LIMITATION OF SOVEREIGNTY UNDER THE NORWEGIAN CONSTITUTION

BY

TORKEL OPSAHL

Professor of Law,
University of Oslo

1. THE CONSTITUTION OF NORWAY

"The Basic Law of the Kingdom of Norway" is one of the oldest written constitutions still in force. It was enacted by a constituent assembly in the spring of 1814, after the ending of a union with Denmark which had lasted for several centuries. The transfer to Sweden of the Kingdom of Norway by the Danish King, following an unfortunate war, was not accepted by the Norwegians. The independence of the country was unilaterally declared, the "Basic Law" (hereinafter referred to as the Constitution) was adopted and a new monarch was elected. Nevertheless a new, short war with Sweden, followed by negotiations, led in the same year to the establishment of the Swedish-Norwegian union under the Swedish King. But throughout these events, the Constitution was preserved intact, apart from certain amendments made necessary by the new union. For its time, the Constitution was liberal and democratic—more so than was, for instance, the Swedish constitution of those days.

During the 19th century constitutional problems played a prominent and often dramatic part in Norwegian public life. An internal development towards a parliamentary system of government had its breakthrough in 1884. Full political voting rights were attained gradually and were achieved in 1898 for men and in 1907 and 1913 for women. Constitutional problems also dominated the struggle for equal rights of the two countries within the union, a struggle which ended in 1905 when Norway unilaterally declared the union ended.

Once political democracy and national independence were established, constitutional development continued in a less dramatic way. And ever since 1814 the country's external relations have mostly been peaceful, save for the Second World War and the German occupation of 1940–45.

Numerous constitutional amendments have been adopted at various times; as a curious token of formal veneration all of them are couched in the form of Danish used in 1814. Incidentally, the

Danish and the Norwegian languages are so closely related that the text is as a rule easy to understand. The text of the Constitution is brief, however, and the amendment procedure (art. 112) is strict and slow. Therefore, constitutional practice and liberal interpretations prevailing in political conflicts have, even more than formal amendments, gradually changed Norwegian constitutional law into a modern instrument of government.

2. SOVEREIGNTY AND INTERNATIONAL COMMITMENTS

From the brief outline given above of the history of the Constitution it will readily be understood why art. 1 holds a particular position in the national consciousness:

> "The Kingdom of Norway is a free, independent, indivisible and inalienable realm. Its form of government is a limited and hereditary monarchy."

Originally the first part of this provision, which is usually seen as a proclamation of the country's sovereignty, was based on a well-founded fear of domination by a single foreign power. It was hoped to secure in law the independence which in other constitutions is implicitly taken for granted. During the union with Sweden, however, it was differently worded and never became fully effective. And thereafter, for a long period, Norway was taking part in a development of international cooperation, unknown and inconceivable in 1814, on an ever-increasing scale without any new, constitutional amendment. Objections based in art. 1 were seldom heard and were never considered decisive, the general attitude being that this provision did not make Norway's sovereignty more unalterable than that of other countries.

The outlook of the Norwegian people and their governments has been internationally orientated. Because of the economic structure and the geographical location of the country, such an attitude has been commonly felt to be in the national interest. Thus, Norway has accepted far-reaching international obligations, both legally and politically—for instance, and notably, through membership of the United Nations, OEEC (now OECD), GATT, NATO, the Council of Europe, and EFTA; not to mention a great number of more special commitments laid down in many other treaties and international institutions in which the country

participates in a quite active manner, and obligations arising from accepting compulsory international jurisdiction in the field of arbitration and adjudication.

As long as these international commitments are not, in relation to those of other participant states, extraordinary or one-sided, constitutional problems have not been felt to be acute,[1] even when such commitments include the acceptance of binding decisions made by majority vote of international organs, and deviations from the principle of the strict equality of the participants. Without any amendments, even very important limitations of the nation's freedom of action under international law have been considered compatible with the Constitution.

On the other hand, it has been uncontested that the national authorities could not, without violating the Constitution, decide that Norway should enter, e.g., a federation of states under a common constitution, even if that constitution provided for the equality of the members and thus might be seen as a complete "pooling" of their sovereign, national powers. Moreover, no constitutional amendment in this respect has been contemplated so far, nor is one likely to be introduced in the foreseeable future.

The important differences of opinion have concerned new forms of cooperation between states, going beyond the international obligations on the intergovernmental level, but not reaching as far as federation. With a view to such forms, the issue of Norway's sovereignty was repeatedly debated from the early 1950s onwards, resulting in an important constitutional amendment of March 8, 1962.

3. THE AMENDMENT OF MARCH 8, 1962, AND ITS LEGISLATIVE HISTORY

On March 8, 1962, a new article of the Constitution, no. 93, was adopted by the national legislature, the Storting, by 115 votes to 35.[2] It is worded as follows:

> "In order to secure international peace and security, or in order to promote international law and order and cooperation between

[1] Certain problems, however, have lurked in the background. For instance, the requirement of art. 26, para. 2, of the Constitution that new international commitments which are "especially important" must have prior approval by the Storting may be difficult to satisfy with the powers given to some international organs in which Norway participates.

[2] *Stortingsforhandlinger* 1961–62 (Parliamentary Records) vol. 7 b, p. 2384. *In favour:* 68 Labour, 29 Conservatives, 12 Liberals, 6 Christian People's Party, *Against:* 6 Labour, 2 Liberals, 16 Centre Party (Agrarians), 9 Christian

> nations, the Storting may, by a three-fourths majority, consent that an international organization, of which Norway is or becomes a member, shall have the right, within a functionally limited field, to exercise powers which in accordance with this Constitution are normally vested in the Norwegian authorities, exclusive of the power to alter this Constitution. For such consent as provided above, at least two-thirds of the members of the Storting—the same quorum as is required for changes in or amendments to this Constitution—shall be present and voting.
>
> "The provisions of the preceding paragraph do not apply in cases of membership of an international organization, the decisions of which are not binding on Norway except as obligations under international law."

The preceding discussions had been thorough and protracted. They concerned, partly, the question of what was already allowed by the Constitution and, partly, the need for and the conditions of a reform. Although the discussions now belong to history, they are still illuminating.

Ever since 1952 proposals for a similar amendment had been pending in the Storting, having originally been submitted by four Norwegian members of the Council of Europe.[3] The proposals were dropped or postponed several times. There was no widely felt sense of urgency, for two reasons. In the first place Norway had adopted the "functionalist" attitude towards European cooperation, as contrasted with the "federalist" view prevailing on the Continent. These issues were unknown to the public at large. Only a few politicians took interest in a debate confined mainly to professional circles. Note had been taken of the adoption of the new Danish Constitution of 1953, with its art. 20 on international cooperation, as well as similar provisions in Franec, Germany and the Netherlands. Secondly, and equally important, the liberal tradition of constitutional interpretation was already well established, and had been much strengthened in the first postwar period. The focus of the debate, therefore, was on the steps which were already permitted under the Constitution in force. How far could one go?

