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W BIAŁORUSKIEJ I ROSYJSKIEJ OPTYCE

**1. PERIODIZATION OF LEGAL REGULATION OF GUARDIANSHIP
IN BELARUSIAN LEGISLATION (LATE XIV CENTURY –
EARLY XX CENTURY)****1.1 Legislation of the Grand Duchy of Lithuania**

As in Roman private law, legislation in the spheres of guardianship and inheritance was interdependent, but because of the specificity of relationships in the Grand Duchy of Lithuania, the categories of persons who had no right to bequeath differed from those in Roman law. For example, Jazep Aliaxandravich Jukho writes: “the law provided that these people had no right to bequeath: minors, persons who have lost their freedom in court, monks, prisoners, persons with mental illness”¹.

Dependence between the institutions of inheritance and guardianship was known as privilege law. An example of this type of connection is the Privilege Law provided in 1387 by the Duke of the Grand Duchy of Lithuania and King of Poland, Wladyslaw Jagiello. In accordance with this Privilege Law, a widow was supposed to assume the guardianship over the property of her deceased husband as long as she did not remarry. The property was then transferred to their children; if there were no children, it devolved to close relatives of her first husband in cases where the widow wanted to marry again. The Privilege Law enacted by Lithuanian Grand Duke Casimir in 1447 also had provisions very similar to these².

Because periodization of the development of regulations of the institute of guardianship within Belarusian territory has not been undertaken, I submit the following results of my research. The first stage of this periodization can be considered to be the period of Privilege Law (XIV–XVI centuries), which is characterized by the partial reception of Roman law’s provisions regulating the guardianship of minors. Laws treating relationships in the sphere of custody and guardianship were incorporated into the Statute of the Grand Duchy of Lithuania in 1529, with further editions published in 1566 and 1588. Some laws and formulations that had been known from Roman law were also later con-

1 Jazep Aliaxandravich JUKHO, *История юридической науки Беларуси* [History of Law Science of Belarus], Minsk 2000, p. 95.

2 *Акты, относящиеся к истории Западной России, собранные и изданные Археологическою комиссиею* [Acts Relating to the History of Western Russia, collected and published by the Archeological Commission], St. Petersburg 1846, p. 375.

solidated in the Statutes of the Grand Duchy of Lithuania, where they formed a strong basis for the legal regulation of relations in the sphere of guardianship for minors.

The Statutes of the Grand Duchy of Lithuania (1529, 1566, and 1588) were the first legal acts in Europe to set forth laws based upon both local and traditional norms. At the same time, “[...] in most European countries the Roman law was used, but not their national laws [...]”³ Thus, in speaking about Statutory law we may note that the adoption of Roman law in its entirety, which started in Italy and France in the XI century and in Germany in the XV century⁴, did not take place on Belarusian territory. In the latter, there was just a partial implementation of mechanisms for the regulation of relations in the sphere of guardianship of minors into Statutory law.

Relations regulated within this sphere are reflected in the works by Sergey Alexandrovich Bershadsky (*The Lithuanian Statute and the Polish Constitution: Historical and Legal Research* [1893]); Galina Viacheslavovna Derbina (*Law and Family in Belarus in the Renaissance Epoch* [1997])⁵; Taisia Ivanovna Dovnar (*History of the State and the Law of Belarus* [2007])⁶; Sergey Andreevich Muromtsev (*Reception of Roman Law in the West* [1886]); Vladimir Ivanovich Picheta (*Concerning the History of Guardianship Law in Accordance with the Lithuanian Statute of 1529* [1928])⁷; and J. A. Jukho (*Resources of Lithuanian-Belarusian Law* [1980])⁸.

These works greatly enriched understanding of the general idea of guardianship, but the picture of the relationship between guardians and minors that can be drawn from them remains fragmentary. Nevertheless, the qualitative elaboration of the legal regulation of guardianship by Statutory rule indicates the high development level of the legal system of the specified period. And moreover, it seems that the implementation of certain provisions of Statutory law into contemporary laws would certainly increase the effectiveness of guardianship for minors at the present time.

