DROIT POLONAIS CONTEMPORAIN
POLISH CONTEMPORARY LAW
1998 №1-4 (117-120)
PL ISSN 0070-7325

THE CRIMINAL LAW ISSUES OF THE NEW POLISH LAW COUNTERACTIVE OF DRUG ABUSE*

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The drafting of the new law on narcotic drugs and psychotropic substances, which was expected to replace the previous law of 1985 on drug abuse prevention, was a time-consuming process. The first suggestions of amending it were lodged with the State agencies as early as 1992, and were motivated by the post-1989 changes in the use and illegal traffic in narcotics. Those changes rendered the numerous solutions of the 1985 law inadequate to the new situation.[1] The legislative activities became more intense on the occasion of ratifying the United Nations Convention against illicit traffic in narcotic drugs and psychotropic substances. The ratification made it necessary to adapt Polish domestic law to that of the Convention. At first, it was not clear, however, whether the adapting should be implemented through amending the 1985 law or through creating a new one. Those doubts were reflected in the two-lane approach that, starting with the autumn of 1994 was adopted in preliminary legislative activities. The Ministry of Justice prepared a draft of the amendment, while the Ministry of Health and Social Welfare - a totally new law. Eventually, it was the second of the two solutions that proved successful. Indeed, the concept of the Ministry of Health and Social Welfare laid the foundations for the governmental draft law which, according to the routine of the law-making process, was presented to the Speaker's staff on 3 July 1995.[2] On 24 April 1997, the legislative work ended with the adoption by the Seym (the lower House of the Polish Parliament) of the Law Counteractive of Drug Abuse. This law, approved by the Senate and signed by the President, came into force on 15 October 1997.[3]

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* This is a slightly changed version of an article which appeared originally in Polish [in:] *Państwo i Prawo* 1998, no. 4.

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[1] Cf. K r a j e w s k i: "W kwestii kryminalizacji posiadania środków odurzających i psychotropowych" [On the Question of Criminalizing the Possession of Narcotic Drugs and Psychotropic Substances], *Państwo i Prawo* 1992, no. 2, p. 49-57.

[2] See *Sejm RP II kadencji, druk 1131* [The Seym of the Republic of Poland, Second Term, Print no. 1131]. Earlier, in November 1994, a group of deputies filed a draft amendment of the 1985 law. See *Sejm RP II kadencji, druk 816* [The Seym of the Republic of Poland, Second Term, Print 816]. The first reading of both drafts was held on 28 September 1995. See *Diariusz Sejmowy, 61 posiedzenie Sejmu RP II kadencji* [Seym Diary, 61 Session of the Seym of the Republic of Poland, Second Term], p. 57-88. In the course of further legislative activities in the subcommission (which was an agency of the Commission of Health), formed to deliberate on the deputies' and governmental projects of a law on drug abuse prevention, both projects were reviewed jointly. The Subcommission concluded its work principally on 17 October 1996.

[3] *Dziennik Ustaw (Dz. U.)* [Journal of Laws] 1997, no. 75, item 468.

The present contribution is concerned, above all, with the penal issues of this law. Since, however, most of its provisions are of an administrative law nature, a few remarks must be made about them, the more so that those provisions are not indifferent for the problems of criminal responsibility for offences defined in the discussed Act.

The first thing that attracts one's attention is the change of the title of the law compared to its 1985 predecessor. While the 1985 law mentioned "drug abuse prevention", the new law is "counteractive of drug abuse". This new approach results, *inter alia*, from the thesis that the preventive and therapeutic model of an approach toward the drug problem, characteristic of the previous law, is out-dated and has to be replaced by more repressive solutions. This line was even reflected in the suggestions that the new law should be called the law "against drug abuse". The legislators were right to reject this idea. In view of the fact that the new law understands drug abuse as "a regular or periodical use of narcotic drugs or psychotropic substances, or their substitutes, for non-medical purposes" (Art. 6, item 5), the use of the term "against" might suggest that the emphasis is placed, above all, on the repression of those persons who use such drugs, substances or substitutes, i.e. drug addicts and other consumers. However, if one can consent to the repression of those who are involved in the illicit traffic in narcotic drugs and psychotropic substances (i.e. their production, smuggling, traffic, etc., in other words: who secure their supply), and even agree that the previous Polish legislation was insufficiently determined while dealing with such offenders, then one should admit that the approach toward the consumers (those who represent the demand) should continue to be preventive and therapeutic.[4] If it were necessary to include the phrase "against" into the law, then the title of law should resemble that of the aforementioned U.N. Convention: the law against the illicit traffic in narcotic drugs and psychotropic substances. When we consider, however, that Polish law, unlike most laws of this type in western countries, lays considerable emphasis on the questions of prevention and treatment, a title containing the term "against" might be found inadequate. Generally speaking, the compromise in the matter of the title seems to be reasonable.

As far as legislative definitions are concerned (Art. 6.), it is characteristic that the technique applied by the previous law in defining narcotic drugs and psychotropic substances (sect. 2 and 3) has been preserved; this technique is also applied by the U.N. Conventions of 1961 and 1971. It consists in the definitions being composed of essential (substances of natural or synthetic derivations affecting the central nervous system) and formal components (substances included in a special schedule). The same technique was applied while defining the new, earlier unknown, notion of "precursor", i.e. a substance which may be processed into a narcotic drug or psychotropic substance, or may serve their production, and is placed in the schedule of precursors (sect. 1). At this point, the legislator introduced a significant modification. In the previous law, the respective schedules were included into the appendix to the Ordinance of the Ministry of

[4] More details on the legal models of drug policies may be found in K. K r a j e w s k i: "Prawo karne wobec środków odurzających i psychotropowych. Z problematyki teorii kryminalizacji" [Illegal Drugs and Criminal Law. Some Problems of the Theory of Criminalization], *Archiwum Kryminologii* 1995, vol. 21, p. 41-79 and the bibliography quoted therein.

