

Negotiating Marriage: Before, During, After

by

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Introduction

What does it mean to *negotiate* marriage? According to the *Longman Synonym Dictionary* the meaning of the word *negotiate* is complex: “Bargain, make a deal, go back and forth, give and take, compromise, meet halfway, agree on, settle differences, settle, come to terms, contract, conclude, complete, finish.” *The Merriam-Webster Dictionary of Synonyms and Antonyms* mentions that negotiating is connected to *arrange*: “*Negotiate, arrange* mean to bring about through an exchange of views and wishes and agreement reached by bargaining and compromise *Negotiate* suggests that the dealings are carried on by diplomatic, business, or legal agencies . . .”, and “*Arrange* implies dealings intended for the restoration or establishment of order of those carried out between private persons or their representatives. . . . *Arrange* a marriage as they did long ago”.

Couples today negotiate their relationships and their marriage contract over and over again. They ask: what are my obligations – what are yours? In what way shall we take care of our children? How much time shall we spend outside the home, and as wage earners? What is best, to share property and income, or to retain separate economy and property? There are many demanding tasks to fulfill in a modern marriage. A critical point is this: Is there really time for sex? Problems and tensions easily arise. Perhaps husband or wife finds comfort in alcohol, or through involvement in extramarital affairs. Some husbands even ventilate their frustration by the use of violence against the spouse and the children. When communication and negotiating fail in the private sphere, there is a good chance that things may go so wrong that negotiating has to continue in the public sphere. Marriage counseling could be a solution or the case ends up in court. As mentioned in the dictionary negotiating may imply that the dealings are carried out by *legal agencies*. The negotiating couple has to decide on child custody and on how to share belongings and property.

The concept “negotiating” is central in the study of modern marriage. Is this also true when we are concerned with the institution of marriage in the early modern period?

In the extensive literature on gender and the family in early modern Europe, the study of marriage trouble, marital breakdowns and marriage negotiations have received increasing atten-

tion and, as a consequence, the topic of how marriage was negotiated in a legal and public setting has also been explored. The context is then both legal history and history of family and of gender.

Negotiating; the promise of marriage, marital life and divorce

It has become clear that in the early modern society some couples found it necessary to negotiate marriage, even before the wedding in the church had taken place. Luther and other reformers broke with the Catholic doctrine that the private consent of the parties alone followed by intercourse was sufficient, and demanded parental consent and a public ceremony for a valid marriage. Still, there was both legal and popular uncertainty about what constituted a marriage and whether breaking a private promise of marriage should have social and legal consequences. The uncertainty made it necessary to take legal action.¹

Research has shown so far that those who were properly married and certain of this led all kinds of married lives. Some, perhaps only a few, were happy together and behaved as lovers and as friends. Others fought and quarreled most of the time. Some experienced ups and downs in their marriages, other a permanent crises caused by contagious disease, violence, drinking and gambling. Many different situations could cause a complete breakdown of a marriage. For those who intended to free themselves from their spouses, desertion probably remained the easiest and most frequent method. But some also sought legal separation and divorce.

Contrary to popular belief, both divorce and legal separation were available on almost equal terms to women and men in Protestant Europe in the early modern period. Couples could bring their dispute to a marriage court, and this was usually a church court or a consistory. In some periods and places people also had the right to petition for secular separation and divorce.² In early modern Denmark and Norway the king received such petitions.

Conflicts between couples married in church or not, were probably most often solved in the private sphere. Family, friends and neighbors gave support and helped finding a solution, a compromise, in other words, marriage was normally negotiated just where people lived, and in a manner that left no written records. This, however, was not always the case, as mentioned. Some conflicts were brought out into the public sphere. I will here present marriage cases that were negotiated in early modern legal culture and in the public administration of that period. I shall

¹ For an overview, especially on divorce see Roderick Phillips, *Putting asunder: A history of divorce in western society*, Cambridge, Cambridge university press, 1988

² Merry Wiesner-Hanks, *Christianity and Sexuality in the Early Modern World: Regulating Desire, reforming Practice*, London, Routledge, 2000, 79-80

limit my geographical scope to Norway as I have previously used Norwegian sources in studying the institution of early modern marriage, separation and divorce.³

Reformation and marriage: The case of Norway⁴

Until the Reformation, which was introduced by the royal power in Denmark-Norway in 1536-1537, canon law was the only law governing the institution of marriage between Christians (property in marriage was regulated by secular law). After the Reformation, canon law could no longer be used, and ruler concerning marriage became part of the secular law. Denmark-Norway got its first protestant marriage law in 1582, the Marriage Ordinance of Frederik II.

Protestant church courts were formally established as marriage tribunals in cathedral towns in Denmark-Norway as early as 1542, just four years after the Danish-Norwegian Reformation had abolished Catholic church courts. In Norway there were four cathedral towns and four dioceses: Bergen, Oslo, Stavanger and Trondheim. In each diocese a consistory court had jurisdictions over huge areas of wilderness, villages and only a very few and small towns. The Diocese of Bergen included Norway's biggest and most important town, the old Hansa town of Bergen.⁵

Spousal cases and divorce cases

There were two main categories of marriages cases that were handled in Norway's four marriage courts or consistory courts, spousal cases (involved the enforcements of marriage contracts) and divorce cases. The marriage ordinance and later legislation in the early modern period did not mention legal separation, but listed three Biblical reasons for divorce: desertion, adultery and impotence. The law also demanded that divorce be granted by the courts, but in the beginning of the 17th century a practice developed whereby the King could dissolve marriages by royal dispensation. This practice was not of particular importance before 1790, but became quite important during the period 1790-1830. The main procedure was first to give a letter of separation

³ Hanne Marie Johansen, *Separasjon og skilsmisse i Norge 1536-1909: En familie- og retthistorisk studie*, Oslo, Den norske historiske forening, 2001; eadem, 'Marriage and money? Legal actions for enforcement of marriage contracts in Norway,' and, 'Marriage trouble, separation and divorce in early modern Norway,' in *The Marital Economy in Scandinavia and Britain 1400-1900*, eds. Maria Ågren and Amy Louise Erickson, London, Ashgate, 2005

