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di Mario Ascheri

IL CAMMINO DELLE IDEE
DAL MEDIOEVO ALL'ANTICO REGIME
Diritto e cultura nell'esperienza europea

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Czech Codifications in the High Middle Ages

by Pavel Krafl

1. Introduction

For centuries, legal culture in the Czech lands was based on customary law, appended with the rulers' law-making acts (princes of Bohemia and, later, kings of Bohemia). There was no need to codify land law (nobility law). The nobility did not trust the rulers' codification efforts that emerged in the last third of the thirteenth century. The first attempts came from the kings Přemysl Ottokar II (1253-1278) and Wenceslaus II (1278-1305). Wenceslaus II invited an important lawyer, Gozzius de Orvieto, from Italy. The noblemen's negative attitude finally made the king abandon codification of the land law, and his codification efforts were implemented only in the sphere of special rights. The *Ius regale montanorum* code originated in 1300¹. Emergence of the mining law's codification coincided with the discovery of rich silver deposits, the development of mining, and the minting of a new high-quality silver coin, the Prague groschen.

Two codification initiatives emerged in the mid-fourteenth century, the first in the ecclesiastical sphere. The Prague and Olomouc dioceses were originally components of the Mainz ecclesiastical province. In 1344, the Prague bishopric was elevated to an archbishopric and the Prague ecclesiastical province was established. The legal requirements of the new ecclesiastical province called for establishment of a legal standard. In 1349, the first Prague archbishop, Ernst of Pardubice (1343-1363), promulgated provincial statutes that represented codification of the Prague province's particular ecclesiastical law². Another attempt to codify Bohemian land law came in the mid-fourteenth

¹ M. Bláhová, *Počátky kodifikace zemského práva v Čechách* [Origins of codification of the land law in Bohemia], in *Kultura prawná w Europie Środkowej* [Legal culture in Central Europe], ed. A. Barciak, Katowice 2006, pp. 79; *Kodifikace, mezníky právních dějin* [Codifications, breaking points in the history of law], ed. K.V. Malý, in «Prameny a nové proudy právní vědy», 14 (1994), pp. 43-44.

² P. Krafl, *Provincial and Legatine Statutes of the Archbishops of Prague*, in «Quaestiones mediaevi novae», 8 (2003), pp. 292-293; P. Krafl, *Legátské a provinciální zákonodárství pro olomouckou diecézi od poloviny 13. století* [Legatine and provincial legislation for the Olomouc diocese from the mid-thirteenth century], in «Sborník archivních prací» (from now on «SAP»), 53 (2003),

century. The Bohemian king Charles IV (1346-1378) had a legal code written in Latin; later, it was called *Maiestas Carolina* (1355). Just like Wenceslaus II, he met with resistance from the nobles and the bill failed to become a valid legal code. Nevertheless, the Czech translation of *Maiestas Carolina* spread during the fifteenth century³. Let us discuss these legal relics in more detail.

2. *Ius regale montanorum*

The *Ius regale montanorum* code (1300) was initiated by King Wenceslaus II⁴. It was a basic standard in all mining locations in Bohemia and Moravia with deposits of precious metals or other specific minerals⁵. The alleged author of the legal code was Gozzius de Orvieto. There is, however, no direct proof of his authorship; older as well as more recent literature deems it likely from his proved activity at the court of Wenceslaus II immediately before the passing of the mining law. The content of the law, its system and form, suggest that the author could not be a local person. Language analysis of the Latin text indicates that the author must have been an Italian, probably Gozzius; the existence of a second Italian lawyer at the court of King Wenceslaus II has not been proven. The author was a lawyer with a deep knowledge of Roman law and canon law. He was also well acquainted with the technical, economic and social circumstances of local mining⁶.

