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Drug-taking and Polish Criminal Law *

Zażywanie narkotyków a polskie prawo karne

Употребление наркотических веществ и польское уголовное право

Seventeen years ago Hart wrote: "As our history only too clearly shows, it is comparatively easy to make criminal law and exceedingly difficult to unmake it."¹ This statement is still valid today. One of the most important examples of overcriminalization in Poland and in other countries is the law on narcotic drugs. In particular, many specialists ask whether we can punish for taking drugs.

Studies in the criminalization of drug-taking involve two great problems: the limits of the criminal sanction and the effective measures of drug-abuse control. Although both have long tradition in jurisprudence and in criminology, they remain controversial in many aspects. But the opinion that "social approach" to drug-abusers is superior to "punitive approach", seems to be well-founded and widely accepted.

When we speak about criminalization of drug-taking, we mean not only the criminalization of illegal use, but also the criminalization of possession of narcotic drugs and even other acts necessarily or usually connected with drug-taking, for example, buying the drug with intent of using it. So when I refer to criminalization of drug-taking, I have in mind direct criminalization and indirect one.

Polish law, like many foreign legislations, criminalizes a wide range of production, distribution, possession and use of narcotic drugs. Article

* Report at the seminar *Drug Abuse and Womens' Criminality*, Warszawa, 12—13 V 1980.

¹ H. L. Hart: *Law, Liberty and Morality*, London 1963, p. I.

161 of the Criminal Code states that "Whoever gives a narcotic drug to another person, or induces another person to take a narcotic drug, is liable to imprisonment for up to 5 years." Article 29 of the Drugs, Narcotic Drugs and Sanitary Supplies Act, 1951, states that "Whoever produces, prepares, imports, exports, transports, possesses or distributes a narcotic drug without permission is liable to imprisonment for up to 5 years and a fine". Article 30 of the same Act states that "Whoever uses a narcotic drug in the presence of another person without a doctor's order is liable to imprisonment for up to one year and/or a fine." And art. 32 states that whoever violates any provision concerning production, transportation, possession or distribution of narcotic drugs is liable to a fine of up to 5000 zł. In this case the fine is imposed by the state administration (by *kolegium* — the special branch of administration dealing with petty offences).

Thus we see that Polish criminal law widely prohibits drug-taking. This impression is supported by legal interpretation.

Let us now consider the term "possession". Article 29 refers to the possession of narcotic drugs, although it is not clear to what extent. According to one interpretation suggested by some students of the problem² "possession" means here only the possession of a larger quantity of drugs intended for distribution. But according to the other interpretation, which seems to be more accurate, "possession" means the possession of any quantity of drugs regardless of the offenders intent.³ Incidentally, under the Narcotic Drugs Act, 1923, the mere possession of drugs was not punishable (art. 7).

In the light of article 161 of the Criminal Code and articles 29, 30, 32 of the Drugs and Narcotic Drugs Act, 1951, almost every act of taking narcotic drugs without a doctor's order is *de iure* a crime. Therefore the police and courts have the legal opportunity to force the extreme "punitive approach" to the drug-abuse problem at the expense of "social approach". Of course, it would be very undesirable if the police, courts and the criminal sanctions at their disposal served as the most important institutions in the field of drug abuse control.

But in fact the police seldom accuses of, and the courts seldom sentence for merely taking a narcotic drug in the presence of another person (art. 30) or for mere possession of a narcotic drug with intent of using it (art. 29). Usually the accusation occurs, when the drug-taker has

² T. Hanausek: *Przestępstwa związane z narkomanią*, [in:] *Narkomania*, Warszawa 1972, p. 167. S. Redo: *Narkomania, Aspekty prawnekarne i kryminologiczne*, Toruń 1979, p. 40.

³ D. Egierska: *Czy bezprawne posiadanie narkotyku w niewielkiej ilości jest przestępstwem czy wykroczeniem?* „Zagadnienia Wykroczeń” 1973, no 1, p. 77.

committed another crime involving narcotic drugs, like for example forgery of prescription, larceny or burglary.

These statements are supported by some data, although no authoritative criminological studies of the problem have been made.

In the last decade (the 70's) the number of drug abusers in Poland was estimated to be 20—30 thousands or more.⁴ Undoubtedly, they committed thousands of crimes like the use and/or possession of narcotic drugs. But according to police statistics, the police dealt only with several hundreds cases of crimes of this kind (for example — in 1976 with 582 violations of article 30).

S. Redo⁵ studied the cases of 84 offenders sentenced by the courts in Warsaw and Gdańsk in 1972—1976. They were sentenced for crimes involving narcotic drugs. Only 4 persons were sentenced merely for taking drug in the presence of another person (art. 30). And 34 persons were sentenced for the same crime, but they were also sentenced, at the same time, for some others crimes, like forgery of doctor's prescription or larceny of narcotic drugs.

Researchers from the Chief Public Prosecutors Office studied the cases of 149 persons accused of crimes involving narcotic drugs in 1972—1973. Only 15 persons were accused of mere violation of article 30, but 53 were accused of this crime together with other crimes, mainly forgeries of prescriptions (41 persons).

