

**Summary of the doctorate thesis**

**Non-custodial Sanctions and Measures  
and the Judge's Power of Discretion**

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## KEY-WORDS

*Community sanctions and measures. Power of discretion (Right and Duty). Dilemmas. Governing principles. International papers. Inner proceedings. European definition. Criminal institutions which satisfy the definition of community sanction and measures (Nowadays inner law / Future inner law). Probation. Probation service. Decisional authority. Implementing authority. Models to assimilate probation. Difficulties to assimilate probation. Reorganising the judiciaries' power of discretion into the community sanctions and measures' framework. Legal picture of community sanctions and measures. Legal device of discretionary power. Psychological mirror of community sanctions and measures. Psychological device of discretionary power. Judiciaries (Judge. Court. Prosecutor). Probation officer. Comparative analysis of opinions. Findings of some research projects. Food for thoughts.*

## REASONING AND TERMINOLOGY

Often, inside the Criminal Code or inside the Criminal Proceeding Code, we meet the sentence „*the Court can ...* “ or the sentence “*the judge can ...* “ or even the sentence “*the prosecutor can ...* “, as an expression of their discretionary power, regulated by law. This power guides their options between two or many directions regulated by law, following some criterions also regulated by law. The discretionary power must mean a right as well as a duty in order to become a real aptitude of a decisional authority. Given the fact that a constant and a responsible attitude into a framework leads to the development of a real aptitude to approach that framework, we consider that the „*judge's power of discretion*” represents one of the most fascinating concepts the juridical language is dealing with, because this concept belongs to Law and Psychology, in the same time and on the same measure. Like the suggestive image of the justice with its two dishes of balance, this concept points out the essence of the professional destiny of a judge, meaning his/her own way to provide judgements and to build up a dynamic balance between his/her own legal power and his/her own human vulnerability.

All legal systems contain some „***non-custodial sanctions and measures***”, dressing various shapes and specific identities as criminal institutions which maintain the offender into community. This thesis draws the entire inventory of non-custodial sanctions and measures from the inner law, but it analyses only those that maintain the offender into community, involving some conditions or obligations that must be respected by the offender and that are enforced by an implementing authority regulated by law to do it (very often, probation service is this authority). With the other words, this thesis will approach only

those criminal institutions that could be considered “**community sanctions and measures**” because they satisfy the requests of Recommendation (92)16 of Council of Europe regarding the European rules concerning the community sanctions and measures. In this matter, a lot of aspects are up to the discretionary power of judiciaries who play the legal role of decisional authority, namely: the freedom of offender; the contents and length of time of the freedom’s restrictions viewed as conditions or obligations imposed alongside a community sanction or measure; the way to manage the situations when the imposed judicial control is broken down by the offender. The judiciary body who has the competence to intervene into the community sanctions and measures’ field is: by excellence - the judge (either viewed as a court or as a distinct personage into the criminal trial scenario), because he decides about all community sanctions and about majority of community measures; sometimes - the prosecutor, by virtue of some contextual competencies about some community measures.

The psychological meanings of discretionary power urged us, there where was possible, on avoiding of the term “*Court*” and on preferentially using of the term “**Judge**”, because this way we can better suggest that it is about a human being who plays the role of a decisional authority and who casually meets other human beings who accomplish different roles into the criminal trial, namely: a prosecutor, a probation officer as well as a beneficiary of a community sanction or measures. Besides this psychological reasoning, the new Criminal Proceeding Code adopted by the Law no. 135/2010 opens the perspective of a juridical reasoning of such an approach. In this respect, there already are some provisions concerning “**the judge**”, viewed not only as a court but also as a distinct personage, namely: “*the judge of rights and freedoms*”, “*the judge of preliminary chamber*”, “*the judge delegated with a sentence’s enforcement*”, each of them having specific responsibilities to intervene on the field of community sanctions and measures, depending the criminal trial stage where they are called to perform their power of discretion.

This thesis wishes providing toward its potential readers (theoreticians or practitioners on the fields of criminal law, criminal proceedings, probation or forensic psychology) the following gifts: some conceptual clarifications; a set of principles that govern the judiciaries’ power of discretion into the community sanctions and measures’ field; an analysis of dilemmas and difficulties connected with this matter – aiming to contribute to their surpassing; an anchoring of the inner provisions and practices on the European politics and rules; a legal picture and a psychological mirror of community sanctions and measures; an emplacement of the judge’s power of discretion on the confluence between the juridical sciences and the psychological sciences; an inroad among those three simultaneous filters of any power of discretion, namely: “**lawfulness – firmness – consequence**”.



## SYNTHESIS OF THE MAIN PARTS OF THESIS

### FIRST CHAPTER DILEMMAS AND PRINCIPLES

Based on a point of view<sup>1</sup>, the discretionary power was defined as being the way used by a judiciary body in order to transform the juridical rules in human actions, following a system of interpretations and choices. Based on other point of view<sup>2</sup>, the discretionary power seems to be the space where the judiciary actor practises his/her choices, offering appropriate answer to the questions and suitable solutions to the problems. Therefore, viewed as a component of juridical philosophy, the discretionary power strictly consists in the relation between „*legal rule*” and „*judiciary actor*”, which means that the interest falls on the analysis of legal rules that authorise the discretionary behaviour, namely those provisions that say: „*the judiciary body can (...)*”. Approaching the community sanctions and measures’ field, some examples in this light could be the legal texts which establish that judiciaries (judges or a prosecutors) „*can*” chose the nature or duration of a community preventive measure, „*can*” decide about the prolongation, maintaining, replacement, modifying or stopping of a such measure, „*can*” chose the nature or duration of a community sanction, „*can*” establish a community way for a prison sentence’s enforcement, „*can*” postpone a punishment’s applying or „*can*” postpone or discontinue a punishment’s enforcement, „*can*” give a pursuit stage up, „*can*” give a punishment’s applying up, „*can*” chose the nature, content or duration of an educative measure, after that „*can*” replace or modify it, etc. But, if we look at it as at a component of psycho-social philosophy, the discretionary power doesn’t mean a simple option between two or many behaviours authorised by law. It rather means choosing the best and the most suitable one from these various options, respectively that one that is able to target the aim regulated by law. Based on our own point of view, the judge’s power of discretion represents his/her right strongly connected with his/her duty to chose as well as to assume that choice which simultaneously satisfy three filters, namely: **lawfulness** (that means staying connected with the legal inventory of criminal institutions and with the legal criterions able to guide his/her choice); **firmness** (that means to be aware about the strong reasons that ground his/her choice); **consequence** (that means to anticipate all the possible consequences which his/her decision will draw of).

Given the fact that, on the matter of community sanctions and measures, the land where the judge is called to practice his/her discretionary power is not enough fruitful, there is the risk of dilemmatic situations, like these: the judge has strong reasons his/her decision to be based on, but the community

<sup>1</sup> Hawkins K., The Uses of Discretion, Oxford Socio-Legal Studies, Clarendon Press, Oxford, 2001, p.15.

<sup>2</sup> Galligan D.J., Discretionary Powers: A Legal Study of Official Discretion, Clarendon Press, Oxford, 1986, p.236.

sanction or measure that the judge wants to apply doesn't make part of the inner legal inventory; the judge applies a community sanction or measure keeping into account its lawfulness and its firmness but ignoring its consequences; the judge applies a legal community sanction or measure staking on the likelihood of its favourable consequences but without any examination of its firmness connected with the given case, etc.

In order to avoid any situation when the lack of one of these three filters could lead toward some arbitrary or subjective decisions, we believe that the Romanian judge's power of discretion must be orientated by some governing principles, it must be connected with the other personages' power of discretion, it must surpass rather to increase or ignore some difficulties related with the insufficient incorporation of European principles into the inner law and finally it must reduce the distance between the judicial individualisation's process and the human individuality.