⁴ This part is based on Phillips, *Putting asunder* (note 1), 50-52, and Johansen, *Separasjon og skilsmisse*, Johansen, *Marriage or money?*, Johansen, *Marriage trouble* (note 3)

⁵ Norway had a small population at the time of the Reformation, estimated at about 500.000-600.000. By 1800 the population had increased to c. 880.000. Less than ten percent of the population in Norway lived in urban areas during the early modern period (Rolf Danielsen, Ståle Dyrvik, Tore Grønlie, Knut Helle, Edgar Hovland, *Norway: A History from the Vikings to Our Own Times*, Oslo, Scandinavian University Press, 1995, 131-143)

and then, after three years, a letter of divorce. When the number of divorces by royal decree increased in the 1790s, local or regional authorities, like the town magistrate, were granted the right to administer applications for separation and also make decisions in these matters.

When petitioning the king for divorce, one did not have to give any reason as long as both parties agreed on the matter, had previously received a letter of separation and had lived apart for at least three years. If one party refused to sign the divorce application, the other had to give a reason. Secular reasons, such as dislike, disharmony, violence and ruining the family economy were accepted. The use of royal dispensation from 1790 was the beginning of the modernizing and secularizing of divorce.

The 1790's were the decade when the institution of marriage was secularized in more than one way. In Denmark-Norway church courts were dissolved in 1797 and marriage cases, such as divorce suits, were transferred to civil courts.

Problems and perspectives; how to study the process of negotiating marriage

I am interested in the negotiating process both from the perspective of the legal authorities, and litigants themselves. A main question is: What kinds of marital ideals influenced the process of negotiating marriage in the legal and public sphere?

Family historians often stress the appearance of opposing models for marital ideal during the early modern period. Merrill D. Smith, who studied marital breakdowns and discord in Pennsylvania, North America, 1730-1830, found two different models. One ideal emphasized such values as patriarchal authority, obedience and subordination of the wife, rigidly defined gender roles, and a double standard of sexuality. The other ideal is quite different, stressing the values of love, companionship, complementary gender roles, and a single standard of sexuality.⁶

The chronology of these opposing models has caused a vivid discussion. Lyndal Roper for example, who studied Germany, argues that the idea that a marriage should be based at least partly upon affection and companionship appeared already in the post reformation era, in the 16th century.⁷ According to Roper the Augsburg Council regarded marriage as a “natural”, complementary, hierarchy of masculinity and femininity. She concluded from this that the Reform-

⁶ Merrill D. Smith, *Breaking the bonds. Marital Discord in Pennsylvania, 1730-1830*, New York and London, New York University Press, 1991

⁷ Lyndal Roper, *The holy household: Women and morals in Reformation Augsburg*. Oxford, Clarendon Press, 1989, 205. See also Lynn Abrams and Elizabeth Harvey, *Gender relations in German history: power, agency and experience from the sixteenth to the twentieth century*, London, UCL Press, 1996, 102

ation concept of companionate marriage was predicated upon a gender hierarchy, but at the same time patriarchal marriage appeared to be constantly challenged or undermined. Lawrence Stone, who used English sources, argues that the companionate marriage did not appear until the 18th century amongst the upper classes.⁸

The two models of marital ideals did not necessarily appear consecutively. There was perhaps not an evolution towards modernization of marital ideals, but rather ongoing clashes between two opposing sets of marital ideals in early modern society.

Marriage cases – valuable sources on how common people and authorities negotiated marriage

For a couple of decades historians have explored marriage cases in court records and in the secular administration for the study of the early modern family and marriage. They often stress that the study of marriage cases can give us important new information about practices and norms in connection with marriage.

Lawrence Stone, for example, writes that divorce cases, if described in sufficient detail, throw a vivid light on attitudes to marriage. Divorce in England was much rarer than in more protestant regions of Europe and also socially exclusive, so that only very rich and powerful men had the possibility to break the bonds of matrimony.⁹ Danish-Norwegian sources related to divorce may be more valuable than comparable English source material, because divorce in Denmark-Norway, even if rare, was available to both sexes and all classes. The law allowed poor litigants to apply for free legal assistance in court by the *in forma pauperis* procedure. This procedure was used in all kinds of cases in the early modern period and quite often in connection with divorce.¹⁰ Professionals, civil servants, or other educated people assisted poor and illiterate people in writing to the King. Poor people were also usually exempt from paying the fee for a royal letter of divorce. (On the other hand, well-to-do people had to pay a considerable fee in

⁸ Lawrence Stone, *The family, sex, and marriage in England, 1500-1800*, London, Weidenfeld & Nicolson, 1977, 202

⁹ Lawrence Stone, *Road to Divorce. England 1530-1987*, Oxford, Oxford University Press, 1990, 6.

¹⁰ Johansen 2001, 102-106. For England see Colin S. Gibson, *Dissolving Wedlock*, London and New York, Routledge, 1993, 68

order to send any kind of petition to the king).¹¹ As far as the occupational and residential characteristics of the petitioners are known, they were representative of the general population.

Also spousal cases, enforcements of marriage contracts, involved people from all strata of society. A majority of plaintiffs were in fact women from simple and relatively poor conditions. To the majority of people in Norway, the 90 per cent who lived in rural districts in the early modern period, getting to consistory courts was difficult on account of the terrain, the climate and the lack of roads. In all districts of Norway rural people living close to cathedral towns were more likely to have a conflict settled in consistory court than those who lived far away. People living in towns and central parts of Norway most often applied to the King for divorce, although inhabitants of northern Norway and distant, isolated rural districts are also found among the petitioners.

