

Lenka ŠMÍDOVÁ MALÁROVÁ, Brünn

## Sexual offences in Arnest's provincial statutes from 1349\*

*Arnest's provincial statutes from 1349 represent the first codification of medieval church law issued in the territory of the historical Czech lands. Several of the total of 86 articles include rules on matrimonial law, the prohibition of clerical concubinage and serious sexual offences. The aim of this paper is to introduce these offences and the penalties imposed on their perpetrators.*

**Keywords:** adultery – canon law – clerical concubinage – Czech lands – medieval church – sexual offences

### Arnest's provincial statutes

#### Introduction and brief presentation

Arnest's provincial statutes from 1349 represent a significant source of medieval church law issued in the Czech lands.<sup>1</sup> The first archbishop of

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<sup>1</sup> Arnest's provincial statutes from 1349 are accessible in two modern editions. Firstly, in an edition from the year 1972, when the text of the statutes was edited by ZELENÝ, Councils and Synods; secondly, in 2002 in a re-edition by POLC, HLEDÍKOVÁ, Pražské synody 115–164. The question of Arnest's provincial statutes and their significance for Czech history has been discussed to some extent in literature. VYSKOČIL, Arnošt z Pardubic 289–304, focused on the content of Arnest's provincial statutes in his monograph about church administration in the Prague diocese (later archdiocese) under Arnest of Pardubice. The monograph was published in 1947 and is in many ways obsolete. One of the author's goals was to analyse the content of Arnest's provincial statutes but his interpretation is very brief. This applies to several Articles, for example Art. 38, 61, 64, 85 and 86 etc. (according to the numbering in the edition by Polc and Hledíko-

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vá, see above). The legal character and importance of Arnest's provincial statutes was pointed out by KRAFL, Arnoštova provinciální statuta. See his text published in international conference proceedings, which was dedicated to Arnest of Pardubice's personality, life and work. From the works of this author who deals with church administration and law we must mention his other publications which are directly connected to Arnest's provincial statutes. See KRAFL, K dochování statut, about the statutes issued by the Archbishops of Prague deposited in the Moravian Provincial Archives (Brno). See also KRAFL, Legátské a provinciální zákonodárství, focused on legatine and provincial legislation for the Olomouc Diocese since the mid-13<sup>th</sup> century. (The text was published also in English: KRAFL, Provincial and Legatine Statutes.) The same author referred to the importance of Arnest's provincial statutes from 1349 in his monograph about medieval synods and the statutes of the Diocese of Olomouc. (KRAFL, Synody a statute 101f; the book was published bilingually – Czech/English). Finally, we refer to KRAFL, Církevní právo 105, about church law in Bohemia and Moravia in the 13<sup>th</sup>–15<sup>th</sup> centuries, where the author briefly talks about the provincial statutes from 1349 in the context of domestic church law development. Arnest's provincial statutes from 1349 are mentioned also in HLEDÍKOVÁ, Arnošt z Pardubic 107–119, which focuses on the life and work of Arnest of Pardubice. She stated the main points of the content of Arnest's codification. POLC, Kapitoly z církevního života, highlighted chosen aspects of the legal amendment of the

Prague, Arnest of Pardubice, proclaimed his statutes at a provincial synod held in Prague on 11<sup>th</sup> and 12<sup>th</sup> November 1349. The previously effective Mainz provincial statutes by Peter of Aspelt from 1310 and the domestic synodic statutes thereby lost their validity.<sup>2</sup> The normative character of the statutes should ensure the enforceability of rights and obligations in the ecclesiastical province of Prague, which was located in the large territory of the Czech lands. The province was formed by the Prague, Olomouc and Litomyšl dioceses. The personal scope of Arnest's provincial statutes extended to clergy but also to lay persons living in the territory of the ecclesiastical province of Prague, including Jews.<sup>3</sup>

Arnest's provincial statutes are legally based not only on the above-mentioned Mainz provincial statutes but mainly on the code of canon law,

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synodic statutes of the Prague (arch)diocese in 1344–1419 concerning Arnest's provincial statutes from 1349. For the importance of Arnest's provincial statutes see briefly HLEDÍKOVÁ, *Synody v pražské diecézi* 117f. and CHALOUPECKÝ, *Arnošt z Pardubic*, 97–99. ŠMÍDOVÁ MALÁROVÁ, *Pronikání římského práva* 53–65, was the first to analyse Arnest's provincial statutes from a Roman law perspective in her bachelor thesis (supervised by doc. PhDr. Pavel Krafl).

