



Criminal Law in *Lex Baiuvariorum*¹

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Abstract. With respect to early medieval German law, the concept of ‘criminal law’ should be handled cautiously as the *Volksrechte* do not contain any principle to distinguish criminal law – or public law – from private law. At the same time, early medieval folk laws basically and clearly show the traces of ‘punitive’ lawmaking, to be more precise, compilation. Therefore, all efforts to systematise this field of law more or less interpret past phenomena in terms of our present approach to law as a system because all that we mean by criminal law needs to be discerned and systematised from various provisions lacking any principle and theoretical demand scattered in diverse codes.

Making this clear at the outset, this paper attempts to present the criminal law of early medieval Bavarian (folk) law, *Lex Baiuvariorum* as a system. First, it will try to create the chapter of ‘general provisions’ discerned from the passages of the code in accordance with the present system of criminal law; after that, it will develop the chapter of ‘special provisions’ setting out from specific states of facts systematised in terms of the protected legal object; finally, it will investigate the system of sanctions of *Lex Baiuvariorum*.

Keywords: criminal law, *Lex Baiuvariorum*

I. ‘General Provisions’ of the Criminal Law

As to the purpose of criminal law, provisions – and sometimes statutory provisions in general – *Lex Baiuvariorum*² formulates at several points that they are to keep peace; to prevent *scandalum* and hostility among the people.³ The *Prologue* of the

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² On *Baiuvariorum* see Nótári 2012; Nótári 2009; Nótári 2010; Beyerle 1926; Merkel 1858. 533–687; Schwind 1912. 415–451; Krusch 1924. 38–163; Kottje 9–23; Eckhardt 1927; Landau 2004.

³ *Lex Baiuvariorum* 2, 3; 8, 9; 13, 3; 16, 12.

code⁴ clearly states as it were to reveal the lawmaker's intention that these statutes were made to ensure that fear of the above should control human depravity, that innocence, i.e., abidance by the law, should enjoy security and that fear should prevent people not abiding by the law from engaging any conduct that injures others: '*Factae sunt autem leges, ut earum metu humana coherceretur audacia tutaque sit inter probos innocentia, et in ipsis inprobis formido supplicia et refrenetur nocendi facultas [...]*'.⁵ All this is definitely in harmony with the locus in Tacitus's *Germania*, which states that a part of the amount to be paid as penalty was due to the injured party or his relatives, another part to the king or the community, which division is not alien from *Lex Baiuvariorum*⁶ – this expresses that unlawful conduct injures the entire community as well as the leader of the community and it is his responsibility to ensure the peace of the community.⁷ Consequently, the code of laws defines general prevention and special prevention as the purpose of the sanction. It defines them not as an abstract principle, which cannot be required from the lawmaking technique of the period, but in relation to certain states of facts; specifically, as regards special prevention, upon increase in the punishment in case of habitual offenders violating the prohibition of work on Sunday.⁸ Similarly, in certain loci of the code – just as in the canons of the Council of Ascheim⁹ – the requirement of asserting justness as a basic principle of dispensation of justice appears, which is applicable where appropriate to criminal law provisions too.¹⁰

The traces of the institution of private revenge as the earliest sign and form of legal awareness or restitution of violation of law can be found also in *Lex Baiuvariorum*, specifically in the lawful killing of adulterers caught in the act and thieves caught in the act.¹¹ Yet, to certify lawfulness of blood feud – as it is ordered also by the Council of Neuching¹² – after killing a thief caught in the act at night, the neighbours should be convened to investigate the signs and attest that no assassination has been committed, in other words, that taking action on one's own authority has been strictly confined. The definition of breach of peace and peace breaker acting unlawfully on his own authority, i.e., *faidosus/feidosus*, can be found in a negative form in the code: when a person kills somebody on the orders of the king or the duke, then he will not be considered *feidosus*, and neither he, nor his children will suffer any disadvantage and will enjoy the

4 *Lex Baiuvariorum* 2, 3; 2, 11; 8, 9; 13, 3; 16, 12.

5 *Lex Baiuvariorum Prologus*.

6 E.g. *Lex Baiuvariorum* 9, 15.

7 Tacitus, *Germania* (Edd. G. Forni–F. Galli, Roma 1964.) 12. ... *pars multae regi vel civitati, pars ipsi qui vindicatur vel propinquis eius exsolvitur*.

8 *Lex Baiuvariorum* 1, 14.

9 *Synodus Aschaimensis* 14. 15. 41. 42.

10 *Lex Baiuvariorum* 2, 1. 16. 17.

11 *Lex Baiuvariorum* 8, 1; 9, 9.

12 *Synodus Niuhingensis* (Ed. G. H. Pertz, *MGH Leges*, III. Hannover 1863.) 3. 11.

duke's protection.¹³ It can be deduced from the above that a *feidosus* will lose the protection of the ruler as well as law and order and will become an outlaw or, to use the terminology of Roman law, *sacer*.¹⁴

Simultaneously, however, as by the time it was written down the *Bavarian Volksrecht* left the stage of blood feud and the *talio* principle, except for exceptionally serious offences, primarily crimes against the state and the ruler (treason), the *conpositio* system prevailed, which in certain respects 'turned criminal law into private law'. By payment of the *conpositio* the matter was 'automatically' resolved: usually it was not brought before any body of administration of justice of the State but was settled through the *pactio* between the injured party and the perpetrator.¹⁵

In spite of the fact that in early medieval Bavarian law one cannot find the crystal clear system of liabilities of Roman law, which worked out the concepts of malice and negligence with respect to both private and criminal law in a form not surpassed ever since,¹⁶ it is possible to demonstrate distinction between malice/contemplation (*dolus*), negligence (*culpa*) and causing damage accidentally (*casus*) also in *Lex Baiuvariorum*.¹⁷ In this respect, it can be observed that the noun *praesumptio*, having the meaning recklessness and turpitude and the verb *praesumpserit* usually occurs in descriptions of states of facts where the perpetrator acted knowingly with intention to do wrong.¹⁸ In general, the code indicates intention to do wrong, undoubted contemplation by the terms *invidia*¹⁹ and *inimicitia*.²⁰ The code does not clearly distinguish negligence (*culpa*) from causing damage accidentally (*casus*); in these cases the perpetrator shall pay the loss only.²¹

In case of certain states of facts the code ordered to punish attempt and the intention to commit the act as well, however, it is not possible to arrive at a general rule on attempt, preparation, completed crimes and results even by taking specific cases into account. For example, after the lawful killing of the adulterer/adulteress caught in the act the code devotes a separate sentence to the case when somebody has only stepped into the bed but adultery has not been carried out.²² Similarly, the code orders to punish the person who has bought something or taken over something for safekeeping while being aware that it has been stolen.²³ Plotting

13 *Lex Baiuvariorum* 2, 8.

14 Nótári 2011. 401. f.

15 Quitzmänn 1866. 216.

16 Nótári 2011. 297. ff.

17 Marcianus, D. (Ed. Th. Mommsen: *Corpus Iuris Civilis*, I. Berlin 1954.¹⁶) 48, 19, 11, 2. *Delinquitur aut proposito, aut impetu, aut casu...*

18 *Lex Baiuvariorum* 1, 4–6. 9; 2, 5; 4, 30; 8, 7; 9, 4. 14. 15; 10, 6; 16, 4; 17, 1; 22, 11; 23, 1.

19 *Lex Baiuvariorum* 1, 6; 2, 1; 8, 15; 9, 19; 10, 1; 12, 11; 21, 1.

20 *Lex Baiuvariorum* 10, 6; 12, 11; 14, 6.

21 *Lex Baiuvariorum* 2, 18; 9, 14; 10, 6; 12, 3.

22 *Lex Baiuvariorum* 8, 1.

