



# The Wergeld, following the manuscripts

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## The *Wergeld*, following the manuscripts<sup>1</sup>

The *Wergeld*, a Germanic obviousness, or the following of a late Roman legal practice? This paper summarizes the main results of its author's thesis on the *Wergeld*, which has driven to the search of all the first occurrences of this term in the manuscripts.

It may be useful to consider first a common definition of the *Wergeld*, or wergild. According to Niermeyer, the *Wergeld* represents "the value of the life of a person, expressed in money and to pay, in the event of homicide, to repurchase revenge... or to repair other misdeeds"<sup>2</sup>. This term is thus usually regarded as an amount of money granted by a clan to repay the "right of revenge" to another clan, mainly in case of a murder, in application of a private justice. One of the aims of the research has been to compare this definition to the primary occurrences of the word in the manuscripts.

But, before entering the matter itself, it is seams necessary to consider what has changed in the representation of antic Europe. From the XVI<sup>th</sup> to the XVIII<sup>th</sup> centuries, most European scholars have considered antic Europe as "Cello-Scythian"<sup>3</sup>. This way of considering the European past, later on qualified of "Celtomania", underwent a powerful inflection between XVIII<sup>th</sup> and XIX<sup>th</sup> centuries. A French school, with Boulainvilliers and Montesquieu, has inaugurated a certain racial reading of the history<sup>4</sup>. Boulainvilliers point of view taken back and theorized by Montesquieu drove to the theories of the "right of conquest"<sup>5</sup>, of the "personality of the laws", and finally to the concept of the "Race of the Lords"<sup>6</sup>. The Prussian school of History has followed this track, even if it had been launched on another political reason, on the instigation of the British Ministry of War<sup>7</sup>. Karl-Ferdinand Werner has shown

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<sup>1</sup> This paper summarizes the main points of its author's thesis "*uueregikdu* or *Wergeld*. The financial repayment of an offence between Roman continuities and Germanic innovation", to be published by Droz, Geneva.

<sup>2</sup> I.-F. NIERMEYER, *Mediae latinis lexicon minus*, Leyden, 1954-1976, p. 1131. More recently: M. PARISSE, « Wergeld », *Dictionnaire du Moyen Age*, GAUVARD, de LIBERA et ZINK (dir.), 2002, p. 1477-1478, O. GUILLOT, A. RIGAUDIÈRE, Y. SASSIER, *Pouvoirs et institutions dans la France médiévale*, t. 1 *Des origines à l'époque féodale*, Paris 1994, p. 68, are in accordance with the quoted citation as well as with that of the Grimm brothers for whom *Wergeld* represents "a pecuniary fine for the death or the wound of a man (thereafter also for the animals), for the prevention of a revenge on blood" (*Blutrache*), J. et W. GRIMM, *Deutsches Wörterbuch*, Leipzig, 1854-1960, vol. 29, col. 320-326.

<sup>3</sup> From G. POSTEL (1510-1581), *Omnium linguarum quibus ad hanc usque diem mundus est usus origo*., Basle, 1552, to G. W. von LEIBNIZ (1648-1716), *De Originibus Gentium, Miscellanae berolinensia ad incrementum scientiarum*, t. I, Berlin, 1710, or: FREDERIC II DE PRUSSE, « Mémoires pour servir à l'Histoire de la Maison de Brandebourg », *Oeuvres de Frédéric le Grand*, t. 1, Berlin, 1844, « De la religion sous le paganisme », p. 196-200, « Des druides dans l'Allemagne », p. 348. Today : M. OLLENDER, *Les langues du paradis*, Paris, 1989, p. 20-30.

<sup>4</sup> Marquis de BOULAINVILLIERS (1658-1722), *Essai sur la noblesse de France*, Amsterdam, 1732. MONTESQUIEU shows his support to this thesis by bringing his own arguments: *De l'esprit des lois*, livre trentième, chap. XXIV-XXV. By such means, Montesquieu tempts to justify the fiscal inequality which was the rule at that time in France "Le corps des nobles doit être héréditaire", *De l'esprit des lois*, livre trentième, chap. 6. Against : J.-B. DUBOS (1670-1742), *Histoire critique de l'établissement de la monarchie française dans les Gaules*, Paris, Nyon, 1742, today: K.-F. WERNER, « La 'conquête franque' de la Gaule. Itinéraire historiographique d'une erreur », *BEC*, t. 154, 1996, p. 7-45.

<sup>5</sup> K.-F. WERNER, « La 'conquête franque' de la Gaule. Itinéraire historiographique d'une erreur », *BEC*, t. 154, 1996, p. 7-45.

<sup>6</sup> J. A. GOBINEAU, *Essai sur l'inégalité des races humaines*, Paris, 1855.

<sup>7</sup> As a cultural reaction to Napoleon's wars: O. W. JOHNSTON, *The Myth of a Nation : Literature and Politics in Prussia under Napoleon*, Columbia, 1987, or, *Der Deutsche Nationalmythos, Ursprung eines politischen Programms*, Stuttgart, 1990.

how the Prussian historical image has served the unification of Germany in 1871, but at the same time furnished the substratum of National-Socialism<sup>8</sup>. Such facts bring to the necessity of a certain re-examination of our usual thoughts and representations of the “Barbarians”. During the last century, this task has been fulfilled, in the fields of archaeology, epigraphy, linguistics as well as history of law.

Archaeology has made the observation that Germanic and Celtic spaces share the same architecture for their cities. The *oppida* said “Manching or Kehlheim” are to be observed both in Gallia and in Germania<sup>9</sup>. The weak differences proved between these spaces are far to meet the expectations of Gustav Kossina and his followers<sup>10</sup>. For Archaeology, the Rhine River does not represent a border. For Epigraphy, The Norwegian Cal Marstrander<sup>11</sup> has presented, against Wilhelm Grimm<sup>12</sup>, the hypothesis, today received, that the runic scriptures might have come from North Italia<sup>13</sup>. In the same kind of ideas, the German Joachim Scharf has stated that; “on epigraphic bases, it is generally impossible to make the difference between Celtic or Germanic inscriptions”<sup>14</sup>. Lately, in the field of linguistics, the observation has been made that, at the time of Tacitus, or even Ptolemy, not a single place’s name brings the evidence that the first Germanic consonantal shift had yet occurred<sup>15</sup>. This statement contraries one of the major pretension of Jacob Grimm who wanted to establish the old Germanic as a *Ursprache*, a ‘mother language’<sup>16</sup>. Nowadays, for linguistic as well, the Rhine does not make a limit. The antic Germanic people are no more regarded as “Germanic” speaking at this time<sup>17</sup>. The historians of law have still been further. Ernst Levy has presented the “Barbarian”

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<sup>8</sup> K.-F. WERNER, *Das national-socialist Geschichtsbild und die deutsche Geschichtswissenschaft*, Stuttgart, 1967. For example Eckhardt, the last editor of the Salic law, had his seat at Himmler’s councils, C. ROQUES, *Interprétation de la loi et perversion du droit*, Astérior, n° 4, april 2006, B. SCHLINK, *Unfähigkeit der Staatsrechtswissenschaft zu trauern? Vergangenheitsschuld und gegenwärtiges Recht*, Frankfurt am Mainz, 2002, p. 127 & f. F. RECTOR, *The Nazi Extermination of Homosexuals*. New York, 1981, F. L. SHÄFER, *Juristische Germanistik. Eine Geschichte der Wissenschaft vom einheimischen Privatrecht*. Frankfurt / Main, 2008. Résume in French: L. WAELKENS, « Droit germanique: la fin d’un mythe? A propos d’un ouvrage récent », *RHD* n° 87, Jul-Sept. 2009, p. 425.

<sup>9</sup> J. HAYWOOD, *Atlas historique des Celtes*, Paris, 2002, p. 47.

