



# Legal Opinion on the Status of Ayahuasca in the Portuguese Legal System

**ARMANDO ROCHA**

**ANA SOFIA MACHADO FERREIRA**

**FRANCISCO QUELHAS LIMA**

**March 2024**



**ICEERS**

INTERNATIONAL CENTER FOR  
ETHNOBOTANICAL EDUCATION  
RESEARCH & SERVICE

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# I. AYAHUASCA IN CONTEXT BY ANA SOFIA MACHADO FERREIRA

## 1.1 INTRODUCTION

Ayahuasca is a beverage traditionally used by different Indigenous peoples in South America for several purposes, including in religious rituals. Despite its confined geographic origins, ayahuasca consumption has become globalized. This brew is now not only part of religious rituals but also used for therapeutic purposes and personal growth.<sup>1</sup>

Ayahuasca consumption has also raised concern among policymakers, which explains why it has been outlawed in some cases. The apprehension surrounding ayahuasca stems from the psychoactive effects produced by one of its key components. This potential effect clarifies why, within the policies aimed at combating the trafficking of narcotic drugs and psychotropic substances, the distribution, possession, or consumption of ayahuasca has been prohibited in numerous regions, often regarded as a criminal offense. These policies exist despite studies indicating that ayahuasca does not lead to substance use disorder and "does not appear to be

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<sup>1</sup> For a comprehensive study of the globalization of *ayahuasca*, see *inter alia* Beatriz Caiuby Labate, Clancy Cavnar & Alex K Gearion (eds), *The World Ayahuasca Diaspora – Reinventions and Controversies (Vitality of Indigenous Religions)*, 1<sup>st</sup> edition (Routledge, 2017), or Beatriz Caiuby Labate & Henrik Jungaberle (eds), *The Internationalization of Ayahuasca* (LIT Verlag, 2011).

associated with the detrimental psychosocial effects caused by other drugs of abuse."<sup>2</sup>

Given this context, this legal opinion aims to ascertain whether the distribution, possession, preparation, or consumption of the ayahuasca brew and/or the plants required for its preparation are lawful within the Portuguese legal system.

## 1.2. WHAT IS AYAHUASCA?

Because this is a legal opinion, we will not discuss the scientific or cultural issues related to ayahuasca. That type of information has already been well-documented in previous studies.<sup>3</sup> However, some brief, preliminary information is necessary to understand the Portuguese legal context.

Ayahuasca is a psychoactive brew obtained from the decoction of different plants. The first element usually present in this preparation is *Banisteriopsis caapi*, commonly known as "ayahuasca," which is a vine endemic to tropical zones in South America. The vine is harvested and

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<sup>2</sup> Josep Maria Fábregas, Débora González, Sabela Fondevilla, Marta Cutchet, Xavier Fernández, Paulo César Ribeiro Barbosa, Miguel Ángel Alcázar-Córcoles, Manel J. Barbanoj, Jordi Riba & José Carlos Bouso, 'Assessment of Addiction Severity among Ritual Users of *Ayahuasca*' (2010) 111 *Drug and Alcohol Dependence*, vol. 111, number 3, 257-61, 260.

<sup>3</sup> For a brief overview, see Constanza Sánchez & José Carlos Bouso, "Ayahuasca: From the Amazon to the Global Village" (2015) 43 *Drug Policy Briefing* 1.

later processed to produce the brew. This vine itself (*B. caapi*) gives the brew (ayahuasca) its name and determines its flavor and color.<sup>4</sup>

The second key element in this preparation may differ according to the geography or intention for the brew. The most common second component of the brew is the leaves of the *Psychotria viridis* (Chacrana) bush.<sup>5</sup> The Latin terminology itself suggests the plant has a psychotropic effect which comes from DMT (dimethyltryptamine or  $C_{12}H_{16}N_2$ ), one of its active ingredients.<sup>6</sup> DMT is psychoactive<sup>7</sup> and is a controlled substance under Schedule I of the 1971 Convention on Psychotropic Substances<sup>8</sup> and Table II-A of the Decree-Law no. 15/93, of January 22<sup>nd</sup> enacted by the Portuguese government.

Nevertheless, when these leaves are ingested orally, the DMT they contain is unable to produce a psychotropic effect because the body naturally inhibits its absorption, mainly through the action of the monoamine oxidase enzyme. The DMT present in the ayahuasca brew

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<sup>4</sup> Constanza Sánchez & José Carlos Bouso, "Ayahuasca: From the Amazon to the Global Village", *cit.*, 3.

<sup>5</sup> Constanza Sánchez & José Carlos Bouso, *ult. loc. cit.*

<sup>6</sup> Hereinafter referred to as "DMT".

<sup>7</sup> Josep Maria Fábregas et al., "Assessment of Addiction Severity among Ritual Users of Ayahuasca", *cit.*, 258.

<sup>8</sup> Hereinafter referred to as the "1971 Convention". Adopted February 21, 1975, entered into force August 16, 1976, Registration no. 14956, 1019 *UNTS* 175. On April 20, 1979 Portugal notified the depositary of the accession to the convention, which implies that, pursuant to its Article 26, the 1971 Convention is applicable in the Portuguese legal order as of July 19, 1979.

produces psychoactivity by mixing the *Psychotria viridis* leaves (that contain DMT) with the ayahuasca vine (*Banisteriopsis caapi*). Many components found in ayahuasca can inhibit monoamine oxidase enzymes, and therefore enable the DMT to be orally available and have a psychotropic effect.<sup>9</sup> By preparing the brew with a DMT-containing plant (*P. viridis*) and the ayahuasca vine (*B. caapi*), which blocks the effect of monoamine oxidase enzyme, ayahuasca produces the specific psychotropic activity it is known for.

### **1.3. THE RITUAL USE OF AYAHUASCA IN PORTUGAL**

Although no systematic studies have yet been done regarding the uses of ayahuasca in Portugal, ceremonies have been observed in the country for about six years. In addition, the collection of participant testimonies and facilitator interviews provided relevant data that warrants further exploration.<sup>10</sup> This information suggests the expansion of ayahuasca use in ceremonial contexts has probably occurred in a very spontaneous manner since the year 2000. As far as it was possible to determine, very few people had contact with the brew in private settings in Portugal before then. Such sessions were facilitated by close acquaintances who started serving the brew after returning

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<sup>9</sup> Josep Maria Fábregas et al., 'Assessment of Addiction Severity among Ritual Users of Ayahuasca', *cit.*, 257.

<sup>10</sup> ANA SOFIA MACHADO FERREIRA, JOSÉ ALBERTO VASCONCELOS SIMÕES. Striving for Religious Freedom: socio-cultural and legal aspects of the Santo Daime Movement in Portugal\*. *submitted*.

from countries where ancestral ritualistic ayahuasca practices were widespread, such as in Peru, Brazil, Bolivia, Colombia, and Ecuador.<sup>11</sup>

However, since the turn of the millennium, more organized practices began to emerge for two different reasons. The first was due to the globalization of ayahuasca and the growing touristic interest in so-called "spiritual practices."<sup>12,13,14</sup> There was also a second wave of Brazilian immigration to Portugal beginning in 2000 and going until the economic crisis of 2010.<sup>15</sup> The phenomenon of ayahuasca globalization, in line with so-called "urban neo-shamanism" (see 3d), has given rise to a series of practices that involve the use of consciousness-expanding plants for healing purposes, alongside a wide range of other methods.<sup>16</sup> The increasing number of Brazilian nationals in Portugal since 2000 has led to the adoption of several Indigenous cultural and religious practices. This includes groups (see

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<sup>11</sup> ANDREW DAWSON (2013). *Santo Daime, a New World Religion*, Bloomsbury. London, New York.

<sup>12</sup> JONATHAN THOMAS LOWELL, PAUL C. ADAMS. The routes of a plant: ayahuasca and the global networks of Santo Daime. *Social & Cultural Geography*, 18(2), 137–157, 2017.

<sup>13</sup> KENNETH W. TUPPER. The globalization of ayahuasca: Harm reduction or benefit maximization? *International Journal of Drug Policy*, 19(4), 297–303, 2008.

<sup>14</sup> MANUEL. A. VÁZQUEZ, CRISTINA ROCHA. Introduction: Brazil in the New Global Cartography of Religion. In C. Rocha & M. A. Vásquez (Eds.), *The Diaspora of Brazilian Religions*, 2013:1–42. Leiden: Brill, 2013.

<sup>15</sup> TAHIS FRANÇA, BEATRIZ PADILLA. Imigração brasileira para Portugal: entre o surgimento e a construção mediática de uma nova vaga. *Cadernos de Estudos Sociais, Recife*, 33 (2), 2018. Consult in: <http://periodicos.fundaj.gov.br/index.php/CAD>.

<sup>16</sup> JOSÉ CARLOS BOUSO, CONSTANZA SÁNCHEZ-AVILÉS, Traditional Healing Practices Involving Psychoactive Plants and the Global Mental Health Agenda. *Health and Human Rights*, 22(1), 145–150, 2020.

3c) where ayahuasca is considered a sacrament within a very specific ritualized context.

Following the globalization of ayahuasca, there has been an increase in tourism to regions of the Amazon basin, where groups with longstanding traditional Indigenous practices or hybrid cultural movements use ayahuasca ritualistically within the context of *cross-cultural "vegetalismo"*.<sup>17</sup> After experiencing life-changing moments, some individuals began bringing facilitators to Portugal and organizing ceremonies with people in their close circles. After more people became interested in ayahuasca, they started traveling to the facilitators' countries of origin regularly to work with the plants. As a result, individuals in their thirties and forties pursued shamanic training within traditions that worked with visionary plants and became proficient in conducting ceremonies on their own. In the early 2000s, the first ayahuasca circles led by Portuguese facilitators emerged. Ayahuasca was offered in a non-traditional ceremonial setting, where Indigenous knowledge intertwined with the facilitators' spiritual practices, occasionally influenced by Brazilian ayahuasca religions. These groups followed eclectic rituals that did not center on maintaining the framework of the original practices. Facilitators were generally committed to offering a meaningful experience through the ceremony's structure and aesthetics. From interviews with several

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<sup>17</sup> KENNETH, W. TUPPER. Ayahuasca healing beyond the Amazon: the globalization of a traditional indigenous entheogenic practice. *Global Networks*, n°. 9(1): 117-136, 2009.



facilitators, it became clear that their utmost priority was creating a safe environment for participants seeking healing and/or spiritual enlightenment within a ceremonial context.<sup>18</sup>

It's important to emphasize that in both unorthodox and religious contexts, facilitators universally emphasize that an ayahuasca circle is not intended for recreation.<sup>19</sup> It is instead regarded as ceremonial work, whether of a religious or spiritual nature, with strict guidelines to be followed by both facilitators and participants. Many Portuguese circles typically include health disclaimers that provide information about the brew, the ritual, interactions with food and medications, contraindications, potential side-effects, and guidelines aimed at maintaining the integrity of the space and the safety of all participants. Once the ceremony begins, the ritual unfolds, which may involve burning incense, invoking protective spirits and guides, offering prayers, and sharing intentions for the ceremony. Throughout the ceremony, music and chants are often performed live by individuals with varying levels of expertise. The conclusion of the ceremony typically includes a closing ritual and a sharing circle where participants verbally express and integrate their personal experiences.

