TOWARDS AN ANALYTICAL FRAMEWORK FOR DETERMINING THE SCOPE OF 'PERSONAL CONSUMPTION' IN LEGAL INSTRUMENTS ON DRUG CONTROL

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This article provides an analysis of the normative framework for Spanish cannabis clubs by contextualising it within a growing body of comparative constitutional law that recognises legal obstructions to personal drug consumption as intrusions on the right to privacy. Article 3 (2) of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988 relieves signatory states from the Article's obligation to criminalise drug possession and cultivation for 'personal consumption' where doing so would conflict with the constitution or the basic concepts of their legal system. Spain relied on Article 3(2) in its decision not to criminalise conduct for personal consumption. The Spanish judiciary has had to consider the legal implications of collective consumption and cultivation in the form of cannabis clubs. As well as operating in a grey area of domestic law, Spain's cannabis clubs straddle the blurred boundary in international and European instruments between 'personal consumption' and 'drug trafficking'. This article explores the theoretical and doctrinal implications of both the Spanish law on cannabis clubs and comparative human rights law on drug use in order to outline the potential contours of a constitutionally protected zone of privacy pertaining to cannabis use in a social context.

Key terms: privacy; autonomy; public health; cannabis clubs; personal consumption; international drug control; shared consumption.

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I.INTRODUCTION

The concept of 'personal consumption' is of normative relevance in the international legal framework for drug control and in the national legal systems of many countries. Under the international legal framework for drug control,[2] the obligation on signatories to treat drug 'trafficking' as a criminal offence liable to criminal sanction is relaxed in relation to drug possession, purchase and cultivation where it is for 'personal consumption'.[3] With the endorsement of several United Nations agencies, a growing number of countries have adopted or now seek to implement new domestic frameworks that include the decriminalisation [4] of drug use and drug possession and cultivation where it is for personal consumption.[5] There is now a growing body of human rights law that includes drug use within the constitutionally protected area of privacy. Debates and discussion in drug policy literature on personal consumption are confined to procedural and evidential questions regarding the pros and cons of legislatively proscribed minimum quantitative thresholds in national systems. [6] It is the potential breadth of the concept of 'personal consumption' in the substantive law of countries where such conduct is excluded from the ambit of the criminal law that I seek to explore in this article.[7]

The legal framework of Spain's 'cannabis clubs' provides a useful case-study for exploring the normative boundary between 'trafficking' and 'personal consumption'. In recent decades cannabis consumers there have created cannabis associations for the collective cultivation of cannabis and its distribution on the private premises of the associative body. 'Cannabis club' is the term used to describe this practice in Spain, the criminality of which is a continual source of doctrinal debate and judicial pronouncement there. The continued operation of cannabis clubs in Spain have generated interest in international drug policy literature[8] and influence on legislative reform[9] in the absence of much by way of legal scrutiny or theoretical analysis of the context in which they evolved.

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[2] The Single Convention on Narcotic Drugs (1961) (as amended by the 1972 Protocol Amending the Single Convention); The 1971 Convention on Psychotropic Substances; The United Nations Convention against Illicit Traffic in Narcotic and Psychotropic Substances (1988).

[3] The possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption are listed in Article 3(2) of the 1988 Convention as forms of conduct in relation to which the obligation to criminalise in domestic legislation is subject to the constitutional principles and basic concepts of a state's legal system. Article 3(4)(d) of the 1988 Convention makes provision for parties which have created a criminal offence of drug possession, purchase or cultivation for personal consumption to apply measures for the treatment, education, aftercare, rehabilitation or social reintegration of the offender as an alternative to conviction or punishment pursuant to it.

[4] Decriminalisation is defined as 'The removal of sanctions under the criminal law, with optional use of administrative sanctions (e.g. provision of civil fines or court-ordered therapeutic responses)' – C Hughes and A Stevens, 'What can we learn from the Portuguese decriminalization of illicit drugs?' (2010) *British Journal of Criminology* 50 999–1022.

[5] N Eastwood et al., *A Quiet Revolution: Drug Criminalisation Across the Globe* (Release, 2016).

[6] Ibid.

[7] See for example Chile's drug law offence which expressly excludes proscribed conduct from the criminal law where for the purpose of 'personal consumption'(*Ley 20,0000)* available at http://bcn.cl/1uuq1

[8] See G Murkin, *Cannabis social clubs in Spain: legalisation without commercialisation* (Transform 2015) available at http://www.tdpf.org.uk/resources/publications/cannabis-social-clubs-spain-legalisation-without-commercialisation (accessed 2 Aug. 2016); X Arana and V Montañés Sánchez, 'Cannabis Cultivation in Spain – The Case of Cannabis Social Clubs' in T Decorte, GR Potter and M Bouchard, *World Wide Weed: Global Trends in Cannabis Cultivation and its Control* (Ashgate 2011); 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 (accessed 2 Aug. 2016).

[9] The most prominent example is the provision made for cannabis collectives in Uruguayan legislation on cannabis in article 5(f) of Ley 19.172.

Spain is a Continental legal system and all of its criminal offences are contained in its Criminal Code. The doctrine of legal goods (also referred to as the doctrine of legal interests) is a basic concept in Spain's as well as other Continental legal systems of the 'Germanic legal circle'. [10] A legal good is an interest or good which the law properly recognises as being necessary for social peace or for individual well-being, and as therefore meriting legal protection.[11] The notion of legal good (*bien jurídico* in Spanish, from the German *Rechtsgüt*) has a heuristic function in Continental legal systems;[12] it is a useful term in referencing what the legislature had in mind, for categorising offences within the criminal code by the interest sought to be protected and for distinguishing therein between collective goods (*bien jurídico* colectivo, from the German *kollektive rechtsggüter*) and individual goods. Its closest counterpart in Anglo-American legal systems is the harm principle[13] but whereas the primary function of the harm principle is to serve as a critical tool for assessing the legitimacy of criminalisation in a liberal democracy, the ability of the doctrine of legal interests to serve a normative role is disputed. [14] The doctrine is grounded in positive law, not in normative principles concerning what the scope of the law should be. Both the harm principle and doctrine of legal goods are criticised for leading to 'circularity' in doctrinal discussion and in judicial decisions on the scope of the criminal law. The main problem with the harm principle is perceived to be the lack of clarity regarding what 'harm' really is. [15] The principal criticism of the doctrine of legal goods is that 'little progress has been made in developing a normative criteria for determining when a legitimate interest for legal protection is present'. [16] Both principle and doctrine are widely considered by critics in in their respective legal systems, to be appropriate as 'mere first step in the criminalisation process.' [17] There is a lack of consensus as to what that next step should be.

On account of its criminal law doctrine and the structure of its criminal code, Spanish jurisprudence essentially reframes the distinction between 'personal consumption' and 'trafficking' as one between public health (the legal good protected by Spain's drug offence) and individual health. The extent to which collective cultivation of cannabis by groups of friends endangers public health, so falling within the scope of the criminal law, has occupied the courts in Spain for two decades now and continues to be a source of uncertainty in the criminal law. In this article we are not concerned with the legitimacy of public health as a legally protectable interest. We are concerned with the fact that public health is a particularly difficult concept to define, making the problem posed by the emergence of cannabis clubs to Spanish legal doctrine closely aligned with the principal challenge to the harm principle; what is a harm? The theoretical incoherence and normative limitations of treating the public/individual health distinction as unitary in the sense of capable of definition in contradistinction to the other (one is present wherever the other is not) has been explored in philosophical

[10] N.Persak, *Criminalising Harmful Conduct. The Harm Principle, its Limits and Continental Counterparts* (Springer, 2007
[11] A Duff in the Stanford Encyclopaedia of Philosophy
[12] M D Dubber and T Hörne *Oxford Handbook of Criminal Law* (OUP, 2014)
[13] According to JS Mill, 'the only purpose for which power can rightfully be exercised over any member of a civilized community, against his will, is to prevent harm to others.'. JS Mill, *On Liberty and other writings*, ed S Colloni (Cambridge University Press 1989) 13.
[14] Nineteenth century German scholar Birnbaum is acknowledged as the originator of the doctrine and his purpose in creating it was to facilitate the criminalisation of collective goods instead of confining the scope of criminal law to the protection of individual rights. N.Persak, (Springer, 2007) For a recent thesis in favour of attaching providing the doctrine with a normative role see M A Álamo *Bien Jurídico Penal y Derecho Penal Mínimo de los Derechos Humanos* (Ediciones universidad Valladoid, 2014)
[15] J Gray, 'Introduction' in J.S Mill *On Liberty and Other Essays* (OUP, 1991)
[16] A V Hirsch 'Foreword' in N.Persak, (Springer, 2007) vi
[17] N.Persak, (Springer, 2007)

literature on the scope and meaning of 'public health' which makes clear that deep scrutiny is required of *both* sides of 'the demarcation' (public and individual health).[18] Whereas the Spanish jurisprudence is helpful in exploring the scope of drug trafficking (endangerment to public health) it fails to directly address the other side of the demarcation (personal consumption). This article will explore the scope of 'personal consumption' as a normatively relevant concept in its own right. For this we turn to comparative constitutional case-law in which privacy has been identified as the right intruded upon by offences which criminalise personal consumption.

I seek to illustrate that the only way out of the circularity of doctrinal debates on whether or not public health is endangered by cannabis clubs to a criminal extent, is to treat the identification of an endangerment to a legal good (public health) as the *first* step in determining whether the criminal law should bite. In human rights law a violation of certain human rights will be justified where done in accordance with a law that seeks to protect a (legitimate) legal interest *and* the violation is *a proportionate response* to the necessity of protecting said interest. In other words, a human rights framework requires consideration of the extent to which public health in endangered by the conduct *and* the extent to which an individual's rights are endangered by the measure for protecting public health. The role of the international human rights framework in providing 'a readily available and legally binding set of broad indicators' against which drug policy goals can be assessed has already been identified in drug policy literature.[19] Elsewhere, Simon Flacks has persuasively argued that a human rights framework is the only appropriate framework, in accordance with both law and ethics, through which drug regulation should be addressed.[20] As we will see from our discussion of comparative human rights law on drug offences, the advantage of a human rights framework is it goes further than drawing an abstract distinction between the public and private and requires any violation of the private realm to constitute no greater interference by the public authority than is necessary to achieve the intended objective in public health.

