

The Preventive Patronage and the Criminal Procedure against Juveniles in Hungary

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Abstract

The main rules of the procedure against juvenile offenders (subjects, evidence, circle of coercive measures, some particular rules of the procedure, special sanctions to be imposed against a juvenile). The proceeding of the preventive patronage. The placement of preventive patronage within the system of child protection

Key words: criminal procedures, preventive patronage, child protection.

1. The procedure against juvenile offenders in Hungary

As previously mentioned, there are 10 different types of the separate procedures (procedure against juvenile offenders, military criminal procedure, procedures based on private prosecution, arraignment, procedure against an absent defendant, waiver of trial, omission of trial, procedure against persons enjoying immunity, procedural rules concerning prominent cases and the asset recovery process).

The conditions of a procedure against juveniles and its borderline cases are as follows²:

Condition: the defendant had already turned 14 (in some cases 12), but has not reached 18 at the time of the commission of the crime		
Case mixed in time: if the accused turns 18 during the procedure, but was juvenile when he committed the crime: The rules of procedure against the juvenile shall be applied	Accumulation of crimes: if against the same accused crimes committed as a juvenile and crimes committed as an adult are judged at the same time: The rules of ordinary procedure shall be applied	Criminal accessory among the abettors there are both juveniles and adults: partial procedure against juvenile

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² HAUTZINGER Zoltán, HERKE Csongor, MÉSZÁROS Bence, NAGY Mariann, *Einführung in das ungarische Strafverfahrensrecht*, Schenk Verlag, Passau, 2008. p. 176

From the cases above the partial procedure against the juvenile means that the special rules shall be applicable only against the juvenile, but not concerning the adults, however, some rules of the procedure (e.g. juvenile court, prosecutor for juvenile offenders) against the juvenile effect the adult criminal also. Other rules (e.g. statutory defence, obligatory means of evidence) are applicable only regarding the juvenile³.

The rules of a procedure against the juvenile have five main fields:

- a) subjects,
- b) evidence,
- c) circle of coercive measures, and
- d) some particular rules of the procedure,
- e) special sanctions to be imposed against a juvenile.

ad a) In a procedure against the juvenile the presence of the defence counsel is always statutory. In the first instance, the presiding judge (single judge), while in the second instance and third instance – except the Supreme Court -, a member of the panel shall be the judge designated by the National Judiciary Council (Act XIX of 1998 about code of criminal procedure (CCP) § 448). The legal representative, as supplementary defence counsel has several rights (§ 451 of CCP), and in some cases an ad hoc guardian is to be appointed (§ 452 of CCP).

ad b) The age of the juvenile offender shall be proven by way of a public deed. A study of living conditions of the juvenile shall be obtained which includes the data recorded and managed by the institution entitled by the Act on Public Education, or the information given by his workplace. The study of living conditions shall be prepared by the probation officer⁴. The testimony of the juvenile offender defendant may not be tested by a polygraph. So, in this procedure the principle of free evidence is infringed partially⁵, since some types of evidence is forbidden, but some is obligatory.

ad c) Some special measures concerning to preliminary arrest are to be mentioned⁶:

- may only be applied if this is necessary due to special gravity of the criminal offence,
- the session ordering the preliminary arrest cannot be held without the defence counsel,
- at the session the legal representative (guardian) may speak also,
- the decision concerning the preliminary arrest shall be disclosed to the legal representative and guardian,
- preliminary arrest can be executed also in a youth custody centre,
- juvenile offenders shall be separated from offenders of legal age.
- the term of preliminary arrest ordered against the juvenile is maximum 2 years.

³ DEÁK Péter, *Aspects of the juvenile criminal procedure*, Vargha László- emlékkönyv, PTE ÁJK Pécs, 2003. pp. 29-40.

⁴ SZIROTA Szilvia, *Juvenile probation supervision*, Doktoranduszok fóruma, Budapest, 2008. pp. 217-220.

⁵ HERKE Csongor, *Los acuerdos celebrados en el proceso penal en el espejo de los principios fundamentales*, Miomir MARULOVIC – Eduard KUNSTEK (eds), *Kazneno pravo, kazneno postupno pravo i kriminalistika, Zbornik radova provodom 70 godina. zivota Berislava Pavisica*, Pravni Fakultet Sveucilista u Rijeci, Rijeka, 2014. pp. 57-72.

