THE DEVIL'S ADVOCATE. DEFENCE AND DEFENDING COUNSEL IN THE 18TH CENTURY AUSTRIAN CRIMINAL PROCEDURE

Andrea Massironi
Università degli studi di Milano-Bicocca
andrea.massironi1@unimib.it

Abstract: The provisions of the *Constitutio Criminalis Carolina* on the intervention of the defending counsel in the trial seemed to be less strict than other contemporary European criminal rules. Since the 16th century the criminal law scholars from the German area read them on the one hand connoting the lawyer with increasing precision as an expert in law, on the other one limiting his leeway in order to not hinder the rapidity and effectiveness of the *inquisitio*. This perspective influenced the choices of the Austrian legislators, which were even toughened from the 18th century onwards in the work of legislative unification by Maria Theresia and in the following codes.

Keywords: inquisitorial procedure, Austria, defending counsel, *Constituto Criminalis Carolina*, *Constitutio Criminalis Theresiana*

In 1755 Johann Peter Banniza, illustrating the criminal procedure in his manual for Viennese students, explained that the accused had the possibility to rebut his charges by himself or with the assistance of relatives or non-relatives. Subsidiarily it was a duty of the judge *ex officio*, electing a defending counsel if necessary[1]. These rules were provided for by the *Constitutio Criminalis Carolina* (1532), the main reference of the prominent professor's treatise[2]. Nevertheless, at the end of these first notes, he warned that these principles were not observed everywhere, surely «nec in Austria», above all where the so called *Ferdinandea* (emanated in 1656 by Ferdinand III for the countries of the Habsburg Empire constituting Lower Austria) was in force: under the heading *Von Advocaten*, the *Ferdinandea* on the one hand prohibited the accused who was admitted to defence from having the assistance of a lawyer, especially if the crime was evident and already clearly proven; on the other hand, when serious reasons that justified the defender's intervention had occurred, the leeway granted him was extremely limited. Indeed, he was bound by oath not to give bad advice in order to not hinder the search for truth, and he was allowed only to make sure that the accused did not omit something advantageous in his defence[3]. This way the burden fell on the judge to do his job with the

---

[1] J.P. Banniza, *Systema jurisprudentiae criminalis*, Viennae 1763 (first edition 1755), c. 11, § 5, pp. 107-108. About Johann Peter Banniza (1707-1775) see C. v. Wurzbach, *Biographisches Lexikon des Kaiserthums Oesterreich*, 1, Wien 1856, pp. 146-147; J.F. v. Schulte, *Banniza, Johann Peter*, in *Allgemeine Deutsche Biographie*, 2, Leipzig 1875, p. 42; E. Landsberg, *Geschichte der deutschen Rechtswissenschaft*, 3.1, Noten, München-Leipzig 1898, p. 190; H. Banniza, *Beiträge zur Geschichte der Geschlechter Banniza/Panizza*, in *Deutsches Familienarchiv*, 32, Neustadt an der Aisch 1966, pp. 220-290, pp. 265-266, 269-273; H. Lentze, *Banniza, Johann Peter*, in *Handwörterbuch zur deutschen Rechtsgeschichte*, A. Erler – E. Kauffman (ed.), mitbegründet von W. Stammler, 1, Berlin 1971, coll. 312-313.

[2] Cf. the *Praefamen* of his work by Banniza himself and the contemporary review in «Wienerischen gelehrten Nachrichten» del 1755, XI, cited by *Leben und Schriften Herrn Johann Peter von Banniza*, Erlangen 1756, p. 29.

[3] *Neue peinliche Landgerichts-Ordnung in Oesterreich unter der Ennß* (*Ferdinandea*), art. 20, consulted in the Viennese edition of 1678 printed by Johann Jacob Kürner and in the Latin translation entitled *Forma processus judicii criminalis seu Praxis criminalis* (Tyrnaviae, Typis Academicis per Joannem Andream Hörmann, 1697). The German text of the *Ferdinandea* is also in *Codex Austriacus*, 1, Wienn 1704, pp. 659-728.

utmost accuracy, searching for all the useful elements for the investigation, including the *pro reo* ones[4].

Joseph Leonhard Banniza, Johann Peter's son, who retraced the footsteps of his father in his studies and teaching, almost two decades after his father wrote a work where he compared the common criminal procedure with the changes introduced by the most recent Austrian laws. Thus, he attested that the position of the defence regarding the accused seemed to have been toughened after the enacting of the *Constitutio Criminalis Theresiana* (1768): the accused usually was not given a defender, neither during the inquiry nor after it; and the exceptions to this rule were reduced to the minimum (a defendant, who could not defend himself because of ignorance, fear or illness; a particularly difficult case; very important circumstances). In any case, the evaluation of the exceptions was left to the judge's discretion[5].

The two jurists were usually resolute on conservative positions. It is natural because they had been part, so to speak, of the establishment of the Habsburg Empire and had been fed the most classical juridical literature and were authors of works, which were certainly not original, but which can be numbered among the epitomes of (substantive and

---

[4] This is the thought of F.J. Bratsch, *Über ... Land-Gerichts-Ordnung in Oesterreich unter der Enns*, Wien 1751, p. 41. On the erudite and anything but original comment on the *Ferdinandea* by Bratsch, see H. Hoegel, *Geschichte des Österreichischen Strafrechtes in Verbindung mit einer Erläuterung seiner grundsätzlichen Bestimmungen*, 1, Wien 1904, p. 45, and F. Hartl, *Grundlinien der österreichischen Strafrechtsgeschichte bis zur Revolution von 1848*, in *Die Entwicklung der österreichisch-ungarischen Strafrechtskodifikation im XIX-XX. Jahrhundert*, G. Máthé – W. Ogris (ed.), Budapest 1996, pp. 13-54, p. 14.

[5] J.L. Banniza, *Delineatio juris criminalis*, II, Oeniponti 1773, c. 8, § 110, p. 51. About Joseph Leonhard Banniza (1733-1800) see Wurzbach, *Biographisches Lexikon*, cit. (note 1), pp. 146-147; E.J.H. Steffenhagen, *Banniza, Joseph Leonhard*, in *Allgemeine Deutsche Biographie*, 2, Leipzig 1875, p. 42; A. v. Wretschko, *Die Geschichte der Juristischen Fakultät an der Universität Innsbruck (1671-1904)*, Innsbruck 1904, p. 23; E. Landsberg, *Geschichte der deutschen Rechtswissenschaft*, 3.1, Text, München-Leipzig 1898, p. 400; Banniza, *Beiträge zur Geschichte*, cit. (note 1), pp. 273-276; R. Moos, *Der Verbrechensbegriff in Österreich im 18. und 19. Jahrhundert. Sinn- und Strukturwandel*, Bonn 1968, pp. 105-107; H. Lentze, *Banniza, Joseph Leonhard*, in *Handwörterbuch zur deutschen Rechtsgeschichte*, 1, cit. (note 1), coll. 313-314; G. Oberkofler, *Joseph Leonard Banniza*, in *Juristen in Österreich 1200-1980*, W. Brauneder (ed.), Wien 1987, pp. 108-109.

procedural) Austrian criminal law of the 18th century[6], so important that they were studied even outside the borders of their country[7]. The Bannizas should be given also credit for the development of Austrian criminal law scholars, independently from the German ones[8].

Furthermore, their writings were indicative of the transition to the achievement of a uniform Austrian criminal procedure that was attempted in those years in the Habsburg Empire, which was still characterized by a centrifugal system of law sources, result of a centuries-old accumulation and of the fragmentation of autonomies gathered under the wings of the biceps eagle. Overcoming the uncertainty arising from such a wide and contradictory clutter of laws was part of Maria Theresia's plan of political centralization[9]. Thus, the *Theresiana* was composed with the aim – specified in its Patent of promulgation – to replace several laws dictating the discipline of the criminal trial in the different countries of the Empire still in the second half of the 18th century: the *Ferdinandea*, the so called *Leopoldina* (*Landgerichts-Ordnung in Oesterreich ob der Ennß* by Leopold I in 1675)[10], the so called *Josephina* (*Neue peinliche Hals-Gerichts-Ordnung*

---

[6] About the work of Banniza junior see, for example, A. Giarda, *"Persistendo 'l reo nella negativa"*, Milano 1980, p. 69.

