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The State of Facts of Robbing of a Grave in Early Medieval German Laws¹

Abstract. In the present paper we analyse the state of facts of robbing of a grave in German folk laws. We pay special regard to the issue to what extent the impacts of Roman law and the Church and primarily German customary law can be demonstrated in the system of state of facts and sanctions of specific laws. This investigation requires the analysis of the legal source base as well as some examination in the history of language, which allows a comparative analysis of the issue and helps to highlight the various layers of the norms of German folk laws by the example of this state of facts.

Keywords: sepuchrum violatum, wargus, Friedlosigkeit, Volksrecht

Introduction

Almost all of German codices—except for *Lex Saxonum*, *Lex Thuringorum* and *Ewa Chamavorum*—extensively discuss legal protection of the grave and the dead body and sanction persons who disgrace the grave and the dead body. So, this scope of issues is dwelt upon in details by *Edictum Theodorici*,² *Lex Visigothorum*,³ *Lex Burgundiorum*,⁴ *Edictus Rothari*,⁵ *Lex Salica*,⁶ *Lex Ribuaria*,⁷ *Pactus Alamannorum*,⁸ *Lex Alamannorum*⁹ and *Lex*

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¹ The present paper was supported by the TÁMOP Project Nr. 4.2.2.B-10/1-2010-0015 „Identitäten: Kulturen und Minderheiten im Donauraum”.

² *Edictum Theodorici* (Ed. F. Bluhme: *Monumenta Germaniae Historica, Leges nationum Germanicarum*, V. Berlin 1889.) 110.

³ *Lex Visigothorum* (ed.: Zeumer, K.: *Monumenta Germaniae Historica, Leges, I*. Hannover, 1902.) 11, 2, 1–2.

⁴ *Lex Burgundiorum* (ed.: v. Salis, L. R.: *Monumenta Germaniae Historica, Leges, II/1*. Hannover, 1892.) 34, 3.

⁵ *Edictus Rothari* (ed.: Bluhme, F.: *Edictus ceteraque Langobardorum leges cum constitutionibus et pactis principum Beneventanorum ex maiore editione monumentis Germaniae inserta*. Hannover, 1869.) 14–16.

⁶ *Lex Salica* (ed.: Eckhardt, K. A.: *Monumenta Germaniae Historica, Leges, I. IV/2*. Hannover, 1969.) 55.

⁷ *Lex Ribuaria* (ed.: Sohm, R.: *Lex Ribuaria et Lex Francorum Chamavorum ex Monumentis germaniae Historiae recusae*. Hannover, 1883.) 55, 1–2; 88, 1–2.

⁸ *Pactus Alamannorum* (ed.: Pertz, G. H.: *Monumenta Germaniae Historica, Leges, III*. Hannover, 1863.) 16, 1–3; 17, 1–7.

⁹ *Lex Alamannorum* (ed.: Pertz, G. H.: *Monumenta Germaniae Historica, Leges, III*. Hannover, 1863.) 48, 1; 49, 1–2.

Baiuvariorum.¹⁰ This paper first examines Gothic, Burgundian and Langobardic sources (I); then, analyses Frankish sources (II); finally, surveys the provisions of South German, i.e. Alemannian and Bavarian sources (III).

I

Several questions arise with respect to the lapidary provision of *Edictum Thoderici* stating that a person who has demolished/ruins a grave shall suffer death.¹¹ (*Edictum Theoderici*, the code of the eastern Gothic ruler, Theoderich the Great I was also created around 500; it did not rest with the principle of personality but applied to the population of both Gothic and Roman origin; it was based on the collections of imperial decrees and Paulus's *Sententiae*.¹²) The historian Cassiodorus relates several cases when Theoderich took direct measures to open graves. He gave an order to his official, Duda to open a grave and take the gold and silver in it for public purposes.¹³ Yet, the ruler commanded that the corpse should remain untouched and he arranged for restoring the grave with proper decoration, and—as he could obtain the treasure only through *funestum scelus*—he gave reasons for this act stating that in the relevant case (as it were referring to a cause excluding unlawfulness) it was possible to take the gold and silver from the grave because it was the living and not the dead who needed them. In his notice to Anna *comes*—as it is related by Cassiodorus—Theoderich condemns robbing of the grave; more specifically, in case of a priest called Laurentius he instructs his *comes* to make sure that the perpetrator should not keep the loot if it is proved that the priest has disturbed the peace of the dead while searching for treasures in the grave.¹⁴ Yet, paying regard to the perpetrator's ecclesiastical status, he waives his punishment alluding at the greater punishment to come by which he means—and this is difficult to decide—either divine punishment or the chastisement imposed by the bishop.¹⁵ In the so-called *Formula comitivae privatarum* left to us by Cassiodorus, the provision by which Theoderich assigns certain duties to his *comeses*, among others, he charges them with arranging for the peace of the dead, preventing the graves from being deprived of marble cover, columns from their decorations, and the corpses and the ashes from being treated undeservedly, impiously, contrary to the requirements of *pietas*.¹⁶ This provision reveals that Theoderich the Great ordered to punish the act of robbing of a grave/desecration of a grave as well as those who has demolished or impaired a sepulchre, for example, in order to obtain building material or remove a grave which limits the use of their estate.¹⁷

¹⁰ *Lex Baiuvariorum* (ed.: Nótári, T.: *Lex Baiuvariorum*. Szeged, 2011.) 19, 1–8.

¹¹ *Edictum Theoderici* (ed.: Bluhme, F.: *Monumenta Germaniae Historica, Leges nationum Germanicarum, V*. Berlin, 1889.) 110. *Qui sepulchrum destruxerit, occidatur*.

¹² Nótári, T.: *Római köz- és magánjog (Roman Public and Private Law)*. Kolozsvár, 2011. 493.

¹³ Cassiodorus: *Variae* (ed.: Mommsen, Th.: *Monumenta Germaniae Historica,, Auctores antiquissimi, XII*. Berlin, 1894.) 4, 34, 129.

¹⁴ *Ibid.* 4, 18, 122.

¹⁵ Nehlsen, H.: Der Grabfrevel in den germanischen Rechtsaufzeichnungen. Zugleich ein Beitrag zur Diskussion um Todesstrafe und Friedlosigkeit bei den Germanen. In: Jankuhn, H.–Nehlsen, H.–Roth, H. (hrsg.): *Zum Grabfrevel in vor- und frühgeschichtlicher Zeit. Untersuchungen zu Grabraub und „haugbrod“ in Mittel- und Nordeuropa*. Göttingen, 1978. 107–168., 113.

¹⁶ Cassiodorus: *Variae. op. cit.* 6, 8, 181. f.

¹⁷ Nehlsen: *Der Grabfrevel... op. cit.* 114.

This is not surprising as it is known of the ruler that he saw to it that Antique buildings should be protected.¹⁸

It is, however, questionable if the death penalty ordered by *Edictum Theoderici* was of German origin *ex asse* indeed. To get an answer to this question, Roman legal regulation and the Council regulations of the period should be looked at. In accordance with classical Roman law, *sepulchrum violatum*, the act of ruining/desecration of the burial place as *delictum* with a sacred background—since the burial place was protected under divine law, more specifically *res religiosa*—resulted in *popularis actio*; so, it could be applied for by any citizen if it was not brought by the relatives.¹⁹ In the former case the amount of penalty depended on the judge's decision, in the latter it was one hundred *sestertius*; the relevant action at law was *actio de sepulchro violato*, which involved *infamia*.²⁰ At the same time, an imperial decree in force in the provinces only, which can be, perhaps, linked with the name of Tiberius, threatened persons who desecrate a burial place with death penalty.²¹ In a more general scope, through jurists' *interpretatio* desecration of a grave became indictable offence, since the provisions of *lex Iulia de vi publica* and *lex Iulia de vi privata*, applicable only to disturbing of a burial in relation to the dead, were extended to desecration of a grave, which from then on became punishable by forced labour, *relegatio*, *deportatio* or death.²² Armed grave robbers just as highwaymen (*latrones*) were punished by death.²³

The content of Paulus's *Sententiae* does not show a clear picture: one of the loci stipulates that the perpetrator should be punished by *deportatio* if he is *honestior* and by mine labour if he belongs to *humiliores*,²⁴ and, according to the other locus, by death if he belongs to *humiliores*.²⁵ Iulianus Apostata's decree threatens to apply the punishment for robbery of a church, i.e. capital sanction, to robbing of a grave/desecration of a grave.²⁶ Gordianus ranks the act of trading with parts, building components of a grave among *crimen laesae maiestatis*,²⁷ and Constantinus I punishes persons who take building materials away from a sepulchre by a further penalty, ten pound gold to be paid to the treasury.²⁸ Valentinianus II's decree from 385 excludes persons who desecrate a grave from the scope of any later amnesty,²⁹ and Valentinianus III's decree from 447 gives detailed regulation of the punishment to be imposed on perpetrators of the act in terms of their *status*: if the perpetrator is a clerical, he should be deprived of his dignity and should live in eternal exile, if he is a slave, *colonus* or a freeman with no property he should suffer death, if he is

¹⁸ Dahn, F.: *Die Könige der Germanen, III. Verfassung des ostgotischen Reiches in Italien*. München, 1866. 170. ff.

