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With Assistance by
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Interrogational Torture in Criminal Proceedings – Reflections on Legal History –

Volume I

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an der Universität Trier

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INTERROGATIONAL TORTURE IN CRIMINAL PROCEEDINGS

– REFLECTIONS ON LEGAL HISTORY –

Volume I

by

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INTERROGATIONAL TORTURE IN CRIMINAL PROCEEDINGS

– REFLECTIONS ON LEGAL HISTORY –*

VOLKER KREY

WITH ASSISTANCE BY

*THOMAS ROGGENFELDER, JAN NIKLAS KLEIN AND PETER STAUDACHER***

Introduction

– Torture: Still Being a Current Problem –

Torture as an interrogational instrument in criminal proceedings or as a means to avert dangers (in German: *Rettungsfolter,* i.e. lifesaving torture)[1] is still of current relevance. In so far, referring

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* This article is in its core the translation of the author's manuscript titled *"Zur strafprozessualen Folter – Rechtshistorische Betrachtungen –"*, published in Festschrift for *Hans-Heiner Kühne*, University of Trier (2013, p. 769 to 792). In doing so, the manuscript has been amended to a certain extent.

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1 The term *"Rettungsfolter",* usual in German legal language, shall be illustrated by the following current and controversial example (*Gäfgen-*

to the US-method of *water-boarding* and to the *Gäfgen-case* in Germany shall be sufficient.[2]

For clarification: The *Gäfgen-case* is often treated as an example of torture. Yet, this evaluation is imprecise. Actually, in the case at hand a mere threat of ill-treatment was given; thus, the European Court of Human Rights in Strasbourg (ECHR) *in casu* has considered such threatening not as a case of torture but only as "inhuman treatment".[3] However, art. 3 European Convention on Human Rights prohibits not only torture but also inhuman or degrading treatment. In this context, the court (ECHR, Grand Chamber) requires as legal element of the term "torture" in the sense of art. 3 European Convention on Human Rights such ill-treatment, "reaching the level of cruelty". [4]

Subject of the following paper is only the interrogational torture in criminal proceedings intending to extort the accused's confession. Nevertheless, this paper will also point out, that torture can even serve as instrument to force a witness' incriminating

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case): In a case of kidnapping, Police officers threaten the kidnapper accused that he will suffer considerable pain if he does not disclose the victim's whereabouts. This threatening aimed at saving the victim being in an eminent mortal danger due to the circumstances of the kidnapping. Thereto: *Krey,* The Rule of Law in German Criminal Proceedings, in: Rechtspolitisches Forum (Legal Policy Forum), Vol. 43, Institut für Rechtspolitik an der Universität Trier (Ed.), 2008, p. 13; see additional infra footnote 2.

2 As to the *Gäfgen-case*, see: ECHR, *Gäfgen* v. Germany, 22978/05, dated 30 June 2008, also published in: NStZ (i.e. a German law journal) 2008, p. 699, 700 (side notes 69, 70); ECHR (Grand Chamber), *Gäfgen* v. Germany, 22978/05, dated 1 June 2010, also published in: NJW (i.e. a German law journal) 2010, p. 3145, 3146 (side note 108). – In addition see supra note 1. –

3 See supra note 2.

4 ECHR, Grand Chamber, supra note 2.

testimony against third parties (in German: *Zeugenfolter*),[5] moreover, that there is no distinct delimitation between interrogational torture against the accused on the one hand and the aforesaid *Rettungsfolter*[6] as well as *Straffolter*[7] (i.e. torture as an additional cruelty to the accused's punishment), and *Lügenstrafen*[8] (i.e. corporal punishment for lying in court) on the other hand. Thereby, the author restricts his reflections to the torture's legal history.

Otherwise (inclusion of today's legal discussion and of lifesaving-torture), the scope of this festschrift article would be inadequately extensive.

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5 Such torture against witnesses was very relevant in witch trials; see infra, Part One, VII, 1 b (2) – Volume II –.

6 See supra with footnote 1.

7 An awful example for worsening the punishment of the convicted offender is the application of the so-called iron claw as an instrument of torture (in German: "*Eisenkralle"*) in case of crime against the crown during the epoch of the Kingdom of the Franks (early Middle Ages). See *Rüping/Jerouschek*, Grundriss der Strafrechtsgeschichte, 4th edition, 2002, side note 66, 80.

8 Thereto infra, Part Two, IV – Volume II –.

PART ONE: Historical Development of Interrogational Torture in Criminal Proceedings

First Chapter: Code of Hammurabi; Germanic Law; Roman Law; Age of the Kingdom of the Franks; High Middle Ages

I. Code of Hammurabi (circa 1750 B.C.)[9]

In spite of some Sumerian precursors[10], the Code of Hammurabi is the first comprehensive codification. It comes from the age of the so-called Old Babylonian Empire and is engraved on a more than human-sized diorite stele, which was discovered at the beginning of the 20th century. The code consists of 282 legal regulations engraved on the mentioned stele, concerning predominantly civil law and, to a quarter, criminal law.

Hammurabi's Code starts with the so-called prologue and ends with the epilogue; the mentioned 282 regulations are laid down in between both. Prologue and epilogue are formulated in a very pretentious manner, both denominating the following purposes of the code:[11]

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9 Thereto *Eilers*, Die Gesetzesstele Chammurabis, 5th edition 1932 (translation of the code in German with introductory remarks); *Eilers*, Codex Hammurabi, Die Gesetzesstele Hammurabis, translated by *Wilhelm Eilers* **(revised version of the 1932-edition), 2009, cited: *Eilers* 2009.** This paper follows the latter version.

10 See *inter alia Wesel,* Geschichte des Rechts, 4th edition, 2014, side note 50 et seq., 54, 55, 57.

11 See: *Krey,* Keine Strafe ohne Gesetz, Einführung in die Dogmengeschichte des Satzes "*nullum crimen, nulla poena sine lege*", 1983, side note 4, 5; *Wesel,* supra note 10, side note 69.

– On behalf of the gods, introducing law and justice (in the prologue, *Hammurabi* is titled as king realizing the law, in the epilogue as king of justice).[12]

– Eliminating the nefarious and evil ones[13] (in fact, numerous criminal law provisions of Hammurabi's Code stipulate capital punishment[14]).

