

Remarks on the Creation and the Prologue of *Lex Baiuvariorum*

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Abstract. *Lex Baiuvariorum* is Bavaria's most important and earliest source in terms of legal history. This paper deals with the history of the creation of *Lex Baiuvariorum*. More specifically, dwelling on the issues of dating of *Lex Baiuvariorum* (I), possible connections between the content of the narrative in the *Prologus* and the process of making the code of laws (II), significance of the first two titles of the code in terms of dating (III) and problems arising with regard to the process of editing *Lex Baiuvariorum* (IV).

Keywords: early medieval legal history, *Lex Baiuvariorum*, edition of medieval laws

I

What we can state with full knowledge of currently available facts is that *Lex Baiuvariorum* has been left to us in more than thirty manuscripts, divided by Merkel into seven manuscript groups (marked A, B, C, D, E, F and G) (Siems 1978: 1887 ff.; Merkel 1863: 184 ff.; Beyerle 1926: XCII ff.). In addition to the manuscripts listed by Merkel, another three manuscripts containing some fragments of *Lex Baiuvariorum* need to be reckoned with (Schwind 1926: 194). In almost all of the manuscripts, a table of contents listing the titles of chapters precedes the actual text of the code, and only the manuscripts marked A1 and A2 include chapter *rubricationes* adopted from this list to the text, the rest of the manuscripts contain numbered chapters only (Fastrich-Sutty 2001: 12). *Lex Baiuvariorum* consists of twenty-two (or twenty-three) *titles* including two hundred and sixty-eight (or two hundred and seventy) *capita*; the numbering of *capita* vary from manuscript (group) to manuscript (group).

In the literature of the modern age, it was Konrad Peutinger who dealt with *Lex Baiuvariorum* for the first time in his work entitled *Sermones Convivales*; however, the text aroused the interest of Beatus Rhenanus and Aventinus as well (Peutinger 1506; Rhenanus 1531; Aventinus 1521). The text was first published in 1520 as a work edited by Johann Böhm (Böhm 1520). In 1530, Johann Sihard compiled the text editions of early medieval German folk laws in a single volume; thereby, *Lex Baiuvariorum* was published again (Sichard 1530). Jean du Tillet, bishop of Meaux and almost at the same time Johann Basilius Herold published a more complete collection of ancient German laws in 1557 in Basel, including a manuscript from Fulda which served as the basis of the edition of *Lex Baiuvariorum* (Tilius 1573; Herolt 1557). In 1613, Freidrich L. Lindenbrog, using Tilius's edition and taking Herold's *editio* into account, made his own text edition, which was later

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adopted and used by Petrus Georgisch in his edition in 1738—this latter edition was based on the above mentioned two earlier editions since Georgisch made it without investigating the original codices (Lindenbrogius 1613; Georgisch 1738). In 1783, Paul Canciani straightly adopted Georgisch's edition (Canciani 1783).

The questions arising with regard to *Lex Baiuvariorum* were addressed in medievalist research from the end of the 18th c. already. Johann Nepomuk Mederer (1734–1803), a former Jesuit, later the professor of the university of Ingolstadt, published his work on the basis of the manuscript owned by the university of Ingolstadt since the 16th c., at present kept at the Universitätsbibliothek of Munich (Mederer 1793; Bischoff 1974–1980: I. 249). Regarding the manuscript from Ingolstadt, Mederer established already that as the earliest manuscript of *Lex Baiuvariorum* it was presumably created at the end of the 8th century (Schwind 1926: 184; Mederer 1793: XXX). In addition to the codex of Ingolstadt, Mederer listed another five manuscripts in his book: the manuscripts from the monastery of Tegernsee, Benediktbeuern, Aldersbach, Oberaltaich and Herrenchimsee—today, these codices are at the Bavarian Staatsbibliothek (Mederer 1793: XXX–XXXIV). At present, we know of more than thirty medieval manuscripts of *Lex Baiuvariorum*, and thereby, besides the eighty-seven manuscripts of *Lex Salica* left to us in eight versions and the approx. fifty manuscripts of *Lex Alamannorum* it is one of the collections of German folk law that have been left to us in the best form (Schott 1978: 1879; Merkel 1858: 533–687; Schwind 1912: 415–451; Krusch 1924: 38–163; Kottje 1986: 9–23). Paul Roth (1820–1892), legal historian from Munich, in his dissertation of 1848 published in Munich, entitled “Über die Entstehung der Lex Bajuvariorum”, considers *Lex Baiuvariorum* a work having been developed step by step, not made uniform when being edited—he supported this view by further arguments (Roth 1848: 1. ff.). Its first critical edition, made by Savigny's disciple, Johannes Merkel (1819–1861) for the *Monumenta Germaniae Historica*, was published also in this period. The process of critical edition commenced by Merkel's *editio* in 1862. As it has been mentioned above, he divided the manuscripts into seven classes and classified them into three large groups, recording three text versions and levels of editing (Merkel 1863: 205 ff.). Merkel's edition can give the impression that originally *Lex Baiuvariorum* might have had three different text layers but Schwind already called the attention to the fact that this impression was false when he stated that this classification was the result of the systematisation of the text variants carried out by Merkel. For this reason, as early as in 1906 Schwind emphatically called the attention to the indispensable need to provide a new critical edition of *Lex Baiuvariorum* as soon as possible (Schwind 1912: 415). This Schwind's edition was published in 1926, and, contrary to Merkel's system, it indicated variants and possible deviations in a single uniform body of text. Very soon, the edition was heavily attacked; among others, Krusch severely criticised Schwind's systematisation (Krusch 1927; Krusch 1938: 1–8). From among later editions, Beyerle's facsimile edition and Eckhardt's *editio* based on three text classes should be underlined (Beyerle 1926; Eckhardt 1934).