Health and Social Welfare, issued within the delegated legislation.[5] In the present law, the schedules became appendices to the law itself. This solution is by all means correct. The point is that the notions: "narcotic drug", "psychotropic substance" or "precursor" make up the statutory constitutive elements of all the offences defined in chapter 6 of the law. A situation when the aforementioned schedules, without which it is impossible to establish whether the given substance is a narcotic drug, psychotropic substance or precursor, was contained in the appendices to the Ordinance, provided for the possibility of raising an objection that the statutory definition of the forbidden act was, in fact, transferred to the level of a Ministerial Ordinance, something very questionable from the point of view of the rule *nullum crimen sine lege.* In this context, it is also worth noting that the new law resigned from forming the analogous schedule of substitutes and, while defining the latter, limited itself (sect. 4) exclusively to the "substantial" component (the substance which is a poison or harmful, and which is used instead or for the same non-medical purpose as a narcotic drug or psychotropic substance). This approach makes the statutory definition of this notion more elastic (since many substances may be used as substitutes). Nonetheless, such an approach is irrelevant from the point of view of criminal law issues, because the notion of the substitute is not to be found in the law in question as a constitutive element of a forbidden act.

Chapter 3 of the discussed law deals with methods of approach applied toward the drug addicts. In this respect, the law introduced an essential novelty, laying the legal foundations for so-called maintenance treatment (Art. 15), whose details are to be regulated by the Ordinance of the Ministry of Health and Social Welfare.[6] This form of treatment has been applied in Poland for a few years now, but the legal status of the treatment was not clear. The point is that Art. 6 sect. 10 of the law provides that the maintenance treatment is tantamount to "applying narcotic drugs or psychotropic substances while implementing the programme of the treatment of drug addiction". Formally speaking, the application of such drugs or substances may constitute a criminal offence defined in Art. 45 of the Law Counteractive of Drug Abuse in the sense of supplying another person with a narcotic drug or psychotropic substance. Art. 15 of the law in question creates, therefore, the legal defence or, according to Polish legal terminology, the so-called "counter-type", i.e. the circumstance making an otherwise criminal act legal.

When viewed in terms of the regulations of the discussed law, the admissibility of other forms of harm reduction also cannot be called to question by criminal law. This refers, for instance, to the programmes of distributing among the drug addicts sterile syringes and needles as well as their exchange. Such a method is considered to be essential in preventing the spread of the HIV virus among drug addicts. In the legal systems of many European states this question gave, and still gives, rise to a considerable problems,

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[5] See the Ordinance of the Ministry of Health and Social Welfare of 21 September 1985 on narcotic drugs and psychotropic substances and the control over them, *Dz.U.* no. 53 (1985), item 275.

[6] Until 31 December 1997 none of the 8 implementing ordinances foreseen by the discussed law were issued. In Art. 61, this law provides, however, that until 15 October 1998 the implementing Ordinances issued on the basis of the delegation arising from the 1985 law remain in force unless they contradict the new law.

because such preventive activities may constitute criminal offences of facilitating drug use.[7] However, pursuant to Art. 46 of the discussed law, offering such facilities to persons indulging in narcotic drugs (as opposed to supplying those drugs or inciting their use) is punishable only when the perpetrator acts in order to obtain material profit or personal gain. This means that the penal liability of those who work within the framework of the discussed programmes is not considered. The same concerns the so-called injection rooms, i.e. premises organised under the supervision of medical staff and volunteers, where the drug addicts may give themselves injections of their own narcotic drugs in hygienic conditions; they also usually receive help and counselling.[8]

The new law did not introduce any changes in relation to the admissibility of applying compulsory treatment. In Art. 13, the law provides for the principle that submitting oneself to treatment, rehabilitation and réadaptation is voluntary. The new law adds, moreover, (Art. 14, sect. 7) that such treatment is free of charge if rendered by a public health service institution. Nor did the law change the previously existing exception to the rule of the voluntary character of treatment; namely, in Art. 17 (Art. 25 in the 1985 law) the present law permits compulsory treatment and rehabilitation when decided by a juvenile court *vis-a-vis* a minor drug addict.[9]

In turn, Chapter 4 on "Precursors, narcotic drugs and psychotropic substances" introduced significant changes. This chapter is considerably larger than the analogous chapter (chapter 3) in the 1985 law, due to its extension by provisions referring to the classification and control of legal turnover in narcotic drugs and psychotropic substances, questions previously dealt with in the already mentioned 1985 Ordinance of the Ministry of Health and Social Welfare. Likewise, the discussed chapter was expanded by new provisions controlling the turnover in precursors - the fulfilment of obligations under Art. 12 of the Vienna Convention of 1988.

Art. 22 preserved the principle that narcotic drugs and psychotropic substances as well as precursors possessed without licence are subject to confiscation. On the other hand, the new law introduced considerable innovations with respect to Art. 13 sect. 4 of the 1985 law. The point is that the 1985 law provided that the above mentioned drugs,

[7] This problem existed for a long time, for instance, in Germany, where it was the subject of numerous legal disputes until the German law on narcotic drugs was modified by the introduction of an express provision confirming that such activities do not constitute offences. Programmes of needle and syringe exchange are prohibited in the USA. and Sweden. On the other hand, they function in Austria, Denmark, France, Germany, the Netherlands, Italy, Switzerland and the United Kingdom. See H.-H. K ö r n e r: *Betäubungsmittelgesetz. Arzneimittelgesetz. Beck'sehe Kurzkommentare*, Munich 1994, p. 572-557.

