NOWA KODYFIKACJA PRAWA KARNEGO. Tom XXXIV
AUWr No 3631 Wrocław 2014

Some remarks on the absolute discontinuance of proceedings against offenders with small amounts of narcotics or psychotropic substances for personal use

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It is probably not an oversimplification in saying that attempts to find a formula dealing with the problem of "small" possession of drugs once and for all, has not given satisfactory and fully consistent results. Some proposals of solving the issue, being the subject of discussion in subsequent legislative works, more closely resemble the peculiar squaring of the circle. Usually, in fact, they refer directly to one of the opposing drug policy options[1]. When simplified, it should be noted that extending the criminalization of any form of drug possession, even a small amount intended for personal use, means creating broad opportunities to use criminal repression, especially against addicts. Although this is because of their addiction, they are found to be demanding a different procedure, which is far beyond the traditional instruments of law. Conversely, although the decriminalization of possession eliminates these kinds of

[1] K. Krajewski, *Prawo wobec narkotyków i narkomanii*, [in:] *Niezamierzone konsekwencje: polityka narkotykowa a prawa człowieka*, ed. K. Malinowska-Sempruch, Warszawa 2005, p. 51.

Nowa Kodyfikacja Prawa Karnego 34, 2014

situations, but in the lack of opportunities for legal entry into possession, it is a legal gap that again hinders the prosecution of criminal offenses in the field of drug trafficking[2]. Meanwhile, there is no need to widely explain that the borders' indication of the demarcation of criminal law interference in this legislative activity area has had an impact on the nature of the statutory model of the response to the phenomenon of drug use and its practical functioning.

When looking at the historical conditions of reproduction that underly the analysis of subject normalization, it should be noted that in Polish legislation, the first criminalization of the possession of narcotics and psychotropic substances was made only on the basis of the Act issued in 1997 on Counteracting Drug Addiction[3]. The first comprehensive Act on Prevention of Drug Addiction, 1985[4], did not provide for such settlement. No criminalization of the possession of narcotics or psychotropic substances in the Act, 1985, although it was rather an exception from the majority of European solutions, however, does not prejudge the assessment of such behavior towards its legality. On the contrary, illegal drug possession was also forbidden, with the only difference being the rules of administrative law. These drugs were subject to confiscation. The defense, taken with such difficulties, of such a perception of the problem of having psychoactive drugs, generally has not changed the critical attitude of representatives of many communities to its assumptions. Primarily, the criminalization of the possession of drugs and psychotropic substances was justified as the responsibility of the fulfillment of the provisions of the United Nations Convention against Illicit Trafficking in Narcotic Drugs and Psychotropic Substances, 1988[5] and the need to facilitate, particularly in terms of evidence, detection of crimes related to illegal drug trafficking. It also seems that the criminalization of drug possession was

[2] A. Muszyńska, *Problematyka granic odpowiedzialności karnej za posiadanie środków odurzających lub substancji psychotropowych w praktyce sądowej*, Pal. 2010, No. 7–8, pp. 115–118.

[3] Primary source: Journal of Laws No. 75, Vol. 468 with later amendments, uniform text: Journal of Laws from 2003, No. 24, Vol. 198 with later amendments.

[4] Journal of Laws. No 4, Vol. 15.

[5] Art. 3 Para. 2 Convention from 1988, ratified by Poland in 1994, Journal of Laws from 1995, No 15, Vol. 69.

accompanied by a strong belief that this is one of the most effective methods of combatting substance abuse[6].

Ultimately influenced by these ideas, the provision of Art. 48 was introduced into the Act of Counteracting Drug Addiction, 1997, that specifies the basic type, certified, minor accident and the clause of criminal record ownership of drugs or psychotropic substances for personal use in small amounts. The lack of a criminal record for possession of a "small" amount of drugs for personal use was the primary advantage, in that it avoids the problems associated with judging a significant number of criminals — drug addicts, carrying out punishments, or finally their drug treatment. This Act, due to the manner of its formulation, totally decreases the effectiveness of the actions against dealers distributing drugs, without much fear of the risk of criminal liability in simply possessing only small quantities. This last argument, as well as complications related to the practical use of the phrases "negligible quantity" and "for personal use" had the influence on an amendment to the Act, 1997, and abolition of Art. 48, Para. 4[7]. When putting more emphasis on creating favorable instruments to combat drug dealers on the grounds of this amendment, it was equally provided that beyond criminal law, drug-use still persists.

