Guardianship as a Part of the Legal Protection of Children in Bohemia and Moravia before 1811[1]

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The essence of legal protection of minors is to provide childcare and education, as well as to protect the interests of children and their property in view of their physical and mental immaturity. If one considers this issue from a historical point of view, it is usually limited to a certain social level – abandoned, ill or poor children reliant on orphanages and other establishments for the poor – and completely ignores the majority group, growing up in the houses of their parents or at least under their authority. For this reason, the beginning of the institutionalization of legal protection of children is usually regarded as dating back to the nineteenth century, although its main principles can be seen in earlier legal codes used in Bohemia and Moravia since the Middle Ages. The main purpose of this paper is to show how the key legal texts from Bohemia and Moravia reflected the social changes, especially in relationships between men and women, which occured in the region during the early modern period, and to consider whether and how the first common codifications of the civil law made in the Habsburg monarchy in the second half of the eighteenth and at the beginning of the nineteenth century related to the law in use before then in Bohemia and Moravia. The legal institution of guardianship, as a major part of the legal protection of children in the past, provides a good illustration.

Legal plurality in Bohemia and Moravia before 1811

However, it is necessary first to say a few words about the legal situation in Bohemia and Moravia before 1811. The legal system in Bohemia and Moravia – as in most territories in early modern period in general – had been traditionally very complicated since the Middle Ages. It was based on a distinction between land law (the law of nobility)[2] and special laws, most importantly municipal law. Other legal systems, such as vineyard or mining law and the Canon law will not be considerd here; because especially the first two only concerned marginal groups. The boundaries between all these legal systems were not impenetrable, and in the matter of the legal protection of children land law

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2 Karel Malý et al., Dějiny českého a československého práva do roku 1945, Praha 2003, p. 91. The law of nobility determined basic constitutional legal relations, i.e. relations between the nobility and the sovereign, the state and the king, and determined the number and form of the highest provincial authorities. It also included regulations covering all other areas of life of the nobility.

and municipal law in particular influenced each other throughout their respective development.

The first legal codes, which did not at that time enforce the law, date back to the fourteenth century.[3] The oldest legal book preserved in its entirety is the *Rožmberská kniha* (Rosenberg Book). Some parts of this book date to the end of the thirteenth century. It was written in Czech and it contains mainly procedural and property law relating to the nobility.[4] The first official code of land law for Bohemia, approved by the King and Estates, comes from the beginning of the sixteenth century and it is known as *Vladislavské zřízení zemské* (Vladislav's Land Law).[5] In 1530, a part of this code was published in a new arrangement and, finally, a new Czech land constitution emerged in 1549, which was partially revised and published in 1564.[6] It is worth mentioning a very high quality piece called *O súdech, dskách země české knihy devatery* (Nine Books of Courts and Tables in the Czech Lands) written by Viktorin Kornel from Všehrdy (1460–1520). This was created in the course of the codification of *Vladislavské zřízení zemské*. Although this book represented the pinnacle of jurisprudence of that time, it was never used in legal practice.[7] Developments in Moravia mirrored to some extent developments in Bohemia. Until the release of the first official collection of Moravian land law in 1535, the courts used the so-called *Kniha Tovačovská* (Tovačovsky's Book), which was composed in the second half of the fifteenth century by an important Moravian politician, Ctibor Tovačovský of Cimburk (1469–1494), and its revised collection, *Kniha Drnovská* (Drnovsky's Book) by Ctibor Drnovský of Drnovice from the 1520s.[8] *Práva a zřízení markrabství Moravského* (Law and Constitution of Moravian Margraviate), written in 1545, was an improved version of these lawbooks and was again revised and reissued in 1562 and 1604.[9] Until the publication of

3 František Hoffmann, České město ve středověku, Praha 1992; for earlier periods see Jiří Kejř, Vznik městského zřízení v českých zemích, Praha 1998; Idem, Die mittelalterlichen Städte in den böhmischen Ländern, Köln/Weimar/Wien 2010; František Hoffmann, K oblastem českých práv městských. In: Studie o rukopisech XIV (1975), pp. 27–64.

4 Edition: Vincenc Brandl (Ed.), Kniha Rožmberská, kritické vydání opatřené poznámkami a glosářem jež učinil Vincenc Brandl, zemský archivář moravský, Praha 1872. From the later legal books, in the context of the codification attempts under Charles IV, the following books deserve mention: *Ordo iudicii terrae* (*Řád práva zemského*); and from later times, especially the work of the highest land judge Ondřej z Dubé *Práva zemská česká*. Edition: František Palacký (Ed.), Archiv český. Staré písemné památky české a moravské, Praha 1872; Josef Čáda (Ed.), Práva zemská česká Ondřeje z Dubé, nejvyššího sudího Království českého, Praha 1930.

5 Edition: Petr Kreuz/Ivan Martinovský (Eds.), Vladislavské zřízení zemské a navazující prameny (Svatováclávská smlouva a Zřízení o ručnicích), Hradec Králové 2007. Its main addition was the Treaty of St. Wenceslas from 1517 that clarified the legal relations between the nobility and towns in the Czech lands.

6 Editon: Josef Jireček/Hermenegild Jireček (Eds.), Zemská zřízení království českého 16. věku, Praha 1882.

7 Edition: Hermenegild Jireček (Ed.), O právích země české knihy devatery M. Viktorina ze Všehrd, Praha 1874.

8 Edition: Karel Josef Demuth (Ed.), Kniha Tovačovská Pana Ctibora z Cimburka a z Tovačova, Brno 1858; Vincenc Brandl (Ed.), Kniha drnovská, Brno 1868.

9 Edition: František Čáda (Ed.), Zemské zřízení moravské z roku 1535 spolu s tiskem z roku 1562 nově vydaným, Praha 1937.

the Josephinian lawbook in 1786 and the *Allgemeines Bürgerliches Gesetzbuch (*ABGB) in 1811*,* the key book for land law was the *Verneuerte Landes Ordnung* (Renewed Land Law), which was issued respectively for Bohemia (1627) and Moravia (1628), with an amendment in 1640 called *Novellae et Declaratoria*.[10]

The situation with municipal law in the Czech Lands was much more complicated than with land law. Various lawbooks contained regulations on the protection of immature persons, but the key text was *Práva městská Království českého* (Municipal Law of the Kingdom of Bohemia).[11] The author of this book, Pavel Kristián of Koldín (1530–1589) was an important Czech lawyer, poet and dean at Prague University. This was the first official codification of municipal law in the Czech Lands, approved by the monarch in 1579. This attempt to create a unified municipal lawbook had been preceded by an unsuccessful attempt by Brikcí of Licsko (1488–1544), which had not been approved by the ruler.[12] The content of *Práva městská Království českého* was based on the domestic law applied in the Old Town of Prague[13], the municipal law of Brno and Jihlava, the land law of Bohemia and Moravia and Roman law. Saxon-Magdeburg law, applied in almost half of the cities in Bohemia and Moravia, was not included in the codification.[14] The intention of Maximilian II, who ordered the codification to be carried out, was to unify the system of municipal law in Bohemia, Moravia and Silesia and to introduce unified legal norms to guide all the burghers in these lands. This process of unification eventually took more than 150 years.[15] While the towns under Prague municipal law started to apply this new lawbook in the following year, other towns

10 Edition: Hermenegild Jireček (Ed.), Verneuerte Landes-Ordnung des Erb-Markgrafthums Mähren. Obnovené zřízení zemské dědičného markhrabství moravského 1628, Brno 1890; Obnowené Práwo a Zrjzenj Zemské Dedjcného Králowstwj Czeského / Cýsare Ržijmské Vherského a Czeského, etc. Krále, etc. Geho Milosti Ferdynanda Druhého etc., http://kramerius.mzk.cz, 3.4.2012; Edition of the Novellae et Declaratoria in: Karel Malý/Ladislav Soukup, Vývoj české ústavnosti v letech 1618–1918, Praha 2006.

