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ORIGINAL SCIENTIFIC ARTICLE / *ИЗВОРНИ НАУЧНИ РАД*

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THE ROMAN ROOTS OF MINORS' CRIMINAL LIABILITY[1]

The impubes's delict liability, in the classic period, is subordinated to being doli or culpae capax; two decemviral provi-sions, instead, established a less severe sanction with respect to pubes in case of impubes's criminal behavior regardless from assessment about their actual ability to commit crime. Some textual clues allow us to speculate on the historical event that determined this evolution whose goal stands as a fundament of our current regulations, where an age range is also expected, characterized from an absolute presumption of not-imputability to the next one (that a recent proposal of law would tend to turn down, bringing it closer to the ages of pubertati proximi) where the imputability depends on the ability to understand and want the subject.

Key words: Impuber; Dolus capax; Culpae capax; Pubertati proximus; Minor's imputability; Impubes's delict liability.

1. PREMISE

When making a diachronic comparison, one has to be cautious so as not to oversimplify, thus asserting the historical priority of Roman law; contextually, one shouldn't use this methodology with the specific aim to indicate the preferred option, condoning the old trope of history as a *magistra vitae.*[2] Furthermore,

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[1] I shall confine myself to indicate, with a small series of notes, the remarks under discussion during the conference acts this book is meant to collect.

[2] T. Massara, "Sulla comparazione diacronica: brevi appunti di lavoro e un'esemplificazione", in M. Brutti & A. Somma (Eds.), *Diritto: storia e comparazione. Nuovi propositi per un binomio antico*, Frankfurt am Main: Max Planck Institute for Legal History and Legal Theory 2018, 114. On the risks this method entails see also A. Somma, "Fare cose con il diritto romano", in *Ostraka* 17, 2008, 225.

it is important to acknowledge the difficulty that such a comparison entails, since it takes into account profoundly diverse historical situations. Finally, one has to bear in mind that the purpose of any comparison is the acquisition of greater knowledge. Such an analysis, in fact, should bring to a better understanding of the inherent problems and the tools employed, since it should make it possible to grasp the ribs of the underlying reasoning.[3] Consequently, despite what has been recently pointed out – that according to romanists, diachronic comparisons are all but a popular option[4] – it would still be useful to deepen our understanding about minors' liability with regard to penal law.

2. CLASSIFYING MINORS ACCORDING TO AGE

The purpose of this brief text is to establish whether or not a line of continuity can be observed between the standards defining minors' criminal liability in modern European systems – with particular attention to the Italian one – and the ones offered and employed by Roman jurists.

The Roman law of the classical period distinguished at least two age groups. The first one comprised the *infantes*,[5] subject to a full non – imputability.[6] The second one included the *impuberes*, who, if *doli* or *culpae capaces*[7] might be held criminally liable. The latter were therefore subject to relative imputability.

[3] T. Massara, 147. On the recent contributions in favor of a diachronic comparison cf., see also, P. Garbarino, "Diritto romano, comparazione giuridica, interdisciplinarietà", in *Scritti di comparazione e storia giuridica, II (From the Comparative Law Seminars of Palermo University and the conference SIRD–ARISTEC named "Storia, Comparazione, Scienza Giuridica" held in June 2012 at the Law University of Palermo) edited by P. Cerami e M. Serio*, Torino 2013, 9, e M. Brutti, "Sulla convergenza tra studio storico e comparazione giuridica", in *Diritto: storia e comparazione*, 49.

[4] T. Massara, 111. For an overview of the literature on this topic please see C. Masi Doria, "La romanistica italiana verso il terzo Millennio: dai primi anni settanta al Duemila", in *Storia del diritto e identità disciplinari: tradizioni e prospettive* (a cura di I.Birocchi – M.Brutti), Torino 2018, 192.

[5] For the exact definition of *infantes* in Roman law, see F. Lamberti, "Su alcune distinzioni riguardo all'età dell'impubere nelle fonti giuridiche romane", in *Scritti di Storia per Mario Pani*, Edipuglia s.r.l., Bari 2011, 212.

