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## **Constitutional Referenda in the Netherlands: A Debate in the Margin**

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The issue of constitutional referenda touches on the very foundations of the constitutional system of a country. It inquires into the nature of the power to make and to amend a constitution, and into how to understand this power and the procedures involved. In particular, it raises fundamental questions regarding the democratic nature of constitutional politics as well as the nature of democracy at the basis of a constitution.

This contribution on the Constitution of the Netherlands could have been very short indeed, much shorter than it is. The present Constitution of the Netherlands does not provide for a referendum, nor has it been practised in the Constitution's making or its amendment. With one or two exceptions, the constitutional referendum is hardly recognized as being of its own kind in this country.

Yet, as we shall see, constitutional referenda have been looming large at the margins of the system. They are at the temporal horizon of the constitutional system from the very beginnings of the Kingdom until the recent rejection of the Treaty establishing A Constitution for Europe. They are at the margins of its territorial scope, as the overseas countries of the Kingdom have repeatedly consulted their population as to the desired constitutional future of the Kingdom. And they are at the horizon of political debate, or rather – with one exception – in the margin of a series of proposals throughout the 20<sup>th</sup> century to introduce a general legislative referendum.

The constitutional referendum is also looming at the margins of the present method of constitutional amendment in a quite different manner: although the Constitution does not provide for a referendum or anything equivalent to that, paradoxically the present method of amending the Constitution is taken by most constitutional lawyers to involve a consultation of the electorate on pending amendments. We hold this view for erroneous on several scores. This kind of misunderstanding as to the precise nature of the constitutional process is in itself significant for the type of constitution we are dealing with.

We shall discuss these various elements in the present contribution. After a brief general characterization of the constitutional system, we will first discuss the present method of constitution making. Next we will have a brief glance at the use of

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constitutional referenda in the constitutional history of the Netherlands, at the use of consultative constitutional referenda in the overseas countries, and finally at the various proposals for introducing constitutional referenda. We will round this essay off with a number of concluding reflections.

## **1. The Nature and Character of the Constitution of the Netherlands**

When we distinguish between revolutionary constitutions and historical, incremental constitutions, the constitution of the Netherlands is definitely of the latter type. There is a single document called *Grondwet*. In 1815, due to the union of Belgium to the Northern Netherlands, it had both a Dutch and French official version. In French it was, significantly, not called *Constitution* but *Loi fondamentale*. This gives a better rendering than the current English translation which we shall use here as well, which translates *Grondwet* as Constitution of the Netherlands.

This *Grondwet* does not encompass the whole of the constitution, nor does it contain the most important constitutional rules. Of higher rank than the *Grondwet* is the *Statuut voor het Koninkrijk der Nederlanden*, Charter for the Kingdom of the Netherlands, which concerns the relations between the European country and the two overseas countries, the Netherlands Antilles and Aruba. Not all fundamental constitutional rules can be found in either of these documents. The fundamental rule of the governmental system – the rule of no-confidence which makes it a parliamentary system of government – has remained a rule of unwritten, customary constitutional law to this day, just as ministerial responsibility has been expressed in the Constitution only in a laconic and incomplete manner.<sup>1</sup>

Apart from other rules of constitutional law contained in sources outside the Constitution [*Grondwet*], there is a fair amount of consensus that the role of the Constitution is primarily to codify rules and principles which have become generally accepted, rather than to modify public society and to dominate and steer the political system.

Most of the great constitutional modifications took place in the 19<sup>th</sup> century and ended with the democratic reforms of the early 20<sup>th</sup> century. These modifications basically concerned the governmental system, which changed from autocratic monarchical rule – albeit under a constitution – towards a system of quasi-aristocratic parliamentary government in 1848 as confirmed by the parliamentary practice of the 1860s; and finally it were constitutional provisions which transformed the system from aristocratic towards democratic as a result of debates raging since the 1870s and finding an end with the revision of 1917 and its final confirmation in the constitutional amendments of 1922.

All these modifications and reforms took place by incremental changes to the Constitution of 1814/1815. The changes required no new republics, not even new constitutions. Although there is some disagreement on whether the original of the present Constitution dates back to 1814 or 1815 – which in itself is significant – we are still constitutionally governed by that 1814/1815 Constitution as amended since. Continuity is the hallmark of the constitutional system, notwithstanding intermittent political upheaval, which, on occasion, led to constitutional accommodation; a real political revolution is hard to trace in Dutch constitutional history since 1848. And even 1848 was not accompanied by truly revolutionary movements in politics – the

<sup>1</sup> Article 42, second paragraph, of the Constitution is all there is. It states: The King shall be inviolable; the ministers are responsible.

liberal movement in the Netherlands was a movement of reform, not a revolutionary movement.

As we shall see, the fact that in the Netherlands the Constitution does not occupy that exclusive and elevated position which it does in other continental European countries has also meant that the constitutional culture is relatively weak. Constitutional debate is nearly absent and, if engaged in, is not very profound nor characterized by intellectual rigour, but dominated by considerations of political convenience. It is not a hazardous guess to hold that politicians are hardly aware of constitutional rules and principles beyond one or two of these. The Constitution is an instrument which in the end is not very different from any other piece of legislation. This sense is perhaps reinforced by the fact that acts of parliament cannot be reviewed by courts for their compatibility with the Constitution (though they can be reviewed against self-executing treaty provisions such as those which are found in, for instance, human rights treaties).

This all has its effect on issues regarding constitutional referenda. But before we can say anything about these, we must indicate the present method for amending the Constitution, because it is within that method that it might have a role to play.

## **2. The Present Role of the Electorate in Constitution Making**

### *2.1. Pouvoir Constituant*

The background we have just sketched, may help understand various traits of the constitutional law of the Netherlands. One of these is that in the literature there is little concern to identify the *pouvoir constituant*, neither historically, nor in terms of present-day constitutional theory. There is no clear concern to identify who has held or holds original power to constitute the state, its institutions and the principles and rules on which they are to operate. Moreover, sovereignty is considered a concept which is not helpful in making a constitution like the Dutch work, nor for understanding its operation. As a somewhat singular exception to continental Europe's constitutional doctrine, sovereignty has no constructive role to play in the treatises and textbooks on constitutional law of the Netherlands.<sup>2</sup> This approach has deep historical roots, which go back to the more than two centuries of the Republic of the United Provinces which did not claim sovereignty over the provinces it united, and in which no institution of this overarching Republic claimed sovereignty either.<sup>3</sup> During the 19<sup>th</sup> century that other concept of sovereignty – sovereignty of the people – was too divisive a principle to be invoked successfully as a founding or legitimating concept.

An authentic, original constitution making power, a true unconstituted *pouvoir constituant*, existing so to say *extra ordinem*, cannot be identified in the Netherlands constitutional history. The Constitution is much rather a product of the vagaries of history, consolidated by incrementally taking up what has emerged as a new or not so new consensus.

As a consequence of this state of affairs the literature speaks rather loosely about the *grondwetgever*, constitution-making power, without any clear distinction between the power to make a new Constitution and the power to amend it within the bounds of the Constitution's own provisions on constitutional amendment – and so shall we in

<sup>2</sup> Exemplary is the most widely used textbook by Kortmann 2005, p. 69-72; in greater detail, De Witte 2003.

<sup>3</sup> For a brief exposition see, Besselink 1996, p. 192-206; also in: FIDE 1996.

this essay. Nevertheless, at times the Constitution has been amended in an unconstitutional manner. This was the case at any rate in 1815<sup>4</sup> and 1840,<sup>5</sup> and, as we shall see below, at least arguably also the recent amendment of 2005 was unconstitutional. But none of the subsequent constitutions have been considered revolutionary.

Also institutionally, this constitution-making (or rather: constitution-amending) power is hard to define. It requires a careful analysis of the provisions on which the process of constitutional amendment is based, as well as of constitutional practice. We shall undertake this analysis with a view to ascertaining the manner in which the electorate cooperates in the exercise of the constitution-making power. We shall conclude that this electorate (the 'people' as one would have it in certain constitutional systems) does not have constitution-making power, neither in fact nor in law.

