

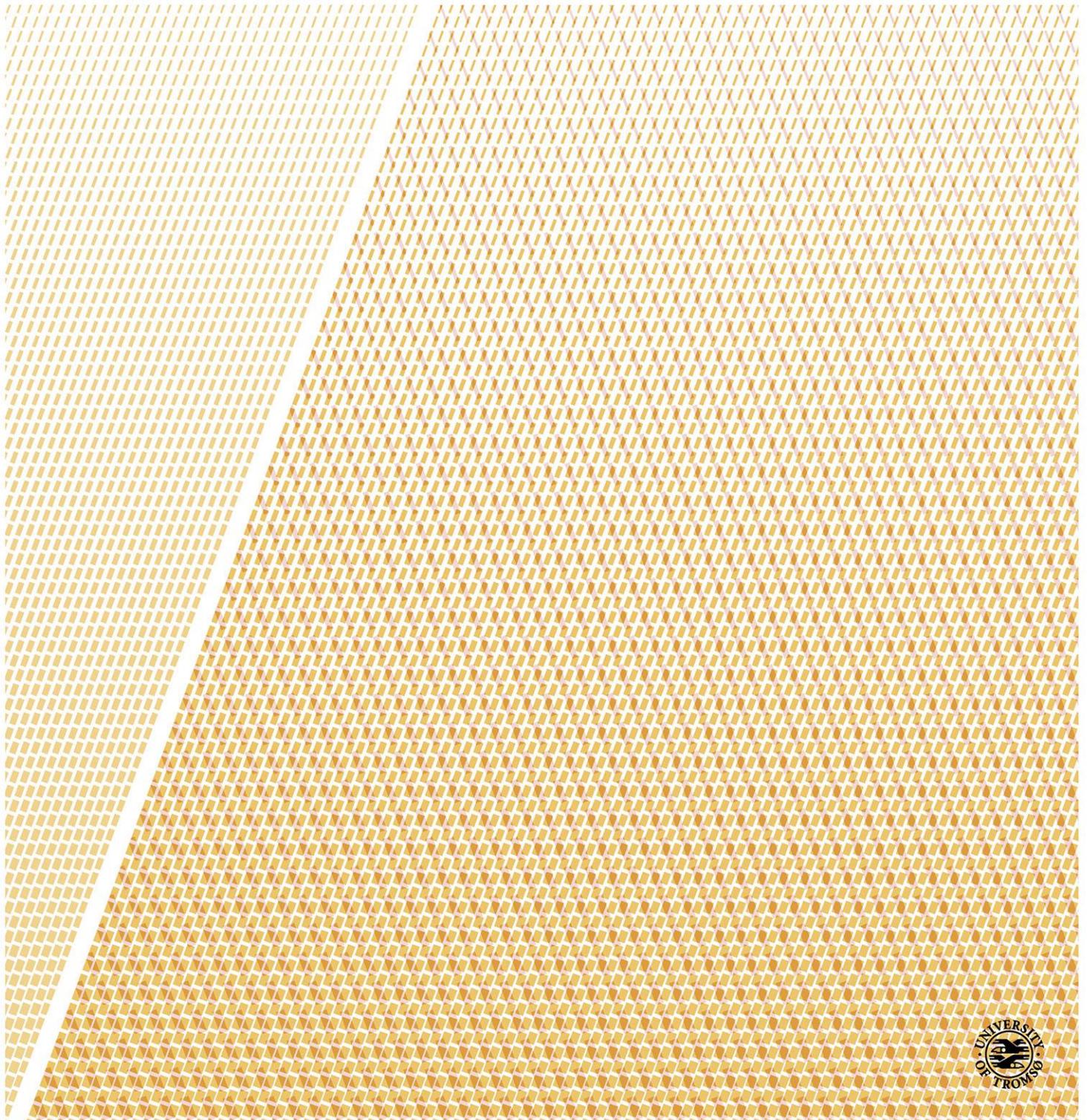
Department of History and Religious Studies

# **In Search of Legal Transmission**

*Inheritance and Compensation for Homicide in Medieval Secular Law*

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*A dissertation for the degree of Philosophiae Doctor – July 2016*





**In Search of Legal Transmission**  
**- Inheritance and Compensation for Homicide in**  
**Medieval Secular Law**



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## Abbreviations

A&G	The treaty of Alfred and Guthrum
A&O	<i>Arvebog&amp;Orbodemål</i> , Book of Inheritance & Non-Compensational crimes
Alf	The laws of Alfred
As	The laws of Æthelstan
ASun	Anders Sunesen's Paraphrase
Ath	The laws of Æthelbert
Atr	The laws of Æthelred
BL	Bjarkey Law
C	<i>Codex Iustiniani</i> , Justinians Code
CJC	<i>Corpus Iuris Civilis</i>
Cn	The laws of Cnut
CTh	<i>Codex Theodosianus</i>
D	<i>Digesta</i>
DgL	Danmarks gamle Landsabslove
DL	The Dala Law
DN	<i>Diplomatarium Norvegicum</i>
Dr	<i>Dråpsbalk/Dråparebalk</i> , homicide section, Swedish laws
E	<i>Edsörebalk</i> , peace section, Swedish laws
E&G	The treaty of Edward and Guthrum
Edm	The laws of Edmund
EHD	<i>English Historical Documents I</i> , in, Diane Whitelock: <i>English Historical Documents I, 500-1042</i> (London: Eyre & Spottiswoode, 1968)
Ek	<i>Ekloga</i> , the Ecloga of Leo III and Constantine V
EsL	<i>Eriks sjællandske lov</i> , Eric's law of Zealand
Eur	The law of Euric
F	The Frostathing Law
G	The Gulathing Law
Gai	<i>Gai Institutionum</i> , The insitutes of Gaius,
GL	The Law of Gotland
HL	The Hälsinge Law

HI&E	Laws of Hlothhere and Eadric
I	<i>Institutiones Iustiniani</i> , The institutes of Justinian
Ine	The laws of Ine
JL	The Law of Jutland
LB	<i>Leges Burgundionum</i>
Liu	Laws of Liutprand
LSK	<i>Lex Salica Karolina</i>
LV	<i>Leges Visigothorum</i>
M	<i>Manhelgdsbalk</i> , personal safety section, Swedish laws
MEL	<i>Magnus Eriksons Landslag</i> , The Swedish Code of the Realm
MGH	<i>Monumenta Germaniae historica</i>
MLL	<i>Magnus Lagabøters Landslov</i> , The Norwegian Code of the Realm
NgL	Norges gamle Love
Nov	<i>Novellae Iustiniani</i> , The Novels of Justinian
NVal	<i>Novellae Valentiniani</i> , The Novels of Valentinian
PLS	<i>Pactus Leges Salicae</i>
Rot	<i>Edictus Rothari</i> , The Edict of Rothair
SL	The Law of Scania
SmL	The Södermanna Law
Tab	<i>Lex Duodecim Tabularum</i> , Law of the Twelve Tables
UL	The Law of Uppland
VgL	The Västgöta Law, older version
VgLY	The Västgöta Law, younger version
VL	The Västmanna Law
VsL	<i>Valdemars Sjællandske Lov</i> , Valdemar's law of Zealand
Wih	Laws of Wihtried
Ä	<i>Ärvdabalk</i> , Interitance section, Swedish laws
ÖgL	The Law of Östgötaland

# 1. Introduction: Transmission of Law

When studying medieval European law, the similarities between texts from completely different periods and different geographical areas are sometimes striking. In early to high medieval legislation, the existence of related concepts of law seems evident. How laws from different jurisdictions and periods came to share legal aspects is not always clear, but one cause may be a transmission of law. The similarities can take the form of shared concepts and coincident developments, but there could also be verbatim repetition of rules. We can thus see many hints of influence and loan in the legal sources, but can we identify transmission of law? Researchers often comment on possible influences on legal texts, and finding the origin of a text could be the aim of their studies or might merely be complementary to those studies. Although studies often point to agreements in laws that are far apart, scholars rarely conduct a broad examination of these similarities between legal sources that are distant in both time and space. To get a fuller overview of common features of European legislation, a wide-ranging comparison is necessary. By involving legal sources from more than two regions, we may be able to assess how transmission of law occurred. By studying rules on a particular topic in legislation over several centuries, we may be able to see the legal development more clearly. This thesis will deal with the transmission of law in the period from AD 400 to 1350, and it is centred on the two themes of *inheritance systems* and *compensation for homicide*.

Society changes, and secular legislators have been occupied with different challenges in their rule and society. But two topics are constant: inheritance and homicide. The transfer of wealth and the existence of deadly violence are necessary topics to address in any society, to have rules on, and which even constitute the very reason for making law.<sup>1</sup> Consequently, these topics are recurrent in written law as well. For this reason, inheritance and compensation for homicide form rewarding objects of study when covering a long period of European legal history.

A wider comparison of medieval laws can illuminate the connections and signs of influence between geographical areas and over time. Legal activity was high during the waning of the western Roman empire and in the succeeding European states.<sup>2</sup> Following the

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<sup>1</sup> For example, see the Danish *Book of Inheritance and Non-Compensational Crimes. Danmarks gamle Landskapslove med Kirkelovene*, ed. by Johannes Brøndum-Nielsen and Poul J. Jørgensen, vol VII, *Valdemars Sjællandske Lov, Arvebog og Orbodemål*, ed. by Erik Kroman (Copenhagen: Gyldendalske boghandel, Nordisk forlag, 1932-1936). Hereafter *DgL*.

<sup>2</sup> Maurizio Lupoi, *The Origins of the European Legal Order* (Cambridge: Cambridge University Press, 2000), p. 41.

Roman model, written law became the norm for medieval authority; this also applied within the Church, which amassed a substantial legal corpus together with increased power in the early Middle Ages. Moreover, legal thinking was transformed from the late-eleventh century onwards. The evolving university studies of Roman and canon law would bring new vigour to royal law-making activity across Europe. Students from many of these European states were influenced by the methodological legal studies. Students returning from their legal studies at university might have brought new ideas that led to legal reform in some of these states, for example, in the Scandinavian realms in the twelfth and thirteenth centuries. Major research on the origins of canon law has provided knowledge of the bond between church and society, and of the Church as a legal institution.<sup>3</sup> The trail of *secular law* comprises another fruitful object of study from the perspective of transmission. Both the legislating authority and the subjects of law relate, possibly differently, to the system of inheritance distribution and the settlement of conflict in the case of homicide in a society. The authorities in the emerging states all had a concept of written law, which would form their own authority.

## 1.1 Aim and scope

It is important to turn our attention now to the demarcation of the project in more detail. The main aim of this thesis is to test *whether it is possible to identify transmission of law in the two chosen topics of inheritance and compensation for homicide, within the written secular laws of western medieval Europe*. To elaborate on this further, the thesis will investigate in what way legislation pertaining to the system of inheritance and to compensation for homicide was subject to influence from laws and ideas outside its own jurisdiction in early and high medieval Western Europe.

In order to limit the task, I have centred my focus on the legal development in the European regions that fall under the cloak of the western Church, which I have labelled the Latin spheres: the late Roman empire, and the Germanic, Anglo-Saxon and Scandinavian kingdoms. However, the early Scandinavian laws originated outside kingly power. Laws from the medieval republics of Iceland and Ireland will not be included in this thesis other than as

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<sup>3</sup> Important examples, although not giving the whole field of research, include: Stephan Kuttner, *Repertorium der kanonistik (1140-1234)*, vol. 1 (Biblioteca apostolica vaticana, 1937, reprint 1981); Jean Gaudemet, *Église et cité: histoire du droit canonique* (Paris: Éd. du Cerf, 1994); James A. Brundage, *Medieval Canon Law* (London: Longman, 1995); Bruce Brasington and Kathleen G. Cushing, eds, *Bishops, Texts and the Use of Canon Law Around 1100: Essays in Honour of Martin Brett* (Aldershot: Ashgate, 2008).

examples.<sup>4</sup> I have also restricted the source material mainly to law that survives as a law code or as a collection of laws. The selected laws all originated, to some degree, in the process of state formation. The reason for this is, first of all, that many of the secular law codes of the European states originated in a period of consolidation, even if they sometimes endured for a considerable time. Second, in such a process, law-making would be a defining feature of the legitimization of power; therefore, we can expect a certain consciousness in relation to the contents, from the legislator and from the legal advisers of all shapes and sizes around the authority with legislative power. The demarcation of the topic and source material described above makes this more of a diachronic comparison than a regional one, since the state formation process and therefore the laws appear at different points during the time span from the late-fifth to the early fourteenth century. A break in European legal activity can be detected in the tenth century, giving rise to theories of a break in the continuity of legal systems and thought.<sup>5</sup> That may be, but the written laws that survived would still have the power to influence later legal thinking. The sources are presented in detail in chapter 2.

The geographical demarcation thus excludes significant areas of European legislation and state consolidation, but includes some of the laws of the Heptarchy, the Lombard, Burgundian, Visigothic and Frankish kingdoms, and the Scandinavian kingdoms. Arguably, several other languages within these areas are more dominant than Latin in medieval written law: there are, for instance, vernacular texts from England and Scandinavia, not to mention the Celtic texts that are left out of the present study for linguistic reasons. My definition of the Latin sphere is that which is opposed to the Greek and Slavic linguistic regions on the Continent, which I have left out of this study. Apart from occasional digressions into Byzantine law, sources from these latter regions will not be part of the comparison.

Using the term ‘state’ in the early medieval context is of course contested. One can hardly get around Max Weber’s definition of the modern state, which encompasses the administration’s ability to claim a monopoly on legitimate violence and an ability to maintain the monopoly within a given territory.<sup>6</sup> In opposition to this, Weber noted that ‘in the past, the

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<sup>4</sup> Irish law originated in the same period as the Germanic laws. Although the laws show a multifaceted development in the many chiefdoms on the island, a common legal culture seems to have developed. Maurizio Lupoi sees similarities between Irish law and other early medieval law, but he has provided arguments as to why it is difficult to compare Irish law with the early medieval legal development, such as lack of literary supplementing sources and uncertainty of origins. Lupoi, *Origins*, pp. 123-24, 131-32, 193-94. The main reason to me is linguistic, as the Irish laws were written in the vernacular. See also Fergus Kelly, *A Guide to Early Irish Law* (Dublin: Dublin Institute for Advanced Studies, 1988), pp. 232–38.

<sup>5</sup> Lupoi, *Origins*, pp. 3-4; Patrick Wormald, *The Making of English Law: King Alfred to the Twelfth Century, Legislation and its Limits*, vol. 1 (Oxford: Wiley-Blackwell, 2001), p. 483.

<sup>6</sup> Max Weber, ‘Politics As a Vocation’, in *Essays in Sociology*, ed. by H. H. Gerth and C. Wright Mills (New York: Oxford University Press, 1946), pp. 77-128 (pp. 3-4)

most varied institutions (...) have known the use of physical force as quite normal'.<sup>7</sup> Using a much-modified version of Weber's definition of the state, I believe that it is fruitful here to use this term in relation to the separate geographical unities under investigation.<sup>8</sup> Medieval states can be defined as encompassing, to a degree, the functions of common boundaries, territory, taxes, defences and law.<sup>9</sup> In the forming state, every above-mentioned feature would only be present to a certain degree. A forming state would *make claims* to common boundaries and a given, but possibly changing, territory. It would make *attempts* at taxation of its subjects, *aspire* to a defence system, and most interesting here, *aspire* to a legal system and laws shared by its subjects. A number of scholarly discussions regarding use and definition of the term 'state' for pre-modern unities emphasise the importance of different features.<sup>10</sup> While pointing to the connection between Christianisation and state formation in Norway, Sverre Bagge argues: 'we should distinguish between unification and permanent unity. It is a normal phenomenon that political units formed by conquest dissolve again, so normal that the real question about state formation is not why the unit in question was formed but why it continued to exist.'<sup>11</sup> The relevant point to this study is that the continuity of the unity is of less importance than the activity, and specifically the legislative activity happening during the period of formation. Bagge continues: 'For continued existence, institutionalization and ideology are probably more important than direct physical power.'<sup>12</sup> The legislation can be seen as both a marker of the state-formation period and one of the reasons for its prospective success. We find all shades of these features in the medieval states examined in this thesis. However, the interests of a legislating authority in a state-formation period can further contribute to our understanding of law and society in medieval Europe.

The present study will focus mainly on *content*, *meanings* and *motivations* behind the laws and rules, and will not consider the manuscripts or perform a linguistic analysis. A linguistic analysis would reveal much more, but such a project would involve another level of

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<sup>7</sup> Weber, 'Politics', p. 3.

<sup>8</sup> As has been done by Susan Reynolds, 'The Historiography of the Medieval State', in *Companion to Historiography*, ed. by Michael Bentley (New York: Routledge, 1997), pp. 117-38.

<sup>9</sup> As, for instance, in Norbert Elias, *The Civilizing Process*, trans by Edmund Jephcott (Oxford: Blackwell, 2000), pp. 256-61, 268-77, 344-47. Elias uses as examples the state-formation processes from the eleventh century onward, but his theories are transferable to earlier states.

<sup>10</sup> See, for instance, John G. Ruggie, 'Territoriality and Beyond: Problematising Modernity in International Relations', *International Organization*, 47, 1 (1993), 139-74; Reynolds, 'Historiography'; Rhys Jones, 'Man and Men in a Medieval State: The Geographies of Power in the Middle Ages', *Transactions of the Institute of British Geographers*, 24.1 (1999), 65-78.

<sup>11</sup> Sverre Bagge, 'Christianization and State Formation in Early Medieval Norway', *Scandinavian Journal of History*, 30, 2 (2005), 107-34, (p. 127).

<sup>12</sup> Bagge, 'Christianization', p. 127.

detail. There would be no space left to discuss the legislators' motives for regulating inheritance and homicide in their laws, or the degree of transmission in the legislative process, which are the primary objectives. Detailed studies of the language and physical creation of the different laws have been carried out for several of the periods and regions included in my survey.<sup>13</sup>

Given the limitations of a doctoral thesis, a broad comparison must be done at the expense of details about context. The present study can only cover a long period of time at the expense of exploring the in-depth context to each legal source. A study with this perspective might provide answers to some of the questions of what, why and how law was incorporated into legal texts outside its original context.

Demarcations of time and space are dependant on each other. I will focus on a given time in the history of each region during which the legal activity was in an important phase, a point at which the legislation and the formation of authority came together. In this way we will travel through the different regions at different times. The project will therefore take the form of an overview of legal development in Western Europe. Another more mundane reason for this approach is that there are few possibilities of a synchronous comparison of the legal development across all the regions. After Roman law, secular law is first found in the successor states on the Continent, with the Anglo-Saxon kingdoms soon following, while the Nordic regions generated written laws centuries later (from the ninth century, albeit mainly in the eleventh and twelfth centuries). However, there are periods of internal legal development in each region, varying in lengths of time. The internal diachronic development will be studied in relation to legal transmission and influences. This will be explained further in chapter 3, on methodology.

A key point is that this is a study of the transmission of *laws-in-books*, not *laws-in-court*. The aim here is to compare the written material of the European legal systems, leaving out the practical use, or lack of use, of the same material in actual cases.<sup>14</sup> Legal transmission

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<sup>13</sup> See, for instance, Julius Ficker, 'Das Langobardische und die skandinavischen Rechte', *MIÖG*, 22 (1901), 1-50; Michael Jacoby, *Germanisches Recht und Rechtssprache zwischen Mittelalter und Neuzeit unter besonderer Berücksichtigung des skandinavischen Rechts: Gegenthese zu J. Grimm und zu romantischer Auffassung im 20. Jahrhundert*, in *Lexemdistribution und Lexemverhalten in Textsorten und Dialekten innerhalb historischer Sprachstufen*, vol. 1 (New York: Lang, 1986); Felix Liebermann, *Die Gesetze der Angelsachsen*, hrsg. im Auftrage der Savigny-Stiftung, 3 vols (Halle a. S.: Niemeyer, 1903-1916); Dorothy Whitelock, *English Historical Documents I, c. 500-1042* (London: Eyre & Spottiswoode, 1968) (hereafter Whitelock, *EHD*); Erik Kroman, 'Danmarks gamle love. Deres Alder og indbyrdes Slaegtskab', *Acta Philologica Scandinavica*, 29 (1971), pp. 111-126; Wormald, *Making of English Law*; Bjørg Dale Spørck, *Kong Magnus Lagabøters kristenretter: Innhold, språk og overlevering* (Oslo: Unipub, 2006).

<sup>14</sup> For studies of evidence of these laws in use, see Patrick Wormald, 'Leges Barbarorum, Law and Ethnicity in the Late Roman West', in *Regna and Gentes: The Relationship Between Late Antique and Early Medieval*

as it is revealed by jurists or by judges' implementation in their work of *ius* from other regions will be brought into the discussion through secondary sources, but will not be treated separately. The reason for excluding the 'reality' of the laws in use is that its inclusion would make the project too ambitious to achieve its aims. In addition, the law codes were not always used in their given jurisdiction, and they were not even necessarily made for use.<sup>15</sup> The main task of the laws was to legitimise the right to rule of those who issued them. Hence, written law formed the platform of their authoritative plan for society, whether this was ad hoc or well planned. Finally, many of the legal sources lack evidence of being applied in court. Even so, the question of whether the laws were intended for practical application impacts on our understanding of the legislator's motives for including relevant rules. Thus, the link between theoretical rules and practice will be addressed in the analysis.

In choosing how to approach legal history, John Hudson has suggested that the approach presented above, examining the ideology behind the legislation espoused by legislators, tends 'to emphasise the conscious ideas of those involved, as revealed by language and practice' and is commonly found among historians.<sup>16</sup> He points to general approach found among legal historians, who study the 'legal ideas' in law and 'their transformation often over periods longer than those treated by historians interested in matters involving law'.<sup>17</sup> My intention is to follow both these approaches in this study: examining the ideology of those involved in law-making, and – if not only the transformation – the transmission of these ideologies over a very long period of time. The agenda behind these approaches is to avoid the traditional division of history into periods, and possibly to discover long-term influences in secular legislation in Latin Europe.

### *Inheritance and compensation for homicide*

The thematic focus of the thesis is on laws on inheritance and laws concerning *wergild* as compensation for homicide. Wergild means the value of a man, Gmc: *wer* + *gilda* = man +

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*Peoples and Kingdom in the Transformation of the Roman World*, ed. by Hans-Werner Goetz, Jörg Jarnut and Walter Pohl, Transformation of the Roman World, 13 (Leiden: Brill, 2003), pp. 21-54 (pp. 45-46).

<sup>15</sup> Patrick Wormald, 'Lex Scripta and Verbum Regis: Legislation and Germanic Kingship, from Euric to Cnut', in *Early Medieval Kingship*, ed. by P. H. Sawyer and I. N. Wood (Leeds: University of Leeds, 1977), pp. 105-38 (p. 107).

<sup>16</sup> John Hudson, *The Oxford History of the Laws of England*, vol. 2, 871-1216 (Oxford: Oxford University Press, 2012), p. 4.

<sup>17</sup> Hudson, *Laws of England*, p. 5. Hudson credits S. F. C. Milson, *The Legal Framework of English Feudalism* (Cambridge: Cambridge University Press, 1976), p. 37.

price. These topics have been chosen because of their frequent occurrence in law, and because of their relationship to the process of state formation. The rules related to wergild and to inheritance could, I believe, illustrate the connection between the consolidation of power in society and legislation applicable to that society.

Generally speaking, we can say that all laws have one of two purposes: there are preventative laws that aim to control human interaction relationships and prescribe procedures for different situations, and there are laws that set prohibitions and impose sentences for breaches of them. The intent of the law is, again put roughly, to regulate these two purposes in order to create the rule of law in a society, and the institutions of inheritance and wergild, respectively, represent them: Inheritance anticipates a fixed distribution of land and wealth from one generation to the next, and compensation for homicide settles interpersonal conflicts.<sup>18</sup>

Laws on inheritance and wergild both reveal aspects of a society's structure of kinship and the position of the extended family in relation to the state structure. Inheritance regulated how land and resources were distributed, and how this was understood by the central power. The distribution of wealth could follow both lines of the family (cognatic), which indicates that the principles of inheritance were orientated in systems of kindred groups, or it could follow just one (agnatic) – usually the male – on the principle of linear groups. Linear systems of inheritance have been seen as an indicator of a weak central power. Laws on inheritance could thus represent how the lawgiver saw the reproduction of society by regulating the frames of kinship and family. It is therefore interesting to examine how the state authority as legal authority treated this, or influenced concepts of kinship through the laws on inheritance. Many studies in the last two decades have focused on family strategies relating to marriage and inheritance.<sup>19</sup> This study will take the legislator's point of view, and seek to expose the motives of the legal authority and the influences and pressures to which it was subject in the law-making process.

The study comprises details of the inheritance systems as they appear in written law. The systems used here derive from the Nordic research on family structures and strategies, which present us with two main models of inheritance distribution, called the *parentela system* and the *gradual system*. These are further presented in chapter 4. A comparison of the

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<sup>18</sup> This is expressed regarding inheritance by, for instance, Alexis de Tocqueville, *Democracy in America: Historical-Critical Edition of De la démocratie en Amérique*, vol. 1, ed. by Eduardo Nolla, trans. by James T. Schleifer (Indianapolis: Liberty Fund, 2010 [1835]), p. 11.

<sup>19</sup> See Lars Ivar Hansen, 'Slektskap, eiendom og sosiale strategier i nordisk middelalder', *Collegium Medievale*, 7, (1996), 103-154 (pp. 103-04) for further outlines and references.

systems reveals congruence between the separate legislation processes from different times and places. Regarding transmission, the similarities are interesting to follow. As the hypothesis stated at the beginning, all societies must have some system of inheritance. The question is then whether similarities in the written systems were a result of transmission or were due to societies arriving at obvious systems which leave traces in written law.

There are different theories concerning how to read the concept of wergild and compensation in the laws: whether it was traditional custom or new legislation regulating private conflicts, whether it was included in written law as punishment or as a basis from which the parties involved might try to reach agreement. We could ask what the governing purpose was of including the compensation in written law. Compensation for homicide or other violence is connected with the authorities' attempts at coping with violence. This is sometimes read as a civilising process in the forming states of Europe.<sup>20</sup> In my view, it is problematic to read the legislation on violence in general, and on homicide in particular, as a conscious programme of civilisation, either from a ruling legislating king or a legislating administration. Rather, the attempts to regulate violence through written law were primarily about establishing control, a virtue of necessity to maintain authority. To regulate violence through the law is part of a claim on a monopoly of legitimate violence and *an aspiration to a law system and legislation shared by its subjects*. Norbert Elias saw the monopolisation of state functions mentioned above as a process with two phases.<sup>21</sup> First, there is a phase of competition and elimination, secondly, a phase of consolidation that can evolve into public functions. However, Elias was not attentive to the function of legislation when discussing his theory of the civilisation process in the medieval (and modern) period, but legislation constitutes a central part of his second phase, particularly legislation to regulate violence, including homicide.

In the case of compensation for homicide, it is significant to examine whether relatives, according to secular law, had a duty to contribute to compensation paid by a killer of their kin group. A personal responsibility ascribed to the killer could indicate that the state's control of the individual was stronger than that of the family. The individual's actions were of concern to the state, and the family therefore lost some of its significance as the monitoring and restricting institution. Compensation has often been viewed as being presented to a society as an alternative to feud, and therefore as indicating the presence of

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<sup>20</sup> Ole Fenger, *Feide og Mandebod, Studier over slægtsansvaret i germansk og gammeldansk ret* (Copenhagen: Juristforbundets Forlag, 1971), pp. 9-10; Elias, *The Civilizing Process*, pp. 257-344.

<sup>21</sup> Elias, *The Civilizing Process*, pp. 276.

centralised power. Alternatively, wergild is argued to be an influence of the Church in a pre-state society. In some laws, part of the wergild was paid to the king or the treasury. Allowing some of the wergild to profit the state meant that the wergild was a source of governmental income and, therefore, a manoeuvre to strengthen central power by extending legal intervention in the state formation process. Such theories will be examined further in chapter 9.

Legal historians often name compensation for homicide as the concept of wergild. In most cases, wergild and the compensation for homicide are identical, as law prescribed that the wergild of the victim was due if someone killed someone else. In some laws, however, the legislators prescribed compensation with a basis in the wergild, but the sum could be  $x$  times the wergild or a fraction of the wergild. Compensation was the conflict resolution alternative to vengeance and continued violence, or an alternative or complete to other solutions, such as public prison or corporal punishment. Although most of the societies where these laws applied had no policing authority and little possibility of prosecution, secular law was recorded in written form with the thought that it would establish power. Written law was in itself a tool of governance.

The present study is based on the hypothesis that concept of law in early medieval Western Europe was based on an awareness of the existence of ‘crime’, the potential of law and the power of legislation. Compensation has been seen as a sign of an undeveloped system of punishment, rather than based on the idea of *crime*, a point that Patrick Wormald believes to be a misunderstanding in historical research.<sup>22</sup> According to this view, the idea of crime in the early Middle Ages was not the same as in later periods, because compensation was not a ‘proper’ punishment.<sup>23</sup> The motive of the legislator to provide a monetary solution for homicide is thus interesting in view of transmission. How did written law present the act of homicide, and a solution through compensation? Regarding transmission, a comparison of the legislation concerning compensation may reveal similarities in motives or process, and it may be possible to assess whether the similarities reflect the influence of earlier rules, or whether any given law was original with the similarity to earlier legislation being coincidental, that is, one society independently arriving at the same solution as another one.

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<sup>22</sup> Patrick Wormald, *Legal Culture in the Early Medieval West: Law as Text, Image and Experience* (London: Hambledon Press, 1999), p. 61.

<sup>23</sup> Frederick Pollock and Frederic W. Maitland *The History of English Law Before the Time of Edward I*, 2 vols (Cambridge: Cambridge University Press, 1899), I, pp. 46-48; II, pp. 449-52.

The thematic focus on inheritance and wergild has been chosen because of the many factors that could influence the legislation on these matters. Inheritance is the most normal, and ideally the most peaceful, way of distributing wealth within the family; compensation for homicide follows one of the most extreme events within society and is a method of conflict resolution in relation to the broader family or kin group. The continuation and transfer of wealth between generations affects the stability of existing society. The transfer of wealth to outside groups as compensation also affects the stability of society, by way of peace regulations. Therefore, the authorities would have an interest in deciding and controlling the principles lying behind such transfers. The position of sons, daughter and other relatives, and the wealth of women, play a role in family strategies, and thus they would be of interest to those people subjected to the law. This is particularly true of the landowning classes. The Church would also have an interest in these regulations, for both ideological and pragmatic reasons, since keeping the peace was of interest to the organisation, as was the distribution of wealth. These are the main interest groups for regulations on inheritance and compensation for homicide. The source material is, as has been pointed out, from periods of state formation. Legislation on principles of inheritance and compensation for homicide could therefore shed light on the roles of kin and the state and their interplay in this period of transformation. In what way was law-making influenced by the re-defining of authority versus the interests of the subjects?

In other words, this project will examine legal transmission from a narrow perspective in a broad geographical and chronological field. The purpose of this approach is to explore legal development over time and to examine transmission of secular law within this scope and timeframe. In extension of this goal, the thesis aims to explore the possibility of transmission a transmission of a European legal thought between the barriers historians tend to construct between periods, as between the period of the Roman empire and the early Middle Ages, and between the early and High Middle Ages.

## **1.2 Historiography**

In the present study, the subject of legal transmission is the overriding objective. Still, the two fields of inheritance laws and wergild will be discussed in depth, as they form part of the object of study. The thesis will cover medieval legal history, the history of state formation and the history of the family and marriage. Moreover, the invaluable research included on the

different historical periods is essential, consisting of research on early medieval European history, pre-Norman England and Scandinavia. A limited outline follows of some of the main works assisting this study.

### *Studies on transmission and transnational perspectives*

Several works have examined one, or have compared a selection, of the regions that are included in the present study. However, there are few that have provided a broader picture of the legal landscape of Europe, from its early beginnings after Roman law on the Continent and in England, following this all the way through the legal revolution in the twelfth century as far as the later secular legislation in the later state formations in the Nordic realms. A strong advocate for studying transmission of law, was legal historian Alan Watson. In his work *Legal Transplants*, Watson argued that most law was a transmission from older legal sources.<sup>24</sup> His unequivocal position, that most legislation is a legal transplant, has caused critical reactions from other legal scholars, among them Pierre Legrand.<sup>25</sup> Watson's theories and the debate on legal transmission will be discussed in more depth in chapter 3.

In the late 1800s, several German legal historians made thorough comparisons of the different European and Scandinavian laws from the medieval period, with works by Karl von Amira and Julius Ficker among others.<sup>26</sup> The nineteenth-century German school of proving transmission and contact was abandoned for decades due to the scholars' affinity for the idea of a common Germanic *Urrecht*.<sup>27</sup> In the Nordic countries, the prevailing view was that Nordic laws originated independent of continental legal culture, a view that was clearly affected by nationalistic trends and that was very tenacious.

Works exploring external influences on law have been a disputed field within legal history. Karl von Amira's and Konrad Maurer's research has revealed a relationship between medieval secular laws from the Continent, Britain and Scandinavia.<sup>28</sup> Grand comparative

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<sup>24</sup> Alan Watson, *Legal Transplants, An Approach To Comparative Law* (Edinburgh: Scottish Academic Press, 1974).

<sup>25</sup> Pierre Legrand, 'The Impossibility of "Legal Transplants"', *Maastricht Journal of European and Comparative Law*, 111 (1997), 111-24.

<sup>26</sup> Karl von Amira, *Das altnorwegische Vollstreckungsverfahren. Eine rechtsgeschichtliche Abhandlung* (Munich: Ackermann, 1874), p. xviii; Ficker, 'Das Langobardische'.

<sup>27</sup> Or 'primal "Germanic" law' as formulated in Wormald, *Making of English Law*, pp. 11-12.

<sup>28</sup> For instance, in Karl von Amira, *Nordgermanisches obligationenrecht*, 2 vols (Leipzig: Veit & compagnie, 1882-1895); Konrad von Maurer *Vorlesungen über altnordische Rechtsgeschichte*. 1-5, (Leipzig: Deichert, 1907-1910).

theories, such as Henry Maine's primary work *Ancient Law*, revealed diachronic correspondences between early and modern law.<sup>29</sup> Although many studies from the nineteenth century shed light on or suggested correlations between early legal systems, methodological difficulties of a comparative law approach led to such an approach falling into disuse.<sup>30</sup> It was too difficult to conclusively determine the source of influences. Rather, legal historians studied the particularities of the individual systems. Then, in the 1960s and 70s, several legal scholars argued that a comparative approach nevertheless contributed to our knowledge of legal systems and their origin. The theories of Alan Watson, that changes in law mainly happens through transplants have already been mentioned. Others, as Bernard S. Jackson argued that comparative law of ancient systems could answer problems in modern comparative law.<sup>31</sup> A comparative study with historical methodological approaches may contribute to the topic without the obstacles associated with comparative law.

After historians from the 1960s turned their back on the hypothesis of originality in the Nordic laws, many pointed out different sources of influence on the Scandinavian and Icelandic laws. Roman influence on Nordic legal culture has been described by legal historian Ole Fenger.<sup>32</sup> His work *Fejde og Mandebod (Feud and Wergild)* from 1971 is both an important discussion of the correlation between state formation and violence, and also one of the few works discussing several western European secular laws from the early and High Middle Ages. Fenger is sceptical of a comprehensive comparative study of law, but his work is still a broad comparative study both in time and space, and as such the work closest in method to the present study. He compares the Danish material with some Germanic, Anglo-Saxon and Norman legislation on feud and compensation. However, he omits the south-western continental laws of the Visigoths and the Burgundians, on the basis that they were incorporated into the Roman empire, and further omits other Germanic laws, except the Lombard and Frankish laws, on the basis that the king and the Church played a similar role in all these jurisdictions.<sup>33</sup> Similarly, he excluded Nordic areas other than the Danish area, because he saw them as similar in content and exposed to the same influences.<sup>34</sup> The Danish

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<sup>29</sup> Henry S. Maine, *Ancient Law: Its Connection with the Early History of Society and Its Relation to Modern Ideas* (London: John Murray, 1861).

<sup>30</sup> Bernard S. Jackson, 'Evolution and Foreign Influence in Ancient Law', *American Journal of Comparative Law*, 16 (1968), 372-90 (pp. 372-73).

<sup>31</sup> Jackson, 'Evolution', pp. 373-74.

<sup>32</sup> Ole Fenger, *Romerret i Norden*, Berlingske leksikon bibliotek 119 (Copenhagen : Berlingske Forlag, 1977).

<sup>33</sup> Fenger, *Fejde og Mandebod*, p. 209.

<sup>34</sup> Fenger, *Fejde og Mandebod*, pp. 210-12.

legal historians Ditlev Tamm and Helle Vogt have discussed transmission in the Nordic laws with a focus on the influence of canon law.<sup>35</sup>

Studies of exchange in early legal culture mainly consist of works that focus on one law and its relationship with Roman law. Jill Harries's various articles on the Visigothic legal material can serve as an example, as can Brigitte Pohl-Resl and Walter Pohl's work on Lombard law.<sup>36</sup> In 1994, the Italian jurist Maurizio Lupoi published the substantial work *Alle radici del mondo giuridico europea* in which he compares the development of the European legal systems from AD 600 to 1100. He demonstrates many kinds of contact and transmission, but mainly examines the development of jurisdiction. An English translation was published in 2000, as *The Origins of the European Legal Order*.<sup>37</sup> Lupoi, although not believing in an *urrecht*, argues for a shared background for both Roman and Germanic law. And, he asserts that it is this ancient shared legal system, rather than adoption (or transmission), which explains shared features in the laws.<sup>38</sup> Concerning medieval laws in general, some scholars, like Lupoi, have argued for the existence of a *ius commune*, also called the European common law, a shared European legal standard.<sup>39</sup> But there are many questions still unasked and unanswered. Jørn Øyrehagen Sunde, among others, has called for a systematic analysis of transmission within the Norwegian medieval laws, in what he labels a shift of paradigms in Nordic legal history.<sup>40</sup> The same appeal could be made for all medieval law codes.

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<sup>35</sup> Ditlev Tamm, *Dansk retshistorie*, 2nd edn (Copenhagen: Jurist- og Økonomforbundets Forlag, 1996); Helle Vogt, *Slægtens funksjon i nordisk høymiddelalderret – kanonisk retsideologi og fredsskabende lovgivning* (København: Jurist- og Økonomforbundets Forlag, 2005). Vogt is translated into English: Helle Vogt, *The Function of Kinship in Medieval Nordic Legislation* (Leiden: Brill, 2010).

<sup>36</sup> See, for instance, Walter Pohl, 'The Empire and the Lombards: Treaties and Negotiations in the Sixth Century', in *Kingdoms of the Empire: The Integration of Barbarians in Late Antiquity*, ed. by Walter Pohl (Leiden: Brill, 1997), pp. 75-134; Brigitte Pohl-Resl, 'Legal Practice and Ethnic Identity in Lombard Italy', in *Strategies of Distinction, The Constructions of Ethnic Communities 300-800*, ed. by Walter Pohl and Helmut Reimitz, *Transformation of the Roman World*, 2 (Leiden: Brill, 1998), pp. 205-19; Jill Harries, 'Not the Theodosian Code: Euric's Law and Late Fifth-Century Gaul', in *Society and Culture in Late Antique Gaul*, ed. by Ralph Mathisen and Danuta Shanzer (Aldershot: Ashgate, 2001), pp. 39-51.

<sup>37</sup> See note 2, above.

<sup>38</sup> Lupoi, *Origins*, p. 23.

<sup>39</sup> Lupoi, *Origins*, p. 424.

<sup>40</sup> Jørn Øyrehagen Sunde, 'Internasjonaliseringa av retten i mellomalderen – ei forskingsutfordring', in *Den juridiske komedien - Ein antologi over tanke og praksis i den norske rettskulturen si historie*, ed. by Jørn Øyrehagen Sunde (Bergen: Fagbokforlaget, 2007), pp. 54-71. See also Gudmund Sandvik, 'Dei norske landskapslovene frå mellomalderen. Nokre aktuelle problemstillingar og forskingsoppgåver', in *Nordiske middelalderlover. Tekst og kontekst, Rapport fra seminar ved Senter for middelalderstudier, 29.-30. nov. 1996*, ed. by Audun Dybdahl and Jørn Sandnes (Trondheim: Tapir, 1997).

## *Regional studies*

The vast bulk of Roman law forms a backdrop for analysing transmission in medieval secular legislation. Understanding the motives behind the Roman legislation on inheritance and homicide from a time period of several centuries is necessary. Some useful works on Roman law shed light on how the content was formed and later interpreted. William Buckland's classic textbook includes thorough discussions of relevant questions in this respect.<sup>41</sup> One of the basic textbooks in English has been produced in a new edition. Jolowicz's *Introduction on Roman Law* was published in 1932, and was revised by Barry Nicholas in 1972.<sup>42</sup> By treating republican law, Jolowicz supplemented the work of Buckland. The revised edition also commented on the transformation of earlier law in late antiquity. More recent works of a similar note are by Georg Mousourakis, and, more directly concerning the legislative process, the basic but thorough *The Sources of Roman Law: Problems and Methods for Ancient Historians*, by Olivia F. Robinson.<sup>43</sup> Many historians have explored the transitional period of the late Roman world and its law. Worth mentioning in respect of transmission and the topics of inheritance and homicide are Judith Evans Grubbs and John Matthews, who have identified, respectively, the motives behind changes in the laws of Emperor Constantine's family legislation and the motives behind the Visigothic use of the Theodosian Code.<sup>44</sup>

Regarding early medieval law, some representatives for the nineteenth-century German *Rechtsschule* has already been mentioned. An important contribution to our understanding of the Germanic legal sources is Katherine Fisher Drew's translations with comments.<sup>45</sup> Scholars are taking an increased interest in early medieval legislation, too. Law makes up much of the written sources for the years AD 400 to 800, and naturally they must be consulted. Even so, in recent decades, a group of historians have contributed to a renewal in

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<sup>41</sup> William W. Buckland, *A Text-book of Roman Law: From Augustus to Justinian* (Cambridge: Cambridge University Press, 1921).

<sup>42</sup> H. F. Jolowicz and B. Nicholas, *Historical Introduction to the Study of Roman Law* (Cambridge: Cambridge University Press, 1972).

<sup>43</sup> O. F. Robinson, *The Sources of Roman Law: Problems and Methods for Ancient Historians* (London: Routledge, 1997); George Mousourakis, *Fundamentals of Roman Private Law* (Berlin: Springer, 2012).

<sup>44</sup> Judith Evans Grubbs, 'Constantine and Imperial Legislation on the Family', in *The Theodosian Code: Studies in the Imperial Law of Late Antiquity*, ed. by Jill Harries and Ian Wood (London: Bloomsbury Academics, 1993), pp. 120-142; Judith Evans Grubbs, *Law and Family in Late Antiquity, The Emperor Constantine's Marriage Legislation* (Oxford: Oxford University Press, 1999); John F. Matthews, 'Interpreting the Interpretations of the Breviarum', in *Law, Society and Authority in Late Antiquity, Shifting frontiers in Late Antiquity*, ed. by Ralph W. Mathisen (Oxford: Oxford University Press, 2001), pp. 11-32.

<sup>45</sup> Katherine Fischer Drew, trans., *The Burgundian Code* (Philadelphia: University of Pennsylvania Press, 1972); Katherine Fischer Drew, trans., *The Lombard Laws* (Philadelphia: University of Pennsylvania Press, 1996 [1973]); Katherine Fisher Drew, *The Laws of the Salian Franks* (Philadelphia: University of Pennsylvania Press, 1991).

the field of Germanic law, through a series of international seminars leading to publications in which the sources are studied from new angles. A significant introduction to these new approaches was the anthology *The Settlement of Disputes in Early Medieval Europe*, edited by Wendy Davies and Paul Fouracre, including important contributions from Chris Wickham and Patrick Wormald, among others.<sup>46</sup> In the series ‘Transformation of the Roman World’, Other major contributions to the field were made, such as the anthology *Strategies of Distinction, The Construction of Ethnic Communities, 300-800* (1998), edited by Walter Pohl, in which Dietrich Claude, Wolf Liebescuetz, Hagith Sivan and others explored the multifaceted ethnic and legal identities of people in the former Roman provinces.<sup>47</sup> Similar contributions have been published by, for instance, Jill Harries and Ian Wood, working on late Roman legislation and early medieval legal identity in the successor states.<sup>48</sup> Walter Pohl and Brigitte Pohl-Resl have studied Germanic understanding of Roman law in the new legislation.<sup>49</sup>

Frederick Pollock and Frederic William Maitland’s legal classic from 1895, *The History of English Law Before the Time of Edward I & II*, has been a major work of reference for scholars of medieval English law.<sup>50</sup> The work provides an important understanding of early English law, although it has a tendency to view early law as that which was later replaced by the origins of English common law and Norman law, rather than as having historical value in and of itself. Contemporary Felix Liebermann’s complete text of the materials for the history of English law, *Die Gesetze der Angelsachsen*, is alone a towering contribution to the study of early English law.<sup>51</sup> His critical comments provide insight into the variation and transmission of the manuscripts, as well as insight into the legislation behind them. An important contributor to understanding the medieval English, as well as European, laws is Patrick Wormald. In several publications, he provided new perspectives on both the legal sources and the legislators. An important contribution to the debate on early medieval laws as sources was his article from 1977, ‘*Lex Scripta and Verbum Regis: Legislation and*

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<sup>46</sup> Wendy Davies and Paul Fouracre, eds, *The Settlement of Disputes in Early Medieval Europe* (Cambridge: Cambridge University Press, 1986).

<sup>47</sup> Walter Pohl and Helmut Reimitz, eds, *Strategies of Distinction: The Constructions of Ethnic Communities 300-800, The Transformation of the Roman World, 2* (Leiden: Brill, 1998).

<sup>48</sup> Jill Harries and Ian Wood, eds, *The Theodosian Code, Studies in the Imperial Law of Late Antiquity* (London: Bloomsbury Academics, 1993); Harries, ‘Not the Theodosian Code’.

<sup>49</sup> Walter Pohl, ‘Frontiers in Lombard Italy: The Laws of Ratchis and Aistulf’, in *The Transformation of Frontiers, From Late Antiquity to the Carolingians*, ed. by Walter Pohl and Ian Wood, *The Transformation of the Roman World*, 10 (Leiden: Brill, 2001), pp. 117-41; Pohl-Resl, ‘Legal Practice and Ethnic Identity’.

<sup>50</sup> See note 23, above.

<sup>51</sup> Felix Liebermann, *Die Gesetze der Angelsachsen*, hrsg. im Auftrage der Savigny-Stiftung, 3 vols (Halle a. S.: Niemeyer, 1903-1916).

Germanic Kingship, from Euric to Cnut'.<sup>52</sup> He discussed the origins of these laws, and claimed they should primarily be seen as forming the basis for kingship. He did, however, argue that Germanic codes cannot be dismissed as normative source material, as they reveal aspects of kingly ideology. Arguably, his most influential work, *The Making of English Law*, published in 1999, gave an account of the early English laws from the seventh to the twelfth century. The work is an unprecedented account of both the status and transmission of the legal manuscripts and a discussion of the thought behind the legislation. Wormald also compares the earliest legal remains of the Heptarchy to earlier and contemporary continental laws.

The Scandinavian provincial laws and national codes have also been a focus of interest from the mid-1800s, and an object of interest for the above-mentioned German *rechtschule*. The legal sources constitute a large part of the relatively sparse medieval written material from Scandinavia. Thus, the laws have always been researched. However, these sources have been subject to a renewed scholarly interest in the last two decades.<sup>53</sup> Nordic, but also international scholars have studied them from new perspectives. Scholars from both history and legal studies have contributed to a fruitful methodological approach and theoretical understanding of the legal sources and their origin. On the other hand, legal historian Helle Vogt studied all the Scandinavian provincial laws in her dissertation from 2005, *Slægtens funksjon i nordisk høymiddelalderret*, revised and published in English in 2010 as *The Function of Kinship in Medieval Nordic Legislation*.<sup>54</sup> In her thorough survey and comparison of the rules concerning wergild, inheritance and marriage, she covers sources of outside influence. Vogt's scope is, nevertheless, not the transmission of normative ideology, but the responsibilities of kin as they are portrayed in legislation, and the incorporation of canonical kinship in the early Nordic laws.

### *Inheritance*

Inheritance laws as a field of research extend into several related fields, such as marriage, property and kinship. Nordic scholars have contributed to the wider field of inheritance legislation, both as regulations and as social phenomenon. By putting forward new ideas of

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<sup>52</sup> Wormald, 'Lex Scripta', pp. 105-38.

<sup>53</sup> A particular example is the series of conferences and publications from The Carlsberg Academy Conferences on Medieval Legal History, organised by Danish academics, from 2005 onwards.

<sup>54</sup> Vogt, *Slægtens funksjon* and Vogt, *Function of Kinship*.

strategies of social reproduction and strategies of kinship, social historians such as Lars Ivar Hansen and Birgit Sawyer, and legal historians like the above-mentioned Helle Vogt, express perspectives on medieval family strategies, and legislation concerned with these, both as a matter of the family strategies themselves and in relation to the interests of the Church and the secular authorities.

Some scholars, including Alexander Murray, have studied the concept of kinship in certain Germanic societies as an expression of societal development.<sup>55</sup> Others have studied inheritance legislation as a channel through which to study family relationships, or the position of women in medieval societies, such as Suzanne F. Wemple, who has studied Frankish women, and Constance Bouchard, who has studied marriages in the tenth and eleventh centuries.<sup>56</sup> Anthropologically orientated scholars, such as Jack Goody, have communicated new perspectives on the family systems of earlier societies, for instance the function of different inheritance systems.<sup>57</sup> In this thesis, inheritance legislation assumes the role of an expression of the legislators' view of the reproduction of society.

### *Wergild and compensation*

Patrick Wormald and Stefan Esders have analysed wergilds as they appear in law. Esders argues that the amounts of compensation stipulated had functions of complex status denominators, whereas the wergilds described in the Germanic laws assume the elite status of the warrior nobility of the Germanic settlers in continental Europe.<sup>58</sup>

The late Lisi Oliver's work was closely connected with wergild and compensation for homicide. In the book *The Body Legal in Barbarian Law* from 2011, Oliver made a thorough survey of the tariffs prescribed by secular Germanic law in the early Middle Ages.<sup>59</sup> She

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<sup>55</sup> Alexander C. Murray, *Germanic Kinship Structure: Studies in Law and Society in Antiquity and the Early Middle Ages* (Toronto: Pontifical Institute of Mediaeval Studies, 1983).

<sup>56</sup> Suzanne Fonay Wemple, *Women in Frankish Society. Marriage and the Cloister 500 to 900* (Philadelphia: University of Pennsylvania Press, 1981); Constance Bouchard, 'Consanguinity and Noble Marriages in the Tenth and Eleventh Centuries', *Speculum*, 56 (1981), 268-87.

<sup>57</sup> Jack Goody, 'Inheritance, Property and Women: Some Comparative Considerations', in *Family and Inheritance; Rural Society in Western Europe, 1200 1800*, ed. by J. Goody, J. Thirsk, and E. P. Thompson (Cambridge: Cambridge University Press, 1976), pp. 10-36; Jack Goody, *The Development of Family and Marriage in Europe* (Cambridge: Cambridge University Press, 1983).

<sup>58</sup> Stefan Esders "'Eliten" und "Strafrecht" im frühen Mittelalter. Überlegungen zu den Bußen- und Wergeldkatalogen der *Leges barbarorum*', in *Théories et pratiques des élites au haut Moyen Âge*, ed. by Bougard, François, Goetz, Hans-Werner and Régine Le Jan, Collection Haut Moyen Âge, 13 (Turnhout: Brepols, 2011), pp. 261-282.

<sup>59</sup> Lisi Oliver, *The Body Legal in Barbarian Law* (Toronto: University of Toronto Press, 2011).

reveals the many types of compensation for many types of injuries. Although she has provided some accounts of the individual wergilds that are less precise, she has made a valuable categorisation of the regional differences. Not many works have concentrated solely on the system of compensation in written laws, apart from the already mentioned works by Vogt. However, inevitably when discussing compensation and the concept of wergild, the related topics of feud and vengeance must also be discussed. Many scholars have contributed to the understanding of feud and the relationship between compensation and vengeance. One example is Paul Hyams, who, through his many works, has demonstrated the complexity of the feuding system as a system within medieval societies. Through earlier research by Max Glükmann, with his central work 'Peace in the Feud', and Wallace-Hadrill, with his book *The Long-Haired Kings*, scholars have touched upon the function of compensation as a tool for controlling vengeance.<sup>60</sup> One intention of this thesis is to bring attention to the widespread legislation on compensation due to its connection with these other topics in respect of the relationship between people as described by the legislator.

## **Conclusion**

Without having the intention of either proving a common legal origin for the German laws or following the idea of a European common law, I believe it is fruitful to examine these similarities more closely, with new approaches. To paint with broad strokes can reveal other connections in medieval law than thorough a point-by-point analysis. The desired contribution of the present study is to provide more points of reference for understanding European medieval legislation and legal thought, unrestricted by geographic and periodic categorisations.

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<sup>60</sup> Max Gluckman, 'The Peace in the Feud', *Past and Present*, 8 (1955), 1-14; John M. Wallace-Hadrill, *The Long-Haired Kings and Other Studies in Frankish History* (London: Methuen, 1962).

## 2. Sources and Context: Medieval Secular Law

In search of transmission, a number of legal sources from the early and High Middle Ages will be examined. Laws issued, and law codes ordered, by royal authority are the main sources, although some of the extant laws analysed, such as the Scandinavian provincial laws, originated outside of royal power. Laws enacted by kings provide an image of kingly legislative power and say something about the motivation of the king as legislator. These laws, enacted through royal initiative, will also contain an element of state administration. For example, in the laws on inheritance and homicide, kings' laws provide an insight into the state authority's attitude towards its subjects' private matters. The significance for this study of these sources lies not in how they functioned within the legal system, or whether they were even used, were outdated or were really just produced for display. Their significance lies in what they have to say about legal transmissions or legal originality, and it is for this reason they are included. Other legal sources are also examined, such as *ius* and works of normative content that are not law.

The term 'law' indicates more than one thing today, as was the case in the early and High Middle Ages. Law could be the custom and traditions experienced by a group, or it could be written rules, or it could be both. The heritage of Rome created the notion of written law in Europe. Both canon law and the different attempts at making or writing down law by secular rulers illustrate the surviving ideological virtue of making laws for humankind. Not all of the sources in the present study are considered unequivocally to be law. Some of them, such as the jurisprudence of the Roman jurists, did not have, or were not intended to have, legal authority, and some, such as some of the Danish provincial laws, may not have been promulgated.<sup>61</sup>

Regardless of whether the law was secular or canonical, the Christian clergy were involved in writing or advising on many of the laws. As others have pointed out, the Church probably only preserved those records serving its own interests, i.e., the records from which the clergy profited.<sup>62</sup> We can assume the same was the case in the clergy's role in law-making

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<sup>61</sup> Per Andersen, *Lærd ret og værdslig lovgivning, Retlig kommunikation og udvikling i middelalderens Danmark* (Copenhagen: Jurist- og økonomforbundets forlag, 2006), p. 16.

<sup>62</sup> Chris Wickham, 'Land Disputes and Their Social Framework in Lombard-Carolingian Italy, 700-900', in *The Settlement of Disputes in Early Medieval Europe*, ed. by Wendy Davies and Paul Fouracre (Cambridge: Cambridge University Press, 1986), pp. 105-24 (p. 105); Paul Fouracre, "'Placitia' and the Settlement of Disputes in Later Merovingian Francia', in *The Settlement of Disputes in Early Medieval Europe*, ed. by Wendy Davies and Paul Fouracre (Cambridge: Cambridge University Press, 1986), pp. 23-44 (p. 32); Oliver, *Body Legal*, p. 26.

and law-keeping, that they made laws which were in their interest. The laws were survived nevertheless, possibly because of the status written law held.

Investigating the practical usage of law exceeds the scope of this thesis. What is relevant, however, to a discussion of the transmission of law is whether the legislator expected his rules to be used in real cases, and whether the rules were made for practical use. Wormald held that Germanic law was more of a 'poster' than practical legal works.<sup>63</sup> The law was, he argued, a display window for the legislative strength of secular authority.

In some modern languages, there is a distinction between 'law' and 'right'. In German, the words are *Gezetz* and *recht*, in French *loi* and *droit*, in Norwegian *lov* and *rett*, and with some ambiguity, in Latin the pair are *lex* and *ius*. Modern English does not have the same pairing with the same semantic content as these other languages. Loosely translated, there is a distinction between the law, as in the rules of law, and rights, as in legal concepts, the legal system and rights according to normative standards. In these languages, the term 'right' also has the antonym 'unright'. As Sara M. Pons-Sanz has pointed out, *riht* can be found in Archbishop Wulfstan's (†1023) canons as a synonym for law, *lagu*,<sup>64</sup> although often the semantics takes more of the modern meaning of right, being the right to do something, or the right of God.<sup>65</sup> In Old English, a division between law and right existed, with *lagu* and *riht*, possibly loans from Old Norse.<sup>66</sup> But *riht* would be overtaken by *lagu* in the language, and *riht* seems to have fallen out of use. It is possible that *riht* has the semantics of right and obligations, and not *law* per se, except in Wulfstan's works.<sup>67</sup> Later English writings on law give the same variations. John Hudson points to the many meanings of both the Latin and the Old English words that are equivalent to the modern English word 'law'; the word had many meanings and much wider fields of meaning than 'a law' or 'a rule', which is similar to the many ways in which the term is used in modern language.<sup>68</sup> The term *riht* also had many meanings, although in many legal documents it meant a particular right. The Latin or Anglo-

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<sup>63</sup> Wormald, *Lex Scripta*, p. 107; Adolf Schmitt-Weigand, *Rechtspflegedelikte in der fränkischen Zeit* (Berlin: W. de Gruyter, 1962), pp. 118-19.

<sup>64</sup> Pons-Sanz, Sara María, *Norse-derived Vocabulary in Late Old English Texts: Wulfstan's Works, A Case Study* (Amsterdam: John Benjamins Publishing, 2007), pp. 104-05.

<sup>65</sup> Pons-Sanz. *Norse-derived Vocabulary*, p. 103.

<sup>66</sup> Here *lagu* was an alternative to the native *æ*, meaning 'law'. See Wormald, *Making of English Law*, p. 101.

<sup>67</sup> Pons-Sanz. *Norse-derived Vocabulary*, p. 103. Pons-Sanz, refers to A. G. Kennedy, 'Cnut's Law Code of 1018', *Anglo-Saxon England*, 11 (1982), 57-81 (p. 68).

<sup>68</sup> John Hudson, *The Formation of the English Common Law – Law and Society in England from the Norman Conquest to Magna Carta* (London: Longman, 1996), pp. 3-4; Hudson, *Laws of England*, p. 244.

Norman words for law and right could take the same meaning, according to Hudson, and the two terms cannot automatically be interpreted as meaning different things.

In this thesis, I will use the term ‘law’ both in a wide sense, meaning normative concepts and scriptures, and in a narrow sense, meaning rules issued by a legislator conscious of the act. The status of a source will be clarified when needed. Moreover, the source material consists of written secular law. The legal sources will be read in their written context, described above as laws-in-books, as opposed to considering their possible or actual reception in real cases.

## **2.1 Using normative sources: Law as image of ideal societies**

There are several pitfalls to using normative sources. As they are idealistic, the normative sources should not be taken at face value as a mirror of society.<sup>69</sup> Thus, a law cannot represent *the society* it covers. To use normative sources as mirror of *the norms in a particular society* is also treacherous, because it is the creator of the law who sets the norms. One should try to disentangle the expectations of the subjects from the expectations of the legislators, in order to assess what has influenced the written law. Nevertheless, to use normative sources as a mirror of the *norms of the legislator* also calls for caution. The text could mirror the norms that the legislator wanted to be mirrored, or the loan of foreign laws possibly had coincidental results. To find the motives behind a section of a law, an edict or a law code will form the main goal of this study, though the task is fraught with difficulties.

The head of state expected to fulfil the role of *Rex Iustus*, while his learned assistants in all probability formulated the words or helped provide the right formulas. The law was the tool of kings, but it was made by advisers, notaries and scholars. This group of disparate agents involved in legislation is what Alan Watson has termed the ‘legal elite’.<sup>70</sup> Watson’s assertion is that those who made the law do not have legislative authority. By contrast, he claims, those who were invested with legislative authority did not make the law, or did not have legislative competence. In evaluating this process, Alan Watson’s theory of the utility of legal transplants becomes relevant, presented in chapter 3.<sup>71</sup> His point is how much easier is is

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<sup>69</sup> Robinson, *Sources of Roman Law*, p. 102; Chris Wickham, *The Inheritance of Rome: A History of Europe from 400 to 1000* (London: Allen Lane, 2009), pp. 14-15.

<sup>70</sup> Watson, *Legal Transplants: An Approach*, pp. 95-101, 112-117; Alan Watson, ‘Comparative Law and Legal Change’, *The Cambridge Law Journal* 37, 2 (1978), 313-36 (p. 328).

<sup>71</sup> Alan Watson, ‘Aspects of Reception of Law’, *The American Journal of Comparative Law*, 44, 2 (1996), 335-51, (pp. 335-39).

and was to borrow existing law, than making new. Existing law would be useful for the creators of new rules.

When it is problematic to use normative material as a mirror of society, what can we read on transmission and originality from its context? Powerful groups could be a possible source of influence on the legislator. Another question is what the law represented to the society over which it had jurisdiction. Different laws had different functions other than being used in court. Constitutional legislation, for example, was meant for the absolutely highest political level, although in Visigothic Spain, for instance, it can be seen that the contemporary top elite disregarded even this.<sup>72</sup> The rules may contain descriptions of family relationships, but they do not necessarily produce a valid image of family life in any given society, and they may not have been recognised by the majority of subjects. Many legislators comment on how the members of different classes should behave, but the actual conception of class and status in the relevant society may have been different. The normative material does, after all, only present a model of what society was or should be according to the creator of the text. What the sources most accurately represent is the mind and views of those legislating and writing down the legal texts.

But can we say something of how the legislator's conceptions of society leave traces in the written law? For the subjects in a jurisdiction, the concept of justice presumably derived from their own experience. The norms or ideals of the legal elite also came from their views of the society around them. In the definition that Reinhart Koselleck gives of *Erfahrungsraum*, the *space of experience*, we can say that the space of experience of the legal elite would determine how their society was described.<sup>73</sup> Thus, to follow Koselleck's theories on the pre-modern conceptions of the relationship between the past and the future, *Erwartungshorizont*, the *horizon of expectation*, we can say that the horizon of expectation of the legislators was closely related to their past experience. In other words, the legal elite would describe society in familiar terms, even if their rules were innovative. The normative expectations of how law would work were connected to the legal elite's expectations of change, or rather status quo. In most cases, we can assume that making law was about preserving established traditions, as Felix Jolowicz asserted was the case for the lengthy Roman legal development.<sup>74</sup> However, in some cases, the idea of writing a law was a novelty,

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<sup>72</sup> Wickham, *Inheritance of Rome*, p. 130.

<sup>73</sup> Reinhart Koselleck, "Erfahrungsraum" und "Erwartungshorizont" – zwei historische Kategorien', in Reinhart Koselleck, *Vergangne Zukunft. Zur Semantik geschichtlicher Zeiten*, (Frankfurt: Suhrkamp, 1989 [1979]), pp. 349-75; Reinhart Koselleck, *Begreber, tid og erfaring* (Copenhagen: Hans Reitzels Forlag, 2007), pp. 33-38.

<sup>74</sup> Jolowicz and Nicholas, *Study of Roman Law*, pp. 4-5.

or in development. In the latter instances, we could argue that the legislators sought to change the future by exercising law. The changes are still derived in the space of experience. Auður Magnúsdóttir gives a useful view of the problem of normative sources when she discusses the value of the rejected law code *Járnsiða* as source material.<sup>75</sup> She asserts that although laws are normative in character, they rarely shed light on existing norms, and even less often on reality.<sup>76</sup> An analysis of the legal texts can shed light on the conflicts surrounding the norms, and an analysis of the reception of a law can reveal it as an ‘expression of conflict between different interests in the society of which it is a product’.<sup>77</sup>

Pre-modern laws rarely described what was not allowed, but more often set out the proper approach to given circumstances, or the proper consequences for a crime. In the sense that there was no police force to execute the law, descriptions of procedure would be the sum of the capacity of the written law. Little real power could enforce a prohibition. In the present study, this is relevant to the rules on inheritance and homicide. An inheritance regulation would mainly contain instructions on how an inheritance should rightfully be distributed, and how to solve conflicts arising from this, if they came before the legal system. A regulation on homicide would mainly contain rules on how to assess the nature of the crime and how to punish and settle the crime. An exception might be Roman law, which was enforced with a certain authoritative apparatus, in the sense that crimes that were considered public offences would be prosecuted without the need for complaint from the injured parties. Still, most of Roman written law implies private action, although brought before public courts. Hence, the laws cannot reveal what people could or could not do, and they can hardly tell us any of the normative standards of society. A private agreement that went against written contemporary law would most likely not be checked by an official authority.<sup>78</sup> Nevertheless, the creation of the texts that we commonly call laws had a meaning, a motivation or an agenda. If the legislator was not assuming that the subjects would follow the law, or was not imagining that he would have the power to enforce it, the rules nevertheless represented existing norms, possibly in society, but more definitely in the mind of the legislator. Who made the law is thus relevant, both the king who was ascribed credit for the law and his legal advisors, the obscure legal elite.

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<sup>75</sup> Auður G. Magnúsdóttir, ‘Islänningarna och arvsrätten 1264-1281’, in *Arverettens handlingsrom. Strategier, relasjoner og historisk utvikling, 1100-2000*, Rapporter til det 27. nordiske historikermøte, Tromsø 11-14 August 2011, *Speculum Borelae*, no. 15, ed. by Per Andersen (Stamsund: Orkana akademisk, 2011), pp. 27-38.

<sup>76</sup> Auður G. Magnúsdóttir, ‘Islänningarna och arvsrätten’, p. 36.

<sup>77</sup> *Ibid.*

<sup>78</sup> Robinson, *Sources of Roman Law*, pp. 118-19.

## 2.2 The legal sources and terminology

The laws included in this study were chosen according to specific criteria: the law must be mainly a secular law constructed by some kind of secular authority; the law must survive in extended form, and not be entirely fragmentary or reconstructed; and the law must be part of a regional collection of laws that originate at different times and thus represent different legislation within overlapping jurisdictions, which can reveal developments over time within a region. The secular non-Roman source material on which I will mainly focus comes from three geographical regions with different time spans. These are the Germanic secular laws from the southern European kingdoms of the Visigoths, the Lombards and the Burgundians, together with the laws of the Salian Franks, all originating in the period from c. 475 to 800, then the laws from the Anglo-Saxon realms from c. 602 to 1028, and lastly, the Scandinavian medieval laws from c. 1070 to 1350.

Therefore, some of the material overlaps in its date of origin. The regions also all have internal diachronic developments, which makes it possible to study the legal development of the region. In addition, these regions coalesced into states simultaneous with their internal diachronic development, a process which thereby invites a discussion about legal development and the transmission of law in the process of state formation. We can study whether an internal process of consolidation stimulated original legislation more than a stable territorial rule. As the remit of this thesis does not cover a thorough reading of manuscripts, I will rely on the printed editions of each law. In most cases, these are harmonised versions of the surviving material. Such an approach does not take into consideration all the varieties in the manuscripts and thus is likely to miss some of the evidence of legal transmission in different versions of the same law. It is worth noting, however, that the standard editions still include critical commentary which shed light on some of these varieties.

### *Roman legal sources*

George Mousourakis has rightly criticised the usual treatment of Roman law en bloc, because the nuances of a period of legal development lasting over one thousand years are lost.<sup>79</sup>

Roman law had three, if not more, lives: first, in its continuous development under the Roman

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<sup>79</sup> George Mousourakis, *A Legal History of Rome* (Abingdon: Routledge, 2007), p. x.

emperors; second, in a massive restructuring and revision under emperor Justinian; and third, in a revival in the medieval law schools and universities.<sup>80</sup> In this comparison with the origins of later legal sources in Western Europe, the important Roman laws are those known by later successor states and those that were most prominent in later medieval culture. The Theodosian Code and Justinian's compilation of the *Corpus Iuris Civilis* fall within this demarcation. The *Digesta*, which is a major part of the Justinian compilation, also represents legal discussion from the classical period.

Compared to the succeeding attempts at law-making, the huge quantity of Roman legislation can certainly be read as general, abstract norms, to fit the label of *civil law*.<sup>81</sup> Law is by nature conservative, and, as asserted by Herbert F. Jolowicz, Roman law changed slowly.<sup>82</sup> When examining legal transmission and Roman law, the point must be made that Roman law was not even transmitted throughout the empire. Republican Roman law applied only to the Italian peninsula. Local custom was applicable in the courts. Olivia F. Robinson calls this the *ius commune* of the empire.<sup>83</sup>

One of the earliest known written laws of Rome was the mythical *Lex Duodecim Tabularum*, the Law of the Twelve Tables, from 450 BC. This law became the core of Roman legal thinking, and, whether correctly or not, was referred to by Cicero, and even in Justinian's laws in the sixth century.<sup>84</sup> The ideals of Roman legal culture thus derived from the perception of this ancient source.

Throughout imperial Rome, in the first centuries AD, a large number of edicts, decrees and laws were issued by the senate and emperors. In the second century and the first half of the third, Roman legal culture was in what has been termed *the classical period* of Roman law.<sup>85</sup> In this era, the jurists were at their peak. Their works were elaborate interpretations of valid law. Their comments achieved a high status, and Roman authorities validated the jurists' commentary as law during late antiquity. Gaius (d. c. 180) was one of the most prominent of the jurists, and his comments are collected in the work we know as *Gaius's Institutions* (Gai). Another, Ulpian (d. c. 228), produced one-third of what was included in the *Digesta* of

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<sup>80</sup> Brundage, *Medieval Canon Law*, pp. 75-78, 223, 234, 285-86; Paul Vinogradoff, *Roman Law in Mediaeval Europe* (London: Harpers & Brothers, 1909), pp. 37ff; Friedrich Carl Savigny, *Geschichte des römischen Rechts im Mittelalter* (Heidelberg: Mohr, 1834).

<sup>81</sup> Mousourakis finds that the Romans 'shape their legal rules in terms of procedural techniques, rather than in terms of general and abstract norms', Mousourakis *Legal History*, p. ix.

<sup>82</sup> Jolowicz and Nicholas, *Study of Roman Law*, pp. 4-5. See also Robinson, *Sources of Roman Law*, p. 22 n. 24.

<sup>83</sup> Robinson, *Sources of Roman Law*, pp. 29.

<sup>84</sup> Cicero wrote that he had memorised the Twelve Tables, Cicero, de. legibus 2.23.59, Marcus Tullius Cicero, *De legibus libri*, ed. By Johannes Vahlen (Berlin: F. Vahlen, 1883), p. 148. The law is largely reconstructed from the works of Cicero.

<sup>85</sup> Jolowicz and Nicholas, *Study of Roman Law*, p. 6.

Justinian. Over time, laws were not suggested by the magistrates and approved by the senate, as earlier, but law or legal responses came directly from the emperor. After almost a millennium of legal production, the existing law was an enormous amount of *ius* and *lex*. No coherent set of laws was in force for the entire empire. Lawyers and judges did not have a formal collection to consult, and the same legal standards did not necessarily apply everywhere. Maybe because of this, several emperors attempted to make collections of the law in the third and fourth centuries, which have not survived.<sup>86</sup>

The earliest surviving collection was the compilation by the Emperor Theodosius II (401-450), the *Codex Theodosianus* (CTh), although much of it is thought to be lost.<sup>87</sup> This code was the most successful in terms of transmission into Western Europe.<sup>88</sup> Emperor Theodosius II ordered the collection of imperial legal acts, *constitutiones* or constitutions<sup>89</sup> in order to create a code. Imperial constitutions are believed to comprise of the edicts, decrees and epistles of the line of emperors.<sup>90</sup> The Theodosian Code contained imperial enactments from the reign of Constantine (r. 306-337) forward. At the same time, Theodosius invalidated all law predating Constantine, although this apparently had no effect.<sup>91</sup> The Code was published in 438 and would spread to large parts of the Roman empire before the western provinces were lost later that century. For this reason, the Germanic groups succeeding to the earlier Roman territory would make use of the *Codex Theodosianus* as the law for their Roman subjects, and not least as the basis for their own legal development. One of these codes is the Visigothic *Breviarum Alaricianus* or, as the denomination used here, *Lex Romana Visigothorum* (LRV). This is a code with added *interpretationes*, interpretations by legally competent persons working for the Visigothic king from the sixth century.<sup>92</sup> Another example

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<sup>86</sup> Robinson, *Sources of Roman Law*, p. 6, The Code of Gregorius, compiled under Diocletian, and its supplement Hermogenianus, which are both lost.

<sup>87</sup> T. Mommsen and P. M. Meyer, eds, *Theodosiani libri XVI cum constitutionibus Sirmondianis et leges novellae ad Theodosianum* (Berolini: Weidemannos, 1904). Translations used are Clyde Pharr, et al., trans., *The Theodosian Code and Novels and the Sirmondian Constitutions: A Translation with Commentary, Glossary, and Bibliography* (New York: Greenwood Press, 1969).

<sup>88</sup> Robinson, *Sources of Roman Law*, pp. 20, 61.

<sup>89</sup> *Constitutio* was the name given to all imperial legislation. In modern scholarship on Roman legal history, the *constitutio* are often termed a 'constitution', as they will be in this thesis. The constitution were however not fundamental principles for the state as a whole, such as we understand the term 'constitution' today. See, for instance Buckland, *Text-book of Roman Law*, p. 18; Alan Watson, *The Digest of Justinian I* (Pennsylvania: Pennsylvania University Press, 1998), p.xxx; Altay Coşkun, *Imperial Constitutions, Chronology and Prosopography: Towards a New Methodology for the Use of the Late Roman Law Codes* (Oxford: Unit for Prosopographical Research, Linacre College, University of Oxford, 2002), pp. 1-20.

<sup>90</sup> Jolowicz and Nicholas, *Study of Roman Law*, p. 366.

<sup>91</sup> Robinson, *Sources of Roman Law*, p. 62.

<sup>92</sup> Matthews, 'Interpreting the *Interpretationes*', p. 14; Jolowicz and Nicholas, *Study of Roman Law*, pp. 466-67. Jolowicz argues that the *Interpretationes* came with the Roman text they were transmitted from. Matthews points to the fact that fragments found of rules from the CTh, not included in the LRV, lack an interpretation. He argues plausibly that they were added in the process of compiling the LRV.

is the *Lex Romana Burgundiorum* (LRB), which was adapted for the Burgundian king Gundobad. Gundobad was also the royal authority behind the Burgundian code (LB) described below.

The success of the Theodosian Code did not avoid the need for another legal revision almost a century later. The compilers of the Theodosian Code, as mentioned above, did not include pre-Christian legislation, but they did include outdated and redundant laws. Whatever the reason, in 527 Emperor Justinian (r. 527-565) started the project that was to be the grandest and most influential in European legal history. This compilation of Roman law, which in the Middle Ages was named the *Corpus Iuris Civilis* (CJC), is a massive work using four independent legal sources.<sup>93</sup> Justinian ordered his trusted adviser Tribonian and a group of jurists to collect, edit and revise all earlier law. The result were published in three collections throughout the 530s. These are the *Codex* (C), the *Digesta* (D) and the *Institutiones* (I). Justinian's project was different from the Theodosian compilation because, according to Justinian's introduction, it omitted and weeded out superfluous, contradictory and redundant law.<sup>94</sup> The jurists' comments were given authority in the Theodosian Code (CTh.1.4.3). In Justinian's compilations, the jurists' writings were edited and included in the *Digesta*, which is actually the largest of the three books of compiled law.

Justinian's compilation is assumed to have been 'too late but also too complex and sophisticated for the Germanic settlers to absorb'.<sup>95</sup> The same was thought of legislation given in Justinian's own name, the *Novellae*. Still, some of the early medieval legislation seems to have had knowledge of the particular regulations made under Justinian. Since it is difficult to pinpoint the exact people involved in and around Germanic law-making, comparing the contents of Germanic laws with later Roman laws could be a way of proving that the late period of Roman legal culture formed part of the pool of legal thought that could influence secular law-making in the early Middle Ages. The content of these works may illuminate what influences, if any, late-Roman law had on Germanic legislation.

Justinian began his enterprise due to his interest in law and his dismay over the condition of the legal system.<sup>96</sup> The *Digesta* consist of fifty books, sorted by subject, not

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<sup>93</sup> T. Mommsen, P. Krueger, R. Shoell and W. Kroll, eds., *Corpus Iuris Civilis* I-II (Berlin: Weidmann, 1872-77). Translations by Peter Birks and Grant McLeod, transl. *The Institutes of Justinian* (London: Duckworth, 1987), and Alan Watson, ed. of translation, *The Digest of Justinian* I and II (Pennsylvania: Pennsylvania University Press, 1998).

<sup>94</sup> Justinian, *Constitutio deo auctore de conceptione digestorum* 7. Translated in 'The Composition of the Digest 7', *The Digest of Justinian* I, trans. by Alan Watson (Pennsylvania: Pennsylvania University Press, 1998), pp. xliii-xlvi.

<sup>95</sup> Robinson, *Sources of Roman Law*, p. 20.

<sup>96</sup> Justinian, *Digesta*, *Constitutio omnem* 2-5. 'The Whole Body of Law'.2-5, Watson, *Digest*, pp. xlvii-li.

always following what would today be considered a logical pattern. The *Codex* was a collection of imperial enactments like the Theodosian Code. However, the imperial enactments that were included also predated Constantine, going all the way back to the time of Hadrian (76-138) and up to, but not including, those of Justinian. The *Codex* was also structured as a set of books, of which there were now twelve.<sup>97</sup> It differed from the earlier collection by Theodosius, because each enactment was stripped of the rhetoric and the lengthy *praefatio* of the imperial responses. The *Institutiones* was both public and private Roman law, extracted and compressed and divided into four books. The plan behind the short version was that it would be the introductory curriculum at law schools, according to the preface of the *Digesta* by Justinian.<sup>98</sup> The *Digesta* would be the second- to fourth-year reading for the law students, and their final year would be dedicated to the *Codex*. The *Corpus Iuris Civilis* was sanctioned as the only permitted legal work from the time of its publication.<sup>99</sup>

To avoid the confusion of the situation that existed before his codification, Justinian allowed only three redactions of it: a translation, a comparison and a résumé of the relevant rule.<sup>100</sup> But even if editing was disallowed from then on, the emperor himself made at least 168 new constitutions called the *Novellae* (Nov).<sup>101</sup> These new constitutions amended or added to the regulations of the earlier corpus. Justinian even contradicted or annulled his own enactments in later *Novellae*.<sup>102</sup> Besides, in the Roman empire, which now covered the eastern and, partly, Italian provinces that were long since centralised in Constantinople, the legal culture was changing.<sup>103</sup> In the provinces of the east, different normative standards evolved, and another revision of prevailing law was due. This resulted in the *Ecloga*, issued around 740

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<sup>97</sup> Part of the Code of Justinian was lost in the following centuries, but became more complete after three missing books were recovered in the eleventh century. The enactments in Justinian's code also consisted mainly of rescripts to the citizens of the empire. Hence, the *Codex* represents a window into the imperial administration from the first to the sixth century, rather than being positive law. However, these rescripts obtained the status of law. In the later ones, Greek was used more and more often, as the Greek language gained ground as the administrative language. Robinson, *Sources of Roman Law*, pp. 38, 59-60.

<sup>98</sup> Justinian, 'Whole Body of Law'.2-5, in Watson, *Digest* I.

<sup>99</sup> However, the signs are that other books were taught, used and kept, such as the Syro-Roman law-book, believed to have been a teaching book in the law school of Beirut, see Robinson, *Sources of Roman Law*, p. 66.

<sup>100</sup> George A. Tsangaras, *Orientalization and Diffusion of Eastern Roman Law* (Cambridge, MA: Harvard University, 1984), p. 45.

<sup>101</sup> The new constitutions were given in Greek to the eastern provinces, and in Latin to the western, thus dividing the legal culture between the Latin and the Hellenic spheres. From this version to the *Basilica* from AD 892, 168 are known. These constitutions were rediscovered in the west in the thirteenth century, and only sets of 122 and 134 constitutions were known outside Greek spheres from the eight to the twelfth century. See Robinson, *Sources of Roman Law*, p. 60, for more on the versions.

<sup>102</sup> See, for instance, Nov.22.4 on accepting divorce by mutual agreement, the annulment in Nov.117.10, and the reinstatement in Nov.140.

<sup>103</sup> Jolowicz and Nicholas, *Study of Roman Law*, p. 502, Tsangaras, *Orientalization*, pp. 1-10, 59; Robinson, *Sources of Roman Law*, p. 60.

by Leo III and his son Constantine V.<sup>104</sup> The *Ecloga* is based on the *Corpus Iuris Civilis*, and, although it can be compared to the latter, it was issued in a much simpler version.

Much can be said about source criticism of the surviving Roman laws. Their transmission through the long centuries to modern times has obviously marked them. Still, there are remarkably full manuscripts surviving from the later part of the first millennium AD. Further, the grand scale of research into the *Corpus Iuris Civilis* and the *Codex Theodosianus* in legal studies conducted in the twelfth and thirteenth centuries has added another layer to the sources, a filter, which is hard for a modern scholar to reach beyond, back into antiquity. The editing done in the printed versions has been carried out with a different mentality from the original compilers, and affects our view of the sources. Tribonian's group was not without errors, and, in particular, the speed at which it collected, selected and edited the legal body has been used as a critical argument. The names and dates of the enactments included in the Code are not necessarily correct.<sup>105</sup> The *Digesta* contains a large bulk of what is still extant of classical law. The problem is obviously that this is the sixth-century version, edited and changed under the order of Emperor Justinian. Bluhme argued that the speed would suggest that the text was copied rather than edited, which makes the result true to the original jurists' commentary, although it was cut up and put together again.<sup>106</sup> The main feature of the texts of the jurists is that they are diverse and contradictory, and that they were allowed to be. The contents of the *Codex* and *Novellae* can be read as the responses or regulations of emperors and accepted as sources for a later compilation.

### *The Germanic legal sources*

The legal activity on the Continent in the wake of collapsing Roman authority in the west was a multifaceted process over the fifth to the ninth centuries, both within different time periods over this span and geographically. The edited laws can be found in *Monumenta Germaniae*

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<sup>104</sup> The dating is disputed, because the book contains no trace of the hated iconoclasm of these two rulers. See Edwin Hanson Freshfield, *A Manual of Roman Law: The Ecloga: Published by the Emperors Leo III and Constantine V of Isauria at Constantinople Ad 726* (Cambridge: Printed at the University Press, 1926), p. 2; Nicolaas van der Wal and Jan H. A. Lokin *Historiae iuris graeco-romani delineatio: les sources du droit byzantin de 300 à 1453* (Groningen: John Benjamins Publishing Co, 1985), p. 132.

<sup>105</sup> Robinson, *Sources of Roman Law*, p. 21. Coşkun, *Imperial Constitutions*, pp. 2-4. Coşkun has argued that the commissioner's job was thorough and of high quality.

<sup>106</sup> Fredericus Bluhme, *Die Ordnung Fragmente in den Pandectentiteln*, in *Zeitschrift für geschichtliche Rechtswissenschaft*, 4 (Berlin: Keip, 1820) p. 257. While we have the *Digesta* surviving in a contemporary sixth-century manuscript and in later ones, the earliest manuscript of the *Institutiones* originates from the ninth century. Robinson, *Sources of Roman Law*, pp. 57-59.

*Historica* (MGH), in the third series of *Leges* and in the fourth series of *Leges nationum Germanicarum*.<sup>107</sup> The emerging states in the West are, in modern scholarship, given the common name ‘Germanic states’, and the multiple groups the ‘Germanic people’. The accuracy of the term ‘Germanic’ can be questioned in many ways, as the apparent origins of the people roaming the European continent in the so-called ‘migration period’ are, more often than not, obscure. The theories of the origins of the same groups are even more obscure, deriving both from the groups own origin myths and from dubious place-name interpretations.<sup>108</sup> As James A. Brundage has rightly pointed out: ‘We conventionally lump the invaders together as “Germans”, although not all of them were by any means “Germanic” in language, dress, customs, habits, or appearance’.<sup>109</sup> Others, such as Jörg Jarnut, have called for making the generic term obsolete,<sup>110</sup> while yet others, like Walter Pohl, have argued for the usefulness of ‘Germanic’ as a term in scholarly research.<sup>111</sup> It is a useful common denominator for all groups who defined themselves as something other than Romans in late antiquity and the early Middle Ages. Moreover, to talk of groups of peoples in terms of *gens* or *volk* has been criticised in the past decades.<sup>112</sup> Another term, still much used in the same way today, is ‘barbarian’. With a few exceptions, this term was shunned by the groups themselves because of the biased meaning associated with it as ‘the other’.<sup>113</sup> The term ‘Germanic’ is highly controversial too, for the obvious reason of the nineteenth- and

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<sup>107</sup> *Monumenta Germaniae Historica*, Legum, vol. 4, ed. by Georgius Heiricus Pertz (Hannover: Hahn, 1868) *MGH: Legum nationum Germanicarum* (LL nat Germ), vol. 1, ed. by Karl Zeumer (1902), vol. 2, ed. by Ludvig Rudolf de Salis (1892) and vol. 4, ed. by Karl A. Eckhardt (1962-69).

<sup>108</sup> Lupoi, *Origins*, pp. 79 and 101. Both this and suggesting origins from place names have led many to the conclusion that Burgundians and Lombards, and indeed Goths, migrated from Scandinavia. Regarding origin myths, see Hoppenbrouwers, ‘Medieval Peoples Imagined’, in *Imagology: The Cultural Construction and Literary Representation of National Characters, A Critical Survey*, ed. by Manfred Beller and Joep Leerssen (Amsterdam: Rodopi, 2007), pp. 45-61;

<sup>109</sup> Brundage, *Medieval Canon Law*, p. 19.

<sup>110</sup> Jörg Jarnut, ‘Germanisch. Plädoyer für die Abschaffung eines obsoleten Zentralbegriffes der Frühmittelalterforschung’, in *Die Suche nach den Ursprüngen. Von der Bedeutung des frühen Mittelalters*, ed. by W. Pohl (Vienna: Verlag der Österreichischen Akademie der Wissenschaften, 2004), pp. 107-13.

<sup>111</sup> Walter Pohl, ‘Vom Nutzen des Germanenbegriffs zwischen Antike und Mittelalter: Eine forschungsgeschichtliche Perspektive’, in *Akkulturation. Probleme der germanisch-romanischen Kultursynthese in Spätantike und frühem Mittelalter*, ed. by Dieter Hägermann, Wolfgang Haubrichs and Jörg Jarnut, *Ergänzungsbände zum Reallexikon der germanischen Altertumskunde*, 41 (Berlin: Walter de Gruyter, 2004), pp. 18-34.

<sup>112</sup> Roger Collins, *Early Medieval Europe* (London: Palgrave Macmillan, 1999), pp. 100-05; Walter Goffart, *Barbarian Tides: The Migration Age and the Later Roman Empire*, The Middle Ages Series (Philadelphia: University of Pennsylvania Press 1-3.

<sup>113</sup> For exceptions, see LB.2.1, PLS.41.1 and CTh.3.14.1 *interpretationes*. See also Ralph Mathisen, *Roman Aristocrats in Barbarian Gaul: Strategies for Survival in an Age of Transition* (Austin: University of Texas Press, 1993), p. 1, and p. 39 for the contemporary understanding of the word with further references p. 178 n.2; Hagith Sivan, ‘The Appropriation of Roman Law in Barbarian Hands: “Roman-Barbarian” Marriage in Visigothic Gaul and Spain’, in *Strategies of Distinction, The Constructions of Ethnic Communities 300-800*, ed. by Walter Pohl and Helmut Reimitz, *Transformation of the Roman World, II* (Leiden: Brill, 1998), pp. 189-203, (pp. 196-97), and Wormald, ‘*Leges Barbarorum*’, p. 31 for comments on these clauses.

twentieth-century German nationalistic movement and the role played by these medieval groups in its nationalistic presentations of the past. The interest in Germanic history and the use of *Germanisch* in the establishment of a racist-based view of the superiority of some people at the expense (or extermination) of others gives the field of study an ugly heritage.<sup>114</sup> In the fields of history, archaeology, ethnology and others, theories of racism and evolutionism were implied in scholarship to establish the image of superior Germanic descendants.<sup>115</sup>

Some of the legislation termed Germanic law in this study has been labelled ‘vulgar law’ by some authors. Before recent decades, this was sometimes done with a negative connotation.<sup>116</sup> The reason is that early medieval laws were simplified – vulgar – versions of complex Roman law. The term is also used with a more neutral connotation, to describe the early medieval laws as a merger of the older Roman legal tradition and the new legal language of the successor states.<sup>117</sup> Germanic law should still be studied as a legal enterprise in its own right. Although a comparison with Roman law is valuable when we are searching for influences, we should not view Germanic legislation as lightweight Roman legislation, but as a different, and new, kind of legislation. For the same reasons, the whole research field of the early Middle Ages, sometimes still called ‘the Dark Ages’, was kept at arm’s length by European scholars in the fields of archaeology, linguistics, history and so on. However, as mentioned in the introductory chapter, interest increased from the late 1970s, and what could be called a surge of interest occurred from the 1990s. But the term ‘Germanic’ has stuck with the field, and functions not as an ethnic denominator, but as a common noun to refer to the groups of non-Roman people existing in, or coming to, the European continent in late antiquity and early medieval times.<sup>118</sup> When writing of the early medieval continental states, I will use the term ‘Germanic’ in this sense.

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<sup>114</sup> For a critical review of the use of Germanic history and mythology, and numerous examples of the deduction of racist ideologies from Germanic research in the period 1880-1945, see Bernard Mees, ‘Hitler and Germanentum’, *Journal of Contemporary History*, 39, 2 (2004), 255-70. Further: Hermann Gilbhard, *Die Thule-Gesellschaft* (Munich: Kiessling, 1994).

<sup>115</sup> Bruce G. Trigger, *A History of Archaeological Thought* (Cambridge: Cambridge University Press, 2004 [1989]), pp. 149-73.

<sup>116</sup> For instance, Ernst Levy, *Weströmisches Vulgarrecht. Das Obligationenrecht.-Weimar: Böhlau 1956. XX, 384 S. 8°*, vol. ii (Weimar: H. Böhlau Nachfolger, 1956); Gudmund Sandvik, *Retts historie*, Jussens venner, v (Oslo: Universitetsforlaget, 1990), p. 307.

<sup>117</sup> For instance, Álvaro d’Ors, *El Código de Eurico*, Estudios visogóticos, 2 (Rome: Instituto Jurídico Español, 1960), B2-b: 2-12; Roger Collins, *Early Medieval Spain: Unity in Diversity, 400-1000* (Basingstoke: Macmillan, 1983), p. 28; Wormald, ‘*Leges Barbarorum*’, p. 29.

<sup>118</sup> See, for instance, Chris Wickham, *Framing the Early Middle Ages* (Oxford: Oxford University Press, 2005), pp. 80-84.

Similarly, as when trying to cover these groups with one term, there are also arguments against treating the continental legislation from the first millennium as one entity in legal history. Although there are parallel developments and contents of law, the particular context of each law could reveal important developmental characteristics and contents explaining the separate Germanic laws as part of individual legal cultures.<sup>119</sup> Still, there are good reasons to view the Germanic laws together, as parts of an overarching legal culture, or groups of legal cultures. The laws I have selected for this study can all be linked to / connected with the Roman empire in some way. The legal activity took place under the influence of Roman law, whether directly inspired by, or as a reaction to, Roman heritage. The originating process of the laws was parallel.<sup>120</sup> Each of the kingdoms and its laws had a different relationship with the old empire, which in turn would influence their legal development. The groups seem to have been much more diverse than the groups termed ‘ethnic groups’ today. The name of a particular group is just as likely to have been the identity of the current leader as to have represented a shared cultural identity and history of the group as a whole.<sup>121</sup> Further, names were often labels arising from contact with Romans, such as army leaders, tax collectors or others. The groups moving about the landscape would in some instances have been bands of men, and not a whole community, with wives, children, oxen and slaves, on the move. The Goths have a long and changing history within the Roman empire. It is certain that pockets of people were left behind, and that others joined them. The settling population on the Iberian Peninsula defined themselves as Goths, because their elite men were Goths.<sup>122</sup> And it is possible that the shared experience during migration, settlement and state formation could create a conception of a common cultural identity.<sup>123</sup> The group names used in this thesis will therefore be the names given to or by the leaders of the authorities that were organised into consolidated entities, being first the *foederati* (confederate allies) or successor states of the Romans, or just states.<sup>124</sup> The same is true of the names of the laws, whether they were given contemporaneously, or in later centuries. There are also serious

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<sup>119</sup> Esders, “‘Eliten’ und ‘Strafrecht’”, pp. 264-65.

<sup>120</sup> Wormald, ‘*Leges Barbarorum*’, p. 21.

<sup>121</sup> Patrick Amory, ‘Names, Ethnic Identity, and Community in Fifth- and Sixth-Century Burgundy’, *Viator*, 25, 1 (1994), 1-30; Wickham, *Inheritance of Rome*, pp. 97-100.

<sup>122</sup> Chris Wickham address the disproportionate small numbers of Goths compared to the Roman inhabitants: Wickham, *Inheritance of Rome*, pp. 90, 101-02.

<sup>123</sup> For theories on the migration myths of the settling groups in the early Middle Ages, see Patrick J. Geary, *The myth of nations: the medieval origins of Europe* (Princeton: Princeton University Press, 2002), p.61; Hoppenbrouwers, ‘Medieval Peoples Imagined’, pp. 47-48.

<sup>124</sup> Walther Pohl contrasts the contemporary definitions of *foederati*, see Pohl, ‘Empire and the Lombards’, pp. 78-80.

problems regarding the origin, dating and not least transmission of the legal sources,<sup>125</sup> with the content of each bulk of *leges* containing revisions from later periods.

One relatively short-lived successor state in the western Roman provinces was the Burgundian kingdom. The first kingdom for the *foederati* was established in the early 400s on the Roman side of the Rhine. This was destroyed by the Huns, by invitation from the Romans, in 437. The second kingdom was established in Sapaudia, with the Burgundians taking land by the arrangement of *sors*, whereby the Romans ceded parts of their land to the newcomers after a certain distribution key.<sup>126</sup> The Burgundians were overrun by the Franks in 534. The Burgundian laws form one of the earliest Germanic codes. The *Leges Burgundionum* (LB), also known as the *Lex Gundobada* or *Liber constitutionum*, consists of a series of enactments from the Burgundian king Gundobad (r. 474-516) and from his son and successor King Sigismund.<sup>127</sup> The code consists of one hundred and five enactments and twenty-one additional acts (the *Constitutiones Extravagantes*). The ‘book of constitutions’ appears somewhat randomly put together, which can be the result of a chronological compilation of the enactments. Thus, it happens that laws on female succession come immediately before a section on theft and another on knocking out teeth. Compared with contemporary and later Germanic legislation, the laws of Gundobad and Sigismund survive in stylistic, short texts, possibly influenced by the Burgundian adaption of Roman law in the *Lex Romana Burgundiorum* (LRB).<sup>128</sup> It is generally accepted that the Burgundians adapted well to Roman institutions and culture, while at the same time, they kept a distinct non-Roman culture themselves. As tributary under the Roman supremacy, the Burgundian kings held the title of *magister militum* or similar, meaning they had the role of high commander in the Roman army.<sup>129</sup> The inclusion in the Roman system would pave the way for influence on a grand-scale from Roman administration and indeed law. The Burgundian kings promoted Burgundian ethnicity, but allowed intermarriage with Romans (LB.12.5). The distinction between the two *gens* extended to jurisdiction, and Burgundians and Romans were not only subject to separate laws, but also had their own judges and courts (LB.22, LB.60). Paul

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<sup>125</sup> Esders, “‘Eliten’ und ‘Strafrecht’”, p. 263.

