

**LEGAL ISSUES IN THE
NORWEGIAN COMMON MARKET DEBATE**

BY

CARSTEN SMITH

*Professor of Law,
University of Oslo*

1. On September 24 and 25, 1972, the Norwegian people through a special referendum rejected the proposal that Norway should become a member of the European Communities. This Norwegian "no" has attracted international attention. Against this background it may be of interest to the readers of *Scandinavian Studies in Law* to receive some orientation on the legal questions connected with the Norwegian process of decision-making in this matter.

The year 1972 was one of national celebration in Norway. According to historical tradition, 1,100 years had passed since the Battle of Håfrsfjord, upon which Norway was made a single kingdom and became a political unit. Many regarded as symbolic the coincidence of jubilee and referendum. Some have attached primary importance to the continuation of the national unity and sovereignty. Others have believed that after 1,100 years the nation should be prepared to accept new forms of organization.

During the last ten years the relationship with the European Communities has been a predominant issue, and at times the paramount question, in Norwegian national life. In the period immediately preceding the referendum the debate was carried on with a strength and intensity which had hardly been encountered here since the second world war. Norwegian jurists joined ardently.¹ And, as has so often happened before in the history of Norway, the political debate was permeated by legal issues and legal argumentation.

At present there is a breathing space in the red-hot political struggle and possibly time for the more soft-hued scientific analysis.

Constitutional elements have played a considerable role in the Norwegian Common Market debate. New issues have cropped up successively, partly as a consequence of political developments and partly as a consequence of the progression of the legal analysis.

¹ Three professors at the Faculty of Law in Oslo who in recent years have had constitutional law as their professional field, viz. Frede Castberg, Torstein Eckhoff and Torkel Opsahl, were in the front line of the struggle *against* Norwegian membership of the European Communities. I find it appropriate to mention that several of my other colleagues, like myself, publicly expressed ourselves *in favour of* membership.

It is true that most of the questions that have been raised have lost political relevance on account of the outcome of the referendum. But the history of Norway did not cease with the referendum. It may already now be observed that a new constitutional debate is in the making as regards the internal legal procedure in case of a possible revival of the issue of Community membership. After the referendum, one M.P., Professor Erling Petersen, put forward a motion for amending art. 93 of the Constitution. Under this article the consent of a *three-fourths* parliamentary majority is required to a proposal whereby an international organization shall have the right "to exercise powers which in accordance with this Constitution are normally vested in the Norwegian authorities". The amendment would reduce the required majority to *two-thirds*. The management of the Norwegian Popular Movement against Membership of the EEC has placed great emphasis on this proposal in the recent debate. Professor Torstein Eckhoff—who is prominent among the opponents of membership—has in several statements during the last few months maintained that, through this proposal on amendment, it has been made clear that the question of membership is still a live issue.

In the short run, it is the questions concerning our free trade agreement with the Communities which will principally engage our attention. However, when recording and evaluating the events of the last few years from the point of view of legal science, this is also quite natural with a view to gaining knowledge for use in the event of a renewed consideration of membership of the Communities. Such knowledge might also be of value in relation to other organizations invested with so-called supranational powers.

In this article there will not be room for a discussion of all the legal issues concerning Norway's relationship with the Communities. The article will concentrate on those legal problems which especially have been of significance in the political debate, and the selection itself will probably also to some extent reflect the present author's own views.

2. It may be appropriate to review here the main points of the political development.

In April 1962 the Storting (Parliament) consented to an application being made to the EEC by the Government for negotiations on full membership. Such an application was submitted

in May 1962, and negotiations were initiated. However, as a consequence of the breaking off of negotiations between the EEC and Britain in 1963, the Norwegian negotiations were also discontinued. In July 1967 the Storting again agreed that the Government should apply for membership. This time, however, we did not even get as far as opening negotiations. But after the change of presidents in France in 1969, Norwegian market politics began moving again, and in June 1970 the Storting confirmed its previous decision. Negotiations started in the same month. On account of incidents connected with the market negotiations the non-socialist coalition headed by Prime Minister Per Borten was replaced in March 1971 by a Labour administration under the premiership of Mr Trygve Bratteli. The new Government submitted a new report to Parliament on relations with the European Communities, and in June 1971 the Storting approved the continuation of the negotiations on membership.

In January 1972, ten years after the first application, the Norwegian Government, together with the Danish, British and Irish governments, signed the Treaty of Accession to the European Economic Community and the European Atomic Energy Community. At the same time the Council of the European Communities made a decision which also authorized Norwegian accession to the European Coal and Steel Community.

In a report submitted to Parliament in March 1972, the Government presented the following conclusion:²

On the basis of a total evaluation . . . the Government finds that membership of the European Communities as a whole will provide Norway with evident advantages as compared with a trade agreement The Government therefore recommends that Norway join the European Communities as a member on the basis of the results of the negotiations contained in the Treaty of Accession of January 22, 1972.

However, the Storting did not subject this question to a vote on the substance of the matter. Instead, in April 1972 it passed a special act for the carrying out of a consultative referendum on the question of whether Norway should become a member of the European Communities.

It was thus the Storting which in this manner asked the people

² *Stortingsmelding* (Parliamentary report) no. 50, p. 176, in *Stortingsforhandling* (Parliamentary records) vol. 3, 1971-72.

for advice. The Government had already officially declared its position. And in August 1972 Prime Minister Bratteli stated that, if the majority of the people voted against accession, he and his colleagues would resign.

The consultative referendum took place on September 24 and 25, 1972. The question the citizens were asked was: "Should Norway become a member of the European Communities?" To this 53.5 per cent replied no, and 46.5 per cent yes. Participation in the referendum amounted to about 78 per cent.

After this referendum the Government submitted a report to Parliament stating that it would not put a motion before the Storting on the consent to ratification of the treaty with its attached instruments.

The Bratteli administration then resigned, and a coalition headed by Mr Lars Korvald of the Kristelig Folkeparti (Christian People's Party) took over. This coalition is composed of representatives of the three non-socialist parties belonging to the centre—Senterpartiet (Agrarians), Venstre (Liberals) and Kristelig Folkeparti. The Senterpartiet was the only party in Parliament which collectively opposed membership. The Venstre and the Kristelig Folkeparti were divided on this issue. In the Venstre the split went so deep that the party disintegrated as a consequence of the formation of this government, and a new political party has been established by the "yes" wing.³

The new Korvald Government stated in its accession address that it would as soon as possible request negotiations with the Communities "with the aim of concluding an agreement between Norway and the Communities as envisaged . . . for those countries not applying for membership of the Communities", i.e. a free trade agreement.⁴ On October 25, 1972, such an application was made to the European Communities.

In December 1972 the Storting went through the final discussions on the consultative referendum and endorsed the actions of the Bratteli and Korvald Governments after the referendum.

When this is being written (March 1973), the negotiations on the free trade agreement have reached a decisive phase.

³ This new party has not yet found its official name, because of a dispute with the remainder of the former Liberal party (Venstre) concerning the use of this designation.

⁴ Declaration of October 24, 1972, *Stortingsforhandlinger*, vol. 7, 1972-73, p. 71.

3. Before 1962 the only constitutional basis for international obligations was the general treaty-making power exercised by the Government with the consent of the Storting. Only a simple majority was required for this consent. It was generally recognized that Norwegian constitutional law established certain absolute limits to this authority, although a certain disagreement prevailed as to where the lines should be drawn in the political field.⁵ This marking of boundaries depended on two questions. The first was how one should interpret the so-called *substantive basic norm* of the Constitution contained in art. 1, stating that Norway is a free and independent realm. The second was whether the various constitutional provisions establishing *the functions and the competence of the state organs* represent limitations on the delegation of power to international organizations. During the discussions on these questions two main tendencies in Norwegian legal thinking emerged. One of these stressed the rule of independence in art. 1, maintaining that the boundaries must be drawn in accordance with a liberal understanding of the concept of sovereignty held at any time. The other emphasized the individual competence rules of the Constitution, maintaining that the boundaries must be fixed in accordance with the principles concerning the possibility of delegating state authority. One can hardly say that the question of which theory to apply has been definitely clarified. Each time during the postwar period when there was talk of accession to a new international organization, the question cropped up. Each time, the Constitution was so liberally interpreted as to recognize accession.