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<sup>18</sup> See footnote no. 10, citing an article containing a compilation of six years of field research among Ayahuasca facilitators in Portugal. The above conclusions are the result of this observational work, that remain unpublished, beyond the information regarding the Santo Daime movement.

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In some cases, facilitators interview first-time participants, taking an interest in understanding their motivations and attitudes toward the work being done. They often reject individuals who may not align with the ceremonial framework, whether it's due to their personality, reputation, contraindicated medications, or their mental state if it could increase the likelihood of a challenging experience.

The average user profile is typically people in their thirties and forties who have somehow become disappointed with mainstream lifestyle and a path towards self-development involving various spiritual practices.<sup>20</sup> They view ayahuasca and other psychedelic substances as tools to go deeper into their inner work, get to know themselves better, accelerate personal development, heal emotional and physical issues, and connect with like-minded people who have a spiritual outlook on life. This, in turn, can inspire individuals (for example those who have attended certain yoga classes, meditation groups, or are connected to a spiritual teacher) to become interested in experiencing ayahuasca within a group setting facilitated by someone trained in these practices.<sup>20</sup>

It is common to encounter individuals who attend these ceremonies sporadically to address significant life issues. Others may choose to follow one or more facilitators over time, particularly during phases of

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<sup>20</sup> See footnote no. 10 and 18. The above conclusions are the result of this observational work, that remain unpublished, beyond the information regarding the Santo Daime movement.

life when they seek deep personal growth. For some, these experiences lead to regular participation in ayahuasca ceremonies. It is also common to find people seeking solutions for their dependency on alcohol, tobacco, and sometimes other drugs who begin working with ayahuasca as a tool for mitigating withdrawal symptoms.<sup>21, 22, 23</sup>

In the second decade of the millennium, these groups experienced significant growth and diversification in the socio-demographic profile of their participants. They not only attracted a larger number of young attendees compared to previous years but also began to welcome individuals from abroad who lacked permanent residences and sought experiences outside mainstream culture. The community grew rapidly, leading some facilitators to specialize in thematic ceremonies tailored for people in higher socio-economic classes to meet the increasing demand. These individuals also prioritize comfort and are willing to pay for high-end venues. Some entrepreneurs and influential figures view ayahuasca experiences as a path to material success.<sup>20</sup>

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<sup>21</sup> JOSÉ CARLOS BOUSO; JORDI RIBA. Ayahuasca and the Treatment of Drug Addiction. In *The Therapeutic Use of Ayahuasca*. Labate, Beatriz Caiuby, Cavnar, Clancy (Editors), 95- 109. Springer: Berlin Heidelberg, 2013.

<sup>22</sup> ANJA LOIZAGA-VELDER A., ROLF VERRES. Therapeutic effects of ritual ayahuasca use in the treatment of substance dependence-qualitative results. *Journal of Psychoactive Drugs*. Jan-Mar;46(1):63-72, 2014.

<sup>23</sup> JONATHAN HAMILL, JAIME HALLAK, SERDAR M. DURSUN, GLEN BAKER. Ayahuasca: Psychological and Physiologic Effects, Pharmacology and Potential Uses in Addiction and Mental Illness. *Current Neuropharmacology*.17(2):108-128, 2019.

Most facilitators conduct their work in an informal and non-proselytizing manner with a limited circle of contacts who learn about these ceremonies through word of mouth. Many facilitators are uncertain about the legal status of ayahuasca in Portugal.<sup>20</sup> Certain individuals who played a pioneering role in ceremonial plant medicine work are either discontinuing their activities or contemplating doing so. This shift came in response to recent incidents involving customs-related arrests, a rise in legal cases associated with plant medicine, concerns about potential interference by authorities, and huge shifts within the ayahuasca community. However, a contrasting trend is emerging, driven by younger facilitators, including a wave of foreigners who have relocated to Portugal after their experiences in South American countries. These individuals have started conducting plant medicine ceremonies and believe that the existing legal framework does not impede their activities. However, the reality is more complex, as will be discussed below.<sup>24</sup>

The second wave of ayahuasca practices mentioned earlier in Portugal coincided with the increasing immigration from Brazil starting in 2000, which also brought the most common ayahuasca religions such as the *Santo Daime* church and *União do Vegetal* to the

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<sup>24</sup> ANA SOFIA M. FERREIRA, JOSÉ ALBERTO V. SIMÕES. Struggling for Religious Freedom in the Santo Daime Movement in Portugal. Presentation at 8th APA - Portuguese Association of Anthropology Conference Évora, 6th-9th September 2022.

country.<sup>25</sup> Again, no studies have yet determined the sociodemographic information of Portuguese members of these groups. However, through personal observations conducted between 2016 and 2020, the most permanent members in both organizations were Brazilian citizens who were part of these religious groups in their home country.<sup>20</sup> Some of them established family ties and made friends with Portuguese residents who also became members. The sociodemographic profile was composed of urban members belonging to the original religious groups.<sup>23</sup> Within the Santo Daime Church, non-permanent members are a mix of Brazilians and Portuguese. Their numbers are smaller and they typically participate occasionally. They often attend multiple groups, depending on their individual needs and preferences.

Motivated by the desire to obtain legal recognition for their practices, both the Santo Daime Church and União do Vegetal began administrative procedures to register their organizations as formal religious entities with the goal of getting their practices fully recognized.<sup>26</sup> In the case of União do Vegetal, their legal strategy

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<sup>25</sup> See footnote no. 26 for details regarding UDV, which records register sessions since 2003. Regarding Santo Daime Church, the initiative to implement their doctrine in Portugal came in 2001, through a spiritual authorization given by the leading Godfather and Godmother (Padrinho and Madrinha) from 'Céu do Mar' church, as reported in ANA S. M. FERREIRA and JOSÉ A.V. SIMÕES, *op.cit* in Footnote no. 10.

<sup>26</sup> Decree-Law No. 134/2003 of 28/06 (2003) created a national registry of religious entities within a computerized database, not only to publicize their legal situation, but mainly to give them legal personality.

involved waiting for the institution's 60th anniversary in Brazil when it obtained automatic recognition granted by article no.37 of the Religious Freedom Act, *i.e.*, Law No. 16/2001 of 22/06.<sup>27</sup> However, even if these organizations receive recognition as religious entities, it doesn't automatically grant them the right to use terms like "Daime" or "Vegetal" (the name given to ayahuasca) in their rituals. The Santo Daime Church is well aware of these limitations despite its religious status. Their legalization strategy involved a few attempts to get recognition as a religious entity with a specific practice (using a psychotropic substance) under the Religious Freedom Act. This attempt was unsuccessful. It was not clear for the Committee on Religious Freedom (an independent advisory body to the government focused on the implementation of the Religious Freedom Act) that they met the legal requirements to be classified as a religious entity with a controversial ritualistic practice.

Now their future strategy is geared at filing a legal suit before a court of law to have their church, and the ritual use of the sacrament they call *daime*, recognized as the backbone of their religious practice. They are still in the process of gathering the necessary documentation which includes detailed pharmacological analysis of the decoction. The goal is to provide clear evidence of its safety and the absence of

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<sup>27</sup> PATRÍCIA PAULA LIMA. *A legalidade da ayahuasca em vista à liberdade ritual em Portugal* 2017. Consult: <http://neip.info>

risks to the lives or well-being of their members.<sup>28, 29</sup> Being a recognized religious group in Brazil,<sup>30</sup> the ceremonial use of a ritual brew containing a scheduled psychoactive component may necessitate either the establishment of an exemption statute through a specific legal procedure or inclusion within the same legal framework as any other citizen. This is where an analysis of the Portuguese legal regime becomes pertinent.

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<sup>28</sup> ANA SOFIA M. FERREIRA, JOSÉ ALBERTO.V. SIMÕES, *op.cit.* in Footnote no.10.

<sup>29</sup> Reflecting the fact that the potential for abuse is inexistent, a 2018 report by SICAD, the official Intervention Service in Addictive Behaviors and Dependencies does not include any data regarding possible misuses of ayahuasca.  
[http://www.sicad.pt/PT/Publicacoes/Paginas/detalhe.aspx?itemId=162&lista=SICAD\\_PUBLICACOES&bkUrl=BK/Publicacoes/](http://www.sicad.pt/PT/Publicacoes/Paginas/detalhe.aspx?itemId=162&lista=SICAD_PUBLICACOES&bkUrl=BK/Publicacoes/)

<sup>30</sup> BIA LABATE, KEVIN FEENEY. Ayahuasca and the Process of Regulation in Brazil and internationally: implications and challenges. *International Journal of Drug Policy*, 23 (2): 154-161. 2012.

## **II. LEGAL STATUS OF AYAHUASCA IN PORTUGAL BY ARMANDO ROCHA**

### **2.1. THE PORTUGUESE LEGAL REGIME ON NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES**

The central statute in the Portuguese legal order is Decree-Law no. 15/93<sup>31</sup> which sets out the “legal regime applicable to the traffic and consumption of narcotic drugs and psychotropic substances.”<sup>32</sup> It adopted domestic-level implementation of the international commitments assumed by the Portuguese State under the 1961 Single Convention on Narcotic Drugs,<sup>33</sup> the 1971 Convention, and the 1988

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<sup>31</sup> Although the Portuguese Constitution affords to the Parliament the prescriptive competence relating to fundamental rights and freedoms, the definition of criminal offenses and its consequences, and the organization and competences of courts and the public prosecutor, the Parliament authorized the Government to enact legislation relating to the fight against narcotic drugs and psychotropic substances (Law no. 27/92, of August 31<sup>st</sup>).

<sup>32</sup> See Article 1.

<sup>33</sup> Hereinafter referred to as the “1961 Convention” adopted on March 30, 1961 and entered into force December 13, 1964. Registration no. 7515, 520 *UNTS* 151. This convention was signed by Portugal on March 30, 1961, approved by the Portuguese Government on August 12, 1970, promulgated by the Portuguese President of the Republic on September 12, 1979, and published as Decree-Law no. 435/79, of September 12<sup>th</sup>. On December 30, 1971, Portugal notified the depositary of the ratification of the convention, which implies that, pursuant to Article 41 (2) of the convention, Portugal became part of this convention on January 29, 1972.