Heinrich Brunner (1840–1915), in his study published in 1901—in line with the thought of the German empire having gained ground—states that *Lex Baiuvariorum* came from a 7th c. Merovingian royal law, which has been lost in the meantime, and based on this hypothesis the Bavarian *lex* would be nothing else than a further developed/shaped provincial version of Frankish imperial law (Brunner 1931: 598–621). The legal historian from Vienna, Ernst von Schwind published the *editio* of *Lex Baiuvariorum* (or as he spelled it: *Baiuvariorum*) in 1926 as part of the *Monumenta Germaniae Historica*, which had been heavily attacked before it was published (Schwind 1926). To investigate the critical edition of *Lex*

Baiuvariorum, the MGH set up an independent committee in 1920, and as part of that Bruno Krusch (1957–1940) severely criticised Schwind’s work described as “serious derailment”, and voiced his conviction in 1924 already (Krusch 1924: 4 ff.; Heymann 1926: 116–137). Krusch refused the thesis of both gradual development set up by Paul Roth and descent from Frankish royal law represented by Heinrich Brunner (Krusch 1927: 39 f.). In his view, *Lex Baiuvariorum* was promulgated in 729 by Charles Martell as an *edictum* of the Frankish ruler, during a campaign in Bavaria; according to Krusch’s hypothesis, by this law forced on Bavaria the Dukedom of Bavaria lost its independence, and the Bavarian Duke became the vassal of the Frankish ruler (Krusch 1924: 271 ff.)

In 1926, Konrad Beyerle (1872–1933), legal historian from Munich, published his work containing the facsimile, transcription and translation into German of the manuscript from Ingolstadt, with an introduction amounting to a monograph, in which he asserts that *Lex Baiuvariorum* is not based on some royal or duke’s law but goes back to a church *auctor*, which seems to be supported also by the strong ecclesiastical character (Beyerle 1926). However, this *auctor*—in view of the correspondences and overlapping with Western gothic content demonstrated earlier—most probably did not come from the Bavarian clergy. Beyerle specifies the monastery of Niederalteich, that is, the Bavarian monastery known by him as the earliest Bavarian monastery, which provably existed around 740 already, as the place of origin. Tradition considers Eberswind the founding abbot of the monastery of Niederalteich—the name Eberswind implies western Gothic origin—and the monks of the monastery came from Reichenau; all this makes it probable that they might have mediated the western Gothic legal material to the Bavarian Church, which attained a solid structure at that time. So, according to Beyerle’s view, *Lex Baiuvariorum* is the work of ecclesiastical author(s) or editor(s), and the *Prologus* is to ensure that the law should make the impression of a royal legal source. With respect to the *ex asse* Bavarian legal material, the monks might have asked for the advice of Bavarian *iudices*, who were, perhaps on the ruler’s express order, available at the duke’s court in Regensburg to the monks who compiled the legal material. As a matter of fact, this theory, which claims that *Lex Baiuvariorum* is the product of editing work of the Church, makes the “folk law” character of the *lex* questionable (Beyerle 1926: LXVI–LXXIV). To sum it up: Konrad Beyerle formulated the following statements: *Lex Baiuvariorum* was created between 741 and 743; the place of its creation is Niederalteich; its compilers were members of the clergy, who also used official assistance of the duke but proceeded on the grounds of informal assignment.

Konrad Beyerle’s position was adopted by Karl August Eckhardt (1901–1979); Ernst Mayer (1862–1932) returned to the theory on gradual development, however, he presumed the existence of a Frankish source from the end of the 6th c. as the basis of the text, which can be traced back to Childebert II, and was built into *Lex Alamannorum*, *Lex Baiuvariorum* as well as *Edictus Rothari*. Mayer asserts that *Lex Baiuvariorum* assumed its present form during the reign of Duke Hucbert (728–737), on the ruler’s order; that is, it can be considered duke’s law (Mayer 1929: 82 ff.). Ulrich Stutz (1868–1938) took a position against ecclesiastical influence and overweight of canon law elements, all the more as the dozen of monks who founded the monastery must have been occupied during the organisation of the operation of Niederalteich for long years by works more common than compilation of the law, such as deforestation (Stutz 1934: 18 f.). Konrad Beyerle’s theses were opposed most resolutely by his younger brother, Franz Beyerle (1885–1977), legal historian from Basel, who claimed that the ecclesiastical provisions of *Lex Baiuvariorum* and *Lex Alamannorum* had been made much before the 8th c. According to Franz Beyerle, a significant part of *Lex Baiuvariorum* had been created as Merovingian royal law before

614, and later on he took the position that it was created during the reign of Theudebert I (532–548) already and continuous novella additions were attached to it up to the 7th c. (Beyerle 1929: 264 ff.; Beyerle 1956: 84 ff.). This theory on *Lex Baiuvariorum* created in the age of Theudebert I, supplied with the novellas of Childebert II and Chlothar II and reedited during the reign of Dagobert I was later adopted by Kurt Reindel too (Reindel 1981: 244). To Franz Beyerle, *Lex Baiuvariorum* is the proof of the high cultural standard of the late antiquity of the former provinces, and in his view the western Gothic elements borrowed from *Codex Euricianus* can be attributed specifically to Parthenius, who was brought up in Theoderich's court in Ravenna, all the more as for a time Bavaria was under eastern Gothic rule, and so the elements of Gothic law could not have been totally alien to this territory. Accordingly, Franz Beyerle lays great emphasis on his conviction that ecclesiastical influence can be considered negligible in the making of *Lex Baiuvariorum*, and this Roman/German intellectual property excellently proves the presence of Antique cultural heritage in the 6th c. on south German territories (Liebs 2002: 62 f.; Beyerle 1956: 127 ff.).

The following decades brought the research of *Lex Baiuvariorum* further regarding several details: according to Krause and Morsak the *auctor* was most probably a member of the clergy; Harald Siems's works, in addition to addressing new aspects, properly summed up the more than two centuries long history of the research; and Isabella Fastrich-Sutty provided interesting additional information on the western Gothic impact (Krause 1969: 70; Morsak 1977: 201; Siems 1978: 1887–1901; Siems 2002: 305–315; Siems 1992: 85 ff.; Fastrich-Sutty 2001).

