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REPORT

OF THE OMBUDSMAN
FOR DRUG
DEPENDENT PEOPLE
2012/2013

Poland's drug law

*Show your drug policy and I will tell you
what country you live in.*

About the author:

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Introduction

The initiative of the Ombudsman for Drug Dependent People was established in 2009 by The Polish Drug Policy Network and the Association of Patients in Substitution Treatment JUMP'93. The impetus to start with the Ombudsman's activity was an urgent need to ensure that drug addicts and users would receive decent legal aid and information on issues which were vitally important for them. There was also a need to improve the situation of drug treatment in Poland.

This is the second edition of the report written by Agnieszka Sieniawska and Jacek Charmast of the office of the Ombudsman for Drug Dependent People [1]. Specific criminal cases discussed in the first report clearly demonstrated the gap between the objectives of the Act on Counteracting Drug Addiction, and the practice of its enforcement. Analysis of the cases included in this report shows that despite the announced changes, law enforcement continues to produce criminals prosecuting recreational users and addicted people instead of effectively eliminate drug dealers. It is difficult to resist the temptation to abuse laws that criminalize the possession of minor amounts of drugs. This law makes it easy, simple, almost effortless to obtain excellent statistical results. This applies to police, prosecutors and the judiciary. The report clearly shows that despite the announced changes, the courts still deal with the cases of possession of small amounts of marijuana. People get labels of criminals, obtain criminal records, the prison become overcrowded.

This report also reveals a problem previously overlooked and not fully understood by us. Drugs obtained the political importance as a "convenient enemy." "Convenient enemy" can be presented as a menacing and inhuman. "Convenient enemy" allows authorities to impose their will and oppose the will of the majority and the common sense. A "Convenient enemy" can frighten and sow resentment. "Convenient enemy" can be destroyed but it never dies. In addition, it is also so vague and hazy so can provide a justification for actions, measures, spending, which would otherwise be opposed. The history knows examples when cigarette smoking was punished by nose trimming and death, while coffee drinking was punished by flogging.

Today, it is known that alcohol and tobacco are worse than marijuana, but it is marijuana causes that people lose reputation and go to jail. Statistics are implicit: deaths due to taking marijuana amount to zero, opiates cause death of approximately 300 people every year, about 3,000 people die annually due to overdose of over the counter inflammatory medicines, 30 000 people die because of alcohol, but marijuana is the very substance which meets all the criteria of a convenient enemy.

The legal context

Drug Policy is the subject of research, discussions and analysis, and like no other topic is controversial at almost every level: approach to addiction treatment, prevention and regulatory issues, including criminalization or decriminalization of selected cases.

The notorious Article # 62.1. of the Drug Act penalizes the possession of any amount of illegal drugs or psychotropic substances, in practice, regardless of their purpose, and implies a penalty of imprisonment up to 3 years. This provision was not aimed at users, although, since 2000 approximately 30 000 persons are arrested every year on suspicion of possession of illicit substances. The EMCDDA 2008 report shows that the number of detected crimes related to drug possession has increased from 1 896 cases before tightening the law (data of 1999) to 31 260 cases in 2007, i.e. about 1648%! Since then, the number of detained persons had remained at a level slightly below 30 thousand per year.

Despite there is a special procedure to prosecute crimes of a minor harm - punishable by a fine, restriction of liberty or imprisonment of up to one year, prosecutors only incidentally qualify crimes for this type. It means that people with even the smallest amount of illicit substance are treated as serious criminals.

Such approach is supported by groups and communities responsible for helping drug users. While in many countries worldwide the addiction therapists apply the philosophy of harm reduction, in Poland, for the last 30 years ago a drug-free approach has reigned. Many institutions and therapists operate still based on this approach believing it is the only effective and relevant way to help drug addicted people. This model supports the stereotype of the addict as a "bad" person, who should be isolated, at the same time blocking the development of various new forms of aid. That is why the drug-free approach favors restrictive drug policy.

RESULTS:

The result of bad practice of the law enforcement agencies and one of the most restrictive in Europe drug laws are mass prosecution, repressions against many drug users, and convictions for possession of insignificant quantities intended for personal use, even in cases of addicted people. These are meaningless practices from the point of view of fighting against crime. However, they are socially harmful and generate costs for the state, affect the lives of individuals who come into conflict with law without having committed serious crimes, make it difficult for addicts to undertake treatment which is the most effective form to prevent petty drug-related petty crimes.