The 1961 Convention was later amended by the 1972 Protocol Amending the Single Convention on Narcotic Drugs, adopted on March 25, 1972 and entered into force August 8, 1975, Registration no. 14151, 976 *UNTS* 3. This convention was approved for accession by the Portuguese Government on November 10, 1978, and promulgated by the Portuguese President of the Republic on December 21, 1978. On April 20, 1979, Portugal notified the depositary of the accession to the convention, which implies that, pursuant to Article 18 (2) of the convention, the convention is binding within the Portuguese legal order since May 20, 1979.



United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances,<sup>34</sup> as well as the law of the European Union.<sup>35</sup>

This statute was greatly amended in 2000 and complemented by Law no. 30/2000, whose objective is *“the legal regime applicable to the consumption of narcotic drugs and psychotropic substances, as well as the sanitary and social protection of the individuals who consume such substances without medical prescription.”*<sup>36</sup> This implies that the legislator's approach was not primarily focused on repression but rather on a humane viewpoint, seeking to balance the protection of human dignity, life, and physical well-being of substance users with the need for public health protection. As we will explore further below, this resulted in a shift toward a policy of tolerating consumption, even while maintaining repression against the trafficking and related activities preceding the consumption of these substances.

To grasp how the consumption of ayahuasca aligns with this legal framework, it's essential to initially distinguish between permitted and

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<sup>34</sup> Hereinafter referred to as the “1988 UN Convention” which was adopted on December 20, 1988, came into force on November 11, 1990, 1582 *UNTS* 95. This convention was signed by Portugal on December 13, 1989, approved by the Portuguese Parliament on June 20, 1991, ratified by the Portuguese President of the Republic on August 12, 1991, published on *Diário da República* on September 6, 1991. On December 3, 1991, Portugal notified the depositary of the ratification of the convention, which implies that, pursuant to Article 29 (2) of the convention, the convention is binding within the Portuguese legal order since March 3, 1992.

<sup>35</sup> See Preamble of Decree-Law no. 15/93.

<sup>36</sup> See Article 1 (1).

prohibited behaviors under Portuguese law (a), as well as identify the substances falling within the categories of prohibited behaviors (b). These two aspects will be discussed separately, although they are intricately interconnected.

### **a) Permitted and criminally prohibited behavior under the Portuguese law**

The legal framework governing narcotic drugs and psychotropic substances can be traced back to the enactment of Decree-Law no. 15/93. This legislation was designed to incorporate the measures into domestic law to combat the trafficking of certain plants, substances, or preparations, as well as the consumption of these products<sup>37</sup> (albeit symbolically, as we will explore further below). The original version of this statute had an extremely prohibitionist approach towards the trafficking *and consumption* of plants, substances, and preparations targeted under the annexed tables of the decree-law.

A change occurred in 2000 when a system reform aimed to introduce a humanist approach that was oriented towards deterrence and rehabilitation. Under this approach, users of such substances are not to be seen as criminals, but rather as human beings who may require some form of medical assistance. As a result, the current legal regime concerning narcotic drugs and psychotropic substances remains

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<sup>37</sup> See Preamble.

strict when it comes to trafficking specific drugs and substances. However, it is relatively lenient towards the consumption of these same drugs and substances.

More specifically, criminal repression is specifically established for activities related to trafficking, which is defined broadly to encompass any stage before consumption. The starting point is Article 21 of Decree-Law no. 15/93, which establishes the tone by criminalizing activities associated with "trafficking." These activities encompass cultivation, production, manufacturing, extraction, preparation, distribution, offering, sale, purchase, transport, import, export, transit, or possession without proper authorization of the plants, substances, or preparations listed in tables I to III attached to this statute.

This provision aims to work as a broad, all-encompassing clause to cover most of the activities connected with –and expressly coined as– the trafficking of narcotic drugs and psychotropic substances. Additionally, other actions preceding consumption are subject to repression under different provisions of Decree-Law no. 15/93.<sup>38</sup>

So far, no reference to consumption has been made. However, Article 40 of the initial version of Decree-Law no. 15/93 imposed criminal liability on people who use plants, substances, or preparations listed in tables I to IV attached to the statute. It also includes those who

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<sup>38</sup> See, for instance, Articles 22, 26, 27, 28, 29 or 30.

cultivated, acquired, or possessed such plants, substances, or preparations for personal consumption. This specific provision underwent significant changes in 2000 and shifted public policies in a different direction.

In the Preamble of Decree-Law no. 15/93, the legislator already mentioned that society needs to have a proper and thorough debate regarding "the way the legal system should cope with the *consumption* of drugs."<sup>39</sup> Furthermore, while the legislator ruled out a "radical change of policy" without a thorough debate, they did acknowledge the importance of responding to the latest scientific findings and being sensitive to different social groups.<sup>40</sup> They also emphasized the somewhat "symbolic" punishing people who use narcotic drugs and psychotropic substances and that such punishment might encourage drug treatment for problematic use.<sup>41</sup>

A dormant inconsistency became evident. While this statute intended to promote medical treatment for individuals with substance use disorder with narcotic drugs and psychotropic substances, it remained unclear how a criminal conviction could contribute to this goal. Even if the punishment was merely symbolic, it conveyed a message that

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<sup>39</sup> See § 32, emphasis added.

<sup>40</sup> See § 33.

<sup>41</sup> See § 37.

elevated the ethical judgment of both trafficking and consumption of these substances, leading to increased legal repression.

At the turn of the century, Law no. 30/2000 was adopted to promote a human-based policy that was more tolerant towards occasional and regular users. To accomplish such a goal, the scope of its application was limited to *“the consumption of narcotic drugs and psychotropic substances, as well as the sanitary and social protection of the individuals who consume such substances without medical prescription.”*<sup>42</sup> The clearest evidence of its intent is found in Article 28 of this statute, which explicitly repeals Article 40 of Decree-Law no. 15/93, except in the case of cultivating plants for personal use listed in the tables attached to the latter document.

This does not mean that the consumption, acquisition, or possession of narcotic drugs and psychotropic substances became completely lawful under Portuguese law. It means instead that these actions are now subject to a new legal regime. According to Article 2 of the Law no. 30/2000, *“[t]he consumption, acquisition, or possession for personal use of plants, substances, or preparations listed in the tables”* annexed to Decree-Law no. 15/93 are qualified as a mere misdemeanor,<sup>43</sup> provided that the quantity found in the individual’s

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<sup>42</sup> See Article 1 (1).

<sup>43</sup> See Article 2 (1).

possession is not higher than the necessary for average consumption within 10 days.<sup>44</sup>

The core challenge of this provision was determining (while adhering to the principles of legality and typicality in criminal law) how to clearly distinguish between a user and a trafficker. The answer to this question seems obvious since the goals and behaviors of those falling into these categories are dramatically different. However, when viewed from a law enforcement perspective, attempting to delve into an individual's intent or the objectives of their activities is doomed to fail. Consequently, the legislator chose to establish a quantitative threshold between a felony and a misdemeanor, thereby differentiating between a trafficker and a user. If the quantity acquired or possessed by an individual does not exceed what is typically required for personal consumption within 10 days, it is generally presumed to be a misdemeanor and the individual is considered a user.

The primary consequence of this numeric boundary is that the quantity of the plants, substances, or preparations acquired or possessed is final to qualify a person as a *prima facie* user or a trafficker.<sup>45</sup> This implies that the crime of trafficking narcotic drugs or

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<sup>44</sup> See Article 2 (2).

<sup>45</sup> Although the table is generally followed by courts and by the police, a court, given the circumstances of each case, may decide that a larger amount is to be

psychotropic substances “occurs with the mere possession of the unlawful substances that are not fully meant for personal consumption even if the intent to sell them is not evidenced.”<sup>46</sup>

The current solution within the Portuguese legal system, when considering the combined reading of Article 40 of Decree-Law no. 15/93 and Articles 2 and 28 of Law no. 30/2000, is as follows:<sup>47</sup>

a) The consumption, acquisition, or possession of plants, substances, or preparations listed in the annexed tables I to IV of Decree-Law no. 15/93 in quantities *higher than* what is necessary for 10 days is, *prima facie*, subject to criminal repression under Article 28 of Law no. 30/2000;

b) The consumption, acquisition, or possession of those same plants, substances, or preparations in a quantity *not* higher than necessary for 10 days is *not prima facie* subject to criminal repression, although it is qualified as a misdemeanor by Articles 2 and 28 of Law

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considered for personal consumption, but also that a smaller amount is considered trafficking.

<sup>46</sup> See Lisbon Court of Appeals, Judgment of September 26<sup>th</sup>, 2018, Process no. 28/17.1GEMFR-3.

<sup>47</sup> See Supreme Court of Justice, Judgment of Uniformization of Jurisprudence no. 8/2008, of August 5<sup>th</sup>, 2008. See also, as recent examples, Lisbon Court of Appeals, Judgment of May 28<sup>th</sup>, 2019 (Process no. 150/14.9PJCSC.L1.5), or Judgment of September 26<sup>th</sup>, 2017 (Process no. 36/13.GBALQ.L1-5); Porto Court of Appeals, Judgment of May 30<sup>th</sup>, 2018 (Process no. 1115/16.9PJPRT.P1), or Judgment of February 28<sup>th</sup>, 2018 (Process no. 387/15.0PFPRT.P1); or Coimbra Court of Appeals, Judgment of November 6<sup>th</sup>, 2019 (Process no. 5/19.8GAMGR.C1), or Judgment of November 8<sup>th</sup>, 2017 (Process no. 29/17.oGBGRD.C1).

no. 30/2000. In any case, qualifying consumption as a misdemeanor is not of minor symbolic importance. This implies, *inter alia*, that criminal courts and proceedings are not the suitable means to address the consumption of the plants, substances, and preparations listed in Decree-Law no. 15/93;

c) Additionally, Article 40 of Decree-Law no. 15/93, as amended by Law no. 30/2000, continues to criminalize the cultivation or growing of plants listed in tables I to IV annexed to Decree-Law no. 15/93, even if it's for personal consumption. The severity of the penalty is determined based on the quantity being cultivated, specifically whether it exceeds the average individual consumption over 3 days.

