

Recalling conditionally released prisoners in Austria

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Abstract

The legal justification for the possibility to recall conditionally released is to motivate the offenders not to commit any further offences. This article discusses whether the practical implementation of recall might not sometimes prove counterproductive as regards this special preventative aspect. Additionally, the extraordinarily important role of the staff of the probation service in the support of the released offender outside prison is emphasized. The probation service also has a key role when it comes to deciding upon ordering recall.

Keywords: Recall - Probation service – Recidivism - Special prevention.

I) Introduction

I.1) Legal aspects

The proverbial “Sword of Damocles” hangs over those who are conditionally released - recall. In Austria, those conditionally released can be – under certain circumstances – recalled to prison², with the consequence that the offender has to serve the (whole) rest of the prison term.³

According to the Austrian Criminal Code (*Strafgesetzbuch – CC*)⁴, conditional release has to be revoked if the offender

- is convicted again for a crime committed during probation time,
 - recklessly disregards directives despite formal warnings during probation time, or
 - persistently fails to keep in contact with his probation officer during probation time⁵
- and
- if revocation of the conditional release seems advisable because of special prevention aspects.

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² Recall is also possible for conditionally released offenders of preventative measures (e.g. psychiatric institutions): They have to return to the detention facility. This aspect will be neglected in this paper which exclusively deals with recall after having been conditionally released from prison.

³ There are limited possibilities of re-release. It has been suggested (by Beclin et al (Workinggroup Youthlaw), Thamsweiger Thesen, forthcoming) that the court should be able to recall only for a part of the open prison term, whereas currently according to law the whole open term has to be ordered (see also supreme court decisions 19. 1. 2011, 15 Os 178/10f, 11 Os 171/10x).

⁴ BGBl. Nr. 60/1974 as amended by BGBl. I Nr. 66/2011. Art 53 CCP, details see infra p.8.

⁵ These rules do not only apply for recall of conditional release, but also for revocation of conditional and semi-conditional leniency.

Where recall is not pronounced, judges can instead extend the probation time.⁶

The decision on recall is, in cases of recidivism, made in principle by the court dealing with the “new“ offence (details concerning jurisdiction in Art 494a (2) CPC and Jerabek, 2010, Art 53 no. 25 et seq.), and in cases of non-adherence to directives and neglecting contact with probation officers, in principle the court who decided about the conditional release (*Vollzugsgericht*) in the region in which the offender had been imprisoned.⁷

I.2) No official data available

Although recall is a daily occurrence in Austrian court rooms, there is no official data available open to the public on the frequency of recall after an early release.⁸ Additionally, there have so far been no studies conducted on the reasons why judges do in fact revoke conditional release or decide against it, respectively, beyond the legal grounds.

I.3) Approach towards tendencies in practice

In order to get a first picture of the factual application of the rules on recall after an early release a short questionnaire for interviews with experts was designed. Lawyers, judges and probation officers, the professional groups of practitioners strongest involved in the decision upon recall, both from the east and west of the country (in Austria, there is a huge difference in the jurisdiction of courts between east and west, see Burgstaller/Császár, 1985, 1 et seq.)⁹, were interviewed face-to-face and by phone. Public prosecutors have not been included in the sample since it is generally the practice of the prosecuting body to demand recall whenever the legal preconditions exist. This undifferentiated approach has been criticised by a lawyer during the interview.

The interview questions were aimed at getting an impression on how often offenders were recalled after conditional release, explaining which of the reasons for recall was the one playing the most significant role in practice and why, and if the offenders actually understand the consequences of them being on probation. Since the role of the probation officer is an important one as regards recall, we also asked for opinions whether the appointment of supervision by probation service and the work of probation officers have a positive influence on the number of conditional releases revoked. After only a few interviews, estimations of a tendency to confirm this implementation of legal rules in practice could be made.¹⁰

II) Conditional release – the basic precondition for recall

Conditional release from prison is a basic requirement for recall to be pronounced, therefore, the conditions for conditional release according to the Austrian CC are here described briefly.