The comparative constitutional case-law is useful in identifying privacy as the right intruded upon by criminal offences impinging upon personal consumption. Its shortfall is in not exploring the scope of personal consumption. We will see from our historical examination of the development of cannabis clubs in Spain that proponents of cannabis clubs, through their efforts to prevent their conduct from endangering the legal conception of public health, have succeeded in establishing a potential zone of personal drug consumption which outstrips that expressly protected in the comparative law discussed. I will thus conclude with a discussion of scope of privacy to shape a broad conceptualisation of 'personal consumption' that builds on the analytical framework developed by the Spanish law on cannabis clubs to provide greater normative coherence to the distinction between criminal and non-criminal drug related conduct.

II.THE TRANSNATIONAL CONTEXT

[18] R Geuss, *Public Goods, Private Goods* (Princeton University Press 2003) ch. III, especially 36–41 as cited in J Coggon, *What Makes Health Public?* (Cambridge University Press 2012). Kindle Edition 31.
[19] D Barrett, 'Harm Reduction is not enough for supply side policy: A human rights-based approach offers more' (2012) *International Journal of Drug Policy* 23 16-23 at 19. See also D Barrett and M Nowak, 'The United Nations and Drug Policy: Towards a human rights-based approach' in A Constantindes and N Zailos (eds), *The Diversity of International Law. Essays in Honour of Professor Kalliopi K. Koufa* (Brill/Martinus Nijhoff 2009) 449-477.
[20] S Flacks, 'Drug Control, Human Rights, and the Right to the Highest Attainable Standard of Health: A Reply to Saul Takahashi' (2011) *Human Rights Quarterly* 33 856-877.

The two terms 'trafficking' and 'personal consumption' provide the conceptual framework for the penal provisions of the international drug control regime. In this section we will see that 'trafficking' is a poorly defined and 'elastic' concept and 'personal consumption' is not defined at all in the international treaties or elaborated upon in the official commentaries.[21] We will also see that although the international drug control regime acknowledges the potential for normative barriers to the scope of 'trafficking,' what exactly these might be is not elaborated upon in the treaties or official commentaries, or indeed within European Union debates on the harmonisation of these concepts. Although European attempts at harmonisation were confined to the identification of common definitions and did not enter into consideration of normative criteria, what does clearly emerge from these attempts is a clear desire amongst member states to draw a distinction, at least in enforcement and sentencing practices, between the two concepts of 'trafficking' and 'personal consumption'.

The definition of the term 'illicit traffic' caused major difficulties in the negotiation of 1988 Convention. The principal source of disagreement was identified at the time as being between one group of delegations which 'strongly favoured a broad-based definition covering all aspects of the drug problem from production and supply to demand' and another which 'preferred a technical definition to a generic one and had argued that it was premature to make consumption the subject of international action'.[22] The 'general consensus' reached was that the notion of illicit trafficking would, instead of being defined, consist of a reference to all drug offences that states would be obliged to create and for this to include the possession, purchase or cultivation of a drug for personal consumption, but for the obligation in relation to these offences to be subject to the 'safeguard wording' that subjected this obligation to the constitution and basic principles of each signatory's legal system, and further provision was made for alternatives to imprisonment as a punishment for such offences when they are created.[23] This compromise position was a political fudge which succeeded in obscuring underlying tensions in the global consensus.

Several calls have been made since for refinement of the concepts of drug trafficking and personal consumption within the European Union by both governmental and non-governmental bodies.[24] The first attempt at harmonisation of the European conception of drug trafficking was made by the European Commission in 2001 in its proposal for a Council framework decision laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking.

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[21] A Marks, 'Legal Perspectives on Drug Trafficking' in V Mitsilegas, S Hufnagel and A Moiseienko (eds), *Research Handbook on Transnational Crime* (Edward Elgar, forthcoming).

[22] United Nations Conference for the Adoption of a Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Vienna, 25 November-20 December 1988: official records. Volume 2, Summary records of plenary meetings, summary records of meeting of Committee I and Committee II' (hereafter UN Conference 1988), Committee 1, 24th meeting, 151 para 13.

[23] Article 3(2) of the 1988 Convention

[24] Commission Staff Working Document: Impact Assessment Accompanying the document: Proposal for a Regulation of the European Parliament and of the Council on new psychoactive substances and proposal for a Directive of the European Parliament and of the Council amending Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit trafficking, as regards the definition of drug', Brussels, 17 Sept. 2013, SWD(2013) 319, 85, available at http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:52013SC0319 (accessed 28 Feb. 2017) and Minority Opinion by Maurizio Turco, Marco Cappato and Ilka Shröder, Report on the proposal for a Council Framework Decision laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of drug trafficking (15102/2/2003 – C5-0618/2003 – 2001/0114(CNS)) (Renewed consultation) Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, European Parliament, 23 Feb. 2004, 6, 9. Available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A5-2004-0095+0+DOC+XML+V0//EN&language=pl

[25] By way of preparation for this initiative the Commission carried out a study of the definitions used and penalties applied in the field of drug trafficking in Europe.[26] In its subsequent proposal, the Commission underlined that it proposed a common definition, covering acts which are classified as offences in all Member States, and that essential criteria in this definition are the notions of acting 'for profit' and 'without authorisation'.[27] The proposed by the Commission 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'.In Article 1 of the Commission's proposal, 'illicit drug trafficking' was defined 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' [author's emphasis].[28] Article 2 of the proposal required member states to make illicit drug trafficking, as defined in Article 1 of the proposal, a criminal offence. According to the Commission, this proposed definition embraced 'the key elements' trafficking in the 1988 United Nations Convention against illicit traffic in narcotic drugs and psychotropic substances.[29]

It took the Council of the European Union over two years to resolve disagreements and finalise a text which it then took Parliament a further seven months of further discussions to agree upon. The Commission had wanted to propose 'stricter *definitions* than those laid down in the UN Conventions on the fight against drugs, but the Council reduced the definition back to those in the conventions'.[30] In the ensuing Council Framework Decision 2004/757/JHA,[31] we find a similar compromise or political fudge to that reached in the 1988 Convention.[32]

The Council Framework Decision does not include a definition of drug trafficking, but instead lists the conduct member states are obliged to make punishable in Article 2 and under the heading of 'crimes linked to trafficking in drugs and precursors'. Article 2 (1) of Council Framework Decision 2004/757/JHA provides that 'Each Member State Shall take the necessary measures to ensure that the following intentional conduct when committed without right is punishable: a) … the offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch in transit, transport, importation or exportation of drugs; … c) the possession

[25] 'Proposal for a Council Framework Decision laying down Minimum Provisions on the Constituent Elements of Criminal Acts and Penalties in the Field of Illicit Drug Trafficking, submitted by the Commission on 27 June 2001 (2001/C 304 E/03)' (hereafter 2001 Council Proposal), *Official Journal of the European Communities* 304 E/172, 30 Oct. 2001.
[26] Study on the Legislation and Regulations on Drug Trafficking in the European Member States, European Commission Directorate-General Justice And Home Affairs, February 2001.
[27] Proposal for a Council Framework Decision, ibid, Explanatory Memorandum, Commentary on Individual Articles
[28] Proposal for a Council Framework Decision, ibid.
[29] Ibid.
[30] Report on the proposal for a Council Framework Decision laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of drug trafficking (15102/2/2003 – C5-0618/2003 – 2001/0114(CNS)) (Renewed consultation) Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, European Parliament, 23 Feb. 2004, 6. Available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A5-2004-0095+0+DOC+XML+V0//EN&language=pl
[31] COUNCIL FRAMEWORK DECISION 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking, *Official Journal of the European Union*, L 335/8, 11.11.2004.
[32] That the final text constituted a political compromise is clear from the Explanatory Statement in the Report of the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, European Parliament in February 2004, which concluded that on account of the length of time it took Parliament to reach unanimous agreement it was 'politically wiser to accept the framework decision as agreed' than for further amendments to be tabled, bearing in mind that it is a 'first small but very decisive step towards the creation of a common judicial space' and that 'it is clear that this framework decision does not ask Member States to change their drug policy.'

or purchase of drugs with a view to conducting one of the activities listed in (a); d) the … transport or distribution of precursors, knowing that they are to be used in or for the illicit production or manufacture of drugs'. 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*'.[33] [author's emphasis]

The Council Framework does not include a definition of 'personal consumption' but leaves this to the national legal systems to define. We will now turn our attention to the principal focus of this article, which is the struggle undergone by the Spanish legal system, in seeking to maintain a clear distinction between 'trafficking' and 'personal consumption'. As we will see, the cannabis club model created in Spain would not satisfy the Commission's proposed definition of drug trafficking on account of the absence of profit, but in the absence of a clear definition of trafficking, it continues to straddle the murky boundary between the two concepts.