– Protection of socially deprived persons (prologue and epilogue: "… the deprived shall not be disenfranchised by powerful ones"; epilogue: "… giving justice to widows, orphans, and disenfranchised ones).[15]

Uwe Wesel characterises the criminal law laid down in Hammurabi's Code as "sanguinary/bloodthirsty".[16] In fact, there are all elements of a cruel criminal law:

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12 *Eilers* 2009, supra note 9, p. 27, 31 (prologue), p. 91-94 (epilogue).

13 See *Eilers* 2009, p. 27 (prologue).

14 Thereto the following provisions – according to the enumeration of *Eilers* –: 1-3 (serious cases of false accusation); 6 (theft of property belonging to the palace or temples of the gods); 7; 8 (killing such a thief who is unable to pay punitive damages); 9; 10; 11 (fraud); 14 (kidnapping of a child); 16 (hiding escaped servants or maidservants of the palace in spite of the herald's calling); 19; 21; 22 (robbery); 25; 26 (refusing military service in spite of the king's order); 33; 34 (theft committed by military chiefs against subordinates); 108 (fraudulent conducts of female [!] innkeepers when selling beer); 109 (obstruction of punishment, committed by a female innkeeper); 110; 129 (a wife's adultery); 130; 133 B; 143; 153 (instigation to kill her husband by a wife due to another man); 155 and 157 (sexual offences); 210 (bodily injury with fatal result against a pregnant daughter of a citizen); 229 and 230 (causing a death as a consequence of a residential building's collapse due to faulty construction by the building constructor).

15 *Eilers* 2009, see supra note 9, p. 27 (prologue), p. 92 (epilogue).

16 *Wesel* (supra note 10), side note 76.

– capital punishment, often aggravated by torturous methods like burning, piling into death or (more frequently) drowning;[17]

– bodily mutilation, usually based on the principle of Talion ("an eye for an eye"), by pulling out one's eye, cutting off hands or ears, fracturing bones, or cutting off a breast;[18]

– whipping.[19]

From a historical point of view, such brutal elements of substantive criminal law are often or even typically connected with the procedural element of interrogational torture, as will be explained later on. A brutalization of substantive criminal law usually goes along with a brutalization of criminal procedure law by using the instrument of interrogational torture.

> To this statement, *Wesel* points out – although in another historical context (late Middle Ages) – that the criminal law was bloodthirsty and the new brutality of torture was in no way less terrible than the substantive criminal law.[20]

Accordingly, there would be *per se* the expectation that Hammurabi's Code has acknowledged **torture** as an interrogational instrument in criminal proceedings. However the Code neither expressively nor at least on the merits of the case orders interrogational torture. This astonishing ascertainment is not to be explained by the following assumption: *the Code held torture to be self-evident and thus saw no necessity for any regulation,*

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17 See *inter alia* the following provisions – according to the enumeration of *Eilers* –: 108, 129, 133 B, 143, 155 (drowning); 25, 110, 157 (burning); 153 (piling).

18 Thereto the following provisions of Hammurabi's Code: 192-197, 205, 218, 226, 253, 282 (according to *Eilers*).

19 In case of hitting a citizen of a superior social class by a lower-ranking offender, provision 202 Code of Hammurabi: 60 hits with a whip – being a life threatening inhuman punishment.

20 *Wesel*, side note 237 (following *Eb. Schmidt*), 240.

concerning this matter. Rather, one has to assume, that there was no necessity for the use of interrogational torture in criminal proceedings due to the Code's law of evidence acknowledging as proof:

Firstly, purgatory oath (i.e. oath of innocence by the accused/defendant).

Secondly, witnesses (apparently not only as mere compurgators).

Thirdly, ordeal (judgment of god, in Hammurabi's Code: ordeal of cold water).[21]

Apparently, the secondary literature on the Code takes the same view as the author's one, saying: *indeed there was a kind of "Straffolter"*[22] *by means of aggravated capital punishment (e.g. burning); in contrast, there was no torture as interrogational instrument in criminal proceedings.*

By the way, the mentioned cruelty of the criminal law provisions of Hammurabi's Code may not primarily be an expression of inhuman cruelty that would have made torture plausible. Rather, such cruelty may predominantly aimed at replacing private revenge, particularly blood vengeance, clan feud, and generally private criminal law by means of the predominance of governmental criminal law.[23]

Such implementation of governmental criminal law is strived for by every increasing state authority. For this purpose, it may be

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21 See the following regulations of the Code: 9-11, 107 (witnesses); 20, 103, 206, 227, 266 (purgatory oath); 2, 132 (ordeal of cold water).

22 See supra, Introduction (with footnote 7).

23 This is illustrated by otherwise incomprehensible rules of the Code, ordering a penal law "S*ippenhaft*", i.e. liability of a family for the crimes of one of its members (see the Code provisions: 116, 210, 230).

helpful to carry out brutal criminal law which meets the victim's respectively his relatives'[24] desire for getting satisfaction.

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[24] In case of the victim's death caused by the criminal offense at hand.

II. Germanic Law

The age of Germanic Law is traditionally described as the time between the epoch of the barbarian migration into the Western Roman Empire (as of the 3rd century A.D.) and the age of the Kingdom of the Franks (since the end of the 5th century A.D.).

> However, Germanic tribes, namely the Cimbri and Teutones, invaded the Roman Empire already at the end of the 2nd century B.C., but finally were eliminated by the Roman commander *Marius*).[25]

The Germanic Law is fundamentally characterized by the following legal position of Germanic people (more precisely: freemen of the respective Germanic tribe[26]): killing a freeman or committing bodily injury against him outside of a war in principle was regarded as taboo.

In contrast to the Roman law, even an unfree bondsman was regarded as a human being and not as a thing like animals; in other words: even a bondsman was not treated as mere subject of property law.[27] However, the class difference between a Germanic freeman on the one hand and a bondsman/slave on the other hand self-evidently shall not be denied here. But even such bondsmen and slaves usually were not subject of legal elimination or physical ill-treatment at the discretion of their

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[25] See: Der Kleine Pauly, Lexikon der Antike, 1979, Vol. 1, keyword *Cimbri*; Vol. 5, keyword *Teutoni*.

[26] In contrast to bondsmen and slaves.

