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Backwards Inheritance in Medieval Scandinavian Law*

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Abstract

The article aims to identify the legal approach to 'backwards inheritance' in medieval Scandinavian law. When a person dies without descendants, the right to inherit from that person reverts to his or her ascendants, which could result in the property of one family falling to another family through marriage. In this article, the circumstances under which backwards inheritance was accepted or tried to be prevented in law is discussed, as well as the question of what the legislators' strategies were. Scandinavian inheritance systems suggest that paternal inheritance rights dominated. However, the present study asserts that the legislation did not necessarily protect the interest of either the paternal or maternal kin group, but rather displayed concern for the surviving family.

A woman called Gerlög, living in late-twelfth century Hillesjö, Sweden, survived two husbands and all her children.[1] Her longest-living daughter herself survived one husband and a son. In the end, the widow Gerlög inherited from them all, and raised a stone to commemorate them.

When a person dies without any descendants, the right to inherit from that person would revert to his or her ascendants. Depending on the legal principles applied, *backwards inheritance* could result in the property of one family falling to another family through marriage. In medieval secular law, we find approaches to this phenomenon. The parents of the deceased would be the closest ascendants to the dead, but both other kin and even legislators could have reasons for opposing direct inheritance to parents. The possibility that parents could inherit from their offspring greatly affects who ends up with the property. Whether the property was split between both sides, or fell as a whole to either side, was determined by the current inheritance system. When the surviving husband or wife died, then his or her relatives could end up with the property of the other family. The family of the spouse first deceased we can call 'the opposite side'.

The main aim of the present article is to identify the legal approach to 'backwards inheritance' in medieval Scandinavian law. Below, a study will be conducted, of the circumstances

[1] Birgit Sawyer, *The Viking-Age Rune-Stones: Custom and Commemoration in Early Medieval Scandinavia* (Oxford: Oxford University Press, 2000), 49–51 for a description, and 238 for Sawyer's dating.

under which such inheritance was accepted or tried to be prevented in law, and the legislators' motives for the regulation. How the legislation on backwards inheritance related to the prevailing inheritance system in the same legal sources is also examined.

In the European context, the Scandinavian laws were noteworthy because of the so-called *provincial laws*, the modern Scandinavian term being *landskapslov*: law of the landscape. The landscape was a defined region with a main provincial assembly, *lǫgþing*.[2] Representative men met at the assembly, which was presided over by a lawman, *lǫgmaðr*, who was a judge and keeper of the law.[3] The provincial laws survive in later manuscripts, but contain elements from several periods.[4] Norwegian and Danish written laws possibly date to the eleventh century, and the Swedish originated mainly in the late thirteenth century. Legislation, revision and formal approval of the laws became the right of royal authority. In 1274, the king of Norway issued a code for the whole realm (Magnus the Lawmender's National Law Code), and in the mid-fourteenth century, the Swedish king also issued a code for the realm (Magnus Eriksson's National Law Code). The legislation absorbed the European legal thinking at the time of writing, and was not a genuinely homegrown product.[5] Concerning the laws origins, scholars' opinions fall mainly somewhere between two extreme viewpoints: either that the laws were the result of oral transmission from the pre-Christian era, or they were alone the product of contemporary political struggles.[6] Medieval law reflects little of real settlements in medieval societies, but we should assume the laws at least reflect real issues known to those who set down the law in writing. If we look to other sources, examples of a husband or wife ending up with the other's property are scarce in the sagas, although there are several examples of the family having an interest in what happened when one spouse died.[7] However, in the rune stone material, Birgit Sawyer has identified hundreds of examples of potential backwards inheritance, where the woman or man became sole owner of an estate.[8] The contents of both the provincial laws and the national codes were nevertheless important for contemporary societies in terms of power and influence. Principles in

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[2] In addition, the few towns had their own assemblies that were independent of the county. The town laws were called *Bærkoyar rettr*, or Bjarkey Law.
[3] Åke Holmbäck and Elias Wessén, *Svenska Landskapslagar 1, Östgötalagen, Upplandslagen*. (Stockholm: Awe/Gebers, 1979), xv.
[4] Knut Robberstad, *Gulatingslovi*, Norrøne bokverk (Oslo: Samlaget, 1981 [1937]), 9 and 305.
[5] Miriam Tveit, "In Search of Legal Transmission, Inheritance and Compensation for Homicide in Medieval Secular Law," (PhD thesis, University of Tromsø, 2016), 158–89 and 269–97.
[6] Examples of the latter viewpoint: Elsa Sjöholm, *Sveriges medeltidslagar. Europeisk rättstradition i politisk omvandling* (Lund: Institutet för rättshistorisk forskning, 1988).
[7] Philadelphia Ricketts, *High-Ranking Widows in Medieval Iceland and Yorkshire: Property, Power, Marriage and Identity in the Twelfth and Thirteenth Centuries*. (Leiden: Brill, 2010), *passim*.
[8] Birgit Sawyer, *Viking-Age Rune-Stones*, 48–66. She finds 101 of 339 reverse cases where the widow inherited: ibid., 66, n. 29.

the provincial laws and in the royal legislation can reveal different conceptions concerning these aspects of inheritance law.

Scandinavian laws comprised several institutions to secure reversion (*heimfall*) of family property of certain status. Germanic legislation included instruments that secured a family's original property by reversion, called *ius recadentiae*.[9] Later, in France, the system of *retrait lignager* developed as an instrument of recovery of ancestral land that was sold outside the family.[10] The Norwegian concept of *odel* developed into an allodial landowning system in the High Middle Ages, where land held for a specified number of generations became protected family land with particular rights of reversion for the male agnates and future generations.[11] Similar institutions are found elsewhere in Scandinavia, called *lovbydelse* in Denmark and *bördsrätt* in Sweden.[12] Securing reversion of land is a form of backwards inheritance. However, I will not discuss the principle of reversion here, focusing instead on the unexpected and, often, problematic kind of backwards inheritance. More precisely, the study revolves around the laws' treatment of inheritance when the line of succession risked property falling to the opposite side.

