



The Legal Landscape for Cannabis Social Clubs in Spain

Amber Marks

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A Preliminary Sketch of the Legal Landscape for Cannabis Social Clubs in Spain (2015)¹

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This briefing is a preliminary sketch of the legal landscape for cannabis social clubs in Spain. Its author is presently conducting legal analysis and empirical research in Spain and her findings will be published in due course. The aim of this briefing is to provide an interim sketch of the relevant law for English speakers working in drug policy.

If you have any comments or questions or if you require a more in-depth discussion or more complete references, please contact Amber Marks at Queen Mary, University of London (a.marks@qmul.ac.uk) for a draft of the article A. Marks, M. Torres and O.Casals 'The Fine Green Line: The Regulation of Cannabis Clubs and Cultivation in Spain'.

1. Any references to this briefing should be cited as A.Marks 'The Legal and Socio-Political Landscape for Cannabis Social Clubs in Spain (Observatorio Civil De Drogas, 2015).

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Introduction and Overview

The so-called 'Spanish Cannabis Social Club model' has generated a great deal of interest in drug policy circles. The model consists of a not-for profit association, democratically operated by its members, officially registered as a legal entity, which collects and distributes cannabis to its members, on private premises licensed for the sole access of members. Several associations cultivate cannabis on behalf of their members. In order to be a member of a cannabis association a person must be an adult, a habitual user of cannabis, and the friend of a signed-up member. Members put money into the association and are thereby entitled, in addition to use of its facilities, to a proportionate share of its products, including cannabis. The legal protection afforded to registered associations by the Constitution and national legislation means that they can only be dissolved by a court order. The licensing of private premises for the use of the association (social clubs) entails the adequate satisfaction of various municipal regulations and autonomous community laws concerned with matters such as health and safety, and the abatement of noise and noxious emissions.

The first cannabis association was formed in 1991 and the first club appears to have been opened in 2001. There was a dramatic proliferation of cannabis associations and clubs between 2007 and 2011³. Official records suggest that there are

now at least 500 cannabis associations operating in Spain, each with hundreds if not thousands of members. The majority is in Catalonia, followed by the Basque country, but they are in existence throughout the country (including in the autonomous communities of Madrid, Valencia, the Canaries, Andalusia, the Balearics, Navarra, Castile and León, and Galicia)⁴. In Catalonia the number of applications for licenses by cannabis associations has resulted in the administrative creation of a specific license for cannabis smoking clubs. A de facto legalisation of cannabis supply has arisen, not as a result of any legislative initiative, but from the persistent testing of Spain's legal boundaries by civil society. Whilst criminal proceedings have been and continue to be brought against cannabis associations for both the distribution and cultivation of cannabis, the overwhelming majority results in acquittals or in a stay of proceedings occasioned by judicial findings that the conduct proven is not in breach of the criminal law of Spain. Such rulings are not infrequently accompanied by judicial statements about the inequity of the prosecutions and the urgent need for government regulation to ensure law enforcement and prosecutions target only criminal supply, and not cannabis clubs.

Faced with the social reality of what are now several hundred cannabis associations and cannabis social clubs, two city councils (the province of Girona and the municipality of

3. Òscar Parés Franquero and José Carlos Bouso Saiz, *Pioneering Drug Policy in Catalonia: Innovation Born of Necessity* (forthcoming in 2015, OSF). See also Xabier Arana and Virginia Montañés Sanchez 'Cannabis Cultivation in Spain – The Case of Cannabis Social Clubs' in T.Decorte, G.R.Potter and M.Bouchard *World Wide Weed: Global Trends in Cannabis Cultivation and its Control* (Ashgate, 2011).