[27] *Rüping/Jerouschek* (supra note 7), side note 4; dissenting, but to some extent too speculative, *Eb. Schmidt*, Einführung in die Geschichte der deutschen Strafrechtspflege, 3rd edition 1965, p. 26 at the end, 27.

master;[28] yet, with regard to the latter (killing or maltreating bondsmen/slaves), this paper cannot go into detail.

This idea of man (in German: *Menschenbild*) saying *that life and limb of a Germanic freeman in principle were untouchable and therefore had to be respected by the general public (tribal community),* led to the following structure of Germanic criminal law and criminal procedure law:

1. Predominance of Private Criminal Law: Criminal Law as a Private Matter

Criminal offences basically were private affairs of the clans concerned; thus, crime did not affect the Germanic tribe. Criminal law therefore was a private matter:

Interior offences/in-house offences, meaning offences inside of a clan, were punished by the clan's patriarch. Here, the most serious revenge was the exclusion from the clan, leading to loss of the protection by the clan. In contrast, blood vengeance by killing the offender probably was unusual.[29]

External offences (meaning offences committed by a member of one clan against members of another clan) were treated as an attack by the offender's clan against the victim's one. Hence, the reaction was clan feud. Such feuds (blood feuds) allowed as means of blood vengeance the killing of any male member of the offender's clan. This often resulted in an almost endless

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[28] See supra note 27.

[29] Thereto: *v. Hippel*, Deutsches Strafrecht, Vol. 1, 1925 (reprint 1971), p. 41, 42 with further references; dissenting *Eb. Schmidt* (supra note 27), p. 26 at the end, 27.

cycle of retaliatory revenge between the clans involved[30], a fact being illustrated particularly in the Icelandic Sagas (Sagas of Icelanders)[31] in an expressive and elaborate manner.

Clan feuds, characterized by mutual bloodshed, typically could lead to considerable casualties among the male members of the clans concerned. Therefore, clan feuds were highly undesirable for the involved tribe. As a consequence, there was an early development of an instrument aiming at replacing clan feuds by providing blood money (so-called *compositio*): On the basis of a contract between the offenders' clan and the victims' one, the latter could waive the right of blood feud in return for blood money

> – offered as an attempt to satisfy the victim's clan desiring for revenge. –

Such contracts (in German: *Sühneverträge,* i.e. "expiation contracts") were often entered into by reason of an intervention by chiefs of the respective tribe. At that time, these payments (blood money) were called Weregild/Wergild, as far as cases of homicide were concerned. As a rule, Weregild/Wergild was not rated in money, but in a certain number of horses, cattle, weapons, etc.

The mentioned replacement of the right to kill a Germanic freeman in the context of clan feuds due to the acceptance of blood money, expressively agreed in an expiation contract,[32] probably

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30 Thereto: *v. Hippel*, p. 40, 41; *Rüping/Jerouschek* (supra note 7), side note 5; *Eb. Schmidt* (supra note 27), p. 22, 23; *Wesel* (supra note 10), side note 181, 183.

31 The Sagas of Icelanders, preface by *Jane Smiley*, introduction by *Robert Kellog*, Penguin Books, 2001.

32 *Tacitus*, Germania (end of the 1st century A.D.), cited pursuant to *Gmür/Roth*, Grundriss der deutschen Rechtsgeschichte, 11th edition 2006, side note 20. As to secondary literature on *Tacitus* see: *v. Hippel* (supra note 29), p. 42, 103; *Rüping/Jerouschek* (supra note 7),

occurred in numerous cases because otherwise whole tribes would have been eliminated over the decades/centuries. Therefore, the aforesaid intervention by chiefs of the tribe concerned may have become more and more common.

> At first glance, this development seems to be astonishing because the right to start a clan feud and thereby to carry out blood vengeance implied at the same time the obligation of honour to do so. However, there were good reasons to enter into a *Sühnevertrag (expiation contract)*[33]: firstly the great extent of the offered Weregild/Wergild[34], secondly the influence of intervening tribe chiefs, and last but not least a weak power of the victim's clan compared to the offender's one.

In short: Killing Germanic freemen outside of a war obviously was most unwanted; this holds even in the case of eliminating murderers in the context of clan feuds. Such view was based on the aforesaid idea of man and was in the interest of the general public (tribal community).

2. Beginning of Governmental Criminal Law/ Public Criminal Law

Beside the mentioned private criminal law, being predominant, there was the beginning of public criminal law regarding very

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side note 5, 6; *Eb. Schmidt* (supra note 27), p. 24; *Wesel* (supra note 10), side note 181, 183.

33 See supra.

34 Thereto – going into detail – infra, IV (Age of the Kingdom of the Franks), 1.

serious offences which affected or endangered the tribe in a significant manner.[35]

In this context, *Tacitus* in his famous ethnological monograph [36] denotes treason and cowardice at war, to be punished by death penalty. Other authors cite as an example cases of sacrilege[37]. However, instead of executing the offender, apparently more often his expatriation was declared, the latter making him outlawed and resulting in forfeiture of all legal protection.

Nevertheless, there is a multitude of discovered bog bodies/bog people (in German *Moorleichen*) dating from the Germanic age and obviously concerning victims of a violent death before being deposited in the bogs. This may suggest that there were cases of executions in the respective age – unless such bog people were examples of human sacrifice.

Corporal punishment, particularly bodily mutilation or whipping, against a Germanic freeman is neither proved sufficiently nor at least probable.[38]

Something else may have applied towards bondsmen and slaves; yet, this paper cannot be deepened insofar.

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35 See *Gmür/Roth*, side note 24; *v. Hippel*, p. 43, 49, 101, 103-105; *Eb. Schmidt*, p. 25, 29 et seq.; *Wesel*, side note 183.

36 See – referring to *Tacitus* (supra note 32) –: *v. Hippel*, p. 103, 104; *Eb. Schmidt*, p. 25; *Wesel*, side note 183.

37 Thereto: *v. Hippel*, p. 104 with footnote 9; *Rüpimg/Jerouschek* (supra note 7) side note 5, 6; sceptical *Eb. Schmidt*, p. 25, 26.

38 *Rüping/Jerouschek*, side note 4, stating: *there was no corporal punishment against freemen*.

