



JAN KUKLÍK

**CZECH LAW
IN HISTORICAL
CONTEXTS**

KAROLINUM

Czech law in historical contexts

Jan Kuklík

Reviewed by:

Doc. PhDr. et JUDr. Jakub Rákosník, Ph.D.

PhDr. Jiří Noha, Ph.D.

Published by Charles University in Prague

Karolinum Press

English text editing Marta Chromá and Jim Critz

Layout by Jan Šerých

Typeset by DTP Karolinum Press

First edition

© Charles University in Prague, 2015

© Jan Kuklík, 2015

This book is written under the auspices of institutional support PRVOUK P04.

Front cover: Allegory of the Faculty of law,
Charles University in Prague.

ISBN 978-80-246-2860-8

ISBN 978-80246-2916-2 (online : pdf)



Charles University in Prague
Karolinum Press 2015

www.karolinum.cz
ebooks@karolinum.cz

CONTENTS

Introductory remarks	7
1. Beginnings of the Czech state and law	9
2. Development of law during the era of the Luxemburgs until 1419.....	20
3. The Hussite period	27
4. Law during the Estate Monarchy	31
5. Law during the Age of Absolutism	40
6. Enlightened Absolutism	45
7. Codification of Austrian civil law	57
8. Austrian constitutional development 1848–1914 and Czech national movement.....	62
9. Austrian legal development 1848–1918	77
10. The break-up of the Habsburg Empire and the establishment of Czechoslovakia	84
11. Continuities and discontinuities in the initial period of Czechoslovak legal development	89
12. Constitutional development of the First Czechoslovak Republic	94
13. Legal aspects of national minorities	102
14. Changes in Czechoslovak law 1918–1938	107
15. The Munich Agreement and the Protectorate of Bohemia & Moravia	111
16. Re-establishment of Czechoslovakia in pre-Munich borders	121
17. Presidential decrees (so-called Beneš decrees)	131
18. The Third Czechoslovak Republic 1945–1948	136
19. May Constitution of 1948 and the political system of the People's Democracy	148
20. Changes in the Czechoslovak legal system 1948–1960	159
21. Political trials and other forms of persecution	169
22. Changes in land law – forced collectivization.....	177
23. Social security and labour law	180

24. The Socialist Constitution of 1960	183
25. Recodification of criminal law in the 1960s.	190
26. New civil law of the 1960s	196
27. Prague Spring	204
28. The period of “normalization” 1969–1989	210
29. Velvet revolution and period of “transformation”	215
References.....	227

Introductory remarks

The legal system of the present-day Czech Republic would not be understood properly without sufficient awareness and knowledge of its historical roots and evolution. The trend of “harmonization” of European legal systems closely interconnected with the phenomenon of the European Union, of which the Czech Republic is a member, and with the profound changes after the so-called 1989 Velvet Revolution, form just a recent part of its complex interpretive framework. The 20th century in particular is very important for today’s Czech state and law: this is connected with the establishment of an independent Czechoslovakia in 1918, which split in 1992 to give rise to the independent identities of the Czech Republic and the Slovak Republic. The 20th century encompassed periods of a democratic regime (in particular that between WWI and WWII) as well as of totalitarian regimes – both Nazi and Communist. The political, ideological, economic and social changes connected with such development were projected into, and reflected in, the system of Czechoslovak law; and it can therefore serve as a “case study” to those researchers interested in the transition of democratic legal systems into totalitarian regimes, and vice versa.

The historical development of Czech law is a good example of an application of the contradictory principles of continuity and discontinuity. It is interesting to observe how the original forms of Slavic law were influenced by the legal systems of neighbouring countries, primarily German and Austrian provinces, as well as by Canon and Roman law. It is equally interesting to see how a legal system originally based on customary law was changed into written and codified law. Czech law has been part of a broader Central European legal culture for centuries. It was so closely connected with developments within the Luxemburg, Jagiellonian and, primarily, Habsburg monarchies that many aspects of the development of Czech law can be observed in neighbouring states, although with some features remaining autonomous.

It is exciting to see the contradictions in the legal development of a changing society of the 18th and 19th centuries, when the Czech national revival and the creation of a modern Czech political nation collided with German ambitions both within the Czech lands and throughout the entire Austrian monarchy. Mutual relations between the Czechoslovak state and its nationalities and the concept of protection of national minorities under the auspices of the League of Nations are yet other aspects deserving the attention of foreign experts.

I believe that this outline of Czech and Czechoslovak legal history will stir the interest of its readers not only in law itself but also in the evolution of Czech and Czechoslovak statehood and culture.

Beginnings of the Czech state and law

The Czech Republic of today was historically made up of three main territorial elements: Bohemia, Moravia and part of Silesia, which together created the identity of the so-called Czech lands.¹ The first permanent settlement on this territory is connected with the Celtic tribes.² Some of their influence is still visible: for example, the original name of the country, Bohemia, was derived from the Celtic tribe of Boii and is still applied to the largest part of the Czech Republic.³ In the first century of the first millennium, the Celts were replaced by the German tribe of Marcomanni. The territory of the Czech lands remained (with the exception of a Roman military camp in Southern Moravia near Mikulov) free of the influence of the Roman Empire.⁴ This fact was important for

-
- 1 For the territorial development of the Czech state including maps see Semotanová, E.: Territorial Development and the Transformation of Landscape. In: Pánek, J. - Tůma, O. et al.: *A History of the Czech Lands*. Prague: Karolinum Press, 2009, pp. 25-54.
 - 2 For Celtic period in Central Europe in broader context see especially classical works by J. Filip. In English Filip, J.: *Celtic Civilization and its Heritage*. Prague: Academia, 1977.
 - 3 In more details Sláma, J.: Boiohaemum - Čechy. In: Teich, M. (ed.): *Bohemia in History*. Cambridge University Press, 1998, pp. 23-24.
 - 4 Tejral J. - Bouzek, J. - Musil, J.: *The fortification of the Roman military station at Mušov near Mikulov*. *Archeologica* 45, 1994, pp. 57 and following.

the legal development in the Czech lands, as Roman law was not reflected at that stage.