<sup>126</sup> Drew, *The Burgundian Code*, p. 22, Goffart, *Barbarian Tides*, pp. 102-03, 152-160. Goffart has put forward a theory of the *sors* being a general share of taxes and recourses in the region.

<sup>127</sup> Drew, *The Burgundian Code*, pp. 6-7.

<sup>128</sup> Rudolf Buchner, *Die Rechtsquellen* (Weimar: Böhlau, 1953), pp. 12-13.

<sup>129</sup> Paul S. Barnwell, *Emperor, Prefects and Kings: The Roman West, 395-565* (Chapel Hill: UNC Press Books, 1992), pp. 41-45. Ian Wood has argued that this role might have been more significant to the Burgundian leaders than the role as king: Ian Wood, ‘Gentes, Kings and Kingdoms – The Emergence of States. The Kingdom of the Gibichungs’, in *Regna and Gentes: The Relationship between Late Antique and Early Medieval Peoples and Kingdoms in the Transformation of the Roman World*, ed. by Hans-Werner Goetz, Jörg Jarnut and Walter Pohl, *Transformation of the Roman World*, XIII (Leiden: Brill, 2003), pp. 243-69.

Barnwell believes that although we must reject the thought of a common Germanic *urrecht*, Roman law was the common model of all Germanic legal enterprises.<sup>130</sup>

The Lombards entered the northern Italian peninsula in 568, a few years after the Roman emperor Justinian had died and in the aftermath of the particularly devastating Roman wars against the Goths.<sup>131</sup> Lombard legislation first emerged in written form in the 640s, when King Rothair issued a lengthy edict, *Edictum Rothari* (Rot), presented in typical fashion as ‘old law’.<sup>132</sup> The edict addressed basic areas of private law, like marriage, inheritance and the rights and duties of kinsmen. Furthermore, it was comprised of criminal law, defining acts of theft, libel and violence, frequently with compensation stipulated for the victim. Thus, the law appears as a manual for judges and the king on how to settle disputes between subjects. Besides the standard decree on treason and revolt against the king (Rot.1-9), Rothair’s edict contains very few constitutional elements, and in any event it would be erroneous to look for this in early continental legislation. Those in a position of authority would either be powerful enough to sort out their own state of affairs, or would be dependent on the support of the nobility. The Lombards selected their kings, and there was fierce rivalry between the elite men holding the posts of regional lords in Italy after the invasions, if we are to believe the Lombard historian Paul the Deacon.<sup>133</sup> On some occasions, the rule passed from father to son, but more often it did not. Rothair would be aided in his legal work primarily by Roman learned men in his court. The Edict was also placed within a traditional Roman frame through the citation of Justinian’s *Novellae* 7 in the introduction and the statement that Rothair was led by his wish of ‘amending all earlier laws by adding that which is lacking and eliminating that which is superfluous’ (Rot.intro). The sentence also resembles Justinian’s commission of the *Digesta*.<sup>134</sup> Patrick Wormald has pointed to several occasions on which this sentence was borrowed in early medieval secular law, for instance by the English king Alfred (r. 871-

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<sup>130</sup> Barnwell, *Emperor, Prefects and Kings*, p. 98.

<sup>131</sup> A. H. M. Jones, *The Decline of the Ancient World* (London: Longman, 1996), pp. 116-17; Edward Peters, ‘Foreword’, in *The Lombard Laws*, trans. by K. F. Drew (Philadelphia: University of Pennsylvania Press, 1996), pp. v-xxii (pp. x-xi); Wickham, *Inheritance of Rome*, pp. 140-144.

<sup>132</sup> Rothair’s Edict, Introduction: Rudolf Buchner, *Die Rechtsquellen* (Weimar: Böhlau, 1953), pp. 33-37. Patrick Wormald, ‘“Inter Cetera Bona Genti Suae”: Law-Making and Peace-Keeping in the Earliest English Kingdoms’, in *Legal Culture in the Early Medieval West: Law as Text, Image and Experience* (London: Hambledon, 1999), pp. 179-99 (p. 182).

<sup>133</sup> Paulus Diaconus, *Historia Langobardorum*, 4.41. Paulus Diaconus, *Langobardenes historie*, trans. by Anne Katrine Frihagen and Bjørg Tosterud, Thorleif Dahls kulturbibliotek (Oslo: Aschehoug, 2003), no.4.41; ‘Pauli historia Langobardorum’, in *Scriptores rerum Langobardicarum et Italicarum saec. VI-IX*, ed. by L. Bethmann and G. Waitz, *Monumenta Germaniae Historica, Scriptores rerum Langobardicarum et Italicarum* (Hannover: Hahn, 1878), pp. 12-187 (pp.133-34).

<sup>134</sup> Justinian, ‘The Composition of the Digest’ 7; Justinian, ‘De conception Digestorum’ 7, *Digesta*. .

899).<sup>135</sup> This feature is also found in the Nordic laws, possibly caused by the revival of Roman law in the eleventh century. The legislation of Rothair appears descriptive and somewhat accidental. Fields are not thoroughly covered: for instance, we find many laws on abduction and adultery, but nothing on incest. There are laws on violence and breaches of the peace in abundance, but hardly any on the Church or secular authority, public areas or maintenance. There is, however, a kind of system in the laws, covering one theme at a time with sliding transitions into other themes. After inheritance comes plots against family members, and after marriage comes adultery.

Next to Rothair's legal opus, we have the surviving laws of four of his successors up to the year 755.<sup>136</sup> These can be reckoned as supplements to the Edict, although the long-reigning King Liutprand (r. 712-744) made a substantial addition. These later laws take a more bureaucratic language and form. Wormald has suggested that they appear to be an attempt to make civil law, by suggesting prescriptiveness.<sup>137</sup> Further, the law-making after Rothair provides a good picture of the changes Lombardian society went through in its cohabitation with Roman culture. The surviving legislation includes the laws of Rothair's direct successor Grimwald (r. 662-671), who added a supplement of nine rules (Gri). The next extant legislation is that of Liutprand (Liu), consisting of 153 rules. King Ratchis (r. 744-749) and King Aistulf (r. 749-756) succeeded Liutprand, and amended the laws with, respectively, fourteen (Rat) and twenty-four (Ais) rules before the Lombard kingdom was incorporated into the Frankish empire in 774. When the Franks annexed the Lombard kingdom, they did not abolish Lombard law.<sup>138</sup> This is likely to be the reason for its survival. Editing and glossing of the laws continued in the Ottonian era up to the eleventh century.<sup>139</sup> The edited laws can be found in *Monumenta Germaniae Historica* (MGH).<sup>140</sup>

The Lombard laws have been seen as a reaction to Roman law, and an attempt to draw the line between the Germanic and Roman populations within the Lombard realm.<sup>141</sup> Roman legal inheritance must have appeared superior. The classification of Roman citizens and Germanic citizens in the Lombard kingdom was carried out at the time of the conquest, in a

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<sup>135</sup> Wormald, 'Lex Scripta', p. 113.

<sup>136</sup> Frederic Bluhme, 'Edictus ceteraque Langobardorum leges: cum constitutionibus et pactis principum beneventanorum', in *Monumenta Germaniae Historica*, Legum, vol. 4 (Hannover: Hahn, 1868).

<sup>137</sup> Wormald, 'Lex Scripta', p. 110.

<sup>138</sup> Vinogradoff, *Roman Law in Medieval Europe*, pp. 37-38.

<sup>139</sup> Drew, *The Lombard Laws*, p. 22. See also Vinogradoff, *Roman Law in Medieval Europe*, pp. 38-39 on the glosses.

<sup>140</sup> *Monumenta Germaniae Historica*, Legum, vol. 4, ed. by Georgius Heiricus Pertz (Hannover: Hahn, 1868).

<sup>141</sup> Wormald, 'Lex Scripta', p. 115; Drew, *The Lombard Laws*, p. 3; Pohl-Resl, 'Legal Practice and Ethnic Identity', p. 207.

way similar to what can be seen in the Visigothic and Frankish realms. The law of the Lombards is one of the few that is outspokenly hostile to Romans and Roman culture, and effective legal discrimination was established in the rules of Rothair, who stipulated lesser compensation if the victim was a Roman (Rot.194). This discrimination had not lost any force more than 160 years after the occupation of northern Italy by the Lombards, when King Liutprand confirmed that Roman citizens had inferior rights to the Lombards (Liu.127.XI). This rule applied in cases between subjects from the two groups. Otherwise, Romans would follow Roman laws.<sup>142</sup> For the Romans, that meant the Theodosian Code. The administrative apparatus seem to have been learned in both, judging by King Liutprand's permission to notaries to make documents under either law (Liu.91.VIII). Birgitte Pohl-Resl asserts that by this Liutprand assumed that all subjects could use either law for their cases.<sup>143</sup> However, the hostility in the Edict and the subsequent legislation from the Lombard kings, combined with the wording in the marriage legislation that Lombard women marrying Romans would follow Roman law, implies that each group answered to its respective law that was in force.<sup>144</sup>

In a late part of the Edict, Rothair reminded his audience of the purpose and tradition of the law (Rot.386). Here, the usability of the law was repeated, suggesting at least the idea that the law was intended for practical usage, although Wormald does not believe that it was useable. The lawmaker also stipulated that it should be accepted at an assembly, *gairethinx*. Romans lived according to Roman laws, but in the latter part of Rothair's Edict, a rule demanded that foreigners entering the kingdom lived by Lombard law. Other Germanic individuals would fall under the territorial rule of the Lombards, then, and not Roman law (Rot.367).

The laws of the Salian Franks also provide the possibility of assessing legal development within a group of fairly continuous existence. The *Pactus Legis Salicae* (PLS) claims to be a code issued under the Merovingian king Clovis (r. 481-511), and a revision seems to have been made by Pepin and Charlemagne. The first laws were supplemented by the successors of Clovis and form an addendum known as the Capitularies. While the *Pactus* and the later Carolingian laws concentrated mainly on a monetary tariff system for different crimes and a description of process, the Capitularies appear more brutal in their regulation of

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<sup>142</sup> Drew, *The Lombard Laws*, pp. 29-30.

<sup>143</sup> Pohl-Resl, 'Legal Practice and Ethnic Identity', pp. 209-10.

<sup>144</sup> Liu.127.XI: In the case of intermarriage, the woman and children were transferred to the man's status and *gens*, and thereby also came under his law.

punishment. A stronger authoritative voice can be detected in the code. In these supplements, one can also detect influences from later Roman law.<sup>145</sup>

Questions have been raised about whether the *Pactus Legis Salicae* can be dated to the reign of Clovis. The manuscripts differ in their emphasis on who should be credited for the work, and four learned men with legal competence were also named as the deciders of right law in the PLS.<sup>146</sup> Ian Wood convincingly asserts that the *Pactus Legis Salicae* must be younger than 507-11, which is the traditional date of the law.<sup>147</sup> The earliest surviving manuscripts date from the eighth century. Moreover, there are signs of later revisions, particularly in the two versions of the prologue, the so-called longer and shorter prologues.<sup>148</sup> Nevertheless, the Capitularies contain evident references to the rules of the PLS, and therefore imply that a written code of this kind existed in the sixth century. The transmission of Salic law has a history that is different from the other early medieval continental laws reviewed in this thesis, mostly because of the sheer number of extant copies. Among the multiplicity of manuscripts of the *Pactus Legis Salicae*, there are clusters of manuscripts.<sup>149</sup> The revision of the PLS in the *Lex Salica Karolina* (LSK) tampered only slightly with the separate rules. The numbering of the LSK will follow that of the so-called systemised version, *Lex Salica S.*<sup>150</sup> Most of the Carolingian version is a verbatim reproduction of the earlier code, only in a different order. Drew finds it striking that, although there was a thorough revision and systemisation, nothing was done to update the monetary system to ninth-century standards, or to incorporate the Capitularies into the original sixty-five titles.<sup>151</sup> Rather, the old laws were moved about, some things were removed, and a few things were added. But there was no thorough revision of the individual sections themselves, and no changes were made to the principles to match the changed standards, for instance in the inheritance system. This, like the legal work of Justinian's team, tells us that law is more easily copied than consciously altered or adapted. The errors of the early scribes were copied alongside the rest. The content of the Salic law revolves around the topics of criminal law, some private law and process.

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<sup>145</sup> Ian Wood, *The Merovingian Kingdoms, 450-751* (London: Longman, 1994), p. 107; Wormald, 'Leges Barbarorum', p. 29.

<sup>146</sup> *MGH*, LL nat Germ, 4.1, pp. 2-3.

<sup>147</sup> Wood, *The Merovingian Kingdoms*, pp. 108-13. This view has been accepted by, among others, Patrick Wormald, 'Leges Barbarorum', p. 28 n. 20.

<sup>148</sup> Drew, *The Laws of the Salian Franks*, p. 52; Wormald, *Making of English Law*, pp. 40-41; Wormald, 'Leges Barbarorum', p. 28.

<sup>149</sup> Karl August Eckhardt, *Pactus Legis Salicae*, in *Monumenta Germaniae Historica, Leges nationum Germanicarum*, vol. 4.1 (Hannover: Hahn, 1962), pp. ix-xi

<sup>150</sup> *Lex Salica*, *MGH*, LL nat Germ, 4.2, pp. 197-230. Also used by Drew, *The Laws of the Salian Franks*, pp. 240-41.

<sup>151</sup> Drew, *The Laws of the Salian Franks*, p. 53.

Basically, the rules set out the fines for particular actions, with a specific set of tariffs. With the exception of the Capitularies, the Frankish laws are often considered the ‘most Germanic’ of the Germanic laws. This view is due to their compensation-based content and the lack of references to Christianity.<sup>152</sup>

The sources from Visigothic Spain are, by and large, legal material, and there is much of it. This is in itself rewarding when studying law, but can be methodologically challenging when attempting to contextualise the enactments that reflect what a self-made image of the Visigothic rulers is. Visigothic society appears, as historian Chris Wickham fittingly comments, to have been law-abiding, and ‘arid as a result’.<sup>153</sup> Thus, the kings have earned a reputation for creating a well-organised state, a view which was basically established through their laws.<sup>154</sup> However, the Visigothic realm in the Iberian Peninsula was inhabited by a marginal group of Goths who set themselves up as rulers of a large population of several ethnicities and identities.<sup>155</sup> After their long migration, the group of Visigoths established their rule in Spain in the fifth century. From their declaration of independence in 475 rejecting Roman supremacy, their control over the territory continued in close cooperation with church leaders.<sup>156</sup> Nevertheless, the stability of this kingdom over the centuries is evidence of a successful government. According to Wickham, the Arab conquest of the peninsula in 711 cannot be explained if there had been a weakened state.<sup>157</sup>

The Visigothic code *Leges Visigothorum* (LV) from 650 survives in comprehensive versions. The kings Reccesvint and Chindasvint who were behind the collection included many of the clauses from the first Germanic law, that of King Euric I (r. 466-484), and also many of the legislative works of King Leovigild (r. 569-586). The laws from the two earlier kings form the backbone of the code. The originals, alas, only survive in fragments, and can only be reconstructed with reservations from the LV of 650. Some of the extant remains of *Codex Euricianus* (Eur), the laws numbered 275 to 336, are preserved in a seventh-century

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<sup>152</sup> Drew, *The Laws of the Salian Franks*, pp. 28-30; Wormald, ‘*Leges Barbarorum*’, p. 28.

<sup>153</sup> Wickham, *Inheritance of Rome*, p. 131.

<sup>154</sup> See P. D. King, *Law and Society in the Visigothic Kingdom* (Cambridge: Cambridge University Press, 1972), p. 222; Peter Heather, ‘The Barbarian in Late Antiquity: Image, Reality and Transformation’, in *Constructing Identities in Late Antiquity*, ed. by Richard Miles, Richard (London: Routledge, 1999), pp. 234-58 (p. 251); Roger Collins, ‘Law and Ethnic Identity in the Western Kingdoms in the Fifth and Sixth Centuries’, in *Medieval Europeans: Studies in Ethnic and National Perspectives in Medieval Europe*, ed. by Alfred Smyth (Ipswich: Macmillan, 1998), pp. 1-23 (pp. 4-5).

<sup>155</sup> Wickham, *Inheritance of Rome*, pp. 38-39, 93-94, 102.

<sup>156</sup> Heather, ‘Barbarian in Late Antiquity’, pp. 234-58.

<sup>157</sup> Wickham, *Inheritance of Rome*, p. 139.

manuscript and are included in the MGH.<sup>158</sup> The Roman notary Leo of Narbonne probably provided the legal knowledge behind the enterprise of making the first written secular law for a non-Roman ruler.<sup>159</sup> This project was apparently initiated by Euric in 471, four years before he declared independence for the Visigoths from the status of *foederati* of the Roman empire. An essential discussion continues about the jurisdiction of the *Codex Euricianus* – whether the code had jurisdiction in the Visigothic territory or exclusively over the Visigothic people.<sup>160</sup> The source itself is silent on the matter, but features from other jurisdictions have been used as arguments that the first Visigothic code was mainly ethnic. The Roman population under Gothic rule would then have been subject to the *Lex Romana Visigothorum*. This compilation, also called the *Breviarum Alaricianum*, the *Breviary of Alaric*, was made by Euric's son Alaric II from the *Codex Theodosianus* to govern the Romans.<sup>161</sup> The suggestion is that this was a move to please Roman citizens under Visigothic rule, given that Clovis was trying at this point to tempt Romans across the border to the Frankish realm.<sup>162</sup> The constitutions in the *Breviary* were each supplied with an interpretation.<sup>163</sup> The same has been suggested for the Burgundian laws of Sigismund. Wormald rejects the argument that the laws only applied to the people of the legislative kings Euric and Sigismund.<sup>164</sup> He holds that the assumed subjects of the law would be the subjects of the kingdom, and that the native legislation and the adaptations of Roman law supplemented each other instead. Given the example of the Lombard legislation, such overlapping seems improbable. There are, however, many later examples of overlapping jurisdictions, and the Visigoths also had a different relationship with the eastern Roman empire from that of the Lombards. Thus, we should not rule out complementary legal systems and laws as a possibility.

The compilation dating from the middle of the seventh century by Chindasvint and his son Reccesvint was an extensive piece, divided into twelve books, with a total of 572

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<sup>158</sup> Printed version in *MGH*, LL nat Germ 1.3. Manuscript *Codex Parisinus* BN Lat. 12161. See also Leo Wiener, *Contributions Toward a History of Arabico-Gothic Culture*, vol. 3 (Philadelphia: Innes & Sons, 1920), p. 28.

<sup>159</sup> Harries, 'Not the Theodosian Code', p. 48.

<sup>160</sup> Dietrich Claude, 'Remarks about Relations Between Visigoths and Hispano-Romans in the Seventh Century', in *Strategies of Distinction, The Constructions of Ethnic Communities 300-800*, ed. by Walter Pohl and Helmut Reimitz, Transformation of the Roman World, II (Leiden: Brill, 1998), pp. 117-130 (pp. 122-23); Roger Collins, *Visigothic Spain, 409-711* (Oxford: Blackwell, 2006), pp. 225-27 summarises this debate.

<sup>161</sup> Jolowicz and Nicholas, *Study of Roman Law*, p. 466; Heather, 'Barbarian in Late Antiquity', pp. 252-53; Robinson, *Sources of Roman Law*, p. 61.

<sup>162</sup> Sivan, 'Appropriation of Roman Law', pp. 196-97.

<sup>163</sup> Jolowicz and Nicholas, *Study of Roman Law*, pp. 466-67; Matthews, 'Interpreting the *Interpretationes*', p. 14. Jolowicz held that it would not have been possible for the compilers to interpret all the, and that these interpretations followed the literature in which they were found. Matthews points to the fact that all the fragments of the CTh not included in the LRV lack such an interpretation. I assume they were added in the process of making the *Breviary*.

<sup>164</sup> Wormald, 'Leges Barbarorum', pp. 27-28.

paragraphs. It included earlier legislation by Euric and Leovigild, which was labelled *antiqua* – ancient – in addition to new regulations from the two kings. The manuscripts were harmonised in the MGH with a critical commentary.<sup>165</sup> This law was definitely territorial: this is explicitly stated early in the code and is ascribed to Reccesvint (LV.2.1.2). In addition, Visigothic law was made the sole valid law (LV.2.2.8-9). The laws of the Visigoths move towards integration of the Romans. Leovigild ended the ban on marriage between Romans and Goths (LV.3.1.1) that was apparently introduced and supported by Alaric II (CTh.3.14.1).<sup>166</sup> The Goths seem to have, over time, approached Roman culture, and their law became ever more accepting of the Romans as peers of the Visigoths.<sup>167</sup>

The relationship between the early codes can be detected, as references to incidents of common importance are mentioned in the texts. The earliest Visigothic code of Euric includes as a time limitation or prescription the death of King Theoderic I. The king died in the Battle of Chalôns against Attila the Hun in 451, (Eur.277). The same battle is also mentioned in the Burgundian laws as a marker for limitation (LB.17.1).<sup>168</sup> The Roman successor states were also entangled with each other through politics and warfare. The Frankish kingdom fought the Visigothic with help from the Burgundians in 500, as there was much enmity between the Burgundians and the Goths. In 534, the Franks conquered the whole of the Burgundian kingdom. In the eighth century, the Lombards and people in another part of the Visigothic territory were overrun and by the Franks and were added to the latter's empire.

### *The English legal sources*

Notions of the level of sophistication of the law have also marked the study of British legal history, where the Norman Conquest represents a watershed. Legal historians tend to categorise their research according to whether the legal sources date from before or after 1066.<sup>169</sup> It is generally accepted that the Norman Conquest brought substantial change in the

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<sup>165</sup> MGH LL NatGerm 1.1 includes variations in the Manuscripts of Reccesvint and later legislators.

<sup>166</sup> Sivan, 'Appropriation of Roman Law', pp. 200-02. Sivan suggests that this abolition was a part of the anti-Catholic propaganda during the conversion of the Goths from Arianism.

<sup>167</sup> Claude, 'Relations Between Visigoths and Hispano-Romans', pp. 117-30; Miriam Tveit, *Non enim coitus matrimonium facit, sed maritalis affectio, Ekteskapslovgivningen i sen romersk og tidlig germansk rett*, (Tromsø: University of Tromsø, 2007), pp. 66-67.

<sup>168</sup> Karl Zeumer *Leges Visigothorum*, MGH, LL nat Germ. I (Hannover: Hahn, 1902), p. 5 n. 2; Drew, *The Burgundian Code*, pp. 6, 9 n. 2, and 34 n. 1 and n. 2.

<sup>169</sup> Karl von Amira, *Germanischen Rechts 2*, revised by K.A. Eckhardt 4<sup>th</sup> edn. (Berlin, 1960 [1890]), p. 80; Pollock and Maitland, vol. I, p. 74; Doris Stenton, *English Justice between the Norman Conquest and the Great*

way laws were made and enforced, although there was some continuity between the Anglo-Saxon system of law and the feudal legal culture of the Normans, a continuity that was first expressed by the Norman rulers themselves.<sup>170</sup> Moreover, the earlier North Sea exchanges of ideas and ideologies, including legal ones, are assumed to have been interrupted. Another historiographical tendency was to downgrade the early English laws.<sup>171</sup> This interpretation sees the early medieval legal system as favouring mediation between the parties to a conflict, while the system in Norman England was seen as authoritative and executive.<sup>172</sup> However, others have emphasised the continuation between the Anglo-Saxon period and the period after the conquest.<sup>173</sup> Moreover, early English law has become an object of research in its own right. As Patrick Wormald has argued and demonstrated, Anglo-Saxon legislation was an important development of the law, not a leftover from the past or a prelude to Norman law reforms.<sup>174</sup> In the present study, I will concentrate on the laws originating in the period from 602 to 1018, that is, on the Anglo-Saxon laws, while only looking at the continued development under Norman rule briefly, as a result of the feudal spirit of these later laws.

These sources for English laws can be divided roughly into three parts. The first part contains the laws of the kingdoms of the Heptarchy, a historical term for the kingdoms of what later became the territory of England in the seventh to the tenth centuries.<sup>175</sup> The second part contains the laws from the period of unification of the kingdom that would be England, opposing the Danes. The third part is formed from the laws from the twilight of Danish rule in the times of Æthelred (r. 978-1016), Swein and Cnut (r. 1014-1035). Wormald sees the legislation from Alfred onwards as being particularly English, and treats the prior legislation from the seventh and eighth centuries as a foundation for it.<sup>176</sup> Chris Wickham has pointed out the anachronistic views of the Heptarchs, where scholars give a teleological sketch of the making of one larger kingdom.<sup>177</sup> Nonetheless, I will label the laws of the Kentish and West Saxon rulers as ‘early English law’, in the sense that these first laws were important parts of developing English law. They were contemporary with continental Germanic law, but in the

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*Charter, 1066-1215* (London: American Philosophical Society, 1965); Hudson, *Formation of the English Common Law*; Wormald, *Making of English Law*, p. 3.

<sup>170</sup> Wormald, *Making of English Law*, pp. 403-05; Hudson, *Laws of England*, p. 258.

<sup>171</sup> Wormald, *Making of English Law*, pp. 14-20.

<sup>172</sup> See, for instance, Stenton, *English Justice*, p. 1.

<sup>173</sup> Lupoi, *Origins*, pp. 303-04; Wormald, *Making of English Law*, p. 26.

<sup>174</sup> Wormald, *Making of English Law*, pp. 25-28.

<sup>175</sup> Consisting of Mercia, Kent, Sussex, Wessex, Essex, East Anglia and Northumbria.

<sup>176</sup> Wormald, *Making of English Law*, pp. 93-108.

<sup>177</sup> Wickham, *Framing the Early Middle Ages*, pp. 49-50.

light of the preservation and transmission of the extant sources they have been put together with other English laws.

The earliest legislation is the Kentish laws, with King Æthelbert's laws (Ath) of 602-03 forming a code.<sup>178</sup> Later kings, reigning many decades after him, added to his laws. Hlothre (r. 673-685) and his nephew Eadric (r. 685-686?) would hardly issue laws together, since Eadric fought and defeated his uncle.<sup>179</sup> Still, their promulgations must have been seen as one entity by the Kentish people, or maybe Eadric built on earlier legislation and reinstated his enemy's laws for legitimacy. The laws of Hlothre and Eadric has anyway survived as one source (Hl&E). Eadric was succeeded by his brother Wihtred (r. 690-691) (Wih), of whose laws we have a few more sections extant. The laws of Æthelbert reveal how the Church was organising itself again on the island; otherwise, the laws concern the privileges of royal authorities and attempts at peaceful regulations for subjects. The law seemingly had jurisdiction within the kingdom, and it does not appear to have a primarily ethnic quality, aspiring, as a territorial law, to go with the kingdom. The later supplements would address obligations between subjects. The laws of Wihtred primarily deal with church privileges, forbidden behaviour and marital behaviour, resembling more of a penitentiary than secular law.<sup>180</sup>

The contemporary West Saxon King Ine (r. 688-726) issued many laws (Ine), but these only survive because they were preserved in the laws of the later Alfred the Great (r. 871-899), in a ninth century manuscript and several fragments (Alf).<sup>181</sup> Therefore, it is uncertain which of these laws were originally Ine's, and which were edited by Alfred's learned men or through later transmissions. Alfred's introduction, containing the Ten Commandments and much about his own expectations as king and judge, tells of the many earlier laws that he disapproved of and removed (Alf.Int.49.9). Thus, Alfred's legislation is still a continuation and transmission of earlier legislation. Since the manuscripts have

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<sup>178</sup> In Liebermann I, pp. 3-8, *English Historical Documents*: printed in Whitelock, *EHD*, p. 29; Frederick L. Attenborough, *The Laws of the Earliest English Kings* (New York: Russel & Russel, 1963), p. 4-17.

<sup>179</sup> Their laws can be found in Liebermann I, pp. 9-11, *EHD*, p. 30, and Attenborough, *Laws of the Earliest English Kings*, pp. 18-21. For a comment on their relationship, see Whitelock, *EHD*, p. 360.

<sup>180</sup> In Liebermann I, pp. 12-14; *EHD*, p. 31; Attenborough, *Laws of the Earliest English Kings*, pp. 24-31. For the early medieval penitentials, see, for instance, Hubertus Lutterbach, 'Die Speisegesetzgebung in den mittelalterlichen Bußbüchern (600-1200). Religionsgeschichtliche Perspektiven', *Archiv für Kulturgeschichte*, 80 (1998) 1-37.

<sup>181</sup> Some was destroyed in a fire in 1731. Whitelock *EHD*, p. 328. The laws of Ine and Alfred are printed and translated in Liebermann I, pp. 15-123; *EHD*, pp. 32-33; Attenborough, *Laws of the Earliest English Kings*, pp. 36-93.

different subdivisions,<sup>182</sup> I will follow the rubricated classification of the law of Alfred, as used by Frederick L. Attenborough and Dorothy Whitelock, in the references.<sup>183</sup>

Groups of normative material constitute the second part of English law, with the unification of the Heptarchy into one kingdom of the English. The first source material here is, fittingly, the treaties with the Danes, first between King Alfred and the mysterious Danish lord Guthrum (A&G), and later by Edward (r. 899-924) and an even more mysterious Guthrum (E&G).<sup>184</sup> Although these sources are contentious, they are rewarding for a discussion of transmission of law, due to contact between the Scandinavian and English administrations. The ruler of the larger territory probably faced challenges from powerful families, as well as the presence of ‘Danes’ or warriors and settlers from the Nordic regions. These documents are normative treaties, and as such comprise the very essence of the law that would have been emphasised by the English and Danish authorities. The English may have emphasised this more, being the victors in the war with the invading Scandinavians.<sup>185</sup> Thus, our interest here lies in the information in the treaties about inheritance and wergild.

There are vernacular manuscripts that contain much of the original law from before the Norman Conquest. The most prominent of these is the *Textus Roffensis*, or H, which is the only one that contains the earliest Kentish laws.<sup>186</sup> The laws of Æthelbert may have been issued in Latin, similarly to the continental laws, and then at some later point translated into the vernacular. Both Oliver and Wormald conclude nevertheless that it probably was originally written in the vernacular, even if they both note the traces of Latin syntax, spelling and word choice in the Old English MS.<sup>187</sup> A Latin translation, the *Quadripartitus*, from the twelfth century comprises a further major source, and in some cases the only source, for early English law.<sup>188</sup> It is believed to be a Latin translation of earlier vernacular documents, although it is uncertain how much has been changed in the process.<sup>189</sup>

The third groups of laws are those ascribed to the kings Æthelstan, Edgar, Æthelred, and Cnut. The three former can be said to have ruled a fairly consolidated state, compared to their predecessors and to England under Cnut. Still, their legislation makes for interesting

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<sup>182</sup> Liebermann III, p. 32.

<sup>183</sup> Attenborough, *Laws of the Earliest English Kings*, pp. 63-93; Whitelock, *EHD*, pp. 372-80.

<sup>184</sup> Alfred and Guthrum in *EHD*, no. 34; A&G and E&G in Liebermann I, pp. 126-35; Attenborough, *Laws of the Earliest English Kings*, pp. 98-109.

<sup>185</sup> Attenborough *Laws of the Earliest English Kings*, pp. 96.

<sup>186</sup> Attenborough *Laws of the Earliest English Kings*, p. 3.

<sup>187</sup> Lisi Oliver, *The Beginnings of English Law* (Toronto: University of Toronto Press, 2002), p. 35-36 ; Wormald, *Making of English Law*, p. 95, 100-01, see also n. 349.

<sup>188</sup> Liebermann I, p. xxxviii; Wormald, *Making of English Law*, pp. 7, 21, 231-35;

<http://www.earlyenglishlaws.ac.uk/laws/texts/Quadri/> [Accessed 15 April 2016].

<sup>189</sup> Wormald, *Making of English Law*, pp. 294-95.

comparison, and enters the discussion when relevant. The traditional scholarly reference to the English laws uses a numerical listing of the laws in apparently chronological succession. However, the nineteenth-century discussion over dating has led to the notion that some laws with higher numbers were actually issued prior to laws with low numbers. Patrick Wormald has criticised the practice of using the established numbers because it hides other, and in his view separate, laws within the traditional classification.<sup>190</sup> In particular, the substantial extant legislation of Æthelstan, numbered from I to VI, suffers from this. Scholars have agreed that V predates IV, and IV predates III, but the numbers remain fixed.<sup>191</sup> Wormald also argues, conversely, that the classification separates entities that should be read as part of a continuous work. He complained that '[f]ew things better betray the enslavement of early English legal studies to traditional practice than continuing use of numeration for Æthelstan's laws that everyone since at least 1858 has known to be wrong'.<sup>192</sup> The enslavement to practice will, even so, be continued here for ease of reference. However, the dating of the law in question will be mentioned when relevant.

The third part of the early English laws covers the late-tenth and early eleventh centuries. It includes the laws of successive kings as they were revised in the eleventh century by the archbishop of York, Wulfstan (†1023), who is usually referred to simply as Wulfstan. He played a major role in English political and ecclesiastical life during his time as archbishop. Wulfstan cooperated closely with King Æthelred and made substantial contributions to the king's administration through councils and texts. When the Danes gained control in England – first through Swein Forkbeard in 1013, and then through his son Cnut after conflicts in 1016 – Wulfstan was loyal to the cause and continued his cooperation with the authorities, though the head had changed.<sup>193</sup> Liebermann holds that Wulfstan was more of an editor of legal texts than the actual author.<sup>194</sup> Dorothy Whitelock and other scholars

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<sup>190</sup> Wormald, *Making of English Law*, pp. 290-91 n. 129.

<sup>191</sup> The laws of Æthelstan can be found in Attenborough, *Laws of the Earliest English Kings*, pp. 122-69; and *EHD*, no. 35-37.

<sup>192</sup> *Ibid.* See also Wormald, *Making of English Law*, pp. 292-93 for a visual presentation of the dating and internal relations of the different laws of Æthelstan. See also II & III Edgar in, *EHD*, no.40.

<sup>193</sup> M. K. Lawson, *Cnut – The Danes in England in the Early Eleventh Century* (Essex: Longman, 1993), pp. 16-48; M. K. Lawson, 'Archbishop Wulfstan and the Homiletic Element in the Laws of Æthelred II and Cnut', in *The Reign of Cnut – King of England, Denmark and Norway, Studies in the Early History of Britain*, ed. by Alexander Rumble (Leicester: Leicester University Press, 1999), pp. 141-164.

<sup>194</sup> Liebermann II, p. 740.

working with the laws of Edgar, Æthelred and Cnut consider him more as the actual author, the lawmaker.<sup>195</sup>

From Æthelred we have a number of legal sources, which can be divided between those written before and those written after Wulfstan became an advisor.<sup>196</sup> They are often numbered as I-VIII, and even up to I-X, Ætr.<sup>197</sup> The origins and succession of these sources follow an unclear system, although II, III and V seem to originate before 1008 and are mainly secular. The later sources have more ecclesiastical features. Æthelred is also credited as the creator of the Treaty with the Danes of 991 (II Atr), although the treaty appears as a dictate from the Danes.

From Cnut's reign we have two actual laws, and letters and documents that shed light on normative standings.<sup>198</sup> The laws are categorised as ecclesiastical (I Cn) and secular (II Cn), where the latter, of course, include the most relevant legislation on inheritance and homicide.<sup>199</sup> The laws have vague internal dating, but many clues exist from which scholars can determine a *terminus ante quem* and *terminus post quem* for the individual manuscripts, relying on the eventful political situation in the late-ninth and early tenth centuries. The dating of the laws of Cnut in particular has been important and an object of debate, not least due to his overthrowing of Æthelred and his later actions in England and in Denmark and Norway.<sup>200</sup> Most scholars agree that 1028 is the year of genesis for the secular law II Cn. Whitelock and others plausibly argue that Wulfstan, who died in 1023, is assumed to be the mind behind I Cn in particular, but also II Cn, promulgated after his death.<sup>201</sup>

The systematisation of canon law brought about a stronger self-awareness in the Church, as the rules of the local parish and the papacy sometimes came into conflict with secular law. Legal activities in the secular sphere were influenced by scholarly methodological legal studies, which resulted in legal reforms in some European states,

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<sup>195</sup> Dorothy Whitelock, 'Wulfstan and the Laws of Cnut', *English Historical Review*, 63 (1948), 433-52; Dorothy Whitelock, 'Wulfstan and the So-Called Laws of Edward and Guthrum', *English Historical Review*, 56 (1941) 1-21; Wormald, *Making of English Law*, pp. 27, 191.

<sup>196</sup> Whitelock, *EHD*, p. 402; Wormald, *Making of English Law*, pp. 320-45.

<sup>197</sup> Liebermann I, pp. 216-70; Agnes Jane Robertson, *The Laws of the Kings of England from Edmund to Henry* (Cambridge: Cambridge University Press, 1925), pp. 52-133; *EHD*, pp. 42-46 (II, III, V, VII and VIII Atr).

<sup>198</sup> Robertson, *Laws of the Kings of England*, pp. 141-53; *EHD*, pp. 48-49.

<sup>199</sup> Whitelock, *EHD*, p. 419, n.2. For detailed studies of Cnut and his political life see, for instance, the works of

Lawson, *Cnut – The Danes in England*, and Timothy Bolton, *The Empire of Cnut the Great: Conquest and the Consolidation of Power in Northern Europe in the Early Eleventh Century* (Leiden: Brill, 2009).

<sup>201</sup> Reasons for describing it to Wulfstan: Whitelock, *EHD*, p. 419, and n.1. See further Lawson, 'Archbishop Wulfstan', pp. 157-58; Wormald, *Legal Culture in the Early Medieval West*, pp. 345-49.

including twelfth-century England. However, the post-Conquest rulers in Britain apparently saw little need to issue royal laws for the English territory immediately.<sup>202</sup>

### *Scandinavian legal sources*

In the following chapters, the legislation in the Scandinavian countries will be treated as one entity, in the same way as the Germanic and English legislation. There are plausible reasons for presenting the Scandinavian region as a whole as a common legal region. The cultural and linguistic, as well as political, fellowship locked together the societies in the areas that became the kingdoms of Denmark, Sweden and Norway, and extensions to the Icelandic republic and the Finnish areas can even be included here. As with the early medieval kingdoms on the Continent, the common culture led to intellectual, economic and dynastic collaboration, but also to violent conflicts and enmity between the realms, and internally within them. However, there are multiple reasons to argue that a scholarly treatment of the Nordic laws as coming from a common legal region would be a false construction.<sup>203</sup> The individual societies in this corner of Europe would have had as much cultural communion and intellectual fellowship with their other neighbours as with each other: Denmark with the Continent, Sweden with the eastern powers and Byzantium, and Norway with England, Scotland and Ireland, where their economic and wider interests lay. I would argue that the vernacular legislation and obvious similarities in the mode of legislation and construction of the law make it natural to treat the Scandinavian laws as related. Differences in the legal sources will still be examined in the analysis, and the possible internal and external influences will certainly be a topic of concern. However, researchers do recognise a main divide in the Nordic laws regarding the structures and principles of inheritance. The laws classify into a western- and eastern-Nordic system, which will be examined further in later chapters.<sup>204</sup>

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<sup>202</sup> Hudson, *Formation of the English Common Law*, p. 21; Wormald, *Making of English Law*, pp. 403-05. Although many writs and *leges* were ascribed to William I, historians generally date these to Henry I's rule in the early twelfth century, and see these sources as part of the secular legal system that had developed by this stage. The major legal opus, the law of Henry I (1100-1135), owed much to the earlier legal systems of Edgar (Eg), Cnut (II Cn) and presumably Edward the Confessor (ECf). Henry II (1058-1089) issued a law book for his English realm, called *Glanvill*, together with numerous legal rolls and assizes, most importantly the Assize of Clarendon (1166).

<sup>203</sup> Vogt, *Function of Kinship*, pp. 34-35.

<sup>204</sup> Elsa Sjöholm, *Sveriges medeltidslagar. Europeisk rättstradition i politisk omvandling* (Lund:Institutet för rättshistorisk forskning, 1988), pp. 120-25; Birgit Sawyer, *Kvinner, familj i det forn- og medeltidiga Skandinavien*, Occasional papers on medieval topics, 6 (Skara: Skriftserie fra Historisk institutt, 1992); Hansen, 'Slektskap, eiendom og sosiale strategier', pp. 119-27.

A particular feature of the Scandinavian laws was the so-called *provincial laws*.<sup>205</sup> The modern Scandinavian term for these laws is *Landskapslov*: law of the landscape. The landscape is a particular region with a shared legal culture.<sup>206</sup> The written laws of these provinces date to periods *after* the Norwegian and Danish kingdoms emerged in the tenth century, and simultaneously with the origins of a Swedish kingdom in the thirteenth century. In the case of Norwegian laws, sources and the content of the laws themselves suggest the rules originated in the tenth century *before* the state-formation process. The provincial laws continued after the state emerged, each belonging to a particular landscape with a main provincial assembly, *løgþing*, and they continued to exist as provincial legal entities when the overarching Danish, Norwegian and Swedish kingdoms were established in the period 900 to 1100. Later, the revision and formal approval of the laws became the task and right of royal authority. Scholars disagree about the power structure in this process. How involved was the king in shaping the law and in deciding the contents, and how much input did the provincial assembly have?<sup>207</sup> The Swedish and Norwegian provincial laws were organised into thematic subsections, called *bálkr*, according to their juridical field, something not found in the other laws included in this study.

For the Nordic sources, several other factors need to be introduced into the debate. First of all, we need to consider the origin of the laws and whether the Nordic provincial laws were a result of works by learned jurists or were an oral transmission from the pre-Christian era.<sup>208</sup> Second, there is the issue of whether the Nordic laws reflected European legal thinking

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<sup>205</sup> The term ‘provincial’ might be misleading, given that the jurisdiction of the ‘province’ began when there was no overarching state of which the province could form a part. Nevertheless, ‘provincial laws’ and ‘provincial assemblies’ has become standard terminology in research on early medieval Scandinavian legal history. In the anonymous work *Historia Norwegie*, the author lists several *patria*e, which coincide with these legal provinces and their subordinate legal regions. Inger Ekrem and Lars Boje Mortensen, *Historia Norwegie*, trans. by Peter Fisher (Copenhagen: Museum Tusulanum Press, 2003), p. 56. See also Steinar Imsen, ‘Law and Justice in the Realm of the King of Norway’, in *Legislation and State Formation: Norway and Its Neighbours in the Middle Ages*, ed. by Steinar Imsen (Trondheim: Akademika Publishing, 2013), pp. 15-40 (p. 18); Gabriela Bjarne Larsson, ‘The Freeholder and Positive Legislation in Late Medieval Sweden’, in *Legislation and State Formation: Norway and Its Neighbours in the Middle Ages*, ed. by Steinar Imsen (Trondheim: Akademika Publishing, 2013), pp. 67-84 (p. 72).

<sup>206</sup> In addition, the few towns had their own assemblies that were independent of the county. The town laws were called *Bærkoyar retrr*, or Bjarkey Law. Apparently, more general versions of the Bjarkey Law were applied in other towns, commercial centres or markets. See Jan Ragnar Hagland and Jørn Sandnes, *Bjarkøyretten – Nidaros eldste bylov* (Gjøvik: Samlaget, 1997), pp. xx-xxxviii; Göran Dahlbäck, ‘Svensk stadslagstiftning under medeltiden’, in *Nordiske middelalderlover: tekst og kontekst: rapport fra seminar ved Senter for middelalderstudier, 29.-30. nov. 1996*, ed. by Audun Dybdahl and Jørn Sandnes (Trondheim: Tapir, 1997), pp. 103-15 (pp. 109-11).

<sup>207</sup> Vogt, *Function of Kinship*, p. 47, assumes royal involvement in the process.

<sup>208</sup> Sjöholm, *Sveriges medeltidslagar*; Thomas Lindkvist, *Plundring, skatter och den feodala statens framväxt, Organisatoriska tendenser i Sverige under övergången från vikingatid till medeltid*, *Opuscula Historica Upsaliensia*, 1 (Uppsala: University of Uppsala, 1988), p. 414.

at the time of writing or whether they were a genuinely original product. As a result of these considerations, the nature of the scholarly debate about Scandinavian law has been different in many ways concerning source criticism and origins, with the only possible exception being the Visigothic code of Euric. I believe that these distinctions have led to separate treatment of the Nordic codes and of earlier medieval western law, at the expense of seeing them as part of a continuous development of European law. Later scholars have maintained that, to a large degree, the laws represented a novelty, although they may contain custom and traditional view on law.<sup>209</sup>

The regions that came to constitute the Norwegian kingdom seem to have already had a complex legal system by the 900s that was comparable to the continental *civitas* courts in the early and High Middle Ages. But since the first written sources only date from the eleventh and twelfth centuries, the origins of the legal system, its design and its development are obscure to us. A region at this time would later become one of the provinces in the newly constituted Norwegian kingdom, and the *logþing* would be the highest provincial assembly.<sup>210</sup> The extant provincial laws are the Gulathing Law (G), for the *Gulapingslög* of the west of the country, and the Frostathing Law (F), for the *Frostapingslög* in the northern and middle parts of the kingdom.<sup>211</sup> The two other provincial laws for eastern Norway are known to have existed, but are lost apart from their Christian law sections.<sup>212</sup> The first known written law of the Norwegian realm was the Gulathing Law, which survives in a late manuscripts, but contains elements from several periods. The law was possibly put into writing in the late-eleventh century but survives in a version that probably found its form in the 1170s.<sup>213</sup>

The Frostathing Law survives in its thirteenth-century version, probably dating from after 1215, as is revealed by the implementation of decisions taken by the fourth Lateran

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<sup>209</sup> For instance, Knut Helle, 'Lov og rett i middelalderen', in *Norm og praksis i middelaldersamfunnet*, ed. by Else Mundal and Ingild Øye (Bergen: Senter for europeiske kulturstudier SEK, University of Bergen, 1999), pp. 7-22 (p. 18).

<sup>210</sup> See Ebbe Hertzberg, *Grundtrækkene i den ældste norske proces* (Kristiania: A.W. Brøgger, 1874), pp. 111-13, on the organisation and subdivision of the *þing*. The regions had a range of legal assemblies, hierarchically positioned, and geographical divided into *fylker* (counties) that seem to have followed the division of jurisdiction or vice versa. Disputes could be resolved on a micro level (*dom*) or in local courts (*fjerdingsing*), and further up the hierarchy there was a court for the county (*fylkesting*). The highest level was the *logþing*, the assembly with jurisdiction over the whole region.

<sup>211</sup> Found in the printed edition *Norges gamle Love* (hereafter *NgL*). Rudolph Keyser, et al. eds, *Norges gamle love indtil 1387*, vol. I (Kristiania: Grøndahl, 1846), pp. 1-118 and 119-300.

<sup>212</sup> Eidsivating Law, for the internal eastern province of Norway, and the Borgarthing Law for the coastal eastern province.

<sup>213</sup> Knut Robberstad, *Gulatingslovi* (Oslo: Norske samlaget, 1981 [1969]), pp. 9, 305.

Council.<sup>214</sup> However, Jan Ragnar Hagland and Jørn Sandnes believe some of the rules on inheritance and wergild to be from earlier versions due to their contents.<sup>215</sup>

From the mid-thirteenth century, major legal reforms began in Norway, and in 1274, King Magnus Haakonsson (r. 1263-80), nicknamed the Lawmender, issued the Code of the Realm (MLL), after which a process of the unification of the law in the Norwegian realm began.<sup>216</sup>

In the provincial laws, one of the points is that there are no certain originators like a royal legislator. Before the thirteenth century, the law, ideally, should have been created at the assembly and transmitted by a lawman (*løgmaðr*). Only after the civil war in Norway (1130-1240) did the king become the unrivalled legislator, for secular law, and the supreme judge. From this period, the job of the lawman also changed from passing on the correct law to acting as a judge. The promulgation of the Code of the Realm in the thirteenth century, annulled the previous provincial laws.<sup>217</sup>

There were many Swedish provincial laws, from the southernmost in Scania – which will be treated as a Danish provincial law because of the shifting political landscapes – to the northernmost in Hälsingeland. They can be divided roughly into an eastern and a western legal culture, because of their content and form. This division coincides with the division into the *svea* and the *göta* districts, where the two major groups constituting the people of the Swedish kingdom lived. In the thirteenth century, the different Swedish areas were put under more direct royal rule than the loose union of regions controlled by the great men of the previous centuries.<sup>218</sup> Compared to the other Nordic countries, and indeed the rest of Europe, it seems that written laws came later in the Swedish realm.<sup>219</sup> Three periods of organised legal work are known to us. The first was in the first three decades of the thirteenth century, when the Västgöta Law (VgL) appeared and was also revised. Another period saw the immense legal work on the provincial laws for several provinces during the 1290s, when several of the

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<sup>214</sup> Jan Ragnar Hagland and Jørn Sandnes, trans., *Frostatingslova*, (Oslo: Det norske samlaget, 1994), p. xxx; Lars Ivar Hansen, 'The Concept of Kinship According to the West Nordic Medieval Laws', in *How Nordic Are the Nordic Medieval Laws? Proceeding from the First Carlsberg Conference on Medieval Legal History*, ed. by Per Andersen, Ditlev Tamm and Helle Vogt, 2<sup>nd</sup> edn (Copenhagen: DJØF Publishing, 2005 [2011]), pp. 177-206 (p. 203).

<sup>215</sup> Hagland and Sandnes, *Frostatingslova*, pp. xxxi-xxxii.

<sup>216</sup> Found in *NgL*, Rudolph Keyser et al. *Norges gamle love indtil 1387*, vol. 2 (Kristiania: Grøndahl, 1846), pp. 2-178, and Absalon Taranger, *Magnus Lagabøters Landslov* (Oslo: Universitetsforlaget, 1979 [1915]).

<sup>217</sup> The king issued a separate law for the towns in 1276 in the same manner, and to a large degree, this built on the Bjarkey Law, which it replaced.

<sup>218</sup> Vogt, *Function of Kinship*, p. 49; Phillip Line, *Kingship and State Formation in Sweden, 1130-1290* (Leiden: Brill, 2007), pp. 107-49, 206-24.

<sup>219</sup> Lindkvist, *Plundring, skatter och den feodala statens framväxt*.

provincial laws were promulgated by royal decree.<sup>220</sup> The third period of legislation occurred around the mid-fourteenth century, when, in about 1347, King Magnus Eiriksson (1319-1364) issued a Code of the Realm (MEL) for Sweden along the lines of the Norwegian Code, and afterwards, in 1357, he similarly issued a Town Law.

The actions of Swedish kings and regents in the thirteenth century show that they were interested in controlling the law, by royal interference with the provincial laws.<sup>221</sup> Moreover, the law-making activity was done in collaboration with the establishment of the Church in the provinces.<sup>222</sup> Doubtless, there existed laws before the first known provincial laws, but it is plausible to assume that the tradition of codifying legislation began in the thirteenth century with the consolidation of the state and the firmer establishment of the Church in the provinces.

The surviving manuscripts date back to the late-fourteenth and early fifteenth centuries, and editing already exists in those early copies.<sup>223</sup> Therefore, some layers in the laws can also be detected in the Swedish material, although of course we must be cautious about pushing back the date of the regulations.

The Danish law-making process was different from the Norwegian and Swedish legal developments. It did not lead to a national code for the whole kingdom after a period of legal activity in juridical regions. Legal historians have discussed the extent of the jurisdiction of a later law, the Law of Jutland, and whether it actually covered other regions.<sup>224</sup> Moreover, it is suggested by legal historians that the earliest law, the law of inheritance and non-compensational deeds (Arvebog og orbodemål, A&O), or at least that part of it concerning non-compensational deeds, was meant to be a law for all Danes.<sup>225</sup> The law was probably shaped from the 1170s and was complete from around 1200.<sup>226</sup>

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<sup>220</sup> Åke Holmbäck and Elias Wessén, *Svenska Landskapslagar I: Östgötalagen, Upplandslagen* (Stockholm: Awe/Gebers, 1979), p. xvi.

<sup>221</sup> See Holmbäck and Wessén, *Svenska Landskapslagar I*, pp. xi-xiii and Vogt, *Function of Kinship*, pp. 51-53, 75-79.

<sup>222</sup> Holmbäck and Wessén, *Svenska Landskapslagar I*, p. xv; Vogt, *Function of Kinship*, p. 49.

<sup>223</sup> Dahlbäck, 'Svensk stadslagstiftning under medeltiden', pp. 103-04; Vogt, *Function of Kinship*, pp. 63-64. See also with caution Holmbäck and Wessén, *Svenska Landskapslagar I*, pp. xix-xxiv, where the translators organised the regulations in relation to each other to offer a picture of what came before and what came after.

<sup>224</sup> Danish historians have discussed whether there was an attempt to assemble the Law of Jutland as a national law, but that the project failed. See Vogt, *Slægtens funksjon*, p. 93, and Andersen, *Lærd ret og værdslig lovgivning*, pp. 5-6 for a summary of the discussion, and pp. 106-07, 293-98 for Andersen's own discussion on the jurisdiction of provincial laws.

<sup>225</sup> Vogt, *Slægtens funksjon*, p. 68-69.

<sup>226</sup> Ibid. Also, Ole Fenger, *Gammeldansk ret: dansk rets historie i oldtid og middelalder* (Viby: Centrum, 1983), p. 94.

Denmark consisted of three legal provinces: Jutland, which is the mainland including the isle of Funen; Zealand, consisting of the isle and surrounding islands; and Scania, southwestern part of modern day Sweden. The earliest extant copy of the Law of Scania is the *Codex Runius*, which is believed to date to the later thirteenth century or around 1300.<sup>227</sup> The references to the Danish provincial laws will follow the numbering in the edited printed editions of the series *Danmarks gamle Landskabslove (DgL)*, published between 1933 and 1951, and the corresponding numbering in the translated publications will follow *Danmarks gamle Love på Nutidsdansk* from 1945 to 1948.<sup>228</sup> For the law on inheritance and non-compensational deeds (A&O), my references are to what has been labelled ‘Text 1’, unless otherwise specified.<sup>229</sup> This is the oldest redaction of the law book, although the earliest manuscripts date from the early fifteenth century. Therefore, the possibility of later editing and of the erasing of rules that did not fit with the later legal norms is present, as with most of the sources used here. However, the A&O does contain several elements that were changed in later Danish legislation, and we can assume that the early version of the law was, to a large degree, copied without critical changes in the following centuries.<sup>230</sup>

We should avoid a teleological perspective that legal activity must result in a national law, even though the provinces formed part of the same legal culture. Helle Vogt describes the quest for a code of the realm as a straightjacket, pointing out that the existence of provincial laws does not exclude the existence of a common idea behind all the provincial laws that, taken as a whole, are almost identical.<sup>231</sup> Dating the Danish provincial laws is a difficult task, since only the Law of Jutland has a known promulgation date; this is also why it has been proclaimed to be the national code of Denmark.<sup>232</sup> The discussion of the origins will follow the survey of Helle Vogt. Legal historian Per Andersen has conducted a thorough examination of the status, age and contents of the many manuscripts of the provincial laws from Denmark, and should be consulted for further details.<sup>233</sup>

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<sup>227</sup> Åke Holmbäck and Elias Wessén, *Svenska Landskapslagar IV, Skånelagen, Gutalagen* (Stockholm: Awe/Gebers, 1943), p. xiv.

<sup>228</sup> *Danmarks gamle Landskabslove med Kirkelovene*, ed. by Johannes Brøndum-Nielsen and Poul J. Jørgensen, vol. I-VIII vols (Copenhagen: Gyldendalske boghandel, Nordisk forlag, 1932-1961); *Danmarks gamle Love på Nutidsdansk*, ed. and trans. by Erik Kroman and Stig Iuul, vol. I-III: (Copenhagen: G.E.C. Gads Forlag, 1945-48).

<sup>229</sup> *DgL*, VII, pp. 3-119.

<sup>230</sup> Kroman, *DgL*, VII, p. xxxvii

<sup>231</sup> Vogt, *Slægtens funksjon*, p. 92.

<sup>232</sup> Andersen, *Lærd ret og værdselig lovgivning* p. 6.

<sup>233</sup> Andersen, *Lærd ret og værdselig lovgivning*. For the law of inheritance and non-compensational deeds, see pp. 77-86; Law of Scania, see pp. 94-105; Valdemar’s Law of Zealand, see pp. 130-25, 140-43; Eric’s Law of Zealand, see pp.150-68; Law of Jutland, see pp. 200-25.

The culmination of Nordic legal development into national laws, bringing several jurisdictions under a unified legal authority, is seen as the effect of strengthened state authority. Göran Dahlbäck suggests that the high medieval European standards on law demanded consistency and formality in legislation, and that the Swedish Code of the Realm and Town Law met the high standards of the legal ideology of their time.<sup>234</sup>

### **2.3 Making the law: Legislators and real legislators – the legal elite**

Who made medieval law? Several of the secular authorities who succeeded the Romans produced secular law. With a few exceptions, these laws claim to have been instigated by the ruler, the king, and most of the others also carry the stamp of royal sanction. The specific lawmaker was not necessarily a king, given the descriptions in the legal sources themselves. As an example, the Visigothic law of 650 hints at the skills and morals of the one *artifex legum*, the maker of the law, who was not the king but was appointed by him (LV.1.2.2-9). The king would, of course, not attempt such an enterprise alone, but was always dependent on a literate and legally trained council. These were the people who are here termed the ‘legal elite’ of medieval Europe, a group consisting of notaries, clergy and educated people close to the secular authority or part of that authority. Patrick Wormald has provided the most radical view of early medieval legislation as being a tool of legitimation used by kings.<sup>235</sup> In this interpretation, the law was not a tool for creating justice or a tool for deciding cases, but a symbol of power. Nevertheless, we must assume that the rulers who ordered a written law were also determined to approve the contents of that law. The authority as legislating king would come from the substance of the legislation.

#### *The king as legislator*

We name the law by the king from whom it is derived, and speak of the king as an active legislator. To a large degree, the laws were promulgated as products of royal enterprise. Romantic images of the introduction of laws depict the king standing amongst his best men and representatives of the Church, deciding what would be the optimum and most needed law. Historians do not necessarily buy this view, but, for pragmatic reasons, refer to the king as the

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<sup>234</sup> Dahlbäck, ‘Svensk stadslagstiftning under medeltiden’, p. 107.

<sup>235</sup> Wormald, ‘*Lex Scripta*’, p. 107; Wormald, ‘*Leges Barbarorum*’, p. 28.

actor by knitting together the law-making process and him as a person. The making of medieval law would happen in many different ways, but most of these ways were more complex than through the sheer genius of the king. *Rex Iustus* ideologies would make kings want to have laws. As Patrick Wormald has argued, the law legitimised the rule of a king, not only as a provider of peace, but also as the regulator of society, and as the giver of the written word.<sup>236</sup> We see successive rulers in most medieval kingdoms attempting to contribute to the collection of laws in the country. The king would, regardless of his role in the process, build his authority on these same laws. A king's authority was protected by the laws, as the laws were protected by his authority. The power to lay down law was invested in the kings of the medieval kingdoms.<sup>237</sup> Law-making was expected. In addition, through this action 'he' would be the ruling authority, whether that authority was constructed of advisors, family or nobody at any given moment. Helle Vogt argues that, at least in Denmark, the provincial assemblies tried maintain an illusion of autonomy but the idea grew that legislation was the king's domain.<sup>238</sup>

Thus, examples of secular law that originate from somewhere other than the royal hand show interesting aspects of the participation of other interest groups, although the royal authority probably did have to agree to the law. In the northern Scandinavian realms, the lawman would be the 'keeper of the law', because he knew the law.<sup>239</sup> There are indications that the office was hereditary in the Norwegian and Swedish provinces.<sup>240</sup> The king in Scandinavia, as in the earlier European kingdoms with legal enterprises, was dependent on a legal elite.

### *The legal elites of medieval Europe*

Legal transmission must come from knowledge of existing law, as original law-making probably requires some legal training too. I have asserted above that the process of legislation, whether royal law or not, were aided by legally trained scholars, termed a 'legal elite' by Alan

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<sup>236</sup> Wormald, 'Lex Scripta', p. 107.

<sup>237</sup> Vogt, *Slægtens funksjon*, p. 127-28.

<sup>238</sup> Helle Vogt, 'The King's Power to Legislate in Twelfth- and Thirteenth-Century Denmark', in *Law and Power in the Middle Ages, Proceeding of the Fourth Carlsberg Academy Conference on Medieval Legal History 2007*, ed. by Per Andersen, Mia Münster-Swensen and Helle Vogt (Copenhagen: DJØF Publishing, 2008), pp. 1-10 (pp. 9-10).

<sup>239</sup> Holmbäck and Wessén, *Svenska Landskapslagar I*, p. xv;

<sup>240</sup> G. Hafström, Y. Blomstedt and M. M. Lárusson, 'Lagman', in *Kulturhistorisk Leksikon for Nordisk Middelalder (KLNLM)*, vol. 10 (Oslo: Gyldendal, 1965), pp. 150-63.

Watson.<sup>241</sup> The legal elite involved in the source material presented here are a heterogenic group of notaries, clergy and high politicians.<sup>242</sup> They exist mostly as an anonymous assumption, but we do know some of the actual characters involved in the process of writing law in the different regions during different centuries.

In European legal history, the Roman jurists of the classical age could serve as the foremost example of the legal elite, and the best example of a situation in which those who develop or make the law have no legal authority. Gaius, Papinian, Paulus and Marcian gave opinions on legal questions, and these opinions would not necessarily have been conclusive.<sup>243</sup> Some of the more prominent jurists, however, had positions as imperial legal counsellors or even Praetorian Prefects.<sup>244</sup> Moreover, almost all of them came from senatorial families. The discussions of family law and other topics could thus be seen as coming from an elitist point of view. Still, the inclusion of problems that were relevant to the poorer classes means that we can give the jurists credit for discussing actual juridical problems concerning normal people. The jurists were given authority by later emperors, and became, through transmission, our foremost providers of classical Roman law.

The European centres of learning were the primary places in which law was thought about and discussed. Young men from every part of Europe came to these centres to be educated by renowned masters; in the twelfth and thirteenth centuries, they also came to the universities of Bologna and Paris. This education meant that the group of learned men in the medieval realms had been trained in many of the same texts, thought about the same ideas and were given the same cultural heritage of the Roman past, so that even a Norwegian or an Irish student would be infused with a Roman background.<sup>245</sup> These men were equipped with much the same *logos*, and taught in the same Latin. In the same way as Christianity worked as a cultural unifier for the western European regions, the schools gave the regions a coordinated administrative apparatus. Given the numbers of those who received this training, both before and after the revival of Roman law, the educated men would easily obtain influential positions as administrators, clergy, judges, lawyers, royal counsellors or other positions requiring men of letters. One factor that divides the source material is the rise of the universities and learned law. For the law material covered by this analysis, this means that the Nordic laws are a product of the time after Roman and canon law became objects of study, while the English

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<sup>241</sup> Watson, 'Comparative Law' p. 328.

<sup>242</sup> See also Lupoi, *Origins*, p. 194.

<sup>243</sup> Robinson, *Sources of Roman Law*, pp. 12-13, 44.

<sup>244</sup> Robinson, *Sources of Roman Law*, p. 45.

<sup>245</sup> Bagge, 'Nordic Students at Foreign Universities', pp. 1-29.

and continental laws originate from the time between the original making of Roman law and the medieval revival of Roman law.

The law that originated in the centuries before the universities was constructed with the help of learned scholars. The project of the Roman successor states of making written law, like the Roman authority, depended on the legal elite maybe even more strongly than did the Roman administration. The existing Roman elite in the regions affected by the disintegration of the Roman state and the genesis of a new kingdom continued their lives to a large degree. As Ralph Mathisen has demonstrated, the nobility exercised different strategies and willingness to adapt to the changes.<sup>246</sup> Some offered their services to the new administration. Some representatives of the legal elite who drafted continental legislation in the early Middle Ages are known to us, and some of them have already been mentioned in the survey of the sources. One of the earliest attempts at non-Roman law-making, by the Visigothic king Euric, was guided, if not run, by the Roman notary Leo of Narbonne.<sup>247</sup> Leo survived into the rule of Euric's son Alaric II, who ruled during the Gothic adaptation of the Theodosian code.<sup>248</sup> Sidonius Apollinaris mentioned him in a poem and appraised him with knowledge of Roman law.<sup>249</sup> Sidonius also reveals in his letters the attendance of a Roman learned man called Sygarius at the Burgundian court. Sidonius praises (or rather mocks) Syagrius for learning the Germanic language and calls him 'a new Solon in the elucidation of Burgundian law'.<sup>250</sup> Ian Wood assumes Syagrius to have assisted the legal work of the Burgundians.<sup>251</sup> Lupoi also points to the legally trained Roman Laconius as part of king Gundobad's counsel.<sup>252</sup>

In the short prologue of the *Pactus Leges Salicae* of the Salian Franks, it was claimed to have been written by a quartet of named men: Wisogast, Arogast, Salegast and Widogast. These were, according to the text, chosen to set the law of the Franks.<sup>253</sup> Katherine Fisher Drew placed no significance on these four in drafting of the legislation or the collecting of the laws into one code.<sup>254</sup> Ian Wood holds them as a reflection of the status of the *Pactus* as not

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<sup>246</sup> Mathisen, *Roman Aristocrats*, pp. 37-85.

<sup>247</sup> Harries, 'Not the Theodosian Code', p. 4.

<sup>248</sup> Mathisen, *Roman Aristocrats*, pp. 126-28.

<sup>249</sup> Sidonius Apollinaris, Carmina 23, in W. B. Anderson, *Sidonius: Poems and Letters with an English Translation*, I (London: William Heinemann Ltd, 1963), pp. 312-315.

<sup>250</sup> Sidonius Apollinaris: Epistulae 5.5.3, in O. M. Dalton, *The Letters of Sidonius*, translated with introduction and notes, vol. 2, (Oxford: Clarendon Press, 1915), p. 54. See also Mathisen, *Roman Aristocrats*, pp. 124.

<sup>251</sup> Ian Wood, 'Roman Law in the Barbarian Kingdoms', in *Rome and the North*, ed. by Alvar Ellegård and Gunilla Åkerström-Hougen (Jonsered: P. Åströms forlag, 1996), pp. 5-14 (p. 8).

<sup>252</sup> Lupoi, *Origins*, p. 81 n. 270.

<sup>253</sup> PLS.2, *MGH LL NatGerm.* 4.1, 2-3.

<sup>254</sup> Drew, *The Laws of the Salian Franks*, p. 232 n. 3.

purely kingly law, but the law of the Franks, even if their existence was unknown.<sup>255</sup> We can probably assume these men to be symbolic, if not mythical, figures in the origins of a Frankish written law. Nevertheless, the care taken to show that righteous men were chosen to carry out the task of deciding the law implies that there was a need to ensure that law-making was supervised with competence, not by the brutality of the king. Wormald holds the view that the law of the Salian Franks could not be linked to royal activity.<sup>256</sup> As has already been mentioned, the attachment of the laws to the Merovingian king Clovis has defined the dating and the views on the origins of the code.

We see that the rulers finding necessity in producing written law make pragmatic use of men of letters in this work. So, too, in a time of colonisation. The way King Cnut (r. 1016-1035) made use of his former opponent Æthelred's right-hand man, Wulfstan, shows a political talent to exploit the newly conquered region's establishment.<sup>257</sup> Wulfstan was intellectual, highly educated and already politically trained. To allow him to continue his work did much to promote stability within the English kingdom. It is possible that Cnut had the same intention for Grimkjell, the trusted English bishop of his former opponent in Norway, King Olaf Haraldsson. The first Christian laws of Norway are ascribed to King Olaf and Grimkjell during Olaf's conquest of the land. And, although the trustworthiness of the transmitted remnants of these laws are highly questionable, the two probably set some kinds of rules when arriving in Norway. After Olaf's death, Grimkjell continued his work under Cnut's son Svein. He might have been involved in Svein's legal work.<sup>258</sup>

The scholastic environment that flourished before the universities came into being in the eleventh and tenth centuries was not built up through institutions, but revolved around individual masters. Mia Münster-Swendsen has shown in great detail how these places of learning were held together by the close relationships between the master and his students and between the students.<sup>259</sup> The success and prominence of the 'school' depended completely on these relationships and on the constant re-creation of the group's reputation. A prominent scholar would take in students who were bound to their master in loyalty and, ideally, in

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<sup>255</sup> Wood, *The Merovingian Kingdoms*, pp. 109-10.

<sup>256</sup> Wormald, *Leges Barbarorum*, p. 28.

<sup>257</sup> Lawson, *Cnut*, pp. 133-148; Lawson, 'Archbishop Wulfstan', pp. 156-160.

<sup>258</sup> Miriam Tveit, 'Lawmaking and Consolidation of Power – Cnut's Laws and the Developing Norwegian Kingdom', in *Nordens plass i middelalderens nye Europa, Samfunnsomdanning, sentralmakt og periferier*, ed. by Lars Ivar Hansen, Richard Holt and Steinar Imsen, *Speculum Boreale*, 16 (Stamsund: Orkana Akademisk, 2011), 55-66 (pp. 61-63).

<sup>259</sup> Mia Münster-Swendsen, 'Masters and Paragons: Learning, Power and the Formation of a European Academic Culture c. 900 – 1200' (Revised bookmanuscript, 2007).

love.<sup>260</sup> They would exercise what Münster-Swendsen has labelled ‘ennobling qualities’ in their painstaking and time-consuming studies. They would aim to reach a higher spiritual level and liberate themselves from desiring material things. However, they would not exclude themselves from society like the religious orders, but rather be a tool of society by applying their skills for the greater good in politics, court life and administration.<sup>261</sup> The diligent student would therefore strive for proper conduct and posture within himself, together with justice and temperance in his surroundings. Students brought these ideals back with them, together with scholarly knowledge of law.

To the kings who were promulgating law, and to those under the jurisdiction of law, what was the ideal of a legal advisor? The lawman at the provincial assembly of Västgötaland, Eskil, was credited for producing the first Swedish written law. He was described in a list of lawmen as ‘wise’, ‘as learned as learned men’ and ‘supportive of the Västgötar and their chieftains’.<sup>262</sup> From this we can picture an ideal legal advisor who was both book-smart and pragmatically loyal to the people affected by law. The Scandinavian provincial assemblies were characterised by their autonomy from the king; the legal elite in other regions would to a larger degree be loyal to the royal apparatus more than to the nobility and general population. Still, the ability to keep in with many interest groups would be a necessary virtue for the legal elite, together with knowledge of the law.

Pride in education and learning was enormous. Abbot Samson of Bury St Edmunds was a former Paris university student. He would chastise his monks with his scholarly intelligence and enjoy dignity as a judge and mediator because of his skills.<sup>263</sup> Samson did not make law, but he showed signs of the legal knowledge of his class, as well as the pride such knowledge gave. The schools were generally attended by students from nearby regions, rather than being international forums of collective learning, as the universities would later become to some degree. But, the schools’ reputations sometimes transcended administrative boundaries, and attracted foreign students.<sup>264</sup> We can assume that the legal elite of sixth- to

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<sup>260</sup> Mia Münster-Swendsen, ‘Medieval “Virtuosity” - Classroom Practice and the Transfer of Charismatic Power in European Scholarly Culture c. 1000-1230’, in *Negotiating Heritage: Memories of the Middle Ages*, ed. by Mette Birkedal-Bruun and Stephanie Glaser (Turnhout: Brepols, 2008), pp. 43-64. (pp. 46-47). The ideology of learning was aesthetic and moral. The masters were praised for their virtue of mind and body, and the students would aim to show in their physical appearance the moral elevation of their souls.

<sup>261</sup> Münster-Swendsen, ‘Medieval “Virtuosity”’, p. 48.

<sup>262</sup> Holmbäck and Wessén, *Svenska Landskapslagar V*, pp. xix.

<sup>263</sup> Jocelin of Brakelond, *Chronicle of the Abbey of Bury St Edmunds*, translated with an introduction and notes by Diana Greenway and Jane Sayers (Oxford: Oxford University Press, 2008).

<sup>264</sup> Mia Münster-Swendsen, ‘Masters and Paragons’, pp. 91, 119 and 140.

tenth-century northern Europe was not primarily taught at these schools. Instead, the clergy of Church centres and abbeys were competent in the law.

Learned clergy would give more than one meaning to the term 'law'. Lawrence of Durham (d. 1154?), a Benedictine monk and a defender and prosecutor at court, argued in his *Oratio pro juvenibus compeditis* (Speech For the Young Men in Shackles) that the master's responsibility for his servant is not found in 'the law', in which unspecified references are made to the Roman corpuses of Theodosius and Justinian together with those of Caesar and Pompey, but in 'the law of this land'.<sup>265</sup> Münster-Swendsen regards this comment as an establishment of learned authority.<sup>266</sup> In other works, Lawrence refers to 'both laws', which Münster-Swendsen links to a passage in canon law where Urban II states that there are two laws, *lex publica* and *lex privata*, the former to be found in *scriptum* and the latter inscribed on the heart.<sup>267</sup> A source contemporary with Lawrence, John of Salisbury, also refers to the dual legal concepts of the law in letters and the law of the mind;<sup>268</sup> the second of these concepts could perhaps be linked to a Christian legal culture. The law of the heart or mind, which we can term a feeling of righteousness, was given higher dignity than the written law. Münster-Swendsen argues that this reveals the dialectic nature of the receipt of the law. The legal elite were conscious that the written law did not necessarily lead to justice from consciousness, but that a sensitive feeling of righteousness should be applied by the judge. According to Münster-Swendsen, this was used as a political argument for demanding that the lords who sat in judgment would consult men of letters, and that learning law would give the learner a greater sense of justice than the lord.

In the Nordic realms, the legal traditions were, to a larger extent, maintained by a legal class, as opposed to through royal sanction. This is because of the political situation; the early realms of Norway, Sweden and the free state of Iceland (although not Denmark) were not united kingdoms, but were still cultural and legal communities. In these three areas, 'lawmen', or people with specific legal knowledge, 'spoke' the law. This means that they recited the law to the assemblies and during cases presented at the assemblies (*þing*). Before any stable authority was established, the legal provinces had lawmen, and these lawmen continued to be legal consultants or 'keepers of the law' in the eleventh century and from then on. Studies of

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<sup>265</sup> Mia Münster-Swendsen, 'Setting Things Straight: Law, Justice and Ethics in the Orations of Lawrence of Durham', in *Anglo-Norman Studies xxvii: Proceedings of the Battle Conference*, ed. by John Gillingham (Woodbridge: The Boydell Press, 2005), pp. 151-168 (pp. 156-59).

<sup>266</sup> Münster-Swendsen, 'Setting Things Straight', p. 162.

<sup>267</sup> *Ibid.*

<sup>268</sup> Münster-Swendsen, 'Setting Things Straight', pp. 162-63.

lists of lawmen have revealed that particular families seem to have had the role of preserving legal knowledge.<sup>269</sup> Without necessarily being legally trained at the universities, in procedural rhetoric or in reading the rules of Roman or canon law, these individuals had, or at least were supposed to have, through family training and constant repetition, a thorough knowledge of the prevailing law of the jurisdiction. However, it seems that the offspring of the Scandinavian elite were also sent to the European universities.<sup>270</sup> Contact between the assemblies must also have led to an expanded legal basis from which to draw and to transmission of legal conceptions between them.

The Nordic elite appeared as students in learning centres on the Continent and in the British Isles. We see at once that the twelfth-century Norwegian clergy went to Paris, more precisely to the Abbey of St Victor. According to Sverre Bagge, Norwegian and Danish students were more represented in the prestigious centres than Swedish, which corresponds to the influence of Christianity in, and the Christianisation of, the Nordic region,<sup>271</sup> and generally to the influence in ‘political, economic and cultural respects’ of the Anglo-Norman and northwest German areas of the east. We can further assume a transmission of the law in the same process. The natural development is that the level and spread of education increased with the increasing influence of the Church in Scandinavia. From 1285 into the fourteenth century, the number of educated men seems to have been much higher in Denmark than in Norway and Sweden.<sup>272</sup> The historian Tore Iversen has suggested that the Norwegian archbishop Eysteinn’s Christian laws in the Frostathing Law were influenced by Eysteinn’s studies at St Victor, an important centre for theological discussion.<sup>273</sup> In 1160-61, he possibly met or was taught the theology of Stephen of Tournai, author of *Summa in Decretum Gratiani* of 1159, and his ideas about *causa efficiens* and marriage.<sup>274</sup> Eysteinn and other canon law

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<sup>269</sup> Michael Gelting, ‘Odelsrett – lovbydelse – bordsrätt – reitrit 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. by Lars Ivar Hansen (Tromsø: University of Tromsø, 2000), 133-165 (p. 142); Hafströmet al., ‘Lagman’, pp. 150-63; and see also M. M. Lárússon, ‘Logsogumaðr’, in *KLNM*, vol. 11 (Oslo: Gyldendal, 1966), p. 137.

<sup>270</sup> Sverre Bagge, ‘Nordic Students at Foreign Universities until 1660’, *Scandinavian Journal of History*, 9, 1 (1984), pp. 1-29.

<sup>271</sup> Bagge, ‘Nordic Students’, pp. 4-6. There was a rise in the number of Swedes in Paris in the late-thirteenth century.

<sup>272</sup> Bagge, ‘Nordic Students’, p. 6.

<sup>273</sup> Tore Iversen, ‘Landskapslovene og kanonisk rett’, in *Nordiske middelalderlover. Tekst og kontekst*, ed. by Audun Dybdahl and Jørn Sandnes, Rapport fra seminar ved Senter for middelalderstudier, 29-30 Nov. 1996 (Trondheim: Tapir, 1997), pp. 69-86.

<sup>274</sup> Tore Iversen, ‘Landskapslovene og kanonisk rett’, p. 77. Stephan Tornacensis – bishop of Tournai. Eysteinn’s successors Eirík (1189-1205) and Þórir (1206-1214) also studied at St Victor.

students would have been involved in these discussions, which took place at all learning centres and universities.

## **Conclusion**

The sources selected for this thesis have distinct origins, but share some aspects in making and content. The legal transmission of rules and concepts related to inheritance systems and compensation for homicide would follow contact between people. The transmission of these concepts into the written law would follow contact between legal elites. In any matter, we rarely know who the individual members of the legal elite were. Therefore, an examination of the legal sources can say something about legal transmission where we lack knowledge of meetings between people. In the next chapter, I will turn to some theories of legal transmission and establish the terminology with which we can discuss the transmission of law.

### 3. Approaching Transmission of Law: Theories and Methodologies

To be able to discuss the possible evidence of legal transmission in medieval secular law, some terminology should be clarified and some careful guidelines should be established. In the humanities and the social sciences, the main term in this study – ‘transmission’ – resonates with terms like ‘spreading’, ‘diffusion’, ‘influences’.<sup>275</sup> The terms and concepts will be treated in this chapter, but the clarifying begins with a discussion of the term ‘legal transplant’.

Some of the methodological challenges and limitations of the present project have already been addressed in the opening chapter, as have the necessary demarcations. As the principal method is comparison, some reflections on the use of variants of a comparative method will be outlined more specifically in the last part of this chapter.

#### 3.1 Theories of legal transmission

The central aim of this thesis is to search for transmission of law in the Latinised spheres of early and high medieval Europe. In such a task, an applicable system of concepts will aid analysis. Theories of comparative law encourage the student to have a conscious awareness of what exactly is transmitted between laws, writings or ideas. Controversies over these factors have resulted in debates among comparative lawyers. In the following, I will go through a theoretical debate in comparative law regarding particular concepts connected with legal transmission, mainly using the ideas of two professors of law, Alan Watson and Pierre Legrand.<sup>276</sup> The purpose of examining this discussion will be to isolate a set of terminology about legal transmission that will be useful throughout the following study of the sources. I will attempt to relate the legal theories to historical approaches, and discuss how these theories of jurisprudence can shed light on historical problems.

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<sup>275</sup> David A. Westbrook, ‘Theorizing the Diffusion of Law: Conceptual Difficulties, Unstable Imaginations, and the Effort To Think Gracefully Nonetheless’, *Harvard International Law Journal*, 47, 2 (Jun 2006), 489-505; Peter Sawyer, ‘English Influence on the Development of the Norwegian Kingdom’, in *Anglo-Saxons: Studies Presented to C. R. Hart in Honour of His Eightieth Birthday*, ed. by S. Keipnes and A. Smytt (Dublin: Four Court Press, 2006), pp. 224-29.

<sup>276</sup> Watson, *Legal Transplants: An Approach*; Pierre Legrand, ‘The Impossibility of “Legal Transplants”’, pp. 111-24.

## *Transplants and filtration*

Alan Watson's work *Legal Transplants*, published in 1974, has been a sound corrective to the rejection of comparative approaches on law.<sup>277</sup> His theories have had implications for the study of comparative law.<sup>278</sup> They are likewise much debated and much criticised, with arguments of exaggeration.<sup>279</sup> His main argument is that laws in the shape of norms, principles and concepts spread just as easily as other intellectual commodities.<sup>280</sup> According to Watson, laws are rarely devised for the society in which they now operate, and he held this to be unproblematic.<sup>281</sup> His 1974 work was a comment on functionalism as an explanation for legal change in legal history.<sup>282</sup> Watson's aim with this work was primarily to point out the widespread use of borrowing in legal material, from the first known laws until the present day. His most central point was that legal development in history *most commonly* happens through legal transplants.<sup>283</sup> In *Legal Transplants*, Watson gave many examples of law being directly borrowed from one legal region by another. His main arguments, though, relate to how Roman law has spread through transplants into the European legal systems from the Roman period onwards.<sup>284</sup> The theory has also been called the 'Roman theory', and is understood to be applicable only to the history of western legal systems.<sup>285</sup>

Although Watson's theory that changes in law mainly happens through transplant calls for moderation, it contributes to the search of transmission of law. Another contribution of Watson's work is that he questioned the long-established paradigm in comparative law and legal philosophy, a remnant from the founder of this field, Montesquieu, that law changes for

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<sup>277</sup> Watson, *Legal Transplants: An Approach*.

<sup>278</sup> See, for instance, Ugo Mattei, 'Efficiency in Legal Transplants: An Essay in Comparative Law and Economics', *International Review of Law and Economics*, 14 (1994), 3-19; John Cairns and Olivia Robinson, eds., *Critical Studies in Ancient Law, Comparative Law & Legal History – Essays in Honour of Alan Watson* (Oxford: Hart Publishing, 2001).

<sup>279</sup> See, for instance, Richard L. Abel, 'Law as Lag: Inertia as a Social Theory of Law', *Michigan Law Review*, 80, 4 (Mar 1982), 785-809; William Ewald, 'Comparative Jurisprudence (II): The Logic of Legal Transplants', *American Journal of Comparative Law*, 43 (1995), 489-510; Legrand, 'Impossibility of "Legal Transplants"'; Esin Örüücü, *Critical Comparative Law: Considering Paradoxes for Legal Systems in Transition*, Nederlandse Vereniging voor Rechtsvergelijking (Deventer: Kluwer, 1999); Anthony Ogus, 'Competition Between National Legal Systems: A Contribution of Economic Analysis to Comparative Law', *The International and Comparative Law Quarterly*, 48, 2 (Apr 1999), pp. 405-18; Westbrook, 'Theorizing the Diffusion of Law'; John W. F. Allison, *A Continental Distinction in the Common Law* (Oxford: Oxford University Press, 1996), pp. 13-16.

<sup>280</sup> Watson, *Legal Transplants: An Approach*, pp. 29-30.

<sup>281</sup> Watson, *Legal Transplants: An Approach*, pp. 95-96.

<sup>282</sup> John Cairns and Olivia Robinson, 'Introduction', in *Critical Studies in Ancient Law, Comparative Law & Legal History – Essays in Honour of Alan Watson*, ed. by John Cairns and Olivia Robinson (Oxford: Hart Publishing, 2001), pp. xvii-xix.

<sup>283</sup> Watson, *Legal Transplants: An Approach*, pp. 95, Allison, *Continental Distinction*, p. 15.

<sup>284</sup> Watson, *Legal Transplants: An Approach*, pp. 25, 31ff, 36ff, 57ff, 79ff, 82ff, 93ff.

<sup>285</sup> Ewald, 'Comparative Jurisprudence', p. 501.

reasons outside the law but inside the jurisdiction.<sup>286</sup> The work was also a comment on the theories of Montesquieu and later works of Otto Kahn-Freund that there are dangerous implications in direct transplants of modern law.<sup>287</sup> The danger is due to the ‘risk of rejection’ by the new host (Kahn-Freund’s organic terminology is not accidental).<sup>288</sup> Montesquieu’s point was that it would be ‘un tres grand hasard’, a great coincidence, if the laws of one nation were suitable for another.<sup>289</sup> Although Watson did not oppose coincidental legal transplants, he did oppose the idea that societies change the law because of elitist interests or political ideologies, and that law reflects the power structures of society. Rather, he shows how law can be autonomous from society. William Ewald pointed out that, in *Legal Transplants*, Watson confronted the prevailing mirror-theories, that in their extreme versions imply not only that law mirrors its society, but also that law is a complete entity, that every piece of it belongs together.<sup>290</sup> My hypothesis is that medieval law is fragmented and coincidentally pieced together, and that the pieces often are transmissions from other law.

In Pierre Legrand’s critique of Watson, formulated in ‘The Impossibility of “Legal Transplants”’ (1997), Legrand claims that *legal culture* is an obstacle to the direct reception of law.<sup>291</sup> ‘Legal culture’ in Legrand’s argument must be understood as the sum of practices, ideas and expectations of the law in a society’s subjects and legal organs. As legal historian Jørn Ø. Sunde asserts, legal culture changes by a gradual transformation of conceptions and expectations of law.<sup>292</sup> Transmission of law will not change the legal culture, but legal culture will form the transmitted law.<sup>293</sup> Legrand’s first objection to legal transplants derives from the manner in which he defines the term ‘transplant’. To Legrand, a transplant means a dislocation.<sup>294</sup> He therefore asks what is actually being dislocated, and he understands Watson’s argument to be that rules can be dislocated freely, in anatomical terms like Kahn-Freund. He also understands Watson as only referring to transplants of rules, as in positive law, and not to transplants of concepts, norms, jurisprudence and other elements that can fall

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<sup>286</sup> Ewald, ‘Comparative Jurisprudence’, p. 490.

<sup>287</sup> Otto Kahn-Freund, ‘On Uses and Misuses of Comparative Law’, *The Modern Law Review*, 37, 1 (1974), 1-27; Allison, *Continental Distinction*, p. 13.

<sup>288</sup> Kahn-Freund, ‘On Uses and Misuses’, p. 7.

<sup>289</sup> Charles de Secondat de Montesquieu, *De l’Esprit des Loix*, Première partie: Livres I à VIII, (1772), <http://dx.doi.org/10.3931/e-rara-25391> [accessed 15 April 2016] (p.12).

<sup>290</sup> Ewald, ‘Comparative Jurisprudence’, pp. 493-95.

<sup>291</sup> Legrand, ‘Impossibility of “Legal Transplants”’, p. 118. See also Pierre Legrand, ‘European Legal Systems Are Not Converging’, *The International and Comparative Law Quarterly*, 45, 1 (Jan 1996), 52-81; Pierre Legrand, ‘Comparative Legal Studies and Commitment to Theory’, *The Modern Law Review*, 58, 2 (Mar 1995), 365-450 (pp. 262-73).

<sup>292</sup> Jørn Øyrehagen, Sunde, *Speculum legale – rettspeglene*, (Bergen: Fagbokforlaget, 2005), p. 31.

<sup>293</sup> A condensed interpretation of Sunde’s depiction of a layered legal culture in Sunde, ‘Min komedie’, p. 13.

<sup>294</sup> Legrand, ‘Impossibility of “Legal Transplants”’, p. 111.

into the category of what is ‘legal’. Legrand consequently argues against Watson only on the basis of transplanting rules, and assert that rules are more than the words constituting them, and that their semantic meaning is what ‘partakes in the ruleness of the rule’.<sup>295</sup> The meaning is locked into the cultural context in which the rule exists, and, since meanings are not transplantable, neither are rules.<sup>296</sup> In addition, he emphasises that received law will pass through what could be termed a *legal cultural filter*<sup>297</sup> and be altered when transmitted into another legal culture. Mere implants will be rejected in the new host legal culture. Legrand holds Watson’s definition of law to be wrong, by ascribing to him the view that rules, both in their exact wording and in their originally invested meanings, can be transplanted as a totality. What Legrand finds impossible is that a rule’s meaning in one culture could be transplanted into another culture. He claims that ‘the imported form of words is inevitably ascribed a different local meaning which makes it *ipso facto a different rule*. As the understanding of a rule changes, the meaning of the rule changes. And, as the meaning of the rule changes, the rule itself changes’.<sup>298</sup> Since the rule is not the same, legal transplants cannot take place, according to Legrand. Further, he finds legal transmission to be an unimportant aspect of legal development, since it is the different culture’s perception of its laws that determines the legal process.<sup>299</sup> This is based on his idea of legal culture and the assumption that each individual legal subject within a society is a bearer of the society’s legal culture.<sup>300</sup> For Legrand, a study of the internal changing of laws is a constructive approach towards understanding legal development. An examination of external influences is not.

Legrand’s rejection of legal transplants is easy to challenge, mainly because he seems to have misrepresented Watson. First of all, Watson did not use the term ‘legal transplants’ to refer to rules being copied with their semantic meanings, but has, like Legrand, repeatedly emphasised that the different interpretations of borrowed rules are a key aspect of legal transplants.<sup>301</sup> The theories given in *Legal Transplants* are not only about copying specific rules into foreign codes, but also, just as Legrand stresses, about how specific rules are interpreted and used differently when transplanted into other legal codes. Second, Watson did not refer solely to transplants of written rules, but also to transplants of norms, concepts,

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<sup>295</sup> Legrand, ‘Impossibility of “Legal Transplants”’, p. 114.

<sup>296</sup> Legrand, ‘Impossibility of “Legal Transplants”’, p. 116.

<sup>297</sup> The term ‘legal cultural filtration’ was coined by Eirik Holmøyvik, ‘A Little Bit of This and a Little Bit of That’, in *Rendezvous of European Legal Cultures*, ed. by Jørn Ø. Sunde and Knut Einar Skodvin, (Bergen: Fagbokforlaget, 2010), pp. 45-59.

<sup>298</sup> Legrand, ‘Impossibility of “Legal Transplants”’, p. 117.

<sup>299</sup> Legrand, ‘Impossibility of “Legal Transplants”’, p. 114.

<sup>300</sup> *Ibid.*

<sup>301</sup> Watson, *Legal Transplants: An Approach*, pp. 19, 21, 27, 97, 105.

jurisprudence and all things legal, and he said that these abstract forms of law also would be interpreted differently in the transplant process. Nevertheless, almost all of Watson's examples of legal transplants concern specific written rules or rules copied from one corpus to another. Examples of transplants of ideas are presumably not very easy to identify, and therefore clear examples are not readily to hand, but must be explained in broader passages. It all boils down to the definition of what is meant by transplant, to what constitutes a rule of law, and to whether one considers legal concepts and elements of processes and punishments as a part of the law.

In a reply, Watson claims that Legrand has an outdated view of the law as the 'spirit of the people'.<sup>302</sup> Further, he finds it 'banal to notice that the same rule operates differently in two countries: it operates to different effects even in one'.<sup>303</sup> Watson then criticises Legrand's dismissal of the focus of comparative legal theories on external influences. Watson agrees that changes within a legal system are important, but says that it is the comparison of different legal systems that reveals their historical relationship.<sup>304</sup>

Still, as Richard L. Abel has pointed out, it is difficult to grasp Watson's treatment of law and society.<sup>305</sup> He is more than vague on what he defines as laws, and on whether the laws he refers to are laws-in-books or laws-in-society. This distinction is crucial for the present study, which concentrates on laws as law-in-books, and the motives of the legislator. The link with society comes from his survey of law-making, when he says that the real lawmakers are neither the authorities nor the people, but the 'legal elite' in society.<sup>306</sup> Watson does not explain the causes or effects of legal transplants, mainly because he finds the process so common that there is no need to explain its background. Laws are difficult to invent and easy to borrow, and there is no need to have a reason for this. As for the link to society, he states, 'the truth of the matter seems to be that many legal rules make little impact on individuals, but what rule actually is adopted is of restricted significance for general human happiness'.<sup>307</sup> His basic opinion seems to be that laws work indirectly within society, so that the 'volksgeist' does not determine legal change.

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<sup>302</sup> Alan Legal Transplants and European Private Law', 4.4 *Electronic Journal Of Comparative Law*, (2000), pp. 1-12 (p. 2).

<sup>303</sup> *Ibid.*

<sup>304</sup> Watson, *Legal Transplants: An Approach*, pp. 19; Watson, *Legal Transplants and European Private Law*, p. 5.

<sup>305</sup> Abel, 'Law as Lag', pp. 786-87.

<sup>306</sup> Watson, *Legal Transplants: An Approach*; Alan Watson, *Comparative Law: Law, Reality and Society* (Lake Mary: Vandepias Publishing, 2007), pp. 1-3.

<sup>307</sup> Watson, *Legal Transplants: An Approach*, p. 96.

One of Watson's frequently used examples is the Turkish adoption of the civil codes of Switzerland in 1926. The authorities of the young republic of Turkey wanted to modernise society, and therefore also its legal system – the secular courts, which were 'backward and primitive', and the religious courts that were in use.<sup>308</sup> In short, a commission shopped around for a law to replace the Ottoman legal system, and chose the Swiss civil codes in their entirety. In addition, Swiss jurisprudence, glossaries and precedents were brought along with the codes, together with Swiss legal professors to teach Turkish lawyers and judges.<sup>309</sup> The commission also borrowed commercial law, maritime law and criminal procedure from Germany, criminal law from Italy and administrative law from France. This is an extreme example of legal transplants, but it illustrates essential points in both Watson and Legrand's arguments: the borrowed laws were then mildly altered to fit with each other and with Turkish social problems, but were largely not tampered with. The result was that the law bore no resemblance to Turkish society. Therefore, fifty year later, one still found in the peripheral communities people living according to the old laws and not the Swiss law.<sup>310</sup> This conclusion supports both Watson and Legrand: law can be transplanted, but it will need to be altered to be applicable in the new society.

Finally, to Legrand's argument about the impossibility of legal transplants, Watson replies with an allegory of a grafted tomato plant, and asks if the plant is the same when it gains strength in its new soil.<sup>311</sup> Watson believes it is, but suspects that Legrand does not, since transplants are impossible. Legrand might perhaps think that rules and tomato plants cannot be compared. The discussion turning towards Heraclitian epistemological philosophy is a less important issue for my focus here and will not be followed any further. The point is not whether the rule, because of the change in its environment, is a different rule because it is interpreted differently, or altered or adjusted. The point here is that the law from one society can be included in another. Depending on one's legal and philosophical leaning, legal transplants are possible.

Although Legrand and Watson have different views on the relationship between law and society, they both agree that law is adjusted when it is included in another law. A fruitful part the argument is the theories concerning the process of alteration, and how received law is

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<sup>308</sup> Watson, *Legal Transplants and European Private Law*, p. 6; Watson, *Comparative Law*, p. 7. Muslim, Jewish and Christian laws and law-courts were all operative in the closing stages of the Ottoman Empire.

<sup>309</sup> Örüçü, *Critical Comparative Law*, p. 84.

