

E-ISSN: 2360 – 6754; ISSN-L: 2360 – 6754

European Journal of Law and Public Administration

2018, Volume 5, Issue 2, pp. 15-22

<https://doi.org/10.18662/eljpa/38>

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Covered in:

CEEOL, Ideas RePeC, EconPapers, Socionet,
HeinOnline

Published by:

Lumen Publishing House

On behalf of:

Stefan cel Mare University from Suceava,
Faculty of Law and Administrative Sciences,
Department of Law and Administrative Sciences

PRE-TRIAL PROBATION AS A WAY TO ENSURE THE PROTECTION OF THE DEFENDANT'S RIGHTS

Oksana MELENKO¹

Abstract

Within the framework of Ukraine's European integration and the development of its legal system, there arises a need for introducing an efficient mechanism, which would make up for convicts' rehabilitation, as well as establish some control over their behavior. The institution of probation seems to be the very mechanism that is able to fulfil the above task, as well as to protect our society, prevent repetitive crimes and stipulate the criminal's reintegration into the society.

The essence of probation lies in establishing control over the convict by obliging him to do certain things and restricting his freedom, without isolating him from the society (to attend probation centers, to meet a supervisory officer, to participate in various activities, etc.)

One of the most important functions, performed by the probation service, is a pre-trial one. It is administered in the process of investigating the crime, together with other investigative actions, by the bodies of inquiry. This pre-trial function presupposes collecting information about the criminal, with the purpose of assisting the court in determining the most relevant punishment (either imprisonment or some other alternative sentence). In this way, implementing the rule of law and ensuring human rights, the legislation allows the defendant to take a direct part: in making up his social-psychological characteristics; in specifying any information concerning his involvement in the committed crime; in compiling a pre-trial report; in receiving information on the procedure of compiling and applying the

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pre-trial report; in providing the probation officer with all the information, required by the report. In case of biased treatment, a defendant can withdraw a probation officer. Any accused individual has an indisputable right to make his own comments and specifications in the process of making up a pre-trial report, as well to refuse to sign it.

Keywords:

Probation, pre-trial probation, pre-trial report, program of probation, probation standards, social rehabilitation.

1. Introduction

The Criminal Code of Ukraine provides several types of criminal liability, alternative to imprisonment. It also presupposes the possibility of convicts' avoiding the punishment with probationary term on condition of ensuring their correction without serving a sentence.

The analysis of the leading European countries' experience in this field shows that the execution of alternative types of punishment should be carried out by a specialized public service (Probation Service), whose authorities go far beyond those of the police and jails.

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This function is to be performed by probation service, which is responsible for protecting society, preventing repeated crimes, and promoting the reintegration of a delinquent back to his previous life.

The Criminal-Executive Inspection used to be a peculiar analogue of probation service till the recent years. It executed punishments, which were not related to imprisonment.

However, probation services in the countries with a high level of democracy considerably differ from the Criminal-Executive Inspection in their functions, forms of organization, personnel, and methods of work.

2. Theoretical Background.

The issues of pre-trial probation (its formation, functioning and evolution) and pre-trial report (its peculiarities and significance) have been

the object of research of numerous scholars: K. Avtukhov, O. Betsa, I. Bogatyrev, O. Bogatyreva, T. Gatsenko, D. Diton, V. Driomin, O. Denisova, K. Zadoya, M. Paliy, L. Olefir, P. Leiden, S. Siomin, O. Kolb, D. Yagunova, G. Ovcharova, M. Panasyuk, N. Tatt, V. Shkadyuk, R. Ford, and others.

The essence of the institution of probation in the present-day foreign law has been revealed in the works by O. Bogatyreva [1]. O. Betsa has dedicated his research to the foreign experience in applying probation in juvenile justice [2]. A pre-trial report in judicial criminal proceedings has been the object of investigations by O. Yeni and L. Matiyek [3]. It is also worth mentioning the studies of social and psychological aspects of implementing probation programs by N. Maximova [4]. The authorities of probation service and pre-trial probation were discussed in the work by L. Ostapchuk [5], whereas T. Tkach laid particular emphasis on the preparation of a pre-trial report by Probation Service, as well as on the analysis of Ukrainian criminal-procedural and criminal-executive legislation [6].

