

Referendums in Constitution- making Processes

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Constitution-making in Focus: Issue Paper

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1. Introduction

The constitutional referendum, that is, a popular vote for the adoption or amendment of a constitution, is one of the main forms of the referendum. Already towards the end of the 1980s, more than 50 per cent of the written constitutions of the world embodied a referendum mechanism of some kind, and the constitutional referendum constituted a decision-making mechanism in around 30 per cent of the written constitutions. The constitutional referendum could at that point be identified as the main mechanism of “bringing in the people” in the context of national decision-making, and the reason for such a position of the constitutional referendum was most likely a wish to recognize a fundamental sovereignty of some kind in the people (Suksi 1993: 142 f., 273). The use of the referendum increased with the political transition and constitutional transformation after 1989, resulting in growing numbers of constitutional referendums and provisions concerning constitutional referendums in the constitutions of the world. At the moment, it could be estimated that at least half of the constitutions contain provisions concerning the constitutional referendum. However, the constitutional referendum is but one form of the referendum, other ones being, *inter alia*, the legislative referendum, the international or treaty referendum, and the advisory referendum.

During the period of 1998–2007, around 140 referendums of all sorts were reportedly carried out in jurisdictions that are identified as states.² Of these, 26 took place in Switzerland. The number of legislative referendums was 40 (24 of which were carried out in Switzerland), and the number of advisory referendums without constitutional connotations or referendums which, on the basis of the question put to the electorate, could be identified as advisory, was 7, which is surprisingly low a figure. The number of international or treaty referendums was 16. This leaves around 70 referendums in the category of constitutional referendums. In relation to the number of states in the world, the number of constitutional referendums is fairly large, indicating that in close to one-third of the states, constitution-making by direct involvement of the people has taken place during the past decade.

In comparison, during the same period of time, around 225–230 presidential elections were organized worldwide,³ and the number of parliamentary elections during the same period of time was around 350.⁴ In addition, around 100 of so-called legislative elections are reported, which apparently increase the number of parliamentary elections to 450 during the ten-year period. This means that the referendums, while probably proliferating, are used less than elections: the on-going and periodic creation of legitimacy in those ruling by way of elections is more frequent than the creation of legitimacy for issues by way of the referendum. The constitutional frames set up by the constitution of a country for the election of the rulers (presidents and parliamentarians) by way of procedures established in the various constitutions is hence the predominant mechanism of participation. Because constitutions are supposed to be more stable than ordinary legislation, the significance of this relatively high number of constitutional referendums is, however, further enhanced.

It can be said from a legal point of view that constitution-building is not a legal term but illustrates a process and that it can be distinguished from constitution-making (Ghai & Galli 2006: 9). Terminologically, the constitution-building referendum is here understood

as a sub-category of the constitutional referendum. Hence not all constitutional referendums are necessarily constitution-building, that is, focused on the creation of an entirely new constitution or on the complete revision of the existing one, but are instead final moments of regular amendment procedures that may even involve votes on even the smallest of constitutional details. In addition, constitution-building is also something which can be attached to attempts to create new states, e.g., by way of secession in situations where territories that are parts of an existing state wish to establish themselves as new states or underline their particularity by organizing a referendum. Therefore, the terms ‘constitution-building’ and ‘constitution-building referendum’ are in this context understood more in a political or procedural setting than in a formal setting. A referendum in this context can hence also be used to set in motion the constitution-building process by establishing independence or some other jurisdictional status so as to necessitate constitution-making that at the end may or may not result in the enactment of the constitution by a referendum.

A topic related to constitution-building would normally result in a fairly theoretical piece. However, the questions or comments delivered by the organizers of the workshop indicated that a more practical or non-theoretical approach is expected. Therefore, at least parts of the theory surrounding constitution-making can be located through the references included in the relatively limited numbers of literature mentioned in the footnotes. Unfortunately, practice or empirical information concerning referendums in a constitution-building context is not readily available in regular academic sources. For that reason, methodologically, the great bulk of information about individual referendums and experiences relating to referendums had to be collected from sources that are non-academic and compiled in the form of narratives describing the factual circumstances surrounding the constitution-building referendums so as to create a platform of experience. Internet sources including news services were used to an extent that may call the reliability of the narratives into question, but those sources also contain serious professional information sites that may help balance the uncertainties produced by the news service sources. Naturally, legal information, such as court cases, has been used whenever such materials existed.

2. Description of the sample: Which referendums are we talking about?

The great bulk of referendums organized in the countries of the world between 1998 and 2007 are of a constitutional nature. These referendums display a relationship to constitution-making or constitutional amendment procedures. The number of such referendums is around 75 popular votes, or, more precisely, referendums on constitutional issues, because in some countries (Australia on 6 November 1999, Bahamas on 27 February 2002, Bolivia on 18 July 2004, Guatemala on 16 May 1999, Kyrgyzstan on 2 February 2003, Liechtenstein on 14 March 2003, Ukraine on 16 April 2000, Venezuela on 25 April 1999), the referendum organized on a particular day did not encompass only one referendum on, for instance, the entire constitution or a single amendment thereof, but instead simultaneous constitutional referendums on several issues that were separately submitted to the people.

Some of the referendums classified here as constitutional were related to the independence process of a sub-state entity or an area which subsequently and as a result of the referendum achieved independence. In comparison with the number of different elections, above, it seems that the need to change constitutions is lesser, which is as it should be. However, at the level of states, new constitutions or constitutions that seem to be results of a more specific constitution-building process rather than a regular amendment process have been decided by means of the referendum only in around 14 cases. These are as follows (with Freedom House ratings in the year of the referendum and in 2006 placed after the semi-colon):⁵

Table Title

Albania	22 November 1998,	yes: 90 per cent	(> 92 per cent?); PF/PF
Burundi	28 February 2005	yes: 92.02 per cent	PF/PF
DR Congo	18 December 2005	yes: 84.31 per cent	NF/NF
Cyprus	24 April 2004	no: 75.83 per cent	F/F
Iraq	15 October 2005,	yes: 78.59 per cent	NF/NF
Kenya	21 November 2005	no: 58.12 per cent	PF/PF
Kyrgyzstan	21 October 2007	yes: 85 per cent	(PF in 2006)
Qatar	29 April 2003	yes: 98.39 per cent	NF/NF
Rwanda	26 May 2003	yes: 93.42 per cent	NF/NF
Serbia	28 October 2006	yes: 97.31 per cent	F/F
Sudan	27 May 1998	yes: 96.7 per cent (?)	NF/NF
Thailand	19 August 2007	yes: 56.69 per cent	(PF in 2006)
Venezuela	15 December 1999	yes: 71.78 per cent	PF/PF
Zimbabwe	12 February 2000	no: 54.68 per cent	PF/NF

Some of the cases, such as the Serbian one, may also display features of regular amendment procedures, which as a consequence could result in their removal from the list.⁶

In three cases, Cyprus, Kenya and Zimbabwe, the referendum did not result in the adoption of the proposal. Hence it can be said that those proposing a new constitution can not necessarily assume that the proposal will be adopted under all circumstances, although the tendency seems to be towards the adoption of the proposal, as drafted by a constituent assembly or by a parliament. Already on the basis of the 14 cases, it is possible to conclude that referendums in the constitution-building context are very unique instances of popular participation, often carried out in somewhat extraordinary circumstances on the basis of rules which are specific to the situation.

On the top of these 14 cases listed above, half of which deal with African states and

indicate a high constitution-making activity on that continent and a certain wish to appeal to the people as the legitimizing authority (perhaps because of the unnatural composition of the states with artificial borders drawn during colonial times that necessitate a visible demonstration of unity; for a similar point, see Ghai & Galli 2006:7), a number of the referendums have concerned procedural issues related to the constitution-making process, such as whether or not to elect a constituent assembly. These are as follows:

Bolivia	2 July 2006	no: 57.59 per cent	PF
Ecuador	15 April 2007	yes: 81.70 per cent	(PF in 2006)
Venezuela	25 April 1999 (two issues)	yes 1: 87.75; yes 2: 81.74 per cent	PF/PF

Interestingly, these cases are all from South-America, and they seem to indicate a preference in that region of the world for a more representative constitution-making after the respective populations have been consulted concerning their wish to enter into a constitution-making process.

It should be possible to refer to a number of so-called independence or secession referendums in this context of constitution-building, more specifically the following:⁷

Montenegro	21 May 2006	yes: 55.49 per cent
Saint Kitts and Nevis	10 August 1998	yes: 61.83 per cent (not valid due to low turnout)
Timor Leste	30 August 1999	yes: 78.50 per cent

However, due to constraints of space, these referendums will not be dealt with in this context. Finally, five referendums concerning constitution-building in the European space might be of interest in this context, those of France (29 May 2005) and the Netherlands (1 June 2005) that brought the process of ratification of the EU Constitutional Treaty to a halt, and those of Luxembourg (10 July 2005) and Spain (20 February 2005), which supported the ratification of the Constitutional Treaty. The Irish referendum of 12 June 2008 on the so-called Lisbon Treaty resulted also in the defeat of the matter.⁸ Of these, the French and the Irish referendums were binding, while the other ones were advisory.

Constitution-building processes do not only take place at the level of states, but similar processes are also relevant at the sub-state level in more or less autonomous areas that may or may not aspire for independence. During the period between 1998 and 2007, altogether 16 referendums could be identified in this category of sub-state areas. The number is probably higher in reality, but the information concerning these referendums does not precipitate to the institutions following up constitutional events unless the referendum has broader national or international significance. Be it as it may, for the purposes of an analysis of the constitution-building processes, the number of cases would probably be sufficient. It seems that all the cases mentioned in this context of sub-state areas display significance from the point of view of constitution-building processes, for instance, by aiming at presenting a constitutional text for the purposes of emerging as an independent

state, for establishing shared sovereignty, or for amending the current statute of the sub-state entity. However, only six of the referendums in sub-state areas can be identified as relevant for the creation of new constitutions. These are as follows:

Chechnya	23 March 2003	yes: 95.97 per cent
Nagorno-Karabakh	10 December 2006	yes: 98.60 per cent
Northern Cyprus	24 April 2004	yes: 64.91 per cent
Northern Ireland	22 May 1998	yes: 71 per cent
Cordillera Autonomous Region	7 March 1998	no: ?
Somaliland	31 May 2001	yes: 97 per cent ⁹

These six referendums could constitute the core of our materials in relation to referendums in sub-state areas, but due to space constraints, these referendums will not be dealt with in this context. An additional twelve referendums might be relevant in the context of constitution-building, but for the same reasons, they will not be analyzed here:

Chechnya	2 December 2007	yes: 85 per cent
Cook Islands	June 1999	yes: 63 per cent
Cook Islands	7 September 2004	?
Corsica	6 July 2003	no: 50.98 per cent
Gibraltar	7 November 2002	no: 98.97 per cent
Micronesia	27 August 2002	yes (failed)
New Caledonia	9 November 1998	yes: 72 per cent ¹⁰
Puerto Rico	13 December 1998	no: 50.5 per cent
South Ossetia	12 November 2006	yes: 99 per cent
Taiwan	20 March 2004 (two issues)	yes 1: 91.80 per cent; yes 2: 92.05 per cent
Tokelau	1–15 February 2006	yes: 60.07 per cent (failed)
Transnistria	17 September 2006 (two issues)	yes 1: 97.20 per cent; no 2: 94.90 per cent

With a view to the limited independence worked out for Kosovo and instituted by means of its 2008 Constitution and to the potential model effect that this separation of the formerly autonomous territory from the state of Serbia may carry with it,¹¹ it could be said against the background of the two lists of territories, above, that the “waiting room” for the status as independent countries and the consequent initiation of constitution-building processes is well populated.

In order to acquire a complete picture of constitution-building and the role of the referen-

dum in that context, it would be necessary to contrast the information about the referendums in the constitution-building context with information about adoption of constitutions through representative institutions of some kind, such as parliaments or constituent assemblies. However, such contrasting information is not readily available for the purposes of this paper in the form of compilations of data, but we are in this respect dependent on scattered information that can not be processed in this context. However, it seems that the constitution-building processes that have been going on at the level of nation states are concluded by a referendum in more than half of the cases involving constitution-building during the past decade, perhaps even in an overwhelming majority of the cases.