## 2.2. *Constitutional Provisions on the Procedure for Constitutional Amendment*

Since 1814, the Constitution has been amended 22 times, usually in packages of amendments comprising the change of one or more provisions: 1815, 1840, 1848, 1884, 1887, 1917, 1922, 1938, 1946, 1948, 1953, 1956, 1963, 1972, 1983, 1987, 1995, 1999, 2000, 2002, 2005. The process of amending the Constitution is determined in Article 137 of the Constitution.<sup>6</sup>

The essence of the procedure is that the amendment has to be passed twice in parliament and be ratified twice by the government; these are called the two 'readings'. Until 1996, we could say more simply that an amendment had to be adopted by two successive parliaments and ratified by two successive governments. Since 1996, however, no new elections for the Upper House are necessary for it to adopt an amendment. So two different Lower Houses deal with the amendment, but in principle it is the same Upper House deals with it twice.

<sup>4</sup> The provisions of the Constitution of 1814 made it explicit that at first reading an act of parliament would have to declare not only the necessity of the amendment, but also 'the amendment or addition [must] be clearly indicated and expressed' (Art. 142 Const. 1814). However, the act leading to the entirely revised Constitution of 1815 only expressed the necessity of this revision but not its contents.

<sup>5</sup> The Belgians no longer participated in the procedure for the amendments following the separation. In reality the amendments took effect not as a result of the Netherlands Constitution of 1840, but as a consequence of the revolutionary force of arms in 1830, sanctioned by the international powers in 1831. The Belgians had their own Constitution already in February 1831 and were no longer part of the Dutch Parliament. In practice, this meant that the provision which prescribed that the Lower House (total number of members: 110, of which 47 Belgian) could only decide if two thirds of the members were present, by a majority of three quarters of the vote (Art. 232 Const. 1815), could not be followed.

<sup>6</sup> Article 137 of the Constitution:

1. An act of parliament shall state that an amendment to the Constitution as proposed in the Act, shall be considered.
2. The Lower House may divide a bill presented for this purpose into a number of separate bills, either upon a proposal presented by or on behalf of the King or otherwise.
3. The Lower House shall be dissolved after the Act referred to in the first paragraph has been published.
4. After the new Lower House has assembled, the two Houses of the States General shall consider, at second reading, the proposed amendment referred to in the first paragraph. They can only adopt it with at least two thirds of the votes cast.
5. The Lower House may divide a bill for the amendment of the Constitution into a number of separate bills, either upon a proposal presented by or on behalf of the King or otherwise, if at least two thirds of the votes cast are in favour.

The 'first reading' takes the form of a normal Act of Parliament 'which states that an amendment to the Constitution as proposed by the Act shall be considered' (Art. 137, first paragraph, of the Constitution). This Act requires the normal majority of the votes in each of the two Houses of Parliament.

After publication of this Act, the Lower House is dissolved (Art. 137, third paragraph, Constitution) – a rule introduced in 1848.

After the election of the new Lower House, each of the Houses of Parliament 'shall consider, at second reading, the proposed amendment [...]. They can only pass it with at least two thirds of the votes' (Art. 137, fourth paragraph, Constitution). This is the 'second reading'.

After governmental ratification, the amendment enters into force immediately upon publication.

In constitutional practice, the dissolution prescribed by Article 137, third paragraph, of the Constitution, is timed in such a manner that the elections coincide with the periodic general election of the Lower House. As we said, the constitutional amendment of 1996 scrapped the dissolution of the Upper House. This was justified as follows. The Upper House is elected by the Provincial Councils immediately after the direct election of the latter. As the dissolution of the Upper House is not accompanied by the dissolution of the Provincial Councils, in practice the Provincial Councils would tend to re-elect the same Upper House.<sup>7</sup> This was considered to be an ineffective ritual.

### 2.3. *The Nature and Meaning of the Dissolution of the Lower House*

The predominant view in present-day constitutional literature is that the dissolution of the Lower House, as part of the process of constitutional amendment, is a consultation of the electorate on the amendment. Often this is taken so far as stating that the newly elected parliament is to decide in accordance with the wishes on the amendment expressed by the electorate. This view goes back to the writings of Thorbecke in the first half of the 19<sup>th</sup> century.<sup>8</sup> This view is, at least under present circumstances, erroneous both in fact and, it is submitted, also in law for the following reasons.

It is erroneous in fact because the electorate does not pronounce itself on the amendment at all. It is true that the amendment may theoretically be a prime issue during the elections. However, the only time that this may be said to have been the case was in 1917, when the general franchise was introduced as well as equal financial treatment of public and denominational schools. The amendment of 1948, which created the (ultimately abortive) possibility of a kind of commonwealth confederation of the Netherlands and Indonesia (as well as Surinam and the

<sup>7</sup> This is so since 1983, but not before; before, only half of the Upper House was elected every three years.

<sup>8</sup> Johan Rudolf Thorbecke (1798-1872), a Leiden law professor and a member of the *Tweede Kamer* [Lower House] who was to become the protagonist of the liberal reform of 1848, and prime minister of three cabinets (1849-1853; 1862-1866 and 1871-1872). Outspoken in this respect was the proposal by the *Staatscommissie*, chaired by Thorbecke, who drafted its report, saying about the newly elected parliament after dissolution: 'Its vocation is to answer the question which has been submitted to the people whether the drafted amendments are wished for or not'. [*Hare roeping is, op de vraag aan het volk, of de ontworpen wijzigingen al dan niet worden verlangd, antwoord te geven.*] In this view the new parliament merely translates the elections into a 'yes' or 'no' to the amendment. This view was not adopted by the government, which endorsed the proposal, but considered the dissolution no more nor less than electing a newly representative body which has to decide on the amendment.

Netherlands Antilles in the West), was another occasion where the politics of decolonisation at the basis of the constitutional amendment played a role in the elections. But in none of the other cases during the 20<sup>th</sup> century amendments and the 21<sup>st</sup> century did the amendment play any role during election campaigns. So as a matter of fact, dissolutions are not aimed at consulting the opinion of the electorate on the amendment pending.

This conclusion is reinforced by the following arguments. Since the introduction of an electoral system of proportional representation in 1917, elections have never produced clear majorities but only minorities. Even if a constitutional amendment were to be limited to one issue only – which it has rarely been – then it would be a rare event to have any clear position with clear results. The fact that parliament after the dissolution continues also as a regular parliament, complicates this further. It means that the issue of the constitutional amendment cannot reasonably be the one and only consideration in casting a vote.

Until 1995, the Upper House was dissolved simultaneously with the Lower House except, in 1995, the dissolution of the Upper House was postponed to coincide with the periodic election of the Upper House by the (newly elected) Provincial Councils. In 1996, as we mentioned, the dissolution of the Upper House with a view to deciding on a pending constitutional amendment was abolished altogether. The consequence of this is that one of the two Houses of Parliament with decisive powers on the amendment of the Constitution is necessarily provided not merely with an older democratic mandate, but with one which is necessarily unrelated to any particular constitutional amendment for the simple reason that at the time of the elections of the Provincial Councils, which subsequently elect the Upper House, there is (usually) no constitutional amendment yet passed at first reading; so the amendment cannot possibly play a role at these elections. Yet, this House has an identical power to adopt or to reject the amendment of the Constitution as the Lower House, which was renewed for the purpose. Under this circumstance, it is incoherent to conceive of the elections as a kind of plebiscite which translates into a newly composed parliament deciding in conformity with the wishes expressed by the electorate on the amendment: if there would be any plebiscitarian aspect to the dissolution (which there is not) this could, since 1996, only be the case for one of the two Houses with constitution-making powers.<sup>9</sup> If the aim of the dissolution of the one House would be to give the electorate the chance to approve or disapprove of the amendment, this approval or disapproval cannot possibly bind the other half of parliament (the Upper House) which is not dependent on any new election.

