

## REMARKS ON THE PRIVATE AND CRIMINAL LAW POSITION OF SLAVES IN THE LEX BAIUVARIORUM

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In terms of the view of society depicted in *Lex Baiuvariorum* it is a highly interesting issue, widely disputed in literature, how the position of slaves is reflected in the text of the code. It is a generally asserted view in literature that in the strict sense of the word slavery (*servitus*) as an institution can be hardly found among the Germans tribes. This standpoint goes back primarily to the interpretation, or misinterpretation, as the case may be, of Tacitus's *Germania*.<sup>1</sup> The phrases *servus* and *mancipium* are translated in literature—also in the analysis of *Lex Baiuvariorum* to be investigated in this study—consistently by the words *Knecht*, *Höriger* or *Leibeigener* and not by *Sklave*, that is, by terms that suggest some kind of—and compared to the content of the Antique meaning quite significant—improvement in the position, *status* of persons in this social standing, a tendency pointing towards acknowledgement of their personality.<sup>2</sup> This somewhat commonplace approach was opposed by Hermann Nehlsen, who examined the position of slaves in depth in eastern and western Gothic, Frankish and Langobardic laws and drew the conclusion that compared to the declining Western Roman Empire in the German states of early Middle Ages the number and economic significance of slaves instead of decreasing definitely

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<sup>1</sup> TACITUS, *Germania* 25.

<sup>2</sup> August CHABERT: *Bruchstück einer Staats- und Rechtsgeschichte der deutsch-österreichischen Länder*. Wien, Hof- u. Staatsdruckerei, 1852. 110.; Heinrich BRUNNER: *Deutsche Rechtsgeschichte, I–II*. Berlin, Duncker & Humblot, 1906<sup>3</sup>. 368. f.; Hans-Werner GOETZ: *Leibeigenschaft*. In: *Lexikon des Mittelalters, V*. Stuttgart, Metzler, 1999. 1845–1848. On the contrary see Hermann NEHLSSEN: *Unfrei*. In: *Handwörterbuch zur deutschen Rechtsgeschichte, V*. Berlin, Schmidt, 1998. 464–470.; Hermann NEHLSSEN: *mancipia*. In: *Handwörterbuch zur deutschen Rechtsgeschichte, III*. Berlin, Schmidt, 1984. 219–230.

increased.<sup>3</sup> Furthermore, in his view, this tendency was the reason for legislation moving from the *ex asse* German *compositio* system towards norms of more public law/criminal law nature<sup>4</sup> and from full-scope owner's liability towards the system<sup>5</sup> of noxal liability.<sup>6</sup>

Accordingly, the next chapter intends to analyse the provisions of *Lex Baiuvariorum* that regulate the position of persons in non-free *status*, i.e., slaves (*servi*, *mancipia* and *ancillae*).<sup>7</sup> In the course of that we make efforts to find an answer to the question to what extent the significant ecclesiastical impact, far exceeding the effect of the rest of German folk laws, becomes evident in *Lex Baiuvariorum*: to what extent acknowledgement of the human quality of slaves appears in the code. Not incidentally, at the end of the paper we try to answer the question whether the meaning of the phrases *mancipium*, *servus* and *ancilla*—which are usually translated by the words *servant* and *maidservant*—can be conveyed in theory by translating them by the word *slave* or they require any other, more differentiated term to reveal the legal content of these phrases. In this analysis, after issues of terminology, first the private and then the criminal law aspects will be looked at. In the scope of the former, slaves as the subjects of legal transactions and transactions entered into by slaves will be investigated, and, in the scope of the latter, damage caused by slaves as injury to property, the *compositio* rules of this act and sanctioning of crimes committed by slaves will be examined.

## 1. Issues of terminology

In what follows, we briefly look into whether *mancipium* and *servus*—and the female equivalent of the latter, *ancilla*—as term cover any legal difference in *Lex Baiuvariorum* and when each of these phrases is used as a general rule. *Mancipium* as slave is referred to as the maker of a thing constituting the subject of sale as well (*quod mancipii mei ex proprio meo materia laboraverunt et fecerunt*),<sup>8</sup> which indicates their scope of occupation.<sup>9</sup> It arises as a reasonable question whether the

<sup>3</sup> Hermann NEHLSSEN: *Sklavenrecht zwischen Antike und Mittelalter. Germanisches und römisches Recht in den germanischen Rechtsaufzeichnungen, I. Ostgoten, Westgoten, Franken, Langobarden.* [Göttinger Studien zur Rechtsgeschichte 7.] Frankfurt a. M.–Zürich, Musterschmidt, 1972. 58. ff.

<sup>4</sup> NEHLSSEN (1972) op. cit. 140. ff.; 220. ff.; 319. ff.; 378. ff.

<sup>5</sup> On the Roman law aspects see NÓTÁRI, TAMÁS: *Római köz- és magánjog [Roman Public and Private Law]*. Kolozsvár, Scientia, 2011. 336. f.

<sup>6</sup> NEHLSSEN (1972) op. cit. 133. ff.; 191. ff.; 274. ff.; 376. ff.

<sup>7</sup> Hermann NEHLSSEN: Die *servi*, *ancillae* und *mancipia* der *Lex Baiuvariorum*. Ein Beitrag zur Geschichte der Sklaverei in Bayern. In: Heinz BELLEN – Heinz HEINEN (Hrsg.): *Fünfzig Jahre Forschungen zur antiken Sklaverei an der Mainzer Akademie, 1950–2000. Miscellanea zum Jubiläum*. Stuttgart, Steiner, 2001. 505–521.

<sup>8</sup> *Lex Baiuvariorum* 16, 14.

<sup>9</sup> NEHLSSEN (2001) op. cit. 509. Hermann NEHLSSEN: Die rechtliche und soziale Stellung der Handwerker in den germanischen Leges – Westgoten, Burgunder, Franken, Langobarden. In: Herbert JANKUHN – Walter JANSSEN – Ruth SCHMIDT-WIEGAND – Heinrich TIEFENBACH (hrSg.): *Das Handwerk in vor- und frühgeschichtlicher Zeit, I. Historische und rechtshistorische Beiträge und Untersuchungen zur*

term *mancipium* can be considered a synonym of *servus* and *ancilla* or some kind of marked difference in meaning can be demonstrated between these terms. Most probably, it is possible to accept Nehlsen's opinion claiming that *mancipium* is a collective noun and as such denotes both *servus* and *ancilla*. In the 5–7<sup>th</sup> c. sources, the phrases *servus* and *ancilla* are undoubtedly more frequent since these texts are closer to the Antique sources owing to their age, and, accordingly, the phrase *servus*—as it is a peculiar feature of classical Latin—denoted both male and female slaves; later, however, when the content of the meaning of *servus* served to name male slaves only, the term *mancipium* as a collective noun came to the front since it would have been complicated to list both *servus* and *ancilla* on each occasion.<sup>10</sup>

On the other hand, it should be underlined that in *Lex Baiuvariorum* the term *mancipium* almost exclusively appears as the subject of the transaction (sale, donation, etc.); on the contrary, *servus* and *ancilla* occur as acting—proceeding or committing—subjects as well as the subject of transaction. The latter is exemplified by the provision on sale of alien or stolen things stating that a person who sells another person's thing in spite of the owner's will (either his servant or maidservant or any other thing) shall return it on the strength of the law and shall give a thing of similar value.<sup>11</sup> Yet, from the fact that *mancipium* is not used to name an acting slave who enters into a transaction or commits a crime it is not possible to draw the conclusion that his legal or social standing would have been different from that of a *servus* or *ancilla*.<sup>12</sup> It is worth adding that it was among the Franks where, in addition to *mancipium* and *servus*, the phrase *sclavus* appeared for the first time: since the Franks pursued several campaigns against the Slavs, and they made the prisoners of war taken their slaves, that is how the meaning slave (*slave*, *Sklave*, *esclave*) developed from the Slavonic word (*Sclavus*).<sup>13</sup>

