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GRUNDSTÖER – DEVASTATION AS VENGEANCE FOR HOMICIDE AMONG SIXTEENTH-CENTURY CARNIOLAN PEASANTS

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ABSTRACT

The renowned late Slovene legal historian Sergij Vilfan mentioned a 'peculiarity' among sixteenth-century Carniolan peasants, referred to as grundstöer (devastation) in the sources, which was used to avenge homicide by destroying the perpetrator's property instead of killing him as in blood feud. Throughout his career, Vilfan remained somewhat unsure about whether grundstöer was distinct from the 'German(ic)' legal institution of Wüstung (devastation), used to sanction homicide the same way. The analysis presented in this paper, predicated on recent research on vengeance, establishes that they were essentially the same institution, a part of and originating from the legal custom of (blood) feud as an ancient system of conflict resolution.

Keywords: grundstöer, Wüstung, devastation, vengeance, blood feud, conflict resolution, legal custom, Sergij Vilfan, subjects, peasants, Carniola

GRUNDSTÖER – LA DEVASTAZIONE COME VENDETTA PER OMICIDIO TRA I CONTADINI CARNIOLANI DEL XVI SECOLO

SINTESI

Il noto defunto storico del diritto sloveno Sergij Vilfan menzionava una "peculiarità" osservata tra i contadini carniolani nel Cinquecento e citata nelle fonti con il termine grundstöer (devastazione), che si usava per vendicare un omicidio con la distruzione della proprietà dell'autore del reato anziché con la sua uccisione, come succedeva nel caso della vendetta di sangue. Vilfan rimase leggermente incerto sul fatto se il grundstöer differisse in qualche modo dall'istituto giuridico "tedesco" o, meglio, "germanico" del Wüstung (devastazione), il quale sanzionava l'omicidio nella stessa maniera. L'analisi fornita nel contributo, basata sugli studi più recenti della nemesi, rivela che si trattava sostanzialmente dello stesso istituto, parte della o derivante dalla tradizione giuridica della vendetta (di sangue) come antico sistema di risoluzione dei conflitti.

Parole chiave: grundstöer, Wüstung, devastazione, faida, vendetta, risoluzione dei conflitti, tradizione giuridica, Sergij Vilfan, sudditi, contadini, Carniola

PROLOGUE[1]

In 1541 the deputation of the Land Estates of the Duchy of Carniola filed complaints for various 'vices' with their Land Sovereign (Prince), the Roman, Bohemian, and Hungarian King, and Austrian Archduke Ferdinand I of Habsburg in Prague.[2] Included in these 'vices' was the practice of Carniolan peasants referred to as *grundstöer* in the source: "*when there is a homicide, the whole kin*[3] *rises up, storms the perpetrator's land, devastates and tramples everything, wanting to regard it as a custom and a right [no better or worse than others], during which a lot of bad things happen*"[4] (ARS, AS 2, fasc. 98, Supplication of the Carniolan deputation to the Roman, Hungarian, and Bohemian King Ferdinand I regarding various grievances, s.d.). The brackets contain the alternate longer version mentioned by the Carniolan historian August Dimitz (Dimitz, 1875, 304). The 1542 concept explicitly states that the devastation is retaliation for homicide (*grundstöer vmb beschehen todslag*) (Vilfan, 1943, 221, n. 5). While the Estates regarded *grundstöer* as both irrational and a vice (Vilfan, 1996, 459–462), its description makes clear that it was related to the legal custom of (blood) feud or vengeance.[5]

(BLOOD) FEUD: STATE OF THE ART IN BRIEF

Traditional (legal) history of the nineteenth and early twentieth centuries, whose interpretations still dominate recent historiography, regarded the custom of vengeance similarly as the Carniolan Estates regarded the peasants' *grundstöer* (yet not quite so the enmities[6] among nobility): a consequence of the irrational mind, stuck in a primitive stage of human mental, social, and legal evolution (Carroll, 2007; Netterstrøm, 2007).

A break with traditional perceptions of vengeance and premodern society occurred in the mid-twentieth century as the result of anthropological research. Anthropologists found that the earliest human societies developed sophisticated systems of social control that upheld peace in the feud, predicated on familial, neighbourly, economic, and similar relations or mechanisms of interdependence that help to sustain society and regulate conflict, which can erupt and escalate with violations of social norms. Transgressions thereof demanded justice, i.e. satisfaction, exacted by the ruler in the name of the community (e.g. for incest, witchcraft, sacrilege, treason) or by the community (e.g. for homicide, rape, theft), either by its appointed members or the injured party itself (Radcliffe-Brown, 1952, 212–219; cf. Brunner, 1892, 464–475, 590–596); hence it can be surmised that *grundstöer* as retribution for homicide could, at least in theory, also have been exacted by the community. Conflict resolution was shaped by the culture of honour (and shame), which limited the set of honourable targets and actions, imposing ritual limitations on violence according to principles of equivalence and reciprocity, i.e. the principle of gift-exchange[7] (Darovec, 2017a). Honour also demanded that actions be public, which enabled the community to intervene in the conflict at any time. Subsequently social mechanisms of peacemaking are inherent in the custom of vengeance, which provides the functions of both conflict resolution and social control, with its tendency for the re-establishment or maintenance of social equilibrium (order) and peace (Gluckman, 1955, 1–55; Evans-Pritchard, 1940; Colson, 1953).

Since the mid-twentieth century, historiography, with the notable exception of Germany (cf. Darovec, Ergaver & Oman, 2017, 397–398), began applying the findings of anthropology to conflict resolution in the politically and socially highly-stratified societies of premodern Europe (Netterstrøm, 2007; cf. Jordan, 2016), and soon established that they were permeated by a tendency toward peace, not violence (Wallace-Hadrill, 1959; Bloch, 1961, 123–130). Predicated on anthropological research of conflict resolution, historiography has shown that European Medieval and early modern societies had mechanisms for peace and social equilibrium at all levels. Peaceful relations and harmonious coexistence were imperative for legal professionals and the clergy, members of the ruling estates, and village elites, as well as the general population. The desire for peace, also rooted in Christian teaching, permeated custom, Roman and statutory law, wherein all complemented each other (Bossy, 1983; White, 1986; Smail, 2003; Bossy, 2004; Smail & Gibson, 2009; Carroll, 2006, 185–233; Cummins & Kounine, 2016).

1 My thanks to Stuart Carroll, Darko Darovec, Angelika Ergaver, Borut Holcman, and Marko Kambič for their comments on the drafts of this paper.

2 The Carniolan deputation in Prague was part of the deputation of the Inner Austrian Estates. These, by then largely Protestant, petitioned the Archduke to grant them freedom of religion (to no avail), among other matters (Dimitz, 1875, 205–209).

3 The same phrasing was still used for settling homicide in seventeenth-century Upper-Carniola: the perpetrator had to make peace not only with his victim's next of kin, but with his or her whole kin, i.e. *gesambte freündtschaft* or *völligen freündtschafft* (ARS, AS 721, kn. 20 (1652–1655), 25 April, 1654; ARS, AS 721, kn. 18 (1636–1640), 25 February, 1637).

4 In the original: *Solicher massen, so sich etwo ein thodtschlag pegibt, so erhebt sich ein gannze freundschafft, dem thäter auf den grundt zufalln verwiessten vnnd zertreten alles, wellens fur ein prauch vnnd recht halltn* [*nicht besser und nicht schlechter als gar manches andere*], *darunter vill args vnnd vbls geschiecht* (ARS, AS 2, fasc. 98, Supplication of the Carniolan deputation to the Roman, Hungarian, and Bohemian King Ferdinand I regarding various grievances, s.d.; Dimitz, 1875, 304).

5 For an overview of the terminology regarding the custom see: Darovec, Ergaver & Oman, 2017, 398–402.

6 Cf. Oman & Darovec, 2018, 98–118.

7 This exchange in feud is also given in the origin of the Slovene word *maščevanje* (vengeance), derived from 'exchange' and 'that, which stands for exchange' (Snoj, 1997, 327; cf. Lévi-Strauss, 1969, 60).