4. La sesión de la comisión mixta para el estudio del problema de las drogas (Session of the Joint Committee on the drug problem) 28th October 2014. http://www.congreso.es/public_oficiales/L10/CORT/DS/CM/DSCG-10-CM-126.PDF



San Sebastian) and the parliament of one autonomous community (Navarra) have all introduced specific criteria for the local regulation and licensing of cannabis clubs. The Parliament of the autonomous communities of the Basque country has announced its intention to do likewise, as has the town council of Barcelona. The Parliament of Catalonia has issued detailed recommendations for their regulation by local councils. The aforementioned councils and parliaments describe the cannabis social club as an opportunity for enhancing civil rights and promoting public health simultaneously. The aim of these regulations is harm-reduction and provision of legal security for cannabis associations. The central government opposes local regulation and claims that any regulation relating to prohibited substances is within the exclusive jurisdiction of the central government in accordance with its obligations under the International conventions.

District council licenses, coupled with the promulgation of local regulations have enhanced the social standing and perceived legitimacy of cannabis social clubs. Cannabis social clubs and cannabis associations adhere to increasingly elaborate self-regulation. Such regulations are far from identical. Both their uniformity and their diversity are a reflection of attempts to exert social pressure on the authorities whilst conforming to exigencies of planning regulations, a vast body of criminal case-law on 'closed-circle use' (see below) and in anticipation of the requirements of municipal regulations for cannabis clubs.

The Cannabis Social Club model has attracted international attention in drug policy circles for several reasons of which the primary appear to be:

- (i) The proliferation of cannabis social clubs in Spain has not attracted criticism from either of the primary drug control bodies, the INCB or UNODC;
- (ii) The model appears to conform with international obligations;
- (iii) The democratic means by which associations must operate to conform to the administrative law on associations, offers consumer control over the product;
- (iv) On account of the associations being not-for profit, the model safeguards against the perceived risk of over-commercialisation;
- (v) The model offers a regulatory opportunity for quality-control of the cannabis distributed and for programmes of risk-prevention;
- (vi) The model provides a means of separating cannabis supply from the black market and harder drugs;
- (vii) The model facilitates research into cannabis consumption and therefore the design of appropriately targeted programmes of harm reduction.



Domestic Law

Spain ratified the Single Convention on Narcotic Drugs UN Convention of 1961 in 1966. The international lists of controlled substances, including cannabis, were incorporated into Spanish law by the Narcotic Law 17/1967 (Ley de Estupefacientes). The Narcotic Law 17/1967 provides the Spanish state (the law pre-dates the 1978 constitution) with the right to take action in relation to drugs. Narcotic Law 17/1967 provides that all substances listed in its schedule IV of the Single Convention cannot be produced, trafficked, possessed or used except in the quantities necessary for medical and scientific research and with the authorization of the Department of Health. It stipulates that no person or legal entity can dedicate themselves to cultivation of such cannabis and production without the relevant authorisation. The Narcotic Law 17/1967 did not create any criminal offences, and does not provide any criminal penalties in relation to any breach of its provisions. The primary purpose of the Narcotic Law 17/1967 was to incorporate the provisions of the Single Convention 1961 and its principal function is to clarify which substances the criminal and administrative offences on drugs in Spanish law relate to. The principal administrative and criminal offences relating to drugs are contained, respectively, in Article 25 and 26 of Ley Orgánica 1/1992 Protección de la Seguridad Ciudadana and in Article 368 of the Criminal Code.

Note on the Judicial System and Precedence: The Spanish legal system is a civil system as opposed to a common law system of precedent. Caselaw is not listed amongst the sources of law identified

in the Spanish Civil Code and the courts are not permitted to create law, only to interpret and apply it. The interpretation of the law is governed by Article 3 of the Civil Code. Article 3 makes clear that the both the objective and the spirit of the law are key to its interpretation. It also specifies that the law must be interpreted according to the social reality at the time of its application. There is presently some ambiguity about the weight and existence of any rules of precedent in relation to the decisions of the Supreme Court in criminal matters.

(1) Possession and Social Supply (Closed-Circle Use)

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. Article 368 is skeletally defined and provides ample scope for the courts to flesh out the offence in its application and interpretation.

