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OUTLINE

TEXT

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1 The study of the *Leges barbarorum*, by which name the early medieval codes of 'folk' or 'people's law' have been known for some time, is part of a long historiographic tradition that was not infrequently conducted in the service of masterful, national-historical narrations. Since the Second World War, the study of these texts has made new headway, however[1]. Five contemporary discussions are worthy of mention – discussions that touch at the core of the generic term *Leges barbarorum*: Firstly (I), the discovery of late Roman Vulgar law and its incorporation into the legal codifications of the early Middle Ages assisted in overcoming the stark dichotomy between "Roman" and "Germanic" law. Since then, a more fluid transition from the law of Antiquity to the law of the early Middle Ages has been adopted[2]. In

the meantime, the extent of the "vulgarization" of late Roman law, as well as the precise term "vulgarization" or "vulgarism", remains disputed. Yet a lasting and important recognition is to be found here, namely that the respective Roman-provincial context has now become important when considering possible continuity and adaptation of Roman legal practice(s)[3]. Furthermore (II), the debate waged since the 1970s on the role of the written word in early medieval legal life, with a focus on the *Leges barbarorum*, has posed the question as to the functionality and practical application of these texts and their relationship to oral legal practice or customary law[4]: Thus, the regulatory intention of individual *leges* has been understood in many different ways. For this reason, the symbolic significance of the *leges*, beside the question of application or non-application in court, has been emphasized[5]. Additionally, the techniques guiding the *leges*' composition and the usage of written models therein have been touched on to a greater extent[6]. Due to these findings, including an extensive investigation of the medieval concept of law (III), the assumption that one could capture "Germanic law" (if such a thing existed), by its nature, in these legal codes has been fundamentally called into question[7]. Instead, the attempt is increasingly made to contextualize the *leges* through other legal texts that originated or were available for study at the same time[8]. Moreover (IV) the comparative perspective on various texts has made it quite clear that the umbrella term *Leges barbarorum* is to be classified, if anything, as hardly an explanatory tool; for these texts (hereby included) are far too different[9]. Clearly, too diverse of regulatory concerns had determined the different compilations and later redactions of such texts in the Middle Ages. The compilation of multiple *leges* into aggregate manuscripts – as they are preserved in compositions largely different from the Carolingian period[10] – must thus be understood as the attempt to provide entirely distinct texts with a new, common administrative and "ideological" purpose, according to the origins and objectives of such texts[11]. Similarly, the codification of new *leges* and the revision of those already in existence, as inaugurated under Charlemagne and Louis the Pious, must be understood first and foremost as originating from the legal-political objectives of the time[12]. And finally (V), a renewed interest in the manuscripts containing *leges*'[13], transmitting them along with capitularies[14] and Roman legal compilations, has led to a critical reappraisal of older editions[15] and also calls for taking

into account glosses, new fragments etc. when reconstructing Carolingian legal scholarship. Only recently, a comprehensive effort has been undertaken to survey the complete manuscript tradition of all early medieval leges, including the *leges Romanae*, in order to make visible the legal knowledge that was available at the time [16].

2 For these reasons, the term *Leges barbarorum*, for the pre-Carolingian period, no longer promises many new insights, if used as a generic or umbrella term. This is all the more important to stress, in that important progress is achieved in the subject matter of these texts, such as relates to procedural [17] and penal law [18], to a system of wergilds and fines [19], as well as to family and inheritance law [20], to commercial law [21] and religious offense [22] (to name only a few of the most important areas addressed); comparative studies on law and *leges* thus remain relevant. However, in light of liberation from the concept of "Germanic law" and the renunciation of a substantive, well-founded coherence of terms, the opportunity presented here should be seen and received – that is, an opportunity to contextualize individual texts in a much more novel, complex fashion, both historically and in legal history.

3 For some time now, a new field is being increasingly unlocked – a field, upon which the transition from antique law to early medieval law is presented as fluid. Furthermore, this field promises clear gains in insight from many of the texts aggregated under the term *Leges barbarorum*, namely the influence of late Roman military law on the law and political organization of the post-Roman kingdoms [23]. As all *gentes* – who, since the 5th century, managed to establish kingdoms (*regna*) in late Roman western territory – served as Roman federates (*foederati*) in Late Antiquity and, as such, were inaugurated under the Roman emperor and put under the authority of Roman officers [24], the presumption of extensive influence of Roman military law has merit from the outset. A few aspects of early medieval law have been previously combed for the imprint of Roman military law. One such aspect is the significance of the oath of allegiance, influenced by the Roman military oath (*sacramentum militare*), upon which the legal concepts of fidelity, payment of homage, and the royal ban are founded [25]. Related aspects include particular forms of punishment, the connection between military authority and civil authority in the hands of the *comites* [26], the problem of compulsory military service – as refer-

enced in different *leges* – the possession and succession of military lands [27], and so on.

4 Most of these findings are of necessary selective form; the reconstruction of Roman military law is already a particularly arduous endeavor [28]. For – aside from related juridical annotations *De re militari* in the Principate (Tarruntenus Paternus, Arrius Menander), such as concerned breach of duty, marriage law, and soldiers' property [29], as periodically quoted in the Digests – attempts to assemble this legal material into systematic compilations first occurred in the late Roman period [30]. The laws of the Empire, collected in the Book VII *De re militari* of the *Codes Theodosianus* [31], address important questions – above all, questions of military organization and administration [32]. Little mention is made of soldiery codes of conduct, however. On the other hand, various texts, stemming partly from legal practice, do include provisions for matters of military law, of which temporal classification and authorship remain somewhat disputed [33]. The most important of these is the Strategikon, attributed to the Roman emperor Maurice (582-602) and written in Greek, in which regulations pertaining to military law can be traced back to older regulations written in Latin [34]. The ability to precisely trace influences of Roman military law is made even more difficult by the fact that much of that, which was incorporated, was customary law, thus largely unwritten [35]. Additionally, military penal law was frequently characterized by an inconsistent execution that, per definition, was not possible to codify in detail [36].

5 In regards to the legal records of the early Middle Ages and their formation by way of Roman military law, one must account for the way in which the influence on individual *leges* could vary so strongly, according to the conditions of the individual *lex*'s origination, the various contexts of its function, and its determined aims. Thus doubt has recently been raised, with good reason, on whether it is sensible to address the bulk of the provisions of the *Lex Salica* – as has been suggested [37] – as "military law" [38]. Additionally, it is necessary to mention that references to military law are much easier to trace in the later *lex* – the *Lex Ribuaria*, written for the Rhineland population in the 7th century – than in the earlier *Lex Salica*, despite this text having served, in part, as an integral model for the *Lex Ribuaria* [39].

6 Aside from such distinctions between texts, the term "military law" itself – a term certainly inclusive of many different things – requires a clarification of its spectrum of meaning and the consistency of those regulations that fall under this term. Does "military law" refer to martial law or does it include the authority of military commanders over the population, and not only within the military's realms of regulatory influence? To what extent does it extend to the ordinary lives of soldiers? Does it apply to the regular army or to members of the population living in colonies, or other military settlements with their families – those who lived separate from their immediate environs? And did not such military law – as is of interest in regards to those groups affected by Roman military law – reflect the differences between troops of the field army (*comitatenses*), the frontier armies (*limitanei*), and the federates (*foederati*), respectively? Even if the further development and late renunciation of late Roman practice in the early Middle Ages is taken into consideration, questions such as the following seem anything but marginal: What is the meaning of "military law", given the fact that the separation between military and civil administration was relinquished in the early Middle Ages, and that military commanders were increasingly charged with juridical tasks? [40] And what were the consequences of seeing the free, male population principally compelled to military service, as had been the case since the 6th century in many post-Roman *regna* [41], thereby effectively militarizing the entire population? [42] Which branches of political and societal life were included to a greater extent in the norms of military law, and which to a lesser extent, if even at all? How did the character of "military law" change, as a shift from a sectorally applied legal system to an increasingly more "general" system of law, which fulfilled the functions of governance and conflict settlement within a political hierarchy gradually taking root?

In the context of this sketch of a double-edged problematic, concerning the research of the *Leges barbarorum*, as well as of the adoption of Roman military law, the following paper has a rather restricted aim. Focused on one individual legal codification, the *Lex Baiuvariorum*, it will be analyzed for influence of Roman military law, – which has yet to be investigated in-depth – being careful not to take the umbrella term *Leges barbarorum* as the point of departure. Instead (1), the historical context in which the *Lex Baiuvariorum* emerged with

the Frankish duchy of Bavaria, as well as (2) the intended realm of application of the *Lex Baiuvariorum*, will be more closely outlined. Next (3), selected examples of verifiable influences of military law will be extracted from the text of *Lex Baiuvariorum* itself – those passages that in many ways bear a Roman imprint. In closing (4), the question as to possible sources of military law and their translation into and transmission in the early Middle Ages will be addressed.

I. The Merovingian Duchy of Bavaria

7 *Baiuvaria* does not denote an ancient geographical region but one of the early Middle Ages. Even the *Baiuvari* – the inhabitants of the region – do not appear in our sources before the 6th century [43]. Since the Bavarians are clearly not an old Germanic tribe, it makes sense to move past the question of their ethnic origin and identity, in dealing with the Bavarian duchy [44]. Indeed, it is wise to begin with the particular region, which has been referred to as *Baiuvaria* since the early Middle Ages and was arranged by the Franks into a duchy [45]. This latter event took place in the late 530s, likely around the years 537/538, according to the some historians [46]. Thus the formation of the Bavarian duchy aligns with the Eastern Roman reorganization of military and provincial structures in the Balkans, begun around 535 as part of Justinian's plans to drive the Ostrogoths out of Italy [47]. Under pressure, the king of the Ostrogoths, Witigis, surrendered the Ostrogoth-controlled regions of "Northern Italy" to the Franks. These regions had originally belonged to the Italian prefecture [48]. As a result of this move, the Franks became the new rulers of the Alpine region. Justinian's reaction is not explicitly recorded, though one could conclude, as analogous to his recorded agreement with the Ostrogoth secession of Provence to the Franks in the year 536 [49], that a complete change of power was the issue at hand, legitimized by the Eastern Roman emperor. Ian Wood has even suggested that East Roman consent to the expansion of Frankish territory could have included Burgundy, which the Franks had previously annexed in the year 534 [50]. At that, it is appropriate to add that the Franks had, immediately prior, eliminated the kingdom of Thuringia, giving way to the formation of a Thuringian duchy [51]. Additionally, the Frankish-

Lombard marital alliance between Theudebert I and Wisgarde had already aided in securing the new landscape [52]. This development also pertained to the new conditions for the formation of the Bavarian duchy, as in the corresponding establishment of the adjoining Alemannic duchy [53]. For this reason, the years between 533 and 538 appear a period of momentous change to the north and the south of the Alps. What occurred during this time in what would become Bavaria was thus most likely anything but a purely local matter; instead, it was part of a much larger Merovingian attempt to induce a new political order of its eastern territory of the Frankish kingdom, in agreement with East Rome. This order was eloquently expressed in a letter from Theudebert I to Justinian, written in 534 or shortly thereafter [54], as well as in a letter from Justinian to the Frankish kings cited by Procopius [55]. The invasion of Northern Italy by the East Frankish King Theudebert, setting in as early as 539, appears to have implied this new order [56].

8 Aside from serving as the foundation for plans of expansion, Bavaria, in its function as a Merovingian duchy, largely helped to defend and secure the eastern and southeastern borders of the Frankish kingdom [57]. The region was primarily composed of the territories of two Roman provinces, *Raetia secunda* and *Noricum ripense*. The Franks took charge of these regions, establishing a military administration for the new border region under the control of a *dux*. This is of particular significance, because the Bavarian duchy was, in all likelihood, not the direct and seamless continuation of an antique *ducatus*. There was indeed a *dux Raetiarum* in the late Roman and Ostrogothic period, but his function was to defend the northern border of the Roman Empire and, later, the northern border of Ostrogothic Italy. However, the two former Roman provinces, incorporated into the Bavarian duchy during the Merovingian period, had thus become part of the Frankish kingdom's southern and southeastern lines of defense. In other words, the region, which had once formed the northern territory of an Empire and one kingdom, went on to form the southern territory of another kingdom. But what were the implications of this geographical shift?