¹⁹ Cf. Ulpianus D. (ed.: Mommsen, Th.: *Corpus Iuris Civilis, I*. Berlin, 1954¹⁶.) 47, 12 pr.

²⁰ Nótári: *op. cit.* 343.

²¹ Cumont, F.: Un rescrit impérial sur la violation de sépulture. *Revue Historique* 163. 1930. 341–366., 242. ff.

²² Macer D. 47, 12, 8; Mommsen, Th.: *Römische Strafrecht*. Leipzig, 1899. 665⁴.

²³ Ulpianus D. 47, 12, 3, 7.

²⁴ Paulus, *Sententiae* (ed.: Riccobono, S.: *Fontes iuris Romani anteiustiniani, III*. Firenze, 1940.) 1, 21, 4–5.

²⁵ *Ibid.* 5, 19A

²⁶ *Codex Iustinianus* (ed.: Krueger, P.: *Corpus Iuris Civilis, II*. Berlin, 1908⁸.) 9, 19, 5.

²⁷ *Ibid.* 9, 19, 1.

²⁸ *Ibid.* 9, 19, 4. = *Codex Theodosianus* 9, 17, 4.

²⁹ *Codex Theodosianus* (eds: Mommsen, Th.–Meyer, P. M., Berlin, 1905.) 9, 38, 8. = *Lex Romana Visigothorum* 9, 28, 1.

a notable, he should be deprived of half of his property and should be *infamis*, and if an imperial official fails to prosecute this crime he should be deprived of his office, property and honour.³⁰ The Council of Toledo IV held in 633 orders to discharge priests who desecrate a grave of their office and obliges them to three years' repentance.³¹

In the light of all that it can be established that Theoderich the Great punishes robbing of a grave/desecration of a grave by death penalty fully in harmony with the spirit and provisions of Roman (imperial) law that took increasingly firm action against this crime, and most probably in the course of that lays special emphasis on protecting buildings and valuable sepulchres, which intention is quite clear from Constantinus I's above-mentioned decree already.³²

*Lex Burgundiorum*³³ contains the following provision: a husband can dismiss his wife with impunity for three reasons: if she has committed adultery, crime, desecration of a grave, and in these cases the judge should pass sentence on the wife.³⁴ (It needs to be added that in case a wife leaves her husband, in accordance with Burgundian law, she shall suffer death by being drowned in a swamp.³⁵) Connections with Roman law are absolutely clear again, for in one of his decrees Constantinus I vests the husband with the right to cast off his wife if she has committed adultery, magic or pandering, and, albeit, this list does not include desecration of a grave, the decree empowers the wife to divorce if her husband is guilty of manslaughter, mixing poison or desecration of a grave.³⁶ *Lex Romana Burgundiorum* issued for the Roman population adopts this provision, and ranks desecration of a grave among causes for divorce that a wife can refer to.³⁷ (*Lex Romana Burgundiorum*—which was also called *Papianus* from the erroneous version of Papinian's name—was created at the turn of the 5th and 6th c. upon the instructions of King Gundobad, and contained provisions for the inhabitants of the territory considered former Roman subjects. It was made on the basis of three collections of imperial decrees: *Codex Gregorianus*, *Codex Hermogenianus* and *Codex Theodosianus*, Paulus's *Sententiae* and one of Gaius's works, however, not by abridgement but by rewriting the content.³⁸) In view of the fact that the Burgundian law mentions desecration of a grave committed by the wife together with adultery to be punished by death penalty, it can be presumed that its

³⁰ *Lex Romana Visigothorum Nov. Valentiniani III.* (ed.: Krüger, P.: *Collectio librorum iuris antejustiniani, III.* Berlin, 1878.) tit. 5.

³¹ *Concilium Toletanum IV. (a. 633)* (ed.: Mansi, J. D.: *Sacrorum conciliorum nova amplissima collectio, IX.* Firenze, 1763.) 46.

³² Nehlsen: *Der Grabfrevel... op. cit.* 118.

³³ See Nehlsen, F.: *Lex Burgundionum.* In: *Handwörterbuch zur deutschen Rechtsgeschichte,* II. Berlin, 1978. 1901–1915.

³⁴ *Lex Burgundionum* 34, 3. *Si quis vero uxorem suam forte dimittere voluerit et ei potuerit vel unum de his tribus criminibus adprobare, id est: adulterium, melficium vel sepulchrorum violatricem, dimittendi eam habeat liberam potestatem; et iudex in eam, sicut debet in criminosam, proferat ex lege sententiam.*

³⁵ *Ibid.* 34, 1. *Si qua mulier maritum suum, cui legitime est iuncta, dimiserit, necetur in luto.*

³⁶ *Codex Theodosianus* 3, 16, 1.

³⁷ *Lex Romana Burgundionum* (ed.: V. Salis, R. L.: *Monumenta Germaniae Historica, Leges, II/1.* Hannover, 1892.) 21, 3. *Quod si mulier nolente marito repudium ei dare voluerit, non aliter fieri hoc licebit, quam si maritum homicidam probaverit, aut sepulchrorum violatorem, aut veneficum.*

³⁸ Nótári: *op. cit.* 493.

sanction could not be any milder.³⁹ To understand to what extent it was translated into practice, it is worth looking at the letter of Sidonius Apollinaris bishop of Clermont, in which he describes an event when he caught perpetrators looting graves in the act and driven by righteous anger he immediately punished the robbers instead of delivering them to the bishop having competence—later, he regretted what he had done, however, he made it clear that they would have been punished by death penalty anyway in accordance with ancient unwritten law.⁴⁰

In the mirror of all that—just as in the case of *Edictum Theoderici*—the severity of the sanction should be traced back to Roman impact rather than to its presumed roots in German folk laws.⁴¹

Although it extensively drew on Roman law, Visigothic law preserved several elements arising from ancient German customary law, for example, the *compositio* system prevailed for a long time—this regime stipulated pecuniary compensation for serious offence in case the perpetrator was a free man. Accordingly, *Lex Visigothorum* sets forth the following provisions under the title *De violatoribus sepulchrorum*. The same locus contains two states of facts: ruining of a grave (literally opening of a grave), robbing of the clothes or ornaments of the yet unburied dead person: if the perpetrator is a free man, he shall pay one pound gold to the relatives of the deceased and shall return the objects taken, if there are no inheritors, the penalty equal to seventy-two *solidus* is due to the treasury; furthermore, the perpetrator shall be hit one hundred times by a whip. If the perpetrator is a slave, after he has been hit two hundred times by a whip—just as in the Roman system where capital punishment was always preceded by *verberatio*⁴²—he shall be burnt.⁴³ Flogging, which is introduced by the term “*praeterea*” and should be executed on perpetrators in a free *status* too, is most probably the result of later addition since there are good chances that the core of the provision evolved as early as during the period of Eurich (466–484) or Leovigild (568–586), and this sanction was included in punishments only during the period of Recceswind (653–672), however, this punishment, which can be presumed to be original, and the sanction under Roman law significantly overlap.⁴⁴

In accordance with the next provision related to the grave: if anybody—specifically a free man—has taken the sarcophagus because he needed *remedium*, he will be bound to pay twelve *solidus* to the relatives of the dead person; if this has been done by a slave upon his master’s command, then his master shall pay instead of him; and if this act has been committed by a slave at his own discretion, then he shall be hit one hundred times by a whip, and once he has returned the misappropriated things, he shall restore the original state

³⁹ Nehlsen: *Der Grabfrevel... op. cit.* 119.

⁴⁰ Sidonius Apollinaris, *Epistulae* (ed.: Luetjohann, C.: *Monumenta Germaniae Historica, Auctores antiquissimi, VIII*. Berlin, 1887.) 3, 12.

⁴¹ Nehlsen: *Der Grabfrevel... op. cit.* 118.

⁴² Nótári: *op. cit.* 429.