⁶ HERKE Csongor, *The preliminary arrest and its substituting institutes*, 3rd International Meeting "Justice and Law 2006". Havana, 2006. p. 13 <http://www.tsp.cu/Archivos/Ponencias/THE PRELIMINARY ARREST AND ITS SUBSTITUTING INSTITUTES.rtf>

ad d) Other rules indicating the special characteristics of the procedure can also be found in the CPC, like concerning the indictment (it can be postponed also in case the criminal offence is punishable by a maximum of 5 years' imprisonment, the prosecutor shall obtain the opinion of the probation officer⁷ before filing the indictment etc) and the trial (public shall be excluded from the trial, may order that the part of the trial which could have a harmful effect on the proper development of the juvenile offender be held in the absence of the juvenile etc.)⁸.

However, the procedure against an absent defendant, waiving the right to trial and private accusation cannot take place regarding juvenile offenders

ad e) The CPC has provisions concerning the youth custody centre (§§ 465, 467 and 468 of CCP) and material sanctions (§ 466 of CCP) in the procedure against juvenile offenders⁹.

2. The placement of preventive patronage within the system of child protection

Preventive patronage as in the framework of administrative proceeding is conducted by the Custodian Office, alongside an already existing placement into protection proceeding or simultaneously conducted with a placement into protection proceeding adaptable as a child protection authority measure since 1st January 2015.¹⁰

The Custodian Office initiates a placement into protection proceeding because of crime or misdemeanour, which may be punished even with occlusion or in the case of an already existing placement into protection proceeding, furthermore it informs the investigating authority about the crime or the misdemeanour authority about the misdemeanour. Following the feedback towards the Custodian Office they visit the Patronage Probation Service to get an environmental study and a risk assessment of threat of the child regarding crime prevention. (further: risk assessment)¹¹

With the introduction of the legal institution the intention of the legislator was that both the system of child protection and criminal justice would preserve their own structure so that they would provide an opportunity for effective cooperation.

Preventive patronage as an authority measure is triple-poled. The Custodian Office participates in the procedure together with the probation officer and the child welfare service. The Custodian Office (district office) makes the decision of enacting the measure and it takes responsibility primarily for its implementation as well.

The probation officer takes part in preparing the necessity of the enactment of the decision (risk assessment, environmental study) and in defining the rules of conduct their implementation.

⁷ CSEMÁNÉ VÁRADI Erika, *The situation and role of probation officer in the Hungarian juvenile justice system*, Bűnözés új tendenciái, Budapest, 2004. pp. 404-410.

⁸ SÁRIK Eszter, *The questions of juvenile crime and restorative justice in Hungary*, Ügyészek Lapja, 2010/3-4. pp. 87-91.

⁹ CZENCZER Orsolya, *Comments on the current legislation and practice regarding the education of juvenile prisoners*, Studia iuridica Caroliensia, Budapest, 2008. pp. 23-26.

¹⁰ § 15 (4) i) of the XXXI Act of 1997 on Child Protection and Guardianship Administration (hereinafter Gyvt.)

¹¹ § 68/D. (1) of Gyvt.

The child welfare service is the one who is in contact with the child (juvenile) even previously, in the framework of providing primary care or placement into protection procedure even if the child did not have a criminal past. The task of the child welfare service is to prepare the environmental study and send a pedagogical opinion towards the patronage probation service. During the preparation of the environmental study the probation officer and the child welfare service can cooperate for the sake of effectiveness.

In practice the procedure takes place as follows. The investigating authority or the misdemeanour authority informs the competent Custodian Office if the child (juvenile) has committed a crime or misdemeanour which can be punished even with occlusion. The investigating authority (misdemeanour authority) does not propose to order the measure of preventing patronage. After informing the investigating authority (misdemeanour authority) the Custodian Office decides if from among the measures available they will exclusively order the placement into protection procedure or together with it, simultaneously (or besides the already existing placement into protection procedure) orders the measure of preventing patronage as well. The Custodian Office visits the patronage probation service in case the placement into protection of the child (juvenile) has already happened before committing crime or misdemeanour, which can be punished even with occlusion. If the person who is subject to proceeding and also placed into protection, the Custodian Office sends its order about the placement into protection to the patronage probation service and at the same time sends its suggestion of ordering preventive patronage to the child welfare service. The patronage probation service prepares an environmental study as well as it carries out a risk assessment on the proneness to a criminal lifestyle. The criteria of this procedure is found in Activity of Patronage Probation Service, act of Ministry of Public Administration and Justice (hereinafter PAJM) 8/2013 (29. IV.).