What can be said against the background of the Proceedings of the Workshop on Constitution-Building Processes is that the constitutional referendum is often the final part of a longer or a shorter constitution-making procedure which involves forums for constitutional development and deliberation.¹² At this point, the fundamental rules of society, registered in the normative form of the constitution, are submitted to the population for an act of approval, the aim of which is to prove publicly the willingness of the population to obey different forms of exercise of public authority, such as legislation enacted on the basis of the constitution and decisions made in individual cases by the public authorities and courts of law on the basis of the legislation. Naturally, the knowledge during the drafting stage of the fact that the final draft will be submitted for the normative decision to the people affects those who are involved in development and deliberation of the matter before the final draft is submitted to the people. Hence the substance of the constitution is at least to some extent influenced by the knowledge that a referendum will be held at the end of the constitution-building process.

The constitutional referendums are many, and the referendums related to constitution-building are also relatively high in numbers. Are the empirical instances of constitutional and constitution-building referendums just a co-incidental appearance of similar decision-making acts without any coherent idea of why constitutional norms are submitted to the people or is there a common idea behind all these referendums that may explain why the referendum is used in the constitutional setting? The tendency to organize constitutional referendums may imply at least two things, either that the submission of constitutional norms to the people for adoption is an opportune thing to do for those who wish to legitimize their power or that the submission of constitutional issues to the people for adoption is perceived as a normatively compelling thing to do. Because there seems to exist a pattern of constitution-making by the people, it is not possible to regard the occurrence of constitutional referendums around the world just a spurious phenomenon without any connecting background theory. Instead, it should be possible to look for explanations for the constitutional referendum in the notions of the sovereignty of the people, the *pouvoir constituant*, and the right of self-determination of a people.

A case can be made that the increasing frequency of constitution-making referendums is actually promoted by the concept of the self-determination of the people. Such a connection could be indicated already in mid-1990s, and the results of this article may further enhance the argument and corroborate the observation of the mid-1990s. Hence there may

exist currents in constitution-making, conscious or unconscious, which drive constitution-making towards a more direct participation of the people in decision-making concerning the constitution that will be set as the foundation of the legal order (Suksi 1995: 145, 149). The implied effect of the right to self-determination as a meta-right to participation, legally entrenched, *inter alia*, in Common art. 1 of the UN Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights (CCPR), would thus be that the forms of participation covered by art. 25 of the CCPR are activated when constitutional choices are made, there among the direct participation of the people through the referendum in the constitution-building processes. Concepts such as the self-determination of the people and the sovereignty of the people are likely not to be directly referred to as reason for an individual constitutional referendum, but a break-down of the concepts into more practical dimensions link directly in to the real-life occurrences of constitution-building referendums and to constitution-building in general: 1) who is it that should have the power to decide upon the basic norm in a society, 2) what is it that a decision about the basic norm should concern, 3) when should a decision of that kind be made, and 4) how should such a decision be made?

It is probably not a coincidence that altogether 14 referendums during the ten-year period 1998–2007 dealt with constitutional issues from a constitution-building perspective, when concepts such as self-determination of the people, the sovereignty of the people and the *pouvoir constituant* can be supposed to exist in the background of such constitutional referendums. In the context of the *pouvoir constituant*, self-determination is a pre-constitutional feature. When a referendum (or elections, as it may be) are used in a situation, the referendum itself obtains a pre-constitutional character: the referendum is deployed in order to create or re-create a unit of national decision-making, but the institution of the referendum has perhaps not yet at the moment come to constitute an established method of national decision-making. Hence self-determination and the *pouvoir constituant* can both be understood as concepts that may involve the use of the referendum (but also elections, as it may be). The issue in this context of constitution-building could be the following: *who may decide, what, when, and how?*

3. Constitution-building

3.1 Who? The people

The reference to the right of self-determination of all peoples is normally to be understood as a reference to the *total population* of an *existing State* regardless of its internal ethnic, linguistic or religious composition. As an administrative matter, the extent of the population is normally determined by the registration of births and deaths as well as naturalisations of foreign citizens, quantified in its entirety either by way of national censuses carried out from time to time or by way of the maintenance of a real-time population register. Hence it is this entire population in its political composition, as defined against the background of Article 25 of the CCPR, which should be entitled to participate in a constitution-building referendum without any discrimination. An exclusion of a portion of popula-

tion would normally not be justifiable.

Constitution-building and definition of what would be the definition of the population or the people were central issues during the break-up of the former Socialist Federal Republic of Yugoslavia during the 1990s. A practical problem in the constitutional referendum of 2006 in Serbia was how to ensure the constitutional limit of 50 per cent of registered voters, that is, absolute majority. The Central Election Commission of Serbia placed the total number of electors at 6639385 for the 2006 referendum, a figure that excluded Kosovo Albanians, who had been boycotting all Serbian elections and censuses since 1990, but the territory of whom was very much in the focal point of the document submitted to the people. At the same time, however, the Serbs in Kosovo were registered on the list of voters. Thus there were 6639385 registered voters in Serbia proper and an additional 186000 Serbs of Kosovo. It was maintained that the constitution is fundamentally undermined because the Albanians—the majority in Kosovo—could not vote on it,¹³ although the referendum also concerned the Kosovo Albanians. This claim was legally speaking correct, but to include them would have been a political suicide for the Serbian government. Including the Kosovo Albanian voters in the list of voters would have increased the number of the electorate, and if the Albanians boycotted or rejected the referendum, the adoption of the new Constitution would have been seriously endangered, because it had to be approved by the majority of the electorate, that is, by absolute majority. Hence there was the paradox of a vote for a constitution that claims Kosovo as an integral part of Serbia while excluding the inhabitants of this region from the electorate. Serbia certainly gave the impression that it wants Kosovo for the sake of the territory, and not its people.¹⁴ Kosovo's majority population, the ethnic Albanians, who have lived virtually independent of Serbia for almost a decade, were left off voters' lists. Belgrade officials did not invite them to participate in the referendum, allegedly because of their past boycotts of elections conducted under Serbian auspices. If voters from among the 2 million pro-independence ethnic Albanian population in Kosovo had participated, it could have greatly diminished chances of the draft getting the required absolute majority approval.¹⁵ The high turnout of the Kosovo Serbs was said to indicate that with their vote, they agreed that it is possible to exclude their fellow Kosovars from any opportunity to have a say over their future.¹⁶

The chapeau of Article 25 of the CCPR permits the delimitation of the group of persons entitled to vote with the reference to citizenship at the same time as the group of “every citizen” can be formed into a political community by reference to, *inter alia*, age so that the “body politick” relevant for giving the consent of the governed is constituted by the adult population of, for instance, 18 years or older. It is within this group of persons that the right to participate directly or through freely chosen representatives should be exercised without discrimination, but the exact determination and circumscription of the group entitled to vote is determined on the basis of the principle of the universal suffrage established in Article 25(b). The concrete definition of the persons entitled to vote in a referendum is established in the lists of voters compiled by the election administration and listing the names of the persons who, under the national law, are regarded as voters for the purposes of the referendum. The people in its political composition is thus in most cases the electorate as defined in the list of voters. In this regard, the ethnically Albanian voters of Kosovo, who formally speaking were Serbian citizens, should have been included on the list of voters in the Serbian referendum.

In the Albanian referendum of 1998, the list of voters seems to have been troubled by a number of inaccuracies that affected the turnout figure for the referendum as the opposition wanted to show an effective boycott and the government a good support for the constitution. “The accuracy of the voters lists thus became a political issue, when attention should have been devoted to ensuring that all

eligible voters be able to exercise their right to vote.¹⁷ The legal provisions governing voter registration were unclear. The Law on Referenda gave all citizens of Albania over the age of 18 the right to vote. However, the Law on Elections to Local Government foresaw that when compiling the voters' lists, the municipalities should cross out the enlisted voters staying abroad. Clear criteria for the citizens living abroad to maintain their registration did not exist. The high degree of internal and external migration and the lack of a reliable civil register contributed to the low quality of the voters lists. To help improve the accuracy of the existing lists and to remove earlier mistakes such as double entries, registration of deceased people and to register the voters where they have their *de facto* residence, the government introduced a procedure of house to house registration by groups of three persons representing both the government and the opposition. However, the lack of clear criteria for the canvassing did not enable these groups to produce accurate lists of voters, particularly in the given time frame, and a consensus within the group does not to a sufficient degree protect the voters individual right to be registered. The Central Voting Commission issued a decision a few days before the referendum, allowing voters to register even on the day of the referendum, to enfranchise voters that by mistake might have been left out of the lists. This, again, makes the enlisting of voters an open-ended process that can be criticized for the reason that there is no definite size of the electorate established before the voting, making turnout requirements almost unworkable. The only long lasting solution to the problems with the voters' lists will be to establish a centralised civil register, for instance on the basis of a census.¹⁸

From a legal point of view, defining the list of voters should normally be fairly uncomplicated, but in the specific situation of New Caledonia, the UN Human Rights Committee had to reconcile the composition of the electorate with the right of self-determination out of concern for the indigenous population of New Caledonia. When examining the merits of the case of *Marie-Hélène Gillot et al. v. France*,¹⁹ a case that deals with New Caledonia, the UN Human Rights Committee (HRC) had to determine whether the restrictions imposed on the electorate for the purposes of the local referendums of 8 November 1998 and in 2014 or thereafter constituted a violation of articles 25 and 26 of the Covenant. The Committee said that the right to vote is not an absolute right and that restrictions may be imposed on it provided they are not discriminatory or unreasonable. Furthermore, it considered that the evaluation of any restrictions must be effected on a case-by-case basis, having regard in particular to the purpose of such restrictions and the principle of proportionality as well as to objectivity. The Committee took note of the fact that the local ballots were conducted in the context of a process of self-determination of the population of New Caledonia and took into account Article 1 of the CCPR when interpreting Article 25 of the CCPR. The HRC was of the opinion that Article 25 of the CCPR had to be considered in conjunction with Article 1. It therefore considered that the criteria established were reasonable to the extent that they are applied strictly and solely to ballots held in the framework of a self-determination process. 'Such criteria, therefore, can be justified only in relation to Article 1 of the CCPR, which the State party does. Without expressing a view on the definition of the concept of "peoples" as referred to in article 1, the Committee considers that, in the present case, it would not be unreasonable to limit participation in local referendums to persons "concerned" by the future of New Caledonia who have proven, sufficiently strong ties to that territory.'²⁰

The HRC also concluded that the restrictions on the electorate resulting from the criteria used for the referendum of 1998 and referendums from 2014 onwards respect the criterion

of proportionality to the extent that they are strictly limited *ratione loci* to local ballots on self-determination and therefore have no consequences for participation in general elections, whether legislative, presidential, European or municipal, or other referendums.²¹ Consequently, the Committee considered that ‘the criteria for the determination of the electorates for the referendums of 1998 and 2014 or thereafter are not discriminatory, but are based on objective grounds for differentiation that are reasonable and compatible with the provisions of the Covenant’.²² On the basis of the foregoing and a number of other considerations not of direct relevance for constitution-building, the HRC was of the view that the facts before it did not disclose a violation of any article of the CCPR by France. Hence in the context of self-determination and with a view to the situation of the indigenous population, the concept of the people for the purposes of Art. 1 of the CCPR can be defined so as not to include the entire population residing on the territory. However, this was an exception to the general rule, and therefore, in a normal situation, the reference to a people for the purposes of self-determination should be understood as the entire population.

The question of how to define the electorate entitled to vote in a self-determination referendum is relevant in the case of *Western Sahara*, where the United Nations has, since the Advisory Opinion of the International Court of Justice (ICJ) in 1976,²³ tried to compile the list of voters for the purposes of the referendum. However, the registration of voters has been very difficult, due to the fact that Morocco has claims on the territory of Western Sahara and has, in support of its own claims, moved its citizens, or persuaded its citizens to move, to the territory of Western Sahara so as to tip the ethnic balance of the territory in favour of Moroccans. Against the background of the *Gillot* case (above), it would seem possible to justify a restriction of the list of voters to those persons who are “original” inhabitants of Western Sahara.

