THE PROBATION MEASURES – THE REASONS FOR THE REGULATION

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Abstract

For a proper understanding of the law institution, it is necessary to understand the reasons that gave rise to the its regulation. By reasons of regulations, we understand the social, economic, political, legal, moral justifications, but also of any other nature that established the legislation adoption represents a positive source of the institution in question. Trying to find reasons for the regulation is a useful step, even under stronger word, if the institution researched is relatively new in the normative context, character that can be easily subject to error, assigned to the probation measures into Romanian law. The utility of teh step is to know the circumstances that caused, encouraged or even imposed the settlement of the probation measures in our country, but also of the goals that the new institution will answer them.

Keywords: *probation measures, restorative justice, the treatment of the offenders in the community, the prevention of the repeated offense, social reintegration, the compensation for the victim's damage, international and european legal on probation measures*

Introduction

In order to facilitate the understanding of the institution of probation measures, we believe it is useful to start by knowing the circumstances which led, encouraged or even required regulation of the measures in question, as well as social, economic, political, legal, moral justifications, but also of any other nature that established the legislation adoption represents a positive source of the institution in question.

Subsequently, we will refer to the purposes more spcific pursued by the lawmaker through the probation measures establishment and we may discover that the main purposes related thereto are reducing the risk of repeated offense, increasing the chances of rehabilitation and social reintegration, excluding extrapersonal and long-term harmful effects, specific to inprisonment, increasing the chances of compensating the prejudice caused by the offense and reducing the financial costs of administrating the criminal justice in its executing phase.

1. The context of imprisonment

As in other countries, in our country a first context that favored introducing the probation measures was the one for an overwhelming increase in the number of people sent to prison. Thus, during the communist regime, a maximum of 60,000 inmates was reached, out of which a significant proportion of serious crimes committed reduced[1]. The maximum noted was close to being reached and after the social, economic and political turmoil after the anti-communist revolution in December 1989, in 2001 the number of the detainees reached 49.840[2].

In this context one of the main reasons for enacting the probation measures was a significant reduction in the number of people who were sent to detention. Of course, reducing the number of the detainees at one time conducted the operations in the period before and after the anticommunist revolution in December 1989, with a multi-anual[3] regularity sometimes, but these reductions intervened through acts of pardon or amnesty.

Unlike the acts of pardon or amnesty, the reduction that was intended by the introduction of the probation measures could operate in parallel with the provision of minimum guarantees to ensure social reintegration of those who were not sent to prison and to preserve public order.

Thus, although in the Romanian legislation the probation measures in a similar form to the way they are outlined in the current legal sense were introduced by the Criminal Code from 1969[4], which established the educational measure of the supervised release and later, the correctional work[5] transformed in execution of the sentence in the workplace, the first institution to provide oversight of the measures in the true sense of the word was the suspended sentence of imprisonment under surveillance, introduced by Law no. 102/1992.

The institution of suspended sentence of imprisonment under surveillance began, however, to operate effectively and efficiently only after 2001 when the entire country, exceeding the experimental level the first specialized service in supervising the execution of the probation measures was set up and established by the

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[1] I. Chiș, The prison reform in Romania, Ando Tours Publishing House, Timișoara 1997, mentioned in I. Chiș, The penal law execution, Universul Juridic Publishing House, Bucharest 2015, p. 85.

[2] According to data from the Activity results on 2009 of the National Administration of the Prison, available on the website www.anp.gov.ro, section About ANP, subsection Reports and studies.

[3] I. Chiș, Executing the punishments, Universul Juridic Publishing House, Bucharest, 2015, p. 86.

[4] Penal Law, adopted thorugh Law no. 15/1968, entered into force on 1st of January 1969.

[5] The correctional work was introduced by Penal Law through Law no. 6/1973.

Government Ordinance no. 92/2000 on the organization and functioning of the social reintegration of the offenders and the enforcement of non-custodial sanctions.

Upon the establishment of the first state organizations specialized in supervising the execution of the probation measures, we believe that we can talk, rightfully, of a system of probation in our country for the development of this system anywhere in the world, and it depended naturally on the development of the services designed to implement it.

The last and most important legislative step in terms of probation measures was conducted when the current Criminal Code entered into force, which introduces a number of institutions based on the probation measures such as the conditional sentence, suspended sentence under supervision, release on conditional supervision.