II

With regard to dating of *Lex Baiuvariorum*, literature several times raises the issue of correspondence of the *Prologus* to historical facts and evaluation of the content elements of the first two titles of the text of the code (on regulations of the Church and the duke). Concerning the creation of *Lex Baiuvariorum*, two definitely contrary views should be distinguished: (i) the unity theory (*Einheitstheorie*) and (ii) the theory of creation in several steps (*Schichtentheorie*). The adherents of the latter theory assert that the version of *Lex Baiuvariorum* left to us presume the existence of at least three text layers that can be clearly separated in time. Representatives of the unity theory, setting out from the introductory sentence of *titulus* one of *Lex Baiuvariorum*, trace the creation of the code back to a uniform royal lawmaking intention and the approval provided by the people at a Frankish imperial assembly (Hohenlohe 1932: 5 ff.; Siems 1978: 1887 f.).

Approximately two-thirds of the *Prologus* of *Lex Baiuvariorum* come from Isidorus's *Etymologiae*, more specifically, book five of this work,¹ which discusses the history of the codification of the Antiquity and its certain mythical elements, and determines—as a kind of legal theory exposition—the relation between law, statutes and unwritten law. Furthermore, the *Prologus* contains a short narrative on king Theuderich's lawmaking activity, in other words, on the creation of the laws recorded for the Franks, the Alemannians and the Bavarians on the orders of the king.

The authenticity of the *Prologus* became the subject of scientific discussion for the first time in the 17th c.; in his work published in 1643 Hermann Conring did not doubt that

¹ *Lex Baiuvariorum* 5, 1, 1–7; 5, 3, 1–4.

the description corresponded to facts (Conring 1643). It was Mederer who pointed out for the first time in 1793 that the text of *Lex Baiuvariorum* and the codification history narrative of the prologue contradict each other at several points; if the content of the *Prologus* fully stood its ground, then the text of the code known to us would have been created in the 7th c., which is contradicted by the provisions of the *lex* that presume the existence of a stable and complex Bavarian church organisation, which fully developed in the first third of the 8th c. only (Mederer 1793: 32 ff.). From that time onward, the authenticity of the narrative of the *Prologus* was doubted by more and more scientists: Gfrörer, who analysed the *Prologus* of the Alemannian code as well, and Schröder branded the text sheer forgery (Gfrörer 1865: 168; Schröder 1932: 234). As a matter of fact, there were attempts at “rehabilitating” the *Prologus* somehow; for example, Brunner interpreted the codification history narrative as a description of the revision of a Merovingian imperial law. Accordingly, this imperial law was issued by king Dagobert I between 629 and 634, and with a scope covering several dukedoms at that. Brunner wanted to support this argument, among others, by the provisions set out in *titulus* one and *titulus* two, and finally drew the conclusion that *Lex Baiuvariorum* assumed its form known to us during the period of duke Odilo, i.e., between 744 and 748 (Brunner 1906: 453 ff.). Gengler takes a stand for dating the code of laws from the 7th c., and justifies this view by stating that in terms of genre the *Prologus* belongs to the world of historical narratives, i.e., historiography rather than codes of laws, i.e., lawmaking. He presumes that the description that can be read in the *Prologus* is an abstract of a larger historical work which was later lost, and accordingly he dates the time of the final editing of the code from the period of the reign of king Dagobert I (623–639) (Gengler 1889: 14). Roth does not rule out the assistance of king Dagobert and his legal scientists in the creation of *Lex Baiuvariorum*; however, he notes that there are good chances that this intervention might have affected a few *titles* only and that the text of the rest of the norms left to us reflect the legal approach of those who carried out later editing work (Roth 1848: 6; Mederer 1793: 32 ff.).

With regard to the creation of *Lex Baiuvariorum*, the first *terminus ante quem* that can be considered certain is the earliest council in Bavaria that can be dated exactly: the Council of Asheim held in 756, where reference² to two passages of *Lex Baiuvariorum* was made.³ The Council mentions the predecessor of Duke Tasilo III too,⁴ which enables us to make it probable that *Lex Baiuvariorum* was created before the commencement of the reign of the last independent Bavarian duke, Tasilo, i.e., 748. Regarding the issue of dating, research has always considered the *Prologus* that introduced the law a point of reference, which gives a general—in certain respect “legal theory”—exposition on the function of the lawmaker and lawmaking, and, following Isidorus Hispalensis, on the concept of *lex* and *consuetudo* (Landau 2004: 30). The final part of the *Prologus*, however, contains a highly specific description that narrates the alleged historical process of making *Lex Baiuvariorum*, based on which this act of lawmaking and codification took place as follows. Theuderich, Frankish king, during his stay in Chalons, after Chlodwig’s death in 511, set up a committee consisting of men well-versed in laws who were to record the law of the Franks, Alemanns

² *Synodus Aschaimensis* 12. *De reliquo promiscuo volgo, ut in lege Baiuvariorum consistere debet, ut de eorum hereditate, exceptis capitalibus criminibus, non alienentur.*

³ Cf. *Lex Baiuvariorum* 2, 1.

⁴ *Synodus Aschaimensis* 4. *De legibus ecclesiarum paterna reverentia conperiemini et nos maxime admoneri oportit, quod tot diffusus orbs oriens occidentisque conservat et precessorum vestrorum depicta pactus insinuat.*

and Bavarians subjected to his rule, in accordance with the customary law of each people, and to replace eliminated pagan elements by Christian ones. This was followed by the corrections of the law implemented by Childebert and Chlothar at the turn of the 6th and 7th centuries, then, by the reform carried out with the assistance of the four advisors involved by Dagobert: Claudius, Chadoind, Magnus and Agilulf and the written promulgation of the legal material considered effective.

