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## The Death Penalty during the Bohemian Wars of Religion

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In the year 1923, following the execution of Josef Kolinský for murder, a lively discussion developed concerning the justification of the death penalty, its effectiveness, and its possible deterrent effects. A preacher of the Unity of Brethren, Jindřich Procházka, who gave the last consolation to the condemned, declared: “No executions, no death penalties will bring about fundamental rectifications of life and morality, as long as the people themselves do not turn away from lives of evil and criminality.”<sup>1</sup> The outstanding scholar of the Bohemian Reformation, František M. Bartoš, also entered the discussion. With reference to the contemporary debate, he cited the historical example of the Taborite bishop, Mikuláš Biskupec, who came out against the death penalty during the polemics at the Council of Basel in 1433.<sup>2</sup> Bartoš was not the first scholar who has reminded us about the attitudes toward the prosecution of criminals early in the Bohemian Reformation, but the purpose of this study is not to add anything new to the historical research, but to contribute, to the contemporary question of the death penalty, an argument from the depth of history.

It is well known that several outstanding theologians of the Bohemian Reformation considered in depth the application of capital punishment to criminals. Divers references to the issue can be found in historical literature; at times in off-the-cuff casual references, at other times, in close examinations of the individual treatises, or in notations of the intellectual starting points of theological teaching.<sup>3</sup> My reason for attempting to present an overview of the issue of capital punishment springs in part from my early interest in the history of law during the Bohemian Reformation, and in part in the persistent discussions about the abolition of the death penalty in contemporary legal theory and practice.

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<sup>1</sup> Cited from an article by G. Trapl, “Československá republika,” in: *Kostnické jiskry* (1923,9).

<sup>2</sup> František M. Bartoš, “Trest smrti v husitské republice [The death penalty in the Hussite republic],” *Kostnické jiskry* (1923,12).

<sup>3</sup> Aside from references to sources and literature that will be cited later in this study, it is possible to list a selection of publications that dealt with the question of capital punishment: Friedrich von Bezold, *K dějinám husitství* [To the history of the Hussite movement], trans. A. Chytil (Prague, 1914) 21-23; Zdeněk Nejedlý, *Prameny k synodám strany pražské a tábořské... v létech 1441-1444* [Sources for the synods from the parties of Prague and Tábor ... for the years 1441-1444] (Prague, 1903) 11; Jaroslav Goll, *Chelčický a Jednota v XV. století* [Chelčický and the Unity in the fifteenth century] (Praha, 1916) passim; Vladimír Solnař, *Z dějin českého zemského práva trestního* [From the history of Czech criminal law] (Prague, 1921) 16. For a survey of views on capital punishment, especially those of Jan Rokycana, Mikuláš Biskupec, and in the *Vojenský řád* of Jan Žižka, see the recently published, Petr Čornej, *Tajemství českých kronik* [The secret of Czech chronicles] (Prague, 1987) 282, 289-290; for individual references see also Rudolf Urbánek, *Věk poděbradský* [The Podebradian era] 3, vol. 3, pt. 3 of *České dějiny* (Prague, 1930) 663, 726 ff.

## Capital Punishment in the Middle Ages

In the Middle Ages, unnatural death was a very frequent phenomenon, occurring because of disastrous epidemics and endemic wars, or as a result of crime, or on the scaffold. Hence, it was not possible to avoid consideration of its justification under the various circumstances of life, especially in relation to the Commandment, "Thou shall not kill," and also in weighing the commensurability between the crime and its punishment. It was a pressing issue for the intellectual leadership of the Bohemian Reformation that was born under the conditions of major social upheavals and continuous warfare with violent death as a common daily occurrence. It is relevant to recall the decisive moments for launching a military defence of the incipient reform movement. The question was then posed, whether it was permitted to lift the sword in the interest of the Truth of God, and a positive answer was accepted only after considerable hesitation.

The rejection or the approval of capital punishment was an equally pressing issue during the entire period of the Bohemian wars of religion. It is known, of course, that many persons were put to death without any court proceedings, and mass executions were not uncommon, often affecting entire garrisons of castles, or of towns. Likewise, many reports testify to the cruelties of crusading invaders, manifest in acts of violence against local inhabitants. We may also recall the horrors of the casting of Utraquists into the mineshafts in Kutná Hora, and certain excesses in the revolutionary history of Prague, beginning with the defenestration of the councillors in the New Town. These events, however, had very little in common with the law, and thus are outside the scope of my interest that focuses narrowly on the theme of capital punishment imposed by a court of law.

Documentary evidence about judicial proceedings and imposition of capital punishment is rather scarce. Even so, we can learn about the death penalty from other sources, especially from homilies, treatises, and polemics among the various factions within the Bohemian Reformation, or from the disputations with the Council fathers at Basel.

The death penalty,<sup>4</sup> therefore, was usually the result of a judicial decision about guilt of certain clear cut felons so that it was rather unusual to question its correctness. Sources indicate its constant application that reflected also the steadily expanding prosecution of heresy, which likewise became viewed as a capital crime. The existing legal theory, however, disapproved of the informal killing of criminals, one that did not follow the verdict of a legitimate court. In particular, authoritative pronouncements of Thomas Aquinas covered this field. Face to face with the Commandment "Thou shall not kill," Aquinas responded that killing was prohibited only, if it had a character of arbitrariness. The putting to death of a criminal or an enemy of the public order, however, was not improper and, therefore, not against the commandment of God.<sup>5</sup> If someone is dangerous to society and threatens to

<sup>4</sup> For general information about death penalty during the Middle Ages, see Rudolf His, *Das Strafrecht des deutschen Mittelalters*, 2 vv. (Leipzig, 1920-1935) 1:476-539.

<sup>5</sup> Thomas Aquinas, *Summa theologica*, II/1, q. 100, art. 8.

spread corruption through sin, it is beneficial, according to St. Thomas, to dispose of him in order to protect the common good.<sup>6</sup> It is, therefore, permitted to put a criminal to death, as long as it happens for the welfare of an entire society, provided it is done by an authority wielding public authority, not by a private person.<sup>7</sup> In addition, capital punishment is condoned for heretics.<sup>8</sup>

## Hus and Jakoubek

It is not easy to trace the intellectual sources or direct examples of the Bohemian Reformers' views on the death penalty. Hus himself did not pay close attention to the question. He does mention the subject in connection with his exegesis of the Decalogue. He assumes that lawless killing is prohibited, and that a judge must exercise a great caution in sentencing an evil person.<sup>9</sup> Elsewhere Hus states: "You will not kill, that is, not kill a person wrongly. One wrongly kills, if he kills an innocent person, or without being authorized to do so."<sup>10</sup> Hus, therefore, condones killing of a person if it happens in accordance with the law and the judge acts responsibly.

The famous chancellor of the University of Paris, Jean Gerson, who was concerned with the teaching of John Wyclif and Hus, found their ideas so dangerous that, in 1414, he advised Konrád Vechta, the Archbishop of Prague to employ the secular arm against the heretics.<sup>11</sup> He then selected from Hus's treatise, *De ecclesia*, twenty articles – citing them carelessly – that he declared as heretical. He was particularly incensed by the teaching in Wyclif's Article 15, upheld by Hus, that whoever was in the state of mortal sin, lost the right to govern, as well as to hold the office he occupied. According to Gerson, it was a perilous opinion that merited refutation not by reason [*ratione*], but by fire and sword,<sup>12</sup> that is, death. In Article 9 of his list, Gerson rejected Hus's view that recalcitrant heretics should not be turned over to the secular arm, that is, put to death. The Chancellor labelled this view a

<sup>6</sup> Ibid. II/2, q. 64, art. 2.

<sup>7</sup> Ibid. art. 3. Giles Charlier cited Aquinas's *Summa theologiae* II/2, q. 108, art. 4, against Biskupec in Basel.

<sup>8</sup> Aquinas, *Summa theologiae* II/2, q. 11, art. 3. As far as Bohemia is concerned, capital punishment for heretics and Jews is documented, above all, by the manual for the Inquisitors from the first half of the thirteenth century. It is known from a copy of 1365, *Modus procedendi inquisitorum*, that, in Article 3, specifies the legal norms for proof of guilt, capital punishment and the confiscation of property for heretics and Jews; see A. Patschovsky, ed., *Die Anfänge der ständigen Inquisition in Böhmen*, Beiträge zur Geschichte und Quellenkunde des Mittelalters 5 (Berlin and New York, 1975) 99-102. Apostates, and those seducing to apostasy, are likewise punished *ultimo supplicio* in the sense of Roman Law, Cod. 1.7.5.: "capitae puniendi censemus"; ibid. 100. As a parallel to the situation in Bohemia, it is possible to cite the English law of 1401, *De hereticis comburendis*, directed against the Lollards, whose teaching revealed signs of similarity with Utraquism; see Anne Hudson, *Premature Reformation* (Oxford, 1988) 15.