From the 4th century AD, Slavic tribes, in the course of the worldwide Great Migration of Peoples, gradually settled down in Bohemia and Moravia.⁵ After clashes between the Slavic population and invaders from the East, called Avars, the first attempt to create a loose state structure in the form of a tribal alliance was successfully accomplished by the Frankish merchant Samo. He was able to resist pressure from Dagobert, the King of the Franks. However, the empire disintegrated after Samo's death, around 658 AD. Some of the invaders from the East settled in Bohemia, later abandoned their nomadic lifestyles and became "Slavicized".⁶ There are only a few written sources available for acquiring some knowledge about this period, the most important of them being a chronicle written by the monk Fredegar from Burgundy.

Another important Slavic state structure on the territory of the Czech lands was connected with the so-called Great Moravian Empire in the 8th century.⁷ The establishment of the Empire gave a powerful impetus for the unification of Slavic tribes; it developed its own legal system and introduced Byzantine Christianity.

There are again very limited sources on legal development in that period. However, using archeological research,⁸ comparative methods and even the methods of legal anthropology,⁹ we can assume that the legal system was based on traditional Slavic customary law, comparable with that of other Slavic tribes. There is a notable exemption from customary law: one important written source of law was preserved from the Great Moravian Empire. It is called "Zákon sudnyj ljudem" – judge-made law for laymen, inspired by the Byzantine Ekloga.¹⁰ It consists of 33 articles and deals primarily with criminal and property law and the law of marriage. The written law was intended as a subsidiary source, used in cases where original customs were to be changed or were completely missing.

During the reign of the Great Moravian Prince Rostislav, a Christian mission was sent by the Byzantine Emperor. The mission arrived at Moravia in 863 under the leadership of the brothers Cyril and Methodius. They instituted

5 In more details Třeštík, D.: Prehistory and Beginnings of Slavic Settlement (to the 8th Century). In: Pánek, J. - Tůma, O. et al.: *A History of the Czech Lands*, pp. 58–64.

6 Charvát, P.: *The Emergence of the Bohemian State*. East Central Europe in the Middle Ages 450–1450, Volume 13. Leiden and Boston: Brill, 2010, p. 113.

7 See for example Třeštík, D.: Great Moravia and the Beginnings of the State (9th and 10th Centuries). In: Pánek, J. - Tůma, O. et al.: *A History of the Czech Lands*, pp. 65–77. For archeological research see Klápště, J.: *Czech Lands in Medieval Transformation*, East Central Europe in the Middle Ages 450–1450, vol. 17. Leiden, Boston: Brill, 2012, pp. 14 and following.

8 *Ibidem*.

9 See especially the works by Leopold Pospíšil. For example Pospíšil, L.: *Anthropology of law*, New Haven, 1971.

10 Dittrich, Z. R.: *Christianity in Great Moravia*. Instituut voor middeleeuwsche geschiedenis, 1962 p. 208.

a Slavonic liturgy comprehensible to ordinary people and developed a special script for the so-called Old Church Slavonic language. Cyril and Methodius translated the Bible from Greek into the Old Church Slavonic language. However, Rostislav's successor, the Moravian Prince Svatopluk (died 894), repudiated the supporters of Slavonic liturgy and switched to the Latin rite. As a result of church reforms new rules for the law of marriage were introduced and Christianity had an impact on changes to the original Old Slavonic family law.

The Great Moravian Empire gradually disintegrated during the reign of Svatopluk's son, Mojmir II (died 906), particularly due to the attacks of Hun (Magyar) nomadic raiders at the beginning of the 10th century.

The beginning of the Czech state (named after the Slavic expression for the Czech people – Bohemia) and its law is connected with clashes between the ruling Slavic families in the 8th and 9th centuries after Great Moravia was destroyed by Magyar tribes. In the end, the so-called Přemyslid dynasty (*Přemyslovci* in Czech) prevailed against its opponents in this struggle and, by the end of the 10th century, formed a nucleus of the Czech state, with its centre in Prague.¹¹ The first historically documented Přemyslid prince, Bořivoj, accepted (around 883) baptism from the hands of Methodius. In the beginning, the Přemyslid prince was loyal to the Great Moravian Empire, but Bořivoj's son, Spytihněv (died 915), took an oath of vassalage to Arnulf, the King of the Eastern Franks. The orientation of the society towards the West prevailed, including the Latin rite in the Church.

Among first Přemyslid princes the most important was Václav, or *Wenceslas* in English. He tried to pursue a policy of friendly relations, primarily with the mighty neighbour Saxony. Václav was murdered in a dispute with his brother Boleslav in the town of Stará Boleslav, most probably in 935. Václav was canonized and, as a patron of the Czech state, became a symbol of Czech statehood.¹²

In 973 the Prague Bishopric was instituted; a number of monasteries were built, with the first one founded in 993 for the Benedictine order in the quarter of Břevnov in Prague.¹³ The second bishop of Prague, Vojtěch (*Adalbert* in English) promoted the basic principles of Christian life, affecting also the domain of law.¹⁴ It should be noted in this context that the Přemyslid prince Boleslav II (died 999) enacted a set of privileges for the Church. In the doc-

11 For the development of Přemyslid domain in Central Bohemia and its transformation into early medieval state in English see Sláma, J.: *Boiohaemum - Čechy*, pp. 31-37.

