

The birth of modern Norwegian police law

- A comment on John Reidar Nilsen's article in Bergen Journal of Criminal Law and Criminal Justice no. 2 2022

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Abstract

In the article 'Norwegian police law, crime prevention and its (need for more) democratic legitimacy' John Reidar Nilsen argues that Norwegian police law has lacked democratic legitimacy, and in some respects still does. According to Nilsen the patriarchal form of police law in the Danish-Norwegian absolute monarchy continued to make its mark on police law in the Norwegian constitutional state, resulting in a lack of democratic legitimacy. Although questions concerning the democratic legitimacy and legality of police law should be discussed, and Nilsen on several points makes interesting contributions to such a discussion, his historical narrative does not give an accurate description of the features of police law in the transition from autocracy to the Norwegian constitutional state. Police law and the legal understanding of it changed throughout the autocracy and from the latter part of the 18th century, it was shaped in line with new European ideas about state, popular government, and legal order. Instead of seeing the first understanding of police law in the Norwegian constitutional state as a legacy from the autocracy, it should rather be seen as the birth of modern Norwegian police law.

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1. Introduction

In the article ‘Norwegian police law, crime prevention and its (need for more) democratic legitimacy’ John Reidar Nilsen argues that Norwegian police law lacks democratic legitimacy, and that this has been a persistent problem from the Danish-Norwegian absolute monarchy to the present.¹ The problem started, Nilsen argues, when the patriarchal understanding of police law in the Danish-Norwegian monarchy continued to make its mark on police law in the Norwegian constitutional state. This patriarchal dimension became a feature of Norwegian police law through the 19th century and up to the present, resulting in, at least to some extent, a lack of democratic legitimacy. It thus seems that Nilsen’s argument is based on the notion that police law had the same patriarchal characteristics throughout the autocracy, and that these influenced the understanding of police law in the Norwegian constitutional state, which resulted in a type of police law that did not live up to the new Constitution’s requirements for democratic legitimacy and legality.

Although questions concerning the democratic legitimacy and legality of police law should be discussed, and Nilsen on several points makes interesting contributions to such a discussion, his historical narrative does not give an accurate description of the features of police law in the transition from autocracy to the Norwegian constitutional state. The police law and the legal understanding of it changed throughout the autocracy and from the latter part of the 18th century, it was shaped in line with new European ideas about state, popular government, and legal order. These ways of understanding the state, law, and police were adopted by the leading Norwegian jurists who considered them to be in line with the Constitution of 1814 and its demands for democracy and rule of law. This was due to an understanding of these principles and their consequences for police law which was quite different from the understanding of democratic legitimacy and legality today.

In the following I will elaborate on some main features of this development.² First, I will give a brief overview of police law in the Danish-Norwegian absolute monarchy (2). Then, I will move on to the shift in German and Danish understanding of state, law, and police from the latter part of the 18th century (3), before I look at how Norwegian jurists adopted this understanding in the beginning of the 19th century (4). Finally, I will argue that instead of seeing the legal understanding of police in the

1 Nilsen (2022) pp. 3-28.

2 I have described different aspects of the development in several publications, see for example Heivoll (2018). The development has also been studied from other perspectives, particularly from a political point of view and with an emphasis on reforms, see Ellefsen (2018) and Ellefsen (2021).

early Norwegian constitutional state as a legacy from the autocracy with patriarchal features, it should rather be understood as the birth of the modern Norwegian police law (5).

2. Police law in the Danish-Norwegian absolute monarchy

The police in Norway were established in the largest cities from the 1680s and developed throughout the 18th century. Its organisation and tasks were defined in police regulations, with a Danish regulation on the administration of the police from 1701 as a model.³ According to this regulation, the chief of police in Copenhagen should have due supervision that all police ordinances were complied with by all persons, and this purpose was also used as a basis in the regulations for the police in Norwegian cities.

The chief of police and his subordinates were to fulfill their purpose by executive, sanctioning and to some extent regulatory means. The police were to patrol and carry out inquisitions and controls in the urban community. It pursued breaches of police regulations in a wide range of areas, ranging from religious legislation and trade regulations to rules on vagrancy and begging. In several of these areas, the population could also lodge a complaint with the chief of police, who treated the complaint as a police matter, and handed down judgment in the police chamber court. The sanction was often a small fine, but other disciplinary sanctions were frequently used, such as transfer to a house of correction or physical punishment of various kinds. More serious breaches of the police regulations were brought before separate police courts. The chiefs of police also issued a type of local regulations to make the enforcement of centrally issued police regulations more effective.

None of these police activities were considered as law enforcement. The judicial authorities were responsible for sentencing criminal offenses described in the law book. It was premised that the police should assist these authorities somewhat in their activities, such as arresting offenders and carrying out some preliminary investigations, but this was not what defined the role of the police in society.

