

The Figure of Constitutional Law of the 'Integrated State': The Case of the Grand Duchy of Luxembourg

Jörg Gerkrath*

EU member state status – Member statehood – The idea of an 'Integrated State' – Impact of EU membership on the concepts and substance of national constitutional law – Europeanization of member state's constitutional law – European constitutional law understood as Europeanized national constitutional law – European functions of constitutional organs – How to protect fundamental rights in a European area characterized by the overlaying of legal sources – The concept of 'higher law' within the national legal order – A Union of Constitutionally Integrated States

INTRODUCTION

Describing the status of member states in the European Union and understanding the implications of this membership on their national constitutional law is undoubtedly one of the challenges raised by the European integration process. The authors of a French constitutional law textbook considered – in a section devoted to the relativization of the contemporary state – that the state which has become a 'community state' is characterised 'by the permeability of its legal order to rules issued by common institutions in which it is represented, but where it exercises, in common with the other member states, the powers conferred on these common institutions'.¹ They then refer to the difficulty of 'identifying, forming a theory of and constructing the new political model that is appropriate for this unprecedented aggregation of states. Which is taking reality ahead of a poorly suited vo-

*Professor at the University of Luxembourg. The author is grateful to Eleftheria Neframi and Nikos Scandamis for their precious comments on a draft version of this paper.

¹ See Vlad Constantinesco and Stéphane Pierré-Caps, *Droit constitutionnel*, 5 edn (PUF 2011), para. 332, p. 297.

cabulary and inadequate descriptions, taken inevitably from the past.² We shall use the sections below to attempt to make a contribution to this quest.

To define this ‘unprecedented aggregation of states’ forming the European Union, it seems essential to improve the understanding of its implications on the status of the states it comprises. By joining the Union, these states effectively consent to substantial transfers of powers to Union institutions. In exchange, they receive rights of participation enabling what could be described as the common exercise of sovereign rights. The state becoming a member state also accepts, as such, numerous particular obligations, many of them arising from its general duty of sincere cooperation. In return, it is endowed with rights such as the right to have its identity respected by the Union, or at least as stated in Article 4, paragraph 2 of the TEU, its national identity ‘inherent in [its] fundamental structures, political and constitutional’. However, this does not exclude these constitutional structures undergoing a certain transformation through the effect of the state joining the Union’s legal framework.

Through joining the Union, the state doesn’t lose its statehood, but the latter changes in meaning.³ This transformation is not equivalent to that undergone by states, which decide to unite as federated states within a federation.⁴ Speaking relatively, it is, nonetheless, comparable thereto. In any case this transformation goes much further than what is usually meant by joining a classic international organisation. For this reason, it seems appropriate to designate the status of a state belonging to the European Union by using a term other than that – too commonly used – of ‘member state’. By reference to the process of European integration it seems preferable to speak of an ‘integrated state’.⁵

Despite the fact that the Union commits to respecting the constitutional identity of its member states, the substance, the spirit and the practice of these states’ constitutional law are being transformed under the influence of their belonging to the Union, to the extent that it is possible to detect a new branch of constitutional law. We propose to call this ‘constitutional law of the integrated state’.⁶

² Ibid., para. 333, p. 301.

³ On the situation of the State within the European Union see the inspiring thoughts of Nikos Skandamis, *L’Etat dans l’Union européenne. Passion d’un grand acteur* (RDP 2012), p. 1339 et seq.

⁴ In the sense given it by Olivier Beaud, *Théorie de la fédération*, 2nd edn (Paris, Coll. Léviathan, PUF 2009), 456 p.

⁵ A term also used by Jean-Denis Mouton, ‘Introduction: Présentation d’une proposition doctrinale’, in J.-C. Barbato and J.-D. Mouton (eds.), *Towards Recognition of Fundamental Rights for the Member States of the European Union? Reflections on a Basis of Notions of Identity and Solidarity* (Bruylant 2010), p. 16 and Hélène Gaudin, *L’État vu de la Communauté et de l’Union européennes*, ADE, vol. II (2004) (Brussels, Bruylant 2006), p. 249.

⁶ Thus, this terminology echoes what can be referred to in English as ‘member statehood’ and the German compound words *Mitgliedstaatlichkeit* and *Mitgliedstaatsrecht*.