⁶ See in detail p. 15 et seq.

⁷ Art 16 (2) No 12 Prison Act (Strafvollzugsgesetz – StVG), BGBl. Nr. 144/1969 as amended by BGBl. I Nr. 111/2010. For financial reasons the former deciding senate of three judges has been replaced by a single judge; the usefulness in allowing only one person do decide in matters of such importance has to be put in question.

⁸ There are data available concerning recall of persons under supervision by the probation service, see Hofinger/Neumann, 2010, 32 et seq. These data are, however, only part of the picture, and additionally, they are not divided into recall after conditional release and recall after a partly suspended sentence. Moreover there exist studies, those again, however, do not specially deal with recall (see Hofinger/Pilgram, 2010, 15 et seq).

⁹ The study of Burgstaller/Császár, 1985 has shown this phenomenon and still has validity even today. Usually, courts in the east punish more severe than courts in the west. This phenomenon is called the east-west-divide. It is also applicable for conditional release (see Hirtenlehner/Birkbauer, 2008, 25 et seq). Therefore, in order not to give a distorted image of the situation, it was necessary to be careful to cover eastern as well as western regions with our interviews.

¹⁰ Due to the uniformity of estimations covering all professional and regional areas the conducting of interviews was stopped after only 15 interviews.

According to Austrian law, a convicted person is sent to prison if the custodial sentence is pronounced as unconditional or partly suspended. “Partly suspended“ means that already, with the judgement, part of the sentence is conditionally suspended and at that time a probation time is pronounced. In both cases (unconditional and partly suspended custodial sentences), offenders in principle do not serve the whole time but have¹¹ to be conditionally early released under certain conditions (Art 46 CC).

II.1) Effort to increase numbers of conditional release

A few years ago the legal provisions on conditional release were amended in the so-called “Haftentlastungspaket”¹² (an Act to reduce the strain of the prison system) and thereby the possibility to pronounce conditional release was extended. At the same time, obligatory supervision by the probation service¹³ was extended in order to facilitate the transition from prison into freedom for the offender as well as to allow for a more efficient follow-up care. Thereby, the purpose was to avoid recidivism (re-offending) more effectively – and, as a consequence, also to avoid recall.

The political background for the enlargement of conditional release was that the overcrowded prisons should be relieved and as a consequence also costs reduced.¹⁴ Even if this lead to a, at least for the short term, increased pronouncement of conditional release in practice (Bruckmüller/Hofinger, 2010, 67), the situation in the Austrian prisons has not significantly changed for the better so far. According to the media, the prisons are still overcrowded in September 2011, with a population of 8443 persons imprisoned (Salzburger Nachrichten 9.9.2011).¹⁵ One reason among many others, which due to the narrow scope of the paper will not be addressed here, might be insufficient crossover, respectively follow-up-care, partly caused by the probation service being overloaded with clients¹⁶ as well as the current practice of recall.

II.2) Application of conditional release

The three preconditions for an early release according to law¹⁷ (the last two of which show the close and harmonised relation between recall and early release within the system of the law) are: serving a minimum period of the term, an assessment of the risk of recidivism, and the determination of a probation time and if applicable the ordering of directives or probation assistance for the period at hand.

- serving a minimum period of the term

In general, one half of the period pronounced, but at least three months, must have been spent in prison.¹⁸

¹¹If those conditions are met, the offender has a legal claim to be released. Conditional release is „no act of mercy as sometime misunderstood“ (Fabrizy, 2010, Art 46 no. 3).

¹² That came into force on 1th January 2008.

¹³ See details p. 13 et seq.

¹⁴ The *Haftentlastungspaket* had been prepared under the motto „*Mehr Sicherheit durch weniger Haft*“ – „Increase security by cutting prison terms“ (see Grafl/Gratz, et al., 2001, 61 et seq). Earlier conditional release in combination with good follow-up care and probation time is more useful and effective than serving the full time without according transit management and follow-up care by e.g. the probation service.