III. SPANISH DRUG LEGISLATION

Prior to 1967, drug trafficking in narcotic substances and the unauthorised sale of pharmaceutical substances deemed capable of harming health were dealt with in the same article of the criminal code, which criminalised unauthorised production of these materials for the purpose of their commercialisation as an offence against public health, punishable with a fine.[34] The provisions stipulated that where the substances were toxic or narcotic (including cannabis) then the fine should be at the higher end of the scale, but in all other respects the law treated the drug trafficker and the unlicensed purveyor of pharmaceutical goods as one and the same.[35] Although the offence only made specific reference to the production (*elaboración)* of drugs, the Supreme Court interpreted the offence broadly so as to embrace all commercially oriented conduct involving drugs, including their trafficking and their possession where the intention of the defendant was to commercialise the product (in the sense of supplying it to others and not in the absence of such intention).[36] Civil preventative measures (such as internment for rehabilitative and educational purposes and outpatient treatment) were available and frequently applied to persons intoxicated with alcohol and other drugs.[37]

In 1966, during the dictatorship of Francisco Franco (1939-1975), Spain ratified the UN Single Convention on Narcotic Drugs 1961 (the Single Convention). The Narcotics Act 17/1967 (the 1967 Act) provides that all substances listed in schedule IV of the Single Convention (including cannabis) may not be produced, cultivated, trafficked, possessed or used except in the quantities necessary for medical and

[33] Ibid.
[34] Articles 34-343 of the Criminal Code 1944: first introduced in the criminal code of 1928.
[35] JC Usó, *Drogas y Cultura de Masas: España 1855-1995* (Taurus 1996) 161.
[36] STS 1534/1966 de 13 de diciembre de 1966 and STS 995/1972 se 17 de enero de 1972
[37] *Ley de 4 de agosto de 1933 de Vagos y Maleantes and Ley de Peligrosidad y Rehabilitación Social de 1970.* The first overhaul of the criminal code was made in 1995, and this repealed the Law on Social Danger 1970 (*Ley de Peligrosidad y Rehabilitación Social de 1970, Ley 16/1970 de 4 de agosto)*, several provisions of which had already been declared unconstitutional by Spain's Constitutional Court. See Usó, *Drogas y Cultura de Masas*, 258-265; Ley Orgánica 10/1995, de 23 noviembre del Código Penal; JL de la Cuesta and I Blanco, 'Spain: non-criminalisation of possession, graduated penalties on Supply' in N Dorn and A Jamieson (eds), *European Drug Laws: the Room for Manoeuvre: Overview of comparative legal research into national drug laws of France, Germany, Italy, Spain, the Netherlands and Sweden and their relation to three international drugs conventions* (DrugScope 2000), available at http://www.drugtext.org/European-Drug-Laws/cover-a-contents.html (accessed 1 Aug. 2016).

scientific research and with authorization from the relevant state department. [38] The 1967 Act did not create any criminal offences or penalties in breach of its provisions, but any such conduct is deemed to be illicit (albeit not necessarily criminal or otherwise punishable) on account of the Act. The primary purpose of the 1967 Act was to incorporate the provisions of the Single Convention 1961 into Spanish law and thereby specify which substances the subsequent criminal and administrative offences on drugs in its domestic law relate to. Reforms introduced to Spain's Criminal code in 1971 (Ley 44/1971) were the first to expressly criminalise conduct related to narcotics as a distinct offence from the unauthorised trade in pharmaceuticals.[39] Article 344 of the Criminal Code created a generic criminal offence against public health for all activities, expressly including cultivation, fabrication, production, transportation, possession, sale, donation and trafficking, that promote, encourage or facilitate illicit narcotic use. [40] The explanatory memorandum to Ley 44/1971 stated that whereas drug trafficking had hitherto only been criminalised indirectly (by the Supreme Court's broad interpretation of the offence of unauthorised production), it was now expressly prohibited in the legislation.[41] On account of the specific articulation of drug 'possession' in the criminal offence, several prosecutions were brought against persons found in simple possession of narcotics. The Supreme Court explained that possession for personal use remained outside the scope of the offence.[42] The Court justified its decision in accordance with (i) the grammatical dictates of the revised Article 344, which criminalised the specified activities 'and *any other means* of promoting, encouraging or facilitating drug use'; (ii) the legal good the offence sought to protect (its *bien jurídico)*[43] which it noted as being specified in the Criminal Code as the collective good of public health (iii) a societal acceptance of drug consumers as infirm persons in possession of a drug for the sole purpose of satisfying their own vice who ought not therefore be punished by the criminal law, but instead rehabilitated in accordance with the provision of the Law on Social Danger 1970[44] and (iv) the distinction drawn in the previous jurisprudence of Spain's supreme court, and by several parties to the Single Convention, including Switzerland, between possession for supply and possession for personal use. The Supreme Court's decision, whilst not welcomed by the national prosecutor, was conceded to be a correct interpretation of Article 344.[45]

In 1983, after Spain's transition from dictatorship to democracy and the ratification of the Spanish Constitution in 1978, urgent reforms were introduced to the criminal code with the stated purpose of updating it in accordance with the values enshrined in the new constitution. [46] Included in the reforms was a subtle rewording of the criminal offence on drugs to more clearly reflect the exclusion of possession for

[38] Articles 8 and 22 of Ley 17/1967, de 8 de abril, De Estupefacientes (BOE núm. 86, de 11 abril [RCL 1967, 706]).
[39] Molina Pérez, 'Breves notas sobre la evolución histórica de los estupefacientes en la legislación española', 313.
[40] Ley 44/1971 de 15 de noviembre, available at https://www.boe.es/boe/dias/1971/11/16/pdfs/A18415-18419.pdf (accessed 2 Aug. 2016).
[41] Ibid
[42] STS 2225/1974; 8th May 1974 and STS 541/1973 de 16 de octubre de 1973 and in accordance with the earlier decisions of the Supreme Court STS 764/1973, 10th October 1973 and STS 245/1974 of the 14th February 1974.
[43] It is clear from reading the principal doctrinal text on the doctrine of legal goods at the time that the doctrine was considered to serve a heuristic as a opposed to a normative role; M P Navarrete, *El bien jurídico en el derecho penal (Universidad de Sevilla, 1974)*
[44] *Ley de Peligrosidad y Rehabilitación Social de 1970.*
[45] The national prosecutor subsequently conceded that possession for personal possession remained outside of the criminal law and opined that this would make little difference in practice on account of the tendency amongst consumers to sell drugs to fund their habit: Usó, *Drogas y Cultura de Masas,* 268
[46] For an English text of the Spanish Constitution see GE Gloss, 'The New Spanish Constitution, Comments and Full Text' (1979) *Hastings Constitutional Law Quarterly* 7:47.

personal use from the criminal law.[47] The same revision introduced a distinction for sentencing purposes between 'hard' drugs (those which cause serious damage to health) and 'soft' drugs (that cause less harm to health and include cannabis) and reduced the maximum sentences for drug offences as well as providing a staggered approach to sentencing – contributing to a general perception that the Spanish government was being soft in its approach to drug offences.[48] A political backlash ensued against the *PSOE*[49] government's soft approach to drug offences, including campaigns by public authorities and political parties for the prohibition of cannabis consumption in public places– eloquently illustrated in this quote from the socialist mayor of Valencia:

'Whoever wants to smoke a joint, do it at home'[50]

The first associations of cannabis consumers, the Association of Consumers of Cannabis Derivatives in Madrid in 1987 and the Association Ramón Santos of Cannabis Studies (ARSEC) in Barcelona in 1991 were established in response to such campaigns. In 1992, partly in response to the political backlash,[51] the government introduced the 'Corcuera Law', containing administrative penalties for drug consumption and possession in public places and for the tolerance of such conduct by owners of establishments open to the public.[52]

Throughout the parliamentary debates of the 'Corcuera law' the *Partido Popular*, then in opposition, repeatedly tabled amendments to criminalise possession for personal use, arguing that Spain's ratification of the 1988 Convention obliged it to do so and that the system of administrative fines for public consumption was insufficient to satisfy Spain's treaty obligations.[53] Article 3 (2) of the 1988 Convention obliges parties to establish as a criminal offence the possession and cultivation of drugs for personal consumption unless doing so would be inconsistent with the parties' constitutional principles and the basic concepts of their legal systems. The PSOE government maintained that this exception applied to the Spanish legal system and both houses of parliament repeatedly rejected the amendments of the *Partido Popular*. The Spanish government did not specify in the parliamentary debates[54] the constitutional principles or basic concept with which the criminalisation of possession or cultivation for personal consumption would conflict, but frequent reference is made to the jurisprudence of the Supreme Court's application of the doctrine of legal goods, to the right to freedom and to the principle of minimum criminalisation.[55] A new Criminal

[47] Ley Orgánica 9/1983, de 25 de junio, de Reforma Urgente y Parcial del Código Penal, full text available at https://www.boe.es/boe/dias/1983/06/27/pdfs/A17909-17919.pdf; see also J Gamella and MLJ Rodrigo, 'A brief history of cannabis policies in Spain (1968–2003)' (2004) *Journal of Drug Issues* 34 630.
[48] Gamella and Rodrigo, 'A brief history of cannabis policies in Spain' 630.
[49] Spanish Socialist Workers' Party.
[50] *Las Provincias*, 19 Oct. 1990, 27, cited in Usó, *Drogas y Cultura de Masas,* 302.
[51] Usó, *Drogas y Cultura de Masas,* 301-302.
[52] Ley Orgánica 1/1992 sobre la Protección de Seguridad Ciudadana. See S Greer, 'Police Powers in Spain: "The Corcuera Law"' (1994) *International and Comparative Law Quarterly* 43.2 405-416 for a fascinating account in English of the more general provisions of this law.
[53] The People's Party is a conservative and Christian democratic party and is one of the four main political parties.
[54] Boletín Oficial de las Cortes Generales, Congreso de los Diputados, núm 219, 8 octubre 1992, 10772-10784.
[55] The principle of minimum criminalisation acknowledges that the criminal law is the most restrictive and severe of legal instruments and holds that as such it should only be resorted to where the objective sought is incapable of being achieved by less restrictive means. See Juan Córdoba Roda, 'El principio de intervención mínima en el fenómeno de la expansión de la justicia penal' in *El Derecho En La Factultad: Cuarenta años de la nueva Facultad de Derecho de Barcelona* (Marcial Pons 2001).