When sectioning the matter, the author followed the system of Justinian's *Institutions*. He sectioned the code into four books according to the theory that the entire mining law applied to the persons participating in mining work (*ad personas*), the mines (*ad argenti fodinas*), the mining lease (*ad concessiones*), and lawsuits with their apparatuses (*ad petitiones*)⁷.

pp. 556-557; P. Krafl, *Several Notes on the Position of Canon Law in Czech Legal Historiography*, in *Vetera novis augere. Studia i prace dedykowane Profesorowi Wacławowi Uruszcakowi* [Vetera novis augere. Studies and works dedicated to Professor Wacław Uruszcak], I., edd. S. Grodziski, D. Malec, A. Karabowicz, M. Stus, Kraków 2010, pp. 451-452; P. Krafl, *Arnoštova provinciální statuta z roku 1349, významná česká právní památka* [Ernst's provincial statutes from 1349, an important Czech legal relic], in *Arnošt z Pardubic (1297-1364). Osobnost, okruh, dědictví. Postať, sféra, dedičstvo* [Ernst of Pardubice (1297-1364). Personality, sphere, heritage], edd. L. Bobková, R. Gładkiewicz, P. Vorel, Wrocław-Praha-Pardubice 2005, pp. 59-64.

³ Bláhová, *Počátky kodifikace*, pp. 80-81; *Kodifikace, mezníky právních dějin*, pp. 44-46.

⁴ Edition: *Codex juris Bohemici*, I., ed. H. Jireček, Pragae 1867, pp. 265-435; A. Zycha, *Das böhmische Bergrecht des Mittelalter auf Grundlage des Bergrechts von Iglau*, II, Berlin 1900, pp. 40-297. A Czech translation of the code from 1460, see *Ius regale montanorum aneb Právo královské horníku* [Ius regale montanorum, or the Royal mining law], ed. J. Bílek, Kutná Hora 2000.

⁵ J. Bílek, *K otázce historického významu Ius regale montanorum* [On question of the historical significance of Ius regale montanorum], in *Československý časopis historický*, 27 (1979), pp. 734-735.

⁶ H. Bulín, *Nejstarší kodifikace procesního práva v Čechách (Poznámky ke IV. knize horního zákoníku Václava II.)* [The oldest codification of procedural law in Bohemia (Remarks on 4th volume of the mining code of Wenceslaus II)], in *«Právněhistorické studie»* (from now on «PHS»), 2 (1956), p. 92; G.Ch. Pfeifer, *Ius regale montanorum. Ein Beitrag zur spätmittelalterlichen Rezeptionsgeschichte des römischen Rechts in Mitteleuropa*, in *«Abhandlungen zur rechtswissenschaftlichen Grundlagenforschung»*, 88 (2002), pp. 17-20.

⁷ Bulín, *Nejstarší kodifikace*, p. 92.

In agreement with this sectioning, the first book concerns the types of offices and jobs involved in the mining activity, along with the tasks, duties and rights of the individual types of royal officers and the mining staff. The second book contains regulations concerning the miners' rights to foreign plots, various technical mining devices, the rights of the galleries, and mining rights. The third book concerns mining leases and their types, selling and purchasing, gifting, passing the possession of rights, and losing rights. The fourth book includes regulations concerning procedures before mining courts, from the summons to the verdict and appeal. The first three books thus contain material mining law, the fourth book contains formal law (procedural). This system, however, was not completely consistent. Important regulations on the judicial system in mining matters are also scattered in various sections of the first book. The first book contains provisions of an organizational character, i.e. directives on the system and composition of mining courts and the affiliations of these courts, while the fourth book contains procedural law in the strict sense of the word and has a character of a court code⁸.

