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The Establishment of Probation Systems in Romania and the Republic of Moldova

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Abstract

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The article targets a historiographical analysis of the establishment of probation in Romania and the Republic of Moldova as a system of social alternatives to the incarceration of persons who have committed crimes. The evolution of probation lies in the institutional perspective on an ascending track, so both countries seem to understand, at least at the level of public policies, the need for alternatives to the non-custodial punishment. The penal reform has included probation as central social institution in the system of recovery of people who have committed crimes.

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Keywords: Probation; Romania; Republic of Moldova; social alternatives; imprisonment.



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1. Introduction

The article targets a historiographical analysis of the establishment of probation in Romania and the Republic of Moldova, as a system of social alternatives to the incarceration of persons who have committed crimes.

Unfortunately, the novelty is maintained even after 10 or 15 years from the first programs that targeted the implementation of the restorative justice. The public is somewhat reluctant, being heavily in debt to the retributive paradigm, and the socio-economic context in the two countries, and the impact of mass-media makes the retributive accents have a vindictive nature. The grounding of probation developed after the Romanian and Moldavian model, is a retributive one, but reaching the international standards required by the convention according to which the two countries adhere to provide a series of restorative elements. The restorative perspectives identified hardly fit in the current normative framework, in which the function of punishment remains retributive and sanctioning. The fact that, officially, the Romanian legislation no longer defines the functions of punishment, leaving that definition up to practice and doctrine, we consider to be a step backwards from the previous legislation which makes sure that the role of punishment is to rehabilitate, and not strictly a coercive one. On the other hand, a step forward is the exclusion of minors who haven't committed crimes from the possibility of being punished. The sanctioning educational measures are not considered punishments and, as such, leaves the minor has no criminal record at the end of their enforcement. In our opinion, this would be a model of good practice that the counsellors of probation from the Republic of Moldova could conduct advocacy activities for.

2. Elements of the history of probation worldwide

The elements of *restorative justice* practice can be identified ever since Greek and Latin ancient times. The origin of restorative practices can be identified in the ethics of Aristotle, where the principle of restoring a fair situation stands next to *justice*, but also to *community*, *punishment* (Gavrielides, & Artinopoulou, 2013).

Modern systems of probation are based on gradual development of the alternatives to imprisonment and the practice of parole (Abadinsky, 2009). The first practices of such type were *trust-based parole* and *guarantee-based parole*. Trust-based parole was done after the criminal promised that he would no longer commit crimes, and the *parole* required a third person to guarantee for the offender. The origin of the term *probation* is connected to the British crime justice, meaning the temporary suspension of a punishment, until the Queen's clemency, or the parole of petty criminals (Durnescu, 2008, p. 8).

One of the first practitioners of *probation* was John Augustus (1784-1859) who guaranteed for the Boston city criminals – selected in advance – that they would not commit any more crimes and will show up for the hearings. The criminals for which Augustus had guaranteed, who managed to rehabilitate and commit no more crimes, would benefit from the cease of the penal process, the court considering that the crime had never existed (Sandu & Unguru, 2014, p. 214). This practice is, today, the basis of the institutions for delaying or suspending the delivery of the sentence, practice who is still

in the jurisdiction of the USA and Europe (Durnescu, 2010). In Romania, according to the NPC, there were introduced institutions such as:

- The waiving of punishment (Art. 80-82), situation in which the person is not subject to any disqualification, prohibition or incapacity that would result from the crime committed [Art. 882, alin. (1) NPC];
- Delaying the punishment (Art. 83-90) situation in which the person benefiting from the postponement is required to receive the visits of the probation officer [Art. 85, alin. (1), point B, NPC], the court being entitled to add a series of obligations, such as: attending a course, performing community service work;
- Attending a course of social reintegration, being subject to treatment or medical care, etc. [Art. 85, alin (2), point a-d, NPC]. The person subject to the delay of punishment, in case he hasn't committed any crime until the end of parole, and there wasn't any measure of revoking or postponing the measure of delaying the punishment, no longer has the punishment enforced, or be subject to any disqualification, interdiction or incapacity; The suspension of punishment on parole (Art. 91-98) is ordered by the court if the punishment applied is of no more than 3 years, and the offender was not previously convicted to more than a year, or the rehabilitation stepped in. The defendant is asked to perform community service [Art. 91, alin (1), point C, NPC] and is supervised by the probation services, the parole being possible after serving at least 2/3 of the punishment in case of imprisonment [Art. 100, alin (1), point A, NPC], or at least 20 years in case of life sentence [Art. 99, alin (1), point A, NPC]. The surveillance measures applied by the probation services are mandatory [Art. 101, alin (1), point A, NPC] (Sandu & Unguru, 2014, p. 216)

