

## A LEGAL GOOD UNDER ART. 62(1) OF THE ACT ON COUNTERACTING DRUG ADDICTION OF 2005

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### ABSTRACT

The focus of this article is the regulation of Article 62(1) of the Act on Counteracting Drug Addiction of 29 July 2005, often referred to in literature as ‘possession for personal use’. The fundamental issue related to the subject matter pertains to the definition of the legal good in Art. 62(1) of the Act. Contrary to initial impressions, identifying this interest is neither simple nor unequivocal, as there may be doubts over whether such a good protected by law exists and, if so, whether it should be protected under criminal law. The article also explores the correlation of this legal good and the need to protect it with other legal goods protected by the Constitution (e.g. individual freedom). Additionally, the article also examines the significance of the consent of a holder of a given good for the exclusion of unlawfulness or the absence of any attack on the legal good. Behaviour undertaken with the consent of the holder, allegedly “violating” the legal good, is after all, an act that conforms to the norm from the outset, and therefore does not involve any element of unlawfulness. As such, it does not constitute a criminal act. There are doubts whether in the case of possession and use of drugs, there is a threat to the legal good or whether such conduct is lawful from the very beginning, given the consumer’s consent. The article critiques the existing criminal law regulations, and its key argument is the thesis that drug addiction is an issue of exclusively medical and social concern, rather than one of criminal law.

Keywords: legal good, drug possession, criminal law, constitution

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## I

In the Constitution of the Republic of Poland of 2 April 1997,<sup>1</sup> the legislator emphasises the need to protect extremely important goods such as freedom, equality and inherent human dignity. The legislator also declares that Poland, as a democratic state governed by the rule of law, will uphold the fundamental rights of the individual, guaranteeing, inter alia, freedoms and human rights, protection of human dignity, private life and health. In Article 31(3), the same legislator also commits to observe the principle of proportionality with regard to limiting the exercise of constitutional freedoms and rights. The various legal instruments for the protection of these rights and freedoms have been concretised in the wake of the Constitution. In axiological terms, the protection of rights and freedoms, i.e. values that are so important for society that they deserve legal protection, has become the main objective of legal norms.<sup>2</sup> This is particularly evident in criminal law. The norms of criminal law have been established by the State in order to protect certain goods of such importance that their protection involves punishability. It is a truism to state that it is this last element, i.e. criminal punishment, that distinguishes criminal law from other branches of law and marks a person's life with the most severe sanction, a deliberately inflicted hardship that deprives a person of what he or she values most.<sup>3</sup> For this reason, criminal law as an *ultima ratio* is used as a last resort when the good protected by law cannot be safeguarded in another way. Accepting the above statement generates certain consequences. On the one hand, one would expect that when the legislator criminalises certain behaviour, it does so in order to protect certain values, which, when given legal protection, become legal goods.<sup>4</sup> On the other hand, one can formulate an appeal for the legislator not to specify punishments for acts that are not directed against these socially precious values and not to make them subject to criminal liability.<sup>5</sup> Legal good should thus be constituted by those values that have become generally accepted and are currently the prevailing world-view among citizens after the fundamental changes following social transformations that have occurred since the beginning of the Third Republic of Poland.<sup>6</sup> The explanatory memorandum to the Criminal Code of 6 June 1997<sup>7</sup> stipulated that the new law must adopt a new

<sup>1</sup> Constitution of the Republic of Poland of 2 April 1997, Journal of Laws No 78, item 483.

<sup>2</sup> Considerations on social groups and protection of their common goals: Makarewicz, J., *Wstęp do filozofii prawa karnego w oparciu o podstawy historyczno-rozwojowe*, Lublin, 2009, p. 51 et seq. Contemporary works e.g. Grześkowiak, A., in: Grześkowiak, A., Wiak, K. (eds), *Kodeks karny. Komentarz*, Warszawa, 2021, p. 273, marginal ref. 7; Warylewski, J., *Prawo karne. Część ogólna*, Warszawa, 2020, p. 81; Bojarski, M. (ed.), *Prawo karne materialne, część ogólna i szczegółowa*, Warszawa, 2020, pp. 103–104.

<sup>3</sup> Tkaczyk-Rymanowska, K., *Podstawy prawa karnego materialnego i prawa wykroczeń*, Warszawa, 2014, p. 13.

<sup>4</sup> Tarapata, S., *Dobro prawne w strukturze przestępstwa. Analiza teoretyczna i dogmatyczna*, Warszawa, 2016, p. 17.

<sup>5</sup> Ibidem, p. 17. Similarly, Kaczmarek, T., in: Dębski, R. (ed.), *System prawa karnego. Tom 3. Nauka o przestępstwie. Zasady odpowiedzialności*, Warszawa, 2013, p. 274.

<sup>6</sup> Introduction of the concept of the legal good into criminal justice considerations is attributable to German academics. In Poland, legal good is a topic that appears in the works of W. Wolter. Details: Gruszecka, D., *Ochrona dobra prawnego na przedpolu jego naruszenia, analiza karnistyczna*, Warszawa, 2012, p. 20 et seq.

<sup>7</sup> Criminal Code of 6 June 1997, Journal of Laws of 1997, No 88, item 553, as amended.

axiology appropriate for a democratic state based on the rule of law, in which criminal law serves the protection of fundamental values and is not merely an instrument of penal policy.<sup>8</sup> This last element should be raised in particular in the context of drug regulations which, as perhaps no other regulations, are a prominent manifestation of penal populism tributary to the ruling political option. One must fully agree with the statement<sup>9</sup> that the reasons for criminalising drug possession have a stereotypical, emotional trait that the legislator camouflages with seemingly rational reasons.<sup>10</sup> This leads to treating people possessing drugs as second-class citizens, without the right to decide their own fate, simply because they indulge in an addiction that is officially unaccepted by the legislator.<sup>11</sup>

With regard to the subject matter of the title of this article, it is necessary to limit our discussion to a few selected issues. First of all, it should be made clear that the focus of the article is the provision of Article 62(1) of the Act on Counteracting Drug Addiction of 29 July 2005,<sup>12</sup> often referred to in the literature as “possession for personal use”.<sup>13</sup> Due to the nature of the regulation, I omit consideration of the possession of a substantial quantity of drugs under Article 62(2) of the Act. This regulation requires a separate analysis precisely because of the description of the causal activity. Secondly, the basic problem concerning the indicated subject matter relates to defining the legal good under Article 62(1) of the Act. Contrary to appearances, defining it is not a simple or unequivocal matter. Thirdly, it is necessary to point out the correlation of this legal good, if such a good exists, and the need for its protection, in relation to other legal interests safeguarded by the Constitution. Finally, the relevance of consent of the possessor of a good to the question of excluding unlawfulness or stating the absence of any attack on the legal good. Behaviour undertaken with the consent of the holder, allegedly “violating” the legal interest, is after all an act that conforms to the norm from the very beginning, and therefore does not involve any element of unlawfulness. As such, it is therefore not a criminal act. In the case of possession and use of narcotic drugs, is there a threat to the legal good, or is such conduct legal behaviour from the very beginning, in view of the consumer’s consent?<sup>14</sup>

<sup>8</sup> Makarewicz, J., *Wstęp...*, op. cit., p. 92 et seq.; Wolter, W., *Nauka o przestępstwie*, Kraków, 1973, p. 35 et seq. Currently inter alia: Wróbel, W., Zoll, A., *Polskie prawo karne. Część ogólna*, Kraków, 2010, p. 41; Kaczmarek, T., in: Dębski, R. (ed.), *System prawa karnego...*, op. cit., p. 273; Marek, A., *Prawo karne*, Warszawa, 2011, p. 5 and p. 108 et seq.

<sup>9</sup> Klinowski, M., ‘W sprawie posiadania narkotyków w orzecznictwie Sądu Najwyższego’, *Państwo i Prawo*, 2012, No. 4, p. 105.

<sup>10</sup> Identically: Davenport-Hines, R., *Odurzeni. Historia narkotyków 1500–2000*, Warszawa, 2006, p. 618.

<sup>11</sup> Budyn, M., ‘Kryminalizacja eutanazji, posiadania narkotyków oraz eksploatacji prostytucji – przejawy usprawiedliwionego paternalizmu państwa’, *Annales Universitatis Mariae Curie-Skłodowska. Sectio G*, 2002, Vol. XLIX, pp. 130 and 154.

<sup>12</sup> *Ustawa o przeciwdziałaniu narkomanii z dnia 29.07.2005 r.*, Journal of Laws of 2020, item 2050, as amended.

<sup>13</sup> For example: Resolution of a panel of 7 judges of the Supreme Court of 27 January 2011, I KZP 24/10; Klinowski, M., ‘W sprawie posiadania...’, op. cit., p. 106; Kornak, M., ‘Głosa do uchwały SN z dnia 27 stycznia 2011 r., I KZP 24/10’, *LEX/el.*, 2011, thesis 9.

<sup>14</sup> Dogmatic-philosophical analysis *sensu stricto* of the concept of legal good has an extensive literature. See in particular Tarapata, S., *Dobro prawne...*, op. cit., p. 15 et seq.; Gruszecka, D., *Ochrona dobra...*, op. cit., p. 11 et seq. and both Polish and German literature collected therein.

## II

In criminal law, every sanctioned norm defining a type of prohibited act is always established for a specific purpose. This purpose is to protect goods that are of importance to community life. The issue of determining correctly the object of protection is relevant for proper interpretation of the provision and appropriate legal qualification of the act. The type of object of protection also bears an influence on the assessment regarding the degree of social harmfulness of the act,<sup>15</sup> constitutes an important factor in imposing penalties and means of punishment, and allows for the application of a number of institutions of substantive criminal law (e.g. recidivism, probation) or procedural law (e.g. granting aggrieved party status).

