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Drug Policy and the Ultima Ratio in A Social and Democratic State, Spain

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Abstract

As a Member State of the United Nations and the European Union, Spain's drug policy is heavily conditioned by these external superior 'legal personalities'. Although, the Spanish legislature has enacted amendments to legislation on illicit substances over the last ten years to attenuate excessively punitive law, their interpretation and internal application of conventions on drug legislation has by in large overlooked the ultima ratio principle i.e. minimum intervention (Arana 2012). Spain's criminal legislation is presented as well as the consequences of the prohibition of illicit substances in this jurisdiction. Finally, alternatives that have emerged in the Basque Autonomous Community to counter the effects of its criminalisation are briefly discussed and promoted as a means of abating external legal constraints that have serious social and legal ramifications.

Key words

Illicit substances; criminalisation; international conventions; constitutional guarantees; democracy; drug offences; ultima ratio; drugs

Resumen

Como miembro de la Organización de las Naciones Unidas y la Unión Europea, la política de drogas española está fuertemente condicionada por la legislación emanada de estas entidades jurídicas. A pesar de eso, los legisladores españoles

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han introducido reformas en la legislación sobre sustancias ilícitas en los últimos diez años para atenuar una legislación excesivamente punitiva, su interpretación y aplicación interna de convenios sobre legislación en materia de drogas en gran parte no toma en cuenta el principio del ultimo ratio (Arana 2012). Se presenta la legislación penal española en materia de sustancias ilícitas y también los efectos que ésta tiene sobre la jurisdicción. Finalmente, las alternativas surgidas en la Comunidad Autónoma Vasca para contrarrestar los efectos de la criminalización, son brevemente discutidas y promovidas como una manera para amainar las limitaciones jurídicas que tienen importantes y serias ramificaciones sociales y legales.

Palabras clave

Sustancias ilícitas; criminalización; convenciones internacionales; garantías constitucionales; democracia; delitos por drogas; ultima ratio; drogas

Table of contents

1. Introduction

There exists a plethora of examples demonstrating that drugs have been acquired and used for different reasons at different times in diverse communities. Many drugs that were once legal and promoted by the public and private sectors are now considered illicit. Conversely, certain substances now considered integral components in many societies were once not only prohibited but also severely sanctioned (Escohotado 2002). For instance, coffee is a substance now considered by many to be an 'imperative' jolt to start their day and a commodity, which was not only once illegal but also considered the 'devil's drink'. Similarly, tobacco is a substance that has been the source of considerable governmental income, but also scientifically demonstrated to have serious short and long term consequences on the health of its consumers as well as those in their surroundings, has only recently become prohibited in many public spaces such as Seattle, Washington and the Basque Autonomous Community (BAC) (Arana 2009). In this respect, drugs have a "social life" (Appadurai 1986) and a legal status that is shaped by interests and priorities that are closely linked to transactions and expressive morality but not science (Husak 1992; Nutt *et al.* 2007). This article will provide a brief contextual and legislative overview of legislation on illicit drugs in Spain and how these have been heavily conditioned by international law, followed by a discussion on the ramifications of the continued criminalisation of controlled substances in the Basque Autonomous Community (BAC) and a new form of resistance.

2. Drug Policies

Del Olmo (1985, p. 38) described the process undergone by substances once valued for their social utility, which are now classified as 'illicit drugs' once having been converted into a market value as: "with capitalism taking hold, drugs like all other things became a commodity. By becoming a commodity, a new market was needed and established and therefore the production, distribution etc. took on the characteristics of a business. Nevertheless, they are legal so long as they exploit external non-capitalist markets, becoming illegal once they attempt to create and exploit the metropolitan market." What was once considered a form of acceptable trade thus became 'trafficking' or 'smuggling'. To what degree is this not also a form of penal communication that is an ´*exchange* of values` by ´exchanging *values*` (Simmel 1978, p. 77)[1]?

The financial aspects of drugs as a social phenomenon conditioned and continue to condition its control. A historical analysis of the profit garnered by Great Britain in China, France in Indochina and Spain in South America, led Beristain (1986, pp. 160-170) to conclude "in the past the economic dimension was more influential when deciding on the legality or illegality of use (or abuse) of drug trafficking, even in the case of those presently considered as the most dangerous." By the nineteenth century, Europe knew of the effects of determinate substances on the health of consumers and yet the trade continued so long as it remained profitable.[2]

The present European context can benefit from the experience gained through past attempts to control the market of substances classified as toxic, narcotics or psychotropic. Legislation regulating access to coffee or alcoholic drinks is far more lax than for that of most prescription drugs without mentioning access to narcotics and psychotropic drugs. Similarly, the control over the growth, production, transport and sale etc. with the exception of narcotics and psychotropic substances, is administratively overseen and only comes under criminal legislation in the most serious of cases. Nonetheless, for substances classified in the various Schedules of the International Conventions, criminal law has become a disproportionate

[1] Italics included in the original text.
[2] Although its users suffer nowadays from social stigmatization and exclusion, heroin was invented and initially commercially sold by the highly profitable and reputable Bayer CO pharmaceutical company in 1898.

