

8 - Handling children's cases by diversion

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International instruments (Beijing Rules, Article 40 of the Convention on the Rights of the Child, General Comment No. 24 of the UN Committee on the Rights of the Child) provide for the possibility of non-judicial proceedings in cases pertaining to children. In the case of juvenile defendants, the possibilities are the following: mediation procedure (Chapter LXVI of the Criminal Procedure Act) and conditional suspension by the prosecutor (Chapter LXVII of the Criminal Procedure Act).

It does not constitute a diversion, but it significantly shortens the length of the proceedings if the court has the opportunity to make a final decision during the preparatory session, or if a punishment order is passed by the court (Section 741 of the Criminal Procedure Act).

Menu

- 8.1 Stages of the proceedings
- 8.2 Advantages and disadvantages of diversion
- 8.3 Applicability of procedural guarantees

8.1 Stages of the proceedings

Regarding the possibilities aimed at shortening the criminal proceedings, it is possible to make a final decision in a juvenile's case during the preparatory session if he/she has confessed his/her guilt, and "the court finds it possible to adjudicate the matter during the preparatory session" (Section 504 of the Criminal Procedure Code). In such cases, the social environment assessment, the probation officer's opinion and the probation officer's summary opinion must also be presented. In this way, the punishment imposed can be consistent with the objectives of punishment determined for juvenile cases.

In juvenile cases, it is not possible to waive the defendant's right to a trial. Given the lighter sanctioning regime for juveniles, a waiver of trial would not have the same advantages as for the adult accused.

"A punishment order shall be passed by a court within one month after receipt of the case" (Section 741 of the Criminal Procedure Act). "In the case of a criminal offence punishable by up to three years of imprisonment, a court, acting upon a motion from the prosecution service or ex officio, shall pass a punishment order without holding a trial and on the basis of case documents if a) passing a decision in the case is simple, b) the accused is at liberty, or in detention in another case, and c) the objective of punishment could be achieved without a trial" (Section 740(1) of the Criminal Procedure Act).

One of the basic requirements of the consensual adjudication called passing a punishment order is the active cooperation of the juvenile. The main advantage of this procedure is that it is faster, and

the juvenile accused can be earlier released from the burden of adverse legal consequences.

No appeal may be lodged in this procedure – the only possibility for legal remedy is to request a trial. This can be requested by the juvenile accused, his/her defence counsel and his/her legal representative without the consent of the accused. It is possible for the juvenile defendant to withdraw his/her request for a trial. However, if it is the defence counsel or the legal representative of the juvenile accused who wishes to take advantage of this option, he/she may only do so with the express consent of the accused. If, for any reason, the juvenile defendant cannot be served with the court's penalty order, the juvenile court must arrange for the appointment of a guardian ad litem for the juvenile accused.

The mediation procedure (commonly known as mediation) “may be conducted upon the motion by the suspect or the aggrieved party, or with their voluntary consent, with a view to facilitating the conclusion of an agreement between the suspect and the aggrieved party, the reparation of the consequences of the criminal offence, and the future law abiding conduct of the suspect” (Section 412 of the Criminal Procedure Act).

According to the legislation, the active repentance of the offender may redeem the offender from punishment in criminal proceedings “where the criminal offence against life, physical integrity or health, against personal freedom, against human dignity and fundamental rights, traffic offence, offence against property or against intellectual property rights”, punishable by imprisonment for up to five years (Section 29 of Criminal Code). The referral of a case to mediation is subject to the suspect's confession of guilt, the consent of both the aggrieved party and the suspect to the mediation, and the absence of any circumstances precluding mediation as defined in this Act (Section 413 of the Criminal Procedure Act).

In the case of mediation, the prosecution suspends the proceedings once, for a period of six months. The prosecution service also communicates the decision to suspend the proceedings to the probation service with competence and jurisdiction to conduct the mediation procedure.

If during the mediation procedure an agreement is reached between the aggrieved party and the suspect in accordance with the Act on Mediation in Criminal Matters (Act CXXIII of 2006), the mediator sends the agreement to the prosecution service. If the mediation procedure is successful, the proceedings against the juvenile must be terminated.