The amendment to the Act on Counteracting Drug Addiction:

The Ministry of Justice of Poland identified the problem of unusual harmfulness of existing drug law and decided to amend the Act on Counteracting Drug Addiction. In 2008, a team of experts, including specialists in therapy and law, was appointed to take a responsibility for developing amendments to the Act. The team was headed by the professor of law Krzysztof Krajewski (presently he is a member of the Program Board of the Polish Drug Policy Network). After numerous findings being results of consultations, debates and conferences, the draft amendment law was put to the vote in the parliament, where it was supported by 258 MPs in opposition to 159 votes. As a result, December 9, 2011, the amended Act on Counteracting Drug Addiction entered into force, being a timid step towards the normalization of the Polish drug law.

One of the most significant changes introduced by the amendment was the Article #62a: provision that allowed the prosecutor to discontinue criminal proceedings and waiver of punishment if the person had drugs in minor quantities for personal use. **This article sets a pathway for prosecutors to follow when they conduct criminal proceedings, and at the same time not obliging them to apply the proposed solution.**

The provision of Art. 62a also introduces the possibility to discontinue the proceedings at a very early stage, i.e. **the proceedings in the initial stage**. This is an extremely important aspect of this provision: good practice of frequent discontinuation of proceedings on the initial stage could lead to reduction of trivial cases unrelated to serious drug crime. It is worth noting that Article 62a can also be used by the judges, who may discontinue criminal proceedings at the judiciary stage, based on this provision. **Articles 70a and 72 of the Drug Act apply to criminal proceedings and bring extremely important and necessary changes. They allow to apply treatment, rehabilitation and preventive education towards drug addicts and recreational users. Article 70a** requires that the prosecutor appoints a certified addiction treatment specialist to assess if a suspect is an addict, problematic user or a person having no health problems associated with drug use.

The amendment to Art. 72 of the Drug Act provides that the prosecutor and the judge have the ability to suspend the criminal proceedings, if the person accused of committing a crime in connection with the use of narcotic drugs, punishable by not more than 5 years of imprisonment, decides to undergo treatment, rehabilitation, or participate in an educational and prevention program. Upon completion of the program, the prosecutor takes into account the program results and may apply for conditional discontinuance of the proceedings. It applies also if a suspect has previous criminal records.

The amendment to the Act also introduced changes to the enforcement proceedings. **Article 73a** of the Drug Act provides that convicted drug addicts serving the term of imprisonment may seek a break in the sentence for a period of treatment or rehabilitation in the community settings. In order to obtain such a break the convicted needs to demonstrate that he/she has a guaranteed place in a treatment or rehabilitation clinic of an appropriate health care facility, relevant to the therapeutic needs, and express consent to the appropriate treatment or rehabilitation program. In addition, the granting of such break in imprisonment is possible if the period before the end of sentence does not exceed two years.

Recognizing the necessity of the above changes, it should be emphasized nevertheless that this reform was too timid. It does not oblige the prosecutor to redeem the criminal proceedings in trivial cases concerning possession of minor amount of illicit substances. Drug amount reference tables have not been envisaged by the law. All these mean that the good practice of police and prosecutors will takes years to shape.

Who, what and how is detained, and how it usually ends?

Based on the data collected by the Ombudsman for Drug Dependent People (we analyzed 134 randomly selected cases we had dealt with), we can conclude that the statistical "offender" who violates the provision of Article#62 of the Drug Act is a man between 17 and 30 years old, graduate or a student (University of high school), detained by the police in the evening during a routine inspection on the street or road. Typically, he possesses a minor amount of marijuana, is not aware of the possibility of discontinuance of proceedings in his case, does not use his rights and voluntarily submits to punishment.

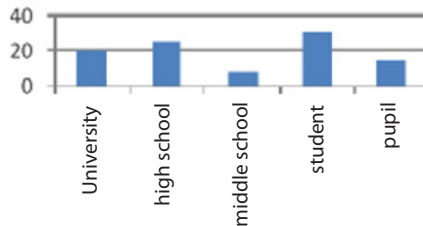
Age of perpetrator



Sex of perpetrator



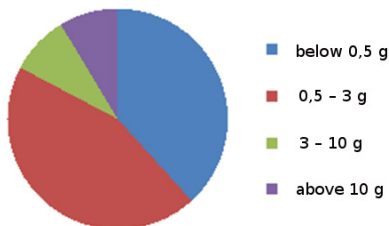
Education



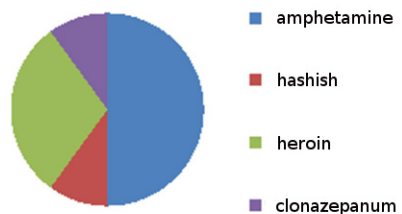
The circumstances of the detention in case of a suspect on the basis of the Article#62 are quite schematic. In all cases we analyzed the detention reports indicated that the offense of possessing a small amount of illicit substance had been detected during a routine check by police in the area of clubs and parks: i.e. in places where young people recreationally use various substances: both legal (alcohol), and illegal (marijuana).