<sup>310</sup> Watson, *Comparative Law*, p. 9.

<sup>311</sup> Watson, *Legal Transplants and European Private Law*, p. 10.

altered by passing through the legal cultural filter in order to be accepted in its new society.<sup>312</sup> In addition, to the extent they touch upon it, they both argue that studies of the alterations that happen in this process will address why the foreign law was transmitted into the new legal system, and that the transmission will reveal developments in the legal system. Therefore, these theories may be useful for historians in determining the cause and effect of legal transmission. While comparative law can provide different angles on how to view the reception of the law, comparative law is rarely used in the context in which these transmissions happen.

In the discussion of legal transmission, relevant issues relate to whom the written law applies, as well as to the boundaries of the law. A normal distinction would be between territorial law and ethnic law, as mentioned in the previous chapter. Roman law, for instance, was in principle valid for everyone within the territory of the Roman Empire, while the Lombard law and some of the Swedish provincial codes, as well as others, seems to have been valid only for those defined under a specific ethnic group.<sup>313</sup> More interesting to the search for legal transmission is the unofficial boundaries of law, or the extent of the law. Patrick Wormald criticised the teleological historical approach to early medieval law as bearer of gens, or as an ethnic marker.<sup>314</sup> Next, we should discuss what the extent of medieval law was, in both people's mentality and the jurisdiction it claimed.

The anthology *Boundaries of the Law* from 2005 raises important questions regarding what we imagine the law's range of influence to be, which could be both its jurisdiction and range.<sup>315</sup> The editor Anthony Musson addresses the geographical, personal, social and cultural legal boundaries.<sup>316</sup> Modern historians understand law to be uniform and total, but he asserts this is not applicable to medieval societies. It is important to remain conscious of the multilayered ranges of medieval law when discussing transmission. Dirk Heirbraut points out that, in Flanders in the twelfth and thirteenth centuries, several competing laws had effect in overlapping regions.<sup>317</sup> Feudal law competed with the urban jurisdiction and local v. regional laws/jurisdictions. He gives examples of local and regional conflicts of law, where the parties

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<sup>312</sup> Legrand, 'Impossibility of "Legal Transplants"', p. 123.

<sup>313</sup> The *Digesta* on the jurisdiction of the law D.2.1.20.

<sup>314</sup> Wormald, '*Leges Barbarorum*', pp. 22-23.

<sup>315</sup> Anthony Musson, ed., *Boundaries of the Law: Geography, Gender and Jurisdiction in Medieval and Early Modern Europe* (Aldershot: Ashgate Publishing, 2005).

<sup>316</sup> Anthony Musson, 'Introduction', in *Boundaries of the Law: Geography Gender and Jurisdiction in Medieval and Early Modern Europe*, ed. by Anthony Musson (Aldershot: Ashgate, 2005), pp. 1-6.

<sup>317</sup> Dirk Heirbraut 'Rules for Solving Conflicts in the Middle Ages: Part of the Solution, Part of the Problem', in *Boundaries of the Law: Geography, Gender and Jurisdiction in Medieval and Early Modern Europe*, ed. by Anthony Musson (Ashgate Publishing, 2005), pp. 118-29.

were from different communities or regions. Territorial boundaries usually solved the problems of conflicting jurisdictions, but Heirbraut explains that this did not happen in Flanders, where the overlapping remained even when the Low Countries were united under one ruler. At the local level, several competing laws still applied.

Such overlapping can also be found in the specific institutions in the law. Although it should have been superfluous to legislate on vengeance due to the development of the state, it still existed in both European medieval society and in the laws. In much the same way, Trisha Olson has shown in a thorough study of the role of sanctuaries as part of medieval conflict resolution how, although giving peace to an offender for having hidden in a sanctuary seems an obsolete practice and ‘antithetical to civilised systems of justice’, this was unproblematic during the period the practice was used, because the layers, tools and processes were different then from our current understanding of right process.<sup>318</sup> Sanctuaries were considered as an existing part of a possible legal process, and mentioned in several secular laws from eighth-century Spain to eleventh-century Flanders to twelfth-century France.<sup>319</sup> Heirbraut has also shown that the same law could be interpreted in many different ways in the different judicial systems of Flanders: for instance, the law giving the eldest son the larger part of the inheritance would bestow on the younger children different shares in different regions.<sup>320</sup> Taking into consideration Legrand’s theory of adaptation of transmitted law into a new legal culture, we must also acknowledge that legal subjects and the legal authorities recognised different laws being current in the same territory, or a group being under several different laws at the same time, and that this was unproblematic.

The discussion between Watson and Legrand forms a theoretical work, and it also provides us with usable terminology. These tools can provide ways to interpret somewhat impersonal legal texts, where we have no clue about the individuals behind the normative material who were in contact with those norms. Watson’s theories give the whole backdrop to *legal transplants*. This phrase is somewhat controversial and rigid. A more subtle version is the term that forms the basis of the present thesis, *transmission*. Legrand’s definition of the term *legal culture* gives us a sustainable framework for discussing the sum of norms and customs and understanding of legal concepts within an area, an area often corresponding with the jurisdiction of the laws. Legrand’s arguments of *adaptation* and alteration explain how

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<sup>318</sup> Trisha Olson, ‘Sanctuaries and Penitential Rebirth in the Central Middle Ages’, in *Boundaries of the Law: Geography, Gender and Jurisdiction in Medieval and Early Modern Europe*, ed. Anthony Musson (Farnham: Ashgate, 2005), pp. 38-52 (p. 39)

<sup>319</sup> Olson, ‘Sanctuaries’, pp. 40-42.

<sup>320</sup> Heirbraut, ‘Rules for Solving Conflicts’, pp. 49-50.

transmitted law can be introduced into other legal cultures, through *legal cultural filters*. Next, some possible ways of law can be transmitted will be depicted.

### *Modes of transmission*

As the theories of Alan Watson, and the discussion that followed them, show, transmission of law can take many forms. We can distinguish three key factors concerning how legal transmission can ultimately take place. First, law can spread by *transplants*, a conscious copying of other societies' laws. Secondly, law can spread by *influence*, intellectual tendencies affecting the makers of law, by reception or pressure, resulting in common concepts of justice in different legal cultures. Finally, law can spread by what we may call *filtration*, when external influences or transplants are altered according to domestic legal traditions. A fourth feature is relevant to this study; the question of the legislators' motives for including contents in law. Influence is the most general and somewhat superficial way of explanation, and the most widely used description for legal transmission by scholars. "Influence" has become almost a dirty word in legal history', Bernard S. Jackson noted in 1968, in his article on influences on ancient law.<sup>321</sup> It might be an obvious point, but it can be fruitful to give some reflections on the modes of transmission. There is, of course, a difference between, on the one hand, ideological impulses from one legal culture to another, and on the other, new laws thrust upon a society by a conquering force. Slow religious or cultural influences are different from the loan of a great bulk of law. The reactions – that Pierre Legrand claims must take place – to the transmitted law would also be different, ranging from acceptance to non-acceptance, and these would be visible in different types of amendments to the new law. A possible way to view both the types of transmission and the types of reaction will be as pairs of terms with positive and negative connotations. The following list is my suggestion to how we can articulate different (not ranked) types of transmission, according to the way it takes form with the legislators and in the legal culture.

<b>Type of transmission</b>	<b>Positive connotation</b>	<b>Negative connotation</b>
Transplant	Loan	Imposed law
Filtration	Adaption	Adjustment
Influence	Reception	Pressure
Motives	Inspiration	Discouragement

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<sup>321</sup> Jackson, 'Evolution', p. 372.

While this vocabulary may be useful in describing transmission in the following chapters, what can the explanations of legal transmission be? Watson has put forward four aspects of ‘legal transplants and of legal autonomy’ as an attempt to theorise on a large scale about borrowings of law that have been and are still conducted everywhere: 1. extreme utility; 2. chance; 3. difficulty of clear sight; and 4. need for authority.<sup>322</sup>

By *utility*, Watson means how easy it is to borrow law, and how difficult it is not to. Laws transmit easily, although not without friction. Watson explains this with an example from the Dutch reception of Roman law transplanted into Dutch law, by pointing out the vigorous effort to learn Roman law by Dutch law students. This effort, he asserts, is a testimony to the conscious attitude that an imposed law can be met with ‘the ability within a system to reject a potent and dominating foreign force.’<sup>323</sup> Another obvious point is that transmission of law must happen through persons, individuals and groups, or with the works of persons as instruments. People from one legal culture must bring law to another or to someone from another legal culture; or someone must actively seek foreign law, visit it or send for it; or multiple meetings between people from different legal cultures must result in gradual influences of legal ideas and concepts of law; or someone must come across legal works by others or laws made for someone else. Alan Watson calls this particular aspect ‘chance’, by which he means something unpredictable.<sup>324</sup> The point is that legal transmissions happen through direct or indirect contacts between people.

The two aspects of *difficulty of clear sight* and *need for authority* are connected to the jurist interpretation of transmitted law in early modern Europe, where Watson uses examples from the understanding of Roman-Dutch and Romano-Scottish law. A point may still be relevant to a survey of medieval laws: Watson argues that *difficulty of clear sight* may cause the legal elite to *give authority* to foreign law while not completely understanding the nature of the transmission. The need to give authority will, according to Watson, also cause legal transplants in itself.<sup>325</sup> This chapter has identified some tools of vocabulary, technical terminology and possible explanations for transmission of law. The next step is to provide some reflections on the comparative approach.

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<sup>322</sup> Watson, ‘Aspects of Reception’, pp. 335-51.

<sup>323</sup> Watson, ‘Aspects of Reception’, p. 339.

<sup>324</sup> Watson, ‘Aspects of Reception’, pp. 339-51.

<sup>325</sup> Watson, ‘Aspects of Reception’, pp. 350-51.

### 3.2 Methodological reflections

A study of legal transmission will, by its very nature, demand a comparative approach to the sources. The aims and scope of the present project require a comparison of broad geographical areas over a wide time span. Moreover, the base of the survey is a systematic identification of origins, influences and directions of the transmission of law. The analysis will be an interpretation of the legal material as normative texts, in order to discuss possible motives behind the legislation or the incorporation of transmitted law. These methodological approaches will be outlined further in this chapter. Comparative approaches can still contribute to the missing links between the surviving materials, when mapping the larger image of medieval legal development.

#### *Large scale comparisons, macro-causal analysis*

The volume of the source material, and the problem of assessing the transmission of law, call for comparisons to be made according to stringent criteria. The theoretical categorising of comparative methods by Theda Skocpol and Margaret Somers will be useful here.<sup>326</sup> Skocpol and Somers classify what they call ‘comparative history’ in three main ways. These ways are labelled ‘parallel demonstration of theories’, ‘the contrast of contexts’ and ‘macro-causal analysis’. The scope and problems of this thesis make it natural to apply the last method, since what are sought are causal connections on the broad level – a macro level – of medieval western legal development. To search for causal connections as explanation presupposes an idea of regularity in historical development, which would be impossible to argue. However, causal connections as explanation make it possible to study the variations in developments that are given value as general patterns. In this study, the general pattern is legislation in the process of the formation of a state, and the variations sought will be in legislation on wergild and inheritance. The method of macro-causal analysis can, according to Skocpol and Somers, be executed in two ways, by what John Stuart Mill termed *The Method of Agreement* and *The Method of Difference*.<sup>327</sup> In using the Method of Agreement, one seeks to identify the crucial causal factor, a common component of studied objects that have a similar result, where those

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<sup>326</sup> Theda Skocpol and Margaret Somers, ‘The Uses of Comparative History in Macrosocial Inquiry’, in *Social Revolutions in the Modern World*, ed. by Theda Skocpol (Cambridge: Cambridge University Press, 1994), pp. 72-82.

<sup>327</sup> Skocpol and Somers, ‘Uses of Comparative History’, p. 79; John Stuart Mill, ‘Two Methods of Comparison’, [selection from his *A System of Logic*, New York, Harper & Row, 1888] in *Comparative Perspectives: Theories and Methods*, ed. by Amitai Etzioni and Frederic L. Du Bow (Boston: Little Brown, 1970), pp. 205-10.

objects are otherwise different. The Method of Difference would, by contrast, mean finding the crucial variable that is different in the studied objects although they are otherwise similar. The third method of Mill's is a combination of the two logics. In regards to assessing the transmission of law, a combination will certainly be used. Even so, the method of difference could be more fruitful to the study in consideration of the notion that one finds what one seeks: the hypothesis put forward in this thesis is that there are traces of transmission and influence between the laws in western medieval legal cultures. The assumption is that a certain agreement in the material exists, an agreement that is unrevealed: the objects agree on crucial points (because of transmission), which results in similar legislation on wergild and inheritance, even though the objects otherwise differ. This would suggest applying the method of agreement. However, if we instead treat the material from different times and regions as fairly similar objects (law codes), and by the method of difference approach the sources with a search for their differences on crucial points (the laws on wergild and inheritance), this approach would be better at falsifying the hypothesis. A combination of the two methods might thus be the favourable solution in a direct comparative analysis.

What, then, are the objects to be compared? To be able to discuss transmission, the comparison would necessarily happen at several levels: of the separate rules concerning inheritance and wergild, of the combined legislation in one law code, and of the legal cultures, and the separate regions within the western spheres. A full comparison at all levels would of course be an unrealistic task for a thesis, but reasonable juxtapositions will be attempted.

The first principle of comparison is that objects of equal sizes should be compared. This rule is the first to be disobeyed in a study of this kind. The reason lies in the unequal legal activity over the centuries and the inequality between the mass of Roman legislation on inheritance and the small number of rules on this subject in the Germanic codes or any other secular medieval written law. In any case, the volume of Roman law simply makes the objects far from equal in any sense. Selected Roman rules will have to be contrasted with a few possible relevant rules found, for instance, in the Edict of Rothair. Similarly, the professionalisation of the Roman legal system makes it unequal with the early medieval continental, English and Nordic systems. As we are aware of this concern, the aim of this study is not to assess sheer quantity or quality, but the ideology of the content. Here, the rules are comparable. We are not looking for equality in the legal systems or quantity of law, but for signs of transmissions.

Another problem regarding these objects is the predefined legal regions in which I operate. In the fundamental work on comparative law by Zweigert and Kötz, the discussion of

the grouping of – mainly modern – *legal families* is addressed.<sup>328</sup> They point to the fact that a classification of the world's legal systems into families would be 'vulnerable to alteration by historical development and change'.<sup>329</sup> As we are studying ancient legal systems, the viewpoint of the researcher would influence the grouping, as would a predisposed attitude towards legal and historical development. The division that has already been sketched out, into the legal regions of Roman law, Germanic or continental law, early English law and Nordic law – disregarding the temporal factor – arguably stems from a modern cultural classification of western culture. Zweigert and Kötz themselves divide the modern legal families of the western world into the Romanist, Germanic, Anglo-American (common law) and Nordic families.<sup>330</sup> Yet, the modern classification arguably has a historical foundation, a factor that Zweigert and Kötz also regard as one of five factors being crucial for a division into legal families.<sup>331</sup> These regions or cultures have a history as legal families. The criticism of a division into such entities has mainly been that the division into modern legal families does not necessarily correspond with the boundaries of legal cultures.<sup>332</sup> Legal cultures overarching different legal families can be interpreted as signs of transmission of law.

### *Comparison along diachronic and synchronic lines*

The aim and scope of this study calls for a comparison of legal sources from different geographical regions and from different periods, which involves comparing them synchronically and diachronically. The terms 'synchronic' and 'diachronic' are mainly used in the subject of linguistics.<sup>333</sup> In the field of social anthropology, where the terms are also in use, diachronic and synchronic comparison denotes, respectively, comparison of occurrences at different points in time and occurrences compared regardless of time or without time being

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<sup>328</sup> Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law*, trans. by Tony Weir, 3<sup>rd</sup> edn (Oxford: Oxford University Press, 1998), pp. 63-73. See also John Bell, 'Civil Law Tradition', in *A Fresh Start for Comparative Legal Studies? A Collective Review of Patrick Glenn's Legal Tradition of the World*, ed. by Nicholas H. D. Foster, 2<sup>nd</sup> edn, *Journal of Comparative Law*, 1, 1 (2006), pp. 100-99 (p. 133).

<sup>329</sup> Zweigert and Kötz, *Introduction to Comparative Law*, p. 67.

<sup>330</sup> Zweigert and Kötz, *Introduction to Comparative Law*, pp. 74-285; for the rest of the world, they only discuss the law in the Far East and religious legal systems: pp. 286-322.

<sup>331</sup> Zweigert and Kötz, *Introduction to Comparative Law*, p. 68. See the discussion of Scandinavia and the Nordic realms as one object of study in Vogt, *Function of Kinship*, pp. 33-37.

<sup>332</sup> Bell, 'Civil Law Tradition', p. 133; Zweigert and Kötz, *Introduction to Comparative Law*, p. 67.

<sup>333</sup> See a good example in Mark Hale, *Historical Linguistics: Theory and Method* (Oxford: Wiley-Blackwell, 2007), ch. 9.

a factor in the operation.<sup>334</sup> Here, however, the term synchronic will be applied to legal developments taking place in different regions in mainly *the same time span*, and its opposite, diachronic, will denote legal developments taking place at *different points in time*, regardless of region.

When studying the transmission, influences and origins of law synchronically, the aim is to examine similarities and contrasts between legal regions. The classification of legal regions has already been discussed above, but some points on geography could be made here. The project has previously been limited to the Latin spheres of Europe, mostly western and south-central Europe, which creates a division between the Latin spheres and the Slavic and Greek spheres, and excludes the latter two. One could ask if this is a natural *legal* division, when thinking, for instance, of the developments in the Byzantine spheres and their interaction with the Lombard and later Norman regions of Italy mentioned earlier. Boundaries between the geographical jurisdictions may be blurred or overlapping. Within the Latin sphere, areas overlapping several states or jurisdictions appear as a natural legal family even although there are many differences between their laws.

When trying to explain similarities in the sources, and to assess the possible direction of transmission, an obvious approach is to look at the geographical proximity of the relevant jurisdictions. However, this should not hinder us from looking at other possibilities, including that transmission could take place between more physically remote areas. For instance, Lisi Oliver and Jocelyn Hillgarth have shown correspondences between, respectively, the Frisian and the Kentish, and the Visigothic and the Irish, legal material that cannot be explained by a shared language or physical proximity, but that still have elements of shared culture due to contact by sea and through trade.<sup>335</sup>

The comparison of the Nordic laws with early medieval continental and English legislation can provide fruitful rewards, despite methodological challenges. The early medieval laws from the European Continent and the high medieval Nordic laws have a similar genesis. They originated in a period of state consolidation, and they originated in the wake of Roman law although at different points in time – the Germanic laws as a response to Roman legal hegemony when successor states were established on or near earlier imperial territory, and the Nordic laws, in written form, from the impact on Europe of the revival of Roman laws

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<sup>334</sup> Fredrik Barth, *Synkron komparasjon*, Analyse, syntese, komparasjon: Studier i historisk metode, vi (Bergen: Universitetsforlaget, 1972).

<sup>335</sup> J. N. Hillgarth, 'The East, Visigothic Spain and the Irish', in *Visigothic Spain, Byzantium and the Irish*, ed. by J. N. Hillgarth, vol. 216 (London: Variorum Publishing, 1985); Oliver, *The Body Legal*, pp. 228-37.

at the universities. Both the Nordic and the Germanic laws could be both a reaction to and an effect of Roman legal culture. We can therefore expect to find (and have found) Roman legal concepts in both continental and Nordic European legislation. Moreover, we can therefore also expect to find in the same sources norms that have been chiselled out and that oppose Roman legal concepts, since legislators or legal cultures as a whole found it necessary to construct legal concepts that were essential in the regional or national legal culture but that were opposed to or were not found in the civil law of the Romans. For this reason, the sources of law from the early medieval Continent and England can justifiably be compared with each other.

The obscure lines of transmission will fully emerge through a diachronic perspective between the legal cultures from different periods and regions. The early medieval legal development was born out of the Roman legal tradition, but found its own way in the following centuries. The establishment of universities in Europe, at which the study of law became professionalised, is a divide in the time span covered by this thesis. This is a significant watershed, and although historians point to continuity with, and the origins in, the learning centres and schools that pre-dated the universities, the unification of canon law and the systematic approach to both Roman and canon law were important developments.<sup>336</sup> The establishment of the European universities made Roman law rise again for a second wave of influence on the *ius* of the developing European states in the 1100s to the 1300s. The division in time will therefore separate the Germanic and English laws as one synchronic legal development, and the Nordic laws as the second, later legal development.

A diachronic comparison of course risks the pitfall of teleological presumption, as for all studies of development over time. The presumption of an existing process of development itself leads the historian in a certain direction. The risk, therefore, when studying the development of laws in the process of the formation of a state is that all choices and selections made by the legislators are read as another step towards the consolidation of authority. A counterweight to this problem is the effect that a diachronic comparison of odd objects separated by centuries and long distances can liberate the analysis from such teleological presumptions. The aim is a comparison of contents regardless of time, not to find the causes and effects of a particular development.

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<sup>336</sup> James A. Brundage, *Medieval Canon Law* (London: Routledge, 1995), pp. 18-69; Münster-Swendsen, 'Masters and Paragons', pp. 343 and 436.

### *A hierarchy of probability*

The primary goal of macro-causal analysis is, according to Skocpol and Somers, to develop explanations of the crucial similarity or differences in the cases being studied.<sup>337</sup> To explain the outcome of legislation in the areas in relation to each other would, as such, be the primary goal of this study. A problem with this is mentioned in the introduction: that regulation of inheritance and homicide is essential in any society. Thus, it could be argued that inheritance and a system of compensation would always exist in legislation enacted in forming states, and would basically have common features in these laws for that reason. The obvious similarities in the topics makes it difficult to assess what is transmission of law and what is similar solutions to similar problems arising in different legal cultures. To be able to disentangle the types of similarities, and assess if similarities can be classified as coincidence or as transmission, the legislation will be analysed by grading the results of the comparison in a hierarchy of probability.

How does one describe similarities in laws? When discussing what or where transmission took place, the search for possible influence would be at some level of correspondence linking two laws: a rule, a statement, a stipulated punishment, a procedural description or something else. For instance, Lisi Oliver has tried to pinpoint the relationships between some of the early medieval continental legislation by using the term ‘textual echoes’.<sup>338</sup> The notion of correspondence can be so vague. A fitting quote from Wormald describing the historian’s approach to the legal material is that it ‘obstinately refuses to fall neatly into clearly distinguishable categories’.<sup>339</sup> The quote can serve as an argument for the challenges of arranging these sources according to the aim of the study. The point is that the problem of explaining transmission lies in the systematic methods of the scholar, more than in the laws themselves. To have some possible guidelines in the study, a ranked model of aspects of the laws has been constructed. The model has been called the hierarchy of probability, which means that the factors are given certain levels.<sup>340</sup>

My hierarchy of probability has the following levels:

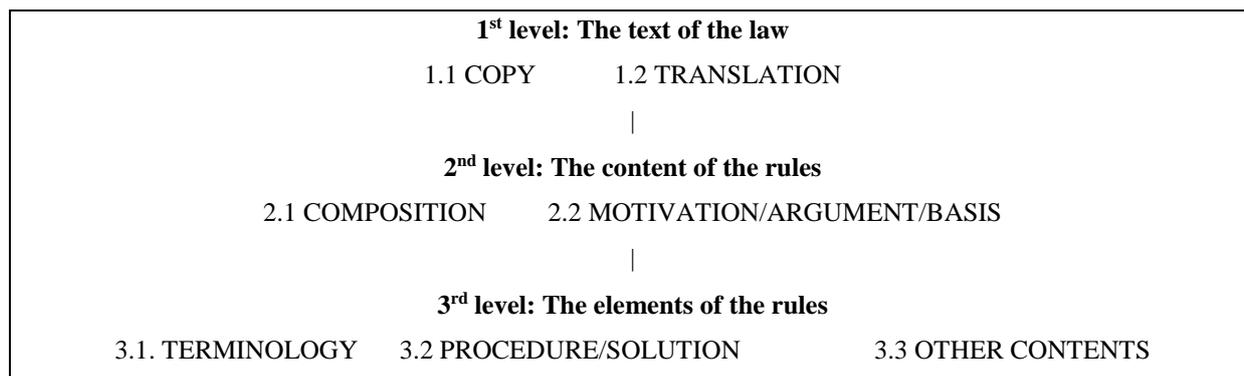
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<sup>337</sup> Skocpol and Somers, ‘Uses of Comparative History’, p. 84.

<sup>338</sup> Oliver, *The Body Legal*, p. 17.

<sup>339</sup> Wormald, ‘*Lex Scripta*’, p. 107.

<sup>340</sup> The term was coined by Jørn Øyrehagen Sunde, *Legal Cultural Encounters in the Nordic Realms in the High Middle Ages*, Workshop, NCMS, Bergen 2009.



The hierarchy will point to similarities, but will not in itself yield explanations for the similarities (or for transmission). Simple in style, it basically illustrates a key point of how to assess the probability of a transmission of law. The task can be questionable because, in many instances, what accounts for actual transmission, and what is merely a remote connection through common thoughts between the European learned elite seen in different law codes simultaneously or at different points in time, is open to discussion. Therefore, the ‘probability’ denotes with what certainty legal texts can be assumed to be related, or to have had an influence on (or have been influenced by) another.

The factors ‘Copy’ and ‘Translation’ are at the top of the hierarchy for obvious reasons. Verbatim conformity would clearly indicate that the scribe of a later text had knowledge of an earlier, although both of course could be copies of an unknown source. This would fall within (but would not alone constitute) what Kahn-Freund and Watson refer to as legal transplants.<sup>341</sup> A text that follows another nearly word for word, although in another language, could be assumed to be a translation. The early English (although these could have been translated later) and Nordic laws are in the vernacular, but possible international influences can be found in Latin.

On the second level, I have set ‘Composition’ and ‘Motivation/argument/basis’ as equally probable indicators of transmission. Motivation, argument and all sorts of background to the issuing of a law can reveal whether one source relies on transmission from another source. Either the lawmaker gave the source of influence directly, or the formulas alone expose a relationship with other sources. The other factor on the second level of probable transmission is ‘Composition’. Here I am considering the structure of the text. Similar build-ups of rules dealing with the same topic, composed with the same structure, with the same arguments and the same style, would indicate that the newer is based on the older.

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<sup>341</sup> Kahn-Freund, ‘On Uses and Misuses’, pp. 5-7; Watson, *Legal Transplants: An Approach*.

The third level of the hierarchy of probability consists of the content and meaning of the rules, and is therefore focused on the semantics of the rules rather than on the technical similarities of the two first levels. Relationships between medieval legal texts can be sensed in the total meaning of the rules, in features like terminology or their prescribed solution to the topic in hand. Most of the early medieval legislation was written in Latin, and thus shares a legal language from the outset.<sup>342</sup> However, scholars have found the irregular employment of vernacular terms useful in the discussion of the relationship between medieval law codes.<sup>343</sup> The similarities and, even more importantly, the dissimilarities in the terminology are valuable sources. In the same way, the usages of similar or different Latin terms in separate laws on the same subject are important clues.<sup>344</sup> The descriptions of procedure or stipulated outcome of certain cases, such as the sequence and size of the compensation, would also be significant concerning the relationship between laws. Background and procedure are on the third level of probability, because neither of these types of general similarities can establish with certainty a transmission of law, or from which source or direction, if this is not stated explicitly. Most of the investigation in this thesis will relate to the two lower levels of probability.

These methods, one could argue, involve a danger of over-generalising the material in question. Still, a systematic comparison of the content and motifs of the laws will reveal nuances concerning possible influences and transmission of law, and thereby shed light on the results of contact of legal intellectuals in medieval Europe, otherwise unknown to us. As a last element on the third level in the hierarchy, I have put 'other contents', in order not to miss clues of transmission omitted through the rigidity of a systematic approach. At this level, we can find how law has been adjusted and adapted to local societies, since the comparisons also reveal the differences, and thereby the changes made to the rules. It is at the second and third level that we compare the meaning of the law, to analyse the broader legal development in the Middle Ages, as transmission with adjustments through a 900-year time span could bring to light connections not found earlier.

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<sup>342</sup> Oliver, *The Body Legal*, pp. 18-19.

<sup>343</sup> For instance, Drew, *Burgundian Code, Lombard Laws, Laws of the Salian Franks*; Matthews, 'Interpreting the *Interpretationes*'; Jack Goody, *The Development of Family and Marriage in Europe* (Cambridge: Cambridge University Press, 1983), pp. 240-61; Inger Dübeck, *Kvinder, familie og formue: studier i dansk og europæisk retshistorie* (Copenhagen: Museum Tusulanum Forlag, 2003), p. 67; Diane Owen Hughes, 'From Brideprice to Dowry in Mediterranean Europe', *Journal of Family History*, 3 (1978), pp. 262-96 (p. 267).

<sup>344</sup> See, for instance, Leo Wiener, *Commentary to the Germanic Laws and Mediaeval Documents* (Cambridge, MA: Harvard University Press, 1915), p. 195.

## **Conclusion**

In this survey, the objects are not of similar size (neither in physical nor in abstract form), time, or origins. The objects being compared are based on my choices, both their selection and the emphasis as an historian, together with what is 'alike' and 'different'. Therefore, I have constructed the hierarchy of probability to systemise my own choices for the reader, and to clarify the variables compared, the criteria weighed, and the conclusions. In the following chapters, I will compare laws on inheritance and compensation for homicide according to the specified criteria of differences and similarities. The terminology for understanding legal transmission that have been established here make useful tools in the survey of the legal sources.



## 4. Laws on Inheritance: Systems and Principles

Laws on inheritance served three purposes. One purpose was to avoid conflicts within a kin group (as compensation was a tool to settle conflict between kin groups). Another purpose was that inheritance laws gave family members the right and duty to provide for relatives, thus strengthening the structures that took care of social needs in society. A third purpose was to determine the way in which property and privileges, and thereby power, was distributed in society.<sup>345</sup> A tidy inheritance system would have a stabilising effect on society. It would also be the way in which resources were transferred between generations, and how families, communities, and eventually the whole of society reproduced itself from one generation to the next. The authorities' interest in family transactions would be all but casual. The motives behind rules on inheritance can thus illuminate if legislating authority made conscious choices on the distribution of wealth among subjects when establishing and changing inheritance laws. Did they analyse the possible consequences as we do? Similarities in the law texts throughout the centuries present us with interesting evidence. They could stem from shared ideas of transferring wealth across the generations, and thus the continuation of society. Similarities possibly in the laws stemmed from coincidental transmission of existing secular law, or even careful and conscious loans from the existing laws of others. One topic to study when examining laws on inheritance systems is whether those families with interest in inheritance pressured legislators.

In the history of inheritance in western Europe, what is comprehended as a strong turn in the eleventh century towards a favouring of the male line and the firstborn male son might have existed.<sup>346</sup> However, Georges Duby has pointed to the fact that although an emphasis on the male line began to be evident, the favouring of the eldest son, primogeniture, was only the custom of the upper seigniorial class in France towards the end of the eleventh century.<sup>347</sup> James Brundage believes that the flexibility of the canons, as regards distribution of inheritance at will, gradually influenced the European systems of inheritance from the eleventh century onwards.<sup>348</sup> Even if there was a change to or peak of favouring the male line

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<sup>345</sup> Hansen, 'Slektskap, eiendom og sosiale strategier', pp. 104-05, with further references to works on the role of authority in organising inheritance.

<sup>346</sup> David Herlihy, *Women, Family and Society in Medieval Europe, Historical Essays, 1978-1991* (Oxford: Oxford University Press, 1995), p. 108; Hansen, 'Slektskap, eiendom og sosiale strategier', pp. 112-18.

<sup>347</sup> See for instance George Duby, *Love and Marriage in the Middle Ages* (Oxford: Oxford University Press, 1994), pp. 109-12.

<sup>348</sup> Brundage, *Medieval Canon Law*, p. 88.

through the firstborn son among European aristocracy at this point, early medieval law differed in their systems. And the same was true of secular law from twelfth-century Scandinavia.

The measures for dividing property by inheritance are often interpreted both in contemporary sources and in modern studies as a triangular struggle between king, Church and nobility: the somewhat caricatured presentation of nobility protecting family property at all costs, the different agents of the Church trying to get hold of it, and the king motivated by enriching the treasury. The stage is often set in eleventh- or twelfth-century France or England, when feudal structures in society must inevitably be taken into consideration.<sup>349</sup> Another interpretation regards the Church and normal people, where Christian intellectuals condemned lay people's sinful mode of living. Regarding inheritance, that would manifest in letting, according to clergy, illegitimate relatives inherit. In the latter example, secular authority could act both under the influence of the Church or as a protector of custom, when siding with either party.

How did secular authority try to regulate inheritance by written law? What tendencies in terms of legislators' view of kinship within the state structure can be seen in the laws? The following chapters on inheritance examine the apparent convictions of secular authority; in the secular legislation on inheritance it may be possible to detect the norms with which authority would be associated. Herein could be found the source of influence on the lawmaker, and the origins and transmission of law. The chapters on inheritance comprehensively assess the legal material's portrayal of inheritance, together with a comparison of the systems that can be detected in it. The inheritance systems as they are portrayed in the legal source will be reconstructed in separate chapters with comparative approaches. The task here is to attempt to identify possible motives, influences and transmission. Yet, law derives from norms and practice alike, and I will discuss the influence from prevailing traditions where relevant. For studies on how the European population dealt with their inheritance according to, or in opposition to, the law at different times, several thorough works can be consulted.<sup>350</sup> The question here is whether practical needs or customs

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<sup>349</sup> For instance, Duby, *Love and Marriage*.

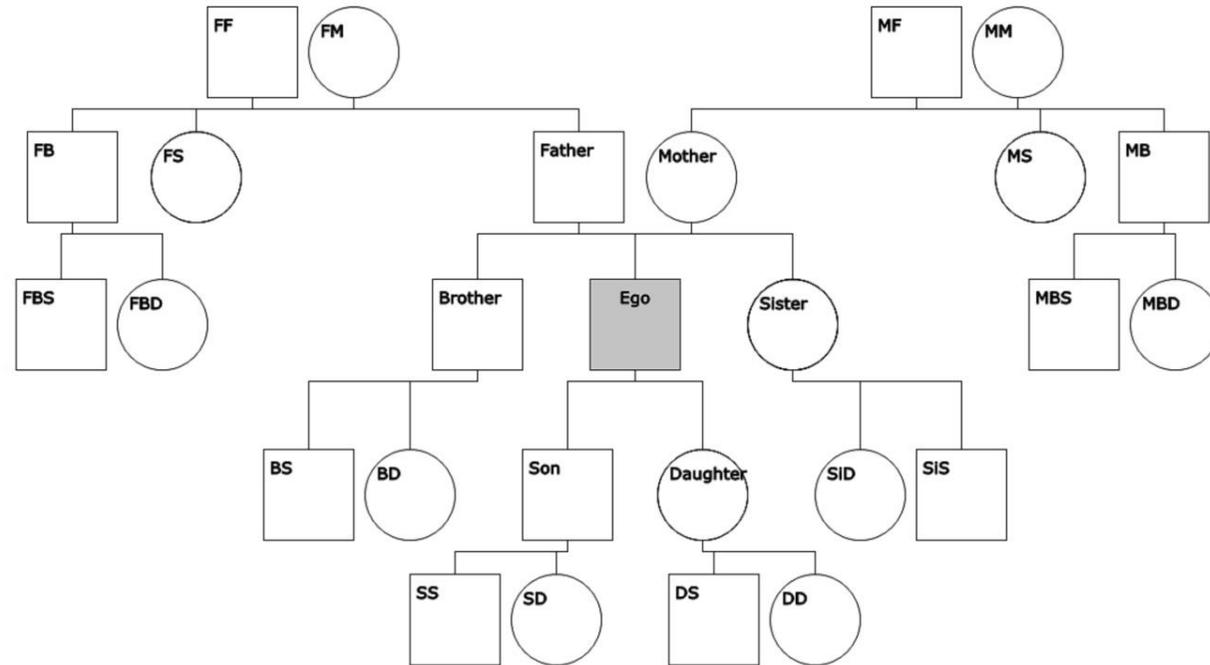
<sup>350</sup> Examples: on Frankish kinship: Murray, *Germanic Kinship Structure*; on Frankish women: Suzanne Fonay Wemple, *Women in Frankish Society: Marriage and the Cloister 500 to 900* (Philadelphia: University of Pennsylvania Press, 1981). On early Scandinavian evidence: Birgit Sawyer, *The Viking-Age Rune-Stones: Custom and Commemoration in Early Medieval Scandinavia* (Oxford: Oxford University Press, 2000), and Lars Ivar Hansen, *Inheritance, Property and Marriage in Medieval Norway* (New York: Boydell and Brewer, 2013). On the Icelandic: Agnes S. Arnórsdóttir, *Property and Virginité, The Christianization of Marriage in Medieval Iceland 1200-1600* (Århus: Aarhus Universitetsforlag, 2010).

manifested in written law or vice versa, and if changes in the law were a result of necessity or of transmission from other law. Principles of inheritance are often used as an explanation for certain medieval social structures, such as kin groups and marriage strategies, but is it possible that, conversely, such structures can explain the changes in principles of inheritance? Canon law and ideologies of the Church called for a cognatic family and inheritance system, and it is interesting to see whether secular legislators complied. Also, how kings as lawmakers would be interested in controlling systems of inheritance can reveal if they borrowed from other laws, or the laws were an image of a current (or outdated) custom.

To demonstrate the inheritance systems in the written laws, I will use genograms. Such a model cannot do justice to the variants of distribution or to the flexibility of a system, but a genogram will illustrate the nature of the default system and dominating aspects of each jurisdiction. Also a model of this kind can assist in explaining the many degrees of kin that appear in the rules, which would be excessive to mention. The prototype genogram with the list of kin related by degree is shown in Figure 1.

## Abbreviations in the genograms

BD	Brother's daughter
BS	Brother's son
DD	Daughter's daughter
DS	Daughter's son
FB	Father's brother
FBD	Father's brother's daughter
FBS	Father's brother's son
FBSS	Father's brother's son's son
FF	Father's father
FFB	Father's father's brother
FFBS	Father's father's brother's son
FFF	Father's father's father
FFM	Father's father's mother
FFS	Father's father's sister
FM	Father's mother
FS	Father's sister
MB	Mother's brother
MBD	Mother's brother's daughter
MBS	Mother's brother's son
MF	Mother's father
MM	Mother's mother
MS	Mother's sister
SD	Son's daughter
SiD	Sister's daughter
SiS	Sister's son
SS	Son's son



**Figure 1: Genogram of Ego with bilateral relatives to the second canonical degree. Miriam Tveit**

The figure above represents a genogram in the form they will be modelled from the laws throughout the survey of the legal sources in this chapter. The person from whom the property is inherited will generally be termed 'Ego' in this thesis, as the centre of the inheritance system, alternately 'the deceased'.

## 4.1 Two models of inheritance system

In the first part of this chapter, I outline the intestate system of inheritance described in the legal sources. We could term this the *default* inheritance system, meaning the inheritance system in its ‘cleanest’ form, without provisions or restrictions. Generally speaking, the default system constitutes the intestate division of the property of a legally married person with legally married parents, and with legitimate children, and/or legitimate siblings and/or legitimate uncles/aunts, and so on. In some secular laws, the inheritance system was described in minute detail, in others, explicit information on the default method of distributing inheritance is lacking. In case of the latter, attempts will be made to recreate the default system using laws on wergild, incest legislation and other relevant regulations that shed light on the authoritative conception of how inheritance should be distributed. This is done to better understand the inheritance regulations that do exist.

Medieval inheritance law is thoroughly discriminatory regarding gender, and this examination of the system will, of necessity, follow this lead. The centre of the inheritance systems, the deceased, will be termed Ego in the tradition of kinship and genealogy research. In this thesis, Ego is always a male, if not otherwise stated. The reason for this is not, of course, that inheritance by females are uninteresting, but that the default inheritance system we are presented with in medieval laws is, with some important exceptions, that of a male. The most elaborate exception is Roman law, where both in classical law and the later imperial constitutions, there are discussions of and changes to the rights of inheriting both to and from women, mainly concerning mothers.<sup>351</sup> The reason is of course connected with the attitude towards female ownership, and the passing of wealth through women. Although there are plenty of examples of rich landholding women and heiresses in the Germanic kingdoms, the laws nevertheless impart another image.<sup>352</sup>

After establishing the ideal system of inheritance and its principles stated in the legal texts, I will address specific inheritance rights that emerge from a specific source. These deal with multiple spouses, half-siblings, different sets of offspring, different classes of illegitimate children (of which there are several categories in Germanic, and also Scandinavian, laws). I will focus on women’s right of inheritance, because studies of inheritance are more often than

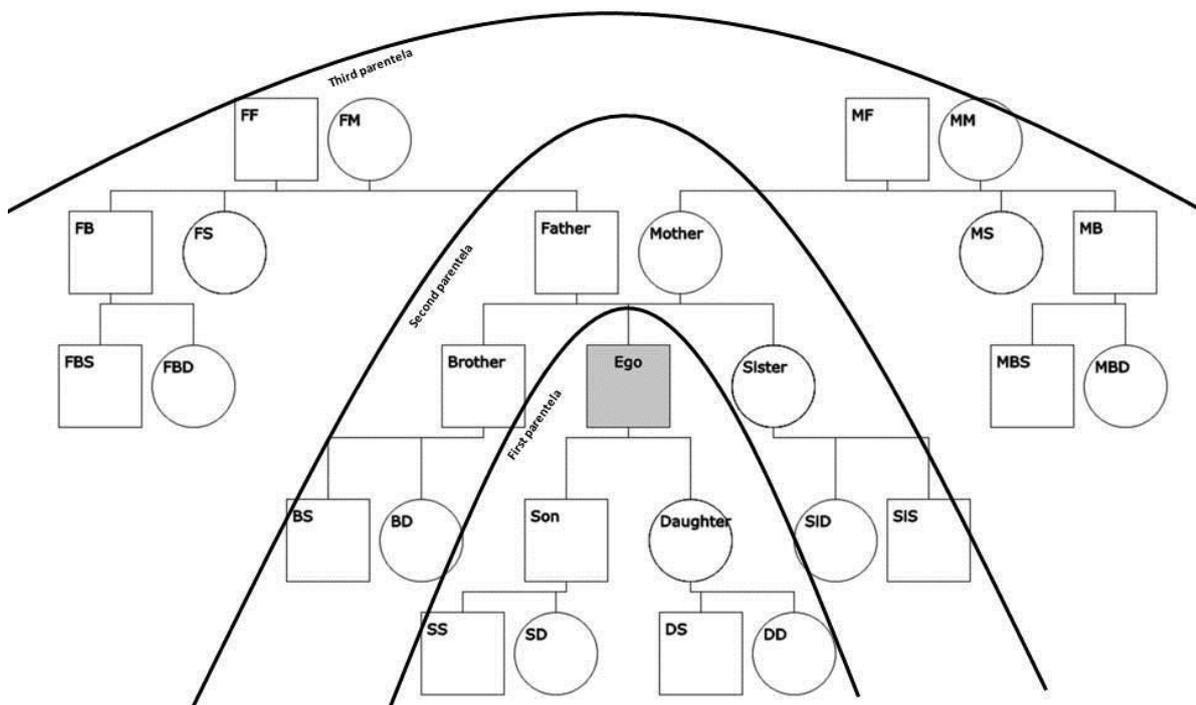
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<sup>351</sup> For a recapitulation of the main points and developments, see Buckland, *Text-book of Roman Law*, pp. 368-71.

<sup>352</sup> An alternative reading of the sources with focus on the female Ego should provide many interesting findings. However, this is a different task not to be undertaken here.

not defined by the rights of women, in order to define the whole system. Unlike females as Ego, females as heirs were significant for the legislator and society's concept of the inheritance system. The focus will equally be on the rights of sons to inherit and the systems that allow brothers to inherit together.

In Nordic scholarship, a scientific branch of study and a particular set of terminology have developed around principles of inheritance found in both the Nordic medieval legislation and in non-normative source material from the Nordic regions. The outlines of the inheritance systems and principles in the laws will be expounded using these terms and classifications, because they have proved useful in exposing particular elements of inheritance laws, and because an equal approach to the entire corpus of source material makes the legal materials comparable. Moreover, such an approach will make the presentation of similar topics in the different sources more coherent. The main terminology from Nordic research on inheritance distinguishes between two systems of inheritance, that is, in the eastern and western Nordic regions. These are called the *gradual* system and the *parentela* system.<sup>353</sup>



**Figure 2: The parentela system. One parentela must be exhausted before the inheritance is transferred to the next parentela.**

<sup>353</sup> Sjöholm, *Sveriges medeltidslagar*, p. 124; Hansen 'Slektskap, eiendom og sosiale strategier', p. 122; Sawyer, *Viking-Age Rune-Stones*, pp. 77-79.

The *parentela system* (Figure 2) specifies the priority of descendants, whereby the line of descent precedes grade of kinship. The first parentela consists of the Ego and its offspring and their descendants; the second parentela is constituted of the Ego's parents, siblings and their offspring downwards. Similarly, the third parentela consists of grandparents, aunts and uncles, cousins and their descendants, and so on. The inheritance would go to descendants of the first degree, i.e., children, and if there were none, then the next degree, grandchildren, had priority. In its cleanest form all descendants of the same degree would share the property equally, and one parentela had to be exhausted of all descendants, and descendants of both sexes, before the right of inheritance passed to a parentela of higher level. As Birgit Sawyer has pointed out, an important feature of the parentela system is the principle of representation.<sup>354</sup> Children of a deceased or disinherited child would claim the inheritance in his/her place. The complete exhaustion of a lower parentela will herein be termed a 'full parentela'. Perfect equality of the division between the sexes or lineages will be termed a 'strict parentela'.

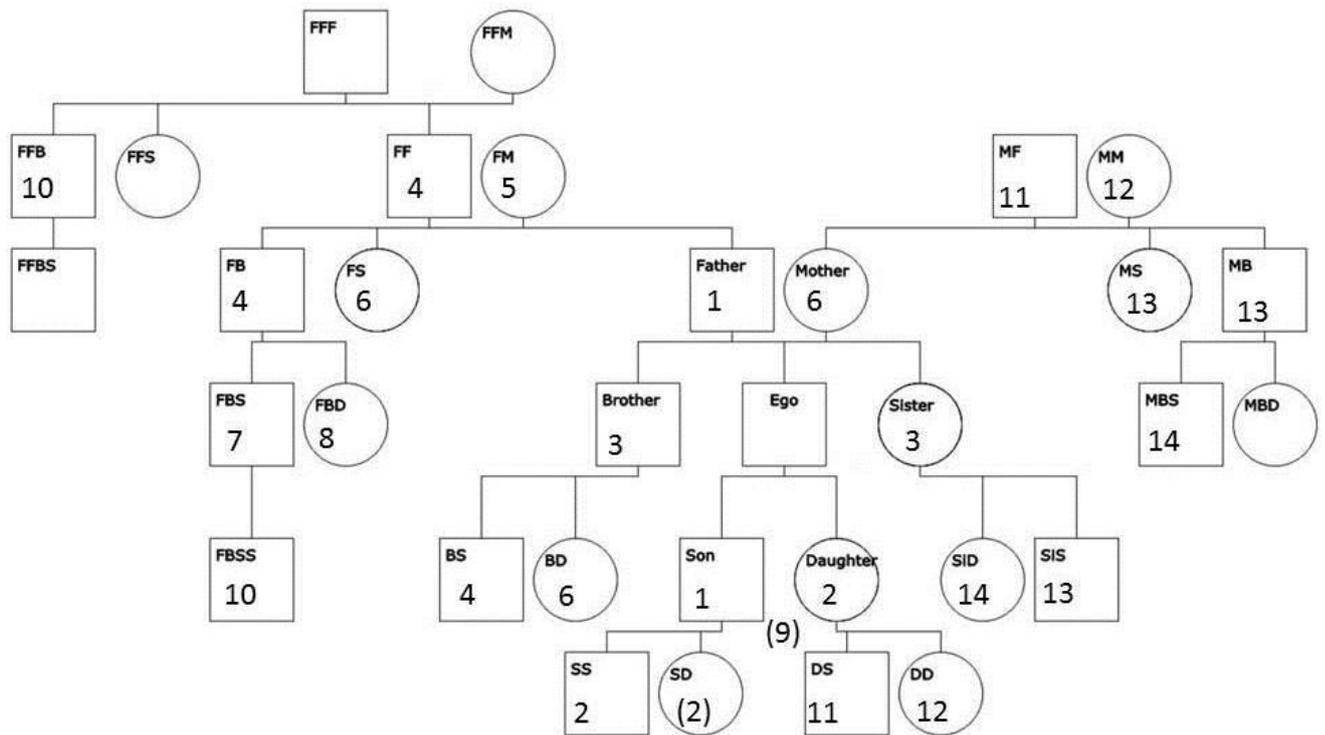
Although female inheritors would be favoured alongside male peers in this system, a mode of division in some law was that women received inheritance by lot. The ratio in the Scandinavian laws was 1:2, i.e., female heirs received half as much as male heirs of the same degree.

The *gradual system* (Figure 3) gives priority according to degree of kinship with Ego. Individuals nearest to the deceased would have the right of inheritance before more distant relatives, which would, for instance, give parents priority over grandchildren. Applying the gradual system also meant calculating the grade of kinship according to specific criteria. Also, principles of priority would be combined with the gradual system, accommodating, for instance, a preference between descendants and ascendants of equal degree, and applying patrilineal principles so that male relatives would be favoured over female relatives of the same distance from Ego.<sup>355</sup>

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<sup>354</sup> Sawyer, *Viking-Age Rune-Stones*, p. 77.

<sup>355</sup> Sawyer, *Viking-Age Rune-Stones*, p. 78; Hansen, 'Slektskap, eiendom og sosiale strategier', p. 120.



**Figure 3: Example of the gradual system of inheritance, according to the Frostathing Law, which also emphasises patrilineal distribution. The different relatives inherit according to distance from the deceased.**

The two models of inheritance system form the basis for the following survey of the sources, where the rules will reveal principles that will be categorised into one or the other. The laws on inheritance do not correspond tidily with these models. However, the models serve as a way of understanding the fundamental principles of an inheritance system and the changes in it, which again serve to identify traces of legal transmission.

## 4.2 Principles of inheritance

A combination of different types of principles is typically found within both the gradual and the parentela system in the normative sources. The principles further determined the norms of property transfer within the default inheritance system. I will here sketch some of the most common and significant principles of inheritance before we meet them again in the legal material.

Besides traces of patrilineal features and favouring of relatives upwards or downwards, what Lars Ivar Hansen classifies as lineage and kinship groups are some of the

principles included in the laws. Sociological studies of family have developed a range of terms for describing the concept of kinship, some of which are relevant when describing the inheritance systems as they emerge in the laws. Kinship can be counted through line of descent, as *lineage*. Lineage can be counted through one sex, unilinear, or through relatives of both sexes, as omnilinear. Another way to comprise kinship is in the group of descendants, ascendants and collaterals of one individual, as *laterality*. They could be formed of relatives counted through both male and female relatives, in *bilateral kin groups*, or just through one sex in *unilateral kin groups*.<sup>356</sup> Then there are the terms *agnatic* and *cognatic* kin, which have various meanings in the sources and are understood differently by scholars. In Roman law, agnatic refers to the paternal kin group, while cognatic referred to the maternal and paternal kin (D.38.10.4). These definitions of agnatic and cognatic will be used here. Roman law also included emancipated children and adoptees, who held a different status. What principles that dominate inheritance practices affect the deconstruction of family property?<sup>357</sup> Applying lineages with rights restricted to, for instance, the firstborn (primogeniture) would in theory hold the estate together. On the other hand, the concept of cognatic kindred groups together with equal distribution among collaterals would split up property from one generation to the next, rearranging the capital. Bilateral kin groups give the impression of being the more flexible and equal system, in terms of the rights of maternal and paternal relatives, and the status of male and female kin. As pointed out by Lorraine Lancaster the ‘Ego-centred bilateral kin groups cannot persist as continuing units (...) When the focal relative dies, the group loses its identity’.<sup>358</sup> Of this reason, we could expect a combination with other strategies to secure the continuation of a kin group. These strategies possibly appear in written law as added principles to the default system.

One related effect of a cognatic concept of kinship is that it includes by principle the *mother* of Ego, hence the default system also includes the mother of Ego’s children. If legitimacy comes from a legitimate marriage, then this person is a legitimate *wife*. The mother/wife constitutes a particularity in the inheritance system. When 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 through the child. This constitutes *backwards inheritance*, also called *reverse inheritance*. Missing descendants return inheritance backwards into the

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<sup>356</sup> See Goody, *Development of Family and Marriage*, pp. 222-24 and Hansen, ‘Slektskap, eiendom og sosiale strategier’, pp. 108-09 for a comprehensive elaboration of the various principles.

<sup>357</sup> Hansen, ‘Slektskap, eiendom og sosiale strategier’, pp. 110-11.

<sup>358</sup> Lorraine Lancaster, ‘Kinship in Anglo-Saxon Society: II’, *The British Journal of Sociology*, Vol 9, No. 4 (1958), pp. 359-377.

parentele, with the risk it would fall, through women, into another kin group. Because the modern scholar has been occupied with the property of nobility, backwards inheritance is conceived of as a problem in medieval inheritance systems. 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 approaching the challenges of a mother having inheritance rights to her offspring. What if parents survived their children, or if their only conceived child was stillborn? How would posthumous children inherit? The laws reveal similarities in the dealings with such questions.

To view a legislator's idea of how many relatives constituted kin with claims to intestate inheritance, the mode of counting kinship is vital. The Romans used what has been termed the *Roman mode* of counting. This is opposed to the medieval mode of counting, called the *canonical mode* of counting, or sometimes the *Germanic mode*. This mode caused turmoil in medieval marriage cases, and modern research thereon, because the combination of this with a marriage prohibition within seven degrees highly reduced the pool of possible marriage partners.<sup>359</sup> In the Roman mode of counting, degrees were calculated by starting with the Ego, then counting one degree by each step upwards and downwards. Thus, a first cousin would be a relative of fourth degree.

From the ninth century, the canonical decrees indicate that the mode of counting kinship had changed to the canonical mode. The change came with sharp restrictions in marriage legislation. What constituted an incestuous and thereby illegitimate marriage was extended from including cousins to include all descendants from the couples' five times great grandparents. The regulation from the Church was in number of degrees, from four to seven degrees of kinship constituting incestuous marriage. But they also counted degrees differently, from counting each joint between two persons, to counting directly to a common ancestor. When counted this way, the cousins became related in second degree and not in the fourth degree, as they would have by the Roman method of counting.

Scholars have discussed several motives behind the change, particularly relating to the relationship between the Church and the aristocracy. The most radical view is that of social anthropologist Jack Goody, who suggested the western Church tried to restrain legitimate

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<sup>359</sup> Constance Bouchard, 'Consanguinity and Noble Marriages', p. 270; Frances and Joseph Gies, *Marriage and Family in the Middle Ages* (New York: Harper & Row, 1989), pp. 83-84; Herlihy, 'Women, Family and Society', p. 102; Michael Gelting, 'Marriage, Peace and the Canonical Incest Prohibitions: Making Sense of an Absurdity?', in *Nordic Perspectives on Medieval Canon Law*, ed. by Mia Korpiola (Helsinki: Matthias Calonius Society, 1999), pp. 93-124 (p. 93).

marriages among the aristocratic families to prevent them from producing heirs.<sup>360</sup> The mode of counting seems to have developed through the early Middle Ages in Western Europe, particular within the Church, but it can also be found in other sources.<sup>361</sup> However, we do not see it in the Germanic laws from the eighth century. Whatever the motives behind, the canonical mode of counting persisted. The extreme incest regulations endured until the fourth Lateran Council in 1215, when the accepted degrees of kinship changed from seven to four, still of the canonical mode of counting.<sup>362</sup> This relaxation can be seen clearly manifested in the Nordic laws, making 1215 a *terminus post quem* for revised provincial laws.<sup>363</sup> Of course, how far kinship was counted had major importance for inheritance regulations, because it increased the number of kindred possibly entitled to inherit. Other measures would kick in to control distribution of wealth, particularly in the marriage legislation. A comparison of the laws on marriage and inheritance reveal both the legislators' and nobility's strategies in that respect. However, in the following, the rules on inheritance will be based on the relevant legitimate marriage.

Some principles come into effect as to the mode of dividing the estate of a deceased. An important principle is *representation*, where the heirs of a missing heir would take inheritance by representing the missing heir. The division was made according to numbers of heirs, calculated from other principles. In the strictest sense, the property would be shared equally among the grandchildren by sons and daughters alike, and with maternal or paternal relatives without consideration of how many there were on each side. Thus, if the mother had four living brothers and the father had two dead brothers, but one nephew, the property would be divided in five equal shares. This principle is called division *per capita*. Another mode of dividing is according to type of relatives they originate from, which *branch* of the close related. This is the mode often found in modern inheritance systems. The Romans named the principle to divide *per stirpes*. If the deceased had two children, and only one lived, then the property would still be divided in two and the dead child's heir would get that share between them. Similarly, if Ego had a number of siblings, but some had died, then the heirs of the dead siblings would take their share by representation. According to this principle, four

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<sup>360</sup> Goody, *Development of the Family and Marriage*, pp. 34-37, 123-28.

<sup>361</sup> Goody, *Development of the Family and Marriage*, p. 56; Herlihy, 'Women, Family and Society,' p. 100.

<sup>362</sup> Bouchard, 'Consanguinity and Noble Marriages', p. 269; Goody, *Development of the Family and Marriage*, pp. 139-44.

<sup>363</sup> Vogt, *Function of Kinship*, p. 63; Lars Ivar Hansen, 'The Concept of Kinship According to the West Nordic Medieval Laws', in *How Nordic are the Nordic Medieval Laws?*, ed. by Per Andersen, Ditlev Tamm and Helle Vogt, Proceedings from the first Carlsberg Conference in Medieval Legal History (Copenhagen: DJØF, 2005, 2nd edn 2011) ', pp. 177-206.

grandchildren by one son and one grandchild by another son was irrelevant; the property was still divided in two. In the parentela system, all on the same collateral relatives are equally in line to the inheritance of Ego. According to the gradual system, specific relatives were given a specific position, or number, in the line of inheritance. Division into branches in the gradual system was specified according to determined principles, not automatically given.

## **Conclusion**

Legal authorities possibly included such principles consciously, or they could have been an expression of family strategies influencing or pressuring law-making authorities. The following chapters will be structured according to the systems and principles stated above, to find the content of the laws and the meanings and motives behind the legislation on inheritance. The given default inheritance systems as they emerge in the laws and the main principles from which these systems are built are of interest to the continuous comparison of the laws.

## 5. The Inheritance System and Principles in Roman Law

Roman law was by all appearances the major source of influence for the early Germanic legislative initiatives. Regarding inheritance legislation, there was potentially much to borrow from Roman law. Regulations regarding family matters are extensive in the surviving corpus of almost a thousand years of Roman legislation. From the Twelve Tables of approximately mid-fifth century BC and through the active age of jurisprudence in the second century AD and up to the massive legal revision by Justinian in the 530s, numerous adjustments to inheritance laws exist. The quantity of regulations or rules regarding inheritance is substantial and detailed, both in describing the rights of succession and in elaborate discussions of the eventualities.<sup>364</sup> Estimations are that roughly 40 percent of the largest bulk of the *Corpus Iuris Civilis*, the *Digesta*, relate to succession and inheritance.<sup>365</sup> The protection and possession of inheritance were included at length.<sup>366</sup> Concerns for the preservation of the inheritance as dowry, dotal land and other property transferred within or between families received elaborate treatment. Topics related to inheritance were also substantial in other parts of the Roman legal corpus that was accessible to medieval legislators; separately Gaius's *Institutes* and Paulus, and the *Codex Theodisiani*. Development within Roman legal tradition is relevant, both the motives and the shifting authorities' politics and, later, between state and Christianity. Several of the *Novellae* of Justinian signified radical change from earlier Roman legal traditions, for instance regarding inheritance.

The inheritance system in Roman law of course changed through the centuries. We see development in the default system, both in the basic principles, and in the kin considered heirs. In the vast material, minor or major contradictions frequently occur. Consequently, I attempt a basic map of the default inheritance system in the parts of Roman law that were accessible to a later legal elite. They would, in the same way as we are today, be presented with Roman law *en bloc*, and not as a chronological development of legal ideologies. Still, I will survey the default inheritance systems in Roman law in three different phases, to establish first the basic system, and then the continuous development of principles. A

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<sup>364</sup> See, for instance, the *Digesta*: D.5.3.13-15, D.23.5 on dotal land, D.37.1-11 on *Bonorum Possessio* concerning wills. See also *Codex Iustiniani* C.6.1-54 and C.3.28-30 for actions on void wills, gifts and dowries.

<sup>365</sup> Bruce W. Frier and Thomas A. Mac Ginn, *A Casebook on Roman Family Law* (Oxford: Oxford University Press, 2004), p. 321.

<sup>366</sup> Basic principles of intestate inheritance in the *Digesta* can be deduced from parts of book 5.3, 37.7-9 and 38.6-9, 11; books 27-34 give interpretations of *fideicommissum*, legacy and other ways of acquiring inheritance.

chronological survey will both explain the motives behind the changes and display the variety of principles from which later Germanic or Nordic legislators could borrow.

Within late Roman written law, the continuous fundamental concept of inheritance was based, more or less, on the parentela system and equality between the sexes (I.3.1). The default intestate inheritance system gave no prior position to the firstborn, or sons before daughters.<sup>367</sup> We can detect the same equality of the sexes as the normative concept within society.<sup>368</sup> The children of the deceased would inherit their parent's portion *per capita*, that is 'per head', i.e. per person, and a principle of representation was expressed through division *per stirpes*, i.e., through the branches of collaterals, a terminology used by Gaius (Gai.3.8, Gai.3.16). The division into branches also extended to the rest of the family and continued to be the mode of distribution, as seen in the rescripts of, for instance, Diocletian in 290 (C.6.55.2) and Justinian in the 530s (C.6.58.15.3).

However, what both legal sources and other sources demonstrate is that in Roman society it was anticipated far more often that one would draft a last will than not. The intestate inheritance seems to be almost an abnormality, if we are to believe the classical texts, at least among the upper strata of society. Jane F. Gardner and Thomas Wiedemann argue that there are signs that Romans died intestate in the early republic, but that this changed.<sup>369</sup> William W. Buckland understood the tradition of wills to be a rooted social sentiment deriving from the early republic.<sup>370</sup> Traditions among the subjects, at least among those with wealth to pass on, probably influenced the legislation on inheritance. In the late republic and later, the norm was to draft a will of any possessions. In particular, we see this feature in the extant laws. The existence of the word for not having made a will – *intestatus* – being an expansion of the word for being with written will – *testatus* – alone suggests the importance of this practice in the Roman legal mindset.<sup>371</sup> Therefore, Roman inheritance legislation mainly revolved around the will; vindication rights concerning the will, and rights of disclaiming wills, arguments

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<sup>367</sup> Jolowicz and Nicholas, *Study of Roman Law*, pp. 125-26.

<sup>368</sup> Jane F. Gardner and Thomas Wiedemann, *The Roman Household: A Sourcebook* (London: Routledge, 1991), pp. 117-18.

<sup>369</sup> Gardner and Wiedemann, *Roman Household*, p. 117.

<sup>370</sup> Buckland, *Text-book of Roman Law*, p. 361. One way to understand these traditions is as a remedy to the introduction of emancipation - which theoretically disinherited the offspring. Another explanation was that the plebeian gained rights of testament and thus cherished this privilege. Finally, Buckland points to the Roman ideal of each deciding one's successor. From Gaius's *Institutes* (2.179-81), we see that the Romans had a tradition of naming substitute heirs in case an heir died before they themselves did.

<sup>371</sup> In medieval Latin, intestate also came to signify dying without leaving alms for one's soul, *Niermeyer Mediae Latinitatis Lexicon Minus 2001*: *intestatus*.

about undutiful wills or interpretations of wills (see, for instance, D.5.2.1).<sup>372</sup> In early medieval secular law, though, the written will did not have such a status, and hardly it appears in written law at all, although there are indications of an increased tradition for a written contract in the sixth- and seventh-century Germanic laws.<sup>373</sup> What is important here are the principles of the intestate system, and whether they could have been the foundation for later lawmakers. It is not whether these rules had frequent consulting and usage in the Roman legal system. Rules about wills reveal information on the intestate system, too. The appointed heir could in fact reject a will, since not only the estate of the deceased would be passed on, by also debt, duties and unsettled business (D.29.2.1-2, 6). The right to refuse inheritance applied for intestate heirs, too. This means that if the appointed heir(s) did not accept, or the will was invalidated, then the system of intestacy applied after all. Furthermore, the anticipated *recipient* in the testament was the same as the *heir* in the intestate system; children had rights and an expectation of being favoured in the will, to the degree that children left out would have vindication to sue on the basis of an undutiful will (D.5.2.2).<sup>374</sup> Thus, direct heirs of the family were protected from disinheritance on mere the disfavouring by parents, and wills that did not favour them were even invalid (D.28.2.30-32).<sup>375</sup> In this way, we can find the Roman intestate inheritance system also in the rules on undutiful wills.

The order of succession in the default system in the subsequent stages of legislative work will be established here, within the parts of Roman law that was accessible to the later Germanic legal elite.

## 5.1 The basis of the Roman inheritance system

Roman law famously distinguished between *sui iuris* (heirs in their own right) and *sui heredes* (his heirs) those under the *patria potestas*, the power of the *pater* (father). The independent would still have been financially dependent on familiar support or on receiving an inheritance

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<sup>372</sup> Though Roman wills is a rewarding topic in legal history, I will not follow that trail here, but concentrate on portraying the intestate system. To read more on the will in Roman law, see Buckland, *Text-book of Roman Law*, pp. 331ff.; Jolowicz and Nicolas, *Study of Roman Law*, pp. 126-32; Mousourakis, *Fundamentals of Roman Private Law*, pp. 284ff.

<sup>373</sup> See, for instance, marriage gifts in Eur.307/LV.5.2.7, and of slaves in Rot.227. See also Hughes, 'From Brideprice to Dowry', pp. 269-75, on the contract among Germanic elite. Evidence of the will in eighth-century Lombard law can be found in Ais.12.III.

<sup>374</sup> Gardner and Wiedemann, *Roman Household*, p. 121.

<sup>375</sup> In the republican era, a further effect was the practice of giving legacies to people who were not heirs. It could both be a way around the requirement to provide for the heirs and also a way of favouring those who could not be heirs.

when the providers died off, as Antti Arjava has pointed out.<sup>376</sup> Because of the absence of waged work among the upper classes, Roman heirs from these ranks would need an inheritance for their livelihood or to sustain a certain lifestyle. Both labourers and the children of elite families would have relied on support. Elite families would largely live off family estates, as peasants would live off their ancestral land. *Sui iuris* could then be the subject of a will, or given other forms of donations as inheritance *inter vivos*.<sup>377</sup>

The basic system from which Roman legal regulation of inheritance was built derives from the republican paraphrasing of the law of the Twelve tables (from c. 450 BC). If we extract the simplest form and cut short the possible alternatives, the first heirs of Ego were those in his power, the *sui heredes*, denoting mainly legitimate children (Tab.5.4). According to the much later Institutes of Justinian (I.2.13.5), the Twelve tables stated that both sons and daughters had equal rights to share in the inheritance. This principle would endure in the Roman concept of inheritance, although in this early phase it regarded only children that were *sui heredes*, but not more remote descendants or ascendants. Grandchildren by sons would inherit by representation if the son was deceased. They inherited *per stirpes*, so that plural grandchildren shared their dead fathers portion (Gai.3.8). Grandchildren through daughters were excluded; the equality did not extend beyond children.

If there were no *sui heredes*, then the agnates were next in line. Agnates were defined by Roman jurists as the male blood-relatives from a common male ancestor (D.38.10.1). The order of succession to the inheritance would follow degree of kinship, with closer excluding the more distant (Gai.3.10-11). Parents were not designated in particular as heirs.<sup>378</sup> However, the father would come to inheritance as agnate, of which he naturally was the first in line by proximity.<sup>379</sup> It all relied on the status of the father and offspring, whether they were emancipated or not.<sup>380</sup> Although the medieval legislators did not use these same terms for family structures, the distinction of independence was relevant to a person's legal capacity. The institution of emancipating children meant that the age varied when a Roman son or

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<sup>376</sup> Arjava, Antti, *Women and Roman Law in Late Antiquity* (Helsinki: University of Helsinki, 1994), pp. 53-54.

<sup>377</sup> Buckland, *Text-book of Roman Law*, pp. 361-62.

<sup>378</sup> The father, if *pater familias*, would have rights to the return of the *peculium*, the child's given capital (D.15.1). The property that the son had earned himself, for instance in the military, the *peculium castrense* or in the civil service, the *quasi castrense* could have been seen in the same manner. Property otherwise appropriated, *bona adventitia*, would be distributed as inheritance, and was as such reserved for the descendants. Buckland, *Text-book of Roman Law*, p. 373.

<sup>379</sup> If the father himself was under the *potestas* of the grandfather, he still was the first agnate, although it is uncertain how and in what order grandfathers came into the equation. See Buckland, *Text-book of Roman Law*, pp. 372-75.

<sup>380</sup> See Jolowicz and Nicholas, *Study of Roman Law*, pp. 118-20. If the father was emancipated and the son not, and the father then readopted, then they were both *sui heredes* to the grandfather who was in *potestas*.

daughter was legally independent. He or she would be a minor, and as such reach sexual maturity at twelve years for girls and fourteen for boys (D.23.1.9, D.23.2.4). The age of personal independence was traditionally twenty-five years of age (D.4.4). This legal age might have reduced to twenty in the later period, as we encounter in the constitutions of Valentinian III from 452 (Nov.Val.35.10).<sup>381</sup> We find the legal age of men and women set at twenty years in Visigothic laws from the same period (Eur.321). A possible reason for the similarity could be the change in Roman understanding of adulthood brought about in the decades where Roman politics and military were highly occupied with, and infiltrated by, men of Germanic descent.<sup>382</sup> This could be a case where late Roman law was influenced by the Germanic law through pressure from Germanic presence.

On the other hand, the mother did not have rights to inherit from her child under the republic. This issue became a topic for later revisions. The mother could inherit a portion as wife of the father if she survived him. This presupposed that she was married to him *cum manu*, the form of marriage that made her part of the husband's family. In contrast, one could also enter marriage *sine manu*, in which a woman kept her ties to her birth family.<sup>383</sup> Of course, the wife of Ego would also be subject to these categories.<sup>384</sup> These distinctions in marriage were obsolete in the late republican era. Possibly, they nevertheless resounded in the Germanic concept of marriage where the wife was legally subordinate to the husband.<sup>385</sup>

The brother and sister were next in line of succession after the father. Siblings came in second degree by the Roman mode of counting, as did grandparents and grandchildren. Grandchildren by deceased sons were favoured by representation, but both the brother and the sister of Ego originally excluded other grandchildren. In this system, the female agnates beyond sisters were excluded (D.38.16.2). The reasons for this could be a general idea that remote kinswomen were not the right successor to administer a man's estate, or, as Felix Jolowicz have pointed to, an apprehension that great wealth of women should be restricted.<sup>386</sup> If the deceased had no accepting agnates alive, then the cognates, termed as the clan of the deceased, the *gentiles*, succeeded to the inheritance (Tab.5.5). Buckland and Jolowicz have posited the notion that refusal by the closest agnate excluded more distant even

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<sup>381</sup> Arjava, 'Paternal Power', p. 162.

<sup>382</sup> Averil Cameron, *The Later Roman Empire, AD 284-430* (Cambridge, MA: Harvard University Press, 1993), pp. 102, 133-150, 167. See also Sivan, 'Appropriation of Roman Law', pp. 191-97, and Wickham, *Framing the Early Middle Ages*, pp. 80-84, on the social and political relationship between Germanic and Roman groups.

<sup>383</sup> See Susan Treggiari, *Roman Marriage: Iusti Coniuges from the Time of Cicero to the Time of Ulpian* (Oxford: Clarendon Press, 1991): p. 28, and Tab. 6.4.

<sup>384</sup> Jolowicz and Nicholas, *Study of Roman Law*, p. 124.

<sup>385</sup> Miriam Tveit, 'Skilsmisserett i senromersk lovgivning', *Klassisk Forum*, 2 (2010), pp. 23-33 (p. 31).

<sup>386</sup> Jolowicz and Nicholas, *Study of Roman Law*, p. 249.

if he rejected the inheritance.<sup>387</sup> A better explanation is that closer agnates excluded the possibility of representation, as Gaius commented (Gai.3.15).<sup>388</sup> At least that may have been the interpretation or the practice of the rule later on by the medieval legal elites.

A surviving wife of Ego would come next in line of succession after the cognates.<sup>389</sup> Reasons for this were possibly the general distrust displayed in the laws of married couples showering each other with the riches of the *familia* for love (D.24.1). A scepticism led to the prohibition of giving gifts to your spouse in Roman classical society, and this was not abolished before Emperor Justinian relaxed the prohibitions in the sixth century. He also lifted the restrictions on the *dos* (dowry) and the *dos ante nuptias* (prenuptial gifts) and called them instead *dos propter nuptias*, ‘gifts in connection with/concerning marriage’ (C.5.20, I.2.7).<sup>390</sup> Classical Roman law shows that intestate inheritance included landed property and movables, but also usufruct, entailed estates and legacies.<sup>391</sup> In the categories of the *Digesta*, we find the collection of laws on legacies strangely detailed, being specified on, for instance, perfume and clothes (D.34.2) or furniture (D.33.10). The dowry – and the *dos ante nuptias*, which became a substantial part of the marriage settlement in the later empire – formed part of the couples’ inheritance *inter vivos*. The dowry was a security for the wife. As with inheritance through wills, the details of the dowry were settled in a marriage agreement, rather than by legal default. The restrictions on inheritance between spouses were, I believe, an expression of a desire to prevent backwards inheritance. If the marriage was childless, expectation was that the marriage gifts returned to the respective family. Therefore, the inheritance of daughters was important, as were the fate of her children. The Romans must be said to have a bilateral kinship structure in the classical age, although the all-powerful *pater familias* overshadowed this in sources and research.

The laws provide an increasing number of degrees for the default Roman inheritance system, laws gave in the. Agnatic claims included the tenth degree in the Institutes of Justinian, counted in Roman mode (I.3.5). In comparison, the acceptable degree of marriage was beyond four Roman degrees, excepting cousins (D.23.2.3, C.5.4.19). Ten degrees was thus an extension from the *Digesta*, where Gaius (D.38.10.1, D.38.10.3) and Paulus

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<sup>387</sup> Buckland, *Text-book of Roman Law*, p. 366 and 371; Jolowicz and Nicholas, *Study of Roman Law*, p. 125; and Gai.3.12.

<sup>388</sup> See also Buckland, *Text-book of Roman Law*, p. 364.

<sup>389</sup> Gardner and Wiedemann, *Roman Household*, p. 140.

<sup>390</sup> It was possible to favour the spouse in the will or by legacy, and numerous examples, fictional or not, reveal a legal acknowledgement of such shortcuts. The wife could be given an heir’s portion of one-fourth (D.33.1.21.2.), or the usufruct of the late husband’s estate.

<sup>391</sup> See, for instance, the whole of book 33 in the *Digesta*. Gardner and Wiedemann, *Roman Household*, pp. 140-41.

(D.38.10.10, LRV.Paul.Sent.4.10) defined relatives to the seventh degree, which was also the limit for inheritance before falling to the treasury. The thorough account in Paulus reveals an important concept of the Roman system: it is primarily focused on the line upwards and downwards. The last joint in his survey of kin ends with *trinepos* and *trineptis* (D.38.10.10.17), the great-great-great-great grandson and -daughter. It could be that the occupation with the tradition of the ancestors, *mos maiorum*, in the Roman political mindset led to collaterals being almost unmentioned in the descriptions. We see collaterals lacking in Justinian's Institutes as well. With the inclusion of inheritance rights to seven degrees of agnates, and in the first centuries of imperial rule, the *Principate*, also including cognates, it would have been overwhelming to explain the complicated sidewise structures of genealogy too. Possibly the up- and downwards focus was merely scaffolding for others to continue from. The praetor's edict ran only to seven degrees (I.3.5.5). In twelfth- and thirteenth-century Norwegian laws, we see description of the bilateral kin group as well, resulting in long, elaborate descriptions. The reason for not including the lateral kin in the Roman texts could be as pragmatic as not dedicating the space for obvious details.

Only legitimate children could be heirs according to Roman custom.<sup>392</sup> The distinguishing of heirs according to the traditions of the *patria potestas*, meant that a child had to be accepted by its father. An illegitimate child was postponed in the order of succession (D.38.8.4). The unborn child would also constitute an object of dispute. It seems that children born posthumously would be equal heirs with their siblings. Within the more remote kindred, the relative would also have to be conceived before the death of Ego, to be a possible heir (D.38.8.1.8). Regarding Ego's own offspring, his widow or divorced wife could not remarry before one year had passed, to avoid confusion of paternity (D.3.2.10, C.5.9.2). Measures were taken to ensure that legitimate posthumous children could join as heirs, but even more to prevent the widow from secretly becoming pregnant shortly after to have other men's children inheriting from the deceased (D.3.2.16). Special regulations existed as to how to examine pregnant women (D.25.4), revealing the importance of legitimacy. In some medieval law, we shall see that legitimacy was also an important factor. Christianity was possibly the source of influence to the medieval laws on legitimacy, although the concept could have been a transmission from secular Roman law as a reception.

The foundation of the default inheritance system of Roman law was thus that of parentela in the immediate family, but with gradual tendencies among distant relatives.

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<sup>392</sup> Geoffrey Nathan, *The Family in Late Antiquity: The Rise of Christianity and the Endurance of Tradition* (London: Routledge, 2000), p. 24.

Backwards inheritance was prevented by restricting the rights of the wife and mother of Ego. The Roman inheritance system included principles of representations, although the children of sons were originally prioritised. Similarly, legitimacy and status of the descendant regulated the distribution of inheritance. The system was based on bilateral principles downwards, although we see a favouring of inheritance going through male agnates among more distant relatives.

## 5.2 Developments through the praetor and imperial legislation

Over time, the different praetors amended the rights of inheritance through edicts, and thus gave extended rights to different groups of relatives by way of claiming *bonorum possessio*, the rights to possession of goods (D.5.5). The rights would rectify the order of succession under the *ius civile*, and thus worked as a parallel system. Whether the old inheritance system had become archaic, or whether active changes to it were made, is uncertain, but the jurists' comments on the *praetor's* edict show a range of differences to the first established system. In fact, some of our knowledge of the republican system derives from it being contrasted to contemporary law in the first centuries AD.<sup>393</sup> The most important developments from this would be the inclusion of all children, regardless of emancipation, the inclusion of female agnates and the inclusion of cognates.

These groups were termed in three classes of possible claimants to the intestate inheritance by Ulpian (D.38.6.1).<sup>394</sup> The first class was the children of the deceased, and the praetor by *bonorum possessio* now allowed children who were emancipated and *sui iuris* to inherit along with the *sui heredes* (D.37.8.1-3, D.38.6, Gai.3.1). In addition, adoptive children came into this category (D.37.8.1.2, D.37.8.6). Adoptees otherwise enjoyed equal status to blood relationship, and now the inheritance rights reflected this.<sup>395</sup>

It seems that principles of prioritising descendants were emphasised in contrast to earlier law; rights of representation developed further. Earlier, a surviving child excluded the grandchildren by a deceased son. According to Gaius, they now had rights to claim a share of their parent's portion along with the other children of Ego (Gai.3.2, Gai.3.15, D.37.8). This regarded only children of deceased sons, although the son's children were not discriminated

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<sup>393</sup> See references in, for instance, Ulpian D.38.7.2.4, Gai.3.17-18.

<sup>394</sup> 'fecit [praetor] enim gradus varios'. To avoid confusion with the system of degrees used in my description of the system, it is sensible to term the groups as *classes of heirs*.

<sup>395</sup> Ruth J. Macrides, 'Kinship by Arrangement: The Case of Adoption', *Dumbarton Oaks Papers*, 44 (1990), 109-18.

against by gender. Prior to Gaius, the jurist Marcellus (late-second century) assumed that grandchildren by daughters also enjoyed this right, according to a rescript from emperor Antoninus (D.37.8.3). The commonplace contradictory opinions expose an inclination towards thinking in concepts of parentela, although the conception had not yet matured. Descendants now enjoyed priorities before ascendants, although the equality between male and female heirs did not extend to grandchildren.

The second class of heirs was the *legitimi*, which consisted of the male agnates, while the third class was the *cognati*, cognates, the remaining relatives on the maternal and paternal side.<sup>396</sup> Tendencies towards also including female agnates in the group of agnates appear in imperial constitutions from the early second century: where only sisters and daughters of Ego would have rights earlier, now the other paternal female relatives gained equal rights after their male collaterals, and together with cognates (Gai.3.29-31, D.38.8). Ulpian (?170-228) argued that the rights of *legitimi* also extended to related women with reference to the *Senatus consultum Tertullianum* under Hadrian (r.117-138) (D.38.7.2.1-2). Although there is little evidence of extended inheritance rights of distant female relatives until the late-fourth century, we could view Ulpian's opinion as an expression of the developing concepts of parentela principles in Roman legal ideology – that women were natural claimants to inheritance. Gender equalities were gradually extended to the distant relatives, together with an emphasis on descendants.

The third class of cognates included all relatives to the sixth degree (D.38.8.1), on both the maternal and paternal side, and definitely including the female cognates.<sup>397</sup> Those more closely related to Ego inherited before those more remote, and collaterals inherited together (D.38.8.1). In the final class of heirs, husband and wife were called to inherit from each other (D.38.11.1). Thus, only if all other relatives to the sixth degree were missing, spouses succeeded in the default system. If neither legal heirs nor spouse claimed the inheritance of Ego, then the public fisc claimed it (D.5.3.20.7).

We see that cognates inherited by proximity, but were descendants prioritised before ascendants? If several cognates were in the same degree to Ego, they should share the inheritance *per capita* (D. 38.8.1.10) and not *per stirpes*, as would become the distribution

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<sup>396</sup> The second and third class were collected under the headings *Unde legitimi* (D.38.7) and *Unde cognati* (D.38.8) in the *Digesta*. Those with statutory claim under earlier law could claim *bonorum possessio*. The system of the *praetor* of claiming inheritance through *bonorum possessio* would in effect become the legal system, although it was actually a way around the regulations of the *ius civile*. Buckland, *Text-book of Roman Law*, p. 367.

<sup>397</sup> Adopted family all fell into this category, since adoptees were considered cognates: D.38.8.1.4, D.38.8.3.

model in later Roman law and in parts of medieval legislation. Probably the same division applied between ascendants, descendants and collaterals, since Gaius reminded his reader that those related in the same degree ‘do not always run together’ (D.38.10.1.2). Hence, we must believe that the cognates were intended to inherit together regardless if they were up- or downwards or sideways related. To calculate the grade of kinship after specified criteria is what we have defined as the gradual system. Roman law appear to have maintained parentela principles in the inner circles of kinship and among paternal male relatives, and gradual principles for the more remote maternal and female kindred.

### 5.3 Towards a parentela system in late Roman law

In the *Principate* and onwards, several imperial constitutions addressed and developed the inheritance system in favour of female relatives in all degrees. In particular, the mother of the deceased would gain a prior position in the sequence of succession. Buckland has argued that the reason for favouring the mother’s and female relatives’ position in the inheritance system was mere repair of injustice of the old law.<sup>398</sup> Despite the total power of the *pater familias* and the social restrictions on the movement of women, Roman society was not discriminatory against women as owners or in terms of economy.<sup>399</sup> Compared to contemporary, and at least the later, societies, the Roman woman officially had many rights of property equal to her male peers. To rectify archaic imbalances could well be the reason for amending the inheritance laws. According to Ulpian, a mother who survived her children would be elevated to the position of the *legitimi*, if she herself had given birth to three children (D.38.7.2.4). This criterion was lifted by Constantine (CTh.5.1), who removed what was labelled, in several ways in his constitutions, as the ‘burden’ of Augustus (CTh.8.16.1).<sup>400</sup> A mother shared with other agnates up to one-third of the estate. The existence of a father or brothers still excluded the mother. Justinian further strengthened the right of a surviving mother to inherit together with other siblings of Ego (I.3.3.4, C.8.58.2). The legislators obviously saw it as natural that both parents surviving their offspring would inherit the parts of their estate reversed.

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<sup>398</sup> Buckland, *Text-book of Roman Law*, p. 368.

<sup>399</sup> Judith Evans Grubbs, ‘Virgins and Widows, Show-Girls and Whores: Late Roman Legislation on Women and Christianity’, in *Law, Society and Authority in Late Antiquity*, ed. by Ralph W. Mathisen (Oxford: Oxford University Press, 2001), pp. 220-41.

<sup>400</sup> Augustus made marriage a duty for the Romans, and rewarded women who had three children, or four if she was a freedwoman. See D.48.5 *Ad legem Iuliam de adulteriis coercendis*, See also Jane F. Gardner *Women in Roman law and society* (London: Croom Helm, 1986), p. 32 and Judith Evans Grubbs, *Law and Family in Late Antiquity, The Emperor Constantine’s Marriage Legislation* (Oxford: Oxford University Press, 1995), p. 132

The closest cognate did not inherit everything, but the closest in groups of collaterals would share. The motives for this could be the general equality among the descendants inspired the view of distribution among more remote relatives. Another explanation is the changes made to marriage legislation in the fifth and sixth centuries. The marriage gifts, *dos* and *dos ante nuptias*, were protected to such a degree for the families providing them, that to keep family estates in the family, it was necessary to ensure that women holding the marriage gifts were joint heirs *mortis causa*.<sup>401</sup> If, in the process of producing Germanic law codes, contemporary legal elites had access to post-Theodosian law, then they might have had to make conscious choices concerning the inheritance rights of mother, daughter, sister and other female relatives in their own legal work. The gift from the bridegroom's family to the bride's was an important part of Germanic marriage, and thus the emphasis on the *dos* may have been a reception from Germanic law.<sup>402</sup> The Visigothic and Lombard laws held the dowry to be a feature of Roman custom and Roman law, a tradition they did not adopt into their own written law (LV.3.1.6, Ais.1).<sup>403</sup> Justinian's disgust with the tradition of 'buying' the bride, as he understood the Armenian tradition to be, with marriage gifts from the husband's family, speaks against this theory (Nov.21).

Late Roman legislators strengthened the rights of descendants by concentrating on the principle of representation. The right of representation had been ambiguous to both legislators and jurists, and the right of grandchildren only became uniform in later rescripts. For instance, a sister would exclude more remote agnates, but contradicting views still existed in the mid-third century, as in the response of Emperor Decius to one Asclepiodota, to whether sisters also excluded the son of a brother (C.6.58.3). Two novels of Justinian, *Novellae* 118 and *Novellae* 127 from 543 and 548, respectively, are considered to have revolutionised the Roman inheritance system.<sup>404</sup> In these, descendants gained full priority before ascendants in the inheritance system, and male and female collaterals became equal. However, tendencies towards a parentela system had already emerged in the fourth century. Emperors Valentinian II, Theodosius I and Arcadius in 389 gave grandchildren by a deceased daughter of Ego the right to inherit from him by representation, although only two-thirds of what the daughter would have had (C.6.55.9). The remaining third would go to the other children at the expense of the grandchildren. In 426, Theodosius II and Valentinian III instructed the senate of Rome

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<sup>401</sup> Tveit, 'Non enim coitus matrimonium facit', pp. 89-93.

<sup>402</sup> Hughes, 'From Brideprice to Dowry', p. 271; Tveit, 'Non enim coitus matrimonium facit', pp. 93.

<sup>403</sup> Hughes, 'From Brideprice to Dowry', p. 273; Pohl, 'Frontiers in Lombard Italy'.

<sup>404</sup> Buckland, *Text-book of Roman Law*, p. 371; Mousourakis, *Fundamentals of Roman Private Law*, p. 283.

that grandchildren by a daughter *undoubtedly* (*sine dubio*) had rights of representation (C.6.55.11), removing any inequality of descendants. A constitution of Justinian from 528 exhibits the idea of prioritising descendants of either branch before ascendants (C.6.55.12), which similarly found its way into the Institutes (I.3.4.1). Obviously, the topic of representation was under discussion throughout the third to the sixth centuries, where the legislators became ever more determined to enforce the rights of grandchildren, and all descendants. This direction may be connected to the change in how the head of family was viewed. The concept of kin through a bilateral kin group is more prominent later Roman legislation, and so the late Roman family has been seen to be less dominated by the *pater familias* figure.<sup>405</sup> Antti Arjava maintains that the *patria potestas* did not lose its place in later Roman society, and particularly not in the legal aspect.<sup>406</sup> Still, as Arjava must admit, new factors determined the late Roman family.<sup>407</sup> A father with *patria potestas* experienced reduced rights in economic regards. Gifts the deceased had received were considered part of his *peculium* and were reversed to the donator or to the *pater familias* (late ex. C.6.61.1). In the late-fifth century, however, Emperor Leo and Anthemius decided instead that it would be given to the children of the deceased, a development already seen in former constitutions (C.6.61.4). Justinian later confirmed that parents had to leave their deceased children's property to the children's own offspring (C.6.61.6). We find in these later constitutions that the mother gained rights in late Roman law, but that the descendant's rights were strengthened even more.

The admission of rights to female kin and to the children of a *familia* may seem like a relaxation of the power of the male heads of family and society. However, the changes were parallel to a tightening of morality and family values in imperial legislation.<sup>408</sup> Later Roman legislation exhibited a different view of the family, with more dogmatic standards of family life.<sup>409</sup> Hence, incest, adultery, divorce and illegitimate unions or offspring were elaborated on more, although not necessarily treated more harshly than in classical law. Emperor Constantine decreed in 331 an infamous prohibition on divorce, which became a turning point

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<sup>405</sup> Eva Cantrella, 'Roman Marriage, Social, Economic and Legal Aspects', in *Hoping for Continuity, Childhood, Education and Death in Antiquity and the Middle Ages*, ed. by K. Mustakallo, K., J. Hanska, H.-L. Sainio and V. Vuolanto, Acta Instituti Romani Finlandiae, 33 (Rome: Institutum Romanum Finlandiae, 2005), pp. 25-32 (pp. 28-32).

<sup>406</sup> Arjava, Anti, 'Paternal Power in late Antiquity', *Journal of Roman Studies*, 88 (1998), pp. 147-65.

<sup>407</sup> Arjava, 'Paternal Power', pp. 164.

<sup>408</sup> Grubbs, 'Constantine and Imperial Legislation', pp. 132-42.

<sup>409</sup> See Tveit, 'Skilsmisserett', pp. 26-32; Arjava, 'Divorce in Later Roman Law', *Arctos*, 22 (1988), 5-21; Grubbs, *Emperor Constantine's Marriage Legislation*, passim; Joshua C. Tate, 'Inheritance Rights of Nonmarital Children in Late Roman Law', *Roman Legal Tradition*, 4 (2008), 1-36.

of family law (CTh.3.16.1). The prohibition became the object of further legislation in the next two centuries, with both relaxations and renewed penalisation.<sup>410</sup> Constantine also passed edicts on the status of children, and defined more precisely those considered illegitimate in all senses, namely the children born of infamous unions (CTh.4.6.2). The laws further divided between legitimate children born in a legitimate marriage, and those of a lawful union but not legitimate marriage. Children of the latter were termed *naturales liberis*. Constantine forbade all gifts to such offspring (CTh.4.6.1-2). Later emperors apparently disagreed in whether natural children could inherit a small amount of the property of their father (CTh.4.6.4-8). Justinian issued a list of reasons for legally disinheriting children (Nov.115.3). The reasons were violence, insults, accusations or attempted killing of parents, as well as impudent behaviour, associating with criminals, actors or circus artists, and not caring for insane parents or refusing to pay ransom if they were captives, a son having intercourse with his stepmother and a daughter living promiscuously or refusing marriage. A similar list of misbehaviour were acceptable reasons for disinheriting parents (Nov.115.4). The list in many ways corresponds with the ever-expanding list of accepted reasons for divorce (Nov.22.3-19 and Nov.117.10-12).<sup>411</sup> We find these topics again in the Germanic laws, being equally occupied with legitimacy and divorce.

Emperor Constantine's change in style in family law has often been interpreted as due to Christian influence. Edoardo Volterra has, for instance, shown how the style and wording in late Roman law was very different from earlier, and has been interpreted as being the work of Christian clergy.<sup>412</sup> However, Judith Evans Grubbs has disputed that the assertion of Constantine's law-texts was different because of his Christian leaning.<sup>413</sup> Rather, she asserts differences in late Roman law to be the result of the new authoritative language and late Roman norms. Nevertheless, there are differences in not only the style of the law language, but also in its contents. The early rule of a public Christian emperor could barely have caused a dramatic change in official terminology by then, into the style of the Church fathers we know from the following centuries. Possibly the stylistic influence went the other way around, from Roman administration to the clergy. Much of the same content, if not style, appears in the early medieval secular law.

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<sup>410</sup> Tveit, 'Skilsmisserett', pp. 26-32.

<sup>411</sup> Tveit, 'Skilsmisserett', pp. 31-32. See also Nov.18, Nov.19 and Nov.115.

<sup>412</sup> Edoardo Volterra 'Intorno ad alcune costituzioni di Costantino', *Rediconti dell'Accademia nazionale dei Lincei. Classe di Scienze morali, storiche e filologiche*, 8, 13 (1958), 61-89.

<sup>413</sup> Grubbs, *Emperor Constantine's Marriage Legislation*, pp. 120, 130, 138-40, 258.

## **Conclusion: Roman inheritance laws**

The mass of legislation on inheritance show signs of contradiction, as more often than not is the case of the collected Roman law. The contradiction between emperors' written decisions, the *responsum* must be read as a contradiction in mindset. Nevertheless, findings show a steady development towards a concept of the parentela system, where descendants were prioritised before ascendants, including relative gender equality and including principles of representation. In late Roman imperial legislation, two groups were repeatedly addressed, the mother and grandchildren of Ego. Through motives of fairness and equity, imperial lawmakers were inspired to advance these relatives in the default inheritance system. The confusing bulk of law comprised the basis for Germanic legislation. Accordingly, we can compare the Germanic development with Roman inheritance legislation from different periods, including the part originating from the same time as the first Germanic laws.

## 6. The inheritance Systems and Principles in Germanic laws

With his work on *Germanic Kinship Structure*, Alexander Murray opposed the longstanding assumption that the Germanic groups stuck to unilineal, even patrilineal modes of counting kinship.<sup>414</sup> The early Germanic legislators paid attention to the topic of inheritance, although to varying degrees. The laws described the ideal system and to how to deal with problematic instances.

Murray also modified the generally accepted interpretations of Germanic ideas of private property. Traditionally, there were three stages, where land was first considered communal, then clan based, and finally there was a move towards a more individualistic concept of absolute ownership due to ‘confrontation with Roman Law’.<sup>415</sup> There was also a common notion of a particular Germanic concept of demanding the consent of relatives when alienating family property. Murray opposed these interpretations of the Germanic legislators themselves, but also justly corrects the view of ownership according Roman law. As he points out, Roman law exhibit a range of ownership types for land and movables, in laws from late antiquity.<sup>416</sup> Co-ownership, usufruct, vindication, purpose- or licence-based ownership are some examples. Moreover, the earlier Roman legal material also exhibits the same differentiations. Ownership could be on many levels and take many forms, and as we remember from the survey of Roman inheritance laws, a testator could not bypass a rightful heir, and the relative’s consent in alienating property was part of Roman legal concepts.<sup>417</sup>

Germanic kinship structure did not favour female heirs, but the prevailing view is that women were gradually given improved economic privileges from the sixth to the eighth century when it comes to rights of possession and owning landed property.<sup>418</sup> From the time of Clovis to the time of Charlemagne, Frankish women were given the right to own land, be sole heir, possess their *dos* and morning gift both in and after the marriage, be co-heirs with their sons, given extended rights to be supported after widowed. According to studies by Susanne F. Wemple, this should be interpreted both as a reflection of the Germanic authorities’ ‘desire to imitate Roman customs’ (which did not distinguish between the sexes

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<sup>414</sup> Murray, *Germanic Kinship Structure*, pp. 35-111.