[7] Cf. M.G. di Renzo Villata, *Giuristi, cultura giuridica e idee di riforma nell'età di Beccaria*, in *Cesare Beccaria tra Milano e l'Europa*, Milano 1990, pp. 225-278, p. 246; E. Dezza, *Tommaso Nani e la dottrina dell'indizio nell'età dei Lumi*, Milano 1992, p. 136; S. Solimano, *Paolo Risi e il processo penale (1766)*, in *Studi di storia del diritto*, 3, Milano 2001, pp. 419-519, pp. 441-442 and note 70, 495.

[8] Lentze, *Banniza, Johann Peter*, cit. (note 1), col. 313; Id., *Banniza, Joseph Leonhard*, cit. (note 5), col. 313.

[9] About the political meaning of the Habsburg legislations in the second half of the 18th century see H. Baltl, *Österreichische Rechtsgeschichte. Von den Anfänge bis zur Gegenwart*, Graz 1979[4], pp. 165, 207-208; W. Ogris, *Maria Theresia und die Entfaltung des Absolutismus in Österreich*, in *Diritto e potere nella storia europea. Atti in onore di B. Paradisi*, 2, Firenze 1982, pp. 867-881, p. 879. The legislative unification promoted by the *Theresiana* was only partially successful. Indeed, it was in force in the hereditary countries and in Bohemia, but not in Hungary, as initially provided for: H. Conrad, *Deutsche Rechtsgeschichte*, 2, *Neuzeit bis 1806*, Karlsruhe 1966, p. 427; R. Hoke, *Österreichische und deutsche Rechtsgeschichte*, Wien 1996[2], p. 240.

[10] The text of the *Leopoldina* copied the *Ferdinandea* (Hoegel, *Geschichte*, cit. [note 4], p. 45), as indicated in *Codex Austriacus*, cit. (note 3), p. 729.

vor das Königreich Böheim, Marggrafthumb Mähren und Hertzogthumb Schlesien by Joseph I in 1707)[11], the *Carolina*, local laws and Roman law[12].

The choice of the *Theresiana* to confine the defender to a marginal role in the trial, but not to completely exclude him[13], does not surprise, at least for two reasons. First of all, because it was perfectly in line with the harshness that characterized the *Theresiana*, which was far from the Enlightenment influences, steeped in *d'Ancien Règime* mentality[14], so much so that it was born «irrimediabilmente vecchia» (hopelessly old), or

[11] Consulted in the edition printed in Freiburg by Martin Parcus in 1711.

[12] The *Theresiana* has been consulted in the 1769 Viennese edition printed by Trattnern and in the official Italian translation (about its date see E. Dezza, *Il divieto della difesa tecnica nell'Allgemeine Kriminalgerichtsordnung (1788)*, in *Codice Generale Austriaco dei delitti e delle pene (1787)*, ristampa anastatica, con scritti di M.A. Cattaneo, G. Chiodi, F. Colao, E. Dezza, R. Ferrante, L. Garlati Giugni, M.N. Miletti, S. Solimano, G. Vinciguerra, S. Vinciguerra, raccolti da S. Vinciguerra, Padova 2005, pp. CXCVII-CCXIV, with some modifications also in «Acta Histriae», 15.1 (2007), pp. 303-320, and in *Regolamento generale austriaco della procedura criminale (1788)*, ristampa anastatica, con scritti di D. Brunelli, C. Carcereri De Prati, E. Dezza, M.G. di Renzo Villata, P. Ferrua, L. Garlati, A. Manna, M.N. Miletti, P. Pittaro, S. Vinciguerra, raccolti da S. Vinciguerra, Padova 2012, pp. LXXIX-XCVI, p. CCXII, note 37, and Id., *Il nemico della verità. Divieto di difesa tecnica e giudice* factotum *nella codificazione penale asburgica (1768-1873)*, in *Riti, tecniche, interessi. Il processo penale tra Otto e Novecento*, M.N. Miletti (ed.), Milano 2006, pp. 13-77, p. 27, note 27). Cf. A. Domin-Petrushevecz, *Neuere österreichische Rechtsgeschichte*, Wien 1869, pp. 52-53; E. v. Kwiatkowski, *Die Constitutio Criminalis Theresiana. Ein Beitrag zur theresianischen Reichs- und Rechtsgeschichte*, Innsbruck 1903, pp. 15-19; W. Brauneder, *Constitutio Criminalis Theresiana*, in *Handwörterbuch zur deutschen Rechtsgeschichte*, begründet von W. Stammler, A. Erler und E. Kaufmann, A. Cordes – H. Luck – D. Werkmüller (ed.), unter philologischer Mitarbeit von R. Schmidt-Wiegand, 2. völlig überarbeitete und erweiterte Auflage, 1, Berlin 2004-2008, coll. 890-891, col. 890.

[13] Art. 36, §§ 10-11 *CCT*. Cf. Domin-Petrushevecz, *Neuere österreichische Rechtsgeschichte*, cit. (note 12), p. 70; Hartl, *Grundlinien*, cit. (note 4), pp. 18 and 21; Dezza, *Il divieto*, cit. (note 12), p. CCXIII; Id., *Il nemico della verità*, cit. (note 12), pp. 26-29.

[14] H. Conrad, *Zu den geistigen Grundlagen der Strafrechtsreform Josephs II. (1780-1788)*, in *Festschrift für H. v. Weber zum 70. Geburtstag*, H. Welzel – H. Conrad – A Kaufmann – H. Kaufmann (ed.), Bonn 1963, pp. 56-74, p. 56; Id., *Deutsche Rechtsgeschichte*, 2, cit. (note 9), p. 427; Hoke, *Österreichische und deutsche Rechtsgeschichte*, cit. (note 9), p. 241, 430; Dezza, *Il divieto*, cit. (note 12), p. CCXIII; K. Bruckmüller, *Constitutio Criminalis Theresiana*, in *Rechtsgeschichte und römisches Recht. Studienwörterbuch*, T. Olechowski – R. Gamauf (ed.), Wien 2010^2, p. 74.

even «quasi morta» (almost dead)[15], but nevertheless a model for other bodies of laws, as for example, the *Norma interinale* in Lombardia in 1786[16]. Secondly, because the *Theresiana* confirmed the spirit of mistrust of lawyers that distinguished Austrian criminal law and that was taken to the extreme in the *Kriminalgerichtsordnung* by Joseph II and in the *Franziskana* by Francis I (although the reasons for such a choice in the two codes was connected above all to a new conception of the role of the judge)[17].

The *Theresiana* indeed presented consolidated matters, which more than a century before, as we have mentioned, had already appeared in the *Ferdinandea*. The Kompilationskommission of Brunn, charged by Maria Theresia with the task to reorganize Austrian laws, was faithful to the

---

[15] These are the judgments by A. Cavanna, *Storia del diritto moderno in Europa. Le fonti e il pensiero giuridico*, 2, Milano 2005, p. 293, and by F. Cordero, *Criminalia. Nascita dei sistemi penali*, Roma-Bari 1986, p. 539. See also A. Cavanna, *La codificazione penale in Italia. Le origini lombarde*, Milano 1975, p. 42; Id., *La codificazione del diritto nella Lombardia austriaca*, in *Economia, istituzioni, cultura in Lombardia nell'età di Maria Teresa*, A. De Maddalena – E. Rotelli – G. Barbarisi (ed.), 3, Bologna 1982, pp. 611-657, also in Id., *Scritti (1968-2002)*, 1, Napoli 2007, pp. 463-512, p. 483; Ogris, *Maria Theresia,* cit. (note 9), p. 879.

[16] Cf. Cavanna, *La codificazione del diritto*, cit. (note 15), p. 497; G. Provin, *Una riforma per la Lombardia dei Lumi. Tradizione e novità nella "Norma interinale del processo criminale"*, Milano 1990, pp. 79-82; Dezza, *Il nemico della verità*, cit. (note 12), pp. 31-32; Id., *Lezioni di storia del processo penale*, Pavia 2013, p. 115.