The importance and the substance of the penal reform made by the current Criminal Code is also underlined by the adoption and entry into force of the simultaneous laws of the criminal custodial[6] and non-custodial[7] sanctions and of a new law for the organization and functioning of the probation services[8].

We can not state, in the most definite way that reducing the number of people subject to detention is due mainly to the introduction of the probation measures in our country, but we can see that since 2001 until now, the number of the detainees registered a permanent downward trend, reaching 27.455 people in 2016, according to data from the Annual Activity Report of the National Administration of Penitentiaries in 2016[9]. Of course, the decline in the number of persons in detention is based on multiple causes, but the introduction of the probation measures and of the specialized services in monitoring their enforcement has undoubtedly a significant contribution.

2. The context of civilizing the punishment

A broader context, which also facilitated the emergence and development of the probation measures in our country was represented by the so-called current *civilizing punishment*[10], a special manifestation of the overall progress of human society over its existence.

This trend started in the modern era, with a gradual reduction of the application cases of capital punishment or corporal under the influence of the thoughts of Cesare Beccaria. In his well-known work *Dei delitti e delle pene*, the famous enlightened, criticizing the death penalty, wrote: *Not the intensity of the punishment produces the greatest effect on the human soul, but its extent... The strongest brake against crimes is not the terrible, the passing show of a wicked death, but the long and arduous example of a person deprived of liberty, which turned into beast of burden, compensates with its toil that harmed her*[11].

Under the influence of Beccaria, a number of enlightened leaders abolished, in fact, corporal punishment and death penalty. Among them a famous author[12] reminds the Prussian King Frederick II, who abolished torture in 1756 and whom Catherine II oppossed the barbaric punishment in 1767 and, throughout his reign, could not admit the execution of any death sentences, but also Leopold of Tuscany, who banned in 1786, torture and death penalty, and Joseph II of Austria, who issued the Criminal Code in 1787, which punished with death only certain military crimes and the Criminal Procedure Code in 1788 prohibiting torture.

It followed the generalization of the prison sentences, all laws adopted since the late eighteenth century until the late nineteenth century providing that the main method of punishment the imprisonment in various ways: forced labour, reclusion, imprisonment, solitary confinement, prison[13].

Although the process of civilization of the sentences also registered the professionalization and humanization of prisons, in the late nineteenth century the system of prison punishments has increasingly become subject to criticism, leading to the conclusion that, instead of reducing the crime and reintegrating the offenders into society, it produced an opposite effect[14].

Finally, the civilizing process of the punishments culminated in the emergence of the probation measures. Moreover, other authors[15] consider that in the trend of the civilizing punishments can be framed even the emergence of the probation and the community sanctions.

We express our opinion that the process of civilization of the punishments will continue in the era of advanced technologies, as the possibilities for remote control and supervision of the offender will be developed and accepted as useful tools in the execution of criminal sanctions. However, we can not fail to notice that technological progress, materialized by the exponential growth of the means of mass communication, can produce a negative effect in terms of analyzed, namely

[6] Law no. 254/2013 regarding the execution of the punishments and of the custodial measures ordered by the court during the criminal trial.
[7] Law no. 253/2013 regarding the execution of the punishments, of the educational measures and of other non-custodial measures taken by the judicial bodies during the criminal trial.
[8] Law no. 252/2013 regarding the organization and functioning of the probation system.
[9] Available on the website *www.anp.gov.ro*, section About *ANP*, subsection *Reports and studies.*
[10] Civilizing punishments is conceptualized by the English criminologist John Pratt within his paper *Punishment and civilization: penal tolerance and intolerance in modern society*.
[11] C. Beccaria, *About crimes and punishments*, ALFA Publishing House, Iași 2006, p. 44.
[12] L. Coraș, *Criminal penalties alternative to imprisonment*, C.H. Beck Publishing House, Bucharest 2009, p. 34.
[13] A.V. Iugan, *The judicial individualization of the punishment. Alternatives to imprisonment*, PhD thesis developed in the PhD School of the Faculty of Law of the University "Nicolae Titulescu" Bucharest, unpublished p. 14.
[14] Idem, p. 15.
[15] G. Oancea, *Probation in Romania*, C.H. Beck Publishing House, Bucharest 2012, p. 31.

to induce among the population a sense of fear by publicizing exacerbated crimes.