<sup>9</sup> Jan Hus, *Výklad delší na desatero přikázání* [Longer commentary on the Decalogue], MIHO 1 (Prague, 1975) 207, 212.

<sup>10</sup> Jan Hus, *Výklad menší* [Shorter commentary], in ibid. 327.

<sup>11</sup> Letter of 27 May 1414; Doc. 523-526.

<sup>12</sup> Letter of 24 September 1414; Doc., 528. Gerson's articles against the teaching of Hus were likewise appended to this letter.

Donatist error that contradicted the laws of the church.<sup>13</sup> Hus's view was once more attacked during the hearing of 8 June 1415 in Constance, where his teaching was summarised in 30 Articles. He was once more censured, in Article 18, for maintaining in his *De ecclesia* that a heretic should not be transferred to a secular court for a sentence of death.<sup>14</sup> It is evident that Hus rejected the common practice of letting secular authorities punish heretics, but otherwise he was not deeply concerned with the issue of capital punishment.

Master Jakoubek of Střibro showed a greater interest in this matter, as evident from passages in his various writings. One source is a collection of sermons from approximately 1415, some of which are so characteristic of Jakoubek's style that they can be safely attributed to him.<sup>15</sup> The document contains an important disquisition on the death penalty.<sup>16</sup> It is true, the preacher does not dare to reject the capital punishment outright, but he emphatically suggests that the convict be allowed sufficient time for repentance and contrition. The execution should not occur immediately. Alternate types of punishment might be considered, such as banishment or whipping.

The same attitude permeates Jakoubek's subsequent exegesis of the Decalogue, probably from the year 1423.<sup>17</sup> The author, in principle, rejects the death penalty for theft, but accepts it in other instances, where permitted by the New Testament. In the same wording as in the previous source, he insists that the convicts be given opportunities for repentance and contrition. In conclusion, he states openly that he does not dare to oppose the execution of criminals, but the punishment must be in accord with the New Testament, or with divine inspiration.<sup>18</sup> He warns against excessively harsh punishments according to the Old Testament, or according to the laws of the pagans. Significantly, he rejects the death penalty for heresy.<sup>19</sup>

Jakoubek is also concerned with criminal punishment in general. In his Czech exegesis on the Revelation of St. John,<sup>20</sup> he recognises the need for punishments, but he requires a just measure of their severity. Bodily sins and hypocrisy had to be prosecuted in every estate. In this sermon, however, Jakoubek does not explicitly reject capital punishment. Even though he rejects disproportionality or misapplication of the death penalty, he does not condemn it in principle.

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<sup>13</sup> Doc. 186.

<sup>14</sup> Jan E. Sedlák, *Mistr Jan Hus* (Prague, 1915) 325\*. The actual existence of the statement in *De ecclesia* has been questioned, although its meaning can be deduced from the text; see FRB VIII: 89, 138-139. For an attempt to resolve the conundrum, see Sedlák, *Mistr Jan Hus* 324\* - 325\*.

<sup>15</sup> František M. Bartoš, "Sborník husitského kazatele asi z r. 1415," [Miscellanea of a Hussite Preacher from about the year 1415] VČA 57 (1948) 15-33.

<sup>16</sup> Ibid. 23-24.

<sup>17</sup> František M. Bartoš, "Příspěvky k dějinám Václava IV [Contributions to the history of Wenceslaus IV], no. 6: Jakoubekův výklad desatera," [Jakoubek's commentary on the Decalogue] VČA 61 (1942) 92-100.

<sup>18</sup> Ibid. 94: "...ego non audio dicere, quod iudices, principes etc. non audeant aliquando aliquem occidere, sed semper dico: si lex nova, que es caritatis et misericordie, ostendit vel revelacio a Deo occidere, occidant..."

<sup>19</sup> Ibid. 95.

<sup>20</sup> Jakoubek of Střibro, *Výklad na Zjevení sv. Jana* [Commentary on the Apocalypse of St. John], ed. František Šimek (Prague, 1932) 1:101-105.

## Early Views in the Academy

At the time when tension was mounting on the domestic ideological and political scene, there were several statements issued from the University which reacted to the common occurrences of capital punishments. They also signified the internal conflicts in the academy between the Reformist and the Roman parties. These polemics continued during the last few months before the final takeover of the University by the Utraquists.

The cautious assessment of the death penalty was conspicuous in three *quaestiae* that were staged at the Faculty of Arts. A detailed analysis of their contents and of their provenance is recorded elsewhere,<sup>21</sup> hence a brief précis will suffice here. The *quaestiae* are as follows: *Utrum peius sit interficere hominem quam interfici ab eodem*; *Utrum secundum iusticiam legalem pro temporali dampno illato homo debet supplicium mortis pati*, and especially, *Utrum propter furtum vel latrocinium aliquis secundum leges sit morti adiudicandus*.

The anonymous author of the first *quaestia* weighs the criteria of justice, and show that the most serious transgression is the unjust killing of a person. He does not reject a just execution, and postulates the permissibility of the proper imposition of a death sentence. An appendix to the text of the *quaestia* refers to a custom which permits the pardon of one of two condemned inmates, who would execute the other.<sup>22</sup> A large-scale application of this principle is recorded in the time of the Taborite campaign in 1420, when, after the conquest of the Fort Sedlec, a certain Pinta, one of six prisoners, executed five of the others and thus saved his own life. He then joined the Taborites.<sup>23</sup>

Our second *quaestia* is evidently a polemic against another *quaestia*, unknown to us, that accepts the death penalty. The author is refuting the conviction about the admissibility of capital punishment, but the scholastic form of the disputation does not yield any specific theoretical justification of the negative view of the death penalty. An important point is the provision for material damages [*temporale dampnum*] that evidently refers to the crimes of theft.

Theft is, indeed, the central theme of the third of our *quaestiae*, which is included in the *quodlibet* of Master Prokop of Kladruby at the beginning of 1417, when it was actually presented, but its final text is not known. Even from the manual of the *quodlibet* speaker, however, we can conclude that theft should not be punished by death, because it is a lesser crime than murder, for which death is a proportionate punishment. The proportionate nature of the punishment to the severity of crime is a criterion that should be maintained. It, therefore, appears that the death penalty was not excluded even by the academy; only commensurability

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<sup>21</sup> Jiří Kejř, "Stát, církev a společnost v disputacích na pražské universitě v době Husově a husitské," [State, church and society in the disputations at the Prague University in the time of Hus and the Hussite movement] *Rozpravy ČSAV*, řada společenských věd 74,14 (1964) 52-55.

<sup>22</sup> Such cases are discussed by Henryk Grajewski, *Kara śmierci w prawie polskim do połowy XIV wieku* [The death penalty in Polish law to the mid-fourteenth century] (Warsaw, 1956) 241.

<sup>23</sup> Vavřinec of Březová, *Kronika*, FRB V: 365.

with the gravity of the crime was required; thus, capital punishment was not to be applied for theft or robbery. This view will be encountered repeatedly.

The cited illustrations indicate that a whole series of polemics concerning the death penalty was taking place, but we can only intuit their number rather than document it from contemporary records. A clear indication, that such discussions occurred, is provided by the resolutions of the so-called St. Wenceslaus Day Synod of 1418,<sup>24</sup> which permit in Article 8 the killing of major criminals by the secular authority, if there is no possibility of rehabilitation, and if the execution is allowed by God. The common good and the Law of God must be taken into account.<sup>25</sup> This interpretation contains a measure of compromise with the more favourable approach to capital punishment that was upheld by the conservative party. In general, the outcome of the Synod reveals the conservatives' influence, resisting the radical opinions, which then were already becoming apparent.

It is not possible to date a similar text, sometimes cited in connection with the Synod or, at other times, separately<sup>26</sup> the so-called *Kusy odvolané od M. Jesenice* [Matters Appealed by Master Jesenice], which likewise condones the death penalty.<sup>27</sup> Even this somewhat enigmatic text indicates that objections were raised against the death penalty, while Jesenice was rejecting them on behalf of the conservative faction at the university.