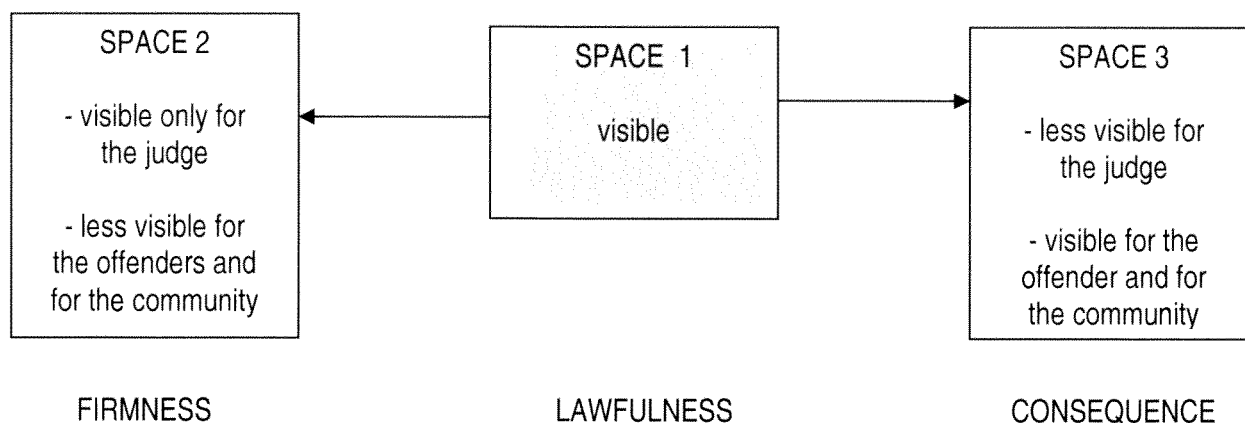
Therefore, when we use the concept "*power of discretion on the community sanctions and measures' field*", the space given to analysis must be split in three parts, namely:

- Firstly, we see a **Space 1**, which is visible for anyone, respectively the disposition dressing the shape of a judiciary paper (settlement, sentence or decision, depending the case), as well as the legal framework in force that is verifiable and that shows the criterions this disposition is grounded on;

- Before his/her specific disposition, the judge who deliberate makes an inroad into a **Space 2** that remains visible only for him/herself but less visible for the offender or for the community. The contents of this space is referring to: theories about crime and punishment; findings of researches and doctrine related with that matter; inner and European jurisprudence; European politics and international papers governing his/her interpretations; his/her own reasons and firm beliefs based on his/her personal or professional experience; his/her own dilemmas concerning the effectiveness of one or other sanction or measure, etc.;

- After the judge's disposition is done, it is the turn of the imposed community sanction or measure to build up a **Space 3**, which is real, specific and visible for the offender and for the community but less visible for the judge. This space refers to: the way of approaching that sanction or measure by the offender; the offender's capacity to abide by conditions related with that community sanction or measure; the degree which his/her freedom is affected with; the degree or the lack of community' satisfaction; the way of that community sanction or measure is able to contribute of the offender social reintegration and of the public protection; the difficulties faced by implementation authority (probation service) during the enforcement, etc.

So, in order to speak about a discretionary power correctly and completely assumed by the judge, it is important that the judge, being on the visible space of judiciary scenario (Space 1), to make an inroad on the past (Space 2) as well as an inroad on the future (Space 3), which are less visible spaces, these inroads meaning: the anchorage of his/her disposition into a firm reasoning and the anticipation of his/her own disposition' consequences or effects.



Being known that always the need of order has on it underground a situation of disorder, Chapter 1 of the thesis wants firstly to underline the dilemmatic space and therefore to identify the main principles that guide the power of discretion, drawing these principles from the international documents concerning the “community sanctions and measures”. Thus, the first part of the chapter is dealing with some categories of **dilemmas associated with the judge’s power of discretion** (about whom the concept belongs to, about the aim of criminal trial, about the aim of punishment, about the enforcement’s way), suggesting that, when the judge practises his/her own power of discretion on the community sanctions and measures’ field, in fact he/she concomitantly targets three levels, namely:

(1) to satisfy the aim of criminal trial, because the judge’s community options facilitate the passing from the approach „**Crime control**” toward the approach „**Due process**”. There are at least five example of dilemmas which, unaware or ignored, could influence the judge’s power of discretion and could push him/her away from the aim of criminal trial, namely: (1) *what the likelihood of making a bad choice have I ?*; (2) *how large the inventory of sanctions and measures grounding my choice is?*; (3) *are there some suitable institutions to assist me concerning the offence’s and the offender’s evaluation?*; (4) *what educative effects my sanction or measure will draw?*; (5) *will the sanction or measure chosen by me be able to guaranty the respecting of human rights?* The absolute assumption that only the community sanctions and measures are suitable or that only the custodial sanctions or measures are effective, regardless the offence and the offenders, is as well as dangerous. Even that will be not an indestructible hypothesis that the aim of criminal trial will be satisfied this way, we still believe that one hand, the enlargement of community sanctions and measures’ legal inventory and on the other hand, the setting up of probation service as its implementing authority, represent two elements able to diminish the dilemmas when a judge tries to change the accent of a criminal trial from “*crime control*” (a formal answer of crime) toward “*due process*” (fair criminal trial). In this respect, even we don’t agree the Romanian lawmaker’s recent option to give up the explicit aim of criminal trial, we still believe that this aim could be search inside the article 8 of the Law no. 135/2010

concerning the new Criminal Proceeding Code (edged named “*the equitable character and the reasonable term of criminal trial*”), reflecting the lawmaker’s intention to type a “*due process*” label on our criminal trial;

(2) to achieve the aim of punishment, because based on his/her community options, the judge gives up the punishment approached as a source of State’ satisfaction and promotes the punishment approached as a suitable way to assure the balance „**offender – victim - community**”. In this respect, the first chapter summaries the main theories about punishment in order to describe the evolution of thought about punishment, starting from an utilitarian and retributive justice, through justice human rights orientated, until a restorative justice. Reflecting upon each of these theories, when the judge is called to practise his/her power of discretion, in fact he/she will find an other piece of puzzle inside the whole picture useful to solve the following dilemma: “*What is most suitable to apply ant the end of my judgement: a community sanction/measure or a custodial sanction/measure?*”;

(3) to chose the most suitable way to enforce the sentence. If each criminological theory offers itself answer to the question „*Why some people commit offences?*” and the theories about punishment try to give their own answers to the dilemma „*Why the offenders have to be punished?*”, an other dilemma frequently comes into sight nowadays, namely: „*How the offenders have to be punished?*”. Therefore, the mission of a judge who plays the role of a decisional authority consists in the most suitable sentence’s applying and the most suitable enforcement way’s choosing. In this respect, the Chapter 1 firstly emphasises the dilemma “**What works?**” (*What sort of interventions would be useful when we work with offenders?*), then it shows up some reasons for giving up the current “**Nothing works**” („*Neither education with what the best it has nor psychotherapy with what the best it has can stop or at least significantly reduce an offender’s propensity to continue his/her own offending career*”) <sup>3</sup>. Finally, the Chapter 1 points out the comparative effectiveness of various treatments detached from the novelty of current „**Something works**” („*Some treatments in certain circumstances in a certain measure and with certain types of offenders are fruitful*”) <sup>4</sup>. In this light, Chapter 1 underlines the idea that the Romanian judge has to take evidence based decisions, keeping into account the findings of scientific researches about what works and about the comparative effectiveness of community sanctions and measures versus custodial sanctions and measures, concerning the risk of reoffending. Unfortunately, the community sanctions and measures are not yet enough embodied into the public mentality and into the elective behaviour of judges, so it is still too early to speak about such kind of

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<sup>3</sup> Martinson R., What works?-Questions and answers about prison reform, in “*The Public Interest*” no. 10/1974, p.22-54; Davies M., Balance between Court and client, in “*Community Care*”, January 25 1990, p.16-17.; Blagg H. și Smith D., Crime, Penal Policy and Social Work, Harlow:Longman, 1989 and Brody S., The Effectiveness of Sentencing, Home Office Research Study No.35/1976, London:HMSO

<sup>4</sup> Lipsey M.W.; What do We Learn from 400 Research Studies on the Effectiveness of Treatment with Juvenile delinquens?, in McGuire J., What works? Reducing Reoffending. Guidelines from Research and Practice, John Wiley and Sons Publishing, Chichester, 1997, p.63-78.

researches. Despite this fact, those demonstrations based on some individual successful cases represent a sum of „*Something works*” answers provided by probation service to the question „*What works?*” wondering by a judge available to improve his/her own power of discretion.

After these dilemmas’ exhibition, the last part of Chapter 1 analyses the international documents (Resolutions or Recommendations of Council of Europe, Frame-Decisions of European Union Council, Resolutions of General Assembly of United Nations Organisation, etc.), which have an explicit or an implicit incidence upon community sanctions and measures’ matter. These documents are split into four categories, namely: those that regulates the identity of “*community sanction and measure*”; those that regulates the contents of community sanctions and measures as well as the role of decisional authority and of implementation authority; those that considers that the community sanctions and measures could be introduced among the special answers to juvenile delinquency; those that emphasises the special values of behaviour requested from the professional categories who deal with community sanctions and measures.