12 In more details see Měřinský, Z. - Mezník, J.: Bohemia and Moravia from the tenth to fourteenth century. In: Teich, M.: *Bohemia in History*, pp. 40 and following.

13 Berend, N. - Urbańczyk, P. - Wiszewski, P.: *Central Europe in the High Middle Ages: Bohemia, Hungary and Poland*, c.900-c.1300. Cambridge University Press, 2013, pp. 115-117.

14 For Bishop Vojtěch see The Life of Saint Adalbert Bishop of Prague and Martyr. In: Klaniczay, G. (ed.): *Saints of the Christianization Age of Central Europe (Tenth-Eleventh Centuries)*. Central European Medieval Texts, Vol. 6., CEU Press, 2013, pp. 77-182.

ument certified by Boleslav in 992 the Church was given jurisdiction over matters of marriage and was assigned the right to levy a bishop's tithe. This is the oldest known piece of legislation adopted by a ruler from the Přemyslid dynasty. The ill-fated policy pursued by Bishop Vojtěch led to open disputes with the prince and his followers; as a result, Vojtěch was forced to leave Bohemia and died during his attempt to Christianize Baltic Prussia. He was later canonized and became the second patron of the Czech state, after the first patron, sv. Václav (St. Wenceslas).¹⁵

The Czech Kingdom gradually became an autonomous part of the Holy Roman Empire (the "Roman Empire" revived by Emperor Otto II). Individual rulers of those territories comprising the Roman Empire as an artificial universal unit remained sovereigns within their own territory but formally received their titles from the emperor.¹⁶ The first Přemyslid prince to be awarded the title of King was Vratislav II in 1085, although this title was entrusted to him just for life. Vratislav II (died 1092) was awarded the title in return for his support of Emperor Henry IV in his political struggle with the Pope. In 1158 Vladislav II (died 1174) was appointed the second Czech king; his nomination for life resulted from his support of the Roman Emperor Friedrich I Barbarossa in his military campaign in Italy. In 1198 Přemysl Otakar I (died 1230) was the first Czech king awarded the hereditary title. This fact was confirmed in 1212, when the so-called Golden Bull of Sicily was enacted by the Holy Roman Emperor Friedrich II, acting also as the King of Sicily.¹⁷ Later Czech kings, as one of seven imperial electors, acquired the right to elect the Holy Roman Emperor.

The Czech lands became known as the "Czech Kingdom" and, later, as the so-called "Kingdom of the Crown of Bohemia". The Czech Kingdom under the Přemyslid dynasty was composed of several regions: Bohemia, Moravia (from 1182 called the Margraviate of Moravia), Upper and Lower Silesia. The Přemyslid dynasty ruled until 1306.

The emerging Czech state took over many cultural and legal aspects developed during the Great Moravia period. The legal system was based on customs, and much of its content was based on the Old Slavonic law of the pre-state period. For example, ownership was based on traditional forms of "common ownership" by extended families; family law was influenced by

15 The third Bohemian Saint was Procopius. In more details see Bláhová, M.: The function of the Saints in Early Bohemian Historical Writing. In: Mortensen, B. H. (ed.): *The Making of Christian Myths in the Periphery of Latin Christendom* (c. 1000–c. 1300). Copenhagen: Museum Tusulanum Press, 2006, pp. 83 and following.

16 For the royal titles and their significance see Třeštík, D. – Žemlička, J.: The Czech State in the Era of Přemyslid Princes and Kings. In: Pánek, J. – Tůma, O. et al.: *A History of the Czech Lands*, pp. 95–97.

17 The document is kept by the National Archives of the Czech Republic, Prague, the fund of the Archives of the Czech Crown. For the Latin text see Friedrich, G. (ed.): *Codex diplomaticus et epistolarius regni Bohemiae*, II. Prague, 1912, No. 96, pp. 93–94.

pagan traditions; criminal law was based mainly on private initiative, including the so called “blood revenge”. Primitive court proceedings used ordeals (called after Christianization *iudicium dei* (the judgment of God)) – primarily ordeal by cold water, ordeal by hot iron and various forms of oaths.¹⁸ Only later was the wager of battle (the duel) introduced into Czech law.

Ordeals as an integral part of court proceedings were known to other European legal systems, including the German law of neighbouring lands. However, some Czech “specials” existed, such as using only cold water, whereas the German, French and Anglo-Saxon legal systems knew ordeal by hot water. The accused person was forced to follow strict rules on ordeal corresponding to the nature of the case. 12th and 13th century sources suggest that an ordeal by hot iron was preferred, either in the form of walking on hot ploughshares barefoot or in the form of an oath with fingers on a red hot iron bar. Ordeal was considered a form of evidence, which is not rational from today’s perspective. Courts observed detailed procedures prescribed for each type of ordeal and issued their judgment according to the result of the ordeal at issue. The outcome of an ordeal was certified by a priest who was present during the performance of the ordeal.

During the 10th and 11th centuries, the first attempts at kings legislation based on Christian principles emerged. The country was gradually Christianized in the Western “Latin” rite from the 9th century¹⁹, and the last Czech monastery built near the Sázava river maintaining the above mentioned Slavonic liturgy ceased to practise it in 1096/97.²⁰

The most important example of legislation based on Christian principles is the so-called Decrees of Prince Břetislav (died 1055) from 1039.²¹ The Decrees introduced marriage based on the principles of Canon law, in addition to many other Christian principles, such as the necessity of burying in Christian graveyards or keeping Sundays and Church holidays.