The code gives the reason for creation of servitude,<sup>14</sup> specifically, in relation to warranty of title. Regarding sale it sets two alternatives: (i) the case of a slave acquired as a prisoner of war in a campaign led by the duke beyond the borders (*istud mancipium ego prehendi extra terminum, ubi dux exercitum duxit*), and (ii) the case of a slave given in slavery by the duke to another person as punishment (*dux illum per debita et iusta culpa tulit et mihi licenter tradidit*).<sup>15</sup> Furthermore, the code reckons with (iii) the case of a slave received as paternal inheritance (*pater meus mihi reliquid in hereditatem*), and (iv) a slave brought up as successor of a slave living in one's own

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*Frühgeschichte der Gilde.* (=Abhandlungen der Akademie der Wissenschaften in Göttingen. Phil.-Hist. Klasse 3. Folge Nr. 122.) Göttingen, De Gruyter, 1981. 267–283.

<sup>10</sup> NEHLSSEN (2001) op. cit. 509. f.

<sup>11</sup> *Lex Baiuvariorum* 16, 1.

<sup>12</sup> NEHLSSEN (2001) op. cit. 510.

<sup>13</sup> BABJÁK, Ildikó: *Barbárság vagy germánság? Árucsera Európa hajnalán [Barbarism or Germans? Exchange of Goods at the Dawn of Europe]*. Budapest, Gondolat, 2011. 33. f.

<sup>14</sup> NEHLSSEN (2001) op. cit. 508. f.

<sup>15</sup> *Lex Baiuvariorum* 16, 11.

house (*ego in propria domo enutrivi eum a proprio meo mancipio natum*).<sup>16</sup> After that, the code notes that the latter two alternatives as form of acquisition can be referred to with respect to draught animals as well;<sup>17</sup> so, we need to notice reference to slaves as being equal to animals.<sup>18</sup>

## 2. Slaves as subject of legal transactions

Among donations made to the Church, servants (*mancipia*) are listed in addition to country houses, land and money.<sup>19</sup> And in case of killing a priest, if the perpetrator cannot pay the three hundred *solidi* calculated in gold, then he shall give other money, servants, land or other things owned by him as redemption.<sup>20</sup>

In the regulation of sale, in addition to animals, *mancipium* is emphatically referred to among the subjects of the transaction mentioned as examples—as Babják calls the attention to this fact<sup>21</sup>. For the code pronounces that compliance with required formalities of sale is of key importance in sale of any thing, slave or animal to ensure that nobody could attack the validity of purchase claiming that he assigned his property at a very low price.<sup>22</sup> It is worth underlining that this rule shows close relation to the relevant provision of *Lex Visigothorum*.<sup>23</sup> Regarding implied warranty provisions, servants are referred to together with horses and other domestic animals; more specifically, in case of defects, blindness, fracture (of bone), epilepsy or leprosy concealed by the seller, the buyer can return the goods for three days.<sup>24</sup> It should be added that the *redhibitio* rule of Bavarians, which allows a three-day period to the buyer, cannot be found in any other German folk laws; yet, the Bavarian law follows the provision of Roman law that—just as the *edict* of the *aedilis curulis*<sup>25</sup>—obliges sellers of slaves, horses and draught animals to supply information.

## 3. Transactions entered into by slaves and the issue of peculium

The code regulates the validity of transactions, especially sale, entered into by slaves in details.<sup>26</sup> In case a person bought something from a *servus* without the owner's knowledge, who did not approve of the transaction subsequently, the purchase price was returned to the buyer and the transaction was considered invalid; however, if the

<sup>16</sup> *Lex Baiuvariorum* 16, 14.

<sup>17</sup> *Lex Baiuvariorum* 16, 14.

<sup>18</sup> NEHLSSEN (2001) op. cit. 509.

<sup>19</sup> *Lex Baiuvariorum* 1, 1.

<sup>20</sup> *Lex Baiuvariorum* 1, 9.

<sup>21</sup> BABJÁK (2011) op. cit. 187. f.

<sup>22</sup> *Lex Baiuvariorum* 16, 9.

<sup>23</sup> *Lex Visigothorum* 5, 4, 7. Cf. NÓTÁRI, TAMÁS: *Lex Baiuvariorum*. Szeged, Lectum 2011. 94. Fn. 314.

<sup>24</sup> *Lex Baiuvariorum* 16, 9.

<sup>25</sup> Cf. NÓTÁRI (2011a) op. cit. 318. f.

<sup>26</sup> NEHLSSEN 2001. 514.

subject of the sale no longer existed, the buyer had to return a similar thing to the master of the slave who entered into sale without any authorisation or commission.<sup>27</sup> Therefore, the starting point regarding this provision is the validity of the transaction, and invalidity shall be reckoned with only when it is aimed against the will of the owner of the slave. It should be noted that in this respect *Lex Baiuvariorum* sharply contradicts Frankish rules, because *Lex Salica* ordered to punish transactions entered into without the knowledge of the owner of the *servus*,<sup>28</sup> and *Lex Ribuarica* excluded the owner's liability.<sup>29</sup> Babják points out that in this issue it can be demonstrated that the Visigothic pattern prevailed in the Bavarian *lex*.<sup>30</sup> Consequently, it was presumed that the owner of the slave must have known of the conclusion of the transaction, and as a general rule the code took a stand for keeping the sale in force, and somehow—e.g., by implied approval—the owner of the *servus* had to take part in the transaction: in such cases Bavarians kept the interests of both parties in view, and made the risk of sales entered into with an alien *servus* predictable.<sup>31</sup>

If the owner sold his slave but was unaware of the separate property, *peculium*, he had—although it should be noted that this passage of the text of the code does not contain the phrase *peculium*, which is, however, referred to by the *Traditiones* of Passau and Freising as well<sup>32</sup>—the former owner had the right to demand subsequently that the separate property should be surrendered.<sup>33</sup> Similarly, the rule is in harmony with Visigothic regulation<sup>34</sup> which states that if a *servus* redeemed his freedom from his *peculium* and the owner did not know about this *peculium*, the transaction was invalid; in other words, the slave's *status* and the identity of his owner did not change.<sup>35</sup> Regarding this provision the code obviously sets out from the fact that the *servus* was given the separate property by somebody else than his owner—which increased the owner's assets—and so there was increment in the slave's value.<sup>36</sup>

As Nelsen establishes, this provision clearly shows that the 8<sup>th</sup> c. Bavarian law defined slaves' free right of disposal over their *peculium* and whenever the *servus* entered into a transaction with his master or a third party, the owner's consent (or at least subsequent *ratihabitio*) was an indispensable condition.<sup>37</sup>

<sup>27</sup> *Lex Baiuvariorum* 16, 3.

<sup>28</sup> *Lex Salica* 27, 33.

<sup>29</sup> *Lex Ribuarica* 77.

<sup>30</sup> BABJÁK (2011) op. cit. 183.

<sup>31</sup> BABJÁK (2011) op. cit. 184.

<sup>32</sup> See *Traditio Pataviensis* Nr. 16; *Traditio Tegernseensis* Nr. 68, 85; *Traditio Frisingensis* Nr. 1168.