People's Party, 2 Socialist People's Party. Of those against, some wanted more precise criteria, some wanted stricter requirements or other changes. This would have meant postponement, which in itself might for political reasons have been convenient for some. But hardly anybody came out openly against every provision of this kind. On the other hand, a sense of political urgency among many of those in favour indicated that not all of them were satisfied with the text of art. 93 as adopted.

[3] Dokument nr. 11 in *Stortingsforhandlinger* 1952, vol. 5, forslag (proposal) nr. 17.

In a pioneering public document from 1951 Mr. Hiorthøy,[4] then a chief official in the Ministry of Justice, had reexamined constitutional doctrines as to international organization. He discussed the many important developments in practice and their theoretical impact. The document took the position, then quite radical, that art. 1 had no special relevance to the matter. Such constitutional obstacles to international organization as might exist were to be found in other provisions and principles. A theory was advanced that the decisive issue was how far the national authorities might *delegate* their powers under the Constitution. Although Mr. Hiorthøy did not, of course, maintain that delegation to national organs and delegation to international organs were legally identical, it was objected, notably by Professor Castberg,[5] the leading authority on constitutional law, that for various reasons this was on the whole not a good approach to the problem. In the view of Castberg, a liberal attitude to the concept of sovereignty as laid down in art. 1 must be the guiding principle. The outlook for further development at the time did not necessitate constitutional amendment. On the contrary, everything which was politically possible at the time could be done under the existing order; but the proposal might create new doubts and lead to discussion as to the constitutionality of certain commitments, perhaps to the application of new requirements, stricter than those ordinarily applying to treaties. Castberg warned against the formal approach which would hold unconstitutional any encroachment from outside, no matter how limited, upon internal self-government, even though ever-widening international obligations were accepted.

From these two main opinions two schools of thought developed. One of these favoured an amendment, while the other opposed it as being both unnecessary in view of the established liberal view of sovereignty and, at the same time, too far-reaching in the form in which it was submitted.

It is worth noticing that the first school, despite its rejection of the view that art. 1 was an obstacle in itself, considered "supranational" arrangements as being unconstitutional in the absence of any amendment providing for such "delegation". The other opin-

[4] Stortingsmelding nr. 89, 1951, in *Stortingsforhandlinger* 1951, vol. 2 c.

[5] Castberg, "Konstitusjonelle spørsmål som oppstår ved statens deltagelse i internasjonale organisasjoner", *Jussens Venner*, series I no. 3, pp. 1, 4 ff. See also his letter to the Committee of the Storting on Foreign and Constitutional Affairs of September 4, 1956, quoted in *Stortingsforhandlinger* 1961–62, vol. 7 b, p. 2223.

ion, stressing the alterability of the concept of sovereignty and the established liberal interpretation of the Constitution, was more willing to accept supranational powers within the framework of existing constitutional law. Even the European Coal and Steel Community, Norwegian membership of which was in 1954 only a very distant theoretical possibility, was not at that time held by Professor Castberg to be outside the permitted area.[6]

The debate on this topic slackened for some years, without any general consensus having been obtained. For a while nothing important happened. The proposed amendment of 1952 was not adopted, but was redrafted in 1956 in several alternative forms, which were held in readiness against such time as a change in the political situation should raise the issue again. But it was fairly typical that as recently as 1958 Norway's Ambassador to NATO, Mr. Boyesen, warned against trying to meet the problems in advance by a broad amendment.[7]

Nevertheless, the idea of such an amendment gradually gained wider support in political quarters. On May 27, 1960, the Parliamentary Committee on Foreign and Constitutional Affairs, under the pressure partly of negotiations for the control of armaments (particularly a ban on nuclear tests) but especially of the free-trade negotiations between the EEC and EFTA, unanimously declared an amendment of this kind to be needed. The Committee, with one dissentient, recommended that a proposal then pending be adopted that year.[8] Some members, however, had wished to include a stricter majority requirement as a condition for limitations of sovereignty, namely three-fourths, four-fifths or five-sixths of the votes in the Storting, against the proposed two-thirds. Because of the rules governing the amendment procedure (art. 112) this wish could not be heeded until the next session; and the possibility was faced of a swift adoption of the then pending proposal, followed by a new amendment the next year. The international negotiations referred to had no immediate results,

[6] *Op. cit.* note 5 *supra*, p. 6.

[7] Boyesen, *Nasjonal suverenitet et avlegs begrep* (lecture May 3, 1958, to Det Norske Studentersamfund) Oslo 1958, p. 14. This is open to the objection that the time-consuming procedure of regular constitutional amendment would make *ad hoc* solutions difficult. In a later, comprehensive work by Colban, *Stortinget og utenrikspolitikken* (The Storting and Foreign Policy), Oslo 1961, pp. 234 ff., it was also recommended that one should use *ad hoc* amendments, combined with a simplification of the regular procedure of amendment under art. 112 of the Constitution.

[8] The Committee report is found as "Innstilling til Stortinget", Innst. S. nr. 292, 1959–60, *Stortingsforhandlinger* 1959–60, vol. 6 a, pp. 609 ff.

however, and on September 28, 1960, the Committee therefore reversed its position.[9] The Storting, on September 29, concurred in rejecting the proposals;[1] and thus the issue was deferred until all the various alternatives could be voted upon in the next session. In their 1960 version, these new alternatives were submitted by representatives of all parties in the Storting except the Communist party (which had only one member in the assembly).[2] It is not unlikely that one of these alternatives might have been adopted in the next session without much public discussion,[3] had not a new and generally unexpected political development taken place.

The British decision in the summer of 1961 to apply for membership of the European Economic Community (EEC) came as a surprise, and in the subsequent debate on Norway's position, the general opinion was that Norway could not follow suit without an amendment of the Constitution.[4] Whether such an amendment was desirable under these circumstances soon became an issue on which those favouring Norwegian membership of the EEC and those opposing it took different sides. The alternative which was finally adopted was recommended in committee on February 21, 1962,[5] with two dissentients. A protracted parliamentary debate took place (March 6, 7 and 8, 1962), with the result reported above.

The very variety of the points of view advanced prevents a succinct presentation of the problem as posed in these discussions inside and outside the Storting. They took place under considerable pressure of time because of the urgency felt by the Government, which wanted to have the issue settled in order to clear the road for Norway's application for membership of the EEC.[6] Political factors thus became predominant. New alignments

[9] Innst. S. nr. 302, 1959–60, *Stortingsforhandlinger* 1959–60, vol. 6 a, p. 625.

[1] *Stortingsforhandlinger* 1959–60, vol. 7 b, pp. 3663–80.

[2] Proposals by Alv Kjøs et al., of September 29, 1960, in Dokument nr. 13, 1959–60, *Stortingsforhandlinger* 1959–60, vol. 5, forslag nr. 10.