<sup>415</sup> Murray, *Germanic Kinship Structure*, pp. 179-80, and see also n. 7.

<sup>416</sup> Murray, *Germanic Kinship Structure*.

<sup>417</sup> Buckland, *Text-book of Roman Law*, pp. 281-360.

<sup>418</sup> See, for instance, Wemple, *Women in Frankish Society*, pp. 44-50.

regarding inheritance), and a way for Germanic authorities to weaken the powerful kinship structures.<sup>419</sup>

The written laws include a distinction between legitimate and illegitimate children, but in slightly different ways. Defining legitimate heirs of course depends on the definition of a legitimate marriage. While in Roman law we find legitimate children and heirs as those born in a marriage, illegitimate children fall into two categories, those conceived in a possible lawful union between individuals who were not married and those of an infamous union. A typical example of the latter is a union between a senatorial relative and an actress (D.23.2.27, CTh. 4.6.2). Non-consistently, children born out of wedlock were termed natural children, *naturales liberi*, in Roman law (D.38.6.4, CTh.4.6.4) and in the Lombard law (Ex. Rot.154-162). Natural children had inheritance rights, although some offspring of infamous unions were deprived of all opportunity to inherit.

The indebtedness of the *Leges* to Roman law is often mentioned, without clear reference to the nature of what the loan consisted of. Regarding inheritance laws, scholars have also argued for more independent legislation, since the Germanic and Roman customs largely diverged in this matter. According to Maurizio Lupoi, we rarely find adoption of rules between Roman and Germanic law, only traces of influence from ancient systems.<sup>420</sup> Others, such as Hagith Sivan, have pointed out how Germanic law follows Roman law closely in marriage legislation, where we would assume strong Germanic custom influenced the content of written laws.<sup>421</sup> This chapter will examine the Germanic laws' presentation of the default inheritance system, one at the time. My survey will also focus on the selection of topics introduced in the previous chapters: type of system, prevailing mode of kinship, principles of representation, and women's inheritance rights as wife, mother and sister or more remote relatives. Moreover, inheritance rights to ancestral lands will be introduced as a topic. The inheritance laws of each legal culture will undergo a comparison with the other Germanic laws and with Roman law. The survey begins with the laws of the Franks, since their inheritance system allegedly contrast the Roman system more than other Germanic law.<sup>422</sup>

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<sup>419</sup> Wemple, *Women in Frankish Society*, p. 44; Suzanne Fonay Wemple, 'Women from the Fifth to the Tenth Century' *A History of Women in the West*, ed. by Georges Duby and Michelle Perrot, (Cambridge, MA: Belknap Press of Harvard University, 1992), pp. 169-201.

<sup>420</sup> Lupoi, *Origins*, pp. 23-24.

<sup>421</sup> Sivan, 'Appropriation of Roman Law', p. 189.

<sup>422</sup> Murray, *Germanic Kinship Structure*, pp. 211-12.

## 6.1 The Frankish legislation on inheritance

The Frankish kingdom established in the wake of withdrawal of Roman authority soon saw a generation of domestic jurisdiction and production of home-made law. The *Pactus Legis Salicae*, (PLS) mainly instigated by King Clovis (r. 466-511), shows more attention to private dispute settlements than to family law, or to constitutional care overall. This has led to Frankish society being represented by modern scholars as an aristocracy-dominated battleground between elite families' interest and struggling authorities' force.<sup>423</sup> Restricted space was given to family law in the *Pactus*. The laws put into writing in the *Pactus* were directly copied, for the most part, into in the law code of *Lex Salica Karolina* (LSK), credited to Pepin (r. 752-768) and Charlemagne (r. 768-814). Nevertheless, the few revisions in inheritance laws are of significance. And, although most of the content was seemingly transmitted in the 300 years between the two codes, the late fifth-century addenda, the *Capitularies*, also provide important additions to the inheritance system as it is portrayed in them.

Murray points out the ambiguity in the inheritance laws of the Franks, where those closely related to Ego are listed in some detail, but the order of succession of more remote relatives is not described.<sup>424</sup> After examining the evidence, I would suggest that Salic law implemented a default inheritance system that changed its principles according to the distance of the nearest relative. The close relatives inherited according to parentela principles, while the more remote inherited by designation, after gradual principles. In Frankish legislation, kinship was counted within six degrees (PLS.44.11-12/LSK.24.10-11). These degrees appear to have been counted in the Roman mode, and was the same number of degrees found in other continental laws, including the Visigothic. At the time of Clovis, six degrees corresponds with the concept of cognatic kinship and inheritance rights in Roman law. It was not until two centuries later that the infamous demand of the Church came into being, where seven degrees between spouses became a requirement for a valid marriage counted in the Germanic mode. We can assume the accuracy in degrees to be a direct borrowing from Roman laws. Other evidence is that early Salic law stated that he who wished to remove himself from his kin group could do so by losing all rights of inheritance together with the responsibility to provide compensation to his kin (PLS.60). This section uses the term *parentilla* of the kin with whom the Ego identified. This does not refer to the concept of parentela as it is used in this study,

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<sup>423</sup> The most well-known example being Wallace-Hadrill, *The Long-Haired Kings*.

<sup>424</sup> Murray, *Germanic Kinship Structure*, p. 178.

but to the entire kin group within six degrees, of which a person was responsible to and could be supported by.<sup>425</sup> Thus, we can assume that the limit of six degrees was already established in the fifth century, as a reception of Roman law and mode of counting.

The rules in *Pactus Legis Salica* and *Lex Salica Karolina* were mainly statements without explanations of the underlying motives. The inheritance system can be deduced from two central rules in the *Pactus* and the later Carolingian law, which also reveal the internal diachronic development.

Primarily, children should inherit from Ego. If there were none, then the parents would inherit, and if no parents survived, then siblings inherited (PLS.59.1-2/LSK.34.1-2). The deceased's maternal aunt was the next in line, then the paternal aunt (PLS.59.3-4). Apparently legislators favoured the matrilineal line, whereby female relatives were first in line to inherit after the close family. The A-family of manuscripts read that the mother would inherit if Ego had no offspring. This led to discussions of whether the Frankish kinship structure was matrilineal in its origins, with counter-arguments that it was patrilineal and the rule itself comprised movables or maternal dowry.<sup>426</sup> The system also suggests that an equal division between the sexes was a priority. The first sequence forms the first parentela, with the exception that it did not mention grandchildren of Ego, nor the children of siblings. However, a later capitulary added grandchildren (PLS.Cap.6.1). This could be an indication that the concept of representation was not accepted in the earliest laws, although it is also possible that the rights of grandchildren were implied. If neither children nor grandchildren existed, the inheritance system of Clovis's laws took the form of a bilateral gradual system instead (See Figure 4). Murray and Wemple have interpreted the Frankish family structure as bilateral.<sup>427</sup>

The system was copied in the later Carolingian version, except that here, paternal aunts are favoured over maternal (LSK.34.3-4). If these maternal, female relatives were absent, the closest family members inherited (PLS.59.5/LSK.34.5). But the classes of manuscript diverge on which line: the oldest, A-family (where the section is numbered 59.4) states whoever is closest, 'quicumque proximo', would succeed, whereas C-family and H-family specify whoever is closest from the *father's line*.<sup>428</sup> The fact that maternal kin came

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<sup>425</sup> See also Drew, *The Laws of the Salian Franks*, p. 40.

<sup>426</sup> Brunner argued against the *mutterrecht*-theory: H. Brunner, 'I. Kritische Bemerkungen zur Geschichte des germanischen Weibererbrechts', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Germanistische Abteilung*, 21, 1 (1900), 1-19, (pp. 13-18). See Murray, *Germanic Kinship Structure*, pp. 201-15 for a thorough survey of the content of the rule and the academic debate.

<sup>427</sup> Wemple, *Women in Frankish Society*, pp. 51-52, 58-59; Murray, *Germanic Kinship Structure*, pp. 135-62, 218-19.

<sup>428</sup> *Pactus Legis Salicae*, MGH, LL nat Germ, 4.1, pp. 222-23.

before paternal had led scholars to the conclusion that this regarded only movable property. It possibly did, but later laws also regarded estates in general at some point. Brunner assumed that the paternal family gained precedence from the 560s.<sup>429</sup> Wemple also assumed that the later changes in the C-family gave the paternal relatives priority, and that this is why the rule came to also include land in addition to movables.<sup>430</sup> Another interpretation is that women held inheritance rights to land where there were no male collaterals. Murray interprets the order of succession to be a distinction of the Franks from the Roman inheritance system, as a ‘statement of the peculiar “Frankishness” of the Frankish inheritance’.<sup>431</sup> However, he here basis his statements on the inheritance system as it was after the Roman Praetor’s edict and before the changes in late antiquity towards favouring the mother and remote female kin. It is thus uncertain whether the Frankish legal elite, whether themselves of Roman or Germanic origin, were not acquainted with fifth-century Roman law or whether they were so much acquainted with *earlier* Roman law as to make a Frankish statement through inheritance regulation.

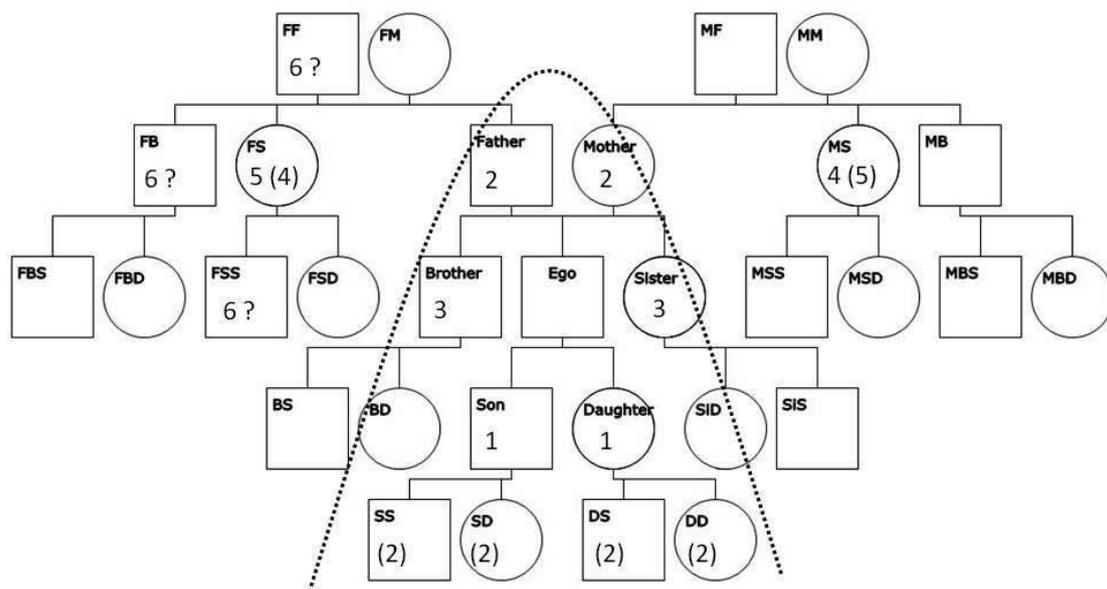


Figure 4: Genogram of the inheritance system in Salic law. Bracketed numbers are revisions from capitularies and LSK.

<sup>429</sup> Brunner, ‘Kritische Bemerkungen’, pp. 1-19.

<sup>430</sup> Wemple, *Women in Frankish Society*, pp. 47, 227 n. 110.

<sup>431</sup> Murray, *Germanic Kinship Structure*, pp. 211-12.

In other rules, we find signs that women were accepted as actors in the economic system. The inheritance system reflected the system of distribution of compensation. PLS.58 follows a similar pattern to that of PLS.59: if a killer was unable to pay the full compensation, then his mother and father were responsible, followed by the maternal aunt and her children and then three of the nearest relatives on both the mother's and the father's side. We find here the same pattern of a parentela as in the rule on inheritance, maternal aunt followed by the bilateral kinship group.

Likewise, the receiving end of the compensation mirrored the inheritance system (PLS.62/LSK.14). Compensation would be divided in two, half to any children and half to be shared between both the maternal and the paternal kin. The capitularies stipulate one quarter to the wife – if the mother of the children – of a killed man (PLS.Cap.1.68) and repeats the model of the three nearest maternal and paternal kin to receive the last quarter, or half if the wife was absent. The outlines of the distribution of compensation will be discussed later in this thesis.

The intestate system emerges as a somewhat inconsistent gradual system where female heirs are favoured first bilinearly, followed by paternal kin, at least in some manuscripts. Therefore, discussions have focused on what kind of property these sections applied to, whether this was movables or land, or types of landed property.<sup>432</sup> The confusing element relates to particular land ownership, as PLS.59 ends with the famous enactment that has preoccupied studies on Salic law: PLS.59.6 concludes that *terra salica* could only go to the male sex.<sup>433</sup> Such land would pass undivided to sons. The section has been taken, by Brunner and Wemple, as proof of the strong patrilineal fabric of the code, and suggestions have been made that section 59.1-4 only concerned movable property.<sup>434</sup> But as Drew has pointed out, there was a difference between this *terra salica* (held as fief or tenure) and allodial land – *alodis*.<sup>435</sup> *Terra salica* was given as tenure either in the lifetime of Ego or in the past to an ancestor. Allodial land, on the other hand, was land held in the family for a certain time, and could seemingly be inherited by female heirs. The A-manuscripts further use only *terra*, indicating a change in either the status of land or the law on landed property.<sup>436</sup> Murray holds *terra* to be 'land however acquired', and he points to the view that *salica* refers to *sala*, that is,

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<sup>432</sup> Wemple, *Women in Frankish Society*, pp. 45-47.

<sup>433</sup> David Herlihy, 'Land, Family and Women in Continental Europe, 701-1200', *Traditio*, 18 (1962), 89-120; Drew, *The Laws of the Salian Franks*, p. 45.

<sup>434</sup> Brunner, 'Kritische Bemerkungen'; Wemple, *Women in Frankish Society*, pp. 47.

<sup>435</sup> Drew, *The Laws of the Salian Franks*, p. 44.

<sup>436</sup> *Pactus Legis Salicae*, MGH, LL nat Germ, 4.1, p. 222.

house and not Salic.<sup>437</sup> He argues that it denominated the family homestead, to be inherited by sons. The changes in time could stem from developing concepts of land over the course of time after conquest. As I will come back to below, the Lombards changed their concept of land in relation to the minimum number of years it needed to be held to bestow ownership in the years after their conquest of the northern Italian peninsula.

Due to consideration of the scope of this thesis, where a rule's content is significant as transmission from earlier laws or as a source for later interpretations, I will not attempt to discuss it further. Thus, I will leave to one side a discussion of the meaning *terra salica* had for the contemporary legal elite. In any case, the rubric of PLS.59 *de alodis* alludes to inheritance of different types of property. Murray argues that the basic principle in Frankish inheritance distribution was that each side secured their original part of the property, by reversion, *ius recadentiae*.<sup>438</sup> Rudolf Huebner argued that *ius recadentiae* came as a reaction to the inclusion of maternal kin in the Germanic kinship structure and inheritance systems.<sup>439</sup> If we accept Murray's contention that Germanic kinship structure not was patrilineal in an early phase, but bilateral, then *ius recadentiae* developed as a reaction to the development of ancestral property, and not as a reaction to the inheritance rights of maternal kin. After the being settled in new territory for a time, the developing landowning class wanted regulations to keep appropriated land. The concept, we can argue, was an original Germanic legal development, and originating due to requirements in the legal culture.

Even if each side held rights to reversion of property in case of backwards inheritance, it seems the legislators realised a need for keeping each of the properties undivided. Thus, the type of property is interesting again. The Herold MS hints at specific rules attached to allodial land. It was transferred undivided, which was usually the primary aim concerning property, until, 'after a long time', an unbearable situation of joint ownership among grandchildren or further down arose.<sup>440</sup> Then it was divided *per capita*, and not after a branch of the original heirs: 'non per stirpem sed per capita'. One possibility is that allodial land was assumed to be held in common by sons and daughters, who would live off the family property. The next generation caused problems of cooperation, and the estate was better divided equally between all grandchildren, rather than according to representation. In this case, we can imagine that other strategies would be applied by each family, with conveyance to a male heir after buying

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<sup>437</sup> Murray, *Germanic Kinship Structure*, p. 212 n. 21.

<sup>438</sup> Murray, *Germanic Kinship Structure*, pp. 212-15. 'paterna paternis, materna maternis'.

<sup>439</sup> Rudolf Huebner, *A History of Germanic Private Law* (Boston: Little, Brown and Company, 1918), pp. 729, 734.

<sup>440</sup> *Pactus Legis Salicae*, MGH, LL nat Germ, 4.1, p. 224.

off the rest, without such ideas surfacing in the extant laws. In the capitulary of what is thought to be King Childebert II (r. 575-595) of Austrasia, we find concrete provisions on representation (PLS.Cap.6.1). It states that *nepotes* would come to inherit in their parent's place, and share their father's or mother's portion. The equality principle is used here as well, both in terms of a son or daughter of Ego being lost and division between grandchildren. The capitulary dates to 594, some few decades after Justinian in the 540s cemented the right of representation by grandchildren (Nov. 118 and Nov.127). If the Frankish legal elite knew Justinian's and earlier emperors' constitutions, the right of representation could have been a legal transmission from Roman law.

However, one of the capitularies of Chilperic I of Neustria (r. 561-584) stated that daughters could inherit land if there were no sons (PLS.Cap.4.108).<sup>441</sup> Drew has interpreted this to refer to *terra Salica*.<sup>442</sup> If this is right, then it would thereby overrule earlier law, by allowing families to transfer beneficial land through daughters as well.

We can see that inheritance was to be divided in the sense that all heirs in the same collateral branch in the same degree would get equal parts of the property; sons and daughters shared and siblings of the departed shared. The allodial land, though, was not divided, but we are not told if equal parts of movables or other land would compensate for one person inheriting the land. If not dividing, it is tempting to assume that a son would get the land and a daughter got the movables as dowry or inheritance. However, this is a biased conclusion; the matrilineal lines were possibly favoured in the intestate system. A reason to give inheritance rights to maternal kin would be to avoid the potential for them to instigate a feud, just as the Lombard law favoured only those who could instigate a feud (see below).

Certainly, real life would have more complicated family structures than just one couple and their offspring. Second or more wives and husbands with their respective sets of offspring presented problems in the first part of the default system, challenges that were met by the lawmakers. The legal material reveals an expectation that property of a deceased spouse would be divided if the children were of age (PLS.Cap.3.101.1). If a wife died first, and the children were still minors, then the husband was required to protect her property or *dos*<sup>443</sup> for her children, and keep it out of reach of his new wife and new children. Similarly, if there were no children of the first marriage, then the dead wife's relatives were entitled to two-thirds of her *dos*, but had to leave some of the furniture for the husband

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<sup>441</sup> See also Cth.13.11.13, and Murray, *Germanic Kinship Structure*, pp. 79-80.

<sup>442</sup> Drew, *The Laws of the Salian Franks*, pp. 44-45.

<sup>443</sup> *Pactus Legis Salicae*, MGH, LL nat germ, 4.1, p. 258: 'res (...) uel dot(em)'.

(PLS.Cap.3.101.2). If it was the woman who remarried, the betrothal fine was due to the dead husband's relatives. But the relatives in question changed from the law of Clovis to the later-sixth century capitularies: in the early law, it was the maternal male relatives of the man (PLS.44.6-12), while the paternal male relatives gained this right in the later revision (PLS.Cap.100.1). Related to the discussion above, we can see both that originally maternal kin was prioritised, and that this right changed to the paternal kin of Ego. Similarly, it appears that the wife of Ego enjoyed the right to the *dos*, but she did not inherit from her husband. This prevented the dubious effects of backward inheritance.

However, another capitulary of Chilperic (r. 561-584) established the half-and-half split between the relatives, as regards the *dos* in the case of the death of one spouse (PLS.Cap.4.110). We find a similar division in Burgundian laws (see below). That the legislator gave emphasis to the woman's right to the *dos* is significant according to Wemple.<sup>444</sup> She points out that this developing transfer in Germanic law of the ownership of the *dos* from the bride's family to the bride herself empowered women economically, also unmarried women. The right to the *dos* extended to the morning gift, and to the dowry and eventually also to landed property. Wemple asserts that Roman custom influenced this change and that the underlying motive, as mentioned above, was an attempt to weaken the kin through permitting rights to the weakest family members.<sup>445</sup> As mentioned in the previous chapter, we can, in the instance of the *dos*, also assume an influence from the Germanic practice on Roman law and practice.<sup>446</sup> The legal cultural encounters in the fifth and sixth century obviously affected legal views on female ownership rights.

Frankish regulations on inheritance follow stages of development similar to what we saw in late Roman law. If transmission of law took place, there was, nevertheless, a Frankish alteration of the Roman laws. The Church may also have influenced Frankish law, and an introduction of the favouring of women as part of the introduction of Christianity from the late-fifth century. If so, Germanic law adapted to Christian concepts on marriage and women in general, where they gained a more prominent status within the Germanic culture. In Frankish law, a modified parentela system of inheritance is displayed, extending no further than to the first line of descendants. The laws consist of strange principles of prioritising maternal kin, but with ancestral land being secured for patrilineal descendants. The introduction of representation appears as a novelty. In the mid-sixth century, the Franks

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<sup>444</sup> Wemple, *Women in Frankish Society*, pp. 44-50.

<sup>445</sup> Wemple, *Women in Frankish Society*, p. 44.

<sup>446</sup> Tveit, 'Non enim coitus matrimonium facit', p. 93.

annexed the Burgundian kingdom. Burgundian rules on inheritance were a different in several regards.

## 6.2 The inheritance laws of the Burgundian kings

Burgundian king Gundobad (452-516) issued his *Liber Constitutionem* around the same time as the Salic laws of Clovis were enacted. As Gregory of Tours vividly described, the Frankish and Burgundian authorities had dynastic and diplomatic relations with approaches that vacillated between friendly and hostile.<sup>447</sup> Gundobad and his son Sigismund (r. 516-524) both revised the laws regarding inheritance. The code from the late-fifth century and amendments dating from the early sixth describe a strict patrilineal system of succession to property. New amendments regarded both the extension and limitation of women's inheritance rights, as the result of encounters between legal cultures among the elite. The *Lex Romana Burgundionum* effected Roman inheritance law on Roman subjects and would have been a work of reference to the Burgundian legal elite. Still, the contemporary relationship with the Roman empire might have been a factor in the shaping of secular law, and not Roman law alone. The Burgundian kingdom was defined as *foederati*, allies, to the Romans. And, although they seem to have enjoyed an independent rule in the west, the Burgundian king Sigismund was presented, through the writings of Bishop Avitus, as a soldier of the Roman emperor and their land as 'uestra orbis',<sup>448</sup> which translate into 'your sphere'. Avitus claims further 'the light of the East touches Gaul and Scythia, and the ray of light that is believed to rise there, shines here'.<sup>449</sup> Barnwell argues the submissive wording reflects 'what was perceived to be the relationship between the king and the emperor' as characteristic of a distant dependent kingdom.<sup>450</sup> The Burgundian elite have been described by scholars as maintaining their Burgundian traits, long after merging with the Roman empire.<sup>451</sup> The Burgundian king and aristocracy have appeared more as warlords than as Romanised, possibly a conscious policy of the legislating kings. Did this also result in inheritance regulations being consciously non-Roman? After being an Arian Christian, Sigismund converted to the Catholic faith, which

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<sup>447</sup> Gregory of Tours, *History of the Franks*, trans. by Ernest Brehaut (New York: Columbia University Press, 1916), 2.28-34 and 3.5-6.

<sup>448</sup> Barnwell, *Emperor, Prefects and Kings*, p. 203 n. 20.

<sup>449</sup> Avitus, *Epistolae* 93, in *Avitus of Vienne: Selected Letters and Prose*, ed. and trans. by Danuta Shanzer and Ian Wood (Liverpool: Liverpool University Press, 2002), p. 147.

<sup>450</sup> Barnwell, *Emperor, Prefects and Kings*, p. 84.

<sup>451</sup> Barnwell, *Emperor, Prefects and Kings*, pp. 41-45; Matthew Innes, 'Land, Freedom and Making of the Medieval West', *Transactions of the Royal Historical Society*, 16 (2006), 39-74 (p. 65).

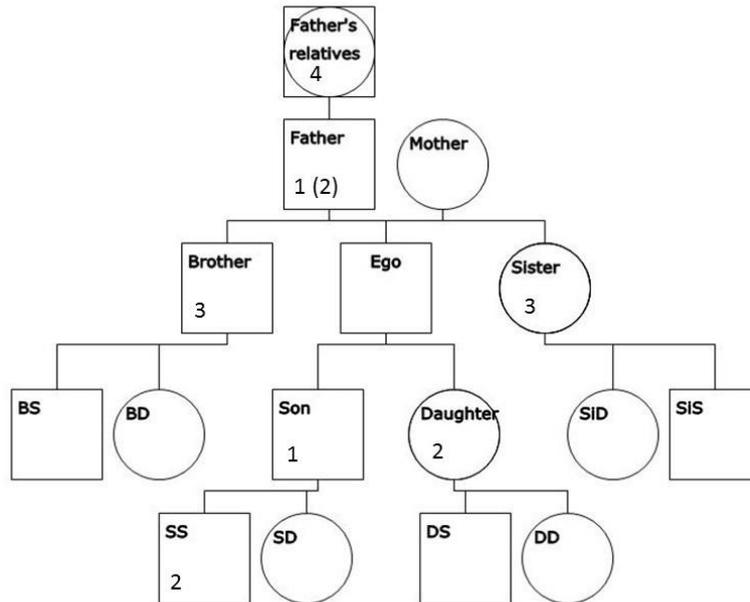
may have made him more credible for the Roman authorities and Romans within the Burgundian territory.<sup>452</sup> The conversion established the Catholic Church in a dominant position within the Burgundian kingdom, although both Arian and Catholic clergy worked side-by-side within the Burgundian realm.<sup>453</sup> It might have been important for the converted king to pay heed to canonical teachings on inheritance and family law – both Gundobad and Sigismund showed interest in theological questions – but inheritance regulations were not predominantly Christian.

King Gundobad presented the principles of inheritance as customary law (LB.51.1, LB.53.1). From the rules we can deduce the default inheritance system. A father had to distribute his property in equal shares among his sons (LB.1.2-3, LB.51.1). Some sections even indicated an expectation of division *inter vivos* to the sons, while the father kept one part for himself. With this part, the father had the right to do what he pleased. Sons were first in line of succession, followed by daughters (LB.14.1). Then the siblings of both sexes were next in line of succession, followed by what the legislator described as ‘near relatives’, ‘proprinquos parentes’ (LB.14.2). From other rules on the family, it is reasonable to assume that the near relatives signified paternal relatives only, although we do not learn whom were considered to be closest, and nor the number of degrees included. Later sections from Sigismund imply that if the deceased had a surviving father, then he would share the inheritance with the deceased’s son (LB.51.2, LB.75.1, LB.78.1). If the father did not spend his own portion after dividing the estate with his sons, they would inherit an equal part in this *mortis causa* (LB.51.1).

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<sup>452</sup> Ian Wood, ‘The Burgundians and Byzantium’, in *Western Perspectives on the Mediterranean Cultural Transfer in Late Antiquity and the Early Middle Ages, 400-800 AD*, ed. by Andreas Fischer and Ian Wood (London: Bloomsbury Academic, 2014), 1-16 (p. 13).

<sup>453</sup> Shanzer and Wood, eds., *Avitus of Vienne: Selected Letters and Prose* (Liverpool: Liverpool University Press, 2002), pp. 9-10, 18-19.



**Figure 5: The inheritance system as portrayed in the Burgundian laws. A gradual system where ascendants were favoured before descendants.**

The Burgundian written law employed principles of representation, in the way grandsons would enter into their deceased father's share of inheritance in relation to the latter's father or brother. Apparently, granddaughters did not hold this right. A father's share in a dead son's property would be divided between the brothers when the father shared it with them or died, i.e., the brothers inherited a share of their dead brother's property. However, this did not apply to daughters, because a father's own portion or obtained portion was reserved for sons only (LB.78.1). The expectation of dividing *inter vivos* in the Burgundian code could also imply that legislators expected daughters to receive a share before their parents passed away, as dowry or addition to dowry.

Provisions were seemingly made by Gundobad for daughters to inherit from their father only if there were no sons (LB.14.1). It was expected that daughters would receive a portion of the paternal property to dispose of at will (LB.14.7). We do not learn the precise size of this, but a clue is the portion due to daughters who entered a monastery (LB.14.5): when a daughter took the veil, she was entitled to a part of her father's allotted land, the *sors*, a type of land discussed below. If she had one or two brothers, then a third of the *sors* was due to her (LB.14.6). If she had four or five brothers, a non-specified, probably smaller, portion was hers. One conclusion from this could be that she received one lot from the property, equal to her brothers; if there were four siblings in total, she got one-fourth, and so on. However, the

restrictions on female relatives in the Burgundian code make this a generous guess. Also, this division only considered a sister that took the veil. We must keep in mind that the rules traditionally regarded nuns as having a higher status according to the legal elite.

Sisters' rights to a father's portion have a correlation with the rules on division between a daughter and a grandson. If Ego died, leaving a father, a sister and a son, then apparently, the property of Ego and his father would be shared by his sister and his son, i.e., aunt and nephew, according to a distribution formula (LB.75.2-3). The rule leaves room for interpretation on the division between the daughter and grandson of Ego. The father of Ego would have half of his son's property and his grandson the other half. Then at the death of the father, the father's half would be divided again, between his grandson and daughter. Drew and Beyerle maintained that if the father had already divided his property with the son of Ego *inter vivos*, the daughter would end up with three-quarters of the father's share according to LB.75.1, but not if the father lived with his property undivided.<sup>454</sup> This would suggest that the parent's decision to divide their property in life would have considerable legal implications for their descendants. The favouring of daughters over grandsons gives some clue as to the inheritance rights of women: they were given consideration, although this practice still complies with patrilineal principles in a gradual system since the father had priority over the son. If we compare this distribution formula to the division of the marriage price, *wittimon*, of an orphan girl (LB.66), a similar pattern appears. The distribution of the marriage portion for a girl left with uncles and sisters, gave the uncles one-third, and the sisters would receive one-third.<sup>455</sup> Here the collaterals were favoured before a male, paternal relative. However, daughters were exclusively entitled to appropriate their mother's movable goods (LB.51.3). The *Leges Burgundionum* did not specify female ascendants in either line, but did specify female descendants or collaterals of Ego, the daughter and sister in LB.75.4. In this constitution of Sigismund, the sister nevertheless constitutes the paternal aunt of Ego's daughter. The portion due to the sister of Ego constituted their paternal portion of the inheritance. This means that the agnatic women were part of the inheritance system. Possibly, by the same mechanisms, they would inherit among the 'propinquos parentes' as well. The Burgundian law of Gundobad followed unilateral principles and had a unilateral gradual system whereby direct ascendants were favoured before distant descendants. As such, it

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<sup>454</sup> See Franz Beyerle, *Geetze der Burgunden, Germanenrechte*, vol. 10 (Weimar: Böhlau, 1936), p. 103 n. 1; Drew, *The Burgundian Code*, p. 72 n. 1-2.

<sup>455</sup> Plus their mother's third. Drew also suggests that the last third was due to the bride herself as a *dos*. For a discussion on the character of this type of payment in Germanic marriage, see Hughes, 'From Brideprice to Dowry', and Dübeck, *Kvinder, familie og formue*.

contrasted with the Roman and Frankish default system, although they work along similar lines regarding female agnates.

Patrilineage principles would also apply to the rearing of minor grandsons by the paternal grandfather, whereby the grandsons' mother could keep them if she did not remarry (LB.59). A woman would rear her sons under the protection of her husband's family. Property and ideas of lineage were modelled on patrimony and protecting the family property. Moreover, Gundobad forbade anyone from disinheriting their sons. The above-mentioned rule LB.51 refers to one *Athila* who tried to disinherit his son. Gundobad claimed that 'what he has done contrary to law shall have no legal force'.<sup>456</sup> He made it illegal to deny sons their due portion, either by intestacy or by testament, although as earlier enactments admit, he awarded men the right of distribution of their own property (LB.1.1, LB.43). The case of Athila, which could well be fictional given the peculiar name,<sup>457</sup> suggests that the Book of Constitutions was well embedded in the legal system of the Burgundians during their short rule. We learn also that a Roman girl who voluntarily runs off with a Burgundian will be disinherited by her Roman parents (LB.12.5). This sentence indicates a reference to Roman law, where eloping daughters would lose their inheritance according to Constantine (CTh.9.24.2), although disinheritance was a normal punishment for disobedient women in Germanic laws, too.<sup>458</sup>

Women inherited their mother's or unmarried sisters' female movables, like fine clothes and adornments (LB.51.3). Still, women could make special provisions for their movable property without contradicting law, and without daughters or sisters being able to sue on grounds of invalidity. There are indications that a woman's property returned to her line, if she had no children; the marriage gifts could not be demanded back by relatives of the husband, and neither could relatives of the wife demand back marriage gifts to him after her death (LB.14.3-4). However, other rules demanded the *dos* returned to the patrimony, or given to the son of the marriage, and to the respective son of each marriage if there were several (LB.24.1). But, if childless, the widow and the husband's relatives would share the *dos* 50/50 (LB.24.2). A widow was required to preserve the property for minor heirs or later relatives, but she could do what she wanted with her own portion or gifts from her son or husband (LB.24.3-5) and keep her *dos* and *morgengeba* (LB.42.2).

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<sup>456</sup> 'quod contra legem fecerat, ex lege iussimus non valere'.

<sup>457</sup> 'Athila' has an unquestionable resemblance to the name of the Hun leader, former foe of the Burgundian military forces.

<sup>458</sup> See, for instance, LV.3.4.7, Liu.5.V, Liu.114.XI.

The widow's entitlements were scrutinised on several occasions in the legislation of Sigismund, after king Gundobad had first favoured the rights of widows in negotiations with the secular nobility. A widow whose son had died was given rights to use her son's inheritance during her lifetime (LB.53.1). In 501, King Gundobad announced that, although he had earlier decreed the inheritance of a childless man should go to his siblings (LB.14.2), after consideration he had decided to amend the law, so that widows who had not remarried could live off part of their husband's property (LB.42.1). Later, apparently by advice of his aristocracy, the 'optimates populi nostri', Gundobad had been counselled against this, because the husband's relatives would have to wait too long for their share (LB.53.1). But, instead of depriving the widow of usufruct, he called for an immediate shift of the man's property: the widow would surrender half of the total property to the in-laws, and have total ownership of the other half (LB.53.2). This was a generous share to the widow, and in 517 King Sigismund reduced it to one-third (LB.62.1). Apparently, after more legal advice or complaints from noblemen, King Sigismund placed further restrictions (LB.74). He set conditions that said she could only obtain the third if she had not received any property from her parents or by gift from her husband. She had to remain unmarried and would only have usufruct. This aspect of the Burgundian legal development is anomalous, if we view the women's enhanced inheritance rights in the early medieval laws as a result of influence from canon law. Widows were granted large parts of the property, in line with Wemple's theory of the contemporary development of enhancing women's property rights, inspired by Roman law. Secondly, these rights were restricted again due to pressure on the legislator from the aristocracy. Obviously, Burgundian secular law was made with conscious knowledge of Roman and other secular law, and, from the fact that changes happened through internal development, we can argue that transmission from external sources probably happened through conscious choice more than by chance.

The prohibition on disinheritance might have been taken with regard to *sors* as it was sometimes called, or *Terra sortis*. *Sors* referred to the land the Burgundians acquired from Roman landholders when establishing *foederati* on Roman territory in 443.<sup>459</sup> The original Romans were required by these agreements to hand over part of their land to a Germanic family, officially as a loan or, as Drew describes it, as 'that land which a barbarian "guest" had assigned from his Roman "host"'.<sup>460</sup> By virtue of these agreements the Germanic groups

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<sup>459</sup> A *foederati* agreement was established in the early fifth century but was abolished and reinstated in the 430s.

<sup>460</sup> Drew, *The Burgundian Code*, p. 22 n. 1.

could seize two-thirds of the land, *sortis*, and the original Roman population could hold a third, *tertia*. Whether this meant dividing the actual estates, as was the earlier understanding, or if it was the total land available, of which two-thirds was given to the newcomers, is debated.<sup>461</sup> In the *Extravagantes*, additional laws by the Burgundian king Codomar, the portion is described as one-half.<sup>462</sup> The land was possibly acquired without the need for royal approval, it seems, as royal grants of land were under different regulation and legislation. However, these properties were most likely granted directly by the king as a reward for services rendered.<sup>463</sup> It is probable that landed property was given to a certain part of the group in question, which established a Germanic landowning class. As Chris Wickham argues, the terminology implied taxation, because Germanic landholding usually meant military services and exemption from taxes.<sup>464</sup> We would still assume that the Roman and the Burgundian had some overlapping ground, or indeed that a concept of commons existed, because we learn that if either Roman or Burgundian made a clearing on the *communi*, then the other should receive an equivalent piece of ground (LB.13).<sup>465</sup> The division of Roman land between Germanic groups and the original owners would also be treated legally in a more direct manner in other states; for instance, in *Leges Visigothorum* (LV.10.1.8-16). Zeumer implied that the Visigothic king Euric had similar constitutions from his father, Theoderic I.<sup>466</sup> Time limitations of 30 and 50 years applied to these holdings, as to other land in the earliest Germanic law, a feature probably adopted from Roman concepts of ownership.<sup>467</sup> If land was held for a certain length of time, normally stated in written law as 50 years, it could not be contested.<sup>468</sup> Burgundians also held two-thirds of the territory in their area. *Terra sortis* contrasted with the Frankish *terra salica*, and also with the allodial land mentioned in the Frankish laws. It was different, too, both in origin and in meaning, from the treatment of the same land division in Visigothic law (see below). The first section of the code stated that a man could do what he wished with his property, except for *terra sortis* (also

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<sup>461</sup> See Wickham, *Framing the Early Middle Ages*, 84-85; Goffart, *Barbarian Tides*, pp. 139-44.

<sup>462</sup> *Leges Burgundionem Extravagantes* 21.12: 'medietas'.

<sup>463</sup> Drew, *The Burgundian Code*, p. 23 points to G. A. Davoud-Oglou, *Histoire de la législation des anciens Germains* (Berlin: G. Reimer, 1845) vol. 1, pp. 408, 446; see also Drew, *The Burgundian Code*, p. 62 n. 1; Beyerle, *Gezetze der Burgunden*, pp. 28, 86. This has sparked discussion about proto-feudalism among the Burgundians.

<sup>464</sup> Wickham, *Framing the Early Middle Ages*, p. 90, and n. 90; See also Heather, 'The Barbarian in Late Antiquity'.

<sup>465</sup> Beyerle, *Gezetze der Burgunden*, p. 28. See also *Leges Burgundionum*, MGH LL nat Germ, 2.1, p. 52 n. \* for different terminology in the MS on what the other should not do, *commotione/commune*.

<sup>466</sup> Zeumer *Leges Visigothorum*, p. 5. See also Wormald, 'Leges Barbarorum', p. 26.

<sup>467</sup> See Eur.277 and LV.10.2.1-7.

<sup>468</sup> Goffart, *Barbarian Tides*, p. 142.

termed *adquisita* (LB.1.1). The particular instruction also suggests that *sors* had a higher status in the inheritance regulation. We further learn that minor wrongdoers would not lose their right to retrieve the *sors* from their parents (LB.47.3). Sigismund forbade the sale of *sors*, and the selling of land to foreigners (*extraneus*) (LB.84). In this way, *sors* probably was under similar protection as terra salica.

We see that Burgundian secular law displayed a unilateral gradual system with emphasis on patrilineal principles. Thus, they diverged from the Roman inheritance system in that women could inherit to a limited extent. Special regulations were nevertheless carefully implemented to ensure the economic safety of daughters and widows of Ego. In the short code of the Burgundian kings, we also see an example of the elite, as opposed to the legal elite, pressuring the legislating king to make changes in law, because the favouring of women affected the nobility's accumulation of wealth. In their neighbouring kingdom to the west, the Visigoths maintained the opposite principles.

### 6.3 The inheritance system in Visigothic law

The laws of the Visigoths in Spain have been labelled by some the law, of all the Germanic laws, that was closest to Roman law.<sup>469</sup> At the same time, Visigothic laws on inheritance are characterised by providing equal division between male and female heirs. Roman influence on the Visigothic laws is thought to be stronger in the seventh-century code *Leges Visigothorum* written by kings Chindasvint (r. 641-653) and Reccesvint (r. 649-672).<sup>470</sup> Euric made a point of opposing the Roman emperors, but he still had Roman help in shaping the code, Leo of Narbonne being a significant figure.<sup>471</sup> Enmity towards the Roman state and culture might suggest that the equality between the sexes was a result of Gothic tradition rather than Leo of Narbonne's influence, but a more plausible explanation is that there had already been an extensive appropriation of Roman laws in the first stage. Later kings were obliged to issue

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<sup>469</sup> For instance, Roger Collins, *Visigothic Spain, 409-711* (Cornwall: Wiley-Blackwell), p. 227; Roger Collins, 'Law and Ethnic Identity in the Western Kingdoms in the Fifth and Sixth Centuries', in *Medieval Europeans: Studies in Ethnic and National Perspectives in Medieval Europe*, ed. by Alfred Smyth (Ipswich: Palgrave, 1998), pp. 1-23 (p. 14); Claude, 'Remarks'.

<sup>470</sup> Francisco Martínez Marina, *Ensayo histórico-crítico sobre la antigua legislación y principales cuerpos legales de los reynos de Leon y Castilla, especialmente sobre el código de D. Alonso el Sabio conocido con el nombre de las Siete Partidas* (Madrid: En la imprenta de la hija de D. J. Ibarra., 1808), pp. 22, 162 n.3; Wormald, *Lex Scripta*, p. 107, King, *Law and Society*, pp. 23-51; Hughes, 'From Brideprice to Dowry', pp. 267-76; Harries, 'Not the Theodosian Code'.

<sup>471</sup> Harries, 'Not the Theodosian Code', pp. 40-48.

laws for the approval of the both higher clergy and the higher Gothic nobility.<sup>472</sup> Still, these later laws also bear a heavy resemblance to the *Codex Theodosiani*. Others have seen more Gothic traits in both of the legal texts.<sup>473</sup> How were the inheritance laws influenced by this?

The Visigothic code of 650 reveals a consistent attitude towards shared inheritance by male and female heirs of the same collateral degree (LV.4.2.1-10). These principles were incorporated from the late fifth-century code of King Euric (r. 466-484) (Eur.320, 328, 331, 336). The image of kinship portrayed by legislators was consistently founded on the idea of a cognatic kinship group. Evidently, from the earliest extant laws of Euric, an inheritance system along both strict- and full parentela principles was legally maintained (Eur.320, 328-331, 336). Descendants were prioritised and collaterals in each parentela had equal rights to the inheritance regardless of sex or side of the family. The order of succession decreed by Euric was that of children and grandchildren, followed by parents, then siblings and their offspring, then grandparents and then uncles and aunts (Eur.331, 336). All the ancient laws specify that the collaterals, both male and female, were to divide the property of the deceased equally. The complete equality between the sexes and lines in every aspect is one of the features that distinguishes the Visigothic from other Germanic legal works.

Visigothic legislators followed Roman legal texts in the way they assessed degree of kinship and the relevant number of degrees. The Visigothic legislation on degrees, LV.4.1.1-7, was copied verbatim from *Leges Romana Visigothorum*, the *Breviary of Alaric*, in the section from the jurist Paulus, 4.10.1-8, even including the *interpretationes*.<sup>474</sup> The *Leges Visigothorum* lists six degrees (LV.4.1.1-6). The last section cites the reason for ending at six as the lack of names for any extensions of kin beyond that (LV.4.1.7). The last ancestor was termed *trivius* and *trivia*, *trinepos* and *trineptis*.<sup>475</sup> The seventh-century rules on degrees in the *Leges Visigothorum* thus had roots in the sixth-century Gothic adoption of Roman law. Because of the direct transmission from Roman law, it is plausible to assume that the Visigoths counted according to the Roman method. However, because the rules count straight up- and downward, we cannot say for sure. The incest prohibition, the forbidden degrees of marriage, mirrored the number of degrees by excluding relatives within six degrees to marry

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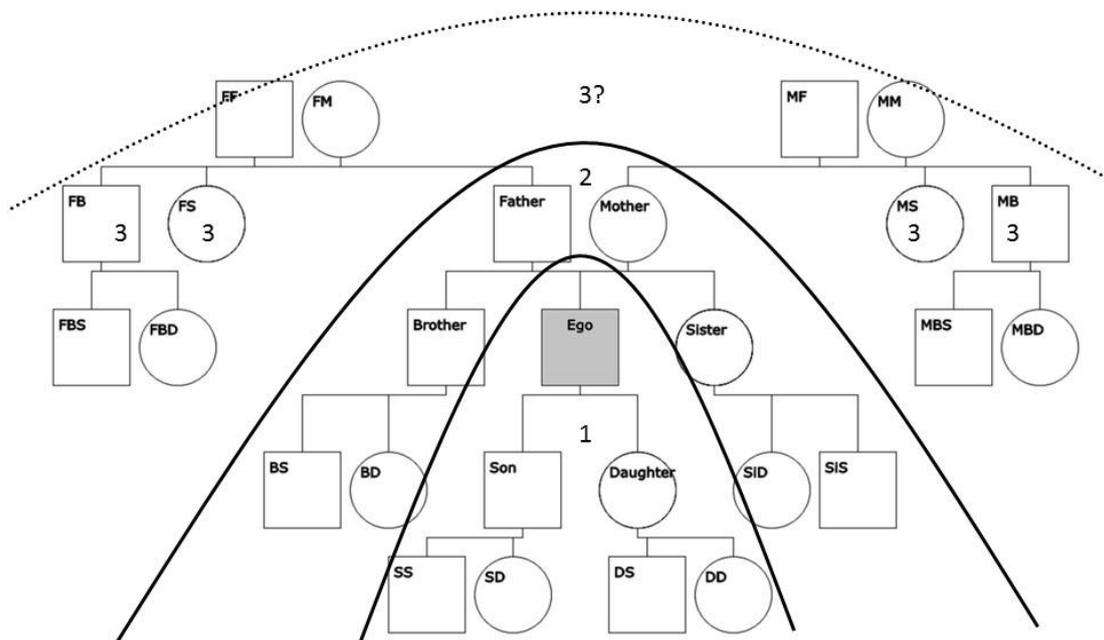
<sup>472</sup> Marina, *Ensayo histórico-crítico*, pp. 21-22; Wickham, *Inheritance of Rome*, pp. 136-37.

<sup>473</sup> John F. Matthews, 'Roman Law and Barbarian Identity in the Late Roman West', in *Ethnicity and Culture in Late Antiquity*, ed. by Stephen Mitchell and Geoffrey Greatrex (London: Duckworth, 2000), pp. 31-44; Harries, 'Not the Theodosian Code'.

<sup>474</sup> *Lex Romana Visigothorum*, ed. by Gustavus Hänel (Leipzig: B. G. Teubner, 1849), pp. 408-409, *Leges Visigothorum*, MGH, LL nat Germ, I, pp. 171-73. The last *interpretatio* was not copied, possibly because it basically said the same as the rule itself.

<sup>475</sup> Meaning great-great-great-great-grandparents, and great-great-great-great-grandchildren.

(LV.3.5.1), while the incest prohibition in Roman law excluded relatives to the fourth degree.<sup>476</sup> This Visigothic marriage prohibition was credited King Chindasvint and could have constituted a part of Gothic legislation that was more distinctively Gothic than the counting of degrees itself. The extensive marriage prohibition was adopted into the western Church in the ninth century.<sup>477</sup> The Visigothic regulation of forbidden degrees in marriage thus superseded that of Roman tradition and the Church in the seventh century, and predated canonical intervention.<sup>478</sup> Possibly the Goths or the dominance of the Gothic church through pressure influenced the Christian scholastic in Western Europe.



**Figure 6: Visigothic laws according to Chindasvint appear as a parentela system, similar to Roman law. Still, gradual features can be detected in the legislation from the 650s.**

The parentela system was inserted into *Leges Visigothorum*, the mid-seventh century compilation. In his later additions, Chindasvint may have introduced tendencies of gradual principles; he asserted that the estate of parents inheriting from their dead children was

<sup>476</sup> Herlihy, 'Women, Family and Society', pp. 97-98. See also chapter 5 of this thesis.

<sup>477</sup> Bouchard, 'Consanguinity and Noble Marriages', p. 270; Gies, *Marriage and Family*, pp. 83-84; Herlihy, 'Women, Family and Society', p. 102. See chapter 4 in this thesis.

<sup>478</sup> At the Councils in Rome in 721 and 743, the prohibition was extended to four degrees, still moderate compared to the Visigothic.

distributed among particular relatives in equal parts after their own passing, and he prioritised their siblings over their parents (LV.4.2.17,18). The absence of grandparents, with aunts and uncles being first in line, could suggest an inclination towards gradual elements. It could also imply the obvious, that the inheritance went through grandparents, too. The rules retained equal shares for males and females.

In what appears as new law in the Visigothic code, the kings restricted the possibility of bequeathing via a testament all of one's property to certain family members, or to strangers, on the grounds that too many wasted their property or dowry and deprived their descendants of the 'naturalis pietas' owed to them (LV.4.5.1). The amount that could be willed away freely was reduced from an unknown sum to one-third. As in the case of Athila in the Burgundian laws, the authorities desired to take inheritance rights out of the intestate system, because they were concerned about leaving the apportioning of inheritance to the whim of the individual, as in the case of disinheritance by will. This could be an attempt to disassociate from the Roman tradition of wills. Naturally, since Romans from the late-sixth century were also subject to Visigothic law, the tradition of wills needed to be treated in this law. Romans made up an overwhelmingly large part of the population and would influence the legislation of Visigothic rulers.<sup>479</sup> Although the legislators made sure family property would largely be kept within the family, Chindasvint set provisions that limited the inheritance to the first parentela, and gave the couple from which the parentela would originate the right to make each other heir by testament (LV.4.2.19, 20). However, in the eighth century, King Erwig had small but significant additions made to the old rules. The revisions focused more on what happened if the deceased died intestate (LV.4.2.3, 7).<sup>480</sup> The additions were abundant, and identical reservations were formulated by Euric's legislators (Eur.320), but the interesting point is the repetition of dying intestate. It may have been included to underline a point. The Gothic notion of succession may have moved towards the Roman model for bequeathing possessions by testament, whereas other continental laws gave more prominence to intestate heirs. Although centuries had passed since the region was freed from Roman authority, it seems that Visigothic inheritance laws were revised in line with Roman principles of inheritance. Antti Arjava has argued that the Visigoths might have adopted the model of emancipating children, although the Gothic view of full age influence

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<sup>479</sup> Wickham, *Framing the Early Middle Ages*, p. 95, *Inheritance of Rome*, p. 102.

<sup>480</sup> LV.4.2.3: 'ut hereditatem accipiant defuncti, qui intestatus discesserit', LV.4.2.7: 'et intestatum eum obisse contingerit'.

Roman tradition.<sup>481</sup> Children became independent at twenty years of age, according to the law of Euric (Eur.321, LV.4.2.13).

The gradual system seems more intricate and open to domination and conflict within the kin group, but the parentela system had its own problems, as the Visigothic legislation reveals. Similar to the concerns of letting the spouse inherit was the possibility that parents would inherit from their offspring. Parents inheriting would have a great effect on where the ancestral property ended up, and the legislator apparently knew about conflicts concerning backwards inheritance (LV.4.2.17). Backwards inheritance could lead to property being split up backwards and allotted to another line. 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 is important. At what point did the child become an heir? Chindasvint argued that a child who 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 confer inheritance rights to its ancestors, but one who lived shorter would not be taken into account. Conversely, a posthumous child would share in the inheritance with other heirs if it survived (LV.4.2.21). Children from each marriage inherited before half-siblings of another union (LV.4.5.4). A parent that survived both the spouse and the children was a risk, because he or she could further distribute inherited property to collaterals, or children by another wife or husband. Letting spouses inherit posed similar challenges, because when the respective husband or wife died, then their relatives would end up with the property of the other family. However, ancestral land was protected in Visigothic law by stricter regulations, so that it would only reverse along the line from which it derived (LV.4.2.6). Murray argues the rule to express the *ius recadentiae*, law of reversion, which he believes developed among the Germanic people.<sup>482</sup> He further agrees with Alvaro d'Ors that it was a novelty in the *Leges Visigothorum*, arguing *ex silentio*, since this topic is absent from the law of Euric.<sup>483</sup> d'Ors suggested that the concept of reversion was an influence from Frankish laws, something Murray supports.<sup>484</sup>

Husband and wife could not inherit from each other if there were relatives within seven degrees (LV.4.2.11), which reflects the earlier tradition in Roman law. However, since

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<sup>481</sup> Arjava, 'Paternal Power', pp. 163-64. See also chapter 5 of this thesis.

<sup>482</sup> Murray, *Germanic Kinship Structure*, p. 215.

<sup>483</sup> Alvaro d'Ors, *El código de Eurico, Cuadernos del Instituto Jurídico Español*, 12, Estudios Visigóticos, 2 (Rome: Instituto Jurídico Español, 1960), pp. 265-66.

<sup>484</sup> Murray, *Germanic Kinship Structure*, p. 215.

Gothic legislation apparently followed the late Roman example, the restriction on the spouse may have been motivated by a requirement of the parentela system. But the legislators enacted constitutions similar to those of Burgundian and Salic law concerning gradual principles, i.e., that a wife could only receive her portion (one-third) of the children's inheritance if they died and the rest would return to the father's relatives (LV.4.2.18). Euric had decreed that a widow with surviving children would divide their father's property with them equally, similarly to the Burgundian father (LV.4.2.14). During her lifetime she was allowed to do what she wanted with the surplus of such property, as long as the value of the property itself was kept for the heirs.<sup>485</sup> The squandering of property is a topic treated in some depth in *Leges Visigothorum* from the 650s but especially in the *Codex Euricianus*. In the earliest Visigothic legislation, provisions to secure and preserve family property for subsequent generations were detailed so minutely that they were only surpassed by Roman law.<sup>486</sup>

Regarding landed property, the Visigoths had also annexed from the Romans part of their land when colonising southern Gaul and the Iberian peninsula. Like the Burgundians, the Goths claimed two-thirds of the land. The division from the fifth century was addressed in seventh-century law, apparently as a continuation of Euric's old enactment of the *sors* (Eur.277).<sup>487</sup> The rule warned Romans against taking more land than the two-thirds given to the Goths, while the Goths should leave the last third for the Romans (LV.10.1.8). Surely, this must have affected inheritance distribution, where all property was to be split equally. Still, the written laws do not explain how to divide the *sors* between heirs although a general opinion is that principles of male priority or primogeniture applied.<sup>488</sup>

Visigothic law contains the cleanest form of a parentela system found in the laws, with principles of utter equality in all joints. The inheritance system resembled what the Roman system would later become, and there may be a trace of transmission from *Codex Theodosiani* or *Codex Iustiniani*. We saw how the counting of kinship was directly copied into the *Leges Visigothorum*, and can assume that the legal elite that made the Visigothic secular law also found other late Roman inheritance legislation sensible. Still, the Visigothic parentela system displayed in secular law was strict and more coherent than we find even in the later sixth-century Roman legislation. Original, possibly Germanic, measures were introduced to secure

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<sup>485</sup> Wemple, 'Women from the Fifth to the Tenth Century', p. 174.

<sup>486</sup> See, for instance LV, book 3 and 4, *Leges Visigothorum*, MGH, LL nat Germ, 1, pp. 123-207.

<sup>487</sup> *Leges Visigothorum*, MGH, LL nat Germ, I, p. 5.

<sup>488</sup> Goffart, *Barbarian Tides*, p. 325 n. 129.

family land. Furthermore, the rules protected the parentela system by regulating the rights of parents to inherit from children or from each other. Their Italian neighbours, the Lombards, issued law enacting other principles altogether.

#### **6.4 The inheritance laws of the Lombard kings**

Lombard legislation lacked the specific terminology and regulations on ancestral land that Salic and Visigothic laws contained. We could explain the absence of such laws as being due to the short period of time between the Lombard occupation of northern Italy (568) and the promulgation of the first written laws (643), which was a mere seventy-five years. However, in the later part of the legal work, issued in the first half of the eighth century, Lombards had held the earlier Roman land for generations. Regulations on landownership according to prescription formed. In the first written *Edict* of King Rothair (r. 636-652), disputes over land held for five years only are addressed (Rot.228). The successors of King Rothair, Grimwald (r. 662-671) and Liutprand (r. 712-744), developed increasingly complex regulations concerning the time land was held, whereby only land possessed for thirty years bestowed ownership (Gri.1, Gri.4, Liu.54.I). In 726, Liutprand further doubled the stipulated period, to sixty years (liu.70.I), and also introduced the concept of possessing what had been royal land (Liu.78.iX), i.e., what the Lombards appropriated in the conquest.<sup>489</sup> This type of land would be equivalent to the *sors* we read of in the other Germanic laws, as John Allen and Friedrich Savigny interpreted it to be.<sup>490</sup> A law from Liutprand's later reign also ruled on disputing possession of movable and landed property after thirty years, where suspicion of falsification existed (Liu.115.XII), and unsurprisingly suggests that the time land was to be held prior to ownership was increased in line with the Lombard presence in Italy. Disputes over property were settled by oath or combat (Rot.228). Landed property was a serious matter to the Lombard legislators, as was inheritance.

The Lombard inheritance system was, similar to that of Burgundian law, a patrilineal gradual system. The simplified version was that property passed to male offspring, and sons inherited from their father. There was no priority given to a particular son or number of the sons, for instance by primogeniture. To disinherit one's son was, as we saw in the Burgundian and Visigothic law, illegal (Rot.168), unless for very serious reasons, like adultery with a

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<sup>489</sup> John Allen, *Inquiry into the Rise and Growth of the Royal Prerogative in England*, vol. 1. (London: W. Bond and W. Amer., 1830), pp. xxxvi-xxxvii.

<sup>490</sup> *Ibid.*

stepmother or attempted murder of relatives (Rot.169). These reasons are also evident in the late Roman laws concerning disinheritance.

The written laws do not reveal the order of succession in the default inheritance system, or the mode of counting degrees. From regulations of inheritance to illegitimate sons (see below), the suspicion is that the legislators worked from the assumption of a patrilineal system. According to Rothair's Edict, Lombards counted relatives to the seventh degree, and probably distributed inheritance up to and including the sixth degree, similar to Visigothic and Frankish laws (Rot.153). Rothair further demanded any Lombard who claimed inheritance to name all relatives between himself and Ego. This may suggest that Lombards counted in the Roman fashion, since in the seven canonical degrees one person had an overwhelming number of relatives.<sup>491</sup> The system fits well with the otherwise paternalistic culture, equally mirrored in the early laws from the mid-seventh century. Sons were entitled to the inheritance, but they were also left with the responsibility or right to guard sisters, aunts and brothers who were still minors. Lombard society was driven by the ideology of a male head of the family, who had power over spouse, children, servants and others (Rot.184, Rot.385). The man could not maltreat or kill his wards or wife without cause (Rot.166, Rot.182, Rot.195, Rot.200), but he alone decided about their actions and property. As such, a free man held full power within his household and boundaries, according to the law. Neither king nor neighbour could disturb him there, if he lived according to the law. Breach of a free man's peace in his home was a grave offence to him (Ex. Rot.32-34). The system did not reflect the *patria potestas* culture of the Romans, though, where offspring, including sons, were dependent on the oldest male ancestor, and the head of family was responsible for his whole parentela. Lombard boys were legally considered minors until they were twelve (Rot.154), and became fully independent at the age of eighteen (Liu.19.I). They then had the right to establish their own household and be the head of their own family.

Women were, by law, incapacitated (Rot.204, Rot.385).<sup>492</sup> They could not be legally independent, but their care, called *mundium*, was entrusted to a man, who became her guardian, called *mundwald*, in the last resort to the king himself. The *mundium* of daughters and sisters of Ego would pass to male heirs, even natural sons or relatives of a deceased husband (Rot.161, Rot.182). The *mundium* would normally be possessed by the father or brothers of a woman (Rot.199), and passed to her husband through formal engagement (Ex.

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<sup>491</sup> This could also be one reason for encouraging drawing of heraldic maps by the synod of Ingelheim in 948, Bouchard, 'Consanguinity and Noble Marriages', p. 272.

<sup>492</sup> Wickham on women in Lombard law and society: Wickham, *Inheritance of Rome*, pp. 199, 213.

Rot.186). The privilege could be sold to and owned by men outside the kin group as well, and gave the holder access to the woman's property (Rot.195-196). A husband could inherit from his wife, but the wife was not the heir of the husband, and a widow could not possess her husband's property undivided. This was probably because she could not legally act without her *mundwald*. However, the husband's relatives inherited the widow's *mundium* as well as the rest of his property, and would be party to any remarriage of the widow (Rot.182). A mother could not inherit from her son. This meant that backwards inheritance into a woman's family was avoided: the husband continued to keep possession of a wife's property after her death for her children and, if the wife survived him, she, or more correctly her new *mundwald*, would not possess the husband's property. It is not clear what was supposed to happen to the property of the wife if the marriage was childless, except we are told that her relatives would inherit it if her husband had killed her without cause (Rot.200). If the tables were turned, and the wife had killed the husband, then his relatives got his property (Rot.203). A possible way for a woman to achieve some independence was for a Lombard woman to marry a Roman man. According to a law issued in 731, this would place her under Roman law and, if she survived him, give her the right to choose her next husband (Liu.127.XI). Romans and Lombards were treated differently under the law, but Lombard attitude towards Romans also appears hostile or at least reserved in real cases.<sup>493</sup> The laws of Ratchis (r. 744-749) were probably edited because the king fell into disgrace due to his flirtation with Roman culture and his marriage to a Roman woman, Tassia.<sup>494</sup> Apparently, a major problem was that Ratchis made charters of land after the manner of Roman law, and accepted a dowry from his wife in the Roman style, instead of providing the traditional Germanic *dos*. The first law of Aistulf revoked all of Ratchis's gifts and favours (Ais.1).<sup>495</sup> As the reaction to King Ratchis's behaviour shows, the hostility did not seem to ease over time. The reason for the Lombards' cold feelings towards Romans may be due to their relationship with the Roman empire.<sup>496</sup> Walter Pohl has suggested that the disintegrating force of politics under Justinian was an obstacle to state consolidation for the Lombard rulers.<sup>497</sup>

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<sup>493</sup> Pohl-Resl, 'Legal Practice and Ethnic Identity', p. 209.

<sup>494</sup> Hughes, 'From Brideprice to Dowry', p. 273. See also Pohl, 'Frontiers in Lombard Italy', for an account of the attitude of Ratchis towards Roman culture.

<sup>495</sup> Bluhme, 'Edictus', p. 196 n. 2.

<sup>496</sup> For a brief picture of the diplomacy and conflicts between the Lombard and Roman elites on the Italian peninsula, see Wickham, *Inheritance of Rome*, pp. 143-46, 267.

<sup>497</sup> Pohl, 'The Empire and the Lombards', pp. 94-95, 132-33.

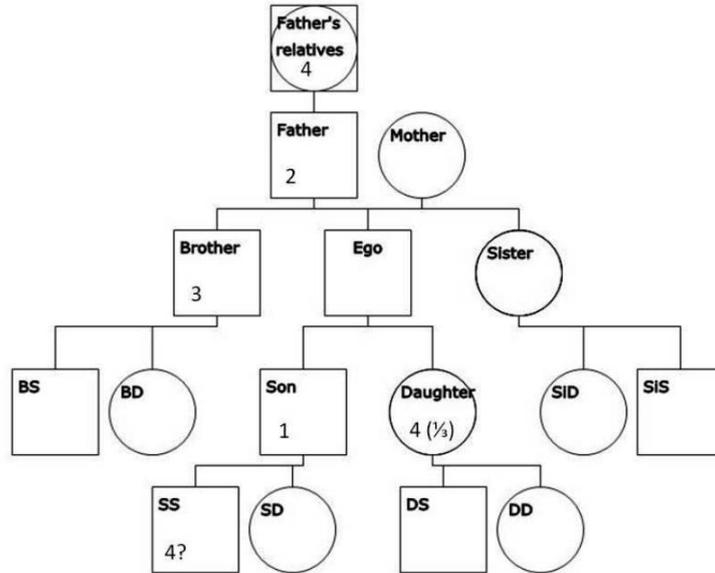


Figure 7: The gradual system of Lombard law

Although Lombard laws appear to be fully patrilineal, it seems kinship was also reckoned in terms of bilateral kin groups. Sons would inherit their mother's marriage portion bestowed on her by her own relatives (Rot.200). Lombards were allowed to use in-laws as oath-helpers in the absence of close relatives (Rot.362), which further supports the belief that Lombard family structure was regarded by legislating authorities as a kin group containing both maternal and paternal kin. Sons possibly also inherited from their mothers, and thus also excluded daughters from inheriting this way, as Liutprand later gave daughters the same rights to a mother's property as sons if there were no sons (Liu.1.I).

The legislation of King Rothair (r. 636-652) was concerned with the alternatives when there was no legitimate son as heir. First of all, there are many regulations on the rights of an illegitimate son, the *naturalis*, which Katherine Fisher Drew translated as 'natural son'<sup>498</sup> These were children born out of wedlock but in lawful unions like concubinage, serfdom and similar. Natural sons also had rights to a share of the inheritance, although it was much less than that of their half-brothers born in wedlock. Children born in infamous circumstances, including incestuous unions of every sort, had no rights at all (Liu.32.III-34.V).<sup>499</sup> If Ego had one legitimate son, then that son was entitled to two-thirds of his property, and the natural son or sons would have one-third. If there were two legitimate sons, then the illegitimate sons

<sup>498</sup> Drew, *The Lombard Laws*, p. 77.

<sup>499</sup> This included children begotten with blood relatives, in-laws and spiritual relatives like godparents or godchildren.

would share a fifth, if three legitimate, the natural sons were left with a seventh part (Rot.154). The rule continues the progression along the same lines:  $\frac{1}{(\textit{legitimate sons} * 2) + 1}$ . The formula, in the ratio of 2:1 in favour of the legitimate sons, reveals that the family property followed the legitimate male line, but, nonetheless, the illegitimate sons were not left empty-handed. As a comparison, the eighth-century increase in daughters' inheritance rights (Liu.102.VI) gave the daughters with legitimate brothers even less than Rothair allowed illegitimate sons with legitimate brothers:  $\frac{1}{(\textit{legitimate sons} * 3) + 1}$ , which gives a ratio of 3:1 in favour of the sons. If there were no legitimate sons, then legitimate still daughters had a claim to the inheritance.

According to Rothair's Edict, a female only child was entitled to just a share (Rot.158); the property would be divided into three between the daughter, natural sons and other relatives of Ego. This ratio is also found in the Scandinavian written records from the twelfth century. However, if there was more than one close female heir, and no legitimate sons, the women would receive half of the property jointly (Rot.159, Rot.160). Both daughters and fatherless sisters of Ego counted in this division. The natural sons of Ego still got a third and other relatives a sixth. Overall, the seventh-century Edict of King Rothair gave unrivalled favour to legitimate sons, followed by legitimate daughters and finally illegitimate male descendants. Daughters were also entitled to a *faderfio*, a gift from their father on their marriage (Rot.199).

The rights of grandsons were not addressed in the Edict but by King Rothair's successor Grimwald (Gri.5). King Grimwald complained that grandsons would be left with nothing if their father was already dead, and evidently introduced the principle of representation. Further, granddaughters and grandsons with natural status had the same rights as daughters and natural sons, proportionally according to number of heirs. The earlier Edict did not mention representatives of grandchildren other than the son of a legitimate son, thus following the pre-Theodosian Roman principles on the same topic. It is likely that the default system did not count further female descendants, considering the limited rights of daughters themselves. Sons of *naturales* had, as mentioned above, no rights of inheritance except by will (Rot.157). Only the legitimate grandson by a legitimate son was eligible to receive a representative portion of the inheritance.

Moreover, there are indications that, in the absence of male descendants, property was transferred to the relatives of the Ego's father. The extant laws provide few details regarding the possible order of these relatives in terms of entitlement to inheritance. Some clues can be

found though, suggesting a traditional sequence following patrilineal principles, as found later in the western Nordic laws. Fatherless brothers would receive compensation for each other in the case of killings, which suggests they were also each other's heirs in the absence of sons or father (Rot.162). The law of Rothair mentions the brother, uncle and cousin in that order in connection with plotting the death of a relative, and we may reasonably assume that to be the expected order of inheritance, too. Uncles accusing their nephews of being born out of wedlock (Rot.164) similarly suggests that the uncle was likely to be at the top of the list of relatives with a claim to the above-mentioned third of the inheritance, if the offspring of Ego were illegitimate.

According to written law, a woman's claim to inheritance depended on male support. Unlike developments in other Germanic successor states in the sixth and seventh centuries, Lombard women were not given extended economic rights and were not given the right of inheritance, other than a third part if they were the only legitimate offspring. If we follow Wemple's argument as to why Frankish women and others gained such rights, it would mean that the Lombards did not desire to imitate Roman customs and that the king was not in position to or interested in weakening the kinship structure. But then, in the early eighth century, Lombard royal legislation changes. The Lombard king Liutprand (r. 712-744) provided the most extensive supplement to the Lombard law after Rothair. In his first year as king and in his first act as legislator, the first law he made concerned the succession of daughters. And in the first year, he issued six sections concerning inheritance, five of them relating to female heirs.

The first law states that in the case of there being no sons, daughters would inherit as if were they legitimate sons, i.e., the whole property (Liu.1.I). The second one continues that both married and unmarried daughters would share, while the third excluded married sisters of Ego and the fourth included unmarried sisters to share equally with daughters (Liu.2.II, Liu.3.III, Liu.4.). Then we are presented with the reservations: the fifth states that female heirs who act against their father's or brother's wishes could be disinherited (Liu.5), which resounds of Justinian's Novella on disinheriting children, although disobedience would be an reason for being disinherited even without inspiration from Roman law (Nov.115.3). And finally the last of Liutprand's six laws makes it possible to overrule all the five previous by saying that a sick and dying man could make decisions on behalf of his soul, and dispose of his property in whatever manner and to whatever extent he wished (Liu.6). This means that a man with no son could give the whole property to the Church, or to male relatives instead of to his daughters. In effect, the Lombard king made it possible for sonless Lombards to

distribute their possessions however they pleased. It is not clarified explicitly whether daughters would surpass illegitimate sons completely, but the text of Liu.1.I reads ‘If a Lombard dies without *legitimate* sons’ (my italics).<sup>500</sup> Maybe the old formula of  $\frac{1}{(\textit{legitimate sons} * 2) + 1}$  would apply, in favour of the main heir, here being legitimate daughters.

In 725, Liutprand nevertheless repeated that a father could not dispose of more than two-thirds of his property if he had daughters, securing a third for them by law (Liu.65.I). This could indicate that fathers were disposing of more than 2/3 of their property to the detriment of their daughters and that the repetition was a result of Liutprand’s earlier regulations not being followed, or, it could be a general repetition, emphasising his sentiment in the matter of daughters’ right to inheritance. Either way reveals that women’s legal status was improving.

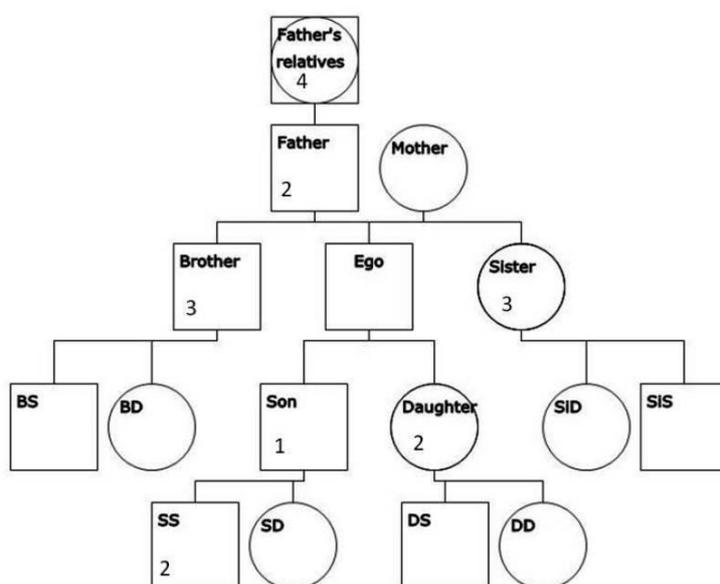


Figure 8: Distribution of inheritance according to the regulations of Grimwald (r. 662-671) and Liutprand (r. 712-744). Grandsons and daughters gained rights of inheritance not seen in the earlier laws of Rothair.

A more difficult principle to establish is whether daughters came before sons of sons. The extant text is silent on this. If the law of Grimwald giving sons and daughters of sons representative inheritance rights is followed, it is tempting to argue that sons of sons would be prioritised before daughters of Ego, or that they shared by an unknown allocative formula.

What was the point of letting daughters inherit? There are several plausible explanations. First, they could bestow continuity within the family, when male descendants

<sup>500</sup> Drew, *Lombard Laws*, p. 145.

were exhausted. Secondly, daughters could gain advantageous marriages as heiresses and thereby transfer their family's property to an even larger unit. This perhaps presupposes a cognatic kinship structure, which the Lombards, according to their laws, can only be said to have to a minor degree. And thirdly, it was perhaps believed reasonable to distribute inheritance to daughters as well as sons, a topic which several Frankish fathers expressed an opinion on in their wills.<sup>501</sup> Brigitte Pohl-Resl interprets the improvement of daughters' inheritance rights as the influence of Roman law.<sup>502</sup> She also illustrates that the practice among Lombards might have been more favourable towards female relatives than the law texts indicate. The last argument is interesting seen in light of three provisions Liutprand issued fifteen years after his first laws, which all are intended to restrict women's possessions over property (Liu.101.VI-103.VIII). Liutprand stated that a woman who took the veil should give two-thirds of her property to her *mundwald*. She thus kept a third, similar to the Burgundian rules. Lombard women who entered monasteries fell under Roman law, and Liutprand in this way secured her property for the Lombard society.<sup>503</sup> The second rule continued that a man with legitimate sons could only give a maximum of one-quarter of his property to daughters and sisters combined, that is in the ratio of 3:1, and the third law forbade a husband from bestowing more upon his wife than he did on the day of their marriage. The latter has the feel of Roman law, which denied gifts between spouses right up to Justinian. The inheritance privileges Liutprand gave daughters only favoured them when they had no brothers. Anyway, these three rules indicate that, to a larger extent, Lombard women became property owners in the eighth century. The motives behind the making of these laws could be the effect that Liutprand's first laws had when they gave daughters the right to inherit. Still, a Lombard was not allowed to control or sell her property in any way, at least not legally, not even when unmarried, childless or widowed, because, according to Lombard law, she would never be emancipated. Hence, men controlled property through women under their guardianship. The earlier marriage laws of Rothair indicate that daughters could nevertheless potentially gain a substantial share of their father's property, but still maximum one-quarter, with a ratio of 3:1. The woman kept her morning gift and the gift she received from her husband in connection with the marriage, called *metfio* (similar to the *dos*),

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<sup>501</sup> Paul Vinogradoff, *Outlines of Historical Jurisprudence*, vol. 1 (London: Oxford University Press, 1920), p. 288.

<sup>502</sup> Pohl-Resl, 'Legal Practice and Ethnic Identity', p. 214.

<sup>503</sup> On secular society and relatives in monasteries, see Alexander Kazhdan, 'Byzantine Hagiography and Sex in the Fifth to Twelfth Centuries', *Dumbarton Oaks Papers*, 44 (1990), pp. 131-43.

but the aforementioned *faderfio* was to be divided with her sisters if widowed, although it remained the woman's during her marriage (Rot.199).<sup>504</sup> A transfer of this kind was voluntary for the woman's family, and not a required part of the legitimising nuptial transfers (Rot.181). The gift was only mentioned in the seventh-century laws from Rothair. Diane Hughes has argued that Liutprand's establishment of inheritance being given to daughters by testament actually alludes to the *faderfio*.<sup>505</sup> She believes this transfer would be of substantial size and sought by men, suggesting families equipped their daughters with large dowries.<sup>506</sup> Since the Lombards viewed the dowry as a Roman institution, the legislator saw *faderfio* not as dowry, but bound to revert to the giver. Liutprand probably replaced this transfer with the opportunity for daughters to inherit according to the circumstances of the respective family.

The secular laws of the Lombards revealed an interesting combination of both the bilateral kin group and strong patrilineal principles. These were combined in a gradual system, but without specifying the order of succession. In the Germanic laws, we primarily find the principle that all legitimate heirs should inherit. In Lombard law, all sons shared at the expense of daughters and illegitimate sons. A particular feature in Lombard regulation on inheritance is the focus on the status of both Ego and possible successors. Legitimacy was sought for both, and, by and large, determined the division of property. Landed property held high status, and it was apparently important to transfer it to the proper successors. As with Salic and Burgundian law, we do not find the principle of representation a natural concept of distributing inheritance. Representation seems to have been a novelty, possibly introduced by Lombard legislators after influence from eastern Roman law in the seventh century. By and large, in the distinctive Lombard law, it is possible to see evidence from transmission of law in the concrete changes of inheritance principles. This evidence of transmission can be traced back mainly to Roman influence, and not to other Germanic laws. The bi-legal system of law obviously caused contamination to the law in development, the *Leges Langobardorum*.

### **Conclusion: Germanic inheritance laws**

When juxtaposed, the examples of Germanic secular legislation on inheritance each appear distinctively domestic, not least because they all originate within different systems. Each of the laws are centred on particular aspects of inheritance that they seek to prevent. When the

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<sup>504</sup> Tveit, 'Non enim coitus matrimonium facit', pp. 97-99.

<sup>505</sup> Hughes, 'From Brideprice to Dowry,' p. 273.

<sup>506</sup> Ibid.

models of inheritance systems are applied, we find that of the four examples of secular legal culture, two fell into a moderated parentela system and two into a form of gradual system. Although the Lombard and Burgundian laws relate to patrilineal principles in the inheritance system, all of the four legal cultures reveal a concept of kinship that includes a connection with both maternal and paternal relatives.

The rules themselves reveal little direct copying between the codes. Nevertheless, there are several concurrences in certain numbers that can only be understood as direct transmission of law. The usage of six degrees is one such concurrence. In Visigothic law, the wording is copied verbatim from Roman law to Gothic law. In Frankish laws, the number of degrees were also indicate a shared notion with Roman law, but not a transmission of the sentence of Paulus as a whole. This can certainly indicate that the limit of six degrees prevailed in the late Roman and early medieval legal understanding of inheritance and kinship. As expected, the probability of transmission between Roman and Germanic law is high.

When comparing the elements of the second level in the hierarchy of probability, some correlations emerge that indicate transmission of motivations and basis. All laws address the disinheriting of sons, which did not fit with the legislators' idea of correct distribution of inheritance. Arguments for not accepting disinheritance comprised the injustice and complications such an act would cause, while Visigothic law emphasised the problem of parents favouring 'strangers' instead of their own children. To regulate inheritance included making sure future generations were not deprived of livelihood, but also ensuring that estates were not fragmented by inheritance through plural descendants. The interest of families were combined with the interest of the individual.

The concept of representation emerged in seventh-century Germanic legislation. We find somewhat uneven inclusions of all descendants in later layers of law. In practice, grandchildren might inherit, but in the legal sources the rights of taking a deceased parent's share is presented as a novelty. The late Roman revisions of regulation of reversion and representation possibly influenced the legal elite of the western kingdoms when Justinian's compilation came to be known. By comparison, we find regulations on backwards inheritance in the laws with bilateral systems, but it was not considered necessary for regulations of either reversion or backwards inheritance in Lombard and Burgundian patrilineal systems.

When compared, the two parentela systems of Frankish and Visigothic law are differently presented in the texts. In the fragments of the Visigothic king Euric from the late-fifth century, distribution of inheritance was described as a remarkably neat system of

equality. The Roman system was the model for this feature, but the Visigothic parentela was more complete than Roman law shows at this point. Decades later, the writing of a Frankish code included the principles that the nearest related (to Ego) would be first in line, according to the order seen in the parentela system, but presented thereafter a range of particular relatives to follow next. Still, the gradual principles were not directed towards the paternal line or male relatives only, as we find in Lombard and Burgundian law.

The latter two gradual systems are not identical either, but focus primarily on a distribution formula in case there are several heirs of different sex or status. However, while they follow patrilineal principles, we do not learn, in either Burgundian or Lombard law, the preferred order of succession of relatives more remote than uncles. Their principles appear founded on the notion of the autonomy of the (male) head of family. We can say that an inheritance system in written law was adjusted to internal interests of the respective society, but with no less involvement from legislating authority.

A discussion of inheritance rights often brings with it a survey of the rights of females to inherit, because daughters' rights as compared with sons' define much in the inheritance system as gradual, parentela, patrilineal and so on. There are mainly three ways in which a daughter would inherit. Either she inherited if she had no brothers, or a sister or sisters received a portion consisting of half of her brother(s) portion, or, sisters and brothers inherited equally from their fathers' and/or mothers' possessions. A diachronic survey of the *Leges*, display the tendency that women obtained more rights in a region's later laws than were seen in the earliest written laws from each legal culture. Such development could be the result of an overall strengthening of women's economic legal position, or it might have been that the legal system of inheritance or the combination of private property with an omnilateral understanding of kinship resulted in other regulations written into the law. Indications are that these changes were the result of influence from Roman law, or more likely, the Roman legal culture prevailing within the Germanic states.



## 7. The Inheritance Systems and Principles in English Laws

In the introduction, I argued that all societies' laws must include regulation of inheritance to a certain degree. The English laws, included in this survey, do this to a very limited degree. Compared with the extant continental legal material, the early English laws are found wanting in terms of rules of inheritance. Moreover, the surviving legal material from the kingdoms of Kent, Wessex and – from the late-ninth century – the king of the English<sup>507</sup>, are much less equipped with regulations concerning family and marriage.<sup>508</sup> In addition, the typical prohibitions on incest and stipulations of betrothal transfers are fewer than those found in the Germanic legislation.

We could argue *ex silentio*, in relation to the legal sources, that a search for transmission from other laws would be futile, but that would be a premature conclusion. As will be clearer in chapter 11, on compensation for homicide, the early English laws and other non-English contemporary legal sources have a lot in common concerning their contents outside inheritance legislation. What is more, congruence of other kinds may emerge from the material. The sparse content of the English laws further provides an ideal opportunity to contrast the legal sources to better see the crucial factors behind the similarities. The earliest extant laws were dominated by the rights of the king and privileges of the Church. The content of the laws also seems to have affected modern research on pre-Norman English legislation, as opposed to both research on the source material and scholarly interest in English family and marriage from the twelfth century onward.<sup>509</sup> Scholars' focus has chiefly been on the power structures of early English society rather than on marriage strategies, concepts of family and distribution of wealth through inheritance systems, which have pre-occupied historians of, for instance, Frankish and Nordic societies. It is nonetheless possible to deduce an image of the lawmakers' view of Anglo-Saxon society from the laws, which is easier than deducing the same lawmaker's concept of the default inheritance system. Other sources on family and inheritance between the Roman withdrawal in the fifth century and King Alfred's reign (r. 871-899) are chronicles, wills and poems. From Bede to Beowulf, the

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<sup>507</sup> If we regard Alfred as 'king of the English', and Æthelstan as the first king of a (more unified) English kingdom. See Wormald, *Making of English Law*, p. 286.

<sup>508</sup> Lorraine Lancaster, 'Kinship in Anglo-Saxon Society: II', *The British Journal of Sociology*, 9, 4 (Dec 1958), 359-77, (p. 360).

<sup>509</sup> Some examples of significance are James A. Brundage, *Law, Sex, and Christian Society in Medieval Europe* (Chicago: University of Chicago Press, 1987); James A Brundage, *Sex, Law and Marriage in the Middle Ages* (Aldershot: Variorum, 1993); Frederik Pedersen, *Marriage Disputes in Medieval England* (London: Continuum International Publishing Group, 2000).

‘Anglo-Saxon family’ can be pieced together.<sup>510</sup> However, the task here is not to arrive at the most plausible inheritance system applied by members of the societies in the Heptarchy or England, but to survey the legislators’ ideas of existing or idealistic inheritance systems and possible transmissions of legal concepts of inheritance.<sup>511</sup> Therefore, the scarcity of regulations concerning inheritance is more relevant than suggestions of the system that can be deduced from the surviving laws. The legislators’ ideas on kinship structures form an important basis for the further discussion of transmission of legal concepts between the legal families. The position of the authorities in society is also needed for analysis of the laws on compensation for homicide in the early English laws (of which there are plenty). A sketch will therefore be made of the kinship structure with an attempt to map out the inheritance situation.

### **7.1 Inheritance in the earliest English legislation**

From the earliest phase of English legislation, the surviving Kentish laws make up most of our knowledge from the Heptarchs.<sup>512</sup> The early medieval English legislation does not generally address inheritance or make any attempt to describe the inheritance system, unlike the lengthy explanations we saw in Frankish law. Maurizio Lupoi has asserted that, although there seems to have been a large degree of influence from the Continent, and particularly the Frankish legislation, in the Kentish laws, the structure and contents of it is much different.<sup>513</sup> It is different not only because of the use of the vernacular in the extant version, but also because of the focus on criminal law and the influences by the Church. The Church did not have a separate judicial system before the Norman Conquest in 1066, and higher clergy would have participated in the secular system, which makes it difficult to call it secular.<sup>514</sup> As Lupoi admits, Bede stated that the laws of Æthelbert were created ‘iuxta exempla Romanorum’, ‘inspired by the examples of the Romans’, although Lupoi interprets the phrase to refer to ecclesiastical influence in writing of the law.<sup>515</sup> As the two spheres of ‘ecclesiastical’ and ‘Roman’ became inseparable in the early Middle Ages, this conclusion is probably correct,

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<sup>510</sup> For instance, see Gies, *Marriage and Family*.

<sup>511</sup> Barbara Yorke, *Kings and Kingdoms of Early Anglo-Saxon England*, (London: Routledge, 2002).

<sup>512</sup> Apparently, Alfred based his laws on laws from the other Heptarchs.

<sup>513</sup> Lupoi, *Origins*, pp. 66-67.

<sup>514</sup> Lupoi, *Origins*, pp. 65-66.

<sup>515</sup> Bede, *Historia ecclesiastica gentis Anglorum*, ed. by Charles Plummer, vol. 2 (Cambridge, MA: E typographeo Clarendoniano, 1896), no. ii.5; Bede, *A History of the English Church and People* (Hammondsworth: Penguin Books, 1983 [1955]), p. 108; Lupoi, *Origins*, pp. 66.

although the men of the Church were vessels of the transmitted Roman-ness from earlier. Roman law in the shape of *Leges Romanorum Visigothorum*, for instance, was studied at Canterbury in the late-seventh century by later Abbot Aldhelm.<sup>516</sup>

There are hints that the system legislators assumed was in place is that of the parentela, with descendants inheriting, male and female collaterals together. Clues to this are found in the Kentish laws from 602-03, ascribed to King Æthelbert, which assume that children shared their father's property between them (Ath.80). In the later Kentish laws of Hlothere and Eadric, a dead father's relatives together with the mother were responsible for safeguarding a child's inheritance until he came of age (Hl&E.6):

Gif ceorl acwyle be libbendum wife 7 bearne, riht is Ðæt hit, Ðæt bearn, medder folgige ; 7 him mon an his fæderingmagum wilsumne berigean geselle, his feoh to heldenne, oþ Ðær he x wintra sie.

If a man dies leaving a wife and child, it is right, that the child should accompany the mother, and one of his father's relatives who is willing to act, shall be given him as his guardian to take care of his property, until he is ten years old.<sup>517</sup>

In his translation, Attenborough consistently interpreted the pronouns for the child as meaning a male child. We find a similar wording in a rule from the laws of the West Saxon king, Ine (688-694). In these laws, a condition was added with specified sums to rear the child (Ine.38). The sum would probably be taken out of the father's property (Ine.38):

Gif ceorl 7 his wif bearn hæbben gemæne, 7 fere se ceorl forð, hæbbe sio modor hire bearn 7 fede : agife hire mon vi schill. to fostre, cu on sumera, oxan on wintra ; healden ða mægas one frumstol, oð ðæt hit gewintred sie.<sup>518</sup>

If a ceorl has a child by his wife and the ceorl dies, the mother shall have her child and rear it, and six shillings shall be given for its maintenance – a cow in summer and an ox in winter. The relatives shall keep the high seat until the child is grown up.<sup>519</sup>

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<sup>516</sup> M.R. James, 'Two Ancient English Scholars: St Aldhelm and William of Malmesbury', *David Murray Lecture* (Glasgow, 1931), 14; Lupoi, *Origins*, pp.63 n. 104.

<sup>517</sup> Attenborough, *Laws of the Earliest English Kings*, p. 18-19. Hlothere & Eadric §26 also specified the sum that should be provided for the rearing of a foundling. Attenborough's translation.

<sup>518</sup> Attenborough, *Laws of the Earliest English Kings*, p. 48.

<sup>519</sup> Translation is based on both Attenborough, *Laws of the Earliest English Kings*, p. 49, and Julie Mumby, 'Anglo-Saxon Inheritance', <http://www.earlyenglishlaws.ac.uk/reference/essays/anglo-saxon-inheritance/> [Accessed 15 April 2016].

The expectation of the mother's involvement fits descriptions found in other early medieval sources.<sup>520</sup> Thomas Charles-Edwards reads primogeniture into the rule of Ine, and asserts that the eldest son would inherit his father's land.<sup>521</sup> It is understandable why Charles-Edwards makes this case, since the gender used in these sections was masculine: *him*, *his*, *hit*. However, the pronoun *hit* could signify neuter as well, and it is plausible that the scribes used neuter as a common denominator for both sons and daughters, or the masculine form as unmarked gender.<sup>522</sup> Julie Mumby also warns against interpreting a male child in this rule based on the neutral *bearn*, and also points to the, admittedly much later, Customal of Kent, giving the family farm to the youngest, by ultimogeniture.<sup>523</sup> Quite possibly, there are differences between the Kentish legislation on inheritance, portrayed in the rule of Hlotere and Eadric, and the West Saxon legislation from Ine. Nevertheless, we should not exclude the possibility of legislators emphasising inheritance rights for male offspring, as the former rule did. The will of King Alfred includes bequests to his three daughters of landed property.<sup>524</sup> This could be used to prove the existence of female inheritance rights in Anglo-Saxon society, but the disproportionate larger bequests to his sons indicates only a favour to his daughters and certainly not equality between children. Lorraine Lancaster has demonstrated how daughters and their offspring appear as recipients in wills from the tenth and eleventh century.<sup>525</sup> Wills could indicate that they did not inherit automatically, although the distribution in the wills might have been as much about which estate or valuable object was to be transferred to which child, as about the overturning of the default system. The inclusion of grandchildren by both sons and daughters in the wills is further evidence of principles of representation, and a tradition of thinking of kinship in bilateral terms and of inheritance as a parentela system.

Other information we can deduce from the sections above is that a mother did not inherit from her children if acknowledged by the father and paternal relatives existed. However, the wife of Ego would inherit from Ego directly, sharing a portion together with the children. According to the laws of King Æthelbert of Kent, the wife was given inheritance

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<sup>520</sup> Gies, *Marriage and Family*, p. 103.

<sup>521</sup> Thomas Charles-Edwards, 'Kinship, Status and the Origins of the Hide', *Past & Present*, 56, (1972), 3–33.

<sup>522</sup> For use of marked and unmarked gender in Old English, see Anne Curzan, *Gender Shifts in the History of English* (Cambridge: Cambridge University Press, 2003), pp. 13-14, 70-73.

<sup>523</sup> Mumby, 'Anglo-Saxon Inheritance'.

<sup>524</sup> *EHD*, no. 96.

<sup>525</sup> Lancaster, 'Kinship in Anglo-Saxon Society', pp. 363-65.

rights to as much as half of her husband's property if offspring were produced (Ath.78). Compared with other western legislation, this is the greatest share a wife was entitled to according to secular law-making. But what can be read about the position of the relatives of Ego when the spouse was favoured in death? The Kentish laws show that a kind of brideprice was expected in a lawful marriage agreement (Ath.77).<sup>526</sup> The woman would be guarded with *mund*, similar to the Lombard *mundium* and the term *mundr* found in the Nordic laws (Ath.75-76).<sup>527</sup> Her own dotal property seems to remain with her, and would be transferred to her own father's side accompanied with the morning gift in case of her dying childless (Ath.81). According to theories on family strategy, these traditions suggest that the father of the woman had expectations in their daughter's offspring as their own heir.<sup>528</sup> This is again evidence that legislators anticipated that daughters inherited together with sons. Moreover, the rights of the wife in terms of the husband's property would follow the children also in divorce, in the way that she would have half his property if leaving with the children (Ath.79), and a children's share if leaving without (Ath.80). This half would surely fall to descendants after her own death, although the laws do not address her remarrying and having other children.

Much can be inferred from these sections. First of all, the wife had inheritance right together with the children, similar to Burgundian and Visigothic law. Second, the inheritance system as it was understood by legislators in Kent and later Wessex followed cognatic lineage rather than cognatic kinship groups, and patrilineal tendencies can be seen in inheritance rights. A woman's inheritance would pass down her father's line primarily. Thirdly, the passing to the nonspecific *magas* – relatives – and unspecified degrees of relations could again suggest that the parentela system was perceived by legislators to be a common norm, but with the wife – as the children's mother – included. If this interpretation is right, we have an inheritance system with parentela principles in the first parentela including the wife, and with patrilineal principles further out. The laws do not give any specific indications of principles of primogeniture, ultimogeniture, or other priorities among the heirs of the body.

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<sup>526</sup> See further the discussions on brideprice in Goody, *Development of Family and Marriage*, pp. 241-42; Hughes, 'From Brideprice to Dowry', p. 267; and Dübeck, *Kvinder, familie og formue*, p. 67.

<sup>527</sup> See, for instance, Rothair's Edict Rot 160-161 and 182, and the Gulathing Law, G.25 and G.51, *NgL I*, pp. 17 and 27. See the etymology of *mund* in the meaning of 'protection' in Pons-Sanz, *Norse-derived Vocabulary*, pp. 148-49, 243 n.‡.

<sup>528</sup> Jack Goody, 'Inheritance, Property and Women: Some Comparative Considerations', in *Family and Inheritance: Rural Society in Western Europe, 1200 1800*, ed. by Jack Goody, Joan Thirsk and E. P. Thompson (Cambridge: Cambridge University Press, 1976), pp. 10-36 (p. 23).