Nordic inheritance principles can roughly be divided into two different systems: the *gradual system* and the *parentela system*. The parentela system gave descendants priority over ascendants, whereby the line of descent precedes degree of kinship. In its cleanest form, collaterals of both sexes shared equally, and one parentela had to be exhausted of all descendants before the right of inheritance passed to a parentela of higher level. The gradual system gave priority according to the degree of kinship with the deceased and other defined criteria, such as gender and line of descent. Individuals nearest to the deceased would have the right to inherit before more distant relatives, which, for instance, gave parents priority over grandchildren. With separate adaptations, the Norwegian, Icelandic and western Swedish provincial laws followed a form of gradual system, while Danish and the eastern Swedish provincial laws followed a form of

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[9] Alexander Murray, *Germanic Kinship Structure. Studies in Law and Society in Antiquity and the Early Middle Ages* (Toronto: Pontifical Institute of Medieval Studies, 1983), 212–15. The Latin phrase "*paterna paternis, materna maternis*" can be related to *ius recadentiae*.

[10] Michael Gelting, "Odelsrett – lovbydelse – bördsrätt – retrait lignager: Kindred and Land in the Nordic Countries in the Twelfth and Thirteenth Centuries," in *Family, Marriage and Property Devolution in the Middle Ages*, ed. Lars Ivar Hansen (Tromsø: University of Tromsø, 2000), 133–65, at p. 144.

[11] Gelting asserts that the institution of *óðal* (*odel*) was a construction of the twelfth century: Gelting, "Odelsrett – lovbydelse – bördsrätt – retrait lignager," 148–52. For discussion of the *odelsrett*, see, for instance, Christer Winberg, *Grenverket: Studier rörande jord, släktskapssystem och ståndsprivilegier,* Institutet for rättshistorisk forskning, Skrifter, series 1, Rättshistorisk Bibliotek 38 (Stockholm, 1985), 10–30, and Knut Robberstad, "Odelsrett," in *Kulturhistorisk leksikon for nordisk middelalder*, vol. 12, ed. Johannes Brontsted, et al. (Copenhagen, 1967), 493–99.

[12] Helle Vogt, *The Function of Kinship in Medieval Nordic Legislation* (Leiden: Brill, 2010).

the parentela system.[13] We find in the Danish provincial laws the inheritance divided into lots, and that women inherited a half lot in relation to men.[14] A daughter was thus entitled half of what her brother inherited. The system was adopted in most Swedish laws and in Norway from the latter half of the thirteenth century.[15] Before that time, the law postponed female heirs. The gradual system was often combined with patrilineal priorities, and the laws maintaining the parentela system also included some principles that favoured paternal kin. Thus, the laws' regulation of backwards inheritance to the mother and maternal kin is of particular interest to this study.

While scholars have only studied legislation on 'backwards inheritance' per se to a very limited extent, several works touch upon the subject when discussing conjoining topics, like inheritance and marriage, and women's inheritance rights.[16] Medieval inheritance laws from the Scandinavian landscapes have been treated thoroughly in several works, including in relation to property falling to the opposite side.[17] Backwards inheritance to the opposite side was not in itself a major part of medieval inheritance legislation, but more often appears indirectly. Inheritance systems reflect how a society recreates social and material status through property devolution; thus, the existing material can shed light on attitudes towards alternative distributions.

The Ways of Backwards Inheritance

Scandinavian written law operated with full awareness of backwards inheritance, (NO: *bakarv*, ON: *bakarff*), where property was inherited 'backwards' by ascendants and their offspring, rather

[13] On the division of the Nordic laws in an eastern and western tradition, see Elsa Sjöholm, *Sveriges medeltidslagar*, 120–25; Birgit Sawyer, *Kvinner och familj i det forn- och medeltidiga Skandinavien*, Occasional Papers on Medieval Topics 6 (Skara: Viktoria Bokförlag, 1992); Lars Ivar Hansen, "Slektskap, eiendom og sosiale strategier i nordisk middelalder," *Collegium Medievale* 7 (1996): 119–27.
[14] Law of Scania, no. 22 and Law of Jutland, no. 1.4, both in *Skaanske Lov og Jyske Lov*, trans. Erik Kroman and Stig Iuul (Copenhagen: G.E.C Gads Forlag, 1968).
[15] The western Swedish Law of Östgötaland, Inheritance section, no. 2.1, in *Svenska Landskapslagar 1, Östgötalagen, Upplandslagen*, trans. Åke Holmbäck and Elias Wessén (Stockholm: Awe/Gebers, 1979); Law of Västgötaland Younger version, Inheritance section, no. 1, in *Svenska Landskapslagar 5, Äldre Västgötalagen, Yngre Västgötalagen, Smålandslagens kyrkobalk, Bjärköarätten*, trans. Åke Holmbäck and Elias Wessén (Stockholm: Awe/Gebers, 1946); The Norwegian National Law Code, no. 5.1, in *Norges gamle Love indtil 1387*, vol. 2, ed. Rudolph Keyser, et al. (Christiania: C. Gröndahl, 1848).
[16] For instance, Elsa Sjöholm, "Några arvsrättsliga problem i de svenska medeltidslagarna," *Scandia: Tidskrift för historisk forskning* 34, no. 1 (1968): 164–95; Lars Ivar Hansen, "The Field of Property Devolution in Norway during the Late Middle Ages: Inheritance Settlements, Marriage Contracts and Legal Disputes," in *Disputing Strategies in Medieval Scandinavia*, ed. Kim Esmark, et al. (Leiden: Brill, 2013), 247–77, at pp. 248–49.
[17] Examples of major contributions: Winberg, *Grenverket*; Hansen, "Slektskap," 103–54; Vogt, *The Function of Kinship*, 215–21.