Decoding a norm in the above-mentioned scope is generally not, as M. Sagan<sup>16</sup> rightly argues, an overly intricate issue, although there are sometimes situations where fundamental divergences of opinions occur in doctrine and case-law, as is the case in particular in the context of the Act on Counteracting Drug Addiction. Academia distinguishes between general, generic and individual subjects of crimes.<sup>17</sup> Both doctrine and case law emphasise not only the significance of correctly identifying the object of protection of a specific criminal law provision, stipulate however that it is insufficient in terms of criminal liability to refer only to a general or generic object of protection but it is important to identify the individual object of protection of the criminal norm.<sup>18</sup> According to the position of the Supreme Court, in order to determine the object of protection it is necessary to refer not only to the content of an act but also to its title, preamble, general provisions, and even to the explanatory memoranda to the drafts of such acts, if the criminal law provisions are grouped in one chapter but have not been given a title indicating even the generic object of protection.<sup>19</sup> Attention is also drawn to the fact that some provisions entail a dual object of protection, and the mere fact that an offence is directed against a general good does not preclude a natural person from being regarded as the aggrieved party where the prohibited act directly infringes their legal good at the same time as infringing the general good.<sup>20</sup>

The purpose of the Act on Counteracting Drug Addiction, according to Article 2(1)(3) and (4) of that Act, is, inter alia, to reduce health and social harm as well as to combat unauthorised possession of substances whose use may lead

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<sup>15</sup> Judgement of the Supreme Court of 11 April 2011, IV KK 382/10.

<sup>16</sup> Sagan, M., 'Glosa do uchwały SN z dnia 27 października 2005 r., ref. I KZP 32/05', *Prokuratura i Prawo*, 2006, No. 5, p. 158.

<sup>17</sup> Gardocki, L., *Prawo karne*, Warszawa, 2021, p. 93; Marek, A., *Prawo karne*, op. cit., p. 108 et seq.; Królikowski, M., Zawłocki, R., *Prawo karne*, Warszawa, 2020, pp. 9–10; Dukiet-Nagórska, T., Sitarz, O. (eds), *Prawo karne. Wykład akademicki*, Warszawa, 2021, p. 157.

<sup>18</sup> Sakowicz, A. (ed.), *Kodeks postępowania karnego. Komentarz*, Warszawa, 2020, p. 224; Gostyński, Z., in: Gostyński, Z. (ed.), *Kodeks postępowania karnego. Komentarz*, Vol. I, Warszawa, 2003, p. 427; Resolution of the Supreme Court of 21 October 2003, I KZP 29/03.

<sup>19</sup> Resolution of the Supreme Court of 27 October 2005, I KZP 32/05.

<sup>20</sup> Ruling of the Administrative Court in Szczecin of 3 April 2019, II AKa 242/18; resolutions of the Supreme Court of: 21 October 2003, I KZP 29/03; of 15 September 1999, I KZP 26/99, and also Sakowicz, A. (ed.), *Kodeks...*, op. cit., p. 224.

to drug addiction (i.e. a phenomenon which is, on all accounts, detrimental not only to public health, but also to the health of individuals and social interaction). Considering the above, it is therefore sometimes argued that the individual object of protection in Article 62(1) of the Act on Counteracting Drug Addiction is the life and health of individuals.<sup>21</sup> On the other hand, another claim cited as a possibility, is that health on a supra-individual level constitutes the object of protection.<sup>22</sup> As argued by M. Kulik, drug addiction is a social phenomenon bringing with it threats in various aspects, it is therefore not legitimate to limit the object of protection only to the well-being of the individual. Moreover, in the aforementioned provision, the legislator themselves stated that the purpose of the Act is to limit social harm.<sup>23</sup>

The approach of M. Bojarski and W. Radecki, pursuant to which the object of protection here is the public good of preventing the phenomenon of drug addiction resulting from uncontrolled possession and use of narcotic drugs that may lead to addiction,<sup>24</sup> is in opposition to the above stance. This form of legal good is also referred to in a number of court rulings.<sup>25</sup> Thus, the legal good is not the personal good of human life and health, but the prevention of drug abuse and counteracting this phenomenon, as well as life and public health in its social dimension.<sup>26</sup> There are also rulings expressing a different position, which basically state that human life and health may also be an object of protection, but from the point of view of the threat posed to them by narcotic drugs.<sup>27</sup> In one of its resolutions, the Supreme Court stated that the primary general objective of the Act on Counteracting Drug Addiction is prevention of the phenomenon as well as helping, treating and rehabilitating addicts. The object of protection is therefore not the regulation of trade in narcotic drugs motivated by the protection of the State's economic interests. Indeed, the motives for criminalising acts are similar to those for criminalising offences against

<sup>21</sup> District Court in Puławy in its judgement of 19 November 2019, II K 34/19. Similarly: Ważny, A. (ed.), *Ustawa o przeciwdziałaniu narkomanii. Komentarz*, Warszawa, 2019, p. 438.

<sup>22</sup> Kulik, M., in: Mozgawa, M., *Pozakodeksowe przestępstwa przeciwko zdrowiu. Komentarz*, Warszawa, 2017, p. 546.

<sup>23</sup> Ibidem.

<sup>24</sup> Bojarski, M., Radecki, W., *Przewodnik po pozakodeksowym prawie karnym*, Wrocław, 1998, p. 250. Similarly, also Chruściel, T., Preiss-Mysłowska, M., *Ustawa o przeciwdziałaniu narkomanii. Komentarz*, Warszawa, 2000, p. 286; Zachuta, A., 'Przestępstwo ciągłe – czyn ciągły i ciąg przestępstw', *Przegląd Sądowy*, 2003, No. 3, pp. 88–89. In criminal law textbooks, the criminal provisions of the Act on Counteracting Drug Addiction are sometimes discussed together with the provisions of the Criminal Code on offences against life and health (e.g. Gardocki, L., *Prawo karne*, op. cit., p. 256 et seq.; Marek, A., *Prawo karne*, op. cit., p. 449 et seq.).

<sup>25</sup> See, inter alia, judgements: Administrative Court in Warsaw of 29 January 2003, II AKa 510/02; Administrative Court in Katowice of 20 June 2002, II AKa 185/02 and of 12 February 2004, II AKa 15/04; Administrative Court in Kraków of 19 October 2004 r., II AKa 213/04; Administrative Court in Białystok of 20 March 2001, II AKa 34/01 and 20 September 2001, II AKa 127/01.

<sup>26</sup> Adopting health as an incidental object of protection was also advocated by T. Srogosz, in whose opinion one may possibly speak about the protection of public health – but not individual health – in terms of a legal good. Srogosz, T., *Ustawa o przeciwdziałaniu narkomanii. Komentarz*, Warszawa, 2008, p. 368.

<sup>27</sup> Judgements: Administrative Court in Wrocław of 28 February 2001, II AKa 303/00 and of 30 December 2003, II AKa 481/03; Administrative Court in Lublin of 19 April 2004, II AKa 75/04.

life and health specified in the Criminal Code.<sup>28</sup> An interesting stance was presented by S. Kosmowski, who asserts that too broad an object of protection – such as social health – should not be formulated with respect to a legal norm. In the author's opinion, the public interest can be the object of protection, but with regard to the observance of administrative law norms for dealing with substances whose use may lead to drug addiction.<sup>29</sup> T. Srogosz seems to present a similar view, invoking public interest, though understood as a certain kind of state monopoly on any kind of trade in narcotic drugs (including their possession), i.e. emphasising the nature of the legal good as being within the scope of administrative law.<sup>30</sup>

According to M. Kulik,<sup>31</sup> the concept – which is quite widespread in the literature – that public health is the legal good protected by the provision, is an expression of a certain compromise between the above-mentioned positions.<sup>32</sup> In a resolution adopted in 2005, the Supreme Court clearly stated that the object of protection is public health, understood as the state of health of the general public (general good) in the aspect of drug addiction prevention.<sup>33</sup> The argument of public health is also raised in the case law of the Constitutional Tribunal.<sup>34</sup> A similar position is taken by courts of general jurisdiction.<sup>35</sup> The problem is that no normative definition of this notion exists, and it is therefore unclear what the above formulation implies. Is it in

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<sup>28</sup> Substantiation of the resolution adopted by a panel of seven judges of the Supreme Court on 21 May 2004, I KZP 42/03.

<sup>29</sup> Kosmowski, S., 'Podstawowe problemy stosowania przepisów kryminalizujących nielegalny obrót narkotykami', *Problemy Prawa Karnego*, 2004, No. 25, p. 19.

<sup>30</sup> Srogosz, T., *Ustawa...*, op. cit., p. 368 et seq. A. Ważny makes an identical assertion in the context of Article 53 of the Act: Ważny, A., *Ustawa...*, op. cit., p. 344. Critical opinions: Górowski, W., Zajac, D. (eds), 'Komentarz do wybranych przepisów ustawy o przeciwdziałaniu narkomanii', in: *Przestępstwa narkotykowe i dopalacze. Komentarz*, Lex KIPK, 2019.

<sup>31</sup> Kulik, M., in: Mozgawa, M., *Pozakodeksowe...*, op. cit., p. 547 and the extensive literature indicated therein. A supporter of this theory is also: Ważny, A., *Ustawa...*, op. cit., p. 438. The latter, however, argues that the life and health of each individual is also an object of protection. I do not share this position, as discussed in the text. The term "public health" has a normative character and is found in legal acts, e.g. in Article 1 of the Sanitary Inspection Act of 14 March 1985, Journal of Laws of 1985 No 12 item 49, as amended or in the most recent Public Health Act of 11 September 2015, Journal of Laws of 2015, item 1916, as amended.