<sup>2</sup> Cf. Arnest's opening declaration placed in front of the text of the provincial statutes: "omnes alias constitutiones provinciales ecclesie Maguntine quoad nostram totam provinciam et omnia statuta sinodalia a predecessoribus nostris vel a nobis usque ad presens edita quoad nostram diocesim presentibus non insertas et inserta irritantes ymo irritas et irrita nuntiantes et omni carere decrevimus roboris firmitate." (POLC, HLEDÍKOVÁ, *Pražské synody* 118). Some texts of synodal statutes for the Prague diocese from 1284–1343 are available in POLC, HLEDÍKOVÁ, *Pražské synody* 95–114. The Mainz provincial statutes from the year 1310 are published in SCHANNAT, HARTZHEIM, *Concilia Germaniae*. IV 174–224 (obsolete edition from the second half of 18<sup>th</sup> century).

<sup>3</sup> For details on the spatial, temporal and personal scope of Arnest's provincial statutes, see KRAFL, *Arnoštova provinciální* 60–62.

the *Corpus iuris canonici*.<sup>4</sup> Altogether 86 articles of Arnest's codification focus on the legal adjustment of church administrative law, procedural law, some rules on the clergy's life, provisions concerning the prohibition of clerical concubinage, matrimonial law, law of obligations and law of succession, usury, the legal status of Jews and heretics, offences and penalties and, finally, several general legal rules and rules of interpretation. Even though most of Arnest's provincial statutes had administrative character and were aimed at the organisation of the newly founded ecclesiastical province of Prague and accompanying property matters of the church, they also include provisions concerning the punishment of sexual offences. These are Article 29 which forbids clerical concubinage (also Art 28) and Article 64, which refers to penalties for adultery in terms of matrimonial law. The aim of this paper is to provide an analysis of these provisions of Arnest's provincial statutes from 1349 and to characterise the sexual offences and corresponding penalties contained therein.

## Clerical concubinage and corresponding penalties

In the time of the episcopate of Arnest of Pardubice and his successors, the criminal jurisdiction over clerics belonged to the office of the Corrector of Clergy. His task was to keep an eye on the church-law regulations of the ecclesiastical province of Prague and the moral life of the clergy. The Corrector also punished offenders in cases of proven illegal conduct (by fines, confiscation

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<sup>4</sup> For the texts taken from the *Corpus iuris canonici* and the Mainz provincial statutes see the chapter "Pražské koncily a synody doby arcibiskupa Arnošta z Pardubic 1343–1363" in POLC, HLEDÍKOVÁ, *Pražské synody* 25f. It must be emphasized that these authors did not focus on Roman law influences. This problem was originally pointed out by ŠMÍDOVÁ MALÁROVÁ, *Pronikání římského práva* 53–65.

of benefice, suspension, exclusion from the diocese, imprisonment and outlawry). The application of the specific kind of punishment was based on the valid regulations of canon law and also related to the social gravity of the offence.<sup>5</sup> The provision against clerics who had concubines and penalties for this offence appear in the domestic synodic regulations of the Prague diocese in the statutes of Bishop John IV. Their creation is dated to the years 1329–1342.<sup>6</sup> The synod-