9 An important topic in the most recent research is the question as to the location of the "headquarters" of the Bavarian duchy of the early Middle Ages, i.e. where the duke held his residence and from where

the duchy's military and administrative tasks were conducted. For quite some time it had been assumed that, for the complete duration of the Bavarian duchy, Regensburg, the former Roman *castra Regina*, had been its capital. While there is no doubt that Regensburg served as the seat of government for the Agilolfing dukes from the late 7th century onward, Arno Rettner recently argued that Augsburg (*Augusta Vindelicorum*) may have, in fact, been the base of the Bavarian *dux* in at least the 6th and early 7th century [58]. If Rettner's theory is correct – which seems plausible to me [59] – then a different light is to be cast on the entire process of the Bavarian duchy's origination and emergence. Augsburg had indeed been the capital of the late Roman province *Raetia secunda*: In establishing the Bavarian duchy, the Merovingians had taken up and integrated existing structures from the crumbling Ostrogothic administration of the northern Alpine region, now (thereby) connected to the former Roman province of *Noricum ripense* (Noricum along the River Danube). *Noricum ripense* seems not to have been under direct control of the Ostrogoths, or was at least more openly accompanied by an East Roman influence at the time of Justinian [60]. However, the territory of the former provinces had to have been functionally re-aligned from Augsburg.

10 The deciding factor, in this case, was the way in which existing structures could be incorporated into the newly created Bavarian duchy. The significance of these structures is, at best and in a rudimentary sense, discernible in the *Notita dignitatum* from around 400, featuring only the most important roads and bases [61]. A much more composite picture has emerged, however, with the reconstruction of the frontier hinterland through the help of both the *Tabula Peutingeriana* and archaeological findings [62]. In addition to dozens of forts (*castella*) and smaller fortresses (*burgi*) [63], various structures of military significance, such as roads (*viae*) [64], corresponding stations (*mansiones*) [65], grain silos (*horrea*) [66], fiscal properties [67], and even *pagi* [68] have to be taken into consideration. Many of these resources and infrastructural aspects did not disappear with the fall of the Western Roman Empire; rather, they persisted under Ostrogothic rule and beyond [69]. For each coming political power, seeking to rule these lands in the centuries to follow, the absorption, adoption, as well as the regeneration of existing Roman structures, where was wise and possible to do so, was of fundamental significance. The late Roman defense strategy was in no

way restricted to the protection of the line of the Danube; rather, implied was the structuring und control of mobility and communication in the entire Alpine Foreland and beyond. The Frankish rulers also took care to bring trade and travel under their control – not without the Alps in mind [70]. Moreover, although the Life of Severinus of Noricum seeks to prompt that, at the end of the 5th century, the Roman administration had completely pulled out from the area [71], groups of Romans continued to persist in the region exercising important military functions: They appear in sources from the following centuries as *Romani exercitales* and as *tributarii* with a notable military connotation [72]. This is particularly relevant for the area surrounding Salzburg, for which solid documentation exists. However, other splinters of information can be gathered, which reasonably suggest the same for other regions [73]. Evidently, the figures being addressed were military personnel particularly compelled to military service, receiving property or military assets in lieu of remuneration. The matter of continuity or the persistent survival of Roman elements seems to have been a largely local phenomenon, while various breaks and ruptures in the continuum are to be expected, in light of certain "superstructures" [74]. Thus in the case of Bavaria, it is important to consider which aspects of the Roman presence survived, how they were adapted to new, local conditions, and why Roman traditions more or less disappeared elsewhere. Reflecting on such questions allows us to provide the context needed to make sense of the *Lex Baiuvariorum*'s provisions – for instance, when *viae publicae* appear in one singular location of the *lex*, without any additional background information [75]. One needs to bring to mind the persistence of local infrastuctures in the region of the former provinces of Raetia and Noricum in order to understand how the early medieval adaptation of such a distinct legal concept typical for Roman infrastructures was meant [76].

II. The *Lex Baiuvariorum*: origins, composition, sources

11 The political and administrative context surrounding the Bavarian duchy provides important background for understanding and interpreting the corresponding textual sources. Nevertheless, it is import-

ant to firstly emphasize how working with texts involves the treading of fundamentally different territory. It is quite likely that, during the establishment and first arrangement of the Bavarian duchy in the 6th century, the respective norms of the duchy were recorded in one way or another. None of these norms has survived directly, however; only traces are to be found [77]. The most important source of the administrative organization of the Bavarian duchy is the *Lex Baiuvariorum*, having emerged significantly later and containing one particular title with provisions for the various functions of the Bavarian duke. The *lex* is disputed among historians and legal historians alike [78], particularly as relates to the precise estimation of the date of its origination, composition, sources, and effects [79]. In terms of date of origin, there are two competing theories fundamentally formulated by legal historians and largely accepted or modified by historians. Both theories had to cope with the fact that the manuscript tradition set in rather late; thus both take compilations from the early Carolingian period (late 8th century) as their point of reference. The most thoroughly formulated theory comes from Konrad Beyerle [80], though newly strengthened by Peter Landau [81]. From the particular uniformity of the textual records and from the political development of the Bavarian duchy during this time the theory concludes that the *Lex Baiuvariorum* could have emerged rather late, namely – with differing emphasis – between the late 720s and the 740s. In effect, the *lex* is linked to tensions within the Agilolfing ducal dynasty, residing in Regensburg at the time. In contrast, Heinrich Brunner's hypothesis [82] – later refined by Franz Beyerle [83] and recently strengthened through important distinctions made by Hermann Nehlsen [84] and Harald Siems [85] – is at odds with Beyerle's and Landau's assumption of a cohesive redaction and emergence of a complete *lex*, suggesting that the extant codex was composed of different, older layers of text [86]. Of particular importance among these textual layers is an alleged Merovingian ruler's decree, recognizable for the singularity of its content and language. This decree can be traced to the legislative efforts of the Merovingian kings in the early 7th century, i.e. those efforts responsible for other legal codes, such as the *Pactus* or the *Lex Alemannorum*, as well as the *Lex Ribuaria* [87]. This hypothesis is not too infrequently related to the long prologue of the *Lex Baiuvariorum*: The history of the *Lex Baiuvariorum*'s redaction is thus set to begin in the

6th century, spurred, above all, by the Frankish Kings Chlothar II (584-629) and Dagobert I (629-639)[88]. Crucial is Brunner's argument that the alleged, lost Merovingian decree was not exclusively at Bavarian command but was the result of the intention to subordinate the dukes (*duces*) in various border regions of the Frankish kingdom strictly to the authority of the Merovingian kingship[89].

12 The idea that the *Lex Baiuvariorum* is to have contained layers of older text is more convincing than that of a later, cohesive redaction of the complete text[90]. In fact, the structure of the *Lex Baiuvariorum* indicates a regulative, indeed, a systematizing and pointed endeavor. This in no way remedies all irregularities and discrepancies within the various sources from which the textual layers originate, however. The first title solely addresses matters that concern the church; this character, shared by the *lex* only with its close relative the *Lex Alemannorum*, attests to significant political objectives. Here, the *Codex Justinianus* (529/533), which discusses church matters in its first section, also comes to mind[91]. In clear contrast to the church, title II of the Bavarian *lex* addresses the legal standing and responsibilities of the *dux*. A shorter third title is devoted to the distinguished, aristocratic families in Bavaria, their relationship to the Frankish king, and the amount of their wergild. The titles IV through XXII are composed first and foremost of long lists of forms of compensation and wergilds, familiar from other *leges barbarorum*. However, matters of marriage, theft, arson, and questions of procedure etc. are also mentioned.

13 For various reasons, I believe that the largest section of the *lex*, mainly the first two titles, though also even the third, reach back into the 7th century in terms of their content. Possible editorship at a later point should not be ruled out, however. The relatively uniform manuscript tradition of the Bavarian *lex* was established much later; no manuscripts from before the end of the 8th century survive. This suggests that – as with the *Lex Ribuaria*[92] – a later redaction formed the basis of a significant portion of today's record of surviving manuscripts. Yet this conclusion in no way precludes the possibility that older textual layers are reflected in the *lex*, the one-time formal independence of which is recognizable to this day.

14 There are two aspects that are most significant, as relates to the structure of the text and the sources of the *Lex Baiuvariorum*: Firstly, noticeable similarities between the Bavarian and the Alemannic legal codes (*Pactus* and *Lex Alamannorum*) are to be found, which further correspond to the structure and select provisions. Contrary to the previous assumption of the Bavarian *lex*'s borrowing from the Alemannic code, Harald Siems has recently traced these congruencies to a common model, used by the compilers of the Alemannic and Bavarian *leges* independently of one another [93]. Secondly, influences of Visigothic law on the Bavarian *lex* are undeniable; stemming, most notably, from the *Codex Euricianus*, the oldest compilation of Visigothic law, of which only fragments survive [94]. These traces of influence are difficult to explain, when placing the origins of the *Lex Baiuvariorum* in the 8th century, i.e. after the fall of the Visigothic kingdom in the year 711. Corresponding assumptions have, in turn, attributed the text's compilation to the "private work" of a scholar. This scholar is said to have prepared the text within a Bavarian abbey according to his own ideals [95] or, even, as Clausdieter Schott has argued, to have forged the text in the Abbey of Niederaltaich [96]. Hypotheses such as these are not all that convincing, however. Besides, these theories overly simplify the procedure for the creation of legally-binding norms in undue fashion, replacing a long process, shaped by records of consultation and consent, with the fantasy of a singular, legally-trained erudite. The *Codex Euricianus* was recorded at the end of the 5th century in Gaul. That one could exploit the text 250 years after its creation, in the sense of a free-floating reception of the compilation in the Bavarian legal code, seems thoroughly less plausible than the presumption of legal influences at the time, when Southern Gaul and Bavaria were equally a part of the Merovingian kingdom – an arrangement, which could have been the case only before the 8th century [97]. Our ability to trace both the Bavarian and Alemannic *lex* back to the same model, even though the two were created and formed independently, corresponds well to the fact that both *leges* owe much to early 7th century efforts to create a *lex* for both duchies – indeed, the case for the Bavarian and Alemannic. In a similar sense, the obvious neglect of Visigothic legislation by the Kings Chindasvinth (642-653) and Reccesvinth (649-672) from the middle of the 7th century, which was presumably also enacted in Southern Gaul, points in a similar direction [98]. Whether or not this

was also the case for the Lombard *Edictus Rothari* of 643 remains to be seen upon further investigation [99].

III. Military Law in the Bavarian code's title on the duke

15 With a focus on military law, the second title is of primary interest [100]. This title was used previously by Heinrich Brunner in arguing that, behind pieces of the *Lex Baiuvariorum*, a Merovingian royal decree of general application that did not survive is to be reckoned with [101]. An indication that Brunner did not pull his conclusion out of thin air appears in the heading of the second title, in fact; in strange grammatical form, the title claims to be: "About the dukes and his affairs, which pertain to him" (*De ducibus et eius causis qui ad eum pertinent*) [102]. This certainly sounds odd. Naturally, there was only one *dux* in Bavaria, so there would have been no reason to speak of *duces* in the plural, unless we assume that this passage was meant originally for more than one *ducatus* or duchy and, without further adaption, was simply incorporated into the Bavarian *lex*. Brunner was able to include further such examples [103]. The more of a general decree we uncover behind the text – the provisions of which extending far beyond Bavaria – the more interesting and significant the question becomes as to the role of Roman military law in the organizational arrangement of the Frankish duchies.

