On the issue of determination of the threshold ratios of narcotic drugs as features of traffic offenses and misdemeanors

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ABSTRACT

The issue presented in this article is the problem of specificity of the features which constitute the prohibited acts whose definitions contain the term "condition under the influence" and the term "condition after consumption." One must take note of the fact that the lack of definition of clear quantitative limits of narcotic drugs in the content of the penalizing regulation does not make it unconstitutional. Although *prima facie* this situation may raise doubts related to the procedural safeguards, there is a number of important reasons for not providing specific ratios. However, it must be emphasized that both the doctrine and the jurisprudence point at the lack of possibility, or significant difficulty, to create an exhaustive list of narcotic drugs and their precise threshold ratios on which the criminality of individual behavior would depend.

This article aims at providing general information on the subject to the broader public, and explaining reasons behind the status quo, rather than at solving the arising legal problems. The commitment embodies the intention to launch an irregular series of papers under a general (sub) title.

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INTRODUCTION

The subject matter of this paper is the problem of specificity of the features which constitute the prohibited acts whose definitions contain the term "condition under the influence," which is a feature of the offense specified in Art. 178a (1) of the Penal Code, and the term "condition after consumption," which is a feature of the misdemeanors described in Art. 86 (1), Art. 87 (1 and 2), and Art. 96 (1) of the Misdemeanors Code.

Constitutionality of penal regulations depends on the implementation of a number of propositions by the legislator. Among the principles pertaining to correct - from the point of view of the legislator's rationality - classification of prohibited acts, of particular importance is the principle of specificity of penal provisions, as expressed in the Latin maxim *nullum crimen sine lege certa.* The principle of specificity of repressive regulations is a substantive requirement that must be met by penal law [1]. The evaluation of fulfillment of the above requirement depends on the functional interpretation of the content of the analyzed law. One must determine *in abstracto* whether the content of the regulation adequately defines what actions the perpetrator may perform to constitute any given offense [1]. Moreover, laws must specify prohibited behavior in a way that enables a clear distinction between the types of behavior that are prohibited by law and the types that are not prohibited (which corresponds to the function of external specificity of an act) and that allows one to differentiate various types of prohibited acts (the function of internal specificity of an act) [2]. It must be emphasized that one of the principal functions of penal law is to induce the persons to whom the law is addressed to observe it. What contributes to the achievement of this is clear information about what acts are prohibited and the perpetration of what acts will lead to penal responsibility [2].

Some premises on which penal responsibility depends may be defined in sub-ordinate legislation. Consequently, the features of offenses may be specified in a more detailed way [3]. It should also be noted that, pursuant to Art. 42 (1) of the Polish Constitution, "the use, in the description of the features of a prohibited act, of an evaluative and ambiguous description does not automatically constitute a violation of the *nullum crimen sine lege* principle" [3]. This principle, reflected in penal laws of democratic law-abiding states [4] makes it possible to decode a number of requirements that should be met by repressive laws that are compliant with constitutional standards [5].

Even a cursory analysis of regulations that penalize behaviour involving threats to traffic safety leads to the conclusion that the Polish legislature, partly because of the legislative technique, has never decided to define the premises of the aforementioned offenses and misdemeanors based on specific threshold ratios in relation to weight, spatial quality, or volume criteria, which would enable clear classification of actions committed under the influence of a narcotic drug as offensive or not [6].

Although *prima facie* this situation may raise doubts related to the procedural safeguards, there is a number of important reasons for not providing specific values.

For the clarity of the deliberations, one can start by giving examples of terms of similar meanings. The term "narcotic drug" is so general and ambiguous that it is virtually impossible to give the same clear criteria of illegality pertaining to all narcotic substances. What is a narcotic drug is dependant on the Drug Addiction Counteraction Act and the annexes referring to it [7]. On the other hand, the phrase "significant quantity" has been feature of offenses that were classified in all successive laws on drug addiction [8]. The Supreme Court, in its deliberations on the meaning of this phrase in case no. I KZP 10/09 [9], refused to make a resolution due to the lack of the requirement to provide a basic interpretation of laws (Art. 441 (1) of the Code of Criminal Procedure). It was noted that the legislator deliberately abstained from defining the phrase "significant quantity" of narcotic drugs, psychotropic substances, and poppy straw, enumerated in Art. 53 (2), Art. 55 (3), Art. 56 (3), and Art. 62 (2) of the Act on Countering Drug Addiction, thus obliging courts to determine it each time and guaranteeing the practical implementation of the principle of appropriate penal response.