[3] In the debate of 1962, this was suggested by several speakers in the Storting, among others by Henningsen, see *Stortingsforhandlinger* 1961–62, vol. 7 b, p. 2290, and Langlo, p. 2309.

[4] Dokument nr. 3, 1961–62 in *Stortingsforhandlinger* 1961–62, vol. 5, contains expert opinions to this effect by Professor Castberg and Professor Andenæs, by the Legal Department of the Ministry of Foreign Affairs, and by the Department of Legislation of the Ministry of Justice.

[5] Innst. S. nr. 100, 1961–62, *Stortingsforhandlinger* 1961–62, vol. 6 a, pp. 137 ff.

[6] The proposal that Norway should apply was approved by the Storting in April, 1962. The application was filed in May that year. No real negotiations

appeared. Some politicians who had earlier supported the amendment now spoke against it.[7] In the elections to the Storting held in September 1961, the Labour Government had by a very small margin lost its absolute majority, but it continued in office. During the election campaign, the European issue and the proposed art. 93 had been consciously played down by the main political parties, which either were not yet ready to take up definite positions or did not want too much debate, partly because of the uncertainty as to the reactions of the electorate. But soon after the election, political circles and public opinion in general became intensely preoccupied with these issues.

On the legal side, few new arguments appeared. But the old ones were reexamined, almost exclusively with reference to the EEC question, and there was now a deeper understanding and a new feeling of the importance of the matter.

This time expert reports,[8] including that of Professor Castberg, generally concurred in the opinion that it was not art. 1, or the idea of sovereignty, which was at stake. What made amendment in view of the EEC necessary was that a number of the provisions in the Rome Treaty bestowed upon the institutions of the Community powers which, under other articles of the Constitution, must be regarded as belonging exclusively to the national authorities. Membership of the EEC was thus held to conflict not with art. 1, but with these special provisions. The question whether the proposed amendment would eliminate these conflicts was not very actively discussed, the answer being generally taken for granted.[9]

This line of argument shows that, despite all the liberality of interpretation, the notion of "sovereignty" still has a strong grip not only on public opinion, but on legal opinion as well.

took place. A new application was, after approval by the Storting, submitted in 1967, but so far without any result.

[7] This was noted several times in the debate. See, e.g., *Stortingsforhandlinger* 1961–62, vol. 7 b, p. 2203 and p. 2206.

[8] Especially those contained in Dokument nr. 3, 1961–62, see note 4, *supra*, p. 159.

[9] The expert reports regarded the Rome Treaty in relation to the then existing Constitution, and did not discuss the proposals for amendment, or did so only briefly (Andenæs in Dokument nr. 3, 1961–62, pp. 16 ff.). Still, they formed the main basis for the adoption of art. 93. This caused minority voices in the Storting to ask for a further expert investigation of the new art. 93, *Stortingsforhandlinger* 1961–62, vol. 7 b, p. 2385. Apparently as a kind of belated reaction by the Government to this wish, reports requested in 1967 from Castberg, Andenæs and the present writer were submitted to the Storting in Dokument nr. 10, *Stortingsforhandlinger* 1966–67, vol. 5.

It is somewhat curious how it can be maintained that the "sovereignty" or "indepenence" (whatever it may mean) of the state (art. 1) is *not* at stake, while, admittedly, the independence of all its organs *is*. Is the state legally distinguishable from the sum of powers exercised by its authorities? In support of their view, some of the experts referred to the prevailing conception of "the Six" as still being "sovereign states". This argument will not be contested here, but it merely shows that this terminology is widespread, not that it is accurate. Besides, the point is not so much how these states were considered at that time, when the system of the EEC had only partly come into effect. More interesting would be the situation at the end of the transitional period, if the supranational powers of the EEC were then effectively applied. The repeated crises and the chronic uncertainty as to the future of the EEC, however, have meanwhile made this perspective less immediate. Only time can show how long the emotional attachment to the *word* sovereignty will stand in the way of a clearer terminology. In Norway, the line of argument upholding art. 1 as unimpaired by any action under art. 93 has been politically significant.[1] Personally, I do not attach much importance to art. 1, under present-day conditions, but I find it difficult not to regard the amendment, and a membership of the EEC based on it, as a modification of this article, as well as of the special provisions dealing with the powers of the various state organs.

Leaving the problems of terminology aside, the EEC issue, which prompted the adoption of art. 93, has probably shown, more clearly than was commonly realized before, that the main legal difference is the following one. The arrangements entered into by Norway earlier involved only the acceptance of international decision-making binding *for* the state of Norway.[2] Art. 93 envisages, in the first place, decision-making power to create obligations immediately binding *within* the state of Norway, that is, without having to be transformed into national law by acts of the Norwegian authorities. Such encroachments on internal *self-government* as are provided for in the Rome Treaty had no basis in the Constitution before.[3] Another, less noticeable, but equally

[1] See, for instance, statements in *Stortingsforhandlinger* 1961–62, vol. 7 b, by Korvald, p. 2304, Lionæs, p. 2324 and Langlo, pp. 2309 f.

[2] Some qualifications—in my view unimportant—to this statement are discussed by Castberg in Dokument nr. 3. 1961–62 pp. 5–7.

[3] This analysis of constitutional law is not invalidated by the fact (1) that the former type of obligation may very well be heavier than the latter, depending on its substance; nor by the fact (2) that the various elements of legal sovereignty may be of little political value to a small nation; still less by the argument (3) that encroachments on self-government are contemplated only in favour of organs where Norway will take part ("common exer-

relevant point concerns the very *capacity* to act, not the freedom to act, under international law. Certainly, the liberal view of sovereignty had accepted far-reaching restrictions on this freedom. But it might be argued with considerable force that the capacity to agree to such restrictions in relation to states outside the organization had never been envisaged before. There was no precedent in Norwegian practice for leaving this capacity to other than national organs.[4]

The main object[5] of art. 93 was to remove the constitutional obstacles to acceptance of forms of cooperation which would encroach upon the legal self-government of Norway under municipal law and/or the legal capacity of Norway to act under international law. On the other hand, the provision itself has given rise to new problems, some of which have been a cause of disagreement. We now proceed to consider some of the questions likely to arise under art. 93 as adopted. They may arise in much the same way in other constitutions of a similar structure.

In practice, the amendment has not yet been applied. Two attempts at entry into the European Economic Community have been fruitless. A few other possibilities have been debated. In the course of 1969, new prospects for Scandinavian integration may bring the question up again.[5b] Meanwhile, our discussion remains to some extent academic.

cise" and "pooling" of sovereignty). Earlier, all these considerations in law had to give way to the simple argument that the organs which according to special clauses in the Constitution (notably arts. 3, 17, 25, 26, 28, 49, 75–79, 88, 90) were empowered with legislative, executive and judicial functions, could not be replaced by other organs without constitutional amendment. Although a certain delegation of powers without express constitutional basis has been recognized in practice, this has always applied to authorizations to national organs for the time being, not authorizations to international ones. The Rome Treaty irrevocably places power under municipal law in the hands of Community organs whose decisions the national authorities can neither instruct, control, nor overrule. If arguments (1)–(3) could not make these arrangements constitutional without the new amendment, they of course tend to reduce some of the concerns connected with its adoption.

