Background and context

The early modern judicial system

The secular judicial structure

In comparison to many European countries, the Swedish judicial system was organised in an unusually uniform manner during the early modern period. In broad outline, it consisted of three secular judicial bodies.

The first body was the local court, *tinget* (the *Thing*), also called *häradsrätten* (the hundred court) in the countryside or *rådhusrätten* (the municipal court) in the towns. The *häradshövding* (hundred-court judge), who acted as the judge for the local court sessions, summoned the court sessions three times a year: winter, summer, and autumn. If a serious crime was discovered in between the regular court sessions, an extra session was summoned, a so-called *urtima ting* (extraordinary court session). In addition to the hundred-court judge, trusted farmers from the local community functioned as judges. In ancient times, the Things were highly public events that were attended by ordinary people from the local community. Many of these individuals also participated in the actual trial process as witnesses or plaintiffs.

*Hovrätten* (the court of appeal), which was the second body in the judicial system, was established in the seventeenth century for the purpose of relieving pressure on the Crown. Above all, the court of appeal was intended to ensure uniformity in the administration of justice by overseeing the work of the lower courts. Each year the lower courts were obliged to send in a transcript of their judgement books, a *renovering*, to the court of appeal, so that the appellate court could make ex-post-facto assessments of judicial decisions.

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1 Sundin 1992, pp. 60–70.
Serious crimes, however – that is, crimes where the defendant risked the death penalty – along with all cases regarding crimes against the prohibited degrees in the first and second degree were to be assessed by the court of appeal before a final judgement was handed down, which is why the records were sent to the court of appeal immediately after the local court sessions. The courts of appeal also served in an advisory function for the lower courts when any doubts arose regarding the nature of the law, but defendants themselves had no right to appeal to the next instance.

The court of appeal was made up of a president and fourteen members, or, as they were called, assessorer (associate judges), half of whom were noblemen, half commoners. They would often have a basic education in civil or criminal law and their periods of service usually lasted for more than ten years, sometimes upwards of 25–30 years. The combined experience of judicial work in the group was thus generally significant. A large majority of the criminal cases were settled exclusively on the basis of the records sent in by the lower courts. If there was a lack of agreement regarding individual judicial decisions, the case was settled by means of a vote. The members of the court of appeal had the authority to deviate from a prescribed punishment when this was considered appropriate. They could arbitrera (mitigate) a punishment or leuterera (pardon) a person if there were especially extenuating circumstances. These decisions were not entirely arbitrary but were to a large extent governed by earlier cases, and new decisions also became precedential for future ones. If a criminal risked the death penalty, the court of appeal had to apply to the Crown for permission to issue a pardon. They could also consult the Crown if they were unsure of the proper meaning of the law in a particular case.

The third and final body was Kungl. Maj:t (the Crown). It was thus the king who had the supreme judiciary power in the country, although he acted in consultation with rikets råd (the Council of the State). The Council of the State consisted of around twenty ecclesiastical and secular men of great power, men whose education varied a good deal. In the absence of the monarch, decisions could be made by the Council alone. If the Crown received a question from a cathedral chapter or a court of appeal, the monarch often answered

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3 Thunander 1993, pp. 12, 221–5. For more detailed information on the composition of the court and the educational level of the members, see Thunander 1993, pp. 27–40.
by way of an official letter or a regulation that laid down how he wished similar cases to be dealt with in all judicial bodies in the future. These regulations were given the status of official laws, and the courts of appeal adhered to them in future judicial decisions.4

The ecclesiastical structure

In premodern society, the secular judicial structure had an ecclesiastical counterpart. On the local level, the vicar (kyrkoherde in Swedish) acted as the leader of his parish. He was, above all, responsible for the spiritual welfare of his parishioners. Via sermons, teaching the catechism, and catechetical examinations in the parishioners’ homes (husförhör), he functioned both as a teacher and as an examiner of the scriptural knowledge of the peasantry. The vicar usually chaired the parish meetings, where minor infractions against prevailing norms were tried and judged. He often had an assistant in the form of a curate (adjunkt), an assistant vicar (kaplan), a perpetual curate (komminster), or a parish clerk (klockare).