This then leads to the following question: what constitutes average individual consumption for a 3- or 10-day period? The answer is pivotal because it establishes the threshold for what does and does not constitute a criminal offense. Moreover, the principles of legality and typicality within criminal law require (as we will explore in greater detail below) that a criminal provision must explicitly define all the essential elements to inform individuals whether their behavior falls under criminal repression or not.

This issue is governed by an administrative ordinance (*Portaria* no. 94/96, of March 26<sup>th</sup>), whose Article 9 states “[t]he maximum quantitative limits for each average individual daily dose (...) are those referred in the table annexed.” This already raises several concerns



regarding compliance with legality and typicality principles. But the Portuguese Constitutional Court accepted that an administrative ordinance could “clarify” quantitative limits only as evidence.<sup>48</sup> However, what stands out from this ordinance is that it only mentions the plants, substances, and preparations most commonly used in Portugal (e.g. cannabis, cocaine, heroin, morphine, opium, or amphetamine). It does not mention what the average individual consumption of DMT for a 3- or 10-day period is. The absence of a clear boundary to distinguish between DMT consumption and trafficking poses a challenging compliance issue regarding the principle of typicality. We will return to this issue below when referring to the absence of an explicit reference to the ayahuasca brew and the plants necessary for its preparation in the annexed tables in Decree-Law no. 15/93.

Portugal followed a model of relative tolerance towards the consumption of narcotic drugs and psychotropic substances with the adoption of Law no. 30/2000. This shift was not necessarily due to viewing the consumption of plants, substances, and preparations listed in Decree-Law no. 15/93 with leniency or favor. Instead, it occurred because public policy transitioned from a model focused on repression to a human-centered approach, with deterrence and rehabilitation as the core goals. As a consequence, it becomes evident

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<sup>48</sup> Judgment no. 534/98, Process no. 545/98 on August 7, 1998.

that the focus on criminalization under Decree-Law no. 15/93 and Law no. 30/2000 is primarily on trafficking, not consumption.

Nevertheless, it remains evident that the legislator excluded the criminalization of the consumption of the plants, substances, and preparations listed in the annexed tables of Decree-Law no. 15/93. However, these behaviors are still categorized as misdemeanors according to Article 2 of Law no. 30/2000. This means that further clarification is needed to understand what *relative tolerance* means in the Portuguese legal system.

Firstly, evidence of this tolerance can be found in the support offered to individuals with substance use disorder. As an example, Articles 42 et seq. in Decree-Law no. 15/93 establish an obligation for public authorities to offer healthcare assistance to individuals dealing with substance use disorders to foster their successful rehabilitation and reintegration into society. Consistent with this rehabilitation-focused approach, the repressive legal framework does not apply to situations where someone seeks professional medical assistance from either public or private healthcare services.<sup>49</sup> Therefore, when someone with substance use disorder undergoes medical treatment voluntarily, *no misdemeanor is committed*.

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<sup>49</sup> See Article 3 (1) of Law no. 30/2000.

Furthermore, if legal proceedings are ongoing involving an individual facing challenges related to substance use, those proceedings will be put on hold if they do not meet the criteria for substance dependence<sup>50</sup> (which also implies that occasional consumption carries no penalties). This also applies when the individual, if medically classified as having an issue with substance use, voluntarily agrees to undergo medical treatment.<sup>51</sup>

The only visible repercussion involves imposing a fine or a non-monetary penalty on individuals who engage in occasional or sporadic use.<sup>52</sup> In this scenario, this approach is not primarily to offer assistance but rather to discourage consumption by dissuading these individuals from continuing such behavior. This, in turn, aims to prevent them from transitioning from occasional use to more frequent use patterns. The same reasoning clarifies why individuals who are already recognized as having a substance use disorder are not subjected to fines or monetary penalties, since deterrence is no longer feasible.

In summary, what the Portuguese legal system criminalizes is the trafficking of the plants, substances, and preparations listed in the annexed tables in Decree-Law no. 15/93 – not the consumption, acquisition, or possession of these same products. To a certain extent,

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<sup>50</sup> See Article 11 (1) of Law no. 30/2000.

<sup>51</sup> See Article 11 (2) and (3) of Law no. 30/2000.

<sup>52</sup> See Article 15 (1) of Law no. 30/2000.

the rationale behind this solution is straightforward. What has the potential for social disruption is trafficking, which in this context refers to any method whereby certain plants, substances, or preparations are made available for public consumption without the necessary authorization, control, or supervision. Additionally, cultivating or growing the plants listed in the annexed tables of Decree-Law no. 15/93 is also regarded as a criminal offense under Article 40 of this statute.

#### **b) Permitted and prohibited plants, substances, and preparations under Portuguese law**

Up to this point, we have discussed that the *consumption, acquisition, or possession* of certain plants, substances, and preparations is not subject to criminal repression under the legal framework in Portugal, as long as these actions are limited in quantity. But is ayahuasca targeted at all in Decree-Law no. 15/93 and Law no. 30/2000?

This is not a trivial matter, since the consumption of ayahuasca naturally presupposes the supply of the plants that are necessary for its preparation, as well as the preparation of the brew itself. Furthermore, given the historical significance of these plants in the Amazonian region, individuals frequently transport the prepared ayahuasca brew into other States instead of bringing the unprocessed plants necessary to make it. As a result, if the plants or the prepared brew are covered by the annexed tables in Decree-Law no. 15/93. This

implies that the preparation, cultivation, and distribution of these plants, or the brew itself, are considered criminal activities. Consumption, on the other hand, is either subject to rehabilitation measures under Law no. 30/2000 or subject to criminal repression if it exceeds the quantity required for 10 days, determined based on the average individual consumption.

The definition of what specific narcotic drugs and psychotropic substances are targeted by Decree-Law no. 15/93 and Law no. 30/2000 is critical. In this regard, the legislator determined that what qualifies as a narcotic drug or a psychotropic substance is a task for science, rather than for national parliaments, governments, or courts. In the context of establishing a legal regime, striving for an authoritative and universally accepted definition of narcotic drugs and/or psychotropic substances is pointless. As a consequence, Decree-Law no. 15/93 refrains from attempting such definitions. It instead delineates its scope by referencing a list of plants, substances, and preparations outlined in the annexed lists<sup>53</sup> which align with the same plants, substances, and preparations relevant to Law no. 30/2000.<sup>54</sup>

Consequently, the legal framework is not concerned with narcotic drugs and psychotropic substances in a general sense, regardless of

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<sup>53</sup> See Article 2 (1) of Decree-Law no. 15/93.

<sup>54</sup> See Article 1 (2) of Law no. 30/2000.

any scientific validation of these definitions. Instead, it solely pertains to the specific plants, substances, and preparations explicitly enumerated in one of the annexes to Decree-Law no. 15/93. This method of legislation follows what is outlined in Article 1 (*j*) of the 1961 Convention, Article 1 (*e*) of the 1971 Convention, and Article 1 (*n*) and (*r*) of the 1988 Convention. It serves as an effective method for incorporating the Schedules annexed in these conventions into the domestic legal system.

As expected, Decree-Law no. 15/93 also stipulates that these tables must be periodically revised to align with pertinent international treaties, European Union regulations, or those approved by United Nations bodies specializing in combating illicit drugs and psychotropic substances.<sup>55</sup> This is not solely a matter of academic or scientific curiosity. Not only does this enable the Portuguese State to always be in a position to comply with international and European commitments, but it also provides internal coherence for a legal system concerning relations between domestic and international legal orders. As such, the purpose of the legislator is not only to guarantee that actions outlawed under international and European law are also proscribed in Portuguese domestic law but *also* that the actions prohibited under the Portuguese legal system *are also those* repressed under international and European law. In other words, complete inter-system

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<sup>55</sup> See Article 2 (2) and (3).

coherence is the end goal.<sup>56</sup> The final evidence of such inter-system coherence can be found in Article 73 of Decree-Law no. 15/93, which refers to *“the rules and technical concepts used in this statute are to be understood in accordance with the international conventions on narcotic drugs and psychotropic substances ratified by the Portuguese State.”* Under this provision, the 1961 Convention, the 1971 Convention, and the 1988 Convention serve not only to elucidate the interpretation of these rules and concepts but also to provide uniformization.

The goal of inter-system coherence is meaningful and has implications on the interpretative level. For example, this implies that despite the sovereign discretion that states may have under international treaties, the choice made by the Portuguese legislator is to align the interpretation of Decree-Law no. 15/93 and Law no. 30/2000 with the principles outlined in the international treaties concerning narcotic drugs and psychotropic substances.

At the international law level, it has been documented that the ayahuasca brew and the plants necessary for its preparation are not controlled under the 1961 Convention, the 1971 Convention, or the 1988 Convention.<sup>57</sup> But this was not without some controversy. The same uncertainty is also mirrored in the Portuguese law.

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<sup>56</sup> See, by implication, Article 3 of Decree-Law no. 15/93.

<sup>57</sup> INCB, *2012 Report* (New York, 2013) §§ 328–9.

In the schedules of the 1961 Convention, the 1971 Convention, and the 1988 Convention, there is no direct reference made to the ayahuasca brew, the ayahuasca vine (*B. caapi*), or the *Psychotria viridis* bush or its leaves. Not surprisingly, there is no reference in the tables annexed to Decree-Law no. 15/93 and applicable to Law no. 30/2000. The logical conclusion is that both the brew and the plants necessary for its preparation are not targeted by Decree-Law no. 15/93 and Law no. 30/2000.

This indicates that the consumption of ayahuasca is not prohibited in Portugal, and that acts before the cultivation, production, preparation, distribution, offering, sale, purchase, transport, or possession are not forbidden either.

However, to align the Portuguese State's international commitments with those at the domestic level, the reference to DMT (an active ingredient in the ayahuasca brew) is included in Table II-A of Decree-Law no. 15/93. This reference is irrelevant in the context of consumption under the aforementioned lenient regime. Moreover, given the absence of documented recreational use and substance use disorder cases related to ayahuasca, we believe that the mild repression outlined in Law no. 30/2000, such as medical assistance and fines or non-pecuniary penalties, does not apply to those who take ayahuasca. This is because the absence of substance use



disorder implies a lack of necessity for deterrence. In any case, the reference to DMT in Table II-A of Decree-Law no. 15/93 could be enough to trigger the application of this statute to acts prior to ayahuasca consumption –namely the cultivation or the possession of those plants, or the transport, preparation, possession, or distribution of the brew–.