In the constitutions of the countries of the world, there are several references to the self-determination of the people or the population. What the reference to self-determination in the Russian Constitution could mean is perhaps illustrated by the so-called *Tatarstan* case from the first Constitutional Court of Russia,²⁴ handed down before the enactment of the 1993 Constitution, which itself took place in a situation of constitutional vacuum created by the president.²⁵ It must be remembered when considering this decision that the Constitution of 1993 had not yet been adopted when the decision was handed down by the court. The argumentation of the Court was not only based on the (extensively amended) 1978 Constitution of the Russian Federation, but also involved considerations of international law. The Court stated that Tatarstan had the right to submit a question on its constitutional status to the people, because this right followed from the people’s right of self-determination, which was guaranteed domestically as well as internationally. The Court viewed the international documents as emphasizing that the right of self-determination should not be invoked for the purpose of disrupting the unity of a state and a nation. Hence without denying the people’s right of self-determination, which could be realized by means of a legal act of will, such as the referendum, the Court concluded that two elements of international law, namely the requirement of territorial unity and the observance of human rights, limited the right of self-determination. Therefore, and because the Constitution of

the Russian Federation did not contain any right of secession for a republic, Tatarstan's attempt to acquire more self-determination than the Republic already had was considered impermissible. This decision seems to indicate that, at least according to the former Constitutional Court of Russia, the *pouvoir constituant*, especially when understood as an equivalent to the right to self-determination, is to some extent limited by international law. In the case, the joint self-determination of the entire population of the Russian Federation was not an issue, but instead, the attributes of a people entitled to decide a constitution-building issue were attached to the population of Tatarstan, of which almost 50 per cent is of Russian origin.

The solution and especially the argumentation was similar in the so-called *Secession Reference* (hereinafter: the *Quebec case*),²⁶ which the Supreme Court of Canada was presented with in 1996 and in which the Court tried both the national constitutional law and the international law relevant in the context, much in the same way as in the *Tatarstan* case, above.²⁷ The Court concluded that in a federal system of government, such as the Canadian, political power is shared by two orders of government: the federal government on the one hand and the provinces on the other, where both levels are essentially representative and based on popular franchise. This arrangement delivers the consent of the governed. Each level is assigned respective spheres of jurisdiction by the Constitution. Federalism is a central organizational theme of the Canadian Constitution, whilst it at the same time is a political and legal response to underlying social and political realities. Democracy, again, is a basic structure of the Canadian Constitution and means the existence of certain political institutions, including freely elected legislative bodies at the federal and provincial levels. The Court felt, nonetheless, that the precise meaning of the term "people" remains somewhat uncertain. A people may encompass only a portion of the population of an existing state, not necessarily the entirety of a state's population, but the case itself signals the existence of at least two peoples in Canada for the purposes of exercising self-determination, that of the entire population and that of Quebec. It was not, however, according to the Court necessary to decide the "people" issue.²⁸ In comparison with the *Tatarstan* case, above, it is evident that the Canadian Supreme Court emphasized the importance of the right of self-determination of the entire population of the state in the context: it is not only the one self-defined people of a sub-state entity that can impose its will on the rest of the population, but the wishes of the rest of the other people, the rest of the population, should also be taken into account. As recommended by the Canadian Supreme Court, expressions of the wishes of a people in a secession context, effectuated by means of a referendum in a sub-state entity, should lead to a negotiation process in which the claims are dealt with.

Politically, in a situation where the dominant political forces (i.e., the majority) and the opposition stand against each other on the issue of adopting a new constitution, it is not unusual that the opposition decides to oppose the constitution by abstaining from voting on it. In the context of the concept of the people, the message that is sent is that there are persons in the total population who do not wish to consider themselves as part of the people which identifies itself through the constitution. Sometimes this opposition is territorially concentrated so that the main part of the country, supporting the new consti-

tution, is standing against a smaller area that may be inhabited by a minority population which is unhappy with the proposed constitution and that may even be promoting separatist agendas, as was and is the case in Kosovo and its relation to Serbia.

A boycott was the case, e.g., in Albania in 1998. ‘The turnout figure for the referendum became a contentious political issue in so much as the opposition wanted to show an effective boycott and the government a good support for the constitution. The accuracy of the Voters Lists thus became a political issue, when attention should have been devoted to ensuring that all eligible voters be able to exercise their right to vote.’ ‘Even though it is any person’s or party’s right not to participate in the referendum, there is no reason for accepting a boycott of the process as an alternative of the same prominence as a “yes” or a “no” vote.’ ‘This jeopardised the secrecy of the vote, since mere participation in the vote could be seen as a public political act. It shifted the emphasis from the content of the Constitution to the referendum as such.’²⁹ The side of the Government maintained that more than 50 per cent of the voters turned out, while the opposition claimed that only 39 per cent of the voters turned out. According to certain analysts, the option of boycott was based on the magic figure of 400000 voters who are emigrants abroad, who did not return in order to vote and who were, therefore, automatically counted as those who were “contra.” This figure of 400000 voters amounts to almost 15 to 20 per cent of Albania’s electorate.³⁰

Although a turnout requirement or a participation threshold may be established with a view to ensuring sufficient legitimacy, such a threshold may also be used against the adoption of the constitution. In the negative scenario, abstention from voting is also given a legally significant meaning and, if the opposition towards the proposal is widespread, abstention can be used to produce a result which under the applicable rules invalidates the referendum.

3.2 When? The Moments that Define the Consent of the Governed

A referendum with a constitution-building connection may produce a decision on the adoption of a new constitution or a significant amendment thereto. In addition, a referendum in a constitution-building context may resolve a procedural issue. However, as is evident on the basis of the *Gillot* case (*supra*, section 3.1.), constitution-building referendums can also take place during the process of changing the legal status of a territory from a sub-state or colonial existence into an independent country, and such referendums can also take place during more regular constitution-building. The important issue in the context is that the constitution-building process is not similar in all cases, but may display different stages, such as one, two or three stages. The primary example of the one stage process is a constitutional convention, which identifies the issues, debates them, develops the draft and adopts the final constitution. A two stage process is one where a body such as an expert commission, or parliamentary committee, first develops the constitutional proposals (there being many different kinds of process—some involving the body acting as a committee of experts, some where it is an arena for elite consultation, some where it is a process involving extensive public consultation, and some involving a mix of all the foregoing), and usually develops them into a draft constitution, after which the constitutional proposals, usually in the form of a draft constitution, go to a decision-making and enactment body—usually either the existing national legislature, or an elected representative body such as a special purpose constituent assembly that sits in “parallel” with the legislature. In addition, there are also two stage processes of a different kind—where a draft

constitution is developed in a national conference, constituent assembly or national legislature and then goes to a referendum. A three stage process is one where in addition to the two stages just outlined, the draft constitution as approved by the constituent assembly or legislature is then put to a referendum for final approval by the people. While the referendum may be a relatively natural part of the three-stage process, a popular vote can also be a part of the other stages.

Namibia (or actually the then South West Africa) is an early example of this, but the territory was never brought under formal trusteeship administration by South Africa. When a plebiscite was held by the South African government in 1946, the results of that plebiscite were not accepted by the General Assembly of the UN 'as a valid expression of the will of the people of the territory.' The reason for this was evidently the fact that "the African inhabitants of South West Africa have not yet secured political autonomy or reached a stage of political development enabling them to express a considered opinion which the Assembly could recognize on such an important question as incorporation of their territory".³¹ Hence the General Assembly established two criteria, political autonomy and sufficient political development, before a decision could be made. When South Africa some decades later wished to organize a referendum in South West Africa, the ICJ turned down the proposal by South Africa to hold a plebiscite in the area in its case *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276(1970)*.³² South Africa's illegal presence in Namibia could not be legitimized by a popular vote. However, the election under United Nations' supervision in 1990 of both a constitutional convention and a President for Namibia constituted an exercise of the right of self-determination. Apparently, at that time, the criteria established in 1946 were fulfilled, but the South African plan of a referendum was altered so as to involve representative decision-making in a one-stage constitution-building process.

One very typical situation where there exists a need to create instant legitimacy by way of an appeal to the people is when the constitutional continuity is broken in one way or another so as to create conditions for the exercise of the *pouvoir constituant*. Such a situation may follow from a revolution or from a constitutional or political collapse.

In Burundi, hostilities between two population groups, the Hutus and the Tutsis, brought the country and the constitutional order to a collapse. After cessation of hostilities, an interim constitution was put into place in October 2004, and already on 28 February 2005, as prescribed by article 308 of the interim constitution, a referendum on a new constitution that replaced the interim constitution was organized, followed, *inter alia*, by elections to the national parliament on 4 July 2005.³³ The draft constitution submitted to the people in what apparently was a two-stage process guaranteed representation for both ethnic groups by setting out the share of posts they shall have in parliament and government and the army, which had been dominated by the Tutsis since independence. Most political parties urged a "Yes" vote in the poll, but some Tutsi parties urged a "No" vote, stating that the new constitution does not give the Tutsis enough guarantees. The referendum day was peaceful and no major incidents were reported. Apart from minor irregularities and incidents, the vote seems to have been carried out well within the boundaries of the norms that regulated the referendum and voting. Voter turnout was high (92.4 per cent) and the final results showed overwhelming support (92.02 per cent) for the new constitution.³⁴ It seems that after the adoption of the

Constitution, Burundi has by and large continued to be ruled in a peaceful manner along the lines established in the Constitution adopted by the people.

In addition, from time to time and especially in some countries where the military is traditionally very involved in the political life, military leaders set out to overthrow the government and to take over power from civilians. Such a measure normally suspends or sets aside completely the constitution, and sooner or later, the military also normally proposes to fill the constitutional vacuum by a new constitution. Such a new constitution is not necessarily adopted by the people in a referendum, but often it is.

On 19 September 2006, Thai military forces took control of government offices in Bangkok and overthrew the civilian government. The bloodless coup came after months of political turmoil. Following the *coup*, a ruling military junta was formed and an interim constitution imposed, outlining a one-year transitional period to draft a new permanent constitution and hold a constitutional referendum before the end of 2007. The Constitution Drafting Assembly, a body chosen from the interim legislature appointed by the *junta*, completed a preliminary draft of a new constitution at the end of April 2007. The participation of political parties under the constitutional drafting process was limited. Only four party representatives were admitted to the 242-seat interim legislature, and parties were hardly given any space to comment on earlier drafts of the new charter. The military *junta* imposed a ban on political party activity in the country until May 2007. In May, the Assembly disseminated the draft to a number of selected state institutes and non-governmental organizations for public comment. A final draft of the charter was publicly released by the Assembly in late June, and a copy was sent to every household in Thailand³⁵ in preparation of the referendum, completing thereby the two-stage process of constitution-making.

Constitutional continuity may, of course, be at risk also due to political measures by civilians, as at least sometimes is the case when secession is requested.³⁶ However, constitution-building is normally connected to fundamental changes in the governmental and political structures of the state.

The constitution-building process of Albania was very protracted. Albania was ruled under a temporary constitution since the fall of the Communist rule in 1991.³⁷ The constitution drafted by the Democratic Party (DP) under Sali Berisha was rejected in a referendum in 1994, and the opposition refused to cooperate with the DP in drafting a new constitution. Since the change of government, the DP has refused to cooperate with the government in the drafting process. In October 1998 the opposition Union for Democracy (which included the DP) stated that it was prepared to participate in the drafting process. However, the DP continued to refuse. The draft was approved in a referendum on 22 November 1998 in what could be described as a two-stage process, and signed into law by the president in the same month. The DP refused during a long time to accept the new constitution or the legitimacy of the referendum.³⁸

An appeal to the people within the framework of the *pouvoir constituant* may also be a more regular feature of the constitutional law of a country and is necessarily not in all situations brought about by a breach of constitutional continuity caused by a revolution or a *coup d'état*. Especially in the constitutional thinking on the American continent, it seems that certain mechanisms can activate the *pouvoir constituant* and thus result in constitution-building.

A case in point could be the constitution-building process in Venezuela at the end of the 1990s. President Hugo Chávez was elected under the provisions of the 1961 Constitution in the presidential election of 6 December 1998. Chávez had been contemplating a constitutional convention for

Venezuela as an ideal means to rapidly bring about sweeping and radical social change in Venezuela. Taking some models from Colombia in the years of 1990–1991, when there was a constitutional assembly, the calling of such a convention was made a political goal, and in the 1998 presidential elections, one of Chávez's electoral promises was to organize a referendum asking the people if they wanted to convene a National Constituent Assembly. After being elected, the very first decree of Chávez as president was thus to order such a referendum, which took place on 19 April 1999. The electorate was asked two questions: 1) whether a constituent assembly should be convened, and 2) whether it should follow the mechanisms proposed by the president. It is evident on the basis of the questions submitted to the people that the two referendums were advisory, not decisive. The first question was answered positively by 87.75 per cent and the second one by 81.74 per cent of the voters.³⁹ How constitutionally correct the procedure to call a constituent assembly was remains disputed,⁴⁰ but the Venezuelan experience shows that a constitution-building referendum may, in some form, also have a place in the one-stage constitution-building process.

