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An analysis of the Peyote Way Church of God in the legal field”

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Introduction

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The interest of this NR lies in its combining two sets of beliefs and rituals that already existed but belonged to two apparently radically separated religious bodies, the Church of Jesus-Christ of the Latter-Day-Saints (LDS), and the Native American Church (NAC). Though it is numerically a small community of 150 members, out of whom about 50 are regularly active, it has played an important role in the field of religious law because, from practically its inception in 1979 until the late 90s, it has been involved in several judicial cases revolving around the constitutionality of allowing the use of the hallucinogenic substance contained in the peyote button exclusively to the members of the Native American Church. It is thus mentioned in most studies of peyotism and/or the legal problems religious groups have to face in the U.S.A. I conducted an analysis of its history, doctrine and judicial commitment in the mid nineties, which the Church has used to prove its quality as a bona fide religion ¹ and I am still in contact with its major leader Rev Anne Zapf.

I will address here the main implications of its religious and legal controversy: did the Native members of the Native American Church receive preferential treatment when the Federal Government issued the peyote exemption and passed the 1978 American Indian Religious Freedom Act? If the Peyote Way Church is a bona fide religion, why could it not practice the rituals only authorized so far to an ethnically defined community? What have the latest developments meant for its survival as a free cult?

**Brief History of the Peyote Way Church of God**

The Church was founded by Reverend Immanuel Pardeahtan Trujillo in 1979. Peyotism was not "borrowed" by New Agers (a common accusation) since the founder is a Native American: Rev. Trujillo is 50% San Carlos Apache who joined the Native American Church in 1948. Now, in various places this Church is only opened to "genuine Natives", ie. people who can prove their ethnic descent is at least 25% derived from American Indian stock, and their spouses, whether Indian or not.  

Dissatisfied, Trujillo left in 1966 to found the Peyote Way Church of God, incorporated in 1979. It is based in Arizona, in Graham County, at Willcox. It strictly adheres to the creeds of the LDS Church. It may seem strange that a religious group basing its religious practice on the ingestion of a hallucinogenic substance should adhere to the teachings of the LDS Church, but it is historically

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2 This blood requirement seems to be recent and not found in all the tribes. Stewart says that in most cases "the presence of non-Indians has been no problem" and that it was the unruly use of peyote by the hippies in the 1960's that brought about the stricter racial rules of membership in Texas. Thus the "ruling of the NAC of NA (North America) that only Indians should be enrolled in the Native American Church is new and is not shared by most peyotists."(Stewart, 333-334) Some states are definitely more color blind regarding the membership of the NAC than Texas: Stewart reports how in 1984, hence when Peyote Church was pending, a white couple was arrested in North Dakota for possession of peyote by the FBI thanks to their denouncement by the president of the NAC of NA. He did not accept Mr. and Mrs. Warner as bona fide members because they were white. However, the jury trial in Grand Forks Federal Court, dismissed the charges.(Stewart 333)
understandable. Anne Zapf, the President of the Church from 1985 to 1993, became a Mormon while in college and she helped Trujillo settle the Church and as we know, a fairly high number of Natives of the region belong to the LDS Church. Steven Shields lists in his *Divergent Paths of the Restoration* the Peyote Way Church among the groups that descend in straight line from Joseph Smith Restoration in 1830. The LDS-peyotism syncretism goes back to the Oto Church of the First-Born which was the first peyote church to seek legal incorporation, in 1914. It was founded by Jonathan Koshiway to help the Oto legalize their religious use of peyote to calm the surrounding hostility. Koshiway, who was half Oto, had in fact been an evangelist for the LDS Church. The Oto later met with Kiowa and Arapaho and founded the "Native American Church".

To regulate daily life the Peyote Way Church uses in particular Section 89 of *Doctrine and Covenant*. Verses 8, 10, 11 recommend the use of herbs to improve the constitution of man. Being defined as a curative herb (especially good against drug addiction) natural peyote is sanctioned as such by the Word of Wisdom.

### Legal controversies

The Church has served to test the constitutionality of state and federal statutes regarding the legal possession of peyote pursuant to the freedom of religious practice. I will concentrate on its two major cases: the 1986 trial in Arizona, and the 1980-88 case against the state of Texas and the Federal Government.