The custom of vengeance thus played the same role in stratified premodern European societies as it did in more egalitarian tribal societies. The culture of honour, which dictated a more or less equal requital for a sustained injury, (ideally) limited the violence in con-flicts and demanded that revenge be public. This enabled communities to intervene in conflicts at any stage, either through mediation or arbitration, which during the suspension of enmity, i.e. in truce, defined the terms for peace or made peace by settling the wrong with a composition payment and the establishment of a new relationship between the parties to the conflict. In Medieval and early modern Europe, composition had to be paid to the injured party (in kind or cash), the community or its authorities, i.e. to the courts as a fine, and peace also had to be made with God by penance, paying for masses, or giving alms. Marriage was often the means by which feuding groups were reconciled and turned into kin, especially in blood feud. Mediation and arbitration reinforced social hierarchy, as authorities (ruler, elders, clergy) and separate legal experts of a community (lawyers, notaries) played prominent roles in the negotiations. The rituals of peacemaking as a key element of vengeance existed in all premodern European societies,[8] underpinned by Roman law and its principle that injustice, including homicide, could be satisfied by monetary compensation (Carroll, 2017, 438). Satisfaction was hardest to achieve for the most serious transgressions. Homicide and similar injuries (heavy wounds, grave insults) had to be requited with blood or weregild (blood money) to be brought to an end by lasting peace. Since the parties to a blood feud were the families or 'whole kins' of both the victim and the perpetrator, it was not necessary for revenge to be exacted upon the actual perpetrator. As any appropriate target would do, generally a free adult or adolescent male member of the enemy kin, the threat reinforced the disposition of both parties towards peace. With the codification of the custom of (blood) feud in the Middle Ages, particularly the custom's key rituals of peacemaking (and, in the Holy Roman Empire, also of the ritual limitations of violence in enmity), legal professionals received an important role in settling conflicts, especially in towns and cities, yet could only force the parties to make truce, not lasting peace (Rolandino, 1546, f. 147r–159v; Frauenstädt, 1881; Boehm, 1984; Miller, 1996; Peters, 2000; Carroll, 2003; Mommertz, 2003; Netterstrøm & Poulsen, 2007; Smail & Gibson, 2009; Carroll, 2015; Povolo, 2015; Ergaver, 2016; Darovec, 2016; Darovec, 2017b; Ergaver, 2017).

The basic structure of the custom of vengeance is dictated by the relationship of mutual animosity, guided by the principle of exchange, wherein all stages of the custom have to be public to achieve satisfaction: injury-enmity-mediation-truce-peace (cf. Darovec, Ergaver & Oman, 2017, 402–414). Enmity, which allows for limited violence to attain satisfaction, erupts when the (pub-licized) injury that triggered the conflict is not appropriately (honourably) settled, or when a violent response is a culturally more appropriate response for a wrong, especially homicide, than composition payment. The state of mutual enmity is maintained until lasting peace is made, establishing a new social relationship wherein enmity is substituted with amity and love, i.e. alliance or kinship.

For the peace to last, arbiters always had to make an extra effort to achieve balance between the feuding parties, as neither could appear to prevail over the other. Honour and shame (humiliation) had to be equally divided. Self-humiliation on the part of the perpetrator played the key role in the restitution of both sides' honour, as only then could forgiveness from the injured party follow, which was necessary for peace to be made (Boehm, 1984, 123–142; Darovec, 2017a).

Balance as the fundamental principle of law remained an essential element of early modern legal order, with courts striving to settle conflicts by re-establishing peace and social equilibrium, by encouraging and forcing the parties towards settlement. Settlement always saw the parties' social status and gravity of the transgression taken into account, e.g. for determining composition. The key change brought by the adoption of criminal legislation in the early modern period was the strengthened role of the courts before which peace was made, while the inquisitorial procedure did not entirely substitute the accusatorial procedure prior to the end of the *ancien régime*, and courts and authorities essentially continued playing the role of arbiters. However, Central and Western-European early modern criminal legislation concurrently reserved the sanctioning and pardoning of ever more transgressions to the rulers and their courts. Beginning in the sixteenth century, conflict resolution, by achieving peace through the pursuit of balance between the parties (restorative justice), had come to be replaced with punishment for the perpetrator (retributive justice) (Povolo, 2017, 29–31). This was also a consequence of economic, political, and social change, which, along with an increase in itinerant forms of crime, ever greater social mobility, altered forms of warfare, and religious and civil wars, resulted in an increase in violence that by the eighteenth century had de-legitimized traditional forms of conflict resolution (Carroll, 2007; Povolo, 2015; cf. Wieland, 2014).

SERGIJ VILFAN ON *GRUNDSTÖER* AND *VASTATIO*

Thus far *grundstöer* has only been addressed by the renowned late Slovene legal historian Sergij Vilfan (1919–1996), who regarded the custom of vengeance

8 Specifically for the early modern Slovene lands see: Oman, 2016; Oman, 2017; Oman & Darovec, 2018; Darovec, 2018, 1–30; cf. Čeč, 2011; Kambič, 2017.

Fig. 1: Sergij Vilfan (born 5 April 1919, died 16 March 1996) (Sergij Vilfan, http://www.sazu.si/clani/sergij-vilfan).

mostly in accordance with the perceptions of traditional (legal) historiography (cf. Vilfan, 1961, 131–132, 261–266, 399).

Since first mentioning *grundstöer* in a paper from 1943 as a 'peculiarity' among Carniolan peasants in the mid-sixteenth century, Vilfan occasionally returned to it for over half a century. As he was not aware of any early modern Slovene terms for *grundstöer*,[9] he translated it as *pustošenje*,[10] meaning devastation. Vilfan attempted to explain it as a 'Slovene' custom, and hence in opposition to the views of the 'German' Estates, and tried to fence it off from the 'German(ic)' institution of *Wüstung*, also meaning devastation. He noted the similarities between both, yet maintained that they were essentially different legal institutions. Vilfan seems to have kept these views on the matter largely unchanged for the rest of his life (Vilfan, 1943, 221, 223–227; Vilfan, 1996, 459–463), although he diverted from them in his perhaps best known work on Slovene legal history, in which he more or less equated *grundstöer* and *Wüstung* (Vilfan, 1961, 264–265).

It is the aim of this paper to take a closer look at both and further clarify the matter in the process, as well as to point out a somewhat different, while not unexpected, use of the terms akin to *grundstöer* in Carniolan sources, although from the seventeenth century.

Vilfan correctly interpreted the institution as a form of vengeance, and argued that by its legal nature *grundstöer* was related to blood feud. He saw similarities between the two in that the prerequisite for both is an attack on one's physical integrity, most commonly a homicide (explicitly only homicide in the source), that the executor of the sanction is the kin group, and that the sanction is carried out without interference by the authorities (communal or otherwise) and is as such private (cf. Frauenstädt, 1881, 168–172) not public. One of the main differences, however, was that blood feud (ideally) followed *lex talionis*, blood for blood as an accurately measured act of retribution (Netterstrøm, 2007, 43), while *grundstöer* avenged bloodshed by property destruction. Vilfan also explicitly stated that it should not be confused with weregild (Vilfan, 1996, 460–461).

In the form of its sanction, however, Vilfan claimed that *grundstöer* was similar to the 'German(ic)' legal institution of *Wüstung*,[11] also translatable as devastation. The Latin term for the custom was *vastatio*, and the verbs for the action itself *destruere*, *diruere*, *devastare*: to devastate, destroy, etc. *Wüstung* and *Störung*[12] were basically synonyms, and Vilfan admitted that *grundstöer* and

9 The term is not given in early modern Slovene dictionaries. In the late sixteenth-century, Hieronim Megiser translated the German word *verwůsten* (Lat. *conspurcare*) as *oskruniti*: to befoul, defile (Megiser, 1592, 280). The closest to the Latin *devastare* (Ger. *oed machen*), was translated by him as *pustu delati*, *opuſzhati* (Megiser, 1592, 172): to devastate, abandon. Both *Wüstung* as *Öde* can also mean abandoned property (Hudelja, 2012, 241; Vilfan, 1996, 460–461). In the seventeenth century Gregor Vorenc and Matija Kastelec translated the Latin verb *devastare* as *satreti*, *opustiti*, *ferdirbati*, and *pogonobiti* (ruin, devastate, abandon), and the gerund (*de*)*vastatio* as *satrenie*: ruin, devastation (Vorenc & Kastelec, 1680/85, 83, 328).

10 Aside from the recent German-Slovene historical dictionary, which follows Vilfan and also contains *grundstör* (Hudelja, 2012, 143), nineteenth-century as well as contemporary German-Slovene dictionaries translate *Wüstung* as *pustota* or *pušča*, meaning devastated, deserted, uncultivated or barren land (Wolf, 1860, 1920; Debenjak, 1993, 1288; Hudelja, 2012, 389) and *verwüsten* as (*o*)*pustošiti*, among others, meaning devastation, destruction, etc. (Wolf, 1860, 1796; Debenjak, Debenjak & Debenjak, 1993, 1218). For the Slovene etymology see: Snoj, 1997, 516.