<sup>10</sup> G. KOSSINA (1858-1931), *Deutsche Vorgeschichte*, Würzburg, 1912, presented archaeology as a “national science” by definition. H. REINERTH, *Das Federseemoor als siedlungs des Vorzeitmenschen*, Augsburg, 1929, following this point of view, has tried to present the first inhabitants of Switzerland as „Germans“. On the political back thoughts of this: M.-A. KAESER, *Les Lacustres. Archéologie et mythe national*. Lausanne, 2004.

<sup>11</sup> C. MARSTRANDER, *Norsk Tidsskrift for sprogvidenskap*, t. I, Oslo, 1928, M. LEJEUNE, *Inscriptions italiques*, (Coll. Froehrer), Paris, 1953.

<sup>12</sup> W. GRIMM, *Über deutsche Runen*, Göttingen, 1821.

<sup>13</sup> D. STIFTER, *Einführung in das Kontinentalkeltische*, Institutteil des Institut für Sprachwissenschaft der Universität, Wien, 2002. W. MEID, „Zur Botorrita-Inschrift“, in: *Die größeren altkeltischen Sprachdenkmäler. Akten des Kolloquiums Innsbruck, 29<sup>th</sup> April - 3<sup>rd</sup> May 1993*, W. Meid et P. Anreiter (ed.), Innsbruck, 1996, p. 146-148. A. D’AVERSA, *La Valle Padana tra Etruschi, Celti e Romani*, Brescia, 1986, A. CRIVELLE, *Atlante preistorico e storico della Svizzera italiana*, Vol. 1: *Dalle origini alla civiltà romana*, Istituto editoriale ticinese, Bellinzona, 1990.

<sup>14</sup> J. SCHARF, *Studien zur bevölkerungsgeschichte der Rheinlande auf epigraphische Grundlage*, Neue deutsche Forschungen Abteilung alte Geschichte, Band 3, Berlin, 1938, p. 148.

<sup>15</sup> D. N. PARSONS & P. SIMS-WILLIAMS, *Ptolemy: towards a linguistic atlas of the earliest Celtic place-names of Europe*, University of Wales, Aberystwyth, 11-12 April 1999, 2000.

<sup>16</sup> J. GRIMM, „Eine Ausnahme der ersten Lautverschiebung“, *Zeitschrift für vergleichende Sprachforschung auf dem Gebiete der indogermanischen Sprachen*, 23, 1822, p. 97-130.

<sup>17</sup> W. MEID, « H. Kuhn’s „Nordwestblock“-Hypothese. Zur Problematik der Völker zwischen Germanen und Kelten », H. BECK (ed.), *Germanenprobleme in heutiger Sicht*, Berlin, New York, 1999, p. 183-212. P. DE BERNARDO STEMPEL « Language and the Historiography of Celtic-speaking people », S. RIECKHOFF (dir.), *Celtes et Gaulois, l’Archéologie face à l’Histoire*, acts of the round table of Leipzig, 16-17 June 2005, p. 35-56, In particular the board of the chronology of the sharing of vocabulary in antic Europe, p. 46.

laws as the first reception of a Theodosian form of the Roman right in Germanic areas<sup>18</sup>. The Franks would then have been the vector of this “late roman power” imposing Roman law to the people submitted to the Frank power, especially Alemans or Bavarians<sup>19</sup>. Today, Patrick Amory presents as a general principle that: “no sub-Roman legal compilation acknowledges the existence of any non-Roman law”<sup>20</sup>. The *Wergeld* seems to deny such an affirmation.

When the question arose to set temporal limits for the study of the *Wergeld*, an astonishing statement had to be made. Surprising enough for a supposed Frank custom, the term of *Wergeld* does not give any evidence of its presence under Merovingian times. Neither in the restricted number of the legal manuscripts of this period<sup>21</sup>, nor especially in Gregory’s of Tours chronicles<sup>22</sup>, or in these of the so-called Fredegarius<sup>23</sup>. The primitive form of the term shows its presence exclusively in Carolingian manuscripts. Therefore the choice was made to focus on the first occurrences of the *Wergeld* among “Barbarian” laws dated of the Merovingian times. The geographical limits of the study brought also considerable information. The use of the *Wergeld*, first to be observed in Merovingian Gauls, unifies the Gallic territory with the Alemanic spaces, as well as Lombardi, Bavaria, and, maybe, the island of Britain<sup>24</sup>. This statement brings to the question of the language which has unified this geography on such a word, at the Carolingian times.

By the way, the recent research has changed the status of the Franks<sup>25</sup>. Formally described as “invaders” together with other “Barbarians” they are now regarded as Roman troops whose obedience to the new Rome, Constantinople, became more and more “uncertain”<sup>26</sup>. Yet, the Frank power describes himself as the successor of Rome<sup>27</sup>.

<sup>18</sup> E. LEVY, *Reflexions on the first “reception” of Roman Law in Germanic States*, *American Historical Review*, 48-1, oct. 1942, p. 20-29. Also: F. WIEACKER, *Foundations of European Legal Culture*, E. BODENHEIMER (trad.), *Stanford Law Review*, 36-1/2, *Critical Legal Studies Symposium*, janv. 1984, p. 1-5.

<sup>19</sup> The prologue of the Bavarian Laws does not express anything else: manuscript of Ingolstadt: Universität München, Cim. 7, p. 6-7.

<sup>20</sup> P. AMORY, « The meaning and purpose of ethnic terminology in Burgundian laws », *Early Medieval Europe*, March 1993, vol. 2/1, p. 1-28.

<sup>21</sup> *Chartae latinae antiquiores*, A. BRUCKNER et R. MARICHAL, 1958-1985, R. MARICHAL, 1985-1993, then H. HATSMA & J. VEZIN, 1993-1997. *Die Urkunden der Merowinger*, C.-R. BRÜHL Th. KÖLZER, with M. HARTMANN & A. STELDORF, *MGH, Diplomata regum Francorum e stirpe merovingica*, Hanover, 2001.

<sup>22</sup> GRÉGORÉ OF TOURS: B. KRUSCH: *Historiarum libri X*, *MGH, SRM 1*, Hanover, 1937. French version H. BORDIER, *Histoire ecclésiastique des Francs*, Paris, t. I, 1858, t. II, 1862.

<sup>23</sup> FREDEGARIUS, in a new version of the book IV: *Chroniques des temps mérovingiens*, traduction, introduction et notes par O. DEVILLERS et J. MEYERS, Turnhout, 2001. Traditional version: F. GUIZOT, *Collection des mémoires relatifs à l'histoire de France*, Paris, 1823.

, introduction et notes par O. DEVILLERS et J. MEYERS, Turnhout, 2001. Traditional version: F. GUIZOT, *Collection des mémoires relatifs à l'histoire de France*, Paris, 1823.

<sup>24</sup> The *Textus Roffensis*, only source of the Ethelbert’s laws, sees its authority weakened, as well by the date of its factory, that by certain details of the text. Therefore, the Saxon wergild will not be taken into consideration in this paper: M. BRETT, « Forgery at Rochester », *Fälschungen im Mittelalter*, vol. 4, *MGH, Schriften* 33, 4, 1988, p. 397-412. N. YATES, P. A. WESBY, *Faith and Fabric. A History of Rochester Cathedral, (604-1994)*, Suffolk, Rochester, USA, 1996. P. WORMALD, *The Making of English Law*, vol. i, Oxford, 1999, for *Wergeld*, p. 573, this author quotes: compositio and do not consider the notion as part of the Saxon heritage.

<sup>25</sup> J.-P. POLY, *La corde au cou. Les Francs, la France et la loi salique, Genèse de l'Etat moderne en Méditerranée*, Coll. de l'École française de Rome, 168, 1993, p. 287-320. K.-F. WERNER, *La ‘conquête franque’ de la Gaule. Itinéraire historiographique d’une erreur*, *BEC* 154, 1996, p. 7-45.