¹⁵ See also data to prisons

<http://www.justiz.gv.at/internet/html/default/8ab4a8a422985de30122a913284b6243.de.html> (10.10.2011).

¹⁶ To this problem see infra p. 14 et seq.

¹⁷ Art 46 CC.

¹⁸ Art 46 (1) CC. With crimes committed prior to the offender’s 21st birthday (young adults), this minimum, however, is only one month (Art 46 (3) CC). The minimum period of time spent in prison for lifers is 15 years, and release is after this time only possible on the additional condition that it is to be expected that the offender will not commit any future crimes after release (Art 46 (6) CC).

- *an assessment of the risk of recidivism*

The second precondition is that the conditional release, supported by directives (conditions) and probation assistance, is not less suited to detain the offender from committing yet another offence than further serving the sentence would be. This shows that nowadays, compared to the old legal situation, the special preventative aspect is finally in the centre of ordinary cases. Special prevention means that the penalty is necessary to deter the individual offender from committing further similar crimes, whereas general prevention has deterring other people from committing a similar crime as goal. Only in exceptional cases do general preventative considerations still (also after the above mentioned amendment) play a role.¹⁹

For the special preventative prognosis the court takes into account the extent that the penalty has been executed so far, especially the extent to which medical, rehabilitative or psychotherapeutical treatment commenced during custody has led to a change of the circumstances under which the offence had been committed, or such a change can be achieved by way of directives and/ or probation assistance. Other criteria for a positive decision are e.g. the offender's personality, chances of reintegration and behaviour in prison.

It is, however, often difficult to estimate how the offender will behave in freedom. Therefore deciding judges should make use of the possibility of asking probation officers or managers of prisons for advice upon the decision in all cases.²⁰

Since recidivism is one – and, as will be shown, in practice, the prevailing – reason for recall, the question arises why this prognostic system often fails. The rules and conditions on early release should have the consequence that (only) those with a suitable prognosis are early released. In principle, only they are released. Additionally, many are appointed a probation assistant as well. In this system that, provided it works, tries to ensure that the positive personal development made in prison is transported into freedom, recall should not occur as often as it does²¹. Whether this is a problem due to the management of the crossing over from imprisonment or something else, however, is hard to tell and further dwelling on this question leads to speculation.

- *the determination of a probation time and, if applicable, the ordering of directives or probation assistance for the period at hand*

The probation time has to be fixed, between one and three years. It can be extended to a maximum of five years where the continuation of a medical, rehabilitative or psychotherapeutical treatment to which the offender already gave his consent is necessary in order to justify the conditional release.²² In addition, probation assistance can or has to be

¹⁹ Between having served one half and two thirds of the time of detention an offender must not be released if due to the seriousness of the crime the further serving of the sentence is by way of exception necessary in order to counter the committing of offences by others. After two thirds of the sentence have passed, the offender has to be released notwithstanding general preventative considerations if the other conditions are met.

²⁰ Art 152 a StVG.

²¹ See estimated number of recalls revoked: p. 10.

²² A special case are those convicted for crimes against sexual integrity and self-determination; probation time can be five years as well (Art 48 (1) CC). The same applies for released from institutions for offenders in need of dehabitation treatment (Art 48 (2) CC). Probation time for conditionally released from life sentence is 10 years (Art 48 (1) CC). For those released from institutions for mentally disordered offenders or dangerous recidivists the probation time is, depending on the individual sentence, five or ten years (Art 48 (2) CC). The probation time can furthermore additionally always be extended for up to three years for offenders released from life sentence or convicted for more than five years for sexual offences, notwithstanding that it might already have been extended once or more. This means that it is de facto possible to put someone under life-long supervision.

ordered and additionally directives (conditions) can be ordered. Since disregarding these directives can lead to recall, the details are explained below.

III) Recalling conditionally released prisoners

III.1) Legal provisions – strict rules but margin of discretion?