This distinctive way of defining the drug problem from the point of view of combatting the supply and the absolutization of repression, was the passing of the Act of 29 July 2005, currently in force regarding drug addiction prevention[8], which also did not provide for any exclusion of criminal possession of drugs as stated in Art. 62, just as in previous legislation, which was of a basic type, because of the significant amount of prohibited substances and the privileged type — minor instances. Therefore, there is no doubt that each and every possession of drugs or psychotropic substances is a punishable offence, and this position is supported by the structure of this provision and the legislator's intention. It soon turned out

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[6] K. Krajewski, *Polskie ustawodawstwo dotyczące narkotyków i narkomanii: pomiędzy represją a terapią*, Serwis Informacyjny Narkomania 2008, no 5 (44), pp. 7–11; idem, *Prawo a zmieniający się obraz zjawiska narkomanii*, Serwis Informacyjny Narkomania 2013, no 4 (64), pp. 28–30.

[7] Art. 23 Act from 26 October 2000, about changing the provision of drug counteraction, Journal of Laws No 103, Vol. 1097.

[8] Journal of Laws No 179, Vol. 1485 with later amendments.

that the legislative foundation decreed on the Act, 2005 for reducing the supply of psychoactive substances was not realized, and worse, contributed to the creation of two negative socio-legal phenomena. First of all, it frustrated the penetration of the environment and people involved in the production, processing, marketing, or even providing these kind of substances. Despite the tightening up of criminal law, the increase of detection of this type of crime was not obtained at all. One would even venture the statement and say that in this area of activity the reverse trend was observed . In addition, a new category of criminals has been "created" — drug addicts and people using illicit psychoactive substances. Aside from the economic consequences of the group of offenders staying in overcrowded penitentiary units, the penalization of possession of any quantity of narcotics or psychotropic substance has limited the reporting of people for treatment, prevented the use of large-scale programs to reduce social harm and health and paralyzed therapeutic contact, medical or corrective educational[9]. It is through these social losses, that it became clear that penalization of any form of drug possession, even a small amount intended for their own use, rather than tackle the drug addiction problem, has led to the criminalization of their use. Similarly, there was no time to wait any longer, to take further legislative action that would overcome this negative trend. Given the lack of political and social approval to return by way of decriminalization to the legal norm corresponding to the former Art. 48 para. 4, Act, 1997 on Counteracting Drug Addiction, an innovative solution in relation to the existing one was prepared anyway.

Art. 62 which was introduced by the amendment to the Act of 1 April, 2011, on Counteracting Drug Addiction and other laws[10], gives you absolute discontinuance of proceedings against the offenders with small amounts of drugs intended for personal use. According to this provision, the prosecutor, and the court at the stage of criminal proceedings shall evaluate, under the listed conditions, expediency sentencing due to the circumstances of the offense and the degree of social harm.

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[9] More in E. Kuźmicz, Z. Mielecka-Kubień, D. Wiszejko-Wierzbicka, *Karanie za posiadanie. Art. 62 ustawy o przeciwdziałaniu narkomanii — koszt, czas, opinie*, Warszawa 2009.

[10] Journal of Laws from 2011, No 117, Vol. 678.

Referring to *ratio legis* of the adopted solution, it is easy to see that by providing a mechanism for the opportunism of prosecution, and in certain situations it results in the cessation of the prosecution and punishment of offenders for minor offenses related to the consumption of "drugs" for which the implementation of penal repression does not bring any positive effects. It also minimizes the costs associated with the operation of the law enforcement agency and jurisdiction. After all, the point is that matters of such possession would not turn into "normal" preliminary proceedings, which would exclude the possibility of achieving the expected results in terms of the proceedings' economics. It does not lead to the decriminalization of the possession of "drugs". Still under the Act on Counteracting Drug Addiction, the possession of narcotics or psychotropic substances, even in of a small quantity and for their own use, remains an indictable offence.