There is the apparent influence of Roman law in the systematic order of the mining code and in the numerous provisions, which were directly adopted from Justinian's compilation (mainly from the Institutions and the Digest). The influence of canon law is also apparent. In the first three books, Roman law appears largely as a form. It is a mere tool for expressing legal content of a domestic origin, i.e. the mining law, which originated in the old traditions of domestic customary law under the direct influence of Roman-Germanic mining rights. The first book is a direct reception of statutes on the Roman-canonic process, which was adapted to domestic circumstances in marginal issues. The material mining law in the first, second and third books is based on the Jihlava law. *Ius regale montanorum* further involves issues that were not included in the Jihlava law, such as the principle of the royal mining right (*ius regale*)⁹. *Ius regale montanorum* was received in the original or a partly modified form in the foreign locations of Kremnica, Olkusz, Frieberg and Villander¹⁰.

3. *Provincial statutes of Ernst of Pardubice, the Archbishop of Prague, from 1349*

Ernst of Pardubice promulgated his codification at the provincial synod on 11th and 12th November 1349¹¹. It was based on provincial statutes of the

⁸ Bulín, *Nejstarší kodifikace*, pp. 92-94.

⁹ Bulín, *Nejstarší kodifikace*, pp. 95-96; E. Ott, *Beiträge zur Rezeptionsgeschichte des römisch-canonicalen Processes in der böhmischen Ländern*, Leipzig 1879, pp. 170-172.

¹⁰ Bílek, *Kotázce historického významu*, pp. 735.

¹¹ Edition of statutes: R. Zelený, *Councils and Synods of Prague and their Statutes (1343-1361)*, in «Apollinaris», 45 (1972), pp. 27-81; reprint in *Pražské synody a koncily předhusitské doby* [Prague synods and councils of pre-Hussite period], edd. J. V. Polc, Z. Hledíková, Praha 2002, pp. 115-164. Cf. P. Erdő, *Synodalbücher der Kirchenprovinzen von Gnesen, Prag und Salzburg*.

Mainz Archbishop Peter of Aspelt from 1310. Only nineteen articles of Ernst's codification are not based on Aspelt's statutes. The individual *Corpus iuris canonici* books are frequently cited (the citations appear in twenty-two articles)¹². Ernst's provincial statutes from 1349 are systematically arranged with the same structure and in the same order as articles in Liber extra. They have an exclusive character¹³.

Ernst's code normatively modified important issues connected with the life of a particular church and its administration. The regulations of the statutes particularly regarded the clerics. A large number of provisions, however, also concerned secular people (the sacraments, the relation between the church and secular power, etc.) and non-Christians (Jews)¹⁴.

All parsons in the entire Prague ecclesiastical province (i.e. in Bohemia and Moravia) were obliged to possess the text of Ernst's code.¹⁵ This concerned more than 2,800 priests. The number of actual copies was probably lower; the decree on possession was not always respected. Almost ninety codices or their fragments from Ernst's code have survived from the hundreds or thousands of manuscripts with medieval copies¹⁶. Ernst's codification was first printed in 1476¹⁷ and re-printed in 1605¹⁸. The provincial statutes of 1349 also applied beyond the Bohemian and Moravian territory; the Prague Archbishop John of Jenštejn promulgated them in 1381 from his position as the permanent papal legate in the Bamberg, Regensburg and Meissen diocese (as legatine statutes)¹⁹.

The codification applied from its promulgation in 1349; its validity is mentioned in provisions of the Prague synods held up to the Hussite revolution and the Moravian synods from the fifteenth century (last held in 1498)²⁰.

Zu den Erscheinungsformen einer spätmittelalterlichen literarischen Gattung, in «Rivista internazionale di diritto comune», 10 (1999), pp. 18-24; P. Erdö, *Kirchenrecht im mittelalterlichen Ungarn. Gesammelte Studien*, Berlin 2005 (Aus Religion und Recht 3), pp. 54-59; Krafl, *Legátské a provinciální zákonodárství*, pp. 574-576; Krafl, *Arnoštova provinciální statuta z roku 1349*, pp. 59-64.

¹² Zelený, *Councils and Synods*, pp. 5-6; Krafl, *Legátské a provinciální zákonodárství*, pp. 556-557.

¹³ Krafl, *Arnoštova provinciální statuta z roku 1349*, p. 60.

