

THE PRINCIPLES OF THE NATIONAL SYSTEM OF PROBATION

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Abstract

The principles of the national system of probation represent a series of rules with a wide applicability, which guide the overall functioning of the system and its components. Knowing these principles is particularly important for a more in-depth understanding of the national system of probation, because they are also meant to guide the process of interpretation and application of the rules with a narrower applicability and to constitute a basis for the functioning of the system in situations where there isn't a special provision.

The principles based on which is organized and functions the national system of probation are laid down in the Law no. 252/2013, and a part represents a transposition into our national law of the International Recommendations, among which those raised through the Recommendation CM/Rec(2010)1 of the Committee of Ministers to Member States with regard to the Council of Europe's Rules of Probation.

In our vision, the national system of probation is guided by the following principles: the principle of legality, the principle of observing judgments, the principle of respect for human rights and fundamental freedoms (with the three concrete components regarding respect for human dignity, respect for private and family life and non-discrimination), the principle of confidentiality and protection of personal data, the principle of case management, the principle of individualization of penalties, the principle of co-interest of the supervised person, the principle of multidisciplinary, the principle of observing the right to information and the principle of professionalism and integrity in the activity of the probation.

Keywords: *national system of probation, principles, International recommendations with regard to probation, legality and jurisdiction, respect for human rights, respect for dignity, non-discrimination in probation, privacy, multidisciplinary, case management, individualization, co-interest, the right to information, professionalism and integrity in probation.*

Introductory remarks

The principles of the national system of probation are a series of rules with a wide applicability, which guides the organization and overall functioning of the system and its components, rules which are also meant to guide the process of interpretation and application of the rules with a narrower applicability and to constitute a basis for the functioning of the system in situations where there isn't a special provision.

The principles after which is organized and operates the national system of probation are laid down in the Law no. 252/2013, which comprises a special chapter dedicated to these general rules¹. The name of the chapter which we refer to might induce the idea that the principles it comprises only refers to the activity of the national system of probation, meaning on its functioning, but, in reality, they govern both the functioning, as well as the organization of the national system of probation, these two sides being, under this aspect, impossible to dissociate.

A series of the principles of the national system of probation represents a transposition into national law of the International recommendations, amongst which those raised through the Recommendation CM/Rec(2010)1 of the Committee of Ministers to Member States with regard to the Council of Europe's Rules of Probation.

1. Principle of legality

The principle in question is regulated by the article 6 of the Law no. 252/2013, according to which *the activity of the probation system is carried out observing the Law and the judicial decisions.*

As can be seen, in the same provision are indicated two principles: principle of legality and principle of observing judgments. Their conjunctive mention is normal, if the close connection between them is taken into account, a relationship of interdependence, being unable to imagine observing judgments, which are meant to interpret and apply the law, outside the principle of legality.

As in the case of the other systems which contribute to delivering of justice, the judicial system and the penitentiary system, for example, the national system of probation is crossed by the principle of legality, according to which the organization and functioning of all its elements must be carried out only in strict observance of the laws.

As a matter of fact, in agreement with some of the well-known professors in criminal execution law², we notice that the principle of legality crosses, as is natural, the entire discipline of execution of penalties and non-custodial measures, and so of those which make up the content of the probation.

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¹ See Chapter II of the Law no. 253/2013, with the marginal name *The principles of the probation system' activity.*

² I. Chiș, A.B. Chiș, *The execution of the criminal sanctions*, Editura Universul Juridic, Bucharest 2015, p. 195.

Although the provision from Article 6 of Law no. 252/2013 expressly mentions only the activity of the national system of probation, and sets it within the limits of legality, it is self-evident that the principle of legality crosses not only the functioning, but also the organization of the national system of probation. We come to this conclusion from the title of the Law no. 252/2013 itself, which outlines the subject matter of the regulation as being not only the functioning, but also the organization of the national system of probation, and also an entire section of the Law³, which comprises provisions relating strictly to the organization of the national system of probation.

The principle of legality in the organization and functioning of the national system of probation is a transposition of the principle of legality regulated through the provisions of Article 1(5) of the Constitution of Romania, according to which in Romania, the observance of the Constitution, of its supremacy and of the laws is mandatory.

The concept of *law* comprised in the name of the principle here in question must be interpreted in the widest sense and cannot be limited only to the homonyms normative acts, which emanates from the Parliament⁴. In the activity of the probation and in the organization of the probation system must be, of course, observed the normative acts of lower level than law or secondary, adopted in implementation and application of the laws. The law itself justifies this statement which, by references to some concrete components of the organization and functioning of the national system of probation, makes express references to the normative acts of lower level than the law, whose observance imposes it.

Thus, a category of secondary normative acts, important for the organization and functioning of the national system of probation, is represented by the Governmental Decisions by which are approved a series of regulations which establish, at the level of detail, the functioning of the components of the system. We recall, at this point of our exposure, the Government Decision No. 1079/2013 through which it was approved the Regulation implementing the provisions of Law no. 252/2013 regarding the organization and functioning of the probation system, a Regulation particularly important for the functioning of the national system of probation. References to compliance with the Regulation in question are frequent in the content of the Law no. 252/2013, including among them, by way of example, those of Article 34(4), which require compliance with the regulation as regards the structure and standard format of the evaluation report of the juvenile offender, and those of Article 115(7), requiring compliance with the Regulation as regards the conditions under which and the reasons for which National Probation Directorate may ask the judge delegated for execution of penalties

to withdraw the empowerment of the community institutions.

Law no. 252/2013 requires that even in the organization and functioning of the national system of probation some of the normative acts placed, in the hierarchy, below Government Decisions, namely Ministerial Orders, to be observed. Thus, from the provisions of Article 120(3) of the law it results that the organization and functioning at the level of detail of the probation system, conditions and the procedure for the organization of competitions for employment leading positions in the National Probation Directorate, the activity of the Consultative Council attached to the National Probation Directorate, the conditions and the procedure for the organization of competitions to fill the positions of head of service and head office within the services and the probation offices are established by Orders of the Minister of Justice.