⁴³ *Lex Visigothorum* 11, 2, 1. *Si quis sepulcri violator extiterit aut mortuum expoliaverit et ei aut ornamenta vel vestimenta abstulerit, si liber hoc fecerit, libram auri coactus exolvat heredibus et que abstulit reddat. Quod si heredes non fuerint, fisco nostro cogatur inferre et preterea C flagella suscipiat. Sevus vero, si hoc crimen amiserit, CC flagella suscipiat et insuper flammis ardentibus exuratur; deditis nihilominus cunctis, que visus est abstulisse.*

⁴⁴ Nehlsen: *Der Grabfrevel... op. cit.* 120. f.

of the grave.⁴⁵ The term *remedium* calls for some explanation since it cannot be interpreted as *medicine*, *drug*. There is a good chance for presuming that the objects related to the dead person were required as requisites of magical rituals since ceremonies conducted by this kind of aids were widely accepted both in Roman and German religious belief.⁴⁶ All this seems to be supported by the fact that Burchard of Worms discussed desecration of a grave under the title *De arte magica* in *Liber decretorum*.⁴⁷ Yet, as a matter of fact, it cannot be ruled out that the sarcophagus was stolen not for some mystical cause but for the pure reason that the thief wanted to use it, which is far from surprising since both Roman law and early medieval lawmaking deals with the issue of double burial and clearly prohibit it.⁴⁸ This might explain the fact that the law orders to punish a perpetrator in free *status* by a penalty of a relatively low amount.⁴⁹

It can be stated that in the legal system of Ostrogoths and Burgundians robbery of a grave/desecration of a grave was punished by death—presumably upon the impact of Roman law; western Gothic law represents some kind of transition between Roman and German legal tradition: while slaves suffer death for this act, free persons are punished by pecuniary penalty only, which will be accompanied only later by corporeal punishment, flogging.⁵⁰

Langobardic laws, more specifically *Edictus Rothari* created in 643, distinguish three states of facts, which serve protection of the dead person and the grave. With regard to murder committed in secret (*morth*) the law orders to punish persons who plunder a dead person (*plodraub*) by eighty *solidus* in addition to the *compositio* of manslaughter (nine hundred *solidus*),⁵¹ which shall be paid to the relatives of the killed person.⁵² If somebody robs a dead person found in a riverbed or outdoors who was not killed by him (*raibraub*) and hides the corpse, he shall pay eighty *solidus* to the relatives of the deceased. However, if he finds a dead person, plunders him, and then notifies the fact to the neighbours, and it becomes clear that he took the valuables found with the dead person as a reward and not with the intention to misappropriate them, then it will not be necessary to investigate the matter, once he has returned the valuables.⁵³ There are good chances that *plodraub* and

⁴⁵ *Lex Visigothorum* 11, 2, 2. *Si quis mortui sarcophagum abstulerit, dum sibi vult habere remedium, XII solidus iudice insistente heredibus mortui cogatur exolvere. Quod si domino iubente servus hoc admiserit, dominus pro servo suo componere non moretur. Servus vero, si ex sua voluntate hoc admiserit, nihilominus C flagella suscipiat, et quod tulerat et loco et corpori proprio reformetur.*

⁴⁶ Dahn, F.: *Westgothische Studien*. Würzburg, 1874. 235; Kiessling, E.: *Zauberei in den germanischen Volksrechten*. Diss. Frankfurt, 1941. 30. f.

⁴⁷ Nehlsen: *Der Grabfrevel... op. cit.* 121.

⁴⁸ Ulpianus D. 47, 12, 3, 3; *Concilium Matisconense* (a. 585) can. 17; *Concilium Antissiodorensis* (a. 573/603) can. 15.

⁴⁹ Nehlsen: *Der Grabfrevel... op. cit.* 123.

⁵⁰ *Ibid.*

⁵¹ Baesecke, G.: *Die deutschen Worte der germanischen Gesetze. Beiträge zur Geschichte der deutschen Sprache und Literatur* 59. 1935. 1–101, 32; Munkse, H. H.: *Der germanische Rechtswortschatz im Bereich der Missetaten. Philologische und sprachgeographische Untersuchungen, I. Die Terminologie der älteren germanischen Rechtsquellen*. Berlin–New York, 1973. 266.

⁵² *Edictus Rothari* 14. *Et si expolia de ipso mortuo tulerit, id est plodraub, conponat octoginta solidos.*

⁵³ *Ibid.* 16. *Si quis hominem mortuum in flumine aut foris invenerit aut expoliaverit et celaverit, conponat parentibus mortui solidos octoginta. Et si eum invenerit et expoliaverit et mox vicinibus patefecerit, et cognoscitur quod pro mercedis causa, nam non furtandi animo fecerit, reddat spolia, quas super cum invenerit, et amplius ei calumnia non generetur.*

raibraub,⁵⁴ i.e. plundering of a dead person, might have been states of facts regulated by German unwritten law a long time before Rothari's code, and the eighty *solidus* as payable amount appears at several other points in *Edictus Rothari*, for example, in the state of facts of *marhwuorfin*, i.e. throwing a free man off of a horse.⁵⁵ (It should be added that linguistically *raibraub* and *plodraub* show close connections with the term *walaraupa* contained in *Lex Baiuvariorum*,⁵⁶ which means plundering of a person killed in action.⁵⁷) However, if somebody ruins a grave and throws out the corpse (*grapwurf*),⁵⁸ he shall pay nine hundred *solidus* to the relatives of the dead person, and if there are no relatives, then this amount will be collected by the *gestaldus* or *sculdhais* for the treasury.⁵⁹ This punishment more or less corresponded to the fine ordered by Constantinus I (ten pound gold), however, as it has been described above, the imperial decree threatened the perpetrator with death penalty in addition to the above.⁶⁰ (The nine hundred *solidus* amount of the *conpositio* is applied with regard to other crimes that seriously prejudice public interest in *Edictus Rothari*, for example, in case of causing *scandalum* at a meeting,⁶¹ attacking a traveller on the way to the king,⁶² distraint of a horse or a herd without the king's licence,⁶³ and the above-mentioned assassination, *morth*.⁶⁴) Presumably, the high amount of *conpositio* was assessed not in view of the motive but because public peace was endangered, i.e. the legal interest meant to be protected by the king⁶⁵ was prejudiced.⁶⁶ If the perpetrator was unable to pay the *conpositio*, he became a life-long servant of his creditor, in accordance with Liutprand's provision.⁶⁷ In case robbing of a grave/desecration of a grave was committed by a slave, he was to suffer death, in accordance with the provisions of King Grimoald,⁶⁸ which might have been an innovation of the king since during the reign of King Rothari when a slave committed a crime, then his master had to

⁵⁴ See van den Rhee, F.: *Die germanischen Worte in den langobardischen Gesetzen*. Rotterdam, 1970. 39 f.; 111. f.

⁵⁵ *Edictus Rothari* 30.

⁵⁶ *Lex Baiuvariorum* 19, 4.

⁵⁷ Baesecke: *op. cit.* 16; 23; 32; 87; Kralik: *op. cit.* 124. f.

⁵⁸ Cf. Rhee: *op. cit.* 78.

⁵⁹ *Edictus Rothari* 15. *Si quis sepulturam mortui hominis ruperit et corpus expoliaverit aut foris iactaverit, nongentos soledos sit culpavelis parentibus sepulti. Et si parentis proximi non fuerint, tunc gestaldius regis aut sculdhais requirat cupla ipsa et ad curte regis exegat.*

⁶⁰ Nehlsen: *Der Grabfrevel... op. cit.* 124.

⁶¹ *Edictus Rothari* 8.

⁶² *Ibid.* 18.

⁶³ *Ibid.* 249.

⁶⁴ *Ibid.* 14.

⁶⁵ *Ibid.* 74.

⁶⁶ Nehlsen: *Der Grabfrevel... op. cit.* 125.

⁶⁷ *Leges Liutprandi* (ed. F. Bluhme: *Edictus ceteraque Langobardorum leges cum constitutionibus et pactis principum Beneventanorum ex maiore editione monumentis Germaniae inserta*. Hannover, 1869.) 152.

⁶⁸ *Leges Grimoaldi* (ed. F. Bluhme: *Edictus ceteraque Langobardorum leges cum constitutionibus et pactis principum Beneventanorum ex maiore editione monumentis Germaniae inserta*. Hannover, 1869.) 3.

pay the *conpositio* and he could not exercise the option to deliver the slave to the authorities in order to get rid of the penalty.⁶⁹

Just as in western Gothic law, in Langobardic law it is possible to discover the German legal roots in judging the act, i.e. the *delictum* character, which required the perpetrator to pay *conpositio*; the *crimen* character, i.e. the option of capital punishment, was introduced later—but, contrary to western Gothic law, Langobardic law did not reach this level in case of perpetrators with a free *status*.⁷⁰

II

From among Frankish sources, first, it is worth investigating *Lex Ribuaria* noted down in the first half of the 7th c.⁷¹ Under the title *De corporibus expoliatis* the law distinguishes plundering of an unburied corpse and an already buried corpse. In case of plundering an unburied corpse, if the perpetrator admits his act, he shall pay sixty *solidus*, if he denies it and he has been proved to have committed the act, he shall pay one hundred *solidus* and the *dilatura*, or he shall take a cleansing oath together with six fellow oath-takers—this issue will be discussed later.⁷² *Dilatura* is usually interpreted in the sense of *default penalty*—nevertheless, the term covers the reward to be paid to the *delator*, the person who makes the charge.⁷³ In the above-mentioned case of plundering the dead person the perpetrator shall pay two hundred *solidus*.⁷⁴

It should be noted that a few titles later *Lex Ribuaria* returns to this issue and under the title *De corpore expoliato* expounds the state of facts of plundering an unburied and a buried corpse again, however, here it no longer distinguishes a perpetrator who admits his act from the one who denies it. The robber of an unburied corpse shall pay one hundred *solidus*, shall return or compensate for the robbed valuables and shall bear the reward of the person who makes charges.⁷⁵ Compared to the state of facts referred to in the above-mentioned title, the difference is that in the former the lawmaker might have presumed that the injured party had been killed by the perpetrator, and for this reason inserted the distinction between an admitting and denying perpetrator in the text subsequently, which is supported by the fact that a cleansing oath to be taken together with six fellow oath-takers is completely senseless in case of a perpetrator who admits his act. In the light of that, the latter title refers to the state of facts when the plundered person has not been killed by the

⁶⁹ Nehlsen, H.: *Sklavenrecht zwischen Antike und Mittelalter. Germanisches und römisches Recht in den germanischen Rechtsaufzeichnungen, I. Ostgoten, Westgoten, Franken, Langobarden*. Göttinger Studien zur Rechtsgeschichte 7. Frankfurt a. M.–Zürich, 1972. 377.