<sup>33</sup> *Lex Baiuvariorum* 16, 3.

<sup>34</sup> Cf. *Lex Visigothorum* 5, 4, 16.

<sup>35</sup> *Lex Baiuvariorum* 16, 3.

<sup>36</sup> NEHLSSEN (2001) op. cit. 514.

<sup>37</sup> NEHLSSEN (1972) op. cit. 168. ff.; NEHLSSEN (2001) op. cit. 515.

#### 4. Damage caused to a slave as injury to property

Killing or causing bodily injury to an alien *servus* is regulated in a separate *titulus* in the code.<sup>38</sup> In what follows, it is worth surveying these provisions in order to establish to what extent *Lex Baiuvariorum* considers killing or mutilation of alien slaves purely injury to things, a kind of *damnum iniuria datum*—just as the regulation known from Roman law<sup>39</sup>—or whether it is possible to discover any acknowledgement of the human quality of the slave in them. In case of killing an alien slave the perpetrator was obliged to pay the holder of the slave twenty *solidi*.<sup>40</sup> It arises as a question what the proportion of this twenty *solidi* to the market value of the *servus* was. The *titulus* on theft (*De furto*) of the code speaks about a higher value in case of objects attaining or exceeding twelve *solidi*, and stresses the example of a horse and *mancipium* of such value.<sup>41</sup> This makes it unambiguously clear that the *compositio* to be paid to the owner in case of killing the slave did not amount to even half of the market value of the *servus* and was far below the one hundred and sixty *solidi* redemption<sup>42</sup> payable in case of killing a freeman.<sup>43</sup> If the *servus* was not owned by a private person but belonged to ecclesiastical slaves, *servi ecclesiae*, who were *de facto* in a somewhat better position, then his killer had to give the Church two servants in value identical with the killed slave.<sup>44</sup> The question arises, which can be hardly answered here absolutely clearly, whether the lawmaker associated this with the *duplum* stipulated in *lex Aquilia*.<sup>45</sup> (The fact that legal relation did not completely terminate between the freedman and the former owner—just as in Roman law<sup>46</sup>—is well exemplified by the fact that in case of killing a *frilaz* the former owner was entitled to forty *solidi*.<sup>47</sup>)

The state of facts of bodily injury is regulated in details in the code and contains several elements of facts and forms of commission that are defined in case of freemen and freedmen (*frilaz*) as well. For this reason, it is worth analysing the former by comparing it to the latter. A person who hits another person's servant out of anger—that is, out of sudden passion—shall pay one *tremisse*.<sup>48</sup> *Tremisse* (*tremissis*) as a monetary unit introduced in the late Antiquity was worth one-third of a *solidus*, and it retained its function as this unit in the early Middle Ages.<sup>49</sup> The same case of commission—supplemented by the phrase *pulislac* as the term for hitting—brought

<sup>38</sup> *Lex Baiuvariorum* tit. 6.

<sup>39</sup> NÓTÁRI (2011a) op. cit. 334. f.

<sup>40</sup> *Lex Baiuvariorum* 6, 12.

<sup>41</sup> *Lex Baiuvariorum* 9, 3.

<sup>42</sup> *Lex Baiuvariorum* 4, 28.

<sup>43</sup> Cf. NEHLSSEN (2001) op. cit. 513.

<sup>44</sup> *Lex Baiuvariorum* 1, 5.

<sup>45</sup> Cf. *Institutiones Iustiniani* 4, 6. 22.

<sup>46</sup> NÓTÁRI (2011a) op. cit. 194. f.

<sup>47</sup> *Lex Baiuvariorum* 5, 9.

<sup>48</sup> *Lex Baiuvariorum* 6, 1.

<sup>49</sup> Cf. NÓTÁRI (2011b) op. cit. 31. Fn. 23.

about one *solidus* in case of a freeman<sup>50</sup> and half *solidus conpositio* in case of a liberated party.<sup>51</sup> (*Pulislac*, i.e., *Beulenschlag* is hitting that leaves a visible trace, literally, a hump on the head.<sup>52</sup>) A person who assaults another person's slave and blood drops shall pay the owner half *solidus*.<sup>53</sup> The *conpositio* of the same act, i.e., *plotruns*—hitting that results in flow of blood (*Blutrünse*)<sup>54</sup> or, in accordance with *Lex Alamannorum Chlothariana*, blood flowing to the ground<sup>55</sup>—is one and a half *solidi*<sup>56</sup> if the injured party is a freeman and eight and a half *saica* if he is a freedman.<sup>57</sup> (*Saiga* or *saica* is a monetary unit worth half *tremisse*, that is, one-sixth of a *solidus*.<sup>58</sup>)

The next provision covers several forms of conduct defined in states of facts detailed separately in case of freemen. A person who raises his hands against another person's slave, wounds him in the head so that the skull bone becomes visible, hits his artery and the wound swells shall redeem his act by one *solidus* to the owner.<sup>59</sup> The name of the first form of commission is *infanc*—i.e., attacking with hostile intention, "taking" (*Einfang*)<sup>60</sup>—and its *conpositio* is three *solidi* if the injured party is a freeman<sup>61</sup> and one and a half *solidi* if he is a freedman.<sup>62</sup> (The phrase *infanc* always means some kind of attack, act of violence; as a technical term it can be taken as the equivalent of the state of facts of *manus inicere in aliquem*, i.e., *raising one's hands against somebody, attack somebody*.<sup>63</sup>) In case of the other three forms of wounding the code stipulates six *solidi conpositio* when the injured party is a freeman<sup>64</sup> and one and a half *solidi* if he is a freedman.<sup>65</sup> Injury to the artery where bleeding cannot be stopped without burning is called *adarcrati*, a wound making the skull bone visible is called *kepolsceni* in the code. *Adarcrati* literally means *opening the vein*; etymologically it is connected with the words *adar* (*Ader, vein*) and *crat* (*Grat, splinter*).<sup>66</sup> The first morpheme of the phrase *kepolsceni* can be related to the

<sup>50</sup> *Lex Baiuvariorum* 4, 1.

<sup>51</sup> *Lex Baiuvariorum* 5, 1.

<sup>52</sup> Cf. NÓTÁRI (2011b) op. cit. 51. Fn. 106.

<sup>53</sup> *Lex Baiuvariorum* 6, 2.

<sup>54</sup> Cf. NÓTÁRI (2011b) op. cit. 51. Fn. 108.

<sup>55</sup> Cf. *Lex Alamannorum* 59, 2. *ut sanguis terram tangat...*

<sup>56</sup> *Lex Baiuvariorum* 4, 2.

<sup>57</sup> *Lex Baiuvariorum* 5, 2.

<sup>58</sup> Cf. NÓTÁRI (2011b) op. cit. 31. Fn. 22.

<sup>59</sup> *Lex Baiuvariorum* 6, 3.

<sup>60</sup> Cf. NÓTÁRI (2011b) op. cit. 51. Fn. 110.

<sup>61</sup> *Lex Baiuvariorum* 4, 3.

<sup>62</sup> *Lex Baiuvariorum* 5, 3.

<sup>63</sup> Dietrich VON KRALIK: Die deutschen Bestandteile der *Lex Baiuvariorum*. *Neues Archiv der Gesellschaft für Ältere Deutsche Geschichtskunde*, 38., 1913. 1–132., 90.

<sup>64</sup> *Lex Baiuvariorum* 4, 4.