The possession of drugs with any objective other than the promotion, encouragement or facilitation of their illegal consumption is not a criminal offence. The possession of drugs for personal use is an example of possession for an objective other than the promotion, encouragement or facilitation of illegal consumption, and it is therefore not a criminal offence. This was the Supreme Court's interpretation of the scope of the offence in 1974 and was confirmed in Parliament's subsequent revision of the Criminal Code. The personal



consumption of drugs is outside the elements of the offence defined in Article 368; the drug must be certified as destined for a use other than the personal use for it to amount to a criminal offence⁵.

The concept of personal use in Spanish caselaw is broader than in English criminal law and is more akin to the concept of 'social supply' used in the sentencing practice of the courts of England and Wales. In England and Wales the supply of drugs to a social group who has contributed to the purchase price of the drug will amount to the offence of supply for the purposes of the substantive criminal law, but in sentencing practice it may be dealt with as if it were an offence of simple possession⁶. In Spain, the Supreme Court's interpretation of the substantive criminal law is to treat **social supply and personal possession** as the same; **both are beyond the scope of criminal law**.

5. "El consumo de drogas o esupecíficas es atípico, para que la mera tenencia se reputa delictiva, es menester que quede acreditado que la poseída no se hallaba destinada al propio consumo (the personal consumption of drugs is not criminal and the possession of drugs will only therefore be criminal when it is destined for use other than personal consumption": STS 20th March 1980.

6. In *Holmes v Chief Constable Merseyside Police* [1976] Crim L.R. 125, the Divisional Court rejected a defence submission that a person who held drugs on behalf of themselves and others was in joint possession and that a person who held drugs on behalf of themselves and others was in joint possession and that a subsequent division of the drugs could not amount to supply. Where there is no commercial element to the supply, and the defendant supplies or possesses drugs intending to supply to them to a small social group had contributed to the purchase price of the drug, the case might be dealt with for sentencing purposes as akin to simple possession: *Denslow* [1998] W.L.R. 1044/745, *Parish* [1999] EWCA Crim.2686 and *Busby* [1999] EWCA Crim.1824 as cited in *R.Fortson Misuse of Drugs and Drug Trafficking Offences* (Sweet and Maxwell, 6th ed. 2011) p.922

For ease of reference both personal use and 'social supply' will be referred to as 'closed-circle use' in this document. **Possession of cannabis in private for 'closed-circle use' is neither an administrative nor a criminal offence.**

One explanation for the exclusion of 'closed-circle use' from the scope of the criminal law is that the purpose of the criminal law on drugs in Spain is the protection of public health as a collective good. Whilst the individual may benefit indirectly from this protection, individual health is not the target of Article 368; the offence concerns itself solely with behavior that endangers public health. Numerous judgments of the Supreme Court include pronouncements on the requirement for there to be some risk of drug diffusion amongst 'third parties', or encouragement of its use by 'third parties' for the elements of the criminal offence to be established⁷. The boundaries of 'closed circle use' and the definition of 'third parties' are difficult to define however. Several valiant attempts have been made to do this by academics and activists through analysis of a large and ever expanding body of case-law from the Supreme Court on 'closed-circle use'. Several decisions in the appeal courts of the autonomous communities also provide digests of the exigencies of 'closed circle use'. Much of the self-regulation of cannabis clubs has been inspired by these analyses and digests,

7. For further discussion of this distinction and citation of case-law of the Supreme Court in support see José Luis Diez Ripolles and Juan Muñoz Sánchez, 'Licitud de la autoorganización del consumo de drogas (Lawfulness of organized drug consumption)' *Jueces Para La Democracia* (Judges for Democracy)(75) November 2012. For a comprehensive analysis of the case-law see *Jacobo Dopico Gómez-Aller Transmisiones atípicas de drogas: Crítica a la jurisprudencia de la excepcionalidad* (Lawful drug transactions: analysis of the jurisprudence) (Tirant lo blanch, 2012)



and in particular that written by Muñoz and Soto at the request of the government of Andalusia⁸. In précis, the supply of cannabis (i) to persons who are habitual users of cannabis (ii) in premises that are closed to the public (iii) in amounts that are consistent with the person's personal use and not redistribution of the cannabis amongst third parties (iv) for its immediate consumption within the locality, will - according to doctrine of 'closed-circle use' - be outside the scope of the criminal offence. Any active recruitment of members through promotional activities, or any supply of cannabis to persons who are not already habitual users, would be criminal.