than by descendants.[18] We also learn of forward inheritance in the Danish provincial Law of Scania, which proclaimed: "*ok arf skal allugatu fram gangæ*" (and inheritance shall always go forward).[19] In the inheritance section of the eastern Swedish Law of Uppland, the preference for allowing inheritance to descend was expressed in the following terms: "Those inheritances that now have been counted, we call direct inheritance; backwards inheritance or other kinds of inheritance never comes first, as long as some of the direct heirs live".[20] The system of parentela naturally prioritized descendants, and thus ascendants inherited after them. The law of Östgötaland, which followed gradual principles,[21] adapted the priorities according to proximity and gender:

> They are direct heirs, that are descendants from the man, and they are backwards heirs, that the man descends from. Then the direct heirs should take inheritance and the backwards step away, if they both are equally related [to the man] and both are male. When a man does not exists, a woman always takes inheritance, if she is more closely related than another man is.[22]

So, while the Law of Uppland gave descendants precedence, the Law of Östgötaland favoured closely related ascendants and male relatives among the equally related. Both systems still emphasized forward inheritance over backwards.

From the Icelandic sagas, we have an illustrating case involving the couple Þorlaug Pálsdóttir and Þórir Þorsteinsson *inn augði*, who went abroad with their young son in the late-twelfth century.[23] All three died while abroad, separately and at different times. The couple's inheritance was then contested by their surviving relatives back in Iceland. The order in which they died was important to the arguments on distribution of inheritance. Þorlaug's father argued

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[18] Otto von Friesen, *Upplandslagen efter Ängsöhandskriften* (Uppsala: Akademiska boktryckeriet, 1902), 34 and 43. The Law of Uppland, Inheritance section, no. 11 and 14, in *Svenska Landskapslagar 1, Östgötalagen, Upplandslagen* , trans. Åke Holmbäck and Elias Wessén (Stockholm: Awe/Gebers, 1979), 70–71. See also the Swedish National Law Code, Inheritance section, no. 3, in *Magnus Erikssons Landslag i nusvensk tolkning*, ed. and trans. Elias Wessen and Åke Holmbäck (Stockholm: Awe/Gebers, 1962).

[19] *Skånske lov og Eskils skånske Kirkelov: tilligemed Andreæ Sunonis lex Scaniæ provincialis, Skånske Arvebog og det tilbageværende af Knud den 6.'s* og *Valdemar den 2.'s Lovgivning vedkommende skånske Lov,* ed. Peder G. Thorsen (Copenhagen: Det Nordiske Litteratursamfund, 1858), 11; The Law of Scania, no. 34.

[20] The Law of Uppland, Inheritance section, no. 11; *Svenska Landskapslagar 1*, trans. Åke Holmbäck and Wessén (Stockholm: Awe/Gebers, 1979), 70.

[21] The Law of Östgötaland, Inheritance section, no. 2–3, although the Law of Östgötaland also included some parentela principles. See Tveit, "Legal Transmission," 182–84.

[22] The Law of Östgötaland, Inheritance section, no. 3, in *Svenska Landskapslagar 1*, trans. Åke Holmbäck and Wessén (Stockholm: Awe/Gebers, 1979), 124.

[23] *Sturlunga saga*, Jón Jóhannesson, et al., vol. 1, (Reykjavik: 1946), 106–109; Ricketts, *High-Ranking Widows*, 140. I thank Philadelphia Ricketts for making me aware of this case.

his case according to the Icelandic law *Grágás*. He claimed that since Þórir died first, the son inherited from his father, and since the son died before his mother Þorlaug, she inherited from her son, and then her father inherited from her. By backwards inheritance, Þorlaug's relatives would have Þórir's large estate. But Þórir's party argued on grounds of fairness that his sister had a claim to the property. They contested the validity of law itself, because it allowed the wealth of the husband to go to the family of the wife when their marriage had no surviving offspring. The party of Þórir thus did not argue about the order of deaths, but the validity of the law. As we understand from this case from Iceland, cases could be argued differently from what the law said. However, the point here is that the saga authors clearly understood the backwards inheritance and the issues that might arise with it.

The legislators, too, were conscious of the potential conflicts caused by backwards inheritance. The embedded inequality of the gradual system invites dispute within the kin group, but the parentela system also produced challenges. Distinct topics emerged in the legal material, which probably aimed at countering inheritance disputes. Primarily, the conjoining of different kin groups by marriage made possible backwards inheritance. If a married couple had children, then the property went forward through their common descendant. If they had no children in common, and spouses still had the right to inherit from each other, it could form a case where the property of one family went backwards into the family of the other spouse. Similarly, the possibility of parents inheriting from their children affected where ancestral property ended up. In medieval law, concerns around these questions often related to whether the *mother* would inherit from a couple's children. If a husband died first, their common child would inherit from him. If the child then died and the wife inherited from the child, then she possessed parts of her husband's family property through her child. The risk was that upon the death of the mother, the husband's property was further distributed to her own kin, as in the case of Þorlaug above. Many kin groups cooperated on land and resources through marriage relations, but the separate families wanted to secure their own family property. Another threat posed by backwards inheritance through the mother was that the property could fall to her children by another husband.

