

Liability Assessments and Criminal Responsibility in Norwegian Legal History

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Development towards a more nuanced study of criminal responsibility, illustrated by an analysis of cases of infanticide registered with Hordaland district court, 1642-1799.

1. Introduction and Issue

The general content of the assessment of intent (*forsett*) was explicitly clarified for the first time in a Norwegian criminal code when the 2005 Criminal Code and its §22 came into force on 1 October 2015. Before the Criminal Code of 1902, the subjective requirement for liability was directed solely in individual regulations, and even though intent pursuant to §40 in this Code was established as a general main rule, it was still up to the courts to report on the content of the judgement.¹ Thus it is clear that the development towards a more and more defined and nuanced study of criminal liability took place gradually. In this article, we will go even further back in time and look at how the discussion of liability and responsibility changed between 1642 and 1799, with particular emphasis on intent and related criteria. This will be achieved by analysing cases of infanticide registered with the Hordaland district court (*bygdeting*), which at this time was the first instance in the legal system.

In this context, infanticide refers to the killing of an unborn or newborn child with the intention of concealing the pregnancy. Strict sexual morals and legislation in the wake

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¹ Grønning, Husabø and Jacobsen, *Frihet, forbrytelse og straff* (Fagbokforlaget 2016) p. 223.

of the Reformation was one of the reasons leading to an increase of this type of crime in around the 17th century. Therefore, infanticide was defined as a separate criminal category in a 1635 ordinance.² These rules were later continued in King Christian V's Norwegian Code of 1687 and hence remained in force as applicable law until the adoption of the 1842 Criminal Code.

Infanticide as a criminal category is far from unknown in legal history, and is referred to in a number of publications from the 'Court records project' at the University of Oslo.³ Nevertheless, there are few examinations of infanticide in the Early Modern Period taking a legal approach, and material and procedural law at the district court are not analysed to any great extent.⁴ Furthermore, the broad scope – in terms of both geography and time – means that this study is appropriate for uncovering new aspects in the processing of cases of infanticide at the district court.

The content of the theoretical accounts published in the latter half of the 18th century will also be discussed as a reference for district court practice. Looking at legal practice at the first instance in the light of their contemporary theories provides a good starting point for the forthcoming report. In addition to the perceptions of the various legal scientists, this also provides an insight into how these concepts proved decisive for the broad layer of appliers of the law. Thus the central concern is to examine how the various players perceived the content of the law and how changes to these notions proved decisive in the practising of the regulations on infanticide, and hence also on the practising of the study of criminal responsibility.

The background for this article is formed by an observation of the fact that people accused of infanticide were consistently handed less strict penalties towards the end of the 18th century.⁵ This discovery was made in connection with a review of the preserved legal reports from the Hordaland district court from 1642 to 1799. More specifically, we can see that the prescribed death penalty was used less and less frequently in instances that appeared to be covered by the descriptions of the deeds in the relevant criminal regulation. This happened despite the fact that the relevant legislation was unchanged throughout the entire period investigated. One of the crucial factors for the change appears to be a more nuanced assessment in which elements of subjective liability, causative links and assessments of unlawfulness appear to be formulated more and more clearly. To analyse legal practice in cases of infanticide could therefore provide an insight into a small part of

² Nielsen, *Letferdige qvindfolk* (Københavns Universitet 1980) pp. 3-6.

³ See <<http://www.hf.uio.no/iakh/tjenester/kunnskap/samlinger/tingbok/>> (Accessed 20 June 2017).

⁴ However, Nielsen 1980 discusses the legal approach in infanticide cases registered by Nørrejylland Appellant court (*Landsting*) in Denmark between 1719 and 1805.

⁵ Based on an analysis of court rulings in connection with the author's master's thesis.

the development of the concept of liability.⁶ More specifically, the purpose of this report is to a) examine differences and similarities in how liability were reported and practised in theory and at district courts, and b) look at the consequences and discuss what could have caused the development we see, particularly towards the end of the 18th century.

2. The Administrative Body as a Legal Institution, and Method When Using District Court Records

It is necessary to place the analysis of the district court reports in context if we are to understand the content and scope of the following discussion. Therefore, we will briefly consider the district court as a conflict resolution body, as well as the methodological approach applied.

The legal system in Norway was reformed in 1590, and the district courts were – inter alia – constituted as a compulsory first instance for all legal cases.⁷ The office of district magistrate was set up just one year later due to the need then arising for a legally trained player. The job of the recorder was initially to inform the appointed members of the jury of applicable law and to write down what was said, done and decided at the meetings of the district court. Since the magistrates were responsible for, and participated in, a number of different district courts throughout the course of the year, they gradually became experienced appliers of the law. Over the next century, their role in court therefore developed, and according to Christian V's Norwegian Code the district magistrate became the sole judge in all minor cases, inter alia.⁸ Still, the skills were nevertheless experience-based, and legal training was only first made mandatory at the time of the 1736 Examination Ordinance.⁹

What now constitutes the county of Hordaland was largely divided into five jurisdictions in the 17th and 18th century. Besides Bergen town court and Rosendal barons court, the district court jurisdictions of Nordhordland, Sunnhordland and Hardanger made up the three largest entities in terms of geography.¹⁰ The court records preserved for

⁶ E.g. Jacobsen, *Hagerup og den strafferettslege ansvars læra* (Fagbokforlaget 2017).

⁷ Sunde, *Speculum legale* (Fagbokforlaget 2005) p. 209.