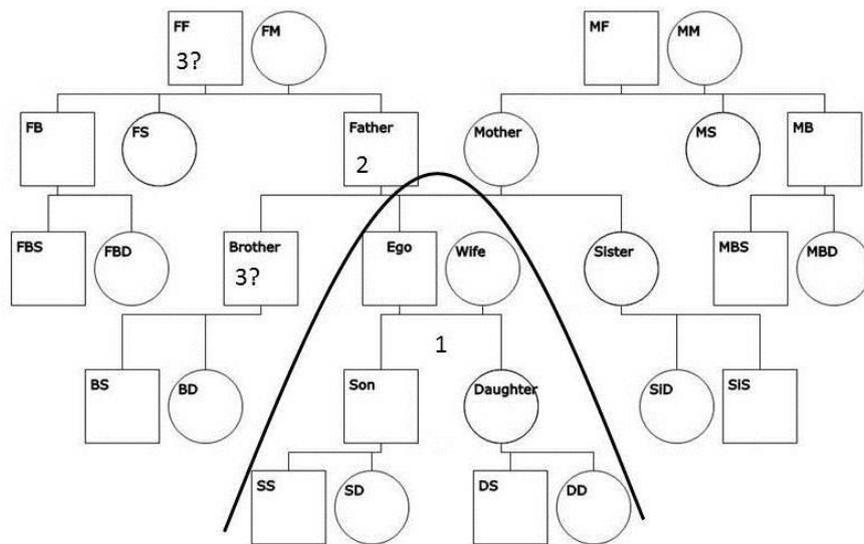


Figure 9: A possible interpretation of the inheritance system in early English law

The laws on compensation indicate that the legislators described a kinship structure based on bilateral principles. I will return to these laws in a later chapter, but some points can be made regarding transmission of inheritance laws. In the laws of eighth- and ninth-century Wessex, we find that the lawmakers distinguished between legitimate and illegitimate heirs, suggesting reception of the Christian concept of legitimacy, or the Roman concept of legitimacy, possibly an influence through the medium of Christian ideology. According to Bede and other Christian scribes, the sanctity of marriage was tied to the provision of legitimate offspring.<sup>529</sup> The laws from Wessex introduced the concept of the illegitimate child. According to Ine, the father who disowned such a child should not have its wergild if it were killed (Ine.27). A later rule of Alfred deprived instead the mother's side of rights, although this specific rule, Alf.8.3, makes reference to the illegitimate child of a fallen nun. The same rule deprived the mother's side of compensation and inheritance from the father of the child. Given the specific circumstances of a nun bearing an illegitimate child, we should assume that this was an exception to the norm, the norm being that the mother's side shared in inheritance as in the compensation. Conversely, the division of compensation following the death of legitimate children might have followed bilateral principles, with both the matrilineal and patrilineal line sharing in it. The same ideas probably applied to the inheritance system.

<sup>529</sup> Gies, *Marriage and Family*, pp. 104-05.

To return to the question of the inheritance right of the spouse versus relatives, the marriage laws of Æthelbert give further clues as to the position of the wife. Adultery by the wife would be settled with the intruding man gaining a new wife for the husband with ‘his own money’, possibly meaning that he provided the *dos*, in addition to paying wergild to the husband (Ath.31). Only the compensation from the wife’s lover was specified, and what happened to the adulterous wife was not mentioned. Frances and Joseph Gies have interpreted this as a generally pragmatic view on marriage, adultery and divorce in English societies. They believe that the attitude towards divorce could be compared with that of the Romans and Merovingians, and that adultery ‘was treated in the same non-judgmental spirit’.<sup>530</sup> It seems reasonable to assume that the legislators had no problem with the dissolution of marriage, regardless of the Church’s teachings. However, in my view, it is difficult to interpret the laws of Æthelbert in any way as ‘non-judgmental’ towards the adultery of the wife. Although a wife could leave her husband, taking the children and half his property, adultery was graver than divorce. A more plausible interpretation is that in the eyes of the legislator, the husband could be violent with her, and possibly kill her, unpunished, in much the same manner as in both Roman and Merovingian legislation together with most normative material from the old testament to laws from the eighteenth century.<sup>531</sup> Her lover still had to pay the compensation and find a new wife, and this settlement in itself was the same as for the grave crimes, like homicide.<sup>532</sup> We do not learn whether the wife also lost the property she brought to the marriage, but an interesting point is that neither she nor her family was held responsible according to the law, only her lover. This could suggest that the wife’s family had no responsibility and thus no rights to her property by inheritance, or one could argue that adultery were non-compensational for her, and looked upon as very grave by secular legislators. This particular rule can be placed together with regulations from the later West Saxon king Alfred (r. 871-899) concerning how a man was permitted to fight another man he found with his four closest-related women: wife, daughter, sister and mother (Alf-42.7, see chapter 7.3). He could do this without fear of vengeance, or rather, it was his full right. Neither did Alfred reveal what should become of the adulterous women, but fighting her lover would suggest that adultery was considered a serious breach of domestic peace and violation

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<sup>530</sup> Gies, *Marriage and Family*, pp. 108-09.

<sup>531</sup> Deut. 22:20-23. In the *Digesta*, adultery was one of the few accepted grounds for immediate vengeance: D.48.5.21-22, D.48.5.25-26, D.48.8.3.5. See for instance Jørn Øyrehagen Sunde, *Speculum legale – rettspegeln*, (Bergen: Fagbokforlaget, 2005), p. 62.

<sup>532</sup> See chapter 11.

of the rights of a husband. The evidence still indicate that the wife was one of the heirs of Ego.

### *Legislation from Alfred to Cnut*

After the subjugation of the south in the 870s, Alfred's laws were applicable to societies of the other kingdoms and implemented by later rulers.<sup>533</sup> There seems to be a change of structure in the legislation of the English kings from the tenth century onwards. A common legal system was established, and King Edward's laws I&II are what Attenborough has described as 'more coherent and logical in form' than the previous centuries' legislation.<sup>534</sup> Neither of these contains particular family law, but they do contain peace regulations. In the laws of Edward, we are given several references to *Domboc*, which Liebermann regards as the laws of Ine and Alfred, a view that is accepted by Attenborough and Wormald.<sup>535</sup> In the preamble to I Edward, the reeves are commanded to judge justly and 'hit on ðære dombec stande', 'based on the lawbook' (I Edw.preamble). Hence, Edward relies on earlier legislation and, if Liebermann is right, on the West Saxon law codes.

The laws of Cnut are also found wanting in family law. Incest would be punished by compensation according to degree of kinship, with *wergild* or a fine or with all owned property (II Cn.51).<sup>536</sup> They do not specify to whom but it is presumably the king. The husband might have claim to the wife's property if she died first, as he would be entitled to her whole property because of her adultery, whereas the wife would lose her ears and nose (II Cn.53). The crackdown on women's conduct might possibly result from an ideological change towards patrilineal principles in Europe.<sup>537</sup>

The Anglo-Saxon laws do not reveal the legislators' ideas on topics we found specified in the continental legislation, such as representation, number of degrees or mode of counting. The few rules describing kinship structures take the organisation for granted, or possibly the organisation varied from family to family. We can assume that the approach to inheritance via kinship structure was flexible. Mumby argues that flexible practices made it

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<sup>533</sup> Wormald, *Making of English Law*, pp. 480-81.

<sup>534</sup> Attenborough, *Laws of the Earliest English Kings*, p. 112.

<sup>535</sup> Liebermann III, p. 92; Attenborough, *Laws of the Earliest English Kings*, p. 204 n. preamble, 205 n. 5.2; Wormald, *Making of English Law*, pp. 479-81.

<sup>536</sup> The vernacular uses versions of 'ealre æhte', whereas *Quadripartitus* uses 'omni pecunia', and *Constitutus Canuti* prescribe 'totam substanciam'.

<sup>537</sup> Hansen, 'Slektskap, eiendom and sosiale strategier'.

possible to pass landed property over the generations through sons.<sup>538</sup> If we follow her interpretation, each family would make strategic decisions regarding their property according to a desired outcome. If this were the case, the strategies would not leave a dominant trace in the legislation from AD 600 to AD 1000.

In the continental laws, the legislators assume, for the most part, that heirs, or at least the male heirs, shared the property equally. In the early English laws, we only find descriptions of cases with one child, which have led to discussion of prioritisation of children. Ultimogeniture is found in the much later period, known from thirteenth- and fourteenth-century sources, as was the case in the *Custumal* of Kent: several boroughs claimed the system of inheritance rights of the last-born son.<sup>539</sup> There is reason to believe that the postponement of daughters in inheritance was a post-Conquest principle, connected to feudal ownership strategies. The principles of ultimogeniture from the borough customs only applied to the English part of the population. It is made clear in the case of Nottingham that the French, who mainly constituted the nobility, the administration and other authorities, would pass their inheritance to the oldest son, by primogeniture.<sup>540</sup> Now, to make the last-born son the sole heir has several advantages: the elder sons must find profession, get married and move out. When the father dies, the mother would probably run the household for a while, since the youngest son quite possibly would be a minor. His sisters would also be married off before his succession. And neatly, the estate is sorted and ready when it is time for the heir to take the place of his father. On the other hand, agnatic seniority, with succession of the oldest brother instead of the deceased's own children, would unite the property in fewer hands again and avoid partitioning of land and valuables.

## 7.2 Bookland and folkland

Having outlined the general system of inheritance and principles in the English sources, a particular principle relevant in the case of inheritance should be discussed regarding transmission of law: land ownership and the legal terms of *bookland* and *folkland*. As with *terra salica*, the debate on the nature of these concepts has been extensive. Baxter and Blair argued 'bookland has assumed a disproportional significance in the literature' on

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<sup>538</sup> Mumby, 'Anglo-Saxon Inheritance'.

<sup>539</sup> See Mary Bateson, *Borough Customs*. vols 1-2 (London: B. Quaritch, 1904-1906). Records of Nottingham i.175-iii.406, Waterford enpartira (Dublin version), Godmanchester (?), Shrewsbury: Court Roll, No 755, Bateson, vol 1, pp. 130-32.

<sup>540</sup> Records of Nottingham i.189, Bateson, vol 1, pp. 130-32.

landownership.<sup>541</sup> There were distinctions between the two, the basic interpretation being that bookland was land that had been granted by royal permission in writing (in a book), and folkland was all other land.<sup>542</sup> More complex are the distinctions between privileges of ownership in each type at a given time, and the discussions thereon. Although many charters deal with folkland and bookland, the terms rarely emerge in the laws. When they do, however, it is with an obviousness that suggests the concepts were familiar to both legislator and subjects. As with *terra salica*, *terra sortis* and allodial land, these two types of land ownership resulted in differential treatment with regard to the inheritance rights of such land.

Alfred's provision stated that those in possession of *bocland*, handed over from kinsmen, were not permitted to alienate the land unless it was approved by those relatives who first had required the land or those who had left it to them (Alf.41). In other words, bookland inherited from kin could not be alienated without permission from the relevant kinsmen. In Edward's law, we find references to *boclande* and *folclande* as two distinct types of landholding and the different rights connected with them. The section I Edw.2 concerns those who withheld another's rights in bookland or in folkland. Infringement of rights in either type of landholding demanded public reparation, with fines of thirty shillings payable to the king for each lost opportunity to do right (I Edw.2.1). In Æthelstan's laws of London, the holder of bookland would be entitled to a cut of a thief's confiscated property if the thief was a tenant on his land – 'Gif hit bocland sy' (VI.As.1.1). The thief himself should be executed, his property would compensate the stolen goods, and the landowner would acquire one-sixth of the remainder of his property, shared with his widow (one-third), the king (one-third) and the associates of the vicim (one-sixth).<sup>543</sup> Associates here could mean the victim's community, guild or companions in the town of London. In the ecclesiastical laws of Edgard from around 960, the owner of bookland is assumed to be a *thegn*. The owner – a *thegn* – would pay a third of the tithes to a church on his land if it had a graveyard (II Edg.2). The mode of landholding was apparently linked to the king's administrative apparatus, although the nature of it was permanent and not tenure. As Stephen Baxter and John Blair put it, all

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<sup>541</sup> Steven Baxter and John Blair, 'A Model of Land Tenure and Royal Patronage in Late Anglo-Saxon England', *Anglo-Norman Studies: Proceedings of the Battle Conference 2005*, 28 (2006), 19-29 (pp. 20-21).

<sup>542</sup> Baxter and Blair, 'A Model of Land Tenure' p. 19.

<sup>543</sup> Liebermann came to this conclusion, Liebermann III, p. 117 n.10. The rule does not reveal the percentage of distribution, but says 'what is left shall be divided into three', and given either to the king or to the owner of the bookland. 'One part shall be given to the wife (...); and the remainder shall be divided into two, the king taking one half and the [slain man's] associates the other half (...) the owner of the land [bookland] shall share equally with the associates', translation by Attenborough, *Laws of the Earliest English Kings*, 157. See also Hudson, *Laws of England*, p. 192.

bookland originally given as royal grants, but all royal grants were not bookland.<sup>544</sup> The distinctions in landownership relating to royal grants of course bring elements of feudal tenure into the discussion, and a third term used in the sources on land holding is *lænland*. However, the term does not define the nature of the two concepts because it seems that both bookland and folkland could be *lænland*.<sup>545</sup> Therefore, some have suggested that bookland was perpetual tenure.

In the laws of Æthelred, the king had a claim to fines imposed on those possessing bookland (I.Atr.1.14). Cnut had deserters sentenced to death and their property forfeited (II Cn.77); they also had to surrender bookland, if owned, to the king (II.Cn.77.1). Liebermann used the term ‘Grundeigen besitzen’, property owner, in Atr.1.14, and ‘urkundlich Grundbesitz’, documented property owner, in Alf.41.<sup>546</sup> His interpretation relates only to land ownership recorded in writing. In 1893, Vinogradoff opposed the prevailing view that folkland represented common land, and instead proposed that it was land held within kinship groups and held by custom within the family as ‘folk-right’.<sup>547</sup> Maitland shared this opinion, and asserted that ‘[i]n all probability, the folk-law of this early period knows no such thing as testamentary power. Testamentary power can only be created by the words of a book, by an anathema’.<sup>548</sup> Folkland relied on folk-law, which, according to Maitland, was the opposite of privileges given ‘in books’. According to this interpretation, folkland was held in the family by custom and right, protected from royal interference, whereas bookland was given by privileges and therefore subject to obligations. Leo Wiener, who asserted that a lot of English terminology were borrowings that are hard to identify because of translations into the vernacular (and therefrom into Latin in the later *Quadripartitus*) held *bocland* to be a direct Anglo-Saxon translation of ‘hereditas allegata’, ‘property recorded in a book’.<sup>549</sup> This interpretation defines bookland instead as land held within the kin group, and protected from sale or confiscation by the king. This view was also shared by Eric John, who argued even more strongly that folkland was controlled by authorities in such a manner that it could be

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<sup>544</sup> Baxter and Blair, ‘A Model of Land Tenure’, p. 27.

<sup>545</sup> Baxter and Blair, ‘A Model of Land Tenure’, p. 20.

<sup>546</sup> Liebermann I, p. 75. See also Liebermann II, 1, p. 26.

<sup>547</sup> Paul Vinogradoff, ‘Folkland’, *English Historical Review*, 8, (1893), 1–17, (pp. 10-11), common land existed as a Norwegian legal concept as ‘almenning’.

<sup>548</sup> William Frederic Maitland, *Domesday Book and Beyond: Three Essays in the Early History of England* (Cambridge: Cambridge University Press, 1987 [1897]), p. 242. Attenborough, who based his translation on Liebermann’s authority, also supports this interpretation (Attenborough, *Laws of the Earliest English Kings*, p. 198 n. 41.1)

<sup>549</sup> Leo Wiener, *Commentary to the Germanic Laws and Mediaeval Documents* (Cambridge, MA: Harvard University Press, 1915), p. 195.

withdrawn from the holder, like tenure, whereas, on the other hand, bookland would be handed down as inheritance to kin as ‘permanent tenure’.<sup>550</sup> In the legislation on desertion, Cnut inserted a specific section on forfeiting *even* bookland, which implies it would in all other aspects be protected for the heirs, i.e., it should be passed on in the family no matter what the circumstances of the possessor. Bookland would be kept within the family as patrimony. This view has been expressed by Patrick Wormald, who claims bookland was given by charter but with permanent ownership that included rights of disposal by will.<sup>551</sup> This explanation is supported by Baxter and Blair, who claim that folkland and bookland were distinguished by two vital facts: bookland was given by royal diploma in perpetuity and could be alienated at will, and folkland was simply unrecorded land, which royals could lay claim to and possessors held in normal ownership but with normal obligations and inheritance principles.<sup>552</sup>

The relevant question, then, is how these types of landownership fitted into the legislator’s idea of inheritance principles. If folkland would automatically be passed on as inheritance, a kinsmen’s claim to it was indisputable. The crucial thing about bookland, then, was that it could be sold or given away from the family without royal sanction. If bookland was held independently and without obligations, it was much more desirable. Although it seems the right of alienation was continuous, this advantageous type of landholding would more often be given to heirs. By custom it became part of the anticipated inheritance, as evidenced in the laws of Alfred (above). The division has many of the same features as that of Lombard and Burgundian royal land. It rather shows a need for defining the status of land and the importance of securing land both as inheritance and for the state.

As Wiener pointed out, the possible transmission of the concept of registration of landownership could be transmission from the continental practices of ‘*hereditas allegata*’. The translation in *Quadripartitus* is ‘*terra testamentalis*’ in Æthelstan (As.1.1), ‘*Liberas terras*’ in Æthelred, and ‘*terra hereditas*’ in Alfred and II Cnut, and ‘*feode*’ in II Edgar (IIEdg.2). The different translations, by apparently the same hand, have been explained by Wormald as ‘embarrassing inconsistency’.<sup>553</sup> He suggests that the conflicting translations of *bocland* into Latin are reflected in the contradictory scholarly discussion of the term.

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<sup>550</sup> Eric John, *Land Tenure in Early England*, (Leicester: University Press, 1960), p. 39.

<sup>551</sup> Patrick Wormald, ‘On þa wæpnedhealfe: Kingship and Royal Property from Æthelwulf to Edward the Elder’, in *Edward the Elder, 899-924*, ed. by N. J. Higham and D. H. Hill (London: Routledge, 2001), pp. 264-79.

<sup>552</sup> Baxter and Blair, ‘A Model of Land Tenure’, pp. 19-29. For instance, tax, maintenance of commons, road-building and so on.

<sup>553</sup> Wormald, *Making of English Law*, pp. 99-100.

If we look at the legislation in the light of inheritance systems, and of continental solutions to land tenure and patrimony, the heir would probably be in the patrilineal line. The legislators of Alfred's and of Edward's law thus seem to be of the view that land should be passed on through the male line, although we cannot know for certain if this was the case if the closest heir was female, for instance if the deceased only had daughters.

### **Conclusion: English inheritance laws**

The lack of inheritance regulation in the laws of early English kings implies that customary laws were sufficient for legislators when creating written law. However, this was not the case for Germanic legislators, who also tried the novelty of law-making. Nevertheless, the little information we have about the early English laws and law-making provides a patchy image of an inheritance system based on combined principles of both patrilineage and bilaterality. As in Frankish laws, the inheritance system appears to be a modified parentela system with descendants sharing equally. In the more remote degrees of kinship, the paternal kin group apparently had primacy when inheriting from a man. Simultaneously, a woman's relatives would have claims to her property if she had no children. A wife's inheritance appears as the vital feature to control in the early laws. A wife was entitled to inherit a share of her husband's estate, like in the continental codes. Another aspect of the English laws that relates to the Frankish laws fairly accurately is the division of status of landownership. The separate rights connected to bookland and folkland could relate to the *salic land* and the allodial land in Frankish law, respectively. The concept of such a divide may have transferred from the Continent together with the Latin terminology for landed property. Although we can detect these features in both Salic laws and Anglo-Saxon laws, it is not evidence of transmission from the Continent, or vice versa. Rather, we should view them as common concepts of inheritance distribution, where the inheritance principles reflect reception of concepts and values rather than transmission of written law. For this reason, there are only a few traces of transmission from non-English written laws, as Roman or Germanic laws, even if we knew these were known in the Anglo-Saxon courts.

If we assess these conclusions with regard to the hierarchy of probability, the probable transmission still appears on the second level, with similarity in content, concepts and motivation. The content of the early English laws synchronise on a few topics, such as lacking detailed descriptions of distribution of inheritance to more remote relatives, but rather, as the

Burgundian and Lombard laws, leaving the distribution open to follow a prevailing kinship structure. English laws also follow Germanic laws in content by including a division of status in landed property, although neither the denomination nor the division is exactly the same. In concepts, the English laws include the use of the concept and terminology of *mund* for caring for women and children. Regarding motivation, English laws, both Kentish and West Saxon, show traces of transmission from Roman and canon ideology through influenced, and influencing, high-ranking clergy, who were learned in Roman law and involved in the process of legislation. Internally, the picture is clearer. The successive legislators outspokenly reissue their predecessors' law, and in both Kent and Wessex the legislators reveal a dependence on earlier laws. Later legislators also refer to earlier legislation, and thus the little we find on family legislation was copied or revised. A question emerges as to why the legislating kings did not find it necessary to regulate inheritance, incest or marriage in more detail, as other secular legislators did. Probably, the kinship structure and inheritance system was flexible, and a divide between the private sphere and the authorities' control made legislation obsolete or unsuitable.

## 8. The Inheritance Systems and Principles in the Scandinavian Laws

The direction of development in the Nordic laws – from which system towards what – has been the subject of discussion among modern scholars.<sup>554</sup> The longstanding view was that the prevailing principles before the laws were put into writing were those with a strong patrilineal element, and that the earliest laws reveal a legal culture in transition towards a bilateral system of inheritance. In the debates in the 1980s and 1990s, this view was contested. Some scholars suggested that the provincial laws were sources indicating or suggesting an opposite development, from cognatic kinship principles towards domination of patrilineal principles in the eleventh and twelfth centuries.<sup>555</sup> This would follow the European development, albeit delayed. The change to cognatic inheritance principles seen in the later Nordic laws would be another turnaround, in line with European legal standards.<sup>556</sup>

The particularities of the Nordic inheritance principles have been thoroughly covered by Helle Vogt's studies of kinship models in Scandinavia.<sup>557</sup> Vogt has shown, above all, the relative speed with which the Nordic laws became up to date on the regulations of the Fourth Lateran Council, where the limitations on incest prohibitions were reduced from seven canonical degrees to four.<sup>558</sup> Her outlines of the course of inheritance distribution and comparisons of the provincial codes in this respect give a clear and sufficient picture of the Nordic legislation on inheritance. I will nevertheless map out the main principles of the inheritance systems in the following. The reasons for doing so are that, to a large degree, Vogt seeks to enlighten what lies in her title; the function of kinship, and how it manifests itself through canon law society. Further, she understands the development to a large degree as influences from the contemporary canonical teachings. Here, the focal point is to assess also possible secular influences and to discuss the motives of the legislators in the process of developing written inheritance laws. Therefore, the inheritance principles will be reviewed.

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<sup>554</sup> See Hansen, 'Slektskap, eiendom og sosiale strategier', pp. 118-45 for a summary of the main debate among Nordic scholars.

<sup>555</sup> Christer Winberg, *Grenverket: Studier rörande jord, släktskapssystem och ståndsprivilegier* (Stockholm: Institutet för rätthistorisk forskning, 1985), p. 27; Sawyer, *Kvinner och familj*, pp. 59; Hansen, 'Slektskap, eiendom og sosiale strategier', pp. 112-15.

<sup>556</sup> Hansen, 'Slektskap, eiendom og sosiale strategier', p. 137; Knut Helle, *Gulatinget og Gulatingslova* (Leikanger: Skald, 2001), p. 137.

<sup>557</sup> Vogt, *Slægtens funksjon*; Vogt, *Function of Kinship*.

<sup>558</sup> Vogt, 'Slægtens funksjon', p. 205.

In chapter 1, I mentioned what has been called a division in the Nordic inheritance laws into roughly eastern- and western parts. The division into east and west represent more areas of legal reasoning than actual compass points. East covers the laws of Denmark and eastern Sweden; west is constituted by laws of Norway, Iceland, and the western Swedish provinces, but also the province of eastern Gothland and the isle of Gotland.<sup>559</sup> Historians Elsa Sjöholm, Birgit Sawyer and Lars Ivar Hansen has have pointed to this break in the otherwise corresponding provincial laws.<sup>560</sup> The division is found in distribution of inheritance by the parentela system in the eastern Nordic laws, and the gradual system in the western Nordic laws. The parentela system, which first followed one stock of descendants until the line was exhausted before moving on to the next, was found in the Danish and eastern Swedish laws. The gradual system, which graded inheritors according to distance to the deceased, agnatic or cognatic lineage and gender, dominated the western Swedish, the Norwegian and the Icelandic laws.

Further, the Norwegian principles of inheritance have been studied somewhat in isolation because they stand out in some respects compared with other Nordic (and European) legal sources. The very detailed inheritance prescriptions and attention to the kin group in both the provincial laws and later Code of the Realm seem reactionary in the vigorous law-making in the latter half of the twelfth century and from 1260 to 1320. Earlier scholarship has perceived the Norwegian laws as inbred and out of line with European contemporary standards, a view that has been rejected in the last decades.<sup>561</sup> The disorderly differences in the Swedish provinces also cry out for particular attention. So does the – in a European context – very late emergence of written law in Sweden. The Swedish provincial laws emerged in writing between the late-thirteenth century and a point a little past occurrence of the Black Death in Sweden. It would be anachronistic to assume a unified state administration in the kingdom of Sweden at this point, but since many of the provincial laws had royal sanction and show high congruence in content and form, it is peculiar that the two different inheritance systems coexisted between the landscapes. The coexistence is evidence that it was the *þing*, the provincial assembly, rather than the king who formed the law in the Swedish provinces. Subsequently the influences on the thingmen would result in transmission of law, and it would be through filtration in the provincial assembly that secular law was adapted to

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<sup>559</sup> Sjöholm, *Sveriges medeltidslagar*, pp. 124-25.

<sup>560</sup> Sjöholm, *Sveriges medeltidslagar*, pp. 120-25; Sawyer, *Kvinner och familj*; Hansen, 'Slektskap, eiendom og sosiale strategier', pp. 119-27.

<sup>561</sup> Hansen, 'Slektskap, eiendom og sosiale strategier'; Sunde, 'Internasjonaliseringa av retten', pp. 54-71.

local legal culture. Even so, the king had an opportunity to put a rubber stamp on the provincial laws through royal sanction. The written Danish laws, although hard to date precisely, possibly originate from the late twelfth century.<sup>562</sup> The close Danish contact with continental Europe and the tidiness of the inheritance system gives them a civil flare lacking in the northern Scandinavian laws. Scholars have suggested that changes in the Swedish and Norwegian laws, particularly with regard to a daughter's inheritance portion, were transmissions due to Danish influences.<sup>563</sup> Though it is justifiable to view the Nordic region as a single legal culture with congruent norms, it is of interest to examine these differences in the written normative sources.

Another difference between the law books is the connection made between marriage laws and inheritance laws. The Swedish provincial laws in particular have inserted marriage legislation in the section on inheritance. In the introduction of the law of Uppland and the Vestmanna Law, the matter was explained:

The inheritance section starts with marriage, for always one comes from two, man from man, one after the other. Never came two together that should not be separated eventually; one passes and the other lives on. With the offspring of man and wife, all inheritance begins.<sup>564</sup>

It presents poetic reasoning, but also a powerful indication that lawful marriage now had become a premise for inheritance rights of children. As we shall see, the Nordic countries that were Christianised as some of the last regions in Europe would emphasise the legitimacy of the heir more strongly than other legal cultures. Helle Vogt has also pointed to the stressing of legitimacy in the Norwegian material and questions why, on the other hand, the Norwegian provincial laws do not knit law on dowry to the inheritance sections.<sup>565</sup> Norway was Christianised in the early eleventh century. Christianity had had a footing in the region prior to this, but not a structural organisation. Christianity was widely introduced by the anglicised war kings Olav Tryggvasson and Olav Haraldsson (later St Olav). Priests, church ornaments, the Bible and canon law were brought to Norway from England.<sup>566</sup> The provincial Gulathing

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<sup>562</sup> Fenger, *Gammeldansk ret*, p. 94; Vogt, *Function of Kinship*, pp. 64-65.

<sup>563</sup> Taranger, *Magnus Lagabøters Landslov*, p. 82; Vogt, *Function of Kinship*, pp. 164-65.

<sup>564</sup> UL.Å.1, V.Å.opening. My translation from the modern Swedish in Holmbäck and Wessén, *Svenska Landskapslagar I*, p. 63.

<sup>565</sup> Vogt, *Function of Kinship*, pp. 172-74.

<sup>566</sup> Absalon Taranger, *Den angelsaksiske kirkes indflytelse paa den norske* (Kristiania: Den norske historiske forening, 1890), pp. 203-216, 296-335, 372-395; Torgeir Landro have modified the view that Norwegian Christian laws were influenced by Anglo-Saxon laws: Torgeir Landro, 'Kristenrett og kyrkjerett,

Law refers to a law given by St Olav himself early in his reign.<sup>567</sup> Although this may be a myth, later legislators or revisers of the law would respect the laws of the saint.

As mentioned in the beginning of this chapter, the reality of family life often involved more complex family situations than a merely legally married couple and its legitimate offspring. Second or more marriages, several broods and children born out of wedlock would play a role in the distribution of property in inheritance. The Scandinavian laws deal with these problems more than the other sources. While the Norwegian laws have detailed descriptions of how illegitimate children or other family members could come into inheritance (or rather not come into inheritance), the Swedish legislation on inheritance can be said to contain a certain focus on the different offspring of separate wives.<sup>568</sup>

While we know that from the thirteenth century the Scandinavian kings tried to control the legislation process, the genesis of Scandinavian provincial laws is obscure when it comes to agent and legislator. Thus, the origins of law could be both from local customs and later royal policy, from the formative phase of royal power, and onward. This point is important when it comes to inheritance legislation, because it gives rise to the question of what or who created the norms. Was it the tradition of the kin groups or transmission from secular authority? Was the development caused by change in concepts of kin or due to the transmission of European legal cultures and/or canonical teachings?

## 8.1 Danish provincial laws

As Helle Vogt has stated, the principle of prioritising descendants prevailed in all the Danish provincial laws.<sup>569</sup> The laws listed the order of inheritance rights in what we have termed the parentela system. In the assumed oldest written law, formed around 1200, *The Book of Inheritance and Non-Compensational Crimes* (A&O), terminology was inserted prescribing that inheritance should, first of all, go forward, meaning down through the parentela to the descendants (A&O.1.13, SL.34). The provisions for controlling backwards inheritance were immediately put into law.

The provincial laws show a large degree of internal dependence, where the later ones, the Law of Jutland (JL) and Eirik's Law of Zealand (EsL) from the 1240s, closely follow the

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borgartingskristenretten i eit komparativt perspektiv', unpublished doctoral thesis University of Bergen, 2010. For comments on general influence from English culture, see also Sawyer, 'English influence', p. 225.

<sup>567</sup> Knut Helle, *Gulatinget og Gulatingslova* (Leikanger: Skald, 2001), pp. 18, 177.

<sup>568</sup> For instance, see HL.Ä.12 and UL.Ä.13.

<sup>569</sup> Vogt, *Slægtens funksjon*, p. 204.

contents, structure and to some degree wording of the Law of Scania (SL) and *The Book of Inheritance and Non-Compensational Crimes*, stemming from the late-twelfth century.<sup>570</sup> There are still numerous differences in their separate rules on inheritance, revealing a legal work conscious of the shifting legal ideals of the time, both those of the Church and of secular society.<sup>571</sup> The impact on the making of the Danish laws by known men of the Church is acknowledged: the work of Bishop Anders Sunesen and Bishop Absalon on the Law of Scania, at least.<sup>572</sup> Generally though, a substantial transmission of law took place between the Danish landscapes, and within the Danish legal culture.<sup>573</sup> Rules regarding inheritance are found in book I of Eirik's Law of Zealand and The Law of Jutland, and they share the same contents and much of the same structure. The assumed earliest law, *The Book of Inheritance and Non-Compensational Crimes*, also contains many of the same rules and contents in book I, albeit with slightly more detectable differences. The Law of Jutland follows the Law of Scania almost verbatim, but with several important variations in the rules. These differences are of course of major interest when studying the development in inheritance regulation in the Danish legal culture. However, regarding transmission of law, it is sufficient to point out that there was a major interdependence between the law texts.

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<sup>570</sup> Kroman and Iuul, *Danmarks gamle Love I*, p. vi; Vogt, *Function of Kinship*, pp. 46-47. Michael Gelting argues that the law found its form in the early thirteenth century. Michael Gelting, 'Pope Alexander III and Danish Law of Inheritance', in *How Nordic Are the Nordic Medieval Laws?*, ed. by Ditlev Tamm and Helle Vogt (Copenhagen: DJØF, 2005), pp. 85-114.

<sup>571</sup> For points of reference for dating the laws, see Erik Kroman and Stig Iuul, 'Danmarks gamle Love. Deres Alder og indbyrdes Slægtskab', in *Acta philologica scandinavica, tidsskrift for nordisk sprogforskning*, 29 (1971-73), pp. 111-26; Vogt, *Function of Kinship*, pp. 64-65. The laws will be cited according to the system of Kroman and Iuul, *Danmarks gamle Love I*, pp. xxvii-xxxiv.

<sup>572</sup> Vogt, *Function of Kinship*, pp. 81-82.

<sup>573</sup> For instance Kroman and Iuul in their description of the many differences between the Danish provincial laws, demonstrate at the same time the laws' internal similarities in content and the interdependence between them: Kroman and Iuul, *Danmarks gamle Love I*, pp. vi-viii.

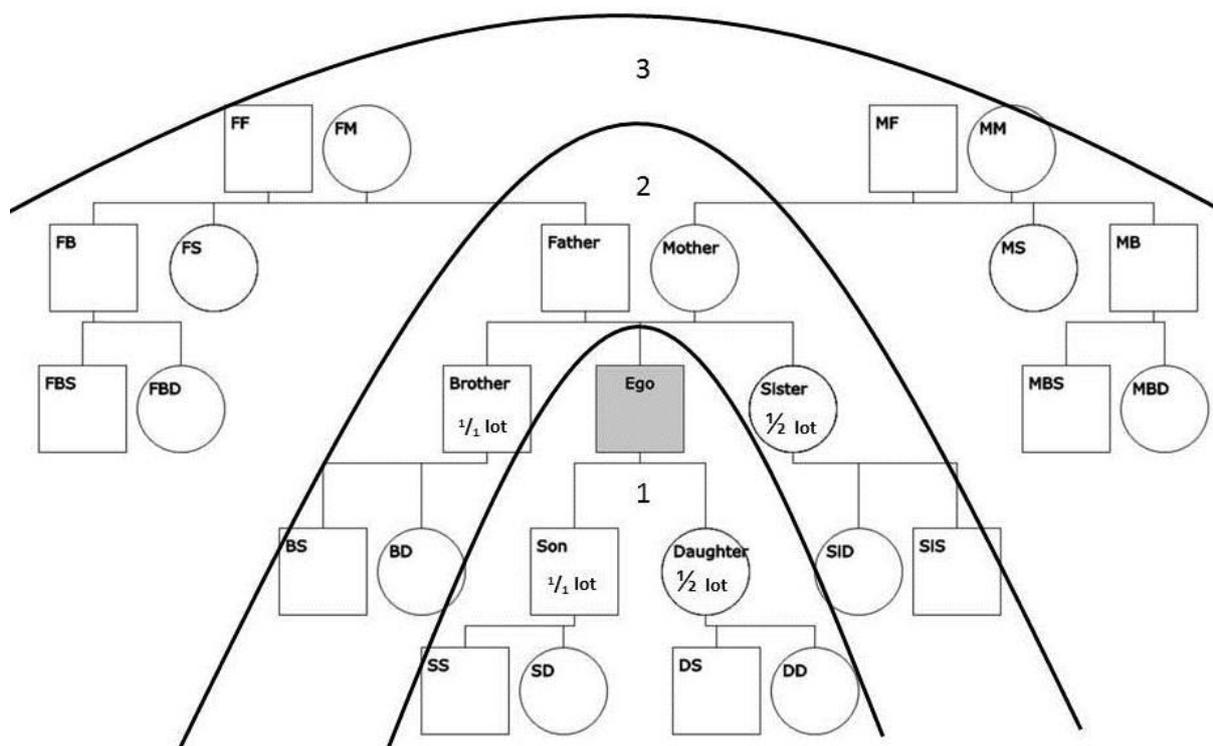


Figure 10: The parentela system after the Danish provincial laws. Notice that the sisters of Ego would also receive half the portion of the brother. In the Law of Jutland, this principle applied to all female relatives.

Outside the default system, Danish law operated with a system called *fællig* (A&O.1.7 and 15), which was joint ownership within a defined group of usually the closest family.<sup>574</sup> The default inheritance system, however, operated with a straight parentela system, dividing the property of Ego between collaterals, descendants before ascendants. The property of the deceased was divided in shares or lots (*loth*) according to the number and nature of the heirs, which can be seen as similar to the Roman division per capita. However, the inheritance among children would be divided in lots according to a method other than the Roman principle of total equality. There was an important principle in the system of division whereby the inheritance was divided into lots between sons and daughters: daughters would get half the lot of a son (A&O.1.1, VmSk.1.1, SL.22 JL.1.4). The fraction was in the ratio 2:1, son to daughter. When there was one son and one daughter, the son would get two-thirds and the daughter one-third. If there were several children, then the estate was supposed to be divided accordingly, so that sons would get one full lot each and the daughters one-half.

<sup>574</sup> Vogt, *Function of Kinship*, 158 n. 5.

Children of Ego were nevertheless first in line, and the principle of representation made certain that eventual grandchildren or great-grandchildren were next in line to inherit, before those of the second parentela, parents or siblings and their children (A&O.12, SL.33-35). The succession in the Law of Scania was also true to the parentela system, with grandparents on both sides, followed by cognatic aunts and uncles (SL.36).

Inheritance was counted to the seventh degree according to the earliest laws, *The Book of Inheritance and Non-Compensational Crimes* (A&O). In later editions of provincial laws, the law of Scania and the Law of Zealand (VsL.1.20), inheritance was limited to four degrees of kinship. This reveals an adaptation of the current legal ideology of the time, stemming from the Fourth Lateran council. However, the law of Jutland operated with seven degrees from its 1241 version (JL.1.23). Similar to the Norwegian Gulathing law, the legal elite seem to have kept the original number of degrees in the revisions made after the Fourth Lateran council. This could be due to an idea of the sanctity of the law, which is unlikely given the willingness among the Danish legal elite to absorb changes in international trends, or due to lack of knowledge or a lack of concentration by those copying earlier law into the Law of Jutland.

*The Book of Inheritance and Non-Compensational Crimes* and Valdemar's Law of Zealand gave slight priority to the patrilineal kin by giving the father's relatives a priority in the third parentela. It is significant that these two are the earliest Danish provincial laws. But what does this tell us? Probably that patrilineal principles were prevailing in the twelfth century, and that this later turned to equal rights of both maternal and paternal lines, and that the Danish laws changed towards more balanced parentela principles in the formative phase. Michael Gelting finds it likely that Danish provinces followed an inheritance system of gradual principles before the laws were set down in writing.<sup>575</sup> He also points to what he believes is the exact time when female inheritance was introduced to the Danes, the 1170s with the legislation of Valdemar I. Vogt asserts that, '[t]he laws give the distinct impression that the inheritance law was under discussion when the provincial laws were being recorded'.<sup>576</sup> The Danish provincial laws nevertheless all include the feature of lots and half-lots. The rules describing the system of lots still do not appear as direct copies of each other, which suggests that the institution of dividing inheritance into full- and half-lots was an integrated part of the legal culture and written down independently. Even if the views of how far back in time to stretch the segregation of the sexes were debated, the system was

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<sup>575</sup> Michael Gelting, 'Odelsrett', p.140.

<sup>576</sup> Vogt, *Function of Kinship*, p. 178.

apparently accepted. The institution may initially have been a transmission from other laws, but it was a non-controversial part of the inheritance system at the time it was put into writing for the different landscapes.

Vogt argues that the ideology of letting both sexes inherit was established through the influence of canonical teaching.<sup>577</sup> She has nevertheless pointed to possible earlier sources of secular influence on the particular distribution of half-lots to daughters<sup>578</sup>: *Novella* 118, where descendants were given preference and the equality between sons and daughters was emphasised, or, more certainly known in Denmark, the *Institutiones* of Justinian (I.3.1), and include the above-mentioned Lombard king Rothair's Edict 159, which stipulated the ratio between legitimate daughters and illegitimate sons. We could also point to Lombard laws stipulated ratio between legitimate and illegitimate son's, which was also 2:1 (Rot.154) and Liutprand's ratio between sons and daughters which was 3:1 (Liu.102.VI), together with the general wrestling with similar problems in Burgundian and Salic laws, as discussed earlier. The continental admission of rights to daughters may well have been the source of influence on Danish legal culture. Moreover, the shift towards bilateral principles within Norwegian legislation, explained below, represents a change in the same direction. Where the earlier laws displayed a view of society and kin as patrilineal, later legislators introduced rights for women to inherit. The change happened through influence and pressure from current European legal thought. We can argue for a transmission of legal ideas, more than transmission of law. My point is that the Danish model of giving a daughter half the lot of a man compares with the earlier European model of giving daughters a share of the inheritance. Burgundian law permitted a daughter a share of one-third of her father's property if she took the veil; Lombard law permitted a daughter a third of her brother's share. The half-lot means that if there was one daughter and one son sharing the inheritance, then she received one-third by law, and he received two-thirds, not very different from the division found in early medieval secular law. There is still a problem with this conclusion: the Danish inheritance laws otherwise follow a strict parentela system, which cannot be said of Burgundian or Lombard law. Other contemporary secular law, such as the Visigothic and Frankish law, follow a parentela system to a large degree, at least within the closest family within the first parentela. These inheritance regulations were based on an equal division between children, regardless of gender. Nevertheless, we remember that the laws of the Visigoths and the Franks also included other

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<sup>577</sup> Ibid.

<sup>578</sup> Vogt, *Function of Kinship*, p. 180-83.

kinds of regulations mildly favouring male heirs or the paternal side. The Danish laws probably reached their form of distribution with less to a daughter for similar reasons: a need to concentrate the main family property in one heir, a man. Thus, the similarities in the legislation on the daughters' portion may be a result of developing solutions to the same problem, and these were drawn in written law. We could still argue that indirect legal transmission took place from the sixth to the thirteenth century, due to the legal elite's knowledge of such modes of discrimination between sons and daughters in secular law. If we argue that the same legal elite had knowledge of Roman law at this point, then the diversion from Roman law must have been a conscious choice among those putting the local laws into writing.

The division into full and half-lots applied to sisters. One interesting difference between the Danish laws was that, while the earlier law thoroughly gave all female relatives half the share of their male collaterals, the later laws gave the more remote female relatives an equal share. The Law of Scania distinguished between the ratio of the property inherited between sisters and brothers, where the sisters should get a half-lot of brothers like the daughters (SL.34, SL.36), while *The Book of Inheritance and Non-Compensational Crimes* asserts that men should always have twice that of a woman (A&O.1.12). So did the Law of Jutland (JL.1.4-5), which sets it apart from the contemporary provincial laws. The reason for the Law of Jutland to contain the apparently older regulation giving all female relatives half that of a male could stem from its transmission from the A&O and the early law of Zealand, as a case where the translator kept the discriminating provisions for some reason.

The representation system mentioned above, functioned with the grandchildren getting their parents due share according to the sex of the parent (SL.33). But the Danish laws only divided per capita within the prior heirs, so that children would receive per capita, but grandchildren would share the lot due to their parent. They would, as described in old Danish in King Valdemar's Law of Zealand (VsL.1.7), inherit 'the same lot as their father or mother would have taken, if they had lived'.<sup>579</sup> We find the same wording in the Law of Jutland, to inherit.<sup>580</sup> Although the Jutish, which was the youngest, and obviously the copy, only mention the father, while also being the law retaining the women's half-portion among remote relatives. The legislators thus found it necessary to explain that if a dead son had one daughter

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<sup>579</sup> 'sæmæ lot ær thæs fathær ællær thæs mothær skuldæ hauæ tækæt um the hafthæ liwæt', *DgL*, VIII, Valdemar skjællandske lov, ed. by Erik Kroman, (Copenhagen: Gyldendalske boghandel, Nordisk forlag, 1941), p. 6. See also *DgL* VII, p. 7 and 137.

<sup>580</sup> 'sicut pater eorum deberet, si uiueret', *DgL* IV, pp. 14-15.

and a dead daughter had many sons, the daughter of the son would inherit a full lot and the many sons of the daughter would share the half-lot. Hence, we can say that the Danish system divided *per stirpes*, according to the first line of heirs. This meant the children of Ego, but also siblings. The brothers and sisters of Ego would inherit from him when the parents had died, and would then form branches of the second parentela.

The wife would acquire one lot of the inheritance intestate if the couple had children (SL.6, SL.22, JL.6). She could not acquire her husband's ancestral land, though, only movable property, 'bought land' and otherwise acquired property. In the Law of Jutland, even the wife's part would be sized according to the sex of the child. She would have a full lot if she had born a son, and a half-lot if the offspring was female (JL.6). The remaining spouse could live undivided in the property if the children were minors. Several of the provincial laws opened with rules on what to do if the surviving wife was pregnant (SL.1, JL.3, EsL.2). Measures would be taken to assure a child was underway, and that it was in fact the late husband's offspring. If it survived, it should be heir. The principle of giving females a half-lot came through in every aspect of the Danish inheritance regulations, revealing the effort given to securing major family property for the male heirs, even in the parentela system

The question of the widow being pregnant leads to another principle in the Danish laws. If we remember the constitution of the Visigothic kings that a child would have to survive ten days to be counted as heir, having implications for the division of inheritance to the child's mother, another criterion comes forth in the Danish material. The child would have to be born sound, but also baptised to be the rightful heir (SL.1-3, JL.1-2, EsL.2). In these sections, too, the Law of Jutland and Eric's Law of Zealand follow the content of the earlier Law of Scania closely, revealing their interdependence and transmission. As will be revealed further down, the Swedish laws gave the mother the right to inherit from the husband if she was pregnant at the time of his passing. The child did not have to be born to make its mother an heir of Ego. The Danish inheritance laws portray a system where, compared to contemporary European legislation, principles of equal rights to be heir persisted among the sexes and the generations, even if the distribution discriminated against females. Joint inheritance rights and the emphasis of baptism calls to mind the concepts we found in the Visigothic system. Nevertheless, without evidence of direct transmission from the Visigothic texts, Roman law and the Church are the obvious explanation for the source of influence, as they also were for the Visigothic legal elite. The Danish inheritance system was probably a result of transmission from the contemporary concept within European legal ideology in the form of Roman law and canon law, most possibly by the works of influential bishops, like

Anders Sunesen or Absalon. The Danish laws included measures that could be activated to ensure the property to be inherited would fall to those desired as heirs, but were in European context equal to heirs. The contemporary laws among the Danes' northern neighbours in Norway followed quite the opposite model.

## 8.2 Norwegian laws

The two surviving provincial laws in Norway show a continuous development in the authoritative inheritance legislation in the Norwegian kingdom. The Gulathing Law (G) from around the 1160s<sup>581</sup> followed a neat gradual system, favouring patrilineal, male relatives.<sup>582</sup> The extant version of the law originating in the province of Frostathing (F) is assumed to date from the 1260s, although it contains older material, some of which from just after 1215, due to its limitation of inheritance to four canonical degrees.<sup>583</sup> The gradual system prevailed in this one, too, only with a heightened emphasis on the legitimacy of the heirs according to Christian canons.<sup>584</sup> Thus, the influence of canon law appear to be evident in the inheritance laws, and the Christian laws in Norway may have been transmitted law as well.<sup>585</sup> The Gulathing Law also contained rules on distribution of compensation that went beyond seven degrees in the responsibility of kin, and incest prohibition that only went to six degrees by dispensation from the pope.<sup>586</sup> The provincial laws were revised in the mid-thirteenth century, but later revisions in the Gulathing Law did not lead to a harmonising of the number of degrees from seven to four, as they should if they followed the canonical decision from 1215.

The early laws called for the son of Ego to inherit first, then the father (G.103). However, it is difficult to establish if the father would inherit if the son of Ego had no heir, i.e., if Ego had no grandson, since the next in line is the grandson sharing with Ego's

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<sup>581</sup> Regarding the dating, see Robberstad, *Gulatingsslovi*, p. 9, and Vogt, *Function of Kinship*, pp. 37-40.

<sup>582</sup> Torben Anders Vestergaard, 'The System of Kinship in Early Norwegian Law', *Medieval Scandinavia* 12 (1988), pp. 160-193; Hansen, 'Slektskap, eiendom og strategier', pp. 129-33; Hansen, 'Concept of Kinship', p. 203.

<sup>583</sup> Hagland and Sandnes, *Frostatingslova*, p. xxx-xxxiii. Although rules on compensation involved relatives from the fourth to the sixth degree, see ch. 12 and also Hansen 'Concept of Kinship', p. 194.

<sup>584</sup> Vogt, *Slægtens funksjon*, p. 214.

<sup>585</sup> Philologist Eyvind Halvorsen has suggested that Norwegian priests would have had the opportunity to make new laws soon after ordination, but we have little evidence that laws were either introduced or adjusted to local customs or features. Eyvind Fjeld Halvorsen, 'De gamle østlandske kristenrettene', in *Nordiske middelalderlover: tekst og kontekst: rapport fra seminar ved Senter for middelalderstudier, 29-30 Nov. 1996*, ed. by Audun Dybdahl and Jørn Sandnes (Sandnes: Tapir, 1997), 59-68, (p. 68).

<sup>586</sup> Norwegians received dispensation for marriage within seven degrees of kinship, due to the remote and sparse settlements. Hansen, 'Concept of Kinship', pp. 170-201.

daughter. Rules on representations are implemented in the Frostathing Law, although the specified representation concerned the son of a son only (F.8.1), not to the whole *stirpes* and not grandchildren by a daughter. That means only a son's son would be heir before ascendants, even if a daughter and a son's son shared mutually (G.103 F.8.2). This feature is a trait of the gradual system.

In the Gulathing Law, if Ego had no children or father, then the siblings were heirs, possibly both sisters and brothers, since the text specifies 'brother inherits from brother, and every sibling with shared father [inherits as well]' (G.103). Sisters were definitely behind brothers in the later Frostathing Law (F.8.4). After the sister, followed the mother of the deceased. Next in line to inherit were the father's brother and the brother's son, according to the Gulathing Law, indicates patrilineal tendencies. The Frostathing Law had the father's father sharing with them (F.8.5). Close patrilineal female relatives sharing with Ego's mother followed them.<sup>587</sup> The mother was thus put back in line to number six, compared to the Gulathing Law, where mother was the fifth heir to her son. Then, the Gulathing Law specified three classes of illegitimate sons – illegitimate daughters were not in the picture – and continued with paternal male cousins (G.104).

There are several theories concerning why the patrilineal element was particularly strong in the Norwegian laws. Torben Vestergaard has revealed that the laws contain a core of three directly related males; father, son and grandson.<sup>588</sup> He calls this the 'minimal kin'. Lars Ivar Hansen argues that the concretising of the minimal kin was an innovation within the Norwegian legislation in the eleventh and twelfth centuries.<sup>589</sup> Both Hansen and Vogt suggest that the tendencies were a result of the battle between the forming state and the established land-based elite.<sup>590</sup> The partiality for patrilineality was thus an attempt to keep estates undivided in response to increased pressure from royal power and the Church as accumulators of land, together with the ideology of cognatic calculation of kin and distribution. Based on these theories, we can assert that these rules originated as a reaction to influence from other legal cultures. The Norwegian legal elite, which at this point grew out of the assemblies, shaped the law in relation to pressure from landowning subjects, who themselves were reacting to canon law. It might also be argued that the landowners were reacting to increasing royal control, which sought to weaken opposition from the landowners by dividing their

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<sup>587</sup> First the father's mother had inheritance rights, then the father's sister with Ego's mother and afterwards the brother's daughter.

<sup>588</sup> Vestergaard, 'System of Kinship', p. 176.

<sup>589</sup> Hansen, 'Slektskap, eiendom og strategier', pp. 137-38.

<sup>590</sup> Hansen, 'Slektsap, eiendom og strategier'; Vogt, *Function of Kinship*, p. 178.

estates. What both Hansen and Vogt demonstrate is that the inheritance laws were flexible, and were written down at a time where these principles were under discussion.

After the domination of the paternal side came the maternal kin and also heirs through female relatives. The listing still consisted of male children of female relatives, and male maternal relatives (G.105, F.8.10-13). Robberstad interpreted these inheritance regulations as the younger part of the law.<sup>591</sup> Compared with other secular law, it is unlikely that the women would be completely excluded from inheriting in the earliest inheritance regulations, and we could assume that women inherited when all male relatives were lacking, as in the Burgundian and Lombard laws. The favouring of males over females to inherit was present in all joints and degrees, and demonstrates the legislators' idea of patrilineality. The Gulathing Law sums up the listings with a clarification: if there were relatives of the same distance to Ego, those on the male side (the paternal kin) would precede those on the female side (the maternal kin) (G.105). Further explanation was given on how to proceed the counting of heirs, and of those women not mentioned in the listing, the son's daughter comes before the others. The fact that this needed clarification suggests the patrilineal emphasis in the provincial codes, and that the calculation of degrees and closeness of kin were negotiable in the legal culture in the two Norwegian provinces.

As described above, the principles of representation were restricted to male patrilineal descendants. A particular feature of the Gulathing Law that separates the provincial law from other European codes is that the unborn child did not have inheritance rights with the other legitimate children (G.104). The unborn would only share in the *dos* of the marriage, and have the mother's dowry, and came only as the thirteenth heir of its father, after the illegitimate children. Roman law had an arsenal of rules regulating the rights of an unborn child, and similarly precautions to ensure that widows were bearing the deceased's child without doubt, which insisted on the widow refraining from remarriage for twelve months after the husband's death or in cases of divorce.<sup>592</sup> Post-mortem heirs are not mentioned in the Frostathing Law, but prescriptions similar to the decisions of Reccesvint and Chindasvint in *Leges Visigothorum* were added in the later Code of the Realm, where unborn children, if they came alive into the world and were baptised, would inherit from their father 'and others' (MLL.5.7.5). Baptism was not expressed as a criterion in the Gulathing and Frostathing Laws, as it was in the Danish and also in the Swedish provincial legislation, but the laws elsewhere

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<sup>591</sup> Robberstad, *Gulatingslovi*, p. 359.

<sup>592</sup> For instance, see D.3.2.10, C.5.9.1.

emphasise the importance of baptism (G.21-22, F.2.2-3), revealing that it was a developing principle due to influences from the Church.

The requirement that heirs were legitimate in a default system of intestate inheritance applies even more to the Norwegian provincial laws than to other laws. In the first section on inheritance distribution in the Frostathing Law (F.8.2-8), and in the Gulathing Law (G.103), legitimacy was one of the factors that determined where in line a potential heir was. Hence illegitimates were also given access to inheritance, as they were in Roman, Burgundian, Lombard and Scandinavian laws. These, too, inserted illegitimate children into the standard description of the inheritance system, but postponed or with a reduced portion. The Gulathing Law first established how legitimate and illegitimate children inherit (G.104), before concentrating on other more remote relatives. Illegitimacy pushed these sons back in line after the legitimate children of both sexes, and parents and siblings. Similar to the Danish material, there were three categories of illegitimate children: born in concubinage (*hornunge*), born in secrecy (*risunge*), and born to a slave woman (*tyboren*). Categories that correspond to natural children, infamous children and slaves, as other European secular law refers to them. As mentioned above, no illegitimate daughters were mentioned in the Gulathing Law, but in the Frostathing Law, they were counted next in line after illegitimate sons (F.8.8), which speaks of a growing consideration for women. This was possibly a result of Christian influence or the knowledge of canon and Roman law. However, these laws are not particularly concerned with illegitimate daughters, and rather we could argue that allowing them to inherit falls within the general pattern in secular European legislation, where legislators in each legal culture included ever more groups within the inheritance systems. It would then be a similar solution to a similar problem, and not necessarily transmission of law. Vogt argues that the attention to illegitimate-born relatives in the Frostathing Law suggests that the finalisation of these inheritance laws happened at a point when the marriage ideal of the Church was fully established in the European ideology, i.e., the late-twelfth century, by Pope Alexander.<sup>593</sup> That is plausible viewed also in light of the establishment of royal succession in the same period, by King Magnus Erlingsson from 1163, which was inserted into the Gulathing Law (G.2).<sup>594</sup> The law of succession decreed that heirs to the throne had to be born within marriage. State development may also have influenced the legislation on inheritance. Church

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<sup>593</sup> Vogt, *Slægtens funksjon*, pp. 215-16.

<sup>594</sup> See further *Regesta Norvegica* I nr. 111. Attention to illegitimate offspring can be seen as a stage in the civil war that engulfed the Norwegian realm between the 1130s and the early thirteenth century.

policy was that illegitimate children should not inherit from parents, although this was not part of canon law's sphere.

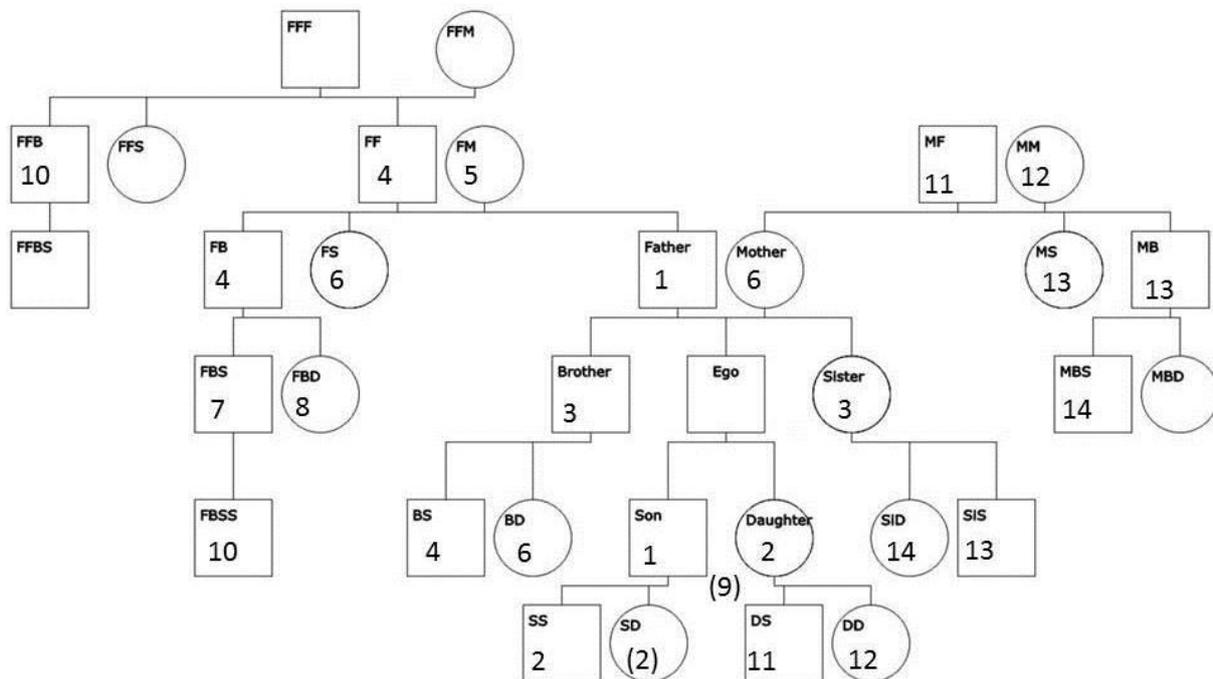


Figure 11: The gradual system from the Frostathing Law.

The medieval inheritance laws from Norway are characterised by the extreme catalogue of degrees according to the gradual system. The listing in the Frostathing Law ends with the maternal uncle's daughter's son (F.8.12), having counted a wide spectrum of the relatives included in the bilateral kin group. Vestergaard has suggested that the multitude of relatives was a repetitive pattern, easy to remember because it originated from an oral transmission of the law.<sup>595</sup> The complex pattern is only mirrored, and even surpassed, by that in the Icelandic law of *Grágás*, which is thought to have been transmitted from Norwegian law.<sup>596</sup> Helle Vogt has dismissed the similar system of transactions of various amounts of compensation for homicide in the Frostathing Law as absurd and hardly applicable, and asserts that the level of detail in naming relatives is a result of the need to instruct Norwegian subjects in canonical kinship structure.<sup>597</sup> However, the equally minute descriptions in Visigothic legislation were the result a transmission from the listings in Roman law. That is a tempting conclusion regarding these rules on inheritance, too, because the texts enlist numerous heirs in succession

<sup>595</sup> Vestergaard, 'System of Kinship', pp. 160-93.

<sup>596</sup> Vestergaard, 'System of Kinship', p. 181; Hansen, 'Concept of Kinship', pp. 195-201.

<sup>597</sup> Vogt, *Slægtens funksjon*, pp. 186-88; Vogt, *Function of Kinship*, pp. 145, 160. For distribution of compensation in the Frostathing Law, see F.6.1-45.

as the Visigothic and Roman rules did. However, the Norwegian rules mostly contain descriptions of the kin group sideways, whilst the list of the jurist Paulus copied into the *Leges Visigothorum* listed mainly ascendants and descendants.<sup>598</sup> Nevertheless, the listing of heirs extends to six degrees, which is the same as the forbidden number of degrees in Norway after dispensation given by the pope, but also the same number of degrees that we find in the Visigothic laws of 650 (see above). It is the implementation in the gradual system that made the pattern complex. Vogt argues that the system was introduced through canon law and the kinship structures found there. Based on the equally minute descriptions of relatives, it seems plausible that the Norwegian legal elite that shaped the inheritance system had been influenced by the concepts found there through transmission of canon law, but also by Roman law, and possibly through other secular law. Nevertheless, the level of detail could possibly speak more of a domestic tradition of keeping track of relatives.

The western Nordic laws seem odd in a European context, with the consistent and complex gradual system. The Code of the Realm of King Magnus the Lawmender would revolutionise the inheritance system in the Norwegian legal culture, but the complexity of the sequences was continued. In the Code, a greater emphasis was put on the rights of female relatives to inherit, and the gradual principles were modified in the direction of parentela. However, it is difficult to establish whether these were slow changes already taking place, or if the shift from the patrilineal preference was an ideology influencing the administration of King Magnus (r. 1263-1280). Vogt concludes that the modification of the patrilineal tendency was a reaction to influence from Roman and canon law in the same period.<sup>599</sup> It is nevertheless significant that the legislator strengthened the emphasis on legitimate heirs (MLL.5.7.1). Legitimate sons of legitimate parents would first in line for inheritance. Hence, whether Ego was born in wedlock himself mattered and continued to be a presumption for the default system.

The major break from the provincial laws was the Code of the Realm giving admission of inheritance to daughters by right. According to the laws of King Magnus daughters would share with their brothers, although only half of their brother's portion, i.e., in the ratio 2:1 (MLL.5.7.2). The Norwegian law now was in line with the principles established in Danish law before 1200. If the deceased had no sons, then surviving son of sons inherited by representation. However, the ratio would not follow a division per *stirpes* as the earlier

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<sup>598</sup> *Leges Visigothorum*, MGH, LL nat Germ, 1, pp. 171-173, LV.4.1.1-6.

<sup>599</sup> Vogt, *Function of Kinship*, p. 178.

European legislation, but the son's son would share equally with a daughter. In this instance, a daughter would receive a full portion, and the grandson would thus get less than his father would have if he were alive, different from the abovementioned Danish principle of grandchildren receiving what their parents 'would have taken, if they had lived'. This principle reveals both a favouring of children over grandchildren, and a continued patrilineal emphasis with son's son coming before other grandchildren (see figure 12). If there were no surviving children, then the father would have the property of the deceased before grandchildren (MLL.5.7.4), a principle that continued the prioritisation of ascendants over descendants. Equality of the sexes did not reach beyond daughters. The principles of representation were not even applied to the first parentela, the exhausting of a parentela before moving to the next. Also allodial land, *óðal* (*odel*, see below), would follow the principles of representation through only one *stirpes* (MLL.6.1.1), and would not be divided equally within the parentela. The default inheritance system in the Code of the Realm still comprised mainly gradual principles.

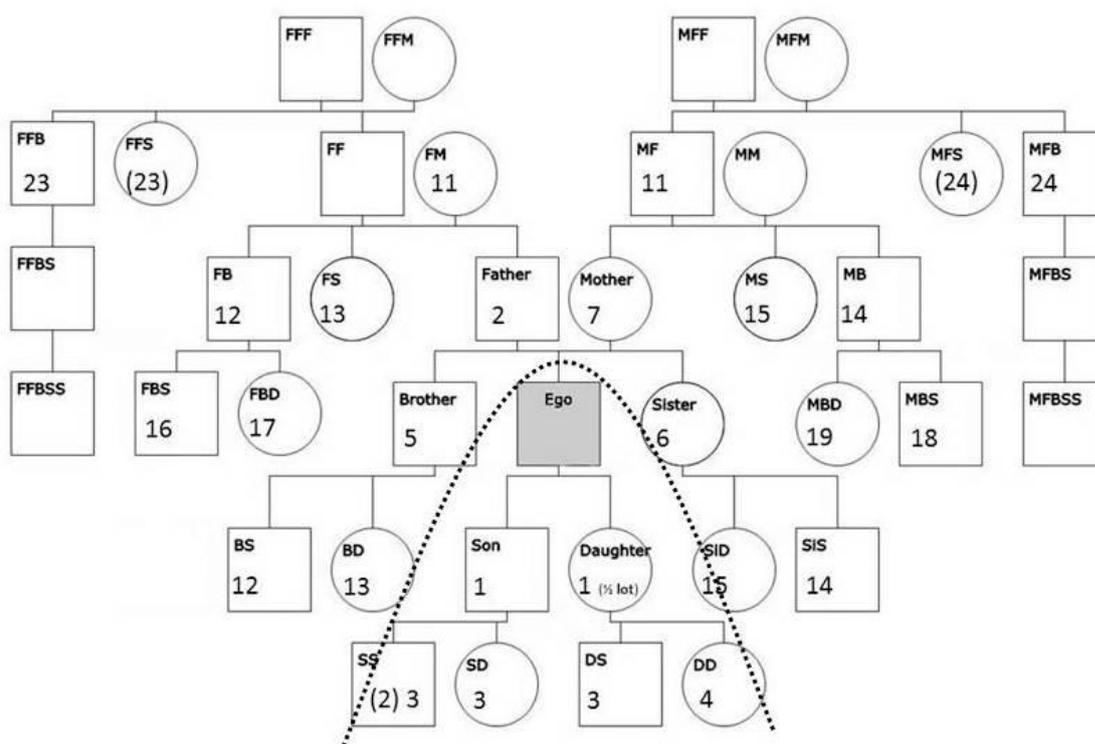


Figure 12: The inheritance system presented in the Code of the Realm from 1274, here presented with only a fraction of the listed heirs in the law. The half siblings in each level and illegitimate offspring are omitted from the geneogram.

Sisters were followed by the mother of Ego, thus becoming the seventh in line, pushed back from the provincial codes. One explanation for this shift could be to ensure that the descendants of Ego's father would inherit before a possible backwards inheritance into the

mother's line and other children. The same applied to a woman's inheritance: her offspring would have her property before her husband (MLL.5.7.6). Then the prescribed sequence of heirs broke up into a gradual system favouring paternal heirs over maternal, and men over women, similar to the provincial laws. Male heirs should come before female relatives of the same degree, but women more closely related came before more distant men in the order of succession outside the closest kin group. The rules continued with the criteria of sharing the lots by branches (*stirpes*) in the more distant relations, as described in the division among grandchildren. In the division between the twelfth heirs, father's brother and brother's son (MLL.5.7.10) provide some insight. If there were several of either category of relatives, then the inheritance was divided by lot between the branches, here the two sons of Ego's grandfather: one branch being Ego's father (represented by the brother's sons) and the other branch being Ego's father's brother. Each branch would receive an equal part, and this should be divided among the designated heirs within the branch. The principle of division into *stirpes* points in the direction of influence from Roman law, although the principles could of course be transmitted through canon law as Vogt suggests. The dividing between branches also resembles thinking of kinship in parentele. The Code of the Realm appears as an intricate mix between the two systems prevailing in the Nordic region, suggesting that the late-thirteenth century was a time of transformation regarding regulation of inheritance.

The compilers of the law dedicated space, and not least parchment, to sections of the continuing list of heirs, which appear as a web of relatives from the paternal and maternal side sharing the lots. The order of succession was complicated further with including in the default system all relatives who were born in wedlock, but only sharing one parent.<sup>600</sup> Thus, the legally born half-sister of Ego's mother who shared the same mother would be the thirtieth heir. This possibility of multiple spouses and children born in concubinage, serfdom or under other conditions were specified in detail and allocated a position around Ego. As we saw in Salic law, the legislators would naturally be aware of such family constellations, but the minute description of each is unique in medieval law.

Finally, the illegitimate daughter was the rightful heir, if all known relatives within the second canonical degree were absent.<sup>601</sup> After her, all illegitimate offspring of the previous and all relatives to the fourth degree would be entitled the inheritance, and in last resort, the property of the deceased fell to the king.

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<sup>600</sup> *NgL* II, pp. 82-84.

<sup>601</sup> *NgL* II, p. 84.

Apart from the admission of female inheritance and prioritising descendants, little novelty was added to family law by King Magnus. One notable exception was a finger pointed towards the wake, which was called an *erfis*: an inheritance banquet. These wakes, according to the text, appeared to the king more as commotion than penitence, hinting that the wakes turned into drunken riots (MLL.5.25). The legislator wished to fine both the host and the participating guests if funerary feasts got out of hand. Although interesting in terms of social behaviour, the significance concerning inheritance is perhaps limited, but it does suggest that the legislator assumed the kin would, shortly after a member's passing, gather either at the residence of the already appointed heir, or to decide the heirs who would share the property. The latter alternative could be reason enough to cause brawls.

We can view the legislation in Scandinavia on landed property and allodial land in light of the legislation of ancestral land versus bequeathed land; *terra sortis*, *terra salica* and *bockland/folcland*. Though the Scandinavian definitions of these categories of land did not presumably derive from the earlier European concepts, they share some basic principles regarding inheritance and compare as ways to differentiate status of land and landownership. In Nordic laws, the restrictions on alienation of allodial land were taken further than earlier European regulations, with the Norwegian Code of the Realm being the extreme in favouring the kin group, especially the patrilineal side, in retaining land with particular status of *odel* (ON: *óðal*). In the thirteenth century the right of *odel* had developed into a right for relatives of pre-emption of land with the status of *óðal*. Land required the status of *odel*, after being held within the family for a specified length of time. In this way, it was the opposite of the principle of *ius recadentiae*, seen in the Frankish laws, where the family's rights of redeeming land was immediate after the death of the holder.<sup>602</sup> Similar rights to pre-emption and redemption of land developed in the Danish landscapes, called *lovbydelse*, and Swedish landscapes, called *bördsrett*.<sup>603</sup> The Norwegian *odel*, however, developed into the system with the longest time prescription and, as stated by Vogt, 'the strongest expression of the rights of first refusal of the kin.'<sup>604</sup> Therefore, a short outline of the Norwegian *odel* will be made as a case to be contrasted with systems of allodial land in earlier secular legislation. The geography of the Norwegian area of the Scandinavian peninsula is mountainous and sparse in arable land. The scarcity of accessible and fertile soil would have caused pressure on land during the increase in population during high medieval period and as a result led to strict

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<sup>602</sup> Murray, *Germanic Kinship Structure*, p. 213.

<sup>603</sup> Gelting, 'Odelsrett'; Vogt, *Function of Kinship*, pp. 215-21.

<sup>604</sup> Vogt, *Function of Kinship*, p. 213.

regulations within society. Helle Vogt has suggested the same, and she contemplates whether landowning was more prestigious in Norway, as opposed to Sweden and Denmark.<sup>605</sup> The latter two kingdoms consist of larger areas of cultivatable land, greater possible acres and a better climate for agriculture. Interestingly, the republic of Iceland did not introduce the *odel* land. Climatically, Iceland had even harsher conditions for both cultivation and animal husbandry than Norway.<sup>606</sup> However, the institution did not occur in the Free State laws in *Grágás*, and attempts to introduce such rights with *Jarnsiða* were rejected.<sup>607</sup> Compared to legislation on allodial land in the Germanic kingdoms, it is a point that their regulation derived from an appropriation of originally Roman land. In the forming Norwegian state, power over arable land could easily become part of the general power struggle. The motives for regulating were nevertheless based in the need to define land, both to distinguish between ancestral land and bought land, and between ancestral land and royally given land. Even if the concepts may have their roots in continental ideas, the common features of the laws probably came from similar solutions to similar problems, and not transmission of law. As Michael Gelting has credibly suggested, the Nordic regulations on ancestral land should be seen as being influenced by canonical and secular regulations from the late-twelfth century concerning the kindred's right to pre-emption of family land, like the French institution of *retrait lignanger*.<sup>608</sup>

The regulations on *odel* land were incorporated into written law, although they probably existed in some form from at least the tenth century. The restrictions of the legislating authority expanded and refined the institution in the twelfth and thirteenth centuries. Few sources from before the late-twelfth century are extant, and those that survive reveal few reasons to believe that *óðal* rights had the elaborate design that they had in the thirteenth century. Vogt and Gelting asserts the *odel* rights of pre-emption by family with time prescriptions to have first been cemented in the thirteenth century.<sup>609</sup> It is plausible that the institution of *odel* rights became connected with landownership and rights to purchase within the kin group only at that point. Vogt points to the small number of references in sources

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<sup>605</sup> Vogt, *Slægtens funksjon*, p. 260.

<sup>606</sup> Although one should be careful with making assessments on medieval agriculture: Umberto Albarella, 'The Mystery of Husbandry: Medieval Animals and the Problem of Integrating Historical and Archaeological Evidence', *Antiquity*, 73, (May 1999), pp. 867-75.

<sup>607</sup> Gelting, 'Odelsrett', p. 147; Auður G. Magnúsdóttir, 'Islänningarna och arvsrätten', pp. 27-38; Knut Robberstad et al., 'Odelsrett', in *Kulturhistorisk Leksikon for Nordisk Middelalder*, vol. 12, (Copenhagen: Rosenkilde og Bagger, 1967), pp. 493-503.

<sup>608</sup> Gelting, 'Odelsrett'.

<sup>609</sup> Vogt, *Function of Kinship*, pp. 211-12; Gelting, 'Odelsrett', p.133-52.

covering the centuries up to 1200. The sagas have very few examples, and were anyway only committed to writing in the thirteenth century when the concept possibly formed. The saga by Snorri Sturluson of King Haakon (918?-961) *aðalsteinsfóstri*, ‘reared by Æthelstan’, the English king, provide some reference to the concept being in use earlier. Snorri has Haakon give back the privileges of *óðal* (odel rights) to the landowners as thanks for being accepted as king at the assembly at Frosta.<sup>610</sup> Snorri could have anachronistically backdated the important issues of landowners in the thirteenth century to the tenth. Or, it could have been a myth passed on, indicating that the concept had developed at some point before the thirteenth century, although the meaning of the term might have been different. King Haakon is assumed to be the establisher of the laws at Gulathing, and he could also be used as an appropriate mythical establisher of the institution for the landowners in the 1200s. King Magnus Erlingsson’s (r. 1161-1184) amendment demanded that outlaws forfeited all their property, and specified that this included odel land (F.5.44).<sup>611</sup> The rule is easily compared with the above-mentioned rule of Cnut, demanding that even bookland would be forfeited by deserters. It is also worth mentioning that G.24, on intercourse with closely related women, states that a man should forfeit ‘every penny of his estate, both land and movables’, but does not add an emphasis on odel land like the section in the Frostathing’s Law. However, in another rule it was stressed that odel land, not bought land, could be part of the compensation (G.223).<sup>612</sup> Surely, odel land or rights was an established concept with a dynamic content in the tenth to thirteenth centuries, similar to the institutions of *sors*, *terra salica* and bookland, even if there need not have been a transmission of the concept, but rather a similar solution to a similar topic of giving land a particular status.

Regulations in Gulathing’s Law reveal the decisive favouring of male owners of land with odel rights in instances of sole female heirs to odel land (G.275). A specified group of female paternal relatives would have the right of odel if none of the male members of the paternal kin group existed.<sup>613</sup> Still, the prior claim of pre-emption would fall to the first son any of the women in this group. And if a male relative bought out a female, and he had a daughter while she had a son, the son would again have prior claim to redeem the odel. In this

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<sup>610</sup> Snorra Sturlusonar, ‘Saga Hákonar góða’, in *Heimskringla*, ed. by N. Linder og H. A. Haggson, vol. 1 (Uppsala: W. Schultz, 1870). , no.1 ‘En þar í mót bauð hann þeim at gera alla bændr óðalborna ok gefa þeim óðul sín er á bjoggu’. However, it is not given that the term *óðal* has the same meaning here.

<sup>611</sup> ‘íamvel óðalsiörðum sem öðrum’. Vogt suggests the privilege found its form with Magnus Erlingsson’s legal reforms in the 1160s. *Slægtens funksjon*, p. 257.

<sup>612</sup> Thanks to Jørn Øyrehagen Sunde for pointing out this rule.

<sup>613</sup> They were the daughter, sister, paternal aunt, brother’s daughter and son’s daughter, i.e., all daughters of paternal relatives and heirs.

manner, the lawmakers saw the privilege of *odel* protected within the patrilineal group, always falling back into the pool, following the same family-tree, albeit changing between branches of the family.<sup>614</sup> The institution of *óðal* in Norwegian laws used the same intervals as the marriage regulations. The incest prohibitions were seven degrees by the canonical mode of counting, while the Norwegian archdiocese had obtained a dispensation of six degrees from the pope (G.24).<sup>615</sup> It could also be interpreted as a reference to the Fourth Lateran Council's downscaling of the incest prohibitions to four degrees. Michael Gelting takes this specific rule as a reference to the fourth degree, and subsequently asserts the rule to be from shortly after 1215.<sup>616</sup>

Of the five women with potential right to *odel*, the daughter and the sister of a man would be his representative recipients of or contributors to compensation in the absence of closer male paternal relatives. They were thus part of the unilateral kin group, called *bauggilde* (*baugilldis*).<sup>617</sup> The paternal female relatives of the *bauggilde* were therefore termed *baugryge*. In the Code of the Realm, King Magnus, although allowing some preference to females in relation to certain inheritance rights, specified that in the division of property containing *odel* land among several children, similar to Danish rules, the sons would have *odel* land and the daughters the other land plus movables (MLL.5.7.3).

The Norwegian legislation on *odel* land tells the story of a strengthening of the rights of kin from the thirteenth century, when the institution reached such a form in the laws, and on to the time of the Black Death, when this no longer mattered.<sup>618</sup> Subsequent kings strengthened the rights of kin to *odel* land throughout the thirteenth century and decreed the most extreme favouring of heirs within the kin to the detriment of outside buyers in the fourteenth century. To gain *odel* rights, a family must have held the land for sixty years, and

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<sup>614</sup> Moreover, the branch that did not hold the property did not entirely lose the rights of *odel*. If the other branch died out, the law explains that 'They [the branches of the family] are not separated from the *odel* until the one who belongs to one of the branches can marry the daughter of the one belonging to the other' (G.282). My translation of the Norwegian text in Robberstad *Gulatingslovi*, p. 257. The original abridged wording: 'En eigi skiliasc oðol med þeim at helldr fyrr en hvártveggia ma eiga dottor annars', *NgL* I, p. 94.

<sup>615</sup> Which also can be detected in the Gulathing Law G.266.

<sup>616</sup> Gelting, 'Odelsrett', p. 135.

<sup>617</sup> The term stems from *baug* – the rings of gold or silver used as currency to stipulate compensation, fines, and as royal gifting in the sagas and poetry. The paternal line originally paid the compensation, hence the term *baug* retained its link to the paternal kin group.

<sup>618</sup> The population was significantly reduced in the plagues, and many estates became ownerless and land abundant in a kingdom with so little fertile soil, hence the term *ødegård* (deserted land). See Jørn Sandnes, *Ødegårdstid i Norge. Det nordiske ødegårdsprosjektets norske undersøkelser*, (Oslo: Universitetsforlaget, 1978); S. Gissel, E. Juttikkala, J. Sandnes, and B. Teisson, eds, *Desertion and Land Colonization in the Nordic Countries c. 1300-1600: Comparative Report from the Scandinavian Research Project on Deserted Farms and Villages* (Stockholm: Almqvist & Wiksell International, 1981).

when having odel rights to land, the right of redemption lasted sixty years after selling it to outsiders (MLL.6.2-4). Gelting argues that from the transmission of these kinds of institutions protecting particular family land, the strengthening of odel was not a reaction from ‘a kin-based society on the defensive against the influence of royal ecclesiastical power and learned law’, but to secure the land for the kin group.<sup>619</sup> The time limitation appears extreme in Scandinavian circumstances, but it can be compared with time limitations found in Visigothic and Lombard law, which increased with geographical distance in relation to independence from the Roman empire. Although a transmission of the rights to odel is far-fetched, it is conceivable that the legal elite dealing with odel in the Code of the Realm knew of similar examples from early medieval secular law and were influenced by regulation of land in the earlier laws.

### 8.3 Swedish provincial laws

The Swedish provincial laws were, with exception of the early Västgöta Law, issued in a fairly concentrated time period, from the last decades of the 1200s and through the first half of the 1300s. The Older Västgöta Law originated sometime in the early 1200s, contemporary with the Danish and Norwegian legal enterprise. The other Swedish provincial laws that are extant are contemporary with the Norwegian Code of the Realm from 1274. The tradition of written laws thus originates later than in the rest of Scandinavia. However, this was also the most active period of secular legal enterprise in medieval Europe, which probably was the very reason for writing down law in the Swedish landscapes.

The different landscapes seem to have produced these laws by local legal activity. Still, the extant copies received royal sanction, if we are to believe the surviving documents.<sup>620</sup> In the consolidation process of the kingdom in late-thirteenth century, the Swedish provincial laws were promulgated by royal decree: the regency of minor King Birger (r. 1290-1317) saw the promulgation of the Law of Uppland and revision of the Östgöta Law. In the reign of his successor, Magnus, the Hälsinge Law and the Södermanna Law were promulgated. Through these actions, we can imagine that the king decided the contents and the differentiation in their contents. Or, that the provincial assembly, together with the thingmen did and that it was given a royal stamp of approval afterwards. However, we must

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<sup>619</sup> Gelting, ‘Odelsrett’, p. 147.

<sup>620</sup> Vogt, *Function of Kinship*, pp. 52, 76-77.

assume that the laws were formed and accepted in the province, and thereof not rejected by the local legal culture. Hence many of the same individuals from among the legal elite must have been involved in the design of the provincial law, and the continuous work would have made these legal advisors transfer and accumulate legal concepts to successors. The shape, form and contents of the provincial laws are also very congruent, and the relationship between them undisputable.

Therefore, the question emerges as to why there are such important differences between the Swedish provincial laws when it comes to both the principle of female inheritance and to the inheritance system as a whole. The problem arises from treating the Swedish provinces as a congruent political unity, which they were not.<sup>621</sup> Consolidation of the Swedish state in the thirteenth century was lacking. The landscapes that formed the Swedish kingdom comprised of regions with separate identities.<sup>622</sup> The eastern laws presented the parentela principle with female rights and the western a gradual system where women only inherited if their male collaterals were absent. Moreover, we find in the Swedish Code of the Realm from around the 1340s,<sup>623</sup> a merging of the two systems, and regulations allowing women to inherit with their male relatives (MEL.Ä.1-11). Most of the Swedish laws were arranged in sections by subject, and we find the inheritance and marriage sections closely connected.

Neither version of the Västgöta Law has this royal stamp. Based on the content, historian Thomas Lindkvist argues that the older Västgöta Law stands out from the other provincial laws.<sup>624</sup> He also finds the lack of royal promulgation of this law as a sign that royal power was weaker within the province than in the rest of the realm, and that the regional elite, influenced by international law, were involved in forming the contents of the law.<sup>625</sup> The lawmen had a strong position in the law-making, and the lawman Eskil was involved in formation of the written law for Västgötaland in the early decades of the 1200s.<sup>626</sup>

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<sup>621</sup> See, for instance, Lindkvist, *Plundring, skatter och den feodala statens framväxt*; Line, *Kingship and State Formation*, pp. 69-149.

<sup>622</sup> *Götaland and Svealand*. See, for instance, Line, *Kingship and State Formation*, p.35.

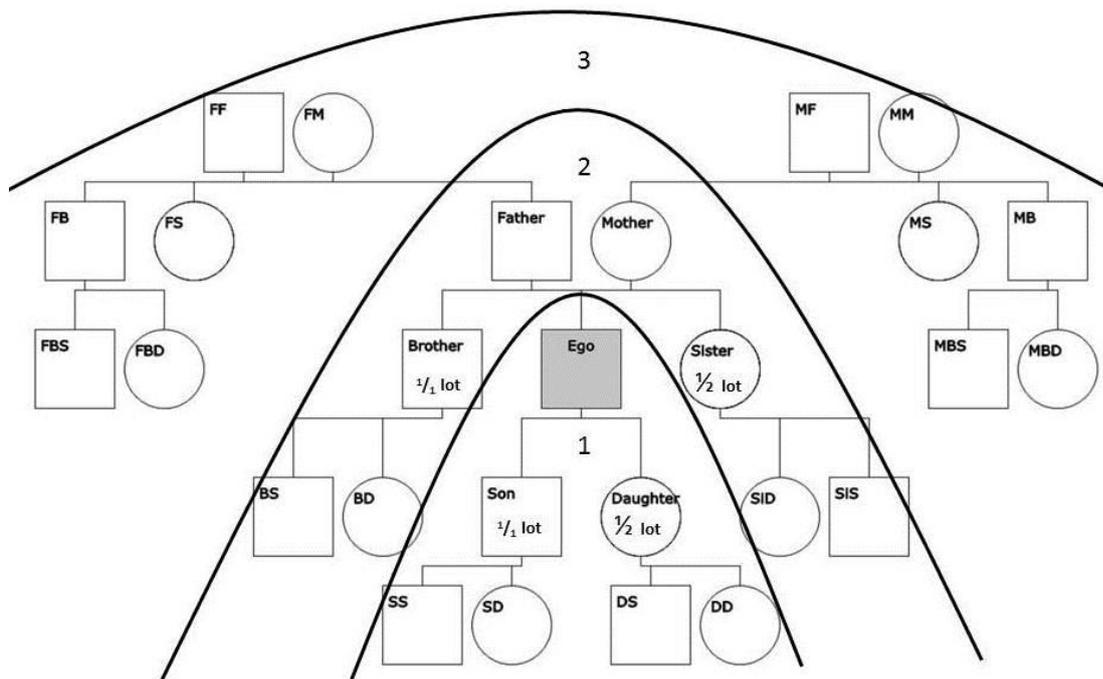
<sup>623</sup> The date of issue is uncertain, see Åke Holmbäck, 'Innledning', in *Magnus Erikssons Landslag i nusvensk tolkning*, ed. by Åke Holmbäck and Elias Wessén, (Stockholm: Awe/Gebbers, 1962), pp. xiii-lxix (pp. xxx-xxxi).

<sup>624</sup> Thomas Lindkvist, 'The Land, Men, and Law of Västergötland', *New Approaches to Early Law in Scandinavia*, ed. by Stefan Brink and Lisa Collinson, Acta Scandinavia, 3 (Turnhout: Brepols 2014), pp. 89-97. Lindkvist actually only uses the term *provincial law* for the older Västgötalaw, because the others were royally sanctioned.

<sup>625</sup> Lindkvist, 'Land, Men and Law', pp. 91, 96.

<sup>626</sup> Åke Holmbäck and Elias Wessén, *Svenska Landskapslagar V: Äldre Västgötalagen, Yngre Västgötalagen, Smålandslagens kyrkobalk, Bjärköarätten* (Stockholm: Awe/Gebbers, 1946), p. xix.

Following the divide of the Nordic laws into an eastern and western legal culture, the eastern Swedish laws applied inheritance by the system of parentela. Thus, the laws of Uppland, the Hälsinge Law and Södermanna Law exhibit the principles we recognise from the Danish provincial laws (UL.Ä.11, HL.Ä.11, SmL.Ä.1). One parentela should be exhausted before moving on to the next parentela, so that even great-grandchildren inherited before siblings of Ego. As in the other Scandinavian laws, the Swedish inheritance system was not of a strict parentela; relatives of same degree but different sex inherited unequally. Like the Danish laws and the principles introduced in the Norwegian Code of the Realm, females would take a half-lot of the male collaterals. However, the favouring of descendants implied that closer female inheritors would inherit the whole lot before more distant male relatives, as the parentela system presupposes. The principle of a half-lot also extended to sisters of Ego who would take a half-lot of a brother (UL.Ä.12, HL.Ä.12, SmL.Ä.1.1). Also, the division of property when representation occurred was conducted in a similar fashion to the Danish. The laws exhibited a consistent use of the parentela system, by representation and by collaterals in each joint, who came into inheritance equally. Still, the unequal division of full lot and half-lot would follow the branches of descendants according to the gender of the first heir (UL.Ä.11, HL.Ä.11). Thus, the children and grandchildren of the sister of Ego would inherit a half-lot to those of Ego's brother, even if they were male. These restrictions to the branch of female heirs reveal a patrilineal tendency in the parentela system. The principles may have been included for the same reasons that were suggested regarding the Danish laws, to secure the transfer of the family property to future male generations. Although the influence for the shape of the inheritance principles came from outside sources, the patrilineal tendencies could have come from the interests of the local elite.



**Figure 13: The inheritance system found in the eastern Swedish provincial laws of Uppland, Hälsingeland and Södermannaland. Daughters received a half-lot of the sons, similar to the Danish mode of division.**

The Law of Uppland states that inheritance could not go to the fifth degree (UL.Ä.11). This is of course unsurprising, since the Swedish provincial laws were issued several decades after the Fourth Lateran council. The need to point this out even at this point could be an argument for the view that canonical teaching was perhaps not at the front of people's consciousness. Still, it may merely be a remnant from earlier and a demonstration of the conservativeness of law. As Alan Watson argued, it would be easier to copy earlier law, than to reformulate the passages.<sup>627</sup>

The western Swedish laws followed a gradual system, although to our eyes, neater than the strange division in the Norwegian laws, in that fewer relatives were listed, and that the order of heirs seem to follow the close family group according to bilateral principles, before more distant relatives. In the older Västgöta Law, daughters were excluded from inheritance if Ego had sons, or children of sons, a trait that was continued in the later Dala Law and Västmanna Law (DL.G.11, VL.Ä.11, VgL.Ä.1). The same three laws excluded sisters if there were brothers. The system in the late thirteenth century laws follows principles of a cognatic kinship group, where relations were counted through both the male and female line. Descendants were prioritised before ascendants, which can be interpreted as an influence of the parentela principles, as we saw in the Norwegian Code of the Realm. The

<sup>627</sup> Watson, *Legal Transplant, An Approach*, passim.

Västgöta Law has been compared with the Norwegian laws in content and terminology, although Lindkvist argues that direct loans have not been identified.<sup>628</sup> Holmbäck and Wessén have pointed to the Norwegian connection of the lawman Eskil, who met with King Haakon Haakonsson (r. 1217-1263) on several occasions.<sup>629</sup> King Haakon revised the Norwegian provincial laws. The main principle in the western Swedish laws was an emphasis on the patrilineal side. The basic order of inheritance was that sons inherited together with daughters, but daughters took half of what their brothers received, and both inherited before the father of Ego in the Östgöta Law and the younger version of the Västgöta Law, both originating in the late-thirteenth century (ÖgL.Ä.2.1, VgLY.Ä.1). Thus, the principle of a half-lot for women also entered the gradual system, again similar to its introduction in the contemporary Code of the Realm from Norway. The mother came next, followed by the brother of Ego and then the sister.

We see in the late-thirteenth century laws the remains of tensions in society between allowing women to inherit, or not, together with their collaterals. That daughters inherited a half-lot with sons was perceived as a novelty among both the legislators and the subjects to which the change had to be explained. A specific framing of the new regulations in inheritance legislation and their perception can be found in the Östgöta Law. The text includes a specific reference to daughters being joint heirs as ‘new law’ (ÖgL.Ä.2).<sup>630</sup> The disregard for the principle in the case of sisters, aunts and nieces in the same rule, and a return to the principle in the following rule (ÖgL.Ä.3), suggest a conscious introduction of female inheritance in the Swedish realm, somewhat reluctantly in the areas where sons and male relatives had traditionally been the obvious first heir. The ÖgL.Ä.2 describes how sisters claimed their share of the property according to the new law, while their brother got the whole inheritance earlier ‘under the old law’. The possible disputes in this period of change might have called for legislation on the matter.

Introducing rights for women to inherit together with men must have been a change due to transmission of legal ideas. We learn several points from the legal text itself. First, the change came in the late-thirteenth century, similar to Norway. Second, the legislators felt the need to explain the change in the text, which reveals the challenges of introducing it to the Swedish landscapes. Third, the legislators’ explanation of old law and new law reveals an anticipation of change in practice as well as in written law. Following the theory of Alan

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<sup>628</sup> Lindkvist, ‘Land, Men and Law’, pp. 94-95.

<sup>629</sup> Holmbäck and Wessén, *Svenska Landskapslagar V*, pp. xx-xxi.

<sup>630</sup> See also Holmbäck and Wessén *Svenska Landskapslagar I*, p. 136 n. 8.

Watson and Pierre Legrand of how law changes, the adjustments to the transmission of law were commented on in the text itself. Elsa Sjöholm believes that the merger of parentela principles into the gradual system in the younger Västgöta Law and the Code of the Realm to be a compromise, implying that there was a tug of war between interested parties within the community.<sup>631</sup> Lars Ivar Hansen has pointed to the effects of the gradual system and the patrilineal principle of keeping property together, and that patrilineage was a reaction to the increasingly centralised power of the kings.<sup>632</sup> Helle Vogt asserts that the differences in the Swedish laws are a reflection of an ongoing discussion in society coinciding with the legal work, or as a result of it.<sup>633</sup> We must assume that the legal subjects' interests put pressure on what principles became part of written law in this respect. The change in the inheritance laws to accord more with the gradual system probably came through a transmission of law, but from where? The most obvious explanation is that the legislators shaping the western Scandinavian laws were influenced by the prevailing principles in the eastern laws of Sweden and Denmark. If the Västgöta province had already been influenced by Norwegian laws, the change in the Norwegian Code of the Realm would be another example to be copied. Regarding the inheritance of daughters in the Danish laws, arguments were that the right came from canon law teachings, and that the restriction to a half-lot could be due to influence from secular Germanic law. Swedish inheritance laws were possibly subject to similar influences, if not Danish law directly. At least we can say that the legal elite participating in shaping the provincial laws of Sweden were updated. In the obscure Swedish provincial Law of Gotland, a distinction between the Gotlanders on the island of Gotland and the non-Gotlanders elsewhere was inserted into the text (GL.24.5), who Holmbäck and Wessén holds to be the Swedes.<sup>634</sup> The point of the differentiation was that Gotlanders followed local rules on family property and not necessarily the mainland norms. The section following obliged Gotlandic brothers to provide for the wedding of their sisters, probably if fatherless, or give a sister only an eighth part of his property (GL.24.4). We could assume that the medieval laws of Gotland kept more in line with the conservative western Nordic legal culture, although the age of the manuscript of the Law of Gotland calls for caution. The women possibly did not receive inheritance rights with their brothers, as in the eastern provinces.

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<sup>631</sup> Sjöholm, *Sveriges medeltidslagar*, p. 124.

<sup>632</sup> Hansen, 'Slektskap, eiendom og strategier', pp. 122-38.

<sup>633</sup> Vogt, *Slægtens funksjon*, p. 214.

<sup>634</sup> Holmbäck and Wessén, *Svenska Landskapslagar IV*, p. 275 n. 19.