[6] Others who claimed the non-imputability of *infantes* in the classic period were: C. Ferrini, "Diritto penale romano. Esposizione storica e dottrinale", *Enciclopedia del diritto penale italiano*, Milano 1902, 64; B. Albanese, *Le persone nel diritto privato romano*, Palermo 1979, 436; A. Burdese, "Sulla capacità intellettuale degli impuberes in diritto classico", in *AG*. 150, 1956, 27; M. F. Cursi, *Iniuria cum damno. Antigiuridicità e colpevolezza nella storia del danno aquiliano*, Giuffrè, Milano 2002, 95.

[7] While the expression *doli capax* appears several times in the sources (cfr.*infra* quelle cit. nelle ntt.) we read *culpae capax* only in D. 47. 2. 23 (Ulp. 41 *ad Sab*.), even though it is considered equivalent to «*iniuriae capax*» in D.9.2.5.2 (Ulp. 18 *ad ed*.), (reported in the text). This can be found for example in M. F. Cursi, 100.

This finds confirmation, for example, in:

D. 9, 2, 5, 2 (Ulp. 18 *ad ed.*) *Et ideo quaerimus, si furiosus damnum dederit, an legis Aquiliae actio sit? et Pegasus negavit: quae enim in eo culpa sit, cum suae mentis non sit? et hoc est verissimum. cessabit igitur Aquiliae actio, quemadmodum, si quadrupes damnum dederit, Aquilia cessat, aut si tegula ceciderit. sed et si infans damnum dederit, idem erit dicendum quodsi impubes id fecerit, Labeo ait, quia furti tenetur, teneri et Aquilia eum: et hoc puto verum, si sit iam iniuriae capax*.[8]

Ulpian raises the question of whether a *furiosus* could be deemed responsible *ex lege Aquilia.* In doing so, he quotes Pegasus's objections, which he fully supports: the unawareness that characterizes the insane person doesn't allow for liability. He equates his/her condition, along with others,[9] to the one of the *infans*,[10] whom he finds unquestionably not punishable.[11] The minor,[12] conversely, since he/she could be found guilty of theft, may also be deemed responsible *ex lege Aquilia*, according to Labeo, but – as Ulpian clarifies – only and exclusively if he/she was found *iniuriae capax*.[13]

The same dual categorization of age groups in reference to the criminal liability of minors appears in the majority of current legal systems. In

[8] This quote was thought to be altered, but only on a formal level: see A. Burdese, La capacità op.cit., 44. For a brief overview of the various opinions see L. Rodriguez-Ennes, "Notas sobre el elemento subjetivo del "edictum de effusis vel deiectis", in *Iura* 35, 1984, 96. Writing in favor of the quote, particularly the last section, being unaltered, please see M. F. Cursi, 99 nt. 94.

[9] Specific reference is made to damage made by animals or things (*si quadrupes damnum dederit, Aquilia cessat, aut si tegula ceciderit*). For a deeper reference to the former, please see M. V. Giangrieco Pessi, *Ricerche sull'actio de pauperie. Dalle XII Tavole ad Ulpiano*, Jovene, Napoli 1995, 30.

[10] The equivalence of these two groups can be found elsewhere among Roman jurists. A. Burdese, 28; S. Schipani, *Responsabilità «ex lege Aquilia». Criteri di imputazione e problema della «culpa»*, Giappichelli, Torino 1969, 273. In D.47.10.3.1 (Ulp. 56 ad ed.) e in D. 43.4.1.6 (Ulp. 72 *ad ed.*) the *furiosus*, conversely, is equate with the minor, as long as they aren't found *doli capax*.

[11] On the distinction between *infans* and minors with regard to criminal law please see D. 47. 2. 23 (Ulp. 41 *ad Sab*.), also by Ulpian.

