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You are Responsible for Your Rose Juveniles and Officiality in Hungarian Criminal Proceedings²

“You know [...] my flower [...] I’m responsible for her. And she’s so weak! And so naive. She has four ridiculous thorns to defend her against the world...” (Antoine de Saint-Exupéry)

1. Introductory thoughts

In Hungary, tens of thousands of children get involved in court proceedings every year. Participating in a court procedure is an extraordinary and often disturbing experience even for adults, perhaps especially when the procedure is a criminal procedure. It is all the more so in the case of children, who, due to their age, are much more vulnerable and cannot defend themselves or protect their rights on their own.³ Therefore, concerning child protection, criminal procedures have become an important issue and it is essential to deal with underage participants of crimes in a suitable way, regardless of their position in relation to the judiciary.

Researchers have found that if children suffer a harm, they will more likely become victims again; and experiences suggest that the younger a perpetrator is, the greater is the chance of repeating the crime. A court experience can make us believe or completely lose our faith in jurisdiction. It can determine whether a child that comes into contact with the judiciary will later, as an adult, believe that that is a system in which their rights and dignity are

respected when they are to account for their actions or contribute to the operation of the State’s punitive power. As we can see, from whatever perspective we approach the positions of juveniles in criminal procedures, it is obvious that making jurisdiction child-friendly is not a big word having an end in itself, but it is an important cornerstone and yardstick of social responsibility.⁴

2. The principle of officiality in criminal proceedings

2.1. Officiality in the new Code of Criminal Procedure

Officiality is basically a necessary feature and a main principle of inquisitorial proceedings. Main principles are theoretical rules that go through an entire procedure, express its specifics and set its frames, and serve as guidelines for the participants of the procedure. However, such main principles are never absolute, they always have a relative value, because they are a manifestation of the prevailing social and legal policy thinking, and as such, they are variable.⁵

One of the greatest, fundamental novelties of the new Code of Criminal Procedure (hereinafter: CCP)⁶ is that it has pushed officiality into the background; therefore, we will take a closer look at the principle of officiality first.

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³ ELEK, BALÁZS: Office Az életkor jelentősége a gyermekkorú tanúk kihallgatásakor a büntetőeljárásban. *Belügyi Szemle*, 2011. március, 93–111.

⁴ GYURKÓ, Szilvia: Gyermekközpontú igazságszolgáltatás, In: GÖNCZÖL Katalin, *Kontroll és jogkövetés, Kriminológiai Közlemények*, issue 71, Magyar Kriminológiai Társaság, Budapest, 2012, pp. 218., 229.

⁵ ANGYAL, Pál: *A magyar büntetőeljárás jog tankönyve I. kötet*, Atheneum, Budapest, 1915, 253.

⁶ Act XC of 2017 on the Criminal Procedure.

The idea behind proceeding *ex officio* is that criminal acts not only violate the rights of an individual, but they are also an attack against the entire society. Due to this, law enforcement is not only a right but also an obligation of the authorities. From this obligation comes the rule that a procedure shall be initiated and conducted *ex officio* if the victim does not request it or even opposes it.

In the concept of officiality we find a principle that existed throughout the formation of the criminal procedural law, in each of its historical periods, and is present in the procedural law from the initiation of the procedure until the legal remedy.⁷ It has a different meaning in the investigative and court trial phases. During an investigation it means that as a rule, the procedure shall be initiated and conducted *ex officio* without it being requested. In the court phase, the principle means that the court is not bound by the parties' requests, judges are obliged *ex officio* to conduct the procedural activities and they may examine or have to examine a matter without it being requested.⁸

Officiality is thus a main rule in criminal proceedings, although from the turn of the 20th century new procedural institutions have appeared that enabled a more differentiated interpretation of officiality, and officiality has appeared more and more broadly as a principle that tolerates exceptions.⁹ The new Hungarian code of criminal procedure also points to reducing the principle of officiality, which in many cases turns to opportunism instead of officiality, with the aim of simplification and of efficiency increasing. And this raises a number of questions to be examined, which we need to deal with in order to see the real effects of the changes on jurisdiction.¹⁰

2.2. The novelties of the new CCP regarding evidence-taking

The new CCP has introduced an innovation of structural importance, in connection with officiality, which is perhaps the best manifested in the obligation of courts to clarify the case facts. The division of labour, expressed as a division of functions, makes it clear that it is not the court's task to prove the charge, but the responsibility for the charge lies solely with the holder of the charge monopoly, i.e. the accuser.¹¹ In line with this, the procedural code establishes that it is the responsibility of the accuser to provide the

⁷ MÓRA, Mihály (szerk.): *A magyar büntető eljárásjogi jog*, Tankönyvkiadó, Budapest, 1961, 107.