Already in 1967 Rev. Trujillo was charged with criminal possession of Peyote in Denver, but he was acquitted since he could prove that it was for the exercise of his religion (*The People of the State of Colorado v. Mana Pardeahtan*, Criminal Action n° 9454, Denver County Court, June 27, 1967). It was on this case in particular as well as on the more famous *People v. Woody* case that a

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3 Incidentally, the first witness happened to be Omer Stewart, then head of the Anthropology Department at the University of Colorado. He testified that he had eaten peyote while participating in Indian ceremonies; he described the sensations and sang a ritualistic song. (Browne) It is also amusing to know that this leading specialist of peyotism had himself been brought up as a Mormon.

4 NAC peyotists, Woody and friends, were arrested during a ceremony in a hogan near Needles, CA, in 1962. Using the Compelling State Interest, the California Supreme Court ruled in
Texas state court relied in 1968 to declare unconstitutional the law that the state of Texas had passed in 1967 prohibiting the possession of peyote in any context. It is subsequently to this that the Texas Department of Public Safety and the Justice Department, and the DEA licensed peyote dealers who could sell the cactus only to Native members of the NAC. (Franklin 41)

On May 21, 1986, Rev. Trujillo was arrested for speeding near Globe, Arizona. Once the officer saw his Peyote Way Church address he questioned him as to whether he had any peyote with him. Trujillo produced a small button that he was carrying and then placed it in his mouth, "in prayer". He was arrested but released on the same day.

In court the jury returned a verdict of not guilty of criminal possession of peyote. The small button and its medicine bag were returned to Rev. Trujillo. The Arizona statute holds that use of peyote in bona fide pursuit of religious faith, regardless of race, is protected by the Free Exercise Clause of the Federal Constitution. Alaska, New Mexico, California, Oklahoma and Colorado, Nevada and Oregon 5 uphold the same liberal laws and Peyotists can continue their practice there without being harassed. 6 But non-NAC groups cannot legally buy their supply of peyote in Texas, the only state where it grows naturally; hence the following case which was to allow the Church to challenge the racial bias of the law at the federal level.

It opened in 1980 and was concluded in 1988. The issue stemmed from false arrest and subsequent dismissal of charges because of subterfuge on the part of the arresting officer. Three Church members had been arrested on their way to the peyote fields in Starr County, Texas. In 1984 Judge William M. Taylor, Jr. granted summary judgment in favor of the Defendants, Edwin Meese III, Attorney General of the United States et al., by upholding the constitutionality of state and federal statutes which prohibit the use peyote except by the members of the Native American Church. The Peyote Way Church appealed. In 1984 the Fifth Circuit Court of Appeal ruled that the Church had standing, that peyote was truly its sacrament, and that the

favor of Woody et al., deciding that in a mass society leading to conformity, the protection of self expression was paramount.(394 P.2d 813 (1963))

5 The religious exemption in Oregon is recent (1991), and this state is better known for its severe decisions in two landmark peyote cases: State of Oregon v. Soto (Or. App. 794, 798-99, 537 P.2d 142, 144 (1975), and the 1990 Supreme Court Decision Employment Division, Oregon v. Smith.

6 The Entheogen Law Reporter lists the statutes of all the states: "Peyote Exemptions Verbatim" TELR, n° 2 (Spring 1994) 10-13. (Entheogen(ic) is a neologism coined in 1979 from an obsolete Greek word meaning realizing the divine within, and it is generally accepted now to describe "shamanic inebriates". (Glen Boire, Summer 1994, 476))
record did not show a compelling state interest in denying members right to use peyote… Therefore, remand was appropriate for further proceedings to determine whether statutes making possession or distribution of peyote a criminal act denied to members of the church the right freely to exercise their religion under the First Amendment. (Synopsis, Syllabi and Key Number Classification, 1984, p.5825)

This US Court of Appeal 1984 decision was however to be reversed in 1988. The Court started by declaring that freedom of belief was absolute but that, in the nature of things, freedom to act could not be, and that even when the action was "in accord with one's religious conviction, (it was) not totally free from legislative restrictions."

The exemption afforded the Native American Church had been in effect since 1965 (79 Stat. 226 §3(a)) to complement the 1965 Drug Abuse Control Amendments. The authorities had already then favored one particular Church.