Moreover, the inheritance rights of the children themselves had implications for further property devolution: what if the only conceived child was stillborn, did it still inherit from its parents? How would posthumous children inherit? The question of whether a child who died in early life gained inheritance rights was important, as it would give parents or their family rights to inherit from each other through the deceased child. In medieval Scandinavia, legislation attempted some different solutions to resolve these challenges.

Letting Spouses Inherit from Each Other

A number of transactions were traditionally and legally expected when forming a marriage. They could be a brideprice to the woman's family or to the woman herself, a dowry from her family to the couple, together with a counter-gift from his family, and a morning gift (*morghongæf*) she received after consummation of the marriage.[24] These gifts were a foundation for the marriage, but also a basis of existence for the surviving spouse, and regulated in written law.[25] The distribution of inheritance after the death of one spouse would also concern these properties. However, regarding the inheritance rights between them, the regulations of property they inherited in addition to the marriage transactions was significant. The status of the land, too, was significant, such as ancestral land that was often secured by the institutions of reversion mentioned above.

Most of the Swedish provincial laws formed in the late-twelfth and early-thirteenth century only allowed husbands and wives to inherit property acquired during the marriage, and not ancestral land. Some items essential for day-to-day life were removed from the property to be divided according to the laws of Uppland and Hälsingeland; the two parties split the common property, while the surviving spouse held back the bed, linen and church clothes.[26] The surviving husband also had rights to the best horse and weapons from their common property, before dividing the rest with her relatives. The early thirteenth century Law of Scania, the Danish province bordering on Swedish landscapes, also allowed spouses to inherit, but ancestral land was also here excluded from the division, which regarded movables, money and bought land, property acquired during the marriage.[27] However, they split everything (except ancestral land) equally, disregarding who brought more or less into the marriage, so that the surviving spouse shared with the deceased's family; the same also applied in the Law of Jutland.[28] The wife was

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[24] Carl Johan Schlyter, *Glossarium ad Corpus juris Sueo-Gotorum antiqui: ordbok til Samlingen af Sweriges gamla lagar*. vol. 13. (Lund: Berlinska&Gleerup, 1877), 443. See, for instance, Jack Goody, "Inheritance, Property and Women: Some Comparative Considerations," in *Family and Inheritance; Rural Society in Western Europe, 120 –1800*, ed. J. Goody, J. Thirsk, and E.P. Thompson (Cambridge: Cambridge University Press, 1976), 10–36, At pp. 21–23;Jack Goody, *The Development of the Family and Marriage in Europe* (Cambridge: Cambridge University Press, 1983), 207, 233, 238; Diane Owen Hughes, "From Brideprice to Dowry in Mediterranean Europe," *Journal of Family History* 3 (1978): 262–96; Inger Dübeck, *Kvinder, familie og formue* (Copenhagen: Museum Tusculanum Press, 2003).

[25] For instance, The Law of Scania, no. 8, 13–14; The Law of Uppland, Inheritance section, no. 2–5, 8–9; The Law of Östgötaland, Inheritance section, no. 9; The Law of Gulathing, no. 51–54, in *Norges gamle Love indtil 1387*, vol. 1, ed. Rudolph Keyser, et al. (Christiania: C. Gröndahl, 1846); The Norwegian National Law Code, no. 5. 1–7. See also Vogt, *The Function of Kinship*, 174.

[26] The Law of Uppland, Inheritance section, no. 10, The Law of Hälsingeland, Inheritance section, no. 10, in *Svenska Landskapslagar 3, Södermannalagen, Hälsingelagen*, trans. Åke Holmbäck and Elias Wessén (Stockholm: Awe/Gebers, 1940), 301–20.

[27] The Law of Scania, no. 1, 5–7.

[28] The Law of Jutland, no. 1.5–6.

permitted a right of division with the man's relatives, even if the couple had no children.[29] If they had children, she would acquire one lot on the same premises as they did. The husband, on the other hand, had the right to a son's portion of both common property and the ancestral land that the children inherited. Apparently, when the couple had children, the father's right to his wife's family land increased.[30] The land would nevertheless return to her direct heirs, their common children, after his death. One might ask what happened if the father survived the children as well.

Norwegian law does not mention inheritance from spouses as such, but regulated the property they owned separately and jointly. The institution of *félag*, developed in the High Middle Ages, was a system of joint marital estates by contract.[31] Lars Ivar Hansen has suggested the institution was a strategy of landowning families meant to surpass the inheritance systems, particularly a relative's rights to land.[32] By defining the status of what each party brought into the marriage, the couple could deprive their own kin from inheriting it. The redefinition can also be interpreted as a counter-strategy against the legislation preventing backwards inheritance. The Law of Gulathing nevertheless only accepted *félag* on terms that had been approved by "the closest kin".[33] We understand here that approval worked both ways; both the relatives of the man and the woman had to consent to joint ownership of the land. The land of female heirs was thus also protected. Furthermore, there was an attempt to avoid backwards inheritance of the woman's property into the man's family, or a detriment of its value, by requiring that a man marrying a widow had to possess more valuable property than she did.[34] *Óðal* (Norwegian *odel)*, that is, allodial land, was in particular protected in inheritance, and could not be inherited by a woman other than as a temporary possession. If a wife came to possess allodial land through her husband or as backwards inheritance from her son, law prevented this type of land of being transferred to her relatives.[35] In the Norwegian National Law Code from 1274, King Magnus let a couple enter into joint ownership without the consent of the relatives.[36] They would then decide themselves whether to give each other part of their property at death, even if the inheritance system prevented them from doing so and the marriage was childless. They could also discuss the way in which their common property would be divided at death, split in half or otherwise. A concern for the welfare of the surviving spouse may have been the motive behind this change.