11 Its origins can be traced back to the Old High German verb *wuosten* (to plunder, burn, devastate) and Middle High German *wüesten* (to desolate, plunder, destroy, rob). The same meaning is given in Old Saxon *wōstian* and Middle Low German *wōsten* (https://www.dwds.de/wb/W%C3%BCstung) (last access: March 2018). An abundance of various termini is given by Alexander Coulin (1915, 342–349).

12 According to Vilfan, the word *grundstöer* is a composite of the words *grunnd* (ground, land) and *stöer*. Eytmologically speaking, he was not wrong with the latter. Its contemporary version is the verb *stören* (to interfere, impede), while the older meaning was to destroy, lay waste, demolish, hinder, etc. (https://www.dwds.de/wb/st%C3%B6ren) (last access: March 2018). The word *stöer* in *grundstöer* could thus be a gerund, which throughout history also stood for all of the above (interfere, destroy, etc.).

Wüstung could both be translated as *pustošenje*, devastation. Yet, even if he regarded them as similar legal institutions, he was certain that they were different in their legal content, and thus translated *Wüstung* as *vastacija*, also meaning devastation (Vilfan, 1996, 460–461).

Vilfan regarded *Wüstung* as a property legal sanction for violations of peace within a community, originally a tribe. The violation was avenged by the community, following a communal (public) resolution, which renounced the legal protection of the transgressor by banishment (*Acht*, *Bann*), with consequences to his or her person and/or property, meaning either its confiscation (seizure) or devastation (total or partial). Vilfan claimed that the devastation evolved into a legal institution of its own, namely *Wüstung*. It supposedly gradually lost its connection to banishment, but retained the one to vengeance. However, he failed to see that banishment was an integral part of the custom of vengeance (cf. Povolo, 2017). According to Vilfan, in time *Wüstung* came to be used as a sanction for the owner's illegitimate actions, and was ordained and executed by his community, i.e. its authorities. As such, *Wüstung* could avenge or sanction not only homicide, but also other offences – and thus, contrary to Vilfan, kept rather than lost its connection to breaches of peace (Vilfan, 1996, 461–462).

Although he admitted that the differences between *Wüstung* and *grundstöer* were not irreconcilable and that many intermediate forms were theoretically possible, it was their execution that made Vilfan draw the line between them. Arguing that, whereas *Wüstung* had to be ordained and executed by the community, *grundstöer* was a kinship action. Hence, he regarded it as an intermediate form between blood feud and *Wüstung*, sharing the prerequisite with both, yet preceding the latter. *Grundstöer* shared the executor (kin group) with blood feud and the sanction (destruction of property) with *Wüstung*. Therefore he offered another solution for the Slovene translation of *grundstöer*: *premoženjsko maščevanje*, property or material vengeance (Vilfan, 1996, 461–462).

While at first Vilfan regarded *grundstöer* as possibly a Carniolan, i.e. 'Slovene', legal custom *sui generis* (Vilfan, 1943, 226) he later remained rather indifferent to the question of its supposed autochthony. Even though the sixteenth-century sources claimed that it was an 'invading vice', he assumed that that had meant that the custom (institution) had become more common than before, while at the same time becoming less acceptable (to state authorities) – this is most likely the correct interpretation – and not that it had originated so late in history. He argued that *grundstöer* must have been known since at least the Late Middle Ages (Vilfan, 1996, 462–463).

In his paper from 1943, Vilfan proposed that *grundstöer* was taken from Lombard law or from thirteenth-century Austrian *Landrecht* stipulations regarding the destruction of castles (Vilfan, 1943, 226–227). While Lombard law did not stipulate devastation, only seizure of the transgressor's property (Coulin, 1915, 336–337, 352), this was probably only an echo of Roman law, which strongly influenced codified Lombard law (Smail & Gibson, 2009, 62), while customary law is another matter. However, later in his life, Vilfan questioned the influence that Lombard law (and custom) could have had on the Slavs in the Eastern Alps in general (Vilfan, 1961, 43–44, 49). The stipulations of the Austrian *Landrecht* regarding the (partial) devastation of castles are just as unlikely a source.

Furthermore, Vilfan admitted that there is no mention of *grundstöer* in statutory law from Slovene historic lands, but still made an attempt to connect it to the *Landesordnungen* (provincial ordinances) of Duke Albrecht II of Austria from 1338 for Carinthia and Carniola. They contain the stipulation regarding homicide, which Vilfan regarded as perhaps being connected to *grundstöer*. In cases of the perpetrator's flight, the *Landesordnung* stipulated that he had to pay a fine to the court to make peace with it, i.e. his community, but this did not include making peace with his enemies, i.e. his victim's kin (*Tůt aber ainer einen totslag und chumt er davon, der ist dem obristen gericht vervallen dreizzig mark und dem niedern gericht sechtzig phenning und hůt sich vor sinen veinden und vor dem geschray*) (Schwind & Dopsch, 1895, 175–176). Should he not make peace with them, retaliation, i.e. blood feud, or a lawsuit would follow (Vilfan, 1961, 217; cf. Mommertz, 2003, 240–241). However, should the culprit be apprehended, either the law of talion ('throat for throat') or a fine would apply, yet the latter could not be paid from the property of his wife or children[13] (*Wirt er aber begriffen, so ist hals wider hals oder er lose sich, wie er stat an dem lantsherren vindet, und sol des hausvrow*[e] *und siner chind nicht entgelten an dem gůt*) (Schwind & Dopsch, 1895, 176). As stated above, Vilfan claimed that the *Landesordnungen* condoned blood feud, perhaps even hinting at a special form of vengeance, namely *grundstöer*. While he was correct regarding blood feud, there is no proof regarding devastation.

Still, this does not mean that he was wrong. Bavarian *Landfrieden* from 1293 and 1300, which Vilfan never cited, contain similar stipulations regarding flight following homicide, with the addition that the culprit's lord should not burn his property (*umb chainer wunden sol im der herre haizze prenner swaz er hat*) (MGH, Const. 3, No. 633, § 6, 615). This is devastation, but not by the victim's kin, and hence *Wüstung*. Moreover, a similar stipulation (*weib vnd khinndt an dem guet, das auf der huebm ist, vnenntgolten, vnd vnschadhafft beleiben*), which Vilfan also never cited in relation to *grund-*

13 This seems to have been a common stipulation when it came to fines. It is, for instance, attested in 1582 for any fineable offence in the Styrian market town of Vojnik (Mell & Müller, 1913, 256).

stöer, was contained in the Carniolan[14] Provincial Court Ordinance of 1535 (LGK, 1535, 8).

Even so, Vilfan correctly maintained that two centuries after the privileges were issued, the conditions sustaining *grundstöer* could, in general, not have changed dramatically. As he was well aware, peace settlements of homicides, for instance, remained[15] a private matter between kin groups, mostly without interference by the princely authorities (much to the chagrin of the Estates) in the rest of Inner Austria[16] at roughly the same time (1518) (Dimitz, 1875, 57) as *grundstöer* seems to have been common in Carniola (Vilfan, 1996, 462–463).

In the end, Vilfan seems to have changed his mind regarding the differences between the institutions of *grundstöer* and *Wüstung*, as he equated them in the book(s) countless Slovene law and history students have sieved through over the decades (Vilfan, 1961, 264–265; Vilfan, 1968, 162–163). Thus it remains somewhat confounding, why in his seminal work on Slovene legal history (Simič, 2007, 156), which was published well afterwards, he still argued that these must have been two separate legal customs, just as he did during the Second World War. This is especially surprising given the fact that he had at least Alexander Coulin's seminal work on *Wüstung* at his disposal and cited it both in his 1943 paper and his 1996 work. The answer is most likely to be sought in his battle with a terminal illness, which prevented him from correcting every inconsistency in the book that was the result of decades of prolific work (Simič, 2007, 156).

As for his previous work, the answer probably ought to be sought between the 'blinders' that are so often put on every national historiography, especially legal history: the 'nativist' approach instead of a broader comparison. This was of course something that also plagued Vilfan's contemporaries (cf. Conte, 2016, 234–238). For instance, Otto Brunner with his now refuted[17] thesis of the exclusively German(ic) origins of the so-called knightly feud or *Ritterfehde* (Brunner, 1990, 17, 32–33). In Vilfan's case, it was the finding of a possibly specifically 'Slovene' legal institution in times of "*prevailing German(ic) law*" (Vilfan, 1943, 219), which was understandable for the time during the Second World War. However, Vilfan seems to have been well aware of these 'nativist blinders', especially as there is no hint at *grundstöer* perhaps being a specifically Carniolan or even Slovene institution in the Austrian edition (Vilfan, 1968, 162) of his probably best known work.

