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Alternatives to imprisonment in Bulgaria – Development, State and Challenges

Mesures alternatives à l'incarcération en Bulgarie : développement, état de l'art et défis

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Riassunto
L'obiettivo del presente articolo è quello di presentare sinteticamente alcuni punti chiave legati all'implementazione delle misure alternative in Bulgaria. Vengono presi in considerazione esclusivamente gli aspetti importanti e viene presentato un approccio equilibrato basato sull'analisi di punti di vista differenti. Nel caso in cui vengano tratte conclusioni particolari o espresse valutazioni, è importante precisare che si tratta soltanto dell'opinione personale dell'autore dell'articolo.

Résumé
Cet article vise à présenter de façon très succincte certains points-clés liés à la mise en œuvre de mesures alternatives à l'incarcération en Bulgarie. Seuls les détails importants sont pris en considération, tandis qu'une approche équilibrée basée sur l'analyse de points de vue différents est présentée. Dans les cas où des conclusions particulières ou des évaluations sont exposées, elles n'expriment que l'opinion de l'auteur.

Abstract
This article aims to present in a very concise manner some key points related to the implementation of alternatives to detention in Bulgaria. Only the most important details have been included, while a balanced approach in terms of different points of view has been pursued. Where particular conclusions or judgements have been expressed, they remain opinion of the author.

Key words: Bulgaria; alternatives to detention; probation service; corrective labour without imprisonment; community service.

1. Historical notes.

The emergence of a unified Bulgarian ethnicity and state dates back to the 7th century AD. All Bulgarian political entities that subsequently emerged preserved the traditions (in ethnic name, language and alphabet) of the First Bulgarian Empire (681–1018), which at times covered most of the Balkans and became a cultural hub for the Slavs in the Middle Ages. With the decline of the Second Bulgarian Empire (1185–1396), Bulgarian territories came under Ottoman rule for nearly five centuries. The Russo-Turkish War of 1877–1878 led to the establishment of a Third Bulgarian state as a principality in 1878, which gained its full sovereignty in 1908. In 1945, after World War II, it became a communist state and was a part of the Eastern Bloc until the political changes in Eastern Europe in 1989/1990, when the Communist Party allowed multi-party elections. Bulgarian politics undertook a transition to democracy and free-market capitalism was introduced.

The Bulgarian government functions as a parliamentary democracy within a unitary constitutional republic. Sofia, a global city, is the country's capital and the 12th largest settlement in the European Union. Bulgaria is a member of the European Union (since 2007), NATO (since 2004),

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the United Nations, the Council of Europe, and the World Trade Organization and is a founding member state of the OSCE and the Black Sea Economic Cooperation Organization.

The Bulgarian legislative system has been greatly influenced by continental law. Court decisions are based on the Constitution, codes and different general and special laws. The main criminal law is the Penal Code. The first Penal Code has been adopted soon after the country gained its independence from the Ottoman Empire – February 21st 1896 (Punishment Law).

Assuming that some elements of alternative sanctions in Bulgaria can be traced back to shortly after the Liberation in 1878, it is important to track the development of particular alternative sanctions. The "deprivation of liberty" penalty was introduced in the system of penalties by the first Penal Law (21st of February 1896). Working on the regulation of all different kinds of penalties, the lawmakers used the extensive experience of England, France, Germany, Russia and other countries and adapted the progressive European ideas to the traditions of the Bulgarian nation. In the organization of the system of sanctions in the Penal Code, the dualistic system of sanction consequences was adopted. The institute of conditional release was established in 1896 and the Conditional Sentencing Law was adopted in 1903 and entered into force in the beginning of 1904. Thus Bulgaria became one of the first European countries to look for alternatives to the deprivation of liberty and seek different forms of intervention on the prisoners while they are in and when they are out of prison.

The current system of penalties was adopted with the Penal Code of 1968 when the country was under Soviet influence (1944-1989). Despite the strong ideologization of the government system, some positive developments of the different alternative sanctions should be recognized. Most important was the utilization of the conditional sentence where the court may rule that a community organization, group of colleagues or a particular person should provide supervision to the sentenced offender within the "trial period". However, it should be mentioned that all community organizations are controlled by the government during this period. The conditional release was still in use during that period. Special Supervising Commissions attached to the local authorities were obliged to support prisoners and ex-prisoners.

The start of democratic changes in Bulgaria since the early 1990s and above all the country's accession, first, to the Council of Europe in 1992 and, later on, to the European Union in 2007, have laid the foundations for the development of legislation towards adoption of modern European approaches in the execution of penalties. The period 1990–1992 saw the beginning of a process of deideologization, demilitarization and humanization of penitentiary treatment, as well as of reforming correctional education work and the training of penitentiary staff. At the same time series of reforms began in the field of criminal policy aimed at synchronization with the European models, and important step towards this aim was the implementation of probation as a specific community measure to impact offenders.