In conclusion, the substantive criminal law of Spain – as applied by the courts - has succeeded in netting the 'drug pusher' whilst excluding drug users and those satisfying the demand of users within their social circle.

In October 2014 José Ramón Noreña, the Anti-Drugs Prosecutor, announced an offensive against the cannabis clubs. In his evidence to the Cortes Generales (the bicameral parliament) he argued that the 'closed-circle' doctrine is of no application whatsoever to cannabis associations, primarily on account of the number of people generally inscribed in such associations. Cazalis Eiguren, an MP from the Basque party (Grupo Parlamento Vasco, PNV) pointed out that his opinion directly contradicts the jurisprudence of

the lower courts and questioned the legitimacy of the prosecutor's stance given the large number of cases to the contrary. The MP cited a recent judgment absolving a cannabis association from the Audiencia Provincial de Vizcaya, in which the court clearly states that number of persons supplied is of no relevance to the applicability of 'closed-circle use'. In response the prosecutor stated he was not bound by the decisions of the lower courts, but by that of the Supreme Court. The Supreme Court has not pronounced on the specific application of the closed-circle doctrine to cannabis associations; the penalty for cannabis supply and cultivation was reduced in 1995 and as a result the final court of appeal for such cases is the Audiencia Provincial. The cannabis social club model appears to conform with the Supreme Court's doctrine on 'closed circle use' and unless and until the prosecution find a legitimate means of getting a case involving a cannabis social club before the Supreme Court, the model is likely to continue to be treated by the lower courts as beyond the reach of the criminal law.

Possession of drugs (including cannabis) in public is an administrative infraction, regardless of the objective for which it is possessed, and attracts financial penalties. The tolerance of its consumption in public premises by their management is also an administrative infraction. Cannabis Social Clubs are private premises to which only members are lawfully admitted.

8. Juan Muñoz Sánchez and Susan Soto Navarro, *Uso terapéutico del cannabis y creación de establecimientos para su adquisición y consumo: viabilidad legal* (Therapeutic use of cannabis and the creation of establishments for its acquisition and consumption: legal viability) *Boletín Criminológico* No 47 (May-June 200) pp 1-4



(ii) Cannabis Cultivation

Cannabis cultivation will amount to a criminal offence when deemed to be in breach of Article 368. Whether the cultivation of cannabis for 'closed-circle use' is criminal is a matter of some debate. The first Supreme Court decisions on this issue (in 1990 and 1994) employ reasoning that is consistent with their decisions on possession for 'closed-circle use'; cultivation that is destined for 'closed-circle use' does not satisfy the requirements of the criminal offence because it would not promote, encourage or facilitate the illegal use of drugs and does not violate the interest protected by the criminal offence (*bien juridico*), which is public health. The most recent Supreme Court decision on this issue, however, was pronounced in 1997 and stated that any cultivation of cannabis posed an inherent danger to the interest protected by the law. The judgment is controversial and described as 'peculiar' in Herrero Alvaerz's legal text on cannabis and the criminal law⁹. In the legal opinion of Herrero, cultivation destined for 'closed-circle use' does not breach the criminal law. On account of the lowering of the penalties in relation to cannabis mentioned above, the 1997 decision was the last such case to reach the Supreme Court. In 2003 the then Prosecutor of the Supreme Court, Fernando Sequeros Sazatornil issued an opinion on the state of the law in relation to cannabis, and stated that cultivation for personal use is not a criminal offence in Spanish law. Trial judges continue to require the prosecution to prove that

the cannabis crop is destined for third parties ie persons outside the 'closed circle'.¹⁰ The vast majority of prosecutions of associations for the cultivation of cannabis for their members have resulted in acquittals on the basis that cultivation for 'closed-circle use' is not a criminal offence.