Elections of 131 deputies to the National Constituent Assembly were held on 25 July 1999. In the election, members of Chávez's MVR and select allied parties formed the Polo Patriótico ("Patriotic Axis"). Chávez's Polo Patriótico won 95 per cent (120 out of 131 seats) of the seats in the new voter-approved Venezuelan Constituent Assembly. The Constituent Assembly convened and debated proposals during the remainder of 1999. However, in August 1999, the Constitutional Assembly first set up a special "judicial emergency committee" with the power to remove judges without consultation with other branches of government (over 190 judges were eventually suspended on charges of corruption). In the same month, the Assembly declared a "legislative emergency," resulting in a seven-member committee that was tasked with conducting the legislative functions ordinarily carried out by the National Assembly, whereby legislative opposition to Chávez's policies was thus instantly disabled. The exercise of legislative powers by a constituent assembly is also in keeping with the theory of the constituent powers, allowing a transfer of all powers on such a body. Meanwhile, the Constituent Assembly prohibited the National Assembly from holding meetings of any sort. Over the span of a mere 60 days in late 1999, the Constituent Assembly framed and drafted a document that enshrined as constitutional law most of the structural changes Chávez desired. Chávez stated that such changes were necessary in order to successfully and comprehensively enact his planned social justice programs. Despite the initial reluctance of the deputies of the Constituent Assembly, it changed the country's official name from "Venezuela" to the "Bolivarian Republic of Venezuela." The Constitution of the Bolivarian Republic of Venezuela was adopted in December 1999, replacing the 1961 Constitution.⁴¹

On the basis of the Venezuelan example, it is possible to say that a new and apparently effective constitution can be created in a constitution-building process involving the idea of the *pouvoir constituant* and the submission of the constitution to the people in a referendum. This seems to be so irrespective of whether or not the outside world likes the ways of constitution-building. With reference to the stages of constitution-building it is possible to distinguish, a referendum can take place in each of them, although it seems likely that a constitution-building process involving one stage only might allow for referendums in the Latin American space with a view to referendums on calling constitutional conventions. Also, it seems that a referendum is relatively natural a final point in a three-stage process, while referendums also occur in two-stage processes.

3.3 What? The Issue and the Question

The issues at hand in a constitution-building referendum can range from the creation of independence through procedural questions on, e.g., whether or not to call a Constitution-

al Assembly and the basic institutional choices of the future constitution (such as the question of republican or monarchical constitution, which was the case in Italy in 1946) to adopting the entire constitution by the people.

Starting with the last dimension, adoption of the entire constitution by the people constitutes the final phase of a constitution-building process. An entire constitution contains a multitude of separate issues, some of which are of a general nature and some of a very particular and even technical nature. A greater or a lesser number of the sub-issues in an entire constitution are completely uninteresting for the common person or the average voter, and if the draft constitution has been adopted in a parliament or a constitutional convention in a manner which is of a representative character, it should be possible to expect that the electorate exercises its vote in the same direction, that is, approves the constitution. It is in many ways for this reason that most of the referendums result in the approval of the constitution: the referendum is but a visual confirmation of a proposal submitted by a deliberative body that has been charged with the task of reconciling different constitutional interests in one document, including those of political and ethnic, linguistic or religious minorities. This is not to say that knowledge about the constitution and the details it contains is unimportant, quite the contrary. However, each voter does not have to have complete information of every detail in a constitution, and should not, as a practical matter, even be expected to have complete information.

A case in point is the French referendum on the Constitutional Treaty of the European Union on 29 May 2005. The Constitutional Treaty, submitted to a decisive referendum by the President of France on the basis of Art. 11 of the French Constitution, turned out in a defeat of the Constitutional Treaty by a narrow margin. The Constitutional Treaty was massive even in comparison with the Constitution of India, which so far is the longest constitutional text in the world. The aims of the Constitutional Treaty were mainly to codify existing European Community legislation at the level of primary law, without introducing many new elements. However, a good part of the campaign focused on a discussion surrounding the issue of the Polish plumber, who would have free access to the labour market of France. This would be the case anyway under the current rules, but the French voters apparently wanted to attribute expected practical problems with the freedom of movement to the Constitutional Treaty. Nonetheless, the vivid public debate on the Constitutional Treaty made its contents widely known among the French voters.

At the same time as there may have been a lack of information concerning the contents of the constitution, the Serbian voters were apparently also asked to take part in a constitution-building referendum in 2006 that was not actually required by the then Constitution of Serbia.

The elevated status of the constitution of a state does not necessarily mean that the text is always prepared with due deliberation and adopted by the people on the basis of comprehensive knowledge and discussion. The process leading up to the adoption of the 2006 Constitution of Serbia could be presented as an example of a compressed drafting process driven by the political necessities at the national and the international level. On 1 October 2006, several months after the dissolution of the State Union of Serbia and Montenegro in May, followed by short negotiations among the largest parties represented in the parliament, the Parliament of Serbia unanimously adopted a draft of the

new constitution, with 242 MPs voting in favour and the remaining eight not present. After six years of discussion and delay, the adoption was decided in such a great rush that the 250 MPs of the Serbian Parliament did not really have time to read the draft. There was no official vote, but the draft was instead adopted by acclamation. After this, the Serbian voters were invited to vote in a referendum on a draft that their political leaders did not even have the time to discuss properly. The vote was carried out on the basis of the following question: 'Are you in favor of confirming the Republic of Serbia's new Constitution?'.⁴² Interestingly, it seems that a two-thirds qualified vote in the parliament would have been enough to approve the constitution and that the referendum was not actually required by the constitution (a feature which actually underlines its connection to the *pouvoir constituant*).⁴³ The draft submitted to the people was the result of a compromise among the key political parties, prepared by a single parliamentary committee and without public participation. If there were any meetings, they were between the party leaders only. Although Serbia is a multi-ethnic country, minorities were not really included in the drafting process. While it was more or less universally accepted that the new draft constitution was a significant improvement in comparison with the 1990 constitution, the main objections of the commentators were directed at the non-transparent way in which the draft was drawn up and approved by parliament. Hence although voters may have wanted to make an input in the preparation of the new constitution, they could not do so. It was decided that the constitutional referendum would be held on 28–29 October 2006, that is, less than one month after its adoption by the Parliament of Serbia. All major political parties supported the draft and began a public campaign for the referendum. The voters were left to believe what the parties were telling them,⁴⁴ and there was not any full public discussion about the constitution. The only political bloc that campaigned against the draft and advocated public boycott was a group of liberal and social-democratic parties. They objected to the lack of public discussion and argued that the claims concerning Kosovo in the preamble were a populist attempt to encourage the voters to participate in the referendum. A government-financed campaign was also urging people to vote "Yes."⁴⁵ In addition, it seems that the government and the Parliament were trying to turn the referendum on the new constitution into an indirect referendum on Kosovo and on confirming the status of Kosovo as a part of Serbia. From that point of view, the referendum also had a link to the then on-going dispute at the international level about the status of Kosovo.

In an open society, knowledge about the constitution submitted to a referendum and its contents can be supplied in manner which can be called objective (so-called voter education) at the same time as the voters should have full possibilities to find out about issues that are included in the constitution.

An example of this is the Albanian referendum of 1998. Article 43 of the Albanian Law on Elections to Local Government states that the Central Voters' Commission (CVC) 'shall organise unbiased programmes on Albanian radio and television to educate the Albanian population about the elections'. 'The Democratic Party interpreted this as giving the CVC an exclusive right to produce all voter education on Public TV, claiming that information on the content of the Constitution as well as on the referendum process has to be approved by the CVC. Furthermore, the DP refused to accept some voter education programmes because they considered them as support of the referendum vote.' The voter education was clearly designed to inform the voters about the contents of the constitution, but because the DP did not like the contents of the proposed constitution, it urged the population to refrain from voting. The special campaign programmes followed the rules defined by the Central Voting Commission, whereas the news favoured the Government's point of view. Out of the total time of 1300 minutes devoted to the referendum, 25 per cent was given in favour of the constitution, 17 per cent against (including boycott) and the rest was neutral.⁴⁶ These figures indicate that the information about the constitution and the referendum was relatively balanced.

In a non-open society, however, knowledge can be controlled and biased so as to ensure a

certain result. The higher the approval rate of a constitution, the more likely it is that the submission of the constitution to the people has not taken place in a free and open society, although the long-term aim may be the creation of a more open society.

In Qatar, the current Emir had performed a *coup d'état* in 1995 and worked towards at least some liberalization of the autocratic rule. A National Constitution Committee was established by a decree of the Emir in July 1999 to draft a new permanent constitution. The drafting committee presented a final draft to the Emir on 2 July 2002. One of the main provisions in the new constitution would be the establishment of an elected parliament.⁴⁷ A referendum to approve the new constitution was held in Qatar on 29 April 2003. The referendum asked the voters to approve Qatar's first-ever written constitution⁴⁸ as the permanent constitution. The constitution was overwhelmingly approved, with more than 98 per cent in favour. Although the population of the country was estimated to be around 790,000 at the time of the referendum, there were only some 85,000 registered voters. Voter turnout was 84.3 per cent and there were 533 invalid votes (0.7 per cent of the total).⁴⁹ The number of negative votes was 2145 (around 2 per cent).⁵⁰ With the new constitutional legislation, the legal situation of Qatar and its citizens has certainly improved, *inter alia*, because of direct elections to the Legislative Council that has the function to pass draft laws, submitted thereafter to the Emir for ratification. In the case of Qatar, the fact that a referendum was organized and a constitution was adopted was regarded as a significant sign of political and constitutional development in a positive direction.

In a non-open society, also the process can be controlled so as to produce a certain result, and if the constitution-building as a process and the constitutional referendum as a part of it are submerged in a governmentally or ideologically controlled agenda, the outcomes are unlikely to be long-lived, as was the case of the 1998 Constitution of the Sudan.

On 1 July 1998, a new constitution entered into force for the Sudan. This constitution was marred by controversy from its inception because it was negotiated during the civil war and without the participation of any opposition representatives. The drafting process began with the formation of a National Constitutional Committee in 1997. Originally, the task of this committee was to submit a draft constitution on behalf of the government to the National Assembly, which would then vote on a final version of the constitution before sending it to the electorate for a referendum. The committee, however, never had a quorum and only submitted a "suggested draft" to the President of the Sudan, who had come into power as a result of a military *coup* in 1989. On 28 March 1998, the president submitted his draft to the National Assembly, but apparently in a form that was in significant aspects different from the one contemplated by the National Constitutional Committee. The discrepancies between the initial and final draft of the constitution became known in due course and they sparked heated debates both in the National Assembly and among political observers. The National Assembly accepted the constitution on 28 March 1998, and the national referendum campaign began on 1 April 1998. During this period, nearly 100 lawyers, trade union activists, and other protestors were detained by security forces for voicing their opposition. At least one individual was charged with the crime of causing "danger" to the constitutional state. Referendum procedures were also subject to questionable practices. As an example, voting attendants allegedly went from house to house offering bribes and using threats in an attempt to convince people to vote. Such practices called into question the integrity of the voting results. The constitutional referendum was held on 27 May 1998. Perhaps the most important problem with the referendum was the possibility of low voter turnout. Throughout the referendum period, it seemed very unlikely that more than 50 per cent of the population would actually vote. This was partially due to the fact that the referendum was held without the participation of large parts of southern Sudan that are not under government control.⁵¹ In addition, several groups advised voters to either vote against the constitution or not to vote at all. The government-sponsored electoral commission confirmed that the constitution

was adopted in mid-June. The commission declared that 91.9 per cent of the registered voters (11.9 million) had voted, with 96.7 per cent (10.9 million) voting for the constitution and 3.3 per cent (326,732) voting against it.⁵² In one region, government officials even claimed that 100 per cent of the voters supported the constitution. Many observers inside and outside the Sudan view these high figures with skepticism, but the government continued to stand by the reported results.⁵³

In so far as the drafting process is unable to bring the adoption of the draft by the drafting body to a conclusion that can be generally speaking accepted by most of the members of the drafting body and clear divisions appear in the drafting body concerning the contents of the constitution, the same divisions can be expected to appear in a referendum that is organized to adopt the constitution. In this respect, cues of politicians involved in the process are probably fairly important.⁵⁴ If the representatives of the people in the drafting body communicate the contentious issues to the electorate and if the opponents of the draft imply that the constitution should not be adopted, the division is likely to be duplicated in the referendum. If the representatives of the people more or less agree on the draft, it will most likely pass, as was the case in Rwanda in 2003.

