Benedikt Carpzov's Influence on the 18th Century Criminal Practice in Hungary – Analysis of a Legal Case from Debrecen*

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Abstract

This paper is essentially founded on two observations regarding early modern periodical criminal law. On the one hand, according to the apparent consensus, the German (Austrian) law had a significant impact on the legal development of the Central-Eastern European region and the marks of these effects can be detected in Hungarian criminal practice as well. On the other hand, the minority age as a relevant circumstance in criminal litigation was a momentous factor concerning the improvement of modern criminal justice.

Due to these assertions, my reseach is based on the "arsenal" of classical and text-related jurisprudential methodology (especially using interpretatio grammatica and systematica) is confined to provide insight into Benedikt Carpzov's influence on the criminal case law of one crucially important city located in the eastern part of Hungary (Debrecen) in the middle of the 18th century.

"Carpzovian-effect" is going to be descriptively illustrated through the analysis of minority age. One legal case chosen among the criminal praxis of Magistrates of Debrecen is going to be dissected with regard to presenting a few contemporary aspects of minority age. This is not an overall case note, since certain procedural parts of the criminal proceedings picked out of the archival file of the legal case on the strength of the research goals are going to be elaborated. The paper aims to demonstrate the noted Saxon legal scholar's emergence in the criminal case law of Debrecen as well as to scrutinize minority age with particular respect to the mitigation of punishment.

Keywords: *Benedikt Carpzov; minority age; mitigating circumstance; incendiarism; criminal case law; criminal jurisprudence; doli capax; poena extraordinaria; arbitrium judicis; Hungary.*

"Juvenilis ardor impetu primo furit:
Languescit idem facile, nec durat diu,
In venere turpi, ceu levis flamma vapor." [1]

Introduction

When a researcher scrutinizes the history of Hungarian criminal law in the 18th century one must always pay attention to those foreign – principally German (Austrian) – sources which had a decisive impact on Hungarian criminal jurisprudence and practice. One of the most important German (Austrian) legal "impulses" could be related to Benedikt Carpzov. The significant authority of the renowned Saxon legal scholar was widely accepted in recent foreign literature, since he exerted crucial influence regarding both European criminal legal scholarship as well as criminal case law in the 17th and 18th centuries.[2] The native legal historians have also generally acknowledged that the German (Austrian) sources had a notable effect on the improvement of Hungarian – especially but not exclusively criminal – law in the different periods of legal history because of geographical, cultural and historical reasons, and also the defi-

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1 CARPZOV, B., *Practicae Novae Imperialis Saxonicae Rerum Criminalium Pars III.* Francofurti, 1677, (referred to as CARPZOV *Op. cit.* [1677a] with marking page number below) p. 356. This quotation was from *Octavia* (on lines 189-191) traditionally attributed to one of Lucius Annaeus Seneca's dramas, consequently Carpzov cited the text of the tragedy with conformity of this common supposition. However, the modern classical philological scholarship has already greatly discredited Seneca's authorship. See the English translation of the quoted text. *"Juvenile ardour, thou must remember, burns only as long as the early impressions operate, which called it forth, nor does it last long, ever, with these unlawful amours, it passes oflflike some flickering flame (…)"* BRADSHAW, W., *The ten tragedies of Seneca with notes rendered into english prose as equivalently as the idioms of both languages permit.* London, 1902, p. 660.

2 PADOA-SCHIOPPA, A., *A History of Law in Europe: From the Early Middle Ages to the Twentieth Century.* Cambridge, 2017, p. 280. PIHLAJAMÄKI, H., Practica nova imperialis Saxonica rerum criminalium I-III (New Imperial Saxon Practice of Criminal Law) 1635 Benedikt Carzpov. (1595-1666). In: DAUCHY, S. et al. (ed.), *The Formation and Transmission of Western Legal Culture: 150 Books that Made the Law in the Age of Printing.* Switzerland, 2016, p. 187-190. especially p. 188. VORMBAUM, T.-BOHLANDER, M., *A Modern History of German Criminal Law*, Berlin-Heidelberg, 2014, p. 19. BAR, C. L. von, *A History of Continental Criminal Law.* Boston, 1916, p. 236-237.

ciencies of domestic (criminal) legal regulation.[3] The assertion is also conceded that Benedikt Carpzov's significance must not be neglected from the point of view of neither *jurisprudentia* nor *praxis* in connection with the research of Hungarian criminal legal history in the 18th century.[4]

Given the above, my research goals are as follows: first of all, to expose Carpzov's appearance on the criminal case law of judicial body of a Hungarian city (Debrecen) in the 18th century, secondly to analyze two potential aspects of the minority age – examining it as a mitigating circumstance of punishment and an obstacle of becoming witness in criminal procedures – mainly focusing on Carpzov's conception.[5] To be able to justify the phenomena outlined above, I will strive to detail a litigation of criminal case law of Debrecen wherein German (Austrian) sources appeared.

Consequently, the primary source of this research is the file of a criminal litigation from the criminal practice of the Debrecen Magistrates where the main participants in the criminal procedure – prosecutor, attorney and the Magistrates of the city – referred to the loci of one of the Carpzov's most remarkable works *(Practica Nova Imperialis Saxonica Rerum Criminalium)* concerning the issue of minority age.[6] In the latter parts in this paper, I intend to scrutinize and interpret these adduced loci, particularly applying the methods of *interpretatio grammatica* and *systematica*, and where it is required mostly by latin texts, I will consider the philological scrupulosity during the textual scrutiny.

On the one hand, I am going to have an opportunity in this research to elaborate upon a couple of substantive criminal features of minority age: as a mitigating circumstance of punishment and the legal principle of *malitia supplet aetatem* as an exception under the general mitigating rule of minority age (Chapter 2, Subchapter 2.1 and Chapter 5]. Furhermore, one procedural characteristic of minority age is also going to be presented as an obstacle of becoming witness in criminal procedure (Chapter 4].

On the other hand, for the purpose of illustrating the Saxon author's importance, I will provide a blow by blow examination of a criminal litigation where Carpzov's opinions could really influence the practice of the Magistrate. Since the analyzed final sentence was in fact founded on German and Austrian sources, partly the conception of the prestigous Saxon jurisprudent and partly the *Praxis Criminalis* detailed below (Chapter 5]. Ultimately, fusing the touched on facets of minority age with "Carpzovian impression", during the entire elaboration of this topic, I endeavour to cast light on those questions and theoretic dilemmas in connection with the minority age which prompted the main participants in the criminal proceedings to invoke Carpzov's ideas.

In the middle of the 18th century, a few (criminal) jurisprudential works had already been prepared in the Kingdom of Hungary, albeit these books presumably could not have a huge impact on the criminal case law of Debrecen.[7] Neverthless, I attempt to compare the revealed Carpzov's conceptions to the approaches of contemporary Hungarian (criminal) legal scholarship demonstrating the similarity between the ideas of Saxon legal scholar and Hungarian jurisprudent in the course of the analysis.

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[3] In a general sense BALOGH, E., Előszó. In: BALOGH, E.-HOMOKI-NAGY, M. (ed.), *Tripartitum trium professorum, Három szegedi jogtörténész Drei Szegediner Rechtshistoriker, Tudományos emlékülés Bónis György születésének 100., Both Ödön születésének 90. és Iványi Béla halálának 50. évfordulóján,* Szeged, 2017, p. 9. With special regard to criminal law BÓNIS, Gy., A magyar feudális és burzsoá magánjog és büntetőjog elemei. In: *Levéltári Szakmai Továbbképzés (Felsőfok) 12.* Budapest, 1959, p. 47. ECKHART, F., *Magyar alkotmány- és jogtörténet,* Budapest, 1946, p. 386. BALOGH, E., Deák Ferenc és az anyagi büntetőjog kodifikációja. In: MOLNÁR, A. (ed.), *A Batthyány-kormány igazságügyminisztere.* Zalaegerszeg, 1998, p. 129. considering the footnote 2nd. For instance, depicts more thoroughly the effect of Austrian civil procedural law on the Hungarian civil procedural development as the result of codification efforts and judicial reforms of Kaiser Joseph II. PAPP, L., Az Ordo judiciarius pro omnibus tribunalibus et foris judiciariis Regni Hungariae praescriptus. In: *Miskolci Jogi Szemle,* vol. 12, Nr. 1, 2017, p. 87-99.

[4] In a general sense VÁMBÉRY, R., *A házasság védelem a büntetőjogban I. Kötet.* Budapest, 1901, p. 150. FINKEY, F., *A magyar büntetőjog tankönyve,* Budapest, 1914, p. 62. About Carpzov's effect on Hungarian criminal case law, see *inter alia* PAULER, T., *Büntetőjogtan, I. Kötet. Bevezetés. Anyagi Büntetőjog Általános Rész.* Pest, 1869, p. 25-26. BALOGH, J., *A büntető perjog tankönyve*. Budapest, 1906, p. 53. and 86. FINKEY, F., *A magyar büntetőperjogi tudomány háromszázados fejlődéstörténete 1619-1914.* Sárospatak, 1948/2000, p. 33-34. PALUGYAY, I., *Magyarország történeti, földirati s állami legújabb leírása.* Pest, 1853, p. 197. and 210. FAYER, L., *A magyar büntetőjog kézikönyve I. Kötet.* Budapest, 1905, p. 33. MÁRKUS, D. (ed.), *Magyar Jogi Lexikon II. Kötet (Bíró–Dézsma).* Budapest, 1899, p. 500. KÁLLAY, I., *Úriszéki bíráskodás a XVIII-XIX. században.* Budapest, 1985, p. 200. WLASSICS, Gy., Ungarn. In: INTERNATIONALEN KRIMINALISTISCHEN VEREINIGUNG (ed.), *Die Strafgesetzgebung Der Gegenwart in Rechtsvergleichender Darstellung,* [LISZT, F. von, (ed.)] *I. Band: Das Strafrecht der Staaten Europa.* Berlin, 1894, p. 163. BÓNIS Gy., *Buda és Pest bírósági gyakorlata a török kiűzése után 1686-1708.* Budapest, p. 316-317. BÉLI, G., *Magyar jogtörténet. A tradicionális jog.* Budapest-Pécs, 2014, p. 91-92. BRANDL, G.-Tóth, G. P. (ed.), *Szegedi boszorkányperek 1726-1744, [A magyarországi boszorkányság forrásai, Várostörténeti források 5.].* Budapest–Szeged, 2016, p. 38. NAGY, S., Fejezetek a hajdúvárosok és a Hajdúkerület büntetőbíráskodásából I. A városi tanácsok eljárásjogi gyakorlata a hajdúk letelepítésétől a pallosjog megvonásáig (1606-1757). In: NYAKAS, M. (ed.), *A Hajdúsági Múzeum Évkönyve VI.* Hajdúböszörmény, 1987, p. 89. KÁLLAY, I., *Városi bíráskodás Magyarországon 1686-1848.* Budapest, 1996, p. 138. About Carpzov's effect on Hungarian jurisprudential works, see *inter alia* FINKEY *Op. cit.* [1948/2000] p. 79. 81. and 83. KOVÁCS, K., A büntetőjog oktatása a nagyszombati egyetem jogi karán 1667-1777. In: *Jogtudományi Közlöny,* (new) vol. 22, Nr. 5, 1967, p. 281. and p. 283-284. NAGY, F., A büntetőjog tudománya. In: JAKAB, A.-MENYHÁRD, A. (ed.), *A jog tudománya tudománytörténeti és tudományelméleti írások, gyakorlati tanácsokkal.* Budapest, 2015, p. 272-273. SCHWARTNER, M. von, *Statistik des Königreichs Ungern Zweyter u. Dritter Theil.* Ofen, 1811, p. 266.

