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**The Importance of Probation
 under the Current Circumstances**

Minodora-Ioana Balan-Rusu

Legal Counselor S.C. SOTIREX S.R.L., Bacău, oana_rusu86@yahoo.com

Abstract: Implemented in our legislation with the entry into force of the Criminal Code of Charles II, the probation system has been developed continuously, increasing its importance from one stage to another. Thus, under the current circumstances, the probation service has a crucial role in the complex activity of rehabilitating the person sentenced to a deprivation of liberty sentence through community supervision of the measures and obligations imposed by the court to the convicted person. Although the most important tasks of the service are those of monitoring sanctions and of measures ordered by the court, however, this institution performs other activities almost equally important in the stage of trial and of execution of custodial sentences. Among the core values of probation that were imposed in recent years both in our country and in the European Union there are: respect for persons, reconciliation between offenders and the communities to which they belong, non-discrimination in the community of persons who have committed criminal acts, supporting and encouraging permanently these individuals to form a correct attitude towards work, the rule of law and to obey the rules of social life. The research of the legal rules that govern the probation service activity highlights some shortcomings as well, which should be corrected, the ultimate goal being that of making them compatible with the EU norms, especially in the cooperating area which must be achieved between these institutions at European level.

Keywords: probation; Criminal Code of Charles II; deprivation of liberty

1. Introduction

We believe that in Romania, the probation system was implemented with the entry into force of the Criminal Code of Charles II, which provided a series of specific rules.

Thus, article 50 states *that along with every court it will operate a patronage company, under the supervision of the Minister of Justice, assisted by a central board for social reclassification of freed prisoners and the fulfillment of the legal attributions relating to minors. These companies will be led by local courts' magistrates.* Although inspired by the Italian Criminal Code, the doctrine of that time, referring to the origin of the text, noted that it *“does not have an identical corresponding text in the foreign codes. It is inspired by the tendency of modern criminal science to help the reclassification of the convict, after finishing the sentence, in order not to recur.”* (Rătescu et al., 1937, p. 234).

At the same time note that in the article 65-69 of the same Code it is regulated the institution of suspending the execution of sentence, for three years, plus the duration of the sentence, in case of a conviction of up to two years of imprisonment, simple imprisonment or fine, only if the two conditions are met, namely:

- the convicted had not being sentenced previously to any custodial sentence for felony or misdemeanor, even though it was rehabilitated, and
- if according to the circumstances of the fact and the convict's history, the court considers that, in the future, his conduct will be good, even without the enforcement of the sentence (1936, Penal Code of Charles IInd).

We note that under the purpose of the reintegration of the convicted persons, there was established a collaboration between the courts and patronage companies, which were led by the magistrates of the locality. In this context we note that the patronage company established by the Penal Code of Charles the IInd, represents to the Romanian law the first probation institution having specific tasks on supervision in the community of persons convicted to sentences of deprivation of liberty. Subsequently, the institution of probation was taken also in the Criminal Code of 1968, as provided in the new Criminal Code,¹ having permanent tendencies of development and modernization in full agreement with the evolution of modern European criminal science.

Regarding the importance of probation during the running trial, the doctrine sustains that the "intervention area of probation can be identified at all stages of criminal proceedings:

- Pre-trial, the probation counselors prepare a report for the court, a sort of social layout, which comes with extra information regarding the criminological perspective on the defendant, it is a psycho-social report that should not be confused with the intervention of a lawyer, the prosecutor, or social assistant, but a legally qualified point of view of an independent institution that supports the court in the individualization of punishment;
- In prison, the probation counselors contribute to the penalty planning, preparation for freedom and, in general, work with education services and psychosocial assistance in prisons;
- The most important activity of probation activity is supervising the sanctions and community measures. In other words, taking into account the proposal of the probation service expressed by the assessment report, the court may decide a punishment other than imprisonment, entrusting the probation service the supervision of the way it is enforced; the probation service is the one that manages all these measures and informs the court if their failure leads to the revocation of the measure of executing the punishment in the community and on to the conviction to imprisonment" (Barbu & Serban, 2008, p. 123).

Other author referring to the core values of probation that were imposed on the international level, mentions the following:

- respect for persons, human value, integrity, and privacy;
- fairness, descent and accountability;
- reconciliation between offenders and the communities to which they belong;
- non-discrimination of persons who have committed criminal acts on no grounds;
- the ongoing support and encouragement of supervised people, assisted and counseled to reintegrate into the society and to assume responsibility for their own actions by forming a correct attitude towards work, the rule of law and rules of social intercourse. (Rusu, 2007, p. 146)

No doubt in the context of criminal sciences development, in agreement with the diversification of re-socialization opportunities for convicted persons, of the requirements imposed by the overall evolution

¹ Adopted by Law. 286/2009, published in the Official Monitor of Romania, Part I, no. 510 of July 24, 2009.

of the society, the probation service will become an institution with a major importance in the Romanian judicial system architecture.