However, when it became a question of membership of the European Communities, a liberal interpretation of the Constitution was no longer sufficient. An amendment was required. This is partly due to the extent of the transfer of authority under the Rome Treaty, partly to the possibility of exercising power by way of majority decisions that is authorized in the Rome Treaty in several areas, and partly to the authority of the Community organs to produce legal norms having immediate effect in national law and being supreme in relation to national law. Several

⁵ Cf. Torkel Opsahl, "Limitation of Sovereignty under the Norwegian Constitution", in 13 *Sc.St.L.*, pp. 151 ff. (1969), especially pp. 157-8, with further references.

statements were made in 1961–62 with conclusions to that effect.⁶

The relation to the Constitution was evaluated on the basis of a *total assessment* of these elements. In the Danish debate on the corresponding issue, decisive emphasis was laid on the possibility of being outvoted by majority decisions.⁷ In the Norwegian debate more weight was laid on the authority of the Community organs to make rules (regulations and decisions) with internal legal effect. A constitutional amendment should permit an international decision-making process to become binding not only *for* Norway, but also *within* Norway.

And in March 1962 the Storting decided on a new provision, a “supranationality” clause, in the Constitution, allowing Norwegian accession to an organization having supranational authority, subject to a parliamentary decision with a three-fourths majority. This is art. 93 of the Constitution, which later became one of the main issues of the debate.⁸

4. The new provision was passed at a time when the political strife concerning Norwegian membership of the European Communities flared up for the first time.⁹ For this reason the parliamentary debate which preceded the passing of the provision, became to a considerable extent a purely political debate for and against such membership. The legal problems of principle were therefore pushed into the background.

The central constitutional question that one faced upon the introduction of this new constitutional provision was the relation to the concluding provision of the Constitution, viz. art. 112. This contains the Constitution’s so-called *procedural basic norm*, i.e. the rules regarding constitutional amendments.¹

⁶ Document No. 3 in *Stortingsforhandlinger* 1961–62, vol. 5, especially Johs. Andenæs, *op. cit.*, p. 16, Frede Castberg, *op. cit.*, pp. 8–9, and the Ministry of Justice, *op. cit.*, p. 48.

⁷ See, e.g., the official paper on Denmark and the European Communities (*Danmark og De europæiske fællesskaber*) (1967), vol. 1, p. 55.

⁸ An English translation of this provision can be found in 12 *Sc.St.L.*, pp. 196–7 (1968), and in 13 *Sc.St.L.*, pp. 155–6 (1969). The provision bears a close resemblance to art. 20 of the Danish Constitution. There are, however, also marked differences, cf. Opsahl in 13 *Sc.St.L.*, p. 167 (1969). Thus the Danish provision authorizes a binding referendum, which is unknown in Norwegian constitutional law.

⁹ On the legislative history of this amendment, see also Opsahl, *op. cit.*, pp. 155 ff.

¹ With regard to the following discussion, reference may especially be made to the author’s article in *Lov og Rett* 1972, pp. 290 ff.

The fundamental point here is that the *main purpose* in passing the new art. 93 was to *make it easier* for Norway to assume membership of international organizations. Even before this provision came into existence, it was quite clear that Norway could enter into any type of international organization, *if* the Storting passed a *specific constitutional provision* to this effect. The Norwegian constitutional procedure is less rigorous than that of some other countries, e.g. Denmark. But at the same time the Norwegian constitutional procedure contains such relatively strong guarantees that it might make the method of amending the Constitution rather cumbersome. A proposal for a new wording of the Constitution must be presented at one of the first three annual sessions in the four-year parliamentary term, whereas the final decision on this is made at one of the first three sessions in the subsequent parliamentary term. Thus a general election will take place between the presentation and the passing of the amendment. According to established practice, a supplement to the Constitution is to be treated in the same way as an amendment.

The intention of the new art. 93 was precisely to make it unnecessary to take this somewhat tortuous road involving readings in two different Stortings with an election in between.

This fundamental point had emerged very clearly when a forerunner of art. 93 was made the topic of a parliamentary debate in 1960. During this debate Erling Wikborg, M.P., a prominent Norwegian jurist, pointed out the advantages of what he called the *individual method*, i.e. that of having a constitutional provision for each single organization with supranational organs, as "in that event one would have a complete survey of the consequences in each single case".² But this "individual method" was impractical because of the time-consuming procedure involved in constitutional amendments.³ This reasoning served to spotlight the real problem. The demand for a *new and general authority* with regard to international organizations arose as a consequence of the rules of procedure for constitutional supplements.

When art. 93 came up for the final passing, this simple point tended to get lost in the extensive debate which was carried on

² *Stortingsforhandlinger* 1959-60, vol. 7, p. 3669.

³ In legal writing from the same period it was recommended by Erik Colban, *Stortinget og utenrikspolitikken* (the Storting and foreign policy), that use should be made of *ad hoc* amendments, combined with a simplification of the regular procedure of amendment under art. 112 of the Constitution.

with regard to international cooperation, national independence and our relations with the European Communities. But several leading politicians now also testified to the essential constitutional significance of this decision. Thus the Minister of Justice, Mr Haugland, emphasized during the debate that without art. 93 it "might take a long time, even as long as five years, before the constitutional obstacle can be overcome by an amendment of the Constitution pursuant to art. 112".⁴

To complete the picture it should also be mentioned that the introduction of art. 93 involved certain secondary functions, viz. an elucidatory function and a restrictive function. On the one hand, the introduction of art. 93 *made clear* how far it was possible to go in the transfer of sovereignty without a separate constitutional decision; on the other it has *possibly* also entailed a certain degree of *restriction* as regards the extent to which the Storting may proceed in this field by means of simple majority resolutions.

The *travaux préparatoires* clearly show, however, that the primary purpose of art. 93 was to establish a simpler mechanism for the transfer of power as an alternative to the ordinary constitutional procedure of art. 112.⁵

This implies that, after the passing of art. 93, there were *two alternative methods* of acceding to a supranational organization. This could be done *either* by using the *new* general authority—establishing a simpler mechanism for the transfer of power—*or* by taking an individual constitutional decision according to the *previous* pattern. A decision pursuant to art. 93 can be made by a *single* reading and vote in Parliament, subject to a three-fourths majority. A decision pursuant to the old art. 112, on the other hand, requires a *two-thirds* majority vote only. Thus by means of the new art. 93, the guarantee of time and the democratic guarantee of election inherent in art. 112 have been abandoned and a more summary procedure has been constructed, but in compensation, the majority guarantee has been tightened up so that this summary procedure can be applied only in more clear cases.⁶

⁴ *Stortingsforhandlinger* 1961–62, vol. 7, p. 2308.

⁵ For further documentation concerning this point, see the author's article in *Lov og Rett* 1972, pp. 295 ff.

⁶ One is here confronted with a certain parallel to the bipartite system which *Finnish* constitutional law generally prescribes for legislation involving amendment of or deviation from the "fundamental laws". According to the

The purpose of introducing art. 93 was *not* to tighten up the *majority* guarantee in this field from two-thirds to three-fourths. The primary intention was to arrive at a new procedure by which the guarantees of *time* and of *election* contained in art. 112 could be *avoided*. The increase of the majority guarantee was thus a compensatory measure intended to ensure that the simpler, and consequently less safeguarded, procedure according to art. 93 should be applied only in cases where the parliamentary agreement was especially extensive.

Which of these two methods is all-in-all the safer and which is the easier will depend on the circumstances. However, the possibility of applying the old method gradually sank into oblivion in political life during the subsequent years. Attention was centred instead on the new art. 93. And, when the original art. 112 method was brought back again in the final stage, this caused considerable surprise.

