

VOL. 13 / 2022

No. 2

JOURNAL ON EUROPEAN HISTORY OF LAW



JOURNAL



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SCIENCE CENTRE



JOURNAL ON EUROPEAN HISTORY OF LAW



JOURNAL

VOL. 13 / 2022 No. 2

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JOURNAL ON EUROPEAN HISTORY OF LAW

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www.sts-books.co.uk / www.historyoflaw.eu

ISSN 2042-6402

‘Pandemic Criminal Law’ in Continental European Legal History

Vid Žepič*

Abstract

The article outlines the development of official criminal policy against the spread of infectious diseases, especially the plague, in continental Europe from antiquity to the end of the 18th century. The crimes and their punishments are presented on the basis of city statutes, early modern penal codes and contemporary legal doctrine. Surprisingly, even though European countries faced devastating plague pandemics, no significant criminal-law related state intervention in pandemics took place until the 16th century, except in a number of coastal cities of the Mediterranean and northern Italian cities. The prosecution of sanitary crimes was the business of sanitary magistrates, who were in charge of wide criminal jurisdiction. The ‘pandemic criminal law’ was characterised by harsh penalties resembling martial law, criminalisation of both commission and omission, intentional and negligent offences, and the departure from the principle of legality when it was already an established legal principle.

Keywords: Plague law; criminal law; Pestordnungen; pandemic; health magistrates; plague spreaders; Holy Roman Empire; Dubrovnik; Italy; quarantine; sanitary cordon; Roman law.

1. Introduction

‘The time of the plague is called the time of death. The plague dissolves all law.’¹ The idea that the laws remained silent at the time of the plague was the governing topos of the early modern legal treatises.² However, the pandemic situation did not lead to a context of total lawlessness, as it is occasionally invoked by the legal adages such as ‘Necessity knows no law’ and ‘Necessity makes licit what is illicit.’³ From the 16th century onward, jurists, in legal treatises dealing with the plague (*Tractatus de peste*), described and analysed deviations from the general law in pandemic situations, the issues involved concern-

ing mainly civil law aspects; meanwhile, questions of criminal law were largely neglected.

Taking into account the fact of there being virtually no reports in ancient legal and literary sources on the official reaction to the health offences,⁴ the task of medieval and early modern jurists in dealing with the legal aspects of recurrent plague waves was particularly challenging.⁵ Jurist Bartolus (1313–1357) believed the plague to be a greater scourge than most human wars. According to him, the pandemic was God’s war against human wickedness.⁶ In his characterisation of the plague as a divine punishment, Bartol referred both to the Bible and to Justinian’s 77th Novella, which is in fact the only constitution

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¹ *Tempus pestis dicitur tempus mortis, quo solvuntur omnia iura.* GAIL, A., *Practicarvm observationvm tam ad processvm iudicialivm praesertim imperialis camerae, quam caesarvm decisiones pertinentivm.* Köln, 1578, p. 114.

² *Tempore pestis leges silent.* DIANA, A., *Antonini Diana Panormitani, clerici regularis, coram sanctiss. d.n. Innocentio x. episcoporum examinatoris, & sancti officij regni siciliae consultoris, resolutionvm moralivm.* Lyon, 1664, p. 146.

³ See the adages *Necessitas non habet legem* and *Propter necessitatem illicitum efficitur licitum.*

⁴ WAZER, C., *Salus Patriae: Public Health and the Roman State.* Columbia, 2017, p. 76 ss.

⁵ The author of the 16th-century legal treatise on the plague, Praevidellus, prefaced his work by stressing its importance: *Nec forsitan hic melius labor erit inutilis, quandoquidem de hac re parum vel nihil admodum scripti reliquit antiquitas. Cum tamen materia esset magnopere scriptione digna.* (‘And this work may not be useless, given that little or nothing was written on the subject in the ancient world. Although the matter would be worthy of extensive writing.’) PRAEVIDELLUS, H., *De peste & eius priuilegiis.* In: *Tractatus illvstrivm in vtroque tvm pontificii, tvm caesarei iuris facultate Iurisconsultorum, De variij verbis Iuris.* Venice, 1584, p. 2.

⁶ [T]empore mortalitatis instantis de anno Domini 1348 prout scitis erat tanta pestilentia [...] & fuit illa hostilitas Dei, fortior quod hostilitas hominum. (‘At the time of the sudden mortality in the year of the Lord 1348 there was such a plague, as you know [...] and this hostility of God was stronger than the hostility of men.’) BARTOLUS DE SAXOFERRATO, *Bartolus super prima digesti novi cum additionibus antea positis additis etiam apostillis Andree Barbatie,* Venice, 1505, p. 100.

in Justinian's legislation that mentions the plague (*pestilentia*) in a legal context.⁷

Later jurists, in line with Bartolus' teaching, consequently suggested that deviant behaviour in pandemic situations should be judged according to the rules applicable in a state of war: 'And since this enmity of God is greater than the enmity between men [...] the doctors conclude that the argument of war is also valid in times of pestilence.'⁸

In 1570, Ingrassia (1510–1580), an Italian physician and major figure in the history of medicine and human anatomy, stressed that the governmental response during the plague period should not only encompass necessary material means to aid the citizens and the organised disposal of contaminated objects, but also sanction the use of legally prescribed force. Not merely 'gold', but 'gallows and fire' were indeed 'the three true remedies against contagious diseases.'⁹

Pandemic situations in the past have been linked to the quest for scapegoats among ethnic, religious, professional, and social minorities. Already in the early medieval *leges* (*barbarorum*),

commandments were common that requiring lepers, who were commonly considered 'civilly' dead, to live in a leprosarium.¹⁰ During the reign of King Philip the Fair, they were blamed for poisoning wells on a massive scale and thereby causing the plague in the first place. The legal response was mass burnings at the stake.¹¹ Subsequently, the same suspicion was assigned to Jews.¹² The first criminal trial of Jews accused of poisoning wells and spreading disease took place in 1348 in Chillon.¹³ Persecutions of these two minorities were later combined with the witch trials. One of Calvin's letters stated that a group of men and women were said to have practised witchcraft to bring the plague into the flesh, whereupon they were burnt at the stake by the authorities.¹⁴ In the early modern era, the suspicion of plague spreaders was also geared toward the Roma people, beggars, prostitutes, pimps, and foreigners at large.¹⁵ Ripa, the author of *Tractatus iuridicus de peste*, an influential legal treatise on the plague, argued that beggars spread the disease by way of their lingering, dishonourable living, and vagrancy in the city.¹⁶ Much like pimps and prostitutes, they ought to

⁷ Iust. Nov. 77, 1: *Et quoniam quidam ad haec quae diximus et blasphema verba et sacramenta de deo iurant deum ad iracundiam provocantes, et istis iniungimus ab huiusmodi blasphemis verbis et iurare per capillos et caput et his proxima verba. [...] Propter talia enim delicta et fames et terrae motus et pestilentiae fiunt, et propterea admonemus abstinere ab huiusmodi praedictis illicitis, ut non suas perdant animas.* ('In addition to the above, there are some who arouse God's anger by swearing in blasphemous language, and oaths using God's name. [...] It is because of offences such as these that famines, earthquakes and plagues occur, and that is why we admonish such people to desist from the said evildoings, lest they lose their own lives.') Translation by MILLER, D. J. D., SARRIS, P., *The Novels of Justinian A Complete Annotated English Translation*. Cambridge, 2018, p. 540.

⁸ [*Quod maior sit hostilitas Dei quam hominum [...] propterea doctores concludunt, valere argumentum de bello ad pestem.* RIPA, G. S., *Tractatus Iuridicus ac Politicus de peste*. Leipzig, 1598 [1522], p. 3 (n. 9). For subsequent use of the topos see VAZ BARBOSA, S., *Principia et loca communia tam decisionum quam argumentorum vtriusque iuris cum plenissima doctorum allegatione collecta*. Barcelona, 1630, p. 38, No. 107: *Argumentum valet de bello ad pestem, ita Ripa tract. de peste in princ. no. 11. Pestis enim dicitur bellum inter Deum, & homines, ex Bart. l. naturaliter, nu. 23 ff. de vsucap. Ripa vbi proxime, Iodoc. in enchiridion parium, verbo pestis.* See also intriguing saying in the Pestordnung for the Land of Steiermark (1681): *'Die während der Seuche herrschende Vergiftung der Luft ist gleich dem offenen Kriege'*. SCHAUNSTEIN, A., *Handbuch der öffentlichen Gesundheitspflege in Österreich: systematische Darstellung des gesammten Sanitätswesens des österreichischen Staates*. Vienna, 1863, p. 485.

⁹ *Oro, forza, e fuoco, tre sono i veri Rimedi del pestifero contagio.* INGRASSIA, G. F., *Informatione del pestifero, et contagioso morbo*. Palermo, 1576, p. 315. On Ingrassia's treatise, see COHN, S. K., *Cultures of plague. Medical Thinking at the End of the Renaissance*. Oxford, 2010, p. p. 80 ss.

¹⁰ *Edictum Rothari, Art. 176: De lebroso. Si quis leprosus effectus fuerit et cognitum fuerit iudici vel populo certa rei veritas, et expulsus foris a civitate aut casam suam, ita ut solus inhabitet: non sit ei licentia res suas alienare aut thingare cuilibet personae. Quia in eadem die, quando a domo expulsus est, tanquam mortuus habetur. Tamen dum advixerit, de rebus, quas reliquerit, pro mercedis intuitu nutriatur.* ('The leper. If someone becomes a leper and the truth of the matter is ascertained by the judge or the people and is expelled from the city and his house, so that he lives alone, he is not allowed to legally alienate or donate his possessions to anyone. Because from the day he was expelled from his home, he is considered dead. However, if he lives, he shall be supported by the proceeds of the goods he left behind.') Edited by BLUME, F., *Edictus Langobardorum*. In: PERTZ, G. H. (Ed.), *Monumenta Germaniae Historica. Legum Tomus VIII*, Hannover, 1868. Translation by LOMBARDO V. In: <https://www.freemasonryresearchforumqa.com/edictus-rothari.php> (2. 7. 2022).

¹¹ HAESER, H., *Lehrbuch der Medicin und der epidemischen Krankheiten*, 2. Bd., Jena, 1865, p. 89. On the criminal prosecution of lepers in modern history, see INGLIS, K. A., *Leprosy and the Law: The 'Criminalisation' of Hansen's Disease in Hawaii, 1865–1969*. In: QUIRK, H., STANTON, C. (Ed.), *Criminalising Contagion, Legal and Ethical Challenges of Disease Transmission and the Criminal Law*, Cambridge, p. 55 ss.

¹² GRAUS, F., *Pest, Geissler, Judenmorde: das 14. Jahrhundert als Krisenzeit*. Göttingen, 1987. On the origins of the Jews' association with the disease, see BAY, C., *Contagion of the Jews: Metaphorical and Rhetorical Uses of Sickness, Plague and Disease in Pseudo-Hegesippus*. In: METHUEN, C.; SPICER, A. (Ed.), *The Church in Sickness and in Health*. Cambridge, 2022, p. 8–27.

¹³ On pogroms against Jews, see HECKER, J. F. C., *Die grossen Volkskrankheiten des Mittelalters, Historisch – pathologische Untersuchungen*. Berlin, 1865, p. 65–75; 43. HOENIGER, R., *Gang und Verbreitung des schwarzen Todes in Deutschland von 1348–1351 und sein Zusammenhang mit den Judenverfolgungen und geisselfahrten dieser Jahre*. Berlin, 1881, p. 6 ss; and MODESTIN, G., *Von der fama communis zur 'forensichen Evidenz'. Der Vorwurf der Brunnenvergiftung während der Pestjahr 1348–1350 im Spiegel der zeitgenössischen Chronik Heinrichs von Diessenhofen*. In: VÖGELE, J., *Epidemien und Pandemien in historischer Perspektive*. Wiesbaden, 2016, p. 287 ss.

