High tea: When law and religious practice conflict

by Thomas C. Berg in the November 1, 2005 issue

What are the limits of religious freedom? The Supreme Court will take up that recurrent question on November 1 when it hears arguments in a case involving O Centro Espirita Beneficiente Uniao Do Vegetal, a small sect that blends Christianity with South American spiritism. As a central act of their faith, UDV members ingest a tea called *hoasca*, brewed by mixing two plants unique to the Amazon basin (*uniao do vegetal* is Portuguese for "union of the plants"). They believe that hoasca connects them to God.

This practice has landed the UDV—which has 8,000 members in Brazil and 135 in America—in trouble with the U.S. government. Hoasca contains a small fraction (just over one hundredth of 1 percent) of a naturally occurring hallucinogen called dimethyltriptamine (DMT), which is prohibited under federal drug laws. This amount, although small, is sufficient to alter the drinker's state of consciousness. The UDV imported its hoasca from Brazil until May 1999, when customs officials confiscated a shipment and federal prosecutors threatened the group with criminal charges.

The UDV sued the government in federal court, alleging that it had violated the First Amendment's "free exercise of religion" clause and the 1993 Religious Freedom Restoration Act. After a two-week hearing, the judge ordered, pending a full trial, that the government allow the UDV to import and use hoasca subject to controls designed to prevent its spread to a broader market of recreational users. After the court of appeals upheld this injunction, the government successfully petitioned the Supreme Court for a review.

The case of *Gonzales v. UDV* raises a long-standing question: when a general law enacted for a legitimate purpose, like the drug law, conflicts in a particular case with a religious practice, should the law give way and exempt the practice? The Supreme Court has vacillated on this issue.

In 1879, holding that Mormons could be prosecuted for engaging in polygamy, the court reasoned that government cannot "excuse . . . [illegal] practices" on the basis of religious conscience, lest "every citizen . . . become a law unto himself." But in the 1960s and '70s the court, emphasizing the fundamental nature of free-exercise rights, held that government cannot substantially restrict those rights, even when enforcing a general law, unless it can show "interests of the highest order" that would be undermined were an exemption granted.

In 1990 the court changed course again, in another case involving sacramental drugs: the ritual ingestion of peyote from cactus plants by members of the Native American Church. The majority in *Employment Division v. Smith* held that in most cases, a "neutral law of general applicability" can be applied to religious conduct no matter how serious the burden it imposes, and even if it serves no strong interest whatsoever. The court's opinion, written by Justice Antonin Scalia, called an exemption from an otherwise valid law a "constitutional anomaly" and said that judges lack competence to balance religious interests against social interests and so determine which practices to exempt.

Smith's logic was far-reaching, because in a society like America with a multitude of laws and a diversity of religious practices, the two will often collide unintentionally. *Smith* implied, to take just two examples, that Catholic churches could be forced to hire female clergy under "generally applicable" sex-discrimination laws, or that dress policies in government agencies or public schools could prevent observant Jews from wearing yarmulkes or Muslims from wearing beards. Justice Scalia said that legislatures retained the authority to accommodate religion in particular contexts, but acknowledged that leaving this task to political actors would place small or unpopular faiths "at a relative disadvantage."

Congress, angered by *Smith's* shrinking of constitutional rights, responded with the Religious Freedom Restoration Act, which reinstated the requirement that any "substantial burden" on religious conduct can be justified only by a "compelling" governmental interest. Although RFRA's application to state and local governments was struck down in 1997 as a violation of states' rights, the statute remains operative in cases involving federal laws.

Under RFRA, a bar on the UDV's core sacramental act clearly would burden the faith seriously. The government has agreed that it must prove a compelling interest. It has asserted concerns about 1) health risks to those who consume hoasca and 2)

the possible diversion of hoasca from UDV services to recreational uses.

The government's witnesses have testified that DMT creates risks of "psychotic reactions," high blood pressure and dangerous serotonin spikes in the blood. The UDV's witnesses have testified that these and other risks are small when DMT is ingested in the particular circumstances of a UDV service: the tea is given in limited quantities, and drinking it produces a far weaker effect than do intravenous injections, the method of delivering DMT in several of the government's studies.

The UDV's witnesses also have testified that diversion to other uses is unlikely because no significant traffic exists in hoasca, drinking the tea often causes nausea and vomiting, and UDV strictly forbids members to ingest it outside of worship services.