[12] The l'*infans* is clearly a minor too, but in my opinion that in no way justifies the claim made by Tumedei (in *Distinzioni postclassiche riguardo all'età.* «*Infanti proximus» e «pubertati proximus»*, Bologna 1922, 54) and shared by Solazzi («Qui infanti proximi sunt», ora in *Scritti di diritto romano* V, Jovene, Napoli 1972, 380 nt. 5) according to which D. 9. 2. 5. 2 (Ulp. 18 *ad ed*.) would be altered, precisely because the distinction between the terms *infans* and *impubes* is ambiguous. It appears to me that Ulpian both in this fragment and in D. 47. 2. 23 (Ulp. 41 *ad Sab*.), having already mentioned the *infantes*, he automatically distinguishes them from the subsequently mentioned *impubes*.

[13] On the meaning of this last passage, please see cf. *infra* nt.

most cases, in fact, there will be a first category which comprises the youngest minors – usually ranging from birth to the preadolescent period – who cannot be held criminally liable,[14] exactly as was the case with classical Roman law, and a second category – ranging from the preadolescent period to full adolescence – whose members could be deemed responsible as long as they met specific requirements.[15] In particular, Article 97 of the Italian Penal Code reads as follows: "Non è imputabile chi, nel momento in cui ha commesso il fatto, non aveva compiuto i quattordici anni". While Article 98 of the same code reads: "È imputabile chi, nel momento in cui ha commesso il fatto aveva compiuto i quattordici anni, ma non ancora i diciotto, se aveva la capacità d'intendere e di volere; ma la pena è diminuita". It becomes evident that, as far as the first age group is concerned, - including minors aged between 0 to 14, equivalent to the Roman *infantes*,[16] an irrefutable presumption of non imputability is applied, whereas in the case of the second age group, including minors aged between 14 and 18 and equivalent to the one of the *impuberes*, a presumption of relative imputability is applied as long as the offender is judged to be mentally fit at the time of the crime.[17]

3. DIFFICULTIES IN THE ESTABLISHMENT OF AN IMPUTABLE AGE

Another interesting point emerging from the comparison between Roman laws and modern criminal law concerns the difficulty to establish the exact age at which the minor becomes punishable. If Roman law simply wouldn't refer to a specific chronological age, in modern European systems that same age varies from 10 to 15.[18] Italy, Austria, Germany and Spain,

[14] The need to impose a minimum age limit for a full non-imputability was stressed internationally on several occasions. For the acts in favor of a reasonably low age limit cf., *infra.*

[15] As will be stated later on (cfr. *infra*), it should be clarified that, while some legal systems hold the minors belonging to the second group (ranging from the preadolescent to the full adolescent stage) criminally liable only as long as they meet certain requirements, other systems apply imputability regardless, imposing specific sanctions.

[16] The term "equivalent" is obviously not meant as "equal", since Romans considered *infantes* minors aged max. seven. See the bibliography mentioned in quote 1. "Equivalent" therefore refers to the fact that both systems provide for a non-imputability age group.

[17] This is the most popular conclusion among jurists but, as it will be stated at the end of this work (cf. *infra*), according to the most recent theory, proved by two decemviral provisions and a few jurisprudence norms, any minor who was found guilty of a criminal behavior would be punished regardless of their awareness of the crime, but with the application of less severe penalties aimed at their social rehabilitation.

[18] The current regulatory approach is deemed unstable and criticized by S. Larizza, "Il minore autore di reato e il problema della imputabilità: considerazioni introduttive", in *Il difetto di imputabilità del minorenne (in Orizzonti della giustizia penale minorile) a cura di D.Vigoni, Giappichelli*, Torino 2016, 4.