[5] Regarding Carpzov's influence on the criminal case law of the Debrecen Magistrates, see also M. ANTALÓCZY, I., *Bűnözés és büntetés Debrecenben a XVIII. század közepén,* Debrecen, 2001, p. 88-89. considering the footnote 129th. M. ANTALÓCZY, I., A blaszfémia és más vallásellenes bűncselekmények Debrecenben a XVIII. század közepén I. rész, In: RADICS, K., (ed.), *A Hajdú-Bihar Megyei Levéltár Évkönyve XXIII.* Debrecen, 1996, p. 70.

[6] The complete title of the work: *"Practicae Novae Imperialis Saxonicae Rerum Criminalium pars I. (…III.) ex jure civili romano, imperiali, saxonico, ordinat. & Constitut. electoral. decisiones absolutas, responsis Scabinorum Lipsiensum approbatas, & usu ac observantia Fori Saxonici confirmatas, exhibens. Folio."* (referred to as *Practica* below) This book was published seventeen times, first in 1635 and last in 1758. SCHILD, W., (ed.), *Benedikt Carpzov 1595-1666 Werk & Wirken (Band I. 1667-1927).* Goldbach, 1997, p. X-XI.

[7] The most significant works were as follows; HUSZTY, I., *Jurisprudentia Practica seu Commentarius Novus in Jus Hungaricum.* Budae, 1745. I am going to use one of the later editions which was published in 1766. TARNÓI GOCHETZ, G., *Systema Praxis Criminalis Inclyti Regni Hungariae, patriumque eidem adnexarum,* Budae, 1746, BODÓ, M., *Jurisprudentia criminalis secundum praxim & constitutiones Hungaricas in partes duas divisia,* Posonii, 1751.

1. The analyzed parts of the legal case and the significance of minority age

As mentioned above, I examine the archival documents of one criminal procedure initiated against more arsonists before the Magistrates of Debrecen in 1755.[8] The files of this criminal litigation have been preserved in quite good condition. This statement specifically concerns the legibility of the texts, especially the sheets of procedural phase of *allegationes* normally considered as one of the most crucial part of criminal proceedings. As a result, these preconditions provide me an excellent opportunity to make a deeper analysis combining the dissection of Carpzovian impact and minority age with each other. The research solely focuses on two phases – *allegationes* and *"deliberatum est"* – of the criminal procedure. Before the scrutiny of the referred loci of *Practica*, both procedural parts must be shortly circumscribed.

The phase of *allegationes* generally meant the "merits" of a legal case (*"meritum causae"* or *"pars meritoria"*) where legal arguments and allegations or, according to contemporary terminology, "backchats" and "hassels" were presented by the prosecutor (*fiscalis procurator* i. e. *actor*) and the delinquent's attorney (*incattus procurator* or *procator*) concerning the previously submitted accusation *(actio fiscalis)*.[9] The initiating of the *allegationes* happened when the attorney answered the *actio fiscalis* on the merits, hence this procedural act he took to constitute the *litis contestatio*, viz that, the defendant enters effectively into the criminal action. In the phase of *allegationes* the parties debated the merits of legal case and attempted to weaken and refute reasons to each other, actually, the case had already been decided in this part of the procedure.[10] In their *allegationes*, the prosecutor and the defence often referred to chiefly Hungarian acts or kings' decrees, the two prominent sources of contemporary native *consuetudo*: *Tripartitum* and *Directio Methodica,* moreover the *Praxis Criminalis* of Austrian origin and Carpzov's *Practica* in order to confirm and support their arguments.[11]

The second examined phase of the criminal litigation is *"deliberatum est"* (*sententia definitiva* or *finalis*), this category signified the final sentence directly followed *allegationes* in criminal procedure. In this part of the proceedings, the judicial body decided the criminal legal dispute, moreover it could inflict an appropriate penalty if the accused person had been found guilty of a crime. Not always but often, the court also alluded to the Bible, Hungarian acts or kings' decrees, *Tripartitum*, *Directio Methodica* and, in addition, *Praxis Criminalis*, Carpzov's *Practica* aiming to give reasons for its decision.

As for the analyzed legal case whose matter was arson, the criminal litigation proceeded against more delinquents (arsonists), although in this paper, I am going to concentrate on only one of the perpetrators who succesfully referred to minority age as a mitigating cause of punishment. As a result, I solely focus on the *allegatio* of the attorney and the final sentence of the Magistrates wherein references occured to Carpzov's *Practica* regarding minority age as a mitigating circumstance of punishment.

It does not seem to be too novel observation that age was generally considered a crucial factor in the early modern era referring to European legal scholarship and practice, as well. The consequences of age – particularly but not exclusively of the minority age in criminal substantive and procedural context – were valued in the different fields of law, e. g. as the requirement of acting capacity or the impediment of marriage.[12] As a consequence of prosperous later medieval Italian legal scholarship, as well as the reception of the Roman law in the Holy Roman Empire, there was the fairly complex system of mitigating and aggravating circumstances of penalty in the 17th and 18th centuries.[13] In this period, for instance, more contemporary German and Austrian *Landgerichtsordnungen* or *Halsgerichtsordnungen* (Ter-

[8] Magyar Nemzeti Levéltár Hajdú-Bihar Megyei Levéltára (MNL-HBML.) (National Archives of Hungary-Archives of Hajdú-Bihar County) IV. A. 1018/g. *Acta Miscellanae,* (Miscellaneous juridical documents) 1751:1-1755:10. 34. d. B4/1755.

[9] HAJNIK, I., *A magyar bírósági szervezet és perjog az Árpád és a vegyes-házi királyok alatt.* 1899, p. 234. Magyar Tudós Társaság (pub.), *Törvénytudományi műszótár.* Pest, 1843, p. 19. Trattner-Károlyi Könyvnyomtató-Intézete (pub.) *A Fő Méltóságu Magyar Kir. Kuriának törvénykezési mesterszavait egybefoglaló szótár.* Pest, 1837, 8. VARGA, E., Polgári peres eljárás a Királyi Curián 1724-1848/49. In: *Levéltári Közlemények,* vol. 39, Nr. 1, Budapest, 1968, p. 286.

[10] BÓNIS, Gy.-DEGRÉ, A.-VARGA, E., A magyar bírósági szervezet és perjog története. In: *Levéltári Szakmai Továbbképzés, Felsőfok 13.* Budapest, 1961, p. 126-127. BÉLI *Op. cit.* p. 189.

[11] The complete titles and the years of first editions of *Tripartitum* and *Directio Methodica*: *Tripartitum opus iuris consuetudinarii inclyti regni Hungariae,* 1517., *Directio Methodica Processus Iudiciarii Iuris Consuetudinarii Inclyti Regni Hungriae,* 1619. The complete title and bibliographical details of the first edition of *Praxis Criminalis*: Forma Processus Judicij Criminalis seu Praxis Criminalis Serenissimo, Neo-Regi Apostolico Hungariae Josepho I. dicata, Per Joannem Nicolaum Martium, Tyrnaviae Typis Academicis, 1687. During the analysis, I am going to use the text of the second edition published in 1697: Forma Processus Judicij Criminalis, seu Praxis Criminalis Serenissimo, Regi Apostolico Hungariae Josepho I. dicata, Editio II., per Joannem Andream Hörmann, Tyrnaviae Typis Academicis, 1697, (referred to as Pr. C. [1697] with marking page number below). Praxis Criminalis was the Latin translation of the *Landgerichtsordnung für Österreich unter der Enns von 1656* (Neue Peinliche Land-Gerichts-Ordnung In Oesterreich unter der Enns. Erster und Anderter Theil. Gedruckt und zu finden bey Leopold Joh. Kaliwoda, auf dem Dominicaner-Platz, in seinem Buch-Gewölb. Wien, [without marking the year of publishing, referred to as LGO. [1656] with marking page number below]) issued for Lower Austria in 1656 by Kaiser Ferdinand III. This Austrian criminal regulation for Land was translated from German into Latin in 1687 so that it could be passed as a Hungarian act. The endeavours of this reception failed several times, consequently the Praxis Criminalis never became the part of Hungarian criminal law in a formal-legal sense. However, thanks to the widespread Hungarian practical application, this regulation still turned into one of the most significant legal sources for the native Hungarian criminal jurisdiction and legal scholarship in the 18th century.

[12] Regarding old age as a mitigating circumstance, see *inter alia* Pr. C. [1697] p. 22. *"Valde provecta aetas."*. RÉTI ILLÉS, E., A büntetőjog kodifikációjának első kísérletei Magyarországon, Kollonics javaslata és a Novum Tripartitum. In: BOGSCH, Á. (ed.), *Angyal-szeminárium kiadványai 2.* Budapest, 1916, p. 13. BODÓ, M., *Jurisprudentia Criminalis secundum praxim & constitutiones Hungaricas in partes duas divis.* Posonii, 1751, p. 90. *"Tales porro circumstantiae poenam ordinariam mitigari exigentes passim recensentur fequentes: (…) Aetas Senilis, (…)"*.