¹⁴ Krafl, *Arnoštova provinciální statuta z roku 1349*, pp. 60-61.

¹⁵ Krafl, *Legátské a provinciální zákonodárství*, pp. 563-564.

¹⁶ Zelený, *Councils and Synods*, pp. 14-18; *Pražské synody a koncily*, pp. 65-71. Further manuscripts were pointed out by P. Krafl, *K dochování statut pražských arcibiskupů v Moravském zemském archivu* [Survival of Prague archbishops' statutes in the Moravian archive], in «Archivní časopis», 50 (2000), p. 214, note 3; pp. 215-218; p. 220.

¹⁷ E. Urbánková, *Statuta Arnoštova, nejstarší datovaný prvotisk českého původu* [Ernst's statutes, the oldest dated incunabulum of Czech origin], in «Ročenka Státní knihovny ČSSR v Praze» 1965 (publ. 1966), pp. 49-59.

¹⁸ *Ernesti archiepiscopi primi Pragensis ante annos ducentos et octoginta novem publicata opera, studio, sumptibus reverendissimi domini Georgii Bartholdi Pontani a Braitenberg etc., s. metropolitanae ecclesiae Pragensis praepositi, Olomucensis et Budissinensis canonici, prothonotarii apostolici, comitis palatini, archiepiscopatus officialis et vicarii generalis*, Pragae 1606.

¹⁹ Krafl, *Arnoštova provinciální statuta z roku 1349*, p. 62.

²⁰ P. Krafl, *Moravské diecézní zákonodárství v druhé polovině 15. století* [Moravian diocesan legislation in the second half of the fifteenth century], in XXVII. mikulovské sympozium Vývoj církev-

Many citations of individual articles from Ernst's code and references to its provisions can be found in synodic statutes of the Olomouc diocese (1413, 1431)²¹. Ernst's code influenced foreign ecclesiastical legislation: the Polish provincial statutes (codification) from 1420 literally adopted several articles²².

4. *Maiestas Carolina*

The main reason for rejection of the draft code by Charles IV²³ was the fact that it was to be exclusive. It would eliminate the right to make law, which was characteristic of the land court in Bohemia and gave it absolute freedom in decision-making. The code also presented interference in valid customary law by introducing new standards and changing or modifying old customary standards. It was another serious argument for rejection of the code²⁴.

In the preamble and two articles, the author of the text used a code by Emperor Friedrich II (*Liber Augustalis, Constitutiones regni Siciliae*); two articles reveal knowledge of the Bohemian legal relic called the *Řád práva zemského*. Rules regarding the faith were adopted from *Liber extra*. The code has many references to the old customary law (*consuetudo*). The author was an erudite lawyer-canonist; he also understood Roman law, but Bohemian law was probably foreign to him or was not his standard²⁵.

The code is preserved in several tens of manuscripts, usually in collections containing various relics of Bohemian land law or relics of municipal law. The owners of the manuscripts were mostly noblemen, but only from Bohemia. A large majority of the manuscripts originate from as late as the

ni správy na Moravě, 9.-10. října 2002 [XXVII Mikulov symposium Development of ecclesiastical administration in Moravia, 9th-10th October 2002], Brno 2003, pp. 330, 333.

²¹ P. Krafl, *Synody a statuta olomoucké diecéze období středověku* [Synods and statutes of the Olomouc diocese in the Middle Ages], Praha 2003 (Opera Instituti historici Pragae B/2), pp. 93-94, 97-98.

²² W. Abraham, *Statuta synodu prowincjonalnego w Kaliszu z r. 1420* [Statutes of provincial synod in Kalisz dated 1420], in «Rozprawy i sprawozdania z posiedzeń Wydziału historyczno-filozoficznego Akademii umiejętności», 22 (1888), pp. 107-108, 110, 173-181; P. Krafl, *Legátská statuta pro Polsko a provinciální statuta Hnězdna do konce 15. století* [Legatine statutes for Poland and provincial statutes of Gniezno by the end of the fifteenth century], in «SAP», 51 (2001), p. 407, note 62.