along with other middle and Eastern–European countries, fix it at 14[19]; England, Wales, North Ireland fix it at 10; Scotland, Turkey and the Netherlands at 12; France at 13; Scandinavian countries at 15. The highest limit is set by Belgium, which fixes it at 18.[20] As a matter of fact, International and Community law doesn't give any specific indication as to what this age should be. According to the UN Resolution 40/33 1985 (Beijing Rules), art. 4: "In quei sistemi giuridici che riconoscono la nozione di soglia della responsabilità penale, tale inizio non dovrà essere fissato ad un limite, troppo basso, tenuto conto della maturità affettiva, mentale ed intellettuale". Clearly, the definition is vague. The 1989 UN Convention on the Rights of the Child, in the third paragraph of art. 40 states that: "States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular: (a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law". In this case too, the expression "minimum age" does not refer to a specific chronological age. Similarly, the *Appendix* of the Recommendation No 11 of 2008 (*European Rules for Juveniles Subject to Sanctions and Measures*) at point 4 of the *Basic principles* reads as follows: "The minimum age for the imposition of sanctions or measures as a result of the commission of an offence shall not be too low and shall be determined by law".[21] Again, no specific indication is given. Finally, in the text number 4 of the above mentioned Recommendation of 2008 is almost entirely reproduced in the guidelines n. 23 of the *Committee of Ministers of the Council of Europe* (2010). But the failed establishment of a minimum age is the result of a precise choice, made evident in the guideline 96 of the Explanatory Report, according to which no age limit should be set as it tends to be too rigid and arbitrary and could lead to grossly unfair consequences: «alcun limite di età, in quanto esso tende a essere troppo rigido e arbitrario e può portare a conseguenze davvero inique».[22]

[19] After the reforms carried out in central and eastern Europe, the most common age limit is set at 14. See F. DÜNKEL, "Il problema della criminalità minorile in Europa. Un confronto", in *La nuova Giurisprudenza civile commentata, fasc. spec., Giustizia minore? La tutela giurisdizionale dei minori e dei "giovani adulti"* 2004, 161.

[20] For an overview of the different age limits set in the various European states cf. F. DÜNKEL, 164; E. Palermo Fabris, "La maturità del minore nel diritto penale", in *La nuova Giurisprudenza civile commentata fasc. spec*., *Giustizia minore? La tutela giurisdizionale dei minori e dei "giovani adulti"* 2004, 58; S. Larizza, *Il diritto penale dei minori. Evoluzione e rischi di involuzione*, Padova 2005, 335.

[21] On the above-mentioned point of the 1989 Convention see cfr. E. Palermo Fabris, 52.

[22] *Linee guida del Comitato dei ministri del Consiglio d'Europa per una giustizia a misura di minore*, in *www.garanteinfanzia.org*, p.78. Clearly there have been some attempts by International organizations - and in particular by the Committee on the Rights of the Child,

4. A TEDENTIAL SIMILARITY IN THE AGE LIMIT

Interestingly enough, Roman jurists refer to the criminally liable minors (hence classified as *doli* or *culpas capacities*) as *pubertati proximus*.[23] Such expression clearly indicates that criminal liability, and thus the capacity of infringing penal law, was directly linked to reaching an age close to puberty, sign of a full development not only of the minor's physical potential, but also of a psychic one.[24] Regardless of when puberty became associated with a chronological age,[25] at the time this would have been set around 12 for women and 14 for men. Therefore, one may easily assert that any minor close to that age could have been considered *pubertati proximi*. In other words, the *pubertati proximi* were the minors between ten and fourteen of age, exactly the same age range cited in current European systems. Despite the passage of centuries, there is a surprisingly similar proposal of age groups in both current criminal law and roman law. This is especially surprising when considering that certain scientific, technological and statistical

set up in the above- mentioned New York convention, - as to what the minimum age for criminally liable minors should be. It was deemed unacceptable to set it at 12 years of age, finding a more appropriate limit in an age range varying from 14 and 16, hence ensuring respect for human rights and legal guarantees. (see Commento generale n.10 del 2007 – *I diritti dell'infanzia e dell'adolescenza in materia di giustizia minorile*, in *www.unicef.it*, p.15). Subsequently a comment was made on the rule n. 4 CM/Rec (2008) 11, specifying that the States should make a specific mention of the age where minors are civilly liable «in other spheres such as marriage, end of compulsory schooling and employment. The majority of countries have fixed the minimum age between 14 or 15 years and this standard should be follone in Europe» Commentary to the European Rules for juvenile offenders subject to sanctions or measures in *www.unicef.org,* 2–3.

