



# **Legal Paper on the Status of Ayahuasca Under the Dutch Legal System**

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# Executive Summary

This legal opinion delves into the intricate challenges surrounding ayahuasca practices of the Santo Daime Church in the Netherlands. These practice have undergone numerous legal examinations since 1994. Ayahuasca, often containing the restricted substance DMT, raises complex issues at the intersection of religious freedom, public health, and international drug control laws.

The legal dispute revolves around the interpretation of international conventions and national legislation. The church consistently invokes Article 9 of the European Convention on Human Rights and other international agreements in its defense. They argue that ayahuasca in their religious ceremonies does not pose a significant health risk.

However, the Dutch judicial system has imposed restrictions, categorizing ayahuasca as prohibited. This decision is rooted in the United Nations' 1971 Convention on Psychotropic Substances. The Santo Daime Church had an exemption from 2001 to 2018 based on religious freedom provisions. However, a 2019 ruling gave precedence to the Opium Act over rights of religious freedom. This decision cited concerns about inadequate safety measures during the church's rituals.

In response, the church filed a complaint with the European Court of Human Rights, challenging the lack of a necessity-based assessment for the infringement on their religious freedom. They also contested the interpretation of the 1971 Convention, asserting that the ECHR inaccurately claimed an international obligation to criminalize ayahuasca.

Currently, the Santo Daime Church in the Netherlands is considering taking their case to the United Nations Human Rights Committee. This could be a significant step in reaffirming their religious freedom and challenging the disproportionate impact of ayahuasca's criminalization on their religious practices.

This legal analysis highlights the struggle of religious minorities to practice their beliefs within the framework of modern drug laws. It underscores the need for a balanced and nuanced policy approach that respects minority religious practices, addresses public health concerns, and upholds international human rights standards. The outcome of this case could establish an influential precedent for other religious and indigenous communities employing controlled substances in their practices in the Netherlands and beyond.

# Introduction

The objective of this legal opinion is to determine if the preparation and distribution of ayahuasca by individuals or by members of syncretic religions, like ICEFLU (Estatuto Social Igreja do Culto Eclético da Fluente Luz Universal) churches,<sup>1</sup> are lawful or if they constitute an infringement on Dutch laws. Particular attention will be given to the use of ayahuasca by the members of the Brazilian ICEFLU church under the umbrella of the fundamental right to religious freedom as laid out in Article 9 of the European Convention on Human Rights. The evolution of the relevant jurisprudence over the last three decades will also be explored.

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<sup>1</sup> Igreja do Culto Eclético da Fluente Luz Universal (Eclectic Church of the Universal Flowing Light).

# Ayahuasca Religions

In the early nineties, the Netherlands got acquainted with ayahuasca brew imported from Latin America. Members of the Brazilian Santo Daime (otherwise known as the ICEFLU - Estatuto Social Igreja do Culto Eclético da Fluente Luz Universal) church have organized worship services in the Netherlands where ayahuasca has been taken since 1994. Two daughter Santo Daime churches were founded in 1995, one in Amsterdam and the other in The Hague.<sup>2</sup> The use of ayahuasca stems from a religious tradition rooted in Brazilian society, in which age-old Indigenous rites and customs that include ayahuasca have been integrated with Christian Catholicism introduced from Europe.<sup>3</sup>

Since 1999, leaders and members of the Dutch Santo Daime churches have been criminally prosecuted on several occasions. The starting point of these proceedings was always the ayahuasca brew which is the holy sacrament of the church. This sacrament is directly received from the church headquarters in Brazil, where it is prepared by church members in the Amazon region from two plants: *Banisteriopsis caapi* and *Psychotria viridis* which naturally contain DMT (N,N-Dimethyltryptamine). However, DMT is considered a banned substance in the Netherlands. In 1971 DMT was placed on Schedule I of the United Nations Convention on Psychotropic Substances and was subsequently also put under special control in the Netherlands.<sup>4,5</sup> Because the plant mixture ayahuasca contains DMT, providing and importing it is considered a punishable offense in the Netherlands.

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<sup>2</sup> The deed of foundation of the denomination Céu da Santa Maria from April 20, 1995 includes a statement from the president of the then principal Brazilian church CEFLURIS on April 4, 1995, that the Amsterdam church is officially part of his church.

<sup>3</sup> The Statutes of the denomination ICEFLU (Estatuto Social Igreja do Culto Eclético da Fluente Luz Universal) 28 February 2019. See also E.J. MacRae, anthropologist at the University of Bahia, expert report 18 September 2000, p. 3.

<sup>4</sup>The Convention was adopted and opened for signature by the United Nations Conference for the Adoption of a Protocol on substances Psychotropic S, held in Vienna from January 11 to February 21, 1971.

<sup>5</sup> The Protocol was adhered to by the Netherlands on September 8, 1993.

# Vegetalismo and Urban Neo-shamanism

Along with the Santo Daime churches, the Netherlands had a growing number of shamans from Latin America in the 1990s, who also worked with ayahuasca for spiritual and medical purposes based on old traditions. They visited the Netherlands and organized sessions for small groups of interested people. In the years that followed, Dutch shamans started to learn from these Indigenous people and later organized sessions in their own country, where interest was growing. There seemed to be a great need for the spiritual deepening and positive therapeutic effects of ayahuasca, despite the criminal law prohibiting its possession and use. It is a need that fits in with a renewed, widespread interest in psychoactive substances and their spiritual effects and possible therapeutic and medical applications. Michael Pollan in his book How to Change Your Mind speaks of a worldwide renaissance.<sup>6</sup>

Until recently, the Santo Daime churches in the Netherlands could successfully claim the right to religious freedom, as protected in Article 9 of the European Convention on Human Rights (ECHR) for their ritual use of this plant medicine. This right was eventually denied to them in 2018. The preparation and distribution of ayahuasca have been banned since the 1990s for all other individuals and groups. According to the Dutch Supreme Court, ayahuasca falls under the prohibition defined in the Opium Act.<sup>7</sup>

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<sup>6</sup> Michael Pollan, 'How to change your mind', Penguin Books Ltd.

<sup>7</sup> The 'main' drug law in the Netherlands is the Opium Act of 1919. The Act was fundamentally amended in 1976, determining the version currently in force. This amendment confirmed the distinction between 'hard' and 'soft' drugs. DMT is listed under List I substances which are officially classified as hard drugs and therefore prohibited. See for more details Section 4.

# The Netherlands and the 1971 UN Convention on Psychotropic Substances

The ayahuasca brew naturally contains a small amount of DMT. DMT is listed as a forbidden substance on List I of the Psychotropic Substances Convention. This means the countries that are part of the convention, including the Netherlands, are obligated to criminalize DMT.<sup>8</sup> The DMT compound may not be freely traded, except under specific conditions for scientific and/or medical purposes.