5. Let me here also first comment on art. 93.

The text of this provision was *not* formulated with an eye to membership of the European Communities. In 1962 it was presumed that this membership might possibly become a reality already within the existing parliamentary term, and it was therefore desired to obtain the necessary constitutional authority at once. As a consequence of the formal rules concerning constitutional amendments, it was necessary to apply a proposal which had been presented during the preceding parliamentary term. And, under the strict rules in this respect, not a single letter of this proposal could be altered.

Against this background, it was quite natural that there should arise a number of problems of interpretation regarding whether this provision covered membership of the European Communities. The discussions were partly about single words in the provision,

first of these constitutional procedures (in principle the main one) two decisions of parliament, with intervening general elections, are required, the second decision requiring a majority of two-thirds. But in order to facilitate speedy constitutional changes in urgent cases, when the changes were supported by a very great majority, an "urgency procedure" has been established. By a majority of five-sixths, Parliament may declare that the question of a constitutional amendment is "urgent", and then a definitive decision may be taken immediately (by the ordinary majority of two-thirds). Cf. the Parliament Act (*riksdagsordningen*), art. 67. This urgency procedure has in fact become almost a standard form of legislation. Cf. Nils Herlitz, *Elements of Nordic public law*, 1969, pp. 39-41. See also the article by Mikael Hidén in this volume.

and partly about principles for the interpretation—the *travaux préparatoires* for the provision were lacking in completeness, the presuppositions were ambiguous, doubts of principle prevailed as to the weight of the presuppositions in such cases, and there was disagreement as to how much decisive significance should be attached to the prevalent legal opinion in political life.⁷

A very substantial part of the Norwegian legal debate on the EEC has revolved around these interpretation problems.⁸ Some of these, however, were very special, and they can also be said to have been cleared up to a considerable extent. I will therefore confine myself to mentioning a few selected questions of somewhat greater importance.

The provision lays down the substantive condition that the international organization shall have the right to exercise power only “within a functionally limited field”. This formula, which was incorporated on the advice of Professor Frede Castberg, may be said to make the provision into a legal standard, and thus also to invest it with the lack of precision typical of a standard. It has been maintained that the field of activities of the European Communities is so comprehensive that it goes beyond the scope of this description.

In this connection attention has been drawn to the wide purposive provisions of the Rome Treaty. However, it is probably irrelevant whether the *purposes* of the Communities reach beyond what may reasonably be called a functional limitation. This follows partly from the wording of art. 93 and partly from concrete reasons. At times the aims of international organizations are very widely formulated, but what counts in this respect is naturally their *authority* only. A provision stating purposes may *limit* the exercise of powers, but *cannot add* anything to them.⁹ The decisive factor must consequently be the provisions of the Rome Treaty authorizing the Community organs to make binding decisions.

But there are at this point some who have begun to have serious doubts.

⁷ The most thorough discussion of these questions has been undertaken by Torkel Opsahl in Document no. 10, *Stortingsforhandling*, 1966–67, vol. 5, pp. 17 ff.

⁸ See Torkel Opsahl in 13 *Sc.St.L.*, pp. 163 ff. (1969), Torkel Opsahl in 9 *Common Market Law Review* 1972, pp. 271 ff., and C. A. Fleischer in 150 *Revue du Marché Commun* 1972, pp. 33 ff., all articles with further references.

⁹ Cf. Torkel Opsahl in 9 *Common Market Law Review* 1972, p. 278.

It has been asked whether the general clause contained in art. 235 of the Rome Treaty is constitutionally acceptable in this respect. It has, however, been the general understanding in Norwegian literature that this provision, despite the fact that, according to its phrasing, it authorizes a general "Kompetenz-Kompetenz" for the Community organs in the field of economy, must be subjected to substantial limitations, so that it does not, in itself, conflict with the prerequisite of a functionally limited area. And besides, the powers of the Rome Treaty are, as is known, on the whole relatively specified and detailed regarding the various fields.

But then one must ask whether the *sum total* of the individual rules of authority is not becoming too comprehensive. Here it has been maintained, on the one hand, that the fact that the specified rules of competence are numerous and amount collectively to an impressive mass of authority does not prevent accession, inasmuch as "limited" must mean "clearly defined" but need not necessarily mean "little".¹ On the other hand it has been asserted that the formulation "functionally limited field" must also say something about the *scope* of the transfer of competence; otherwise the criterion would be practically without reality, because any case of delegation of authority may be formally limited. It has further been said that the restriction of the Community activities to *economic* policy is an insufficient restriction, on account of the fact that in a modern society economic policy will affect most aspects of the society's life.

In this connection specific interest was attached to the *dynamic element* of the European Communities. Precisely the *development* of integration within the Communities had a decisive effect on Norwegian politics, this being the chief motivation of the Centre Party (the Agrarians) for swinging from being supporters of the membership negotiations—headed by their Prime Minister Per Borten—to becoming a party of opponents.

It was emphasized that a decision to ratify the Treaty of Accession would only apply for the Communities in their *present* form, and that a further development of the Communities must require a new evaluation and new constitutional steps on the part of Norway. To this it was answered that membership would *in reality* represent a definite step, that, as a consequence of the integration of the Norwegian economy in the European Community

¹ *Ibid.*

economy in the event of membership, it would also be necessary to go along should there be a further expansion of the Communities, and that a legal evaluation ought to *anticipate* such a development.

The contention concerning art. 93 of the Constitution as authority with regard to membership gradually quietened down, although not everybody agreed. Professor Torstein Eckhoff has recently published a textbook on sources of law, where in a single sentence he makes a very appropriate summing up. Remarking how our legal writers sometimes act as judges with regard to questions of constitutional law, he states: "Thus the, in my opinion, doubtful question of whether art. 93 of the Constitution provides authority for Norwegian membership of the EEC is regarded by the majority as being definitely settled after Andenæs, Castberg and Opsahl have replied in the affirmative in their statements to the Storting."²

If the idea of membership is revived, however, it is quite probable that this issue will be brought up once more. In the last resort the decision will depend on the discretionary evaluation of the Storting.³ But the *legal* objection will appear as a *political* objection when it comes to the parliamentary decision. I will in this connection conclude with two observations—both of which are likely to become controversial in my country. First, I presume that a question such as the present one cannot, owing to its nature, be definitely clarified until the Storting has made a decision about accession. Secondly, I consider that this uncertainty shows that the application of art. 93 is not an entirely suitable procedure in relation to the European Communities.

6. A fundamental question regarding the relation between the Communities and the Norwegian legal system was what status and what rank Community law would be given in Norway after an accession. This is a modern variety of the classical question of the relation between national and international law.

This problem had already been the object of a protracted and thorough analysis as regards the relation between Community

² Eckhoff, *Rettskildelære*, Oslo 1972, p. 238. These constitutional theorists are all members of the Faculty of Law in Oslo.

³ It is quite true that the possibility of control by Norwegian courts has not formally been cut off. It is hardly imaginable, however, that a Norwegian court would in a concrete case consider such a parliamentary decision unconstitutional.

law and the law of the individual member countries. Here in Scandinavia the issue was particularly intensely debated in Denmark prior to the referendum.

And there it was also brought into the discussions on the legal conditions for membership.

In Danish legal writing it was asked whether the country would be able, without a constitutional amendment, to comply with the demand for *supremacy* of Community law which the Community Court of Justice makes with regard to the legal systems of member states. Briefly, the argumentation in this respect may be said to be that the Court in its practice requires precedence for Community law over national legislation, that this demand "will interfere with something quite central in the structure of the society", namely "the obedience or loyalty of the courts to the legislature", and that such a demand is hardly authorized by the Danish Constitution.⁴ This approach to the problem gave rise to a thorough discussion of the consequences following from the Danish Constitution with regard to the relation between Community law and Danish law, and whether the Danish Constitution would have to be (or, at least ought to be) amended prior to a Danish accession to the Communities.⁵ In July 1972, however, the Danish Ministry of Justice submitted a report which concluded by saying that it would not be necessary to amend the Constitution.