16 Here, the Merovingian kings arranged the legal protection of the Bavarian *dux*, whom they – and in part the people – had appointed and who was subordinate to them in rank: The title contains a comprehensive codex of military penal law, which was to have determined the conduct of soldiers both fundamentally and at times of war. The text addresses, among other things, sedition against the duke (*seditio*) [104], inciting discord (*scandalum*) within the army or within the duke's court [105], pillage and arson during military campaigns in the province (*praedatio*) [106], and the theft of military equipment [107]. In addition, regulations for the protection and special peace of the ducal court (*curtis ducis*) [108], fines in the case of contempt of the ducal ban [109], dates for army and court assemblies (*placita*), as well as fines for failed appearances to such assemblies [110], were established. The text moves on to different provisions for dealing with matters of jur-

isdiction through the *comes* and the remaining *iudices*[111]. A special position is occupied by the express provision regarding the case of revolt against the duke, as stirred by his own son. This appears to be the result of a concrete case, although it appears in the *Lex Alamannorum*[112], and is thus likely traceable to a common textual model.

17 The following cannot provide a comprehensive or even an exhaustive analysis of the Bavarian law code's chapter about the dukes – a text deserving of its own thorough and detailed commentary. Instead, a few provisions will be examined more closely. The first two of them are worded in general terms and fundamentally concerned with the protection of the *dux*:

> If anyone attempts to take the life of the duke whom the king appoints to that province or whom the people themselves choose as duke, and he is convicted so that he cannot deny it, let that man and his life be in the power of the duke, and let his property be confiscated by the state. And this is not to occur by chance, but let the proven fact reveal the truth. And let it not be proven with one witness, but with three witnesses, all of equal class. If, however, one witness testifies and another denies it, then let them resort to the judgment of God, and let them go to the field, and let God give victory to whomever is to be believed. And let this take place in the presence of the people, so no one may die through malice.
> Let no free Bavarian lose his freehold land or his life [unless punishable for] a capital offense; that is, attempting to take the life of the duke, inviting enemies into the province, or devising to seize the state (*civitas*) through foreign intervention. And [if] he is convicted, then let his life be in the power of the duke, and let all his property [descend] into the treasury (*patrimonium*). Moreover, for other offenses (*peccata*) that he commits, let him compensate according to the law (*lex*), as long as he has property. If, however, he has no property, let him be pressed into slavery, and let him serve that one whom he injured several months and years, if he was able to profit [from his act], until he restores the whole debt.
> If anyone kills his duke, let his life (*anima*) be taken for the homicide he caused, and let his property be permanently confiscated by the state[113].

18 In the *Lex Baiuvariorum* the legal status of the Bavarian *dux*, according to the example of the Merovingian kingdom, was defined as a

form of royal deputyship [114]. The *dux* clearly remained subordinate to the king, though governing with power to the greatest extent that his domain allowed. The provisions quoted above, which demonstrate the tight, matter-of-fact, linguistic parallels between the text and similar regulations in the *Lex Alamannorum* for the protection of the Alemannic duke [115], joined concrete sanctions to seemingly necessary, fundamental clarifications and legal justifications. One example of such is the dictates given for trial procedures, in which evidence of traitorous activities against the *dux* had to be presented. On the other hand, it was emphasized that the death penalty and the confiscation of property were only permissible in such cases of *crimina capitalia*. For all other offenses, the usual compensation system was to be employed, in which fines were paid first and foremost to the opposing party [116]. In terms of *criminal capitalia*, the infliction of death penalties and expropriation needed to be especially justified, as there were no traditions of a binding nature to speak of. In addition, the wording *anima pro anima* employed to justify the death penalty suggests some ecclesiastical influence here [117].

19 The *lex* qualified various offenses against the *dux* as *crimina capitalia*, thereby assigning the form of punishment to the "public" legal sphere. The quoted provisions for the protection of the Bavarian *dux* demonstrate a particular blend of highly complex legal concepts and simple forms of procedure. The very fact that punishment of treasonous acts was "not to occur by chance but that the proven fact was to reveal the truth" (*et hoc non sit per occasionem factum, sed probata res pateat veritatem*) indicates close literal agreement with the Digest-title that contains the commentary of the Roman legal practitioner, Modestin, to the *Lex Iulia Maiestasis* [118], as the *Lex Baiuvariorum*'s editor, Ernst von Schwind, has already indicated [119]. This title had dictated the inclusion of the defamed, of slaves, and of freemen as plaintiffs, even soldiers. Soldiers were usually excluded from the right of *accusation*, now included with the reasoning: "he who protects the peace must all the more be allowed the power to accuse" [120]. The references to the Roman crime of *lèse majesté* (*laesa maiestas*) continue. Interesting to note is that the regulations addressing attacks on the life or person of the Bavarian *dux* had declared the planning of the crime already as punishable to the highest degree; the provision that was so central for the stability of the political order thus emanated

from an entirely "unarchaic" understanding of the law. The criminal liability emphasized in the *Lex Baiuvariorum*, not only in the criminal attempt but also in the planning of the act, is quite evocative of the *Lex 'Quisquis'* from 397, which had decreed exactly the same for crimes of *laesa maiestas*[121]. Also the double-sanction of the death penalty and confiscation of property appears to be directly related to Roman *laesa maiestas*[122]. Harald Siems recently considered it plausible that the Bavarian *lex*'s compilers – or the model thereby employed – could have called upon a legal collection on the *crimen laesae maiestatis*[123]. This proposition seems much more likely than Theodor Mommsen's theory about a letter from Gregory the Great[124]. The former cannot be substantiated, however.

20 One aspect that might prove interesting is the location of the Roman *crimen laesae maiestatis* at or near the interface of public law and military law, as previously suggested by Mommsen in another context[125]. For this reason, not only attacks on the ruler's person are included but also numerous offenses related to military law, such as the failure to follow orders, mutiny, desertion, absent without leave, and treason, respectively. It thus seems conceivable that the notion of the Roman law of treason was transferred to the early medieval *regna* as part of regulations pertaining to military law. This theory finds even more support, when the context surrounding the provisions of the *Lex Baiuvariorum* is considered. This includes their intended regulatory scope. The quoted regulation regarding the death penalty and its provisions for a pardon – or an arbitrary form of punishment – also evoke late Roman military law: The perpetrator and his life should be within the control of the *dux* (*in ducis sit potestate homo ille et vita illius*), in other words, in the control of the highest ranking officer[126]. The ability to make a decision, here, was not placed in the hands of the Frankish king but was to remain at the level of the *ducatus*. The duke's authority to either have the offender executed or to pardon him is hardly a product of Christian influence. There is an arbitrary element here, as well, which proves more difficult to trace back to the *laesa maiestas* than to military law. This is not to deny that the principle of *clementia principis* could even be extended to pardoning traitors in the Roman period. However, more characteristic of the Bavarian provision is that the possibility of pardoning was explicitly affirmed in such a general way. The punitive authority of a high of-

ficer needed to be capable of a naturally flexible application, so that he could potentially pardon an offender, if circumstances made this advisable [127].

21 An additional aspect that exemplifies the influence of special legal principles under military pretext is the described evidentiary proceeding. This procedural demand is to have kept the significant danger of potential abuse small, while achieving a characteristic balance between differing procedural concepts. The quoted provision of the *Lex Baiuvariorum* indicates, in its relation to the Digest provision also quoted above [128], that the dangerous possibility of arbitrary justice triumphing over truth, in cases of treason against the duke, was taken as a given. The trial, which was contrived in opposition to this tendency, seems to have been determined by the legal practice of the military sphere: Could the three required witnesses for proof of treasonous activities not be provided, proof was to be organized through public ordeal by battle between witnesses and defendant. This was seen as a practical and acceptable form of proof in a case of life and law, which clearly did not always permit more complex methods of truth-finding. While the definition of punishable offenses outlined in the provisions pertaining to military law in the Bavarian and Alemannic *leges* indeed rested upon respective regulations of Roman treason, the same legal codifications presented its procedural provisions in a form adapted to the changing realities of the Frankish kingdom.

From those offenses classified as treasonous within the text of the *Lex Baiuvariorum* emerged a much stronger punitive power as was customary in the case of homicide. Additionally, treason of country (*proditio patriae*) belonged to those grave offenses, the perpetration of which was anticipated within the army's domain. These regulations are to be found in late Roman military law, as well [129]. According to the Strategikon of Maurice, "he who has been entrusted with guarding a city or fortress and who thereupon is to have surrendered or abandoned his post, against the order of his commander, receives the death penalty" [130]. The above quoted provision in the *Lex Baiuvariorum* (the first provisions of the chapter on the duke) thus considered it *crimen capitale* to summon enemies into the territory or to plot the taking of a city (*civitas*) by outside forces [131]. In the related *Lex Alamannorum*, death or the "banishment to wherever the duke so

chooses", as well as the confiscation of property, was the possible penalty for the *homo* to have brought foreign plunder and arson upon the land[132]. Here, both penalties of the *crimen publicum* tradition meet again, while the mitigation of the death penalty by way of banishment undeniably demonstrates, once again, an element of the arbitrary.

22 An additional tradition from the Roman army is continued in the separation between treasonous and non-treasonous offenses. Desertion and defection to the enemy were always treated as a break from the oath of allegiance in Roman times, while a guard's negligence and lesser violations were punished as disciplinary offenses[133]. However, another distinction was made, which bore repercussions for the sanctions of choice, namely those offenses committed in wartime – i.e. during a military campaign – and in peacetime[134]. The *Lex Baiuvariorum* handled sedition (*seditio*, also *scandalum in provincia*[135], old-Bavarian *carmulum*[136]) against the duke separately from inciting discord in the duke's army (*scandalum in hoste*[137]), thereby resorting to a distinction made previously in Roman law[138]. Both offenses had likely been included in the late Roman prohibition of *coniuratio*, which was, at the same time, perpetrated as a political offense and within the military domain[139]. In both cases, instigators (seen as higher-ranking, in this case) were to be punished with a fine of 600 *solidi*, according to the Bavarian *lex*, whereas co-perpetrators of *seditio* were to pay 200 shillings, and free 'followers' or accomplices of a lower class (*minor populus*) were to pay 40 shillings.

23 In contrast, in the case of insurrection in the duke's army, it was explicitly determined that, in addition to determining financial penalties, king and duke should have the right to impose penalties at their own discretion:

> If anyone in the army that the king or the duke appoints in the province stirs up a quarrel (*scandalum*) within his own band, and men are killed there, let him compensate with 600 solidi to the state (*in publico*). And whoever causes beatings (*percussiones*) or injuries (*plagae*) or commits homicide (*homicidium*) there, let him compensate each according to his class (*secundum suam genealogiam*), just as the law (*lex*) requires. And let a man who does this extol the king or his duke as merciful as he grants him his life. Concerning

> lesser men (*minores homines*), however, if they stir up a quarrel (*scandalum*) in the army, let it be in the power (*potestas*) of the duke [to decide] which punishment (*poena*) they are to endure. For this practice must be eradicated, so that it does not occur. A quarrel frequently rises, in fact, over horse fodder or firewood, since some [soldiers] are assigned to defend farm buildings and barns, where hay and grain are found. This [disagreement] is forbidden so that a quarrel (*scandalum*) does not occur. If anyone finds fodder (*pabulum*) or firewood (*ligna*), let him take what he wishes, and let no one be prevented from taking [what he wants], so that a quarrel (*scandalum*) may not occur because of this. If anyone dares to do this and opposes this in some way that the law forbids, then let him, if he is discovered, be liable to military law in the presence of the duke (*coram duci*) or before his count (*ante comiti suo*); that is, let him receive fifty lashes (*percussiones*)[140].

24 This provision addressed the weight and consequences of insurrection within the army. If fatalities were to result, the offender was to pay a high public fine in addition to the wergild he was liable to the surviving family members, while the decision over the offender's life or death was to rest in the power of the duke or king. Again, this arbitrary penal authority is met by the highest general. At the same time, the power of the Bavarian duke was explicitly connected to that of the king. This demonstrates that it was ultimately royal law, which was *mutatis mutandis* adapted to the Bavarian duchy[141]. In its reference to the *genealogiae*, that is the Bavarian noble families addressed in the third title of the *lex*, it becomes clear that both titles must be seen in relation to one another.