It is important that most of the above-listed issues have been analyzed by the experts in the field of criminal-executive law. Nevertheless, there is a considerable lack of works investigating the procedural aspects of applying respective norms in criminal proceedings. Besides, the psychological peculiarities of administering and introducing pre-trial probation, as well as the implementation of defendant's rights (ensured by the Constitution) when making a pre-trial report, have not been sufficiently studied. Therefore, the paper under discussion aims at elucidating the issues of defendant's participation in the proceedings with the purpose of protecting his own interests, as well as his ability to affect the content of a pre-trial report, made by a probation inspector.

3. Argument of the paper.

Today, probation is an indispensable component in the system of criminal justice in many European states. Various international organizations have adopted numerous resolutions, recommendations and rules, which are closely related to the development of the institution of probation in criminal proceedings in the countries-members of the Council of Europe and the UN.

In particular, the principles and provisions of today's probation have been laid out in the Recommendations of the Cabinet of Ministers of the

Council of Europe, the so-called European Probation Rules (CM/Rec(2010)1) [7]. In compliance with them, probation is referred to as a system of executing punishment, imposed on a delinquent, which includes a range of measures of an educational nature. These are supervision, control and assistance, which have to stipulate involvement of the convict in social life and to ensure social security.

In accordance with the normative definition of probation by the international acts, in Ukraine, there also have been adopted two laws determining the peculiarities of probation bodies' personnel (particularly its status and authorities) and the legislative conditions for implementing pre-trial probation. These are the Law of Ukraine "On Probation" [8] and the Law of Ukraine "On Amendments to Some Legislative Acts of Ukraine Regarding the Enforcement of Executing Criminal Sentences and Implementing the Convicts' Rights" (of September 7, 2016 № 1492-VIII) [9].

One of the most important functions, performed by the probation service, is a pre-trial one. It is administered in the process of investigating the crime, together with other investigative actions, by the bodies of inquiry. This pre-trial function presupposes collecting information about the criminal, with the purpose of assisting the court in determining the most relevant punishment (either imprisonment or some other alternative sentence) on the basis of forecasting the offender's further behavior and the opportunities for his/her correction either in confinement or on the loose. Apart from the severity of the crime, there are some additional restriction factors for determining the punishment. They comprise the studies of delinquent's personality, which will include the analysis of the psychological mechanisms of unlawful behavior, individual-psychological and social factors of his previous life, criminal's situational responses, and his typical psychological and moral qualities.

A pre-trial report is necessary for the judge to make a fair sentence. It enables him to obtain some additional information about the person, suspected in committing a crime. With the help of a pre-trial report, the judge can also find out the circumstances of suspect's life, which might lead to the crime, as well as the measures, offered by the probation body in order to eliminate the above circumstances. A pre-trial report also enables the court to obtain the information, which is difficult to collect in the course of the investigation and the trial.

The international experience shows that the pre-trial function of probation is referred to in some countries as “a social investigation of the defendant’s personality” [1]. It consists in a comprehensive analysis of the defendant’s personality, in making up a preliminary message (report) about him, and his presence at the trials. In some states, this “social examination” is conducted not only by the probation system, but also by various social services. The obtained information is essential for the officers of probation service in order to elaborate the program of delinquent’s resocialization, as long as he/she is sentenced to some alternative type of criminal liability. In case, he/she is sentenced to imprisonment, this information may constitute a part of the program of educational impact on him/her in confinement.