Probation as a main alternative to imprisonment finally became reality in the Bulgarian legislation through the Law for Amendments of the Penal Code passed on the 27th of September 2002. The general regulation of the nature of probation, the mechanisms for its execution and the structural implementation of the probation system in Bulgaria

have been made with the adoption of further amendments of the Penal Code and the Law for Execution of Penalties on the 23rd of November 2004. The first probation sentences were issued by courts in the summer of 2005.

2. Current state of the alternatives to imprisonment.

It should be noted that the development of modern alternatives to imprisonment was not so much the result of internal debates or evidence based initiatives, but rather because of the need to synchronize the existing legislation with the *acquis communautaire* in the process of EU accession. If we track the history of the establishment of probation system in Bulgaria, we should mention that first came the amendments of the legislation, which were then followed by the process of elaboration of strategy for development of the service. Within the twinning project "Establishment of Probation Service in Bulgaria" (BG/2004/IB/JH/2007) implemented in the period 2005-2007 with the support of English experts, the first Strategic Plan and Priorities 2007-2009 of Bulgarian Probation Service has been developed. So it is safe to say that the ideas and philosophy behind the application of non-custodial measures, and especially probation, came from the outside, and not as a result of internal processes.

As a result, Bulgaria has a system of alternatives that is not really innovative and follows the structures and content seen across most EU Member States (1).

With regard to the pre-trial phase, according to Bulgarian law the measures, alternative to pre-trial detention are the rest of the remand measures, laid down in art. 58 of the Penal Procedure Code (PPC)

- signed promise for appearance, granting bail and home arrest. The home arrest is the most repressive of all those measures. The accused is banned from leaving their home without a permission of a relevant competent authority.

In the post-trial phase, the most important measures, alternative to effective custodial sentence are the application of "stay of enforcement" and "stay of execution" with a probation supervision obligation under the art. 66 PPC (suspended or conditional sentence with or without supervision).

This legal regime has traditionally a large application, when the proprietor has not been sentenced to imprisonment towards the moment of committing the offence. This "stay of enforcement" burdens the statute of the person, but does not lead directly to their isolation from the society or to making any other commitments and it comes down to a warning to abstain themselves from committing other criminal acts in the probation period. In case where such acts have been committed the offender would serve separately the postponed punishment as well. Because of that special feature the effectiveness of the sanction is disputable. After 2005 that effectiveness may have been increased by the additional application of a measure of probation surveillance in the probation period, by which an actual influence on the convicted person is exercised.

- the enforcement of probation as a combination of measures for influence and control.

Probation can be imposed as a single penalty (Article 55, Paragraph 1, Sub-paragraph 2, case "b" from the Penal Code). It is designed as the appropriate sentence for offenders who have committed low impact crimes. The Bulgarian legislation allows in some cases deprivation of liberty to be substituted with probation.

Probation can also be imposed as a complementary penalty in cases of conditional sentencing, as mentioned above (Article 67, Paragraph 3 from the Penal Code). In such cases probation does not lead to suspension of the conditional sentence but adds to it by measures for supervision during the "trial period".

Speaking of post-trial alternatives, probation can also be imposed in cases of conditional release from prison. A peculiar legal regulation in such cases is that the judge deciding on whether to grant conditional release, can select only one of the available probation measure options, and in the vast majority of cases this measure is either the regular registration at the probation service office, or regular meetings with a probation officer. Therefore we conclude, that in cases of conditional release, the system focuses on the supervision of the released individual.

Given the regulations and characteristics of probation outlined above, we can conclude that probation will always be an alternative to imprisonment. The experience so far, indicates that the punishment fulfills its purpose effectively to some extent. As an alternative to the imprisonment, the probation in its two forms (as an independent sanction and as a form of surveillance in the probation period of the "stay of enforcement" or a pre-term release) should be encouraged by the European Union.

In the transposition of the Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions, every Member State has the heavy task of offering a set of probation measures, which should cover the large scope under Art. 4 of the Framework Decision. Bulgaria has enough opportunities through individualizing and combining the 6 probation measures, laid down in our law to satisfy the requirements of the Framework Decision, without an amendment to the material law.

