Legal / criminal consequences of behaviours related to cannabis: doctrinal positions and jurisprudential criteria

Consecuencias jurídico-penales de los comportamientos relacionados con el cannabis: posicionamientos doctrinales y criterios jurisprudenciales

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Abstract

Behaviours related to cannabis, including its consumption, possession and cultivation, must comply with the provisions of the legal system, otherwise they could constitute an administrative offence or even a criminal offence. The confusion between administrative and criminal regulation, together with a tolerant social attitude towards cannabis, could partly explain the erroneous belief that these behaviours are always fully legitimate. This article will address the criminal legal regulation of behaviours related to this substance - which the jurisprudence of the Supreme Court considers to be a drug that does not cause serious harm to health -, examining some of the most controversial issues that arise in judicial practice, especially in relation to cannabis associations and social clubs, such as the possible application of the doctrine of shared consumption or the error of prohibition, taking into account the most recent jurisprudential criteria in this area.

Keywords

Cannabis; possession; jurisprudence; shared consumption.

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Resumen

Los comportamientos relacionados con el cannabis, incluyendo su consumo, posesión y cultivo, deben ajustarse a lo dispuesto en el ordenamiento jurídico pues, de lo contario, podrían llegar a ser constitutivos de una infracción de carácter administrativo o, incluso, de un delito. La confusión entre la regulación administrativa y penal, junto con una actitud social tolerante hacia el cannabis, podría explicar, en parte, la creencia errónea de que estas conductas son siempre plenamente legítimas. En este artículo se abordará la regulación jurídico penal de los comportamientos relacionados con esta sustancia -que la jurisprudencia del Tribunal Supremo considera como una droga que no causa grave daño a la salud-, examinando algunas de las cuestiones más controvertidas que se plantean en la práctica judicial, especialmente en relación con las asociaciones y clubes sociales de cannabis, como es la posible aplicación de la doctrina del consumo compartido o el error de prohibición, teniendo en cuenta los criterios jurisprudenciales más recientes en esta materia.

Palabras clave

Cannabis; posesión; jurisprudencia; consumo compartido.

1. CRIMINAL POLICY REGARDING CANNABIS IN SPAIN

Policies related to cannabis in Spain are based on a prohibitionist approach, as is the case with other drugs. Since the Single Convention on narcotics of 30th March 1961, in which the prohibitionist approach was established, it has been furthered with the signing of the Convention on psychotropic substances of 21st February 1971, through to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, which was consequently reflected in the legislation of the States (Arana & Germán, 2005: 43). Prohibitionism is based on the principle of interdiction or strict regulation of drug related activities, whether this involves cultivation, production, distribution or use, which can be regulated by law (Germán, 2020: 440).

In any event, cannabis has and continues to be the subject matter of heated debates concerning its legal status, and constitutes a controversial political matter. Its legal status has been reviewed in some countries with a changing trend towards a less repressive attitude, particularly concerning the therapeutic use of this substance, but also for recreational use. There are arguments of differing natures regarding this matter. Indeed, some references, for example, are made to the properties allegedly associated with this substance, mainly regarding therapeutic use, that offset the possible adverse effects of consumption. In relation to the above, the current consideration is that the problem is not so much in the substances themselves, but rather the use that is made of them,

thus advocating a responsible use of them, and a public policy regarding cannabis that respects human rights (Val, 2017: 176). Other arguments in this field criticise the prohibitionist policy, claiming that this policy not only fails to prevent drug trafficking, but it also causes other adverse consequences (Miró, 2014: 150; Samper Pizano, 2016: 23).

Criticism likewise addresses the legal insecurity that the current criminal drug regulations entail. However, this argument confuses how legislation is defined with how it is applied, since the disparate results in "apparently" similar cases, arise out of the specific circumstances surrounding each case (Germán, 2020: 437), since the judged behaviours are not always identical, even though they may be similar, and the perpetrators taking part in such behaviour may not have taken part to the same degree. Consequently, some facts can be considered as the basic type of offence in the Criminal Code (Article 368.1) or an attenuated type of offence (Article 368.2), or an aggravated type of offence (Article 369) or hyper-aggravated type (Article 369 bis. 1 and 2), and sentences eventually given to the perpetrators may be different according to their degree of participation in the offence, or if there are other circumstances modifying their criminal liability, all of which leads to very different sentences when comparing cases, even when the same procedure is involved. Therefore, the possible divergences in the results of these processes are not entirely due to defective legislation. Even when legal insecurity is a result of defective laws however, they are not necessarily the result of policies in line with a given ideology, but rather, as is explained (García-Escudero, 2005: 136), it is a law that is more or less defective in line with the quality of the applied legislative technique, both from the bill stage and through parliamentary procedures until it eventually becomes law. This does not mean that criminal regulation of behaviours related to drugs is in any way perfect, since the Criminal Code (CC) does have problems regarding this matter, but the legal insecurity in this area cannot just be blamed on regulations, since, as mentioned earlier, other related factors play a role in the actual circumstances of each specific case to which the law is applied.