[4] This is what the members of the EEC are to do in the field of trade agreements, according to the Rome Treaty: Treaty Establishing the European Economic Community of 25 March 1957, art. 114.

[5] A secondary reason for its adoption was *clarification*, *Stortingsforhandlinger* 1961–62, vol. 7 b, Bondevik, p. 2235, Petersen, p. 2237, and even *restriction* as compared to the earlier practice was mentioned in the debate, Garbo, p. 2211, Bergesen, p. 2298.

[5b] However, a comprehensive plan for more traditional forms of cooperation in the economic field, not necessitating the use of art. 93, was recently presented in a Nordic expert report (made public in July, 1969) on "Udvidet nordisk økonomisk samarbejde", *Nordisk udredningsserie* 1969: 11, Stockholm 1969. (Footnote added during the second proofreading.)

4. HOW SOVEREIGNTY MAY BE LIMITED

A. General Characterization

Generally speaking, the area for voluntary limitation of sovereignty in our time may conveniently, if somewhat imprecisely, be characterized as that of *supranational organization*.[6] This idea has been taken up in Norway and underlies art. 93; it is not applicable to treaties at large, or to international organizations as such, nor to limitation or surrender of sovereignty in favour of another state or a federation of states.[7]

Although the provision avoids the term "supranational", the substance which justifies this characterization is clearly stated in the text, both in the operative sentence in para. 1, and in the *ex tuto* limitation in para. 2. This is further illustrated by the background already described. The influence of other, modern European constitutions containing similar provisions is obvious.[8] For a closer interpretation, parliamentary records of the debate preceding the adoption of the amendment afford some guidance. Other *travaux préparatoires* are scarce.[9] But indirectly, the earlier development described above is quite important here, too.

B. Parliamentary Sovereignty and the Essence of the Amendment

Under a doctrine of absolute parliamentary sovereignty exercised by ordinary majority vote, the situation is much simpler than under a constitution which, like that of Norway, has the status of

[6] This term and its ambiguities have been much discussed in the literature. For an attempted definition, see Opsahl in "Suverenitet og overnasjonale organer", *Internasjonal Politikk,* Oslo 1962, p. 228. It seems worth while to distinguish between a supranational *status* and supranational *powers.*

[7] Many speakers in the Storting expressly made the last reservation, *Stortingsforhandlinger* 1961–62, vol. 7 b, among others Lyng, p. 2275, Lyngstad, p. 2282, Langlo, p. 2310.

[8] In its recommendation before the 1960 session, the Parliamentary Committee argued that the preferred alternative was the one closest to the Danish provision, Innst. S. nr. 292, 1959–60, *Stortingsforhandlinger* 1959–60, vol. 6 a, p. 611.

[9] The procedure of constitutional amendment does not in practice secure an adequate advance discussion of the legal implications, in puzzling contrast to the ordinary legislative procedure in Norway, see critical remarks by Opsahl in Dokument nr. 10, 1966–67, p. 18. Legal writers have subsequently tried to fill the gap. On art. 93, see besides reports cited *supra,* Fleischer in *T.f.R.* 1962, pp. 205 ff., 1963, pp. 71 ff., and in *Jussens Venner* (serie Y), 1963, pp. 74 ff., Opsahl in *T.f.R.* 1962, pp. 391 ff., Eide in *Lov og Rett* 1963. pp. 211 ff., Castberg, *Norges Statsforfatning,* 3rd ed., Oslo 1964, vol. 2, pp. 135 ff., and Hambro in *Recueil d'Etudes de Droit International en hommage à Paul Guggenheim,* Geneva 1968, pp. 557 ff.

a *lex superior*. But even in the latter case, limitations of the sovereignty of the national assembly in practice may be seen as a question not of substance, but of form. The Constitution itself may in due form be amended by the Storting, and by it alone.

In any discussion of the power conferred upon the Storting under art. 93 one should therefore bear in mind that the essence of the reform is to introduce a new *procedure*. It is common to assume that the amendment has also changed the substance of the powers of the Storting. This is not quite correct; whatever the Storting may do under art. 93 by a *three-fourths* majority, it might also have done before,[1] and still may do, alternatively as the sole master of the Constitution under art. 112, by a *two-thirds* majority in the form of a regular constitutional amendment. For this however, it is a requisite that a proposal to that effect shall have been pending for at least one year before the Storting was elected. It is true that one Storting cannot for this reason act as a constituent assembly alone, and that therefore this alternative is, strictly speaking, not within its "own" powers. Such a proposal according to art. 112, must be submitted, printed and published within the stated time limit, but it cannot be discussed or voted upon until the first session after the election, and a decision must be taken during the first three years of the four-year period.

A few supplementary remarks should be made here. Art. 112, which governs constitutional amendments in general, contains not only procedural provisions, but also the following clause: "Such amendment, however, must never contradict the principles embodied in this Constitution, but merely relate to modifications of particular provisions, which do not alter the spirit of this Constitution. ..." This clause may be seen as an attempt to limit the possibility of constitutional change in *substance*. But it is deprived of the effect which probably was originally intended, owing to its vagueness and consideration of historical precedents, combined with the fact that the Storting is in practice the sole judge of its power in this respect. The judicial control of the constitutionality of the acts of the Storting, customarily recognized in other respects, has never been exercised with regard to the constitutional amendments themselves and may be left out of the discussion. This clause may, of course, be invoked and make an impression in the debate on constitutional amendments. But with the adoption of the new art. 93, this argument has once and for all been removed from the discussion of any particular arrangement under that article.[2] This

[1] This was also mentioned in *Stortingsforhandlinger* 1961–62, vol. 7 b, by Stray, p. 2205.

[2] See also Dons in *T.f.R.* 1968, p. 231.

> is politically important: an argument based on "spirit and principles" might have gained some support in public and parliamentary opinion in the discussion on Norway's joining a particular organization. But this was not felt as a strong argument against the adoption of general provisions pursuing such honourable objectives as the securing of "international peace and security" and the promotion of "international law and order and co-operation between nations" (art. 93). The parliamentary debate preceding the adoption illustrated this point very well. Although the question as to the advisability of joining the EEC that underlay the proceedings was often discussed and obviously influenced the vote of some representatives, it was time and again retorted, and not without effect, that this was not the issue to be decided,[3] and that a rejection of art. 93 would be a reactionary attitude not worthy of Norwegian traditions as a nation championing the cause of international progress.[4]

The net effect of the reform is thus that the *strict time* requirement and the other clauses of art. 112 have been replaced by the *stricter majority* requirement of art. 93. Therefore, although it does not seem to be commonly realized, a failure to obtain the three-fourths majority immediately for a specific arrangement under art. 93 does not prevent a two-thirds majority from adopting the same proposal in the next period, when only the formal requirements of constitutional amendment are observed.