From our perspective, it is clear that referring to an active ingredient is not the same as the plant itself, a bush, the plant's leaves, or a preparation that may contain such an active ingredient. The annexed tables in Decree-Law no. 15/93, similar to the schedules in the relevant international treaties, explicitly mention plants when applicable. For example, Table I-B specifies the inclusion of cocaine leaves and their chemical derivatives, while Table I-C explicitly mentions the cannabis plant, seeds, and resin. Concerning the Schedules in the 1971 Convention, this perspective is echoed in the official commentary on the convention. This holds significant importance since maintaining intersystem consistency is the legislator's primary objective. As a result, although the consumption of cannabis or cocaine is not a criminal offense in Portugal, the trafficking of cannabis or coca plants and its elements is a criminal act. Also, Table III was annexed to Decree-Law no. 15/93 makes an explicit reference to several preparations that are controlled under this statute. And yet, no direct reference is made to the ayahuasca brew, to the ayahuasca vine (*B. caapi*), or the *Psychotria viridis* bush or its leaves.

The absence of this mention is self-explanatory and inherently implies that the ayahuasca brew and the plants required for its preparation are not covered by the tables in Decree-Law no. 15/93. This not only signifies that consuming the ayahuasca brew does not violate any provision of Decree-Law no. 15/93 and Law no. 30/2000, but also that any actions preceding that stage –including possession of the necessary plants and the brewing process itself– do not violate Portuguese law.

But if this is the case, what is the reference to the active ingredient DMT? When referring to an active ingredient, the principle of legality in criminal law (particularly the dimension of typicality), dictates that sanctions, for the sake of clarity and predictability, should only apply to the specific behaviors associated with the active ingredient in its pure form (i.e. the substance obtained through complete chemical synthesis). For example, when DMT is mentioned in Schedule I of the 1971 Convention and Table II-A attached to Decree-Law no. 15/93, it doesn't target the plants from which it can be extracted or a preparation that may contain it as an active ingredient. Instead, it focuses on the product resulting from the extraction process itself. The concerns raised by the drafters of the 1971 Convention and Decree-Law no. 15/93 regarding the deleterious effects of consuming DMT in its

purified form do not extend *ipso facto* to the circumscribed, sacramental uses of ayahuasca.<sup>58</sup>

Article 29 (1) of the Portuguese Constitution translates in positive law the Latin adage *nullum crimen sine lege certa*, establishing typicality as a mandatory constitutional principle and a safeguard against excessive discretion and arbitrariness in public coercion.<sup>59</sup> The same principle is embodied in Article 7 of the European Convention on Human Rights<sup>60</sup> and Article 15 of the International Covenant on Civil and Political Rights.<sup>61</sup> According to this principle, individuals must have the chance to adjust their behavior to what is established in a prior legal commandment to avoid being criminally prosecuted. However,

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<sup>58</sup> For a similar view, regarding a statute act enacted by the US Supreme Court, see *Gonzales v. O Centro Espirita Beneficente União do Vegetal*, 546 U.S. 418 (2006), 11.

<sup>59</sup> Américo Taipa de Carvalho, 'Artigo 29.º', in Jorge Miranda & Rui Medeiros (eds), *Constituição Portuguesa Anotada*, vol. I, 2<sup>nd</sup> edition (UCE, 2017) 485-91, 488; Jorge de Figueiredo Dias, *Direito Penal — Parte Geral*, vol. I, *Questões Fundamentais. A Doutrina Geral do Crime*, 3<sup>rd</sup> edition (Gestlegal, 2019) 212-3.

<sup>60</sup> Hereinafter referred to as 'ECHR'. Adopted November, 4 1950, entered into force September 3, 1953, Registration no. 2889, 213 *UNTS* 221. This convention was signed by Portugal on September 22, 1976, approved for ratification by Law no. 65/78, of October 13<sup>th</sup>, promulgated by the Portuguese President of the Republic on September 11, 1978. On November 9, 1978, Portugal notified the depositary of the ratification of the convention, which implies that, under Article 66 (3) of the ECHR, Portugal became party to this convention on the same day of the deposit of its instrument of ratification.

<sup>61</sup> Hereinafter referred to as 'ICCPR'. Adopted December 16, 1966, entered into force March 23, 1976, Registration no. 14668, 999 *UNTS* 171. This convention was signed by Portugal on September 22, 1976, approved for ratification by Law no. 29/78, of June 12<sup>th</sup>, promulgated by the Portuguese President of the Republic on June 5, 1978. On June 15, 1978, Portugal notified the depositary of the ratification of the convention, which implies that, under Article 49 (2) of the ICCPR, Portugal became a party to this convention on that date.

“to have an *actual* chance of acting accordingly” a criminal provision must be *clear* and *comprehensive*. It should leave no room for doubt and precisely define which facts are prohibited by the law and which actions are exempt from criminal penalties.<sup>62</sup> In essence, this requires that a criminal provision be objectively ascertainable by individuals so they can adjust their behavior with the legal directive.<sup>63</sup>

*Foreseeability*, therefore, is the key word to understanding this principle. As referred by the European Court of Human Rights (ECHR),<sup>64</sup> the principles of legality and typicality “impl[y] qualitative requirements, including those of accessibility and foreseeability (...). These qualitative requirements must be satisfied as regards both the definition of an offense and the penalty the offense in question carries (...) An individual must know from the wording of the relevant provision and, if needed, with the assistance of the court’s interpretation of it, what acts and omissions will make him criminally liable and what penalty will be imposed.”<sup>65</sup> These words suggest that a certain margin

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<sup>62</sup> Gomes Canotilho & Vital Moreira, *Constituição Portuguesa Anotada*, vol. I, 4<sup>th</sup> edition (Coimbra Editora, 2007) 495; Américo Taipa de Carvalho, ‘Artigo 29.º’, *cit.*, 488-9; Jorge de Figueiredo Dias, *Direito Penal*, *cit.*, 209 *et seq.*; or Germano Marques da Silva, *Direito Penal Português*, vol. I, *Parte Geral. Introdução e Teoria da Lei Penal*, 3<sup>rd</sup> edition (Verbo, 2010) 262. For a European reading, see Bernardette Rainey, Elizabeth Wicks & Clare Ovey, *Jacobs, White & Ovey The European Convention on Human Rights*, 7<sup>th</sup> edition (Oxford University Press, 2017) 334.

<sup>63</sup> Gomes Canotilho & Vital Moreira, *ult. loc. cit.*, 495, Jorge de Figueiredo Dias, *Direito Penal*, *cit.*, 218-9.

<sup>64</sup> Hereinafter referred to as “ECHR.”

<sup>65</sup> *Kafkaris v. Cyprus*, App no. 21906/04, Judgment on February 12, 2008, § 140.

of the court's interpretation is "inevitable." But the ECHR only condones such a margin of interpretation "*provided that the resultant [interpretation] (...) could reasonably be foreseen.*"<sup>66</sup> Provisions such as Articles 29 (1) of the Portuguese Constitution, 7 of the ECHR, or 15 of the ICCPR are "resistant to vague or uncertain definitions."<sup>67</sup>

Considering the strict requirement of foreseeability, how should we interpret a criminal provision that mentions an active ingredient but does not reference any plant or preparation containing that active ingredient? In simple terms, vague or incorrect wording works in favor of freedom.<sup>68</sup> Uncertainty, in and of itself, has legal significance: it means that no criminal consequences are at play.

In other words, when the language used clearly references an active ingredient (i.e. DMT), the trafficking of that specific ingredient becomes subject to criminal prosecution. But if the used language makes no

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<sup>66</sup> *S.W. v. the United Kingdom*, App no. 20166/92, ECtHR November 22, 1995, §§ 36; *C.R. v. the United Kingdom*, App no. 20190/92, ECHR November 22, 1995, § 34; *Streletz, Kessler and Krenz v. Germany*, Apps no. 34044/96, 35532/97 & 44801/98, ECtHR March 22, 2001, § 50; or *Kafkaris v. Cyprus, cit.*, § 141.

<sup>67</sup> Judgment 93/2001, Process no. 318/2000, Judgment of March 13, 2001.

<sup>68</sup> Jorge de Figueiredo Dias, *Direito Penal, cit.*, 212-3. In the case law of the ECHR, some level of indeterminacy of a specific criminal provision has been accepted, provided that, according to the facts of the each case, there is evidence that individuals could actually foresee the application of that provision and anticipate the penalty applied: e.g. *Jorgic v. Germany*, App no. 74613/01, ECHR July 12, 2007, §§ 103-14; or *Custers, Deveaux and Turk v. Denmark*, Apps no. 11843/03, 11847/03 & 11849/03, ECHR May 3, 2007, §§ 78-97. When such foreseeability is not evidenced in the case, the ECHR promptly declares an infringement of Article 7 of the ECHR: e.g. *Pleshkov v. Romania*, App no. 1660/03, ECHR September 16, 2014, §§ 64-76.

clear, explicit, or direct reference to the ayahuasca brew and the plants necessary for its preparation, then this uncertainty means that no criminal consequences are at play. The principle of typicality mandates ruling out any interpretative outcome that lacks a direct and explicit connection to the language used. This means that the ayahuasca brew and the plants required for its preparation could only be subject to Decree-Law no. 15/93 if they were directly and explicitly referenced, rather than one of their active ingredients.

In this context, DMT in its pure form (as an active ingredient) falls under the purview of Decree-Law no. 15/93 and Law no. 30/2000. This implies that the deterrence and rehabilitation measures outlined in Law no. 30/2000 can be virtually applied to the consumption of the active ingredient itself (i.e., the chemical molecule of DMT.) Additionally, the criminal measures specified in Decree-Law no. 15/93 are also applicable to the trafficking of the same active ingredient.

At this point, the pivotal question is to determine what acts can be classified as trafficking DMT. Especially relevant for this purpose is Article 21 (1) of Decree-Law no. 15/93, which refers to the trafficking and other unlawful activities of the plants, substances, and preparations listed, *inter alia*, in Table II-A to this statute. For obvious reasons, not all cases listed in this provision are relevant to DMT. For instance, cultivation or farming is not physically possible since DMT is a molecule and not a plant. Any of the following activities constitute a

criminal offense if not adequately authorized or controlled: the production, manufacturing, extraction, preparation, distribution, offering, selling, purchasing, transporting, importing, or exporting of DMT as an active ingredient.

While the wording of this provision is quite broad, it does not appear to be relevant concerning the uses of ayahuasca. In all instances, actions associated with the active ingredient itself are subject to criminal sanctions, while the plants used to prepare the brew, and the ayahuasca brew itself, are not. At most, what might capture a judge's interest is whether the process of preparing the brew could be classified as "extraction." This is because combining the *Psychotria viridis* bush (containing DMT as an active ingredient) with the ayahuasca vine (which contains tetrahydroharmine –THH– as one of its active ingredients) can produce the desired psychoactive effects people seek. However, this outcome of the preparation process does not align well with the wording of Article 21(1) of Decree-Law no. 15/93. Enabling potential psychoactivity is not synonymous with extracting or producing an active ingredient like DMT. This interpretation is further supported by Article 1(i) of the 1971 Convention, which must be considered as a binding interpretative tool under Article 73 of Decree-Law no. 15/93. Article 1(i) refers to the concept of "manufacture" as the process of "obtaining" psychotropic substances, typically after a process of "refining."