As mentioned before, conditional release has to be revoked in cases of recidivism, or where directives are disregarded or probation service is not cooperated with. An additional precondition for pronouncing recall is that revocation of the conditional release seems advisable because of “special prevention” aspects. The law does not provide for clear rules on the necessity of recall out of special preventative aspects, but does allow for a certain margin of discretion for the judges to decide. It would seem advisable for the probation officer, where probation has been ordered as directive, to be interviewed by the judge about his estimation of the situation. This way, judges would not be left alone with the situation and, in consequence, making this important decision. In cases of recidivism, the probation officer’s statements, however, are valued differently when it comes to their influence on judges’ decision.²³

III.2) Practical implementation – recall used frequently

In Vienna the experts estimated the number of recalls in principle to be between 50% to 70%²⁴; lower numbers (of around 50 %) were estimated for recall of minors, and a higher number for drug crimes, around 70 % – 80 % estimated in Vienna.²⁵ In the southernmost province the number of recall was estimated as rather low.²⁶ In court practice in the westernmost province recall seems to be *ultima ratio*: it seems that more or less always probation time is extended first, and only if someone was caught re-offending a second time would judges revoke the conditional release.²⁷ This is unsurprising to those acquainted with the Austrian legal landscape; interviews showed a significant distinction between the court practice in the east and the west of the country as regards recall.²⁸ This reflects the general court practice, i.e. an “offender friendly“ practice in the west, explicable by the general attitude²⁹ of judges, which might well have its roots in their training. In Vienna, there seems to exist a difference in numbers on recall depending on which court decides: According to one lawyer, district courts (*Bezirksgericht*), responsible for judging minor crimes, almost never revoke conditional release, whereas the regional courts (*Landesgericht*) do it more often.³⁰

²³ See further infra p. 16.

²⁴ Lawyers say 60% to 70% and judges 50% - 70%. There were only one lawyer from the west whose answers differed: See estimated recalls in Innsbruck (west) with nearly 100 %, which is interesting considering at the one hand that according to experience with the east-west-divide, court practice in the west should be more offender-friendly, and on the other hand that another lawyer also from the west gave the opposite estimation (see also Hofinger/Neumann, 2010, 32 et seq).

²⁵ Estimation of lawyers in Vienna.

²⁶ Lawyer from Carinthia.

²⁷ Lawyer’s estimations, confirmed also by a probation officer from the same region.

²⁸ To the east-west-divide on sentence practice see supra p. 7.

²⁹ Mentioned by lawyers.

³⁰ See Arts 30 to 32a CCP (Austrian Criminal Procedure Code – Strafprozessordnung) BGBl. Nr. 631/1975 as amended by BGBl. I Nr. 67/2011.

III.3) Recidivism as precondition

III.3.a) Legal aspects – wide field of application

The offender has to be recalled if he commits a new offence during the probation time for which he is also convicted, and as well if recall seems necessary from a special preventative point of view.³¹ For the evaluation whether recall is necessary out of special preventative considerations³² the sentence for the new offence has to be taken into account. If this new sentence is already sufficient in order to detain the offender from further committing offences, the old sentence must not be executed. The sentence for the new offence has to be pronounced independently of a former sentence (see details: Maletzky, 2011, 69 et seq).

According to decisions from higher courts, fresh offences that necessarily lead to recall are those based on the same impairing attitude,³³ (7 Bs 40/89 OLG (*Oberlandesgericht* – Higher Regional Court) Innsbruck), and are of the same kind (7 Bs 569/88 OLG Innsbruck), and are committed only shortly after release (7 Bs 40/89 OLG Innsbruck and 7 Bs 569/88 OLG Innsbruck). In principle it does of course make sense to decide against recall where good conduct over a long time can be observed. The offender has proven his good behaviour – at least for a longer period – and might be reintegrated in society or the working environment and therefore resocialised. It would be absurd to pronounce recall for an offence committed a long time ago. On the other hand, however, judges should, where recidivism occurs shortly after release, to a greater extent consider the circumstances that lead to the new offence. Often the reason can be found in the offender's inability to cope in freedom after life predetermined and arranged in prison. It is not appropriate to recall at once in these cases without giving the offender, especially where the new offence is a minor one, a second chance, for example where recidivism can be explained with insufficient crossing-over management. This is often the case with drug dependent offenders who are under substitution treatment during prison. The medication used as a substitute for the drug for a few days and a leaflet listing the respective institutions the person can go to is handed over on release; this is in many cases too little – these persons need literally to be “picked up” (in details to the problems of crossover between prison and freedom of drug addicts see Bruckmüller et al, 2011, in print).