[17] Cf. J.F. Henschel, *Die Strafverteidigung im Inquisitionsprozeß des 18. und im Anklageprozeß des 19. Jahrhunderts*, Freiburg im Breisgau 1972, pp. 32-36; Hoke, *Österreichische und deutsche Rechtsgeschichte*, cit. (note 9), p. 433; A. Cavanna, *Ragioni del diritto e ragioni del potere nel Codice penale austriaco del 1803*, in *Codice penale universale austriaco (1803)*, con scritti di S. Ambrosio, A. Cadoppi, C. Carcereri De Prati, M.A. Cattaneo, A. Cavanna, M. Da Passano, P. De Zan, E. Dezza, P. Pittaro, P. Rondini, S. Tschigg, S. Vinciguerra, raccolti da S. Vinciguerra, Padova 2001, pp. CCXIX-CCLXV , also in Id., *Scritti (1968-2002)*, 2, Napoli 2007, pp. 1137-1184, p. CCXL; E. Dezza, *L'impossibile conciliazione. Processo penale, assolutismo e garantismo nel codice asburgico del 1803*, *ivi*, pp. CLV-CLXXXIII, also in Id., *Saggi di storia del processo penale nell'età della codificazione*, Padova 2001, pp. 141-169, pp. 144-146, 151; Id., *Il divieto*, cit. (note 12), pp. CCXI-CCXIII; Id., *Il nemico della verità*, cit. (note 12), pp. 18-31, 73-75; M.N. Miletti, *«Per quali vie convenga investigare la verità». L'opzione inquisitoria nella* Kriminalgerichtsordnung *del 1788*, in *Regolamento generale austriaco*, cit. (note 12), pp. LIII-LXXVIII, p. LXXI-LXXII.

demand of the sovereign to take the best from the bodies of laws by Ferdinand III and by Joseph I to create a new *corpus*, looking at the first one for substantive law and at the second one for the discipline of trials[18]. Thus, about the defence of the accused the *Theresiana* was inspired above all by the *Josephina*: with reference to the denial of a defending counsel, the text of the *Josephina* was literally transposed in the *Theresiana*, except for some expressions, such as a generic, but suggestive, *Rechts-Freund* which the more precise *Defensor, Vertheidiger oder Beiständer* corresponded to[19].

The *Josephina* and the *Theresiana*, sixty years apart, were parallel also in the explanation of such a provision, clearly explained with a discursive style, typical of the Habsburg way of drafting laws[20]: the intervention of a lawyer delayed the administration of justice, since experience showed that he was an expert at instructing subterfuges and expedients for the accused. The explanation sounds anything but original, mirroring the secular discussions of jurists on this issue. Also the provisions of laws and statutes had always considered the too long speeches and dilatory tactics of the defenders as the cause of the excessive duration of the trials[21]. Thus, the body of law, which aimed to unify the criminal procedure in the

---

[18] Domin-Petrushevecz, *Neuere österreichische Rechtsgeschichte*, cit. (note 12), p. 55; W.E. Wahlberg, *Forschungen zur Geschichte der alt-österreichischen Strafgesetzgebung*, Wien 1881, p. 6; Kwiatkowski, *Die Constitutio Criminalis Theresiana*, cit. (note 12), pp. 21-24, 136-137; Hoegel, *Geschichte*, cit. (note 4), pp. 65-66; Conrad, *Zu den geistigen Grundlagen*, cit. (note 14), pp. 56-57; F. Hartl, *Das Wiener Kriminalgericht. Strafrechtspflege von Zeitalter der Aufklärung bis zur österreichischen Revolution*, Wien-Köln-Graz 1973, pp. 20-21; Id., *Grundlinien*, cit. (note 4), p. 18; W. Hülle, *Theresiana*, in *Handwörterbuch zur deutschen Rechtsgeschichte*, A. Erler – E. Kauffman – D. Werkmüller (ed.), unter philologischer Mitarbeit von R. Schmidt-Wiegand, mitbegründet von W. Stammler, 5, Berlin 1998, coll. 173-175, col. 173.

[19] *Josephina*, art. 12, § 1, e *CCT*, art. 36, § 5. Suggestions from the *Ferdinandea* seem to be also in the provisions about the extent of the leeway of the defender in the rare case he was admitted: indeed, the text of *Ferdinandea*, art. 20, § 1 and the text of *CCT*, art. 36, § 12, are very similar.

[20] Cf. Cavanna, *Ragioni del diritto*, cit. (note 17), p. CCLIV.

[21] Cf. P. Fiorelli, *Avvocato (diritto romano e intermedio*), in *Enciclopedia del Diritto*, 4, Milano 1959, pp. 646-649, p. 648; Dezza, *Il nemico della verità*, cit. (note 12), pp. 70-71; R. Bianchi Riva, *L'avvocato non difenda cause ingiuste. Ricerche sulla deontologia forense in età medievale e moderna*, 1, *Il medioevo*, Milano 2012, pp. 38-42, 48.

Empire, proposed the same solution that the local bodies of laws to be replaced had proposed: entrusting the judge with the duty to search for *pro reo* elements, giving him the triple role of judge, prosecutor and defender of the accused (*Richter, Klager und Unschuld-Vertheidigung*), typical of the Austrian criminal procedure[22]. However, it was the way the defence of the accused was practised to be discussed, not the defence itself, because this was a prerogative that had been recognized *de iure naturali* and *divino* since the days of the *ius commune*[23]. Indeed, everyone was entitled to this faculty, even the devil if he took part in a trial, as exemplified since the 13th century[24] with a hyperbole that «tota schola docet» still in the 18th century[25].

The disapproval of the presence of a defender at all or only in some stages of the criminal trial is nevertheless a phenomenon that can be found in other important bodies of laws since the 16th century and also outside the extensive imperial borders, albeit with mixed success in their effective use:

---

[22] Cf. *Josephina*, art. 1, § 2, e *CCT*, art. 36, § 6. On this matter see Domin-Petrushevecz, *Neuere österreichische Rechtsgeschichte*, cit. (note 12), p. 56, and W. Gleispach, *Das österreichische Strafverfahren*, Wien 1924, p. 8. Cf. also Dezza, *L'impossibile conciliazione*, cit. (note 17), p. 151. According to Hoke, *Österreichische und deutsche Rechtsgeschichte*, cit. (note 9), p. 428, gathering every role in the judge means that the accused was object and not subject in the criminal trial.

[23] See E. Dezza, *L'avvocato nella storia del processo penale*, in *Un progetto di ricerca sulla storia dell'avvocatura*, G. Alpa – R. Da Novi (ed.), Bologna 2003, pp. 111-134, p. 114; Id., *Lezioni*, cit. (note 16), p. 133; O. Condorelli, *«Ius» e «lex» nel sistema del diritto comune (secoli XIV-XV)*, in *Lex und Ius. Beiträge zur Begründung des Rechts in der Philisophie des Mittelalters und der Frühen Neuzeit*, A. Fidora – M. Lutz-Bachmann – A. Wagner (ed.), Stuttgart 2010, pp. 27-88, pp. 53-60.

[24] See Henricus de Segusio, *Summa*, Lugduni 1537, *ad* X. 2.25, *de exceptionibus*, n. 3, fol. 257va, and G. Durantis, *Speculum iudiciale*, Lugduni 1531, lib. 3, *de inquisitione*, § *ultimo nota*, n. 6, fol. 23va. See C. Gallagher, *Canon Law and the Christian Community. The Role of Law in the Church According to the* Summa Aurea *of Cardinal Hostiensis*, Roma 1978, p. 160; K. Pennington, *The Prince and the Law, 1200-1600. Sovereignity and Rights in the Western Legal Tradition*, Berkeley-Los Angeles-Oxford 1993, p. 163; Id., *Due Process, Community, and the Prince in the Evolution of the* Ordo iudiciarius, in «Rivista internazionale di diritto comune», 9 (1998), pp. 9-47, pp. 36, 46.