23 *Lex Baiuvariorum* 9, 15. 16.

against the duke's life will result in punishment, even if the plot has not been implemented.²⁴ If the duke's son attempts at throwing his father off the throne, although he is fully in possession of competencies necessary for ruling, the son's punishment can be determined by the father.²⁵ In case of making animals jump by violence or frightening, that is, endangering animals without actually causing damage, the perpetrator was obliged to compensate for the value of the animal.²⁶

Nor is it possible to discern any general rules on acts committed as joint offenders, instigation and abetment from the code of laws, however, certain provisions seem to imply different sanctioning of perpetrators and persons privy to the act. The leader of a plot against the duke was obliged to pay six hundred, the persons in unity of intent with him two hundred and abettors in lower *status* following them forty *solidi*;²⁷ consequently, in these cases perpetrators and persons privy to the act were in theory judged differently. However, it is a question whether the persons 'following them' should be interpreted as persons privy to the act indeed or joint offenders, and whether the amount of *conpositio* to be paid by them is lower purely due to their lower social *status*. It is worth adding, that in case of acts committed on one's own authority called *heriraita*, i.e., carried out together with forty-two or more people²⁸ or acts of similar kind called *heimzuht*, performed with a lower number of people²⁹ the code orders to punish only the originator of the crime, to be more precise, he shall pay the *conpositio* whereas the rest of the people taking part in the act shall not. Two passages of the code can be connected with instigation: the owner of a slave who sells a free man on the orders or with the agreement of his master will be judged identically as the slave committing the act,³⁰ and if a slave commits theft on the orders or with the agreement of his master, the slave shall be flogged two hundred times and his master shall pay *conpositio* as a thief, that is, nine times the value of the thing stolen.³¹

It should be mentioned among the rules of the quasi-general provisions of *Lex Baiuvariorum* that its system of sanctions was developed in accordance with the *status* of the injured party – depending on whether he was a noble, a free man, a liberated slave or a slave. This will be elaborated in details in the part of this paper on sanctions, however, in summary this system can be described as follows: an injured party of noble standing was entitled to twofold, a freedman to half and a slave – to be more precise, his owner – to a third *conpositio*.³² In case of

24 *Lex Baiuvariorum* 2, 1.

25 *Lex Baiuvariorum* 2, 9.

26 *Lex Baiuvariorum* 14, 2. 3.

27 *Lex Baiuvariorum* 2, 3.

28 *Lex Baiuvariorum* 4, 23.

29 *Lex Baiuvariorum* 4, 24.

30 *Lex Baiuvariorum* 9, 5.

31 *Lex Baiuvariorum* 9, 7.

32 Quintzmann 1866. 225.

perpetrators in a free man's or slave's *status* the code sets different sanctions again; accordingly, corporeal punishment usually applied to slaves could be used against free perpetrators as punishment only for breach of military discipline and recurrent or habitual violation of the prohibition of work on Sunday.³³ Also, the amount of *conpositio* was influenced by the gender of the injured party since the amount to be paid in case of female injured parties was twofold of the amount payable in case of male injured parties; for example, a woman in free *status* who did not want to take up arms to defend herself as a man was given twofold *conpositio*,³⁴ and in case somebody got another person's slave to run away, he had to pay twelve *solidi* but if it was a maidservant he had to pay twenty-four *solidi*.³⁵ Furthermore, the amount of *conpositio* was modified by the place where the act was committed, e.g., in case of theft committed at places of primary importance, in churches, the duke's court, mills, threefold of the usual redemption, that is, twenty-sevenfold of the stolen value (*triuniungeldo*) had to be paid.³⁶ Crimes committed in secret, by stealth³⁷ or crimes committed at night – a term sometimes used as a synonym for this form of commission³⁸ – were judged more seriously; in other words, they were not only considered as circumstances subject to judge's discretion but were regulated in the code as aggravated cases. As it has been noted above, the code ordered to punish violation of prohibition of work on Sunday committed as a habitual offence more seriously,³⁹ yet, no reference can be found in *Lex Baiuvariorum* whether habitual offence was so judged in case of each crime, and if it was, what sanction it involved.

II. 'Special Provisions' of the Criminal Law

The states of facts under the 'special provisions' of *Lex Baiuvariorum* can be divided in terms of protected legal objects into the following groups: crimes against life, causing danger of life, bodily injury, other acts of violence, ruining things, numerous mixed acts of violence and acts causing damage, religious crimes and treason/lese-majesty.⁴⁰

The terminology of crimes against life is relatively diverse: accordingly, in the description of the states of facts one can meet the verbs *occidere*,⁴¹ *interficere*,⁴² *vitam*

33 *Lex Baiuvariorum* 2, 4; 1, 14.

34 *Lex Baiuvariorum* 4, 29.

35 *Lex Baiuvariorum* 13, 9.

36 *Lex Baiuvariorum* 1, 3; 2, 10–12; 9, 2.

37 *Lex Baiuvariorum* 1, 6; 9, 10, 13; 19, 2, 3.

38 *Lex Baiuvariorum* 1, 6; 9, 6, 10; 10, 1; 20, 9.

39 *Lex Baiuvariorum* 1, 14; *Synodus Niuhiensis* 15.

40 Quitzmänn 1966. 227. skk.

41 *Lex Baiuvariorum* 1, 5, 8, 9, 10; 2, 2, 8; 4, 28, 30, 31; 5, 9; 6, 12; 9, 6, 10, 11; 19, 2, 3. Cf. *Synodus Niuhiensis* 3, 10; *Synodus Dingolviensis* 9.

42 *Lex Baiuvariorum* 8, 1, 2, 9; 18, 1; 19, 4, 6. Cf. *Synodus Niuhiensis* 3.

*aufferre*⁴³ and the nominals *mors* and *mortiferum*.⁴⁴ The term *homicidium* denotes simple manslaughter, the case when someone is killed in open clash or fight⁴⁵ and the term *homicida* refers to the perpetrator who hits a pregnant woman so that she aborts.⁴⁶ The phrase *murdrida* – just as in Alemannian law⁴⁷ – denotes the conduct engaged by a person who kills somebody in secret/by stealth and throws the corpse in the river or hides it.⁴⁸ With regard to killing a pregnant woman the code stipulates that if the foetus did not live, then the perpetrator had to pay twenty *solidi conpositio* in addition to the redemption of the woman, but if the foetus lived already, then the perpetrator had to pay the *conpositio* of homicide on the foetus too.⁴⁹ This provision was borrowed from the Alemannian law, which, however, determined the child's death in eight or nine days from birth.⁵⁰ Similarly, the prohibition of making or administering drinks causing abortion comes⁵¹ from Alemannian law.⁵²

The code defines causing danger of life by the phrase *in unwan/in unuuan*, and translates it by the Latin phrase *desperatio vitae*. This state of facts includes thrusting a person from the riverbank or a bridge into water,⁵³ pushing someone into fire,⁵⁴ wounding someone by a poisonous arrow,⁵⁵ administering poisonous drink that does not cause the death of the injured party,⁵⁶ causing fire hazard.⁵⁷ Likewise, the category of causing danger of life includes stopping a person from fleeing from his enemies by violence to enable his enemies to catch up with and kill him, but the code provides this state of facts with an independent name: *wancstodal*.⁵⁸ Quitzmänn includes *wanclugi* in the scope of the same state of facts:⁵⁹ this is an act of a person who runs away with a free woman and discharges her on the way.⁶⁰

With respect to bodily injury, *Lex Baiuvariorum* distinguishes acts in terms of the character of the injury (for example: fracture of bone, bleeding wound, paralysis, etc.), the intention and motivation to cause injury. The bodily injury denoted by

43 *Lex Baiuvariorum* 3, 1.

44 *Lex Baiuvariorum* 2, 1; 4, 22.

45 For example *Lex Baiuvariorum* 1, 10; 2, 4; 9, 6. Cf. *Synodus Dingoltingensis* 9; *Synodus Niuhringensis* 14.

46 *Lex Baiuvariorum* 8, 19.

47 *Lex Alamannorum* 49, 1; *Pactus Alamannorum* (Ed. G. H. Pertz, *MGH Leges*, III. Hannover 1863. 2, 14. *Si quis mortuatus fuerit ...*

48 *Lex Baiuvariorum* 19, 2.

49 *Lex Baiuvariorum* 8, 19.

50 *Pactus Alamannorum* 2, 31; *Lex Alamannorum* 79.

51 *Lex Alamannorum* 94, 1.

52 *Lex Baiuvariorum* 8, 18.

53 *Lex Baiuvariorum* 4, 17; 6, 11.

54 *Lex Baiuvariorum* 4, 20.

55 *Lex Baiuvariorum* 4, 21.

56 *Lex Baiuvariorum* 4, 22.

57 *Lex Baiuvariorum* 10, 4.

58 *Lex Baiuvariorum* 4, 26.