After the 1994 genocide, Rwanda's transitional period ended almost a decade later with presidential and parliamentary elections in 2003, following the adoption of the new constitution by the people in May 2003. Rwanda was governed after 1994 by a "basic law" drawn from several texts, including the 1991 constitution and peace accords signed in 1993 in Arusha, Tanzania.⁵⁵ A constitutional commission appointed by the government completed the draft of a new constitution that would be presented to voters in a referendum in late May 2003, and on 23 April. When a constitution is submitted to the people in a referendum for approval or rejection, the framing of the question is normally very simple. What is sought is a normatively binding decision concerning the approval of the highest norm of the state in its entirety. At this final stage, it is normally not possible to separate different issues to multiple distinct referendum questions for approval. It is not easy to envision what would happen if, e.g., the chapter on the judiciary was isolated to a separate referendum question and then voted down in the referendum, while the rest of the constitution is approved by the people. Instead, what is normally submitted is a variation of the question of whether or not to approve the draft constitution as elaborated by the drafting body. Such a framing of the question seeks to make a normative decision by establishing the highest written norm upon which all other norms are based, as was the case in Serbia in 2006. What is expected in such a situation is a complete approval of the text of the entire constitution.

From time to time, the issue submitted to the people in a constitution-building process is not the constitutional norm itself, but one or several preliminary questions or issues that have to be resolved before the actual draft is produced. One example of such preliminary questions is the issue concerning the Mwami (king) of Ruanda during the colonial period, before the independence of Ruanda. The administering authority of Ruanda, which was Belgium, suspended the powers of the Mwami and did not allow him to return to Ruanda to resume his duties as Mwami. The United Nations then decided that the position of the institution of the Mwami should be submitted to a referendum at a simultaneous general election in August 1961. The questions put to the people were the following:

- 1. Do you wish to retain the institution of the Mwami in Ruanda?**
- 2. If so, do you wish Kigeli V to continue as the Mwami of Ruanda?**

Only 20.2 per cent of the participating voters voted "Yes," in fact concerning both of the questions. After the result became clear, the United Nations recommended negotiations on the issue between the relevant parties.⁶¹ The constitution-building process itself may, too,

be submitted to a referendum or referendums, as was the case in Venezuela in 1999 (see above). It is thus possible to submit at least some (but probably not very many) preliminary issues to the people for adoption in a referendum. The aim of such preliminary issues would be to give direction to the rest of the constitution-building process, which apparently was the case in Kenya in 2005, where the final decision would be made by the Parliament and the voters were consulted by means of the following question: ‘Are you for or against the ratification of the proposed new Constitution?’.

Hence one constitution-building issue that has been and still is very important is the secession of a part of a state for the purposes of creating a new state or joining another. In this respect, it seems clear on the basis of international and even national law that unilateral secession by referendum held in the part of the state wishing to secede is not possible. In the *Gillot* case, the question in the planned referendum would evidently be whether New Caledonia should emerge as an independent state or continue as a constitutionally defined sub-state entity of the French state. This has, however, not always been clear. In the *Cameroon v. UK* case,⁶⁴ the International Court of Justice had to consider different options for the issue. The German colony of Kamerun was, in the aftermath of World War I, placed under the League of Nations mandates system, with France and Britain as administrators of each part of Cameroon. After World War II, Cameroon was made a Trust Territory of the United Nations. The French part declared independence on 1 January 1960. In the British part, a referendum (or plebiscite, as the vote was called) was organised in February 1961. As a result of the referendum, the northern part of the Trust Territory under British administration chose to join the Federation of Nigeria, while the southern part chose to join the former French part of Cameroon. This union resulted in the creation of the Federal Republic of Cameroon on 1 October 1961. In the case, the ICJ commented the fact that only two substantial and mutually exclusive alternatives were presented to the voters. “The Court cannot blind its eyes to the indisputable fact that if the result of the plebiscite in the Northern Cameroons had not favoured joining the Federation of Nigeria, it would have favoured joining the Republic of Cameroon. No third choice was presented in the questions framed by the General Assembly and no other alternative was contemporaneously discussed.”⁶⁵ It is possible that the ICJ considered independence of the Northern Cameroons as a third conceivable alternative for the people in the referendum, on the top of the two alternatives which could be understood as “free association or integration with an independent State.”

The case of Western Samoa merged the adoption of the Constitution and the declaration of independence during its de-colonization process. First, a constitutional convention elected by the people adopted a constitution, and thereafter the United Nations recommended the administering authority to ascertain the wishes of the people by means of a plebiscite in which the following two questions were put to the people:⁶⁶

- 1. Do you agree with the Constitution adopted by the Constitutional Convention on 28 October 1960?**
- 2. Do you agree that on 1 January 1962 Western Samoa should become an independent State on the basis of that Constitution?**

Both referendum questions were answered in the affirmative by the Samoans. The example of Western Samoa can be appreciated because of its very logical progression: first a referendum on the constitution and thereafter a referendum concerning independence under that same constitution.⁶⁷

As indicated above (*supra*, section 3.1.), a referendum was planned for 21 March 1992 in

the Autonomous Republic of Tatarstan within the Russian Federation on the following question: ‘Do you agree that the Tatarstan Republic is a sovereign state and a party to international law, basing its relations with the Russian Federation and other republics and states on treaties between equal partners? Yes or no?’ The Constitutional Court of the Russian Federation ruled, *inter alia*, that the Referendum Law of Tatarstan conformed to the Constitution of the Russian Federation. However, the referendum itself was held unconstitutional under Articles 70, 71, and 78 of the Constitution of the Russian Federation with respect to that part of the question which considered Tatarstan a subject of international law and which stated that the relations between Tatarstan and the Russian Federation, other republics, and States were based on treaties between equal partners. The reason for its unconstitutionality was the unilateral alteration of the national and governmental structure of the Russian Federation, which would have meant that Tatarstan did not belong to the Federation. By submitting the definition of the position of the republic to a referendum, the Supreme Council of Tatarstan had tried to make it into a norm of the highest order, approved by the people. Therefore the measure was not only of an implementing character in relation to the Declaration of Sovereignty issued by Tatarstan on 30 August 1990, but also a normative issuance which would determine the direction and content of the legislative process. In this respect, the Court seemed to understand the referendum as an exercise of the *pouvoir constituant* of some kind (although it was not entirely an instance of constitution-making) and of the right of self-determination, but considered such a possibility as pre-empted under the 1978 Russian Constitution at least to the extent it might involve a unilateral secession.⁶⁸ The Court also raised objections concerning the unclear formulation of the question. It is possible that the Court disliked the legalistic formulation of the referendum question, which, although correct, was not using the term independence, but remained perhaps instead quite convoluted for the regular voter.

In the *Quebec* case, the Supreme Court of Canada also referred to some qualitative elements of such referendum results, if they were to be taken as an expression of the democratic will of a population: the resolution must be supported by a “clear” majority, which means that the referendum result must be free of ambiguity both in terms of the question asked and the and in terms of the support it achieves. As concerns the clarity of the question, the Court did not give any further directions on how a referendum question should be phrased.⁶⁹

3.4 How? Decision-making Rules

It is recalled that the theory surrounding the notion of the *pouvoir constituant* departs from simple majority of those voting as the decision-making rule, and because the decision-making body is omni-competent and independent, no external instance can prescribe any particular decision-making formula, such as a super-majority. It is, however, not unthinkable that the constituent body itself agrees upon decision-making rules that deviate from the principle of simple majority. It is also recalled that the right of self-determination of peoples does not prescribe any particular decision-making formula and that silence on this issue speaks in favour of simple majority.⁷⁰ Such a simple majority was required, e.g., in the

case of Venezuela in 1999, where a majority of overall voters was required for the referendum issue to be passed.⁷¹ However, a good share of the constitution-building referendums were carried out under specific requirements of turnout or support.

Rules requiring the degree of support on constitutional issues may take on two different forms, a turnout requirement and a support requirement (and the support requirement can, in addition, be framed as a veto). It seems that none of the two are very frequent in older constitutional systems, but that the new constitutions that were established as a consequence of political transitions to some extent employed one of the two forms. The Iraqi example, above, is an example of one form of the support requirement, and the constitutional referendum in the Democratic Republic of Congo in 2005 was premised on the requirement of absolute majority of those voting. The practical consequence facing the politicians in the hands of a (possibly) indifferent population in a referendum with a turnout requirement is that the sufficient turnout has to be secured in one way or the other, as indicated by the case of Kyrgyzstan.

In the Kyrgyzstan referendum, there were two separate questions: one asking for the approval of the new constitution, the other asking for the approval of the new electoral law. The official turnout was reported at 81.58 per cent. Despite claims to the contrary by election officials, independent monitors said the election was flawed and the turnout was far below the 50 per cent needed to make the vote valid.⁷⁵ Therefore, the participation requirement of at least 50 per cent of the electorate probably compelled the leadership to report a sufficiently high turnout rate. The first question (on the constitutional amendments) was approved by 76.19 per cent of those voting and the second question by 76.14 per cent.⁷⁶ Because the votes against the proposals were 3.64 per cent and 3.70 per cent respectively, it seems possible that the empty ballot papers were counted as votes cast.⁷⁷

In Albania in 1998, a number of amendments were made to the Law on Referenda on 12 October 1998, only a good month before the referendum. One of these was to remove the requirement for the 50 per cent turnout for a valid vote. It was concluded in the Preliminary Statement of the OSCE/ODIHR observation mission that '[t]here is no set international standard for whether or not a turnout requirement should be applied. The difficulties in establishing reliable voters lists would also make a turnout threshold difficult to implement. However, the late date for making such a change was unfortunate and raised accusations that the rules of the game were changed to ensure that the constitution would pass.'⁷⁸

The *Quebec* case is illustrative of the overall concerns in a secession situation. Taken together, democracy and federalism may, at least in Canada, mean that there can exist different and equally legitimate majorities in different provinces and territories on the one hand and at the federal level on the other. However, democracy is not just majority rule: the opinions of those affected must also be taken into account, and democracy actually accommodates cultural and group identities. Moreover, democracy is not just a matter of procedure, but is fundamentally connected to substantive goals, such as the promotion of self-government. This can be viewed as a requirement of a continuous process of discussion, expressed by the 1982 Constitution Act as a right of each participant in the federal arrangement to initiate constitutional change. The Court also pointed out that this right imposes a corresponding duty on the other participants in the federal arrangement to engage in constitutional discussions in order to acknowledge and address democratic expressions of a desire for change in other provinces.⁷⁹

Nonetheless, according to the Court, the principle of democracy embedded in the Constitution 'would demand that considerable weight be given to a clear expression by the people

of Quebec of their will to secede from Canada, even though a referendum, in itself and without more, has no direct legal effect, and could not in itself bring about unilateral secession'.⁸⁰ Such a referendum would, according to the Court, carry some weight: it would confer legitimacy on the efforts of the government of Quebec to initiate the amendment procedure of the Constitution in order to secede by constitutional means. The Court also referred to some qualitative elements of such a referendum results for them to be taken as an expression of the democratic will of a population: the resolution must be supported by a "clear" majority, which means that the referendum result must be free of ambiguity both in terms of the question asked and in terms of the support it achieves. A clear repudiation of the existing constitutional order and the clear expression of the desire to pursue secession by the population of a province would, as a legal consequence, give rise to a reciprocal obligation on all parties to the federal arrangement to negotiate constitutional changes to respond to that desire. Hence the provinces and the federal government would have to enter into negotiations and conduct them in accordance with the underlying constitutional principles of federalism, democracy, constitutionalism and the rule of law, and respect for minorities.

