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Law and Politics in Swedish-Norwegian Union Law, 1814–1905 – an Elegy

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I. Geopolitics and the making of the Swedish-Norwegian Union 1814/15

The Napoleonic Wars dramatically changed the political boundaries of the Nordic countries and the system of state dependencies. Finland had been part of the Swedish Crown since the late Middle Ages but, as a result of both internal circumstances in Sweden and the 1808 peace treaty between France and Russia, Finland was occupied by Russia in and turned into a grand duchy (1809). This led to a coup d'état in Sweden, forcing the King into permanent exile. It also prompted the enactment of the 1809 Constitution and, in turn, eventually lead to the creation of a new royal dynasty headed by the French Marshal Jean Baptiste Bernadotte as Karl Johan (1810, King 1818). Norway had been a kingdom since the Middle Ages, but had become increasingly dependent upon the Danish Crown. The Union of Kalmar (1397) formally united the three kingdoms – the Swedish, Norwegian and Danish – under one monarch. In the early 16th century, Sweden left the union and Norway became a province under the Danish Crown. By the late 18th century Norway was a vital part of the Norwegian-Danish conglomerate state – one of the most effective and absolutist European regimes since 1660. As a result of the vicissitudes of the Napoleonic Wars, Denmark-Norway was forced into an alliance with France whereas Sweden became a member of the anti-Napoleon league. This changed the geopolitical position of Norway considerably.

As Sweden lost Finland to Russia, old ideas about binding Norway to Sweden were resurrected, as this would secure the Swedish western front and would ease the military problems posed by the loss of Finland. Through international treaties between Sweden and the Great Powers, Sweden promised to participate in the final battles against Napoleon as compensation for receiving Norway, which was then to be ceded from the Danish-Norwegian Crown to the Swedish. After a short war between Denmark and

Sweden in January 1814, the Treaty of Kiel (January 1814) was made to that effect. The Danish administration left Norway, but because the Swedish army was busy elsewhere, no Swedish representatives entered. The absence of Swedish representatives created a military vacuum. During spring 1814, the Norwegian elite, led by the Danish Prince, Christian Fredrik, took advantage of the situation: they hastily wrote the Norwegian Constitution of May 1814, which was then rather democratically enacted, thus creating an entirely new state – the Kingdom of Norway – and they elected Christian Fredrik as king. As the Swedish Crown built its claim to Norway on the Treaty of Kiel, which had been anticipated in international treaties between the Swedish Crown and the Great Powers, after a short war, Norway was forced to accept the union and, after a long negotiation process lasting between August 1814 and August 1815, was eventually transferred to the Swedish Crown.

Thus, as a result of international events and inter-state relationships, a number of legal documents were produced; these documents were to be debated for the rest of the 19th century by lawyers and politicians.¹ The fundamental debate addressed the impossible, but equally necessary, legal and political question: What was ›the true legal character‹ of the union between Norway and Sweden?

In order to answer this question, one had to interpret the long succession of documents beginning with the Swedish Constitution of 1809 and the above-mentioned 1814 Treaty of Kiel between the Swedish and the Danish-Norwegian Kings. Further relevant legal documents were those leading up to the enactment of the Norwegian Constitution of May 17, 1814 and the election of the new Norwegian king (Danish Prince, Christian Fredrik), who was tied to the constitution in the style of the revolutionary epoch. Then there was a turning point. In August 1814, the Swedish and Norwegian representatives signed the Peace Treaty of Moss, in which, within the frame of the Swedish-Norwegian union, the Swedish King accepted the constitutional autonomy of Norway based on its May constitution. The result was the abdication of the Norwegian king and a revision of the Norwegian constitution, enacted on the 4th of November, 1814, in which a number of new regulations were implemented to accommodate the coming union. Following, the Norwegian parliament elected the Swedish king as the new Norwegian king. In August 1815 the treaty between Norway and

1 E. HOLMØYVIK, The Theory of Sovereignty and the Swedish-Norwegian Union 1814, in: *Journal of the History of International Law* (2005) 137–156 (here 139–141).

Sweden was finalized in the *Riksakt*, which defined the legal content of the union to have common kings and common foreign policy.