59 Quitzmänn 1866. 233.

60 *Lex Baiuvariorum* 8, 17.

the phrase *pulislac* means hitting or wounding someone out of sudden passion which does not cause fracture of bone or bleeding⁶¹ but results in a swelling (cf. *Beulenschlag*).⁶² The same phrase and state of facts can be found in *Lex Alamannorum*,⁶³ *Edictus Rothari*⁶⁴ and *Lex Ribuaria*⁶⁵ as well. *Palcprust* as a kind of bodily injury means *fracture of bone* that is not open and has developed without injury to the skin⁶⁶ – as it is clear from *Lex Alamannorum* already.⁶⁷ Therefore, it can be presumed that both Bavarians and Alemannians defined a state of facts covering bodily injury that causes damage to the skin since this state of facts is mentioned *expressis verbis* in *Lex Visigothorum*.⁶⁸ The phrase ‘*cute rupta*’ used in *Lex Visigothorum* can be taken as the equivalent of the phrase ‘*cutem fregit*’ of *Lex Baiuvariorum* and the phrase ‘*pellem ruit*’ of *Lex Alamannorum*, more specifically of the negation of the state of facts in the latter two codes.⁶⁹ *Plotruns* as a form of bodily injury means bleeding wound, flow of blood,⁷⁰ however, the wound does not result in paralysis.⁷¹ The injury caused was categorised in terms of whether its healing/cure required any medical intervention. That is how *adarcrati* as a form of bodily injury was determined: injury to the artery where bleeding can be stopped only by burning.⁷² The word *adarcrati* literally means *venae percussio*, that is, wounding the artery.⁷³ They took into account whether the bone became visible due to injury to the head. The phrase *kepolsцени* means injury where the skull bone becomes visible.⁷⁴ Likewise, it influenced judgment of the act whether the arm was stabbed under or above the elbow, just as among the Alemannians⁷⁵ – as a matter of fact, the latter case resulted in twofold *compositio* since it significantly influenced the capacity to fight and work of the injured party.⁷⁶ Similarly, twofold

61 *Lex Baiuvariorum* 4, 1; 5, 1. *Si quis eum percusserit, quod 'pulislac' vocant, cum medio solido componat.*

62 Brunner 1906. II. 636; Kralik 1913. 98.

63 *Lex Alamannorum* 67, 1. *Si quis alium per iram percusserit, quod Alamanni 'pulislac' vocant ...*

64 *Edictus Rothari* 125. *Si quis servum alienum rusticanum percusserit pro unam feritam id est pulslahi ...*

65 *Lex Ribuaria* (Ed. R. Sohm: *Lex Ribuaria et Lex Francorum Chamavorum ex Monumentis germaniae Historiae recusae*. Hannover 1883.) 19. *Si ingenuus servum ictu percusserit ut sanguis non exeat usque ternos colpos, quod nos dicimus bunislege ...*

66 *Lex Baiuvariorum* 4, 4.

67 *Lex Alamannorum* 67. *Si enim brachium fregerit, ita ut pellem non rumpit, quod Alamanni balcbrust ante cubitum dicunt ...*

68 *Lex Visigothorum* 6, 4, 1. *Si quis ingenuum quolibet hictu in capite percusserit, pro libore det solidos V, pro cute rupta solidos X, pro plaga usque ad ossum solidos XX, pro osso fracto solidos C.*

69 Kralik 1913. 94. sk.

70 *Lex Baiuvariorum* 4, 2.

71 Brunner 1906. II. 636; Kralik 1913. 98.

72 *Lex Baiuvariorum* 4, 4.

73 Kralik 1913. 48.

74 *Lex Baiuvariorum* 4, 4.

75 *Pactus Alamannorum* 2, 5. *Si quis brachium super cubito transpunxerit...; 2, 6. Si subter cubitum fuerit...*

76 *Lex Baiuvariorum* 4, 12.

redemption had to be paid by a person who knocked out another person's *marchzand* compared to any other tooth – in *Lex Baiuvariorum* *marchzand* means molar,⁷⁷ just as in *Lex Alamannorum*.⁷⁸ The code devotes a separate passage to regulating the case where a person knocks out a bone from the skull or the humerus above the elbow,⁷⁹ however, contrary to the Alemannian statute, the Bavarian code does not mention the method used to determine the seriousness of the injury – the piece of bone had to be thrown from a distance of the width of the road against a shield and the thud heard would govern.⁸⁰ Bodily injury causing lasting injuries was, as a matter of fact, sanctioned by a higher *conpositio* in the code, even if it did not influence the capacity to work and fight and 'only' spoiled the appearance of the injured party. For example, *lidiscart* was considered such a state of facts, which meant cutting off the ears as mutilation distorting outward appearance⁸¹ – *Lex Alamannorum* uses the phrase *orscardi* with regard to cutting off one of the ears.⁸² Bodily injury causing injury to internal parts is denoted by the phrase *hrevawunt(i)* in the code.⁸³ This phrase can be related to the loci of *Pactus Alamannorum* where the word *revo* is used in the text, beside *latus*, that is, *side*, in the meaning of *internal part* in the sense of *injury to internal organs (placatus in revo)*,⁸⁴ which cannot mean mortal injury as the amount to be paid for it should be much higher. If bodily injury caused paralysis, then the *conpositio* amounted to half of the redemption to be paid for mutilation of the given part of the body.⁸⁵ The following two exceptions to bodily injury causing lasting damage or disability are interesting provisions. Causing lasting wound to the lower lip and lower eyelid resulting in – to use the words of the code – the injured party being unable to retain saliva or tears brought about twofold redemption compared to causing wound to the upper lip or upper eyelid; there are good chances that this twofold *conpositio* was meant to recompense for 'aesthetic shortcomings'.⁸⁶ The code calls the form of lameness caused by bodily injury when the relevant person's foot touches dew, i.e., he drags his foot, *taudregil*.⁸⁷ This phrase in the same sense and with the same explanation can be found in *Lex Alamannorum* too.⁸⁸ (It should be noted that the

77 *Lex Baiuvariorum* 4, 16; 6, 10.

78 *Lex Alamannorum* 67, 22. *Si autem dentem absciderit, quod marczan dicunt Alamanni...*

79 *Lex Baiuvariorum* 4, 5.

80 *Pactus Alamannorum* 1, 3. *Si quis alteri caput frangit ut ossus de capite ipsius tollatur et supra via in acuto sonet...*

81 *Lex Baiuvariorum* 4, 14.

82 *Lex Alamannorum* 58. *Si enim medietatem auri absciderit quod scardi alamanni dicunt...*

83 *Lex Baiuvariorum* 4, 6; 5, 5; 6, 5.

84 *Pactus Alamannorum* 11. *Si quis in revo placatus fuerit aut in latus...; 12. Si quis in latus alium transpunerit, sic ut in revo placatus non sit...*

85 *Lex Baiuvariorum* 4, 9; 5, 6; 6, 6; 4, 10; 4, 14.; 6, 11.

86 *Lex Baiuvariorum* 4, 15.

87 *Lex Baiuvariorum* 4, 27; 6, 11.

88 *Lex Alamannorum* 57, 62. *Si quis autem alium in genuculo placaverit, ita ut claudus permaneat, ut pes eius ros tangat, quod Alamanni taudragil dicunt...*

German technical terms of *Lex Baiuvariorum* at certain points are not in want of linguistic humour either: consider, for example, the folk language phrases for the valueless ‘grass destroyer’ horse, *angarnago*,⁸⁹ or the lame man ‘walking on dew’, *taudregil*.⁹⁰ It can be explained definitely by military reasons that the code sets one-third higher *conpositio* on a finger paralysed by wounding than on a finger cut off, most probably because a paralysed finger (which cannot be bended) represented greater impediment in handling arms than lack of a finger.⁹¹

The code sanctions acts of violence in several passages. Attacks, acts of violence not causing bodily injury are summed up by the phrase *infanc* in the code.⁹² As technical term – just as in the Alemannian statute⁹³ – *infanc* can be taken as the equivalent of the state of facts *manus inicere in aliquem*, i.e., *raising one’s hand against somebody, attacking somebody*.⁹⁴ The phrase *hraopant*, just as in *Pactus Alamannorum*,⁹⁵ as a state of facts denotes the act of taking captive by violence but without binding,⁹⁶ and as a compound it means *binding roughly, by violence (rohes Binden)*.⁹⁷ Similarly, the following acts constitute independent states of facts implementing infringement of the freedom of a free man: binding by a rope,⁹⁸ throwing off a horse⁹⁹ – also defined in Alemannian law¹⁰⁰ – and shutting up the injured party by violence in his own house.¹⁰¹ Acts of violence include acts against women’s chastity and honour, specifically, lecherous touching of a free maiden or woman, i.e., *horcraft*,¹⁰² lifting a woman’s dress over the knee with immoral intention, i.e., *himilzorunga*¹⁰³ (this state of facts is defined also by the Alemannian statute – without referring to the German legal technical term¹⁰⁴) and *walfvurf*, tearing off the kerchief¹⁰⁵ – this state of facts can be related to the state of facts of the Alemannian code that sanctions the act of stopping a woman

89 *Lex Baiuvariorum* 14, 12.

90 *Lex Baiuvariorum* 7, 24.

91 *Lex Baiuvariorum* 4, 11.

92 *Lex Baiuvariorum* 4, 3; 5, 3; 6, 3.

93 *Pactus Alamannorum* 3, 25. *Si quis alterius infanc minolledis fuerit III solidos conponat.*; 3, 26. *Si medianus fuerit VI solidos conponat.*; 3, 27. *Si meliorissimus fuerit XII solidos conponat.*

94 Kralik 1913. 90.

95 *Pactus Alamannorum* 3, 5. *Si quis altero per mano aut per drappo natus priserit solidos VI conponat.*

96 *Lex Baiuvariorum* 4, 8.