2. Community Supervision

Referring to the establishment of the most effective measures that would lead to a decrease in crime, our doctrine has sustained and consistently argued, based on criminological studies performed on this line, that "in general, it cannot be determined a direct correlation between heavy use of prison punishment and crime reduction. For the United States of America, for example, it has been calculated that it needs another million prisoners to reduce the crime index by a percent. Also, nowhere in the world tightening the sanctions did automatically lead to lower crime index). Prison, no matter how modern it is, how many experts would be involved in the social rehabilitation programs is rather an area of diversification of criminal techniques than of penance or of premises for the renunciation to criminal career" (Rusu, 2007, p. 167).

No doubt that probation, in our opinion (and others as well), will hold in the near future the most important role in complex work of reforming the judiciary in all states with democratic regimes recognized in the whole world. Without diminishing the role and importance of other tasks of the probation service, we appreciate that the *supervision in the community* is the main attribution, with direct effects on the entire set of functions conferred on these judicial institutions.

According to the law, the community supervision is carried out by the probation service or a judge for the following categories:

1. The convicted persons to whom the court imposed during the probation period to follow the next supervising measures:

- to present, at fixed dates, to the judge assigned to his supervision or to the Probation Service;
- to announce in advance any change of domicile, residence or dwelling and any travel exceeding eight days and the return;
- to communicate and justify the change of workplace, and
- to communicate the information which can be controlled by the existence means.

2. Persons convicted to whom the court imposed to follow one or more of the following obligations:

- to carry out a task or to follow a course of education or qualification;
- not to change residence or the owned residence, or not to exceed the established territorial limit, other than the conditions set by the court;
- not to frequent certain places;
- not to come into contact with certain persons;
- not to drive any vehicle or certain vehicles, and
- submit to control measures, treatment, or care, especially for detoxification.

When the convicted person does not meet the requirements set by the court, the judge or chief of the probation service will notify the competent court. When the informed competent court finds that the convicted person does not meet, in bad faith, the supervision measures or obligations imposed by the court (as mentioned above), it revokes the suspended sentence under supervision, ordering the execution of the full penalty of deprivation of liberty.

In this situation, we note that the court will revoke the suspended sentence under supervision only if it finds that the convicted one has not fulfilled its supervision measures *in bad faith* or its obligations

established by the court. Consequently, when the adduced evidence does not indicate the existence of this requirement, the court can not proceed in suspending the execution of the sentence under supervision and implicitly the disposition of fully executing the sentence.

The interpretation of the text referred to in article 864 paragraph (2), it results that the court, when the convicted person does not meet in bad faith the supervision measures or the obligations imposed, will have to decide the revocation of suspending the execution of the sentence under supervision.

Note that revoking the suspension of sentence execution under supervision may be taken by the court also when committing a new crime or not executing the non-civil obligations, situations where the court is informed by the prosecution or the injured party.

3. Minors whose court-imposed the compliance with one or more of the following obligations:

- not to frequent certain places;
- not to come in contact with certain persons, and
- to perform an unpaid activity in a public institution set by the court, lasting between 50 and 200 hours, maximum of 3 hours per day, after-school, holidays and vacation.

According to G. D. no. 1239/2000 regarding the approval of the Application Rule of Government Ordinance stipulations no. 92/2000 on the organization and operation of probation services,¹ the probation counselor, in charge of the case will maintain a permanent contact with the child's family, or where appropriate, with the legal person or institution responsible for supervising the juvenile, with local authority representatives, of local police, and with any natural or legal person that could provide information on the compliance of the juvenile with the obligations imposed by the court. When the child avoids the exercised supervision or has bad manners or commits an offense under the criminal law, the court shall revoke the supervised freedom and decide the hospitalization in a rehabilitation center. At the same time, if the act under the criminal law constitutes an offense, the court decides the hospitalization measure or applies a penalty.

3. Conclusions and Critical Remarks

In the current context, the Probation Service is an institution with a major importance in the legal gear of Romania and EU Member States, whose role is to contribute to the achievement of justice. Despite having a number of complex attributions, the most important of these remains the supervision of convicted persons sentenced to deprivation of liberty punishments in the community in which they were established. Although in the recent years, at legal level, there have been taken important steps on this line, however, the current national and European legislation has some weaknesses. Thus, on the cooperation at EU level, a first issue that needs to be settled in our special law is the one referring to the document through which the Member States seek recognition and enforcement of such legal decision. Thus, while in the special law it is mentioned the application for the recognition of foreign criminal judgments, the European legislative act refers to as a document accompanying the certificate of final judicial decision.²

Other fundamental differences between the European legislative act and the special law regard the procedure for the recognition of such judgments.

¹ Republished in the Official Monitor of Romania, Part I, no. 844 of December 16, 2000.

² The drafting model is referred to in Annex 1 of the Framework Decision

Also, the examination of the European legislative act¹ highlights some provisions which, in our opinion, are at least questionable.