[13] LANGBEIN, J. H., *Torture and the Law of Proof: Europe and England in the Ancien Régime.* Chicago and London, 2006, p. 45-47. According to Carl Ludwig von Bar, the alleviating circumstances, namely the recognition of mitigating punishment indicated the first evasion of severe penalty system of Constitutio Criminalis Carolina *(Peinliche Halsgerichtsordnung Kaiser Karls V.*, referred to as CCC. below). However, he noted that the theoretical background of applying alleviation and judicial discretion *(*arbitrium judicis) had been already appearing in Italian case law at the end of the 15th century and in the 16th century. BAR *Op. cit.* p. 237. Cf. with this footnote.

ritorial Courts Ordinances) included the list of those circumstances which could either lighten or increase retribution.[14]

The alleviating causes had an extenuating effect on the sentence: this approach is conceptualized from criminal substantive law. The creation of an intricate system of mitigating and also aggravating circumstances was a progressive recognition in the European legal development because the appraisal of these facts allowed a possibility for penal jurisdiction to judge committed acts more differentially. This distinguished judgement denoted that the mentioned factors could modify in the directions of the two opposite sides in criminal sentencing, namely these circumstances were able to alleviate or aggravate those sanctions ordinarily determined by law. Moreover, the spreading of these circumstances – specifically mitigating causes – was also a notable improvement with a particular regard to the humanizing process of European criminal justice, as well as the alteration of the previous system of sanctions. In course of penal judgement, the court had to take certain investigated causes into consideration and appraise those at the imposition of punishment. However, the alleviating factors could not entirely preclude sanctions established originally for crimes, notwithstanding that those were able to mollify retributions.[15]

The aforementioned *Praxis Criminalis* comprised a possible classification of alleviating as well as aggravating circumstances concerning the question of where these causes originated from or more precisely what sort of facts of the committed crime these causes could be connected with. As a result of this conscious categorization, seven groups could be found in *Praxis Criminalis*: delict, the person of offender, the person of victim, the state of sinner's mind and preparation, the place of perpetrating, the time of committing and the mode of executing of delict.[16] The minority age or rather youth – with respect to the phrase of *Praxis Criminalis* – can be interpreted as a mitigating circumstance that belonged to the second enumerated category, the person of perpetrator.[17]

Although the research places emphasis on the presentation of minority age as a mitigating circumstance of punishment, the fact cannot be overlooked that in this era, the valuation of minority age had a ponderosity not only in the criminal substantive, but also in the criminal procedural law. The latter approach regarded minority age as an obstacle of becoming witness in criminal proceedings and this procedural aspect is going to be elaborated on in Chapter 3.

2. A substantive approach: Minority age as a mitigating circumstance of punishment

After I attempted to sketch out the significance and essence of minority age as an alleviating circumstance of punishment, in this chapter I am going to scrutinize the *allegatio* of the defence wherein the argument of minority age was referred to. Since this analysis is going to be confined to those reasons concerned minority age as a mitigating factor of penalty, therefore this substantive feature of minority age is going to be focused on.

In one of *allegationes*, one defendant's attorney argued that this arsonist seemed an *impuber* person regarding her age, and due to this fact, the Magistrates should impose a lightened punishment on her. The attorney endevored to support his assertion referring to the above mentioned Benedikt Carpzov's memorable *opus*: *Practica Nova Imperialis Saxonica Rerum Criminalium*. Actually, the reasoning of the defence was almost completely based on the illustrious Saxon author's work concerning minority age. As a result, I am going to present minority age as a mitigating circumstance of punishment following the argumentation of the defence, therefore mainly concentrating on the presentation of the Carpzov-opinions referred to by the attorney hereinafter. During this analysis I will strive to touch upon the conceptions of Hungarian jurisprudence regarding minority age as an alleviating factor.[18]

In the locus of *Practica* firstly referred to by the attorney, Carpzov alleged that girls who had already reached 12 years of age could be regarded as *puberes* on the strength of Justinian law, nevertheless, according to Carpzov, there was not such differentiation between girls and boys in respect of deliberation of their age in his era. Since both of them were considered *impuberes* before completing 14 years, consequently they were exculpated under all ordinary punishments *(poena ordinaria)* originally specified by

[14] Such lists can be detected in the texts of the following legal regulations. LGO. [1656] p. 42-45. *Neue Landtgerichts Ordnung/Deß Ertzhertzogthumbs Oesterreich od der Ennß, Erster/Anderter/und Dritter Theil.* (referred to as LGO. [1675] with marking page number below) Linz, 1677, p. 70-73. *Neue Peinliche Hals-Gerichts-Ordnung/vor das Königreich Böhaimb/Marggrafftumb Mähren/und Hertzogthumb Schlesien.* Alt-Stadt Prag, 1708, p. 58-62. *Constitutio Criminalis Theresiana oder der Römisch-Kaiserl. zu Hungarn und Böheim Königl. Apost. Maiestät Mariä Theresiä Erzherzogin zu Oesterreich, Peinliche Gerichtsordnung.* (referred to as CCT. [1769] with marking page number below) Wien, 1769, p. 20-25.

[15] Pr. C. [1697] p. 22. *"Circumitantiae, quae unius, alteriusve delicti poenam, non quidem omnino tollunt, sed tamen juxta qualitatem rei, aliquantulum alleviant, (…)"*. RÉTI ILLÉS *Op. cit.* p. 12.

[16] Pr. C. [1697] p. 23. *"Breviter, atq; uno verbo, alleviatio, aut aggravatio poenarum. 1° Ex delicto. 2° Ex delinquentis persona. 3° Ex pesona laesi. 4° Ex animo,* & *praeparatione. 5° Ex loco. 6° Ex tempore. 7° Ex modo patrati delicti, colligenda est."*. RÉTI ILLÉS *Op. cit.* p. 15. This categorization emerged almost verbatim in LGO. [1675] and Bodó Mátyás' *Jurisprudentia Criminalis*. LGO. [1675] p. 73. BODÓ *Op. cit.* p. 135.

[17] Pr. C. [1697] p. 22. *"Juventus delinquentis,* & *notata in eo imprudentia."* RÉTI ILLÉS *Op. cit.* p. 13.

[18] Out of the Hungarian reputable authors, Bodó Mátyás and Huszty István also listed minority age among the mitigating circumstances of arson crime. Both of them professed similar opinions about minority age as Carpzov. They connected the extenuation of penalty concerning minority age with subcategories of *(impuberes) pubertati proximi* (see below). BODÓ *Op. cit.* p. 276. *"Si tamen Reus minorennis,* & *Pubertati proximus fuerit; quia in tali minor est militia* & *judicium adhuc infirmum: aetas pubertati proxima, tametsi Delinquentem non excusat; attamen, quoad poeam mitigandam multum juvat; efficitque, ut mitius* & *extraordinarie puniatur nisi observetur notabilis malitia."* The phrasing of *"nisi observetur notabilis malitia"* probably alluded to the legal principle of *malitia supplet aetatem* (See in more detail in the Chapter 3.). HUSZTY, I., *Jurisprudentia Practica seu commentarius novus in jus hungaricum, (Libri Tres).* Tyrnaviae, 1766, p. 98. *"Et quidem in specie locum non esse poena ordinaria, sed mitiori arbitrariae. Imo. Si reus pubertati proximus fuerit, tam in hoc quam aliorum delictorum casibus; quia in tali minor est malitia* & *judicium adhuc infirmum. Tametsi enim aetas pubertati proxima delinquentem in totum in totum non excuset, sicut eximit aetas infantiae, quae est ad annos septem, propter absentiam malitiae* &, *judicii, attamen quoad poenam mitigandam multum juvat, efficitque, ut mitius puniatur."* The phrasing of *"sicut eximit aetas infantiae, quae est ad annos septem, propter absentiam malitiae* &, *judicii,"* was concerned *infantes*.

law. The Saxon legal scholar traced this conclusion back to Article 164 of CCC. *("Vom jungen Dieb")* where the age of 14 years had been already accepted in case of girls as well.[19] Since the attorney argued on a young female defendant's behalf, thus he could adduce this Carpzov-opinion in order to confirm his reasoning. Namely, he asserted that the court should apply a lower age limit in case of girls in the process of imposing punishment. According to Carpzov, if the *impuberes* persons completed the 14th year and entered 15th from then on they were named *puberes* or *minores* as long as they completed their 25th year.[20] In contrast, the category of *minorennitas* lasted until the age of 21 and who completed the age of 21 were regarded as *majores* in the Saxon law.[21]

The attorney recognized that the young female delinquent was far from the age of *infantia*, since she could exculpate under all sanctions in this case, for his part he considered the defendant as only a 12-year old person. The main point of the attorney's argumentation was that the defendant *(incattus)* seemed to be only an *impuber* person, therefore the Magistrates should inflict only a mitigated *poena extraordinaria* or *arbitraria* on her instead of more severe *poena ordinaria*.

In the attorney's *allegatio* adduced, the hitherto and also further analyzed loci of Carpzov's book essentially served as confirmation as well as corroboration of one significant substantive legal principle. Although, this regula was not explicitly referred to by the defence, notwithstanding the loci of *Practica* adduced by the attorney intrinsically expounded and explained this doctrina, due to these facts, I must also allow for this regula. This principle declared who was *impuber* had *doli capax*, hence this circumstance, the court had to impose punishment on them, even though not *poena ordinaria* in this case. It was permitted of inflicting extraordinary penalty for a judge on the strength of his discretion *(arbitrium judicis)*.[22] Before I would give further details on the analysation of the Carpzov-opinions referred to by the attorney, the three main elements of this legal principle must be presented.

The first and perhaps most notable one of the three was considered to be the concept of *doli capax*. This notion could draw a clear line between the age categories of *infantia* as well as *impuberitas*. This component of the legal principle can actually be interpreted as the earlier form of modern guilt.[23] *Doli capax* had an inverse concept-couple, the *doli incapax* and *doli capax*

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[19] CARPZOV *Op. cit.* [1677a] p. 356. *"Licet enim jure communi Justinianeo foeminae sint puberes, quae duodecimum expleverunt aetatis annum, (…). Attamen hodiernis moribus in poenalibus, ceu odiosis, haec differentia non observatur, sed foeminae aeque, ac masculi, ante annum decimum quartum completum, pro impuberis habentur, atque a poena ordinaria liberantur. Tum ob text. in art. 164. Ordin Crimin. In. verb. So der Dieb oder Diebin ihres Alters unter 14. Jahren wären/die sollen nicht vom Leben zum Tode gerichtet werden. Quae sane verba quoad supplicii irrogationem impuberitatem etiam puellarum ad annum 14. extendunt."*.

[20] CARPZOV *Op. cit.* [1677a] p. 359. *"Postquam Impuberes annum decimum quartum compleverunt, & decimum quintum annum ingressi fuere, puberes sive minores dicuntur, usque ad annum vigesimum quintum: quo completo, de jure communi majores habentur in negotiis peragendis, ac etiam in delictis, (…)."* Carpzov wrote down in this locus that those could be regarded as *majores* who were in this age concerning striking a deal as well as committing crimes based on *ius commune*. Cf. CARPZOV *Op. cit.* [1677a] p. 354.

[21] CARPZOV *Op. cit.* [1677a] p. 359. *"Sed de jure Saxonico minnorenitas durat saltem usque ad annum vicesimum primum inclusive. Quia enim in terris Saxonicis maturius aliquanto sapiunt homines, ideo majores statim dicuntur completo vigesimo primo anno, per textum (…)."*.

