Release on Probation according to the Regulations of the New Criminal Code

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Abstract: The paper deals in a systematized and detailed way with the problems regarding probation through the perspective of the new criminal code provisions. On the basis of examining the relevant provisions of this law, and also on a comparative approach with the provisions of the present criminal code, when necessary, the paper manages to explain the new vision of our legislator in this matter. The author comes to the conclusion that there are fundamental differences between the regulations from the two criminal codes, and that the new approach, inspired by the German, French and Spanish criminal law, is a better answer to the need of fighting against crimes. Through its conclusions, the paper is useful to legal advisors, both at a theoretical and practical level, being a starting point in any discussion on this matter, considering the imminent coming into force of the New Criminal Code.

Keywords: New Romanian Criminal Code; special law; good conduct; penalty; convicted

1. General Considerations on the Main Changes of the New Criminal Code in Probation Matters

In the New Criminal Code the probation institution knows significant changes, both in terms of release conditions and the social reintegration process of the convict by the qualified and active involvement of the state and qualified, in this respect the role of probation counselors is essential. (Boroi, 2010, p. 493)

Regarding the conditions of release, there were not maintained the depositions on differentiated regimes for granting release between men and women prisoners or between prisoners for crimes committed intentionally or by negligence. (Hotca, 2009, p. 106) In the first case, the reason of the modification seeks the ruling of a single regime where the relevant criterion is represented by the length of the

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executed sentence. Secondly, the form of guilt with which the crime was committed cannot represent a basis for substantiating differentiated regimes of granting conditional release because the form of guilt was recovered in the operation of individualization of punishment, which is reflected in the nature, timing and the manner of executing the sentence, as applied by the sentencing decision. The European orientation in this matter, and the Law no. 275/2006 on the execution of sentences, fully justified, is to regulate the granting of probation, taking into account only the convict's conduct during the penalty, because this is the only way that it can be influenced and shaped the conduct of the convict who acquires an added motivation, thus being aware of a conduct that would lead him closer to his release. Granting release by taking into account the status quo prior to the commencement of the enforcement, such as the nature or seriousness of the offense, the form of guilt, conduct during the trial, represent a cause for discouragement of the convict in the reintegration process as he realizes that his release does not depend on the conduct during the execution, but his previous acts, which however he can no longer influence in any way. (Boroi, 2010, p. 491)

At the same time, through the regulation way of granting release conditions, it is more clearly highlighted the role and the reasons for probation. The judicial practice in the last decade has transformed the probation; it is true because of the drastic increase of the limits of punishment, in the convict's right to be released after serving the fraction punishment according to the law. It was also noted that in the terms of the condition of the existence of solid evidence of referral, it was considered as being satisfied as long as the convict was not disciplinary sanctioned for misconduct committed during imprisonment.[1]

Probation does not represent a recognized right of the convicted not serving its sentence to term, but a legal instrument by which the court finds that there is no need to continue the execution of the penalty in terms of detention until reaching the full term established, as the conduct throughout the execution proves an apparent progress in the social reintegration and thus persuading the court that he will not commit crimes and that an anticipated release will not become a danger to society. Based on these considerations, the new Criminal Code in relation to the following conditions governing the conduct of the convict is assessed for granting conditional release:

[1] See *Expunere de motive privind noul Cod penal/Report of reasons regarding the New Criminal Code.*

a) the convicted had a good conduct throughout the execution of the sentence, showing constant interest in the rehabilitation programs and made tangible progress in social reintegration;
b) the convicted is executing the sentence under semi- open or open regime;
c) the convicted has fully fulfilled the civic obligations established by the sentence, unless it proves that there was no possibility to perform it;
d) the court is convinced that the convicted has straighten up and he will no longer commit other crimes.

Regarding the recovery process after release, during the term of surveillance, the convicted has not only the negative general obligation of not committing other crimes, the verification of the compliance with this obligation is subject to a regime of surveillance, but also a number of obligations which follows the re-accommodation with the community life of the convict, in order to facilitate in its social reintegration. (Boroi, 2010, p. 492)

In this respect, during the term of surveillance, the convict is obliged to respect certain surveillance measures (to report to the probation service on established dates; to receive the visits of the designated person for his supervision; to announce in advance any change housing and any travel of more than five days, and also the return, etc.) or he may be required to achieve certain activities useful for the reintegration activities (to follow a training course or qualified school; to attend one or more social rehabilitation programs organized or coordinated by the service probation, not being in certain places or at certain sports events, cultural or other public gatherings, established by the court etc.).