⁸ *King Christian V's Norwegian Code, 1687*. University of Oslo: Department of Archaeology, Conservation and History. Available from <<http://www.hf.uio.no/iakh/forskning/prosjekter/tingbok/kilder/chr5web/chr5register.html>> (Accessed 20 June 2017), ref. Dobbe, *Blant Granner og myndigheter* (Tingbokprosjektet 1996) pp. 45-47.

⁹ Nilsen, *Lov og rett* (Tingbokprosjektet 2002) p. 40.

¹⁰ Sunde, 'Quind folch', - Kvinner og tilhørslse mellom 1642 og 1802, 7 *Från Schlyters lustgård* (2007a) pp. 117-152, at 119. The geographical scope of the latter district nevertheless varies some throughout the examination period, ref. Bernssen annex 1.

the latter three have been transcribed over the past few decades, so we now have access to the legal records of these district courts in digital text documents.

This transcription has two consequences for research into the field. Firstly, material has been made available for analysis without the reader needing any prior knowledge of Gothic handwriting. In earlier studies of court records from various parts of the country, either the original sources were used directly or smaller elements of the registers were transcribed specifically for the purpose. For the most part, researchers with a historical background have used the preserved legal information in this way, which of course does impact on the angle taken in the research. To uncover nuances in the legal practice required prior legal knowledge, and so little of this has taken place. Hence, these transcriptions pave the way for a greater range of research into district court practice, not least from a legal angle.

The other consequence of the transcription and digitisation is that this provides the opportunity to review large volumes of text while searching for specific information. Thus digital searching has made it possible in this study to reveal all preserved cases of infanticide from over a period of more than 150 years; previously, this would only have been possible by reading through tens of thousands of handwritten pages.¹¹ These cases have been found by searching on relevant terms such as ‘secret’ (*døglismaal*), ‘child/baby’ (*barn/foster*) and ‘birth’ (*fødsel*).¹² Consequently it is only necessary to review text manually if it contains any of these terms.¹³ In this study, reviews of this kind have been carried out from the preserved court records for Nordhordland (1642-1799), Sunnhordland (1648-1799) and Hardanger (1648-1772). However, several of the court records from this period are missing in all three districts, and hence a number of cases of infanticide have probably been lost.¹⁴ The court records from Hardanger have not been fully transcribed as yet, and so these have only been examined up to and including 1772.

Investigation has uncovered a total of 32 genuine cases of infanticide. These cases relate to women who were proven to have given birth, the baby was dead, and a judgement was pronounced on the case with regard to the extent to which the situation was covered

¹¹ There are more than 15,000 printed pages for Nordhordland alone; ref. Sunde 2007a p. 118.

¹² Words and forms discovered/used in the search are secret(ly) (*døls/dølg/duls-maal/mall*), concealed/hidden/secret (*døll, dult/dulgt/dulg(-e)*), child/ baby (*barn/baren/foster*), born/ birth (*fød/født/fødsel*), childbirth (*barsel*), pregnant/with child (*svanger*), executed/put to death (*ombragt*). Only parts of search terms, e.g. just ‘*døll/dul*’, have been used if it has been possible to do so without resulting in excessive numbers of hits. All the ‘genuine’ cases presented hits on various forms of the word ‘*dølge/dølgsmål*’, while all relevant cases presented hits on ‘*barn*’. It is not worth searching on legal regulations as the references are so varied.

¹³ More about the method and challenges linked with research of this type can be found in Sunde 2007/2008 pp. 118-120.

¹⁴ In total, court records are missing from around 25% of years during the period examined, ref. Bernssen 2017 annex 1.

by the rules relating to infanticide. In addition, another eleven cases have been found in which women have been suspected of the same crime to a greater or lesser extent, but where there was no assessment or judgement in which the rules on infanticide was applied. Examples of this are where the parents have run away before the case went before the district court, where accusations of pregnancy have proved to be unfounded, or where witnesses could prove that the baby was born alive and died of natural causes. One thing these cases have in common is the fact that the court does not explicitly discuss the content of the regulations in question. As this study relates to specific interpretation and subsumption of the rules on infanticide, these are therefore omitted.

Table 1: Occurrence of cases according to decade and district (NH = Nordhordland, SH = Sunnhordland, HVL = Hardanger)

	1640	1650	1660	1670	1680	1690	1700	1710	1720	1730	1740	1750	1760	1770	1780	1790
NH	1	0	0	1	1	2	2	1	0	1	1	1	2	0	0	1
SH	0	0	0	0	0	0	3	0	2	0	1	2	0	3	3	0
HVL	0	0	0	0	0	0	0	1	0	1	0	0	1	1	0	0

According to this table, the average occurrence of genuine cases of infanticide stood at around one every five years. As regards occurrences in relation to other serious crimes, this can be illustrated by means of a study of the criminal cases for which appeals were submitted to Bergen Appellant Court (*Lagting*) between 1702 and 1737.¹⁵ There were a total of 43 murder cases in this period, no fewer than 23 of which involved the murder of unborn or newborn babies.¹⁶ In this context, it is also necessary to mention that there are probably substantial numbers of unrecorded cases of infanticide. By way of illustration, it may be noted that Kari Knudsdatter from Hardanger committed no fewer than four infanticides before she was eventually caught and accused.¹⁷

When the relevant legal reports have been picked, the essential information has been recorded and each individual case has been subject to a legal analysis. Nevertheless, a couple of remarks have to be specified with regard to how much can be made out from the various reports. As stated, the legal reports were mainly written down by a recorder within each district. Initially these were the magistrates, who became experienced legal players and a judge in the district court. According to The Norwegian Code of 1687 1-8-3 the district court judges were obliged to write the report as the cases were dealt with in

¹⁵ As well as being the Court of Appeal for the three investigated district court jurisdictions, the territorial jurisdiction further included eight judicial districts, ref. Hansen, *Bergen Lagting* (T. Hansen 1993) p. 12.