Code was introduced in 1995, and did not include a criminal offence for possession for personal consumption.

The principal administrative and criminal infractions relating to drugs are now contained, respectively, in Organic Law 4/2015 for the Protection of the Security of the Citizen[56] and in Article 368 of the Criminal Code. The consumption and possession of drugs in a public place, and the cultivation of drugs in a place that is visible to the public are punishable under the administrative legal framework with financial penalties. Wherever such conduct amounts to a criminal offence, it ceases to be punishable in the administrative law. 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.[57] (author's emphasis)

The source, meaning and implications of the phrase 'illegal consumption' in Article 368 have greatly exercised the minds of the Spanish legal profession; how can any activities specified in Article 368 be criminal when all that is facilitated by them is drug consumption, an activity which is not (at least when conducted in private) punishable in law and therefore not illegal?[58] According to the Supreme Court, although neither the UN treaties nor the 1967 law make provision for any sanctions for the conduct therein proscribed, they do state that the possession or use of the drugs listed in the schedules to the Convention is unlawful unless authorised by the state on medical or scientific grounds. As pithily summarised by the Supreme Court 'Article 368 does not punish consumption, but it does punish all activity that encourages it.'[59]

IV. THE DOCTRINE OF SHARED CONSUMPTION DEVELOPED BY SPAIN'S SUPREME COURT

During the 1990s the 'innovative spirit' of Spain's Supreme Court developed what is now commonly referred to as the doctrine of shared consumption, the practical effect of which was to include possession for shared consumption amongst a closed circle of drug consumers within the concept of non-criminal personal consumption by excluding it from 'trafficking'.[60] The doctrine applies to drug sharing wherever it is possible to completely discard the possibility of any risk of drug diffusion amongst members of the public. The Supreme Court justifies the creation of the doctrine with reference to the disproportionate (*desmesurada)* breadth otherwise constituted by the drug offence outlined in Article 368 of the Spanish Criminal Code, the specific objective of which is the protection of public health.[61] This reference to proportionality might suggest a normative turn in the Court's application of the doctrine, were it not for the fact that no mention is made in the Court's judgment of any right or interest that such criminalization might infringe. The Court's reasoning is simply that the protected good of the generic criminal offence is public health; just as where drugs are possessed for personal consumption, so too where drugs are shared amongst a close group of

[56] *Ley Orgánica 4/2015, de 30 de marzo, de Protección de la Seguridad Ciudadana*. It is a new version of *Ley Orgánica 1/1992 Protección de la Seguridad Ciudadana*.
[57] Author's translation of Article 368 of the Criminal Code of Spain.
[58] See for example JLD Ripollés and J Muñoz Sánchez, 'Licitud de autoorganización del consumo de drogas' (2012) *Jueces para la democracia* 79 56-60, and STS: 670/1994, 17th March 1994.
[59] STS 484/2015, 23.
[60] STS 484/2015, 32 and STS 1014/2013, de 12 diciembre and cited at STS 596/2015, 17.
[61] STS 397/2016.

friends and drug consumers, the drugs are not distributed to 'others' in the sense of third parties, and so public health is not affected, or at least not to any significant extent, and no criminal offence is thereby committed.

Cultivation of cannabis is specifically listed in Article 368 as an activity that might promote the unlawful use of drugs. The Supreme Court (with one notable exception discussed below) has consistently ruled that cultivation will only amount to a criminal offence where it facilitates illicit drug consumption by *third parties;* just as all actions including drug acquisition, demand and production, are not punished in criminal law where their objective is personal consumption (including shared consumption), so too is this the case with cultivation. There will be no criminal offence in the absence of 'otherness'; where the cultivation does not promote, encourage or facilitate consumption by *others* it will not be punishable in criminal law.[62]

Whilst a criminal offence will not have been committed in the absence of the 'otherness' (*alteridad)* that connotes a threat to public health, the precise meaning of 'otherness' has proven elusive. The shared consumption doctrine is the means by which the Supreme Court has sought to identify the *absence* of 'otherness'. The doctrine has continued to evolve since its inception in the 1990s, as the circumstances in which parties have sought to apply it diversified and the resulting case law has been described as contradictory.[63] The Supreme Court has noted that public health is a particularly abstract concept; it exists neither as a measurable reality nor as the sum of the health of individual persons.[64] Jacob Dopico Gómez-Aller, author of the most comprehensive critical analysis of the Court's application of the shared consumption doctrine, attributes inconsistencies and contradictions within it to the fact that public health is 'an ideal, with incredibly vague outlines, at least in the jurisprudence on drug trafficking; not so much in other offences that endanger public health such as those for pharmaceuticals and food'.[65] I argue that the Supreme Court's reframing of the distinction between 'personal consumption' and 'drug trafficking' as one between public health and individual health limits its normative reach by reifying the abstract concept of 'public health'. The extent to which the analytical framework created by Spain's Supreme court is 'theoretically flawed' and 'normatively useless' will be illustrated by my analysis of recent Supreme Court decisions on the inapplicability of the shared consumption doctrine to cannabis clubs and is best explained by public health theorist John Coggon:

> Setting the public up as an entity that is in and of itself ontologically separable from the individual people it comprises is formally problematic. It pulls something from nowhere – essentially off the back of a metaphor – and then obscures any sound purpose of the metaphor. Conceptual notions such as the public good, public purpose, or public interest do not require the conceptualisation and reification of an abstract concept. In fact, the creation of such an entity is problematic and can lead to considerable (and illusory) analytic problems: the public's interests enter into conceptual normative disputes, for example 'between the individual and society'. Such a formulation pits people outside of and against something of which they are supposed to be a part. This

[62] STS 484/2015, 26.
[63] For a comprehensive analysis of the case-law see JD Gómez-Aller, *Transmisiones atípicas de drogas: Crítica a la jurisprudencia de la excepcionalidad* (Tirant lo Blanch 2012).
[64] STS 484/2015, 23.
[65] Gómez-Aller, *Transmisiones atípicas de drogas,* 17.

> is a point of crucial importance to the sound analysis of public health. We should reject as analytically crippling and conceptually invalid the idea that we can draw an antagonistic dichotomy between 'the individual and society'[66]

We will see the challenge posed by cannabis clubs to the coherence of the shared consumption doctrine below, but first we must understand how civil society sought to protect the rights and freedoms of cannabis consumers through the exercise of the right to freedom of association. It is in their efforts to protect their activities from endangering public health that we will find our framework for testing the boundaries of the right to privacy in the context of drug laws in the final section of this article.

V THE EMERGENCE OF CANNABIS ASSOCIATIONS AND THEIR EVOLUTION INTO CANNABIS CLUBS

The birth of Spain's cannabis activism and its evolution into the widespread establishment of cannabis consumer associations and clubs is best described as civil society's response to their perceived need to protect the rights and freedoms of cannabis consumers and their right to recreational drug use in a social context.[67] Cannabis consumers perceived the administrative penalties introduced by the 'Corcuera law' as an unacceptable infringement on personal freedom. Whilst administrative penalties do not carry the social stigma or risk of imprisonment of a criminal offence, they make it difficult for cannabis consumers to consume cannabis in a social context, as they would be unable to transport the substance in public without risking administrative fines.

Section 22 of the Spanish Constitution protects the right to freedom of association as a fundamental right. The Law 1/2002 on Regulation of the Right to Association provides regulations for not-for-profit associations, one of several means of exercising the right to freedom of association in Spanish law.[68] The preamble to Law 1/2002 acknowledges the importance attached to the freedom of association in the legal traditions of Spain and the European Union and of the vital role played by associations in conserving democracy by enabling individuals to share their convictions, actively pursue their ideals, ensure that their voices and opinions are heard and to exert influence and provoke social changes by representing the interests of citizens to public authorities. Associations constitute legal entities consisting of three or more persons with shared interests. Associations must have constitutions that lay out the basis on which they operate and their communal objectives. This constitution must be democratic and provide for the holding of a general assembly at least once a year. Any and all monies generated by the association must be used to further the objectives of the association. An association must be inscribed in a public register and the registration must include a copy of its constitution. Associations that pursue criminal activities are illegal and secret associations and those of a paramilitary character are prohibited. Associations may only be dissolved or have their activities suspended by virtue of a court order stating the reasons for dissolution.[69]

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[66] Coggon, *What Makes Health Public?* 29

[67] Usó, *Drogas y Cultura de Masas,* 304-5; see also OP Franquero and JCB Saiz, *Innovation Born of Necessity: Pioneering Drug Policy in Catalonia* (Open Society Foundations 2015), 14, 34, available at http://www.opensocietyfoundations.org/sites/default/files/20150428-innovation-born-necessity-pioneering-drug-policy-catalonia.pdf (accessed 28 Feb. 2016).

[68] Ley Orgánica 1/2002, de 22 de marzo, reguladora del Derecho de Asociación.

[69] Further and more detailed regional regulations supplement the national legislation.