In connection to the obligations that may be imposed on the convicted during the release on probation, it appears that they are similar in terms of content with the accessory punishment of prohibiting the exercise of certain rights, which also may be executed during the release, but they will not overlap because the law prohibits imposing certain obligations that have the same content as with a prohibition already imposed as an accessory punishment. Only to the extent that with certain prohibitions there have not been established as an accessory punishment and at the date of release the court considers useful to apply some of them, it can do it only to the extent where these prohibitions are set out within the obligations that may be imposed on the released convicted and only with this title.

The new regulation of the probation institution, by which the convict is subject during the term of surveillance, to surveillance and re-accommodation process of a

life in the community, was inspired by the similar provisions in German criminal law (§ 57 - § 58), Spanish (article 90) and Portuguese (article 61 - article 63).

2. Conditions of Probation in the Case of Imprisonment

According to article 100 paragraph (1) Code of Civil Procedure, where the parole in the case of imprisonment may be ordered, if:

a) the convicted has served at least two thirds of the length of the sentence, in the case where imprisonment has not exceeded 10 years or at least three quarters of the length of the sentence, but no more than 20 years, in the case of imprisonment of more than 10 years.

It is a peremptory condition, which if it is not satisfied, it makes impossible to switch to the verification of the other conditions provided by the law for granting parole.

The first condition for granting conditional release represents a minimum of the length of the sentence that must be executed in both effectively and by labor of the convict, as a mandatory internship in penitentiary.

This interval of time that must be mandatorily spent at the detention place and which represents the execution of a part punishment ensures the collection of a sufficient number and conclusive proof of convict's behavior, setting up the stage of his improvement.

Under the law, the mandatory fraction that must be executed by the convicted according to the penalty imposed by the court is in relation to the length of the sentence that is being executed, and in some cases it is also in relation with the type of the offense that has drawn condemnation.

b) the convict is executing the sentence under semi-open or open regime;

c) the convict has fully met the civil obligations established by the judgment, unless it proves that he had no possibility to achieve it.

In the case of not paying the costs and civil damages which is not due to the bad faith of the sentenced person, the probation may be ordered. The condition in the

article 1009 letter c) of the new Criminal Code is not met when the convict has evaded the payment of civil damages until they were prescribed.[1]

d) the court is satisfied that the convicted person has set to rights and may reintegrate into the society.

"Straightening up" regards the formation of moral qualities of the condemned, that would exclude the possibility of committing new offenses. There are considered solid evidence of straightening up the effective participation in the activity of civic and moral-Christian education, the way of executing tasks that are not paid (e.g. the household), the interest for qualification or requalification, good behavior in place of detention. (Mărgărit, 2002, p. 63)

The process of rehabilitation of offenders during sentencing cannot be seen only through the view of performing useful work for society and the individual, or the disciplinary behavior of prisoners, but it must be viewed in terms of moral recovery and of straightening up.

The solid evidence for straightening up that prisoners must show during the penalty represents the fourth condition set out in article 100 paragraph (1) of the new Criminal Code for granting parole.[2] They must be pursued during detention under remand period because, on one hand, this period is deducted from the ordered sentence, on the other hand article100 paragraph (1) of the new Criminal Code makes no distinction on the period where the convict must give solid evidence of straightening up.[3]

So for a convict to be on probation the Criminal Code requires him to give solid evidence of straightening up, in order to establish whether he has morally changed during the execution of the sentence; the moral recovery of the convicted represents radical transformation of his attitude towards work, the rule of law and rules of social coexistence.

The responsiveness of the convict to the moral recovery work performed by the administration of the detention place cannot be considered as a criterion for establishing the third condition for parole, but it is important to follow if he actually straightened up.

[1]Bucharest Municipality Court, Criminal Section II, Decision no. 1066/1992, C.P.J.P., 1992, p 269.
[2] AC Bucharest, criminal decision no. 354/2001, P.J.P. 2001-2002, p. 65.
[3] County Court Timis, criminal decision no. 234/1978, no DRR. 11/1978, p 65.

Being considered synonymous the terms of *moral recovery and straighten up,* we cannot treat as equal *straightening up and reeducation.*

Strengthen up pursues the goal of special prevention, the formation at the sentenced of the moral qualities that would exclude the possibility of committing a new crime and, *the reeducation* of the convict is a certain transformation of world views, the views and ideas that that make the man not only safe for society, but rather socially useful. Regardless of the committed offense and the degree of dangerousness of the offender during the penalty, there should be considered both aspects.

We may say that a convicted gives solid evidence on straightening up only when:

- he participates effectively in the civic education and moral-Christian activity conducted by educators and prison staff;
- he performs without reservation different tasks that had been assigned (e.g. how to execute the some household tasks without being remunerated);
- he shows interest to qualify or re-qualify in a profession, achieving good results;
- he has a good behavior at the detention place, following exactly the rules of procedure, etc.