25 The second section of the provision applied to discord incited by *minores homines* and fell entirely within the jurisdiction of the *dux*, or within the jurisdiction of his subordinate *comes*, respectively. In this case, the imposition of the type of punishment was left to the latter (the *comes*). In morally-didactic language, it was impressed upon that, in the search for horse feed and firewood, conflicts of a severe nature were not to develop: *ille usus eradicandus est, ut non fiat*. There is explicit mention of a military punishment (*disciplina hostilis*), consisting of 50 blows, to be imposed by the duke or, alternatively, the count under whose command the crime has occurred. The regulations quoted above explicitly indicate a special military penal law, which is

reminiscent of the Roman *disciplina militaris* both conceptually and in the threat of corporal punishment (beatings, even possibly whippings) equally found in Roman military law[142].

26 Another offense within military law, which is referenced by the *Lex Baiuvariorum*, is "military invasion" (*heriraita*), precisely differentiated from "home invasion" (*heimzucht*)[143]. Both offenses reference armed attacks on homesteads (*curtes*) with the intention to surround a freeman with shields, arrows, and other projectiles. The difference, here, is the number of participants in the attack: *heriraita* only comes into question when 42 shields (i.e. men) are present at the attack; for those attacks with fewer shields than 42, *heimzucht* was said to have occurred. In contrast stands the particular sanction for this offense: While the primary perpetrators in the case of *heimzucht* were met with a fine of 12 *solidi*, the particularly public nature of *heriraita* becomes clear in the exact form of compensation; for the higher fine of 40 shillings was not to be paid only to the aggrieved side but to the duke, as well[144]. *Heriraita* occurred with an armed band (*hostili manu*, *collecta manu*, *manu armata*, *exercitus*); the most closely related term in Latin for such troops was *collectae*[145]. The term *collecto contubernio*, used in the same context in the *Lex Salica*, as well as in the clearly elevated penalty for homicides committed by such troops in the *Lex Salica* and the *Lex Ribuaria*[146], indeed demonstrate that regular military units are at play and were, indeed, deployed in such tasks[147]. Those *collectae* practiced, in addition to their military tasks, a form of feud-like justice, which the Frankish kings struggled to combat as the punishable act of *harizuht*[148]. Shortly after the year 800, Charlemagne expressly subsumed the omission of any kind of *harizuht* under the loyalty owed to the emperor: Its disregard has subsequently been counted among the eight cases to which the royal ban applied – together with arson, bride kidnapping, and other offenses – that were anchored in various *leges*[149].

The context of *disciplina militaris* becomes even more apparent in the following provision for violent plunder and arson on the part of the army, when committed without the explicit order of the duke:

> If anyone in the army wishes through hostility to plunder the province without his duke's order, or to take hay or grain or burn buildings, we forbid this totally, and it is not to occur. And hereafter

> let a count be careful [of its happening] in his retinue; in fact, let him give order (*ordinatio*) to his hundred-men and ten-men, and let each one watch over the troops that he commands so they do not act contrary to law (*contra legem*). And if anyone does this audaciously, it [the act] is to be examined by the count whose man does it (*cuius homo hoc fecit*). And if the count neglects to enquire who does this, let him restore all things from his own property; nevertheless, let him have time to investigate. And if such a powerful man does this that a count cannot restrain him (*destringere non potest*), then let him tell his duke, and let the duke restrain him according to law (*distringat secundum legem*). If he is a freeman, let him owe forty solidi, and let him restore all things with equal value. If a slave does this, however, let him be sentenced to capital punishment. Let his master, however, restore all things equal, since he did not forbid his slave to do such things. If you devour one another, you will perish quickly. Nevertheless, let a count not neglect to watch over his army, so that it does not act contrary to law (*contra legem*) within his province [150].

27 This problem is already addressed in the earliest decree extant from the reign of King Clovis, issued before the campaign against the Visigoths [151]. Gregory of Tours later described the pillaging committed under the army of King Gunthram in vivid Old Testament imagery [152]. The *Lex Baiuvariorum* also utilized drastic wording in reference to combating evil: "If you devour one another, you will perish quickly".

28 The Bavarian text, in its efforts to combat this form of pillaging, reveals the entire military hierarchy – originating in and using the terminology of the late Roman period [153] – from *dux* down to *comes*, from *centenarius* to *decanus* on duty [154], each of whom was to supervise "his own" (*sui*), i.e. those *homines* subordinate to his command, and to apply his powers of coercion, if called for. In the particular verb of choice, *distringere*, a term with roots in military penal law is again utilized [155]. In Frankish times, this verb was aptly communicated as *districtio* and often combined with the word *bannus* [156].

29 Here, the *comes* became quite significant: For it was the *comes* who was responsible for issuing a respective order (*ordinatio*); he was to investigate (*inquirere*) possible offenses and determine the identity of the captured offender (*cuius homo sit*). That the *comes* was to answer with his own property, if this investigative duty were neglected, also followed an established principle of administrative law. In such a case,

or in the case of all too powerful individuals among the offenders, the *dux* was to intervene and exact force (*distringere*) against the offender, forcing compliance. Free offenders were to be punished with a fine of 40 shillings and required to pay compensation for any damages; slave offenders – who must have been many in number in the Bavarian army – were punished by death, with their master held responsible for those damages incurred.

30 Yet, there are terminological differences compared to Roman military law; soldiers were no longer referred to as *milites*, but rather simply as *homines*[157]. We cannot rule out the de-professionalization that is suggested by this terminological shift, though seemingly more important is the fact that the term itself reflects general compulsory military service, which was a particularly relevant feature of a duchy. The more open term *homines* ("men") could also include slaves. Moreover, the term *homo* was more politically-charged, as can be demonstrated by the text of the general oath of allegiance, which had to be sworn to the Merovingian and Carolingian rulers by the population of the Frankish realm[158]. For free adult men – focused if nothing else on future military service – were to promise the Frankish king "allegiance like that of leudes" (*fidelitas et leudesamio*)[159] or to be loyal (*fidelis*) to him "as a man should, by law, be to his master" (*sicut homo suo domino per drictum esse debet*)[160]. That is precisely what seems to be echoed by the concept of this Bavarian provision, even though military loyalty (*fidelitas*) was a concept here used exclusively with regard to the king.

31 Precisely the extensive lack of an allegiance or loyalty category in the Bavarian *lex* is striking. The *Lex Baiuvariorum* documents a legal situation in which the subordination of dukes to the king is taken as a given fact[161], thereby emphasizing the *duces*' allegiance to the king[162]. Yet the population of the Bavarian duchy was in all likelihood not obligated to pay this allegiance to the *dux*, allegiant solely to his military command, instead. This is an *argumentum e silentio*, by necessity. It remains noteworthy, however, that those examples included from the Bavarian and Alemannic *leges* do not brand attacks on the life of the duke as *infidelitas*. This can likely be attributed to the fact that the free population in this region, at the time of the *leges*' recording, was required to promise fidelity not to the dukes but to the Frankish kings. This finding is important, in so far as the Frank-

ish rulers had in their concept of fidelity (*fidelitas*) absorbed fundamental elements of Roman *laesae maiestatis*, placing these upon the legal foundation of the general oath of allegiance [163]. The oath of allegiance also enabled the Merovingian and Carolingian kings to delegate those legal powers to the relevant office-holders, according to the appropriate military rank: Such was done through the instrument of the ban. Under these conditions, it became possible to connect *crimen laesae maiestatis* to the power of military functionaries like the *duces*. Indeed, treason was not only related to attacks on the person of the ruler but was inclusive of different military offenses, as well as protective of the highest officials [164]. Here, the extent to which the adoption of *crimen laesae maiestatis* could be closely connected with infidelity offenses is once again demonstrated [165]. This indicates, further, how regulations in the Bavarian duke's statute – as these legal concepts were first received in the context of kingship – were successfully implemented into the administrative routine of a border province.

IV. From Roman Military Law to the Duke's Statute of the *Lex Baiuvariorum*

32 In this investigation of the adoption and appropriation of late Roman military law in early medieval Bavaria a clear distinction has been drawn between the historical context of the establishment of Bavaria as a duchy and the reflection of military elements in the text of the Bavarian law code. This was due not only to the uncertainty in precisely dating the draft of the *Lex Baiuvariorum* but also to a methodological caution not to intermix textual observations with general historical findings from the outset. Nevertheless, the aim was to illustrate a regional context within which the provisions of the Bavarian *lex* make sense. This "sense" happens to be largely a product of Frankish interests in Bavaria.

33 Regarding the origins of the Bavarian duchy, as more recent research has identified a clear borrowing from precursory provincial-Roman structures, a regionally different integration of provincial-Roman elements into the Bavarian duchy seems plausible. Fortresses, roads,

fiscal property etc. could be integrated by the post-Roman rulers and their military elites into the new functional entity of the Bavarian duchy. As a result, we not only encounter the highly complex Roman concept of *via publica* in the *Lex Baiuvariorum*, but also *munera publica*, such as *paraveredus* and *angariae*, even though such obligations were increasingly transferred to the dependents of ecclesiastical institutions, as indicated in the statute on *coloni* of the *Lex Baiuvariorum* [166].

34 However, such a regional-historical perspective can only provide the background needed to call attention to the complexity and selective nature of the problems addressed in this legal codes. For while there is no doubt that the *Lex Baiuvariorum* was intended for Bavaria, it cannot be assumed with equal certainty that the *Lex* was written in Bavaria by a Bavarian [167]. Early medieval *Baiuvaria* was a border region of the expanded Frankish kingdom; and it was in the scope of this kingdom that adoption and appropriation processes of legal systems occurred – traces of which are tangible in the text of the Bavarian *lex*. The result, one could conclude, is a compilation of various legal influences, fused into a composite whole through the directing hands of its compilers. Homogenization – to the extent that the text's various stages would become indistinguishable – did not occur, however [168].

35 The quoted provisions from the chapter on the duke reveal the "inconsistent" flexibility that is characteristic of the legal practice of the military, subordinated to the purpose of maintaining military discipline and the army's readiness for deployment. It is precisely these many arbitrary elements, which demonstrate the attempt to reconcile legal considerations with practical needs. On the other hand, the stark separation between treasonous offenses and those other offenses penalized by fines, as well as the distinction between offenses committed in wartime and those committed in peacetime, demonstrates the importance of defining crucial issues as precisely as possible in a frontier duchy. In this light, the *Lex Baiuvariorum* proves to be a powerful text, illustrative of the exceptional character of the frontier duchies and their particular legal order, in striking contrast to the other *leges* of the Frankish kingdom.