[8] The purpose of such initiatives, apart from the fact that they prevent the spread of the HIV virus, is also prevention of overdosing and other negative health consequences arising from the illicit consumption occurring in subcultural circumstances. Those initiatives have another objective consisting in rendering quick medical assistance in cases of an overdose or other complications. The latter may appear when one considers the fact that the discussed premises function also as dormitories, baths and stations rendering any assistance and counselling needed. Such premises function, for instance, in numerous German and other European cities. Their existence, although usually tolerated by the authorities, is, however, sometimes fairly controversial from the legal point of view, and the controversy may arise on the basis of the facilitation of drugs by providing addicts with this kind of premises. Cf. H.-H. K ö r n e r: *op. cit.*, p. 583-588.

[9] See H. H a a k: *Prawo karne wobec narkomanów* [Criminal Law and the Drug Addicts], Warszawa-Poznan 1993.

substances and precursors were *ipso iure* subject to confiscation or seizure in favour of the State Treasury, with the application of executive proceedings in administrative law. This was due to the fact that under the regime of the previous law, the possession of narcotic drugs and psychotropic substances did not constitute a criminal offence. In such circumstances, when the possessor could be accused of nothing but possession itself, the confiscation of drugs or psychotropic substances could be implemented only outside criminal proceedings. The situation changed only when the possession of the drugs and substances in question was criminalised pursuant to Art. 48 of the new law. In accordance with Art. 22 sect. 2 of the discussed law, provisions relating to executive proceedings in administration are applicable only in order to seize and secure drugs and substances possessed without a required licence. However, it is the court which decides about their confiscation during criminal proceedings. This means that while convicting the perpetrator for offences provided for in Art. 40-50 of the discussed law, it is mandatory for the court, pursuant to Art. 55 sect. 1 and 2 of this law, to pronounce the confiscation of the secured narcotic drugs, psychotropic substances or precursors.[10] [11] Since the new penal codifications came into force,[11] this duty to pronounce confiscation refers also to cases of conditional discontinuance of proceedings, irrespective of whether the latter is pronounced on the basis of general principles or those laid down in Art. 57 of the discussed law. This results from the fact that, in accordance with Art. 66 § 1 of the new Criminal Code, the conditional discontinuance of proceedings will be applied exclusively by courts, and not by public prosecutors, as was the case under the 1969 Code of Criminal Procedure. In those cases, however, when absolute (as opposed to conditional) discontinuance of criminal proceedings is at stake, the public prosecutor, in view of the content of Art. 55, sect. 2 of the discussed law, will have to turn to the court with a request that such confiscation be pronounced.

A separate situation will come to being when criminal proceedings have not been instituted in the given case. This situation becomes significant with respect to the purview of Art. 48 sect. 4 of the discussed law. This Article provides that the possession of narcotic drugs or psychotropic substances for one's own use, and in small quantity, defines circumstances that exclude punishability. In such a situation, therefore, the proceedings are not instituted and, in case they had been instituted, they are to be discontinued. In those cases, which in practice may be fairly frequent, Art. 22 sect. 4 of the law in question assigns the Voivodeship Pharmaceutical Inspector the competence to pronounce the confiscation of narcotic drugs or psychotropic substances pursuant to the provisions on executive proceedings in administration. This means that public prosecutors would have to lodge suitable requests with the aforementioned Inspectors. Unfortunately, there is no doubt that Art. 22 sect. 4 of the discussed law is unconstitutional,

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[10] In case of the perpetrator being convicted for offences provided for in Articles 40-47 and 49-50 of the discussed law, the obligation of the court is broader and extends not only to the forfeiture of the object of the offence (in practice, this is most frequently the narcotic drug, psychotropic substance or precursor), but also of the objects and tools that served or were designed to serve the commission of the offence.

[11] The new criminal code, code of criminal procedure and execution of punishments code passed by the Seym on 6 June 1997 entered into force on 1 September 1998.

since according to Art. 46 of the Constitution of the Republic of Poland confiscation may be pronounced exclusively by courts.

As far as penal provisions in the discussed law are concerned, it may be said that the scope of penalisation was significantly extended while showing restraint in lavishing penalties. This approach deserves some approval, since it contradicts the long-lasting tendency observed in many countries to develop an absurdly sharp punitive policy *vis-à-vis* narcotic-related offences.[12] In the discussed law, the only symptom of sharpening repressions is the introduction of a new felony[13] that consists in: supplying a minor with narcotic drug, facilitating a minor's use of a narcotic drug or inducing him to use this drug or substance, if committed for the purpose of obtaining material profit or personal gain (Art. 46, sect. 2).[14] In turn, Art. 45 sect. 1, treating the plain (i.e. without any involvement of the perspective of material profit or personal gain) supply of the narcotic drug or psychotropic substance, or inducing another person to indulge in it, as an offence, lowered the maximum statutory penalty to be imposed on the perpetrator from 3 years of deprivation of liberty (as foreseen by Art. 31 of 1985 law) to 2 years of deprivation of liberty, 2 years of limitation of liberty, or a fine. The remaining sanctions, to which perpetrators are liable according to the new law, do not differ from those provided for in the 1985 law.

However, when juxtaposed, some sanctions of the discussed law may give rise to certain doubts. This refers particularly to a discord between the sanctions provided for by Art. 40 (illicit manufacture of narcotic drugs or psychotropic substances) and those provided for by Art. 42 (illicit import, export, and transport). As a result, the illicit manufacture of a considerable quantity of narcotic drugs is a misdemeanour carrying a penalty up to 5 years of deprivation of liberty (Art. 40, sect. 2), while the smuggling of the same amount of narcotics is tantamount to a felony threatened by the penalty of deprivation of liberty for a term of no less than 3 years (Art. 42. Sect. 3). Is a laboratory, which manufactures narcotics, really so much less harmful than smuggling them? In fact, the abstract threat to the legal value protected by those provisions, which is nothing else but public health, and thus, consequently, the proportion of social harm arising from both offences,

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[12] In Polish circumstances, a particularly drastic example of this tendency was the project of amendments to the 1985 law, drafted in 1994 by the Polish Psychiatric Society. Apart from its embarrassingly low legislative standard, the project distinguished itself by proposing that almost all offences defined in it constitute felonies.