11 Edition: Josef Jireček (Ed.), M. Pavel Kristián z Koldína Práva městská království českého a markrabství moravského, Praha 1876. Literature: Jaromír Štěpán, Studie o kompilační povaze Koldínových Práv městských, Praha 1940; Bedřich Peška, O mistru Pavlovi Krystianovi z Koldína a jeho pozůstalostech. In: Právník III (1864), pp. 195–234; Karel Malý (Ed.), Městské právo v 16.–18. století v Evropě, Praha 1982.

12 Edition: Josef Jireček/Hermenegild Jireček (Eds.), M. Brikcího z Licka práva městská, Praha 1880. Literature: Jaromír Čelakovský, O Právech městských M. Brikcího z Licska a o poměru jich k starším sbírkám právním, Praha 1880.

13 Edition: Emil Franz Rössler (Ed.), Das Altprager Stadtrecht aus dem XIV. Jahrhunderte, Prag 1845. Literature: Bedřich Mendl, Tak řečené právo norimberské, Praha 1939; Wilhelm Weizsäcker, Die Altstadt Prag und das Nürnberger Recht. In: ZRG, GA 60 (1940), pp. 117–142; Jaromír Štěpán, Ke krystalizačnímu procesu městského práva českého. In: Městské právo v 16.–18. století v Evropě (1982), pp. 267–276.

14 Edition: Hermenegild Jireček (Ed.), Extrakt hlavnějších a přednějších atikuluov z práv Sasských anebo Magdburských, Jeho Mti. Císařské, Maximilianovi Druhému etc. podaný od Litoměřických i jiných měst týchž práv užívajících. 13. Februarii Anno etc. 1571 (Spisy právnické o právu českém v XVI-tém století), Vídeň 1883.

15 Pavla Slavíčková, Proces zániku litoměřické a olomoucké oblasti sasko magdeburského práva v Čechách a na Moravě. In: Karel Malý (ed.), Práva městská království českého, (in print).

in Bohemia stayed with the Litoměřice version of Saxon-Magdeburg law[16], and changed over just before the outbreak of the Thirty Years' War. Towns in Moravia which used Saxon-Magdeburg law[17], with their court of appeal in Olomouc, and those applying the autochtonous law of Brno-Jihlava[18] managed to preserve their own legal sovereignty throughout the seventeenth century and started to apply the lawbook of Pavel Kristián of Koldín definitively only in the first half of the eighteenth century. Unlike the *Verneuerte*

16 Edition: Vladimír Spáčil/Libuše Spáčilová (Eds.), Míšenská právní kniha: historický kontext, jazykový rozbor, edice, Olomouc 2010 (German); Idem, Památná kniha olomoucká z let 1430–1492, Olomouc 2004 (Latin); Idem, Nejstarší městská kniha Olomoucká (Liber actuum notabilium) z let 1343–1420, Olomouc 1982 (Latin). Literature: Julius Lippert, Geschichte der Stadt Leitmeritz (Beiträge zur Geschichte Böhmens, Abteilung II. Orts-Geschichten II), Prag 1871; Wilhelm Weizsäcker, Leitmeritz als Vorort des Magdeburger Rechts in Böhmen. In: Neues Archiv für Sächsiche Geschichte 60/I (1939), pp. 1–23; Idem, Zur Geschichte der Sammlungen Magdeburger Schöffensprüche im böhmischen Raum. In: Wolgang Kugel (Ed.), Festschrift Adolf Zycha zum 70. Geburtstag am 17. Oktober 1941, Weimar 1941, pp. 265–284; Karel Tieftrunk, Kmetská stolice Magdeburského práva. In: Památky archeologické a místopisné IV (1860), pp. 122–130; Jaromír Štěpán, Litoměřický extrakt z r. 1571. In: Václav Vaněček (Ed.), Miscellanea historico-iuridica k šedesátým narozeninám Jana Kaprase (1940), pp. 256–277; Jaromír Čelakovský, O právních rukopisech města Litoměřic. In: Časopis muzea Království českého LIII (1879), pp. 143–153; LIV (1880), pp. 542–558.

17 Edition: Barbora Kocánová/Jindřich Tomas et al. (Eds.), Libri civitas III. Městská kniha Litoměřic (1341)–1562 v kontextu písemností městské kanceláře, Ústí nad Labem 2006 (Latin); Wilhelm Weizsäcker, Magdeburger Schöffensprüche und Rechtsmitteilungen für den Oberhof Leitmeritz, Stuttgart/Berlin 1943. Literature: Otto Peterka, Leitmeritz und das Magdeburger Recht. In: Stadt Leitmeritz 1227–1927. Festschrift zur Feier des 700-jährigen Bestandes als Stadt, Leitmeritz 1927, pp. 79–88; Otto Peterka/Wilhelm Weizsäcker, Beiträge zur Rechtsgeschichte von Leitmeritz, Prag 1944; Antonín Kobliha, Urkunden Sammlung betreffend die Privilegien und Rechte des hochwürdigst getreuen Metropolitankapitels zu Olmütz, Olmütz 1890; Hans Kux, Verwaltungsgeschichte der Stadt Olmütz, Olmütz 1942; Josef Teige, Kdy a kým zavedeno bylo právo magdeburské na Moravě. In: Právník (1920), pp. 244–248; Vladimír Spáčil, K počátkům olomouckého městského práva. In: Pocta PhDr. Evě Šmilauerové (1995), pp. 143–150; Vincenc Prasek, Organisace práv magdeburských na sev. Moravě a v rak. Slezsku, Olomouc 1900; Idem, Tovačovská kniha ortelů olomuckých. Sbírka naučení a rozsudků vedle práva magdeburského vrchním právem olomuckým menšímu právu tovačovskému od r. 1430 do 1689 vydávaných, Olomouc 1896; Idem, Das Olmützer Stadtgericht als Oberhof von 1590–1620, Olmütz 1896; Ferdinand Bischoff, Deutsches Recht in Olmütz. Ein rechtsgeschichtliches Fragment, Olomouc 1855; Wilhelm Weizsäcker, Die Rechtsmitteilung Breslau an Olmütz. In: Franz Laufke (Ed.), Festschrift für Otto Peterka zum 60. Geburtstag, Brünn et al. 1936, pp. 85–103; Alfred Fischel, Die Olmützer Gerichtsordnung. Ein Beitrag zur Geschichte des Österreichischen Prozessrechtes, Brünn 1903.