The records of the Norwegian protestant marriage courts and petitions to the King for separation and divorce, and to the town magistrates for separations only, provide valuable insight into popular marital disputes and the negotiation of marriage in early modern culture, in particular in early modern urban culture. Still, we need to be careful about making sweeping statements because these kinds of records are rather special, first and foremost because turning to a court and to the authorities for the solution to household and family difficulties was an exceptional measure. Second, because what went on in the legal culture was the production of a narrative. Tactical considerations were of great importance. People held back information or told just what they considered wise for the occasion.

Before: Negotiating the promise of marriage¹²

During the 16th and 17th centuries, spousal cases were relatively infrequent in Norway. Each of the four church courts only heard one or two cases every year or even just every second year. Around 1700, the number of cases increased for a while, but then abruptly disappeared.

In early modern society there was, as mentioned, both legal and popular uncertainty over what constituted a marriage and whether breaking a private promise of marriage should have social and legal consequences. This uncertainty resulted in legal proceedings. The court records

¹¹ Steinar Supphellen 'Supplikken som institusjon i norsk historie', *Historisk Tidsskrift*, 57, 1978, 152-186; with an English summary, 'The complaint to the king as an institution in Norwegian history', also found at <http://www.rhd-uit.no/ht/HTHeimen.aspx>

¹² This part is based on: Hanne Marie Johansen, 'Ekteskap, erstatning eller avvisning? Om makesøking og falske ekteskapsløfter i Norge 1570-1800', *Historisk tidsskrift*, 70, 1991, 1,29; with a summary in English; 'Marriage, Compensation or Repudiation? On Spouse-seeking and False Promises of Marriage in Norway, 1570-1800' also found at <http://www.rhd.uit.no/ht/HTHeimen.aspx>

of Norway reveal that the promise of marriage could be performed in three different ways: as a betrothal in the presence of a priest, in or at the church, as a traditional popular ceremony, and as a secret (non-public) promise. In court women often described in detail how the proposal of marriage had taken place. If they could not prove formal betrothal it was an advantage to convince the court of a proposal that was in accordance with tradition and common practice. Women demanded that the man should marry them, or if not he should pay compensation.

Some suits brought to Norwegian consistory courts were simply abandoned or were settled out of court, but most cases were determined by judges. The tendency was to examine the case with great care even if it was clear from the very beginning that a true betrothal had not taken place. The judges looked to the medieval elements in the law and asked if the couple had agreed on marriage in some way. If the man could not deny this he was in some cases sentenced to pay compensation. In Bergen, 1604-1708, 12 out of 47 decisions implied that the plaintiff obtained financial compensation.

According to the oldest Norwegian law and folk culture, marriage was established through two ceremonies, *festermål* and *bryllup*, which usually took place in private settings, without the participation of a clergyman, but with family, friend and neighbours present. *Festermål* was a public promise of marriage. It was the celebration and statement that the two parties had decided on a future marriage. After a *festermål* the couple was allowed to sleep together. They were supposed to marry later on, for example when the woman became pregnant or just after the birth. The child was considered legitimate.

Stories on how the promise of marriage was made varied according to social status. To common people the contract of marriage could be a very informal affair without a witness or with only a single witness present. This was not a social happening like *festermål*. Parents and other kinfolks were seldom involved, much less the clergyman. The woman had often received a small gift, such as a ring, or a small amount of money as a symbol of a binding union. It seems as if the couples did not wait long before they began sleeping and even living together after such a private promise of marriage. Declaration of love seems to have been a convention in connection with these private and informal ceremonies.

A girl named Gertrud came to the Consistory in Bergen, on September 3rd, 1624. She said that Hans Caspersøn of Copenhagen, a bookbinder, had slept with her under the promise of mar-

riage. According to Gertrud he had told her: ‘I love you of all my heart’. Hans swore this was not true, but the case was not dismissed, but turned over to secular authorities.¹³

In a few cases men accused women of breach of marriage promise. On October 6th, 1699, such a case was recorded in Bergen. Daniel Thomssøn complained that Margrete Pedersdatter had refused to marry him in spite of a previous promise to marry. Her excuse was that ‘her mind and heart had never really been turned to Daniel’.¹⁴

In spousal cases it was not at all uncommon to mention that marriage could *not* take place because there was lack of love or because the feeling of love and attraction had ceased. It looks like people tried to convince the judges that a happy marriage should be based on love, personal attractions and deep sympathies. The judges listened to these arguments and the court spent a lot of energy and time on recording them. By so doing the judges and the court expressed understanding of the love argument, and perhaps also of the love match. They knew about folk traditions in regards to marriage.

In early modern, rural Norway, like in some other parts of Scandinavia, young women and men were allowed to visit each other during the night in groups or even as a couple. This was the traditional institution of *nattefrieri* (night-courtship). The ideal was that the couple should stay together in bed fully dressed and get to know each other without the interference of parents. Yet, the institution of night-courtship was socially controlled by the young people who participated in this game. Rumours could easily be spread about girls who allowed too many boys in their beds and in an improper way. If it was obvious that a girl and a boy had become a couple, then it was expected that the boy assumed his responsibility and married the girl in case she got pregnant.¹⁵

What predated a marriage then was a courtship, partly out of parents’ control. Spousal cases reflect that young adults had relatively great freedom in seeking out a spouse for *festermaal* and marriage, but also that night-courtship, and day courtship for that sake, sometimes went wrong and resulted in birth out of wedlock. As mentioned earlier, conflicts over marriage contracts abruptly disappeared from records. After 1734 hardly a single cases is known to be heard.