It is not the newly elected Lower House which alone has decisive constitution-making power; it shares it with the old Upper House whose mandate has not been renewed to adapt it to its new role of makers of the Constitution. The Upper House is turned from a law-maker into a constitution-maker, as if by chance, through the coincidence of the adoption of an Act at first reading and the dissolution and the forming of a new Lower House with constitution-making powers. It certainly is not turned from a law-maker into a constitution-maker by any decision of an electorate, not even by its own electorate, being the (themselves directly elected) members of the

<sup>9</sup> The abolition of the dissolution of the Upper House in 1996 increases the democratically unrepresentative nature of the constitution-making process. Letting the dissolution coincide with the elections of the Upper House after the (direct) elections of the Provincial Councils (as happened against the initial wishes of the government in 1995) would have increased the representative nature of the constitution-making process. In the very muddled reasoning at the time of the constitutional amendment of 1996 this was entirely overlooked.

Provincial Councils. As there is no trace of any direct or indirect decision of an electorate that could possibly be at the basis of the subsequent decision of the Upper House to approve or not to approve the amendment (disapproval requiring only one third of the vote (minus one), approval two thirds of the vote), it has become impossible to say that at the basis of parliament's decision there is some quasi-plebiscitarian consultation of the electorate.

The most decisive argument against the orthodoxy that dissolution exists to consult the electorate on the desirability of a particular constitutional amendment, is the strictly representative nature of the electoral process involved. The dissolution concerns in law and in fact no less nor more than the election of a representative body. This representative body is bound by the constitutional provision guaranteeing its members total independence of judgment in fulfilling their representative task.<sup>10</sup> It is precisely the *non*-plebiscitarian character of the process of amending the Constitution which necessitates the use of a representative body to adopt or reject an amendment. The new election is urged to assure the truly representative nature of one of the two branches of parliament which is to decide about such an important issue as the amendment of the Constitution.

This argument is confirmed also in terms of strict law. As the language of Article 137 makes clear with great precision, at first reading Parliament adopts an Act, which declares that a proposed amendment 'is to be considered' (paragraph 1). This proposed amendment is to be considered not by the electorate at elections. Nor is it in fact, for never has the proposed amendment been submitted to the electorate at elections in any straitforward manner (although in relatively rare cases mentioned it played a role at the background). The voters are not asked to pronounce on the text of an amendment. The elections at dissolution are not a referendum at all. The Constitution makes it quite clear that elections are aimed at composing the House (until 1996 the Parliament) which is to consider the proposed amendment at 'second reading' (see Art. 137, fourth paragraph, of the Constitution). At this second reading the real constitution-making power is exercised, because only now can a final decision be taken.

What is lost out of sight in the present constitutional literature and practice is the function which the dissolution was supposed to have in relation to the issue of who has constitution-making power. The originally proposed amendment of 1848 was quite outspoken in this regard. It proposed to elect a new parliament in order to distinguish clearly between the legislature, i.e. the law-making power and the constitution-making power.<sup>11</sup> It even went so far as to propose not only the dissolution of the old Houses to that purpose, but also the subsequent dissolution of the new Houses after it had exhausted its constitution-making function.<sup>12</sup> This element has clearly been retained in the language of the present provisions, which go back to 1848. Even though the newly elected Lower House (until 1996: Parliament) continues to function as a normal legislative assembly, the very reason for this new election, as reflected in the language of Article 137 of the present Constitution, is to enable it to act as a *constitutional* assembly.

<sup>10</sup> Article 67(3) of the Constitution: 'The members shall not be bound by a mandate or instructions when casting their votes'.

<sup>11</sup> See on this Buys 1887, p. 794 et seq.

<sup>12</sup> The proposed but failed amendments of 1946 and 1951 to elect a Chamber for Constitutional Revision after adoption of an amendment at first reading is similar to the original proposal of 1848, and is also based on institutionally identifying the constitution-making power and separate it from the normal legislative power.

All this has now been quite definitely gone lost in the constitutional practice of the day. It is the view of the present government (parliament concurred in the view of the government)<sup>13</sup> that it is not necessary to have a constitutional amendment decided by the Lower House sitting after the election ex Article 137, but can also be decided at second reading by a later Lower House which has not assembled on the basis of a dissolution ex Article 137, third and fourth paragraph, of the Constitution. This Lower House does of course have an electoral mandate, but not a mandate covered by Article 137 of the Constitution, and hence no constitution-making power. And yet, the constitutional amendment of 2005, concerning the right of elected members of the representative bodies to be temporarily replaced in case of illness, pregnancy or child-birth, was not adopted at second reading by the Lower House elected after the dissolution of 23 March 2002, which was based on Article 137, third paragraph, of the Constitution,<sup>14</sup> but by the House elected at a later dissolution as a consequence of a political crisis in November 2002 (on the basis of Art. 64 of the Constitution only, so not on the basis of Art. 137(3)).<sup>15</sup> It is therefore at the very least arguable (but this author holds it as the better view) that the one amendment which has so far passed at second reading<sup>16</sup> after this dissolution was passed in an unconstitutional manner and can therefore not be deemed to be constitutionally binding.

It should be pointed out that this is a merely academic stance, which normally has no impact at all on the views of the politicians within the constitutional institutions. Readers are reminded that Article 120 of the Constitution of the Netherlands prohibits courts from reviewing the constitutionality of acts of parliament. It is inconceivable that a Netherlands court would take this prohibition to be so narrow as not to prohibit judicial review of constitutional provisions.

However all this may be, this constitutional practice illustrates how hard it is to identify who holds the constitution-making power.

#### 2.4. *Who has Constitution-making Power?*

Institutionally, the criterion is that the relevant institutions must have decisive powers to adopt or reject the relevant document authoritatively. Thus, with regard to the legislative power, Article 81 of the Constitution of the Netherlands states that it is

<sup>13</sup> They did so following a totally incomprehensible advisory opinion of the Council of State, *Raad van State* (Advies Raad van State 17 October 2003, *Kamerstukken II* [Parliamentary Documents Lower House] 2003/04, 29 200 VII, nr. 36). It argued that the history and intention of Article 137 in 1995/1996 made clear that only the Lower House elected after dissolution on the basis could consider a pending amendment, but that a strictly literal interpretation did not exclude another conclusion; this literalist interpretation has, in the opinion of the *Raad*, to prevail – a rare species of constitutional interpretation of such a very recent constitutional provision, no doubt inspired by purely political considerations of the moment. If the *Raad* – whose advice is not binding – had concluded otherwise, it would have implied the end of at least one constitutional amendment (on the direct election of mayors) which was crucial to the smallest coalition party; on this Peters 2004, nr. 3. In the end, the constitutional amendment on the election of mayors was rejected on second reading by the Upper House, just as an amendment introducing a corrective referendum had been rejected on second reading in the Lower House, but the amendment on the temporary replacement of elected representatives was passed in both Houses by the required two thirds of the vote.

<sup>14</sup> See *Staatsblad* [Official Journal] 2002, 173.

<sup>15</sup> See *Staatsblad* [Official Journal] 2002, 536.

<sup>16</sup> The amendment on the temporary replacement of representatives Act of 20 January 2005, *Staatsblad* 2005, 52; another amendment on changing Article 23 of the Constitution aiming to make cooperation between denominational and public schools possible is still pending, see *Staatsblad* [Official Journal] 2002, 171.

exercised by the government and States General jointly.<sup>17</sup> The fact that, for instance, the Council of State, *Raad van State*, is not mentioned although it is mandatory that it is heard on any bill before its introduction in parliament, makes clear that decisive power is the criterion. This was confirmed by the (so far: failed) attempts to introduce a binding corrective referendum. There is general consensus that this requires an amendment to Article 81 of the Constitution. Thus, all proposals to introduce a legislative referendum propose an amendment to this Article to the effect that the legislative power is exercised by the government and States General jointly, 'subject to the possibility of a referendum'. In a sense, the voters at referendum are thus considered to share in the legislative power.

The constitution-making power can on this basis and in light of the analysis in the previous section of this essay, institutionally be located in the institutions at second reading. It is true that this second reading requires the initiative of an act of parliament at first reading. But this is no more than a prerequisite initiative, it is not the exercise of ultimate power to adopt or reject the amendment.<sup>18</sup> The initiative taken by act of parliament consists in the formulation of the amendment and a decision on whether to have it considered by the constitution-making power proper, which is parliament (and government) at second reading.