It is important to note that the Psychotropic Substances Convention only banned the listed substances and not the various living organisms in which they naturally occur, for example, *Psychotria viridis* and *Mimosa hostilis*, two plants used in ayahuasca brews that contain DMT.<sup>9</sup> At the United Nations meeting on this Convention, one delegate said, "It is not worthwhile attempting to impose controls on biological substances from which psychotropic substances could be obtained."<sup>10</sup>

Psychotropic substances naturally occur in various living organisms. Those drafting the convention explicitly recognized that an attempt to ban them would involve eradicating and destroying an unpredictable variety of plants, animals, and other living organisms. The official commentary on the treaty clearly shows this was never the intention. Organisms that naturally contain psychoactive substances do not fall under the Convention's control. This also applies to plants that naturally contain DMT. In the words of the commentary: "Neither the crown, fruit, mescal button of the Peyote cactus nor the roots of the plant *Mimosa hostilis* nor *Psilocybe* mushrooms themselves are included in Schedule I, but only their respective active principals Mescaline, DMT, and Psilocybe (psilocin)."<sup>11</sup>

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<sup>8</sup> Convention on Psychotropic Substances, Vienna, February 21, 1971, Articles 5, 7 and 22.

<sup>9</sup> Commentary on the Convention on Psychotropic Substances, Vienna, February 21, 1971, United Nations New York, 1976/CN/7/589, Reservations under art. 32, sub 5, p. 385.

<sup>10</sup> This was the delegate of the United States, Records 1971, Volume II, p. 38/39.

<sup>11</sup> Commentary on the Convention on Psychotropic Substances, Vienna, February 21, 1971, Reservations, art. 32, p. 387.



This implies that the country members of the Psychotropic Substances Convention have no obligation to criminalize plants such as *Psychotria viridis* or *Mimosa hostilis*. They are only obligated to prohibit extracted DMT as a substance where it is solely permitted for medical and/or scientific purposes.

The Netherlands was informed by the INCB about this early on.<sup>12</sup> After the arrest of Santo Daime church leaders in the Netherlands in 1999, the Dutch Ministry of Health asked the INCB for advice on the status of ayahuasca. Did this brew, traditionally used by Indigenous peoples for spiritual and medical purposes, fall under the prohibitions of the Conventions or not? The INCB's answer was introduced into the criminal proceedings against the church leaders in 2001 by Herbert Schaepe to Senior Inspector for Opium Law Cases, Dr. R.J.J.Ch. Lousberg. The message was clear. It read:

*"I would like to refer to your facsimile of 20 December 2000 concerning the traditional use of controlled substances, in particular the use of a preparation called 'ayahuasca' by religious groups in The Netherlands. The above-mentioned issue was consulted by the INCB Secretariat with the Scientific Section and the Legal Advisory Section of the United Nations International Drug Control Programme (UNDCP).- "It is our understanding that 'ayahuasca' is the common name for a liquid preparation (decoction) for oral use prepared from plants indigenous to the Amazon basin of South America, essentially the stem bark of different species of a jungle vine (Banisteriopsis sp.) and the tryptamine-rich plant Psychotria viridis. According to the scientific literature, ayahuasca commonly contains a number of psychoactive alkaloids, including DMT, which is a substance included in Schedule I of the 1971 Convention on Psychotropic Substances. No plants (natural materials) containing DMT are at present controlled under the 1971 Convention on Psychotropic Substances. Consequently, preparations (e.g. decoctions) made of these plants, including ayahuasca, are not under international control and, therefore, not subject to any of the articles of the 1971 Convention."<sup>13</sup>*

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<sup>12</sup> The International Narcotics Control Board (INCB) is the independent and quasi-judicial monitoring body for the implementation of the United Nations international drug control conventions. It was established in 1968 in accordance with the Single Convention on Narcotic Drugs, 1961.

<sup>13</sup> Letter dated January 17, 2001 from Herbert Schaepe of the INCB to Senior Inspector for Opium Law Cases, Dr. R.J.J.Ch. Lousberg, sent on January 23, 2001 to the Dutch College of Procurators General and submitted by the Public Prosecution Service to the Amsterdam District Court in the first criminal proceedings against the Amsterdam church.

# The Dutch Legal Regime on Narcotic Drugs and Psychotropic Substances

The "main" drug law in the Netherlands is the Opium Act dating back to 1919. It was not intended to solve national problems with drug use but rather to align with international obligations. A United Nations Opium Conference was held in the Netherlands in 1912, which resulted in an Opium Convention. It stipulated that member states should restrict the use of drugs to medical, veterinary, and scientific purposes. Use for pleasure or intoxication needs to be discouraged.<sup>14</sup> The treaty was signed by the Netherlands in 1914 and formed the basis for the country's first Opium Act of 1919. It focused on combating smuggling and production from the beginning yet had a relatively tolerant attitude adopted toward users.

The current Opium Act came into effect in 1928. This law was thoroughly revised in 1976. A distinction was made during the revision to differentiate between hard drugs, which posed unacceptable risks to public health (such as heroin, cocaine, DMT, and LSD) and soft drugs (such as cannabis) which were considered less dangerous. The former drugs were included in List I of the Appendix to the Opium Act, and the latter to List II. To this day, this classification has direct consequences for the prosecution and punishment of drug offenses in the Netherlands. The penalties for List II offenses are considerably lower than those on List I.

The principle of "separating the markets" between hard drugs and cannabis was codified in 1976. "Coffeeshops" emerged as the half-official, half-unofficial sales channels for cannabis, albeit under strict conditions. Violation of the Opium Act is a crime punishable by up to 12 years imprisonment in cases involving the importation or exportation of "hard drugs." The penalties vary according to the quantity and type of substances involved. Drug possession carries lower maximum penalties.<sup>15</sup>

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<sup>14</sup> M. van Laar & M.M.J. van Ooyen-Houben (red.), 'Evaluatie van het Nederlandse drugsbeleid', WODC 2009, <http://hdl.handle.net/20.500.12832/1783>.

<sup>15</sup> Article 10 (in conjunction with article 2) and article 11 (in conjunction with article 3) of the Dutch Drug Act.

Although the possession of small quantities of drugs for personal use is punishable by law, the authorities rarely conduct a targeted investigation in such cases. Although the police will seize the drugs, most people caught with a small amount for personal use are not charged. The legal threshold for cannabis is five grams. For hard drugs and dried psychoactive mushrooms, the limit is much lower – 0.5 grams.

The possession, production, or sale of drugs for commercial purposes will be prosecuted and is considered a more serious offense than possession for personal consumption. Prosecution policy in drug-related cases is determined by the directives of the Prosecutor General.<sup>16</sup> Drug use itself is not illegal under the Dutch Opium Act. Sometimes it is prohibited locally to maintain public order or protect the health of minors, such as in schools and on public transport. It is up to the local authorities to regulate this issue.<sup>17</sup>

Adding new substances to List I or II of the Opium Act is up to the Ministry of Health. They can proceed with this process if they consider a substance harmful to public health or are obligated to do so on the basis of international regulations. The Ministry of Health informs the Senate and the House of Representatives accordingly, requesting advice from the Council of State. If neither the House of Representatives nor the Senate object, and the Council of State agrees to the intended government decision, it is published in the Bulletin of Acts, Orders, and Decrees. This thereby makes it a punishable offense to produce, trade, and/or possess the substance in question.<sup>18</sup>

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<sup>16</sup> Public Prosecutor's Office, Directives for criminal proceedings under the Opium Act, hard drugs (2019R011) and Directives for criminal proceedings Opium Act, soft drugs (2018R013).

<sup>17</sup> See for example EMCDDA, Netherlands, Country Drug Report 2019.