36 It is not readily possible to name one definite written source or model for those elements evidently pertaining to military law in the duke's statute in the *Lex Baiuvariorum*. A form of umbrella law for all Frankish duchies, as Brunner's theory of the lost Merovingian royal decree suggests[169], would indeed not be without late Roman forerunners. However, equivalent regulations by the Eastern Roman Emperors Anastasius I (491-518) and Justinian I (527-565) for duchies in North Africa and the Near East must undoubtedly be ruled out as the direct model for the Merovingian royal law[170]. Yet from where did the Frankish kings take their regulations of military law and from which texts could such a royal decree have been composed? In light of the remaining textual borrowings, though also due to parallels with the *Lex Alamannorum*, it can be assumed that it is not a matter of oral customary law being written down but one of the adoption of legal texts. The military context of the duchy and the provisions contained within the *Lex Baiuvariorum* suggest perhaps less of a legal compilation on the Roman *crimen laesae maiestatis* than a dossier of texts pertaining to military law. Such texts, it may be suggested, were used by the Frankish kings as a framework for their Eastern duchies. This framework was then fleshed out individually in the specific duchies and, in part, translated into vernacular terms. Naturally, this is impossible to prove with any certainty. If one takes the spectrum of the remaining traceable sources in the Bavarian *lex* into account, it does not seem by any means implausible, though still unlikely, that the Merovingian monarchs directly called upon collections of Roman statutes of military law. Such collections are indeed well-attested and were in wide circulation, as the Strategikon of Maurice has shown in reflecting older traditions of Latin military law[171]. However, it is ultimately the numerous imprints of Visigothic law in the *Lex Baiuvariorum*, which make the Franks' borrowing from a Visigothic text originating in Gaul (or, alternatively, from an intermediate text drawing on such a text) seem possible. Karl Zeumer had suggested that the provisions for treason in the *Lex Baiuvariorum*, as well as similar regulations in the Lombard *Edictus Rothari*, might be traceable to a common Visigothic model. These provisions would thus have been drawn 'from the old law of the Visigoths', which had only been suspended under King Reccesvinth in the mid 7th century[172]. The little that remains today of the extensive *Codex Euricianus*[173] hardly allows for any conclusions to be made as to the Visigothic military law at the

time. This is the case, even when recorded provisions about the *patrocinium* and the *Bucellarii* allow us to suppose that, originally, the *Codex Euricianus* would have contained much more, regarding questions of military law, than indicated by the few remaining fragments we have today[174]. Meticulously comparing the *Lex Baiuvariorum* with its Visigothic sources and parallels, Isabella Fastrich-Sutty has brought to light many aspects on the methods applied by the compilers when drafting the Bavarian law-code. Yet for the title on the duke, specifically, she was hardly able to identify parallels to Visigothic law[175]. However, the number of parallels to be possibly taken into account in this domain may be larger than initially assumed[176].

37 Perhaps the method of strict textual comparison reaches its limits in the case of military law. Precisely the flexibility of military law in imposing sanctions, in particular, may have advised its compilers against an all too rigid transfer of sanctions from a possible model to the equivalent offenses in the *Lex Baiuvariorum*. Important to the adoption and afterlife of Roman military law in the *Lex Baiuvariorum* was the reservation of the death penalty and confiscation for particularly severe offenses[177]. Of particular interest to the modern observer is the variable handling of most sanctions that occurred. With this context in mind, a certain ability to work independent from existing models appears among the compilers, in that particular punishments attested in Visigothic law were now provided for offenses that had actually called for different sanctions in Visigothic law[178].

38 It can be assumed that the alleged Merovingian royal decree, which had guided the conception of the Frankish duchies, had already encroached upon those Visigothic legal texts upon which it was based. For we must assume that the provisions for *laesea maiestatis* – originally intended for the Roman emperor, then applied to the successor kings – must have been eventually applied to the person of the *dux*. This was done, in order to link such provisions to regulations regarding army discipline in wartime and peacetime, as well as to clarify questions of jurisdiction and legal procedure. This is even more likely, given that the office of the *dux* played a distinctly more important role in the Frankish context than in the Visigothic kingdom, where office and title appear in legal texts not before the 7th century[179]. The appeal of Brunner's concept of a Merovingian "royal decree" as a decreed framework for the Frankish duchies lies, if nothing else, in that

it explains why such different regulations affecting the office of each and every *dux* – which had until that point been passed on within various textual contexts – were then compiled into one consistent statute, intended especially for the conditions present in a frontier duchy[180].

39 The incorporation of such models in the text of the *Lex Baiuvariorum* will have provided another reason to adapt particular items to present-day conditions, as concerns the sanctions to be imposed[181]. In the process, further far-reaching changes came to be – for example, the ecclesiastical transformation of and changed reasoning on numerous provisions: He who kills the *dux*, it so reads, should pay for the soul of the *dux* with his own, and his property should be permanently confiscated[182]. The curious word choice *anima pro anima* and *in sempiternum* immediately suggests that a cleric must have been involved in the formulation of this passage; there are many other passages in the *lex* that carry the mark of the ecclesiastical hand, downright employing Mosaic rhetoric[183]. These passages do not only indicate that ecclesiastical scholars had some part to play: such passages also document far-reaching processes of the transformation of legal thought itself[184]. The translation of key legal terms and their related concepts into the vernacular represents another momentous intervention in the law[185].

40 In light of these many possible processes of the production, reception, compilation, and redaction of legal texts, if one were to take stock of the long journey late Roman military law has traveled since its initial adoption in Gaul, to its taking root in early medieval Bavaria, one would, at best, maintain an indirect influence of late Roman texts. In the course of this process, many features of late Roman military law became adapted, transformed and newly legitimized. But even if legal change appears to be so discernible in the long-term development, what is even more astounding is the consistency and "adoptability" of Roman military law, with regard to its definition of punishable offenses. Its classification of certain offenses as well as the idea that the imposition of sanctions would have to be flexible in military matters seem to have had a large and longlasting effect, so much so that these classifications were translated in Bavaria – partially employing Frankish example – into the vernacular or language of the people[186]. Much of this would now become Bavarian in termin-

ology and labelling as it would below the surface remain – to some extent, at least – Roman in substance.

NOTES

1 On the scholarly debate see C. Schott, "Der Stand der Legesforschung", *Frühmittelalterliche Studien*, 13, 1979, 29-55; P. Wormald, "The *Leges Barbarorum*: Law and Ethnicity in the Post-Roman West", in *Regna and gentes: The Relationship between late antique and early medieval peoples and kingdoms in the transformation of the Roman world*, H.-W. Goetz, J. Jarnut, W. Pohl (eds.), Leiden-Boston, 2003, p. 21-53; *Leges – gentes – regna. Zur Rolle von germanischen Rechtsgewohnheiten und lateinischer Schrifttradition bei der Entstehung der frühmittelalterlichen Rechtskultur*, G. Dilcher, E.-M. Distler (eds.), Berlin, 2006; *Les lois barbares*, S. Joye, M. Cândido da Silva, B. Dumézil (ed.), Rennes, 2015 (forthcoming).

2 On the concept of "vulgar law" see D. Liebs, "Roman Vulgar Law in Late Antiquity", in *Aspects of law in late antiquity. Dedicated to A. M. Honoré on the occasion of the sixtieth year of his teaching in Oxford*, B. Sirks (ed.), Oxford, 2008, p. 35-53. Studies on individual legal topics include E. Levy, *West Roman Vulgar Law: The Law of Property*, Philadelphia, 1951; *Id.*, *Weströmisches Vulgarrecht: Das Obligationenrecht*, Weimar, 1956; H. Nehlsen, *Sklavenrecht zwischen Antike und Mittelalter. Germanisches und römisches Recht in den germanischen Rechtsaufzeichnungen*, 1: *Ostgoten, Westgoten, Franken, Langobarden*, Göttingen, 1971. See more recently, S. Kerneis, "L'ancienne loi des Bretons d'Armorique. Contribution à l'étude du droit vulgaire", *Revue historique de droit français et étranger*, 73, 1995, p. 175-200; *Id.*, "Le pécule de la Bretonne. Les prestations matrimoniales dans la Gaule du v^{e} siècle. Droit romain et coutumes celtiques, le témoignage du droit vulgaire", in *Études d'histoire du droit privé en souvenir de Maryse Carlin*, O. Vernier (ed.), Paris, 2008, p. 477-496.

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75 *Lex Baiuvariorum*, X, 19 (*Lex Baiwariorum*, ed. E. v. Schwind, *MGH LL nat. Germ.*, V, 2, Hanover, 1926, 394). See S. Esders, "Spätantike und frühmittelalterliche Dukate" (*art. cit.*, n. 74), p. 446-447.

76 On the Roman legal backgriund to this see C. Möller, "Die Rolle der Unterscheidung von *via publica* und *via privata* im römischen Deliktsrecht", in Ars iuris. *Festschrift für Okko Behrends zum 70. Geburtstag*, M. Avenarius,

R. Meyer-Pritzl, C. Möller (eds.), Göttingen, 2009, p. 421-444; S. Frühinsfeld, "Rechtsschutz von öffentlichen Wegen", in *Politische Räume* (*op. cit.*, n. 26), p. 37-46.

77 See E. v. Schwind, "Kritische Studien zur *Lex Baiuvariorum* I", *Neues Archiv der Gesellschaft für ältere deutsche Geschichtskunde*, 31, 1905, p. 399-453, at 445-446; F. Beyerle, "Die beiden süddeutschen Stammesrechte", *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Germanistische Abteilung*, 73, 1956, p. 84-140, at 123-128; W. Hartung, *Süddeutschland in der Merowingerzeit* (*op. cit.*, n. 49), p. 115. On the prologue to the Bavarian law code, often cited in this context, see below n. 88.

78 For a valuable introduction to this text see H. Siems, "Das Lebensbild der *Lex Baiuvariorum*", in *Rechtssetzung und Rechtswirklichkeit in der bayerischen Geschichte*, H.-J. Hecker, R. Heydenreuther, H. Schlosser (eds.), Munich, 2006, p. 29-73.

79 See H. Siems, "Herrschaft und Konsens in der *Lex Baiuvariorum* und den *Decreta Tassilonis*", in *Recht und Konsens im frühen Mittelalter*, V. Epp, C. Meyer (eds.), (forthcoming).

80 Lex Baiuvariorum. *Lichtdruckwiedergabe der Ingolstädter Handschrift*, K. Beyerle (ed.), Munich, 1926, XLVI-LIII.

81 P. Landau, *Die* Lex Baiuvariorum. *Entstehungszeit, Entstehungsort und Charakter von Bayerns ältester Rechts- und Geschichtsquelle*, Munich, 2004, whose position was adapted, with slight modifications, by E. Schumann, "Entstehung und Fortwirkung der *Lex Baiuvariorum*", in *Leges – gentes – regna* (*op. cit.*, n. 1), p. 291-319, at 303-306.

82 H. Brunner, "Über ein verschollenes merowingisches Königsgesetz des 7. Jh." (1901), in *Id.*, *Abhandlungen zur Rechtsgeschichte. Gesammelte Aufsätze*, Weimar, 1931, 1, p. 598-628. On Brunner, see now the excellent biographical study by J. Liebrecht, *Brunners Wissenschaft. Heinrich Brunner (1840–1915) im Spiegel seiner Rechtsgeschichte*, Frankfurt am Main, 2014.

83 F. Beyerle, "Die süddeutschen *Leges* und die merowingische Gesetzgebung. Volksrechtliche Studien II", *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Germanistische Abteilung*, 49, 1929, p. 264-432, at 346-372.

84 H. Nehlsen, "Italien, Bayern und die Langobarden", in *Bayern mitten in Europa. Vom Frühmittelalter bis ins 20. Jahrhundert*, A. Schmid, K. Weigand (eds.), Munich, 2005, p. 26-44.

85 H. Siems, "Herrschaft und Konsens" (*art. cit.*, n. 79).

86 H. Brunner, "Über ein verschollenes merowingisches Königsgesetz" (*art. cit.*, n. 82) also believed that a unifying redaction traces of older texts still visible in later recensions.

87 F. Beyerle, "Die süddeutschen Leges" (*art. cit.*, n. 83).

88 *Theuderichus rex Francorum, cum esset Catalaunis, elegit viro sapientes qui in regno suo legibus antiquis eruditi erant. Ipso autem dictante iussit conscribere legem Francorum et Alamannorum et Baioariorum unicuique genti quae in eius potestate erat, secundum consuetudinem suam, addidit quae addenda erant et inprovisa et inconposita resecavit. Et quae rant secundum consuetudinem paganorum mutavit secundum legem christianorum. Et quicquid Theuderichus rex propter vetustissimam paganorum consuetudinem emendare non potuit, post haec Hildibertus rex inchoavit, sed Chlotarius rex perfecit. Haec omnia Dagobertus rex gloriosissimus per viros inlustros Claudio, Chadoindo, Magno et Agilulfo renovavit et omnia vetera legum in melius transtulit et unicuique genti scriptam tradidit, quae usque hodie perseverant*. (ed. v. Schwind [*op. cit.*, n. 75], p. 197-203, at 201-203). On this text, see H. Brunner, "Über ein verschollenes merowingisches Königsgeset" (*art. cit.*, n. 82), p. 612-614; F. Beyerle, "Die süddeutschen *Leges*" (*art. cit.*, n. 83), p. 373-387; H. Nehlsen, "Italien, Bayern und die Langobarden" (*art. cit.*, n. 84). On Justinianic legal thinking still visibile in the prologue see G. B. Ladner, "Justinian's Theory of Law and the Renewal Ideology of the *Leges Barbarorum*", *Proceedings of the American Philosophical Society*, 119, 1975, p. 191-200.