The constitutional practice from after 2002, to the effect that also a later Lower House than the one elected after dissolution on the basis of Article 137 has constitution-making power, makes the identification of the institution retaining this power at second reading very blurred. Any Lower House elected after the first reading can hold that power, just as since 1996 any Upper House has constitution-making power. This blurring also implies means a blurring of the distinction between constitution-making power and normal legislative power. Hence it may even blur the distinction of constitutional law with normal law, which is not clear-cut in the Netherlands legal order anyway, composed as constitutional law is of norms of various status and character.

One thing is certain and this regards the question who does *not* have constitution-making power and who therefore cannot be said to be part of the constitution-making power: that is the electorate electing a new Lower House which is to decide on a constitutional amendment. So, also from an institutional point, the conclusion must therefore be that the electorate (the 'people') does not have constitution-making power in the Netherlands.

### **3. The Constitutional Referendum at the Margins of the Netherlands Constitution**

The above situation should not obfuscate the fact that at the temporal and territorial horizons there have been constitutional referenda and there has existed and still exists also a debate on constitutional referenda in the margin of the debate about the possible introduction of referenda in general. We discuss those marginal cases here.

<sup>17</sup> Article 81 of the Constitution: Acts of Parliament shall be enacted jointly by the Government and the States General.

<sup>18</sup> Also for normal legislation an initiative is necessary, which is the introduction by or on behalf of the King of a bill, or the initiative presented by a member of the Lower House and its introduction by the Lower House in the Upper House. This does not give the King or member of the Lower House at this stage legislative power in the sense of Article 81 of the Constitution. And, of course, the cooperation of many others is necessary as well; we mentioned the *Raad van State* already, but we could add countless civil servants, assistants to members of parliament, etc., etc. None of these have legislative power, although they cooperate in its exercise.

### 3.1. *Historical Constitutional Experience: the 19<sup>th</sup> Century*

Historically, the Netherlands resulted from the end of the Republic of the United Provinces, after more than two centuries, in 1795. Formally, it were the States General of the old Republic which called for a new constitution when they established the Regulation for the National Assembly – which included a plan for the drafting of a new Constitution to be referred to the people for adoption or rejection in each province. The States General also called the National Assembly's first meeting, thus putting an end to themselves.<sup>19</sup> The resultant new Batavian Republic, initially began a process of constitution-making along the lines of the said Regulation. However, the first proposal – the Big Book, consisting of no less than 918 Articles (excluding the General Principles and Annexes) – was massively rejected in a popular referendum on 8 August 1797, with 108,761 voting against and 27,995 voting in favour of the proposal. Incidentally, only citizens could vote who had declared 'to hold as legitimate solely the form of government which is based on the sovereignty of the whole nation, and thus to hold all hereditary offices and dignities as illegal and in conflict therewith'.<sup>20</sup>

The solution to the deadlock came by a *coup d'état* and a text based on an adaptation of the French Constitution of 1795 by Larevellière-Lépeaux, put forward by the secretary to the French Ambassador in The Hague.<sup>21</sup> The eventual text was subjected to a popular scrutiny of sorts, those citizens not being called to the elections who had not shown up in the previous referendum, nor those 'who are publicly known as supporters of the stadholderate and of the federal form of government', and 'those who are publicly known as being against the present state of affairs'.<sup>22</sup>

A subsequent constitutional referendum, overturning the 1798 Constitution, which itself provided that it was to remain unchanged for five years, was called in 1801, in order to be able to bypass parliament. This was done to sanction the Constitution of 1801 – a text which had the strong support of and was presented by Napoleon Bonaparte himself – on the basis of the recurring constitutional principle of the 'right of the people to change its Constitution'<sup>23</sup> now turned into the inherent 'power of the people at any time to change the Constitution'.<sup>24</sup> The fact that only 52,219 voters of an electorate of 416,419 had voted against was reason to consider it adopted with overwhelming majority – the fact that only 16,617 had actually voted in favour and the rest did not show up, remained conveniently undisclosed to the public, although at the time it was something of a public secret.<sup>25</sup>

Similarly, the Constitution of 1805, which centralized power in one person for the sake of convenience of relations between France and the Batavian Republic, was

<sup>19</sup> Some of the relevant documents are published in Bannier 1936, p. 1-35 and p. 554-556.

<sup>20</sup> Article 11 of the Regulation of the National Assembly [Reglement volgens het welk eene algemeene Nationale Vergadering door het Volk van Nederland zal worden byeen geroepen en werkzaam zal zijn], 30 December 1795; in: Bannier 1936 (note 2) p. 19.

<sup>21</sup> Bannier 1936, p. 7.

<sup>22</sup> Decree of the Constituent Assembly of 10 March 1798, quoted in Bannier 1936, p. 9.

<sup>23</sup> Decree of the National Assembly 19 January 1798, concerning the principles of the proposal to be referred to the people, which speaks of *het recht des Volks tot verandering zyner Constitutie*, the right of the people to change its constitution; in: Bannier 1936, p. 7.

<sup>24</sup> A letter of the Executive to the Representative Assembly asserts that 'a nation always has the power to change its constitution', *een Volk altijd de magt heeft zijne staatsregeling te herzien*; see Bannier 1936, p. 117.

<sup>25</sup> See the sources in De Gou 1995.

subjected to a popular vote. This time the electorate counted 353,332 persons. Of these 136 voted against and on the basis of the principles of the referendum of 1801, the rest of the citizens – of whom on this occasion 339,157 did not show up – was considered to have been in favour.

The Constitution of 1806, which turned Holland (as it was then called) into a puppet monarchy with the French emperor's younger brother Louis Napoléon on the throne, was not put to a popular vote to avoid the irritation of the Emperor – and obviously, the subsequent annexation in 1810 by France did not require any sham for imposing the French Constitution of 1799.

The interlude between the end of the old Republic in 1795 and 1813 when the French left, was looked upon throughout the rest of the 19<sup>th</sup> century as a dreaded example, and it cannot surprise that it is still considered a period of constitutional instability. The particular use to which constitutional referenda were put in that period made the phenomenon highly suspect. However, one could not quite do without any form of direct or indirect legitimacy for the new constitutional regime established shortly after the French left the Netherlands.

Thus, the Constitution of 1814, which the sovereign prince William I had asked for as a condition for accepting sovereignty, was submitted to some form of approval. A referendum to the people itself was considered too democratic and reminiscent of the French constitutional abuses. That is why one contrived an indirect form of legitimacy. Lists of in total 600 notable men were drafted which were laid before the public who could approve, disapprove or object to the names. The eventual group of notables (counting 474) met in a 'Great Assembly representing the United Netherlands' to cast their votes, of which only 26 opposed the Constitution (mainly because of the provision stating that the prince had to be a member of the Reformed Church).