The exact wording of the text of Břetislav’s Decrees remains unknown. The Decrees were recorded later by the monk Kosmas in his famous Chronicle of Bohemians (*Chronica Boemorum*)²² in the form retrieved from the original text of the Statutes of Hniezdno. Břetislav proclaimed his decrees on Polish territory (Hniezdno, or Gniezdno, is a city in central-western Poland), when he launched a military campaign to return the remains of St. Vojtěch back to

18 For legal aspects of ordeals see Bartlett, R.: *Trial by fire and water, The Medieval Judicial Ordeal*. Oxford: OUP, 1986.

19 In more details Sommer, P. - Třeštík, D. - Žemlička, J. - Doležalová, E.: *The Christianisation of Bohemia and Moravia*. Annual of Medieval Studies 13, CEU, 2007, pp. 153 and following.

20 Třeštík, D. - Žemlička, J.: *The Czech State in the Era of Přemyslid Princes and Kings*. In: Pánek, J. - Tůma, O. et al.: *A History of the Czech Lands*, p. 87.

21 An interesting account in Wolverton, L.: *Hastening toward Prague, Power and Society in the Medieval Czech Lands*. Philadelphia: University of Pennsylvania Press, 2001, pp. 28–29.

22 For English text see *The Chronicle of the Czechs, Cosmas of Prague*, translated with an introduction and notes by Lisa Wolverton. Washington D.C.: The Catholic University of America Press, 2009.

Prague. Břetislav assigned great importance to Christian principles, as his aim was to spiritually reconcile the memory of St. Vojtěch with “pagan” Czechs.

It is clear from the Chronicle of Kosmas that family law in particular was heavily influenced by principles conceived by Canon law. From the beginning of the 11th century Czechs living in the territory of Bohemia used an ecclesiastical form of marriage, followed the principles of monogamy (bigamy was prosecuted) and Canon law restrictions on marriage, such as the prohibition of adultery (sexual intercourse between a married person and someone other than his or her spouse), repudiation of one’s spouse or desertion (leaving one’s spouse with no intention of returning) and divorce. Basic principles of law of marriage were partly based on Roman law, including requirements and obstacles regarding the capacity to constitute a valid marriage. The Church acquired jurisdiction over all matters related to marriage law. The Břetislav Decrees included the application of ordeals in courts and a system of administration based on castles as regional centres. Restrictions on pubs were introduced as a possible source of revenue for the treasury and prohibition of trade on Sundays; however, it seems to be quite doubtful that these restrictions were followed in practice.

Břetislav is known for another piece of legislation, which is connected with his attempt to consolidate the Czech state. Before his death he proposed the so-called Act on “Seniority Rule”, in 1054–1055.²³ The Rule provided that the ruler of Bohemia should always be the eldest member of the Přemyslid dynasty. This principle led to a series of disputes among members of the Přemyslid dynasty; younger members of the dynasty were often given small portions of the territory as their dominions, especially in Moravia (úděly in Czech, or *deals* in English, with centres in Brno, Olomouc, Břeclav and Znojmo).²⁴

The year 1189 is closely connected with yet another important legal achievement. The Přemyslid Prince Conrad II Otto (died 1191) called a congress of leading representatives of nobility (gentry) to the township of Sadská near Prague. During the meeting he proclaimed a set of rules known as the Statutes of Prince Conrad. The texts became known from the beginning of the 13th century, when the rules were certified for Moravian dominions of the younger Přemyslid princes.²⁵ According to those Statutes members of the emerging nobility were proclaimed to be free and hereditary landowners (close to the English term of *freehold*) of the gifts of land made to them earlier by Přemyslid princes. It was therefore possible to create a system of nobility

23 Třeštík, D. – Žemlička, J.: The Czech State in the Era of Přemyslid Princes and Kings. In: Pánek, J. – Tůma, O. et al.: *A History of the Czech Lands*, p. 83.

24 See for example Měřinský, Z. – Mezník, J.: *Bohemia and Moravia from the tenth to fourteenth century*, p. 44, and Marečková, M.: *Czech Legal and Constitutional History, Brief Summary*. Prague: Linde, 2006, p. 18.

25 Latin text published in Friedrich, G. (ed.): *Codex diplomaticus et epistolarius regni Bohemiae II*. Prague, 1912, No. 234.

domains, which became legal areas of their own, with their own jurisdiction and a special relationship between the lord and his subjects.

The Statutes confirmed the validity of several important customs; on the other hand, they introduced some changes to customary law and especially to its interpretation. For example, the law of succession was changed in favour of daughters should there be no male heirs. Changes were made in administrative matters, criminal law and court proceedings. However, the Statutes should not be regarded as a codification of law, because they covered only small parts of customary law; all other customs, not mentioned in the Statutes, remained fully in force.

During the 13th and 14th centuries, new settlers were invited by Czech kings, Church and nobility to Bohemia and Moravia to colonize areas with a low population density, in particular the border areas. The first German settlers had come to Bohemia much earlier; for example, in 1176–1178 Prince Soběslav II (died 1180) gave privileges (confirmed several times later) to German traders in Prague and exempted them from the law of the land.²⁶ However, the mode of colonization, both in its form and numbers, changed in the 13th century. This is why the Czech lands ceased to be inhabited solely by Slavs; German and Jewish populations settled on the territory of the Czech lands and lived there until the tragic events of WWII and immediately after the war in the middle of the 20th century.²⁷ In those early times, the population of Germans and Jews was regulated, as well as protected, by king's legislation, including the famous Jewish Privileges awarded by King Přemysl Otakar II. (died 1278) in 1254 (so called *Statuta Judaeorum*).²⁸ The Statutes granted Jews special permission to carry on financial business and exemption from local courts. They were subordinated directly to the king. In 1268 similar privileges were granted also to the Jews settled in Moravia.