The international documents’ analysis targets to draw **the principles that govern the discretionary power** of a judiciary body who plays the role of decisional authority into the field of community sanctions and measures, namely: the judge (either viewed as a court or as a distinct personage), by excellence or the prosecutor, in some certain cases. This analysis ends with the following ten principles:

(1) Principle of lawfulness. All international documents request in the same voice the respecting of this principle upon three significant levels, namely: (a) the types of community sanctions and measures, its contents of conditions or obligations as well as the consequences of their infringement will be regulated by law; (b) the implementing authority will be regulated by law; (c) the way of recruitment, selection and professional training of staff authorised to intervene into this field will be regulated by law. As an extension of this principle, the international documents recommend to member states to put away from their inner legislation any shortcomings or gapes that make its implementation being difficult as well as to create new provisions in order to enlarge the inner inventory of community sanctions and measures;

(2) Principle of proportionality. This principle refers the direct proportionality between the seriousness of an offence and the seriousness of a sentence, meaning that „*the nature and the length of time associated with a community sanction or measure must be directly proportional with the seriousness of offence and must keep into account the personal circumstances*”, also the internal proportionality (the degrees of seriousness inside the taxonomy of community sanctions and measures) as well as the explicit proportionality (meaning to establish certain “*referential*” sanctions for certain offences);

(3) Principle of individualisation. Saying that the individualisation means „*the correspondence between offence, criminal answer to that offence, offender’s personality and offender’s capacity to*

*straighten his/her own behaviour*", the European recommendations approach the principle of individualisation in a dynamic way concerning three stages, namely: "*an initial moment*", comprising those criteria that judiciary decision bases upon, when he/she imposes a community sanction or measure; "*certain intermediary moments*", referring those criteria that ground the judiciary decisions to replace a community sanction or measure with an other one as well as the judiciary decisions to modify the initial judicial control (formed by conditions/obligations); "*a final moment*", consisting those criteria that ground the judiciary decision to stop or revoke a community sanction or measure;

(4) Principle of conditioning. The European definition itself (comprised into the European recommendation R(92)16) establishes *inter alia* that a sanction or measure couldn't be considered having a "*community profile*" only if it involves some "*obligations or conditions*". They are imposed by a decisional authority but firstly they must be clearly and explicitly established by inner law. After that, an implementing authority will take the responsibility to overview whether or not the offender respects those obligations or conditions. Referring to this principle of conditioning, the international documents recommend what differential behaviour has to be adopted by the national lawmakers, judiciaries and implementing authorities face on the minor or the significant infringements of these obligations or conditions;

(5) Time-determination principle. Striking the matter of community sanctions and measures, the rule is that "*any sanction or measure will be not imposed for an indeterminate period of time*" (the community sanction or measure's length of time will be established by the competent authority, respecting the legal limits and keeping into account the offence's seriousness and the offender's personal circumstances). The exception of this rule refers the situation where "*certain community sanctions or measures can be imposed without any time specification*" (for example, regarding very serious offences or certain personal characteristics of offender – aspects that permanently entertain a suspicion of risk addressed to life, health or safety of the other community members). Notwithstanding, even concerning these exceptional situations, the international documents request to member states to set up legal provisions that promote periodically re-assessments of this kind of offenders made by an independent authority regulated by law;

(6) Principle of human rights and freedoms' guarantying. The process of community sanctions and measures' settlement and use has to be combined with the guaranty that they don't jeopardize the human rights and freedoms protected by European Convention adopted on November 4, 1950 under the shape named "*the principle of restrictions' proportionality*" or named "*the principle of abuse's avoidance*". Hence, the main rights and freedoms guaranteed for an offender under the incidence of a community sanction or measure refer the followings: freedom as rule and prison only as exception (*prison as last resort*); offender's right at two defence's ways (recurs and complaint); offender's right to be informed, listened and assisted; offender's right to a due process; offender's right at private life and dignity; offender's right at

physical and mental integrity. Besides, the juvenile who are the beneficiary of certain community sanction or measure has some special guarantees connected with “*the superior interest of child*”, so it comes into sight promoted by the international documents in this matter;

(7) Principle of internal ant external consistency. „*Internal consistency*” means the link between the decisional authority’s activity (the contents of judiciaries’ decision) and the implementation authority’s activity (ways, means or techniques of enforcement). With the other words, in order to respect the principle of consistency on the community sanctions and measures’ field, probation service is not authorised to apply something else than judiciaries already imposed, to overpass the boundaries already established by judiciary sentence or to impose an other nature, more or less afflictive than the judiciaries already imposed to the associated conditions/obligations. At its turn, „*external consistency*” means that both the decisional authority’s activity and the implementing authority’s activity must be strongly connected with the international politics, principles and standards regarding the community sanctions and measures. This kind of harmony between internal and external landscape is wishful, considering the novelty of mutual recognition and international cooperation into the field of community sanctions and measures (the Frame-Decision of European Union Council 2008/947/JAI reflects an expression of this desire);

(8) Self-determination principle. The international documents regarding the matter of community sanctions and measures promote the concept of self-determination, giving to it three meanings, namely: self-responsibility, consent and cooperation. Based on a psychological approach, „*self-determination*” comes into sight as being the individual’s capacity to find inside him/herself the causes, the reasons and the energetic resources to do or to not do something, to believe or to not believe in something as well as to respect or to not respect something. The import of this concept from Psychology to Law and the recognition of this concept’s importance become visible each time when a national lawmaker makes explicit references to „*the person*”, for example when he speaks about the aim of a sanction or measure or about the individualisation’s process. This way the connection between the sentence’s effectiveness and the offender’s “*degree of self-determination*” is well recognised. Our inner law comprises texts that request from judiciaries to make appreciations concerning the personal situation of offender, the firm evidences of his/herself behavioural straighten, the offender’s capacity to respect obligations or conditions flowing from the sentence applied as well as to accomplish the sentence’s aim even without freedom’s deprivation. In the same way, the ups and downs of self-determination alongside a community sanction or measure’s enforcement become the object of some other appreciations made by judiciaries, leading their next decisions toward the sentence’s modifying or revoking;

(9) Principle of effectiveness and credibility. Even if the showing of “*the prison’s disadvantages*” (based on a psychological, social or economical reasoning) should be enough in order to become the only

inspiration source for build up „*the probation's advantages*“, however the international documents concerning the community sanctions and measures say that „*the simple fact of targeting a prison substitute doesn't justify a community sanction or measure if this aim isn't accompanied with an analysis of the advantages and disadvantages and if the outcomes of this analysis doesn't show a prevalence of the advantages rather than the disadvantages*“. With the other words, the community sanctions and measures have not a previous credibility but this credibility has to be gained step by step following its demonstrated effectiveness. Some tools to demonstrate the effectiveness refer *inter alia* to: comparative analyses concerning the re-offending rate of offenders being under the incidence of a community sanction or measures versus custodial sanctions or measures; costs/benefits analyses; findings of scientific studies or experimental researches. Therefore, in order to emphasise the link between effectiveness and credibility, the international documents request member states to struggle themselves into direction of widely providing information addressed both to large and special public, about the community sanctions and measures' advantages, these efforts having the mission to lead the public to the conclusion that this kind of sanctions and measures means an appropriate answer to crime;

(10) Principle of pro-social modelling. „*Pro-social modelling*“ appoints the principle which the professional relation between probation officer and offender is based on. This principle is favourable for the last one because he/she voluntary or involuntary receives some behavioural values promoted by the first one. The concept of „*pro-social modelling*“ starts with the profile of the early probation officers considered as „*friendly, advisable and kind*“, but it doesn't remain attached of this profile. On the contrary, this profile is changed or improved with other features transferrable from probation officer toward offender, referring to: a responsible attitude face on the offence and its consequences, skills of alternative thinking, motivation of change, being aware about the problems and active involvement into their solving process.

Thus, the main message comprised by the Chapter 1 is that „***the discretionary power of judge***“ (either viewed as a court or as a distinct personage), when it is applied into community sanctions and measures' field, it means an oxymoronic building that equally incorporates: the dilemma and the governing principle, the creativity and the strictness, the right and the duty. In order to surpass the dilemmas, the judge has to have a strong anchorage into criminology and penology, international principles and European politics as well as into philosophical currents and empirical findings concerning the criminal treatments. As we will see following the next chapters of this thesis, the judge's power of discretion means a dynamic concept because it meets others' power of discretion during the criminal trial scenario (it is about the prosecutor, the probation officer or even about the beneficiary of a community sanction or measure). Next chapters will point out the various contexts where these powers interacts each other.