THE LEGAL INSTITUTION OF *WÜSTUNG*

In order to clear up Vilfan's interpretations of *grundstöer* and to understand it in the context of the custom of vengeance, *Wüstung* must be elaborated on first. Older, yet thorough, analyses by Alexander Coulin (1915) and Theodor Bühler (1970) shall serve as the foundation. The most common definition of *Wüstung* was given by Coulin at the beginning of the twentieth century: the legally permitted or ordained (total or partial) destruction of property for the transgressions of its owner by the community of his peers (Coulin, 1915, 341). Bühler later added that the act of destruction was 'ceremonial' and thus acted as containment of affective violence (Bühler, 1970, 12–13). This is to be expected, since customs were always enacted through rituals to provide the semblance of order and structure for the emotions of the community (Darovec, 2014, 455–456).

The containment of vengeful emotions, which could take the upper hand in devastation, was also in the interest of both the community and its authorities. The origins of *Wüstung* are without a doubt ancient, as the institution is attested in medieval and early modern Montenegro and Northern Albania for homicide or the abduction of girls, medieval Russia for arson (Miklosich, 1888, 136–137), and Early Medieval Germanic *leges*. At the same time, Early Medieval Frankish, Lombard, and Visigothic (codified) law, under the influence of Roman law, all attempted to substitute devastation with seizure and confiscation. Still, *Wüstung* is first stipulated as a sanction in Early Medieval law. Perhaps already in *Lex*

14 The Carniolan Provincial Court Ordinance was made after the example of the one for Austria below the Enns from 1514 (LGK, 1535). In comparison, in neighbouring Styria, the Ptuj town statutes of 1376 and 1513 respectively do not stipulate *Wüstung* in any form for any offence or transgression (Hernja Masten et al., 1998; Hernja Masten & Kos, 1999), nor is it found in any of the Styrian or neighbouring Carinthian *Weistümer* (Bischoff & Schönbach, 1881; Mell & Müller, 1913), nor in their respective Provincial Court Ordinances (LGSt, 1574; LGKt, 1577). It seems that by the Late Middle Ages *Wüstung* was not part of Styrian and Carinthian statutory law anymore, while customary law is another matter.

15 Regarding this, things changed little up until the eighteenth century, when there were still grievances over the supposedly trifling sums paid as a peace settlement (composition payment, weregild) by the killers to their victims' kin (ARS, AS 1, šk. 251, Patent of the Carniolan *Landeshauptman* regarding the eradication of sins and vices, 4 March 1724, Ljubljana).

16 Inner Austria was an entity of Habsburg hereditary lands (1564–1619/1749) made up of the Duchies of Carinthia, Carniola, and Styria, the Princely County of Gorizia and Gradisca, the Free City of Triest, the Margraviate of Istria, and a few other smaller territories. Its capital until 1619, when the Princely court moved to Vienna, was the Styrian capital Graz, which remained the seat of the Inner Austrian Government until 1746. The latter was the Princely governing body second only to the Princely Privy Council in Inner Austria. The Government had the authority over those at the lower Land/Provincial level, including the courts (Spreitzhofer et al., 1988, 64–66).

17 Brunner's theses on *Fehde* (feud) as a specific custom of the German nobility dominated the research on vengeance in German historiography almost until the end of the twentieth century. Even after the lower orders were 'included' into the concept of *Fehde* at the beginning of the twenty-first century, doubts about its uniqueness have only been expressed very tentatively. Ignoring modern anthropological and historiographical research on vengeance, German historiography still almost exclusively approaches the custom as a rigid normative legal institution, rather than a complex social phenomenon (Darovec, Ergaver & Oman, 2017, 398).

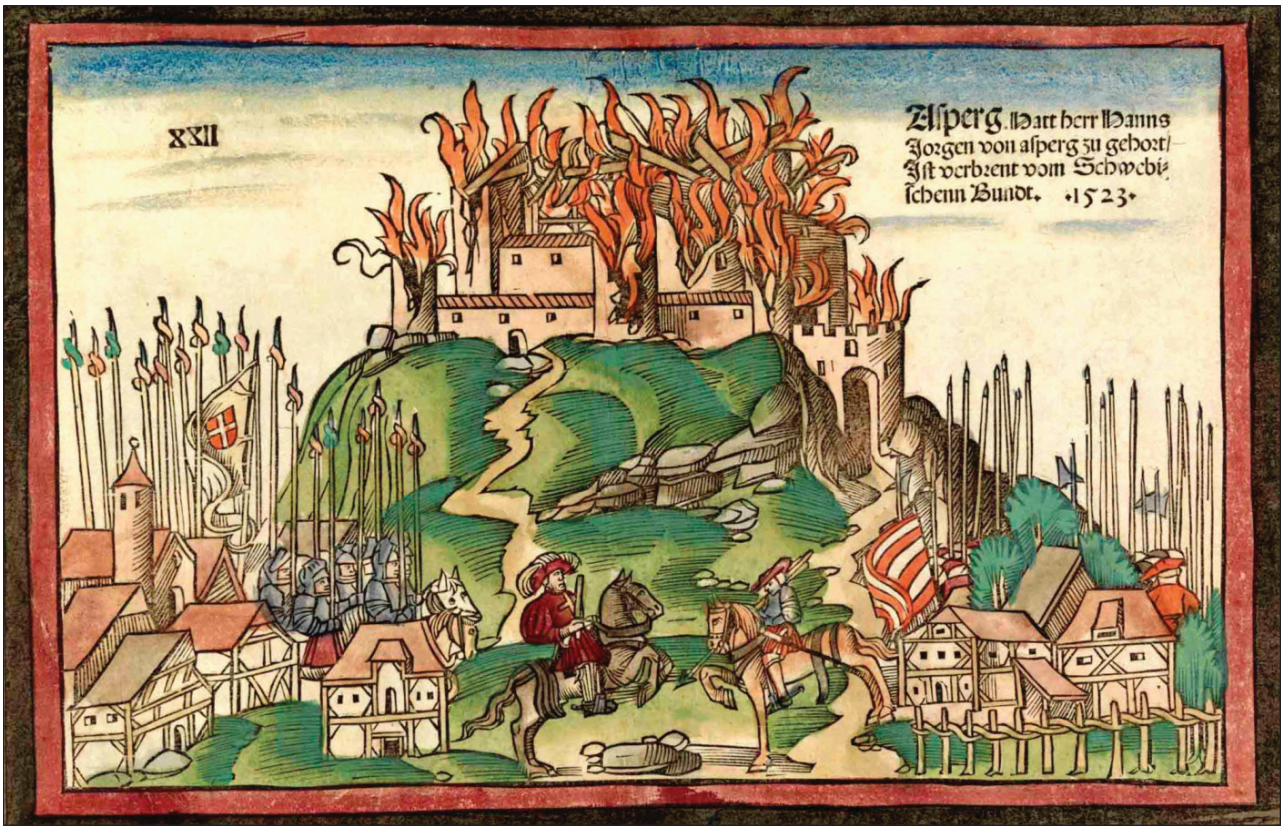

Fig. 2: This woodcut by Hans Wandereisen from 1523 depicts the devastation of the Absberg castle (Wandereisen-Holzschnitte von 1523, https://de.wikipedia.org/wiki/Wandereisen-Holzschnitte_von_1523). It was one of 23 castles that the Swabian League destroyed during the so-called Absberg Fehde in 1523. The castle belonging to the Franconian nobleman Hans Thomas von Absberg (depicted) and those of his allies were destroyed in the campaign. It erupted due to von Absberg's killing of Count Joachim von Oettingen, one of the most prominent members of the League, in a feud three years prior, as well as for von Absberg's various serious violations of the rules of conduct in enmity (Carl, 1996, 486–491; Zmora, 1997, 138–140).

Salica and *Lex Baiuvariorum*, and certainly in *Lex* and/or *Capitulare Saxonum* (797), which stipulates *Wüstung* as the destruction of one's house or castle as a sanction for certain transgressions and contumacy. Similar stipulations were issued in High and Late Medieval statutory law (Bühler, 1970, 3–7, 22–23; Coulin, 1915, 351).