Addressing the criminalisation of drug related conducts, the sectors critical of the prohibitionist policy regarding cannabis, advocate positions that range from decriminalisation to legalisation or regulation of this substance. As mentioned previously, Spain maintains a prohibitionist approach in its drugs policy, and at present certain behaviours related to cannabis are treated in the same way as the rest of toxic, narcotic or psychotropic drugs and substances, and consequently they can be covered by offences defined in Administrative Law or Criminal Law.

2. ADDRESSING REGULATIONS ON BEHAVIOURS RELATED TO CANNABIS

Behaviours related to illegal drugs are regulated through Administrative Law and Criminal Law. More specifically this is implemented through Article 36 of Organic Law 4/2015 of 30th March on the protection of the safety of citizens (LOPSC), and in Articles 368 and following of the Criminal Code. In order to know which of the fields of Law is applicable, the conduct in question in each specific case needs to be verified.

2.1. The Organic Law on the Protection of the Safety of Citizens and the Criminal Code in regard to cannabis

When deciding which of the two laws is applicable, the LOPSC or the Criminal Code, we need to differentiate between the different cannabis related conducts. The consumption of cannabis is not a crime in itself, although this does not mean that it is fully legitimate, since if it is consumed in public it constitutes an administrative offence in accordance with Article 36.16 of the LOPSC. The same is true for possession for one's own consumption, which is not criminally relevant providing that the quantity does not exceed certain limits, but it would be punishable under the aforementioned article of the LOPSC. The same legal text also considers planting and cultivating cannabis in places visible to the public as punishable (Article 36.18). According to the LOPSC, all these conducts are considered as serious offences, entailing fines that can be very severe, ranging from 601 Euros to 30,000 Euros.

In any event, in regard to possession and cultivation, it is important to know when they are or are not criminal offences, and consequently entailing criminal procedures. Article 368 of the Criminal Code determines typical conducts, which are the cultivation, elaboration and trafficking of toxic, narcotic or psychotropic drugs and substances, and any other conducts that promote, favour or facilitate illegal consumption or possession for the said purposes. This article establishes two categories of drugs in accordance with how harmful they are, and depending on this classification, the applicable sentence varies, differentiating between substances that cause serious harm to health, entailing prison sentences of 3 to 6 years, and a fine of three times the value of the drug, and other cases entailing prison sentences of 1 to 3 years and a fine of twice the value of the drug. In regard to these two categories, the Supreme Court (SC) considers cannabis to be a substance that does not cause serious harm to health, although this circumstance does not take into account the arguments put forward in health sciences (Germán, 2021: 611), where warnings about the harmful consequences of cannabis consumption are given, since according to scientific evidence in this field, cannabis has negative social and psychological consequences (Isorna, 2017: 217). For example, Sentence 617/2020 of 18th November (Case Law/2020/4280) establishes that marijuana is "a substance that certainly does not cause serious harm to health", and in Sentence 386/2016 of 5th May (Case Law/2016/5019), it is stated that "cannabis sativa/weed" is not a particularly harmful substance. This is in contrast to other drugs such as heroin, cocaine and LSD, which consolidated jurisprudence by the Supreme Court considers to be "seriously dangerous to health", whereas "hashish, marijuana, joints and in general cannabis derivatives, are not seriously harmful" (by all, Supreme Court Sentence 2723 of 19th July 1993. ROJ: Supreme Court Sentence 9541/1993).

The second section of Article 368 defines an attenuation, which was introduced with the amendment of the Criminal Code in 2010, by means of Organic Law 5/2010 of 22nd June, considering a lower sentence in cases of low quantities and considering the personal circumstances of the offender (Germán, 2021: 618), providing that no other circumstances defined in Articles 369 bis and 370 of the Criminal Code concur, in which aggravating circumstances are

considered. The personal circumstances of the offender mainly refer to cases of "small scale dealing", i.e. the possession of drugs by consumers to deal in small quantities in order to finance their own addiction, which "defines the profile of an addicted consumer who finances his/her habit through this activity" (Fernández Roz, 2011).