⁸ LICHTENSTEIN, András: *The Principles of Legality and Officiality in Criminal Procedure*. In: *Central & Eastern European Legal Studies*; 2018, Issue 2, 290–293.

⁹ POLT, Péter (szerk.): *Kommentár a büntetőeljárásjogi törvényhez*, Wolters Kluwer, Budapest, 2022.

¹⁰ BARTA, Júlia Dóra: *Finkey officialitás-elméletének hatása a magyar büntetőeljárásra*, In: *Erdélyi Jogélet*, issue 2021/1, 15–24.

¹¹ POLT, *op.cit.*

evidence necessary to prove a charge, or to initiate its acquisition,¹² and that the court obtains evidence on the basis of a motion during the clarification of the facts.¹³ If there is no such motion, the court is not obliged to obtain and examine the evidence.¹⁴ Consequently, based on all this, the court cannot assume the role of the accuser, and as a result, the court is not obliged *ex officio* to prove the charges or to detect the facts that are the subject of the indictment.

Of course, courts still shall – within the framework of the indictment – seek to ascertain well-founded and realistic case facts, taking into account the need to detect the material truth. However, based on the new CCP, the court's decision shall not be classified as unfounded if, in the absence of a prosecutor's motion to do so, it did not obtain otherwise obtainable means of evidence or did not conduct an evidentiary procedure.¹⁵

3. Underage participants in criminal proceedings

Basically, as we have seen above, the new CCP points to the reduction of officiality. It has introduced the general rule that evidence-taking shall be performed upon a motion, and so it has turned to an important element of English law. Even so, there are still some issues where it has to be guaranteed that the decision does not depend on the parties' motions only, but the authority should have the opportunity to make a decision *ex officio*. Such an issue is the protection of juveniles' rights involved in procedures, regardless of their position in the procedure.

3.1. Underage defendants in criminal procedures

Some scholars claim that in a sense every underage defendant is a victim too. Even if we do not start a debate on this strong, criminological opinion, we can acknowledge that underage defendants of criminal proceedings need care and protection due to their age. Therefore, if they commit a crime, it is necessary to solve and compensate the problems that have led to their action, with education or training. This is why the CCP establishes that procedures against juveniles shall be conducted in a way that “the juvenile's social integration is ensured by promoting their education and their physical, mental, moral, and emotional

¹² Paragraph (1) of section 164 of the CCP.

¹³ Paragraph (2) of section 164 of the CCP.

¹⁴ Paragraph (3) of section 164 of the CCP.

¹⁵ Paragraph (4) of section 593 of the CCP.

growth. It shall also be ensured that the juvenile does not commit another criminal act.”¹⁶

Although in the chapter of the CCP containing the special rules of criminal proceedings against juveniles we do not find a subchapter for court tasks, the rules themselves as well as the objectives set for proceedings against juveniles clearly indicate that courts acting in juveniles’ cases have other obligations too besides the activity of adjudication. Thus, it is not enough to ascertain the facts in the framework of charging and evidence-taking motions, to establish the criminal responsibility of the defendant, to apply a criminal sanction etc., but courts are also to detect as widely as possible the juvenile’s personal characteristics, living conditions and background, and if necessary for their protection, to report them or to initiate an action at an authority, and last but not least, to enforce the special objective of criminal proceedings against juveniles during both the application of procedural rules and the establishment of criminal sanctions.¹⁷

It is important to emphasize that there is more behind a juvenile’s criminal act: besides recounting the criminal act, it is also essential to examine the perpetrator’s personal abilities, and the motives inducing and facilitating the crime. In light of this, the CCP establishes the ex-officio obligation that in a criminal procedure against a juvenile the evidence-taking shall be extended to the assessment of relevant circumstances concerning the juvenile’s personal needs and environment.¹⁸ With this, the procedural code requires an ex-officio obligation from courts that breaks with the general rule of taking evidence upon motions. The importance of the guaranty rule is also shown by the fact that it is more than just an obligation of judicial discretion. It does not depend on a judge’s discretion or conviction whether to take evidence in this field in the absence of a motion, but it is the duty of the court to order it in all cases.

In order to achieve the above objectives in criminal proceedings against juveniles, the CCP also determines special means of proof in addition to the general means of proof.¹⁹ Among these, the law requires that an environmental study shall be made after the questioning of the suspect.^{20, 21} Consequently, the procedural code not only specifies a portion of the questions to be answered during evidence-taking, but it also breaks with the principle of free proving by determining the obligatory means of proof, for the sake of the juvenile defendant.²²

All these, guaranty-like special rules have been made to ensure that during criminal procedures juvenile perpetrators be not treated as defendants only, but also as children.