¹⁴ 'The Lord is testing us greatly; a conspiracy of men and women has recently been discovered who have, by I know not what magic, spread the plague in the city during these three years. Already fifteen women have been burned, several men have committed suicide in prison because of the terrible punishments, and there are still twenty-five prisoners – yet they do not stop greasing the locks of the houses with ointments daily. Look, these are the dangers we find ourselves in.' Henry, p. 416 s. See also RÜPING, H., JEROUSCHEK, G., *Grundriss der Strafrechtsgeschichte*. München, 2011, p. 57 s; PIETH, M., *Strafrechtsgeschichte*. Basel, 2020, p. 36.

¹⁵ BIRABEN, J. N., *Les hommes face à la peste, en France et dans les pays européens et méditerranéens*. In: *Annales de l'École pratique des hautes études*. 1971, p. 810.

¹⁶ See COHN, S. K., *Cultures of plague. Medical Thinking at the End of the Renaissance*. Oxford, 2010, p. 223.

be banned from the city immediately.¹⁷ The appeals of legal practice were implemented not only in Italian cities. Because they were suspected to be Turkish spies and plague spreaders, in 1512, Emperor Maximilian banned Roma people from entering Austrian lands.¹⁸

The repertoire of legal-historical studies of the criminal response to the spread of infectious diseases is surprisingly scarce.¹⁹ Nevertheless, it is quite certain that the authorities responded to the socially destructive effects of the spread of infectious diseases and the many accompanying deviant circumstances linked to personal dramas²⁰ and and limitation of socialisation with restrictive legislative measures, thoroughly transforming the general criminal law.²¹ Muratori was undeniably right in saying: ‘Despair, terror and melancholy are also a plague in times of pestilence.’²²

This paper aims to trace the development and basic features of ‘pandemic criminal law’ as a form of extraordinary criminal law up to the 18th century. In the first section, I discuss the ancient development, followed by the ‘pandemic law’ in the legislation of the Northern Italian or Mediterranean geographical circle and of the Holy Roman Empire.²³ Then, I describe the basic features of the relevant Theresian and Josephine legisla-

tion in the Austrian territories. Lastly, I highlight several common traits of the early-modern ‘pandemic criminal law’.

2. Antiquity

Ancient society is led by the conviction that no human being can assert a significant influence on the spread of infectious diseases, whose *causa efficiens* is assigned a transcendent origin. The deep-rooted notion of plague as a divine punishment imposed on corrupt humanity was not only present in Ancient Greece,²⁴ it was also common in Rome. Hence, when the plague broke out, they addressed public vows (*vota publica*) to spare them of the worst. The vower promised to perform a public service on the condition that the pandemic or some other elementary or social danger would cease. The *votum* was performed in front of the priests, the consul, the praetor, and the assembled people. Titus Livius reported that during the great pestilence (*pestilentia*) of 433–432 BC, a mass vowing in the Temple of Apollo in Rome was held: ‘The pestilence that year kept everything quiet. The duumvirs did many things prescribed by the sacred books to appease the wrath of the gods and remove the pestilence from the people.’²⁵

In addition to these sacral measures,²⁶ the Roman authorities sought to protect public health through rudimentary pre-

¹⁷ *Sed si tabificus morbus immineat, non solum lenones & meretrices, sed etiam mendicantes validos debent, qui curam Reipublicae habent, ab vrbe secludere. Hi enim sunt qui morbum introducunt introductumque nutriunt dum vagantur, dum singulos urbis angulos circumeunt, dum se ingurgitant, dum turpiter vitam agunt.* RIPA, G. S., *Tractatus Iuridicus ac Politicus de peste*. Leipzig, 1598 [1522], p. 247.

¹⁸ PEINLICH, R., *Geschichte der Pest in Steiermark*, Graz, 1877, p. 197.

¹⁹ The most comprehensive monograph on the legal-historical aspects of the pandemic, written by ASCHERI, M. (*I giuristi e le epidemie di peste (Secoli XIV–XVI)*), Siena, 1997) deals with criminal law on only two pages from a total of one hundred and seventeen.

²⁰ The authorities encouraged the denouncement of the afflicted even among the family members. They thereby contributed to breeding discord and distrust in society. CENTORIO, A., *I cinque libri degl'avvertimenti, ordini, gride et editi, fatti et osservati in Milano ne' tempi sospettosi della peste, ne gli anni 1576 et 77*. Venice, 1579, p. 90.

²¹ [N]am quo tempore gentes affliguntur, ea est rerum omnium perturbatio, ut noui casus emergentes nouas ordinationes necessario exigere uideantur. (‘For at a time when peoples are stricken with the plague, that is, the upheaval of all things, it seems that the cases which appear anew also necessarily call for new ordinances.’) PRAEVIDELLUS, H., *De peste & eius priuilegiis*. In: *Tractatus illustrius in vtroque tm pontificii, tm caesarei iuris facultate Iurisconsultorum, De variij verbis Iuris*. Venice, 1584, p. 2.

²² MURATORI, L. A., *Del governo della peste*. Modena, 1720, p. 9.

²³ Historical development of the criminal law legislation in anglo-american legal circle is outside the scope of this paper. On this, see COKE, E., *The Third Part of the Institutes of the Laws of England concerning Hight Treason, and other Pleas of the Crown and Criminal Causes*. London, 1797, where a felony against the public health is cited as follows: ‘If any person infected with the plague, commanded (by such persons as are appointed by the act) to keep house, shall contrary to such commandment wilfully and contemptuously goe abroad, and shall converse in company, having any infectious fore upon him uncured, such person shall be adjudged a felon.’

²⁴ Homer, *Ilias* 1, 1: ‘[T]he son of Leto and Zeus; for he in anger against the king roused throughout the host an evil pestilence (νοῦσον), and the people began to perish, because upon the priest Chryses the son of Atreus had wrought dishonour.’ See also Homer, *Ilias* 1, 44–53. Ed. HOMER, *Iliad*, Volume I: Books 1–12, translated by MURRAY, A. T.

²⁵ Liv. *Ab urbe condita* 4, 25, 3–7: *Pestilentia eo anno aliarum rerum otium praebuit. Aedis Apollini pro valetudine populi vota est. Multa decemviri ex libris placandae deum irae avertendaeque a populo pestis causa facere.* Translation by ROBERTS, C. Canon, *Livy's History of Rome*, 1912–24.

²⁶ *Lectisternium* (*lectum sternere*, ‘to spread (or to cover) the bed’) was an ancient Roman ritual in which food was placed on the bed and offered to the deities. The rite, which is said to have been first performed in 399 BC and was practised especially during epidemics, is described by Livy, *Ab urbe condita*, 5, 13, 4–8: *tristem hiemem, sive ex intemperie caeli raptim mutatione in contrarium facta sive alia qua de causa, gravis pestilensque omnibus animalibus aestas excepit. cuius insanabili pernicie quando nec causa nec finis inueniebatur, libri Sibyllini ex senatus consulto aditi sunt. duumviri sacris faciundis lectisternio tunc primum in urbe Romana facto per dies octo Apollinem Latonamque et Dianam, Herculem Mercurium atque Neptunum tribus quam amplissime tum apparari poterat stratis lectis placavere. privatim quoque id sacrum celebratum est. tota urbe patentibus ianuis promiscuoque usu rerum omnium in propatulo posito, notos ignotosque passim advenas in hospitium ductos ferunt et cum inimicis quoque benigne ac comiter sermones habitos, iurgiis ac litibus temperatum; vinctis quoque dempta in eos dies vincula; religioni deinde fuisse quibus eam opem di tulissent vinciri.* (‘The severe winter was succeeded, whether in consequence of the sudden change from such inclement weather to the opposite extreme, or for some other reason, by a summer that was noxious and baleful to all living creatures. Unable to discover what caused the incurable ravages of this distemper, or would put an end to them, the senate voted to consult the Sibylline Books. The duumvirs in charge of the sacred rites then celebrated the first *lectisternium* ever held in Rome, and for the space of eight days sacrificed to Apollo, to Latona and Diana, to Hercules, to Mercury and to Neptune, spreading three couches for them with all the splendour then attainable. They also observed the rite in their homes. All through the City, they say, doors stood wide open, all kinds of viands were set out for general consumption, all comers were welcomed, whether known or not, and men even exchanged kind and courteous words with personal enemies; there was a truce to quarrelling and litigation; even prisoners were loosed from their chains for those days, and they scrupled thenceforth to imprison men whom the gods had thus befriended.’) Translation taken from LIVY, *Books V, VI and VII With An English Translation*. Cambridge, Mass., 1924, p. 48 s.

ventive measures. For example, the Temple of Asclepius, where the sick usually sought refuge, was built outside the city in 293 BC at the specific request of the Senate.²⁷ Legislative sanitary precautions included the prohibition of burial within the city walls (*pomerium*) and the precepts to keep drinking water reservoirs and streets clean.

The prohibition of burial within the confines of the walls in the *Lex Duodecim tabularum* was motivated not only by the risk of the outbreak of fire during cremation, but also by the danger of spreading possible diseases caused by the decomposition of a corpse in a warm climate.²⁸ The sources show several repetitions of this sanitary measure, which is probably indicative of its numerous violations, but also of a strong awareness on the part of the authorities that minimum sanitary standards ought to be ensured. Hadrian extended the prohibition of burial in the city to all cities of the empire.²⁹ During the time of Marcus Aurelius, it is said that the notorious Antonine plague led to the re-enactment of strict laws on burial practices.³⁰

In the 3rd century AD, jurist Paul observed that the act of polluting drinking water in wells, waterworks, lakes, or the pollution by any other substance that would be detrimental to the public interest, was an *iniuria* contrary to sound morals (*iniuria contra bonos mores*).³¹ The engineer Frontinus mentioned that the deliberate pollution of water in an aqueduct was punishable

by a fine of ten thousand sesterces.³² Censors and ediles controlled sanitary irregularities.³³ In fact, the cleanliness of the public streets was subject to interdicts by every Roman.³⁴ Most sanitary offences were treated as *crimina extraordinaria*, i.e., offences imposed by senate decree or by the imperial constitution.³⁵ Roman law did not include a specific offence protecting public health.³⁶

3. 'Plague Law' in Northern Italian and Littoral Towns

3.1 The First Plague Statute

The first curative measures taken by the authorities in the wake of the outbreak of the plague were administrative, introduced with the intention to restrict mobility. The majority of reports on the subject come from the Italian regions.³⁷ Boccaccio records that in 1348, the authorities in Florence banned infected people from entering the city.³⁸

While various sanctions and prohibitions had been put in place to ensure the hygienic minimum for citizens, the first recording of a penal reaction to the violation of pandemic provisions lies in the Plague Statute issued by Visconti on 13 January 1374 for the town of Reggio in Modena: 'We, the lord of Milan, etc., the imperial Vicar, etc., desiring, as far as possible, to protect our subjects from contagion, have adopted the decree

²⁷ CILLIERS, Public Health in Roman Legislation. In: *Acta Classica*, vol. 36, Classical Association of South Africa, 1993, p. 2, n. 4.

²⁸ Cic. *De legibus* 2, 23, 58 (= XII tab. 10, 1): *Hominem mortuum [...] in urbe ne sepelito neve urito* ('Do not bury nor burn a dead body in the city.'). Diocl. Max. C. 3, 44, 12; Isid. *Etymologiae* 15, 11, 1: *Prius autem quisque in domo suo sepeliebatur. Postea vetitum est legibus, ne factore ipso corpora viventium contacta inficerentur*. ('Originally people were buried in their own homes. Later this was prohibited by law, so that the bodies of the living would not be infected by contact with the stench.') Translation by BARNEY, S. A., LEWIS, W. J., BEACH, J. A., BERGHOF, O., *The Etymologies of Isidore of Seville*, Cambridge, 2006, p. 313.

²⁹ Ulp. D. 47, 12, 3, 5: *Divus Hadrianus rescripto poenam statuit quadraginta aureorum in eos qui in civitate sepeliunt, quam fisco inferri iussit, et in magistratus eadem qui passi sunt, et locum publicari iussit et corpus transferri. quid tamen, si lex municipalis permittat in civitate sepeliri? post rescripta principalia an ab hoc discessum sit, videbimus, quia generalia sunt rescripta et oportet imperialia statuta suam vim optinere et in omni loco valere*. ('The deified Hadrian in a rescript prescribed a penalty of forty gold pieces, payable to the imperial treasury, for those who bury bodies in a city, as also for the magistrates who allow it, and he directed that the place of burial should be expropriated and the corpse moved elsewhere. What if the municipal law allows burial in the city? We must consider whether, in the light of imperial rescripts, this provision has to be departed from; for the rescripts are of general scope and imperial legislation has its own force and should apply everywhere.') Translation by WATSON, A. *The Digest of Justinian*, Vol. 4. Philadelphia, 1985, p. 300.