<sup>26</sup> Other people are nowadays also concerned by the status of Roman troops: M. HARDT, *The Bavarians, Regna and gentes, the relationship between late antique and early medieval peoples and kingdoms in the transformation of the Roman world*, H.-W. GOETZ, J. JARNUT, W. POHL (ed), Leyden, 2003, p. 429-462. P. LANDAU, *Kanonensammlungen in Bayern in der Zeit Tassilos III. und Karls des Großen*, L. KOLMER et P. SEGL (ed.) *Bayern und Europa, Festschrift für Kurt Reindel zum 70. Geburtstag*, Regensburg, 1995, p. 137-148. Following P. Landau, I. FASTRICH-SUTTY, *Die Rezeption des westgotischen Rechts in der Lex*

Then, was the *Wergeld* a “Barbarian” notion, or a late Roman one?

To answer this question, it is first necessary to observe the manuscripts as well as the late Roman judicial procedures. Then in the case that the *Wergeld* has never been a “Barbarian” notion, how did it happen that we have so long believed so?

In the manuscripts of the *Wergeld*, the investigation has to observe both the formal aspects of the source as well as its legal content. The oldest manuscript where a lesson of the *Wergeld* is to be found is a complete book, a Code of law, of the IX<sup>th</sup> century, ms. of Paris BNF 4404<sup>28</sup>. The first surprise, for someone looking for the oldest manuscript of the *Wergeld*, comes from its general aspect. Dated about 813, its late Roman character is remarkable. The first page presents the emperor Theodose II in majesty, together with Marcianus and Marjorianus<sup>29</sup>. The second page reinforces this Roman impression by the image of four famous Roman jurists: Severius, Gaius, Paulus and Hermogenianus<sup>30</sup>. The Roman atmosphere of this *Codex* is confirmed by its Prologue<sup>31</sup>. When presenting the content of the *Codex*, its author starts by the “XVI books of Theodose”. This Theodosian *corpus* is followed by the later novels... among them the “*Pactus salicae*”, where it is to be stressed that no occurrence of the *Wergeld* is to be found. In this manuscript, only the *edictus* of the king Childebertus II, dated of 596, reveals the first presence of the studied term. But, its juridical application does not correspond at all to our modern definitions. The first apparition of the *Wergeld* takes place under a Latin form, the *uueregildus*. It is then the occasion to observe its juridical meaning at its very birth. In this text, the *uueregildus* does not represent a private repayment of revenge, but plays the role of a common judicial mechanism, the composition. The *uueregildus*, as judicial penalty, meets three cases of application: an attempt offence to the criminal procedure, an offence to the court, a default of appearance in justice.

For this first case, a homicide, it is remarkable that the *uueregildus* is not aimed at the actor of the penal deed, but at one who would like to intervene in the judgment: “one of his parents, or friends, would like to help and to amend the above mentioned solution, that the one who presumes to help him composes himself of his own *uueregildum*”<sup>32</sup>. The term represents in this case a fine to be paid to the king, supreme judge, for insult in his public authority. In case of default of payment, the condemned man shall be put to death: *Aut se redimat aut de uita*

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*Baiuvariorum: Eine Studie zur Bearbeitung von Rechtstexten im frühen Mittelalter* (Köln 2001), G. GALLO, *Historia, Derecho e Historia del Derecho. Consideraciones en torno a la escuela de Hinojosa*, AHED 23, 1953, p. 5-36, on this bend in the history of Spanish right: F. de ARVIZU, « Histoire et droit, considération rétrospective d’une polémique espagnole », *Histoire de l’histoire du droit*, J. POUMAREDE (ed.), Toulouse, 2006, p. 351-358.

<sup>27</sup> A. CHAUVOT, « Une approche juridique de la notion de « barbare », *Le bréviaire d’Alaric, aux origines du Code civil*, M. ROUCHE et B. DUMEZIL (ed.), Paris, 2008, p. 27-41. A. CHAUVOT, « Images positives images négatives des Barbares dans les sources latines à la fin du V<sup>e</sup> siècle et au début du VI<sup>e</sup> siècle après J.C. », *Clovis, histoire et mémoire*, actes du Colloque international d’histoire de Reims, 19-25 septembre 1996, M. ROUCHE (ed.), Paris, 1997, p. 3-14. R. W. MATHISEN, « Les Barbares intellectuels dans l’Antiquité tardive », *Dialogues d’Histoire Ancienne*, n° 23/2, 1997, p. 139-148.

<sup>28</sup> The *Codex Sangallensis* 731 has for a long time been regarded as earlier, dated of 794. Since, Simon Stein has identified that it contains the design of a denier of Charles the Bold. This statement drove to push back the dating of the *cx. Sangallensis* 731 to the twentieth year of the reign of this king, the year 863: S. STEIN, « Lex Salica », I & II, *Speculum*, Medieval Academia of America, vol. 22, n° 2, April 1947, II, p. 401.

<sup>29</sup> Ms BNF, Par. Lat. 4404, folio 1.

<sup>30</sup> Ms BNF, Par. Lat. 4404, folio 2.

<sup>31</sup> Ms. Par. 4404, folio 3r, col. b-folio 3v, col. b.

<sup>32</sup> *Ibid.* : *nullus deparentibus aut amicis ei quicquam adiuvet ; nisi qui praesumpserit ei aliquid adiuuare, suum uueregildum omnino componet.*

*componet*: 'that he either repays himself or composes of his life'<sup>33</sup>. We are far from a private justice in the absence of public order. This statement has to be enlarged to most of the first occurrences of the *uueregildus*, a judge is generally present, would he be king, duke or judge.

Other statements contrary as well the usual vision of the *Wergeld*. In particular, the *uueregildus* occurs in application of Roman juridical notions. For example *imputatio*, 'intention', that is to say the appreciation of the will of the actor in a criminal deed. Although this notion is commonly regarded as ignored by the Germanic laws<sup>34</sup>, *imputatio* is to be observed together with the application of the *uueregildus*, especially in the *lex Alemanorum*<sup>35</sup>, or the *leges Langobardorum*<sup>36</sup>, who both make a precise distinction if the mortal act results or not of the will of its actor<sup>37</sup>. On the 28 primary occurrences of the *uueregildus* 27 concern a criminal case that the Roman law had qualified of "capital", the *quinque criminibus, quae capite vindicantur*<sup>38</sup>. Among them: seven cases of *crimen maiestatis*<sup>39</sup> or *perduellio*<sup>40</sup>, the same quantity of cases for homicide, qualified by the Roman justice of *crimen de capite cuius*<sup>41</sup>, four cases for *raptum*, that is to say abduction<sup>42</sup>, three cases for offence to the criminal

<sup>33</sup> Ms BNF, Par. Lat. 4404, fol. 191v-192r, .PLS., ECKHARDT, A1, L, 51, 3, p. 196.

<sup>34</sup> W. SELLERT et H. RÜPING, *Studien- und Quellenbuch zur Geschichte der deutschen Strafrechtspflege*, Strafrecht Allgemeiner Teil, t. I, Aalen, 1989 p. 55-65. A.-E. GIFFARD, *Droit romain et ancien droit*, Paris, 1958, p. 55-65.

<sup>35</sup> *cx Sangall.* 731, p. 317-318, ms Par. lat. 4404, folio 205r, *Lex Alaman.*, LEHMANN, XLV, 1, 2. p. 104-105 : *De rixis quae saepe fieri solent in populo*.

<sup>36</sup> Ms. Paris Lat. 4614, folio 5, col. b, l. 17-19, *Lex Langobard*, BLÜHME, MGH, Legum, t. IIII, *Edictus Rothari*, c. 9-11, p. 13-14.