[25] J.G. Reinmann, *De edendis a iudice actis ad formandam defensionem pro avertenda inquisitione*, Erfordiae 1721, c. 3, § 1, p. 13.

for example, the French *Ordonnance* of Villers-Cotterêts of 1539, the Dutch *Ordonnantiën* of 1570[26] and the French *Ordonnance criminelle* of 1670[27].

Precluding the intervention of a defending counsel in such a way was a choice that did not emerge in the *Carolina* that, notwithstanding its unbinding nature, constituted the criminal common law, model of all the bodies of laws regarding criminal law in German-speaking territories – including the *Ferdinandea*, the *Josephina*[28] and hence the *Theresiana*[29] –

---

[26] See, for example, L.-T. Maes, *Die drei großen europäischen Strafgesetzbücher des 16. Jahrhunderts. Eine vergleichende Studie*, in «Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Germanistische Abteilung», 94 (1977), pp. 207-217, p. 216; A. Allard, *Histoire de la justice criminelle au seizième siècle*, Gand-Leipzig-Paris 1986, pp. 228-234; E. Dezza, *"Pour pourvoir au bien de notre justice". Legislazioni statali, processo penale e modulo inquisitorio nell'Europa del XVI secolo*, in «Diritto penale XXI secolo», 1 (2002), pp. 159-202, also in «Acta Histriae», 10.1 (2002), pp. 7-38, p. 13 (the prohibition of professional defence was most likely already implicit in the extraordinary procedure illustrated in the *Ordonnance* of Blois of 1498); Id., *Lezioni*, cit. (note 16), p. 35; J.-M. Carbasse, *Histoire du droit pénal et de la justice criminelle*, Paris 2006[2], p. 207.

[27] See, for example, A. Esmein, *Histoire de la procédure criminelle en France et spécialement de la procédure inquisitoire, depuis le XIIIe siècle jusqu'à nos jours*, Paris 1882, pp. 231-234; R. Martucci, *Il modulo inquisitorio nelle «ordonnances» francesi da Colbert alla Costituente*, in *Le politiche criminali nel XVIII secolo*, L. Berlinguer – F. Colao (ed.), Milano 1990, pp. 233-313, pp. 250-253; J.-P. Royer, *Histoire de la justice en France. De la monarchie absolue à la République*, Paris 1996[2], p. 36; A. Laingui, *Introduction* to *Code Louis. T. II. Ordonnance criminelle, 1670*, Milano 1996, pp. VII-XXV, p. XIX and note 20; Carbasse, *Histoire du droit pénal*, cit. (note 26), p. 211; Dezza, *Il nemico della verità*, cit. (note 12), pp. 62-68; A. Astaing, *Droits et garanties de l'accusé dans le procès criminel d'Ancien Régime (XVIe-XVIIIe siècles). Audace et pusillanimité de la doctrine pénale française*, Aix-en-Provence 1999, pp. 110-122; M.-Y. Crépin, *Ordonnance criminelle dite de Saint-Germain-en-Laye, août 1670*, in *La procédure et la construction de l'État en Europe XVIe-XIXe siècle. Recueil de textes, présentés et commentés*, J. Hautebert – S. Soleil (ed.), Rennes 2011, pp. 449-462, pp. 456-457.

[28] Domin-Petrushevecz, *Neuere österreichische Rechtsgeschichte*, cit. (note 12), p. 27; Kwiatkowski, *Die Constitutio Criminalis Theresiana*, cit. (note 12), pp. 15-16; Hoegel, *Geschichte*, cit. (note 4), p. 59; Gleispach, *Das österreichische Strafverfahren*, cit. (note 22), p. 7; Moos, *Der Verbrechensbegriff*, cit. (note 5), p. 110, note 115; Hartl, *Das Wiener Kriminalgericht*, cit. (note 18), p. 18; Id., *Grundlinien*, cit. (note 4), p. 14; Bruckmüller, *Constitutio Criminalis Theresiana*, cit. (note 14), p. 142.

[29] Conrad, *Zu den geistigen Grundlagen*, cit. (note 14), p. 57; Id., *Deutsche Rechtsgeschichte*, 2, cit. (note 9), p. 427; H. Liebel-Weckowicz, *Auf der Suche nach neuer*

and reference for judges and legal scholars for a very lengthy period (even up to the first half of the 19th century)[30]. Thus, it has been possible to say that Austrian procedural law was only a branch of the evolution of German procedural law[31], and that the target of an at least formal detachment of Austrian criminal law from German criminal law was probably reached for the first time only by the *Theresiana* itself[32].

Indeed, there were several provisions in the *Carolina* that seemed to open «qualche spiraglio alla difesa»[33] (some possibilities of the defence). The effective practice of the defence is not to be searched in

---

Autorität: Raison d'État in den Verwaltungs- und Rechtsreformen Maria Theresias und Josephs II., in *Österreich im Europa der Aufklärung. Kontinuität und Zäsur in Europa zur Zeit Maria Theresias und Josephs II.*, Wien 1985, pp. 339-364, p. 360; Hülle, *Theresiana*, cit. (note 18), col. 173; R. Lieberwirth, *Constitutio Criminalis Carolina*, in *Handwörterbuch zur deutschen Rechtsgeschichte*[2], 1, cit. (note 12), coll. 885-890, col. 889.

[30] E. Schmidt, *Die Carolina. Ein Vortrag*, in «Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Germanistische Abteilung», 53 (1933), pp. 1-34, p. 10; Id., *Einführung in die Geschichte der deutschen Strafrechtspflege*, Göttingen 1965[3], pp. 141-143; G. Schmidt, *Sinn und Bedeutung der Constitutio Criminalis Carolina als Ordnung des materiellen und prozessualen Rechts*, in «Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Germanistische Abteilung», 83 (1966), pp. 239-257, p. 255; J.H. Langbein, *Prosecuting Crime in the Renaissance. England, Germany, France*, Cambridge, Massachusetts 1974, pp. 140, 166; Maes, *Die drei großen europäischen Strafgesetzbücher*, cit. (note 26), pp. 207-208; G. Kleinheyer, *Tradition und Reform in der Constitutio Criminalis Carolina*, in *Strafrecht, Strafprozess und Rezeption. Grundlagen, Entwicklung und Wirkung der Constitutio Criminalis Carolina*, P. Landau – F.-C. Schroeder (ed.), Frankfurt am Main 1984, pp. 7-27, pp. 9, 26; Lieberwirth, *Constitutio Criminalis Carolina*, cit. (note 29), col. 889; A. Astaing – H. Henrion, *Constitutio Criminalis Carolina, 1532*, in *La procédure et la construction de l'État*, cit. (note 27), pp. 375-422, pp. 381-382; C. Camby, *Criminal-Ordnung, 8 juillet 1717*, ivi, pp. 463-505, p. 468.

[31] Gleispach, *Das österreichische Strafverfahren*, cit. (note 22), p. 6.

[32] Hülle, *Theresiana*, cit. (note 18), col. 175.

[33] E. Dezza, *Accusa e inquisizione dal diritto comune ai codici moderni*, Milano 1989, p. 95, note 142; Id., *Pour pourvoir au bien de notre justice*, cit. (note 26), p. 20; Id., *Lezioni*, cit. (note 16), p. 43. See also Astaing – Henrion, *Constitutio Criminalis Carolina*, cit. (note 30), p. 380. U. Falk, *Zur Geschichte der Strafverteidigung. Aktuelle Beobachtungeng und rechtshistorische Grundlagen*, in «Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Germanistische Abteilung», 117 (2000), pp. 395-449, p. 433, admits the existence and a certain effectiveness of defence in criminal trials between the 16th and the 18th century.

Article 88, entitled *Von Fürsprechen* (an old German word indicating the speakers in favour of a trial party[34]): indeed, it referred to the judgment day (the *entliche Rechtstag*), when the procedural dialectics between those who accused and those who defended were a homage to tradition within the ceremonies and spectacular settings that represented an already written verdict. The presence of the pleader of the accused, even chosen from among the *Schöffen* part of the court, had a merely ritual meaning, as it is clear by the fact that he was obliged to read a form provided for the purpose, which precluded him from playing an active role[35].