It is worth noting that Article 1 (i) of the 1971 Convention refers to "preparations," contrary to Article 1 (1) (n) of the 1961 Convention.<sup>69</sup> The use of the term "manufacturing" seems to indicate a process whose typical *outcome* is the production of a substance controlled under the Schedules of the 1971 Convention (downstream use). However, Article 4(b) appears to broaden the scope of the 1971 Convention to include the use of controlled substances for the production of non-controlled substances (upstream use). In both cases, to classify the preparation of the ayahuasca brew as manufacturing, it would require explicit mention of the plants used or the brew produced in the Schedules annexed to the 1971 Convention. As demonstrated, none of these cases is applicable, indicating that the preparation of the ayahuasca brew cannot be categorized as "manufacturing" under Article 1 (i) of the 1971 Convention. The extraction of DMT from the plants or the brew is the only process that could fit the concept of manufacturing for this purpose.<sup>70</sup>

Therefore, based on our interpretation, Article 21 of Decree-Law no. 15/93 does not apply to the acts involved in the preparation of the ayahuasca brew when read in conjunction with Article 1 (i) of the 1971 Convention.

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<sup>69</sup> United Nations, *Commentary on the Convention on Psychotropic Substances, cit.*, 20.

<sup>70</sup> United Nations, *Commentary on the Convention on Psychotropic Substances, cit.*, 24.



The conclusion that the ayahuasca brew and the plants necessary for its preparation are not targeted by Decree-Law no. 15/93 and Law no. 30/2000 seems straightforward. But further context is still needed.

Article 8 (2) of the Portuguese Constitution states that international conventions, once duly approved or ratified by Portugal, are considered valid within the national legal order, provided that they are also valid under international law, applicable in the latter legal order, and published in the official Portuguese Journal (*Diário da República*). Consequently, international treaties (like the 1961 Convention, the 1971 Convention, and the 1988 Convention) have direct applicability in domestic courts. These courts must interpret and enforce domestic statutory norms as outlined in these treaties under the international obligations of the Portuguese State. The interpretation of domestic law in alignment with international treaties is especially relevant in the context of controlling narcotic drugs and psychotropic substances. The legislator intended to harmonize domestic legislation with international legal frameworks to establish consistency between these systems.<sup>71</sup>

The consistency between these systems is relevant because those treaties do not refer to the ayahuasca brew or the plants necessary for its use, although the 1971 Convention does list DMT as a substance under international control. The question of whether or not ayahuasca

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<sup>71</sup> See the afore-mentioned Article 73 of Decree-Law no. 15/93.

is controlled has already been raised regarding Schedule I of the 1971 Convention. However, the INCB (a quasi-judicial body established to ensure the execution of the treaties on narcotic drugs and psychotropic substances) has explicitly mentioned: "[t]he utilization of plant-based preparations [that] are *not under international control* and which contain natural psychoactive ingredients." These preparations are "often part of traditional indigenous rituals, traditional medicine and religious ceremonies. Examples of the plants or parts of plants from which such preparations are concocted include (...) ayahuasca (...)." Although the INCB referred to the "lack of clarity with regard to the control status of the plants at the national or the international level," it still mentioned that "*[a]t present, no plants, including the ones containing psychoactive ingredients, are controlled under the 1971 Convention, although the active ingredients they contain are sometimes subject to international control. For example, cathine and DMT are psychotropic substances included in Schedule I of the 1971 Convention, while the plants and plant-based preparations that contain them, namely khat and ayahuasca, respectively, are not subject to any restrictions or control measures.*"<sup>72</sup>

The conclusion reached by the INCB is not without significance. If the reports adopted by the INCB are meant to guide the legal community, then their role in enlightening interested individuals should have a significant impact. Treaties with a universal scope, such as the 1971

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<sup>72</sup> *Idem*, § 329.

Convention, require centralized and authoritative institutional means of interpretation. In the absence of an advanced system for settling international disputes, treaty-based bodies like the INCB *do* serve this role to ensure stability, coherence, and predictability within the legal system. We are not suggesting that the views presented by the INCB are binding on States, but rather that domestic courts should consider them as an authoritative interpretation of the international legal framework regarding the control of narcotic drugs and psychotropic substances. This is especially important because private individuals may rely on these interpretations when aligning their actions with international legal standards.

This becomes particularly significant in the context of the 1971 Convention, where potential criminal consequences are at stake. If the INCB has definitively determined that the ayahuasca brew and the plants required for its preparation are not controlled under the 1971 Convention, we believe that domestic courts must consider this authoritative interpretation when interpreting Decree-Law no. 15/93 and Law no. 30/2000. This includes adhering to Article 73 of Decree-Law no. 15/93. Furthermore, courts should acknowledge the reliance of private individuals on the technical information provided by the INCB.

The individual responses from the INCB affirm that the ayahuasca brew and the plants involved in its preparation are not subject to

control under the 1971 Convention. For instance, the Dutch Inspectorate for Health Care posed that question to the INCB in 2001. The Secretary of the Board explicitly replied that “[n]o 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>73</sup>

## **2.2 THE PROTECTION OF THE RELIGIOUS USES OF AYAHUASCA UNDER FREEDOM OF RELIGION CLAUSES**

Up to this point, we've discussed how various uses of ayahuasca aren't explicitly prohibited under Portuguese law. However, this might not offer much help to people who take ayahuasca because it doesn't automatically grant them the right to possess the necessary plants, prepare the brew, or partake in its sacramental use. Nonetheless, individuals may have a legal basis for consuming ayahuasca through their freedom of religion.

The origins of ayahuasca are connected with religious shamanic rituals and practices by specific Indigenous peoples in the Amazon region. It is part of the religious practices of the *Santo Daime* or the

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<sup>73</sup> Doc. INCB-PSY 10/01 (January 17, 2001).

*União do Vegetal*.<sup>74</sup> Their practices are based on the idea that ayahuasca is *the* sacramental tea brewed from plants unique to the Amazonian region, which provides a “persistent Amazon worldview” for such rituals.<sup>75</sup> The ritual of drinking this brew is critical to providing religious communion to the followers of these belief systems. It is the *core* ritual, and without it, no religious communion is possible. For this reason, “*without ayahuasca, there is no ceremony and without a ceremony, ayahuasca is not ingested. These are two inseparable aspects just as the ritual wine of the Eucharist would be in a Christian mass.*”<sup>76</sup> Although these religions cannot be reduced to the consumption of a brew, ayahuasca “is foundational to these groups.” Ayahuasca serves as a distinguishing symbol of identity for these groups, thus “mark[ing] their collective identity, ‘us’ as opposed to ‘them.’”<sup>77</sup>

Given the intricate connection between ayahuasca consumption and religious rituals, the key question arises: is the consumption for religious purposes protected under freedom of religion, as stated in

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<sup>74</sup> See Beatriz Caiuby Labate, Edward MacRae & Sandra Lucia Goulart, ‘Brazilian Ayahuasca Religions in Perspective’, in Beatriz Caiuby Labate & Edward MacRae, *Ayahuasca, Ritual and Religion in Brazil* (Routledge, 2014) 1-20.

<sup>75</sup> Constanza Sánchez & José Carlos Bouso, ‘Ayahuasca: From the Amazon to the Global Village’, *cit.*, 5.

<sup>76</sup> *Idem*.

<sup>77</sup> Beatriz Caiuby Labate, Edward MacRae & Sandra Lucia Goulart, ‘Brazilian Ayahuasca Religions in Perspective’, *cit.*, 11.

Article 41 of the Portuguese Constitution, Article 9 of the ECHR, and Article 18 of the ICCPR?

To address this question, it must first be assessed whether *Santo Daime*, *União do Vegetal*, or any other group that incorporates ayahuasca as a sacrament can be classified as a religion. The term “religion” is not defined in the Constitution,<sup>78</sup> ECHR, ICCPR, or the Portuguese Law on Religious Freedom.<sup>79</sup> The lack of mention is on purpose. The concept of religion is deeply cultural and embedded in the particular interpretations of each community. This lack of mention is useful to accommodate qualifying non-mainstream religions or belief systems under the protections of these provisions.

In this context, treaty-based bodies such as the ECHR and the United Nations Human Rights Committee have been asked to provide guidance on whether specific groups can invoke protection under Article 9 of the ECHR or Article 18 of the ICCPR. Although each body developed its unique case law, both upheld the idea that a belief system “*is not synonymous with the words ‘opinions’ and ‘ideas.’ It denotes views that attain a certain level of cogency, seriousness, cohesion and importance.*”<sup>80</sup> In this regard, both the ECHR and the HRC

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<sup>78</sup> Jorge Miranda & Pedro Garcia Marques, ‘Article 41’, in Jorge Miranda & Rui Medeiros, *Constituição Portuguesa Anotada*, cit., 645-67, 660.

<sup>79</sup> Law no. 16/2001, of June 22<sup>nd</sup>.

<sup>80</sup> See *Campbell and Cosans v. the United Kingdom*, Apps no. 7511/76 & 7743/76, ECHR Judgment February 25, 1982, § 36; *Valsamis v. Greece*, App no. 21787/93, ECHR

did not intend to establish a strict criterion for defining religion. They instead aimed to provide objective elements to assess whether a particular belief should be considered a religion, with an emphasis on the *seriousness* of a certain belief.

A case involving the "Assembly of the Church of the Universe" was presented before the HRC as a stress test. In this case, the applicants were members of this organization that held beliefs and practices centered around the care, cultivation, possession, distribution, and worship of the cannabis plant (*Cannabis* spp.). They considered cannabis to be "God's tree of life" and therefore part of their sacraments. However, the HRC ruled out that this question could "raise *prima facie* issues under any provision of the Covenant," as "*a belief consisting primarily or exclusively in the worship and distribution of a narcotic drug cannot conceivably be brought within the scope of Article 18 of the Covenant.*"<sup>81</sup>

This approach seems restrictive at first. Both the ECHR and the HRC take a generally liberal approach when it comes to qualifying a particular group as a religion or belief unless there are clear reasons to doubt the sincerity and seriousness of such a claim. The default position is to grant protection under Article 9 of the ECHR or Article 18 of

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Judgment December 18, 1996, § 25; or *Hasan and Eylem Zengin v. Turkey*, App no. 1448/04, ECHR Judgment October 9, 2007, § 49.