## SECOND CHAPTER

### „PROBATION” – AS A SET OF COMMUNITY SANCTIONS AND MEASURES

### „PROBATION SERVICE” – AS AN IMPLEMENTING AUTHORITY

The Chapter 2 starts through an analytical searching for a **definition of “probation”**, performed by three stages, namely:

(1) legal definition. As often the word „probation” comes out into the international documents regarding community sanctions and measures, as rarely the term has a “legal definition” into the national legislations. The lack of a legal definition has on one hand the disadvantage to expose it to many interpretations but on the other hand the advantages to better cope with the changeable socio-judicial contexts. Therefore, we need a „practical definition” or an “operational definition” of probation, useful to guide the practitioners’ interventions (definition which should be set up by each national doctrine respecting the international recommendations in the matter) rather than a “legal definition”.

(2) practical definition. It was shown<sup>5</sup> that the first definition adopted by the practitioners from common law system belongs to M.Tomic and D.Kalageroupoulos and it was borrowed by the practitioners from continental Europe, including post-communist countries as well as our country<sup>6</sup>, according with the changing brought by the last decades of XX<sup>th</sup> century into their criminal systems. Based on this definition, probation comes into sight as being „a socio-pedagogical based way to sanction, characterized by a combination between supervision and assistance. It is applied into community to the delinquents who are selected keeping into account their criminological personality, the main aim being that one to offer them the possibility to change their attitude face on social life and to reintegrate him/her into social environment, at their free wish and away from the risk of re-offending”. Analysing this definition, we can draw those three main aspects that guide any probation service’s practice, independently by the legal system they belong to, namely: criminological personality’s assessment; supervision into community; offender’s social reintegration. However, this practical definition has only a value of landmark, pointing out those three essential assignments of probation, but there are national probation systems which not include all these elements (for example, Bulgarian system doesn’t include assessment) as well as other national systems which can include many elements besides those three essential ones. Some examples in this light could be: social reintegration of offenders whom punishments has been pardoned (Romania), social reintegration of

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<sup>5</sup> Chapman T. și Hough M., Evidence Based Practice. A Guide to Effective Practice HM Inspectorate of Probation, Home Office Publications Unit, London, 1998, p.6.

<sup>6</sup> Durnescu I., Haines K., Lazăr C., Willie A., Probation in Romania, Anul 1, nr.1/2002, Editura Didactică și Pedagogică, București, 2002, p.7.

victims (United Kingdom, Romania), victim-offender mediation (Czech Republic) or alternatives to preventive measures (U.S.A., Czech Republic).

(3) operational definition. By our view, the most relevant operational definition is that one provided by Recommendation of Council of Europe (92)16 concerning the European rules regarding community sanctions and measures. According with the point 1 of the terms glossary annexed of this document, the concept “community sanctions and measures” reflects „those sanctions and measures that satisfies three requests, namely: maintain the offender into community; involve some freedom’s restrictions meaning conditions or obligations; are implemented by an authority regulated by law on this purpose”. The term designates any sanction imposed by a court or a judge and any measure taken before or instead of a decision on a sanction as well as ways of enforcing a sentence of imprisonment outside a prison establishment. The same European recommendation specifies that the monetary sanctions don’t fall under this definition. The most recent operational definition is found into the Frame-Decision of European Union Council 2008/947/JAI concerning the principle of mutual recognition of sentences and decisions of probation, aiming to supervise the probation measures and the alternative sanctions. Thus, the article 2 (named “Definitions”) provides following information: „Alternative sanction” – means that sanction which doesn’t refer to imprisonment, custodial measure or financial sanction and which involves an obligation or a constraining measure; „Probation measure” – means those obligations or constraining measures imposed by a competent authority to a physical person, according the national legislation, concerning a suspended sentence, a conviction with punishment applying postponed or a conditional release.

After a short inventory (reported to the last 50 years) of community sanctions and measures, the Chapter 2 approaches the **probation service – as an implementing authority**, based on the definition of “implementing authority” given by the same European recommendation (92)16, respectively viewed as „the body or bodies empowered to decide on, and with primary responsibility, for the practical implementation of community sanction or measure”. Because in many countries the implementing authority is the probation service, this chapter shows the possible interventions of it alongside the criminal trial stages, namely:

- the pretrial stage. Depending the national legal system which probation service belongs to, this service could be considered as implementing authority of some community measures imposed in an early stage of proceedings respectively before trial or even without any trial, namely: (1) *discretionary prosecution*, that means the prosecutor’s power to give up the accusation or to discontinue the criminal proceeding, his/her power of discretion being guide by some principles expressed into the Recommendation of Council of Europe (87)18 concerning the criminal proceedings’ simplification; (2) *out of court settlements*, that means that a judiciary or an extra-judiciary authority empowered by law can intervene into the preliminary proceedings, making proposals about an alternative solving of criminal conflict, specially where

it is about certain less serious offences; (3) *alternatives to pretrial detention*, for examples some of those that are proposed by Recommendation of Council of Europe (99)22 concerning prisons' overcrowding, namely: obligation to live at a certain address or interdiction to leave a certain place (town or country); bail or release under judicial control; surveillance by a body designated by judiciary; electronic surveillance;

- the trial stage (presentence stage). This stage, the probation service could be requested to provide presentence reports able to assist the court concerning the most suitable sanction or measure's imposition. In this respect, the Resolution of Council of Europe (70)1 concerning the practical organising of surveillance and assistance of people being under a suspended sentences or a conditional release is the first European document that explicitly speaks about "*the presentence investigation*" made by probation service and able to give to the judiciaries relevant information about offender's person and his/her social circumstances. An other document, respectively the Recommendation of Council of Europe (2000)22 concerning the improvement the European rules regarding the community sanctions and measures speaks about "*the progress reports*" whereby the probation service assess the progress or the regress registered by offender. Once they are laid on hand of judge, these progress reports become the landmark which a next disposition could be reported to (that means modifying, replacing, prolongation or revoking of the sanction or measure initially imposed). Finally, a particular decisional stage refers to conditional release proceedings, where, according with the Recommendation of Council of Europe (2003)22 regarding conditional release, the judge needs two types of information, namely: information about the offender's personal circumstances during detention – provided by the prison staff; information about the offender' social circumstances – provided by the staff who will be involved into the post-release conditions' surveillance;

- the enforcement stage. The work tools used by probation service in this stage refer *inter alia* to: techniques of assessment and re-offending risk's prediction; schemes and strategies of surveillance concerning the obligations or conditions imposed during a community sanction or measure; ways to provide public safety and protection; effective programmes either directly initiated into community or started into prison and carried on after release. Based on its interventions performed during the enforcement stage, probation service takes the chance to build up its credibility and to demonstrate that community sanctions and measures mean, for the offender – a maintaining or a planed coming back to the community as well as they don't mean, for the community – a reason of insecurity. Thus, probation service is requested this stage to pay a special attention to certain special needs called "*criminogenic needs*" (they mean those needs or problems that have a significant impact to the offence's committing and that will lead the person to re-offending if they are not suitably satisfied or solved), namely: a socio-family support not strong enough; a low toleration of frustration; a low capacity to encounter the group's pressure; an educational deficiency or a lack of job; addiction or misusing of alcohol, drugs or other substances. Also, „a special attention" is

requested by some special categories of peoples, namely: juveniles and teenagers; people who re-offended with more serious offence than the previous one; people with a high risk of re-offending. Finally, also during this stage, the probation service accomplishes the following tasks: prepares progress reports recording the offender's behaviour evolution; deals with the minor infringements of conditions or obligations imposed; informs the judiciary concerning the significant infringements of these obligations or conditions.