In 1977 I studied the cases of 49 persons accused by public prosecutors and sentenced by the courts in Kraków and Lublin. I did not find anybody accused of mere use or mere possession of narcotic drugs. But in most cases the offenders were accused of and sentenced for these crimes together with other drug-involving ones.

Imprisonment, suspended or not, and fine, are not the only sanctions for use of narcotic drugs in the presence of another person (art. 30) or for possession of narcotic drugs (art. 29). Conditional discharge (articles 27—29 of the Criminal Code) may be applied in the first case. And, what is very important, in every case when the convict is a drug-abuser the court may suspend imprisonment and order him to stop taking drugs, to begin or to continue medical treatment and so on (art. 75 of the Criminal Code). In the case when a crime has been committed in connection

⁴ T. Hanausek, W. Hanausek: *Narkomania, Studium kryminologiczno-kryminalistyczne*, Warszawa 1976, p. 60, 61. Z. Thille, L. Zgirski: *Toksykomanie, Zagadnienia społeczne i kliniczne*, Warszawa 1976, p. 33.

⁵ S. Redo: *Przestępczość związana z nadużywaniem środków odurzających w świetle badań akt sądowych*, „Zeszyty Naukowe Instytutu Badania Prawa Sądowego” IV, 1976, p. 36.

with drug-abuse, the court may, beside punishment, order compulsory treatment in hospital for 6 months or up to 2 years. After the treatment has been completed, the court decides if imprisonment is to be executed (art. 102 of the Criminal Code).

According to art. 61 of the Code of Execution of Criminal Sanctions the compulsory treatment of an addict can be applied in prison. And the fact that the court can order the parolee to stop drug-taking, to start or to continue treatment and so on (art. 94 of the Criminal Code) should also be mentioned here.

In the sentence passed in 1973, the Supreme Court said that offenders who are drug-abusers should receive harsher punishments than others (Orzecznictwo Sądu Najwyższego, Izba Karna i Wojskowa, 1974, poz. 20). This point of view is favoured by S. Redo⁶, but I am afraid that the Supreme Court was absolutely wrong.

There are some reasons to suppose that lower courts do not punish drug-takers extremely severely. Data gathered in the seventies by W. Hanausek and also by S. Redo⁷ support this supposition, but they also inform that courts seldom apply treatment and the other measures mentioned above.

Criminalization of drug-taking can be seen as retribution, prevention and deterrence — when we approach the problem from the standpoint of the classical school, but it can also be seen as the starting point or, in other words, the pretext for treatment of drug-takers — when we look at it from the standpoint of the positivist school.

Polish supporters of the criminalization of drug-taking (for example H. Kanigowski and W. Wisłocka, J. Gurgul, A. Duracz-Walczak and to some degree S. Redo⁸) express the opinion that punishment deters and prevents drug abuse and helps to cure drug abusers. But they have not studied this problem, although the *onus probandi* is on their side.

Detailed papers defending the criminalization of drug-taking are rare in foreign legal studies, but an interesting article by M. Bertschi⁹, an officer engaged in drug-abuse control in Switzerland, could be mentioned.

⁶ Redo: *Narkomania...*, p. 64.

⁷ Hanausek, Hanausek: *Narkomania...*, p. 147. Redo: *Przestępczość...*, p. 37—41.

⁸ H. Kanigowski, W. Wisłocka: *Uwagi o zjawisku narkomanii i o zwalczaniu jej*, „Służba MO” 1972, no 2, p. 226. J. Gurgul: *Z zagadnień walki z narkomanią*, „Problemy praworządności” 1972, no 9, p. 31. A. Duracz-Walczak: *Nasilenie i charakter toksykomanii w Polsce*, „Patologia Społeczna-Zapobieganie” II, 1976, p. 94. Redo: *Narkomania...*, p. 34.

⁹ M. Bertschi: *Strafloser Konsum von Betäubungsmitteln?* „Schweizerische Juristen-Zeitung” 1972, no 24, p. 369.

As we know, the classical hypothesis assumes that punishment will deter, if it is certain, speedy and severe. G. Waldo and T. Chiricos¹⁰ and later J. J. Teevan¹¹ tested this hypothesis with regard to marihuana use and they found it partly supported by the data. Those respondents, who perceived a higher certainty of punishment, engaged in less marihuana use. But those, who perceived a higher severity of punishment, did not engage in less marihuana use.

Opponents of the criminalization of drug-taking are in majority. They have written a lot of papers and books, and, what is the most important, their arguments are substantial. For example, K. Buchała, S. Batawia, Z. Thille and L. Zgirski¹² belong to this group in Poland.

Many, like for example L. H. C. Hulsman, R. Jenny, H. L. Packer, H. Schultz¹³ hold that drug-taking does harm to nobody except the drug-taker, and as such cannot be forbidden by criminal law. They maintain that harm to others is the necessary condition of criminalization and that self-injury, even highly immoral, is beyond the limits of the criminal sanction. This point of view may be traced to J. S. Mill's famous statement that "[...] the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."

