

BRIEF COMMENTS REGARDING THE DRAFT OF NEW LAW ON PROBATION

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***Abstract:** Within the extensive regulatory reform that was triggered by the Ministry of Justice for several years, meaning in its domestic development and adoption of new codes in civil and criminal matters, was included a draft law on the organization and functioning of the probation in Romania. This paper presents briefly some of the most important provisions of the project, improvements compared to the current legislation in the field of probation in Romania.*

***Keywords:** probation, psychosocial services, social reintegration, re-education, reinsertion, legislation, legality, enforcement of sentences, convicted persons.*

1. HISTORY AND BACKGROUND

1. History. Originally, the probation is a way to give a chance to those who have committed a crime for the first time or have committed minor offenses. The goal of using the probation was to determine the offender not to cause relapse, and behave morally acceptable to the community to which it belongs (Stănișor *et al.*, 2003:58; Barbu & Erban, 2008:288-289).

Probation has a recent history in the legal system of Romania, its foundation seeds appeared around the year 1996, based on a Dutch project implemented in the penitentiary system of Romania with the specific enthusiasm for absolute news at relatively short period of time after the change of political regime in Romania. By Government Decision no. 487/1998 amending and supplementing Government Decision no. 65/1997 on the organization and functioning of the Ministry of Justice, Probation Service was established within the Ministry of Justice. By the Order of the Minister of Justice no. 2626/C/2000 for changing the organizational structure of the General Directorate for Judicial and Anti-criminal strategy coordination, the Probation Service within the Ministry of Justice was reorganized as the

Social Reintegration and Supervision Directorate, under the same ministry.

The Government Ordinance no. 92/2000 on the organization and functioning of the services for social reintegration of offenders and supervision of the execution of non-custodial sanctions approved by Law no. 129/2002 have been established social reintegration services for offenders and supervision of the execution of non-custodial sanctions under the Ministry of Justice authority as specialized bodies without legal personality, operating on every court, but under the coordination of Social Reintegration and Supervision Directorate. The name of services was changed to probation services by Law no. 123/2006 on the status of the probation service and central structure from Ministry of Justice called The Probation Department.

2. Highlights of Recommendation EC no. (2012) 1 of 2010 on the European Rules on probation. Definitions:

a) **Probation:** refers to the implementation in the community of the sanctions and measures defined by law and imposed on an offender. This includes a range of activities and interventions involving supervision, guidance and assistance with the aim of social

inclusion of offenders and contributes to community safety.

b) **Probation Agency:** means anybody designated by law to implement the above tasks and responsibilities. Depending on the national system the activity of a probation agency may include provisioning information and advice to the judicial authorities and other authorities with decisional right to help them make informed and fair decisions; providing guidance and support to offenders who are in prison and prepare their community setting; the monitoring and assistance of the persons who are released early; interventions to strengthen justice; and assistance for the victims of crimes.

c) **Community sanctions and measures:** mean sanctions and measures that maintain offenders in the community and involve some limitations to their freedom by imposing certain conditions and/or obligations. The term designates any sanction imposed by a judicial or administrative authority and any measure taken before or instead of a decision on a penalty, and how to apply sentence of imprisonment outside a prison.

d) **Observation:** means the reintegration process of an offender, on a voluntary basis and after final release from detention to home community in a constructive, planned and supervised manner. Under these rules, the term is distinguished from the term "recovery", which refers to statutory involvement after release. "

2. Background: In the context of adoption of the new Criminal Code and the new Code of Criminal Procedure, which introduced significant updates to Romanian criminal law on non-custodial sanctions and measures applicable in criminal proceedings, it was necessary a reconstruction of the general framework for their execution.

Material office in the year 2011-2012 is represented by provisions of a limited number of articles of the Law no.275/2006 on execution of punishments and measures ordered by the court during the trial, which complements the provisions of the Criminal Code and the Code of Procedure criminal. As such, it can be appreciated that the present regulations are not adequate to the new reality

and also the rules of the new code of criminal matters. Existence of a limited regulation of the regime of execution of non-custodial sanctions and measures in Law no.275/2006 have the origin in a reduced scope of these sanctions and measures in the Penal Code and Criminal Procedure Code, especially when they enter the force (January 1969), with some improvement in the last 20 years. Thus, institutions as supervised suspension of penalty execution supervised freedom accompanied by obligations imposed on juvenile, supervision or control suspension of minors, provisional release under judicial control, and sanctions on legal persons are modern categories of sanctions and measures taken by the Romanian law relatively recently and the new code of criminal matters provide an extension and improvement. These legislative changes have not always given due attention to regulating the implementation of the new measures introduced, framework legislation on the enforcement regime remains focused on execution in prison.¹