Later, in 1972, at the federal level, another peyotist religion, the Church of the Awakening founded in 1963 by John W. and Luisa Aiken in New Mexico, was refused exemption because the court considered it to be only a "loose confederation of kindred souls whose purpose is to explore the mystical boundaries". The judge did not believe that its use of peyote was essential or central to its religion whereas it was for the Indian one: "the overriding factor that peyote is essential and central to the religion is that without peyote their religion (of the Native American Church) would not exist." (Department of Justice Hearing, 35 Fed. Register N° 185, 14789, 14790 (1970))

For its part, the Fifth Circuit Court decided then that:

The exemption granted both by federal and Texas law to the ritual use of peyote by the Native American Church tends, as the Church suggests, to negate the existence of a compelling state interest in denying the same to it. In the absence of evidence, we cannot simply assume that the psychedelic is so baneful that its use must be prohibited to a group of less than 200 members but poses no equal threat when used by more than 250 000 members of the Native American Church. (Synopsis, p.5834)

Strangely enough, this sensible argument was dismissed by the higher Court.

The suit was remanded back to the US District Court for the Northern District of Texas, Dallas Division, which had to determine, in Peyote Way Church of God v. William Smith, et al (742 F2d 193), whether those statutes denied the members of this Church their First Amendment rights to freely exercise their religion. The Church was asking for the same exemption as that afforded the Native American Church, since, among other reasons, it subscribed to similar tenets. It was seeking
to prove that the Texas and federal regulations granting the exemption to the Native American Church was unconstitutional, as violating the Free Exercise and Establishment Clauses of the First Amendment, the Equal Protection Clause of the Fifth Amendment, and its right to privacy.

The Court was guided by United States v. Rush, (738 F. 2d 497 at 513(1st Cir.1884), cert. denied, 470 US 1004 (1985)) where the First Circuit Court held that "the peyote exemption is uniquely supported by the legislative history and congressional findings underlying the American Indian Religious Freedom Act".

The Attorney General, with apparent congressional approval, adopted a regulation which is now contained in the Code of Federal Regulations:

The listing of peyote as a controlled substance in Schedule I (21 USC § 812(b)) does not apply to the nondrug use of peyote in bona fide religious ceremonies of the Native American Church, and members of the Native American Church so using peyote are exempt from registration. (21 C.F.R. § 1307.31)

If we compare this regulation to the New Mexico statute quoted above we can see why it has been interpreted as granting preferential treatment at the federal level to one Church only, and why it is the bone of contention between Native and non-Native peyotists.

In Peyote Way v. Smith the Court gave a complete definition of peyote including the remark that its potentially adverse effects can be minimized when it is used in a controlled setting, and when the subject is prepared for its use.

In United States v. Rush the Court had used the three questions of the "state compelling interest test" to decide religious freedom cases (already defined in United States v. Lee (455 US 252, 256-59, 102 S.Ct. 1051, 1054-56, 71 L.Ed.2d 127 (1982)):

1. whether the challenged law interferes with the free exercise of a religion;
2. whether the challenged law is essential to accomplish an overriding government objective;
3. whether accommodating the religious practice would duly interfere with the fulfillment of governmental interest.

In the Peyote Way case the Court answered affirmatively to the three questions, and held that:

Accommodating Peyote Way's religious practices would unduly interfere with the fulfillment of the federal and state governments' overriding concern for the protection of public welfare. Findings of Fact and Conclusions of Law, p.8)
The Court then examined the Native American Church Exemption and found that it was the result of a grandfather clause: since this exemption had existed for more than ten years before the enactment of the American Indian Religious Freedom Act (since 1965 in fact), it was supported by the policy and Congressional intent underlying the Act.... The Court therefore concludes that regardless of the sincerity of Peyote Way's members' beliefs in peyotism, the exemption provided the Native American Church cannot be expanded to include non-Native American Church use of peyote...

(The overriding interest of Congress to control the use of narcotics and psychotropic drugs outweighs the interest of expanding an exemption that clearly was meant to be a grandfather clause, and not a full-scale exemption of religious peyote use.... Peyote Way's claims for violation of the free exercise clause and establishment clause of the First Amendment must fail.... (Its) right to privacy argument must also fail.... The state...(and) federal exemption is a political classification, not a racial one, and therefore does not violate the Equal Protection Clause. (Findings of Fact, pp.15-17)

The judgment read: "It is ordered and adjudged that Plaintiff Peyote Way Church of God, Inc. take nothing, and that the action against Defendants Edwin Meese III...be dismissed on the merits."