### Young Mikuláš Biskupec of Pelhřimov

Among the polemics about capital punishment, a special place belongs to a treatise devoted specifically to that subject. Its author is Mikuláš Biskupec of Pelhřimov, whose later views will be discussed subsequently, after he had attained the episcopal dignity within the Taborite Brotherhood. As noted, the concise treatise. *De homicidio*,<sup>28</sup> written prior to the year 1419,<sup>29</sup> deals with capital punishment as its main theme. I will analyse this important text in detail, particularly because it contains starting points of Biskupec's views that might have been later

<sup>24</sup> For a long time the Synod was dated to 1419, following František M. Bartoš, "Do čtyř pražských artikulů [Towards the Four Articles of Prague]." The correct date was established by Howard Kaminsky, *A History of the Hussite Revolution* (Berkeley, 1967), and Blanka Zilynská, *Husitské synody v Čechách* [Hussite synods in Bohemia] (Prague, 1985) 31-39.

<sup>25</sup> Doc., 679: "Nemo audeat dicere et tenere, quod malefici magni, si aliter mitius nec induci possunt nec corrigi, licite nullomodo possunt deo auctorisante per brachium seculare interdum occidi; ita tamen, ut ad salutem puniendi salus communi bono pro posse intendatur et ad legem dei causa cum occidendo conferatur."

<sup>26</sup> See Zilynská, *Husitské synody* 37-39.

<sup>27</sup> AČ VI: 38: "Item nad škodnými a zlymi lidmi jmá se stát poprava řádem a láskú."

<sup>28</sup> See Nikolai V. Iastrebov, *Etiudy o Petre Khelchitskom[i] ego vremeni* (Petersburg, 1908) 111-115; concerning authorship, see *ibid.* 107-111. The work was ascribed to Jakoubek of Stříbro by František M. Bartoš, *Literární činnost M. Jakoubka ze Stříbra* [The literary works of M. Jakoubek of Stříbro] (Prague, 1925) no. 62, p. 48. The authorship was restored to Mikuláš Biskupec by Pavel Spunar, *Opera Nicolai Biskupec de Pilgrim (Pelhřimov)*, in Noemi Reichrtová, ed., *Směřování* (Prague, 1983) no. 6, p. 106; Spunar *lno.* 96, p. 73; and Amedeo Molnár, "Réformation et r[é]volution: Le cas du senior taborite Nicolas Biskupec de Pelhřimov," *CV* 13 (1970) 137-153.

<sup>29</sup> Bartoš, *Literární činnost M. Jakoubka ze Stříbra* no. 62, p. 48.

somewhat modified but, on the whole, characterise his permanent convictions and the manner of his argumentation.

Biskupec's starting proposition is that the Israelites judged according to the Hebrew law, given to them by God, not according to pagan laws. Where the law required killing, they slew, otherwise they abstained from killing. They avoided killing for minor offences, such as theft. In the era of the law of grace, the bearers of authority – monarchs, dukes, judges, bishops – should observe the law of grace, not the laws of pagans or human inventions. Killing is permissible only if it is according to the intent of God. The Old Testament has a minimal relevance, and pagan laws, as well as worldly wisdom are irrelevant. Execution must be governed by the law established by Christ.<sup>30</sup>

According to Biskupec, the Old Testament imposed milder punishments on personal human vices. The judges according the New Testament should, therefore, punish more mildly, for instance, theft, but more severely blasphemy, simony, heresy and fornication. In the secular world, however, transgressions against persons are punished more severely than sins against God, such as fornication, murder, simony, etc. Thefts and other human injuries are punished by death. Authorities, not observing the Gospels but the customs of this world, mercilessly slay people for transgressions against property, but not for transgressions against God. Yet, the death penalty in accord with God's command is permissible. Nevertheless, clergy should discourage the judges' zest for cruel punishments beyond the Gospel rules, and insist on commensurability between the crime and its punishment.<sup>31</sup>

Biskupec, therefore, accepts the death penalty, if it is imposed in agreement with the Gospel, and not according to pagan laws, or human inventions. He stresses commensurability and insists that transgressions against God deserve heavier punishments than transgressions against human beings. He rejects capital punishment for theft. In his interpretation, the Law of God is the decisive norm.

Other statements can demonstrate that, with some modifications, this interpretation of capital justice prevailed at the threshold of the violent upheavals of the religious warfare in Bohemia. In a homily of 1416-1419, ascribed to Jan Želivský,<sup>32</sup> the preacher chastises the barons that they protect flawed priests, and excoriates the town fathers that they shelter prostitutes. Thieves did not use to be put to death, now they are; on the contrary, adulterers used to be slain, now they are not.<sup>33</sup> The barons have petty thieves hanged, but let major ones go free.<sup>34</sup> Here

<sup>30</sup> Iastrebov, *Etudy o Petre Khelchitskom* 113: "Non occidas, ergo secundum aliam legem quamcunque, in ewangelio non fundatum, vel impedientem et contradicentem ewangelio vel magis proprias personales iniurias vindicando, vel alias humanas personales, inconsulto Domino."

<sup>31</sup> Ibid. 115: "Si secundum Chrisostomum heretici prohibentur occidi, quanto magis alii, qui sunt minoris culpe et levioris."

<sup>32</sup> František M. Bartoš, "Nová postila Jana Želivského [A new postil of Jan Želivský]," ČČM 101 (1927) 135-148; idem, "Dvě studie o husitských postilách [Two studies of Hussite postils]," *Rozpravy ČSAV, řada SV* 65,4 (1955) 21-34. Bartoš's identification of Želivský, as author, is opposed by Josef Pekař, *Žižka a jeho doba* [Žižka and his times], 4 vv. (Prague, 1927-1933) 3:16, 4:12-13. I argue for the probability of Želivský's authorship in Jiří Kejř, "Boj o státní formu v husitském revolučním hnutí," [The battle over state forms in the Hussite revolutionary movement] PhS 2 (1956) 139 n. 56. The homily is included among Želivský's *dubia* by Božena Kopiczková, *Jan Želivský* (Prague, 1990) 217.

again punishment for theft is compared with that for adultery, and this comparison will be encountered repeatedly, with adultery viewed as a far graver sin. The death penalty is not rejected in principle.

### Taborites and Utraquists

Up to this point we have encountered the views from the academic milieu of Prague, which was tolerated even by the radical preacher of the populace of the New Town, Jan Želivský. Now we are proceeding to the opening act of the radical upheavals in the countryside, at the start of the great wave of incipient Taboritism, and even at the spring of such extremist currents such as, above all, chiliasm that affected a large group of the original Taborites.

One of the crucial concerns was whether it was permissible to conduct war and inflict casualties for the sake of the Law of God and, if so, what were the criteria of a permissible war. This is not the place to review the numerous findings on these issues but, for our purposes, we do have to be aware of them.<sup>35</sup> Articles in chiliastic documents openly urge the slaying, by fire and sword, the opponents of God's Law.<sup>36</sup> This ferocity was unleashed only in 1420; calls for pitiless warfare had not yet been heard during the "going-to-the-mountains" movement in the summer and the fall of 1419.<sup>37</sup> The escalation was linked with the rise of ecstatic chiliasm, and Jakoubek noted this shift in the Taborite thinking in February 1420, when he chastised Master Jan of Jičín, who had joined the Taborites: "Nonne primo predicastis contra occisionem et quomodo iam res sit versa in oppositam qualitatem."<sup>38</sup> Although neither the Taborite practice, nor Jakoubek's admonition, dealt specifically with the death penalty, only with the slaying of opponents in war, nevertheless it can be inferred that the courts – to the extent that a regular judiciary then existed – would not have hesitated to impose the death penalty.

The Taborite harshness is projected also into the text of the fourth of the Articles of Prague that requires prosecution of all those who committed mortal, in particular, public sins.<sup>39</sup> The article states explicitly that such sinners deserve the sentence of death: "Because those who commit such sins, as St. Paul tell us, are worthy of death; not only those who commit them, but also those who approve of them" [*Nebo kdož ty hřechy činie, jakož die sv. Pavel, hodni jsou smrti, netoliko jenž je činie, ale [i] ti, jenž jim k tomu svolují*]. This or an almost identical wording is

<sup>33</sup> Bartoš, "Dvě studie o husitských postilách," 26: "Defendunt... domini malos sacerdotes, scabini meretrices. Propter furtum non occidebant, nunc autem occidunt, sed propter adulterium accidebant, nunc autem non."

<sup>34</sup> Ibid.: "Principes... suspendunt fures huius mundi medicos, sed magnos non cu[r]ant..."

<sup>35</sup> Suffice it to refer to the chapter, "Bellum iustum," in Ferdinand Seibt, *Hussitica* (Cologne and Graz, 1965) 16-57. The issue of capital punishment, however, is not treated.