In Norway this issue was to a certain extent pushed into the background in the political debate. It was considered more as a subtlety for jurists.

As regards Norwegian law, it is a somewhat obscure spot in the discussion whether art. 93 provides a basis for giving Community law precedence over Norwegian law.⁶ Such a precedence would imply that Community law rules should be given priority by Norwegian courts and administrative authorities in cases of conflict, and not only with *previous* Norwegian legislation—

⁴ The main statement in this direction is by Erik Siesby in *Juristen* 1971, pp. 414 ff. The quotation, *op. cit.*, p. 425. Here he opposes a statement made by Max Sørensen to the Folketing Market Committee, quoted in *Juristen* 1971, pp. 434 ff.

⁵ Important further statements here are those of Max Sørensen in *Juristen* 1972, pp. 117 ff., Erik Siesby, *op. cit.*, pp. 120 ff., Alf Ross, *op. cit.*, pp. 161 ff., Erik Siesby, *op. cit.*, pp. 220 ff., C. A. Fleischer, *op. cit.*, pp. 311 ff., and Jens Fejø in *T.f.R.* 1972, pp. 178 ff., especially pp. 198 ff.

⁶ See my article in 12 *Sc.St.L.*, pp. 151 ff. (1968), especially pp. 196–7, and Torkel Opsahl in 9 *Common Market Law Review* 1972, p. 282.

which in accordance with the *lex posterior* principle merely places Community law on an equal footing with Norwegian law—but by virtue of a *lex superior* principle also in conflict with *subsequent* Norwegian legislation. The phrasing of art. 93 is not conclusive in this respect, because it considers only the “status problem” regarding the Community rules, i.e. that they shall be directly applicable as national law, and not the “ranking problem”, i.e. the priority relation between Community rules and Norwegian legislation. Some statements have tended to recognize the primacy of Community law over Norwegian legislation.⁷ The presupposition of the Norwegian Foreign Office seems to have been in conformity with this point of view, despite the fact that the Foreign Office has traditionally been conservative in its attitude to the application of international law as a national source of law. This shift of opinion can, however, hardly be said to have been given a really principal motivation. On the whole, it can hardly be maintained that an indisputable solution to the question has been found. For myself, I believe that at any rate some reservations must be made, as the solution must to some extent depend on the prevalent understanding of the position of international law in relation to national authorities, and I consider it doubtful, from a realistic point of view, whether any uniform norm of collision can be established.⁸

However, the central point in this connection is that, regardless of what might be the solution of this problem of rank between Community law and Norwegian law, the general opinion was that a lack of compliance with the demands of Community law in this respect could not be regarded as an obstacle to a Norwegian ratification of the Treaty of Accession. This opinion was based on a belief that the possibility of conflict was in itself far too hypothetical, and that in any case conflict with Community law can always be avoided, if the national authorities refrain from provoking it.

This last reasoning leads to a more general reflection on the debate, namely that even if non-recognition of the supremacy of

⁷ For a survey of the Norwegian literature, see the present author's article in *Lov og Rett* 1972, pp. 306–8, especially notes 45–48. For discussion of the question in other languages than Norwegian, cf. C. A. Fleischer in 150 *Revue du Marché Commun* 1972, pp. 33 ff., especially pp. 37–38 and pp. 39–40, Fr. Fr. Gundersen in 15 *Kölner Schriften zum Europarecht* 1972, pp. 65 ff., Torkel Opsahl in 9 *Common Market Law Review* 1972, pp. 280–3, and the present author's article in 12 *Sc.St.L.*, pp. 151 ff. (1968), especially pp. 195–8.

⁸ I still consider the analysis made in 12 *Sc.St.L.*, pp. 195–8 (1968), as valid.

Community law over Norwegian legislation would not constitute an *obstacle* to membership, a rule to this effect would represent a *limitation* on the effects of a membership.

A corresponding attitude was taken with regard to several questions where it might be maintained that Norwegian law would not comply with the demands of Community law.⁹ Whereas the Rome Treaty, according to art. 240, has been concluded for an "unlimited period", a transfer of authority to the Community organs cannot, according to Norwegian constitutional law, be made irrevocable. And, whereas Community law is generally binding, according to its own contents, the limitation applies, under art. 93 of the Norwegian Constitution, that the Communities can only exercise powers which are normally vested in the Norwegian authorities, "exclusive of the power to alter this Constitution". So, if there should later occur, on the part of Norway, a unilateral secession in conflict with the Treaty, or if there should later be established, on the part of the Communities, rules conflicting with the Norwegian Constitution, a conflict would arise between the Community legal system and the Norwegian legal system. However, as this conflict between the two systems was purely potential, and as there was considered to be only a very remote possibility of such situations, it was not regarded as relevant. That means that it was not considered an obstacle to membership—and this was what was politically significant. But at the same time it must be clear that here, subsequent to a Norwegian accession, constitutional limitations would be encountered with regard to the effects of a membership.

Consequently the material conditions in Norwegian constitutional law for accession to a supranational organization might be of interest even after an accession—but then from the point of view of constitutional limitations to the *effect* of a ratification of a treaty of accession.

7. When the Treaty of Accession had been signed in January 1972, there came an interval where certain legal questions concerning *Norway's specific conditions* became the object of marked attention. This applied especially to the position of fisheries and agriculture.

One of the bones of contention was the arrangement for *fish-*

⁹ This view has been especially strongly emphasized by Torkel Opsahl, cf. *op. cit.*, *supra* note 7, *passim*.

eries within the Norwegian fishing boundary.¹ According to a special protocol on the fisheries regime for Norway, the waters from the south-western Norwegian town Egersund to the Soviet frontier in the north within a zone of twelve nautical miles should be reserved for Norwegian fishers in the ten-year period 1973–82.² This represented an exception from the Community regulation on a common structural policy for the fishing industry that permission to fish within the fishing boundary shall be given in a non-discriminatory way to the fishers of all the member countries.³ However, in the Treaty of Accession it is laid down that the Council of the Communities shall, before the end of 1982, acting on a proposal from the Commission, examine the provisions which could *follow* the derogations in force on this point.⁴ What now came up as a question of interpretation was what kind of guarantee the Norwegian state would have that it would be able *after 1982* to obtain special arrangements paying due regard to the specific geographical situation of the country, its specific pattern of population settlement, and the social structure in the coastal areas. Some maintained, *inter alia* on the basis of formulations in the protocol on fisheries, that there existed a *legal obligation* for the EEC to take account of such considerations after 1982 also, and that, until a satisfactory new regime had been established in this sector, Norway would have the right to maintain the derogating arrangement after 1982 also. The Government only underlined that Norway had obtained a *real political guarantee* securing the Norwegian interests in this sector, as the Government stated in a special declaration to the EEC.⁵ Others again were of the opinion that this guarantee for specific arrangements after 1982 could *not* be considered to be sufficiently secure since the legal obligations of the Community in this respect were so vaguely described. This last opinion was held by our Minister of Fisheries, Knut Hoem, who was Nor-

¹ The Government's view is stated in its parliamentary report on Norway's accession to the European Communities, *Stortingsmelding* (report) no. 50, pp. 96–8, in *Stortingsforhandlinger*, vol. 3, 1971–72. Another view is stated in the "Counter-report" presented by the Popular Movement against Membership in the EEC (*Folkebevegelsens melding om Norges forhold til De Europeiske Felleskap*), pp. 123–7. Numerous articles in the press concerned this subject.

² Protocol no. 21 attached to the Treaty of Accession. See also arts. 100–103 of the Treaty.

³ Regulation (EEC) no. 2141/70, art. 2.

⁴ Treaty of Accession, art. 103.

⁵ Declaration of January 15, 1972.

wegian representative during the negotiations. Precisely because of the defective legal guarantee on this point, he could not share in the Government's recommendation of the result of the negotiations, and he therefore resigned his office, a step which, according to a number of political observers, had a very marked effect on the outcome of the referendum.