<sup>18</sup> Article 3a of the Dutch Drug Act.

# The Status of Ayahuasca in the Netherlands

Despite the INCB's position on ayahuasca, it was declared forbidden by the judicial authority in the Netherlands. The treaty gives individual member states the freedom to impose stricter restrictions on psychoactive substances and the plants and organisms they naturally occur in. This happened in the Netherlands with psychoactive mushrooms, the so-called "paddo" jurisprudence.<sup>19</sup>

In 2001, the INCB informed the Dutch Authorities that psychoactive mushrooms were not prohibited in the Convention on Psychotropic Substances. The Board wrote about psychoactive mushrooms that year, "As a matter of international law, no plants (natural material) containing psilocine and psilocybine are at present controlled under the Convention on Psychotropic Substances of 1971. Consequently, preparations made from these plants are not under international control and, therefore, not subject to any of the articles of the 1971 Convention."<sup>20\*</sup>

The Dutch Supreme Court followed the INCB in this interpretation of the treaty and decided in 1998 and 2002 that organisms naturally containing psychoactive substances, such as mushrooms and truffles, are not punishable by law as long as they are not listed in the Dutch Opium Act. At the same time, the Supreme Court took the liberty of making an important restriction. Natural products that are not listed in the Opium Act but do contain naturally occurring prohibited psychoactive substances are not prohibited under the Convention. However, the Supreme Court decided this changes the moment these natural products have undergone any kind of processing, including grinding, mixing, or active drying.<sup>21</sup>

This court decision prohibited the actively dried or otherwise processed psychoactive mushroom in the Netherlands, while the fresh psychoactive mushroom was officially declared legal. The legal status of fresh psychoactive

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<sup>19</sup>Paddo means "mushroom" in Dutch.

<sup>20</sup> The Secretary of the INCB, United Nations International Narcotics Control Board, in a letter dated September 13, 2001.

**\*Editor's Note:** Although the INCB refers to "psilocine", "psilocybine", and "preparations made from these plants" in the 1971 Convention, it must be clarified that the components in these mushrooms are "psilocin" and "psilocybin" and that no plants contain psilocybin, only certain species in the mushroom kingdom do.

<sup>21</sup> Dutch Supreme Court (Hoge Raad) 5 November 2002, ECLI:NL:HR:2002:AE2094, NJ 2003,488.

mushrooms in the Netherlands came to an end on December 1, 2008 when a Dutch legislator added a series of psychoactive mushrooms to List II of prohibited substances of the Opium Act.<sup>22</sup>

The developed mushroom (“paddo”) jurisprudence has remained in force in the Netherlands. This has direct implications for the ayahuasca brew which is made up of plants that naturally contain a small amount of DMT: *Psychotria viridis* and *Mimosa hostilis*. These plants are not on the Opium Act’s lists of prohibited substances. They can be freely imported and traded in the Netherlands. But ayahuasca is prepared by mixing these plants with other botanicals and boiling them for a long time. Once this has happened, they have undergone an “active processing” in the eyes of the Supreme Court. Therefore on the basis of the paddo jurisprudence, the product created during this process must be equated to the psychoactive substance DMT, which the plants naturally contain.

The principle of the paddo jurisprudence was confirmed in the first criminal trial held in the Netherlands against Santo Daime churches. In its judgment on May 21, 2001, the District Court of Amsterdam expressly ruled the following:

*“The defense also referred to the interpretation of the Convention in the Commentary on the Convention on Psychotropic Substances, done at Vienna on 21 February 1971.*

*According to the defense, this implies that - contrary to the order made by the Supreme Court of the Netherlands, following the advocate general, in the Mushroom Order - infusions of plants or parts of plants which contain a substance on the list, if they are the result of a simple preparation, fall outside the scope of the Convention and therefore fall outside the scope of the Opium Act.*

*The court can leave open the question whether - contrary to the order of the Supreme Court of the Netherlands in the Mushroom Order - infusions which are the result of a simple preparation fall outside the scope of the Convention and whether this means that they also fall outside the scope of the Opium Act, since in the opinion of the court it cannot be held that the liquid in question, the ayahuasca, is the result of a simple preparation.*

*The report of expert De Wolff states that the ayahuasca is prepared by combining the leaves of Rainha (*Psychotria viridis*), which contain DMT,*

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<sup>22</sup> Decision of 17 November 2018, amending Lists I and II of the Opium Act in connection with the inclusion of hallucinogenic mushrooms in list II.

*with Jagube (Banisteriopsis caapi), which serves as a source of MAO inhibitors. Without these inhibitors DMT has no effect if taken orally.*

*The ayahuasca is therefore a blend of infusions of different plants, in which those different plants are necessary in order to achieve the desired effect. There is therefore no question of a simple infusion of one plant containing substances included in List I of the Convention.*

*The contents of the above-mentioned letter from Herbert Schaepe cannot affect this conclusion, if only because it is not implied by the Convention that the interpretation of the Convention by the United Nations International Narcotics Control Board must be regarded as official and binding. The Court therefore rejects this defense.”<sup>23</sup>*

Ayahuasca thus is a forbidden product in the Netherlands. This has been applied to all groups and individuals in the Netherlands who prepare, dispense, and use ayahuasca since 1998. In 2001, Santo Daime churches were the only group to be exempted from this rule by the court on the basis of their right to religious freedom. This exemption came to an end in 2018 after seventeen years of legality.

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<sup>23</sup> District Court of Amsterdam May, 21 2001, Case 13/067455-99, ECLI:NL:RBAMS:2001:AB1739 and AB 2001, 342.

# The Santo Daime Church and its Appeal to Freedom of Worship

The members and leaders of the Amsterdam-based Santo Daime church (Ceflu Cristi-Céu da Santa Maria) have been the subject of criminal proceedings in the Netherlands on several occasions since 1999. The charges against them started with their right to religious freedom to import the ayahuasca brew from Brazil and distribute it to their members as the sacrament of their worship.

For years, the church has been able to successfully invoke its fundamental right to religious freedom as detailed in Article 9 of the ECHR.<sup>24</sup> This states that everyone has the right to practice freedom of thought, conscience, and religion.<sup>25</sup> It is a fundamental right that the law in a democratic society can only restrict if it is necessary in the interest of public health or to protect the rights and freedoms of others.<sup>26</sup> The condition of legal restriction was met with the criminalization of the Opium Act, according to the church's reasoning. In this particular case, there wasn't a sufficient risk to public health to legitimize restricting the churches' religious freedom.

The church submitted a wide range of expert reports in support of its position. This led to a series of court rulings that upheld the church's appeal to the protection of Article 9 of the ECHR. The risk to public health was not considered sufficient to justify infringing on the fundamental right to religious freedom. The Dutch judge's opinion for 17 years was that Article 2 of the Opium Act did not apply to the responsible use of ayahuasca within the church's worship services.

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<sup>24</sup> The Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the European Convention on Human Rights, was signed in Rome on November 4, 1950 and came into effect on September 3, 1953. The *Netherlands* ratified the *European Convention on Human Rights* in 1954.