The division of custody into guardianship and curatorship was well known by the jurisprudence of the Grand Duchy of Lithuania. For example, G. V. Derbina noted that in the law of the Grand Duchy of Lithuania the term “guardianship” meant:

3 Sergey Alexandrovich BERSHADSKY, *Литовский Статут и Польские конституции: историко-юридическое исследование* [*The Lithuanian Statute and the Polish Constitution: Historical Legal Research*], St. Petersburg 1893, p. 115.

4 Sergey Andreevich MUROMTSEV, *Рецепция римского права на западе* [*Reception of Roman Law in the West*], Moscow 1886, p. 159.

5 Galina Viacheslavovna DERBINA, *Права і сям’я ў Беларусі эпохі Рэнесансу* [*Law and the Family in Belarus in the Renaissance Epoch*], Minsk 1997, p. 174.

6 Taisia Ivanovna DOVNAR, *Гісторыя дзяржавы і права Беларусі* [*History of the State and Law of Belarus*], Minsk 2007, p. 399; EADEM, *The Reformation of the Legal System of the Grand Duchy of Lithuania*, “Social and Economic Research”, 2009, No. 1, pp. 175–191; EADEM, *The Most Famous Belarusian Legal Document*, “Justice of Belarus”, 2008, No. 3, pp. 74–75.

7 Vladimir Ivanovich PICHETA, *До історіі опікуньскага права в Литовьскому Статуці 1529 р.* [*Concerning the History of Guardianship Law in Accordance with the Lithuanian Statute of 1529*], Minsk 1928.

8 Jazep Aliaxandravich JUKHO, *Крыніцы беларуска-літоўскага права* [*Resources of Lithuanian-Belarusian Law*], Minsk 1991, p. 238.

“1) a form of legal defense of private and property interests of persons who were not able because of current circumstances (being minors, illness) to realize such functions by themselves; 2) a system of norms which regulate legal relations between persons who were under the guardianship and guardians”.

The term “curatorship” in Statutory Law meant activity provided by a curator – a person who “(...) provides curatorship for minors and widows who were left without parents and husbands and also for persons who have a mental illness... The curatorship was initiated by relatives or the Grand Duke”⁹.

The Statute of the Grand Duchy of Lithuania of 1529 and its later editions in 1566 and 1588 contained a section entitled “About Guardians,” which provided the basis for rules and the legal regulation of guardianship. In the statute it is noted that guardianship was established for children in order to avoid the squandering of property by minors after their parents’ death, as minors lack the ability to manage property, as well as other useful skills.

Section VI of the Statute of the Grand Duchy of Lithuania of 1566 first established governmental control over the implementation of duties by appointed guardians. This control was assumed by the Grand Duke, the governor and the rural courts, which indicates a high degree of centralization of the legal regulation of guardianship. Article 18 of Section I of the Statute of 1529 sets the age of majority as 18 years for men and 15 years for women. These ages were reaffirmed by the Statute of 1566, but revisions in the Statute in 1588 kept the age of majority for men at 18 years, but lowered it to 13 for women.

The Statutes also described other reasons for establishing guardianship: “[...] guardianship is established in the case of parents’ death for the purpose of taking care of both their children and the property”¹⁰. J. A. Jukho noted that “[t]he legal majority of women and children was restricted. Men’s majority began at 18 years of age, and for women – 13. Nevertheless, even after attaining this age, women were still not endowed with full civic capacity”¹¹. Article 8 in Section V of the Statute of 1529 decreed that the guardianship is established over children, property, or wives.

A guardian could be assigned from among the ward’s the relatives and appointed by citizens, as provided by Article 5 of Section VI of the Statute of 1588. Sections V and VI of the Statute of 1588 provided methods for assigning custody, and indicated the category of persons who were able to be appointed as guardians. In particular, Article 1 of Section VI of the Statute of 1588 requires that guardians should be chosen from among the ward’s relatives and must be in possession of full civil capacity. Article 3 of Section VI noted that a guardian could also be named for children in their father’s will.

9 Galina Viacheslavovna DERBINA, *Статут Вялікага княства Літоўскага, 1588: Тэксты. Даведнік. Каментарый* [The Statute of the Grand Duchy of Lithuania of 1588], Minsk 1989, p. 570.