<sup>36</sup> AČ III: 209-210. Similar pronouncements, during the Synod in the House of Zmrzlík, were noted by Vavřinec of Březová, *Kronika FRB V*: 414, 454.

<sup>37</sup> FRB V: 402 ff.

<sup>38</sup> Kaminsky, *A History of the Hussite Revolution* 544.

<sup>39</sup> The harsh tone expressed the wishes of the Taborites, who opposed the milder version of the Utraquists; see Amedeo Molnár, " 'Život v dobré proměnění': Nad čtvrtým pražským artikulem," ["To change life for good": concerning the fourth Article of Prague] *Theologická revue* 16 (1983) 50-61.



contained in all the principal variants of the long version of the Articles that were written at, or close to, their origin.<sup>40</sup> The reference to St. Paul is in Rom. 1:32.<sup>41</sup> Subsequent versions of this article, especially certain in abbreviated texts, were subject to various modifications that gradually mitigated its harshness.<sup>42</sup>

Not even the radical Taborites, however, persevered in such extreme vindictiveness, or in demanding that clergy participate in the taking of lives, as one of the chiliastic documents had required: “Both secular and clerical people are duty bound to sanctify their hands with the blood of the wicked” [*Item [i]světští [i] duchovní lidé povinni jsou rukú svých v krvi zlých posvěcovati*].<sup>43</sup> The Taborite synods of 1422 and 1424,<sup>44</sup> as evident from Article 2 of their resolutions, already prohibit priests to kill, to command a military unit, or to commit physical violence.<sup>45</sup> Moreover, Article 4 states that the death penalty should not be imposed according to the Old Testament, but only in urgent cases, permitted by the New Testament.<sup>46</sup> These directives correspond to the views of Biskupec that were noted earlier and that will be encountered subsequently. It is, therefore, most probable that Article 4 reflected his influence.<sup>47</sup> Unfortunately, we lack adequate documentation concerning the judiciary in Tábor and, therefore, we cannot verify, whether the judicial restraint on death penalty was observed in actual practice.

The views of the Prague and the Taborite parties were aired during the great polemic of their respective theologians, which took place at the Prague Castle on 16 October 1424, the day which had already been agreed upon when the Praguers concluded an agreement with Žižka on the Field of Špitál [*Špitálské pole*] on 14 September 1424, shortly before Žižka's death. The University of Prague presented the Taborites with twenty-four theological propositions or articles, to which the latter promised to respond in a few weeks. Their response, summing up the principles of

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<sup>40</sup> AČ III: 216; for a German translation, see František M. Bartoš, “Manifesty města Prahy z doby husitské [Prague manifestos from Hussite times],” SPDMP 7 (1933) 271; for Latin translation, see *ibid.* 284; and FRB V: 394.

<sup>41</sup> Explicit references to Rom 1:32 are given in the Czech and German versions, but are lacking in the Latin ones.

<sup>42</sup> Concerning the modifications, see František Šmahel, *Husitské Čechy* (Prague, 2001) especially 301-308. Šmahel considers the version in FRB V: 394 as the official one, see *idem*, *Husitské Čechy* 187. No official text, however, had been formally promulgated. It, therefore, became necessary to put together a single version, toward the end of 1432, prior to the departure of the Bohemian delegates to the Council of Basel; see Charlier, *Liber de legationibus* MC I: 386-387.

<sup>43</sup> AČ III: 219.

<sup>44</sup> The Articles of the Synods are recorded in the chronicle of Mikuláš Biskupec; see Höfler 2:482-488.

<sup>45</sup> *Ibid.* 2:483.

<sup>46</sup> *Ibid.* 2:484: “Quarto praedicti sacerdotes respicientes excessus in vindictis, publicandum iudicarunt, quod nec in condemnatione reorum nec in occisione lex vetus ut huiusmodi in singulis suis iudiciariis est exequenda, neque leges humanae evangelio contrariae sequendae sunt et allegandae nec ipsa occisio unquam in aliqua causa alicui infligenda, nisi si et in quantum urgente necessitate lex nova occidere et condemnare licenciat, et per potestates legitimas suadet et autorizat...” These resolutions that limited the application of death penalty were called “a truly golden page in the history of Bohemian civilization,” by Hugo Toman, *Husitské válečnictví* [Hussite warfare] (Prague, 1898), 43.

<sup>47</sup> Toman, *Husitské válečnictví*, 41-43, ascribes the moderating influence to Žižka. That is doubtful, as we shall shortly see, when discussing Žižka's Military Ordinance.

their theology, was prepared at a Synod in Klatovy as early as 11 November 1424.<sup>48</sup> The Taborites, therefore, fulfilled their promise to give answers *in spacio aliquot septimanarum*, and the negotiations between the two parties resumed as early as 23 November, first at the Prague Castle, then at the Charles College.<sup>49</sup> The Taborite clergy, evidently under Biskupec's leadership, carefully examined the Praguers' articles, and attached to most of them their own, often very different, versions.

Surprisingly, there was no basic difference concerning Article 11 that dealt with the death penalty. Both versions declared that the Old Testament and human inventions (in conflict with the New Testament) should be disregarded; there should be no taking of life in a private dispute; and capital punishment could be imposed only by legitimate authority, acting in accordance with the New Testament. The requirement of mercy should be observed in all proceedings. The Taborites added that – in the absence of legitimate authority – the latter could be replaced by the people or by anyone filled with the spirit of God. The Old Testament may be observed, if permitted by Christ, and by the practice of the primitive church.<sup>50</sup>

Both parties accept the execution of a culprit, but only with rigorous reservations, and, in principle, counsel extreme caution in the imposition of the death penalty. The Taborite amendments, however, do admit the possibility of the death penalty also in cases, where the Praguers do not cite such exceptions.

### During the Wars of Religion

A document of a different purpose and character, the so-called Military Ordinance of Žižka dates to approximately the same time, the year 1423.<sup>51</sup> Of the twelve articles of this code of military justice, the first ten deal with discipline and organisation, the last two concern punishment of improprieties and public sins. Stern punishments, even death penalty are stipulated for violations of the ordinance. The imposition of capital punishment is made explicit in four articles: Article 1, indiscipline; Article 4, carelessness causing losses to the army; Article 7, plundering; and Article 10, desertion. In addition, capital punishment was implicitly applicable in Article 9 (injury or manslaughter), and in Article 12 that permits various types of penalties for “improprieties.” The last is an especially worrisome provision,<sup>52</sup> because the term “improprieties” is not defined and hence left evidently to arbitrary interpretations. Likewise implicitly, capital punishment could be imposed on liars,

<sup>48</sup> Höfler 2:711-724.

<sup>49</sup> Kaminsky, *A History of the Hussite Revolution* 500-516, reconstructed the negotiations on the basis of available sources.

<sup>50</sup> Höfler 2:716-717; newly published by Kaminsky, *A History of the Hussite Revolution*. On the article dealing with death penalty, see Toman, *Husitské válečnictví* 54-55.

<sup>51</sup> See text in the appendix to Toman, *Husitské válečnictví*. See also František M. Bartoš, *Žižkův duch, povaha a listy* (Prague, 1924) 75-80; Bohuslav Havránek, ed., *Výbor z české literatury doby husitské 2 vv* (Prague, 1963-1964) 1:502-507. Concerning editions and literature on the topic see Pavel Spunar, “Soupis písemné pozůstalosti Jana Žižky z Trocnova,” [Catalogue of the literary legacy of Jan Žižka of Trocnov] JSH (1974) 46-47 [special issue published on the 550<sup>th</sup> anniversary of the death of Jan Žižka].

<sup>52</sup> As pointed out by Pekař, *Žižka a jeho doba* 2:190.

thieves, drunkards, fornicators, adulterers, and other comparable sinners, who were to be “punished... according to the Law of God.”

