he was using to treat his condition. He was refused, and then challenged the government on constitutional grounds claiming that his right to life, liberty and security of the person was violated.[249] The judge in that case agreed that Section 56 of the CDSA was the most appropriate venue for his claim and that he had not yet availed himself of it; however, in a second challenge just a year later the judge agreed that the Section 56 mechanism was "illusory" and that the lack of internal processes meant that "the Minister of Health has no real and meaningful way of considering his application."[250] This judgement led to the implementation of internal structures and procedures designed to allow Section 56 to actually function for individual petitioners. The issue of medical marijuana quickly outgrew the project, however, when another Court of Appeals judge in a subsequent case, *Regina v. Parker (2000)*,[251] found

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[246] *Id.*, at 173.
[247] Letter from Johanne Beaulieu, Director, Office of Controlled Substances, to Dr. Gabor Maté (Nov. 4, 2012), https://www.bialabate.net/wp-content/uploads/2008/08/Letter_Health_Canada_Gabor_Mate_1.pdf (page 1) & https://www.bialabate.net/wp-content/uploads/2008/08/Letter_Health_Canada_Letter_Gabor_2.pdf (page 2) (Can.).
[248] Tupper, *Dissertation*, *supra* note 224, at 163.
[249] Wakeford v. Canada [1998] O.J. No. 3522 (Can. Ont.); *See also* Tupper, *Dissertation*, *supra* note 224, at 164.
[250] Wakeford v. The Queen [1999] O.J. No. 1574 (Can. Ont.).
[251] Regina v. Parker [2000] OJ No. 2787 (Can. Ont.).

CDSA prohibition of possession and cultivation of medical marijuana to be unconstitutional. The judge in that case ruled that forcing the claimant to choose between imprisonment and the medicine he needed violated his right to liberty and security of the person. The remedy was to invalidate the relevant portions of the CDSA and send the issue back to Parliament where new statutory provision could be made to properly accommodate marijuana's medicinal uses. Moreover, the judge's opinion was that requiring use of Section 56 was "inconsistent with the principles of fundamental justice" because of the "unfettered" nature of the Minister of Health's absolute decision-making power.[252] He reasoned that:

> [Section 56] reposes in the Minister an absolute discretion based on the Minister's opinion whether an exception is "necessary for a medical … purpose", a phrase that is not defined in the Act. The Interim Guidance Document issued by Health Canada to provide guidance for an application for a s. 56 exemption sets out factors that the Minister "may" consider in deciding whether an exemption is necessary for a medical purpose. This document does not have the force of law and, in any event, merely sets out examples of factors the Minister may consider. It does not purport to exhaustively define the circumstances [. . .] The document also suggests that the power under s. 56 is only to be exercised in "exceptional circumstances", a qualification not found in the statute itself. Even if the Minister were of the opinion that the applicant had met the medical necessity requirement, the legislation does not require the Minister to give an exemption. The section only states that the Minister "may" give an exemption.[253]

The parallels between the Parker case and the Céu do Montreal petition, filed only a year later, are striking. The appeal judge's carefully researched and scathing criticisms of Section 56 bureaucracy anticipated the total lack of transparency that the church would face over the course of its long and confusing struggle to have its rights recognized. It also sheds light on the government's preoccupation with a potential constitutional challenge as evidenced by the Issue Analysis Summary, which makes even more sense in the wake of the *Regina v. Parker* challenge which effectively both dismantled sections of the CDSA and bypassed Health Canada's decision-making authority. In the instance of medical marijuana, the medical function system was able to assert itself by presenting what the judge deemed a "great deal" of scientific, and other "evidence

[252] *Id.*, at ¶ 10.
[253] *Id.*, at ¶¶ 178, 179.

[that] demonstrated the therapeutic value of marijuana for treating a number of very serious conditions,"[254] even in spite of a strong fight by the government to keep marijuana prohibition intact. The position of the government, of course, was not simply ideological but also practical in nature, its principal interest being the consolidation of power over an arena in which not only the medical system showed interest, but also the economic and legal systems. This was not a misguided concern, for indeed in less than two decades marijuana would become completely legalized in Canada and available for sale on the open market for both medical and recreational use.

In the case of marijuana, the transconstitutional dialogue has been particularly pronounced in Canada and much more could be examined along these lines, but in the case of ayahuasca the tolerant reaction shown by policymakers seems to have been largely precautionary. As long as the Health Minister continues to keep the ayahuasca religions at bay with Section 56, decision-making remains reversible and at the "unfettered" discretion of the Ministry, and well out of the judicial or public domain. On the one hand, a critical examination of the complex mechanisms, motivations, and commitments underlying government action in the Céu do Montreal process highlights the precarious nature of the exemption granted, but the fact remains that the ayahuasca churches in Canada have set an important and ground-breaking administrative precedent by legalizing a controlled substance for religious use.

5.2 UNITED STATES

DMT is controlled by Schedule I of the Controlled Substances Act (CSA). In contrast to the lack of transparency surrounding the administrative Canadian legal process that resulted in exemptions being granted for religious ayahuasca use, the US process was completely transparent by virtue of its judicial nature. The most significant of the U.S. cases was *Gonzales v. O Centro Espírita Beneficiente Uniao do Vegetal (2006)*,[255] which was heard by the Supreme Court and resulted in the creation of important legal precedents. The most significant of these was that the ruling that exemptions can be made to the CSA pursuant to the free exercise protections afforded by the Religious Freedoms Restoration Act (RFRA). This is a major

[254] *Id.*, at ¶ 5.
[255] Gonzales v. O Centro Espírita Beneficiente Uniao do Vegetal, 546 U.S. 418 (2006) (U.S.).

development which opens the door to future cases involving controlled substances, and which since prompted the US Drug Enforcement Agency (DEA) to proactively start inviting petitions for religious exemption to the CSA. The most crucial points decided in favor of the UDV were that its religious practice is sincere, protected by the RFRA, and analogous to the Native American use of Peyote to the extent that it deserves to be equally protected. The holding itself was actually extremely narrow, having granted only a preliminary injunction to the church to safeguard its right to continue religious practice until the final outcome of a complaint filed in court against the DEA. The UDV's complaint sought to permanently prevent the government from prohibiting the importation, distribution, and ritual use of the church's sacramental ayahuasca.[256] The case was ultimately never decided on its merits because a preliminary injunction is granted only where there is deemed to be "a substantial likelihood of success on the merits of the case,"[257] and so the long and escalated contest over the preliminary injunction effectively finalized the issue to the satisfaction of the parties. The impact of *Gonzales* is limited to federal law, which means that individual states remain free to control substances according to their state laws, and as of this writing only a minority of states has as yet enacted a RFRA equivalent.

Following the success of the UDV in its 2006 Supreme Court triumph, 2009 saw a Santo Daime sect in Oregon called the Church of the Holy Light of the Queen (CHLQ) (belonging to the CEFLURIS umbrella organization) decide to follow in the UDV's footsteps with its own federal litigation. A shipment of this church's tea had been seized by customs in 1999, and subsequent attempts to secure an exemption directly from the DEA had met with failure.[258] The church was, however, successful in petitioning the Oregon Board of Pharmacy in 2000, which determined that "CHLQ's religious use of Daime tea was a 'non-drug' use and therefore not subject to state drug laws and regulations."[259] In the wake of *Gonzales*, the District Federal Court made short work of granting a permanent federal injunction against the DEA from interfering with the church's ritual use, importation, and distribution of ayahuasca on virtually the same

[256] The UDV calls its sacrament Hoasca just as the Santo Daime sects use the term Daime, but the names refer to the same drink.
[257] Kikumura v. Hurley, 242 F.3d 950, 955 (10th Cir.2001) (U.S.).
[258] *See* Tupper, *Dissertation*, *supra* note 224, at 178; Roy Haber, *The Santo Daime Road to Seeking Religious Freedom in the USA*, *in* THE INTERNATIONALIZATION OF AYAHUASCA 301 (Beatriz C. Labate & Henrik Jungaberle eds., 2011).
[259] Church of the Holy Light of the Queen v. Mukasey, 615 F.Supp.2d 1210 (2009).

grounds upheld by the Supreme Court.[260] The Santo Daime church has reportedly since being granted exemptions by the DEA in Los Angeles and Washington.[261] It is presumably no coincidence that the DEA implemented its in-house exemptions procedures at around the time of the 2009 Santo Daime ruling, probably anticipating a deluge of wasteful litigation as each individual religious organization would have to litigate for a judicial injunction against government interference.

The Brazilian ayahuasca churches appear to have made very significant inroads toward the right to use ayahuasca in the United States, but ritual use outside of these structured and well-established religious contexts remains highly controversial. There has been at least one instance of a well-respected indigenous shaman being arrested for importation and possession of ayahuasca, but in that case charges were dropped after an outpouring of public support and aid from the lead attorney from the *Gonzales* case.[262] As in Brazil, the legal framework put in place to accommodate formal religious use puts traditional Native American users — 'shamans' — at a disadvantage because their uses cannot be so easily categorized as religious in the Judeo-Christian sense. It is also perhaps impossible to differentiate traditional indigenous uses from itinerant ayahuasca use by non-Native American shamans, healers, and therapists — the 'neo-ayahuasceros.' There has been at least one arrest in Florida against an average citizen for importation and possession of ayahuasca, which resulted in a sentence of 100 hours of community service (a very lenient sentence considering that an offense in this category could have carried a penalty of imprisonment up to 6 months and a $10,000 fine).[263] Various types of organizations are appearing in the US offering ayahuasca retreats, healings, spiritual rituals, etc, some of which have been shown to be of dubious reputation.[264] It appears inevitable that a red line will eventually have to be drawn by US authorities by way of enforcement of serious penalties in order to protect public health and safety from charlatanism and unsafe practices. As

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[260] *Id.*
[261] Ayahuasca Defense Fund, *supra* note 23.
[262] *Id.*
[263] USA v. Gustavo Alberto Vargas, No. 8:18-cr-296-T-35AAS (D. Fla, Oct. 2, 2018) (U.S.).
[264] Regarding the case of the Oklevueha Native American Church (ONAC), aka the New Haven Native American Church, see J. Hamilton Hudson, *Don't believe the hype about the "Legal Ayahuasca USA Church" going around Facebook—it's not legal, it's dangerous, and here's why*, BIA LABATE BLOG (Dec. 7, 2015), https://www.bialabate.net/news/dont-believe-the-hype-about-the-legal-ayahuasca-usa-church-going-around-facebook-its-not-legal-its-dangerous-and-heres-why ; and Gayle Highpine, *The "Legality" of Ayahuasca Churches Under the Oklevueha Native American Church*, BIA LABATE BLOG (Dec. 15, 2015), https://www.bialabate.net/news/the-legality-of-ayahuasca-churches-under-the-oklevueha-native-american-church

in other countries, the question that remains is how to separate the 'sincere' practitioners from the fraudulent and predatory ones.

5.2.1 Peyote and the Religious Freedoms Restoration Act

The landmark *Gonzales* case is hugely important in its own right, but also the latest chapter in an ongoing saga in US legal history over the link between controlled substances and religion. To understand the full significance of *Gonzales*, it is necessary to cover a little background on the legal history of peyote and to briefly examine a jolting US Supreme Court case that opted for the denial of protection for the ritual use of peyote by Native Americans over the preservation of a vigorous "strict scrutiny" standard of judicial review to safeguard the Free Exercise Clause of the First Amendment of the US Constitution.