<sup>65</sup> *Lex Baiuvariorum* 5, 3.

<sup>66</sup> Cf. Matthias VON LEXER: *Mittelhochdeutsches Handwörterbuch, I–III*. Stuttgart, Hirzel, 1872–1878. I. 1073.; KRALIK op. cit. 48.; NÓTÁRI (2011b) op. cit. 51. Fn. 112.

Old High German word *gebal/kebul* having the meaning *skull*, the second morpheme with the Old High German words *scīnan*, *scein* with the meaning *to appear, to become visible*;<sup>67</sup> accordingly, the term can be translated by the phrase *apparitio testae* (*Schädelschein*).<sup>68</sup>

The redemption of hitting a slave resulting in fracture of bone is one and a half *solidi*.<sup>69</sup> The code does not specify the character of the fracture of bone and the part of body affected, however, from the description of the fracture of bone of a freeman to be redeemed by six<sup>70</sup> and of a freedman by three *solidi*<sup>71</sup> it can be deduced that this case of assault covers the bone knocked out/broken out of the wound to the head or the arm above the elbow. The next provision again embraces several forms of commission. In accordance with it, a person who wounds another person's slave and the brain becomes visible or injures his internal parts—which is called *hrevavunt*—or beats and tosses him until he remains there half dead shall redeem this act by four *solidi*.<sup>72</sup> Regarding freemen and freedmen *Lex Baiuvariorum* refers to fracture of the skull that makes the cerebrum visible and injury to internal parts called *hrevavunt*, and stipulates twelve<sup>73</sup> and six *solidi conpositio* in case of the former and the latter respectively.<sup>74</sup> The first morpheme of the phrase *hrevavunt* (*Leibwunde*)<sup>75</sup> is connected with the Old High German words *href*, *ref* and the Anglo-Saxon word *hrif* having the meaning *body, lower parts of the body*,<sup>76</sup> which are etymologically related to the Latin word *corpus*.<sup>77</sup> The second morpheme of the word, *wunt* (*uunt*) should be interpreted as *participium*, i.e., in the sense of *wounded in its internal parts*.<sup>78</sup> (The word *hrevawunti*,<sup>79</sup> which means injury to internal parts<sup>80</sup> is closely related to this phrase.)

The next passages regulate the *conpositio* of various mutilations. A person who knocks out the eyes, cuts off the hands or feet of another person's servant shall pay

<sup>67</sup> Eberhard Gottlieb GRAFF: *Althochdeutscher Sprachschatz oder Wörterbuch der althochdeutschen Sprache, I–VI*. Berlin, Commission der Nikolaischen Buchhandlung, 1834–1842. (Neudruck: Hildesheim, Olms, 1963.) IV. 127., VI. 499. ff.

<sup>68</sup> KRÁLIK op. cit. 91.

<sup>69</sup> *Lex Baiuvariorum* 6, 4.

<sup>70</sup> *Lex Baiuvariorum* 4, 5.

<sup>71</sup> *Lex Baiuvariorum* 5, 4.

<sup>72</sup> *Lex Baiuvariorum* 6, 5.

<sup>73</sup> *Lex Baiuvariorum* 4, 6.

<sup>74</sup> *Lex Baiuvariorum* 5, 5.

<sup>75</sup> Cf. NÓTÁRI (2011b) op. cit. 51. Fn. 117.

<sup>76</sup> Charles FRESNE DU CANGE: *Glossarium mediae et infimae Latinitatis, I–X*. Niort, Favre, 1883–1887. IV. 256.; GRAFF op. cit. IV. 1153.

<sup>77</sup> Alois WALDE – Johann Baptist HOFMANN: *Lateinisches Etymologisches Wörterbuch, I–II*. Heidelberg, Winter, 1954<sup>2</sup>. I. 194.

<sup>78</sup> KRÁLIK op. cit. 88.

<sup>79</sup> *Lex Baiuvariorum* 1, 6; 10, 1. 4.

<sup>80</sup> KRÁLIK op. cit. 89.

the owner six *solidi*.<sup>81</sup> The *compositio* of the same act is forty<sup>82</sup> and ten *solidi*<sup>83</sup> in case of a freeman and a freedman respectively. In case of cutting off the thumb, the index finger or the little finger, the middle or the ring finger the perpetrator shall pay the owner of the slave four, two, and two and a half *solidi* respectively.<sup>84</sup> When the injured party is a freeman, the above amounts will be as follows: the *compositio* shall be twelve *solidi* for cutting off a thumb, eight for the index and little finger, and five for the middle and ring finger. It should be noted, however, that the amount will increase by one-third when the finger is preserved but paralysed because lack of a finger was a smaller impediment in handling arms than a paralysed finger.<sup>85</sup> Regarding freedmen the fee of *compositio* amounted to six, one and a half and two *solidi* in the above order.<sup>86</sup> In their case—just as in case of slaves, of course—the code does not refer to bodily injury causing a paralysed finger because the issue of handling arms was not taken into account with respect to such persons. On the other hand, it should be noted that there is almost no difference between the amounts of *compositio* to be paid for loss of fingers of a freedman and a slave or sometimes the fee to be paid to the owner of the slave is higher: there are good chances that this is related to decrease in capacity to work and thereby the volume of the damage caused to the owner.

Piercing the nose of the *servus* resulted in payment of two,<sup>87</sup> injury to the lower lip, the ears and the lower eyelid one and a half, injury to the upper lip and upper eyelid one,<sup>88</sup> knocking out the molar called *marchzand* three, other teeth one and a half,<sup>89</sup> cutting off the ears one and a half, piercing the ears one, deafening them four<sup>90</sup> *solidi compositio*.<sup>91</sup> The *compositio* of piercing the nose of a freeman was nine,<sup>92</sup> piercing the ears—although the code refers to other injuries to the ears as well—was three, deafening them was forty *solidi*,<sup>93</sup> the *compositio* of the lips and eyelids were again three *solidi* but this sum amounted to six *solidi* in case of lower lips and lower eyelids when the wound resulted in the relevant person being unable to retain saliva or tears<sup>94</sup>—there are good chances that this increment was to sanction aesthetic shortcomings. Knocking out the *marchzand* was punished by twelve, other teeth

<sup>81</sup> *Lex Baiuvariorum* 6, 6.

<sup>82</sup> *Lex Baiuvariorum* 4, 9.

<sup>83</sup> *Lex Baiuvariorum* 5, 6.

<sup>84</sup> *Lex Baiuvariorum* 6, 7.

<sup>85</sup> *Lex Baiuvariorum* 4, 11.

<sup>86</sup> *Lex Baiuvariorum* 5, 7.

<sup>87</sup> *Lex Baiuvariorum* 6, 8.

<sup>88</sup> *Lex Baiuvariorum* 6, 9.

<sup>89</sup> *Lex Baiuvariorum* 6, 10.

<sup>90</sup> *Lex Baiuvariorum* 6, 10.

<sup>91</sup> *Lex Baiuvariorum* 6, 8–11.

<sup>92</sup> *Lex Baiuvariorum* 4, 13.

<sup>93</sup> *Lex Baiuvariorum* 4, 14.

<sup>94</sup> *Lex Baiuvariorum* 4, 15.

by six *solidi compositio*.<sup>95</sup> (The word *marchzand* literally meant a corner tooth—*Markzahn*—, so, presumably, it must have been used for teeth other than molars, such as eye-teeth and incisors as well.<sup>96</sup> The phrase *marchzand* occurs also in *Lex Alamannorum*<sup>97</sup> and corresponds to the Middle High German phrase *marczan*.<sup>98</sup>) It is worth adding that the code does not contain any regulations on injuries to the face with respect to freedmen.