The dean (prost) was responsible for a deanery (kontrakt) which could include several cures (pastorat). He acted as a supervisor of and advisor to the vicar. Above him, the dean had a bishop who managed the regional cathedral chapter. During earlier periods the cathedral chapter, or the ‘consistory’ as it was also called, had had significant judiciary power in society; but around the turn of the century in 1700, the hearing of most criminal cases had been transferred to the secular courts. At the beginning of the investigated period, the cathedral chapters were primarily responsible for the education of the country’s priests, but their purpose was also to pass judgement in certain religious and marital cases.5

The Christian incest prohibition in a historical perspective

All the major world religions, including Christianity, Judaism, Islam, Buddhism, and Hinduism, have regulated sexual relations between relatives in some way.6 But the prohibitions developed in the

4 From 1789 judiciary power was taken over by Högsta Domstolen (the Supreme Court). Thunander 1993, pp. 183f.
6 Bittles 2012, Chapter 2. The different forms of incest prohibitions in relation to different cultures and times are presented in great detail by Michael Mitterauer in Mitterauer 1994.
Christian world appear exceptional in scope. The Catholic Church based its prohibitions on the Bible; but the text was vaguely worded, making alternative interpretations possible. The Catholic Church chose to interpret the text so that the number of prohibited degrees was extended far beyond the wording of the Bible. From the year 1215, incest prohibitions included both consanguinity and affinity relationships up to the fourth degree.\(^7\) In other words, a man and a woman were prohibited from marrying if they had one common relative four generations earlier. With respect to affinity relationships, a widower was forbidden to marry anyone who had been similarly related to his deceased wife. The rules necessitated an exogamous marriage pattern; that is to say, marriages had to be contracted outside a person’s own kinship sphere.\(^8\) In addition to the above prohibitions, there were also regulations governing so-called ‘spiritual kinship’ (e.g., godparenthood) and ‘legal kinship’ (e.g., adoption).\(^9\)

In Sweden, the marital laws of the Catholic Church were applied from the twelfth century onwards, which is when Christianity began to permeate the country’s judicial system in earnest.\(^10\) The incest prohibitions are mentioned in the earliest laws from the thirteenth century, where relationships in the first and second degree were equated to manslaughter of a close relative.\(^11\) In the eyes of the church and the law incest was a most reprehensible sin; but the punishments were usually limited to fines, even though the Old Testament text recommended capital punishment.\(^12\) Table 3 presents the prohibitions that are enumerated in the Bible.

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7 Prior to the year 1215, the prohibition was extended all the way up to the seventh degree. Donahue 2016, p. 35; Christensen-Nugues 2004, p. 313; Gaunt 1996, pp. 226f.

8 Gaunt 1996, pp. 219f; Christensen-Nugues 2004, p. 313. Scholars have pointed out that from a financial perspective, these extended prohibitions had positive consequences for the Church, because the rules minimised the risk of the formation of smaller and stronger family alliances that could compete with the Church for influence in society. Herlihy 1995, pp. 103f. Regarding the earliest formulations of the prohibitions, see also Ubl 2008.


10 Christensen-Nugues 2004, p. 309. It is likely that there were some kinds of restrictions for marriages between relatives even before this, but the first written evidence can be found in the Swedish landskapslagar (provincial law-rolls). Inger 2011, pp. 28–30.


12 For a more detailed presentation of the punishments in early Swedish legislation, see Almquist 1961, pp. 31f.
Incest in Sweden

From the table, it appears that the biblical text was unclear with respect to certain points. For instance, there was no explicit prohibition against a man marrying his own daughter. Neither was the relationship between a man and his niece mentioned, nor the one between a man and his cousin. However, these were kinship ties that were forbidden according to older customs in several countries. In addition, the prohibitions were listed in Chapter 18 of Leviticus, whereas the punishments were stated in Chapter 20; but not all relationships mentioned in the former chapter are referred to in the latter. The question was how these relationships should be punished. Furthermore, the interpretation was made even more difficult by the fact that several of the relationships prohibited in Leviticus occurred in other biblical stories without the relationship being condemned. It was therefore very difficult, not to say impossible, to establish an exact regulatory system exclusively based on the text of the Bible.