Ritual use of peyote is at least centuries old, but has been an important feature of Native American religious life in the United States since the late 19th century when it grew into a kind of mass post-apocalyptic syncretic religious movement, uniting tattered groups of those natives who had survived the first stages of colonization. The largest present-day organization claiming peyote as a sacrament is the Native American Church (NAC), founded in 1918 in Oklahoma, which by some estimates claims at least 300,000 members.[265] Attempts to wipe out peyote use came in starts and stops over the years, but by the time the CSA appeared in the 1970's, a special exemption was in place to secure the "nondrug use of peyote in bona fide religious ceremonies of the Native American Church."[266]

This changed, however, in 1990 when a Native American man in Oregon was fired from his job for peyote use and later deemed ineligible for unemployment benefits because the firing was considered to be on the basis of "misconduct." He subsequently sued the government (*Employment Division v. Smith*).[267] The case reached the Supreme Court, which decided to fundamentally alter the judicial test used to determine whether a law unconstitutionally burdened an individual's right to the free exercise of religion. Previously, constitutional law had demanded the *Sherbert Test*[268], which applied a "strict scrutiny" standard of review to laws which

[265] Church of the Holy Light of the Queen v. Mukasey, 615 F.Supp.2d 1210, 1221 (2009) (U.S.).
[266] Feeney, *Legal Basis for Religious Peyote Use, supra* note 40 at 235.
[267] Employment Div. v. Smith, 494 U.S. 872 (1990) (U.S.).
[268] Sherbert v. Verner, 374 U.S. 398 (1963) (U.S.).

substantially burdened the free exercise of religion, requiring the government to prove that: (1) there is a compelling state interest in doing so; (2) that the law is "narrowly tailored" to address the compelling interest. In *Employment Division*, the Supreme Court decided that the *Sherbert Test* would no longer apply to generally applicable laws and would be used only for laws that directly target the free exercise of religion. The standard for acceptable interference therefore became one based on neutrality, dictating that as long as a law burdens everyone equally then the burdening of religion is permissible. This significant loosening of freedom of religion protections caused widespread and tenacious uproar among religious groups all across the US,[269] and Congress was compelled to intervene by passing the Religious Freedoms Restoration Act in 1993. This statute's purpose was eponymous; it restored religious freedoms by effectively elevating the lost *Sherbert Test* of constitutional case law to the level of legislation. The "narrowly tailored" requirement was altered in wording to a "least restrictive means" test, but the test remained the same and ensured religious groups the protection from government interference that the Constitution no longer provided in the wake of *Employment Division*. The RFRA was significantly weakened in 1997 when a Supreme Court ruling found it not to extend to the separate states on federalism and separation of power grounds,[270] but as of this writing 21 states have passed their own equivalents, and many more have proposals in the legislature.

Judicial opinions in *Employment Division* suggested that the religious use of peyote may not have passed the *Sherbert Test* even if the test had been retained, which spurred peyote lobbyists to seek a separate statutory federal exemption for native peyote users. A 1994 amendment to the American Indian Religious Freedom Act openly recognized that "the traditional ceremonial use of the peyote cactus as a religious sacrament has for centuries been integral to a way of life, and significant in perpetuating Indian tribes and cultures."[271] The exemption does not extend to non-native users and courts have been clear that non-native uses contravene the CSA; however, the non-native use restriction may yet be successfully challenged in light of the precedent set by the UDV case, which established that the mere existence of CSA prohibitions does not constitute a sufficiently compelling interest for government interfere with

[269] Feeney, *Legal Basis for Religious Peyote Use, supra* note 40 at 236.
[270] *Id.* at 247.
[271] American Indian Religious Freedom Act of 1978, 42 U.S.C. ch. 1, subch.1 § 1996a (2018) (U.S.).

the use of a controlled substance as part of a sincere religious practice, regardless of race.[272] As a final note, it is fitting that the UDV won the freedom to use ayahuasca free from the interference of the federal government by way of a religious freedom statute that arose from a dispute over the ritual use of peyote, a plant which contains another Schedule I hallucinogen. These debates, as esoteric as they are in many ways, have been significant in shaping the course of US constitutional law as it applies to all religions.

5.2.2 Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal

The United States chapter of the UDV was officially established in 1994, with the first ceremony being carried out some years earlier in 1987. The church carried on normally with its services during its nascent years, importing ayahuasca from the central church in Brazil, until 1999 when US Customs seized a shipment of the drink.[273] The ayahuasca was tested and found to contain DMT, at which time the UDV mobilized to meet with the DEA alongside a large number of distinguished experts in order to seek an amiable resolution with the agency.[274] These efforts did not placate the DEA, and a six month Grand Jury Investigation was initiated to build a criminal case against the church for the importation of contraband. It was at this point that the church chose to preemptively enter into litigation to prevent prosecution, and its preliminary injunction to enjoin the prevention of its continued religious practice during the proceedings turned out to be the spark which set the main body of the legal battle into motion.

One of the most significant points of the *Gonzales* case is that the government never disputed that the UDV practice of ingesting ayahuasca was a "sincere exercise of religion" — the threshold that must be met for the RFRA to apply — and thus did not dispute that the government would carry the burden of proof as the strict scrutiny standard of the statute demands. As the District Court judge explained in detail in his decision, this is the key point differentiating this case from other notable instances in which individuals or groups sought relief

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[272] *See* Kevin Feeney, *Peyote, Race, and Equal Protection in the United States*, *in* PROHIBITION, RELIGIOUS FREEDOM, AND HUMAN RIGHTS: REGULATING TRADITIONAL DRUG USE 65 (Beatriz C. Labate & Clancy Canvar eds., 2014); *see also* Feeney, *Legal Basis for Religious Peyote Use, supra* note 40.

[273] Jeffrey Bronfman, *The Legal Case of the União do Vegetal vs. the Government of the United States*, *in* THE INTERNATIONALIZATION OF AYAHUASCA 287, 287 (Beatriz C. Labate & Henrik Jungaberle eds., 2011).

[274] *Id.*

under the RFRA,[275] such as in *United States v. Meyers* (1996)[276] and *United States v. Bauer* (1996)[277], both of which happened to be marijuana cases. In *Meyers* the court found the complainant's beliefs to be ideological rather than religious, and in *Bauer* the court found that the majority of criminal charges in that case did not directly burden activities related to Rastafarianism. Ayahuasca was met with a very different reception, with the sincerity of the religious practice not being challenged even by the DEA, who was certainly not pulling punches and whose persistence in barring the preliminary injunction would reach the level of decidedly mean-spirited towards the end of the appeals process.[278] The UDV looks exactly like a religion as a Christian would expect one to look, with its long-standing history, highly organized bureaucracy, church ceremonies, and theological foundations in Christian Scripture. Considering also that many distinguished scientists and experts on religion advocated on the church's behalf, it is no surprise that the UDV met the "sincere" threshold set out by the statute; and because ayahuasca is literally the church's holy sacrament, much like the communion wafer and wine is for many Christians, the "burden to free exercise" hurdle was also easily met.

In addition to its reliance on the RFRA, the UDV also relied on several other interesting arguments: such as that the CSA is not a generally applicable law and therefore should not escape the *Sherbert Test*, that the CSA does not extend to ayahuasca because the substance is not specifically listed, and that exemption under the legal principle of comity would "not only show comity to, and enhance our relations with [Brazil], but will also demonstrate our government's willingness to give appropriate respect to a multi-cultural international community generally."[279] These other arguments were carefully considered by the judge but rejected. It is significant that the comity argument seems very much like an invitation to a transconstitutional exchange in the spirit of that envisioned by Marcelo Neves. The government, for its part, filed a list of compelling interests to satisfy its obligations under the RFRA: (1) Health risks to members of the UDV; (2) Potential for diversion to non-religious use; and (3) Appeal to the importance of adhering to the 1971 Convention on Psychotropic Substances. The District court found that the evidence of the parties on the health risks to members to be in "equipoise,"[280] and the evidence

[275] O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft, 282 F.Supp.2d 1236, 1252 (2002) (U.S.).
[276] United States v. Meyers, 95 F.3d 1475 (10th Cir.1996) (U.S.).
[277] United States v. Bauer, 84 F.3d 1549 (9th Cir.1996) (U.S.).
[278] *See* Bronfman, *supra* note 273.
[279] O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft, 282 F.Supp.2d 1236, 1251 (2002) (U.S.).
[280] *Id.*, at 1262.

on the risk of diversion to be "virtually balanced."[281] The issue of adherence to the 1971 Convention was dismissed as uncompelling on the basis that the judge considered the Convention not to apply to ayahuasca. With all three compelling interests either in balance or dismissed, the court had no reason to proceed to the "least restrictive means" part of the statutory test; therefore, upon finding that the UDV held a substantial likelihood of succeeding on the merits of the case, it issued the preliminary injunction.

The preliminary injunction issued by the District Court never went into effect because the government immediately appealed to the 10th Circuit Court of Appeals, requesting and receiving an emergency stay on the injunction until the Appeals Court had the opportunity to review the case in its entirety.[282] The appeals court ultimately upheld the granting of the injunction,[283] and the government in turn demanded a rehearing to review certain legal technicalities after which the Court of Appeals once again upheld the injunction.[284] Clearly unsatisfied, the government immediately appealed to the Supreme Court, claiming:

> The preliminary injunction fundamentally alters a legal status quo that has been in existence for decades. And the harm that will befall international efforts to combat drug trafficking, domestic efforts to prevent the creation of new delivery systems and markets for the most dangerous controlled substances, and the physical health and safety of individuals who use the DMT-laden hoasca with its severe and dangerous side effects will be immediate and irreparable.[285]

The government presented a new compelling interest to the Supreme Court: that the CSA does not allow for judicial exemptions and must be followed to the letter. The court flatly rejected this claim, largely by pointing out that the peyote exemption has been in place since the very birth of the CSA and that this has never impeded the statute's proper operation nor resulted in harm to society or practitioners.[286] Accordingly, the Supreme Court upheld the preliminary injunction, deeming there to be a substantial likelihood of success on the merits, and remanded the case back to the District Court for trial. The Court did, however, modify one of the holdings

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[281] *Id.*, at 1266.
[282] O Centro Espirita Beneficiente Uniao De Vegetal v. Ashcroft, 314 F.3d 463 (2002) (U.S.).
[283] O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft, 342 F.3d 1170 (2003) (U.S.).
[284] O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft, 389 F.3d 973 (2004) (en banc review) (U.S.).
[285] Emergency application to the United States Supreme Court for a temporary stay pending filing petition for a Writ of Certiorari (Dec. 2004) (U.S.), *cited in* Bronfman, *supra* note 273, at 296.
[286] Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 419-23 (2006) (U.S.)

of the lower courts: it ruled that the 1971 Convention *does* apply to ayahuasca as a "preparation" under the wording of the treaty, even if the INCB itself does not consider this to be the case. Even so, the court did not consider international treaty obligations to be a compelling interest with regard to the operation of the CSA. After the Supreme Court reached its decision, the DEA agreed to enter into negotiations over the nitty-gritty details of exemption.[287] The most significant implication of the ruling is that federal government action pursuant to the CSA is subject to the RFRA, a legal development so far-reaching that the DEA established in 2009 its own internal system for receiving petitions and granting exemptions based on the basic legal formula established by the case.[288] States, however, are not restrained by the RFRA and remain free to control substances as they see fit unless they have passed their own RFRA equivalent.

A final point to mention with regard to the UDV strategy in this case is its strong collaboration from the very beginning with religious groups across the spectrum: including the Catholic Bishops of the United States, the American Jewish Congress, the National Association of Evangelicals, the Presbyterian Church of North America, the Baptist Joint Committee, and many others. These groups submitted amici curiae briefs to both the Court of Appeals and the Supreme Court, and the Court of Appeals even emphasized in its 2004 decision that: "The presence of these very groups as advocates for the UDV further highlights the vital public interest in protecting a citizen's free exercise of religion."[289] The UDV church leader in the US and also the man overseeing the litigation, Jeffrey Bronfman, points out that 4 out of the 9 Supreme Court Justices hearing the case were active Catholics, and thus the brief from the Catholic Bishops of the United States must have held great weight.[290] The Catholic Bishops brief read in part: "The interference with UDV goes to the core of its religious practices for its faithful. These intrusions must be subjected to the most rigorous scrutiny if religious autonomy is to continue to have vigor."[291] The importance of the mainstream support garnered by the UDV cannot be overstated. It conveyed mainstream legitimacy both to the church and to the use of

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[287] Richard Glen Boire, *RGB on UDV vs USA: Notes on the Hoasca Supreme Court Decision*, 16 MULTIDISIPLINARY ASS'N FOR PSYCHEDELIC STUD. 19, 20 (2006).
[288] Guidance Regarding Petitions for Religious Exemption from the Controlled Substances Act Pursuant to the Religious Freedom Restoration Act, DRUG ENFORCEMENT AGENCY, https://www.deadiversion.usdoj.gov/pubs/rfra_exempt_022618.pdf (last updated Feb. 26, 2018) (U.S.).
[289] O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft, 389 F.3d 973, 1010 n.6 (2004) (U.S.).
[290] Bronfman, *supra* note 273, at 289.
[291] Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal, 2005 WL 2211654, 18 (2005), *quoted by* Bronfman, *supra* note 273, at 298.

ayahuasca itself. The amici curiae groups were stakeholders in *Gonzales* in addition to being advocates, since the last major Supreme Court decision involving religious use of a controlled substance — *Employment Division* — had effectively eviscerated constitutional free exercise protections. All eyes were on the *Gonzales* case because its outcome would prove to what extent the RFRA had replaced them.