The new draft Ley de Seguridad Ciudadana will make the cultivation of cannabis in public sight an administrative infraction. The draft law is a clear acknowledgement of the present lack of certainty surrounding whether cultivation, even in full public view, is unlawful. Assuming that the draft Ley de Seguridad Ciudadana is approved, any cultivation in public view will amount to an administrative infraction.

Compliance with International Law and European Law

There is general consensus that there is no obligation under the international conventions on drug control for drug possession to be a criminal offence where it is for personal consumption. There is also ample scope for arguing that the same latitude applies to cultivation for personal consumption¹¹. The drafters of the Single Convention 1961 appear to have had only commercial cultivation in their sights. The

9. Herrero Alvarez, S.'El cannabis y sus derivados en el derecho penal español (Cannabis and its derivatives in Spanish criminal law' *Adicciones*, 12(2), 315-329 at 322 available at <http://www.adicciones.es/files/herrero%20315-329.pdf>

10. See for example the decision 250/09 of the Audiencia Provincial of Gipuzkoa on the 6th July 2009

11. N.Boister *Penal Aspects of the UN Drug Conventions* Kluwer Law International (2001)



first and only reference in the UN Treaties to 'cultivation for personal use' is in Article 3 of the 1988 Convention which provides that:

"Subject to its constitutional principles and the basic concepts of its legal system, each party shall adopt such measures as may be seen necessary to establish as a criminal offence under its domestic law, when committed intentionally, the possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention."

The author is exploring the concept of "personal use" in a range of jurisdictions and for the purpose of this briefing it will suffice to note that at a European level, the Council Framework Decision 2004/757/JHA on illicit drug trafficking specifically excludes the following from its definition of criminal traffic in drugs:

"(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). The principal target of the Framework Decision is "transnational trafficking and actions undertaken for the purpose of transferring ownership for profit."

The above suggests that the case-law in Spain that interprets possession and cultivation for personal use (and by extension, 'closed circle use') as outside the scope of the criminal law is in compliance with the Convention.

What is ambiguous is under what circumstances, if any, a country could 'permit' possession. Permission suggests a form of legal authorization, as opposed to the exclusion of a behavior from

the criminal law. The conclusion to the extensive legal analysis conducted by TNI on the scope of treaty latitude is that legal regulation of the cannabis market for recreational purposes cannot be justified within the existing limits of latitude of the UN drug control treaty¹².

Social impact And Effectiveness

Whereas the potential of the Spanish cannabis club model to reduce harm is widely acknowledged, there are as yet no completed empirical studies on their operation in practice or analyses on the social impact of their proliferation. Official figures suggest that during the period of their proliferation there has been an increase in the amount of cannabis cultivated, a decrease in the amount of cannabis imported¹³ and a decrease in the amount of cannabis consumed¹⁴. The author's preliminary research suggests that continued targeting of cannabis crops by law enforcement may have the effect of encouraging the indoor (as opposed to outdoor) cultivation of cannabis.

12. M. Jelsma, T. Blickman and D. Bewley-Taylor, *The Rise and Decline of Cannabis Prohibition: The History of Cannabis in the UN Drug Control System and Options for Reform* (TNI, 2014) available at <http://www.tni.org/rise-and-decline>

13. Luis Gómez, 'España quintuplica desde 2009 su producción industrial de marihuana' *El País* 17 September 2014

14. Òscar Parés Franquero and José Carlos Bouso Saiz, *Pioneering Drug Policy in Catalonia: Innovation Born of Necessity* (forthcoming in 2015, OSF)



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