The same device was used in 1815, when Belgium was united to the Netherlands subsequent to a decision to that effect by the Congress of Vienna. The country was to be governed by the Constitution of the Northern Netherlands '*qui sera modifiée d'un commun accord, d'après les nouvelles circonstances*'.<sup>26</sup> This *commun accord* took two forms. Firstly, a constitutional committee was formed composed of both Belgian and Dutch representatives. They negotiated and drafted a new Constitution, with novelties like a bicameral parliament. The text was submitted to the normal procedure for constitutional amendment in the Northern Netherlands and, secondly, submitted to the approval of the notable Belgians selected in the same manner as was done in 1814, representing the then three million Belgians. This form of indirect popular scrutiny could only have a positive outcome by making use of a variation on the earlier experience of constitutional referenda, and more in particular the odd manner of counting the votes. About one sixth of the voters did not show up, which according to the proclamation of William I on the results 'displeased' him 'although their absence can be considered proof that they were satisfied with the proposed draft'. Also, of the 796 which voted against there were 126 who did so expressly declaring their objections to the provisions on liberty of religion, provisions which could not be otherwise because the international Treaties on the unification imposed them – hence,

<sup>26</sup> This was stipulated in the first of the so-called London Articles: 'Cette réunion devra être intime et complète de façon que les deux pays ne forment qu'un seul et même état, régi par la constitution déjà établie en Hollande et qui sera modifiée d'un commun accord, d'après les nouvelles circonstances'. These articles were included by reference to by the Protocol of the Conference of 21 June 1814, as 'les points de vue mis en avant par lord Clancarty et agréés par le Prince Souverain d'Hollande.

also these were considered to be in favour of the rest of the proposed Constitution. And finally, the States General of the Northern Netherlands, representing some two million citizens, had voted unanimously in favour. Thus, William I concluded that 'after these calculations and comparison of the respective votes cast, no doubt can remain regarding the feelings and wishes of the large majority of our subjects and the consent of this large majority has clearly become apparent'.<sup>27</sup>

We can see in the devices used in 1814 and 1815 historical precedents to the mixing of the idea of representation with that of consulting citizens, which nowadays is still prevalent in the constitutional literature and practice we discussed in the previous section of this essay. We could say, nevertheless, that given the nature of the process, the consultations of 1814 and 1815 were more of a referendum than can be said of the present method for amending the Constitution. Moreover, the consultation of 1814 (and perhaps also of 1815) concerned not the amendment of the Constitution, but the making of a new Constitution. It concerned the involvement of citizens in a more original *pouvoir constituant* than is at play in amending the present Constitution.

If the 1814/1815 consultations can then be considered constitutional referenda, they were the first and last experience with the instrument as far as the Netherlands Constitution, the *Grondwet*, is concerned. But it was not the last experience with constitutional referenda in general. There are two other examples of constitutional referenda in the Kingdom, the consultative referenda in the overseas countries and the consultative referendum on the Treaty establishing a Constitution for Europe. We will briefly describe them.

### 3.2. *The Consultative Constitutional Referenda (I): the Overseas Islands of the Kingdom*

The Kingdom of the Netherlands is formed by the country in Europe and by two countries in the Caribbean: the Netherlands Antilles, which consist of five islands (Curaçao, Bonaire, St. Maarten, St. Eustatius and Saba), and the country of Aruba. As we mentioned above, the relations between the three countries are governed by the *Statuut voor het Koninkrijk der Nederlanden*, the Charter for the Kingdom of the Netherlands (1954).<sup>28</sup> These constitutional relations are quasi-federal in as much as a number of matters, such as foreign relations and defence are declared matters for the whole realm (federal matters) whereas all other matters are within the autonomy of each of the countries (such as economic, financial and social affairs, etcetera). We must mention all this in this paper, because the *Statuut* provides for the right to unilateral secession for Aruba, conditional on a *referendum* to that effect in that country; and because on the other islands consultative referenda have been organized on the constitutional future of the islands.

The island of Aruba was originally part of the Netherlands Antilles, but gained autonomy as a separate country in 1986. This was originally intended to be an interim status leading to independence 10 years later. However, the clause on independence in 1996 was withdrawn by an amendment of the Charter of 1994. Instead, Aruba

<sup>27</sup> Proclamation of 24 August 1815, *Staatscourant* 26 August 1815; also in Colenbrander 1909, p. 618-620.

<sup>28</sup> Until 1975 the *Statuut* also covered the country of Surinam, which in that year gained independence. Significantly, the people of Surinam were not given the chance to express themselves on their independence by referendum, as the instrument was strange to the constitution on the Kingdom.

acquired the right of secession. This is to be found in Articles 58 to 60 of the Charter.<sup>29</sup> A legislative act of the parliament of Aruba is to declare the wish to terminate constitutional relations within the Kingdom and thus to gain independence. This act must be accompanied by a draft future constitution of Aruba and can only be adopted with a majority of two thirds of the members of the Aruban parliament. According to Article 59 of the Charter, this act must be subjected to a referendum, in which it can only be adopted with a majority of votes.

This referendum is at present the only binding referendum that exists within the Kingdom. It is strictly speaking a legislative referendum, but as it concerns the structure and form of the Kingdom, it must in effect be considered a constitutional referendum.

As we mentioned, the five islands of the Netherlands Antilles have had a series of consultative referenda on the constitutional future of these islands within the Kingdom and the Netherlands Antilles. The first round took place in November 1993 and October 1994.<sup>30</sup> Four options were sketched from which one only could be indicated, which were the continuation of the relations within the present Netherlands Antilles, a separate status as a country (like Aruba), the status of a province within the Netherlands (incorporation) and independence. The outcome showed an overwhelming preference for retaining the present constellation of the Netherlands Antilles.<sup>31</sup> This meant that certain attempts to work towards a new constellation, including independence, had to be shelved.

This position changed over the last years. The five islands show, in terms of their political system, little coherence. Political parties are not organized on a countrywide basis but have an island constituency only. The electoral system fosters this. The

<sup>29</sup> Charter, Article 58: 1. Aruba may declare by country ordinance that it wishes to terminate the constitutional order enshrined in the Charter in respect of Aruba. 2. A bill for such a country ordinance shall be accompanied on its submission by an outline of a future constitution, containing in any event provisions on fundamental rights, government, the representative assembly, legislation and administration, the administration of justice and amendments to the Constitution. 3. The States may only approve such a bill with a majority of two thirds of the sitting members.

Article 59: 1. Within six months of the approval by the States of Aruba of the bill referred to in Article 58, a referendum to be regulated by country ordinance shall be held, at which those entitled to vote in elections to the States may express their opinion on the bill. 2. The bill shall not be enacted as a country ordinance until it has received the approval of a majority of the voters in a referendum.

Article 60: 1. Once the country ordinance has been enacted in accordance with Articles 58 and 59 and once the future constitution has been approved by the States of Aruba with a majority of at least two thirds of the sitting members, the date on which the government of Aruba feels that the constitutional order should be terminated in respect of Aruba shall be determined by royal decree. 2. This date shall be no more than a month after the constitution has been adopted, which in turn shall be no more than a year after the date of the referendum referred to in Article 59.

<sup>30</sup> For the background and results of the first round of referenda, see Oostindie & Klinkers, 2001, especially p. 229-234. Of the second round of referenda there exist no generally accessible official documents. For the purpose of this essay this author has relied on details published in newspapers, particularly the Antillian newspaper *Amigoe* (which has a good, freely accessible internet version) and Dutch newspaper reports, particularly *NRC Handelsblad* and *Volkskrant*.

<sup>31</sup> At the island of St. Maarten (half of which is French), where this was the preferred option for 59.4 per cent of the votes; on the other islands this preference ranged from 73.6 to 90.6 per cent of the votes). An autonomous status was the preference of 33.2 per cent of the voters on St. Maarten, and 17.9 per cent on Curaçao, but less than 10 per cent on the other islands. Incorporation was an option for 7.7 per cent of the votes on Curaçao, but only a few per cent elsewhere. Independence was the preferred option on St. Maarten for 6.3 per cent of the vote, but elsewhere less than 1 per cent.

predominance of Curaçao in the country government (which is located on Curaçao), economic differences between the island economies and the geographic distance between the leeward and windward islands weakened the sense of having much in common. Hence, also the mood shifted. This was reason for another set of consultative referenda on the constitutional future of the Netherlands Antilles, organized by the islands. The first was St. Maarten (approximately 34,000 inhabitants), which organized its referendum in 2000, when the population preferred a separate autonomous status like Aruba. Bonaire (approx. 12,000 inhabitants) held a referendum in September 2004, followed by Saba (approx. 1,500 inhabitants) in November 2004; both opted for more direct relations with the Netherlands over retaining the present Netherlands Antilles. Curaçao (approx. 133,000 inhabitants) opted for an autonomous separate status in April 2005, while the small island of St. Eustatius (approx. 2,700 inhabitants) was the only one which with overwhelming majority voted to remain in the Netherlands Antilles in a referendum of the same month.