[22] The inverse of this legal principle belonged to *infantes*. These persons were considered *doli incapax*, therefore they could not be punished. CARPZOV *Op. cit.* [1677a] p. 355. *"Prima sit Regula: Infans ex delicto non obligatur nec aliquam incurrit."* STUMP, B., *„Adult time for adult crime" - Jugendliche zwischen Jugend- und Erwachsenenstrafrecht.* Mönchengladbach, 2003, p. 26. The conclusion was similar as a result of interpreting Article 164 of CCC. REMUS, G., *Nemesis Karulina: Divi Karuli V. Imp. Caes. PP. Augusti, invictiss. & gloriosiss. Principis, Sacriq. Rom. Imperii Ordinum, Leges rerum capitalium.* Francofurti ad Moenum, 1618, p. 103. *"Infantem, quia doli capax non est, furtum non cadit."*.

[23] It seems to be quite effortful task to exactly define the concept of doli capax. In the current German literature, doli capax has been considered one of the first early forms of recent Schuldfähigkeit or Schuldbegriff. Doli capacitas (the nounal mode of doli capax) has been closely connected with the definition of Schuldfähigkeit. GÜNZEL, S., *Die geschichtliche Entwicklung des Jugendstrafrechts und des Erziehungsgedankens.* Marburg, 2001, p. 10. PETERS, J., *Kindheit im Strafrecht: Eine Untersuchung des materiellen Strafrechts mit besonderem Schwerpunkt auf dem Kind als Opfer und Täter.* München, 2014, p. 28. HAUER, G., *Hexenprozesse an der Ludoviciana: Die Spruchpraxis der juristischen Fakultät Gießen in Hexensachen (1612-1723). Hildesheim, 2016, p.* 151. SCHNYDER, S., *Tötung und Diebstahl Delikt und Strafe in der gelehrten Strafrechtsliteratur des 16. Jahrhunderts.* Köln, 2010, p. 169. GUTBRODT, T., *Jugendstrafrecht in Kolumbien.* Mönchengladbach, 2010, p. 78. The concept of *doli capax* derived originally from Canon law and later medieval Italian legal scholarship, moreover beyond Roman law. GÜNZEL *Op. cit.* p. 10. DAHM, G., *Das Strafrecht Italiens im ausgehenden Mittelalter: Untersuchungen über die Beziehungen zwischen Theorie und Praxis im Strafrecht des Spätmittelalters, nahmentlich im XIV. Jahundert,* Berlin und Leipzig, 1931, p. 249. GUTBRODT *Op. cit.* p. 78. STUMP *Op. cit.* p. 26. CIPRIANI, D., *Children's Rights and the Minimum Age of Criminal Responsibility A Global Perspective.* London and New York, 2016, p. 72. In Hungarian literature, the concept of *doli capax* has a close connection to the term of culpability (guilt). Since *doli capax* denoted a capacity of persons to grasp the impropriety of their acts, viz that, "they were able to comprehend their sinning". According to Molnár Imre, *doli capax* and *inuriae capax* (also originated from Roman law) were two sides of the same issue. The *inuriae capax* signified the capacity of persons to grasp the illegitimacy of their acts, whereas the concept of *doli capax* indicated the comprehension of intention. Owing to this meaning, *doli capax* essentially implied the conceptual nub of culpability. MOLNÁR, I., Büntető- és büntetőeljárási alapelvek római jogi előzményei. In: TÓTH, K. (ed.), *Emlékkönyv Dr. Tokaji Géza c. egyetemi tanár születésnek 70. évfordulójára, Acta Universitatis Szegediensis de Attila József Nominatae, Acta Juridica et Politica.* Szeged, 1996, p. 175-177. MOLNÁR, I., Az ókori római jogi bűncselekmény-fogalom ismérvei. In: HOMOKI-NAGY, M. (ed.), *Acta Universitatis Szegediensis de Attila József Nominatae, Acta Juridica et Politica.* Szeged, 2010, p. 583-584. The phrasing of *"intelligere se delinquere;"* presumably expressed the conceptual essence of *doli capax* the most of all potential defintions. These words were found with a few marginal differences in the works of more authors. CARPZOV, *Op. cit.* [1677a] p. 356. *"delinquere intelligitur"*, BODÓ *Op. cit.* p. 91. *"intelligere se delinquere;"*. This couple of words probably stemmed from Roman law, from Gaius' Institutes. GAIUS, *Institutionum commentarii IV.* Lipsiae, 1825, p. 120. *"et ob id intellegat, se delinquere"* MOLNÁR *Op. cit.* [1996] p. 176. GAIUS, *Die Gaianischen Institutionen-Commentarien.* Bonn, 1857, p. 188. *"und deshalb einsehen kann, daß er delinquire"*. Nevertheless, *doli capax* can be defined by means of analysing of its opposite as well. Applying *argumentum a contrario*, *doli capax* can be deduced from *doli incapax* regarding Article 179 of CCC *("Von übelhättern die jugent oder anderer sachen halb, jre sinn nit haben")*. ZOEPFL, H. (ed.), *Die Peinliche Gerichtsordnung Kaiser Karl's V. nebst der Bamberger und der Brandenburger Halsgerichtsordnung sämmtlich nach den ältesten Drucken und mit den Projecten der peinlichen Gerichtsordnung Kaiser Karl's V. von den Jahren 1521 und 1529 beide zum erstenmale vollständig nach Handschriften.* Heidelberg, 1842, p. 250. The text of *"Item wirt von jemandt, der jugent oder anderer gebrechlicheyt halben, wissentlich seiner synn nit hett,"* can clearly reflect the essence of *doli inpcapax*. Cf. REMUS *Op. cit.* p. 111. *"Si quis per aetatem (…) doli fraudisque incapacem, (…)"*.

composed together a rebuttable presumption-couple in certain cases.[24] The second crucial factor was deemed *poena extraordinaria* or *arbitraria* wherein the extenuating effect could be effectively manifested itself at sentencing. The *poena extraordinaria* or *arbitraria* was based on the third element, on the discretion or more precisely the discretion (deliberation) of judge *(arbitrium judicis)*. Consequently, this principle denoted that the age of *impuberitas* was an alleviating circumstance of penalty, since who was in this age had to be inflicted a punishment on the strength of judge's *arbitrium*: a lighter *poena extraordinaria* or *arbitraria* instead of applying more severe *poena ordinaria* ordinarily specified for the given crime by law.

If this regula is meticulously denuded, the general theoretical process of mitigation will become distinct all at once. The first step on this path meant for the judge to investigate and identify the cause(s) which possessed an alleviating impact, albeit the judge did not only have to explore mitigating circumstances, but he also had to take account of aggravating factors as well, moreover these two groups of circumstances had to be appraised altogether in the course of sentencing. The second momentum was the use of judicial *arbitrium* creating a real connection between the detected alleviating (and aggravating) circumstance(s) and the imposed sanction. Finally, the judge had to inflict such a punishment wherein the comparsion and valuation of mitigating as well as exacerbating causes was able to manifest themselves.

With some margin, the legal principle explained above also appeared in a few Hungarian jurisprudential works in the 18th century. According to Bodó Mátyás, if the delinquents were in the age of *infantia* they hardly ever had *culpa (culpae capax)* in general, even less *doli capax*. Nevertheless, those who were in the age of *puerillis aetas* also known as *pubertati proximi*, it could be supposed that when these persons perpetrated crimes, they had already comprehended their acts. Therefore, these people had *doli capax* and thus they deserved lightened penalty.[25]

Another famous Hungarian legal scholar, Huszty István used a more general approach, taking the category of *objecta juris* purported the conceptual trichotomy of *personae*, *res* and *actiones* as his starting point. Those people belonged to the category of *personae* – which appears to be just relevant one of the three with particular regard to the analysis – who possessed *rationis* as well as *doli capax*, since according to Huszty, these two abilities were necessary so that people could be subjected to law *(legis)*. As a result, the *legis* could not obligate *infantes* and insanes *(amentes)*, namely these persons had neither *rationis* nor *doli capax*. Both boys and girls who had not completed 7 years yet were not culpable and when they completed 7 years they could be penalized, although *poena ordiaria* could not be inflicted on.

In Huszty's opinion, the *pupilli* persons as far as their 12th year were absolutely exempted from the constraint of *legis*. In case of the persons under 7 years, they were not allowed to regard them as *doli* and *rationis capax* people, nonetheless it was permitted to presume about them to use comprehension after they completed 7 years. Huszty also underlined that the *impuberes* were not punished with *poena ordinaria*, but the applying of mollified sanction seemed to be appropriate.[26]

The attorney adduced further loci of *Practica* in order to support the legal principle elaborated on above. In addition, in the text of *Practica* referred to, Carpzov principally cogitated on the *impuberes* could be penalised, however they had to be acquitted under *poena ordinaria*. In this context, the Saxon legal scholar brought more reasons but perhaps the most interesting one of these arguments was that the judge had to impose alleviated punishment on *impuberes* because in these cases there was still some hope for return to honest life *(emendatio vitae)*, namely it was possible – as Carpzov explained – if such young sinners became older they would amend their way of life.[27]

During the review of the Carpzov-opinios referred to by the attorney, it needs to be explored one of these loci of *Practica* wherein Carpzov cited and interpreted Article 164 of CCC. Ac-

[24] The *doli capax-doli incapax* as a conceptual pair could be interpreted as two rebuttable presumptions with respect to certain age categories. Regarding the age subcategories of *impuberes infantia proximi* as well as *impuberes pubertati proximi* it was possible to create a couple of rebuttable presumptions opposed to each other. Who belonged to the age subcategory of *impuberes infantia proximi*, they could be considered *doli incapax*, consequently these persons had not had *doli capax* yet. In contrast, who were in the age of *impuberes pubertati proximi*, it could suppose that they had already possessed *doli capax*. The significance of accurately analysing these presumptions concerning these age subcategories, see below in more detail. STUMP *Op. cit.* p. 23. considering the footnote 73rd. The approach of *doli capax* presented above had already been in ancient Roman law as well. CIPRIANI *Op. cit.* p. 72.

[25] BODÓ *Op. cit.* p. 91. *"Minor aetas praecipua est Circumstantia, Reum excusans. Quo nomine, non venit Infantia; in hanc enim utpote vix culpae nedum doli capacem, Poena nulla cadit; eamque secundum etiam Jus Civile innocentia consilii tuetur: sed aetas Puerillis aut Puberati proxima, eamque quadantenus excedens. Hanc enim assecuti, jam supponuntur intelligere se delinquere; hujusmodique aetas cadit sub considerationem hujus Circumstanitae."* The concept of *pueritia aetas* used by Bodó intrinsically correspond with the definition of *impuberitas* of Carpzov. BODÓ *Op. cit.* p. 92. *"Jure Imperiali (…) Pueritia ad annos 14. (…) restricta habetur."* CARPZOV *Op. cit.* [1677a] p. 354. *"Impubes dicitur masculus infra 14. foemina vero infra 12. aetatis annum completum,"*. The phrasing of *"jam supponuntur"* written down by Bodó can provide a chance to interpret the concept of *doli capax* as a rebuttable presumption, namely these words can also confirm the approach that the concepts of *doli capax-doli incapax* could be regarded as a pair of rebuttable presumptions (See in more detail in the footnote 27th.). The phrasing *"eamque secundum etiam Jus Civile innocentia consilii tuetur"* was originated in one of Modestinus' regulas (D.48. 8. 12.). DÜLL, R., *Corpus iuris: Eine Auswahl der Rechtsgrundsätze der Antike (Sammlung Tusculum). Berlin, Boston,* 2014, p. 240. MOLNÁR *Op. Cit.* [2010] p. 584.