⁷⁰ *Ibid.* 126.

⁷¹ Schmidt-Wiegand, R.: *Lex Ribuaria*. In: *Handwörterbuch zur deutschen Rechtsgeschichte*, II. Berlin, 1978. 1923–1927.

⁷² *Lex Ribuaria* 55, 1. *Si quis autem hominem mortuum, antequam humetur, expoliaverit, si interrogatus confessus fuerit, bis trigenos solidos multetur. Si autem negaverit et postea convictus fuerit, bis quinquaginta solidos cum dilatura multetur, aut cum VI iuret.*

⁷³ Nehlsen: *Sklavenrecht ... op. cit.* 313²⁸⁶.

⁷⁴ *Lex Ribuaria* 55, 2. *Si quis mortuum effodire praesumpserit, quater quinquagenos solidos multetur aut cum XII iuret.*

⁷⁵ *Ibid.* 88, 1. *Si quis corpus mortuum, priusquam sepeliatur, expoliaverit, C sol. cum capitale et dilatura multetur.*

robber.⁷⁶ With respect to the two hundred *solidus* penalty imposed on the person who plunders an already buried person there is no difference between the two titles, but the latter adds a stipulation to it, concordant with *Lex Salica*, stating that the perpetrator will be considered *wargus* until—emphatically until and as long as—he has paid the *conpositio* to the relatives of the injured party.⁷⁷

The analysis of the relevant loci of *Lex Salica* is significantly more problematic than the examination of the folk laws containing fairly clear provisions, discussed so far, which can be attributed to a considerable extent to uncertainties of the texts left to us, therefore—for the avoidance of doubt—we shall consistently use the terms of Eckhardt's *editio*.⁷⁸ In the most reliable manuscripts (A2, A3, A4, C5, C6) the state of facts of plundering a yet unburied dead person in a free status can be found under the title *De supervenientis vel expoliationibus*, and the law orders to punish it by one hundred *solidus* penalty.⁷⁹ In agreement with Eckhardt, the term *chreumusido* can be translated as body snatching (*Leichenberaubung*).⁸⁰ However, a few titles later the state of facts of body snatching occurs again (under the title *De corporibus expoliatis*), and on this locus there are considerable differences between the manuscripts that belong to group A and group C, since the texts of group C set out sixty-two and a half *solidus* penalty and speak about the corpse of a dead person only (*corpus hominis mortui*);⁸¹ yet, the texts of group A stipulate *conpositio* amounting to sixty-three *solidus* and mention the corpse of a killed person (*corpus occisi hominis*).⁸² Eckhardt corrected the term *freomosido* in the glossary (interpreted by him as robbing of a free man) and replaced it by *chreosido* that occurred before;⁸³ yet, no matter which text version we accept, the amount of the *conpositio* set out in the two titles are by no means equal, which is adopted by *Lex Salica-Karolina*, too.⁸⁴ At the same time, newer manuscripts (D, E) mention body snatching at one place only, and they order to punish it by sixty-two and a half *solidus*.⁸⁵ There are good chances that *Lex Salica Karolina* did not adopt the two separate states of facts—specifically: the differentiation of plundering a person killed by the robber (*occisus*) and of a dead person not injured by the robber (*mortuus*)—

⁷⁶ Nehlsen: *Der Grabfrevel... op. cit.* 136.

⁷⁷ *Lex Ribuaria* 88, 2. *Si autem eum ex homo traxerit et expoliaverit, CC sol. cum capitale et dilatura culpabilis iudicetur, vel wargus sit (hoc est expulsus), usque ad parentibus satisfecerit.*

⁷⁸ Eckhardt, K. A. (ed.): *Lex Salica. Monumenta Germaniae Historica, Leges nationum Germanicarum*, IV. 2. Hannover, 1969.

⁷⁹ *Lex Salica* 14, 9. *Si quis hominem mortuum antequam in terra mitatur in furtum expoliaverit, malb. chreumusido sunt den. III M qui fac. sol. C cupl. iud.*

⁸⁰ Eckhardt, K. A. (ed.): *Pactus legis Salicae. Monumenta Germaniae Historica, Leges nationum Germanicarum*, I. 4/1. Hannover, 1962. 281.

⁸¹ *Lex Salica* 55, 1. (C6) *Si quis corpus hominis mortui antequam in terra mitatur in furtum expoliaverit, malb. freomodiso sunt den. IIMD qui fac. sol. LXII semis culp. iud.*

⁸² *Ibid.* 55, 1. (A1) *Si quis corpus occisi hominis antequam in terra mittatur expoliaverit in furtum, mal. uuaderio hoc est f. sol. LXIII culp. iudic.*

⁸³ Eckhardt: *Pactus... op. cit.* 205.

⁸⁴ *Lex Salica Karolina* 17, 1. *Si quis hominem mortuum antequam in terra mittatur in furtum expoliaverit, IVM denariis qui faciunt solidos C culpabilis iudicetur; 57, 1. Si quis corpus hominis mortui antequam in terra mitatur per furtum expoliaverit, MMD denariis qui faciunt solidos LXII semis culpabilis iudicetur.*

⁸⁵ *Ibid.* 19, 1. (D) *Si quis corpus occisi hominis, antequam in terra mittatur, in furtum expoliaverit, mallobergo chreo mardo (sunt dinarii MMD qui faciunt) solidus LXII semis culpabilis iudicetur.*

because it did not become deeply rooted in legal literacy. On the other hand, it maintained the double amount of *compositio*: sixty-two and a half and one hundred *solidus*, which might have meant that the man who robbed the valuables of a dead person was obliged to pay one hundred *solidus*, while the one who killed his victim first and then plundered him was obliged to pay, in addition to blood money for murder, sixty-two and a half *solidus*.⁸⁶

In case of plundering a dead slave, the perpetrator shall pay thirty-five *solidus* to the slave's master,⁸⁷ if, however, the objects with the slave did not exceed the value of forty *denarius*, then the perpetrator was obliged to pay merely fifteen *solidus*.⁸⁸

All these amounts of *compositio* properly harmonise with other blood moneys of *Lex Salica*: a robber of a free man shall pay sixty-two and a half *solidus*, too,⁸⁹ just as those who intrude into an alien courtyard⁹⁰ or commit bodily injury causing paralysis of the hands;⁹¹ similarly, a person who plunders a live slave shall pay thirty-five or fifteen *solidus*.⁹² The *compositio* amounting to one hundred *solidus* occurs in the case of robbing of a sleeping person.⁹³

Actual robbing of a grave is dealt with by the groups of older manuscripts (A, C, K) under two titles: *De supervenientis vel expoliationibus* and *De corporibus expoliatis*. In case of the first, the man robbing a grave shall pay two hundred *solidus*.⁹⁴ The second locus (according to groups A and C) again stipulates indemnification of two hundred *solidus*, however, it includes the stipulation containing the term *wargus*, which gives rise to extensive disputes, that condemns the perpetrator as *wargus* until he has discharged his debt. A person considered *wargus* is compelled to live outside society until the relatives of the injured party ask the judge to let him return, until which time nobody, not even his next of kin or relatives can give him bread or shelter; so, he gets into a kind of *exlex* status, and anybody who breaches this prohibition shall pay fifteen *solidus*.⁹⁵ The groups of manuscripts D and E explain the term *wargus* by the word *expellis*, and again add that the perpetrator can live his life solely as an outcast until paying off the *compositio*.⁹⁶

⁸⁶ Nehlsen: *Der Grabfrevel... op. cit.* 138.

⁸⁷ *Lex Salica* 35, 6. (C6) *Si quis servum alienum mortuum in furtum expoliaverit et ei super XL den. valentes tulerit, malb. teofriomosido IMCCCC den. qui fac. sol. XXXV culp. iudic.*

⁸⁸ *Ibid.* 35, 7. (C6) *Si quis spolia minus XL den. valuerit, teofriomosido DC den. qui fac. sol. XV culp. iud.*

⁸⁹ *Ibid.* 14, 1.

⁹⁰ *Ibid.* 14, 6.

⁹¹ *Ibid.* 29, 2.

⁹² *Ibid.* 35, 2. 3.

⁹³ *Ibid.* 26, 1.