¹⁶ See Hansen 1993 pp. 252-253.

¹⁷ SAB: Tingbok for Hardanger 1767-1772 fs. 78b-79b.

court. However, the district court judges not only came from other parts of Norway, but generally from other parts of Denmark-Norway. Therefore, the language and culture in the district could seem strange to them, particularly at the start of their careers.¹⁸ There is also evidence indicating that the district court judges did not always write the reports directly at court, but that this information was entered in the court records afterwards on the basis of notes.¹⁹ Thirdly, the variation in scope and level of detail in legal records establishes that the district court judges handled their cases in very individual ways. For instance, the cases referred examined in this article vary from two to more than forty handwritten folio pages, but this does not necessarily reflect the complexity of the individual case. Thus one must adopt a certain critical approach to the historical material. With this in mind, we will now look at legal practice in the specific cases.

3. Infanticide and the Starting Point for Legal Handling at the District Court

As stated, this study is based on the legal court records relating to cases of infanticide. As well as establishing aggravated death penalties for premeditated murder in The Norwegian Code of 1687 6-6-7, concealed births resulting in a dead child were placed on a par with premeditated murder. According to the following article 6-6-8, therefore, any woman who gave birth to a child without asking for help should be sentenced to death if the child died. Probably due to the issue of evidence, the latter rule is largely what we see practised at the district court. When the king was granted both legislative and judicial power by the King Act of 1665, written law was also the only formal legal source.²⁰ Despite this strict methodology, nevertheless we see that the practising of the said rules changed. To provide a starting point for the following thesis, it may be appropriate to illustrate this phenomenon by means of two cases heard by the district court in Sunnhordland, sixty six years apart.

The first case was heard on 26 April 1712 by the district court in Strandebarm in Hardanger. Zidsele Samsonsdatter, 22 years old, was accused, suspected of being responsible for the death of her newborn baby. She had fallen pregnant due to a relationship with her sweetheart, and he was also the only person she told about the pregnancy. When she told the baby's father that she no longer could feel any life in the baby, about ten days before the birth, he earnestly asked her to conceal the pregnancy for as long as possible. Zidsele thus gave birth to the baby alone in her bed in the loft where she lived, without

¹⁸ See Dobbe 1996 p. 24.

¹⁹ Sunde, Silence, Lies and Rhetoric in the Legal Discourse in Court in *Reading past legal texts*, ed. Michalsen (Unipax 2006) pp. 113-133, at 128.

²⁰ See Sunde 2005 p. 277.

calling for help. After that, she concealed the stillborn baby in a chest, where it was discovered four or five days later.²¹

Sixty six years later, on 28 March 1778, Kari Bårdsdatter Lundøen was in approximately the same situation. At the district court meeting at Våge in Sunnhordland, she admitted having concealed her pregnancy from everyone except the baby's father. She also gave birth alone in her usual bed in a loft, somewhat distanced from people and the other farm buildings on the estate. Kari also hid her baby in a chest in her room, and threw the afterbirth on the ground. When the child was found two weeks later, she also claimed that it was stillborn.²²

Both of these women were accused of breaching the aforementioned regulations on concealment of birth and infanticide in the Norwegian Code of 1687. Nevertheless, we see that there was a difference in the outcomes of the two cases referred to. While Zidsele was found guilty according to the regulations on concealment of birth and infanticide and was sentenced to *'lose her life'*, Kari – sixty six years later – escaped with an arbitrary penalty of lifetime in prison. Significant elements in the latter case were – inter alia – that it was not proven that *'the child was born alive'* or that Kari had a *'murderous intent'*.²³

These two cases indicate that a development was taking place which had major practical consequences for the women accused of concealment of a childbirth. As stated, the legal regulation of infanticide was the same up to 1842. To investigate the content and basis of the change in the legal assessment it is therefore necessary to analyse the interaction of external circumstances, substantive law and the legal players operating at the time.

4. Regulations on Concealment of Birth and Infanticide, and Criminal Responsibility up to 1735

Although the appliers of the law throughout history have been without the theoretical and linguistic tools we use to depict the study of liability, this does not mean that the basic concept of nuanced assessments of criminal liability was absent. When it comes to distinguishing worthiness of penalty between deliberate and accidental actions, we find such things mentioned as long ago as in the legal texts of the Middle Ages.²⁴ Christian V's Norwegian Code of 1687 had no general rules regulating the requirement for liabil-

²¹ SAB: Rettsprotokoll Hardanger, Voss og Lysekloster 1711-1713 fs. 76-79.

²² SAB: Rettsprotokoll Sunnhordland 1777-1782 fs. 23b-26b.

²³ SAB: Rettsprotokoll Sunnhordland 1777-1782 fs. 26.