In principle, it has to be mentioned that most offenders don't understand length of and reason for probation time. This issue will be discussed in more detail below (in the section on disregarding directives and formal warnings).

III.3.b) Practical implementation – recidivism as main reason to recall

The overwhelming majority of recalls clearly seem to be for recidivism. Nearly all practitioners questioned said that it was by far the main reason, and that they had only seldom had cases where recall was pronounced for one of the other two reasons.

In the following, the reasons for judges to recall are listed³⁴ (in practice judges do not have to give any reasons for not recalling). There is a wide spectrum of answers, but three main reasons could be identified: prior convictions, the nature of the crime (both the original one

³¹ It has to be emphasised that it is not necessary that the reoffender is convicted for the new offence during the crucial period (see details Jerabek Art 53 no. 5' Seiler, 2008, § 53 no. 375).

³² It is meant in this context that the offender's personal situation, his social integration, eventually working environment etc. are taken into account when considering the probability of him becoming recidivist.

³³ That means especially that the offender committed another crime out of the same motivation.

³⁴ Other aspects of significance that do not, however, necessarily lead to recall, are in detail infra p. 12 and p. 13.

for which the offender was convicted in the first place and the one committed during probation time) and the time at which the re-offence was committed. Although Austria does not, in principle, know the concept of binding effect of higher court decisions, the reasons mentioned in the interviews reflect the higher court decisions mentioned above.

The prior convictions play an important role for the decision to revoke the conditional release, as does the fact that the new offence is in some sort of connection to the old one, is e.g. of the same kind or against the same legally protected interest.³⁵ Confronted with a recidivist, judges think that the re-offenders have not learned their lesson.³⁶ The severity of the new crime is an argument for recall.³⁷ It was said that the most recalls occurred in cases of or in connection with drug offences.³⁸

The sooner the new offence is committed, the more likely conditional release is revoked.³⁹ Of course it should be taken into account that it is mostly shortly after release that people are confronted with problems.⁴⁰ In that respect, the interviewees support the criticism expressed regarding higher court decision. They also mentioned that prison usually does not have a positive influence on the social network, and people very often take the social contacts established in prison with them when released. What is more, it might prove difficult for released offenders to get a job, and the day structure in freedom is entirely different from that in prison.⁴¹

III.4) Disregarding directives as precondition

III.4.a) Legal aspects - vague definitions but indications

The court can order directives (conditions), instead of or in addition to probation supervision. A directive is an order or a prohibition that seems suited to deter the offender from committing further offences. Often ordered directives are therapeutical treatments⁴², therefore, also therapists play an important role in the recall proceeding.

Directives which would be an unacceptable intrusion into the offender's personal rights or his way of living are not allowed.⁴³ The court has to order directives where this seems necessary and purposeful in order to deter the offender from committing further criminal offences.⁴⁴ Again, special preventative aspects are taken into account.

If the offender disregards the directives recklessly although he has received a formal warning, recall has to be pronounced where, again, additionally special preventative considerations demand recall.⁴⁵ The term "recklessly" is a vague term. It includes all kinds of intent, also *dolus eventualis*, but excludes negligence. The legislator decided on the use of the word "recklessly" as combining all these elements (Jerabek, 2010, Art 53, no. 10). In practice, it might prove difficult to prove the offender's intent on the one hand, and on the other,

³⁵ Estimated by lawyers and a judge.

³⁶ Statement by a lawyer.

³⁷ Judge, lawyers and probation officer.

³⁸ Lawyer.

³⁹ Judge, lawyers and probation officer.