"Threshold ratios" are a difficult issue from the point of view of both prosecution policies and legislative techniques. It is difficult to provide a precise definition of this term for several reasons. The first is the imperfect diagnostic methods. The diagnostic methods that have been used so far do not guarantee error-free, simple, quick, and relatively inexpensive quantitative determination of the concentrations of specific substances in the bodies of drug users. Consequently, unlike in the case of alcohol, it is not possible to accurately determine the "boundary conditions" of criminal responsibility. In the case of alcohol, the legislator makes a firm assumption that the presence of the substance in a human body has a specific detrimental influence on psychosomatic capacities. In the case of THC and other narcotic drugs of this type, there is no "averaging effect" to speak of. Thus, the legal situation of a drunken person is less subject to error because the diagnostic techniques for determination of constitutive elements of misdemeanors or offenses are thorouglily reliable. This is not possible in the case of narcotic drugs. The reason is that tests for presence of narcotic drugs in the body do not make it possible to determine the quantity of the drug consumed; as a

result, they do not determine how intoxicated the tested person is. Moreover, the estimated average time of detection of psychoactive substances (using low-precision screening tests, between 2 days in the case of amphetamine and 10 days in the case of methadone and its derivatives) makes it harder to precisely determine the time of contact with narcotic drugs [10].

In conclusion, one must take note of the fact that the lack of definition of clear quantitative limits of narcotic drugs in the content of the penalizing regulation does not make it unconstitutional.

Condition under the influence and after consumption of a narcotic drug de lege lata

A condition **"under the influence of a narcotic drug"** is a condition that, by acting on the central nervous system, in particular impairing psychomotor activities, causes the same effects as consumption of alcohol that leads to drunkenness [11]. Being under the influence of a narcotic drug constitutes an attribute of an offense described in Art. 178a of the Penal Code.

One should define the characteristics of the condition after consumption of substances that have similar effects to alcohol, which include narcotic drugs, whose effects are equivalent to those resulting from consumption of alcohol [11].

Consequently, the behavior that has the attributes of a misdemeanor described in Art. 86 (2) of the Misdemeanors Code is causing a hazard to traffic safety on a public road, in a residential zone, or a traffic zone, committed through failure to exercise proper care while in a condition **after consumption of alcohol or another substance of similar effects.**

Due to the limited scope of this paper, one must focus on a more detailed interpretation of the features of the condition after use of a substance of similar effects to alcohol. Determination of the meanings of this term (feature) would make it possible *a contrario* to determine the meanings of the other. Logically, it is not possible to simultaneously be in a condition under the influence of a narcotic drug and in a condition after the consumption of a narcotic drug. Of course, this does not mean that it is not necessary to prove in a penal proceeding the meeting of the features of the "condition under the influence" of a narcotic drug.

The issues related to substances of similar effects to those of alcohol are discussed in the subsidiary legislation. Until 20 July 2014, narcotic drugs were enumerated in a list included in the Regulation of the Minister of Health [12]. To a certain degree, this issue is currently regulated in a similar manner - which is to be discussed further in this paper.

Section 2 of the Regulation contained a list of substances that have effects similar to those of alcohol (and, in the legislator's opinion, that resulted, as a minimum, in a condition after the consumption), as well as the conditions and methods of tests to be performed on drivers or other persons who are subject to reasonable suspicion that they could drive a vehicle, in order to determine presence of substances of similar effects to alcohol in the bodies of the tested persons.

Substances of similar effects to alcohol were substances designated as **opiates, amphetamine and its analogs, cocaine, tetrahydrocanabinols, benzodiazepines, and barbiturates [13]**. Diagnostics aimed to confirm the presence of the condition under the influence of the aforementioned substances consisted in simultaneous or separate performance of saliva, urine, and blood tests [14].

The aforementioned diagnostic tests are quite complex, much more than those performed in the case of suspicion of intoxication with alcohol. Saliva was tested using the immunological method, blood (two samples) was analyzed in a laboratory using the gas chromatography and gas spectrometry method connected with mass spectrometry, or another instrumental method [15].

Urine was tested using similar methods as those used for blood tests. The Regulation defined the contents of the individual substances (LOQ - limit of quantification), above which their presence in the results had to be mentioned. The results of the tests had to be recorded in test reports.

This way, the quantitative ratios of individual substances were determined. One must note the fact that the Regulation required determination of the presence of the substances in the tested samples (if their quantities were equal to or higher than the threshold ratio), **which did not automatically lead to the conclusion that the tested person was automatically considered to be under the influence of a narcotic drug.**

At present, this issue is regulated in a partly different way. Pursuant to Art. 129j (1) of the Traffic Law [16], in principle, tests aimed to determine the presence of a substance of effects similar to those of alcohol in a human body are performed using **methods that do not require laboratory testing**. Pursuant to Art. 2 of the Traffic Law, laboratory tests are performed when the condition of the tested person prevents using methods that do not require laboratory testing or when the person refuses to undergo tests using such methods. In such a case, the presence of a substance which causes effects similar to those of alcohol is determined by way of a blood test or a urine test.