A particularly relevant matter in regard to the possession of cannabis or other drugs is the differentiation between when this behaviour is not criminally punishable, and at the most it could be considered an administrative offence and any other cases when possession is criminally relevant, and therefore falls within the conducts considered in Article 368 of the Criminal Code. This distinction is not provided for in the LOPSC or the Criminal Code, but the criteria for differentiating between cases can be found in the Supreme Court's jurisprudence, through a system of evidences established to discern if possession is for dealing, i.e. an excessive amount of the substance; accreditation of being an addict or at least a consumer; possession of money in amounts not accounted for through earnings; possession of tools or materials for drug trafficking (precision scales, small bags, etc.); substances suitable for diluting drugs (the fact that the substances are in small packets are a sign of the intention to deal, whereas when the drug is not separated it is considered to be for one's own consumption), or a variety of substances in possession which would also determine the intention of trafficking (by all, Supreme Court Sentence 724/2014 of 13 November, ROJ: Supreme Court Sentence 4447/2014).

In any event, it is important to bear in mind that among the guiding principles of Criminal Law, is "minimum intervention" which restricts its application to conducts that are not regulated or punishable through other branches of the law, owing to their subsidiary nature, i.e. "exhausting less harmful social control mechanisms both outside and inside the legal system, before resorting to Criminal Law" (Fernández Cabrera, 2019: 16) and which leads to considering Criminal Law, also taking into account the fragmented nature, as the last resort, limiting its activity to protecting legal assets from more serious offences, and when there is no other legal regulation governing such, since this situation "prevents Criminal Law from regulating conduct that is not sufficiently serious to endanger legal assets that are essential for coexistence" (Fernández Cabrera, 2019: 15).

2.2. The legal criminal relevance of certain cannabis related behaviours: Special reference to cannabis associations and social clubs

One of the most controversial matters from the point of view in criminal law regarding cannabis, is related to activities that take place in associations and social clubs. This activity can be considered a crime regulated in accordance with Article 368 of the Criminal Code when it is carried out outside of the permitted limits, which are sometimes exceeded either due to ignorance, negligence or deliberately by the people who take part in these associations (Germán, 2021: 618). There are two questions of special interest from a legal point of view in regard to the activities by these cannabis associations in order to determine if the activity is or is not criminally relevant: the applicability of shared consumption doctrine, and the possibility of considering there to be an error of prohibition.

In regard to shared consumption, Article 368 of the Criminal Code provides for encouraging consumption by other persons. One of the matters that can be questioned in certain cases is if this conduct does actually take place in cannabis associations and social clubs. Hence the relevance of the shared consumption doctrine, which the Supreme Court has considered unpunishable since it considers that the protected legal asset, i.e. "public health" is not affected in these cases (Germán, 2020: 447; Dopico, 2013: 25), since conduct such as delivery, or purchase for delivery of a certain quantity of drugs to third parties does not create a "risk for undetermined third parties" because of the "minor significance or relevance", and it is therefore a "minor threat to the protected legal asset" (Marever, 2019: 9). In other words, the drug is only for one person or several, specific persons, and is therefore not a danger for collective health (Manjón-Cabeza, 2003: 49). On the other hand, any conduct promoting or facilitating indiscriminate distribution of cannabis causing undue consumption would be criminally relevant. Ultimately, in order to avoid criminal action, it is important to belong to a stable group of consumers, to ensure that the association prevents the distribution of cannabis and illegal consumption, and that handling of the drug is carried out in a controlled manner, in order to ensure that it is not distributed outside the establishment. The Supreme Court considers a number of requirements to determine whether shared consumption in cannabis associations and social clubs falls into the criminal type regulated in Article 368 of the Criminal Code, e.g. Sentences 484/2015 of 7th September, 4454/2018 of 20th December, 508/2019 of 19th February and 3722/2019 of 19th November, among others, which can be summarised as follows: 1) that the consumers are all addicts or at least frequent consumers; 2) that consumption takes place in a closed place in order to avoid it spreading; 3) that the quantity is insignificant and proportional for consumption at a single meeting; 4) that the community who consumes the drug consists of a small number of persons that permits speaking one-on-one, without public outreach; 5) that the consumers are duly identified; and 6) that it is immediate consumption, previously planned in the correct manner and very close in time to possession of the substances, in order to avoid any subsequent alterations at the original destination (Germán, 2020: 447). In the specific case of failing to meet all of these requirements, the conduct at the association will be considered as criminal misconduct, as can be seen from the consolidated jurisprudence of the Supreme Court. The Supreme Court's jurisprudence warns about the distinct difference between cases when a small group of people buy drugs, with contributions by all of them to immediately consume it together, and cases when this conduct takes place in the association itself through an organised structure, with the intention of continuing and being open to the successive, gradual integration of a high number of members (Germán, 2021: 614). Furthermore, the Supreme Court states that this must not involve "mass storage of drugs" (Supreme Court Sentence 484/2015 of 7th September, Case Law\2015\4178, among others).