³⁰ Historia Augusta, Vita Marci 13, 4: *tunc autem Antonini leges sepeliendi sepulchrorumque asperrimas sanxerunt, quando quidem caverunt ne quis villae adfabricaretur sepulchrum, quod hodieque servatur* ('From that time onwards, however, the laws of the Antonines severely punished burials and the making of sepulchres, for they stipulated that no one was to build a sepulchre in his own villa. This is still the case today.')

³¹ Paul. D. 47, 11, 1, 1: *Fit iniuria contra bonos mores, veluti si quis [...] aquas spurcaverit, fistulas lacus quidve aliud ad iniuriam publicam contaminaverit: in quos graviter animadverti solet*. ('It is an affront contrary to sound morals when a person [...] defiles waters, water pipes, or a lake, or contaminates anything to the detriment of the public; against such persons, stern action is taken.') Translation by WATSON, A. *The Digest of Justinian*, Vol. 4. Philadelphia, 1985, p. 298.

³² Front. Aq. 2, 97: *Ne quis aquam oletato dolo malo, ubi publice saliet. Si quis oletarit, sestertiorum decem milium multa esto*. ('No one shall with malice pollute the waters where they issue publicly. Should any one pollute them, his fine shall be ten thousand sesterterii.')

Translation by https://penelope.uchicago.edu/Thayer/E/Roman/Texts/Frontinus/De_Aquis/text*.html, 2. 7. 2022.

³³ BAAS, H., *Zur Geschichte der öffentlichen Hygiene*, Braunschweig, 1879, p. 332.

³⁴ Ulp. D. 43, 23, 1, 2: *Curavit autem praetor per haec interdicta, ut cloacae et purgentur et reficiantur, quorum utrumque et ad salubritatem civitatum et ad tutelam pertinet: nam et caelum pestilens et ruinas minantur immunditiae cloacarum, si non reficiantur*. ('The praetor has taken care by means of these interdicts for the cleaning and the repair of drains. Both pertain to the health of civitates and to safety. For drains choked with filth threaten pestilence of the atmosphere and ruin, if they are not repaired.') Translation by WATSON, A. *The Digest of Justinian*, Vol. 4. Philadelphia, 1985, p. 115. On Roman private law protection against pollution of the environment, especially drinking water, see FARGNOLI, Umweltschutz und römisches Recht. In: *Das Vermächtnis der Römer: römisches Recht und Europa: Referate einer Vorlesungsreihe des Collegium Generale der Universität Bern im Frühjahrssemester 2011*. Bern, Stuttgart, Wien, 2012, p. 151 ss.

³⁵ On *crimina extraordinaria*, see FALCHI, G. F., *Diritto penale romano, I singoli reati*. Padova, 1932, p. 246 ss.

³⁶ REIN, W., *Das Criminalrecht der Römer von Romulus bis auf Justinianus: ein Hilfsbuch zur Erklärung der Classiker und der Rechtsquellen*, Leipzig, 1844, p. 399: 'Injury to health and to the human body in general was never considered a specific, distinct offence under Roman law, but was incorporated in various forms into other offences and constituted partly a punishment and partly compensation for the damage caused.'

³⁷ CARMICHAEL, A. G., Plague Legislation in the Italian Renaissance. In: *Bulletin of the History of Medicine*, Vol. 57, (1983) No. 4, pp. 508–525.

³⁸ BOCCACCIO, G. *Il Decameron, a cura di Aldo Francesco Massera*, Bari, 1927, p. 10.

which we are sending to you, and which we ask to be observed in the town of Reggio and to be inserted in the statute book. Given in Milan on the 17th of January 1374. – To the noble lord, the *podestà* of our town of Reggio: We wish that anyone infected should immediately leave the town, fortified town, or castle where he has been and depart to the fields, countryside, or woods, and remain there until he dies or recovers. Whoever has served (to the infected) should keep himself away (from other people) for ten days after having been in contact (with the infected person). The priests should examine the infected people and find out what is wrong. They should report the sick to officials immediately; otherwise, they are threatened with being burned at the stake. Both movable and immovable property (of the infected) should belong to the commune. The property of the one who spread the plague should be assigned to the *camera domini*, and the property shall not be returned. No one, except those specially qualified to do so, shall, being liable to the penalty of death and forfeiture of property, be allowed to help the infected. The aforesaid shall be communicated to all the subjects.³⁹

The Visconti Decree was adopted in a context in which the adherence to religious processions⁴⁰ and veneration of relics were widely regarded as the most effective means to overcoming epidemics. The decree commands the infected to isolate themselves. It is reasonable to conclude that the prescribed isolation period lasted at least ten days, given that this period is also imposed on apparently healthy individuals who have served or have encountered the infected person in one way or another. The statute does not yet envisage specific institutional care for the infected in terms of the subsequent quarantine facilities: the sick person was left to fend for themselves.

The priests, to whom the administrative functions of health inspection were delegated, were responsible for detecting any signs of the disease. The obligation to report obvious signs of the plague among one's social circle was, however, imposed on all residents, whose disobedience was said to be penalized by death. Because priests might, out of pity for the infected, con-

ceal suspicious persons, an omission to report was punishable by death at the stake (a punishment usually reserved for heretics).

The exiled patients had their immovable property confiscated and contaminated movable property was destroyed. The criminal sanction of (definitive) confiscation of property affected those who had deliberately or negligently spread the disease among the city. In the meantime, these people were not explicitly threatened by the death penalty.

In 1383, Visconti reinforced the provisions of the statute and, under penalty of death, forbade city officials to allow foreigners to enter the city if travelling from infected areas⁴¹ Under threat of the death penalty, no one was allowed to take under his roof a refugee who had fled from these areas.⁴² These provisions of both orders reveal just how much the authorities sought to compensate for the evasive control of the epidemic by way of total control of the infected.⁴³

Among the Mediterranean coastal cities, the Republic of Dubrovnik (*Ragusa*), as a junction of overland and maritime trade routes, had the oldest anti-plague legislation.⁴⁴ On 27 July 1377, the Grand Council of Dubrovnik issued, according to the prevailing views (which may be questioned),⁴⁵ the world's first quarantine decree: 'In the same year, on the 27th of July, in a Great council assembled as is customary, in which 47 councilors were present, it was taken and confirmed by 33 of them that both our own people and newcomers coming from pestilential places should not be received into Dubrovnik or its district, unless they had first stood in Mercana in the Old City to purify themselves for one month. Likewise, by the councilors 43 of the same council it was taken that no person from Dubrovnik or its district shall dare or presume to go to those who come from pestilential places that stay in Mercana or in the Old City, under penalty of standing there for one month. And those who will bring them provisions or other necessities cannot go to them without the permission of the officials for this purpose, with an order from the said officials giving them, under the said penalty of standing there for one month. Also by the votes of 29 councilors of the

³⁹ *Nos Dominus Mediolani, etc. Imperialis Vicarius, etc. Volentes subditos nostros a contagione morbi quanto plus possumus conservare, fecimu quaedam decreta, quae tibi in hoc inclusa mittimus, et quae volumus in Rhegio observari, et in volumine Statutorum nostrorum inseri. Data Mediolani 17. Januarii 1374. – Nobili Viro Potestati nostro Rhegii. Volumus, quod quaelibet persona, cui nascentia, vel brosa veniet, statim exeat Urbem, vel Castrum, vel Burgum, in quo fuerit et vadat ad campos in capannis, vel in nemoribus, donec aut moriatur, aut liberetur. Item qui servient, stent post mortem alicujus decem dies antequam habeant consortium cum aliqua persona. Item Sacerdotes Ecclesiarum Parochialium inspiciant infirmos et videant, quod malum est, et statim notificent Inquisitoribus deputatis sub poena ignis. Item quod omnia bona tam mobilia, quam immobilia applicentur Camerae Domini. Item qui aliunde portaverint Epidemiam, similiter ejus omnia bona sint Camerae Domini, de quibus nulla unquam fiat restitutio. Item quod sub poena bonorum et vitae nullus alius vadat ad serviendum infirmis, praeterquam ut supra. Et de praedictis fiat omnibus subditis notitia. Chronicon Regiense ab anno 1272 usque ad 1388. In: MURATORI, L. A., *Rerum italicarum scriptores ab anno aerae Christianae quingentesimo ad millesimumquingentesimum*, Milano, 1731, p. 82.*

⁴⁰ See LEE, A. R. A., *Plague and Popular Revival: Ecclesiastical Authorities and the Bianchi Devotions in 1399*. In: METHUEN, C.; SPICER, A. (Ed.), *The Church in Sickness and in Health*. Cambridge, 2022, p. 68–90.

⁴¹ SIMON, Ueber Geschichte und Contagiosität der Pest. In: *Zeitschrift für die gesammte Medicin: mit besonderer Rücksicht auf Hospitalpraxis und ausländische Literatur*, 1838, p. 28.

⁴² CARMICHAEL, A. G., *Plague Legislation in the Italian Renaissance*. In: *Bulletin of the History of Medicine*, 57 (4), 1983, p. 512.

⁴³ See FOUCAULT, M., *Discipline and Punish. The Birth of the Prison*. New York, 1979, p. 195–200, who is vividly describing importance of order and the totality of surveillance during the plague: 'The plague is met by order; its function is to sort out every possible confusion [...].'

⁴⁴ BLAŽINA TOMIĆ, Z. and BLAŽINA, V., *Expelling the plague: the Health Office and the implementation of quarantine in Dubrovnik 1377-1533*, 2015.

⁴⁵ See BLAŽINA TOMIĆ, Z., *Kacamorti i kuga: utemeljenje i razvoj zdravstvene službe u Dubrovniku*, Zagreb in Dubrovnik, 2007, p. 81. However, the Visconti Decree, published three years earlier, already contains a demand for the isolation of the infected and of those who came into closer contact with him. As I have already indicated, the Visconti Decree did not clearly set a time limit for isolation. In the section on protection against infectious diseases in the wider European context, Blažina Tomić surprisingly does not mention the Visconti Decree.

same council it was taken and confirmed that whoever does not observe the aforesaid or any of the aforesaid must pay a fine of fifty perperos and is bound to observe the aforesaid as well.⁴⁶

The decree stipulated that no newcomer from infected places could enter the city without spending a month in *purgatio* (purification) on the islands of Mrkan (*Mercana*) and Cavtat (*Civitas veteris*), south of Dubrovnik. If townspeople violated the decree and hosted newcomers in their homes or provided them with food without permission from the authorities, they were liable to a one-month quarantine and a fine of fifty perperi. The original Dubrovnik quarantine lasted thirty days (*trentina*) but was later increased to forty days, giving rise to the now commonplace term *quarantina* (forty days).⁴⁷

3.2 Sanitary Magistrates with Penal Jurisdiction

A particular innovation of Dubrovnik's anti-plague legislation was the establishment of the first official anti-pandemic service. In 1390, three officials from the ranks of the city patriciate were responsible for supervising 'those coming from infected places' (*officiales contra venientes de locis pestiferis, officiales ad providendum super venientibus de locis pestiferis*). From 1395 onward, these officials were called *cazamortae* (*caxamortae, cazzamortae*);⁴⁸ in other words, those who 'persecute the dead'.⁴⁹ Their extensive penal competencies, which led some to place them alongside the ordinary courts,⁵⁰ were specified in the decree *Contra eos qui veniunt de locis pestiferis* (1397). Violators of anti-pandemic measures were commonly punished with a fine. However, if they failed to pay their debts, the *cazamortae* arranged for a rigorous corporal punishment: 'The same officials may inflict corporal punish-

ment on the previously named offenders who have not paid the aforementioned (pecuniary) penalty, namely, by beating them with a cane, branding them, or inflicting a similar punishment, up to and including the cutting-off of an ear. [...]'⁵¹

All the while, the *cazamortae* also imposed jail sentences ranging from a few months to a year.⁵² As Tomič notes, the *cazamortae* had powers that ranged from the judicial to the executive, and even acted as criminal judges in the case of serious crimes.⁵³ In 1482, for instance, two gravediggers were prosecuted for having dumped the clothes and other personal effects of a wealthy man who had died of the plague on the street in such a way that the contaminated items were easily accessible to the masses. They were promptly sentenced to death by hanging in light of their carelessness.⁵⁴ When the plague spread from Dubrovnik to the village of Konavle in 1503, the jurisdiction of the *cazamortae* was further increased: officials were allowed to incinerate the houses of Konavle villagers who disobeyed the plague laws.⁵⁵ Punishment is also reported in the form of branding the convict's cheek and public shaming on the column of infamy.⁵⁶

In 1486, the Senate of the Republic of Venice appointed a Sanitary Council, composed of three councillors (*magistri sanitatis* also known as *proveditori della sanità*), to supervise the observation of health legislation.⁵⁷ With the consent of all its members, it was initially allowed only to impose financial penalties on those who infringed the sanitary ordinances.⁵⁸ In 1504, the Senate considerably extended its competencies. They were allowed to detain a suspected violator of the sanitary regulations and even torture him when being questioned; famously, the imposition of the death penalty was also available.