5.2.3 Marijuana Cases

It is worth returning to the marijuana cases for a moment, touched on briefly above, just to put them in perspective vis-à-vis ayahuasca and the RFRA statute. The UDV's District Court Judge pointed out that even before *Employment Division*, all courts have found marijuana use to be incompatible with the Free Exercise Clause — even under the *Sherbert Test* — largely on account of risk to public health and safety and the high likelihood of diversion of the substance to the public.[292] For example, an appeals judge on the Eighth Circuit denied a criminal defendant's request to rely on the RFRA in a marijuana case with the simple rationalization: "the government has a compelling state interest in controlling marijuana."[293] In 2008, the DEA responded to a request for CSA exemption for marijuana from an organization called the Church of Reality, issuing an intricately detailed 33 page decision which reads much like a judicial opinion.[294] Drawing on the precedent set by *Gonzales*, the government denied the request on the grounds that: (1) the prohibition of marijuana did not significantly burden a sincere exercise of religion, and (2) prohibition is the least restrictive means to address the compelling government interest in denying the exemption. On the exercise of religion point, the agency cited a Third Circuit Court of Appeals decision[295] in developing its own three-pronged test for identifying a religion:

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[292] Leary v. United States, 383 F.2d 851, 860–61 (5th Cir.1967) (U.S.); United States v. Brown, 72 F.3d 134 (8th Cir.1995) (U.S.); United States v. Greene, 892 F.2d 453, 456–57 (6th Cir.1989) (U.S.); United States v. Middleton, 690 F.2d 820, 825 (11th Cir.1982) (U.S.).

[293] O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft, 282 F.Supp.2d 1236, 1254 (2002) (U.S.).

[294] Letter from Joseph T. Rannazzisi, Deputy Assistant Administrator, Office of Diversion Control of the DEA, to Marc Perkel, The Church of Reality (Oct. 1, 2008), https://www.bialabate.net/wp-content/uploads/2008/08/DEA_Rejection_Church_of_Reality.pdf (U.S.).

[295] *See* Africa v. Commonwealth of Pensylvania, 662 F.2d at 1032 (U.S.) (outlining three "useful indicia" of religion).

> (1) whether the beliefs involve fundamental and ultimate questions about life, purpose and death that address a reality beyond the physical and apparent world; (2) whether the beliefs represent a comprehensive moral or ethical system; and (3) whether the belief system includes certain structural and external signs characteristic of religions generally.[296]

Like all other US case law attempts to cast marijuana use as religious, the Church of Reality failed to meet its burden under the agency's test. Marijuana is a substance already so widely used for recreational purposes, and in such massive quantities, that perhaps it holds a special place among the hallucinogenic substances controlled by the CSA and should be expected to receive especially skeptical treatment by the courts even where religious use is concerned. However, it is important to note that the largest Santo Daime sect, and indeed the same one represented by the Canadian church in the process described above, at one time in its history included marijuana in its services as a holy sacrament alongside ayahuasca. While this has since changed and the CEFLUIS sect no longer officially incorporates marijuana into its religious rituals (in large part to avoid running afoul of Brazilian authorities and the other major churches such as the UDV which strongly disapprove of marijuana use), it is still used by many branches on an informal basis.[297] In Brazil, the combination of marijuana with ayahuasca tarnished the credibility of the ayahuasca churches in the eyes of both the public and the state during their long domestic campaign towards religious legitimacy, which is precisely why churches like the UDV pressured CELFLURIS to stop using it. Still, the fact remains that a major Brazilian ayahuasca church whose religious sincerity matches that of the UDV once used marijuana as part of its religious practice, which leads us to wonder whether a US court applying the RFRA to an established ayahuasca religion petitioning for the right to use marijuana would still give it a pass on the sincerity test. It is merely a thinking point, but the scenario raises important questions about cultural bias on both the accepting and rejecting ends of the spectrum where questions of religious legitimacy are concerned. Indeed, in the same vein, the fact that as of this writing 11 states and the District of Columbia have in the past few years completely legalized recreational marijuana use prompts us to question how compelling the government interests really were in the US run of marijuana cases. It appears that government interests have

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[296] Letter from Joseph T. Rannazzisi, *supra* note 294, at 7.
[297] Edward McRae, *The Religious Uses of Licit and Illicit Psychoactive Substances in a Branch of the Santo Daime Religion*, 2 FIELDWORK IN RELIGION 393, 411-13 (2006).

shifted as transnational function systems such as economy, medicine, and education have cleared the way for the emergence of new compelling norms, both cultural and legal.

Chapter 6 – Europe and Other Countries

Europe presents a diversity of national approaches to controlling ayahuasca, with many gray areas still to be colored-in. For other countries in Asia, Africa, and beyond there is almost no data available, and the only prominent cases are from Russia and Israel. In Europe, domestic laws are subject to an important supra-constitutional instrument called the European Convention on Human Rights (ECHR). The Convention adds an important intermediary step between national and international lawmaking, and represents the collective will of the 47 member states of the Council of Europe in protecting basic human rights. Matters of national drug policy and even of national constitutional law must conform to the articles of the convention (in addition to EU regulations), though implementation itself is carried out by the domestic constitutional practices of individual states.[298] The ECHR's freedom of religion protections are the bedrock on which claims for exemption from national drug laws have been hereunto founded in European ayahuasca cases. Article 9 of the Convention reads:

> 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.[299]

While virtually all European constitutional cases have incorporated an appeal to Art. 9 protections, only in the Netherlands was such an appeal met with support from the courts. But even in the Netherlands courts have been split on the issue, and in 2019 the Supreme Court ruled in a case involving Santo Daime worshipers that limitations on even the sincere religious use of ayahuasca were necessary in the interest of public health and safety.[300] In an earlier Dutch

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[298] Küfner et al., *The Santo Daime Church – The Protection of Freedom of Religion Under International Law*, AMSTERDAM INTERNATIONAL LAW CLINIC (Mar., 2007) (discussing freedom of religion from an international law perspective with a particular emphasis on how it might impact religious ayahuasca use).
[299] Convention for the Protection of Human Rights and Fundamental Freedoms, art. 9 (Nov. 4, 1950).
[300] HR 1 oktober 2019, NJ 2019, 418 m.nt BEP Myjer (18/01356) (Neth.).

ayahuasca case that reached the Supreme Court, a religious defendant appealed an unfavorable decision to the European Court of Human Rights (ECtHR).[301] The ECHR is enforced by the ECtHR, and any individual or state may petition to have their case heard by the court. In that instance, the court declined to hear the complaints, recognizing the sincerity of the religious practice involved but reasoning that European courts are well within their rights to determine that health risks outweigh the right to religious freedom.[302] That 2014 ECtHR decision has since empowered various countries to make similar determinations without fear of running afoul the ECHR, and in light of a 2012 International Narcotics Control Board (INCB) UN report associating ayahuasca with "various serious health risks (both physical and psychological) and even with death,"[303] it has not been difficult for them to do so. The hard science has not yet caught up with the claims of this controversial INCB report, which does not cite sources,[304] and the ongoing lack of real evidence to support such serious detractory claims explains why so many gray areas still exist in Europe, and also why constitutional challenges and administrative processes have met with favorable outcomes in the Americas.

The situation as it stands, therefore, is that any legal order in Europe under the jurisdiction of the ECtHR that wishes to criminalize ayahuasca on public health grounds can easily do so, regardless of how great the threat to health may actually be. Supreme Courts in Belgium, and Denmark have gone this route in specific cases. The Supreme Court of the Netherlands has gone one step further and issued a specifically blanket prohibition, as have policy-makers in France and the UK through administrative means. Spanish and Italian courts appear to have reached a consensus that ayahuasca is not currently subject to their drug laws: in the case of Italy this determination was reached by the Supreme Court specifically on the basis that there was not enough evidence to prove a public health risk. Countries such as Germany, Portugal, Finland, and Austria are still grey areas, with varying amounts of police activity but no decisive policy action as yet. Switzerland is the only country to have embraced ayahuasca as legally permissible under certain circumstances. Penalties resulting from conviction in Europe

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[301] Fränklin-Beentjes and CEFLU-Luz da Floresta against the Netherland, Eur. Ct. H.R. Application no. 28167/07 (May 6, 2014).
[302] *Id.*
[303] Rep. of the Int'l Narcotics Control Bd., U.N Doc. E/INCB/2012/1, 46-47 & ¶332 (2012); *See also* Tupper & Labate, *supra* note 81, at 17, 21.
[304] *Ayahuasca Technical Report 2017*, INTERNATIONAL CENTER FOR ETHNOBOTANICAL EDUCATION, RESEARCH, AND SERVICE (2017).

appear to be relatively minor, consisting almost entirely of suspended sentences, fines, and community service.

On the fringes of Europe and beyond, the legal situation is more foreboding. Israel has seen some arrests and minor convictions,[305] but a defendant in Lithuania was reportedly sentenced to two years in prison for importing ayahuasca.[306] Russian convictions for import and possession of ayahuasca have been draconian, with a Brazilian being sentenced to 6 and one half years in prison in 2016,[307] and one Russian man reportedly sentenced to 11 and one half years in prison in 2018.[308] The Brazilian was returned to Brazil after serving 2 years of a reduced 3-year sentence to serve the remainder at home on probation.[309]

6.1 THE NETHERLANDS

DMT is controlled under List 1 of the Opium Act.[310] The possession, distribution, and import of ayahuasca for religious purposes were recently prohibited in a 2019 Supreme Court ruling.[311] This final decision came after almost 2 decades of disagreement among courts regarding whether limitations on the right to religious ayahuasca use were necessary in light of potential dangers to the public health. Ayahuasca first came before the Dutch Regional Courts in 2001 when a member of the Santo Daime church of the Brazilian CEFLURIS sect was arrested in her home during an official church ceremony.[312] That lower court found that the Santo Daime church is a legitimate religion and that the defendant's convictions were sincerely religious, facts

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[305] Ayahuasca Defense Fund, *supra* note 23.
[306] Jonathan Hobbs, *"Altered by the hand of man": contextualizing ayahuasca law in Britain and Europe*, *in* THE EXPANDING AYAHUASCA WORLD DIASPORA: APPROPRIATION, INTEGRATION, AND LEGISLATION 40, 51 (Beatriz C. Labate & Clancy Cavnar eds., 2018).
[307] J. Hamilton Hudson, *Brazilian Ayahuasca Practitioner Arrested and Sentenced to Prison in Russia*, CHACRUNA INSTITUTE FOR PSYCHEDELIC PLANT MEDICINES (Aug. 1, 2018), https://chacruna.net/brazilian-ayahuasca-practitioner-arrested-and-sentenced-to-prison-in-russia/
[308] *Man sentenced to 11.5 years for bringing bottle of Peruvian Ayahuasca drink to Russia*, PRAVADA.RU, Aug. 22, 2018, https://www.pravdareport.com/news/society/141435-Ayahuasca/
[309] Marcelo Freire, *"Sem traumas", diz terapeuta de vlta ao Brazil após 2 anos preso na Rússia*, UOL NOTÍCIAS, Dec. 13, 2018, https://noticias.uol.com.br/internacional/ultimas-noticias/2018/12/13/sem-traumas-diz-terapeuta-de-volta-ao-brasil-apos-2-anos-preso-na-russia.htm
[310] Wet van 12 mei 1928, tot vaststelling van bepalingen betreffende het opium en andere verdoovende middelen (Opiumwet) [Act of May 12, 1928, Containing Regulations Concerning Opium and Other Narcotic Substances (Opium Act)], STAATSBLAD VAN HET KONINKRIJK DER NEDERLANDEN [STB.] [OFFICIAL GAZETTE OF THE KINGDOM OF THE NETHERLANDS], May 12, 1928, No. 167. (Neth.).
[311] HR 1 oktober 2019, NJ 2019, 418 m.nt BEP Myjer (18/01356) (Neth.).
[312] Rechtbank Amsterdam 21 mei 2001, AB 2001, 342 (13/067455-99) (Neth.).