Considering the *agricultural* sector, there arose an intense and to some extent confusing debate on the permission to apply milk subsidies—an important instrument in Norwegian agricultural policy.⁶ Recognizing the specific conditions under which Norwegian agriculture operates, compared with farming in the Community countries, a specific protocol containing separate conditions for Norwegian agriculture was also established.⁷ The problem here was that the identity of the Norwegian text of the treaty with those in other languages was disputed, and that therefore doubts arose as to whether price subsidies for milk could be used irrespective of the other provisions of the protocol, or whether, on the contrary, the use of such subsidies must not conflict with the other provisions.⁸ There is reason to presume that this confusion around a central economic problem helped to create scepticism as to the result of the negotiations.

These questions of interpretation of the protocols concerning the special conditions of accession for Norway, which, from the *political* point of view, were perhaps the *most decisive* legal problems in our EEC debate, lie, however, in the border area of what one would call the constitutional sphere, and at any rate they are now definitely a thing of the past. The existing Treaty of Accession with its supplements can no longer be assumed to have any reality where Norway is concerned. If at some future time the issue of Norwegian membership of the European Communities is again broached, this will, all things considered, have to be done on a new formal basis and by way of new negotiations.

8. When we arrive at the final part of the decision-making process on the Norwegian home ground, we meet two institutional phe-

⁶ The Government's view is stated in its parliamentary report, *op. cit.*, *supra* note 1, pp. 82 ff. Another view is stated in this respect also in the "Counter-report", *op. cit. supra* note 1, pp. 114 ff.

⁷ Protocol no. 20 attached to the Treaty of Accession.

⁸ The dispute concerned the wording of art. 9 of the protocol. This wording became the basis of a special parliamentary debate, see *Stortingsforhandling* 1971-72, vol. 7, pp. 2540.

nomena which, although rather simple from a legal point of view, are at the same time so unusual in our system that they are likely to enjoy a long life in our constitutional debate—the referendum and the Government's request for a vote of confidence in this referendum.

The demand for a referendum was put forward as early as 1962, when Norway applied for membership for the first time. General political agreement was reached relatively early on this point. However, since the Norwegian Constitution—unlike, for instance, the Danish Constitution—does not recognize a binding referendum, the function of the referendum must be a *consultative* one. We were here facing an attempt to combine direct and representative democracy which might come to be regarded as something of an experiment.

There are no rules on referendums in the Norwegian Constitution. Since the last century there has been a stream of proposals to this effect. But they have always been rejected. The four referendums held previously were specially arranged in each separate case.⁹ The reports submitted on the question may, however, partly be read as an augury of the 1972 referendum, as is witnessed, for instance, by the following extract:¹

A general tendency seems . . . to be that the *less often* referendums are held, and the more *extraordinary* they are, the more emotional *agitation* and *excitement* go with them. This is probably due in part to the fact that as a rule the matters that are subjected to a referendum are of an especially controversial nature, if and when the instrument is applied only on special occasions. But it is probably also partly due to the circumstance that the unusual and unknown character of single, direct appeals to the people easily might lead to a temptation to exaggerate.

The Norwegian Constitution is based *inter alia* on the principles of representative democracy and of parliamentarism. Referendums create problems of adaptation in relation to both these principles. Such problems can be solved in a written constitution. However, when the referendum, as was the case here last autumn, becomes an addition to an already existing structure and

⁹ It was pointed out that under our constitutional system referendums seemed to occur with the same frequency as eclipses of the sun.

¹ Report from the Parliamentary Election System Commission of 1948 (*Innstilling fra den parlamentariske valgordningskommissjon av 1948*) (submitted 1952), p. 41.

the framework of rules concerning the effect of the referendum has not been laid down but is drawn freehand by people who are engaged in the political battle, it must necessarily depend to a large extent on the individual designer what shape the new wing of the constitutional building will assume.

The essential issues were the effects a referendum should have for Parliament and Government respectively.

Let us take the *Storting* first.² Even though the act on a referendum was passed by a unanimous *Storting*, there was wide disagreement as to what effect the referendum should have on the subsequent parliamentary handling. Here one may notice a certain change with time as a consequence of the political development. Originally the demand for a referendum was most strongly supported by groups of people who were against accession. At this time there seemed to exist the requisite three-fourths majority in Parliament in favour of membership, and the "no" wing was accordingly disposed to maintain that a referendum must be given decisive weight. When the act on a referendum was passed in April last year, however, it seemed highly probable that, on a free vote, less than three-fourths of the total number of M.P.s would vote for membership. Now, therefore, a positive referendum had become the only chance for the adherents of membership, and the roles had been exchanged. It was the "yes" wing who argued that a referendum must be considered to be politically binding and thus be decisive for the voting of the M.P.s. The main speaker in the parliamentary debate on the bill of referendum stated that it was "quite obvious that, when we at last resort to the constitutionally unusual and irregular procedure of asking for the opinion of the people before we make our final decision, the assumption must be that we attach decisive weight to the advice given to us by the people."³ On the other hand, some of the M.P.s opposing accession stated that they would continue in their opposition, practically regardless of the result of the referendum; in justification, they invoked the "minority protection" inherent in the requirement of a three-fourths majority in art. 93. Others replied more conditionally, saying that they would vote depending on factors such as the result in their own constituency or in the part of the country where they came from, on the extent

² On this question, see also Torkel Opsahl, 9 *Common Market Law Review* 1972, pp. 289 ff.

³ Negotiations in *Odelstinget, Stortingsforhandlinger* 1972, vol. 7, p. 323.

of participation in the referendum, on their assessment of how "fair" the preceding campaign had been, on the distribution of the votes among various population strata and groups of interests, and on a closer evaluation of the size of the majority. Spokesmen of the Bratteli Government then in power and other members of the "yes" wing maintained that those who harboured such reservations as to basing their opinion on the referendum ought logically to have opposed the very holding of the referendum—an attitude which, however, was politically almost unthinkable at that time. When the Government then asked for the people's vote of confidence, the "no" wing maintained that now the people were exposed to a factually irrelevant pressure, and this argument was used to substantiate the opinion that a simple majority in favour could not be sufficient. When at last the result was a majority against accession, the discussions died away. However, in so far as evaluatory comments have been attempted, it is now primarily the "no" wing which rejects further evaluations on the ground that one should "respect the referendum".

I think the best summing up in this respect is the one made by the veteran agrarian politician Jon Leirfall, who has amusingly satirized the events of the EEC happenings in a saga-style fable entitled "The Saga of Tryggve's Downfall". In this we read as follows:

The bands then went to battle against each other on the field. They placed an arrow between themselves, and said that the band that had reached beyond this arrow when the battle had ended could say that it had won For a long time the battle wove back and forth, and several times each band gained or lost ground When one band had drawn back, the men in this band shouted that it could not be counted as a loss if the other band had not advanced more than two stick lengths beyond the arrow. But the band who had advanced shouted that if they got as much as a cock's step in front of the arrow, then this was perfect proof of victory. This was shouted in turn by the men in both bands as they moved back and forth.

From a strictly legal point of view, it is quite obvious that every single member of the Storting would have to decide for himself how much importance he should attach to the advice coming from a consultative referendum. This follows quite simply from the fact that our Constitution does not recognize a binding referendum, and that an ordinary statute cannot then delimit the

constitutionally free mandate of the parliamentary representatives. At the same time it is evident that there will necessarily be a marked inner tension between the *legally* viewed purely *consultative* effect and the *actual political* effect, which in any case will tend to become of a *semi-decisive* character.

Against this background one may say that, under the Norwegian constitutional system, the question of the degree of effect of a referendum will be a *political* issue. This question cannot be *decided* on the basis of constitutional-law arguments. But that does *not* mean that legal reasoning is here *without* relevance. In my opinion a task in this connection ought to be to point out the legal arguments that should count in the political decision.