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[29] The Law of Scania, no. 1, 25, 29.
[30] The Law of Scania, no. 21–24.
[31] *Felag*, from *fe* and *lag*, holding property together, Hansen, "The Field of Property Devolution," 252.
[32] Hansen, "The Field of Property Devolution," 247–49.
[33] The Law of Gulathing, no. 53.
[34] Ibid.
[35] Hansen, "The Field of Property Devolution," 250–51; The Law of Gulathing, no. 274; The Law of Frostathing, no. 12.5; The Norwegian National Law Code, no. 6.7.
[36] The Norwegian National Law Code, no. 5.3.1, *Norges gamle Love* 2, 76.

Scandinavian legislators were not the first to address these subjects. Until the sixth century, Roman law had restrictions on mixing property between spouses.[37] As an heir, the wife came very last in line in classical law.[38] In addition, transmission of property was strictly regulated, and famously spouses were not allowed to give each other gifts. In the *Digesta* of Justinian, a separate chapter was dedicated to the subject.[39] The reason for the prohibition was to "prevent people from impoverishing themselves through mutual affection by means of gifts".[40] More likely, it was to protect the heir's property from gold diggers. We must assume that Roman jurists had very valuable gifts in mind, like land or treasures. Small gifts of, for instance, perfume were allowed, as the jurist Ulpian concluded.[41] As a comparison, prenuptial gifts under 200 solidi, a substantial amount, did not require public record from the year 428.[42] What concerned Roman legislators were the interests of the two kinship groups for the given property, contrasted with the couple's interest in starting a new household. The same motives that were behind the Roman prohibitions on gifts between spouses were also the motives behind legislation on preventing backwards inheritance by spouses. Justinian dissolved this prohibition in the 530s, when he allowed a marriage transaction from the groom's family, the *dos propter nuptias*, "gift on account of marriage".[43] His argument was that the woman's dowry could be increased during marriage, and thus it was right that the man could provide or increase his counter-gift after the marriage had taken place. As long as the dowry and *dos* were of equal value, the couple could increase or decrease their contribution at will. Here we see that legislation catered for the interest of the couple, at the expense of other heirs, much like the motives behind supporting the institution of *félag* in Scandinavian law.

Secular legislation in early medieval Europe provided different solutions to inheritance between spouses. According to the earliest laws of Kent (*c.* 602), the mother of a husband's legitimate offspring would inherit from him directly, sharing a portion with the children. The wife

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[37] Tveit, "Legal Transmission," 98.
[38] *Digesta*, 38.11.1, in *Digesta*, ed. Theodor Mommsen and Paul Krueger. Vol 1: *Corpus Iuris Civilis* (Berlin: Weidmann, 1872); Herbert. F. Jolowicz, and Barry Nicholas, *Historical Introduction to the Study of Roman Law* (Cambridge: Cambridge University Press, 1972), 472–73; George Mousourakis, *Fundamentals of Roman Private Law* (Berlin: Springer, 2012), 279–90.
[39] *Digesta* 24.1.
[40] *Digesta* 24.1.1, translation from *The Digest of Justinian*, ed. Alan Watson, vol. 1 (Philadephia: University of Pennsylvania Press, 1998). Also: "true affection was based on the heart alone", not because of gifts; *Digesta* 24.1.3.
[41] *Digesta* 24.1.7.
[42] *Codex Theodosianus*, 3.5.13, in *Theodosiani libri XVI cum constitutionibus Sirmondianis et leges novellae ad Theodosianum*, ed. Theodor Mommsen and Paulus M. Meyer (Berlin: Weidemann, 1904).
[43] *Codex Iustinianus*, no. 5.3.20, in *Codex Iustinianus,* ed. Paulus Krueger. Vol. 2: *Corpus Iuris Civilis* (Berlin: Weidemann, 1900); *Institustiones* 2.7, in *Institutiones*, ed. Theodor Mommsen and Paulus Krueger. Vol. 1: *Corpus Iuris Civilis* (Berlin: Weidemann, 1928).

was given inheritance rights to as much as half of her husband's property if offspring were produced.[44] In seventh-century Lombard law, a woman was legally dependent on a man, and although a husband could inherit from his wife, the wife was not the heir of the husband.[45] Thus, a mother could not inherit from her son. This meant that Lombard law avoided backwards inheritance to women, albeit not to men. The Scandinavian laws, to a larger degree, protected the right of the surviving spouse in obtaining a share of the property.

Inheritance Rights of the Mother

According to Scandinavian law, the father always inherited from his children if he was alive. However, concerning the mother's rights, the laws displayed contrasting principles. One effect of an inheritance system recognizing cognatic kinship is that it includes in principle the mother of the deceased; hence, the default system also includes the mother of the deceased's children. The mother / wife constitutes a particular challenge in the inheritance system, because if a mother survives her children, or a wife survives her husband with whom she has children, the property of the father's ascendants can fall to her and her relatives. The above-mentioned Gerlög came to inherit three estates this way, and Þorlaug's kin claimed inheritance on the same grounds. The wife would gain her husband's property, partly or totally, as a mother, through the mechanisms of backwards inheritance. Of course, a woman's family property could and did likewise enter into her husband's family through the same mechanisms. We see medieval legislators dealing with the challenges when the mother had rights to inherit from her offspring. If the agnatic kin was prioritized, or patrilineal principles dominated, then female agnates were considered as one factor in the strategies to retain the family property within their kin group.[46] Of all the women in a person's kin group, the mother represents the outside element in the inheritance system. She married into the family, but her own kin might have inheritance rights to her property. While a sister and paternal aunt would be married into other families, they still represented paternal kin. Another outsider in the kin group was of course the paternal grandmother. When descendants were lacking, returned inheritance backwards into the parentele, and thus, through these women, was transferred to another kin group.