German speaking settlers from Saxony, Bavaria, Swabia, Austria or even Rhineland brought with them not only advanced agricultural techniques and trade skills but also their own law. Initially, they could use it as a privilege certified by the king. Legal development in the Czech lands was therefore substantially influenced by legal patterns derived from neighbouring countries. This was visible mainly in the development of municipal law and in new ways of landlords' renting of land (real estate) during the internal colonization – this was known as *emphyteusis* or *purkrecht*. Its main effect was the impetus for

26 English translation in Wolverton, L.: *Hastening toward Prague. Power and Society in the Medieval Czech Lands*. Philadelphia: University of Pennsylvania Press, 2001, pp. 28–29.

27 In more details see Beneš, Z. – Kural, V. (eds.): *Facing history: the evolution of Czech-German relations in the Czech provinces 1848–1948*. Prague: Gallery for the Ministry of Culture of the Czech Republic, 2002, Chapter I. Historical Roots, pp. 10 and following.

28 For historical context see Agnew, H. L.: *The Czechs and the Lands of the Bohemian Crown*. Hoover Institution Press, 2004. For the text of Statuta see Bondy, B. – Dvorský, F.: *K historii židů v Čechách, na Moravě a ve Slezsku 906–1620*. Prague, 1906, pp. 15 and following.

the establishment of new villages and towns.²⁹ The newcomers from German lands were granted significant reliefs. The feudal lords contracted with their representatives (so-called locator) for the division of a designated area (for example a future village) into fields, and arranged for dwellings to be built for the use of the colonists. The rights and obligations of the new settlers were set down by the land lord in writing. It was customary to exempt the new settlers from taxes for a period of several years. After that period the relationship to the land was based on fixed monetary sums paid regularly, usually twice a year. The colonists were also given hereditary rights to their property, subject to their continued cultivation of the land. This “German law” (*ius teutonicum*) was different from and in most aspects more favourable to the original “Slavonic law” (*ius slavicum*). Under original Slavonic law the land of a peasant was subject to escheat and therefore reversed to the feudal lord upon the death of the original tenant.

At the same time yet another legal form typical for the feudal system developed within the Czech Kingdom. Besides the freehold there were forms of fiefs, in which a special bond between a feudal lord and his vassal developed. The vassal was obliged to be loyal to his lord, to assist him in arms (or, for example, to protect his castle), and to perform honorary services. The feudal lord, on the other hand, had to protect his vassals. Later, the law developed a special theory of division of ownership between the lord and his vassal. This field of law was also influenced by the law of neighbouring countries, especially Saxony. The object of the fief was not only land, but also dignity, office or certain rights.

In the beginning of the 13th century towns started developing their structures into special legal entities (corporations) – the number of town corporations amounted to 40 by the end of the century.³⁰ Towns were usually established directly by a Czech king (so called royal towns). Medieval towns were constituted as centres for trade and crafts, with most of them having developed from earlier settlements located close to important castles. Some of them were built from scratch as new settlements (“on a greenfield land”). The king usually awarded special privileges to a town, such as the right to conduct regular markets, to produce beer or have various other industries, to collect duties and to raise fortifications. For example, the town of Brno was granted by King Václav I (1205–1253) privileges called *iura originalia* (i.e. original laws). Inhabitants of towns were personally free; they were subject to their town’s own jurisdiction and enjoyed a number of legal and economic

29 Třeštík, D. – Žemlička, J.: The Czech State in the Era of Přemyslid Princes and Kings. In: Pánek, J. – Tůma, O. et al.: *A History of the Czech Lands*, pp. 100–102. See also Žemlička, J.: *Přemysl Otakar II, Král na rozhraní věků – Přemysl Otakar II. A King on the Turn of Ages*. English resume, Prague: Lidové Noviny, 2011, pp. 701–702.

30 Berend, N. – Urbańczyk, P. – Wiszewski, P.: *Central Europe in the High Middle Ages: Bohemia, Hungary and Poland, c. 900–c. 1300*, pp. 448–449. See also Klápště, J.: *Czech Lands in Medieval Transformation*, especially pp. 350 and following.

rights and privileges. Their only lord (master) was the king, who exercised his powers over towns through his servants, so-called constables. Taxes paid by municipalities became important revenue for the royal treasury. Since royal towns were entitled to legislate on a number of issues in the form of statutory law, they established an autonomous administration – the town council and the court. The autonomous statutory law of royal towns dealt with a variety of issues, such as the regulation of individual crafts in guilds, the regulation of construction and development activities, the regulation of prostitution and the maintenance of public order.

Some municipalities, called dowry towns, such as Hradec Králové, were founded to serve economic purposes for the benefit of the queen. Other towns were built by the local nobility or by the Church; inhabitants of such towns were regarded as subjects of the founder of the town and their legal status was usually inferior to the status of the inhabitants of the royal towns.

There was no unified system of municipal law: practically every town of some importance had its own legal system. Nevertheless, a majority of towns in Northern Bohemia and Moravia were governed by Saxon law in accordance with the pattern of the Saxon town of Magdeburg. In other parts of Bohemia and Moravia an influence of Bavarian, Schwabian or Austrian municipal laws can be traced. The Old Town of Prague was developed from previous settlements which had originated during colonization with privileges granted by the king. The Old Town was also influenced by Nuremberg law (Schwabian law), as local merchants maintained close trade ties with this South German town.

The Prague Old Town and the Moravian capital of Brno gradually developed their own legal systems based on their original patterns supplemented by the statutes and findings of municipal bodies, customs and privileges often expanded and certified by kings. Municipal law became a vehicle for Roman law institutions to be introduced into the Czech legal system, particularly in the law of persons, the law of property and the law of obligations. Such development was closely connected with, and supported by, the University's teaching of Roman and Canon law and with the role of learned scribes and notaries working for town councils. The reason why Roman law was suitable for law applied in towns was particularly the trade and property matters to be resolved. Business or market negotiations, often concluded in town centres of trade (sometimes becoming even international), were an excellent environment for using traditional forms of contract developed by Roman law. Roman law was applied in developing the concepts of ownership, easements, the law of persons (including legal capacity), the law of succession, and the property aspects of family law. In towns, the application of modern forms of court proceedings based on Canon law and Roman law was possible. Municipal law was suitable for the development of new, written forms in which law was created and applied.