In conjunction with the adoption of a new law on probation, based on the premise that extends the sanctions and alternative measures (including community) in criminal matters, by the normative content of the new codes of criminal law (eg. to establish conditional sentence, community work extends the non-custodial educational measures etc.) an important legislative necessity represents the creation of a framework regulation of the execution of sentences and non-custodial measures, distinct from that for performance under imprisonment.

2. BRIEF DESCRIPTION OF THE LAW ON THE ORGANIZATION AND OPERATION OF PROBATION (AT OCTOBER 2012)

The draft law on the organization and functioning of the probation system rethinks it

¹ The argumentation on the draft of the new probation law lists several arguments for extending the competency area of the probation services to penal sanctions and measures. The draft is published on www.just.ro and will be analysed in Parliament for adoption.

entirely, both organizationally and functional and is developed based on Law no. 286/2009 on the Criminal Code and Law no. 135/2010 regarding the Code of Criminal Procedure. The project aims at reforming the probation system assimilating more provisions of European regulations on probation, but harnessing the practical experience in probation work so far.

The draft law is **divided into 4 units** and covers the following aspects: Title I - General Provisions: Chapter I - Scope and application; Chapter II – The principles of the activity of the probation system; Chapter III - Definitions; Title II – The probation system organization; Title III – Probation activity: Chapter I - General Provisions, Chapter II - Evaluation of the defendants and supervised persons, Chapter III - Supporting the court in the process of individualisation of sanctions and educational measures; Chapter IV - Coordinating surveillance, Chapter V - Coordination of fine performance by providing a community work service; Chapter VI - Activity of the probation counsellor about detainees; Chapter VII - Acts of the probation officer; Chapter VIII - Working with community institutions; Title IV - Transitional and Final Provisions. To be noted some of the provisions contained in Title II, dedicated to the probation system organization, namely the provisions on the structure of probation on two levels, central and local levels, and indicating links between the two forms of organization.

The coordinating structure is presented as a National Probation Directorate, with legal personality, within Ministry of Justice, established by reorganizing the current Probation Department. Drafters of the law have said that "the adoption of such a measure is necessary for better management of national probation system, including the administration of the budget, taking in consideration that probation services have a double subordination: administratively to the courts and functionally to the National Probation Directorate in the Ministry of Justice, which hampers the work of probation. This solution is all the more necessary as in the view of the new code, the probation activity will increase exponentially, which will require an

appropriate institutional response in terms of resources allocated to the probation system. In this context, is forcibly needed a unified administration of all probation system resources through a separate budget, to ensure a strong, coherent and sustainable probation and creation of a strong central structure which shall be able to manage both functionally and administratively the entire probation system.

In this section are presented the main tasks of the Directorate that focuses towards establishing strategic lines of the development of the probation system and the enforcement of sentences and non-custodial measures, coordination of the development of Probation system, Probation control, financial, administrative and human resources management. The elements in managing the financial and administrative resources presents novelty compared to the current situation (compared with current legislation) and were placed in the grounds of greater efficiency of managerial act.

In the draft, the National Probation Directorate is imagined therefore, as the Romanian state autonomous structure subordinated to the minister of justice, so that funding is provided from the state budget through the Ministry of Justice in which it works. Considering that the probation system will manage the execution of penalties directly, while others will be outsourced to community structures was necessary to introduce a provision for allocation of funds for such activities. However, considering the opportunity offered by EU funds and other potential donors was introduced the possibility that the Directorate can access other funding sources (besides the allocated budgetary resources) or to receive donations and sponsorships.

The draft also presents the management and representation of the central structure of the probation system, methods to appoint the management and the attribution as secondary credit coordinator of the General Director. It was introduced a fair and transparent procedure for filling management positions at the first three levels of management, and a limited mandate to hold the function, to enhance the performance management and

providing equal opportunities for career advancement of the personnel from probation system. To encourage a participatory management to develop strategic lines of the probation system was provided and there is a board that will include the coordinators from all departments of the central structure.