Obligation to comply with Government Decisions and Ministerial Orders in the organization and functioning of the national system of probation does not dilute, does not empty the content the legality principle, because the source of the obligation in question is found in the law itself. In other words, compliance with the provisions comprised in Government Decisions and Ministerial Orders to which the law itself refers, only means respect for the law itself.

The principle of legality represents also a guarantee of quality in the organization and functioning of the national system of probation, through the imperative of observing the legal provisions, creating the necessary conditions for imposing particularly high standards.

These standards are not jeopardized by certain aspects of the organization and functioning of the national system of probation regulated by normative acts of lower level than the law, since these provisions contained in those normative acts cannot transgress legal norms.

With regard to this latter aspect we consider useful to invoke a situation in which it can be discussed of a transgression of the law by means of rules included in an act of a lower level than the law, a situation which is eloquent also in terms of practical functional aptitude, the operationalization of the principles of the national system of probation.

The situation we have is as follows: the Court renders a decision and postpones the application of the penalty or the suspension of the execution of penalty under supervision, imposing to the supervised person unpaid community work for the benefit of the community, and without complying with the provisions of Article 404 par. 2 and 3 of the Criminal Procedural Code omits to indicate the entities in the community within which unpaid community work for the benefit of the community is to be carried out. This omission

³ See Title II of the Law no. 253/2013, with the marginal name - The organization of the probation system.

⁴ According to article 76 par. (1) from the Romanian Constitution, the Parliament adopts constitutional laws, organic laws and ordinary laws.

constitutes an obstacle to the enforcement of the judgment, which, according to the provisions of Article 598(1)(c) of the Criminal Procedural Code, is a case of opposition to the enforcement of the judgment which is given in jurisdiction of the enforcement Court⁵. However, with regard to the omission of the Court to indicate the two institutions from the Community, the probation counselor has, in accordance with Article 14⁶¹ par. (8) of the Regulation for implementing the Law no. 252/2013, the possibility (and the obligation) to ask the judge delegated with the enforcement of the judgment, to designate an institution from the Community in which the work is to be carried out. This procedural means of removing the impediment to enforcement in question, easier, has been introduced by the Government Decision No. 603/2016, which amended and supplemented the Regulation for implementing the Law no. 252/2013.

Trying to draw a conclusion with regard to the case in question, we express our opinion that the transfer of the functional competences from the enforcement Court to the judge delegated with the enforcement, through a Government Decision, without denying the practical utility of this transfer, puts serious problems of legality in the activity of the national system of probation.

As we were saying, without having doubts regarding the usefulness of a procedure more flexible in cases such as those in question, we only suggest *for future enactment of laws*, in order to comply with the principle of legality, such procedures, involving a transfer of competences from the enforcement Court to the judge delegated with the enforcement, to be regulated by law, as planned, as a matter of fact, in a situation of the same category, consisting in the impossibility to work for the benefit of the Community in the two entities from the Community indicated in the judgment⁶.

2. The principle of observing judgements

Taking into consideration that the most significant part of the probation activity is carried out after the judgement is rendered in the criminal trial, observing judgements is raised at the level of principle of the national system of probation. In the view of other authors, which, however, refer to a wider scope of research, concentrated to the execution of all sanctions and non-custodial measures, this principle is called the basis of enforcement⁷.

Of course, the principle of observing judgements is closely linked to that of legality, from which it arises, judicial decisions being only a materialization of the law enforcement.

The close link between the principle of legality and that of observing judgements is emphasized by the legislator also through their explicit consecration in the same article of the law, Article 6 of Law no. 252/2013.

The fact that the observing of law and judgments is put on the same level of importance in the probation activity is an approach which is perfectly justified from the legislator, starting from the idea that through judicial decisions it is been expressed the legality with reference to a specific case.

However, raising the observing of judgments at the level of a principle may lead to some difficult situations for the probation counselors in the hypotheses in which judgments become enforceable in a non-legal form.

To illustrate what we want to show at this point of our exposure, we exemplify with a judicial decision in which legal provisions have been breached in relation to the length of the supervision period in case of suspension of the execution of penalty under supervision⁸.

So, in the criminal judgement in question, not appealed, the resulting penalties of 2 years and 8 months imprisonment has been suspended under supervision and a period of supervision of only 2 years has being imposed, by breaching the provisions of Article 92 (1) from the Criminal Code, according to which the duration of the suspension of the penalty under supervision constitutes period of supervision for the convicted person and it ranges between 2 and 4 years, without the possibility to be less than the duration of the penalty imposed.

Although the judge delegated with the enforcement has made opposition to the execution of the judgement, invoking the case provided for in Article 598(1)(c) of the Criminal Procedural Code, the Court rejected the opposition as groundless, with the reasoning that the establishment of a period of supervision such as the one in question, does not constitute either a doubt with regard to the judgment which is to be executed or an obstacle to the enforcement the judgement⁹.

In such a case, after exhausting the procedural means the probation counselor and the judge delegated with the execution have at hand, if the illegality is not removed, the probation counselor which contributes to the enforcement in these conditions of the provisions of

⁵ In this way we exemplify with the Criminal decision no. 7/2016 of the Filiași Court of First Instance, accessible on the free jurisprudence portal www.rolli.ro.

⁶ According to art. 51 par. (2) of the Law no. 253/2013 on the execution of penalties, educational measures and other non-custodial measures imposed by the judicial bodies in the course of the criminal trial, if the execution of the work is no longer possible in any of the two community institutions mentioned in the judgment, the probation counselor refers the judge delegated with the execution, who will designate another institution in the community for the execution of the work

⁷ I. Chiș, A.B. Chiș, *The execution of the criminal sanctions*, Editura Universul Juridic, Bucharest 2015, p. 195.

⁸ Criminal decision no. 205/2016 of the Bihor Tribunal, non-appealed, unpublished.

⁹ The opposition to the execution was rejected by the criminal decision no. 6/P/2017 of the Bihor Tribunal, non-appealed, accessible in the electronical database Lege5.

the judgment is defended by the principle of observing judgments.