Apart from probation there are two other non-custodial sanctions, which are not standalone, but are used in conjunction with either suspended prison sentence or probation – "community service" and "corrective labor without imprisonment":

- "Corrective labor without imprisonment". This is a measure for reparation of harm caused by the crime. It is imposed by appraisal of the court and is legally defined by Article 43 of the Penal Code and Article 141f of the LEP. This measure is actually gathering of deductions of 10 to 25 percent of the salary in state's benefit and excluding the period of the sentence from the social security record (providing the right to receive a pension) of the sentenced person. This measure is applicable only to persons that have permanent jobs. If the sentenced becomes unemployed the measure is substituted with community service.
- "Community service" is a measure for reparation of the harm caused by the offence. It is imposed by appraisal of the court and is legally defined by Article 42b, Paragraph 5 of the Penal Code and Article 141g of LEP. This measure is one of the most frequently applied so far and by its nature it is similar to the probation practices throughout Europe. It consists of work in benefit of the society for a period between 100 and 320 hours per year, for no more than 3 consecutive years. The workplaces where this can happen are selected by the correspondent Probation Council; they should not be privately owned, state or municipal

ownership of more than 50 % of the capital is required. The sentenced person does not get paid for this work and it is not included in the social security record. In regard to restorative justice, from community service can benefit victims of the crime that have expressed agreement for this.

Of course, all meaningful alternatives to imprisonment should contain elements of support, building the human capital (2) and social capacity of offenders, in order to reduce the risk of re-offending. In Bulgaria the legal framework for corrective and supportive interventions is defined only with regards to probation.

The Law on Execution of Penalties describes a specific measure, which can be included in a probation sentence by discretion of the court: "Participating in vocational qualification courses and programs for corrective influence".

This is a measure for support and assistance to the sentenced person that can imposed by appraisal of the court. It is legally defined by Article 42b, Paragraph 4 of the Penal Code and Articles 141c, 141d and 141e of the LEP. The content of this measure comprises an obligation on the sentenced person to attend for professional qualification courses and/or programs for corrective influence with the aim of labor integration and development of social skills and law-abiding behavior of the sentenced person.

This measure, as said above, includes participation in professional qualification courses and/or programs for corrective influence. Programs for corrective influence are two types:

- personal development programs include literacy courses, developing job search skills, positive communication with the social services and the police.
- corrective programs are aimed at changing the personal values and behavior of the sentenced person or to help him/ her to overcome an addiction.

From administrative point of view all alternatives, as well as detention measures, are structured within the Ministry of Justice jurisdiction, in particular General Directorate "Execution of Sanctions". The General Directorate incorporates three key sectors:

- Prisons, responsible for the implementation of imprisonment;
- Probation service, responsible for the implementation of probation. It consists of administrative staff, probation officers (called inspectors), junior probation inspectors (serving police like support functions) and technical support staff. An important part of this service are specialized probation officers based in prisons, who are responsible for supporting the inmate's release from prison back into the society;
- Arrests – responsible for the implementation of pre-trial detention.

It is important to note that this three-directional structure is replicated on the local (district level), where there is a District Service "Execution of Sanctions", incorporating the local arrests, probation service units and where applicable – a local prison (there are 11 prisons for adult males, one for adult females and one for male juveniles).

3. Some problems of the application of alternatives in Bulgaria.

The system is rather hierarchical and rigid and in this aspect follows the similar approach taken by the legislator. All pre- and post-trial alternatives to detention in Bulgaria are described in the penal legislation, the conditions for selection are also

described, and the responsible decision maker is always the judge. This means that there is simply no space to allow for discretion or maneuvers by the judge, no difference in the approach that we can pick up and say that this is a good practice. Alternatives are the same for everyone and are implemented in the same way as required by the legislation.

This tight framework does not always produce the best effect for those sentenced to an alternative sanction or measure. During the initial development of the legislation on probation in Bulgaria in the period 2002-2005 we insisted that it should be introduced as an alternative not to imprisonment, but to criminal sentencing as a whole (3). The arguments in this regard were that if the offender had the opportunity to avoid the sentence, and thus to preserve their clean criminal record, the motivational effect of this will be much larger. The balance of the severity of the sanction would have been maintained by limiting the possibility for a person to be sentenced more than once to probation for the same thing. Neither approach was adopted by the legislative body, which decided that probation will have be imposed with a sentence and will be a punishment, which, however, can be imposed unlimited number of times with respect to the same person.