Last part of the Chapter 2 shows up **five models of probation's assimilating** into the criminal proceedings, namely: United Kingdom, Estonia, Czech Republic and Romania. The reasoning of a such selection is based on the fact that the United Kingdom represents the main provider of concepts, principles and practices to the majority probation systems from Europe, meanwhile those other four states (Estonia, Czech Republic, Bulgaria and Romania), recently coming into the European Union, struggle to cope with the European politics and principles which grounded the community sanctions and measures, their efforts being supported inclusively by concepts, experiences and experts imported from United Kingdom. In order to see the evolution of probation according with the European principles, we selected two thereof those ten countries that adhered at the European Union in 2004 (Estonia and Czech Republic) and those two countries that became member states only in 2007 (Bulgaria and Romania). The comparative analysis of these five models was set up on two levels, namely: (I) Probation service's organising and functioning, including here some aspects about evolution, professional staff and beneficiaries; (II) Probation service's role alongside criminal trial, including here its main assignments during the pretrial stage, presentence stage and enforcement stage.

### **THIRD CHAPTER**

#### **SOME DIFFICULTIES TO ASSIMILATE PROBATION INTO THE NOWADAYS INNER CRIMINAL PROCEEDINGS AND SOME WAYS TO DEAL WITH THESE DIFFICULTIES**

In Romania, the history of probation comprises two **stages**: the experimental one (since April 18<sup>th</sup> 1997 until 2001), starting with the first experimental probation centre – as a distinct department inside Penitentiary of Arad and carrying on with other 10 such experimental centres, either under the umbrella of some penitentiaries or the umbrella of some NGOs; the institutional one (since September First 2001 until nowadays), meaning that 41 probation services have been set up nearby all Romania county courts as well as that the legal framework was regulated in order to assure these bodies' organizing and functioning. The first calling of probation service inside the Criminal Proceeding Code comes into sight only in 2003, based on the Law no. 281/2003. After that, its place alongside criminal proceedings was improved and diversified based on the Law no. 356/2006 but the first calling of probation service inside the Criminal Code comes into

sight only in 2006 based on the Law no. 278/2006. Unfortunately, after the probation service seemed that it gained a certain recognition into the lawmakers' eyes (as an implementing authority of community sanctions and measures), the Law no. 275/2006 concerning the enforcement of punishments and measures imposed by judiciaries alongside the criminal trial doesn't speak about „*probation service*” but about „*probation officer*” jeopardizing this way its institutional image. Only in the future, when the Laws no. 286/2009 concerning the new Criminal Code and no. 135/2010 concerning the new Criminal Proceeding Code will come into force, it will be suitable to say that these provisions will have the aptitude: to enlarge the inner inventory of community sanctions and measures according with the European recommendation in this matter; to transform the Romanian probation service into a real and widely recognised implementing authority; to reorganise the discretionary power of a judiciary (judge or prosecutor, depending the case) based on individualisation's principle. Notwithstanding, in order to recognize the probation service's role of “*participant at criminal trial*” and to avoid the previous confusions which affected the probation's history, we make a proposal of *lege ferenda* concerning one hand – the modification of the edge title of art. 98 from the Law no. 135/2010 concerning the new Criminal Proceeding Code, from « *the probation's object* » into « *the proof's object* » and on the other hand – the explicit calling of probation service as part of the concept “*other criminal trial's subjects*” (besides the witness, the expert, the interpreter, the clerk, the special bodies of notice) promoted by the art. 34 from the same law.

After we have already seen that the Chapter 2 identified probation – as a set of community sanctions and measures and probation service – as an implementing authority, it is the turn of Chapter 3 to signalise certain **difficulties concerning probation's assimilating** into our inner criminal proceedings, being revealed by the jurisprudence<sup>7</sup>. The analysis is focused on the ways to surpass these difficulties either by some proposals of *lege ferenda* or by a more firm and specific exercise of discretionary power performed by the competent judiciaries, respectively: the judge, by excellence (either viewed as a court or as a distinct personage) or the prosecutor, by the case. The difficulties were identified and analysed alongside each criminal trial stage:

#### (1) **Difficulties concerning the pretrail stage (pursuit stage)**

- up to the year 2006, the probation services encountered a low availability of prosecutors to request for presentence reports, after that, during the period 2007 – 2008, a bad situation of probation services' overwhelming was met;

- once that the prosecutor has only the faculty to request for a presentence reports meanwhile the court has the duty to request for it (concerning the juveniles), the doubts about juridical nature of these

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<sup>7</sup> There it is about the unpublished jurisprudence of many criminal courts covering the counties: Arad, Bacău, Braşov, Buzău, Covasna, Cluj, Galaţi, Harghita, Mureş, Neamţ, Satu Mare, Sibiu, Sălaj, Timiş, Vâlcea, Vrancea and the Bucharest municipality.

reports still persist inside the doctrine; based on the means of proof's strictly inventory regulated by art. 64 C.P.C., there are enough reasoning in the favour of considering these document as a reliable mean of proof as well as enough reasoning to don't do that;

- the presence of probation service thereby a probation officer into the hearing proceedings regarding the juveniles, regulated by the nowadays legislation, it is accompanied with some doubts concerning the necessity of this presence and the role that has to be played by the probation officer during these criminal proceedings;

- the same doubts and gaps in provisions are maintaining during the special proceedings of hearing concerning the victim, the civilian part and the witness, situations where the probation service is summoned;

- recording some differences face on the other systems (eg. British, Czech or Dutch systems), our inner legislation doesn't allow an enough using of probation service into the field of community preventive measures imposed during the pursuit stage of the criminal trial, even the judicial control associated with these measures is similar with that one associated with the suspended sentence;

- even they represent an European principle and an inner desiderate, the present provision doesn't comprise enough techniques of criminal proceedings' simplification thereof we remember some like: *diversion*, *alternatives to prosecution*, *substitution of pretrial detention*, *„out of court settlement“* or *„victim – offender – mediation“*. Nevertheless, the probation service could play a role on this direction, specially into the situations where the presentence report points out either that the committed fact doesn't have the social danger of an offence or that the both parts wish an alternative solving of the criminal conflict;

## **(2) Difficulties concerning the trial stage (judgement stage)**

- keeping into account that the art. 197 line 2 C.P.C. (such how it was modified by the Law no. 356/2006) handles the lack of presentence report concerning the juvenile with the sanction of absolute nullity, the doctrine is wondering whether or not the presentence report can be considered a reliable mean of proof. If the answer given to this question would be *“yes”* concerning the juveniles, the next question would be *“why not for the presentence report concerning an adult offenders too?”*

- the persistence of contradictions between the special legislation (which forbids probation service to make proposals) and the criminal proceeding legislation (which regulates the probation service's right and duty to make proposals concerning the most suitable measure that will be taken concerning a juvenile) leads to certain doubts concerning the presence of probation service, after it was summoned – into the judgment stage or after it was informed – about the preventive arrest imposed to a juvenile;

### (3) Difficulties concerning the enforcement stage

- given the lack of harmony between the organic legislation and the special legislation, one of the theoretical problems is that one to know whether or not the probation service is the implementing authority of community sanctions and measures?

- as an expression of the conflict between the decisional authority's power of discretion and the implementing authority's power of discretion, there are some courts which establish the frequency of appointments between the probation officer and the offender. If the court performs in this way, then this frequency initially established becomes part of what the juridical language calls "*authority of judged thing*" meaning that this thing couldn't be changed for ever. Notwithstanding, the burden of appointments frequency's establishment should belong to probation service and laid on the probation officer's power of discretion. He/she is only able to appreciate according with the offender's evolution if this frequency has to be maintain or modified (increased or decreased) during the probation period;

- Romanian probation services as well as the others belonging to various systems prepares so called "*progress reports*" alongside the probation period. Even the European recommendations say that this kind of report serves to judiciaries who exercise their power of discretion in order to modify the judicial control associated with a community sanction or measure, in Romania this report can't be used into the offender's favour (for example in order to put away some conditions or obligations already accomplished) but only into a negative direction (for example in order to revoke a community sanction or measure if the offender didn't respect the conditions or obligations associated with);

- the nowadays inner law doesn't allow the Romanian judge to deal differently with a minor and a significant infringements of judicial control formed by conditions or obligations. Thus, the Romanian judge is not called to give a suitable answer according with the seriousness of infringement but only with the question whether or not the bad-belief accompanies this infringement. This way, if a minor infringement is done with bad-belief then the community sanction or measure will be revoked. On the contrary, if a significant infringement is done by negligence then it could be neglected, second situation expressing an inequity face on the first one. In this respect, the doctrine already shows up many cases where the bad-belief can't be demonstrate, where the offender becomes an endless source of justifications and invokes the negligence either it is about a minor or a significant infringement. This kind of infringements (significant but without bad-belief) can not be dealt because the Romanian lawmaker gave up the institution of "*probation period's prolongation*" without replace it yet with an other judicial tool like for example the institution of "*judicial control's modifying*";