Against this background of constitutionalism and the mutual rights and duties under the Constitution, the purportedly original popular sovereignty held by the constituent Provinces in the federal arrangement can not revert back to a Province where "the people" in their exercise of their popular sovereignty could decide to secede by their majority vote alone. The commitment to the federal arrangement can not be extinguished by a unilateral act of will. Hence it would not be possible to legitimately circumvent the Constitution by resort to a majority vote in a province-wide referendum, although the holding of such a referendum can well be understood as a legitimate expression of the will of that particular part of the whole population. Constitutional rules, such as the participation of one Province in the constitutional arrangement, can be amended, but only through a process of negotiation which ensures that there is an opportunity for the constitutionally defined rights of all parties to be respected and reconciled. The wish of a Province to effectuate secession from Canada was therefore deemed to establish a duty to negotiate with other participants to the constitutional process and to require an amendment to the Constitution. Secession could not be effectuated by Quebec without prior negotiations with the other provinces and the federal government: such an amendment must be negotiated in the light of the same constitutional principles that gave rise to the duty to negotiate: federalism, democracy, constitutionalism and the rule of law, and the protection of minorities.⁸¹ In the *Quebec* case, the Supreme Court of Canada concluded that the referendum, which is the first step of secession, was not really at issue, but the final act of purported unilateral secession. However, because the clear expression of democratic will in a referendum in the province of Quebec was viewed as the supposed juridical basis of such an act, the Court felt itself compelled to examine the possible juridical impact of such a referendum on the functioning of the Canadian Constitution and on the claimed legality of a unilateral act of secession. The Court pointed out that the Constitution of Canada does not itself address the use of the referendum procedure. Hence at the federal level, such a provincial referendum could be mainly of an advisory character, although it could be considered compelling

evidence of the wishes of the population of a province and would lead the representatives of the people in the amendment negotiations. The Court concluded that the results of a referendum have no direct role or legal effect in the constitutional scheme of Canada.⁸² However, the Court was of the opinion that such a referendum undoubtedly could provide a democratic method of ascertaining the views of the electorate on important political questions on a particular occasion. In fact, the principle of democracy embedded in the Constitution 'would demand that considerable weight be given to a clear expression by the people of Quebec of their will to secede from Canada, even though a referendum, in itself and without more, has no direct legal effect, and could not in itself bring about unilateral secession'.⁸³ Such a referendum would, according to the Court, carry some weight: it would confer legitimacy on the efforts of the government of Quebec to initiate the amendment procedure of the Constitution in order to secede by constitutional means.

In its conclusion concerning the constitutional aspects, although 'a sovereign people exercises its right to self-government through the democratic process,' the Court was of the opinion that under domestic constitutional law, 'Quebec could not purport to invoke a right of self-determination so as to dictate the terms of a proposed secession to the other parties: that would be no negotiation at all'. At the same time, 'the rights of other provinces and the federal government cannot deny the right of the government of Quebec to pursue secession, should a clear majority of the people of Quebec choose that goal, so long and in doing so, Quebec respects the rights of others. The solution to the problem is a middle way, the duty to negotiate an amendment in a situation in which none of the majorities, expressed either through the referendum or through the representatives of the populations, either that of the province or that of the federation, is allowed to trump each other. On the contrary, the aim would be to reconcile 'various rights and obligations by negotiation between two legitimate majorities, namely the majority of the population of Quebec and that of Canada as a whole'. 'Our democratic constitution necessarily accommodates a continuous process of discussion and evolution, which is reflected in the constitutional right of each participant in the federation to initiate constitutional change.'⁸⁴ However, apart from formulating a duty of negotiation, the Court refrained from pointing out the procedure towards such settlement.

Referendums in constitution-building contexts are sometimes advisory as concerns their outcomes, not binding. It could be argued that the Cypriot referendum, above, was only advisory, because it would not have enacted the new constitution if it had been successful. Instead, it would only have established a target and a road-map to reach that target, while specific legislation should have been enacted in order to fulfill the expectations created by a positive referendum result. The advisory nature of the constitutional referendum is somewhat more clearly present in the case of the Kenyan referendum of 2005.

Hence even a referendum which is ostensibly advisory may gain decisive features, because the result of an advisory referendum can be expected to affect the politicians that have been elected to their office by the same population that participated in the referendum. This is so especially if the time span between the advisory referendum and the final decision is relatively short. However, with the passage of time and perhaps with one or more parliamentary elections held before the constitution is enacted, it is possible that the referendum could retain its advisory nature and affect less the final decision-maker.⁸⁸ A similar advisory effect could probably be attributed to the referendum in Zimba-

bwe in 2000.

Thus in spite of the fact that the government may be in a position to control decision-making rules of the formal nature and influence the substance, it is not always so that the people will follow along.

4. Conclusions

An answer to the question put above, “who may decide, when, what, and how?” could contain the following: The people may decide, in a situation where there is a constitutional vacuum, a constitutional break-down or something similar, to create a new or an independent constitution for themselves, either directly through the referendum or indirectly through a body elected by the people (Suksi 1997a: 456). A people, again, is normally understood as the entire population of the territory in question, but there is also evidence for holding that there may, at the sub-national level, exist distinct peoples that have the right to exercise their right of self-determination, sometimes even by the referendum. Therefore, the constitutional referendums accounted for above are not just haphazard and unrelated instances of incidental submissions of constitutional texts to the people, but instead expressions of an (unconscious?) understanding that the consent of the governed is central to the legitimacy of the government. In this context, the concept of the *pouvoir constituant*, on the one hand, and the right of self-determination, on the other, press decision-making in constitutional matters in the direction of direct popular participation so as to make it possible to refer to the exercise of the sovereignty of the people when constitutions are adopted by the people. Having said that, the environment in which the people exercises its sovereignty by means of the referendum does not have to be particularly inclusive or “participatory”: quite often, constitutions submitted to the people in constitution-building contexts have been developed and deliberated upon in authoritarian environments, as in the cases of Congo, Iraq, Qatar, Rwanda and the Sudan. The consent of the governed that is sought for in this way is, therefore, not particularly genuine and may be requested only in order to legitimize the government of the day. In this respect, the Sudanese constitutional referendum stands out as a particularly negative experience of the use of the mechanism.

The constitutional referendum in the constitution-building context seems to be proliferating and John Locke is therefore more topical than ever. Well over 50 per cent of the constitution-building instances in the world during 1998–2007 seem to have used the referendum as the decision-making mechanism over a new constitutional text, which makes the use of the referendum more likely than not as a part of a constitution-building process. However, it is striking that constitution-building in the cases included in our review is taking place in some of the most troubled countries of the planet. Through a pledge by its military government, Burma surprised the world by promising to join this lot in May 2008 in its endeavour to hand over at least some governmental powers to civilians.⁹³

It would seem that countries under distress are often very likely to use the referendum in a constitution-building context at some point of their political history. For various reasons, political or military leaders in these countries feel that there is a need to create a new constitution and to obtain

the broadest possible legitimacy for a new constitutional arrangement and the greatest possible visibility for the constitutional solution. In such a situation, the referendum is often utilized, but at the same time, a referendum in a constitution-building context still remains an extremely unique event in the political and constitutional life of a particular country. It is also interesting in the context that a good number of these countries under distress have been characterized as “failed states.”⁹⁵ Such states may have a special interest in trying to establish legitimacy for public authority throughout their territories. Referendum may, under such circumstances, be the final resort, either due to opportunism on the part of the leaders of the state wishing perhaps to legitimize their position or because of an honest attempt to re-create public authority by a reference to the root of legitimacy, the people.⁹⁶

In spite of the aim to create legitimacy and a new fundament for the legal order of the country, it is not possible at every instance to determine whether constitution-making by the referendum is generally speaking “good.” The aims leading to a constitutional referendum in a constitution-building situation may be very opportune. However, the fact that the voting population on some occasions also has cast a collective “No” vote (as in Kenya, Zimbabwe and Cyprus) may be taken as evidence for the capacity of the people to see through at least some of the rhetoric surrounding a draft constitution submitted to the people.

Issue-based referendums may be confrontational, while referendums about entire constitutions are necessarily not such, because it is unclear what the substantive alternative to an entire constitution would be in a situation of, e.g., a constitutional vacuum or break-down of the entire country. It may be better to have a constitution than to continue without one. However, certain parts of the constitution may be picked out in the campaign leading up to the referendum as separate elements and turned into contentious issues that determine the fate of the entire constitution. In such situations, the political debate between the majority and the minority may turn the popular vote into a very divisive exercise. If the politicians involved in the drafting of the constitution are divided on issues contained in the constitution, so will the population, too, at least in most cases. In such situations, the referendum will be just a visible confirmation of the divisions, as in the Sudan, Iraq and Cyprus. It is not the fault of the referendum mechanism if the opinions are divided. Whatever contentious issues that remain after the drafting process is finished, they will emerge in the referendum. Therefore, the political forces drafting the constitution should try to achieve a text as uncontroversial and consensual as possible during the drafting stages that precede the referendum before the text of the constitution is submitted to the people. In addition, the politicians should give positive signals to the voters if they wish that the text is adopted.

Unexpectedly, the idea of the adoption of a constitution in a constitution-building referendum does not always mean that the referendum is decisive in nature. Although the theory of the *pouvoir constituant*, the sovereignty of the people and the self-determination of the people would seem to hold that a constitution-building referendum is decisive and produces a binding normative result in the form of a constitution, this is not necessarily always so, as is shown by the cases of Kenya, Zimbabwe and Quebec. In a good number of cases, the referendum is actually formally speaking advisory, although the result is to be understood as, politically speaking, binding in relation to the final decision-making body, which

may be a parliament. Sometimes, as in the case of Cyprus, the referendum may be placed between an advisory and a decisive referendum in that the result of the referendum, if positive, would not produce a constitutional norm, but a binding object for subsequent legislative enactments. When the actual constitution-building takes place in a one-stage procedure, the referendum may be advisory or deal with the preceding issue of whether or not to call a constitutional convention, while the two- and three-stage procedures relatively regularly end with a constitutional referendum of a decisive nature as concerns the contents of the constitution.

In a number of cases, such as the Sudan, Kenya, Zimbabwe, the political leaders were not in agreement with the result of the drafting process and changed the text that was submitted to the people, often with negative consequences. Interestingly, in countries where the government was unable to persuade the majority of the country's voters to approve the constitution in the referendum (Kenya, Zimbabwe, Venezuela), the "No" vote did not result in the collapse of the government, but instead in pledges from the government that the verdict of the people will be respected. In the case of Iraq, the contentious issues were threatening the adoption of the constitution, but because of a pledge of constitutional revision and a referendum in the future on the proposed amendments, it was probably possible to defer the most contentious issues to a later stage. Such a procedural feat (which is either positive or negative depending on the preferences of the outside observer) is unlikely to succeed under all circumstances and in all countries.

All of the countries included in this review are multi-ethnic and divisive issues are bound to arise already because of factional politics in the drafting process. However, a referendum is normally binary, begging for a "Yes" or a "No" vote, and the range of various needs and opinions that the different population groups may have can therefore not be reflected in the referendum itself (it should, however, be remembered that sometimes and in exceptional situations, multiple alternatives might exist in the referendum). Therefore, the needs and opinions of the various population groups must be reflected in the draft constitution, or else the draft runs a risk of being voted down. Even in the case of the approval of the constitution, the groups being on the disadvantaged side may feel that a constitution which does not take them into account is illegitimate and may refuse to co-operate within the constitutional institutions. This has been the case at least with the Kosovo Albanians in Serbia. The use of a veto mechanism inside the frame of a support requirement, as in the case of Iraq, may offer an opportunity to pay special attention to some population groups that are sufficiently concentrated in some sub-divisions of the country, as when the proponents of the Iraqi constitution wanted divisive issues to feature both across the country in general and in various regions. Nonetheless, that particular example together with Albania, Serbia and Kyrgyzstan show that different turnout and support requirements may force the election administration to undertake measures that are not in keeping with best practices of election administration. Anyway, it seems as if our review included a number of countries, such as Congo, Rwanda and Burundi, where the constitution was turned into a demonstration of shared values by the multi-ethnic population. It does not seem that the constitution-building referendums dealt with here had started civil wars, but such referendums have, in many cases, been held in the aftermath of civil wars, as in Congo, Rwanda,

Burundi, Serbia and even the Sudan. Perhaps it is important to create a new national bond after such sad events, and one of the mechanisms available is the referendum.