During the reign of King Přemysl Otakar II (died 1278) the Czech Kingdom acquired Austrian and Alpine lands and strengthened the position of the king.³¹ Přemysl Otakar II is said to have started preparations for the codification of the law of the land (a name tailored to cover the “common law” of the Czech Kingdom and the law of nobility), but he failed to succeed in his initiative. The idea of codification was influenced by Canon law (including the teaching of just law and of the law of kings as law-makers), which could be found in private collections, including the legal textbook of Canon law by Gratian, called *Decretum Gratiani*, known in the Czech state from the middle of the 12th century, or in the rediscovered legislation of the Roman Emperor Justinian. Přemysl Otakar II is assumed to have planned to use some foreign models for his codification, including Saxon law. Přemysl’s ambition to become the Roman Emperor was halted by Roman King Rudolf of the Habsburg dynasty during the Battle on the Morava Field in 1278, when Přemysl died.

During the reign of King Václav II (1271–1305) another attempt of the king to codify the law of the land failed, although the king invited Gozzius of Orvieto, a distinguished Italian lawyer, to prepare a code based upon his knowledge of both Canon and Roman law. The king only succeeded in codifying one of his sovereign rights, his *iura regalia* – specifically the law of mining. This law was closely connected with municipal law: the towns established by the king (e.g. Jihlava or Kutná Hora) were natural centres of mining. The law of mining was therefore regarded as a special part of municipal law. Between the years 1300–1305 the law of mining was codified.³² The Code is known as *Ius Regale Montanorum*, or later as *Corpus Iuris Metalici*; the Code is a very good example of the influence of Roman law on Czech law (see Chapter 2). The proceedings were based on Roman Canon law proceedings.³³

It represented the successful codification of existing legal, business, technical and even labour provisions promoting the expansion of mining activities. Some of its provisions were modern if seen from the perspective of medieval law. For example, corporations established for mining activities divided their capital into shares (*kuksy* in Czech), which served for the accumulation of capital, division of profit and for compensation to land owners who were forced to suffer mining operations on their land. The term “*kuks*” in the meaning of a share in mines, together with the right to start mining activities in given area, existed in Czech law until 1945, when mining companies were nationalized by the Czechoslovak state.

31 Třeštík, D. – Žemlička, J.: The Czech State in the Era of Přemyslid Princes and Kings. In: Pánek, J. – Tůma, O. et al.: *A History of the Czech Lands*, pp. 106–110.

32 For its new edition see Bílek, J. (ed.): *Ius regale montanorum, právo královské horníkuov*. In: *České horní právo*, volume II., 1978.

33 For more details see Ott, E.: *Beitrage zur Receptions-geschichte der römisch-canonischen Proces-ses in den Böhmischen Landern*. Leipzig, 1897.

The Code was also used in Silesian, Slovak and Hungarian mining centres and in the Saxonian town of Freiberg. The Code was enacted in Latin, but shortly after its issuance it was translated into German and Czech and later also supplemented by other sources of municipal or mining law and published.³⁴ The German text is known from the beginning of the 15th century, when the translation was done by Notary Jan of Gelnhausen and was used especially in the Jihlava mines. The Czech translation was the second and emerged in the middle of the 15th century in Kutná Hora. It should be noted that a century later (in the mid 16th century) the Code was translated into Spanish, to be applied to mining activities in new Spanish colonies (especially in Bolivian mines in Potosí).

The codification of mining law was connected with currency reform when Václav II introduced a new silver coin – the so called *Prague groschen*. The new coin symbolized the supreme position of the Czech king, and the right to issue the coin was regarded as another sovereign right of the ruler.

Václav II later became the Polish King, and he managed to secure the Hungarian crown for his son, Václav III (1289–1306). However, when Václav II died in 1305, his son lost his Hungarian crown and, trying to secure his Polish title, he was murdered in Olomouc in 1306 while making his journey to Poland. Thus the male line of the Přemyslid dynasty became extinct and short political crises followed during which the Church representatives and Czech nobility were searching for a new king.³⁵

34 See for example two versions of *Ius regale montanorum* preserved in the collections of Czech National Museum and Czech National Library from 1515 and 1528 and the database of manuscripts available at www.v3.manuscriptorium.com

35 Měřínský, Z. – Mezník, J.: *Bohemia and Moravia from the Tenth to Fourteenth Century*, p. 53.

/2/

Development of law during the era of the Luxemburgs until 1419

After the short reign of Rudolf of Habsburg (1281–1307) and Henry of Carinthia (died 1335), one of the most important ruling dynasties in Medieval Europe, the Luxemburg dynasty, ruled the country between 1310 and 1419.³⁶ The first king of the dynasty, John (1296–1346), married Přemyslid Princess Eliška (Elisabeth). He reached significant success especially in foreign policy, such as acquiring Upper Lusatia and Silesia to enlarge the Czech Kingdom. He is also known as “Knight-errant King”, which took part in the Hundred Years War on the side of French and died in the battle of Crécy.³⁷ The most important member of this dynasty was Charles IV (1316–1378) who became the “Holy Roman Emperor” in 1355.³⁸ Charles IV introduced a series of reforms: his Constitu-

36 Polívka, M.: The Expansion of the Czech State During the Era of the Luxemburgs 1306–1419. In: Pánek, J. - Tůma, O. et al.: *A History of the Czech Lands*, pp. 119–123.