Researchers' opinions whether the content of the *Prologus* corresponds to facts have been divided up to now. To Bruno Krusch, the *Prologus* was nothing else than a tendentious forgery that legitimised the Frankish ruler's lawmaker's power over Bavaria, tracing it back to Chlodwig's death (Krusch 1924: 259 ff.). Franz Beyerle presumes that the *Prologus* was written before 656, that is, during king Dagobert I's life, because the attribute *gloriosissimus* was given only to him from among the rulers listed (Beyerle 1929: 373 ff.). On the other hand, Mayer believes that the *Prologus* might have been created in the 7th c., and that the narrative passage on Frankish lawmaking was supplemented only later by thoughts on the nature of the *lex* and *consuetudo*, borrowed from Isidorus (Mayer 1929: 80 ff.). On the other hand, it should be established that certain parts of the *Prologus* most probably refer to historical facts since we know of lawmaking that took place during the reign of both Childebert II and Chlothar II, and the *Directio* created around 596 can be related to the former one and the *Praeceptio* of 584/628 and the *Edictum* of 614 can be related to the latter one. Furthermore, an ancient version of *Lex Alamannorum* left to us was made also during the reign of Chlothar II, and *Lex Ribuarica*, in content mostly based on the Salian Frankish law, was made during the reign of Dagobert I, around 633 (Schott 1978: 1927; Schmidt-Wiegand 2001: 201; Mayer 1886: 133 ff.; Landau 2004: 32). Two of the king's advisors mentioned in the *Prologus* are historically identifiable persons: Fredegar highly acknowledges the wisdom and erudition in sciences of Claudius, who filled the office of *maior domus* in 605,⁵ and mentions Chadoind as Dagobert I's *referendarius* and commander.⁶ Detlef Liebs identifies Claudius mentioned by Fredegar with the Claudius included in the *Prologus* (Liebs 2002: 75 ff.). Regarding Agilulf, we can think of the bishop mentioned by Fredegar concerning the events of the year 642,⁷ and of a bishop of Avignon regarding Magnus. At the same time, we cannot ignore that other sources do not speak about Dagobert I's lawmaking activity covering Bavarian territories, and Theuderich I's role as Alemannian and Bavarian lawmaker could not be more than a mere legend, all the more as sources give account of the appearance of Bavarians for the first time only one and a half decades after Theuderich's death, i.e. 533, and the territory of the later Bavaria could not have been under Frankish authority (Landau 2004. 33 f.).

With regard to dating *Lex Baiuvariorum*, Peter Landau pays special attention to the column of the introduction, which can be found in most of the manuscripts: "*Hoc decretum est apud regem et principes eius et apud cunctum populum christianum qui infra regnum Mervungorum consistunt.*" (Schwind 1926: 267) The Frankish ruler from whom the

⁵ Fredegar, *Chronicae* 4, 28. *Anno 11 regni Teuderici subrogatur maior domus Claudius genere Romanus, homo prudens, iocundus in fabolis, strenuus in cunctis, pacienciae deditus, plenitudinem consiliae habundans, litterum eruditus, fide plenus, amiciciam cum omnibus sectans.*

⁶ Fredegar, *Chronicae* 4, 78. *Dagobertus de universum regnum Burgundiae exercitum promovere iobet, statuens eis capud exercitus nomeni Chadoindum referendarium, qui temporebus Theuderici quondam regis multis priliis probatur strenuus.*

⁷ Fredegar, *Chronicae* 4, 90. *Eodemque diae qio ibidem peracceserat Ailulfo Valenciae urbis episcopo et Gysone comite ad prevedendum que agebantur Augustedunum dirixerat.*

lawmaking initiative set out is not *regnum Francorum* but *regnum Mervungorum*, that is, emphasis is shifted from belonging to the people of the Franks to the dynasty. This emphasis will have any sense only in the event that the creator of the text intends to support the Merovingians' royal claim—possibly just because it is in danger (Landau 2004: 34).

It is well-known that approximately a century before the Carolingians' actual takeover already the rulers of the Merovingian dynasty were present in politics merely as puppet kings, actual governance was concentrated in the hands of *maiores domus*, and after Theuderich IV's death in 737, Charles Martell, until his death, i.e., 741, not caring to keep up appearances either, did not replace him by a king, and governed the Frank empire for lack of a *de iure* ruler (Ewig 1988: 202 ff.). The sons of Charles Martell, Carlomann and Pippin set a puppet king, Childebert III, in 743, from the Merovingian dynasty, but after his death in 751 Pippin had himself crowned king (Affeldt 1980: 95 ff.). During the years between 737 and 743, discord around Charles Martell's estate evolved between his elder sons, Karlmann and Pippin, and his son from his second wife from the Agilolfing dynasty, Swanahilt brought with him from the campaign in Bavaria in 725, Grifo, who was through his mother a relative of Odilo, who ruled as a duke of Bavaria from 736. Charles Martell's daughter, Hiltrud married Odilo, after her father's death, ignoring her brothers' opposition, encouraged by her stepmother, Swanahilt, a relative of the Bavarian ruler (Reindel 1981: 124). Odilo, as Charles Martell's son-in-law, most probably supported Grifo's claim to the Frankish throne (Jarnut 1977: 273 ff.; Reindel 1981: 124). In 743, Pippin and Carlomann marched in arms against Bavaria, and this campaign ended with the defeat of the Bavarians (Jahn 1991: 186 ff.). After Odilo's death, in 749, Grifo attempted to seize power in Bavaria; several dignitaries, including the Alemannian duke, count Lantfrid and count Suitger joined him; Pippin defeated the rebels and made the then eight years old Tasilo the duke of Bavaria, under his sister's guardianship.⁸

The Bavarian duke, Odilo could well legitimise his opposition to Charles Martell's sons by his loyalty to the ruler from the Merovingian dynasty even if the throne was not filled at that time. Perhaps, the brothers put the last puppet king, Childebert III on the throne, among others, in order to deprive thereby the Frank/Bavarian opposition of legitimacy. It was for this reason that it could have been expressly useful to the Bavarian ruler if *Lex Baiuvariorum* referred to *regum Francorum* simply as *regnum Mervungorum* just as the Agilolfing dynasty's claim to the throne of Bavaria must have been set out in the law for the same reason⁹ because at that time Odilo did not sit safely on his throne. Based on all that it can be made probable that *Lex Baiuvariorum* obtained its final form between 737 and 743, and it cannot be considered a royal law (*Königsgesetz*), because it was made not in a Bavaria subjected to the Frankish royal power also in terms of public law (Beyerle 1926: LII; Landau 2004: 36).