Union membership modifies the meaning of many important concepts of constitutional law.⁷ This phenomenon of Europeanization can be observed in every member state, and has been particularly highlighted on the occasion of recent accessions. It appears even more obviously in a small founder state such as the Grand Duchy whose commitment to the process of European integration needs no further demonstration.⁸

The thesis defended hereafter implies a certain degree of 'disciplinary mix'. Ordinarily, the discipline of constitutional law has to bear on the study and analysis of the rules, principles and institutions based on the constitution, be they directly dedicated to it or arising indirectly from it by virtue of statutes, of jurisprudence, custom or institutional practice. If all constitutional law is not, therefore, confined to the constitution, it is, nevertheless, connected to it in one way or another. Thus, it is no surprise that European integration only made its entry – however modest – into the textbooks of constitutional law at the very moment, when member states started to constitutionalise their membership of the Communities and the Union through specific 'Europe clauses'.

However, the true degree of Europeanization of a member state's constitutional law, making it possible in due course to talk of the emergence of a 'constitutional law of the Integrated State', does not appear by looking only on explicit adaptations to its constitution. Europeanization takes several routes. The introduction of constitutional provisions enabling the transfer of powers, modifying the role of the national parliament in European affairs or derogating nationality conditions that contravene the Union's law are but the most obvious route. Europeanization also comes from the provisions of the Union's law which themselves enrich constitutional matters by instituting new forms of political participation for the benefit of the organs or citizens of member states. One needs only think about the functions of national parliaments in monitoring compliance with subsidiarity, or the possibility that citizens have of launching a European citizens' initiative. Moreover, Europeanization arises from gradual, less obvious transformations that membership of the Union entails for the running of the state. The separation of powers is altered and the functions of state organs are enlarged. Similarly, the 'right to trial before the lawful judge', included in several constitutions, must be considered by national judges as a constitutional foundation for

⁷ Cf. in that regard for Poland, Krzysztof Wojtyczek, 'Die Europäisierung am Beispiel der Verfassung Polens', in E. Sileikis (Hrsg.), 'Verfassungsentwicklung in Litauen Polen und der im Kontext Europäisierung', 1 *Development of Public Law* (2010) p. 56, <www.devpublaw.eu/index.php/dpl>.

⁸ A Eurobarometer survey of 2013 showed that at 87%, the 'European sentiment' of the population of Luxembourg population is the highest in the Union.

the obligation to refer for preliminary ruling at the Court of Justice and including, from this, the right of access to the Union's courts.⁹

After all, Europeanization may result in some point from treaty articles that fill up a lacuna at national level. This is the case, for instance, with the member states' 'economic constitution'. Article 120, paragraph 2, TFEU provides indeed that 'the Member States and the Union shall act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources, and in compliance with the principles set out in Article 119'. As the Member States, with the exception of Germany, are actually lacking economic constitutions, this provision, enjoying the primacy of Union law, establishes a regime which applies not only to the Union but also to each individual member state. Finally, a provision, such as Article 3, paragraph 2, of the Fiscal Compact (Treaty on Stability, Coordination and Governance in the Economic and Monetary Union; TSCG), requires the ratifying Eurozone states to enforce the so called 'golden rule' of balanced budgets 'through provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes'. Thus in the constitutional law of an 'Integrated State' one finds provisions arising from the Union's law rubbing shoulders with provisions arising from constitutional law of national origin.

The thesis defended implies acceptance of the idea that the corpus of the member state's constitutional law – in its broad sense – now also includes elements originating in Europe. These rules, principles and institutions forming part of European law are usually studied in the Union's law textbooks. The 'disciplinary mixing' will consist of including within the discipline of constitutional law the contributions of the Union's law which, by their content, their objectives or their effects, complement, modify or otherwise affect items unquestionably arising from constitutional law in the material sense.

But one might well ask, 'what is gained from doing this?' What one gains is conceptual clarity. By accepting that there is now a certain osmosis through the membrane separating the spheres of the member state's constitutional law and the Union's law, we can better understand the changes in the former and, by the same token, the legal nature of the latter.