²⁴ Skeie, *Den norske strafferett* (Olaf Norlis forlag 1937) p. 71.

ity, but individual criminal regulations indicate that intent was required for the strictest penalties.²⁵ Harm as a consequence of negligent actions was also regulated explicitly to a certain extent, inter alia by means of a separate chapter on ‘*accidental actions*’.²⁶

Nevertheless, the two regulations relating to infanticide did not include any such specific differentiation. As stated, the regulations are indicated in Norwegian Laws 6-6-7 and 6-6-8, worded as follows:

Art. 7

Loose women who kill their baby should lose their neck, and the head be set upon a pole.

Art. 8

Should any loose woman be with child and she conceal her childbirth and not use the properly appointed means that could serve her and the baby in such instance, and the same child is gone, or if its stillbirth is accelerated, or if it is otherwise weakened to the point of death, it shall be considered that she had killed her baby with intent.

The aforementioned death penalty is specified in article 7. As well as being beheaded, these women’s heads would be placed on poles. The regular penalty for murder was a life for a life, according to the Norwegian Code of 1687 6-6-1. The infamous or aggravated element pursuant to 6-6-7, that the head were to be placed on a pole, thus reflected a greater degree of severity in the act of the murder of an innocent child.²⁷ As well as the fact that the child was killed by its closest carer, it was also not baptised and could not be buried in consecrated ground. According to popular belief, their souls were thus doomed to eternal damnation. In the case of the aggravated death penalty, the person put to death would also be buried at the place of execution, and the women found guilty of infanticide would therefore suffer the same fate as their babies.²⁸

Article 8 states, as indicated, that mothers who gave birth under the circumstances described in greater detail would be judged as if they ‘*had killed her baby with intent*’; that is, they would be handed down the penalty specified above. First of all, the woman had to be a ‘*loose woman*’, which in this instance meant that she had fallen pregnant outside

²⁵ E.g. the Norwegian code of 1687 6-7-1, ref. Skeie 1937 p. 152.

²⁶ The Norwegian code of 1687 6-11.

²⁷ See Skeie 1937 p. 144.

²⁸ Nielsen, *Lætfærdige Qvindfolk* (Delta 1982) p. 83.

of marriage.²⁹ Secondly, she had to have given birth in ‘*secret*’ without using the ‘*properly appointed means*’. Thus this regulation affected women who gave birth to their babies in secret without calling for help from midwives or other experienced women who could help and supervise the birth.³⁰ To be found guilty of murder, the final condition was – naturally – that the child was ‘*gone*’ or ‘*its stillbirth is accelerated, or if it is otherwise weakened*’. If all these conditions were met, the woman would be ‘*considered*’ to have killed the child. This regulation was therefore based on a presumption of liability and criminal responsibility without explicitly paving the way for exceptions where the child was actually stillborn, or for a broader and more nuanced assessment of excusing factors.

In the early part of the period under investigation, such presumption of guilt appears to have been used as a basis relatively uncritically. Of the 15 women who were found to have given birth to a child alone prior to 1735, 13 were sentenced to death. This means, as we have seen, that Zidsele was sentenced to death for murder in 1712 even though her baby probably died in her womb several weeks before the birth. In another case from 1687, the fact that the birth took place during serious illness and that the mother of the woman was notified and present during the birth, does not seem to have been judged as a somewhat extenuating circumstance.³¹ Finally, we also have a number of cases where women have given birth abruptly, clearly prematurely, and thus have given birth without the prescribed assistance. By way of example, the maid Ingerj Larsdatter gave birth to twins in her bed in 1705, and according to herself she was in about the fifth month of the pregnancy.³² When her mistress – who was also the mother of the father of the babies – discovered this, she ordered Ingerj to get rid of the babies without telling any of the men in the household about the pregnancy. In all of these cases, it is intuitively apparent that the mothers had no obvious liability for the death of their children. Nevertheless, they were sentenced to death as if they ‘*had killed her baby with intent*’. Thus the judges in the court of first instance appear to have followed the legal text literally, and the issue of criminal responsibility was solved by an assessment of whether the prescribed circumstances relating to the birth were objectively present.

The fact that the notion of a more nuanced assessment of the basis of liability was nevertheless not far off, is illustrated by a relatively sensational acquittal from Nordhordland in 1705.³³ Here, 20-year-old Søgner Olsdatter gave birth to a child in a room with her foster parents, after having fallen pregnant with her foster uncle. As she had not avoided

²⁹ Brorson, *Forsøg til den siette Bogs Fortolkning i Christian den Femtes danske og norske Lov* (Gyldendal 1791) p. 141.

³⁰ Hedegaard, *Fierde forsøg til en Dansk Juridisk dissertasjon angaaende Barnefødsel i Dølgemaal* (Frid. Chr. Pelt 1756) p. 37.

³¹ SAB: Rettsprotokoll Nordhordland 1685-1687 fs. 70-72, 73-74b.

³² SAB: Rettsprotokoll Sunnhordland 1705 fs. 53-57b, 76-78b.

³³ SAB: Rettsprotokoll Nordhordland 1704-1705 fs. 68b-71b, 100b-101b.