The date of creation between 737 and 743, presumed by Heinz Löwe and Peter Landau, is supported by the ecclesiastical influence of an extent far exceeding German folk laws that can be identified in *Lex Baiuvariorum*. The text of the law makes it clear that its compiler set out of the knowledge of canon rules and a clearly circumscribed church organisation.¹⁰ It was by that time that the church organisation obtained a crystallised form in Bavaria. Pope Gregory III appointed Bonifatius his legate, who determined four episcopal

⁸ *Annales regni Francorum a. 748; Annales qui dicuntur Einhardi a. 748; Annales Mettenses priores a. 749.*

⁹ *Lex Baiuvariorum* 3, 1.

¹⁰ Cf. *Lex Baiuvariorum* 1, 12.

sees eventually in Bavaria: Regensburg, Passau, Salzburg and Freising—these towns obtained a significant role not only as secular centres; in the case of Regensburg, Salzburg and Freising their sacral legitimisation was ensured by the activity of missionaries, Emmeram, Rupert and Korbinian too (Schmidinger 1985: 94). He did not acknowledge the (abbot)bishops acting at these four sees as diocesan bishops—without doubting their bishop’s rank—and filled their places by bishops ordained by him: by John in Salzburg, Erembert in Freising, and Gaubald in Regensburg;¹¹ In Passau, in spite of his reservations, he left Vivilo in his office, which was confirmed by the pope (Reindel 1981: 229 f.; Schieffer 1980: 180 ff.). It is possible that around 740—when the first Bavarian monasteries were founded—Isidorus’s works were known to the compiler of *Lex Baiuvariorum*, and that he used them for the “legal philosophy” arguments of the *Prologus*, while half a century before there would have been not much chance for that (Semmler 1994: 294 ff.; Dopsch–Wolfram 1982: 26 ff.; Jahn 1991: 192 ff.; Störmer–Dannheimer 1988: 305 ff.; Bischoff 1966: 171 ff.). Beyond all that, the fact that the compiler of *Lex Baiuvariorum* used *Lex Alamannorum* too during his work also supports dating to a point of time between 737 and 743 (Landau 2004: 37). According to *communis opinio*, *Lex Alamannorum* was made on duke Lantfrid’s initiative sometime between 712 and 730, however, Baesecke did not rule out close co-operation between the monastery of Reichenau founded in 724 by Pirmin and the duke’s agents (Baesecke 1935: 28). In view of the, most probably quite close, kin-relationship between Lantfrid and Odilo, it can be presumed that Odilo’s program as a duke contained collection of the legal material as he had seen it implemented in the case of Lantfrid (Zöllner 1951: 260 ff.; Jahn 1991: 123; Landau 2004: 38).

Peter Landau raises the question whether in their work those entrusted by Odilo could use any kind of earlier made legal material on Bavaria, possibly arising from the age of the Merovings, which in a revised or supplemented form could help them to fulfil their task. (Regarding Alemannia it can be taken for granted that the compilation initiated by duke Lantfrid was actually a kind of *renovatio* since the manuscript of *Pactus Legis Alamannorum* from the early 7th c. is available to us.) Heinrich Brunner set up the hypothesis that both certain parts of *Lex Alamannorum* and the 1st and 2nd titles of *Lex Baiuvariorum* go back to a lost Merovingian royal law, however, he claims that the text of the original law cannot be reconstructed (Brunner 1931: 619). His arguments are based mainly on the fact that in defining its own scope of territory *Lex Baiuvariorum* often uses the phrase “*illa provincia*”, and based thereon Brunner believes that the Bavarian lawmaker would not have used this somewhat degrading phrase with regard to the independent Bavaria ruled by the Agilolfings (Brunner 1931: 569). At the same time, in the usage of the first half of the 8th c.—especially in the usage of the Church, which should be taken into account regarding the monks who edited *Lex Baiuvariorum*—they quite often referred to independent territories as *provincia*; Pope Gregory III (731–741), for example, used the phrase “*in Baioariorum provincia*” when he praised Bonifatius’s achievements in Bavaria.¹² The pronoun “*illa*” standing before “*provincia*” does not sound special or disdainful, considering the fact that Bavaria was only the place of living and activity and not the mother country of the clergymen who compiled the text of the law (Landau 2004: 39).

Based on all that it seems to be rather doubtful that the narrative on the “history of codification” set out in the *Prologus* can be considered historically authentic (Landau 2004:

¹¹ *Vita Bonifatii* 7.

¹² Bonifatius, *epistolae* 45.

40). However, if we accept this standpoint, the question might arise what prefigurations, sources the editor of *Lex Baiuvariorum* could use with respect to the parts of the *Prologus* that were not based on Isidorus's *Etymologiae*. Childebert and Chlothar as lawmakers are referred to by the manuscript of *Lex Salica* from Wolfenbüttel already (Krammer 1969: 466 ff.). Two versions of the *Prologus* of *Lex Salica*—drafted before the first half of the 8th c., i.e., the time when *Lex Baiuvariorum* was made—mentions four men (*electi de pluribus viris quattuor*), who set the text of Frankish folk law in a final form in three sessions. So, the narrative on the four-member committee might have been included in *Lex Baiuvariorum* upon the effect of *Lex Salica*. Presumably, the author borrowed the names of Claudius and Chadoind from Fredegar's *Chronica*; here Agilulf's name most probably covers a fictitious person referring to the family of Bavarian dukes and not a historical person; regarding the name of the fourth man, Magnus, views vary. Konrad Beyerle considers it a well-sounding but colourless and unidentifiable name, and Peter Landau connects it with the *praefectus praetorio* who acted as a legal scientist around 460 in the court of the western Gothic king, Theuderich II, Magnus of Narbonne, who was highly praised owing to his education by Sidonius Apollinaris in a *panegyricus*. Thus, it cannot be ruled out that reference to Magnus's name is nothing else than a kind of allusion to the prototype of the legal advisor of German rulers. Taking all the above into account, in agreement with Landau, it can be stated that the history of origin suggested by the *Prologus* does not stand its ground as the source of the creation of *Lex Baiuvariorum*, however, it provides lots of additional information regarding the legal approach, education, consciousness of identity of the 8th c. compilers. To the question whether *Lex Baiuvariorum* was also preceded by a kind of *Pactus legis Baiuvariorum*—just as *Lex Alamannorum* was preceded by *Pactus legis Alamannorum*—it is not possible to give a reassuring answer or to set up a more or less credible hypothesis either (Beyerle 1926: LXIII f.; Landau 2004: 41 f.).

