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From "Working with the Individual" to "Managing the Individual" in the area of court guardianship

Abstract: The court guardianship, which has been operating in our country for a hundred years, took on different forms. Its forms of work, depending on the tasks assigned to it, were changing, evolving. In this article, the author shows the change which has been made over the last years, i.e. abandoning the work with an individual in favor of management of an individual. He wonders about the sense of this type of solutions, questioning their effectiveness and postulating the necessity of building an effective guardianship primarily on relations based on empirically verified theoretical assumptions.
Keywords: Guardianship, *case work*, *case management*, relations, GLM.

The increase in crime observed in our country as a result of social and political changes, additionally "dramatized" by the mass media, causes a constant increase in the sense of anxiety[1]. The society, due to the inability of the modern state to deal with this phenomenon, loses confidence in the authorities responsible for solving this problem. "So they began to follow new rules that give direction to changes in criminal policy. Provision of effective protection of the public against

[1] Interestingly, the level of anxiety in a given society is often independent of the current level of crime. Poland can be the example, in which the sense of anxiety is much higher than in countries with higher level of crime. On this subject, see, among others: Siemaszko, Gruszczyńska, Marczewski 2003.

threats to its safety becomes the main task. The personality of the offender and their powers are taken into account only to the extent required by fundamental human rights, but the most important thing is to „make them harmless", to deprive them of the possibility of posing a threat [...], which corresponds at the same time to the retributive justice, and thus to the social demand of retaliation with punishment" (Poklewski-Koziełł 2002, p. 85). And even though D. Garland focuses on the analysis of the culture of criminal control and the criminal justice system in the United Kingdom and the United States, some tendencies can be seen already marking their presence also in other countries, including Poland.

The currently dominant neoclassical paradigm in criminology and criminal policy manifests itself in a return to the idea of classical criminal law, where the perpetrator of a criminal act is responsible for their actions and the reactions of criminal law are proportional to the seriousness of the act and the degree of fault (Błachut, Gaberle, Krajewski 1999, p. 55). The legal responses are retributive in nature and are focused not so much on the perpetrator themselves, as indicated by the above quoted D. Garland, but on the protection of society, that is, on general prevention. Social rehabilitation is becoming not an end, but a means to an end, and one of many means at that (apart from, among others, deterring or preventing), an unnecessary and far too costly means to be applied to everyone (Stańdo-Kawecka 2010, p. 891–907).

As a consequence of the changes in thinking about the offender, as well as about punishment and ways of carrying it out, which have taken place over the last decades, it was necessary to develop new mechanisms for preventing crime and recidivism, in which the probation has found its prominent place.

The institution of guardianship in literature, as it is commonly understood, is identified with probation. This one in turn describes the perpetrator of a crime at large remaining under the supervision of another person – a probation officer – for a certain time. The idea of probation was secondary to practice and grew in Anglo-Saxon countries, but historically it developed in two models described in the literature; the Anglo-Saxon (English-American) and the Franco-Belgian (Kusztal 2006, p. 11–20). "These models, in addition to the significant difference related to the specificity of the *common law* system, where practice overtakes the regulations and continental laws, where (legal) institutions only exist after the entry into force of the relevant legal standards, have some common features. These models are mainly based on the work of a highly specialized professional probation officer, operating within the group of social workers. Probation officers are institutionally independent from the judiciary, although their work focuses, among others, on providing judicial assistance. Within the work of probation officers with the ward themselves and their families, school or professional environment, educational and therapeutic elements dominate" (Kusztal 2006, p. 11–20).

In the Polish criminal law system there are many probational measures (see e.g. Kusztal, Muskała 2018). However, it is worth noting that – despite

a noticeable change (cf. Judicial statistics – Final judgments of adults in 2013–2017, 2019) – adjudicating many such measures without a reliable diagnosis and with such poor resources – including human resources (the number of professional probation officers is just over 5000, of which less than 3,130 employees are in the penal division, supported by less than 12,000 guardians (Report of NIK (Supreme Audit Office), Reg. no. 20/2018/P/17/106/LWR 2018)), must lead to numerous cases with an unsuccessful ending. Summary of all judgments related to the broadly understood probation (first of all, the exercise of supervision in the case of conditional release, suspension or remission of a penalty, the execution of the penalty of restriction of liberty and socially useful work imposed on the basis of Article 45 of the Executive Penal Code, as well as the exercise of electronic tagging) shows that over 1% of the country's population is covered by some probation measure, which places our country among the infamous European leaders.