'*appropriate locations*' and revealed the child as soon as she was back on her feet, it was concluded that Søgna had not '*deliberately wished to give birth in secret; and concealed her child*'. She is therefore one of two women who was fully acquitted of concealment of birth and infanticide by the district court, despite having found that she had given birth to a child who was dead.³⁴ As we shall see below, the temporarily appointed district judge Hans Theiste appeared to be before his time in several ways as regards the assessments made in this case. In this context, it is particularly interesting to note that the assessments of the intentions of the accused appeared to be discussed as a separate element in connection with the explicitly formulated terms in the Norwegian Code of 1687 6-6-8. However, as the judgement nevertheless stands out as a clear deviation from the legal situation, it will not be examined in greater detail here. Still, the case serves as an example of the fact that the notion of a more comprehensive and nuanced assessment of liability did exist, but at this time it did not appear to have gained a foothold in the deliberations of the court of first instance concerning rules relating to concealment of birth and infanticide.

5. Traces of a Development

As stated initially, there were relatively major changes in the outcomes of district court cases towards the end of the 18th century. Without placing too much importance on pure statistics, we can see that of the seventeen women found to have concealed their births between 1736 and 1799, six got an arbitrary prison sentence. No fewer than five of these verdicts were handed down after 1774, and at the same period only two of the women were sentenced to death according to the Norwegian Code of 1687. Thus one can see a clear development in the practice of the rules relating to concealment of birth and infanticide.

We also find signs of development towards a more nuanced interpretation in the theory. The first preserved report of the rule relating to concealment of birth and infanticide was resented by Danish lawyer and legal expert Christian Ditlev Hedegaard (1700-1781) in his Dissertation of 1756.³⁵ In this, he wrote – inter alia – that one '*did not see, pursuant to this article, that one can and should sentence a wretched person to death as soon as it is only proven that she has given birth in secret and that the baby is dead*'. Thus, he indirectly

³⁴ In the second case (SAB: Rettsprotokoll Sunnhordland 1705 fs. 22b), the woman appears to have been acquitted due to the social position of her father, ref. Hansen 1993 p. 134. The assessment here also appears to be less based on the Norwegian code of 1687 6-6-8, and the woman was sentenced to death when the case was later brought before Bergen Appellant court. In his line of defence, her father emphasised that Sille had not proceeded '*as is usually the case when a woman has such thoughts and evil in her mind*', but no corresponding assessment of intent was repeated by the court.

³⁵ Björne, *Patrioter och institutionalister* (Nerenius & Santérus förlag 1995) p. 174.

stated that an assessment must be made of the explicit conditions in the Norwegian Code of 1687 6-6-8. If a woman was able to prove that the child was premature and/or stillborn, and that she had not had a '*malicious intent*', Hedegaard stated that the penalty should be less severe.³⁶ In other words, it was necessary to take into account both subjective liability and other potentially excusing circumstances when considering the reaction to the breach of the law.

If the woman could not be held responsible for the actual death of the child, later legal professor Jens Bing Dons (1734-1802) claimed in 1763 that she could not be sentenced to death.³⁷ In 1791, his colleague Christian Brorson (1762-1835) went even further and stated full acquittal in such cases.³⁸ The latter two appear first and foremost to link the reduction in penalty to the logical flaw in judging someone to have killed a child who was already dead, and does not refer explicitly to any subjective liability assessments. However, Brorson also refers to the legal regulation of accidental actions, and points out that it could not have been the king's intention to provide death penalties where the parents were '*unfortunate enough to become the cause of their child's death, though they wished to neither harm nor kill it*'.³⁹

As regards subjective liability, Professor Lauritz Nørregaard (1745-1804) really appears to separate this out as an argument with independent significance in the field of criminal law as referred to. In agreement with what was stated by Brorson three years later, he wrote in his lectures of 1788 that – firstly – if a woman could '*prove fully*' that she was not the cause of her child's death, she had to be fully acquitted. Furthermore, he also stated that if a woman could '*provide a presumption*' that she did not have '*intent to kill her baby*', but was solely '*culpable or negligent*', she should not be sentenced to death.⁴⁰ In addition to the fact that there had to be causative links between the woman's actions and the child's death, the fact that this had to have been her intention was another requirement that was set forth as necessary for the death penalty to be pronounced.

Viewed overall, there were therefore major changes in higher legal circles with regard to interpretations of the regulations on concealment of birth and infanticide. Compared with the apparently unnuanced legal interpretation by the district court up to 1735, this transition appears to have been relatively radical. The theoretical accounts thus provided an apparent basis for a new dimension of assessments at the district courts. As stated,

³⁶ See Hedegaard 1756 p. 62.

³⁷ See Björne 1995 p. 164, Dons and Hesselberg, *Juridisk Collegium Tredie part* (Frantz Christian Mummens Enkes Boghandling 1763) p. 302.

³⁸ See Björne 1995 p. 178.

³⁹ See Brorson 1791 p. 142. By referring to the King's practice of pardoning, Brorson goes a lot further by stating that the death penalty was only handed down in cases where the woman had killed the child actively, ref. *ibid.* p. 145.

⁴⁰ Nørregaard, *Forelæsninger over den Danske og Norske Private Ret: fjerde deel* (1788) p. 155.

these comments emerged from the mid-1750s, and it may seem as though the mindset represented there gradually made a great impact on the assessments of the judges at the courts of the first instance in western Norway. As we will see below, there was apparently also a development in practice both previously and independently of these publications. The content of the legal comments was thus probably itself influenced by a development in legal perceptions that was already taking place.