37 The English King Edward highly regarded his bravery and this was regarded by historians like R. W. Seton Watson as the first direct link between Bohemia and England. Teich, M.: *Bohemia in history*, Introduction, p. 18.

38 Kavka, F.: Politics and Culture under Charles IV. In: Teich, M. (ed.): *Bohemia in history*, pp. 59 and following, and Polívka, M.: The Expansion of the Czech State During the Era of the Luxemburgs 1306–1419. In: Pánek, J. - Tůma, O. et al.: *A History of the Czech Lands*, pp. 128 and following. See also the foreword by F. Seibt in Balazs, N. - Schaer, F.: *Autobiography of Emperor*

tional Charter established the term “Czech Crown” designating expanding territories of the Czech Kingdom with Bohemia and Moravia as the “main lands”, with the Principality of Silesia, Upper and Lower Lusatia as so-called “adjacent lands”. Charles IV ordered a new crown of St. Wenceslas to be kept in Karlštejn Castle as a symbol of the state structure.

Charles IV established the relationship between the Czech Kingdom and the Holy Roman Empire in his so-called Golden Bull of 1355.³⁹ The Bull provided that the Czech king be considered the first elector of the Holy Roman King and Emperor. Charles IV established Prague as the capital of his Kingdom: he used his political influence to establish the Prague Archbishopric in 1344 and, three years later, to found the University of Prague.

The beginning of the University dates back to as early as 1347, when Pope Clement VI approved its foundation. Charles IV constituted a university (a so-called *studium generale*) in Prague on 7th April 1348.⁴⁰ The University was composed of four establishing faculties, the Law Faculty being one of these. The other three were the Faculties of Theology, Medicine, and Liberal Arts.

At its beginning, the University of Prague followed the pattern of universities in Paris and Bologna. It was the oldest university north of the Alps and east of Paris. Not only people living in Bohemia became members of the academic community of the newly established University, but also many foreign teachers as well as students came to Prague from Central Europe to join the University. The main subjects taught at the Law Faculty comprised the so-called learned laws, i.e. Canon and Roman Laws. Until the Decree of Kutná Hora was issued in 1409, persons of four nationalities – Saxon, Polish, Bavarian and Czech – had been students of law.⁴¹ After 1409, the decision of King Václav IV (1361–1419) strengthened the position of domestic students and university masters.

From 1372 there was a separate University of Jurists in Prague – *universitas iuristarum*, sometimes called “the university of canonists”.⁴² The reasons why the University of Jurists was established were primarily disputes between leaders of the University of Prague and jurists over management of the institution. Many outstanding lawyers of that time taught at the University of Jurists,

-
- Charles IV. And his Legend of St. Wenceslas.* New York: Central European University Press, 2001, and the standard work in English by Jarret, B.: *The Emperor Charles IV.* London, 1935.
- 39 The text in English published by Phillips, J. T. (ed.): *The Fundamental Laws and Constitutions of Seven Potent States and Kingdoms in Europe.* London, 1752, p. 107 and following. See also www.avalon.lawyale.edu/medieval/golden.asp, Henderson, E. F. (ed.): *Select Historical Documents of the Middle Ages*, London: George Bell and Sons, 1896, pp. 39 and following.
- 40 In more details see Svatoš, M.: *The Studium generale 1347/8–1419.* In: *A History of Charles University.* Volume I. A History of Charles University 1348–1802. Edited by I. Čornejová, M. Svatoš with collaboration of P. Svobodný. Prague: Karolinum Press, 2000, pp. 22–93.
- 41 Šmahel, F.: *The Kutteneberg decree and the withdrawal of the German students from Prague in 1409: a discussion.* In: *History of Universities*, 4, 1984, pp. 153–166.
- 42 See part by J. Kejr in *A History of Charles University.* Volume I. *A History of Charles University 1348–1802*, pp. 149 and following.

such as Professor Bonsignore de Bonsignori from Bologna, its rectors Nicolas Geunher, Jan of Pernstein, and the distinguished masters Vilém Horborch, Bohuslav of Krnov and Kuneš of Třebovle. Students and graduates from the University of Jurists very often held prominent offices in the Church hierarchy or in the king's court. Only a smaller proportion of students obtained the formal degree – Bachelor or Doctor, due to very expensive and long studies, which often took more than seven years.

The establishment of the Law Faculty influenced the introduction of Roman law in the administrative offices and courts of Czech and Moravian towns. Instruction of Roman law helped lawyers in the Czech lands to understand the Roman law terminology and institutions in the sphere of private law.

In 1355 Charles IV proposed the first written codification of the law of the land for the whole Czech Crown called *Codex Carolinus* (the Code of King Charles); later, when it was rediscovered and published in 1617, the Code was known as *Maiestas Carolina*.⁴³ The codification was inspired by the Sicilian Constitutions of Melfi (*Constitutiones regni Siciliae* or *Liber Augustalis*) enacted in 1231 by the Roman Emperor Frederick II of the Hohenstaufen dynasty for the Kingdom of the Two Sicilies. It was based upon Canon law and, to a certain extent, upon Roman law, in particular when dealing with the position of the Czech king. The Code was drafted in Latin and Roman law institutions were often used to express the Czech legal terminology.

It was a combination of the traditional customary law of the land and of new provisions. The Code dealt with the position of a king, with religious matters, including provisions on the persecution of heretics, with administrative matters both at central and regional levels, with court proceedings, land registers, property, family and criminal law. The Code also provided that the Crown lands and most important castles could not be sold or otherwise disposed of without protecting adjacent forests. The Code stipulated that should a noble family become extinct the freehold property was to be returned to the king as royal escheat. Regarding court proceedings the Code proposed limits for the application of ordeals. At the time of drafting the Code, Charles IV, with the assistance of the Archbishop of Prague, had already put the limits into practice. Criminal law provisions in the Code preferred property punishments and fines collected by the royal treasury rather than corporal punishments; the criminal jurisdiction of nobility over their subjects was restricted.