18 Edition: Emil Franz Rössler (Ed.), Die Stadtrechte von Brünn aus dem XII. und XIV. Jahrhundert, Prag 1852; Miroslav Flodr (Ed.), Právní kniha města Brna z poloviny 14. století, vol. 1–3, Brno 1992–1993 (Latin); Idem, Pamětní kniha města Brna z let 1391–1515, Brno 2010 (Latin); Idem, Manipulus vel directorium iuris civilis. Příručka práva městského, Brno 2008 (Latin); Idem, Pamětní kniha města Brna z let 1343–1376 (1379), Brno 2005 (Latin); Idem, Iura originalia civitatis Brunensis: Privilegium čes. krále Václava I. z ledna roku 1243 pro město Brno, Brno 1993 (Latin); Idem, Nálezy brněnského městského práva (1389), Brno 2007; Johann Adolf Tomaschek, Der Oberhof Iglau und seine Schöppensprüche aus dem XIII.–XIV. Jahrhundert, Innsbruck 1868. Literature: Wilhelm Weizsäcker, Wien und Brünn in der Stadtrechtsgeschichte. In: ZRG, GA 70 (1953), pp. 125–158; Bertold Bretholz, Johann von Gelnhausen. In: ZVGMS 7 (1903), p. 21; Johann Adolf Tomaschek, Recht und Verfassung der Markgrafschaft Maehren im XV. Jahrhundert, Brünn 1863; Wilhelm Saliger, Über das Olmützer Stadtbuch des Wenzel von Iglau, Brünn 1882; Ivan Štarha, Okruh brněnského městského práva v době předbělohorské. In: Brno v minulosti a dnes 8 (1966), pp. 172–188; Idem, Okruh brněnského městského práva. In: Brno mezi městy střední Evropy (1983), pp. 158–165; František Hoffmann, Brněnské městské právo. In: Brno mezi městy střední Evropy (1983), pp. 166–180; Miroslav Flodr, Brněnské městské právo, Brno 2001; Idem, Brněnské městské právo po smrti notáře Jana (1359–1389), Brno 2006; Gertrud Schubart-Fikentscher, Das Eherecht im Brünner Schöffenbuch, Stuttgart 1935.

Landes Ordnung, *Práva městská Království českého* was strongly influenced by Roman law, or at least by its classifications, which, together with many other elements, were adopted by the author and adjusted to local purposes.[19] The lawbook contained legal norms which basically regulated the lives of the citizens, the administration and the judiciary of the towns. In the middle of the seventeenth century, a decree by Emperor Ferdinand II introduced mutual subsidiarity between *Práva městská Království českého* and the *Verneuerte Landes Ordnung*. Some time later, the application of *Práva městská Království českého* was extended to include other subjects. At the same time, the law contained in these codes was gradually being supplemented by the rulers' decrees, instructions, rescripts, patents, pragmatics, privileges and other legal norms, which partially superseded parts of both these lawbooks. The civil code of Maria Theresia, *Codex Theresianus*[20], was never brought into effect, but a unified system was finally introduced by the civil code of Joseph II of 1786, translated into Czech by Josef Valentin Zlobický as *Všeobecná práva městská* and especially by the *ABGB* of 1811[21], at the end of the period under consideration.

This brief outline of the development of legal codes provides the background to the issue which concerns us here: the legal protection of children. In the past this was divided into two separate areas: paternal authority and trusteeship, i.e. the protection of orphans by guardians. The latter is the main topic we want to discuss in this paper but for the sake of completeness we shall consider the first one briefly.

Paternal authority

Paternal authority (*patria potestas*) was seen as a set of special privileges to which only the head of the family (*pater familias*) was entitled in relation to his wife and children. In a broader sense, this term denotes authority over all family members, including servants and others who shared the household.[22] The *pater familias* had sovereign patriarchal authority over persons as well as things. The father was the only person with responsibility for property rights, and his rights provided the basis for all the family's external economic relationships. Originally, the extent of this authority had been much broader. It included, among other things, the right to decide questions of life and death for family members. When exactly the father lost this absolute power we are not able

19 Miroslav Boháček, Einflüsse des römischen Rechts im Böhmen und Mähren, Milano 1975.

20 Edition: Philipp Harras von Harrasowsky, Der Codex Theresianus und seine Umarbeitungen, 5 volumes, Wien 1883–1886. Literature: Dějiny kodifikace rakouského práva občanského. In: Právník VII (1868), pp. 725–731, 763–769; Valentin Urfus, Koldínův zákoník a příprava osnovy rakouského tereziánského kodexu. In: Městské právo v 16.–18. století v Evropě (1982), pp. 331–339; Jaromír Čelakovský, O účasti právníkův a stavů ze zemí českých na kodifikaci občanského práva rakouského, Praha 1911.

21 Edition: Obecný zákoník občanský ze dne 1. června 1811. In: Ilona Schelleová/Karel Schelle (Eds.), Civilní kodexy 1811–1950–1964, Brno 1993. Cited as ABGB.

22 ABGB, § 147.

to ascertain, but some aspects of it can still be found in the Bohemian and Moravian legal books from the end of the Middle Ages or the Early Modern Period mentioned above. For example in the book of municipal law from Brno, we can find such a sentence in which killing a child is not a criminal offence because of "quilibet enim in re sua, quod ei placet, facere potest".[23] Also land law, namely *Řád práva zemského* (Order of the Land Law) and *Práva česká zemská* (Land Laws of Bohemia) of Ondřej of Dubá (1320–1412/1413) permitted a father to kill a child, particularly a daughter, who had voluntarily submitted to a sexual offender.[24] And finally, the same provision is included in *Práva městská Království českého*, according to which, a husband was allowed to kill his wife or daughter with impunity if he caught them in debauchery or adultery.[25]

The father's status as the sole official representative of all family members in public matters and juridicial proceedings corresponded to his role as the manager of family property. The position of the father as head of the family automatically meant that women and children, as well as other household members, were bound by the same law as the father.[26] According to municipal law: "A father in place of his minor and unmarried children, a husband in place of his wife, a master in place of his servants, in civilibus causis, can (provided he wants to) charge, and in turn to answer the charges of others."[27] In other words, he was under no obligation to answer in court for his family members.[28] Brikcí of Licsko put even special emphasis on the fact that a husband could not be forced by anyone or anything, even the law itself, to make a charge on his wife's behalf nor to answer a charge made against her. On the other hand, if he decided of his own free will to stand in for his wife or child at trial, he would have to take full responsibility for the lawsuits in question, whatever the result.[29]

Last but not least of the responsibilities of the *pater familias* was to encourage his children and other household members, including his wife and servants, to lead a good and virtuous life.[30] While earlier collections of munici-

23 Emil Franz Rössler, Die Stadtrechte von Brünn aus dem XIII. und XIV. Jahrhundert nach bisher ungedruckten Handschriften, Praha 1852, art. 536, p. 252.
24 Řád práva zemského, art. 84; Nejvyššího sudího Království českého Ondřeje z Dubé Práva zemská česká, art. 21, p. 130.
25 Práva městská Království českého, art. M XXXIX.
26 The only exception was if any of them owned free estate under another law. In this case it was essential that this person, in the case of any dispute concerning the property, addressed the appropriate court. See, eg. Práva městská Království českého, art. B. III.
27 „Otec na místě dětí svých nezletilých a nevybytých, manžel na místě své manželky, hospodář na místě své čeládky, in civilibus causis mohau (ač chtějí-li) viniti, i také zase na obvinění jiným odpovídati." Práva městská Království českého, art. A LVIII [translated by Marie Brančíková].
28 We find many examples in sources when even married women stand in courts on their own without representation of the man. See Pavla Slavíčková, Pater familias a jeho role v raně novověké rodině, In: Radmila Pavlíčková/Radka Švaříčková-Slabávková/Jitka Mašátová (Eds.), Konstrukce mužské identity v minulosti a současnosti, (in print).
29 Brikcí z Licka, chap. XXXX, art. I.
30 Brikcí z Licka, chap. XLVIII.