Without doubt, the production of so many legal documents resulting from shifting geopolitical circumstances also produced an ambiguous legal foundation for the Swedish-Norwegian union. Indeed, until 1905 there were fundamental disagreements about the scope and character of union law. While some gave no credence to the idea of an autonomous union law, only recognizing the constitutional law of two separate nation states, others maintained that several independent union bodies existed. A particularly debated issue was the king's role. Given the legal sources, one could legally argue both for and against his position as a ›union king‹ in addition to his roles as Norwegian and Swedish king. Despite the debates, for the duration of the personalized rule of King Karl Johan (he died 1844) the legal problems of the union were kept at a political minimum. Norway had barely survived as an independent state and was in no position to quarrel with Sweden as to the scope of union law. Moreover, Sweden had not yet taken any serious interest in Norway. Gradually, however, the lack of a more comprehensive legal text defining the borders between the union and the two nation states became a challenging issue. As the personal rule of the King – who held the union together – diminished, the question of whether or not to strengthen the union as an independent entity arose. Over six decades there were three major proposals for a new union treaty (1844, 1870, 1898), but, for different reasons, they all failed in both countries. Since the union seemed to be more of a formal than of a real nature, when the union was peacefully dissolved in 1905 through a series of complicated legal operations, few missed it.

II. Union History: Perspectives and Interpretations after 1905

After 1905, Norwegian historiography forgot the union as an historical unit; instead its dissolution became a symbol of the triumph of nationalism and democracy.² In hegemonic liberal and social democratic historical research, the union was ideologically viewed as a hindrance for the realization of what had, in reality, already been achieved in May 1814, namely a national

² This Norwegian national interpretation of the union was posthumously presented to a German speaking audience in A. AALL, N. GJELSVIK, Die norwegisch-schwedische Union. Ihr Bestehen und ihre Lösung, Breslau 1912.

liberal constitution, which attained an almost essentialist quality. In this Norwegian variant of the »Whig interpretation of history«, the Swedish-Norwegian union was only understood as a vehicle for nationalism and little, if any, for unionism. The union had been an obstacle to overcome, not a possibility to develop. Thus, there is no Norwegian research that has looked at the union's history, i. e. a history of the union; rather, the only Norwegian research on the subject subsumed the union within Norway's general national history. In Sweden things are somewhat different. Since the late 1950s to early 1960s, there have been a number of important Swedish contributions to the history of the union.³ Because the union does not have the same historical significance in Sweden as in Norway and since the history of the union had been of minor importance for Swedish national self-understanding during the 20th century, this might seem surprising. This inherent detachment, however, was an important precondition for the production of such rich Swedish union research. In 2005 this trend culminated in the Swedish historian Bo Stråth's seminal book on the union, which is, in reality, its first realistic historical interpretation.⁴ The central issue of Stråth's book is the relationship between the weak institutional basis of the union and the process of political modernization during the 19th century in light of geopolitical trends. The union was built upon a strong personal monarchy that bound the two realms together, but the 19th century constitutional history of the two Scandinavian countries is the history of the constitutionalization of personal royal power and the parliamentarization of governments. As the union had no such bodies, could it survive? According to Stråth, it could not. But nothing was predetermined in 1815. If some of the plans to reform the union had been carried out, which was back then not entirely unlikely, the union might have survived and contemporary Scandinavia might have had another political structure altogether.

Also in 2005, Michael Stolleis interpreted the Swedish-Norwegian union as an example of the complex 19th century European landscape of inter-state connections and of »Staatenverbindungen« that dominated the European state system, contrary to what one would think in a century of rising nationalism.⁵ The central legal issues: state, sovereignty, union and nation, were debated everywhere, but nowhere as eagerly as in Austria and Germany. There the lawyers developed a specific legal discipline on this subject,

3 J. WEIBULL, *Carl Johan och Norge 1810–1814*, Lund 1957 and *IDEM*, *Inför unionsupplösningen 1905 – Konsulatfrågan*, Stockholm 1962, E. VEDUNG, *Unionsdebatten 1905*, Stockholm 1971.

4 B. STRÅTH, *Union och demokrati. De Förenade rikena Sverige-Norge 1814–1905*, Nora 2005; for the following summary, see, in particular, p. 19.