In case of beating up the *servus* causing lameness—i.e., a *taudregil* state—thrusting him from the riverbank or a bridge to water the owner was entitled to four *solidi*.<sup>99</sup> In case of thrusting a freeman to water, called *inunwan* by the code, the redemption was twelve *solidi*.<sup>100</sup> Causing injury to the extent that the person remains a cripple, i.e., his feet—as the code puts it—touches dew (*taudregil*) brought about twelve<sup>101</sup> and six *solidi compositio* in case of a freeman and a freedman respectively.<sup>102</sup> *Taudregil* is nothing else than a person who drags his foot, in other words, whose foot touches dew (*Taustreifer*, *Taustreicher*).<sup>103</sup> This phrase in the same sense and with the same explanation can be found in *Lex Alamannorum* as well.<sup>104</sup> The etymology of the first morpheme of the word is absolutely clear: it is related to the Old High German word *tau*, i.e., *dew*.<sup>105</sup> The morpheme *dregil/dragil* can be related to the Gothic verb *þragian* having the meaning *to run* as Grimm has pointed out already.<sup>106</sup> The phrase *in unwan* (*inunwan*) occurs in the text of the code in the state of facts of thrusting a freeman from the riverbank or a bridge to water,<sup>107</sup> thrusting a freeman from a ladder,<sup>108</sup> wounding a freeman by a poisonous arrow<sup>109</sup> and arson as well as deaths occurring in relation to it.<sup>110</sup> Linguistically, the phrase can be related to the Old High German word *wân* (*uuânî*) having the meaning *opinion*, *view*, *hope*;<sup>111</sup> consequently, the explanation of the locus quoted as the fourth item, which states that the word *unwan* can be conveyed by the phrase *desperatio vitae*, that is, *despair over life*, or in

<sup>95</sup> *Lex Baiuvariorum* 4, 16.

<sup>96</sup> Cf. NÓTÁRI (2011b) op. cit. 53. Fn. 130.

<sup>97</sup> *Lex Alamannorum* 67, 22. *Si autem dentem absciderit, quod marczan dicunt Alamanni...*

<sup>98</sup> LEXER op. cit. I. 2044.

<sup>99</sup> *Lex Baiuvariorum* 6, 8–11.

<sup>100</sup> *Lex Baiuvariorum* 4, 17.

<sup>101</sup> *Lex Baiuvariorum* 4, 27.

<sup>102</sup> *Lex Baiuvariorum* 5, 8.

<sup>103</sup> Cf. NÓTÁRI (2011a) op. cit. 55. Fn. 143.

<sup>104</sup> *Lex Alamannorum* 57, 62. *Si quis autem alium in geniculo placaverit, ita ut claudus permaneat, ut pes eius ros tangat, quod Alamanni taudragil dicunt...*

<sup>105</sup> GRAFF op. cit. V. 346.

<sup>106</sup> Jacob GRIMM: *Deutsche Rechtsalterthümer, I–II*. Leipzig, Mayer & Müller, 1922<sup>4</sup>. II. 187.

<sup>107</sup> *Lex Baiuvariorum* 4, 17.

<sup>108</sup> *Lex Baiuvariorum* 4, 19.

<sup>109</sup> *Lex Baiuvariorum* 4, 21.

<sup>110</sup> *Lex Baiuvariorum* 10, 4.

<sup>111</sup> GRAFF op. cit. I. 857.

free translation: *danger of life*,<sup>112</sup> seems to be sound. It is worth adding that in case of thrusting a slave into water, the lawmaker defined *conpositio* probably due to causing danger of life, however, the lawmaker could not think of breach of honour occurring in relation to freemen in such cases because this was out of the question concerning slaves. For the same reason, the code does not mention the case of throwing a slave off a horse as an act to be sanctioned either.<sup>113</sup>

In view of the fact that *Lex Baiuvariorum* contains an independent *titulus* dealing with acts related to women as well<sup>114</sup> it is justified to analyse the passages that can be found under this title in terms of persons in servant *status*. There is a sharp difference between women in free standing and maidservants in case of assault causing abortion. In case of free women, if as a result of assault the yet "not viable" foetus—by which the text of the code, most probably, means foetus in an early stage, not viable even in case of naturally occurring premature birth—died, the amount of *conpositio* was twenty *solidi*, and if the foetus "lived" already (i.e., was considered viable), the usual redemption for homicide, i.e., one hundred and sixty *solidi*<sup>115</sup> had to be paid.<sup>116</sup> Concerning maidservants, in case of the same acts the amount of *conpositio* was as follows. If the foetus did not "live" yet, four,<sup>117</sup> and if the foetus lived already, ten *solidi* had to be paid by the perpetrator causing premature birth by assaulting the *ancilla*<sup>118</sup> to the owner.<sup>119</sup> It is worth noting that in case of death of a free woman's foetus deemed viable the perpetrator had to pay the complete *Wergeld* of a free person, i.e., one hundred and sixty *solidi*, whereas for a maidservant's viable foetus it was not the usual twenty *solidi conpositio* of live slaves<sup>120</sup> but only half of it, ten *solidi* that had to be paid to the owner.<sup>121</sup>

Just as in case of abusing or killing a *servus* and *ancilla*, in case of sexual relation with maidservants the *conpositio* was payable to the owner. The code provides that a person who sleeps with another person's married maidservant shall pay twenty *solidi* to the owner—so, not to the husband of the maidservant.<sup>122</sup> In case of unmarried maidservants this sum amounts to four *solidi*.<sup>123</sup> (In case of liberated and married

<sup>112</sup> GRIMM op. cit. II. 187.; KRÁLIK op. cit. 120. f.; Georg BAESECKE: Die deutschen Worte der germanischen Gesetze. *Beiträge zur Geschichte der deutschen Sprache und Literatur*, 59. 1935. 1–101., 18.

<sup>113</sup> NEHLSSEN (2001) op. cit. 513.

<sup>114</sup> *Lex Baiuvariorum tit.* 8.

<sup>115</sup> *Lex Baiuvariorum* 4, 28.

<sup>116</sup> *Lex Baiuvariorum* 8, 19.

<sup>117</sup> *Lex Baiuvariorum* 8, 22.

<sup>118</sup> *Lex Baiuvariorum* 8, 23.

<sup>119</sup> *Lex Baiuvariorum* 8, 22–23.

<sup>120</sup> *Lex Baiuvariorum* 6, 12.

<sup>121</sup> Cf. NEHLSSEN (2001) op. cit. 513. f.

<sup>122</sup> *Lex Baiuvariorum* 8, 12.

<sup>123</sup> *Lex Baiuvariorum* 8, 13.

women the amount of *compositio* will be forty,<sup>124</sup> in case of unmarried *frilaza* eight *solidi*.<sup>125</sup>)

A person who brings a false charge against a freeman shall suffer the same punishment that would have threatened the accused person if he had been condemned.<sup>126</sup> This provision is in harmony with the sanction of *calumnia* known from Roman law: if somebody was condemned due to *calumnia*, that is, slanderous charge, in the period of the Roman Empire the false accuser (*calumniator*) was usually punished by the same penalty that would have been imposed on the accused if he had been condemned; in other words, the *talio* principle was applied over and above *infamia*.<sup>127</sup> On the contrary, a person who brought false accusation against another person's slave who was for this reason tortured had to give the owner a slave with similar value; and if the slave died during interrogation, he had to give two slaves, but if he could not fulfil this provision he became a slave because he caused an innocent person's death.<sup>128</sup>

Quite interestingly, the code discusses the state of facts of inducing another person's slave to run away under the *titulus (De pignoribus)* on right of pledge. A person who induces another person's slave to run away and leads him across the border shall pay twelve *solidi* redemption and shall bring the runaway back.<sup>129</sup> In case of maidservants induced to run away the *compositio*—without any explanation provided by the code—is twenty-four *solidi*.<sup>130</sup> The sanction of the same act is somewhat different when the slave or maidservant belongs to the Church; this issue is regulated in the *titulus* on the affairs of the Church.