3. Interrogational Torture During the Germanic Age

In the light of the mentioned findings, it may be hardly surprising that there was no legal acceptance of interrogational **torture** against freemen during the Germanic age:[39]

Firstly, the aforesaid beginning of public criminal law was not characterized by cruel capital punishment, bodily mutilation or whipping towards Germanic freemen.[40] Due to the fact that interrogational torture as an agonizing inhuman instrument of criminal investigations mostly comes along with a bloodthirsty substantive criminal law, such lack of torture is by no means surprising.

Secondly, there was a law of evidence in the Germanic age, apparently being held as sufficient at that time regardless of its irrationality. Accepted as proof were particularly the offender being caught in the very act, the purgatory oath (connected with compurgators), and the ordeal, especially ordeal by battle.[41]

Thirdly, interrogational torture against a Germanic freeman would seriously have contradicted the aforementioned idea of man.

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39 See *v. Hippel* (supra note 29), p. 52, 53 with footnote 1; likewise on the merits of the case *Wesel* (supra note 10), side note 237, second passage.

40 Regarding corporal punishment see supra with footnote 38.

41 See *v. Hippel*, p. 107.

III. Roman Law

1. Roman Republic

It started about 500 B.C. (expulsion of the last king) and ended 27 B.C. (Principate of *Augustus*, *de facto* the first roman emperor).

a) Law at the beginning of the Roman Republic was customary law (judge made law), applied by judges being members of the upper class ("patricians") and thereby concealed from the members of the lower class ("plebeians"). In the long run, the plebeians were not willing to bear this discrimination anymore. They finally achieved that essential parts of the law were regulated by statute law, namely by the famous *Law of the Twelve Tables (Latin: Leges Duodecim Tabularum),* 451 B.C.[42] This law in its core covers civil law but also includes plenty rules in criminal law and partially public law. The Twelve Tables were by their very nature a publicly accessible codification of law intending to enable the plebeians' legal knowledge and to limit the arbitrariness of judges and roman magistrates (consul, praetor, etc.).[43]

In spite of the fact that back then private criminal law still was of considerable relevance, the *Law of the Twelve Tables* enacted to a significant extent criminal law provisions and thereby stipulated capital punishment for some offenses.[44] Sporadically, bodily mutilation based on the principal of Talion was ordered; thereto, Table VIII, 2 states:

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42 See: *Düll*, Das Zwölftafelgesetz, 3rd edition 1959. *Krey* (supra note 11), side note 9 with further references.

43 Thereto: *Krey*, side note 9; *Wesel*, side note 131.

44 Such as: nocturnal theft of harvest; arson; false testimony (see *Düll*, p. 51, 55).

> "If someone mutilates a limb (of another one) he shall suffer the same evil unless there is an amicable arrangement between the offender and the victim concerned."[45]

Furthermore, corporal punishment in the form of whipping is applied to roman citizens only in an exceptional case, namely pursuant to Table VIII, 14 (according to *Gellius*):

> "...ordered by the *Decemviri* (authors of the first ten tables) against a thief caught in the very act, that such an offender, if he was a roman freeman, was flagellated and given as a slave to the victim."[46]

Anyhow, the Twelve Tables made no mention of interrogational **torture** in criminal proceedings. This fact is not surprising because the criminal law laid down in the Tables, as far as they are preserved as a source, could hardly be called bloodthirsty, despite the ("in very few cases", *Cicero*)[47] threatened death penalty. Furthermore, bodily mutilation and whipping were only ordered in extreme exceptions, as above mentioned.

Already at that time it was becoming apparent that the idea of man regarding roman citizen makes death penalty, bodily mutilation and whipping extremely unwanted. This also is clarified by the institute of "*provocatio ad populum*" (i.e. appeal to the people's assembly) allowing a roman citizen to contest capital punishment imposed by supreme state authorities in the context

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45 Near translation.

46 Near translation. – By the way, the nocturnal thief caught in the act could legally be killed by the theft's victim (Table VIII, 12) which makes such flagellation less serious. –

47 See *Düll*, Das Zwölftafelgesetz, p. 48.

of their *coercitio* (coercive power). Accordingly, the life of a roman freeman/roman citizen was protected by law against a consul's (or praetor's) arbitrariness.[48]

b) Summing up, there was no significant relevance of death penalty, in principle no bodily mutilation or whipping, against roman citizens; these findings even stronger apply to the late republic (2nd and 1st century B.C.):

In principle, whipping and bodily mutilation against roman citizens were unintended.[49] Death penalty as punishment largely disappeared; where it still was threatened by law the accused could evade this penalty by self-exile.[50]

Above all, there generally was a legal development in those two centuries B.C. then being astonishingly modern because it established a statutory basis for criminal law and criminal proceedings:

Thereto, the author refers to the *leges iudiciorum publicorum*, enacted during the late Roman Republic, covering a large part of criminal law and criminal justice, and regulating with respect to specific criminal offenses as murder a legal definition, a legally ordered punishment, and a legally obligated trial by jury court.[51] Accordingly, the *leges iudiciorum publicorum* constitute an important beginning of the *rule of law in criminal matters*,

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48 Thereto *v. Hippel* (supra note 29), p. 59, 62; *Mommsen*, Römisches Strafrecht, 1899 (reprint 1961), p. 41 et seq.; *Wesel* (supra note 10), side note 132.

49 See *v. Hippel*, p. 62 with footnote 2, p. 65 footnote 4; *Mommsen*, p. 981.

50 See *v. Hippel*, p. 60, 68; *Mommsen* (supra note 48), p. 922, 923, 941 et seq.

51 Thereto: *v. Hippel*, p. 62 (at the end) up to p. 65; Der Kleine Pauly (supra note 25), vol. 4, keyword *Quaestio*; *Krey,* Keine Strafe ohne Gesetz (supra note 11), side note 35 with further references; *Mommsen*, p. 186 et seq.

more precisely in its essential core as principle of the predominance of statute law. This holds for a series of relevant crimes during the late Roman Republic. Moreover, also in the scope of application of those *leges,* the threat of capital punishment and even more its execution were atypical, and since the beginning of the 2nd century B.C., corporal punishment against Roman citizen in principal was forbidden.[52]

However, there also were serious dark sides of the criminal law at that time:

– Over the period of the Roman Civil Wars between 133-30 B.C. (keywords: failed attempts at political reforms by the *Gracchi*, tribunes of the people; *Marius* v. *Sulla*; *Octavianus* v. *Antonius*) the protection of the rights of roman citizens by the *leges iudiciorum publicorum* was violated by means of arbitrary actions and bloodthirsty massacres against the defeated.