<sup>25</sup> Article 9 paragraph 1 of the ECHR reads: *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.*

<sup>26</sup> Article 9, paragraph 2 of the ECHR reads: *Freedom to manifest one's religion or beliefs shall be subject 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.*

This was mentioned during the first criminal trial against the Amsterdam Santo Daime church, in which the District Court of Amsterdam ruled on May 21, 2001:

*“On the basis of these expert's reports and the Articles of Association, the Court is of the opinion that the Amsterdam church CEFLU Cristi-Céu da Santa Maria must in fact be regarded as a church community. The doctrine professed must be regarded as a religious creed and the use of the tea, ayahuasca, or the Daime, being the most important sacrament in the worship of the Santo Daime church, must be regarded as an essential part of the religious life of the faithful. The defendant declared at the hearing that the Santo Daime church gives her support and strength and that the ayahuasca is used as a sacrament together with dancing and the singing of hymns. The defendant's conviction must therefore be regarded as a religion, which, together with the practice of the holy sacrament in which this religion is expressed, enjoys the protection of Article 9 of the ECHR.*

*By virtue of the Convention on Psychotropic Substances and the prohibition in Section 2 of the Opium Act and the occurrence of DMT on List 1 of that Act, DMT is a prohibited substance. The Public Prosecution Service has argued that the restriction of the defendant's right to practice her religion freely is justified for reasons of public health.*

*In view of the insight provided by De Wolff's report into the composition of ayahuasca and the health risks attached to it, the court takes the view that drinking ayahuasca in the religious context of the Santo Daime church does not involve any appreciable risks to public health. It is true that in individual cases the substance DMT which is present in the Daime may constitute a health risk, but in the opinion of the court the information provided about this and the controlled use within the religious community constitute a sufficient safeguard against unacceptable health risks in those cases in which consumption of the tea is inadvisable.*

*In view of the above, the Court is of the opinion that in the defendant's case the statutory prohibition against possessing, supplying, and distributing DMT, which is based on the Convention, and as a result of which she cannot receive the most important sacrament of her religion during the worship service, constitutes such a serious infringement of her religious freedom that this infringement cannot be regarded as being necessary in a democratic society.*



*Furthermore, in this case the interest of the defendant, namely that no infringement should be made of her right to religious freedom as guaranteed by the ECHR, must be weighed against the interest of the State, namely that it must fulfil its duty to prohibit DMT, a duty arising from the Convention on Psychotropic Substances. Considering the weight which must be attached to religious freedom and the circumstance that, as was considered above, there are no appreciable health risks involved in the ritual use of ayahuasca, the Court is of the opinion that in this case the greater weight should be attached to the protection of religious freedom. The conclusion is that in this case Section 2 of the Opium Act should not apply.”<sup>27</sup>*

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<sup>27</sup>District Court of Amsterdam May 21, 2001, Case 13/067455-99, ECLI:NL:RBAMS:2001:AB1739 and AB 2001, 342.

# The Principal Brazilian Santo Daime Church

The use of psychoactive drugs in religious rites is as old as our knowledge of human history, as experts in the criminal case against the Amsterdam church have pointed out, "Historically and sociologically, the relationship between drugs and religion is the rule rather than the exception... intoxicants are used to facilitate contact with the supernatural, the divine or the spiritual."<sup>28</sup>

The liturgy of the Santo Daime church follows Indigenous rituals from the Amazon region. According to the church, "Our spiritual work originated in the ancestral practices of pre-Columbian peoples, who for millennia had already used psychoactive plants as means of communication with divine entities and the spirits of their ancestors. In the 20th century, this ancient tradition took its current eclectic and Christian form through the revelation received by Master Irineu."<sup>29</sup> The ayahuasca brew prepared by Santo Daime members is inseparable from worship services, "For us, Daime is a sacrament. Its preparation is done in a ritual called *Feitio*, one of the most solemn and important moments in our spiritual work. According to our belief, inside the Daime there is a Divine Being and its manifestation depends on the material vehicle, which is the beverage itself, elaborated in the *Feitio* process."<sup>30</sup>

The main Santo Daime church based on this historical tradition is legal in Brazil. After DMT was declared a forbidden drug by the Psychotropic Substances Convention of the United Nations in 1971, a broad and thorough investigation of its traditional and religious use was carried out by the Brazilian government. This research led to the official legalization of ayahuasca for religious purposes in

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<sup>28</sup>F.A.M. Snelders, historian, Free University of Amsterdam, expert report dated November 27, 2000, p. 2. And Kranenborg, theologian and religious scientist, Free University of Amsterdam, expert report dated February 27, 2001 and Drs. H.C. Ossebaard, development psychologist, expert report November 2000.

<sup>29</sup>ICEFLU, Church of the Eclectic Center of the Fluent Universal Light Patron Sebastião Mota de Melo 2015, 'Institutional Dossier', p 6.

<sup>30</sup> ICEFLU 2015, 'Institutional Dossier', p. 30.

Brazil in 1992 and to it being further regulated later on.<sup>31,32</sup> Their investigation concluded that ayahuasca demonstrated no harm to public health.<sup>33</sup>

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<sup>31</sup>Resolutions No. 6 of February 4, 1986 and No. 9 of August 8, 1986 of CONFEN (Brazilian Federal Council on Narcotic Drugs) and the Report of the 3rd General Assembly of CONFEN of June 2, 1992.

<sup>32</sup> The document 'Deontological Principles for the Religious Use of Ayahuasca, November 23, 2006, published as 'Annexo Relatório final de Grupo Multodisciplinar de Trabalho - GMT - AYAHUASCA' in: 'Diário Oficial da União, Resolução, Presidente do Conselho Nacional de Políticas sobre Drogas (OONAD)' January 25, 2010, p. 57-60.

<sup>33</sup> E.J. MacRae, anthropologist, Universiteit of Bahía, wrote in his expert report of September 18, 2000, p. 9: "*That no damage to health has been proven caused by the brew and that the members of the different religious groups had been found to be orderly and to lead their lives according to the accepted social values.*"

# The Legal Status in the Netherlands

The Santo Daime churches in the Netherlands were legal for seventeen years based on the defense of ayahuasca for religious purposes in Brazil. The appeal to Article 9 of the ECHR protecting the right to religious freedom and the practice thereof was upheld by several courts in the Netherlands, even after a similar appeal from someone who was not a church member was rejected in the same Dutch court.<sup>34</sup>

As mentioned before, the first criminal prosecution of the Amsterdam church leader took place on May 21, 2001. The Amsterdam District Court ruled that Article 2 of the Opium Act should not apply to the ritual use of ayahuasca in the privacy of the church, which was recognized as an official denomination. According to the court, the doctrine adhered to by the church was considered a religious conviction. In addition, the ayahuasca brew was considered the most important sacrament within the worship services and an essential part of the religious experience of churchgoers. It, therefore, had the protection of Article 9 (1) ECHR.<sup>35</sup> A large number of expert reports demonstrated the court also ruled that the responsible consumption of the sacrament ayahuasca in the Santo Daime church worship services “does not entail any significant” risks to health to justify infringing on the right to religious freedom within the meaning of Article 9 (2) ECHR. Article 2 of the Opium Act was not applied based on these circumstances.<sup>36</sup>

This opinion from the Court of Amsterdam was repeated by the Court of Haarlem on March 3, 2009 in regards to the church importing ayahuasca from Brazil.<sup>37</sup> Based on the earlier ruling in Amsterdam, the court of Haarlem also decided that ayahuasca within the religious framework of the church did not involve

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<sup>34</sup> I am referring here to Mrs Fränklin-Beentjes' from the outset failed reliance on Article 9 ECHR, which led to the decision of the Dutch Supreme Court on January 9, 2007, ECLI:NL:HR:2007:AZ2497 confirming the order of the Amsterdam Court of Appeal of 25 January 2006, RK 2655-05.