To the extent that, like Germany and France, many member states have constitutionalised their Union membership, there now exists an explicit constitutional basis for it. This makes it possible to justify crossing the disciplinary frontier by European elements materially arising from constitutional law, even without

⁹ Cf. in this sense the well-established case-law of the German Constitutional Court since the *Solange II* ruling of 22 Oct. 1986 (BVerfGE 73,339), later confirmed by rulings of 8 April 1987 (BVerfGE 75,223) and 31 May 1990 (BVerfGE 82,159).

formally doing so. The absence of a European clause in Luxembourg has not prevented this phenomenon happening here. Moreover, the inclusion of such a clause is now on the agenda.

The Europeanization of constitutional law has already been the subject of many scholarly papers.¹⁰ This phenomenon occurs with the greatest impact when a new state joins and has to make all the associated constitutional adaptations in the course of the prior negotiations.¹¹ It has led to the appearance of a branch of 'European constitutional law', understood here as an ensemble of laws within the constitutional law of a member state having to do with European integration and, more specifically, with the State's membership of the Union. This is what the German language doctrine calls *nationales Europaverfassungsrecht*.¹²

Paraphrasing the words of Vlad Constantinesco on the permeability of the member state's national legislation,¹³ it is noted that its constitutional law becomes permeable to the influence of the Union's law.¹⁴ The Europeanization of member states' constitutional laws does not stop with the introduction of a 'Europe article' and various other 'reconciliations' in legal texts.¹⁵ Membership of the Union brings with it a much deeper transformation of the member state's constitutional law.

It is impossible to give a full account here of every aspect and every variation of the Europeanization of internal constitutional law observable in the different member states. That task would demand the publication of an entire collection of books dedicated in each member state to what is termed in the German language

¹⁰ See, in particular, Jacques Ziller (ed.), *L'européanisation des droits constitutionnels à la lumière de la Constitution pour l'Europe* (Paris, L'Harmattan 2003), 336 p., Monica Claes, 'The Europeanization of National Constitutions in the Constitutionalization of Europe: Some Observations against the Background of the Constitutional Experience of the EU-15', *Croatian Yearbook of European Law and Policy* (2007), p. 1-38.

¹¹ Lastly, for matters concerning the accession of Croatia, see Irena Andrassy, 'Constitutional Implications of EU Membership: An Overview of Constitutional Issues in the Negotiating Process – The Croatian Perspective', in 4 *Croatian Yearbook of European Law and Policy* (2008) p. 224-247 and Frank Hoffmeister, 'Constitutional Implications of EU Membership: A View from the Commission', 3 *Croatian Yearbook of European Law and Policy* (2007) p. 59-98.

¹² Cf. also Christoph Grabenwarter, 'Staatliches Unionsverfassungsrecht', in A. von Bogdandy and J. Bast (eds.), *Europäisches Verfassungsrecht*, 2nd edn (Berlin 2009), p. 121-175.

¹³ *Supra*, n. 2.

¹⁴ On this phenomenon, see Mattias Wendel, *Permeabilität im europäischen Verfassungsrecht* (Tübingen, Mohr Siebeck 2011), 764 p.

¹⁵ Cf. the reflections of Genoveva Vrabie, 'L'européanisation du droit constitutionnel roumain après l'adhésion de l'État à l'Union européenne', 20 *Bulletin Stiintific Universitatea 'Mihail Kogalniceanu'* (2011) p. 1-7. Faced with the way in which some constitutions have been complemented (not to say 'reconciled'), the author is wondering about the usefulness of developing 'a model of fundamental law' able to inspire national constitution drafters and reflecting a new philosophy from the (specific) content of the Constitution in the Union's member states.

Mitglied-Staatsrecht. More modestly, an attempt will be made to explain the notion of constitutional law of one Integrated State by showing, using some examples, how membership of the Union affects and transforms some principles, institutions, powers and rules of Luxembourg's constitutional law.

The constitutional implications of EU membership can be subdivided by following the principal objects of any constitution. The constitution refers firstly to the state, in this case, the state that has become a member state (1). Secondly, it determines the separation of powers among constitutional organs that also assume European roles (2). Thirdly, it provides for the protection of rights and liberties, which must be integrated into the European space of fundamental rights (3); and it constitutes the basis of a legal system which opens itself to the Union's law (4).