However, we can not fail to notice that technological progress, resulted in exponential growth of the means of mass communication, can cause a negative effect in terms of analyzed perspective, namely to induce among the population a sense of fear by publicizing exacerbated crimes[16]. Paradoxically, this culture of fear can determine a stream of *uncivilizing punishment*[17], because globally crime is substantially declining as the economic progress raises the standard of living of the population, such as a process of tightening the sanctioning that the political factor can impose when trying to give a signal, sometimes populist, of intransigence to anti-social manifestations.

3. The legal international context

Another context which favored the development of the probation system and thus the introduction of the probation measures as an alternative to imprisonment, it was the need to adapt national legislation to the Council of Europe recommendations and normative acts of the European Union.

In the explanatory memorandum[18] that accompanied the projects and that have resulted in Law no. 253/2013 on the execution of penalties, of the educational measures and of other non-custodial measures ordered by the court during the criminal proceedings and in Law no. 252/2013 on the organization and functioning of the probation system, it shows explicitly that the drafts envisaged, inter alia, the Council of Europe's recommendations, namely Recommendation No. R(92)16 on the European rules on the community sanctions and measures; the Recommendation of the Council of Europe No. R(97)12 on staff involved in the implementation of the community sanctions and measures; the Recommendation of Council of Europe No. R(99)22 on reducinng the number of persons imprisoned and overcrowding them; Recommendation of teh Council of Europe No. R(2000)22 on improving the implementation of the European rules on community sanctions and measures; Recommendation of teh European Council No. R(2003)22 on the release on parole; Recommendation of the Council of Europe No. R(2006)2 on the European Prison Rules; Recommendation of the Council of Europe No. R(2008)11 on the European rules for juvenile offenders subject to criminal sanctions and measures, Recommendation of the Council of Europe No. R(2010)1 on the European probation rules.

Also, by drafting Law no. 200/2013 amending and supplementing Law no. 302/2004 on judicial cooperation in criminal matters, the proceeding to the adoption of EU instruments for cooperation in the enforcement matters of the probation measures, among other acts, the Framework Decision 2008/947/ JHA of 27 November 2008 on the principle of mutual recognition to judgments and probation decisions with a view to supervising probation measures and alternative sanctions, as resulted from the explanatory memorandum, was implemented[19].

4. The jurisprudence context of the European Court of Human Rights

A context, still very current, which has boosted and will continue to spur concern for identifying alternatives more and more diversified and viable for the custodial sentences and thereby to the development of the probation system, is the European Court of Human Rights, which finds a breach by the Romanian State of the article 3 of the European Convention on human rights and fundamental freedoms, as a result of placing detainees in irregular detention conditions (including overcrowding).

One of the most relevant causes[20] from the analyzed standpoint related to our country, the European Court mentions a report following its visit to Romania, drafted by the Commissioner for Human Rights, which, inter alia, urged Romanian authorities to develop a system of alternative punishments, an effective dispensation of the release on parole and one judicial policy involving the use of sparingly custodial sentences[21].

In this context, the reason for which the probation system will be developed in our country is to avoid future convictions for the conditions of detention which can be considered as inhuman or degrading treatment.

5. The purpose of reducing the risk of a repeat offense

In favor of the probation measures, among others, it pleads the argument through which it is ensured a better protection of the society and of the offender towards the risk to relapse into the criminal conduct.

Although even the custodial sentences ensure a protection of the society against a repeat offense and, throught the incapacity in itself, even of the offender, this protection is only on a short term (it lasts only as long as

[16] In the current media culture there are some well known news broadcast on national television at a time of great audience, who has as favorite theme to present in detail the most heinous crimes committed in the country; this show was the inspiration for other TV channels, thereby contributing to the proliferation of the genre and even imposing in the vocabulary a phrase that identifies this type of shows, *Headlines at 5 o'clock.*

[17] G. Oancea, *op. cit.*, p. 32.

[18] Available on the website of the Chamber of Deputies *www.cdep.ro*, section *Pursuing the legislative process.*

[19] Available on the website of the Chamber of Deputies *www.cdep.ro*, section *Pursuing the legislative process.*

[20] Cause *Iacov Stanciu against Romania*, Decision from 10.07.2012 of the third section, available on the website http://www.echr.coe.int.