[44] The Laws of King Æthelbert no. 78, in *The Laws of the Earliest English Kings*, ed. and trans. Frederick L. Attenborough, (New York: Russell and Russell, 1963), 14–15.
[45] Edictus Rothari, no 182–183, 200, in *Edictus Langobardorum*, ed. Fredrick Bluhme, Monumenta Germaniae Historica. ed. Georg Heinrich Pertz, vol. 4 (Hannover: Hahn, 1868), 43 and 49.
[46] Goody, *The Development of the Family*, 222–39, 262–78.

Both in the eastern and western Swedish provincial laws, the order of succession placed the mother before siblings or more distant paternal kin.[47] The problem of inheritance falling to a surviving mother was discussed in detail in the Swedish provincial laws. According to a short paragraph in the Law of Uppland, with the rubric *bakarff* – backwards inheritance – parents inherited from a child who had died without descendants, presuming that only one of the parents survived.[48] The father or the mother shared with the siblings, if there were any. The rule distinguished between different set of children, both full brothers and sisters where they split 50/50, or half-brothers and -sisters, where the siblings received one-third. The Law of Östgötaland elaborated on a whole scenario of potential conflicts, including murdering a pregnant widow. It gave the mother rights to inherit from the husband if she was pregnant at the time of his death; the child did not even have to be born.[49] The rule said that if a man died and the widow gave his heirs the property, but afterwards found out she was pregnant, the child would inherit from the man. If the relative who had already received the inheritance attempted to keep it by killing the widow, and after her burial, suspicion arose that she had been pregnant and murdered, then the community would be obliged to dig up the dead woman and cut her guts open in search of a foetus.[50] This dramatic procedure must have been set down in law to determine if a child gave the mother, and hence her relatives, the rights to inherit. The level of detail in secular legislation suggests the scenario was imaginable, and also that the rights for receiving the backwards inheritance was a serious matter in written law. It is unknown whether such procedures were enacted in actual cases.

In the inheritance system of the Norwegian provincial codes, few women were favoured. The gradual system allowed only close female relatives to inherit from a man and only in the absence of a male heir in the same degree of kinship. Only daughters, sisters and mothers fell into the primary groups of inheritors, and other female relatives were among the 'uncounted'.[51] The Law of Gulathing prioritized kin through male relatives and paternal relatives.[52] The mother inherited as fifth in line, after the deceased's paternal uncle and nephew through a brother. The sister of the deceased also inherited before his mother. The Law of Frostathing placed the mother further back in line, as number six, after the paternal grandparents, paternal aunt and

[47] The Law of Uppland; The Law of Östgötaland, Inheritance section, no. 2; The Law of Västgötaland, Younger version, Inheritance section, no. 1.
[48] The Law of Uppland, Inheritance section, no. 14.
[49] Holmbäck and Wessén, *Svenska Landskapslagar 1*, 126.
[50] The Law of Östgötaland, Inheritance section, no. 7.
[51] The Law of Gulathing, no. 103–105.
[52] Torben Anders Vestergaard, "The System of Kinship in Early Norwegian Law," *Medieval Scandinavia* 12 (1988): 160–93, at p. 176; Hansen, "Slektskap," 137–38.

uncle.[53] Backwards inheritance went first to a number of paternal relatives, before the mother and her relatives came into question. In the Norwegian National Law Code, the mother inherited what she had already brought to the union.[54] The law can be interpreted as letting the mother inherit her share, and the father his, in case of backwards inheritance. King Magnus's National Law Code introduced principles similar to eastern Nordic laws, with daughters inheriting with sons, and with extending principles of representation to grandchildren of either branch and of both sexes.[55] Daughters still inherited only half a portion, similar to what Danish law had established before 1200. A later amendment to the Norwegian National Law Code in 1313 further restricted parents' opportunities for obtaining landed property through backwards inheritance.[56] The surviving parent had possession of the land for life, but could not alienate the property, and relatives of the spouse originally owning the land would claim it back by allodial right afterwards.[57] We see in general that the mother's right to inherit from her child varied greatly within the Scandinavian laws.

Who Died First? The Order of Death

Of course, descendants had to die *before* their ancestors for backwards inheritance to apply. Thus, the order of death had major consequences for the line of succession. As we saw in the example from Iceland, the family of the wife Þorlaug claimed the property of the husband Þórir on grounds of not only her surviving the others, but on the order in which they died. Even if Þórir's family rejected the law, the law was clear in the matter. Legislation also includes clarification on what to do when the order of death was disputed or unknown. For instance, the Law of Östgötaland addressed serious accidents killing the whole family, in almost poetic form, in the rule *Um kull suarf ok kiolsuarf ok kulsuarf*, translated as "On childbed inheritance and keel inheritance and coal inheritance".[58] The names play on alliteration, concerning death of a several family members in childbed, at sea, or by fire, alluding to hypothetical cases of all the heirs dying at once. The point was to determine who died first, the children or the parents, the mother or the father, to see the order of succession. If the father died before the child and the child before the mother, then the child inherited from the father, and the mother inherited from the child. The