These referenda were indeed only consultative, and were organized by the islands separately. Nevertheless, they have pushed forward negotiations between the islands of the Netherlands Antilles and the Netherlands to dismantle the Netherlands Antilles. This will of necessity sooner or later lead to a revision of the *Statuut voor het Koninkrijk*.

### 3.3. *The Consultative Constitutional Referenda (II): the Treaty Establishing a Constitution for Europe*

The Netherlands have had their own consultative constitutional referendum on the Treaty establishing a Constitution for Europe on the 1<sup>st</sup> of June 2005. This referendum was called for by a parliamentary initiative in the Lower House, which promoted the adoption of a bill prescribing a consultative referendum, to be held before the Lower House was to debate and decide on the constitutionally required parliamentary approval of the Constitutional Treaty.<sup>32</sup> The justification for this referendum was found in the fact that the European Union has acquired constitutional importance for the Netherlands. The Council of State in its advisory opinion on the referendum bill by a stretch of the imagination even saw a parallel between this consultative referendum and the elections prescribed before the second reading of an amendment to the national Constitution.<sup>33</sup>

The particular moment of the referendum, that is to say preceding the parliamentary debate on the Constitutional Treaty, was thought to derive from the consultative, non-binding nature of the referendum. It was to inform parliament about public opinion. Contrary to this ostensible aim, a number of political parties felt constrained to pronounce they would consider the outcome of the referendum binding, dependent on the voters turn-out. Thus, nearly all major parties committed themselves to the outcome as binding if there was a clear result and a sufficient number of voters casting a vote. And so there was. The turnout was about 63%, which is considerably higher than for elections for the European Parliament, and the 'no' was supported by 62% of the voters. This led to the withdrawal by the government of the bill on the approval of the Treaty without any parliamentary debate taking place on the Treaty at

<sup>32</sup> Wetten van 27 januari 2005 [Acts of 27 January 2005], *Staatsblad* 44 and 45, 2005.

<sup>33</sup> Advisory opinion of the Raad van State of 14 July 2003, *Kamerstukken II* 2002/03, 28 885 A, p. 2-3.

all.<sup>34</sup> So much for the informed debate in parliament which the consultative referendum aimed at.

It is the official view of the government, supported by a majority in parliament, that the present text of the EU Constitution cannot be re-submitted. The expectation is that it will not be until 2007 that a debate on Europe's constitutional future will again become possible.

The aftermath of the referendum is paradoxical. A large majority of parliament supported the outcome of the intergovernmental conference, and – obviously – so did the government itself. So the overwhelming 'no', although it could be foreseen in the last weeks before the referendum took place, must have been a disappointment to all those politicians. Members of parliament, however, were quite enthusiastic about the referendum as such. It was for the first time in many years that they were called to speak several times a day – not, as during the normal campaigns to a small group of loyal party members dutifully showing up, but in cafés, meeting rooms, debating clubs, societies and debating meetings of many kinds, filled to the brim with passionately discussing citizens. This was not what they were used to. It triggered a recent spate of initiatives attempting again to introduce referenda at the national level, as we shall see presently.

#### **4. The Debate on Referenda: Proposals for Introducing Constitutional Referenda in the Netherlands**

In this section we discuss the proposals which have been put forward in the course of time to introduce a constitutional referendum. With the exception of the proposal of the early 1920s, they all treated the constitutional referendum as one form of the general legislative referendum.

##### *4.1. The 1920s*

In December of 1918, an official 'state commission' was installed by royal decree to prepare a general revision of the Constitution. This commission, chaired by the Minister for the Interior, Ruys de Beerenbrouck, was asked also to study the peoples' initiative and referendum. The general background to their work was the situation after the end of the First World War. The aim of the constitutional revision was reinforcing democracy. This was not merely from a sense of after-war optimism, but also to prevent revolutionary movements and a renewed declaring of the revolution as had occurred (and failed) a month before.

The largest possible majority of the commission (only J. Schaper, member of the Lower House for the socialist party dissented) concluded in its quite brief report that the introduction of a peoples' initiative and referendum would involve 'grafting a plant of exotic origin on our constitution' and judged this to be 'a dangerous experiment'.<sup>35</sup> It made an exception, however, for a referendum in two cases: 1) on constitutional amendments, and 2) when a decision has to be taken as to the form of the state when no successor to the throne is constitutionally available, that is to say on the question whether the monarchy has to be continued.<sup>36</sup> As to constitutional

<sup>34</sup> Letter from the prime minister of 1 July 2005, *Kamerstukken II* 2004/05, 30 025, nr. 8 (reprint).

<sup>35</sup> *Verlag van de Staatscommissie ingesteld bij Koninkrijk Besluit van 20 december 1918*, no. 78, aan welke is opgedragen de voorbereiding van eene herziening van de Grondwet, 's-Gravenhage, 1920, p. 3-4.

<sup>36</sup> The matter of choosing a new successor to the throne (in case the monarchy was retained), however, was deemed unsuitable to be referred to the electorate.

amendment, the state commission proposed a constitutional referendum as ‘a more simple and articulate form’ of consulting the electorate than the dissolution of parliament ‘which avoids the inconveniences attached to any dissolution’.<sup>37</sup> It stated that if an amendment is adopted by parliament with a large majority, there is no need for a referendum:

‘One may then rightly assume that the decision is in conformity with public opinion. Is that majority in one of the Houses less than two thirds, than a consultation of the people is unavoidable and a referendum appropriate. Also then, however, a majority of two thirds shall be appropriate, in accordance with what the Constitution already prescribes, because only when a general conviction has occurred a revision of constitutional provisions should take place’.

In other words, the approval of a constitutional amendment required the adoption in a referendum with a two thirds majority of the vote.<sup>38</sup>

This proposal was introduced by the next government, of which Ruys de Beerenbrouck was prime minister. However, many objections were voiced and several amendments put forward in the Lower House, which in the end rejected the proposal at first reading.<sup>39</sup>

#### 4.2. *The Proposals of 1946 and the 1950s*

There have been two government proposals to change the procedure for amending the Constitution, which did not directly propose a constitutional referendum, but which did touch indirectly on the idea of a constitutional referendum.

The two proposals, which differed in technical details that will not concern us here, had in common the idea of elections for a special Chamber of Constitutional Revision, *Kamer voor Grondwetsherziening* which was to decide about a constitutional amendment after adoption of the initial Act formulating the amendment. The establishment of this Chamber would obviate the need for an interim dissolution of parliament. It would no longer be necessary to wait with proceeding with the amendment until the general elections. Also, the elections for the Chamber would more clearly focus on the proposed amendments.

Both times the proposal did not receive enough support in parliament. The bill of 1946 was rejected at second reading in the Lower House, where the main objections focussed on the fact that it was considered desirable to have constitutional amendments dealt with in a parliament elected on more general political considerations than that of a pending amendment only. At the background there seemed to exist the perception that the situation in the colonies might make amendments necessary, while also the cold war ideologies made themselves felt by the end of 1946 – two sensitive issues which one did not like to be presented as single

<sup>37</sup> These ‘inconveniences’ refer particularly to the fact that the dissolution entered into effect immediately (since 1983, the dissolution takes effect on the day of the first meeting of the newly elected House); dissolution especially for amending the Constitution would therefore interrupt the continuity, while letting it coincide with regular elections would push the issue of the proposed amendment towards the background.

<sup>38</sup> As to the referendum on the monarchy, the Commission held that it ought to be decided by a simple majority of the votes cast in a referendum.

<sup>39</sup> The same happened to the proposal also to dissolve the provincial councils when the Upper House was to be dissolved. For an overview see Huart 1925.

issues to a popular vote.<sup>40</sup> However that may be, it was deemed wiser that political parties would decide on the basis of established political lines, and not so much on separate issues and interests that might be at stake in revising the Constitution.

The objections to the bill introduced in 1951 were already apparent at first reading in the Lower House to such an extent that the government decided to withdraw the relevant bill when it came to a vote on the text and on a plethora of amendments and sub-amendments.<sup>41</sup> For our purposes it is relevant that the objections were similar to those in 1946, but were even more articulate. They concentrated precisely on the emphasis which the government had put on separating the issue of the constitutional amendment in elections from general political considerations. This, in the view of many, made the election of the Chamber for Constitutional Revision an indirect referendum and would be at odds with the representative nature of parliamentary democracy.