<sup>5</sup> The criminal law agenda of the Corrector of Clergy was laid down in a manuscript named "Acta correctoria". From the noticeably broad range of documents concerning decisive actions of the Corrector, only one volume from the years 1407–1410 was preserved. Introductory literature on this volume is represented by the study by PODLAHA, *Akta korektorů duchovenstva* (from the twenties of the last century). The fact that the bigger part of the agenda was concerned with the punishment of clergy testifies to their lax approach to celibacy. Therefore, we can say that the punishments lacked preventive force. Updated literature concerning the Office of the Corrector of Clergy is linked to the work of HLEDÍKOVÁ, *Korektoři kléru*, and several contributions by Jan Adámek, who prepares the edition of the above-mentioned volume of the *Acta correctoria* from the years 1407–1410: ADÁMEK, *Řeholníci a úřad korektora kléru*; ADÁMEK, *Akta korektorů kléru* 44–54. Important is his contribution about the Corrector of Clergy as a criminal judge (ADÁMEK, *Korektor kléru*), where Adámek focuses exclusively on property delicts with the exception of two cases which concern crimes against life and health. The study does not solve the problem of clerical concubinage; for the process of preparing the edition see ADÁMEK, *Acta correctoria* (2003), and ADÁMEK, *Acta correctoria* (2011).

<sup>6</sup> From sources that are available, see Art 3 (VIII. *Statuta synodalia*): "Item statuimus et mandamus, ut nullus vestrum mulierem suspectam presumat in domo propria retinere; si quis vestrum contrarium facere presumpserit, noverit se non solum excommunicationis sentencie, quam contra tales ipso facto provulgamus, esse dinoscitur subiacere, sed etiam de nostra dyocesi, beneficii privacione premissa utique expellendum" (POLC, HLEDÍKOVÁ, *Pražské synody* 105). In the text quoted, the bishop forbade clerics to provide shelter to the women concerned. If they disobeyed, the clergy should be punished with the depri-

vic statutes from 1343 issued by Arnest of Pardubice, who was at that time Bishop of Prague, also briefly refer to the prohibition of clerical concubinage.<sup>7</sup> The reason for the brief legal regulation of this offence in these synodic regulations is the fact that the Mainz provincial statutes (from 1310) as the regulation with superior legal force dealt thoroughly with the problem of clerical concubinage before the emergence of the ecclesiastical province of Prague.<sup>8</sup> Proper space for the legal punishment of the above mentioned offence was provided in the text of Arnest's provincial statutes from 1349. Arnest orders the priests in Article 28 "De vita et honestate clericorum" (About the life and dignity of clerics), which contains the list of rules concerning the professional and private lives of the clergy, not to disregard the fact that some of the clergy had illegal relationships with women with whom they enjoyed the pleasures of life in their parochial districts.<sup>9</sup> The clerics could enter the women's monastery just with the approval of the local abbess.<sup>10</sup> Article 29 "De cohabitatione clericorum et mulierum" (About clerics living with women) is expressly focused on the problem of

vation of their ecclesiastic office or the confiscation of their benefice.

<sup>7</sup> XII. Synodic statutes of Arnest of Pardubice from 18. 10. 1343 amending the prohibition of concubinage in Art. 10 "De incontinentibus" (About unrestrained ones). The bishop, following the pattern of his predecessor, points out the illegality of shared households of clerics and concubines. He penalizes this by the confiscation of the benefice.

<sup>8</sup> For the Mainz provincial statutes cf. Art. "De vita et honestate clericorum" and mainly Art "De cohabitatione clericorum et mulierum" (SCHANNAT, HARTZHEIM, *Concilia Germaniae* 185–189).

<sup>9</sup> Art. 28 APS: "Clausuram monasteriorum monialium absque causa rationabili et manifesta et sine superioris licentia ingredi non presumant" (POLC, HLEDÍKOVÁ, *Pražské synody* 131).

<sup>10</sup> Art. 28 APS: "Presbyteri parochialium ecclesiarum campanatores literatos seu clericos, non laicos uxortos habeant, qui cum eis cantare et legere non ignorant [...] (ibidem 131f).

clerical concubinage and the respective punishments.<sup>11</sup> Arnest emphasizes fornication (*crimen fornicationis*) as a despicable offence which is committed by clerics who disregard their professional status and share their households with women or hide them at their neighbours' places.<sup>12</sup> A cleric who lived with a concubine in a shared household or was caught with her in public despite the stated prohibition, was punished by the confiscation of his benefice. If the benefice did not belong to the offender he was deprived of his ecclesiastic office forever.<sup>13</sup> If the offence committed was considered particularly harmful socially, taking into account the circumstances, this led to imprisonment or outlawry. According to Arnest's order, the sentence of outlawry was proclaimed only in cases where the rehabilitation of the offender was not possible in any other way, considering his lifestyle.<sup>14</sup> Arnest ordered to punish the archdeacons and parish priests who willingly tolerated clerical concubinage in the same way as if they had committed the offence themselves.<sup>15</sup> But even an

expelled cleric was permitted to attend the liturgy until the judgment of conviction was issued or until the offender confessed that he had committed the offence.<sup>16</sup>