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[53] The Law of Frostathing, no. 8.5
[54] The Norwegian National Law Code, no. 5.7.6.
[55] The Norwegian National Law Code, no. 5.7.2.
[56] *Norges gamle Love indtil 1387*, vol. 3, ed. Rudolph Keyser and Peter Andreas Munch (Christiania: C. Gröndahl, 1848), 99–100.
[57] Hansen, "The Field of Property Devolution," 251.
[58] Axel Olof Freudenthal, *Östgötalagen med förklaringar* (Helsinki: Tidnings & tryckeri-aktiebolagets tryckeri, 1895), 139; The Law of Östgötaland, no. 6.

mother would then be the last heir, as we saw happened in the story of the widow Gerlög. According to the inheritance systems in the laws, such situations would make the mother's kindred rightful successors to the father's property. We do not know what happened, after her death, with all the estates Gerlög possessed. It is reasonable to suspect that she only held them during her lifetime, by usufruct, and that the relatives of both Gerlög's and her daughter's deceased husband claimed it back at that point. However, according to written law, most of the property fell to her side. On the contrary, if the mother died before the child and the father, then the father and his family would possess the heritable property of the mother. If the child died first, according to Swedish law, the two sides would share whatever the child possessed or keep their own part. In disputes between the families on who died last, the two sides were encouraged to "stay within the law", probably alluding to the parties sharing the inheritance after default principles.[59] These are surprisingly specific descriptions, but they indicate the existence of the mechanisms of backwards inheritance, where both families had opportunities to inherit from the other family.

Burning or drowning together were the examples also used in other western Scandinavian laws, obviously potential incidents in medieval society. We find a less dramatic wording in the older version of the Law of Västgötaland from early thirteenth century.[60] According to this law, two mutual heirs dying coincidently neutralized each other's claim to inheritance. The rule refers to two men only, although we can assume the rule followed the inheritance system of the older Law of Västgötaland in case of the death of other mutual heirs. If the men died in separate locations or together in the same house, if they burned or drowned simultaneously, then the older law instructed that "nobody is the other's heir", suggesting each side should keep their property. The contemporary Law of Frostathing concluded simply that if "everybody drowned or everybody burned", the kindred should consider this as if they had died at the same time.[61] Similarly, the Law of Uppland established that, when impossible to decide order of death, the families inherited their respective parts, the woman's kin her, the man's kin his.[62]

Did a child who died in infancy gain inheritance rights? If yes, then the parents or their family could inherit from each other through the dead descendant. That is why determining the limits of a child's inheritance privileges was of importance. According to the Danish laws of Scania and Jutland, the child would have to be born sound, but would also have to be baptized to

[59] The Law of Östgötaland, no. 6.
[60] The Law of Västgötaland, Inheritance section, no. 13.
[61] The Law of Frostathing, no. 9.2.
[62] The Law of Uppland, Inheritance section, no. 17.

be a rightful heir.[63] Baptism, and the fact that the child would have to be born from a legitimate marriage, indicate a stronger influence from canon law on Danish law.[64] Concerning death in childbed, Danish laws demanded a child to be baptized to receive inheritance. If in doubt, the burden of evidence lay with those arguing that the child had been baptized before dying.[65] Certainly, the requirement for a child to be baptized to receive inheritance contributed to preventing backwards inheritance to the opposite side.

From the mid-thirteenth century, the Law of Jutland said that "If a child dies in joint ownership (*fællig*) with the father and the mother, then it shall be regarded as if it was never born".[66] We can interpret this rule to mean that the surviving parents should not inherit from each other through a child, and thus not inherit a portion of the other's property. The rule continues that if the mother died before the child, then the father inherited from the child exclusively without sharing with its siblings. If the father died before the child, then the mother inherited one lot, but no more. In this rule, principles appear that favour backwards inheritance to the paternal line. The siblings would of course inherit after the death of their father, but apparently not a mother's share of it. The law of Scania includes a simpler version, only stating that if a child died in joint ownership, it should not be regarded legally to have lived.[67] The Scandinavian legislators all demonstrated an awareness of how the order of death, combined with other principles, consequently determined the distribution of inheritance.

The Unborn Child

Potential descendants, conceived, but not yet born at the time of their father's passing, was another element of legislation concerning backwards inheritance. The issue is twofold: the one who was conceived, but born posthumous and alive, and the one who died in its mother's womb. First, did a child become an heir before it was born, or was birth required to constitute a legitimate heir? Secondly, did the posthumous child inherit with its siblings? In early medieval Continental law, we find the same questions. In early medieval Spain, the Visigothic king Chindasvint argued that a child that had hardly seen the light of day could not own property, and set the critical limit of death for an infant after ten days and baptism. A child surviving longer would have inheritance rights to its ancestors, but one who lived shorter would not be taken into

[63] The Law of Scania, no. 2–3; The Law of Jutland, no. 1–2.
[64] On canonical influence, see Vogt, *The Function of Kinship*, 178–79, and Gelting, "Odelsrett – lovbydelse – bördsrätt – retrait lignager," 136–39.
[65] The Law of Scania, no. 4.
[66] The Law of Jutland, no. 9.
[67] The Law of Scania, no. 20.

account. Conversely, a posthumous child would share in the inheritance with other heirs if it survived and was baptized.[68] Scandinavian legislators toiled over similar questions. According to the Danish laws, which considered baptism as a criterion for inheritance, an unborn child could inherit only after surviving birth and baptism.[69] The relatives of a widow should observe her while waiting for an eventual birth. The widow should further be in the care of a guardian, probably to prevent her from conceiving with another man in order to deceivingly obtain the inheritance for her unborn child. The rule is interesting when contrasted with the western Swedish rule from the Law of Östgötaland on exhuming the buried widow for a foetus: we see that the apparent equal parentela system in the Danish laws used other measures *to counter* the possibility of backwards inheritance, while the apparent unequal gradual system of the Swedish law used other measures *to protect* the rights of backwards inheritance to the opposite side.

