The theory of sovereignty and the Swedish-Norwegian union of 1814

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1. Introduction

In the history of legal science, few notions have been the subject of more controversy than sovereignty. During the last half of the nineteenth century and towards World War I the focus of international law was on the state, and sovereignty was the basis upon which legal scholarship built international law. Perhaps in no area or discipline was sovereignty more controversial than in the discussions concerning the various unions of states dominating the international community at the time. One cause for this dissension among scholars, or perhaps is it more correct to define it as the source of dissension, were various notions of the character and nature of sovereignty. With regard to the unions of states one could question whether sovereignty prohibited an intermediate or supranational association in the form of shared government institutions. Was it possible for two or more states to found a mutual government organ without losing their status as sovereign states? Contemporary legal theory produced at least two conflicting notions regarding the contents and scope of sovereignty in this matter. On one side we have those who regarded sovereignty as a relative and divisible phenomenon restricted by the state’s obligations with respect to other states and international law. On the other side we find those who conceived sovereignty as an absolute and indivisible phenomenon. This division was also evident in Norwegian legal theory during the union debates in the two decades before the dissolution of the union in 1905.

Legally speaking, the Swedish-Norwegian union was a creation of international law. It was an union of sovereign states. The legal foundation of the union was a treaty, the Riksakten of 1815, between the sovereign states of Norway and Sweden. By the writers of international law, the Swedish-Norwegian union was defined as a real union. This term described a formal legal bond between two monarchical states in which the monarch, as a person, was one and the same in both kingdoms. Although absolut-
ism had partially surrendered to constitutionalism, the king still retained many of his prerogatives in the Norwegian constitution of 1814 and even more so in the Swedish constitution of 1809. The king’s personal competences were substantial, particularly in foreign affairs. In the first decades of the union, the executive power of the state was the king in person. By sharing the executive power, the union as a creation of international law thus gained state law connections.

In the decades before and after 1900, legal constructions like the Swedish-Norwegian union were of particular interest for the writers of constitutional and international law. Such unions of states challenged the understanding of the content and scope of sovereignty. With regard to the Swedish-Norwegian union, this challenge came in the shape of a Norwegian claim for a separate Foreign Ministry in the years between 1885 and 1905. In this context, two distinct notions of sovereignty emerged in Norwegian legal theory. It is hardly surprising that these notions would follow the political division in Norway between the conservatives who advocated a strong union between Norway and Sweden, and the liberals who opposed the union, if not explicitly. Among conservative jurists like professor Bredo Morgenstierne, sovereignty was regarded as divisible or relative. Sovereignty was thus a sum of rights or competences which could, to some extent, be transferred to the union as a distinct corporate legal subject. This notion of sovereignty was challenged by liberal jurists like Nikolaus Gjelsvik who maintained the notion of sovereignty as an absolute and indivisible phenomenon. For them, a joint Foreign Ministry was a violation of both Norwegian and Swedish sovereignty, and only by keeping their government organs strictly separate could these states remain sovereign under one king. This position was widely influenced by the distinguished German professor Georg Jellinek and his monograph “Die Lehre von den Staatenverbindungen” published in 1882. By introducing the works of Jellinek into the political controversy in Norway, his theories were then applied in a specific political and legal matter. In this context, the introduction of Jellinek serves as a link to the discussion regarding sovereignty and the state in international legal theory.

In this article I shall examine the conflicting notions of sovereignty expressed in Norwegian legal theory during the debates over the union and a separate Foreign Ministry. In this context I will emphasise the influence of international legal theory, and in particular the doctrine of Georg Jellinek, with regard to sovereignty and the understanding of unions of states. With this I hope to examine elements of the Swedish-Norwegian union in a wider international and theoretical perspective. First though, I will discuss the historical and legal background the union.

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4 For a wider perspective, see Michael Stolleis’ article “The dissolution of the Union between Norway and Sweden in 1905: A Century Later”, included in the forthcoming Rett, Nasjon, Union, see Michalsen 2005.

5 In this context Jellinek’s doctrine was also discussed in Swedish legal theory. See C.A. Reuterskiöld’s monograph from 1896 Om Stater och Internationella Rättssubjekt.