It was mainly in Articles 47 and 73 that the legal scholars studying the *Carolina* till the late 18th century (the large number of commentaries written about it for many years is the best example for the continuation of such a model[36]) tried to find the principles to protect the defendant. The former provided for the judge to urge the accused to produce facts in his justification, by himself or with the help of a person he trusted (*Freund*), before the instruments of torture entered the scene; then, these facts had to

---

[34] The term was usually translated with the Latin word *procurator*, but it is interesting that J.H. Böhmer, *De potestate procuratoris in causis criminalibus*, Halae Magdeburgicae 1726, § 27, p. 47, and K.F. Walch, *Glossarium germanicum interpretationi Constitutionis Carolinae inserviens*, Ienae 1790, p. 295, explained it using only *advocatus*. See H. Winterberg, *Fürsprecher*, in *Handwörterbuch zur deutschen Rechtsgeschichte*, 1, cit. (note 1), coll. 1333-1336; P. Oestmann, *Fürsprecher*, in *Handwörterbuch zur deutschen Rechtsgeschichte*[2], 1, cit. (note 12), coll. 1883-1887.

[35] Cf. Henschel, *Die Strafverteidigung*, cit. (note 17), pp. 7, 14-17; Langbein, *Prosecuting Crime*, cit. (note 30), pp. 189-192; Kleinheyer, *Tradition und Reform*, cit. (note 30), pp. 11-12, 19-21; W. Schild, *Der "entliche Rechtstag" als das Theater des Rechts*, in *Strafrecht, Strafprozess und Rezeption*, cit. (note 30), pp. 119-144; W. Sellert, *Studien- und Quellenbuch zur Geschichte der deutschen Strafrechtspflege*, 1, *Von den Anfängen bis zur Aufklärung*, Aalen 1989, pp. 209-210; G. Alessi, *Il processo penale. Profilo storico*, Milano-Bari 2001, p. 71; Dezza, *Pour pourvoir au bien de notre justice*, cit. (note 26), pp. 23-24; Id., *Lezioni*, cit. (note 16), p. 46.

[36] P. Fiorelli, *La tortura giudiziaria nel diritto comune*, 1, Milano 1953, p. 108, note 48; Schmidt, *Sinn und Bedeutung*, cit. (note 30), pp. 255-256; H. Rüping, *Die Carolina in der strafrechtlichen Kommentarliteratur. Zur Verhältnis von Gesetz und Wissenschaft im gemeinem deutschen Strafrecht*, in *Strafrecht, Strafprozess und Rezeption*, cit. (note 30), pp. 161-176, pp. 163-165.

be carefully checked by the judge[37]. The latter allowed the communication of copy of the testimonies to a pleader (*Sachwalther*) and to the accused in prison after the *pubblicatio processus*; the accused was also granted the possibility to have an interview with somebody who could help him (*Beistender*)[38].

The Latin translations of the *Carolina* made between the 16th and the 17th century by Justinus Gobler and Georg Remus – who was author of a paraphrase, which enriched the German text in a certain number of cases – tried to define more precisely the vagueness of these rules[39]. They did not provide important novelties about Article 47 – the former spoke about the intervention of *propinqui*, the latter of *agnati* – even if Remus justified the aid of a third party by the common inability of the accused to plead for himself *perite et prompte*. This way, though, he let believe that it was necessary to contact someone who could extricate himself skilfully among the insidious mechanisms of the trial in order to have an intervention characterized by experience and rapidity[40].

———————————

[37] See Esmein, *Histoire de la procédure criminelle*, cit. (note 27), p. 309; Henschel, *Die Strafverteidigung*, cit. (note 17), pp. 13-14, 21; Rüping, *Die Carolina*, cit. (note 36), pp. 168-169; Dezza, *Pour pourvoir au bien de notre justice*, cit. (note 26), p. 22; Id., *Lezioni*, cit. (note 16), p. 45.

[38] See Henschel, *Die Strafverteidigung*, cit. (note 17), pp. 19-20; A. Roth, *Strafverteidigung*, in *Handwörterbuch zur deutschen Rechtsgeschichte*, 5, cit. (note 18), coll. 6-9, col. 7.

[39] The Latin translation by J. Gobler (1543) and the paraphrase in Latin by G. Remus (1618) are both in J.F.H. Abegg (ed. Heidelberg 1837). About Justinus Gobler (1504-1569) see R. v. Stintzing, *Geschichte der deutschen Rechtswissenschaft*, 1, München-Leipzig 1880, pp. 582-585; H.E. Troje, *Gobler, Justin*, in *Handwörterbuch zur deutschen Rechtsgeschichte*, 1, cit. (note 1), coll. 1726-1728. About Georg Remus (1561-1625) see Stintzing, *Geschichte der deutschen Rechtswissenschaft*, 1, cit., pp. 636-637. The first clarifications of the *Carolina* were composed by judges and consultants (just as Gobler and Remus). They were not real commentaries, but lexical explanations of the text, translated in Latin, of little scientific worth: F. Schaffstein, *Die allgemeinen Lehren vom Verbrechen in ihrer Entwicklung durch die Wissenschaft des gemeinen Strafrechts*, Berlin 1930, pp. 7-8; Rüping, *Die Carolina*, cit. (note 36), p. 166; H. Schlosser, *Tiberio Deciano ed il suo influsso sulla scienza penalistica tedesca*, in *Tiberio Deciani (1509-1582). Alle origini del pensiero giuridico moderno*, M. Cavina (ed.), Udine 2004, pp. 121-137, pp. 127-128; Id., *Neuere Europäische Rechtsgeschichte. Privat- und Strafrecht vom Mittelalter bis zur Moderne*, München 2012, p. 99.

[40] Remi paraphrasis, cit. (note 39), p. 67.

On the contrary, the translation of Article 73 was more interesting. Gobler gave an *advocatus* both the possibility to receive a copy of the evidence and to meet the accused, while Remus, this time perhaps more faithful to the text, seemed to distinguish the different situations, referring the communication of the testimonies «ad eos quod interest» and the interview to the person providing his patronage to the accused[41]. In neither case, however, we can say that they were necessarily referring to technical defenders, although there was an attempt to refine the vocabulary.

Almost a century after the enacting of the *Carolina,* Matthias Stephani proposed a *summa* of the same articles that was identical to Remus's version in many parts. On the one hand, he founded on the *ratio pietatis* the support that the judge had to give to *rusticiores*, *adolescentes* and *mulierculae*, also with the indications of a defender. On the other hand, he founded the reasons for the tools and the moments dedicated to the defence on the necessity to avoid a different treatment between the accused and the accuser[42].

Not even a decade later, Benedict Carpzov, who was not a direct commentator of the *Carolina*, but one of the greatest and most quoted authorities on criminal law of the time, so much so that he was considered the German Bartolus[43], in his monumental work on Saxon law included the

---

[41] Remi paraphrasis, cit. (note 39), p. 89. Walch, *Glossarium*, cit. (note 34), pp. 203-206, 430-431, approved the translation of Remus: it was more relevant to the historical context to which the *Carolina* referred to, since it was general.

[42] M. Stephani, *Caroli Quinti ... Constitutiones publicorum iudiciorum, cum jure communi collatae*, Francofurti 1626, *ad* art. 47, p. 111; *ad* art. 73, n. 1, p. 148. The vocabulary used by Stephani could induce to think that Article 73 referred to the accusatorial procedure, as explicitly emphasized by some succeeding commentators of the *Carolina* (for example, see J.F. Ludovici, *Caroli quinti … constitutiones criminales*, Halae Magdeburgicae 1707, *ad* art. 73, p. 68; G. Beyer, *Delineatio iuris criminalis secundum Constitutionem Carolinam*, Lipsiae 1737 [first edition 1714], *ad* art. 73, p. 135; J.S.F. Böhmer, *Meditationes in Constitutionem Criminalem Carolinam*, Halae Magdeburgicae 1774 [first edition 1770], *ad* art. 73, § 1, p. 268; Walch, *Glossarium*, cit. [note 34], p. 205). About Matthias Stephani (1576-1646) see A. v. Eisenhart, *Stephani, Mathias*, in *Allgemeine Deutsche Biographie*, 36, Leipzig 1893, p. 95.