10 Ibid., p. 225.

11 J. A. JUKHO, *Крыніцы беларуска-літоўскага права* [Resources of Lithuanian-Belarusian Law], p. 143.

However, there were also situations when a particular person was not specified in a father's will to be appointed guardian to his children. According to Article 3 of Section VI of the Statute of 1588, in such cases the selection of someone for the position of guardian would occur in the following order of priority: the elder brother of minor children; the senior uncle in the male line, then other older men in the male line; older uncles and other relatives in the female line; a senior woman in the male line; older married women.

Natalia Nikolaevna Alekseychikova writes: "female relatives began to appear in the documents as guardians only in the XVIII century [...]"¹² Moreover, N. N. Alekseychikova specified that in the XVIII century "[...] children left without a mother were starting to be classified as orphans [...]"¹³. Thus, it is undeniable that the position of women in the family was strengthening during that period. Another piece of evidence for this thesis is that in the XVI–XVII centuries, children who had lost both parents were considered to have been left without parental care (as it had been in previous eras), as well as children left without the care of a father.

A guardian had to meet the following requirements: virtuous; devout; settled and living in the city where the child placed under the guardianship lives. He or she must not be a foreigner, nor wasteful; and must be prosperous and not very old. In the case of failure by the person who had been specified in a father's will to become a guardian, a replacement could be selected from other respectable citizens. Refusal to execute the duties of a guardian was possible for the following reasons: 1) a large number of one's own children; 2) public service; 3) lack of livelihood; 4) disease; 5) old or young age; 6) hostile relations between the guardian and the father of the children placed under the guardianship.

In accordance with Section V of the Statute of 1529 on guardians, transactions were prohibited with the property of children placed under guardianship. Moreover, after attaining civil capacity a person who had been under guardianship had the right to litigate for the reimbursement of all property and expenses from an ex-guardian who had squandered it.

Article 4 Section VI of the Statute of 1588 established regulation of the responsibility of a guardian who managed the child's property improperly and thereby caused great material losses for a child who placed under his or her guardianship. In such cases, all material losses could be ordered by a court to be compensated from the guardian's property (even if he was already deceased) to the plaintiff. In accordance with Article 4 of Section V of the Statute of 1588, a guardian was obligated to return all property and all statements to the person for whom the guardianship had been established after the ward

12 Natalia Nikolaevna ALEKSEYCHIKOVA, *Опека над несовершеннолетними детьми в белорусских городах XVI–XVIII века (на примере Могилева)* [*Guardianship of Minors in Belarusian Cities in the XVI–XVIII Centuries (Based on Mogilev)*], "Polotsk State University Review", 2010, No. 1, pp. 31–41.

13 Ibid.

reached the age of majority. Guardianship for boys ended after they reached the age of majority, and for girls when they married¹⁴.

According to the Article 8 of Section V of the Statute of 1529, the salary for guardians was fixed for their performance of obligations and duties. Article 4 of Section VI of the Statute of 1588 clarifies that 1/10 of the annual income of the child's property was to be the guardian's salary. The remaining 9/10 of the annual income of the child's property was supposed to cover costs for education, services, servants, legal protection of the property, and other costs.

Since the institution of guardianship was regulated by the norms of Statutory law, it was regulated as a full value instrument for protecting the rights and interests of children who had been deprived of parental care, which indicates a high level of maturity in the legal system of that time. These are some of the distinctive features of guardianship that can be specified for that time period: the registration of property belonging to a child who was placed under the guardianship; guardians' reports; state control over the assumption of obligations by a guardian; appointment of guardians by the city magistrate or Grand Duke.

It should be noted that this Statutory law reflects all the trends that characterized the legal systems of most of medieval Europe. For example, in Bohemia in the the XV century, a guardian was chosen from among the ward's relatives if the father had not appointed one in his will. This relative could be a "brother of the deceased father, and if there were no male relatives, a sister of the deceased father became the guardian. The guardian could also be a mother – the widow of the deceased. However, as soon as one of the orphaned brothers reached adulthood, guardian rights devolved to him"¹⁵.