⁴⁰ Probation officer, lawyer.

⁴¹ Probation officer.

⁴² See details Art 51 CCP.

⁴³ In practice, directives play an especially important role where offenders dependent on drugs are involved, or in cases of violence anger management courses (*Anti-Gewalttrainig*) are ordered.

⁴⁴ Art 50 (1) CC.

⁴⁵ Art 53 (2) CC.

circumstances outside of the offender's control could be the reason for him acting in a way interpreted as "recklessly" disregarding. An example would be a drug addict living on the countryside who has huge difficulties to follow the directives to regularly go to therapy because the institutions he is ordered to go to simply do not exist (see Bruckmüller et al, 2011, in print).

The condition that the offender has to be warned formally where he disregards directives – which means a warning that makes the offender mentally recap the directives and reminds him to adhere them – is only fair. Some offenders do not understand the content of the directives or the consequences of disregarding them to a sufficient degree. It was confirmed by most interviewed experts that some people might not understand the gravity of the situation when they reoffend and they do not necessarily understand that they can be imprisoned easily. Therefore the practice, i.e. that a special notice of the threat of recall is not a necessary element of a formal warning (see Jerabek, 2010, Art 53, no. 10), seems to, in reality, pass by the offenders' needs. It should be among the judges' duties to make the possibility of recall clear when issuing the warning. This should also be the probation officers and defence lawyers (where such are at hand) responsibility.

III.4.b) Practical implementation – marginal significance

Interviewees identified the number of recalls because of disregarding directives as marginal. This might, however, well be explained by the necessity to formally warn the offender, because through the warning the offender is better able to understand the reason and consequences of being on probation.⁴⁶ Interestingly enough, there was no significant east-west-divide discernible here. Where recall because directives had been disregarded occurred, it was said that it happened mostly in cases of or in connection with drug offences.⁴⁷ Yet it seems problematic in this context that, especially in regard of drug addiction, relapse and therefore disregarding directives is part of the medical condition. Judges should keep this medical aspect in mind (see details Bruckmüller et al, 2011, in print).

Also sex offenders are given directives. An interesting aspect is that here general preventative aspects can play a role, as one judge explained: Where a group therapy for sex offenders has been ordered as a directive for minors, disregarding it necessarily leads to recall, because it would be unacceptable from a general preventative point of view if other minors in the same group therapy would see that not doing so is not punished.

III.5) Neglecting cooperation with probation service as precondition

III.5.a) Legal aspects – vague definitions and no indications

The third of the three listed reasons for recall is the offender's persistent failing to keep in contact with his probation officer.⁴⁸ The Austrian system of probation does not focus on the control of the offender by the probation officer, but on the support and assistance of the offender. The probation officer has the duty to encourage the offender in his situation after release as far as possible (e.g. house and job hunting). Staff of the probation service also have a duty to report to the court. Maybe a better translation regarding the preliminary tasks a probation officer has to perform in Austria would be „probation assistant“ as it is also called in German – “*Bewährungshelfer*”.

⁴⁶ Stated by a judge.

⁴⁷ Stated by lawyers.

⁴⁸ Art 53 (2) CC.

A first report has to be made six months after the order of probation assistance, another report at the end of the probation period. Furthermore, a report has to be made when the court demands it or where it is necessary to answer the purpose of probation assistance, and in cases of revoking the appointment of probation assistance. One interviewee called his work the “high art to manage the balance act of establishing trust to be better able to help and reporting when necessary“.

In principle probation service has to be ordered if it is necessary from a special preventative aspect. As mentioned before, the so-called “*Haftentlastungspaket*” extended the obligatory order of probation assistance after early release. The legislator recognises the importance of the probation officer both for the support of the offender and the proceedings as a whole, especially the question of recalling in the individual case.

Therefore probation assistance has to be ordered by the responsible court if the conditionally released offender (Art 50 (2) CC)

- is released prior to having served two thirds of the sentence,
- has committed the crime he was sentenced for prior to his 21st birthday,
- had been sentenced for a crime against the sexual integrity and self-determination⁴⁹,
- had been sentenced to prison for more than five years, or
- had been sentenced for life.