(As a little detour I would indicate that it seemed important to the legislator to amend the Code of Criminal Procedure (Act XIX. of 1998) in this context with the purpose of the unification of the tasks on the side of patronage joining to the criminal and administrative procedure. So in § 114/A (4a) they introduced the definition of overall probation officer opinion, which contains alongside the opinion of the officer, the summary statements of the results of preventive patronage ordered by the Custodian Office. The summary opinion is obtained by the prosecutor after the submission of indictment by the court. § 453 (5) in case preventive patronage was ordered for the juvenile under placement into protection)

As an interesting fact based on § 5 of the PAJM the Patronage Probation Service has 30 days to prepare the environmental study from the arrival to the government office while the Custodian Office has 21 days to prepare their decision based on the § 33 (1) CXL of 2004 of General Rules of Administrative Proceedings and Services (hereinafter KET). For the time of preparing the environmental study the procedure will be suspended based on § 32 (1) KET, this period does not count into the administrative period based on § 33 (3) e).

In case if the degree of the crime prevention risk assessment prepared by the probation service is too high, the Custodian Office imposes preventive patronage and placement into protection procedure compulsorily if it did not happen before. Given the fact that in the frame of administrative procedure they intend to establish obligation, the Custodian Office holds a hearing based on § 62 (1) KET and § 91/L Government Decision 149/1997. (IX. 10) of Custodian Offices as well as child protection and guardianship

procedures (hereinafter Gyer.) At the hearing the Custodian Office listens to the child, parents and child care officer and in case of high degree of risk assessment, participation of the patronage officer is compulsory (The Custodian Office notifies the patronage officer in case of the initiation of every procedure, even if the decree of risk assessment is not high). In the decision the Custodian Office considers the rules of conduct established by the patronage service. The child care officer working with the child welfare service can also establish rules of conduct.

The Custodian Office – in case the degree of preventive criminal risk assessment is medium – after examining every circumstance, can ignore the imposition of preventive patronage. In this case, reviewing this decision is compulsory after six months. Reviewing is intended to examine the child's changed circumstances and if it is needed the involvement of the probation service should be initiated. If the risk assessment is on a low level, the Custodian Office ignores the imposition of preventive patronage.

Based on the above the initiation of a procedure based on the degree of risk assessment prepared by patronage probation service has a key importance. Based on the § 68/D (4) b) of the Gyt. Custodian Office may consider ordering preventive patronage in the case of medium level risk assessment. So in this case preventive patronage can be ordered. In terms of crime prevention in the case of low level risk assessment the act clearly rejects the possibility of imposing preventive patronage.

The Custodian Office reviews the ordered institution of preventive patronage together with the procedure of placement into protection every year *ex officio*. The review can happen after six months if the probation officer or the child welfare service suggests so. The cases of initiating the procedure *ex officio* or based on application and the list of eligible applicants are found in § 91/O (2) of the Gyer. The measure taken by the authority can be terminated in the following cases.

Half a year after the decision had become final, as a result of the review it can be concluded that the objective of the measure has been achieved or the minor's behaviour changed in a positive direction. In this case, the Custodian Office may decide to terminate both placement into protection and preventive patronage but may also decide that they terminate preventive patronage but reserve placement into protection.

The next reason for the termination of preventive patronage is that if the Custodian Office imposes some other official child protection measures, if the risk of threat of the child cannot be terminated in a current family environment. In this case, a preventive patronage measure may be maintained, the child protection officer and the place of the childcare are cooperating with the probation officer. The reasons outlined above are potential termination reasons.

Reasons for the mandatory termination of preventive patronage are the followings:

- Probation measures have been applied against the young offender
- The young offender was sentenced to reformatory education
- The young offender was sentenced to imprisonment
- S/he has reached the age of majority--- against whom preventive patronage was ordered

The importance of the institution of preventive patronage ensues from the preventive nature of it. In cases where the juvenile commits a crime, – besides a criminal procedure – at the same time an administrative procedure takes part which will be completed by ordering the measure of preventive patronage. So these two processes run parallelly. The prosecution is less concentrated on the personality of the accused juvenile, while the aim of the measure of preventive patronage is specifically aimed at

the reintegration training of the juvenile accused to the society with the integration of child welfare services and preventive patronage officers having expertise on child protection.