<sup>32</sup> See for example Zontek, W., in: Górowski, W., Zajac, D. (eds), *Komentarz...*, op. cit., marginal ref. 1; Kurzępa, B., in: Ważny, A., *Ustawa...*, op. cit., p. 438.

<sup>33</sup> Resolution of the Supreme Court of 27 October 2005, I KZP 32/05. For example, M. Sagan expressed a critical opinion on this resolution, asserting, inter alia, that the preventive aspect should not be linked with the object of protection, but with the legislator's motive for establishing the punishability of a given type of a prohibited act. He also stated that the result of a proper interpretation of a legally relevant notion should not contain superfluous phrases, whose omission does not affect the essence, characteristics or linguistic meaning of the notion. Sagan, M., 'Glosa...', op. cit., p. 164.

<sup>34</sup> Judgement of the Constitutional Tribunal of 4 November 2014, SK 55/13; decision of the Constitutional Tribunal of 17 March 2015, S 3/15.

<sup>35</sup> District Court in Puławy in its judgement of 19 November 2019, II K 34/19; Regional Court in Wrocław, in its judgement of 17 November 2021, III K 106/21. Moreover: Administrative Court in Katowice in its judgement of 24 April 2008, II AKa 102/08: "the object of protection of the provision in question is social (public) health which also substantiates that no threat is posed to this legal good in the situation of possessing such a negligible amount of the drug (small residue) as is difficult to determine".

substance the sum of the states of health of individuals?<sup>36</sup> Does the criminalisation of “possession” require the existence of a threat to the health of many people?<sup>37</sup> In the Public Health Act of 11 September 2015,<sup>38</sup> the legislator has only specified tasks within the scope of public health that include, inter alia:

“monitoring and assessing population health, public health risks and public health related quality of life; providing health education (...); health promotion; shaping health and social attitudes conducive to the prevention of high-risk behaviour; preventing addictions and their consequences for health and society; preventing diseases (...); international cooperation in public health research”.<sup>39</sup>

Bearing in mind the above, it should therefore be pointed out that in defining the notion of public health (which in case-law is equated with the notion of social health),<sup>40</sup> two features of the notion are apparent: health in the aspect of population health and risk avoidance, and a certain system of activity by public institutions in view of maintaining and improving people’s health,<sup>41</sup> including the prevention of addictions and the consequences for health and society that they entail. Therefore, not only the designatum of “health”<sup>42</sup> is crucial in defining public health, but also a certain set of actions taken at the level of whole communities in view of strengthening people’s health, and not only individual efforts to this end.<sup>43</sup> The doctrine emphasises that when speaking of public health, one should bear in mind “the health of a larger number of people”.<sup>44</sup> The notion cannot therefore be applied to an individual or to

<sup>36</sup> M. Szydło argues, that it is not. Szydło, M., in: Safjan, M., Bosek, L. (eds), *Konstytucja RP. Tom I. Komentarz do art. 1–86*, Warszawa, 2016, p. 788, marginal ref. 103. W. Górowski and D. Zając argue that it is. Górowski, W., Zając, D. (eds), *Przestępstwa...*, op. cit., marginal ref. 8.

<sup>37</sup> The attribute of “many persons” has a fairly well-established interpretation, see for example Bogdan, G., in: Wróbel, W., Zoll, A. (eds), *Kodeks karny. Część szczególna. Tom II. Komentarz do art. 117–211a*, Warszawa, 2017, p. 436, and rulings indicated therein. Wąsek, A., *Kodeks karny. Część szczególna. Tom I. Komentarz do artykułów 117–221*, Warszawa, 2006, p. 423. Also e.g. judgement of the Administrative Court in Katowice of 18 October 2001, II Aka 372/01; Judgement of the Administrative Court in Lublin of 2 February 2004, II Aka 421/03.

<sup>38</sup> The Institute of Public Health of the Jagiellonian University proposes an interesting definition of public health, drawing on the definition proposed in 1920 by Yale University Professor Ch.E.A. Winslow, based on the Constitution of the WHO of 22 July 1946. Text at: <https://izp.wnz.cm.uj.edu.pl/pl/blog/czym-jest-zdrowie-publiczne/>, accessed on 10 September 2022.

<sup>39</sup> Article 2 of the Public Health Act of 11 September 2015, Journal of laws of 2015, item 1916, as amended.

<sup>40</sup> See for example the Resolution of the Supreme Court of 27 October 2005 I KZP 32/05.

<sup>41</sup> Similarly Sagan, M., ‘Glosa...’, op. cit., p. 165.

<sup>42</sup> Definition of health adopted by the WHO at the time of its inception in 1948: health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity; in: Sygit, B., Waśik, D., *Prawo ochrony zdrowia*, Warszawa, 2016, p. 13. According to M. Kacprzak, health is not only the absence of disease or infirmity, but also a feeling of good health and such a degree of biological, mental and social adaptation as is achievable for the individual under the most favourable conditions. Health criteria are therefore subjective (an individual’s experience of their body, e.g. feeling energetic or tired), objective (based on physiological phenomena, e.g. heart function) and social (factors that enable or hinder carrying out certain roles, e.g. employee, parent, etc.). Cited after: Sygit, M., *Zdrowie publiczne*, Warszawa, 2017, pp. 23–24.

<sup>43</sup> Similarly Sagan, M., ‘Glosa...’, op. cit., p. 166.

<sup>44</sup> Szydło, M., in: Safjan, M., Bosek, L. (eds), *Konstytucja...*, op. cit., p. 788, marginal ref. 103.

the sum total of the health of individuals. This is because it refers to a certain state whose occurrence is very likely to result in a simultaneous threat to the health of a number of people. Such probability should be established on the basis of the current state of knowledge and life experience.<sup>45</sup> However, it is impossible to agree with the thesis advanced by M. Szydło that such threats may be not only external, but also of an internal nature, i.e. originating from the individuals themselves, who may wish to voluntarily create a threat to their own health (e.g. by abusing alcohol or using drugs). This is a tenuous thesis to defend, given that the protection of every person's health, within the meaning of Article 68(1) of the Constitution, is a constitutional human right, however, under Article 31(1) of the Constitution, freedom, in its various manifestations, including the right to decide on one's personal life and the protection of privacy (e.g. Article 47 of the Constitution) is also such a right.

Of course, looking at the gradual development of health systems in the world over the past centuries, it should be underlined that health care in its entirety, including medical care, was and is treated in most countries as a public good. For many years, the guiding principle in developing health systems worldwide has been to consider health as a public good rather than an individual good. At the initiative of the WHO, a list of essential public health activities was compiled in the 1990s which included prevention, monitoring and addressing diseases affecting the community, health promotion, health education as well as legislation concerning health care.<sup>46</sup> Authors can be found in the literature who claim that an object of protection thus defined seems too broad a notion.<sup>47</sup> It cannot be denied that they have a point. The main objective of the Act on Counteracting Drug Addiction is combating the supply of drugs, their illegal production and distribution, and not protecting the personal good of specific individuals.<sup>48</sup> However, addressing the issue of drug supply, that requires counteraction by the State, is one thing, and "consuming" drugs is another. The Act serves the purpose of protection against drug addiction as a certain negative social phenomenon that society has an interest in preventing. When invoking the necessity to introduce criminal liability for drug possession on account of the requirement to align national legislation with EU and international regulations,<sup>49</sup> it is often underlined that the reason for introducing it was the will to prosecute perpetrators already at the stage of preparation to pass on a narcotic drug or psychotropic substance to another person. Indeed, it has not always been possible in practice to apprehend the perpetrator directly when carrying out a specific act

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<sup>45</sup> Ibidem, p. 788, marginal ref. 103.

<sup>46</sup> Sagan, M., 'Glosa...', op. cit., p. 166.

<sup>47</sup> See for example Kulik, M., in: Mozgawa, M., *Pozakodeksowe...*, op. cit., p. 549.

<sup>48</sup> Judgement of the Administrative Court in Warsaw of 29 January 2003, II AKa 510/02, Regional Administrative Court 7/2003, item 71; Klinowski, M., 'Granice odpowiedzialności za posiadanie narkotyków', *Prokuratura i Prawo*, 2011, No. 3, p. 101.

<sup>49</sup> However, as K. Krajewski rightly argues, it is possible to provide solutions that meet international requirements but allow for the decriminalisation of behaviour typical of drug users. Therefore, the argument justifying the criminalisation of drug possession as essential under international law must be deemed misconceived. Further literature on this topic: Krajewski, K., 'Problematyka kryminalizacji posiadania środków odurzających i psychotropowych w świetle regulacji prawnomiędzynarodowych', *Państwo i Prawo*, 1997, No. 1, p. 58 et seq.



with the participation of another person, the introduction of Article 62 of the Act on Counteracting Drug Addiction was therefore intended to “facilitate the work” of law enforcement authorities.<sup>50</sup> However, contrary to the legislator’s intention, this was not reflected in the legislation. In addition, very serious doubts arise as to whether the criminalisation of behaviour, and therefore encroachment on the sphere of individual freedoms and rights guaranteed by the Constitution, can be justified by the need to facilitate the work of law enforcement authorities.