A particular feature from the Law of Gulathing, separating this provincial law from the other European codes, is that the unborn child did not have inheritance rights with the other legitimate children.[70] The unborn child would only share in its mother's marriage gifts, and came only as the thirteenth heir of its father, after the illegitimate children. This rule is strange when compared to, for instance, Roman law, which included an arsenal of rules protecting the rights of the unborn, and similarly included precautions that were put in place so widows would bear the deceased's child without causing doubts on paternity, by refraining from remarriage for twelve months after the husband's death.[71] Post-mortem heirs are not mentioned in the Law of Frostathing, but in the later Norwegian National Law Code from 1274, where unborn children, if they came alive into the world, would inherit from their father "and other men".[72] Here, too, the new National Law Code appears updated to reflect contemporaneous legal ideology, giving legitimate children inheritance posthumously.

The above-mentioned example of exhumation of a widow from the thirteenth-century Law of Östgötaland further suggest that neither birth nor baptism was required for the foetus to inherit the father and pass on the inheritance to the mother. It is notable here, too, that the child's gender was irrelevant in the law. While the western Swedish law also introduced inheritance rights for daughters together with their brothers, it would not matter if the unborn child were a boy or a girl.[73] In contemporaneous eastern Swedish laws containing the parentela

[68] Leges Visigothorum, no. 4.2.17 and 4.2.21, in *Leges Visigothorum*, ed. Karl Zeumer. Monumenta Germaniae historica, Legum nationum Germanicarum 1 (Hannover: Hahn, 1902).
[69] The Law of Scania, no. 1; The Law of Jutland, no. 1.3.
[70] The Law of Gulathing, no. 104.
[71] See, for instance, *Digesta*, no. 3.2.9–10, *Codex Iustinianus*, no. 5.9.1.
[72] The Norwegian National Law Code, no. 5.7.5.
[73] The Law of Östgötaland, Inheritance section, no. 2.

system, a child would have had to be born alive and sound to be an automatic heir, as seen in the Law of Hälsingeland.[74] In cases of infant deaths, the testimony of other women who saw the baby having been born and living would count as two men. Giving a woman elevated status as a witness was contrary to most other European medieval legislation, where women's testimony was rarely worth the same as a man's.[75] The sphere of nativity, particular to women, and where men were excluded, would make a woman more likely to confirm a pregnancy or attend the birth. Unlike the Danish laws, this rule protected the rights of the woman, at the expense of property falling to the opposite side, although the Law of Hälsingeland also used the parentela system. We see that there were different approaches in writing in relation to the inheritance rights of unborn children. The chosen approach may be linked to the inheritance system in question, as actions to secure or prevent backwards inheritance that followed the parentela and gradual systems.

Concluding Remarks

Can we find a pattern in the legislation on backwards inheritance? Most of the laws include rules that legislate for inheritance to pass through children if they died after first having lived. A child who was born living would, according to medieval Scandinavian law, be ensured consideration in the inheritance system, and possibly enable backwards inheritance. Two extremes are found regarding the inheritance rights of an unborn child, and posthumous inheritance. On the one side, we have the law of Östgötaland as the only law that asserted inheritance through a child who died in its mother's womb, and on the other side, the Law of Gulathing, which did not allow an unborn child to inherit posthumously. It might be putting too much emphasis on the two rules if we maintain these extremes. In the process of legislation, they nevertheless were included for reasons of regulating backwards inheritance to the opposite side. The difference between the regional laws are otherwise revealed in the other features: when letting spouses inherit from each other, the backwards inheritance through children was countered by requiring baptism. Clearly, the sacraments of marriage and baptism provided legal privileges in the Christian family that surpassed the interests of the kin group. Danish laws accepted spouses sharing inheritance with the opposite side, but required baptism of a child for inheritance to pass through it. The eastern Swedish provincial laws followed the Danish inheritance system in many ways, but they did not accept childless couples inheriting from each other, and neither was baptism a criterion for a child's right to inherit. We could argue here that one prevention made the other superfluous. We

[74] The Law of Hälsingeland, Inheritance section, no. 13. Tveit, "Legal Transmission", 164 and 186.
[75] Also in the Law of Scania, no. 1. Other examples, when accused of witchcraft: The Law of Gulathing, no. 28.

see that legislators did not necessarily aim at preventing backwards inheritance altogether. The *right* of backwards inheritance to maternal and paternal relatives was equally protected by written law. Norwegian laws had a system of joint ownership that, if applied, would let spouses inherit. At the same time, the laws accepted a living born child as heir. The consent from relatives was needed initially for joint ownership. After that was abandoned, the spouses could freely enter into joint ownership that secured the surviving spouse a share of the property, also stemming from the opposite side. This detail reveal that legislators anticipated married couples themselves caring for each other just as much as for their separate kin groups. However, the mother did not inherit from her offspring directly if she survived according to the gradual system used in Norwegian law, but came after the paternal kin in the line of succession. The institution of joint ownership between spouses could be a response to the mother's low position in the inheritance system that protected the right of paternal kin. In the parentela system described in eastern Scandinavian laws, the mother inherited together with the paternal side, if inheritance went backwards.

Thus, the pattern is that paternal kin were not necessarily always protected by legislation. Many of the regulations were put into place to ensure the mother received a share if she survived her husband and child. Legislation concerned with backwards inheritance did not necessarily protect the interest of the kin group on either side, or the original owner of landed property. It seems in fact that regarding backwards inheritance, legislators were careful to find fair solutions, and not only for the purpose of preventing property being split up. Another issue is to what degree the landowning families saw benefits in these kinds of laws themselves.

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