[43] A. Cavanna, *Storia del diritto moderno in Europa. Le fonti e il pensiero giuridico*, 1, Milano 1982, pp. 465-466. About Carpzov and the *Carolina* see Schmidt, *Sinn und Bedeutung*, cit. (note 30), p. 254.

aid of a person among the instruments available for the accused to prepare his defence[44]. Also in this case, however, it does not seem that the role necessarily had to be covered by a jurist, since he merely mentioned relatives among those who could give their support to the accused, as in the letter of Article 47 *C.C.C.*[45]. When Carpzov expressly dealt with the

[44] B. Carpzov, *Practica Nova Imperialis Saxonica Rerum Criminalium*, 3, Wittebergae 1670 (first edition 1635), q. 105, nn. 23-24, p. 37. About Benedict Carpzov (1595-1666) the bibliography is very wide: for example, see T. Muther, *Carpzov, Benedict*, in *Allgemeine Deutsche Biographie*, 4, Leipzig 1876, pp. 11-20; R. von Stintzing, *Geschichte der deutschen Rechtswissenschaft*, 2, München-Leipzig 1884, pp. 55-100; H. v. Weber, *Benedict Carpzov. Ein Bild der deutschen Rechtspflege im Barockzeitalter*, in *Festschrift für E.H. Rosenfeld zu seinem 80. Geburtstag am 14. August 1949*, Berlin 1949, pp. 29-50; E. Döhring, *Carpzov, Benedict*, in *Neue Deutsche Biographie*, 3 (1957), pp. 156-157; Schmidt, *Einführung*, cit. (note 30), pp. 153-157; F. Wieacker, *Privatrechtsgeschichte der Neuzeit. Unter besonderer Berücksichtigung der deutschen Entwicklung*, Göttingen 1967, trad. ital. *Storia del diritto privato moderno con particolare riguardo alla Germania*, U. Santarelli – S.-A. Fusco (ed.), 1, Milano 1980, pp. 325-327; G. Schubart-Fikentscher, *Carpzov, Benedict*, in *Handwörterbuch zur deutschen Rechtsgeschichte*, 1, cit. (note 1), coll. 595-597; G. Kleinheyer – J. Schröder, *Deutschen Juristen aus fünf Jahrhunderten: eine biographische Einführung in die Geschichte der Rechtswissenschaft*, unter Mitarbeit von E. Forster, H. Hof und B. Pahlmann, Heidelberg 1989[3], pp. 53-57; Dezza, *Accusa e inquisizione*, cit. (note 33), pp. 82-88; Id., *Lezioni*, cit. (note 16), pp. 70-72; J. Otto, *Carpzov, Benedict*, in *Juristen. Ein biographisches Lexikon. Von der Antike bis zum 20. Jahrhundert*, M. Stolleis (ed.), München 1995, pp. 115-116; I. Kabus, *Der Inquisitionprozeß im Mittelalter und der frühen Neuzeit*, in „Auss Liebe der Gerechtigkeit vnd umb gemeines nutz willenn”. *Historische Beiträge zur Strafverfolgung*, G. Jerouschek – H Rüping (ed.), Tübingen 2000, pp. 29-75, pp. 44-49; F.J. Casinos Mora, *Benedikt* Carpzov, in *Juristas universales. 2. Juristas modernos. Siglos XVI al XVIII: de Zasio a Savigny*, R. Domingo (ed.), Madrid-Barcelona 2004, pp. 381-383; G. Jerouschek, *Carpzov, Benedikt*, in *Handwörterbuch zur deutschen Rechtsgeschichte*[2], 1, cit. (note 12), coll. 819-821; M. Schmoeckel, *Benedict Carpzov und der sächsische Prozess. Mündlichkeit und Konzentration im sächsischen Verfahren vor dem Hintergrund des Ius Commune und der Reformation*, in «Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Germanistische Abteilung», 126 (2009), pp. 1-37; T. Olechowski, *Carpzov, Benedict*, in *Rechtsgeschichte und römisches Recht*, cit. (note 14), p. 65.

[45] Carpzov, *Practica Nova*, cit. (note 44), q. 105, n. 23, p. 37, e n. 35, p. 39; q. 115, n. 10, p. 136. For modern legal scholars the defendant's friends and relatives «conservano a lungo un ingombrante protagonismo processuale, anche in sede penale, sotto l'unitaria e generica denominazione di *defensor*» (for a long time kept an intrusive need to be at the centre of the attention also in criminal trials, being generically called *defensor*): M.N. Miletti, *In giudizio per altri. La procura alle liti tra giurisprudenza moderna ed età*

advocati, he focused on their very strict moral standards, without which they «ipsius diaboli sunt mancipia»: they should be experts in law, as can be deduced by the blame he addressed towards the habit – deemed as ridiculous – they had to argue quoting the *Corpus iuris* and the *doctores* in order to influence the decision of the judge, «ac si aegrotus medico curam praescribere vellet ex Galeno, Hippocrate et aliis». Saxon law tried to correct this inconvenience by banning the accused and his lawyer from having the copy of evidence, thus limiting the lengthening of the duration of the trial, which was unacceptable in that it was «contra naturam istius processus»[46].

Johann Brunnemann in the same years schematically explained his ideas on the issue in his treatise on the criminal trial: granting the defence to the accused before the torture, also by means of the aid of another person, was always necessary, even in case it had not been requested or there had already been a confession by the defendant. Indeed, this way the judge was saved from being responsible for not respecting the procedures and also the nullity of the whole trial was prevented. The delivery of a copy of the circumstantial evidence was the fundamental condition of effective exercise of the defence, as was the interview with the lawyer. Nevertheless, Brunnemann warned against the fraudulent behaviours of lawyers, for which he proposed to choose him from among the *Schöffen*, as suggested by the *Carolina* – but this custom fell into disuse[47] – and in any case to

---

delle riforme, in *Agire per altri. La rappresentanza negoziale processuale amministrativa nella prospettiva storica*, Convegno Università di Roma Tre (15-17 novembre 2007), A. Padoa Schioppa (ed.), Napoli 2009, pp. 593-636, p. 599.

[46] Carpzov, *Practica Nova*, cit. (note 44), q. 115, n. 90-103, pp. 142-143. For Carpzov's admission of the defender in the criminal trial, cf. Esmein, *Histoire de la procédure criminelle*, cit. (note 27), pp. 311-312; Falk, *Zur Geschichte der Strafverteidigung*, cit. (note 33), pp. 412-419; Id., *De la torture judiciaire en Saxe, en particulier chez Benedict Carpzov (1595-1666)*, in *La torture judiciaire. Approches historiques et juridiques*, sous la direction de B. Durand, avec la collaboration de L. Otis-Cour, 2, Lille 2002, pp. 709-742, pp. 735-738.

[47] D. Clasen, *Commentarius in Constitutiones Criminales Caroli V*, Lipsiae 1718 (first edition 1684), *ad* art. 47, pp. 176-177, and *ad* art. 88, p. 272; Beyer, *Delineatio iuris criminalis*, cit. (note 42), *ad* art. 47, p. 96, and *ad* art. 88, pp. 156-157; J.P. Kress, *Commentatio succincta in Constitutionem criminalem Caroli V*, Hanoverae 1730 (first edition 1721), *ad* art. 88, p. 205. See also Henschel, *Die Strafverteidigung*, cit. (note 17), p. 74.

make sure that he was pious and honest or bound by oath. Furthermore, the *doctores* proposed to make the interview with the accused under surveillance. Finally, the duration of the trial could also be controlled, since the original proceedings could be examined *in judicii loco*, thus saving copying time[48].