#### 4.3. *Constitutional Referenda as a Variety of a Regular Referendum: The Biesheuvel/Prakke Commission*

The issue of constitutional referenda later on arose in the margin of the debate about introducing a general possibility for national referenda. The main source of concrete and well-considered proposals came from another state commission, named after its chairmen the Biesheuvel/Prakke Commission, which presented its report in December 1985.

This Commission proposed three types of referenda. Firstly, it proposed the introduction of a binding, corrective referendum. It would be facultative, that is to say at the initiative of the electorate itself, expressing itself in an initial request supported by 10,000 voters and a definitive request by 300,000 voters. The Commission did not wish to exclude constitutional amendments from this type of referendum, but restricted the possibility of a referendum to an amendment adopted by parliament at second reading (i.e. with at least two thirds of the vote). In this referendum no special majorities would be required to adopt or reject the amendment; in the view of the Commission a normal majority should suffice. The restriction to a referendum at second reading only was motivated with the argument that otherwise two referenda on the same amendment would become possible, which was deemed undesirable (why parliament should have two chances to speak out but the electorate not should not, was left unclarified). It acknowledged that the dissolution after the first reading also involves the consultation of the electorate, but argued that this does in practice not concern the substance of the proposed amendment.<sup>42</sup>

The Commission also proposed to introduce a people's initiative, *volksinitiatief*, to be exercised in combination with the referendum. This initiative concerns the introduction of a bill in the Lower House, if supported by at least 300,000 citizens. Should either the Lower House reject the bill with at least two fifths of the vote in favour of the bill, or the Upper House reject it, or not be dealt with within a period to be specified, the bill would have to be subjected to an obligatory referendum for adoption. The initiative should in the opinion of the Commission also extend to initiatives to amend the Constitution, although its adoption in a subsequent

<sup>40</sup> See *Handelingen II [Minutes of the States-General]*, 1946-1947, Tweede Kamer, p. 99-122.

<sup>41</sup> See *Handelingen II*, 1950-151, Bijlagen, 2341 nrs. 1 et seq.

<sup>42</sup> *Relatie kiezers-beleidsvorming; referendum en volksinitiatief*. Staatscommissie 1985, p. 49-50.

referendum would require a majority of two thirds of the vote which should also be at least thirty percent of the total number of citizens entitled to vote.<sup>43</sup>

Finally, the Commission also proposed the introduction of a consultative referendum before the Lower House takes any decision on a bill, which as a general possibility would – in the view of the Commission – require a basis in the Constitution. The consultative referendum could consider any topic on which parliament is to take decisions, which includes proposals for amending the Constitution.<sup>44</sup>

#### 4.4. *The 1990s and Beyond*

None of the proposals of the Commission received a positive response in parliament at the time. It was only in 1996 that the proposals of the Biesheuvel/Prakke-Commission received a follow-up. This was a consequence of the coalition agreement in which the smallest party, D66, which originated in 1966 as a party for constitutional reform, wrought from the other two coalition parties<sup>45</sup> the concession that a binding corrective referendum be introduced. The bill subsequently introduced opened the possibility of a referendum in the manner proposed by the Biesheuvel/Prakke-Commission. For constitutional amendments this meant that a facultative referendum would become possible after adoption of an amendment at second reading.

This proposal for introducing the referendum was adopted at first reading, but in May 1999 in a dramatic session of the Upper House it was rejected with a one vote margin at second reading.<sup>46</sup> This led to a brief political crisis in the cabinet, which was resolved by a compromise according to which a Temporary Referendum Act was to be introduced in parliament at the short term, while a renewed attempt was to be made to introduce the same amendment to the Constitution as had just failed.

The Temporary Referendum Act was introduced successfully in 2001 and provided for a non-binding corrective ('consultative') referendum. The Temporary Referendum Act of 2001 excluded referenda on constitutional amendments. This was due to the fact that the referendum which the Act opted for was to take place after parliamentary adoption and governmental ratification of a bill, suspending only the entering into force of an Act in Parliament in case of a referendum. The present Constitution makes such suspension impossible as regards constitutional amendments.<sup>47</sup> It was taken for granted that the choice for the moment of the referendum (after parliamentary adoption and ratification, before entry into force) would have as a side-effect that constitutional amendments were excluded. It would

<sup>43</sup> Staatscommissie 1985, p. 77-78 and 125-133. One curious exception to the obligation to subject the initiative to a referendum was found in the a proposed Article 89j to the Constitution: 'A referendum will not be held, if the Lower House deems the bill in conflict with *the Constitution*, the Charter for the Kingdom of the Netherlands or an obligation under public international law'. It is unclear when an initiative to amend the Constitution could be deemed to be in conflict with the Constitution, as the Constitution does not contain substantive limits to the possibility of amending it. Presumably, this could only be the case when an initiative would claim original *pouvoir constituant* beyond the provisions of the Constitution itself.

<sup>44</sup> Staatscommissie 1985, p. 81-90 and p. 131-133.

<sup>45</sup> PvdA (the social-democrat labour party) which was a lukewarm supporter of the referendum, and VVD (liberal conservative party) which had always opposed the referendum.

<sup>46</sup> This was due to the negative vote cast by the former leader of the VVD, *Wiegel*, who thus failed to follow what was on this occasion the line of his party.

<sup>47</sup> Article 139 Constitution: Amendments to the Constitution passed by the States General and ratified by the King shall enter into force immediately after they have been published.

have been very easy to change its timing and choose for a referendum between parliamentary adoption and ratification by the government, either for consultative referenda in general or for constitutional referenda only. Evidently, the concern to include referenda on constitutional amendments was not deemed so important as to lead to a reconsideration of the moment for the referendum. This confirms that constitutional amendments play a marginal role in the debate over the referendum.

No attempt to initiate a referendum under the Act was ever made, also because of the very high thresholds for holding a referendum. The Temporary Referendum Act expired on 1 January 2005. The intention again to introduce in the Constitution the possibility of a facultative referendum but then a binding, decisive one (including the possibility of a referendum after adoption and ratification of a constitutional amendment at second reading) failed at second reading, this time in the Lower House under a different coalition cabinet (29 June 2004) – and this time without a cabinet crisis.

#### 4.5. *After the EU Referendum*

As we remarked above, the high participation of citizens in the EU referendum, which seemed to express in the eyes of politicians a renewed political interest of citizens, were reason for members of parliament to renew efforts to introduce the referendum as a means of bridging the gap between political decision-making and the citizen. These led to a proposal on a 'light version' of the citizens' initiative; the re-introduction of a consultative referendum, which again takes for granted that it excludes constitutional amendments; and a renewed attempt at introducing a facultative, binding and corrective legislative referendum which does extend to constitutional referenda. We will briefly sketch the main points of these proposals.

The first, a 'citizens' initiative', was launched by the presidency of the Lower House.<sup>48</sup> This initiative is to take the form of a petition to the Lower House by at least 15,000 persons resident in the Netherlands of at least 16 years of age and should 'aim at the making, amending or withdrawal of a legislative measure or at the governmental policy to be pursued'.<sup>49</sup>

Whereas the Biesheuvel/Prakke Commission deemed it necessary to change the Constitution for its introduction, the present proposal is to regulate the matter only in the Rules of Procedure of the Lower House and its Committee on Petitions (to be renamed: Committee on Petitions and Citizens' Initiatives). The Committee is to report to the House and may refer the initiative to another appropriate committee. Although this may seem a clear route towards legislative initiative, parliamentary committees do not have the right to present and initiate bills, only individual members of the Lower House and the Lower House itself have this right; so it will remain dependent on individual members to follow up or not to follow up a petition. Due to this, the citizens' initiative does not really create a legislative initiative at all. This may explain why the matter need not have a constitutional basis. The proposed regulations are meant as an experiment to be evaluated after two years.