At the general assembly of Association Ramón Santos of Cannabis Studies (ARSEC) in 1993, some 150 members debated and agreed to plant a cultivation of cannabis for their collective consumption. Their crop was impounded by the police and the four governing members of the association charged with drug trafficking in contravention of Article 368. The case was tried by the provincial court of Tarragona and the defendants acquitted of all charges, the court concluding that no criminal law had been breached on account of the cultivation being intended for their own personal consumption. The prosecution appealed the decision to the Supreme Court under article 849 of the Criminal Procedure Law (*Ley de Enjuiciamiento Criminal*) that provides a ground of appeal for allegedly incorrect applications of the law to the proven facts. The Supreme Court (1997) overturned the first instance decision and convicted the defendants, on the basis that any unauthorised cultivation of cannabis necessarily endangered public health.[70] The decision in the ARSEC case was considered to be aberrant by legal commentators on account of the number of earlier decisions by the Supreme Court to the effect that cultivation was not a criminal offence where the purpose of the cultivation is personal consumption. [71] The decision did not amount to binding precedent and was largely ignored by the lower courts. The ARSEC case was the last of its kind to be heard in the Supreme Court until 2015 as changes to judicial procedure restricted the appellate jurisdiction of the Supreme Court to offences for which the maximum sentence is five years or more. Criminal prosecutions for cannabis cultivation were thenceforth decided by the single judges and the regional courts of the fifty provinces of Spain, which exercise criminal jurisdiction for offences where the maximum penalty does not exceed five years. In the exercise of their criminal jurisdiction the provincial courts act as both trial courts and appeal courts.[72] During the interim period of almost twenty years between the first appeal to the Supreme Court concerning an association of cannabis consumers in 1997 and the second in 2015, a synthesis of developments in the social, judicial and local political spheres resulted in a dramatic proliferation of cannabis social clubs throughout Spain and their firm entrenchment in the social fabric of at least Catalonia and the Basque country. [73]

The number of associations in operation throughout Spain rose to somewhere in the region of 1,000 by 2015, some of them with several thousand members and many subscribing to detailed self-regulation promulgated by federations of cannabis associations.[74] Included amongst the objectives listed in the constitutions of several of the associations is the provision of a private space for the exercise of member rights to autonomy over their mind and body, dignity and the right to free development of the personality. [75] The associations rented premises for members to congregate and socialise (private members' clubs) and obtained licenses for these to ensure compliance with fire safety, smoke evacuation and other public health requirements of various regulations by the municipal authorities for their activities, which include the dispensation and consumption of cannabis cultivated on behalf of the membership body. The clubs operate very much like bars or cafes in terms of their provision of social spaces, cultural entertainment, refreshment, Wi-Fi and work-spaces but their

[70] TS 17 November 1997, 3014/1996. For commentary see A Herrero, 'El cannabis y sus derivados en el derecho penal español' (2000) *Addicciones* 12 322.
[71] Herrero, 'El cannabis y sus derivados en el derecho penal español' 322, citing STS 12/12/1990 and STS 17/1/1994.
[72] For a detailed account of Spanish legal procedure see E Merino-Blanco, *Spanish Law and Legal System* (Sweet and Maxwell 2006) and L Bachmaier and A Del Moral García, *Criminal Law in Spain* (Kluwer International 2011).
[73] See Franquero and Saiz, *Innovation Born of Necessity.*
[74] Ibid. There are no reliable records of the number of associations in existence and this is based on estimates given to parliament, see http://www.congreso.es/public_oficiales/L10/CORT/DS/CM/DSCG-10- CM-126.pdf.
[75] O Casals and A Marks, 'La rosa verda: El florecer de los derechos fundamentales en el debate sobre las drogas en España' in DP Martínez Oró (ed.), *Las sendas de la regulación del cannabis en España* (Ediciones Bellaterra 2017).

legal identity is distinguished by their private membership, democratic method of management, not-for profit status and by the provision of cannabis for consumption on the premises. [76]

VI.THE CANNABIS CLUBS: DRUG TRAFFICKING OR PERSONAL (SHARED) CONSUMPTION?

Regional prosecutions of the governing members of the cannabis associations attracted criticism from several quarters including the Ombudsman of the Basque country.[77] The consensus of opinion in legal journals was that the cannabis clubs were not in breach of the criminal law. [78] The vast majority of criminal investigations into cannabis associations throughout the country between 1999 and 2015 resulted in stays of proceedings or acquittals by both judges at first instance and provincial courts.[79] In terms of jurisprudential doctrine, the majority of judgments went no further than noting that the conduct complained of came within the ambit of the Supreme Court's doctrine on shared consumption. One notable exception is a judgment by the *Audiencia Provincial* of Palma de Mallorca (henceforth the Audiencia) in 2014, in an appeal by the prosecution of the decision by a first instance judge in Ibiza acquitting the defendants of drug trafficking for their operation of a cannabis club. [80] In their grounds of appeal the prosecution argued that the doctrine of shared consumption was of no application to cannabis associations. The case is notable because in it the Audiencia recognised the that the doctrine of shared consumption was in practice no more than a tool for ensuring that only conduct which endangers public health is criminalised.

The Audiencia noted that the Supreme Court's shared consumption doctrine had undergone a process of amplification over the years but that its core requirements could be listed as the following: (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 drug users; (iv) the drug must be for immediate consumption. A final requirement, that the users must be addicts, had been extended by the Supreme Court to include persons who habitually consume drugs at weekends, or special occasions such as parties and celebrations. The first four requirements are concerned with ensuring that there is no risk of the drug going beyond the intended recipients or encouraging others to consume drugs; the final requirement in ensuring that the intended recipient is not a member of the public who has been encouraged to consume drugs by the supplier, but a person who is already a regular consumer at the time of being supplied.

According to the Audiencia the issue for its consideration was whether the conduct of the defendants came within the shared consumption doctrine, or within a

[76] Franquero and Saiz, *Innovation Born of Necessity.*
[77] Resolución 2015R-486-14 del Arateko [Ombudsman] de 9 de febrero de 2015.
[78] See for example J Muñoz Sánchez and SS Navarro, 'Uso terapéutico del cannabis y creación de establecimientos para su adquisición y consumo: viabilidad legal' (2000) *Boletín Criminológico* 47 1-4; Ripollés and Muñoz, 'Licitud de la autoorganización del consumo de drogas'. Concern was however expressed in several quarters that not all of the clubs subscribe to the democratic structures or non-profit nature stipulated by Law 1/2002 on Regulation of the Right to Association, or to the good practice guidelines of the federations which prohibit advertising or active recruitment of new members (necessary to comply with the prohibition on encouraging drug use in Article 368). See generally Franquero and Saiz, *Innovation Born of Necessity.*
[79] For the most comprehensive compilation of such cases see Fundación Renovatio, *Autos y Sentencias Relacionada con la autorganización del Consumo* (2013) available on request from fundacionrenovatio@gmail.com and Muñoz Sánchez, 'La Relevancia Penal de Los Clubes Sociales de Cannabis'.
[80] Audiencia Provincial, Palma De Mallorca, Section 1, Appeal No: 162/14, SAP IB 2541/2014.

variation of that doctrine that shared the same *raison d'être*. The Audiencia 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). In relation to the first point of diversion, the Audiencia stated that it must be borne in mind that cultivation is a lengthy process of several months and it is therefore logical for the amounts possessed to exceed what might be consumed immediately. The Audiencia observed that it was far from surprising that cannabis consumers, wishing to avoid engagement with the black market and all the risks it entails, resort to domestic cultivation, particularly given the ease with which the substance can be readily cultivated. Regarding the second, the Audiencia emphasised that the issue in the case was whether the defendants had committed the offence of trafficking, which would entail the promotion, encouragement or facilitation of drug use by third parties. It asserted this to be a qualitative and not a quantitative question on the basis that it would be unreasonable for criminality to hinge on the number of consumers. The Audiencia held that there is no qualitative distinction between the operation of the association and the shared consumption doctrine established by the Supreme Court; collective cultivation does not threaten the objective of the criminal law on drug trafficking because it is for the consumption of persons who have voluntarily participated in the cultivation of their own accord.[81]

The Audiencia upheld the decision of the court of first instance in acquitting the defendants and provided the following findings as its basis for ruling that the prosecution had failed to prove the criminality of the conduct: (i) the reasons for the creation of the association were reasonable; they had created a stable organisation with an organised structure and corresponding articles of association to avoid accessing cannabis from the black market. Obtaining cannabis from the black market entails risks such as endangering their health with contaminated or adulterated substances; (ii) the amount and the identity of persons to whom the cannabis was supplied were documented in the association's paperwork and the amount was limited to two grams per member per day, an amount that had been agreed by the board members of the association; (iii) there is no qualitative distinction between the operation of the association and shared consumption doctrine of the Supreme Court; (iv) the association was non-profit and all the money it generated was re-invested in the association; (v) the activity of the association conformed with its articles of association; (vi) the shared consumption doctrine does not require those supplied to be drug addicts but regular drug users; the fact that those supplied voluntarily declared themselves to be consumers of cannabis sufficed for its application; (vii) the fact that the association could not guarantee that its members did not take their cannabis out of the club for subsequent consumption did not make its supply criminal because the amount supplied was limited to two grams per person, an amount that posed no threat to public health on account of it not being reasonable to claim that such an amount could be destined for drug trafficking; (viii) the four kilos of cannabis found on the association's premises was not a significant amount given that the association had 455 members to supply; (ix) there was no evidence of supply by the association to persons other than members. The Court

[81] Audiencia Provincial, Palma De Mallorca, Section 1, Appeal No: 162/14, SAP IB 2541/2014.

concluded that in these circumstances neither the supply nor the cultivation of the cannabis by association members amounted to a criminal offence.

In October 2014 the Anti-Drugs Prosecutor announced an offensive against cannabis associations. In his evidence to the *Cortes Generales* (the bicameral parliament) he argued that the shared consumption doctrine is of no application to cannabis associations, primarily on account of the large number of people generally inscribed in such associations, that the cannabis clubs were therefore criminal and the lower courts were incorrect in their application of the law.[82] In 2013 the national prosecution service started adding the additional charge of membership of a criminal organization to prosecutions of persons operating cannabis associations (increasing the maximum sentence from four to 10 years) thereby making the decisions of provincial courts appealable to the Supreme Court on grounds of an incorrect application of the criminal law to the proven facts. The Supreme Court is the most superior court in Spain in all matters other than constitutional questions.