[21] Cause Iacov Stanciu against Romania, paragraph. 128;

the offender is effectively incarcerated), and in terms of the offender, the protection is illusory.

Since the imprisonment runs in detention where, in spite of the separation criteria, the offenders freely communicate with each other, the prison contagion occurs and thus, the risk of a repeat offense increases significantly. Besides, the fact that penalty prison is running, as a rule and in the most significant part, it is in common, as a famous author noted[22] an obvious and insurmountable disadvantage of the possession by the fact that it allows the enraged and savvy criminals to exercise one bad influence on those who make first contact with the prison and who, although do not have one criminal culture, thus they acquire it and they release from prison much more prepared to conduct a criminal activity than they were following the entry into the prison.

The probation measures being performed into the community, are more protected from the risk of crime contamination because the community in which the performance takes place is an open, generally it represents the society that is fundamentally different from the closed and pernicious community prisons. We can say, in antagonism with the prison sentences that the probation measures are performed individually.

Moreover, even if serving the prison sentences is intended to be as individualized as possible[23], the execution of the probation measures allow a deeper administrative individualization, which can reach up to the level of customization for each individual[24]. It is this level of customization up to the convicted individual which is considered legal doctrine able to reduce to a significant extent the risk of recurrence[25].

6. The purpose of increasing the opportunities for rehabilitation and social reintegration

By that the probation measures leave much of the burden of re-education and re-socialization into the responsibilities of the offender, their execution increases the chances of effective reeducation and a real social reintegration.

Even if serving a prison sentence resulted in an exemplary rehabilitation of the offender who, during execution, acquired, let's say, a new job, that he could practice freely, he will carry for the rest life "the convict stigma", of the person imprisoned, who served a custodial sentence and, for that, in the collective mind, must have committed an abominable act.

This stigma is an almost insurmountable obstacle in the way of real and effective social reintegration after release, and he is not in case of executing the probation measures. The person whom were applied such measures is so much requested to work towards reintegration, knowing that he/she does not bear the stigma of convict, than the person who serving a custodial prison and knowing that it will be more difficult reaccepted by the society is not at all stimulated to act towards reintegration.

In most of the cases, after executing the probation measures, the perpetrator is not even subjected to a ban, fall or incapacity[26] or his rehabilitation will be more easy and, usually, earlier than the persons imprisoned[27], thereby having much greater chance at reintegration.

Moreover, the process of social reintegration of the persons performing the probation measures starts from the final judgment decision when the probation measures are imposed, which is another advantage over the assumption of prison punishment when the reintegration process can begin, actually, at the earliest when released from the prison.

7. The purpose of excluding extrapersonal and on long-term harmful effects, specific to the prison sentences

In addition to the strict legal orders effects and that are always borne by the individual who served a prison sentence under detention leave other traces, of different nature than the legal ones, within the family, or the relatives of the offenders. The legal doctrine referred to the fact that custodial sentences also affect the caregivers of the prisoner and that these effects extend far beyond the term of the release from prison[28]

The family and the inner circle of the persons serving a sentence in detention are required to make contact with the prison when they visit the prisoner or if providing packages, they are obliged to pay, sometimes more than significant, in order to keep in touch with the prisoner and to make his prison life bearable. After release, the impact of the acquired skills of the person that served the sentence in detention is often difficult to be resorbed by the kindred with substantial costs or even

[22] I. Chiș, *Executing the punishments*, Universul Juridic Publishing House, Bucharest, 2015, p. 22;

[23] In this respect, art. 89 para. (4) of Law no. 254/2013 regarding the enforcement of the sentences and the custodial measures, requires preparation, after the period of quarantine and observation by the provisions of art. 44 of an *Individualized Assessment and Therapeutic and Educational Intervention Plan*;

[24] In this respect, art. 1446-1450 from its Rules of application of Law no. 252/2013 on the organization and functioning of the probation service, approved by Government Decision no. 1079/2013, as amended and supplemented by Government Decision no. 603/2016, requires preparation of the *Monitoring Plan*;

[25] I. Chiș, *Executing the punishments*, Universul Juridic Publishing House, Bucharest, 2015, p. 22;

[26] This is the case, for example, of the person to whom it was given the solution of postponing the enforcement of the sentence when, according to art. 90 para. (1) Criminal Code, one is not subject to decay, prohibition or impairment that would result from such an offense if a crime committed back to the expiration of the supervision, it was decided to dismiss the delay and no cancellation policy cause has been found.