[13] It is very difficult to find proper English equivalents for the Polish categorisation of the acts prohibited by the criminal law, namely "zbrodnie", "występki" and "wykroczenia". This translation is made even more difficult since, technically, only two first categories constitute criminal offences *sensu stricto.* The third category constitutes a separate type of prohibited petty acts regulated not in the criminal code, but in separate law. In translating those Polish categories this article follows the terminology adopted by S. W a l t o ś, M. A b r a h a m o w i c z and H. H o r b a c z e w s k i in their translation of the Polish Code of Criminal Procedure of 1969 (see S. W a l t o ś (ed.): *Code of Criminal Procedure of the Polish People's Republic,* Warszawa 1979), i.e. felony, misdemeanour and transgression. Although this approach may be controversial from the point of view of the meaning of those notions in Anglo-American legal tradition, its justification provided by the mentioned authors (see p. 73) seems to be quite convincing.

[14] As a result, the new law provides for two felonies. The second consists in the importation, exportation or transportation of narcotic drugs and psychotropic substances in considerable quantities (Art. 42 sect. 3), this offence being classified as felony already in the 1985 law (Art. 29 sect. 3).

is almost the same. One may also ask why the felony defined in Art. 42 sect. 3 (aggravated form of smuggling) is threatened by a cumulative fine, while the felony provided for in Art. 46 sect. 2 (supplying a minor with narcotics for the purpose of obtaining material profit) is not. This solution is not very consistent, since in both cases the intent of obtaining material profit belongs to the constitutive elements of the offence.

The extension of the scope of penalisation[15] in the new law consists, above all, in the introduction of a provision that criminalises the possession of narcotic drugs or psychotropic substances (Art. 48). In Art. 44, the discussed law criminalises also preparations for the commission of offences consisting in the illicit import, export or transport of narcotic drugs or psychotropic substances (Art. 42), or in their illicit introduction into drug traffic (Art. 43).[16] Similarly, this law introduced the penalisation of certain activities bound with traffic in precursors (Art. 52 and 53). Such activities were, however, classified as transgressions.[17] In addition, in some cases, the extension of criminalisation was achieved by a change of the wording applied in the provisions. For instance, on the basis of Art. 43, not only the introduction of substances listed therein into drug traffic (penalised already by Art. 30 of the 1985 law), but also any sort of participation in such traffic is penalised.

Most of the provisions that criminalise respective activities, whose object are narcotic drugs or psychotropic substances (manufacture, importation, exportation, transportation, introduction into traffic, supply, supply in order to obtain material profit, possession, etc.) are composed of basic, aggravated and mitigated forms of offences. The mitigated offence is always defined as a case of minor importance. The constitutive element of an aggravated type is, in turn, a considerable quantity of a narcotic drug or psychotropic substance, this element being found in most provisions. In addition, in Art. 45 sect. 2, and in Art. 46 sect. 2 supplying a minor with a narcotic drug or psychotropic substance is also tantamount to an element qualifying for an aggravated offence. The adoption of a legislative technique that amounts to multiplying mitigated and aggravated forms of offences doubtless makes the penal segment of the discussed law fairly complicated and unclear. This, however, is a sin committed by all laws on narcotic drugs all over the world, creating a jungle of aggravated and mitigated offences, or aggravating and mitigating circumstances, sometimes formulated in an extremely casuistic way. All this is formative for confusion difficult to disentangle, and provides for numerous problems in practice. The frequent use of evaluating features in cases of thus formulated types is responsible for an additional difficulty. It is also worth noting that the phrase “for the purpose of obtaining material profit or personal gain” (Art. 40

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[15] All the cases of new penalisation fulfil obligations arising from the ratifying of the Vienna Convention of 1988.

[16] It is essential, however, that punishability of the preparation refers exclusively to the basic and aggravated, and not to the privileged forms of those offences. This is important for at least one reason: privileged forms, in the shape of a case of minor importance, will, in practice, refer most frequently to the prohibited acts committed by the drug addicts.

[17] Illicit cultivation of the low-morphine poppy and the fibrous hemp plant (Art. 51) was also penalised as only a transgression. As a result, the discussed law contains three types of transgressions. The previous law did not provide for any transgressions at all.

sect. 2, Art. 42 sect 3, Art. 46 sect. 1) is used in the new law as an element qualifying the act as an aggravated offence. Yet the way the legislator uses this element demonstrates a manifest logical error, which existed already in the previous law. The point is that while turning every, however slight, material profit, and every personal gain, into an element classifying the given act as aggravated offence, the legislator renders the basic forms of offences to be practically empty categories! While reviewing all the acts referred to in the above quoted provisions, one would hardly find any in which obtaining material profit or, above all, personal gain, would not be the motive of the perpetrator's activity. Hence the feature of the aggravated offence should be limited merely to the phrase: "considerable material profit" while the qualification: "personal gain" should be eliminated.[18]