3. The principle of respect for human rights and fundamental freedoms

The principle of respect for human rights and fundamental freedoms is expressly provided in the Article 3 of Law no. 252/2013, according to which *the activity of the probation system is carried out under conditions which ensure observance for human rights and fundamental freedoms, any restraint of them being possible only within the limits inherent in nature and content of the penalties and measures imposed by the judgment and under the conditions arising from the specific intervention, depending on the seriousness of the crime and the risk of committing any crimes.*

This principle is found, even if differently formulated, and in the Recommendation CM/Rec(2010)1 of the Committee of Ministers¹⁰. Also, this principle, as it is written in the Law no. 252/2013, includes another principle from the same international legal document, according to which in the implementation of any penalties or measures, the probation offices will not impose any burden or restriction of the rights of the offender greater than that provided by the judicial or administrative decision and imposed in each individual case by the seriousness of the offense or by the correctly assessed risks of re-offending¹¹.

Of course, the legislator has raised the obligation to respect for human rights and fundamental freedoms at the level of principle of the activity of the probation also due to the importance it has acquired, in the recent years, the jurisprudence of the European Court of Human Rights, especially for the institutions that have competences relating to the restriction of rights and freedoms in question.

The same importance of observing of human rights and fundamental freedoms is underlined by the fact that this obligation is raised to the rank of principle also through Article 6 of Law no. 253/2013 on the enforcement of penalties, educational measures and other non-custodial measures imposed by judicial bodies in the course of the criminal trial.

The general framework of human rights and fundamental freedoms is drawn by the provisions of the European Convention on fundamental human rights and freedoms and the additional Protocols to the Convention, but also by the jurisprudence of the European Court of Human Rights¹².

Specifically, the principle in question requires the probation counselor that, in the activity carried out in connection with the person subject to the supervision measures or voluntary obligations, to report itself always to the need for strict observance of human rights and fundamental freedoms.

A specific task in the exercise of which a concrete problem of respect for human rights and fundamental freedoms can be raised is that of granting permissions during the performance of the obligations referred to in Article 85(2)(e) and (f) or Article 101(2)(d) and (e) from the Criminal Code.

The task in question is governed by the provisions of Article 45 of Law no. 253/2013, text which provides, at the same time, also the cases in which the probation counselor may grant permissions such of those in question.

One of the cases which justifies granting of permissions during the performance of the obligations referred to in Article 85(2)(e) and (f), respectively in Article 101(2)(d) and (e) from the Criminal Code, is the one consisting in following a treatment or a medical intervention, which seeks to respect the most important of the fundamental rights, namely the right to life, as guaranteed by Article 2 of the same Convention.

This example of a mechanism to guarantee the observance of human rights and fundamental freedoms in the activity of the probation requires, of course, knowing the definitions and content of the rights in question, their nature, absolute or relative, the situations in which interferences of the authorities within the exercising these fundamental rights are justified¹³.

As we will see in the following, given that some of the fundamental human rights are considered more important in the economy of the organization and functioning of the national system of probation, the legislator provides for special regulations with regard to them, right in the section dedicated to the principles of the activity of probation. Although they are structured in different articles, we are of the opinion that the rules in question are part of the regulations relating to the principle of the respect of human rights and fundamental freedoms.

From the point of view of legislative systematization this way of proceeding it is not the happiest, but approaching the obligations concerning compliance with some of the fundamental human rights in particular may be accepted in the light of the importance of the rights in question in the probation activity. We consider at this point of our exposure *the right to dignity, the right to private and family life and the right not to be subject to any form of discrimination.*

¹⁰ According to the first thesis of the second basic principle set out in Recommendation CM / Rec (2010) 1 of the Committee of Ministers, the probation agencies will respect the human rights of offenders.

¹¹ See point no. 5 of the Recommendation CM / Rec (2010) 1 of the Committee of Ministers.

¹² The European Convention for the protection of Human Rights and Fundamental Freedoms was ratified by the Romanian Parliament by Law no. 30/1994, which expressly recognized the mandatory jurisdiction of the European Court of Human Rights.

¹³ Without proposing to detail here these notions, we make our duty to point out a valuable source for the persons involved in the probation activity facing issues of human rights and fundamental freedoms: <https://jurisprudencedo.com>, which provides free access to a significant number of European Court of Human Rights judgments, structured also according to the articles of the Convention.

3.1. Respect for human dignity

According to Article 4 first thesis of Law no. 252/2013, the activity of the probation system is carried out under conditions that respect the dignity of the person.

Dignity is one of the intrinsic values of the human being, the importance of which is emphasized and in that it is found among those inviolable values, absolute in the arsenal of values that form the basis of the acts of the international conventions on human rights.

Thus, human dignity is absolutely protected by the recognition of the right not to be subjected to torture, inhuman punishment or degrading treatment, by the provisions of Article 2 of the European Convention for the protection of human rights and fundamental freedoms.

As other authors have noticed¹⁴, human dignity, as an indivisible and universal value, is placed at the foundation of the Charter of Fundamental Rights of the European Union¹⁵, which strengthens, once more, the significance of this value in the heritage of common values of modern civilization.

Also, human dignity has to a place of honor among the supreme values of the Romanian Constitution¹⁶.

In the matter of probation, dignity as a value associated to each person, gets also important operational valences, in that the observance by the probation counselor of the dignity of the supervised person is a condition *sine qua non*, a prerequisite for a successful social reintegration process.

Dignity requires respect, and respect shown by others is one of the most important sources from which the individual draws his own social profile.

In the probation activity to respect human dignity of the supervised person means treating it with respect, listening it carefully, empathizing up to a point with it, removing the inappropriate arguments in a neutral, elegant and convincingly logical way, highlighting the strong points and illustrating the harmfulness of the undesirable skills, not abusing its position of authority. In this way, the person subject to probation gets confidence in the probation counselor and in its own strengths, feels valued and is thus able to put greater efforts towards re-socialization.