## Adultery as diriment impediment nullifying the marriage

Arnest's provincial statutes define the offence of adultery (*adulterium*) and its legal consequences under matrimonial law. This illegal behaviour plays an important part in the assessment of whether the conditions for a valid conclusion of a marriage were fulfilled at the private law level of church law.<sup>17</sup> Article 64 "*De eo, qui duxit in matrimonium quod polluit per adulterium*" (About him who solemnizes the marriage polluted by adultery) is aimed at cases where the offence of adultery had been committed during the first (or the other) marriage, so adultery represents the diriment impediment hindering the validity of a newly concluded marriage in cases where the first marriage had terminated upon the death of the betrayed person. This statutory marriage impediment was equivalent to the proven existence of spiritual kinship (*cognatio spiritualis*), blood kinship (*consanguinitas*) and relationship in-law (*affinitas*).<sup>18</sup> Arnest in this

<sup>11</sup> Cf. the interpretation of the provision by VYSKOČIL, Arnošt z Pardubic 296.

<sup>12</sup> Art. 29 APS: "*Quamvis fornicationis crimen inter cetera crimina sit detestabilius [...] multi tamen clerici sue salutis et professionis immemores, non solum temptationibus victi desideria carnis perficiunt sed etiam temptationem preveniunt, dum ne frustra temptentur in domibus propriis vel vicinis, paratas ad malum fornicarias nutriunt mulieres.*" (POLC, HLEDÍKOVÁ, Pražské synody 132).

<sup>13</sup> Art. 29 APS: "[...] omnes clericos, qui de cetero in domibus suis suspectas mulieres vel etiam extradomum in sua procuracione publice detinent concubinas, si sint beneficiati beneficiis suis privandos, si vero non habeant beneficia ab executione ordinum per suos superiores fore decrevimus perpetuo suspendos" (ibidem 132).

<sup>14</sup> Art. 29 APS: "[...] quos demum eorum malitia exigente ipsi superiores carcerum penis afficiant vel de suis diocesibus eiciant et expellant, si nec sit curaverint suam vitam emendare" (ibidem 132).

<sup>15</sup> Art. 29 APS: "*Archidiaconos autem locorum, qui clericos sui archidiaconatus et plebanos, qui vicinos sive socios hac labe respersos scienter tolerant,*

*tamquam pro concubinato proprio volumus condempnari*" (ibidem 132).

<sup>16</sup> Art. 29 APS: "*Licet autem clericus per fornicationis crimen vel alio mortali quolibet quod se ipsum sit suspensus, non tamen debet ab aliis in divini officii evitari nisi crimen ipsum sit notorium per sententiam seu per confessionem factam in iure aut evidentiam rei que tergiversatione aliqua celari non possit*" (ibidem 132).

<sup>17</sup> For the problem of the solemnization of marriages in the domestic legal environment in the late Middle Ages see e.g. NODL, Pronikání kanonického práva, who also refers to other literature to this topic.

<sup>18</sup> The stated impediments of marriage are amended in Arnest's provincial Statutes from 1349 in Art. 62–64, see POLC, HLEDÍKOVÁ, Pražské synody 149f.