The *Sachsenspiegel* (ca. 1220–1235), for instance, stipulated that should a 'violator of peace' (*vredebrekere*) not appear before the judge when summoned (contumacy), his house (castle) and everything within shall be destroyed (*vervestet*). Also, one could have his castle destroyed in the case of a lost judicial duel. Later stipulations show that a house (castle) could be regarded as a 'culprit' in the transgressions of its owner, e.g. robbery or illegitimate feuding (see Fig. 2), and had to be punished accordingly (MGH, FiNS 1/1, II 72, §§ 1–5, 192–194).

Similar stipulations were issued in Article 67 of the Austrian *Landrecht* of 1278[18] (Schwind & Dopsch, 1895, 72), which Vilfan at first speculated could have been one of the possible sources from which the Carniolans might have taken, received, or adapted *grundstöer* (Vilfan, 1943, 227). However, the destruction of castles is of less importance here, as the case at hand pertains to the lower orders.

One stipulation from the High Middle Ages is especially of note, Article 1 of Emperor Frederick I Barbarossa's *Constitutio contra incendiarios*, the so-called *Brandstifterbrief*, from 1186 or, more likely, 1188. The article stipulates that judges are exempt from the general prohibition of arson, being permitted to use it as punishment for malefactors (*Excipiuntur et iudices, quos in malefactores incendii penam iustitia permittente exercere contingit*) (MGH, Const. 1, No. 318, § 1, 450). While Barbarossa's prohibition of arson was at the foremost directed against its use in enmity (Wadle, 1999, 82–83), the stipulation regarding its use by the judges specifically condones *Wüstung*. The judges would authorize the community to execute the devastation.

18 The older datation of the *Landrecht* set to 1237 has been rejected by Max Weltin (Weltin, 1977, 402–413).

For the Late Middle Ages, Bühler provided indispensable insight into *Wüstung* as part of statutory law, even if mostly from Swiss town statutes. One that particularly stands out is Article 14 of the *Handfeste* of the town of Bremgarten (Aargau) from ca. 1258, which stipulates: "*yet should the killer escape and flee, his house shall be razed to the ground and [the plot] then remain vacant for a whole year*" (*Ist aber, das der manschlechtig endrint und fluchtig wirt so sol sin hus* ***von grund uff zerstört*** *werden und dann ain gantz iar ungebuwen beliben*) (Bühler, 1970, 7–8). That the given example is the only known use (at least to the author) of the words *Grund* and *zerstören* in the context of *Wüstung*, aside from the Carniolan example, should not be vexing. As it is the context that is of interest here, the wording of the stipulated devastation is of less importance. Whether the house was razed to the ground (*von grund uff zerstört*) or broken apart (*niderbrechen*) as in a thirteenth-century statute from Luzern, it always stood for devastation (Bühler, 1970, 7–8; Coulin, 1915, 346).

No matter the diction of the stipulations for devastation (*niderwerfen*, *zerbrechen*, *wüsten*, etc.), town legislation (ordinances, statutes) and judgements presented by Bühler always stipulated that a killer's home should be devastated (destroyed, demolished). The differences being whether the perpetrator's 'finest' home in town was to be devastated, all the houses and property that he owned, or a house belonging to his family if he was living there. Sometimes it was stipulated that the perpetrator had to flee first, whereas sometimes he was exiled by the destruction of his home. Sometimes, for instance in fourteenth-century Zürich, the devastation was considered as part of a peace settlement (i.e. compostition payment) with the perpetrator, who also had to pay a fine to the town authorities, similar to Carniolan stipulations regarding homicide settlement. There are other nuances, again from fourteenth-century Zürich: should a burgher kill a townsperson who did not own a house (i.e. not a burgher) or one whose house was of little worth, he would only pay a fine and his house remain untouched. Regarding the custom of vengeance, it can be surmised that the perpetrator still owed weregild to his victim's kin. Thus, *Wüstung*, just like blood feud, could always be averted by conceding to the demands of satisfaction, e.g. by paying composition for homicide: weregild to the injured party and a fine to the authorities (Bloch, 1961, 128; cf. Oman, 2017, 158–167). In Zürich, burghers could also have had their homes devastated for feuding, which was forbidden in the city (Bühler, 1970, 9–12).

Since burgher communities were founded on burgher oaths, any violence among them was considered a breach of the oath, and with that of peace. Hence the town authorities, and it was the same in the countryside (cf. Carroll, 2007, 16–17), always strived to contain and work towards a peaceful resolution of conflicts (Reinle, 2003, 40–41). Should this not succeed, offences could be sanctioned by various grades of devastation for various breaches of peace, moral offences, and/or transgressions of ordinances. This made *Wüstung* most directly and originally linked to *Friedlosigkeit* or 'peacelessness', i.e. outlawry. What is here regarded as peace was legal protection and security, so outlawry meant having neither, being outside of peace. No peace could be broken with the outlaws, no injustice committed against them. Since violators of peace were rarely apprehended at the moment they committed a transgression, usually the judicial path had to be taken. It was there that the perpetrators were declared outlaws (bandits) and ritually cast (banished) from the community if and for as long as they refused to make peace with their victims or their kin. Thus *Wüstung* could be avoided by composition payment (weregild) until the very start of devastation, which could also be exacted upon those refusing to accept the composition payment (Coulin, 1915, 411–412). Considering the costs and the practical problems of its execution, it can be surmised that *Wüstung* was rarely carried out in practice, and the threat of devastation was generally enough to guarantee satisfaction. But when *Wüstung* was enacted, in towns, taking part in the rituals of devastation and banishment was considered a burgher's duty; it is unlikely that this was much different in villages (Bühler, 1970, 9–10, 14–21).

The purpose of *Wüstung* was to deprive the transgressor of his home, since for as long as his house was still standing, he had protection within due to the immunity or sanctuary of home or household (*Hausfrieden*), a certain form of peace that it provided. By destroying the home, the community not only cast the transgressor from within its midst, but also ritually ensured the assertion of communal bonds and the demonstration of its authority and power. This put immense pressure upon its members and especially on the transgressor to submit and make peace. A person's outlawry was only complete with the devastation of his property, not only as means of survival, but also as the deprivation of the sanctuary it provided, be it a burgher's house or a peasant's, or, as means of subsistence, the latter's fields. It should be noted here that the devastation and trampling of 'everything' in *grundstöer* originally probably encompassed both the destruction of the perpetrator's fields and house. For the same reasons (sanctuary, survival), both had been excluded as legitimate targets in feuds (Coulin, 1915, 366–368; Bühler, 1970, 15; Brunner, 1990, 95, 99).

The destruction of the means of survival clarifies the connection between the Carniolan *grundstöer* and *Wüstung*. Originally, the devastation of fields might have had the intent to hinder the outlaws from reaping their benefits (crops), and to prevent them from remaining in the community. According to Coulin, the practice of field devastation survived up until the thirteenth century in the French Anjou, as seizures of the transgressor's property were supposedly not in use at the time. When con-

fiscation became common, this type of *Wüstung* (Coulin termed it *Feldwüstung* as opposed to *Hauswüstung*), supposedly quickly disappeared. The intermediate form was seizure of one year's worth of crops from the fields to be devastated by the transgressor's lord. With the growing property of the individual in the High Middle Ages, *Wüstung* had begun to encompass the devastation of all of the transgressor's assets, not only his (finest) house (in town), but also his agricultural land: fields, orchards, and vineyards. A specific terminology for both types of *Wüstung* supposedly resulted from this. While in thirteenth-century Padua, for instance, the devastation of fields supplanted that of the house, the general development elsewhere was the opposite. Even so, Coulin was quite wary of equating devastation of a field and that of a house (Coulin, 1915, 368–369, 380).

However, the link seems clear, as what both forms or targets of *Wüstung* had in common was precisely the deprivation of the transgressor's means of survival and/or sanctuary, i.e. their 'peace', making the banishment not only ritually formal (cf. Knoll & Šejvl, 2010, 140) and visible, but also materially very real. Hence, the institution's power and long-term survival.

Banishment further stipulated that the transgressor's house – and it was most likely the same with fields belonging to it in the countryside – had to be left in ruins as well, indefinitely at first, and later for specific time periods, e.g. one year. Stipulations of an indefinite vacancy of a plot surely soon proved themselves impractical in towns, and this would certainly hold true for arable land as well. As in the aforementioned Anjou countryside, *Wüstung* in towns was first replaced by seizures in fourteenth-century Italy, with the notable exception of Florence, where this process was 'delayed'. However, the institution seems to have survived the longest within the Holy Roman Empire, and had been divided into various grades, depending on the gravity of the transgression (Bühler, 1970, 15–16).

