

EFFICIENCY OF LEGAL NORMS IN THE CONTEXT OF SUPPRESSING THE MISUSE OF NARCOTICS

Case study of Serbia and comparative legal review

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Abstract

Misuse of narcotics is more and more our reality and its explicit tendency is increasingly destructive against the existing state of affairs. More precisely, negative consequences of use of narcotics as well as of crimes connected to them, and particularly the organized crime, are spreading around the globe assuming disastrous dimensions. In spite of the fact that international community has reacted to the situation with a determined strategy applying coordinated instruments in the struggle against the misuse of narcotics, the negative trend still continues. There is no doubt that states invest considerable efforts and enormous resources to put under control this negative social phenomenon. Approaches in that respect differ from country to country due to numerous and variable factors (economic, social, cultural...). The question is: repressive or liberal methods? Special attention in the present paper is paid to the explanation, i.e. monitoring and evaluation of appropriate modalities in preventing and suppressing that negative phenomenon. The optics used are, in a way, the September 2009 Law on amending the Criminal Law, and several more important concept innovations (or those implicitly based on a theoretical conception) as well as criticism of certain new incriminations specified in that Law.

Key words: misuse of narcotics, organized crime, unauthorized manufacture and trade, possession of narcotics for personal use, criminal liability, sanctions.

1. Introduction

Narcotics misuse has been and still is the follower of the epoch we live in. As a mortal infection, the illness is not located at a single place, in a single country or region, spreading instead across all the states of the world. That phenomenon has become global and transgresses the state borders without recognizing state sovereignty.

In a permanent expansion and with frightening consequences we are witnessing here one of the biggest problems for all countries in the world, a “planetary

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pestilence” that undermines the very foundations of social values. At present 185 million people are using the narcotics. According to official UN data, the majority of them are inhabitants of developing countries. That this illicit use is drastically increased is probably best evidenced by the report of International Agency for Narcotics Control in terms of which this phenomenon assumed, only in 1986 the proportion of epidemics, so that with more than 48 million of drug addicts, the situation has become alarming.

At the beginning of eighties, some 50 million, at the end of the first decade of the present century – three times more! And more than that! According to some indicators, at the end of 2000, more than 700 billion dollars was the value of world trade in narcotics. Enormous financial force and assuming a merging of all smugglers into a single multinational company that would be a third corporation in the world, between Ford and Standard Oil.¹

According to a recent research of the European Center for Supervising Drugs and dependency from drugs (EMCDA), there exist at present in the EU countries between 1.2 and 2.1 million of drug consumers, among which between 850,000 and 1.300,000 intravenous users. Furthermore, 1.500,000 persons in the entire territory of Europe consume cocaine within a single month, while another 12 million – cannabis. Abuse of drugs is particularly spread among the young ones, in some countries even up to 8 percent. Recently, a phenomenon of mixing various kinds of narcotics is also noticed, most often with alcohol and medical pills (“e-poly drug use”). In addition, the number of those infected with AIDS and hepatitis has increased in some of the countries of the region, which is especially true for 2005, with the figure around 26,000 persons.²

In spite of intensive police activities in preventing the manufacture and dealing with narcotics, according to Interpol assessment, only 5 to 10% of illicit trade in drugs has been discovered and confiscated. Worth of attention is also the information disclosed by International Organization of Criminal Police according to which even where six sevenths of drug is seized, the whole “business” is still remunerative.³ Even in our country this exceptionally dangerous form of criminality is deeply infiltrated into every cell of the “system of living”, ruining thus in a direct way the health, psycho-social, economic and cultural spheres of society. Geographic position of our country on the shortest continental connection between Asia and Europe, but also the civil war and the sanctions in the 1990s, resulted in the increase of an already large market of its consumers. In spite of a dense network on that road with the accompanying infrastructure, it is almost useless to warn that in a transitional and post-war Serbia, burdened by considerable political and social problems, remain large quantities of these drugs.⁴ Consequently, it is no wonder that in that “small” Serbia there is now

¹ Quoted from: M. Nicović, Povezanost opojnih droga i organizovanog kriminala. Organizovani kriminalitet i korupcija (Organized crime and corruption), Kopaonik, March 1996, 81.