<sup>35</sup> District Court of Amsterdam May 21, 2001, ECLI:NL:RBAMS:2001:AB1739 (p. 4 of the judgment). On the recognition of religious communities and article 9 ECHR, see also Teunis van Koten, 'Het kerkgenootschap in de Neutrale Staat, Een verkenning en analyse van de positie van het kerkgenootschap binnen de Nederlandse rechtsorde' (diss. Vrije Universiteit Amsterdam), 2017, p. 40 ff.

<sup>36</sup> District Court of Amsterdam May 21, 2001, ECLI:NL:RBAMS:2001:AB1739 (p. 6 of the judgment) and AB 2001, 342 with annotation B.P. Vermeulen.

<sup>37</sup> District Court of Haarlem March 26, 2009, ECLI:NL:RBHAA:2009:BH9844.

considerable risks to public health. The expert reports previously submitted by the church remained in effect as no new facts, insights, or circumstances had emerged to render them invalid. Under these circumstances, the prohibition of DMT importation as a natural component of ayahuasca had to be considered an infringement of the religious freedom of the Church that was “not necessary in a democratic society” according to the Haarlem District Court in 2009.<sup>38, 39</sup> The Amsterdam Court of Appeal upheld the Haarlem District Court decision for appeal on February 24, 2012.<sup>40</sup>

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<sup>38</sup> District Court of Haarlem March 26, 2009, ECLI:NL:RBHAA:2009:BH9844 (p. 5 of the judgment).

<sup>39</sup> District Court of Haarlem March 26, 2009, ECLI:NL:RBHAA:2009:BH9844 (p. 4 and 5 of the judgment).

<sup>40</sup> Amsterdam Court of Appeal February 24, 2012, ECLI:NL:GHAMS:2012:BV6888, NJFS 2012/111.

# The Consideration in Concreto

In prior proceedings at the Amsterdam Court of Appeal, the Public Prosecution Service had relied on an earlier court decision in 2006 in the Fränklin-Beentjes case. Fränklin-Beentjes appealed for Article 9 ECHR protection after ayahuasca was confiscated from her. She reported working with ayahuasca for religious purposes. The Amsterdam Court rejected her appeal. This decision was upheld by the Supreme Court in 2007.<sup>41</sup>

On the basis of this Supreme Court ruling, the Public Prosecution Service argued that the case of the Amsterdam church left no room for a concrete review by the court because the danger of DMT to public health had to be considered an established fact through its inclusion in List I of the Opium Act. This interpretation of Article 9 (2) ECHR by the Public Prosecution Service was rejected by the Amsterdam Court of Appeal in 2012 in the case against the church. The Court of Appeal considered it essential to test the necessity of the infringement of the right to religious freedom for each individual case. It ruled that Article 9 (2) ECHR requires an assessment of whether the restriction of the right to religious freedom in the concrete case is actually necessary for a democratic society. According to the Court of Appeal, "...when assessing the lawfulness of the infringement of the right to freedom of religion, it is sufficient to establish whether the infringement is provided for by law and serves one of the purposes mentioned in Article 9, paragraph 2, ECHR. The separate answering of the question whether that infringement is also necessary (in a democratic society) is then no longer necessary, which, as contrary to the wording of Article 9, paragraph 2, ECHR, cannot have been the intention of the Supreme Court."<sup>42</sup>

According to the Amsterdam Court of Appeal, the concrete necessity of the intervention had to lead to different outcomes for each of the cases. In 2006, the Court did not uphold Fränklin-Beentjes' reliance on Article 9 of the ECHR. In 2012 it did accept the Amsterdam church's plea to legitimize the importation of ayahuasca from Brazil.

The Court of Appeal explains why. In the earlier case of Fränklin-Beentjes, the court had "attached weight to the statement of the complainant [Fränklin-Beentjes]

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<sup>41</sup>See Supreme Court January 9, 2007, ECLI:NL:2007:AZ2497 (Fränklin-Beentjes) confirming the judgment of the Amsterdam Court of Appeal of January 25, 2006, RK 2655-05 in the case.

<sup>42</sup> Amsterdam Court of Appeal 24 February 2012, ECLI:NL:GHAMS:2012:BV6888 (p. 3 of the judgment).

that she was able to practise her religion without ayahuasca tea." Moreover, Fränklin-Beentjes was not a member of the Brazilian Santo Daime principal church. Whereas in the 2012 case, the court said it involved "a member of the [official] Santo Daime church for whom drinking ayahuasca tea was essential to practising his religion."<sup>43</sup>

In the final deliberation in the Amsterdam church case, whether a ban on importation as provided for in the Opium Act was necessary to protect (public) health, the Amsterdam Court of Appeal also relied on the expert reports previously submitted in the cases against the church. The conclusions also led the Court to decide that the importation of ayahuasca "for the purpose of its controlled use... within the Santo Daime Church in Amsterdam... poses a very small and therefore acceptable danger to health."<sup>44</sup> According to the court, the circumstances of this particular case again lead to a successful exercise of religious freedom. The lack of binding international treaty obligations, in this case, gave the Dutch court the ability to weigh the right to religious freedom more highly than the Opium Act. With this decision, the Amsterdam Santo Daime church was told for the third time in a row by the Dutch court that the Opium Act provisions, which prohibit the importation of DMT into the Netherlands, did not apply in its specific case on the basis of Article 9 (2) ECHR.

A cassation appeal lodged by the public prosecutor against this judgment of February 24, 2012 was prematurely withdrawn.<sup>45</sup>

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<sup>43</sup> Amsterdam Court of Appeal 24 February 2012, ECLI:NL:GHAMS:2012:BV6888 (p. 3 of the judgment).

<sup>44</sup> Amsterdam Court of Appeal 24 February 2012, ECLI:NL:GHAMS:2012:BV6888 (p. 4 of the judgment).

<sup>45</sup> The formal act of withdrawing the cassation appeal is dated April 9, 2014.

# The Deathblow to the Church

The Dutch Public Prosecutor did not give up and initiated a new criminal prosecution of the Amsterdam Santo Daime church in 2016. This time it involved the leader of the church and two members who had brought ayahuasca from the Brazilian church headquarters to the Netherlands. Again, the Haarlem District Court refused to find the church guilty. In its judgment on September 8, 2016, the court concurred with the earlier decisions and sided with the church. Like the Amsterdam Court of Appeal in 2012, it based this on the expert reports already submitted in the previous cases. The church was thus discharged from all legal proceedings for the fourth time. This was because the specific circumstances of the case did not provide the “necessity” required by Article 9 (2) ECHR to justify restricting the right to religious freedom.