However, Charles IV was forced to reject the Code because of pressure from the leading representatives of the Czech nobility; as a result, he solemnly proclaimed that the proposal for the Code had been destroyed by a fire. Nobility objected to the Code being drafted; noblemen were rather resistant

43 For its modern edition see Hergemöller, B. U. (ed.): *Maiestas Carolina: Der Kodifikationsentwurf Karls IV. für das Königreich Böhmen von 1355*. In: *Veröffentlichungen des Collegium Carolinum Bd. 74*. München, Oldenbourg 1995.

to changes in the traditional way of law-making – i.e. through findings of nobility courts. They were afraid that the codification would reduce their existing rights to only “freely searching for law and justice”. Adoption of the Code would inevitably strengthen the powers of the king and, on the other hand, the privileges of nobility would be limited.

Despite their failure to codify the law of the land, the period of the Luxembourg dynasty rule marked profound changes in the Czech legal system. The changes are linked with the diversification of the legal system in accord with social class affiliation and other personal criteria, i.e. law based on privileges and personal and social status. The following main branches of Czech law may be listed: the law of the land (termed also as the “law of province”), which encompassed the law for nobility and public law for the whole territory of the Czech Crown; Canon law of the Catholic Church; municipal law for inhabitants of towns; peasant law for subjects; and some special branches of law, such as mining law or the law of vineyards.

During the 14th century new sources of written law were introduced into the Czech legal system for the first time; before then, changes had been based mainly on customs. So-called law books – private written aids for judges and other practising lawyers – represented the most important written source of Czech law of that period. They were written both in Czech and Latin and represented private recordings of customs and procedures applied in courts. The first law book in old Czech was written at the end of the 13th and beginning of the 14th centuries. Although there are several versions known, they preserved the title of the Law Book of Rožmberk. The modern edition was published in the 19th century and divided the text into 289 articles.⁴⁴ Unfortunately, the author of the Law Book remains unknown; it is presumed to have been ordered by the high official of the Crown and nobleman Peter of Rožmberk. The Law Book is a collection of customs from all branches of the law of province, including property law, criminal law and court procedure. Customs are followed by instructions to a judge on how to use and interpret them in a court and what kind of ordeal to apply. By the second half of the 14th century another law book originated as a direct consequence of the above-mentioned unsuccessful attempt by Charles IV to codify law. The title is “The Order of the Law of the Land”, and the text was written both in Czech and Latin (as *Ordo iudicii terrae* in Latin). The book encompassed not only customs but also decisions (findings) of nobility courts. It dealt mainly with court procedure; a fictitious case of murder was introduced to show the sequence and purpose of individual stages of court proceedings. The book included various types of evidence, including a famous description of the wager of battle before court.

44 There are two editions from the second half of the 19th century: Brandl, V. (ed.): *Kniha Rožmberská*. Prague, 1872, and Gebauer, J. (ed.): *Kniha Rožmberská*. In: *Listy filologické a paedagogické* 7, 1880.

According to Czech law, a woman was allowed to take part in the wager of battle on condition that she was the only surviving member of the family and her male opponent was fighting at a disadvantage – he was to remain in a hole during the battle.

By the end of the 14th century, Ondřej z Dubé (Andrew of Dubá), a Czech lawyer and the chief justice of the Provincial court, wrote a manuscript (a law book) on the law of the land.⁴⁵ He used older legal writings, customs and findings of courts to prepare a useful aid for every person applying the Czech law of the land in practice. Ondřej z Dubé focused on court proceedings, the organisation of courts and offices and on land registers. Some impact of Roman law terminology and Canon law can be found in his book; however as a whole, the Czech law of the land resisted the influence of Roman law. Ondřej z Dubé tried to formulate some preliminary definitions regarding the law of the land, including his view on the priority of the law of the land over municipal law and other “special” laws.

Another important written source of law were the so-called *zemské desky* (the land records or registers), which emerged towards the end of the rule of Přemysl Otakar II.⁴⁶ These were not only public land registers of real property owned by nobility but also comprised precedential decisions of a nobility court called the Court of Province (*zemský soud*). The role of decisions of nobility courts in the Czech legal system of that time could be compared with the position of precedents in English common law. The law of nobility gave rise to some specific Czech institutions, in particular in the field of property law and the law of obligations, which represented a unique Czech legal culture different from Roman law. The Czech law of the land, for example, recognized collective ownership of property by the noble family as a whole, without any division of the property into individual parts (*nedíl* in Czech, “undividedness” in English).⁴⁷ Such collective ownership consisted of movable and immovable things and differed according to its “head”, i.e. the person representing the ownership entity. There were units headed by the father of the family, grandfather or, even in some cases, the mother of the family. The “head” was acting on behalf of the whole entity.

Different provisions, if compared with Roman law, applied to the law of succession or to dowry. Special formal provisions were used in court proceedings, where ordeals ceased to apply just before the outbreak of the Hussite movement.

A number of legal writings and other forms of written sources connected with the application of law originated in Bohemian and Moravian towns. The

45 Čáda, F. (ed.): *Nejvyššího sudího království českého Ondřeje z Dubé Práva zemská česká*. Prague, 1930.

46 Žemlička, J.: *Přemysl Otakar II. A King on the Turn of Ages*, p. 702.

47 See for example Marečková, M.: *Czech Legal and Constitutional History. Brief Summary*, pp. 60–62.