² EMCDDA (2005b) Thematic papers – illicit drug use in the EU: legislative approaches. <http://www.emcdda.eu.int/index.cmf?fuseaction=public.content&nnadied=70798&languageiso=EN>

³ V. Rakočević, Krivično delo neovlašćene proizvodnje i stavljanja u promet opojnih droga, problemi u praksi i zakonodavna rešenja, Krivično zakonodavstvo Srbije i Crne Gore, 2003, 124.

⁴ According to Ministry of Interior of the Republic of Serbia and Montenegro, in addition to 700 kg. of heroin, mostly of Afghan origin, 13 kg. of cocaine, 60 kg. of hashish and 19,000 ecstasy pills have

three times more drug addicts than ten years ago. In addition, one should note that 95% of heroine from Turkey, Bulgaria, Albania and Kosovo traverses through Serbia and that in 2006 some 700 kg. of heroine was confiscated in this country, while in 2004, 2005 and 2006, that figure was 1.5 ton – most often at the Gradina border crossing. Particularly interesting is the information that 100.000,000 EUR is spent every month in Serbia for buying drugs – a really frightening amount.

Unfortunately, such extremely unfavorable state of affairs remains constant. Hiding behind important efforts to set some limits to such kind of conduct, is a befogged view. Although a drug story has been told long time ago and although everything was already known and clear, so that there was nothing new to be said, it seemed that the discussion of the problem was always at the start and that it was indispensable to begin its deciphering as soon as possible. As for now, there is no conjurer's wand yet that would at least accelerate the positive trends and eventually halt, prevent and absolutely eliminate all these misfortunes. But with a more responsible approach along that line and with enormous efforts and resources, narcotics could be placed under control to a considerable degree, with the aim of preventing and beating back in such a way their misuse.

2. Prevention versus Repression

The problem of regulation and control of the use of drugs may be viewed from two levels: preventive, as clearly a useful approach, and the other – repression, which still remains in contemporary society a prevailing instrument of struggle. In fact, each one of these two ways of reaction has both positive and negative features, although often their mutual relation becomes forgotten.

We opt for strengthening of prevention, in spite of this being a slow and difficult process. Naturally, some forms of conduct in this sphere are so full of problems, that no prevention or control would help without being coupled with repression.

A rising complexity in understanding this phenomenon combined with explanation that the problem focuses on the inefficiency of legal and judicial control has strategic importance for future actions. To be true, the present situation, with all the confusion and uncertainty is not a good climate to settle the drugs problem. New approaches are necessary and possible instead, although the unacceptable, the absurd and the unripe ideas in this respect should by all means be rejected. Consequently, by abandoning the former basic principle of generally preventive effects of punishment

been confiscated in 2006.. Almost 90% of these quantities continues to the West, while the rest stays for drug-addicts population in our country. Cocaine mainly comes from South America, synthetic drugs from Holland and Belgium, while marihuana is a "specialty" of this region. In 2006 only, 2 tons of that drug has been confiscated as well as a total of 6,300 kg. of all narcotics in the entire state. To all that one should add that only in course of that year The Customs Administration of Serbia managed to confiscate drugs valued at some 4.500,000 EUR. The problem of abuse of narcotics is a serious problem in all EU member states, particularly due to the fact that their manufacture and trade are in the hands of well organized criminal groups. Quoted from: M. Reljanović, Pojavni oblici organizovanog kriminala, trgovina drogom, Borba protiv organizovanog kriminala u Srbiji, Institut za uporedno pravo, Beograd, 2008, 81.

and the criminal law enforcement, with all its institutions, new framework should be established, but with a changed and reasonable content, and always paying attention to avoid extreme approaches.

The emphasis should be on the coordinated action of all social factors and the multidisciplinary approach, including certain specific instruments and measures to be invented in accordance to the problem at issue.

This is generally the leading idea in determining the content and the essence of future way of reaction which should also consider the need for guaranteeing human rights in combination with preventing their abuse. It goes without saying that this line of activity may not be realized either in the short-run or easily.

3. Repressive approach or liberal methods? - criminal offences implying misuse of narcotics

Serbian Criminal Law (CL) specifies (chapter XXIII) a group of two criminal offences of drug abuse under the title "Criminal offences against human health". The terms used are "unauthorized manufacture, possession and trade of narcotics (art. 246) and "making available the use of narcotics" (art. 247).