Interestingly, many of the constitutions submitted to referendum during 1998–2007 in a constitution-building process were the first-ever constitutional referendums, such as those of Kenya, Thailand, Venezuela, and the Sudan, and in some cases, the constitution-building referendum was even the first referendum ever held on any issue. For this reason, but also because of the special characteristics of the referendum in this context, the referendum legislation in constitution-building situations is apparently relatively *ad hoc*: the rules governing the procedure of the referendum are found in interim constitutions or in acts of parliament that have been enacted only some time before the referendum takes place.⁹⁷ These *ad hoc* referendum acts also seem to be relatively short and, in countries where election legislation exists, may remain short by making references to the election act that already is in place and provides for at least some of the necessary rules. The uniqueness of the process means that very few voters, if any at all, have understanding of the process. Luckily, for the average voter, the referendum is a fairly simple technical exercise. It is much more demanding to understand the object of the referendum, which normally is the entire constitution, especially in comparison with elections, where voters can not be expected to establish very much solid knowledge of the person or the party, but create instead a relationship of trust of some sort to the candidate or party they are voting for. At the same time as a constitutional referendum is a very good mechanism to educate the voters on the contents of the constitution, the fact remains that a constitution is seldom so clear that it does not need interpretation as to its general political consequences for the individual voter or the group he or she is a member of or as to its legal details. Therefore, the average voter is predestined to listen to the cues of his or her political representatives or superiors.

The constitution-building referendums will proliferate irrespective of whether or not we like the referendum as a decision-making mechanism. The symbolic value of the all-encompassing and global vote among the population of a country is high, and the “ritual” of separating the final adoption of the constitutional text from the drafting body and giving the decision to the people has compelling force for the creation of legitimacy. In spite of the generally not too negative an assessment of the constitution-building referendum voiced in this review, it is submitted here that an appeal to the *pouvoir constituant* through the referendum should preferably be avoided, because the consequences may be unpredictable at least in circumstances of undeveloped political maturity. The omni-competence of the *pouvoir constituant* should not be unleashed, because at least from the point of view of the theory and the principles surrounding the concept, the *pouvoir constituant* can not be limited by rules of positive law established in advance or by any of the pre-existing constitutional institutions. Instead, the regular amendment provisions of the constitution should be used, wherever possible. The political and constitutional life of nations is, however, such that the constitutional continuity may occasionally suffer breakdowns. At those moments, we will be able to observe that constitution-building referendums are held, also in the future and presumably at the same frequency or higher as during the ten-year period our

review encompassed.

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- Markku Suksi, 'On Mechanisms of Decision-Making in the Creation (and the re-creation) of States—with Special Reference to the Relationship between the Right to Self-Determination, the Sovereignty of the People and the *pouvoir constituant*,' in 3 *Tidsskrift for Rettsvitenskap* 1997 (Oslo, Copenhagen, Stockholm, Boston: Scandinavian University Press, 1997) (Suksi 1997a)

Abbreviations

CCPR Covenant on Civil and Political Rights

DP Democratic Party

EU European Union

HRC Human Rights Committee

ICJ International Court of Justice

MP Member of Parliament

TAL Interim Constitution of Iraq

UN United Nations

Endnotes

- 1 This article is based on a paper presented at the Bobst Center for Peace & Justice at Princeton University, the International Alliance for Peace-building (Interpeace) and International IDEA, workshop on “Institutions and Procedures in Constitution Building” 5–7 March 2008 in Princeton, New Jersey. The participants in this workshop, in particular Anthony Regan, are hereby thanked for their helpful comments.
- 2 IFES Election Guide, at <www.electionguide.org> (accessed on 16 January 2008), lists referendums from 15 March 1998 (Madagascar) until 2 December 2007 (Venezuela). The list is not complete, but has been complemented by the author by using a variety of sources, such as the Westlaw and other Internet tools, concerning, inter alia, referendums in Albania (1998) and Turkey (2007). The list also encompasses a number of referendums at the sub-state level, but these have been dealt with in a separate group of referendums organized in sub-state areas. The IFES listing of referendums also includes a number of popular decisions which actually are not referendums proper, but instead elections of some sort, such as confirmations of the incumbent in office, recalls (that is, reverse elections), and impeachment-related decisions. These “elections” do not resolve an issue as is the case with referendums, but deal instead with persons, which is the normal focus of elections. The number of such “elections” is 4, and the vote in Pakistan on 30 April 2002 could also be classified in this category. In spite of the specifications of the list, this piece of research does not make any claim of having identified all referendums that were organized during the period 1998–2007. See also <<http://africanelections.tripod.com/index.html>> for election results in the African countries.
- 3 IFES Election Guide, at <www.electionguide.org> (accessed on 18 January 2008), encompasses presidential elections from 10 January 1998 (Lithuania) until 27 December 2007 (Kenya). In so far as the elections are designed so as to have a second round, such a second round has not been counted as a separate election because it is part of the same process with the same persons. Also, some presidential elections in non-independent sub-state areas have been excluded from the count.
- 4 IFES Election Guide, at <www.electionguide.org> (accessed on 18 January 2008), encompasses parliamentary elections from 1 February 1998 (Costa Rica) until 27 December 2007 (Kenya). In so far as the elections are designed so as to have several rounds or stages, such rounds or stages have not been counted as a separate election because it is part of the same process with the same persons. Also, a number of parliamentary elections listed for non-independent sub-state areas have been excluded from the count.
- 5 See Freedom in the World Country Ratings, at <<http://www.freedomhouse.org/template.cfm?page=15>> (accessed on 11 February 2008). F = free; PF = partly free; NF = not free. Undoubtedly, the three categories are too crude, and a more detailed study of the Freedom House ratings also give an indication about the direction of the development, whether it is upward or downward going or keeping the same level. Towards the end of this review, Burma is added to this group of countries because of the 10 May 2008 constitution-building referendum. According to the Freedom House, Burma was rated in 2008 as NF.
- 6 Such a removal was carried out for the constitutional referendum of Niger on 18 July 1999, which initially looked like a referendum on a new constitution but which, nonetheless, seems to have been a substantive amendment of the 1993 Constitution. A similar removal was undertaken in the case of the constitutional referendum in Senegal on 7 January 2001, which has been referred to as the adoption of a new constitution but which in reality seems to be an amendment to the 1963 Constitution.
- 7 Moreover, internal peace agreements in the Sudan with a view of Southern Sudan and in Papua New Guinea with a view to Bougainville set out a time-table for holding of referendums on whether or not these special parts of the two countries would become independent.
- 8 Although the material object of the referendum was the ratification of the treaty, formally the referendum dealt with the amendment of the Irish Constitution, because treaties of this kind have to be formally added to the Irish Constitution in order to abolish the constitutional conflicts between the treaty and the Constitution. The proposal to amend the Constitution was rejected by a majority of 53.4 per cent. See <<http://electionsireland.org/results/referendum/refresult.cfm?ref=2008R>>, accessed on 24 September 2008.
- 9 The referendum in Somaliland was actually organized in order to assert independence and to adopt a constitution for the independent state of Somaliland. However, it seems that no or very few states have recognized the independence of Somaliland, and at the moment (in the beginning of 2008), there is a chance that Somaliland might become a part of a federal Somalia.
- 10 New Caledonia is, however, included in chapter 3 of this review, below, on the basis of a case decided by the UN Human Rights Committee.
- 11 It should, however, be pointed out that the 2008 Constitution of Kosovo does not contain any provisions concerning the referendum and that the plans in Kosovo to hold an independence referendum were stopped. See, e.g., <<http://kosovareport.blogspot.com/2006/05/kosovo-independence-referendum-now.html>> (accessed on 29 September 2008) and <<http://www.dtt-net.com/en/index>>.

- php?page=view-article&article=3420> (accessed on 29 September 2008). As outlined in another plan, later on, there might be a referendum in Kosovo on whether or not to join Albania. See <<http://www.serbianna.com/news/2007/03142.shtml>> (accessed on 29 September 2008).
- 12 Proceedings, “Workshop on Constitution Building Processes,” Princeton University, 17–20 May 2007, Bobst Center for Peace and Justice, Princeton University, in conjunction with Interpeace and International IDEA, pp. 15–49. See also Harris & Reilly 1998: 92, 102, 118.
- 13 <<http://www.iht.com/articles/2006/10/23/news/serbia.php>> (accessed on 9 February 2008).
- 14 <<http://www.axisglobe.com/article.asp?article=1105>> (accessed on 9 February 2008).
- 15 <<http://www.washingtonpost.com/wp-dyn/content/article/2006/10/27/AR2006102700831.html>> (accessed on 9 February 2008).
- 16 <<http://seeuropeonline.blogspot.com/2006/10/after-all-serbia-has-not-changed.html>> (accessed on 9 February 2008).
- 17 Preliminary Statement of the OSCE/ODIHR observer mission, <http://www.osce.org/documents/odihr/1998/11/1184_en.pdf> (accessed on 4 February 2008), p. 3.
- 18 Preliminary Statement of the OSCE/ODIHR observer mission, <http://www.osce.org/documents/odihr/1998/11/1184_en.pdf> (accessed on 4 February 2008).
- 19 (Comm. 932/2000, U.N. Doc. CCPR/C/75/D/932/2000).
- 20 See *supra* note 20, the *Gillot* case, para. 13.16.
- 21 In the case of *Py v. France* (European Court of Human Rights, Judgment of 11 January 2005), however, the European Court of Human Rights had to deal with a similar limitation of universal suffrage in New Caledonia in elections, but did not find a violation of art. 3 of the First Protocol to the European Convention of Human Rights.
- 22 See *supra* note 20, the *Gillot* case, para 13.18.
- 23 See *Western Sahara*, Advisory Opinion, I.C.J. Reports 1975. It is obvious on the basis of the case that, in addition to referendums, also elections and in some situations even other forms of the exercise of (external) self-determination can be possible.
- 24 Decision no. 671 of 13 March 1992 by the Constitutional Court of the Russian Federation
- 25 On a personal note, the author of this text had the opportunity to participate in the election and referendum observation mission to the Russian Federation in 1993. Concerning the constitutional-building referendum, the participation requirement was set at 50 per cent of the electorate and the decision-making rule at simple majority in the Decree No. 1633 of 15 October 1993 entitled ‘On the Holding of a Nation-Wide Referendum on the Draft Constitution of the Russian Federation’. According to the Decree, the question submitted to the people was the following: ‘Will you adopt the Constitution of the Russian Federation?’. Doubts were voiced after the referendum, held in conjunction with parliamentary elections to organs created by the new constitution to be adopted, on whether or not the turnout requirement was met, because the lists of voters were open-ended until the polling stations closed. See Suksi 1997b: 57.
- 26 *Reference Re Secession of Quebec* (20 August 1998), No. 25506 (S.C.C.).
- 27 For analysis of the *Quebec* case and the *Tatarstan* case along the two levels, that of national constitutional law and that of public international law, see Suksi 2005.
- 28 See *supra* note 27 the *Quebec* case, paras. 123, 124 and 154.
- 29 Preliminary Statement of the OSCE/ODIHR observer mission, <http://www.osce.org/documents/odihr/1998/11/1184_en.pdf> (accessed on 4 February 2008), pp. 4, 5.
- 30 <<http://www.aimpress.ch/dyn/trae/archive/data/199812/81214-001-trae-pod.htm>> (accessed on 4 February 2008).
- 31 G.A.Res. 65/1946, Supp. No. 4, at 79.
- 32 See *supra* note 24, p. 16, at 57.
- 33 Concerning the elections, see Mission d’observation électorale de l’Union Européenne au Burundi, *ELECTIONS LEGISLATIVES 2005, Rapport final*, Bujumbura juillet 2005, at <http://ec.europa.eu/external_relations/human_rights/eu_election_ass_observ/burundi/final_2005_fr.pdf> (accessed on 15 February 2008).
- 34 <http://en.wikipedia.org/wiki/Burundian_constitutional_referendum,_2005> (accessed on 5 February 2008).
- 35 Different from most other countries, constitution-building in a situation of the *pouvoir constituant* seems to be a recurrent feature in Thailand, with up to 18 constitutions, the effectiveness of which have in most cases been interrupted by the intervention of the military.
- 36 See the *Quebec* case, *supra* note 27.
- 37 On a personal note, already on 20–26 July 1991, the author of this report wrote and presented a commentary on the Albanian Draft Constitution in Tirana, Albania, on behalf of three Swedish organizations (Pro Justitia, the Swedish Helsinki Committee, and the Swedish Section of the International Commission of Jurists). It is to be hoped that this early contribution did not cause the constitution-building process of Albania to become so difficult.
- 38 See M.A. Smith, *Albania 1997–1998* (Conflict Studies Research Centre, March 1999),