The reason: the perpetrator had on him/her usually from 0.5 to 3 grams of marijuana. Interventions usually took place in the evening: 47 crimes were detected after 8 p.m, 13 crimes - earlier. We had no data on the remaining cases. It is worth noting that the detection of the illicit substance is identical with the detection of crime, so the police is enthusiastic to make searches and arrests of random people in public places. Interestingly, the detention reports and indictment contained different amounts of the illicit substance. Sometimes it was a gross weight of the seized substance, i.e. the weight of the substance together with the container in which it was placed, together with the additives (tobacco, pollutants), in other cases, the net value, or weight isolated from the packaging and additives. Most common package was the aluminum foil, glass pipe, joint with tobacco, or sealed plastic bag. All these items had different weight, and their possession is not prohibited and penalized, but if in the indictment the prosecutor will indicate the gross weight of the substance, the offender is persecuted for possession of the package too.

Marijuana possession

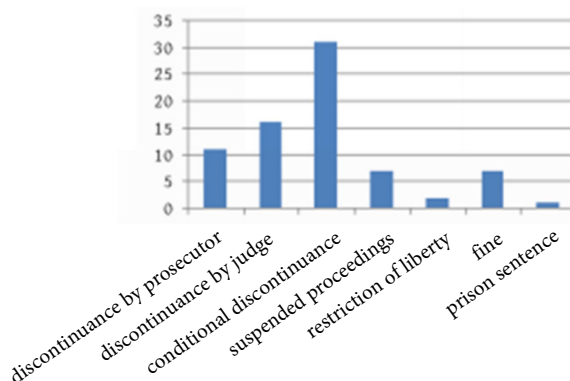


Other substances



End of criminal proceedings: among analyzed cases with the substance amount involved which can be considered "minor", 32% ended by the conditional discontinuance of criminal proceedings. It means the completion of the criminal proceedings for the trial period (1-2 years). If the offender on probation commits an intentional offense for which he/she will be eventually convicted, the court is obliged to recommence the proceedings on the first case. In almost all cases of the conditional discontinuance of the proceedings, the judge decided to additionally use the punitive measures, **such as fine (in the range of 500 to 800 zlotys), probation officer surveillance or the obligation to cover the costs of the criminal proceedings**. Thanks to our activity on providing free legal counseling and interventions, 27 cases ended by discontinuance of criminal proceedings in cases of possession of minor amounts of drugs. However, there was a case in which we were unable to help, although the amount was 0.2 grams of marijuana, and the offender was sentenced to one year of imprisonment.

Completion of the criminal proceedings



The results of our analysis are supported by the official data of the Ministry of Justice: the total number of cases for possession of illicit substances in 2012 was 18 441, and only 11.6% of cases of possession were discontinued on the basis of the new article# 62a by prosecutors.

Activity of the Police in Poland and the rights of the detained person? - In 2008, the departments to fight the drug crimes were established at the Headquarters of the Municipal Police. Among drug offenses detected from January to June 2008, approximately 50% concerned possession of drugs, and 16% of sharing drugs not aimed at making profit. The rest of the cases related to serious drug crimes. This means that **a total of 66% of detected crimes within a half year of the departments' activity did not concern serious organized crime such as trafficking, smuggling and drug production**. Instead, the mechanism of activity of these departments engaged them in persecution of petty drug-related crime. Therefore they focus on persecuting the users and distort the meaning of the Act. The criminals are generated on paper, statistical outcomes increase and a lot of public money is spent. The detection rate of serious drug crime persists almost on the same level for years. It is a very expensive machine: as it was estimated by the Institute of Public Affairs in 2009, it costs about 80 million zlotys per year.

People detained by the police are often not aware of their rights and do not exercise them. The detainee has the right to demand a contact with the relatives, employer, school or university (or our hotline of the Ombudsman for Drug Dependent People). The Police Act provides that a detained person should immediately undergo the medical examination or be provided the first medical aid, in the event of a justified need.

It is also worth remembering that a detained person shall have the right to file a complaint against the control, stopping and searching his/her place of residence. Information about the request should appear in the detention report. In the complaint to the district court, the detainee may require assessment of the legitimacy and legality of the detention, as well as the correctness of its implementation. It is also necessary to pay attention to the content of the detention report, which should contain the exact reasons for detention and personal checks, as well as a statement concerning the intention to file a complaint.

Is it worth voluntarily submitting to penalty?