Another argument in addition to the preventive nature is that the child welfare services are very often in contact with the juvenile accused within the frames of basic care before committing a crime. As a result of this, when preparing the risk assessment there is already enough available information regarding the circumstances of the child's personality.

Considering the scope of the relevant age specific features I find it fortunate that measures taken within the framework of the administrative procedure prescribe such rules of conduct for the minor, with which compliance is mandatory and their implementation is enforceable even before the closure of criminal prosecution. These rules of conduct can be partly of a preventive nature, on the other hand, they may serve to prevent repeat offending as well. However, when the juvenile is prosecuted under probation or reformatory education or imprisonment is imposed that would compulsorily conclude with the elimination of the preventive patronage measure.

This study is aimed to introduce the institution of patronage primarily within the aspect of family law and child protection. As I have already mentioned several times before, we are talking about a very young legal institution, so its practical application and required preventive and socializing and re-socializing effects cannot yet draw far-reaching conclusions.

According to the perspective of guardianship, an opinion can be formulated about the mechanism of the action of the measure when the reviewing procedures have started about ordering or ignoring the measures because that will be the time when the Custodial Office comes into contact again with the persons concerned in the measure. The exercise in Pécs is that there was no application launched for review and the mandatory review is expected in the first half of the year 2016. The reviewing procedures could provide a basis for returning to the subject.

In the imposition of measures or in the ignorance of them the degree of risk in the environmental study prepared by the probation officer have a crucial role. I consider it important therefore to reflect on the exercise of risk assessment based on practice in Baranya county. On the side of Probation they consider it a bad idea to introduce the institution towards the child protection system, they do not agree with the current "mixed" form, *i.e.*, combining administrative, criminal and family law elements of control. The probation officers take the view that the controversy is based on the fact that they do not have the basic teaching skills, working at the child welfare services they do not know the criminal side of the family. So the expertise of the two sides is not put together but both use their own tools separately.

The prosecutor currently takes part in the three- poled system as a warning system but I see Pálvölgyi's viewpoint interesting to display.

In the prosecution's perspective, the measure lives up to the expectations attached to the application, if it is based on a high degree of risk assessment with the administrative procedure, as in the "minor" cases, criminal proceedings, may already be closed at the prosecutor's phase. These cases are not lengthy court proceedings, because typically the prosecutor's reprimand phase makes it to an end with postponements of accusation or mediation procedures. Stepping in judicial phase, the trial negligence proceeding can be arranged within 30 days. So in these cases the criminal proceedings

are completed sooner than the final administrative decision is made. So this time the preventive nature of the measure fades by the prosecution's rate.

The compulsory purchase of overall patronage opinion can also cause further stalling in those cases where the prosecution could be closed at the prosecutor's period.

The measure may have a positive effect regarding prosecutor's or judicial approach, if the decision on ordering preventive patronage says that appearance before competent authorities is obligatory having regard to the fact that the juvenile accused is willing to appear at the authority at a lesser extent.

From a judicial perspective greater emphasis may be placed on the order of preventive patronage in such cases when recurring proceedings are initiated towards the same juvenile accused. In such cases having regard to the unification of judicial cases the judicial phase may even take several years.

It is also important to provide rules for mandatory appearance at the authorities within the rules of conduct (§ 461 (1) of the CCP). In case of the accused juvenile's absence the trial cannot be held and according to § 463 of CCP the cancellation of the trial in case of the juvenile cannot be applied. The above mentioned rules may result in further delays in the judicial phase.

According to the prosecutor's consideration the positioning of the measure within the child protection system is questionable. At certain procedural actions it is necessary and considered to be positive to impose the measure, but the prosecutor's participation would be more important because he supervises the investigation. It could be a special prosecutor with professional experience or with a deployed decision involved to speed up such cases.

As the guardianship, probation and prosecution opinions are all put together we can see that the measure is needed to fill the gap, but the interdisciplinary nature of its branches of law placement is still questionable, after the experiences of the review procedures are drawn it could be decided whether the current system leads to efficiency or not.