Another aspect of respecting human dignity in probation is the valence of the reductive agent of the criminal stigma, an undesirable effect of criminal sanction¹⁷. This valence is translated into that, if treated with respect, the offender subjected to probation will look at himself with other eyes, but, at the same time, he will be seen otherwise by the other members of society.

Also, the person who has committed a crime and which is treated with dignity by a representative of the state authority tends to no longer feel wronged and "lets the guard down", being so, much more receptive to positive influences.

3.2. Respect for private life and family

According to Article 4 second thesis of Law no. 252/2013 the activity of the probation system is carried out under conditions that do not interfere with the exercise of the right to private life of the person more than is inherent to the nature and content of the intervention.

Like human dignity, also private and family life is one of the fundamental rights recognized as such by both international conventions in the field and by the Romanian Constitution.

Thus, according to Article 8 of the European Convention of Human Rights and Fundamental Freedoms, any person has the right to respect for his private and family life, his home or his correspondence, no interference by a public authority with the exercise of this right being allowed except when it is in accordance with the law and is a measure necessary in a democratic society for national security, public security, the country's economic well-being, the defense of order and the prevention of criminal acts, the protection of the health, morals, rights and freedoms of others.

In a more simplified form, article 7 of the Charter of Fundamental Rights of the European Union stipulates *that any person has the right to respect for his private and family life, home and communications secrecy*.

Finally, according to Article 26 of the Romanian Constitution, public authorities respect and protect intimate, family and private life, the natural person having the right to dispose of itself, unless it violates the rights and freedoms of others, public order or good morals.

A concrete manifestation in probation of the obligation to ensure compliance with the right to private and family life is represented by one of the cases in which may be granted to the permissions during the performance of the obligations referred to in Article 85(2)(e) and (f), respectively in Article 101(2)(d) and (e) Criminal Code and which, according to Article 45(1)(a) of Law no. 253/2013, consists in the attendance of the supervised person to the marriage, baptism or funeral of a family member, from among those referred to in Article 177 Criminal Code. In other words, establishing the case in question is just a mechanism that guarantees the observance of the right to private and family life.

¹⁴ I. Chiș, A.B. Chiș, The execution of the criminal sanctions, Editura Universul Juridic, Bucharest 2015, p. 196.

¹⁵ The Charter of Fundamental Rights of the European Union, published in the Official Journal of the European Union no. C 83/403 has replaced, since the entry into force of the Treaty of Lisbon, the old Charter proclaimed on 7 December 2000.

¹⁶ According to art. 1 par. (3) of the Constitution of 2003, Romania is a state of law, democratic and social, in which the human's dignity, citizens' rights and freedoms, the free development of human personality, justice and political pluralism are supreme values in the spirit of the democratic traditions of the Romanian people and of the ideals of the Revolution of December 1989 and are guaranteed.

¹⁷ S. Poledna, in the *Probation Manual*, coordinated by V. Schiacu și R. Canton, Editura Euro Standard, Bucharest 2008, p. 28.

3.3. Non-discrimination

According to art. 5 of the Law no. 252/2013, within the probation system, any activity is carried out without any discrimination on grounds of race, nationality, ethnicity, language, religion, gender, sexual orientation, opinion or political affiliation, wealth, social origin, age, disability, non-contagious chronic disease or HIV / AIDS infection or on other circumstances of the same kind.

The principle according to which discrimination is forbidden within the probation represents an implementation into the Romanian legislation of the basic principle No. 6 of Recommendation R(2017)3 of the Committee of Ministers to the Member States relating to the European rules on sanctions and community measures.

The interdiction of discrimination is regulated in the European Convention of Human Rights and Fundamental Freedoms, which, by means of the provisions of Article 14 provides that the *exercise of the rights and freedoms recognized by the Convention should be ensured without any discrimination based, in particular, on sex, race, color, language, religion, political opinions or any other opinions, national or social origin, membership of a national minority, wealth, birth or any other situation.*

Also, the Charter of Fundamental Rights of the European Union expressly prohibits in Article 21, the discrimination of any kind, based on grounds such as sex, race, color, ethnic or social origin, genetic features, language, religion or beliefs, political opinions or of any other nature, membership of a national minority, wealth, birth, disability, age or sexual orientation, and as regards the scope of EU treaties, with the exception of special provisions, on the grounds of nationality.

In the Romanian Constitution interdiction of discrimination is dealt with in relation to the right to equality before the law and the authorities, enshrined in Article 16.

By comparing the internal provision from Article 5 of Law no. 252/2013 with the international regulations we will notice that the Romanian legislator offers a very wide range of protection against discrimination, providing most of the hypotheses in which supervised persons can find and which cannot constitute grounds for discrimination, but leaving, at the same time, open the list of such hypotheses.

In concrete terms, what is important in the activity of the probation counselor in relation with the prohibition of discrimination, is the understanding of the fact that this principle is violated when, without any reasonable and objective justification, a state applies different treatments to persons that are in similar situations or, on the contrary, does not apply a different treatment to persons who are in different sensitive situations¹⁸.

An internal provision whose implementation could raise problems from the perspective of the

discrimination on the grounds of religion, for example, is that of Article 45(1)(a) of Law no. 253/2013, which we have mentioned above and which gives the probation counselor the prerogative of granting permissions to the supervised person during the execution of certain obligations inherent in the status of the person subject to probation. According to the text in question, some cases which might justify granting the permissions are represented by the attendance of the supervised person at certain moments of religious significance in the life of family members, including baptism. How baptism is a mystery specific to Christian religion, we believe that a strict interpretation of the provisions in question could lead to an unjustified discriminatory situation between persons under supervision of Christian religion and those of other religions who do not know the mystery of baptism but know the equivalent spiritual practices. Therefore, in respect to the matter in question, we are of the opinion that the concept of "baptism" in Article 45(1)(a) of the Law no. 253/2013 should be interpreted in the widest sense, leading to the conclusion of the applicability and in the case of an equivalent spiritual practices, encountered in the context of the other religions than Christianity.