Art. 93, therefore, offers a general clause *allowing*, but *not prescribing* a different procedure for constitutional reform in this particular field, instead of referring each particular case of supranational organization to regular constitutional amendment.

C. The Procedure Analysed: Some Weaknesses of a General Nature

Action under art. 93 is a matter for the Storting in plenary session.[5] In practice, all members or their alternates are likely to

[3] *Stortingsforhandlinger* 1961–62, vol. 7 b, e.g. by Petersen, p. 2238, Garbo, p. 2190, Petersen, p. 2177, Lyng, p. 2175, Hønsvald, p. 2199, Lionæs, p. 2321.

[4] *Stortingsforhandlinger* 1961–62, vol. 7 b, Lionæs, p. 2324, in slightly different words.

[5] Decision in plenary session also applies to ordinary treaty approval (art. 26) and constitutional amendment (art. 112), but not to legislation (arts. 76–77), where the Storting divides into two chambers, the Odelsting and the Lagting. The use of plenary decisions even without express basis in the Constitution, in areas outside formal legislation, e.g., for taxation and appropriations, is among the most important of customary constitutional practices. Whether based in the Constitution or not, acts of the plenary, apart from regular constitutional amendments, cannot as a rule replace formal legislation. This has some consequences as to the effect of art. 93, see *E.a., infra.*

be present on such important occasions, so that 113 of the 150 votes will be necessary for a decision.[6]

The three-fourths majority requirement may seem strict, even undemocratic.[7] Its justification may be sought in two considerations: first, if opinions are more equally divided, this fact in itself may be felt as a warning against a decision which departs, perhaps radically, from settled constitutional principles; second, when abandoning, in this area, the time requirement and thereby the influence of the voters prescribed for constitutional amendment, it was felt by some that by way of compensation a higher degree of parliamentary consensus should be required.[8] Both of these considerations might seem to gain in strength from the fact that party discipline may conceal disagreements within the six parties represented, if not between them. Still, the procedure seems to have its weaknesses.

Procedural requirements which, in representative democracies, depart from simple majority decisions, may generally be of several kinds: procedures intended to secure a well-reasoned, carefully prepared decision (e.g. repeated adoption, etc.); those intended to safeguard an element of direct democracy (e.g. referendum); and those mainly intended to make decision difficult (qualified majority).[9] Art. 112 contains a little of all of these elements.[1] In contrast, art. 93 lacks guarantees as to careful decision-making[2] or popular approval, in which respects the political mechanisms have

[6] The *quorum* rule of two-thirds, corresponding to the rule for constitutional amendment, means that half of the membership (3/4 of 2/3), or 75, may be sufficient under art. 93. But this is merely theory. When the Storting, shortly after the adoption of art. 93, decided in 1962 to approve the Norwegian application for membership of the EEC, the voting was, quite significantly, exactly 113 in favour, 37 against. Opposition to the new application in 1967 was smaller. These decisions in favour of opening negotiations were not made under art. 93. This provision only regards the later stage: ratification.

[7] *Stortingsforhandlinger* 1961–62, vol. 7 b, Henningsen, pp. 2290 f.

[8] *Stortingsforhandlinger* 1961–62, vol. 7 b, Langlo, p. 2310.

[9] Cf. Ross, *Dansk Statsforfatningsret,* 2nd ed., Copenhagen 1966, vol. I, pp. 159 f.

[1] It may, however, be argued that they are not effective, for the following reasons. The regular elections do not bring constitutional issues home to the voters as well as does a referendum. The practice of submitting a great many alternative proposals blurs the issues still further. And since no discussion on the submitted proposals takes place in the first period, the time requirement does not *secure* the maturing of the decision. An easier constitutional amendment procedure was favoured by the Labour Party in 1947, but did not receive the necessary two-thirds vote under art. 112.

[2] Remarked in *Stortingsforhandlinger* 1961–62, vol. 7 b, by Kjeldseth Moe, p. 2214. The procedure is also discussed by Hegna, p. 2255, Stray p. 2314, Aarvik p. 2325.

to be relied on, to my mind not too confidently. By way of compensation it only has the majority requirement, a mere difficulty-creating provision and as such a poor substitute for the above-mentioned guarantees.

Strong demands for a *referendum* on the EEC issue were answered in 1962 by a qualified promise on behalf of the Government to arrange a consultative referendum when the EEC negotiations (later suspended) had been completed. Such referenda are neither envisaged nor prohibited by the Constitution, and they have been resorted to before in a few cases.[3]

This compromise solution posed a number of difficulties which cannot be discussed here, and it was viewed with distrust in many circles, though for very different reasons. Still, it was commonly accepted as being, in the prevailing circumstances, the only feasible concession to needs which were widely felt.

Although art. 20 of the Danish Constitution of 1953 has been regarded as closely related to the Norwegian art. 93, there are striking differences as to these procedural features. The Danish provision has an even stricter majority requirement, five-sixths of the members of the Folketing. But if this majority is not obtained, a *binding* referendum is offered as an alternative, if the proposal has obtained the simple majority needed for ordinary legislation and if the Government persists with the proposal. If the referendum then does not reject the bill, the latter is adopted. There is some inconsistency between these alternatives because of puzzling details in the requirements,[4] but in principle this might seem to be a better solution than the one adopted in Norway. The consultative referendum envisaged in 1962 would not secure a democratic solution, because the three-fourths majority would also be needed.

Instead of a binding referendum as an alternative to the qualified majority, Norway will have the time-consuming, formal procedure of amendment to the Constitution as the only remedy against the undemocratic rule of a minority of little more than a

[3] Concerning the dissolution of the union with Sweden in 1905, and the establishment of national monarchy, in the same year; as well as twice in the 1920s concerning the prohibition of liquor.

[4] Cf. Ross, *op. cit.*, vol. I, p. 411: The very strict five-sixths rule goes far in demanding *positive support*, while the alternative shows that adoption is possible provided the *resistance* is not strong. In extreme cases, only a few members of the Folketing may have voted in favour, while a number sufficient to constitute a quorum, has abstained. The act will then be considered adopted, even if a majority of the participants in the referendum, though not the required 30% of all registered voters, vote for its rejection.

quarter of the representatives. In the meantime, the next election will have to serve as a substitute for a referendum, but as such it is unsatisfactory: a right of dissolution of the Storting does not exist,[5] so that harmful delay cannot be avoided. And the issue will not be put squarely to the people, but may easily be submerged in a mass of ordinary election topics. Moreover, a minority of little more than one-third under art. 112 still may prevent a solution which is desired by the Government as well as by a clear majority both among the people and among the representatives, who in their persistence in the face of delays and obstacles have demonstrated the permanence of their position.