The provision of Art. 62a determines the basis for discontinuance of the proceedings, therefore, does not refer to the regulations of the Code of Criminal Procedure, including Art. 17 § 1 of the defining negative conditions of discontinuation of criminal proceedings. However, the discontinuance of the proceedings on its basis might occur only if there is cumulative fulfillment for the following reasons: 1) the offender offender has narcotic drugs or psychotropic substances in small amounts, 2) narcotics or psychotropic substances are intended for the personal use of the offender offender, 3) a judgment against the offender's punishment would be pointless due to: the circumstances of the offense and the degree of social harm.

When talking about the provisions of this institution it should be added that, in the Act on Counteracting Drug Addiction, the concept of a small amount of narcotics or psychotropic substances was not defined, adopting in its place the judgmental value (just as in the case of the well-known Act on Counteracting Drug Addiction, a significant amount of narcotics or psychotropic substances constituting circumstance qualifying of some types of offenses). Thereupon, on the stage of writing this provision there was no effort associated with the quantification of e.g. in the Annex of the Act, small amounts with such a diverse and ever-changing catalog of narcotics and psychotropic substances. It seems to be the rational solution to be satisfied with the judgmental value especially if you notice

that in the field of its interpretation, the practice of the judicial decision has already developed acceptable criteria[11]. However, of course it cannot completely exclude the return of some critical provisions raised on the basis of the functioning of existing provisions (Art. 62), and pertaining to the evaluation and in consequence defined the amount of minor, common and significant amount of narcotics or psychotropic substances, or concerns related to the determination of the proper relationship between the provision of Art. 62a, and the minor case of Art. 62 para. 3, which also accepts the small amount of "drugs" and its personal possession.

Also in the interpretation of subsequent evidence, moreover, and closely related to the one mentioned above, is namely the purpose of narcotic or psychotropic substances for personal use of the offenders in which some difficulties may occur. In practice, there is sometimes some form of simplification in this area, i.e. in the case of possession by the offender of insignificant amounts of narcotics or psychotropic substances, if there is no evidence indicating the purpose for commercial purposes, it shall be adopted, *a priori*, that it is intended for his/her own use. Meanwhile, in the case of determining the prevalence of this condition, this requires a determination of the manner of used psychotropic substances (i.e. the frequency of drug use and the amount consumed as a single dose) and the type of narcotics or psychotropic substances. After all, it shall not be difficult to conclude that the higher the addiction level of the offender offender, the higher his/her "need" for narcotics and the greater amount of the drug shall be intended for personal use[12].

Moving on to the premises in the form of "the circumstances of the offense" and "the degree of social harm", it seems that they do not require a broader discussion, and that is because they were repeatedly discussed at the level of criminal law. Hence, there is the possibility to limit yourself to recall only that part of the justification for the draft of an amendment to an act that directly relates to them and in which we read that

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[11] A. Muszyńska, *Opinia w przedmiocie rządowego projektu o zmianie ustawy o przeciwdziałaniu narkomanii oraz niektórych innych ustaw* (no 3420), www.sejm.gov.pl, p. 4.

[12] B. Wilamowska, *Komentarz do art. 62 a*, [in:] P. Kładoczny, B. Wilamowska, P. Kubaszewski, *Ustawa o przeciwdziałaniu narkomanii. Komentarz do wybranych przepisów karnych*, Warszawa 2013, p. 95.

The decisive elements that the circumstances of the offense warrant dismissal of the proceedings may be primarily the lack of a clear threat to the legal interests of thirdparties. In other words, we may assume that, for example, cases of the possession of narcotics or psychotropic substances at school or other educational institutions, educational centers, military units, during sporting events or other mass events, potentially would always pose such a risk. It is therefore advisable to exclude the application of this provision. Therefore, in the case of *cannabis* possession, and therefore substances with less harmful effects than many other drugs, in small amounts and circumstances presenting no threat to the legal rights of third parties, the validity of the proposed rule may be presumed. For other measures, due to the greater risk they pose generally to the protected good, which is public health, the application of this provision should come into effect much less, which however does not mean the complete exclusion of such a possibility[13].