The claim that public health is a legal good under Article 62(1) of the Act on Counteracting Drug Addiction generates further consequences. Firstly, it is difficult to equate the rather enigmatic notion of “public health” with the attribute of “life and health of many people” that already exists under the provisions of the Code. Indeed, in the first case, we are talking about a certain “health status” of the human population,<sup>51</sup> whereas in the second case, we are talking about a much more concrete group of persons, precisely described in the case-law. From what moment, then, can we assert that the perpetrator’s behaviour is detrimental to such a good? If one person is in possession of a narcotic drug, is that already an act which may be detrimental to “public health”? Or do there have to be two, ten or at least a hundred such persons for this to be the case? Under Article 62(1) of the Act on Counteracting Drug Addiction, the act of drug possession by any individual is criminalised, which may give rise to the supposition that one should nevertheless assume the health of each individual to be the object of protection, this in turn means that we are entering the sphere of individual rights and freedoms. If I am in possession of a portion of a drug that law enforcement officials somewhat “incidentally” seize during a search of my residence, my behaviour does not appear to harm the legal good of public health. One must indisputably assume that the State has an interest in preventing serial, collective, self-inflicted acts against people’s own health or lives (e.g. suicides carried out in the context of membership in certain groups), but it does not, after all, do so on the basis of criminal law. However, it is difficult to find an argument supporting State interference in an individual’s decision to act against their own health by causing self-harm (e.g. suicide). After all, such behaviour, as a manifestation of individual freedom, is not criminalised at all or legally “regulated” in any manner. Not every activity of an individual that is contrary to the interests of society and may be an expression of some kind of social pathology (e.g. alcohol abuse, prostitution, suicide) is an object of interest to the legislator, particularly to the criminal law legislator. This follows from the principle of subsidiarity, referred to in the introduction, in the light of which certain behaviour may be objectionable from the point of view of respecting good morals, for example, but certainly does not require criminalisation.<sup>52</sup> Admittedly, it is difficult to describe prostitution as a constitutionally protected subjective right, since it is not an expression of values embedded in society that need to be protected, but as long as the person directly

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<sup>50</sup> Tkaczyk-Rymanowska, K., ‘Refleksje na temat art. 62 ustawy o przeciwdziałaniu narkomanii na tle karnoprawnym i konstytucyjnym’, *Ius Novum*, 2021, No. 1, p. 48.

<sup>51</sup> Sagan, M., ‘Glosa...’, op. cit., p. 167.

<sup>52</sup> Zoll, A., in: Bojarski, T. (ed.), *System prawa karnego. Źródła prawa karnego. Tom II*, Warszawa, 2011, item 35.

involved in this type of activity, who provides services voluntarily, does not infringe the rights of third parties, there should be no question of restricting their right to provide such services for financial reasons, with due respect for the right to privacy. Drug users should be regarded in an identical manner. Of course, carrying out certain activities (e.g. driving) under the influence of narcotic drugs is a different matter, however, in this case the object of protection is different. Another issue is that of the supply of drugs, their availability, production or circulation, which should be controlled by the State on a similar basis to alcohol or other stimulants. Non-medical use of drugs alone, and possession associated therewith, should not be covered by the criminal law prohibition, subject to the age requirement, the prohibition of consumption in public places, and passing them to another person.<sup>53</sup>

It is impossible to agree with the position that human health is the object of protection under Article 62(1) of the Act on Counteracting Drug Addiction. Such an approach would mean accepting excessive legislative interference with individual freedom and the right to decide about one's private life. Excessive paternalism, characteristic of authoritarian governments,<sup>54</sup> which allows for pseudo-protective treatment of individuals, in reality interferes with their actions, restricts their freedoms, invoking motivations such as the person's good or the need for protection. Individuals subjected to paternalistic care are deemed incapable of managing their own behaviour and therefore in need of support and control.<sup>55</sup> The problem with paternalism is that the person whose freedom is restricted "for the sake of their

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<sup>53</sup> There are a number of inconsistencies in the Act regarding the perpetrator of the offence. Anyone in possession of any amount of a drug is subject to criminal liability. Therefore, since even the smallest dose of a drug gives rise to liability, psychotherapists, who are contacted by people who have used such drugs or are under their influence, and perhaps have a "fix" in their pocket, should notify law enforcement. They do not benefit from the protection guaranteed by medical confidentiality. This is an absurd situation that develops the drug market even further and drives drug users underground for fear of criminal liability. Similar arguments: Krajewski, K., 'Prawo karne wobec narkotyków i narkomanii: ustawodawstwo polskie na tle modeli regulacji dotyczących narkotyków', *Alkoholizm i narkomania*, 2007, Vol. 20, No. 4, pp. 426–428 and 434.

<sup>54</sup> The Polish People's Republic was a "welfare" State, it treated its citizens in a paternalistic way, but it had fairly liberal drug laws that did not criminalise possession. Obviously, this was propaganda-driven: "We take pride in the fact that we do not have the scourge of drug addiction, which, especially in the countries of the capitalist West, has assumed the dimensions of an extremely dangerous phenomenon" – these were the words used by Edward Gierek in June 1980, at the plenum of the Central Committee of the Polish United Workers' Party on health, to dispel growing concerns in the country about the problem of drug addiction. <https://histmag.org/Dzieci-z-dworca-ZOO-na-polskim-podworku-problem-narkomanii-w-PRL-22073>, accessed on 30 September 2022. Officially, there was no drug problem, although the reality was quite different. Health service statistics reported patients addicted to drugs and chemical substances, and police data referred to the phenomenon of home-made opiates. This issue is presented in the EMCDDA report: Rychert, M., Palczak, K., Zobel, F., Hughes, B., *Przeciwdziałanie narkomanii i narkotykom w Polsce*, EMCDDA, 2014, p. 9 et seq.

<sup>55</sup> J.S. Mill, in his 1861 essay "On Liberty", stated that no one has the right to tell another mature human being that they are not allowed to lead their lives how they see fit. Valid reasons may justify admonishing, reasoning, persuading or pleading, but under no circumstances forcing or punishing. Liberal supporters of Mill admit interference to protect the interests of individuals, at the expense of encroaching on their freedom, in exceptional cases, in order to protect others such as children, older persons or the mentally ill. According to Mill, the only situation when limitations may be imposed upon the individual is when we want to protect others from

own good” does not necessarily recognise this as an action for their benefit. Drug possession for use is a typical “victimless crime”.<sup>56</sup> The State is not in a position to accurately determine what an individual expects and what gives them satisfaction. It is rightly argued that forcing a fully informed person to make certain decisions, even for their own good or benefit, is a limitation of their status as an independent subject. The possibility of choice, regardless of the wisdom or pertinence of that choice, is a good in itself.<sup>57</sup> Indeed, freedom also manifests itself in the fact that it is the person to whom such freedom is given who decides on its exercise.<sup>58</sup> The ability to decide autonomously and to make use of and interpret certain phenomena according to one’s own experience and view of the world is both a right and a proper condition of adulthood.<sup>59</sup> There can be no argument with the above reasoning. After all, if a person is aware of their behaviour and its consequences, I doubt whether anyone should usurp the right to force them to change a decision they have made. It is therefore easy to conclude that the problem of drug addiction, non-medical possession for use and use of narcotic drugs lies essentially outside the scope of the law and, in particular, outside the scope of criminal law. When regulating a matter by law, the legislator must take into account not only the educational function of the law, but also its stabilising function, i.e. protecting social interests and safeguarding, changing or stimulating certain community relations. While it is possible to legislate and try to enforce compliance with norms, if those norms prescribe behaviour that is not in keeping with community life in a particular era, such legislative activity will prove ineffective in the long term. It should be made clear that, in contradiction to populist tendencies, the criminal law is not able to impose desirable behaviour on society through the threat of severe sanctions. Criminalisation in situations where it is known that legal provisions will not be applied poses additional dangers, both in terms of the constitutional principle of equality before the law – when various extra-legal considerations determine who and when is held accountable – and in terms of making criminal law a law of symbolic application.<sup>60</sup> Before deciding on criminalisation, one should always consider whether other, more lenient measures are being employed to protect the legal good in question. Other measures are primarily those available under other branches of the law, as well as in the scope of social and

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the consequences of certain behaviours. <https://www.google.pl/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwj1w8vysrD6AhVvtIsKHSHiAwQQFnoECAgQAQ&url=https%3A%2F%2Fwww.lo13.wroc.pl%2Fd1%2Fmill.pdf&usg=AOvVaw2ZEEaqljYV35yYcAyl-eJca>, accessed on 25 September 2022; Vogt, M., *Historia filozofii*, Warszawa, 2007, p. 363; Kozerska, E., in: Kozerska, E., Sadowski, P., Szymański, A. (eds), *Idea wolności w ujęciu historycznym i prawnym, wybrane zagadnienia*, Toruń, 2010, p. 8.

<sup>56</sup> Falandysz, L., ‘O koncepcji tzw. przestępstw bez ofiar’, *Państwo i Prawo*, 1978, No. 8–9, p. 107 et seq. Cited after: Książkowska, A., ‘Problem tzw. »przestępstw bez ofiar«’, *Studenckie Zeszyty Naukowe*, 2003, Vol. 6, No. 9, p. 9.

<sup>57</sup> Wróbel, W., Zoll, A. (eds), *Polskie prawo...*, op. cit., p. 169.

<sup>58</sup> Frankiewicz, A., in: Kozerska, E., Sadowski, P., Szymański, A. (eds), *Idea wolności...*, op. cit., p. 411.

<sup>59</sup> Gmurzyńska, E., *Rola prawników w alternatywnych metodach rozwiązywania sporów*, Warszawa, 2014, p. 128 et seq.