pal law usually restricted themselves to a mere moral appeal, *Práva městská Království českého* for the first time specified the basis of this duty. The duty to guide children in accordance with the Ten Commandments had originally fallen not only to the father but to both parents, so although it was up to the *pater familias* to take responsibility of each family member, the mother's role in raising children was also acknowledged. Parents were expected to guide their children towards thoroughness and diligence by giving them tasks to do, thereby avoiding idleness and negligence. If a child misbehaved and caused trouble instead of leading a decent life, the parents were blamed. As the *Práva městská Království českého* said quite literally: "Law will punish them severely as they deserve to sorrow and shame of yours."[31]

The right of a father to mete out physical punishment to his wife and children for their misbehaviour was perhaps a remnant of the older right of a father over life and death of his inferiors. Physical chastisement of children was recommended in *Práva městská Království českého*, as well as in some earlier lawbooks, especially as an alternative to judicial punishment for petty crimes like theft.[32] The earlier municipal law of Brno and the lawbook of Brikcí of Licsko, which was based on it, considered twelve strokes of the cane an adequate punishment for a child. However, if the punishment was harsher or even if it resulted in the death of the child, the person carrying out the punishment bore no legal responsibility. The same lawbook explicitly states that such cases are not homicide, and if the perpetrator was not the father himself, but for example a master of a guild, he only had to pay the father a fine of a reasonable amount.[33] Nevertheless, there is a clear positive development in this regard in Bohemian early modern law. *Práva městská Království českého* was the first lawbook which distinguished between physical chastisement of a child, which was not only acceptable but even deemed to be educational, and violence against a child which was strictly condemned by law.[34]

Although there are specific legal regulations included in *Práva městská Království českého* and the *Verneuerte Landes Ordnung* which clearly imply a burden of rights and duties on the father with regard to his children, they are only a collection of scattered fragments, and neither a definition nor a structured summary of the legal regulations concerning a father's authority can be found. However, these codes also contain some provisions which transferred a few of the father's competences to public authorities. For example, according to the municipal law of Brno and the legal book of Brikcí of Licsko, the government could punish a father who squandered the family property without

31 „Právo přísně podle jich zasloužení a vám k zarmoucení i k hanbě trestati je bude." Práva městská Království českého, art. D XLI [translated by Marie Bančíková].
32 Brikcí z Licska, chap. XXV, art. XII.
33 Brikcí z Licska, chap. XX, art. XII.
34 Práva městská Království českého, art. M VII; art. K IV.

reason. Similarly, under the *Práva městská Království českého* anyone could report a father to the court if he failed to take care of his children properly. In the same spirit a father could lose his dominant position in the family on account of old age, if he lost his mind, became unable to speak, was incapacitated by stroke, leprosy or other serious disease, lost limbs, or because of his inappropriate behavior and idle lifestyle, or if he became a tavern loafer, drunkard or notorious gambler. In such cases the government could delegate his powers to another person, usually to his wife.[35] In this new arrangement she obtained the right of disposal over the family property as well as rights and obligations over all family members including the father. However, how often this happened in practice is difficult to say. The only type of situation in which the woman played the "male" role in the family, and about which we have solid evidence from sources, is in cases of guardianship. Let us move to this topic.

Guardianship

In the Bohemian Lands in the pre-modern period, guardianship was the key institution in the legal protection of children deprived of paternal authority, i.e. orphans. As in other European countries, references to it can be found in the oldest lawbooks. While the *ABGB* distinguished between guardianship (*tutela*) and custody (*cura*)[36], Bohemian and Moravian municipal and land law did not recognise this distinction. Care of orphans deprived of paternal authority and other dependent persons was the only institution the laws included.[37] *Práva městská Království českého* defined guardianship as "protection, authority and sovereignty given and sanctioned by law over a free person, to protect and defend this person who cannot protect things in his own possession nor himself for his age."[38] This clause was later taken over from *Práva městská Království českého* and adopted in the *Verneuerte Landes Ordnung*.[39] *Práva městská Království českého* is apparently indebted to the influence of Roman law for the refined style, structure and abstraction of its chapter on guardianship. This sharply distinguishes it from other lawbooks dating from the end of the medieval and early modern periods, all of which also paid considerably less attention to guardianship.[40] The *Verneuerte Landes Ordnung* and the *Práva městská Království českého* distinguished three types

35 Flodr, Brněnské městské právo, s. 273.
36 The guardian takes care of the person as well as the property of the child. The duty of the custodian is to take care of matters of persons who for other reasons than the minority can not do it alone. ABGB, § 188.
37 Jan Kapras, Poručenství nad sirotky v právu českém se zřetelem k právům římskému, německému a v Rakousích platnému, Praha 1904, p. 11.
38 „ochrana, moc a vrchnost nad osobau svododnau, k opatrování a k obhajování té osoby, kteráž pro mladost a věk svůj dětinský a nedospělý ani sama sebe, ani věcí svých opatřiti a ochrániti nemohla, od práva stvrzená a daná." Práva městská Království českého, art. D V [translated by Marie Brančíková].
39 Verneuerte Landes Ordnung, art. N I.
40 Jaromír Štěpán, Studie o kompilační povaze Koldínových Práv městských, Praha 1940.

of guardianship, following Roman law, while the Prague law and previous land law had reached the same result independently.[41] These were: 1) *tutores legitimi*, i.e. through blood relationship; 2) *tutores testamentarii*, i.e. appointed by testament; 3) *tutores dativi per inquisitionem judicis*, i.e. appointed by a court.[42] Although in practice guardians were mostly appointed by testament, *Práva městská Království českého* preferred family members to take on that role because, together with the orphans, they were the closest heirs to the property, which would tend to guarantee their personal interest and care. The order in which these guardians were appointed was the same as the rules of succession governing inheritance. However, while *Práva městská Království českého* did not distinguish between relatives in the father's or mother's line and clearly put the interests of the child first, earlier Bohemian and Moravian municipal and land law had favoured relatives of the father for the role of guardian.[43] The *Codex Theresianus* contains the same provision as the *ABGB*.[44] A relative who refused to take on the burden of guardianship of the child automatically lost any right to stake any legal claim to a share of inheritance if the child or children were to die.[45] And the *ABGB* went even further – according to Franz von Zeiller's commentary, a relative who refused to take on guardianship could be fined or imprisoned.[46] However, § 203 of *ABGB* states only that the public authority can use reasonable penal measures.[47] Courts had to choose carefully from among the relatives. If the next of kin was not able to guarantee the orphan's property, take care of the children and raise them well, the court would appoint a more distant relative who appeared more capable of carrying out the role of guardian.[48]

The second form of guardianship specified in *Práva městská Království českého* deals with guardians appointed by the public authorities on the basis of the wishes of the father or grandfather, as recorded in their testament.[49] A special version of this type of guardianship was that of "powerful paternal guardian". This institution was very popular in practice, and it was adopted into *Práva městská Království českého* from the land constitution of 1549/1564.[50] Powerful paternal guardians were *paternae potestatis*, that is, they had the same authority as the father himself. This gave their guardianship special privileges; among other things they did not have to keep books recording the manage-