Pre-trial probation provides a thorough collection of the information about the previous convictions of a detained person, as well as his “social characteristics”, i.e. his/her biography and life conditions that made up for the formation of his/her personality [4]. The respective data shall be collected by an independent probation officer, who (with the help of special methodology) conducts the investigation of the defendant’s social surroundings, learns his/her criminal record, family status and family relations, financial situation, leisure time pursuits, physical and psychic health and also determines if a delinquent is alcohol or drug addicted. It is crucial that all information is obtained during the individual meetings with the defendant by means of inquiring him and recording the obtained data in a pre-trial report. The defendant’s right to defense is administered through his/her direct participation in compiling a pre-trial report. The conclusion of a probation officer regarding the future positive prospects of the defendant mostly depends on the reliability of the information he gives [3]. It is not worth ignoring the offender’s conversations with his/her close relatives, family, workmates and friends in the course of a social investigation. This is why the above function of a probation officer requires certain proficiency not only in the field of law, but also in the sphere of psychology and pedagogy.

On the other hand, the objective of pre-trial probation is to establish certain obligations and restrictions for the defendant, without isolating him from society (visiting probation centers, meetings with probation officers, participation in certain activities, keeping to law-abiding behavior, etc.). We suppose that the essence of probation lies in the fact that apart from considerable restrictions in delinquent’s everyday life, it is also “maintained”

to by his fear to be imprisoned as long as he/she does not keep to certain conditions.

4. Arguments to support the thesis.

It is generally recognized that imprisoned individuals are subject to the influence of jail regime and criminal surroundings, as well as suffer from psychological pressure and isolation. Therefore, the advocates of probation and pre-trial probation claim that the latter do not hinder individuals' resocialization, as well as may make up for its acceleration. Undoubtedly, it is very difficult to prepare a convict for the free life because of the fact that jails are socially isolated institutions. Consequently, the only possible way to assess the degree of offender's rehabilitation is to learn the level of repeated crimes (in fact, one of the components of a pre-trial report is the assessment of the probability of committing repeated crimes).

Thus, the issues of pre-trial probation, the peculiarities and contents of a pre-trial report, as well as the efficiency of the latter's implementation, require thorough analysis and research. We suppose that a substantial reconnaissance of the issues under discussion may stipulate a better understanding of the phenomenon of probation and a more efficient implementation of the delinquent's right to defense. This may also lead to modern scientific elaborations in the field, which will considerably facilitate law enforcement and human rights protection.

5. Arguments to argue the thesis.

The reform of the State Criminal-Executive Service, as well as the formation of the central body of regulating probation (The Department of Probation with respective probation administrations) will create scientific grounds for various types of research regarding expediency, necessity, and efficiency of the introduction of probation. It will also stipulate theoretical and practical investigation of the issues of assigning and executing sentences. When a court makes decisions concerning the election of punishment, a pre-trial report performs only advisory functions. The court does not necessarily take it into account when delivering its verdict, because no pre-trial reports can be applied as a proof of defendant's guilt (or innocence) in criminal proceedings.

6. Conclusions.

In Ukraine, probation is considered as a punishment, alternative to imprisonment. Its social and psychological constituents, which include psychological assistance, correction, social rehabilitation, resocialization, social support and control, aim at solving the problem of preventing repeated crimes [10]. The scope of this work is usually presented in the form of a pre-trial report that gives defendant's psychological description. A pre-trial report is made only on consent of the court and is to contain defendant's social-psychological characteristics, the assessment of the risks of his/her committing repeated crimes and the conclusions regarding the probability of his/her correction without imprisonment. The aim of a pre-trial report is to provide the court with profound information for determining a relevant verdict.

The conclusions, made by probation service, will help probation officers in their work on offenders' correction. Nevertheless, every defendant has a right to dismiss his/her probation officer with the purpose of elaborating the approbation programs for more efficient resocialization in the future. Every defendant has also a right to participate directly in the process of making a pre-trial report, as well as to demand explanations on the procedure of preparing and applying this document [3].

The author of the article under studies claims that the issues she touches upon in her research are very important. Therefore, she invites her colleagues, both theoreticians and practitioners, to take part in a discussion on the matter with the purpose of determining all the peculiarities of the phenomenon of probation.

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