⁴⁶ *Cap. 49 Veniens de locis pestiferis non intret Ragusium. vel districtum. Eodem anno, die XXVII iulii, in consilio maiori congregato ut est moris, in quo interfuerunt consiliarii XLVII, captum et firmatum fuit per XXXIII ipsorum quod tam nostrates quam advene venientes de locis pestiferis non recipiantur in Ragusium nec ad eius districtum, nisi steterint prius ad purgandum se in Mercana in Civitate Veteri per unum mensem. Item per consiliarios XLIII eiusdem consilii captum fuit quod nulla persona de Ragusio vel suo districtu audeat vel presumat ire ad illos qui venient de locis pestiferis et stabunt in Mercana vel Civitate Veteri, sub pena standi ibidem per unum mensem. Et illi qui portabunt illis de victualibus seu aliis necessariis non possint ire ad illos sine licentia officialium ad hoc ordinandorum, cum ordine a dictis officialibus illis dando, sub dicta pena standi ibidem unum mensem. Item per consiliarios XXVIII eiusdem consilii captum fuit et firmatum quod quicumque non observaverit predicta seu aliquod predictorum, solvere debeat de pena ypperos quinquaginta et nichilominus teneatur predicta observare.* The text of the Decree can be found in Chapter 49 of the Green Book (*Liber Viridis*). NEDELJKOVIĆ, B. M., *Liber Viridis*, Beograd 1984, p. 23.

⁴⁷ More on the quarantine of Dubrovnik, see RAVANČIĆ, G., *Dubrovnik's Invention of the Quarantine and the Transfer of Knowledge about the Spread of Pandemics*, In: *Radovi – Zavod za hrvatsku povijest*, Vol. 53 (3), Zagreb 2021.

⁴⁸ [A]retissimis legibus et poenis nexum et institutum est super hoc quoddam officium, cui nomen Cazamortae, in quo ex potioribus et mortis timidioribus quinque eliguntur nobiles, qui vigilantissime a venientibus inquirunt quae urbes, quae oppida et quae loca ac regiones morbo contagioso infectae sint. DIVERSIS, P. de: *Situs aedificiorum politiae et laudabilium consuetudinum inclytiae civitatis Ragusij*. Zara, 1882, p. 82.

⁴⁹ BLAŽINA–TOMIĆ, Z., *Kacamorti i kuga: utemeljenje i razvoj zdravstvene službe u Dubrovniku*, Zagreb and Dubrovnik, 2007, p. 93, n. 186.

⁵⁰ LONZA, N., *Pod plaštem pravde, Kaznenopravni sustav Dubrovačke Republike u XVIII. stoljeću*, Dubrovnik 1997, p. 71.

⁵¹ [P]ossint ipsi officiales praedictos contrafacientes non solventes dictam poenam punire in personam faciendo ipsos fustigare, aut bruscolare, vel similem poenam illis inferendo, usque ad incisionem auriculi. [...] GELČIĆ, J., *Delle istituzioni marittime e sanitarie della Repubblica di Ragusa*. Trieste, 1882, p. 140; BLAŽINA–TOMIĆ, Z., *Kacamorti i kuga: utemeljenje i razvoj zdravstvene službe u Dubrovniku*, Zagreb and Dubrovnik, 2007, p. 87.

⁵² LONZA, N., *Pod plaštem pravde, Kaznenopravni sustav Dubrovačke Republike u XVIII. stoljeću*, Dubrovnik 1997, p. 71.

⁵³ BLAŽINA–TOMIĆ, Z., *Kacamorti i kuga: utemeljenje i razvoj zdravstvene službe u Dubrovniku*, Zagreb and Dubrovnik, 2007, p. 93 in 104.

⁵⁴ *Ibid.* p. 108. In 1528, a similar affair broke out when the very member of the health service who was supposed to supervise the burials and burning of contaminated personal effects of the plague victims himself concealed these in order to gain pecuniary benefit. He was sentenced to death by hanging. Blažina–Tomić, p. 174, quotes an excerpt from the judgment (citing *Libro deli Signori Chazamorbi*, a tergo, f. 109): 'Dizemo et criminalmente ad morte sententiamo prefato Giorgi de Marchetto, sia conduto fore della zitta alle Pille et li sia, infra le porte, incipato per le canne della gola, ad eo che l'anima si parta dal corpo suspenso, el corpo suspenso senza anima rimanga ad exemplo et castiga deli altri simil exzessi cometer volleseno.'

⁵⁵ *Ibid.* p. 131, op. 249: [...] *de dando libertatem officialibus Cazzamortis quod infectis in Canali et alibi, si non obedient possint conburi facere domum et ipsos inobedientes in ipsis domibus possint conburi facere.* (Acta consilii Rogatorum, ser. 3, sv. 29, f. 131–131').

⁵⁶ *Ibid.*, p. 134.

⁵⁷ RODENWALDT, E., *Die Gesundheitsgesetzgebung des Magistrato della sanità Venedigs. 1486–1550*. Heidelberg, 1956, p. 6.

⁵⁸ *Habeant plenam et omnimodam libertatem, Fakultatem, et potestatem ipsi tres de concordia imponendi penas, exigendi eas [...]* Codex 'Terra 1483–1485, Senato I–R. 9'. RODENWALDT, E., *Die Gesundheitsgesetzgebung des Magistrato della sanità Venedigs. 1486–1550*. Heidelberg, 1956, p. 117.

The death sentence was to be imposed by the Sanitary Councils for even relatively trivial offences, such as destroying a sign on a door indicating that a plague patient was accommodated in the house.⁵⁹ From 1585 onwards, an appeal against a decision of the Council of Sanitary Magistrates was no longer admissible.⁶⁰ The position of the sanitary magistrates can be compared with that of the ‘judges of blood’, since a criminal judgment of the judges of blood also could not, in principle, be subject to appeal under the rules of the *ius commune*.

Additionally, the Sanitary Council was responsible for supervising lazarettos, i.e., facilities where newcomers and locals who were likely to have been infected with a contagious disease had to reside temporarily.⁶¹ Even after recovery, plague survivors were required to spend forty days in the infirmary. Ancient Greek physicians believed that the 40-day period marked the transition from an acute and, in principle, contagious disease to a chronic one that was, in principle, non-contagious.⁶²

In Milan, in 1534, Francesco II. Sforza, by a particular act of the *Nuove Constitutioni*, laid the foundations for the functioning of the Sanitary Prefecture (*Officium praefectorum sanitatis*), which eventually became a permanent municipal magistrate’s office. The Senate annually elected members of the Council that consisted of two Quaestors, two doctors, a lawyer, and a secretary.⁶³ The Prefecture was empowered to ‘command, fine, confiscate property, judge and punish, including the imposition of the death penalty, all those who do not obey the orders and decrees of the (Sanitary) Commission and the city authorities’.⁶⁴ The constitution also contains a rather striking justification for harsh punishments: ‘Strict measures are to be taken to prevent crimes which not only ruin the city but threaten the whole province and the human race with a certain end’.⁶⁵

Soon thereafter, specialised councils of sanitary magistrates (*provisores sanitatis, officiales sanitatis, commissarii sanitatis, gubernatores sanitatis, deputati sanitatis*) became a permanent institution throughout the cities of Europe. Under supervision of these

councils, addressees seem to have predominantly complied with the sanitary legislation.⁶⁶ The harsh penalties certainly contributed to its effectiveness, at least to some extent. According to Muratori, in 1656, four medical magistrates of the Pontifical Congregation for Health in Rome were empowered to prosecute clerics who did not comply with the health measures and, ‘after verifying the truth under the martial law, without (the accused’s) right of defence’ (*sola veritate inspecta, denegatis defensionibus, more belli*), impose the familiar death penalty.⁶⁷ Given the general rule that ecclesiastical tribunals were not allowed to shed blood (*Ecclesia non sinit sanguinem*), it is surprising that, once the plague broke out in 1656, the Pontifical Congregation for Health (*Congregazione della Sanità di Roma*) was empowered to carry out the death penalty even against clerics if they violated health precautions. In turn, offences against public health were considered to be among the most aberrant acts, which were subject to the notable observation by Carpov: ‘In the most serious offences, it is permissible to exceed the applicable law because of the immeasurable criminal quantity.’⁶⁸

3.3 *Tractatus de peste* – Criminal Law Aspects

The pioneering work on the (civil) law aspects of the plague was the *Tractatus iuridicus de peste* (1522), written by the professor of Roman and canon law Sannazario della Ripa (1480–1535). Ripa’s overview of relaxations of legal rules was followed by the *Tractatus legalis de peste* (1524) by the Bolognese jurist Praevidellus (1496–1534). These two treatises, which have been repeatedly reprinted due to their originality and applicability, addressed a broader audience and contrasted with the specialised commentaries.⁶⁹ In both treatises, contagion is described as a deadly disease, which, because of its rapid spread and uncontrollability, forced a frightened population into fleeing. The ‘plague law’ came into force when an pandemic was officially declared in an area, but according to some views, it was sufficient if it was at least notorious.⁷⁰ The texts focused on

⁵⁹ RIVA, R. B., ‘Per istirpare questa maligna e pestifera contagione’. Sanità pubblica e diritto penale durante la peste di San Carlo (1576-1577). In: *Italian Review of Legal History*, 2020 (6), 11, p. 262.

⁶⁰ LE BRET, J. F., *Staatgeschichte der Republik Venedig von ihrem Ursprunge bis auf unsere Zeiten, aus echten Quellen vorgetragen, und nach einer richtigen Zeitordnung geordnet, Des zweyten Theiles zweyte Abtheilung*. Riga, 1775, p. 752.

⁶¹ RODENWALDT, E., *Die Gesundheitsgesetzgebung des Magistrato della sanità Venedigs. 1486–1550*. Heidelberg, 1956, p. 16 ss. The Lazzaretto Vecchio, established in 1423, was the first official lazaretto in Europe. The name lazaretto comes from the name of the island Santa Maria of Nazareth.

⁶² WEDEL, G. W., *Propempticon inaugural de quadragesima medica*. Jena, 1688, p. 3: *Quadragesima medica terminus est morborum acutorum terminus limitaneus inter acutos & chronicos, ultimus acutorum primus chronicorum, inde productorum, ut, qui ultra quadragesimum diem durat morbus*. (‘The forty-day medical time limit is the time limit which separates acute from chronic diseases, the last day of an acute disease being the first day of a chronic disease, as is evident in cases where the disease lasts longer than forty days.’)

⁶³ *Constitutiones Domini Mediolanensis*. Milano, 1552, p. 22b.

⁶⁴ [I]mperandi, mulctandi, ac bonorum confiscationem ad Sanitatis beneficium, nec non et quascumque corporis poenas, ad ultimum usque ad Supplicium inclusive iudicandi, et quoscumque eorum mandatis et ordinibus non obtemperantes puniendi, servatis ac non servatis ordinibus et constitutionibus. *Constitutiones Domini Mediolanensis*. Milano, 1552, p. 23a.