3.2. Underage victims in criminal procedures

Jurisdiction, of course, should be child-friendly not only in criminal proceedings against minors, but also in cases where the victim is a juvenile, which is perhaps an even more cardinal issue. Adequate empathy, preparation and respect for children’s rights are very important for avoiding re-traumatization and secondary victimization and also because experiences gained in childhood fundamentally determine expectations and attitudes in adulthood. It is mainly children whose rights are respected and not violated by law enforcement who will become conscious and law-abiding adults.²³

Becoming a victim of a crime or an abuse is a very difficult and defining experience at any stage of life, and childhood victims are particularly vulnerable due to their life condition. Children who have suffered an abuse usually try to bury the traumatic memories caused by the abuse. These are memories that the human mind tries to bring to the surface as little as possible; therefore, it can be extremely painful and highly retraumatizing if they have to be recounted several times and recalled again and again.²⁴

Concerning crimes, those committed against sexual morality are perhaps one of the greatest latency, since abuses most often take place behind closed doors, and in many cases it is not possible to draw clear conclusions even from a medical examination. Consequently, the strongest and often the only evidence of a sexual abuse is the victim’s testimony.²⁵ However, sexually abused children rarely speak about what happened to them because it is a taboo or because they lack the appropriate vocabulary. In addition, they often do not express themselves with words (or at least not in the way we expect), but use non-verbal means instead, or need help in giving sufficient information that is required for the procedure.²⁶ Therefore, it is crucial that the person conducting a questioning be aware of the cognitive and emotional maturity level of children of various ages, and be able to communicate with them accordingly.²⁷

²³ GYURKÓ, *op.cit.*, 218.

²⁴ GÁL, Emese Dorottya: A gyermekbarát igazságszolgáltatás modellje a büntetőeljárársban. A Barnahus-modell, *Családi Jog*, 2021, year XIX, n. 2, 30.

²⁵ RICHARDSON, Gina Carol: *The child witness: A linguistic analysis of child sexual abuse testimony*, Georgetown University, ProQuest Dissertations Publishing, 1993, 1–2.

²⁶ KARNI-VISEL, Yael – HERSHKOWITZ, Irit – Lamb, Michael E. – BLASBALG, Uri: Facilitating the Expression of Emotions by Alleged Victims of Child Abuse During Investigative Interviews Using the Revised NICHHD Protocol, *Child maltreatment*, issue 2019. 24 (3), 311.

²⁷ SZOJKA, Zsófia: *Milyen eszközei vannak a gyermekbarát igazságügynek a szexuális bántalmazás feltárására?*, 2017. [https://merce.hu/2017/11/14/milyen-esz-](https://merce.hu/2017/11/14/milyen-esz-nalis-bantalmazas-feltarasara/)

¹⁶ Section 677 of the CCP.

¹⁷ POLT, *op.cit.*

¹⁸ Paragraph (1) of section 683 of the CCP.

¹⁹ Paragraph (2) of section 683 of the CCP.

²⁰ Paragraph (1) of section 684 of the CCP.

²¹ NAGY, Alexandra – NAGYNÉ GÁL, Mónika: A fiatalkorúak elleni büntetőeljárás sajátosságai, In: *Büntetőjogi Szemle*, issue 2018/1, 61.

²² HERKE, Csongor: A fiatalkorúak elleni büntetőeljárás, In: *Jura*, issue 1997/1, 31–32.

The so-called Barnahus model has been introduced to provide adequate space and tools for this in criminal proceedings. The Hungarian legislature included it in the procedural code recently, to make child-friendly jurisdiction more efficient. In the following we will take a closer look at its implementation.

3.2.1. The introduction of the Barnahus model in the Hungarian criminal jurisdiction

The novel amendment of the CCP²⁸ paved the way for the application of the so-called Barnahus method in Hungarian criminal proceedings from 1 January 2021. The right to a hearing that is considerate towards children was introduced in the Hungarian law on 1 January 2019 by section 61 of Act XXXI of 1997 on Child Protection and Guardian Administration (hereinafter: Child Protection Act). In fact, in subitem bb) of item b) of paragraph (1) of section 87 of the CCP the same kind of hearing was codified, establishing that courts, prosecution offices and investigative authorities may order during an investigative activity involving an underage person that the activity be conducted with the participation of a forensic psychologist expert or a consultant providing services defined in the abovementioned ruling of the Child Protection Act.