"Because of the most meaningful and perfect content of the Statute of 1588, it remained valid in the territory of Belarus until the 1630s, even while Belarus was still part of the Russian Empire"¹⁶. S. A. Bershadsky notes in *The Statute of the Lithuania and Polish Constitution: Historical and Legal Research*, the outstanding importance of the Statute of 1588, which "[...] was considered the only source of law until the fall of the Rzeczpospolita, despite the fact that the courts and the bodies used a Polish translation of the Statute"¹⁷.

In papers published in the period before the October Revolution of 1917, researchers including Konstantin Nikonorovich Annenkov, Pavel Osipovich Bobrovsky, Alexander Ivanovich Zagorovsky, Dmitry Ivanovich Meyer marked the significant role of

14 Ibid., p. 39.

15 Victor Ivanovich ERMOLOWICH, *Основные институты брачно-семейного права средневековой Чехии* [*The main institutions of family law of middle-aged Bohemia*], "Law Journal", 2006, No. 2, pp. 49–52.

16 Ihor Nikolaevich KUZNETSOV, *История государства и права Беларуси* [*History of the State and the Law of Belarus*], Minsk 1999, p. 271.

17 S. A. BERSHADSKY, *Литовский Статут и Польские конституции* [*The Lithuanian Statute and the Polish Constitution*], p. 6.

orphan courts in the protection of children left without parental care¹⁸. It seems that the organization of orphans' courts indicates a special relationship to the problems of children left without parental care while Belarus was a part of the Russian Empire.

After this period, further developments in the legal regulation of guardianship of minors are described in this periodization under the heading of the Statutory Period (1529–1840).

1.2 The Pre Revolutionary Period

In prerevolutionary works, researchers often raised the issue of guardians' remuneration. As a general rule, it was set at 5 percent of the annual income of a minor's property. Meanwhile, in the Chernihov and Poltava provinces the compensation was set at 10 percent. An explanation for this has been provided by Isaak Solomonovich Volman, who noted that the Chernigov and Poltava lands belonged to the Ruthenia province, where the Statutory Law which provided 10 percent of the ward's income as a guardian's compensation was in effect.

The law recognized the following conditions to exempt one from assuming the duties of a guardian: 1) government or public service; 2) illiteracy; 3) age (less than 25 or over 60, in some districts over 70 years); 4) responsibilities of the guardian for three children; 5) large families; 6) poverty and neediness; 7) illness; 8) a new place of residence. Guardianship at that time meant the performing of guardian's functions; more precisely, "care of the person" (supervising their education, career, marriage, and health) and property management (compiling inventories, reporting, storage of property, administering income from the property). Guardianship for minors terminated upon: 1) the ward's death; 2) his attaining full civil capacity; 3) reaching the age of 21; 4) adoption; 5) marriage (for girls). There were also reasons for guardians to terminate their status; for example death, dismissal on legal grounds by the orphan's court; removal from the duties of a guardian; expiration of the term for which guardianship was set.

After this point, legal regulation of the guardianship of minors shall be further explored in the Pre-Revolutionary Period (1840–1917). The ascendance of the October Revolution in 1917 marked the beginning of a new stage in the development of the institution of guardianship for orphaned children: the Soviet Law Period.

18 Konstantin Nikonorovich ANNENKOV, *Система русского гражданского права* [*The system of Russian Civil Law*], St. Petersburg 1905, p. 259; Vladimir Vladimirovich VELJAMINOV-ZERNOV, *Опыт начертания Российского частного гражданского права* [*The experience of Russian Private Law*], St. Petersburg 1821, p. 155; Isaak Solomonovich VOLMAN, *Опека и попечительство* [*Guardianship*], St. Petersburg 1903, p. 2; Pavel Osipovich BOBROVSKY, *Гродненская губерния* [*Grodno Province*], St. Petersburg 1863; Alexandr Ivanovich ZAGOROVSKY, *Курс семейного права* [*Family Law Course*], Odessa 1909, p. 521; Dmitry Ivanovich MEJER, *Русское гражданское право: чтения* [*Russian Civil Law*], St. Petersburg 1864, p. 737; Konstantin Petrovich POBEDONOSCEV, *Курс гражданского права* [*Civil Law Course*], St. Petersburg 1871, p. 223.