THE 'INDEPENDENT' NATION STATE IS TRANSFORMED INTO A MEMBER STATE

Article One of the Constitution of 1868, currently in force, states among other matters that the Grand Duchy is an 'independent' state, a statement that appeared in the same place in the previous constitutional texts of 1848 and 1856. These latter constitutions, however, very clearly put this independence into perspective by going on to state that it was 'part of the German Confederation'. The 1856 text went even further by stating that it 'participates in the rights and obligations arising from the Federal Constitution. These rights and these obligation cannot be derogated by the internal legislation of the country'.

Be it a matter of the past tense of the German Confederation or the present tense of European integration, the constitutional proclamation of independence has never stopped the Grand Duchy from participating in integration exercises with a constitutional dimension. Moreover, at no time has the preservation of the independence of the State ever been seriously discussed as a possible limit to Luxembourg's participation in the European integration process.¹⁶

Its successive incorporation in the German Confederation (1815-1866), the 'Zollverein' (1842-1918), the Belgo-Luxembourg Economic Union (from 1921) and Benelux (from 1944) have, on the contrary, enabled it to acquire the experience indispensable for being prepared for the legal implications of its membership of the European Communities and Union.

It is well known that the Treaty of Rome of 2004 establishing a European Constitution had formalised the elements constituting the status of the member state. Thus, it contained clauses relating to Union membership defining eligibil-

¹⁶Cf. Georges Wivernes, 'Le droit européen et les constitutions nationales. Luxembourg report', in Lord Slynn of Hadley and M. Andenas (eds.), *FIDE XX. Congress*, vol. 1 (London 2002), p. 267 et seq.

ity criteria (Article I-58), suspension of membership rights (Article I-59) and voluntary withdrawal (Article I-60). It also defined the relationship between the Union and member states (Article I-5) and articulated the principle of solidarity between the Union and its member states (Article I-43). The Treaty on European Union has essentially maintained these elements. The status of the member state is, consequently, a combination of provisions governing Union membership and defining the rights and obligations arising therefrom.¹⁷

There can be no doubt that it is Article 4 of the TEU, which covers the fundamental elements of the status of the 'Integrated State'. This provision indeed marries the duty of the Union to respect the national identities of its member states with their obligations arising from the duty of sincere cooperation.¹⁸ It involves respect for the essential functions of the state, including the monopoly of coercion, its right of withdrawal and its competence-competence principle. It also safeguards the jurisprudence of the Court of Justice on the duty of sincerity which 'expresses an obligation inherent to member status'.¹⁹

The condition of being a member state of the Union now constitutes a separate legal status, a sort of particular statehood ('Mitglied-Staatlichkeit' or 'member statehood') which differs from that of an independent nation state.²⁰ The very particular nature of this member statehood even allows considering the idea of member states holding fundamental rights that the Union has a duty to respect.²¹ Four types of state consequently exist: independent states, member states of an international organisation or confederation, Union Integrated States and federated states.

Because of the constitutional implications, several member states have gone on to constitutionalise their Union membership. For now, Luxembourg has been

¹⁷ On the French case cf. Bélich Nabli, *L'exercice des fonctions d'État membre de la Communauté européenne. Étude de la participation des organes étatiques à la production et à l'exécution du droit communautaire. Le cas français*, vol. 63 (Paris, Dalloz, Collection Nouvelle Bibliothèque de Thèses 2007), 670 p.

¹⁸ Mouton, *supra*, n. 5, p. 16.

¹⁹ Cf. Eleftheria Neframi, *L'État membre au service de l'Union européenne*, vol. II (ADE 2004), p. 72-73.

²⁰ Cf. Christopher J. Bickerton, *European Integration, From Nation-States to Member States* (Oxford University Press 2012), 217 p., esp. p. 52 ff, where he evokes the idea of 'Member Statehood as legal title'.