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ISSN: 2079-5971

protagonist, capable of quashing preventative, educative, health and social aims by capitulating to the demands of the more punitive sectors. Nadelmann (1988, p. 83) described this as an obsession to control drug trafficking that has led to "increasingly harsh criminal penalties regulating virtually every aspect of drug use with little regard for the costs..."[3]

Authors such as Engelsman (1989) and Baratta (1989) distinguish the primary effects of drug policies from secondary ones. Primary effects are those that stem from the actual consumption of the substances; whereas, the secondary effects are the consequences of prohibitionist policy. As such, Wodak (1995, p. 89) argued "the majority of drug related problems are secondary to the policy and are not a product of the actual pharmacological properties of illegal psychotropic substances." These include aspects related to health (adulterations of drugs), the social control of a sector of consumers in particular the most vulnerable, corruption, money laundering and an increase in violence, etc.

Spain is a Member State of the United Nations and the European Union. Consequently, its internal rules and guiding principles in drug policy reflect the provisions set in these external superior jurisdictions. The United Nations Single Convention on Narcotics Drugs of 1961 (UN 1961) and the criteria set in the document have remained the dominant point of reference in this area for well over fifty years ago. There is now sufficient evidence demonstrating that alternative policies should and can be adopted from those used up until now. Drugs –their distinct use and form of use are a relevant and ever present part of civilisation and are unlikely to disappear. They are not harmful in and of themselves. When assessing the harm and costs deriving from narcotics one must consider the quantity and form of consumption as well as the consumer and their personal circumstances. Present prohibitionist policies in public and closed spaces such as prisons counteract harm reduction strategies and breach the right to individual freedom (Section 17 of Spanish Constitution (SC)). Substances also have positive effects and these have to be taken into account (Gamella 2003, p. 329; Beristain 1990). As repeatedly demonstrated, persons who choose to consume and have the financial means to do so will not be prevented from doing so through prohibitionist policy based on criminal law. Prisons have not led to a drop in common crime nor recidivism, which makes one question the logic of a legislature that believes that it is an adequate means of managing a problematic behaviour rooted in a psychological and chemical dependency such as drug related offending. It is time to assess alternatives to criminalization and perhaps learn to live and accept drug use.

3. Ultima Ratio and the State of Law in a Social and Democratic State

3.1. Principles of the social and democratic state regarding the enforcement of rules/legislation

This is not a trivial matter. The State of Law in a social and democratic State may "not appear to be a clearly defined system or stable"; however, it should strive to minimise State intervention. Consequently, there is a never-ending struggle to "deepen its human and fundamental rights in effort to legitimate the State's acts solely from a participative democratic underpinning" (Bustos 1989, p. 43). The State of Law therefore has the power to reaffirm "the guarantor role of Law."[4] From this perspective, "the challenge for criminal law in democratic States should be coherent with their guaranteeing principles" (Baratta 1991, p. 55).

[3] The UN (1961) states outright "addiction to narcotic drugs constitutes a serious evil for the individual and is fraught with social and economic danger to mankind."

[4] Ferrajoli (2008, p. 62) defined guaranty in this context as "the limits and ties imposed to all powers – public and private, politicians (or the majority) and economics (or the market), at a state and international level - by their tutors through their compliance to the law and, concretely, the established fundamental rights and guarantees as much the private areas from public authorities as public from private authorities.

Having assessed the consequences of criminal law and the State of Law in the social and democratic State, Mir (1994, pp. 33-42) was led to conclude that "this involves not only an attempt to submit the conduct of the social State without renouncing the formal limits of the State of Law, but also its material orientation towards a formal democracy" if only to "serve the majority but also to respect and understand all minorities and all citizens, to the extent that it is compatible with social peace." In the context presently under discussion this also implies that criminal law "should only intervene to protect citizens when it is absolutely necessary." Further, as argued by Hormazabal (1991, pp. 143-144) "criminal law in a democratic society is not fit to provide full protection. The right to protect over the same subjects can be shared with other branches of Law, but given its ultima ratio character its scope to protect should be reserved for the most serious of assaults." As such, other branches of law such as administrative law are clearly alternatives and perhaps more appropriate legal guarantors.

For Bustos (1989, pp. 34-35), the purpose of a penalty in a social and democratic State "can be no other than to protect its social system, which in the criminal field implies the protection of set legal assets i.e. concretely determined social relations, which is why the offences that attack these assets are always politically determined." For this reason, he stresses that the authors of offences as well as the offences themselves are essentially political and it is the responsibility of all members of the State to determine what are to be the protected legal assets i.e. the offence and to "establish the necessary conditions so that these do not become an insurmountable obstacle for the subject."

The following principles refer to the material application of legislation and function as a reference and to guide their use and compliance. Criminal protection under the State of Law in a democratic State should be based at bare minimum on three fundamental principles: the principle of legality, the principle of minimum intervention (last resort) and the principle of proportionality. All serve to restrict the State's power to punish thus serving to ensure that there is a need or necessity to criminalise certain behaviour. All of these principles have been breached in one form or another by Spanish drug legislation.

