

Cannabis Associations and Social Clubs: An elegant and UN convention compliant solution?

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What is a Cannabis Association/Social Club?

- Created by civil society (cannabis activists assisted by legal academics) in Spain
- Not-for-profit (all revenue goes back into the association)
- Association of adult members
- Grow Cannabis on behalf of Members
- Provides a licensed space for its distribution and Consumption in Private: the space is funded by revenue generated

Advantages of the Model (1)

- Civil society creation based on the right to association
- Human rights *and* Public health friendly
- Complies with the international drug treaties
- Empowers the consumers of cannabis
- The democratic structures with which which registered membership associations must comply provides members with means of product control and with product information

Advantages of the Model (2)

- Not for profit status protects against the risks associated with commercialisation (strength of product and encouragement to use, regulatory burden)
- Protects the consumer of cannabis from risks associated with the black market (exposure to sale of drugs other than cannabis, exposure to criminal environment, measures of control over product or product info)
- Facilitates research into the effects of cannabis association and effectiveness of public health measures
- Reduces 'black market' production (perceived and potential advantage)

The Spanish Legal Context

Right to Association

- Fundamental Right Protected in the Constitution: Acknowledged to be of great importance to democracy
- Detailed regulations for the functioning, rights and protection of Membership Associations as a Legal Entity

Domestic Drug Law in Spain

- **La Ley de Estupefacientes 17/1967**
- Drug Cultivation, Production, Consumption etc not authorised except with the authorisation of the Department of Health and then only for medical and scientific reasons
- *Drug Conduct that is unauthorised or for purposes that are neither medicinal nor scientific is forbidden but not punished.*

Criminal Offence in Spain

- Article 368 of the Criminal Code makes it a criminal offence:
- to cultivate, produce, traffic, *or otherwise promote, encourage or facilitate the illegal consumption* of toxic drugs, narcotics or psychotropic substances, or to possess these substances with such objectives.
- Supreme Court in 1973 The Doctrine of Legal Goods (or Legal Interests) (*Bien jurídico*)
- Parliamentary Debates in 1992 (*Bien jurídico*) (Principle of Minimum Criminalisation)
- Supreme Court Jurisprudence in the 1990s: (Doctrine of shared consumption)

Doctrine of Shared Consumption

- (i) the collective consumption must take place out of public sight for the purpose of avoiding drug diffusion amongst third parties;
- (ii) the amount of the drug must be consistent with personal and occasional consumption;
- (iii) the collective must be a small nucleus of individually identifiable and regular drug users;
- (iv) the drug must be for immediate consumption.
- Concerned with ensuring that there is no risk of the drug going beyond the intended recipients or encouraging persons who do not consume drugs to do so.

Birth and Evolution of the Cannabis Association in Spain

- 1992 Administrative Penalties Introduced for Consumption **and** Possession in public and first cannabis associations founded (1987 and 1991)
- Collective Cultivation and Regional Court support
- In the region of 1000 associations by 2015 some with several hundred members and many subscribing to detailed self regulation promulgated y federations of cannabis associations
- Licensed Clubs
- Regional regulations

Jurisprudential Debate

- Regional Prosecutions: majority resulted in stays of prosecution or acquittals and prosecutions attracted criticism from Basque Ombudsman and legal journals
- Most stayed-/acquitted on grounds that came within shared consumption doctrine
- Audiencia of Palma found two notable diversions by the cannabis association from the criteria established for the application of the shared consumption doctrine: (i) the shared consumption doctrine stipulates that the drug possessed is for immediate use and this cannot be said about an un-harvested cannabis crop; (ii) the number of members in a cannabis association exceeds those considered in cases heard by the Supreme Court (usually groups of three or four).

Stalemate

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- Anti Drugs Prosecutor Offensive in 2014
 - 2015 Supreme Court rulings, all majority decisions (minority concerned re legal uncertainty engendered by majority decisions, and harm principle)
 - Effect: case by case basis : 300 members too many as outside **normal concept of personal consumption** and product **would not be subject to state control as it in countries which have regulated (nb conventions)**
 - Reasons for stalemate: weary of traipsing on parliamentary terrain, no consideration given to proportionality and human rights – debating circular question of the conceptual boundaries to ‘endangerment of Public health’ without using HR framework

Implications of Stalemate

- Lack of regional regulation
- No incentive for clubs to comply with good practice guidelines
- Difficulties for Law Enforcement
- Uncertainty for Associations and Members
- Grey market (difficult to police source of supply)
- Limitations on Meaningful Empirical Research on effectiveness of Model

International Drug Treaties and --- Comparative Law

The International Drug Treaties

- Only drug use that is for medical or scientific uses may be **authorised**
- Article 3 (1) of the 1988 Convention lists the conduct which states parties are **required to establish as criminal offences** under its domestic law. (**drug trafficking**)
- Article 3(2) of the 1988 Convention lists the conduct with state parties are **not required to criminalise** wherever doing so could be in conflict with the constitutional principles or basic concepts of a state's legal system.: **The possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption**

Basic Conceptual Framework

- Trafficking (must be criminal)
- Personal Consumption of drugs which not for medical or scientific purposes (must not be authorised but need not be criminal, scope of which is matter for national law)

Constitutional Principles (Human Rights): A right to consume cannabis?