6. District Court Cases, 1736-1799

As regards practice, we can essentially see – in line with the specified legal comments – two changes in the assessment of cases from 1736 onwards. In addition to assessment of subjective liability – which we will return to shortly – greater and greater emphasis was placed on whether the child was alive at birth and consequently on whether the mother was the cause of its death. Discussion of this matter was of particular relevance following a decree in an ordinance dated 22 May 1751 concerning medical examination and autopsy in all murder cases.⁴¹ Prior to this, such examination appears only to have taken place in one case.⁴² Initially, the district court appears to have worked on the basis that as long as there was a ‘*certain presumption*’ that the child had been alive, any mother who gave birth alone had to be deemed liable for its death.⁴³ This nevertheless appears to be changing beyond the 1770s, and in the case against Kari Bårdsdatter in 1778 the court states, *inter alia*, that ‘*as there is no evidence that the child was born alive (...) due to doubts this court does not find (...) it appropriate (...) to pass a death penalty*’.⁴⁴

The second element to which more and more importance was attached, as we can see, is – as stated – an assessment of subjective liability; even though this assessment was made more implicit than explicit, particularly in the beginning, which we can clearly see in the occurrence of comments linked with words such as ‘volition’ (*vilje*), ‘intent’ (*forsett*) or what was referred to as ‘thought’ (*tanke*) prior to the birth. Other corresponding wordings that are used more sporadically are ‘intention’ (*intensjon*), ‘necessary’ (*om å gjere*) or – in instances where the father was also involved – whether the parents ‘agreed’ (*einige*) beforehand on how the birth should happen. Prior to 1735, such assessments appear to have been made by the court only four times, including in the case of acquittal in 1705 already referred to. After 1735, however, this was recorded in no fewer than 16 out of 17 cases. We thus see an apparently very abrupt transition, where the issue of whether

⁴¹ See Nielsen 1980 pp. 3-16.

⁴² SAB: Rettsprotokoll Nordhordland 1743-1748 fs. 173b-177.

⁴³ SAB: Rettsprotokoll Nordhordland 1754-1760 fs. 360.

⁴⁴ SAB: Rettsprotokoll Sunnhordland 1777-1782 fs. 26-26b.

the punishable outcome was the result of a deliberate action went from not being discussed explicitly to being recognised as an important part of the assessment.

Even though we see an abrupt increase in various discussions relating to subjective liability and various excusing elements, it appears to take time before these assessments caused any genuine changes in the outcome of infanticide cases at the district court. Decline in actual executions during the 18th century nevertheless indicates that women were either handed down reduced penalties in the appellate courts or were pardoned by the king.⁴⁵ It is difficult to say, without more extensive study, whether this decline took place due to a change in the assessment of liability, but it is possible that a change in legal perception first had consequences in the higher courts.

The first case of an arbitrary penalty at the district court came as early as 1743, with the case against Guri Haldorsdatter Uglehuus. After this it took more than 30 years before the next woman escaped the prescribed death penalty for concealment of birth and infanticide in a district court in the county of Hordaland. Even in this first case, we can nevertheless see signs that the assessments of the judges at the courts of first instance were making subtle distinctions and extending the discussions of the statutory conditions. Initially, it was clear in this case that Guri had given birth without the prescribed assistance and that her baby then died. Nevertheless, from the conclusion of judgement it is clear that she could not be handed down a penalty according to the Norwegian Code of 1687 6-6-8 as the child had been born so prematurely that '*it is not possible to consider that it could have been killed by human hands*' or that it '*was concealed with such intent*'.⁴⁶ Thus the content of the rules on concealment of birth and infanticide appears to have been taken to include both a causative requirement and a requirement for subjective liability. In this case, it was nevertheless very clear that Guri herself did not cause the child's death, and so the issue was not taken to extremes.

As regards the arguments in the judgements otherwise, we can see a relatively clear difference between the cases ending with the death penalty between 1736 and 1774, and the cases ending with arbitrary penalties from 1774 onwards.⁴⁷ In the earliest decisions, where assessments of themes resembling intent and the condition of the child were discussed in greater detail, criminal liability was largely ascertained on the basis of one or more of three elements: a) the pregnancy was not obvious prior to the birth, b) the birth took place in a solitary location, and/or c) the woman hid the child after the birth. In

⁴⁵ See Hansen 1993 p. 252-253, ref. Bernssen 2017 Annex 6 and Sørnes (2014) *Ondskap: De henrettede 1772-1876* Available from: <<http://www.ondskap.org/de-henrettede-1772-1876.html>> (Accessed 20 June 2017).

⁴⁶ SAB: Rettsprotokoll Sunnhordland 1741-1746 fs. 111.

⁴⁷ The two cases ending with the death penalty after 1774 were different in this context, as one case (SAB: Rettsprotokoll Sunnhordland 42 1782-1787 fs.35b-41) involved murder with a knife, while in the other case the woman (SAB: Rettsprotokoll Nordhordland 1796-1802 fs 51b-58) had given birth to another child in secret before.

contrast to the acquittal case against Søgni Olsdatter as specified previously, where these appear to have been used as cumulative conditions, in the other cases they do not appear to have been discussed consistently or systematically.⁴⁸ In cases from 1774 onwards, however, the arguments appear to be gradually more nuanced and a greater emphasis has been placed on excusing circumstances.