A few years later (in 1650), Caspar Manz held that the defence was effectively carried out if the circumstantial evidence against the accused was communicated to him (notwithstanding the prevision of a large number of exceptions to this principle). Manz claimed to have personally witnessed the practice of granting an *advocatus* to the defendant not only at his explicit request, but also *ex officio,* since «hoc spectat ad defensionem, quae iuris naturalis est»[49]. The real situation remained very uncertain, since it was left to the considerations of the legal scholars and to the judicial practice of the courts. However, there were correctives and indispensable limits to this option, made necessary according to Manz by the conduct often followed by defending counsels that «omnia mala norunt, et aliqui modicae sunt conscientiae»: a traditional *cautela* corresponded to these traditional criticisms, i.e. lawyers should have to swear not to obstruct the course of justice and even to abandon the defence if they realized the culpability of the accused[50]. Manz thought that

---

[48] J. Brunnemann, *Tractatus iuridicus de inquisitionis processu*, Wittebergae 1679 (first edition 1647), c. 8, m. 3, nn. 1, 5-6, 9-14, 18, 21-28, pp. 131-139. About Johann Brunnemann (1608-1672) see E.J.H. Steffenhagen, *Brunnemann, Johann*, in *Allgemeine Deutsche Biographie*, 3, Leipzig 1876, pp. 445-446; Stintzing, *Geschichte der deutschen Rechtswissenschaft*, 2, cit. (note 44), pp. 101-112; Wieacker, *Privatrechtsgeschichte*, cit. (note 38), p. 327; Kleinheyer – Schröder, *Deutschen Juristen*, cit. (note 44), pp. 335-336; P. García Cavero, *Johannes Brunnemann*, in *Juristas universales*, 2, cit. (note 44), pp. 390-392; H. Lück, *Brunnemann, Johann*, in *Handwörterbuch zur deutschen Rechtsgeschichte*^{2}, 1, cit. (note 12), coll. 690-692.

[49] C. Manz, *Commentarius rationalis in Criminalem Sanctionem Carolinam*, Ingolstadii 1650, *ad* art. 47, nn. 15-18, 23, 25-27, pp. 197-201. About Caspar Manz (1606-1677) see A. v. Eisenhart, *Manz, Kaspar*, in *Allgemeine Deutsche Biographie*, 20, Leipzig 1884, pp. 281-285; *Manz*, *Kaspar*, in *Deutsche Biographische Enzyklopädie*, 6, München 1997, p. 602. About the method followed by Manz in his commentary see Rüping, *Die Carolina*, cit. (note 36), p. 172.

[50] Manz, *Commentarius rationalis*, cit. (note 49), *ad.* art. 47, nn. 28-29, p. 201. Another invective against the habits of lawyers *ivi*, *ad* art. 88, n. 16, p. 338. About the issues on this

the oath could be the solution also for the problems concerning the interview between the lawyer and the defendant: if he swore to behave properly, the interview could be held without anyone from the court keeping watch on them. This moment was very important, since the accused was often ignorant and needed the help of an expert in law to whom he had the necessity to speak without restraint in order to learn the best way to face the charges against him. If the freedom of speech was limited or denied, the defence itself was limited or denied. However, the point of view of Manz met opposition in his time[51].

Twenty years later, Christoph Blumblacher indicated how it was customary to grant a lawyer to the defendant, but he did not consider it necessary. Indeed, the defence itself was essential to the trial, but the lawyer constituted only one way of exercising the rights of the defence, as suggested by the *ratio* of Article 47: according to the circumstances, the defence could be circumscribed by the judge, especially when considering that the malicious behaviour of the pleaders was an obstacle to justice and a delay of the trial[52].

Therefore, the legal scholars studying the *Carolina* justified the presence of the defender in the trial, but at the same time seemed to oppose it, since he was seen above all as an obstacle to the rapidity and effectiveness of the *inquisitio*. Thus, they limited his leeway: in addition to the lawyer's expertise, on the one hand they made old recommendations,

---

kind of oath see J.A. Brundage, *The Ambidextrous Advocate: A Study in the History of Legal Ethics*, in *«Ins Wasser geworfen und Ozeane durchquert». Festschrift für K.W. Nörr*, M. Ascheri – F. Ebel – M. Heckel – A. Padoa Schioppa – W. Pöggeler – F. Ranieri – W. Rütten (ed.), Köln-Weimar-Wien 2003, pp. 39-56, p. 44; Id., *The Lawyer as His Client's Judge: the Medieval Advocate's Duty to the Court*, in *Cristianità ed Europa. Miscellanea di studi in onore di L. Prosdocimi*, I.2, C. Alzati (ed.), Roma-Freiburg-Wien 1994, pp. 591-607, pp. 593, 595-603; Bianchi Riva, *L'avvocato non difenda cause ingiuste*, cit. (note 21), pp. 9-77, 170-181.

[51] Manz, *Commentarius rationalis*, cit. (note 49), *ad.* art. 73, nn. 27-34, pp. 300-301. On the contrary see, for example, Ludovici, *Caroli quinti … constitutiones criminales*, cit. (note 42), *ad* art. 73, p. 68.

[52] C. Blumblacher, *Commentarius in Kayser Carl deß V. und deß heiligen Römischen Reichs peynliche Halß-Gerichts-Ordnung*, Salzburg 1752 (first edition 1670), *ad* art. 47, n. 6, p. 142. About Blumblacher (1624-1674) see P. Putzer, *Christoph Blumblacher*, in *Juristen in Österreich*, cit. (note 5), pp. 46-49.

as Daniel Clasen did, who warned a lawyer to plea an accused only if innocent[53], on the other hand they prescribed the lawyer a huge number of moral requirements[54].

This way, the development of a literature dedicated to the more general problem of the defence[55], or one concerning the role of the defending counsel in the criminal trial[56], was favoured. These kinds of works focused particularly on the enumeration of the moral features that a defender must have to do his job, since they were deemed as a guarantee against every hindrance to the smooth running of the trial. Johann David Thönnicker's work of the early 18th century can be numbered among these. He made recommendations on conduct of the lawyer based on well-known stereotypes, albeit in a watered-down form with respect to those in similar works. Nevertheless, he asserted that producing the usual excuses in order to refuse the accused a lawyer – i.e. the risk of lengthening trial time, increasing costs, the clarity and simplicity of the case, the confession already obtained or the conduction of the trial in a conscientious way by the judge – could indicate bad faith because it meant excluding in fact the primary available means of defence[57].

Over time, the granting of the defence (even *ex officio*), starting from the phase immediately before the torture, by means of the granting of a professional defender (a *Rechtsgelehrter*, a person who had sufficient

---

[53] Clasen, *Commentarius*, cit. (note 47), *ad* art. 47, pp. 177-178; *ad* art. 73, pp. 246-249. About Daniel Clasen (1622-1678) see the short lemma in *Deutsche Biographische Enzyklopädie*, 2, München 1995, p. 331.

[54] See J.B. Suttinger, *Observationes practicae ad stylum provincialis Austriae intra Onaesum*, Nürnberg 1656, obs. 20, pp. 36-42; B. Finsterwalder, *Practicae observationes ad consuetudines Archi-Ducatus Austriae Superioris*, Salisburgi 1719 (first edition 1681), obs. 22, pp. 49-62; N. Beckmann, *Reformata doctrina iuris*, Norimbergae 1681, pp. 39-43. About these works see M.R. Di Simone, *Aspetti della cultura giuridica austriaca nel Settecento*, Roma 1984, pp. 18-31.

[55] Cf., for example, T. Granz, *Defensio inquisitorum ex genuinis jurisprudentiae principiis*, Francofurti et Lipsiae 1718 (first edition 1702), c. 4, s. 2, pp. 71-102.

[56] See, for example, B. Agricola, *De advocato, sive de qualitatibus et officio boni advocati*, Neapoli Nemetum 1618; A. Fritsch, *Advocatus peccans*, Francofurti et Lipsiae 1678.

[57] J.D. Thönnicker, *Advocatus prudens in foro criminali*, Chemnitii et Lipsiae 1710, cap. 4, pp. 11-18, and cap. 13, n. 2, p. 70. See also the *Praefatio ad Lectorem*.

technical-juridical preparation), who would have contributed with his experience to the trial, were agreed upon (albeit with caution) by legal scholars[58]. The *ante quaestionem* presence of the defender, who must know the circumstantial evidence *speciatim* in order to oppose it effectively, was left to the judge's discretion, though jurists seemed to prefer this option[59]. As always, large gaps remained in which *arbitrium* and interpretation may have entered. Heinrich Meier spoke – unheeded – against the discretion of the judge and the fact that he assumed both the prerogatives of the prosecutor and of the defender; this way «facile confunditur»: the inquisitorial trial lacked a *contradictor* to balance the prerogatives of the judge and could be represented by a professional defender[60].