Many of these features of hoasca resemble those of peyote—which has been used for years by some 250,000 Native American worshipers under federal and state exemptions, with no significant record of health problems or illicit use—and differ greatly from those of drugs that have a large recreational market.

Finally, the government argues that permitting importation of hoasca would violate U.S. obligations under an international drug-control treaty. The UDV has replied that, among other things, the treaties make provision for accommodation of sacramental uses.

The judge who heard this conflicting evidence found it "virtually in equipoise." He ruled for the UDV—correctly, in my view—because the government bore the burden of proof under RFRA in two ways that are crucial to the statute's protection of religious freedom. First, RFRA requires the government to prove the necessity of its law not in general but in its application to the particular religious conduct involved. So the issue is not DMT's general dangerousness, but its dangerousness in the hoasca drink when consumed in the controlled circumstances of the UDV ritual.

Focusing on the danger in the particular religious context is sensible, indeed crucial, for protecting religious freedom. It allows sincere believers to practice their faith in that context, and the government still to apply its law in the vast majority of cases. If the federal government could simply assert the general need for a law, religious freedom would almost never prevail. Nearly all laws serve some important social purpose in the abstract.

Second, the judge noted that under RFRA the government must prove more than just some risk of harm. Since “compelling interest” is legal phraseology for a very demanding standard, the harm in question must be serious and the likelihood of its occurring great.

Applying these principles vigorously is important for the religious freedom of all faiths. In the Christian tradition, the argument for accommodating religion in the face of a general law stems from the priority of conscience over government. As James Madison, trained by Calvinists at Princeton, wrote in his famous *Memorial and Remonstrance*, duties to God are “precedent both in order of time and degree of obligation to the claims of civil society.” Government, of course, has authority to make general laws to preserve peace, welfare and others’ rights, and one can even argue that there is no general constitutional right to exemptions from such laws. But a government that makes such accommodations, through means such as RFRA, should be commended for respecting its limits and treading on conscience only where necessary.

Marci Hamilton, a leading opponent of RFRA, argues in her book *God and the Gavel* that RFRA immunizes believers and churches from the rule of law, giving them carte blanche to harm others. She points to cases of obvious harm being done in religious settings: the sexual abuse of children by priests, the deaths of children whose parents refused medical treatment. Her arguments have had some appeal to mainline and liberal Christian leaders who worry about religious triumphalism and appreciate the wrongs that religion can do.

But this argument is misleading. The obvious harms that Hamilton lists certainly point to compelling state interests. Courts have uniformly rejected claims that sexual abuse or refusals to treat sick children are protected from liability. Religious practices remain governed by the rule of law, since courts—the embodiment of law—judge such practices under RFRA’s legal standards. Moreover, for every horror story of religious wrongs there is a corresponding story of government overregulation: a shelter run by Mother Teresa’s order barred from opening in New York because it lacked an elevator to its second-floor location, a prison inmate subject to rules against alcohol consumption barred from attending mass because of the wine served there, and so forth.

Hamilton concedes that religious practices that violate statutory law can nevertheless be consistent with the public good, and she endorses the effort of

legislatures to create exemptions in particular statutes. Her ultimate complaint is not that RFRA accommodates religion, but that it does so through a general standard—“compelling interest”—that allows courts to decide whether to exempt in a particular case. Judges, she says, lack competence to take and evaluate evidence concerning the necessity of a law.

But courts constantly take and evaluate evidence such as expert testimony and studies. The trial judge’s 60-page opinion in the UDV case, painstakingly reviewing the evidence, exemplifies how a diligent judge can determine whether the government has shown the compelling need to apply the law in a particular case.

Moreover, there are important reasons why RFRA protects religion through a general standard. For Congress to anticipate and resolve each of the myriad possible conflicts between federal law and religious conscience would not only be practically impossible, it would also leave decisions on the protection of minority faiths entirely to a majoritarian body.

For all their imperfections, courts have historically played a key role in protecting minority rights, partly because judges are free of direct electoral pressure and partly because, unlike legislators, they have to hear every claim that comes before them. By setting forth a single standard, applicable to all faiths and interpreted in the relatively neutral judicial forum, RFRA maximizes the chances of protecting the religious freedom even of the unfamiliar and unpopular.

Thomas Berg wrote a friend-of-the-court brief in the UDV case on behalf of 17 religious and civil-liberties groups from across the ideological spectrum.