Article prohibits that a man enter into a new marriage with a woman with whom he had sex during his first marriage after the death of his first wife. If the man promises to his mistress that he will marry her after the death of his lawful wife, even though his wife is still living, or if he then actually solemnizes the marriage, the marriage will not be considered valid.<sup>19</sup> If the adulteress did not know that her lover was married, then following another rule in the same Article, such a marriage was considered valid but only if the new wife insisted on it.<sup>20</sup> A stricter rule would be applied if the man reoffended and the same situation happened during his second marriage. Then the third marriage was valid.<sup>21</sup> In case that the man or his adulteress desired to kill the lawful wife and the wife did indeed die, the possibility of a valid solemnization of the marriage between them was excluded without any exception. The same was true in cases where the lovers did not have sex (so they did not commit adultery) but had caused the death of the wife.<sup>22</sup>

## Conclusion

The first Archbishop of Prague, Arnest of Pardubice, laid down binding rules in his provincial

<sup>19</sup> Art 64 APS: "Habens uxorem legitimam, si adultere sue, hoc scienti, promittit fidem de ea ducenda post mortem uxoris vel cum ea de facto contrahit carnali copula precedente vel sequente, non potest cum ipsa, legitima mortua, in matrimonio permanere" (ibidem 150).

<sup>20</sup> Art. 64 APS: "Si vero secunda ducta contractum cum alia ignorabat, tunc secunda instante cum ea compellitur remanere [...]" (ibidem 150).

<sup>21</sup> Art. 64 APS: "[...] si vir cum tertia contrahit, tenet contractus, est tamen propter hoc penitentia sibi imponenda" (ibidem 150).

<sup>22</sup> Art. 64 APS: "Similiter si ipse vel adultera sua mortem uxoris legitime effectualiter procuravit, non potest adulteram aliquatenus ducere in uxorem. Item si uterque etiam sine adulterio in mortem legitime essetmachinatus cum effectu" (ibidem 150).

statutes from 1349. Those who had committed sexual offences in the ecclesiastical province of Prague were punished on their basis. Because of the personal scope of this regulation, these could be clerics (in the case of clerical concubinage or other illicit intercourse of clerics with women), or secular persons (offence of adultery). The prohibition of concubinage or adultery on the part of clergy was derived from the canon law concept of the purity of clerics – celibacy. While convicted clerics were punished by confiscation of their benefice, deprivation of their ecclesiastic office, in the worst case imprisonment or outlawry, adultery committed by a secular person was penalized more leniently. Arnest's provincial statutes located the problem of adultery in matrimonial law, where this sexual offence represents the diriment impediment preventing the validity of the second solemnized marriage. Thus, the facts of the case become an illegal act with a private law character.

## Summary:

### Sexual offences in Arnest's provincial statutes from 1349

Arnest's provincial statutes from 1349 represent an important legal regulation of medieval church law, which was binding in the territory of the ecclesiastical province of Prague. The statutes include 86 legal articles focused on administrative canon law, procedural law, clerical concubinage, matrimonial law, law of obligations (regarding church property), usury, the legal status of Jews, offences and penalties, and some rules of interpretation in the conclusion. The articles, which include the prohibition of clerical concubinage and some rules of matrimonial law, constitute the legal regulation of serious sexual offences and penalties in the field of canon law. Archbishop Arnest explicitly provided for penalties for the violation of rules which prohibited clerical concubinage or other illegal contact with women. Among the pun-

ishments directed against fornicating clergy were the confiscation of their benefice, the deprivation of their ecclesiastic office, imprisonment or outlawry. Another sexual offence explicitly regulated in Arnest's provincial statutes was adultery. The issue of adultery here relates to contracting a marriage. Men who promised their adulteress to marry her after the death of his wife were punished by prohibition to enter the marriage with such a woman. If this prohibition was broken, the marriage was invalid.

### **Korrespondenz:**

Lenka ŠMÍDOVÁ MALÁROVÁ  
Jabloňová 811/6, Moravany 66448, Czech Republic  
261132@mail.muni.cz  
ORCID-Nr. 0000-0002-2883-7465

### **Abkürzungen:**

APS Arnest's Provincial Statutes  
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[<http://www.rechtsgeschichte.at/files/abk.pdf>]