[23] The sources on this topic are: Gai. 3. 208; D. 4. 3. 13. 1 (Ulp. 11 *ad.ed.*); D. 44. 4. 4. 26 (Ulp. 76 *ad ed.*); D. 50. 17. 111(Gai. 2 *ad ed. prov.*). However, it is important to stress that in some passages the minor is referred to as *pupillus* – D. 47. 10. 3. 1(Ulp. 56 *ad ed.*); D. 43. 4. 1. 6 (Ulp. 72 *ad ed.*); D. 47. 12. 3. 1(Ulp. 25 *ad ed. praet.*) or simply *impubes* – D. 47. 2. 23, D. 9. 2. 5. 2 – and while it is specified that recognizing *doli* or *culpas capacities* is imprenscindibile, no mention is made of the necessity of being a *pubertati proximus*. For the authenticity of these sources please see cfr., M. Kaser, "Gaius und di Klassiker", in *ZSS* 70, 1953, 171. For the origins of the expression *pubertati proximus* see cfr., B. Perrin, "L'apparition du «pubertati proximus» en droit romain classique", in *Synteleia Arangio-Ruiz*, Napoli 1964, 469.

[24] See G. Pugliese, "Appunti sugli impuberi e i minori in diritto romano", in *Studi in onore di A. Biscardi IV*, 1982, 473, nt. 3, where the mentioned sources are quoted.

[25] On this point see A. B. Schwarz, "Die Justinianische Reform des Pubertätbeginns und die Beilegung juristischer Kontroversen", in *ZSS* 69 (1952) 345; G. Wesener, sv. Pubertas, in *PWRE.* Suppl.14, 1974, 571; S. Tafaro, *La pubertà in Roma. Profili giuridici*, Bari 1991, 256; C. Fayer, *La familia romana. Aspetti giuridici ed antiquari* 2. Sponsalia. Matrimonio, Dote, Roma 2005, 426. The age of puberty was set at 12 years old for women in the classic period, while the 14 years limit for men was not set until Giustiniano (cfr. I. 1. 22 pr.), Please see G. Pugliese, 474. It is reasonable to presume that the reason why *inspectio corporis* was preferred for men instead of the age limit that soon prevailed for women is that the latter passed from the *tutela impuberum* to the *mulierum*, while men, once reached puberty, would become fully liable.

tools were not available in the past and everything was based on experience exclusively.[26] In light of the above, and particularly in light of men being criminally liable as soon as they reached 12 years of age in roman systems, it is interesting to report a legislative proposal recently made in Italy. It is the Draft Law n.1580, proposed by the Honourable Mr. Cantalamessa and other deputies on February 7th 2019,[27] in which it is asked to lower the minimum age from 14 – as set out in Article 97 Penal Code – to 12. If the proposal were to be welcomed, the new age limit would coincide with the one suggested by Romans for the *pubertati proximi*.

5. IMPUTABILITY FOR THE SECOND AGE RANGE: TWO POSSIBLE OPTIONS

One last comparison between Roman law and modern criminal law with regard to minors' criminal liability concerns the disciplinary actions regarding the second age range, which provides for relative imputability.

The prevailing tendency in the classic period, as has been repeated several times in the previous paragraphs, was to deem the minor criminally responsible only if *proximus pubertati* and *doli* or *culpae capax.*[28]

According to a less popular case–study approach, the minor was given lighter punishments than the adult, regardless of their being *doli* or *culpae*

[26] See T. Bandini, U. Gatti, "Imputabilità e minore di età", in *Trattato di Medicina Legale e Scienze Affini a cura di G.Giusti*, vol. V, Padova 1999, 667 ; L. Benso, F. Milani, "Alcune considerazioni sull'uso forense dell'età biologica", in *https://www.minoriefamiglia.org/images/allegati/uso-forense-etbiologica-BENSO-MILANI.pdf;* G. Savio, "I metodi di accertamento dell'età cronologica dei sedicenti minori stranieri tra giurisprudenza e prassi applicative", in *https://www.questionegiustizia.it/articolo/i-metodi-di-accertamento-dell-eta-cronologica-dei-_05-03-2015.php.*

[27] Draft Law**:** CANTALAMESSA and others: "Modifiche al codice penale e alle disposizioni sul processo penale a carico di imputati minorenni, di cui al decreto del Presidente della Repubblica 22 settembre 1988, n. 448, in materia di imputabilità dei minori e di pene applicabili a essi nel caso di partecipazione ad associazione mafiosa " (1580). This proposal led to a particularly critical press release by the Unione Nazionale delle Camere minorili, see *https://lnx.cameremiorili.it/comunicato-stampa-ddl-1580-abbassamento-delleta-imputabile/*. For a synthesis of the Projects for reform of the Criminal Code on criminal responsibility for minors please see E. Palermo Fabris, 60.