One further explanation we consider is needed at this point of our material, namely that the interdiction of discrimination does not mean applying the same treatment to any person, regardless of the situation. If many different situations associated with some persons do not give rise to differentiated treatments (e.g. the differences of race, nationality, ethnicity, language, religion, gender, sexual orientation, opinion or political affiliation, wealth, social origin, age, disability, non-contagious chronic disease or HIV/AIDS infection), there are also different situations which justify differentiated treatments. To exemplify this last statement is enough to keep in mind the differentiated situation of studies, in general, professional training, in particular, which can justify the choice of the probation counselor, on the basis of the prerogative provided for by in Article 50(1) of the Law no. 253/2013, of education or training courses or of professional qualification courses different after this criterion, without creating a situation of discrimination. Thus, we can say that discrimination is not equal to justified differentiation based on objective criteria, but only to the unjustified differentiation of such criteria.

4. The principle of confidentiality and the protection of personal data

According to Article 7 of Law no. 252/2013, the activity of the probation system is carried out observing the confidentiality and in compliance with the rules for the protection of personal data, as provided for by the applicable legal provisions.

¹⁸ See, for example, the judgement from ECHR – Grand Chamber - Case Thlimmenos against Greece.

The two aspects of this principle, confidentiality and protection of personal data are intimately linked, but not to be confused.

By confidentiality in probation we have to understand that characteristic of the probation activity that makes it not exclusively intended for revealing. We cannot say, however, that the probation activity is a secret one, but it cannot be the subject of unhindered access of the public.

With regard to the public access to what means the activity of the probation, we can say that it is restricted from a legitimate reason, revealed also by other authors in this field¹⁹, that of being in the interest of the reintegration of the supervised person to have a statute that is as close as possible to that of an individual who is not in conflict with the criminal law. In other words, it is desirable that in the eyes of the other members of the society, the supervised person to appear as an ordinary individual, without the stigma of the offender imprinted in a visible place, which would make him vulnerable and, thus, make difficult the process of social reintegration.

Of course, the confidentiality we are talking about doesn't mean hiding the fact that supervised person has committed a crime, but only that committing the offense is not displayed in public. Confidentiality in probation cannot be the opposite in situations that require protecting superior interests, such as the good functioning of various state bodies with responsibilities in the field of public safety.

As the activity of probation involves the cooperation of several entities, confidentiality knows and a limitation inherent to this cooperation, by virtue of which the necessary data must be the subject of an exchange between probation services, on the one hand, and the entities in the Community, in charge with the implementation of the probation, on the other hand. With regard to this the limitation of confidentiality, by Article 9 of Law no. 253/2013 it is provided a protection mechanism, according to which the natural and legal persons involved in the execution of penalties, educational measures and other non-custodial measures are obliged to observe the confidentiality and the rules for the protection of personal data, provided for by the relevant regulations.

A mechanism aimed to preserve confidentiality within the activity of probation is also that governed by the provisions of Article 53(3), final thesis of the Law no. 252/2013, which subjects to the agreement of the supervised person the request of any person to consult the content of the probation file. To highlight once more that the principle of confidentiality does not affect the activity of the state bodies with competences in the field of delivering justice and protecting public order, we highlight that the agreement of the supervised person is not necessary in order to facilitate the access to the probation file by the judge delegated with the enforcement, by the prosecutor and by the police, as it

results from the provisions of Article 53(3), first thesis and paragraph (6) of the Law no. 252/2013.

Last but not least, in accordance with the provisions of Article 24 of the same law on the organization and functioning of the probation system, confidentiality cannot hinder the research activities in the field of probation, although confidentiality must also be observed and on this occasion.

With regard to the protection of personal data, it should be recalled that the National Probation Directorate and the subordinate services are personal data operators within the meaning of the Law no. 677/2001 for the protection of individuals with regard to the processing of personal data and free movement of such data, framing them, from the point of view of the functional competences they hold, in the category described in Article 2(5) of that law, that of operators carrying out activities involving the prevention, investigation and prosecution of criminal offenses and maintaining public order, as well as other activities carried out in the field of criminal law.

Framing National Probation Directorate and the subordinate services in the category of operators who carry out activities for the prevention, investigation and prosecution of criminal offenses and maintaining public order, as well as other activities carried out in the field of criminal law, although gives wider powers of processing, among which the right to the processing of certain data without the agreement of the person monitored, it does not mean that with regard to the processing of personal data, the Direction and the subordinate services are not kept to comply with the rules concerning the processing of personal data, drawn by the provisions of Articles 4, 5 and 6 of the Law no. 677/2001, according to which the processing should be carried out in good faith, in accordance with the conditions laid down by law, for determined purposes, explicit and legitimate, in adequate manners, relevant and not excessive in relation to the purpose of the processing, with accuracy and update, with storage in appropriate and safe forms.

5. Principle of case management

According to the provisions of Article 8 of Law no. 252/2013, the probation activity shall be conducted in compliance with the principles, values and methods of case management during the process of supervision. Of course, the principle concerns also the organization of national system of probation as regards the fulfillment of the main substantial competences to coordinate the supervision of the offenders.

Although the law requires that the institutions of the Community and other authorities and public institutions to also observe the principles, values and methods of case management, the probation counselors are the main actors to whom the institution of case management addresses to.

¹⁹ I. Chiș, A.B. Chiș, *The execution of the criminal sanctions*, Editura Universul Juridic, Bucharest 2015, p. 199.

The meaning of case management is legally defined by means of the provisions of Article 14 let. (b) of Law no. 252/2013, according to which the case management means the process of coordinating all assessment activities of the supervised person, planning and conducting assistance and control interventions, monitoring the way of implementing the measures and obligations imposed by the judicial bodies, including by making use of internal potential of the person and integrating the contribution of the institutions within the Community.

Specific method of working in social assistance, by means of which it is intended to adapt the activity of providing social services to the complexity of the problems within this field, case management has also been implemented in correctional matters as a method by which to connect the activity of dealing with offenders with the activity of rendering justice and to provide a framework of rules to support the intervention rehabilitation²⁰.

In fact, case management in probation is a set of rules that guide the assessment activity of the supervised person, the activity of planning and carrying out the assistance and control interventions of the supervised person, monitoring of the implementation of the measures and the obligations imposed by the judicial bodies.