<sup>37</sup> In the *Edictus Rothari*, the distinction is established between the act followed by an effect: *mortuus fuerit*, 'the death followed', and the ineffective act: *mortuus non fuerit*, although planned. The premeditation is incriminated (c. 10.), at the same level as the attempt not followed by an effect (c. 11.), because a fine of twenty *solidi* penalizes in the same way both cases. The appreciation of the will in a murder's project, or an attempt, seems of the same nature between Lombard right and Roman legal thought.

<sup>38</sup> CTh.9.38.2.

<sup>39</sup> Ms. Par. Lat. 4404, folio 232, col. a, ll. 1-25, *PLS* ECKHARDT, p. 268; ms. Par. Lat. 4627 folio 73v or ms. BPL 114 of Leyden, folio 120<sup>v</sup>, *Marculfi Formulae*, ZEUMER, MGH, Hanover 1886, p. 55 : I-18; *cx Sangall.* 731, page 311, *Lex Alaman.*, LEHMANN, XXIX, 1. p. 87 : XXIX – 1.

<sup>40</sup> Ms. Par. Lat. 4404, folio 232r, col. a, l. 26-31 et b, l. 1-3, *PLS* ECKHARDT, p. 268; ms. Par. Lat. 4404, folio 203r, *Lex Alaman.*, LEHMANN, XXXIV, 1. p. 91; ms. Par. Lat. 4614 folio 33v-34r, *Novellae Liutprandi*, 35. ms. Par. Lat. 4614, folio 59<sup>f</sup>, *Novellae Liutprandi*, 83, *Lex Lang.*, BLÜHME, p. 46.

<sup>41</sup> *Cx Sangallensis* 728, p. 196, l. 18-29, 197, l. 1-18. *Lex Ribuarie*, F. BEYERLE et R. BUCHNER, p. 94, *Lex Ribuarie*, SOHM, p. 67 ; ms. Par. Lat. 4404, folio 222v, col. a, l. 26-31 col. b, l. 1-12, *Lex Ribuarie*, F. BEYERLE et R. BUCHNER, 66 (63) p. 118, *Lex Ribuarie*, SOHM, 63 (65) p. 90 ; ms. Par. Lat. 4404, folio 222v, col. a, l. 26-31 col. b, l. 1-12, *Lex Ribuarie*, F. BEYERLE et R. BUCHNER, 67 (64) *De homine in domo propria occisso*, p. 118, *Lex Ribuarie*, SOHM, 64 (66) p. 90; *cx Sangall.* 731, folio 319, *Lex Alaman.*, LEHMANN, XLIX, 1, 2. p. 107-108, *cx Sangall.* 731, p. 330 or ms Par. lat. 4404, folio 209v, *Lex Alaman.*, LEHMANN, LXXXVI, p. 136-137; ms. Paris Lat. 4614, folio 5, col. b, l. 17-19, *Lex Langobard*, BLÜHME, MGH, Legum, t. IIII, *Edictus Rothari*, c. 9-11, p. 13-14; ms Par. Lat. 4614, folio 82<sup>v</sup>, *Lex Baiw.*, de SCHWIND, tit. XVIII, 2. XVIII. II p. 455-456.

<sup>42</sup> *cx Sangall.* 731, p. 318 or ms Par. lat. 4404, folio 205v, *Lex Alaman.*, LEHMANN, XLVI, 1, 2. p. 105-106; *cx Sangall.* 731, p. 319 or ms. Par. lat. 4404, fol. 205v-206r, *Lex Alaman.*, LEHMANN, LI, 2. XLIX p. 109; ms. Par. Lat. 4614 fol. 5rb l. 17-19<sup>r</sup>, *Lex Langobard*, BLÜHME, nov. Liutprandi 48, ms Par. Lat. 4614 folio 76<sup>f</sup>, *Lex Baiw.*, de SCHWIND, tit. IX, 4, p. 370-371.

procedure<sup>43</sup>, two cases for adultery<sup>44</sup> and *falsum*<sup>45</sup>. The other occurrences of the *uuerigildus* appear in application of the incriminations of: *malum carmen*<sup>46</sup>, *calumnia*<sup>47</sup>, abortion<sup>48</sup>.

The only application of the *Wergeld* which would not have been qualified as a “capital” case by the Roman justice is represented by a mortal act on behalf of an animal<sup>49</sup>:

‘If a quadruped < has > killed, for half, that he (the quadruped) be received as *uuerigilde*, and the other half, that the master of the quadruped takes care of repaying it, without fine for what has made a quadruped, a fine is not due’.

In this case, the value of the penalty cannot be called “the worth of the man”. It is the value of the beast which determines the *uuerigilde*. The total amount is due by the man responsible of it, his master. It is to be remarked that the Roman law has followed, for a very long time, the same process in the appreciation of a death on behalf of an animal: “The offence of *pauperie* is reprehensible, without that the insult can be retained: an animal cannot indeed carry insult, what indicates the common sense”<sup>50</sup>. A beast is not *dolus capax*, cannot bear the intention of damage. In such a case, the Roman right had given an *actio de pauperie* to the victim. Again, the appreciation of the will of the actor in a deadly case shows his presence in a “Barbarian” law, here the *Lex Ribuaria*<sup>51</sup>.

Then, it is very hard, in the incriminations bringing to the applications of the *uuerigildus*, to find any difference with these of the late Roman justice. Therefore, is it so obvious to consider the *Wergeld* as a “Barbarian” notion in opposition with the Roman right? The *uuerigildus* revealed by the manuscripts appears more as a successor of a late Roman judicial mechanism. An important difficulty to consider the *uuerigildus* as a possible following of the Roman right consists in a belief. All scholars have been taught that *liberum corpus aestimationem non recipit*<sup>52</sup>, ‘that the body of a free man cannot receive compensation in money’. Is this principle checkable in the history? It is to be stated that in the same book, Gaius transmits the fine to be paid in case of death of a free man, or adultery<sup>53</sup>. According to Sextus Caecilius, consular person quoted by Aulus-Gellius, the composition is the repayment

<sup>43</sup> In the *Decretio Childeberti* : ms. Par. Lat. 4404, folio 232, col. a, ll. 1-25, ms. Par. Lat. 4404, folio 232r, col. a, l. 26-31 et b, l. 1-3, ms. Par. Lat. 4404, folio 232v, col. a, l. 23-30, PLS ECKHARDT, p. 267-269.

<sup>44</sup> Ms Par. Lat. 4614, folio 75<sup>r</sup>, *Lex Baiw.*, de SCHWIND, tit. VIII, l. 1, p. 353; ms Par. Lat. 4614 folio 75<sup>r</sup>, *Lex Baiw.*, de SCHWIND, tit. VIII, l. 2, p. 354.

<sup>45</sup> In the *Novellae Liutpriandi* : ms. Par. Lat. 4614, folio 56<sup>v</sup>, *Lex Langobard*, BLÜHME, nov. 63, ms. 4614 folio 70<sup>r</sup>, *Lex Lang.*, BLÜHME, Nov. 91. p. 49.

<sup>46</sup> Ms. Par. Lat. 4404, folio 226v, col. b, l. 12-20, *Lex Ribuaria*, F. BEYERLE et R. BUCHNER, 86 (83) *De maleficio*, p. 131.

<sup>47</sup> Edictum Rothari, ms. Paris Lat. 4614, folio 5, col. b, l. 17-19, *Lex Langobard*, BLÜHME, MGH, Legum, t. III, *Edictus Rothari*, c. 9-11, p. 13-14.

<sup>48</sup> Ms Par. Lat. 4614 folia 75<sup>v</sup>-76<sup>r</sup>, *Lex Baiw.*, de SCHWIND, tit. VIII, l. 18, 19, p. 362.