1.3 Soviet Law Period

The state created by the dictatorship of the proletariat was based on the theory of social education for children that had been popular in the pre-revolutionary literature of the XVIII – XIX centuries. For example, Friedrich Engels expressed the following opinion about education “[...] for all children from the time they can live without maternal care in public institutions at public expense”¹⁹.

This view was later revised, and the recommendation was that it should be understood as expressing the need to combine family and public forms of education. The Commissioner of Justice Dmitry Ivanovich Kursky described a “supposed broadly-defined public education of children [...]”²⁰. In accordance with the opinion of Sergey Nikolaevich Zakhartcev, “it will be impossible to succeed in the public placement of children for education while they are under the care of their mother and purported father”²¹.

The basic foundations of the old laws had been destroyed and new regulations were just starting to develop under such slogans as: “Among the functions of the rule of law [...] maintaining the stability of family relations is not included; and indeed a stable family is not so necessary [...]. It would be much better if all children, not only the illegitimate ones, would be placed under state care rather than the care of their parents”²².

The direct assertion of the institute of guardianship in the Soviet decrees “On Termination of Marriage” (10 November 1917) and “On Civil Marriage” (18 December 1917) was not enacted. Meanwhile, some of the norms contained within these decrees provided for the legal regulation of certain relationships within the sphere of guardianship for minors. These were then put into the basis for the Soviet Code in acts on civil status, marriage, family and guardianship (1918) which were also in effect on the territory of today’s Belarus. It should be noted that this Code was also the first one adopted by Soviet authorities. The first Belarusian Code appeared only in 1927. Previously, legal regulation of guardianship was based on the 1918 Code which was enacted after the liberation of Belarus from German occupation²³.

Due to the fact that adoption of children was abolished by the Code of 1918, guardianship became the only form of placement for orphan children into families. In the Code of 1918 was Section IV on “Guardianship Law” which consisted of four chapters, guardianship was established for: 1) minors; 2) mentally ill persons (a list of persons in

19 Alexandra Matveevna NECHAEVA, *Семейное право: курс лекций [Family Law: Lectures]*, Moscow 2002, p. 318.

20 Natalia Matveevna ERSHOVA, *Опека и попечительство над несовершеннолетними по советскому праву [Guardianship of Minors under Soviet Legislation]*, Moscow 1957, p. 4.

21 Sergey Nikolaevich ZAHARTCEV, *Советское право в годы нэпа (1921–1929 гг.) [Soviet Law in the Period of the New Economic Policy (1921–1929)]*, Tambow 2004, p. 51.

22 Nadezhda Stepanovna NIZHNIK, *Правовое регулирование семейно-брачных отношений в русской истории [The Legal Regulation of Family Relations in Russian History]*, St. Petersburg 2006, p. 57.

23 Elena Anatolievna KUKHARENOK, *Становление законодательства о международном усыновлении в Республике Беларусь [Development of the Legislation of the Republic of Belarus on International Adoption]*, “Belarusian Journal on international law and international relations”, 2003, no. 2, pp. 21–29.

respect to whom guardianship was appointed due to mental illness was published for the public); 3) spendthrifts²⁴.

There were also new grounds for the establishment of guardianship that were unique. In the opinion of Alexandra Matveevna Nechaeva, “the criteria for losing parental care were very strange. It was necessary to appoint a guardian, for example, if parents were good with their children, and gave them an education, but contradicted all the principles of the new Soviet system [...]”²⁵. Guardianship was a duty and person could only refuse it in the cases specified in Article 214 of the Code of 1918. They were if a person was: 1) older than 60 years of age; 2) experiencing illness; 3) had their own family with more than 4 children; 4) already acting as a guardian for a single person or a group of persons.

In accordance with Articles 207 and 208 of the Code of 1918, a person could be appointed as a guardian if they had reached the age of majority, with the exception for persons who: 1) were already personally placed under guardianship; 2) had been judicially deprived of civil rights; 3) had interests in conflict with the interests of the person placed under the guardianship. The preferential right to be appointed as a guardian was reserved to those persons who were chosen by a minor if he had already reached 14 years of age, or who had been selected by the ward’s mother or father. If such person had not been selected by the minor it was possible to choose a guardian from among his or her close relatives. Other factors that had to be taken into account included a potential guardian’s place of residence, and the personal relationship between the guardian and ward.