Most specialists (for example S. Batawia, R. Jenny, A. Kreuzer, H. Schultz)¹⁴ argue that effective prevention and deterrence of drug-taking through criminal sanctions are doubtful or even impossible. The "dark number" of illegal use and possession of narcotic drugs is immense, and the real enforcement of the criminal law seems unlikely here. Drug-takers are accused and sentenced at random. And as a result, subjective perception of deterrence is very low in these cases. What's

¹⁰ G. Waldo, T. Chiricos: *Perceived Penal Sanctions and Self-reported Criminality*, „Social Problems” 1972, no 2, p. 522—540.

¹¹ J. J. Teevan, Jr.: *Subjective Perception of Deterrence (Continued)*, „Journal of Research in Crime and Delinquency” 1976, no 2, p. 156—163.

¹² L. Gardocki: *Problemy zwalczania narkomanii (posiedzenie Komitetu Nauk Prawnych PAN)*, „Państwo i Prawo” 1973, no 8—9, p. 242. Thille, Zgirski: *op. cit.*, p. 151—160. S. Batawia: *Problematyka toksykomanii i narkomanii u młodzieży*, „Państwo i Prawo” 1975, no 3 p. 41.

¹³ L. H. C. Hulsman: *The Penal System and Drugs: Criteria for Criminalization and Decriminalization*, „Revue Internationale de Droit Penal” 1973, no 3—4, p. 448. R. Jenny: *Drogenkonsum und Drogenhandel in der Sicht des Kriminologen*, Zürich 1973, p. 133. H. L. Packer: *The Limits of the Criminal Sanction*, Stanford 1968, p. 266, 267. H. Schultz: *Die strafrechtliche Behandlung der Betäubungsmitteln*, „Schweizerische Juristen-Zeitung” 1972, no 15, p. 230.

¹⁴ Batawia: *op. cit.*, p. 40. Jenny: *op. cit.*, p. 131. A. Kreuzer: *Kriminologische und kriminalpolitische Aspekte der Drogenproblematik II*, „Kriminalistik” 1973, no 4, p. 168. Schultz: *op. cit.*, p. 231.

more, this rare and random enforcement of law destroys faith in justice. Addicts (2—3% of all drug-takers) are immune to any deterrence.

L. H. C. Hulsman¹⁵ says that criminalization of drug-taking in order to help the drug-taker or to make his treatment possible, runs contrary to theoretical criteria for criminalization. But this solution is likewise incorrect from the pragmatic point of view.

Practicians and researchers¹⁶ believe that if the treatment of drug-abusers is to be effective, it must be voluntary. The very idea of compulsory treatment of drug-abusers is controversial, and many are against the incorporation of it into Polish law. In other countries it is also criticized, for example some American lawyers¹⁷ define it as unconstitutional, ineffective and irrational.

Some specialists suggest that criminalization of drug-taking is not only unfounded, but even harmful. H. Schultz, Z. Thille and L. Zgirski¹⁸ stress that stigmatization, alienation and subculture are caused by it. Their arguments are very convincing at the time when "labelling approach" is so popular.

As a result of reasonable arguments and opinions of the majority of experts, many international congresses and institutions suggest the adoption of the "social approach" to the problem of drug-abuse and the decriminalization of taking and possession of narcotic drugs. For example, the resolution adopted by the Committee of Ministers of the Council of Europe in 1973, the resolution of the 11th Congress of A.I.D.P. in 1974 and the resolution of the 5th United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1975.

For the same reasons international law, which for many years had been promoting overcriminalization in the field of drug control¹⁹, underwent a change. The Protocol Amending the Single Convention on Narcotic Drugs (made in 1972) enables the parties to provide that abusers shall undergo treatment and rehabilitation, even as an alternative to conviction.

Although the criminalization of illegal production and distribution of narcotic drugs was not the subject of this paper, amendments also in this field seem to be necessary. For example, law should distinguish between "dealers" and "users", and between "soft drugs" and "hard drugs" with regard to criminal responsibility. This is necessary in the rational, permissive model of drug control advocated here.

¹⁵ Hulsman: *op. cit.*, p. 445.

¹⁶ Batawia: *loc. cit.* Thille, Zgirski: *loc. cit.*

¹⁷ *Civil Commitment of Narcotic Addicts*, „The Yale Law Journal” 1967, no 6, p. 160.

¹⁸ Schultz: *op. cit.*, p. 232. Thille, Zgirski: *op. cit.*, p. 151.

¹⁹ Hulsman: *op. cit.*, p. 445.

STRESZCZENIE

Przedstawiono rozważania na temat zakresu bezpośredniej i pośredniej penalizacji zażywania narkotyków w polskim prawie karnym oraz na temat praktyki karania za takie czyny. Omówiono sankcje, które grożą za naruszenie odnośnych przepisów, a także przedstawiono argumenty przeciwko penalizacji zażywania narkotyków.

РЕЗЮМЕ

Анализируется проблема охвата непосредственной и посредственной пенализацией употребления наркотических веществ в польском уголовном праве и проблема наказания за такое деяние. Рассматриваются также санкции, грозящие за нарушение соответствующих норм, представлены аргументы против пенализации употребления наркотических веществ.