In this regard it may be especially pointed out that the Constitution distinguishes between a decision to *accede to* a supranational organization and the alternative of *remaining outside*.⁴ Only the first decision requires a qualified parliamentary majority. There is no constitutional symmetry. If one should let a majority from the referendum be equally decisive irrespective of the nature of the result, that would in reality imply that a consultative referendum was allowed to replace the requirements of the Constitution for a qualified majority.

Our four previous referendums do not provide any considerable guidance. Two of them took place in 1905. The first of these was designated to confirm an almost revolutionary act on the part of the Storting—the dissolution of the union with Sweden. The second—on the choice between monarchy and republic—showed clear traits of constitutional emergency law. Consequently we were in these cases moving outside the ordinary frames of the Constitution. The two following referendums, in 1919 and 1926, were both concerned with prohibition, one of them introduced prohibition and the other revoked it. In both cases it was assumed to be a general opinion that the political authorities would yield to a simple majority at the referendum. But the question of introduction and revocation of prohibition was something that could be settled through ordinary legislation, i.e. a parliamentary decision by a *simple majority*. The question we are faced with in the EEC matter, however, is a change in constitutional competence requiring a *qualified* majority. The character of the problems is therefore different.

⁴ This view has especially been maintained by Frede Castberg in *Lov og Rett* 1972, pp. 164 ff., at pp. 166–7.

In my opinion it will be necessary to take into account that a slight majority in favour of accession would probably not in itself be sufficient in the event of a possible new referendum. And I also consider the most well-founded solution to be that a majority in favour need not necessarily have the same impact as a majority against.

Turning now to the effects of the referendum as regards the *Government*, the fact is, as mentioned before, that the Storting only asked the people for advice. The Government had already officially taken up its position, and in August 1972 it asked for a *vote of confidence*, not indeed from the national assembly, but from the people.

From a strictly legal angle a government must have the opportunity of resigning when it finds this to be justified. However, from a political point of view, this demand was an exceedingly controversial act.⁵ The Government and its adherents maintained that the foundation of its work would have given way if, in a context where its most important political platform was concerned, it were to be opposed by a majority of the people. The "no" wing held that the people had now been exposed to a "cross-pressure", which meant that the referendum did not imply a real popular vote on membership of the European Communities.

In my country it has been a traditional opinion that the instrument of referendum is incompatible with a rational application of the parliamentary system. Prime Minister *Jørgen Løvland* once stressed this in the following words:⁶

You may turn it whichever way you want, yet the fact remains that English parliamentarism does not go with the Swiss referendum.

When a 1917 committee on the electoral system proposed the introduction of rules on referendums, a minority took a negative stand, *inter alia* as a consequence of the relation to the parliamentary system, and this minority was supported by a majority

⁵ When the editorial comments in 9 *Common Market Law Review* 1972 at p. 362 speak about the "inevitable resignation" of Mr Trygve Bratteli's government, this statement would not find support in quite a number of Norwegian circles.

⁶ Quoted from Frede Castberg, *Den utøvende makt* ("The Executive Power") (1945), p. 54.

of the parliamentary constitutional committee and of the national assembly itself. The committee minority made the following prophecy:⁷

A Storting majority, on which the Government may safely lean, may one day face a situation where a big and important issue, maybe one of its platforms, that has been brought to a desirable decision, or at least *close to* such a decision, is outvoted by a referendum, whereas the *opposition*, the Storting minority, will *come out the winner*. The situation will be neither pleasant nor easy to handle. The Government may refuse to continue its administration, after it has thus been demanded that the administration of its affairs shall be different from what it judges to be correct or in harmony with its own and the parliamentary majority's programme. The Storting majority itself will have been weakened by the defeat. And, despite its majority among the "people", the opposition will be entirely incapable of forming a new government which *can* work together at all with the Storting then existing. This situation will easily become very intricate; it *must* be so, when one government is to have *two* different "overlords", and these two are at variance with each other.

The political result last autumn did to a certain extent confirm this prophecy, inasmuch as there grew up an enormous tension between the manifestations of the representative and the direct democracy respectively. The Bratteli Government, which in this case had strong support in the national assembly, was opposed by the majority of the people. The present Korvald administration, which has the task of enforcing the will of the people, is, seen from a parliamentary point of view, one of the weakest governments in our history.

One sometimes operates with the concept of *referendum parlamentarism* as a contrast to *genuine* parlamentarism. The Bratteli Government chose the political solution of introducing referendum parlamentarism into Norwegian political life. The comment one may make on this, from a legal angle, is that this phenomenon was a novelty, that it was not a necessary solution from a constitutional-law angle, and that this solution should not be regarded as binding for the future.

9. In the last stage of the political strife the possibility of a constitutional amendment was brought back again.

⁷ Report (*innstilling*) no. VII of November 27, 1924, p. 135.

It is already mentioned how, after the passing of the new art. 93, there were two alternative roads to the decision concerning membership. A decision on membership in accordance with the new art. 93 would actually imply a constitutional amendment, as the extensive transfer of power this would entail would change the constitutional rules on state authority. If instead it was decided to have recourse to a special constitutional supplement directly aimed at membership of the European Communities, the situation would simply be that the ordinary rules on constitutional amendments would be applied to a decision which, in reality, would be such an amendment. This was the method used in Ireland last summer.

From the parliamentary negotiations prior to the passing of art. 93 it clearly emerges that the new provision was not intended to bar future application of the ordinary constitutional procedure authorized in art. 112.⁸ In this connection reference may be made to statements from opponents of membership, who regarded with scepticism the introduction of art. 93 as a preparatory measure to entry into the EEC, and who therefore at that time underlined the favourable aspects of the art. 112 procedure. Besides, it also follows from more general constitutional principles that art. 93 could not prevent an application of the constitutional procedure according to art. 112; for, according to our Constitution, art. 112 decisions are the supreme form of legally valid decisions in our legal system. In fact, such decisions may even bring about an amendment of art. 93 itself.

The background of the introduction of the art. 93 procedure as a new constitutional method was the fact that the art. 112 procedure *normally* would be too time-consuming and therefore an impractical line of action. The reason why the art. 112 procedure may nevertheless, in special cases, appear as a topical alternative, is that this ordinary constitutional procedure is *comparatively liberal* in respect of the conservative guarantees established in it. In the evaluation of the question of the use of the art. 112 procedure there were in 1972 two factors in particular that appeared politically relevant.

First, there was the position of the EEC issue in the national assembly. A decision according to art. 93, as stated before, presupposed a three-fourths majority, whereas an ordinary constitu-

⁸ Cf., for more information, the present author's article in *Lov og Rett* 1972, pp. 290 ff., especially pp. 296 ff.

tional decision necessitated a two-thirds majority only. And in parliament the opinion appeared to be—disregarding the effects of the referendum—that there would be a majority of two-thirds in favour of membership, but not one of three-fourths.

Secondly, there was the time factor. As mentioned above, owing to the procedural rules on presentation and intervening election, as much as five years may pass before a constitutional bill can be decided on. In this case, however, the distance between the political celestial bodies was at an absolute minimum. The third session of the current parliamentary term, which was the last to which a new constitutional amendment could be presented, was dissolved on September 29, 1972. This meant that the timetable caused this to happen, dramatically, four days after the referendum. If a proposal on membership of the EEC had been presented in the course of these four days, it would have been possible to reach a decision in the art. 112 procedure just after the parliamentary election in the autumn of 1973. In other words, by choosing this method, membership would not have to be delayed by more than one year.

However, for some time our political life had been orientated towards the idea that the proper procedure would be a referendum combined with an art. 93 decision. The other solution seemed to be almost forgotten.

In an article in the summer of 1972 I discussed the possibility contained in the art. 112 line.⁹ This caused a rather strong reaction in some quarters. Under the heading "Unparalleled hazard" our Liberal newspaper *Dagbladet* wrote: "A legal subtlety, hatched in an ivory tower in (the University's) Domus Media, is once again about to be lifted over into the political arena. The outcome will be a storm." And, from opponent quarters it was said that now the EEC adherents had travelled all the way around the clock. They started out in 1962 by amending the Constitution, i.e. by introducing art. 93, in order to obtain authority for membership. If now this authority or the referendum did not bring results, they would begin a new round of constitutional amendment.