However, the public prosecutor appealed against this verdict. In the meantime, the Dutch Supreme Court's 2007 decision in the Fränklin-Beentjes case had also been upheld by the European Court of Human Rights.<sup>46</sup> It led to a new ruling by the Amsterdam Court of Appeal (in a renewed composition), which broke with the 17-year-long legal status of the Dutch Santo Daime churches. Unlike the Public Prosecution Service, the Court of Appeal still considered a judicial review of whether the infringement of religious freedom was necessary in the specific case. However, this necessity test led to a different outcome this time.

Suddenly the precautionary measures taken by the Church were, in the opinion of the Court of Appeal, not sufficient to reduce public health risks to acceptable levels.<sup>47</sup> To this point, the Court of Appeal explicitly considered, “Also taking into account that in the last few years there has been a strong increase in the interest in the use of ayahuasca, especially outside the religious setting, the court of appeal... is of the opinion that it must be concluded that... the application of the Opium Act provisions in question and with that the restriction of the right to freedom of religion of the accused is necessary in a democratic society for the protection of public health.”<sup>48</sup>

With this ruling, the legal status of ayahuasca as a holy sacrament of the Santo Daime churches came to an end in the Netherlands.

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<sup>46</sup> ECHR May 6, 2014, No 28167/07 (*Fränklin-Beentjes and Ceflu-Luz Da Floresta v Netherlands*).

<sup>47</sup> Amsterdam Court of Appeal February 28, 2018, ECLI:NL:GHAMS:2018:688 .

<sup>48</sup> Amsterdam Court of Appeal February 28, 2018, ECLI:NL:GHAMS:2018:688 (p. 6 of the judgment).



# The Appeal in Cassation

The Church launched a cassation appeal against the legal status of ayahuasca in the Netherlands. According to the Church, the Court of Appeal's new opinion lacked factual, expert substantiation. No new information contradicted the Court of Appeal of Amsterdam's earlier ruling regarding the negligible risk to public health for the church's controlled use of ayahuasca, as the District Court of Haarlem previously indicated. The court's judgment was based on the increased popularity of ayahuasca outside the Church, which was completely outside of their sphere of influence. In addition, it is impossible to see how this situation could create an additional danger to public health given the strict, regulated use of ayahuasca by church members.<sup>49</sup>

A second objection to the cassation of the church concerned the possibility of so-called "less restrictive means" being completely ignored. According to the church, the goal of protecting (public) health could have been achieved with less drastic measures than a total ban on the import of their sacrament.<sup>50</sup> In the long years of its legal functioning in the Netherlands, the Church had taken several initiatives to this end. In 2001, it approached the competent authorities to propose a mutually satisfactory arrangement for how to import the court-authorized sacrament from Brazil. They received a negative response: an import permit could not be issued because the judge had ruled that Article 2 of the Opium Act did not apply to the church. In 2016, the church also proposed the prosecutor's office start being more transparent about notifying and registering all ayahuasca imports and their use, a practice already established in the United States since 2006 and in Canada since 2019.<sup>51</sup> The Dutch government never responded to this request.

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<sup>49</sup> Cassation grounds (grounds I and II) of August 30, 2018 leading to the decision of the Dutch Supreme Court of 1 October 2019, ECLI:NL:HR:2019:1456.

<sup>50</sup> Cassation grounds (ground IV) of August 30, 2018 leading to the decision of the Dutch Supreme Court of 1 October 2019, ECLI:NL:HR:2019:1456.

<sup>51</sup> Based on the decision of the District Court of Oregon March 18, 2009 (Church of the Holy Light of the Queen), the U.S. Department of Justice, Drug Enforcement Administration issued "Permits to Import" and "Controlled Substance Registration Certificates" to the ICEFLU church in question. Health Canada on June 7, 2019, granted the Canadian branch of the ICEFLU Church, C eu do Montr al, Eclectic Centre of the Universal Flowing Light, a "valid exemption under subsection 56 (1) of the Controlled Drugs and Substances Act (CDSA), for possessing, dispensing, transporting, importing, destroying and administering Daime Tea."

# The Supreme Court: The Opium Law Always Takes Precedence Over the Right to Religious Freedom

The Supreme Court ruled on the cassation case on October 1, 2019. Few words were devoted to the objections raised by the church. Relying on the judgment of the European Court of Human Rights in the *Fränklin-Beentjes* case, the Supreme Court followed the view advocated by the Public Prosecution Service that, in case of infringement to the Opium Act, a test of necessity for the infringement in concreto may be omitted. This opinion deviates from all previous judicial decisions about the Amsterdam church, in which the necessity of the infringement of the right to religious freedom was explicitly tested.<sup>52</sup> The Supreme Court stated that a general test is adequate in this case, as it pertains to the prohibition of ayahuasca importation outlined in the Opium Act, which is intended to safeguard public health. Consequently, this can be considered a limitation on the freedom of religion, deemed necessary in the interest of protecting public health as stipulated in Article 9, paragraph 2 of the ECHR.<sup>53</sup>

In response to a similar position taken by the Public Prosecution Service in 2012, the Amsterdam Court of Appeal stated that such a view should be regarded as contrary to the Convention. This interpretation of the second paragraph of Article 9 could never have been the Supreme Court's intention.<sup>54</sup> However, it was, as shown by this latest ruling in the case of the Amsterdam church.

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<sup>52</sup>To this end, the Supreme Court referred more specifically to the judgment of the ECHR May 6, 2014, no. 28167/07 (*Fränklin-Beentjes and Ceflu-Luz Da Floresta v. the Netherlands*).

<sup>53</sup>HR 1 October 2019, ECLI:HR:2019:1456, r.o. 2.3 and 2.5 and NJ 2019/418 with annotations by B.E.P. Myjer.

<sup>54</sup>Amsterdam Court of Appeal February 24, 2012, ECLI:NL:GHAMS:2012:BV6888 (p. 3 and 4 of the judgment).

# Complaint to the European Court of Human Rights

The Santo Daime church did not accept the Supreme Court decision and lodged an initial complaint with the ECHR. They argue that their religious freedom is being violated. They believe that the prohibition in the Opium Act, which restricts the importation of DMT or ayahuasca brew containing DMT, does not consider the necessity of the infringement in relation to their religious practices. In the church's opinion, this view ignores the right to religious freedom as guaranteed by Article 9 of the ECHR. The ECHR formulated this in 1999 in the case of *Serif v. Greece*, "It is true that in a democratic society it may be necessary to place restrictions on freedom of religion to reconcile the interest of the various religious groups... However, any such restriction must correspond to a 'pressing social need' and must be 'proportionate to the legitimate aim pursued.'"<sup>55</sup>

This ruling shows that the necessity of the infringement will always have to be considered. In doing so, the member states are granted a certain margin of *appreciation*, as long as it respects the limits set by the Convention. The court indicated in 2013 in the case of *Eweida and others v. the United Kingdom*, "According to its settled case-law, the Court leaves to the States party to the convention a certain margin of appreciation in deciding whether and to what extent an interference is necessary (...). The court's task is to determine whether the measures taken at national level were justified in principle and proportionate."<sup>56</sup>

The Supreme Court decision on October 1, 2019 regarding the Amsterdam church case invoked the European Court's earlier judgment in the *Fränklin-Beentjes versus the Netherlands* case. However, the European Court indicated that the judgment seems to be less of an overruling of the necessity test in Article 9(2) ECHR and instead granted a certain discretion to the national court. In the *Fränklin-Beentjes* case, the ECHR ruled, "The respondent party was entitled to consider that the prohibition of the possession for use of DMT was necessary in a democratic society for the protection of health, considering its known effects as described above."<sup>57</sup>

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<sup>55</sup> ECHR December 14, 1999, no. 38178/97 (*Serif v. Greece*), para. 49.