13 Genesis (20:12 and 29:9–30) tells the story of Abraham, who was married to his half-sister, and of Jacob, who was married to two sisters who were also his cousins. In Exodus (6:20) there is a man who was married to his aunt. For a more detailed analysis of the biblical vagueness and for possible explanations of this, see Carmichael 1997, Chapter 1.
When the Catholic Church prohibited relationships between relatives up to the fourth degree, the freedom to choose marriage partners was limited to a far greater extent than what is stated in the Bible. As has been pointed out by Jarzebowski, the prohibitions thus also came to regulate the social order in society.\footnote{Jarzebowski 2012, pp. 10, 13.}

In parallel to the prohibitions, there was the possibility of applying for a dispensation from the Pope for marriages in the kinship degrees prohibited according to canon law but not mentioned in the Bible.\footnote{In practice, however, this authority was delegated to an administrative unit in Rome, the so-called Apostolic Penitentiary. Salonen 2001, pp. 67f. During the later Middle Ages, some dispensations could be handled within the Nordic countries without being sent to Rome; Gaunt 1996, p. 222.}

During the Middle Ages, this possibility was almost exclusively used by members of the nobility.\footnote{Salonen 2001, p. 266; Gaunt 1996, p. 224.}

In addition, people from the very top of society – both abroad and in Sweden – used the same regulatory framework in order to wriggle out of an unwanted marriage after the event.\footnote{Salonen 2001, p. 114; Jarzebowski 2006, p. 45; Hehenberger 2003, p. 195. Christensen-Nugues 2004, pp. 313–15.}

After the Reformation, the right to grant dispensations for marriages between relatives was transferred to the Swedish monarch; but the tradition according to which the Church was the first place to turn to survived until the turn of the century in 1800.\footnote{For the transition from ecclesiastical to secular law, see Korpiola 2006. At the beginning of the eighteenth century, the number of applications regarding marriage received by the cathedral chapters was still far greater than those directed directly to the king, while the relationship was the opposite towards the end of the same century. Compare Tables 4 and 5 in the Appendix. Catholic leaders sometimes also attempted to nationalise the handling of applications for dispensation. Lanzinger 2015, pp. 155–7.}

\textit{The European context}

In Catholic Europe, the extended interpretation of prohibited family relationships up to the fourth degree prevailed during the greater part of the Middle Ages. In the fifteenth century this changed as a result of the papal right to give dispensations being questioned in the contemporary theological debate. The discussion intensified in connection with the Reformation and then continued off and on for several centuries. Martin Luther recommended the Bible
as a guiding principle. Only the degrees of kinship enumerated in Holy Writ should be prohibited and the Pope had, according to Luther, no right of dispensation whatsoever. In spite of this authoritative clarification, opinions among Lutheran theologians and lawyers continued to diverge. Everyone agreed that the boundaries of the prohibitions as defined by the Catholic Church should be circumscribed in order to better agree with the Bible, but the question was by how much. On the one hand it was argued that the Bible should be interpreted literally, on the other hand that one should try to find an underlying principle that still adhered to the logic of the text.

During the seventeenth century, most Lutheran theologians came to advocate a limited, but still generalising, interpretation of the prohibited degrees. At the same time, punishments were recommended that corresponded better with the message of the Bible. In other words, fewer prohibitions but more severe punishments were required. Introducing a new, but at the same time uniform, punishment system was nevertheless problematic, especially in geographical areas where the administration of justice was divided into smaller regional units (e.g., German and Dutch areas). In countries where Protestantism had been introduced, the handling of incestuous crimes was usually transferred from ecclesiastical to secular courts, while at the same time the penalties were made more severe. England was an exception to this rule, however, because there incestuous crimes continued to be tried by the ecclesiastical courts after the Reformation with relatively mild punishments as a consequence.

Above all, the academic debate surrounding the prohibited degrees, their boundaries and penalties had to do with the question of which relationships were in fact prohibited by God. Clear answers were sought, but there was only a vaguely worded biblical text as a foundation for forming an opinion. Because there were no firm guidelines, the theoretical discussions continued for centuries.