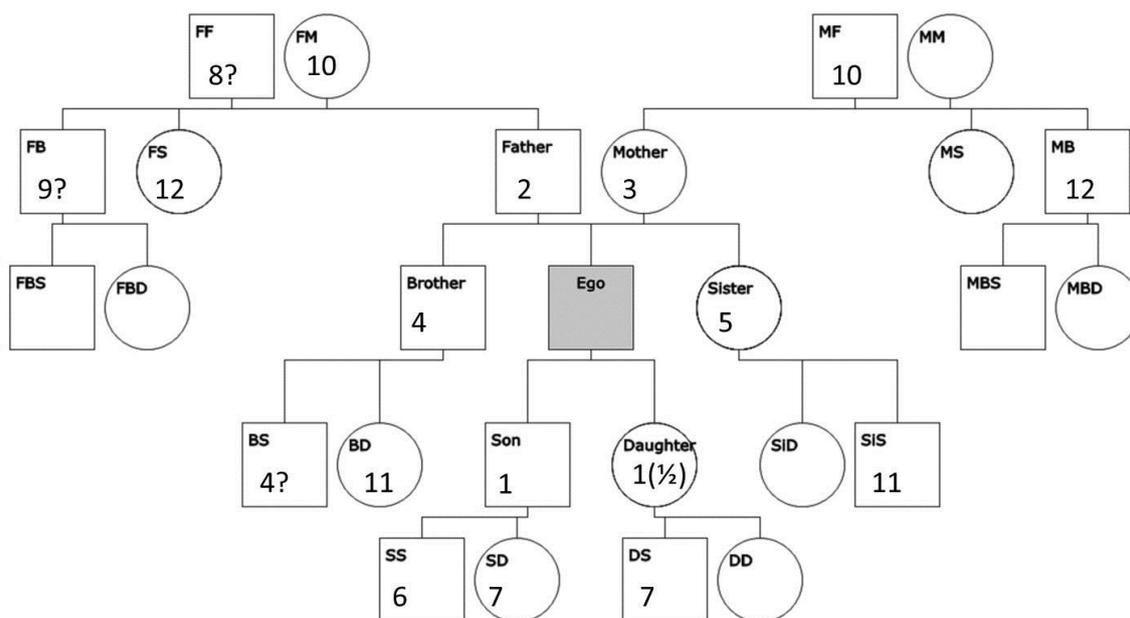


Figure 14: The inheritance system of the Östgöta Law, showing some unmentioned male relatives (with question mark), which leaves us guessing. The gradual system includes some parentela principles, such as prioritising descendants and equality between collaterals.

The order of sequence in the Östgöta Law juxtaposed the female relatives on the patrilineal side with the male relatives on the matrilineal side upwards, and sons of female relatives with daughters of male relatives downwards, exactly the same as what we see in the Norwegian laws (ÖgL.Ä.2-3). Daughter's daughters or great-grandchildren are absent in the texts. Like in the Norwegian Code of the Realm, grandchildren were ranked, favouring male descendants. Moreover, the children of siblings are listed omitting the brother's son. However, the Östgöta Law includes the principles of representation and a division according to *stirpes*. Nephews of Ego were therefore probably meant to take their father's share. We could ask, though, if that implied that daughter's sons would have a half-lot, and son's daughters a full lot. The text stipulates that each branch should take half (if two heirs are of different branches), and does not elaborate on a calculation between the branches like we saw in the eastern Swedish laws, and in the Burgundian and Danish legislation. Another question that arises is how far down the branch of Ego's siblings a share would be passed on before moving upwards again. The Östgöta Law maintained a prioritising of descendants over ascendants. It was explicitly worded that if descendants existed, then the ascendants would step back (Ögl.3.2). However, this only applied if ascendants and descendants of equal degree

were both male. Female would be favoured as the closest relative, but step back if equally related with a male. The Dala Law gave the half-siblings', including daughters', offspring priority before more distant relatives (D.G.11), something that can suggest that the legal norm was that descendants should be exhausted before ascendants came into inheritance. The total picture reveals the same tendencies as we saw coming through in the Norwegian Code of the Realm above: the law follows a gradual system, but with a slight leaning towards parentela principles, which was a prevailing ideology in European legal thinking in the late-thirteenth century and thereafter.

We find provisions for the complicating factors of family life. The older version of the Västgöta Law addressed the problem of several marriages for both man and woman. If a man had a different set of children with three successive wives, then the property would be divided into three equal parts, but the oldest set of children divided inheritance first, and then the next (VgL.Ä.5). If the woman had three successive husbands, the children from the last marriage would inherit from her (VgL.Ä.6, VgLY.Ä.8). Holmbäck and Wessén interpret this as the woman having separated from the children from the prior marriages.<sup>635</sup> In the Östgöta Law, separate broods of Ego's children would inherit by capita and not by *stirpes* as long as they were legitimate; all sons received an equal share and all daughters half as much (ÖgL.Ä.3.3).

Most of the Swedish provincial laws did not allow the husband and wife to inherit from each other, with exception of the man getting the best horse, weapons and his 'church clothes' from their common property (UL.Ä.10, HL.Ä.10). It is worth mentioning here that the Danish Law of Scania, the province bordering on the Swedish landscapes, did allow spouses to inherit. The wife was even given the right to a division with the man's relatives, if the couple had no children (SL.1). If they had children, she would acquire one lot along the same lines as the children did. When spouses did not inherit from each other, the chance of losing family property into another family by marriage or backwards inheritance was weakened. However, if the parents were first in line to inherit from their children, then the chance of such happening would be increased by backwards inheritance. As pointed out earlier in this chapter, concerns over these questions related mainly to the *mother* inheriting from a couple's children. Both in the eastern and western provincial laws, the Swedish regulations have the mother inheriting before siblings or more distant paternal kin. In comparison with how backwards inheritance was addressed in the Visigothic law, the topic was afforded far greater discussion and extreme provisions in the Uppland Law and Östgöta

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<sup>635</sup> Holmbäck and Wessén, *Svenska Landskapslagar V*, p. 85 n. 19.

Law. Parents would inherit from their childless offspring, father first, then the mother (UL.Ä.14). In the Östgöta Law, a whole scenario of possible scenarios were elaborated. 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 then the relative who already had received the inheritance would prevent losing it by killing the widow, and then after her burial, suspicion arose that she was murdered and pregnant, then the community would be obliged to dig up the dead woman and cut her guts in search of a foetus (Ögl.Ä.7). Those who killed their kindred would of course be deprived of inheriting from them (ÖgL.Dr.20). The hypothetical cases of serious accidents were also addressed, in poetic forms (ÖgL.Ä.6): ‘Um kull suarf ok kiolsuarf ok kulsuarf’ – ‘On childbed inheritance and keel inheritance and coal inheritance’.<sup>636</sup> The names played on alliteration, but they concern the death of a whole family at once, in child bed, at sea or by fire. A problem in these cases was to determine who died first, the children or the parents, mother or father. The order of death had implications for the order of succession. The Östgöta Law would have witnesses or oathgivers on the case, deciding whether the father died before the child and the child before the mother, in this case making the mother’s kin rightful heirs to the father’s property.

Burning or drowning together were the examples used in other western Scandinavian laws. It is natural to include such laws, because these were quite likely incidents in medieval society. However, such detailed focus was not found in inheritance laws from the earlier European legal cultures treated in this thesis. According to the older version of the Law of Västgötaland, two mutual heirs dying at the same time neutralised each other’s claim to inheritance (VgL.Ä.13). The rule refers to two men only, keeping in line with the male-dominated language of the older Law of Västgötaland. If the men died in separate locations or together in the same house, if they burned or drowned simultaneously, then the law instructed that ‘nobody is the other’s heir’, suggesting each side should keep their property. The contemporary Norwegian Law of Frostathing concluded simply that if ‘everybody drowned or everybody burned’, the kindred should count as if they died at the same time (F.9.2). We find this again in the eastern laws, the Law of Uppland having somewhat less dramatic wordings on both pregnant buried widows and calamities than found in the Östgöta Law; if it was impossible to decide order of death, the families inherited their respective portions, the woman’s kin hers, the man’s kin his (UL.Ä.17), similar to the principles of *ius recadentiae*

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<sup>636</sup> Axel Olof Freudenthal, *Östgötalagen med förklaringar*. No. 29, (Helsinki: Tidnings & tryckeri-aktiebolagets tryckeri, 1895), p. 139.

although applied in a specific context. The Hälsinge Law, too, decreed this solution in accordance with the Law of Uppland (HL.Ä.13). A child would have to be born alive, and in sound condition, to be an automatic heir, as we saw was the criterion in the *Leges Visigothorum* and also in the Danish material, on which it quite certainly was modelled.

The Swedish laws regarding inheritance clearly originated by transmission from the contemporary Scandinavian legal family. We can sense a forced introduction of inheritance rights to daughters, and as scholars have pointed out, a discussion of these principles within the landscapes, at the provincial assemblies, and among the families. The most probable direction of influence was Danish law, but it may also have come from acknowledging similar changes in Norwegian law. In the inheritance sections, the Swedish medieval provincial laws follow the systems and principles of neighbouring written law. The late origins of the sources makes it easy to point to Danish and Norwegian influences, outside the evident adjustments in accordance with canon law, on the process of putting Swedish law into writing. Eastern and southern Swedish landscapes have laws resembling the already existing Danish provincial laws. The western provinces together with Gotland have the same gradual system and patrilineal principles as we find in Norwegian laws. As we have seen, the same principles of giving equal inheritance rights to women and to representative grandchildren and so on are evident, and the reception may also have come from other European secular and canon legal sources, or from the contemporary scholarly ideology.

### **Conclusion: Scandinavian inheritance laws**

Compared with the written laws treated earlier in this thesis, what stands out in the Scandinavian laws is the quantity of regulation stipulating a shared inheritance. The level of detail also surpasses European medieval law. So what signs of legal transmission appear in the inheritance sections of the Scandinavian laws? The similarities *within* each legal culture, and *within* the Scandinavian legal landscape, between Danish, Norwegian and Swedish legal cultures, is already well known and attested, when it comes to inheritance legislation. However, this examination of the laws proves that the respective laws should not be assumed the same, as Ole Fenger assumed. On the contrary, it has revealed distinct particularities *together with* close familiarity.

Regarding the continuity of the work of the lawmen, one would assume a higher level of direct transmission between the three kingdoms' laws. The members of the intellectual elite

had the same background, were educated in the same ideologies and should have constructed the same laws. That was not the case, and Vogt asserts that local and personal interests would influence the work of writing a legal corpus.<sup>637</sup> The legal elite would not act as a unanimous group, but intellectual currents would reach many of them and influence their work, including that of advising a ruling king in his legislation. The contemporary legal influence from learned law may have interrupted any local harmonising of the provincial laws, and opened the way for individual adaptation to European influences. However, the common legal framework of European legal thought would in itself have had a harmonising effect on the provincial laws as outside influence.

If we view the comparative likenesses in light of the hierarchy of probability, we still find evidence of transmission outside the obvious interdependence of the provincial codes in each kingdom. There was clear copying of inheritance laws within each legal culture, for instance from the Law of Scania to the Law of Jutland, and from the Law of Uppland to Hälsingland. The two extant Norwegian provincial laws mirror each other both in contents and in construction, and were obviously written from the same design. Here the Law of Frostathing is younger, and thus in its surviving form appears as the copy of Gulathing. Although there are numerous diversities in the provincial laws, there are obvious similarities on a second level: composition, motivation, argument or basis; and on a third level: comprising of procedure or sentencing assessment and other contents. The similarities to each legal culture's respective neighbour are mainly in principle and content, while the form and order of sequence were different, together with the motivations behind the rules. It is obvious that in the case of inheritance regulation in secular laws, the Scandinavian legislators had to respond to canonical teaching of particularly the Fourth Lateran Council of 1215. Legislators also commented consciously on the 'new' inheritance laws in the thirteenth century, giving increased rights to women to share with men. The most important findings of transmission regarding legal concepts are on the level of motivation and basis, with the inheritance rights of daughters with sons. First of all, the daughter's half-lot in the Danish laws can be compared with similar partitions in other secular law; both the Germanic and the early English laws treated above included regulations that either restricted or favoured daughters in relation to inheriting a portion of the property, regardless of whether brothers existed. This partitioned inheritance in several instances amounted to a third of the property. My argument is that the Scandinavian secular laws were influenced by the opportunity to maintain the family property

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<sup>637</sup> Vogt, *Slægtens funksjon*, p. 145.

by simultaneously giving women inheritance rights. The principle of allowing women rights was probably an influence from canon law, although we also saw in the Lombard laws arguments based on justice and reason for why women should inherit. The principle of giving women a half-lot was introduced as a novelty to the late-thirteenth century laws in Sweden and Norway. These may have been a transmission from similar sources, although it is more likely that a borrowing of the Danish principle caused the change, which itself was a continuation of older European legal principles.

Of the particularities in the content, we see that the level of detail in the Norwegian material cannot be retrieved in the Swedish. Such detail corresponded with Roman law texts, and transmission of Roman law into Visigothic law. It is possible that these descriptions of kin were a model for Norwegian provincial laws. The consistent application of half-lots throughout the inheritance system in Danish laws stands out from the two other kingdoms. Further, the Swedes had other content which stands out from the rest of the Scandinavian material. However, there were several instances of similar wording within the rules of different provincial laws, as in the discussion of order of death. The interest in problems such as determining the order of deaths, and the dramatic solutions posed to disputes suggested in some of the material, can be said to have local origins. It is also possible that the particularities of the Swedish law derived from influences from other sources outside the scope of this thesis. Other researchers have pointed to potential influences on Scandinavian laws and culture from Russian or eastern law.<sup>638</sup>

There was clear reception of Norwegian law in the provincial laws from Västgötaland, as others already have identified. The proximity of the region to Norwegian landscapes and the weakness of the Swedish state makes such contact only natural, as the province could equally identify with their western neighbours as with the Swedes. What is more interesting is the fact that the other western provincial laws, the Östgöta Law and the Law of Gotland, do not share the same familiarity with the Norwegian laws, although they include the same content. Rather, the Östgöta Law distinguish itself as containing the most peculiar original legislation of inheritance when it comes to elaboration and examples, although the topics within inheritance legislation were the same.

The Scandinavian laws also reveal that they contain both original material and influences from European legal culture. We can find influences of canon and Roman law in

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<sup>638</sup> Helena Bodin, *Bruken av Bysans: studier i svenskspråkig litteratur och kultur 1948-71*, (Skellefteå, 2011).; Landro, 'Kristenrett og kyrkjerett', pp. 50-51, 62 on the Norwegian rules for rites of baptism compared with the Russian and Armenian rules in the Middle Ages.

the legislators' motives to control inheritance. Even so, we see that the legal elite in Scandinavia in the eleventh and twelfth centuries also produced law in response to European legal influences. Inheritance laws in the western Nordic region contained strong patrilineal elements to frustrate the forces of equal distribution represented by canon law and Roman law. This is an example supporting Legrand's theory on how legal transmission only happens with adaptation to the new legal culture, while still not being able to avoid influence from contemporary trends.



## 9. Compensation for Homicide and Secular Law

The present chapter will primarily discuss the concept of compensation in general and what the institution of compensation was in medieval law. The theories discussed will form the basis for my survey of the sources in the following chapter. Additionally, it is necessary to place the crime of homicide and the legislation thereon into context, by discussing the motives behind secular legislation on private violence.

Compensation appeared as a solution to homicide, and many other wrongdoings, in most of the medieval secular laws. We can view the institution of compensation in many ways. First of all, it is a question of whether compensation should be regarded as *punishment* or *compensation* in the view of the legislator. Was the required sum a punishment of the killer, or compensation to the victim for the loss? The most obvious answer would be to see the required compensation as an *equivalent loss* for the offence done, although this is only an equivalent translated into worldly values and without consideration for the human loss. We should view the institution of compensation in light of *Lex talionis* and the formulated principles of ‘a life for a life, an eye for an eye’ from Exodus.<sup>639</sup> The law of talion is also found in the Code of Hammurabi (§196-197), and has been interpreted as its underlying principle.<sup>640</sup> The point of the principles in the law of talion was to curb excessive punishment and to give proportionate punishment.<sup>641</sup> In our material on compensation for homicide, the proportional measure was between the deed and the restoration. The notion of taking a life for a life, and executing the killer, might be more in line with compensating the human loss. Compensation as equivalent loss must then satisfy the experience of injustice felt by the injured party, and be in proportion to the loss. Herein lies the concept of compensation as pacifying tool, which is another way of interpreting compensation: as a *tool for avoiding vengeance*. It is also the aspect of settlement by compensation that legal historians have emphasised as important: compensation for offences to prevent further violence.<sup>642</sup> The sum would stop the injured party seeking vengeance for the misdeed. A disproportionate revenge would similarly throw the settlement out of balance. The continued acts of vengeance would

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<sup>639</sup> Exodus 21:23–27, and similar in Leviticus 24:19 and Deuteronomy 19:21.

<sup>640</sup> For a translation of the Code of Hammurabi, see Robert Francis Harper, *The Code of Hammurabi, King of Babylon: About 2250 BC: Autographed Text, Transliteration, Translation, Glossary Index of Subjects, Lists of Proper Names, Signs, Numerals, Corrections and Erasures, with Map, Frontispiece, and Photograph of Text* (London: The Lawbook Exchange, Ltd, 1904), pp. 72-73. See also, J. Dyneley Prince, ‘The Code of Hammurabi’, *American Journal of Theology*, 8, 3 (1904), 601-09.

<sup>641</sup> Fenger, *Fejde og Mandebod*, pp.186-87; Tikva Frymer-Kensky, ‘Tit for Tat: The Principle of Equal Retribution in Near Eastern and Biblical Law’, *The Biblical Archaeologist* (Autumn, 1980), pp. 230-34.

<sup>642</sup> Wallace-Hadrill, *The Long-Haired Kings*; Drew, *Lombard Laws*, pp. 25-27.

be the feud, which we know from medieval literature and in particular associate with Frankish society and the Norse societies of the Middle Ages. Stefan Esders is sceptical about such an interpretation, arguing that it disregards the complexities of the legal thought behind the regulation, and also portrays a horrible, violence-ridden society.<sup>643</sup> However, scholarly research does prove that, more often than not, vengeance or feud was an option not easily achieved.<sup>644</sup> To ‘take back’, to use the terms of Irish legislation, is in its simplest form about obtaining justice.<sup>645</sup> More complex vengeance would include restoring the honour of the dead and/or its family, and would furthermore have many kinds of messages incorporated into it.<sup>646</sup> The early continental legislation, as well as the early law of the Nordic regions, which was not produced by kings, treated compensation as *conflict resolution*. Compensation would be a solution to conflict between parties, and in the end, a tool to keep the peace. That could explain why compensation was prominent in laws that also contained much legislation on vengeance and responsibility of kinship. Roman authority would, at least in theory, be powerful enough to decree punishment instead of resolutions. Likewise, the Roman legal system would, again in theory, be sophisticated enough to execute justice without negotiating peace between the parties. As elaborated on in chapter 2, the legal systems of the successor states, the early English and Nordic kingdoms, were not.

Yet a different angle is to view the compensation as *restoration* of the potential productivity through work of the dead or injured, as an economic compensation. This theory is more in line with the contested institution of brideprice, where the family of the bride received a price for the loss of her potential productivity when she left the family.<sup>647</sup> Although this is a materialistic approach to the legal system, we should not overlook the economic impact of the death of a family member. It is also possible that the legal elite would be able to reckon the value of a life more easily in economic terms than in terms of honour or punishment. A better approach when considering the motives behind legislation is to be receptive to considering a combination of these theories of what the compensation for homicide represented to the legislator.

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<sup>643</sup> ‘das Schreckenszenario einer gewaltbereiten Gesellschaft’, Esders, “‘Eliten” und “Strafrecht””, p. 266.

<sup>644</sup> See, for instance, Paul R. Hyams, ‘Was There Really Such a Thing as Feud in the High Middle Ages?’, in *Vengeance in the Middle Ages: Emotion, Religion and Feud*, ed. by Susanna Throop and Paul Hyams (Farnham: Ashgate, 2010), pp. 151-75, and a comment by Paul R. Hyams, ‘Afterwords’, in *Vengeance in the Middle Ages*, pp. 203-220 (pp. 209-12).

<sup>645</sup> *Athgabál*. Fergus Kelly, *A Guide to Early Irish Law*, (Dublin Institute for Advanced Studies, 1988), p. 177.

<sup>646</sup> As Paul Hyams has well described in Paul R. Hyams, *Rancor and Reconciliation in Medieval England* (Ithaca: Cornell University Press, 2003), pp. 3-67.

<sup>647</sup> See Hughes, ‘From Brideprice to Dowry’; Goody, *Development of Family and Marriage*, pp. 241-42; Tveit, ‘Non enim coitus matrimonium facit’, pp. 94-101.

An extension of the materialistic view is to interpret the system of paying compensation as the mark of lacking central authority.<sup>648</sup> The responsibility of kin to contribute to the payment was a means of stalling violence through internal justice. The sharing of the compensation by the victim's family would then be means of avoiding further enmity, pacifying the relatives' responsibility to take vengeance. Thus, compensation has been interpreted as the legal system that emerges in a *kin-based society* with little legal authority. It is nevertheless an important point that the existence of feud does not mean the absence of the state, even if the absence of the state often resulted in the existence of feud. Moreover, it could be argued that the regulations on wergild that we find in secular law were a utilisation of the feud, to institutionalise modes of conflict into the legal system and thereby control it.<sup>649</sup> More than any other, the secular sources reveal that state authority acknowledged the existence of vengeance and even made it a part of the legal system. Likewise, compensation as a legal solution was an integrated part of the legal system and written law, possibly incorporated to the benefit of legislating secular authority.

## 9.1 The European concept of wergild

In several sources, compensation was given in terms of *wergild*, directly or indirectly. The definition of the term *wergeld* or *wergild* is the worth of a man's life in the Germanic languages. The etymology stems from *wer*=man, and *geld*=payment/money, (et. *Vir*:Lat, *wer*:Germ, *Gield*:AS, *gyld*:AS, *giolld*:ON). However, wergild was not the only term used to define the worth of a life in the legal sources. Burgundian law applied the Latin *pretium* with signification of 'payment', 'recompense' and 'punishment'. However, the worth of a man's life would frequently be used to stipulate an appropriate fine for an offence, or as a resolution.<sup>650</sup> For instance, Lisi Oliver has shown how compensation for physical injuries would also be stipulated in relation to the wergild.<sup>651</sup> In this thesis, the term 'wergild' will be used for where the legal sources stipulate the worth of a man.

We usually distinguish between the fines in the laws paid to the treasury for crimes, and the compensation for death or injury to people or livestock paid to the kin or to associates,

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<sup>648</sup> Frederick Pollock, 'The King's Peace in the Middle Ages', *Harvard Law Review*, 13, 3 (1899), 177-89; Fenger, *Fejde og Mandebod*, pp. 37, 306.

<sup>649</sup> See also Wormald, *Making of English Law*, p. 26, on the concept of early law, state and feud.

<sup>650</sup> Oliver, *Body Legal*, passim.

<sup>651</sup> For a summary of the ratio, see Oliver, *Body Legal*, pp. 226-31, and the appendix with charts of this ratio in *ibid*, pp. 247-61.

and therefore ‘personal’.<sup>652</sup> To pay compensation was in many ways a private settlement between the parties, but secular authority wanted to regulate matters of homicide, violence and injury. This was a part of the consolidation of power, to have power over violence and justice and to control conflict settlement. The treatment of compensation and wergild in written secular law, and attempts to define the process in cases of private violence, reveal that authorities wanted to take part in conflict settlement. Furthermore, direct compensation to the insulted side does not exclude that the deed may have been an insult to the population as a whole, and that authority would need to build a self-image of control of violence and unrest, to have legitimacy.<sup>653</sup> Even so, there were strong economic motivations for introducing or continuing monetary settlement in law, and for putting this into writing.

Moreover, we must see the use of wergild as being founded in the belief of the value of human life in and of itself. The high sums had preventive effect, but they were based on the wergild (regardless of terminology). With this basis on the wergild, the compensation could be half wergild or double wergild or other fractions and multiplications. As the sources will reveal, we also find in the rules a highly differentiated system of prices according to status, gender and age. Nevertheless, all compensation stipulated was costly. It is possible that it was considered unrealistic for those other than the nobility to pay it.<sup>654</sup>

Where did the concept of wergild and the institution of compensation come from? There are usually three explanations both in written law and in modern scholarship: as originally Germanic, a necessity of weak central power, or a product of the Church. Compensation in the laws appears as the original Germanic contribution to law, as Oliver and Stefan Esders have argued.<sup>655</sup> Usually, this theory is argued based on the lack of evidence of a concept of wergild and compensation as a solution in Roman law. The concept of setting compensation for different deeds was firmly present in the Germanic laws by the time they were put into writing. It was an institution of medieval secular law, and a method of settlement in the continental, English and Nordic legislation from the fifth to the fourteenth century. In particular, it was the solution most applied for conflict resolution and punishment in the laws treating violence and offences against other people within the community. To set compensation for offences might have been a developing institution at this point.

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<sup>652</sup> For instance, Oliver, *Body Legal*, p. 10.

<sup>653</sup> For instance, Patrick Wormald, ‘Giving God and King their Due’, in *Legal Culture in the Early Medieval West*, Patrick Wormald (London: Hambledon Press, 1999), pp. 333-57 (p. 341).

<sup>654</sup> Esders, “‘Eliten’ und ‘Strafrecht’”, p. 266. Paul Hyams, ‘Feud and the state in late Anglo-Saxon England’, *The Journal of British Studies* 40.01 (2001), 1-43 (pp. 21-22).

<sup>655</sup> Oliver, *Body Legal*, p. 10; Esders, “‘Eliten’ und ‘Strafrecht’”, pp. 261-72.

We should also remember that the early attempts to ‘mend the law’ were responses to, or in some cases, inspired by Roman law. However, Roman legislation, to a large extent, lacks compensatory conflict resolutions. The absence of such is normally interpreted as a reflection of the powerful legal system of Roman provincial authority.<sup>656</sup> On the other hand, compensation is often interpreted as an expression of kin-based societies and of weak or less ‘cultivated’ ruling systems.<sup>657</sup> The existence of what seems to be compensation for homicide in Tacitus’s *Germania* underpins such arguments.<sup>658</sup> He mentioned a certain *satisfactio* that was the redress of wrongdoings. In recent years, scholars have begun to see the legal system and the system of feud as interconnected instead. For instance, Paul Hyams has criticised the theory that compensation is a sign of a weak state, and opt scholars to ‘discern the legitimating norms through which feuds were waged’.<sup>659</sup> These more refined approaches to studying law and violence foster more complex understanding of both the legislation and medieval society. Violence, vengeance and feuding existed within the legal territories, as it did in the law, and so did compensation as an alternative to further violence.

Another theory – which is not mutually exclusive – is that the payment of compensation was encouraged by Christian authority in the unstable period from the fifth to the seventh century, all while the first Germanic legislation developed. Ole Fenger maintained that the compensatory system seen in early English legislation originated in the teachings of guilt by the Church and the emphasis on guilt (*culpa*) in canon law.<sup>660</sup> He saw the minor participation of the kinsmen as a sign of assigning guilt to the active individual, away from kinship responsibility. This would be the wish of the Church and of royal authority, not a sign of deteriorating kinship structures. Fenger points to the similar development in Scandinavia several centuries after Æthelbert’s legislation.<sup>661</sup> Nordic kings made the law in the same environment of a developing church organisation. While the Church in England was at a different stage of its development in 602 than it was around the reign of, for instance, Æthelred, it was nevertheless regaining an earlier position, not starting on virgin land. The Roman imperial presence had introduced Christianity to the island before its withdrawal in 410, and it seems that, to some degree, the religion had some continuity among the inhabitants of the British island after the disappearance of the Roman legions. In terms of Christian

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<sup>656</sup> Wormald, ‘*Leges Barbarorum*’, p. 30; Oliver, *Body Legal*, p. 9.

<sup>657</sup> Oliver, *Body Legal*, p. 10.

<sup>658</sup> Tacitus, *Germania*, in *Agricola, Germania, Dialogue on Oratory*, trans. by M. Hutton and W. Peterson (Cambridge, MA: Harvard University Press, 1914), I.21.

<sup>659</sup> Hyams, *Rancor and Reconciliation*, p. 7.

<sup>660</sup> Fenger, *Fejde og Mandebod*, pp. 187, 271.

<sup>661</sup> *ibid.* p. 271.

authority, the restoration was prompted and urged by Christian writers, like Augustine.<sup>662</sup> It is worth noting that Christianity was not unknown in the Nordic countries either before Christianity was accepted or imposed. Cultural contact by trade, warfare and migration exposed the northerners to the teachings of the cross in the centuries before the religion gained domination in the region.<sup>663</sup> These regions apparently knew both Christianity and wergild before the law was written down, but it is not possible to determine whether Christianity fostered ideas of compensation as a potential solution. Rather, it makes sense to assert that compensation was a legal solution which evolved because it was a reasonable solution to conflict.

Connections between compensation in secular legislation and the provisions of the Church can be established in later English legislation, too; in the lengthy introduction to his compilation of laws, King Alfred of Wessex (r. 871-899) explains that after Christianity spread, synods were assembled throughout the world by bishops and wise men. Here ‘they then established, for that mercy which Christ taught, that secular lords might with their permission receive without sin compensation in money for almost every misdeed at the first offence (...); only for treachery to a lord they dared not declare any mercy’ (Alf.int.49.7).<sup>664</sup> The section tells of treachery as the only non-compensational offence, and of compensation being a solution that was too merciful. The intent of the author of the introduction could just as well be both to wash the king’s his hands of prosecution of enemies and to prosper through fines from the legal system.<sup>665</sup> Still, the statement that clergy could give absolution to secular authority for extracting fines is interesting, and suggests a connection, or the notion that there might have been a connection, between Church teachings and compensation in secular law. However, whether it would be considered merciful at all times, as the law of Alfred gives the impression it was, is doubtful. The sizes of the sums demanded for homicide were indeed large. The Church was obviously connected with developing the institution of compensation, also in secular law. The institution of compensation is synchronous with the ideology of early medieval Christianity on humanity and responsibility.<sup>666</sup> The origin and aspect of punishment in the institution of compensation will be further discussed in the following chapters in the context of the legal sources.

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<sup>662</sup> Saint Augustine, *On Free Choice of the Will*, trans. by Thomas Williams (Indianapolis: Hackett, 1993 [1964]), p. 8.

<sup>663</sup> Bagge, ‘Nordic Students’, pp. 1-29.

<sup>664</sup> Translation by Dorothy Whitelock, in Whitelock, *EHD*, p. 373.

<sup>665</sup> The laws of Alfred start out with another non-compensational offence, which was to not keep an oath or pledge (Alf.1).

<sup>666</sup> Tsangaras, *Orientalization*, pp. 3-10.

We must see compensation as a combination of punishment and restoration, but maybe most of all as prevention for offences together with implementation of the notion of the value of life. A life should not be cheap. We can also view compensation as a practical solution to conflict resolution, where other alternatives were impossible or less functional, for instance, imprisonment.

Presumably, compensation was a tradition in the separate legal cultures. For that reason, it was what Koselleck called the horizon of expectation with both the legal elite and subjects within the legal culture that compensatory settlements should become part of written law.<sup>667</sup> The legislators may have had the opportunity to omit compensation from the *leges*, but they chose not to.

## 9.2 Authority and private violence

How can law on compensation express how medieval authorities dealt with private violence? The regions included in this survey coincide to a large degree with forming states, and were chosen specifically for this reason. Whether the consolidation process was successful or not, or the unities lasted, the laws can be seen in light of the authorities' power to regulate interaction between its subjects during consolidation, of which the laws were a part of the authorities' attempts to demonstrate their power. These were kingdoms in the Latin sphere, but it is arguable whether they deserved the label 'state' at all times. In chapter 1, I applied the medievalist equivalent of the Weberian definition of state to define the constitution of medieval territorial units.<sup>668</sup> According to this theory, the authority would claim common territorial boundaries of a region, and would claim monopoly on taxation of the citizens and, most important here, would have a monopoly on the use of violence within the state. The medieval authorities promulgating the laws discussed in this thesis had different opportunities and approaches to controlling violence within their borders. In some of the regions presented, we can discuss whether any central authority existed behind the law. For instance, this is debatable in Scandinavia, particularly in Norway and Sweden, where the establishment of kingship was a protracted process.<sup>669</sup> There were also varying ideas of boundaries and access

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<sup>667</sup> Koselleck, "Erfahrungsraum" und "Erwartungshorizont", pp. 349-75.

<sup>668</sup> Weber, 'Politics'; Reynolds, 'Historiography', pp. 117-38.

<sup>669</sup> See an updated view on the relationship between Christianisation and Norwegian state formation, together with a review of the historiography, in Bagge, 'Christianization and State Formation', pp. 107-34.

to taxation, but the claims were nevertheless present. We could as such treat these kingdoms as forming states, even if their executive power was uneven or non-existent.

Most of the legal sources treated here include compensation as the solution in cases of violence, before public corporal punishment. We can interpret compensation as a tool for avoiding vengeance used by secular authority, but vengeance need not have been the anticipated alternative. The ideal of restoring equilibrium is perhaps closer to the motives behind the institution of compensation. Moreover, monetary punishments could produce an income for the ruling government. Fines in excess of the wergild were prescribed in some laws; in others, the full compensation was shared between the king and victim according to a specified ratio. We rarely see substantial additional fines in the law in legal cultures without royal authority. In the early phases of formation of the Norwegian and Swedish states, the assembly (*þing*) acted independently from the king. The same is found in the age of the Icelandic republic, when there was no king, where the assembly acted as the government. A fine in addition to compensation was not part of the written law. In the Swedish laws, the province received the public fine. It would nevertheless be in the interest of centralised power to keep this type of settlement, as it would be more profitable than costly public displays of punishment.

When discussing transmission of law and influences on the legal elite, we see that the concept of *talionis* and the discussion of accepting violent or peaceful means was part of the intellectual trends of early and high medieval Europe. Augustine accepted reprisals against killers, although he encouraged people to await patiently for the vengeance of God.<sup>670</sup> Thus, vengeance was just, but degraded. He even had his interlocutor Evodius say: ‘The law of the people merely institutes penalties sufficient for keeping the peace among ignorant human beings, and only to the extent that their actions can be regulated by human government’.<sup>671</sup> To what degree did these trends permeate the legislative work?

Roman law did not interfere in conflicts between individuals or families, as a mediator. Crimes like homicide were a public matter, and the law did not acknowledge private actions, like settlements or vengeance, in any such matters.<sup>672</sup> On the other hand, Germanic law revolved around the possibility of re-establishing peace between the parties through arrangements for the settlement between parties.<sup>673</sup> Thus, it focused on re-establishing

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<sup>670</sup> Saint Augustine, *On Free Choice of the Will*, pp. 8-10.

<sup>671</sup> *ibid.* pp. 9-10.

<sup>672</sup> *Institutiones Iustiniani*, Book 4, chapter 18, and particularly §5.

<sup>673</sup> Wormald, ‘*Leges Barbarorum*’, p. 30.

peace within the community. The institution of paying compensation has thereby often been viewed by modern scholars as the result of a ‘less developed’ central power, a less consolidated power, less able to enforce ‘proper’ punishment.<sup>674</sup> However, some see other features in the system of solving conflicts through payments: for instance, Jolowicz maintains that the development of composition was a development of liability, and ‘the germ of contract’.<sup>675</sup> In his critique of legal historians’ teleological view on state and feud, Wallace-Hadrill asserted that compensation existed before the powerful state, and continued to exist after the state emerged.<sup>676</sup> He also recognised that the feud existed as well. In studies of feud and vengeance in the last half-century, historians have seen compensation as a peace-keeping tool, not necessarily equivalent with a weak legal authority.<sup>677</sup> The so-called ‘peace project’ and the crime of breaking the peace are central to the authorities’ take on regulating violence, including homicide. The opportunity to take part in these regulations could itself indicate a certain degree of state consolidation.<sup>678</sup>

From the late-tenth century, an active church movement originating in southern France sought to advance ideologies of peace in society, the Peace of God.<sup>679</sup> The Church evolved in Western Europe as a state in a world of feudal anarchy, but even so, it would be in the Church’s interest to keep the peace in society.<sup>680</sup> A stable society was in the interest of the Church not at least because of its dependence on landed property.<sup>681</sup> As keeper of the peace, the clergy were equipped with tools of imposing penance, fines and excommunication. Late Roman legal authority accepted the division of a separate legal system for the clergy.<sup>682</sup> However, the inclusion of secular cases before the canonical court developed in the early Middle Ages, both materialistically and ideologically. Gregory of Tours portrayed a violent Frankish society and leadership, but still warned agitators of civil war that ‘without peace you

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<sup>674</sup> Pollock and Maitland, *History of English Law*, I, pp. 46-48; Drew, *Lombard Laws*, p. 27.

<sup>675</sup> Jolowicz and Nicholas, *Study of Roman Law*, p. 162.

<sup>676</sup> Wallace-Hadrill, *The Long-Haired Kings*, pp. 121-47.

<sup>677</sup> See Sunde, *Speculum Legale*, pp. 56-63; Hyams, *Rancor and Reconciliation*, p. 14; Jeppe B. Netterstrøm, ‘Introduction – The Study of Feud in Medieval and Early Modern History’, in *Feud in Medieval and Early Modern Europe*, ed. by Jeppe B. Netterstrøm and Bjørn Poulsen (Aarhus: Aarhus University Press, 2007), pp. 9-67. See further Gluckman, ‘The Peace in the Feud’.

<sup>678</sup> Esders, “‘Eliten’ und “Strafrecht””, p. 268.

<sup>679</sup> Fenger, *Fejde og Mandebod*, pp. 190-91. See Thomas F. Head and Richard Allen Landes, eds., *The Peace of God: Social Violence and Religious Response in France Around the Year 1000* (Ithaca: Cornell University Press, 1992), pp. 1-18.

<sup>680</sup> Sunde, *Speculum Legale*, pp. 62-63; Vogt, *Function of Kinship*, pp. 90-91.

<sup>681</sup> Hans-Werner Goetz, ‘Protection of the Church, Defense of the Law, and Reform: On the Purposes and Character of the Peace of God, 989-1038’, in *The Peace of God: Social Violence and Religious Response in France Around the Year 1000*, ed. by Thomas F. Head and Richard Allen Landes (Ithaca, London: Cornell University Press, 1992), pp. 259-79.

<sup>682</sup> Theodosius and Valentinian gave clergy the privilege to be judged by their own, except in grave breaches on secular law (Sirm.15).

have not the grace of God'.<sup>683</sup> The Church had the opportunity to condemn, but it had few tools at its disposal to execute earthly punishments, other than opposing violence and demanding fines.<sup>684</sup> Secular authority represented the power to uphold the interests of the Church, as Augustine admits.

The ideology of King's Peace follows the same ideology, making the king protector of the peace and the authority to demand peace. Thus, a breach of the peace would be a breach against the king's law, and in itself a serious crime. The ideology evolved into the concept of the *rex iustus*, the king as embodiment of justice and protector of good law. According to these ideas of a peace, homicide constituted a crime against the king's peace. Important in the role as *rex iustus* was the ability to enforce law, but so was the capability to *give* just law. The royal legislator would mirror his honour in the laws of his kingdom. As such, we must read the inclusion of compensation for homicide in law as an expression of an acknowledgement that this was a just solution, even if the motives may have been more pragmatic or materialistic. In this way, secular laws were influenced by the peace movement.

To have legitimate power, secular authority had to check violence, particularly in the form of homicide.<sup>685</sup> The extreme version of homicide, premeditated murder, was non-compensational in many secular laws and was punished with exile, execution or other measures. The fact that this criminal action was considered unable to be compensated for can be explained with premeditated murder being considered a crime against the people among whom the murderer lived, and against their lord: i.e., it was a public offence. To make amends was not enough to create equilibrium in the affected community; the murderer had to leave society. Following, the feature of compensating for homicide, both intentional (but not premeditated) and accidental, implies that legislators considered homicide not uncommon, and an act that could be solved with relative peaceful measures. The compensational penalty would be a tool for avoiding further violence, by paying back for the loss of life at its material value. Hence, it was in this management tool of the secular state authority that we find – at least in high medieval law – a peacekeeping measure. This raises further questions about how we interpret the legal rules on the satisfaction of the family of a homicide victim; do the legislators portray the family as victims of a crime or possible avengers? As poor wronged

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<sup>683</sup> Gregory of Tours, *History of the Franks*, 5.prologue.

<sup>684</sup> Fenger, *Fejde og Mandebod*, pp. 191-92; Christof Rolker, *Canon Law and the Letters of Ivo of Chartres*, vol. 76 (Cambridge: Cambridge University Press, 2010), p. 191.

<sup>685</sup> Wormald, '*Lex Scripta*'.

relatives or raging feuders? The presentation in law of the recipients of compensation will be discussed in the following survey of the sources.

Let us return to the question introduced at the start of this chapter, on how to interpret compensation given in written law, as punishment or compensation in light of the state authority as legislator. An aspect of the historiography is the tendency to view conflict resolution in early medieval law, for instance compensation, as *agreement*, while the laws of the more organised states of the twelfth century brought in the notions of *crime* and *punishment*. Traditionally, compensation in early medieval law has been interpreted as agreement, as in works by Pollock and Maitland in their conception of Norman legal authority in England after the Conquest, among others.<sup>686</sup> They categorised Anglo-Saxon and Norman law in line with this distinction, that is, of the concept of punishing a criminal replacing the idea of settling a conflict with restoration of equilibrium. In this interpretation lies a reading of the early medieval legal system as mediator of the parties in a conflict, while that of Norman England was authoritative and executive.<sup>687</sup> Historians who do not subscribe to this distinction have countered such a view since.<sup>688</sup> The anthology edited by Wendy Davies and Paul Fouracre, *The Settlement of Disputes in Early Medieval Europe*, do not use this distinction for the early medieval period. Rather, the authors point out the ‘absence of any real distinction between civil and criminal cases’.<sup>689</sup> Patrick Wormald asserted that the concept was a misinterpretation of early English Law, and dismissed the idea that crime had its origin in Norman legal dominance, while early law consisted of the concept of torts.<sup>690</sup> We should understand the methods of conflict resolution in medieval law within its context, as a possible form of punishment. The legislator’s concept of the violence that brought about the need for compensation was that the action was a crime; it was a violation against society and tried tackled by written law. The presence of violence and homicide did not exclude condemnation of it, or the desire to live peacefully.

Does the legislation on private violence express a dialectic dialogue between the legal elite and the subjects of law? The lack of sources to settlements of this kind makes it difficult

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<sup>686</sup> Pollock, ‘The King’s Peace’, pp. 177-89; Pollock and Maitland, *History of English Law*, I, pp. 46-48, II, pp. 449-52, 458.

<sup>687</sup> See, for instance, Doris Stenton, *English Justice Between the Norman Conquest and the Great Charter, 1066-1215* (London 1965), p. 1.

<sup>688</sup> Davies and Fouracre, *Settlements*, p. 4; Wormald, *Making of English Law*, p. 26; Lupoi, *Origins*, pp. 303-04.

<sup>689</sup> Chris Wickham, ‘Dispute Processes and Social Structures, Conclusion’, in Davies and Fouracre, *Settlement*, p. 231.

<sup>690</sup> Patrick Wormald, ‘Frederic William Maitland and the Earliest English Law’, in *Legal Culture in the Early Medieval West, Law as Text, Image and Experience*, Patrick Wormald (London: The Hambledon Press, 1999), p. 61.

to clearly establish statistical knowledge on whether settlements usually involved amounts of compensation much higher than those we find stipulated in the laws, or whether they were lower. The prescribed tariffs are quite steep, but then again, the topic of regulation was killing. It is possible that the conflict settlement most used in a region would be making peace by public display of remorse or doing penance in a religious context, as Burchard of Worms was an agent for.<sup>691</sup> Vengeance may still have been preferred, sought or expected by the offended party though, or anticipated by the community.

### 9.3 Principles of compensation in secular laws

Would the use of compensation in written law signify that the legislators expected local settlements of cases, or that official courts, or in the last resort the king himself, took on the task of passing judgment on whether compensation was the correct solution? If so, what determined the size of the sum to be paid in secular laws, and to whom? The institution of compensation as a tool of conflict resolution is complex and diverse, although the main points are common regardless of period or geographic location: someone had killed another and the relatives or associates of the victim would receive compensation valued according to a certain system of stipulation. Afterwards, those compensated should theoretically bear no further resentment towards the killer, and the killer should not be the object of retaliation of any sort. Some vital details concerning compensation are usually included in written laws. Some indicate the anticipated giver and recipient of the compensation, the amount of compensation and the time frame in which the transfer should be carried out. The sums found in the normative material were of substantial sizes, at least for the average family. The prescribed sums were also given in gold and silver, which most people did not possess.

In this survey of transmission of law on compensation for homicide, I shall primarily consider four specific features in the laws: The given *value*, the *distribution*, the *conditions* and the designated *nature* of the compensation. The first is the stipulation of the compensation, i.e., the legally prescribed value recompensed for a life. This involves how the legislator assessed the value of a life, and what criteria were used in law to differentiate between the subjects. Interesting factors here include the gender and age of the person killed, together with social standing, all of which was reflected in the price of the victim's life.

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<sup>691</sup> Burchard of Worms, *Decretum*, book 6.

Moreover, in light of transmission of law, the concurrence or differences of the wergild between the laws sheds light on their interdependence.

It lies within the scope of this thesis to examine how compensation was paid and received, which relates to the second feature. Was the killer alone obliged to produce the sum, or did the relatives also share responsibility? To what degree of kinship did this responsibility extend in such regulations? On the other hand, it is interesting to see which relatives in the victim's circle, according to the law, were to be compensated. It might aid further research on the topic to see how descriptions of the involved parties on both sides reflect the inheritance system found in the same laws. Were only closely related family the natural recipients, or were more distant relatives and associates also included? The level of detail in describing the people involved on both sides is also interesting regarding legal transmission. Were particular relatives of the killer obliged to contribute to the compensation, and why these and not others? Some laws are silent on the matter, and others designate recipients of the compensation. Comparing the results from the separate laws will reveal whether these descriptions reflect other secular law.

Thirdly, as with the conditions of the victim, the conditions of the homicide affected some legislators' stipulation of the compensation. As with the distinction between murder and homicide, the time, place and course of events are suggested in some rules as a possible indicator of the motivations behind the crime. To the legislator, the killer was assumed to be a male. As in the previous chapters on inheritance systems, secular legal sources usually describe the main character in the masculine form. Most laws include specific rules in cases where the homicide was committed by a woman, with consequences different to those for a man. The punishment for a female killer could be either harsher and more lenient than for a male, depending on the situation.

Lastly, the legislator's motivations, if stated, behind the rules on homicide may shed light on the question of how the legislator viewed compensation as a solution – whether the payment should primarily be seen as punishment or compensation. Do the separate laws concur on this matter? Other crimes considered as severe as homicide will be examined when relevant. These comprise a group treated similarly in many laws: adultery, theft and treason. Moreover, a brief look at these types of crime, which also gave rise to compensation, can provide further enlightenment on compensation for homicide.

The size of the compensation would, in any instance, be difficult to convert into graspable figures today, even more so in terms of converting the currencies used by each jurisdiction and comparing them. Likewise, it is problematic to compare amounts in similar

currencies at different points of time. Inflation, shortages and the value of gold and silver would all influence the standard value of any price. Furthermore, prices would be influenced by – and might even reflect – the milieu in which they were stipulated. Troublesome times, unrest and war would influence the value of a life and the power of the claimant. We can imagine that the structure of society, whether under a stable, powerful authority or more kin-based, would play a role in anticipated and legislated compensation. In regions in which the king or lord had the legal power to demand part of the compensation or a fine, we could look at whether the size of the share to the wounded party might be reduced. We can find such a correlation in the stated *duties* of kin to contribute to compensation and the *right* to receive compensation.<sup>692</sup> In contrast to a kin-based society in which internal justice ruled, the threat of vengeance or outlawry might push expectations of the size of compensation higher. But would this leave its trace in the normative material? It is challenging to see if the compensation stipulated for homicide reflects the price demanded, or whether conflict resolution through the transmission of wealth was as widespread as the law would lead us to believe. We can also question whether the parties, relatives or individuals involved were able to produce the sometimes immensely high sums demanded, and whether these sums were realistic pointers to real settlements or whether they have only a symbolic value. In light of legal transmission, a comparison of the value of these sums can reveal similarities both in case of symbolic or realistic compensation. A comparison of the wergild and fines in the separate laws should provide an idea of what these sums represent in writing. A method of solving the problem is through comparison of what the sums symbolised for the lawmakers and what the sum's proportion was within each jurisdiction compared with those in other jurisdictions. Similarities and differences in the sums can in themselves point to the existence and direction of legal transmission in medieval secular law.

## Conclusion

The following chapters are an analysis of how the legal sources present compensation for homicide, and to what degree we can see traces of legal transmission in the laws on homicide. The questions raised above will be *foci* in the survey: was compensation considered a punishment or a tool of conflict resolution, restitution for loss of life or a pacifier? Who were

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<sup>692</sup> Karl Wührer, 'Mansbot – Danmark', in *KLNM* 11, p. 332. Wührer also mentions the attempts of Danish kings and the Church to minimise the common duties of the kin, which probably did not result in substantial change, since complaints about the burden of paying compensation for relatives were still extant in the sixteenth century.

the recipients of compensation, and how were they represented? What can we draw from the anticipated size of the compensation for homicide? First, it is important to establish to what degree homicide was to be settled with compensation according to secular law, and the next chapter begins chronologically with Roman law, which reputedly did not contain compensatory solutions, and the transition to Germanic law.



## 10. Compensation and homicide in Roman and Germanic Laws

When studying legal transmission, signs of transmission in the Germanic laws from Roman law is anticipated. However, Roman law principally did not have compensation as an institution, while in the Germanic laws compensation was a main principle. Because of this contrast, an initial comparison of the two legal cultures is interesting even beyond the chronological structure of this thesis. Juxtaposing the known Roman law, which lacks compensation for homicide, with the Germanic laws modelled on Roman law can, shed light on those aspects of the law that were original in the Germanic legislation, while also providing some answers as to the degree that the legislation on compensation was originally Germanic, and the degree to which Roman law was devoid of this type of solution to violence.

### 10.1 The crime of homicide in Roman law

In Roman legal history, the principle of homicide as a crime against the state apparently became part of Roman legal culture at a very early stage under the republic.<sup>693</sup> This crime would be subject to public trial and punishment and was not to be resolved by private settlement. In this case, homicide meant an intended and unlawful act, if not premeditated. Accidents causing death were a different matter and were apparently treated much more leniently. However, in the initial years of the Roman Republic, before homicide was seen as a crime against the state, early republican legislation on homicide was formed along the same lines as it later was in the medieval law. In this respect, William Smith pointed out that the term *parricidium* could refer to homicide in the meaning of intentionally killing in general, not necessarily killing family members or a head of state.<sup>694</sup> In the early republic, according to George Mousourakis, the victim's kin was left to punish the perpetrator by vengeance and apparently was expected to do so.<sup>695</sup> Mousourakis believes this custom to have been so rooted in the legal culture that it resulted in the initiation of prosecution lying in the hands of the family of the person killed, even after the state court acknowledged the crime as grievous. Nevertheless, in the extant law from the second century BC onwards, it was a crime against

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<sup>693</sup> William Smith, *A Dictionary of Greek and Roman Antiquities* (London: John Murray, 1875), p. 687, entry: De sicariis et veneficis.

<sup>694</sup> Ibid.

<sup>695</sup> Mousourakis, *Fundamentals of Roman Private Law*, p. 208 n. 37.

the state. The law neither encouraged vengeance directly nor mentioned vengeance as a possible outcome, except in the case of an adulterous daughter or wife (D.48.5.21–22, D.48.5.25–26). The terms *ultio* – revenge – and *inultio* – not revenged, or not punished – appear in the laws on hereditary rights in relation to claims to succeed those killed (C.6.35.1,6,7,9, 9.9.27). Similar verbs are *ulsiscor*, *punire* and *vindicare*.<sup>696</sup> However, the meanings of these are to seek vengeance by law or through the court. These imperial constitutions date mainly from the third century and appear part of the contemporary discourse, rather than touching upon anything latent in the legal system. To kill someone in self-defence or if enraged by a sexual assault would, however, constitute extenuating circumstances (D.48.8.1.3–5).

Because of the difference between the later laws of Latinised medieval Europe and Roman law regarding compensation as conflict resolution, it is of interest to search for any notions of compensation in Roman law. As it happens, the ideology of retribution existed. Indeed, compensation was introduced in early Roman legal culture. We find in *lex Aquilia*, from 286 BC, legislation on compensation for damage to property and the killing of beasts or slaves belonging to another person (D.9.2.2.2, D.9.2.27.5).<sup>697</sup> Still, this refers to wrongful damage and not to compensation for causing death. Nonetheless, it implies that the principle of restoration after injury was part of Roman legal thinking. Roman jurist Gaius (c. AD 130–180) asserts that the *lex Aquilia* is the origin of the *Damni iniuriae actio* (Gai.3.210, Gai.3.217), the right of compensation for the killing of these ‘properties’ done with *dolus* – intent - or *culpa* - neglect. This compensation was included in Justinian’s *Institutiones* in the sixth century (I.4.3). Similarly, Gaius points out that The Twelve Tables stipulated fixed compensation for injury, and that this was quite low due to the ‘extensive poverty of the time’ (Gai.3.223). Again, these were included in Justinian’s *Institutiones*, with the follow-up that this small penalty had become obsolete, replaced by a penalty introduced by the *praetors*, where the injured could demand a chosen sum, which the judge decided on according to status of the complainant (I.4.4.7). Apparently compensation for damage, loss and injury had been a part of the Roman legal system, or had become a more prominent solution in the late Roman

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<sup>696</sup> Examples of these verbs used in the meaning of avenging, although through the public court not through private violence, include C.1.19.1, C.2.40.1, C.6.6.7, C.6.35.9, C.6.40.2.

<sup>697</sup> Robinson, *Sources of Roman Law*, p. 30; Mousourakis *Fundamentals of Roman Private Law*, p. 58. See also *Pauli sententiae* 1.15, in *Ulpiani liber singularis regularum, Pauli libri quinque sententiarum, fragmenta minora saeculorum*, ed. by Paul Krüger, *Collection librorum iuris anteiustiniani*, vol. 2 (Berlin: Weidmann, 1878), p. 57.

legal culture, as argued by Lehman.<sup>698</sup> Justinian also awarded compensation to victims of rape from the property of the rapist (Nov.150). Rape had earlier – at least in law – been equally judgmental of the victim as of the perpetrator (CTh.9.24.1). Constantine’s notorious rule of disinheriting raped daughters and executing assistants to rape was severe, but should possibly be seen as part of his programme to ensure family morality.<sup>699</sup> Justinian’s revision and condemnation of other resolutions to rape (such as marriage, disinheritance and honour killings) must be seen as a legal improvement to the ruling of state (Nov.143).

Roman legal culture was originally founded on the principle of *talionis*, retaliation, as we see in the examples from the Twelve Tables on injury, explained by Gaius (G.3.223). In the examples of acts leading to compensation above, we also notice that compensation is considered punishment (*poena*) and not merely compensation.<sup>700</sup> Interesting, too, is that the commentators from the third century and the sixth century considered the old punishments cheap. The version included in the *Institutiones* explains that the injured would estimate his or her own value, and that it would be considerably higher.

Furthermore, the concept of ‘*condemnatio semper pecuniaria*’ existed, which stipulated that the sentence would be given in money and not the actual restoration of the subject of dispute.<sup>701</sup> This is a concept of compensation, but for damaged property rather than for violence. The concept was based on the principle that the one suing would be awarded a sum corresponding to the value of the lost or damaged property. The sum would be imposed on the person convicted, who could pay it voluntarily or through the confiscation of property. Jurist Paulus in the early third century explained that capital offences would be punished with death or exile, whereas other criminal acts would be punished with a fine or corporal punishment (D.48.1.2). The fine would not be proper compensation for the victim of a crime, but a punishment providing income for the public. The fines to be levied for the benefit of the Roman treasury were stipulated as high sums, such as we see in, for instance, the *Codex*, with ceilings from a sixth-pound of gold to fifty pounds of gold for serious crimes (C.1.54). The fines would go directly to the treasury, according to a constitution given in 384 (C1.54.5).

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<sup>698</sup> Esders, “‘Eliten’ und ‘Strafrecht’”, p. 262; further references to Walter Lehmann, *Über die Vermögensstrafen des römischen Rechts. Eine rechtshistorische Studie* (Berlin: Walter De Gruyter Incorporated, 1904). Not available.

<sup>699</sup> Grubbs, ‘Constantine and Imperial Legislation’, pp. 130, 138-40.

<sup>700</sup> *Gai institutions, or Institutes of Roman Law by Gaius*, ed. by Edward Poste, Edward Arthur Whittuck and Abel Hendy Jones Greenidge (Oxford: Clarendon Press, 1904), p. 427.

<sup>701</sup> Max Kaser, *Das römische Privatrecht, Erster Abschnitt: Das altrömische, das vorklassische und das klassische Recht*, in *Handbuch der Altertumswissenschaft, Rechtsgeschichte des Altertums*, vol. 10, 3.3.1 (Munich: C.H. Beck’sche Verlagsbuchhandlung, 1955), pp. 408-10.

Nevertheless, these laws tell only of injury and not homicide. Homicide was an offence against the public, together with treason, adultery, embezzlement from authority, the forgery of wills, tampering with the corn supply, extortion and election fraud, as summed up by the third-century jurist Marcian (D.48.1.1). So what punishment did Roman law require for killers? Classical Roman law stated that malicious killing and also intentions to commit homicide would be punished as homicide (D.48.8.1.3, D.48.8.15). Conversely, unintentional homicide, for example through accidents or self-defence, would not be punished at all (D.48.8.1.3, D.48.8.14). A convicted killer was to be punished according to the severity of the action and not the status of the person killed (D.48.8.1.2). For homicide, the penalty could be either death or banishment from society. Exile in capital cases was supposed to be permanent, denying the offender ‘aqua et ignis’, water and fire, the necessities of life, a basic sign of belonging in Roman culture. Mousourakis compares this harsher exile to outlawry enactments.<sup>702</sup> It is possible to see similarities with the institution of outlawry that we find in early medieval European law. The third-century jurist Marcian explained that the penalty for murderers and poisoners was deportation and confiscation, but that ‘nowadays’ the death penalty had become the norm (D.48.8.5). Higher-ranking nobles would traditionally be exiled for a short period when convicted. In the early fourth century, Constantine at least attempted to ensure that high-ranking officials would be tried and convicted for crimes without their elevated status protecting them (CTh.9.1.1). It is possible that the tradition of permanent exile for outlaws and more temporary solutions, for instance for elite members, still prevailed in the third and fourth centuries: Constantine found it necessary to send a decree to the African proconsul that killers should receive the death penalty and not be allowed to appeal and be exonerated (CTh.9.10.1). Since Marcian saw how exile was replaced with the death penalty in the third century, it seems the practice became law by the early reign of Constantine. The death penalty for intentional homicide appears to have been current law in Roman legislation until Justinian.

Examples can illustrate the severity of homicide to Roman legislators. When emperor Constantine (r. 306–337) himself was to pardon criminals in honour of his newborn grandchild, homicides were excluded (CTh.9.38.1), and early in his reign, he reiterated that homicide was one of the capital crimes (CTh.9.40.1). Following Constantine, his son Constantius upheld that those convicted of homicide lost the right to appeal (C.7.65.2.). This perception of homicide continued into later Roman legislation. An early fifth-century decree

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<sup>702</sup> Mousourakis, *Fundamentals of Roman Private Law*, p. 38.

urged that those taken for grave crimes, among them homicide, be presented at court immediately (CTh.9.2.5), suggesting that the authorities wanted to give judgment in cases of violent crimes, and also that the authorities were reluctant to have serious criminals in prison. Both the examples from late Roman law tell us that the public legal system was expected to deal with killers, an expectation that became incorporated into the legislation.

Some homicides were graver than others. Sulla left his mark in the laws by establishing separate courts for poisoning and assassination in the *Lex Cornelia de sicariis et veneficis*.<sup>703</sup> The killing of one's own family members was worse than killing others according to republican law and the jurists' discussion of these killings (D. 48.9). Such cases were therefore not a family matter. The only instance not covered by *parricidium* was the previously mentioned case of a father killing his daughter. Fathers had extraordinary permission to do so if the *filia* committed adultery (D.48.5.21–22, D.48.5.25–26, D.48.8.3.5). The killer of a family member was to be punished as other killers, except for those who committed parricide in the sense of killing one's own father. Here, the notorious punishment of *culleus* applied, being sewn up in a sack and drowned (D.48.9.9). The only instance where a woman could bring a case herself without representation through her *patria potestas* or curator was in the investigation of the deaths of her parents or children or a patron's family (D.48.2.1–2).<sup>704</sup>

A decree signed by Gratian, Valentinian (II) and Theodosius from 383 called for thorough hearings before execution and the absence of hasty judgments in charges of murder (CTh.9.1.14). However, Valentinian III and Theodosius II urged in a joint constitution from the year 445 that judges should not be lenient (NVal.19). Here, the division between premeditated murder and accidents leading to death was addressed. The emperors' words claimed too many played the 'accident' card. Investigation in each case was demanded, with swift and merciless punishment for those not having killed by accident.

Roman law, even if the most elaborate and sophisticated example of civil law, was to a large extent procedural.<sup>705</sup> In the periods of the Principate and the late empire, an official move in procedure developed, called *cognitio*, where the state took the role of accuser.<sup>706</sup> The classic procedure in Roman society was that the pursuer of justice would have to play an active role in the accusing and summoning process.<sup>707</sup> With *cognitio*, the Roman empire

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<sup>703</sup> Mousourakis, *Fundamentals of Roman Private Law*, p. 78.

<sup>704</sup> A sentiment that was continued by Constantine in 322, CTh.9.1.3.

<sup>705</sup> Mousourakis, *Fundamentals of Roman Private Law*, p. ix.

<sup>706</sup> Mousourakis, *Fundamentals of Roman Private Law*, pp. 32, 126-27.

<sup>707</sup> Robinson, *Sources of Roman Law*, pp. 85-88.

apparently became more of a constitutional state with a rule of law, as we think of it today and as many imagine the Roman legal system to have been. However, there is far less on criminal procedure in Roman legal sources than on civil procedure.<sup>708</sup> Robinson explains this by pointing out that in the Roman legal system all injury was a violation of law and homicide would be one of the graver crimes. *Cognitio* made appeal possible, but if found guilty of homicide, appeal was not possible (CTh.11.36.1, CTh.11.36.4) and as such would not be a debatable topic for jurists. This was also a clear case to legislating emperors: if the accused was found guilty, he or she should be convicted.

After Justinian, legislative work found a new direction. In the seventh-century law code *Ecloga*, things changed considerably with regard to compensation as a means of conflict resolution. The idea behind the *Ecloga* was, according to Edwin H. Freshfield, to have a more humanistic law, compatible with the Christian ideology of the time.<sup>709</sup> One result, among others, was an extensive use of compensatory fines that followed the development of western legal ideology. Another difference was the replacement of the death penalty with mutilation in many cases. This was thought to be a more humane punishment, giving the culprit time to save his soul. The code was intended as a tariff list of punishment for various crimes, which makes it an entirely different type of source compared to the jurists' discussions in the *Digesta* and the late Roman imperial legislation. In the *Ecloga*, several violent crimes were punishable by fines, possibly as compensation, or partly as restoration to the victim's party. The listed form of the text does not reveal its purpose, as it comprised more a short manual for judges than a normative discussion.<sup>710</sup> Murderers would still be executed, but violence that could apparently be paid for (Ek.5, Ek.17.5, Ek.45-48). This raises the question of whether there was a precedent regarding compensation in the late Roman court prior to Leo III's *Ecloga*.<sup>711</sup> Still, as background to the early medieval concepts of compensatory punishments which were developing and also to this concept in the high medieval Nordic laws, it is essential to note that most of the Roman written law passed down only contained the notion of compensation to a minor degree. It is important to stress this point, given that the concept of compensation would be such a prominent institution in the secular medieval laws.

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<sup>708</sup> Robinson, *Sources of Roman Law*, pp. 98-99.

<sup>709</sup> Edwin Hanson Freshfield, *A Manual of Later Roman Law, The Ecloga, ad Procheiron Mutata* (Cambridge: The University Press, 1927), p. x; Edwin Hanson Freshfield, 'The Official Manuals of Roman Law of the Eighth and Ninth Centuries', *The Cambridge Law Journal*, 4, 1 (1930), pp. 34-50.

<sup>710</sup> Freshfield, *Manual of Roman Law*, pp. 1-2.

<sup>711</sup> See, for instance, Freshfield, *Manual of Later Roman Law*, p. 211, n. 1.

## 10.2 Wergild and vengeance in continental legislation

Whereas Roman legislation on homicide works as a backdrop in this chapter, the Germanic laws serve as its fulcrum. Compensatory punishments were institutionalised and became more sophisticated in the legislation of the successor states, to the extent that they determined the whole law in some of them. Simultaneously, we find the meeting of the old legal culture of the Romans in the Germanic laws, although changed and changing, and the development of national legal cultures among groups in the forming of states. Wormald has suggested the size of the tariffs themselves constitute an ethnic marker of the law.<sup>712</sup> To Lisi Oliver, compensation is what separates the Germanic laws from Roman ancestry.<sup>713</sup> She asserts that the idea of compensation was an original Germanic part of law, which Roman legal tradition could not influence, as it had not existed. While that may be so, it is worth noting that the Germanic legal tradition started before the waning of Roman law in the West. Thus, the late Roman adaptations of compensation for different crimes may well be influences, as reception from Germanic law, or more likely Germanic custom. Also, the tariff lists in the Byzantine law of *Ecloga* can be viewed as adapted transmission from Germanic legal culture in the East.

The institution of wergild is thus a determinant of early medieval law, but was it a long-standing tradition? The law texts themselves are constructed to give us this impression. Compensatory punishments were also stipulated in the legislation on homicide. In the laws ascribed to the Burgundian king Gundobad, and the Frankish king Clovis in late-fifth and early sixth century, compensation was already a major part of the legal system. However, the level of making use of it in the legal texts vary; while the appearance of corporal, moral and monetary punishments are balanced in the Burgundian code, compensation permeates the Salic laws of Clovis entirely. Although the Germanic legislators of the early Middle Ages claim their law to be ancient and/or prevailing law, much of the written norms in Germanic law codes could well have been an invention.<sup>714</sup> This question must be considered as part of the discussion about whether the Church promoted the idea of resolving conflict through peaceful means. The big question is whether the notion of compensation evolved from Germanic norms of conflict resolution or through the influence of or interaction with the Church. We do not have the privilege of observing a mainly non-Christian law from

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<sup>712</sup> Wormald, '*Leges Barbarorum*', pp. 41-42.

<sup>713</sup> Oliver, *Body Legal*, pp. 8-11.

<sup>714</sup> Edictum Rothari Prologue.1, *Leges Langobardorum*, MGH, LL, 4, p. 1; Lex Burgundionum prologue; *Leges Burgundionum*, MGH, LL nat Germ, 2.1, p. 29. The attribution of the prologue in the *Lex Gundobada* is dubious, and it has been suggested that it is a product of successor Sigismund's reign. Nevertheless, the act of ascribing the deed to a previous king is an act of creating a traditional bond through the laws.

Germanic groups in the Latin spheres. The very outset for most of the extant laws was the preceding Christianising of the *gens*. A feature of several of the medieval laws was to divide between premeditated murder and impulsive killings. Legal authority attempted to suppress the extreme violence of killing another, but the extenuating circumstances of rage or retaliation was almost embedded into the act in these laws. Vengeance, or the urge to reciprocate, stands out as the driving force in the rules on homicide. However, the atrocity of planned and deliberate killing was the worst crime against society and against the rule of law, and thus against the king as well as the victim. In Germanic laws, then, compensation included an acknowledgement of the existence of vengeance.

That the legal elite in some of the Germanic kingdoms of Europe knew Roman civil law and inserted compensatory punishments anyway constitutes an interesting problem in legal history; did the late Roman law adapt to the legal cultures of inhabitants coming in from the north and east of the empire? The peoples of the Roman empire kept their group indicators and ethnic characteristics to a large degree.<sup>715</sup> The all-embracing release of Roman citizenship in AD 212 by Caracalla changed the meaning of what was essentially Roman and instead divided the population into a group with high status and one with low status, i.e., *honestiores* and *humiliores*. As A. H. M. Jones has pointed out, differentiation in society was from then on ‘no longer regional between Italians and provincials, but social’.<sup>716</sup> The universal issue of citizenship would probably still not erase the differences of the *gentes* and groups within the Roman border. ‘Otherness’, as opposed to the Roma-Roman, was always present in the Roman empire from the time it extended beyond the Italian peninsula. Legal cultural differences could have influenced the law-making process of the empire in its entirety and possibly had a great affect in practice. However, the late use of restoration through compensation by Justinian can perhaps be seen as an effect of Germanic influence.

### *The Burgundian laws*

The Burgundian code, one of the earliest Germanic laws, was contemporaneous to the law of the Merovingian king Clovis from the beginning of the sixth century. The rules of the Burgundian king Gundobad from around the year 500, and the additions and revisions of his successor Sigismund (from 523), apparently originated in the intersection between aspects

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<sup>715</sup> Tveit, ‘Non enim coitus matrimonium facit’, pp. 88-93.

<sup>716</sup> Jones, *Decline of the Ancient World*, p. 23.

lacking in Roman models and essential requirements in the Burgundian legal system. The Burgundian laws in general contain little on violent death compared to the other Germanic codes, but the three or four notes are clear enough. Murder should be punished with death (LB.2.1). In Gundobad's legislation, we find a provision stating that the aggrieved party should be careful to concentrate vengeance on the guilty person alone and not harm innocent associates: 'ita nihil molestia sustinere patimur innocentem' (B.2.7), in other words, he should avoid a feud. Such constrictions, although implied in many of the medieval laws, are found explicitly only in the laws of the English king Edmund (r. 939–946) from the 940s (II Edm.1). The sentence suggests that Gundobad tried to gain a firmer grip on the regulation of private violence through the law than can be found in the contemporary continental codes. This could be a reception of Roman juridical ideologies of assigning *culpa* to the culprit. Instead, it may have been an expression of the legal system desired by the legal elite of the Burgundian authority, an attempt to avoid conflict in society given the political turmoil with its neighbours.

Written Roman law must be taken into consideration when examining the topic of compensation for homicide in Burgundian legislation. The *Lex Burgundionum* would naturally be highly influenced by and modelled on the adaptation of the Theodosian Code, the *Lex Burgundionum Romana* (LBR). The table of contents alone reveal that the codification of Roman law was the design for the Germanic code, with the first three chapters being identical and the second chapter treating the act of homicide. The LBR.2 would have paraphrased the aforementioned *Novel* of Theodosius II and Valentinian III from 445 (NVal.19.1–2), as the LBR.2 itself suggests. The LBR.2 and the LB.2 were both titled *De homicidiis*, and the first clause of both of these codes refers to the aggravating circumstances of murder and the next to the extenuating circumstances of accidental homicide, which stated that if 'homicide has been committed, either by accident or because of the necessity of avoiding death, pardon shall be granted.'<sup>717</sup> The contents and legal ideology became part of the Burgundian adaption of Roman law.<sup>718</sup>

Whether Gundobad actually had the power to control the legal system to such an extent we cannot tell, but his regulation of grave crimes suggests such control was considered necessary, or desirable. The Gundobadian rule emphasised the aspect of retaliation more than these two and, when including the following statement in a possible borrowing, was first

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<sup>717</sup> Translation from Pharr, *Theodosian Code*, p. 532. NVal.19.2: 'si homicidium vel casu vel vitandae mortis necessitate constiterit admissum'.

<sup>718</sup> LBR.2.2: 'Si vero homicidium casu vel vitande mortis causa forte dicatur admissum'.

adapted to the legal culture of the Germanic tradition: ‘if he pursues his persecutor and overcome by grief and indignation kills him’, then he should pay half wergild (LB.2.2).<sup>719</sup> In this version it is not only self-defence and accidents that make for extenuating circumstances, but impulsive anger caused by the person who was killed, similar to Roman law allowing vengeance to be taken on adulterous daughters and wives.

Murder was a non-compensational crime and should be punished with death (B.2.1). In the laws of Gundobad, murder is equal to treason in severity. Burgundian law did not, however, indicate that the death penalty could be employed as vengeance; the wording rather hints that one should expect official punishment. How to interpret what should happen in the case of intentional homicide that was neither provoked, nor premeditated, is unclear. Nevertheless, compensation was an option.

Paradoxically, Gundobad’s laws set the compensation for taking a life at half the value of that life, i.e., half the wergild of the person (B.2.2). However, this particular rule does list actions of retaliation or self-defence leading to death, and this could be the reason for the reduced compensation. There is little else on compensation for homicide in terms of the way it was classified in other secular law, such as that for manslaughter, regardless of conditions. It would be wrong to force the source into predefined categories, and it is possible that the Burgundian division of homicide is between murder – as in killing with intent – and death as a result of unintentional actions. The former resulted in the death penalty and the latter in payment of half the wergild. In this way, it is in line with Roman law on homicide. Nevertheless, it is necessary to ask the question: do the two degrees of killing disguise a middle level, i.e., of manslaughter, with the full wergild being paid? Presumably, Gundobad’s legislation would reckon on such a middle level with full wergild being paid. The solution to a real case would most likely be negotiated between the parties, ensuring revenge or agreed compensation. The laws are silent on how the process of resolving the conflict was supposed to happen. Neither do they reveal how to decide the severity and nature of a killing in a public setting or as a private settlement. Finally, the written laws are silent on the mode of distribution of the compensation, and they do not reveal whether the legislators anticipated the killer would pay the compensation alone, or whether his family would contribute, which is strange given the high sum of between 150 and 300 *solidi*, depending on the status of the victim.

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<sup>719</sup> Translation by Drew, *The Burgundian Code*, p.23. ‘dum sequitur percutientem dolore aut indignatione compulsus occiderit’, *Leges Burgundionum*, *MGH*, LL nat Germ, 2.1, p. 42.

The wergild of men was itself stipulated based on the status of the victim of the crime. In the Burgundian code, the worth of a person is termed in the Latin *pretium*. The differentiation of status is according to three classes, with 300 *solidi* for those in the *optimas nobilis* class, 200 for those in the *mediocris* class and 150 for those in the *minor persona* class (B.2.2). Oliver assumes that *minor persona* designated the category of the unfree.<sup>720</sup> More likely, those in this group were among the free, although low-status, as concluded by Edgar Holmes McNeal and Katherine Fisher Drew.<sup>721</sup> The inferior class was subject to regulation in the case of violent injury, which no unfree person would be (LB.26.3). King Sigismund also treated this group in his marriage legislation, together with the middle and higher classes (LB.101.2). The fact that *minores* were mentioned together with the *mediocris* and the *optimates* supports the view that they were freeborn. The *minor persona* status had more in common with the rank of *ceorl* than with the unfree, which we find in the early laws from Kent and Wessex, and the *minima persona* in the laws of Lombard King Liutprand, within which category people were certainly considered to be free. Homicide against the king's slaves or agents would of course be punished harshly but, even if intentional, the law prescribed compensation commensurate with the deed (B.10, B.50). The stipulated amounts of compensation in these cases were ranked according to the craft or skill of the dead; for instance, a goldsmith was worth 200 *solidi*, but a carpenter only forty *solidi*. The sums were based mainly on the wergild of free men and show only the importance of the craftsmen or the status of the slave of the king. The transaction would also be allotted to the royal treasury and resembled a fine rather than the wergild.

Women probably held a wergild corresponding to a male relative, similar to what we find in the Lombard laws. *Lex Gundobadorum* provides little direct regulation of what should become of a female killer. We can only assume that the sterner penalties imposed on women with regard to other grave offences, such as adultery and desertion of the family, would also apply in the case of homicide, and if so, she would face the death penalty imposed by a public judge. We do not learn of differentiation between the Burgundian and Roman, if the Roman was the victim of homicide. We know that Romans were subject to Roman law, and conflicts between Romans and Burgundians should be taken before a Burgundian judge (LB.22).<sup>722</sup> Ralph Mathisen asks whether there was segregation of the Roman and Germanic population

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<sup>720</sup> Oliver, *Body Legal*, p. 213 places *minora persona* in the table of slaves' worth.

<sup>721</sup> Edgar Holmes McNeal, *Minores and Mediocres in the Germanic Tribal Laws* (Columbus, OH: Press of FJ Heer, 1905), p. 40; Drew, *The Burgundian Code*, p. 85 n. 1.

<sup>722</sup> See also *Leges Burgundionum Extravagantes* 20, from 516, which repeats the provision.

within the administration.<sup>723</sup> However, punching Roman nobility in the face rendered a compensation of fifteen *solidi*, the same as for the Burgundians *optimates* (LB.26). Regarding violence, they were apparently on equal footing, although as Drew points out, the *Leges* do not reveal the full relationship between the Romans and Burgundians within the kingdom.<sup>724</sup>

Burgundian domestic legislation thus gives a brief picture of the demarcation between Roman legislation and the anticipation of the Burgundian legal culture and sense of justice. Killings acted out deliberately – and thus particularly grave – would, as in Roman law, call for capital punishment in accordance with the keeping of order in Burgundian society. As the kingdom of Gundobad and his successor Sigismund was fairly stable during a turbulent period in the central European regions, we could expect harsh measures in law-making by the kings. Then again, it is not clear what to expect as Burgundian authority, similarly to that in other continental states, was possibly testing a new tool of government: written law. The short Burgundian code nevertheless appears as a crossover between Roman public law and the expectation of local solutions through compensation, as we see in other continental codes of the early Middle Ages. Compensation for homicide could be an expression of tradition or an solution invented for the task of creating a functioning society.

### *The Visigothic laws*

The law codes of King Chindasvint and King Reccesvint from 650, known as the *Leges Visigothorum* (LV), have been labelled a fusion of earlier Visigothic enactments and Roman law adapted from the Theodosian code.<sup>725</sup> To a large degree, this is also valid for the regulation of homicide. Instead of compensatory punishments and a focus on vengeance, we find heavy use of corporal punishment in the procedural legislation of the Visigoths. Compensatory punishments in the code are few, but a number of offences or incidents would result in fines to the treasury. Compared to the other extant Germanic laws, the *Leges Visigothorum* do not resort to compensation to the same extent in the case of homicide. However, the few references to compensation are so detailed that they constitute a problem of interpretation.

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<sup>723</sup> Mathisen, *Roman Aristocrats*, pp. 128-29.

<sup>724</sup> Drew, *The Burgundian Code*, p. 41 n. 1.

<sup>725</sup> P. D. King, *Law and Society in the Visigothic Kingdom* (Cambridge: Cambridge University Press, 1972), pp. 23-51; Heather, 'The Barbarian in Late Antiquity', pp. 251-53; Harries, 'Not the Theodosian Code', pp. 40-48.

In the seventh-century *Leges Visigothorum*, punishment for intentional killing was the death penalty, similar to Roman and Burgundian laws (LV.6.5.9). The following of Roman laws started even earlier: Gothic adjustments to the corpus of Theodosius in the *Lex Romana Visigothorum* are important. There was a small, but essential change in terminology in the *interpretatio* of the decree of Gratian, Valentinian II and Theodosius concerning capital punishment for those who forged wills and killed the testator (CTh.9.1.14). The amenders changed ‘internecivi’ in the original decree to ‘homicidii’ in the Visigothic interpretation. The change reveals that the Gothic legal system in its nascence applied the death penalty in an official sense from the time of Alaric II (r. 484-507). Even if the Roman constitution specified the particular kind of murder, the legal elite of the Visigothic king would have it cover all kinds of homicide. However, we must assume that they meant homicide with intent, as ‘homicidium’ indicates killing with the intention to kill. The interpretation of the aforementioned Valentinian *Novellae* from the mid-fifth century emphasises the distinction between premeditated and accidental killings (NVal.19. *interpretatio*). The original Visigothic legislation included the same distinction. There was a differentiation in terms of the intent: as in Roman law, deadly accidents should not be punished according to Visigothic law (LV.6.5.1–2); also, the specified punishment for homicide was execution (LV.6.5.7, LV.6.5.12). As with Roman law, killing family members was a particularly grave act and was accorded the death penalty, together with special regulations governing the property of both the offender and the victim to ensure that no one benefitted from parricide by inheritance (LV.6.5.15, 17–19). Homicide, as in killing with intent, would then receive the same punishment as murder, i.e., as premeditated killing (LV.6.5.11). Thus, the death penalty pertained to killing someone deliberately, compensation was awarded in the case of killing a third party in violent action and no punishment for accidental deaths. However, collaborators with homicide and murder would be whipped and scalped and would moreover be required to pay compensation to the victim’s family to the amount of fifty *solidi* (LV.6.5.12).

Violence, damage and insults were actions that could incur both physical punishments or, in some cases, compensation. The result depended on the damage done or the wishes of the victim (LV.4.1.2). In some instances, the outcome would also depend on the status of the offender, as explained below. The punishment stated for killing someone was ambiguous, and the *Leges Visigothorum*’s chapter on homicide does not include compensation tariffs as we find in other written laws, although these exist elsewhere. There is one strange section in the eighth book concerning violence and injuries, in the fourth chapter, concerning damage done by and to animals and damage to property; the sixteenth rule relates to animals that kill or

disable people (LV.8.4.16). The rule prescribed the compensation due from the owner of the animal. The compensation, we learn, was supposedly *equivalent* to that in the case of homicide:

...iuxta leges componere non moretur, sicut est de homicidis, id est viris ac mulieribus, infantibus, servis vel ancillis compositio constituta.<sup>726</sup>

...as required by law shall without delay compensate just as in case of homicide, that is the agreed compensation for men, women, children, slaves and female slaves.

Brunner interpreted the rule as regarding compensation for unintended offences.<sup>727</sup> It obviously was, but it also refers to an equivalent compensation for homicide. As we know, unintentional homicide was treated as in Roman law elsewhere in Visigothic law, without punishment. Contradictions in written law are quite normal, and these tariffs could be the punishment for unintended homicide. They still reveal the wergild of persons, and more probably there was a list of compensation for manslaughter. Such an equivalent list might be lost, or never written down.

The rule is labelled *Antiqua*, ‘ancient’, the mark of those rules ascribed to Euric from his law of 475. However, fragments show that, in the 580s, King Leovigild added more details to the text.<sup>728</sup> The section continues with listing all the specified compensation. According to this section, a set of tariffs existed which enumerated the current levels of compensation according to the law. The oddly placed account of the tariffs has a high level of detail in the differentiation of value; it is more explicit in this respect than we find in other laws, either from the Continent or the English or Scandinavian regions, as will be discussed later. LV.8.4.16 consists of several specified sums, taking into account the nature of the person killed. There were twenty-one different levels of compensation depending on the age, sex and status of the victim.<sup>729</sup> Whereas some of the high medieval Nordic laws give detailed descriptions of the distribution of the sum among the relatives, the paragraph on compensation in the Visigothic law rather records the details through differentiating between those killed (see Figure 15).

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<sup>726</sup> *Leges Visigothorum* 8.4.16, MGH, LL nat. Germ. I, pp. 336-37.

<sup>727</sup> Heinrich Brunner, *Über absichtslose Missethat im altdeutschen Strafrechte*, vol. 35 (Reichsdruckerei, 1890), p. 818.

<sup>728</sup> *Leges Visigothorum*, MGH, LL nat. Germ. I, pp. 487-8. Zeumer does not list Chindasvint or Reccesvint as contributors to this rule, only Leovigild, Zeumer, *Leges Visigothorum*, p. 487.

<sup>729</sup> *Leges Visigothorum*, MGH, LL nat. Germ. I, p. 336.

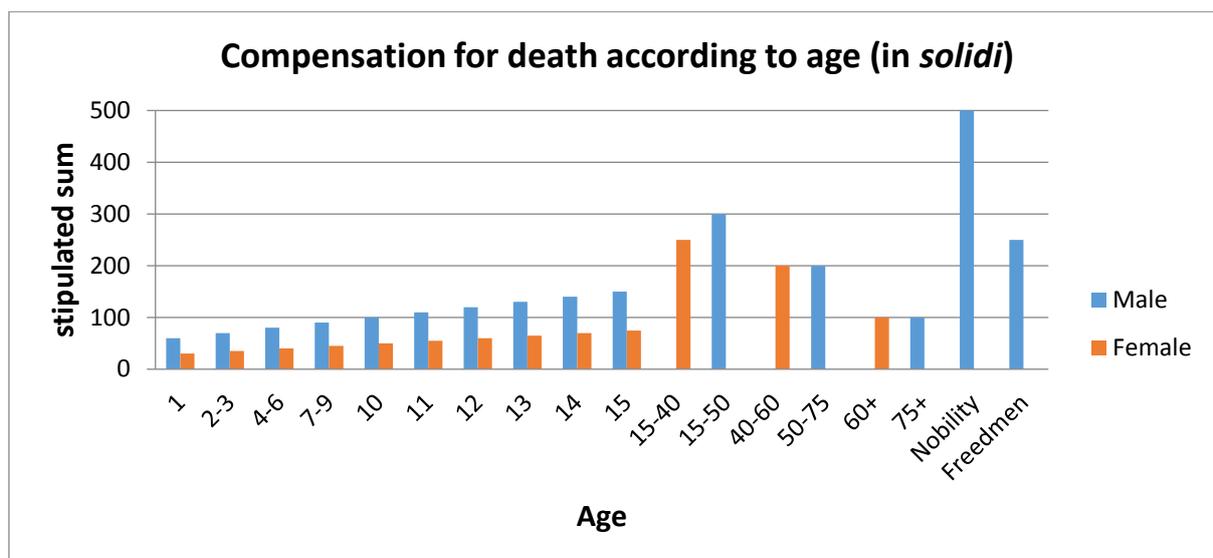


Figure 15: Amounts of compensation in the *Leges Visigothorum* 8.4.16

Figure 15 shows that treatment of men and women was less equal than what we saw in the inheritance legislation. Furthermore, according to this particular rule, children were valued considerably lower than grown men and women, or those above fifteen years. An original feature here is the differentiation between children of different ages. The older the child, the higher the value if killed. This would certainly be based on the experience of child mortality in the period. For each year a child survived, the greater the chance of the child growing up and reaching maturity. Maturity was attained when a person turned fifteen years of age (LV.4.3.1), which explains the difference before and after fifteen years. Even so, both men and women became emancipated first at the age of twenty (LV.4.2.12).<sup>730</sup> A more interesting discrimination in the tariffs is the rating between girls and boys, where girls under fifteen years of age had half the value of a boy of the same age. Although discrimination against female subjects is not surprising in itself, the Visigothic laws, both from Euric and those from the middle of the seventh century, were in many respects very gender equal. In terms of inheritance, equality in status was expressed in written law, both in relation to property in marriage and the age of majority.<sup>731</sup> Grown women of what we must assume was considered fertile age were otherwise of slightly lower value than men. Bearing in mind these estimations of women in terms of future work capacity, marriage options and the potential for producing

<sup>730</sup> The differentiation between emancipation and age of majority is explained in King, *Law and Society*, p. 244. The same separation between full age and minority can be found among the Lombards (Rot.154), but only for men of eighteen years or older.

<sup>731</sup> See, for instance, Frag.331/LV.4.2.12, LV.2.4.11.

children, it is puzzling that older women, categorised as aged forty to sixty and older than sixty years, both enjoyed equal worth to the equivalent male categories aged fifty to seventy-five and over seventy-five years. Possibly this is the wrong way to look at the numbers and the answer is not that a low value was placed on young women, but that a particularly high value was placed on boys and grown men. Thus, older women did not enjoy a value equal to their male peers, but rather older men suffered a particular loss in value after the age of fifty according to Visigothic law. These differentiations are comparable to the Frankish laws' differentiation in the same categories, treated below. However, the lines of differentiation are different. The categorisation and value given to each category must therefore have a basis in the norms of Gothic legislators, not necessarily from transmission of outside law, even if the concept of distinguishing between age, gender and status can be found in all of these written laws. Compensation due for forcing a woman to abort is comparable, valued at 200 *solidi* (LV.6.3.2). This sum is higher than for the death of a live boy, which may include an element of punishment for the damage of the woman's fertility and honour, in addition to compensation for the loss.

It is not stated in the legal texts that the sums represent the wergild. The Latin term used was merely 'conponantur', which could be translated as 'to be settled with'. In other sections of the *Leges Visigothorum*, terms such as 'conpositionem accipiat', 'accepting compensation (LV. 6.4.3) and 'satisfacere', 'compensate' (LV.8.3.3) appear.<sup>732</sup> If we assume that this list of tariffs was supposed to include manslaughter in addition to unintentional homicide given its obscure placing among the damage by animals, then the list is in line with the Burgundian distinction between intentional homicide and those done in self defence or as revenge. It is only comparable in this distinction, not in the actual categories it contains.

In some of the existing manuscripts, the listing of compensation in LV.8.4.16 opens with a differentiation on the basis of status, where an *ingenuus* – a noble or possibly freeborn – had a compensation value of 500 *solidi*.<sup>733</sup> In contrast, a *libertus* – a freed person – had a value half of that, at 250 *solidi*. This was an amendment from King Ervig (r. 680-687), and these two categories appear to have replaced the age-differentiator in the version of Reccesvint and Chindasvint. This was possibly a later invention, but the distinction corresponds to the emphasis on status in several other parts of the law, also labelled 'ancient'. If *ingenui* meant Gothic nobility, or native born, in contrast to Romans, this could be due to earlier attempts to make Goths and Romans equal in the law (LV.3.1.1). Naturally, Euric's

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<sup>732</sup> *Leges Visigothorum*, MGH, LL nat Germ 1, pp. 265, 322.

<sup>733</sup> *Leges Visigothorum*, MGH, LL nat Germ. 1, pp. 336-37, 489.

laws would consider their *gens*, which was no longer necessary. The seventh-century version still contained many references to differences in class and status, and it is unlikely that the new law aimed to erase that difference in the amounts of compensation.

In contrast to other legislation in the secular sphere, Visigothic law made a distinction in the status of the offender in relation to various offences of injury, damage and violence other than homicide. The law distinguished between lesser and higher status using a variety of terms, such as *maior persona* and *inferior persona* (LV.8.3.10), *honestiore* and *minor persona* (LV.7.5.1), *potentior* and *humilior* (LV.7.5.2). The division in many of these distinctions lies in a fine alone being imposed on the *maior* class, but corporal punishment, and perhaps a lower fine, being imposed on those in the *minor* class.<sup>734</sup> A striking aspect of the terminology is the suspicious correspondence in the division into *honestiores* and *humiliores* in Roman juridical status, although the meaning of this is obscure. Caracalla's division into two classes in AD 212 might have been adopted as a strategy and as terminology by the successor states. The corporal punishments were substantial in the graver cases, including, for instance, being forced into slavery, the loss of a hand or 100 lashes. However, monetary punishments were also sizeable, in line with wergilds listed in other continental laws. Nevertheless, nobility evaded the cruellest punishments, for instance investigation by torture (LV.4.1.2). According to the *Leges Visigothorum*, false testimony would deprive the *honestior persona* of the right to give witness in court, plus a double fine, but the *inferior persona* would receive 100 lashes in addition to losing the right to testify (LV.2.4.3). We can assume that the legislators held the same to apply in case of homicide, i.e., that those without the means to pay very high amounts of compensation were condemned to death while the rich were able to buy off their lives.

However, it is still problematic to make sense of the list of amounts of compensation. Two other rules in the *Leges Visigothorum* confirm that the normal compensation, possibly the wergild, for a man of low status was 300 *solidi* (LV.6.5.14, LV.7.3.3).<sup>735</sup> Otherwise, there are few signs of the institution in the law, and only in a few sections of this elaborate corpus did the legislators insert compensatory punishments, and only in a very few sections do we find vengeance being addressed in particular. Two explanations can be suggested: either compensation as a means of conflict resolution was of declining importance or the legislating authority attempted to suppress it, or alternatively compensation for violence or homicide was so embedded in the conception of justice among the sixth- and seventh-century Visigoths that it was a system outside the system. Ideals from Roman standards in other parts of the written

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<sup>734</sup> McNeal, *Minores and Mediocres*, p. 107.

<sup>735</sup> For differences in surviving manuscripts, see McNeal, *Minores and Mediocres*, p. 101 n. 4.

code, and the outspoken fusion with Roman ideas stated in the code, could result in these more 'barbaric' forms of solutions being downplayed. Maybe it did not fit well with the Roman proclivity of the code, or with the legal elite identifying themselves as Romans or with what were considered Roman ideals. Nevertheless, the obvious reliance on compensation among neighbouring societies and expressed in other sources makes it unlikely that the Visigothic law did not include compensation as a means of settlement. The use of compensation in the case of damage by animals, as well as in the case of damage to property, reveals that it was a well-known concept. If so, the private nature of compensation for homicide did nothing to ensure its prominence in the code, but its obvious existence would also make it unnecessary. It was possible to list the contemporary wergild of people, the amounts of which may have changed over time.

The Visigoths ensured that murderers would not later hold significant roles in court, even if they were not executed for the homicide; in addition to exile, the murderer was prohibited from acting as an attorney. The relevant rule listed the types of actions making a person unsuitable to testify in court: 'homicide, malefici, fures, criminosi sive venefici, et qui raptum fecerint vel falsum testimonium dixerint, seu qui ad sortilegos' (LV.2.4.1). Thus, murderers, wrongdoers, thieves, criminals or poisoners and those who abducted or give false witness were excluded. A similar list can be found in late Roman law. In Constantine's above-mentioned legislation on divorce, similar, although not identical, actions were listed as a just cause for divorce if instigated by the wife (CTh.3.16.1): 'si homicidam vel medicamentarium vel sepulchrorum dissolutorem maritum suum esse probaverit'. This list was continued and extended in divorce law in the following centuries by, among others, Theodosius II (CTh.3.16.2, CI.5.17.8) and Justinian (CI.5.17.10–11, Nov.22.3–19, Nov.117.8–10).<sup>736</sup> The listing of serious offences apparently was a standard verse, and the Visigothic equivalent must be a transmission from Roman legal culture.

Visigothic kings are considered to have been powerful rulers, but this view is to a large extent based on the nature of their laws rather than other sources.<sup>737</sup> As Wickham argues, the legal sources do not reveal much of what happened outside the royal court.<sup>738</sup> After the Visigoths' conversion from Arianism, the Catholic Church had an influential

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<sup>736</sup> Tveit, 'Skilsmisserett', pp. 26, 29–32. See also Theodosius II's revocation of the restriction of female-instigated divorce in the eastern Roman empire (Nov.Th.12.1).

<sup>737</sup> See King, *Law and Society*, p. 222; Heather, 'The Barbarian in Late Antiquity', p. 251; Roger Collins, 'Law and Ethnic Identity in the Western Kingdoms in the Fifth and Sixth Centuries', in *Medieval Europeans: Studies in Ethnic and National Perspectives in Medieval Europe*, ed. by Alfred Smyth (Ipswich: Macmillan, 1998), pp. 4–5.

<sup>738</sup> Wickham, *Inheritance of Rome*, p. 137.

position in the Visigothic kingdom and played an important role in the law-making process. Could we explain the few references to vengeance in the laws by moderation from the clergy? As a paradox, the single unmistakable reference to vengeance mentions the sanctuary of the church: if a killer sought refuge in a church, the law states that the *ones chasing him* had to consult the priest before dragging him out (LV.6.5.16). Afterwards, he should not receive capital punishment, but either be blinded or given up to the family of the victim to be killed by them. Otherwise, we learn that one could kill a rapist (LV.3.3.6). Visigothic laws adapted Roman legal concepts, but still acknowledged that vengeance was a part of the system, and in these sections we see that private vengeance was an accepted right of the kin group. An adulterous wife or daughter could be killed, and her lover, without incurring sanctioned punishment (LV.3.4.4), similar to the right awarded to the head of family in Roman law.