The activities carried out by the police throughout the 18th century were part of the absolute monarchy's policy and management of society, with particular focus on life and business in the largest cities. The purpose of the state was understood as welfare and security, and the police system was part of this rationality. Through their activities, the police were to contribute to well-functioning and orderly urban communities.

3 Forordning om politiens administrasjon 22. oktober 1701.

The enforcing, judging, and regulating activities carried out by the police were a form of administrative disciplining of society and citizens.

From the latter part of the 18th century this police system became subject of debate in academic circles. In these debates, the distinction between the judicial authorities and legal system on the one hand and police authorities on the other, was reformulated within the framework of new European understandings of state, governance, and society.

3. A shift in the legal understanding of police from the latter part of the 18th century

Nowhere else in Europe was state governance and administration studied and debated as thoroughly in the 18th century as in the German states. This was done in natural law, state law and in criminal- and procedural law, in a form of early administrative law known as police law and in a separate administrative science, called cameral- and police science.

These studies and debates became influenced by new ideas and perspectives from the latter part of the 18th century. It became increasingly common to move away from seeing welfare as the main goal for state governance and instead focus on security. The motivation for this shift towards security varied, but for many, it was a result of a new understanding of state, law, and government.

One of the main features of this shift, was a new perspective on the relationship between the judiciary on the one hand and what we might call the administrative apparatus on the other. New forms of political philosophy and natural law became important influences on these debates. One of the most influential authors, Immanuel Kant, argued in his political writings that the state should be a legal order, and that this was the primary purpose of the state. This should also become the primary goal for the state's organs, namely, to secure the state as a legal order. But Kant, and others, assumed that to do this, the state must also be able to strike down on actions that could pose a threat to it, even if they do not actually violate the state as a legal order or an individual legal right. One of the primary responsibilities of the administration lay here, namely, in stopping and clamping down on various types of actions that could pose a danger to the legal order. Although they were not legal regulations, the state should be able to issue police regulations with such a purpose, which the police institutions had to enforce.

Many German jurists argued that there should be a sharp distinction, institutionally and functionally, between the judiciary responsible for enforcing the law, and the

police responsible for enforcing police regulations and preventing violations of the law. Many held that both state organs should contribute to secure the state as a legal order, but in different ways. It became common to assert that the state should enforce the law through the courts and the legal system, while the police, on the other hand, should ensure that violations of the law did not occur.

Jurists in Denmark-Norway followed German debates closely. One of the most influential professors at the University of Copenhagen in the 1790s, J. F. W. Schlegel, distanced himself from earlier understandings of state, law and police. Influenced by German authors, especially Kant, he assumed that the purpose of the state was to establish and maintain a legal order, where the judicial authorities had the direct responsibility for enforcing the law, while the police authorities only had an indirect responsibility. The state could issue police regulations, which were meant to discipline the population from committing dangerous and immoral acts, and which could conceivably threaten the state as legal order and the individual's legal rights. Other authors made a similar distinction and connected it more explicitly to the actual existing legislation and other positive legal sources. Even though he criticised the notion of a sharp distinction between justice and police maintained by several German lawyers, the highly influential jurist A. S. Ørsted, also promoted a new understanding of the relationship between justice and police, where the role of the police became more bound up with securing the law. Another jurist and professor, J.L.A. Kolderup-Rosenvinge, published a textbook in 1825 on police law, where police law was understood primarily as the law of the police force.⁴ According to Kolderup-Rosenvinge, the police should contribute to secure the state as a legal order, but only indirectly. Both the judiciary and the police had preventive functions, he believed, but while the judiciary had a preventive function through enforcement of the law, resulting in a psychological prevention, the police' prevention was of a more general and immediate nature.

4. The Norwegian jurists' understanding of the police's purpose, function, and authority after 1814

In the Norwegian constitutional state that emerged from 1814, it was the higher civil servants, especially the jurists, who became the ruling class in politics, legal development, and administration. They had studied in Copenhagen at the time when the new understanding of state and governance had emerged. In books, lectures, debates and legislation, the Norwegian jurists used this understanding as the basis

4 Kolderup-Rosenvinge (1825).

for their own conceptions of the purpose and function of the police. Like Danish and German authors, they defined the role of the police by drawing a boundary between the activities of the judicial authorities and the police. The role of the police should be to secure the state as a legal order. This should be done not by enforcing the law, but by ensuring the safety of the state and society and prevent violations of the law.