3.1.1. Principle of Legality and Spanish Drug Legislation

The principle of legality is founded on the following four basic assumptions: *Nulla poena sine lege scripta, nulla poena sine lege previa, nulla poena sine lege stricta* and the more selective *nulla poena sine lege certa.*[5] In the case of offences against public health, Boix Reig (2000, pp. 390-392) maintains the "principle of legality clearly rests on the legislation under study, creating margins of legal insecurity, which are not sustainable in the Rule of Law." For instance, the overly broad criminalization under Art.368 of behaviour that "encourages or facilitates" is a good example of the legislature's failure to enact drug legislation that clearly defines prohibited conducts. Similarly, the failure to clearly define toxic drugs whilst including aggravating types that are based on evaluative criteria is equally problematic.[6] The afore led Boix Reig (2000, p. 392) to critically question the

[5] 'Selective' because it is not expressed in International Conventions.

[6] In Spain, the penalty for drug offences officially varies dependent upon the substances involved and therefore the judiciary must account for this when prosecuting. Law on Narcotic Drugs of 8 July 1967 and Royal Decree 2829/1977 classify narcotic drugs and psychotropic substances, respectively, in accordance with the UN Conventions. When concluded to be for personal use, the penalty is not linked to the drug type; however, if for trafficking the penalties vary according to drug type. Further, under the Organic Law 8/1992 of 23 December amending the Criminal Code and the Law of Criminal Procedure in matters of drug trafficking penalties for trafficking reflect the perceived seriousness of the harmfulness (of the health damages associated) to the drugs as well as any aggravating and mitigating circumstances. Custodial sentences can reach up to 20 years and 3 months such as in the case of sale to minors or the sale of large quantities. If no aggravating mitigating circumstance are present, the person may receive from a one to three years if the drug does not cause serious health damage (Schedule I), and from three to nine years if they do. A fine is also applied. The three to nine year sentence was reduced to three to six years under Organic Law 5/2010 of 22 June.

outcomes or rather repercussions of their application. "In any case, the possibility of covering three degrees of penalties and relying on the judicial labour to integrate evaluative elements is questionable from a principle of legality."

3.1.2. Principle of Minimum Intervention

The punitive power of the State of Law in a social and democratic State must be bound to the principle of minimum intervention. As such, criminal law should only be enacted as a last resort "to protect particularly important individual legal assets and criminalise behaviour that is truly harmful or that puts in danger these assets. Given this difficult balance, the need to resort to criminal penalties as well as the goods protected warranting its mobilisation should always be critically assessed" (Muñoz Conde 1991, p. 56). In short, the criminalisation of certain conduct-types is only justified if it cannot be dealt with otherwise (Padovani 1984, p. 124; Bustos 1989, p. 44) and should be a reflective equilibrium of all interests and relevant argumentation i.e. a balance of principles and their application (Rawls 1999). This led Ferrajoli (1995, p. 104) to conclude that criminal law as the highest guarantor for citizens freedoms and protector against arbitrary penalties should be conditioned and restricted to the utmost. Further, it should also retain a "rational and certain ideal" and for this reason criminal responsibility for uncertain or indeterminate premises must be avoided.

3.1.3. Principle of proportionality

The principle of proportionality combines retroactive and prospective elements (Jareborg 2005, p. 532). The first refers to the basic assumption that penalties for offences should reflect their gravity. Does the conduct-type warrant its criminalisation? The second refers to the means used and the goal aimed for. Legitimate penalties in the Spanish jurisdiction must conform with three constitutional requirements (Vives Antón 1986). They must serve to protect constitutionally legitimated legal interests, be efficient in doing so and finally, from a utilitarian standpoint be proportionate to the harm caused. It has now been demonstrated that the proscription of all aspects of substances has grave secondary effects such as the emergence of organised crime and price inflation. This of course is without including the costs incurred as a result of a tardy harm reduction policy.

Under the shield of the present international security context, national exceptional legislation is being enacted and legitimated in the alleged fight against terrorism, organised crime, drug trafficking, illegal immigration etc. that overrides constitutional fundamental rights and guarantees under the Rule of Law in a democratic State (Muñoz Conde 2005, pp. 168-169). Muñoz Conde (2005) warns against this tendency's potential "to become generalised and to convert a rule that inspires the institutions and agents responsible for overseeing the enforcement of criminal law e.g. police and judges and thus to provoke the social 'fascification' of the masses –a trait more typical of a dictatorship than that of a participative democracy in which minorities are respected." In the same vein, both Soto Nieto (1992) and Ristroph (2005) view the principle as a means to control legislative penal prerogative. It therefore involves not only the institution and agents involved in the enforcement but also the political spheres that draft legislation. On occasion this leads messengers to compete with the authors.

Although this should suffice, other doctrinal principles at risk in the context of drug policy are the constitutional right to the presumption of innocence (Section 24.2 SC), equality (Section 14 SC) and reinsertion (Section 25.2 SC). The presumption of innocence plays a central juridical epistemological role and is the "true axis of the system" (Andrés Ibáñez 1992, p. 134). It is recognised in International Treaties, and has been repeatedly upheld in decisions handed down by the Spanish Constitutional and Supreme Tribunals (Choclán Montalvo 2004, p. 627). The Constitutional Tribunal reiterated in Decision 31/81 of 28 July that the presumption

of innocence "has ceased to be a general principle of law, once used to guide judicial activity *(in dubio pro reo)* and is now a fundamental right that links all branches of government."