²¹ In favor of this idea see Jean-Denis Mouton, *Introduction: Présentation d'une proposition doctrinale*, in Barbato and Mouton, *supra* n. 5, p. 16 et seq. The ECJ recently decided that, as the 'European Union is a union based on the rule of law, its institutions being subject to review of the conformity of their acts, inter alia, with the Treaty and the general principles of law', new Member states 'must enjoy, in relation to all measures which [...] affect them in their capacity as Member States, a right of action as applicants pursuant to the second paragraph of Art. 230 EC. Hence Member States can rely on the principle of effective judicial protection. ECJ, Case C-336/09 P, *Poland v. Commission*, 26 June 2012, points 36-38.

content to have a very general clause allowing the temporary devolution to ‘international institutions’ of the exercise of powers, reserved by the Constitution to the three powers of the State.²² As part of the current overhaul, though, it is envisaged to provide in a new Article 5 that the Grand Duchy ‘participates in the European Union’ and that ‘the exercise of the State’s powers may be transferred to the European Union [...] by an act passed by qualified majority’.²³ Integrated State status will then be anchored in the Union’s law and constitutional law. We can only regret that it is not in Article One that it is intended to write this European clause, as was the case in the past with membership of the German Confederation.

Taking as our starting point the fact that international law defines the sovereign state as being delimited by established territorial boundaries, inside which its laws apply to a permanent population and its organs exercise effective authority, one could ask to what extent the elements of this definition are affected by Union membership.

Insofar as the resident population is concerned, Luxembourg, it will be noted, is in a particular position. More than 38% of its 537,000 residents are, in fact nationals of other EU member states and 55% are of Luxembourg nationality. Added to this are 160,000 frontier workers, who work in Luxembourg while residing in neighbouring countries.²⁴ This situation leads politicians to consider opening the right to vote in parliamentary elections up to residents.²⁵ The relationship between the concepts of citizenship and nationality is, thus, evolving not only under the influence of Union citizenship, which is in addition to national citizenship, but also under the demographic pressure of European citizens exercising their right to free movement. Unless the right to vote in parliamentary elections is opened up, the representative legitimacy of the Chamber of Deputies is at risk of dwindling.

This particular demographic situation had been recognized by the protocol on the Grand-Duchy of Luxembourg joint to the treaty of Rome in 1957. Its Article 2 provided: ‘When framing the regulations on freedom of movement for workers provided for in Article 48 (3) of this Treaty, the Commission shall take account, as regards the Grand Duchy of Luxembourg, of the special demographic situation in that country.’²⁶ Brought forward in Case C-473/93, *Commission v. Luxembourg*,

²² Art. 49bis of the Constitution introduced by a revision of 1956.

²³ Cf. the Opinion of the Council of State of 6 June 2012, Annex 2, with juxtaposed texts of the current Constitution, the proposed revision and the Opinion, available at <www.conseil-État.public.lu>.

²⁴ Figures published by the statistical agency for 2013, <www.statec.lu>.

²⁵ Cf. contributions to issue 326 of the magazine ‘forum’ *Citoyenneté et droit de vote*, February 2013, p. 20-51, <www.forum.lu>.

²⁶ The Protocol was abrogated in the course of the simplification of the Community treaties realized by the Amsterdam Treaty of 2 Oct. 1997 (Art. 6(III)(1)(d)).

the argument did not, however, convince. The Court considered that Luxembourg could not be allowed on that basis 'to unilaterally exclude workers from other Member States from entire areas of occupational activity'.²⁷

Let us not forget that beyond the demographic context, all Union citizens residing in Luxembourg are granted political rights. Some of them, such as the right to petition the European Parliament, the right to vote at European and municipal level and the right to participate in a European Citizens' Initiative, are recognised directly through the Union's law and in this way complement rights that the Constitution, in principle, reserved solely for nationals. Regarding the exercise of political rights by 'non-Luxembourgers' (Article 9) and their eligibility for public office (Article 10bis, para. 2), the Constitution was modified to a minimum extent in 1994 and 1999 to allow a legal waiver and, thus, comply with the Union's law.²⁸

On these two points, the pending constitutional revision aims to go further, by particularly explicitly safeguarding the political rights of Union citizens (new Article 10 para. 2). In the Luxembourg population, the classic division between nationals and foreigners is, therefore, gradually being replaced by a more nuanced distinction between nationals, Union citizens and third country nationals.