89 H. Brunner, "Über ein verschollenes merowingisches Königsgesetz" (*art. cit.*, n. 82), p. 600-603 and 605.

90 See S. Esders, *Römische Rechtstradition und merowingisches Königtum. Zum Rechtscharakter politischer Herrschaft in Burgund im 6. und 7. Jahrhundert*, Göttingen, 1997, p. 228-232; *Id.*, "Spätantike und frühmittelalterliche Dukate" (*art. cit.*, n. 74), p. 445-446.

91 D. Liebs, "Roman law", in *Late Antiquity: Empire and Successors A.D. 425–60. The Cambridge Ancient History* XIV, A. Cameron, B. Ward-Perkins, M. Whitby (eds.), Cambridge, 2000, p. 238-259, at 247-249.

92 See S. Esders, "La loi ripuaire", in *Les lois barbares* (*op. cit.*, n. 1).

93 H. Siems, "Herrschaft und Konsens" (*art. cit.*, n. 79).

94 I. Fastrich-Sutty, *Die Rezeption des westgotischen Rechts* (*op. cit.*, n. 6).

95 K. Beyerle, "*Lex Baiuvariorum*" (*art. cit.*, n. 80).

96 C. Schott, "Lex und Skriptorium — Eine Studie zu den süddeutschen Stammesrechten", in *Leges – gentes – regna* (*op. cit.*, n. 1), p. 257-290, at 284-290. For a powerful argument against this view see H. Siems, "Herrschaft und Konsens" (*art. cit.*, n. 79).

97 H. Siems, "Herrschaft und Konsens" (*art. cit.*, n. 79).

98 I. Fastrich-Sutty, *Die Rezeption des westgotischen Rechts* (*op. cit.*, n. 6). – On these rulers' legislation see also P. D. King, *Law and Society in the Visigothic Kingdom*, Cambridge, 1972; *Id.*, "Chindasvinth and the first territorial law-code of Visigothic Kingdom", in *Visigothic Spain. New Approaches*, E. James (ed.), Oxford, 1980, p. 131-157.

99 Such influence is declined by H. Nehlsen, "Italien, Bayern und die Langobarden" (*art. cit.*, n. 84), p. 41-43.

100 See F. S. Lear, "The public law of the Ripuarian, Alamannic and Bavarian Codes" (1944), in *Id.*, *Treason in Roman and Germanic Law. Collected Papers*, Austin/Texas, 1965, p. 196-226.

101 H. Brunner, "Über ein verschollenes merowingisches Königsgesetz" (*art. cit.*, n. 82), p. 600-605.

102 *L. Bai.*, II, 1 (ed. v. Schwind [*op. cit.*, n. 75], p. 291-311).

103 H. Brunner, "Über ein verschollenes merowingisches Königsgesetz" (*art. cit.*, n. 82), p. 603-605.

104 *L. Bai.*, II (*De ducibus et eius causis quae ad eum pertinent*), 3 (ed. v. Schwind [*op. cit.*, n. 75]), p. 294.

105 *Ibidem*, II, 4 u. 10, p. 295-297 u. p. 304-305.

106 *Ibidem*, II, 5, p. 297-299.

107 *Ibidem*, II, 6, p. 299-300.

108 *Ibidem*, II, 10-12, p. 304-306.

109 *Ibidem*, II, 13, p. 307.

110 *Ibidem*, II, 14 (ed. v. Schwind [*op. cit.*, n. 75], p. 307-9).

111 *Ibidem*, II, 14-18, p. 307-11.

112 *Ibidem*, II, 9, p. 302-304, und *L. Alam.* 35 (*Leges Alemannorum*, K. Lehmann, K. A. Eckhardt (eds.), *MGH LL nat. Germ.*, V, 1, 1966, p. 92-93).

113 *L. Bai.*, II (*De ducibus et eius causis quae ad eum pertinent*) 1: *Si quis contra ducem suum quem rex ordinavit in provincia illa aut populus sibi elegerit*

ducem, de morte eius consiliatus fuerit et exinde probatus negare non potest, in ducis sit potestate homo ille et vita illius et res eius infiscentur in publico. Et hoc non sit per occasionem factum, sed probata res pateat veritatem. Nec sub uno teste, sed sub tribus testibus personis coaequalibus sit probatum. Si autem unus fuerit testis, et ille alter negaverit, tunc Dei accipiant iudicium: exeant in campo et cui Deus dederit victoriam, illi credatur. Et hoc in presenti populo fiat, ut per invidiam nullus pereat. Ut nullus Baiuuarius alodem aut vitam sine capitale crimine perdat. Id est, si in necem ducis consiliatus fuerit aut inimicos in provinciam invitaverit, aut civitatem capere ab extraneis machinaverit et exinde probatus inventus fuerit: tunc in ducis sit potestate vita ipsius et omnes res eius in patrimonium. Cetera vero, quaecumque commiserit peccata, quousque habet, substantiam conponat secundum legem. Si vero non habet, ipse se in servitio deprimat et per singulos menses vel annos quantum lucrare quiverit, persolvat cui deliquid, donec debitum universum restituat. 2: Si quis ducem suum occiderit, anima illius pro anima eius mortem quam intulit, recipiat et res eius infiscentur in publico in sempiternum (ed. v. Schwind [*op. cit.*, n. 75], p. 291-293). The translation is quoted from: *Laws of the Alamans and Bavarians*, Translated, with an introduction, by Theodore John Rivers, Philadelphia, 1977, 124, with modifications.

114 W. Sickel, "Das Wesen des Volksherzogthums", *Historische Zeitschrift*, 52 (= N. F. 16), 1884, p. 407-490.

115 *L. Alam.* (*op. cit.*, n. 112), p. 23-35, 84-93.

116 While the Bavarian system of conflict resolution (*lex*) was based on wergild and composition fines, the category of *crimina capitalia* certainly conveyed a notion of „public law" centered around the law of treason and thus introducing special sanctions, see H. Siems, "Herrschaft und Konsens" (*op. cit.*, n. 79).

117 As does the qualification of lesser offenses as *peccata*. On biblical justification of punishments, a striking feature of the Bavarian law code, see G. Köbler, "Die Begründungen der *Lex Baiwariorum*", in *Studien zu den germanischen Volksrechten. Gedächtnisschrift für Wilhelm Ebel*, G. Landwehr (ed.), Frankfurt am Main, 1982, p. 69-85.

118 Dig. 48, 4 (*Ad legem Iuliam maiestatis*), 7 § 3: *Hoc tamen crimen iudicibus non in occasione ob principalis maiestatis venerationem habendum est, sed in veritate* ([Iustiniani] *Digesta*, ed. T. Mommsen, Berlin, 1908, 845). See J. D. Cloud, "The Text of Digest XLVIII, 4 *Ad legem Iuliam maiestatis*", *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung*, 80,

1963, p. 207-232. On the reception see also H. Siems, “Herrschaft und Konsens” (*art. cit.*, n. 79).

119 See E. v. Schwind (*op. cit.*, n. 75), p. 292.

120 Dig. 48, 4, 7 § 1-2: *Famosi, qui ius accusandi non habent, sine ulla dubitatione admittuntur ad hanc accusationem. Sed et milites, qui causas alias defendere non possunt: nam qui pro pace excubant, magis magisque ad hanc accusationem admittendi sunt. Servi quoque deferentes audiuntur et quidem dominos suos: et liberti patronos* (ed. Mommsen [*op. cit.* n. 118], p. 845).

121 Codex Theodosianus IX, 14 [*Ad legem Corneliam de sicariis*], 3, published in 397: *Quisquis cum militibus vel privatis, barbaris etiam scelestam inierit factionem aut factionis ipsius susceperit sacramenta vel dederit, de nece etiam virorum illustrium qui consiliis et consistorio nostro intersunt, senatorum etiam (nam et ipsi pars corporis nostri sunt), cuiuslibet postremo qui nobis militat cogitarit (eadem enim severitate voluntatem sceleris qua effectum puniri iura voluerunt), ipse quidem utpote maiestatis reus gladio feriatur, bonis eius omnibus fisco nostro addictis***.** (*Theodosiani libri*, Mommsen, Meyer (eds.) [*op. cit.*, n. 31], 1, 458 = *Codex Iustinianus* IX, 8, 5: *Codex Iustinianus*, ed. P. Krüger, Berlin, 1915, p. 361). **See** R. A. Bauman, “Some Problems of the *Lex Quisquis*”, Antichthon, 1, 1967, p. 49-59; L. Kolmer, “Christus als beleidigte Majestät. Von der Lex *Quisquis* (397) bis zur Dekretale *Vergentis* (1199)”, in *Papsttum, Kirche und Recht im Mittelalter. Festschrift für Horst Fuhrmann zum 65. Geburtstag*, H. Mordek (ed.), Tübingen, 1991, p. 1-13, at 2-3.

122 S. Esders, “Treueidleistung und Rechtsveränderung” (*art. cit.*, n. 25), p. 33-35. J. Weitzel, “Das Majestätsverbrechen zwischen römischer Spätantike und fränkischem Mittelalter”, in- *Hoheitliches Strafen* (*op. cit.*, n. 18), p. 47-83 with a very different systematisation that I did not find convincing.

123 H. Siems, “Herrschaft und Konsens” (*art. cit.*, n. 79).

124 *Gregory the Great*, Letters, XIII, 49 (*S. Gregorii Magni registrum epistularum*, D. Norberg (ed.), *Corpus Christianorum Ser. Lat.* 140A, Turnhout, 1982, p. 1058-1064; see also T. Mommsen (*op. cit.*, n. 118), p. 803.

125 T. Mommsen, *Römisches Strafrecht*, Leipzig, 1899, p. 30-33.

126 On arbitary punishment see S. Esders, “Treueidleistung und Rechtsveränderung” (*art. cit.*, n. 25), p. 36-37.

127 On the Roman law of pardon in general see W. Waldstein, *Untersuchungen zum römischen Begnadigungsrecht.* Abolitio – indulgentia – venia, Innsbruck, 1964, p. 78-82. On its different character and function in the Roman military, including such sanctions as the *decimatio*, see T. Mommsen, *Römisches Strafrecht* (*op. cit.*, n. 125), p. 27-33; A. Müller, "Die Strafjustiz im römischen Heere", *Neue Jahrbücher für das klassische Altertum, Geschichte und deutsche Literatur*, 9, 1906, p. 550-577, at 553; E. Sander, "Das römische Militärstrafrecht" (*art. cit.*, n. 36), p. 291; J. H. Jung, "Die Rechtsstellung der römischen Soldaten" (*art. cit.*, n. 29), p. 967-973 and 995; J. Rüpke, Domi militiae. *Die religiöse Konstruktion des Krieges in Rom*, Stuttgart, 1990, p. 91 and 93.