[28] As may be seen from D. 47, 2, 23 (Ulp. 41 *ad Sab*.); D. 9, 2, 5, 2 (Ulp. 18 *ad ed.*) D. 44, 4, 4, 26 (Ulp. 76 *ad ed*.). As far as the necessary meeting of both requirements is concerned, one should take into account what has been pointed out *supra* nt. 13, i.e. the principle that the pupil, *infatia maior*, would be held criminally liable especially if close to puberty seemed to have progressively established itself because repeatedly stressed by Giuliano, and was said to be the "result of a slow and univocal case-law evolution.", see S. Tafaro, *Il giurista e l'"ambiguità". Ambigere, Ambiguitas, ambiguus*, Cacucci, 1998 Bari, 128; and A. Lebigre, *Quelques aspects de la responsabilité pénale en droit romain classique*, Paris 1967, 48; G. Tilli, A. Lebigre, *BIDR*. 72/1969, 316.

capax. Such approach is much more ancient than the one which would later prevail; its existence is confirmed by two decemviral provisions[29] and it seems to have been shared by Labeo in the classic period.[30]

According to the Tab.8.9,[31] in fact, any adult who took advantage of someone else's cultivated field or destroyed its fruits, would be subject to capital punishment[32], whereas any minor who committed the same crime, would only be whiplashed as prescribed by the district court judge[33] and was liable to pay the double amount of the compensation.

Even according to the Tab. 8. 14,[34] any adult thief caught in *flagrante delicto* would be punished more severely[35], while a minor would again be subject to *verberatio arbitratu praetoris*[36] as well as the payment of compensation (*noxiam factam sarcire*[37]).

The idea that Labeo shared the tendency according to which the minor should be held criminally liable regardless of his being *doli* or *culpas capax*, seems to clearly emerge from the previously quoted passage (D. 9. 2. 5. 2). In fact, right in the final section where he questions himself whether or not the minor could be held *ex lege Aquilia*, Ulpian quotes Labeo, whose idea was that, since the minor could be punished for theft then he could also be held liable *ex lege Aquilia*[38] as long as they were proved to be *iniuriae capax*. Therefore, one could infer that Labeo didn't find the "*si sit iam iniuriae*

[29] Cf., see the immediately following notes.

[30] The fact that Labeo's opinion on the minor's liability in case of *furtum* could find an explanation in the existence of an ancient precept, expressed in D. 9. 2. 5. 2 was claimed, among others, by C. Ferrini, 63; S. Schipani, 222; M. F. Cursi, 96.

[31] Nat. Hist. 18. 3. 12 (=XII. Tab. 8. 9) *frugem quidem aratro quaesitam furtim noctu pavisse ac secuisse puberi XII tabulis capital erat, suspensumque Cereri necari iubebant gravius quam in homicidio convictum, inpubem praetoris arbitratu verberari noxiamve duplionemve decerni*.

[32] In particular he would have been sacrificed to Cerere, god of fields. On this point, see A. Corbino, Il danno qualificato, 37.

[33] On the reference to the *praetor* in the age of the Twelve Tables see A. Corbino, "Il danno qualificato e la Lex Aquilia", *Corso di diritto romano²*, Milano 2008, 37.

[34] Gell. 11. 18. 8: *Ex ceteris autem manifestis furibus liberos verberari addicique iusserunt ei, cui furtum factum esset, si modo id luci fecissent neque se telo defendissent; servos item furti manifesti prensos verberibus adfici et e saxo praecipitari, sed pueros inpuberes praetoris arbitratu verberari voluerunt noxiamque ab his factam sarciri*.