With regard to the relationship between the state and its territory, a certain change can be noted here also. Admittedly, as Francette Fines reminds us, states 'are not dispossessed of their territory', but they have accepted 'that their territory also serves as the territorial framework for action by Community institutions, which are thereby granted Community territory'.²⁹

On the concept of sovereignty, one is tempted to doubt its explanatory value for the situation of Integrated Union States. Admittedly, one could legitimately remain attached to this notion and defend the position that in the Union sovereignty resides with States.³⁰ But does that grasp all the originality of the situation of these member states? Is it not preferable to consider, like Carl Schmitt, that in a federation the question of sovereignty is, so to speak, 'suspended'?³¹

²⁷ ECJ, 2 July 1996, *Commission v. Luxembourg*, C-473/93, ECR I-3207, point 45. Cp. point 35: 'considerations relating to the preservation of national identity in a demographic situation as specific as that prevailing in the Grand Duchy of Luxembourg' cannot justify exclusion of nationals of other Member States from all the posts in an area such as education'.

²⁸ The real opening of Luxembourg's public service results from the law of 18 Dec. 2009 and a Grand Duchy Regulation of 12 May 2010 which lists the employments that 'involve direct or indirect participation in the exercise of public power' and which are, therefore, reserved for nationals.

²⁹ Francette Fines, 'Quel territoire pour les États membres de la Communauté européenne dans un espace sans frontières intérieures?', 2 *ADE* (2004), p. 9-30, esp. p. 30.

³⁰ As does Dieter Grimm, *Die Zukunft der Verfassung II: Auswirkungen von Europäisierung und Globalisierung* (Berlin, Suhrkamp Verlag 2012), 357 p. and *Souveränität: Herkunft und Zukunft eines Schlüsselbegriffs* (Berlin 2009), 140 p.

³¹ Carl Schmitt, 'Verfassungslehre des Bundes', in *Verfassungslehre*, 8th edn (Berlin, Duncker & Humblot 1993), p. 361 ff, p. 372.

Regarding the external aspect of sovereignty, account must always be taken of the fact that the international relations of Integrated States in the Union will be subject to duties of action and abstention flowing from the duty of sincere cooperation which 'is of general application' and depends neither on the exclusive nature or not of the Union in question's competence 'nor on any possible right on the part of the member states to enter into obligations towards third countries'. Thus, Luxembourg accepts an obligation of close cooperation towards the Union's institutions in such a way as to facilitate the accomplishment of the Union's mission and to 'guarantee the unity and coherence of action and international representation' by and for the Union.³²

THE CONSTITUTIONAL ORGANS OF LUXEMBOURG TAKE ON EUROPEAN FUNCTIONS

In Luxembourg, as in other member states, the constitution organises the separation of powers and the distribution of competences among the organs it institutes. Through belonging to the Union, these constitutional organs also have European functions conferred on them to varying extents. Their European functions, therefore, are in addition to their constitutional functions, leading to a kind of 'functional doubling' of each organ involved, without this being reflected in the text of the 1868 Constitution.³³

Regarding executive power and, firstly, the head of state, it will be noted, nonetheless, that the Grand Duke may not represent Luxembourg in the European Council. He does not meet the condition, in use by Article 10 of the TEU since the Lisbon Treaty came into force, of being 'democratically accountable' either to the Chamber of Deputies or to the citizens of Luxembourg.³⁴ One could even ask oneself how it is possible to reconcile the hereditary nature of his function with the Union's constitutional system, which makes the equality of all citizens a central principle.³⁵ Luc Heuschling demonstrated, moreover, that behind the body of the monarch is the citizen, able to demands rights on this basis.³⁶ In any event,

³² *Case C-266/03, Commission v. Luxembourg [2005] ECR I-4805, points 58-60.*

³³ On what she calls 'national projections in European institutions', see the Simone Beissel's very comprehensive overview, 'Luxembourg', in J. Rideau (ed.), *Les Etats membres de l'Union européenne. Adaptations, Mutations, Résistances* (Paris, LGDJ 1997), p. 337-366, p. 348 et seq.

³⁴ Cf. Jan-Herman Reestman, 'The State of the European Union's Monarchies. An Introduction to the Series', *EuConst* (2011) p. 270.

³⁵ Cf. Wim Roobol, 'Twilight of the European Monarchy', *EuConst* (2011) p. 286.

³⁶ Luc Heuschling, *Le citoyen monarque. Réflexions sur le Grand-Duc, la famille grand-ducale et le droit de vote* (Brussels, Larcier 2013), 296 p.

