INTRODUCTION OF PRETRIAL PROBATION PROCEDURE IN UKRAINE

The article defines notion «pretrial probation», its purpose and possible prospects of pretrial probation procedure implementation in criminal justice of Ukraine.

Keywords: pretrial probation; pre-sentence report; defendant; probation agency; prosecutor.

Problem formulation. The Concept of the state policy in the area of reformation of State Criminal Executive agency of Ukraine, approved by the Order of the President of Ukraine as of 8 November 2012 No. 631/2012 [1] (hereinafter – the Concept) foresees till 2017 introduction of pretrial probation procedure in Ukraine. Although the Concept does not define «pretrial probation» advising only that the aim of pretrial probation is to provide accurate information on social characteristic of a person accused in crime commitment in order to choose the most appropriate for such person preventing measure or punishment not related to imprisonment or restrain [1]. As the result it seems that developers of the Concept interpreted «pretrial probation» as accurate information on social characteristic of person accused in crime commitment.

At the same time currently the only submitted to Verkhovna Rada draft Law on Probation No. 1197-1 as of 18 January 2013 [2] (10.10.2013 Parliament used it as the basis, and draft Law on Probation Agency was debriefed and withdrew) defines pretrial probation as providing a court with formalized information characterizing the person charged with a crime aiming for the court to determine person’s punishment [2].

From the legal perspective it is clear that in the draft law this notion is defined more accurately, and what is referred in the draft law No. 1197-1 to as pretrial probation in the Concept is defined as its goal.
However it is stipulated in the Concepts that the goal of pretrial probation is to choose for a person preventing measure or punishment not related to imprisonment or restrain, while in the draft law No. 1197-1 the court has to decide person’s punishment. Such contradictions as well as absence of coherent interpretation of the notion «pretrial probation», conceptually different approaches in interpretations of probation, its functions, tasks and results caused the need to consider such issues.

**Analysis of recent studies and publications.** The issue of introducing in Ukraine pretrial probation partially analyzed in the works of local scientists as I.G. Bohatyriov, V.M. Dryomin, A.K. Stepanjuk, V.M. Trubnikov, D.V. Yahunov, I.S. Yakovets et al.

**The purpose of this Article (objective)** – determine the concept and perspectives of pretrial probation in criminal, criminal executive and criminal procedural laws of Ukraine.

**Description of basic research material.** This article is based on the regulations of the draft Law On probation No. 1197-1, Provision on the Concept of state policy in the area of reformation of State Criminal Executive agency of Ukraine, European Probations Rules and laws in the area of probation in European states.

Abroad pretrial probation is not deemed to be defined as providing a court with information characterizing a person; the primary goal of pretrial probation is stated as safety of a society.

For example in USA which is considered to be one of the founders of probation in the world, pretrial probation (preliminary probation period) is a form of punishment whereby a criminal defendant agrees to abide by terms of probation before a final adjudication of the case is entered. Pretrial probation sometimes requires the defendant to report to a probation officer or other supervisory agent. The terms of the pretrial probation are agreed to between the defendant and the prosecutor. Courts can approve or revoke such agreements but do not impose pretrial probation as a punishment.

Probation is granted to criminal defendants who plead guilty or are convicted of a crime (if the nature of a crime and defendant’s records allow for imposition of probation), in such case defendant begins serving a period of pretrial probation before plea agreement or verdict is entered. Pretrial probation is applied only if defendant has no criminal history, agrees to pretrial probation programs and meets certain criteria. For example, he does not have two or more felony convictions, is not drug addicted, as well as is not a public official accused in violation of public trust, or is a person accused of a national security offence.

When the defendant completes probation period, the criminal charges are then dropped; he will not have a criminal record, and a state at the same time will safe time on crime investigation and sentence execution, which defendant has already served in a form of pretrial probation [3]. So pretrial probation is beneficial both for the state and for the defendants.

Hence in USA pretrial probation does not mean collection of information on a person but relates to non-custodial measures allowing for discharge of extra burden on law enforcement and court systems at the same time preventing new crimes that could have been committed by the person on pretrial probation.
Recommendation CM/Rec (2010) 1 of the Committee of Ministers to member states on the Council of Europe Probation Rules does provide definition of «pretrial probation» and refers only to the report to the court: Depending on the national legal system, probation agencies may prepare pre-sentence reports on individual alleged offenders in order to assist, where applicable, the judicial authorities in deciding whether to prosecute or what would be the appropriate sanctions or measures [4]. The same is stipulated in UN Minimum Standard Rules for non-custodial measures, containing sub-section on social information, providing that when available, judicial authority may make use of a factual, unbiased report by a competent official or agency that contains social information [5].

In European states with established probation institute most of probation laws does not define pretrial probation in a sense advised by the draft law No. 1197-1 and the Concept. The exaptation mostly relates to the countries of former USSR for example Article 2 of the Law on Probation of Republic of Moldova as of 14 February 2008 defines pretrial probation as psychosocial evaluation of the suspect, accused, or culprit. Further Article 8 of this Law stipulates that in the process of pretrial probation suspect, accused, or culprit court pre-sentence psychosocial personality evaluation report is drawn up [6].

Draft Federal Law on Probation in Russian Federation also implies term pre-trial probation as measures used in respect to the suspect, accused, or culprit and investigation and evaluation of social and psychophysiological and other characteristics of above mentioned individuals for drawing up pre-sentence report and its submission to pretrial investigation agency and a court as well as preparation of suggestions on measures for social reintegration and rehabilitation.