As regards the events prior to the birth, elements other than whether the pregnancy had been announced also have a part to play. For instance, two women had acquired baby clothes, which indicated that they intended to keep their children.⁴⁹ If the birth took place alone, it was asked whether the woman had attempted and/or had opportunities to get help. In the case against Kari Bårdsdatter as referred to, it was thus stated in the conclusion of judgement that – inter alia – her bed in the hayloft was located so far away from the other buildings on the farm that ‘*nothing of that which has been proven contradicts*’ the fact that she attempted to call for help, as she claimed.⁵⁰ As regards the treatment of the child after birth, it was to the advantage of the woman if the umbilical cord was cared for, as this meant she had attempted to save the child’s life.⁵¹ The fact that a ‘*young and simple woman could be unskilled in what to do in the event of birth of an infant*’ is also deemed to be extenuating circumstances.⁵²

The change in the outcome of these cases appeared to be the result of an overall assessment of subjective intent on the one hand, and on the other of the more specific issue of whether the mother was responsible in practice for the death of the child. Due to variation in presentation and clarity of the referred arguments, it is often difficult to determine whether either element was conclusive in the individual cases. One example where the lack of intention to kill nevertheless appeared to have been of conclusive importance is the 1776 case against Christie Gulbrandsdatter. As well as acquiring baby clothes, she had agreed with the father of her child that he would go to her parents and announce her pregnancy; he had already announced it to his closest family. In addition, Christie gave birth five weeks prematurely, was unable to get help during the birth, and had tied the baby’s umbilical cord. The report states that even though she should not have been alone in a cold loft when the birth was imminent, she could not be sentenced to death as circumstances proved that she had no ‘*thoughts to take the life of the child that she was expecting*’. Although the fact that there was no proof that this child was born alive probably

⁴⁸ These three elements coincide with the conditions in the Swedish regulation on ‘infanticide’ dating back to 1734. Hedegaard refers to the first of these in his dissertation, and it is possible that this has a connection, ref. Hedegaard 1756 p. 212.

⁴⁹ SAB: Rettsprotokoll Sunnhordland 1772-1777 fs. 273 and SAB: Rettsprotokoll Sunnhordland 1787-1792 fs. 169b-182.

⁵⁰ SAB: Rettsprotokoll Sunnhordland 1777-1782 fs. 26.

⁵¹ SAB: Rettsprotokoll Sunnhordland 1772-1777 fs. 271b-273b.

⁵² SAB: Rettsprotokoll Sunnhordland 1782-1787 fs. 318.

had a part to play, the assessment of intent appears to have played a very central part. It can also be noted that this case took place more than a decade before the work of Nørregaard and Brorson was published, which indicates that the intent of the mother already had an established position in district court practice before it appeared in legal literature.

7. Arbitrary Penalties

In contrast to the two 1705 cases of acquittal as referred to, we can see that all the women who avoided the death penalty from 1743 onwards were sentenced to prison for between six years and life for their handling of the childbirth. As the rules on concealment of birth and infanticide are the only regulations explicitly referring to this type of crime, this penalty is non-statutory.⁵³ The question is what provided the foundation for these – despite everything – relatively strict penalties, as there was no regulation of this kind in existence in the field.

As regards the appeals, we can see examples of Bergen Appellant Court overturning the death penalty in cases of infanticide and issuing prison sentences instead as early as in 1730.⁵⁴ In cases where the accused was pardoned by the king, we also sometimes see penalties reduced to imprisonment and fines.⁵⁵ Thus it may appear that the district court adapted to the practice of the higher courts by using imprisonment as a substitute for beheading, if the conditions indicated that a less severe penalty would be applicable. It is nevertheless interesting to study what basis the judges in the court of first instance appeared to apply in order to come to this conclusion.

In the case against Christie Guldbrandsdatter in 1776, it emerges that '*for her negligence*' she had '*to pay penalties of 6 rdr: for her intercourse outside marriage, and to work at Bergen Prison for 8 years*'.⁵⁶ It's the only one of the six cases involving arbitrary penalties in which we find an alternative, subjective form of liability referred to explicitly. In the two cases that ends with life sentences, the grounds for the penalty state that despite the fact the women did not intend to kill their children, and that the babies were probably stillborn, they both nevertheless '*worked so much in secret*' that if '*the child was born alive*' they would '*probably have done something to hasten the child's death (...) [and] therefore*

⁵³ Brorson refers to a legal unity in respect of the legal regulation of negligence when he argues in favour of arbitrary penalties in cases involving concealment of birth. If young children who were unable to look after themselves were to die in accidents, according to the Norwegian code of 1687 6-11-13 the parents would make '*public confession and give money to the poor according to their wealth*'. As we can see, this regulation does not justify a prison sentence.

⁵⁴ See Hansen 1993 p. 123.

⁵⁵ See Hansen 1993 p. 134.

⁵⁶ SAB: Rettsprotokoll Sunnhordland 1772-1777 fs. 273b.

should suffer an exemplary penalty'.⁵⁷ In the three remaining cases, the grounds for the arbitrary penalties are not stated in further detail, other than the fact that the accused were sentenced to 6 years of prison as a result of their '*very suspicious*' behaviour, their '*illegal actions*' or their '*crime*'.⁵⁸

As we can see, reports on the grounds for the alternative penalties are sparse. Nor does it always seem as though the judges in the court of first instance themselves were capable of defining and giving reasons as to why these women, despite everything, had to be held liable for their actions. To a certain degree, the results may appear to be based on the fact that the women's actions were deemed to be reprehensible and indefensible. The modern wording of the Criminal Code of 2005 §23, stating that '*anyone contravening the requirement for acceptable conduct in an area, and who can be blamed on the basis of their personal assumptions, is negligent*', thus appears to be relatively apposite. Even though it is not always stated as explicitly in the judgements, the arbitrary penalties to which the women were sentenced may thus be regarded as a result of negligence.