⁶⁵ *Severius enim agendum est ad ea facinora comprimenda, quae non solum oppido, aut civitati perniciem parere, sed universae Provinciae, & humano generi exitium afferre possunt. Constitutiones Domini Mediolanensis*. Milano, 1552, p. 23a.

⁶⁶ LE BRET, J. F., *Staatgeschichte der Republik Venedig von ihrem Ursprunge bis auf unsere Zeiten, aus echten Quellen vorgetragen, und nach einer richtigen Zeitordnung geordnet, Des zweyten Theiles zweyte Abtheilung*. Riga, 1775, p. 752.

⁶⁷ MURATORI, L. A., *Del governo della peste*. Modena, 1720, p. 247.

⁶⁸ *Notissimum est, quod in delictis atrocissimis propter criminis enormitatem jura transgredi liceat*. CARPZOV, B., *Practicae novae Imperialis Saxonicae Rerum Criminalium*, Leipzig, 1723, p. 14.

⁶⁹ ŽEPIČ, V., *Kužni privilegiji v občepravnih doktrini in evropskih civilnih kodifikacijah*. In: *Acta histriae*, 30 (1), Koper, 2022, p. 4.

⁷⁰ The principle of the law of necessity, which applied only at a certain time and place (*Necessitas est lex temporis et loci*), applied to the privileges of the plague. As soon as the state of emergency ended, the established rules of law came into force. *Ibid.*, p. 6.

private law. In Praevidellus' treatise, there are a few, albeit distinctly limited, questions relating to criminal law. For example, the jurist wondered how to punish a deliberate spreader of the plague: 'I am thinking about a new question, which everyone knows has arisen this year because of the event in Bologna: a plague-infected person, either out of desperation or hatred of humanity, wanting to kill others while himself was dying, went, surrounded by a crowd of people, to a densely populated part of the city to spread the disease (among the inhabitants). Which punishment is to be imposed on him? I argue that he should be punished with the death penalty: the similar text in D. 47, 11, 9 speaks in favour of this since the very matter (namely, the deliberate spreading of the plague) itself leads to death. Baldus also says at the beginning of his commentary on C. 9 (entitled 'Who cannot bring an accusation?') that he who has set the fire must himself be burned. As Baldus says, arson leads to death, so the arsonist should taste that punishment which he threatened. And so, in its sense, is D. 47, 11, 9.'⁷¹

Thus, Praevidelli proposed that the wilful spreader of pestilence should be condemned to death. He justifies his verdict with two arguments. The first refers to Ulpian's description of the so-called scopelism (*σκοπελισμὸν, lapidum positio*), the second includes Baldus' teaching on the just punishment of the arsonist. Scopelism was a rite which was supposed to be especially widespread among the Arab peoples.⁷² The local peasants placed stones in the fields of their enemies and threatened that any cultivator of the fenced fields would suffer a violent death, thereby invoking magical powers. Due to the superstitious tendencies of the population, the practice led to famine, as the peasants did not dare to cultivate their fields. Ulpian records that the provincial governors imposed the death penalty owing to the widespread danger of this occult act, which caused great fear among the population: 'There are activities which allow punishment according to the custom of the province. For instance, in the province of Arabia, *σκοπελισμὸν* is called a crime. Its nature is this: several enemies *σκοπελίζειν* the land of the person to whom they are hostile, that is, they place stones as a sign that if anyone cultivates that land, he will die horribly

because of the plot of those who place the stones; this creates such fear that no one dares to approach this land, fearing the maleficence of those who place the stones. Such conduct the governor should punish severely, even with the capital penalty; for the very act threatens death.'⁷³

In the second part, Praevidellus summarised Baldus' view that the arsonist deserved the death penalty. The criminal quantity of wilful arson was said to be comparable both to scopelism and the deliberate spread of infectious diseases.

From the point of view of assessing the grounds of criminal defenses, the following dilemma of Praevidellus is particularly interesting: 'Someone who is suffering from the plague, and who is known to everyone as being infected, is so foolish or crooked that he wants to embrace or stick to a healthy person and talk to his face: can such a healthy person, who cannot defend himself or slip out of the hands of an infected person except by using a sword or a torch and, if necessary, by killing him, remain unpunished? Think about it, because all laws stipulate that whoever has done something to protect his body has done it by the law. Baldus says in C. 9, 12, 8, that he who kills another out of fear of a tyrant will not be justified in his act (*non penitus excusatur*), but neither does he have to die for it. He may be punished by some other penalty. In addition, both the fear of the tyrant and the fear of the plague may be treated equally in this case, as you have already seen above. [...]'⁷⁴

Praevidellus discusses how one could punish a person who, fearing infection, killed a deliberate plague-spreader. He compares the event with Baldus' case, where the perpetrator had killed someone as an order of a tyrant. Baldus considered that this was an unlawful act; however, he argued that the perpetrator could have been punished more leniently because of a serious fear of the tyrant. Praevidellus adopted the same reasoning in the case of the killing of the infectious disease spreader. In this case, he also thought the perpetrator's conduct was illegal, but that his guilt, and therefore the sanction, was reduced.

One of the most detailed descriptions of the authorities' response during the pandemic period is Centorio's report. It records the development of the outbreak of the plague in Milan

⁷¹ *Quaero de vna noua quaestione quam omnes sciunt hoc anno contigisse Bononiae: quidam peste infectus vel desperatione vel odio humani generis, vt quia moriendo vel let alios secum perire, iuit per frequentes hominum conuentus in frequentioribus locis ciuitatis hunc & illum studiose infectando: qua poena debet puniri. Ego dico istum usque ad poenam capitis esse puniendum: de hoc in simile est tex. in l. sacularij. § sunt quaedam ibi, quia & ipsa res mortem comminat ff. de extraordi. crimi. per quem tex. Bal. in l. data opera: in prin. C. qui accus. non poss. dicit, quod qui magnum incendium iuxta aliquod aedificium fecit causa comburendi debet & ipse comburi ratio est, dicit ipse: quia incendium in quantitate ignis mortem multis praeparat. & ideo incenso mortem quam minatur experiatur. d. § sunt quaedam in ratione sui. PRAEVIDELLUS, H., De peste & eius priuilegiis. In: *Tractatus illustrivm in vtroque tvm pontificij, tvm caesarei iuris facultate Iuriconsultorum, De variij verbis Iuris. Tomus XVIII.*, Venice, 1584, p. 184.*

⁷² The most comprehensive treatise on this mysterious Roman public crime was published by RHODE, M., *Dissertatio juridica de scopelismo*. Frankfurt an der Oder, 1705.

⁷³ D. 47, 11, 9 (Ulp. 9 de off. procons.): *Sunt quaedam, quae more provinciarum coercionem solent admittere: ut puta in provincia Arabia σκοπελισμὸν crimen appellant, cuius rei admissum tale est: plerique inimicorum solent praedium inimici σκοπελίζειν, id est lapides ponere indicio futuros, quod, si quis eum agrum coluisset, malo leto periturus esset insidiis eorum, qui scopulos possuissent: quae res tantum timorem habet, ut nemo ad eum agrum accedere audeat crudelitatem timens eorum qui scopelismum fecerunt. hanc rem praesides exequi solent graviter usque ad poenam capitis, quia et ipsa res mortem comminatur.* WATSON, A. *The Digest of Justinian, Vol. 4*. Philadelphia, 1985, p. 299.

⁷⁴ [A]liquis peste laborans quem omnes sciunt secum gestare pestilentiam est ita fatuus vel malignus, quod vult hominem sanum amplexari, vel alias homini sano adhaerere & in faciem eius loqui: An iste sanus non valens aliter illum pestilentem euitare nec alio modo ex manibus illius elabi possit gladio vel fuste illum impune repellere et occidendo si necesse fuerit. Cogitabis super hoc, omnes leges & omnia iura dicunt, quod illud, quod quis ad tutelam sui corporis cum moderamine fecerit iure fecisse aestimetur. Bal. tamen in l. seruos C. ad l. Iul. de vi. dicit, quod ille, qui metu tyranni occidit aliquem: non penitus excusatur, licet non debeat mori tamen aliqua poena debet puniri & metus tyranni & pestis in hac materia per Docto. solet aequiparari: ut uidistis supra. PRAEVIDELLUS, H., De peste & eius priuilegiis. In: *Tractatus illustrivm in vtroque tvm pontificij, tvm caesarei iuris facultate Iuriconsultorum, De variij verbis Iuris. Tomus XVIII.*, Venice, 1584, p. 184.

between 1576 and 1577. Under penalty of confiscation of property, corporal punishment, and – at the judge’s discretion – even the death penalty, it was forbidden to enter the city without a certain health pass (*bolletta di sanità*).⁷⁵ The authorities encouraged the denunciation of offenders with a denouncer’s reward of one-third participation in the exacted fine.⁷⁶ The heads of families were obligated, under the threat of the death penalty and confiscation of their property, to report infectious patients to the priests, who in turn reported them to the Sanitary Commission.⁷⁷ The home of the infectious patient was sealed and the priest kept the keys.⁷⁸ If anyone wished to leave their home, they had to be granted permission by the Health Commission. The houses were locked and the doors of the houses of the sick and suspicious persons (mainly brothels) were sealed with chains.⁷⁹ As a consequence of the fear of plague caused by scroungers and beggars, the Milanese health board sought to control also other sectors of the poor. ‘Porters, mountain people, women rag dealers, and similar persons who lodged in bed-sits, kept their clothes unwashed and greasy, and gave off the worst stench’, were particularly risky ‘of causing a big pandemic’.⁸⁰ The health board prohibited the entry of tricksters, knaves, negroes, gypsies, herbalists, street-singers, comedians, prostitutes, and similar ‘odd sorts of people’.⁸¹ The Health Commission ordered the strict burning of contaminated objects belonging to infected residents. The theft or concealment of these items was considered a qualified crime punishable by death.⁸² The Milanese authorities relied heavily on the deterrent effect of the death penalty.⁸³

One of the best-known descriptions of criminal proceedings against alleged plague spreaders is Manzoni’s depiction of the trial of the greasers (Italian: *untori*, French: *engraisseurs de peste*) in his brilliant novel *I promessi sposi* (The Betrothed, published in 1827). On 22 April 1630, Milanese citizens encountered the walls and doors of the houses and the cathedral to be cov-

ered in grease.⁸⁴ As the occupants of these buildings were dying of the plague in large numbers and at a higher rate than other Milanese, the belief spread that the plague was caused by humans and that it was therefore ‘artificial’ (*Teoria della peste manufatta*).⁸⁵ The alleged perpetrators were accused of having gathered the grease from the saliva of the plague victims and having maliciously rub it upon public surfaces. The two unfortunate scapegoats were quartered, allegedly left alive in the square for six hours, and then burned at the stake. A pillar of shame (*collona infame*) was erected on the site of the alleged perpetrators’ burnt-down house.⁸⁶ The accusations against them were unfounded entirely, while the trial itself appeared with Musumeci’s words as ‘esempio più deteriore della giustizia dell’ancien régime in cui prova legale e tortura sono i tratti peculiari del sistema probatorio.’⁸⁷

4. The “Plague Law” in the Lands of the Holy Roman Empire between the 16th and the 18th Centuries

4.1 Pestordnungen

In the Holy Roman Empire, the governmental measures with a criminal or at least an administrative-punitive character, aimed at limiting the spread of pandemics, are found in the Police Regulations (*Policeyordnungen*). These were the prince’s collection of regulations covering mainly administrative, but also, to a lesser extent, civil and criminal law. Regulating various aspects of daily life and public morals would ensure a harmonious life of the community.⁸⁸ One of the areas of ‘good policy’ was also the protection of public health.⁸⁹ Due to the *ad hoc* nature of these measures that had to consider local incidence of the disease, they were not included in general state ‘*Polizeyordnungen*’ but in separate ‘*Infektionsordnungen*’ or ‘*Pestordnungen*’.⁹⁰ A common feature of all these orders is that the criminal law means of controlling the pandemic were strik-

⁷⁵ CENTORIO, A., *I cinque libri degl’ avvertimenti, ordini, gride et editti, fatti et osservati in Milano ne’ tempi sospettosi della peste, ne gli anni 1576 et 77*. Venice, 1579, p. 27 s.