The model of probation initiated by John Augustus in Boston and adapted to the particularities of the modern penal systems has extended, probation being seen as an alternative solution of punishment, leading to the prevention of mass imprisonment, especially of minors and young people, therefore reducing the drawbacks of imprisonment, and being a significant part of the social rehabilitation of criminals. The Romanian model presented in NPC introduced probation as a public service directly involved in surveillance, rehabilitation and social reintegration of criminals (Sandu & Unguru, 2014, p. 217)

The first law of probation was adopted in Great Britain in 1887 under the name of *Probation of First Offenders Act*, being carried out starting from the American model of probation – modelled on John Augustus – aiming to keep free, under surveillance and support, the criminals who have committed petty crimes (Durnescu, 2010).

The institution of *suspension of sentence* arose as an answer to the criticisms brought to Augustus' model of keeping criminals free, who, if weren't performing any other crimes for a certain period of time, were then completely exonerated of guilt. The critics of this model consider that the lack of sanction prones to relapse. The model of parole, considering that the criminal would not commit other crimes, reduces the possible inequity arising from the lack of a conviction decision. The prosecution is pronounced, but its application is suspended on a certain period of time that, once exceeded, the punishment is removed, being followed by rehabilitation. By being declared guilty in the sentencing

act, it clearly shows the position of the court, and implicitly of society towards the crime committed. The suspension of the sentence differs from the Anglo-Saxon model of probation, where the court doesn't pronounce the sentence, which makes the assumption of innocence continue to exist, and the defendant to benefit from it (Sandu & Unguru, 2014, p. 218). As we have previously mentioned, the acquittal after probation, according to the Anglo-Saxon model, excludes the existence of certain criminal records, because no conviction has been pronounced.

In certain jurisdictions – including the Romanian one before the emergence of the NPC – the supervision is not mandatory, within the community or by probation officers, of the people prosecuted with suspension. NPC introduces this element of novelty by control through means of the probation services, of the offenders that do not run imprisonment (Sandu & Unguru, 2014, p. 219).

3. The history of introducing social alternatives to incarceration in Romania

In Romania, the first manifestations of certain practices that target parole appears in the Law, under the prison system from 1874, considered among the most progressive norms of the time (Durnescu, 2008, p. 10). The Romanian countries have acknowledged, even prior to this date, the first formalization of parole, a series of practices in which the defendant is either turned into a slave or could be set free, or could even benefit from the Prince's generosity. The Middle Ages knew such practices of parole, for example when the death sentenced was being chosen by a young lady to be her husband. The marriage would bring the accused amnesty.

In Romania, "*noncustodial legal provisions*" and elements of probation have existed ever since the pre-war times. The institution of *supervised probation* was defined by Art. 146 NPC from 1936 as being the entrustment of the minor to be closely watched, for a year, either by the legal guardian, or by a state institution – child-care – or a trustworthy person who would take this responsibility (Sandu & Unguru, 2014, p. 220). The court delays the sentence until the expiration of the trial term. The person or institution who was entrusted to supervise the minor had the obligation to continuously do so, being obliged that, at the exert of the trial term, to report to the court how the minor has behaved (Durnescu, 2008, p. 11). In case the minor on trial didn't commit any crimes, the sentence was not pronounced, hence the accused was not being sentenced. The subsequent legislation replaces this measure with the suspension of the punishment, or in case of NPC, the difference of the punishment under supervision, which means that the defendant is condemned, and therefore declared guilty. Even under the current legislation, such practice forms of not sentencing the guilt can be identified in the institution of removing from criminal prosecution. The removal from under prosecution is pronounced by the prosecutor who, based on evaluating the social risk (Bulgaru, 2005) of new criminal acts, proposes to remove the criminal from criminal investigation. This practice isn't connected to *probation*, not requesting a period of trial or supervision from a specialized service.