The importance of these procedural problems from a general viewpoint of constitutional policy should be realized. It is not unlikely that, from now on, institutional changes and the corresponding constitutional reforms may become more in demand in the field discussed here than they would under the traditional procedure of art. 112. Therefore, art. 93, although a special provision in relation to art. 112, may become of greater practical importance than the latter.

D. The Description of Supranational Powers

a. Once the need for such a special procedure has been accepted, it is necessary to describe the substantive conditions for its application. The description will be of importance in constitutional law in two directions, "downwards" and "upwards": a delimitation must be drawn, on the one hand, against arrangements which may be entered into by an ordinary treaty[6] and, on the other, against "unconstitutional" arrangements, i.e. those which would require a formal constitutional amendment.

A comparative study of constitutions which have provided for

[5] Pending proposals for constitutional amendment on this point were rejected—as earlier—in 1968, *see Stortingsforhandlinger* 1967–68, vol. 7 c, pp. 4164–67. A proposal to amend art. 93 was rejected in 1967, see Innst. S. nr. 126, *Stortingsforhandlinger* 1966–67, vol. 6 a, pp. 230–31, and *Stortingsforhandlinger* 1966–67, vol. 7 b, p. 3362.

[6] This "lower limit", seen from the other side, was prominent in the Norwegian discussion on how far one could go in the period before the amendment was adopted (3, *supra*). It is not quite clear whether the adoption of art. 93 was intended to *restrict* the practice of the ordinary treaty-making power (see note 5 at p. 162, *supra*). This question will not be discussed here. See, however, Eide, *op. cit.*, concerning a case discussed in Innst. S. nr. 149, 1962–63, and Fleischer in *Jussens Venner* (Serie Y), 1963, pp. 85 ff. The latter author maintains that it is not necessary to apply art. 93 for the acceptance of supranational powers, i.e. with immediate effects in Norway, if they are not substantial.

the acceptance of limitations of sovereignty by supranational authorities would no doubt reveal important similarities, implicit or explicit. We shall now look at a few questions which, although arising in this context as points of interpretation of the Norwegian provision, may have to be asked in a similar way elsewhere also.

The Norwegian provision partly states the purposes and extent of limitations of sovereignty in rather flexible terms. Further, it expresses or implies some conditions which impose true restrictions upon these arrangements.

b. Objectives indicated in terms such as peace, security, legal order and cooperation, may not easily be invoked as barring any particular arrangement conceivable in practice. The same goes for the term 'international organization".[7] Some people have held that regional organizations, especially closed ones, are not "truly" international. But in Norway it has been clearly assumed that some of these regional bodies, in particular the EEC, may qualify under art. 93,[8] as well as world-wide ones.

In countries like Norway, where a judicial control of the constitutionality of acts by state organs is recognized as the general rule, this control must in principle extend even to the interpretation of such flexible terms. But in practice, the political judgment exercised by the Storting on these points is unlikely to be overruled by the courts.

c. The history of international integration indicates the inevitability of dynamism: there will either be expansion or stagnation. This introduces an element of uncertainty which constitutional provisions cannot prevent. But a clear need has been felt for limiting the extent of the supranational powers and thus the consequences of entry. It could be met in various ways.

Art. 93 has chosen to make the reservation that powers must be "within a functionally limited field". Opinions have differed greatly concerning the meaning of this reservation, which has been supposed by many to be the main brake on international integration. Nevertheless it does not really tell us very much. It does not state whether the functions of the supranational authori-

[7] E.g. Andenæs in Dokument nr. 3, 1961–62, p. 16.

[8] The question whether the EEC for other reasons does not qualify, was perhaps settled by the adoption, cf. remarks in *Stortingsforhandlinger* 1961–62, vol. 7 b, by Stavang, p. 2295, or at least soon thereafter, cf. Opsahl in Dokument nr. 10, 1966–67, pp. 18–20.

ties must be narrow or could be wide, only that they are to be limited. This must presumably mean that they cannot be stated too vaguely. The treaty must define the powers with some certainty. *How* wide they can be, so long as they are clear, cannot be read out of, or into, this provision. It is a "standard". Originally, there were few facts to elucidate its intentions.

There is evidence to show that the drafters of the provision in 1960 had in mind particularly such arrangements as might become necessary to settle the relations *between* the EEC and EFTA. Further, the prospects in connection with inspection for disarmament, etc., were held out (3, *supra*). Membership *of* the EEC was not considered at that time. At the time of the adoption doubts had been voiced, mainly by the minority, concerning an area so wide as that covered by the Rome Treaty. Art. 235 of the Treaty, especially, was regarded as very far-reaching. According to an interpretation which has since seemed questionable,[9] this article was read as authorizing an exercise of powers regarding the economic field as a whole. The majority nevertheless seemed to be willing to allow an interpretation af art. 93 which would cover this wide scope, although some declared that they would not understand it in this way.[1] This too, however, is in the opinion of the present writer a question in which the majority of the Storting must in practice exercise a final, political discretion.

Many spokesmen, from both the majority and the minority, have said that they will not consider a "political union"—whatever that term may imply—to be within the scope of art. 93.

It might have been easier to state the scope of this standard if there had existed a general attitude, or precedents, regarding what a "functionally limited field" should mean. As it is, we face the perspective of a gradual development. What other states are willing to do will probably be the most decisive consideration.

d. The question of limiting sovereignty in this way may arise in at least five types of situations:

First, the creation of new powers for existing, traditional organizations, already joined by the state under a regular treaty (United Nations, Council of Europe, etc.).

Second, the joining of organizations already established by

[9] Cf. Opsahl in Dokument nr. 10, 1966–67, pp. 24–26.

[1] For instance in *Stortingsforhandlinger* 1961–62, vol. 7 b, by Offerdal, p. 2306.

other states with such powers (as the EEC issue presented itself to Norway in 1962 and 1967).

Third, the augmentation of the powers of such organizations later on (e.g. as a member of EEC in the future).

Fourth, the creation, together with other states, of entirely new organizations with such powers (e.g. on a Nordic basis).

Fifth, the merging of several existing organizations into a more comprehensive arrangement.

A state faced with any of these situations will usually contemplate a full membership status. But there are exceptions. Constitutional provisions of the type discussed here raise the question whether supranational powers could be given to organizations of which the state is *not* a full member. This, of course, depends on the individual provision. Usually they require or imply participation in the exercise of the powers. Therefore, such powers cannot easily be given to an organization with which the state only has a treaty (e.g. a trade agreement), without taking any part in the activities of its organs. A status of *association* can be organized in such a way that in fact a new organization is created, e.g. with an association council exercising the powers in question. Then the problem is solved. If not, it could be argued that the arrangement would be unconstitutional.