⁷⁶ *Ibid.*, p. 28.

⁷⁷ *Ibid.*, p. 90.

⁷⁸ *Ibid.*, p. 259.

⁷⁹ RIVA, R. B., ‘Per istirpare questa maligna e pestifera contagione’. Sanità pubblica e diritto penale durante la peste di San Carlo (1576-1577). In: *Italian Review of Legal History*, 2020 (6), 11, p. 276.

⁸⁰ COHN, S. K., *Cultures of plague. Medical Thinking at the End of the Renaissance*. Oxford, 2010, p. 225.

⁸¹ CENTORIO, A., *I cinque libri degl’ avvertimenti, ordini, gride et editti, fatti et osservati in Milano ne’ tempi sospettosi della peste, ne gli anni 1576 et 77*. Venice, 1579, pp. 13–15.

⁸² *Ibid.*, p. 278.

⁸³ *Ibid.*, p. 285.

⁸⁴ On criminal procedure against alleged Milanese plague-spreaders, see FARINELLI, G., PACCAGNINI, E. (Ed.), *Processo agli untori. Milano 1630: cronaca e atti giudiziari*, Milano, 1988; MUSUMECI, E., ‘Il funesto delitto’: il contagio e l’imbarazzo dei giuristi. In: *Historia et ius – Rivista di storia giuridica dell’età medievale e moderna*, 12, 2017, p. 5; DI RENZO VILLATA, M. G., Il processo agli untori di manzoniana memoria e la testimonianza (ovvero... due volti dell’umana giustizia). In: *Acta Histriae*, 19 (2011) 3, p. 419–452; PASTORE, A., Dal lessico della peste: untori, unzioni, unti. In: *Acta Histriae*, 15 (2007) 1, p. 134.

⁸⁵ STICKER, G., *Abhandlungen aus der Seuchengeschichte und Seuchenlehre, I. Band, Die Pest*, Gießen, 1908–1910, p. 141.

⁸⁶ *Ibid.*, p. 144.

⁸⁷ MUSUMECI, E., ‘Il funesto delitto’: il contagio e l’imbarazzo dei giuristi. In: *Historia et ius – Rivista di storia giuridica dell’età medievale e moderna*, 12, 2017, p. 6.

⁸⁸ HÄRTER, K., *Policeyordnungen*. In: *Handwörterbuch zur deutschen Rechtsgeschichte IV*, col. 646–652.

⁸⁹ BERGIUS, J. H. L., *Polizy- und Cameralmagazin*, Vienna, 1788, p. 93.

⁹⁰ STURM, P., *Leben mit dem Tod in den Reichsstädten Esslingen, Nördlingen und Schwäbisch Hall, Epidemien und deren Auswirkungen vom frühen 15. bis zum 17. Jahrhundert*, Ostfildern, 2014, pp. 137–226. An outline of the *Infektionsordnungen* for the Austrian lands is given by BERGIUS, J. H. L., *Polizy- und Cameralmagazin*, Vienna, 1788, p. 95.

ingly not prioritised. The prevailing norms are, to use the contemporary terminology, those of the law of minor offences or even misdemeanours.⁹¹ The descriptions of offences are either non-existent or of a blanket character: for example, they prescribe that an act is to be ‘severely punished’ or that an act is forbidden ‘under penalty’.

In 1521, Archduke Ferdinand for the Inner-Austrian lands issued the first *Infektionsordnung*.⁹² Yet, these did not include penal regulations. The Infection Order of Ferdinand I (1551) identified the source of the plague with people’s impiety, debauchery and villainy, which was not renounced despite divine admonitions and commandments from the authorities.⁹³ It was not until the Infectious Orders of 1571 and 1578 that monetary and corporal punishments for violation of quarantine decrees first appeared.⁹⁴ On 12 November 1710, an imperial patent threatened the violators of health legislation with an instant execution by firing squad.⁹⁵

4.2 Crimen extraordinarium

The German-speaking jurists of the late 18th and early 19th centuries classified the deliberate spread of infectious diseases under the crime of ‘generally dangerous conduct’ (*gemeingefährliche Handlung*).⁹⁶ According to the provisions of the *Allgemeines Landrecht*, as observed by Binding, the threat had to endanger ‘the State, public safety or many people’. It was not until the 19th century that the prohibited consequence was limited to injury to life, health and property.⁹⁷ Notably, the spread of the animal plague was defined as a separate crime.⁹⁸ In addition to the deliberate spread of infectious disease, arson, causing a flood risk, and poisoning were the main manifestations of the offence of ‘generally dangerous conduct’. Only arson (*incendium*) was regarded as a separate offence, with a history going back as far as Roman law.⁹⁹ Ultimately, a great dilemma arose

for the learned jurists as to which Roman law delict or public crime the spreading of infectious diseases could be classified as. The question was also related to whether only intentional or also negligent forms of the commission were to be targeted.

Abegg, German criminal law scholar, commented on the crime of ‘generally dangerous conduct’ found in the Roman *Lex Aquilia*.¹⁰⁰ Meister claimed that the delict of *damnum iniuria datum* could only be spoken of in the case of an interference with property and not with public health. If, on the other hand, the interference was concerning personal property, the judges would have to resort to the principles of the crime of public violence (*vis*), injury (*injuria realis*), or another extraordinary crime (*crimen extraordinarium*).¹⁰¹ Abegg’s attempt to describe universally dangerous conduct in the mould of the Aquilian law was supported above all by the desire to criminalise the negligent form of the spread of infectious disease.¹⁰² This was unthinkable under the rules of *iniuria*, which were applicable only in the case of intentional acts. Some jurists equated the intentional spreading of a contagious disease, such as syphilis, with being a form of poisoning.¹⁰³ The latter resulting in death was found to be a qualified form of manslaughter.¹⁰⁴

The history of regulations against plague in the Middle Ages and of the practice confirms the criminal relevance of any act or omission that constituted a danger to public health.¹⁰⁵ This applied not only to epidemic diseases such as plague, but also included the spread of sexually infectious diseases such as syphilis. Roßhirt, another German criminal law scholar, pointed out that the dispositions of the offence were rather blanketed. In the practice of the Middle and Modern Ages, ‘any deliberate circumvention of the rules of the sanitary police was punishable if the authorities had so ordered [...] and even without a prescribed penalty, it was possible to impose a penalty *ex arbitrio* since police practice never bothered to apply the principle of

⁹¹ They are cited by HIERSCHKE, A., HOLZINGER, K. IN EIBL, B., *Handbuch des Epidemierechts unter besonderer Berücksichtigung der Regelungen betreffend COVID-19*. Vienna, 2020, p. 4, n. 21. See also the detailed study by STURM, P., *Leben mit dem Tod in den Reichsstädten Esslingen, Nördlingen und Schwäbisch Hall, Epidemien und deren Auswirkungen vom frühen 15. bis zum 17. Jahrhundert*. Ostfildern, 2014, pp. 206-210.

⁹² FLAMM, H., *Die ersten Infektions- oder Pest-Ordnungen in den österreichischen Erblanden, im Fürstlichen Erzstift Salzburg und im Innuviertel im 16. Jahrhundert*. Vienna, 2008, p. 11.

⁹³ GLASER, E., Kuga v dobi Andreja Perlacha. In: *Časopis za zgodovino in narodopisje*. Maribor, 62 (1991) 2, p. 207.

⁹⁴ FLAMM, H., *Die ersten Infektions- oder Pest-Ordnungen in den österreichischen Erblanden, im Fürstlichen Erzstift Salzburg und im Innuviertel im 16. Jahrhundert*. Vienna, 2008, p. 22.

⁹⁵ MACHER, M., *Handbuch der kaiserl. königl. Sanität-Gesetze und Verordnungen mit besonderer Beziehung auf die innerösterreichischen Provinzen, Erster Band*. Graz, Ljubljana, Klagenfurt, 1846, p. 36.

⁹⁶ HEFFTER, A. W., *Lehrbuch des gemeinen deutschen Criminalrechtes*. Halle, 1848, p. 331; BINDING, K., *Lehrbuch des Gemeinen Deutschen Strafrechts. Besonderer Teil, Zweiter Band, Erste Abteilung*. Leipzig, 1904, p. 1–9.

⁹⁷ BINDING, K., *Lehrbuch des Gemeinen Deutschen Strafrechts. Besonderer Teil, Zweiter Band, Erste Abteilung*. Leipzig, 1904, p. 2.

⁹⁸ Under the provisions of the *Allgemeines Landrecht*, the intentional spreading of cattle plague was punishable by three to six years’ imprisonment, or, if the perpetrators could only be held guilty of gross negligence, by six months’ to three years’ imprisonment: 2, 20, 17 § 1506 ALR: ‘Wer ansteckende Seuchen unter das Vieh verbreitet, hat, wenn es vorsätzlich geschehen ist, eine drey- bis sechsjährige; im Falle einer groben Fahrlässigkeit aber, oder bey übertretenem Polizeygesetze, eine sechsmonathliche bis dreyjährige Zuchthaus- oder Festungsstrafe verwirkt.’

⁹⁹ ABECC, J. Fr. H., *Lehrbuch der Strafrechts-Wissenschaft*. Neustadt, 1836, pp. 515–516.

¹⁰⁰ *Ibid.*, p. 526.

¹⁰¹ *Quodsi desit damnum patrimoniale, ad aliud delictorum genus laesio referenda est. Sic, quod illicite dolo malo, alteri tantum nocendi aut aegre faciendi causa fit, sed sine patrimonii damno, pro varia circumstantiarum ratione, tanquam vis, iniuriarum, stellionatus, aliudve extraordinarium crimen puniri potest.* MEISTER, G. J. F., *Principia iuris criminalis Germaniae Commvnis*. Göttingen, 1819, p. 202.

¹⁰² Ulp. 9, 2, 44: *In lege Aquilia et levissima culpa venit.* (‘Under the *lex Aquilia* even the slightest degree of fault counts.’)

¹⁰³ GROLMAN, K., *Grundsätze der Criminalwissenschaft nebst einer Darstellung des Geistes der deutschen Criminalgesetze*. Giessen, 1798, p. 346.

¹⁰⁴ Cf. Ant. C. 9, 18, 1 pr., *Plus est hominem veneno extinguerere quam occidere gladio.* (‘It is worse to kill someone with poison than with a sword.’)

¹⁰⁵ ROßHIRT, K. F., *Geschichte und System des deutschen Strafrechts, Dritter Theil, Zweite Abtheilung*. Stuttgart, 1839, p. 182.

nulla poena sine lege to these matters'.¹⁰⁶ The absence of a consistent application of the principle of legality is particularly important in terms of the history of public health offences. If there was no prescribed punishment for acts, but the gravity of the act corresponded to some other foreseeable offence, there was no obstacle to punishment according to the judge's discretion or by analogy.¹⁰⁷ The *Constitutio Criminalis Carolina*, a source of substantive and procedural criminal law from the 16th to the 18th centuries, did not acknowledge the principle of legality. Moreover, *Carolina* did not foresee a closed catalogue of offences, of which only a small number are described by way of exhaustive statutory signs. The judge was allowed to apply, in the alternative, the 'common law of the empire', in other words, the received rules of Roman and canon criminal law.¹⁰⁸

The cases of the spread of sexually transmitted diseases were particularly challenging. This field has been the subject of legal theoretical debate from a relatively early stage.¹⁰⁹ Curiously, according to Carpzov, prostitution *per se* was still punishable by burning at the stake, whereas he made no mention of the intentional transmission of a sexually infectious disease.¹¹⁰

The *Allgemeines Landrecht* regulated the offences of prostitutes (*Gemeine Hurerey*) in the section on 'carnal offences' ('*Von fleischlichen Verbrechen*'), although the prevailing view at the time was that prostitution was not a crime; after all, it did not lead to injury or endangerment of third parties.¹¹¹ The ALR stipulated that a prostitute who showed signs of syphilis had to inform the manager of the brothel, who in turn informed the police, to prevent the further spread of the sexually contagious disease

by isolating the subject.¹¹² Regardless of whether the prostitute knew of her syphilis infection and the disease spread,¹¹³ she was liable to a three-month prison sentence and, in the event of a relapse, to the sentence's extension by six months.¹¹⁴ If the infected female prostitute (*angesteckte Weibsperson*) concealed the existence of the disease and thereby continued the spread, she was subjected to a six- to a twelve-months prison sentence.¹¹⁵ Persons who were not employed in a brothel, but who knew they were infected with syphilis and who recklessly had intercourse with others and infected them, also risked three months of imprisonment.¹¹⁶

4.3 *Constitutio Criminalis Theresiana* (1768)

In 1728 and 1732, Charles VI ordered the establishment of a sanitary cordon with quarantine facilities on the Austrian-Ottoman border.¹¹⁷ Whoever crossed the border at a time when the plague on the Turkish side was raging had to remain in quarantine for 84 days, while 42 days sufficed in the event of a suspected plague. Even when there were no plague reports or rumours thereof, the quarantine lasted up to 21 days.¹¹⁸ Quarantines made border crossings very difficult, but they were effective in reducing the risk of an outbreak of the plague.¹¹⁹

Between 1755 and 1764, Maria Theresia amended Charles's decrees for the Austrian Littoral (the counties of Gorizia and Burgenland) as well as for the Austro-Turkish frontiers. In 1766, all the provisions were supplemented by punitive decrees in the 'Penal Code for Sanitary and Contumacy Offenders' (*Strafgesetz für die Uebertreter der Sanität- und Kontumaz-Ordnungen*). The rel-

¹⁰⁶ Ibid, p. 183.