In 2015 the Supreme Court made three rulings on prosecution appeals from acquittals by provincial courts in what will henceforth be referred to as the 2015 trio: the 'Ebers case'[83], the 'Three Monkeys case'[84] and the 'Pannagh case'.[85] These decisions by the Supreme Court in 2015 are its first authoritative pronouncements on the application of the criminal law to the organised system of collective of cannabis cultivation, distribution and consumption that first emerged in the form of cannabis associations in the late 1990s, evolved into cannabis clubs in the 2000s, proliferated throughout the country this decade, and which has been sanctioned in multiple decisions by regional courts and even regulated by several municipalities. All of the Supreme Court cases consist of appeals by the public prosecutor against regional court judgments in which operators of cannabis associations were acquitted on the basis of an interpretation of the criminal law with which the national prosecutor disagreed. In all three cases the Supreme Court decided that the defendants should have been convicted but its elaboration upon the applicability of the shared consumption doctrine to cannabis clubs, and upon the distinction between trafficking and shared consumption remain blurred. The judgments have not served to clarify the legal status of cannabis clubs or stem the controversy and uncertainty surrounding it.[86]

In the 2015 trio, the Supreme Court held that the provincial courts, albeit with good intentions, had stretched the doctrine of shared consumption to breaking point.[87]. In the trio of judgments the Court states that whilst it is theoretically possible for collective cultivations to operate beyond the reach of criminal law and within the doctrine of shared consumption, any permanent structure established for the dispensation of successive cultivations to an open-ended number of members would be likely to be in breach of Article 368, and that the outcome of each case would depend

[82] See Diario de sesiones de las cortes generales comisiones mixtas año 2014 X legislatura núm. 127 para el estudio del problema de las drogas presidencia del excmo. Sr. D. Gaspar Llamazares Trigo Sesión núm. 20 celebrada el martes 11 de noviembre de 2014 en el Palacio del Congreso de los Diputados (available at http://www.congreso.es/public_oficiales/L10/CORT/DS/CM/DSCG-10-CM-127.pdf, accessed 22 March 2016).
[83] STS 484/2015.
[84] STS 755/2015.
[85] STS 834/2015.
[86] The legal status of the clubs is often described in the Spanish press as one of '*alegalidad'*. The word made its first appearance in the *Real Academia Española* in 2014 (23rd edition) as a descriptive term for something that is 'neither regulated nor prohibited'.
[87] STS 484/2015, 27.

upon its particular facts. Determining whether the philosophy that inspired the exclusion of 'shared consumption' from criminal liability applies to collective cannabis cultivation would need to be done on a case-by-case basis and not by the judicial establishment of a series of semi-administrative requisites. The court expressed concern that any such list could substitute the determination of the lawfulness of the activity in terms of the extent to which it threatened the interest protected (public health) with a subscription to protocols of a quasi-administrative nature. Whilst the courts can provide indications and guidance in a given case, it is for the legislature alone to establish a list of requirements, the presence of which would deny the applicability of the offence, and the absence of any of which would confirm its commission. The creation of such a list by the Court would shift the focus away from the real issue in each case, which is whether there has been an offence under Article 368. Article 368 criminalises the promotion of consumption by others, and not the facilitation of personal consumption. Only forms of collective consumption that lack any structure for servicing third parties, akin to the facilitation of one's own consumption, are excluded from the scope of the criminal law.[88] A criminal offence will be committed where a system of cultivation, harvesting or acquisition of drugs is put in place with the objective of distributing it to third parties including where those third parties have been incorporated within a list, club or association and where the distribution is carried out on a not for profit basis.[89] Profit is one of many indicators that a supply exceeds the bounds of shared consumption and suggests 'otherness' (*alteridad)* but the absence of profit does not in and of itself make the behaviour one of shared consumption.[90]

Whilst the concept of 'third parties' (*alteridad*) was not clarified and remains controversial, the Court did provide in the 2015 trio the following indicators of non-criminal activity: a reduced number of persons gathered together on an informal basis in a closed circle, who know each other on account of the links and relationships between them and who are familiar with each other's consumption habits to the extent that they can be more confident in their reasonable belief that the drug will not be re-distributed or commercialized outside of their circle than would be the case from the mere imposition of a formal obligation for this not to happen.[91] Other factors include the absence of any commercial spirit or profit; the absolute spontaneity and free, voluntary and informed nature of the decision of those who group together for this purpose, which in itself excludes the inclusion of underage persons.[92]

The dissenting judgment in the *Ebeers* case (4 out of 15 judges) disagreed with the majority's refusal to elaborate further on the criteria for establishing what conduct is outside the scope of Article 368: 'on the contrary we believe it is our function to provide clear and assertive criteria to set the meaning of the law and we believe that in order to do this we need to depart from the doctrine of shared consumption and adapt it to the this social modality of consumption, signposting the circumstances in which it would be outside the scope of the criminal law by the means that least endanger liberty'.[93]The minority judgment opined that the majority's refusal to elaborate on the criteria meant that the judgment failed to address the matter brought to it for resolution with clarity and instead perpetuated the uncertainty surrounding the conduct of

[88] STS 484/2015, 36.
[89] STS 484/2015, 35.
[90] STS 596/2015, 10.
[91] STS 484/2015, 37.
[92] Ibid.
[93] Ibid. 96.

associations of cannabis consumers and thus facilitated arbitrary law enforcement. The minority judgment elaborated upon the criteria that associations should comply with in order to remain outside the criminal concept of 'trafficking' and in doing so its focus is, like the majority, on identifying what would and what would not endanger public health. In the minority's opinion public health endangerment would be avoided where membership is restricted to adult and habitual consumers (in full possession of their self- governing faculties and already dedicated cannabis consumers) of some thirty persons (in order to ensure that they are known to each other and fixed in number) and where their conduct takes place on private premises (so as to avoid encouraging others).

Legal scholar Juan Muñoz Sánchez (Muñoz henceforth) is the most prolific critic of the majority judgments and argues that the proven facts did not amount to an endangerment of public health on account of the association's supply being restricted to club members and in the absence of any evidence of diversion to third parties, a category in which Muñoz claims it would be absurd to include private members and adult consumers of cannabis who have personally requested cannabis to be cultivated on their behalves.[94] Muñoz purports to be in agreement with the Supreme Court's interpretation of law but to disagree with its application of the law to the facts. Muñoz agrees that the essence of the criminal offence is the endangerment of public health and that it is in the absence of such endangerment that no criminal offence will have been committed. Muñoz's critique is not normative, but is restricted to debating the endangerment of the legal good protected. After emphasising the lack of any evidence to suggest that anyone other than members of the association was provided with cannabis, Muñoz elaborates on his reasons for disagreeing with the court's finding of endangerment to public health by critiquing each of the three elements of the factual matrix in this case that the Court treats as indicative of public health endangerment:

1. *The incapacity of the association to control the risk of diversion of the drug to third parties including the risk of members providing the amounts supplied by the association to them to others.*

Muñoz takes issue with the relevance of the risk of members providing third parties with the cannabis on the basis that the amount supplied to each member is below the threshold amount stipulated in Spanish jurisprudence for personal consumption. Muñoz asserts that the cultivation or storage of large amounts is insufficient in and of itself to amount to endangerment. He supports his analysis of the level of risk thereby created by pointing to the existence of opium plantations authorised by Spain's Ministry of Health and Consumer Affairs. He concludes that the risk must therefore reside not in the fact of existence of a plantation or by the size of the amount stored, but in the measures of control applied to securing them against public access. [95] Although not pursued by Muñoz, the analogy he draws with national control measures for authorised production suggests a potential alternative source for the identification of public health endangerment, which is the international drug conventions themselves as it is these which guide the national control measures applied. The conventions provide detailed control measures for the production and manufacture for medical and scientific purposes of scheduled substances. Article 22 of the *Single Convention on Narcotic Drugs, 1961* provides that the only circumstances in which a party is obliged to institute an outright prohibition on the cultivation of cannabis otherwise authorized by the state

[94] Muñoz Sánchez, 'La Relevancia Penal de Los Clubes Sociales de Cannabis'.
[95] Muñoz Sánchez 'La relevancia penal de los clubes sociales de cannabis. Análasis jurisprudencial' in Oró, *Las sendas de la regulación del cannabis en España* 368-369

is where the prevailing conditions in the country or the territory of a party to the convention are such that it would be the most suitable measure, in the opinion of that country, for protecting the public health and welfare and preventing the diversion of drugs into the illicit traffic. The UN's official *Commentary on the Single Convention on Narcotic Drugs, 1961* suggests that this judgment is one for the individual party to make but envisages it being made where the Government reaches the conclusion that 'it cannot possibly suppress a significant diversion into the illegal traffic without prohibiting the cultivation of the plant.'[96] The commentary elaborates on when this is likely to be the case:

> Any diversion is likely to cause harm to the health of human beings, but cultivation must be prohibited only if it is also necessary 'for protecting the public health and welfare'. The additional condition appears to indicate that the authors of article 22 did not consider that any diversion whatever constitutes *ipso facto* a problem of *public* health and welfare including that of other countries but only one which is sufficiently large to present such a problem. A Party is therefore not bound to prohibit cultivation if the drug in question is diverted only in relatively minor quantities.[97]

Whilst Article 22 is only of application to cannabis cultivation authorized for medical or scientific purposes, its objective is the same as that of Spain's Supreme Court in ensuring that cultivations are prohibited (in this case by the criminal law) wherever public health is endangered. The divergence in approach between the UN commentary and Spain's Supreme Court highlights limitations of public health endangerment as a normative concept.