Based on the foregoing, the Supreme Court has started to consolidate the doctrine that shared consumption by cannabis associations cannot be admissible "owing to the magnitude of the quantities involved, the real, evident risk of spreading consumption, the impossibility of proving with all certainty that they are all consumers or users of the

substance and how to control the use of the cannabis made by the recipients", which was established in Supreme Court Sentence 352/2018 of 12th July, and Supreme Court Sentence 373/2018 of 19th July 2018 following the sentence by the Plenary Session 91/2018 of 21st February 2018. According to the High Court's jurisprudence, the misconduct would be the inability to control the risks of dissemination, i.e. the liability stemming from creating a source of "real, uncontrollable risks when those quantities of the substance are managed which are distributed among hundreds of people whose activities or motivations cannot be controlled" (Supreme Court Sentence of 8th July, Case Law 2020\3600).

If the judge or court decide that the association's activity amounts to a criminal offence, and that this cannot be applied in the specific case of shared consumption, cannabis associations and social clubs have been alleging an error of prohibition. The error of prohibition regulated in Article 14.3 of the Criminal Code concurs when the person who perpetrates the criminally relevant conduct acts without knowing that the conduct is prohibited or believes that it is authorised (Germán, 2021: 616). An error of prohibition (Article 14.3 of the Criminal Code) depending on the specific circumstances surrounding the situation (Cerrada, 2019: 121) could be "avoidable", which leads to application of a lower penalty by one or two degrees, or "unavoidable" which leads to the exclusion of a criminal penalty for a wilful wrongdoing, and it is therefore applied in a restricted manner and exceptionally in jurisprudence (Fernández Bautista, 2021: 125). The Supreme Court's jurisprudence establishes that error of prohibition "entails mistaken knowledge about the fact that affects knowledge about its criminal significance, and therefore the results and consequences of the actions (Supreme Court Sentence 87/2019 of 19th February, Case Law 2019\670). In relation to cannabis associations, the Supreme Court has observed an error of prohibition in several of its rulings, by understanding in these cases that there was a "mistaken understanding that the activity involving distribution of the drugs was tolerated in the legal system" (Pena González, 2019: 4). When error of prohibition has been applied to members of a cannabis association, the Supreme Court has based this "on the mistaken perception by the accused that the drug distribution activity they were carrying out among their members, sharing growing and infrastructure costs among them all on the understanding that all of them were consumers of the substance and seriously committed to assigning it for their own personal use was tolerated by the legal system" (Supreme Court Sentence 91/2018 of 21st February, Case Law 475/2018). However, as is the case of the shared consumption doctrine, in the case of error of prohibition, Sentence 484/2015 of 7th September by the Supreme Court is particularly important, since it establishes and defines the requirements for this situation, namely: 1) generic knowledge of the illegality of the conduct is required, and therefore the offender is not required to know the specifics and particulars of the exact limits of this criminal conduct; 2) the error has to be proved; and 3) the error of prohibition must be considered to be avoidable when the offender has reasons to believe the illegality of his/her conduct, and has the means to gain knowledge about such illegality, and is also required to make use of such before acting. The decisive matter, as stems from this resolution, is the duty to avoid the error, and consequently the accused are the ones

who need to verify if their activity is legal, i.e. to know if the conduct in question does or does not infringe the law. Today, and when the subject matter in trials after the Supreme Court Sentence of 7th September 2015, the possibilities of observing an error of prohibition are considerably less, and it is still widely cited and discussed at different forums in which cannabis associations and social clubs take part, and they can therefore hardly claim being unaware of the limitations governing the actions that take place within their associations.