<sup>49</sup> Ms. Par. Lat. 4404, folio 218r, col. b, l. 27-31, 218v, col. a, l. 1-3. *Lex Ribuaria*, F. BEYERLE et R. BUCHNER, 48 (46) *De quadrupedis, si hominem occiderint*, p. 99, *Lex Ribuaria*, SOHM, p. 72 : *Si quis quadrupes qui eam interfecerit in medietate uuerigilde suscipiatur et aliam medietatem dominus quadrupedes soluere studeat absque freto quia quod quadrupedes factum freto non exigitur*. ‘If a quadruped killed < him >, for half, that he (the quadruped) is received as *uuerigilde*, and the other half, that the master of the quadruped takes care of repaying it, without fine for what made the quadruped, a fine is not due’.

<sup>50</sup> Ulpianus: *pauperies est damnum sine iniuria facientis datum: nec enim potest animal iniuria fecisse, quod sensu caret*. Dig. 9.1.1.3, Ulpianus 18 ad ed.

<sup>51</sup> Against the scholar’s common opinion: W. SELLERT et H. RÜPING, *Studien- und Quellenbuch zur Geschichte der deutschen Strafrechtspflege*, Strafrecht Allgemeiner Teil, t. I, Aalen, 1989 p. 58-61.

<sup>52</sup> *Liberum corpus nullam recipit aestimationem*, Dig. 9, 1, 3 ; Dig. 9, 3, 7.

<sup>53</sup> Gai institutionum commentarius, III. 194: *Adulter uel homicida sit; at illud sane lex facere potest, ut proinde aliquis poena teneatur*.

of the *talio*. According to this witness, the *talio* is not conceived to be applied, but to represent the threat of a torture equivalent to the insult. This threat is offered to a "judicial repurchase" to the author of the condemned criminal fact. In early times, the price has been freely suited between parties: *habens facultatem paciscendi*<sup>54</sup>. Later on, the judge had to play his part in the solution: "In case of defect of the parties to reach an agreement, the judge intervenes, estimates the damage, and condemns the culprit to pay a fine that he defines arbitrarily"<sup>55</sup>. Later on, the edict of the *praetor* has proceeded to the *aestimatio iniuriarum*, 'the pecuniary estimation of the insults'<sup>56</sup>. Both solutions, a price to be agreed, as well as a fixed one defined by the law, may very well describe the mechanism of judicial ransom named *uueregildus*.

Beside these judicial appreciations of the value of a man, at later times, it seems that it is the Christian influence which has driven the emperors to adapt the right of *postliminium*. A Roman citizen, if captured by enemies, was formally deprived of his citizenship<sup>57</sup>. At least from Theodose II and Honorius, in a spirit of redemption, the possibility of repurchase his former status by himself has been offered to the captive<sup>58</sup>. This implicates the setting of a value for a free man. At the same period, the Roman authorities have also offered a defined tax reduction for the "supply" of recruits for the army, called *pretium tironi*<sup>59</sup>. Finally, it is also to be stated that the selling of himself, on behalf of a free man, has become very frequent and also requires the setting of a price for such a person<sup>60</sup>.

At the beginning of the V<sup>th</sup> century, a comedy of, the *Querolus*<sup>61</sup>, proves that the payment of penalties for injuries or death is common enough, at this period, to represent a subject of laughter within a comedy<sup>62</sup>:

That defeated, the *parasitus* receives the value of his wounds. If in a feast, his garment was torn, that he receives from the king of the banquet the double of the value of the repair. For overalls, the punishment will be of a quarter of a *solidus*, for wounds swelled of a *triens*, that if there is bruises and wounds, he will obtain justly two thirds of a *solidus*. Specifically we grant one ounce as soon as some blood is to be seen pouring. Furthermore, in case of broken-out bone, it has pleased us and is agreed that is granted one *solidus* for the small bones and a pound of silver for the main bones...

<sup>54</sup> 'They have the faculty to form a pact', AULUS-GELLIUS, *Nuits attiques*, Liv. XX, 1. p. 470-471.

<sup>55</sup> *Nam si reus, qui depacisci noluerat, iudici talionem imperanti non parebat, aestimata lite iudex hominem pecuniae damnabat*, AULUS-GELLIUS, *ibid*.

<sup>56</sup> AULUS-GELLIUS, *Nuits attiques*, Liv. XX, 1. p. 470. A. MAGDELAIN, *De la royauté et du droit de Romulus à Sabinus*, Rome, 1995, citation p. 48. The tendency to try to define the amount of the fines by a text is observable, according to TITE-LIVE, as soon as 450 A. C., When the tribunes wanted to fix by a law the pecuniary value of the fines until then payable in cattle: TITE-LIVE, IV, 30, 3. First pushed aside, this reform was adopted under the consulate of C. Julius and P. Papirius, CICÉRON, *de re publica*, II, 60, in 430 A. C.

<sup>57</sup> M. V. SANNA, « Capitis deminutio e captivitas » *Diritto a Storia, Tradizione Romana*, Cagliari, 2007.

<sup>58</sup> *Constitutio* of the 11th. Dec. 408: CTh.5.7.2.1 [=brev.5.5.2.1], CTh.5.7.2.4 [=brev.5.5.2.4].

<sup>59</sup> CTh. 7.13.7.2, CTh. 7.13.13, CTh.7.13.20.

<sup>60</sup> J. RAMIN & P. VEYNE, « Droit romain et société : les hommes libres qui passent pour esclaves et l'esclavage volontaire », *Historia* n° 30, Stuttgart, 1981, p. 472-492. A. RIO, « Becoming unfree: self-sale in early medieval Europe, c. 400-1100 », Cambridge, 10 Feb. 2009.

<sup>61</sup> *Querolus*, dated of 407 in the surroundings of Tolosa, C. JACQUEMARD-LE SAOS, (Coll. des Universités de France), Paris, 1994, p. 74.

<sup>62</sup> *Ibid.* scaena XV, 111 *Mercedem uulnerum uictus accipiat parasitus. In conuiuiu si fuerit ueste discussus, a rege conuiuii duplam mercedem reparationis accipiat. De liuoribus in quadrantem solidis unius, de tumoribus in trientem poena transibit, quod si et tumor fuerit et liuor solidis unius bessem iure optimo consequetur. Unam uero unciam aporiae, hoc est excoctionis, contemplationi concedimus. Iam porro de ossibus fractis placuit conuenitque ut in minutalibus solidus, in principalibus uero ossibus argenti libra protenus traderetur.*



A few decades earlier, Ammianus Marcellinus illustrates the mechanism of judicial ransom which is offered to a wealthy man condemned to death<sup>63</sup>. He has the possibility to abandon his fortune, or part of it, to the judge. Doing so he escapes to the capital punishment. This mechanism is called “*poena dominorum*” sometimes “*poena maxima*”<sup>64</sup>, applied to the *honestiores*, the rich people. For those who have no fortune to abandon, the *humiliores*, the poor people, the capital punishment is applied. This judicial barter is confirmed by the *Liber Papiani*<sup>65</sup> which refers to the Theodosian code:

What to oppose, if a free man gets ready to accuse of crime another free man? He has to register as to be tried, if one decides to execute him, registered with the one that he has accused, he cannot oppose to the possibility of the physical torture, as well as he must oblige as well his head as his properties, as the Theodosian law indicates it, book nine, under the title I, which is given to Marianus, vicar of Italy.

In fact, the quoted title of the Theodosian code<sup>66</sup> brings the expected proof of the common repayment of a criminal offence under late Roman justice: *aut poena capitis sui aut facultatum amissione compenset*, ‘shall he compensate either with his head or with the hardship of its properties’.