When compared with the 1985 version, the major novelty of the present law is the introduction (in Art. 48) of the criminalization of the possession of narcotic drugs or psychotropic substances. In recent years, this question was subject to numerous controversies, because the scope within which the possession of narcotics is criminalised is, to a large extent, determinative of the model of the drug policy adopted by the legislator. The acceptance of a broad scope of criminalisation, including cases of "minor possession", tantamount to possessing small quantities of narcotics for one's own use, most frequently means the adoption of a restrictive and repressive model. On the other hand, the décriminalisation of such "minor possession" is equivalent to adopting the permissive and therapeutic model, which gives priority to prevention and therapy and not criminal sanctions as measures applicable towards those addicted to narcotics.[19] Apart from the controversy relating to the role of criminal law in drug policies, another question raised during the discussion held in recent years was the scope of obligations under the Vienna Convention of 1988, especially under Art. 3 sec. 2.[20] The presently discussed law dealt with the obligations in question in a compromise manner. The legislator tried to reconcile requirements arising from international obligations with his intention to preserve a permissive and therapeutic approach toward the drug addicts. This was conducive to a policy of criminalising activities concerning the supply side of the drug problem, and combining them with a partial décriminalisation (or strictly speaking: non-punishablity) of drug consumption or demand.

Thus Art. 48 of the discussed law, which reflects the above tendencies, provides for four forms of possessing narcotic drugs or psychotropic substances. They include a basic offence (sect. 1), followed by a case of minor importance (sect. 2), an aggravated of-

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[18] In the course of the legislative process the motion to this end was tabled by deputy A. Gaberle. However, it was not taken into consideration.

[19] On the essence of this dispute in Poland see K. K r a j e w s k i: *Prawo karne wobec..., op. cit.,* as well as his: "Czy i jak dokonać w ustawodawstwie polskim kryminalizacji posiadania środków odurzających i psychotropowych - wokół seminarium Grupy Pompidou" [Should the Possession of Narcotic Drugs and Psychotropic Substances be Criminalized in Polish Law and How to Reach this End - on a Seminar of the Pompidou Group], *Przegląd Sądowy* 1994, no. 9, p. 44-58 and the bibliography quoted therein.

[20] See K. K r a j e w s k i: "Problematyka kryminalizacji posiadania środków odurzających i psychotropowych w świetle regulacji prawnomiędzynarodowych" [The Question of Criminalizing the Possession of Narcotic Drugs and Psychotropic Substances from the International Law Perspective], *Państwo i Prawo* 1997, no. 1, p. 58-69.

fence qualified by the element of possessing a considerable quantity of the drug (sect. 3); last but not least, the law provides that the offender possessing even a small quantity of narcotic drugs or psychotropic substances for his own use is not liable to penalty (sect. 4). This means that full depenalisation of "minor possession" was not introduced in the discussed law. All forms of narcotic possession constitute criminal offences, and "minor possession" constitutes a circumstance excluding only the punishability but not the criminality of an act.[21] From the point of view of criminal proceedings this means that pursuant to Art. 11 sect. 2 of the Code of Criminal Procedure of 1969 (which is Art. 17 § 1 item 4 of the new Code) criminal proceedings shall not be instituted in cases of "minor possession". This means that the decision about the refusal to institute the proceedings is to be issued, and if the proceedings has already been instituted, it is to be discontinued. This manner of dealing with "minor possession" of narcotics by those addicted to them or their occasional consumers is expected to prevent those groups from being driven underground by incessant "hunting" conducted by law enforcement agencies. It is believed that the adoption of a "hunting" attitude most frequently impedes any contact with those groups and an eventual preventive or therapeutic approach by social and medical services.

Though the above outlined solution generally deserves approval, it gives rise to certain reservations and doubts as regards details. The point is that the final formulation of Art. 48 sect. 4 differs considerably from the version of this Article approved by the report of the Subcommision which worked on it, and which was far better than the wording finally adopted in the law. The Subcommission's draft did not use the phrases "small quantity" and "for his own use" but simply adopted so-called "border quantities", i.e. maximum quantities of possessed drugs that justify the unpunishablity of the perpetrator.[22] True, such a solution may seem excessively rigid. This probably was the argument which, eventually, led to the final introduction of evaluating elements, whose role was to provide for more elasticity in solving specific cases of possession of small quantities of narcotics. Yet, as is always the case with legislation relating to narcotics,

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[21] Hence, this solution seems to comply with the requirements of the Vienna Convention of 1988. More details on this may be found in K. K r a j e w s k i: *Problemy kryminalizaeji..., op. cit.*

[22] See "Sprawozdanie podkomisji o poselskim projekcie ustawy o zapobieganiu narkomanii i rządowym projekcie ustawy o zapobieganiu narkomanii i zwalczaniu nielegalnego obrotu środkami odurzającymi i substancjami psychotropowymi" [The Subcommission Report on the Deputies' and Governmental Projects of a Law on the Prevention of Drug Abuse and Against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances], *Sejm RP, II kadencja, druk 1131* [The Seym of the Polish Republic, Second Term, print no. 1131], Art. 49 sect. 4. The mentioned "border quantities" were laid down in the appendix to the draft of the law and amounted to: 5 g of "Polish heroin" or "kompot", 10 g of marijuana, 3 g of hashish, 0,25 g of amphetamine, 0,1 g of meta-amphetamine, and 0,2 *g of* MDM. The schedule did not provide for "border quantities" with respect to all narcotic drugs and psychotropic substances, and, above all, to those as essential as morphine, heroin or cocaine. This was the weak point of the schedule. Those responsible for its drafting argued, however, that it exhausted the list of drugs and substances at the moment of significance on the Polish consumer market. One has to admit, however, that in order to avoid future problems and the necessity, for instance, to quickly supplement the schedule (which would amount to using full parliamentary procedure), the schedule should have to be extended. On the other hand, this was not an easy task to perform on account of differences of opinion among experts relating to those quantities and criteria of their establishment. In this situation, the compromise on the abridged list could be regarded a considerable success.

such legislation demonstrates neither good nor bad solutions, but only more or less unsatisfactory ones. Unfortunately, for a variety of reasons, the solution finally adopted in the discussed law seems to be worse than that suggested by the Subcommission and, significantly, more troublesome in practical application.

