

THE INSTITUTION OF PROBATION – A COMPARATIVE OVERVIEW OF THE PENAL CODE IN EFFECT AND THE PROJECT OF THE PENAL CODE

Maria-Magdalena BÂRSAN¹

Abstract: *Probation is an institution which is supervenient to the execution of prison sanctions, a means of administratively customizing the punishment, which consists of the dismissal of the convict from prison prior to executing the entire sanction of imprisonment or life imprisonment, under the condition that the convict does not commit any other crimes until the full term of the punishment is fulfilled. Probation can be granted to any prisoner, regardless of the crime committed and irrespective of whether he has previously benefited from probation for any other punishment.*

Key words: *institution of probation, Penal code, punishment, detention, sanction.*

1. Introduction

Probation is an institution which is supervenient to the execution of prison sanctions, a means of administratively customizing the punishment, which consists of the dismissal of the convict from prison prior to executing the entire sanction of imprisonment or life imprisonment, under the condition that the convict does not commit any other crimes until the full term of the punishment is fulfilled.

Probation can be granted to any prisoner, regardless of the crime committed and irrespective of whether he has previously benefited from probation for any other punishment.

Probation is regulated by art. 59-61 of the Penal Code and art. 75-77 of Law no

275/2006, art. 190-191 of the Rules of application of Law 275/2006.

2. Granting conditions

In order for the court to grant probation several conditions must be met, conditions which are stated by art. 59 of the Penal Code, art. 75 of Law no 275/2006 and art. 190, point 2 and 3 of the rules of application of Law no 275/2006.

The first condition to be met is the obligation to have executed a part of the sanction, which is different depending on the duration of the sanction, the form of guilt of the crime, the age of the convict and the criminal record.

Probation is granted according to art. 59, point 1 of the Penal Code:

¹ Law Department, *Transilvania* University of Braşov.

- after having executed at least two thirds of the sanction in case the sanction is not over 10 years;

- after having executed at least three fourths in case the sanction is over 10 years, according to the provisions of art. 59, point 1 of the Penal Code.

After having executed a third of the sanction which is not above 10 years or a half of the sanction above 10 years, if the person was convicted while still under age, when they reach 18 years old, as well as convicted felons above 60 years old for men and 55 years old for women, can be granted probation if they meet the rest of the conditions stated in art. 59, point 1 and art. 60, point 2 of the Penal Code.

A special case is the probation granted to the convict sentenced for life imprisonment, according to the provisions of art. 55¹:

- the person sentenced to life imprisonment can be granted probation after having executed 20 years of detention and if he/she proves to be orderly, disciplined and can improve themselves, keeping in mind their criminal record according to art. 55¹, point 1 of the Penal Code;

- the person above 60 years old for men and 55 years old for women can be granted probation after having executed 15 years of detention, if the other conditions stated in the first point of art. 55¹ and second point of the Penal Code are met;

- the sanction is considered to be executed if, within an interval of 10 years, the sanctioned person didn't commit a new crime according to art. 55¹, point 3 of the Penal Code.

From the above-stated facts, we can conclude that several conditions must be met with regard to the orderly and disciplined character of the convict. Perseverance in work during the execution of the sanction shows that, once freed from prison, the convict has the necessary skills to earn an honest living. Also, the convict

must respect all rules of conduct, order and other obligations stated by law during the execution of their sanction, otherwise disciplinary measures can be taken against them.

Another mandatory condition is the solid proof that the convict is improving his/her behaviour, of course keeping in mind their criminal record. The following activities are considered serious proof of an improved behaviour: the participation in activities of civic and moral - Christian education, the performance of tasks for which the convict doesn't receive any payment, interest showed towards professional qualification or requalification, good behaviour in detention.

The orderly character and the discipline of the convict. This condition is respected if the convict was, during the execution of his sanction, diligent, hard-working, showed initiative and care while fulfilling tasks, performed quality work, while respecting work discipline and the internal regulations of the detention facility.

Solid proof of an improved behaviour. These proofs result from the convict's behaviour in any circumstance, the thorough achievement of tasks, the respect for the prison management and other convicts. The orderly and disciplined character of the convict as well as the proof of an improved behaviour must be registered in a protocol of the probation board, which functions in every prison in accordance with the provisions of the law for the execution of prison sanctions. Granting probation is the sole attribute of the court which will grant or reject probation, depending on the fulfillment of the legal conditions.

In the project of the New Penal Code, the institution of probation is significantly changed in regard to the granting conditions as well as the process of social reinsertion of the convict by actively involving the state in this process through probation counselors, who are assigned a

significant role. Additionally the granting conditions are regulated, the role and reason of probation are more clearly stated.