[26] HUSZTY *Op. cit.* p. 31-32. *"Objecta Juris, de quo hactenus egi, sunt tria: Persona, quibus; Res, super quibus; & Actiones per quas Jus dicitur. Ita (…) Personas autem, seu homines subjectum esse Legis intellige illos, qui rationis & doli sunt capaces: unde infantes, & amentes non obligantur Legibus. (…) Nec pueri, & puellae ante 7. aetatis annum completum sub culpa; bene tamen post illum completum, licet non statim sub poena saltim ordinaria. Ita communis sententia. Secundat (…) qui immunitatem pupillorum ab obligatione Legis usque plane legitimam 12. annorum aetatem extendere videtur. Pars prima fundatur in eo, quod ante 7. aetatis annum ordinarie non censeantur esse capaces doli, & rationis; Leges autem humanae non attendant ea, quae per accidens, & raro contingunt; licet Jus Naturale, & Divinum obligent, quando citius per accidens sufficiens usus rationis adest. Pars secunda pariter in eodem principio, quod post septennium praesumatur adesse usus rationis, & Jura attendant ea, quae communiter evenire solent. Pars terita in (…) & etiam in Jure Patrio consuetudinario, quo poenis Jure humano civili statutis ordinariis impuberes non subjiciuntur; sed mitigatur poena."*.

[27] CARPZOV *Op. cit.* [1677a] p. 356. *"Quare haud immerito mitius puniendi sunt, praesertim quia in iis spes est emendationis vitae. Nam si ad maturiorem aetatem pervenerint, saepius ad meliorem quoq; frugem redire solent,"*.

tually, Carpzov used an analogy placing this Article in a more general context, because he supposed that the penalties implied in Article 164 of CCC. were not allowed to apply merely on theft but also on other delicts. The more precise analysis of Article 164 of CCC. is not neglected concerning the presentation of minority age as a mitigating circumstance of punishment. Since out of the text of this Article, Carpzov deduced *inter alia* the legal principle of *malitia supplet aetatem* in addition to the upper age limit of *impuberitas* had needed to be 14 years in case of girls as well as boys. Article 164 of CCC. declared that if thefts had not been over the age of 14 it was not allowed to inflict capital punishment *(poena ordinaria)* on them, although courts could impose a mitigated, corporal retribution in combination with taking of an eternal peace oath *(ewiger Urphede)*.

Furthermore, this Article enabled the judge to use judicial discretion *(arbitrium judicis)* – if certain conjunctive requirements had been present. The presentation of these preconditions is going to detail during the analysis of *malitia supplet aetatem*, in this chapter I intend to shed light solely on the essence of *arbitrium*. The *arbitrium* practically signified that the judges had to deliberate and confer with their judgemental associates *(Urteiler)* about punishment. Actually, if the thief was a young person under 14 years of age, the court was allowed to optionally inflict material (pecuniary), corporal or capital punishment on the delinquent with special regard to the revealed facts of the given legal case.[28] After the analysation of the CCC., Carpzov cited the text of another noteworthy legal source, *Sachsenspiegel* and his conclusion was the same as the result of the interpretion of CCC., viz that Saxon law did not also permit to impose capital punishment on an *impuber* perpetrator.[29]

The attorney referred to Carpzov's further opinions regarding the age of *impuberes pubertati proximi*. Up to this point of the presentation of the Saxon legal scholar's ideas, I have generally zeroed in on the age category of *impuberitas*, which had an alleviating impact, but now a distinction must be made within this age category. Namely the *impuberitas* was determined between 7-14 years, nonetheless one could distinguish two subcategories, as well. The first subgroup named *impuberes infantia proximi*, the persons in this age had been even near the age limit of *infantia*, therefore they had not had *dolus* yet and were exempted from almost all punishments.[30] As a result, those who were in the age of *impuberes infantia proximi* were appraised in accordance with similar criterias as *infantes*. Consequently, *impuberes infantia proximi* could be regarded as if they had been *infantes* because the rebuttable praesumption of *doli incapax* appeared in case of them. The second subgroup was called *impuberes pubertati proximi* considered as the opposite of *impuberes infantia proximi*, since the rebuttable presumption of *doli capax* applied

[28] CARPZOV *Op. cit.* [1677a] p. 356. *"Tum, ob Sanctionem Carolinam in. artic. 164. Ordin. Crim. In verb. So der Dieb oder Diebin ihres Alters unter 14. Jahren wären/die sollen numb Diebstal ohne sondere Ursach auch nicht vom Leben zum Tode gerichtet/sondern der obgemeldeten Leibesstraffe gemäß/mit samt ewiger Urphede gestraffet werden. Et in sin. So sollen Richter und Urtheiler deshalben auch Rats pflegen/wie ein solcher junger Dieb an Gut/Leib oder Leben zu straffen sen."* Regarding Article 164 of CCC. see also *inter alia* GÖBLER, J.-REMUS, G., *J. Gobleri Interpretationem Constitutionis Criminalis Carolinae ex unica,* Heidelbergae, 1543, 1660/1837, p. 182. REMUS *Op. cit.* p. 103-104. Furthermore, see also two renowned commentaries of CCC. which meticulously analyzed Article 164. BÖHMER, J. S. F. von, *Meditationes in Constitutionem Criminalem Carolinam,* Halae Magdeburgicae, 1776, p. 789-790. KRESS, J. P., *Commentatio succincta in constitutionem criminalem Caroli V. imperatoris,* Hannoverae, 1744, p. 590-593. The CCC. had not contained the dissevered and unified enumeration of alleviating and aggravating circumstances yet. Although, it had already sporadically mentioned such circumstances which had mitigating or exacerbating effect on sentence, e. g. Article 124, 137, 164, 175 and 179. Moreover certain facts could exclude culpability, see in more detail Article 166. These phenomena are interpreted as an "individualization (or rather subjectivisation) process" closely linked with the emergence of personal liability as well as *Schuldprinzip (Schuldhaftung)*. Furthermore, these tendencies can considered as a momentous advancement from the perspecitve of progression of criminal law, eroding the domination of *Erfolgshaftung* and collective liability. LAUFS, A., *Rechtsentwicklungen in Deutschland.* Berlin, 2006, p. 145. SCHMIDT, E., *Einführung in die Geschichte der deutschen Strafrechtsplege [Zweiter, unveränderter Nachdruck der dritten Auflage].* 1995, p. 117. In John H. Langbein's opinion, the CCC. was fundamentally regarded as a particularly procedural regulation. Nevertheless, this procedural trait was not exclusive, since CCC. also included several substantive-featured contents, for example the mitigation of punishment. LANGBEIN, J. H., *Prosecuting Crime in the Renaissance: England, Germany, France.* Clark, New Jersey, 2005, 259. BERMAN, H. J., *Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition.* Cambridge, Massachusetts – London, 2003, p. 140. and 144. The concept of *arbitrium* = appeared in the text of Article 164 of CCC. – did not mean that judge did not have an opportunity to inflict capital punishment on person who had not completed 14th year yet. ROYAARDS, A. G. G., *Dissertatio juridica inauguralis, de poenarum mitigatione.* Trajecti Batavorum, 1803, p. 21. *"(…) unde patet, judicem iis, qui annum decimum quartum jam egressi sunt mortis supplicium remittere haud cogi."* The *arbitrium judicis* (judicial discretion) was implicitely declared in Article 164 of CCC. and "the effective appearance" of using this discretion signified a permission for judge regarding sentence. This authorization could practically manifest itself in the choosing among diverse punishments. This regulation can provide a chance to link the notion of *arbitrium judicis* with an possible interpretation of *poena extraordinaria*. According to John H. Langbein, this potential approach of *poena extraordinaria* denoted an option among sanctions which choice proved to be an essential component of the general concept of *poena extraordinaria*, namely judge were directly empowered to choose among penalities by law. Langbein brought also an example in order to prove this conception. The instance derived from Article 131 of CCC. *("Straff der weiber so jre kinder tödten.")* which stated that the mother – who killed her own child – had to be buried alive and be impaled or be drowned for her sin. ZOEPFL *Op. cit.* p. 239. *"Item welches weib jre kind, das leben vnd glidmass empfangen hett, heymlicher bosshafftiger williger weiß ertödtet, die werden gewonlich lebendig bergraben vnd gepfelt, (…) ertrenckt werden."* LANGBEIN 2006 *Op. cit.* p. 46. BERMAN *Op. cit.* p. 149. However, thanks to the respect of age as a mitigating circumstance, Article 164 of CCC. did not merely include the authorization of a "simple" choosing among punishments, since it involved the possibility of "effective" mitigation by choosing between two different types of penalties. The part of Article 131 of CCC. referred to by Langbein only permitted to opt for either of the capital punishments. Therefore Article 131 can be interpreted in compliance with the phrasing of *"Aber darinnen verzweiffelung zuuerhüten,"* that Article 131 provided an opportunity for judges to impose drowing – which supposedly issued in less suffering – instead of applying crueler, buried alive and impalement. BRAMBRING, A., *Kindestötung (§ 217 a.F. StGB): Reformdiskussion und Gesetzgebung seit 1870.* Berlin/New York, 2010, p. 11-12. CLOSMANN, K., *Kindstötung historisch-dogmatisch dargestellt.* Erlangen, 1889, p. 15. JORDAN, L., *Ueber den Begriff und die Strafe des Kindsmordes nach der peinlichen Gerichtsordnung Karls V.* Heidelberg, 1844, p. 104-105.

[29] The Hungarian translation of the quoted part of the Sachsenspiegel comes from REPGOW, E. von, *A Szász tükör,* (transleted by BLAZOVICH, L.) Szeged, 2005, p. 198.

[30] Carpzov did not exactly define the upper age limit of *impuberes infantia proximi*.

to this age category. Those who were *impuberes pubertati proximi* had already had *dolus*, though the judge had to inflict only alleviated punishment on them.[31] These two subcategories allowed the judges to differentiate within the age of *impuberitas* in the course of sentencing. The age of *impuberes pubertati proximi* is going to be touched upon in more detail during the elaboration of *malitia supplet aetatem*.

To sum up, the substance of the attorney's reasoning presented above was fundamentally based on the train of Carpzov's thought, the young female defendant by virtue of her age had to be inflicted a mildered penalty (*poena extraordinaria* or *arbitraria*) in lieu of more rigorous death by fire prescribed as *poena ordinaria* for arson by law. The attorney's arguments were essentially anchored in Carpzov's opinions and the analysis of these thoughts opens the door to getting an almost complete image the contemporary judgement of minority age as a mitigating circumstance of punishment.