The issue at stake here is that peyote is offending, that is, considered as posing a health threat to people, only on account of belonging or not to a racially defined religious group, and not in the absolute.

Since peyotism was strictly forbidden by the laws of 1965 and 1970, the exemption for the Native American Church stems from guilty feelings about the previous disregard towards Native Religions and it seems to have been the context within which at least the American Indian Religious Freedom Act (AIRFA) was passed in 1978. Yet whiffs of preferential treatment cannot be entirely dismissed.

At the time of the AIRFA passage ((Joint Resolution, 95th Congress. Public Law 95-341—Aug., 11, 1978. 92 Stat. 469, 42 U.S.C.), some were already asking why Congress had singled out a specific religion for protection under the Free Exercise Clause of the First Amendment. The underlying necessity for the Act was in fact the fiduciary relation of the tribes to the Federal Government, whereby the tribes need more protection than other groups from arbitrary governmental activity, and the Government has special responsibility towards them. In the Senate hearings before the passage of the Act the problem of the establishment of a religion was raised, but after passage, the courts that had to decide on claims to privileged access and use of sacred sites cases held that AIRFA did not give the tribes special status because that would violate the Establishment Clause. One
has to go back to the 1968 Indian Civil Rights Act (or Indian Bill of Rights) for the roots of the AIRFA and the 1970 exemption.

It held that "no tribe in exercising powers of self government shall make or enforce any law prohibiting the free exercise of religion" (§ 1302). Yet this Act did not prohibit any tribal law "respecting an establishment of religion", which meant that in fact the tribes were freer than most groups. The reason advocated was the same that the Court would use in the 1970 Church of the Awakening case mentioned above and that would constitute the third and fourth paragraphs of the AIRFA: religion is an inherent part of the life system of the tribes and prohibiting its establishment would disrupt it totally. It appears that the 1968 Act had been felt necessary because in several instances some tribal governments had limited the free exercise of religion for their own members. One of these involved precisely peyotism: that time it was the Native American Church which had sued the Navajo Tribal Council for its prohibiting the importation, sale, use or possession of peyote within the reservation (Native American Church v. Navajo Tribal Council, 272 F.2d 131 (10th Cir., 1959). In this case, as in Toledo v. Pueblo de Jemez (these Pueblos had been attacked for their beliefs by their tribal government), the courts had held that the religious clauses of the First Amendment did not apply to the tribal governments. The 1968 Act sought to redress these inequalities. But, obviously "the subcommittee made a deliberate choice to exclude the Establishment Clause out of respect for the theocratic tradition of some tribes."(Michaelsen 95)

Even when all the elements (these are just a few) leading to AIRFA are considered, the act remains ambiguous because it seems to imply preferential treatment for the "traditional religions" of the Natives. Thus Section 2 of AIRFA states that the government will consult with "native traditional religious leaders in order to (...)preserve Native American religious cultural rights and practices." Yet nothing defines how these leaders are to be considered so, and when one knows the rift between traditionalists and the other members within the tribes one can see how the wording of AIRFA opens the door to a variety of constructions.

In the years following its passage this ambiguity led various courts to point to the possible unconstitutionality of its granting special privileges for the practice of traditional Native religions. However, it was found, in particular by the court in Wilson v. Block, that AIRFA "was meant to ensure that American Indians were given the protection that they are guaranteed under the First Amendment; it was not meant to in any way grant them rights in excess of those guarantees."(708 F.2d 735 (D.C. Cir. 1983)) In fact, most freedom of religious practice cases in
which Native plaintiffs appealed to AIRFA have not succeeded, so that the Act has seemed so far to be pure tokenism.

In the *Peyote Way Church v. Smith* case, the Court cited the AIRFA and said that Congress had passed it because it was its duty (in the fiduciary sense) to preserve Native religions and cultures and that the federal and Texas exemptions complemented this Act by protecting peyotism as the core of these cultures and religions.

This touches also the issue regarding the authorization given by AIRFA to members of Native religions to use the feathers of endangered birds for their rituals. It is easy to accept since those species became endangered by the encroaching of non-Native populations. Peyotism is another matter: the law is of course not meant to protect it as "an endangered species" (though it is now so\(^7\)) but to keep human lives from being endangered. One understands perfectly well the grandfather clause argument in this case, but if the consumption of peyote was not considered as posing a threat to society and as not contradicting the interest of the State for those people who used it before 1970, why consider it as dangerous for those who have consumed it since, or who consumed it before that same deadline, but not within the privileged enclave of one special religion/interest group, which itself has not existed of all eternity? Since courts have found it to be safe in its religious use, why not legalize it in *all* religious contexts?