- <<http://se2.isn.ch/serviceengine/FileContent?serviceID=ESDP&fileid=FBA60F2B-3D02-3AB8-C04B-CC837D713F02&lng=en>> (accessed on 4 February 2008).
- 39 According to Wikipedia, the “Yes” vote in response to these two questions totaled 92 per cent and 86 per cent, respectively.
- 40 See <<http://www.electionguide.org/election.php?ID=822>> (accessed on 12 February 2008).
- 41 See <<http://www.electionguide.org/election.php?ID=822>> (accessed on 12 February 2008).
- 42 <<http://www.electionguide.org/election.php?ID=1266>> (accessed on 12 February 2008).
- 43 See <<http://www.electionguide.org/interest.php?ID=1266>> (accessed on 12 February 2008).
- 44 See <<http://www.voanews.com/english/archive/2006-10/2006-10-31-voa3.cfm?CFID=257814273&CFTOKEN=88586103>> (accessed on 9 February 2008).
- 45 See also <<http://www.voanews.com/english/archive/2006-10/2006-10-31-voa3.cfm?CFID=257814273&CFTOKEN=88586103>> (accessed on 9 February 2008) as well as <<http://www.iht.com/articles/2006/10/23/news/serbia.php>> (accessed on 9 February 2008), <<http://www.axisglobe.com/article.asp?article=1105>> (accessed on 9 February 2008), <<http://www.washingtonpost.com/wp-dyn/content/article/2006/10/27/AR2006102700831.html>> (accessed on 9 February 2008) and <<http://seeuropeonline.blogspot.com/2006/10/after-all-serbia-has-not-changed.html>> (accessed on 9 February 2008).
- 46 Preliminary Statement of the OSCE/ODIHR observer mission, <http://www.osce.org/documents/odihr/1998/11/1184_en.pdf> (accessed on 4 February 2008).
- 47 <http://www.qp.com.qa/mic/web.nsf/web/mic_aboutq> (accessed on 8 February 2008).
- 48 <<http://www.electionguide.org/election.php?ID=341>> (accessed on 8 February 2008).
- 49 <http://en.wikipedia.org/wiki/Qatari_constitutional_referendum,_2003> (accessed on 8 February 2008).
- 50 <<http://english.mofa.gov.qa/details.cfm?id=80>> (accessed on 8 February 2008).
- 51 With the establishment of the National Population Census Council, plans are anticipated for a population census to be conducted in February 2008 in preparation for national elections in 2009. The Comprehensive Peace Agreement mandates that the government hold a referendum at the end of a six-year interim period in 2011, allowing southerners to secede if they so wish. See <<http://www.state.gov/r/pa/ei/bgn/5424.htm>> (accessed on 8 February 2008).
- 52 Reuters, reporting a July 24, 1998, statement by the Sudanese Election Commission.
- 53 The text concerning the Sudan in this section is modified on the basis of the article by Ghazi Suleiman & Curtis Francis Doebbler, Human Rights in Sudan in the Wake of the New Constitution, at <<http://www.wcl.american.edu/hrbrief/fall198/ghazi.html>> (accessed on 10 February 2008).
- 54 However, see Magleby 1984: 174, in which it is concluded that in referendums at the state level in the United States, the party cue, that is, indication by a political party of support for one of the alternatives, is generally absent at referendums, although the assumption seems to be (at 122, 128, 145) that cues could play a role in persuading the voters to vote for a particular alternative.
- 55 *Rwanda—referendum constitutionnel 26 mai 2003*. Mission d’observation électorale de l’union européenne (rapport final), p. 9.
- 56 <<http://www.globalsecurity.org/military/library/news/2003/05/mil-030527-29d0630e.htm>> (accessed on 8 February 2008).
- 57 <<http://www.ipu.org/news-e/10-7.htm>> (accessed on 8.2.2008). See also Mission d’observation électorale de l’union européenne: *Rwanda—referendum constitutionnel 26 mai 2003 (rapport final)*.
- 58 <<http://africanelections.tripod.com/cd.html>> (accessed on 5 February 2008).
- 59 <http://en.wikipedia.org/wiki/Democratic_Republic_of_the_Congo_constitutional_referendum,_2005> (accessed on 5 February 2008).
- 60 Mission d’observation électorale de l’Union Européenne en République Démocratique du Congo, *ELECTIONS PRESIDENTIELLE, LEGISLATIVES ET PROVINCIALES 2006 Rapport final*, Kinshasa, le 23 février 2007, at <http://ec.europa.eu/external_relations/human_rights/eu_election_ass_observ/drc/moe_rdc_2006_final.pdf>.
- 61 G.A.Res. 1605/1961, U.N.Doc. A/4684/Add. 1.
- 62 Turkish Cypriot community, however, approved of the plan with a vote of 64.90 per cent at a turnout-rate of 87 per cent.
- 63 <http://en.wikipedia.org/wiki/Annan_Plan_for_Cyprus> (accessed on 5 February 2008).
- 64 *Case concerning the Northern Cameroons (Cameroon v. United Kingdom)*, Preliminary Objections, Judgment of 2 December 1963, I.C.J. Reports 1963, p. 15, at 28.
- 65 See *supra* note 65.
- 66 G.A.Res. 1569/1961, UN Doc. A/4684.
- 67 However, against the background of the philosophical construction of John Locke, the questions should probably have been presented in the reverse order.
- 68 In its judgment in the so-called Chechnya Case of 31 July 1995 (translated into English by the Federal News Service Group and published by the Council of Europe/European Commission for Democracy through Law, CDL-INF(96)1 on 10 January 1996), the Constitutional Court of the

- Russian Federation concluded that state integrity is one of the foundations of the constitutional system of the Russian Federation and that the status of a subject of the Russian Federation may only be changed by mutual agreement between the Russian Federation and the subject of the Russian Federation in accordance with the federal constitutional law.
- 69 See the *Quebec* case, *supra* note 27, para. 87.
- 70 Suksi 1995, pp. 152, 153.
- 71 <<http://www.electionguide.org/election.php?ID=822>> (accessed on 12 February 2008).
- 72 <http://en.wikipedia.org/wiki/Proposed_Iraqi_constitution> (accessed on 6 February 2008). See also <http://www.servat.unibe.ch/law/icl/iz00000_.html#I000_> (accessed on 6 February 2008).
- 73 During this election, security detainees held by coalition forces and the Ministry of Interior were given the opportunity to vote. This is the first time in the modern history of the Middle East that detainees of this nature were allowed to vote in any election.
- 74 See <http://en.wikipedia.org/wiki/Proposed_Iraqi_constitution> (accessed on 6 February 2008) and <http://www.servat.unibe.ch/law/icl/iz00000_.html#I000_> (accessed on 6 February 2008).
- 75 <<http://www.electionguide.org/interest.php?ID=1376>> (7 February 2008).
- 76 <http://en.wikipedia.org/wiki/Kyrgyzstani_constitutional_referendum,_2007> (accessed on 7 February 2008).
- 77 See also <<http://www.electionguide.org/interest.php?ID=1376>> (7 February 2008) and <http://www.ihf.com/articles/ap/2007/10/23/asia/AS-POL-Kyrgyzstan-Referendum.php?WT.mc_id=rssap_news> (accessed on 7 February 2008).
- 78 <http://www.osce.org/documents/odihr/1998/11/1184_en.pdf> (accessed on 4 February 2008).
- 79 See the *Quebec* case, *supra* note 27, para. 88.
- 80 See the *Quebec* case, *supra* note 27, para. 87.
- 81 See the *Quebec* case, *supra* note 27, para. 90.
- 82 See the *Quebec* case, *supra* note 27, para. 87.
- 83 The *Quebec* case, *supra*, note 27, para. 87.
- 84 See the *Quebec* case, *supra* note 27, paras. 64, 91–93, 150–152.
- 85 Turkish Cypriot community, however, approved of the plan with a vote of 64.90 per cent at a turnout-rate of 87 per cent.
- 86 <http://en.wikipedia.org/wiki/Cypriot_Annan_Plan_referendumper cent2C_2004> (accessed on 5 February 2008).
- 87 <<http://www.electionguide.org/election.php?ID=172>> (accessed on 12 February 2008).
- 88 In the case of *Njoya and others v. Attorney-General and others*, [2004] LLR 4788 (HCK), the High Court of Kenya may have given some weight to the practical precedence of the 2005 referendum when concluding that the people of Kenya should be allowed to vote on a total revision of the constitution.
- 89 <<http://www.electionguide.org/interest.php?ID=625>> (accessed on 10 February 2008).
- 90 <<http://www.electionguide.org/election.php?ID=625>> (accessed on 10 February 2008).
- 91 <http://www.parlzim.gov.zw/cmspercent5CActspersent5CTitle02_PRESIDENT_AND_PARLIAMENT/REFERENDUMS_ACT_2_10.pdf> (accessed on 10 February 2008). Concerning the referendum in Zimbabwe, see also <http://en.wikipedia.org/wiki/Zimbabwean_constitutional_referendum,_2000> (accessed on 10 February 2008), and Richard Carver: Zimbabwe: An Example of Unbalanced Coverage, at <http://aceproject.org/ace-en/topics/me/mey/mey_zw> (accessed on 10 February 2008).
- 92 A report containing a draft constitution, was amended by officials of the Zanu-PF and thereafter presented to a full meeting of the Constitutional Commission the following day, where it was pushed through without a vote, leading to protests and threats of resignation by some Commissioners. Two Commissioners appealed to the High Court, in an attempt to get the referendum delayed because of the alleged illegality of the alterations to the draft. In the case of *Mushayakarara v. Chidyansiku* NO 2000(1) ZLR 248, the High Court of Zimbabwe was of the opinion that Mugabe had powers under the Referendums Act to make ‘any corrections, clarifications, alterations or amendments to the draft constitution he so wishes.... he could even have discarded it completely and put his own draft before the electorate’. See Hatchard 2001: 214 and Barbara Stewart & Stuart Nolan: Zimbabwe: Referendum defeat for Mugabe shakes Zanu-PF government, at <http://www.wsws.org/articles/2000/feb2000/zimb-f22_prn.shtml> (accessed on 10 February 2008).
- 93 It seems that constitutional referendums will soon be held also in Kyrgyzstan and Bolivia.
- 94 <<http://news.bbc.co.uk/2/hi/asia-pacific/7338815.stm>> (accessed on 26 September 2008), <<http://www.freedomhouse.org/template.cfm?page=363&year=2008>> (accessed on 26 September 2008), <<http://www.voanews.com/english/archive/2008-05/2008-05-23-voa44.cfm?CFID=44301185&CFTOKEN=28755885>> (accessed on 26 September 2008), <<http://www.abc.net.au/news/stories/2008/05/11/2241266.htm?section=justin>> (accessed on 26 September 2008)>, <<http://www.abc.net.au/news/stories/2008/05/17/2247910.htm>> (accessed on 26

September 2008), <http://en.wikipedia.org/wiki/Burmese_constitutional_referendum,_2008> (accessed on 26 September 2008) and

<http://www.bangkokpost.com/breaking_news/breakingnews.php?id=127601> (accessed on 26 September 2008).

95 During the period 2005–2008, during which an index of failed states has been compiled, altogether nine states (Sudan, Zimbabwe, Iraq, Democratic Republic of Congo, Burundi, Kenya, Rwanda, Kyrgyzstan and Venezuela) out of the fourteen included in our review have been characterized as ‘failed states,’ and in addition to them, also Burma. A clear majority of the countries reviewed here either are or have been classified as failed states towards the end of the review period of 1998–2007. See <<http://www.fundforpeace.org/web/index>.

<http://www.fundforpeace.org/web/index> php?option=com_content&task=view&id=99&Itemid=140> (accessed on 25 September 2008). The notion of ‘failed state’ is, however, not without problems, and while a state might be placed in this group, it could still be a relatively strong state.

96 The adoption of the 2008 Constitution of Kosovo is a notable exception to this situation: that Constitution was adopted in a representative procedure, and the direct participation of the people was actually prevented. See *supra* note 12.

97 It seems as if the approval of the constitution by a referendum at the same time often implied that the idea of the referendum as a mechanism of decision-making in constitutional matters is transported to the text of the constitution and is framed as a referendum provision for the amendment of the constitution.