²³ Edition *Maiestas Carolina. Ein Kodifikationsentwurf Karls IV. für das Königreichs Böhmen von 1355*, ed. B.-U. Hergemöller, München-Oldenburg 1995 (Veröffentlichungen des Collegium Carolinum 74); *Archiv český*, III., ed. F. Palacký, Praha 1844; *Codex juris Bohemici*, II/2, ed. H. Jireček, Pragae 1870, pp. 100-197.

²⁴ T. Saturník, *Majestas Carolina a její vliv na české právo obyčejové* [Majestas Carolina and its influence on the Bohemian customary law], in «Sborník věd právních a státních», 48 (1948), p. 5. For the emergence, promulgation and withdrawal of the code, see J. Kejř, *Sporné otázky v bádání o tzv. Maiestas Carolinae* [Disputable issues in research on the so-called Maiestas Carolinae], in «PHS», 32 (1992), pp. 59-61, 65-68; M. Nodl, *Maiestas Carolina. Kritické postřehy k pramenům, vyhlášení a "odvolání" Karlova zákoníku* [Maiestas Carolina. Critical observations on the sources, promulgation and "withdrawal" of Charles' code], in «Studia Mediaevalia Bohemica», 1 (2009), pp. 21-35.

²⁵ Saturník, *Majestas Carolina*, p. 6; Kejř, *Sporné otázky*, pp. 62-63.

second half of the fifteenth century. Nevertheless, quite a large number of manuscripts still originate from the early sixteenth century; however, the number then falls (as a consequence of the Vladislav constitution). Only six manuscripts with the original Latin text have survived; the others from 1500 are Czech translations, which show significant dissimilarities to the original. Many abridged versions and excerpts have also survived. German translations originated as late as the eighteenth and nineteenth centuries, naturally just for studying purposes²⁶.

Many provisions of the code express the king's endeavours and goals. The first article threatens all opponents of the Catholic denomination with death and infamy (article 2). It also pays attention to heretics and their supporters (articles 3-5). These rules form a preamble to the code and succeed the canon law²⁷.

Charles IV faced certain consequences resulting from a weakening of central power in the Kingdom of Bohemia under his predecessor John of Luxembourg. The foundations of power lay particularly in royal property. Charles IV thus attempted to ensure the non-alienability of royal property. In this spirit, *Maiestas Carolina* established three categories of royal estates: 1. utterly inalienable estates (29 towns, 13 castles and three imperial pledges), 2. exchangeable and temporarily pledgeable estates, and 3. free estates²⁸.

Any partition of the state territory was forbidden. An obligation to crown the new king within six months of accession was formulated. The lawmaker considered a situation when a widowed queen decided to re-marry (article 37). Several provisions are dedicated to the supreme provincial offices (articles 17, 18)²⁹.

The judicial system ruled that the king was not to be taken to court personally; the summons was to involve his officials. Likewise, he was not to summon anyone else; this act was in the hands of the court judge (article 42, 43). These provisions differed from customary law. *Maiestas Carolina* removed ordeal by hot iron, water and other means (article 39). Only ordeal by duel was allowed, but only in specific cases³⁰.

Maiestas Carolina partly restricted the royal right to grant pardons. The code forbade the establishment of noble confederations and societies without the king's knowledge or command (article 33). Societies against the life of

²⁶ J. Kejř, *Maiestas Carolina v dochovaných rukopisech* [*Maiestas Carolina in extant manuscripts*], in «Studie o rukopisech» [from now on «StR»], 17 (1978), pp. 5, 6, 11, 16. Cf. J. Kejř, *Maiestas Carolina v dochovaných rukopisech (Dodatky)* [*Maiestas Carolina in extant manuscripts. Supplement*], in «StR», 20 (1981), pp. 87-91; I. Martinovský, *České zpracování Majestas Carolinae a jeho rukopisy. K 600. výročí smrti císaře Karla IV.* [Czech production of Majestas Carolina and its manuscripts. To the 600th death anniversary of the death of emperor Charles IV], in «Ústecký sborník historický», 1979, pp. 29-44.