It seems likely that the *poena militum* would have represented the same kind of mechanism, of judicial ransom dedicated to the personnel of the *militia*. The members of the army represent a kind of free men who has no real estates to offer to the judge. The “fortune” they have to offer to the judge can only consist in their savings kept in the *scholae* of the camps<sup>67</sup>. Therefore, penalties at a fixed price may have been defined for this special category of personnel. The Theodosian code gives examples of penalties at a fixed price to penalize the breaches of certain senior officials or professionals categories<sup>68</sup>. The Salic law, nowadays regarded as a Roman military Code of law<sup>69</sup>, expresses the same idea for repayment of the condemned man by himself: *aut se redimat aut de uita componet*:

But if the *uuere-gildus* may have been a Roman procedure of military justice, how have we believed that it was a specific Germanic notion? A first reason may come from the history of the study of the Roman right in Europe. A second reason seems more political, the *Wergeld* may have represented, at different periods, an historical argument.

Due to the enthusiasm of its recovery, the Justinian compilations have, during several centuries, been considered as *The Roman right*, to the eyes of European scholars. But, of

<sup>63</sup> AMMIEN MARCELLIN, XIV, 7, 21.

<sup>64</sup> J. L. STRACHAN-DAVIDSON, *Problems of the Roman criminal law*, (2 vol.), t. I, Amsterdam, 1969, t. II, Oxford, 1912, citation: t. I, p. 170-187, in opposition about the *poena maxima* with P. -F. GIRARD, *Histoire de l'organisation judiciaire des Romains*, 1901, p. 154 et 234, as well as Th. MOMMSEN, *Droit pénal romain*, J. DUQUESNE (trad.), G. HUMBERT (dir.) (3vol.), Paris, 1907.

<sup>65</sup> *Lex romana Burgundinum*, L.-R. von SALIS, *MGH, Leges*, t. I, 2. 1, Hanover, 1892, p. 127-175.

<sup>66</sup> *Liber Papiani*, 7.0. Titulus VII. *De obiectione criminum vel inscriptionibus ingenuorum sive servorum*. 7.1. *Si quis ingenuus ingenuo crimen intendens, quod obiecit, se scripserit probaturum, si probatio defuerit, inscribendi se cum eo, quem accusat, corporali supplicio licentia non negetur, ita ut aut caput aut facultatem suam obliget, sicut lex Theodosiani libro nono sub titulo primo designat, quae ad Marinianum vicarium Spanie data est.*

<sup>67</sup> Y. Le BOHEC, *L'Armée romaine*, Paris, 1998, p. 205.

<sup>68</sup> CTh.2.1.9 [=brev.2.1.9] *Imp. arcad. et honor. aa. archelao praefecto augustali. dat. viii. kal. dec. constantinopoli, caesario et attico coss.: Quisquis contempto provinciae iudice, ad illos, qui armatis praeesse noscuntur, causam suam crediderit transferendam, exilio se deputandum esse cognoscat, et eum, qui causam illius suscepit proponendam, decem libras auri esse damnandum.*

<sup>69</sup> J.-P. POLY, « La corde au cou. Les Francs, la France et la loi salique », *Genèse de l'Etat moderne en Méditerranée*, Coll. de l'École française de Rome, n° 168, 1993, p. 287-320.

course, the right of Justinian was unknown and of course not practised at all in Western Europe, during the late Roman times. This brings to wonder if one of the effects of the restrictive classification, inherited from the scholar studies of the Roman right, would not have driven to qualify "of irrelevant to Roman law", some of the pre-Theodosian, Theodosian, or "vulgar" practices of the late Empire<sup>70</sup>?

It is also to take into consideration that the *uueregildus* may have been from its very beginning a political argument. The Carolingian times show a certain tendency to use official forgeries at the highest level of power<sup>71</sup>. The appearance of the term *uueregildus* in manuscripts, at the same period, would be to be put in relation with the promotion of the Frank nation, under Carolingian times<sup>72</sup>. This tendency has been described for both prologues of the Salic law, written at this period<sup>73</sup>. These two prologues had the purpose to legitimise the Frank power maybe at the moment that the Pope gave the unction of *Patricius* to Pippin the Short, in 754. This act has represented an important offence against the imperial power of Constantinople. The long prologue of the Salic law insists on the fact that the Franks "have torn away of their necks the very hard yoke that Romans had placed on it". What is omitted is the date when the Franks would have managed to emancipate them of the Roman power. By this omission, the Carolingian writer of this prologue let think that the date the independence of Franks could go back up to Clovis's advent<sup>74</sup>. It would be possible that the *uueregildus* participates in the initiative of Carolingian times who wanted to demonstrate the old independence of the Franks from the imperial authority, at a time when the later still pretended to it<sup>75</sup>. The object of the addition of "vulgar" terms in texts of laws would be then identical to that of the long prologue of the Salic law. The utility of the word *uueregildus*, to the eyes of the Carolingian power, like the other "vulgar" terms, could lie in its "vulgarity". The Carolingian scribes, by the use of vulgar terms in texts of laws, would have wanted to demonstrate that the Roman power had no part in their emission. This would explain the sudden fashion of such words, at the Carolingian period, in the manuscripts. The object

<sup>70</sup> S. COGIEZ-PEREQUIN et P. JAILLETTE, *Le Code théodosien. Diversité des approches et nouvelles perspectives*, coll. de l'Ecole française de Rome, n°412, 2009, E. MAGNOU-NORTIER, *Le code de Théodose, livre XVI, et sa réception au Moyen-Age*, Paris, 2002.

<sup>71</sup> Like the donations "Constantini" and Pippini, granted to the Pope: J.-L. De RENAUCOURT, *La donation de Constantin et la prise de pouvoir par Pépin le Bref*, Paris, 1987, or R.-J. LOENERTZ, « En marge du *Constitutum Constantini*, contribution à l'histoire du texte » *RSPT*, n°59, 1975, p. 289-294, lately: G. LUBICH, *Das Mittelalter: Orientierung Geschichte*, 2008, p. 64-83, in peculiar p. 64-66.

<sup>72</sup> According to Eginhart, Charlemagne wishes to keep the memory of the old songs of the Franks, EINHARDI, *Vita Karoli Magni*, c. XXIX.

<sup>73</sup> On the writing of the long and short prologues of the Salic law: O. GUILLOT, « La justice dans le royaume franc à l'époque mérovingienne », *La Gustizia nell'alto Medioevo (Secoli V-VIII) Spoleto*, 1995, II, p. 653-736, or *Arcana imperii (IV<sup>e</sup> – XI<sup>e</sup> siècle)*, Limoges, 2003, p. 52-53, n. 75 et 76. This author since showed us his conviction that both prologues, were in fact united by their object: legitimize the Carolingian power.

<sup>74</sup> In reality, Clovis's power results from Roman appointments come from the imperial seat of East, in the dignities of governor of second Belgium, in 481, then consul, in 508, M. ROUCHE, *Clovis, op. cit.*, p. 202-204, 315-320. Avit of Vienne confirms the byzantine origin of Clovis's power, J.-P. BRUNTERC'H, *Archives de la France*, Paris, 1994, p. 108-114, K.-F. WERNER, « La 'conquête franque' de la Gaule. Itinéraire historiographique d'une erreur », art. cit., p. 10. The correspondences preserved between some Merovingian kings and queens and the emperors does not demonstrate at all, by the employed diplomatic vocabulary, the independence claimed by the Frank power with regard to the authority of Byzantium, in this period: *Epistolae austrasicae*, W. GUNDLACH, *MHG, epist.* n° 9-47, p. 122-152.

<sup>75</sup> This claim of authority of Byzantium on Franks is going to last for some centuries, this question is going to lift well known difficulties at the passage of crusades: R. GROUSSET, *Histoire des croisades et du royaume franc de Jérusalem* (3 vol.), Paris, 1934-1991, t. I, p. 14-27, and motivate the grip of Constantinople to muzzle the arrogance of "the Emperor of the Greeks" who still considers the Franks as auxiliaries subjected to his authority, in 1204, ROBERT DE CLARI, *Historiens et chroniqueurs de Moyen Age*, A. PAUPHILET, E. POGNON, (coll. De la Pléiade), Paris, 1952, p. 7-81.

pursued by the presence of the "vulgar" terms would be then to be deciphered according to a passage of the short prologue of the Salic law: *eos legali auctoritate precellerent*: "they disposed of the legislative authority"<sup>76</sup>.