In addition to the regulatory function in concrete of the activities that compose the probation supervision process, case management has also the function of empowering the probation counselor to whom the task of supervision is assigned.

Case management begins with the appointment of the case manager, that is to say the probation counselor responsible for the process of supervising a person²¹.

After this initial moment, all activities that comprise the process of supervision, convocation, initial and further evaluation of the person monitored, control of the person supervised and the way in which it fulfils the obligations arising from its statute of a person subject to probation, coordination and control of the activities carried out by the institutions within the Community with the person monitored, the relationship with the judicial bodies or of public order, with other entities designed to contribute in assisting the supervised person, shall be the responsibility of the counselor case manager and represents the manifestations of the case management.

In concrete terms, case management is manifested through the fulfillment by the probation

counselor case manager of the tasks that are provided to it by the pertinent normative provisions such as: convocation of the person supervised (Article 51 of Law no. 253/2013); coordination of the process of supervision (Article 52 of the same law); direct control of compliance with the supervision measures (Article 56 of the same law); determination of the concrete content of the obligations of the probation (Article 58 of the same law); notification of the court responsible for the enforcement with the revocation of the alternative benefit to the execution of custodial penalties (Article 67 of the same law).

6. The principle of individualization

Article 9(1) of Law No 252/2013 regulates, as a matter of principle, the obligation of the probation counselor to adapt the intervention according to the individual characteristics, the needs of the person, the risk of committing crimes and the particular circumstances of each case.

The principle of individualization within the probation activity is a particular transposition of the more general principle of the individualization of criminal sanctions. From the point of view of the classification after the criterion of the body which has the responsibility to individualize, individualization in the activity of the probation is a form of the administrative individualization, which intervenes in the post-trial phase, in the execution phase of the criminal trial.

Because the probation measures are being carried out in the open community, from which the offender comes from, they differ fundamentally from the closed and harmful community of penitentiaries. We can say, by comparison with the penalties involving deprivation of liberty, the probation measures are being executed individually.

Although the execution of penalties involving deprivation of liberty also tends towards a more personalized individualization²², the execution of the probation measures has a much deeper administrative personalization potential, which can go up to customization²³. Even this customization up at the level of individual is considered in the doctrine to be able to greatly reduce the risk of re-offending²⁴.

In the normative acts governing the national system of probation we find numerous practical application of the principle of individualization.

²⁰ F. McNeill, P. Raynor și C. Trotter, *Offender Supervision – New directions in theory, research and practice*, Editura Willan Publishing, New York 2010, p. 344.

²¹ According to art. 50 of Law no. 252/2013, upon receipt of the copy of the court decision ordering the supervision of a person by the probation office, the head of the service shall appoint a probation counselor case manager.

²² In this respect, Art. 89 par. (4) of the Law no. 254/2013 on the execution of penalties and imprisonment measures, provides for the obligation, to draw up, after the period of quarantine and observation, established by the provisions of Art. 44, an *Individualized assessment and educational and therapeutic intervention plan*.

²³ In this respect, Art. 14⁴⁶-14⁵⁰ of the Regulation for the application of the provisions of Law no. 252/2013 regarding the organization and functioning of the probation service, approved by the Government Decision no. 1.079 / 2013, modified and completed by the Government Decision no. 603/2016, provides for the obligation to draw up the *Supervision plan*.

²⁴ I. Chiș, *Non custodial penalties of the XXI century*, Editura Wolters Kluwer, Bucharest 2009, p. 22.

Thus, an important application of the principle of individualization consists in the competence assigned to the probation counselor by Article 53(1) and Article 57(2) of the Law no. 253/2013 to establish, in concrete terms, on the basis of the initial assessment of the person supervised, the program or programs of social reintegration that must be followed, and also, where appropriate, the institution, respectively the institutions within the Community in which will take place, in the hypothesis the obligation to follow such programs was imposed by the judicial decision.

Another manifestation of the principle of individualization in the activity of the probation is the competence assigned to the probation counselor by Article 61(1) of the Law no. 252/2013 to establish, depending on the situation and needs of the person and according to the usefulness of the activities for the Community, in which of the two institutions in the Community referred to in the judgment of the Court is to be carried out the obligation to provide unpaid work for the benefit of the community.

7. The principle of co-interest of the supervised person

The principle of co-interest of the supervised person is regulated, firstly, by means of the provisions of Article 9(2) of the Law no. 252/2013, according to which, *in the course of the activity, the probation counselor aims to develop a positive relationship with the supervised person, for the purpose of involvement in its own process of rehabilitation.*

Secondly, the same principle is governed by the provisions of Article 11(1) of the same law, according to which the probation counselor shall inform the person with respect to the nature and content of the main acts carried out in the course of the probation and seeks *to obtain its consent with regard to the execution of the respective acts.*

The postponement of the application of the penalty, the suspension of the execution of penalty under supervision and the conditional release represent manifestations of the new vision of the Romanian legislator in what concerns the individualization of criminal sanctions, a part of the mechanism introduced by the Criminal Code in force in order to enable the court to choose the most appropriate form of criminal liability for the individual who has committed a crime provided by the criminal law.

Also, these new opportunities for judicial individualization of the sanction constitute, in principle, an alternative to imprisonment, as a consequence of the restorative current which crosses modern criminal laws and detaches them from the paradigm of criminal justice purely vindictive.

In the content of these new ways of individualization of the criminal sanction, instead of applying and executing the custodial sentence imposed, the offender is required to perform a series of obligations or to observe a range of interdictions which,

together, are intended to ensure, primarily, achieving the desirability of re-educating and rendering the offender to the community.

The obligations and interdictions imposed are carried out within the community from which the offender comes from, which community is thus seen to be involved in the process of re-education and re-socialization of the offender.