Furthermore, it has to be noted that the grandfather clause argument used in the federal exemption did not protect *all* the Natives who were former users of peyote, but only *those pertaining to* the Native American Church. Yet, as we saw earlier, this religious group came into being thanks to various historical conjunctures, which were not always pure of spiritual intent (witness the personal rivalries at work in its inception in the 1910's), and it did not, and still does not, include all Natives, nor all Native peyotists.

The laws of some states such as Arizona or New Mexico, seem far fairer in this respect. Still, they are not completely clear either since they force people to belong to an officially registered bona fide religion if they want to use peyote or other mind-altering/"enlightening" substances. For that matter, the restriction applies just as well for individual Natives in or out reservations, like for non-Natives, and it raises the issue of real personal religious freedom, or freedom of conscience, which has already been debated in various cases similar to Leary's and not been resolved in a convincing way.

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\(^7\) Mexico placed it on the list of endangered species in 1991 and because of oil wells, cattle grazing and inconsiderate harvesting, Texas fields are also being seriously depleted.
Such a debate was of course temporarily put an end to by the 1990 Supreme Court Decision *Employment Division, Department of Human Resources of Oregon v. Smith*, aka "the Peyote Case" (494 U.S. 872 (108 L. Ed.2d 876, 110 S.Ct. 1595)). Justice Scalia speaking for the majority, argued that the ingestion of peyote by members of the Native American Church (here Smith and Black) is not an activity deserving protection under the Free Exercise Clause of the First Amendment. And, what is interesting for our case study, and rather logical within the context of the Code of Federal Regulations, he ruled that "it would be courting anarchy" to create an exemption to allow members of the 250,000 strong Native American Church to consume peyote as a religious sacrament when the plant is illegal for other citizens in a recreational context. The majority opinion was clearly answering the line of argument holding that if peyote is considered a dangerous substance, let it be so for everybody.

One year after the Smith decision, the peyote Way Church of God saw another of its trial come to an end but with the same sentence as in its previous case. In *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210 (5th Cir. 1991) (*called an Establishment Clause case applying rational-basis scrutiny*), the Church "sued for a declaratory judgment that federal and state laws prohibiting peyote possession by everyone except ...the Native American Church were unconstitutional. The Fifth Circuit court upheld however the exception for the Native American Church. It found that Congress did have authority over Indian matters and could not enforce the First Amendment restriction to the tribes as it did to other citizens, for in this fiduciary relation the federal government was not separated from the tribes:

"The unique guardian-ward relationship between the federal government and Native American Tribes precludes the degree of separation of church and state ordinarily required by the First Amendment. The federal government cannot at once fulfill its constitutional role as protector of tribal Native Americans and apply conventional separatist understandings of the establishment clause to the same relationship." (*Peyote Way*, 922 F.2d at 1217.

*The court held that the federal exemption “represents the government’s protection of the culture of quasi-sovereign Native American tribes and as such does not represent an establishment of religion in contravention of the First Amendment.”* (*analysis of US District Court, District of Maine, Clergyman, Native American Church of the USA v. Director, U.S. Fish and Wildlife Service. Civil No. 90-0258 P. internet: dmc_2-90cv258_clergyman_v_usf 2*)
Conclusion

On June 15, 1991, the Church experienced another arrest that could possibly allow it to challenge once more the peyote laws. Brother Bill Stites was arrested by Federal Rangers in Big Bend, Texas, with 32 peyote buttons in his car and he was charged with felony possession and potential ten-year incarceration. Under Smith he was precluded from raising a defense based on the free exercise clause. On April 20, 1993 he agreed to sign a plea agreement. However because the RFRA was signed soon afterwards with retroactive validity, his attorneys are challenging the legality of his conviction. As of December 1994, the Church leaders were hoping that the case would be brought to trial to test the strength of the RFRA. (Ex Parte William Stites, N° 2897-A, 83rd District Court of Brewster County, Texas) They were yet no more successful than previously.

The Church has become more family oriented and while it is proud of its civil disobedience, it seems to have lost some of its fighting spirit to face the courts.

References


*Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210 (5th Cir. 1991) (Establishment Clause case applying rational-basis scrutiny).


Fin du texte