The discontinuance of proceedings on the basis of Art. 62a of the Act on Counteracting Drug Addiction is optional, and provisions named in the provision *se ipse* circumstances do not preclude the initiation and continuation of the proceedings. So there are no negative reasons not to undertake a process of denoting conscientiousness or discontinuance of proceedings. This lack of automation, according to the legislature, should guarantee an individual approach, and thus the realization of other objectives of criminal law (general prevention, therapeutic targets), in situations that really deserve it. As a result, cases of possession of insignificant quantities of narcotics or psychotropic substances do not meet the other conditions specified in Art. 62a and should continue to be classified with Art. 62 para. 1 and Art. 62 para. 3 in conjunction with the wider use of Art. 72 and 73 of the Act on Counteracting Drug Addiction.

On the other hand, considering the economy of the process it was allowed to terminate the proceedings before the decision on the initiation of criminal proceedings. The prosecutor might then refuse to initiate proceedings and not take a series of actions following usually after the decision to initiate an investigation. According to the legislator, the sense of the practical application of Art. 62a contains in the simplified area of criminal procedure, and it would be eliminated if the rules had to be entirely carried out investigations and only then decide to discontinue the proceedings. This last point provides the most interpretative doubts on the normative level. When taking into account just a moment of dis-

[13] Uzasadnienie do projektu ustawy z 1 kwietnia 2011 o zmianie ustawy o przeciwdziałaniu narkomanii oraz niektórych innych ustaw, www.sejm.gov.pl.

continuance of proceedings it can be immediately found that the decision of the legislature, at the same time empowering the court, deprives the institution of its basic message. In practice, in the case of fulfillment of the statutory objective, redemption should be at the earliest possible point of the proceedings. From this point of view, there is no need to punish the offenders offender of inexpediency, conducting the proceedings until the case has reached judgement. Otherwise, the value of opportunistic institutions would be seriously weakened.

The formula of redemption of no taking proceedings also seems to be equally controversial. First of all it is taken from the fact that Art. 17 of the Penal Code leaves no doubt as to the fact that only proceedings previously initiated may be discontinued. So there is no need to complicate this bright and fully rooted scheme in practice, under which, depending on the moment of the occurrence of certain procedural obstacles to criminal proceedings shall not be instituted, shall be discontinued or possibly acquit the accused of the commission of his alleged offense[14]. The construction of "redemption prior to initiation" is also difficult to reconcile with the solution in Art. 303 of the Code of Criminal Procedure, which implies that in case of reasonable suspicion of committing a crime it is necessary to issue a decision to initiate an investigation, and in its framework to define the act at issue and its legal qualification. The same standard applies to the investigation, which follows from Art. 325a § 2 Code of Criminal Procedure[15]. According to that, the decision to discontinue the investigation usually must be preceded by carrying out a series of operations, including, among others, obtaining information by specialists in drug rehabilitation, determining the real amount and type of drugs and clarification of the offender's addiction offender. Hence, proceedings usually occur, and in the first instance the prosecutor shall establish the amount and type of protected intoxicant. In practice, this occurs most often through using the weight and the tester, without the admission of expert opinion. A further step shall be interviewing the suspect. At

[14] A. Bojańczyk, T. Razowski, *W sprawie nieprzekraczalnych granic semantyki*, Prok. i Pr. 2011, No. 11, pp. 142–143.

[15] A. Sakowicz, *Opinia prawna na temat regulacji prawnokarnych zawartych w projekcie ustawy o zmianie ustawy o przeciwdziałaniu narkomanii oraz niektórych innych ustaw* (No. 3420), www.sejm.gov.pl., p. 8.