This brief survey of Žižka’s Military Ordinance shows the implacable sternness of punishment for acts that endangered the safety of the troops, and their moral standards. Modern historians were taken aback by its harshness, especially the frequent references to the death penalty.<sup>53</sup> Without intending to minimize the severity of Žižka’s Ordinance, it is necessary to realize that military affairs required unconditional discipline and strict order. The security of the army was the overriding objective. In addition, the punishment of improprieties and public sins was entirely in harmony with the original Taborite strictness that had found its way into the Fourth Article of Prague. Žižka does not shirk even from the supreme punishment.<sup>54</sup>

It is well known that even after Žižka’s death the ferocity of the field armies had not ceased, nor did diverse resolutions of the Bohemian diets, or the great commune [*velká obec*] of Prague, hesitate to threaten culprits with the loss of life and estate. Shortly after the great spring offensive of 1421, which subjected to the Utraquists a large portion of northwestern Bohemia, the great commune of Prague felt the need to adopt the rules “for the suppression of various errors and impudence” [*pro odrazenie všlikterakého domněnie bludův a vštečnosti*] that stemmed from dogmatic deviations or clerical agitation.<sup>55</sup> A series of articles provided for loss of life and estate, not only for the perpetrators, but also for their protectors. Such punishments were stipulated for priests, who did not agree with the Utraquist masters and priests of Prague; further for priests who congregated elsewhere than in the town hall; and for those individuals who disobeyed the orders for military mobilization. Moreover, the punishment applied to those, who caused schisms or disputes in the military formations; those should be executed immediately. In addition, an assembly of fifty orthodox men was to guard against Pikartism and other similar errors, whose advocates should be put in jail. It is evident that this resolution was directed, above all, against the adherents of extreme Pikart views, in particular priests, who sought to influence public opinion in Prague.<sup>56</sup> Exactly in this period, on 23 July 1421, a Prague burgher, the cobbler Vaněk, was put to death for insulting the sacrament of the altar.<sup>57</sup>

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<sup>53</sup> Pekař, *Žižka a jeho doba* 2:189-192, concludes: “Žižka’s Ordinance is concerned only with obedience and order in the camp and in the field, and about division of booty; it has no other interests, and thus also here Žižka’s God is presented to us as a ruthless avenger, paying no heed to the vanquished and suffering.” Similarly, Amedeo Molnár, “Na okraj Žižkova rozchodu s Tábořem [On the margins of Žižka’s separation from Tabor],” *JSH* (1974) 34-35, states that the Ordinance represents “an unheard-of usurpation of the right to threaten and execute the death penalty... [Žižka] viewed the right to impose death as a part of his contest for the Law of God...;” see also idem, “Život v dobré proměnití,” 56. František Šmahel, *Husitská revoluce*, 4 vv (Prague, 1993) 3:141-142, notes realistically that, in Žižka’s Ordinance: “... the severity of penalties did not exceed the customary norms.” The ideological root of Žižka’s struggle against sin was recently traced to the Law of God by Thomas A. Fudge, “Crime, Punishment, and Pacifism in the Thought of Bishop Mikuláš of Pelhřimov, 1420-1452,” *BRRP* 3 (2000) 78-79.

<sup>54</sup> He was unlikely to influence the moderate tone of the Taborite synods of 1422 and 1424; see also n. 47 above. The moderation was more likely due to Biskupec.

<sup>55</sup> “Usnesení velké obce z 21. července 1421,” [The resolution of the great commune of 21 July 1421] *AČ* I: 204-206.

<sup>56</sup> See Jiří Kejř, *Mistři pražské university a kněží táborští* [The masters of Prague University and the priests of Tabor] (Prague, 1981) 59-60.

The threat of the death penalty received added visibility in September 1421. On the initiative of Želivský, Jan Hvězda of Vicemilice (known as Bzdinka) was appointed a captain with the extended authority to impose on all those disobedient an appropriate punishment, including the death penalty.<sup>58</sup> During a military campaign, leaving or deserting the army was made punishable by the loss of life and estate.<sup>59</sup> This provision is reminiscent of one of the articles of Žižka's Military Ordinance that was issued soon afterward.<sup>60</sup>

The way justice was administered under Captain Bzinka is illustrated by the execution of Lord Jan Sádlo of Kostelec.<sup>61</sup> This outstanding nobleman and a faithful Utraquist wished to clear himself of the charge of reneging on a military obligation, before the town councillors of Prague. Although provided with a guarantee of immunity (*glejt*), he was arrested on the arrival at the city hall and, without any proper judicial procedure, beheaded. It is hard to avoid suspicion, that Želivský's personal grudge against Lord Sádlo played a role in this atrocity.<sup>62</sup>

Similar sternness characterizes another document that concerned both towns of Prague, the New as well as the Old, and that presaged Želivský's downfall from his status as the bearer of supreme authority in Prague.<sup>63</sup> The edict concerning the two towns of Prague, proclaimed on 5 February 1422 by respected nobles [*ubermané*], including Žižka, established a new municipal order, appointed new councils, and tightened up the town administration.<sup>64</sup> The edict established a quartet of spiritual administrators, including Želivský and three of his opponents among the University masters. As a result, Želivský's power was marginalized. The quartet was to watch over religious affairs and to correct improprieties. Anyone opposing the four was to be banished, and in the case of any priest who persisted in his errors: "let him be executed, as it is proper for a stubborn heretic."<sup>65</sup> Finally, whoever would opposed the edict, was to be severely punished. In fact, the town officials were instructed that such individuals should be banished and subject to the death penalty; their estates should be confiscated and used for public welfare.<sup>66</sup>

It is, therefore, evident that during the political unrest and attempts to usurp power in the city of Prague, the threats of capital punishment served as a normal means of deterrence. Although records of judicial decisions are lacking, it is difficult to doubt that capital punishment was actually meted out. It is enough to recall the

<sup>57</sup> FRB V: 508.

<sup>58</sup> FRB V: 514: "...eidem plenariam potestatem dans... ut vicelicet inobedientes per captivitatem aut decollacionem coherceat aut de civitate bannire vel aliam, quamcumque sibi videretur, poterit penam inflingere..."

<sup>59</sup> Ibid.: "nullus sine scitu capitaneorum ab exercitu redeat, nec de bello, si pugnare contigerit, sub pena colli et omnium bonorum perdicione subterfugiat quovismodo."

<sup>60</sup> Toman, *Husitské válečnictví* 15.

<sup>61</sup> FRB V: 515.

<sup>62</sup> For details, see Kopiczková, *Jan Želivský* 163-167; and Šmahel, *Husitská revoluce* 3:103-104. See also Pekař, *Žižka a jeho doba* 4:76-79.

<sup>63</sup> For a new assessment of the entire episode, see Šmahel, *Husitská revoluce* 3:112-119.

<sup>64</sup> AČ I: 209-212.

<sup>65</sup> Ibid. 211.

<sup>66</sup> Ibid. 212.

execution of Želivský and his supporters without a proper judicial verdict, and the subsequent revenge by indignant followers of Želivský on the town councillors, who were held responsible for his death.<sup>67</sup> All such deeds resulted from the temporary ascendancy to power of a vengeful faction, and they did not reflect any rules established by a legitimate legal authority. The earlier-mentioned judicious [*ubermanský*] edict of 5 February, because of dissent, was never implemented.

After the arrival of Duke Sigismund Korybut, a firmer order was introduced in Prague by a resolution of the great commune on 28 May 1422.<sup>68</sup> Likewise, this document provided for capital punishment. It stated, it is true, that all antagonisms, springing from the death of Želivský and his followers, should cease, but stipulated that whoever did not heed this injunction would lose his life and estate for the benefit of His Ducal Grace and the commune of Prague. The same penalty was applicable for holding secret assemblies. To prevent quarrels, it was stated that who unsheathed the sword would pay with his hand, and whoever injured another would pay with his neck. This was not an innovation. The loss of a hand was from times immemorial a common punishment for certain types of commercial malfeasance, or for violations of the peace of the land, or the peace of the city.<sup>69</sup> The great commune was presumably led to re-emphasize the provision in order to prevent violence in the time of the current unrest. Finally, as an expression of special moral earnestness, it was added that if a householder maintained a prostitute, both of them should be put to death.

A supplementary provision by the great commune augmented the original document only two days later on 30 May 1422.<sup>70</sup> Counterfeiting was added to the roster of capital crimes. Likewise, interference with regular judicial proceedings was frowned upon. Whoever attempted to impede the courts became liable “to Duke Korybut and the barons” with his neck and his estate.<sup>71</sup>

The threats of capital punishment were directed mainly against political opponents and religious dissenters.<sup>72</sup> The rules were not clear-cut; accusations of “improprieties” could be arbitrarily construed and interpreted. Nevertheless, a certain positive pattern can be discerned that sought to prevent real criminal acts that endangered civil peace and economic life. This was evident from the prohibition to use the sword to settle disputes; to interfere with judicial proceedings, or to counterfeit money.

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<sup>67</sup> Symptomatically, the priest Vilém blamed the Prague Masters, particularly Jakoubek, that their influence, or even instructions, had led to the death of many of Želivský's partisans; see AČ III: 237-238.

<sup>68</sup> AČ I: 213.

<sup>69</sup> His, *Das Strafrecht des deutschen Mittelalters* 2:99; Solnař, *Z dějin českého zemského práva trestního* 17-18.