The most common form of *Wüstung,* and the one from which the others supposedly originated, was what German legal historiography has termed *Totalwüstung*, total devastation. It was the complete destruction of the outlaw's home (house, castle, town). Bühler inferred that in the original form total devastation must have encompassed not only the incineration of the house, but also of everyone and everything who lived in it or belonged to it. He furthermore cited a case from medieval Navarra, where even setting the houses of the neighbours on fire was permitted in order to destroy the outlaw's, probably for practical reasons. Bühler assumed that devastation by arson could have originated as vengeance for *Mordbrand*, night-time killings by arson, citing some French (*droit d' arsin*, *incendie judiciaire*, *fere justice de feu et de flamme*, *comburere*, *incendere*, *ardoir*) and Flemish (*bernen*, *woestballinc bi brande*) terms for *Wüstung* as evidence. Be that as it may, as late as the thirteenth century, fire was seen as the most convenient means of getting rid of outlawed members of a community, especially if the devastation could not be executed otherwise. Yet with time, devastation by arson had to be supplanted by less dangerous means as the distance between neighbours decreased, both in villages and in urban communities. Arson was substituted with razing the transgressor's house to the ground, with the intermediate form of razing it to the ground first and burning the rubble at a safer location later.[19] The omission of burning in *Wüstung* necessitated stipulations against plundering the outlaw's remaining property. In medieval France, a transgressor's moveables were seized by the courts and transferred to his lord (Bühler, 1970, 16–17; Coulin, 1915, 348–349, 373, 397).

Consequently, this led to restrictions of total devastation and to the development of various forms of so-called partial devastation (*Partialwüstung*), depending on the gravity of the breach of peace, and with time also on the gravity of moral offences and/or transgressions. The most common partial form of *Wüstung* became the devastation of a single house of the killer and not all of his property as before. While partial forms were limited to individual perpetrators, in collective cases of breaches of peace (illegitimate *diffidatio*, rebellion, etc.), e.g. by towns and cities, partial devastation meant that only the town or city walls and other defences were to be demolished, and not the whole settlement razed to the ground. The destruction of its defences exposed the town or city to the dangers of the world outside, but even then partial devastation was sometimes probably only symbolic (Althoff, 1999, 14–16; Brown, 2011, 145). The institution survived into the early modern period (Coulin, 1915, 375, 423; Zmora, 1997, 33), although it is perhaps best known from the High Middle Ages (Bühler, 1970, 17–18; cf. Mastnak, 1994, 107).

Within the settlements themselves, less extensive forms of partial devastation were limited to certain parts of the transgressor's house. The gravest of these forms was the unroofing, which basically made the house unsuitable for living, at least for longer periods of time than lesser partial forms of *Wüstung*. Unroofing is already attested in medieval Bavaria, France, and Italy. In some thirteenth- and fourteenth-century Swiss town statutes, unroofing was stipulated as (part of) a peace settlement for homicide, i.e. in blood feud. Elsewhere in the Holy Roman Empire, unroofing was also used for moral transgressions, e.g. households where the wife was beating

19 In part, this is echoed by the aforementioned Article 67 of the Austrian *Landrecht* of 1278, which stipulates that should a castellan commit any offence during his lord's absence and flee, the rooms where the offence was commited were to be torn from the house (castle), taken in front of it and burned (Schwind & Dopsch, 1895, 72). The stipulation followed Emperor Barbarossa's *Constitutio contra incendiarios* (MGH, Const. 1, No. 318, § 14, 451), as did, for instance, the *Pax Bawarica* of 1256 (MGH, Const. 2/III, No. 438, §§ 13 & 16, 596–597).

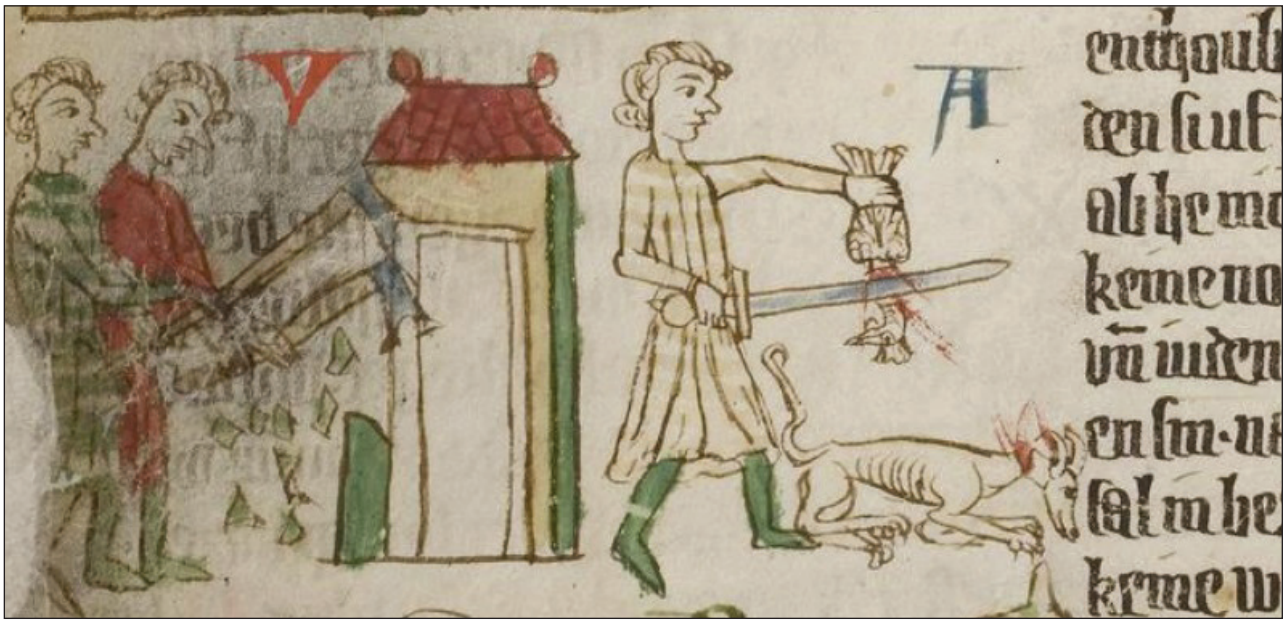

Fig. 3: Devastation of a house in which rape was committed, and the killing of the animals (rooster, dog) that had 'witnessed' the crime, depicted in the Heidelberg copy of the Sachsenspiegel from the early fourteenth century (f. 17r, detail: http://digi.ub.uni-heidelberg.de/diglit/cpg164/0038). Animals belonging to a household were killed for two reasons: not helping the victim by raising alarm and as property to be destroyed with the rest of the house (Coulin, 1915, 429–431). The destruction of architecture, objects, and animals that had 'witnessed' the transgression could also be regarded as a form of ritual cleansing of space, since all material traces of the crime were destroyed (cf. Terry-Fritsch, 2018, 55, n. 8).

the husband. However, if the husband carried out the unroofing himself, his wife was deprived of the sanctuary of their home and outlawed. While unroofing in such cases seems not to have been used prior to the early modern period, it survived at least until the late eighteenth century. A somewhat similar form of *Wüstung* was tearing down only one of the house's walls (Bühler, 1970, 18–19; Coulin, 1915, 382–385).

Another lesser form of partial devastation did not make the house entirely uninhabitable, but either allowed entrance to everyone or denied it altogether, by removing all its doors and windows or barring them shut. Even if this was most commonly punishment for nonpayment, it was also used for breaches of peace. For instance, a Strasbourg town statute, from ca. 1200, stipulated that should a killer flee, the doors and windows of his house were to be removed. Thus his home was accessible to all, losing its immunity for the time of his banishment (Wackernagel, 1965, 301; Bühler, 1970, 19).

When *Wüstung* targeted a house stove and well, by either extinguishing or breaking it apart, the goal was again to make the house uninhabitable, but such cases were rare. Somewhat more common was the targeting of the transgressor's food stocks and kitchenware, squatting or having a crowd run through the house (especially for moral transgressions of the clergy) and similar forms of trespass.[20] The destruction, theft, or looting of valuables during *Wüstung* was strictly forbidden. Most aforementioned forms of partial devastation were used as punishment for moral transgressions, usually of a matrimonial or sexual nature, although the use of *Wüstung* for moral transgressions is attested primarily since the early modern period. While this might also have been a consequence of the Reformation, Bühler was correct to point out that the process also corresponded with the time when the original forms of devastation – much like the custom of vengeance itself (Darovec, 2017a, 87–88) – started to be taken over by state legislation (Bühler, 1970, 19–22).