However, the September 2009 Law on amending the CL of Serbia, this "group" indicated the change to some degree of these offences. Introduction of a new offence of "unauthorized possession of narcotics" through art. 246 a has extended the part of Law which specifies the criminal liability for that kind of criminal offences⁵. But is this provision new or old? That question also implies another one: what is happening with arts. 246 and 247, i.e. is the change only terminological or the one of conception of that group of offences? Namely, are the changes formal or substantial?

Let us consider the very essence of all three offences, beginning with determining the sense and the very nature of these incriminations and with defining their general notion, context and grounds. This is to be followed by considering some theoretical and practical dilemmas and problems relating to the offence of unauthorized

⁵ Article 246 - "Unauthorized manufacture of and trade of narcotics"

"(1) Whoever without authorization manufactures, processes, sells or offers to sell or who, for the purpose of sale, purchases, possesses or mediates in purchasing and selling, or in some other way puts in circulation the substances or preparations that are proclaimed as narcotics, shall be punished by imprisonment of from three to twelve years.

(2) Whoever without authorization grows poppy or psycho-active hemp or other plants, shall be punished by imprisonment of from six months to five years.

(3) Should the offence specified in para. 1 of the present article be committed by a group, or should the perpetrator of this offence organize a network of resellers or mediators, he shall be punished by imprisonment of from five to twelve years.

(4) Should the offence specified in para. 1 of the present article be committed by an organized criminal group, the perpetrator shall be punished by imprisonment up to ten years, at the minimum.

(5) A perpetrator of the offence specified in paras. 1 through 4 of the present article who uncovers the one he obtained the narcotics from, may be exempted from punishment.

(6) Whoever without authorization makes, procures, possesses or makes available the equipment, material or substances, knowing that these are intended for the manufacture of narcotics, shall be punished by imprisonment of from six months to five years.

(7) Narcotics and means for their manufacture and processing shall be confiscated."

manufacture and trade of narcotics as well as the offered solutions and proposals for efficient elimination of that most destructive form of criminality.

As far as previous formulation of that criminal offence specified in the CL of Serbia is concerned, it is possible to conclude that the provision of article 246 of the Law amending the CL is rather similar with that one, and thus also with the formulation of the offence specified in article 245 of the General Criminal Law (GCL). But still, some differences of substantive character do exist. It is obvious that amendments have intervened in several areas: paragraph 1, for instance, is almost identical in all three legislative texts, except for the heading and the prescribed penalties. Thus, the amending Law defines paragraph 1 in the same way, and the only change refers to the amount of penalty. In art. 246 the threatened penalty is raised from two to three years. Consequently, the GCL, although identical in terms of terminology and essence of the offence, differs regarding the amount of penalty and is, therefore, stricter (the minimum penalty is 5 years of imprisonment). The lawmaker incriminates that offence with a special minimum of threatened penalty, while in the other case the amendments have raised that minimum for another year, while meting out the penalty along the range between 3 and 12 years.

Paras. 2 through 4 are significantly modified, since para. 2 is the new one, reading: "whoever grows poppy or psycho-active hemp or other plants...", while specifying the range of penalties of from six months to five years of imprisonment. So, there is a difference in relation to art. 245 of the GCL as well as in relation to art. 246 of the CL of Serbia. Furthermore, paras. 3 and 4 provide for more serious forms and include situations of acts of commission by a group or a perpetrator who organized a network of resellers or mediators with the aim of committing that offence, while in para. 4 another qualifying circumstance was added should the offence be committed by an organized criminal group. In para. 3 previous formulation is omitted, i.e. that the persons involved have associated in order to commit criminal offences, but the threatened penalty remained the same. With such penalty and/or framework for its imposing, the Law has accepted the solution existing in the CL as adequate.