The influential professor and politician A. M. Schweigaard wrote about the role of the police in several contexts and defined this by separating it from the role of the judicial authorities, and by emphasising prevention as the central function. In his lecture on administrative law given in the early 1840s, and which circulated in transcript among students for several years, he maintained that while the judiciary should enforce the law, the police should enforce police-regulations, which were given not to protect natural rights, but to prevent breaches of such rights and which the police therefore should enforce for the sake of good custom, order and general security.⁵

In the Constitution of 1814 it was decided that the Parliament should adopt a new Norwegian criminal and civil code within a few years.⁶ When the Criminal Code was enacted in 1842, it was primarily a law for the judicial authorities, and based on a distinction between the courts, responsible for adjudicating cases of direct legal offences, and the police responsible for enforcing police offenses and thus contributing to preventing criminal acts, that is, genuine legal offences. In the preparatory work on a Norwegian Police Penal Code and Procedures Act for police cases (which never were enacted), these understandings of the purpose and function of the police were also used as a basis. In several laws, regulations and instructions given during the 19th century the police as responsible for preventing crime was emphasised and given authority to carry out this task in an efficient and reassuring way.

5. The birth of modern Norwegian police law

Nilsen writes that '[...] The exercise of public authority is legitimate when it is based on the consent of the citizens [...].’ And, with reference to Markus Dubber, he assumes that '[...] legitimate government is self-government’, and that '[t]he state’s use of punishment is only legitimate if it is considered “self-punishment”’.⁷ It is somewhat unclear whether this is intended as a descriptive characteristic of actual government or a normative statement about how this should be understood. If it is intended as an assertion of actual state governance and exercise of public authority, it is too narrow.

5 Schweigaard (1842).

6 Article 94 in the Constitution.

7 Nilsen (2022) p. 11.

Although the modern state is commonly seen as a political association based on the consent of the people secured through law, it is also a purpose-driven association where considerations of security play a central part.

If the transition from absolute power to the Norwegian constitutional state shows us anything, it is precisely this tension in the modern state, between freedom and law on the one hand and purpose-driven security needs on the other. To make freedom real, the jurists in the beginning of the 19th century envisioned the state as a legal order. This was to be ensured through a judicial system responsible for enforcing violations of the law, while the police were to contribute more indirectly, by removing dangers that could lead to violations of the law. Despite natural law losing importance in legal argumentation and the concept of law itself changed from the second half of the 19th century, this preventive function continued to be highlighted as the central role of the police.

In this way, the understanding of police's function and authority that emerged in the early 19th century can be seen as the birth of modern Norwegian police law and as normative basis for the institutional and functional apparatus that became the modern Norwegian police from the second half of the 19th century and onwards. It was through this understanding that the notion of the police's purpose, function and authority was adapted to the new era and a free constitution. In many ways, the police law was, in this way, transformed in accordance with principles of popular sovereignty and rule of law, but in a different manner than people associate with the rule of law today.

This birth of modern Norwegian police law occurred when leading Norwegian jurists started distancing themselves from the autocratic understanding of police at a principled level. Under the absolute monarchy the purpose of the police was to implement the monarch's policies and expectations of a functioning and orderly society, especially through disciplinary measures. After 1814 the police's primary task should be to secure the new Norwegian constitutional state as a legal order defined by the people through the parliament. The contribution to the rule of law or the legal order was not to be direct, such as the contribution of the judicial authorities, who were supposed to enforce the law. The police's contribution was indirect, namely, to remove dangers that could threaten the law and legal order. The police had to do this within the framework of the Constitution and parliamentary legislation, but since in principle one could not give an exhaustive description of the dangers that could threaten the legal order and neither could say anything exhaustive about how the police should proceed to avert these, any exhaustive legal regulation of the police's authority could not be given. The essential feature of the modern police authority was its new purpose and function. Legitimate police activity was the activity that

was necessary to realise the new purpose and function of the police: to protect the Norwegian constitutional state and legal order through enforcement of police regulations and other police measures.

References

Legislation

Forordning om politiens administrasjon 22. oktober 1701.

Literature

Ellefsen H B (2018) *Politiens politikk og politikkenes politi*, University of Bergen.

Ellefsen H B (2021) Embetsmannsstatens politipolitikk 1814-1842, *Norsk historisk tidsskrift* 100 (2).

Heivoll G (2018) Om det historiske grunnlag for læren om politiets generalfullmakt, in eds. Blume, P, Vogt H and Volqvartsen M *Ret, magt og historie: festskrift til Henrik Stevnsborg*, Djøf Forlag.

Kolderup-Rosenvinge J L A (1825) *Grundrids av den danske politiret – til brug ved forelæsninger*, Kjøbenhavn: Gyldendalske Boghandlings Forlag.

Schweigaard A M (1842) *Forelesninger over den administrative ret*.