A person who induces a servant or maidservant of the Church to run away and leads them across the border shall pay fifteen *solidi* and shall call the runaways back; until the persons induced to run away are recovered, they shall be replaced by servants as pledge; and if he cannot recover them, in addition to the amount of *compositio*, he shall give the Church similar servants or maidservants to replace them.<sup>131</sup>

There is a sharp dividing line between persons in servant and free *status* with respect to their death and corpse as well. The state of facts of desecration of a grave protects the grave of a freeman only.<sup>132</sup> Also, there is a significant difference with respect to homicide committed in secret or by stealth. A person who kills a freeman in secret and throws him in the river or throws him to a place from where he cannot surrender the corpse—which is called *murdrida* by the code—shall pay forty *solidi* due to making a decent burial impossible, and shall repay the *Wergeld* in accordance

<sup>124</sup> *Lex Baiuvariorum* 8, 10.

<sup>125</sup> *Lex Baiuvariorum* 8, 11.

<sup>126</sup> *Lex Baiuvariorum* 9, 19.

<sup>127</sup> NÓTÁRI (2011a) op. cit. 423.

<sup>128</sup> *Lex Baiuvariorum* 9, 20.

<sup>129</sup> *Lex Baiuvariorum* 13, 9.

<sup>130</sup> *Lex Baiuvariorum* 13, 9.

<sup>131</sup> *Lex Baiuvariorum* 1, 4.

<sup>132</sup> *Lex Baiuvariorum* 19, 1.

with the victim's *status*.<sup>133</sup> A person who kills a servant in such fashion and hides his corpse in a similar form shall pay ninefold of the redemption payable for stealing a slave, that is, one hundred and eighty *solidi*.<sup>134</sup> So, while in case of a freeman deprivation of the last honours is also sanctioned, in case of slaves only the value of the property taken stealthily from the owner was taken into account by ninefold redemption.<sup>135</sup>

Below, two loci will be analysed because these are the only two provisions in *Lex Baiuvariorum* which show some kind of tendency that the lawmaker acknowledged the human quality of slaves by judging their fate and act identically as that of freemen.

With respect to death, the corpse of a freeman and a *servus* will be judged identically only in the burial of the found corpse. In harmony with the provisions of *Poenitentiale Gregorii* and *Poenitentiale Cummeani*,<sup>136</sup> to ensure<sup>137</sup> that the dead person should not lie unburied and should not end up in the bowels of pigs and dogs or other beasts, the code orders that the burier must be given one *solidus* as reward by the relatives of the dead person or the master of the slave.<sup>138</sup> It should be added that it is not possible to clearly identify the Biblical correspondence of the quotation or reminiscence from the Holy Scripture referred to above (*mortuum sepelire*); the quotation is the closest to the relevant locus<sup>139</sup> of the *Genesis*.<sup>140</sup>

On the other hand, the code provides right of asylum in church (*asylum*) for slaves as well.<sup>141</sup> Pursuant to this provision anybody who takes refuge in a church shall not be removed from there by violence but shall be chastised there in accordance with the priest's advice—at this point *Lex Baiuvariorum* refers (by some kind of reminiscence rather than literal quotation<sup>142</sup>) to the locus from the *Gospel according to St. Matthew*<sup>143</sup> which states that he who forgives will be forgiven and he who does not forgive will not be forgiven.<sup>144</sup> A person who drags his runaway servant or

<sup>133</sup> *Lex Baiuvariorum* 19, 2.

<sup>134</sup> *Lex Baiuvariorum* 19, 3.

<sup>135</sup> NEHLSSEN (2001a) 511.

<sup>136</sup> Cf. *Poenitentiale Gregorii* 137. 138.; *Poenitentiale Cummeani* 1, 26. 27.

<sup>137</sup> Cf. NÓTÁRI (2011b) 105. Fn. 338.

<sup>138</sup> *Lex Baiuvariorum* 19, 7.

<sup>139</sup> *Genesis* 23, 6. 15.

<sup>140</sup> Cf. NÓTÁRI (2011b) op. cit. 105. Fn. 340.

<sup>141</sup> NEHLSSEN (2001) op. cit. 512.

<sup>142</sup> Cf. NÓTÁRI (2011b) op. cit. 35. Fn. 29.

<sup>143</sup> Cf. *Evangelium secundum Matthaëum* 6, 14. f.

<sup>144</sup> *Lex Baiuvariorum* 1, 7. *Si quis culpabilis aliquis configium ad ecclesiam fecerit, nullus eum per vim abstrahere ausus sit, postquam ianuam ecclesiae intraverit, donec interbellat presbiterum ecclesiae vel episcopum, so presbiter representare non ausus fuerit. Et si talis culpa est, ut dignus sit disciplina, cum consilio sacerdotis hoc faciat, quare ad ecclesiam confugium fecit. Nulla sit culpa tam gravis, ut vita non concedatur propter timorem Dei et reverentia sanctorum, quia Dominus dixit: 'Qui dimiserit, dimittetur ei; qui non dimiserit, nec ei dimittitur'.*

anybody else by violence out of a church shall pay the church forty *solidi* and the treasury also forty *solidi*.<sup>145</sup>

## 5. Sanctioning crimes committed by slaves

With respect to several crimes, the code does not distinguish between free and *servus* perpetrators; accordingly, the rate of *compositio* depends solely on the person, *status* of the injured party irrespective of the personal *status* of the perpetrator.<sup>146</sup> Below you will find the analysis of crimes where different sanctions are imposed on perpetrators in free and servant *status*.

It arises as a question whether the owner was every time obliged to pay the amount of *compositio* in case of acts committed by a *servus*—just as in the Frankish and Langobardic law<sup>147</sup>—or he could exercise the option of giving in *nox* known from Roman law. Let us first survey the logic of noxality in Roman law. In Roman law punitive claims were made against persons under power—i.e., both family children and slaves—in case of their *delictum* as if the act had been committed by independent and free persons. When the *delictum* was committed by a person under power (member of the family, a slave or a person in *mancipium*), the injured party could enforce his claim only by a so-called noxal action (*actio noxalis*). Direct persecution of the perpetrator would have represented intervention into the family head's power. Accordingly, civil law and the *praetor's* law brought an action against the *pater familias* in these cases who surrendered the perpetrator to the injured party (*noxae deditio*). In such a case the family head had a choice of either paying the penalty (the claim could seek the above only) or giving the person under his power in *nox* (*facultas alternativa*). For the period of *nox* the family child was given in *mancipium*, however, the injured party acquired ownership of the slave definitively. In Rome this right most probably dates from the age of private revenge: the injured party had the right to take revenge for the injury he had suffered but the person exercising power had to protect against his revenge as he was obliged to protect the persons under his power. Thereby the person exercising power would have been compelled to take part in this endless fight and it was this vicious circle that the family head could relieve him and his *familia* from if he surrendered the perpetrator under power. In interstate relations it can be observed as well that the Roman state often exercised the option of surrendering the culprit to the enemy and thereby saving itself from its revenge. In the *praetor's* law this was changed to the extent that if the person exercising power knew about the *delictum* of the person under power, he could not choose giving in *nox* instead of payment of the penalty—however, in this case it was not his own act that the *pater familias* was responsible for; therefore, he was not inflicted by *infamia*. If the person exercising power was privy to the act as instigator, then *actio poenalis*

<sup>145</sup> *Lex Baiuvariorum* 1, 7.