A recent research that included in-depth interviews with offenders and probation officers illustrates the practical implications resulting from this legislative approach (4):

Interviewer: *"What do you think on this – if probation is not a punishment but a sanction and a measure only? Will there be any effect on your work?"*

Inspector: *"For our clients it would be better that way. Because people start to resent the system and instead of the work being aimed at him solving the problem, it focuses on explaining that the system is not so nasty, it's not about screwing him, etc., but if it's not a penalty, the way it is in other countries, then the work could focus entirely on the person and their ability to solve problems."*

Loss of motivation and negative reaction to the conviction is typical for people who have not committed any offenses to this point, and carry low risk of committing a new offense. An important principle of working with offenders is that the intensity of intervention should be based on their needs and the risk they pose (5). Therefore in terms of low-risk cases, government intervention can turn out to be excessive:

Inspector: *"Unfortunately, I see more and more such people who have a first conviction, and just turn bitter towards the system and the state in general. And I mostly understand them, because at some point the punishment really becomes disproportionately severe. If they hadn't done anything wrong by that point, you can't say this person had any manifested criminal attitudes. And it gets "Am I really the greatest criminal in this country?" He really suffers much more sanctions, and since he's, so to speak, a decent person, the very fact that he was on trial makes him feel bad. He's ashamed and then he also gets a much more severe punishment, which I believe has the opposite effect.*

On the other end of the problem are situations bordering with absurdity, when on the same person multiple consecutive sentences "probation" are imposed without any legal method to compel the court to finally impose a more severe punishment. For this reason, the practice shows cases of people who have been sentenced to probation more than twenty times and never went to prison.

Offender: *"Pretty much since probation exists I've been on it. Five or six times I've been convicted, I'm not sure. And to tell you... it's been always the same – misuse of alcohol."*

For such individuals the probation inspectors cannot achieve any additional effects:

Inspector: *"Through probation and the programmes they are supposed to receive some support, but this is for people with a first conviction. Otherwise, there are people who from the beginning of probation have already changed 5 inspectors because they are constantly on trial and have an active probation. Their case is a little different. Since I've been working here for five years, their number has increased. On the other hand, it is natural for their number to rise because they received probation, say, 5 years ago, etc. From this perspective, the classical case are people who drive without a licence because they work as illegal taxis. These people come with 5 or 6 sentences, a few cumulations are done, etc., but every time you try to speak with them, they say: "There's nothing else I can do, I can only be a taxi driver." At some point they have their licence taken away because they run out of points. However, they can't pay the fines or they have to take a refresher course, while they earn money working as taxi drivers and that's how they're sentenced to probation. Judges apparently consider it ridiculous to put in jail someone for driving without a licence but with no accidents on their record; it's a crazy story!"*

Inspector: *"He's here with me for the third time for the same thing. There's nothing new I can tell him."*

Another problem is the lack of a global procedure for judges to receive and review all necessary information on the offender prior to deciding about their sanction. Although the possibility for the court to request from the probation service a pre-trial report on the defendant has been introduced in the Law on Execution of Sentences and Detention (ESGDA), in practice this opportunity is used by very few judges in the country. We leave aside the arguments of the magistrates not to require pre-trial reports (independence of the court, the fact that pre-trial report does not appear in the Criminal Procedure Code, but only in special in nature ESGDA etc.) and focus on the results of non-use of pre-trial report. They are expressed in a more or less constant percentage of "poor" sentences that are not commensurate either with the needs of the convicted person nor valid for their criminogenic factors and problem areas or even their ability (physical and mental) to participate in relevant probation activities. Therefore, the court keeps sending pensioners to vocational training courses, illiterate persons to cognitive-behavioural programs and people with prestigious and useful professions to clean arrests - and examples of this kind are abundant. The problem is further deepened given that the type of the sanction imposed, including the individual probation measures, is determined by the court, and the legislation does not provide that the will of the offender is taken into any consideration whatsoever.

This lack of feedback from the offender in the pre-sentence phase of their trial can be overcome only at a later stage, and only to some extent. Taking feedback from offenders enables probation inspectors to adjust their approach to the individual person (6) to overcome the barriers between them and to eliminate formal and declarative participation of the offender in the probation activities. Therefore feedback should be encouraged despite any resistance on behalf of the offenders. It would be advisable to develop and implement more innovative and interactive methods for obtaining such feedback, while bearing in mind that with the current level of rigidity of the judicial system, such efforts will have limited impact.

Still it is important to conclude that with all the developmental and ethical issues, alternatives to imprisonment, and probation in particular, constitute one of the biggest achievements in the field of justice reform in Bulgaria. Its impact on the

lives of more than 45 000 clients since 2005, on their families and communities, and the Bulgarian society as a whole is beyond questioning, and there are many testimonials to this.

Further broadening of the understanding of the complex philosophy and theory behind modern alternative sanctions and measures will only benefit further the Bulgarian system, and this can be achieved directly with the involvement of the country in projects such as "Reducing Prison Population: advanced tools of justice in Europe".

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