2.1 *Malitia supplet aetatem* as an exceptional rule

In the previous chapter, the alleviating effect of minority age as a substantive character was presented with the help of analysing the reasons adduced by the defence. Hereinafter, I intend to briefly expose the essence of the legal principle of *malitia supplet aetatem* closely connected with the age category of *impuberitas*.[32] This doctrine actually denoted an exception under the age of *impuberitas* regarded as a general mitigating circumstance within the overall category of minority age.[33] The substance of this principle signified that *"the malice of perpetrator could supply the (lack of) expected age" (malitia supplet aetatem)*.[34] This special legal regula provided judge an opportunity to pronounce death sentence *(poena ordinaria)* on *impuberes* before they completed the required age of punishability with *poena ordinaria*.[35]

However, this ancient legal maxim did not explicitly appear in the scrutinized criminal litigation, in spite of this fact I suppose I must dwell on this principle in a couple of words, because *malitia supplet aetatem* appear to be an integral part of legal thought about minority age, moreover it can assist in understanding more clearly how minority age was appraised in connection to criminal law in the early modern period. Furthermore, this legal principle has had a long history which goes as far back as the Roman law. Additionally, it proves currently to be a living idea with particular regard to the conception of *"adult time for adult crime"*.[36] In this part, I am still going to concentrate mostly on Carpzov's approach during the fairly concise presentation of *malitia supplet aetatem*.

In his *Practica*, Carpzov conceptualized the aforesaid legal principle as one of three conjunctive prerequisites, if *malitia supplet aetatem* had been proven together with two other elements in criminal proceedings, the judge would have been authorized to punish *impuberes* with death penalty. Carpzov deduced these postulates from the text of Article 164 of CCC. and, in addition he emphasised that if only one of the three had not been proven, the judge could not have imposed such a serious sanction.

According to the first precondition, the *impuber* defendant had to be close to 14 years, viz, to be *impuberes pubertati proximi ("Wo der Dieb nahe bey vierzehn Jahren alt wäre/")*. This requirement can be interpreted as the appearance of the rebuttable presumption of *doli capax* detailed above. The next circumstance was *malitia supplet aetatem ("Also daß die Boßheit das Alter erfüllen möchte/")*, namely the delinquent's *malitia* had to supply the shortage of the age required. Finally it was demanded that the act perpetrated had to be one of the cruelest crimes or such additional circumstances had to emerge during the criminal procedure which could exacerbate delict *("oder beschwerliche Umstände so gefährlich darbei gefunden würden/")*.[37]

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[31] According to Carpzov, there were three definitions concerning the question who belonged to this age category. Someone would have been regarded as *impuberes pubertati proximi*; if the person had already completed 10 and half years (the first definiton of *impuberes pubertati proximi*), or if the person had already been even near the age limit of *pubertatis* and had been completed the age limit in 1 and half years (the second definiton of *impuberes pubertati proximi*). As stated by third definiton, delinquent would have been considered *impuberes pubertati proximi*, if the person had been completed for a lack of 6 months the age limit of *impuberes pubertati proximi*. CARPZOV *Op. cit.* [1677a] p. 356-357. *"Etsi vero alii aliter hosve definiant, ut scilicet pubertati dicantur proximi, vel, qui decimum annum & dimidium compleverunt, (…). Aut, qui probe ad pubertatem accesserunt, & intra annum & semester eam assequntur, (…). Aut cui ad puberem aetatem menses tantummodo sex desunt,"*.

[32] The *malitia supplet aetatem* was also known in the Hungarian legal scholarship in the middle of the 18th century. According to Bodó Mátyás and Tarnói Gochetz Gábor, this legal principle was deemed an exception under the mitigating rule of minority age. Furthermore, both of them emphasized that the exploration as well as the consideration of perpetrator's *malitia* were left to judge's "prudent discretion" *(arbitrium judicis)*. BODÓ *Op. cit.* p. 92. *"In Delinquentibus tamen, non tam numerus annorum, quam temperamentum, judicium, capacitas, malitia, quae aetatem supplet, vel etiam superat aliaeque qualitates, considerari debeant."* TARNÓI GOCHETZ, G., *Systema Praxis Criminalis Inclyti Regni Hungariae, patriumque eidem adnexarum,* Typis Veronica Nottensteinin Viduae, Budae, 1746, p. 33. *"Porro circumstanitae poenam etiam capitalem in temporaneam commutabunt: Si delictum ab impuberi, (nisi malitia suppleri aetatem, Jdex pro prudenti discretione comperiat)"*. PAULER *Op. cit.* [1869] p. 232-233.

[33] MONBALLYU, J., *Six Centuries of Criminal Law.* Leiden, 2014, p. 108. CARPZOV *Op. cit.* [1677a] p. 358. *"Quinto: Denique notandum, licet impubes poena regulariter exemptus sit, fieri tamen quandoque posse ut ob insignem & supinam malitiam, supplicium mortis ipsi jure infligatur. Et sic exceptio a Regula antea posita hoc casu facienda est,"* MALDONER, J. F., *Synopsis Militaris Oder Kurtzer Begriff Uber Die Kayserliche Kriegs-Articul.* Nürnberg und Franckfurth, 1724, p. 285. HENKE, H. W. E., *Lehrbuch der Strafrechtswissenschaft.* Zürich, 1815, p. 97-98. especially regarding the footnote 1st on the page 98.

[34] KLEINSCHROD, G. A., *Systematische Entwickelung der Grundbegriffe und Grundwahrheiten des peinlichen Rechts.* 1794, p. 138. SCOPP, J. G., *Der in peinlichen Fällen wohl Instruirte Richter, oder Theoretisch-practischer Criminal-Tractat, aus denen Kayserlich-Carolingisch- und Churfürstlich-Sächsischen Rechten genommen, und zum heutigen Gebrauch verordnet.* Nürnberg, 1758, p. 217.

[35] STUMP *Op. cit.* p. 26. Cf. the legal regulation of *Constitutio Criminalis Theresiana.* CCT. [1769] p. 21.

[36] AEBERSOLD, P., *Schweizerisches Jugendstrafrecht [3. Auflage].* Bern, 2017, p. 54.

[37] CARPZOV *Op. cit.* [1677a] p. 358. *"Quare, priusquam poena mortis Reo impuberi irrogetur, haec tria concurrant, necesse est. Nempe, ut impubes prope egressus annum aetatis 14. ex supina malitia delictum commiserit atrocissimum, vel cum ejusmodi qualitatibus, quae crimen atrox multum aggravant. Quorum uno deficiente, haudquaquam ad mortis supplicium deveniri poterit."* There was a crucial point that perpetrator's *malitia* had to be intense (to such a degree) that it could have a "supply-effect" on the lack of the required age. This "quality-requirement" of *malitia* was highlighted by a lot of authors. CARPZOV *Op. cit.* [1677a] p. 358. *"insignem & supinam malitiam"* BODÓ *Op. cit.* p. 276. *"notabilis malitia"* REMUS *Op. cit.* p. 104. *"manifesto malitia"*.

If these three preconditions had been proven, then judicial *arbitrium* could have been applied concerning infliction, although the second and third conditions had already required the judge to deliberate the extent (degree) of defendant's *malitia* as well as the existence of a cruelest crime or aggravating circumstances. The judge's *arbitrium* also appeared in the text of Article 164 of CCC. as a possibility of choosing among sanctions which aspect has already been more thoroughly detailed in Chapter 2. During the previous analysis of Article 164 I strived to accentuate the option of inflicting a milder retribution than the death penalty, since the court could decide on material or corporal instead of capital punishments during the course of the sentencing. In contrast, in this subsection, I sought to highlight the opportunity of pronouncing death sentence because the essence was the use of judicial discretion in both cases of applying mortal and non-mortal sanctions.

To summarise this short part, Article 164 of CCC. empowered the judge to mete out death penalty, as well, in cases where the legal principle of *malitia supplet aetatem* along with two other detailed conditions had been proven. Nonetheless, the imposition of capital punishment meant only an option but not an obligation for the judge also in this case, since the judge always had to take special account of prudent exploring and deliberating particular facts as well as the circumstances of diverse legal cases.

3. A procedural approach: The minority age as an obstacle of being witness

In this part, I attempt to outline a procedural approach before I start to analyse the final decision of the Debrecen Magistrates. So far, during this scrutiny, the substantive-featured loci of *Practica* have merely been elaborated as well as presented, even though the criminal litigation researched also included two Carpzovian opinions with procedural content regarding minority age. Neverthless, I must note anyway that the substantive law had not obviously been differentiated from procedural (criminal) law in a current conceptual sense neither at the age of Carpzov, videlicet in the first half of the 17th century nor in the middle of the 18th century yet.

As it was formerly described, the elaborated criminal proceedings were initated against more offenders. The most juvenile female perpetrator of them made a confession about the committed crime, thereby providing a crucial evidence for other arsonists, as well. This deposition was proved to be significant concerning the production of evidence, thus the defence argued in his another *allegatio* that this proof should not be useable in the criminal procedure because the defendant was too young to be a witness.

In order to bear out his allegation, the attorney reasoned invoking the text of *Practica* again, he alleged that the *impuber* defendant could not testify against other two arsonists. According to Carpzov, witnesses whose testimonies were refused because of certain causes were rejected in criminal cases, moreover he gave some instances – consanguines, affinities, orphans and *impuberes* – in order to confirm his statement. The Saxon author also mentioned two arguments regarding the question why *impuberes*' depositions had to be nixed. As stated by the first factor, the *impuberes*' intentions seemed to be uncertain and secondly *impuberes* were apt to lie by virtue of their age: actually, they were more easiliy predisposed to tell an untruth. In his opinion, it was not permitted for these persons to be witnesses in criminal procedures, unless they already turned 20 years of age. Consequently, the attorney chimed in with Carpzov's reasoning, he asserted that the *impuber* defendant had not been able to produce evidence for other delinquents in the criminal litigation because she was under 20. In contrast with criminal litigations, – as Carpzov wrote – it was a sufficient expectation in any civil case that witnesses had to be *puberes,* viz, to be older than the age of 14 years for males and 12 years for females. Therefore, the age of 20 years as one of prerequisites of testifying in criminal procedures appeared to be stricter compared to the age demanded in civil proceedings.