During the XVI<sup>th</sup> century another stake appeared, when the independence from the papal see, as well as from the emperor, became a political matter. After Luther, the universality of the Roman right, in the hands of the emperor, appeared as a barrier to the emancipation of the reformed communities. In 1557, Johannes-Basilius Herold edited the antique Germanic laws as a historical limit to the influence of Roman right<sup>77</sup>. In its publication Herold has added the occurrence of one *uuereguldum* to the Salic law. This act shows the eminent role played by the *Wergeld* as a proof of Germanity<sup>78</sup>. This trend has had followers.

Since the beginning of the XIX<sup>th</sup> century, the mission of implementation of a Germanic history, given to the *Gesellschaft für deutsche Altertumskunde*, in 1809, and pursued by the *MGH*, was not compatible with the late Roman presentation of the *Pactus Salicae* and other "Barbarian" laws in the prologue of the ms. BNF 4404. This contradiction between a historical ideology and a venerable manuscript has driven Pertz, when publishing this prologue, to neglect its first half<sup>79</sup>, which presented the "Barbarian" laws in a position subsidiary to the Theodosian *corpus*. Then, a question has risen inside the *MGH*, whether Herold's publication should to be considered as a source<sup>80</sup>. This point has caused many debates inside this eminent school of edition<sup>81</sup>. Only after the Second World War, Karl-August Eckhardt has achieved Pertz's project of publication of the Salic law. The text of Herold figures with the rank of a source among original manuscripts in its publication, in 1965. Among 92 manuscripts, the only source quoted for the *Wergeld* is Herold's edition<sup>82</sup>. It seems that this word had kept, at contemporary times, all his importance in the affirmation of Germanity.

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To conclude, the study of the manuscripts of the *uueregildus* brings statements on form and content. The primitive form of the term drives to consider the meaning of the *uueregildus*. The main difficulty to allocate the *Wergeld* to a Germanic language comes from this very form of *uuere-gildus*, which shows a rather Latin morphology. This word is composed with a second term *gildus* which has a very common use and meaning in late Latin. It is simply a tax<sup>83</sup>. This Latin etymology would appear in coherence with the juridical meaning of the *uueregildus* as revealed by a close study<sup>84</sup>. For the first term, *uuere-*, it is of course possible to

<sup>76</sup> O. GUILLOT, « La justice ... », *op. cit. supra*, p. 55-56.

<sup>77</sup> B. J. HEROLD, *Originum ac germanicarum antiquitatum libri*, Basel, 1557, or : *Recensio Heroldina*.

<sup>78</sup> B. J. HEROLD, *Originum ac germanicarum antiquitatum libri*, title LIII, § 2, reedited in *fac-simile* by K.-A. ECKHARTT in his publication of the version in 80 titles of the *Pactus legis salicae*, Göttingen, 1954, p. 241-279, quotation p. 271.

<sup>79</sup> G.-H. PERTZ, *Legum*, *MGH*, t. III, Hanover, 1859, in front of p. XVIII, image n° 5.

<sup>80</sup> G.-H. PERTZ, *Archiv der Gesellschaft für ältere Geschichtskunde*, VII, p. 751.

<sup>81</sup> *Congruit editio Heroldina non cum antiquiore textu, quod falso putavit Pertz*. 'We cannot confuse Herold's edition with an ancient manuscript, as Pertz wrongly thought', *Lex Ribuariorum*, R. SOHM, *MGH*, Hanover, 1883, p. 28. This question drove to numerous renouncements, on behalf of prestigious personalities such as Pertz himself, Holder, Sohm, Krammer, who gave up in the project of publication of the Salic law, S. STEIN, *Lex Salica*, I et II, art. cit. *supra*, minutes of the annual meetings of the *MGH*, *Lex Salica* I, p. 133-134.

<sup>82</sup> P. L. S., ECKHARDT, Tit. LIII (*H10*), p. 197; on Herold's version quoted *H10*, introduction, p. XL.

<sup>83</sup> DU CANGE, *Glossarium mediae et infimae latinitatis*, Paris, 1938, t. IV, p. 68. I.-F. NIERMEYER, *op. cit.*, p. 465, 468, 1130-1132, *op. cit.*, t. IV, p. 55, 67-68.

<sup>84</sup> A second reason would come from the absence of any track of such a tongue at the time of the *Edictus Childeberti*. A contemporary of this period, GEGORY OF TOURS never testifies of the existence of any Germanic language, as he discusses nevertheless the attempts of alphabetical innovation of the king Chilpericus, and, at

read it as an unusual written form of the classic Latin *uir*, *uiri*, 'the man'<sup>85</sup>. The meaning generally attributed to the *Wergeld*, 'the price, the tax for a man', would so be obtained without going out of the late Latinity<sup>86</sup>. The prefix *uuere*, shared with many old European tongues<sup>87</sup>, could also meet the meaning of the old Celtic *uuer(o)* : "high"<sup>88</sup>. The *uuere-gildus* in a Celto-Latin mixture, often met in late Roman times, would then be the "high tax", which corresponds to its juridical content as well as to the Latin locution: *poena maxima* of which the *uuere-gildus* would represent a "vulgar" synonym. For the legal point of view, after observing the juridical content of all the first cases of the *uueregildus*, it is remarkable that not a single one corresponds to its romantic definition<sup>89</sup>. For all cases, the incrimination corresponds to a Roman notion. If the *uuere-gildus* may have been a Roman juridical notion it would still be adventured to claim at any exclusivity. The Arabian spaces use of the *diya*, which can be regarded as a certain equivalent of the *uuere-gildus*<sup>90</sup>. Other areas, which have

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this occasion, quotes the Hebraic, Gallic and Syriac tongues, Greg. Tur., *Hist. Eccl. Franc.*, I, 17, I, 32, VIII, 1. E. SEEBOLD, B. BULLITA, *Chronologisches Wörterbuch des deutschen Wortschatzes*, Berlin, New-York, 2001, p. 27-38. The first track of the French language is well known, with the oaths of Strasbourg, in 842. In the same way, the western Germanic appears a century earlier, with its first text, dated between 740 and 790, the *Wessobrunnergebet* Munich, Bayerische Staatsbibliothek, clm 22053, III, folia 65<sup>v</sup>-66<sup>f</sup>, W. SCHERER K. MÜLLENHOFF (ed) *Denkmäler deutscher Poesie und Prosa aus dem VIII. - XII. Jahrhundert*, Berlin, 1892/1964, W. BRAUNE (ed.) *Althochdeutsches Lesebuch*, Tübingen, 1968, H. D. SCHLOSSER (ed.) *Althochdeutsche Literatur*, Frankfurt / Main, 1970, K. A. WIPF (ed.), *Althochdeutsche poetische Texte*, Stuttgart, 1992, U. HARSCH (ed.) for the electronic version, Universität Augsburg, 2003.

<sup>85</sup> In fact, in late Latin the double *u-* becomes frequent in initial position, at the same time, the phonetic equivalence between *ĩ-* et *ē-* represents also one of the characteristic of the language of this period, J. HERMANN, *Le latin vulgaire*, Paris, 1967, p. 40-42.