<sup>60</sup> Zoll, A., in: Bojarski, T. (ed.), *System prawa...*, op. cit., point 36.

health policy.<sup>61</sup> If such measures are not employed, they should be implemented, however, if they are employed, it would be justified to verify how they are enforced and whether introducing certain adjustments increasing the effectiveness of the protection a given good would not suffice. The decision to criminalise must be based on a reasonable belief that the use of measures outside the criminal law is ineffective in protecting the good.<sup>62</sup> In the case of drugs, the experience of Poland, but also that of many other countries, shows that the effectiveness of criminal law regulation is questionable.<sup>63</sup> Of course, the law also has an educational role to play, but this function should be carried out primarily by families, schools, workplaces, educational, welfare and cultural institutions, social organisations, churches, etc. Courts fulfil their educative role only by means of punishment, coercion, authority; they act in the majesty of the law and on behalf of the State. It is precisely the law that should protect the individual from State interference in a sphere that should remain a sphere of individual choice. The consequences of interference in the sphere of human freedom may consist in a change in public attitudes or beliefs, but if imposed "by force" such interference may also lead to an escalation of social conflict over a particular controversial regulation. Such is the case, for example, with regard to the possession of at least some categories of narcotic drugs.<sup>64</sup>

It is difficult to agree with the standpoint that public health is an object of protection under Article 62(1).<sup>65</sup> As K. Grabowski rightly argues, the notion of public

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<sup>61</sup> Grabowski, K., 'O pewnych cechach szczególnych przestępstw narkotykowych', *Czasopismo Prawa Karnego i Nauk Penalnych*, 2014, No. 2, p. 112. Invoking literature as well as social and health policy objectives, the author argues that such exhaustion of less painful methods has not occurred. On the determinants and objectives of social and health policy: Orczyk, J., *Polityka społeczna*, Poznań, 2008, p. 17 et seq. and p. 143 et seq. On the need for integrated action in this area: Denys, A. (ed.), *Zagrożenia zdrowia publicznego. Wybrane zagadnienia*, Warszawa, 2014, p. 143 et seq. (in particular p. 147 et seq.) and Jamrozik, P., 'Edukacja młodzieży w zakresie zapobiegania zażywaniu substancji psychoaktywnych (narkotyki, dopalacze, alkohol)', in: Tokarski, Z. (ed.), *Zagrożenia zdrowia publicznego. Rola edukacji w prewencji chorób. Część 4*, Warszawa, 2016, p. 169 et seq.

<sup>62</sup> Zoll, A., in: Bojarski, T. (ed.), *System prawa...*, op. cit., point 33.

<sup>63</sup> See Krajewski, K., *Sens i bezsens prohibicji. Prawo karne wobec narkotyków i narkomanii*, Zakamycze, 2001, p. 19 et seq. and p. 81 et seq. as well as the literature indicated therein.

<sup>64</sup> Cf. 2011 CBOS survey results. ([https://www.google.pl/url?sa=t&rc=tj&q=&esrc=s&source=web&cd=&ved=2ahUKEwjD-uukyLL6AhXR4sKHT0jBzLQFnoECAGQAQ&url=https%3A%2F%2Fwww.cbos.pl%2FSPISKOM.POL%2F2011%2FK\\_089\\_11.PDF&usg=AOvVaw0TKBRz6bbkXeAiSdpQYQ6l](https://www.google.pl/url?sa=t&rc=tj&q=&esrc=s&source=web&cd=&ved=2ahUKEwjD-uukyLL6AhXR4sKHT0jBzLQFnoECAGQAQ&url=https%3A%2F%2Fwww.cbos.pl%2FSPISKOM.POL%2F2011%2FK_089_11.PDF&usg=AOvVaw0TKBRz6bbkXeAiSdpQYQ6l)) and 2020 study results (<https://medycznamarihuana.com/cbos-nie-chcemy-karania-za-posiadanie-marihuany-ale-wciaz-nie-jestesmy-za-jej-legalizacja/>). The number of people that are against punishment for the possession of so-called soft drugs is growing. Besides, the perception of drugs in society varies, even depending on the social group of people who use them. There is a kind of social acceptance for artistic bohemians to use such substances or abuse alcohol (except when driving under their influence). According to M. Budyn, this approach originates from the French bohème, indulging in absinthe and opium. This is yet another example of the social hypocrisy and irrational attitude of the legislator. Budyn, M., 'Kryminalizacja eutanazji...', op. cit., p. 151. Similarly: Davenport-Hines, R., *Odurzeni...*, op. cit., p. 12.

<sup>65</sup> A. Stasiak points out, citing the example of Portugal, which introduced decriminalisation at a time when Poland was tightening its drug laws, that, until 2011, the only opportunity to see a doctor in the course of criminal proceedings for drug possession was a psychiatric examination of accountability, often lasting less than 10 minutes. More alternatives to punishment are now available to courts and public prosecution services, however their use is not generalised.

health is a concept that is ambiguous and difficult to grasp. Firstly, the need to protect public health may justify very extensive criminalisation. Secondly, public health is an abstract notion with no concrete references and therefore difficult to measure.<sup>66</sup> All this has the effect of turning the criminal law into an instrument for the protection of practically all types of good, thus contradicting its subsidiary nature. Using the same logic as in the case of public policy, discussed in the following section, it would have to be argued that adopting a supportive standpoint would require demonstrating that possession of substances whose use can cause addiction leads, *in abstracto*, to negative social consequences. The legislator has used the attribute “possesses”, however, it is difficult to always perceive threats in the mere fact of possessing. Of course, possession can (and most often does) involve the use of drugs by their user, however, it should be made clear that the purpose of the provision was and is not the prosecution of users but combating drug supply and prosecuting dealers who sell drugs in small portions<sup>67</sup> which could suggest to law enforcement authorities that they are only users and leave them, as holders of small quantities, outside the scope of criminal interest. Besides, offenders who possess a narcotic drug in order to use it, act only to the detriment of their own health and good. The argument for the criminalisation of such behaviour is that, through the negative impact on their own health, such holders have a negative impact on public health. However, public health is not a simple sum of the state of health of individuals. As K. Krajewski rightly points out, such reasoning would lead to absurd conclusions, as it could imply an obligation for each individual to keep themselves in good health because this affects the state of public health. Furthermore, if this were the case, there would be no obstacle to criminalising alcohol consumption, cigarette smoking, but also consumption of excessive amounts of unhealthy food (fast food, salt, sugar, fatty foods), due to the risk of lifestyle diseases, motorcycling and many other “unhealthy” behaviours. Therefore, invoking German literature that questions the relevance of singling out this type of object of protection, the author argues that the all-too-enigmatic notion of public health cannot effectively fulfil its function of narrowing the limits of criminal liability.<sup>68</sup> One must agree with the above standpoint. After all, criminalisation of behaviour is not a way of preventing disease and health risks, nor does it have a noticeable impact on the

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Data collected by the author show that Article 70a, which imposes the obligation to include an addiction therapist in the proceedings when there is a reasonable suspicion that the perpetrator is an addict or substance abuser, was used only 1,287 times in 2015. In that year, there were 21,630 people suspected of drug possession. The author therefore poses the legitimate, rhetorical question, where in all this is public health protection? Stasiak, A., *Karanie za posiadanie marihuany to opresyjny i nieskuteczny nonsens. Świat od tego odchodzi*, article of 13 February 2022, available at: <https://oko.press/karanie-za-posiadanie-marihuany-to-opresyjny-i-nieskuteczny-nonsens-swiat-od-tego-odchodzi/>, accessed on 6 October 2022.

<sup>66</sup> Grabowski, K., ‘O pewnych cechach...’, *op. cit.*, pp. 107–108.

<sup>67</sup> Minister Żochowski concluded that as a result of lack of penalisation of possession dealers would go unpunished but would only have to do a few more rounds. *Diariusz Sejmowy*, 61 sitting of the Sejm on 28 September 1995, p. 65. Cited after: Krajewski, K., *Sens i bezsens...*, *op. cit.*, p. 419.

<sup>68</sup> Krajewski, K., ‘Glosa do wyroku SN z dnia 21 stycznia 2009 r., II KK 197/08’, *Państwo i Prawo*, 2009, No. 11, pp. 132–133.

number of addicts or drug users. On the contrary, according to K. Krajewski, there are strong indications that repressive criminal policies only escalate the problem.<sup>69</sup> Unfortunately, in October 2000, the inauspicious amendment to the previous 1997 Act<sup>70</sup> led to the beneficial permissive-medicinal model being replaced with a restrictive-repressive model, and the previously applicable clause stipulating unpunishability for possessing drugs in insignificant amounts, for personal use, being replaced by full punishability in all cases of possession.<sup>71</sup> This puts occasional users, addicts and those who benefit financially from the trade in small quantities of drugs on an equal footing.<sup>72</sup> The current Act of 2005<sup>73</sup> is very different from the Act on the Prevention of Drug Addiction of 1985 which was elaborated on the tide of the freedom movements of the 1980s, presented an extremely liberal approach to drug possession and did not penalise this type of act at all. Over the next two decades, this approach has transformed into one of the most restrictive approaches in Europe.<sup>74</sup> One can only regret that this has happened. However, this fact is the crowning argument in support of the thesis that “possession for personal use” stipulated in Article 62(1) of the Act on Counteracting Drug Addiction, in the wording of the current Act, in the context of the alleged justification of the need to protect “public health”, is merely a secondary ideology added to the established legislation and an attempt to justify a regulation that is questionable from a legislative and constitutional point of view.<sup>75</sup> This is all the more so as, when the legislation was drafted, the legal interest of public health was not mentioned as a *ratio legis* of the provisions introduced.<sup>76</sup>

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<sup>69</sup> Interview with K. Krajewski: <https://www.youtube.com/watch?v=2DVbhFBXRWI> (4.10.2022). J. Vetulani's statements are in a similar vein: <https://www.youtube.com/watch?v=nfm8wiNqAOA>, accessed on 4 October 2022.

<sup>70</sup> Act on Counteracting Drug Addiction of 24 April 1997, Journal of Laws of 1997 No 75 item 468 as amended, in particular amendments made in 2000. (Journal of Laws of 2000 No 103 item 1097).

<sup>71</sup> Krajewski, K., 'Prawo karne...', op. cit., p. 434.

<sup>72</sup> Identically e.g. Kornak, M., 'Glosa...', op. cit., thesis 1.