5 See M. STOLLEIS, *The Dissolution of the Union between Norway and Sweden in 1905: A Century later*, in: *Rett, nasjon, union*, ed. by O. MESTAD, D. MICHALSEN, Oslo 2005, 35–48 (in particular for the following citation 41–42). Cfr. also M. STOLLEIS, *Geschichte des öffentlichen Rechts in Deutschland*, II, 1800–1914, Munich 1992, 365–368 and 450–455.

which gained huge international renown, as the names of Jellinek and Laband testify.

Like Stråht, Stolleis also asks why the union between Sweden and Norway was dissolved in 1905. Stolleis sees the dissolution of the union as the »end point of once dominant Sweden« which, after 1905, became an ordinary nation state without a transnational realm. Stolleis also claims that the dissolution of the union was »the victor of national parliamentary democracy over the last remnants of the old monarchical principle«. Moreover, the debates on union states, which were so important all over Europe at the turn of the century, were, according to Stolleis, linked to the waning monarchical principle and the weakening of the remaining European empires, which had a strong impact on the geopolitical situation of Scandinavia.

These general themes loom through much of the Swedish and Norwegian legal literature of the 19th century dealing with the law of the union. From 1814/15 until 1905 there was a large and lively legal and political debate on the issues of nation, state and union. The legal sources were, as already mentioned, rudimentary. They included the central passages in the *Riksakt* (1815) concerning a) the existence of a specific union law regulated only through royal succession (§§ 2–3, 6–11), b) the King's competence in war and peace (§ 4) and c) a rather vague regulation on what became known as the Joint Council of State, which literally only stated that members of Swedish and Norwegian state councils would attend the same meetings on specific cases »involving common issues for both countries« (§ 5). These formulations were an invitation to debate the scope of union law in a legal field already furnished by two sophisticated national constitutions. Thus, lawyers were invited to interpret union law by drawing on international legal concepts, historical arguments, contemporary ideological concerns and more urgent political necessities. The following section elaborates on this issue.

III. Aspects of the Legal Science of Swedish-Norwegian Union Law

Although Sweden and Norway are neighbours, they had during the 19th century less in common than one would initially expect – even though the languages are similar. Sweden was an

aristocratically-led state and this resulted to significant social and political differences between Sweden and Norway, which was more egalitarian. In fact, Norwegian politics were always more democratic and liberal. The catchword of Swedish conservatives during the late 19th century – »the Norwegian infection« – is highly suggestive of the atmosphere and relations between Sweden and Norway during this time, as Sweden was worried that Norway's more liberal approach would ›rub-off‹ on its home politics. A central issue for historians has been whether these social and ideological differences were unbridgeable, making a more profound integration of the two states impossible, or, rather, if the differences were in fact surmountable, suggesting that they did not necessarily have to lead to the dissolution of the union in 1905.⁶ Whatever the most plausible historical interpretation, Norwegian legal scholars of the 19th century utilized these differences to argue against an expansion of the union law; they made specific arguments about historical national diversities, with implied references to Montesquieu and Savigny.⁷ Even though these differences seemed to be less important in the final decades of the union, the arguments continued to bear significant political weight in a progressively more nationalistic Norway. This is testified in the influential book *The Union* (1891); written by Sigurd Ibsen (son of Henrik Ibsen), this book emphasized national differences.

This raises the question: Were politics this legal literature's dominating force? Without a doubt, there was a close connection between the political attitudes of authors and their interpretations of union law. At the end of the 19th century four major positions existed in regards to the scope and character of union law, two from each country. The Swedish conservative nationalists maintained that Norway was legally subordinate to Sweden in the union whereas the Swedish liberal position argued for the most accepted model, namely equality between the two states within the union and the assertion of the existence of some union organs. The Swedish liberal position was quite similar to the Norwegian conservative position as they stressed the dogma of equality between the two states and the peacekeeping effects of the union. There were, however, differences amongst the Norwegian conservatives as to the existence of union organs.⁸ According to the Norwegian liberal nationalists, the union did not exist as an independent entity. Rather, they argued that it existed only as a particular function of

6 Bo Stråht favours the latter interpretation; see STRÅHT, *Union och demokrati* (n. 4) chp. 11.

7 See for references, also for the following text, D. MICHALSEN, *Nasjon eller union? Norsk unionsrettsforskning 1814–1905*, in: *Rett, nasjon, union* (n. 5) 211–274.