<sup>70</sup> AČ I: 214-215.

<sup>71</sup> AČ I: 215. Likewise, according to the concurrently adopted Municipal Ordinance, the members of every craft were to select four members who were authorised to maintain peace in the town, as well as in their craft. Whoever would interfere with their responsibilities, was considered a traitor to the Law of God, a designation, which implied a candidacy for the death penalty; see *ibid.* 214.

<sup>72</sup> Such a threat had been already pronounced against the Utraquists by the resolution of the Brno Diet of 17 November 1421; AČ III: 234.

The Saint Gall Diet of 1 November 1423 continued with the monetary concerns and ordained that the little Groschen could be minted only in Kutná Hora and nowhere else. Whoever would disobey this injunction, should be treated as “a falsifier of money” [*falešník peněz*] and a despoiler of the land and, in consequence, lose his head and estate.<sup>73</sup> Likewise, public roads were to be protected against robbers, and any evildoer was to be punished “as befitted a public robber and a despoiler of the land,” which meant once again the penalty of death.<sup>74</sup>

It cannot be denied that – with the passage of time – the provisions against political opponents tended to diminish, and even a rather conciliatory spirit began to manifest itself. An example of the latter was an agreement among the towns of Prague from 1428, which gave an opportunity to surrender and ask for mercy to all those, who had participated in the attempt of Lord Hynek of Kolštejn to seize power in the city. Such would be forgiven; but even those who would not ask for mercy, should not be immediately executed, but subjected to appropriate judicial proceedings. Only those, whose guilt was proven, were “to suffer, as befits and is proper for traitors.”<sup>75</sup>

One of the few references to the imposition of the death sentence can be found in this period. A certain Makovec was beheaded on 7 March 1428 because of “his evil deeds, adultery and rape of virgins and widows during the war.”<sup>76</sup> This was, however, the case of an ordinary criminal, who would be subject to capital punishment even according the mildest of the Utraquist criteria.

## Later Theological Polemics

Theological polemics about the permissibility of capital punishment received an expression in the resolutions of the Synod that was held at the beginning of 1432.<sup>77</sup> They established the principles that the Old Testament should not be considered in weighing the question of guilt; that no one should be put to death out of revenge or in a personal dispute; that no one should be executed who could be rehabilitated; and that the death penalty should be imposed only, if it were inevitable according to the New Testament, and then only by *potestas legitimas*, or in the

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<sup>73</sup> AČ III: 244.

<sup>74</sup> Ibid. 245. The theme of securing the roads for the maintenance of order also characterized the Agreements of Zdice [*úmluvy zdické*] which two years later adopted the same provision; see Josef Macek, “Úmluvy zdické,” AUC – Philosophica et historica 2 (1958) [Sborník prací k počtě 75. narozenin akademika Václava Vojtíška] 199, 207.

<sup>75</sup> AČ I: 221.

<sup>76</sup> *Starší letopisové čeští*, ed. František Palacký (Prague, 1829) 74.

<sup>77</sup> About the Synod, see Zilynská, *Husitské synody v Čechách* 20-21; the documentary evidence, for the Synod and for the concurrent session of the Bohemian Diet, is sorted out in *ibid.* 69-73. I have used the Czech version in AČ III: 269, as well as the Latin one in *Confessio Taboritarum*, ed. Amedeo Molnár and Romulo Cegna (Rome, 1983) 343. For the Taborites' response, see *ibid.* 351. Another Latin version is in MC I: 183. The standpoints of the Utraquist professors and priests and those of the Taborite clergy roughly repeat the principles already established in 1424; see n. 43-50 above. It should be noted that the resolution concerning the justification of the punishment's imposition only “per potestates legitimas, etc.” is contained in the Czech version, and in the Latin one in *Confessio Taboritarum*, but not in the Latin version in MC or in the Taborite response.

Czech version: *skrze moci zřiezené*. In addition, considerations of pity and mercy should come into play. It is beyond doubt that Rokycana's views are reflected in these concepts. In particular, the emphasis on "legitimate authority" [*moci zřiezené*] echoes his calls for legitimacy and rejection of arbitrariness.

Let us now turn from resolutions and proceedings of the great commune, synods, and other assemblies again to literary works, which originated in that time, and let us follow their opinions and polemics. As early as the autumn of 1420, Vavřinec of Březová had recorded in a large work in verse, *The Quarrel of Prague with Kutná Hora* [Hádání Prahy s Kutnou Horou], their mutual accusations of murderous deeds. The hypostatized Kutná Hora, at that time a sworn enemy of Utraquism, chastises Prague for murdering and burning priests, whereupon Prague, as the representative of Utraquism, responds:

If it is proper to burn,  
To slay according to the law,  
Those who counterfeit money and the Groschen,  
Who rob and murder others,  
Then the more so are worthy of fire,  
Of all kinds of execution,  
Who falsify the venerable faith...<sup>78</sup>

Transgressions against the true faith are thus considered much more reprehensible than the garden-variety crimes that, by a common agreement, are punishable by law. Vavřinec does not appear to be in the least disturbed by the brandishing of the death penalty.

We have already encountered Biskupec's treatise, *De homicidio*, that was written before the outbreak of the religious warfare. His opinions concerning the capital punishment, however, do not turn sterner during wartime; quite to the contrary, his tone notably softens. His *Postila na Apokalypsu*, which assesses the condition of the Taborite brotherhood roughly from 1425 to 1426,<sup>79</sup> quite openly voices his opposition against any kind of slaying, because every one could be rehabilitated.<sup>80</sup> Likewise, he rejects the facile imposition of the death penalty under the Municipal Laws of Magdeburg that were in use in many Bohemian towns since the thirteenth century.<sup>81</sup> Presumably, Biskupec's distaste for capital punishment has its source in the teaching of the Waldensians.<sup>82</sup>

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<sup>78</sup> Slušie-li ty upáliti / podle práva umořiti, / ješto groš, peniez falšují, / lidi lúpije [i] mordují, / jsúť hodnějšie upálenie, / všelikého umrtvenie, / ještoť vieru ctnú falšují... / See *Husitské skladby budyšínského rukopisu* [Hussite compositions in the Budyšín manuscript], ed. Jiří Daňhelka (Prague, 1952) 115-116.

<sup>79</sup> František M. Bartoš, "Táborské bratrstvo let 1425-1426 na soudě svého biskupa Mikuláše z Pelhřimova," [The Taborite brethren during the years 1425-6 at the court of its bishop Mikuláš of Pelhřimov] ČSPSČ 29 (1921) 103-122, containing numerous excerpts from the text.

<sup>80</sup> "Ego, ut sepe publice profiteor et confessus sum, ad nullius hominis mortem consencio, quia quocumque modo potest reformari." Ibid. 106.

A burning issue, throughout the period under consideration, is the question, whether the death penalty is applicable to heresy.<sup>83</sup> The gist of opposing arguments is contained in an extensive manifesto of November 1431, apparently of Taborite origin with the likely participation of Biskupec. Originally in German, the document was posted on the door of the city hall of Basel at Christmas time. We know only its Latin translation, preserved in the treatise, *Liber de reductione Bohemorum*, by Jan Stojković of Dubrovnik.<sup>84</sup> The document contains, above all, a stern condemnation of clerical vices, which culminates, in Article 20, with a critique of judicial proceedings against heretics and of their execution by fire. The manifesto seeks support in the New Testament, which counsels avoiding heretics, and isolating them from the community of believers, but not slaying them.<sup>85</sup> It is essentially a resolute rejection of the views of Aquinas, who condoned the death penalty for heresy,<sup>86</sup> as well as of the pitiless practice of the courts of the Inquisition.

Considerations of the death penalty can be found in Biskupec's other writings, and in the resolutions of the Taborite party, in the formulation of which he had participated. Let us turn our attention to his statements at the Council of Basel.<sup>87</sup> As a representative of Tábor, Biskupec was entrusted with the defence of the Prague Article (of Taborite origin) concerning the punishment of public sins. He focused his critique, above all, on the vices of clergy, but he did not neglect discussing other issues that related to the punishments for sin. Mikuláš, indeed, acted as a stern chastiser of all sinful acts, and as an advocate of their appropriate punishment; nevertheless, he expressed serious reservations vis-à-vis capital punishment and its misuse. Shortly after the opening paragraphs of his speech, he rejected – by and large in agreement with his treatise, *De homicidio* – the misuse of capital punishment. He repeated his standard position that the death penalty should not be imposed according to the Old Testament, or according to secular laws that were inconsistent with the law of the Gospel. It should be administered only in accordance with the law of the Gospel, and according to the practice of the primitive church.<sup>88</sup>

<sup>81</sup> “Discunt iudicia quidam non a Christo, sed a ... Nayburgensium homine[s] mortificare de facili.” Ibid. 106.