Let us look now this solution in a wider context, suggesting that a better one, in contemporary conditions, would be the solution specified in the GCL. Relevant in this respect is the fact that comparative law unfortunately reveals the picture of rather different approaches and conceptions that, although offering some improvement, often are transformed into mere façade or apparently ideal solutions. The essence of regulation has in fact remained the same: strictness and prescribing a wide range of penalties deemed as sufficient way of suppressing this exceptionally dangerous phenomenon. There is no convincing argument that would shake that construction in the struggle against that type of collective criminality or favor some other solution. By enacting the CL of Serbia and the Law amending the CL, these and other provisions became genuinely modern and more appropriate to respond to radical changes in our society. However, some objections still could be raised: inclination towards the perpetrators engaged in an organized way in manufacturing and distribution of narcotics by keeping the lower limit of the possible penalty. Consequently – why that minimum is 5 years and how to justify the range of 5 – 15 years, having in mind the criminal policy in assessment of offences and the need for their punishment? In this

case the decisive element should be the extreme seriousness of committing offences in the group and the degree of danger for society. This is especially true in the case of a modern code, which should include strict penalties and norms otherwise provided in international acts.

Para. 4, however, considerably sets aside that objection. Obviously, in the first and the second case, less strict forms and lower number of group members (loose association, short period of criminal activity, etc.) are at issue here. Committing the basic offence in an organized group is threatened by imprisonment of ten years at least, meaning that the law-maker considered that offence as a more serious and more dangerous one than the previous two. In addition to providing the incrimination of “group” and “organized network”, the law-maker specified yet another form – “organized criminal group”, considering it as particularly dangerous form belonging to the most severe offences. The appropriate court practice should make more precise that legal standard in practical implementation. Moreover, that solution appears more logical because following the corresponding international documents.

The provision of article 5 specifies the possibility of exemption from punishment of a perpetrator who reports the person he procured the drugs from. This is a motivation for prospective perpetrators to reveal the other ones, usually more dangerous perpetrators in the process.

Consequently, having in mind the seriousness of the offence, the danger for society and damaging effects in term of health, at the one hand, and enormous difficulties in discovering that criminal offence and supplying evidence at court, the Law provides for specific benefits. So, the introduction of a “special institute” of exemption from criminal liability is fully justified as an instrument of shaking the existing and planned ways of discretion in the chain of sale and distribution of narcotics. However, isn't that solution appropriate only if looked as a specific case of perpetrators of such serious offence? Although rather efficient in the sphere of collecting evidence, this measure of exempting only one perpetrator in the chain who wants to cooperate, is at least not along the lines of proportionality in punishing while considering the whole perspective of the situation. Such objections are justified if one has in mind the implied indefiniteness which makes possible arbitrary court decisions (and thus a possible abuse of that legislative solution). The aggravating circumstance here is that usually drug sellers do not know the identity of their supplier or do not want to risk their lives in becoming informants.⁶

Consequently, the amending Law did not succeed to improve the situation and establish clearer indicators that would at least attenuate uncertainty and inequality in this matter. And one idea more: a too favorable attitude towards perpetrators willing to cooperate should rather be corrected by court's possibility only to “decrease” the penalty (to impose a minimum or a half of the penalty...).

This specific parallelogram of the GCL (General Criminal Law) and CL of the Republic of Serbia solutions shows that the identical para. 3 in these texts does not exist in the Law amending the CL, which applies also to the place of para. 4 of the CL. However, para. 4 of the GCL and para. 5 show that the formulation of these provisions

⁶ M. Reljanović, op. cit., 84.

"moves" along the identical line of proceeding and that there was no need to change anything in the light of the reform that has been carried out.

In the Law on Amending the Criminal Law, after article 246, a new article 246a is added⁷ reading: "*Unauthorized possession of narcotics*". It has already been noted that crimes relating to narcotics represent, in terms of their size and way of committing, a great danger for society. Adding to that are ever more organized forms, specialization and professional approach present these days in the sphere of such crimes. All in all, the whole problem is more and more complicated through various elements which have a considerable impact on the choice of most adequate solutions.