²⁷ Saturník, *Majestas Carolina*, pp. 8-9.

²⁸ Saturník, *Majestas Carolina*, p. 9; Kejř, *Sporné otázky*, p. 57.

²⁹ Saturník, *Majestas Carolina*, pp. 10-12.

³⁰ Saturník, *Majestas Carolina*, pp. 13-14; Kejř, *Sporné otázky*, p. 65. On ordeals see K. Schelle, *Ordály jako důkazní prostředek v procesním právu* [Ordeals as the means of evidence in procedural law], in «Slovenská archivistika», 15 (1980), 1, pp. 117-146.

another person or with other hostile motives were also forbidden (article 34) and the issue of the potential invasion of another owner's estate was also resolved (article 35). The application of mutilation as a punishment for serfs was restricted (article 79)³¹.

As regards private law, the code of Charles IV brought fewer novelties. We can mention a change in inheritance. According to the old principle, only sons who stayed in the family property partnership called *nedíl* were entitled to inheritance.³² The change consisted in hereditary succession extending to separate sons who had already received their share of the father's property (article 65). The code also eliminated berating (in Czech "láni"), i.e. public vilification of the debtor by the creditor (article 88). To protect debtors, a regulation prohibiting the dice was established (article 31)³³.

The exclusivity of the code, the tendency to strengthen royal power, and changes to existing customary law thus met with resistance from the nobles. The general assembly of the Crown of Bohemia rejected the bill in 1355, so Charles IV cancelled it on 6th October 1355. Under pressure from the nobles, he was forced to proclaim that the only copy of the code had burned by accident³⁴. Some of the provisions later penetrated into the land codes. Its main value lies in the fact that it documents old Bohemian customary law. Oddly enough, we can encounter an interesting fact: the fifteenth century materials appear to recognise the validity of the *Maiestas Carolina* provisions. The content of the code was respected as a law book and became a regularly used tool in land law. The awareness that Charles had made concessions had disappeared³⁵.

5. Summary, conclusion

The mining code of Wenceslaus II contains in its fourth book the first systematic codification of procedural law in the Czech lands. This code is the oldest formal reception of Roman-canon law in the Czech lands. *Ius regale montanorum* was also the first codification attempt to introduce a Roman-canon process for secular courts in Central Europe at the start of the fourteenth century³⁶.

Provincial statutes of Ernst of Pardubice from 1349 were used for at least two centuries, perhaps two and a half or more. These statutes were the most widespread and applied written legal standards in the Czech lands. It is the only codification whose provisions involved all citizens of Bohemia and Moravia. It cannot be emulated by any other codification in the Bohemian

³¹ Saturník, *Majestas Carolina*, pp. 14-15.

³² For *nedíl*, refer to K. Kadlec, *Rodinný nedíl čili záduha v právu slovanském* [*Family nedíl, or záduha in the Slovanic law*], Praha 1898.

³³ Saturník, *Majestas Carolina*, pp. 15-16.

³⁴ See above.

³⁵ Kejř, *Maiestas Carolina v dochovaných rukopisech*, p. 10.

³⁶ Bulín, *Nejstarší kodifikace*, p. 87.

middle ages as regards legal particularism and the enforcement of the personality principle in law.

Codification efforts contradicted the essence of Bohemian law, which was customary. Adoption of the king's written code would have limited the role of the nobility in forming the law and making the law at the land court. The nobles were provoked by the fact that it was to be exclusive. The initiative of Charles IV thus failed. Paradoxically, Czech translations of the Latin code by Charles IV became quite commonplace during the fifteenth century, when they were used as a law book.