<sup>82</sup> This is the judgment, on the basis of Biskupec's *Výklad na Apokalypsu* and his treatise, *De homicidio*, in Molnár, “Réformation et r[é]volution,” 146. As for the teaching of the Waldensians, may it suffice here to refer to the excerpt from the Inquisition report of 1398, in Jaroslav Goll, *Chelčický a Jednota v XV. Století* (Prague, 1916) 36 n. 62: “Item dampnant et reprobant imperatores, reges et principes... iudices et scabinos propter quodcunque homicidium, quamcunque iudicialiter et iuste factum.”

<sup>83</sup> Already Jan Hus, *De ecclesia*, ed. S. Harrison Thomson (Prague, 1958) 138, sharply rejected the assertion of “the eight doctors” that, whoever disobeyed the Roman Pope, should be put to death.

<sup>84</sup> MC I: 153-170.

<sup>85</sup> MC I: 168: “... nunquam factum est, quod sancti apostol[i] domini nostri Iesu Christi hereticos aut errone[o]s occiderint...” See also Bezold, *K dějinám husitství* 34.

<sup>86</sup> Aquinas, *Summa theologica* II/2, q. 11, art. 3.

<sup>87</sup> Concerning the teaching of Biskupec about guilt, punishment, and rejection of violence, see Fudge, “Crime, Punishment, and Pacifism in the Thought of Bishop Mikuláš.” For the statements by Biskupec at Basel, and for references to his concern with the death penalty, see *ibid.* 88-90

<sup>88</sup> František M. Bartoš, ed., *Orationes, quibus Nicolaus de Pelhřimov... et Nicolaus de Znojmo... articulos de peccatis puniendis et libertate verbi dei in concilio Basiliensi anno 1433 ineunte defenderunt* (Tábor, 1935) 5: “...quod nec in condemnatione reorum nec in occisione lex vetus ut



Against the objections of his opponent, Giles Charlier, Biskupec restated his position more emphatically and fully during his second presentation two months later. He appealed to the views of famous Church doctors, who – acting as fathers rather than tyrants – posited lesser penalties than death for the period of the law of grace. Mikuláš repeated his thesis that the ways of Christ and of the primitive church were worthy of following, not the ways of the Old Testament or of secular laws. He added that he could not condone capricious executions, especially since their outcome was not subject to rectification. Nevertheless, he recognized the need to punish those guilty of public mortal sins, regardless of their status in life.<sup>89</sup>

Charlier, in turn, argued against the assertions of Biskupec. He ruminated about the nature of guilt and punishment,<sup>90</sup> appealing also to the Epistle to the Romans 1:32 and 13:4. He concluded that a judge was permitted to sentence to death those, whom God had condemned, but he did not mean that all crimes should be punished by death, admitting that some should not be.<sup>91</sup> Charlier repeated once more that a judge was permitted to sentence to death those, whom God had condemned.<sup>92</sup> He was willing to admit that adultery was a graver sin than theft, but there were good reasons for punishing theft more heavily: People thirsted more for their neighbours' property than for their neighbours' spouses; therefore – although a lesser sin – theft should be punished more severely.<sup>93</sup> At this point Jan Rokycana intervened in the debate and opposed Charlier's arguments for the death penalty. He declared that in Prague no one was hanged for a number of years, because the Old Testament had not stipulated capital punishment for theft.<sup>94</sup> Again comparing adultery with theft, Rokycana declared that adultery was a graver sin than the theft of as many as a hundred horses.<sup>95</sup> In concluding his response, Biskupec called attention to the difference between Charlier's standpoint and his own, and once more denied the propriety of the death penalty.<sup>96</sup> Moreover, in the

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huiusmodi in singulis suis iudiciariis est exequenda nec leges humane, evangelio contrarie, sequende sunt et allegande, sed lex specialiter evangelica et praxis ecclesie primitive in punicione reorum est attendenda.”

<sup>89</sup> Bartoš, ed., *Orationes, quibus Nicolaus de Pelhřimov* 53: “...quomodo notabiles doctores pro tempore legis gratie minores penas citra mortem pro puniendis peccatoribus inveniebant, cupio, quatenus iudices in punicione reorum habeant se tamquam patres, non tamquam tirani, non iudicialia legis veteris, ut huiusmodi, nec leges humanas, legi evangelice dissonas, aspicientes, sed processum Christi et praxim ecclesie primitive. Fateor, ex quo non possum restituere vitam occiso, non gaudebo in talibus occisionibus nec faciliter ad mortem alicuius consenciam. Nichilominus tamen cordialiter exopto, ut omnia peccata mortalia publica puniantur ad reformationem hominis peccantis sine distincione personarum.”

<sup>90</sup> Charlier distinguishes, in the concept of punishment, punishment as such that applies to transgressions of the past, and a component of prevention that discourages transgressions in the future; see MANSI XXX: 415. This pronouncement was also noted by the author of the so-called *Deník Petra Žateckého* [The diary of Petr of Žatec]; see MC I: 341.

<sup>91</sup> MANSI XXX: 404: Ergo quos Deus iudicet ad mortem, potest iudex licite interficere; dico, quod illud dictum ... est verum, nec est universale nec requivalet universali ... aliqua crimin[a] lex humana potest puni[r]e licite mortis supplicio, aliqua, non omnia... nec adeo demens sum, quod dicere vellem omnia peccata publica lege humana esse punienda supplicio mortis.”

<sup>92</sup> Ibid. 405.

<sup>93</sup> Ibid.: “Sic in proposito proniores videntur homine[s] ad capiendum aliena, quod sit in furto, quam adulterium, gravior pro eo poena determinat[a] est.”

<sup>94</sup> MC I: 341.

<sup>95</sup> Ibid.

Council session of 7 April, he returned to his debate with Charlier and, among other matters, reaffirmed his conviction that, according to the Law of God, nobody should be punished by death.<sup>97</sup>

The protest against capital punishment, as expressed by Biskupec and Rokycana, was based mainly on the theological reasons that were deduced from the Law of God. It is another question whether these principles were respected in the actual judicial proceedings. It may be admitted that Rokycana was correct in maintaining that no thief had been executed in Prague for a long time. Yet, because of the lack of documentation, it is difficult to judge to what extent the theologians' views were reflected in the decisions of the courts.<sup>98</sup> Let us not forget that Master Jan of Přebor chastised the Taborite clergy for participating in tribunals that had pronounced sentences of death.<sup>99</sup> To this we must juxtapose the voice heard from the Roman side when Master Ondřej of Brod alleged that the Taborites accepted into their midst any kind of criminal; that nobody was given an appropriate punishment; and that neither thieves, nor those committing sacrilege or robberies were prosecuted.<sup>100</sup> The two accusers attacked the Taborites from two different positions, but with an equally intense prejudice. Nevertheless, from Ondřej's statement, we may infer that, more likely, capital punishment was not imposed frivolously.

As a rarity, we do have a report about the trial of a criminal. Čeněk of Sendražice, who was convicted of theft, robbery and other misdeeds by the council of the New Town of Prague on 7 May 1433. As he was led to the scaffold, a certain maiden Markéta, with several other women, asked the councillors to pardon the culprit and to give him to Markéta for a husband. The councillors consulted the assembled townspeople, who agreed to grant pardon. The prisoner was taken to the town hall and, having promised to reform, was betrothed to the maiden.<sup>101</sup> Since the earlier-mentioned execution of Makovec, this is the first documentation of a major criminal trial. Only two days later, however, two criminals were released from jail in honour of the delegation from the Council of Basel.<sup>102</sup>

Biskupec was by no means alone in rejecting capital punishment. We have already encountered Rokycana's view voiced at the Council of Basel and in his

<sup>96</sup> Bartoš, ed., *Orationes, quibus Nicolaus de Pelhřimov* 81: "... ego per commemoracionem punicionis non intelligo supplicium mortis corporalis, sed penam citra mortem condignam."

<sup>97</sup> MC I, 347: "... de homicidio dico, quod secundum legem Dei communem non licet per homicidium puniri."

<sup>98</sup> The lack of reliable documentation for actual judicial practice is repeatedly noted by Karel Malý, *Trestní právo v Čechách v 15. a 16. století* (Prague, 1979) 28 n. 97; idem, "Zločin a trest v české stavovské společnosti," [Crime and punishment in Czech feudal society] in *Pocta akademiku Váněčkovi k 70. narozeninám* (Prague, 1975) 93.