41 Štěpán, Studie o kompilační povaze, p. 17.
42 Práva městská Království českého, art. D VI.
43 Brikcí z Licska, chap. 14, art. VII; České zemské zřízení z roku 1549, art. F 25 etc.
44 Philipp Harras von Harrasowsky, Der Codex Theresianus und seine Umarbeitungen, I. vol., Wien 1883, pp. 174–177 (cited as Codex Theresianus I). Similarly ABGB, § 198.
45 Codex Theresianus I, § 55.
46 Franz von Zeiller, Commentar über das allgemeine bürgerliche Gesetzbuch I, Wien 1811, § 182.
47 ABGB, § 203.
48 Práva městská Království českého, art. C VII.
49 Práva městská Království českého, art. D VIII.
50 Compare with article I 64.

ment of the orphan's estate and present accounts at the end of their guardianship.[51] However, this type of guardianship often involved lawsuits, especially when it was a widow who tried to claim this position for herself.[52]

The role of widows in guardianship administration was very specific in the Bohemian legal system. While land law did not exclude either widows or other female relatives of an orphan from exercising guardianship, Saxon-Magdeburg municipal law, Brno municipal law and Brikcí z Licska were either reserved towards widows exercising guardianship or excluded it altogether.[53] Perhaps under the pressure of real life, when a widow claimed the right to act as a powerful paternal guardian, *Práva městská Království českého* would allow her to do so de jure, but under certain conditions. Given that the widow, as a guardian, would be managing her own property as well as that of the children, her most important duty was to remain a widow. If she remarried, there was a possibility that the children would lose their property when her and her husband's property were brought together. In such cases *Práva městská Království českého* ordered that the widow had to take her share of the property and a new guardian was to be appointed for the children.[54] Guardianship administered by a widow was called, in municipal law, *tutela anomala,* i.e. special or exceptional guardianship, owing to the fact that a woman was not usually allowed to become a guardian unless the father of the children had named her in his testament as the powerful paternal guardian, in which case she could look after the children and their property.[55] However, it was stressed at the same time, that if a widow did not prove herself to be capable, and managed the property poorly or squandered it, she would be immediately stripped of her position and another guardian would be appointed.[56] Another safeguard provided by law was to appoint two other guardians known as *tutores honorarii* to assist the widow. According to municipal law, however, these guardians could not be appointed by the testator himself, but only by some authority, such as a city council.[57] If the powerful paternal guardian was male, this option was not considered.

While municipal law preferred relatives as guardians before testamentary guardians, as laid down in *Práva městská Království českého*, in Bohemian and Moravian land law people most commonly became guardians by being appointed by the father making a record in the Land tables – so-called "table

51 Práva městská Království českého, para. D IX.
52 Pavla Slavíčková, Právní podstata poručnické správy sirotků v raném novověku. In: Acta Universitatis Palackianae Olomucensis, Facultas Philosophica, Historica 34 (2008), pp. 45–52.
53 Flodr, Brněnské městské právo, p. 278.
54 Práva městská Království českého, art. C LVIII, para II, C LIX, C LX.
55 Práva městská Království českého, art. D X.
56 Práva městská Království českého, art. C LVIII, para III, D X, para II.
57 Práva městská Království českého, art. D XXII. Compare with Štěpán, Studie o kompilační povaze, p. 18.

guardians". The oldest record of this kind comes from 1327. This type of guardianship is described in the lawbooks of Ondřej of Dubá from the fourteenth century and also in the legal code of Viktorín Kornel of Všehrdy from the end of the fifteenth century.[58] Only once this kind of guardianship had been ruled out or was impracticable, could guardians be appointed in accordance with their degree of kinship. The sequence, in descending order, was brother, uncle, sister, aunt. The final option, according to some earlier legal collections, including land administrative law, was for a guardian to be appointed by the king.[59]

Finally, guardians were appointed by a court or a city council only if the father of the orphans had either not left a testament or it was declared invalid and, at the same time, there were no relatives who could take care of the children. Public authorities were supposed to choose a suitable person to act as guardian who would take good care of the children. The only prerequisite was that the guardian be resident under the same law as the ward. The public authority was responsible not only for supervising guardians but also for providing guidance or advice when needed.[60] A person appointed to any kind of guardianship role, had to accept the position. If he wanted to refuse it, he had to submit a list of reasons to the city council within two weeks stating why he could not take on the position. However, *Práva městská Království českého* does not give any details of the conditions under which a person could refuse to become a guardian.[61]

In the *ABGB* and in earlier legal regulations, minors and mentally ill persons were deemed unfit to act as guardians.[62] Furthermore, the *ABGB* excluded persons with previous convictions and anyone "who cannot be expected to raise orphans properly and manage their property beneficially" from becoming guardians.[63] The *ABGB*, Brno municipal law and the lawbook of Brikcí of Licsko all prohibited clergymen, foreigners and any person that had not been on friendly terms with the parents of the orphans from becoming guardians. A person who had outstanding debts owed from the orphans' estate was also precluded. [64] Unlike the *ABGB*, which preferred to vest guardianship in one single person, some earlier legal regulations took the opposite view. If there was more than one person assigned to the role, for example, in a father's will, these guardians could either manage the whole property of the orphans jointly, or

58 Štěpán, Studie o kompilační povaze, pp. 25–36.
59 Ibid.
60 Práva městská Království českého, art. D XI.
61 Práva městská Království českého, art. D XII.
62 ABGB, § 191; Práva městská Království českého, art. D XXIV; České zemské zřízení z roku 1549, art. F 11.
63 „o nichž se nelze nadíti, že budou sirotka řádně vychovávati a jeho jmění s užitkem spravovati." ABGB, § 191 [translated by Marie Brančíková].
64 ABGB, § 192–194; Brikcí z Licka, chap. 14, art. V.

divide it, with each bearing responsibility for his respective part. However, if they chose the latter option without the court's consent, they remained jointly responsible for any damage to the property as a whole. In this respect the *ABGB* and the *Práva městská Království českého* did not differ.[65]

While the previous civil codes of Maria Theresia and Joseph II, and especially the *ABGB*[66], recognised a distinction between the duty of a guardian to represent a minor legally and the duty of managing the entrusted property, the actual raising of the children was usually up to a mother or another relative.[67] Both Bohemian land and municipal law stated that these roles – managing the property and raising the children – were to be carried out only by an appointed guardian. However, how commonly the children actually lived in the guardian's house is difficult to say because the sources do not tell us. For the orphans' upbringing, guardians were obliged to guide "orphans in the time of their childhood to virtue and all good things" and when they reached a certain age "to free arts or crafts, services and be good people home or abroad, so they learn to fear God from early age, live honestly, be generous and serve good people; and when God deigned to give them reasonable age so they could be good and honest with firstly the Church, then their own country, and finally with their friends".[68] Funds for raising, educating and feeding orphans could be taken from their property in reasonable amounts – of course, with diligent records of any expenses in the books.