In practice, the principle of equality is equally problematic and is the principle under which the "political contradictions between the principle of equality and unequal distribution" are the most blatant (Pavarini 1983, pp. 35-36). A critical analysis of the criminalisation process i.e. the classification of certain conduct-types as undesirable or criminal by legislators -primary criminalisation and the enforcement of this normative judgement by the juridical apparatus -secondary and tertiary criminalization, readily demonstrates that it is anything but equal. Having theoretically analysed a series of empirical studies completed on the penalisation of drug dependency in Spain, Baratta (1989, pp. 167-169) concluded that the evidence "radically negates the myth that criminal law is a law of equality." This is all the more evident in intent to supply cases involving drug dependents and non-users. For this reason, Laurenzo Copello (1995, p. 14) criticised Spanish drug legislation for "not providing distinct legal treatments as would be required in a system that respects the principle of equality, one manifestation of which lies precisely in the necessity to not treat as equals those who are far from it." For example, the Spanish Criminal Code (CC) lacks clear criteria to distinguish possession for personal use from possession with the intent to sell. Nonetheless, this has since been resolved through extensive case law. The following criteria are now used to determine whether or not the accused acted with the intent to supply: quantity seized; whether the accused is in possession of poly substances; if the substance prepared in individual doses for sale; the place of arrest; if in possession of instruments or materials to manufacture or distribute the substances e.g. scales and the suspect's financial means (Magro Servet 2004). Further examples include penalties such as fines, sentencing aggravates (Arts. 369 and 370 CC) and attenuates (Arts. 376 CC), and finally laws such as the recently abolished legislation on the illicit sale of narcotics and psychotropic substances under which an individual could be convicted for breaching administrative and criminal law for the same conduct i.e. *ibis idem*.[7] It is now fair to conclude that the enforcement of law in the area of narcotics and psychotropic substances in a system that alleges to protect potential future consumers from dealers, "is selectively and discriminatorily applied [in breach of the principle of equality], affecting predominantly the actual drug dependents or smaller dealers, and not the large criminal organisations" (González Zorrilla *et al.* 1989).

Numerous authors have critically questioned the aims of the constitutional right to reinsertion arguing that custody is the social exclusion of persons and therefore renders any attempts to reinsert or include asinine (Baratta 1989). Further, there is a considerable difference between the "legal prison" and "real prison", and "penitentiary law and the reality suffered" by those incarcerated (Muñagorri 2000, pp. 16-17). The high suicide rate of detainees and prisoners, and prison overpopulation (SPACE I 2010, p. 32)[8] –one of the highest in Europe despite being one of the "low crime countries in an EU context" (van Dijk, van Kersteren, Smit 2007, p. 44) demonstrate the serious obstacles faced when attempts are made to protect this right. All of the above is evidence of an institution that "foments stigmatisation and the de-socialisation of prisoners" (Quintero Olivares 2000, p. 102). For drug dependents that from the onset are disproportionately socially and legally marginalised and excluded, this has further ramifications.

[7] De la Cuesta (1989, p. 229) criticised the different criteria used by different audiences when deciding on the question of bankruptcy. Despite appropriate consultation and a Circular letter emitted by the Solicitor General "the Tribunal have not reached a unified solution regarding this important matter. A situation of such insecurity, a serious attack on the principle of equality and legal security" and required a intervention on behalf of the legislators to clarify prevailing doubts. This has since been rectified through the amendments introduced under OL 5/2010.

[8] On 1 September 2008, Spain (State administration) had 141.9 prisoners per 100 places. The European Median was 95.87.

Amendments introduced to the Spanish Penal Code under Organic Law (OL) 10/1995 of 23 November introduced an article that rewards testimonials or collaboration – a strategy imported from terrorism legislation. This is not a provision directed at the drug dependent who sells small quantities in order to finance their own use. In parallel, the amendment further lengthened pre-existing sentences and criminalised certain states to the degree that the convict could receive a sentence of over 5 years. There has therefore been a progressive move towards further criminalising all aspects of drugs whilst rewarding informants, which is characteristic of legislation that breaches numerous principles of law and fundamental rights.

4. Requirements under International Conventions in matters of narcotics and psychotropic substances

Through a historical analysis of the rise and consolidation of the prohibitionist policy in matters of psychotropic substances and narcotics it becomes evident that it is based on extremely fragile and weak foundations. Given the information available on the matter, we can now confirm that it is an example of *globalised localism*[9] i.e. the United States' reigning puritanical doctrine in matters of drugs at the end of the nineteenth century- became globalised – insofar as the United States held a determining influence in the global arena, especially following WWII and its preponderance at the United Nations, and in the organisations created at its headquarters (Romani 1999; Jelsma 2011, p. 2).