2. *The establishment by an association of an institutionalized and permanent structure to supply cannabis to an indeterminate membership (on account of being open to additional members on an indiscriminate basis) is likely in itself to endanger public health and the supply of cannabis to the members of such a body will thereby represent supply to third parties and so amount to a criminal offence.*

Muñoz's first point of disagreement is with the court's description of the membership approval process as indiscriminate given that members must satisfy various criteria as stipulated by the association including affirmation from the applicant that they are already a regular consumer of cannabis and are willing to comply with the rules of the association and provision of their identity documents. Muñoz observes that openness to additional membership is integral to an association based on the shared interests of its membership body. Muñoz does not make this point in order to bring the right of association into play in his critique however, but instead to emphasise the normality of the conduct in question. Finally, Muñoz takes issue with the Court's suggestion that on account of the aforementioned characteristics of the association, supply to the members is akin supplying third parties. Muñoz disputes this characterisation on the bases that (i) members are adult consumers of cannabis who have personally requested cannabis to be cultivated on their behalves and stipulated their monthly quotas when doing so and (ii) the association has means of verifying their identity. Héctor Brotons Albert (Brotons) also criticises the Supreme Court for deprecating the importance of the right to association by failing to evaluate the functioning of the associations in accordance with its registered constitution and the

[96] United Nations, *Commentary on the Single Convention on Narcotic Drugs, 1961* 275 para 1, available at https://www.unodc.org/documents/treaties/organized_crime/Drug%20Convention/Commentary_on_the_single_convention_1961.pdf (accessed 2 Aug. 2016).
[97] Ibid. para 2.

democratic mechanisms prescribed in Law 1/2002 on the Regulation of the Right to Association[98]. Brotons does not highlight the law regarding associations in order to suggest any breach of the right to association but to explain the Court's 'confusing' equation of members with third parties to its failure to examine this aspect of the association's conduct.

Neither scholar addresses the Court's discomfort with the continuous and permanent nature of the cannabis supply system established by the associations though it seems to me that it is this characteristic of the cannabis clubs that most markedly distinguishes them from the informal circumstances of social supply to which the doctrine of shared consumption continues to be applied. I argue that the Court's discomfort with the permanent structure, and its reluctance to provide clear guidance or criteria for distinguishing between collective cannabis cultivations which are criminal and those which are not, is best understood with reference to the principal objectives of the drug conventions. The principal objectives of the drug conventions are generally understood to include the limitation of scheduled drug use to medical and scientific purposes[99]. The general consensus, even amongst advocates of drug reform, is that any formal regulation of recreational cannabis supply would be in breach.[100] The preoccupation of Spain's Supreme Court with convention compliance is evident from its citation of the treaties and quotation from article 3 (1) (a) of the 1988 Convention. of the conduct a country is obliged to criminalise. The Court did not quote the exceptions provided by article 3(2) for such conduct where it relates to personal consumption. Neither did the Court note that parliament had relied upon this exception in its decision to retain personal consumption outside the remit of the criminal law. Indeed the author has been unable to locate any reference to this in any of the drugs literature on Spain. The provision of detailed criteria on the distinction between criminal and non-criminal collective cannabis cultivation would not amount to the regulation of its supply so long as the criteria provided a means of providing much needed clarification of the distinction between 'personal consumption' and 'drug trafficking' in national law.

3. The large number of members inscribed (290 persons)

Muñoz asserts that the question of whether or not public health has been endangered is not of a quantitative nature. A similar opinion was expressed in Judge Ferrer's dissenting judgment in a later and similar decision on a cannabis association by the Supreme Court in 2016. [101] Both Muñoz and Ferrer emphasise the absence of public health endangerment where the supply is to a membership body constituted by adults in full possession of their self-governing faculties.

Whilst noting the leeway provided to nation states in terms of how narrowly or expansively they define personal consumption in their national legislation, Spain's Supreme Court expressed a concern that to deem Spain's concept of personal consumption sufficiently widely to embrace a cannabis association supplying several hundred members would amount to such an extreme departure from the traditional

[98] H Brotons Albert, 'Principio de proporcionalidad, derechos fundamentales y atipicidad de los CSC' in Oró,*Las sends de la regulación del cannabis en España*,464-478
[99] Article 4(c) of the Single Convention 1961.
[100] D Bewley-Taylor and M Jelsma, *The UN drug control conventions: the limits of latitude* (TNI 2012) available at https://www.tni.org/files/download/dlr18.pdf (accessed 11 Dec. 2017).
[101] Magistrada Doctora Ana María Ferrer García in STS 3972/2016.

interpretation of the concept of personal consumption that a preliminary ruling would first need to be sought from the Court of Justice of the European Union on account of its doubtful compatibility with European norms. [102]

It is unfortunate that Spain's Supreme court did not seek a preliminary ruling on this question for it is in fact far from clear that that a broad definition of personal use would constitute an extreme departure from international or European norms, and it is arguable that any such departure might in any event be justified on the basis of the rights enshrined in human rights instruments. There is not scope in this article to explore the breadth and range of national definitions, suffice it to note for present purposes Spain is not alone in its inclusion of shared consumption (at least amongst a small number of friends) within the scope of personal consumption, and neither is it alone in doing so on the grounds that such conduct does not pose a significant threat to public health.[103]

VII THE LIMITATIONS OF SPAIN'S PUBLIC HEALTH FRAMEWORK

Spain's application of the doctrine of legal goods reframes the distinction between 'trafficking' and 'personal consumption' as one between conduct that endangers public health and conduct that does not. Spain's Supreme Court developed the shared consumption doctrine as a tool for further refining this distinction. The weakness of the doctrines are that both the majority and the minority in the Supreme Court and the principal critic of the majority decisions all focus exclusively on the presence or absence of public health endangerment and reach different conclusions. The practical and theoretical limitations to the utility of the abstract concept of public health endangerment as the sole yardstick for determining the criminality of drug-related conduct have been illustrated by our analysis of the normative framework of cannabis clubs in Spain and the continued ambiguity surrounding their legal status. *Criminal law, Philosophy and Public Practice* marks an important contribution to the literature on public health protection in criminal law. Its contributors seeks to provide a varied examination of the conceptual, normative and practical implications of protecting public health through criminal law. [104] Several contributors to the volume explore the distinction between public and private from a deontological perspective. As Damon Barrett has pointed out, drawing a distinction between a human rights framework and a public health framework is not to suggest that the relationship between them is

[102] STS 484/2015, 18-19.

[103] In the Chilean Supreme Court case of Ministerio Publico C/ Paulina Patricia Gonzàlez Cespedes R.U.C. Nº 1.300.243.332-4 R.I.T. Nº 14-2015 Rol 4949-2015 decided on 4 June 2015. the issue was whether the defendant had been rightly convicted of cannabis cultivation pursuant to article 8 of the Law 20.000 (available at *http://bcn.cl/1uuq1).* According to article 8 persons who cultivate cannabis in the absence of an authorisation from the Agriculture and Livestock Agency (Servicio Agrícola y Ganadero, SAG) will be guilty of a criminal offence *unless* the cultivation is exclusively for their 'personal use' in 'proximate time'. The defendant, Gonzalez, was a member of a group of public health professionals researching addiction and perception expansion and Gonzalez cultivated cannabis on behalf of the group for their collective consumption. The issue for Chile's Supreme Court was whether cultivation for consumption by a group falls into the statutory exception for 'personal use' and it concluded that it does. The court's reasoning was similar to that underpinning the doctrine of shared consumption developed in Spain to the extent that the Chilean Supreme Court notes the good protected by the criminal law is public health and for an offence to be established, the good must actually be threatened, even if not actually harmed. However, unlike the Spanish Supreme Court, the Chilean court also makes specific reference to the right to autonomy in noting that the legislature had respected this right in its provision of the personal use exception from criminalisation and that persons are free to put their own health at risk; according to the Supreme court of Chile, this applies as much to collective cultivation as to cultivation by an individual; in Chile collective cultivation of cannabis will not be a criminal offence where the cannabis is for the consumption of those involved in its cultivation to the exclusion of anyone outside the collective and takes place in private.

[104] AM Viens, J Coggon and AS Kessel (eds), *Criminal Law, Philosophy and Public Health Practice* (Cambridge University Press 2013).

antagonistic, in fact far from it.[105] The two can complement each other in tailoring legislative responses. The status of the cannabis club model is uncertain in Spanish law on account of the intractability of drawing clear boundaries around public health. Lawyer and legal scholar Héctor Brotons Albert is exceptional in criticizing the trio for failing to take the constitutional issue of human rights into account in reaching its judgment and for seeking instead to examine the issue of public health endangerment in a normative vacuum and without examination of the individual rights affected and the application of the proportionality test in relation to their breach.[106]

We will now turn our attention to a growing body of comparative constitutional law in which recreational drug use is acknowledged as coming within the constitutionally protected realms of privacy and autonomy

VII. PENAL PROVISIONS ON DRUGS IN THE HUMAN RIGHTS FRAMEWORK

In comparative constitutional case-law the freedom to consume cannabis in the absence of state interference has been consistently situated within the right to privacy and associated personality rights the objective of which is the protection of personal autonomy. .[107] The courts have reasoned that the right is exercised by the consumption of substances that produce experiences that in some way affect the thoughts, emotions and/or feelings of the person, for these are indeed amongst the most personal and intimate of activities.[108] The crucial question under a human rights framework is the extent to which legal measures that interfere with autonomy (privacy/free development of the personality) can be justified as a proportionate means of achieving a legitimate objective. The four stages of the justifiability test are (i) the legitimate goal stage, the purpose of which is to exclude impermissible goals such as perfectionism[109], (ii) the suitability or rational connection which assess the suitability of the means for achieving the goal (iii) the necessity test which asks whether there is a less restrictive but equally effective means of achieving the goal and (iv) the balancing stage which involves the striking of a fair balance between the rights of the individual and the interests of the community.