which conferred freedom of religion protections under Article 9 of the ECHR. Even though the precedential value of this decision was limited by the low stature of the delivering court, it was the first judicial opinion of its kind in Europe and signaled that the famously liberal drug control policy of the Netherlands would tolerate ritual ayahuasca use. It also marked the first time in the Netherlands that drug legislation had given way to higher constitutional rights,[313] and informally put the country on the map as a safe haven in Europe for not only the Brazilian ayahuasca churches but also shamanic *vegetalismo*, therapeutic practitioners, and other neo-ayahuasceros of all descriptions. Such nonreligious uses were cited prominently, however, in the unfavorable 2019 Supreme Court decision discussed above (and in the 2018 Appeals court decision leading up to it[314]), which emphasized that the burgeoning incidence of non-ritual use and the insufficient mechanisms in place to protect against diversion and health risks were partly what justified burdening a sincere religious practice.[315]

Just a year prior to the favorable 2001 decision in a Reginal Court, another Regional Court had in 2000 come to the opposite conclusion in a case involving the same set of facts: the police searched the home of a Santo Daime practitioner and found a quantity of ayahuasca which tested positive for containing DMT. The defendant in that case was found guilty of possession of a controlled substance.[316] An appeal languished for five years before the Court of Appeal dismissed all criminal charges in 2005, finding the process to have taken an unreasonable time.[317] The defendant refused to allow the case to be discarded without review of the merits of the freedom of religion argument and once again petitioned the Court of Appeal, this time demanding that the confiscated ayahuasca be returned.[318] The Court of Appeal dismissed this subsequent position on the grounds that the petitioner had admitted that she could practice her religion without the use of ayahuasca (a statement that she claimed was unfairly taken out of context), and thus even a slight health risk was enough to justify rejecting the Article 9 freedom of religion claim. The decision was appealed to the Supreme Court in 2007, which upheld the

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[313] Adèle van den Plas, *Ayahuasca under International Law: The Santo Daime Churches in the Netherlands*, *in* THE INTERNATIONALIZATION OF AYAHUASCA 327, 331 (Beatriz C. Labate & Henril Jungaberle eds., 2011).
[314] Hof Amsterdam 28 feb. 2018 (23-003371-16) (Neth.).
[315] HR 1 oktober 2019, NJ 2019, 418 m.nt BEP Myjer (18/01356) (Neth.).
[316] Fränklin-Beentjes and CEFLU-Luz da Floresta against the Netherland, Eur. Ct. H.R. Application no. 28167/07, ¶ 9 (May 6, 2014).
[317] *Id.*, at ¶ 11.
[318] HR 9 januari 2007, AB 2007, 181 m.nt. BP Vermeulen en L.C. Groen (00810/06) (Neth.); *See* Fränklin-Beentjes and CEFLU-Luz da Florests against the Netherland, Eur. Ct. H.R. Application no. 28167/07, ¶ 12 (May 6, 2014).

decision of the Court of Appeal while admitting that it was powerless to conduct further fact-finding to verify the veracity of whether ayahuasca was essential to the petitioner's religion or not.[319] Both the initial dismissal of the criminal case by the Court of Appeal and the dismissal of the subsequent petition to have the sacrament returned have the air of bad faith dealings on the part of the court. The strategy was likely to escape an examination of the key constitutional question at hand: whether freedom of religion protections under Article 9 of the ECHR outweighed the potential health and safety risks posed by ayahuasca use. By characterizing the case as one in which a sincere exercise of religion was not truly burdened, the court were able to skirt the issue. It was at this point that the defendant appealed to the ECtHR.

The question of religious use still remained pending, therefore, in the Netherlands as of 2007. As the process of petitioning the European Court wound its course, a new 2009 Regional Court case in the Netherlands sided with the favorable 2001 case. A quantity of ayahuasca was seized in the airport on its way from Brazil to a local Santo Daime denomination,[320] and the Regional Court decided that a legitimate religious practice was being burdened by the operation of the Opium Act. The court was of the opinion that "virtually no risks to public health were involved in the consumption of the brew in the setting of the church services,"[321] and thus freedom of religion protections should prevail. It observed that the previous Supreme Court decision of 2007 did not apply because in that case it was found that the use of ayahuasca did not constitute an essential part of the defendant's religion, whereas in the present case it was found to be essential. The government prosecutor appealed the decision, and in 2012 the Court of Appeals confirmed that the Brazilian Santo Daime church is a legitimate religion whose holy sacrament is ayahuasca and whose religious practice should not be burdened by the Opium Act.[322] It based its decision on close examination of the merits of the case and specific circumstances, whereas the Supreme Court in 2007 had only conducted a superficial review of the merits and relied on a lower court's fact-finding.[323] In this case, the Court of Appeals sided with the lower court in its decision that potential health risks did not outweigh the importance of upholding the church's religious freedoms.

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[319] HR 9 januari 2007, AB 2007, 181 m.nt. BP Vermeulen en L.C. Groen (00810/06) (Neth.).
[320] Rechtbank Haarlem 26 maart 2009, NJF 2009, 139 (15-800013-09) (Neth.).
[321] Fränklin-Beentjes and CEFLU-Luz da Floresta against the Netherland, Eur. Ct. H.R. Application no. 28167/07, ¶ 33 (May 6, 2014).
[322] Hof Amsterdam 24 februari 2012, NJF 2012, 111 (23-001916-09) (Neth.).
[323] Fränklin-Beentjes and CEFLU-Luz da Florests against the Netherland, Eur. Ct. H.R. Application no. 28167/07, ¶ 24 (May 6, 2014).

For a time it once again appeared as though religious ayahuasca use would be protected in the Netherlands, but in 2015 there was another arrest of a Santo Daime member at an airport bringing ayahuasca from Brazil. The charges were dismissed by a Regional Court in a 2016 case,[324] which followed the 2001, 2009, and 2012 rulings in determining that the right to religious freedom outweighed the minimal health risk posed by use of ayahuasca. The government prosecutor appealed, and in 2018 the Court of Appeal reversed the lower court's ruling and reinstated the criminal charges, though imposing no penalty whatsoever.[325] This appeal is the same case referenced above which in 2019 led to a Supreme Court reaffirmation and the resultant blanket prohibition. As mentioned, the primary concern of the higher courts in this case was the "sharp increase in interest in the use of ayahuasca, especially outside the religious setting,"[326] and there was also concern surrounding the admittance of nonmembers to services as well as a lack of controls and procedures for storage and import of the drink which opened up the question of a risk of diversion. In 2019 there were at least two confirmed deaths as a result of participation in ayahuasca ceremonies in the Netherlands — neither of which appear to be connected to religious use — and a number of arrests have been made though charges appear to still be pending.[327]

6.2 UNITED KINGDOM

DMT is controlled under Class A of the Misuse of Drugs Act 1971,[328] and ayahuasca is controlled under the Psychoactive Substances Act 2016.[329] Raw plant materials are not controlled by the Misuse of Drugs Act (MDA), but the act does have a provision which states that a preparation containing a scheduled substance is also scheduled.[330] In any case, the Psychoactive Substances Act was passed in 2016 to eliminate all loopholes, ambiguities, and omissions surrounding the Misuse of Drugs Act. It instated a blanket prohibition on any

[324] Rechtbank Noord-Holland 9 september 2016, Rechtspraak.nl (15/720119-15) (Neth.).
[325] Hof Amsterdam 28 februari. 2018 (23-003371-16) (Neth.).
[326] *Id.*
[327] Zach Newmark, *Man dies after psychedelic healing ceremony: police*, NLTIMES.NL, Sept. 25, 2019, https://nltimes.nl/2019/09/25/man-dies-psychedelic-healing-ceremony-police
[328] Misuse of Drugs Act 1971, 1971, c. 38 (Eng.).
[329] Psychoactive Substances Act 2016, 2016, c. 2 (Eng.).
[330] Misuse of Drugs Act 1971, 1971, c. 38, Schedule 2, ¶ 5 (Eng.).

substance which "affects the person's mental functioning or emotional state."[331] The main target is so-called "New Psychoactive Substances" (NPS) — new drugs that emerge with such rapidity that traditional legislative process is unable to keep up. Alcohol, nicotine, and caffeine are exempted.

There has been one ayahuasca case in the UK which tested the applicability of ECHR Article 9 protections. In *R v Aziz* (2011), a trial court rejected the Article 9 argument,[332] and the Court of Appeal denied an application for review on the grounds that religion does not constitute an MDA defense."[333] The court followed the reasoning of earlier marijuana case *R. v Taylor* (2001) in which a religious defense was attempted, the result of which was a Court of Appeal decision finding the Article 9 defense to be completely incompatible with the aims of the MDA.[334] Mr. Aziz was not a member of an organized ayahuasca religion but rather an independent therapeutic practitioner. He was sentenced to 15 months imprisonment.[335]

The earlier *R. v Taylor* case established the precedent that English courts should view the threshold for intervention on public health grounds as being dictated primarily by the 'Classes' in which the legislation groups them.[336] In other words, Class A drugs are classified as such because they are the most dangerous drugs with the highest potential for abuse, which means that their prohibition has already been deemed necessary for the good of society (Class B and C drugs are correspondingly less dangerous and associated legal penalties less severe). This kind of circular reasoning — that a compelling government interest in prohibition has already been demonstrated by virtue of it being controlled by legislation in the first place — was one of the arguments put before the US Supreme Court by the prosecutor in *Gonzales*. *Gonzales* was so significant precisely because it refuted this reasoning.

In 2010, seven members of Santo Daime churches were arrested in the UK and the public prosecutor went to unusual lengths in terms of both preparation time and personnel to arrange a

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[331] Psychoactive Substances Act 2016, 2016, c. 2, § 2 (Eng.).
[332] R. v Aziz (2011) Bristol Crown Court, unreported (Eng.).
[333] Aziz [2012] EWCA Crim 1063 (Eng.); *See* Rudi Forston, Case Comment, *R. v Aziz: producing and supplying controlled drugs - Misuse of Drugs Act 1971 s.28 - whether art.9 of the European Convention on Human Rights could read down s.28 so as to provide a defence of religious belief*, CRIM. L. REV. 801 (2012).
[334] *See* R. v Taylor. (2001) EWCA Crim 2263 (Eng.); Taylor [2002] 1 Cr. App. R. 37 (Eng.); *see also* Hobbs, *supra* note 306, at 45.
[335] Hobbs, *supra* note 306, at 45.
[336] *See* Forston, *supra* note 333; *see also* Charlotte Walsh, *Caught in the crossfire: Plant medicines and the Psychoactive Substances Act 2016*, 1 J. OF PSYCHEDELIC STUD. 41 (2017); Charlotte Walsh, *Ayahuasca in the English courts: legal entanglements with the jungle vine*, *in* THE WORLD AYAHUASCA DIASPORA: REINVENTIONS AND CONTROVERSIES, 243 (Beatriz C. Labate et al. eds., 2016).

case, but in 2012, just months before the scheduled trial, the prosecution was suddenly dropped without any explanation.[337] While it seems plausible that there may have been some irregularity in the prosecutor's case which threatened the possibility of conviction, the event echoes the pattern of avoidance displayed in other jurisdictions. The government may have feared a successful constitutional challenge domestically or in the ECtHR which might have threatened the integrity of the drug control regime as it currently stands. The UDV attempted in 2017 to go through administrative law channels to seek permission to import their sacrament into the UK and were denied. The reasoning of that court was: "there is a strong public interest in preventing the consumption of class A drugs on public safety and health grounds, and that there is a paucity of evidence regarding safety and the impact on health of hoasca."[338] This decision suggests that new evidence regarding the safety and impact on health might still serve to open the door to a religious exemption. For the moment, however, ayahuasca is illegal in the UK — be it under the MDA or the Psychoactive Substances Act.