To sum it up, the novel amendment has brought about two important results. First, if the victim of a crime committed against the freedom of sexual life or sexual morality has not reached the age of eighteen, then, in order to protect the victim, the court may, ex officio or on motion, waive the questioning of the victim as a witness, if the victim has already been interviewed with an audio-video recording in the course of the investigation. In this case the witness testimony that the victim made during the investigation may be used as a means of evidence. Previously, this was possible only in the case of victims under the age of fourteen. And secondly, the Barnahus model was codified by establishing that courts, prosecution offices and investigative authorities may order during an investigative activity involving an underage person that the activity be conducted with the participation of a forensic psychologist expert or a consultant providing services defined in paragraph (2) of section 61 of the Child Protection Act.²⁹ Such a questioning of a juvenile victim may thus be ordered ex officio too, without a motion, if it is necessary and its conditions are met.

Considering that this change is the most important novelty of the new amendment of the CCP re-

garding child-friendly justice, in the following we examine in detail the Barnahus model and the methods used in it, keeping in mind the requirements of child-friendly justice as well as the specifics of questioning minors.

3.2.2. The Barnahus model

Barnahus is an Icelandic word meaning “children’s home”, where bodies of jurisdiction and child protection continuously cooperate, and their activities are closely intertwined. The Barnahus method is mainly applied during the forensic interviewing of children who have been victims of sexual abuse and is intended to ensure that the child need to talk about the trauma only once and that the testimony and information obtained during the interview provide sufficient evidence for prosecution and sentencing.³⁰

The Barnahus service has been available in Hungary since 2016 in the city of Szombathely, but, as we have seen above, with the amendment of the CCP effective of 1 January 2021, it is an ex-officio obligation of authorities to examine the option of applying the Barnahus model and to order its application, if necessary, during the questioning of underage victims in criminal proceedings.

Basically, this method seeks to ensure a considerate treatment for children in two ways. First, the number of parallel procedures and thus the number of hearings can be reduced thanks to the recording of the hearings and to the cooperation between the bodies of child protection which conduct the questioning and the bodies involved in criminal proceedings. Secondly, the hearing itself is conducted by a child protection expert or a psychologist (likely someone the child has already known within the framework of the child protection procedure), in an environment that is suitable for the child, using easily comprehensible communication methods. The member of the body acting in the criminal procedure directs the questioning through communicating with the child protection expert and not directly with the child.³¹

The questioning of the underage victim takes place in a child-friendly interview room with a family atmosphere, as it is important to create an environment where the child feels that they will really be listened to, helped, and more importantly, that they will be believed and will be safe throughout.³²

We have already seen, but it cannot be emphasized enough, that children often express themselves using non-verbal means. They are not always able to give coherent, adequate answers to questions or to

kozei-vannak-a-gyermekbarat-igazsagugynek-a-szexualis-bantalmazas-feltarasaral/ (accessed on 10 July 2022).

²⁸ Act XLIII of 2020 on the Amendment of the Code of Criminal Procedure and Other Related Acts.

²⁹ Subitem bb) of item b) of paragraph (1) of section 87 of the CCP.

³⁰ LAZÁRY, Fanni: *A Barnahus-szolgálatban mindig hisznek a gyerekeknek*, 2021. <https://hintalovon.hu/2021/02/05/a-barnahus-szolgalatban-mindig-hisznek-a-gyerekeknek/> (accessed on 14 July 2022).

³¹ POLT, *op.cit.*

³² LAZÁRY, *op.cit.*

tell with words what happened to them. However, this does not mean that they have nothing to tell, so various communication supporting tools are used during the questioning.

Such a tool are anatomically detailed dolls or abuse dolls.³³ They are dolls of different sizes, sexes, ages, and looks, they can be dressed and undressed, and their genitals are elaborated. With the help of dolls, a child with poor communication skills, a very young child or an intellectually disabled child can also express what happened to them, even without words, or they can supplement or elaborate a verbally made statement, so that the expert can get a more detailed picture of what happened.

In the case of children over the age of fourteen, the Rorschach test can be performed additionally, but it cannot be applied to younger children; therefore, children under the age of fourteen are usually given the World Game Test instead.³⁴ This test is used to examine attitudes and experiences related to the natural and built environment. It works like an “interpreter” between the child’s world and the outside world, as it makes the child’s thoughts and feelings visible, and due to this, it is excellent for examining various experiences.³⁵ In child psychology, the World Test is one of the most comprehensive diagnostic and therapeutic tools. It provides information about the child’s intelligence, personality structure and emotions, among other things. The great advantage of this procedure is that it creates an experience of joy and creativity in children, while the examining expert obtains important information from the projected content.³⁶

As we have mentioned above, one of the most important elements of the Barnahus method is that the entire questioning goes with audio-video recording. In the monitoring room, judicial and child protection experts can follow the conversation through a screen and can ask the child questions which are conveyed by the expert conducting the questioning. In addition, the Barnahus method makes it possible that the defendant and their defence counsel also participate in the procedural activity, staying in one room with the authority, and propose questions to the child.