Incidentally, it is worth adding that the use of such measures (especially the use of electronic tagging) generates additional effects known as *net-widening*[2]. This concept refers to the increase in the number of people in contact with the justice system and is defined as an unintended result of the use of new practices (Richard 2010, p. 113). The research quoted by T.G. Blomberg and his colleagues show that *net-widening* can reach from 10% to 50% (Blomberg, Heald, Ezell 1986, p. 59). The sanctions, which were intended, among others, to reduce the size of the prison population, by applying them to perpetrators of minor crimes who, in the absence of such measures in the range of penalties available to the courts, would have received short prison sentences of several months, unfortunately, did not meet these expectations. Perpetrators of minor crimes continue to go to prison for short-term sentences, while those who would otherwise remain outside the influence of the judicial authorities are subject to probation measures, as is the case with electronic tagging. As P. Moczydłowski notes in his work on electronic tagging, the application of this measure may increase the scope of social control, and moreover, "the problem lies not only in the fact that a new penalty measure is being introduced, which may lead to an increase in the population of convicts, but also in the fact that the punishment itself may turn out to be more severe" *(Moczydłowski 2006, p. 42; cf.* Clear, Cole 2003, p. 218–219). This last point in particular shows that *net-widening* can take place at any stage of contact with justice. This is in line with the much expanded definition of the discussed phenomenon proposed by J. Austin and B. Krisberg, also including *wider*, *stronger* and *different* networks in its area. This means an increase in the

[2] In the few Polish studies in which this issue appears, the term is usually quoted in its original wording without any attempts at translation, see for example Utrat-Milecki 2006, or is translated into "rozszerzanie sieci" or "ekspansja sieci", see Moczydłowski 2006; Barczykowska 2012, p. 87–100; Kusztal 2011.

duration or intensity of penal interventions, as well as the creation of new entities (institutions, agencies) to which supervision and enforcement of sentences are delegated (Richard 2010). It should be emphasized that when analyzing the literature on the issue of *net-widening*, one can find arguments showing at least potentially positive consequences of this phenomenon. It is suggested that such widening of the network could help to draw the attention of the community, the local community, to the so far unnoticed and unresolved social problems, such as domestic violence and abuse of psychoactive substances. In the latter case, *net-widening* is intended to help health services and institutions responsible for prevention and treatment to reach out to people using drugs.

The probation officer as well as guardian "performs tasks mainly for the court, and treating guardianship as probation is not only misleading, but because of the low effectiveness of the tasks it performs in the fight against crime, it even hinders the adaptation of the idea of probation in Polish society" (Pelewicz 2017, p. 135). It is difficult to point out in this short study the similarities and differences in the meaning of guardianship and probation, but the need to emphasize the diversity of these concepts should definitely be stressed. In the literature, especially in the field of social rehabilitation pedagogy, often these terms are used interchangeably, which sometimes does not allow for maintaining the clarity of the argument and generates further substantive errors. As P. Moczydłowski states in turn, the probation officer acts mainly as an assistant of the judge, which requires special emphasis, "because without understanding this phenomenon it is impossible to understand the enormous amount of bureaucratic work that probation officers do to serve the courts – without any visible effects, except for the full realization of the court's need of documentation" (Moczydłowski 2006, p. 103). As a result, the implementation of social rehabilitation and educational tasks of the probation officer "is only possible on the basis of a bureaucratic settlement of the case and no in-depth research is needed to realize the impossibility of their reliable performance" (Moczydłowski 2006, p. 134). In turn, according to R. Pelewicz, "such stratification and subjective duplication of activities in the area of supervision over the execution of imprisonment in the system of electronic tagging (punitive and security measures executed in this system) is deprived of rational axiological and organizational justification" (Pelewicz 2017, p. 135).

Currently, the process of reintegration of convicts into the local environment is becoming the most important aspect of probation activity. And although the atmosphere around the probation has not always been favorable, its current significance is based on the following premises: "1) not all crimes are serious enough and their perpetrators demoralized enough to be punishable by custodial sentence as part of the care for public safety, 2) almost all people return to society after serving their prison sentences, and nowadays nobody doubts the negative consequences of penal isolation, which are also manifested by the massive problems in the process of social readaptation, understood as taking up pro-social roles

again, 3) control of the perpetrators of crimes is much more effective than leaving them on their own" (Barczykowska, Dzierzyńska-Breś, Muskała 2015, p. 175).