Recent decisions by the Supreme Court of Mexico[110] and the High Court of South Africa[111] are particularly noteworthy on account of the rigour with which they apply the proportionality test. In the Mexican case the court, once having established

[105] D Barrett, 'A critique of human rights based approaches should demonstrate an understanding of human rights based approaches' (2012) *International Journal of Drug Policy* 23 185-186.
[106] H Brotons Albert, 'Principio de proporcionalidad' in DP Martínez Oró *Las sendas de la regulación del cannabis en España*.
[107] In the United States of America: the Supreme Court of Hawaii in *State v Kanter* 493 F.2d 306 (1972) and the Alaskan decision *Ravin v State* 537 F.2d 494 (1975); in South America: the Constitutional Court of Colombia, Sentence No. C-221/94, Constitutional Court Gazette 1994 Special Edition (available at www.drugtext.org/legal) as cited in N Boister, *Penal Aspects of the UN Drug Conventions,* (Kluwer Law International 2001) 125 n. 228, Supreme Court of Argentina (D Cozac, 'Rulings in Argentinian and Colombian courts decriminalize possession of small amounts of narcotics' (2009) *HIV/Aids Policy & Law Review* 14.2 as cited in Eastwood et al., *A Quiet Revolution,* 13.), the Supreme Court of Mexico (2015) (Amparo appeal 237/2014, the Supreme Court of Chile (Ministerio Publico C/ Paulina Patricia Gonzàlez Cespedes R.U.C. Nº 1.300.243.332-4 R.I.T. Nº 14-2015, Rol 4949-2015 decided on 4 June 2015.); in Africa the High Court of South Africa in *Prince and others v Minister of Justice and Constitutional Development and others (2017) (* Case No: 8760/2013 in the High Court of South Africa (Western Cape Division, Cape Town)
[108] Amparo appeal 237/2014 vi
[109] K Möller, *The Global Model of Constitutional Rights* (OUP 2012). See further Mattias Kumm, whom Möller identifies as the first author to link the philosophical idea of anti-perfectionism to proportionality-based rights analysis: M Kumm, 'Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement' in G Pavlakos (ed.), *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (Hart Publishing 2007), 131 as referenced in Möller Kindle location 3400.
[110] Amparo appeal 237/2014
[111] *Prince and others (2017)*

the engagement of a protected interest in the legislative measures pertaining to drug use, proceeded to the legitimate goal stage. It identified the protection of public health and public order as the legitimate aims. The Court then proceeded to the suitability or rational connection stage, observing that the state's measure would satisfy this if the measure could be shown to contribute in any extent and to any degree the legitimate purpose sought by the lawmaker.[112] Interestingly, the court stated the impact of the policy on the number of persons consuming drugs was not the relevant question; the questions that needed to be asked were (i) what harm the consumption of cannabis posed to public health and public order and (ii) whether these were minimized by the measure. The Court found that the consumption of cannabis among drivers (i) increased the probability of vehicular accidents and the consumption amongst people more generally (ii) did pose a risk to health of consumers, but not an important risk since its permanent consequences are 'unlikely, minimum or reversible'. The court concluded that there was a rational connection between the measure and the legitimate goal in relation to (i) only. At the necessity stage, the court noted that the measure had not reduced the number of consumers and had not therefore decreased harms related to its consumption. It noted that in relation to the effects on the health of consumers, educational and health measures, and prohibitions on advertisement, would provide adequate alternative measures, and noted that legal measures should discourage consumption in specific circumstances, such as driving. [113] It then moved on to the final balancing stage, and concluded that the measure was disproportionate.[114]
A similar exercise and outcome was more recently conducted in *Prince and others* in the High Court of South Africa.[115] Having acknowledged the intrusion on the right to privacy by the drug offences, the court ruled that the dispute would have to be determined in terms of the justification for limitation of privacy, with the burden resting on the state to satisfy this. The factors for consideration at this stage are set out in s.36 of the South African constitution and are similar to those of the justifiability test outlined above: (i) nature of right (ii) importance of the purpose of the limitation; (iii) nature and extent of the limitation; (iv) relation between the limitation and its purpose; (v) availability of less restrictive means to achieve this purpose. The court observed that this limitation analysis 'should be conducted through the prism of a court's reading of the animating normative framework…in light of the values which underlie and open and democratic society based on human dignity, equality and freedom.'[116]

The court heard evidence on harms from all parties and concluded 'the evidence as set out in this judgement supports the argument that the legislative response to personal consumption and use is disproportionate to the social problems caused as a result thereof'. The High Court accordingly ruled that the legislation needed to be amended to ensure that these provisions do not apply to those who use small quantities of cannabis for personal consumption in the privacy of a home as 'the present position unjustifiably limits the right to privacy... The limitation on autonomy should in other words be narrowly tailored to achieve its purpose, […] it should be carefully focused or that it should not be overbroad'[117]

The human rights case-law on personal consumption approaches the demarcation between drug trafficking and personal consumption from the opposite

[112] Amparo appeal 237/2014 xii-xv.
[113] Ibid. xv-xvii.
[114] Ibid.xxii
[115] Case No: 8760/2013 in the High Court of South Africa (Western Cape Division, Cape Town).
[116] Ibid. para 22.
[117] Ibid. para 93.

angle to the doctrine of legal goods, by starting with the question of what is private or what restricts a person's autonomy. However the case-law goes no further than identifying the relevant right. The focus of the judgements is on the extent to which interference with the right is justified. In other words, we are back to evaluating the endangerment to public health, albeit in a more nuanced and structured manner. Although several of the constitutional cases specifically restrict the engagement of the privacy right to 'personal consumption' the actual scope of 'personal consumption' is not addressed, with one exception. In the decision by the Supreme Court of Chile 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 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. [118]

The Chilean court's interpretation of the statutory term is not based on any normative analysis of the scope of privacy however and it is only by exploring the scope of privacy that we can begin to sketch out the contours of a normative conception of personal consumption

VIII. TOWARDS A NORMATIVE CONCEPTION OF PERSONAL CONSUMPTION?

The concept of privacy in Article 8 of the European Convention on Human Rights (ECHR) includes the right to establish and maintain relations with other human beings for the fulfilment of one's personality and this extends to the right of association:

> The Court reiterates that 'private life' is a broad term encompassing the sphere of personal autonomy within which everyone can freely pursue the development and fulfilment of his or her personality and to establish and develop relationships with other persons and the outside.[119]

In *Niemitz 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. [120]

The North American theorist Bloustein has proposed an explicit link between individual privacy and the right of association. 'The right to be let alone,' he asserts, 'protects the integrity and dignity of the individual. The right to associate with others in confidence – the right of privacy in one's associations – assures the success and integrity of the group purpose.' He explains that:

> [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

[118] Ministerio Publico C/ Paulina Patricia Gonzàlez Cespedes, para 8, author's translation.
[119] *Jehovah's Witness of Moscow & Others v Russia*, Application No. 302/02, Judgment 10 June 2010, para 117.
[120] ECtHR, *Niemietz v Germany* judgment of 16 Dec. 1992, Series A no. 251-B.

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.[121]

If we are to define 'personal consumption' as all that which pertains to the constitutionally protected realm of the private, it at least arguable that this should include collective cultivation and consumption by consumers in private.

IX. CONCLUSION

Ambiguity surrounding the meaning of 'personal consumption' in the international conventions on drug control and in national legal systems is best decided within a human rights framework, particularly given the acknowledgement given to the engagement of constitutional principles by the term in the 1988 Convention. By examining the case-law from Spain, we can see that the normative strength of the Spanish public health framework is that it should exclude conduct which has no harmful impact on persons other than those engaged in it, and therefore, despite being an application of the Continental doctrine of legal goods, aligns its analysis with the objectives of the normative and liberal Anglo-American harm principle. Its weakness is that the law is uncertain and remains vulnerable to the same criticisms that have plagued the harm principle, primarily the perennial question of what can be said to constitute a harm (or in the Spanish context, what can be said to be harmful to public health).[122]

Whilst the application of human rights law to the recreational use of drugs remains controversial[123] and there is still much to be resolved in the application of human rights law to recreational drug use, recent decisions by the Supreme Court of Mexico and the High Court of South Africa represent important advances in their rigorous application of the proportionality principle to legislative measures prohibiting drug use. The strength of the human rights framework is that it lends itself to a more nuanced approach whereby both the public health impact and the intrusion into privacy can be examined in tandem and the proportionality test applied to ensure that legislative measures achieve the correct balance between the two. Whilst the case-law suggests that the decision of whether to consume drugs is a deeply personal one, the question of whether the same can be said of an organised system of collective cultivation and consumption is more complex. Our review of the constitutional case-law has enabled us to identify autonomy as the value endangered and privacy as the right engaged to protect it. A brief analysis of case-law and theoretical literature on the scope of privacy more generally, suggests that the right to privacy does include social or 'group' privacy and that drug consumption in a social context could in certain circumstances come within the constitutionally protected realm of private life. This could result in a broad conception of 'personal consumption' capable of embracing Spain's cannabis clubs.

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[121] E Bloustein, 'Group privacy: the right to huddle' (1977) *Rutgers Camden Law Journal* 8.2 219-283.

[122] Mill, *On Liberty and other writings*; J Feinberg, *Harm to Others* (Oxford University Press 1984); RA Duff, *Answering for Crime* (Hart Publishing 2007) 126-165.

[123] See e.g. Saul Takahashi, *Human Rights and Drug Control: The False Dichotomy* (Bloomsbury 2016) Kindle edition 4623-7: "In sum, there is no foundation for any so-called 'right to abuse drugs'. There is nothing in international human rights law that points to such a right, and the only justifications that advocates of drug liberalisation are able to muster on this point consist of classical liberal philosophy from the 19th century, and concepts specific to bourgeois Western culture. Such justifications ring somewhat hollow in the ears of most people in the world, and are extremely weak grounds on which to stand for organisations or individuals promoting modern international human rights standards."