¹³ *Bergen Domkapitels forhandlingsprotokoll*, I, 1605-1624. Oslo, Universitetsforlaget, 229

¹⁴ Statsarkivet i Bergen, Bisparkivet, Bergens domkaptittels forhandlingsprotokoll, VII, 1696-1708, folio 41

¹⁵ The first to describe “night courtship” in Norway was Eilert Sundt, a 19th century sociologist (modern edition: Eilert Sundt, *Om giftermål i Norge*, Oslo, Pax, 1992. English edition: *On marriage in Norway*, tr. Michael Drake, Cambridge, Cambridge University Press, 1980

Why did the court handle spousal cases at all? Why did they suddenly stop to hear these cases? My impression is that the judges needed to negotiate how protestant marriage law should be put into practice. The law was difficult to interpret. Part of the law text contradicted the principle that the promise of marriage should be given in public and with the consent of parents. I cite the words as they are repeated in the law book of 1687:

“If a man should ask another man for his daughter’s hand in marriage, and sleeps with her before the betrothal is announced, or before he has gotten the final promise to wed, then he is obliged to marry her, depending upon the blessing of her parents or guardians. He ought to give her a generous damage award according to his wealth, should her parents or guardians refuse him. The same rule should apply if a man is intimate with a virgin or a widow whose reputation is beyond reproach. If he denies his seduction and she cannot make him confess his actions, his Word of Honor will be his defense.”¹⁶

This part of the law is rooted in the medieval tradition that a private promise of marriage and sexual intercourse was a true marriage. An offended virgin could go to court and complain of a broken promise of marriage. If the man refused to marry, she could receive compensation.

The ordinance of 1734 brought something quite new. It stated that men did not owe anything to a seduced woman, and she could no longer sue him, unless the marriage promise was recorded in writing. The 1734 decree established that a man was the weaker party, forced into marriage against his family’s wishes, and the woman was now viewed as licentious, rather than violated and dishonored. The 1734 decree has been seen as expressing the values of the new upcoming bourgeoisie who wanted to protect their sons from marrying ‘below’ their rank. Even to be involved with women of the working classes was too much. Such women should not be allowed to present any claims towards young men of “better standing”.¹⁷

It was important for parents and kin at this social level to preserve and control family fortunes. Spousal cases disappeared with the 1734 decree, almost overnight. Protestant marriage courts were no longer forums for communication about spousal conflicts in the local community, and the change must have caused hardship for seduced women. Another important development was that talk about love matches and secret promises of marriage disappeared from the legal culture. The Norwegian historian Sølvi Sogner, who has studied control and conflict-handling in the early modern Scandinavian courts, mentions that the encounter between the people and the law

¹⁶ Christian Vs Norwegian Law, chapter 6, part 13.4 . Oslo, Universitetsforlaget, 1982

¹⁷ Strange Beck, 'Ægteskabsret og samfundsudvikling – et perspektiv', in *Familieret*, ed. Jørgen Graversen, København, Juristforbundets forlag. 1980, 174-184

was an ongoing process which involved elements of control from above and of influence from below. It was a continuous learning process.¹⁸

My point is that the 1734 decree in Norway was a watershed: It meant that the popular element in spousal cases was cut out. Judges no longer considered testimonies about secret marriage promises and declarations of love as something to be taken seriously in a legal setting. The people could not influence the legal culture as strongly as before.

Family historians often tell us that the rising social elite in the early modern society, that is the upper bourgeoisie, invented modern family life and romantic marriage. Romantic marriage then filtered down to lower classes. The study of spousal cases should perhaps make us think differently. Impulses went both ways, and when the same impulses existed on many different layers of society, those impulses became culturally very strong. The romantic marriage ideal was not alien to the lower classes. I am not saying that the vast majority of people in early modern society made love matches. I agree with Merry Wiesner when she argues that women and men of the early modern period were motivated more by what we would regard as pragmatic concerns than by romantic love.¹⁹ But the need for economic security and the desire for social prestige were important together with emotions and sexual passions.

The age of marriage in North Western Europe in the early modern period was late, usually 23-30 years.²⁰ Maybe the system of late first marriages fostered "the free choice marriage", and perhaps also the romantic marriage ideal?

Because of the modernization of the legal system, the practice of "the free choice marriage" was regarded as dangerous and unfitting. In the early modern era, where the bourgeoisie was about to take the lead, marriage became much more property oriented, something that ought to be better controlled by parents.

Negotiating during: marriage trouble leading up to divorce

Both the church courts and the clerical and secular officials were involved in the process of sorting out marital trouble and restore marital order and discipline so that the institution of marriage should not be discredited. By studying different kinds of petitions for separation and

¹⁸ Sølvi Sogner, 'Conclusion. The Nordic Model', in *People meet the law: Control and Conflict-handling in the courts*, eds. Eva Österberg, Sølvi Sogner, Oslo Universitetsforlaget, 2000, 276

¹⁹ Merry E. Wiesner, *Women and Gender in Early Modern Europe*, Cambridge, Cambridge University Press, 2000, 71-78

²⁰ John Hajnal, 'European marriage pattern in perspective', in D.V. Glass and D.E.C. Eversly (eds.), *Population in History: Essays in Historical Demography*, London, Edward Arnold, 1965

divorce we can gain insight into how marital tension and marital breakdowns were negotiated, solved and brought to an end by assistance from the court and the king.²¹

Court and king – the granting of divorce

Let us first take an overview of the use of separation and divorce in the Norwegian early modern society. How many people had a separation and divorce, and what reasons were regarded good reasons?

Norwegian protestant marriage courts granted only a very few divorces during the early modern period, approximately nine to ten divorces each year during the 17th century. The court in Bergen heard 256 divorce cases from 1604 to 1708. During the 18th century protestant marriage courts stagnated as divorce courts and heard even fewer cases than in the 17th century. A small increase in divorce did not appear until the 1790s, when it became state policy to grant secular divorce by royal decree. From 1790 until 1831, 538 Norwegian couples obtained a divorce by royal decree. The yearly average was 15-20 cases until 1825. From 1825 on the number of dispensations were gradually reduced. People who had valid reasons for divorce after 1825 were now advised to bring their case to court instead.

Among the 538 petitions filed between 1790 and 1831, husbands were registered as applicants in 46 per cent of cases (248), wives in 31 per cent (165 cases). The remaining 23 per cent of petitions (125) were signed by both spouses or unspecified. Petitions for separations are kept in archives all over Norway. I have not looked into all these archives, but only studied petitions for separation in Christiania (present-day Oslo). From 1799 to 1836 166 couples were granted separation from bed and board in Christiania.