A convicted does not give solid evidence on straightening up when he "poses" a better behavior when approaching the time to discuss in the Commission the proposals for the release on probation.

The legal practice, not infrequently, has showed the aspect that some inmates behave properly only in order to obtain parole, seeking to deceive the authorities in prison on the solid evidence of straightening up.

The problem of the concrete establishment of straightening up solid evidence is of the Commission proposals and the court. The "Proofs" or "evidences" are produced in a special plan namely within the execution criminal reports on the attitudes towards the senior management or control bodies of the prison, towards inmates or people at work. These proofs, evidences of straightening up are very numerous, diverse, contradictory and individual, bearing the imprint of the personality structure of each offender.

In the calculation of the penalty fractions provided for in article 100 paragraph (1) there are taken into account the part of the length of the sentence that may be considered, according to the law, as executed based on the performed work.

(Molnar, 2011, p. 247) In this case, probation may not be ordered before the effective execution of at least half of his prison sentence, when it does not exceed 10 years and at least two-thirds, when the punishment is more than 10 years [article 100 paragraph (2)].

In the case where the convict has attained the age of 60 years it may be ordered probation, after serving half of his actual sentence, if imprisonment has not exceeded 10 years, or at least two thirds of the length of sentence, in the case of imprisonment of more than 10 years, if there were fulfilled the conditions specified in paragraph (1), letter b) - d).

In this case, in the calculation of the penalty it is taken into account the part of the length of sentence that might be regarded according to the law as executed on the performed work. In this case, probation may not be ordered before the effective execution of at least one third of the length of imprisonment, when it does not exceed 10 years and at least half, when the punishment is more than 10 years [article 100, paragraph (4)].

The court has the obligation of providing the reasons which led to granting probation and alert the convicted on its future conduct and consequences to which he is exposed, whether he will commit more crimes or he will not comply with the surveillance measures or will not execute it, being the obligations during the term of surveillance [article 100, paragraph (5)].

The interval between probation date and the date of the fulfillment of the sentence duration represents the surveillance term for the convicted [article 100, paragraph (6)].

According to article 77, paragraph (1) of Law no. 275/2006, the probation is granted under the procedure provided for in the Code of Criminal Procedure, at the request of the convicted person or at the Commission's proposal for the individualization of enforcement regime of sentences involving deprivation of liberty.

The Commission for individualization of enforcement regime of deprivation of liberty sentences, with the participation of the judge in charged with executing the deprivation of measures sentences, as president, it proposes probation, taking into account the fraction of the sentence actually served and the length of the sentence which is considered as executed based on the performed work, the conduct of the convicted and his efforts for social reintegration, particularly in educational,

cultural, therapeutic, psychological and social assistance, training and training school activities, the entrusted responsibilities, the granted rewards, the disciplinary of the imposed sanctions and his criminal history. (Mărgărit, 2002, p. 63)

The Commission's proposal for admission of probation contained in a motivated report, documents showing the particulars in the report, it shall be submitted to the court in whose jurisdiction is the place of detention and notifies the convicted person.

If the Commission finds that the person convicted does not meet the condition to be released on probation, in the report it is set a deadline for reviewing his situation, which cannot be more than one year. However, the Commission shall inform on the report the convicted person and notifies him under his signature, that he can address the court with the request for release on probation.

When the sentenced person addresses directly to the court, asking for release on probation, with the application it is send the report prepared by the Commission for individualization of enforcement regime for deprivation of liberty sentences, together with documents showing the contained particulars.

In order to solve the request for release on probation of the convicted person or a proposal from the Commission, the court may refer the individual file of the convicted person. (Boroi, 2010, p. 493)

3. The Conditions of Release on Probation for Life Imprisonment

Probation for life imprisonment may be imposed if:

a) the convict has effectively served 20 years of imprisonment;
b) the convict had a good conduct throughout the execution of the sentence;
c) the convict had fully met the civil obligations established by the sentencing court, unless it proves that he had no possibility to fulfill them;
d) the convicting court is convinced that the convicted person has straighten up and he may reintegrate into society.

It is mandatory to submit the reasons which led to granting the release on probation and warning the convicted on its future conduct and consequences to which he is exposed, whether he will or not commit crimes or he will not comply with surveillance measures or if he will not perform his obligations during the surveillance term.