Probation is not a right granted to the convict in order to allow him/her to not fully execute their sanction, it is a legal instrument through which the court determines that it is no longer necessary to continue executing the full term of the sanction in detention as the convict, by their behaviour and conduct throughout the execution, shows he/she has made significant progress in order to be reinserted into society and thus, convinces the court he/she has changed, will no longer commit crimes and their anticipated release from prison represents no danger for the community. The project regulates several conditions to be met when evaluating the conduct of the convict for granting probation:

According to the provisions of art. 99, first point, in case of life imprisonment, probation is granted, if the following conditions are met:

- a) the convict executed 20 years of detention;
- b) the convict had a good conduct throughout the execution of his sanction;
- c) the convict has fulfilled his civil obligations stated in the sentence, except for when the convict proves he had no possibility to fulfill his obligations;
- d) the court is convinced the convict is rehabilitated and is ready to be reinserted into society.

(2) It is mandatory to present the reasons which determined the granting of probation and the warning of the convict that his future conduct may result in consequences if he commits crimes or disrespects the supervision measures or if he fails to fulfill his obligations during his period of observation.

(3) The convict is subject to a period of observation of 10 years starting from the date of his probation.

The law speaks of the provisions of art. 101, which regulates the observation measures and the obligations of the convict. During the observation period the convict is compelled not only to abide the law, not commit more crimes, but also to respect a series of obligations which are meant to reinsert him into society and readjust him with living in a community.

During the observation period, the convict is obligated to respect certain observation measures (to show up at the probation service at the established dates, to receive the visit of the person in charge of his observation, to previously notify any change of location or any displacement which takes longer than 5 days) or to fulfill certain tasks which might help the reinsertion process (attend a school course or a professional qualification course, to attend one or more social reinsertion courses organized by the probation service, to avoid certain places or cultural events, sports or other public gatherings established by the court).

According to the project of the Penal Code, in view of granting probation, the regulations which established different conditions of granting between men and women or for crimes committed with or without intent were not maintained.

The reason for this change is the necessity to have a unique system based on the most relevant criterion: the duration of the sanction which was already executed. Then, the form of guilt can no longer be the grounds for different probation granting conditions as the form of guilt was already used as a circumstance meant to individualize the sentence and it reflects in the nature, duration and means of execution of the sanction as established in the conviction decision.

According to the provisions of Law no 275/2006, probation is granted according to the procedure stated in the Penal Procedure Code, on the request of the convict or on the

suggestion of the board in charge with individualizing the prison sanction.

This board, whose president is a judge, suggests probation taking into consideration the part of the sanction which was already executed, the work performed in prison, the conduct of the convict and his/her efforts for social reinsertion, especially educational, cultural, therapeutic, psychological counseling and social assistance, professional qualification and responsibilities given, the rewards given and the disciplinary measures taken against the convict, as well as his/her criminal record.

3. The reversal of probation

The optional reversal of probation. If, before the fulfillment of the full term of the sanction the convict commits another crime for which a prison sanction is regulated by law and by taking into consideration the severity of the crime committed, probation can be either maintained or reversed, according to the provisions of art. 61 point 1 of the Penal Code.

If probation is reversed, the punishment established for the second crime as well as the rest of the first punishment will be cumulated, with the possibility to increase the sanction by 5 years, according to the provisions of art. 61, point 1 of the Penal Code.

The mandatory reversal of probation. The reversal of probation is mandatory in case the crime committed is a crime against state security, peace and mankind, first degree murder, or an intentional crime which resulted in the death of a person or a crime which caused serious consequences, according to art. 61, second point, of the Penal Code.

We can conclude that the reversal of probation can be determined only if it is established that, while on probation, the convict committed a new crime, as another reversal possibility is not regulated by law.

As for the reversal of probation, according to the project of the Penal Code, this states the following in art. 104:

(1) If, during the observation period, the convict intentionally disregards the observation measures or fails to execute the mandatory obligations, the court reverses probation and rules on executing the rest of the sanction.

(2) If, after granting probation, the convict commits a new crime, which is discovered during the observation period and for which the convict is sentenced to prison, even after the expiration of the period, the court reverses probation and rules on executing the rest of the sanction.

References

1. Fondor, I., Dongoroz, V., et al. : *Theoretical explanations of the Criminal Code*, Volume II. Bucharest. Romanian Academy Publishing House, 1969, pp. 42 ff.
2. Barbu, S.G., Serban, A.: *Penal Execution Law*. Bucharest. All Beck, 2005.
3. *Decision no. 1897 of 21 December 2006 for approval of the application of Law no. 275/2006 on execution of punishments and measures ordered by the court during the trial*. published in Official Gazette no. 24 of 16 January 2007.
4. *Penal Code*. Bucureşti. Editura Hamangiu, 2012.
5. Margarit, Gh.: *The institution of probation*. Bucureşti, 2002, p. 63.
6. Mitache, C., Mitache, Cr.: *Romanian Criminal Law. General part*. Bucureşti, 2003, p. 403.
7. Oancea, I.: *Criminal Law, General Part*. Bucureşti. Ed. Didactică și Pedagogică, 1971, p.507.
8. Moldovan, A.T.: *Criminal Law, General Part*. Braşov. Lux Libris 2009.
9. www.euroavocatura.ro