8 Cfr. HOLMØYVIK, *Theory of Sovereignty* (n. 1, here 148–151 on different Norwegian authors ar-

guing about the ›right‹ to a separate Norwegian Foreign Ministry).

the two national constitutions. While this legal opinion was contrary to state practice, it was not without some legal foundation.

Finnish legal historian Lars Björne has maintained that this literature amounted to legal-political journalism rather than traditional legal literature.⁹ He uses the expression »rättskamp« (*law-struggle*) literature to signify this type of legal writing concerning issues of national importance that was so widespread in the Nordic countries at this time. For instance, »rättskamp« literature concerning Finland's position to Russia, Iceland's position to Denmark, Denmark's position to Schleswig and Holstein, Sweden's position to Norway and to the Åland islands, and Norway's position to Sweden and, later on, to Greenland can be found. Territorial losses or insecurities produced legal literature that addressed national political aims in legal language.

To disagree with Björne's argument would be wrong, but it must be noted that these legal authors were also bound to a certain legal logic and a particular legal vocabulary, which effectively tied them to a typical form of legal argumentation and, in turn, required responses of a similar nature. Furthermore, most of the legal scholars were already engaged in what we may call »an operational legal science«, actively pursuing all kinds of legal and political works. Accordingly, the differences between traditional legal science and that of union law were quite fluid. One should also note that the union literature was first published in newspapers and pamphlets reaching a very large audience, thus expanding the political public sphere and, consequently, contributing to a more democratic legal debate.¹⁰ This was, paradoxically, legal activism in an age that had declared the ideal of autonomous legal science.

The major concepts of nationalism and unionism formed the legal arguments in both Norway and Sweden. The models used by Norwegian legal scholars to interpret the »true character« of the union can be summarized as either »nation-nationalist« or »union-nationalist«. These terms express the two main ways in which Norway's legal place in the union could be understood: »a unique nation« or »a unique nation in a union«. This reflected, in many ways, the difference between the liberal and the conservative image of the union. In Sweden an alternative model was also launched.¹¹ From the late 1880s a distinct Swedish nationalism (and economic protectionism) developed in response to Norwegian radical anti-unionism. This Swedish nationalism was initiated

9 L. BJÖRNE, Den nordiske rättsvetenskapens historia, Vol. III, Lund 2002, 111, cfr. 18–19. For what follows, see L. BJÖRNE, De nordiska rättskampernas långa sekel, in: Rett, nasjon, union (n. 5) 177–196.

10 For Sweden: S. HADENIUS, Fosterländsk unionspolitik, Stockholm 1964, passim. Cfr. D. MICHALSEN, The Making of a Public Legal Sphere, in: Juristische Zeitschrift

ten in Europa, ed. by M. STOLLEIS, Frankfurt a. M. 2006, 29–54.

11 STRÅHT, Union och demokrati (n. 4) 294 sq.

by historian Oscar Alin in his major work *Den svensk-norska unionen* (1889). The main legal and historical argument in Alin's book was that the above-mentioned Treaty of Kiel represented the primary legal foundation of the union, whereby the Swedish state (and not the King in person) had taken possession of Norway in 1814. This made Sweden the principal member state of the union and it gave Sweden the right to veto Norwegian constitutional acts that concerned the union. By this, Alin and his followers constructed the revised Norwegian Constitution of November 1814 as not only a Norwegian constitution but also as an international treaty between Norway and Sweden. The Conservative party quickly adopted this interpretation, an action which did nothing to ameliorate the tense political atmosphere within the union.

As we have seen, historical arguments abounded in this legal literature. The large number of union events that occurred and union documents that were published before the Treaty of Kiel (1814) formed various plausible legal stories about the two nations and the union. At the same time, these historical-legal sources were condensed into sources of law used in specific legal interpretations. Not only ›History‹, but also different concepts of law became sources of law. In particular, the concept of ›union‹ provided an inexhaustible source of arguments capable of supporting different perspectives. To some extent the legal scholars of this time operated with two competing meta-principles regarding their interpretations of union law, either a tacit loyalty to the union or a tacit loyalty to the nation; by the end of the 19th century only a few adhered to the former.