I myself believed that it was a good case, not only from a strictly legal point of view, but also from the point of view of legal policy. And I believe that the idea of such an individual constitutional decision—an art. 112 decision—would be in a stronger posi-

⁹ *Lov og Rett* 1972, pp. 290 ff.

tion in the future, if and when the question of membership should come up again.

Reference may be made to the fact that ever since 1814 (the year of our Constitution) an art. 112 decision has been the *normal* procedure concerning decisions on amendments of the rules on state authority, and that rules contained in such a decision are the *supreme* legal norms in our country. Reference may be made to the fact that the new art. 93 was adopted in order to *facilitate* our joining international organizations. It may therefore, on the basis of a constitutional assessment, be characterized as being *contrary to purpose* if this provision, through its demand for such a large majority, should actually become the provision that prevented EEC membership. Reference may further be made to the purpose of the rules on constitutional amendments which have been based on the principle that important and controversial issues should receive a longer period of consideration. Reference may be made to the fact that it was precisely the leading opposing politicians who at the introduction of art. 93 pointed to the existing art. 112 procedure as being the most appropriate line. Reference may be made to the fact that, through an art. 112 decision, one could eliminate the uncertainty connected with an art. 93 decision, both with regard to *whether* art. 93 actually represents an adequate authority and to what is the *effect* of the limitations inherent in that article. Reference may be made to the fact that, through art. 112, one would get the judgment of the people by the regular constitutional means, i.e. a general election, thus avoiding the uncertainties involved under our constitutional system in a referendum on an issue in this sector. And, finally, the situation which might very well have arisen (and which may possibly arise if the procedure is repeated), i.e. a "yes" majority at the referendum which is *not* sufficiently marked to bring about a three-fourths majority in Parliament, is one which must necessarily produce enormous political tensions among the people.

To me it seems fairly evident that a proposal to a constitutional amendment and a subsequent election would be an adequate and "fair" procedure as a concluding part of the decision-making process.¹

¹ It may be mentioned that Professor Torkel Opsahl, opponent to Norwegian membership in the Communities, has characterized the demand for three-fourths in art. 93 as "undemocratic", cf. 13 *Sc.St.L.*, p. 167 (1969), and 9 *Common Market Law Review* 1972, p. 289.

10. When the result of the referendum became known the night before September 26, 1972, there were a number of political issues which needed immediate attention. At the same time it was in the course of only four days to decide whether to present a constitutional proposal and thus go forward to an election on the EEC issue in 1973.

A natural precondition for any attempt to promote a constitutional amendment was that the referendum should result in a "yes" majority. In that case there would have been obtained a democratic legitimacy for a further line of action in the event of the Storting's not following suit with regard to the majority among the people. This foundation, however, did not now exist. And quite naturally, none of the political parties chose to bring forward a constitutional proposal.

What did happen during the hectic days following the referendum was, however, a solo action by Professor Erling Petersen, who, before time was up, in his capacity of parliamentary representative presented the aforementioned proposal for an amendment whereby the requirement for a three-fourths majority contained in art. 93 would be altered to one for a two-thirds majority. After the coming election in 1973 this amendment *may* be adopted by a two-thirds majority. That means that, from a legal-technical point of view, it would be possible for a two-thirds majority in the coming parliamentary term *first* to alter the majority requirement contained in art. 93 to two-thirds, and *then* to decide on membership of the Communities by the same two-thirds majority.

There have been varied reactions to the proposal. It has been said in the press debate that the proposer "kept a level head". But most of the "yes" politicians have adopted a negative or evasive attitude. Politically, the proposal does not have much prospect of success. Nevertheless the opponents of membership and the press have paid considerable attention to it.²

The art. 112 line of action mentioned above presupposed a specific constitutional decision authorizing Norwegian accession to

² The Popular Movement against Membership in the EEC has declared that the movement will publish a report on which standpoints the individual candidates at the general election (September 1973) are taking concerning this proposal. The press now (March 1973) has quite frequent comments in connection with the current nominations to the parliamentary election with a view to finding out whether in the safe seats there will be nominated 52 definite no-candidates, i.e. the number required to prevent the possibility of using the procedure mentioned.

the Communities (from a legal-technical point of view, this means a constitutional decision authorizing the King to ratify a treaty of accession). The constitutional proposal for a reduction of the majority fraction is another procedure. It is true that both procedures have the same goal—to pave the way for Norway's entry into the Communities, and it is further true that both procedures employ the same kind of remedy—that of a special constitutional decision. Legally there are, however, also essential differences. First, there is a difference in the relation of the two procedures to the presumptions and legislative history of the Constitution. A separate constitutional decision aimed at *this organization only* (the individual method) is a procedure on which the various political groups agreed as being entirely acceptable at the time when the general authority contained in art. 93 was passed in 1962, whereas, on the other hand, an alteration of the majority requirement in the *general* authority itself will result in a lowering of this requirement below the figure which the various political groups agreed as representing the minimum limit in 1962. Secondly, a reduction of the majority fraction will not harmonize very well with the rest of the constitutional system. As mentioned, an art. 93 decision is really a constitutional decision—in summary form. A reduction of the fraction to two-thirds would mean that a far-reaching constitutional amendment could be carried through by the same majority as in the ordinary constitutional procedure, without, however, the guarantees as regards time and a general election that pertain to that procedure. According to the prevailing Norwegian opinion, it should not be possible to relinquish, for instance, the constitutional liability protection in case of expropriations or the constitutional prohibition against retroactive legislation by means of a single parliamentary two-thirds majority decision, which would lack the other guarantees inherent in the constitutional procedure. For similar reasons, I believe that the strengthening of the majority fraction to three-fourths which has been included in the “supranationality clause” is justified.

If one assumes, however, that the proposal on a reduction of the fraction depends entirely upon a preceding and positive new referendum, resulting in a “yes” majority, then the real difference between such a constitutional amendment and a constitutional decision specifically on membership of the Communities will be substantially reduced.

11. The parliamentary debate on the referendum came just before Christmas 1972.

In the time following the referendum important political events had taken place as a direct consequence of that measure. The situation was somewhat paradoxical, however, as the Storting itself, the organ that had asked for the people's advice, had not yet, i.e. on December 12, taken any decision in this matter.

With this we come to the last act of the national drama about EEC membership.

This act proved to be a short one. There was no longer any question as to the realities of the EEC problem. These were quite clear.³ The only problem for the actors was what form the negative parliamentary decision should have. This had now become a question of the relation between Parliament and the Government. The material which formed the foundation of the parliamentary handling was a report on the resigned government's assessment of the referendum outcome.⁴ If the Storting had wished to demonstrate its determination to undertake the political management of the EEC matter, the adequate form would have been a *decision on the substance of the matter*, expressing Parliament's own evaluation of the referendum and of the future political course. This might also have been motivated by the great national interest in the matter. At the same time, however, it would have compelled the various parliamentary groupings to formulate a standpoint and to indicate how much weight should be attached to the referendum. Instead the Storting chose to have the report only *inserted into the records*, i.e. it passively made a note of the events that had taken place outside the national assembly.

With this trivial decision the curtain went down on ten years of futile efforts by a succession of governments.

12. The present problem is the free trade agreement.

On December 4, 1972, the Norwegian Government presented a memorandum containing its main views regarding the contents of the future agreement. In this we read, *inter alia*:⁵

³ An attempt on the part of one single representative to have a substantive debate proved to be a monologue only.

⁴ Parliamentary Report (*Stortingsmelding*) no. 15 in *Stortingsforhandling*, vol. 3, 1972-73.

⁵ Memorandum on Negotiations between the Government of Norway and the European Communities, presented by Mr Hallvard Eika, Minister of Commerce and Shipping, Brussels, December 4, 1972.