6.3 IRELAND

DMT is controlled under the Misuse of Drugs Acts 1977-2015,[339] and ayahuasca is controlled under the Criminal Justice (Psychoactive Substances) Act 2010.[340] The latter act is similar in effect to the Psychoactive Substances Act 2016 of the United Kingdom, whose purpose is to stay one step ahead of rapidly emerging new drugs by instituting a blanket prohibition. In 2006, the leader of a Brazilian Santo Daime church of the CEFLURIS sect was charged with possession of ayahuasca with intent to supply and was met with a stiff sentence of 5000 Euros and probation. On appeal this was reduced to a fine of merely 300 Euros, and while the judge was clear that it was not his place to decide constitutional freedom of religion matters, he commented that he did not consider the defendant a criminal and did not dispute the religious sincerity of the Santo Daime group.[341] A constitutional challenge was originally put in motion by

[337] Hobbs, *supra* note 306, at 46.
[338] Uniao Do Vegetal v Secretary of State [2017] EWHC 1963 (Admin), ¶ 8 (Eng.).
[339] Misuse of Drugs Act 1977 (Act No. 12/1977) (Ir.); Misuse of Drugs Act 1984 (Act No. 18/1984) (Ir.); Misuse of Drugs (Amendment) Act 2015 (Act No. 6/2016) (Ir.).
[340] Criminal Justice (Psychoactive Substances) Act 2010 (Act No. 22/2010) (Ir.).
[341] Thomas St John O'Dea, *Legal Update on the Santo Daime case in Ireland* (2010), https://www.bialabate.net/wp-content/uploads/2008/08/O_Dea_Legal_Update_Santo_Daime_Case_-Ireland.pdf

the defendant but this never materialized,[342] and therefore a religious use argument has not yet been put before the Irish courts. The Criminal Justice Act 2010 effectively prohibits ayahuasca and its constituent parts.

6.4 FRANCE

DMT is controlled under Annex IV of the list of controlled substances[343] by authority of the Public Health Code[344] which is enforced by the Penal Code.[345] Furthermore, harmine, harmaline, tétrahydroharmine (THH), harmol, and harmalol are controlled under Annex III, which also specifically prohibits the raw plants typically used in the preparation of ayahuasca: Banisteriopsis caapi, Peganum harmala, Psychotria viridis, Diplopterys cabrerana, Mimosa hostilis, and Banisteriopsis rusbyana. The listing of raw plant materials beyond the three required by the 1961 UN Convention (opium, marijuana, and coca leaf) is unusual, and reflects the particularly strong antidrug stance of the French government. France is also well known for its strong anti-cult sentiment which culminated in the controversial About-Picard law of 2001,[346] which conveyed upon the government sweeping powers to penalize both individuals and organizations found guilty of manipulating or brainwashing the vulnerable.

In 1999, six high-ranking members of a Santo Daime church were arrested and eventually convicted in 2004 of the acquisition, importation, possession, sale, and use of ayahuasca.[347] They received suspended sentences of between 4 to 10 months, and then upon appeal the case was dismissed in 2005 on the grounds that ayahuasca is not the same as extracted DMT and therefore

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[342] Gillian Watt, *Santo Daime in a "post-Catholic" Ireland: reflecting and moving on*, *in* THE EXPANDING AYAHUASCA WORLD DIASPORA: APPROPRIATION, INTEGRATION, AND LEGISLATION 61, 67 (Beatriz C. Labate & Clancy Cavnar eds., 2018).

[343] Arrêté du 20 avril 2005 modifiant l'arrêté du 22 février 1990 fixant la liste des substances classées comme stupéfiants, [Decree of Apr. 20, 2005, modifying Decree of Feb 22, 1990, establishing the list of substances classified as narcotic drugs]. JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRAÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mai 25, 2005, no. 102, p. 7636, text no. 18 (Fr.).

[344] CODE DE LA SANTÉ PUBLIQUE, art. L. 5132-1, L. 5132-7, L. 5132-8, L. 5432-1, R. 5132-43, R. 5132-74 (primarily) (Fr.).

[345] CODE PÉNAL [C. PÉN], art. 222-34 to 222-43 (primarily) (Fr.).

[346] Loi 2001-504 du 12 juin 2001 tendant à renforcer la prévention et la répression des mouvements sectaires portant atteinte aux droits de l'homme et aux libertés fondamentales [Law 2001-504 of June 12, 2001, extending to strengthen the prevention and repression of sectarian movements which infringe human rights and fundamental freedoms], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRAÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], June 13, 2001, n° 135, pp. 9337-9340 (Fr.); CODE PÉNAL [C. PÉN], art. 223-15-2 (Fr.).

[347] Tribunal de grande instance [TGI] [ordinary court of original jurisdiction], Paris, 16eme Chambre, Jan. 15, 2004, unreported (no.P9828602936) (Fr.).

not a controlled substance.[348] This was a major victory for the Santo Daime church, but a short-lived one. The decision was rendered on Jan 13, 2005, but by May 5, 2005, a decree was issued by the Ministry of Social Affairs, Health, and Family which added to Annex III the above enumerated raw plant materials and chemical compounds required to produce ayahuasca (besides DMT, which was already controlled).[349] The agency action also resolved a concurrent ayahuasca prosecution against a therapy center begun in 2002, which was dismissed under the principle of non-retroactivity. [350] That case had begun as an anti-cult case under the new About-Picard law, but when the cult charges were dismissed as baseless[351] the government retried the case as a drugs prosecution with a supplemental trial in 2003.[352]

Following the prohibition of ayahuasca itself in 2005, the Santo Daime church immediately petitioned to have the prohibition struck down on freedom of religion grounds. The then Ministry of Health and Social Affairs rejected the argument that the prohibition of a substance can impact religious freedom, and asserted that even if it could, the ministry has the constitutional right to prohibit any substance on the basis of public health concerns.[353] Both a direct appeal and subsequent petitions have met with little success. Given the strength of anti-cult sentiment in France, it seems unlikely at this time that the government would willingly permit the use of a powerful psychotropic substance by a tiny and esoteric religion from the Amazon rain forest. France is actively enforcing its prohibition on ayahuasca, and in 2015 a group of 4 Santo Daime members were fined 750 Euros each plus additional fees for attempting to import ayahuasca.[354]

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[348] Cour D'appel [CA] [regional courts of appeal] Paris, 10ème chamber, Jan. 13, 2005, unreported (no.04/01888) (Fr.).

[349] Arrêté du 20 avril 2005 modifiant l'arrêté du 22 février 1990 fixant la liste des substances classées comme stupéfiants, [Decree of Apr. 20, 2005, modifying Decree of Feb 22, 1990, establishing the list of substances classified as narcotic drugs]. JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRAÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mai 25, 2005, no. 102, p. 7636, text no. 18 (Fr.).

[350] Cour D'appel [CA] [regional courts of appeal] Pau, Dec. 2, 2005, unreported (no. 665/2005) (Fr.), *cited by* Ghislaine Bourgogne, *One Hundred Days of Ayahuasca in France: The Story of a Legal Decision*, *in* The Internationalization of Ayahuasca 353, 357 & n.23 (Beatriz C, Labate & Henrik Jungaberle eds., 2011).

[351] Bourgogne, *supra* note 350, at 357 & n.22.

[352] *Id.*, at 355-59.

[353] Direction générale de la santé [General instructions] from Didier Eyssartier, Le Chef du service politique de santé et qualité de système de santé, adjoint au Directeru général de la santé, Ministère de la Santé et des Solidaritiés [Head of Health Service and Quality, Deputy General Director of Health, Ministry of Health and Social Affairs], Feb. 15. 2006, re: request n. 282100, https://www.bialabate.net/wp-content/uploads/2008/08/Ayahuasca_Appeal_Answer_Ministry_Health_France_20061.pdf (Fr.)

[354] Cour D'appel [CA] [regional courts of appeal] Nimes, 3ème Chambre, Feb. 24, 2015 , unreported (no. 15/00101) (Fr.).

6.5 SWITZERLAND

DMT is controlled under the Federal Act on Narcotics and Psychotropic Substances of 1951.[355] Switzerland is unique in Europe, however, in that it has officially exempted ayahuasca from its drug control instruments. This was done by the government agency Swissmedic, "the central Swiss supervisory authority for therapeutic products, including illegal (controlled) drugs and substances (narcotics) subject to restricted import conditions and marketability."[356] The agency's 2012 statement read:

> Plants, parts thereof, other extracts (e.g. tea), which contain the DMT substance in natural concentration are currently not subject to the regulations of the Swiss Narcotic Act and are consequently freely marketable without special authorization.[357]

A subsequent 2014 statement further clarified that:

> Whether in individual cases a liquid extract of N,N-DMT-containing plants or another form of preparation classified as 'plant' or as a 'N,N-DMT-containing preparation' depends on the product, its presentation and promotion, as well as the context. This is the purview of the competent authorities of the cantons in individual cases.[358]

Agency decisions of this kind are modifiable or revocable at any time and are not a constitutional right. The UDV currently has authorization to import and use ayahuasca in the Canton of Geneva.[359] An application was made in 2017 to the Canton of Lausanne by a Swiss-based association proposing to use ayahuasca for therapeutic purposes, and that project is

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[355] RS 812.121, Loi fédérale du 3 octobre 1951 sur les stupéfiants et les substances psychotropes [Federal law of Oct. 3, 1951 on narcotic drugs and psychoactive substances] (Switz.).
[356] Letter from Dr. Hans-Beat Jenny, Deputy Director, Swissmedic, to anonymous (May 25 2012), https://www.bialabate.net/wp-content/uploads/2008/08/Swiss-supervisory-authority-on-drugs-statement-on-ayahuasca-2012-German-and-English.pdf (Switz).
[357] *Id.*
[358] Letter from Dr. Hans-Beat Jenny, Deputy Director, Swissmedic, to Dr. Hämmig (June 6, 2014), https://www.bialabate.net/wp-content/uploads/2008/08/Swiss-Supervisory-Authority-Drugs-Satement-Ayahuasca-German-2014.pdf (Switz.).
[359] Ayahuasca Defense Fund, *supra* note 23.

supported by several reputable Swiss universities.[360] The liberal approach to ayahuasca taken by Swiss authorities is unique in Europe so far, and if therapeutic uses are approved it will be the first instance in the internationalization of ayahuasca that legality was conveyed for anything other than strictly religious use.

6.6 GERMANY

DMT is controlled under Schedule 1 of the Narcotics Act.[361] Germany may have been the first European country to face an ayahuasca arrest, which took place in 1999. This was just shortly prior to the arrests conducted in the Netherlands and France, and was targeted at a Santo Daime church of the CEFLURIS sect, as were those subsequent raids. The German raid was notable for the sheer show of force it involved: nearly 100 heavily armed police officers, many wearing black masks and brandishing automatic weapons, descended upon a special ceremony including distinguished invitees from the central Santo Daime church in Brazil.[362] A quantity of Daime was seized at this time, as was information which led to a series of searches and arrests in other German cities over the coming months. The media frenzy surrounding the event was particularly sensationalist and malignant, which together with heavy-handed police tactics prompted many members of the church to abandon their faith, and many others to choose exile in the Netherlands.[363] Most members arrested during this episode accepted their fines, but one group exiled in the Netherlands refused to make an admission of guilt and communicated to the government their intention to go to trial to fight for their religious rights. These members heard nothing for four years regarding the case, and when they reached out in 2004 to inquire as to the status of their process they were told it was on hold because they were not in the country. Another three years of delay tactics led to the case finally being dismissed in 2007 on the grounds that the members had not knowingly committed a crime.[364] The judge also ruled that the danger posed to public health outweighed the state's commitment to protect freedom of

[360] *Id.*
[361] Betäubungsmittelgesetz [BtMG] [Law on Narcotics Trafficking], July 28, 1981 (Ger.).
[362] Silvio A. Rohde & Hajo Sander, *The Development of the Legal Situation of Santo Daime in Germany*, *in* THE INTERNATIONALIZATION OF AYAHUASCA 339, 344 (Beatriz C. Labate & Henril Jungaberle eds., 2011).
[363] *Id.*
[364] *Id.* at 347

religion,[365] but the decision was not possible to appeal on account of the acquittal. In order to advance its freedom of religion claims as part of a constitutional law appeal, the church countered with a legal process to reclaim the Daime tea seized during the 1999 raid. Surprisingly, the court complied with this request (again foiling the attempt at a constitutional challenge), acknowledging the religious importance of the tea and offering to return it to church authorities in Brazil upon receiving the necessary paperwork.[366]

This series of events suggests that Germany reconsidered its legal position vis-à-vis ayahuasca sometime following the initial arrests, probably in response to the leniency showed by the 2001 Regional Court in the Netherlands and to the successes of the UDV in the US throughout the early 2000's. Germany most likely feared a constitutional challenge that might significantly alter its drug control regime, which would explain why the courts twice blocked any possibility of sustained constitutional challenge and why the issue has not yet arisen again in the courts. Santo Daime church members have since returned to Germany and openly practice their ceremonies in a number of cities.[367] Efforts to enter into dialogue with the government continue, and only time will tell what path Germany will take with regards to formally regulating ayahuasca.