The heart of the matter is in the whole atmosphere of the society dismembered by egotistic attitude, cold indifference, difficult general atmosphere permeating our lives, establishing selfish and limitless interests and excessive appetites full of anomalies, deviations and at the same time becoming dominant and normal style of living for many "other people". In the series of other reasons for such extremely bad situation, this form of organized crime looks like a game of chance with adjusted mechanism. The only winners are those on top of the pyramid, highly placed on the ladder of drugs middlemen, while all the rest are but losers. An individual consuming the drug becomes a mere puppet in the hands of his supplier, passively aware that "things are as they are" and that he can do nothing about them. Simply said, such way of his life is like a high wall before his face, becoming the only way he knows and the one he can not change. And here we come again to the complexities of the problem aggravated by parallel damaging processes and obstacles to attempts at searching for adequate solutions. In this way that social and individual phenomenon is transformed into unsolvable puzzle at the detriment of both private and social interests. A realistic look into the future brings about immediately the dark menaces and warnings about possible disastrous consequences.

The next topic we discuss concerns the incrimination of the offence of possessing narcotics (art. 246a). Since a more definite answer to the question posed in relation to that article is not possible, it suffices to present various conceptions and possible connections characteristic of this criminal offence. The "new" legislative solution restores the "old idea in new appearance" and/or the "old-new" form of the offence expressed in incrimination of the very possession of narcotics. The CL, namely keeps the incriminations that existed in the current criminal legislation and that are "verified". However, the nature of that offence is characterized by specific circumstances which, as such, determine the less serious and privileged form of its perpetration.

And again the same question: repressive approach or liberal methods?

The following answers will help us: what is the quantity to be considered for personal use only (5, 10 or 15 grams, or 100 grams of marihuana in 80 packages, or

⁷ "(1) Whoever without authorization possesses small quantities for his own use of substances or preparations that are proclaimed as narcotics, shall be punished by a fine or imprisonment of up to three years, and may be exempted from punishment.

(2) A perpetrator of the offence specified in para. 1 of the present article who discloses the one he procured the narcotics from may be exempted from punishment.

(3) The narcotics shall be confiscated."

10-20 grams of heroine hidden in perpetrator's house This might be a key point and the peak of indefiniteness of a given criminal offence, giving ground for abuses in the sphere of meting out the penalty. On the other hand, such solution should not be entirely disregarded due to a rather wide range of actual possibilities: court interpretation anyhow faces in all other cases almost the same problem of indefiniteness of the regulated matter.

So, the debate is conducted along two opposing tracks, each with its own *pro et contra* arguments. Nevertheless, our legislation succeeded to produce a provision defining this criminal offence. Although there are no justified criminal law policy reasons for a conspicuously repressive public attitude regarding the misuse of narcotics in general, supported by some international documents (adopted after intensive pressure by the U.S.A.) as well as by court practice etc., it was sufficient to again actualize the punishment of the very act of procuring and possessing of drugs for personal use.⁸ We say "again" since the same wording has been introduced in the 2003 Amendments. This new form is unknown to CL.

4. Comparative Legal Review - Possessing of narcotics for personal use according to foreign legislation and court practice

It is certain that contemporary criminal law, in regulating this kind of conduct, differs from country to country. Already a summary view on some criminal codes reveals the differences in accepted solutions, some of them rather contradictory; on the other hand, there exist similar conception, in some cases even identical. The following comparative review is inspired by the intention to search for best available solutions, in spite of obvious risk of such attempt. In fact, the only way the insight of this complex of problems could be encompassed as an entirety is to discern some other relevant approaches and solutions.

Our research in the field of most adequate normative regulation of this kind of conduct begins with reviewing various legislative solutions. What is the degree of making relative the fact of "small quantity of drugs", of possessing them "in a public place", of possessing all kinds of drugs or consuming "only" cannabis, of habitual perpetration within a single year, of the first, the second or the third perpetration? Perhaps, however, as the preceding one, the question: is not the noted phenomenon the issue of freedom of an individual and the one of choice of one's own way of life, but of an individual belonging to the "relation of the network"?! And here again, we are at the beginning. So, how to draw a line between the strict legal principles and the practice approaching human life as one's own matter motivated "exclusively" and "sincerely" by reasons of humaneness and purposefulness?

To be true, the problems with this offence in almost every country are solved in "their own way". This is rather important since it does always provoke thinking.

⁸ Z. Stojanović, Nove tendencije u savremenoj nauci krivičnog prava i neka pitanja našeg materijalnog krivičnog zakonodavstva, Symposium on new trends in our criminal theory and legislation, Zlatibor Mountain, 2005, 36.