Criminal law must frequently resort to various arbitrarily defined bounds. The so-called "insobriety limit" may serve as a classical example. A statutory definition of the "border quantities" that justify the use of Art. 48 sect. 4, although to all appearances non-flexible, would have, above all, the advantage of sharply differentiating between punishable and non-punishable activities. Thus, the decision on this problem should not be left with the law enforcement and prosecuting agencies. Simultaneously, this would provide the latter with a clear suggestion about the boundaries set for their intervention. If the quantity of the seized and secured narcotic drug or psychotropic substance were below the limit (weighing the drug or substance being sufficient to establish this), then the agencies might without further involvement refuse to institute the proceedings. Unfortunately, the solution accepted in the discussed law will burden the police and the public prosecutors with much additional work, often deprived of any sense sincę its only aim would be to find grounds for the refusal to institute the proceedings. In each case, it will be necessary to estimate whether the given quantity is in fact small, and whether it is designed only for the suspect's own use. The need to arrive at this kind of estimation may lead to the unnecessary drawing of addicts and other consumers into the orbit of criminal investigation. It is also worthwhile to note that the small quantity of a drug or substance is practically the most frequent circumstance pointing to this drug or substance being designed for someone's own use. In practice, the possibility of proving the aim of the possession of the drug or substance by circumstances other than their quantity, is fairly rare and accounts for the small role played by the element: "for one's own use".

All this means that in practice there will have to function, sooner or later and in a less or more formal way, some border quantities that unfortunately were left unspecified by the law. Similarly, it may be assumed that, contrary to what might be expected, judicial decisions will play only a marginal role in this respect. The simplest solution to be applied would be the formulation of the Supreme Court's guidelines for the lower courts relating to this problem. However, from 1990 on, this solution is not applicable.[23] One may also hardly suppose that the regular appelate decisions of the Supreme Court or the Appellate Courts would play a significant role. In fact, one may assume that in this sort of cases appeals will be filed relatively rarely, and that they will reach the Supreme Court or Appellate Courts only in exceptional cases.[24] What will be left,

[23] Since 1990, Polish law does not provide for the right of the Supreme Court to issue any guidelines for the lower courts, since earlier the former were often abused to encroach on judicial independence.

[24] Under the current law, regular appeals ("apelacja") of the decisions of district courts are heard by the appellate chambers of the Voivodeship Courts (there are 49 of them). Appellate Courts (14) hear only appeals brought against the decisions of the voivodeship courts acting as a court of first instance. As a third instance the Supreme Court hears only extraordinary appeals ("kasacja") of the decisions of other courts. Only the decisions of the Supreme Court and Appellate Courts are published, and exert influence on the decisions of the courts of the

therefore, are case-by-case decisions of the lower courts which, however, may be quite discordant. This situation may be responsible for the fact that solutions applied in practice vary considerably. But even if the courts were to arrive at a certain standardisation of their decisions, this target could be reached only after a few years practice. In the meantime, the public prosecutors and the district courts will have to cope with the problem themselves. This may lead to a series of remarkable problems in view of their lack of experience in narcotic cases.[25] In practice, some sort of guidelines, along which one may proceed, will have to appear, first of all in prosecutorial practice. However, they will comprise the internal rules of prosecuting agencies instead of those that might emerge from criteria clearly established in the law.

In the new law, the question of border quantities has a wider aspect, which in practice may lead to still larger difficulties. The point is that the discussed law, apart from the small quantity element contained in Art. 48 sect. 4, uses in its numerous provisions (Art. 40 sect. 2, 42 sect. 3, 43 sect. 3, 45 sect. 2) the considerable quantity element which, as has been mentioned, is the constitutive element of aggravated offences. At first glance, one may say that in Polish legislation we deal with three legally relevant quantities of narcotic drugs or psychotropic substances, known to many other legislations. They include: small quantity, "average" quantity (which is not referred to by this name in the law, but functions *de facto* as the constitutive element of the basic offences) and considerable quantity. This would also mean that designing the notions of small and considerable quantities (irrespective of the way in which this goal is reached) automatically leads to the designation of "average" quantity.

The situation becomes still further complex due to the fact that the discussed law includes also cases of minor importance as mitigated forms of offences (Articles: 42 sect. 2, 43 sect. 2, 46 sect. 3). This refers particularly to the case provided by Art. 48 sect. 3 (possession of narcotic drugs or psychotropic substance that constitute a case of minor importance). It is believed correctly that admissibility to qualify the forbidden act as a case of minor importance should depend on both objective and subjective circumstances.[26] It is, however, also true when we say that in practice objective circumstances frequently become determinative. This, in particular, refers to acts in whose

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first instance. Decisions of the appellate chambers of the Voivodeship Courts remain usually unpublished, and have very little influence on lower courts. Cases concerning the possession of drugs belong to the jurisdiction of the district courts, and eventual appeals are heard by the mentioned appellate chambers. The situation may be different in cases of aggravated offences when considerable quantity is involved. Such cases, on account of higher penalties, both threatened and imposed, have greater chances to reach even the Supreme Court, and, as a result, may be more formative for judicial practice. Simultaneously, it is worth noting that what is at stake in interpreting the phrase "considerable quantity" is the boundary between the basic and aggravated form of offences. The phrase "small quantity", on the other hand, delimits the more important boundary between punishable and non-punishable acts.

[25] Germany is a classical example of a country in which enormous interpretative differences relating to the notions of small and considerable quantities (functioning also in German legislation) may be encountered in respective federal states. Practice did not succeed in standardising those notions, despite an unequivocal order issued by the Federal Constitutional Tribunal.