Grounds for divorce and judgments

The most commonly cited ground for divorce in the courts was desertion or absence of a spouse. During the 16th and 17th centuries 60 to 70 per cent of divorce cases had to do with disappearances, usually that of the husband. Adultery was the second most common reason for legal divorce right up to the end of the 18th century in Norway. Women made up close to half of those who applied for divorce because of their spouse's adultery. The success rate of plaintiffs was

²¹ Johansen, *Separasjon og skilsmisse i Norge 1536-1909*, Johansen, *Marriage or money?*, Johansen, *Marriage trouble* (note 3)

nearly 100 percent in desertion and adultery cases. Inadequate cases of this kind were probably dismissed.

Irregular cases: Violence, abuse, marital cruelty and mutual dislike

Violence, abuse, marital cruelty and mutual dislike were not valid reasons for divorce in the eyes of the law and the court did not consider the possibility of divorce on these grounds. Still, for a long period of time the consistory courts of Norway spent both energy and time on cases primarily related to such problems. Many of these irregular cases were examined very thoroughly. The couple involved was sometimes asked to come to the court several times to explain their problem and to be disciplined. It could take a year or more to finish such cases. Of the roughly 500 divorces in Norway in the period 1600-60, nearly 50 were caused by 'tyranny and quarrel'.²² From about 1700 irregular divorce cases were gradually reduced in numbers and then disappeared from the records, leaving only standard desertion and adultery cases.

Was adultery excused in any way, was it something to negotiate? Did people and judges express a double standard of sexuality? And was a violent and unreasonable patriarch tolerated in the house and in the community?

Adultery

Protestant law defined all sex outside marriage as a sin. Adultery was considered a serious offence for both men and women in the early modern society. A Danish-Norwegian ordinance of 1617 dealing with immorality was of special importance. In case of fornication, *leiermål*, both parties should pay fines or damages to the King.²³ Adultery was, as mentioned, a common reason for divorce, and usually a third to one half of all cases concerning adultery registered in Norwegian church court records were brought to the court by wives. So it was not only men who could complain about the sexual misbehavior of the spouse. Both women and men had a good case if their spouse were already punished for extra marital relations. Was it possible to prove adultery if the spouse was not punished for the crime of fornication?

In some cases the innocent party was able to bring witnesses who had actually spied on couples that committed adultery. The baker Zent Karstenssøn of Bergen was divorced from his

²² Aksel Kayser, 'Tyranni i ekteskapet: Separasjon og skilsmisse på ulovfestet grunnlag i tidlig etterreformatorisk tid. En retthistorisk undersøkelse', *Det juridiske fakultets skriftserie*, 24, Bergen, 1989.

²³ Sølvi Sogner, Marie Lindstedt Cronberg, Hilde Sandvik, 'Women in court', in *People meet the law. Control and Conflict-handling in the courts*, eds. Eva Östberg, Sølvi Sogner, Oslo, Universitetsforlaget, 182

wife in 1648. His suit was successful because his maid testified that she had looked thought the small open door in his house one evening with bright moonshine, and had seen the baker's wife together with the man servant of the house. What did the maid see? The baker's wife having sex with the baker's journeyman on top of a bread box. This had happened while the baker was away at a tavern, drinking. A male servant could also testify that this was true. The baker had no difficulty in getting a divorce.²⁴

Sometimes the spouse had witnessed what went on. Anne Jørgensen from Bergen, the wife of Morten "taskemaker" (purse maker) accused her husband of adultery in Bergen's marriage court on November 22nd, 1617. Anne said that she had seen here husband in bed with another woman, and her husband and this other woman had both been naked.²⁵ Whether Anne's marriage was dissolved or not, is not known, but from hers and similar cases it becomes clear that to have a case heard in court was not a male privilege during the 17th century. Wives could use the court in order to have a husband disciplined. Of course, most husbands must have gotten away with their infidelity, but the collective of urban wives were at least able to make an example of somebody on some occasions, as were the courts.

Husbands often mentioned that a wife's adultery dishonored them and brought shame on the children as well. Anders Hansøn, a burgher of Bergen, accused his wife Maris of having a lover, a young foreigner from the Hansa quarter at the Bryggen in Bergen. Maris confessed and begged tearfully for her husband's forgiveness when the case was heard in the protestant marriage court in September 1609. Her husband cried tearfully, too! What had happened was so sad! But Anders could not forgive his wife 'for the sake of his innocent children', and the couple was divorced. Anders mentioned, he ought to take care of the children. This case shows that an adulterous wife risked losing everything, but also that a repentant, adulterous wife could gain some support and even sympathy. The judges had advised Maris' husband to take her back, and when doing so had uttered that her wrong doings were not that horrible.²⁶

The attitude of the judges was that a divorce should be avoided at almost any cost. They tried to make the couple forgive each other and start over again. This was true even when the wife was the guilty party. During the 17th century judges did not condemn the adulterous beha-

²⁴ Statsarkivet i Bergen, Bispearkivet, Bergen Domkapitels forhandlingsprotokoll, II, 1624-1655, folio 292, February 9th, 1648

²⁵ *Bergen Domkapitels forhandlingsprotokoll*, I, 1605-1624, Oslo, Universitetsforlaget, 1961, 187

²⁶ Statsarkivet i Bergen, Bispearkivet, Bergen Domkapitels Dombok 1604-1646, folio 62 a-b and 63 a, September 13th, 1609

violation of wives harder than that of husbands. The attitude was pragmatic. The double standard towards women's sexuality can hardly be found in court records and is, not surprisingly, even harder to find in secular petitions for divorce from the 1790. The word pragmatic comes to me all the time when studying the history of divorce in early modern Norway. Lyndal Roper reports that adultery in reformation Augsburg challenged the integrity of the household, but was still sometimes excused by husbands as well as by judges. The involvement of the judges in these affairs remains interestingly ambivalent, says Roper.²⁷ Comparative studies on church records should be interesting to follow in order to uncover attitudes towards women, gender, marriage and sexuality in post-reformation Europe.