<sup>146</sup> Cf. NEHLSSEN (2001) op. cit. 515.

<sup>147</sup> NEHLSSEN (1972) op. cit. 274. ff.; 376. ff.

could be brought against him and *actio noxalis* against the person under power due to the *delictum*.<sup>148</sup>

A provision that seems to be both related to<sup>149</sup> and different from *Lex Visigothorum*<sup>150</sup> makes it probable that in certain cases the owner could be relieved of the obligation to pay *compositio* by giving in *noxam*. It sets forth that if somebody induced an alien *servus* to steal (or cause damage at his master's expense) to be able to accuse him, more specifically the owner, the owner did not lose his servant and did not have to pay redemption either but the instigator was punished as a thief by payment of *niungeldo* and the owner did not have to redeem his slave but the slave was punished by being beaten by a stick two hundred times after the thing had been returned.<sup>151</sup> This highly complicated rule would have any sense if it were based on the possible solution that in certain cases the owner of the slave who committed crime had the option to deliver the *servus* perpetrator to the injured party instead of payment of the *compositio*.<sup>152</sup>

A completely different picture is showed by a rule possibly belonging to an earlier layer of the code that provides for the sanction of adultery. First, it is worth surveying the passage that determines the punishment of adultery committed by a freeman. If a freeman sleeps with another freeman's wife and he is caught in the act, the "seducer" shall pay the husband the *Wergeld* of the wife. If the husband kills the adulterer and adulteress when catching them in the act, then the perpetrator has paid the blood money by his life and his relatives will have no right to take revenge or demand *compositio*. If, however, he "stepped into bed with one foot only" but the wife pushed him out and nothing else happened, then he shall pay the husband fifteen *solidi*.<sup>153</sup> If the perpetrator is a slave, the code provides the following. If the husband kills him and the wife, due to her shame the wife's blood money shall be decreased by twenty *solidi*, and the remainder shall be paid by the owner; however, if the slave escapes and he is not killed but his act is proved later on, the owner shall surrender him in return for twenty *solidi* to the person whose wife he has raped, the remainder of *compositio* shall be paid by the owner again since he did not discipline his servant enough.<sup>154</sup> Strictness of this rule is undoubtedly connected with the character of the act highly affecting the husband's prestige and the family's honour. By the less convincing reasons—by which the "participation" of the owner of the *servus* is invented—that the owner omitted to discipline the slave properly, the code unambiguously substantiates the owner's liability and delivery of the *servus* itself does not exempt the *dominus* from payment of the *compositio*.<sup>155</sup>

<sup>148</sup> Cf. NÓTÁRI (2011a) op. cit. 336. f.

<sup>149</sup> NEHLSSEN (1972) op. cit. 194. f.; NEHLSSEN (2001) op. cit. 515.

<sup>150</sup> NÓTÁRI (2011b) op. cit. 69. Fn. 201.

<sup>151</sup> *Lex Baiuvariorum* 9, 7.

<sup>152</sup> NEHLSSEN (2001) op. cit. 516.

<sup>153</sup> *Lex Baiuvariorum* 8, 1.

<sup>154</sup> *Lex Baiuvariorum* 8, 2.

<sup>155</sup> NEHLSSEN (2001) op. cit. 516. f.

Concerning certain acts the code determines different sanctions for perpetrators in free and servant *status* but even in these cases the punishment of the *servus* does not always mean that the owner is exempted from the obligation to pay *conpositio*.

For setting church property on fire—out of roguery, as a thief during the night—the perpetrator shall pay fifteen *solidi*; for each roof top that has fallen down in the fire he shall pay twenty-four *solidi*, and everything that has burnt up shall be replaced by a similar thing; furthermore, he shall pay *conpositio* to each man who has escaped uninjured from the fire; also, he shall pay *Wergeld* in accordance with bodily injury and homicide for the persons who have been injured or died in the fire.<sup>156</sup> If the perpetrator is a *servus*, he shall be punished by losing his hands or eyes, and his owner shall recompense for or replace everything burnt in the fire by something similar.<sup>157</sup>

If a *servus* steals a thing used in the army—e.g., harness, more specifically hobble, halter, bridle, coarse blanket—he shall be punished by cutting his hands off, and his owner shall return or recompense for the things stolen.<sup>158</sup> In case of perpetrators in free *status*, in addition to the obligation to return things, the *conpositio* amounts to forty *solidi*. It should be pointed out that this is where the nature of the *conpositio* system is formulated most clearly in the code since with regard to the forty *solidi* it notes that he “shall redeem his hands” by it.<sup>159</sup>

If a slave robs something or commits an act of violence, e.g., arson, during a campaign he shall suffer death and his owner shall recompense for everything by something similar (the code again invents the owner’s failure to fulfil his supervisory obligation).<sup>160</sup> (In case of perpetrators in free *status* the amount of *conpositio* is forty *solidi*, which is, as a matter of fact, supplemented by the obligation to recompense.<sup>161</sup>) Just as in case of setting fire to church property, in addition to punishing the *servus*, the code imposes the obligation to take responsibility and recompense on the owner.<sup>162</sup>

A free person who intervenes in a single combat in the duke’s court or elsewhere shall pay forty *solidi conpositio*.<sup>163</sup> If this is done by a slave, he shall be punished by losing his right hand but his master can redeem it by the *conpositio* payable for the killed slave,<sup>164</sup> that is, twenty *solidi*.<sup>165</sup> There are good chances that the reason for this high amount for the right hand of the slave was that the servants who accompanied

<sup>156</sup> *Lex Baiuvariorum* 1, 6.

<sup>157</sup> *Lex Baiuvariorum* 1, 6.

<sup>158</sup> *Lex Baiuvariorum* 2, 6.

<sup>159</sup> *Lex Baiuvariorum* 2, 6.

<sup>160</sup> *Lex Baiuvariorum* 1, 6.

<sup>161</sup> *Lex Baiuvariorum* 1, 6.

<sup>162</sup> Cf. NEHLSSEN (2001) op. cit. 517.

<sup>163</sup> *Lex Baiuvariorum* 2, 11.

<sup>164</sup> *Lex Baiuvariorum* 6, 12.