The communist times also knew different alternatives to imprisonment, of which the most significant was the sanctioning and education through labour, instituted through the Decree no. 218/1977 (Durnescu, 2008, p. 12). Work was considered a method of social recovery and replaced the imprisonment of up to 5 years. The policy of the communist regime was the des-institutionalization of the criminal punishment for minors, which lead to the decrease of imprisonment rate in Romania, from

66% in 1976, to 29,4% in 1979 (Durnescu, 2008, p. 12). The model applied can be considered analogous to the community service work, sanction available in the criminal legislation of the USA and numerous other states. Currently, community work doesn't exist in the Romanian legislation, and neither in the one of the Republic of Moldova, as a penalty, but it can be pronounced by courts as a criminal fine paid in working days. The criticism that can be brought to the system of sanction and education through work is that supervision is left exclusively at the level of the working people collective, and the bodies of police/security, without considering it necessary to have professionals in the field of psychology, sociology and social work that would supervise the *surveillance within the community* of the people who have committed crimes. Another common practice in the communist period of time is the frequent amnesty, including general amnesty through which the convicts were released and amnestied under the condition that they would no longer commit crimes (Sandu & Unguru, 2014, p. 221).

After 1989, the Romanian legislation introduced the following measures:

- The suspension of penalty under supervision (Law 104/1992);
- Serving the penalty through work (Law 140/1996).

The establishment of probation services both in Romania and in the Republic of Moldova aimed to develop alternative measures of punishment for criminals, that would reduce financial and social costs of imprisonment (Dumitrașcu & Schiacu, 2008).

A relevant statistics in the Republic of Moldova shows that the prison system is overcrowded, the prisoners questioned showing that 38.7% find the conditions in the Moldavian prisons as being very hard, and even inhuman, other 18.5 percent considering them tough, and only 21.1% as being good and normal, respectively 20.7% as bearable (Dilion, 2005).

The institution of probation gains an important weight in administering the sentencing and the educational measure – both custodial and noncustodial – and of the measures of surveillance in case of convicts whose conviction has been delayed, suspended etc.

The first project that aimed to experimentally introduce the services of probation in Romania was developed in Arad Prison, followed by the expansion of the project in 1998 in 9 other cities in Romania. Since 2000, there is a Special Directorate within the Ministry of Justice, having in subordination 41 services of probation locally, in every county, that have double subordination under the Ministry of Justice, and the local Court (Durnescu, 2008, p. 20; Balica, 2009).

In the Republic of Moldova, probation is recently introduced, after 2001, together with other alternative measures of detention, among which criminal mediation and community service work (Cojocaru, 2005).

We find that the three components – probation, criminal mediation and community service – of the paradigm of restorative justice are separately regarded, as alternatives to imprisonment, and not as a unified system of social intervention in the area of protection and social reintegration of people who have committed criminal acts, through means of mobilizing the existing resources in the community. Probation is seen as working in two stages of the penal process, the pre-sentencing and the sentencing one.

The pre-sentencing stage aims to offer social and psychological care to people accused of committing crimes. In the pre-sentencing stage, the probation counsellor develops the psycho-social evaluation report of the perpetrator (Zaharia, Popa, Popa & Astrahan, 2009, p. 67), especially of the minor, which constitutes a significant element in individualizing the penalty.

The sentencing stage aims to apply measures of rehabilitation and reintegration under surveillance to the *criminal* in the community (Popa, 2005). Sentencing probation includes the management of penalty, establishing the system of punishment execution – in case of custodial sentences etc.

We see an overlap between the activity of the counsellor of probation and the social worker from prison. By conducting rehabilitation activities, of punishment management and preparation for release, the activity of the counsellor of probation acquires an assisting preponderance that is imposed by the controlling side of the penalty (noncustodial). The probation counsellor is a specialist in the welfare area, whose client is the person who committed crimes.

The participation in the act of justice offers the probation system, both in Romania and in the Republic of Moldova, an institutional particular nature, namely that of functioning in the purpose of social rehabilitation of criminals, of diminishing the risks of committing new crimes and increasing the safety level in the community (Sandu & Unguru, 2014, p. 245). The paradigm in which such a system is placed is a communitarian one, the functioning of probation targeting the interests of the community – social rehabilitation of people who have committed crimes, on one side, and the increase of the safety level within the community, on the other side. Another major objective of the functioning of the probation system is represented by the reduction of costs of criminal sanctions, including the social costs implicated by the dysfunctions that the prison-centred paradigm can generate (Sandu & Unguru, 2014, p. 246).