Another extremely important issue in the context of the legal awareness of drug users is the legal tool of voluntary submission to penalty. The criminal law allows the prosecutor to include in the indictment a request for a conviction and sentence agreed with the defendant without a court hearing, if the circumstances of the crime cause no doubt, and the attitude of the defendant indicates that the objectives of the proceedings will be achieved. This solution is routinely used in drug-related cases.

While in many cases voluntary submission to the penalty is a useful tool, allowing to decrease the time and costs of the proceedings, in the case of petty drug-related crime it led to establishing of a harmful practice of proposing pseudo settlement concerning the penalty and routine procedure to close the cases.

Out of 97 randomly selected cases the Ombudsman dealt with, 54 defendants have opted for voluntary submission to penalty, and 43 have refused. It means a significant improvement compared with the previous year, when out of 90 cases only 4 of our clients had refused to voluntarily submit to punishment.

The prosecutor's settlement proposal was always disproportionate imprisonment with conditional suspension of its implementation. The proposed punishment was almost as severe, regardless of the quantity of the illicit substance: usually of 6 to 8 months of imprisonment, suspended for a period of probation of 2 to 4 years. Every time prosecutors would propose additional fines and probation office surveillance.

Medical Marijuana: health or prison?

The scientific research shows that marijuana is an effective medicine to reduce nausea associated with chemotherapy, stimulates appetite, inhibits the development of glaucoma, and also reduces muscle spasticity in patients with neurological disorders. Tablets containing synthetic THC are available on prescription in most European countries and the U.S. [2]. In the European Union, the pharmaceutical preparations based on active ingredients of the cannabis herbs (eg. Sativex) or dried cannabis as a medicine (eg. Bedrocan), have been included in the list of medicinal products. These preparations belong to the group of low risk of addiction and are sold on prescription.

In Poland, sick people who use marijuana as a medicine, expose themselves to criminal persecution.

The Ombudsman for Drug Dependent People dealt with cases of those who had cannabis not only for their own needs, but also for medical purposes. Despite this they have become "clients" of the criminal justice system. Undoubtedly cannabinoids have medical use, mainly relieving chronic pain, at the same time do not cause such strong side effects as chemical drugs. The lack of possibility of medical use of cannabis in Poland creates, in practice the situation when patient's right of access to effective and affordable treatment is violated.

The most effective and most comprehensive way to introduce a legal medical marijuana seems to be an additional legal regime for it including it to the list of medicines (as initiation for a registration procedure as a medicinal product) and removing it from the list of IV-N by amendment of the Act on Counteracting Drug Addiction and the Polish Pharmaceutical Act. Such a solution would allow the therapeutic use of this plant. In addition, it is worth advising to allow the cultivation of marijuana for medical purposes in special patients' clubs following the example of California. Medical marijuana is grown there under strict state control, and the purchase and consumption are allowed only to patients, so the drug does not enter the black market. This is a well evaluated and effective model. [3]

Recommendations:

- * decriminalization of the possession of minor amounts of drugs intended for personal use by the offender, based on the Portuguese model,
- * introduction of drug amount reference tables
- * decriminalization should be accompanied by preventive and educational activities introduced at the stage of school education.
- * Issue by the General Prosecutor guidelines aimed at developing new and better practice of the Article # 62a enforcement.
- * Exclusion of cannabis resin and herb from the Table IV-N and to legalization of cultivation of cannabis for own medical needs. In connection with the completed registration process of the medicinal product containing THC, it seems worth considering to conduct a nationwide education campaign among physicians on the medical properties of cannabis.
- * It is worth considering introduction of the possibility of substitution treatment on prescription.

News:

In June 2012, by the initiative of the 15 MPs from Palikot Movement and Civic Platform the draft amendment to the Act on Counteracting Drug Addiction was submitted in the Parliament. It contained a provision on the drug amount reference tables and the possibility for methadone substitution treatment on prescription. The authors of the draft amendment are members of the Steering Committee of the Polish Drug Policy Network. By the date of publication of the Ombudsman's report, the draft had not been put to the vote.

[1] This study relates to the part of the report on legal issues by Agnieszka Sieniawska. We invite you to read the part dedicated to the addiction treatment system by Jacek Charmast www.politykanarkotykowa.pl

[2] *Marijuana myths, marijuana facts. A review of the scientific evidence*, Ph. Lynn D. Zimmer, MD, John P. Morgan, New York, U.S. 1997

[3] Model California presents The Hungarian Civil Liberties Union *FriPaving the Way: Harborside Medical Marijuana Center*, Oakland, 2010, <https://www.youtube.com/watch?v=QLapPhQdLtc>

The Report issued by:

POLSKA SIEĆ
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