Different opinions and starting points result in rather different solutions. That still does not mean that there is no respect for the difference!

Legislative solutions for the offence of procuring and possessing drugs for personal use distinguish between the consumption of drugs as such (so-called common use) and/or possessing (holding) them. In France, Greece, Finland, Sweden, Norway, Luxemburg (except for cannabis) as well as in Cyprus, the “common use of drugs” is considered a criminal offence. In Estonia, Spain, Portugal and Latvia such use is treated as infraction only. Some other states do not directly ban the consumption, but do that only indirectly by prohibiting “preparation acts preceding the use of drugs”. This particularly concerns the act of possession. The conception of “possessing small quantities of drugs”, consequently, includes not only the idea of individual use but also the preparation acts. Speaking of illicit possession, these acts are expressly banned in the Czech Republic, Ireland, Spain, Italy, Spain, Belgium and Luxemburg. The sanctions are various, but where there are no aggravating circumstances – as the case is also with possessing small quantities of drugs for personal use – the law excludes imprisonment as a penalty. And conversely, with aggravating circumstances and recidivism, the law provides the imprisonment. In Luxemburg, Belgium and Ireland this refers to cannabis only, while in Spain, Italy, Portugal and Czech Republic this includes all dangerous drugs.

Entirely contrary, the courts in China may order execution against anyone possessing 50 grams of heroine, while smaller quantities entail the sentence for life. In Malaysia the danger for society is graded on the ground of the basic criterion: the kind and quantity of drugs found at the perpetrator.

According to the 1952 Dangerous Drugs Act, the offence does exist after finding at the perpetrator less than 2 grams of heroine, morphine, MAM etc., while the penalty provided is 5 year imprisonment or a fine amounting to 100,000 rignits, or both these penalties. For a more serious form (exceeding 2 grams and less than 5 grams of cannabis or 15 grams of cocaine, etc.), the minimum imprisonment is 2 years and the maximum – 5 years, as well as the additional penalty – 3 to 5 lashes. The most serious forms entail even death penalty.

Most criminal codes in continental Europe distinguish between possession and use, and there is no imprisonment for the use.

We continue with submitting the assignment of reasons for solutions applied to this form of offence. In Italy, for instance, possessing drugs for personal use (which includes their purchase and importation), the sanction includes taking away of perpetrator’s driver’s license for a period of from 1 to 3 months (for cannabis) and 2 – 4 months for other dangerous drugs. These measures include also taking away of permit to carry arms, passport and sojourn permit (in case of foreign citizens). The first-time perpetrator with small quantity of drugs may be only warned by the court (reprimand).⁹

The Austrian 1998 Drugs Act simplifies the whole procedure in the case of cannabis by eliminating the requirement of having an opinion of health care agencies

⁹ *Codice penale... Giudici del Tribunale Milano, 1952. Compendio di Diritto penale, Parte generale e speciale*2004; Marino R. Gatti G., *Codice penale e leggi complementari*, Napoli, 1992.

which does not apply in the case of other dangerous drugs. In the case of small quantities, the specified penalty is imprisonment of up to 6 months or a fine. Otherwise this Act provides for more freedom to public prosecutor not to plead for punishment for purchasing or possession of small quantities of drugs for personal use.¹⁰

Consuming and possessing of drugs for personal use in a public place, as well as if there exist aggravating circumstances (consuming during driving the car, leaving the used needle at the public place), in Spain entails a fine.¹¹

In Belgium (2003) and Luxemburg (2001) consumption of cannabis (as well as purchase, transporting and possessing it for personal use) entails a fine for the perpetrator. In Luxemburg, more concretely, should such consumption be treated as “dangerous for others” (e.g. at work post or in the school) still requires the penalty of imprisonment of from 8 days to 6 months, and up to 2 years should the drugs be consumed in the presence of one or several under-age persons. Otherwise, in prescribing sanctions, this Law makes no distinction between different kinds of other drugs. In addition, if the cannabis consumer creates no problem, i.e. does not commit new infractions, and if there is no indication of his being addicted, there shall be no criminal prosecution. First transgression is punishable by fine only and its amount is to be increased within a year after pronouncing the first penalty should the perpetrator commit another offence. Such perpetrators are also subject to imprisonment of from 8 days to 1 month, coupled with the fine. In this case the Law distinguishes between “problematic consumption” and “disorder in a public place”, the latter threatened by stricter punishments, e.g. imprisonment of from 3 months to 1 year combined with the fine (although with the alternate application of only one of these). For those using a minimal quantity of cannabis, i.e. 3 grams, sufficient according to Law for 24 hours, the prescribed measure is only to be entered into police records.¹²