Regarding the place of creation of *Lex Baiuvariorum*, the literature highly appreciates the hypothesis set up by Konrad Beyerle, which states that the place of creation is most probably the monastery of Niederalteich. (Beyerle 1926: LXVI). Isabella Fastrich-Sutty, when investigating the impact produced by the western Gothic folk law, to be quite precise, by the earliest western Gothic law-book, *Codex Euricianus* on *Lex Baiuvariorum*, has made the following statements: the compilers considerably screened the western Gothic provisions that could not be applied to Bavarian conditions, completely eliminated certain elements and replaced others by *ex asse* Bavarian law material (Fastrich-Sutty 2001: 140 ff.; 220 f.). To carry out this complicated work presuming high-level knowledge of the legal material, the compilers needed proper assistants and a library that contained both secular and ecclesiastical legal materials (Fastrich-Sutty 2001: 290). If we accept this statement, then neither the Frankish royal court, nor the Bavarian duke's court could have been a proper place for the work of compilation/codification, and Niederalteich did not have a proper library or *scriptorium* either (Landau 2004: 44).

If we continue to support the most probable period of creation around 740, then, in theory, in this period three larger centres can be possible places of creation of *Lex Baiuvariorum*: Salzburg, Freising and Regensburg. In Salzburg, a Christian monks' community existed in the early 7th c. already, which was reorganised by Rupert—the phrase “*renovare*” in *Gesta Hrodberti* might refer to that too¹³—as St Peter monastery (Dopsch-Wolfram 1982: 26; Hermann 1996: 32 f.). On the other hand, in view of the fact that the

¹³ *Gesta sancti Hrodberti confessoris* 8.

bishopric was founded in 739, and that significant literary activity could start only after Virgil was ordained bishop in 749, and that the library of the monastery provably contained legal texts only after 790, it is not probable that *Lex Baiuvariorum* was compiled in Salzburg. Freising is ruled out by the following arguments. The bishopric was founded here only in 739, a decade after the operation of Corbinianus (717–728), and information on significant cultural activity is available from the period of the bishop Arbeo (764–784); furthermore, in the 8th c. Freising was under the direct influence of the Huosi *genealogia* rather than that of the Agilolfings, which again does not make it probable that a code taking sides with the central power of the duke was made here (Jahn 1991: 149 ff.; Jahn 1990: 201 ff.; Landau 2004: 45). In favour of the third town referred to, Regensburg, the following arguments can be put forward. Although it was made a regular bishopric as the duke's seat only in 739, its Benedictine monastery, which soon adopted the name of St Haimhrammus (Emmeram), was the intellectual centre of Bavaria around 700 already—quite interestingly, it was Romuald Bauerreiß who raised the possibility for the first time in the literature that *Lex Baiuvariorum* was created in Regensburg (Bauerreiß 1949: 162). Several arguments can be made in favour of the point that Regensburg, more precisely, the St Emmeram monastery might have been the place of creation of the law, all the more as the monastery had a significant library in the 8th c. already. What follows is a survey of the arguments made in favour of the creation of *Lex Baiuvariorum* in Regensburg, following Peter Landau's argumentation (Landau 2004: 47 ff.).

The earliest known manuscript of *Lex Baiuvariorum*, the *Codex Ingolstadensis* created around 800, kept at the Universitätsbibliothek in Munich, was most probably made in Regensburg or in the vicinity of Regensburg, which proves the presence of the text of the law—in the strict sense of the word—on this territory. The compilers included the provision in the 1st title of the law that solely the bishop shall have jurisdiction on the grounds of canon regulations over ecclesiastical persons, more specifically, priests, deacons, and other clergymen,¹⁴ which makes it probable that a collection on canon law was *de facto* available to the editors. The collection entitled *Epitome Hispana* was already known in Bavaria in the middle of the 8th c., which is proved by the fact that it was quoted at the Council of Asheim in 756 (Landau 2004: 146 ff.). In 821, Baturich, bishop of Regensburg and abbot of the St Emmeram monastery had a canon law collection made by using this *epitome*, and the 8th c. manuscript from Copenhagen of this collection was safeguarded in the Middle Ages at the monastery of Regensburg, and presumably it was taken there from Gaul around 740. Based on all the above, there are good reasons to presume that the compilers of *Lex Baiuvariorum* had some kind of education in canon law, as it is reflected in the relevant passages of the law (Landau 2004: 48). Only one locus of *Lex Romana Visigothorum* published by Alaric II, which overlaps with *Codex Theodosianus*¹⁵ shows¹⁶ direct impact produced on *Lex Baiuvariorum*,¹⁷ and the provision set out in this passage bans clergymen from living together with alien women under the same roof (Nehlsen 1982: 143–203). In spite of the direct impact on the text being of a low extent, it is a fact that the oldest manuscript of this code left to us and at present safeguarded in Munich was in Bavaria in the 8th c., which clearly shows that as early as at that time there was some kind of interest in Bavaria in the work of law mediating Roman legal tradition too. Strong ties of *Lex Baiuvariorum* to the

¹⁴ *Lex Baiuvariorum* tit. 1.

¹⁵ *Codex Theodosianus* 16, 2, 44.

¹⁶ *Lex Romana Visigothorum* 16, 1, 6.

¹⁷ *Lex Baiuvariorum* 1, 12.

Church is resolutely supported by the duke's sovereignty and the Agilolfings' claim to the throne, which allows to make it probable—as it has been established by Konrad Beyerle too—that monks were given significant help from the duke to carry out the work of lawmaking (Beyerle 1926: LXVI).

We have a good chance of accepting Peter Landau's hypothesis that this work relation between the monks and the duke's court must have been much closer if we presume that the compilers of *Lex Baiuvariorum* included the monks of the St Emmeram monastery located at the duke's seat, in Regensburg rather than the monks of the monastery of Niederalteich (Landau 2004: 50). The date of creation between 737 and 743 is supported by the ecclesiastical impact of an extent far exceeding that of German folk laws, which can be clearly demonstrated in *Lex Baiuvariorum*.