97 Kralik 1913. 85.

98 *Lex Baiuvariorum* 4, 7; 5, 5.

99 *Lex Baiuvariorum* 4, 7.

100 *Pactus Alamannorum* 3, 28; *Lex Alamannorum* 68.

101 *Lex Baiuvariorum* 4, 25.

102 *Lex Baiuvariorum* 8, 3.

103 *Lex Baiuvariorum* 8, 4.

104 *Lex Alamannorum* 58, 2. *Et si eius vestimenta levaverit usque ad genucla...*; 58, 3. *Et si eam denudaverit genitalia eius appareant vel posteriora...*

105 *Lex Baiuvariorum* 8, 5. *Si autem discriminalia eiecerit de capite, quod ‘walcvurf’ dicunt, vel virgini libidinese crimes de capite extraxerit, cum XII solidis conponat.*

with hostile intention and tearing off her kerchief.¹⁰⁶ (It should be added that the code does not order to punish a woman who voluntarily yields to seduction, only the ‘seducer’ contacting her was obliged to pay *conpositio*.¹⁰⁷ Concerning sex morals, the only provisions that definitely appear in the code primarily apply to prohibition of incestuous marriage¹⁰⁸ as well as to the obligatory nature of the redemption to be paid in case of adultery committed with a married free woman and liberated woman or maidservant, or to the husband’s right to kill the adulteress caught in the act, with impunity.¹⁰⁹) The provisions of the code sanctioning abduction of virgins, widows¹¹⁰ and another person’s fiancée¹¹¹ can also be ranked among acts of violence infringing sex morals.

Lex Baiuvariorum distinguishes numerous crimes against property. Robbery, i.e., misappropriation of another person’s property by violence is defined by the verbs *rapere*, *furari*, *despoliare*, *aufferre* in the code, and as the *lex* does not contain any clear, specific technical term with regard to this crime, in all of the cases where the code does not refer to the fact that misappropriation was carried out by stealth, in secret or at night, the relevant act must have been robbery.¹¹² Similarly, it was considered robbery when a person intruded into a house on fire – pretending to bring help – and took something from there.¹¹³ The German technical term for robbery used by the code is the compound *waluraupa*, i.e., the phrase denoting robbing the clothes of a killed man – that is, as a literal equivalent¹¹⁴ of *vestitus occisorum*.¹¹⁵ In *Lex Baiuvariorum* a peculiar state of facts is constituted by kidnapping and selling a free man, which brought about restitution of the free *status* of the injured party and payment of forty *solidi conpositio*, and if it was not possible to restore the *status*, it resulted in the perpetrator becoming a slave.¹¹⁶ Likewise, persuading another person’s slave to run away or assisting in the act can be ranked among crimes against property since it represented wilful impairment of the owner’s assets.¹¹⁷ It is a material element of the state of facts of theft that the act is committed by stealth, however, the code stresses this in

106 *Lex Alamannorum* 58, 1. *Si quis libera femina vadit in itinere suo ... et obviaviat eam aliquis per raptum denudat eius caput...*

107 Cf. *Lex Baiuvariorum* 8, 8.

108 Cf. *Lex Baiuvariorum* 7, 1–3.

109 Cf. *Lex Baiuvariorum* 8, 1. 10. 11. 12.

110 *Lex Baiuvariorum* 8, 6. 7. Cf. *Lex Alamannorum* 54, 1. *Si quis filiam alterius non sponsatam acciperit sibi ad uxorem...*

111 *Lex Baiuvariorum* 8, 16; Cf. *Lex Alamannorum* 51, 1. *Si quis liber uxorem alterius contra legem tulerit...*; 52. *Si quis sponsatam alterius contra legem acciperit...*

112 Quitzmänn 1866. 245.

113 *Lex Baiuvariorum* 15, 3.

114 Kralik 1913. 124.

115 *Lex Baiuvariorum* 19, 4.

116 *Lex Baiuvariorum* 15, 3. 9, 4. 5; 16, 5. Cf. *Synodus Niuuhingensis* 3.

117 *Lex Baiuvariorum* 1, 4; 13, 9.

several passages by using the phrases *occulte* or *nocte*.¹¹⁸ The code underlines the fact of committing the act at night as *differentia specifica*¹¹⁹ with regard to hiding stolen things too. As a matter of fact, the *conpositio* was influenced by the value of the stolen thing, however, the code defines ‘higher value’ – most probably as a result of inconsistent *redactio* – in ten *solidi* in one locus¹²⁰ and twelve *solidi* in another locus.¹²¹ Instead of the usual ninefold *conpositio* of theft (*niungeldo*),¹²² the redemption for theft committed at places of primary importance, in churches, the duke’s court, mills and forges amounted to twenty-sevenfold of the value of the stolen thing (*triuniungeldo*).¹²³ In case of thieves caught in the act, as a matter of fact, there was no need for special demonstration of evidence, and the thief could be killed with impunity.¹²⁴ In case of theft, house search was allowed, however, if the person carrying out the house search found nothing or the house search was carried out in the absence of the owner of the house, then six and three *solidi* *conpositio* placed on the threshold had to be paid respectively.¹²⁵ Accordingly, if the owner of the house refused or prevented house search, he was obliged to pay forty *solidi*.¹²⁶ Receivers of stolen goods were judged identically as thieves; so, they also had to pay *niungeldo*.¹²⁷ Among crimes against property the code devotes several passages to ruining a house and certain components of the house,¹²⁸ destroying the fence¹²⁹ and ploughing up another person’s land and stealing his produce.¹³⁰ At several points the code refers to stealing wood that can be used as building material,¹³¹ cutting down fruit-trees,¹³² moving border marks and thereby impairing the territory of an estate¹³³ and killing animals (for example, domestic animals, hunting dogs and birds used for hunting as well as songbirds).¹³⁴

With respect to form of commission and the protected legal object, a kind of ‘mixed group of crimes’ is composed by arson, poisoning wells/contaminating wells, breach of domicile, blocking public roads and false accusation.¹³⁵ Regarding

118 *Lex Baiuvariorum* 9, 6. 10; 20, 9.

119 *Lex Baiuvariorum* 2, 12.

120 *Lex Baiuvariorum* 9, 9.

121 *Lex Baiuvariorum* 9, 3.

122 *Lex Baiuvariorum* 9, 1.

123 *Lex Baiuvariorum* 1, 3; 2, 12; 9, 2.

124 *Lex Baiuvariorum* 9, 6. 9.

125 *Lex Baiuvariorum* 9, 2. 4.

126 *Lex Baiuvariorum* 9, 5. 7.

127 *Lex Baiuvariorum* 9, 8.

128 *Lex Baiuvariorum* 10, 5–15.

129 *Lex Baiuvariorum* 10, 6. 7.

130 *Lex Baiuvariorum* 13, 6. 7.

131 *Lex Baiuvariorum* 12, 11. 12; 22, 1.

132 *Lex Baiuvariorum* 22, 2–8.

133 *Lex Baiuvariorum* 12, 1–8.

134 *Lex Baiuvariorum* 1, 3; 9, 2. 9–11; 13, 4. 5; 14; 15, 1; 20; 21; 22, 8–10; 23.

135 Quitzmänn 1866. 252.

arson it can be clearly established that *Lex Baiuvariorum* does not include this crime in the scope of causing public danger but interprets it as *delictum* against private property only since, for example, it sanctions setting agricultural buildings on fire by three *solidi* redemption.¹³⁶ If people stayed inside a residential property set on fire, then *conpositio* had to be paid in accordance with their *status* in case of their death or in case they were compelled to escape from danger undressed (as arson was considered an act of *inunwan*, i.e., *in desperationem vitae*¹³⁷) – twofold amount for women. As a matter of fact, destroyed furnishings had to be paid for and collapsed roof had to be redeemed by forty *solidi*.¹³⁸ If arson committed wilfully or by stealth (at night) affected the property of the Church, the procedure was as follows: if the perpetrator was a slave, he was punished to lose his eyes and hands, and his owner was obliged to pay for the burnt property; if the perpetrator was a free man, he had to pay the *conpositio* of the persons who were wounded or died in accordance with the above; furthermore, he had to pay forty *solidi* for the act itself and twenty-four *solidi* for the building falling in.¹³⁹ The code sanctioned breach of domicile, that is, forcible entry to another person's house or courtyard by payment of three or six *solidi* redemption respectively.¹⁴⁰ With regard to blocking public roads unlawfully, it is necessary to refer to the sign set up at given points for strategic purposes called *wiffa*, usually a handful of straw tied to a stick, placed to block a road or protect or enlarge an area of pasture. Removing or transferring this sign brought about one *solidus conpositio*.¹⁴¹ Due to the character of the road, depending on whether it was a duke's road or a road used by neighbours for going over or driving animals or simply a path, the *conpositio* amounted to twelve, six or three *solidi* respectively.¹⁴² In case of contaminating or poisoning wells, on the one hand, the perpetrator was obliged to restore the original condition of the well, and, on the other hand, the *lex* distinguished wells used by private persons only from wells used by the entire community.¹⁴³ In case of false accusation – just as among the Alemannians¹⁴⁴ – the accuser suffered the same punishment that was imposed on the crime the accuser falsely charged another person with.¹⁴⁵ If the charge was a capital offence, the accuser had to prove his truth by tournament of doom in case he had no witnesses, so that nobody could cause the ruin of another person out of sheer

136 *Lex Baiuvariorum* 10, 2. 3.