According to the Dutch 1996 Opium Act, the possession of all kinds of drugs is punishable. In terms of art. 11 (5) there shall be no punishment should the quantity of marihuana or hashish for personal use fail to exceed 5 grams. Sale, possession and consumption of cannabis in coffee shops is not prosecuted if following conditions specified by so-called AHOJ-G criterion are met¹³ and one of them is that “Maximum quantity of drugs permitted to be sold and kept is limited to 5 grams per person”.¹⁴ The implementation of this Act is entrusted to prosecutors and the police who are bound to follow only the purposefulness principle and the general guidelines of the Prosecutors’ Board.

The similar liberal approach regarding cannabis consumers is applied in France and Denmark.

¹⁰ <http://www.emcdda.eu.int>.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ A) Prohibited drugs must not be advertised, H) “Hard” drugs must not be sold; O) Coffee shops must not create problems in the public; J) Drugs must not be sold to under-age persons (under 18), who otherwise are not admitted to such shops;

¹⁴ <http://www.emcdda.eu.int/index.ctfm?fuseaction=public.content&nnodeid=70798&languageiso=EN>

According to the existing Law in Germany, as amended in 1998, the public prosecutor decides to refrain from punishment in the cases of “minor” transgressions, if criminal prosecution is not in public interest and if someone “cultivates, imports, exports or purchases drugs for personal use only”, i.e. in minimum quantities. Illustrative of this point is the 1994 verdict of the Karlsruhe Federal Constitutional Court where the emphasis in a cannabis case was placed on the “ban on excessively strict penalties”.¹⁵

According to the British 1971 Drugs Abuse Act, all psycho-active substances are classified into three categories – A, B, and C, on the ground of their respective levels of danger. Cannabis was in the B group in 2002, but the government decided to put it in C group since it represented a lesser danger. However, the police is still authorized to confiscate that substance and notify the prosecutor accordingly should there be no aggravating circumstances. If these are present, the punishment threatened is the imprisonment of up to 2 years. After the new Act entered into force in 2005, special law enforcement “agencies” are empowered to test the arrested persons for coke and heroin; aggravating circumstances are also provided for cases of selling drugs near schools or using children as couriers.¹⁶

In Hungary in the 1999 – 2003 period the drug consumption has been punishable as criminal offence. But under the new Criminal Code enacted in March 2003, this is no more the case, so that punishments may not be imposed against drug addicts.¹⁷

In Lithuania, Estonia and Latvia possessing of small quantities of drugs is not treated as criminal offence. However, such “offence” as well is threatened by “a sanction” of home custody of 15, 30 or 45 days.¹⁸

An interesting solution in the form of gradual penalties for habitual offenders is provided in the 1977 Irish Drugs Abuse Act. The first time cannabis offender, for instance, is fined by 63 EUR; the second infraction entails the fine of 127 EUR, while the third one – of up to 317. In some cases this penalty – at court’s discretion – may include imprisonment. This progressive penalty system, however, does not apply in case of possessing other kinds of drugs where the punishment may be a combination of fine at the amount of 317 EUR and imprisonment of up to 12 months.¹⁹

Possession of drugs in the U.S.A territory is not permitted and is treated as infraction. Since this matter is not regulated by federal law, there exist various laws at the states’ level. In addition to differences, they have some identical solutions as well. The requirement for criminal liability is the need of proving “criminal intent”. Distinguishing between “simple possession of drugs” and “possession with the aim of distributing” is crucial. In the first case “the prosecution must prove actual possession or constructive possession, together with awareness about the presence and character of the given substance”. This is a rather widely accepted rule in the states’ legislation,

¹⁵ <http://www.emcdda.eu.int>

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Ibid.

where the law specifies the quantities to be considered²⁰ as possessed only, i.e. without intent to be distributed.