– In addition to the mentioned trial by jury court pursuant to the *leges iudiciorum publicorum* there was the penal power of the *tresviri capitales*, apparently competent for a brief and dashing criminal trial against slaves and members of the lower class.[53]

– In the end, the mentioned *coercitio* (penal/disciplinary power of consul and praetor) remains applicable: it mostly was carried out at the consul's (praetor's) own discretion, and was in its core only limited by the aforesaid *provocatio ad populum* towards capital punishment. Yet, even in the area of applying such *coercitio*, corporal punishment against roman citizen in principle was prohibited during the late Roman Republic.[54]

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52 Thereto: *v. Hippel*, (see footnote 51); *Mommsen*, p. 922, 923, 941 et seq., 981 et seq.; *Wesel* (supra note 10), side note 133.

53 Der Kleine Pauly (supra note 25), keyword *Tresviri,* 1 b; *Wesel*, side note 133.

54 See *v. Hippel* and *Mommsen*.

As in the early Roman Republic[55], in the late republic as well the law made no mention of interrogational **torture** in criminal proceedings against roman freeman/roman citizens. This is easily comprehensible due to the, at that time, quite moderate character of the substantive criminal law, furthermore because of the idea of man (in German: *Menschenbild*) concerning a roman citizen.

Maybe, there is another aspect being even more important: the roman law of evidence in criminal proceedings did not necessarily need the accused's confession to get a conviction. This is because the jury courts decided on the basis of the impression gathered during the trial. Likewise, a consul (or praetor), when deciding in the field of punishment on the basis of *coercitio*[56], imposed the respective sanctions according to his own conviction attained by proof like witness' testimony, circumstantial evidence, etc.

In contrast, interrogational **torture** in criminal proceedings against slaves was admissible: this holds already during the time of the Roman Republic.[57] The reasons for that may by no means be seen in requirements of giving evidence in criminal proceedings. Rather, the determining reason might be the inhuman valuation and legal classification of male or female slaves as they were treated like a part of property law, comparable with animals. Hence, torture against slaves in the final analysis was based on the inhuman roman class justice, which at that time was most applied against slaves.

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55 Supra, a).

56 Thereto supra, III, 1 a) with footnote 48, 1 b) with footnote 54.

57 See: *v. Hippel* (supra note 29), p. 52, 53 with footnote 1, p. 70; Der Kleine Pauly, vol. 5, keyword *Tormenta*; *Mommsen*, p. 416 et seq. (with footnote 4); *Rüping/Jerouschek* (supra note 7), side note 80; *Wesel*, side note 237.

However, **torturing slaves** even then was by all means questionable because it touched the rights of the owner: in principle, slaves were not allowed to testify against their owners.[58]

2. Roman Imperial Era (Principate of Augustus up to the End of the Western Roman Empire)

This era started with *Augustus'* Principate (27 B.C. to 14 A.D.); the Western Roman Empire ended 476 A.D. (deposition of the emperor *Romulus Augustus*[59] by *Odoacer*).

a) Already during the classic era of the Principate (1st and 2nd century A.D.) the Roman Criminal Law's character changed increasingly in the direction of severity and cruelty, both of them rising not only in substantive criminal law but also in criminal procedure law:

– Death penalty was threatened and actually executed more frequently.

– More and more, whipping/flagellation against such Roman citizens being members of the lower class became accepted, namely for the most part as supplementary punishment in case of forced labour conviction (particularly sentencing to forced mining labour). Typically, such conviction *de facto* amounted to death penalty when that punishment was long-standing.

Later on, whipping/flagellating members of the lower class as a criminal punishment became even more important in its nature

58 In detail: *Mommsen*, p. 414, 415.

59 Sarcastically called *„Romulus Augustulus"*.

as a substitute for criminal fine against impecunious Roman citizens.[60]

– Since the Principate of *Tiberius*, successor of *Augustus*, interrogational **torture** in criminal proceedings step by step evolved into an admissible instrument of taking evidence in criminal proceedings, namely against Roman citizens of the lower class (*humiliores*), even though this held a long time only in case of crime against the Princeps/Emperor and some other serious felonies. The members of the despised lower class in so far were increasingly equated with slaves.[61]

Above all, in cases of crime against the Princeps/Emperor there might have been cases of torturing even members of the upper class (*honestiores*, i.e. patricians like senators and knights).[62] However, insofar the differentiation between law and imperatorial arbitrariness is hardly possible.

b) During the post-classical period of the Roman Empire (since the 3rd century A.D.), the aforesaid progressive elements of criminal law and criminal proceedings, to be characterised as important beginning of the rule of law in criminal matters (see supra, III., 1., b) became irrelevant. Moreover, the imperial power pursuant to the absolutistic concept *princeps legibus solutus* (*Ulpian*,[63] meaning: *the emperor is not bound by the law*) more and more became unlimited. As a result, the tendency to-

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60 As to flagellation as supplementary punishment in case of forced labour, see: *v. Hippel*, p. 69 with footnote 3; *Mommsen*, p. 984. With respect to whipping as a substitute for irrecoverable criminal fine, see *Mommsen*, p. 985.

61 *v. Hippel*, p. 70; *Mommsen*, p. 406, 407.

62 *v. Hippel*, p.70 with footnote 6.

63 *Ulpian*, Digesten (D. 1, 3, 31).

wards a more severe and cruel criminal law and criminal procedure law was rising, primarily to the disadvantage of the *humiliores* (lower class).[64]

> An evil example for this presents the enactment of mutilation as a criminal punishment since the time of *Diocletian* (Roman emperor from 284 to 311 A.D.).[65]

Nevertheless, even now roman citizens being members of the upper class *(honestiores)*, in addition soldiers as well, in principle were excluded from **torture**; however, there were exceptions particularly in case of crime against the emperor (in Latin: *crimen laesae maiestatis*).[66]

3. Conclusion

a) The Roman Criminal Law in its very nature is not ruled by the principle of equality; rather, already during the era of the Republic and increasingly during the era of the Principate/Empire there were serious class distinctions:

During the era of the Roman Republic, primarily the slaves suffered most from such discrimination. Additionally, those roman freemen/roman citizens being impecunious members of the lower class suffered from legal discrimination as well. This holds in particular for the poor people of Rome, the latter already at that time being a megacity with a high level of criminality; insofar, referring to the above mentioned *tresviri capitales* (see supra III, 1 b with footnote 53) shall be sufficient.