- the jurisprudence points out many situations where a sentence lacked of specificity (as an expression of a misunderstood power of discretion performed by a judge) leads the probation service to

difficulty of enforcement. Hence, if the probation service encounters a sentence lacked of specificity (eg. without any specification of the activity which the offender is requested to perform; without establishing the territorial boundary that the offender is prohibited to surpass; without any specification of the places where the offender is forbidden to visit or the persons whom the offender is forbidden to meet; without any inventory of the vehicles that the offender is forbidden to drive; free of any specifications about the measure of control, treatment of care impose on the offender's burden), then the probation service will has not a clear object of surveillance. Unfortunately, the rescue solutions will be inconsistent or adjourned. Firstly, because this kind of gaps is not regulated by law as a "*clear omissions made by a judge*" (art. 196 C.P.C.) and secondly, because the probation service is not entitled to make a "*complaint against enforcement*" (grounded on the art. 461 line 1 letter c C.P.C. that regulates the situation where a doubt concerning the enforcement comes into sight), the only one who can request that being the judge delegated with enforcement (art. 419 line 2 rep. at art. 460 C.P.C.);

- the jurisprudence shows up many situations where the judge's power of discretion performs an incomplete journey on the road "*lawfulness – firmness – consequence*", meaning that the judge doesn't anticipate the probation service's difficulties to enforce a sentence lacked of continuity concerning the juveniles. One of the analysed examples in this respect refers the situation when the court applies a suspended sentence under supervision based on art. 110<sup>1</sup> C.C. but without any obligations imposed up to accomplish the age of 18 years (from those obligations that are regulated by art. 103 line 3 C.C.) and with surveillance's conditions/obligations imposed only once the juvenile becomes an adult (art .86<sup>3</sup> line 1, line 3 C.C.). In this situation, the wide freedom of juvenile for a length of time that could be up 4 years, followed by supervision once he/she becomes an adult, is very risky. One hand, because the sentence will remain far away from its educative aim and on the other hand, because probation service will meet difficulties in order to persuade people to abide by some conditions or obligations after such a long period of freedom;

- an other incomplete journey of the judge's power of discretion on the road "*lawfulness – firmness - consequence*", this time the lawfulness and firmness being affected, it is shown by the successive or concomitant sentences imposed to the same person. Besides the difficulties connected with their enforcement, such a kind of sentences also creates some undeserved problems to probation service, because their annulations or revocations will be seen as being "*failures*" into the probation services' statistics. In order to avoid this situation, the courts have the duty to previously pay more attention and to suitably use the institutions of indivisibility (art. 33 C.P.P.) or connection (art. 34 C.P.P.), according with the Recommendation of Council of Europe (87)18 concerning the criminal justice' simplification;

- our nowadays inner law comprises some gaps in regulation concerning the unpaid work perform into community. So, it can be met only as an "*obligation*" imposed by the court to juveniles, accompanying



the educative measures of supervised freedom (art. 103 line 3 letter c C.C.) or as and “*obligation*” connected up 18 years with the suspended sentence under supervision (art. 110<sup>1</sup> rep. at art. 103 line 3 lit.c C.C.). The next attempts to fulfil the Criminal Code and the Criminal Proceeding Code with other norms having a lower juridical weight (eg. the Government Decision no. 747/2008 that modifies the Government Decision no 1239/2000, the Minister of Justice's Orders no. 78/2005 and no. 2.355/c/2008 concerning community service) have split the doctrine and jurisprudence into two fight's fields. So, some courts believe that the community service has to remain a specific institution for the juvenile meanwhile the other courts consider that it could be extent to the adult too. The last ones understand that the obligation associated with a suspended sentence under supervision concerning the adult „*to perform an activity*” (art. 86<sup>3</sup> line 3 letter a C.C.) could be assimilated with the obligation concerning the juvenile “*to perform an unpaid work into community*” (art.103 line 3 letter c C.C.);

- analysing the Romanian judge's power of discretion on the matter of conditional release, keeping into account those three filters (“*lawfulness – firmness - consequence*”), we notice that even some post-release conditions would be suitable, even its imposition by a judge would be firm and justified and even its no imposition could attract unfavourable consequences either for the offender or for the community, notwithstanding such a kind of disposition would be lawless, because the nowadays Criminal Code doesn't regulate the judge's aptitude to practice his/her own power of discretion in this direction. The only exceptional situation where a conditional release would be associated with a judicial control formed by conditions and obligations is regulated by art. 60 line 2 C.C. rep. at art. 110<sup>1</sup> line 4 C.C. (concerning the juveniles) but this situation is no met into the jurisprudence.

## FOURTH CHAPTER

### THE LEGAL PICTURE OF COMMUNITY SANCTIONS AND MEASURES

#### THE LEGAL DEVICE OF DISCRETIONARY POWER

Into the first part of Chapter 4 we propose a journey inside the inner law, searching those concepts that are similar with the concept “*community sanctions or measures*”. Afterwards, the analysis was focused on those criminal institutions that satisfies the European definition in this matter, allowing us to settle a **legal picture of “community sanctions and measures”**, keeping into account the nowadays legal provisions improved in 2006 (mainly by the Laws no. 275, 278 și 356) as well as the new Criminal Code adopted by the Law no. 286/2009 and the new Criminal Proceeding Code adopted by the Law no. 135/2010. Such a settlement emphasises that a larger generosity and clarity of the legal framework is not a guaranty but it could be a premise for a more dynamic exercise of judiciaries power of discretion. In order to

build up this picture, all the criminal institutions were filtered through those three requests of European definition, namely: to maintain the offender into community; to involve some restrictions of his/her liberty through the imposition of some conditions or obligations; to be implemented by bodies designated in law to that purpose. As outcomes of this analysis, we consider that:

- (1) **the nowadays legal picture of community sanctions and measures is formed by:** community security measures (obligation to a medical treatment regulated by art. 113 C.C.; interdiction to have a function or to perform a profession, a handcraft or an occupation regulated by art. 115 C.C.; interdiction to be into certain places regulated by art. 116 C.C.; interdiction to come by into the family house during a certain period regulated by art. 118<sup>1</sup> C.C.); community preventive measures (interdiction to leave the locality, interdiction to leave the country, temporary release under the judicial control or bail); suspended sentence under supervision (regulated by art. 86<sup>1-6</sup> C.C. concerning the adults and by art. 110<sup>1</sup> C.C. concerning the juveniles); punishment's enforcement on the work place (on the way regulated by art. 86<sup>8</sup> line 3 C.C.); educative measure of supervise freedom (in the way regulated by art. 103 line 3 C.C.); conditional release concerning the juvenile (regulated by art. 110<sup>1</sup> line 4 rep. at art. 60 line 2 C.C.); postponement of punishment's enforcement, respectively, postponement of educative measure of confinement - regarding the juveniles (regulated by art. 453, 453<sup>1</sup> and 454 C.P.C., respectively by art. 491<sup>1</sup> rep. at art. 453 C.P.C.); discontinuance of punishment's enforcement, respectively, postponement of educative measure of confinement – regarding the juveniles (regulated by art. 455-457 C.P.C., respectively by art. 491<sup>1</sup> rep. at art. 455 C.P.C.). After the analysis of the institutions above, the Chapter 4 goes on pointing out the fact that, besides this legal picture of community sanctions and measures, there are some criminal institutions which only have the appearance of « *community sanctions and measures* ». They are only summarised because they didn't pass the exam of the European definition's requests;

- (2) **the future legal picture of community sanctions and measures (in the light of the Law no. 286/2009 concerning the new Criminal Code and the Law no. 135/2010 concerning the new Criminal Proceeding Code) is formed by:** community security measures (obligation to a medical treatment regulated by art. 109 from the Law no. 286/2009; interdiction to have a function or to perform a profession regulated by art. 111 from the Law no. 286/2009); community preventive measures (judicial control regulated by art. 211-215 from the Law no. 135/2010; judicial control on bail regulated by art. 216-217 from the Law no. 135/2010; home preventive arrest regulated by art. 218-222 from the Law no. 135/2010); giving up the pursuit stage (regulated by art. 314 line 1 letter b, art. 318 from the Law no. 135/2010); fine's enforcement through performing a community unpaid (art. 64 from the Law no. 286/2009); postponement of punishment's applying (art. 83-90 from the Law no. 286/2009); suspended sentence under supervision (art. 91-98 from the Law no. 286/2009); conditional release (art. 99-106 from the Law no.