128 See above n. 118 and 120.

129 A. Müller, "Die Strafjustiz" (*art. cit.*, n. 127), p. 563-564.

130 Maurice, *Strategikon*, I, 6, 6: Εἴ τις παραφυλακὴν πόλεως ἢ κάστρου πιστευθεὶς τοῦτο προδώσει ἢ παρὰ κέλευσιν του ἄρχοντος αὐτοῦ ἐκεῖθεν ἀναχωρήσει, ἐσχάτῃ τιμωρίᾳ ὑποβληθείη. (ed. G. T. Dennis, *op. cit.*, n. 34, p. 94; see also *ibid.* I, 7, 15 at 98). The provisions on military law as contained in the Strategikon are part of a long and old legal tradition not extant anymore in surviving texts. Thus, by referring to the Strategikon, I do not intend to suggest that this Greek text was known in Merovingian Gaul, but rather want to point to Roman tradition of miliatry law that spread widely and came to be integrated in many later texts.

131 See above n. 113.

132 *L. Alam.*, 25: *Si homo aliquis gentem extraneam infra provinciam invitaverit, ut ibi praedam vastet hostiliter vel domos incendat, et de hoc convictus fuerit, aut vitam perdat aut in exilium eat, ubi dux miserit, et res eius infiscentur in publico* (ed. Lehmann – Eckhardt [*op. cit.*, n. 112], p. 84-85). Further parallels between the position of the duke in the *Lex Baiuvariorum* and *Lex Alamannorum* are demonstrated by I. Fastrich-Sutty, *Die Rezeption des westgotischen Rechts* (*op. cit.*, n. 6), p. 211.

133 J. Rüpke, *Domi militiae* (*op. cit.*, n. 127), p. 90 u. 95-96. Providing the enemy with food, weapons and horses was regarded as a form of treason already in the Roman period and paralleled with desertion, see A. Müller, "Die Strafjustiz" (*art. cit.*, n. 127), p. 564 (referring to Digest 48, 4, 4) and 567.

134 This distinction is often drawn in early medieval legal texts, which impose a multiplied fine for crimes committed *in hoste*. Relevant here is also the lifting of martial law by the deposition of arms (*armorum depositio*) and

the suspension of the military ban (*bannus resisus*), for which the vernacular term *scaftlegi* first appears in a capitulary given by Louis the Pious in 829: *Postquam comes et pagenses de qualibet expeditione hostili reversi fuerint, ex eo die super quadraginta noctes sit bannus resisus, quod in lingua theodisca scaftlegi, id est armorum depositio, vocatur* (*Capitularia regum Francorum 2*, A. Boretius, V. Krause (eds.), *MGH LL*, Sect. II, 2, 1897, No. 192, c. 13, p. 16. On this term, see A. de Sousa Costa, *Studien zu den volkssprachigen Wörtern in karolingischen Kapitularien*, Göttingen, 1993, p. 288-291; J. L. Nelson, "Violence in the Carolingian World and the Ritualization of Ninth-Century Warfare", in *Violence and Society in the Early Medieval West*, G. Halsall (ed.), Woodbridge, 1998, p. 90-107, at 95: "*Scaftlegi* looks ancient and Germanic, but translates a Roman phrase." Nelson, *ibid.* points to further vernacular terms from the Carolingian period bearing a stamp of the late Roman military.

135 *L. Bai.*, II, 3: *Si quis seditionem excitaverit contra ducem suum, quod Baiuuarii carmulum dicunt, per quem inprimis fuerit levatum, conponat duci DC solidos. Alii homines qui eum sequuti sunt illi similes et consilium cum ipso habuerunt, unusquisque cum CC solidis conponat. Minores populi qui eum secuti sunt et liberi sunt, cum XL solidis conponant, ut tale scandalum non nascatur in provincia* (ed. v. Schwind [*op. cit.*, n. 75], p. 294). This provision does not refer exclusively to the situation *in hoste*.

136 On the meaning of the old Bavarian term *carmulum* see D. v. Kralik, "Die deutschen Bestandteile der *Lex Baiuvariorum*", *Neues Archiv der Gesellschaft für ältere deutsche Geschichtskunde*, 38, 1913, p. 13-55, 401-449 and 581-624, at 425-429. The Latin term *seditio* is directly translated into a Bavarian word, suggesting that it should translate a legal systematization into the vernacular to make it easier to understand, but also to maintain the Latin classification. The persistence of Latin vocabulary as related to military matters and the relevance of Latin loanwords is most aptly illustrated by Maurice's Strategikon, where we find Latin terms directly inserted into the Greek text, see e. g. Strategikon XII B 24ed. G. T. Dennis (ed.) (*op. cit.*, n. 34), p. 484 and 486. See H. Mihaescu, "Les termes de commandement militaires latins dans le Strategicon de Maurice", *Revue roumaine de linguistique*, 14, 1969, p. 261-272; G. Reichenkron, "Zur römischen Kommandosprache bei byzantinischen Schriftstellern", *Byzantinische Zeitschrift*, 54, 1961, p. 18-27; T. G. Kolias, "Tradition und Erneuerung im frühbyzantinischen Reich am Beispiel der militärischen Sprache und Terminologie", in *L'armée romaine et les barbares du* III^{e} *au* VII^{e} *siècle*, F. Vallet, M. Kazanski (eds.), Saint-Germain-en-Laye, 1993, p. 39-44.

137 *L. Bai.*, II, 4; see below n. 140.

138 The distinction between *seditio* in general and *seditio* as committed within the army draws on a Roman model. For the former, see Dig. 48, 19 (*De poenis*), 38 § 2: *Actores seditionis et tumultus populo concitato pro qualitate dignitatis aut in furcam tolluntur aut bestiis obiciuntur aut in insulam deportentur* (ed. T. Mommsen [*op. cit.*, n. 118], p. 876); for the latter (*seditio atrox militum*) see Dig. 49, 16 (*De re militari*), 3, §§ 19-21: *Qui seditionem atrocem militum concitavit, capite punitur. Si intra vociferationem aut levem querellam seditio mota est, tunc gradu militiae deicitur. Et cum multi milites in aliquod flagitium conspirent vel si legio deficiat, avocari militia solent* (ed. T. Mommsen, *ibidem*, p. 888). See also J. H. Jung, "Die Rechtsstellung" (*op. cit.*, n. 29), p. 996.

139 As again becomes evident from Maurice's Strategikon I, 6, 5: "If some dare to instigate a conspiracy or sedition against the commander of their unit for whatever reason, they shall be decapitated, in particular the leaders of the gang" (Εἴ τινες τολμήσωσι συνωμοσίαν ἢ φατρίαν ἢ στάσιν κατὰ τοῦ ἄρχοντος τοῦ ἰδίου ποιῆσαι ὑπὲρ οἱασδήποτε αἰτίας, κεφαλικῇ τιμωρίᾳ ὑποβληθῶσι, κατ᾽ ἐξαίρετον οἱ πρῶτοι τῆς συνωμοσίας ἢ τῆς στάσεως γενόμενοι; ed. G. T. Dennis, [*op. cit.*, n. 34] p. 94-5). This passage seems to reflect a fundamental principle of Roman military law. On *conspiratio* see the *Lex ‚Quisquis'* (quoted above n. 121), and J. H. Jung, "Die Rechtsstellung" (*op. cit.*, n. 29), p. 996.

140 *L. Bai.*, II, 4: *Si quis in exercitu quem rex ordinavit vel dux de provincia illa scandalum excitaverit infra proprium hostem, et ibi homines mortui fuerint, conponat in publico DC solidos. Et quisquis ibi aut percussiones aut plagas aut homicidium fecerit, conponat sicut in lege habet, unicuique secundum suam genealogiam. Et ille homo qui haec commisit, benignum inputet regem vel ducem suum, si ei vitam concesserint. De minoribus autem hominibus, si in hoste scandalum commiserint, in ducis sit potestate qualem poenam susteneant. Et ille usus eradicandus est, ut non fiat: Solet enim propter pabula equorum vel propter ligna fieri scandalum, quando aliqui defendere volunt casas vel scurias ubi fenum vel granum inveniunt. Hoc vetandum est, ne fiat. Ut si quis invenerit pabulum vel ligna, tollat quantum vult, et nemine vetet tollendi, ut per hoc scandalum non nascatur. Si quis hoc ausus fuerit facere aut contradicere aliquid quod facere lex vetat, illi tunc, si inventus fuerit, coram duce disciplinae hostili subiaceat vel ante comitem suum, id est L percussiones accipiat* (ed. v. Schwind [*op. cit.*, n. 75], p. 295-297). Translation by Rivers (*op. cit.*, n. 113), p. 125.

141 See F. Beyerle, "Die süddeutschen *Leges*" (*art. cit.*, n. 83), p. 355-356 emphasizing the Frankish background visible in the general clause *dux de provincia illa*.

142 M. Fuhrmann, "*Verbera*", *Pauly's Realencyclopädie der classischen Altertumswissenschaft*, Suppl., 9, 1962, p. 1589-1597. See also O. Stoll, ",Heeresdiziplin'. Vom Einfluß Roms auf die Germanen", in *Id.*, *Römisches Heer und Gesellschaft. Gesammelte Beiträge 1991-1999*, Stuttgart, 2001, p. 269-279.

143 On the meaning of *heimzuht* and *heriraita* see v. Kralik, "Die deutschen Bestandteile" (*art. cit.*, n. 136), p. 438-439. Sousa Costa, *Studien zu den volkssprachigen Wörtern* (*op. cit.*, n. 134), p. 321-322 clearly underrates the military importance of these terms. For the legal distinction see also H.-R. Hagemann, "Vom Verbrechenskatalog des altdeutschen Strafrechts", *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Germanistische Abteilung*, 91, 1974, p. 1-72, at 13-17.

144 *L. Bai.*, IV (*De liberis, quomodo conponuntur*), 23: *Si quis liberum hostili manu cincxerit, quod heriraita dicunt, id est cum* XLII *clyppeis, et sagittam in curtem proiecerit aut quodcumque telarum genus, cum* XL *solidis conponat; duci vero nihilominus.* 24: *Si autem minus fuerint scuta, verum tamen ita per vim iniuste cincxerit, quod heimzuht vocant, cum* XII *solidis conponat* (ed. v. Schwind [*op. cit.*, n. 75], p. 331-332).

145 As is attested for the reign of Charles the Bald by the Capitulare Silvacense of 853, c. 3: *Similiter de collectis, quas Theudisca lingua herizuph appellat, et de his, qui immunitates infringunt et qui incendia et voluntaria homicidia ad adsalituras in domos faciunt* (*Capitularia regum Francorum* 2 [*op. cit.*, n. 134], No. 260, 272).

146 *Pactus legis Salicae*, 42 (*De homicidiis ingenuorum*) and 43 (*De homicidiis a contubernio factis*) (ed. K. A. Eckhardt, *MGH LL nat. Germ.*, IV, 1,1962, p. 154-156 u. 162-64) are based on the same systematization as the Bavarian provision on *heimzuht* and *heriraita*. On *hariraida* see also Lex Ribuaria 67 (64) (*De homine in domo propria occiso*) (F. Beyerle, R. Buchner (éds.), *MGH LL nat. Germ.*, III, 2, 1954, p. 118), with specifications.

147 H.-R. Hagemann, "Vom Verbrechenskatalog" (*art. cit.*, n. 143), p. 16-19.

148 *Ibidem*, p. 21.

149 This is most obvious in the so-called *Summula de bannis*, transmitted in an early 9th century manuscript from Northeastern France (Bamberg, Staatsbibliothek, Jur. 35) that also contains *Lex Salica*, *Lex Ribuaria* and *Lex*

Alamannorum: *De octo bannus unde domnus noster vult, quod exeant solidi LX.* […] 5: *Qui raptum facit, hoc es qui feminam ingenuam trahit contra voluntatem parentum suorum.* 6: *Qui incendium facit infra patriam, hoc est qui incendit alterius casam aut scuriam.* 7: *Qui harizhut facit hoc est qui frangit alterius sepem aut portam aut casam cum virtute* (*Capitularia regum Francorum* 1, A. Boretius (ed.), *MGH LL Sect.*, II, 1, 1883, No. 110, p. 224). On the manuscript see H. Mordek, *Bibliotheca capitularium regum Francorum manuscripta* (*op. cit.*, n. 14), p. 17-18.