Taking into consideration the component of co-interest of the Community in the process of reeducation and re-socialization of the offender, these modalities for the enforcement of obligations and interdictions alternative to imprisonment, in particular, are also called *sanctions or community measures*, in international normative acts, such as *the Recommendation R(2017)3 of the Committee of Ministers to the Member States relating to the European rules on sanctions and Community measures, abovementioned, which replaces Recommendation R(92)16 to the Committee of Ministers of the Member States relating to the European rules on penalties applied in the Community.*

A characteristic of community criminal sanctions is represented precisely by the co-interest of the offender in the process of re-education and re-socialization which, without this involvement of the main subject on which community levers should act, would remain an empty and without a chance process.

In order for the community sanctions to be successful, the offender must therefore be co-opted in the process of reeducation, he must express his adherence to the process of fulfilling the obligations and prohibitions that make up the content of community sanctions, adherence without which the re-socialization cannot take place

Thus, the Recommendation R(2017)3 of the Committee of Ministers to the Member States relating to the European rules on penalties and Community measures allocates a whole chapter to the consent and cooperation of the offender, Chapter V. In Article 56 of this chapter it is established that a sanction or a Community measure will be imposed only if it is known that the suspect or the offender is willing to cooperate and to observe the obligations and the specific conditions, and in Article 59 it is stated that the agreement of the suspect must be obtained even before imposing the penalties or Community measures.

Concluding, the agreement of the offender, followed by his cooperation in the process of enforcement of sanctions and Community measures is essential to ensure the favorable conditions in which reeducation and re-socialization will be accomplished, and represents, we can say, a substantive ground for the adoption of such alternatives to imprisonment.

The importance itself of this co-interest for the success of the process of reeducation and social reintegration has made the Romanian legislator to raise it to a principle of the national probation system.

Knowing the springs that have led to the raising of the level a principle of the co-interest of the

supervised person in the process of executing the probation measures is not only of theoretical importance, a good example to support this statement being the non-unitary practice of the courts in the matter of knowing if the prior consent of the defendant to work unpaid for community (in case of postponement of punishment) is mandatory or not.

This issue was submitted for analysis to the High Court of Cassation and Justice through the mechanism of resolving prior legal issues, regulated by the provisions of art. 475-477¹ Criminal Procedural Code.

As the Supreme Court dismissed as inadmissible the matter in question²⁵, the non-unitary practice on the issue to know whether the prior agreement of the defendant to provide unpaid work for the benefit of the community (in case of postponement of punishment) still remains, but it could, in our opinion, be stopped just on the basis of the principle of the co-interest of the supervised person, co-interest without which, as we said, execution of the probation measures in a manner which would lead to the reeducation and re-socialization, would not be possible.

In the relevant normative laws, we find concrete manifestations of the principle of co-interest of the supervised person in the process of implementation of the probation measures.

Thus, Article 55(1) of Law No 252/2013 provides that the monitoring plan shall be drawn up by the probation counselor case manager and *with the involvement of the supervised person*.

Also, according to the provisions of Article 14⁴⁵ of Regulation for the implementation of the Law no. 252/2013, with the occasion of informing the supervised person, carried out at the first meeting, it shall be made aware of the possibility of participating in certain activities and programs of reintegration during the period of supervision, *with its agreement*, explaining to it the practical arrangements in which it may be assisted in view of its social rehabilitation.

8. The principle of multidisciplinary

According to Article 10 of Law no. 252/2013, the probation counselor seeks the interdisciplinary approach of each case and coordinates the activities carried out in collaboration with the institutions from the Community in order to cover the needs of the person and maintain the safety level of the community.

The activity of the probation counselor is particularly complex and implies having knowledge and skills in various fields.

Given the fact that it has to work with tools such as the assessment interview, that it has to perform complex analyzes of the person's behavior, that he is in constant communication throughout the supervision process, the probation counselor must possess sound knowledge of psychology, sociology, but also

criminology, in addition to the absolutely necessary legal background.

As a matter of fact, the different knowledge and the various and multiple perspectives of the activity of the probation staff are an essential part of working with the offenders in the Community, imperatively needed to ensure social education and reintegration, but also to maintain a climate of public safety. The multidisciplinary knowledge of the probation counselor is therefore necessary in the context of the complexity of the offender's needs and of the imperative of the risk management.

Multidisciplinary in the activity of the probation is highlighted by the fact that the specializations required alternatively to be appointed as probation counselor are multiple. Thus, according to the provisions of Article 20 of the Law no. 123/2006 on the statute of the probation staff, to be appointed as probation counselor a person must comply, *inter alia*, with the condition to be licensed in social assistance, psychology, sociology, pedagogy or law.

9. The principle of respecting the right to information

Compliance with the right to information of the person subject to probation was raised at the level of principle by means of the provisions of Article 11 of Law no. 252/2013, according to which the probation counselor shall inform the person, in a language or communication method that it understands, with regard to the nature and content of the main acts carried out in the course of the probation and seeks to obtain the consent with regard to the progress of the acts in question.

Informing the supervised person about the nature and content of the main acts carried out in the course of the probation is a prerequisite for co-interesting the person in its own process of reeducation and resocialization.

Concrete manifestations of the principle of informing the person subject to probation are found quite frequently in the relevant normative acts.

Thus, according to Article 52(a) of Law no. 252/2013, informing the person with regard to the process of supervision is a part of the coordination of this process by the probation counselor.

In accordance with Article 54 of the same law, during the first meeting, the probation counselor, case manager, informs the sentenced person with regard to the supervision measures and the obligations it has to execute and about the consequences of compliance or non-compliance with them, and also, if appropriate, with respect to the obligations whose performance is verified by other competent authorities than the probation service.

²⁵ See Decision no. 27/2015 of the High Court of Cassation of Justice – the panel responsible for solving criminal issues of law, published in the Official Monitor, First Part no. 65 from 22/01/2018.

Provisions of greater detail relating to informing the supervised person are found, for example, in the provisions referred to in Article 14⁶¹ par.(2) of the Regulation implementing the Law no. 252/2013, according to which the probation counselor case manager informs the supervised person during the meeting with it about the concrete possibilities for carrying out the obligation to provide an unpaid work for the benefit of the Community in the institutions of the Community, as well as those of Article 14⁶² par. (3) of the same Regulation, according to which, within the first interview, the probation counselor case manager informs the supervised person with regard to the concrete possibilities for carrying out the obligation to attend a program of social reintegration at the level of the probation service, within the office reintegration programs or, if not possible, within a community institution listed in the database set up at national level.