20 Jónsson 1994, p. 858.
The Swedish context

After the Reformation, the attitude to crimes against morality hardened in Sweden as well. The Catholic Church had considered all sexuality to be more or less sinful. Although marriage was considered a sacrament, sexuality was primarily seen as a necessary evil and a concession to human frailty. With the Protestant Reformation, especially in its Lutheran guise, sexuality within marriage was upgraded. Sexuality in its proper element was regarded as something that contributed to a good marriage, which in its turn was the foundation of a good household and, ultimately, of a good society. Conversely, all forms of extramarital sexuality were seen as offences against God’s commandments, transgressions which contributed to the corruption of society and to the threat of God’s wrath striking everyone in the form of war, pestilence, crop failure, or other disasters. This provided a link between morality and social development that could justify severe sexual legislation even when punishing crimes that did not really have an actual plaintiff, e.g., with respect to fornication.24 The policymakers of the sixteenth century endeavoured to increase the correspondence between the biblical message and its practical application.25 With regard to the regulation of incestuous relationships, this meant that the number of prohibitions decreased in comparison to the number during the Catholic period, but that the punishments became harsher for those prohibitions that remained. In connection with Västerås riksdag (the parliamentary session at Västerås) in 1528, it was established that ‘heresy’ with a person’s mother, sister, or stepmother, with a mother and daughter, or with two sisters and ‘such’, was prohibited by God and thus regarded as an eldsak (a crime punishable by burning at the stake).26 This confusion between the concepts of incest and heresy also occurred in the other Nordic countries and goes some way towards explaining why attitudes toward the crime of incest were especially strict in this region.27 Several letters patent from the

24 The Reformers were critical of several parts of the matrimonial legislation in canon law. For a more detailed survey of the Reformers’ criticism and the changes made to matrimonial legislation after the Reformation, see Donahue 2016, pp. 40–55; Witte 2002, pp. 199–255.
26 Kongl. stadgar, förordningar, bref och resolutioner (Royal statutes, royal regulations, letters patent, and royal ordinances), p. 5.
27 Jónsson 1998, p. 4; Gaunt 1996, p. 229. In the judgement books from the turn of the century around 1700, it was still common for this crime to be designated ‘heresy’. See, e.g., the registers in GHA, BIIA:3; GHA, BIIA:8.
second half of the sixteenth century reiterate and emphasise that these crimes could only be atoned for by death, not by means of the payment of a fine.28

*Sveriges Rikes Lag* (*The Statute Book of Sweden*) was published in print form for the first time in 1608. For want of an official church code, the Swedish king had parts of Leviticus added as an appendix to the law. The severe biblical text thus became part of the legislation, which explains why the seventeenth century became the strictest orthodox period in the history of the country.29

As in other countries, however, Swedish theologians and lawyers continued to be unsure of how to assess different incestuous relationships. The discrepancy between the degrees mentioned in the Bible and the degrees that were prohibited in practice was never properly clarified.30 It was also felt that contradictory decisions had been made in different cases.31

In connection with a preparatory legislative document from the end of the seventeenth century, Swedish lawyer Johan Stiernhöök presented a proposal for a new marriage code where he commented on the prohibited degrees. He concluded that there was no written

28 See, e.g., Erik XIV’s proclamation of 1563 on capital criminal cases, Johan II’s official letter of 1578, and the parliamentary decision of 1604. *Kongl. stadgar, förordningar, bref och resolutioner*, pp. 48f, 68f, and 119. However, the fact that there was a need for reiteration indicates that the more severe punishments were not applied immediately and that people who violated these laws could initially buy themselves free. Almquist 1961, pp. 34, 39f.

29 Inger 2011, pp. 87f, 146f.

30 During most of the seventeenth century, the Swedish Church Ordinance of 1571 was in force, which prohibited marriages to the fifth degree. Before the Swedish Church Law of 1686, individual dioceses could also create local regulations. The definition of prohibited degrees thus diverged between the *Statute Book* and the Church Ordinance. Lennartsson 1999, pp. 40f, 87, 111.