137 *Lex Baiuvariorum* 10, 4.

138 *Lex Baiuvariorum* 10, 1.

139 *Lex Baiuvariorum* 1, 6.

140 *Lex Baiuvariorum* 11, 1. 2.

141 *Lex Baiuvariorum* 10, 18.

142 *Lex Baiuvariorum* 10, 19. 20. 21.

143 *Lex Baiuvariorum* 10, 22. 23.

144 *Lex Alamannorum* 44, 1.

145 *Lex Baiuvariorum* 9, 19.

hostility or hatred – as the code emphatically states.¹⁴⁶ A person falsely accused or intending to protect himself against false testimony could clear himself by tournament of doom as well.¹⁴⁷ It is worth adding that the person who accused a slave falsely and the slave died while being tortured had to give two slaves to the owner, or became a slave himself if he could not accomplish that.¹⁴⁸

The scope of crimes offending the order of religion includes failure to sanctify Sunday, incest, desecration of graves or dead persons and magic. The code – in harmony with several Council regulations and ecclesiastical rules¹⁴⁹ – clearly forbids performance of serf's works, for example, ploughing, harvesting, haymaking and carriage-driving. The person who commits the act again in spite of punishment shall be flogged fifty times, in case of habitual offence half of his property shall be confiscated and in case of continued unwillingness to engage law abiding conduct he shall be deprived of his freedom. Similarly, the code forbids travelling on Sunday.¹⁵⁰ The impact of Christianity is shown again – as indicated by the regulations of the Penitentials¹⁵¹ – by prohibition of incestuous marriage, which is highly emphasised in family law (within private law).¹⁵² The Bavarian code of laws devotes a separate *titulus* to issues related to the dead and graves. *Murdrida* as state of facts denotes the crime when somebody commits homicide by stealth and throws the corpse into the river or hides it so that it could not be found and the dead person could not be provided with proper burial.¹⁵³ A person who wounds a corpse by an arrow to drive away birds settling on it shall pay twelve *solidi*.¹⁵⁴ Also, the burial of the dead person is served by the rule stating that an alien burier shall receive reward.¹⁵⁵ The *lex* unambiguously takes a stand against pagan burial

146 *Lex Baiuvariorum* 2, 1.

147 *Lex Baiuvariorum* 17, 6.

148 *Lex Baiuvariorum* 9, 20.

149 On sanctifying Sunday see *Concilium Aurelianense III.* (a. 538) (Ed. F. Maassen, MGH Concilia aevi Merovingici, I. Hannover 1893.) 28; *Concilium Cabilonense* (a. 644) 18; *Concilium Rotomagensense* (a. 650) (Ed. J. D. Mansi: *Sacrorum conciliorum nova amplissima collectio*, X. Firenze 1764.) 15; *Concilium Narbonense* (a. 589) (Ed. J. D. Mansi: *Sacrorum conciliorum nova amplissima collectio*, IX. Firenze 1763.) 4; *Concilium Matisconense II.* (a. 585) (Ed. F. Maassen: *MGH Concilia aevi Merovingici*, I. Hannover 1893.) 1; Isidorus, *De ecclesiasticis officiis* (Ed. C. M. Lawson: *Corpus Christianorum, Series Latina*, 113. Turnhout 1989.) 1, 24, 1; *Poenitentiale Gregorii* (Ed. J.-P. Migne: *Patrologia Latina*, 89. Paris 1830.) 54; *Poenitentiale Cummeani* (Hrsg. J. Zettinger, *Archiv für katholisches Kirchenrecht* 82. 1902.) 12, 3. 4; *Decretio Childeberti II.* (a. 596) (Ed. G. H. Pertz: *MGH Leges*, I. Hannover 1835.) 14. On the prohibition of travelling on Sundays see *Poenitentiale Pseudotheodori* (Hrsg. F. W. H. Wasserschleben: *Die Bußordnungen der Abendländischen Kirche nebst einer rechtsgeschichtlichen Einleitung*. Halle 1851.) 23, 8.

150 *Lex Baiuvariorum* 1, 14.

151 Cf. *Poenitentiale Gregorii* 78; *Poenitentiale Theodori Cantuariensis* (Ed. J.-P. Migne: *Patrologia Latina*, 99. Paris 1851.) 2, 12, 25; *Poenitentiale Cummeani* 3, 24.

152 *Lex Baiuvariorum* 7, 1. 2. 3.

153 *Lex Baiuvariorum* 19, 2.

154 *Lex Baiuvariorum* 19, 5.

155 *Lex Baiuvariorum* 19, 7.

rituals as well.¹⁵⁶ As penalty of robbing a grave – if the deceased was a man in free *status* – the code stipulates payment of forty *solidi*, and with respect to the valuables taken from there, it prescribes the *compositio* imposed on theft.¹⁵⁷ *Lex Baiuvariorum* contains two stipulations that sanction taking the boat of another person.¹⁵⁸ It cannot be ruled out that this provision has to do with the ancient pagan burial form where the dead person and his valuables were put on a boat and were set afloat. Furthermore, the order of religion was offended by magic art and exercise of pagan burial rituals, which continued to exist in Bavaria as implied by Council regulations.¹⁵⁹ *Lex Baiuvariorum* mentions *expressis verbis* the state of facts of *maleficae artes* in relation to practising magic on another person's burial.¹⁶⁰ It arises as a question whether the state of facts of *suezholi* or *sweizcholi*,¹⁶¹ i.e., when somebody frightens another person's animals so that they sweat blood,¹⁶² refer to some kind of pagan or magical crime – as it is made probable by Quitzmänn¹⁶³ – more specifically, whether this state of facts is connected with the belief that witches ride animals at night, but a fully reassuring answer can be hardly given to this question. Two regulations of the Council of Neuching refers to two further forms and sanctioning of magical intervention: taking stolen things across the border in stealth,¹⁶⁴ and reducing the champion's force by magic art in tournament of doom.¹⁶⁵

The most important crime against the state (treason) is calling the enemy into the country, where punishment depended on the duke's deliberation and – just as in the Alemannian code¹⁶⁶ – could involve death penalty.¹⁶⁷ The code orders to punish the act of stirring up discord in the army (*scandalum*) – in harmony with the Alemannian *lex*¹⁶⁸ – in such form that it places imposition of the sanction in the duke's hands, which could be capital punishment or exile, as the case may be.¹⁶⁹ Similarly, crimes

156 *Lex Baiuvariorum* 19, 8.

157 *Lex Baiuvariorum* 19, 1.

158 *Lex Baiuvariorum* 9, 9. 10.

159 *Synodus Niuhringensis* 6. ...*verbis, quibus ex vetusta consuetudine paganorum idolatriam reperimus...*

160 *Lex Baiuvariorum* 13, 8.

161 *Lex Baiuvariorum* 14, 15.

162 Kralik 1913. 107.

163 Quitzmänn 1866. 261.

164 *Synodus Niuhringensis* 2. ...*extra finem Baiuvariorum venundare vel machinis diabolicis extraminare insidiis tentit...*

165 *Synodus Niuhringensis* 4. *De pugna duorum quod uuehadinc voratur, ut prius insortiantur quam parati sunt, ne forte carminibus vel maschinis diabolicis vel magicis artibus insidiantur.*

166 *Lex Alamannorum* 25. *Si quis homo aliquis gentem extraneam infra provinciam intraverit, ubi praedam vastet hostiliter vel somos incendat et de hoc convictus fuerit, aut vitam perdam aut exilio exeat...*

167 *Lex Baiuvariorum* 1, 10; 2, 1.