The sparse dealings with vengeance raise the question of whether it was such a natural course of action that it would have been superfluous to address vengeance in the laws, or whether such a topic did not fit well with the Roman and Christian spirit of the code. P. D. King asserted that strong royal power undermined the authority of the head of the family in the Gothic household, and that even if the kinship system predominated among the Visigoths it was the law and not a sense of honour that decided right and wrong in Visigothic society.<sup>739</sup> The Visigothic elite may have engaged in fierce feuding, without it being a matter of concern for legislators. Chindasvint himself erased many aristocratic families to secure his own power.<sup>740</sup> We must keep in mind that the written law was probably constructed as an image of the legislator. To the Visigothic legislators, neat public procedures were given a prominent position over private settlements. It could be argued that this is a sign of a consolidated and strong Gothic state, but more probably it is the transmission from Roman law that rather gives this impression. As has been demonstrated above, the Gothic law nevertheless included distinctly Gothic legislation. As a result, we must assume that the transmission was consciously accepted, and was not merely uninformed receptions.

### *The Frankish laws*

The above point concerning vengeance is suggestive compared to the legal sources of the Goths' northern neighbours and later conquerors, the Salian Franks. In the Salic laws, we find

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<sup>739</sup> King, *Law and Society*, p. 222.

<sup>740</sup> Wickham, *Framing the Early Middle Ages*, p. 39.

no direct mention of vengeance, but the threat of violence may be the reason for their fully compensation-based enactments. Salic law has thus been used frequently by scholars to explain or prove the instability of the Frankish authorities. Wallace-Hadrill was of the view that Frankish law reflected the extreme feud-ridden rule of the Merovingian kings and that feuding was not only legally accepted but encouraged to keep the threatening aristocracy preoccupied with fighting each other and thereby pacify them.<sup>741</sup> The Frankish legislators clearly built on an already existing concept of vengeance. However, there were probably other motives behind the legislation than simply manipulation of the elite as a peacekeeping resolution for general society.

The Salic laws originated in the early sixth century under the Merovingian king Clovis, a contemporary of Gundobad. In its extant form, the text of *Pactus Legis Salicae* (PLS) appears more as a manual, with tariffs for compensation, than a legal code, not unlike the later, east-Roman *Ecloga*. Salic law contains descriptions of many types of offence and the corresponding sum to rectify the deed. Compensation was the prescribed solution for almost every kind of offence committed by free men and women.<sup>742</sup> This includes the grave acts of murder, homicide, rape, molestation, torture, abduction, stealing and adultery.<sup>743</sup> Unlike the Burgundian and Visigothic laws, there was apparently no crime too grave for compensation under the legislating authority in the Merovingian kingdom.

The successors of Clovis added important revisions to the law over the years through the so-called *Capitularies*. These new laws had a completely different conception of the punishments for grave offences and in some instances also addressed the shortcomings of the original law. Concerning private violence, the *Capitularies* constitute a break with both earlier and later legal texts. For instance, King Chilperic (r. 561–584) of the western parts of the Frankish realm prescribed the death penalty for procurers (PLS. 99) and rapists (PLS.130.3), while Childebert II (r. 575–595) of the northeastern parts did so for murder (PLS.Cap.6.2.2,3) and theft (PLS.Cap.6.2.5). He also used the same wording as in the Burgundian Roman law (LBR.2) concerning homicides caused by accidents and self-defence, which was derived from the adaptation of the Theodosian Code (PLS.Cap.6.2.3).<sup>744</sup> Furthermore, the penalty for abduction and adultery was adjusted to outlawry or death (PLS.Cap.6.2.2). The revisions

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<sup>741</sup> Wallace-Hadrill, *The Long-Haired Kings*, pp. 125-26.

<sup>742</sup> Except in the case that a free man or woman had intercourse with or ran off with a slave; this would reduce them to slave status: PLS.13.8-9, LSK.23.7 and LSK.23.11. The *Capitularies* (PLS.98) prescribed the confiscation of property plus outlawry for a woman marrying a slave and gave her relatives the right to kill her.

<sup>743</sup> Murder and homicide: PLS.41, PLS.42, PLS.43, PLS.62, PLS.65e; molestation, wounding and torture: PLS.29; abduction and rape: PLS.13, PLS.15, PLS.133.

<sup>744</sup> Eckhardt, *Pactus Legis Salicae*, p. 268. NVal 19.2.

might have been current practice in Frankish society that ignored the law of Clovis, rather than a sharp shift in legislation. The interesting factor here is that these heirs of Clovis, who were ruling divided and destabilised kingdoms, legislated to an even larger extent for public settlement. Simultaneously, the *Capitularies* also contain encouragement of private initiative and duty in weeding out criminals and keeping the peace in local communities.<sup>745</sup> Their turbulent periods of ruling may have necessitated the implementation of stricter laws, imagining a strong legal system. If this interpretation is correct, then state consolidation cannot always be measured by the quality of its laws.

Compensation for homicide was stipulated on the basis of the wergild, with the victim's gender and age as crucial factors. The normal wergild for a freeborn, grown man was 200 *solidi* and this was also the compensation stipulated for killing a man (PLS.15, PLS.41.1).<sup>746</sup> A young boy (PLS.24.1, 4, PLS.41.18) and a fertile woman (PLS.24.8, PLS.41.16) were valued at the highest worth, at 600 *solidi*. Girls of minor age (PLS.41.15) and older women (PLS.24.9, PLS.41.17) were accorded the same compensation as a man, i.e., 200 *solidi*. The legislators stipulated amounts of compensation following principles similar to those in the Visigothic sources, although with some important differences. Women were here compensated by a much higher sum than men. There are the same distinctions in the Salic laws between grown women, and older women or girls of minor age. The latter two groups were to be compensated for in amounts equal to the sum for a grown man. Again, this must be interpreted as we have above in relation to the Visigothic differentiation of gender, although without the minute classification as seen there. The Salic law, too, reveals a high estimation of a boy as the potential man and heir, and of a woman, probably as producers of heirs. Lisi Oliver has interpreted the triple amount accorded for the fertile woman as the wergild for the woman's life, the unborn child and the horror of the act.<sup>747</sup> Carol Hough, although also regarding this wergild as the tripling of that for others, has criticised this conclusion and suggests that the price is for the life of the woman and her potential future children.<sup>748</sup> This is more likely, given that the *Pactus* also includes several references to the killing of a pregnant woman and the unborn child, which was to be compensated by 700 *solidi*, 600 for the woman and 100 for the child (PLS.24.5–6, PLS.41.19–20). This corresponds to the compensation for killing of a foetus in the womb but not its mother, which was 100 *solidi*. The destruction of

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<sup>745</sup> Clothar: PLS.Cap.II.92, 93; Chilperic: PLS.115; Childebert: PLS.Cap.6.2.2.

<sup>746</sup> Wormald 'Leges Barbarorum', pp. 21-54.

<sup>747</sup> Oliver, *Body Legal*, p. 241.

<sup>748</sup> Carole Hough, 'Review: *The Body Legal in Barbarian Law* by Lisi Oliver', *Law and History Review*, 30, 2 (May 2012), 641-42.

the ability to produce future offspring and heirs could well be the reason for the wergild of a grown woman being set at threefold that of an ordinary man. If so, then the compensation in the laws was based on principles of restoration of the loss of a person's work potential to the victim's family, rather a solution than a punishment. The Merovingian kingdom is notorious among historians as the society most known, next to Iceland, for its culture of feuding, especially since Wallace-Hadrill's 1962 publication, *The Long-Haired Kings: And Other Studies in Frankish History*.<sup>749</sup> Nonetheless, the Salic laws essentially reveal little direct evidence of how acts of vengeance were perceived or what procedures were to be taken in the case of retaliation. Compensation is not directly linked to vengeance, either. Instead, we see that the sums correspond to a person's worth or value, which signifies that compensation should propitiate and substitute the actual loss and not necessarily pacify.

Having been added to and corrected over a period of approximately 300 years, the law of Clovis was moderately revised and thoroughly restructured under Pepin and Charlemagne in the *Lex Salica Karolina* (LSK) from the early ninth century. It seemingly ignored the sterner capitularies and concentrated on systemising the rules of the *Pactus Legis Salicae*. All the rules treating offensive acts, such as violence, killings, theft and adultery, present various sums that would be satisfactory in providing restoration for the damage done.<sup>750</sup> However, other rules mention that there were crimes for which the death penalty was given, without revealing what those crimes were (LSK.5.2). These were possibly the traditional crimes of a grave nature, such as murder, arson and treason, which carried the death penalty according to the *Capitularies*. If so, the Carolingian version had similar ideas of differentiation of premeditated homicide and manslaughter and unintentional deaths as the Visigothic laws, but such motives are not stated in writing.

Even if compensation was stipulated for all kinds of deeds in the *Pactus*, which would elsewhere be non-compensational, a distinction was made between homicide and secret killings, or murder. If the killer tried to hide the body, the compensation extracted amounted to 600 *solidi* and the highest sum was 1800 *solidi* (PLS.41.4-7). In the later capitularies, these higher sums were reintroduced as compensation for the murder or homicide of noblemen, high clergy and men in the king's administration.<sup>751</sup> These are linked to high-ranking status. Little is revealed concerning status within the freeborn Franks, distinguishing between the

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<sup>749</sup> Wallace-Hadrill, *The Long-Haired Kings*.

<sup>750</sup> The rules referenced mostly correspond to those in the PLS stated above: murder and homicide: LSK.11, LSK.12-14; molestation, wounding and torture: LSK.XVI; abduction and rape: LSK.22; theft: LSK.39-43.

<sup>751</sup> PLS.8.1-7, 'Seven types of cases'.

higher and lower classes, such as we find in the other Germanic law codes. The *Capitularies* make reference to the familiar distinction between a higher class of *meliores* and a lower class, the *minoflidis*, in a situation in which a body was found between two communities (PLS.102).<sup>752</sup> There was a further distinction regarding ethnicity, or perhaps more correctly, identity. Frankish law distinguished between the Franks and the Romans, where the latter were accorded half the value of the former (PLS.41.8–10) In the *Pactus*, a Roman victim was even compared with the half-free and servants (PLS.42.4). Thus, killing a person identified as Roman and not of Frankish ethnicity was only penalised at half the amount of a Frankish man. The same applied in the case of robbery (PLS.14.2–3). Thus, the Frankish laws do not observe a mutual standing for the Franks and the Romans within their jurisdiction as the Visigoths did. In the late-fifth century, this issue was current. We can imagine that the relatively new rulers in the relatively new Merovingian kingdom would need to distinguish themselves from the old structures of the Romans in Gaul. Possibly, it strengthened legal authority to also raise the status of Franks in law above that of the Romans. With all the upheaval in the region before the genesis of a Frankish kingdom, the Romans did not have a particular hold in the region that needed to be suppressed. The distinction was continued in the *Capitularies* of the later part of the sixth century (PLS117.2), in which Roman women were also valued at half the sum of Frankish women (PLS.104.9). What is more puzzling is the continuation of this distinction in Carolingian law on killing a Roman as opposed to a Frank (LSK.11.6-8, LSK.12.4) or robbing a Roman (LSK.18.1-2). It is reasonable to believe that the distinction between the Romans and Franks was likely to have been blurred by the eighth century. In other sources, Roman disappear as an ethnic marker. Ralph Mathisen argues that the Romans in the Germanic kingdoms adapted to Germanic culture and became indistinguishable.<sup>753</sup> Legal discrimination might have motivated such an adaptation, which would nevertheless have happen over the centuries. Mathisen also emphasises that the Franks became equally Romanised, which was also the case for the Visigoths according to Dietrich Claude.<sup>754</sup> Moreover, Charlemagne showed a neo-Roman streak and tried to establish an empire along the lines of the Roman model.<sup>755</sup> Nevertheless, there were disturbances between the Franks

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<sup>752</sup> McNeal, *Minores and Mediocris*, pp. 56-57, asserts that a *minoflidus* was a smallholding, ordinary peasant, not a tenant. See also Drew, *Laws of the Salian Franks*, p. 45.

<sup>753</sup> Mathisen, *Roman Aristocrats*, pp. 145-46.

<sup>754</sup> Dietrich Claude, 'Remarks About Relations Between Visigoths and Hispano-Romans in the Seventh Century', in *Strategies of Distinction, The Constructions of Ethnic Communities 300-800*, ed. by Walter Pohl and Helmut Reimitz, (Leiden: Brill, 1998), pp. 117-22, 127, 130.

<sup>755</sup> Wickham, *Inheritance of Rome*: 375-404.

and Roman Byzantines in the Balkans and elsewhere.<sup>756</sup> The distinction between Franks and Romans in the later revision only confirms that the legal system needed to differentiate within the population, and that not all legislation necessarily had realistic prospects. Relating to transmission of law, one possibility is that the distinctions were merely copied without any reflection of what these differentiations meant. This may simply have been the utility of using the earlier laws, where the Carolingian legal elite had enough to do reorganising the law and little time to assess the contents. This hypothesis is supported by Alan Watson's theory of how easy it is to borrow law, and how difficult it is not to when laws are available.<sup>757</sup>

In the Carolingian revision, the delineation of compensation from the *Pactus* was continued (LSK.11, LSK.33). The same amounts of 200 *solidi* and 600 *solidi* were given as the proper compensation for killing respectively a man, a girl or a barren woman, or a boy or a fertile woman. Pregnant women, too, were held to be worth compensation of 700 *solidi*, whereas the death only of the foetus was valued at 100 *solidi*. Given that Pepin initiated a major reform of the old monetary system of the *solidi*, it is peculiar that the old amounts are replicated. The reforms gave systematic value to the lesser currency units that developed during the Middle Ages, most importantly the *tremissis*.<sup>758</sup> However, as Drew has pointed out, the old denominations and the 'meaningless Malberg glosses' were omitted, so some consideration must have been taken in the revision.<sup>759</sup> It is possible that the actual amounts were more symbolic than real, given that no development had taken place in the course of 300 years. If written law was, as Wormald suggests, rather a showcase for royal power, then the amounts themselves meant little in real court cases.<sup>760</sup> In any case, the mechanism of the early medieval economy did not cause the same type of inflation as later and the amounts might have corresponded to the expectations of parties in a conflict. Again, we find that law was transmitted with very little attention to the contents, or possibly with considerable respect for the authority of earlier royal legislation. Still, there are some minor changes that suggest practical usage of Carolingian law. In the reissued rule on compensation for homicides of women and children, we find the differentiation of status rearranged putting the killing of a

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<sup>756</sup> Timothy Gregory, *A History of Byzantium* (Malden, Oxford, 2005), *A History of Byzantium*, pp. 200-204, Paul Magdalino 'The Medieval Empire (780-1204)', in *The Oxford history of Byzantium*, ed. by Cyril Mango (Oxford: Oxford University Press, 2002), pp. 169-208 (p. 171-72).

<sup>757</sup> Watson, *Legal Transplants*, pp. 25-30, 95; Watson. 'Aspects of Reception', pp. 335-39.

<sup>758</sup> Stewart Lyon, 'Historical Problems of Anglo-Saxon Coinage, 3: Denominations and Weight', Address by Stewart Lyon, President of the British Numismatic Society, Delivered at the Anniversary Meeting, 25 November 1969, *British Numismatic Society Publications*, (1969), p. 207; Peter Spufford, *Money and its Use in Medieval Europe* (Cambridge: Cambridge University Press, 1988), pp. 18-21.

<sup>759</sup> Drew, *The Laws of the Salian Franks*, p. 53.

<sup>760</sup> Wormald, 'Lex Scripta', pp. 126-29.

young boy before a pregnant woman (LSK.33.4-9). Into this list of wergild and status, was also inserted the killing of a young girl (LSK.33.6) from the section on circumstances of the homicide (PLS.41/LSK.11).

Unlike the other Germanic codes studied here, Salic law included details of how the legislator anticipated the giving and receiving of the compensation. It was anticipated that the killer would provide the compensation out of his own property. If a killer was unable to pay the full compensation, then his mother and father (in some manuscripts his mother and brother) should contribute as much as possible, followed by the maternal aunt and her children (not the brother's children?) (PLS.58).<sup>761</sup> If they were unable to do so, then the remaining sum would be divided among three of the nearest relatives on the mother's and on the father's side. The responsibility of the compensation mirrored the pattern of inheritance (PLS.59). However, the sister of the killer was not mentioned. The sister might be assumed to be married, unable to use her husband's property to pay compensation. The killer's wife could not contribute either.

Both the original and the revised law also contain descriptions of how the compensation, when paid, would be distributed. The compensation was to be divided with half going to any children and a quarter each to the paternal and maternal relatives (PLS.62/LSK.14). If the deceased lacked any of these relatives, the treasury received their part of the compensation. Alexander Murray has argued, based on the rights of the authority, that the two lesser parts were considered completely independent compensations.<sup>762</sup> The paternal and maternal relatives were only connected through joint rights, but they did not receive the compensation as a joint clan. According to this theory, we should look at the compensation given in written law as three compensations, not one.

The *Capitularies*, possibly of Childebert I, included the stipulation that the mother of the children of Ego received one-fourth, so that the heir received one-half and the wife of the killed man received half of the remaining half of the compensation (PLS. 68, Cap.I).<sup>763</sup> What is interesting in this text is what happens with the last portion. The rule diversifies to a greater extent in terms of which relatives would receive compensation, giving the closest three relatives from the maternal and paternal side the last share. If there was no wife, the relatives

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<sup>761</sup> See Murray, *Germanic Kinship Structure*, pp. 225-230 on his comments to the versions of this section in the MSS.

<sup>762</sup> Murray, *Germanic Kinship Structure*, pp. 138-39.

<sup>763</sup> This rule is only part of two manuscripts, *Pactus Legis Salicae*, MGH, LL nat Germ, 4.1, p. 239; Heinrich Brunner, I. 'Sippe und Wergeld nach niederdeutschen Rechten', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Germanistische Abteilung* 3.1 (1882), 1-87. (pp. 31-35); Murray, *Germanic Kinship Structure*, pp. 140-44.

would share her portion, i.e., half the compensation, in the manner that the two closer of each side would share two-thirds of the portion and the two more remote relatives would split the last third according to the same principle, where the closer received two-thirds. Murray, who discusses the rules on compensation as a realistic and not merely a written system among the Franks, has pointed out that the portion of the relatives was divided into parts with the ratio 6:2:1.<sup>764</sup> Hence, compensation was distributed in such a manner that those who were closer would receive larger parts of the compensation, but other close relatives would also be entitled to a share. Even if this study is based on the hypothesis that the legislation represented motives and not necessarily the reality of the legal system, the motives behind such a distribution could have been a way of satisfying those relatives who were potential initiators of feuds, so as to avoid vengeance for a homicide and prevent private violence. Similar distribution systems can be found in the English and Scandinavian material, and will be discussed later.

So why did compensation permeate Salic law? Wallace-Hadrill argued that as weak rulers, the Merovingian authorities were themselves caught in the dynastic conflicts of the Frankish elite.<sup>765</sup> They used feuds and institutionalised the form of settlement. Wallace-Hadrill believed Merovingian kings could not abolish vengeance because they depended on it for the system of compensation to work. If there was no threat of vengeance, people would not pay the fines. We could further argue that this was the situation for all these societies and all levels of society – that the offender or the kinsmen paid money to escape violent reprisals – and that it was not a particularly Frankish mindset. Conversely, if there was no threat of expensive compensation, it would be difficult to stop people from feuding. We must assume that the legislators, both Clovis, and Charlemagne 300 years later, wanted to replace vengeance with peaceful settlements. Compensation was the most practical way to achieve this, and was set down in written law. Nevertheless, the consistent copying of earlier rules suggests, as stated above, that the Carolingian version was adapted, to a limited extent, to the current legal culture, and was only systemised according to a new order.<sup>766</sup>

In seeking to determine whether compensation was regarded as a punishment or a solution, the Frankish laws indicate that the royal treasury might gain from making private conflict resolution authoritative law. The *Pactus Legis Salicae* invites court settlements

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<sup>764</sup> Murray, *Germanic Kinship Structure*, p. 142. Brunner also saw similarities between the Salian distribution and that of the Keure of Oudenarde in Flanders: Brunner, 'Sippe', p. 35.

<sup>765</sup> Wallace-Hadrill, *The Long-Haired Kings*, pp. 133-34.

<sup>766</sup> One of the few additions to the Carolingian version was a regulation on stealing trees : LSK.55.

through its descriptions of procedure, or at least through threats to those not appearing in court when summoned (PLS.1/LSK.1, PLS.56/LSK.2). The earliest law code expected subjects to co-operate in peacekeeping, which included capturing and possibly harming criminals.<sup>767</sup> To a greater extent than expressed in the *Capitularies*, legal authorities relied on the efforts of its communities to ensure justice. Possibly, the later legislators saw the necessity of controlling the court systems, or perhaps they had the means to do so. In the *Lex Salica Karolina*, there is little change from sixth-century law on possible income for the royal authorities in cases involving private violence. The focus on procedure that is demonstrated through Frankish law and even more so in legal records nevertheless suggests a desire for official settlements. Paul Fouracre has argued that the importance of the ‘procedural framework of Frankish dispute settlement can be overemphasised’.<sup>768</sup> Fouracre suggests that the focus of procedural steps could instead be an emphasis on public settlement contra private and also ensuring that settlements did not take place outside court.<sup>769</sup> The same appears in the chapter on proceedings in the *Leges Visigothorum*, which emphasised that agreements between the parties were unacceptable when the case was brought to court (LV.2.2.5). Settlements between the parties before the conflict was subjected to the public legal system appear to have been a concern to both Frankish and Visigothic legislators, which is connected to the state’s interest in controlling the legal system and sharing money transfers, as Murray also pointed out.<sup>770</sup>

The overall image given in the Frankish laws is that of a legal process that could settle every case with compensation, but asserted this should be done in court. The *Capitularies* have lean somewhat more towards Roman principles than the codes. The motives behind the rules were rarely provided, although we find quite a detailed system of tariffs and distribution of the compensation for homicide. The Carolingian copies of outdated material from the *Pactus* suggest that the sixty-five-version had more to do with prestige than with exercising of law.<sup>771</sup>

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<sup>767</sup> PLS.15, PLS.50, PLS.56.6, PLS.90.1.

<sup>768</sup> Paul Fouracre, “Placitia”, p. 34.

<sup>769</sup> Fouracre, “Placitia”, pp. 34-35.

<sup>770</sup> Murray, *Germanic Kinship Structure*, p. 139.

<sup>771</sup> On the sixty-five version, see Wood, *Merovingian kingdoms*, pp. 108-14.

## *The Lombard laws*

The Franks' and Visigoths' neighbours in northern Italy, the Lombards, had written laws comprised of deeds and tariffs, similar to the Frankish laws. Lombard law contained compensatory solutions to most misdeeds, and added a fine to the royal treasury in most cases. In this respect, the Lombard laws appear to be modelled on the earlier Frankish laws, but with certain major differences in relation to the use of violence. The Lombard king Rothair, who enacted the first *Lex Scriptum* in the 640s, devoted much of the edict to problems regarding private violence. *Faida*, feuding, was addressed in several of the laws. The legal text gives the cessation of feuding as motivation for the enactments. For instance, in Rothair's edict we read in case of injury that '(...), composition is to be paid according to the procedure provided below and the blood-feud shall cease' (Rot.45) and:

...we have set a higher composition than did our predecessors in order that the *faida*, that is, the blood feud, may be averted after the receipt of the above-mentioned composition, and in order that more shall not be demanded and a grudge shall not be held. (Rot.74)<sup>772</sup>

Patrick Wormald demonstrated how elements coincide in the Frankish laws, both the Salian and Ripurian, with the *Edict*, and with the seventh-century laws by Æthelred of Kent, which will be dealt with below.<sup>773</sup> He follows the trail of Brunner's argument that these laws had a common source of a lost law code from Merovingian king Dagobert.<sup>774</sup> And, although Wormald does not support an original *lex*, he demonstrates the interdependence between the Frankish laws and the Lombard and Kentish, regarding several topics, and particularly compensation. However, where the Alaman and Ripurian laws correspond to the Frankish laws in structure and contents, Lombard law show a higher degree of deviation. Lisi Oliver pointed out the same familiarity, regarding compensation for injury.<sup>775</sup> From this, we can assume, from the outset of the process of legislation, transmission of law from the sixth-century Frankish laws to the seventh-century Lombard *Edict*, and simultaneously assume a

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<sup>772</sup> Translations by Drew, *Lombard Laws*, pp. 61 and 64-65; *Leges Langobardorum*, MGH, LL, 4, p. 20. Rot.75: *Leges Langobardorum*, MGH, LL,4, p. 24: 'ideo maiorem compositionem posuimus quam antiqui nostri, ut faida, quod est inimicitia post accepta suprascripta compositione postponantur'. See also Rot.75, Rot.138, Rot.143, Rot.163, *Leges Langobardorum*, MGH, LL, 4, pp. 31-33, 37-38.

<sup>773</sup> And also with the Alaman and Bavarian laws. Wormald, *Making of English Law*, pp. 96-101, list on pp. 98-99.

<sup>774</sup> Ibid. p. 97; Brunner, 'Vershollenes merowingisches Königsgesetz', pp. 932-55.

<sup>775</sup> Oliver, *Body Legal*, pp. 17, 72-226.

certain degree of original legislation and even a conscious attitude towards the loans from other legal sources.

Later Lombard kings supplemented Rothair's edict. King Liutprand (r. 712–744) too, was more forthcoming in stating the motives behind the laws. His legislation continues the emphasis on avoiding violence. For instance, in resolving the conflict resulting from a broken engagement, he was credited with the reasoning that '[w]e do this in order that enmity may cease and there may be no feud' (Liu.119). Thus, from the Lombard legislators we have the most outspoken acknowledgement of feuding in society and, among the sources included in this study, the only declared attempt to eliminate the custom. In the process of state consolidation, addressing violence would be a sensible way to ensure loyalty to the king. It is not possible to read from these sections that Lombard society was more violent than others were, or that the state apparatus actually curbed private violence within or outside the legal system. The set phrases in Lombard laws were, nevertheless, strong statements on the subject of feuding, contrasted with contemporary law. Traditions could be difficult to overcome in a forming state, illustrated by the Lombard king Liutprand's attempt to abolish judgment by duel (Liu.118.II). A duel was not necessarily a fight to the death, but it was believed to reveal God's verdict on the matter. The first blow would determine the guilt and from there compensation should be exchanged. Liutprand expressed the very core of the predicament in proclaiming 'Quia incerti sumus de iudicio Dei' ('We are uncertain of God's judgment'), referring to the fact that the wrong person might lose the combat. Resigned, he continued that 'on account of the customs of the Lombards, we are unable to abolish this law'.<sup>776</sup> The rational thoughts of a legislating king could not alone enable him do away with a traditional proceeding. He was caught in what Katherine F. Drew has called the 'clash between custom and the needs of the time'.<sup>777</sup> Applied to the legality of wergild and the threat of feud, this raises the question of whether compensation was retained in the laws because it was too embedded in people's sense of justice. The system of oath giving had the same purpose, to determine guilt with signs rather than evidence. However, oath giving declined in the Lombard legal system during the eight century, although it continued as a formality of written law.<sup>778</sup> Hence, in some cases practice changed while law remained conservative. The same could be the case with the compensatory solutions in the laws.

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<sup>776</sup> *Leges Langobardorum, MGH, Legum, 4, p. 156.*

<sup>777</sup> Drew, *Lombard Laws*, p. 253 n. 12.

<sup>778</sup> Wickham, 'Land disputes'.

Unlike other contemporaneous or later laws, Lombard legislators also explicitly admit by discouragement that compensation should be paid to *avoid* enmity and feuding: 'propter faida'.<sup>779</sup> Furthermore, people seeking vengeance by killing an associate of the offender after receiving compensation should pay the compensation back twofold, but suffer no further reprisals from the official authority (Rot.143). The rule of the Lombard kings was troubled by conflicts with regional lords fighting for power and autonomy, many examples of which are provided by Paul the Deacon.<sup>780</sup> Royal authority was conferred by election among these lords and was not hereditary. Besides unstable rule, the influence of the clergy on both legislation and the authorities was also limited, perhaps because both the Arian and Catholic churches operated within the boundaries until the beginning of the eighth century, and thereby neutralised each other.<sup>781</sup> We can thus assume a limited pressure on legislation from the Church.

Monetary settlements were stipulated in cases of homicide, as well as in cases of injuries, insults and abduction.<sup>782</sup> Compensation for grave offences should be stipulated based on the victim's wergild and – in most cases – the king's treasury would also receive a share. The compensatory system also constituted an income for the authorities. The prescribed procedure was set in an official framework and the written laws encouraged public settlement by institutionalising compensation. This ideally made the king a participant in the execution of justice and the law, although the king's authority was limited.

The compensation stipulated for homicide and rape was set at several times the wergild. The size of the wergild was not revealed in the edict of Rothair, but Liutprand's laws include a list (Liu.62). According to this, wergild was differentiated according to status in *two* classes: those in the *primus* class were valued at 300 *solidi*, a *minima persona* at 150 *solidi*, and then there were the members of a third class, the royal *gasindii*, or servants of the king, which were valued at 200 *solidi*. This last class was an unfree but privileged group. The divide between higher and lower status is similar to the Roman divide. With the third group, the classification also resembles those seen in the Burgundian and Visigothic laws and in the Frankish *Capitularies*, and the sums correspond.

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<sup>779</sup> Rot.188, Rot.190, Rot.214 in *Leges Langobardorum*, MGH, LL, 4, pp. 45, 46 and 52. And 'pro ampotandam inimicitia sacramenta prestitia'. Rot.143 in *Leges Langobardorum*, MGH, LL, 4, p. 32.

<sup>780</sup> See, for instance, Paulus Diaconus, *Historia Langobardorum*, 4.41, 4.51, 6.19-25 in 'Pauli historia Langobardorum', ed. by L. Bethmann and G. Waitz, *Monumenta Germaniae Historica*, Scriptorum rerum Langobardicarum et Italicarum saec. VI-IX (Hannover: Hahn, 1878), pp. 12-187.

<sup>781</sup> Drew, *Lombard Laws*, pp. 16, 36. The Lombards converted to Catholicism in a slow process over the course of the seventh century, not violently or top-down.

<sup>782</sup> See Rot.14-34, Rot.41-138, Rot.205-10, Rot.381-84.

The sums may represent the wergild during Rothair's seventh-century rule as well. As we saw in the compensation in Frankish law, changes were not made in the actual sums over the course of the centuries. However, Rothair's edict does give details about the relationship between compensation and wergild. In contrast to the Lombard downgrading of Roman citizens in the marriage legislation, we do not find a distinction between Lombard and Roman as compensated victims as in the Frankish and Burgundian laws. Even if Romans answered to Roman law in the Lombard kingdom, a Lombard killing a Roman would be a case for Lombard courts. However, we learn that illegal intercourse with someone else's Roman slave brought a smaller fine of twelve *solidi*, rather than the twenty *solidi* due if she was a Lombard.<sup>783</sup> Neither do we find in writing other differentiations in age, as are found in the Visigothic and Frankish laws, and in this matter they do not faithfully follow the Frankish code. However, Lombard law did differentiate between male and female, both as killer and victim. The legislators paid much attention to the control and protection of women as both victims and violators. As previously mentioned, women were not legal persons (Rot.204), but there was nevertheless steep compensation prescribed for harming, killing or offending women. Women probably had a wergild equal to their male peers.<sup>784</sup>

We also see indications that both the wergild and multiple wergild could be the anticipated compensation: like the Salic laws, the homicide of a pregnant woman meant compensation should be collected for both her and the unborn child, with half her wergild for the child (Rot.75). In this case, her status and wergild determined the compensation. However, another section stipulated compensation for killing a woman was as much as 1200 *solidi*, the highest compensation in the Lombard written laws (Rot.200-201), and higher than other Germanic laws. This rule concerned a woman's unjust death at the hand of her husband. The 1200 *solidi* would be shared between the king and her own relatives, which suggests that her natal family would have some interest in her after her marriage or transfer. It also means that her kin held the right or duty to avenge her. As a point of comparison, rape of a woman was also settled at a high rate. Rape gave a woman's *mundwald* (guardian) the right to compensation according to her status, that is, 900 *solidi* for a free woman (Rot.186).<sup>785</sup> If the wergilds in Lombard law corresponded with differentiations in other Germanic laws, then the recorded amounts of compensation were unique to both earlier and later laws. The reason may

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<sup>783</sup> Rot.194, *Leges Langobardorum*, MGH, LL,4, p. 47.

<sup>784</sup> Drew, *Lombard Laws*, p. 242 n. 23.

<sup>785</sup> Less for the half-free and slaves (Rot.205-07). The rape of a nun resulted in compensation of 1000 *solidi*, which would be shared with the king (Liu.30.I).

be the particular Lombard focus on curbing the feud, but more probably the high sums were intended to prevent violence generally in the Lombard state.

According to Rothair's *Edict*, women who killed or attempted to kill their husbands would lose their lives (Rot.203). Whether this was by the hand of the husband's relatives or by the authorities was unstated. Legislators similarly expected a husband to deal with an adulterous wife himself and, apparently, honour killing was due in such cases (Rot.212).<sup>786</sup> However, if the wife was killed without good cause, the same high compensation of 1200 *solidi* applied, which would be shared between her kin and the king (Rot.200). Except for vengeance against adulterers and thieves, there was no legal acceptance of vengeance as a non-recurrent means of conflict resolution in the Lombard laws. Nonetheless, it was recognised that it was a frequent form of settlement in Lombard society.

The legislators did not specify in detail who should give and receive compensation in case of homicide, as Salic law did, apart from 'the relatives'. Regarding the recipients, that is, the family of the victim, close male relatives were the natural recipients according to Lombard legal culture. As mentioned in the chapter on inheritance, men could also inherit on the grounds that women could not raise the feud (Liu.13.VII). Although, based on literary sources, Murray has cautioned against interpreting contributors of compensation and those involved in the feud as one and the same, Liutprand's statement indicate that there was a connection.<sup>787</sup> Likewise, male relatives of legitimate status had precedence over those with the status of natural children (Rot.162). It was probably the legitimate-born who also had precedence in starting a feud, or natural sons and brothers may have been deprived of this right altogether.<sup>788</sup> The law did not otherwise state any particular division of the sum, like we find in Salic law. Neither do we learn how compensation was to be paid or collected. Liutprand demanded the killer's entire property be confiscated in cases of murder (Liu.20), and possibly the underlying expectation was that the payment started with the killer himself, without shares or instalments coming from either side of his family.

A few actions lead to a harsher punishment than compensation, although these were admittedly steep. Crimes against the king were of course among these and were listed first in Rothair's *Edict* (Rot. 1–7). Further, any upheaval against authorities was considered in the

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<sup>786</sup> See Rot.190-95, Rot.205-17 and Liu.119 on rape, adultery, abduction and eloping, all of which were sanctioned as grave crimes but, with exception of adultery, could be resolved through payment of steep compensation. See also Tveit, 'Non enim coitus matrimonium facit', pp. 79-80.

<sup>787</sup> Murray, *Germanic Kinship Structure*, p. 136.

<sup>788</sup> Drew, *Lombard Laws*, p. 244 n. 40 suggests the latter option.

same category.<sup>789</sup> Parricide would be settled with a harsher punishment, probably the death penalty, as the Romans decreed in their laws. A concern was that the killer might be the victim's heir. Therefore, other family members would inherit instead, in case of family homicide (Rot.163). On the other hand, planned killings, as defined in the category of murder in this study, would actually be remedied through compensation by wergild (Rot.11, Rot.141); a failed murder attempt gave rise to a fine of only twenty *solidi* (Rot. 10, Rot.12, Rot.139). In comparison, Roman law and the Visigothic legislators stated this to be as grave as murder and stipulated the death penalty. However, there was a distinction between planned murder and secret murder, compensation for the latter being 900 *solidi* (Rot.14). Liutprand's stricter regulation in the eight century demanded full confiscation of the killer's property to make up the compensation (Liu.20). If the value of the property exceeded compensation, the residue would be shared between the victim and the king, i.e., the treasury. In this way, a killer's wealth would not make it possible for him to pay his way out of the offence. Whether this was part of an attempt by Liutprand to place subjects on equal terms, we cannot say. But, viewed together with the previously mentioned ban on duelling and the granting of inheritance rights to women (see chapter 6), Liutprand's legislative contribution could have been due to a notion of social change.

In the Lombard royal legislation on homicide, we find many of the same features as the three other continental legal cultures, alongside some that stand out as unique features from the Lombard legal elite. We find tariffs of compensation for homicide, and the tariffs are categorised according to the victim's gender and status. Although Lombard law valued women very highly, and it does not bother with age differentiation, the legal thought is recognisable. The distinctive character of Lombard law is that at least in the earliest written law, compensation was more about avoiding vengeance than punishing the killer. While it is easy to read too much into legal platitudes, the interest in avoiding feud is repeated and elaborated on by both Rothair and Liutprand, and it must be understood as a significant topic giving the Lombard royal legislator some authority. Following on from this, the legislation on homicide must be read as a recommendation to reach agreement and keep the peace. In regard to transmission of law, the familiarity of Lombard laws with the other Germanic laws, and in particular the Frankish laws, is evident. Again, Lombard laws nevertheless have crucial differences in the stated regulations concerning compensation for homicide, revealing an

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<sup>789</sup> To rebel against one's superior and kill a lord was punished with death (Rot.13, 19), as was sending secret messengers to neighbouring lands, as found in the laws of King Ratchis (Rot.9). Causing a disturbance near the physical presence of the king could also risk death (Rot.36).

independent approach to those loans made from the earlier legislation of neighbouring legal cultures.

### **Conclusion: Roman and Germanic laws on homicide and compensation**

This detailed survey of the content of the Germanic laws has mapped out the similarities and dissimilarities in the regulation of homicide. As a preliminary conclusion regarding early medieval legislation on homicide and compensation, we can see that the sources revolve around the same topics, the same problems and perhaps – apart from the Visigothic laws – roughly the same solutions, with compensatory punishment for these crimes. Vengeance was not generally accepted legally as a form of conflict resolution, although in particular circumstances it was, and it was at least acknowledged by the lawmakers as part of society's system of justice and peacekeeping.

However, the different Germanic lawmakers we have examined here had different ways of dealing with private violence in the written laws. While the Visigothic kings prescribed public proceedings and corporal punishments, the Frankish and Lombard kings assumed private agreements of monetary compensation. The Burgundian legal material shows a combination of the fine-based legal system and corporal punishment, as seen in the Roman and Visigothic codes. Burgundian and Visigothic law are already known as those which reflected Roman law in their wording, content and appearance. That may be the reason for not devoting much space to the compensatory system in the written laws, although it does appear in them. The Visigothic law demands an equal treatment of the Romans and the Goths, which is vaguely detected in the earlier Burgundian law as well. The Lombard and Frankish laws downgrade Romans, and the Frankish laws also devalue them. Burgundian law contained adaptations from Roman law on assigning guilt and meting out punishment, and also on distinguishing between types of homicide, with or without intent, and between these and manslaughter justified by anger. These distinctions were also included in the other Germanic law. But while the Visigothic and Burgundian laws followed the Roman example of assessing murder as a capital crime, the two others included compensation even here. The differentiation in status can also be assumed to be an inheritance from the Roman legal apparatus, which influenced the Germanic. All the Germanic laws in this study include a two- or three-part definition of status groups, outside the unfree. The Roman model of *honestiores*

and *humiliores* were presumably the source of this influence, although the Germanic versions had three groups and slightly different Latin names.

If we then view the findings in light of the hierarchy of probability, we see the same transmission in some specific areas of laws regarding compensation. Starting from the bottom, with the simple elements of the rules, there are many common features in the continental rules on compensation for homicide. Here we look at the terminology, solutions and otherwise similar features in the simplest elements of the rules. However, the main terms differ between the codes. All four codes have different terminology. While Burgundian law uses the Roman term *pretium*, the Lombards employ the Germanic term *wergeld* and vague references to both appear in Visigothic and Salic laws, together with the term *leod*. These terms still have the same meaning and content in terms of the value of a life. When we look at the solutions, the laws also contain the same recompense: compensation. All four jurisdictions stipulate compensation based on the wergild in the same law and computed to be either the same amount or two- or threefold. Although the stipulated sums of actual compensation differ, there is a concurrence between these tariffs that cannot be explained other than by an influence or perhaps interdependence between them. Both in contemporaneous and diachronic sources, the sums revolve around the value of 150, 200 and 300 *solidi*, according to status. The sums themselves might have been of abstract sizes given the insurmountable values stipulated and the realities of these sums. Why the legislators stipulate these sums for wergild specifically, and not other sums, is not stated by them. The most obvious thought is a common idea of wergild shared between the Germanic legal elite, probably deriving from a counting system where these numbers are significant. Burgundian laws did not employ the numbers apart from in the rule on wergild, nor did Frankish laws outside giving high-ranking servants and slaves of the king a wergild of 300 *solidi* (PLS.41.8 and PLS.54.2). In Visigothic law we find the occasional punishment of 200 lashes, although 100 lashes was more frequent, and those causing the disablement of a slave through torture were fined 200 and 300 *solidi*.<sup>790</sup> Lombard laws otherwise set compensation at 200 *solidi* in the case of adultery with a nun, or breach of agreement, while the numbers 150 and 300 do not occur elsewhere (Liu.42.XIII, Liu.76.VII). The sums must therefore derive from copies of earlier laws giving these sums or, more likely, from a common Germanic idea of the value of wergild, just as widespread as the common idea of the seven-day week and the name of the days.<sup>791</sup> The size of the wergild and compensation may have been widespread in a similar fashion.

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<sup>790</sup> For instance, LV.5.4.9, LV.6.1.4, LV.6.2.3, LV.6.3.1,5,6.

<sup>791</sup> Lupoi, *Origins*, pp. 141-44.

Looking then at the composition of the rules, we can discern four different directions in the legislators' arguments for compensation as the solution for homicide. Differences also exist in sources originating in the same period. The early sixth-century Burgundian laws make a few references to vengeance and more infrequently use compensation as solution. The contemporary Salic laws stipulated compensatory punishments and made no references to vengeance. The later Visigothic laws from the mid-seventh century provide few references to compensatory settlements and even fewer to vengeance. Meanwhile, contemporary Lombard law, like the earlier Salic law, incorporated a compensatory system of punishment, but unlike the Salic law, Lombard lawmakers strongly stressed the threat of vengeance so that it permeated all aspects of private law.

The most probable evidence of transmission is in copied rules. There exists obvious copying of the Frankish laws from the sixth in the ninth century, but otherwise there is little copying of entire rules or passages between the Germanic laws. The loan of phrases and paragraphs came from Roman law, which did not have the institution of compensation for homicide. In these respects, the early Germanic laws that originated in the wake of Roman legal culture reveal more differences in addressing private violence than anticipated. Their similarities could be the result of similar solutions to similar problems rather than legal transmission of intellectual commodities. Nevertheless, the total number of concurrences in the laws' solutions to homicide proves the transmission of law in this respect.

## 11. Compensation for Homicide in the English Laws

In the chapter on inheritance in England, the recurring theme was the lack of rules regulating inheritance, and thus the few parallels to continental secular laws. Regarding compensation, the picture is quite different. Early English legislation is comprised to a large extent of crimes/criminal actions and tariffs pertaining to them, either as fines or compensation or both, similar to those found in the Frankish and Lombard laws. Hence, there are several comparable points between the English laws from the seventh and eighth century and Germanic and Roman legislation. The political context of the ninth century onward brought contact with Scandinavian legal culture. Thus, this chapter will anticipate some parallels between the English laws and those Scandinavian laws from later centuries. The first known attempts at written law in the old Roman province of *Britannia* was the legislation of King Æthelbert, assumed to date from the period AD 602–03.<sup>792</sup> Roughly contemporaneous with continental legal activity, the earliest Kentish laws support the idea of a legal transmission between the island and the Continent in many respects, including compensation.

### 11.1 Continuation of continental compensation in Kent and Wessex

The law of Æthelbert comprised legislation on theft, fornication and killings in the first sections (Ath.1–26). Killing would require compensation in the manner of Frankish law, but using a different currency and perhaps at a lower amount. Bede, in praising Æthelbert's deeds, drew attention to his legal activities.<sup>793</sup> He wrote that the king, with the advice of learned men, gave judicial decrees, 'iuxta exempla Romanorum'. Bede essentially complimented the king on setting compensation for theft from the Church and the clergy. Perhaps Bede also found it advantageous to give the first written law a Roman flair, which would also give it a Catholic spirit by association. Patrick Wormald suggested that the Romans might have been Franks, and the examples of written law might have been the post-Roman secular laws of the Continent.<sup>794</sup> It is highly likely that the Kentish administration was inspired by the contemporary and neighbouring Frankish legislation, as well as through having knowledge and access to Roman law. King Æthelbert married Bertha, daughter of the Neustrian king

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<sup>792</sup> Liebermann, III, p. 2; Whitelock, *EHD*, p. 357.

<sup>793</sup> Bede, *Historia ecclesiastica*, no.ii.5;

<sup>794</sup> Wormald, *Making of English Law*, pp. 29, 97.

Charibet and a Christian.<sup>795</sup> According to Bede, she laid the groundwork for the re-Christianisation of the English, which Augustine, sent by Pope Gregory from Rome, later continued.<sup>796</sup> Bertha also brought a bishop with her and she might have contributed to the transmission of written legal concepts or actual texts from the Frankish cultural sphere. For those in authority in the Kentish realm, both Christianity and the law would be tools for legitimising kingship. What reveals the relationship between the island and the Continent is the term for wergild, which is *leodgelde* (Ath.7, Ath.21), *leode* being a form of *leude* in the Salic laws (PLS.41.5, PLS.53.8, PLS.63.1) and the laws of Gundobad (LB.101.2).<sup>797</sup> In the Burgundian law, this constitutes persons of the lower classes. Similarly, Æthelbert's wording states that if a smith or a messenger of the king was killed, then ordinary or 'middle' wergild, *meduman leodgelde* would apply (Ath.7).<sup>798</sup> That the *leodgelde* was the basis for compensation suggests that the compensation would normally be calculated from wergild. Further, the existence of a *meduman* wergild implies that Kentish legislators operated with a notion of wergild according to status. Another rule reads that if one man killed another, *medume leodgeld* of 100 shillings was to be paid as compensation (Ath.21).

We can assume the 'middle wergild' of 100 gold shillings was for average free men without any particular rank, that is, not for kings, officials, nobility and so on.<sup>799</sup> The early laws do not reveal what compensation should be paid for higher-ranking persons, but these sums are specified by later Kentish kings, Hlothhere and Eadric (HI&E.1–4). A nobleman, probably with a status equivalent to a *thegn*, had a wergild of 300 shillings, and the price is likened to that of three men or four servants.<sup>800</sup> The parallel to the continental laws is obvious, but the Kentish laws were not copies or translations of, for instance, Frankish laws, and the composition and emphasis in them show originality when contrasted with the Germanic laws. Wormald asserted that the Kentish legal enterprise was an 'emulation, not imitation' of earlier law, which in the scope of this thesis could be classified as influenced by, if not directly copied.<sup>801</sup> There is nevertheless reason to argue that legal ideologies, motives, contents and terminology were transmitted to the legislators of Kent.

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<sup>795</sup> Lupoi, *Origins*, p. 62; Bede, I.25.

<sup>796</sup> Bede, I.26.

<sup>797</sup> Attenborough, *Laws of the Earliest English Kings*, p. 175 n. 2.1; Wemple, *Women in Frankish Society*, p. 228 n. 2.

<sup>798</sup> According to Joseph and Elisabeth Wright, *Old English Grammar*, (London: Oxford University Press, 1925), p. 231, § 446, the infix *-uma-* formed the superlative of the adjective, giving *meduman* and *medume* the meaning 'middle' here. Attenborough translated it to 'ordinary', *Laws of the Early English Kings*, pp. 4-7, 175 n.7, 176 n. 21.1.

<sup>799</sup> For various views of the Kentish shilling, see Attenborough, *Laws of the Earliest English Kings*, p. 176 n. 16.

<sup>800</sup> See Hudson, *Laws of England*, pp. 201-24, for a survey of Anglo-Saxon differentiation of status.

<sup>801</sup> Wormald, *Making of English Law*, p. 101.

Æthelbert demanded a portion of the transaction as an additional punishment for breach of the peace (Ath.2, Ath.5–9). The *bot* or *wite* were payments to the state in addition to the compensation paid to the family of the victim. The English kings can be seen to make regulations that enrich the state from the very first known legal works. Possibly, in this respect, the Nordic medieval ‘currency’ of *baugr* can also be found in the very first of the English laws as Kentish king Æthelbert’s sixth section reads of ‘drihtinbeage’ (Ath.6), which Frederick Attenborough and Dorothy Whitelock recognise as the archaic form *manbot*,<sup>802</sup> a fine paid to the king for the life of a subject. *Baugr*, meaning rings, was used in defining compensation in the Icelandic law *Grágás*, and defined the reliable kinship groups within the Norwegian law of Frostathing.<sup>803</sup> Conceptually, the early English laws share terminology and contents with both the contemporary continental laws and the later Scandinavian laws.

As mentioned in the survey of inheritance laws, the main content of the Kentish laws was structural power and protection of the peace, not the private subjects of family and marriage, although there are some sections in Wihfred against adulterers, ‘unrihthæmde mæn’, urging them to set right their unions in a Christian form (Wih.3–4).<sup>804</sup> As such, it is not a kinship-dominated legal text in the sense of the continental laws, but an early attempt to build the institutions of kingship and Church. King Wihfred (r. 690?–725), unlike originators of contemporary Germanic law, included several passages on proceedings for clerical staff (Wih.16–24), combining canon law directly within his enactments. This is what one might have expected more of a Visigothic secular legislator, having such a close relationship with the higher clergy. Nevertheless, the lack of tradition for both canon law and secular law between the English may have led to such a fusion. Otherwise, the following Kentish legislation gives the impression of filling in the gaps in the law of King Æthelbert. Hlothere and Eadric targeted insults and brawls, and Wihfred’s laws fought paganism and heresy (Wih.9–15), and accounts for the rights, but also the duties, of clerics.

The first English laws from the early seventh century contained provisions for the killer to pay the entire compensation alone, without help from relatives (Ath.21). Only if the killer fled the land, i.e., went beyond the borders of Kent and the jurisdiction of Æthelbert’s

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<sup>802</sup> Attenborough, *Laws of the Earliest English Kings*, p. 175 n. 6.1; Whitelock, *EHD*, p. 357 n. 1.

<sup>803</sup> Bertha Phillpotts, *Kindred and Clan in the Middle Ages and After: A Study in the Sociology of the Teutonic Races* (Cambridge: Cambridge University Press, 1913), pp. 11–14; Agnes S. Arnórsdóttir, *Property and Virginité*, pp. 49–50; Hansen, ‘Concept of Kinship’, p.195 n. 35. See also chapter 8.

<sup>804</sup> Wihfred’s law against foreigners, who would be exiled if they did not make their relationship legal (Wih.4), was also included in Cnut’s law (II Cnut.55). Although there was no standardisation of Christian blessings or rites for marriage by the late-seventh century, the early medieval perceptions of what constituted legitimate and illicit unions were extensive. See, for instance, Tveit, ‘Non enim coitus matrimonium’, pp. 39–71.

law, which was probably territorial, then kin would be held responsible (Ath.23). The early English laws differ from the contemporary continental laws, which anticipated a degree of assistance from relatives. With the connection between vengeance and wergild, it is relevant to consider what implications these regulations might have had on the regulations on vengeance and feuding. Specific rules on the target of retaliations were first clearly put into writing in the laws of King Edmund (r. 939–946), in which it was stated that the killer ‘should take the feud alone’ (II Edm.1). It is not evident from the laws prior to Edmund whether such a perception was prevalent. With Wihfred, however, the term ‘healsfang’ was presented (Wih.11–12). In the context of later laws, Attenborough interpreted it as signifying the first instalment of the compensation, and Whitelock interpreted it as signifying the first heir’s share of it.<sup>805</sup> They also both suggest that ‘healsfang’ constitutes a surety for avoiding feud. In medieval European law, there was no automatic correlation between tolerating vengeance and the designated providers of the compensation; still, there are several instances, as in the Lombard laws, of division of the sum in relation to the potential to raise the feud. The practical usage of ‘healsfang’ suggests that the concept was originally Kentish, and not necessarily transmission from the Continent, although it falls into the same pattern of motivation as, for instance, Lombard law.

Ine (r. 688-726), king of Wessex and a contemporary legislator of Wihfred’s, enacted a range of laws which covered more general topics concerning private settlements and crimes than the Kentish laws. As before and indeed later in early medieval English history, the legislation was greatly occupied with the crime of theft and legalising the killing of thieves. Ine’s laws would also accept this, but the killer would have to pledge on oath the guilt of the thief (Ine.16). The same section forbids any associates from taking the oath with the killer of the thief: ‘nalles ða gegildan’ (without associates). For one thing, that means individual responsibility and it also suggests a digression from joint oath-giving in favour of a truth-seeking oath. This distinguishing of actual guilt tends not to be seen in early medieval laws. It did not enter the Nordic legislation before the introduction of a common legal system in the respective kingdoms from the thirteenth century. Attenborough has argued through interpretation of the term ‘gegildan’ that relatives were held jointly responsible with the killer for paying compensation under Ine.<sup>806</sup> ‘Gegildan’ would be the killer’s associated contributors, i.e., his with-payers. Nevertheless, the term could also signify non-related

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<sup>805</sup> Attenborough, *Laws of the Earliest English Kings*, p. 181 n. 11.1; Whitelock, *EHD*, p. 363 n. 3.

<sup>806</sup> Attenborough, *Laws of the Earliest English Kings*, p. 185 n. 16.1.

associates, as it did later.<sup>807</sup> In that case, there was no analogue concept in earlier and contemporary continental laws. If associated contributors signify relatives and not friends, then the kings of Wessex might have played with the notion of investigation and not the proof of oath alone: in other words, the concepts of investigation and individual responsibility.

Later king of Wessex, by approximately two centuries, Alfred (r. 871–899), would make use of the earlier legislation, in particular that of Ine. Wergild as compensation and a fine to the authorities were both elements incorporated into the legal code (Alf.1.5, 2.1, 27). More importantly, Alfred's laws also give clues to the anticipated recipients of the compensation, although these appear in the law as in the highly irregular situation mentioned in chapter 7: if a nun was abducted and had a child as a result, if this child was killed, then *her* relatives were not entitled their due portion of the compensation, although the illegitimate father's relatives would get theirs (Alf.8.3). We must understand the division of the compensation between the relatives of the father and mother of the victim accordingly; in case of homicide, the maternal family would be entitled to one portion of the compensation, and the paternal family to another portion. Similarly, we learn in another rule that between the killer's relatives, the compensation should be in the proportion of one-third from the mother's relatives and one-third from the paternal side, the last third coming from the killer himself (Alf.30). Thus, we see here a specific division in the collective responsibility of kinship in terms of contributing to the compensation. This is different from the continental laws, which, apart from Salic law, gave few clues as to the specific mode of sharing, and to the Kentish laws, which demanded the killer to make the payment alone. If the killer lacked relatives on either side, the killer's associates would have to contribute. If, on the other hand, the victim had no kin, the associates shared the compensation with the treasury due to the lack of relatives (Alf.31). Otherwise, the king was entitled to a fine in each case of between 60 and 120 shillings. Accordingly, ensuring compliance with the legal system must have been an important task and source of income for the secular authorities.

In the West Saxon laws, the stipulation of wergild was divided into groups of 200, 600 and 1200 shillings according to status (Alf.10, 18, 39, 40). The lowest amount was for the *ceorls*, which were low-status – but free – peasants, while the highest wergild was reserved for the *thegn*, the royal officials. The recipient of the wergild of 600 shillings is not specified and the sum disappears in later laws.<sup>808</sup> It might have been the wergild of the free peasant proprietors, the same group that had a relevant interest in the bookland and folkland discussed

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<sup>807</sup> See Whitelock, *EHD*, p. 366 n. 2. She gave one example of such a use in VI Æthelstan.37.

<sup>808</sup> Lyon, 'Historical Problems', p. 211.

earlier. In his translation, Attenborough points out that the shilling of the West Saxon contained four pence, as did the Mercian shilling.<sup>809</sup> The shilling of Wessex might have been reckoned at four pence up until the period of Alfred, when it changed to five pence.<sup>810</sup> However, Chadwick – and later Lyon – suggested that the differences lay in the weight of the penny rather than the shilling.<sup>811</sup> The wergild in the laws of Wessex was then not only larger in its amount, but the currency was also subject to inflation.

The wergild of a woman is not given, although we understand that she would have a worth according to her status, which again was determined by the rank of her father, or husband if married. The killing of a woman would, as for men, be compensated according to her wergild. A pregnant woman was compensated plus half the father's wergild for the unborn child (Alf.9). We do not learn exactly what this means, other than the child being valued according to who the father was. The rule resembles those of the Frankish and Lombard laws, in which the unborn child was also half that of a man's wergild, while the woman was accorded higher compensation. In comparison, Alfred's laws also follow the continental pattern in relation to compensation for insults, rape and abduction (Alf.8, 10, 11, 18, 29, 35). The one difference is that verbal insults should be punished, quite surprisingly, by the loss of the tongue (molestation), if not compensated by the whole wergild, probably the victim's (Alf.32). This type of punishment is in line with the principles of *talionis*, with the culprit being punished after the fashion of the crime. These types are seen mostly in the later Norman laws, although there were also some earlier attempts in the legislation of Cnut (r. 1016-1035), in which rapists were to be castrated, thieves would have their hands cut off, and so on.<sup>812</sup>

Vengeance was regulated by law, and vengeful homicide was only accepted in the case of adultery by the wife. Violent actions (*feohtan*) were acceptable if a man caught four particular female relatives in the act: his wife, daughter, sister or his lawfully married mother (Alf.42.7). The offended man would again be protected from vengeance by the offence itself. This can be related to the same normative standards we saw in both the Roman material and the Germanic laws, although here the honour killings also regarded the sister and mother, which is an extension of the practice of Roman law. However, it corresponds to a later Norwegian rule, found in both the Frostathing Law and the Gulathing Law, listing the same

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<sup>809</sup> Attenborough, *Laws of the Earliest English Kings*, p. 191 n.59.1 and p. 195 n.12.1.

<sup>810</sup> Attenborough, *Laws of the Earliest English Kings*, p. 191 n. 59.1.

<sup>811</sup> Hector Munro Chadwick, *Studies on Anglo-Saxon Institutions* (Cambridge: Cambridge University Press, 1905), p. 12; Lyon, 'Historical Problems', pp. 209-10.

<sup>812</sup> *The Ten Articles* ascribed to William I (WI art), and the laws of Henry I (LHP), contain much of Cnut's secular law, such as the rules about punishment: II Cn. 2.1, 30.4-5, WI art.10.

four women (GL.X.11, F.IV.39). It is apparent that the developments of law in Anglo-Saxon England share many of the traits also found in Scandinavian law. Adultery with someone's wife could still be compensated for in the same manner as other crimes in the laws of Alfred (Alf.10). Compensation was set as a share of the husband's own wergild, ranging between a tenth and a sixth part of the respective status, and thus identifying him as the victim of the offence. Private settlement by violence was apparently not a major issue in the earliest English laws, although the solution of compensation reveals that it was considered a feasible outcome.

Unlike the situation for inheritance laws, in which scraps and bits had to be puzzled together to create some sort of system, the English laws are more rewarding when examined for legislation on compensation for homicide and crimes as a whole. The articulation in the texts on private violence and the silence on family property in the legal material could, as previously suggested, have been the result of the status of the state. The arrangement between relatives in terms of succession and the distribution of property would be considered a private matter, whereas private violence had implications for society in general and the position of secular authority. Hence, the legal work of the kings, both during the Heptarchy and within the larger unit of the English kingdom, regulated homicide in greater detail.

## 11.2 The treaties and compensation

From the time of Alfred and his successor Edward, we also have the extant controversial but rewarding 'treaties with the Danes'.<sup>813</sup> The treaties were written down, respectively, by Alfred and Guthrum in the 880s, and Edward and another Guthrum, or more likely a fictitious Guthrum, in the early tenth century. The dating of these documents is uncertain, but the first Guthrum's death is believed to have occurred in 890. Thus, Dorothy Whitelock dated the first treaty to the late 880s, whereas Liebermann dated it vaguely to the 880s or 890s.<sup>814</sup>

Attenborough observes that the Guthrum who made a treaty with Edward could be the unknown Danish king mentioned in the *Anglo-Saxon Chronicle* who died in 921.<sup>815</sup>

Liebermann asserts that the treaty between Edward and Guthrum was not authentic and rather

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<sup>813</sup> Liebermann II, pp. 126-27; Attenborough, *Laws of the Earliest English Kings*, pp. 98-99; Whitelock, *EHD*, no. 34.

<sup>814</sup> Whitelock, *EHD*, p. 380; Liebermann I, pp. 126-28.

<sup>815</sup> Attenborough, *Laws of the Earliest English Kings*, pp. 96-97. *Anglo-Saxon Chronicle* (A), Ann. 921 *Anglo-Saxon Chronicle*, ed. and trans. by John Allen Giles (London: G. Bell & Sons, 1914), pp. 72-73.

a product of Æthelstan's rule.<sup>816</sup> Whitelock, on the other hand, suggested that Archbishop Wulfstan was the author of the later treaty, or at least that he rewrote it when he first came to York.<sup>817</sup> Wormald has also suggested that the treaty was a product of Wulfstan drafted in York in approximately 1002, in which Wulfstan backdates some of his ideology to the realm of Edgar, or founding the ideology expressed in the treaty in that time.<sup>818</sup>

In the context of wergild and compensation, the treaties with the Danes are of great interest. As mentioned in chapter 2, the treaties were the crux of English and Scandinavian norms, but also the lowest common denominator of what could be agreed upon. We could interpret the treaty as the essence of the legal cultures, although we must not disregard the particular circumstances under which they potentially originated. Alfred's army subdued the Danes prior to the treaty, and so we can assume that the English 'agreed' more than the Danes. In any case, the settling of violence in such turbulent times was of importance. No later than the second section of the first treaty, wergild is referred to, putting the 'Engliscne' and the 'Deniscne' on an equal footing by setting the same value on the life of each (A&G.2). Different from the Frankish laws, where the Frankish 'coloniser' and the Roman 'colonised' were valued unequally, this treaty forced mutual valuation. The given value was eight half-marks of gold. This was a Scandinavian currency and a high value compared to contemporary English wergilds. Attenborough and Whitelock interpreted this sum as being of the same value as the *theng*, which comprised 1200 shillings under Ine and later Alfred (see above, Ine.79, Alf.10, 39).<sup>819</sup> Stewart Lyon agreed with their conclusion, although he cautioned that the 'answer must remain in doubt'.<sup>820</sup> Whitelock also suggested that the sum amounted approximately to the highest English status, based on the ratio of gold to silver, which at the time was 1:10.<sup>821</sup> However, she and Attenborough admitted that the sum could represent the Scandinavian wergild recognised at the time.

As will be discussed in the next chapter, the wergild in the Nordic laws, and especially the Norwegian laws, was relatively higher than in other regions. However, these were laws from some 200 to 300 years later. The jurist Knut Robberstad identified the wergild of eighteen silver marks as the earliest layer in the Norwegian law of Gulathing, G.180 (while

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<sup>816</sup> Liebermann III, p. 87.

<sup>817</sup> Whitelock, 'Wulfstan and the So-Called Laws of Edward and Guthrum', pp. 1-21.

<sup>818</sup> Wormald, *Making of English Laws*, pp. 339, 389-91.

<sup>819</sup> Whitelock, *EHD*, p. 381, n. 2; Attenborough, *Laws of the Earliest English Kings*, p. 201 n. 2.1.

<sup>820</sup> Lyon, 'Historical Problems', p. 216.

<sup>821</sup> Whitelock, *EHD*, p. 381 n. 2. For the estimation of the ratio of gold to silver, see Munro Chadwick, *Studies on Anglo-Saxon Institutions*, pp. 50ff.

later on in G.218–21 the total compensation amounts to seven times that).<sup>822</sup> In Archbishop Wulfstan's *Sermo Lupi ad Anglos*, 'Sermon of the Wolf to the English', possibly dating from 1014, he lamented the practice of the Danes of demanding outrageously high compensation for their lowest men, and how the English waived in the matter.<sup>823</sup> In the treaty between Edward and Guthrum, compensation was discussed using different terminology, being *lahslit* in the Danish territory and *wer(e)* among the English (E&G.2.2, E&G.2.3, E&G.6). *Lahslit*, according to Whitelock, signified a breach of the peace, but was ascribed a value according to the status of the offender.<sup>824</sup> It is not clear whether the Danes demanded compensation according to the status of the killer or the victim. The juxtaposition with the English term suggests that they had a similar meaning, the wergild being that of the victim. However, the idea of using separate terms for Danish and English compensation might suggest that they had different meanings. *Lahslit* could have been a term derived from *lagu*, law.<sup>825</sup> It bore the semantics of compensation for broken law and corresponded to the Old English *wite*, hence the juxtaposition in the paragraph. Seemingly, *lahslit* was the Scandinavian term for compensation, although Pons-Sanz has suggested that the usage and a collocation of compounds points to an Anglo-Scandinavian coinage of the word.<sup>826</sup> After some decades had passed between the two treaties, a system better adapted to the requirements and realities of each party came to be used for the second treaty. As Patrick Wormald pointed out, the Alfred-treaty does not resemble the language of Alfred's *Domboc* (*Doom book*) as much as the language is echoed in the later English laws from Edward to Edmund, particularly in the phrase 'We declare'.<sup>827</sup> This does not mean that the treaty spurred a Scandinavian influence on the legislation, but that phrases which were applied sporadically in the late-ninth century laws of Alfred became standard terminology among his predecessors. In Norman laws, the language and terminology was different from this and the compilers did not always understand the right meaning of the words in earlier laws.<sup>828</sup> Thus, the Anglo-Scandinavian terms have become a determining factor in uncovering the old legal tradition.<sup>829</sup> The treaties can be claimed as a point of reference regarding adapting to each others' legal concepts.

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<sup>822</sup> Robberstad, *Gulatingsslovi*, pp. 373-74.

<sup>823</sup> *The Sermon of the Wolf to the English*, in Whitelock, *EHD*, p. 240.

<sup>824</sup> Whitelock, *EHD*, p. 409 n. 1.

<sup>825</sup> Pons-Sanz, *Norse-Derived Vocabulary*, pp. 68-69.

<sup>826</sup> *Ibid.*, pp. 119-21.

<sup>827</sup> Wormald, *Making of English laws*, pp. 285-86.

<sup>828</sup> For example, Lyon, 'Historical Problems', pp. 210-11.

<sup>829</sup> Whitelock, *EHD*, p. 392 n. 3; Hudson, *Laws of England*, pp. 66-67, 244, Pons-Sanz, *Norse-Derived Vocabulary*.

The agreement between the Danes and the English can further be compared to another treaty made a century later with the same parties, the English king and the invading Scandinavian armies, but perhaps with a different power balance. The Vikings had joined forces and demanded heavy tributes to stop ravaging the island, and it seems that Æthelred was forced to pay.<sup>830</sup> Æthelred also initiated, or entered into, an agreement with Viking leaders, among them the later Norwegian king, Olav Tryggvasson. The agreement constituted a truce (II Atr.6). It also nullified the claims due to violence experienced by those subjected to English law prior to this treaty. The victim's family had no rights of compensation or vengeance for *earlier* incidents. Furthermore, if someone was killed who themselves disturbed the peace by taking vengeance for an earlier crime, this treaty would deprive his family of compensation (II Atr.3.4). The rule shows how fragile the peace treaty was, but also that the English king would intervene in the traditional legal practices for the benefit of the state by imposing martial law. There was a distinction between breaking the peace, a normal concept within law, and breaking the truce. A breaking of the truce was not simple homicide but the death of at least eight men (II.Atr.5.2). Otherwise, the treaty would hold and normal compensation of wergild would apply in incidents that happened after the treaty.

The wergild was not specified in this later treaty, but killing between the nations in the post-treaty period was set at twenty-five pounds (II Atr.5), which applied both if a Dane killed an Englishman and vice versa.<sup>831</sup> The sum has been compared to the eight half-marks of gold stated in the Treaty of Alfred and Guthrum, and is assumed to represent approximately the same value.<sup>832</sup> If so, this means that the legal encounter between the English and Danes, which was a tense situation of conflict, gave rise to increased compensation. This is possibly because of the expectations of the Scandinavians, or possibly because of the tension.

### 11.3 Changes in the tenth-century laws

From the tenth century, we have the largest compilation of what was intended to be royal legislation, with the six series of laws attributed to King Æthelstan (r. 925?–939) comprising most of it. Liebermann placed the laws from Edward the Elder (r. 899–924) to Æthelred (r.

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<sup>830</sup> The tribute was also incorporated into the treaty. II Atr.7.2. Liebermann I, pp. 224–25.

<sup>831</sup> Liebermann I, pp. 222–23; *EHD* I, no. 42.

<sup>832</sup> Agnes Robertson, *The Laws of the Kings of England From Edmund to Henry I* (Cambridge: Cambridge University Press, 2009 [1925]), pp. 47–48; Attenborough, *Laws of the Earliest English Kings*, p. 201 n. 2.1; Whitelock, *EHD*, p. 381 n. 2–3.

1014-1016) together. This is natural, since these form the laws of the domestic kings of a united English kingdom, but what is more relevant here in terms of legal development is that there are common features in the laws of these kings. The individualisation we find cultivated in the laws of Cnut emerged through a legislation focusing slightly more on the power invested in kingship and the duties of the subjects, rather than the other way around. In Æthelstan's laws we find a greater concern, or maybe desperation, to control the violence in his dominions, which threatened not only the legitimacy of his authority but also directly his rule and his life.<sup>833</sup> This could be a reflection of the political situation, but it provides even greater signs of seemingly more generalised legislation. Æthelstan's laws borrow from Alfred's, but have a different style, as Wormald has described in detail, expressed as the impersonal voice of authority.<sup>834</sup> Law was professionalised and with it, royal legal power. V Æthelstan was concerned with social unrest and breach of the peace (see V As.prologue). For example, Æthelstan's call for conscription was a greater burden on communities than other aspects described in the English laws, with two men on horses for each plough (II As.16). And in his ordinance given at Grately, which primarily concerned theft (II As), Æthelstan would repeat the long-standing view that a thief should not be avenged if killed (II As.6.2-3).

Secret murder involving witchcraft would be a non-compensational deed according to Æthelstan (II As.6). To clear oneself from the accusation required a massive triple ordeal. However, imprisonment for 120 days followed by a payment of 120 shillings to the king's treasury, plus payment of full compensation to the affected kinsmen would apparently commute the death sentence. The last part could perhaps stand as an argument for the deep-rooted tradition of compensation as a means of conflict resolution, or just a testament to the power of money, both for expensive kings and injured families. Wormald has interpreted the specific rule the other way around, with imprisonment being the normal ordeal and execution occurring only upon failure to express a denial of the accusation.<sup>835</sup> He compared the rule to the anonymous law on arson and secret murder, 'be blaserum et be morðslihtum'.<sup>836</sup> Wormald interprets 'morðslihtum' not as secret killings, but as all those not happening face-to-face, i.e., without the opportunity to defend oneself. Even so, the main regulation of this law was that

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<sup>833</sup> Wormald, *Making of English Laws*, p. 307.

<sup>834</sup> Wormald, *Making of English Laws*, pp. 301-02, 309.

<sup>835</sup> Wormald, *Making of English Laws*, p. 367.

<sup>836</sup> *Ibid.* See also Liebermann I, pp. 388-89.

Æthelstan did not find compensation to relatives in the case of murder a satisfactory solution.<sup>837</sup>

In the legislation of Æthelstan, we can find one of the few references to the providers and recipients of compensation, normally given as the non-specific ‘magas’ (relatives) (II As.11). The procedure described decreed that the one demanding the compensation was to come forth with two from the paternal side (of the killed, we must assume) and one from the maternal side. Furthermore, the kinsmen were obliged to swear that the relative killed was not a thief. They should also appear at an agreed time at the risk of incurring a rather large fine of 120 shillings to the king for failure to appear, probably to ensure that the case was solved with peaceful means, and possibly to ensure private settlement was made public. Thus, we have a private settlement made in a public display, with a substantial public fine. The person making the demand, pronounced in masculine terms, was not specified as a particular relative. It is likely that the closest relative or heir was assumed to be the person to put forth the claim for compensation, or possibly the head of family. Here again we find the three-way partition of the compensation, as seen in the Frankish laws. We are not told if the division should be proportional, with two-thirds to the father’s side and one-third to the mother’s. The heir was probably counted among the two claimants from the father’s side. As we saw in the chapter on inheritance, there was a slight dominance of patrilineal principles in the English inheritance system, and the division of wergild might have mirrored this. If so, then the distribution of the compensation would be 2:1 between the paternal and maternal relatives. However, as mentioned above, the distribution of inheritance for the illegitimate slain child of a nun in the laws of King Alfred (Alf.8.3) also spoke of a division between the paternal and maternal side, and thus there could be the same differentiation to collecting compensation. The Alfredian division of contribution was nevertheless one-third from each side and one-third from the offender (Alf.30).

The law referred to as II Edmund, dating from the mid-tenth century and set down by King Edmund (r. 939–946), is a piece of legislation directed specifically at the social problem of vengeance. The law ties together the relationship between vengeance and compensation by demanding that the killer alone should be subjected to the feud, even if his relatives did refused to provide to the compensation (II Edm.1.1-2). And he would only be subjected to the feud unless he could provide the compensation of full wergild according to the status of the victim within twelve months with the help of his friends . The rule reveals that in spite of the

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<sup>837</sup> This appears to be the case for stoning (IV As.6.5 or VI As.6.3) and molestation (II As.14.1) in Æthelstan’s laws, as pointed out by Wormald, *Making of English Laws*, p. 306. See also *Leges Visigothorum* 8.6.2.

peace project, vengeance was disturbingly normal. However, as pointed out above, the authority's concession of the practice does not mean it was a greater problem than in the legislation not mentioning vengeance or feuding. As John Hudson has pointed out, there were little evidence of feuding in England, but many indications of vengeance or people taking action through vengeance.<sup>838</sup> By addressing vengeance, Edmund institutionalised and encapsulated it within the authoritative regulation of private violence. We cannot assume that Edmund or his medieval peers could completely prevent private violence through the resources available to them, but the effort was made through the power of legislating. To narrow the target of vengeance to the killer only was also a narrowing of the responsibility to the individual. The killer's kinsmen were free of the burden, but at the same time they would legally be deprived of each other's support. However, the rule of Edmund still included the opportunity for relatives to voluntarily help gather the compensation sum. Furthermore, if they would not pay but were associated with the killer, they would lose their inviolability (II Edm.1.2). If, on the other hand, the victim's relatives attacked anyone other than the individual, they would be subject to the king's hostility and confiscation of property (II Edm.1.3). Such measures were taken to curb vengeance and prevent further violence. The involvement of relatives on both sides in a homicide was restricted. If the victim's relatives took revenge, they would immediately be subject to royal judgment, while the first killer would by law have the opportunity to provide compensation.

The time limit is also of interest in the discussion of compensation. The offender was given twelve months to amass the full wergild, and thus another aspect of the settlement is revealed about which earlier law was silent. As the law states, Edmund added the procedural details to 'stop the feud' ('fehðe sectan') (II Edm.7). The procedure was slightly different from that of Æthelstan. Some kind of agreement or placing of guilt had to be clear prior to the settlement, as, unlike stealthy murder discussed above, the investigation of the killer would be unnecessary. The killer would then give a pledge to the relatives of the dead through a mediator, and the one speaking for the victim's family would give a surety not to harm the killer. After agreeing on compensation as settlement, the offender had twenty-one days to pay the so-called 'healsfang' mentioned above. According to Whitelock, this meant 10 percent of the wergild, as surety due to the nearest relative of the victim.<sup>839</sup> What might have been implied in continental and earlier English laws was put in writing here.

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<sup>838</sup> Hudson, *Laws of England*, p. 169.

<sup>839</sup> Whitelock, *EHD*, p. 363 n. 3 and 392 n. 6. See above, *Wih.11-12*.

In the secular laws of King Edgar (r. 959-975), we are provided with a rendering in the middle of the tenth century of what the purpose of compensation should be according to the English authorities, namely such compensation ‘as shall be justifiable in the sight of God and acceptable in the eyes of men’ (III Edg.1.2).<sup>840</sup> Perhaps we should not read too much into the use of the phrases here, but it is worth noting that the compensation should satisfy secular society (‘worldle/seculum’) and ecclesiastical authority, not only the relatives of the dead.<sup>841</sup> The settlement should satisfy not only the affected families, but the society of which they were a part. The sentiment was repeated in the laws of Æthelred (VI Atr.10) and Cnut (II Cn.2). Moreover, in the question of whether the compensation for taking a life would amount to the wergild, the value of a man, we find that ‘in crimes that admit of compensation, no one is to forfeit more than his wergild [wer]’ (III Edg.2.2).<sup>842</sup> This rule could be interpreted in several ways. Since wergild was the highest form of compensation, this suggests, unsurprisingly, that homicide was the gravest crime that could be remedied through compensation. At the same time, the rule hinted at parties demanding inappropriately large sums both in cases of homicide or other crimes. Edgar’s homiletic law granted the Danes their own laws, due to loyalty (IV Edg.12 and 2.1). It may be that the practices of the Danes influenced the practices between the English in this matter.

The forming of kingship in England can be observed from how royal laws displayed their legal power through the law. The laws of the rival kings Æthelred and Cnut both paid close attention to private violence and legislated to reduce it. They also both borrowed heavily from the laws of King Edgar and, like him, they reissued large chunks of Alfred’s law.<sup>843</sup> However, in the case of homicide, we see more of an emphasis on the role of public judgment than earlier.

Whitelock has demonstrated how Christianity was weaved into the role of the king in the later laws of Æthelred.<sup>844</sup> These laws have a homiletic style that must be ascribed to the achievements of Archbishop Wulfstan, who must be credited as the mastermind behind the legislation.<sup>845</sup> Wulfstan, together with a proper group of assistants, constituted a legal elite who probably had great control over the laws emanating from Æthelred and Cnut. By apparently putting aside his qualms concerning the shifting politics, he could shape the law of

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<sup>840</sup> Translated by Robertson, *Laws of the Kings of England*, p. 25.

<sup>841</sup> Ibid, p. 24; Liebermann I, p. 201.

<sup>842</sup> Translation from Whitelock, *EHD*, p. 396.

<sup>843</sup> In the notes to the Laws of Cnut, Whitelock includes a number of references to loans, *EHD*, pp. 419-32 notes.

<sup>844</sup> Whitelock, *EHD*, p. 411; Wormald, *Making of English Laws*, pp. 341-42.

<sup>845</sup> Wormald gives a detailed account of the extent of Wulfstan’s enterprise, in *Making of English Laws*, pp. 199, 330-66.

the English into a peace project permeated with ideologies from a high-ranking ecclesiastical position. This of course also covered violence and the violent decades of the late-tenth and early eleventh century comes through in the legal texts. The aforementioned source with Wulfstan's own name on it, 'The Sermon of the Wolf to the English', criticised the population for lacking family feelings and not standing up for each other in grave times. In the textual speech, when Æthelred had fled for Normandy and Cnut had settled his rule, the pragmatic attitude of the archbishop was revealed, as well as his ability to exploit the situation. The 'wolf' referred to the horror of the time and explained it as a punishment for the sinful and unchristian behaviour of the population.<sup>846</sup> He thus criticised his flock and also the king for poor rule, which had caused the legal situation to become unbearable. He addressed, for instance, the enslavement of children for petty theft, suggesting the rulers acted harshly against the weak while graver atrocities were rampant and went unchecked. The sermon included no appeal to fight the invaders, but Wulfstan instead exhorted his people to accept the situation and live chastely and peacefully. The critique of relatives failing each other can be interpreted as the archbishop believing in collective compensation. Such a message from high-ranking clergy is interesting in the context of a discussion about why the legislation we have seen develop up to the eleventh century had changed towards excluding relatives from paying compensation and towards public procedure. One would assume that a focus on individual responsibility was important within Christian ideology, but the clergy possibly saw kinship responsibility as the best way of creating a peaceful society. Maybe the public legal system failed to accomplish this with public procedure and corporal punishments. Through the works of Wulfstan, secular law was influenced by Christianity, but in the form of ideology rather than canon law.

The post-Conquest legal system, and in particular the Angevin reforms, is a watershed in the law on public punishment. As mentioned in chapter 9, some scholars have seen compensation in the Anglo-Saxon laws as a tool of conflict resolution, while the later Norman legal authority brought in the ideas of *crime* and *punishment*.<sup>847</sup> Wormald has opposed such a view because the distinction is not sustainable.<sup>848</sup> Three arguments should be put forward. First, Anglo-Saxon legislation saw homicide as a crime and compensation as the punishment. That the authorities lacked the means to maintain prisons or engage in policing does not mean that society did not view killing as an outrage. The second point to be made is that the pre-

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<sup>846</sup> Whitelock, *EHD*, pp. 858-59.

<sup>847</sup> For instance, Pollock and Maitland I, p. 74; II, pp. 452, 458.

<sup>848</sup> Wormald, *Making of English Laws*, p. 26; Lupoi, *Origins*, pp. 303-04.

Conquest secular authorities attempted measures to introduce public punishments and control private settlements. The third point is that compensation as conflict resolution continued to exist in law and in practice after all these regulations were introduced. Compensation also continued to exist in the Angevin legal system and later. Thus, one cannot interpret compensation as a primitive mode of settlement, but rather as a functional mode of resolving conflict and avoiding further strife. The legislators also saw this advantage of compensation and it was never totally abandoned in written law. The late-tenth century laws and Cnut's continuation of these still brought about important changes in the criminal laws. To a greater extent, individuals now became responsible for their actions. Moreover, the public was responsible for the prosecution of crime according to public methods. Criminal acts were previously considered a breach of the peace and the victims would have been involved in the process, but according to the new legislation, the state was now entitled to and *capable* of pursuing criminals without the sanction or initiation of the injured party.

We can detect a fusion between the old system of compensation to avoid vengeance and the new state process in a rule in the secular law of Cnut, which demands that premeditated murder be treated by an official court, but that the punishment for the accused, if found guilty, was to be handed over to the family of the victim (II Cn.56). The secular legislating authority would thus be entitled as the legislating and judicial power, although the remnants of collective penal systems were still discernible, also in the law. Paul Hyams has interpreted this as state weakness and authority's 'little part in the process'.<sup>849</sup> Wormald argued that, compared to earlier English law, this particular rule demonstrates a more direct official involvement of the state than earlier written law did. It seems apparent that the legislation of Cnut aimed to control the legal system more directly than earlier legislators did, and had no intentions of covering up such intentions. In this way the private settlement was put into a public frame, much like the procedural instructions in the Salic laws. Whatever happened in practice, the motives in Cnut's written law speak of an active use of law to strengthen state administration. The solution of having the public sentencing before letting relatives battle it out is also reminiscent of the Visigothic solution to the same issue; if a killer sought refuge in a church, he would go through the authority of the priest before being given up to the wrath of the victim's kin (LV.6.5.16).

Homicide would otherwise be punished with outlawry and the confiscation of property (II Cn.6). The descriptions of punishments moved away from settlement by compensating the

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<sup>849</sup> Paul Hyams, 'Feud and the State in Late Anglo-Saxon England', *Journal of British Studies*, 40, 1 (2001), 1-43.

loss of the victim and towards the public expelling the offender from society. The same ideology prevailed in the laws on theft, adultery and injury, in which earlier compensatory punishments were replaced by mutilation and exile (II Cn.6–7, II Cn.30, II Cn.53). Mutilation was introduced in grave crimes (II Cn.30.5). In early medieval law, mutilation is rarely found as a legal recourse, but the Byzantine *Ecloga* from the eighth century contain the same types of mutilations; here, too, capital punishment was in some cases replaced by mutilation and compensation.<sup>850</sup> In Byzantine law, the punishment of mutilation was prescribed for manslaughter and injury, and sexual offences were punished by cutting off the nose of the perpetrator.<sup>851</sup> The brutality of the laws is assumed to demonstrate a turn towards Hellenic influences and the doctrines of *humanitas* and *philantrophia* in Eastern Christianity.<sup>852</sup> The violator had a visible disfigurement for the rest of his days, but his life was spared and his soul could be saved. The same motives might have been behind Cnut's laws, to avoid the death penalty and to save the soul.<sup>853</sup> Cnut inserted mutilation for adulterous wives as well, who would have their noses cut off (II Cn.53). A husband could not kill an adulterous wife, and the guilty man would pay compensation. In this way, Cnut's laws derive from the Latin tradition, and possibly also took inspiration from Greek sources, mutilation of the nose was the punishment prescribed also in *Ecloga* (Ek.17.27-28). Whether there was contact between Cnut and Byzantine authority is not known, but Cnut's travels to Rome and other political activity *might* have enabled his legal elite to have contact with the Eastern legal culture. By the eleventh century, versions of the *Ecloga* existed in both Sicily and in Russia.<sup>854</sup> Although there are no evidence of transmission from these legal cultures, the diffusion of the Greek laws implies their contents might have been known to some degree in Latin Europe, too.

In some ways, Cnut's laws abolished the approval of vengeance from earlier law, and inserted in their place corporal punishments and other procedures that were to be enacted in public, which also placed a heavy responsibility on the parties involved. The laws called on everyone to purge the country of criminals, give up fugitives and chase outlaws (II Cn.8, II Cn.12, II Cn.13, II Cn.15<sup>a</sup>). Vengeance, however, was not a responsibility of the family, but rather an acknowledged right given, it seems, after proceedings, unlike what we find in other

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<sup>850</sup> For instance, Ek. XVII.2 and 27, Murder was still given the death penalty and manslaughter was punished with exile, murder and homicide: Ek.XVII.45-50.

<sup>851</sup> For instance, rape: Ek.XVII.30, incest: 34, adultery: Ek.XVII.23-27, adultery with in-laws: 26 and 34.

<sup>852</sup> Freshfield, *Manual of Later Roman Law*, pp. 16 and 21; Gregory, *A History of Byzantium*, p. 193.

<sup>853</sup> Hudson, *Laws of England*, pp. 186-87.

<sup>854</sup> Freshfield, 'Official Manuals of Roman Law', pp. 45-47; Ferdinand J. M. Feldbrugge, *Law in Medieval Russia* (Leiden: Brill, 2009), pp. 70-75.

medieval legislation.<sup>855</sup> The process that developed in English legislation in the eleventh century moved more towards investigation and oath-giving, rather than settlements between the parties. This means that either one was found guilty with or without extenuating circumstances, or one should be acquitted. Although the reality of the English court systems would have been more complicated than this, it is a sign of legal authority with the confidence to claim power over the legal system.

Scholars have asked whether the rule of Cnut in England brought Danish influence on English laws, and vice versa.<sup>856</sup> The conclusion drawn has repeatedly been that there are some similarities in the laws of Cnut, and the later Danish written laws, but rather the differences between them are more prominent. Danish laws in Cnut's time may have been different than those in the thirteenth century, from when the extant laws originate. Others have pointed to a great deal of novelties that must have derived as a result of close contact with Danes, in the wider meaning of Scandinavians.<sup>857</sup> Johannes Steensrup argued that Scandinavian influence on the Anglo-Saxon legal system was substantial, and that the introduction of outlawry and the death penalty was the substance of the transmission from Danish legal culture. However, these institutions may have been responses to the tumultuous events of the early eleventh century, or arose from a general legal ideology of the period that came out through Wulfstan. It is thus little that can be concluded about whether Cnut's rule in England influenced the legal ideologies of Scandinavia and the written laws there, as a result of his rule in England, but some points will be made in the following chapter examining the Scandinavian laws from the twelfth and thirteenth centuries.

In the Latin translation of early English laws *Quadripartitus* collected on the order of Henry I, the reintroduction of Cnut's law by Edward the Confessor, and after the Conquest by Henry I, was justified. These laws differed little from those of other kings. King Edward was stated saying that he would have the laws of Cnut to 'continue with unshaken firmness'.<sup>858</sup> Yet, the *Quadripartitus* includes in its versions legislation on wergild from, for instance, Ine, Alfred and Edgar, and also the treaties in some versions.<sup>859</sup> The system of compensation was

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<sup>855</sup> Although Hudson interprets an acceptance of vengeance against those not willing to surrender to compensation, Hudson *Laws of England*, pp. 172-73.

<sup>856</sup> Danish scholars only assessing Danish influence, not a general Scandinavian influence: J. F. W. Schlegel, *Om de gamle Danskes Retssædvaner og Autonomie* (Copenhagen: Det Kongelige Danske Videnskabernes Selskab, 1827), p. 74; Peder Kofod Ancher, *En Dansk Lov-Historie*, vol. 1, (Copenhagen: Det Kongelige Danske Videnskabernes Selskab, 1769), p. 27-29; Fenger, *Fejde og Mandebod*, p. 268.

<sup>857</sup> Phillpotts, *Kindred and Clan*, pp. 205-44; Karl Kroeschell, 'I. Die Sippe im germanischen Recht', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Germanistische Abteilung*, 77, 1 (1960), 1-25 (p. 8 n. 35).

<sup>858</sup> Wormald, *Making of English Laws*, p. 239 n. 313, with translation.

<sup>859</sup> Liebermann I, pp. 529-46; Wormald, *Making of English Law*, pp. 240-41.

transmitted into later legislation of the eleventh century and comprised the basis for the later Norman approach to English laws on this topic.

As a postlude to the examination of early English law, and as a prelude to the Scandinavian law in the next chapter, a note on the development after Cnut can be fruitful. Legislation by the Normans in England strengthens the interpretation of a restricted continuation of Anglo-Saxon law. After the Conquest, Anglo-Norman legal activity was conscious of establishing official procedure and tried to subjugate private settlements, but more or less continued the institution of compensation.

The death penalty by public judgment was supposed to replace compensation or vengeance. William I (r. 1066-1087) was also credited with replacing the death penalty with the more 'humane' punishment of mutilation (WI art.10). Various forms of corporal punishment seem to have existed parallel to victims claiming compensation. In the laws of Henry I (r. 1100-35), the circumstances of an offence could lead to *an additional* punishment of a corporal character.<sup>860</sup> These regulations may have originated in the laws of Cnut, which added corporal punishment to compensation (II Cn. 2.1, 30.4-5).

The laws of both William I and Henry I prescribe compensation to be paid according to the wergild of the slain person, and according to the old regional customs (WI art.4, LHP.68, 70). As earlier, the king demanded a fine, together with confiscation of property and outlawry. The standard compensation was six marks. The stipulated fine to the king was substantially larger, at forty marks. And accompanying the six marks to the family, a public settlement would be an overwhelming burden for the offender, but an important income for the king to control. Rules specified sums both in terms of money and its equivalent in livestock and land, which was of course the currency available to most people (Leis WI.8-9). Such measures were attempts to institutionalise the settlements that were surely expected by the insulted party. The forty marks in the laws of William I and of Henry I possibly also corresponds with the eight half-marks of gold that we find in the source of the Treaty of Alfred and Guthrum of the 880s, where English and Scandinavian legal traditions met in a peace treaty.<sup>861</sup> Even more significant, the smaller compensation sum of six marks seems to correspond with the old normal wergild of 200 shillings, and as historian John Hudson suggests, 'may point to a pre-Conquest origin to the fine, and one linked to Scandinavians'.<sup>862</sup>

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<sup>860</sup> Hudson, *Laws of England*, p. 410.

<sup>861</sup> Hudson, *Laws of England*, pp. 408-09. See Lyons, 'Historical Problems', p. 210 on the correlation between mark and pence around the time of the Conquest. Peter Spufford, *Money and its Use*.

<sup>862</sup> Hudson, *Laws of England*, p. 408.

A final point is that the Norwegian Code of the Realm from the late-thirteenth century also used forty silver marks as the standard fine for offences (see chapter 12).

Under the re-imposed laws of Edward the Confessor (r. 1042-1066), compensation had to be paid to relatives in the case of a royal pardon (ECf.2, 9ECf.18). Thus, a killer, if not sentenced to death, would have to pay compensation to the victim's relatives to avoid the feud. This demonstrates that compensation as a tool for avoiding violence continued to be used by the post-Conquest authorities.

However, mentions of compensation gradually decreased in Anglo-Norman law. Hudson has suggested that the Norman French were unfamiliar with the compensation system, as compensation was usually described with old English terms and in reference to English persons, not the French. However, ninth-century Frankish law, which was more or less filled with compensatory solutions, was probably known in Normandy.<sup>863</sup> A plausible explanation is that the Norman French were acquainted with compensation, and although it was not a vital part of feudal law, secular authorities saw an opportunity to increase power and to gain from demanding fines. Royal authority demanded a larger fine, while the victim was granted a smaller amount of compensation. In order to bring this about, private, out of court settlements would have to be brought to court. Later in the mid-twelfth century, Henry II (r. 1154-1189) *developed* this type of solution, possibly intended to replace compensation completely.<sup>864</sup> Henry II's reform introduced the concept of *trespass*, and categorised a larger number of crimes as trespasses on the king's peace, among them certain types of violence and homicide. In dealing with these more serious offences, it was vital to develop official procedure and investigation.<sup>865</sup> With Henry II's revision of the legal system, a greater emphasis was placed on royal execution. Henry II also increased the number of cases where a fine had to be paid to the crown, but the people's demand for compensation led to a continued acceptance or tolerance of this form of conflict resolution as added procedure. Killers would, in addition to being executed, also forfeit property, partially to the king, but also to the victim's family.<sup>866</sup> In cases of the royal pardon of a killer, a substantial fine plus compensation could be nevertheless extracted.<sup>867</sup> The old system was apparently part of the

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<sup>863</sup> Ibid.

<sup>864</sup> Pollock and Maitland II, p. 458.

<sup>865</sup> Hudson, *Laws of England*, p. 737.

<sup>866</sup> Hudson, *Formation of the English Common Law*, pp. 166-71.

<sup>867</sup> Pollock and Maitland II, pp. 480-81; Hudson, *Laws of England*, p. 743. The Assize of Clarendon (c.5) allowed the property of a convicted person to serve as compensation for a crime, after conviction in a public court. The ties of kinship were also severed in the collecting of compensation, as associates, more than kin, were mentioned as those who could appeal the crime (Glanvill.14.3), according to Hudson, *Formation of the English Common Law*, p. 167.

foundation of the new public procedure in the eleventh and twelfth centuries, and it is clear that compensation was still an important part of the peace settlement, both inside and outside court, though those settlements concluded inside court were more costly.<sup>868</sup> The reforms brought a greater reliance on investigation instead of on physical proof (such as ordeal or combat), and they must have been encouraging to the parties trying cases in the public system.<sup>869</sup>

The early English laws follow the same fundamental ideology on homicide: the tool of conflict resolution required the offender to compensate the injured party. It was sanctioned by secular authority, but therein lies the anticipation of private settlements or settlement involving the local witan. This more detailed examination of the laws still revealed several differences in terms of the legislators' attitudes towards the crime of homicide. Moreover, during the period from the early seventh century up to the early eleventh century, we have seen a particular legal development in the legal sources, from the expectation of collective responsibility, to that of determining individual responsibility. The development could be an expression of the growing power of royal authority over the legal system. It could likewise be a change in legal culture and thus a factor leading to the same growth in royal authority, with the ever narrowing of the legal unit from kin to the individual, weakening the power of the kin and/or strengthening the role and power of the king. The 'Sermon' of Wulfstan supports this conclusion. The opportunity to make such laws also suggests a change in the legal culture originating among the English legal elite, from an experience of compensation to an expectation of public procedures. Nevertheless, the concept of compensation did not disappear, as can be seen in the Normans' endeavours relating to the tradition. In several instances from all these periods of legislation, there are rules and concepts foreshadowing the Scandinavian contact. Due to lack of contemporary written law from Scandinavia, the comparative juxtapositions in the following chapter must be done with law originating centuries later.