31 The law-drafting committee of 1642 was summoned because ‘diverse appeals and complaints’ were received on an almost daily basis from subjects regarding the administration of justice. Both with respect to decisions and procedure there was ‘a great deal of confusion and disorder’. *Åtgärder för lagförbättring 1633–1665* (‘Measures for the improvement of the laws’, 1633–1665), p. 33. The task of the law-drafting committee in 1643 was, among other things, to establish what position to take with respect to the king’s previous ‘contrary resolutions regarding gradib(us) prohibitis’ (the prohibited degrees). *Åtgärder för lagförbättring 1633–1665*, p. 36. Later regulations and resolutions also refer to the earlier ‘disorder’. See, e.g., K.B. (letters patent) 1678, 1 March, and K.F. (royal ordinance) 1680, 3 December.
law to comply with. In other Protestant countries, the laws had gone through an official adaptation since these countries had ‘thrown off the papal yoke’. But the appendix to the *Statute Book* that had been introduced in Sweden in 1608 had not been interpreted or commented on by trained lawyers, which is why Stiernhöök believed it was necessary to untangle this matter.\(^{32}\) According to Stiernhöök, the prohibitions should be based on ‘the word of God and secular law and the practice that has been customary among us’.\(^{33}\) He divided the prohibited degrees into three categories: first, the relationships explicitly prohibited in the Bible; second, the relationships that ought to be forbidden as a logical consequence of God’s prohibitions. The third and final of Stiernhöök’s categories concerned the relationships that were not prohibited by God or the Bible but only by ancient custom or habit, and consequently he categorised these prohibitions as secular – not divine.\(^{34}\) Furthermore, Stiernhöök observed that practice had differed greatly with respect to all of these relationships. In Rome, as in England and in Poland, dispensations were granted for marriages in the first collateral affinity degree (*wife’s sister*): the Austrian king had married his *niece*, the Swedish king Gustavus Vasa had, in his third marriage, married his deceased *wife’s niece*, and there were also the example of a nobleman in Sweden marrying his *wife’s sister* without a dispensation.

Stiernhöök believed that no dispensation from God’s own prohibitions could be given, either by kings or by popes. On the other hand, the handling of degrees of kinship not explicitly mentioned in the Bible could be discussed. He argued that it was reasonable to punish sexual congress in the closest degrees by death, because here God’s prohibitions corresponded to ‘moral law’ and ‘natural law’ and because other Reformed leaders in Germany, Prussia, and Denmark did the same.\(^{35}\) Relationships between cousins were not


\(^{33}\) *Förarbeten till Sveriges Rikes Lag 1666–1686*, p. 116. Similar formulations were also used in connection with other preparatory legislative texts. In 1643 the law-drafting committee made their decisions, in their own words, ‘in accordance with God’s law, other secular laws, and the best interest of one’s conscience’ (*Åtgärder för lagförbättring 1633–1665*, p. 61).

\(^{34}\) *Förarbeten till Sveriges Rikes Lag 1666–1686*, pp. 109f.

\(^{35}\) Stiernhöök referred to Germany in spite of the country’s not being unified until 200 years later. He presumably referred to certain German-speaking Protestant areas. *Förarbeten till Sveriges Rikes Lag 1666–1686*, pp. 111–13.
Incest in Sweden mentioned in the Bible but were forbidden in both Catholic and Protestant countries (even if dispensations were often granted for the elite), so Sweden should also require dispensations for such relationships, according to Stiernhöök. However, marriages in the second affinity degree (wife’s stepmother, wife’s brother’s widow) could be allowed.36

In contradistinction, diagonal affinity relationships (aunt/niece) were problematic. A man’s kinship with his aunt was, logically speaking, as close as his kinship with his niece, but only the former relationship was prohibited in the Bible. In this case Stiernhöök relied on written statements from Hugo Grotius, Moses Maimonides, and Martin Luther, all of whom differentiated between these relationships, among other things with the justification that an aunt was in the position of a parent to a man; consequently, he was obliged to show her due respect and deference.37 Conversely, when the relationship concerned a man’s niece it was the niece who should show respect for the man.