3. FINAL REFLECTIONS ON THE SPANISH CRIMINAL POLICY RELATED TO CANNABIS. SCIENTIFIC EVIDENCE

There is currently an ongoing debate in Spain on cannabis, focussing on possible regulation, particularly in regard to therapeutic use. More recently, in June 2022 in order to analyse experiences on regulating cannabis for medicinal use, the Subcommittee, created in the Health and Consumer Committee, endorsed a report paving the way for regulation of the use of cannabis for these purposes. The fact that the UN removed cannabis from Schedule IV of the Convention on drugs in 1961, which refers to certain narcotic drugs with little or no therapeutic value, has influenced the decisions by the aforementioned Subcommittee. Nevertheless, cannabis is still on Schedule I, which lists the substances that are very addictive or susceptible to probable misuse. Consequently, conduct related to this subject that can be criminally typical shall continue to be punishable under the Criminal Code.

In regard to the latter, it is important to point out that despite the fact that since the Spanish Criminal Code was approved in 1995, it has undergone several reforms, some of which have been very significant, although in regard to drug related crimes there have been hardly any modifications at all; and on the few occasions that these offences have been modified, it has involved an increase in the severity of the sentence. In fact, with the reform of Organic Law 15/2003 of 25th November, certain new aggravating circumstances were defined, and the scope of confiscation was broadened; and through Organic Law 1/2015 of 30th March, new regulations on drug confiscation were implemented, considering such as an effective measure in the fight against organised crime and other serious forms of crime. The exception to this increased punishment however is found in the reform approved by Organic Law 5/2010 of 22nd June, which, as previously stated, brought about the possibility of attenuating the sentence in cases of low quantities and the personal circumstances of the offender, referring to the provision contained in the Agreement by the Non-Jurisdictional Plenary Session of Courtroom 2 of the Supreme Court of 25th October 2005.

In any event, regarding cannabis associations and social clubs, it must be stated that attempts to regulate them have not been successful. The events that took place in regard to the Regional Law 24/2014 of 2nd December, regulating collective users of cannabis in the region of Navarre, and Law 13/2017 of 6th July on cannabis associations and consumers in Catalonia, were declared unconstitutional and null and void, since they fell into criminal typification of illegal conduct defined in State legislation (Germán, 2020: 437). The Municipal Regulation on the loca-

tion of cannabis social clubs and the conditions for their activities approved in San Sebastian on 30th October 2014 was annulled by the Supreme Court, which referred to resolutions by the Constitutional Court in relation to appeals against the aforementioned laws in Navarre and Catalonia. Article 83 of the Basque Parliament Law 1/2016 of 7th April on Comprehensive Care for Addictions and Drug Addiction is a different matter however, since the Constitutional Court declared that the questioned precept is in accordance with the Constitution, providing that it is interpreted in accordance with the limits to which the healthcare administration should cooperate. Having said that, it does not establish what type of associations of cannabis consumers it refers to. On the other hand, the position of jurisprudence in regard to activities carried out at cannabis associations and social clubs tend to limit application of the doctrine of shared consumption, which can only be considered if the requirements established by the Supreme Court are strictly met, particularly after Sentence 484/2015 of 7th September. The same is the case with the possibilities of appreciating an error of prohibition which has been considerably reduced, particularly after the aforementioned Sentence.

Therefore, any activities carried out within these associations today, must continue to be controlled, entailing the risk of severe administrative penalties, and can even incur in criminal penalties in accordance with article 368 of the Ciminal Code. In the event of the conduct being considered criminal, by establishing the criminal response it is fundamental to determine the penalty to impose, avoiding a negative judgement for the perpetrator, as defended by Muñagorri, which "permits objectively applicable criteria that are equal, assert security and avoid margins of discretion and uncertainty" (Muñagorri, 1998: 222). Furthermore, at this time, when Spain is holding debates on cannabis, the question arises about what the situation of cannabis associations and social clubs will be, even in relation to the regulation of medicinal use of this substance. Effectively, in view of the interest by healthcare parties to participate, the Report prepared by the Subcommittee analysing experiences of cannabis regulation for medicinal use, determines that "prescription must be exclusively by healthcare professionals, in a context that is free from any potential conflicting interests, such as those provided by healthcare services."

In any event, in conjunction with the current debates on cannabis, it must be taken into account that it is a substance that is not harmless, and despite progress in regulations for medicinal use, its therapeutic potential according to the aforementioned report states that "the available scientific evidence is limited in relation to the therapeutic uses of cannabis and its by-products, and is restricted to certain diagnoses", which means further research is required in this field. It is important not to underestimate the possible adverse effects of its use in order to avoid any mistaken social perception about the benefits of this substance, which are not always properly attributed.

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