<sup>86</sup> The first track of the French language is well known, with the oaths of Strasbourg, in 842. T. ALKIRE, C. ROSEN, *Romance Languages, A Historical Introduction*, Cambridge, New York, 2010, p. 323-326. p. 27-38. In the same way, the western Germanic appears a century earlier, with its first text, dated between 740 and 790 (E. SEEBOLD, B. BULLITA, *Chronologisches Wörterbuch des deutschen Wortschatzes*, Berlin, New-York, 2001), the *Wessobrunnergebet*: München, Bayerische Staatsbibliothek, clm 22053, III, folia 65<sup>v</sup>-66<sup>f</sup>, W. SCHERER K. MÜLLENHOFF (ed) *Denkmäler deutscher Poesie und Prosa aus dem VIII. - XII. Jahrhundert*, Berlin, 1892/1964, W. BRAUNE (ed.) *Althochdeutsches Lesebuch*, Tübingen, 1968, H. D. SCHLOSSER (ed.) *Althochdeutsche Literatur*, Frankfurt / Main, 1970, K. A. WIPF (ed.), *Althochdeutsche poetische Texte*, Stuttgart, 1992, U. HARSCH (ed.) for the electronic version, Universität Augsburg, 2003. Then a hypothetic Germanic etymology cannot exclude those out coming from attested languages at the time of the first occurrence of the word. In the same way, the western Germanic appears a century earlier, with its first text, dated between 740 and 790, the *Wessobrunnergebet* Munich, Bayerische Staatsbibliothek, clm 22053, III, folia 65<sup>v</sup>-66<sup>f</sup>, W. SCHERER K. MÜLLENHOFF (ed) *Denkmäler deutscher Poesie und Prosa aus dem VII.*

<sup>87</sup> The term *uer(o)* represents an equivalent of the Latin *super* or Grec *hyper* and must also been put in connection with the Gothic *ufar*, old hight Geramn *ubir*, (modern German *ober*), or old Saxon *ofer*, (English *over*): J. POKORNY, *Indogermanisches Etymologisches Wörterbuch*, Bern, München, 1959-1969, p. 1105, L. FLEURIOT, *Dictionnaire des gloses en Vieux-Breton*, Paris, 1964, p. 181. *Uer(o)* means 'high', as in the place's name of Verdun, *uer(o)-duneon*, the 'high fence', A. MARTINET, *Des steppes aux océans, op. cit.*, citation p. 37, or even in the judicial term « verdict », *\*uer(o)-dictus*, le 'high saying', X. DELAMARRE, *Dictionnaire de la langue gauloise*, Paris, 2001, p. 264.

<sup>88</sup> The term *uer(o)* represents an equivalent of the Latin *super* or Grec *hyper* and must also been put in connection with the Gothic *ufar*, old hight Geramn *ubir*, (modern German *ober*), or old Saxon *ofer*, (English *over*): J. POKORNY, *Indogermanisches Etymologisches Wörterbuch*, Francke Verlag, 1959-1969, p. 1105, L. FLEURIOT, *Dictionnaire des gloses en Vieux-Breton*, Paris, 1964, p. 181. *Uer(o)* means 'high', as in the place's name of Verdun, *uer(o)-duneon*, the 'high fence', A. MARTINET, *Des steppes aux océans, op. cit.*, citation p. 37, or even in the judicial term « verdict », *\*uer(o)-dictus*, le 'high saying', X. DELAMARRE, *Dictionnaire de la langue gauloise*, Paris, 2001, p. 264.

<sup>89</sup> J. et W. GRIMM, *Deutsches Wörterbuch*, Leipzig, 1854-1960, vol. 29, col. 320-326.

<sup>90</sup> Y. BEN HOUNET, *L'Algérie des tribus : le fait tribal dans le Haut Sud-Ouest contemporain*, 2009, p. 312-319, but as other pre-Islamic notions this old mechanism might descend of a Roman one A. K. IRVINE, A. F. L. BEESTON, « Homicide in pre-Islamic south Arabia », *Bulletin of the School of Oriental and African Studies*, University of London, vol. 30, n° 2, Fiftieth Anniversary Volume, 1967, p. 290. D. M. HART, « Murder in the market. Penal aspects of Berber customary Law in the precolonial Moroccan Rif », *Islamic Law and Society*, vol. 3, n° 3, 1996,

not known the Roman influence, such as Ireland<sup>91</sup> Slavic spaces<sup>92</sup> ancient Israel<sup>93</sup>, antic India<sup>94</sup>, or African civilisations<sup>95</sup> prove that, under many forms, the repayment of his life by a guilty man has represented a common practice for many antique people. The publishers of the Barbarian *corpus* of laws have realized certain manipulations of the sources, which reveal a certain will to use the *Wergeld* as a historical proof of the influence of the “Barbarians” in the European history. Maybe a peaceful future depends on a better use of the realities of our past.

Christophe CAMBY

### Resume:

Was the *Wergeld* a « Germanic » notion? The European research has modified the description of antique Germany inherited from XIX<sup>e</sup> and XX<sup>e</sup> centuries. The Franks, as Roman soldiers, were they in the position to transmit a specific juridical notion? The manuscripts reveal a primitive form in *uueregildus*. The study concentrates on the “barbarian” laws of the Franks, Lombards, Alemans and Bavarians. When comparing the cases of application of the *uueregildus* with the juridical contexts of the late Roman Empire many points appear in contradiction with the usual definition of the *Wergeld*. The actions are never private, but generally take place in front of a judge. The criminal procedures applied are similar to late Roman ones. The pecuniary estimation of a free man had become a common practice under late Roman Empire. The Theodosian code gives a proof of judicial ransom practises under imperial right. The *uueregildus* may have been a “popular” equivalent of a Roman penal denomination. The *uuere-gildus* could be the ‘high tax’, the maximal penalty. The default in its payment implies capital punishment of the condemned. In late Roman right, this procedure corresponds to the penal treatment of the *causae capitales*, sometimes said: *poenae maximae*, of which the *uueregildus* may be a synonym. The historiography of the *uueregildus* presents the abuse of its use as a pretended historical proof, under Carolingian times, and from the XVI<sup>e</sup> to XX<sup>e</sup> century, for the benefit of the thesis of a pretended Frank “conquest”.

### Key words:

Alemans, antic Europe, Barbarians, Bavarians, composition, Franks, Germanic laws, judicial ransom, late Roman empire, Lombards, private justice, public authority, revenge, Romans, Theodosian code, “vulgar” laws, *uueregildus-Wergeld*,

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p. 343-371, citation p. 345 et 360. Th. P. ION, « Roman Law and Mohammedan Jurisprudence », *Michigan Law Review*, vol. 6, n° 1, nov. 1907, p. 44-52. C. BONTEMPS, « La découverte de l’anthropologie juridique, un témoignage », *Anthropologie et Droit : Intersections et confrontations*, Laboratoire d’anthropologie juridique de Paris, Université Paris X : Nanterre Centre Droit et cultures, 2004, p. 73-84.

<sup>91</sup> C. ARCHAN, *Les chemins du jugement, procédure et science du droit dans l’Irlande médiévale*, Paris, 2007.

<sup>92</sup> First identified by T. D. WIARDA (1746-1826), *Altfriesisches Wörterbuch*, Aurich, 1786, p. 364, today: K. MODJELWSKI, *L’Europe des Barbares*, Paris, 2006, p. 15, 144, or: V. VODOFF, *Autour du moyen âge russe: trente années de recherche*, Institut d’études slaves, Paris, 2003.

<sup>93</sup> A. LEMAIRE, « Vengeance et justice dans l’ancien Israël », R. VERDIER et J.-P. POLY (ed.), *Vengeance, pouvoirs et idéologies dans quelques civilisations de l’Antiquité.*, p. 13-29.

<sup>94</sup> C. MALAMOUD, « Vengeance et sacrifice dans l’Inde brahmanique », *ibid.* p. 35-46.

<sup>95</sup> E. EVANS-PRICHARD, *Les Nuer*, Paris, 1994. P. DESCOLA, *Les Lances du crépuscule, relation; Jivaros, Haute-Amazonie*, Paris, 1993. L. LEVY-BRÜHL, *Le Surnaturel et la nature dans la mentalité primitive*, 1931/1963, Paris.