[35] On the penalties provided for in the Twelve Tables with regard to adult thieves please see (relatively recent), C. Pelloso, *Studi sul furto nell'antichità mediterranea*, Cedam, Padova 2008, 192.

[36] Cf.., supra nt. 22.

[37] On the meaning assigned to this expression see R. La Rosa, *La repressione del furtum in età arcaica. Manus iniectio e duplione damnum decidere,* Napoli 1990, 34; A. Corbino, 33 in part. 36.

[38] Scholars have reflected on Labeo's analogical reasoning. For all the different opinions see M. F. Curis, 96.

capax"[39] an essential precondition for holding the minor criminally liable.

Even today, I think that the traces of these two different systems can be seen in the case–law provisions regarding minors' criminal responsibility in the different European countries.

For example, the previously quoted Article number 98,[40] deeming it necessary to ascertain the minor's capacity, clearly refers to the approach that prevailed in the classic period, according to which being *doli* or *culpae capacitas* was necessary in order to hold the minor criminally liable. In the Austrian, French and Dutch system, despite different modalities, criminal liability in the case of minors belonging to the second age group (where the limit is set at 18) is not applied unless the minor actually realizes the illicit nature of their actions.[41] For example, according to the Austrian reform (JGG), minors between 14 and 18 years of age are considered to be criminally liable except for specific exceptions, including any circumstance where the subject is not shown to be mature enough to understand what they have done or to act according to judgement (§ 4 Abs 2 Z 1 JGG).[42]

Conversely, Article Number 73 *Criminal Code of the Socialist Federal Republic of Yugoslavia*[43] establishes less severe penalties[44] – or at least pe-

[39] On the link between *iniuria* and *culpa* and especially on how to interpret *capacitas iniuriae* cf. S. Schipani, *Responsabilità «ex lege Aquilia». Criteri di imputazione e problema della «culpa»,* Torino 1969, 303 cui *adde* C. A. Cannata, "Genesi e vicende della colpa aquiliana", in *Labeo* 17, 1971, 76, the latter drawing attention to the fact that the notion of fault implies the possibility to choose two or more alternative conducts; «ed è proprio la necessità di tale possibilità di scelta che sta alla base della nozione di soggetto *iniuriae* o *culpae capax*….la quale permette di distinguere, tra gli impuberi, quelli che rispondono e quelli che non rispondono *ex lege Aquilia*. Questa nozione è stata evidentemente ricalcata su quella giulianea di soggetto *doli capax* ». On the equivalence between the terms *iniuriae capax* e *culpae capax* C. A. Cannata, "Sul problema della responsabilità nel diritto privato romano", in *Iura* 43, 1992, 31. Mor recently on the definition *iniuriae capax* as referred to in D. 9. 2. 5. 2 (Ulp. 18 *ad ed*.) A. Corbino 148, claims «La responsabilità aquiliana vi sarà perciò quando l'impubere risulti persona in grado di valutare non solo l'illiceità del suo comportamento, ma anche l'antigiuridicità di questo espressa dalla sua negligenza».

[40] Cf. *Supra.*

[41] On this point cf. E. Palermo Fabris, *La maturità del minore nel diritto penale*, 58.

[42] See V. Murschetz, "Reforms in Austrian Criminal Law and procedure concerning juveniles and young adult offenders", in *La nuova Giurisprudenza civile commentata, fasc. spec., Giustizia minore? La tutela giurisdizionale dei minori e dei "giovani adulti*", 167.

[43] The text reads as follows: (1) A juvenile who at the time of commission of a criminal act had attained the age of 14 years but had not reached the age of 16 years (a junior juvenile) may not be punished but educational measures shall be ordered on him. (2) A juvenile who at the time of commission of a criminal act had attained the age of 16 years but had not yet reached the age of 18 years (a senior juvenile) may be subject to educational measures under conditions laid down by this code, and exceptionally, he may be sentenced to a juvenile custody.