In the 20th century, it was widely accepted that the relation in the guardianship was the key to its effectiveness. It was important to focus on the personal relationship between probation officers and individual offenders and to believe in the personal influence of the court employee on the wards. *Casework* was the probation officer's main instrument. However, since the turn of the century, many studies have started to shift both thinking and practice in a different direction, referred to as *case management*. This is related with the paradigm shift in thinking about the possibilities of social rehabilitation influences. It is the result of the achievements of Canadian researchers including D.A. Andrews and J. Bonta and the *what works* movement, the main ideas of which come down to risk assessment and the search for crime-inducing factors leading to criminal behavior.

And although the concept of social rehabilitation has survived, despite all odds, adapting to the three dominant discourses of the modern penal system, the tension between the findings of *evidence-based practice* (see Muskała 2016, p. 89 et seq.), and managerialism gaining the increasing importance on the grounds of court guardianship is serious and real. These three discourses are utilitarianism, managerialism and punitive approach respectively. Utilitarian narratives highlight the overall benefits of crime reduction, which are the result of effective social rehabilitation; punitive approach seeks to satisfy the social desire for severe punishment, while managerialism seeks profitability and predictable risk control.

Over the last few years, also in Poland, court guardianship has been increasingly described in the *case management* discourse. This management of the individual is increasingly evident in the "directives" of the work and practice of the probation officer[3], a clear example of which in Polish law are the levels of risk of recidivism which the probation officer is responsible for assessing.

[3] In view of the many areas of the probation officer's activity described above and the increasingly specialized tasks, the question about the possibility of good preparation of the probation officer for work becomes more and more "urgent", as the change from a *case work* model to a *case management* model has become a fact. It seems that the "pedagogical arm of justice" is being replaced by an "organizational" arm – the quicker and more efficient the better. M. Heine and V. Będkowska-Heine took into consideration the problem of the adequacy of the current system of education of special educators (including social rehabilitation educators) to the educational and pedagogical tasks facing them (Heine, Będkowska-Heine 2010, p. 25-37). The competence model of cultivation that currently dominates in education assumes that the effect of education and professional preparation is precisely a package of personal, cognitive and behaviorally observed attitudes to work in a specific area of activity (Sajdak A., (elaboration) Division of educational strategy based on the work of B. Joyce, E. Calhoun, D. Hopkins and D. Gołębniak, materials available to the author)). Guardianship (for families and adults) may be only one of the areas of professional activity of a social rehabilitation pedagogue, but competence to work with socially maladjusted people is necessary especially in this area. It can be assumed that the acquisition of competences takes place in the process of "apprenticeship", for example during internships or legal apprenticeship, although the question of the welfare of the wards or supervisors remains open. (Heine, Będkowska-Heine 2010).

This requirement was introduced by the Regulation of the Minister of Justice of 26 February 2013 on the manner of performance of duties and powers by the probation officers in executive penal matters. Then, in almost unchanged form, it was incorporated into the Executive Penal Code (Article 169b) (Act of 6 June 1997 – Executive Penal Code, Journal of Laws of 1997 no. 90 item 557 as amended). However, as B. Stańdo-Kawecka shows in her insightful analysis, references to the theoretical assumptions of the what works movement and the R-N-R concept that emerges from it (from the three fundamental principles of *risk*, *need* and *responsivity*) are not entirely consistent and the criteria for assigning to individual risk groups are at least doubtful. As she notes, "The mere introduction of the division of perpetrators placed under guardianship into three groups of recidivism risk based on arbitrary, rigid and controversial grounds [...] [without M.M.] equipping probation bodies with empirically proven, reliable, structured tools for assessing the risk of recidivism and providing a base of programs aimed at changing dynamic risk factors [...] has rather little to do with building a risk management-oriented probation service in the sense of modern European standards' (Stańdo-Kawecka 2014, p. 35–36).