Guardians had full disposal of orphans' property, with the proviso that they were "obliged to manage it diligently, carefully and justly".[69] A guardian had to administer the property to avoid losses and if possible make gains. If an orphan's property included enough money in cash, a guardian was allowed to invest it, either by buying property or lending it with interest. On the other hand, the guardian was forbidden to buy anything from the orphan, even where there was more than one guardian and they were buying the things from one another. This kind of transaction was possible only where the city council ruled that it would be favourable to the orphan. The council's consent had to be part of the sale agreement and was to be recorded in the books.[70] If there was any accident during the guardianship period, for example fire or floods, and the property lost its original value, then the guardian was not blamed or liable for the losses. However, in cases where the guardian had abused his role

65 ABGB, § 210. Compare with: Práva městská Království českého, art. D XXVII, para. II.
66 ABGB, § 218.
67 Kapras, Poručenství nad sirotky, pp. 55–57.
68 „sirotky v letech jich dětinských k ctnostem, k mravům a ke všemu dobrému," [...] „k učení svobodnému, anebo k řemeslům poctivým, též k službám, doma aneb ven z země a k dobrým lidem dávali, tak aby hned z mladosti své zvykali Pána Boha se báti, poctivě a šlechtně živi býti a lidem dobrým slaužiti; a kdyžby Pán Bůh ráčil jim dáti let rozumných dojíti, aby předkem církvi, potom vlasti své, a naposledy přátelům svým se odsluhovati a všechněm jiným lidem se hoditi a ku poctivosti býti mohli." Práva městská Království českého, art. D XX [translated by Marie Brančíková].
69 „pilně, bedlivě a spravedlivě opatrovati povinni jsau." Ibid. [translated by Marie Brančíková].
70 Práva městská Království českého, art. D. XXXIII.

and position or neglected his duties – according to the *ABGB* as well as to some earlier Bohemian law – a ward could complain to the court or inform his next of kin of such behaviour, and the guardian would have to make amends.[71]

It was the duty of a guardian to represent orphans in court, especially in property matters.[72] If any debt owed to the orphan became irrecoverable, it was up to the guardian to sue the debtor and the legal costs were, in such cases, considered as permissible losses under guardian administration.[73] Anybody who had any claims on the orphan was supposed to address the guardian. If they did not do so, this was seen as a procedural mistake and the plaintiff would lose the dispute.[74] Consequently, an orphan under guardianship could not conclude any contracts, sell or buy property or borrow money without his guardian's knowledge. If the orphan did any of these things, the transaction was only deemed valid if "it was for his own good and benefit".[75] An orphan, boy or girl, could not marry without the guardian's consent. However, *Práva městská Království českého* urged guardians not to impede the marriage of their wards in order to delay the moment the guardianship ended.[76]

As mentioned above, certain rights and obligations went with specific types of guardianship. Guardians appointed by a public authority were obliged under municipal law to make an inventory of all property before assuming control of it. There were several reasons for this. By making all liabilities on the property public, they could be paid, and all debts drawn up and collected. The property inventory also served to ensure that the guardian became familiar with the state of the farm he was taking into his administration, and as a guarantee for the orphans regarding their final settlement. The duty of the city council was to keep the inventory in the town hall until the last of the children had reached maturity.[77] Apart from its role in ensuring support for fatherless children, the inventory was also important as a means of control over the guardians' activities during their period of guardianship. This was apparently introduced into Bohemian legal practice relatively late at the end of the fifteenth century. Some owners were reluctant to let members of an inventory committee into their own home so they could "snoop around", because this would mean that the value of the family property was about to become widely known.[78] This was also probably the reason why the *ABGB* tightened up the

71 Práva městská Království českého, art. D XXIII..
72 Pavla Slavíčková, Různé formy správy sirotčího majetku v královských městech v období raného novověku. In: Historica Olomucensia, vol. 26 (2010), pp. 21–30.
73 Práva městská Království českého, art. D XXXIV, para. 1.
74 Práva městská Království českého, id., parat. 2.
75 „žeby to k jeho dobrému a užitečnému se vztahovalo." Práva městská Království českého, art. D XXXII; see also art. D XL [translated by Marie Brančíková].
76 Práva městská Království českého, art. D XXXV.
77 Práva městská Království českého, art. D XIII.
78 These facts in practice, first pointed out Jiří Pešek, Pražské knihy kšaftů a inventářů. Příspěvek k jejich struktuře a vývoji v době předbělohorské. In: Pražský sborník historický, vol. XV., Praha 1982, pp. 63–90.

practice, which up to then had been negligently performed, and ordered that an inventory must be always carried out, even against the wishes of the father or another testator.[79]

In municipal and land law all guardians, apart from the powerful paternal type, had a duty to guarantee the orphan's property which he was taking under his administration[80], even though there were some exceptions to this rule.[81] In contrast, in the civil codes of Maria Theresia and Joseph II[82] and finally the *ABGB*, this was not necessary. In the *ABGB* it literally says: "A guardian is not obliged to provide security at the time of the start of his guardianship. He does not have this obligation if he follows precisely statutory provisions to ensure possessions and presents bills properly and on time."[83]

Not only *tutores dativi*, but according to municipal law, everyone else, except for the powerful paternal guardian, was obliged to keep the books of the orphan's property regularly in the form of a register, "in which revenues of the orphan's estate, and also exceptional costs and expenses of the orphans had to be properly recorded by a guardian or a person appointed by a guardian to do so."[84] The previous civil codes and especially the *ABGB* retained and even tightened up the accounting rules in administering orphans' property in the Bohemian Lands. A guardian was required to submit accounts to the court for annual checks no later than two months after the end of the previous year. Records were supposed to include any information on revenues and expenditures and at the end of the year they had to state any gains or losses in the value of the entrusted assets. If a guardian did not submit the accounts, the court could use coercive legal means to compel him to do so.[85] A guardian could be relieved of this obligation only where the entrusted property was of little value or where the profits resulting from it did not exceed the costs of the maintenance and upbringing of the child.[86]

Guardianship of an orphan ended, according to both the *ABGB* and the earlier Bohemian and Moravian legal regulations, under one of following

79 ABGB, § 223.

80 Práva zemská česká Ondřeje z Dubé, § 75; O právích země české knihy devatery M. Viktorina ze Všehrd, kniha V., art. 38, 41, 43; Vladislavské zřízení zemské, art. 105; České zemské zřízení z roku 1549, art. F 11; Obnowené Práwo a Zrjzenj Zemské Dedjcného Králowstwj Czeského / Cýsare Ržijmské Vherského a Czeského, etc. Krále, etc. Geho Milosti Ferdynanda Druhého etc., http://kramerius.mzk.cz, 3.4.2012, art. N VI.

81 Kapras, Poručenství nad sirotky, p. 47.

82 Philipp Harras von Harrasowsky, Geschichte der Codification des österr. Civilrechts, Wien 1868, p. 155.

83 „Poručník není povinen dáti jistotu, když v poručenství nastupuje. Této povinnosti nemá ani potomně, dokud dbá přesně zákonných ustanovení o zajištění jmění a podává účty včas a řádně." ABGB, § 237 [translated by Marie Brančíková].

84 „do nichž by příjmy z statku sirotčího, i také obzvláštní proti tomu vydání a náklady na sirotky i na jich statek pořádně poznamenávali aneb jinému poznamenávati sobě, do týchž register sirotčích, poručili." Práva městská Království českého, art. D XIV [translated by Marie Brančíková].