Another way to settle children's cases without a trial is conditional suspension by the prosecutor. The prosecution service may suspend the proceedings by decision if “a) the investigation is being conducted for a criminal offence punishable by imprisonment for not more than eight years, and b) the juvenile can be expected to develop in an appropriate direction as a result of conditional suspension by the prosecutor, having regard to the nature of the criminal offence, the manner of its commission, and the person of the suspect” (Section 690 of the Criminal Procedure Act). If the juvenile is subject to conditional suspension by the prosecutor, the court suspends the proceedings for a period of one to three years within the limits of the scale of punishment specified in the Special Part of the Criminal Code.

Before conditional suspension by the prosecutor, the prosecution service orders the acquisition of a probation officer's opinion if it intends to impose a specific rule of conduct or obligation in order to further the purpose of probation.

In the probation officer's opinion, the probation officer proposes the imposition of a specific rule of conduct or obligation on the juvenile, and even in the absence of a provision by the prosecution, he/she states whether the juvenile undertakes to comply with the envisaged rules of conduct or

obligations and is able to comply with them, and whether the aggrieved party agrees to the amends to be made to him/her.

In this procedure, a juvenile offender may also be required to provide a financial benefit for a specific purpose or to perform community service work; however, it can only be imposed on a juvenile who has turned 16 by the time the decision is made on the conditional suspension by the prosecutor, in accordance with the provisions of the Criminal Code on community service work and work in amends.

8.2 Advantages and disadvantages of diversion

The arguments that are the most frequently cited in Hungarian literature in favour of the mediation procedure and conditional suspension by the prosecutor in juvenile cases are the following:

- it is a solution that focuses on conflict resolution;
- it focuses on the future of the aggrieved party and the juvenile offender;
- it speeds up the proceedings;
- it allows for the interests and needs of the aggrieved party to be directly represented in the criminal proceedings;
- it provides a better opportunity for the juvenile to take direct responsibility for his/her actions,
- the stigmatising effect of criminal proceedings can be mitigated or completely avoided,
- it is a trauma-sensitive procedure.

On the other hand, the most frequent objection is that if mediation is not successful, it causes an unnecessary delay in the proceedings, and the requirement of timeliness is violated. In addition to that, research on the subject has identified resistance and mistrust of mediation among prosecutors as a reason for the low caseload.

8.3 Applicability of procedural guarantees

Juveniles must be properly informed about the content and consequences of diversion. As a rule, the juvenile's legal representative must participate in the mediation procedure. Moreover, young persons have the opportunity to be heard and express their views in each and every case. Therefore, the Hungarian legislation upholds the right of the child to information and legal representation in accordance with Article 40 of the Convention on the Rights of the Child, and as set out in Point 11.3 of the Beijing Rules.

Further reading

Tünde Barabás A.: A mediáció alkalmazásának szélesedése a jog és a gyakorlat alapján – a resztoratív elvek érvényesülése az igazságszolgáltatásban [The Widening Use of Mediation in Law and Practice – The Application of Restorative Principles in the Administration of Justice

Source: <https://jog.tk.hu/uploads/files/BarabasTunde.pdf>

Dr. A. Nagy – Dr. M. Gál Nagyné: A fiatalok elleni büntetőeljárás sajátosságai [The Specificities of Juvenile Criminal Proceedings]. Source: <https://ujbtk.hu/>

Dr. Barnabás Turi: Juvenile court procedure and its specificities. Source: <https://ujbtk.hu/>

Helsinki Committee: Children Deprived from Liberty. Country Report: Hungary (pp.313-360)

Source: https://helsinki.hu/wp-content/uploads/BHC_2014_Children_Deprived_of_Liberty_EN.pdf

Act LXIV of 1991 on the promulgation of the UN Convention on the Rights of the Child

General Comment No. 24 of the UN Committee on the Rights of the Child

Act XXXI of 1993 on the promulgation of the European Convention on Human Rights

Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspect or accused persons in criminal proceedings

Act CXXIII of 2006 on Mediation in Criminal Matters

Act C of 2012 on the Criminal Code

Act CCXL of 2013 on the Enforcement of Penalties, Measures, Certain Coercive Measures and Detention of Misdemeanours

Act XC of 2017 on the Code of Criminal Procedure