Beyond *Practica*, in connection with the matter of becoming witness in criminal litigation, the *Praxis Criminalis* was also adduced by the defence. According to its Article XIV, testifying was the most appropriate way to prove the perpetration of a delict, even though potential witnesses were required to be "eligible and without any exceptions" so that they could appear as witnesses in criminal proceedings. The one component of these expectations was adequate age determined by reaching 20 years in Section 4 Article XIV in accordance with Carpzov's opinion. However, the *Praxis Criminalis* took note of younger people, because they could be summoned in advance of reaching the age required to appear as witnesses in criminal litigations if the delict had shortly occurred before turning 20 years of age. The *Praxis Criminalis* gave the explanation of this regulation that persons in this age already had certain knowledge about the committed crime which could be also presented by them before the court.[38]

The minority age as an obstacle of becoming a witness in criminal proceedings also emerged in Hungarian jurisprudential works in the 18th century. According to Bodó Mátyás, *impuberes* were considered as being incapable of testifying in criminal cases pursuant to *ius commune*. The minimum age of becoming witness was 18, even though he underlined that this was either 16 or 12 as maintained by other authors' opinions. The persons who were younger than these age limits were not allowed to be witnesses because *impuberes* had weak discernment and were prone to lie, moreover they proved to be impressionable.

It was not commonly permitted to give credence to those people in legal actions who could not take an oath and the *im-*

[38] Pr. C. [1697] p. 5. *"Cum delictorum probationes potissimum per testes fiant, ad hoc autem idonei, & exceptione majores testes requirantur, in his sequentes Regulae observandae sunt: (…) In Criminalibus testes sint saltem viginti annorum completorum, quamvis de ijs rebus, quae in minori sua aetate, non multo ante contigerunt & de eorum notitia, causas afferre potest, citari possit."* CARPZOV *Op. cit.* [1677a] p. 130. *"Quare causis criminalibus ii demum testes rejiciuntur, qui certis ex causis a testimonio repelluntur; quales sunt Consanguinei & Affines, Pupillus, Impubes, (…) ob lubricum consilium (…) & quia aetas illa ad mentiendum est facilis, (…)."* CARPZOV *Op. cit.* [1677a] p. 130. *"Notandum porro & hoc, quod in causis criminalibus testes non admittantur, nisi annum vigesimum excesserint In civilibus equidem causis sufficit testes esse puberes & masculos 14. annis, foeminas vero 12. annis majores, (…) Attamen in testificationibus criminalibus requiritur aetas annorum 20. (…) Eaq; opinio ceu verior & communior in foro est recepta."*.

puberes could not swear an oath in accordance with the rules of civil law, since these people had weak (uncertain) of sound mind as well as discernment. As a result, their testimonies could not carry such a ponderosity which could have resulted in the condemnation of offenders in criminal proceedings. However, Bodó touched on an exception, the age of being witness was also accepted under the age of 16th year in case of a defendant's exculpation. The reason of this exception stemmed from the ancient procedural maxim of Roman origin denoted that *"The condition of the defendant must be favoured, rather than of the plantiff"*. If this doctrine is limited to criminal law, it will signify that the position of the *reus* (the synonym of the *incattus*' concept) always had to be more favourable in criminal legal action than of the accuser *(actor)*. Due to this principle, which was closely connected with *in dubio pro reo*, those witnesses who were younger than the expected age had to be accepted in order that the defendants could attempt to exculpate themselves by dint of these persons' testimonies. Nevertheless, in these situations, the judge had to examine the quality as well as capacity of such youthful witnesses' discernment. Consequently, the judgements of these issues were left to the distinguised and prudential discretion of the judge *(arbitrium judicis)*, therefore the qualities and capacities of younger witnesses had to be thoroughly deliberated by court in order that these persons' testimonies could be used in criminal litigations in favour of the defendant's exculpation.[39]

I presume that the real debate was between parties in the analyzed criminal litigation concerning the above presented procedural approach of minority age how the deposition of the young defendant could be regarded; it could be considered the testimony of a witness or rather the confession of an accessory *(complex)*. This question seemed to be of crucial importance because the argumentation of the defence held the young female arsonist a witness against the approach of the prosecution, which deemed her an accessory. Regarding the evidence adduced by the young female defendant, the parts of both *Practica* and *Praxis Criminalis* referred to by the attorney were premised on the supposition that the young defendant could be considered as a witness in the criminal procedure, consequently the postulate of being in the adequate age could be requirable from her with regard to testifying.

The Magistrates of Debrecen essentialy resolved this theoretical dilemma in the final sentence, when it regarded the juvenile perpetrator's confession as an alleviating circumstance, since she was one of the defendants who firstly and spontaneously made a confession about the committed incendiarism in the investigation of the criminal procedure *(benevolum examen)*. Nevetheless, it becomes clear that minority age did not merely carry a substantive feature, but also a procedural trait, because the latter one could function as a potential impediment, with respect to deposition in criminal litigations.

4. Analysis of the final sentence: The imposed punishment as a *poena extraordinaria*

In the last main chapter of the elaboration, I intend to scrutinize the final sentence of the Debrecen Magistrates *("deliberatum est")*. The principal points are as follows; how the judicial body appraised the minority age, to what extent it conceded the attorney's argumentation and relied on the loci of Carpzov's *Practica*. In this part of the paper, the analysis primarily focuses on the imposed penalty and the locus of *Practica* referred to by the Magistrates in the final sentence.

The judicial body inflicted decapitation on the young female defendant as well as ordered that the offender's cadaver had to be burned afterwards. When the court passed the final sentence, it took two mitigating circumstances into consideration. On the one hand, it sized up the commited act rested on the explored circumstances and established that the delinquent seemed to be only in her 16th year, thus she had not been in the required age *("perfecta aetas")* yet. On the other hand, this defendant was the first who made a confession about arson in the interrogation of the criminal proceedings *("in benignum examen")* as it was already mentioned in the end of the previous chapter. The court adduced one locus of *Practica* in the final sentence regarding the lack of expected age and this Carpzov-opinion is going to be exhaustively dissected hereinafter.

In a taxonomical approaching, this referred locus of *Practica* differed from those which have been analyzed in the former chapters of the paper. Nevertheless, at this point of the scrutiny, the topic structure of *Practica* needs to be slightly touched upon. This book was divided into three same parts *(pars)*, each one of them comprised 50 questions *(quaestio)* including numbered paragraphs *(numerus)* in the diverse matter of criminal law. The referred locus in the final sentence is founded in the *quaestio* concerning arson whereas the loci referred to by the attorney in

[39] BODÓ *Op. cit.* p. 23. *"Jure communi, in Criminalibus, pro inhabilibus reputantur Impuberes, etiam minores 18. secundum nonnullos vero 16. aut 12. annis ob judicii imbecilitatem: tum ex eo; quod tales ad mendacium sint proclives; tum vero, quod facile corrumpi possunt; tum denique, quia Testi non creditur nisi adjurato. Jam vero Impuberi, secundum Constitutiones Juris Civilis, Juramentum deferri non potest. Ratio: Quia minorennium lubricum est judicium, & consilium. Ergo ipsorum testimonia, non habent tantum ponderis; ut ad condemnationem urgeant. In exculpationem tamen Rei admitti videntur etiam 16. Annis inferiores; & quidem ex ea ratione: quod Rei semper favorabiliores sint quam Actores. Quod ipsum, discreti Judicis prudenti arbitrio relinquendum esse, quos, & quales Testes, secundum judicii eorum qualitatem & capacitatem, admittere debeat; id ipsum Jure communi quoque dictante."* The legal principle of *"quod Rei semper favorabiliores sint quam Actores"* stemmed from a phrasing of Digest. *"Gaius libro quinto ad edictum provinciale Favorabiliores rei potius, quam actores habentur."* (D.50. 17. 125.). HALKERSTON, P., *A collection of Latin maxims & rules, in law and equity.* London, Edinburgh, 1823, p. 47. CAMPBELL BLACK, H., *A Law Dictionary Containing Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern (Second Edition).* Union New Jersey, 1995, p. 485. BALLENTINE, J. A., *A Law Dictionary of Words, Terms, Abbreviations, and Phrases Which Are Peculiar to the Law and of Those Which Have a Peculiar Meaning in the Law.* Clark, New Jersey, 2005, p. 169. Both arguments of *"lubricum est (…) consilium"* as well as *"ad mendacium sint proclives"* emerged also in Carpzov's *Practica*, moreover these reasons appeared in other scholars' works. AYRER, J.-FRITSCH, A., *Historischer Processus Iuris.* Nürnberg-Frankfurt, 1737. p. 179. *"Et constat, quod talis impubes regulariter testis esse non possit, (…). Tum propter lubricum consilium, (…). Tum, quod aetas illa sit mentiendum facilis, (…)."* BLUMBLACHER, C., *Commentarius in Kayser Carl deß V. und deß heiligen Römischen Reichs peinliche Halß-Gerichts Ordnung.* Salzburg, 1752, p. 75. *"Ratio est, quia lubricum est ejusmodi personarum consilium. (…) Et censentur ad mentiendum faciles."*.

his *allegatio* belonged to the *quaestio* wherein Carpzov dealt with minority age as a possible alleviating cause of penalty in a more general approach.[40] In Q. 143., the author presented minority age as a common mitigating circumstance of punishment in contrast to Q. 39. In this latter *quaestio*, the minority age was elaborated as one of potential mollifying causes of an arsonists's penalty, and wherein the Saxon legal scholar exclusively zeroed in on the extenuation of arson. The "special" locus in Q. 39. diverged from the "general" loci in Q. 143. concerning the determination of age limits. Namely, those arsonists – who stepped across the age limit of *pubertatis* by a few years – could be penalized with decapitation instead of the burning alive functioned as *poena ordinaria* of incendiarism. These perpetrators had already completed their 14th year, though they had not completed the age of 16 or 17 yet.[41]

In this sentence, the mitigation of retribution manifested itself in the imposition of beheading in lieu of burning alive, since the penalty of sword presumably brought about less suffering than destruction by fire. Although the Magistrates did not want to forego the "reflective element" of arsonists' sanction in this case, therefore they linked beheading with the burning of the dead body. The consumption of a sinner's corpse by fire can be interpreted as such an element of the imposed sanction which could mirror the essence of the perpetrated act, consequently this component proved to be the part of the applied punishment similarly as the decapitation serving as the target of general prevention by deterrence.[42]

The beheading can be regarded as a lightened punishment, a *poena extraordinaria* concerning the analyzed legal case.[43] In respect of the interpretation of the decapitation, I must spare a few words about the Hungarian legal regulations of arson with special regard to the sanction of this crime. Perhaps the most significant one of domestic rules was Act XI of 1723, which made a conceptual distinction between the categories of *incendiarius publicus* as well as *privatus* as two possible categories of perpetrators in the 13th of its Sections.[44] The latter Section prescribed that *poena ordinaria* for incendiarism had to be burning alive in case of both *incendiarius publicus* and *privatus*.[45] This legal regulation included a clause which gave the judge permission to impose a milder sanction than burning alive if alleviating circumstance(s) had been proven in a criminal procedure.[46] Nevertheless, according to this provision, the delict of incendiarism had to be punished with death in each case.[47] Therefore, inflicted punishment could never be lighter than death, the native law excluded the "real" possibility of mitigation. Nonetheless, decapitation could be regarded as an alleviated *poena extraordinaria* in the Hungarian legal regulation of the early modern period, as well.