## Literatur:

- Jan ADÁMEK, Acta correctoria: databázové zpracování svazku z let 1407–1410, in: Antonín KOSTLÁN (ed.), Semináře a studie Výzkumného centra pro dějiny vědy z let 2002–2003 (Praha 2003) 171–174.
- ID., Řeholníci a úřad korektora kléru na počátku 15. století, in: Dušan FOLTÝN (ed.), *Historia Monastica*. I. Sborník z kolokvií a konferencí pořádaných v letech 2002–2003 v cyklu „Život ve středověkém klášteře“ (Praha 2005) 97–102.
- ID., Akta korektorů kléru z let 1407–1410 a plzeňský děkanát, in: Štěpánka KARLOVÁ (ed.), *Historická dílna*. 1. Sborník příspěvků přednesených v roce 2006 (Plzeň 2006) 44–54.
- ID., Korektor kléru arcidiecéze pražské jako trestní soudce, in: Pavel KRAFL (ed.), *Sacri canones servandi sunt: ius canonicum et status ecclesiae saeculis XIII–XV* (Praha 2008) 343–351.
- ID., Acta correctoria, in: Pavel KRAFL (ed.), *Almanach medievisty-editora* (Praha 2011) 96–98.
- Václav CHALOUPECKÝ, Arnošt z Pardubic, první arcibiskup pražský (1346–1364) (Praha 1946).
- Zdeňka HLEDÍKOVÁ, Synody v pražské diecézi v letech 1349–1419, in: *Československý časopis historický* 18 (1970) 117–146.
- ID., Korektoři kléru pražské diecéze, in: *Právněhistorické studie* 16 (1971) 71–111.
- ID., Arnošt z Pardubic: arcibiskup, zakladatel, rádce (Praha 2008).
- ID., K dochování statut pražských arcibiskupů v Moravském zemském archivu, in: *Archivní časopis* 50 (2000) 213–222.
- ID., Legátské a provinciální zákonodárství pro olomouckou diecézi od poloviny 13. století, in: *Sborník archivních prací* 53 (2003) 556–557, 574–576.
- ID., Provincial and Legatine Statutes of the Archbishops of Prague, in: *Quaestiones Medii Aevi Novae* 8 (2003) 289–300.
- ID., Arnoštova provinciální statuta z roku 1349 – významná česká právní památka, in: Lenka BOBKOVÁ, Ryszard GLADKIEWICZ, Petr VOREL (eds.), *Arnošt z Pardubic (1297–1364). Osobnost – okruh – dědictví. Postać – środowisko – dziedzictwo* (Wrocław–Praha–Pardubice 2005) 59–64.
- ID., Církevní právo v Čechách a na Moravě ve 13.–15. století, in: Pavel KRAFL (ed.), *Sacri canones servandi sunt: ius canonicum et status ecclesiae saeculis XIII–XV* (Praha 2008).
- ID., Synody a statuta olomoucké diecéze období středověku (Praha 2014).
- Martin NODL, Pronikání kanonického práva do českého prostředí, jeho recepce nařízeními církve a rezistence laického prostředí vůči kanonickým předpisům, in: Pavel KRAFL (ed.), *Sacri canones servandi sunt: ius canonicum et status ecclesiae saeculis XIII–XV* (Praha 2008) 651–660.
- Antonín PODLAHA, Akta korektorů duchovenstva diecéze pražské z let 1407–1410 (Praha 1921).
- Jaroslav Václav POLC, Kapitoly z církevního života Čech podle předhusitského zákonodárství, in: Zdeňka HLEDÍKOVÁ, ID., *Pražské biskupství (1344–1994). Sborník statí o jeho působení a významu v české zemi* (Praha 1994) 30–57.
- ID., Zdeňka HLEDÍKOVÁ, *Pražské biskupství 1344–1994. Sborník statí o jeho působení a významu v české zemi* (Praha 1994).
- ID., Zdeňka Hledíková (ed.), *Pražské synody a koncily předhusitské doby* (Praha 2002).
- Johan Fridrich SCHANNAT, Josephus HARTZHEIM (eds.), *Concilia Germaniae IV (Coloniae 1761)*.
- Lenka ŠMÍDOVÁ MALÁROVÁ, Pronikání římského práva do středověkých českých zemí. Arnoštova provinciální statuta z r. 1349 a římské právo? (Bachelor thesis, Brno 2010).
- Jan Kapistrán VYSKOČIL, Arnošt z Pardubic a jeho doba (Praha 1947).
- Rostislav ZELENÝ (ed.), *Councils and Synods of Prague and their Statutes (1343–1361)*, in: *Apollinaris* 45 (1972) 27–81.