168 *Lex Alamannorum* 16. *Si quis in exercitu litem commiserit ita ut cum clamore populus concurrat cum armis et ibi pugna orta fuerit infra propria oste et alitui ibi occissi fuerint ... aut vitam perdat aut in exilium exeat...*

169 *Lex Baiuvariorum* 2, 4.

against the State included plotting against the duke's life,¹⁷⁰ which – at the duke's discretion – brought about death penalty and confiscation of one's total property.¹⁷¹ It is considered a crime against the State, which can be committed by the duke's sons only – either from their own resolution or on other persons' advice as noted in the Alemannian statute too¹⁷² – when an attempt is made at throwing their father off the throne although he is still capable of ruling: in this case, in addition to optionally being exiled by their father, they lost their right of succession to the throne.¹⁷³ In case of *carmulum*, i.e., instigating revolt against the duke¹⁷⁴ – which state of facts is also defined by the Alemannian code but typically without the Bavarian technical term¹⁷⁵ – the code clearly differentiates the punishment imposed on the leader of the revolt from the punishment of his followers and persons in lower *status* participating in the event. In the light of all that, it is absolutely clear that killing the duke brought about death penalty and confiscation of one's total property.¹⁷⁶

III. System of Punishment of *Lex Baiuvariorum*

The provisions of *Lex Baiuvariorum* on sanctions are in harmony with the description of Tacitus's *Germania*, which states that the punishments of specific crimes – both in their extent and character – are somehow connected with and reflect the acts committed.¹⁷⁷ As an example, Tacitus notes that traitors and deserters were hanged, while cowards, people unfit for fighting and fornicators were drowned in a swamp; in case of crimes of lower weight, however, private revenge could be redeemed by handing over a determined number of horses or other animals, for even in case of homicide the option to discharge this kind of *compositio* was offered, a part of which was given to the king or the State, another part to the family of the injured party in order to ward off private fight disintegrating the community.¹⁷⁸ Apart from

170 Cf. *Lex Alamannorum* 24. *Si quis homo in mortem ducis consiliatus fuerit et inde convictus fuerit aut vitam perdat aut se redimat...*

171 *Lex Baiuvariorum* 2, 1.

172 *Lex Alamannorum* 35. *Si quis dux habet filium contumacem et malum qui rebellare conetur contra ipsum per stultitiam suam vel per consilium malorum hominum et volunt dissipare provinciam et hostiliter surrexit contra ipsum patrem suum...*

173 *Lex Baiuvariorum* 2, 9.

174 *Lex Baiuvariorum* 2, 3.

175 *Lex Alamannorum* 34. *Si quis praesumpserit infra provinca hostiliter res ducis invadere et ipsas tollere et post haec convictus fuerit...*

176 *Lex Baiuvariorum* 2, 2.

177 Quitzmänn 1866. 265.

178 Tacitus, *Germania* 12. *Proditores et transfugas arboribus suspendunt, ignavos et imbelles et corpore infames caeno ac palude, iniecta insuper crate, mergunt.*; 21. *Suscipere tam inimicitias seu patris seu propinqui quam amicitias necesse est; nec implacabiles durant: luitur enim etiam homicidium certo armentorum ac pecorum numero recipitque satisfactionem universa domus, utiliter in publicum, quia periculosiores sunt inimicitiae iuxta libertatem.*

three capital offences, the Bavarian *lex* prescribed payment of *conpositio* or, in the event that the perpetrator's property seemed to be insufficient for discharging this penalty, threatened with debt slavery;¹⁷⁹ in other words, it completely superseded the application of the *talio* principle. *Conpositio* as technical term conveyed the meaning of *reparation, restitution, settlement*, that is, it appeared as a penalty functioning as compensation for damage, which – as noted by Grimm – could provide a solution more favourable for both the perpetrator and the injured party: the perpetrator could evade danger threatening his life and honour by handing over his property or a part of it, and the injured party could count on pecuniary growth to recompense him for the injury that could be taken for granted, instead of private revenge uncertain both in its occurrence and outcome.

The code does not contain too many statements of principle as to the purpose of the criminal law sanction being fundamentally to keep peace of the province; yet, the reference to indicate this aim of the lawmaker was most probably borrowed from the Alemannian statute.¹⁸⁰ In terms of keeping peace as a legal objective, the *lex* clearly underlines the importance of the so-called *Heerfrieden*, because anybody who robbed and looted during campaigns or stole things from military equipment was punished not by the usual sanction generally applied in 'civil criminal law' but by one which could represent *conpositio* of a higher amount (ranging from two hundred to forty *solidi*) and, in certain cases, death penalty as well.¹⁸¹ To keep the so-called *Heimfrieden*, i.e., inviolability of private persons' dwelling, the code contains several provisions that guarantee the security of the house/yard/garden and sanction violation of security.¹⁸² Similarly, forcible entry to an abode without the permit of the owner of the property and armed attack against residential property are judged as aggravated crime.¹⁸³ Furthermore, the code determined four places which, having become the scene of committing crime, brought about threefold of the usual sanction (e.g., in case of theft, twenty-sevenfold instead of ninefold *conpositio*) – such scenes were churches, the king's/ duke's court, (armour)smiths' forges and mills, which were considered places of primary importance in terms of economic and military affairs.¹⁸⁴ It needs to be added, however, that there are several contradictions between statutory provisions on keeping the peace and property of the Church; e.g., whereas one locus stipulated payment of twofold redemption,¹⁸⁵ another one prescribed single

179 *Lex Baiuvariorum* 2, 1.

180 *Lex Baiuvariorum* 2, 14. Cf. *Lex Alamannorum* 36. *Ut conventus secundum consuetudinem antiquam fiat in omne centina ... de VII in VII noctis quando pax parva est in provincia; quando autem melior post XIV noctis.*

181 *Lex Baiuvariorum* 2, 4. 5. 6.

182 *Lex Baiuvariorum* 10, 6–17; 22, 1.

183 *Lex Baiuvariorum* 11, 1–4; 4, 23–25.

184 *Lex Baiuvariorum* 9, 2.

185 *Lex Baiuvariorum* 1, 2. 5.

or ninefold redemption for harming the property of the Church;¹⁸⁶ likewise, while one locus imposed twenty-sevenfold redemption on theft from churches every time, the other one restricted the scope of this stipulation to misappropriation of liturgical accessories only.¹⁸⁷

The right of church asylum (*asylum*): the opportunity for perpetrators of crimes to find shelter and protection in church or at other sacred places, as a matter of fact, did not mean that the person concerned could completely avoid the punitive power of the State. By entering the church he could escape from the direct consequences of possible blood feud only, however, thereby he surrendered to the punitive power of the Church.¹⁸⁸ To keep peace of the duke's court, a regulation set forth that a person who stirred up discord or private fight in it was more severely punished than in case of committing these acts at other places, and the *conpositio* for theft committed in the duke's court amounted to threefold of the usual redemption, and the person who concealed any assets found there was automatically considered a thief.¹⁸⁹ It can be deduced from the option to redeem the above listed crimes ranked into the category of breach of peace by *conpositio* that early medieval German laws – including Bavarian folk law – were inclined to re-rank them from the category of public crimes to the category of private crimes even in case of offences more seriously threatening the order of society.¹⁹⁰ This process can be identified most clearly, perhaps, in the highly disputed loci of *Lex Salica*: whereas one locus classified a person who committed robbing of a grave or desecration of a grave *wargus*, i.e., an outlaw,¹⁹¹ the other locus regulating the same state of facts imposed 'merely' payment of two hundred *solidi*.¹⁹²

In the code, peace money is most often called *fretum*, *publicum*, *dominicum*, *fiscus* or simply penalty to be paid to the duke, by which the perpetrator as it were redeems or purchases (*redimere*) the peace violated by him by committing the crime and – as the case may be – his life or body by which he would suffer punishment in theory in accordance with the *talio* principle.¹⁹³ The rate of peace money depended on the seriousness of the act committed – or, in more general terms, the seriousness of breach of peace implemented by the crime: the two fundamental amounts used in *Lex Baiuvariorum* (although the code, of course, does not apply these penalty amounts absolutely consistently) are twelve and forty *solidi*, and, accordingly, most of the *conpositio* amounts are produced as

186 *Lex Baiuvariorum* 1, 4. 6.

187 *Lex Baiuvariorum* 9, 2; 1, 3.

188 *Lex Baiuvariorum* 1, 7.

189 *Lex Baiuvariorum* 2, 10. 11. 12; 9, 2.