[26] See R. A. S t e f a ń s k i: "Okoliczności uzasadniające przyjęcie wypadku mniejszej wagi" [Circumstances Justifying the Case of Minor Importance], *Prokuratura i Prawo* 1996, no. 12, p.125-131.

case such circumstances are easily "measurable" in objective terms. Art. 199 § 2 of the Criminal Code of 1969 may provide a classical example of determining a case of minor importance by means of the value of stolen property.[27] The same holds true for those provisions of the Law Counteractive of Drug Abuse in which, among the objective circumstances of the forbidden act, one will have to classify, above all, the quantity of a narcotic drug or psychotropic substance which is the object of this act, the drug or substance being easily expressible in specific weight units. This becomes particularly significant in view of the fact that in the discussed law objective quantitative features are directly determinative of the existence of aggravating offences. In such a situation, the treatment of objective circumstances as those that are basically determinative also of the admissibility of the acceptance of the mitigated offence in the shape of a case of minor importance, is an inescapable conclusion.

Were it not for the existence of the case of minor importance in the provision criminalising the possession of narcotics, one might assume that in other provisions we might encounter a case of minor importance, usually when a small quantity of narcotics is the object of the prohibited act. However, the fact that the case of minor importance (sect. 2) is provided for in Art. 48 alongside the case of the possession of a small quantity of drugs (sect. 4), as the circumstance excluding punishability, means that those two situations cannot be identical. True, one might assume that within the framework of this provision a case of minor importance is tantamount to the possession of a small quantity of the drug or substance, which are not designed for one's own use, but, for instance, for the purpose of introducing it into drug traffic. The practical value of such an interpretation seems slight for the mere reason that, as has been mentioned, it is most frequently impossible to prove by other means for what purpose the perpetrator possessed the narcotic. One might, at best, deduce such a purpose from the quantity possessed by the offender. This would mean that the new law does not provide for three, but for four legally relevant border quantities: small quantity, quantity determinative of a case of minor importance, the already mentioned "average" quantity, and considerable quantity. The clarification of those four notions may constitute an enormous burden for criminal justice agencies.

The problem might be easily avoided if the legislator resigned from the case of minor importance, found in Art. 48. This would mean that, within the framework of this Article, the notion of small quantity would be determinative of the admissibility of a circumstance that excludes punishability. In other provisions of the discussed law, this notion would function as the constitutive element of a case of minor importance. It is worthwhile to note that such a solution would be also logical from the juridical point of view as well as from that of criminal policy. This is obvious when we remember the assumptions adopted by the law in question: the supply activities with a small quantity of the narcotic as their object, would comprise cases of minor importance, whereas the same activities on the demand side would be left unpunished.

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[27] See for instance J. B a f i a [in:] J. B a f i a, K. M i o d u s k i, M. Siewierski: *Kodeks karny. Komentarz* [Criminal Code. Commentary], second edition, Warszawa 1987, p. 230-231.

The characteristic feature of modem criminal law relating to narcotics consists in such a constructing of the types of offences which criminalises all that what is available in the sphere of the traffic and consumption of narcotic drugs and psychotropic substances. The law discussed here is doubtless exponential of a further "improvement" of this tendency. It is noteworthy, however, that, viewed from this perspective, Polish law still demonstrates two significant gaps. First of all, the purchase of narcotic drugs or psychotropic substances is not criminalised, although the latter is required by Art. 3 sect. 1, item a and Art. 3 sect. 2 of the Vienna Convention of 1988. Of course, cases of purchase may be, in practice, subject to penalties by virtue of the provision that criminalises possession, because the possessor must have first arrived at possession in some manner, for instance, through purchase. This, however, need not always be the case, and many legislations, trying to be prepared for everything that may happen, contain penal provisions including the element of "purchase".[28] Another gap in the discussed law consists in a lack of provisions that would criminalise public inciting or inducing others to use narcotic drugs or psychotropic substances, such criminalising being required by Art. 3 sect. 1, item c of the aforementioned Convention. A project of a suitable provision of that type could be found in one of the versions of the draft law prepared by the Ministry of Health and Social Welfare. The provision in question was deleted when preparations were still in the phase of a ministerial draft; the question of its réintroduction has never been raised again, the major cause being probably the legislator's awareness of enormous difficulties encountered whenever we try to define when public inciting or inducing others to use drugs comes into being. In other countries, such provisions, apart from obvious cases of unequivocal advertising, also result in considerable interpretative problems. This is particularly true of the texts of many rock songs and "subcultural" publications, and sometimes even scientific periodicals.[29] Hence it is a good thing that the final version of the discussed law does not contain provisions of that type.[30] On the other hand, the discussed law might have found room for a much less controversial provision criminalising the advertising of narcotics. In addition, it may be emphasised that, in the light of the discussed law, the mere use of narcotic drugs or psychotropic substances does not constitute an offence. However the criminalising of use is not required by the U.N. Convention. Nor is it considered an offence in most of the European countries.

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[28] This obviously gives rise to the same problem as the one encountered in the case of possession. It concerns the manner in which to treat the purchase of a small quantity of a drug or substance for one's own consumption.

[29] It is characteristic that the commentary to the German law on narcotic drugs, referring to the respective provision (§ 29 sect. 1, item 12), contains numerous examples of songs in whose case elements of the offence specified in this provision are not materialised. Examples of texts that would materialise those elements are absent. Cf. H.-H. K ö r n e r: *op. cit.*, p. 555-559.