Based on all that it can be established—in agreement with Fastrich-Sutty—that it is almost impossible to draw any conclusions that are appropriate in every respect as to the authenticity of the *Prologus*; in other words, its content can hardly get us any closer on the merits to accurately dating the code of laws (Fastrich-Sutty 2001: 22).

III

These three steps of the history of origin, as Prinz claims, can be harmonised with the following political events: (i) the strengthening of the power of the Franks in the 6th c., (ii) the increasing influence of Frankish kings over Bavaria, which is indicated by the inauguration of duke Tasilo I by Childebert II as well; (iii) Dagobert I's powerful conquest policy towards the east (Prinz 1965: 361). All this can be brought into harmony with Brunner's view claiming that *Lex Baiuvariorum* was created as a result of a gradual lawmaking intervention carried out step by step, possibly, on the grounds of a Frankish imperial law presumed by him, rather than a single lawmaker's act (Brunner 1931: 598 ff.). If we accept the theory of creation in several steps, then the use of Alemannian and western Gothic legal sources and the fact of borrowings from them seem to be logical; yet, if we accept that editing the final form can be dated from the period of king Dagobert I, then it is impossible to explain the origin of the provisions that are in line with and reflect the historical conditions of the 8th century (Fastrich-Sutty 2011: 24).

With regard to dating *Lex Baiuvariorum* a further point of reference can be provided by the introductory sentence of *titulus* one, which leads to the first statutory provision. Brunner divides the Bavarian code into three main parts: (i) the norms on the Church set out in *titulus* one, (ii) the norms in *titulus* two on the duke and his family, and (iii) the norms set out in the remaining twenty *titles* on mixed provisions and private and criminal law states of facts (Brunner 1931: 610). In theory, the introductory sentence corresponds with the codification history narrative in the *Prologus* since it traces the Bavarian *lex* back to the lawmaking work of the Merovingian rulers.¹⁸ If we accept that it corresponds to facts, this sentence, furthermore, indicates that *Lex Baiuvariorum* was recorded as a result of the ruler's lawmaking rather than as folk law (Fastrich-Sutty 2001: 24). Therefore, Brunner asserts that *titulus* one and *titulus* two of *Lex Baiuvariorum* are identical with or at least can be mostly deduced from the Frankish imperial law of the Merovingian period. Based on that, Brunner strictly separates the above-mentioned two *titles* from the rest of the code,

¹⁸ *Lex Baiuvariorum Prologus, Hoc decretum apud regem et principibus eius et apud cuncto populo christiano, qui infra regnum Mervungorum consistunt.*

considered by him the results of later revision dated from the period between 744 and 748 (Brunner 1906: I. 461). It should be noted that Brunner's above view was highly criticised by Krusch. However, it can be established that it was the *Prologus* and the introductory sentence of *titulus* one that provided grounds for setting up the hypothesis on dating which claims that the provisions constituting the core of the code—having a general scope, most probably, among the peoples living under Frankish rather than specifically Bavarian influence—were created in the first half of the 7th c., and the code assumed its final form some one hundred years later, before the middle of the 8th c. (Krusch 1924: 258 f.).

In addition to the *Prologus* and the introductory sentence of *titulus* one, it is worth taking the provisions of *titulus* one and *titulus* two into account as well in terms of dating, provided that we do not refuse the possibility that the scope of the rules set out in them originally covered not only Bavaria but other German peoples living under Frankish influence as well (Brunner 1906: I. 457). This hypothesis seems to be supported by the fact that in these *titules* provinces are referred to in plural and the duke is defined as the ruler of a part of the territory.¹⁹ The content of the ten *capita* of the first *titulus* and the provisions of *Lex Alamannorum* considerably, sometimes literally, overlap.²⁰ Brunner draws the conclusion from this correspondence that the two codes of laws go back to the same prefiguration (Brunner 1931. 599). Yet, it should be taken into consideration that whereas the relevant locus of *Lex Baiuvariorum*²¹ refers to the king, *rex*, the related Alemannian norm does not mention any king.²² As a matter of fact, it cannot be ruled out that this word is simply the result of editing work carried out upon Frankish impact (or the word *rex* was deleted from the Alemannian code), and that in spite of that the corresponding passages in the two codes can be traced back to the same text. On the other hand, even if we presume that *titulus* one and *titulus* two of *Lex Baiuvariorum* go back to a Merovingian antecedent, it is highly questionable whether it is righteous to declare the relation of this antecedent to *Lex Baiuvariorum* since this law from the Merovingian period cannot be considered specifically Bavarian and thereby we would be compelled to classify any further changes or any stages of presumed text versions some kind of revision, consequently, subsequent editing. Perhaps it seems to be more appropriate if we do not refer to an ancient version and subsequent editings of *Lex Baiuvariorum* as technical term but content ourselves with drawing the conclusion that (i) the text version left to us was selected, i.e., compiled by the editors of the code from the body of norms available to them, and (ii) the norms so adopted were supplemented by them by their own texts (Fastrich-Sutty 2001: 27).

In principle, a further reference point for dating the code could be provided by the analysis of the provisions set out in *titulus* one and *titulus* two as to what extent they can be related to specific historical events as possible *occasio legis*. In this respect, the most obvious one seems to be the provision set out in *titulus* one that sanctions the killing of the bishop,²³ especially because literature—primarily Hohenlohe—traces the creation of this passage back to the assassination of St Emmeram in 715 (Hohenlohe 1932: 45). As a matter of fact, the provisions sanctioning the assassination of ecclesiastical persons can be also connected with the relevant loci of *Lex Alamannorum*, although the Alemannian statute

¹⁹ Cf. *Lex Baiuvariorum* 2, 4. ...*dux de illa provincia*...

²⁰ Except *Lex Baiuvariorum* 1, 6. 11. 12.

²¹ *Lex Baiuvariorum* 1, 1. ...*non rex, non dux, nec ulla persona*...