[44] The same is provided for in the Zenardelly code, at least as far as the second age rage is concerned. However, in the Art.98 c.p. it is explicitly sanctioned that, in case of minors'

nalties which aim to rehabilitate the minor – without necessarily ensuring capability or good judgement first. Consequently, this latter system is more in line with the approach stated in the XII Tables, later shared by Labeo. The same goes for the English system, which has introduced a full liability for subjects aged between 10 and 14 regardless of their alleged capacity since the 1998 *Crime and Disorder Act*, subverting the traditional rules that established relative imputability, unless said capacity was ascertained.[45]

6. CONCLUSIONS

Based on our premise, it follows that the regulatory principles of the imputability of minors still present common traits, despite the several centuries which separate our legal experiences from the Romans. First of all, the necessity to set an age limit for full imputability has remained unchanged – with certain exceptions,[46] albeit with a sensible difference between the limit set by Romans and the one stated in current legal systems.[47] Secondly, there seems to be a common difficulty in establishing a precise chronological age at which the criminal liability is applicable[48]; nevertheless, the age ranges taken into account are substantially equivalent.[49] Finally, it seems interesting to observe how Roman jurists already discussed the two options of imputability with regard to the second age range, considering full imputability – albeit with less severe penalties, tailored to the needs of an immature subject and at least aimed at their correction – or relative imputability, which would be applied only when made sure that the minor was aware of their illegal conduct.[50]

Full imputability is applied to this day in those systems where a need for social security is more evident, while relative imputability is chosen by more considerate systems, whose priority is to ascertain the minor's capa-

liability the sentence is reduced, allowing a comparison with the milder penalties established in the decemviral Code.

[45] On this point see E. Palermo Fabris, 60.

[46] These exceptions are to be found exclusively outside of Europe. For example in India (Indian Penal Code, Section 82), in Pakistan (Pakistan Penal Code, Section 82) and in Thailand (Thailand Penal Code, Section 74) the set age limit for full non-imputability is 7 and it therefore coincides with the one applied by Romans in reference to the end of childhood.

[47] As so often happens, the solutions proposed by the jurists are all but univoque, due to what has been said *infra*, note 24 : some call for the necessity that both requirements - being *pubertati proximi* and being *doli* or *culpae capaces* be met in order for the minors' to be considered criminally liable, while others make more generic references to the minor or the pupil, and they only consider the second requirement. In this latter case only would this hypothesis be validated, that there is a substantial difference between the 7 year age limit imposed by Romans and the 12–14 age limit set by the modern systems.

[48] Cf. *Supra.*

[49] Cf. *supra.*

[50] Cf. *supra.*

city. Obviously, opting for the first approach avoids the difficulties inherent in the assessment of fact, whereas the second approach necessary calls for the establishment of specific criteria related to the minor's development, a particularly difficult task for several reasons.[51]

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[51] Cf. see, amog others, P. Martucci, "Maturità psicofisica e imputabilità del minore", in *Famiglia e Diritto* 2, 2000, 145; D. Chicco, "Il discernimento dei fanciulli: il tema dell'imputabilità dei minori nella cultura giuridica contemporanea", in *Famiglia e diritto* 11, 2011, 1039.

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РИМСКИ КОРЕНИ КРИВИЧНЕ ОДГОВОРНОСТИ МАЛОЛЕТНИКА

Резиме

Деликтна одговор impubes-а у класичном периоду зависи од тога да ли је он doli или culpae capax; две центумвиралне одредбе, међутим, предвиђају мање строге санкције у случају кажњивог понашања impubes-а без обзира на њихову стварну способност да учине злочин.

Увиди у неке текстове омогућују нам да износимо претпоставке о историјским догађајима који су условили ову еволуцију чији циљ стоји као темељ наше данашње регулативе, од тога да се за саму животну доб везује необорива претпоставка неурачунљивости, према томе да неурачунљивост зависи од способности субјекта да разуме и да поседује вољу (што један недавни законски предлог тежи да укине, приближавајући се на тај начин доби оних који су pubertati proximi).

Кључне речи: *Impuber; Dolus capax; Culpae capax; Pubertati proximus; Урачунљивост малолетника; Деликтна одговорност impubes-а.*