150 *L. Bai.*, II (*De ducibus et eius causis quae ad eum pertinent*), 5: *Si quis in exercitu infra provincia sine iussione ducis sui per fortiam hostilem aliquid praedere voluerit aut fenum tollere aut granum vel casas incendere, hoc omnino testamur, ne fiat. Et exinde curam habeat comis in suo comitatu; ponat enim ordinationem suam super centuriones et decanos et unusquisque provideat suos quos regit, ut contra legem non faciant. Et si aliquis praesumptiosus hoc fecerit, a comite illo sit requirendum cuius homo hoc fecit. Et si ille comis neglexerit inquirere quis hoc fecit, ille omnia de suis rebus restituat; tamen tempus requirendi habeat. Et si talis homo potens hoc fecerit, quem ille comes destringere non potest, tunc dicat duci suo et dux illum distringat secundum legem. Si liber est, XL solidos sit culpabilis et omnia similia restituat. Si servus hoc fecerit, capitali subiaceat sententiae; dominus vero eius omnia similia restituat, quia servo suo non contestavit, ut talia non faceret. Quia si vosmet ipsos comeditis, cito deficitis. Comes tamen non neglegat custodire exercitum suum, ut non faciant contra legem in provincia sua* (ed. v. Schwind [*op. cit.*, n. 75], p. 297-298). Translation by Rivers (*op. cit.*, n. 113), p. 125-126.

151 *Capitularia regum Francorum*, 1, Boretius (ed.) (*op. cit.*, n. 149), No. 1, p. 1-2.

152 See Gregory of Tours, *Liber historiarum*, VIII, 30 (B. Krusch, W. Levison (eds.), *MGH SS rer. Mer.*, I, 1^2, Hanover, 1951, p. 393-395.

153 On the adaptation of Roman military offices into Frankish administration see A. C. Murray, "From Roman to Frankish Gaul: *Centenarii* and *centenae* in the administration of the Merovingian kingdom", *Traditio*, 44, 1988, p. 59-100.

154 In addition to the Visigothic reference given by I. Fastrich-Sutty, *Die Rezeption westgotischen Rechts* (*op. cit.*, n. 6), 155 as a base for *L. Baiuv.*, II, 5 (*L. Vis.*, VIII, 1, 9: *Leges Visigothorum*, ed. K. Zeumer, *MGH L nat. Germ.*, I, 1, 1902, 316-7) one should note that some Visigothic *Antiquae* (e.g. L. Vis. IX, 2, 3 u. 4, ibd. 367-8) refer to the complete military hierarchy as in the Bavarian

clause, that is including the *comes* (*civitatis*), the *centenarius* and the *decanus*.

155 On the term *districtio* and its semantic connectedness to *rigor*, *severitas* and *disciplina militaris* see F. Schulz, "Roman registers of births and birth certificates", *Journal of Roman Studies*, 32, 1942, p. 78-91 and 33, 1943, p. 55-64, at 62.

156 On the Frankish *bannus* and its possibe derivation from the Roman legal concept of *imperium* see W. E. Voss, "Vom römischen Provinzialprozeß" (*art. cit.*, n. 16), p. 104-105. On the terminology related to *bannus* see also H. Wiessner, *Twing und Bann. Eine Studie über Herkunft, Wesen und Wandlung der Zwing- und Bannrechte*, Vienna, 1935.

157 See L. Sarti, *Perceiving War and the Military* (*op. cit.*, n. 42), p. 102-129 and 249-288.

158 S. Esders, "Treueidleistung und Rechtsveränderung" (*art. cit.*, n. 25); *Id.*, "Rechtliche Grundlagen" (*art. cit.*, n. 25).

159 *Formula Marculfi*, I, 40 (*Formulae Merovingici et Karolini aevi*, ed. K. Zeumer, *MGH LL Sect.*, V, 1886, p. 68). *Leudes* is a vernacular term equivalent to *homines* here.

160 As we find find it in two formulas for the oath of fidelity sworn to Charlemagne in 802: *Capitularia regum Francorum*, 1, ed. Boretius (*op. cit.*, n. 149), No. 34, p. 101-102; see S. Esders, "Fidelität und Rechtsvielfalt. Die *sicut*-Klausel der früh- und hochmittelalterlichen Eidformulare", in *Hiérarchie et stratification sociale dans l'Occident médiéval (400-1100)*, F. Bougard, D. Iogna-Prat, R. Le Jan (eds.), Turnhout, 2008, p. 239-255.

161 H. Siems, "Herrschaft und Konsens" (*art. cit.*, n. 79).

162 *L. Bai.*, III: *Dux vero qui presest in populo, ille semper de genere Agilofingarum fuit et debet esse, quia sic reges antecessores nostri concesserunt eis: ut qui de genere illorum fidelis regi erat et prudens, ipsum constituerunt ducem ad regendum populum illum* (ed. v. Schwind [*op. cit.*, n. 75], p. 313).

163 S. Esders, "Treueidleistung und Rechtsveränderung" (*art. cit.*, n. 25), p. 33-37.

164 See above n. 121 the passage quoted from the *Lex ‚Quisquis'* of 397.

165 J. Weitzel, "Das Majestätsverbrechen" (*art. cit.*, n. 122) does to my mind not offer a convincing explanation for the similiarities and differences between *maiestas* and *infidelitas* by tracing the former to Roman and the latter to (what he believes was) "Germanic" legal tradition.

166 L. *Bai.*, I, 13 (ed. v. Schwind [*op. cit.*, n. 75], p. 286-290). See W. Metz, "Die hofrechtlichen Bestimmungen der *Lex Baiuvariorum* I, 13 und die fränkische Reichsgutverwaltung", *Deutsches Archiv für Erforschung des Mittelalters*, 12, 1956, p. 187-196; T. J. Rivers, "The Manorial System in the Light of *Lex Baiuvariorum* I, 13", *Frühmittelalterliche Studien*, 25, 1991, p. 89-95; such obligations were often referred to as *servitia publica* in the early medieval period. See S. Esders, "‚Öffentliche' Abgaben und Leistungen im Übergang von der Spätantike zum Frühmittelalter: Konzeptionen und Befunde", in *Von der Spätantike zum frühen Mittelalter* (*op. cit.*, n. 8), p. 189-244, at 193-194.

167 H. Siems, "Herrschaft und Konsens" (*art. cit.*, n. 79).

168 I. Fastrich-Sutty, *Die Rezeption des westgotischen Rechts* (*op. cit.*, n. 6).

169 H. Brunner, "Über ein verschollenes merowingisches Königsgesetz" (*art. cit.*, n. 82), p. 605 and 618.

170 S. Esders, "Spätantike und frühmittelalterliche Dukate" (*art. cit.*, n. 74), p. 428-433.

171 See above n. 130 and 139.

172 K. Zeumer, "Geschichte der westgotischen Gesetzgebung II", *Neues Archiv der Gesellschaft für ältere deutsche Geschichtskunde*, 24, 1899, p. 39-122, at 59-60.

173 On the *Codex Euricianus* see J. Harries, "Not the Theodosian Code: Euric's Law and Late Fifth-Century Gaul", in *Society and culture in late antique Gaul, revisiting the sources*, R. W. Mathisen, D. R. Shanzer (eds.), Aldershot, 2001, p. 39-51; D. Liebs, *Römische Jurisprudenz in Gallien* (*op. cit.*, n. 16), p. 157-163. On the background see M. Koch, *Ethnische Identität im Entstehungsprozess des spanischen Westgotenreiches*, Berlin-New York, 2012, p. 59-71.

174 W. Kienast, "Gefolgswesen und *Patrocinium* im spanischen Westgotenreich", *Historische Zeitschrift*, 239, 1984, p. 23-75.

175 I. Fastrich-Sutty, *Die Rezeption des westgotischen Rechts* (*op. cit.*, n. 6), p. 155-157 and 211-213.

176 See M. E. Osaba García, "En torno a *Lex Visigothorum* IX, 2: ‚*De his qui ad bellum non vadunt aut de bello refugiunt*", in Civitas, iura, arma. *Organizzazioni militari, istituzioni giuridiche e strutture sociali alle origini dell'Europa (sec. III–VIII). Atti del Seminario internazionale Cagliari 5-6 ottobre 2012*, F. Botta / L. Loschiavo (eds.), Lecce, 2015, p. 159-191.

177 See above n. 113.

178 Further parallels – not dealt with in this article – include the ninefold multiplication of penal fines, see, e.g., *L. Bai.*, II, 12 (ed. v. Schwind [*op. cit.*, n. 75], p. 306) and *L. Vis.*, IX, 2, 5 (*Antiqua*), ed. Zeumer (*op. cit.*, n. 154), p. 368-369.

179 R. Sprandel, "*Dux* und *comes* in der Merovingerzeit", *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Germanistische Abteilung*, 74, 1957, p. 41-84, at 55. Visigothic *duces* are first attested in the laws of king Chindasvinth (a. 642-653). One cannot rule out the possibility of Lombard influence here, since duces are attested in Lombard Italy much earlier.

180 H. Brunner, "Über ein verschollenes merowingisches Königsgesetz" (*art. cit.*, n. 82).

181 See H. Siems, "Herrschaft und Konsens" (*art. cit.*, n. 79).

182 See above n. 113 and 117.

183 G. Köbler, "Die Begründungen" (*art. cit.*, n. 117), p. 69-85. On the literary character of some passages in the Bavarian code see F. Beyerle, "Die beiden süddeutschen Stammesrechte" (*art. cit.*, 77), p. 119-120.

184 The possible function of Augsburg both as episcopal see and as the duke's residence (see above, n. 58 and 59) might have an impact on the interpretation of some ecclesiastical provsions contained in the Bavarian code.

185 See above n. 136 and 143. On veracular terminology in early medieval Bavaria see H. Tiefenbach, "*Quod Paiuuari dicunt* — Das altbairische Wortmaterial der *Lex Baiuuariorum*", in *Die bairische Sprache. Studien zu ihrer Geographie, Grammatik, Lexik und Pargmatik. Festschrift für Ludwig Zehetner*, A. Greule, R. Hochholzer, A. Wildfeuer (eds.), Regensburg, 2004, p. 263-290; W. Haubrichs, "Baiern, Romanen und Andere: Sprachen, Namen, Gruppen südlich der Donau und in den östlich der Alpen während des frühen Mittelalters", *Zeitschrift für bayerische Landesgeschichte*, 69, 2006, p. 395-465.

186 H. Tiefenbach, "*Quod Paiuuari dicunt*" (*art. cit.*, n. 185).

ABSTRACTS

English
This paper investigates the influence of late Roman military law on the *Lex Baiuvariorum* – a text, which served as the basis for the Merovingian kings' organization of the Frankish kingdom's eastern border-region as a *ducatus* or duchy. Particular considerations concerning the historical background of the Bavarian duchy's formation will be addressed, after which provisions for the protection of the Bavarian *dux* or duke, largely as relates to treason and military discipline, will be investigated. By comparing sources for the Roman *crimen laesae maiestatis* and other legal texts of Roman military writers, it will be demonstrated that the provisions of the Bavarian law-code clearly bear the influence of Roman military law.

Français
Cet article étudie l'influence du droit militaire romain tardif sur la *Lex Baiuvariorum* un texte, qui a servi de base aux rois mérovingiens pour l'organisation en duché (*ducatus*) de l'est de la région frontalière du royaume franc. Il prend particulièrement en considération le contexte historique de la formation du duché de Bavière. Ensuite, les dispositions pour la protection du duc (*dux*) de Bavière seront étudiées, se rapportant essentiellement à la trahison et la discipline militaire. En comparant les sources sur le crime de lèse-majesté romain et d'autres textes juridiques d'auteurs militaires romains, il sera démontré que les dispositions de la loi bavaroise portent clairement l'influence du droit militaire romain.

INDEX

Mots-clés
droit militaire romain tardif, duché de Bavière, rois mérovingiens, Lex Baiuvariorum

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