⁹⁴ *Ibid.* 14, 10. (A2) *Si quis hominem exfuderit et expoliaverit, mal. turni cale sunt din. VIIIM fac. sol. CC cui fuerit adprobatum cul. iud.*; (C6) *Si quis hominem mortuum effoderit vel expoliaverit, malb. ternechallis sive odocarina sunt den. VIIIM qui fac. sol. CC culp. iud.*

⁹⁵ *Ibid.* 55, 4. (A, C) *Si quis corpus iam sepultum effoderit et expoliaverit et ei fuerit adprobatum, mallobergo muther hoc est, uargus sit usque in diem illam quam ille cum parentibus ipsius defuncti conveniat, ut et ipsi pro eo rogare debeant, ut ei inter homines liceat accedere. Et qui ei, antequam cum parentibus conponat, aut panem dederit aut hospitem dederit, seu parentes, seu uxor sua proxima, DC denariois qui faciunt solidos XV culpabilis iudicetur. Tamen auctor sceleris, qui hoc admisisse probatur aut efodisse, mallobergo tornechale sunt, VIIIM denarios qui faciunt solidos CC culpabilis iudicetur.*

⁹⁶ *Ibid.* 55, 4. (D, E) *Si quis corpus sepultum exfoderit et expoliaverit, uargus sit, id est expelliis, usque in diem illum, quam ipsa causa cum parentibus defuncti faciat emendare et ipsi*

From among provisions on desecration of a grave, up to now in literature the greatest attention has been paid to title 55 of *Lex Salica*,⁹⁷ as it is here that the word *wargus* can be read as a synonym of *expulsus* or *expellis*, which was translated by Jacob Grimm as *robber* or *wolf*, in view of the fact that the person cast out of the community is the inhabitant of the wilderness just as a beast, and anybody can kill him with impunity just as a wolf.⁹⁸ This conception was confirmed by Wilda's view⁹⁹ which stated that close connection can be made between *wargus*, interpreted by him in the context of restlessness (*Friedlosigkeit*), and the Old Norse *vargr* (malefactor, wolf)—in spite of all the criticism,¹⁰⁰ this view prevailed both in older¹⁰¹ and contemporary German legal history.¹⁰²

For example, Mitteis defines *Friedlosigkeit*—in organic relation to the legal content of the meaning of the term *wargus*—as follows: it includes violation of the interests of the people and the state (for example, body snatching, since thereby the perpetrator makes it impossible to exercise the cult of the dead), acts committed with vile intentions, by stealth—due to all that the perpetrator will become an outlaw (*exlex, outlaw*), his wife shall be considered a widow and his children orphans, from then on he must live in the wilderness, far from any human community, just as if he were a werewolf (*Werwolf, gerit caput lupinum*).¹⁰³ Kaufmann also connects the phrase *wargus* with the Anglo-Saxon word *vearg* and the Old Norse word *vargr*, and relates the person cast out of the community—specifically concerning the robbing of a grave considered religious crime—to a wolf that lives outside human society, civilisation.¹⁰⁴ In his interpretation, Erler goes even further: he calls the attention to the aspect of the wolf in Old German religion based on which it was associated with body snatching, corpse/carrion eating and therefore was considered a death demon—so, he provides further indicium with regard to a desecrator of a grave or a body snatcher for relating him to a wolf.¹⁰⁵ It should be underlined that Erler considered this identification an allegory, imagery manifesting itself in law as well as one of the most magnificent documents of archaic thinking.¹⁰⁶ A similar position, a position unambiguously considering body snatching/desecration of a grave one of the major crimes, was taken in this respect by

parentes rogare ad iudicem debeant, ut ei inter homines liceat habitare, si tamen auctor sceleris, mallobergo turnichal, (sunt dinarii VIIIIM qui faciunt) solidus CC culpabilis iudicetur. Et qui eum, antequam cum parentibus defuncti satisfaciat, ospicium dederit, (sunt dinarii DC qui faciunt) solidus XV culpabilis iudicetur.

⁹⁷ Geffcken, H.: *Lex Salica*. Leipzig, 1898. 205. ff.; Unruh, G. C. v.: *Wargus. Friedlosigkeit und magisch-kultische Vorstellungen bei den Germanen. Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Germanistische Abteilung* 74. 1957. 1–40; Jacoby, M.: *wargus, vargr, Verbrecher, Wolt, eine sprach- und rechtsgeschichtliche Untersuchung*. Uppsala, 1974. passim.

⁹⁸ Grimm, J.: *Deutsche Rechtsalterthümer, I–II*. Leipzig, 1922⁴. I. 270; 334. f.

⁹⁹ Wilda, W. E.: *Geschichte des deutschen Strafrechts, I. Das Strafrecht der Germanen*. Halle, 1842. 278. ff.

¹⁰⁰ Rehfeldt, B.: *H. Siuts, Bann und Acht und ihre Grundlagen im Totenglauben, 1959. Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Germanistische Abteilung*, 87. 1961. 437–439.

¹⁰¹ Brunner, H.: *Deutsche Rechtsgeschichte, I–II*. Berlin 1906³. I. 410. ff.; Harder, 1938. 5.

¹⁰² Mitteis, H.: *Deutsche Rechtsgeschichte*. München, 1978¹⁵. 31. f.

¹⁰³ *Ibid.* 31.

¹⁰⁴ Kaufmann, E.: *Acht*. In: *Handwörterbuch zur deutschen Rechtsgeschichte, I*. Berlin, 1971. 25–32.

¹⁰⁵ Erler, A.: *Friedlosigkeit und Werwolfglaube*. Paideuma 1. 1938/40. 303–317.

¹⁰⁶ *Ibid.* 317.

Amira¹⁰⁷ and His¹⁰⁸ too. In literature it was Nehlsen who called the attention for the first time—quite properly—to the point that in relation to this state of facts extreme care should be taken when comparing sources, especially in involving northern sources.¹⁰⁹

When interpreting this locus—to get an answer to the question whether the *wargus* locus covers an institution of ancient German customary law *ex asse* indeed—it is worth examining ecclesiastical lawmaking as well. The Council of Toledo IV held in 633 classified desecration of a grave as *sacrilegium*.¹¹⁰ *Poenitentiale Romanum* from the 8th c. sentences a clerical who commits desecration of a grave to seven-year penitence, including three years on bread and water,¹¹¹ in other words, it imposes the same punishment as on a layman committing manslaughter,¹¹² and *Poenitentiale Casinense* dating from the early 8th c. prescribes five-year penitence¹¹³ (exactly as many as in case of kidnapping/abduction),¹¹⁴ just as the Frankish *Poenitentiale Parisiense*,¹¹⁵ *Poenitentiale Merseburgense*¹¹⁶ and *Poenitentiale Hubertense*.¹¹⁷ If the perpetrator was not willing to submit to either secular punishment (payment of *conpositio*) or ecclesiastical penalty (penitence), the Church had the opportunity to excommunicate him from the Church, i.e. apply *anathema* against him.¹¹⁸ This sanction was applied, for example, against those who caused damage to ecclesiastical property, who stubbornly refused to pay reparation,¹¹⁹ however, similar punishment was imposed in accordance with *Poenitentiale Vinniai* on clericals who committed homicide and who were allowed to enter the community again only after long penitence, reconciliation with the relatives of the injured party.¹²⁰ The sanction of *Poenitentiale Columbanii*¹²¹ created in Gallia, which can be definitely compared with this provision, states that a *homicida* who

¹⁰⁷ See Amira, K. v.: Die germanischen Todesstrafen. Untersuchungen zur rechts- und Religionsgeschichte. *Abhandlungen der Bayerischen Akademie der Wissenschaften*. Philosophisch-philologische und historische Klasse, XXXI/3. München, 1922.

¹⁰⁸ His, R.: *Geschichte des deutschen Strafrechts bis zur Karolina*. München–Berlin, 1928. 159.

¹⁰⁹ Nehlsen: *Der Grabfrevel... op. cit.* 111.

¹¹⁰ *Concilium Toletanum IV. (a. 633)* (ed. Mansi, J. D.: *Sacrorum conciliorum nova amplissima collectio*, IX. Firenze, 1763.) 46. *Si quis clericus in demoliendis sepulcris fuerit deprehensus, quia facinus hoc pro sacrilegio legibus publicis sanguine vindicatur, oportet canonibus in tali scelere proditum a clericatus ordine submoveri, et poenitentiae triennio deputari.*

¹¹¹ *Poenitentiale Romanum* (Hrsg.: Schmitz, H. J.: *Die Bußbücher und Bußdisziplin der Kirche*. Mainz, 1883.) 29.

¹¹² *Ibid.* 4.

¹¹³ *Poenitentiale Casinense* (Hrsg.: Schmitz H. J.: *Die Bußbücher und Bußdisziplin der Kirche*. Mainz, 1883.) 76.

¹¹⁴ *Ibid.* 79.

¹¹⁵ *Poenitentiale Parisiense* (Hrsg.: Wasserschleben, F. W. H.: *Die Bußordnungen der Abendländischen Kirche nebst einer rechtsgeschichtlichen Einleitung*. Halle, 1851.) 9.