Re-reading the preamble to the Single Convention two clearly dichotomous approaches emerge i.e. medical use in contrast to illicit use, drug addiction. Over the centuries, substances such as cannabis and its derivatives, opiates, coca leaves etc. have been used therapeutically – for medical purposes only to be subsequently heavily restricted unless controlled by the pharmaceutical industry or by determinate medical corporations. Similarly, the different yardsticks used to measure dependency are equally arbitrary. In the case of narcotics, the Convention clearly states that signatories are "conscious of their duty to prevent and combat" drug dependency and purports that this can only be achieved through the use of criminal law (UN 1961). Nonetheless, in order to confront other forms of dependency that are responsible for the death of millions of persons per year e.g. tobacco, alcohol and prescription drugs, substances which are not only legal but also promoted in publicity campaigns and sponsored by public and private institutions, the United Nations has opted to not penalise consumers but rather to prevent, assist and reinsert.[10]

By making reference in the preamble to a concern for mankind's health –physical and mental- from this serious evil, the UN 1961 amalgamates the medical and moralistic discourses which have characterised and conditioned policy in the area of drugs for well over a century. Under an alleged preoccupation for the mental and physical wellbeing of mankind, as well as the political, economic, cultural backlash against the illicit sale of these substances, the foundations of the criminal prohibitionist policy took shape and were crystallised in these Conventions, camouflaging an ethnocentric conception of drugs as a social phenomenon that

[9] Santos (1998, p. 57) defined a globalised localism as the "process through which a local phenomenon gains global popularity or success."

[10] Nonetheless, the Framework Convention on Tobacco Control (FCTC) (2003) was the first treaty negotiated under the auspices of World Health Organisation (WHO) and designed to address the globalization of the the snuff epidemic phenomenon. It is the most endorsed United Nations related agreement and has become a benchmark because it marks a global trend for relying on scientific evidence and recognising the right of consumers. The FCTC is a clear example of good practice and drug policy. It is much more consistent with the ultima ratio principle and the guarantees and inherent rights of states.

sidesteps other cultural realities, lifestyles as well as contrasting political, social, economical perspectives to confront this issue.[11]

The terminology used in the Conventions under discussion e.g. social and economic danger to mankind, physical and moral health, narcotics, illicit use etc. is unscientific and extremely ambiguous. Nevertheless, it has generated its own language which has been introduced and more importantly, reproduced, not only in legislation but also in medical, social and political discourse, and by the dominant sectors that support the prohibitionist policies. It has even influenced the discourse of sectors that favour very distinct policies to the one of the prohibitionists.

The criminalisation of the entire cycle e.g. growth, harvest, production, transportation, sale and use, for which the use of penalties is all the more pre-occupying, is a criminal policy option that is bound to fail. Criminal law does not have the means or tools to adequately deal with such a complex phenomenon. Further, the excessive use of criminal law has negative ramifications, in particular for persons who are socially and personally vulnerable as well as the very guarantees enshrined in criminal law.

Under the argument of efficiency, it can be observed that the International Conventions have decisively brought about important changes in the area of criminal and procedural law in Member States. The virtual criminalisation of all related activity and the ability to hand down a plethora of penalties (custody, fines, confiscation of personal goods, intermediate sanctions...) and, finally the introduction of a new supervised surrender, generates considerable juridical insecurity, which is in complete disaccord with the policy of last resort and criminal law that is guarantees based.

The implementation of the Conventions has led to an internationalisation of conflicts related to the phenomenon. The Conventions on illicit drugs have conditioned and condition the criminal and social policies of many States because they are obliged to unify criteria and introduce legislation that does not take into account the unique realities of the different United Nations' Member States. For this reason, the social phenomenon of drugs has been converted into a fundamental pillar centred on social control – especially formally, in the national stage as well as in the International one. This is in spite of scientific evidence demonstrating the negative effects of the Conventions in many Member States. This is all the more evident in countries plagued with serious trafficking related problems that do not benefit from a strong State and where a political desire to amend historical errors of this type is lacking. That said, even established States must bow to what many perceive to be erroneous policy.

Section 96.1 SC states "international treaties, once officially published, shall be part of the internal legal system." Consequently, International Conventions once ratified by the Spanish State become "internal law in Spain and oblige our country to criminally sanction behaviours" (Luzón Peña 1982, p. 66; Magro Servet 2004; Iñigo, Ruiz de Erenchun 2007). Moreover, according to De la Cuesta (1987, pp. 367-77) "the majority of legislation of a formal rank in Spanish Law are the product of the International Conventions cited." He and Cardona Llorens (1987) believe that Section 96 SC can "be upheld (...) by virtue of that ordained by Section 10.2 of the SC[12], which is an instrument of particular importance in view of the interpretation of the scope of the "right to the protection of health" as recognised under Section

[11] According to David Nelken (2009), ethnocentrism in criminology is particularly dangerousness. It leads to the assumption that what we do, and our way of thinking about crime and responding to it are universally shared, which can lead us to believe that we know what is best for the other and that our reprobation is a universal moral standard.

[12] Section 10.2 of the Spanish Constitution states "Provisions relating to the fundamental rights and liberties recognized by the Constitution shall be construed in conformity with the Universal Declaration of Human Rights and international treaties and agreements thereon ratified by Spain."

43 of the SC."[13] For this reason, he claims "all Spanish legislation (...) must respect and develop its content in light of the International Narcotics Control Board, the institutions responsible internationally for overseeing the application of the Conventions."