¹⁰⁷ SCHMIDT, E., *Einführung in die Geschichte der deutschen Strafrechtspflege*. Göttingen, 1965, p. 166 s.

¹⁰⁸ Art. 105 [of the CCC], *qui, ingenue fatens, omnium omnino criminum poenas CCC, haud contineri, iudices, si de crimine aliquo aut plane nihil sancitum, aut poena ejus silentio praetermissa aut certe non satis distincte explicata sit, ante omnia ad jura communia imperialia respicere jubet. Sub juribus imperialibus autem in primis jus Romanum intelligi neminem fugit, quocirca hic, ubi crimen aliquod in CCC omisum esse deprehendimus, ad jus illud recurrendum atque ex ejus praeceptis CCC. supplendam esse, sequitur.* Since the question of the application of the law and the understanding of the sources often caused insurmountable difficulties for the untrained judge, he was permitted to turn to the learned jurists (*radts pflegen*) at the law faculties in doubtful cases.

¹⁰⁹ On recent history, see GREGG, S. M., *Criminal Punishment for the Transmission of Sexually Transmitted Diseases: Lessons from Syphilis*. In: *Bulletin of the History of Medicine*, vol. 65, no. 4, 1991, p. 550 ss.

¹¹⁰ 'Der Fall, wenn ein mit venerischer Krankheit behafteter Mensch einen andern durch Beischlaf ansteckt, gehört ganz vorzüglich zu den Verbrechen wider die Gesundheit. Die deutschen Gesetze erwähnen denselben nicht. Sie wollen Schwächung und Hurerei bestraft wissen, und vergessen im heiligen Eifer über diese strafbaren (??) Vergehen, die Hauptsache!' TITTMANN, C. A., *Grundlinien der Strafrechtswissenschaft und der deutschen Strafgesetzkunde zum Gebrauche bei Vorlesungen*. Leipzig, 1800, p. 118.

¹¹¹ MAYER, C. W., *Prostitution unde venis, quo vadis? Zur Definition, rechtshistorischen Entwicklung und aktuellen juristischen und gesellschaftlichen Bewertung der Prostitution*. Hamburg, 2021, pp. 150 ss.

¹¹² 2, 20, 12 § 1013 ALR: 'Wird eine Weibsperson in einem dergleichen Hause mit einer venerischen Krankheit befallen: so muß es die Wirthin der Polizey sofort anzeigen, und nach deren Anordnung, für die Cur und Verhütung des weitem Ansteckens sorgen.'

¹¹³ FEUERBACH, P. J. A. V., MITTERMEIER, C. J. A., *Lehrbuch des gemeinen in Deutschland gültigen peinlichen Rechtes*, Giessen, 1847, p. 727.

¹¹⁴ 2, 20, 12 § 1014 ALR: 'Unterläßt sie dieses: so hat sie das erstmal Gefängnißstrafe auf drey Monathe; im Wiederholungsfalle aber sechsmonatliche Zuchthausstrafe, mit Willkommen und Abschied verwirkt.'

¹¹⁵ 2, 20, 12 § 1015 ALR: 'Hat die angesteckte Weibsperson ihre Krankheit verschwiegen, und dadurch zur weitem Ausbreitung des Uebels Anlaß gegeben: so soll sie mit Zuchthausstrafe auf sechs Monathe bis Ein Jahr, nebst Willkommen und Abschied, belegt werden.'

¹¹⁶ 2, 20, 12 § 1026 ALR: 'Alle nicht in Hurenhäusern lebende Personen, welche wissen, daß sie mit einer venerischen Krankheit behaftet sind, aber dennoch sich mit Andern fleischlich vermischen, und wieder damit anstecken, haben eine dreymonatliche Gefängniß- oder Zuchthausstrafe verwirkt.'

¹¹⁷ See the text of Charles order in: HERRENLEBEN, S. G., *Sammlung Oesterreichischer Gesetze und Ordnungen wie solche von Zeit zu Zeit ergangen und publiciret worden, so viel deren vom Jahr 1721 bis Höchst-traurigen Tod-Fall der Römisch-Kayserslichen Majestät Caroli VI aufzubringen waren*. Supplementum Codicis Pars II. Vienna, 1752, s.v. Sanitäts-Sachen, pp. 499 s and pp 789–790. On this see BRONZA, B., *Austrian Measures for Prevention and Control of the Plague Pandemic Along the Border With the Ottoman Empire During the 18th Century*. In: *Scripta Medica*, 50 (4), 2019, p. 179.

¹¹⁸ BRONZA, B., *Austrian Measures for Prevention and Control of the Plague Pandemic Along the Border With the Ottoman Empire During the 18th Century*. In: *Scripta Medica*, 50 (4), 2019, p. 180.

¹¹⁹ After the introduction of the sanitary cordon, the plague spread to the Austrian lands only in the years 1739 to 1742 within the territory of Croatia and Hungary. BRONZA, B., *Austrian Measures for Prevention and Control of the Plague Pandemic Along the Border With the Ottoman Empire During the 18th Century*. In: *Scripta Medica*, 50 (4), 2019, p. 180.

evant norm reads as follows: 'Against all who either themselves knowingly issue false certificates, passports or similar forgeries relating to health, or who make use of such forged documents, or who have knowingly assisted in the use of such forged documents, or who have otherwise obtained such documents, and who attempt, evade quarantine, that such persons shall be punished by death by hanging, and that such persons shall be committed to the nearest criminal court and noble or otherwise privileged persons to their authorities for trial, without the slightest distinction between persons, whether medical officers or subordinates, aliens or serfs. Likewise, We intend that the same punishment shall be inflicted on those officials who allow persons or goods to pass with a knowingly forged passport, as well as on those who allow persons or goods to leave before the expiration of the prescribed period for settlement, and, lastly, on subalterns and officials if they have knowledge of such abuse and do not immediately report it within twenty-four hours to the nearest military command or to the civil authorities, where the proceedings against such offenders shall be expedited as far as possible, and the punishment inflicted shall be executed immediately and without a petition for clemency.'¹²⁰

The death penalty by hanging was foreseen for anyone who had made, presented, or helped to manufacture false sanitary certificates. It did not matter whether the offenders were sanitary officials, foreigners, or serfs. The same penalty was also prescribed for officials who allowed persons with false certificates to cross the border, persons who had not passed the prescribed quarantine or those who received newcomers outside the prescribed quarantine border posts.¹²¹ Those who had travelled from infected areas and lied about their origin or about the origin of goods also faced the death penalty. Innkeepers were threatened with two years of forced labour if they allowed a person to stay overnight without medical authorisation.¹²² Offenders were processed promptly, and no pardon was granted.

After the adoption of Maria Theresa's Criminal Code (*Constitutio Criminalis Theresiana*) in 1768, ancillary criminal legislation became part of the general code. Under the heading, 'On public authority and those violent acts contrary to public safety' (*Von dem öffentlichen Gewalt, und jenen gewaltsamen Thathandlungen, so der gemeinen Sicherheit entgegen stehen*), we thus find a characteristically blanketed criminalisation of violations of epidemiological rules: 'The salutary police constitution and the general national security are violated [...] in various other ways, for which the violator is to be punished according to the malicious intent, the danger and the harmfulness of the act. [...] For crimes of this kind, our noblest ancestors, or ourselves, have already enacted their own and detailed penal laws against the violators; for there are: Firstly, those who act unlawfully at the time of the plague or other contagious diseases, or who exceed the generally prescribed measures in the event of a cattle plague, or who otherwise undertake something dangerous against the state of health.'¹²³

4.4 *Constitutio Criminalis Josephina* (1787)

In the General Code of Crimes and their Punishment¹²⁴ of Joseph II., the violation of the sanitary regulations can be found in the chapter on political offences that harmed the life and health of fellow citizens (*Von den politischen Verbrechen, die dem Leben oder der Gesundheit der Mithürger Gefahr oder Schaden bringen*). *Politische Verbrechen* were misdemeanours, prosecuted in administrative proceedings; in this feature, they differed from criminal offences (*Criminalverbrechen*).¹²⁵ Since certain ordinances carry the death penalty, their nomotechnical classification as 'political crimes' does not seem to be a very apposite solution.

Under the provision § 25 (2nd Part) of General Code of Crimes and their Punishment, anyone who crossed borders or brought goods by land or sea to a place beyond a province was quarantined because of the risk of plague outbreaks. Ad-

¹²⁰ 'Wider alle, welche entweder selbst falsche attesstate, Pässe, Fehden, Prattika, oder dergleichen die Passirung wegen der Gesundheit betreffende Falsa wissentlich verfassen, oder sich einer solchen falschen Urkunde bedienen, oder wissentlich hiezu verhilfflich gewesen, oder auch solche in anderen Wegen erworben haben, und wodurch die jemand treffende Kontumaz abzuleiten versucht wird, ohre weiters mit der Todesstrafe, und zwar mit dem Strang fůrgegangen, und zu solchem Ende die hiers unter verfangenen Personen dem nächsten Kriminalgerichte, adelige oder sonst privilegirte aber ihrer betreffenden Obrigkeit zur Prozessformirung, und zwar ohne den geringsten Unterschied der Personen, sie mögen Sanitätbeamte, oder Subalterne, Fremde oder Untertönen sein, übergeben werden sollen. Ingleichen wollen Wir, daß mit dieser nämlichen Strafe diejenigen Beamten unnachsichtlich angesehen werden sollen, welche auf einen wissentlich falschen Paß die Personen oder Waaren passiren lassen, nicht weniger jene, so den Personen oder Waaren vor Ablauf der vorgeschriebenen Kontumazzeit den Austritt gestatten, und endlich auch die Subalternen und Amtdiener, wann sie von einer solchen Mißhandlung Wissenschaft haben, und solche nicht sogleich in Zeit von 24 Stunden dem nächstgelegenen Militärkommando, oder der Zivilbrigade anzeigen, wo sodann der mit solchen Missetätern abzuführende Prozeß möglichst beschleuniget, und das ausgefallene Urteil sogleich, ohne Bestattung eines Gnadengesuche zum Vollzug gebracht werden solle.' The text of the Law of 25 August 1766 is quoted by MACHER, M., *Handbuch der kaiserl. königl. Sanität-Gesetze und Verordnungen mit besonderer Beziehung auf die innerösterreichischen Provinzen, Erster Band*. Graz, Ljubljana, Klagenfurt, 1846, p. 85 ss.

¹²¹ § III: 'The officers of the Cordon Stations shall therefore immediately return any person who enters the frontier of the place or direct him to the quarantine station, and if their warning is not obeyed and he tries to enter by force, they shall without hesitation execute him on the spot in accordance with the penal law published on 25 August 1766.' Anno 1770 Sanitäts- und Kontumazordnung, Zweyter Theil, (I. Instruction für die Sanitätskordone, wo sie immer aufgestellt sind, Codex Austriacus Pars IV, Suppl. VI., p. 1264.