85 ABGB, § 239.

86 ABGB, § 238.

circumstances. Firstly and most importantly, it ended if the child died. Given that a guardian was not usually appointed for each child separately, but rather the children of one father shared one guardian, according to some earlier legal collections a guardian was relieved of his position only once all the children were dead. In the case of the death of one of the children, its property was divided among the other children, either on the principle of equal shares or in accordance with the father's testament; however the exercise of guardianship did not change in any way.[87] If, on the contrary, a guardian died, according to both the *ABGB* and earlier Bohemian collections, a council was supposed to appoint a new guardian for the children.[88]

Guardianship would also come to an end when the orphan came of age. According to municipal law "orphans come of age the moment a boy turns eighteen and a girl turns fifteen."[89] A father or grandfather of the orphans had the right to postpone the moment of maturity in his testament, which the law considered to be good and useful for the children. Apart from this maturity limit, *Práva městská Království českého* also codified the rights of persons under the age of 25, who had inherited property from their parents but had mishandled the property, wasting it on harlots and suchlike. In the public interest, they could be put in jail and their property placed under administration, or they could be expelled from the town for some time so that

> "they would firstly wander for a while to acquire sounder mind and intellect, and after tasting misery and poverty then they could behave seriously, honestly and humbly, learn of moderation in all things and also in use of their estate, so they could enjoy those goods, which their parents worked hard to save and leave behind so they turned it to their own good, and they may live honourably, generously and in a Christian way amidst good people".[90]

When the age of a child was uncertain, both *Práva městská Království českého,* and land law permitted an examination. Girls could be examined only by women "to maintain modesty". [91] In practice, however, witnesses were deemed sufficient. Nowhere in the municipal law was there any provision to allow a child's age to be granted by the king, as was customary in land law, although in practice this was a common occurrence. Both the *ABGB* and the Bohemian

87 Pavla Slavíčková, Ukončení poručenské správy nezletilých osob v raně novověkém městském prostředí. In: Theatrum historiae 6 (2010), pp. 9–21.

88 ABGB, § 249. Práva městská, art. D XXX.

89 „léta pak sirotkův jsau, kdyžby pacholík osmnácte, a děvečka patnácte let právě z auplna a zcela došli." Práva městská Království českého, art. D XXVI, para. II [translated by Marie Brančíková].

90 „předkem se provandrovali, jiné mysli a rozumu zdravějšího nabyli, a okusíce bídy, psoty a nauze, uměli se potom vážněji, poctivěji i pokojněji chovati a střídmosti při všech věcech, i také při užívání statkův svých, požívati, tak aby statky ty, kteréž jim rodičové s prací velikau nachovali a po sobě pozůstavili, k dobrému svému obraceli, a mezi lidmi dobrými obcujíce, ctně, šlechetně a křesťansky živi byli." Práva městská Království českého, art. D. XXXIX, para. III [translated by Marie Brančíková].

91 Práva městská Království českého, art. M XXXVIII.

and Moravian legal regulations speak of the so-called "granting age".[92] Unlike in earlier legal practice, to do this it was necessary to gain the consent of the ruler or a competent authority.[93]

A key event in the last phase of guardianship administration was the presentation of final accounts and handing the property over to the wards. According to the *ABGB*, a guardian had to submit the final accounts to the wards within two months of ending his guardianship at the latest. Based on these accounts, a ward was to issue a letter to his guardian confirming that he had administered his post properly and honestly. The same paragraph stipulates, "this letter, however, does not relieve him of the obligation to refrain from deceitful conduct, which would be eventually revealed".[94] Similarly, the guardian was to return all the assets to the ward, which was again confirmed in writing so that it could be presented in court. The basic requirements for handing over the ward's assets were the list of assets acquired before the guardian took over the administration, and the regular annual audits. That this should be in writing, emphasised especially in the *ABGB*, is a reflection of the official practice that was introduced during the seventeenth or eighteenth century at the latest by the authorities then responsible for guardianship. This possibility of submitting final accounts within a few months of the end of the guardianship contrasted with the provisions of earlier lawbooks, which had refused to "recognize" the release of guardians from their guardianship before this matter was settled.[95] The reason for this probably lies in the guardian's separate administration of children and of property, which, as mentioned above, had not been customary in the past.

As laid down in both the earlier Bohemian and Moravian lawbooks and the *ABGB*, although a guardian did not guarantee the orphan's property with his own, he was responsible for any damage to the property occurring under his administration. However, alongside the guardian himself, the *ABGB* also placed liability on the court of wards.[96] On the other hand, according to *ABGB*, *Práva městská Království českého* and the land law books, the guardian could reclaim the costs associated with maintenance and upbringing from the wards themselves.[97] Consequently, the *ABGB* introduced new standards for orphans who lacked means. In such cases, the court of wards would attempt to "get the wealthy next of kin to provide maintenance". If these attempts were not successful, a guardian who was unable to provide for an orphan either

92 ABGB, § 252.
93 Kapras, Poručenství nad sirotky, pp. 12–21.
94 „tento list jej však nezprošťuje závazku z jednání lstivého, které by později vyšlo najevo." ABGB, § 262 [translated by Marie Brančíková].
95 E. g. Práva městská Království českého, art. D XVIII.
96 ABGB, § 265.
97 ABGB, §§ 219–221. Compare with Práva městská Království českého, art. D XIX.

from the orphan's assets or his own income, could put the child into the care of benefactors or institutions for the poor.[98]

An innovation in the legal standards related to guardianship institutions, the absence of which in earlier legal regulations had proved particularly delicate, was a provision regarding the remuneration of guardians. According to *Práva městská Království českého*, one of the first lawbooks to address this issue, a guardian was entitled to remuneration only if all the children under his guardianship had died before reaching adulthood. In such a situation, a guardian was entitled to inherit a share of the orphans' assets.[99] In contrast to that, all the new civil codes, including *Codex Theresianus*, gave these questions a lot of attention.[100] According to the oldest civil codes, and especially the *ABGB*, the court of wards could grant a guardian an annual salary, which was to be paid from "saved income", but was not to be higher than four thousand florins or 5 % of the amount. If the orphan's property was not extensive enough to pay the fee annually, it was possible to pay a guardian at the end of his administration, up to a reasonable amount.[101]

The care of an orphan's property and of the orphan himself were not separated until the *ABGB*, which even switched the order of priority for these two parts of the guardianship administration. "A guardian is mainly expected to take care of the wards, but at the same time to take care of their property."[102] This lawbook allows these powers to be divided; with the upbringing of the child to be a priority entrusted to the mother, who had, up to then, been either legally banned or at least restricted in every way possible.[103] Also for the first time, the *ABGB* allowed for expenditure on education, upbringing and maintenance of an orphan to be deducted, with the sums involved controlled by public authorities, namely the court of wards. Although similar to the upbringing of a child by its mother, this provision was not based on an established practice; there is no evidence of any similar provisions in legal form in Bohemia before the *ABGB*.

Conclusion

To sum up: if we return to our questions, we see that the basic principles of legal protection of children contained in the earlier Bohemian and Moravian law books, were not rejected by the new civil codes, *Codex Theresianus,* Civil

98 ABGB, § 221.
99 Práva městská Království českého, art. D XVII.
100 Codex Theresianus I, § 461, 463, 471, 478, 479. Jaromír Čelakovský, O účasti právníků a stavů ze zemí českých na kodifikace občanského práva rakouského, Praha 1911, p. 12.
101 ABGB, §§ 266–267.
102 „Poručníkovy náleží především péče o osobu poručence, ale zároveň také správa jeho jmění." ABGB, § 188 [translated by Marie Brančíková].
103 Pavla Slavíčková, Instituce mocného otcovského poručníka jako příklad kontroverzního vztahu města a rodiny v oblasti poručenství nezletilých sirotků. In: Kateřina Čadková et al., Konfliktní situace v dějinách, Pardubice 2007, pp. 45–50.

code of Joseph II and the *Allgemeines bürgliches Gesetzbuch*. Indeed, it was rather the other way around – as Harrasowsky noted, "unter den Landrechten, die im *Codex Theresianus* benützt sind, überwiegt das böhmische [...]"[104] However, to make a thorough investigation of the origins of the *ABGB*, one would have to compare all municipal and land laws very closely. As we have shown, in the matter of guardianship and legal protection of children, successive civil codes, including the *ABGB*, followed the customary practice of Bohemia and Moravia. Even though the legal institutions were newly formulated, systematized, and their contents supplemented with the requirements of modern times, many of them can be traced back to the Middle Ages.