[27] This is the case, for example, of the convict whose surveillance sentence was suspended and according to art. 165 Criminal Code it is rehabilitated by law, with the only condition that no other offense be committed within three years from the expiry of surveillance.

[28] I. Chiș, *Executing the punishments*, Universul Juridic Publishing House, Bucharest, 2015, p. 21.

impossible for both sides. The negative effects of the prison detention spread like the shock waves in the community (family, entourage) of origin where the prisoner returns.

All these negative aspects can not be found if the probation measures, involving lower costs for the person who serves them and that allows them during the execution, to have a family, social life, almost the same as before acquiring the statute of person subject to surveillance measures.

8. The aim to increase the chances of compensation for damage caused by crime

Lately, it has been noticed an important change of paradigm, moving from a vindictive to one restorative justice, whereby to increase the chances of compensation for damage caused by the offense.

The probation measures as an alternative to detention, have this purpose, to increase under a double aspect, the chances to compensation for damages.

Under a first aspect, the objective reality is as obvious as possible that a person incarcerated has significantly fewer opportunities to make money from covering the damage caused by the offense than the person who is subject to the probation measures and that can lawfully earn income as a person who had contact with the criminal justice system.

Under the second aspect, of the legislative reality, this part of the probation system purpose has a normative consecration, both internationally and domestically.

At international level, repairing the damage caused by the offense is among the first targets in the Council of Europe Recommendation no. R (92)16 on the European rules regarding the community sanctions and measures.

The purpose of the current national legislation in question is guaranteed by lifting the compensation for the damage to a rank of imperative condition to achieve the full effects of serving all measures of probation in case of disposing different forms of individualization of punishment without imprisonment[29]. Likewise, the new law on the organization and functioning of the probation service obliges the probation officers to carry out steps to boost the damage repair[30].

We believe that even a more conspicuous emphasis on the purpose of repairing the damage caused by the offense can be achieved through a brief analysis of the historical perspective of the name that the probation service had it for over a period of its existence. Thus, by Law no. 211/2004 on the protection of victims[31], the name „social reintegration services for offenders and supervising the execution of non-custodial sentences" under the Government Ordinance no. 92/2000 was replaced by the suggestive name of "services to protect victims and social reintegration of offenders", which it has been maintained until the entry into force of Law no. 123/2006 on the probation staff statute[32].

9. The purpose of reducing the financial costs on the administration of criminal justice during its execution

Talking about the social costs of the monitoring measures, we can not just make reference to the financial resources that the state, through its specialized organs, must allocate to enable monitoring on the persons subject to the measures in question. And because these absolutely costs considered *ut singuli* may not provide much relevant information, we focused on a comparative analysis between the costs of the state probation measures and of the custodial sentences.

According to data from the Annual Activity Report of the National Administration of Penitentiaries in 2016, the average monthly cost for a person imprisoned was in reporting year of 3.532,42 lei. Analyzing data from the Annual Activity Report of the National Probation in 2016 and the budget for the same year for this institution[33], it results that dividing the budget (28.744.000 lei) to the number of monitored people (57.814 people), the monthly cost of a monitored person is about 41,43 lei.

As it can be seen from statistic data which we referred above, a conclusion downright shocking can be drawn: the cost of implementing the probation measures is over 85 times lower than the cost of the execution of the custodial sentences.

However, this conclusion is somewhat distorted by the fact that the probation system in our country works to a level of the ratio of people monitored by a a probation officer that we can call inappropriate and that is likely to cause a shock so powerful: 153 people monitored by a probation counselor[34]. This ratio can not

[29] Pursuant to art. 88 para. (2) and art. 96 para. (2) of the current Criminal Code, the disobeyance of reparing thedamage during the term of supervision is case to revoke the penalty postpone or of the suspended sentence under supervision.