<sup>56</sup> ECHR January 15, 2013 and May 27, 2013, nos. 48420/10, 59842/10, 51671/10 and 36516/10 (*Eweida and Others v the United Kingdom*), para. 4.

<sup>57</sup> ECHR May 6, 2014, No 28167/07 (*Fränklin-Beentjes and Ceflu-Luz Da Floresta v Netherlands*), para 48.

# Misinterpretation of the Psychotropic Substances Convention

In the Fränklin-Beentjes case, the European Court of Human Rights explicitly referred to the Dutch criminalization of DMT as "legislation... which applies neutrally and generally."<sup>58</sup> But the ECHR used an argument the Supreme Court should have known was incorrect. The ECHR explicitly referred to the fact that the Netherlands is under an international obligation to criminalize ayahuasca, "...the illicit nature of DMT is reflected not only in the Opium Act but also in rules of international law binding on the respondent party. These rules require the respondent Party to prohibit all possession for use of that substance..."<sup>59</sup> The European Court was misinformed on the Fränklin-Beentjes case.

Dutch authorities have known since at least 2001 that there is no international obligation for the Psychotropic Substances Convention member states to criminalize ayahuasca, commonly brewed with the plant *Psychotria viridis*, which naturally contains DMT. The Dutch Opium law does not criminalize ayahuasca as such, nor the plants from which it is brewed. The Dutch courts have ruled that any (active) processing of products that naturally contain psychotropic substances such as DMT is a punishable act. But there is no international obligation to do so, as the European court seems to have wrongly assumed in Dutch ayahuasca cases. On the contrary, the INCB was perfectly clear about this in its 2001 letter to the Dutch authorities. Neither plants that naturally contain DMT nor infusions of those plants, such as ayahuasca, fall under the prohibition of the Psychotropic Substances Convention of 1971. This is an unchanged position of the INCB to date on the traditional and religious use of ayahuasca.

It is the increased interest in ayahuasca that caused concerns to the INCB. It has recommended that member states possibly adopt restrictive measures as a

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<sup>58</sup> ECHM May 6, 2014, nr. 28167/07, (*Fränklin-Beentjes and Ceflu-Luz Da Floresta/Nederland*), par. 46, which reads, *inter alia*: "Article 9 does not protect every act motivated or inspired by a religion or belief. ( ) In particular, it does not confer a right to refuse, on the basis of religious convictions, to abide by legislation the operation of which is provided for by the Convention and which applies neutrally and generally."

<sup>59</sup> ECHR May 6, 2014, no. 28167/07, para. 49 and paras. 26-28 (*Fränklin-Beentjes and Ceflu-Luz Da Floresta v Netherlands*).

result. In the words of INCB, "The Board notes increased interest in the recreational use of such plant materials. In addition, such plants are often used outside of their original socio-economic context to exploit substance abusers. (---) no longer limited to the regions where the plants grow, or to the communities that have traditionally used the plants. ( ) The Board recommends that Governments that have... experienced problems with regard to persons engaging in the recreational use of or trafficking in such plant material, to remain vigilant.... The Board recommends that Governments should consider controlling such plant material at the national level where necessary."<sup>60</sup>

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<sup>60</sup> [https://www.incb.org/documents/Publications/ePublication/E-Publication\\_E\\_FINAL.pdf](https://www.incb.org/documents/Publications/ePublication/E-Publication_E_FINAL.pdf), INCB publication, 2014, p. 68 and 69.

# The Protection of Religious Minorities

In the opinion of the Dutch Santo Daime congregations, the new INCB recommendation to discourage the “recreational use of ayahuasca” does not apply to them. They are part of the Brazilian Santo Daime denomination, which legally and responsibly works with ayahuasca on historical religious grounds. Such use (in the words of the INCB) not only remains outside the control of the Psychotropic Substances Convention, but should be respected.<sup>61</sup>

Contrary to what the European Court of Human Rights assumed in the Fränklin-Beentjes case, there is no “compelling obligation” for the Netherlands to criminalize the traditional use of ayahuasca by religious minorities. Nor are there any other international laws that would force the Netherlands to do so. The Netherlands is obligated by many international treaties to respect and protect the traditional use of natural medicines by religious minorities subjected to modern drug laws.

As early as 1993, the United Nations Human Rights Committee warned against an excessively narrow, ethnocentric interpretation of the right to religious freedom protected in Article 18 of the International Covenant on Civil and Political Rights (ICCPR). It then stated:

*“Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms ‘belief’ and ‘religion’ are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions. The Committee therefore views with concern any tendency to discriminate against any religion or belief for any reason, including the fact that they are newly established, or represent religious minorities that may be the subject of hostility on the part of a predominant religious community.”<sup>62</sup>*

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<sup>61</sup> Letter dated January 17, 2001 from Herbert Schaepe of the INCB to Senior Inspector for Opium Law Cases, Dr. R.J.J.Ch. Lousberg, forwarded to the Dutch College of Procurators General on 23 January 2001.

<sup>62</sup> Office of the High Commissioner for Human Rights, CCPR General Comment No. 22: Article 18, adopted at the Forty-eighth Session of the Human Rights Committee, on July 30, 1993, CCPR/C/21/Rev.1/Add.4, General Comment No. 22. (General Comments).

A similar concern is expressed in the thesis by the jurist Sohail Wahedi. He describes the increasing ethnocentrism with which religious minorities have to exercise their fundamental right to religious freedom within Western democracies.<sup>63</sup> Three religious scholars Massimo Introvigne, Holly Folk, and Wouter Hanegraaff point to the warning from the UN Human Rights Committee about the ECHR complaint filed by the Amsterdam church. They emphasize that the Santo Daime church must be seen as a fully-fledged religion with a systematic doctrine, hierarchy, codified rituals, and national and international leaders. In their view, its member denominations are entitled to the protection of religious freedom laid out in that convention.<sup>64</sup> Article 18 of the ICCPR is almost identical to Article 9 of the ECHR, which has a direct binding effect on the Netherlands.

The United Nations Convention no. 169, the *Indigenous and Tribal Peoples Convention of 1989*, was ratified by the Netherlands in 1996.<sup>65</sup> The principles agreed on by this convention are further elaborated on in the United Nations Declaration on the Rights of Indigenous Peoples of September 13, 2007. Article 12 of the Declaration reads, "Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies." According to the following Article 31, this implies the right "to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions... including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora." The Santo Daime is a religious tradition the Amsterdam church ascribes to. This religious tradition is deeply rooted in Brazilian culture and ayahuasca is considered the holy sacrament inseparable from worship services.