<sup>99</sup> Josef Macek, ed., *Ktož jsou boží bojovníci: čtení o Táboře v husitském revolučním hnutí* [Who are the warriors of God: reading on Tabor in the Hussite revolutionary movement] (Prague, 1951) 285: "sami jsou v radách bývali, když sú kněžíe aneb jiné na smrt odsuzovali."

<sup>100</sup> Ondřej z Brodu, *De origine taboritarum*, ed. Jaroslav Kadlec (Tábor, 1980) 27, climaxed his statement by the assertion: "Non errant furce seu patibula, non maleficum quemquam digna pena vel ulcio sequebatur, nec fures nec sacrilege aut spoliators tunc plectebantur." This part of the text was already noted by Bezold, *K dějinám husitství* 23 n. 64.

<sup>101</sup> Tomek, *Dějepis* 4:572; Urbánek, *Věk poděbradský* 3:766.

<sup>102</sup> Tomek, *Dějepis* 4:573.

subsequent writings his opinion did not change.<sup>103</sup> He frequently gave as the reason that even judges were sinful and that, at times, they deserved to be punished themselves.

Another consistent opponent of the death penalty was Petr Chelčický, who – in addition to scattered remarks – wrote an entire treatise on the topic.<sup>104</sup> He dwelt on the fact that the transgression of the seventh commandment by theft was more likely to be punished by death than the violation of other commandments that were punished more severely in the Old Testament.<sup>105</sup> The New Testament did not mandate the death penalty for thieves.<sup>106</sup> Chelčický recommended that the thief be subjected to forced labour by which he would render satisfaction for the theft. It would be a deterrent solution because “many, rather than being subjected to such labour, would not wish to lend their hand to thievery” [*nejednomu, než by měl v takovou robotnú práci poddán býti, nechtělo by se k zlodějství ruky ztáhnúti*].<sup>107</sup> Chelčický’s disquisition does not rest on theoretical legal norms, but primarily on theological reasoning, underpinned by the knowledge of actual judicial practice.

Among the critics of the opponents of capital punishment was conspicuously Jan of Přebor. He voiced his opinion in a lengthy, apparently unpublished, treatise against Wyclif, in which he took up from his sharp polemic with Peter Payne. Přebor defended the legitimacy of capital punishment, and disagreed with the notions that judges should not sentence apostates to death, and that even heretics were protected from execution by the New Testament.<sup>108</sup>

Was the criminal of Bohemia affected in the long run by the debates about the death penalty that were carried on during the religious wars? Not long after the end of the wars, in 1440, we find some evidence to the contrary in the protocol of the peace guarantee [*zemský mír*] of the circuit of Boleslav, soon followed by similar provisions in four other circuits of Bohemia. These edicts, designed to ensure public security, once more returned to sternly phrased provisions for capital punishment in the cases of robbery, arson, and counterfeiting.<sup>109</sup>

The persistence of the earlier norms of criminal law is also attested by the so-called Laws of Soběslav [*Soběslavská práva*], written about the same time, that served as a legal compendium for the Old Town of Prague.<sup>110</sup> The opening sections

<sup>103</sup> František Šimek, *Učení M. Jana Rokycany* (Prague, 1938) 209-210.

<sup>104</sup> Jaroslav Boubín, *Traktát Petra Chelčického o trestu smrti*, [The tract of Petr Chelčický on the death penalty] MHB 4 (1995) 279-295; and the text in *ibid.* 296-303.

<sup>105</sup> *Ibid.* 298.

<sup>106</sup> *Ibid.* 297.

<sup>107</sup> *Ibid.* 298.

<sup>108</sup> Jana Zachová and Jaroslav Boubín, “Monumentální soupis Viklefových bludů z kapitulního sborníku D 49,” [Monumental catalogue of Wyclif’s errors from the capitular miscellanea D 49] MHB 7 (2000) 133-174, include a list of Wyclifite propositions, which Přebor subjected to his critique, in particular, Article 308, “Quod iudices non debent prevaricator[e]s [i.e., apostates, J. Kejř] corporaliter occidere,” and Article 309, “Quod nulli heretici sunt a iudicibus occidendi secundum legem novam,” *ibid.* 160. Přebor’s reasoning still needs to be fully analysed.

<sup>109</sup> Protectors of robbers were to be punished just like the robbers; arsonists were to be executed “as was appropriate for arsonists,” and counterfeiters “as falsifiers and despoilers of the common good;” AČ I: 252. For an implication of similar punishments, see also *ibid.* 260.

of the code contained the rules of conduct for the town councillors in the exercise of their official functions. Already in this early part, there were provisions for capital punishment, applicable to those councillors who misused municipal funds for private purposes, or who revealed confidential decisions of the town council.<sup>111</sup> There was also a provision for a judge's fee from the property of an executed thief – an indication that death was considered the normal punishment for theft.<sup>112</sup> Likewise, the second part of the code, the Old Prague Laws [*Staropražská práva*], stipulated the death penalty for breaking an official seal, for unauthorized sale of goods belonging to some one else, and for theft from the vineyards. The same penalty threatened a burgher who would participate in usury with the Jews.<sup>113</sup>

### Premature Humaneness

We shall terminate here our consideration of the opinions on death penalty that were current during the Bohemian Reformation. At this point in time, it is obvious that capital punishment remained a part of criminal justice, and that the rejection of the death penalty had not prevailed in judicial practice. It is probably correct to state that this reaffirmation was connected with the installation of King Sigismund in 1436.<sup>114</sup> The monarch, sanctioning the execution of Lord Roháč of Dubá and his companions, symbolically signified a return to the traditional forms of punishment.

This concise survey, that has assessed the views of Bohemian reformers on the nature of crime and punishment, has revealed the recurrence of several major criteria. From the theological standpoint, there was the repeated rejection of punishment according to the stern rules of the Old Testament and the secular laws, and the use of punishment for personal gain or for revenge was found inadmissible. The new approach was to be based on the New Testament rules, that is, on the principle of mercy, and on the example of the primitive church. Yet, capital punishment was not excluded absolutely, it was admitted, if the New Testament condoned its application.

One of the constantly repeated stipulations was a commensurability of punishment and the crime. This led to comparing the prosecution for theft with that for adultery. The latter was considered a particularly serious crime, and the heavier punishments for theft, than for adultery, were viewed as paradoxical. In the same sense, comparisons with murder were brought up. In general, however, theft was viewed as the emblematic crime. Accordingly, Rokycana boasted in Basel that, for a number of years, no thief had been put to death in Prague.

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<sup>110</sup> Published in Rudolf Schranil, *Die sogenannten Sobieslaw'schen Rechte* (Munich, 1916). We can safely disregard earlier speculation dating the document to the beginning of the Bohemian wars of religion.

<sup>111</sup> Ibid. Article 20, p. 62; article 22, p. 62.

<sup>112</sup> Ibid. Article 50, p. 67.

<sup>113</sup> Ibid. Article 59, p. 69; Article 122, p. 93; further in Supplements to the Old Prague Laws [*Dodatky k právům staropražským*], ibid. Article 22, p. 92; Article 32, p. 95.

<sup>114</sup> Tomek, *Dějepis* 8:318.

Yet, if the execution of criminals, especially of thieves, was frowned upon, this stand did not imply an unconditional opposition to the death penalty, inasmuch as even the rules of the New Testament condoned capital punishment under certain circumstances. If within the theological discussions of the Bohemian Reformation, voices of prominent scholars and statesmen (such as Biskupec, Rokycana, Želivský and, particularly, Chelčický) denounced the death penalty, the aim was not its abolition in principle. It must be recalled that – despite the clamour during the Bohemian Reformation for moderation in imposing criminal punishments – in practice, the various diets, synods, and municipal councils did not shirk from intimidating references to the death penalty. In addition, even during the religious wars, there were those, like Příbram and other conservatives at the University, who overtly supported the traditional view of capital punishment. Moreover, the advocates of moderation helped to undermine their own case, when they eschewed the solid ground of legal theory, and appealed rather vaguely to the New Testament, and to somewhat nebulous moral principles.

The intellectual spokesmen for the Bohemian Reformation, therefore, did not bring about any substantial lasting change in the theory or application of criminal justice. Their sentiments were far ahead of the existing conventional wisdom to be credible for the judicial practice of the fifteenth century. Only half-a-millennium later, the time would be ripe for a real appreciation of their humane standpoint.

(Translated from the Czech by Zdeněk V. David)