In accordance, under Section 91 SC persons and public officials -including legislative power- must submit themselves to the legal framework established in the rules and constitutional principles. For Calvo García (1992, pp. 88-89), if the Constitution is recognised "as the source of law, it has very important consequences" because amongst other things "the precepts and constitutional principles have abolishing powers and consequently, the Constitution the highest juridical order can annul any juridical norm that is in contradiction with itself. That is, constitutional values of an equal basis in the Constitution are not only hierarchically legally superior but also serve as a basis on which the content of the rules themselves were interpreted.

These assertions regarding the SC and in particular, Section 96.1 SC are of particular transcendence. Through the enforcement of the latter, laws are enacted incorporating diverse provisions found within these various International Conventions on narcotics and psychotropic substances. In reaction to European directives but equally applicable in the case of International Conventions, Ferrajoli (1999, p. 115) ascertained "these new sources of legislation, insofar as they prevail or at least, aspire to prevail over laws and on occasion over Constitutions in and of themselves, run the risk of deforming the constitutional structure of the European democracies, creating a vacuum for a new absolute power." At the beginning of the 90s, Bergalli (1992, pp. 15-16) described the acceptance of the diktats of the TREVI group and the *Schengen Accords* as the "ideological submission" of Member States. Illegal immigration, supposed public safety, the illicit sale of drugs, State issues and the protection of personal data are but some of areas that have been directly affected. In his view, "all these emerging questions are being looked at through the eyes of State reason with obvious violations of the actual democratic Rule of Law foreseen in the SC. While the situation is only moderately different in other communitarian Members States (...) in Spain, it has prevented the evident democratisation of civil society reaching its full breadth at a State level."

As previously mentioned, the International Conventions do not reflect present scientific findings. They are characteristic of a prohibitionist policy for certain substances that is based on amongst other things myths and ethnocentric conceptions on the social phenomenon of drugs, and ambiguous and unscientific terminology (Scheerer 2003; Nadelmann 2007). The above has allowed for the criminalisation of almost all aspects related to toxic drugs, narcotics and psychotropic substances and an excessive resort to criminal law to restrict rights and constitutional guarantees whilst obliging signatories to include those principles in their national laws.

The International Agency that oversees the application of International Conventions in this matter, the International Narcotics Control Board, is not renowned for basing its decisions on scientific evidence nor for its defence of Human Rights but rather for "a culture of secrecy and lack of transparency" (Blickman 2008, pp. 33-34). Nonetheless, it disposes of sufficient power to demand that different States adopt practices which may conflict with their principles. The philosophy gathered in the International Conventions under discussion and the legal tools available to oblige signatories to bring their legislation into line with them, becomes a Trojan Horse and function to undermine the prevailing constitutional guarantees of a social and democratic State.

[13] Sections 43.1 and 43.2 of the Spanish Constitution state "The right to health protection is recognized" and "It is incumbent upon the public authorities to organize and watch over public health by means of preventive measures and the necessary benefits and services. The law shall establish the rights and duties of all in this respect."

Different sectors have criticised the present legislation on illicit drugs for not meeting the requirements stipulated in the Constitution on fundamental rights and public liberties, which in theory condition criminal and social policies. In a social and democratic State the competency over social intervention policy (criminal policy, social policies...), can produce tense rapports because there is often disequilibrium between social and criminal policy. However, at this crossroad, the principles, fundamental rights and public liberties recognized in the social and democratic State must prevail and override criminal law.

5. Judicial Approaches to Narcotic Drugs, and Psychotropic and Toxic Substances

Based upon the above information, it can be argued that the International Conventions on narcotics and psychotropic substances have left little margin for the ultima ratio principle. Criminal law becomes the first resort or prima ratio in drug policy and is incorporated as such in the national legislation of signatory states with an adverse effect. They are obliged to internally adopt legislation based upon the Conventions' external demands.

A review of the doctrinal contributions on the legal interests protected by laws against the illegal sale of narcotics can be synthesized as the following: a) health (as stated in the Law on Narcotic Drugs of 8 July 1967 in accordance with the UN 1961); b) freedom (the loss of freedom); fiscal interests (OL 12/1995 of 12 December on Smuggling[14]); moral or social reinsertion (prohibition was at first directed at the "unwholesome social atmosphere" or rather condemned alternative lifestyles that were considered degrading); e) collective safety (trafficking is criminalised because drug use causes social disruption and puts the community at risk); f) various legal assets (violates many norms such as individual health, collective health etc.); g) absence of legal interests (a set of criminal policy questions that led the legislator to criminalise its illicit sale without providing a unique entity as the specific legal element). This led Joshi Jubert (1999, pp. 39-41) to conclude that the legal interests protected are "the public health in the legal sense." That is, "it is a legal concept of public health." Furthermore, it is "the legal protection of legal interests that must respect the principles of fragmentation, meaningless, social adequacy, proportionality and ultima ratio."

Similarly, Bustos (1990, pp. 95-98) noted that "the only singular legal interest that can be encountered in these drug offences is public health." Nonetheless, "if it is actually protecting public health" the justification is contradictory. "(...) no argument justifies the declared purpose (the protection of public health) in criminal law because it does not offer protection to public health from all drugs. Moreover, the illicit drugs identified have not been shown to be the most socially harmful, which is not the case for those that are permitted." Consequently, he proclaimed that "drug use by adults cannot be prohibited (...) [so] if the use cannot be prohibited nor logically can their sale be" (Bustos 1986, pp. 277-178).