In essence, *Wüstung* was always an act of social control and of maintaining the social equilibrium, as retaliation for various acts against communal coexistence: homicide, robbery, theft, arson, rape (see Fig. 3),

20 Unsanctioned trespass or trespass with malicious intent was known as *Heimsuchung* in German (in Switzerland also a term for *Wüstung*) and strictly prohibited in the Holy Roman Empire (Bühler, 1970, 20; Hernja Masten et al., 1998, 192; Reinle, 2003, 18, 78). In the Styrian market town Šentjur pri Celju, *Heimsuchung* is attested as *hauspruch* in 1539 (Mell & Müller, 1913, 258). Here *pruch* means breaking into the house, not razing it to the ground. In comparison, while the Ptuj town statute of 1376 contains the term *haeimsuchen* (Hernja Masten et al., 1998, 192), the statute of 1513 uses the wording of malicious trespass (*frevenlich inlawfft*) (Hernja Masten & Kos, 1999, 142).

sodomy, heresy, treason, rebellion,[21] breach of peace, unsanctioned construction of castles, nonpayment, insolvency, counterfeiting, offences against trade and police ordinances, flight, contumacy and other, but with time mostly moral transgressions (Bühler, 1970, 20–22, 27). All this points at a highly complex and evolved legal institution. Yet not everything resembling *Wüstung* necessarily originated from it or was related to it.

There was a fundamental difference between the destruction in a feud and in *Wüstung*, even if both were part of the legal custom of vengeance. With *Wüstung*, (partial) destruction of the transgressor's home and other means of his sustenance, which was (ideally) strictly forbidden in a feud, was the means of withdrawing the sanctuary it provided the transgressor, thus restoring social equilibrium. When carried out in a feud, or rather enmity, as the custom's stage that allowed for limited violence, property destruction was generally not its goal, but the means of forcing the adversary or enemy to return to non-violent means of conflict resolution, and provide satisfaction for the inflicted injury, thus also restoring social equilibrium. While attaining satisfaction and restoring social equilibrium is the goal of both *Wüstung* and enmity, the targets of their violence are very different.

Violence in feuds between nobles was mostly limited to the infamous robbery and arson (*Raub und Brand*), the dispossession and/or destruction of the adversary's crops and produce, while the destruction of orchards, vineyards, gardens, ploughs (i.e. attacks during fieldwork), and mills, all of which also functioned as sanctuaries in enmity, or the killing of animals was (ideally) prohibited. The destruction of homes as the primary sanctuaries, whether villages, peasant houses or castles, was also ideally prohibited (Brunner, 1990, 79–80, 84–86; Patschovsky, 1996, 171; Wadle, 1999, 79, 86). Violence, mostly arson, had the same purpose in feuds among subjects (Peters, 2000; Mommertz, 2003; Reinle, 2003), as well as in feuds of Montenegrin and Northern Albanian tribes (Ergaver, 2016, 120).

The institution of *Wüstung* was directly connected to feud only insofar as it was used as a sanction for too frequent or too severe violations of the customary limitations to enmity. In such a case, violators would have had their house or castle destroyed by either the victorious party (i.e. enemy kin) or a superior authority (Brunner, 1990, 83; Carl, 1996, 474–475; see Fig. 2). However, as with *Wüstung*, enmity could always be averted by conceding to the demands of satisfaction, i.e. by paying composition.

Seemingly connected to *Wüstung* was the so-called *Herausfordern* or *Herausrufen aus dem Haus*, taunting or challenging an adversary to leave the sanctuary of his or her home. If the challenged party came out of the house, they would be acquitted for any injuries to the challenging party. On the other hand, the challenger would always be regarded as the transgressor. Should the challenged party still refuse to come out, which was not without consequences to their honour, an attack on the person could be 'substituted' by the destruction of his or her fence, the breaking of windows or, more symbolically, by sticking a knife in the front door. Violence upon a person was 'substituted' with violence upon his or her house (Schwerhoff, 2004, 230).

While it appears superficially similar to *Wüstung* due to this 'substitution', the taunting and the property damage instead of an attack on a person was, whether executed by an individual or a kin group, always regarded as an offence according to custom, not a communal act that upheld or restored peace and order in a community. Although *Herausfordern* was regarded as a breach of peace, especially of the *Hausfrieden*,[22] it remained popular well into the early modern period (Reinle, 2003, 269–270). Stipulations against *Herausfordern*, or attempts at managing it, were also common in sixteenth- and seventeenth-century Styria, Carniola's neighbouring Duchy (Bischoff & Schönbach, 1881, 133; Mell & Müller, 1913, 134, 141, 170–174, 264). Taunting could also be regarded as 'private vengeance' by contemporaries (Reinle, 2003, 346–347). There are certainly connections between feud and taunting, as various threats were one of the initial modes of conduct before enmity was declared (Mommertz, 2003, 217–241). However, the connection between *Wüstung* and *Herausfordern* (cf. Coulin, 1915, 364–366) is questionable.

ON *WÜSTUNG* AND *GRUNDSTÖER*

How should Vilfan's theses on *grundstöer*, presented in the second chapter of this paper, be interpreted in light of the analysis of *Wüstung* given above? First of all, it renders obvious that the main problem is not the translation of allegedly separate legal institutions with synonyms, but the thesis that *grundstöer* and *Wüstung* are two essentially different and separate legal institutions, even customs, with one perhaps specifically Carniolan ('Slovene') and the other allegedly specifically German(ic).

As Vilfan already established, both institutions sanction homicide, with the fundamental difference between them being that *grundstöer* is executed by the victim's kin and *Wüstung* by the whole community. Although a more precise definition is not given in the sources, predicated on the above analysis of *Wüstung* it can safely be reasoned that *grundstöer* either followed the perpetrator's flight, which was also Vilfan's thesis, or banished him, or acted as a peace settlement. Most likely all of the above, depending on the situation at hand. In essence

21 On the other hand, *Wüstung* could be a (collective) sanction for not joining a rebellion. For instance, some peasants refusing to join the so-called Second Slovene Peasants' Revolt of 1635 were threatened with arson by their peers (Koropec, 1985, 166).

22 On some aspects of the concept of *Hausfrieden* in early modernity see e.g. Schmidt-Voges, 2010, 200–209.

however, *grundstöer* as retaliation for homicide was a substitution for blood feud.

The same was true with *Wüstung* when it sanctioned homicide. As the community strived to achieve the restoration of the social equilibrium following the gravest breaches of peace, especially homicide, it was certainly preferable to avoid the risks entailed by blood feud. In Lilienthal in Lower Saxony in 1468, the devastation of the property of a killer who has fled was specifically envisioned as a measure to prevent the custom of blood feud among the subjects of the Prince Bishopric of Bremen (Frauenstädt, 1881, 15). Could such reasoning, albeit not at the state or provincial level as in Bremen, also have been at the origin of *grundstöer* in Carniola? In any case, the origins of *Wüstung* are to be sought in connection with flight or banishment of the perpetrator, especially if he refused to, or could not, provide compensation for his transgression. Thus if blood could not be settled or repaid with either blood or blood money, then at least the destruction of the perpetrator's means of survival provided some satisfaction to the victim's kin and the community. In this way, *Wüstung* could work similarly to the institution of banishment: it cooled passions and facilitated peacemaking (cf. Povolo, 2015, 215, 219). Thus, the later development of *Wüstung* as a sanction for other transgressions was logical, as it (ideally) decelerated the escalation of conflict. Since *Wüstung* could also act as composition payment, and thus as part of a peace settlement, Vilfan was surely wrong when he claimed that *grundstöer* should not be taken as weregild.

His translation of *grundstöer* as 'property vengeance' also solves nothing, even if Vilfan most likely meant it as vengeance upon property instead of in blood. However, since *Wüstung* as retaliation for homicide was also property destruction as substitution for blood feud, the term 'property vengeance' can be used as a synonym for it as well or, better yet, altogether dropped. This is also true for *grundstöer*, especially since 'property vengeance' can imply retaliation for the destruction of property, just like blood feud was retribution for spilled blood and other grave dishonours. Yet neither *grundstöer* nor *Wüstung* were retaliation for property damage. The connections between the two thus lead to the conclusion that while *grundstöer* might have indeed been Carniolan, it was not a specific legal institution, let alone custom, but a local (provincial?) synonym for or form of *Wüstung*, perhaps indeed only as retaliation for homicide.