The draft Law On pretrial probation includes measures as follow:

1) collecting data on living conditions of the suspect, accused or culprit, upbringing of minor suspect, accused or culprit, their level of psychological development and other personal features (social and psychological examination to specify personality and prepare prospects of social reintegration and rehabilitation) and providing such information to the parties of criminal proceeding upon their request;

2) submitting pre-sentence report to interrogating officer, investigator and court (judge) on social and psychological examination of suspect, accused or culprit (the file on social and psychological supervision of suspect, accused or culprit) [7].

Most of the foreign probation laws use term «pre-sentence report». We believe that such term should also be applied in national legislation as provided in draft law No. 1197-1 definition of probation «as system of supervisory and socially-educative measures imposed by court ruling in compliance with the law in respect to persons charged with a crime and submission to the court of information characterizing person charged with a crime» does not comply with provided in Recommendation CM/Rec (2010) 1 of the Committee of Ministers to member states on the Council of Europe Probation Rules European Probation Policy definition «probation relates to the implementation in the community of sanctions and measures, defined by law and imposed on an offender. It includes a range of activities and interventions, which involve supervision, guidance and assistance aiming at the social inclusion of an offender, as well as at contributing to community safety».

Whereby we believe, that such definition of probation as: providing the court with information on a person charged with a crime, does not reflect the concept of probation.
Thus provided in Article 10 of draft law No. 1197-1 definition of pretrial probation related rather not to probations itself but to development of pre-sentence report to be drawn up by future officers of probation agency.

As it appears from Article 10 the developers on the draft law unreasonably equate pretrial probation with preparation of pre-sentence report, although such report is just an element of pretrial probation.

We strongly believe that foremost pretrial probation should relate not to the collection of information on accused (culprit) but to imposition of supervisory and socially-educative measures contributing to safety of a society.

Also the draft law No. 1197-1 stipulates that pre-sentence report is drawn up in respect to a person charged with a crime.

Although we believe that pre-sentence report should be drawn up not only in respect to accused (culprit) but to convicted person with a right to early release on parole or who is on probation (regular or special pre-sentence report). That is why we suggest pre-sentence report to be defined as confidential, formalized information on offender collected to provide recommendations to the court on imposition of proper enforcement measure. For example, in respect to individuals on probation in regular pre-sentence report officer of Probation agency if there are reasons may recommend the court to commute probation or otherwise if the person on probation breaches the terms of probation, advise in special pre-sentence report to substitute probation.

However there still are open questions – what shall be the reason for preparation of pre-sentence report; is it a subject to request of a court or only specific cases foreseen by the Law? If it is a subject to request of a court what type of crimes should it refer to? Maybe there should be limitation in respect to preparation of pre-sentence report depending on the subject of a crime. Such issues should be resolved prior to introduction of pre-trial probation procedure (we believe prior to drawing up pre-sentence report).

Hence in respect to the Law of Republic of Latvia on State Probation Service pre-sentence report is drawn up under request of court or prosecutor [8]. At the same time in Republic of Moldova pre-sentence report is obligatory drawn up only on minor suspect, accused or culprit. In respect to adults, request of criminal prosecution body, prosecutor or court is required [6].

In Estonia prosecutor requests from the officer of the department of criminal supervision pre-sentence report, which is very helpful as police proves a crime and officer of the department of criminal supervision collects the rest of social information, in such manner police does not waist time on addressing schools, doctors etc. In Denmark information on culprit personality is called report before verdict which is prepared by probation center upon prosecutor’s request [9].

Definitions are important issue of the state activity. Preparation of pre-sentence report is not an exception. If it is prepared as it is laid down in the Concept, in order to choose the most appropriate for accused preventive measure it will be extra hard to define the terms. We believe that at such stage of criminal proceeding pre-sentence report is not required, as it might be non-informative as officers of Probation agency will not be able to prepare it due to the lack of time as almost right after apprehension if applicable the preventive measure is chosen and most likely nobody will wait for recommendation of pre-sentence report.
If punishment not related to imprisonment or restrain is chosen pre-sentence report should be prepared before trial.

As it can be seen from the Concept and the draft law on Probation No. 1197-1, pretrial probation will be executed by the officers of Probation agency created by reformation of criminal execution inspection. However it is not clear if the officer who prepared pre-sentence report must be present at the hearing of such report or they should appear in the court only under the court’s request as in Republic of Moldova? That is why Criminal Procedure Code of Ukraine should define if officer of Probation agency is a procedural person, trial participant. In any case officer is responsible for culprit if the latter is imposed with alternative punishment or other criminal enforcement measure not related to imprisonment. Thus there is a risk that officers of Probation agency will intentionally recommend imprisonment to a court in order to avoid further problems related to supervision and prevention of convicted defendant from commitment of another crime. Even though the judges are independent such recommendation may influence a judge, and the person will be imprisoned. Thus we believe that elimination of subjectivity of officers of Probation agency and state bureaucracy is the key issue in introduction of probation.

After such issues are solved they should regulated and Criminal execution as well as Criminal Procedure Codes of Ukraine should respectfully be amended.

Hence mentioned issues need to be resolved, they show that mechanism of introduction of pre-trial probation in Ukraine is absent as well as is misinterpreted, there is no consensus.

In approved by the Cabinet of Ministers of Ukraine as of 29 April 2013 No. 345 state special purpose program on reformation of State Criminal execution Agency for 2013 – 2017 [10] implementation of the Concept unfortunately does not regulate the process of introduction of Pretrial Probation which should be very gradual and cautious as it relates to life and future of a person. However, the presence of mentioned regulations and certain scientists work give reasons to believe in prospects of implementation of pretrial probation procedures in criminal proceedings of Ukraine.

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