286/2009); non-custodial educative measures (stage of civic training; surveillance; staying home on the weekend, daily assistance), regulated by art. 117-123 from the Law no. 286/2009; community changes concerning the custodial educative measures (the replacement of confinement with daily assistance; the release from an educative / detention centre), regulated by art. 124 line 4, 5 and art. 125 line 4, 5 from the Law no. 286/2009; postponement of prison's enforcement (respectively, postponement of custodial educative measure – regarding the juveniles), regulated by art. 589-591 (respectively, by art. 519 from the Law no. 135/2010); discontinuance of prison's enforcement (respectively, postponement of custodial educative measures – regarding the juveniles), regulated by art. 592-594 (respectively, art. 519 from the Law no. 135/2010); complementary and accessory punishment regarding some forbidden rights (regulated by art. 66-68 from the law no. 286/2009).

Regarding each community sanctions and measures above, this chapter of thesis deals with: its evolution; its contents and its anchorage into the European definition; its effectiveness and deficiencies; some proposals of *lege ferenda*; the judiciaries ways to enhance the value of that criminal institution based on their power of discretion. Finally, the last part of Chapter 4 retakes the idea of those three filters associated with power of discretion ("*awfulness – firmness - consequence*"), afterwards it analyses those two directions that **reorganize the judiciaries power of discretion**, into the field of community sanctions and measures, during the period 2006-2010, namely:

- (1) the obligation of judiciaries to motivate and clarify their decision concerning a community sanction or measure as well as to warn the offender about the consequences where the judicial control (formed by conditions or obligations) will be infringed;

- (2) the possibility of judiciaries to reorganise their reasoning and to modify the judicial control initially imposed, according with the offender's evolution. This role of decision makers played again and again assures more flexibility of community sanctions and measures on their road to accomplish the purpose what they have been imposed for.

The Chapter 4 ends with an inventory of benefits grace on this aptitude of judiciaries to reorganise their power of discretion. One of these benefits refers to the improvement of cooperation between the decisional authority (judge, court or prosecutor) and the implementing authority (probation service) of community sanctions and measures. This way, the laws from the period 2006-2010 shows up the progressive availability of Romanian lawmakers and decision-makers to assimilate the European recommendations concerning the effectiveness, the consistency and management of inner act of justice.

**FIFTH CHAPTER**  
**THE PSYCHOLOGICAL MIRROR OF COMMUNITY SANCTIONS AND MEASURES**  
**THE PSYCHOLOGICAL DEVICE OF DISCRETIONARY POWER**

Firstly, the Chapter 5 wants to underline the distinction between “*the legal device*” and “*the psychological device*”, afterwards to deal widely with the last one. So, “***the legal device of the judiciaries’ power of discretion***” into the community sanctions and measures’ matter comes into sight as being the sum of all free ways to practice their will (to deliberate, to chose, to decide, to come back into his/her initial decision in order to modify it, to motivate this decision or to entitle it as having a final or temporary nature), according with the principle of the sanction or measure’s lawfulness (“*nulla poena sine lege*”) as well as the principle of the criminal trial’s lawfulness (“*nullum judicium sine lege*” sau “*nulla justitia sine lege*”). Therefore, all judiciaries’ decisions concerning a community sanction or measure must be performed inside the legal framework in force. With the other words, for the judiciaries, a power of discretion’s practice through the instrumentality of the legal device means to be focused strictly on those criminal institutions that are regulated by the inner legal inventory and on those ways of administration that are regulated by the law in force. Nevertheless, besides the legal inventory, we can speak about the appearances or perspectives as well as about the different ways of perceptions concerning the legal inventory, meaning that there is a different mirroring of this legal device. We will define this mirror as being “***the psychological device of the judiciaries’ power of discretion***”. The psychological device represents a larger, a more subtle and a less visible frame than the legal device, being formed by: perceptions, reasons, strong beliefs, will, imagination, prejudgements, personality, character, expectations, fears, attitudes, aptitudes, different luggage of experience, different doses of availability, daring or scepticism). The unavoidable double anchorage of the judiciaries’ decision into the legal device as well as into his/her own psychological device, including the matter of community sanctions and measures, leads to the recording of some interesting differences between what community sanctions and measures should mean based on theory and law and what they truly mean based on the reality and practice. So, *inter alia*, these **differences** could refer to:

- the legal inventory and the psychological inventory of community sanctions and measures. While the Romanian law doesn’t establish an explicit legal inventory, it will remain at the hand of judiciary’s power of discretion to identify the criminal institutions able to be part of such a legal inventory. Even they have the same landmark (respectively the European definition into the community sanctions and measures), it is strange that judiciaries who play different jurisdictional roles (judge or prosecutor) build up different inventories. Also there are differences between the perception of a decisional authority (judge or

prosecutor) and the perception of a implementing authority (probation officer) concerning what criminal institutions the legal inventory is formed by;

- the degree of confidence concerning the community sanctions and measures' aptitude to cope with the inner law and Romanian mentality;

- the comparative appreciations about the effectiveness of the community sanctions and measures versus the custodial sanctions and measures;

- the strong belief concerning the most suitable criterions which a community sanction or measure's election must be based on, where the judiciary considers that a community sanction or measure is more appropriate than a custodial one;

- the appreciations concerning which the most appropriate structure of a sanction's system addressed to juveniles is (one which is formed by punishments and educative measures versus one which is formed only by educative measures);

- the appreciations about what the most effective implementing authority concerning the community sanctions and measures is.

These psychological differences of appreciations can be recorded inside the decisional authority (between judges' opinions and prosecutors' opinion) as well as when we compare the opinions of people who play the role of decisional authority (judges or prosecutors) and the people who play the role of implementing authority (probation officers). Also, we want to underline the idea that a judiciary body who decide a community sanction or measure has the chance to enlarge his/her own psychological device of discretionary power if he/she finds out the opinions of a beneficiary itself. This way, the judiciary body can understand what a community sanction or measure's "*real meaning*" is - for the real beneficiary of this kind of sanction or measure as well as what a community sanction or measure's "*virtual meaning*" would be - for the beneficiary of a custodial sanction or measure.

Therefore, the last chapter of thesis represents inter alia **a research study**<sup>8</sup> concerning the inner legal provisions related with community sanctions and measures' matter (made on the period 2007-2008, hence after the last significant modifications brought by the 2006' laws). One hand, this study reflects the appreciations of judges, prosecutors, probation officers and beneficiaries concerning the effectiveness of community sanctions and measures and on the other hand, draws a warning signal about the low

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<sup>8</sup> The study was accomplished on the period 2007-2008, under the double umbrella of Justice Ministry – Probation Directorate and National Institute of Magistracy (request no. 4006/INM/7.09.2007). Pieces of work were value on the context of workshops performed inside Trans-national Project called „*Stop the deviant career of juvenile offenders*”: Rome - Italy (February 7<sup>th</sup>-8<sup>th</sup> 2007), Lisbon - Portugal (October 24<sup>th</sup>-26<sup>th</sup> 2007), Eutin - Germany (March 10<sup>th</sup>-13<sup>th</sup> 2008), Arad – România (September 17<sup>th</sup>-20<sup>th</sup> 2008), Naple – Italy (December 14<sup>th</sup>-18<sup>th</sup> 2008) and inside the International Conference of Juvenile Justice, Bucharest (27<sup>th</sup>-28<sup>th</sup> octombrie 2007). Wholely, the findings of this study were given to Justice Ministry – Directorate of Probation in order to serve, if its will be considered useful, into the professional training of judiciary and extra-judiciary bodies called to administrate the community sanctions and measures.

institutional capacity in order to guaranty the effective administration of the community sanctions and measures in force as well as those ones that expect to come into force. The purpose of this study is to settle the **psychological mirror of „community sanctions and measures”**, using in this way some information collected from many *“paper - sources”* respectively statistics data provided by some institutions<sup>9</sup> involved into criminal justice administration as well as some answers requested to 784 *„people - sources”* respectively judges (164), prosecutors (160), probation officers (242) and juveniles being on probation (131), on prisons or educative centres (87).