6.7 ITALY

DMT is controlled under Schedule 1 of the list of controlled substances by the authority of law D.P.R. 9 n. 309, October 1990.[368] A wave of arrests commenced in early 2005 resulted in the house arrest of over 20 members of the Santo Daime church of the CEFLURIS sect. A trial for those prosecuted began in early 2005 and was swiftly appealed to the Supreme Court for clarification on whether ayahuasca is in fact prohibited by the drug control laws, with the finding that not enough scientific data was presented by the prosecutor to prove that it was.[369] The trial court case was dismissed in 2006[370] and the ayahuasca itself returned in 2008 following a second

[365] *Id.* at n.16 (citing case as "Amtsgericht Weimar, 5. 04. 2006, Az: 674 Js 325 19/99 1 Ls").
[366] *Id.* at n.18 (citing case as "Landgericht Erfurt, 16. 02. 2007; Az: 6 Qs 170/06").
[367] *Id.* at 349.
[368] Decreto Presidente della Repubblica [D.P.R.] 9 ottobre 1990, n. 309 (It.).
[369] Cass. Pen., sez. sei,, 6 ottobre 2005, n. 19028/05 (It.); Walter Menozi, *The Santo Daime Case in Italy*, *in* THE INTERNATIONALIZATION OF AYAHUASCA 378, 380-83 (Beatriz C. Labate & Henril Jungaberle eds., 2011).
[370] Trib., Pergugia, 13 gennaio, 2006, n. 1391/05 (It.).

appeal to the Supreme Court;[371] however, one of the initial four prosecutions had for some reason been omitted from the first trial, and so a second trial was initiated in 2006. The second trial was dismissed in 2009[372] on the same grounds as those set out by the Supreme Court in 2005: that not enough evidence had been presented to prove that ayahuasca was controlled by the drug control laws. In the meantime, in 2008 the Italian Santo Daime church became successfully registered with the Italian Government as a legitimate religious organization.[373]

The Italian Santo Daime church continues to grow and the UDV has also established a presence in Italy, but a string of additional arrests and custom seizures have taken place since the initial Santo Daime court proceedings.[374] The acquittals that took place do not constitute a strong legal basis for the legality of ayahuasca in Italy, and instead point to a kind of inconclusive state of the evidence on the very narrow legal question of whether ayahuasca is contemplated by the Italian drug laws as they currently stand. A simple modification of these laws by the responsible government agencies would be sufficient to definitively prohibit ayahuasca as a dangerous drug, as occurred in France. The religious use argument has not yet been formally submitted to the courts, though one of the defendants in the above described cases feels that evidence of religious sincerity was an important informal influence upon the reasoning of the judge during the second trial which ended in 2009.[375]

6.8 SPAIN

DMT is controlled under Article 368 of the Penal Code,[376] but notably this article does not specify a list of prohibited substances and instead relies upon the 1961 and 1971 UN Conventions for specifics.[377] Spain is something of a paradox on account of how vigorously it continues to prosecute ayahuasca-related offenses while still not taking proactive measures to clarify the ambiguous legal status of the drink. The first incident occurred in 2000 with the arrest

[371] Cass. Pen. prima sez., 23 aprile 2008, n. 033905/2007 (It.).
[372] Trib., Reggio Emilia, 26 marzo 2009, n. 738/08 (It.).
[373] *Id.* at 385.
[374] Ayahuasca Defense Fund, *supra* note 23.
[375] Menozi, *supra* note 369, at 386.
[376] Código Penal [C.P], art. 368-78 (Spain).
[377] Santiago López-Pavillard and Diego de las Casas, *Santo Daime in Spain: a Religion with a Psychoactive Sacrament*, *in* THE INTERNATIONALIZATION OF AYAHUASCA 365, 371-72 (Beatriz C. Labate & Henrik Jungaberle eds., 2011).

of 3 Santo Daime members of the CEFLURIS sect. At trial it was found that the Daime tea contained insufficient levels of DMT to pose a health risk, however the judge was unaware that the effects of DMT are greatly amplified when mixed with harmala alkaloids. Moreover, it was determined that the members were protected by a unique feature of Spanish case law which protects drug users when they gather together in groups ("clubs") of habitual users ("addicts").[378]

Both Santo Daime and the UDV went through a torturous set of administrative processes to be recognized within Spain's Religious Entity Registry. The UDV achieved recognition after 6 years of effort,[379] while Santo Daime managed it in 2, but only on account of a technical oversight on the part of Ministry of Justice.[380] Inclusion in the registry conveys special legal rights such as full organizational autonomy, and also offers some degree of legal protection to the extent it formally establishes groups of habitual users of a controlled substance. Ironically, the protection conveyed by this strategy is based at its core on the legal premise that the church members are a group of drug addicts, but national recognition of their religious status will also be important should they one day need to rely on an Article 9 freedom of religion claim.

As it stands, the many ayahuasca-related prosecutions over the past decade have met with a judicial consensus that ayahuasca is not controlled by the 1971 UN Convention and therefore is not controlled by Spanish law.[381] This conclusion was in large part supported by the repeated declarations on the part of the INCB that ayahuasca is not specifically controlled by the convention.[382] Nonetheless, the import of ayahuasca continues to arouse the ire of customs and government prosecutors who continue to seize shipments, make arrests, and press charges. Even the two officially recognized ayahuasca religions are subject to penalties when importing, as Spanish law only protects communal use itself. It is yet to be seen how Spain acts to reconcile the diverging approaches taken by different branches of the government, and whether it chooses

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[378] *Id.* at 366 & 372.
[379] José Vicente Marín Prades, *Legal Recognition of the União do Vegetal in Spain*, *in* THE INTERNATIONALIZATION OF AYAHUASCA 375, 375 (Beatriz C. Labate & Henril Jungaberle eds., 2011).
[380] *Id.* at 370.
[381] This was the decision reached in a case against a devotee importing ayahuasca on behalf of the UDV, and the court cited a string of 10 provincial court cases decided between 2013-2015 which came to the same conclusion. A.P., Valencia, 13 febrero, 2016, n. 96/15 (Spain).
[382] Spanish authorities contacted the INCB regarding this question on Jan 18, 2013, and received the same response that other governments and courts have received to this question. *Id.*

to either rein in its prosecutors or take steps to officially criminalize ayahuasca at the national level, perhaps by way of a special Ministerial order.[383]

6.9 PORTUGAL

DMT is controlled under Decree Law 15/93,[384] and NPS's are controlled under Decree Law 54/2013,[385] but only when specifically listed by the Ministry of Health. Ayahuasca is still a grey area in Portugal, and partly on account of the shared language with Brazil, ayahuasca is widely and quite openly used in a variety of religious and therapeutic contexts. Following the arrest of a Santo Daime member in 2011,[386] however, the UDV largely suspended its services after having been quite active in the years previous.[387] Criminal charges were ultimately dropped, but the refusal of authorities to as yet recognize Santo Daime or the UDV as official religious entities is another red flag that religious use may not be protected.

6.10 BELGIUM

DMT is controlled under the Act of February 24, 1921,[388] and ayahuasca is controlled under the Royal Decree of September 6, 2017,[389] which applies a blanket prohibition to all psychoactive substances, such as found in the UK and Ireland. In 2014, a leader of a Santo Daime church of the CEFLURIS sect and his associated nonprofit organization were both found

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[383] *Estudio Documental La Ayahuasca en España: Informe Jurídico y Científico*, PLATAFORMA PARA LA DEFENSA DE LA AYAHUASCA 21 (2014), http://www.plantaforma.org/wp/wp-content/uploads/ PDA_INFORME_FINAL_ 2014.pdf

[384] Decreto-Lei n.º 15/93 de 22 de Janeiro [Decree-law n.15/93 of January 22], 1993, DIÁRIO DA REPÚBLICA 18/1993, pp. 234-252 (Port.).

[385] Decreto-Lei n.º 15/93 de 17 de abril [Decree-law n.15/93 of April 17], 2013, DIÁRIO DA REPÚBLICA.75/2013, pp.2250-54 (Port.).

[386] Distrito Judicial, Lisboa, 31 Maio 2012, proc. 350/11.0JELSB, n. 1439580 (Port.).

[387] Patrícia Paula Lima, *A legalidade da ayahuasca em vista à liberdade ritual em Portugal*, NÚCLEO DE ESTUDOS INTERDISCIPLINARES SOBRE PSICOATIVOS (2017), https://neip.info/novo/wp-content/uploads/2017/10/Lima_ Legalidade_Ayahuaca_Portugal_2017.pdf

[388] 24 February 1921, Loi concernant le trafic des substances vénéneuses, soporifiques, stupéfiantes, psychotropes, désinfectantes ou antiseptiques et des substances pouvant servir à la fabrication illicite de substances stupéfiantes et psychotropes, [February 24, 1921, Act respecting the traffic in poisonous, soporific, narcotic, psychotropic, disinfectant or antiseptic substances and substances which may be used for the illicit manufacture of narcotic and psychotropic substances], 1921 (Belg.).

[389] 6 Septembre 2017, Arrêté royal réglementant les substances stupéfiantes et psychotropes, [Royal decree regulating narcotic and psychotropic substances], 2017 (Belg.).

guilty by a 2014 Court of First Instance for the importation and possession of ayahuasca.[390] This decision was upheld by a Court of Appeal in 2015[391] as well as by Belgium's highest court, the Court of Cassation, in 2016.[392] The Court of Cassation's reasoning was that ayahuasca constitutes a sufficiently serious public health and safety risk that infringement on freedom of religion is necessary. The church leader escaped punishment, but the organization itself received a suspended fine of 18,000 Euros. It therefore stands that Belgium has taken the official position that both DMT and ayahuasca are prohibited by law and that religious use is also impermissible. In a separate case, several persons involved with a non-religious therapeutic group were convicted in 2017 for possession of psychotropic substances including ayahuasca and sentenced to 6 months suspended sentence and 6000 Euro fines.[393]

6.11 DENMARK

DMT and ayahuasca are controlled under the Euphoriant Substances Act of 1955,[394] which since 2012 has contained a provision applying a blanket prohibition to all psychoactive substances, such as found in the UK and Ireland. In 2014, a Santo Daime church of the Brazilian Céu Sagrado religion applied to the Ministry of Health for a specific exemption for their religious use of ayahuasca, and also applied to the Ministry of Ecclesiastical Affairs for official religious status in Denmark. Both applications were denied, at which time the decisions were appealed through a High Court as a joint case (which was determined to be necessary under the circumstances). The High Court upheld in a 2017 decision that the burden on the church's exercise of religion is outweighed by public health risks, and clarified that the Ministry of Ecclesiastical Affair's refusal to grant official religion status was based only on the group's insistence on using a controlled substance (and added that being forced to forgo official status did not constitute an interference).[395] A subsequent appeal to the Supreme Court resulted in a 2018 reiteration of the High Court's decision: that the health and public safety risks outweighed

[390] Rechtbanken van Eerste Aanleg [Rb.] [Tribunal of First Instance] Bruges.14th ch., Mar. 31, 2014 (n. BG60.98.1106-12 NB) (Belg.).
[391] Hoven van Beroep [HvB] [Court of Appeal] Ghent, Mar. 31, 2015 (n. 2014/PGG/1666-2014/VJ11/563) (Belg.).
[392] Hof van Cassatie [Cass.] [Court of Cassation], Sept. 6, 2016, no. P.15.0614.N (Belg.).
[393] Correctionele Rechtbanken [Corr.] [Criminal Tribunal] Antwerp, Mar. 20, 2017 (n. ME60.L2.67-15) (Belg.).
[394] Euphoriant Substances Act of 1955 (Den.).
[395] Court of the Eastern Lands, 10th Ch., Mar. 15, 2017 (n. B-2638-15) (Den.).

the right to religion.[396] It therefore stands that Denmark has taken an official position that both DMT and ayahuasca are prohibited by law and that religious use is also impermissible. The one known case of criminal prosecution — decided in 2016 — resulted in a six-month prison sentence, reduced to 120 hours of community service upon appeal.[397]

[396] Supreme Court, Jun. 26, 2018, n. 81/2017 (Den.).
[397] Ayahuasca Defense Fund, *supra* note 23.