In the first two cases the court has only to restrain from ordering the probation service if it is to be expected that the offender won't commit any future offences even without ordering due to the kind of his offence, his personality and his progress so far. According to law the period for supervision is fixed by the court, and can never be longer than the probation time.

Obligatory ordering supervision by probation service seems, at first glance, well defined and clear; also for this legal provisions accounts, however, that the implementation is “open“ and allows for a certain margin due to the link to special prevention. The probation service law (*Bewährungshilfegesetz*) provides for rules according to which the judge has to ask for a statement by the probation service for the individual case whether or not probation assistance would seem useful.⁵⁰ According to a probation officer interviewed, courts only seldom make use of this possibility. It is useful if the probation service gives an estimation already at the hearing upon the decision about conditional mitigation⁵¹ in all cases.⁵²

It was the overall impression of the interview partners that the legal extension of obligatory probation assistance does indeed help to detain from re-offending. The amendment has unfortunately not been worked out with special consideration of the financial side. The Austrian probation service (called „NEUSTART“⁵³ [„Re-start“]) has huge problems: since the amendment they have more clients, but get no more money from the state for trained personnel. Therefore the probation service is “underfunded and overstrained with the number of cases each officer has to care for”.⁵⁴ The amendment was an important step and should not be cancelled, but it is feared by the authors that clients may now be supported less extensively than is necessary.

⁴⁹ In these cases additionally a so called „court supervision“ has to be ordered (Art 52 a CC).

⁵⁰ Art 15 Probation service law (*Bewährungshilfegesetz* – BewHG) BGBl. Nr. 146/1969 as amended by BGBl. I Nr. 64/2010.

⁵¹ Art 494a (3) CPC.

⁵² Art 152a StVG does only provide that where it seems practicable.

⁵³ NEUSTART is an association, see details <http://www.neustart.at> (10.10.2011).

⁵⁴ Interview probation officer and see also article Grafl/Gratz et al, 2010, 127 et seq; Birklbauer, 2008, 710 et seq.; Birklbauer/Hirtenlehner, 2009, 145 et seq.

The phrase “persistently fails to keep in contact with his probation officer” needs to be interpreted and has not, as is the case with the rules on disregarding directives, been interpreted so far by the courts. According to doctrine, the offender has to prevent the probation officer from influencing him with repeated and constant behaviour (see Fabrizy, 2010, Art 53 no. 8) and therefore signalling that he does not want to accept the help of the probation officer. Crucial is therefore whether the offender contributes his part to enable the probation officer to meet him by and large as frequent and in such temporal extend factually necessary in the individual case (Jerabek, 2010, Art 53 no. 11). If the requirement of persistency is met, the cause for recalling is fulfilled, further requirements such as a formal warning are not intended (Jerabek, 2010, Art 53 no. 11). A formal warning analogous to the one required where directives are disregarded would be reasonable, since the offenders do not, as the interviews show, understand the relationship between refusing probation assistance and recall. It seems useful and necessary also in these cases to make the situation comprehensible for offenders by being emphasised by the judge. It seems to be the practice that the responsible probation officers in such cases approach the judge so that the judge instructs the offender a second time.

III.5.b) Practical implementation – basically no significance

Interviews showed that this reason for recall hardly ever occurs in practice. The probation officer from the west of Austria had numbers available: there was only one case of recall not because of recidivism in three years in which he worked with 300 clients. This estimation is consistent with the numbers given by a probation officer in Vienna: He estimated the number of recalls because of neglecting the contact with the probation officer at around 1 %.

Interestingly enough, there was no significant east-west-divide identifiable for the reasons for recall. The probation officers’ engagement to motivate their clients might be the cause for this situation. Their reports to court are objective, also as regards the extent of the contact and going to appointed meetings, yet their prognosis usually is very benevolent⁵⁵. An additional aspect might be that there are no higher court decision or intern guidelines dealing with that matter.