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64 See: *v. Hippel*, p. 68-70; *Mommsen*, p. 943, 982 et seq.; *Wesel* (supra note 10), side note 133.

65 Thereto: *v. Hippel*, p. 69; *Mommsen*, p. 982, 983.

66 See: *v. Hippel*, p. 70 with footnote 6; *Mommsen*, p. 406, 407.

At the time of the Principate/Empire, with rising tendency, the class distinction even inside of the roman freemen, namely between *humiliores* and *honestiores* became more serious. The rising severity and cruelty of substantive criminal law as well as criminal procedure law **(torture)** primarily applied to the *humiliores.* In this context, it shall be clarified that interrogational torture was not at all essential for criminal convictions pursuant to the Roman law of evidence because in addition to the accused's confession there was sufficient other proof like witness testimony, documents, etc.[67]

Anyhow, from the state authority's standpoint torture may have been an "easy going instrument" of fighting mass crime, committed by members of the despised urban lower class: torture might have been suitable to facilitate brief and dashing criminal proceedings against perpetrators belonging to the *humiliores*.

> However, regarding the *crimen laesae maiestatis*[68], the above said worsening of criminal law as well as the torture's application also struck *honestiores*.[69]

b) Summing up, the relevance of the Roman imperial era to the interrogational torture can be described as follows: *opening the floodgates for this evil instrument*.

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67 *Mommsen* (supra note 48), p. 400 et seq., p. 408 et seq., p. 418, 419, 430 et seq.

68 See supra, III 2 at the end.

69 Supra note 68.

IV. Age of the Kingdom of the Franks (Early Middle Ages)

After the end of the Western Roman Empire (476 A.D.), on its territory the Kingdom of the Franks arose, at first under the reign of the Merovingian dynasty (starting from the 5th century A.D.), then of the Carolingian one (8th and 9th century A.D.). The Kingdom of the Franks in its period of glory under the rule of *Charlemagne* (ca 747 up to 814)[70] covered almost the whole of Central Europe.[71]

The Kingdom's law in its core was based on the so-called *leges barbarorum,* meaning tribal laws applying to the different Germanic tribes, which lived under the rule of the Kingdom of the Franks. Among these tribal laws, the *Lex Salica* applying to the Franks as the reigning tribe shall be pointed out. The mentioned tribal laws are decisively still influenced by traditional Germanic Law, however to some extent also by Roman law

> – the latter primarily still being of relevant influence on the Roman inhabitants of the Kingdom as well as on the Christian Church –.[72]

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[70] See the great biography on *Charlemagne* by *Fried*, Karl der Große, dated 2013. An excellent treatise of the history of the Early Middle Ages offers *Fried*, Das Mittelalter (i.e. the Middle Ages), 2nd edition, 2009, p. 35-97.

[71] Thereto *Wesel* (supra note 10), side note 186, map 13.

[72] As to the *leges barbarorum*, particularly the *Lex Salica*, see inter alia: *Gmür/Roth* (supra note 32), side note 32-35; *Rüping/Jerouschek* (supra note 7), side note 8-11; *Eb. Schmidt* (supra note 27), p. 25; *Wesel*, side note 178, 191, 192. Regarding the Roman Law's influence: *Rüping/Jerouschek*, side note 13, 17; *Wesel*, side note 191, 201.

In addition, there was law of the king, in particular the capitularies of the Carolingian dynasty (King's edicts); yet, it is questionable, how far such law of the king became accepted throughout the whole Empire of the Franks.[73]

The aforesaid very nature of the law of the Kingdom of the Franks as in principle Germanic Law, regardless of some Roman Law's influence and many attempts to change tribal laws by enacting King's edicts, make the following findings plausible:

1. Private Criminal Law still Being Predominant

As to the Germanic tribes, living under the rule of the Frankish Empire, primarily private criminal law was applicable; this fact resulted from the above said Germanic tradition expressed in the mentioned tribal laws.

a) Offences, committed by a member of one clan against members of another clan (so to say: external offences) led to clan feuds.[74] The replacement of such feuds with "expiation contracts"/"atonement contracts" (in German: *Sühneverträge*) was possible and in the public authority's interest. The authority's influence on the conclusion of those contracts instead of carrying out clan feuds was rising; thereby, beside the blood money to be paid to the victim's clan, in addition a *fredus* (peace money, in German: *Friedensgeld*) must be paid to the public authority,[75] the latter typically represented by a judge.

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73 *Rüping/Jerouschek*, side note 17; also see *v. Hippel* (supra note 29), p. 111 with footnote 3.

74 See supra, II 1.

75 Such *fredus* was to some extent by its very nature an archetype to the later on developed criminal fine. As to peace money at that time see: *Gmür/Roth* (supra note 32), side note 24, 62, 74; *v. Hippel*, p. 111; *Eb. Schmidt*, p. 25.

The urgent interest of the public authority in the conclusion of "expiation contracts" in order to prevent blood feuds particulary is clarified by the fact that the mentioned *leges barbarorum*, enacted during the Kingdom of the Franks, especially the *Lex Salica,* in its core were nothing more than Catalogues of blood money, e.g. Wergild (comparable with modern Catalogues of fines/administration fines):

In detail the leges barbarorum ordered the Weregild's/Wergild's[76] amount respectively the comparable compensation in case of mere bodily injury to the victim's disadvantage. In this context, a severe differentiation between the victims concerned according to their tribal affiliation, other class distinctions, gender, etc. is to be ascertained:

A difference was made e.g. between the killing of

- members of the Frankish tribe as the ruling one;
- members of other Germanic tribes;
- Roman inhabitants of the Kingdom of the Franks;
- priests.

Here, the amount of Weregild/Wergild (and other compensation) for Frankish victims was highest, for other Germanic victims lower, for killed or injured Roman people lowest. However, even higher than for Franks was the Wergild for priests as victims.[77]

b) The replacement of blood feuds by paying blood money, based on "expiation contracts", not only was in the public authority's interest but also in the interest of the Christian Church.