[30] The dangers involved in this situation may be illustrated by one of the cases examined in Cracow courts. The author and the publisher of (the rather foolish) *Narcotics - A Guidebook* was convicted (a suspended sentence) on the basis of Art. 32 of the 1985 law, i.e. for facilitating the indulging and the inducing of other persons to indulge in narcotic drugs, although jurisprudence makes it clear that this article criminalized the resumption of such activities only in relation to a specific individual; the publication of a book cannot materialise those elements. The introduction of a provision that would criminalize public incitement or encouragement to the use of narcotics might result in many trials of rock singers which, in fact, would be deprived of any greater sense.

Apart from the provisions defining offences and transgressions related to illegal traffic in narcotic drugs or psychotropic substances, chapter 6 of the law in question contains also provisions concerned with the application of therapeutic measures *vis-à-vis* those drug addicts who commit offences. In this case, the new law in its Art. 56 accepted Art. 34 of the 1985 law. Therefore, it provides for the mandatory imposition on the drug addict of the duty to submit himself to medical treatment in those cases when he is convicted for an offence related to the use of narcotic drugs or psychotropic substances, and sentenced to a deprivation of liberty, which is conditionally suspended. When such a drug addict is convicted to a non-suspended deprivation of liberty, the law provides for his optional placement in a medical institution prior to his serving the sentence. In Art. 57 the new law introduced also a new provision, which makes Polish law finally fulfil the requirements of the principle treatment instead of punishment.[31] The point is that within the framework of Art. 56 (or Art. 34 of the 1985 law) the possibility of the drug addict submitting himself to treatment instead of being punished is conditional, above all, on the type of pronounced penalty (suspended or not), and not on whether the given person expresses the will to undergo such treatment. Art. 57, on the other hand, enables the public prosecutor to suspend the preparatory proceedings if the perpetrator is willing to undergo treatment. In such circumstances, the treatment, though not fully voluntary since it was accepted under the threat of continuing the criminal proceedings, is not strictly compulsory and may provide for better prognosis as to its results.

The possibility of resorting to this provision is wide, since it extends to offences punishable with a penalty not exceeding 5 years of deprivation of liberty. Consequently, it may be applicable to an unquestioned majority of offences, both those contained in the Law Counteractive of Drug Abuse as well as those of common nature (e.g. thefts, forgery of prescriptions, etc.), typical for drug addicts. When the treatment ends, the public prosecutor, having considered its results, either continues the proceedings, or lodges a request with the court that they be conditionally discontinued. Conditional discontinuance may be applied following the pattern established for the suspension of proceedings, i. e. when the offence is threatened with a penalty not exceeding 5 years of the deprivation of liberty.[32] It seems obvious that in order to preserve the sense of this institution (in return for submitting himself to medical treatment the addict obtains concessions relating to his penal liability), in the case of positive results of the treatment, the public prosecutor should be *de facto* obligated to lodge a request with the court for a conditional discontinuance of criminal proceedings.

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[31] Cf. K. K r a j e w s k i: *Problematyka kryminalizacji posiadania środków odurzających i psychotropowych w ustawodawstwie polskim* [On the Question of Criminalizing the Possession of Narcotic Drugs and Psychotropic Substances in Polish Law], Instytut Wymiaru Sprawiedliwości, Warszawa 1994. This publication contains also the project of extended provisions regulating the matter in question.

[32] This means an extension of the admissibility of conditional discontinuance when compared with what is possible under the Art. 66 § 2 of the new Criminal Code), which allows the application of this institution when the offence is threatened with a penalty not exceeding 3 years of deprivation of liberty.

The discussed provision deserves unequivocal positive appraisement. As regards its practical application, however, the interpretation of the phrase: "the perpetrator submits himself to treatment in an appropriate medical institution", constituting a premise of the application of the provision in question, will be of key significance. On the one hand, the mere declaration of the will to be treated will not suffice. The drug addict must resume certain activities showing that he would really submit himself to such treatment. On the other hand, the requirement that he would actually begin the treatment seems to be too far going. A certificate of the medical institution, confirming that this specific person is guaranteed his turn in the process of treatment, although he might wait for it, should suffice.[33] The phrase: "until the treatment is ended" might in practice also give rise to controversies as to its interpretation. It is obvious that physicians and therapists would be the first to decide on whether the treatment ended with positive or negative results. Another problem may emerge when the treatment, although continued for a long time, does not lead to uni vocally positive results. Hence, it seems that the legislator made an error when he left the maximum admissible period, for which the proceedings may be suspended, unspecified, although he might resort to the pattern established in other provisions, e. g. in Art. 17 sect. 2 of the law, and limit the admissibility of such suspension to a period of no more than two years.

One may also wonder why the legislator limited the admissibility of this provision exclusively to the preparatory phase of the proceedings. It seems that the possibility of its application should exist also during the trial. The drug addict may, in fact, become sufficiently mature to make a decision on the treatment as late as this phase of proceedings. Providing him with a chance by the possible suspension of the trial seems to be a better solution than convicting him in order to resort to Art. 56 of the discussed law, the more so that in the case of a non-suspended sentence his treatment is only optional and *de facto* compulsory. The same postulate refers to the extension of the possibility of applying the suspension of proceedings, as set forth in Art. 57, so as to include the executory proceedings. The wording found in Art. 150 of the new Punishment Execution Code, regulating conditions for granting the interruption of the execution of the penalty, do not seem to provide a sufficient basis for using such an interruption in order to facilitate the resumption by the convict of treatment outside the penal institution. It seems highly advisable that the addicted convicts be provided with a chance to resort to this kind of treatment (after they had served part of their sentence), because correctional institutions usually provide limited possibilities for success in this respect.

[33] Those matters are, for instance, regulated in detail in §§ 35-37 of the German law on narcotic drugs. From that point of view, Art. 56 sect. 1 of the law counteractive of drug abuse seems to be formulated too laconically.