A case of 'property vengeance' as substitution for blood feud is attested in Carniola in 1614, between subjects of Georg Moscon and Christoph Taidolovitsch (Taidolović), where the looting of money and clothes was the retaliation for the 'kidnapping of' (eloping) and fornicating with another man's wife (ARS, AS 306, kn. 11 (1613–1614), Moscon c. Taidolouitsch) instead of killing the adulterers (cf. Verdier, 1980, 28–30; Radcliffe-Brown, 1952, 217). Although the relationship between the 'plunderers' and the 'kidnapper' is not given, it was most certainly a case of kinship retaliation or vengeance, i.e. by the husband for the severe dishonour his wife's act brought upon the family, not a communal sanction due to her moral and sexual transgression. And even if the latter were the case, it would be a matter of seizure not devastation.

However, one of the main questions that remains is: Why was *grundstöer*, if it was but a Carniolan version of *Wüstung*, enacted by the homicide victim's kin (*freundschafft*) and not by his or her community, e.g. village or neighbourhood (*Nachbarschaft*)?

That *grundstöer* was growing more problematic and started to be regarded as a vice might have echoed both Martin Luther's teachings regarding self-redress (*selbstrichten*) among the largely Protestant Carniolan Land Estates of the 1540s, as well as the recent criminal legislation, such as the *Constitutio Criminalis Carolina* (1532). Still, both legislation and theological treatises needed time to establish themselves in society (Carroll, 2006, 12–13). Furthermore, the Estates' attitude towards *grundstöer* was older and part of the nobility's general view on peasants, which included (blood) feud among subjects as an irrational if not outright illegitimate custom (cf. White, 1986, 202; Algazi, 2000; Reinle, 2003, 111, 174, 201; Carroll, 2006, 12). Thus, the reaction of the Carniolan Land Estates towards *grundstöer* is understandable and the average, and not only Carniolan, nobleman probably did not regard the institution's use by the peasants very differently. It was after all his land and his sustenance that were being destroyed by these acts of vengeance (Vilfan, 1961, 265). Material reasons might have been behind the complaint of the Estates in the first place. The nobility's attitude combining class-based morality with material concerns, certainly further exacerbated by the violence of the so-called First Slovene Peasants' Revolt of 1515 (Grafenauer, 1944; cf. Jerše, 2017), rather than the new religion or criminal law, might have obstructed the open use of devastation by the peasant communities. Hence, prior to the sixteenth century they might have already left *Wüstung* or *grundstöer* to the victim's kin. Also, the reading of *freundschafft* among the peasants as only the victim's kin, i.e. blood relations, might be too narrow (cf. Mommertz, 2003, 226–229, 245), and the village actually carried out *grundstöer* as a (legal) community or, probably most likely, ordained its execution to the victim's family. Considering the typical small size of peasant communities, it is also hard to imagine that the victim's kin would ever be excluded from either *grundstöer* or *Wüstung*. The same can surely be surmised for at least smaller towns and market towns.

Vilfan was also surely correct when he inferred that *Wüstung* enacted by the victim's kin was the older form of the institution. While Gerd Schwerhoff regards "*late Medieval and early modern towns* [...] *as the birthplace of measures for violence prevention*" and that "*the village and the early modern territorial state followed this example later on*" (Schwerhoff, 2004, 235), his assump-

tion is incorrect. That devastation as community sanction had already existed in tribal societies shows that it had to have originated from the ancient custom of (blood) feud. Considering the non-existence of *Wüstung* in Styrian and Carinthian statutory law of the Late Medieval and early modern periods, by the mid-sixteenth century the Carniolan *grundstöer* might have already been a remnant of the once more widespread institution. It was in the countryside that *Wüstung* persevered the longest throughout the Holy Roman Empire and was, consequently, adapted to rural life.

Thus *grundstöer* is to be regarded as the Carniolan peasant form of *Wüstung* intended to prevent the settling of blood with blood, probably following a similar reasoning as in the Lower Saxon Lilienthal, and by the 1540s perhaps already limited to a few localities.[23] Like *Wüstung*, *grundstöer* originated from the custom of blood feud, serving as a sanction for those unwilling to provide satisfaction, and as the ritual deescalation of the emotions of the injured party and community, with the intent to facilitate a peace settlement. Since satisfaction had to be given to both the community and the injured party, it could be surmised that the latter could also execute *Wüstung* by itself, yet certainly only following the community's or its elders' (in/direct) consent. However, should satisfaction have not been given following *grundstöer*, banishment or blood feud, still attested in Carniola in the seventeenth century (Oman, 2017, 167–172), was likely to have followed.

EPILOGUE

Save for the complaints of the Carniolan Land Estates' deputation from 1541/42, *grundstöer* has so far not been found in contemporary sources as a term for devastation, nor in connection to blood feud, not even in the Duchy itself. It is only attested a century later, yet with a quite different meaning.

In Upper Carniola in 1651, the phrase *grundtstör* is attested as trespass in several documents regarding a conflict between the Lordships of Radovljica and Bled, and is connected to other violations of the Lordship of Bled's rights (*gewalt, landtgericht: vnd grundtstör*) (ARS, AS 721, fasc. 25, Dienstmann Georg (Bled) v Thurn Johann Ambros (Radovljica), 1651). In conflicts among the subjects of the same Lordship, the phrase *grundt steher* is used in a case in 1646 that most resembles *Heimsuchung* (ARS, AS 721, kn. 19 (1644–1651), 5 June, 1646, 419–422), and in 1636 as *grundt gestört*, i.e. 'common' trespass (ARS, AS 721, kn. 18 (1636–1640), 1 September, 1636). In the Lower-Carniolan Lordship of Klevevž in the seventeenth century, *grundtstör* was also used for trespass (ARS, AS 306, kn. 10 (1593–1695), Klingenfels c. Suschel). It is clear that none of these cases attest to the institution of devastation as retaliation for homicide.

At least by the seventeenth century, *grundstöer* and similar terms were foremost used for trespass. Hence, it can be concluded that this 'familiarity' with the term was the reason for its use in the complaint of the Carniolan Land Estates from 1541/42. In a way, *grundstöer* was especially, but not only symbolically, the epitome, or rather climax, of trespassing, interfering with one's property and sustenance. That the institution was not recorded as *Wüstung* is most likely the result of its disuse in Carniola and/or the scribe's German translation of the original Carniolan Slovene expression, which has been lost today.

23 Due to the nature of the Carniolan Land Estates' deputation, ecclesiastic and monastic lordships and estates could perhaps be ruled out.

GRUNDSTÖER – PUSTOŠENJE KOT MAŠČEVANJE ZA UBOJ MED KRANJSKIMI KMETI V 16. STOLETJU

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POVZETEK

Priznani pokojni slovenski pravni zgodovinar Sergij Vilfan je v razpravi iz leta 1943 omenil "posebnost" med kranjskimi kmeti v 16. stoletju, v virih izpričano kot grundstöer (pustošenje). Šlo je za maščevanje uboja z uničenjem storilčevega premoženja namesto z ubojem storilca kot je to pri krvnem maščevanju. Vilfan je do smrti, dobrega pol stoletja kasneje, ostal nekoliko negotov glede tega, če se je grundstöer, ki ga je sprva imel celo za specifičen slovenski običaj, razlikoval od domnevno "nemškega" oziroma germanskega pravnega instituta Wüstung (pustošenje), ki je uboj sankcioniral na enak način. Temeljno razliko je Vilfan videl v izvršitelju pustošenja, saj je grundstöer izvedlo sorodstvo žrtve, Wüstung pa celotna skupnost, sledeč odloku svojih oblasti. V prispevku podana analiza, utemeljena na najnovejših raziskavah maščevanja, pokaže, da sta bila grundstöer in Wüstung v osnovi enak pravni institut, namreč pustošenje, izvirajoč iz oziroma del pravnega običaja (krvnega) maščevanja kot starodavnega sistema reševanja sporov. Pri tem je grundstöer bil kranjska kmečka oziroma podložniška različica pustošenja. Institut prav tako ni germanskega izvora, saj je v različnih oblikah izpričan širom po predmoderni Evropi. Četudi so viri s podatki o institutu grundstöer preskopi, da bi omogočali neizpodbitne trditve, poznavanje običaja maščevanja vendarle omogoča sklep, da je bila skupnost pri izvršitvi pustošenja tudi med kranjskimi kmeti v 16. stoletju prisotna vsaj toliko, da je družini žrtve odobrila izvršitev dejanja.

Ključne besede: grundstöer, Wüstung, pustošenje, maščevanje, krvno maščevanje, reševanje sporov, pravni običaj, Sergij Vilfan, podložniki, kmeti, Kranjska

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