190 Quitzmann 1866. 272.

191 *Lex Salica* 55, 4. (A, C)

192 *Lex Salica* 14, 10. (A2)

193 *Lex Baiuvariorum* 2, 6. 11.

the multiple of these numbers.¹⁹⁴ As a matter of fact, both in the Alemannian and Bavarian code one can find peace money amounts different from the above; e.g., sixty *solidi* as a higher¹⁹⁵ and fifteen *solidi* as a lower peace money amount.¹⁹⁶ The usual technical terms for payment of peace money are as follows: *duci pro freto*, *pro freto in publico*, *ad partem fisci pro freto*.¹⁹⁷ Higher peace money – usually forty *solidi* in accordance with the Bavarian code and sixty *solidi* in the Alemannian statute – had to be paid, among others, in case of uprising against the duke,¹⁹⁸ robbery committed in the army, breach of peace committed in the duke's court or the venue of administration of justice, arson, homicide, kidnapping a free man, abduction of women, receiving stolen goods, certain cases of breach of domicile,¹⁹⁹ *heriraita*²⁰⁰ and breach of ecclesiastical peace.²⁰¹ In case of the above listed crimes, payment of higher peace money was stipulated by the Bavarian *lex* as well – as it has been noted – by other German statutes, however, in several cases when the rest of German laws require the perpetrator to pay peace money in lower amount only, the Bavarian code stipulates the higher amount. This category includes the act of refusing house search in case of suspicion of theft; holding things in pledge unlawfully, refusing mandatory appearance before the law and contempt of the duke's seal as a habitual offender as well as bribing the judge proceeding in a case.²⁰² Accordingly, the sanction of payment of lower peace money (amounting to twelve *solidi*) in *Lex Baiuvariorum* is restricted to a narrower scope of acts: e.g., abetment in theft, concealing things found in the duke's court and contempt of the duke's seal not as a habitual offender.²⁰³ In exceptional cases, extraordinary peace money, which cannot be adjusted to the above-mentioned calculation system, was imposed; e.g., in case of killing the bishop: payment of gold equal to the weight of the victim's statue cast in lead; however, the code does not define it unambiguously whether it was due to the king or the people or the Church or the relatives of the bishop killed.²⁰⁴

194 Quitzmänn 1866. 274.

195 Cf. *Lex Alamannorum* 55. 34; *Lex Baiuvariorum* 1, 7, 2, 3.

196 *Lex Baiuvariorum* 2, 12. 13. 14; *Lex Alamannorum* 28, 1; 36, 4.

197 *Lex Baiuvariorum* 13, 2. Cf. Quitzmänn 1866. 275.

198 *Lex Baiuvariorum* 2, 3. *Lex Alamannorum* 34.

199 *Lex Baiuvariorum* 2, 5. 6. 10. 11; 1, 6; 10, 10; 1, 9. Cf. *Synodus Niuhingensis* 10. *Lex Baiuvariorum* 7, 4; 9, 4; 8, 6. 7. Cf. 2. 7.

200 *Lex Baiuvariorum* 4, 23.

201 *Lex Baiuvariorum* 1, 7. *Lex Alamannorum* 4.

202 *Lex Baiuvariorum* 11, 5. 7; 13, 2. 3. Cf. *Synodus Niuhingensis* 15. 2, 17; *Lex Alamannorum* 41, 2. *Si autem per cupiditatem ... contra legem iudicaverit, cognoscat se delinxisse et XII solidos sit culpabilis.*

203 *Lex Baiuvariorum* 9, 11. 12. 15. 16; 2, 13. Cf. *Lex Alamannorum* 28, 1. *Si quis sigillum ducis neglexerit ... XII solidos conponat;* *Lex Baiuvariorum* 2, 14. Cf. *Lex Alamannorum* 36, 4. *Si quis liber ad ipsum placitum neglexerit venire ... XII solidos sit culpabilis qualis persona sit aut vassus ducis aut comitis.*

204 *Lex Baiuvariorum* 1, 10.

In a narrower sense, *conpositio* is nothing else than *Wergeld* due to the injured party or his relatives, which, as a matter of fact, includes acknowledgement of the commission of the crime – while the original function of peace money was to redeem breach of peace of the community and the blood feud of the clan of the injured party, the purpose of *conpositio* was to redress legal injury suffered by an individual, the injured party, and redeem the blood feud of the narrower family.²⁰⁵ In harmony with the above outlined process of re-ranking specific states of facts from the category of public crimes into the scope of private crimes it can be established that among the punishments of *Lex Baiuvariorum conpositio* (i.e., *werageldo*) appears with greater weight than peace money (*fredum*) and the function of the latter is mostly restricted to aggravated acts and acts more seriously violating public order and social integration.²⁰⁶ Quite often, it is possible to meet the solution where *conpositio* and peace money appear side by side, as sanctions incurred simultaneously for the same crime. An example for that is the sanction of cutting down fruit-trees of another person: twenty *solidi* were due to the treasury and twenty to the owner, furthermore, the perpetrator was obliged to plant new trees to replace those cut down and pay one *solidus* redemption *per annum* for each tree cut down until the new trees became productive.²⁰⁷

The amounts of *Wergeld* also changed in accordance with differentiation of social *status*. For it can be made probable from the provision of the code which determines *Wergeld* of a free man in twice eighty²⁰⁸ *solidi* that originally the amount of this *Wergeld* was no more than eighty *solidus* since otherwise it would have been senseless for the code to use twofold multiplier for a given amount.²⁰⁹ On the other hand, Quitzmann presumes that the eighty *solidi* are already the product of doubling since originally merely two statuses were taken into account among the Germans: of free men and of slaves.²¹⁰ Accordingly, originally the amount of *conpositio* to be paid to the owner on killing a slave might have been twenty *solidi*. As a result of the process that freedmen appeared beside free men and slaves as a social class, the code was compelled to raise the *Wergeld* of free men to eighty *solidi* in order to express the difference between persons belonging to these three social statuses. In view of the fact that the code defined the *Wergeld* of freedmen in forty *solidi*, there are good chances that rising of the *Wergeld* of free men to one hundred and sixty *solidi* can be attributed to the fact that as a *status* higher than that of common freedmen but lower than that of free men the category of persons manumitted by the king or the Church appeared,

205 Quitzmann 1866. 277.

206 *Lex Baiuvariorum* 2, 3. 10–14. 17; 10, 19–23; *Synodus Niuhingensis* 2. 7.

207 *Lex Baiuvariorum* 22, 1.

208 *Lex Baiuvariorum* 4, 28. Cf. *Lex Alamannorum* 69, 1. *Si quis autem liber liberum occiderit, componat eum bis LXXX solidos...*

209 Quitzmann 1866. 283.

210 Quitzmann 1866. 281.

whose *Wergeld* was determined now in eighty *solidi*.²¹¹ However, the aforesaid one hundred and sixty *solidi* were again multiplied in case of groups of certain people; consequently, twofold *Wergeld* was due to monks and servants of the Church up to subdeacons, members of the five great noble clans and women.²¹² *Wergeld* of priests was defined in threefold of that of free men,²¹³ members of the duke's family were entitled to fourfold, the duke himself to sixfold *Wergeld*.²¹⁴ Compensation of loss that can be measured in terms of property can be ranked into the category of penalty functioning as compensation for damage as well.²¹⁵ Single amount of the loss caused had to be reimbursed, for example, in case of arson, theft committed in the army, assisting a thief by covering the act, damage caused to animals and fruit-trees.²¹⁶ Twofold compensation was stipulated in case of harming the property of the Church, passing unlawful judgment in bad faith, unlawful sale of another person's property and plundering killed persons.²¹⁷ In case of robbery fourfold,²¹⁸ in case of theft ninefold²¹⁹ and in case of theft committed at the above listed places provided with special protection twenty-sevenfold compensation obligation was imposed on the perpetrator.²²⁰

Actual punishments, which are not penalties functioning as compensation for damage, appear in *Lex Baiuvariorum* consistently in case of more serious crimes that cannot be redeemed by pecuniary compensation, composition. In the code, punishment is usually called *poena*²²¹ or *disciplina*,²²² and with regard to the purpose of punishment at a particular locus the code formulates – although it lacks any kind of legal principle of either private or criminal law or abstraction – that the function of punishment is special prevention, in other words, to hinder the perpetrator from committing further crimes.²²³ In several cases, the code emphatically leaves it to the duke's or the ruler's discretion to impose the punishment or set the rate of sanction.²²⁴ The major types of punishment

211 *Synodus Niuhiensis* 10. *Liberi, qui ad ecclesiam dimissi sunt vel per cartam acceperunt libertatem a rege si occidantur LXXX sol. componantur ecclesiae vel filiis eorum...* Cf. *Lex Alamannorum* 17. *Liberi qui per cartam firmitatem acceperint, si occidantur LXXX sol. componantur ad ecclesiam vel ad filium eius.*

212 *Lex Baiuvariorum* 1, 8; 3, 1; 1, 11; 4, 29. Cf. *Lex Alamannorum* 49, 2; 58, 3; 59, 3.

213 *Lex Baiuvariorum* 1, 9; 2, 3. 4.

214 *Lex Baiuvariorum* 3, 1. 2.

215 Quitzmänn 1866. 288.

216 *Lex Baiuvariorum* 1, 4; 10, 1; 2, 5. 6; 9, 15. 16; 14, 3. 5. 6; 15, 1; 20, 1. 3. 4. 7; 21, 1–3; 12, 11; 22, 1. 3. 4. 6.