Guardianship duties were performed with no remuneration, but guardians were entitled to reimbursement from the property of the person who was placed under the guardianship for all the costs of their ward’s education, training, and treatment, so long as these costs do not exceed his income. Moreover, Article 238 of the Code of 1918 established that the welfare department could assign a reward to a guardian for managing the property of a person placed under the guardianship, taking into account: 1) the net income from the property of the person who is placed under the guardianship; 2) the value of his property; 3) efforts expended by guardian to manage the property, which means that an evaluative approach was applied to calculate the guardian’s remuneration.

As we can see, the Code of 1918 introduced very progressive new provisions. The prerevolutionary law had not provided for an evaluative approach for determining remuneration to be paid to a guardian according to the quality of his efforts. Guardians were supposed to submit a general report at the termination of their duties, as well as an annual written report on the management of property of the person placed under the guardianship not later than 15 January of the New Year in cases where the income from that property exceeded the subsistence minimum established for this area.

24 Natalia Matveevna ERSHOVA, *Опека и попечительство* [Guardianship], Moscow 1971, p. 78.

25 A. M. NECHAeva, *Семейное право: курс лекций* [Family Law: Lectures], p. 287.

The legislation of the early Soviet period established public education for children. However, the practice of applying these rules within the sphere of guardianship proved to be complicated in practice, due to the civil war. Other unresolved issues resulted in reduction of the network of orphanages in 1921–1922 and an increase the number of children left without parental care.

1.4 Conclusion

In summary, the periodization of legal regulation of the institution of guardianship for minors should begin with the period of *Privilege Law* (XIV–XVI), due to partial adoption of Roman law's provisions in the sphere of guardianship for minors.

The second period analyzed is that of *Statutory Law* (1529–1840). The beginning of this period is marked by the enactment of the Statute of Grand Duchy of Lithuania of 1529 in the territory of Belarus. Its end is associated with the decrees issued in 1830 and 1840 that terminated the action of the Statute of Grand Duchy of Lithuania of 1588.

The third period is *Prerevolutionary Law* (1840–1917), which is associated with the termination of the Third Statute of the Grand Duchy of Lithuania (1588), and promulgation of the Russian Empire's legislation into the territory of Belarus.

The fourth period is *Soviet Law*, which began in 1917 after the ascendance of the October Revolution that year.

2. KWESTIA BIAŁORUSKA W POLSKO-ROSYJSKICH STOSUNKACH (KILKA UWAG PODSTAWOWYCH)

2.1 Wokół genezy narodu białoruskiego

W dzisiejszej Rosji jest nadal rozpowszechniona opinia wywodząca się z okresu przedrewolucyjnego, że naród białoruski jest tworem sztucznym, wymyślonym przez Polaków w celu destabilizacji państwa rosyjskiego. Do tego dochodzi dość rozpowszechniona opinia (zwłaszcza w kręgach nacjonalistycznych) o tym, że naród ten jest sztucznym tworem, powstałym w wyniku rywalizacji polsko-rosyjskiej i utworzonym przez bolszewików w latach 20-tych z przyczyn ideologiczno-pragmatycznych.

Ile w tym jest przesady, ile rzeczywistych faktów? Prawdą bezsprzecznie jest to, że bolszewicy (i Stalin osobiście, jako komisarz ludowy do spraw narodowościowych) świadomie stworzyli z kwestii białoruskiej istotny czynnik destabilizacyjny wobec II Rzeczypospolitej. Partia Komunistyczna aktywnie i sprawnie dążyła do rozwoju białoruskiej kultury, szkolnictwa i odrodzeniu języka białoruskiego, ale nie w celu rzeczywistego zaspokojenie potrzeb narodowych samych Białorusinów, lecz w celu uwodzenia (czy nawet zniewolenia) umysłów białoruskich mieszkańców polskich „kresów” północno-wschodnich. „Prawdziwe” centrum odrodzenia białoruskiego znajduje się