10. The principle of professionalism and integrity in the probation activity

Although the principle in question is regulated in two articles of the law, which might mislead the idea of the existence of two principles, the indissoluble link between professionalism and integrity makes us affirm that we are in the presence of a single principle.

In accordance with Article 12 of Law no. 252/2013, staff carrying out their activity in the framework of the probation system must have a specialized background in accordance with the responsibilities assigned to it by the law and must seek, during the activity, the achieving of a high standards of professionalism and compliance with the standards of ethics and professional deontology, and according to Article 13 of the same law, in the framework of the probation system the activity shall be conducted in compliance with the principle of integrity by carrying out the actions in a responsible, transparent, impartial and through the judicious use of available resources.

The principle of professionalism and integrity in the probation is found, in another form, in the Recommendation CM/Rec(2010)1 of the Committee of Ministers to the Member States with regard to the Council of Europe's Rules of Probation, where, in point 13 it is stated, as a matter of principle, in the sense that all activities and interventions performed by the probation offices will observe the highest ethical and professional standards, national and international.

In any field of activity, the proper training and compliance with the ethical and deontological rules of the profession represent imperative conditions of integrity.

The importance of professional training for the probation activity, in accordance with the importance it has among the activities of delivering a criminal justice is highlighted also by the concern the Council of

Europe has under this aspect through the Recommendation No R (97) 12 of the Committee of Ministers to the Member States with regard to the staff responsible for the implementation of the sanctions and measures (criminal)²⁶, allocating a large section for training of staff, detailing long enough for a normative act of such importance, the forms of training, both initial and continuous, purposes and methods of training and even the content that must represent the subject of the training.

As a manifestation of the implementation of the International Recommendations, training of probation staff is the subject to regulation of a the whole section of the Law no. 123/2006 on the statute of the probation staff, through which are laid down the objectives of the training (adaptation to the requirements of the job; updating the knowledge and skills specific to the position; improvement of the professional training; gaining advanced knowledge of modern methods and processes, necessary for carrying out the professional activities; promoting and improving the professional career), the forms of organization of the training after the time criterion (initial and continuing training) and after the criterion of organizing the activities (seminars organized by the Ministry of Justice or other professional training courses in the field, professional traineeships to adapt to the requirements of the job; internships and specializations; the process of supervision).

The importance of professional training is highlighted also by its systematization, by drawing up, by the Ministry of Justice, through the specialized direction, of the professional training programs, as resulting from the provisions of Article 39 of the Law no. 123/2006.

Even if it does not reflect exactly the latest developments of the probation national system, referring here, for example, to the name that the probation staff currently carries, being adopted by the Order of the Minister of Justice No. 3172/C/26.11.2004, the Ethical Code of the social reintegration and supervision staff contains standards of professional conduct of the probation staff, in order for it to be consistent with the honor and dignity of the profession, whose failure to observe can lead to disciplinary liability.

In concrete terms, in the Ethical Code are regulated obligations specific to the profession's deontology, such as: the obligation for the probation counselors to notice, as soon as possible and, in writing, the hierarchical superior, any situation in which they have, or there may be the appearance that they would have any interest of any kind in the case in question; the obligation to carry out with professionalism, loyalty, fairness and conscientiously the tasks and the obligation to refrain from any act which might prejudice the institution in which it carries out the activity; the obligation to fulfil their tasks rapidly, in

²⁶ Recommendation no. R (97) 12 of the Committee of Ministers to Member States on the staff responsible for implementing sanctions and measures was adopted by the Committee of Ministers on 10 September 1997 at the 600th meeting of the Prime Ministers.

compliance with the deadlines provided by the law and, in the case where the law does not provide a deadline, within a reasonable period of time; the obligation to impose order and decency during the performance of specific activities, by having a balanced attitude, reliable and civilized towards the persons in evidence of the service and other people with whom they come into contact in their capacity; the obligation of continuous training and the of disseminating the knowledge acquired.

Also, the Code draws up interdictions that are intended to ensure the dignity and honor of the profession, but also the freedoms allowed both in the exercise of their professional tasks, as well as outside those, such as: the interdiction to use their professional quality for solving personal, family, or other persons' interests, other than within the limits of the legal framework regulated for all citizens; the interdiction to intervene in order to influence in any way the decisions concerning their career; the freedom of collaboration with the specialized publications; freedom of association with professional organizations.

Conclusion

The set of principles of the national system of probation is not, as it can be seen, a random join of rules of general applicability, with no connection between them. On the contrary, these principles are in a close connection with each other, depend on each other,

influence each other in the process of guiding the organization and functioning of the national system of probation, forming themselves a system of general rules.

In order to better understand the way in which principles of the national system of probation are functioning we believe it is useful the parallel with the principles of the criminal trial, whose functioning as a whole was surprised by some of the most renowned Romanian criminal procedural professors in a particularly fine definition, according to which the principles of an institutional system should be understood as *a set of rules that are interconnected dialectically*²⁷.

Of particular importance is also the functional aptitude of the principles, which means that all the normative provisions after which is organized and operates the national system of probation will be interpreted and applied in the light of the principles governing the system, principles that will also facilitate solving situations where no special rules are provided for.

This last functional aptitude of the principles governing a particular institutional system, to represent a framework for the interpretation and application of the rules with a narrower enclosure area or to constitute legal basis to resolve situations not provided by law, has been recognized also by other authors who have studied institutional systems related to the national system of probation, such as the system of the criminal trial²⁸.

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²⁷ I. Neagu și M. Damaschin, *Treaty of Criminal procedural law. General Provisions*, Editura Universul Juridic, Bucharest 2015, p. 60.

²⁸ N. Volonciu, *Treaty of Criminal procedural law. General Provisions*, Editura Paideia, Bucharest 1999, p. 54.