In Norway, it seems to be the natural reading of art. 93, and one in line with its purpose, to require membership and membership rights. A status of association not giving Norway any participation in the exercise of the organization's powers in respect of Norway would not appear to be within the scope of art. 93.[2]

Every step taken along any of the five roads listed above requires a new decision under art. 93. Each step must be "within a functionally limited field", but as stated earlier, this clause in itself is likely to be considered as quite flexible.[3] In the event of a series of successive steps, the limitation may become rather formal, especially if the powers gradually transferred are concen-

[2] Cf. Andenæs and Opsahl in Dokument nr. 10, 1966–67, p. 13 and pp. 29–30; see, however, remarks by Dons in *T.f.R.* 1968, p. 233.

[3] Thus one of the minority speakers in the Storting characterized the position as follows: "Without presenting the issue to the people, the Storting will have the power to give up the sovereignty of Norway bit by bit—not the whole sovereignty at once. Each time it must be a functionally limited field. I might ask: Into how many functionally limited fields is it necessary to divide the whole of the sovereignty of Norway? At any rate, it will be quite a large bit we intend to give away the first time." *Stortingsforhandlinger* 1961–62, vol. 7 b, Undheim, p. 2216. (Author's translation.)

trated in a regional grouping. Political opposition is then more likely to arise than in the case of transfers to different, specialized organs with a universal membership. But it may be overcome by the gradualist approach so far practised by successive Norwegian Governments. There is room for interesting political manoeuvres with a view to maturing an opinion in favour of integration. In the last few years, however, the political situation in Europe has had the effect of postponing these issues. Since 1968 a new initiative for closer Nordic cooperation has given the development a new turn.

e. The points so far discussed may be said to depend in practice on political judgments. But the application and effects of limitations of sovereignty are further defined by certain constitutional considerations, to which we now turn. They are more exact, although perhaps of less practical importance. Parallel problems seem bound to arise in other countries.

Art. 93 is part of a context, the constitutional law of Norway. It makes reference to this context in two ways. Positively, it deals with powers which "are normally vested in the Norwegian authorities"; and, negatively, it may not be applied to "power to alter" the Constitution. These crucial reservations, which are often relied on in public debate, call for analysis.

f. The international organization may exercise powers which "in accordance with this Constitution are normally vested in the Norwegian authorities". This wide description includes legislative, executive and judicial functions, limited only by the Constitution itself. Nevertheless, it leaves some important points unsettled.

It has been stated as a guiding principle for the interpretation of the corresponding constitutional provision in Denmark, art. 20, that it only permits the substitution of international organs for national ones but does not authorize an arrangement which would be unconstitutional even in the case of a national organ.[4] Such a point of view might give rise to certain doubts. For instance, powers which are constitutionally reserved to the legislature, i.e. powers which cannot be delegated to other national organs, might not then seem to come within art. 93. Other conceivable (but not necessary) applications of such a theory would be, e.g., that legislative acts by an international organ could never

[4] Ross, *op. cit.*, vol. I, pp. 407 ff., who has, however, somewhat modified his statements in the first edition (1959) pp. 348 ff.

be permitted to override acts of the national legislature; that the powers "delegated" under art. 93 would have to be freely revocable at any time, etc.

Thus such a theory, despite its deceptive simplicity, seems to suggest limitations not contained in the text of art. 93. For example, art. 240 of the Rome Treaty, which declares its duration to be unlimited, would seem difficult to fulfil under constitutional law if the powers were to be freely revocable. And regulations under art. 189 of the Treaty are to supersede national legislation. The EEC powers in the field of tariffs might conflict with a constitutional prohibition against delegation of powers of taxation, etc.

Since the text of art. 93 does not contain any such limitations, and since the common assumption in Norway at the time of its adoption was that it would cover the EEC, another interpretation would seem called for. This would mean that art. 93, within its field, prevails over such constitutional principles as prohibitions of delegation,[5] and that it authorizes the Storting to write off national powers, in perpetuity or for a definite period.[6] Whether such steps are in fact taken is a matter of interpretation of the actual decision made under art. 93. Nevertheless, the constitutional effect of such a decision remains problematic (see *E.b., infra*).

The constitutional guarantees for the protection of the individual have been seen as another set of absolute obstacles to the exercise of international powers approved under art. 93.[7] This view is correct, but can easily be misunderstood, and needs a further analysis.

It is correct that such a protection must be preserved. The powers which may be exercised under art. 93 are themselves limited by the Constitution, including the guarantees in question.

But in important respects these guarantees are formal or procedural, and not substantial; that is to say, certain steps against the individual are not prohibited but are conditioned by a "due process of law". Therefore these guarantees do not necessarily prevent the exercise of international powers, if only similar pro-

[5] Cf. more fully on art. 93 and delegation by the Storting, Opsahl, *Delegasjon av Stortingets myndighet*, Oslo 1965, pp. 163 ff.

[6] In *T.f.R.* 1962, p. 397, I have assumed that the commitment may be irrevocable under international law, but must be understood with an "implied reservation" under constitutional law. The present argument represents a revision of that position and is more fully developed in Dokument nr. 10, 1966–67, pp. 26 ff.

[7] Andenæs, in Dokument nr. 3, 1961–62, p. 17, Stray in *Stortingsforhandlinger* 1961–62, vol. 7 b, p. 2314; compare Ross, *op. cit.* vol. I, pp. 407 ff.

cedures to those prescribed for national authorities are respected. Art. 96 of the Constitution states: "No one must be convicted except according to law, or be punished except in accordance with a judicial sentence." But could not the power to enact the law, or to sit in judgment—in both respects powers "normally vested in the Norwegian authorities"—be transferred, in a "functionally limited field", to international organs? The answer seems to be in the affirmative.

Consequently, the constitutional guarantees in important respects do not seem to make art. 93 inapplicable. In so far as they merely call for "due process" the exercise of international powers under art. 93 would seem to be constitutional, provided that this requirement is fulfilled. That reservation, however, is in itself important enough. For instance, the requirement "no punishment without a sentence" at least implies a court-like organ and procedure. It is disputed whether a subsequent judicial review would be sufficient.[8] And in so far as the guarantees protect the substance of individual rights (against retroactive laws, art. 97, censorship, art. 100, or expropriation, art. 105), they are under constitutional law equally binding upon the supranational powers.

g. The phrase *"not to alter the Constitution"* is usually taken to mean also not to violate or deviate from the Constitution.[9] This must apply both to general norms and to individual decisions authorized under art. 93, and does not mean only that the wording of the Constitution must be left intact. It is also a statement of the priority of the Constitution in cases of conflict with other norms, general or singular. This is, of course, the really important and problematic point. In this respect, the clause is binding upon the authorities of the state, including Norwegian courts. The customary powers of these courts to try the constitu-

[8] A newspaper comment by Professor Torstein Eckhoff was referred to in the debate in the Storting, *Stortingsforhandlinger* 1961–62, vol. 7 b, p. 2250. It drew attention to the power of the Commission of the EEC under a regulation to decide on "fines" up to $ 1 Mill., subject to subsequent judicial review. For various reasons, this arrangement would in Eckhoff's opinion hardly satisfy the constitutional requirements as understood in Norway. Later this question was further discussed, *inter alia,* in *Markedsutvalgets rapport II,* Oslo 1967, p. 5, and by Castberg and Andenæs in Dokument nr. 10, 1966–67, pp. 4 f. and 11 f.