<sup>73</sup> Ustawa z 31.01.1985 r. o zapobieganiu narkomanii (Journal of Laws of 1985, No 4, item 15).

<sup>74</sup> Wiszejko-Wierzbicka, D., in: Kuźmicz, E., Mielecka-Kubień, Z., Wiszejko-Wierzbicka, D. (eds), *Karanie za posiadanie. Artykuł 62 ustawy o przeciwdziałaniu narkomanii – koszty, czas, opinie*, Warszawa, 2009, p. 7.

<sup>75</sup> It is, of course, necessary at this point to mention the provision of Article 62a of the Act on Counteracting Drug Addiction introduced by the amendment of 1 April 2011 to the Act on Counteracting Drug Addiction and Certain Other Acts (Journal of Laws of 2011, No 117, item 678). While it allows for the discontinuation of proceedings in the case of possession of an insignificant amount of a drug for personal use, it is still not an institution that decriminalises drug possession, and its application is subject to the assessment of law enforcement authorities. It should be underlined that this discontinuation is of an optional nature. For more details on Article 62a of the Act on Counteracting Drug Addiction: Tkaczyk-Rymanowska, K., *Karnoprawne aspekty posiadania narkotyków. Ujęcie statystyczne*, Rzeszów, 2020, pp. 41–46 and statistical data on the application in practice of the provision in question, presented in that publication, pp. 62–161.

<sup>76</sup> Górowski, W., Zając, D. (eds), *Przestępstwa...*, op. cit., marginal ref. 4. This is also claimed by: Grabowski, K., 'O pewnych cechach...', op. cit., p. 113, citing documentation from the legislative procedure.

## III

In the doctrine, one may also encounter the claim that the good protected by the Act on Counteracting Drug Addiction, also by the provision of Article 62(1) thereof is public policy.<sup>77</sup> The term frequently appears in the legal order<sup>78</sup> but there is no legal definition in the legislation giving it a uniform content and scope of meaning. It is a vague, catch-all notion, which allows for flexibility in the application of the law, adapting the content of the notion to the changing social situation, but at the same time it is dangerous, especially in the context of criminal law. This type of concept is concretised by the competent authorities applying the law, who have a wide margin of discretion in using these concepts and in defining their content.<sup>79</sup> The definition of “public policy” – recognised in the literature – as a set of legal and extra-legal norms (moral, ethical, customary, etc.) whose observance determines the normal coexistence of human individuals within an organised State was formulated in the inter-war period.<sup>80</sup> According to these theories, public policy is peace, i.e. public security, and the social order that is shaped under peaceful conditions.<sup>81</sup> Attention began to be drawn to the fact that political, religious, ethical, moral elements etc. have an influence on shaping public policy norms. These are therefore views that have emerged against the background of a collective life that varies depending on the time, the place and the setting. It should be made clear that in the literature definitions relating to the sphere of public policy are strictly linked with the notion of public policy under administrative law.<sup>82</sup> In the context of criminal law, these notions were more broadly characterised by W. Kubala and L. Falandysz: “Public policy, analysed as the generic object of protection under criminal law, should be understood as the state of social relations and structures that is desirable from the point of view of State interests, ensuring the proper functioning of power and governance and guaranteeing security and peace in public areas; this state

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<sup>77</sup> Kulik, M., in: Mozgawa, M. (ed.), *Pozakodeksowe...*, op. cit., p. 550; Górowski, W., Zając, D. (eds), *Przestępstwa...*, op. cit., marginal reference. 4. Claims also appear in the literature that every violation of the law is in a sense a violation of public policy. Kaczmarek, J., *Przestępstwo wzięcia i przetrzymywania zakładnika. Aspekty prawne i kryminologiczne*, Warszawa, 2013, p. 115 et seq. The above leads to the conclusion that the notion of public policy is only an interpretative guideline and that it is hazardous to justify the criminalisation of certain acts on its basis.

<sup>78</sup> Góra, T., Łabuz, P., ‘Pojęcie bezpieczeństwa publicznego i porządku publicznego’, *Policja*, 2021, No. 1, pp. 10–18.

<sup>79</sup> Osierda, A., ‘Prawne aspekty pojęcia bezpieczeństwa publicznego i porządku publicznego’, *Studia Iuridica Lublinensia*, 2014, No. 23, p. 91.

<sup>80</sup> A brief overview from a historical perspective of the notion of public policy as defined under criminal law: Czeszejko-Sochacka, K., ‘Przestępstwo wzięcia zakładnika jako przestępstwo przeciwko porządkowi publicznemu’, *Państwo i Prawo*, 2013, No. 9, p. 70 et seq.

<sup>81</sup> Bojarski, M., in: Gardocki, L. (ed.), *System Prawa Karnego, Tom 8. Przestępstwa przeciwko państwu i dobrom zbiorowym*, Warszawa, 2013, p. 757, marginal ref. 23.

<sup>82</sup> See Osierda, A., ‘Prawne aspekty...’, op. cit., p. 92 et seq. in which the author presents a number of academic definitions of public policy. However, their basis is the notion presented in the text above, elaborated in the inter-war period by W. Kawka.

is regulated by legal norms and principles of social co-existence".<sup>83</sup> Public policy is not equivalent to legal order or to principles of social co-existence, although attention is drawn to the breadth of this definition, in which security aspects are also included in public order. According to another definition, public policy is a certain public order, the totality of collective life relations, but also a certain system of norms, legal and customary rules, regulating the coexistence of people in general or only their behaviour in public places; this gives rise to a certain fundamental objection, because the term treats public order as an abstract system of norms and not as a concrete fragment of the reality of human coexistence that is in compliance with such norms. In this sense, "public policy" is understood as public order, encompassing the totality of collective life relations in all their manifestations.<sup>84</sup> The notion of public policy is pertinently summarised by A. Osierda, who assumes that nowadays public policy is the observance of legal norms, but also of moral, customary and religious norms as well as rules of social coexistence leading to the harmonisation of individuals and human communities.<sup>85</sup>

In the case law of the Constitutional Tribunal it is clearly assumed that public policy, although far from being defined in terms of content, encompasses shaping the state of affairs within the State in a manner enabling the normal coexistence of individuals in that State. When restricting individual rights and freedoms, the legislator should be guided by the concern to ensure harmonious coexistence of members of the community, which includes both protecting the interests of individuals and protecting certain social goods.<sup>86</sup> It follows from the above that when interpreting the notion of public policy the Constitutional Tribunal invoked interpretations elaborated – already in the inter-war period – on the basis of certain legal norms and extra-legal assessments, namely certain assessments of a social and philosophical nature, often with a moral and religious underpinning.<sup>87</sup> Unfortunately, lack of precise articulation of public policy as an object of protection generates practical consequences, foremost of which are the danger of "loosening" the boundaries of criminal liability and the arbitrariness of recognising certain goods as objects of protection. Treating public policy as an abstract system of norms, rather than as a fragment of reality in compliance with such norms, extends liability to behaviour which, although contrary to certain principles, does not lead to disruption of the normal course of public life, particularly where there is no "public" element at all or where surrounding people are not affected by the act. However, if one also focuses attention on the indefinite number of – predominantly customary – rules of behaviour, it is difficult to specify any limit of criminal liability. There is no doubt that non-medical use of narcotic drugs on a large scale has far-reaching

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<sup>83</sup> Kubala, W., 'Porządek publiczny jako rodzajowy przedmiot ochrony przepisów prawa karnego', *Palestra*, 1981, No. 7–9, p. 56.

<sup>84</sup> Falandysz, L., 'Pojęcie porządku publicznego w prawie karnym i karnoadministracyjnym', *Palestra*, 1969, No. 2, pp. 64 and 67.

<sup>85</sup> Osierda, A., 'Prawne aspekty...', op. cit., p. 106.

<sup>86</sup> Judgement of the Constitutional Tribunal of 12 January 1999, P 2/98; Judgement of the Constitutional Tribunal of 7 February 2001, K 27/00; Judgement of the Constitutional Tribunal of 8 October 2007, K 20/07.

<sup>87</sup> Safjan, M., Bosek L. (eds), *Konstytucja...*, op. cit., p. 787, marginal ref. 99.



consequences, not only for health but also for society. It is not an individual problem, as it affects both a person's closest relations and society as a whole, disrupting the harmonious coexistence of its members, and therefore undermining the social order thus defined.<sup>88</sup> In one of its judgements, the Tribunal concluded that public life should be organised so as to protect individuals from the phenomenon of social structure destruction associated with drug addiction.<sup>89</sup> It is argued that one of the most important constitutional principles is to shape the legal order in such a way as to enable the elimination of threats to entire social groups, but also to eliminate external threats to the health of individuals and situations conducive to the voluntary destruction of one's health. Criminalising behaviour that poses even a merely abstract threat to public policy or public health is, therefore, in the view of the Constitutional Tribunal, the duty of State authorities.<sup>90</sup> Such a claim has its consequences. Indeed, it obliges the legislator to establish appropriate norms and safeguards that provide sufficient guarantees for compliance with and enforcement of these norms. The problem is that recourse to criminal law can only be justified when the desired objective cannot be achieved in any other way. The Constitution imposes an obligation on the legislator to select, from among possible measures, those least burdensome for the subjects to whom they are to be applied, or burdensome to the extent necessary to achieve the objective pursued, but not more.<sup>91</sup> The question, then, is whether indeed criminal law as the *ultima ratio* is the appropriate tool for protecting public policy against drug addiction (which is a medical and social problem<sup>92</sup>) or whether it is an example of unacceptable interference by the legislator in constitutional rights and freedoms, including the right to privacy and self-determination.<sup>93</sup> The justification for criminalisation must always be the value that the regulation introduced is intended to protect. Furthermore, it must never go beyond the principles of a democratic state of law. As argued in the literature, non-democratic criminal law emphasises first and foremost the proscriptive function of the criminal law norm and criminalises an act not because it poses threats to the fundamental principles of the proper functioning of society, but because it is linked with violating the obligation to obey the orders of authority.<sup>94</sup> In a democratic State

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<sup>88</sup> Krajewski, K., *Sens i bezsens...*, op. cit., p. 58.