217 *Lex Baiuvariorum* 1, 2. 5. 6; 2, 17; 16, 1. 4. 5; 19, 4. 1, 2. 5. 6. 2, 17. 16, 1. 4. 5. 19, 4.

218 *Lex Baiuvariorum* 15, 3.

219 *Lex Baiuvariorum* 1, 3; 9, 11. 15, 5; 19, 1. 4. 10; 21, 5.

220 *Lex Baiuvariorum* 1, 3; 2, 12; 9, 2.

221 *Lex Baiuvariorum* 2, 4; 8, 9.

222 *Lex Baiuvariorum* 2, 4; 9, 5.

223 *Lex Baiuvariorum* 1, 6.

224 *Lex Baiuvariorum* 2, 1. 4. 5; 9, 5.

in the Bavarian code are capital punishment, maiming of the body or corporeal punishment, penalties implying reduction of honour, depriving somebody of his freedom, exile and confiscation of property.

Regarding capital punishment, the code only determines the scope of crimes where this sanction was to be or could be imposed, however, contains no reference to the form of execution.²²⁵ The *lex* ordered to punish high treason, uprising and desertion (*harisliz*) by death penalty.²²⁶ It should be underlined that in case of several offences the slave perpetrator was punished by death penalty, while a perpetrator in free *status* could redeem himself from this punishment by the amount of *conpositio* determined in the code.²²⁷ It is worth pointing at the inconsistency in regulating the sanction of killing the duke: while one locus (presumably the older one) determines nine hundred *solidi Wergeld* in case of killing the duke,²²⁸ the other passage (most probably inserted in the text as a result of a later editor's activity) orders to punish killing of the duke by death.²²⁹ The same duality can be noticed in the Alemannian statute as well. While one passage judges the duke identically as the bishop with respect to *Wergeld*,²³⁰ the later revision attributed to King Chlothar threatens with death penalty in case of killing the duke.²³¹ With regard to the form of execution of capital punishment, Quitzmann lists the following forms: hanging,²³² beheading,²³³ burying alive, burning at the stake – imposed on the perpetrator in case of knowingly causing fire hazard in adherence to the *talio* principle – and breaking on the wheel.²³⁴

The code defines two major types of corporeal punishment: maiming of the body and flogging of the perpetrator. As a general rule, corporeal punishment was applied against slaves, however, in exceptional cases this sanction could be imposed on persons in free *status*. In several cases, regarding imposition of corporeal punishment it was left to the judge's discretion whether he applied it or not, and if he did, to what extent.²³⁵ Maiming of the body and blinding was applied against slaves primarily in case of arson and kidnapping/abduction.²³⁶

225 *Lex Baiuvariorum* 2, 1. 2. 4. 5; 9, 9.

226 *Lex Baiuvariorum* 2, 1. 2. 4.

227 *Lex Baiuvariorum* 2, 5; 8, 2. 9.

228 *Lex Baiuvariorum* 3, 2.

229 *Lex Baiuvariorum* 2, 2.

230 *Lex Alamannorum* 11, 2.

231 *Lex Alamannorum* 24.

232 Cf. *Vita Corbiniani* 7; *Annales Fuldenses* (Ed. F. Kurze: *MGH Scriptores rerum Germanicarum in usum scholarum*, 7. Hannover 1891.) a. 899. ...femina nomine Rudpurc quae eiusdem sceleris auctrix deprehensa certa examinatione inveniebatur Ebilinga in patibulo suspensa interiit...

233 *Annales Fuldenses* a. 893. ...Willihelmus, filius patrueis ejus, missos suos ad Zuentibaldum ducem dirigens reum maiestatis habebatur capite detruncatus est.; a. 899. ...quorum unus vocabatur Graman qui reus maiestatis convictus et ideo Otinga docollatus est...

234 Quitzmann 1866. 292 ff.

235 *Lex Baiuvariorum* 2, 4.

236 *Lex Baiuvariorum* 1, 6; 9, 5.

Against free men and persons of high rank this punishment was applied primarily in politically relevant cases, e.g., in judgments passed on plotting.²³⁷ No reference to cutting off the nose and ears as mutilation punishment can be found in the code.²³⁸ Cutting off hands was applied either independently or together with other mutilation penalties; e.g., against slaves in case of kidnapping/abduction or theft committed in the duke's court.²³⁹ The code orders to impose corporeal punishment on free men in case of two states of facts: failure to sanctify Sunday and breach of military discipline;²⁴⁰ it should be noted that contrary to slaves they were not flogged but beaten by a stick.

As penalty implying reduction of honour, primarily ruining the house of the convicted person, e.g., demolishing the roof, the main beam or certain columns, was applied.²⁴¹ This punishment most probably dates from the remotest ages since it is not by chance that the code contains regulation of and compensation for loss caused to the house in the minutest details.²⁴²

Deprivation of freedom – as it is clear, among others, from Tasilo III's dethronement trial – was often replaced by confinement in a monastery, especially in judgments passed in trials of political nature.²⁴³ Also, it was considered deprivation of freedom when the sanction appeared in the form of debt slavery in case of perpetrators unable or unwilling to pay the *conpositio* arising from more serious crime.²⁴⁴ It can be interpreted as manifestation of the family head's power that in these cases the perpetrator could submit himself as well as his wife and sons to slavery. Deprivation of freedom, i.e., becoming a slave was brought about by failure to sanctify Sunday as habitual offender, incestuous relation between free persons – which was punished only by confiscation of property in case of persons in high rank – abortion, kidnapping/abduction and in case of false accusation of another person's slave when the slave died from torture.²⁴⁵ The Council of Neuching set forth that all persons liberated by the Church and their descendants should enjoy free *status* without violation until they commit a crime that cannot be redeemed by *conpositio*, in which case they became slaves of the injured party or the Church.²⁴⁶

237 *Annales Fuldenses* a. 792. ...auctoribus partim morte partim et caecitate dampnatis...; 870. ...morte dampnatum luminibus tantum oculorum privari praecepit...; 893. *Engilscalculus* ... audacter contra primores Baioarie in rebus sibi submissis agens iudicio eorum Radispona urbe obcaecatus est.

238 Quitzmann 1866. 299.

239 *Lex Baiuvariorum* 2, 6. 11. 12.

240 *Lex Baiuvariorum* 1, 14; 2, 4.

241 *Lex Baiuvariorum* 10, 6–10.

242 Quitzmann 1866. 303.

243 *Annales Fuldenses* a. 895. *Hildigardis filia Hludowici Francorum regis contra fidelitatem regis agere accusata inde publicis honoribus deposita in Baioaria quadam insula palude Chiemicse nominata inclusa est.*

244 *Lex Baiuvariorum* 1, 10.

245 *Lex Baiuvariorum* 1, 14; 7, 3; 8, 18; 9, 4. 20.

246 *Synodus Niuhingensis* 9. Cf. *Lex Baiuvariorum* 8, 18.

Exile as punishment was applied quite often in political cases; for example, after Tasilo III's dethronement a part of his adherents were exiled or forced dwelling was assigned to them by Charlemagne.²⁴⁷ According to *Lex Baiuvariorum* imposition of exile, in case of certain states of facts, was left to the duke's discretion: he could use this option in case of his son making an attempt at throwing him off the throne²⁴⁸ or a nun abductor who was unable or unwilling to pay the *conpositio*.²⁴⁹

Confiscation of property as punishment could stand alone or could be imposed as main punishment. Accordingly, e.g., in case of treason the property of the person sentenced to death was confiscated as second punishment.²⁵⁰ Sometimes, confiscation of property affected not only the movable property of the perpetrator but his immovable property as well – that is, the part of property passed from generation to generation as estate handed down within the family.²⁵¹ Confiscation of property was imposed as independent punishment in case the family or the clan exercised the (in this case unauthorised) option of blood feud against the person who killed a thief caught in the act or cast off a wife caught in adultery.²⁵²

Conclusions

This paper first dealt with the issues of criminal law. In early medieval German laws we cannot find dogmatic distinction between criminal and private law – yet, we have been able to establish that *Volksrechte* are basically the products of 'punitive' lawmaking. In the light of all that we tried to systematically outline the chapter of 'general provisions', 'special provisions' and the system of sanctions of *Lex Baiuvariorum*.

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247 *Annales qui dicuntur Einhardi a. 788. ...Baioarii quoque qui perfidiae ac fraudis eorum conscii et consentanei fuisse reperti sunt exilio per diversa loca religabantur.*

248 *Lex Baiuvariorum* 2, 9.

249 *Lex Baiuvariorum* 1, 11.

250 *Lex Baiuvariorum* 2, 1. 2. Cf. *Synodus Dingolwingensis* 9.

251 Quitzmänn 1866. 307.

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