Based on the delegation provided for in Art. 129j (5), a new Regulation was issued [17]. The new Regulation contains a shorter list of substances, and specifies in more detail and expands the list of the diagnostic methods.

Also, the new Regulation modifies the threshold

ratios of the contents of substances whose presence in the samples must be mentioned in the test report.

Diagnostic difficulties and the problem of legal qualification of an act

Due to the aforementioned imperfection of the diagnostic methods, there are adjudication problems related to qualification [18] of behavior consisting in driving a motor vehicle under the influence or after the consumption of a narcotic drug [19].

In the aforementioned judgment, the Supreme Court noted that, given the lack of appropriate diagnostic measures, determination of the actual condition may in many cases be impossible. There is no doubt that it is always very difficult. It is difficult to determine whether the offender, whose psychomotor capacity (**impaired by consumption of narcotic drugs**) is beyond question, is "under the influence" of a narcotic drug or in a condition "after consumption" of such a substance. The Supreme Court demonstrated that the legal qualification of the act should not be determined on the basis of the probability of meeting the legal features of an offence. Consequently, given the frequent uncertainty, it is necessary to observe the *in dubio mituis* principle and be more lenient on the perpetrator. The Supreme Court noted that the aforementioned principle is directly derived from the *in dubio pro reo* principle. Basically, with respect to criminal responsibility, the Supreme Court put an equal sign between the condition "under the influence" of a narcotic drug and the condition of "drunkenness" caused by consumption of alcohol. The same applies to the condition "after the consumption" of a narcotic drug, which was made equal to the condition "after the consumption" of alcohol. Most opinions that can be found in legal doctrine share this point of view [20].

Thus, detection of a narcotic drug in the blood of a driver of a motor vehicle, depending on the factual circumstances, leads to responsibility for a misdemeanor and in some cases (where lack of significant doubts does not justify observing the *in dubio mitius* principle) - responsibility for an offence [21]. However, the latter depends on the condition that the behavior of the person demonstrates a disorder of psychomotor activity typical of drunkenness or, as appropriate, the condition after consumption of alcohol. The latter circumstance, which defines the feature of an offense or a misdemeanor, cannot be determined diagnostically but, in principle, requires testimony of witnesses.

De lege ferenda prospects?

Thus, impairment capacities caused by alcohol are currently defined by giving appropriate threshold ratios (specific) of substances in the blood or in the exhaled air, while the cause of the same condition caused by narcotic drugs is defined in a descriptive manner. This may raise doubts from the point of view of the aforementioned principle of specificity of features of offenses (Art. 42 (1) of the Polish Constitution). One must note, however, that the Constitutional Tribunal has refused to follow up on the constitutional complaint on this issue, substantiating its decision with the lack of doubts concerning interpretation of the law (the *clara non sunt interpretanda* principle) [22].

Nevertheless, the decision of the Tribunal does not mean that an optimum regulation of this matter should not be sought.

Theoretically, it is possible to use a limited legal definition of the conditions in question, by giving mathematically definite contents (quantities) of chemical substances. However, giving a specific definition, e.g. by introducing the so-called threshold ratios, found in the offender's blood, of only a single substance (**e.g. THC, because detection of this substance and its metabolites is relatively the easiest**), when the definitions of other substances remain descriptive (**which, given the lack of popular diagnostic techniques, is inevitable**), would not meet the requirements of rational legislation. Such a solution appears to be internally inconsistent. If it is concluded that it would be proper to provide a more detailed definition of the condition under the influence (and after consumption) of cannabis and its derivatives, the question that arises is: What arguments would justify continued descriptive definition of condition of psychomotor impairment caused by other narcotic drugs? This legislative proposal could be justified by the "popularity" of cannabis and its derivatives or by difficulties due to the toxicological diagnostics of other narcotic drugs.

However, this justification is insufficient. Determination of the concentration of chemicals in blood, affecting the psychomotor capacity of a person, appears to be possible also in the case of other, although not all, "frequently consumed" narcotic drugs [23].

CONCLUSIONS

In conclusion, the terms "condition under the influence" and "condition after the consumption" of a narcotic drug have been, in the scope corresponding to the form of this article, characterized quite precisely in the aforementioned judgments of the Supreme Court. Defining those terms by introducing the so-called threshold ratios would be reasonable only if it applied to all narcotic drugs. Answering the question of whether such a legislative measure would be feasible requires extensive knowledge in the field of toxicology and forensic techniques.

One must note, however, that both the

doctrine [24] and the jurisprudence [25] point at the lack of possibility or significant difficulty to create an exhaustive list and to specify the so-called limiting quantities of substances contained in narcotic drugs.

Conflicts of interest

None.

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