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[76] Thereto supra, II 1.

[77] For references regarding historical sources see *Rüping/Jerouschek*, side note 10, 11.

Accordingly, the Church often offered assistance with the payment of blood money respectively other form of Weregild/Wergild like horses, cattle, weapons etc.[78]

At the time of the Carolingian dynasty, sovereigns ultimately tried to enforce the conclusion of such contracts instead of carrying out clan feuds, but in the end all of such attempts were in vain.[79]

c) The mentioned private criminal law did not apply to bondsmen and slaves who, as the case might have been, were more or less arbitrarily punished with whipping or (in "hard cases") with death.[80]

2. Public Criminal Law

Even though private criminal law still was predominant, there additionally was to some extent public criminal law gradually rising. Here, punishing with death penalty or bodily harm as well as criminal proceedings by the public authority existed; in other words: punishment striking life and limb (in German: *peinliche Strafen*) by the authority was to be found. However, the examples of such punishing largely concerned crime against the king and/or his royal power *(crimen laesae maiestatis)*, in particular high treason; in such cases the king without further ado ordered **torture** and execution.[81]

Apart from that, there only rarely was public punishment; this even holds in case of homicide. Indeed, in the capitularies of the Carolingian dynasty (King's edicts) there were threatened

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78 See *Rüping/Jerouschek*, side note 16.

79 *Fried*, Das Mittelalter (supra note 70), p. 41, 85, 86; *v. Hippel*¸ p. 111 with footnote 2; *Eb. Schmidt*, p. 24.

80 *Rüping/Jerouschek*, side note 12; *Eb. Schmidt*, p. 27.

81 *Rüping/Jerouschek*, side note 14; see also infra, 4. with footnote 87.

punishments like loss of life and property, moreover bodily punishment, sometimes even as mutilation. However, to a large extend such public punishments could be replaced by expiation payment (in German: *Sühnezahlung*).[82]

3. Interrogational Torture in Public Criminal Proceedings

Even in criminal proceedings carried out by the authority, interrogational **torture** against freemen (free Germanics) in principle was excluded. Yet, as already mentioned, there were exceptions in case of *crimen laesae maiestatis*. In contrast, bondsmen and slaves could be tortured in order to extort the accused's confession.[83]

Such generally applying non-use of torture against freemen is not surprising:

On the one hand, the criminal law under the Kingdom of the Franks was all in all rarely cruel and bloodthirsty, as far as Germanic freemen being accused were involved and no *crimen laesae maiestatis* was concerned. Death penalty as well as bodily punishment, be it bodily mutilation or whipping/flagellation, at that time were in principle undesirable because such punishing contradicted the idea of man as to Germanic freemen.[84]

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82 Thereto: *v. Hippel*, p. 113, 114; *Eb. Schmidt*, p. 28. Above all, the respective royal court often replaced *peinliche Strafen* (i.e. punishment striking life and limb) by expatriation or imprisonment (deciding by equity); see *Rüping/Jerouschek*, side note 20.

83 As to torturing bondsmen: *Gmür/Roth* (supra note 32), side note 65; *v. Hippel*, p. 121 with footnote 1. As to torturing freemen in case of high treason: *Rüping/Jerouschek*, side note 21, 80 (also see infra, 4. with footnote 87).

84 Thereto supra, II (in front of point 1).

On the other hand, interrogational torture from the view of that time might have been not indispensable for criminal proceedings. This is because there was a law of evidence then being held as sufficient regardless of its irrationality (purgatory oath, connected with compurgators, and ordeal[85]); furthermore, it ought to be taken into consideration, that against offenders, caught in the very act, no additional proof was necessary.

4. Conclusion

The tendency towards the development of public criminal law with punishment striking live and limb (*peinliche Strafen*)[86] during the Age of the Kingdom of the Franks is distinctive; this holds particularly at the time of the Carolingian dynasty. Insofar, there are considerable differences against the old Germanic law. However, this tendency did not become accepted in the end. In this respect, a great difference between the Kingdom of the Frank's law and the Roman law is to be stated.

Torturing freemen was excluded during the Frankish period, although there were exceptions in case of *crimen laesae maiestatis*

> – yet, it remains an open question to what extent arbitrariness was dominating here.[87] –

In contrast, under the law of the Kingdom of the Franks, just like under the Roman law, bondsmen and slaves were not protected

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85 *Gmür/Roth*, side note 63-65, 68; *v. Hippel*, p. 120, 121; *Eb. Schmidt*, p. 39, 40; *Rüping/Jerouschek*, side note 22-24.

86 See supra, 2.

87 *Rüping/Jerouschek*, side note 14.

against torture;[88] insofar, an evil commonality between both legal systems existed.

Anyhow, compared with the criminal proceedings during the era of the Roman Empire (supra III, 2, 3), characterized by the rising use of torture even against Roman freemen, the Frankish legal system until the very end was considerably less inhuman and more liberal.

88 See supra, 3. with footnote 83.

V. High Middle Ages

The High Middle Ages started, when the Kingdom of the Franks ended, namely during the second half of the 9th century A.D. due to the kingdom's final partition under the successors of Charlemagne.[89] The end of the High Middle Ages and at the same time the beginning of the Late Middle Ages is for the most part equalized with the end of the 12th century A.D. Therefore, the epoch of the High Middle Ages simply said covers the 10th, the 11th, and the 12th century A.D.[90]

This epoch often is characterized as being part of the dark Middle Ages (mostly called Dark Ages); however, such assessment is not convincing:[91] With respect to the cruelty of criminal punishment and the horror of **torturing**, it is not the epoch of the High Middle Ages, which was so bloodthirsty. Rather, opening the floodgates for cruel criminal law with atrocious punishment striking life and limb *(peinliches Strafrecht)* in connection with the so-called *Inquisitionsprozeß* (i.e. inquisitorial trial/inquisitory proceedings), characterized particularly by sanguinary torture, did not occur in the High Middle Ages but only from the 13th century as the beginning of the Late Middle Ages:

1. Together with the end of the Kingdom of the Franks, the tendency towards the development of public criminal law at first came to a standstill. The 10th century A.D., due to a considera-

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89 Thereto *Fried*, Das Mittelalter (supra note 70), p. 86, 87-97. Also see *Winkler*, Geschichte des Westens, 2009; **Jubiläumsedition**, i.e. anniversary edition, 2013, p. 45.