[9] Andenæs in Dokument nr. 3, 1961–62, p. 17, Lyng in *Stortingsforhandlinger* 1961–62, vol. 7 b, p. 2261.

tionality of other norms is in itself protected by art. 112, and thus could not be denied them under art. 93.[1]

The power to interpret allegedly conflicting norms may be exercised by other organs, such as the Community Court under art. 177 of the Rome Treaty.[2] Neither art. 93 nor art. 112 of the Norwegian Constitution seems to prevent this. But the power to interpret the Constitution and the duty to uphold it in case of conflict between its norms and other norms as interpreted in this way must still remain with the Norwegian courts.[3]

This is the answer under the Norwegian legal system. However, a conflict of norms may be solved in one way in one system, and differently in another. In international law, constitutional limitations are not accepted as a defence for a breach of an obligation undertaken by treaty. Art. 93 by no means excludes this possibility. A system of community law may be based on a similar principle to that of international law just mentioned. In fact, the EEC system seems to be so conceived.

This situation is neither strange nor disturbing from the point of view of legal theory. It is inherent in the recognition of several independent legal systems based on different fundamental norms. But it creates some uncertainty. The final outcome of contradictions of this kind depends on extralegal forces. They may disturb a political balance which may exist between the two systems so long as the issue has not been brought to a head. If, for example, the Norwegian Supreme Court should refuse to apply a norm of Community law made by an organ authorized under art. 93, because its application would violate the Norwegian Constitution, and the Community Court should later find that Norway had thereby violated the Treaty establishing the Community, political and not legal factors would decide the outcome of the crisis. The Community/state relationship would have to be redefined in one way or another. So far, we can tell only the priority of norms within each system, not the priority between the systems; there is as yet no "super-system" to which a possible conflict may be referred.

[1] Art. 93 itself could, however, have restricted the power of the courts to review the constitutionality of steps taken according to it. But this has not been done.

[2] Cf. Opsahl in *Legal Essays, Festskrift til Frede Castberg,* Oslo 1963, pp. 280 ff.

[3] Andenæs in Dokument nr. 3, 1961–62, states at p. 17: "For Norwegian courts, the Constitution must be the supreme source of law." See also Castberg in *Lov og Rett,* 1962, p. 151.

E. Effects of Limitations of Sovereignty

a. Neither the ordinary ratification of a treaty nor its approval by the Storting under art. 26 of the Constitution implies a transformation of the treaty into national law. If legislative or other acts of the Storting under national law are required, these are, and must be, issued separately.

The effect of a decision under art. 93, however, must be to give the international organs concerned the power envisaged in the treaty, and to do so with immediate effect under Norwegian law, provided, of course, that the treaty has also been ratified as usual. No further act by the Storting should be necessary. The answer, however, depends to some extent on the international document. And if it contains provisions intended to be self-executing, as is the case with some of those in the Rome Treaty, the necessary basis for giving them this effect does not seem to be contained in art. 93, which only covers the immediate effect of acts of the organs created by the treaty, not the original treaty itself. Such original provisions therefore seem to need transformation by parallel legislation, which will not be necessary for future acts of the international organs authorized under art. 93. Acts of the international organs made before the time at which Norway adheres may pose similar problems.[4]

b. The effect of an act under art. 93 is further qualified under constitutional law by the overriding power of the Storting under art. 112 to amend the Constitution and all acts derived from it. Even if in a decision under art. 93 an arrangement is made "irrevocable" or valid in perpetuity or for a certain period, the power of the Storting as the sole master of the Constitution must of necessity prevail. It seems to be agreed that abrogation may violate an international commitment, and still be constitutionally valid.[5] But in a case where national powers have been explicitly or impliedly written off (validly, according to our interpretation in *D.f., supra*), there is constitutionally no other way than art. 112[6] of abrogating or repudiating the commitment. Such an act

[4] Differing views on these questions are presented by Castberg, Andenæs and Opsahl in Dokument nr. 10, 1966–67, pp. 5 f., 14 f. and 31 f.

[5] Ross, *op. cit.* p. 412, Andenæs in Dokument nr. 3, 1961–62, p. 18.

[6] Thus I arrive for this case at a different conclusion from that of Ross, who holds that an act under the Danish Constitution, art. 20, may be abrogated by a regular act, adopted by a simple majority; *op. cit.*, p. 412. This result, in my opinion, is only tenable where the transfer of powers does not specify its duration or permanence. Then the act may be interpreted in conformity with the general principle that a "delegation" is revocable at any time.

cannot be based on art. 93 and be made at any time, say, by a three-fourths majority. But under the constitutional amendment procedure of art. 112, art. 93 itself may be removed from the Constitution at any time allowed by art. 112. And the Storting as a constituent assembly may also do what is less comprehensive: repeal any decision made under art. 93, whether this would mean violating an international commitment or not. This delicate conflict would correspond to one discussed earlier (*D.g., supra*). It will not arise so long as the Storting for political reasons does not want to provoke it. An example of such an irrevocable limitation of sovereignty, which in my opinion could only be withdrawn in this way (if the treaty had not been broken by other parties), might be the Rome Treaty, viz. its art. 240.

c. If the decision under art. 93 is not originally made irrevocable, with the effect just discussed, the question arises of how it is to be repealed. Even in this case a repeal may violate international commitments and still be constitutionally valid. This is not the point to be discussed here, however. For that matter, a regular denunciation, in keeping with the international commitments, e.g., because a right to withdraw has been expressly reserved, raises the same problem: How is an approval made under art. 93 to be withdrawn, constitutionally?

It has been suggested that the regular power of the King, i.e. the Government, to denounce treaties, even those approved by the Storting, might apply also in these cases, with the effect that the supranational powers authorized by the Storting would automatically lapse.[7] Such a move by the Government without consulting the Storting seems, however, merely theoretical. But if the Storting is to decide on an abrogation, it would not seem justifiable to require a three-fourths majority. With equal reason one might argue in the opposite sense: that the conditions of approval cease to exist once the three-fourths majority has disappeared. For an abrogation, however, more must be required than a negative finding that the original support has been lost. Thus it seems that, in the absence of any express provision, a simple majority must be necessary and sufficient to repeal the arrangement entered into under art. 93. Once more, it seems natural to draw a parallel with the position under similar provisions elsewhere.[8]

[7] Andenæs, *loc. cit.*

[8] This result is in accordance with the more general conclusion of Ross, *loc. cit.*, cf. note 6, *supra*, p. 176.