¹²² BERGIUS, J. H. L., *Polizey- und Cameraalmagazin*, Vienna, 1788, p. 96.

¹²³ § 15 CCT: *Die heilsame Polizeyverfassung, und gemeine Landessicherheit wird [...] in verschiedene andere Wege verletzet; welcher wegen entgegen die mißhandelnde nach Gestalt des bösen Vorsatzes, Gefährde, und Schädlichkeit der That peinlich zu verfahren ist. [...] Oder es sind wegen so gearteter Verbrechen allschon vorhin von Unsern löblichsten Vorfahren, oder von Uns selbst eigene, und ausführliche Straffgesetze gegen die Uebertreter erlassen worden; als da sind: Erstlich: Welche zur Zeit der leidigen Pest, oder anderen ansteckenden Krankheiten gesetzwidrig handeln; oder bey einem Vieheumfall die allgemein vorgeschriebene Maßregeln überschreiten, oder in anderweg was gefährliches wider den Gesundheitsstand unternehmen.* The marginal title to the criminal offence is *Qui tempore pestis, vel contagionis armentariae ordinationibus publicis contraveniunt* ('Whoever, during a time of pestilence or contagion of cattle, contravenes a public ordinance.')

¹²⁴ *Allgemeines Gesetzbuch über Verbrechen und derselben Bestrafung*. Vienna, 1787.

¹²⁵ § 7, Part 2 of General Code of Crimes and their Punishment. The penalties for political offences were flogging, the scaffold, imprisonment with or without community service (§ 10, Part 2 General Code of Crimes and their Punishment).

ditionally, anyone who failed to report when crossing a sanitary cordon, or who, when reporting to the authorities, gave a false statement of the country of origin, or who used false sanitary documents, and anyone who left a quarantine establishment on his account committed a punishable offence, had to isolate. Acts by the authorities that, by their very nature, constituted a violation of the sanitary orders were also criminalised, in particular the unlawful release of an individual from quarantine, the issuing of a false sanitary certificate, and the like. Interestingly, in addition to the cases listed exhaustively in § 25, the Penal Code also equates with them ‘all acts which the perpetrator knows are or may be harmful to health.’ Since the Code could not define all these acts exhaustively, the following acts were listed as examples: dumping dead livestock in wells, streams, and rivers; violating sanitary orders in the event of an outbreak of cattle plague; and failing to report rabies. The sanction prescribed was forced labour, the duration of which was determined by the court according to the extent of the damage.¹²⁶ The Code also prescribes that the military courts be given jurisdiction to deal with the above offences, which were first laid down in 1732.¹²⁷ As suspected, the death penalty remained an applicable sentence for this political crime.

5. Conclusion

In the Middle Ages and early modern era, jurists followed a widespread belief that the plague was a war of God or a Divine punishment inflicted on sinful people. Since the human race must endure this ‘punishment’, an official response against a force that lying beyond all resistance would itself be illegitimate and doomed to fail in advance. Although the aetiology of plague as a phenomenon of transcendent origin persisted in Europe until the 18th century,¹²⁸ the appearance of the plague

treatises in the first half of the 16th century marks the beginning of the ‘pandemic criminal law’ debate.

The most prominent feature of the ‘pandemic criminal law’ was the harsh punishment of delinquents; the more the authorities lost control over the epidemic situation, the harsher the penalties they sought to impose on the masses.¹²⁹ Even though Muratori, the famous Italian Enlightenment intellectual of the first half of the 18th century, was in principle committed to the humanisation of criminal law, he stressed the importance of generally preventive death sentences for anyone who violated sanitary norms.¹³⁰ Criminal law theorist Filangieri described the deliberate spread of plague as the deadliest crime of all, a threat to the public health commons that necessitated a corresponding measure.¹³¹ Salomo Zachariä, who in 1826 drafted the penal code for the German federation, included the violation of rules established to limit infectious diseases among the crimes considered to pose the gravest threat to man, in addition to high treason and murdering one’s parents. Whereas high treasonists, by their predations against the state as *hostes reipublicae*, were excluded from the community of the state, the murderers of parents and the spreaders of infectious diseases were – to use Salomo Zachariä’s terms – ‘enemies of the human race’ (*hostes generis humani*).¹³² In the second half of the 18th century and the first half of the 19th, the by then relatively generally recognised principle of legality fell into oblivion when enlightened monarchies faced pandemic situations in several European monarchies.

The pandemic criminal law was, up to the 18th century, characterised by the blanket nature of the dispositions of offences; the criminality of both the commission and omission of offences; and the relevant feature of fault being, as a rule, intent, or sometimes negligence. The prosecution of sanitary offences was mainly the responsibility of assigned medical magistrates, who

¹²⁶ § 28, Part 2 of General Code of Crimes and their Punishment.

¹²⁷ KUDLER, J., *Erklärung des Strafgesetzes über schwere Polizey-Uebertretungen, mit Berücksichtigung der auf dasselbe sich beziehenden, später erlassenen Gesetze und Erläuterungen, Erster Band*. Vienna, 1831, p. 312 s.

¹²⁸ See, e.g., BERGIUS, J. H. L., *Polizey- und Cameralmagazin*, Vienna, 1788, p. 93: ‘Although the plague is indeed God’s judgment, we are now convinced that, like other infectious diseases, it is not only possible to keep it out of a country by taking precautions, but also to prevent its further spread. [...]’

¹²⁹ HIERSCHKE, A., HOLZINGER, K. IN EIBL, B., *Handbuch des Epidemierechts unter besonderer Berücksichtigung der Regelungen betreffend COVID-19*. Vienna, 2020, p. 2.

¹³⁰ MURATORI, L. A., *Del governo della peste*. Modena, 1720, p. 25 s: ‘*Le Città e Terre preservate non hanno riportato sì gran beneficio senza la morte di qualche di: subbidente in cose gravi, quale è chi venendo da Luogo Appestato passa i confini senza Fedi, o con Fedi false, e simili Trasgressori troppo nocivi. Per altro ai Conservatori della Sanità s’ha a dare in tali casi un’assoluta balia ed autorità di poter procedere more belli contra i trasgressori; e se la necessità il richiede, sarà Carità verso il Pubblico il Rigore verso qualche privato disubbidente, e massimamente nella Guardia de’Confini e delle Porte in sospetti di Contagio.*’

¹³¹ ‘*Tra’ delitti contro la salute pubblica, il più funesto è il contagio della peste.*’ FILANGIERI, G., *La scienza della legislazione e gli opuscoli scelti, Tomo terzo*. Livorno, 1827, p. 240. The Italian Penal Code of 1930 also imposed the death penalty in the case of the deliberate spread of an infectious disease resulting in the death of several people (Art. 438 Codice penale: (Epidemia): ‘*Chiunque cagiona un’epidemia mediante la diffusione di germi patogeni e’ punito con l’ergastolo. Se dal fatto deriva la morte di piu’ persone, si applica la pena di morte.*’)

¹³² SALOMO ZACHARIÄ, K., *Strafgesetzbuch Entwurf mit einer Darstellung der Grundlagen des Entwurfes*. Heidelberg, 1826, p. 9. See Art. 590–593 of the draft. Art. 592: ‘*Wer eine Sperranstalt verletzt, welche gegen eine ansteckende Krankheit für das Land oder für einen Bezirk des Landes oder für einen Ort oder für ein Haus angelegt worden ist.*’ Article 590 refers to a violation of quarantine. Art. 591: ‘*Wer von einer ansteckenden Krankheit die Anzeige bey der Behörde zu machen unterläßt, die er nach den bestehenden Verordnungen oder zufolge eines obrigkeitlichen Befehls zu machen verbunden war, oder wer, gegen einen obrigkeitlichen Befehl, die Kleidungsstücke, die Betten oder die Geräthschaften eines, an einer ansteckenden Krankheit Verstorbenen zu vernichten oder sie auf die vorgeschriebene Weise zu reinigen unterläßt, oder wer, gegen einen obrigkeitlichen Befehl, die Kleidungsstücke, die Betten oder die Geräthschaften eines an einer ansteckenden Krankheit Verstorbenen verheimlicht oder verkauft oder sonst weggibt oder sie an sich bringt oder nimmt, oder wer, gegen ein obrigkeitliches Verboth eine Leiche, während eine ansteckende Krankheit am Orte herrscht, zur Schau ausstellt.*’ Art. 592: *Die Regierung ist berechtigt, die Nichtbefolgung derjenigen Verordnungen, die sie, um den Ausbruch oder die Verbreitung einer ansteckenden Krankheit in einem bestimmten Falle zu verhindern, erlässt, mit Gefängnisstrafe von einer jeden Klasse und selbst mit der Todesstrafe zu bedrohn, auch in einem solchen Falle die in den S. 590. 591. enthaltenen Strafrohungen in demselben Masse zu erhöh.*’

were equal in the jurisdiction to judges of blood. In this sense, it is a case of extraordinary criminal law.

Among the offences against sanitary care (*Sanitäts-Gesetzübertretungen*), Austrian criminal law¹³³ included offences against quarantine (*Kontumaz*) and infectious institutions; omitting objects belonging to those who had died of an infectious disease; grave robbing; contamination of wells and cisterns; sale of meat from animals not slaughtered according to the regulations; offences against the current regulations on rinderpest; transfer of

beverages and goods in a manner injurious to health; and conversion of pewter vessels with lead.¹³⁴

Perhaps surprisingly, no comprehensive and specialised legal debates on epidemic criminal law prior to the 19th century took place. This, in my view, is largely a reflection of the scepticism of legislators, who rightly wondered whether it was even possible to respond to the relatively rare attempts of deliberately transmitting infectious diseases effectively with the instruments of criminal law.¹³⁵

¹³³ For the Austrian lands, see *Strafgesez in Bezug auf Gesezübertretungen 1805 bei ansteckenden Krankheiten* (21. Mai 1805). According to § 393 of the Austrian Criminal Code (1852), a person was responsible for an offence, if, in a district in which special institutions had been established to prevent the imminent danger of plague or other contagious and for the general state of health dangerous diseases, he or she undertook any act, consisting in commission or omission, deliberately or negligently, that according to its natural consequences or those which are easily recognisable to everyone by the specially published regulations, caused or further spread the disease. The provision is almost identical to § 1 of 'Penal Law concerning Offences against the Law in the case of contagious diseases' (1805). Regarding punishment, § 393 referred to the special regulations enacted at the time in question. The punishment for the offence was determined by the existing regulations for such circumstances or by special regulations issued depending on the circumstances of the case. On this HERBST, E., *Handbuch des allgemeinen österreichischen Strafrechtes: mit Rücksicht auf die Bedürfnisse des Studiums und der Anwendung*. Vienna, 1883, p. 335 ss. For the solutions of the German StGB, see BINDING, K., *Lehrbuch des Gemeinen Deutschen Strafrechts, Besonderer Teil, Zweiter Band, Erste Abteilung*. Leipzig, 1904, pp. 88–100. On the emergence of the 'pandemic criminal law' (Seuchenstrafrecht), see WAHLBERG, W. E.: *Das Strafrecht des Gesundheitswesens*. In: *Gesammelte kleinere Schriften und Bruchstücke über Strafrecht, Strafprocess, Gefängnissskunde, Literatur und Dogmengeschichte der Rechtslehre in Oesterreich*, 3. Bd. Vienna, 1882, p. 307.

¹³⁴ For a concise historical introduction to the more recent Austrian 'pandemic law', see HIERSCHKE, A., HOLZINGER, K. and EIBL, B., *Handbuch des Epidemierechts unter besonderer Berücksichtigung der Regelungen betreffend COVID-19*. Vienna, 2020, p. 1–28; the Italian development in 19th century criminal codes is presented by MUSUMECI, E., 'Il funesto delitto': il contagio e l'imbarazzo dei giuristi. In: *Historia et ius – Rivista di storia giuridica dell'età medievale e moderna*, 12, 2017, p. 8 ss.

¹³⁵ This legal-political aspect in the prosecution of public health offences is pointed out by QUIRK, H., STANTON, C. (Ed.), *Criminalising Contagion, Legal and Ethical Challenges of Disease Transmission and the Criminal Law*, Cambridge, p. 16 pp.