¹¹⁶ *Poenitentiale Merseburgense* (Hrsg.: Wasserschleben, F. W. H.: *Die Bußordnungen der Abendländischen Kirche nebst einer rechtsgeschichtlichen Einleitung*. Halle, 1851.) 15.

¹¹⁷ *Poenitentiale Hubertense* (Hrsg.: Wasserschleben, F. W. H.: *Die Bußordnungen der Abendländischen Kirche nebst einer rechtsgeschichtlichen Einleitung*. Halle, 1851.) 16.

¹¹⁸ Cf. *Concilium Toletanum IV. (a. 633)* 75.

¹¹⁹ *Concilium Turonense II. (a. 567)* (ed. Maassen, F.: *Monumenta Germaniae Historica, Concilia aevi Merovingici*, I. Hannover, 1893.) 25.

¹²⁰ *Poenitentiale Vinniai* (Hrsg. Wasserschleben, F. W. H.: *Die Bußordnungen der Abendländischen Kirche nebst einer rechtsgeschichtlichen Einleitung*. Halle, 1851.) 23.

¹²¹ Laporte, J.: *Le penitentiel de Saint Coloman*. Tournai–Paris–Rome–New York, 1958. 20. ff.

does not submit to secular punishment must be expelled from the community and can enter it again when a cleric attests that he has paid the *compositio* to the relatives of the injured party.¹²² In accordance with *Lex Salica* the relatives themselves stand witness that payment of the *compositio* has been made.

In case of abduction of nuns, the expulsion of a perpetrator who fails to perform the punishment imposed on him is prescribed by *Lex Baiuvariorum*, too,¹²³ and the phrase "*expellatur de provincia*" used by it is a clear reminiscence of the phrase "*wargus sit, id est expellis*" of *Lex Salica*.¹²⁴

On the other hand, ecclesiastical lawmaking contains, in addition to excommunication, prohibition of maintaining contact with the outcast person. For example, the relevant canon of the Council of Arles concluded in 506¹²⁵ was inserted in *Collectio vetus Gallica* created between 585 and 626/27, which forbids any kind of connection with the outcast person.¹²⁶ In 511, the Council of Orléans¹²⁷ set similar regulations; what is more, it subjected persons breaching this prohibition to *anathema (excommunicatio)*.

Based on all that it can be declared that the provision of *Lex Salica* highly corresponds to the ecclesiastical lawmaking of the period, i.e. the efforts of the Church to outcast those from society who are reluctant to pay the penalty, and to ensure that all kinds of solidarity and communication with them shall be prohibited until it is proved credibly—by testimony of the relatives of the injured party in *Lex Salica*—that they have discharged the statutory sanction. As the Church introduced this practice from the late Antiquity already, the current ruler, who took such action against perpetrators in case of robbing of a grave/desecration of a grave, could rely on the support of the Church. As far as *Lex Baiuvariorum* is concerned, ecclesiastical assistance in drafting the text can be considered fairly clear; however, based on that even in case of *Lex Salica* the contribution of the clergy to editing cannot be ruled out either.¹²⁸

Now, it is worth examining what the term *wargus* covers in *Lex Salica* and to what extent it can be considered a surviving element of ancient German linguistic tradition and written law. Three loci in Wulfila's Gothic translation of the New Testament are noteworthy with respect to the translation of the verb *damnare* and its derivatives. It interprets the text on condemnation of Jesus in the Gospel according to St. Matthew (*et damnabunt eum*

¹²² *Poenitentiale Columbani* (Hrsg. Wasserschleben, F. W. H.: *Die Bußordnungen der Abendländischen Kirche nebst einer rechtsgeschichtlichen Einleitung*. Halle, 1851.) 15.

¹²³ *Lex Baiuvariorum* 1, 11.

¹²⁴ *Lex Salica* 55, 4.

¹²⁵ *Concilium Arelatense* (a. 442–506) (ed.: Mansi, J. D.: *Sacrorum conciliorum nova amplissima collectio, XXIII*. Firenze, 176.) 2.

¹²⁶ *Collectio vetus Gallica* (Hrsg.: Mordek, H.: *Kirchenrecht und Reform in Frankenreich. Die Collectio Vetus Gallica, die älteste systematische Kanonensammlung des fränkischen Gallien. Studien und Edition*. Berlin, 1975) 17, 12. *Si quis a communione sacerdotale fuerit auctoritate suspensus, hunc non solum a clericorum, sed etiam a totius populi conloquio adque convictu placuit excludi, donec resepicens ad sanitatem redire festinet.*

¹²⁷ *Concilium Aurelianense I.* (a. 511) (ed.: Maassen, F.: *Monumenta Germaniae Historica, Concilia aevi Merovingici, I*. Hannover, 1893.) 11. *De his, qui suscepta poenitentia religionem suae professionis obliti ad saecularia relabuntur; placuit eos a communicatione suspendi et ab omnium catholicorum convivio separari. Quod si post interdictum cum iis quisquam praesumserit manducare, et ipse communione privetur.*

¹²⁸ Nehlsen: *Der Grabfrevel... op. cit.* 154.

morte) by the phrase "jah gawargjand ina dauþan",¹²⁹ in which *gawargjand* corresponds to the Latin verb *damnare*.¹³⁰ The noun *damnatio* in one of the loci of St. Paul¹³¹ is translated into Gothic by the word *wargiþa*¹³² and in another locus¹³³ *condemnatio* corresponds to the Gothic noun *gawargeins*.¹³⁴

The term *wargus* in this form occurs for the first time in one of Sidonius Apollinaris's letters, which relates that a woman was abducted by *varguses*, i.e. highwaymen, and explains that this is how local robbers are called (*latrunculi*).¹³⁵ In chronological order this locus is followed by the relevant passage of *Lex Salica*,¹³⁶ however, this law contains both the noun *wargus* and the verb *wargare* in relation to kidnapping an alien slave where *plagiavit* is explained by *wargaverit*.¹³⁷ this locus supports that *wargare* means *to kidnap (to abduct)*.¹³⁸ The first loci of the Carolingian Age can be found in the Anglo-Saxon *Heliand*: Judas ends his life *warg an wargil*,¹³⁹ the convicted rogues crucified alongside Christ die as rogues deserve to die (*waragtrewe*),¹⁴⁰ and the author puts the word *giwaragean* into Christ's mouth regarding those condemned to the pains of hell.¹⁴¹ Tatianus's Old High German translation of the Gospel contains *firwergit*¹⁴² and *forwergiton*¹⁴³ as equivalent of *maledicti*.¹⁴⁴ In the mirror of all that it is not surprising that the authoritative lexicon lists the phrases *wiergan* and *weargcwedolian* as equivalents of *maledicere*, *maledictio*, *maledictus* and *malignari*.¹⁴⁵ The terms *anathemazatus*, *maledictus*, *profugus*, *vagus* and *rapax* that appear in ecclesiastical lawmaking, applied by the lawmaker to a person expelled from the community, can be taken as the equivalent of the phrases *wargus*, *gawargjan*, *warc* etc.¹⁴⁶

Based on the above, Nehlsen excludes *a limine* that the phrase *wargr (vargr)* means *wolf* with respect to early medieval sources, and adds that the (mostly Old Norse) underlying

¹²⁹ *Evangelium secundum Marcum* (Biblia Sacra Iuxta Vulgatam Versionem, Stuttgart, 1994.) 10, 33.

¹³⁰ Feist, S.: *Vergleichendes Wörterbuch der gotischen Sprache*. Leiden, 1939³. 210; 325; 551; Nehlsen: *Der Grabfrevel... op. cit.* 154.

¹³¹ Paulus, *Epistola ad Romanos* (Biblia Sacra Iuxta Vulgatam Versionem, Stuttgart, 1994.) 13, 2.

¹³² Feist: *op. cit.* 551; Nehlsen: *Der Grabfrevel... op. cit.* 155.

¹³³ Paulus, *Epistola ad Corinthos* (Biblia Sacra Iuxta Vulgatam Versionem, Stuttgart, 1994.) 2, 7, 3.

¹³⁴ Feist: *op. cit.* 325; Nehlsen: *Der Grabfrevel... op. cit.* 155.

¹³⁵ Sidonius Apollinaris, *Epistulae* 6, 4. ...*forte Vargorum, hoc enim nomine indigenas latrunculos nuncupant.*

¹³⁶ *Lex Salica* 55, 4.

¹³⁷ *Ibid.* 66. (E); 65. (D)

¹³⁸ Nehlsen: *Sklavenrecht ... op. cit.* 110. ff.; Nehlsen: *Der Grabfrevel... op. cit.* 155.

¹³⁹ *Heliand* (Hrsg. C. Burchardt, Verden, 2007.) 5168.

¹⁴⁰ *Ibid.* 5563.

¹⁴¹ *Ibid.* 25131.

¹⁴² *Evangelium secundum Iohannem* (Biblia Sacra Iuxta Vulgatam Versionem, Stuttgart, 1994.) 7, 49.

¹⁴³ *Evangelium secundum Matthaum* 25, 41.

¹⁴⁴ Cf. Nehlsen: *Der Grabfrevel... op. cit.* 156.