Thus, the wording of article 11 called "grounds for refusal of recognition and supervision", even in the context of paragraph (1) states that "the competent authority of the executing State may refuse the recognition of the judicial decision or, as appropriate, of the decision for probation or alternative sanctions"

After the interpretation of those provisions, it results that although the article's name leads to the conclusion that there are obligatory reasons of non-recognition and non-execution of such judgments, and then in the paragraph (1), it is written the word "may", something that induces the idea that the recognition and enforcement of such a decision is still optional for the executing state. Therefore, the reasons for non-recognition and implicitly of non-execution of such judgments referred to in the European legislative act, remain only optional and not mandatory. We also believe that it is necessary to make a judicial cooperation between the involved states, since the prosecution phase, or pending a final court decision, thus avoiding the possibility of refusing the enforcement of the decision by the executing state. Another observation refers to a situation where the convicted person has disappeared from the territory of the sentencing state, in which case it is necessary to consider pursuing the concerned person within the European Union space, with urgent informing the possible executing state, taking into consideration the citizenship or residence of the convict. Please note that the European legislative act contains no provision for this situation, which is very common in the legal practice. Based on the above, we believe that the European legislative act should provide these issues, or they should be covered by other legislative act.

The European legislative act provisions make no reference to the situation where, the person convicted in Romania (or in any other Member State) with the suspension of sentence under supervision, subject to the execution of supervision measures and / or obligations, began the execution, but during the execution a number of changes on its status have occurred.

Here is the situation which after starting the execution, and being taken out by the probation service, the concerned person:

- obtained a contract of employment in another Member State;
- became a family member of a citizen of another Member State residing in that State (by marriage), and
- intends to study or other form of qualification in another Member State.

We appreciate that each of the three different cases, the court, at the request of the concerned person, will have to decide its status. In these circumstances, the probation service will be required to inform the court, after conducting checks to certify the new mutations occurring in the concrete situation, checks specifically involving the cooperation with similar institutions in that Member State or other institutions of the Romanian or executing Member State. We believe that in such situations, the competent court can be asked by both the probation service and the concerned person.

In response, the court will consider primarily the achievement of the purpose of the European legislative act namely to *increase the chances of social reintegration of the sentenced person, allowing*

¹ 2008/947/JHA Framework Decision on the application of the principle of mutual recognition to judgments and probation decisions with the supervision of probation measures and alternative sanctions, published in the Official Journal of the European Union L 327/102 of 16.12.2008.

him to preserve family, linguistic, cultural connections and of any other nature, but also improving monitoring of compliance with probation measures and alternative sanctions, in order to prevent recidivism, thus paying due attention to protecting victims and the general public.

Given these issues that can become in the near future quite frequent, we consider it necessary to amend and supplement the European legislative act according to the ones mentioned above. Also, the European legislative act contains no provision on the obligation of the States concerned to achieve a record of persons who have suffered such convictions. Another critical remark concerns some legal terms and phrases used in the European legislative act, which are not listed in our legislation.

Given Romania's status as an EU member state, a status which will be based on specific national measures for enforcement of European normative acts related to increased specific activities of international judicial cooperation in criminal matters (in particular as regards the recognition and enforcement of judgments emanating from a competent authority of another Member State), and the terms and phrases used in our legislation, we consider it necessary the adoption of an interpretation law. A last remark concerns the status of the probation service in the current context. Thus, the development of this institution was determined by considerations of criminal policy of the state, influenced by developments in legal sciences, the criminological research being carried out by proposing another way of re-socialization of the convicted persons, other than the one of deprivation of liberty, which in many cases proved to be poor.

Under the current regulation, the institution has a double subordination, on the one hand, being subject to supervision and control of the judiciary authority on insuring the legality enforcement measures ordered by the court, on the other hand it is subordinated to the Probation Department within the Ministry of Justice, which provides staff training and other activities circumscribed to the functional responsibilities of this institution. But according to Law no. 275/2006, probation counselors are under the authority of the judge, while both the Criminal Code and Criminal Procedure Code or the special law specifically mention the probation service, which implies (correctly, in fact), the existence of an institution with specific functions and powers and also a system of organization and operation, plus its own standards of professional performance. In this context we consider that, under the hierarchical aspect, the probation counselors should be under the authority and to be accountable to the Head of the probation service.

Bibliography

Barbu, G. S., A. Serban A. (2008). *Execution Penal Law*. 2nd Edition. Bucharest: C. H. Beck.

Rusu, M.I. (2007). *Execution Penal Law*. Third edition revised and supplemented. Bucharest: Hamangiu.

Rusu, M.I. (2008). Victim Protection and Reintegration of Offenders Service. *Criminal Law Review*, no. 1.

Rătescu, C.C.; Ionescu-Dolj, I.; Periețeanu, Gr. I.; Dongoroz, Vintilă; Asnavorian, H.; Pop, Traian; Papadopolu, M.I. & Pavelescu, N. (1937). *The Criminal Code of Charles II*. Annotated, Volume I, General part, Bucharest: Bookstores Socec & Co., the comment was made by I. Ionescu-Dolj.

Criminal Code Charles II.

2008/947/JHA Framework Decision of 27 November 2008 on the principle of mutual recognition to judgments and probation decisions for supervision of probation measures and alternative sanctions, published in the Official Journal of the European Union no. L 337/102 of 16 December 2008.

The new Criminal Code adopted by Law no. 286/2009, published in the Official Monitor of Romania, Part I, no. 510 of July 24, 2009.