Violence, drinking

The entire issue of disorderly and violent marriages consumed, as mentioned, much time in court. These kinds of cases brought to the surface how women and children were victimized in marriage by violent husbands who drank a lot and squandered family money and valuables. Bad husbands also contracted debts, without consulting the wife, and even squandered the property that the wife had brought into the marriage. Judges listened to the complaints of wives of how the fruits of their labor were being wasted. Wives told willingly about their own contribution and hard work in the household and with the children, presenting themselves as good housewives and Christian mothers.

Judges did not defend violent and bad husbands, instead they regarded them as small scale criminals who ought to be disciplined and punished. The punishment was in some extreme cases even prison or forced labor. In most cases, however, the church courts did not decree punishment, but turned bad husbands over to secular courts.

In petitions for separation and divorce after 1790 the marriage trouble that was mentioned was exactly of the same kind as previously heard in the church courts. Husbands were described as bad housekeepers and fathers: they drank, were violent and contracted too many debts. After 1790 wives could have the marriage dissolved for these reasons and husbands were usually not imprisoned or fined to forced labor. Instead they were sometimes declared incapable of managing their own affairs, in order to avoid that they squandered common property and family money. When this happened, the wife had a guardian appointed, often a brother or another relative.

²⁷ Roper, *The Holy Household*, 203-204

Wives could also be the wrongdoers; some husbands obtained a separation and divorce because of their wives' drinking and wasting their money on alcohol. Such wives were regarded as bad mothers. Children should be spared to see their mother tumbling around dead drunk. It was sometimes said they needed someone with a "mothers heart", and then divorce and perhaps a remarriage would be the best solution.

In many cases the problem was simply quarreling and general disharmony. In court quarrelling husbands and wives were asked to shake hands and promise a new beginning in their life together and in most cases they did so in front of the judges. A single couple in Bergen in 1613 refused, and the church court then decided that secular authorities should consider what to do next.²⁸

Until about 1700, the church courts heard irregular marriage cases in order to settle marital disputes and bring peace in the neighborhood. (Desertion and adultery cases were heard till 1797, when church courts as marriage courts were abolished). In doing so the judges often used Biblical language and arguments, stating that it was important to make peace and uphold order in the household, to avoid that God would turn his wrath against the whole community. God would punish every one if the judges did not make couples live as good Christians. Husband and wife should forgive each other and behave according to the word of Christ and go to church every Sunday. The husband should rule his household in a loving, friendly and Christian way, while a wife should listen to him. In this language we hear the echo of the set of marital ideals that emphasized patriarchal authority along with the obedience and subordination of the wife. But this language was not used very often in the church courts. As was the case with adultery, judges most often used a more pragmatic and secularized language when talking about marital disharmony and how to improve a marriage.

The secularized language that emphasized the importance of friendship and love in a marriage was very much in use in petitions for separation and divorce after 1790. Petitioners quite often merely argued that the marriage ought to be dissolved due to lack of understanding and love. The couple had drifted away from each other, had no longer warm mutual feelings, nor was able to communicate and to understand each other. The children would be hurt if they witnessed how parents quarreled. Here we have to do with the modern divorce, and neither magistrates, arbitrary councils nor the king himself tried in any way to stop this modern and secularized language of divorce. The modern set of marital ideals was domineering in the legal culture of the

²⁸ *Bergen domkapitels forhandlingsprotokoll I* (note 26) 157

1790s and the early 19th century, but the ground had been prepared well from the time of the Reformation.

Negotiating: After

When a marriage was about to be dissolved there were as mentioned many problems to deal with and it was time once more to negotiate the marriage contract. Did a woman have rights in this process? Or did the patriarchal society just overrule her so that she ended up in a very difficult situation? And was a divorced woman allowed authority over children and property? This might have been the case. After all, widows in the early modern society had strong rights and independence in family and property matters. So why shouldn't a divorced woman have the same kinds of rights?

Rules for taking care of children and property after separation and divorce:

The marriage Ordinance of 1582 gave rules for betrothals and divorce, but did not say a word about child custody and responsibilities in case of marital breakdowns and divorce. Inheritance and property rights in marriage in case of desertion, divorce and widowhood was also not dealt with. In these matters traditional law and custom determined the outcome. The judges and officials who handled divorce cases had only to use common sense when helping divorcing couples to set up contracts or agreements.

Consistory courts only very seldom dealt with the obligations towards children and the economic consequences of a divorce, but handed this part of the problem over to a secular court. As the records of the secular courts have not been studied, I do not know what agreements were made there.

After 1790: economic arrangements

When people wrote petitions to the king for separation, they had to prove that they had reached an agreement on how to divide common property, take care of children etc.²⁹ Local authorities played an important part in helping couples negotiate and reach such agreements.

In 1795 arbitration councils was established in Denmark-Norway.³⁰ The aim was to solve civil cases and conflicts outside the legal system to save time and expenses. Separation and di-

²⁹ A Royal decree of 1788 stressed that agreement in economic matters was a condition for receiving separation by decree of any authority and divorce by royal decree, printed in F. A. Wessel-Berg, *Kongelige Rescripter, Resolutio-ner og Collegial-Breve for Norge i Tidsrummet 1660-1813*, Christiania, Cappelen, 1841-1847

orce was an issue that was perfect suited for these new secular and modern institutions. Most couples, negotiating a divorce, reached an agreement after one meeting in the local arbitration council. The agreement of separation was often just renewed and made permanent.