¹⁴⁵ Köbler, G.: *Lateinisch-germanisches Lexikon. Arbeiten zur Rechts- und Sprachwissenschaft* 5. Göttingen–Gießen, 1975. 189.

¹⁴⁶ Nehlsen: *Der Grabfrevel... op. cit.* 156.

sources are from the 11th c. or from later periods, and thereby he deprives the *Friedlosigkeit* theory of one of its most important bases. He asserts that the term *wargus* is the German equivalent of the ecclesiastical usage, the loci of *Lex Salica* (and *Lex Ribuarica*) indicate merely borrowing of ecclesiastical lawmaking and do not prove the ancient German theory and continued existence of ancient German faith.¹⁴⁷ Furthermore, he makes it clear that expulsion from the community did not incur *ipso facto*, instead, the perpetrator had to wander the world alone as Cain (*more Cain vagus et profogus*) only as a consequence of failure of the payment of *compositio*, i.e. refusal of statutory punishment.¹⁴⁸ Therefore, in this case living the life of a *wargus* is the consequence of defiance of the law, as it seems to be supported by the phrase "*si noluerit emendare et reddere*"¹⁴⁹ in *Lex Baiuvariorum*.¹⁵⁰

On the other hand, still with regard to the phrase *wargus*, the question arises why the later groups of texts of *Lex Salica* (E) completely omitted this term from the text. Probably because this folk law term without any explanation would have been no longer interpretable in the Carolingian Age.¹⁵¹ The Middle Latin term *wargus* appears to be related to the following German words: the Old Norse *vargr* (*malefactor; wolf*), the Anglo-Saxon *wearg* (*outcast, damned, malefactor*) and the Old High German *warg/warch* (*enemy, devil*) and the Gothic words: *gawarjagan* (*to condemn*), *wargiba* and *gawargeins* (*judgment, condemnation*).¹⁵² Furthermore, the following words can be considered related phrases: the Old Saxon *giwaragean* (*to condemn a malefactor*), *warg/warag* (*malefactor; devil*), *wurgil* (*rope*), *wargtreo* (*gallows*), the Old English *warhtreo* (*gallows-bird*), the Old Norse *gorvargr* (*cattle thief*), *kaksnavarher* and *brennuvargr* (*arsonist murderer*), *morðvargr* (*murderer*) and *vargdropi* (*descendant of an outcast*).¹⁵³ The etymology of all these phrases that can be traced back to the Old German word **warz-a* is not fully clarified,¹⁵⁴ yet, if we presume to find its origin in the Indo-European root **uer-gh* (*to wind, to press, to strangle*), then *wargus* might mean *strangler* and *the person to be strangled*.¹⁵⁵ In the mirror of the above, Schmidt-Wiegand can see a clear connection with the meaning *wolf*; at the same time, he claims that it should be investigated whether this word carried the meaning *hostis* (*alien, enemy*) in ancient German times already, and as underlying words he refers to the Langobardic *waregang* and the Old English *waeregenga* (*alien, protection seeker*).¹⁵⁶

Consequently, it should be analysed in what connection, chronology the meaning *malefactor* is related to the meaning *wolf*, in other words, which meaning can be considered primary with respect to the phrase *wargus/vargr*. It can be declared beyond doubt that the

¹⁴⁷ *Ibid.* 157. f.

¹⁴⁸ *Ibid.* 164.

¹⁴⁹ *Lex Baiuvariorum* 1, 11.

¹⁵⁰ Nehlsen: *Der Grabfrevel... op. cit.* 165.

¹⁵¹ Schmidt-Wiegand, R.: *Wargus. Eine Bezeichnung für den Unrechtstäter in ihrem Wortgeschichtlichen Zusammenhang*. In: Jankuhn, H.–Nehlsen, H.–Roth, H. (Hrsg.): *Zum Grabfrevel in vor- und frühgeschichtlicher Zeit. Untersuchungen zu Grabraub und „haugbrod“ in Mittel- und Nordeuropa*. Göttingen, 1978. 188–196., 190.

¹⁵² *Ibid.* 191; Feist: *op. cit.* 210. 551.

¹⁵³ Sehrt, E.: *Vollständiges Wörterbuch zum Heliand und zur altsächsischen Genesis*. Göttingen, 1966². 641. f.; 725; Schützeichel, R.: *Althochdeutsches Wörterbuch*. Tübingen, 1974². 222; Vries, J. de: *Altnordisches etymologisches Wörterbuch*. Leiden, 1962². 183; 645.

¹⁵⁴ Jacoby: *op. cit.* 12.

¹⁵⁵ Pokorny, J.: *Indogermanisches etymologisches Wörterbuch, I*. Bern, 1959. 735.

¹⁵⁶ Schmidt-Wiegand: *Wargus... op. cit.* 191. Cf. Baesecke: *op. cit.* 96; Rhee: *op. cit.* 133. f.

meaning *malefactor* is much earlier in terms of the age of the source since sources from the Continent in this sense occur from the 6th c. already, while the meaning *wolf* beside the meaning *malefactor* can be documented only in Old Norse sources from five centuries later—on the other hand, it should not be forgotten that the Old Norse terminology was basically developed later than the Continental one.¹⁵⁷ In the light of that, the Old Norse phrase *vargr*—irrespective if either ‘malefactor’ or ‘wolf’ is considered the primary meaning—belongs to a later layer compared to Continental terms and even within Old Norse.¹⁵⁸ Also, it should be made clear that both on the Continent and on northern territories relatively few traces of pagan tradition can be found in laws written down since all the rules wanted by enacting such laws was to eliminate ancient German elements and introduce Christian thinking and legal awareness.¹⁵⁹ After all, Schmidt-Wiegand finds that *wargus* as a legal term should be interpreted in a wider sense: as expulsion from the community, and refuses the primacy of the meaning *wolf/werewolf*, although he acknowledges the significance of further development of the term to this direction both on the Continent and in the north. Expulsion (*Acht*) was imposed on perpetrators of all the acts (desecration of a grave /robbing of a grave, manslaughter by arson, assassination, breach of peace, etc.) that was denoted by the Gothic and Old Norse legal language by the phrase *fairina* and *nidingsverk*, respectively, and whose sanction, i.e. expulsion, was expressed by the Old Swedish word *utlægher*, the Old Norse *utlagr*, the Anglo-Saxon *utlath*, the Middle High German *ēlos* and the Middle Latin *exlex*. Transformation of the meaning *outcast* and its extension by the meaning *wolf* can be undoubtedly connected with the fact that it was noted in *Lex Salica* already that a malefactor who has failed to pay *conpositio* hides in the forest (*per silvas vadit*),¹⁶⁰ and later he was denoted by the phrase *wealdgenga* by the Anglo-Saxon sources and *skōgarmadr* by the Old Norse sources.¹⁶¹

III

Alemannian law regulates the issue more specifically and—to put it more exactly—it determines the amount of *conpositio* depending on the *status* of the dead person. *Pactus Alamannorum*¹⁶² noted down in the early 7th c. sets up the following system. In case of killing a free man, if the perpetrator in a free *status* delivers taken valuables to the relatives, no investigation need to be conducted due to robbing of the dead person,¹⁶³ if, however, he does not deliver them, he shall pay forty *solidus*.¹⁶⁴ If the perpetrator took the valuables of a

¹⁵⁷ Schmidt-Wiegand: *Wargus... op. cit.* 193.

¹⁵⁸ Jacoby: *op. cit. passim*.

¹⁵⁹ Schmidt-Wiegand: *Wargus... op. cit.* 194.

¹⁶⁰ *Lex Salica* 115. *Nam si certe fuerit malus homo, qui malei in pago faciat et non habeat ubi consistat, nec res unde conponat, et per silvas vadit et in praesentia nec agens nec parentes ipsum adducere possunt...*

¹⁶¹ Schmidt-Wiegand: *Wargus... op. cit.* 196.

¹⁶² See Schott, C.: *Pactus, Lex und Recht*. In: Hübner, W. (Hrsg.): *Die Alemannen in der Frühzeit. Veröffentlichungen des alemannischen Instituts* 34. Bühl-Baden, 1974. 135–168.