<sup>165</sup> *Lex Baiuvariorum* 2, 11.

their masters to the duke's court must have been experienced warriors; so, for their owners it was worth paying that much in order to preserve their ability to fight.<sup>166</sup>

The redemption of theft committed in the duke's court was *triuniungeldo*, that is, threefold of the usual (i.e., ninefold) redemption of the stolen thing, consequently the twenty-sevenfold value,<sup>167</sup> but if the perpetrator was a slave then either his owner paid the ninefold value, i.e., *niungeldo*, or the *servus* was punished by losing his hand.<sup>168</sup>

The above cases reveal that concerning certain acts the owner had *facultas alternativa* to either deliver his slave for being punished or redeem his act by payment of a given amount of *compositio*. Concerning numerous crimes, however, this option was not provided—as the cases described below will reveal.<sup>169</sup>

In harmony with *Lex Alamannorum* and *Lex Visigothorum*<sup>170</sup> as well as Langobardic laws,<sup>171</sup> *Lex Baiuvariorum* provides that if a freeman has sold another freeman as a slave, then, in addition to being obliged to reinstate him in his free status, he shall pay forty *solidi* to the injured party and another forty to the *fiscus*; and if he cannot redeem him, he shall become a slave as punishment.<sup>172</sup> However, when the perpetrator is a person in a servant status, his owner shall deliver him to the judge, and subject to the duke's decision he shall lose either his hands or eyes—at this point the code, excluding the owner's discretion, emphasises that "without this mark he should not ever leave, no matter how precious he is to his master"—and if the owner takes part in the act either as instigator or abettor, he shall suffer punishment identical with that of the *servus*, and shall surrender the servant.<sup>173</sup>

In sanctioning removal of border marks or border stones, borrowing from *Lex Visigothorum* is evident:<sup>174</sup> if the perpetrator is a freeman, he shall pay the neighbours six *solidi*,<sup>175</sup> and if he is a slave—just as in the Visigothic law<sup>176</sup>—he shall be flogged fifty times for each mark moved.<sup>177</sup> The code unambiguously forbids placement of new border marks,<sup>178</sup> and a person breaching this provisions shall pay six *solidi*.<sup>179</sup> If, however, the perpetrator is a slave, and his owner did not know about his act, then—

<sup>166</sup> NEHLSSEN (2001) op. cit. 518.

<sup>167</sup> *Lex Baiuvariorum* 2, 12.

<sup>168</sup> *Lex Baiuvariorum* 2, 12.

<sup>169</sup> NEHLSSEN (2001) op. cit. 518.

<sup>170</sup> Cf. *Lex Alamannorum* 46; *Lex Visigothorum* 7, 3, 3.

<sup>171</sup> Cf. *Leges Liutprandi* 8. 38. 91. 131; *Leges Ratchis* 3. 14.

<sup>172</sup> *Lex Baiuvariorum* 9, 4.

<sup>173</sup> *Lex Baiuvariorum* 9, 5.

<sup>174</sup> Cf. NEHLSSEN (2001) op. cit. 519.

<sup>175</sup> *Lex Baiuvariorum* 12, 1.

<sup>176</sup> Cf. *Lex Visigothorum* 10, 3, 2.

<sup>177</sup> *Lex Baiuvariorum* 12, 2.

<sup>178</sup> *Lex Baiuvariorum* 12, 5.

<sup>179</sup> *Lex Baiuvariorum* 12, 6.

just as in *Lex Visigothorum*<sup>180</sup>—he shall be flogged two hundred times but his owner will not be obliged to pay anything.<sup>181</sup>

*Lex Baiuvariorum* defines two cases when it imposes decrease in *status* or corporeal punishment both on perpetrators in free *status*, who are able to pay *compositio*, and on perpetrators in servant *status*, and in both cases—most probably—it is a resolute ecclesiastical prohibition that is in the background of this tough punishment.<sup>182</sup> If a woman in free *status* gives another woman some drink for the purpose of abortion, she will lose her freedom and will become the slave of the person whom the duke designates as her owner; when the perpetrator is a maidservant, she shall be beaten by a stick two hundred times.<sup>183</sup> The punishment of a freeman in breach of the ban on performance of work on Sunday<sup>184</sup> as habitual offender is being beaten by a stick fifty times, and in case of a recurrent habitual offender loss of his freedom.<sup>185</sup> If the perpetrator is a slave, he shall be beaten and if he is a habitual offender, he shall be punished by losing his right hand.<sup>186</sup>

Sexual relation between slaves and free persons is discussed by *Lex Baiuvariorum* in a narrower scope than in Visigothic, Frankish and Langobardic laws, which provide, for example, that relation between a free woman and a slave or her own servant, as the case may be, will every time bring about capital punishment for each of the parties<sup>187</sup>. The code sanctions a passing sexual relation between a free woman and an alien slave—that is, not *contubernium* as it is clear also from the passage that punishes sexual intercourse between a woman and a man in free *status*, which is not legalised but is based on agreement,<sup>188</sup> by twelve *solidi*<sup>189</sup>—as follows. If a *servus* enters into a sexual relation with a free woman—which outrages everybody among the people according to the reasons of the code—then the owner shall deliver the slave to the woman's relatives for being punished or even killed by them but shall not pay *compositio*.<sup>190</sup> The code is silent about punishing the free woman, most probably because—just as in Langobardic and Visigothic laws—it was subject to the relatives' discretion or the powers of the home court.<sup>191</sup>

<sup>180</sup> Cf. *Lex Visigothorum* 10, 3, 5.

<sup>181</sup> *Lex Baiuvariorum* 12, 7.

<sup>182</sup> Cf. NEHLSSEN (2001) op. cit. 519.

<sup>183</sup> *Lex Baiuvariorum* 8, 18.

<sup>184</sup> See *Concilium Aurelianense III.* (a. 538) 28; *Concilium Cabilonense* (a. 644) 18; *Concilium Rotomagense* (a. 650) 15; *Concilium Narbonense* (a. 589) 4; *Concilium Matisconense II.* (a. 585) 1; Isidorus, *De ecclesiasticis officiis* 1, 24, 1; *Poenitentiale Gregorii* 54; *Poenitentiale Cummeani* 12, 3, 4; *Decretio Childeberti II.* (a. 596) 14. Cf. *Concilium Autissiodorensis* (a. 578) 16; *Concilium Narbonense* (a. 589) 4.

<sup>185</sup> *Lex Baiuvariorum* 1, 14.

<sup>186</sup> *Lex Baiuvariorum* 1, 14.

<sup>187</sup> Cf. NEHLSSEN (1972) op. cit. 241. f.; 308. ff.

<sup>188</sup> *Lex Baiuvariorum* 8, 8.

<sup>189</sup> Cf. NEHLSSEN (2001) op. cit. 520.

<sup>190</sup> *Lex Baiuvariorum* 8, 9.

<sup>191</sup> Cf. NEHLSSEN (1972) op. cit. 147. f.; 242.

Sexual intercourse of freemen with their own *ancilla* resulted in legal consequences merely in terms of succession. If the testator had a son from a maidservant, the son was not entitled to inherit anything on the strength of the law, and whatever he was given was thanks to his half-brothers' mercy, who are warned by the code to do so by referring to the Bible, albeit, erroneously, to the Old Testament, actually, to St. Paul's letter to the Galatians,<sup>192</sup> to be more precise<sup>193</sup> concerning the particular locus.<sup>194</sup> Nehlsen presumes—possibly correctly—that the category of the poor mentioned by the code (*pauperes*)<sup>195</sup> included this scope of persons not entitled to lawful share of inheritance.<sup>196</sup> On the other hand, we can add to this that in Bavarian law—contrary to the basic principle of Roman law which stated that a slave woman's child followed his mother's legal *status*<sup>197</sup>—a child born of a maidservant whose father was a person in free standing was given the free *status*.

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<sup>192</sup> Paulus, *Epistola ad Galatas* 4, 30.

<sup>193</sup> Cf. NÓTÁRI (2011b) op. cit. 90. Fn. 297.

<sup>194</sup> *Lex Baiuvariorum* 15, 9.

<sup>195</sup> *Lex Baiuvariorum* 4, 31.

<sup>196</sup> NEHLSSEN (2001) op. cit. 521.

<sup>197</sup> NÓTÁRI (2011a) op. cit. 190.