Negotiating the future: after a marriage was dissolved

The lower the social status of the petitioners, the less was said about the results of property division. Some couples just stated that they had divided the estate and movable goods in two parts as the law required and were satisfied. Details are not always mentioned. Others made clear there was nothing to share, some blaming this on the spouse. Ole Justesøn Liverød, a poor tenant farmer, was one of them. In his supplication for divorce in 1797, he stated that he and his wife owned nothing because of his wife, Catherine's, 'distracting' effect on housekeeping.³¹

Middle class couples most often conclude with a simple statement that husband and wife 'shared everything between them'. Whether the sharing was just is difficult to tell.³² To divide evenly as the law required was not always an option, and there are many examples of unequal division after a separation and divorce. People compromised a lot. Mons Lie for example, a procurator (lawyer) in Trondheim and father of many small children, received a divorce by royal decree in 1793. His wife had a drinking problem and was considered 'the horror of the neighborhood'. At the time of their separation in 1790, the couple had agreed to split the estate in two halves of 360 *riksdaler* each. But when Mons applied for divorce he wrote that he could make do with a smaller amount of money. He demanded 100 *riksdaler* instead of 360.³³ The reason for his modest request we do not know. Cash could be difficult to produce, as values were tied to movable goods and real estate. Mons may have wished to avoid requests for maintenance, although it is not clear that his wife made such a request. Maybe Mons Lie was just good-hearted? Mons did promise in his supplication for divorce that he would try to gather his young children, who had been placed with 'strangers' during the three years of their parents' separation as their mother was unable to care for them.³⁴

³⁰ Ditlev Tamm, Jens Christian V. Johansen, Hans Eivind Næss, Kenneth Johanson, 'The Law and the Judicial System', in *People meet the Law* (note 18), 48

³¹ Riksarkivet, Norge, Danske Kanselli, Norske innlegg, kongl. res. 17.03.1797

³² Couples from the upper strata of society sometimes also attached their marriage contract, made before the wedding. In a marriage contract people could agree on separate estates.

³³ Riksarkivet, Norge, Danske Kanselli, Norske innlegg, kongl. res.14.06.1793

³⁴ *Ibid.*

Making a deal about children's upbringing and wives' requests for maintenance

To dissolve a marriage meant negotiations, not just between the couple but between the couple and the local authorities as well. The most important issues were the maintenance of the wife and child support. Maintenance or alimony was a personal allowance paid by the husband for the support of his wife and children living with their mother, allotted annually, with amounts varying according to the husband's wealth.

In the 1790s, husbands with moderate incomes, like shopkeepers, craftsmen and ordinary farmers, often paid 6 to 20 *riksdaler* each year in maintenance and child support. After 1800 these sums increased due to inflation. Six *riksdaler* in the 1790s was enough to feed a small family for a year. Paying for housing and other costs, the wife and grown-up children needed additional money or they had to become domestics or find other work.

Agreements made at the time of separation were difficult to change. Civil servants paid alimony varying from 50 to 200 *riksdaler* each year, probably half of the husband's income. Alimony at lower levels of society was intended to provide for no more than the wife's day-to-day needs and to help towards the costs of child rearing.

Child care and wives' requests for maintenance

Young, dependent children often remained with their mother after separation and divorce. But it was not uncommon for parents to decide that brothers and sisters had to live apart, as the father assumed responsibility for older children and the mother for younger ones, or girls became the mother's responsibility while boys stayed with their father. Occasionally, as in the case of Mons Lie, it also happened that fathers took sole care of the children. Some couples agreed on alimony for just a few years, until children reached a certain age usually 12 to 16.

Wives usually made requests for maintenance whether they had children or not. Only if the family was very poor was this issue avoided. Gisle Olsen and his wife Johanne from Eidsvoll in Eastern Norway, who was divorced by royal decree in 1793, merely wrote in their supplication that they had nothing to share and that in the future each of them would 'care for themselves'.³⁵

When poor people in Christiania petitioned for separation, the magistrate often made them set up a special agreement of future insurance. Gun Halvorsdatter for example, separated in 1808,

³⁵ Riksarkivet, Norge, Danske Kanselli, Norske innlegg, kongl. res.19.07.1793

should receive 12 shillings a week from her husband Syvert Syvertsen. She also kept the family's pig as an investment for the future.³⁶

The negotiation process in connection with separation and divorce was not isolated from the rest of society. Civil servants and judges did not want to make decisions that had as consequence that the community had to support more single women. The widow problem was already there. The authorities therefore showed a pragmatic attitude in helping couples reach agreement on the conditions for a divorce and it was important to ensure that the wife also got a proper share.

Final remarks

It was an open, rather secularized attitude to marriage and divorce in Norway in the early modern period, especially around 1790 and some years after 1800. The sources I have used did not reflect the ideal of patriarchal authority to a great extent. Instead complementary gender roles seem to have been an ideal both in and outside the courtroom. At least up to the 1730s young unmarried women had the opportunity to defend their sexual honor in court and have some compensation, in case their suitor broke his promise of marriage. Both sexes could demand a divorce. In case of marriage breakdowns wives were considered fit to take care of both children and property, just like widows. Women who sought separation and divorce were not punished economically by judges. But whether these women were able to obtain the rights and property awarded them, is more difficult to say.

³⁶ Oslo City Archive. Kristiania Magistrats Separasjonsprotokoll, 16.08.1803.

Zusammenfassung

Verhandlungen über die Eingehung einer Ehe, vor, während, nach (Eheversprechen, Ehegemeinschaft und Ehescheidung)

Im protestantischen Europa herrschte sowohl seitens des Gesetzes als auch der Bevölkerung Unsicherheit darüber, was eigentlich eine Ehe ausmache und darüber, ob der Bruch eines privaten Eheversprechens soziale und gesetzliche Folgen haben sollte. Diese Unsicherheit bedeutete manchmal, dass es notwendig war, ein Gerichtsverfahren und eine Eheverhandlung einzuleiten, und zwar vor Eingehung der Ehe.