### **Conclusion: English laws on compensation for homicide**

The Anglo-Saxon material shows an attempt to regulate violence through monetary compensation in the same manner as in the continental laws. Furthermore, the duty to uphold

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<sup>868</sup> Hudson, *Formation of the English Common Law*, p. 169.

<sup>869</sup> Hudson, *Formation of the English Common Law*, p. 172.

the peace is placed on the subjects in the local community. Still, we find an incremental emphasis on individual responsibility, both in vengeance and in compensation. This development is taken a great step further by legislation under Cnut, which focuses primarily on the individual wrongdoer and also demands public proceedings before any private punishments are executed.

English laws from the seventh century up to the reign of Cnut do not relate to a consistent period in legal history. The examination reveals some consistencies in the underlying norms on homicide, both compared synchronically to the continental legislation and diachronically through the centuries over which the English kingdom was created. If we apply the model to the probability of transmission, the findings fall into separate groups. Regarding the features of the rules, the comparison displays a range of similarities. Following the hierarchy of probability, we can only conclude that the instances of transmission by copy are those internally from the English legal culture. Likewise, the instances of translation are translation into Latin from earlier English laws. The early English laws are special due to their vernacular form, which sets them apart from contemporary continental laws sharing the Latin language.

However, on the second level of probability, a number of similarities appear regarding contents, particularly concepts and motives. Terminology related to the wergild and compensation resembles the continental Latin and Germanic words. *Wergeld*, *were* and *leod* appear to be similar to the Germanic tradition as the name of compensation, although we find Norse-related words, such as *bot* and *lahslit*, with the same meaning. The solution to homicide is another common feature in the early English laws, which consists mainly of compensation. The first codes from Kent almost take the form of tariffs, as do the Frankish codes, listing the crimes and the fines. The contents of the rules are thus also similar to those from the Continent. In those from eighth- and ninth-century Wessex, we can also discern some explanations for the compensatory sums, which appear to be more original contributions. The basis and motivation for compensation included references to preventing enmity. An important common feature was the stipulated size of the compensation, centred around 200 shillings for the average person and 1200 shillings for nobility, proving transmission of these features. Moreover, the dissimilarities found in the sources support the argument that the given amounts were not unconscious copies of earlier law, but were considered the legitimate price of compensation, exemplified by the disappearance of the 600 shillings as the value of wergild from the late-ninth century.

Royal legislation tried to institutionalise vengeance. Legislation in the period from Æthelstan to Æthelred also included attempts to downplay compensation and increase fines to the treasury. Nevertheless, the concept was the same as in Germanic law, and compensation continued in written law. Regarding the content of the rules on homicide, we can therefore assume that there was a transmission from continental law of the concept of a compensation system as solution to homicide and also transmission of the notion of amount and distribution. Nevertheless, the persistent use of compensation as a solution for homicide and various crimes was the result of a continuation of the legal culture rather than transmission from outside. The underlying motivation for regulating compensation in written law was also to suppress vengeance in English society by legislation. In both the shorter lists of amounts of compensation and in the longer passages of the tenth-century legislators, the peace project always formed the basis for making the rules. The differences lie in the composition of the rules, rather than in the given motivation for regulation. As we have already learned from the Frankish and Visigothic laws, the texts may not have spelled out that compensation was a tool for avoiding further violence, but other factors expose this relationship. As for the English legislators, the connection between compensation and violence appears to have been a premise for making law in the first place.

The English legislators made good use of the laws of their predecessors, and the copying of rules was a mark of respect as well as a form of pragmatism. As Alan Watson argues, utility is the main reason why lawmakers borrow rules from earlier law.<sup>870</sup> Scholars have pointed to the inheritance from King Ine's laws in the legislation of King Alfred and to the borrowing from Edgar's laws in those of his successors, Æthelred and Cnut. We have seen that the rules on homicide have much in common in terms of content, although the texts in the rules were slightly rewritten or modified depending on the law in question. Thus, we see that throughout the period from AD 600 up to the reign of Cnut, royal authority relied on the culture of compensation to sustain the legal system. The regulations promoted stronger public intervention, the replacement of compensation with corporal punishment, as well as the increase in fines to the king, imply that the authorities displayed strength, but only using the tool of compensation. The Norman legislation downplayed the institute of compensation, but it did not disappear. Compensation as a legal solution in the case of violence prevailed in the post-Conquest laws in England, although it was diminished.

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<sup>870</sup> Watson, 'Aspects of Reception', pp. 335-39.

Compensation as conflict resolution was an important pillar of the contemporary Scandinavian written laws. As has been hinted at in this chapter, early English laws shared many concepts with the later Scandinavian laws. These similarities will be discussed further in the next chapter.

## 12. Compensation for Homicide in the Scandinavian Laws

The Scandinavian provincial laws emerged as written laws during the period of the rise of the universities, and the revival of Roman law. One should expect a great deal of transmission from Roman law in the Scandinavian laws, and also general influence on the legal work of the Scandinavian legal elite as a result of their education at the universities. Roman influence is visible when sought.<sup>871</sup> Nevertheless, what characterises the written laws is the domination of compensatory solutions, not characteristics of Roman law. When the Norwegian laws were put into writing around the late-eleventh or early twelfth century, compensation was the backbone of the legal system. Further, the system of compensation appears as a well-established institution in conflict resolution at the time the rules set down in writing. It is thus of interest to see which of the ideas about compensation were adopted and adapted in the written sources as transmission from other European sources, and what was original legal thought.

Liebermann accepted the notion that the English laws influenced the Norwegian through the Christianisation of the land by King Olav Haraldsson (St Olav) and his bishop Grimkell, who was brought from England.<sup>872</sup> Later Scandinavian researchers have noticed possible links between Scandinavian law and the English, as mentioned in chapter 8. This appears to be mostly in Anglo-Norman law, but there are also connections with the Anglo-Saxon and Christian laws. Absalon Taranger found that the Norwegian Christian laws echoed English secular laws, while Knut Helle has pointed to correspondences between the Gulathing Law and the early English laws.<sup>873</sup> The linguistic evidence of contact has already been considered in previous chapters. However, it is also possible that the early English laws contain concepts originating within the Scandinavian legal culture from the centuries when we have no written law from the Nordic region. Unfortunately, we cannot contrast contemporary law from England and Scandinavia from the seventh to the eleventh century, due to the lack of written evidence from the latter region. However, the evidence allows for an interesting comparison with the Anglo-Norman period, although this area and time period, with its feudal nature, falls outside the scope of this project.

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<sup>871</sup> See, for instance, Tore Iversen, 'Property and Land Tenancy in Norwegian Medieval Laws and the European Learned Law', in *How Nordic Are the Nordic Medieval Laws?*, *Proceeding from the First Carlsberg Conference in Medieval Legal History*, ed. by Per Andersen, Ditlev Tamm and Helle Vogt (Copenhagen: DJØF, 2005 [2<sup>nd</sup> edn 2011]), pp. 135-76; Iversen, 'Landskapslovene og kanonisk rett', pp. 147-70; Fenger, *Romerret i Norden*.

<sup>872</sup> Liebermann III, p. 168; Helle, *Gulatinget og Gulatingsloven*, pp. 18, 177.

<sup>873</sup> Taranger, *Den angelsaksiske kirkes indflytelse*, pp. 296-335; Helle, *Gulatinget*, p. 35.

As Helle Vogt has already provided a thorough discussion of the Danish, Swedish and Norwegian rules on wergild and compensation, it is unnecessary for me to repeat many of the topics other than by reference.<sup>874</sup> However, there are details of the regulations concerning the procedure regarding compensation for homicide, as well as its size and distribution, which I will examine more closely in line with the aim of the present study.

What characterises the Scandinavian laws on homicide is the emphasis on the involvement of relatives, to a greater extent than we have seen in earlier laws. Otherwise, we find compensation to be a much-used solution in laws on crime in general, and compensation can also be found in the laws on homicide. Legislation on homicide in the Scandinavian provincial laws is marked by the division between homicide that are compensational and of non-compensational killings (*óbotemál*).<sup>875</sup> The grave deeds that fell under the term *niðingsverk*, meaning a deed that was deceitful or evil, were theft, stealthy murder, rape and adultery.<sup>876</sup> The same differentiation exists in the earlier legislation of the Continent and in the English laws, but not as a concrete method of placing responsibility. In the Scandinavian legal material, guilt was individual, but the legal responsibility of the kin still applied to compensational deeds. Of course, the relatives could only really contribute to the conflict settlement with hard currency. Still, vengeance could afflict innocent relatives and associations, and shame and isolation from society could affect those associated with an offender. All the Scandinavia laws uses the wider kin group as the basis for compensation, coming under that which Vogt identifies as canonical kinship.<sup>877</sup> The level of details on which relatives were obliged to contribute is still different between the provincial laws.

We also find a great variety in the prescribed amounts of compensation. The Danish provincial laws differ from law to law, showing regional differences, while the Norwegian have variations within the same law, revealing changes over time. These differences in space and time could be due to the price of silver and the overall changes necessary in paying larger or smaller amounts of compensation. The differences in need of paying a larger compensation could be connected to how great the threat of vengeance was towards the offender, or how much power the offended party had to enforce his claims of compensation. In the following chapter, I will go through the main principles of differentiation, size and distribution within the Danish, Norwegian and Swedish provincial laws, together with the Norwegian Code of

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<sup>874</sup> Vogt, *Function of Kinship*, pp. 125-53.

<sup>875</sup> Vogt, *Slægtens funksjon*, p. 165.

<sup>876</sup> Imsen, 'Den gammelnske drapsprosessen', p. 186. *NgL V*, p. 472. See, for instance, EsL.3.41, F.4.1-4.

<sup>877</sup> In the Norwegian Gulathing Law, the kin group was wider than the canonical one, having eight degrees (G.235). See Hansen, 'The Concept of Kinship', p.190.

the Realm. Due to the particular nature of the Norwegian compensation system, most of the discussion is devoted to these laws, and to the diachronic changes within the Norwegian legal culture. A survey of the main principles in the Danish provincial laws makes for a good starting point.

## 12.1 Compensation for homicide in the Danish provincial laws

The system of compensation is absent from the first Danish provincial laws.<sup>878</sup> This understandably leads to the conclusion that compensation for homicide did not exist in the legal culture of the Danes before the beginning of the thirteenth century. Another explanation is that the first laws were not written down until after the central authorities had already succeeded kin and the local community as the framework overseeing settlement.<sup>879</sup> As Vogt points out, the very name of the first laws, dating to the 1170s, *The Book of Inheritance and Non-Compensational Crimes* (A&O), implies that compensation was a known solution.<sup>880</sup> By arguing *ex silentio*, we could even assume that it was a well-established procedure within the Danish realm, so common that it was unnecessary to mention it. Another noteworthy element is that, in the thirteenth century, Valdemar's Law of Zealand contains only wording indicating individual responsibility that assumes knowledge of the institution of compensation (VsL.1.139). However, the later provincial laws all acknowledge the collective contribution to compensation, and also the kin's right to receive compensation (JL.2.27). While written law distinguished between stealthy murder and homicide, there were also a distinction between wilful homicide and accidents leading to death, as we saw in the Roman and Germanic laws. In case of accidents due to mishap or carelessness, the killer paid a smaller fine of three marks of silver (EsL.2.59-65) or nothing at all (EsL.3.15), similar to the differentiation made in the Roman and Germanic laws regarding *culpa*.

In *The Book of Inheritance and Non-Compensational Crimes*, the term for wergild was expressed as the *manbotunum/manboth*, etc. (A&O.3.2).<sup>881</sup> However, the amounts of compensation, and how they were estimated, are obscure. In the rule above, twenty-four marks were due to the king and the same to the heir, *besides* the wergild. There is sparse evidence of the wergild being a permanent sum in the Danish laws. In several instances, the

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<sup>878</sup> Vogt, *Slægtens funksjon*, p. 311.

<sup>879</sup> Wührer, 'Mansbot – Danmark', p. 330 suggests such an explanation; he writes that the provincial laws were recorded in writing in an age when the 'old arrangements were about to dissolve' (my translation).

<sup>880</sup> Vogt, *Function of Kinship*, pp. 128, 134.

<sup>881</sup> *DgL VII*, p. 71.

compensation was based on the wergild, without disclosing what that was considered to be (ex. JL.3.25). However, the Law of Jutland states that a full wergild was three times eighteen marks of coined silver or the equivalent value (JL.2.9). We can assume fifty-four marks as a standard compensation in the thirteenth century. The Law of Scania reads that, in case of wounds, a man should not receive more than five marks of weighed silver (SL.96). Given the ratio of weighed to counted silver in thirteenth-century Denmark, this should amount to fifteen marks of counted coin.<sup>882</sup> This wergild was due to a grown free man, and it is also what Wührer interpreted as the Danish wergild.<sup>883</sup> We learn that a fifteen-year-old would pay compensation for his misdeeds, but the law does not reveal age-differentiated wergilds or compensations. Neither does written law describe specific amounts of compensation according to the victim's gender or status. We thus do not know if women were valued higher, lower or equal to their male peers, as we have seen examples of in early medieval material. Killing someone in a sacred or inviolable space, such as at the *þing*, in a church or while the victim was working in the fields, brought with it an additional fine. The fine of twenty-four marks should go to the relatives and a similar fine to the king (EsL.3.4, SL.87, JL.3.22). The Law of Jutland from the mid-thirteenth century includes a description of compensation of three times eighteen marks in coins (JL.3.21), but does not specify who the three recipients were to be. These were probably a member of the father's side, a member of the mother's side and the heir, as in the laws of Zealand. These fines could amount to as much as fifty-four plus forty-eight marks, totalling 102 marks in coin. Even though the coined silver was only worth one-third of the weighed, this would still be a substantial sum.

The system drawn in the Danish legal material was less intricate than the northern Scandinavian systems described below. In Eric's law, it was stated that the compensation would be distributed according to the inheritance system (EsL.3.28), but only the male heirs were involved. The male relatives on both parents' side would contribute the compensation according to their distance in degrees from the killer. They would, according to Erik's Law of Zealand, raise the whole sum, even if they were only a few male relatives to share the burden (EsL.3.26). Women were thus excluded from the distribution, both as recipients and contributors, something also found in the law of Jutland. It is plausible that ascribing the compensation duties to male relatives was connected with the male relative's responsibilities in taking vengeance, as was obvious in the Lombard laws. Although the law regulated against vengeance from about 1200, it still affected legislation in Denmark as elsewhere. Similar to

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<sup>882</sup> Nils Ludvig Rasmusson, 'Mark (Mark penningar)', in *KLNM*, vol. 11, p. 437.

<sup>883</sup> Wührer, 'Mansbot-Danmark', pp. 330-32.

the other secular European legislation, to kill a man caught having had sex with one's wife was not compensated (A&O.2.1, JL.3.37). In other legislation, the adultery of a daughter was included in such regulation, but we do not find that here.

Relatives of the victim would likewise have the compensation distributed among them according to degree of kinship, where the sum was halved for each more distant degree (SL.92). Similar to what we find in the Salic laws and the laws of the West Saxon king Alfred, compensation should be divided in three on the providing side. One-third each was provided by the maternal and paternal side, along with the offenders own third (EsL.2.38, SL.85).<sup>884</sup> The provincial laws differ, but the main structure is that the homicide victim's representative would receive compensation, which would be paid in three parts in three shares or instalments, the first by the offender, the second by his father's kin and the third by his mother's kin. These instalments would be handed over after a mirroring system, the offender's share to the direct heir, the paternal share to the relatives of the victim's father, the maternal share to the relatives of the victim's mother. The extent of the kin obliged to contribute to the payment reached four degrees in the law of Jutland (JL.1.25). The Jutish law here aligned with the earlier Fourth Lateran Council, contrasting with inheritance laws that extended to seven degrees (see chapter 8).

In the law of Scania, we find reason to believe that the makers of written law anticipated the laws to be in use, or at least that the regulations on homicide could contribute to real cases: the laws imagine a likely event that persons could be related to both the killer and the victim (SkL.97). In such cases, the degree of kinship that was nearest would determine if they were obliged to pay or to receive payment.

The Danish material demonstrates that *time* was a central component in the system of paying compensation. The amount of time between the crime, the settlement and the transfer was specified in the laws. Further, the laws insisted on the above-mentioned instalments – the thirds – handed over with time intervals between them. Not only as an absolute deadline of payment, but also as a *minimum* of time between the transfers (ASun.48). However, these intervals could according to Eric's Law of Zealand, only extent to a year (EsL.3.26). To legislate a postponement might have been a delicate attempt at cooling down the conflict between the parties. The whole amount was not supposed to be surrendered at the time of the worst grief and anger, but after some delay when the sorrow might have eased. Another point was to ensure that the killer paid the first contribution (SL.85), so as to limit the financial and,

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<sup>884</sup> See also EsL.3.15, 31, SL.92, ASun.48.

we must imagine, mental burden he laid on his male relatives. On the other hand, one can imagine that years of being tied to a conflict could tear open the wounds and create long-term hatred between families for each instalment. Possibly, the instalments were given to secure time for the contributors to collect the amount. Royal legislation sought to regulate the time aspect of private settlements, just as much as the amount and sender/recipient of the compensation. A supplement to the Law of Scania is a royal decree from December 1200, which is dedicated to regulations of compensation for homicide (SL.Till.A.1). Here, King Cnut VI (r. 1182-1202) addresses a problem of certain people using compensation for personal gain, by killing and then involving ‘all kinds of kin, even strangers’<sup>885</sup> to extract payments from them, and apparently taking the money for themselves. In the king’s attempt to smoke out such unacceptable theft, he ordered that no payments from any kin should be transferred before the killer had provided his third of the compensation. The other two thirds would be transferred to the killer and then to the offended party on the day prescribed, not before. In this way, the killer could not run off with, spend or lose the portion. We see that time was an important aspect in all stages of the law concerning the procedure of compensation. The brother of Cnut, King Valdemar II (r. 1202-1241) went even further on responsibility, and in a decree demanded that the perpetrator provided all three repayments himself (SL.Till.A.II). This should take place at the three following provincial assemblies. If he was unable or unwilling or absent, first his father’s relatives and then his mother’s relatives were obliged to offer compensation, but only what amounted to two-thirds.<sup>886</sup> King Valdemar also decreed the abolition of the ordeal (SL.Till.III), a further step towards legal authority for the centralised powers.

Helle Vogt identifies an important development in the Danish material concerning procedure that reveals the lessening of the legal power of kin and the expansion of the legal power of the king.<sup>887</sup> *The Book of Inheritance and Non-Compensational Crimes* decreed that the king could not overrule the outlawry of a killer without the permission of the victim’s relatives, while in the roughly seventy-year-younger Eric’s Law of Scania, it was added that the kin could not accept compensation from the outlaw without the permission of the king

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<sup>885</sup> ‘Consanguineos annumerant, licet extraneos’ – interpretations of this passage have been many, from the expanded kin group, to those outside the kin group, to the group of associated alliances. For different readings of the passage, see: Kroman and Iuul, *Skaanske Lov*, p. 84, for one interpreted translation into modern Danish (no relation); and further Fenger, *Fejde og Mandebod*, p. 363 n. 85 (remote kin); and Vogt, *Function of Kinship*, pp. 135-36 n. 31 (outside the canonical kin). I interpret this wording as mere exaggeration from the legislator, although it possible refers to those outside the fourth degree of kinship.

<sup>886</sup> Vogt, *Slægtens funksjon*, pp. 174-75, argues that, on closer reading, this wording actually indicates that the collective responsibility of the kin was not reduced at all, although legal historians would have it so.

<sup>887</sup> Vogt, *Slægtens funksjon*, p. 168.

(ESL.2.9).<sup>888</sup> The king would still confer with the family before accepting peace with the outlaw. According to the Law of Scania and amendments of King Cnut VI (r. 1182-1202), it was vital that the killer paid the first instalment, to avoid abuse of the obligations of relatives (SL.85, SL.Till.I.1-3). The amendment even stated that the killer could not force his relatives to pay, but that the relatives themselves would encourage each other to fulfil their obligation. In his Latin edition, Anders Sunesen (†1228) addressed this very arrangement – the unsatisfactory situation that the law demanded only a third from the killer himself (ASun.45). Fenger suggested that Anders Sunesen himself thought it less than acceptable to divide the guilt within a kin group, and not let the offender bear the burden alone.<sup>889</sup> Sunesen’s clerical background is also thought to be the motivation behind inserting Christian ideas of guilt and punishment into Danish law. As we have seen, this were the ideas current in the rest of the Latin sphere, and at this point could be the result of general legal ideologies just as much as transmission of specific ideologies from the Church. Sunesen was himself apparently present at the Fourth Lateran Council, and was probably the driving force behind many of the initiatives to harmonise Danish law in accordance with the definitions accepted there.<sup>890</sup>

From the laws’ emphasis on fines to the king, the placing of guilt on the individual culprit and regulation of the procedure dealing with compensation, we can view the Danish laws in light of the motives behind Cnut’s English laws, which likewise demanded public procedure of private settlements and individual guilt. Perhaps the similarity does not come from a shared Danish legal ideology, but rather from an attempt in the tenth century onward to curb vengeance, control the compensatory system and gain legal authority through reducing the responsibility of kin and emphasising the individual legal subject. However, contrasting with Cnut’s law is the procedure describing just these kinship responsibilities in rather more detail than the English laws do. Danish laws also make the effort to ensure the mode of paying compensation is described, which must be about calming the tension between the parties, although we could question whether it was to satisfy or pacify the victim’s relatives. The Norwegian laws focused more on the distribution of compensation, rather than the transfer.

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<sup>888</sup> *DgL* III, p. 224.

<sup>889</sup> Fenger, *Fejde og Mandebod*, pp. 370-71.

<sup>890</sup> Fenger, *Fejde og Mandebod*, p. 375.

## 12.2 Compensation and state formation in the Norwegian laws

A characteristic of the Norwegian provincial laws is the exceptional level of detail in the explanation of the high number of relatives that should be involved in the distribution of compensation. Another is the elaborate way in which the many transactions are described. The Norwegian laws on homicide show a textbook example of how we imagine legal development and state formation to be, from what seems to be very particular case solutions in the first provincial laws to a generalised law, with general principles, where legal authority was held by official authority. The overall image given by the written law is of an early legal system in the Gulathing Law, where both the initial procedure and the final settlement would be the responsibility of the parties themselves, i.e., the offender, the victim and their relatives, to a situation where the state controlled the legal system and the law, as indicated in the Frostathing Law from early 1200 and in the Code of the Realm from 1274. As Jørn Øyrehagen Sunde has noted, the response to all the cases in the Gulathing Law that called for vengeance, i.e., cases of injury, adultery, insults and theft, was altered to encompass a more public legal solution in the later laws.<sup>891</sup> The reality of administration of justice was not as clear, but we can see in written laws a motivation to gradually obtain power from the legal assembly, the *þing*, through these laws.

It is difficult to say to what degree each society was violent or not, and it is not the task to do so here. However, it is relevant to assess what the *expectations* of the legislator were concerning the level of violence, homicide and vengeance. As mentioned above, the work *The Peace in the Feud* contradicted the idea of the feud-discourse we find in sources from early medieval Europe being an image of violence, and that it rather can be interpreted as a language of peacekeeping.<sup>892</sup> Similar thoughts have been proposed regarding medieval Iceland and early modern Scottish society.<sup>893</sup> Likewise, interaction in Norway was less directed by vengeance and violence than the provincial laws and sagas portray. Robberstad explained the high sums of some compensation (see below) as due to Norwegians being more eager to use vengeance as a means of conflict resolution in the twelfth century, when civil war raged the Norwegian realm.<sup>894</sup> Sverre Bagge asks whether the image Snorri presented of the feuds of King Olav (†1030, later sainted) in *Heimskringla* was *not violent enough*, and

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<sup>891</sup> Sunde, *Speculum Legale*, 58-61.

<sup>892</sup> Gluckman, 'Peace in the Feud', pp. 1-14.

<sup>893</sup> For instance, Jenny Wormald, 'Bloodfeud, kindred and government in early modern Scotland' *Past & Present* 87 (1980), pp. 54-97; William Ian Miller, *Bloodtaking and peacemaking: Feud, law, and society in Saga Iceland* (Chicago: University of Chicago Press, 2009), pp. 179-299.

<sup>894</sup> Robberstad, *Gulatingslovi*, p. 374. The civil war is traditionally dated from 1130 to 1240.

suggests that Snorri's understanding of feud in Norway was based on his Icelandic background.<sup>895</sup> Bagge here refers to the actions of the Norwegian political elite in the eleventh century, and not necessarily the actions from the time when each of the vengeance regulations was included in the Gulathing law. However, it is relevant to assume that the lawmen of the Norwegian provinces anticipated violence as a potential solution to conflict.

We can argue that the Gulathing Law was the most violence-orientated set of rules from among the source material, with detailed descriptions of the potential injuries and situations where death might occur among its subjects.<sup>896</sup> In spite of this, or possibly rather because of this, it is also orientated around the process that should follow, for instance, homicide. This includes both the actions to be taken immediately after the incident, by the killer and by witnesses, and the actions in the aftermath, with the victim's family notifying the community and summoning the thingmen to the site (G.151). The circumstances of the homicide affected the procedure, and the surrounding community were encouraged to violent policing. If someone was killed in a group, the others had a duty to run after the killer (G.152); if someone was killed on a ship, the rest of the crew should shove the killer overboard or set him ashore (G.171). However, this was not about vengeful kindred, but about policing that was carried out by associates of the victim. Furthermore, the victim's kin had the right to take vengeance: this provincial law allows vengeance to be sought instead of compensation (G.187). It states that a man was only allowed compensation three times 'if he doesn't get revenge once in a while'. This is generally interpreted as an old law or as a reaction to the compensatory system thrust onto society by the Church.<sup>897</sup> One view has been that the Church introduced compensation to Norway. I find this unlikely, given the traces of compensation in pre-Christian Scandinavia, and the existence of compensation in the rest of northern and western (Christian) Europe. The population of Norway had substantial contact with the rest of Europe long before both written laws and the kingdom originated.<sup>898</sup> We must assume that compensation for homicide was as much a transmission of legal ideas from the Continent as from the Church. Surely, the developing Church in Norway would encourage peaceful solutions instead of vengeance, and ideas brought in from the Continent were indeed ideas supported by the Christian peace movement. Also, the above-mentioned rule in the

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<sup>895</sup> Sverre Bagge, 'Mellom kildekritisk og historisk antropologi. Olav den hellige, aristokratiet og rikssamlingen', *Historisk Tidsskrift*, 81 (2002), 197-98.

<sup>896</sup> For instance, G.4.18-30, 36, 38-46 gives graphic examples of wounds and violence.

<sup>897</sup> Sunde, *Speculum Legale*, p. 346 n. 62.

<sup>898</sup> Peter H. Sawyer, *Kings and Vikings: Scandinavia and Europe AD 700-1100* (Hoboken: Routledge, 2013), pp. 64-73, 141.

Gulathing Law demanding action and not merely accepting payment could be a reaction to the Church's teaching on the subject. Nevertheless, the system of compensation could be a solution to conflict in non-Christian societies, and moreover was a most useful tool of law for both the victims and the secular authorities. In addition, the first churchmen in Norway had low status in society, if we are to believe the law mentioned in the Gulathing Law abolishing the whipping of priests, a treatment usually reserved for slaves (G.15). The system of compensation and the allowing of vengeance would be policing tools for the administration, lacking such an apparatus. We cannot assume that violent vengeance was desired by all victims, especially those incapable of taking it. Therefore, it is a probable statement that rules regulating compensation, and rules accepting vengeance, were intertwined as two sides of a peacekeeping system. The compensation we find in the Norwegian written laws was not a transmission from Christian ideology, but was possibly supported by the growing Church in the kingdom.

The process was very similar in the Frostathing Law, but with important adjustments. At every stage, there were simple changes that shifted the responsibility for justice from the victim's family to the local ombudsman and the official apparatus. First of all, the responsibility was shifted from the victim to the killer and his or her kin, to take the necessary and legally required steps in right process. Notification of the community was required (F.4.1, F.4.7) to obtain temporary *grið* – protection from vengeance – and the killer must also make an appearance at the next *þing* (F.4.22). If the killer escaped or was unknown, the basis for the crime changed and the case was to be treated murder, which was non-compensational (F.4.9, F.4.14). In these cases, confiscation of property and outlawry applied (F.4.2-3), similar to earlier English laws from Edmund, Cnut and William, and the contemporary laws of Henry I.

As in the Germanic laws, if a woman was the killer, then the Frostathing Law put her fate in the hands of the victim's family (F.4.33, 35). She could be killed to obtain vengeance, if she had not gone into exile within the prescribed number of days and compensation would be drawn from her property. If the victim was a woman, her heir would be entitled to her wergild according to the Gulathing Law (G.201). In cases of adultery, the usual right of vengeance against the wife and closely related women applied (G.160, F.4.39, F.5.46). Although this right was continued in King Haakon's revision of the Frostathing Law, sections in both of the provincial codes also opted for a more peaceful solution. The offended man could be compensated to the amount of the woman's wergild (G.197, G.201, F.3.4). However, we do not learn the size of this wergild. In the Frostathing Law, adultery also carried a separate penalty, payment of three marks to the bishop, and if the adultery did not stop, the

adulterers continued to pay up to eighteen marks, after which confiscation of property and banishment applied (F.3.4-5, F.3.7). The involvement of the Church in the matter of adultery demonstrates transmission from canon law into secular legislation. This becomes even more evident when the same terms applied in case of male adultery or incest (F.3.1, F.3.3, F.3.1.5-6, F.5.25). The growing power of the Church introduced peaceful alternatives to violence, and the organisation received jurisdiction in secular legislation, through the clergy's involvement in the legislation process as the legal elite.

The elaborate descriptions of distributing compensation of a given amount came in several sets with minor and major differences between them.<sup>899</sup> Without going into all the details, a few common traits should be mentioned. First of all, there are six main sums, ranging from six marks, then five marks, four marks, three marks, two and half marks and two marks, all of gold (F.6.2, 13, 20, 27, 34 and 41). The written law informs us that these were differentiators according to status, and the law also notes that the sums should not be decided by those negotiating settlement, who might force the amounts up or down (F.6.1). The legislating authority thus claimed the right to operate with fixed sums, and explicitly states that private agreements, subjected to the parties' power, should cease. Although the wergilds were given in amounts of gold, the distribution scale was described in marks of silver.

The laws divided each relative's sum due according to intricate descriptions of degrees of relationship that basically fell into three groups, following the gradual system of counting degrees of kinship (F.6.). The first group consisted of the closely related agnatic males, the second of the cognatic male relatives in the second degree, and the third group of the more remote male relatives up to the sixth degree.<sup>900</sup> Even though the numerous degrees of relatives are listed, the prime heir of Ego was generally favoured with the greatest portion by far (see, for instance, F.6.2-3). The next heir in line, according to the corresponding inheritance system, would be granted a smaller, but still substantial portion of the total sum. We could therefore ask whether or not the distribution of compensation actually followed the same pattern as seen in some of the other European legislation, as Alexander Murray demonstrated, with the heir receiving one portion, and the maternal and paternal relatives receiving one portion each, although unequal portions.<sup>901</sup> Only here, the shares to patrilateral relatives add up to more than one-third.

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<sup>899</sup> For a detailed discussion of the differentiations in amounts in The Law of Frostathing, see Torben Anders Vestergaard, 'The System of Kinship', pp. 160-93; Hansen, 'Concept of Kinship', pp. 191-95.

<sup>900</sup> Hansen, 'Concept of Kinship', p. 192.

<sup>901</sup> Murray, *Germanic Kinship*, pp. 139-44. See chapter 10.

Likewise, the relatives next in line as heirs were to receive significantly smaller portions of the full compensation. The systems can as such be tied to the order of succession, although some of the sets mentioned later lie beyond the limits of the inheritance system. Moreover, these were the male relatives, thus revealing the correlation between vengeance and compensation according to the theory used with Lombard law and Danish law.

In the Gulathing Law, we find five different calculations of compensation, with corresponding patterns of distribution of the compensation.<sup>902</sup> Knut Robberstad suggested that these were different sets of compensation, all of which survive in the extant written copies.<sup>903</sup> The different values and historical price increases in the compensation reveal not only the differences of status, but also an increase of the wergild over time. The law assumed to be oldest, G.180, explains how the amount of the wergild or compensation was related to status. The tariffs for the compensation given started with the 'haudd' (G180, G.200). A 'haudd' was a free, landowning peasant, with a respectable status without being nobility.<sup>904</sup> The status would then rise or fall from eighteen marks, according to the status presumably of the victim. The law assumed to be youngest, G.316-20, from the early 1200s, had a gradation from three to six marks of gold, which was delineated in values of silver. Thus, the wergild varied within the law, from eighteen marks of counted silver to six marks of gold, or the equivalent of forty-eight marks of silver. The law differentiated in relation to status, but no information is available about the wergild according to age, as in the continental laws. However, the section on marriage does state that a husband could demand a wergild for his wife as for himself, implying that women held a wergild equal to their male peers (G.52).

The king was entitled to a fixed sum in each case, which in the assumed older parts of the laws was fifteen marks, and forty marks in the newer.<sup>905</sup> The fine of forty marks corresponds with those fines due in cases of homicide in the Norman English laws, also from the twelfth century.<sup>906</sup> The forty-mark fine also continued in the laws of Henry I and in the Norwegian Code of the Realm from 1274, where other compensation was omitted. Apparently, the discontinuation of compensation for homicide and the continuation of a forty-mark fine was a legal trend in the North Sea states in the thirteenth century.

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<sup>902</sup> G.180, G.218-28, G.229-35, G.236-42, G.243-52 and G.316-20.

<sup>903</sup> Robberstad, *Gulatingslovi*, pp. 370-75.

<sup>904</sup> Arne Bøe, 'Haudd', i *KLNM*, vol. 6 (Copenhagen: Rosenkilde og Bagger, 1961), pp. 251-54.

<sup>905</sup> Karl Lehmann, *Der Königsfriede der Nordgermann* (Berlin: J. Guttentag, 1886), §21. See, for instance, G.199-200.

<sup>906</sup> For instance, King Magnus Erlingsson in G.2, and possibly earlier G.20, G. 149.

Though these tariffs were from different periods, the system of distribution appears similar in the laws. However, Hansen has identified three particular systems of paying wergild in the Norwegian provincial laws.<sup>907</sup> Some of the gradations described relate to a system with the total sum distributed according to degree of kinship, with the closest kin taking the largest cut, which is the system most similar to other secular law. Another system included a mirroring of the two parties, where each relative of the offender pays the corresponding relative of the victim. With several varieties, this system shows what Hansen has termed ‘reciprocal kinsmen’, where a relative would pay the corresponding relative, but also the kinsmen related in the same degree to Ego.

In this system, as elsewhere, the closest heir received a major part of the total compensation. In figure 16 below, we see that, although there are numerous recipients, the first male heirs of the victim, i.e., son, father, brother and uncle – which, with exception of the missing ‘brother’s son’, corresponds to the Icelandic *baugatal*<sup>908</sup> – were entitled to most of the compensation. More distant relatives were left with fractional amounts. This leads to the conclusion that compensation was a pacifying tool in the Norwegian laws, where the needs of those having reason to seek vengeance were considered.

An example of legal transmission on a micro level is Bjarni Marðarson’s reciting of *saktal*, that is, the system of collecting and distributing compensation for murder. Marðarson was a leading legal authority from the northernmost province in the kingdom of Norway in the late-twelfth and early thirteenth century.<sup>909</sup> In the late-twelfth century, Marðarson was involved on the losing side in the last remnants of the civil war in the kingdom. In beginning of the thirteenth century, he was appointed *lagmann* and apparently took some part in the further political structuring of the authorities.<sup>910</sup> In the Gulathing Law, we find Bjarni Marðarson’s *saktal* as a new supplement.<sup>911</sup> The section is very interesting, for three reasons. First, Marðarson proclaimed a new or revised system of calculation for payment of compensation. Second, the section was included at the time of the Fourth Lateran Council and relates to degrees of kinship, and thus could reveal a contemporary understanding of kinship.

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<sup>907</sup> Hansen, ‘Concept of Kinship’, pp. 186-95.

<sup>908</sup> Vilhjálmur Finsen, ed., *Grágás efter det Arnamagnæanske haandskrift nr. 334 fol.*, *Staðarhólsbók* (Odense: Gyldendal, 1879), pp. 24-26.

<sup>909</sup> For a discussion of his position, and of the status of Hálogaland, the northernmost province of Norway, see Miriam Tveit, ‘The Introduction of a Law of the Realm in Northern Norway’, in *Legislation and State Formation- Norway and Its Neighbours in the Middle Ages*, ed. by Steinar Imsen (Trondheim: Akademika forlag, 2013), pp. 41-54.

<sup>910</sup> Jakob Schøning, ‘Lagmenn i Nordlandene og Finnmark mellem omtr. 1200 og 1797’, *Håløygminne*, 4 (1930), 179-94 (p. 181).

<sup>911</sup> *NgL I*, pp. 316-20.

Third, it is an example of legal transmission from a jurisdiction assumed to be low status within Norway to one regarded as prestigious. Bjarni Marðarson's knowledge of penal law appears persuasive and thorough based on the extensive insertion in the Gulathing Law. He quoted long passages of distribution systems for the fines. Since this was around 1215, the reduction of canonic kinship from seven to four degrees is relevant here. The obligation to pay wergild for relatives extended to the sixth canonical degree in this scale.<sup>912</sup> It might be that Marðarson introduced some adaptation of the already revised Frostathing Law from eight degrees to four. Or, he ignored, or was ignorant of the restrictions of the Fourth Lateran Council. Vogt finds it probable that the decisions of Fourth Lateran Council were unknown within the Norwegian legal system when Marðarson recited the wergild system at the western assembly.<sup>913</sup> Since the puzzling inscriptions of kinship responsibility exceed that of normal practice within Catholic Europe, Sunde has suggested a theory of Marðarson's *saktal* being much older law, knowledge that was forgotten in the Gulathing district but rekindled by a legal authority from another jurisdiction.<sup>914</sup> A third possibility regarding the number of degrees being out of kilter with the latest canonical decisions is that they need not have been imitatively followed, but transmitted into the peripheral jurisdictions gradually.

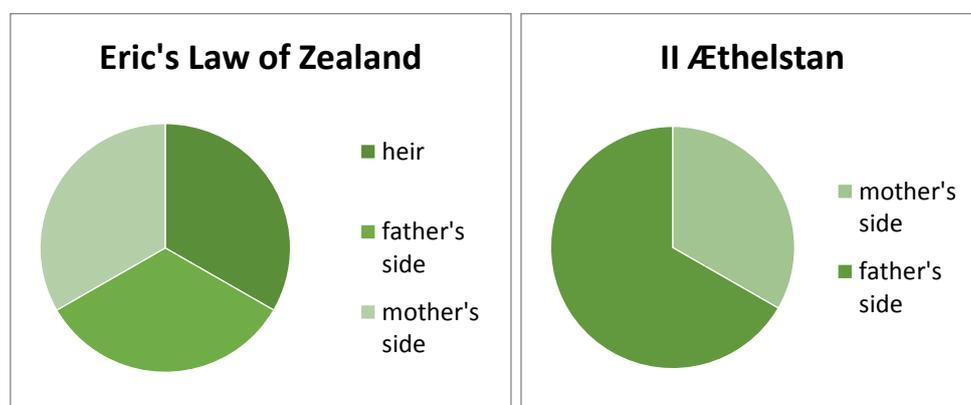


Figure 16: The pattern of distribution in the Danish and English laws.

In the Danish and English laws, we saw that one pattern of distribution was a threefold system, where the killer, his father's side and his mother's side would pay one-third of the total amount each. Accordingly, the paternal heirs and the maternal heirs would receive one-

<sup>912</sup> Hansen, 'Concept of Kinship', pp. 200-01.

<sup>913</sup> Vogt, *Function of Kinship*, p. 147.

<sup>914</sup> Jørn Øyrehagen Sunde "'De skal vere samde menn'" – Ei vitenskapleg fundering og spekulasjon over den eldste norske prosessen', in *De lege*, ed. by Petter Asp (Uppsala: Juridiska fakulteten i Uppsala, 2007), pp. 307 n. 6, and 308ff.

third each. No more specific details were found necessary on how, and if, the relatives should divide their share, except possibly a portion for the victim's closest heir.<sup>915</sup> In the Norwegian provincial laws, the system was described in minute and accurate detail, both regarding which relative should pay, who would receive a particular share, and not least, the exact size of each of the relative's payments. Figure 17 below is a division of the total compensation as given in the Gulathing Law assumed to be the youngest description of division, covering the gradations of Bjarni Marðarson, which illustrate the complexity of the system and the large number of people involved. Here, we have relatives up to the sixth degree mentioned as receiving a share of the compensation.

Some of the laws assumed to be older which prescribe the pattern of payment and receipt of compensation include kin as far as eight degrees (G.235). This is of course baffling, being a step further than the comprehensive incest prohibition of the Church. Suggestions have been made that this dates these laws to somewhere before the Norwegian archdiocese was established in 1152/53 and coincides with a dispensation of a mere six degrees limit to marriage.<sup>916</sup> Conversely, it is asserted by Hansen that this reveals the intricate system as a 'construct' and that the last degrees were added *after* 1152/53.<sup>917</sup>

The rules of the Frostathing law, listing the number of kinsmen who should contribute with the killer to pay the compensation, follow a similar pattern, although the relatives were additionally classified into groups of contributors (F.6.2-47). The classifications follow the gradual system of inheritance rights, which was explained in chapter 8, but included more of the cognatic kindred than those found in the inheritance system of the same Frostathing law. The groups were the *bauggildi*, comprised of the seven prime male patrilineal relatives, the major *nefgildi*, being the patrilateral male relatives through women and the matrilineal male relatives, and the minor *nefgildi* made up of relatives in the third degree on both sides.<sup>918</sup> Thereafter, the relatives are more remote, up to the sixth degree from Ego.

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<sup>915</sup> See chapter 11.

<sup>916</sup> DN.XVII no. 8.

<sup>917</sup> Hansen, 'Concept of Kinship', p. 190.

<sup>918</sup> These groups are explained in Hansen, 'Concept of Kinship', pp. 191-92.

**Figure 17 Distribution pattern according to the gradations of Bjarni Marðarson – six marks of gold, included in Law of Gulathing.**



Possibly due to the expectation to take vengeance, it was primarily male relatives who were among those listed on both sides of the transaction.

Female relatives were listed as mediums through which sons had claims or duties (F. 6.7-8). However, woman who was the sole heir of the person killed could provide and receive compensation until she married (F.6.4). A section on gifts from the women on the killer's side to the women on the victim's side, such as mother, daughter, sister and wife, were included in one of the sets in the Gulathing Law (G.245).

Thus, the main feature of the concept of compensation in the Gulathing Law and the Frostathing Law is the detailed enumeration of the kinsmen who should be involved in case of a homicide. Hansen has reckoned that the regulations of the Frostathing Law imply a minimum of 210 and a maximum of 240 transactions in case of a homicide, if applied directly.<sup>919</sup> As he points out, there are no sources testifying to a homicide settlement being this complex. This obscure pattern of distribution is what sets the Norwegian provincial laws apart

<sup>919</sup> Hansen, 'Concept of Kinship', p. 190 and n. 29.

from earlier and contemporary western European secular legislation. However, we do find the same pattern in the Icelandic laws,<sup>920</sup> which is, of course, one of the reasons for suggesting a western Nordic legal culture separate from an eastern one. The system may constitute an original contribution to medieval law. The Norwegian Code of the Realm only follows suit with the level of detail within the inheritance section, as described in chapter 8. The contributors and recipients appear as a confusing number of relatives. However, if we categorise them into maternal and paternal relatives, where in-laws and step-family represent the side they are connected with, we see that the compensation distribution in the Norwegian laws also fall into three thirds, albeit favouring the paternal kin slightly. The heir received one-third, and the maternal and paternal kin shared the rest according to their degree of relationship. Alexander Murray likened the distribution system in Norwegian laws to that described in Frankish laws, where the heir and the wife received large shares, and the rest being divided among the closest relatives according to degree of relationship in the ratio of 6:2:1.<sup>921</sup> This similarity was first pointed out by Bertha Phillpotts.<sup>922</sup> Arguing a transmission of law between Frankish and Norwegian law, based only on this parallel, would be too uncertain. A retrospective perspective is more reasonable: the apparently exaggerated descriptions in the Norwegian laws were imagining typical systems of distribution of compensation in medieval societies, only that here the legislators and legal elite made the effort to write this down. If we compare the detail in the Norwegian distribution with the detail of the Salian laws, the level of detail in the Norwegian laws surpasses the latter. Other receptions from the Frankish society have been suggested. Geir Atle Ermland has, for instance, pointed out the likeness between the Norwegian defence system of *leidang*, naval conscript, and the Frankish and Anglo-Saxon systems.<sup>923</sup>

But what could be the reason for the descriptions of relatives, and, moreover, involving so many different ones? Helle Vogt has argued that it was way to teach the Norwegians canonical kinship, and thus it had a pedagogic function.<sup>924</sup> This assertion presupposes that the elaborate net of kindred was unknown or was not part of the concept of kinship in Scandinavia before the twelfth century. However, she maintains that the period of unrest during the so-called Norwegian civil wars encouraged closer family ties, in this

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<sup>920</sup> Hansen, 'Concept of Kinship', pp. 195-97.

<sup>921</sup> Murray, *Germanic Kinship Structures*, pp. 142-43.

<sup>922</sup> Phillpotts, *Kindred and Clan*, p. 266.

<sup>923</sup> Geir Atle Ermland, *Norsk forsvarshistorie, I: Krigsmakt og kongemakt* (Institutt for forsvarsstudier, Eide forlag, 2000), pp. 45-49.

<sup>924</sup> Vogt, *Function of Kinship*, pp. 147-48.

instance by describing those family ties in the laws. This might also explain why legislating kings would allow and encourage the use of compensation as conflict resolution to a large extent; unstable political conditions call for a reliance of peacekeeping with the help of the population, before the authority was powerful enough to rely on its own force (or, more the threat of its own force). As has been suggested earlier in this chapter, the legislating power would want control of the legal system, but could only claim control, not enforce it. Hansen has also suggested that the elaborate kinship structure related to canonical kinship.<sup>925</sup> Another possible reason is that involving as many as possible in the aftermath of a homicide attempted to eliminate all possible candidates for vengeance, and thus eliminate further enmities. The intricate system could also have a preventive function for the same reason, because the offence caused the offender to involve a great number of his kin. The kin group would then correct each other, and moderate themselves responsibly. A similar reckoning has been thought to lie behind the increase of the incest regulation from four to seven degrees in the first place.<sup>926</sup> The fact that those responsible for compensation was extending those with rights of inheritance to the same Ego, is interesting. Hansen suggest could be to include as many relatives as possible.<sup>927</sup> This was presumably to ensure that each member's actions affected as many others in the network, so that the system itself kept violence at bay. If interpreted in this way, we see that the system of compensation could be used as a tool of to curb vengeance and violence in society.

The intricate system of contribution of payments was abolished in 1271 by decree, which was included in the Code of the Realm. Helle Vogt has argued that the system of distribution was abandoned because it was unnecessarily complicated.<sup>928</sup> The complexity possibly contributed to the abolishment, but the system was not replaced by a simpler general wording, as found in other European secular legislation. It was a demonstration of the strength of King Magnus that he was able to remove the system of compensation, and it clearly expresses development towards individual responsibility. Legal developments had been taking place throughout the last half of the thirteenth century.<sup>929</sup> First, King Haakon

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<sup>925</sup> Hansen, 'Concept of Kinship', p. 201.

<sup>926</sup> Along with many other reasons suggested for the Church to severely limit the number of possible marriage options. See Bouchard, 'Consanguinity and Noble Marriages', p. 270; Gies, *Marriage and Family*, pp. 83-84; Herlihy, 'Women, Family and Society', p. 102; Gelting, 'Marriage, Peace and the Canonical Incest Prohibitions', p. 93.

<sup>927</sup> Hansen, 'Concept of Kinship', pp. 190, 193.

<sup>928</sup> Vogt, *Slægtens funksjon*, pp. 182, 190.

<sup>929</sup> See, for instance, the decrees on right summoning and procedure MLL.1.9-11, in the last one of which we find the statement that the king is above the law; Taranger has interpreted this as an influence from the Roman formula *Princeps legibus solutus est*: Taranger, *Magnus Lagabøters Landslov*, p. 16. The phrase is found in the *Digesta* 1.3.31 (Ulpian) and would have been part of the principles discussed on legal studies in Europe. See also

Haakonsson decreed in an addendum in c. 1260 that no one other than the one guilty of homicide should pay compensation and fines, thereby releasing the family of the offender from the burden (MLL.10.1.2). Later, his son, King Magnus further constrained responsibility in cases of homicide, by making the killer responsible for paying the compensation, and the victim's closest heir became the recipient of it (MLL.4.13, MLL.10.2.5). According to the Code of the Realm, those who refused to pay compensation would face harsher sanctions (MLL.4.21); outlawry and increased fines were levied.

Another relevant development in relation to the provincial laws is that first Haakon and later Magnus reduced the fines due to the king in each instance by two-thirds (MLL.10.1.1). The reason was probably that making the killer alone responsible for producing the sum made it likely that it would be impossible to produce the whole sum. To avoid a binding judgment not being fulfilled, reducing the sum was a pragmatic solution.

As in the earlier European laws, killing adulterers (of closely related women) was still accepted, although proof that the adulterers had been caught in the act would have to be produced. The act of adultery was made both a non-compensational deed, where the adulterer would be banished (MLL.4.1), and compensational, where the husband would be entitled to compensation for his adulterous wife, and half-wergild for his adulterous daughter, sister and mother (MLL.4.5). The latter rule stipulated the compensation in relation to the wergild of the adulterous man, not the woman, as before. The contradiction reveals the possible inconsistencies in legislative work.

The revisions of King Magnus saw changes to procedure that brought the Code of the Realm into line with European developments of legal thought and procedure. A clearer divide between homicide in the first and second degree was made in general terms, so that murder would be punished with outlawry and/or the death penalty, which also brought these rules into line with the English laws of Henry I described earlier. Execution was a public matter, and only an officially appointed executioner was acceptable according to the Code of the Realm (MLL.4.9). The law included procedural innovations in the case of homicide. Rules on investigation were added, with the so-called *prov*, proof, in which a description of the events should be written down. The investigation would then be used to determine what verdict should be handed down to the killer through an exploration of the graveness of the action (MLL.17-18). Would compensation do, or was complete confiscation of property or possibly execution the proper outcome? The emphasis on investigation and evidence was in line with

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Raoul C. van Caenegem, *Legal History: A European Perspective* (London: The Hambledon Press, 1991), pp. 122-23.

the Norwegian legal reformation of the late-thirteenth century (see, for instance, on the oath of the jurors MLL.1.3). Moreover, the role of authority was strengthened through the king investing himself with the right to show mercy to the outlaw, with, as Steinar Imsen has shown, the possibility that the kings profited from this.<sup>930</sup> However, prior to investigation, the Code of the Realm informs us that the initial steps taken after a killing occurred would be the responsibility of the killer. General procedures followed those of the Frostathing Law, with the killer having the responsibility to announce the homicide (MLL.4.2, 12.1). But if he did not inform those in the surrounding community of his guilt for the homicide, a different set of rules applied, where the charges changed to murder, and both the offended party and the official authorities would take action (MLL.4.12.3-7). This pattern is similar to that seen in the Danish laws on murder.

In the Norwegian provincial laws, compensation appears as a means of settlement, rather than punishment. The legislators had in mind a restoration of the peace, more than harsh retribution. The sum and number of relatives involved might thus be an attempt at preventive legislation. Ideologically, the royal legislator's motivations for compensation would try to pinpoint the guilt of the individual, and remove the kin-based solution for the conflict. The steep fines added, and later removed from, the compensation, show us a conscious usage of an existing compensation system to enrich the treasury, all the while strengthening royal legislative authority.

The wergilds in the Norwegian laws were high compared to other European law, but they fell in line with the Scandinavian tradition we saw in the English material. Little effort was made to ascribe differences in the sums according to status, gender or age. This must have been the basis for the dialogue between the parties, which aimed at reaching an agreement of the compensation in real cases. Or, those who set these rules down in writing did not know or care for any differentiation in wergild, although the tariffs are based in an understanding of status. What appears original in the Norwegian laws on homicide was the system of distribution, with details of both provider and recipient, and an inclusion of a large number of relatives on each side. When it comes to a legal assessment of conditions surrounding the homicide, we find that the actions of those witnessing the act, more than where or when it happened, were of importance. In the Norwegian laws, we thus find points of concurrence with both the continental and early English systems, and also similarities to

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<sup>930</sup> Steinar Imsen, 'Den gammelnorske drapsprosessen', *Historisk Tidsskrift* (2009), pp. 185-229 (p.186).

Roman law. The Norman English laws regarding public fines in case of homicide could also be a source of influence for the legal elite in Norway.

### 12.3 Compensation and state formation in the Swedish laws

Coming to the Swedish provincial laws, we see that the process of exchanging compensation with public procedure and public punishment was taken one step further. The laws emerging were in part royally sanctioned regional laws promulgated in the decades leading up to the Black Death. We expect that those laws being revised by royal authority would include conscious choices of prescribed solutions to homicide and violence. With the exception of the law of Västgötaland, which originates from the early thirteenth century, the various laws were written during a process of development that began in the 1270s during the reign of King Magnus III.<sup>931</sup> The royal authorities issued letters of affirmation to the Law of Uppland, as well as to other laws from other provinces.<sup>932</sup> When King Magnus Ericsson issued a Code of the Realm, possibly in the late 1340s, the institution of compensation disappeared from written law, similar to the Norwegian process.<sup>933</sup> Two-thirds of the original total of forty marks continued to go to the king and the Church. However, the system of compensation for homicide was not declining in previous provincial laws. Thus, we can argue that omitting compensation from the Code of the Realm was the result of a conscious choice made by the legal elite involved in the making of a law for the whole kingdom. If the loose formation of the Swedish state at this point influenced legislation on grave violence, it might explain the emphasis on vengeance and compensation in the laws. The thirteenth century was a period of political unrest in the region, Magnus III himself being a rebellious usurper. Eventually the unrest ended in the consolidation of the landscapes into one kingdom.<sup>934</sup> With the turmoil and few tools for enforcing law, the basis of a culture of vengeance was present. Continuation of the institution of compensation may have resulted from influences from the Church in the absence of powerful secular authority. Still, from the late 1200s, legislative activity was high, as it was in northern Europe as a whole. Probably influenced by its neighbouring legislative activity in Norway and Denmark, written law included the regulation of compensation, size

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<sup>931</sup> Vogt, *Function of Kinship*, p. 52.

<sup>932</sup> Vogt, *Slægtens funksjon*, pp. 100-02.

<sup>933</sup> MEL.Dr1.1; Holmbäck and Wessén, *Magnus Erikssons Landslag*, 234 n. 3.

<sup>934</sup> Vogt, *Slægtens funksjon*, pp. 100-02.

and procedure. We still know that vengeance continued under the consolidating states; thus, it is natural that the system of compensation as legal solution continued as well.

Among the number of provincial laws from Sweden, examples from four of them can illuminate the synchronic differences as well as the diachronic development in the 1200s. The first two, the earlier Law of Västgötaland (VgL) and its younger counterpart (VgLY), and the Law of Östgötaland (ÖgL), the provincial code that originated later, represent western Nordic (and western Swedish) legal culture, and the two other late-thirteenth century laws, the Law of Uppland (UL) and the Hälsinge Law (HL), represent the eastern legal culture. In these laws, there are several references to vengeance, called *oran*, as a possible cause of action, similar to the description in the Danish laws. A system of compensation was the norm in case of homicide that were not murder or otherwise heinous, which was considered a breach of the so-called *edsöre*, the peace. To seek vengeance in any matter after compensation was agreed upon would be considered a breach of the peace (ÖgL.E.2, ÖgL.E.7, ÖgL.Dr.9). We also find detailed rules on how the person with a claim to vengeance and the person targeted should deal with each other to reduce stress. If they belonged to the same community and attended the same church or local gatherings, they should avoid the same roads and entrances (ÖgL.Dr.VII). If a man should find a body by the road, he should not announce it in a village where someone had a claim to vengeance on him (*oran*), but in the next village (UL.M.12).

In the Östgöta Law, we find a non-acceptance of taking vengeance on someone other than the offender (ÖgL.E.2). To kill or harm his kin or associates would be considered a breach of the peace. The legal material further encouraged public procedure in private conflicts, although the community involved was responsible for bringing evildoers to the *þing* for a hearing. In both this law and in the Law of Uppland, homicide was settled with compensation, and stealthy murder was prescribed the death penalty.<sup>935</sup> Interestingly, in the Östgöta Law and the Law of Uppland, stoning was the prescribed punishment for women (Ex. ÖgL.E.17, UL.M.13). This punishment is highly unusual in the European legal context, and one of the few known examples of this being carried out comes from Sweden: the English missionary Eskil was stoned and martyred by the Swedes.<sup>936</sup> One finds stoning again in the Swedish Code of the Realm as punishment for murder (MEL.H.1, MEL.H.8), and in the Norwegian laws concerning theft.

We see that provisions in the laws tried to constrain vengeance, and invited enmity and hostility to be taken to the assembly for peaceful settlement by compensation. At the

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<sup>935</sup> For instance, ÖgL.E.25, ÖgL.E.29, ÖgL.Dr.3, UL.M.15, UL.M.19.

<sup>936</sup> 'Eskil, Srt.', in *Svensk konversationslexikon*, vol. 1 (Stockholm: P.G. Berg 1845), pp. 440-41.

same time, instant vengeance was more readily accepted by the lawmakers; at least, it was an acknowledged outcome of a homicide. In the Västgöta laws, vengeance connected with the instant reaction to a crime against one's person was legal (VgL.M.6, VgLY.Dr.17). A killer who was killed instantly would not be compensated and his killer not persecuted. If someone was killed, an immediate slaying of a killer by his victim's kin would not require compensation (ÖgL.Dr.2). According to the Law of Östgötaland, the kin of the dead killer still had to compensate the first victim's family. Maybe this law was accepted because such an immediate reaction was considered a satisfactory solution by the communities and by the legal authorities which had little means of policing subjects. Any delay in retaliation meant that the offender should be taken to court instead. According to the western laws, adultery by the wife justified vengeance against the couple if caught in the act, and if the husband announced the killing immediately at the *þing* in the same manner as in other Nordic laws (ÖgL.E.26, VgL.M.11, VgLY.Dr.22). No compensation was required from the killer. The anger of the situation justified the action. The eastern Law of Uppland quite oppositely, intentional killing of an adulterous wife should be punished with execution by stoning (UL.M.13). However, in Law of Uppland and the Hälsinge Law, vengeance was also given as an alternative to compensation for the kin in case of homicide (UL.M.8, HL.M.38). The acknowledge was still present in written law, of vengeance as settlement of a homicide.

If we compare the Swedish provincial laws' treatment of homicide with the legislation on theft, we see that strict measures were taken in case of the latter. Legislators' crackdown on theft was a recurring theme of medieval legislation, and in Sweden, too, thieves were given the death penalty, although the Law of Östgötaland prescribed slavery for women.<sup>937</sup> To let a thief escape carried a fine, and the thief should be contained and led to court (UL.M.39, ÖgL.V.33). Relevant here is that Swedish provincial laws did not accept killing as self-justice to guard oneself from thieves, but stated that a man who witnessed stealing should bring the thief to justice, as we find in the Danish and later Norwegian laws. Maybe influenced by the neighbouring legislation, Swedish laws demanded the right of authorities to take care of legal protection.

The Hälsinge Law also include a particular list of compensations due to where a man was killed also use the term *bogh*, where the similarity with the term *baugr* in Norwegian and

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<sup>937</sup> For instance, UL.M.37, UL.M.49, ÖgL.E.32, ÖgL.V.4, ÖgL.V.33-41. The Law of Uppland also graded the graveness of theft according to the object stolen, and minor theft would be fined with an equivalent sum (UL.M.32-37); alternatively, the judge could choose mutilation.

Icelandic law has been pointed out by Brink (HL.M.6.2).38).<sup>938</sup> The Hälsinge Law otherwise followed the Law of Uppland closely, but on the issue of the rights of kin the former diverges from the latter. In its total amount, the stipulated compensation for homicide was reckoned together with the fine to the king. The earliest provincial law, the Older Västgöta Law, stated a compensation of twenty-one silver marks, where the heir would have nine marks and the other kin twelve marks (VgL.M.1.4). A sum which of totally 12 marks was also to be paid to the kin (VgLY.Dr.5-7), so that the final sum totalled almost forty marks. As we saw in the contemporary Norwegian and Danish laws, the sum of forty silver marks was a recurrent standard. A similar division is found in the Östgöta Law, where forty marks was divided between the victim's kin, the king and the community.<sup>939</sup> We find the total of forty marks also expressed in the Law of Uppland (UL.M.10.1), suggesting the amount was a common standard in Scandinavian legal culture.

Status was significant for the stipulation of the wergild of a man. The old and younger Västgöta Law (VgL.M.5, VgLY.Dr.10) decreed thirteen and a third marks as the wergild for those who came from Sweden, but were not under the Västgöta Law. One was not to be outlawed for killing those who came from outside Sweden, 'utländskan man' (VgL.M.5.3-6, VgLY.12). Similar to other European secular law, those outsiders had lower wergilds; according to the younger Västgöta Law, those from Norway, Denmark and England, and 'southerners', had a wergild of nine marks (VgLY.Dr.13,15), although those with the status of a priest had the same wergild as a Swede, even if he was foreign (VgLY.Dr.14). If the killer was a woman, then her closest male relative would bear the brunt and be outlawed (ÖgL.Dr.8-9). The compensation was further differentiated according to the victim's age and gender. This feature is not found in the other provincial laws of the western or eastern Nordic region. Killing of women gave a higher compensation, as it did in Frankish and Lombard laws (UL.M.11, UL.M.29.3, DL.M.3).<sup>940</sup> A woman killed in her own home was a breach on the peace, on the 'edsöre', but still compensational. Her relatives could demand eighty marks, and if she was pregnant, then forty marks were added (ÖgL.E.33). Women and minors were not in the position to regain the honour by vengeance, and thus a number of fines did not apply when they were the offender or the victim (ÖgL.E.15, ÖgL.Dr.11). Furthermore, children and elderly people should be compensated with a double amount of grown men (UL.M.11.2,

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<sup>938</sup> Brink, 'Hälsinge Law', pp. 46-47.

<sup>939</sup> Per-Edwin Wallén, 'Mansbot – Sverige', KLNLM, vol. 11 (Copenhagen: Rosenkilde og Bagger, 1966), p. 328. See also Robberstad, Gulatingslovi, p. 371 n.5.

<sup>940</sup> Wallén, 'Mansbot', p. 329.

HL.M.21), which is opposite to what we read in the Germanic laws. Thus, the size of wergild in Sweden was not necessarily based on the victim's potential labour or fertility. We can thus assume that wergild and compensation were stipulated on principles of protection for the innocent and weak, rather than their potentiality in life.

As the provincial laws differ in other aspects, they also differ in the prescribed distribution of the compensation. Some of the laws give clear procedures; the killer had to pay a share of the sum, the relatives were responsible for the rest. The killer paid one instalment, and the paternal and maternal side paid one instalment each (UL.M 11). Another system was to divide after the familiar ratio 2:1 between the paternal and maternal relatives, as we see in the Östgöta Law (ÖgL.Dr.7). Vogt reads these responsibilities as direct transfers between the relatives on each side, as a peace token and not a part of the compensation.<sup>941</sup> However, this kind of direct involvement was present in the Norwegian provincial laws and the laws of Æthelstan. It was certainly a gesture to keep the peace, but also considered a part of the full settlement of the homicide. Vogt further interprets the ratio 2:1 between the relatives as mirroring the new inheritance system appearing in the later 1200s.<sup>942</sup> This interpretation is probably sound, given that it was introduced into both the eastern and western Swedish provincial laws, including the Östgöta Law (Ögl.Ä.2, see chapter 8). Nevertheless, we must remember that the laws of King Alfred operated with the same ratio on paying compensation, where the paternal relatives were responsible for two-thirds, and the maternal relatives for one-third. Seeing that distribution was similar in the Danish and Norwegian laws, we can conclude that there was a common idea among secular lawmakers in northern Europe that compensation should be distributed this way. It is difficult to point to any particular source of transmission into or within the Scandinavian laws. But, since the English laws are earliest, this at least suggests possible transmission of legal ideas from England to Scandinavia.

The distribution given in the Hälsinge Law is also different. Here we again find the mirroring system, where each relative both pays and receives compensation according to degree of relation to the killer or the victim (HL.M.38). The rule includes specific descriptions of what each relative was due to pay and receive, with parents, brother and wife of the victim being the three foremost relatives, and cousins in the fourth degree the last listed. This was possibly a textual transmission from the Norwegian laws, although the Hälsinge Law belongs

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<sup>941</sup> Vogt, *Function of Kinship*, pp. 140-41.

<sup>942</sup> *Ibid.*, p. 141.

to the group of eastern laws believed to be influenced mainly from east and south.<sup>943</sup> Stefan Brink has demonstrated the connection between the Hälsinge Law and Norwegian legal terminology, particular for rules on compensation.<sup>944</sup> Given that the compensation was distributed among relatives up to the fourth degree, the list of relatives could also be another attempt to sort out the relatives belonging to the kin group according to the Fourth Lateran Council. In any case, the reduction of degrees in the marriage legislation in 1215 apparently had great consequences for Scandinavian secular regulation of both inheritance and distribution of compensation. However, the rule also includes the total of the combined fine and compensation, which was four plus seven silver marks, respectively. The translators see this as inexpensive compared with the law of Uppland which they interpret as thirteen and one-third marks each being due to the victim, the king and the hundred (UL.M.9.2).<sup>945</sup> That the total amount in the Hälsinge Law was approximately one-third of the total amount in the Uppland Law may suggest a reduction of the total amount contemporaneous with the reduction we saw in the Norwegian Code of the Realm. If so, then the Hälsinge Law would include transmission from both provincial laws and the national law of Norway. The landscape of this area bordered the two regions partly under the Frostathing jurisdiction, that is, Jämtland and Härjedalen.<sup>946</sup> It is probable that the listing of relatives and the reduction of the fine was a transmission from the Law of Frostathing.

The Law of Uppland omitted the responsibility of relatives, and demanded that the killer produce the compensation alone (UL.M.9-10). The same is absent in the Laws of Södermannaland and Västmannaland, and Vogt has pointed out that these were royally sanctioned provincial laws.<sup>947</sup> This omission could mean that secular authority had an interest in subduing kin-based responsibility, together with being the result of a general influence from Roman legal concepts.

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<sup>943</sup> Stefan Brink, 'The Hälsinge Law between South and West, King and Church, and Local Customs', in *New Approaches to Early Law in Scandinavia*, ed. By Stefan Brink and Lisa Collinson, Acta Scandinavia, 3 (Turnhout: Brepols, 2014), pp. 37-56 (pp. 37-39).

<sup>944</sup> Brink, 'Hälsinge Law', pp. 44-49.

<sup>945</sup> Holmbäck and Wessén, *Svenska Landskapslagar III*, p. 356 n. 201.

<sup>946</sup> The demarcation between the Norwegian and Swedish landscapes can be found in Holmbäck and Wessén, *Svenska Landskapslagar III*, pp. 398 and 408 n. 9, On demarcation: Holmbäck and Wessén, *Svenska Landskapslagar IV*, pp. xii-xiii, and in *NgL IV*, pp. 667ff. 'Om islenskr perg 4:o'. The demarcation can be found in several manuscripts, among them AM 60, assumed to be from 1330s; *NgL IV*, pp. 547-48. See further MS B in *NgL II*, pp. 487ff. AM.114 (see AM.322). On the legal jurisdiction of Jemtland, see Magne Njåstad, "'The Eastern Realm": The King of Norway and the Border Province Jemtland', in *Rex Insularum. The King of Norway and His "Skattlands" as a Political System c.1260-c.1450*, ed. by Steinar Imsen (Bergen: Fagbokforlaget, 2014), pp. 323-45.

<sup>947</sup> Vogt, *Function of Kinship*, p. 141.

In the Swedish Code of the Realm from the mid-fourteenth century, the institution of compensation was curbed, as it had been in the Norwegian law. The legal elite of King Magnus Ericsson, who had the code assembled, made thorough changes to the compensation system. That is, they failed to include aspects of homicide legislation that played such an important role earlier. The law specified that vengeance on innocent people was outlawed, and thus equalled with homicide (MEL.E.13).<sup>948</sup> Vengeance on the killer would be punished as regular homicide, with fines to the king and the community (MEL.D.3-5). Also, the law hardly mentions compensation (MEL.D.13-14), and does not include any stipulated wergild. The fine to the king was a third of the amount of forty marks, and again we see a numerical parallel to the Norwegian legal development, where king Magnus reduced the punishment to one third of forty marks. Finally, the law held the killer solely responsible for compensation.

To the Swedish legal elite participating in constructing provincial law, compensation appears to have been both a punishment and a means of reaching agreement. By allotting some of the compensation to the community, the notion of a crime committed against the public, and repentance towards the republic, are present. The emphasis on individual responsibility in the royal law tells us that the state sought to suppress the kinship structures dominating the legal system. However, the regions in the process of becoming the Swedish state had a significant relationship with the institution of compensation for homicide, through its complex system of distribution (between society, Church and victim). It is possible that influences from other Scandinavian and European legal thought were well known in Sweden. The particularly brutal punishments of stoning and burning have unknown origins, although they are well known from biblical sources and the town laws of Denmark and Sweden.<sup>949</sup> These particular features could stem from customs in the Swedish regions, or other sources of influence, for instance, a literal interpretation of the Old Testament.

Swedish laws have some of the same values we find in the later Norwegian laws, for example, a total wergild of forty silver marks. However, the amounts are not identical, and they are divided differently between recipients than as they are divided in the neighbouring Scandinavian laws. There is also differentiation in the amounts according to gender and age in these laws, something we frequently find in the western European secular laws, but to a much lesser degree in Norwegian or Danish provincial laws. One possibility for this is that such

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<sup>948</sup> Which Holmbäck and Wessés parallel to the Norwegian attempts to the same in the thirteenth century. Holmbäck and Wessén, *Magnus Erikssons Landslag*, p. 205-06 n. 34. See also MEL.E.22.

<sup>949</sup> Vogt, Helle, 'Danish Penal Law in the Middle Ages: Cases of Homicide and Wounding', in *New Approaches to Early Law in Scandinavia*, ed. by Stefan Brink and Lisa Collinson, Acta Scandinavia, 3 (Turnhout: Brepols, 2013), pp. 185-200.

categories derive from European legal influence, for instance, knowledge of Germanic laws. Swedish laws also include an assessment of *conditions* surrounding the homicide, apart from the usual feature seen in several other laws of whether it was committed in secret. In the Swedish laws, both the scene of the crime and the time at which the crime occurred mattered. In general, the examples of the Swedish provincial laws include a variety of particularities that make them stand out in their content more than other Scandinavian provincial laws. Further research might uncover other points of comparison with eastern laws, from the Greek sphere.

### **Conclusion: Scandinavian laws on compensation for homicide**

Following the model of probable transmission, some elements of the rules were similar in the Scandinavian laws. The wergilds were given in the same currency, the mark. Although the total amounts change within each jurisdiction and at different times, they change to and from the same amounts in all the provincial codes. The legislators provided similar descriptions of right process in cases of homicide and what constituted compensational homicide, though the process was in development. The main pillars were that the killer should admit guilt immediately, and then a hearing should take place at the next assembly. A significant change in the Scandinavian legal development was how officials gained ever more responsibility in the process.

When summarising the probability of transmission of law between the Scandinavian laws, it becomes clear that, in spite of obvious and numerous similarities, they have unique features concerning content and motivation. Danish provincial laws emphasised the time period for paying compensation, and provided details of expiry dates in payment of instalments. Norwegian provincial laws emphasised the very many contributors to and recipients of compensation, before the Code of the Realm removed the whole system. Swedish laws, on the other hand, emphasised the problematic social aspects of a homicide, where the urge for vengeance made precautions necessary. The particularities in Danish law not found in Swedish or Norwegian laws may be connected with transmission from ideas subsisting in another legal culture, rather than with particularities in the other two Scandinavian laws. In the specific rules on homicide, the composition of the rules varies from Swedish to Danish to Norwegian legal texts. As with the inheritance laws, several identical formulas exist in the respective laws within these legal cultures; the Danish laws are copied

from each other, the Norwegian are as well, and some of the Swedish are, too. Thus, we must assume that the provincial laws in one kingdom formed part of a legal culture. It is also between the provincial laws that the examples of copied texts emerge. Nevertheless, the copying of existing law was modified, not necessarily to fit a different set of norms in another region, but to fit growing royal intervention, as seen, for example, in the adjustments from the elder Gulathing Law in the Frostathing Law, and from the use of the law of Uppland in the Hälsinge Law. This supports the argument that borrowing from existing law texts was the easiest mode of making law in the Middle Ages, but also that adjustments usually occurred. For these reasons, it is fruitful to compare these different sets of law to law outside Scandinavia. Apart from numerous linguistic parallels with early English laws, there is little evidence of direct copying of rules or phrases on compensation from other secular law, although there are examples of translation of standard phrases elsewhere in other sections of the laws. More interesting parallels appear connected to the second level of probability, regarding motivation and basis. As we have seen from the survey, a shared idea of the distribution of compensation seems to have existed among the legal elite involved in writing the laws. The Scandinavian laws assumed a tripartite compensation, where the maternal and paternal side contributed or received one part each, and the offender and the closest heir, respectively, paid and received the last third. The basic principles are the same as found in earlier English and Frankish laws, and must be regarded as a continuation of this principle. These thirds were of unequal sizes in the Norwegian and Frankish laws, giving preference to paternal kin, as at least Norwegian laws did in all instances in inheritance laws. According to Danish and Swedish laws, the thirds were apparently of equal size, as the English laws assumed – if we regard the heir as receiving one-third, reflecting an inheritance system of parentela principles.

Regarding the lowest level in the hierarchy of probability, regarding procedural descriptions, this is where the Scandinavian laws include the original descriptions mentioned above. However, when it comes to sentences and other content, there are numerous parallels, some which are obvious. The existence of a compensatory system is common and shared with European law, and the use in written law of the Scandinavian currency of the mark show that the institution was adjusted to the regions currency, although stating the amounts in the monetary value give the flare of compensation as a symbolic value, instead of a pragmatic solution to homicide. The aforementioned payment system in shares between relatives of maternal and paternal kin is common and parallel to European written laws. Other similarities with European laws that fall outside the actual institution of compensation but are nonetheless

linked to it are more subtle, such as the added fine to the king, where Scandinavian laws operated with forty marks as compensation, as in Norman law.

The strengthening of public procedures had features similar to Henry II's legal programme. Presumably, the revisions of King Magnus saw changes to the procedure that brought the Norwegian Code of the Realm into line of those in the Angevin reforms and in European legal developments. Both the legal regions of Scandinavia and England follow a development towards a more public system of conflict resolution, although the written laws in both Anglo-Norman England and Norway continued to allow for the traditional compensation system to remain in place. In law and in practice, it can be seen that compensatory punishments seem to play a vital role in conflict resolution, in order to restore equilibrium between parties. Still, public authority became a more decisive third party in any conflict and was ever more involved in trying to reach solutions through the making of laws.

We must assume that the system of compensation to the victim in cases of homicide or violence that we find in Danish and Norwegian written laws was influenced in part by early English law. However, it is also possible to easily argue that the Anglo-Saxon laws were influenced by Scandinavian legal culture, at least in terminology. Attempts to bring the settlements under the control and fee of royal authority were already present in early English laws. Nevertheless, administrative developments and the extensive use of the death penalty and fines to the king might have been the result of contact with the legal system of twelfth-century England. Somewhat delayed, Norwegian law follow Norman and Angevin development on compensation. Compensation for homicide and other crimes constituted a common feature in the Scandinavian laws, despite the differences in composition of the rules and differences in stated procedure. The question is whether it was a longstanding tradition in the legal culture of Scandinavia before written laws emerged. Vogt has argued that the detailed descriptions of kinship and the distribution of compensation imply that those who executed and were subjected to the law needed to learn the nature and extent of canonical kinship. Thus, the collective compensation system possibly was little known in Scandinavia before a forced introduction from the twelfth-century onward. Even if we see examples in other law detailing pedagogical listings of kin, as in Visigothic and Roman law, the familiar names of relatives in the earliest laws of Gulathing imply that the components of a clan, 'ætt', were known in Scandinavian society, if not in the canonical fashion. The vague references in the English laws to the *lahslit* of the Danes strengthens the argument that compensation was part of Scandinavian legal culture long before Scandinavia saw written laws. Even if notions of the *ætt* included both blood-relatives and friends, and the notion of contributors to

compensation included the same groups, the system of compensation was present in Scandinavian legal culture. We find the clearest attempts to replace the kin-based legal system with a state legal system in the Swedish and Norwegian national laws. The most important development in legislation on crimes in Scandinavia was probably the shift to individual guilt in law. The examination of royal legislation shows that the legislating king's individualisation of his subjects was connected with his search for legal power. However, the examination revealed little concerning what influenced this tendency. Possible explanations emerging in the survey include influence from the Church and influence from Roman legal principles. Nevertheless, the survey of early medieval law provided many examples of secular authority trying the same, before the revival of Roman law, and supporting arguments claim that the Church gained more from a system of collective compensation than from other modes of punishment. Legislators in England also operated at the intersection of making acceptable law according to their legal culture, and furthering their own power in the legal system. Internal motives in the jurisdiction for breaking the kin-based system could explain the move to command responsibility from the homicide from without.



## Conclusion

This comparison of about forty legal sources from different geographical regions covering a period of approximately nine hundred years has produced a range of indications of legal transmission. The ambition was to test whether it is possible to identify transmission within written secular laws of western medieval Europe, with a focus on the laws on inheritance and compensation for homicide. One general conclusion is that there is clear evidence that those who set laws down in writing in the Middle Ages were familiar with much earlier, secular written laws, but there is less evidence of the actual transmission of law, and from where the transmission came. It is nevertheless possible to argue the probability of a transmission and a probable source of influence in each instance. The thesis has confirmed to a large degree the findings of other studies on the connection between different regions, but the results suggest that our conception of the range of transmission of law in the Middle Ages should be expanded. The legislators' apparent knowledge of other secular law is not surprising in itself, but this comparison has exposed the existence of the continuation of several concepts in western European legislation. It seems that the legal elite who worked for the legislative authorities not only knew of law books, but had an understanding of some general legal principles regarding inheritance and compensation for homicide that left traces in the written law, albeit often with genuinely original twists on the formulation of the rules.

The juxtaposing of legal sources from a larger area has provided a better overview of the common legal principles than when examining only one or two. Those parallels that appear in two neighbouring sources could be assumed to derive from a shared legal ideology between these two, but when compared with a wide range of sources, other patterns emerge. We see that a principle may not only be found in the nearest contemporary legal culture, but in older laws or those from more remote legal cultures. Some features are shared by all the legal sources examined here. For example, the existence of a concept of legitimate heirs, as a result of the need for prioritising, or the acceptance of the killing of an adulterous wife or daughter, because of the grievance connected with it. Such overall parallels suggest that the principle concerned was a general principle in the legal ideology, and therefore more a result of spread of legal concepts than of direct transmission of written law. Other features are shared by many legal sources, for example the exclusion of women in the distribution of compensation even in societies with bilateral inheritance systems, because of the connection between compensation and vengeance. Furthermore, some particular principles appear to have taken hold in the individual legal cultures as a result of the legislators' adaptation of known

legal concepts such as the partite inheritance to daughters, shared by both patrilineal and bilateral systems, and the shared anticipation of partite distribution of the compensation into thirds, the portion of the paternal and the maternal relatives, and the heir. One contribution made by this thesis is therefore the mapping of legislation across a wide range of material on inheritance and compensation for homicide over a long timespan. The possibility to observe development and continuity of written secular law from the end of the Roman empire to the coming of the Black Death is alone a significant outcome of the study.

Regarding transmission of law in a process of state consolidation, I put forward the theories of Alan Watson on the ease of legal transplant, and Pierre Legrand's counterargument that transplanted law would be rejected by the legal culture it was applied to. The intention was to investigate if transmission with or without adjustments was involved in the process of making written law in these forming states. Watson's main argument was that legal transplants happen because it is easier to borrow law than to make new law. The parallels we find in secular written laws are sufficient to support this argument. In the written laws regulating inheritance and compensation for homicide, much of the basic regulations are the same, indicating that legislators used known concepts and shared legal ideologies, which were sometimes due to influences and sometimes due to direct borrowing. However, this theory must be modified in accordance with Watson and Legrand's discussion of the filtration of law. The material from each legal culture has so many variants and features particular to it, regulating specific situations, that we must conclude that the legal elites knowledge of legal concepts elsewhere were not borrowed without careful adaptations. The local variants make it difficult to argue for unrestricted legal transmission of large quantities of written law in medieval Europe, as a result of easy access and the ease of borrowing, as Watson has argued. This is not only because local legal culture would reject the imported law, but also because variations probably happen in the transmission. Whether such adaptations were done consciously to fit the local legal culture, or they were coincidental changes added in the process of transmission, is not always detectable. Nor can we tell if the adaptations were a result of the whim of the legal elite involved in the writing of law, but some probable directions of influence can be pointed out.

In the introduction, the comparative method was introduced as a possible approach to a study of transmission of laws from many regions and periods. This method has formed the basis of the analysis, but a more overarching conclusion should be presented at this point. This is the suggestion of crucial causal factors that meant that the laws with different bases achieved a similar result, and of crucial variables that explain how apparently similar written

laws resulted in different outcomes in regard to the same topic. Many individual topics and principles in the laws on inheritance and compensation for homicide have emerged through this comparison, both particular and more general features. The parallel concepts in the legal sources will not be repeated in detail, but some significant observations can still be expressed.

More general features include, for instance, the classification of the inheritance laws into two main systems, the gradual system and the parentela system. Although the models have been constructed by modern scholars on the basis of medieval Nordic inheritance systems, it has proved fruitful to apply this classification to the western European written laws. The legal culture could be sorted roughly into one or the other system, and we even saw development from one to another – always from gradual principles to parentela principles – in Roman law and Scandinavian laws. The existence of parentela principles can be found in late Roman law and Visigothic law, and also in the eastern Scandinavian laws. In the Frankish and English laws, inheritance rights according to parentela principles can be detected in the first parentela, while the more remote relatives inherited according to gradual principles. Suggestions are therefore that the existence of parentela system in the written laws point to an influence from the original Roman legal ideology as the common crucial variable. It could be argued that the direction of this development indicates that the presence of the parentela system in state laws suggests stronger state authority. The Germanic laws, which otherwise share several points, differed in the systems of inheritance they espoused. The Visigothic and the Frankish laws, which presented the parentela system, both had a bilateral kinship system, while the Lombard and Burgundian laws, which presented a gradual system of inheritance, for the same reason appeared as a mainly patrilineal system of kinship. All four legal cultures reveal transmission from Roman law in other, particular, aspects. The one feature shared by the Germanic gradual laws is a reduced focus on individual responsibility for the compensation for homicide, something they also share with the English laws before Æthelstan and the western Scandinavian laws also adhering to the gradual system. This is construed as the common crucial variable. The parallel could explain the gradual system as representative of a society of kin-based settlements, and collective solutions instead of individual guilt, which again confirms that the gradual system could be a sign of a weak state authority, or rather a legislating authority yielding to pressure from those advocating interests of landowners.

Another general feature of significance is the existence of wergild and the system of compensation in the rules from the fifth to the fourteenth century. It has proved difficult to give a conclusive explanation to the origins of compensation in written law, but the existence

of compensatory solutions prior to the writing down of laws according to the Roman model may be one explanation. The usefulness of such a legal solution in forming states is an even better explanation as to why the principles continued in medieval Europe. The legal authorities needed compensatory settlements to have an existing legal system, and wove the solution into the fabric of law to assume control over private settlements. We could argue that, despite encouraging the use of public procedure and not vengeance, secular authorities not only acknowledged violent settlements, but also found them useful as means of policing their society. Put into formal legislation, the compensatory system worked as a tool of creating a rule of law for legislating authority in this respect.

A more particular feature found in the laws was the corresponding concept of allowing partitioned inheritance to daughters. This was found directly or indirectly, as gifts, in several of the inheritance laws, either already existing or, as in the early Lombard laws of Rothair, and in the earliest Norwegian provincial laws, and the Swedish provincial Law of Västgötaland, developing through the phases of law-making. Only these legal cultures originally postponed daughters from inheriting in the default inheritance system. Then we could ask, what were the crucial causal factors that created these laws allowing partitioned inheritance to daughters, and caused the other secular laws to include this feature, although they otherwise differ on many points? Though this might be the wrong question to ask, because, as the feature was so widespread, a crucial factor would be difficult to identify. Another possibility for letting daughters share in the inheritance could be the motive suggested in Liutprand's legislation, that allowing daughters to inherit was a desired development in itself, and not necessarily reception of law. However, the comments in high medieval Swedish legislation on how inheritance to a daughter had been distributed earlier, and how it was distributed now, suggest that in this case the change was forced. While the Swedish legal elite transmitted the European inheritance principles, they were consciously doing it. If we then look further, another feature corresponding in the written laws, and only added later in the Lombard, Swedish and Norwegian laws, was the right of representation for grandchildren. Regarding the rights of representation, however, the examination of the sources has revealed that this was a principle that was forming in most of the legal cultures, as we saw in chapter 6-8. In Roman law, Germanic law and Scandinavian law, the rights of grandchildren to inherit in the place of a deceased parent was a principle that was being established. The son of a son often had a favoured position in this respect. As we have seen, granddaughters and grandchildren by daughters were not automatically given inheritance rights, even if their parents had rights and even if the default system followed bilateral

concepts of kinship. In the Roman legal culture, the discussion apparently related to the rights of the *paterfamilias*. In the medieval legislation, the discussion also related to how the family property would be divided, where paternal, male relatives had priority over grandchildren by a daughter. Inheritance rights for grandchildren were introduced in the Germanic laws and in the Scandinavian laws. Only Visigothic law presented a full parentela system exhausting descendants, which most probably was a reception of late Roman law. What we can suggest from the similarity of inheritance rights for daughters and all grandchildren is that these principles were transmitted throughout Europe, most likely through the spread of Roman legal concepts.

A related topic is the emphasis on legitimacy in the legal sources. In the Scandinavian legal sources from the thirteenth century, legitimate birth and baptism was an important priority in the inheritance system. Because of the powerful position of the Church in Europe in this period, it is natural to assume the principle of priority by legitimacy to be a part of the Christian influence on the European authorities at the time. However, the corresponding differentiation between a legitimately born heir and an illegitimate born heir in the seventh century Lombard and Visigothic laws, and also in the pre-Christian Roman law, tells us that the high medieval legislation was based on earlier concepts. The legal subordination of illegitimate children in the Middle Ages was of course connected with Christian definitions of what constituted legitimacy, but the reason for adopting such principles had as much to do with passing on the family property as with Christian ideology. It would be in the interest of both land-owning families and legislative authorities to have a neat inheritance system. In extension to the rights of representation and the priority of legitimate children in the inheritance system is the categorisation of landed property. Also relevant for regulating family property is the development of division of status in landed property and allodial rights. This is found in all the legal cultures examined here, although with very distinct features in each. Something that is similar, though, is the idea of prescriptive rights to land after a certain amount of time. The Germanic laws and Norwegian law both increased this time prescription from thirty to sixty years, and although each system of land ownership appears to be different, the concept of time prescription in the later law was perhaps inspired from the Germanic idea of the length of time prescription.

Relating to the latter, we could then ask why other principles from Roman law were not transmitted to all European secular laws. The logical answer is that the legal elite borrowed what was currently available and desirable at the time of legislation. The existence of compensation for homicide was something that distinguished medieval law from Roman

law. Nevertheless, there are indications that Roman law included the principle of compensating offences, and that Roman law may have been influenced by Germanic law in this respect. In the Kentish laws, we saw linguistic familiarities with the Frankish terminology, while the following English laws demonstrated a similar tripartite distribution among the maternal and paternal side. English laws also contrasted with the contemporary Scandinavian traditions when it came to the size of the compensation and differentiation according to status, although much of the terminology was used. Scandinavian laws reveal that compensation was in existence prior to the writing down of the laws. The influence of Roman law in the twelfth century did not immediately wipe out this system, which was the core of secular Scandinavian law. Compensation was first individualised and then omitted from the Code of the Realm in Norway and Sweden from the late-thirteenth century, and this may have resulted from new sources of influence from Norman England, but also from the general view of the legal system and state authority in this period. The system of compensation for homicide presented in the English and Scandinavian laws was probably a reception from Germanic laws, although the notion of compensating possibly evolved independently of each other.

Another principle suggesting transmission of law that was related in the same way to the legislators' interests in kinship structures is the way these legislators expressed how compensation for homicide should be distributed among relatives. The survey in chapters 10 to 12 demonstrated that, although the institution of compensation was differently presented in the written laws, a core of understanding of the way such dramatic compensation should be paid and received, and thus of the function of the compensation, existed. Excepting Frankish law, the Germanic laws studied here included only the paternal side, reflecting their inheritance system, or said nothing on the matter as part of hiding the existence of compensation, as in Visigothic laws. The Frankish laws made the distribution system reflect the inheritance system, and involved both the maternal and the paternal side, including female relatives. The secular laws that came later also included both the maternal and paternal sides as contributors and recipients of the total amount, without reflecting the inheritance system. Thus, the tripartite distribution system in Frankish law was a crucial similarity in later legislation, all including the compensation system. Frankish principles seem to have been spread through transmission into other secular written laws. The differentiation of the compensation according to gender, age and status was a major part of the Germanic regulation of homicide, but is found only indirectly in the Scandinavian laws apart from the reduced

compensation for strangers in Swedish laws. This suggest again that, the shared legal concepts were the result more of a transmission of legal ideology, than of written law directly.

Contrasting from the systems of distribution and the principles adopted in the legislation on inheritance and compensation for homicide, the smaller elements in the laws provide stronger indications on transmission of law. Correspondences in the relevant degrees of kinship, the sizes of compensation, terminology regarding the transaction and currency have been demonstrated in the previous chapters. A striking point is nevertheless that legislators appear to have been conscious of the details of the contents of written law, and therefore conscious about introducing law from other sources. Compared with each other, we find that the differences between the written laws reveal a distinct homemade adjustment to borrowed law. One example of such original content includes the Visigothic and Frankish legislation on compensation for homicide, and their differentiation of persons according to age, sex and status. They both have detailed regulation on this, but the actual differentiations are different, and to a degree opposite to each other, with regards to the value of boys and girls, young and old, men and women. The concept of distinguishing the wergild was also common for the other European legal cultures, but the value placed on each category was apparently adjusted in accordance with regional norms, and, more than any other example, reveals the regional adaptations made to legal concepts that were probably borrowed. However, even if the specified amount to a specified category of status, age or gender differed, the very categories and amounts themselves were parallel in the various laws, suggesting a shared concept of differentiating wergild and compensation in early and high medieval Europe.

The major patterns of legal transmission that have emerged through this investigation indicate that the sources include evidence of transmission from several different sources and predominantly a single one. This is, of course, particularly true for the Scandinavian laws, which originated later in time, and could have been influenced by both neighbouring regions in England, and earlier laws from the Continent, or through the influence of Roman and canon law via university students and clergy in their respective kingdoms. Scandinavian laws reveal an interdependence. Particularly, Swedish provincial law appears to include transmission from Danish and Norwegian law. Further, Scandinavian laws relate to Roman law in the description of relatives, developing the parentela system, legitimacy and the subordination of illegitimacy. The linguistic similarities with early English laws suggest a considerable exchange of legal concepts between these legal cultures. The similarity with later English

laws of the size of fines to the king, and the laws generally include a similar focus on public procedure and individual guilt was probably due to legal transmission in the thirteenth century. Scandinavian laws adhere to Germanic law regarding the distribution of the compensation. The detailed description of the kin group within Norwegian law may be original, but finds a basis in Roman and Visigothic adaptations. Danish laws have the most similarity with Lombard laws and Roman law, regarding the partitioned inheritance of daughters.

The earliest English laws show signs of transmission from Germanic laws, specifically Frankish laws, when it comes to the distribution of the compensation for homicide, and the division among status groups. Inheritance laws may also have connections with the Frankish inheritance system, combining parentela and gradual principles. The English laws from the ninth and tenth century display a connection with Scandinavian legal culture, in respect of both terminology and concepts, due to contact. The compensation system otherwise seems to develop along the same lines as continental laws. The laws of Cnut include an emphasis on corporal punishment, possibly an eastern European influence, while his, and the other English laws, relate to Roman legislation on legitimacy and illegitimacy.

The Germanic laws reveal reception from Roman inheritance regulations, especially regarding giving daughters extended inheritance rights. Here, the Visigothic law follows late Roman law closely, and laws on degrees were directly copied. The number of counting relatives within six degrees received from Roman law apparently became a standard within Germanic laws. Regarding compensation for homicide, the Germanic laws display an interdependence with each other. This is particularly true of the Lombard connection with Frankish laws. Germanic laws coincide also regarding the wergild and the system of differentiation according to context, status and gender, although the particular stipulations vary. The categorising of compensations according to status was probably a particular feature developing in the Germanic legislation, but the concept of division and the terminology still appear to derive from Roman late concepts.

Roman law, unsurprisingly, appears to have influenced medieval legislation in several periods of jurisdictional activity. As the examination has revealed, however, reception of legal principles also appears to have taken place in the late Roman legislation. Germanic notions of emancipation and compensation possibly influenced the Roman legislation of the fifth and sixth centuries.

This study has transgressed some of the traditional demarcations of historic periods, both regarding general medieval history and periods of legal history. In this way, the European legal enterprises have been juxtaposed in a new way, comparing studies of the legal material far apart in time and geographical distance. This approach offers the opportunity to review development over a long time-span. Thus, the thesis contributes to the available research on medieval legislation at different points in time, and discusses how existing European law influenced other secular legislating apparatus, either directly or conceptually. Such a wide perspective has brought forth evidence of legal transmission between the legal cultures in Western Europe that can be considered dissimilar or not comparable.

What is lost by such an approach, however, is the opportunity to do an in-depth analysis of how and by whom transmission of law happened. All the legal exchange among the European legal works happened through persons, most probably legally trained, but finding who was responsible for which legal transmission goes beyond the remit of the present study. Further, the possible source of influence could be many and varied in many instances in the cases in this study. Although this thesis attempts to discuss the most probable source in cases of transmission, a much more detailed study in each instance would provide more definitive conclusions. Conceivably, this study may form a basis for other studies exploring the correspondences of medieval law, where others may conduct a more thorough analysis based on the findings here, or make comparisons with other legal sources excluded from this thesis. Also, this study has concentrated on two particular themes in law, inheritance and compensation for homicide. These topics are extensive in and of themselves, and the present study has only discussed the main aspects of the related regulations in the written laws. Nevertheless, a comparison with a focus on *other* topics would possibly confirm and expand the correlations between the written sources and their legislators. The juxtaposing of Western European legislation constitutes in itself a basis for future research on legislating activity, state development or family structures.



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