During this procedural activity, the participant who directly questions the child shall be a forensic psychologist expert – whose expert activity in this case is the participation itself – or a person providing services according to the Child Protection Act, who can act as a consultant. From the point of view of procedural law, it is important to emphasize that

the questioning based on the Barnahus method is a procedural activity, not an expert examination. Consequently, it shall be conducted and controlled by the authority conducting the criminal procedure, while the person participating in the questioning as expert or consultant is like an “interpreter”. It is the body conducting this procedural activity that shall be responsible for its lawful and orderly implementation (for the presence of the persons involved in it and for the enforcement of their rights).³⁷

The video records of the questionings, the verbatim minutes and the results of the abovementioned tests are annexed to the expert’s judgement and serve as proofs in the procedure.³⁸

All this is necessary to ensure that as many and as accurate proofs be obtained as possible. As a result, the number of questionings can be reduced, the procedure can be completed sooner, and the underage victim will have fewer secondary injuries.

4. Conclusions

In conclusion, neither underage defendants nor underage victims should be treated as “little adults”, but it has to be taken into consideration throughout a procedure that they are children.³⁹ Therefore, it is important to ensure that jurisdiction is implemented in an efficient and child-friendly way in practice too. In accordance with the international requirements of child-friendly jurisdiction, the Hungarian Code of Criminal Procedure, in a freshly amended version, promotes the respect for and the efficient enforcement of children’s rights in criminal proceedings, at the highest possible level. It is also important that, in whatever position they are part of a proceeding, the interests of children should always be taken into account in the cases in which they participate or by which they are affected.⁴⁰

This notion is the reason why the Code of Criminal Procedure – despite pushing officiality to the background – treats proceedings involving juveniles as a priority issue and guarantees that in a certain sphere the decisions do not depend solely on the parties’ motions, but they are an ex-officio obligation of courts.

As we can see, the legal background is given for child-friendly jurisdiction, but in order to realize it, it is not enough to keep to the letter of the law, because only the persons participating in the proce-

³³ SKINNER, Linda J. – BERRY, Kenneth K.: Anatomically Detailed Dolls and the Evaluation of Child Sexual Abuse Allegations, *Law and human behavior*, 08/1993, Volume 17, Issue 4, 399.

³⁴ GÁL, *op.cit.*, p. 35.

³⁵ PERÉNYINÉ SOMOGYI, Angéla: A gyermekek környezeti attitűdjeinek vizsgálata projektív eljárásokkal, *Új Pedagógiai Szemle*, vol. 65, no. 1–5, 2011, 363.

³⁶ <http://www.vilagjatek.hu/> (accessed on 14 July 2022).

³⁷ POLT, *op.cit.*

³⁸ GÁL, *op.cit.*, p. 35.

³⁹ NAGY–NAGYNÉ GÁL, *op.cit.*, 68.

⁴⁰ FRECH, Ágnes: Az Országos Bírósági Hivatal Gyermekbarát Igazságügyi szolgáltatás Munkacsoportjának tevékenysége – kérdések és új irányok, In: Lux Ágnes (szerk.), *AJB Projektfüzetek, Gyermekközvetítő Igazságügyi szolgáltatás. Gyermekjogi projekti*, issue 2013/1., Alapvető Jogok Biztosának Hivatala, Budapest, 2013, 253–254.

ture with the appropriate expertise and preparation can make the procedure humane.⁴¹ It is therefore important to put great emphasis on the training of legal practitioners concerning these legal institutions, and on the development of the special competences and knowledge of those dealing with children during procedures. It is also crucial to remedy any error or shortcoming by continuously monitoring the practice.

What depends on these tasks is nothing less than whether children who come into contact with the

justice system will have confidence in it, whether they will have faith as an adult that this is a system in which their rights and dignity are respected when they contribute to the punitive power of the State or when they take responsibility for their actions. Child-friendly jurisdiction is therefore not a big word having an end in itself, its realization in everyday practice is an important cornerstone of the rule of law and of our social responsibility.⁴²

⁴¹ NAGY-NAGYNÉ GÁL, *op.cit.*, 68.

⁴² GYURKÓ, *op.cit.*, 229.