Had there been a sincere desire to protect public health, harm reduction programmes would have been introduced much earlier on e.g. the distribution of condoms and sterilised paraphernalia in prisons. Along the same line, Terradillos (1991, p. 9) questioned to what extent criminalization had served to protect legal interests and if not, conversely to serve different purposes such as to define a type of individual, to consolidate extra-judicial strategies of control, to legitimate power, or to absolve itself of responsibility and hide its social policy's shortcomings. If this is the case, why bother considering more effective and alternative measures rather than criminal law?

In response in part to the non-jurisprudential plenary decision of 3 February 2005 and the Supreme Tribunal's jurisprudence, Rodríguez Ramos (2009, p. 1125-1126)

[14] OL 12/1995 was recently amended under OL 6/2011 of 30 June.

concluded that the subject under protection by the legislator is vague given public health is not a real subject. Further these decisions led him to believe that the aims of the legislator were to prevent the spread of dangerous social practices, which may cause the deterioration of the population. Similar conclusions were drawn in an appeal filed by the State prosecutor against a decision handed down by the Bizkaia Provincial Appeal Court. The sale of under 0.4 grams was argued to "be an abstract [*social*] danger." Further, the legal asset public health was concluded to not coincide with the individual's health directly affected by the offence. As such, the latter's legal interests i.e. the consumer are not those being protected but rather those of the former, a vague and abstract concept of public health (Supreme Tribunal Sentence 8295/2005 of 17 June).[15] We therefore may be witnessing a "rethinking or reinventing" of the supposedly protected legal interests and consequently, the criminalisation of certain conducts, which is now more characteristic of a protection of individual assets in combination with harsher sentences (Fernández Pantoja 2008, p. 283-286). The Supreme Tribunal's recognition that the *subject to protect* laid out by the legislator is *particularly vague* is highly significant. Equally so is their recognition that the illicit use of narcotics and/or psychotropic substances is *negative for the indemnity of this legal asset, public health* and therefore *agreed to prohibit it*. The legislative power along with the vagueness of the subject under protection and its particular understanding of determinate forms of use as negative for the indemnity of legal assets whilst not other forms of use, has obstructed the use of the ultima ratio in cases of offences against public health.

6. Turning Tides in Spanish and Basque Legislative Approaches

Up until the enactment of OL 5/2010 of 22 June, all amendments to public health offences and more precisely, to drug legislation could be characterised as increasingly punitive. The amendments introduced under OL 5/2010 to Art. 368 CC are not a panacea but a move in the right direction for this type of offence.[16] Although still based on prohibitionist underpinnings i.e. offences in themselves have not changed and all aspects remain criminal, the sentences have. Custodial sentences for offences against public health have been reduced. The minimum sentence remains three years; however, the maximum of nine years has been reduced to six. Further, tribunals can now reduce the sentence by one grade once having assessed the nature of the facts under question and the personal circumstances of the convict providing the circumstances listed under Art. 369 and Art. 370 CC are absent.

In the preamble of the OL 5/2010, the legislator recognised that adjustments to penalties were introduced in order to bring them into accordance with international law, more specifically *Council Framework Decision 2004/757/JAI* of 25 October 2004 on "constituent elements of criminal acts and penalties in the field of illicit drug trafficking." Decision *2004/757/JAI* stressed the need for proportionate sentences whilst encouraging absention; however, without constraining Member States to do so. Of equal importance, the legislature recognised that the possible sentence reductions introduced to Art. 368 CC was based upon the agreement of the Supreme Tribunal's Second Chamber non-jurisdictional plenary decision of 25 October 2005. Thus, demonstrating the judiciary could succeed in reminding the legislature of their responsibility to uphold the principle of proportionality.

The agents in tribunals responsible for applying the legislation presented are in a paradoxical situation. The public and the media demand that they be harsher with dealers and traffickers; however, this criminal subject contrasts with the actual

[15] Having overturned the Provincial Appeal court's sentence, the convict received a three year custodial sentence and a 10 euro fine.

[16] Many provisions were included in the reform and although it is argued that it is improvement in the area of offences against public health, it has amplified criminalisation and security measures for other types of offences e.g. sex offences and terrorism.

subject on trial. At a state level, on 1 September 1999 10,955 individuals were serving a custodial sentence whose main offence was drug related, representing 32% of the total prison population. Close to ten years later, on 1 September 2008 12,523 individuals found themselves in a comparable position, representing 27.4% of the total prison population (SPACE I 2001, 2010). A change in policy therefore cannot be sizeably observed despite the introduction of suspended sentences in 2003 for custodial sentences of less than 5 years. At a first glance, this data provides little on which to draw any conclusions because it may be demonstrative of better cross-border cooperation, higher crime rates, better surveillance etc.; however, the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA) statistics are more revealing. Based on statistics provided by Spain's Reitox national focal point, there were 372,230 drug related convictions for use related offences and 25,390 for supply related offences. Drug use related offences represented 93.6% of all convictions (EMCDDA 2011*a*).[17] Once again, this does not provide sufficient information on which to make any binding conclusions; however, it is most certainly not indicative of a change in policy and most certainly not of ultima ratio in the area of drug offences.