If this theory was used as a basis, we could state that the strengthened position for the assessment of subjective liability and other excusing elements had two consequences. Firstly, it meant that the judges in the court of first instance could legitimately circumvent the death penalty, even if the conditions of the rules on concealment of birth and infanticide were met. Secondly, it meant that the women could still be sentenced as their negligent actions were identified and recognised as reprehensible. Both of these changes nevertheless illustrate the same thing, that is to say a gradual move away from the strict legal positivistic appliance of statutory law and towards a more nuanced assessment of liability.

8. Summary and Discussion of Causes

As we have seen, there was a relatively major transition in the mid-18th century where – inter alia, assessments of causative links and subjective liability were given greater scope in cases of infanticide. In legal theory, the earliest time at which this was expressed was in Hedegaard's dissertation of 1756, while intent as a condition for the death penalty was formulated initially in Nørregaard's lectures in the 1780s. Even so, there were signs of a development in the same direction in district court practice even before these sources were published. If we view the discussions of criminal liability in a rough timeline, we can say that the assessments seem to be rather scarce and unnuanced in the period before

⁵⁷ SAB: Rettsprotokoll Sunnhordland 1782-1787 fs. 318, corresponding to the following in SAB: Rettsprotokoll Sunnhordland 1777-1782 fs. 26b.

⁵⁸ SAB: Rettsprotokoll Sunnhordland 1741-1746 fs. 111, SAB: Rettsprotokoll Sunnhordland 1772-1777 fs. 166 and SAB: Rettsprotokoll Sunnhordland 1787-1792 fs. 182.

1735, more elements were incorporated between 1736 and 1774 but still had few consequences, while the altered legal perception after 1774 appeared to play a central part in explaining why more women avoided the death penalty.

Thus this development appears to have taken place over a longer period of time, and consequently it is difficult to say for sure what the triggering cause of this change was. As stated, the substantial law was the same throughout the entire period investigated, and so it is necessary to look at other, and external -factors. The year in which we see the first signs of a change in district court practice also provides an indicator of what may have heralded the start of the development that would gradually have major consequences.

In the mid-1730s, two ordinances of major significance to district court practice came into being. It is probably no coincidence that we see the first signs of change when these came into force. The first of these, the Administration of Justice Ordinance II of 1735, included two new regulations that probably both had consequences for the legal discourse that was conducted locally.⁵⁹ Firstly, the obligatory appeal was extended to apply to all serious criminal cases. As the district court judge was obliged to pay compensation for illegal verdicts, mandatory review of the appellant court probably increased awareness of the formulation of the judgements.⁶⁰ Furthermore, the accused was allocated public defence counsel. Even though the expertise of the defence counsel appointed did vary, we can in several cases see a clearly more nuanced evaluation of excusing elements as a consequence of a well-trained procurator. Twice as many skills were on hand with two legal players, and the foundation was laid for a local legal debate.

The second ordinance that probably had major consequences for the law practised was the Examination Ordinance of 1736. As of this year, all legal players were obliged to complete an examination in law. Despite the fact that the syllabus was limited initially and that it naturally took some time to implement the ordinance in practice,⁶¹ the examination preparation and lectures provided the entire spectrum of future appliers of the law with a collective base of knowledge.⁶² Unpublished manuscripts and notes that were initially intended for sitting examinations could thus also include a broad spectrum of appliers of the law in the ongoing debates.⁶³ The more extensive commentaries prepared in the decades that followed therefore not only formed the basis for the gradual development of a legal fellowship, but were also a result of it. It was perhaps a collective understanding of this kind that gave the district court judges in the county of Hordaland the

⁵⁹ Sunde, 'Enhver Borger har ret til at fordre Sikkerhed af staten' - Ordninga med offentlig forsvarar mellom 1735 og 1775, *Rettsjelp fra kyst til vidde. Festskrift til jusshjelpa i Nord-Norge* (2009) pp. 322-342, at 324.

⁶⁰ Norwegian Code of 1687 1-5-3.

⁶¹ See Nilsen 2002 p. 40.

⁶² See Sunde 2007a p. 148.

⁶³ Sunde, *Fornuft og erfaring* (Det juridiske fakultet, Universitetet i Bergen 2007b) pp. 149-152.

desire and skills to supplement the strict and apparently unnuanced legal text in the rules on concealment of birth with broader assessments, in order to achieve more reasonable results.

In addition to extending legal expertise, there was also better access to evidence. For example, the mandatory autopsy of 1751 gave the law a more authoritative source on which the judges could base conclusions relating to the child's chances of living. These investigations were also discussed in detail in works such as Hedegaard's, and thus it appears as though increasing emphasis was placed on this element in practice.⁶⁴ Thus greater medical expertise may also have been an important factor in this development.⁶⁵

It is difficult without a more extensive and broad survey to provide a concrete and indisputable response as to what caused this change in legal life. According to what we have seen, it does not appear as though the lawyers themselves always perceived or were capable of defining what legal operations they were actually undertaking. Despite the linguistic and theoretical obstacles, nevertheless we can see that these assessments in concealment of birth and infanticide cases in the 17th and 18th century appear to represent an important step towards the modern conception of liability.

⁶⁴ See Hedegaard 1756 pp. 51-59.

⁶⁵ See also Shiøtz, Svarene ligger i kroppen in *Historier om Helse* Oslo 2009, pp. 19-33.