Conclusion

The objective of this thesis was to account for the differential treatment accorded to ayahuasca by the global drug control regime, and to use the existing case law and administrative record in countries across the world to formulate a normative framework to guide future decision- and rule-making. The hypothesis was that the religious/traditional nature of the drink would account for the differential treatment, and that a normative framework would have to be one that takes sociocultural context into account in order to find a balance between the great many transnational function systems intersecting at the international ayahuasca boom. The findings were that ayahuasca is unique compared to other substances banned by the UN Conventions because of: (1) its diversity of uses and the geographical scope of use, and (2) the timing of its introduction to a globalizing, transnational world stage. The normative framework must be one that focuses on meeting evidentiary standards and bureaucratic methodologies of decision-makers, and treating bureaucratic sociocultural contexts as equally worthy of respect and accommodation as those of user groups (but no more so). The process undergone in Brazil can never be duplicated because Brazil's relationship with ayahuasca use is historically unique, but its underlying premise of collaboration and mutual respect should underpin concrete regulatory measures devised by other countries grappling with the same legal dilemma.

Differential Treatment

Careful examination of legal processes world-wide confirms that there is something different about ayahuasca that just about every country has recognized in one way or another, either by turning a blind eye to its use, legalizing, handing out only nominal penalties, or actively avoiding a constitutional challenge that might force serious deliberation over the issue. Russia is the exception which proves the rule, after handing out an 11 year prison sentence in 2018 for simple importation and possession of a small amount for personal use. DMT tops the most highly controlled substances list of every country that has one, and so penalties in this range could easily be the norm internationally but are not. The initial European crackdown in the early 2000's occasioned police raids by heavily armed officers in Germany and malicious media reports in a number of countries, but we see that almost across the board governments have stood

down from treating the internationalization of ayahuasca as a drug epidemic or invasion of evil sects. The only exception was France, whose atypical reaction is probably better explained by the anti-sect sentiment prominent there in those years than by drug control concerns per se. The high profile UDV case in the United States during the early 2000's was likely an influencing factor on the change of heart in Europe following the initial crackdown, and the ultimate UDV victory in the US Supreme Court in 2006 was probably a watershed moment for decision-makers everywhere as they watched the leading country in the 'War on Drugs' make an unprecedented special allowance for a drink containing a Schedule I substance. Instances in which ayahuasca was met with tolerance — such as in Brazil, Canada, the United States, Switzerland, and some of the Netherlands cases — are for the most part easy to understand because rationalizations are in most cases transparent; however, the story is harder to follow elsewhere. In those many countries that persist as gray areas, or even in those instances where convictions have been made but only nominal ones, it is more difficult to guess that what authorities are thinking.

Courts and policymakers have usually focused on the religious and traditional aspects of ayahuasca use when opting for legalization or lenience. This is not at all surprising given the fact that ayahuasca *is* undeniably unique among powerful hallucinogens in terms of its long-standing history as an important cultural mainstay of a massive geographic area. The explicitly Judeo-Christian religious dimension of its use is also long-standing, dating back almost 100 years in Brazil. In the past three decades, the permissive legal stance of most Amazonian countries, including Brazil, combined with growing international interest and tourism has occasioned a veritable renaissance in ayahuasca use and a concomitant explosion in cultural variety and diversity encircling the drink. There is simply no other substance that comes close to matching it on any of these metrics, with the closest runner-up being peyote in the US and Canada, whose use is widespread and long-standing, but also locked within the static and legalistic definitions of culture and tradition that underpin the textual conditions of its legality. The niche inhabited by peyote, permitted in the US only by members of federally recognized tribes, has not allowed for the kind of growth and permutation of applications seen with ayahuasca in South America, nor has it permitted the kind of constitutional challenge undertaken by the UDV in *Gonzales*. Ayahuasca is the very first of the traditional plant medicines to resist an encounter with publics on such restrictive cultural and legal terms, leveraging its diverse religious dimensions in South American contexts to demand re-evaluation of policy on the basis of Western cultural values

themselves rather than some kind of exotic 'otherness.' Other 'entheogens,' as they are sometimes called (referencing their capacity to alter states of consciousness to facilitate spiritual experiences), such as ibogaine[398] and so-called magic mushrooms[399] are widely used as well, but cannot compare to ayahuasca in terms of the ritual and religious manifestations that their effects occasion, the sheer scale and long-standing nature of their organized use, nor the level of organization that some user groups have achieved.

It is not possible, however, to attribute the unprecedented legal climate surrounding ayahuasca to the nature of the substance alone. Perhaps the most significant factor in favor of ayahuasca vis-à-vis the international prohibitionist drug control regime is the timing with which the first court cases starting appearing in the early 2000's. In recent years, globalization, the Internet, and transnational forces have radically altered both the functioning of governments but also the thinking of the publics that sponsor and comprise them. It is clear that cultural biases underlie fundamental thinking on drug use, and so it follows that we must interpret the 1961 and 1971 UN drug conventions in the light of their times. Marijuana use, for example, was still fairly remote from the everyday lives of most Westerners in 1961 when it was first slated for international prohibition at the hands of the US, an age in which there was far less information available to the public and fewer forums for critical reflection on government decisions. The public was told the drug was evil, and so they accepted it as such. If the objective nature of a substance was alone sufficient to impact drug control policy we would expect to see an inversion of the legal status of marijuana and alcohol, for example, based simply on public safety concerns. Marijuana has been proven to be dramatically less dangerous than both alcohol and tobacco,[400] and indeed the World Health Organization estimates that alcohol use and abuse accounted for

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[398] Ibogaine is a traditional plant medicine from Africa which is scheduled under international law and prohibited in most countries, though in some countries such as Canada and New Zealand it is regulated and made available by prescription for drug addiction treatments. *Ibogaine Legal Status*, GLOBAL IBOGAINE THERAPY ALLIANCE, https://www.ibogainealliance.org/ibogaine/law/ (last updated Aug 19, 2017).

[399] The psilocybin-containing mushroom has a history of traditional use in the Oaxaca region of Mexico, but is probably more well-known for its superficial association with LSD and the counter-culture revolution of the 1970s, and is almost uniformly prohibited under both international and national laws. Santa Cruz, California, has just become the third city in the US to recently decriminalize possession of these mushrooms, following Oakland and Denver, Colorado, a move which is not the same as legality at either the state or federal level, but which points to a trend toward rethinking controlled substances with a proven potential for therapeutic applications.[399] Santa Cruz and Oakland have decriminalized ayahuasca possession too. David E. Carpenter, *Santa Cruz is Third U.S. City to Decriminalize Psilocybin, Plant Medicine, as Advocacy Expands*, FORBES (Feb. 1, 2020), https://www.forbes.com/sites/davidcarpenter/2020/02/01/santa-cruz-is-third-us-city-to-decriminalize-psilocybin-plant-medicine-as-advocacy-expands/#6223194d5d0d

[400] Dirk W. Lachenmeier & Jürgen Rehm, *Comparative risk assessment of alcohol, tobacco, cannabis and other illicit drugs using the margin of exposure approach*, 5 SCI. REP. 8126 (2015); *see also* Nutt et al., *supra* note 144.

3.8% of all world deaths in 2004, equaling about 2.5 million deaths per year, with the heaviest use taking place in Western and Eastern Europe.[401] Today, the lingering social and legal stigma of the harsh treatment accorded to marijuana in early years is giving way to a legislative revolution in the US surrounding its legalization, a radical bottom-up paradigm shift which demonstrates how in this day and age a faceless grassroots movement can indirectly impose change on national governments and beyond. This is the global context into which ayahuasca is making its entrance, with the added advantage that unlike most other controlled substances, ayahuasca is free from any accumulated cultural stigma attached to Cold War-era ideologies or the excesses of the counter-culture revolution of the 1970's. What makes ayahuasca unique is the *when* of when it came to the attention of international policymakers as much as its unique properties themselves.

The special significance of the present day is not simply that attitudes are changing or evolving in any one specific way, but that both cultural and organizational life is being increasingly governed vis-à-vis the operation of transnational function systems. World society is undergoing massive and unprecedented organizational changes. Those who subscribe to the systems theory of Luhmann might see international law as a branch of a transnationally expanding function system — the legal system — and the UN drug control conventions of 1961, 1971, and 1988 as part of a constitutional order that operates at this level. The conventions frequently come into conflict with national constitutions as well as transnational, supranational, and local legal orders; yet in spite of the abundant evidence that international law has taken on a largely imperialistic and symbolic value, particularly within the context of the global drug control regime, there is also evidence that transconstitutionalism is taking hold in certain contexts. Legal orders are transforming as they encounter one another in the search for common solutions. Part of the explanation for this rests on novel processes of politicization occurring both among publics and at the institutional level. Such processes can provoke the transformation of inflexible legal instruments and a counterbalancing of hegemonic political forces, as seen plainly with the example of the coca leaf.

The case of ayahuasca is another example of transconstitutionalism in action, illustrating how strategies of politicization and constructive exchanges between constitutional orders, both

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[401] *Global status report on alcohol and health*, WORLD HEALTH ORG. 24 (2011), https://www.who.int/substance_abuse/publications/global_alcohol_report/msbgsruprofiles.pdf

within and beyond the nation state, can contribute toward novel constitutional outcomes. In the case of marijuana in the US, the legal system is becoming eroded by a powerful intersection of the medical system, the economic system, and also of course the political system, which together are producing novel outcomes which outright defy the constitutional authority of the federal government. In the case of ayahuasca in both the US and internationally, the same set of function systems are intersecting with the religious system to produce novel results which defy international law norms. These appear to be prompting national legal systems to watch one another for clues as to how to best control the complex issue. Behind function systems are publics comprised of individuals from all over the world, united through the internet and other nodes of mass communication, which are able make their collective will felt in legal and political debates with a weight never before seen.[402] The tremendous exchange of information about ayahuasca on the Internet is tangible evidence that publics exist and are speaking to one another across vast distances, and the conversation is altering both the culture of traditional users in South American countries and that of the foreign observers and participants who consume those cultures.[403] The same type of transmutation of bodies appears to be taking place at the level of legal policy also. Against the invisible background of diverse transnational publics acting through a variety of function systems, ayahuasca has resisted the established drug control paradigm and is now floating within a juridical grey area. Only time will tell what regulatory path it will take, especially at this moment of radical shifts within other areas of the global drug control regime. This outcome should not be left to chance, and careful regulation will maximize rights protection for users while minimizing risk to users and the plant species themselves.