In order to ensure the duties of Directorate in an efficient and effective manner was provisioned the possibility of setting up departments and other specialized structures in certain areas of competence established by the Rules of organization and functioning of the Directorate. Given the complexity of the tasks of the National Probation Directorate to manage the system was necessary to identify categories of staff who can work within the central structure. In addition to categories of staff currently working in the Department of Probation was specified a large category of probation staff to extend the access of probation staff from probation services. Current reality proved the need to involve practitioners in management activities of the probation system, and this provision will increase access probation staff in such activities. The project pays specific attention to staff training activities in the field of probation and the study and research work needed to underpin the development of probation practice. These activities are assigned to central structure which it manages either directly or in the territorial structures under its supervision. Expressly stipulating these responsibilities arise from: the need of vocational training for probation staff under the novelty of regulation, adoption of a uniform practice in the probation service, probation staff specialization diversity convergence, the importance of establishment on scientific foundations of the practice directions, stimulate research and study to permanently connect the dynamics of social reality to probation practice. All considerations listed are found both in other states with consolidated probation system and the relevant European Recommendations (remember the recent Recommendation No. (2010) 1 on the European Rules on Probation).

In the local structures of the probation system, in addition to probation services

currently operational (one in each county and in Bucharest) could be set up secondary establishments of their probation services according to the needs of local communities, but are envisioned also other ways to increase organizational responsiveness of probation system to crime issues, given that it varies from one area of the country to another, from one county to another and even within the same county. There were introduced methods of employment opportunity through competition and for a limited mandate for the coordinators of the local structures, similar to the employment of the management of the central structure.

Regarding territorial competency the criterion of the home of the person has proven its efficiency as far as now and was still maintained, following to be established as the benchmark by reference to the level of a county or the territorial jurisdiction of the court. The text of law foresees the possibility that inside the services can be set up certain specialized departments pursuing the same goal of effective intervention in addressing crime. Compartments can be established so that ones to work mainly with the courts, others in the community for the supervision and assistance of persons sentenced to penal institutions or to develop practice areas such as specialized programs work with offenders or community works service.

Currently in the probation service operates only probation staff, councillors and heads of services, which means that they carry inclusive administrative duties. In this respect, the draft law introduces a provision imperative for the introduction of new categories of staff to the probation staff for activities related to secretarial, administrative, IT and other specific tasks that do not require qualification of probation.

3. COMPARATIVE STATEMENT OF PROBATION DUTIES/ COMPETENCIES NOW AND IN THE DRAFT LAW

1. Positive law: According to Government Ordinance nr.92/2000 on organization and functioning of social reintegration of offenders and supervision of the execution of non-

custodial sanctions (Article 11 being the principal place of matter in this respect), the probation have essentially the following powers and duties:²

a) Art.424 CPS probation service prepare assessment reports in cases involving juvenile accused or defendants at the request of the

² **Art. 11** (1) The social reintegration and probation services have the following duties:

a) supervise compliance by the person convicted of the measures referred to in art. 86 ^ 3 par. 1 letter. a)-d) of the Penal Code

b) monitor the obligations imposed upon him by the court as provided in Art. 86 ^ 3 par. 3 letter a)-f) of the Penal Code;

c) oversee the obligations imposed by the juvenile court as provided in Art. 103 par. 3 letter. a)-c) of the Penal Code;

d) prepared at the request of the prosecution and the courts, evaluation reports about persons referred to in Art. 1 or on the defendants;

e) collaborate with public institutions for juvenile compelling execution of the provision of unpaid work in a public institution;

e ^ 1) initiates and develops special programs for social reintegration for persons sentenced to imprisonment, which sentence was totally pardoned by law, and minors who have committed offenses under the criminal law, to which was removed by law educational measure of admission into a rehabilitation center;

f) conduct, on request, individual counselling activities of offenders in terms of social behaviour, group and individual;

g) initiate and conduct special protective programs, social and legal assistance to juveniles and young offenders;

h) initiate and conduct, along with volunteers and representatives of civil society and governmental and nongovernmental organizations Romanian and foreign re-socialization programs for persons referred to in Art. 1 and Art. 3. par.(2) who have applied to participate in these programs to help them comply with the conditions imposed by the court and their social reintegration;

i) collaborates with public and private institutions and individuals and businesses in their area of expertise to identify, as appropriate, available jobs, educational courses, as well as the qualifications or retraining;

j) any other duties prescribed by law.