The Magistrates did not only invoke *Practica*, but made a reference to Article LXXXVIII of *Praxis Criminalis* in the final sentence, as well. The text of *Praxis Criminalis* also corroborated the interpretion of the imposed sanction detailed above, namely the beheading combined with the burning of a dead body seemed to be an alleviated penalty, a *poena extraordinaria*. Article LXXXVIII Section 7 of *Praxis Criminalis* declared that the judge had to punish with decapitation or other milder punishment in lieu of inflicting burning alive, provided that mitigating circumstance(s) had been proven. Therefore, if the delinquent appeared to be a young person and his malice was not deemed so large (to such a degree) compared to adults, the arsonist avoided suffering death by fire, however, he had to be inflicted decapitation with the burning of his cadaver.[48]

With reference to the analysis of the final sentence, I must additionally mention some other loci of *Practica* referred to in his *allegatio* by the attorney. These texts were adduced concerning minority age as a mitigating circumstance of penalty, but were not previously elaborated in Chapter 2 of the paper. These Carpzov-opinions were closely connected with the locus of *Practica* that appeared in the final sentence, albeit

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[40] *"Quaestio XXXIX. "Quibusnam in Casibus Poena Incendii Ordinaria sit mitiganda? (…) Quaestio CXLIII. "An & quando propter Aetatem tenellam Infantum, Impuberum, atque Minorum, Poena sit remittenda, vel mitiganda?"* (referred to as Q. 39. and Q. 143. below).

[41] CARPZOV, B., *Practicae Novae Imperialis Saxonicae Rerum Criminalium, Pars I.* Francofurti, Wittebergae, 1677, (referred to as CARPZOV *Op. cit.* [1677b] with marking page number below) p. 234. *"Tertio: A poena incendii ordinaria rigorosa quae est ignis, eximuntur quoque Rei ob minorennitatem, qui puberes quidem sunt, paucos tamen annos post inchoatam pubertatem excesserunt, quales sunt, qui anno decimo sexto vel septimo nondum complete hoc delicti genere se contaminant, in quibus minor est malitia & perversitas judiciumque adhuc infirmum. Quos propterea in crimine hoc gladii poena affici, sufficere visum fuit multoties Scabinis."*.

[42] The Magistrates applied this retribution in other cases, as well. M. ANTALÓCZY *Op. cit.* p. 157. Regarding the "reflective element" of the penalty imposed cf. BODÓ *Op. cit.* p. 274. *"Per quod quis peccat, per idem punitur et idem."* This concept can be considered as the manifestation of *lex talionis*.

[43] In his indictment, the prosecutor made a motion that the offenders should be punished by burning them alive. He adduced Carpzov's *Practica* (*Pars* I *Quaestio* 38), *Praxis Criminalis* (*Pars* II *Articulus* LXXXIII) and Act of XI and CIX of 1723 in order to support his proposal for this penalty.

[44] BODÓ *Op. cit.* p. 273. *"Incendiarii, juxta Art. 11. 1723. alii sunt publici, alii privati. Publici dicuntur illi, qui studio, manifeste & non occulte, ignem, tectis, aedibus, acervis, aut segetibus, & id genus aliis, supponunt. Privati, vero, qui occulte, in utroque tamen casu, malitiose & deliberate, id faciunt."*.

[45] BODÓ *Op. cit.* p. 274. *"Hujusmodi autem dolosi Incendiarii, non tantum Jure Patriae, verum & ex Ordinatione Carolina & Josephina Criminali, flammarum supplicio afficiuntur."* See in more detail the the texts of two legal regulations (*Praxis Criminalis* and Article 125 of CCC.) mentioned by Bodó. Act XI of 1723 Section 13 *"Incendiarii autem publici; vivi cremabuntur; pariter et privati,"* BODÓ *Op. cit.* p. 274. *"Poena hujus voluntarii, & malitiosi Criminis, est ignis, de praescripto etiam Art. 11. 1723. juxta illud: Per quod quis peccat, per idem punitur & idem."* Pr. C. [1697] p. 69. *"(…) hujusmodi incendiarius, ignis supplicio puniatur."*. ZOEPFL *Op. cit.* p. 238. *"Straff der brenner. (…) Item die boßhafftigen überwunden brenner sollen mit dem fewer vom leben zum todt gericht werden."*.

[46] Act XI of 1723 Section 13 *"(…) pro rerum circumstantiis gravioribus, pari poena: in levioribus vero mitiori (…)"* BODÓ *Op. cit.* p. 274. *"Qualis poena, non solum publicis sed & privatis Incendiariis, in gravioribus Circumstantiis, iroganda eodem Articulo praescribitur; in levioribus vero, mitior, pro rerum circumstantiis, (…)"*.

[47] Act XI of 1723 Section 13 *"(…) attamen amissione vitae plectendi venient."* BODÓ *Op. cit.* p. 274. *"(…) semper tamen capitalis,"*.

[48] Pr. C. [1697] p. 69. *"Circumstantiae alleviantes. §. 7. E contra poena de vivo comburendo condonatur, & ejus loco Reus antea gladio plectitur aut juxta circumstantiarum qualitatem extraordinarie & adhuc levius punitur, (…) Similiter si Reus adhuc juvenis esset, & in eo Judex tantam malitiam, quam forte in alio, non deprehenderet, talis incendiarius gladio plectatur, ejusque corpus nihilominus comburatur igne."*. Cf. Pr. C. [1697] p. 24. *"Vel etiam quando circumstantione aliquam poenae alleviationem admittunt, potest prius decapitari, deinde corpus in pyram poni, igne consumi, & cineres. &c."*.

these loci exclusively mentioned in the *allegatio* of the defence. Invoking a taxonomical approach, these texts need to be presented at this point of the paper in order to confirm the conception, namely the sanction applied by the Magistrates was considered as an alleviated penalty. The analysis of these Carpzov-opinions can assist in a clearer understanding of the question what the theoretical ground of the final sentence was. Moreover, these loci can justify the supposition that the court actually conceded the attorney's arguing, furthermore the passed sentence was really based on *Practica* as well as *Praxis Criminalis*.

In these loci of *Practica*, Carpzov reasserted that the minority age was considered a mitigating circumstance, which could particularly alleviate punishments of minors who had already been nearest the inchoation of *pubertati proximi*, although this alleviating cause could not entirely acquit delinquents. Through this assertion, Carpzov essentially alluded back to the locus adduced by the Magistrates, and if the structure of *Practica* is more meticulously scrutinized, it will become obvious that the referred locus in the final sentence preceded – in a taxonomical sense – those loci in the *Practica* appeared in the *allegatio* of the defence. Returning to the review of Carpzov's opinions, it seemed to be a fairly difficult task to define precisely who was nearest to the inchoation of *pubertati proximi*. According to Carpzov and also the several other authors mentioned by the answer to this question could be less doubtful in those cases when perpetrators had not completed the age of 16 yet.

Carpzov thought the extenuative impact of minority age as an adaptable conception for the graver delicts, therefore, in his opinion, the penalty of minors should be mitigated in case of not only arson but also other, more atrocious delicts. Since these juvenile persons' perversity or rather depravity in the perpetrated acts by virtue of their younger age appeared to pale in comparison with the crimes committed by seniors (adults). Carpzov clarified this concept with a short example as well. According to one instance, one certain noble lad, who had not completed the age of 18 yet, murdered his father with poison. The court infilcted the retribution of sword on him because his age was regarded as an alleviating cause, which was able to lighten the rigor of law.[49]

Conclusion

In conclusion, I hope that the scrutinized procedural parts of the criminal litigation could expressively illustrate Carpzov's appearance or rather emergence in the criminal case law of Debrecen, however the facts cannot be denied that the paper merely analyzed certain procedural phases of one criminal action in point of only a few various aspects of minority age, chiefly concentrating on Carpzov's approach. Thus I am not able to provide overall consequences and deep connections at the end of my scrutiny. Nevertheless, neither did such intentions originally constitute a part of my research targets.

This paper just endeavours to highlight the potential of criminal legal historical research in the early modern period, furthermore the possibilities of analyzing foreign legal effects in native legal "environment". In addition to all these purposes, it makes an effort to take "a snapshot" of a tangle of different age categories belonging to the period of the 17th and 18th centuries by means of Carpzov's ideas. This analysis simply attempted to be awareness-raising with particular respect to mitigating circumstances, *doli capax*, *arbitrium judicis*, *malitia supplet aetatem* and *poena extraordinaria* which concepts that have basically been proven to be worthy of attention from the point of view of modern criminal law.

The law – implying legal regulation, practice and scholarship – has not only progressed *per se*, solely within a purely and hermetically separated national legal framework, but it has also been permanently changing and developing in an international context. Through making use of this approach, legal historical "investigations" could be even more enriched if these analyses took a more particular note scrutinizing external legal effects. I believe that one of the main missions of recent legal historical reseach is to explore and explain different actions and interactions among diverse legal cultures and systems. In my opinion, Saxon Benedikt Carpzov's influence or "Carpzovian authority" can be interpreted as such a potential action referring to the history of Hungarian criminal law in the 18th century. Therefore, this paper is considered as an introductory research which is able to provide a short glimpse of this phenomenon in a descriptive way, moreover it can involve the possibility of a further and more extensive analysis concerning Carpzov's impact on domestic criminal legal development.

[49] CARPZOV *Op. cit.* [1677 b] p. 234. *"Equidem non ignoro, quod minor aetas delinquentem in totum neutiquam excuset, ut post alios communiter docet (…). Attamen quoad poenam mitigandam multum juvat, efficitque, ut minores inchoatae pubertati adhuc proximi, mitius puniantur, (…) ubi dicit, hoc minus dubium habere, si delinquens nondum sit major sedecim annorum. Neque aliter sese res habet in criminibus gravioribus & atrocibus, (…). Quin & in atrocissiumis delictis ob minorem aetatem poenam ordinariam mitigandam esse, tradit (…). Licet namq; dolosum sit judicium minoris est, tamen infirmius propter naturae infirmitatem, ut ita minor perversitas in hoc, quam in majore appareat. Praeterea & aetas haec suapte natura vitiorum incitamentum est, quare minorum delicta ipsorum potius fragilitati adscribuntur, juxta illud D. Ambrosii: Vicina est lapsibus adolescentia, qua variarum aestus cupiditatum sevore calentis inflammatur aetatis. (…). Hinc Nobilem quendam juvenem nondum habentem 18. annos, eo, quod patrem veneno necaverat, juris rigore mitigatio, capite fuisse obtruncatum, meminit (…) Vid. quoque (…)."* Regarding Carpzov's example see also in more detail FRANCHIS, V. de, *Decisiones Sacri Regii Consilii Neapolitani (Tomus Secundus).* Venetiis, 1620, p. 6-7.