From the date of release on probation, the convicted is subject to a surveillance term of 10 years (article 99 the Code of Civil Procedure). (Boroi, 2010, p. 494)

4. Measures of Surveillance and Obligations

If the rest of the punishment remained unexecuted at the release date is of 2 years or more, the convict must meet the following surveillance measures:

- to report to the probation service, at the dates fixed by it;
- to receive the visits of the person designated with his supervision;
- to announce, in advance any change of residence and any travel that exceeds 5 days;
- to notify the change of employment;
- to communicate information and documents that would allow the control of its means of existence. (Boroi, 2010, p. 495)

In the case referred to in paragraph (1), the court may require the convict to execute one or more of the following obligations:

a) to attend at training courses or academic qualification;
b) to attend one or more social reintegration programs conducted by the probation service or organized in collaboration with community institutions;
c) not to leave the Romanian territory;
d) not be in certain places or certain sports events, cultural or other public gatherings, established by the court;
e) not to communicate with the victim or his family members, with the participants in the offense or other persons determined by the court, or not to get near them;
f) not to drive certain vehicles established by the court;
g) not to hold, use and wear any type of weapons.

The obligations described in paragraph (2). c) - g) can be imposed to the extent in which there were not applied in the content of additional penalty on forbidding the exercise of certain rights. (Molnar, 2011, p. 258)

When it is determined the obligation in paragraph (2) letter e), the court individualizes, specifically, the content of those obligations, taking into account the circumstances of the case.

The Surveillance measures and obligations provided in paragraph (2) letter a) and b) are executed in the moment of granting release, for a period equal to one third of the duration of the surveillance term, but no more than two years, and the obligations provided in paragraph (2) letter c) - g) are executed throughout the surveillance period.

In order to establish the content of the obligations provided at paragraph (2) letter a) and b), the court shall consult with the probation service, which is obliged to make recommendations in this regard.

5. The Surveillance of the Convicted

During surveillance, the data provided in article 101 paragraph (1), letter c) - e) is notified to the probation service.

The surveillance of the execution of the obligations provided by the article 101 paragraph (2), letter a) and b) is made by the probation service. The verification of the fulfillment of the obligations under article 101, paragraph (2), letter c) - g) is made by the competent authorities, who will notify the probation service of any infringement. The surveillance of the execution of the obligations provided by the article 101 paragraph (2) letter d) and e) can be achieved through an electronic of surveillance, as provided by the special law. (Boroi, 2010, p. 497)

During the surveillance, the probation service shall notify the court if:

- it has intervened the reasons that justify the modification of obligations imposed by the court or the termination of the execution of some of them;
- the supervised person fails to comply the surveillance measures or perform, as determined, its obligations (article 102 of the Code of Civil Procedure).

6. Modification or Termination of Obligations

If during the surveillance period there have intervened reasons that justify imposing new obligations, or increase or decrease of the executing conditions of the existing ones, the court imposes the modification of the requirements in order to ensure to the convict greater chances for reintegration.

The court shall terminate the execution of some of the imposed obligations, when it appreciates that maintaining them is no longer required (article 103 Code of Civil Procedure).

The request to reduce the conditions of executing the initially established obligations or the termination of some of these obligations may be, in our opinion, formulated also by the convict. In this case, for solving the request, the court will require a viewpoint motivated by the probation service. (Boroi, 2010, p. 492)

7. The Effects of the Release on Probation

If by the deadline of the surveillance the convict did not commit a crime again and it was not ordered the revocation of probation and it was found no reason for annulment, the penalty shall be considered as executed (article 106 of the Code of Civil Procedure).

8. The Revocation and Cancellation of Release on Probation under the New Criminal Code

According to article 104 of the New Criminal Code, if on the surveillance duration of person, the convicted does not comply, in bad faith, with the measures of surveillance or it does not execute the imposed obligations, the court shall revoke the release and enforce the remaining of the sentence.

If, after the release the convict has committed a new crime, which was discovered within the surveillance term and for that it was ruled a sentence of imprisonment, even after the expiry of that period, the court shall revoke the release and impose the execution of the remaining sentence. The punishment for the new offense is established and implemented as appropriate, in accordance with the recurrence or multiple intermediate.

These provisions are applied accordingly and in the case of release on probation from the execution of the sentence of life imprisonment. If, during the period of surveillance is discovered that the person convicted commits another crime until granting the release for which it was applied the prison sentence, even after that date expired, the release is canceled, applying, where appropriate, the provisions on competition offenses, repeat offenses or intermediate plurality.

In the case where in the report of resulting sentence, the conditions provided in article 99 or 100 are fulfilled, the court may grant probation. If the release was ordered, the surveillance term is calculated from the date of granting the first release.

When, after the annulment, the court disposes the execution of the resulting sentence, the part from the duration of the complement sentence of forbidding the exercise of some unenforced rights at the date of the annulment of the suspension, it will be executed after executing the prison sentence. (Boroi, 2010, p. 492)

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