The United Nations Human Rights Council recently adopted a report by the High Commissioner for Human Rights examining the impact of the global drug war on the specific rights granted to Indigenous peoples. The report discusses the various ancient Indigenous religious practices which sometimes (as in the case of the Santo Daime churches) involve psychoactive plants. The report notes this can lead to conflicts with existing drug legislation in some member states. But it declares:

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<sup>63</sup> Sohail Wahedi, 'The Constitutional Dynamics of Religious Manifestations, On Abstraction from the Religious Dimension' (diss. Rotterdam, Erasmus Universiteit), 2019

<sup>64</sup> M. Introvigne & W.J. Hanegraaff & H. Folk, 'The Santo Daime Church in the Netherlands: Why the ECHR should consider the case', *The Journal of CESNUR* 4/2 (2020) [supplement] CLVII-CLXII, sub 1. (online publiek).

<sup>65</sup> United Nations Convention 169, the Indigenous and Tribal Peoples Convention, 1989, ratified by the Netherlands in 1996, Treaty Series 1996, 99.

*"Pursuant to article 18 of the International Covenant on Civil and Political Rights, religious minorities and indigenous peoples have the right to manifestations of their freedom of religion or belief. This has been found, in some cases, to include the use of controlled substances in religious and ceremonial practices when there is a historical basis for doing so (see A/HRC/30/65). The right of indigenous people to use controlled crops... in their traditional, cultural and religious practices is also supported by the United Nations Declaration on the Rights of Indigenous Peoples (arts. 11, 24 and 31) and the Indigenous and Tribal Peoples Convention, 1989 (No. 169) (arts. 3.2, 5 (a) and 23). (See E/2009/43-E/C.19/2009/14, and the submissions of Maloca International and the Transnational Institute.)"*<sup>66</sup>

In the eyes of the Santo Daime churches, the Dutch Supreme Court erroneously views the criminalization of ayahuasca as "legislation which applies neutrally and generally." Ayahuasca does not fall under the control of the Psychotropic Substances Convention of the United Nations, according to the INCB, which allows the Dutch courts to interpret the Opium Act in the same way in specific cases.

According to the Human Rights Council of the United Nations, international treaties (also signed by the Netherlands) call for the protection of religious minorities who traditionally use natural medicines which now fall under the control of modern drug laws. According to the Santo Daime churches, this protection includes the traditional use of ayahuasca during their worship services. In spite of these arguments, the ECHR did not address the Santo Daime churches' complaint about the recent Dutch ban on its holy sacrament and declared it inadmissible without further reasoning.<sup>67</sup>

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<sup>66</sup> Annual report of the United Nations High Commissioner for Human Rights, adopted at the meeting of Human Rights Council on September 14, 2018, sub C1, § 70.

<sup>67</sup> ECHR September 24, 2020, no. 15226/20.



# The UN Human Rights Committee in Geneva

The Santo Daime churches are considering the next steps in navigating the current scenario with ayahuasca in the Netherlands. This may include a complaint to the United Nations Human Rights Committee along with other groups who work with ayahuasca for spiritual purposes in a culturally historic tradition.

For the churches, these decisions are about freedom of worship and the direct expression of faith. This is a central element of the right to religious freedom guaranteed by the ECHR and the ICCPR. An assessment of this violation in the case of Santo Daime churches should be required.<sup>68</sup> There is no international requirement for the Netherlands to criminalize ayahuasca, but there is an international obligation to protect religious minorities. The case of Santo Daime churches in The Netherlands can offer the courts sufficient information to weigh all aspects of the individual case.

The Dutch courts decided in favor of Santo Daime churches for 17 years. This basis was founded by a wide range of experts who unanimously concluded that ayahuasca within the specific “setting” of the Santo Daime churches did not pose any health dangers. Their reports have remained undisputed and unchanged to this day. However, the government has set the goal of preventing increased “recreational use” of ayahuasca outside the church. The ban on the church’s sacrament should be considered an unnecessary and disproportionately heavy approach.<sup>69</sup>

The Dutch Santo Daime church maintains that the absence of a necessity and proportionality test, which would encompass all aspects of its particular case,

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<sup>68</sup> ECRM July 14, 1987, no. 12587/86 (*Chappell v. United Kingdom*) and also ECHR January 15, 2013 and May 27, 2013, no. 48420/10, 59842/10, 51671/10 and 36516/10 (*Eweida and others v. United Kingdom*), paras. 79-82, as well as ECHR June 10, 2010, no. 302/02 (*Jehovah's Witnesses of Moscow and Others v. Russia*), para. 108 and ECHR 5 October 2006, no. 72881/01 (*Moscow Branch of the Salvation Army v. Russia*), paras. 76 and 77. In a similar way, also Adriaan Vleugel, 'The legal concept of religion' (diss. Radboud University Nijmegen), 2018, Wolters Kluwer, Deventer, 2018, chapter 2.2.5, p. 40 ff.

<sup>69</sup> ECHR September 12, 2012, no. 10593/08 (*Nada/Switzerland*), para. 183, as well as ECHR April 30, 2009, no. 13444/04 (*Glor/Switzerland*), para. 94 and ECHR October 11, 2011, no. 48848/07 (*Association Rhino and others/Switzerland*), paras. 65 and 66.

constitutes an unacceptable violation of its right to religious freedom protected by Article 9 of the ECHR and Article 18 of the ICCPR. They are not alone in this. Introvigne, Folk, and Hanegraaff also wrote about the recent developments in the Dutch church as "...prohibiting the import and use of Ayahuasca by the Dutch Santo Daime church is equivalent to ruling that church out of existence by judicial fiat, which is a clear breach of religious freedom."<sup>70</sup>

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<sup>70</sup> M. Introvigne & W.J. Hanegraaff & H. Folk, 'The Santo Daime Church in the Netherlands: Why the ECHR should consider the case', *The Journal of CESNUR* 4/2 (2020) [supplement] CLVII-CLXII, (online publication).

# Conclusions

Two of the plants in the ayahuasca brew (*Banisteriopsis caapi* and *Psychotria viridis*) are not listed as prohibited substances in the Opium Act. They can be imported and freely traded in the Netherlands. However, the Supreme Court views the preparation of ayahuasca as undergoing “active processing.” This is equated with the psychoactive DMT compound (which only one of the plants in the brew naturally possesses) making the mixture a forbidden product on the basis of the jurisprudence.

According to jurisprudence, drinking ayahuasca during worship was essential for church members to practice their religion. The various expert reports convinced the courts that the responsible use of ayahuasca in the privacy of the Santo Daime church did not pose sufficient risks to health to justify an infringement of the right to religious freedom as required by Article 9 (2) ECHR.<sup>71</sup>

On February 28, 2018 the Amsterdam Court of Appeal came to a different conclusion. They based their decision on the increasing interest in ayahuasca outside the specific religious setting of the church in recent years. In October 2019, the Dutch Supreme Court ruled to prohibit the importation of ayahuasca. They based this decision on the stipulation that the Opium Act can be regarded as a lawful restriction on the freedom of religion, necessary in the interest of protecting public health as referred to in Article 9, paragraph 2 of the ECHR. The decision of the Dutch Supreme Court was brought before the European Court of Human Rights, where the decision was upheld.

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<sup>71</sup> District Court of Oregon March 18, 2009 (Church of the Holy Light of the Queen). See also US Supreme Court February 21, 2006, Attorney-General v Centro Espirita Beneficente União Do Vegetal (546 US 2006).

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