III.6) Extending the probation time as an alternative to recall

An alternative to revoking the conditional release in all three cases⁵⁶ is the extension of the probation time of up to a maximum of five years.⁵⁷ In addition to the extension it has to be reviewed whether and what kind of directives have to be issued anew and whether probation assistance has to be ordered, if it had not been ordered in the first place.⁵⁸

The advantages and disadvantages of recall and extending probation time were explored in the interviews. In addition to the previous convictions, the kind of offence and the timing of the offence were relevant. For serious crimes extending the probation time is hardly an option.⁵⁹

Further social reintegration and a good contact with the probation officer, the offender’s behaviour during trial and whether or not he accepts responsibility are of importance, as is the compensation provided for the victim.⁶⁰ The personal situation mostly only plays a role in

⁵⁵ A lawyer pointed out in the interview that probation officers mostly do not speak against their clients.

⁵⁶ The possibility to extend the probation time instead of recalling has been amended and extended in 2001; before, it was only possible in cases of recidivism.

⁵⁷ 15 years in cases of life sentences.

⁵⁸ Art 53 (3) CC.

⁵⁹ Stated by a lawyer.

⁶⁰ Answers by lawyers, probation officers.

cases where minors are threatened with recall.⁶¹ This can probably be explained by the fact that the Juvenile Court Assistance provides the judges with the juveniles' life stories. In cases of adults, the judges do not seem to reflect the current situation of the offender so much.

The role a probation officer plays in the proceedings is regarded important, especially in cases of juvenile delinquency. The same accounts for therapists. A positive statement from probation officers or therapists signals that the offender tries hard.⁶² Judges obviously trust probation officers, since they know their clients well.

Conclusions

According to practitioners' assessment, in Austria recall from conditional release from prison seems to be pronounced in a large number of cases, especially because of offences committed during probation time. For offences committed only shortly after release, recall seems to be executed nearly automatically and therefore excessively. Practice orients itself on decisions of higher courts, but judges' opinions that offenders had not learned anything from their last served sentence does, however, play an important role as well. This is not, though, the real cause for recidivism; for many an offender it is difficult to manage the change from prison out into freedom. It is often the case that skills and abilities acquired in prison cannot be transferred into real life, due to e.g. structural differences concerning the day rhythm. Even if an individual plan for both the prison time and the crossover management is worked out it is often difficult for the persons to realise these plans. Quick recidivism therefore is – one is tempted to say so – pre-programmed. It should additionally be taken into account that many offenders do not understand the significance and meaning of the probation time and the consequences of recall.

Therefore, the probation officer plays a significant role. In order to fulfil their duties, probation services should have the means at hand for all their clients, which is at the moment not possible in Austria because of the financial situation and capacity overload. In principle judges should give stronger consideration to the offenders' personal situation when deciding upon recall, also where adults are concerned. This information could, on the one hand, be given by probation officers. On the other hand, a body – analogous to the Juvenile Court Assistance (*Jugendgerichtshilfe*) – would have to be set up which could collect the respective information on the offender and make it accessible (see Bruckmüller, 2011). This would help judges to better estimate whether recall in such cases might even be counter-productive from a special preventative point of view. Recall has the consequence that the offenders have to go back to prison (even longer) and the problem shows itself again after the repeated release. Where the new offence is a minor one and monetary penalty or fully suspended custodial sentence can be pronounced, the offender should in any case be able to slowly (re)socialise outside prison. The practice of recall as regards recidivism shows that an east-west-divide is a strong indicator that the attitude of judges, most likely due to their training, is crucial.

It is of interest that in the whole of Austria, east and west, the other two reasons to revoke recall – disregarding directives and failing to keep in contact with the probation officer – have little to no significance in practice. This should stay as it is and can most likely be explained with the vague terms, and perhaps the committed approach of probation officers and therapists.

⁶¹ Lawyers, judge.

⁶² Judges, probation officers and nearly all lawyers were of that opinion (only one lawyer stated, "Judges would not care about probation officers' or therapists' opinions at all").

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