(2) The social reintegration and probation services, with specialized staff assistance and advice of the prison administration can run programs on business activities, socio, educational and vocational training for persons convicted.

(3) The persons referred to in Art. 7. (1) prepared during their activities, periodic reports of social reintegration and supervision for those who have requested assistance and advice from the social reintegration and probation services.

court and evaluation reports on adult defendants and persons in service supervision at the request of the court;

b) Art.863 paragraph 1 letter a)-d), paragraph 3 letter a)-f) and 103 paragraph 3 letter a)-c) of the Criminal Code - Probation Service supervises compliance of the convicted person of the measures and obligations provided in case of suspension of sentence under supervision and supervised freedom, including supervision of community work service.

c) Art. 484 CPP - probation counsellors participate in hearings in juvenile cases after quoting the probation service by the court;

d) Law no. 272/2004 on the promotion and protection of child rights - Probation Services shall report, at the request of the court for children who have committed a criminal offense and not criminally responsible in all cases concerning the establishment, replacement or termination of special protection measures;

e) Participates in making the statement of the victim or civil party whose life, physical integrity or liberty is endangered, at the request of the judicial body or of the victim or civil party heard;

f) Carries on demand structured programs of social reintegration of offenders in terms of adjusting social behaviour.

g) Supports prison staff specialized in psychosocial intervention activities in prisons, in order to carry out re-socialization programs for persons convicted during the execution of the sentence of imprisonment or during hospitalization of minors in rehabilitation centres (Barbu & Ţerban, 2008:291-295).

h) Assessment of juveniles and adults charged in criminal prosecution, at the prosecutor request (Unianu, Frangulea-Pastor, 2011:103-107);

i) Participates in the proceedings of the conditional release proposal from prison establishments;

j) Works with public institutions for juvenile compelling execution of the provision of unpaid work in a public institution.

2. Highlights of legislation on activities and skills of probation in the draft of the new law:

a) The assessment made by the probation counsellors on adult offenders, optional at the request of the court, respectively of the juvenile defendants - mandatory during trial;

b) Supporting the court in the process of individualization of sanctions and educational measures by participating in hearings with juvenile defendants, namely the formulation of proposals (in all cases involving juvenile defendants);

c) Direct participation in the procedure for enforcement of non-custodial educational measures in front of the judge;

d) Supervising adults in cases of postponement of penalty, suspension of sentence under supervision, conditional release (if remaining unexecuted 2 years or more);

e) Overseeing adult defendants for penalty fines by providing a community work service;

f) Supervise minors in all non-custodial educational measures: length of civic education, monitoring, recording weekends, and daily assistance.

g) Evaluation of supervised minor and major (at any change and at the end of surveillance) as well as minor and major defendants in criminal prosecution, at the prosecutor's request.

h) Specific activities in relation to detainees:

- Participation in preparation for the release of detainees;

- Participation in the development of proposals for the work of the conditional release of inmates, at the Education Council organized at the level of the educational commission respectively at the detention centres.

4. CONCLUSIONS

On probation, both now and in the future regulation expected in Romania, is a group of related steps with judicial activities themselves, efforts aimed at social inclusion of offenders and support community safety, which are centred essentially on four levels: a specialized assistance given to the court on time on criminal cases as expressly provided by law, by making specialized knowledge

reports about people being prosecuted in court; assistance in assessment / knowledge of people indicted, institutional support given to the prosecutor, also in cases specifically provided by law, all point to this case; - Involvement in the supervision and coordination of behaviour of persons convicted of non-custodial arrangements (typical of social inclusion activities); involvement in overseeing and coordinating the conduct of persons convicted in custodial arrangements supporting the efforts of social reintegration and rehabilitation staff they carry in prison system (social inclusion specific activities).

Of these, only the first level aims at working more closely in connection with the court, with justice itself, in the sense of Article 126 paragraph 1 of the Romanian Constitution. Others are specific responsibilities of the Executive powers, having generic role to apply penal policy and the social assistance of the state and to determine the actual role of social rehabilitation of sentenced persons under supervision and counselling procedures, harmonizing as more as possible the Romanian institutional pattern with the majority of EU states model, namely an institution is autonomous but coordinated by the Minister of Justice, or directly subordinated to the Ministry of Justice.

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