<sup>89</sup> Judgement of the Constitutional Tribunal of 4 November 2014, SK 55/13 with reasons, p. 30 (including critical opinions by: Kulesza, J., 'Glosa do wyroku...', op. cit., pp. 132 et seq., and Jezusek, A., 'Glosa do wyroku...', op. cit., p. 194 et seq.).

<sup>90</sup> Reasons for Judgement of the Constitutional Tribunal of 4 November 2014, pp. 31–32.

<sup>91</sup> Judgement of the Constitutional Tribunal of 25 February 1999, K 23/98.

<sup>92</sup> The thesis that the issue related to consumer drugs use is purely a social and medical one is advanced in the paper: Tkaczyk-Rymanowska, K., 'Narkomania – problem społeczny, medyczny i prawny', in: *V Ogólnopolska Społeczna Konferencja Naukowa "Analiza polskiego społeczeństwa"*, abstracts edited by Iwaniuk, M., Szymczyk, P., Lublin, 2021, p. 20 (unpublished paper).

<sup>93</sup> More details on this topic Tkaczyk-Rymanowska, K., 'Refleksje...', op. cit., p. 47 et seq. A "proportionality test" was conducted therein, on the grounds of Article 31(2) of the Constitution, which led to the conclusion that the regulation of Article 62(1) of the Act is unconstitutional (pp. 56–61).

<sup>94</sup> Zoll, A., 'Odpowiedzialność karna za czyn niesprowadzający zagrożenia dla dobra prawnego', in: Majewski, J. (ed.), *Formy stadialne i postacie zjawiskowe popełnienia przestępstwa*, Toruń, 2007, p. 12.

under the rule of law, the violation of a norm, understood as an order of authority, is not a sufficient basis for punishment, it only marks its limit. The violation of such a norm is a necessary condition for imposing legal consequences (not necessarily under criminal law) that consist in interference in the sphere of freedom, though it is not a sufficient justification for such interference.<sup>95</sup>

Criticism should be directed towards understanding public policy as a status protected by a set of appropriate regulations. The character of such interpretation is questionable, as it is not clear whether it concerns legal order in general.<sup>96</sup> A fundamental flaw in the notion of public policy is describing this category of goods in a normative and abstract way as a certain system of norms (legal, ethical, customary), rather than as a concrete social arrangement in compliance with these norms. Adopting a broad notion of public policy is possible, however, such an extended interpretation of it as an object of protection raises concerns with respect to guaranteeing such protection. The word “public” encompasses the most relevant meaning, although this meaning is somewhat neglected in the doctrine, which is obviously not tantamount to “social” or “legal”. “Public” means “concerning society as a whole or a certain community; accessible to all or intended for all; connected with a certain office or non-private institution; taking place in front of witnesses, in an overt manner”.<sup>97</sup> Can we therefore adopt the thesis that the notion of public policy includes the overt behaviour of people, in compliance with social norms, in places accessible to an unspecified number of people?<sup>98</sup> If so, then it should be made clear that public policy is therefore not the norms and principles alone, but a specific fragment of actual human coexistence. Is it therefore possible to attack or threaten the legal good of public policy in the absence of a “public” element? It seems that possessing a drug fix in private, outside a public place (e.g. in one’s own flat, in a car), in the absence of co-participants aware of such “possession”, in conditions

<sup>95</sup> *Ibidem*, p. 14.

<sup>96</sup> Given the impossibility of assigning specific content – which would always be proportionate to the society development level – to the notion of public policy, the terms “untamed horse” or “chameleon” that appear in academic papers are extremely illustrative and apt. Bałos, I., ‘Stosowanie klauzuli porządku publicznego a drażliwe zjawiska społeczne’, *Monitor Prawniczy*, 2013, No. 3, p. 137.

<sup>97</sup> <https://sjp.pwn.pl>, accessed on 29 September. Under the Code of Petty Offences or the Criminal Code, the attribute “public” is composed of two elements: “public place” or “publicly / in public”. “Public policy”, which is a legal good, appears apart from these as the title of Chapter XXXII of the Criminal Code. They are therefore not identical notions, although the first two appear to be a part of public policy. For if I publicly incite to a certain behaviour or perform certain acts in a public place, I thereby undermine a certain order, public policy.

<sup>98</sup> L. Gardocki is of the opinion that if public policy is understood as a certain order and peace prevailing in public places, then the good thus defined becomes the object of protection of selected provisions. Gardocki, L., *Prawo karne*, op. cit., p. 324. He also wrote about the definition of public policy *sensu stricto* as order in a public place, in the context of the regulation of Chapter XXXII of the Criminal Code. Bojarski, M., in: Gardocki, L. (ed.), *System Prawa...*, op. cit., p. 757, marginal ref. 22. On the contrary, M. Bojarski argues differently in another of his publications, taking the view that public policy is “a system of public law structures and social relations emerging and shaped in public places and in non-public places, whose aim and task is, in particular, to protect life, health, property (...).” For the reasons stated in the text I do not agree with the adoption of such a broad definition. Bojarski, M. (ed.), *Prawo karne...*, op. cit., p. 742.

of total absence of the “public” element, does not pose a threat to the legal good of public policy. A public place and the presence of public are not in themselves sufficient to assume a threat to public policy if the offender’s behaviour does not directly affect surrounding people. In other words, if the drug remains “hidden” from third parties, there seem to be no grounds for holding the perpetrator criminally liable on the basis of the notion of legal good thus constructed.<sup>99</sup> However, should the legislator have doubts (incidentally – unfounded ones) about the complete decriminalisation of drug possession for use, administrative liability could at least be considered. The prohibition of “possession” would only apply in the situation of possessing a drug in a “public” setting. This too would, unfortunately, generate a multitude of doubts similar to the current prohibition under criminal law, but it would be a far more favourable regulation for users than the current one. It would represent a complete paradigm shift: drug use would be moved from the criminal law sphere to the social and health sphere, if more harm reduction programmes were launched at the same time. Above all, a change in policy would protect possessors from the stigma and series of problems associated with an entry in the National Criminal Register, and perhaps also prompt addicted users to reach out for official help without the fear of facing criminal liability.<sup>100</sup>

#### IV

In the light of the above considerations concerning the potential legal goods protected by the provision of Article 62(1) of the Act on Counteracting Drug Addiction, another problem emerges connected with the unlawfulness of this type of act. An attack on legal good is a prerequisite for the act to be considered contrary to a sanctioned norm. The most frequent case of absence of threat to the good

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<sup>99</sup> By way of example, it can also be pointed out that the Act of 25 February 2011 on chemical substances and their mixtures, (Journal of Laws 2011, No 63, item 322) does not provide for criminal liability for the unlawful possession of a chemical substance, that is often more dangerous and whose potential possession leads to much graver negative consequences. Criminalisation covers behaviour related to production, trade, etc.

<sup>100</sup> Attention should be drawn to the regulations already signalled in this article, applicable in Portugal, a country viewed as a contemporary drug policy model. Details on the Portuguese model where drug possession has been decriminalised, the conditions for such decriminalisation, the situation of users when law enforcement discloses drug possession: interview with K. Krajewski: <https://www.youtube.com/watch?v=2DVbhFBXRWI>, accessed on 5 October 2022. Moreover: Kowalik, M., *Portugalia: zamiast kar za narkotyki pomoc dla uzaleznionych*, article of 6 January 2022, available at: <https://krytykapolityczna.pl>, accessed on 7 October 2022; Kijek, K., ‘W Portugalii nie ścigają za ćpanie. Tam ludzie jak chcą, to biorą. A ścieki pokazują całą prawdę’, *Gazeta Wyborcza*, 27.09.2021, article available at: <https://wyborcza.pl/duzyformat/7,127290,27611122,w-portugalii-nie-scigaja-za-cpanie-tam-ludzie-jak-chca-to.html>, accessed on 6 October 2022. A similar option was offered in one state in the USA. In Oregon, instead of facing court, residents caught with drug amounts within the legal limit will have a choice: a fine (100 USD) or a visit to a drug clinic for a health assessment – Sochaczewski, J., *Oregon jak Portugalia. Pierwszy stan w USA, gdzie legalnie można posiadać narkotyki*, article available at: <https://www.national-geographic.pl/artykul/oregon-jak-portugalia-pierwszy-stan-w-usa-gdzie-legalnie-mozna-posiadac-narkotyki>, accessed on 6 October 2022.

is when the behaviour is not subject to evaluation as it lies within the scope of human freedom.<sup>101</sup> Under this premise, one would have to assume that the act of a perpetrator consisting in possessing the drug does not constitute an attack on any of the above-mentioned legal goods. Indeed, a perpetrator may possess a drug for a variety of purposes: to take the drug and become intoxicated, to hide it in a drawer, etc. It is therefore questionable whether the perpetrator's act poses a threat to the goods of public health and public policy. Indeed, it is not unlawful to commit an act that does not harm any legal good.<sup>102</sup> Intermediate standpoints can also be found in the literature: that the act of possessing a drug may harm a legal good, as it poses a threat – in abstract terms – to the goods of health or public policy, however, the consent of the drug holder makes their behaviour legal from the very beginning.<sup>103</sup> Proponents of this view argue that the unlawfulness of the behaviour is precluded by the holder's consent to the violation of the good at their disposal, in this case – health. This argument could be analysed if the health of the individual were the good legally protected by Article 62(1) of the Act on Counteracting Drug Addiction, however, as indicated above, such reasoning would inadmissibly interfere with the freedom of the individual, would be contrary to the purpose of the Act on Counteracting Drug Addiction, as stated in Article 2 thereof, and unconstitutional.<sup>104</sup> The consent of the holder of a legal good to the "violation" thereof or posing a "threat" thereto results in the absence of an attack on the legal good in a situation where there is no third party involved, and the person disposing of and violating the potential legal good is the interested "possessor" himself, who is not the offended party, does not recognise himself as such and is not interested in the interference of law enforcement authorities. Acts that pose an abstract threat to a legal good, which acts stipulated in Article 62(1) of the Act on Counteracting Drug Addiction<sup>105</sup> are considered to be, although very distant from the possible actual threat to the good (only the question is: what good? freedom of individuals only from drug addiction, since the criminal law legislator does not show such concern about possible alcohol addiction?), should also have certain limits in terms of such "distance". It would be absurd to prohibit cigarette smoking because it can cause diseases that prevent members of society from fulfilling social roles or limit their fulfilment, thereby adversely affecting the so-called social order. It would also be irrational to impose alcohol prohibition<sup>106</sup> arguing that the use or abuse of alcohol

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<sup>101</sup> Wróbel, W., Zoll, A., *Polskie prawo...*, op. cit., p. 168.