For our purposes it is important to note that the proposal excludes citizens' initiatives to amend the Constitution. The proposed Article 132a of the Rules of Procedure of the Lower House excludes from the initiatives 'matters in conflict with the Constitution or public morality'. An amendment to the Constitution is necessarily a proposal to change it, and in a sense necessarily conflict with it; there are no

<sup>48</sup> Proposal of 8 June 2005, *Kamerstukken II* 2004/05, 30 140, nrs 1-3.

<sup>49</sup> Draft Article 132A of the Rules of Procedure of the Lower House, see *supra* note 48, nr. 2, p. 2.

substantive constitutional provisions limiting any change or amendment of it. On the other hand, the language used may leave open an initiative aimed at amending the Constitution as long as this does not conflict with the procedural rules for amending it.<sup>50</sup>

The matter was raised in the (written) investigation of the proposal by the Committee on Procedures of the House. The answer given by the Speaker of the House reveals that indeed citizens' initiatives cannot be allowed to concern an amendment to the Constitution. The reason adduced is that the procedure for amending the Constitution should not be evaded by a citizens' initiative.<sup>51</sup> This is a most unsatisfactory answer, as it suggests that initiatives can bind the Lower House, which it clearly cannot, because in the proposal an initiative is in essence no more than a petition which the Lower House may deal with in the fashion it considers appropriate. It does in no manner affect either the powers of the Lower House or the legislature.

Given the unsatisfactory answer, one can hardly blame those who think that this kind of proposal is based on the premise that it is harmless to hear the opinion of citizens on unimportant decisions, but that citizens should not become too deeply involved in important decisions.<sup>52</sup>

The second proposal made since the EU referendum is a bill presented at the initiative of three members of the Lower House and concerns the re-introduction of a 'consultative', that is to say a non-binding corrective, referendum by act of parliament.<sup>53</sup> This proposal does not require an amendment of the Constitution, and can be introduced by Act of Parliament. The bill lowers the thresholds for holding a referendum (it requires 300,000 citizens after an initial request of 10,000 citizens). Like the (lapsed) Temporary Referendum Act of 2001, the bill excludes any constitutional amendments from this referendum.<sup>54</sup> An attempt at circumventing the purely formal constitutional obstacle has not been made, although the solution would be very simple indeed.

The third proposal is a proposal to amend the Constitution and introduce a facultative, binding referendum.<sup>55</sup> Identical to the Biesheuvel/Prakke proposal and the earlier constitutional amendment which was rejected in June 2004, the new amendment adds a paragraph to Article 137 to the effect that a constitutional

<sup>50</sup> See footnote 43, for a possible – and equally unclear provision – in the report of the Biesheuvel/Prakke Commission, which, however, made explicit provisions for the inclusion of initiatives to amend the Constitution.

<sup>51</sup> The formulation of the answer (in *Kamerstukken II* 2005/06, 30 140, nr 5, p. 4) was clumsy to say the least. The Speaker spoke of the 'legislature' having surrounded constitutional amendments with special, laborious procedures, and mentioned especially the necessity of a declaration of the legislature at first reading 'after a parliamentary debate' – he must have forgotten that most of the amendments of 1996 concerned the deletion of most of the transitory articles to the Constitution which had substantively lapsed. No parliamentary debate was devoted to these amendments of the Constitution either in first or in second reading, nor were any remarks made at committee stage in both readings.

<sup>52</sup> After finalizing the present contribution, the Lower House adopted the proposals on the citizens' initiative on 7 February 2006. Amendments adopted concern the raising of the minimum age to 18 years, the threshold from 15 000 to 40 000 and the prohibition of an initiative on an issue within two years after it has been on the agenda of the Lower House. The prohibition of a citizens' initiative on the Constitution has been retained.

<sup>53</sup> The bill was presented on 16 November 2005, see *Kamerstukken II* 2005/06, 30 372, nrs. 1-3.  
<sup>54</sup> Article 5 sub d of the Bill.

<sup>55</sup> The present version of the Bill was presented on 16 November 2005 and can be found in *Kamerstukken II* 2005/06, nrs 6 (text of the Bill) and 7 (explanatory memorandum).

referendum is only possible after completion of the second reading. The difference between the new bill and the rejected amendment is that the present bill leaves the establishment of the thresholds to be determined by an act of parliament which can only be adopted by two thirds of the vote.

## **5. Some Concluding Remarks**

Summing up, we can say that constitutional referenda are not in the limelight in the Netherlands.

The experiences with constitutional referenda during the period immediately after the French Revolution and during the first years of the Kingdom were quite negative. Apart from a series of consultative referenda at local level in the overseas countries and the constitutional referendum for one of the overseas' countries in case it wishes to make use of its right of secession, there is only mention of it in the very margin of the debate on the introduction of legislative referendum. Constitutional referenda are – with one exception – at best considered to be a mere species of the legislative referenda, but even then its special character is hardly recognized.

The debates on the introduction of the legislative referendum have focused on its consequences for the representational character of the present parliamentary system. This was made explicit with regard to constitutional amendments on the occasion of the rejection of the proposals of 1946 and 1951 to introduce a Chamber of Constitutional Revision to be elected after adoption of a constitutional amendment at first reading by Act of Parliament.

This is by now curiously at odds with the dominant view in the constitutional practice and literature which considers the present dissolution of the Lower House (before 1996: both Houses of Parliament) as a consultation of the electorate in the manner of a quasi-referendum. This view is based on a misunderstanding, as we have tried to argue in this essay.

This dominant view is hard to reconcile with the ease with which in proposals for a consultative, non-binding referendum not the slightest attempt is made to include a consultative referendum on constitutional amendments. Worse, the present proposals for a citizens' initiative excludes constitutional amendments, notwithstanding the fact that the initiative is, when it comes to it, entirely non-committal for any of the institutions involved in legislation and constitution-making.<sup>56</sup>

Altogether we may say that constitutional thought and practice in the Netherlands as to the nature of constitutional amendment and the possible role of the electorate in it, also in the form of a constitutional referendum, is quite incoherent.

The new attempts to introduce referenda (and the citizens' initiative) do not have as their primary concern constitutional referenda; two of them explicitly exclude them for no good reason. This may surprise all the more as the infamous referendum on the Treaty establishing a Constitution for Europe which triggered these proposals was, though not formally, substantively a constitutional referendum and found part of its justification in the constitutional importance of that Treaty.

One explanation for this is the lack of distinction made between normal legislation and constitution-making within the Dutch constitutional order. Constitution-making is marginal to law-making, the former being no more than a species of the latter. This agrees with the relative position of the Constitution within

<sup>56</sup> See *supra* note 52.

the whole of the constitution and within the legal order. It is reinforced by the weak constitutional culture within political circles and outside.

Would the presently pending proposals to attempt the introduction of a referendum – and in its margin a constitutional referendum – stand a chance to be adopted this time?

This is – at the time of writing – a matter of speculation only. Here, this speculation can only concern general explanatory trends. These may give reason to think that sooner or later the referendum may materialize. Whereas during the 20<sup>th</sup> century the Netherlands was characterized as a ‘pillarized’ society based on denominational minorities and the absence of any majority view, this has changed since secularisation became socially effective and dominant since the 1990s. Previously nearly all social institutions of civil society existed in about three to five varieties. Protestants, Catholics, socialists, and liberals or ‘neutrals’, each had their own sports clubs, trade unions, employers associations, radio and television broadcasting associations, and political parties, while none of these pillars could possibly claim to represent a majority position. Under such circumstances it was important to act merely through power brokering by representative institutions. Decision-making based only on numeric considerations could but endanger the social and political equilibrium. Referenda do not fit in this system. But as secularisation has largely removed the foundations of the pillars, and one can say in the meantime also the pillars itself, representative institutions are themselves controversial. In the new climate – although it shows some of its instable aspects in the occasional violent excesses of the last years in the Netherlands – precisely instruments of direct participation unmediated by political or other representative institutions are appropriate.

From this point of view it may well be expected that sooner or later referenda shall be introduced on a regular basis. But constitutional referenda shall for the time being not acquire special status. For this the constitutional climate is too different from that in some other European countries and elsewhere in the world.

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