Normative Framework

A normative legal framework to guide regulation of ayahuasca use is a contentious proposition. The same transnational interweaving of function systems that makes it difficult for the legal system to summarily dispose of ayahuasca in accordance with its inner logic of blanket prohibition makes it equally challenging for any single interest group to have its way on how the

[402] *See* Teubner, *supra* note 59, at Ch. 4.
[403] Matthew Conrad, *The global expansion of ayahuasca through the Internet*, *in* THE EXPANDING AYAHUASCA WORLD DIASPORA: APPROPRIATION, INTEGRATION, AND LEGISLATION 95, 103 (Beatriz C. Labate & Clancy Cavnar eds., 2018).

drink is regulated. We are witnessing something of a stalemate in which certain religious groups are managing to safeguard their own private religious practices, but in which the majority of users persist in a legal vacuum. The vacuum creates a precarious situation because it opens a space for unsafe practices which inevitably lead to injury and scandal, and in doing so provide detractors with reasons to have ayahuasca pegged as unsafe and impermissible. The data accumulated in these pages suggests that the best approach to regulation is to prioritize one key interest group: the policymaker. In other words, the best framework is one which meets the needs of policymakers first and foremost where reasonably possible, though of course not exclusively. It permits the greatest level of control and ease of adoption for host countries, while giving user groups a fair shot at having their priorities heard and considered on an equal basis with those of the most powerful and financially-backed lobbyist groups. It is essentially the transconstitutional model, which strives to put state and international lawmakers on an equal footing with religious, indigenous, business, and health system policy-makers in a search for mutually beneficial solutions to their collective constitutional dilemma. Brazil, Canada, Switzerland, and to some extent the US are the countries already on the path to implementing this kind of approach, but they have taken only a first step. The next step will be the creation of regulatory boards with the authority to delineate acceptable uses, proscribe rules and regulations, and to delegate oversight authority with the power to exercise licensing and penalize infractions.

The publics currently supporting the legalization of ayahuasca and the promotion of legal support for users are for the most part an overlap of publics with divergent interests and hailing from separate transnational flows. The principal groups are i) those concerned with drug control reform generally, ii) those concerned with the protection of human rights such as cultural or religious freedoms, and iii) those with either a scientific or economic interest in therapeutic uses. Those of the first category tend to view ayahuasca as a champion in a reform agenda encompassing either all entheogens, plant medicines specifically, or all controlled substances. On the religion side there is the strong presence of the Brazilian ayahuasca religions, whose goal is international expansion and whose interests at times overlap with those of mainstream religions in protecting religious rights from government intervention. Those interested in the medical/therapeutic include academics and indigenous practitioners, but also businesses operating in Latin America and abroad specializing in retreat centers and sponsoring itinerant shamans/therapists who offer healing or spiritually transformative ceremonies à la carte. Despite

the wide range of interest groups involved, it is the ayahuasca religions that have thus far represented the nucleus of juridification efforts worldwide, which complicates matters because they are strictly against both drug use (they do not consider ayahuasca a drug, but rather a sacrament) and the commercialization of ayahuasca. As we have already seen in the chapter on Brazil, these groups can have the tendency to minimize others on the basis of doctrinal disagreements, and this can result in regulation that does not adequately engage with issues inclusively. The large Brazilian groups are not the only ones guilty of this: the Amazonian shamans are renowned for feuding between themselves using the magical powers bestowed by the drink.[404]

The leading NGO lobbying on behalf of ayahuasca is ICEERS (the International Center for Ethnobotanical Education, Research, and Service), which also runs the Ayahuasca Defense Fund. The core mission of this group is in line with the proposition that policymakers should be the focus of advocacy efforts, and its function is to both lobby and provide guidance for users who run afoul of the law. The organization is chaired by individuals associated with each of the publics with a stake in legalization, and this has at times led to acrimony within the NGO and the departure of key members. The concept is sound, however, and the efforts of this body have aided in important legal outcomes in countries such as Chile and Israel. Its projects include the World Ayahuasca Conferences, three of which have taken place, in 2014, 2016, and 2019. These have been opportunities for a wide range of publics to come together to discuss every conceivable facet of ayahuasca, to learn from one another, and to unify efforts. The 2016 conference was particularly significant because it took place in the city of Rio Branco in the Brazilian state of Acre. This is the city where Santo Daime and Barquinha were first established and where they continue today, and a state in which a large number of Brazil's indigenous user groups are located. The deep-rooted tensions that permeated that event were a major factor in leading me to the conclusion that total reliance on user groups to self-regulate as a coherent body is not a realistic goal for the time-being:[405] collective lobbying is crucial, but the intervention of a neutral third-party to actually hammer out regulatory details is equally indispensable.

The first country to revisit in the context of envisioning a normative framework is Brazil, noteworthy for the extraordinary collaboration between government, scientists, and religious user

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[404] EDWARD MACRAE, GUIDED BY THE MOON – SHAMANISM AND THE RITUAL USE OF AYAHUASCA IN THE SANTO DAIME RELIGION IN BRAZIL 29-31 (1992), http://www.neip.info/downloads/edward/t_edw2.pdf

[405] *See also* Goulart & Labate, *supra* note 194.

groups. From the initial 1987 legalization through a series of turbulent challenges and the ultimate promulgation of a detailed deontology of use in 2010, Brazil has stood as a unique example of internal transconstitutional debate and decision-making. A major problem, however, is that the legal gains for ayahuasca are almost entirely symbolic: legality of ayahuasca in Brazil is a negative legality consisting principally of an absence of prosecution. No enforcement mechanism means that regulations have almost no practical effect, and so the situation is difficult to distinguish from one in which no regulation exists at all. Entities are aware that only religious use is permitted and so the free-for-all more typical of completely unregulated Peru has not occurred in Brazil (which proves that the symbolic effect of the rules does carry some weight); however, the lack of state supervision leaves open a space for irresponsible uses that are bound to eventually cause harm and scandal. One such recent event was the 2010 murder of renowned Brazilian cartoonist Glauco Villas Boas and his son by a member of a Santo Daime congregation of the Céu de Maria sect, of which Boas was the leader. It appears that the murderer was a troubled young man with serious psychiatric disorders who had not been adequately screened from participation in the group's rituals.[406] The resulting media frenzy brought ayahuasca once again back into the spotlight as a dangerous drug taken by secretive sects, damaging its public image significantly. The current ultra-rightwing government that has since taken power in Brazil could easily be expected to use a scandal of this magnitude to bring an end to decades of tolerance overnight. Stronger regulations and penalties for misuse would help protect public safety, and also protect ayahuasca's precarious legal status.

During deliberations over the content of the 2010 deontology, the representatives from the ayahuasca religions repeatedly raised the suggestion of a board comprised of religious representatives to be tasked with supervising religious use and monitoring adherence to the rules.[407] This was rejected without much discussion on the grounds that such a body would be unconstitutional, but also amid concerns that rivalries and disagreements between groups would corrupt the effort.[408] The fact that the government was hesitant to make the 2010 regulations enforceable is a sign that the rules arrived upon by the committee are actually beyond the power of the state to actually enforce them. While the input of the committee members was of course

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[406] John Paul Rathbone, *Ayahuasca: A psychedelic murder story*, FIN. TIMES, June 19, 2015, https://www.ft.com/content/40993b48-bd40-11e4-b523-00144feab7de

[407] MacRae, *supra* note 174, at 202-203; *see also* Resolução n.01, de 25 de janeiro de 2010, CONAD, Proposals ¶ 3 (Braz.).

[408] MacRae, *supra* note 174, at 202-203.

crucial to the success of the rulemaking, it was precisely the lack of real world applicability of the rules — in short, the lack of concrete policymaker input — that has rendered them symbolic/advisory in nature. The most effective deontology would have been one that brought precise, carefully measured, and realistic policy goals to bear upon the idealism of the academics and religious groups, to the end of producing regulations that represent a balanced, safe, and enforceable set of protections for the environment, the public, the major religions, and also smaller religious groups and itinerant shamans. This is important because in countries far from the Amazon where religious traditions of this kind are unheard of, nothing less will pass muster in the eyes of judges and policymakers.

There are collateral benefits to Brazil's experiment with ayahuasca that have proved fundamental to legal processes in other countries. Firstly, the government's symbolic gesture of ratifying the 2010 deontology of use (along with all the previous reports and recommendations of workgroups regarding the importance of preserving the religious use of ayahuasca) confers upon such uses an enormous legitimacy in the eyes of foreigners. A common finding in all the international case law is that the legitimacy of the Brazilian ayahuasca religions is treated by foreign decision-makers as a foregone conclusion. Secondly, thirty years of tolerance in Brazil provides a massive test case of health and social impact upon both individuals and urban environments. As this data continues to be collected harnessed by researchers, it conveys powerful evidence that ayahuasca does not present a threat to public health or safety when responsibly used.

In Canada, Switzerland, and the US, small steps are taking place that build upon the Brazilian experience, but which also take the issue in a more concrete administrative direction. These countries have delegated government agencies to decide who should be permitted to use ayahuasca and under what specific circumstances. Decision-making in Canada and Switzerland is almost completely nontransparent and at the total discretion of agencies, which is not ideal. In the US, decisions are transparently made by the DEA using the precise legal test established by the RFRA followed by the Supreme Court in the UDV *Gonzales* case, which has the advantage of transparency but the disadvantage of considering only religious use. In Canada, Switzerland, and the US, a central feature to the legalization of ayahuasca has been a central registry of users and a concomitant case-by-case determination of appropriate health, safety, and drug control (anti-diversion) measures to be implemented. This feature is crucially important to effective

regulation, and does not have to be implemented in its entirety by government agencies but can be streamlined through delegating some functions to user associations; for example, licensing boards could provide accreditation services for those administering ayahuasca, and this would go far toward standardizing health and safety issues. Such a system would be similar to that employed by doctors, chiropractors, and osteopaths, but also that used by religious organizations to standardize the training of priests and ministers. As mentioned briefly in the chapter on South American countries, there has already been implementation of a system such as this one in Ecuador and Colombia for practitioners of indigenous medicine, including ayahuasca. Agency delegation of certain key functions would embody the spirit of collaboration seen in the Brazilian context, but would also separate powers so that each body has control over the area of its own expertise: government would be responsible for promulgating basic criteria and enforcing penalties, and user groups would collectively agree upon basic standards of use and see them implemented.

This differs significantly from what was proposed by the representatives of the ayahuasca religions in the Brazilian deontology deliberations. A board implementing those rules would have had the power to (1) fill in the vagueness and circular reasoning of the regulations by supplying its own partisan interpretations, and (2) implement sanctions for noncompliance. In short, such an arrangement might have empowered the churches to become the arbiters of ayahuasca law and punishment in Brazil, and it is obvious why this was not permitted by the government. A secular board tasked with training religious users in the nitty-gritty details of safety protocols, storage requirements, and screening procedures would be an entirely different matter, and would complement government decisions over which classes of use are deemed acceptable and why. We know that this nature of control mechanism would be important to international decision-makers because data shows that the religious groups with most success in legal proceedings were those with the best organized and most rigorous procedures for transporting, storing, and serving the drink, as well as for controlling who had access to it. The matter of a registry was addressed in the most recent Brazilian deliberations after the government requested that such a registry be created, and it was agreed by the committee that the new National Register of Ayahuasca Using Groups (CENA)[409] would remain optional so as to limit

[409] Cadastro Nacional das Entidades Usuárias da Ayahuasca

state control over religion.[410] This step back makes sense in the context of the Brazilian history of state-sponsored repression of African religions using a similar registry,[411] but looking abroad, registries will be indispensable for keeping track of which entities have been granted exemption from drug control laws. Another major issue to be revisited by regulators — especially in the Amazon countries — is propagation, trade, and protection of the plants, a matter of increasing urgency and concern which is unlikely to be solved simply by constricting supply.

In conclusion, the Brazilian approach to regulation was absolutely pioneering in taking the rights claims of ayahuasca users seriously and venturing beyond a reductionist list of controlled chemicals to recognize a cultural and religious reality unique to Brazil. All traditions grow and change, and as the long-standing patterns of ayahuasca use in the Amazon regions of South America merge into global flows of cultural exchange, the rest of the world must now contend with a phenomenon unlike anything we've ever seen. The global stage on which the drink now finds itself is equally unprecedented, and what comes next is unlikely to mirror the approach to controlled substances of the past 70 years. Global judicial decisions that have already found ayahuasca use to be an unacceptable risk to public safety will have to be revisited by legislative efforts as lobbying efforts by concerned publics continue to mount, and as more scientific data becomes available out of the South American context. Questions of who is permitted to use ayahuasca and why should be determined in conjunction with impartial experts in politics, law, culture, religion, and medicine, and not by government or religious entities acting in isolation. The act of concretizing regulations pertaining to use and enforcement, however, must be handed over to government in order for ayahuasca to safely and permanently remain part of the sociocultural terrain of modern societies.

[410] Resolução n.01, de 25 de janeiro de 2010, CONAD, ¶ ¶ 18, 19, 20 (Braz.).
[411] MacRae, *supra* note 174, at 191 & 193.

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