- Personal Autonomy: (personality rights) right to privacy, right to human dignity (since 1972 *State v Kanter*, 1972 Supreme Court of Hawaii)
- Constitutional Court decisions in Colombia (1994) Argentina (2009) Mexico (several since 2015) South Africa (2017) Georgia (2018)

Mexico (2015)

- **Protected interests engaged:** right to privacy and associated personality rights; Supreme Court observed that the right is exercised by the consumption of substances that produce experiences that in some way affect the user's thoughts, emotions and/or feelings, which are indeed amongst the most personal and intimate of activities.
- **Legitimate Aims of Legislature:** Protection of public health and public order
- **Suitability of the measure and proportionality:** identification of the harm (driving).
- **Conclusion:** neither effective nor proportionate response

South Africa

- High Court decision confirmed by the Constitutional Court of South Africa in 2018.
- Declared the criminal law unconstitutional to the extent it criminalised possession and cultivation for personal use in the privacy of one's own home.

Basic concepts of a legal system

- The Doctrine of Legal Goods (or Legal Interests) (*Bien jurídico*)
- Principle of Minimum Criminalisation
- Supreme Court of Spain in 1973
- Parliamentary Debates in 1992

Does Personal Consumption only apply to one person?

Supreme Court of Chile (2015)

- According to Article 8 of the Law 20.000 , people who cultivate cannabis without authorisation will be guilty of a criminal offence *unless* the cultivation is exclusively for their ‘personal use’ in ‘proximate time’.
- In the decision by the Supreme Court of Chile on the concept of personal consumption (enshrined in the statutory exception to the commission of the offence), the Court held:
- [the term] does not necessarily imply that the use or consumption of the substance obtained from the plant must be that of one sole individual, only that it is conducted solely and exclusively by the same people who sowed the seeds, planted, cultivated or harvested the plant that produced it, excluding thereby the use or consumption of third parties or others distant from such actions.

Scope of Personal Consumption?

- ❖ Everything that is not trafficking (Spain)
- ❖ Thresholds
- ❖ Everything that is protected by the right to privacy and associated personality rights that does not harm third parties.

No Help in the Treaties

Personal Consumption Defined?

- European Union
- The first definition proposed by the Commission defined 'trafficking' as 'the act, without authorisation, of *selling and marketing* as well as, *for profit*, of cultivating, producing, manufacturing, importing or sending or, for *the purpose of transferring for profit*, of receiving, acquiring and possessing drugs' specifically excluded (i) simple users who illegally produce, acquire and/or possess narcotics for personal use and (ii) users who sell narcotics **without the intention of making a profit** (for example, someone who passes on narcotics to their friends without making a profit) which it stated to be 'in line with the practice in all the Member States'.

European Council Framework Decision

- No definition of treaty-refers to Treaties
- Article 2 (2) specifically excludes from the scope of the Framework Decision conduct described in paragraph (1) ‘when it is committed by its perpetrators *exclusively for their own personal consumption as defined by national law*’.

Defining Personal Consumption

- Human Rights: Personality Rights (autonomy): right to form and join associations
- Proportionality (public health)

Why a Social Club?

- Where consumption banned in public
- In *Niemietz v Germany*, the European Court of Human Rights stated:
- The Court does not consider it possible or necessary to attempt an exhaustive definition of the notion of ‘private life’. However, it would be too restrictive to limit the notion to an ‘inner circle’ in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings.
- ECtHR, *Niemietz v Germany* judgment of 16 Dec. 1992, Series A no. 251-B.

Group Privacy

- [g]roup privacy is an extension of individual privacy. The interest protected by group privacy is the desire and need of people to come together, to exchange information, share feelings, make plans and act in concert to attain their objectives...., group privacy protects people's outer space rather than their inner space, their gregarious nature rather than their desire for complete seclusion.
- E Bloustein, 'Group privacy: the right to huddle' (1977) *Rutgers Camden Law Journal* 8.2 219-283.

Spanish Clubs: Empirical Research

- Belackova, V., et al. Qualitative research in Spanish cannabis social clubs: “The moment you enter the door, you are minimising the risks”. *International Journal of Drug Policy* (2016)
- Reduces health risks: users are capable of assessing the presence of harmful contaminants or adulterants, and there are mechanisms through which product quality can be achieved, educates consumers regarding strains and effects, allowing consumers to “better match their cannabis use to the the desired psychic state or daily activity. Such a capability is an aspect of achieving well being”: provision of social/peer support and education interventions in a controlled setting

The Legal Model

Legal Pre-requisites: (though could be prosecutorial guidance *in lieu*)

- Possession of cannabis for **personal use** is not a criminal offence
- Cultivation of cannabis for **personal use** is not a criminal offence
- Broad Definition of **Personal use**
 - Legal Add-ons:
- Financial penalties for public consumption and cultivation (and reason for providing Social Cubs)

The Regulatory Scope