Generally speaking, this kind of argumentation, which referred to history and concepts, corresponded to the German model of legal reasoning – that of combining historical and systematic interpretation. The Scandinavian authors were acutely aware of this model, but to what extent German legal science influenced research into union law is debatable. In 1883 the Swedish author Nils Höjer criticized those who always referred to German authorities for guidance, saying ›one should not submit the decisions of Nordic legal conflicts to the German catheter.‹¹² But as the conflict grew more virulent at the turn of the century, German legal science became an indispensable source of arguments.

As Stolleis has shown, there were plenty of reasons for Norwegian and Swedish authors to take the ›Staatenverbindungen‹

12 N. HÖJER, *Statsförbundet mellan Sverige och Norge*, Visby 1885, 173.

literature into account, as this literature suggested a number of ways to »impart the right form to the political forces.«¹³ The lawyers discovered that the problems of the Swedish-Norwegian union were, in fact, of European nature. Georg Jellinek's famous »Die Lehre von den Staatenverbindungen« (1882) came as a shock to the unionists, as he inferred from the notion of indivisible sovereignty that, contrary to the official politics of the two countries, both Norway and Sweden had the right to a separate Foreign Minister.¹⁴ But other authors gave different answers. Furthermore, international law practice was utilized to give flesh to the rather bare bones of the *Riksakt*, a practice which could easily be used in favour of a unionist interpretation.¹⁵

IV. Swedish-Norwegian Union Law, 1814–1905 – an Elegy

The vigorous legal and political Norwegian and Swedish debates regarding nation, state and union between 1814 and 1905 came to an abrupt end when the union was dissolved. In an open and expansive legal public sphere, the very best of the two countries' legal scholars had produced piles of books, pamphlets, articles and speeches. As leading interpreters of the »true« character of the union they had become major public figures. Suddenly this entire literature became irrelevant, as the institutional conflicts that impelled its writing dissolved. Countless volumes of legal texts amounted to nothing overnight – they could not be utilized by successive generations of scholars and, likewise, there are almost no references to them in later legal works. To come across this literature today is akin to rediscovering an unexpected cultural artefact from a distant past. As a legal historian one almost feels obliged to write an elegy in their honour.

During the 20th century there were only nation states and no unions in the Nordic region. The dissolution of the unions in this area was, as Stolleis maintains, the victory »of national parliamentary democracy over the last remnants of the old monarchical principle«, whether these last remnants were to be found in Copenhagen, Stockholm or St. Petersburg.¹⁶ But the union structures of these states did not necessarily facilitate communication between legal science and legal actors. As late as the 1860s, Swedish and Norwegian legal scholars had to inform themselves of legal

13 STOLLEIS, Dissolution of the Union (n. 5) 43.

14 For this HOLMØYVIK, Theory of Sovereignty (n. 1) 147–148.

15 L. M. B. AUBERT, Norges folkeretslige Stilling, Kristiania 1897, 192 sq.

16 See n. 5 above.

changes in their mutual neighbouring countries by reading, for example, Mittermaier, who was the closest one came to a European ›legal online‹ in the 19th century.¹⁷

Towards the end of the 19th century Nordic legal cooperation began to slowly emerge, despite deep seated national conflicts of a different kind. Unsurprisingly, the leading scholars of union law fought most eagerly for Scandinavian and Nordic legal cooperation. 1905 represented a momentary blow to this development,¹⁸ but quite soon after cooperation continued, resulting in important common Nordic legislation on private law. Consequently, it is in this body of law that one may trace the true legacy of the Norwegian-Swedish union law literature.

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¹⁷ References for this diagnosis O. A. BACHKE, in: Ugeblad for Lovkyndighed (1862) 281.

¹⁸ See evocatively about this momentary breakdown, S. GAGNÉR, Hagerups Zeitschrift, in: IDEM, Abhandlungen zur europäischen Rechtsgeschichte, ed. by J. RÜCKERT, M. STOLLEIS, MAXIMILIANE KRIECHBAUM, 2004, 615–750 (in particular 639–651).