It seems, however, that sometimes going down this road can be very risky. Solutions referring to the paradigm of risk estimation and management of an individual on the basis of probation sometimes take quite controversial forms. In the United States, in the case of people classified in the low-risk group, it can be said, according to the findings of the creators of the R-N-R concept, that in this case the undertaken social rehabilitation activities do not reduce the level of return to crime (Andrews, Bonta 2006), in principle, the contact with the probationer was abandoned and replaced by a report submitted in the so-called *kiosk supervision*. It is an automated electronic reporting system, the task of which – according to the authors' assumptions – is to reduce the need for a low-risk offender to meet with the probation officer. The report is submitted in a device resembling an ATM which, after biometric identification (hand or fingerprint) – as it was specified in one of the studies – prompts the person to answer a few questions about issues which are usually discussed with the probation officer. Some of the devices allow for the payment of various fees or fines or randomly select people for drug testing (more broadly: Bauer and others. 2015; Jesse, Halberstadt 2011).

However, pedagogical literature still "calls" for reflection on the rightness of returning to traditional methods of guardianship work: "A probation officer who respects the *case work* principles in their work with the wards can effectively resolve perceived conflicts between the requirements of social control and influences consisting in education, can balance the right to subjectivity and autonomy of the supervised person with the power and formal authority given to them by the court, and can finally combine the caring supervision resulting from the ordered probation measure with social rehabilitation influences stimulating

the constructive functioning of the ward in the social environment" (Węgliński 2016, p. 57).

More and more studies indicate that both the quality and consistency of the relationship between offenders and their probation officers are key to successful practice both from the perspective of the criminal, in terms of promoting motivation, and of the society (or system) within the scope of successful social readaptation (Rex 1999, p. 366–383; Beaumont, Caddick, Hare-Duke 2001; Dowden, Andrews 2004, p. 203–214).

This relationship is formed in the process, so it requires time for the diagnosis of the ward, and then for consistent implementation of the plan – a program of individual social rehabilitation actions. So how can you optimize the probation officer's work?

As R. Opora states, "it is worth to look at the idea of working with an individual case in a slightly different way and emphasize the importance of individual influences, in which the relationship between the educator and the ward plays a central role. Literature discussing the creation of an effective relationship at work with an individual case highlights the importance of empathy, respect, positive interest in a person, a skillful approach to achieving goals, honesty, being specific and predictable" (Resistance 2013, p. 75). "Being in a relationship" requires, above all, time to build and maintain it, which is not helped by the excessive workload of probation officers, which has been discussed in the literature for years. "If, however, the legislator assumes a significant increase in the adjudication of freedom instruments of criminal law reaction to a committed criminal act and requires the effective performance of probation tasks and educational activities, as well as continuous monitoring of the process of social rehabilitation of the convicted person, then the productive and thus effective implementation of the objectives of electronic tagging requires entrusting probation officers with even greater normative trust and extending the scope of decision-making powers in the course of execution of sentences, while at the same time minimizing the interference of courts and judges (court registrars) in these proceedings" (Pelewicz 2017, p. 136). Thus, it is widely postulated that "probation officers should be relieved of tasks and activities of a legal, administrative or organizational nature, in order to expose and focus (keep) their activity on the tasks of a probational, educational and social rehabilitation nature. As it is defined in the Act of 27 July 2001 on probation officers (Journal of Laws of 2001 No. 98, item 1071, as amended), specifying in Article 1, the nature of the tasks of professional probation officers is educational and socializing, diagnostic, preventive and controlling" (Pelewicz 2017, p. 136).

Theoretical considerations constitute an aid to these views. It is about the concept called the Good Lives Model (Ward, Maruna 2007) which is gaining more and more recognition in the disciplines dealing with changing criminal behavior. This latest theory by T. Ward, although drawing strongly on the R-N-R model,

expands it with elements of positive psychology, referring to the resources and needs of the individual themselves.

In the literature in the field of social rehabilitation pedagogy in the context of the practice of supervision over the sentenced person/ward, the roles and tasks of persons responsible for the social rehabilitation process are defined by three models: counselor – where the probation officer can motivate the probationer, educator/pedagogue – where they help to accumulate, develop and implement human capital and advocate (ally) – able to develop and, above all, use social capital (Farral, McNeill 2010, p. 214) – it should be added, legal, positive social capital (Barczykowska 2011), which in the case of criminals is often destroyed. If they cannot perform all these functions on their own, they must be able to help the former/the perpetrator to access them.

Today, unfortunately, probation officers are moving further and further away from these roles in their activities. Their activities are mainly focused on elements of control. The role they play is much closer to a guard than any of the above.

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