We can observe a conspicuous movement in the relationship between men and women. Although one of the older Bohemian and Moravian municipal and land law books, *Práva městská Království českého*, granted the wife along with the father responsibility for raising children, a widow was allowed to exercise guardianship only until she remarried. It also required that the public authority designate co-guardians for the widow. Mothers did not get a full duty of personal care for their fatherless children until the Josephinian lawbook, and responsibility for managing their children's property came much later. We can conclude that the new civil codes, including *ABGB*, did not bring any fundamental change at all to the legislation on guardianship and paternal property. In this sense they served more to connect the old world with the new one, rather than the beginning of the nineteenth century with the present.

Pavla Slavíčková, Vormundschaft als Teil des Rechtsschutzes für Kinder in Böhmen und Mähren vor 1811

Der moderne Staat lässt jedem Kind ungeachtet seiner körperlichen und geistigen Unreife besondere Sicherheiten, Fürsorge und entsprechenden Rechtsschutz, insbesondere das Recht der Kinder auf ordentliche Erziehung, auf den Schutz seiner Interessen und seines Vermögens, zuteil werden. Der heutige Kinderschutz umschließt einen umfangreichen Katalog von Rechten, deshalb wird er in vielen Justizbereichen geregelt und man kann ihn folglich nicht unter einer Rechtsnorm subsummieren. Das System dieser Vorschriften basiert auf einer jahrhundertlangen Entwicklung, die im 18. Jahrhundert in die privatrechtlichen Kodifikationen mündete – vorbereitet durch den Codex Theresianus von 1766, der nie in Kraft trat, gefolgt vom Allgemeinen Bürgerlichen Gesetzbuch von 1786, später Josephinisches Gesetzbuch genannt, und schließlich dem Allgemeinen Bürgerlichen Gesetzbuch von 1811.

104 Codex Theresianus I, pp. 3, 19, 29.

Bis zum Inkrafttreten des Allgemeinen bürgerlichen Gesetzbuches galten in Böhmen ältere Rechtsvorschriften, die in der Zeit des Rechtspartikularismus entstanden waren. Es handelte sich dabei vor allem um die entsprechenden Vorschriften der Verneuerten Landesordnung aus dem Jahre 1627 (für das Königreich Böhmen) bzw. 1628 (für die Markgrafschaft Mähren) und der Sammlung des Stadtrechts aus dem Jahre 1579, die Pavel Kristian von Koldin zugeschrieben wird. Beide Kodifikationen stützten sich auf ältere Rechtsvorschriften, die Koldin zugeschriebene Sammlung auch auf das römische und kanonische Recht. Ab der Mitte des 17. Jahrhunderts hatten – gemäß der Vorschrift des Königs – beide Rechtssammlungen gegenseitige subsidiäre Geltung.

Die den Kinderschutz betreffenden Vorschriften galten in dieser Form im gesamten 17. und 18. Jahrhundert und bildeten als Grundpfeiler der in den böhmischen Ländern geltenden Rechtsordnung in der Zeit der Kodifizierung des bürgerlichen Rechts unter der Herrschaft von Maria Theresia und Joseph II. einen Teil der Quellen für die entsprechenden Vorschriften des Codex Theresianus und des Allgemeinen bürgerlichen Gesetzbuches. Erst in der Mitte des 19. Jahrhunderts versuchten Jaromir Celakovsky und nach ihm zu Beginn des 20. Jahrhunderts andere bedeutende tschechische Rechtshistoriker Jan Kapras, Valentin Urfus und Jaromir Stepan den Einfluss des Stadtrechts wieder zu betonen und aufzuwerten. Sie beschäftigten sich damit, inwiefern die Stadtrechte den Codex Theresianus vor allem im Bereich des Familienvermögensrechts, Erbrechts, der testamentarischen Nachfolge und auch im Gebiet der Vormundschaft und Vermögensversicherung der Familie beeinflusst hatten.

Ziel dieses Aufsatzes ist es, die Bestimmungen des Stadtrechts von Pavel Kristian Koldin und der Verneuerten Landesordnung mit jenen im nicht in Kraft getretenen Codex Theresianus und vor allem im Allgemeinen bürgerlichen Gesetzbuch im Bereich des Kinderschutzes zu vergleichen und den Blick auf die Handlungsspielräume der beteiligten Personen zu richten.

Pavla Slavíčková, L'istituto giuridico della tutela: un tassello della protezione legale dei minori in Boemia e Moravia prima del 1811

Lo Stato moderno assicura a ogni minore, indipendentemente dalla sua maturità fisica e mentale, precise garanzie, assistenza e tutela giuridica, in particolare il diritto all'educazione, alla tutela dei propri interessi e del proprio patrimonio. La tutela dell'infanzia che oggi conosciamo abbraccia un ampio ventaglio di diritti; nella misura in cui la sua regolamentazione ha luogo in ambiti giuridici diversi, è impossibile sussumerla sotto un'unica norma di legge. Il sistema

di norme attualmente in vigore trae origine da uno sviluppo secolare, confluito nelle codificazioni di diritto privato del secolo XVIII, prima fra tutte quella del Codex Theresianus del 1766, mai entrato in vigore, al quale è seguito il Codice civile del 1786 – passato alla storia col nome di Codice Giuseppino – e infine quello del 1811.

Prima dell'entrata in vigore del Codice civile, vigevano in Boemia norme di legge più antiche, che avevano visto la luce nell'epoca del particolarismo giuridico. Si trattava nella fattispecie delle norme in materia di tutela dell'infanzia contenute nel nuovo ordinamento regionale del 1627 (per il regno di Boemia) e del 1628 (per la contea di Moravia) nonché della raccolta di leggi municipali del 1579, la cui compilazione è attribuita a Pavel Kristian von Koldin. Stando alle direttive del sovrano, a partire dalla metà del Seicento le due raccolte di leggi dovevano integrarsi vicendevolmente.

Le norme in materia di tutela dell'infanzia rimasero in vigore in questa forma per tutto il Sei e Settecento, andando a costituire, in quanto pilastri dell'ordinamento giuridico dei Paesi boemi nell'epoca della codificazione del diritto civile durante i regni di Maria Teresa e di Giuseppe II, una parte delle fonti utili per la compilazione del Codex Theresianus e del Codice civile. Fu solo con Jaromir Celakovsky, nella seconda metà dell'Ottocento, e con altri prestigiosi storici del diritto cechi quali Jan Kapras, Valentin Urfus e Jaromir Stepan, all'inizio del Novecento, che si cercò di ribadire l'importanza del corpus di leggi municipali e di operare in vista di una sua rivalutazione. Questi storici del diritto si occuparono di analizzare in quale misura tale corpus di leggi avesse influito sul Codex Theresianus, in particolare in materia di diritto patrimoniale della famiglia, diritto di successione, successione testamentaria, come anche riguardo all'istituto della tutela e all'assicurazione dei danni patrimoniali della famiglia.

Questo contributo si propone si mettere a confronto la normativa in materia di tutela dell'infanzia del corpus di leggi municipali di Pavel Kristian Koldin e del nuovo ordinamento regionale, da un lato, con quella del Codex Theresianus mai entrato in vigore e, soprattutto, del Codice civile, e di focalizzare l'analisi sui margini d'azione dei soggetti interessati.