²² *Lex Alamannorum* 1. ...*non rex, non comes, nec ulla persona*...

²³ *Lex Baiuvariorum* 1, 10.

begins the list of states of fact with the assassination of the bishop²⁴ and gets from that to injury to clericals in lower *status*, whereas the Bavarian code, quite on the contrary, enumerates the above by moving from persons in lower to those in higher social rank.²⁵ However, in view of the fact that the date of St Emmeram's death is disputed—Mayr argues for 714/715 (Mayr 1990: 202), Reindel presumes an earlier date, namely 652 (Reindel 1981: 196)—and it would be difficult to prove that it was due to his assassination that the typically Bavarian sanction imposed on killing of the bishop was included in the code, this provision will scarcely get us any closer to dating the code (Fastrich-Sutty 2001: 29).

Titulus three of *Lex Baiuvariorum* enumerates five noble clans whose members were entitled to priority *conpositio*, on the one hand, and sets forth that in rank they follow the Agilolfing dynasty nominating a duke, on the other.²⁶ It is necessary to consider the presumption formulated by Störmer concerning the reference made in the code to clans (Störmer 1973: 44 ff.). In the charters analysed by him the traces of only two clans, referred to in the code as well, can be discovered in a reassuring form: the Hosi and the Fagana clans. Therefore, most probably, this provision of the code is from the period when all the five *genealogiae* listed by the *lex* besides the duke's clan still had serious political influence in Bavaria. However, as in the 8th c. the existence of neither the Trozza, nor the Anniona clan can be identified in the sources, the origin of this provision might go back to the 7th c. (Störmer 1972: 90 ff.).

IV

In addition to dating, it arises as a further question how the laws that constitute the form of *Lex Baiuvariorum* known to us at present were edited. In his dissertation Roth noted already that the *Prologus* does not imply that the code assumed its final form during the reign of Dagobert I. (Roth 1848: 5 ff.). Several provisions are indeed in line with the historical/political conditions of this period, however, others reflect the spirit of the age of Charles Martel, while others, for example, the provisions on sanctioning the act of practising magic on grain²⁷ or robbing of graves or dead persons²⁸ without mentioning Christianity, show—as Roth claims—a much earlier state preceding the influence produced by Christianity (Roth 1848: 6).

The above discussed first two *titles* of *Lex Baiuvariorum* constitute an integral whole in terms of their structure, language and the manuscripts left to us. Furthermore, these *titles* and the provisions of *Lex Alamannorum* on the Church and the ruler clearly overlap. Therefore, it can be made probable that at least these *titles* were integrated as a single unit from the first since the editors of the code could hardly go back to the statutes serving as the sources of the first two *titles*: *Codex Euricianus* and *Lex Alamannorum* every time the code was revised (Fastrich-Sutty 2001: 32).

In the research it often arose as a question whether the German rulers of early Middle Ages made laws in order to regulate social integration indeed or their lawmaking activity served legitimisation to enable them to appear as worthy successors of Roman emperors by

²⁴ *Lex Alamannorum* 13–15.

²⁵ *Lex Baiuvariorum* 1, 8–10.

²⁶ *Lex Baiuvariorum* 3, 1.

²⁷ *Lex Baiuvariorum* 12, 8.

²⁸ *Lex Baiuvariorum* 18, 1.

following their traditions (Wormald 1977: 105 ff.). As a matter of fact, in early medieval statutes one can often find regulations that can be clearly identified as no longer having any practical significance in the period when the laws were recorded, however, rulers nevertheless included them in the codes created by them—as it were for legitimisation purposes (Nehlsen 1977: 449 ff.). It should be stressed that, contrary to descriptions on early medieval lawmaking, concerning king Dagobert I the *Prologus* of *Lex Baiuvariorum* refers not only to the work of collecting and summing up laws but to the fact as well that the king with the assistance of his legal scientists renewed outdated statutes and corrected several former provisions or replaced them by more efficient norms;²⁹ from all this it can be inferred that the purpose of the maker of the code must have been to translate rules into practice and make them applicable indeed (Fastrich-Sutty 2001: 34).

In view of the fact that two-thirds of the *Prologus* of *Lex Baiuvariorum* relies on Isidorus's *Etymologiae* and that the provisions of the code show connections at several points with *Codex Euricianus*, it cannot be ruled out that the provisions of *Codex Euricianus* reached Bavaria only after 621 as well since Isidorus sent his work to king Sisebut in the same year (Fastrich-Sutty 2001: 35). As a matter of fact, this presumption can stand its ground only in the event that we presume that western Gothic legal sources and Isidorus's work reached Bavaria on the same occasion and in the same form, which is far from being certain, in view of the fact that *Etymologiae* was highly popular (Brunnhölzl 1975: 79). At the same time, it is by all means an individual phenomenon that Isidorus's text and the codification history from the Merovingian period were united in the same *Prologus* because no prefiguration or parallel appearance of the above can be demonstrated in either the Frankish or the Alemannian statute. On the other hand, concerning the *Prologus* it cannot be clarified in a fully reassuring way what category of genre it can be classified into, specifically, whether it should be considered an authentic compilation report, a historical narrative or purely a legend with legitimisation purposes (Beyerle 1926: LXIV).

Just as it was impossible to take a stand with full certainty with regard to the issue of dating before in-depth analysis of loci—more specifically, whether *Lex Baiuvariorum* (provided that by this name we should mean an already *ex asse* Bavarian body of laws) was created in the 7th c., i.e., in the period of Dagobert I or in the first half of the 8th c.—two definitely different standpoints are opposed to each other concerning the process of editing as well. One of the opinions claim that several editors or compilers working at the same time dealt with specific parts of the text and the *titles* so produced were set in a final form by a single act of lawmaking. The other view, which can be made probable by the *Prologus* of the code, asserts that phases of editing followed each other in time and therefore these layers can be (possibly) demonstrated in the text (in theory) as well (Fastrich-Sutty 2001: 38).

²⁹ *Lex Baiuvariorum Prologus, ...addidit, quae addenda erant, et inprovisa et inconposita resecavit. Et quae erant secundum consuetudinem paganorum, mutavit secundum legem Christianorum.*

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