this point the general question is revealed of the existence or absence of addiction and the related need for the admission of expert opinions of psychiatrists, appointed public defender, if the suspect does not use a private lawyer. It should be also remember that Art. 70a of the Act on Counteracting Drug Addiction applied in preparatory proceedings to the prosecutor, and in the proceedings of jurisdiction in the court, the obligation to collect information on the use of the suspect (accused) of narcotics, psychotropic substances or substitute with the participation of an addiction specialist. This refers to situations in which there is a reasonable suspicion that the offender is an addict or harmfully uses psychoactive substances. The imposition of such an obligation shall stimulate the activity of the judiciary to collect data about people's addiction and somehow coerce the bodies to use a wider than ever range of institutions implementing the principle of "treatment instead of punishment". When assessing the adopted solution as a proper form of obtaining information about an individual offender, necessary for the application of the measures referred to Art. 71–73 of Act on Counteracting Drug Addiction, it is easy to notice the risk of prolongation of proceedings relating to the implementation of this obligation. It is, after all, a group of recipients defined as people who use harmful psychoactive substances (i.e. also using occasionally), and leads to the conclusion that the obligation to collect such data would update in every criminal case, which directly relates to Art. 62a of the Act on Counteracting Drug Addiction. Therefore, it is possible that the practice of jurisdiction, in order to minimize activities on the subject to redemption, not accompanied by appropriate measures of educational or therapeutic purposes, would violate the provision of Art. 70a and even ignore the evidence tending to obtain data mentioned before. The solution to the above problem may arise from the resignation from compulsory condition of such an interview. Assessing the adopted solution as a proper form of obtaining information about an individual offender, necessary for the application in practice of the measures referred to in Art. 71–73 of the Act on counteracting drug addiction, it is easy to notice the risk of prolongation of proceedings relating to the implementation of this obligation. It is, after all, a group of recipients defined as people who use psychoactive substances harmful (i.e. also using occasionally), which leads to the conclusion that the obligation to collect

such data will update in principle in every criminal case, which directly relates to Art. 62a of the Act on Counteracting Drug Addiction. It is possible, therefore, that the practice of justice, in order to minimize activities on the subject to redemption, not accompanied by appropriate measures of educational or therapeutic purposes, would violate the provision of Art. 70 and even ignore the evidence tending to obtain data which were mentioned. The solution to the above problem may arise from the avoidance of compulsory condition for such an interview.

No further listing of all the possible doubts that arise while reading Art. 62 of the Act on Counteracting Drug Addiction, already at this point it would be suggested that the legislator ensure better legal certainty of offenders "small" ownership. In view of the last it would be very desirable to verify the fact of the offense described in Art. 62 para. 1 and 3 of the cited Act, finding that psychoactive substances held in small amounts, and at the same time intended for the personal use of the offender offender and found that the judgment against him/her offender would be pointless in the circumstances of the offense and the degree of social harm followed after completion of the criminal proceedings, that is after having its initiation[16]. When leaving law enforcement agencies too far-reaching freedom in this regard, it might in fact expose the applicable regulation of Art. 62 and objection of Art. 2 of the Constitution and the principles of specificity and completeness of procedural law (Art. 45, para. 1 in conjunction with Art. 176, para. 2 of the Constitution of the Republic of Poland)[17]. Without questioning the importance of the discussed institutions, one therefore would propose rewording the content of Art. 62 and the part that talks about the possibility of discontinuation of criminal proceedings before their commencement. The use of the already known phrase of "discontinuance of proceedings" would dispel earlier expressed doubts, and it would give the desired shape to the discussed regulation, finally, in the normative field. No change in this respect will prevent the application of this solution because in practice it would back all discussion on the treatment of offenders of "small" ownership to its origins.

[16] Ibid., pp. 8–9.

[17] M. Płatek, *Opinia do rządowego projektu ustawy o zmianie ustawy o przeciwdziałaniu narkomanii oraz niektórych innych ustaw* (No. 3420), www.sejm.gov.pl., p. 17.

Summary

In this article the author presents the evolution of the legal solutions applied to offenders offender of the crime "small" possession of drugs. Under the framework, a lot of space was devoted to the analysis of the new institution from Art. 62, Act, 2005 on counteracting drug addiction, which provides for the discontinuance of proceedings against the mentioned group of offenders. Referring to the statutory regulation there were also identified areas that prove defects identified in the adopted solutions and hence require rapid intervention from the legislator.

Keywords: possession of narcotics or psychotropic substances, the absolute dismissal of proceedings with regard to offenders offender of a "small" possession.