The Government of Norway wants to emphasize . . . that the result of the referendum cannot be interpreted as a rejection of the existing, close and extensive co-operation with the countries of Western Europe; a co-operation which has been and remains a cornerstone in Norwegian foreign policy . . . The aim of the Norwegian Government is to achieve a balanced agreement allowing for the broadest possible scope for trade relations, in which due regard is paid to the special characteristics of Norwegian industry and trade, and in particular Norway's export structure.

A unanimous Norwegian Parliament is behind these negotiations.

Such an agreement will hardly give rise to specific constitutional problems.

One reservation must, however, be made in this respect. Earlier, in the 1960s, considerable attention was focused on the possibility of an *association* with the European Communities. For a long time it had been presumed that this would involve no constitutional problems, since, as long as an authority for *entry* into the Communities had been provided by art. 93 of the Constitution, it was thought to be an *a fortiori* conclusion that any kind of association arrangement could be established. This opinion had been generally accepted until Professor Torkel Opsahl rejected it by some simple arguments.⁶

In short his reasoning was as follows. The rule in art. 93 gives Norway the possibility of joining a supranational organization. Then it must be an independent condition that Norway participates in the organization which is to exercise power. If it is to be delegated any essential authority under an association agreement with the Communities, this can therefore *not* take the form of a delegation to the Community organs. Instead there must be created a separate association organ upon which Norway is represented.

A corresponding debate may arise again where a trade treaty is concerned, should this treaty delegate essential decision-making power to the Community organs. However, having regard to the existing pattern of the agreements already concluded between

⁶ Document no. 10 in *Stortingsforhandlinger*, vol. 5, 1966-67, pp. 29-30. In the same direction also Johs. Andenæs, *op. cit.*, p. 13. The view of Opsahl and Andenæs has, however, been strongly criticized by C. A. Fleischer in 150 *Revue du Marché Commun* 1972, p. 43.

the Communities and the countries in the remainder of EFTA, this is a purely academic reservation.

First, according to these agreements, a so-called Joint Committee is to be established—one for each treaty—composed of representatives of the Communities on one side and representatives of the treaty nation in question on the other. The Committee is responsible for the administration of the agreement and has to ensure its proper implementation. In other words, there have been established separate treaty organs on which each of the contracting parties is represented. Secondly, the delegation of power to this joint organ is very modest. As a general rule the Joint Committee may only issue recommendations. Only in special cases does it have authority to make decisions. These decisions do not have the effect of national law, but are to be put into effect by the contracting parties according to their own rules. Moreover, the Committee's decisions have to be unanimous.

13. The existing trade agreements between the Communities and the remainder of EFTA, apart from that with Finland, contain so-called *evolutionary clauses*. These clauses have aroused political attention and, in certain Norwegian quarters, some anxiety that by means of these clauses we are going to enter the Communities "through the back door". The Norwegian Government is, however, in favour of the inclusion of such a clause in our trade agreement.

Regarded as a legal text, an evolutionary clause is rather toothless. It contains no obligation to carry on the development of the cooperation. All it does is to establish a *standard procedure* in the event of one of the contracting parties wanting to attain a further development of the connections to comprise new fields. In that case the parties may leave the matter in the hands of the Joint Committee. The Committee, however, can only make recommendations, even these must not be aimed at affecting the autonomy of decision of the contracting parties—whatever that may mean—and any new agreements ultimately resulting from such an initiative shall be subject to ratification or approval by the contracting parties in accordance with their national law. All that there exists of legal norms in these clauses is, as far as I understand the situation, only a rule on the competence of the Joint Committee to deal with such requests, possibly combined with an obligation for one party to evaluate the proposals presented by the other party.

It may, of course, happen that a legal baby turns into a political giant. The Norwegian Government has already indicated a number of fields where it believes that the clause in the Norwegian agreement might be applied, such as protection of the environment, protection of consumers, technology and research, monetary policy and cooperation in the shipbuilding sector. However, viewed through the jurists' glasses this development clause is a rather underdeveloped clause and is hardly capable even of creating legal issues of significance.

14. Outside the field of constitutional law, the legal problems connected with the Norwegian trade agreement are at present exclusively of a nature that concerns *legal policy*, since the contents of the agreement are the subject of negotiations.

The agreements which the Communities have concluded with the EFTA countries not applying for membership follow the same basic pattern. The Norwegian Government has declared that this pattern is in principle also a suitable basis for an agreement between Norway and the Communities.⁷

The individual agreements are, however, to a certain extent adapted to the specific conditions in each of the countries. The most important wishes presented by the Norwegian Government with regard to such adaptation fall into the following three main groups.

First, we want restrictions of the exceptional rules on "sensitive products", i.e. products where, in the interest of the members of the Community, specific rules apply to the gradual abolition of tariffs, with different periods of winding up for various groups of commodities, and, in addition, quota limitations. The sectors producing these sensitive products are of great importance in the Norwegian industrial structure, both as regards production and employment. This applies especially to wood processing, the aluminium sector, the ferro-alloy industry, and zinc production. In Norway's case, sensitive products constitute a comparatively larger share of exports to the EEC than is the case with the other countries which have been negotiating for a trade agreement, with the sole exception of Finland.

Secondly, we want the trade agreement to be extended to comprise fish and fish products. In this sector Iceland, especially, has obtained important concessions. The Norwegian Government

⁷ *Op. cit.*, *supra* note 5.

holds that many of the special features in this sector which prevail in Iceland are also applicable to important regions in Norway.⁸

Thirdly, we wish to arrive at an arrangement providing for consultations between the parties on shipping questions.

The better the conditions we obtain, the stronger will be our links with the European Communities, not only in economic respects, but probably also as seen by Norwegian popular opinion, and consequently in political respects too.

15. On November 24, 1972, our new Foreign Minister reported in the Storting on the new negotiations with the European Communities for a trade agreement. Concerning *Nordic* cooperation, he said:⁹

Some time ago the Nordic Council decided to make an account of concrete forms of Nordic cooperation. As a consequence of the marked political concentration on the Common Market issue both in Denmark and Norway, this work has been somewhat delayed. When the relations of the Nordic countries with the European Communities have become clarified, the countries can *now* concentrate more on these efforts, and the aim is to carry through a programme of action within a number of sectors. The Government will contribute to this, and in other fields also further the development and strengthening of Nordic cooperation.

In 1972 the centenary of the Nordic Jurists' Conferences was celebrated, and a main topic of the discussions was "the problem of Nordic unity of law today". One major issue was the danger of a crisis in Nordic cooperation in the field of law that would arise if the Nordic countries should arrive at different forms of adherence to the European Communities.

In the Norwegian debate about the European Communities, Nordic cooperation was a central concept. The "no" wing did in part present Nordic cooperation as an alternative to membership of the Communities. The "yes" wing also described this cooperation as a primary task of Norwegian policy, only it would not accept the view that membership of the Communities would bar such cooperation. Now that the great battle over the referendum has come to an end, it should be possible for both parties to go together in wholehearted joint efforts in this field.

⁸ *Ibid.*

⁹ *Stortingsforhandlinger*, vol. 7, 1972-73, p. 668.

However, in the time that has passed since the referendum, there has been no really new development in Nordic cooperation. In 1864 Henrik Ibsen wrote at the time of the collapse of Scandinavism: "The words that flowed, as if they came, from other hearts to home, were nothing else but empty words, and now the drought has come." One may fear that this quotation will once again become true.

It has been maintained, as a political maxim, that it is precisely when a crisis has arisen in an area that one should take the opportunity of moving forward. This is the attitude which the Nordic peoples, including the Nordic jurists, ought to adopt in the present situation. In that case Nordic cooperation, and thus also our cooperation in the field of law, might be given a great new chance.

It might be added that the negotiations between the Communities and Norway resulted in two treaties: first, an agreement between the European Economic Community and Norway ; secondly, an agreement between the member states of the European Coal and Steel Community and the European Coal and Steel Community, of the one part, and Norway, of the other part. The Norwegian Parliament gave in a unanimous decision on May 24, 1973, its consent to the ratification of the agreements.