4. The ethical-axiological dimension of the establishment of Probation Services in Romania and the Republic of Moldova

The constitutive values of the probation practice acknowledged by the Romanian legislator:

- The fundamental human rights and liberties;
- The dignity of the person and the right to a private life;

The operational values of the systems of probation in Romania and the Republic of Moldova target:

- The non-discrimination and equal treatment;
- Respecting the law and the legal decisions as an expression of the state of right;
- Confidentiality and protection of personal data.

The constitutive and operational values of the practice of probation are operationalized in the principle of the individualization of intervention based on each person's needs, the risk of committing new crimes and particular circumstances of each case, therefore transposing into practice the theoretical – methodological perspective on the uniqueness of each case and the individual as value itself of the case management in the system of probation. The development of a positive relationship and his implication in the process of rehabilitation places the accent on the individual and his resources of self-management of recovery (Sandu & Unguru, 2014, p. 247).

The beneficiary of the probation system is the society, while the main resource is the perpetrator who is central in the process of his own recovery, carried out under the agreement and with full cooperation from the person in the system of probation, if he consents. The counsellor of probation is held (Art. 10) to pursue the development of a positive relationship with the person, fact that requires an approach centred on the person, trust and respect towards his social reintegration potential.

The interdisciplinary approach of each case and the coordination of the activities undertaken with other institutions in the community, ensure the balance between the needs of the supervised person and the community. Informing the supervised person regarding the nature and content of main acts taken (Art. 11) in the activity of probation and the informed consent is absolutely necessary, otherwise the strategies of reintegration through community work contravene the human fundamental rights and the Recommendations (92)16 on the European rules regarding sanctions and measures applicable in the community. The recommendation of the Committee of Ministers to the Council of Europe on October 19, 1992 expressly states the need for consent from the person implicated, for imposing any measures applied in the community before the trial, or instead of a decision on the penalty (Bucur, Dima & Obreştescu, 2008 ; Sandu & Unguru, 2014, p. 248). Even if the supervised person has agreed, in principle, on the surveillance measures imposed by the court at the moment of suspending the custodial punishment, a separate agreement on each measure, including the supervision and especially on the unpaid community work, is considered to be necessary.

The informed consent is considered to be an instrument that is necessary to establish intervention measures included in the case management, precisely for respecting the human dignity, the positive relationship and the right to information. The informing is done in a language that the supervised person understands [Art. 11, Law 252/2013] (Sandu & Unguru, 2014, p. 249).

5. The institutional context of the establishment and functioning of probation services in Romania and the Republic of Moldova

The analysis of the institutional context of the functioning of probation services made the object of a research (Balica, 2009) within the Service of Probation of the Bucharest Court, which worked based on the legislative and institutional framework in effect in Romania in 2007. There institutional relationships of collaboration and subordination developed with other institutions were analysed, among which the Ministry of Justice, the National Administration of Penitentiaries, courts and tribunals, other Directorates of probation in the country. The resulting scheme highlights the relationships of collaboration and of subordination in which the Service of Probation is involved.

Even if the scheme shows the institutional relationships in which the Probation Department (Bucharest) is involved in 2007, under the empire of the previous law of Probation, the institutional relationships established by the Services of Probation can be considered somewhat similar, at least regarding the cooperation with the courts, criminal prosecution organs, prisons etc. The potential of generalization of the model makes it generally available at the level of Probation Services both in Romania and the Republic of Moldova, being able to constitute a starting point in the analysis of the institutional relationships of the probation services in the two countries involved.

In the process of constructing the profession of probation counsellor, the institutional relationships of the organization the professional is coming from, leads us to identify the social networks, formal or informal, both latent and manifesting, that constitute the *context of the interactions* in which the practitioner builds his professional identity. The Probation Department investigated in the mentioned research (the one operating with the Bucharest Court) was dealing with a chronic staff shortage, accompanied by an increase of over 10 times the volume of activity which lead to an increased pressure on the probation counsellors.