<sup>81</sup> See *M.A.B., W.A.T. and J.-A.Y.T. v. Canada*, Communication no. 570/1993, HRC Decision October 14, 1993, para. 4.2.

the ICCPR unless evidence suggests that the applicants are attempting to manipulate these provisions. The ECHR will acknowledge the existence provided that a person's belief is coherent, cogent, and central to their approach to life.<sup>82</sup> This liberal approach is fundamental to the very nature of religious freedom, which "excludes any discretion [i.e. any bias or judgment] on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate."<sup>83</sup>

This issue was raised before the ECHR in the Fränklin-Beentjes case concerning *Santo Daime* or *União do Vegetal* in the Netherlands.<sup>84</sup> The Strasbourg Court applied its liberal test to qualify the Santo Daime as a religion or a belief for the purposes of Article 9 of the ECHR. The ECHR simply declared that "*for its part, [it] is prepared to accept that denying the applicants the possession for use of ayahuasca in their rites interfered with their right to manifest their religion in 'worship,' as guaranteed by Article 9 of the Convention. That Article is thus applicable.*"<sup>85</sup>

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<sup>82</sup> Bernardette Rainey, Elizabeth Wicks & Clare Ovey, *Jacobs, White & Ovey The European Convention on Human Rights, cit.*, 458.

<sup>83</sup> See *Hasan and Chaush v. Bulgaria*, App no. 30985/96, ECtHR Judgment October 26, 2000, § 78, and *Manoussakis and Others v. Greece*, App no. 18748/91, ECtHR Judgment September 26, 1996, § 47.

<sup>84</sup> *Alida Maria Fränklin-Beentjes and CEFLU-Luz da Floresta v. Netherlands*, App no. 28167/07, ECHR (Decision) May 6, 2014.

<sup>85</sup> See § 36.



Implicit in this decision is the recognition that *Santo Daime* and *União do Vegetal* qualify as religions or beliefs for Article 9 of the ECHR, indicating that they meet the seriousness test. Therefore, they are entitled to protection under Article 9 of the ECHR. This conclusion can also be applied to Article 41 of the Portuguese Constitution and Article 18 of the ICCPR.

However, qualifying a group as a religion or a belief system says very little about what entitlements such a group has. What is critical at this point is to determine whether the use of ayahuasca for religious purposes is protected under the clauses on religious freedom.

It is uncontested that freedom of religion includes a right to *devotio privata and publica*, as well as stringent protection of each individual's *forum internum*. The preceding point pertains to the rituals and rites that are required elements of the *Santo Daime* or *União do Vegetal* religious practices. This was the point in the Fränklin-Beentjes case that the ECHR declined to provide protection. They declared that the use of ayahuasca for religious purposes could be prohibited by States on the grounds of maintaining public order and health since both are legitimate goals<sup>86</sup> and measures necessary in a democratic society.<sup>87</sup> This framework thereby was able to justify the restriction of religious freedom. Nonetheless, the ECHR only made that decision because it

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<sup>86</sup> See § 41.

<sup>87</sup> See § 48.

relied on an insufficient and biased description of the possible side-effects of ayahuasca,<sup>88</sup> and a flawed and unsupported reading of international treaties.<sup>89</sup>

A better approach should be tested. Firstly, a restriction to a fundamental freedom must, in general terms, pursue a legitimate aim (1) prescribed by law (2) and be confined to what is necessary in a democratic society (3). It's not sufficient to merely suggest the existence of a possible justification for a restriction. When it comes to fundamental rights, there is a substantial duty to provide a valid justification supported by evidence for such a restriction. In a case concerning the sacramental use of ayahuasca by the *União do Vegetal*, the US Supreme Court not only recognized the group as a religion but also emphasized that restrictions on freedom of religion cannot be imposed without valid grounds. They scrutinized the reasons to restrict taking ayahuasca and determined that there were no valid health reasons to justify such actions.<sup>90</sup> Unlike the ECHR, the US Supreme Court recognized that merely mentioning a threat to human health is not sufficient. Public authorities must provide substantial evidence demonstrating ayahuasca can lead to harmful effects.

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<sup>88</sup> See § 7.

<sup>89</sup> See § 49.

<sup>90</sup> *Gonzales v. O Centro Espirita Beneficente União do Vegetal*, 546 U.S. 418 (2006), 12 *et seq.*

Furthermore, it is well accepted that freedom of religion clauses protect practices that may be qualified as “worship.” While a UN General Assembly resolution isn't legally binding, the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief holds significance as it plays an important role in interpretation.<sup>91</sup> Article 6 (a) and (c) expressly mention the freedoms “[to] worship or assemble in connection with a religion or belief,” and “[t]o make, acquire and use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief.” The General Commentary no. 22 also mentions that religious freedom includes “worship” and “[t]he concept of worship extends to ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts, including (...) the use of ritual formulae and objects (...).”<sup>92</sup>

The range of types of worship protected by religious freedom clauses is broad. However, the ECHR does not recognise protection to any practice or observance that might be influenced, motivated, or

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<sup>91</sup> See UN General Assembly Resolution no. 36/55, of 25 November 1981, UN Doc. A/RES/36/55.

<sup>92</sup> HRC, CCPR *General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)*, July 3, 1993, UN Doc. CCPR/C/21/Rev.1/Add.4, § 4. The ECHR has also confirmed the protection due to ‘objects intended for the celebration of divine worship:’ see *Holy Monasteries v. Greece*, Apps no. 13092/87 & 13984/88, ECHR December 9, 1994, § 87.

inspired by a certain belief.<sup>93</sup> According to the ECHR, “the act in question must be intimately linked to the religion or belief,” and “the existence of a sufficiently close and direct nexus between the act and the and the underlying belief must be determined on the facts of each case.”<sup>94</sup> Furthermore, in the *Cha’are Shalom* case in France, the ECHR denied protection to a religiously motivated practice, arguing that orthodox followers of the same religion could still access the same products.<sup>95</sup>

The fundamental principle in comprehending the case law of the ECHR concerning limitations on religious practices, observance, or worship is the notion of alternative. If restrictions “prevent worship by the applicant in other circumstances than those specifically claimed,” then the ECHR is more likely to recognize protection under Article 9.<sup>96</sup>

However, ayahuasca practices of the *Santo Daime* or *União do Vegetal* must be framed in different terms than in the *Cha’are Shalom* case. First, it is not incidental or merely motivated or influenced by a

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<sup>93</sup> *Arrowsmith v. the United Kingdom*, App no. 7050/75, EC Report October 12, 1978 § 71; *Kalaç v. Turkey*, App no. 20704/92, ECHR July 1, 1997, § 27; *Metropolitan Church of Bessarabia*, App no. 45701/99, ECHR December 13, 2001, § 114.

<sup>94</sup> *Eweida and Others v. the United Kingdom*, Apps no. 48420/10, 59842/10, 51671/10 & 36516/10, ECtHR January 15, 2013, § 82.

<sup>95</sup> *Cha’are Shalom Ve Tsedek v. France*, App no. 27417/95, ECtHR 27 June 2000, §§ 80-4.

<sup>96</sup> Paul M. Taylor, *Freedom of Religion – UN and European Human Rights Law and Practice* (Cambridge University Press, 2006) 241.

religion. It rather is *the* core sacrament of religious ceremonies.<sup>97</sup> Secondly, the sacramental ritual within the religious ceremony cannot be performed without ayahuasca. There is no alternative for the followers of such religions or belief systems. But what would be the point of being recognized as a religion if its sacramental practice is outlawed? A restriction on ayahuasca doesn't merely limit the range of practices available to the followers of *Santo Daime* or *União do Vegetal*. It imposes constraints on their choices. It also excludes the very possibility of performing religious rituals, and thereby the existence of the religion itself. However, the qualification as a religion must hold significance. It implies not only to the *forum internum* (the inner realm of belief where no restrictions are allowed),<sup>98</sup> but it also encompasses communal practices, rituals, and rites that bonds individuals together in a shared belief system.<sup>99</sup> In the case of ayahuasca, it is this ritual that connects the individual with the community. By sharing *and practicing* such rituals, individuals are no longer in isolation and become integral members of their specific religious community.

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<sup>97</sup> The ECHR easily concedes that central ceremonies of each religion are especially protected under Article 9 of the ECHR: see *Cumhuriyetçi Eğitim Ve Kültür Merkezi Vakfı v. Turkey*, App no. 32093/10, ECtHR December 2, 2014, § 41.

<sup>98</sup> See, generally, Paul M. Taylor, *Freedom of Religion – UN and European Human Rights Law and Practice*, *cit.*, 115.

<sup>99</sup> The exercise 'in community with others' is a critical dimension of freedom of religion: see *Kokkinakis v. Greece*, App no. 14307/88, ECHR May 25, 1993, § 31; *Buscarini and Others v. San Marino*, App no. 24645/94, ECHR February 18, 1999, § 34.

As a result, it is our view that taking ayahuasca for religious purposes is protected under Article 41 of the Constitution, as well as under Articles 9 of the ECHR and 18 of the ICCPR. It is also *the* central practice of the religions that have it in their ceremonies. It is difficult to reconcile a general restriction to these practices with freedom of religion clauses.

Consistent with this perspective, not only is the consumption of the ayahuasca brew within a religious context safeguarded against interference by public authorities, but also the actions preceding and essential to the preparation of the brew (including the supply of the plants) are protected under freedom of religion clauses.

### **2.3 THE RECENT APPROACH OF PORTUGUESE LEGAL AUTHORITIES TOWARDS AYAHUASCA**

We have outlined our interpretation of ayahuasca's legal status under Portuguese law. Nevertheless, it is also important to mention the view of the Portuguese courts in the few cases involving ayahuasca. To clarify, the Portuguese legal system operates as a civil law system. It does not have a system of precedent in which prior judicial decisions bind courts in future similar cases. Nonetheless, the approach previously adopted by Portuguese courts can provide insights into whether a consistent approach exists and might be predictably followed in the future by these authorities.

The first aspect that should be highlighted is that there are only a few criminal cases in Portugal involving ayahuasca. However, some examples have emerged in recent years which present us with interesting conclusions. To our best knowledge, there are three recent criminal cases directly involving ayahuasca: case no. 88/21.0JELSB,<sup>100</sup> case no. 15/21.5JELSB,<sup>101</sup> and case no. 56/21.2JELSB.<sup>102-103</sup> A brief description of each of these cases is therefore justified.