Entgegen der allgemeinen Auffassung, standen sowohl Ehescheidung als Ehetrennung in gleicher Weise Männern und Frauen im protestantischen Europa in der frühen modernen Periode offen zu. Ehepaare konnten sich mit ihrem Fall, ihrer Uneinigkeit ans Ehegericht wenden. In gewissen Perioden und an gewissen Orten waren die Leute auch dazu berechtigt, nicht-kirchliche Trennungsklage und Scheidungsklage einzureichen. Im Zusammenhang mit der Auflösung der Ehe verhandelten die Leute sowohl über Sorgerecht für die Kinder als die Aufteilung ihres Vermögens und Eigentums. Mit anderen Worten: Ehepaare verhandelten über ihren Ehevertrag sowohl während und nach der Auflösung ihrer Ehe.

Über Eheverträge und eheliche Probleme wurde normalerweise dort verhandelt, wo die Leute wohnten und in der Privatsphäre, aber, wie schon erwähnt, wurden einige eheliche Konflikte auch in der Öffentlichkeit ausgetragen. In diesem Aufsatz befasste ich mich mit Eheprozessen, über die in der frühen modernen Gerichtskultur und der öffentlichen Verwaltung dieser Zeit verhandelt wurde. Ich interessiere mich für den Verhandlungsprozess sowohl seitens der gerichtlichen Behörden als auch der streitenden Parteien. Eine Hauptfrage ist: Was für eheliche Ideale beeinflussten in der gerichtlichen und öffentlichen Sphäre den Prozess der Eheverhandlung.

Familienhistoriker unterstreichen, dass entgegengesetzte eheliche Ideale während der modernen Periode aufkamen. Die eine Tendenz betonte Werte wie die patriarchalische Gewalt, den Gehorsam und die Unterordnung der Ehefrau, scharf abgegrenzte Geschlechterrollen und eine Doppelmoral mit Bezug auf die Sexualität; die andere Tendenz, Liebe, Kameradschaft, komplementäre Geschlechterrollen und eine einzelne Sexualitätsmoral. Ich werde mich geographisch auf Norwegen beschränken, da ich mich früher norwegischer Quellen im Studium der frühen modernen Ehe, Trennung und Scheidung bedient habe.

Ehepaare in Dänemark-Norwegen konnten sich mit ihrem Fall, ihrer ehelichen Kontroverse an ein Ehegericht wenden, und dieses war ein kirchliches Gericht oder ein Konsistorium.

Es gab zwei Hauptkategorien von den in diesen Gerichten verhandelten Eheprozessen: Klagen auf Heirat (die Erfüllung von Eheverträgen betreffend) Ehescheidungsprozesse.

Frauen, die in allerhand Heiratsprozesse verwickelt waren, verlangten dass sie der Mann heirate, wenn nicht, müsse er sie entschädigen. Eine sehr lange Zeit hindurch nach der Reformation sahen die Richter auf die mittelalterlichen Elemente des Gesetzes und fragten nur danach, ob sich das Paar zu heiraten einig gewesen sei. Wenn der Mann das nicht leugnen konnte, wurde er in einigen Fällen dazu verurteilt, Entschädigung zu zahlen. Klagen auf Heirat verschwanden aus den Archiven vom Jahr 1734 an wegen einer Verfügung dieses Jahres, das etwas ganz Neues brachte. Sie stellte fest, dass Männer einer verführten Frau nichts schuldig wären, und sie könnten sich nicht mehr beschweren, es sei denn, dass das Eheversprechen in schriftlicher Form vorläge.

Der am meisten zitierte Grund für Ehescheidung in den Gerichten war böswilliges Verlassen (Abwesenheit eines Ehegatten) und Ehebruch, die beiden gesetzlichen Gründe für eine Ehescheidung, die im dänisch-norwegischen Ehegesetz von 1582 angeführt sind. Die Erfolgsaussichten der Klägerinnen waren in Fällen von böswilligem Verlassen und Ehebruch fast 100% günstig. Gewalt, Missbrauch, eheliche Grausamkeit und gegenseitige Abneigung waren in den Augen des Gesetzes keine gültigen Gründe für eine Ehescheidung, und das Gericht genehmigte keine Möglichkeit für Ehescheidung aus diesen Gründen. Dennoch verbrauchten Konsistoriumsgerichte lange Zeit und Energie auf Prozesse, die vorwiegend mit solchen Problem verbunden waren. Viele dieser unordentlichen Fälle wurden gründlich untersucht das Ziel war die Aufrechterhaltung der sozialen Disziplin und die Bewahrung von Frieden und Ordnung in der ganzen Gesellschaft.

Das Gesetz bestimmte, dass Ehescheidung lediglich durch die Gerichte zu genehmigen sei, aber allmählich setzte sich eine Praxis durch, womit der König kraft königlicher Dispensierung eine Ehe auflösen konnte. In Dänemark-Norwegen war dieses Recht auf nicht-kirchliche Trennungs-und Scheidungsklage von dem letzten Jahrzehnt des 18. Jahrhunderts an von besonders großer Bedeutung. Nicht- kirchliche Gründe wie Abneigung, Gewalt und Verschwenden vom Geld der Familie wurden akzeptiert, wenn in einer Familie eine solche nicht-kirchliche Ehescheidung stattfand. Es herrschte in Norwegen eine offene, ziemlich weltliche Haltung zur Ehe und Ehescheidung in der frühen modernen Periode, besonders um 1790 herum und einige Jahre nach 1800.

Die von mir benutzten Quellen widerspiegelten nicht allzu sehr das Ideal der patriarchalischen Gewalt. Statt dessen scheinen komplementäre Geschlechterrollen ein Ideal gewesen zu

sein, und zwar sowohl innerhalb als außerhalb des Gerichtes. Wenigstens bis zu den dreißiger Jahren im 18. Jahrhundert hatten junge unverheiratete Frauen die Möglichkeit, vor Gericht ihre sexuelle Ehre zu verteidigen und eine gewisse Entschädigung zu bekommen, falls ein Freier sein Eheversprechen bräche. Beide Geschlechter konnten auf Ehescheidung klagen. Im Falle von Zusammenbruch einer Ehe galten Ehefrauen als völlig fähig, sich der Kinder und des Eigentums anzunehmen, genau so wie Witwen.

Übersetzung Tom Rundqvist