Insisting on special explanation of offered solutions in fact means insisting on the need for a thorough insight into different legislative and judicial solutions, especially enhanced by the interest to discern new possibilities in approaching our problem. One, however, has to admit that the heterogeneity in this area is suppressed by a different, and first of all, more liberal strategy.

5. Liberal Approach - "Making possible the use of narcotics"

The changes in relation to article 247²¹ of the CL are those introduced by two new paragraphs, while the basic formulation of the offence remains the same, i.e. as in its more serious form. The existing incrimination now provides for yet another qualifying circumstance – death of a passive subject, caused by making available the use of narcotics, while the former qualifying circumstance involved a minor victim or several persons, or should the offence entail serious consequences (para. 2). The Law amending the CL introduced new form of incrimination (para. 3), with the sanction being imprisonment of from 3 to 5 years.

This comment applies also to the provision of article 246 of the GCL, although, as already said, these two legislative texts differ regarding the amount of specified penalties – imprisonment of from 1 to 10 years according to GCL (para. 1) and/or 3 years as the minimum in case of serious form (para. 2), while the CL reduces the penalty down to imprisonment of from 6 months to 5 years. On the other hand, opting for that amount of punishment opens up the possibility of imposing, on the ground of article 66, paras. 1 and 2 of the CL, a parole sentence against a perpetrator of the basic offence.²²

Justification of that legislative solution in terms of criminal policy is clear since such conduct by its nature may not be compared with those of manufacturing and distributing of substances considered as narcotics.

²⁰ S. Champman, *Narcotics and Crime Control*, Springfield, Illinois, 1988, 109.

²¹ Article 247:

“(1) whoever incites another to use narcotics or provides him with narcotics in order to use them for himself or by another person, or makes available an accommodation for the purpose of using narcotics, or in some other way makes possible to another the use of narcotics, shall be punished by imprisonment of from six months to five years.

(2) If the offence specified in paragraph 1 of the present article is committed against a minor person or against several persons, or entails particularly serious consequences, the perpetrator shall be punished by imprisonment of from two to ten years.

(3) Should due to commission of the offence specified in paragraph 1 of the present article cause the death of a person, the perpetrators shall be punished by imprisonment of from three to fifteen years.

(4) There shall be no punishment for the offence specified in paragraphs 1 and 2 of the present article of a medical worker who makes possible the use of narcotics in course of extending medical assistance.

(5) Narcotics shall be confiscated.”

²² M. Reljanović, *op. cit.*, 84.

But, immediately, a counter-argument: one of the basic characteristics of drug addiction now is the rise in the number of addicts induced by various forms of making drugs available. On the other hand, due to the importance of the offence, i.e. numerous negative consequences, both for the individual and the society, the law-maker attempted to find “a golden mean” by bringing closer all relevant circumstances.

However, already making precise the essence of that offence (in its title, too) as well as of the offence specified in article 246, which relate to the phenomenon of drugs abuse, while still distinguished by their essential definition, is absolutely sufficient to explain law-maker’s attitude in defining the given incrimination: persons whose activity does not amount to direct sale of drugs but “only” indirectly influences the expansion of the circle of their users.²³

6. Conclusion

One thing is sure, however: all those who consider in one or other way the matter of specific exposition of the manufacture and trade of narcotics cannot help but to experience a series of dark pressures and disgust as well as a terrible sense of repugnance and anxiety. Here is then the occasion for a wide range of academic disciplines to thoroughly grasp this problem – the phenomenon which in these difficult times full of evil makes us feeling bound, burdened and discouraged.

But at that very point the hesitation begins. Judging by the former practice, many questions remain unanswered. Unfortunately, it seems that this time again the outcome might not be the one we expect. Genuine answers may entail various interpretations, numerous messages and a hill of comments. However, should one begin with such ideas, one reaches the end of the end even before making the first step, i.e. before efficiently starting to settle the problem we consider. Therefore, we can conclude that the reduction of possible penalties in no way complies with an efficient suppression of the manufacture, misuse and trade of drugs and the strategy of opposing this form of organized crime. Besides prevention attempts at the state level as well as at the international level, the repression in the form of efficient legal norms and adequate sanctions remain the essential arm to fight against the misuse of narcotics.

²³ Ibid.