Past and present prohibitionist drug policy has been criticised since its introduction and demands that drug policy be based on scientific evidence and not moral and/or economic interests have existed for a comparable amount of time. Further, as human rights and harm reduction strategies gain legitimacy and ground, it is hoped that the social reintegration of the socially vulnerable and their participation in civil society will do so as well. Concrete proposals to regulate this area have been presented since the mid-eighties but none have yet to come to bear (Muñoz Sánchez 2007; Arana 2005). The majority of these opt for decriminalisation and or/normalizing drug policy in which social policies, prevention, education and the principle of minimum intervention are prioritised.

6.1. Democratic and Legitimate Resistance in the Basque Autonomous Community

As earlier stated, *Council Framework Decision 2004/757/JAI* does not require Member States to penalise drug use. The aforementioned amendments to Spanish Criminal Code are recent and therefore it is too early to tell if they will allow for a resurrection or rather the respect and compliance with the ultima ratio principle. Nonetheless, since the enactment of the 1995 CC, the BAC has legislatively enacted parallel legislation and erected policy which is gradually allowing for the principles of proportionality and ultima ratio to be restored in this area; however, this did not occur overnight.

Certain minor changes in sentencing practices at the Gipuzkoa's Provincial Court between 1981 and 1990 can be observed in drug related cases (Arana 2012). Of those tried in 1981, close to a quarter were absolved (25.3%). Nine years later, 29.6% of those tried were absolved. In many of these cases, the case was discharged because the Court concluded that there was not sufficient evidence or that the amount in possession was demonstrative of a personal use and not illicit sale (Arana 1996, p. 208). This in spite of a series of amendments introduced to the Criminal Code during this period in matters of illicit substances. Further, in over a half of cases (55.9%), the convicted received a 'short sentence' (Arana 1996, p. 209).[18] Nonetheless, the acquittal of over a quarter of those who had been refused bail is demonstrative of an abusive use and a reliance on criminal law and preventative detention when offences against public health are involved i.e. "prison without conviction" (Andrés Ibáñez 1996, p. 13). This is in clear contradiction with

[17] Of these, 323,416 (81.3%) were for cannabis, 52,153 (13.1%) for cocaine and 11,091 (2.8%) for heroin (EMCDDA 2011*b*).
[18] 25.7% of the convicted received a custodial sentence of one to two months minus one day and 30.2% received a custodial sentence of 6 months to 2 years and four months minus one day.

a guarantor Criminal Law in a social and democratic State of Law. It is fair to conclude that during this period that neither the principle of proportionality or ultima ratio were upheld.

Conversely, in 2008 1,908 offenders in the BAC were diverted from custody. The overwhelming majority of these were for drug-related offending with a total of 1,316 receiving an alternative penalty. Of these, 1,261 received a suspended sentence, 53 a security measure and 2 a community work order (Servicio a la asistencia a la reinserción 2008). The overwhelming majority of suspended sentences for drug related offending by drug dependents were handed down in Bizkaia, 1,018. This is indicative of changes at all of the stages earlier previously mentioned in the criminalisation process. First, legislation has been enacted allowing for alternative sentences to become a legal alternative. Second, judges and prosecutors consider them a legitimate alternative and are applying them. Finally, community corrections have been put in place in order to allow for them to be put into practice and enforced.

At present, the Basque Autonomous Community is drafting a bill on the Law of Addictions, which includes a section dedicated to the rights of drug consumers of legally registered not-for-profit associations – Cannabis Social Clubs. Members are adults who choose to consume cannabis and who can access the substance and/or its derivatives without taking recourse in the illicit market. It is an alternative means of bringing the associations and its members into legality and is argued that this is a step towards the restitution of ultima ratio and the minimisation of state intervention.

7. Conclusion

There are therefore patent examples demonstrating how International and Communitarian Law and Conventions have shaped and condition national and regional legislation in matters on drugs. Further, how these oblige Member States such as Spain to import legislation that does not account for local needs and practices, and can have detrimental effects on not only the rights of the user and the legally protected assets but also to basic principles of law and the ultima ratio principle.

The vast majority of those penalised under existing drug legislation are for consumption related conducts. Rights and freedoms in the State of Law in a social and democratic State should not be conditioned by International Conventions on narcotic and psychotropic substances. The range of penalties (criminal and administrative) should never be the prima ratio but rather the exception and secondary to other policies e.g. prevention, education, health etc.

Nonetheless, small but important steps are being taken at a local level to counter-balance these and it is hoped that that they will ensure and allow for a more progressive turning of the tides. The Framework Convention on Tobacco Control demonstrated that drug policy can be more consistent with the ultima ratio principle and inherent rights and guarantees. The Basque Autonomous Community's Law on Addictions may help to regulate the cultivation and consumption of cannabis and its derivatives, and is in line with the ultima ratio principle. That is, a change that prioritises necessity and rights as a prima ratio and the use of criminal law as the ultima ratio for drug-related conducts.

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