[30] Pursuant to art. 65 of Law no. 252/2013 on the organization and functioning of the probation system in order to check the compliance of the supervised person with the civil obligations established by the judgment, six months before the expiry of the supervisory probation period, the probation counselor - case manager requests information regarding the steps taken by the person to fulfill these obligations, requiring proof of completion that is attached to the probation file if the person under observation did not fulfill the civic obligations, the probation officer checking the reasons for failure and, if necessary, directing the person to perform civil obligations three months before the expiry of surveillance; according to art. 67 para. (2) of the same law, if the monitored person does not fulfill civil obligations by no later than three months before the monitoring expiry, the probation officer prepares a report assessing, recording the reasons for failure and informs the court to revoke the benefit of individualizing the penalties without imprisonment.

[31] Law no. 211/2004 on the protection of victims was published in the Official Gazette no. 505 / 04.06.2004.

[32] Law no. 123/2006 on the staff regulations of the probation services was published in the Official Gazette no. 407/10.05.2006.

[33] Available on the electronic address http://www.just.ro/wp-content/uploads/2015/12/anexa-2.3.1-buget-DNP-16.03.2016.pdf.

[34] The report was based on the number of people monitored and of the number of the probation counselors out of the plan for the National Probation Directorate, as they appear in the annual activity report of the institution in 2016.

be one according to the Tokyo Rules[35], which in art. 13.5 establishes the number of cases assigned to each agent shall be maintained as far as possible at a reasonable level in order to ensure the effectiveness of the treatment programs.

Of course, there are efforts to normalize the numerical ratio between the monitored probation counselors and people under surveillance by recruiting a large number of advisers[36]. Although these efforts will lead to a cost increase that the state should support it for each person monitored, we assume without fear of making mistakes, that he still remains much lower than that the one involving a person imprisoned. Moreover, this increase in the number of probation counselors will bring not only an increase in the cost but also improved quality of the monitoring activities, which is the premise of the need to leave any political development of the probation system.

Conclusion

The conditions that favored in our country the emergence and development of the probation system in general, and the probation measures as a viable alternative to imprisonment, in particular, they were various and acted, although starting in different historical stages, in collaboration, thus creating a positive pressure on those responsible for drafting the criminal policy.

Thus, the context of over-imprisonment of civilizing penalties, of the international normativity, of the jurisprudence of the European Court of Human Rights provoked finding viable sanctioning alternatives to the custodial sentences, which in the historical period we are facing now proved not to be the most suitable to ensure the goals of rehabilitation and reintegration of the offenders, especially for those that comit crimes to a certain degree of hazard.

We believe that all those responsible for the development of the probation system, resulting in the analyzed contexts above continues to exert pressure on further development of how the probation system is structured and operates, thus working togheter to shaping a professional and efficient probation service.

Moreover, as I stated above, the need for closer monitoring and characterized of the persons performing the criminal sanctions in the community is a prerequisite for achieving the goals that the probation proposes: reducing the risk of repeat offenses, increasing the chances of rehabilitation and social reintegration, exclusion of extrapersonal and long-term adverse effect, specific to the imprisonments, increasing the chances of compensation for the damages caused by crimes and, not least, reducing the financial costs of administrating the criminal justice during its execution.

Of course, the probation can not be the universal response for the treatment criminal sanctions in case of committing any crime, its limit being represented by a certain threshold of gravity of the facts and of the perpetrators, above which the probation measures can not be assessed as effective.

However, the actual social reality showed that there are real possibilities of recovering a significant number of people who come into conflict with the criminal law, without requiring their imprisonment, while the social deviance that they manifest is of a certain severity and the possibilities for treating this deviance are more and more diversified.

In other words, if we draw a parallel with the medical community and the developments registered, we could compare the treatment of the offenders in the community with the treatment of the patients in ambulatory, the imprisonment of the offenders, similar to hospitalization of the patients and it must be a final answer, only applicable to the worst deviant.

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[35] The United Nations Minimum Rules for the development of non-custodial measures, known as the Tokyo Rules were adopted in the 68th plenary session of 14 December 1990.

[36] The Government Decision no. 328/2016 amending and supplementing the Government Decision no. 652/2009 on the organization and functioning of the Ministry of Justice and amending certain legislative acts, supplemented the probation services plan with 565 positions of probation counselors and support staff, which further fulfilled one of the strategic objectives which are included in the *Strategy for 2015-2020 for developing judicial system,* namely *Strengthening the administrative capacity of the Ministry of Justice and the institutions under its subordination and coordination*.