Johann Samuel Friedrich Böhmer, whose early work on criminal law, based on the *Carolina*, was considered the first scientifically significant manual of common German criminal law and in particular of the criminal procedure[61], laid down the most traditional positions of the doctrines developed until then. For this reason, it was one of the main sources (sometimes copied almost literally) used by Banniza senior, who in Austria was in fact the mediator of his thought. The *Theresiana* itself later drew from many points of the system, which was described there[62]. Whatever the crime, Böhmer found it difficult that the accused could be denied defence, insomuch as that sometimes it was prepared *ex officio*. The defender – whoever he was: the defendant himself, one of his relatives, a third party or the judge – must have the instruments to properly prepare his work, of which most notably were having an interview with the accused and being able to read a copy of the circumstantial evidence. Though,

---

[58] J.C. Frölich v. Frölichsburg, *Commentarius In Kayser Carl des Fünfften ... Peinliche Hals-Gerichts-Ordnung*, Ulmae 1709, t. 18, n. 6, pp. 161-162; Kress, *Commentatio succincta*, cit. (note 47), *ad* art. 73, p. 186, mentioned an *Anwald* together with a friend and an uncle among the people who could plea for the imprisoned accused.

[59] Kress, *Commentatio succincta*, cit. (note 47), *ad* art. 47, §§ 3-4, pp. 128-129.

[60] H. Meier, *De defensione pro avertenda inquisitione*, Lipsiae 1738, §§ 2-5, pp. 4-7.

[61] Landsberg, *Geschichte der deutschen Rechtswissenschaft*, 3.1, Text, cit. (note 5), p. 301.

[62] Landsberg, *Geschichte der deutschen Rechtswissenschaft*, 3.1, Text, cit. (note 5), p. 400; D. Oehler, *Wurzel, Wandel und Wert der Strafrechtlichen Legalordnung*, Berlin 1950, p. 95.

these activities were often opposed because they delayed the progress of the trial[63]. This was nothing new, including a reference to the risk of lengthy litigations, a real obsession for all jurists, who always found one culprit, i.e. the captious lawyer.

When in 1770 the more mature Böhmer approached the *Carolina* to write a commentary, more severe judgments replaced simple descriptions. Indeed, he started from the premise that in every step of the trial potentially prejudicial for the accused, he should have the opportunity to defend himself. However, then he focused in particular on what was set forth by the judge in defence of the accused, since the inquiry he conducted was guided by the aim to get the truth. The custom of appointing a defender was not justified with the risk of not having the necessary impartiality by the judge, but rather with the risk of too many commitments for which he was overburdened, due to the overlapping of his duties. On the contrary, intervention of lawyers in the trial should be limited to avoid abuses by them. In any case, Böhmer reiterated that there were no written rules in the *Carolina* expressly providing for the intervention of the defender, but any question regarding him was left to the discretion of the judge. However, if the case presented difficulties against which the accused would have rarely been able to prepare an adequate defence, a defending counsel was then necessary, who could become informed on the proceedings, preferably in their original format

---

[63] J.S.F. Böhmer, *Elementa jurisprudentiae criminalis*, Halae Magdeburgicae 1732, s. 1, c. 9, §§ 157-159, pp. 79-81, and c. 15, §§ 247-253, pp. 124-127. An overview of the opinions of other authors on many of the same issues is also in Id., *Observationes selectae ad B. Carpzovii Practicam novam Rerum Criminalium Imperialem Saxonicam*, Francofurti ad Moenum 1759, *ad* q. 115, pp. 54-58. About Johann Samuel Friedrich Böhmer (1704-1772) see J.F. v. Schulte, *Böhmer, Johann Samuel Friedrich von*, in *Allgemeine Deutsche Biographie*, 3, Leipzig 1876, p. 76; Landsberg, *Geschichte der deutschen Rechtswissenschaft*, 3.1, Text, cit. (note 5), pp. 301-304; Schaffstein, *Die allgemeinen Lehren vom Verbrechen*, cit. (note 39), pp. 17-19; G. Boldt, *Johann Samuel Friedrich Böhmer und die gemeinrechtliche Strafrechtswissenschaft*, 1, Berlin-Leipzig 1936, pp. 1-46; E. Döhring, *Böhmer, Johann Samuel Friedrich von*, in *Neue Deutsche Biographie*, 2, Berlin 1955, pp. 391-392; Kleinheyer – Schröder, *Deutschen Juristen*, cit. (note 44), p. 335; Dezza, *Accusa e inquisizione*, cit. (note 33), pp. 89-92; Id., *Lezioni*, cit. (note 16), pp. 72-73; F. Hess, *Böhmer, Johann Samuel Friedrich*, in *Handwörterbuch zur deutschen Rechtsgeschichte*[2], 1, cit. (note 12), col. 640.

and under the surveillance of a judicial officer to prevent tampering of the documents[64]. The distrust of lawyers remained, even when it seemed that there were some possibilities for their intervention.

The criminal law scholars from the German area, therefore, starting from the text of the *Carolina*, through constant interpretation (which began with its versions in Latin), laid the foundation of a practice that gave some space to the figure of the defender, first leaving undefined contours, then connoting him with increasing precision as an expert in law. The pages of these authors, however, were filled with repeated interventions and recommendations regarding the conduct and the necessary moral prerequisites lawyers should have, as if they actually abused the limited opportunities given to them. Indeed, this seemed to justify the invectives that painted them as greedy swindlers and manipulators, who sneaked around diabolically in the dangerous bottlenecks of the trial: for this reason the risk was still there, noted with concern also in the *Josephina* and in the *Theresiana*, that their intervention, characterized by sophistry and attempts of procrastination, created disorder in the inquisition.

Thus, the shift from the precarious and uncertain opening towards lawyers by legal scholars to the limits set since the 17th century by the Austrian bodies of laws was nearly natural. These criminal laws included the prohibition of the defender, strengthened in their choice also by the widespread belief that the trial was the tool used by the judge to achieve the truth; the possible innocence of the defendant could emerge through the work of this man; if the accused was guilty, the intervention of a defender would have proved useless anyway. The problem of finding someone who practiced law and did not obstruct quick and effective justice, aimed at finding a culprit, was solved with the entrusting of all the duties to the judge (who above all became judge of himself and of his work)[65]. This way, the asymmetric dynamics of the absolute State were

---

[64] Böhmer, *Meditationes*, cit. (note 42), *ad* art. 47, §§ 1-6, pp. 192-197; *ad* art. 73, § 3, p. 269.

[65] Cf. L. Garlati, *Inseguendo la verità. Processo penale e giustizia nel* Ristretto della prattica criminale per lo Stato di Milano, Milano 1999, pp. 141, 144-145; Dezza, *Il divieto*, cit. (note 12), pp. CCIV-CCV; Id., *Il nemico della verità*, cit. (note 12), pp. 19-20, 69-70. La ricerca della verità «è il nòcciolo dell’inquisitorio austriaco» (the search for the truth is the

reproduced on a small scale, in which the subject was unarmed and helpless before the power[66].

One can therefore assume that the holder of the truth worked in the interest of the defendant and of justice better than the lawyer, who on the contrary aimed to obscure the facts. In the opposition – almost biblical – between a judge who was one and trine and a lawyer who took the place of the devil, in the battle between angels and demons, the pious Austrian legislator of the second half of the 18th century, supported by a strong tradition and by old-century considerations of legal scholars, did not have (nor could he have) doubts on which *mala herba* to eradicate.

---

core of the Austrian inquisitorial trial): Miletti, *Per quali vie convenga investigare la verità*, cit. (note 17), p. LXIX.

[66] Gleispach, *Das österreichische Strafverfahren*, cit. (note 22), p. 9.