¹⁶³ *Pactus Alamannorum* 17, 1. *Si quis ingenuus ingenuum interficiet et ei aliquid de res suas sangulentas tullerit aut hoc offerit ad parentes, nihil est ad requirendum.*

¹⁶⁴ *Ibid.* 17, 2. *Si enim vero non offerit, XL sol. solvat.*

liberated dead person, he paid thirteen *solidus* and one *tremisse*,¹⁶⁵ and if the “injured person” was a slave, the sum of *compositio* amounted to twelve *solidus*.¹⁶⁶ If the dead person was an Alemannian woman in a free status, then the perpetrator had to pay eighty *solidus* or had to take a cleansing oath together with twelve fellow oath-takers.¹⁶⁷ In case of a liberated woman, the perpetrator had to pay twenty-six *solidus* and two *tremisse*,¹⁶⁸ and in case of a woman in a slave *status* he had to pay twelve *solidus* or had to take an oath together with twelve fellow oath-takers.¹⁶⁹ The forty *solidus* payable in case of a free Alemannian injured party corresponds to the *compositio* of bodily injury—a cut off ear according to the source¹⁷⁰ or to the penalty that had to be paid when somebody placed an object with a value higher than one *solidus* beside the dead person.¹⁷¹ The *compositio* payable in case of female injured parties amounted to twice the sum to be paid by male persons, however, this principle was not enforced with regard to servants. *Pactus Alamannorum* contains a further provision, which regulates the state of facts of plundering a yet unburied person killed by a third party: in this case the law—just as *Edictus Rothari*¹⁷²—prescribed *compositio* of eighty *solidus*.¹⁷³ However, the interpretation of the locus raises difficulties as the phrase regarding plundering a buried dead person (i.e. actual robbing of a grave) was, beyond any doubt, inserted in the text later—as it is shown by the uneven linguistic structure. Consequently, there are good chances that *Pactus Alamannorum* originally defined only two states of facts in this scope: the crime called *plodraub* and *rairaub* in Langobardic law, and the state of facts of robbing of a grave was interpolated in the text of the law only later.¹⁷⁴

Lex Baiuvariorum regulates issues related to dead persons and the grave in an independent title (*De mortuis et eorum compositio*). In case of homicide committed in secret, if the perpetrator throws the corpse in the river or hides it so that it could not be found, he shall pay forty *solidus* (and the law gives an explanation: because the dead person cannot be provided with decent burial) in addition to blood money; and if somebody throws a corpse washed ashore into the water again, he shall pay twelve *solidus*.¹⁷⁵ In case of an injured party in a slave *status* the amount of *compositio* is one hundred and eighty *solidus*.¹⁷⁶ These loci contain the phrase *murder*; i.e. *murdrida* and *camurdrit*. Two further passages serve the protection of an unburied corpse. One of them stipulates that a person who wounds a corpse by an arrow to drive away birds settling on it shall pay twelve *solidus*.¹⁷⁷ In

¹⁶⁵ *Ibid.* 17, 3. *Si letus fuerit in ecclesia aut in heris generacionis dimissus fuerit, XIII sol. et tremisso componat.*

¹⁶⁶ *Ibid.* 17, 4. *Si servo fuerit facto, XII sol. componat.*

¹⁶⁷ *Ibid.* 17, 5. *Si ingenua Alamanna factum fuerit, LXXX sol. componat aut cum XII iuret.*

¹⁶⁸ *Ibid.* 17, 6. *Si leta fuerit, XXVI sol. et duos tremissos componat.*

¹⁶⁹ *Ibid.* 17, 7. *Si ancilla fuerit, XII sol. componat aut cum XII medicus electus iuret.*

¹⁷⁰ *Ibid.* 6, 2.

¹⁷¹ *Ibid.* 16, 1.

¹⁷² *Edictus Rothari* 16.

¹⁷³ *Pactus Alamannorum* 16, 3. *Et cuicum que mortuo, tam occiiso quam qui sua morte morit, aloquid tollatur aut involatur, de fossa, ubi reponatur, exfoditur et expoliatus fuit, quod ibi tullit, reddat et LXXX sol. solvat.*

¹⁷⁴ Nehlsen: *Der Grabfrevel... op. cit.* 129.

¹⁷⁵ *Lex Baiuvariorum* 19, 2.

¹⁷⁶ *Ibid.* 19, 3.

¹⁷⁷ *Ibid.* 19, 5.

accordance with the other locus, a person who wounds the body of a person killed by somebody else shall pay twelve *solidus* as *compositio*, both in case of serious mutilation (cutting off the head, hands, feet or ears) and wounds causing minor bleeding (as the dead person died not long ago).¹⁷⁸ With regard to a perpetrator who prevents burial of a dead person, the question has arisen in literature if the making of the state of facts go back to pagan or Christian traditions: Dahn supported the former,¹⁷⁹ while His the latter view¹⁸⁰—most probably properly, paying regard to the powerful ecclesiastical contribution to creating *Lex Baiuvariorum*.

The importance of burying the dead person is implied by the provision which stipulates that an alien burier must be given one *solidus* as reward—this passage supports the significance of the ecclesiastic impact as the reasons of the law refers to a locus in the New Testament,¹⁸¹ which makes burial of the dead person obligatory.¹⁸² This thought was highly emphasised in old Christian authors already, for example, Lactantius claimed that it is forbidden to leave a man made in God's own image unburied so that he should end up in the bowels of beasts, he should be returned to earth where he comes from.¹⁸³ The provision of *Lex Baiuvariorum* that takes position against heathen burial ceremonies is meant to strengthen this thought, too.¹⁸⁴

With regard to actual desecration of a grave/robbing of a grave in case of an “injured party” in a free *status* the law prescribed payment of forty *solidus* and *compositio* imposed on theft with respect to the valuables taken, i.e. compensation of¹⁸⁵ ninefold amount of the value.¹⁸⁶ Forty *solidus* as *compositio* is not different from that of mutilation since, for example, the perpetrator was obliged to pay this amount for cutting off a foot.¹⁸⁷ (It is worth adding that while this state of facts was punished by Langobardic law by *compositio* of nine hundred *solidus*,¹⁸⁸ the Bavarian law contended itself with a fraction of it—at the same time, it should be noted that while in accordance with *Edictus Rothari* in the absence of any relatives this amount was due to the king, *Lex Baiuvariorum* is silent about the fact that in this case the amount of *compositio* would be due to the duke's treasury.¹⁸⁹)

In addition to robbing of a grave, the law provides for taking the clothes of unburied dead persons (*waluraupa*):¹⁹⁰ if the person who has killed them has taken them along, he should pay double indemnification, if they have been taken by somebody else, not the perpetrator of the murder, then he shall pay the usual amount for theft,¹⁹¹ i.e. nine-times *compositio*.¹⁹² Accordingly, the differentiation between clothes taken by the murderer and

¹⁷⁸ *Ibid.* 19, 6.

¹⁷⁹ Dahn, F.: *Die Könige der Germanen, IX. Die Bayern*. München, 1903. 271.

¹⁸⁰ His: *op. cit.* 123.

¹⁸¹ Cf. *Genesis* 23, 6. 15.

¹⁸² *Ibid.* 19, 7.

¹⁸³ Lactantius, *Institutiones divinae* 6, 12.

¹⁸⁴ *Lex Baiuvariorum* 19, 8.

¹⁸⁵ *Ibid.* 9, 1.

¹⁸⁶ *Ibid.* 19, 1.

¹⁸⁷ *Ibid.* 4, 9.

¹⁸⁸ *Edictus Rothari* 15.

¹⁸⁹ Nehlsen: *Der Grabfrevel... op. cit.* 133.

¹⁹⁰ Cf. Eckhardt: *Pactus... op. cit.* 76.

¹⁹¹ *Lex Baiuvariorum* 9, 1.

¹⁹² *Ibid.* 19, 4.

somebody else can be found in the Bavarian law, too, just as in Langobardic and Alemannian law. The issue of double *conpositio* mentioned here, however—as it was underlined by Brunner already¹⁹³—is far from being unproblematic. It can be presumed that here the law imposed the payment of the double amount of the usual *conpositio* and not of the valuables taken on the perpetrator as it was stipulated by law, for example, in case of acts committed against travellers.¹⁹⁴ Nehlsen—in our view properly—presumes ecclesiastical impact behind the stipulation of this unusually high amount in the law.¹⁹⁵ (This title of *Lex Baiuvariorum* contains two stipulations, which sanction taking of the boat of another person.¹⁹⁶ It arises as a question why the two passages covering boats were placed beside the provisions on dead persons. It is possible that somehow it has to do with the ancient pagan burial form where the dead person and his valuables were put on a boat and were set afloat.)

With regard to the provisions of *Lex Baiuvariorum* concerning robbing of a grave—and plundering of dead persons in general—it should be stated that they do not contain any provisions that go back to ancient German legal customs or have the perpetrator expelled from the community; what is more: it is this law where the impact of the Christian Church is the most striking with respect to judging these crimes.

Conclusion

The aim of this study has been to provide a comparative analysis of the state of facts of robbing of a grave, paying regard to the question to what extent elements of Roman law, canon law and primarily German customary law can be demonstrated in specific codes. As part of that the Gothic, Burgundian, Langobardic, Frankish, Alemannian and Bavarian *Volksrecht* have been examined. As a result, with regard to all these codices it can be established that formulation of the state of facts of robbing of a grave/desecration of a grave and the related sanction clearly draws on Roman and canon law roots and—although, as a matter of fact, these provisions organically fit in with the spirit and system of sanctions of German folk laws—neither the system of sanctions, nor the images related to it imply any genuine connections with ancient German (pagan) thoughts and religion.

¹⁹³ Brunner: *op. cit.* I. 879.

¹⁹⁴ *Lex Baiuvariorum* 4, 30.

¹⁹⁵ Nehlsen: *Der Grabfrevel... op. cit.* 134.

¹⁹⁶ *Lex Baiuvariorum* 9, 9. 10.