90 *Gmür/Roth*, side note 86 et seq., 136 et seq.; *Wesel* (supra note 10), side note 186: beginning of the Late Middle Ages as from the 13th century.

91 Thereto in detail and convincing *Fried*, p. 7, 8, 536 et seq. See additionally infra, 2.

ble lack of written historical sources also called the dark century, still is shaped by clan feuds and *Sühneverträge* (expiation contracts).[92] However, since the 11th century also in Germany the so-called *Gottesfrieden* (i.e. Peace and Truce of God, in Latin: *Pax Dei, Treuga Dei*) became more and more accepted. Step by step they then were supplemented by the so-called *Landfrieden* (i.e. public peace, enacted by the German territorial rulers, e.g. dukes, and/or by the German King respectively Emperor). These *Landfrieden* primarily banned feuds at specific days (on Thursdays to Sundays) and intended to protect certain categories of person (women, priests, peasants, etc.) and of property (e.g. churches, farms).[93]

Such authority's attempts to limit clan feuds constituted one of the roots of the *peinliche Strafrecht* because severe violations against *Landfrieden* were prohibited by threat of punishment striking life and limb.[94]

> – This serious punishment in the end might have been based on the following reason: cases of severe breach of public peace (in German: *Landfriedensbruch*) apparently were regarded like a *crimen laesae maiestatis*[95] meaning as an attack against the respective territorial ruler's and/or king's authority. –

A further root of cruel criminal law *(peinliches Strafrecht)* then connected with **torturing** were the ecclesial heresy trials. However, such trials, being characterized by torturing and burning, to the greatest extent did not yet occur in the era of the High

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92 *Rüping/Jerouschek* (supra note 7), side note 25; *Wesel*, side note 236.

93 *Fried*, p. 136; *v. Hippel* (supra note 29), p. 123; *Rüping/Jerouschek*, side note 48, 49: *Wesel*, side note 207.

94 *Fried*, p. 136; *v. Hippel*, p. 123-125; *Rüping/Jerouschek,* side note 48*; Eb. Schmidt* (supra note 27), p. 48 et seq.; *Wesel,* side note 207*.*

95 As to this term see supra, III, 2 b at the end, 3, IV, 2, 4.

Middle Ages. This is because at that time, the church in principle had a negative approach towards death penalty and torture.[96]

2. The last century of the High Middle Ages most contradicts the distorted image of the Middle Ages as part of the Dark Ages. This century, the 12th one, led to a so to say Golden Age nowadays increasingly called *"Kleine Renaissance"* (meaning an early/minor Renaissance) as a beginning of the European modern time *(Wesel)*; in this context, the following keywords may be sufficient, which are more or less relevant for **torture** as the subject of the paper at hand:

– Rise of cities,[97] becoming cultural centres and enacting autonomous town statutes (e.g. also criminal ones) as a basis for the development of trade, monetary economy and long-distance trade.[98]

– Foundation of the first universities since the end of the 11th century (Bologna) where Canon Law and especially Roman Law pursuant to the rediscovered *Corpus Iuris Civilis* of the Byzantine Emperor *Justinian* (published 533, 534) was taught. Here the so-called Reception of Roman Law started.[99]

– The aforesaid development of *Gottesfrieden* and *Landfrieden* (Peace and Truce of God, public peace)[100] caused a

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96 Concerning death penalty: *v. Hippel*, p. 83 with footnote 4, p. 90; however, already in that era occasionally cases of burning heretics happened (see *Fried*, p. 177, 276). Concerning **torture** see infra, Volume II, VI, 2.

97 Thereto: *Rüping/Jerouschek* (supra note 7), side note 52 et seq.; *Wesel* (supra note 10), side note 202, 215, 216, 240.

98 As to the latter, the crusades were important.

99 See: *Fried*, p. 110, 111, 195, 196, 232 et seq., 359; *v. Hippel*, p. 90, 91, 159 et seq.; *Rüping/Jerouschek*, side note 29, 30-34; *Wesel*, side note 202, 215-217.

100 Supra, V, 1.

considerable gain in security of life and limb as well as in property of the people due to the mentioned legal limitations of feuds enacted by the *Landfrieden* of the territorial rulers and/or the kings. Even though feuds of the nobility still occurred for further centuries, they now were significantly limited and thus largely defused.

3. Summing up, one can state: during the epoch of the High Middle Ages cruel penalties striking life and limb as well as the *Inquisitionsprozess*, carried out by the authority and being characterized by the horror of **torturing**,[101] did not play a major role. Nevertheless, the enactment of *Landfrieden* (public peace), the rise of the cities with autonomous town statutes, and the rediscovery of Roman Law in the end laid the basis for the future development of the cruel criminal law with punishment striking life and limb *(peinliches Strafrecht)* as well as of the interrogational torture, both implemented in later times, namely during the Late Middle Ages (13th, 14th and 15th century) particularly in context with merciless heresy trials: Then, opening the floodgates to such awful aberration of criminal law and criminal proceedings took place. However, the final bursting of the dam happened even later, more precisely in the Early Modern Age (16th and 17th century) being the flood tide of witch trials. These statements will be elaborated in the following **sub-chapters VI and VII** of the paper at hand

– both being the first parts of its Volume II, which is expected to be published in early 2015 –.[102]

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101 Supra, V, before point 1.

102 **To get a preview to Volume II see its table of contents** (annexed to Volume I's table of contents).

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Interrogational Torture in Criminal Proceedings
– Reflections on Legal History –

Volume I

Subject of this publication is torture as an interrogational instrument in criminal proceedings from a legal history point of view. Thereby, the author makes a distinction between torturing the accused on the one hand and, on the other hand, torture as an instrument to force a witness' incriminating testimony against third parties (in German: Zeugenfolter), torture as a means to avert dangers (lifesaving torture), torture as an additional cruelty to the accused's punishment (in German: Straffolter), and corporal punishment for lying in court. Only the first manifestation, namely torturing the accused intending to extort his confession, is the real subject of this paper.

Volume I covers the following historical periods: Code of Hammurabi; Germanic Law; Roman Law; Age of the Kingdom of the Franks; High Middle Ages.

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