The solutions identified were introducing the professional supervision of practice, the computerization of the service and the establishment of a database that would include all the institution's activity, as well as the development of certain advocacy activities which led to changes in the legislative framework, allowing to diminish the institutional pressure that the probation counsellors were facing (Balica, 2009).

We must mention the important role of the community justice centres in the development of services for convicted people and ex-convicts. They aim to represent the interests of the community to have an active role in the prevention of criminality and the social reintegration of former convicts, promoting the active measures of restorative justice. In the Republic of Moldova, a first such centre was established in 2005 at the initiative of the Institute of Penal Reforms in Ungheni. The centre's purpose was to assist the public institutions in promoting the criminal reform in order to implement alternatives to detention and social reintegration of the released (Ardeleanu, Racu, Pistrinciu & Zaharia, 2009, p. 12). The quoted source shows that in 2009, in the Republic of Moldova, there were 15 centres of community justice.

In Romania, the NGOs have also developed programs of restorative justice based on centres of community justice, such as those developed by the Social Alternatives Association in Iasi¹ and the centre for Mediation and Community Security², also from Iasi. We observe that the centres of community justice had an active role in promoting restorative justice and imposing the need for probation in the two countries. In Romania, the pilot programs of justice for minors, for example developed by the Social Alternatives Association, were the basis of the development of policies of probation services, achieving in fact an extensive exploratory research activity regarding the adaptation of the techniques and probation methods of the Romanian social and cultural context.

In the Republic of Moldova, the establishment of Community Justice Centres didn't precede the adoption of probation as an alternative, who developed in parallel as support services for the public institutions that implement the criminal reform and the probation as social practice. Due to the relationship between probation and community security between the two countries, we can explain why the legislation, although favourable to the elements of restorative justice in both states, doesn't put an emphasis on it in organizing the services of probation, the implication of the community being left in the private area of the NGOs, which aim to undertake programs of communitarian justice (and security).

The establishment of Probation Services began in the Republic of Moldova by pilot programs supported by the Centre for Resources of the Institute of Criminal Reforms. The practical activities of

¹ See the programs of the Association: <http://www.aoc.ro>

² See the programs of CMCS: <http://www.cmcs.ro>

implementing the service of probation began on January 1st, 2004, by the piloting of the pre-sentential probation on minors by the Institute of Penal Reforms (IPR) in the Center sector, in Chisinau County. The activities of piloting included in the project “Alternatives to detention and legal assistance for children in the criminal justice system”, implemented by the Institute of Penal Reforms in partnership with the UNICEF Moldova, referred to:

- Creating a pilot service of pre-sentencing probation on minors in the Institute for Criminal Reforms;
- Preparing the conditions for establishing the probation activities;
- The methodological construction of probation reports;
- Extending the probation activities in other piloting sectors;
- Evaluating the probation activities of pre-sentencing probation;
- The identification of possibilities of generalization for the pre-sentencing probation activities at national level (Zaharia, Popa, Popa & Astrahan, 2009, p. 67).

The same practice of piloting underwent the grounding of the Probation System in Romania, starting from the pilot programs in the field of restorative justice for minors, conducted between 1998-2001.

6. Conclusions

The evolution of probation lies in the institutional perspective on an ascending track, so both countries seems to understand, at least at the level of public policies, the need for alternatives to the non-custodial punishment. The penal reform has included probation as central social institution in the system of recovery of people who have committed crimes.

The paradigm proposed by Ioan Durnescu (2008, p. 14) for the Romanian probation system – also valid, in our opinion, for the Republic of Moldova – shows a series of causes and contributing factors which led to the emergence and development of probation services. The non-custodial measures are consistent with the social policies of social-democratic corporate type, characterized through inequality of incomes and moderate social rights (Baciu, 2001), being coherent with the humanist vision already existing at the level of the public policies in Romania. Replacing the custodial punishment with the non-custodial ones leads to reducing the costs in the national prison system. A special contribution to the development of the probation system has the adherence of Romania and the Republic of Moldova to the European Conventions – such as the European Convention of Human Rights and the European Convention on preventing torture and inhuman and degrading treatment (Durnescu, 2008, p. 16). The modernizing of the criminal legislation of the two countries led to the necessity of establishing and developing the probation system, and with that, the emergence of the profession of *probation counsellor*.

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