1. Case no. 88/21.0JELSB began after the defendant was found in possession of amphetamines and ayahuasca. He was subsequently accused of drug trafficking under article 21(1) of Decree-Law no. 15/93. The Lisbon District Court gave its decision on March 31<sup>st</sup>, 2022. The court established that the defendant was indeed in possession of 2,462.50 grams of a paste-like substance containing DMT, which was identified as ayahuasca. This product had been imported from Peru and was being sent to the defendant's acquaintance in Germany.

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<sup>100</sup> Lisbon District Court (Central Criminal Court of Lisbon – Judge 11), Judgment of March 31, 2022 (Process no. 88/21.0JELSB).

<sup>101</sup> Public Prosecutor's Office of the District of Castelo Branco (Prosecution of the Local Criminal Court of Castelo Branco – 1<sup>st</sup> Enquiries Section), Decision of July 7, 2022 (Process no. 15/21.5JELSB).

<sup>102</sup> Lisbon District Court (Local Criminal Court of Lisbon – Judge 10), Judgment of October 26, 2022 (Process no. 56/21.2JELSB).

<sup>103</sup> In another case, even though prohibited substances were found and seized in the context of a raid to an 'Ayahuasca Retreat', the Court did not consider proven that *ayahuasca* or substances which contained DMT were found (Guarda District Court (Central Civil and Criminal Court of Guarda – Judge 4), Judgment of May 24, 2022 (Process no. 964/18.8T9GRD)).

The court then analyzed the legal status of ayahuasca. The court cited the INCB's position that ayahuasca is not prohibited under the 1971 Convention.<sup>104</sup> However, quite surprisingly and potentially in violation of the principle of legality, the court chose to ignore this conclusion. They argued that an INCB report does not constitute a binding source of law under the Portuguese legal system. (While technically correct, the crucial point is that the INCB report represents an authoritative interpretation of a treaty that is directly applicable in the Portuguese legal system). The court instead ruled that since the seized ayahuasca extract did contain DMT, which is a prohibited substance under the 1971 Convention and Table II-A of Decree-Law no. 15/93, this alone was sufficient to establish the typicality required for the crime of drug trafficking. The court then found the defendant guilty of the minor crime of drug trafficking as per article 25(a) of Decree-Law no. 15/93. They imposed a suspended prison sentence of two years.

2. Case no. 15/21.5JELSB relates to the importation of ayahuasca into Portugal, yet it was never brought to trial. The defendant allegedly imported a natural extract from Peru that was found to contain DMT (and tetrahydroharmine) that weighed 1,625.30g. The defendant claimed it was ayahuasca intended for personal

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<sup>104</sup> See § 23.



use. He claimed he did not pay for it nor did he order the extract (it was allegedly a Polish friend who took care of the process).

The public prosecutor argued that, except for the quantity seized, there were no signs of drug trafficking being committed. It was noted that the evidence gathered would not be sufficient to hold the defendant guilty of such crime. Therefore, a decision was reached on July 7<sup>th</sup>, 2022 to file the case.

3. Finally, in case no. 56/21.2JELSB, the defendant was accused of drug trafficking under article 21(1) of Decree-Law no. 15/93 for importing 97.9g of an ayahuasca decoction from Peru containing DMT (and tetrahydroharmine) by mail. The Lisbon District Court rendered its decision on October 26<sup>th</sup>, 2022.

The Court found that ayahuasca is a brew of a “spiritual nature” and that it “does not provoke pleasure effects nor the necessity of consumption for relief from withdrawal or abstinence.” It also concluded that the defendant did not import this substance with the intention of selling it to others and he did not know this behavior was prohibited and punishable by law.

In its legal analysis of the case, the court initially clarified that the crime of drug trafficking, as stipulated in Article 21(1) of Decree-Law no. 15/93, does not include situations in which the

drug is intended for personal use, as defined in Article 40. However, Article 40 does not apply to the *importation* of drugs for personal use but rather the *cultivation, acquisition* or *possession* of drugs for personal use. Therefore, the potential crime committed in this case would be drug trafficking.

The court also concluded that it was irrelevant to determine the existence of a crime based on whether the imported substance was a decoction and not pure DMT. The ayahuasca decoction was considered prohibited under Decree-Law no. 15/93 based on the presence of a prohibited substance in the decoction, coupled with ayahuasca's psychoactive and hallucinogenic effects which resemble those induced by DMT. However, it's worth noting that this classification doesn't align with scientific evidence.

Nonetheless, the court determined that the defendant was unaware that the importation of the decoction was illegal. This led them to conclude the defendant did not act with intent. The court did acknowledge the defendant acted negligently, since he should have been properly informed and aware of his unlawful behavior. However, as the crime of drug trafficking is only punishable when committed with intent and not negligence. The defendant was therefore acquitted.

It's important to note that we are not aware of any appeals filed regarding the decisions mentioned above. It's possible that appeals have been submitted, and additional verdicts in these cases may have been or will be issued. Nevertheless, there are a few important conclusions that can be reached based on the cited cases.

Firstly, the lack of apparent uniformity between the decisions rendered in these cases is striking. In all three cases, the defendants were found in possession of ayahuasca (which had been proven to contain DMT). But the verdicts in their criminal proceedings were very different.

Despite this apparent inconsistency, it appears that the Portuguese authorities involved in these cases consider the presence of DMT as sufficient grounds to classify a substance as prohibited under Table II-A of Decree-Law no. 15/93.<sup>105</sup> In other words, even if DMT is not found in a purified form but is rather present within an extract or decoction of natural plants, the substance has been treated as prohibited. We disagree with this position for the reasons previously mentioned. The Portuguese authorities' approach implies a lack of transparency and scientific merit.

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<sup>105</sup> Even in case no. 15/21.5JELSB where the Defendant was not accused of drug trafficking, the Public Prosecutor seemed to consider that the ayahuasca found was a prohibited substance since it contained DMT. The final decision to file the case was rather based on the lack of further evidence suggesting the commission of the crime of drug trafficking.

In this context, it is crucial to discuss the stance adopted by Portuguese authorities concerning the INCB's findings. These findings weren't even mentioned in case no. 15/21.5JELSB and case no. 56/21.2JELSB. The court did reference them in case no. 88/21.0JELSB but swiftly disregarded them and cited their supposed lack of legal authority within the Portuguese legal framework. It is true that an INCB conclusion is not a direct source of binding law, as previously stated.<sup>106</sup> However, it is not meaningless. Portuguese authorities should consider it as an authoritative reading of the 1971 Convention when interpreting Decree-Law no. 15/93. Portuguese authorities should, therefore, not overlook or dismiss the significance of the INCB's conclusions but rather take them into account when interpreting Decree-Law no. 15/93 and Law no. 30/2000.

This understanding of the Portuguese authorities, including the courts and public prosecutor, reveals a certain "obscurantism" when classifying ayahuasca as a drug, connected to a certain "side ruling" based on scientific data. This suggests that Portuguese courts and public prosecutors tend to categorize ayahuasca as a prohibited drug under the Portuguese legal framework in cases involving psychotropic substances, even if the scientific evidence and the language of the law do not consistently support such a classification. However, these cases also seem to demonstrate a degree of leniency from Portuguese authorities when it comes to drug offenses involving ayahuasca. Only

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<sup>106</sup> See § 23.

at first glance does it seem contradictory to the earlier verdicts. The problem is not how they qualify ayahuasca but rather what consequences it has for the individuals involved. Even in case no. 88/21.0JELSB, where the defendant was given a suspended prison sentence, the court acquitted him of drug trafficking and convicted him of a lesser crime (minor drug trafficking). This predisposition may be influenced by the ways ayahuasca was discovered in these cases, its intended purpose, and a certain tolerance toward the ambiguity surrounding its legal status, as emphasized in case no. 56/21.2JELSB.

Finally, it's worth noting that Portuguese authorities did not address the potential use of ayahuasca in a religious context in the examined cases. This could be because, to the best of our knowledge, the defendants did not raise any arguments for religious freedom to justify their actions. Thus, it remains to be seen how Portuguese authorities will respond to such rationalizations in the future.

### III. CONCLUSION

1. In the Portuguese legal system, the consumption of the plants, substances, and preparations listed in the annexed tables to Decree-Law no. 15/93 (which corresponds to the Schedules of the 1961 Convention, the 1971 Convention, and the 1988 Convention) is not considered a criminal offense, as long as the quantity is limited to what is reasonably needed for an individual's average consumption over 10 days. However, deterrence and rehabilitation measures may still be implemented in such cases.
2. Despite a reference to DMT (an active ingredient present in the ayahuasca brew) in Table II-A of Decree-Law, we believe that the ayahuasca brew and the plants required for its preparation are not regulated under Portuguese law. This conclusion is based on the intention of the Portuguese legislator to align domestic law with the list of controlled plants, substances, and preparations outlined in international law. The ayahuasca brew and the plants necessary for its preparation are not included in the relevant international treaties governing narcotic drugs and psychotropic substances.
3. Consequently, we assert that the consumption of the ayahuasca brew, along with the actions preceding and necessary for such

consumption (such as the possession of the ayahuasca vine and *Psychotria viridis*), are not governed by the legal framework concerning narcotic drugs and psychotropic substances. Therefore, these activities should not be subject to criminal prosecution.

4. Furthermore, we believe that the use of ayahuasca for religious purposes is safeguarded by various freedom of religion provisions. This implies that a broad restriction on such usage—encompassing consumption within a religious framework and the preparatory acts required for its use in a religious context—would constitute a violation of Articles 41 of the Constitution, 9 of the ECHR, and 18 of the ICCPR.
5. Regrettably, the recent approach of Portuguese authorities (the courts and the public prosecutor) involving ayahuasca has been inconsistent and has resulted in varying outcomes in drug offense cases. These outcomes do not align with our legal analysis. It appears the authorities have taken the position that the mere presence of DMT in ayahuasca is adequate to classify the substance as prohibited under Table II-A of Decree-Law no. 15/93. However, the reasoning provided by these authorities has its shortcomings and leaves room for legal challenge.

6. In conclusion, despite the unclear approach taken by Portuguese authorities, our legal opinion is that the possession, preparation, and consumption of ayahuasca are not prohibited under the Portuguese legal system. And its religious use is, in fact, protected under the relevant legal provisions.

Lisbon, March 2024

**Ana Sofia Machado Ferreira, Ph.D**

*Clinical Psychologist*

**Armando Rocha, Ph.D.**

*Professor of International Law*

*Lisbon School of Law, Universidade Católica Portuguesa*

In collaboration with

**Francisco Quelhas Lima, LL.M (Cantab)**

*Assistant Lecturer*

*Porto School of Law, Universidade Católica Portuguesa*