In this respect, the Chapter 5 of thesis makes firstly some references toward a **study performed, during the period 1997-1998, in United Kingdom**, which points out that the community sanctions and measures' improvement doesn't need obligatory a lawmaker's intervention but a better practice of magistrate's power of discretion. This means inter alia an improvement of cooperation between the magistrate who plays the role of decisional authority and the probation service what plays the role of implementing authority. Afterwards, the thesis shows up a **study performed, during the period 2007-2008, in Romania**, pointing out: the context, the participants, the tools work used to collect information (a questionnaire sent by electronic mail), the start hypotheses, the quantitative and qualitative data' analysis accompanied by some graphics. In the light of this study's findings, the final conclusion is that in Romania the distance between *“the legal device”* of community sanctions and measures and *„the psychological mirror”* is still significantly big and it pays tribute to the following realities:

- The legal picture of community sanctions and measures is formed by 8 criminal institutions belonging to the inner legislation in force, namely: community security measures; community preventive measures; suspended sentence under supervision; supervised freedom concerning the juveniles; postponement of punishment's enforcement; discontinuance of punishment's enforcement, punishment's enforcement into the work place; conditional release concerning juveniles;

- The psychological device associated with judiciaries' power of discretion (the judge, by excellence and the prosecutor, in certain cases) and that one associated with the implementing authority's power of discretion are functioning similarly when they reflect the legal picture of community sanctions and measures. Even they play different roles into the process of community sanctions and measures' administration, there are any significant differences between their opinions concerning the legal inventory of its. So, both the decisional authority and implementing authority build up an inventory based on the same 7 correct identifications, namely: community security measures; community preventive measures; suspended sentence under supervision; supervised freedom concerning the juveniles; postponement of punishment's

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<sup>9</sup> Statistics were provided by: Justice Ministry – General Secretariate, Superior Council of Magistracy, Prosecutor Office nera by the High Court of Justice, National Administration of Penitentiaries, Probation Directorate

enforcement; discontinuance of punishment's enforcement, punishment's enforcement into the work place as well as based on the same 3 wrong identifications, namely: criminal fine; conditionally suspended sentence; conditional release concerning the adult offender;

- Inside the decisional authority there are significant differences of perception concerning the "community sanctions or measures" identity dressed by certain criminal institution. For example, the prosecutors on the contrary by the judges are tempted to believe the solutions of judgement's avoiding or of sentence's avoiding (in the way these options are regulated by the inner law in force) represent community measures;

- No one thereof the questioned professional bodies builds up an „psychological inventory” perfectly overlapped with the „legal inventory” of community sanctions and measures. Therefore, even the legal inventory in force is formed by 8 criminal institutions, the psychological inventory of each professional body has a different configuration being placed on a certain distance by the legal inventory, namely: the judges identified 12 criminal institutions (thereof 8 – correct identifications and 4 – wrong identifications, what means a fidelity score of 50%); the prosecutors identified 14 institutions (thereof 8 – correct identifications and 6 – wrong identifications, what means a fidelity score of 25%); the probation officers identified 10 institutions (thereof 7 – correct identifications and 3 – wrong identifications, what means a fidelity score of 50%). Perhaps the similarity of appreciation shown up by the judges and probation officers is based on their common experience concerning the community sanctions and measures' matter. In this respect we have to keep into account that based on the Romanian legal frame in force, the probation service is already regulated as being the implementing authority concerning many community sanctions and measures imposed by judge, while the law in force doesn't regulate explicitly the possibility of probation service to intervene – as implementing authority on the community measures which can be imposed by prosecutor. That could be one of the reasons which don't allow them a common experience's collection;

- The degree of confidence concerning the community sanctions and measures' appropriateness for the inner law and for the Romanian mentality is bigger concerning the implementing authority's confidence (75%) than the decisional authority's confidence (62,5%). That means that the confidence is given not necessarily by the active role played by judiciaries (judge, by excellence and prosecutors, in certain cases) into the criminal trial but rather by the active involvement into the enforcement's stage of community sanctions and measures, this last role belonging to probation service;

- There are significant differences between judges and prosecutors concerning the effectiveness of community preventive measures, even the decisions of both professional bodies should be guided under the same principle, namely „freedom as rule and preventive arrest as exception”. Hence, the judges consider that the community preventive measures and the preventive arrest have the same effectiveness –

concerning the adult offenders and the first ones are more effective than the last ones – concerning the juveniles, while the prosecutors consider that community preventive measures are less effective than the preventive arrest – concerning the adult offenders and they have the same effectiveness – concerning the juveniles;

- Both the implementing authority (probation service) and the decisional authority (judges and prosecutors) appreciate that suspended sentence under supervision is more effective than prison punishment concerning the juveniles. The differences of appreciations come into sight when it is about adult offenders, because the implementing authority (probation officers) consider it more effective concerning the adult offenders too, while the judges – consider it having the same effectiveness and the prosecutors – consider it less effective;

- Both decisional authority and implementing authority consider at the same size that „*the person*” has to represent the most relevant criterion which the judiciaries must keep into account of, when they decide that a community sanction or measure is more effective than a custodial one either it concerns an adult offender or a juvenile;

- In the perspective of the new Criminal Code adopted by the Law no. 286/2006’ s coming into force, the psychological device associated with the judge’s power of discretion should be characterized by openness and acceptance while the psychological device of probation officer should be characterized by resistance and unavailability, given the fact that a new sanction’s system addressed to juveniles (which will be formed exclusively by educative measures) would request only a changing of mentality – concerning the judges, while for the probation officers it would mean a meeting with a lack of human and logistic resources. Despite this fact, the findings of this research study show up that the degree of acceptance is very low concerning both professional bodies, even less concerning the judges than probation officers. In practical terms, these empirical findings draw a warning signal, saying that the new Criminal Code will meet a decisional authority unprepared by psychological point of view as well as an implementing authority unprepared both by psychological and by administrative point of view;

- Even that according with the European recommendations concerning juvenile justice matter which promote the principle „*using imprisonment as measure of last resort*”) the prison should be perceived as the least effective sanctions concerning the juveniles, notwithstanding according with the results of this study it doesn’t come into sight as staying on the bottom of “*the scale of effectiveness*” no matter whom professional body this appreciation belongs to. More than that, based on the prosecutors’ view, the prison is placed even on the top of the scale of effectiveness, being considered the most effective sanction. According with the judges and the probation officer’s view, the prison achieved the final mark „5” what means that these two kind of professional bodies perceive prison as a sanction of middle effectiveness,



respectively less effective than the suspended sentence under supervision or the supervised freedom but more effective than the reprimand or criminal fine. Based on this empirical findings, the study warns once again that neither the decisional authority nor implementing authority are not yet enough prepared to totally give up the punishments and assimilate a sanction's system addressed to juvenile exclusively formed by educative measures, as the Romanian lawmaker proposes through the instrumentality of the new Criminal Code;

- There are not differences between the decisional authority and the implementing authority's view about what institution is the most suitable in order to implement the community sanctions and measures concerning the juveniles. Both of them consider that this institution is the probation service. From here we can draw some additional conclusions, namely: since 2001 until the nowadays, the probation service represented anyway the implementing authority of community sanctions and measures imposed by judges to juveniles there where the law in force regulates that. If the judges as well as the prosecutors consider that the probation service has to have the same assignment concerning the future too, then it means that there is a high degree of confidence on the quality of work performed by this service;

- There are not differences at all between the „*real meaning*” and the „*virtual meaning*” of the community sanctions, what is understandable while both the free juvenile and the detainee juvenile share the same value concerning the freedom, even the first one lives it effectively and the second one only aspires to it. Also, there are not significant differences between the „*real meaning*” and the „*virtual meaning*” of the custodial sanction, therefore the research study denies the hypothesis according with to the free juvenile should have a different perception about detention - only because he/she just imagines it meanwhile the detainee juvenile even lives it. Therefore, concerning the juveniles, the criminal politics focused on the exemplarity and dissuasive functions of punishment are not enough justified, because the juvenile doesn't need to pass effectively and physically through a detention's experience in order to become able to understand what the detention means and to value consequently the freedom. Paying attention to the psychological device of a juvenile, we notice that a juvenile either he/she was sanctioned in a custodial or in a community way has the capacity to understand the freedom's value and he/she needs only some imagination exercises in order to understand the detention's meaning. Targeting the purpose of keeping a juvenile away from the field of criminality, maybe the competent bodies have to practice the re-educative function of the punishment rather than the exemplarity or dissuasive one. In this respect, the „*virtual meaning*” of detention and the „*real meaning*” of community have to be enhanced not the opposite. Therefore, some movies about prison life and some visits into prison would represent enough and effective ways based on the balance „*psychological costs / benefits*” rather than to send a juvenile into prison.