<sup>102</sup> Gruszecka, D., *Ochrona dobra...*, op. cit., p. 65.

<sup>103</sup> The opposite claim is made by: Piaczyńska, A., 'Przestępstwo udzielenia środków odurzających lub substancji psychotropowych', *Prokuratura i Prawo*, 2010, No. 11, p. 145.

<sup>104</sup> Tkaczyk-Rymanowska, K., 'Refleksje...', op. cit., p. 56 et seq.

<sup>105</sup> Budyn, M., 'Kryminalizacja...', op. cit., p. 147 et seq.; Piaczyńska, A., *Przestępstwo...*, op. cit., p. 144; Zontek, W., 'Jak posiadać, żeby nie posiadać? Kilka refleksji nad orzecznictwem sądowym ostatnich lat w sprawach narkotykowych', *Czasopismo Prawa Karnego i Nauk Penalnych*, 2010, No. 1, p. 53.

<sup>106</sup> The USA has rehearsed the issue of alcohol prohibition, and its consequences proved dramatic. This topic is discussed in academic literature, but also in journalism, for example by: Krajewski, K., 'Czy zalegalizować narkotyki (wokół debaty amerykańskiej)', *Ruch Prawny, Ekonomiczny i Socjologiczny*, 1997, No. 2, year LIV, p. 124 et seq.; Krajewski, K., *Sens i bezsens...*, op. cit., p. 19 et seq.; Davenport-Hines, R., *Odurzeni...*, op. cit., p. 19 et seq.; Hari, J., *Ściągając*

by the public can lead to a number of diseases and behaviours that may also disrupt certain social relations. It would also be absurd to ban the possession of household chemicals, which, after all, in case of improper use, can lead to a number of health complications, including deaths.<sup>107</sup> Indeed, glue, paint, varnish or solvent can all be narcotic substances. The criminal law prohibition of the possession of substances that are mostly widely known and used in medicine is similarly absurd. It should not be the object of interest of criminal law as this causes more harm than good.<sup>108</sup>

Although offences related to an abstract threat are not a homogeneous category, they are characterised by an *a priori* assumption on the part of the legislator that a certain category of behaviour poses a threat to a legal good; this threat is not an attribute of the offence and the courts are relieved of the need to specifically prove this threat in every case.<sup>109</sup> A threat posed to a legal good should only be the motive for the legislator's action and this should be the measure of compliance of the regulation of Article 62(1) of the Act on Counteracting Drug Addiction with Article 31(3) of the Constitution. However, as has been rightly argued in academia, in order to establish such compliance, it is not sufficient to refer to the mere threat posed to abstractly defined social relations, but it is necessary to indicate the concrete value that is threatened by the behaviour that violates the sanctioned norm.<sup>110</sup> When introducing the criminalisation of a certain type of behaviour, the legislator is obliged to justify it on the basis of its social harmfulness. Such harmfulness arises when it is established that a certain category of acts threatens a good that has a certain socially recognised value. However, this is not a sufficient condition for introducing a criminal law prohibition. It must also be established that it is possible to influence the behaviour of the norm addressees by the prohibition and threat of punishment in the event of non-compliance.<sup>111</sup> From there, it is a straightforward matter to conclude that the envisaged prohibition and the penalty for its violation are intended to be a proportionate response in the light of Article 31(3) of the Constitution. If we considered regulations related to "supply-side" activities in the broadest sense, this claim would be defensible. However, possession for use in itself, under Article 62(1) of the Act on Counteracting Drug Addiction, cannot benefit from such defence. All

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krzyk. *Dzieje wojny z narkotykami*, Wołowiec, 2018, p. 15 et seq.; Walton, S., *Odlot. Kulturowa historia odurzenia*, Warszawa, 2017, p. 13 et seq.; Winnicka, E., *Zbuntowany Nowy Jork, wolność w czasach prohibicji*, Kraków, 2019, p. 15 et seq.; Kowalik, T., Słowiński, P., *Dragi i wojna. Narkotyki w działaniach wojennych*, Warszawa, 2019, p. 491 et seq. (in particular p. 502 et seq.).

<sup>107</sup> In the 1960s and 1970s, experiments with commonly available substances used in the household were popular. One of these was the famous "Tri" liquid, designed to remove stains from textiles, but used for inhalation as a euphoric-hallucinogenic agent. <https://histmag.org/Dzieci-z-dworca-ZOO-na-polskim-podworku-problem-narkomanii-w-PRL-22073>, accessed on 30 September 2022.

<sup>108</sup> Further literature on this topic: Tkaczyk-Rymanowska, K., 'Narkomania...', op. cit., abstract, p. 20.

<sup>109</sup> Zöll, A., 'Odpowiedzialność karna...', op. cit., p. 15. I believe that it is possible to provide counter-evidence to such an assumption, demonstrating that in a particular case there was no threat to a potential good; this will affect the assessment of the degree of social harm of the act and the consideration of the individual's behaviour as not punishable and therefore not criminal.

<sup>110</sup> Ibidem, p. 16.

<sup>111</sup> Ibidem, p. 18.

the more so as the legislator has indicated “possession” of the drug and not its “offering”, as the causative action, therefore it is not justified to invoke public policy or public health considerations as legislative motives.<sup>112</sup>

It is impossible to rid the world of all possible risks, and the belief that it is possible to win the so-called fight against drug addiction by means of criminal law norms is an approach that is by all measures illusory, as demonstrated both by history and the experience of other countries.<sup>113</sup> In view of this, it would be appropriate to consider a path that carries some risk, but at the same time is an expression of tolerance, compromise, respect for the freedom of individuals and their autonomy as subjects capable of making informed and rational decisions. Sacrificing this freedom in the name of a false sense of security only leads to abuses and wasting energy on activities that produce no results (apart from generating police statistics). The excessive paternalism, embodied in the criminalisation of drug possession, in a form that imposes a certain hierarchy of values, certain moral principles, regardless of an individual's preferences, is difficult to accept. Just as it is obvious that there is one legal system in the country, it is also obvious that there can be many ethical, moral systems. The constant control of individuals, of what they may or may not possess, treats citizens like children, which may raise fears that they will eventually begin to behave in such a way. Deprived of the right to decide for themselves, they will lose the capacity to view the situation independently, rationally and to make decisions, and will become entirely “dependant” on the protective parent. If we want to move in this direction, it is still important to remember that in the proper process of raising children and caring for them, there comes a point when these children must be allowed to grow up.<sup>114</sup>

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<sup>112</sup> There are statements in doctrine and case-law that equate drug possession with drug use, such an interpretation to the disadvantage of the perpetrator is unconstitutional. In a democratic state under the rule of law, legislative defects cannot be remedied by the doctrine or the judiciary. On this issue: see Supreme Court Resolution of 27 January 2011, I KZP 24/10 and polemic by M. Derlatka and M. Klinowski: Derlatka, M., ‘Glosa do uchwały SN z 27 stycznia 2011 r., I KZP 24/10’, *Państwo i Prawo*, 2011, No. 12, p. 131 et seq., and Klinowski, M., ‘W sprawie posiadania...’, op. cit., p. 101 et seq. Fortunately, the Supreme Court changed its mind in 2019: “since the Act (...) does not criminalise (...) the actual use of drugs by the perpetrator, it is not possible to consider that the use of a narcotic drug constitutes an offence. The intention of the legislator was to make possession of a narcotic drug punishable at the time the offender was found to be in physical possession of such a drug. The use of drugs itself is not criminalised by the current laws in Poland.” Judgement of the Supreme Court of 23 October 2019, IV KK 577/18.

<sup>113</sup> Similarly critical views on the policy of “deterrence” under criminal law for example Davenport-Hines, R., *Odurzeni...*, op. cit., pp. 614–615. This author proposes interesting forms of social campaigns aimed at the group most at risk of drug abuse i.e. young people. Similar campaigns are already being carried out in Poland, see for example spots at: [http://konkurs.kampaniespoleczne.pl/kk\\_kampanie.php?Edycja=2016&kk\\_id=893&kk\\_kat=3&action=details](http://konkurs.kampaniespoleczne.pl/kk_kampanie.php?Edycja=2016&kk_id=893&kk_kat=3&action=details), accessed on 6 October 2022 or <https://kampaniespoleczne.pl/to-tylko-narkotyki/>, accessed on 6 October 2022.

<sup>114</sup> Budyn, M., ‘Kryminalizacja...’, op. cit., p. 127.

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