Stiernhöök’s argumentation shows that although incest prohibitions were primarily based on religious arguments, there was a parallel, active idea to the effect that cultural ideas and local customs should also be considered before official rules could be established. With respect to the closest relationship categories, Stiernhöök was of the opinion that God’s law, moral law, and natural law agreed with one another. In other words, he described what he regarded as a self-evident norm in society.

He also admitted that the assessment of some kinship categories (e.g., niece, cousin) was not obvious and that it was possible to hold different and conflicting opinions. Whether these relationships should be defined as prohibited or allowed was hence a matter of negotiation. In active negotiation Stiernhöök drew on contemporary ideas surrounding the interrelationships among different family members, which explains why the kinship between a man and his aunt could be differentiated from his kinship to his niece, even though the degree of closeness of these relationships was in fact the same. The difference lay in the duties that followed from a certain position in the family.

36 Förarbeten till Sveriges Rikes Lag 1666–1686, pp. 114f.
37 Moses Maimonides (1135–1204) was a well-known Jewish philosopher whose writings were still considered important in the seventeenth century. Hugo Grotius (1583–1645) was a Dutch scholar, theologian, and lawyer. He was known for his views regarding jurisprudence and natural law and has been referred to as ‘the father of international law’.
Filial deference, or the respect that children were expected to feel for their parents, was of fundamental significance in early modern society. The entire social structure rested on hierarchies, and its stability depended on people’s respect for all authorities. The first

4 Johan Stiernhöök (1596–1675). Stiernhöök was elevated to the nobility in 1649 and has been called ‘the father of Swedish jurisprudence’.
authority an individual encountered was his or her parents, and to fail in respect for them would be tantamount to rejecting the hierarchical order. Because the relationship between a parent and a child was likened to that between a ruler and a subject, such impertinence could disturb the balance throughout society.\textsuperscript{38} Indeed, filial deference was regarded as the foundation of a stable society, and even adult children who did not show proper respect for their parents could be prosecuted.\textsuperscript{39} Because the man was considered the dominant party in a marriage relationship, his duties would be downright contradictory if he were in a subordinate filial role to his wife while at the same time he was expected to dominate her in his role as a husband. These reasons were not viewed as an impediment in the same way for a relationship between a man and his niece, because the father’s position of authority was similar to that of a husband. According to Stiernhöök, it was up to the respective secular leader to decide whether a secular prohibition should apply in such cases.

That there was great uncertainty regarding some relationships during the early modern period is also clear from other records from the preparative legislative material. From the mid-seventeenth century up to 1734 års lag (the Civil Code of 1734), there were various suggestions concerning what consequences should follow a man’s possible relationship with his own niece, his wife’s niece, or his wife’s sister. It was admitted that practice had varied and that legal scholars disagreed on what penal consequences were reasonable.\textsuperscript{40} The concrete legislative proposals prescribed, by turns, fines, banishment, and death. On one occasion a harsher punishment was recommended for one of these relationships compared to the others, but on another occasion the situation might be reversed.\textsuperscript{41} It is obvious that a man’s relationship with his niece or with his wife’s sister were regarded as relationships that were particularly difficult to assess. There was no obvious set of values, no common norm, on which agreement in the assessment of these offences might have been based. The inconsistency indicated by the legislative

\textsuperscript{38} Hammar 2012, pp. 111–13.
\textsuperscript{39} The same rules applied to, for instance, parents-in-law and spouses who had married into a family. Odén 1991, pp. 90–2; Odén 2001.
\textsuperscript{40} Åtgärder för lagförbättring 1633–1665, p. 227; Förarbeten till Sveriges Rikes Lag 1666–1686, p. 116.
\textsuperscript{41} Åtgärder för lagförbättring 1633–1665, pp. 62, 152, 227; Förarbeten till Sveriges Rikes Lag 1686–1736, Volume 7, pp. 353, 442.
proposals suggests that there was active negotiation in respect of how these relationships should be regarded and assessed.

In summary, there was uncertainty when it came to determining the boundaries of incest prohibitions and the criminal consequences of certain relationships; and although the debate rested on a religious foundation, it is clear that the argumentation of the legal scholars also comprised secular elements. The question is what consequences this had for the practical handling of incest matters, criminal cases as well as applications for dispensations.