Union membership of a constitutional monarchy does not come without creating frictions which could adversely affect its constitutional law.³⁷

Regarding the Grand Duchy's Government, its European function essentially consists of representing Luxembourg in the Council, which as we know exercises 'jointly with the European Parliament, legislative and budgetary functions'. Members of the Luxembourg Government exercising their right to vote there pursuant to TEU, Article 16, paragraph 2, are also participating at the Union level in functions which, internally, are reserved to the legislative power. Membership of the Union is reflected in a considerable expansion of the functions assigned to members of the government, without this being reflected in the Luxembourg Constitution.

Concerning the legislative power and, therefore, the Luxembourg Chamber of Deputies, it is noted that its participation in European affairs has also developed outside of the Constitution. Its 'European function' is no less real for all that.³⁸ Under the new Article 12 of the TEU, national parliaments are, in effect, called upon to actively contribute to the good functioning of the Union, including 'by seeing to it that the principle of subsidiarity is respected in accordance with the procedures provided for in the Protocol on the application of the principles of subsidiarity and proportionality'.³⁹ The scrutiny they exercise in this regard on compliance with subsidiarity criteria can be connected both to their role of controlling national executives and to their participation in the exercise of European legislative power. Once again, membership of the Union brings with it the expansion of the powers of a constitutional organ.

At the level of the judiciary, the 1868 Constitution is limited to setting out the general framework for the organisation of justice. The individual must, nevertheless, read this Chapter VI of the Constitution in the light of the provisions of the TEU and the TFEU to understand that he or she has access, limited but real, to the Court of Justice. Within the meaning of Article 13 of the Constitution, which states that 'no-one may be reassigned against his will to a court other than that designated by law', the Court of Justice must be considered a 'legal court' for the purposes of internal constitutional law. This raises the ultimate question of whether the obligation of the Luxembourg court to make a reference for preliminary ruling to the ECJ may, where appropriate, be sanctioned by domestic law. The

³⁷ See Hans Ulrich Jessurun d'Oliveira's reflections, 'The EU and Its Monarchies: Influences and Frictions', *EuConst* (2012) p. 63-81.

³⁸ Cf. Martina Mayer, *Die Europafunktion der nationalen Parlamente in der Europäischen Union* (Mohr Siebeck 2012), 613 p. Patrick Dumont and Astrid Spreitzer, 'The Europeanization of Domestic Legislation in Luxembourg', in S. Brouard et al. (eds.), *The Europeanization of Domestic Legislatures, The Empirical Implications of the Delors' Myth in Nine Countries* (2012), p. 131-149.

³⁹ Cf. on this point, Martin Gennart, *Le contrôle parlementaire du principe de subsidiarité. Droit belge, néerlandais et luxembourgeois* (Brussels, Larcier 2013), 363 p.

only remedy available under Luxembourg law would then be to introduce an action for liability against the State.⁴⁰ Speaking generally, the statistics show that Luxembourg's courts, which do not seem to experience any great difficulty in applying and interpreting the Union's law, are among those sending the lowest number of referrals for preliminary ruling to the Court of Justice.⁴¹

To conclude: the organs of the Integrated State assume henceforward some functions in the interest of the Union. The separation of powers is then modified at the national level. One example of this is the fact that the Grand Duke's prerogative to appoint magistrates is put to one side by the law of the Union. Members of the Court of Justice are indeed appointed by common accord of the governments of member states. The Government of Luxembourg, therefore, is exercising in this area a power that the Constitution internally reserves to the Head of State.

If membership of the Union affects the separation of powers in the member state, it also entails its special responsibility to ensure the democratic legitimacy of the Union. The political accountability of Luxembourg members of the European Council and the Council of Ministers is, in fact, to the Chamber of Deputies, which actively participates in the management of European affairs.⁴² In the same vein, we must not forget that the election of Members of the European Parliament also takes place to some extent in accordance with national rules.

One final consequence of the attributions of European functions to constitutional organs or to their members is the appearance of 'European' and 'crossed' incompatibilities coming to be added to the regime of incompatibilities defined by the Constitution. In Luxembourg law, the list of incompatibilities with the mandate to be a deputy, appearing in Article 54 of the Constitution, was complemented by the electoral law on the basis of Article 55 of the Constitution, under which 'the incompatibilities provided for under the preceding article do not present any obstacle to the law establishing others in future'. A bill of 2 May 2013 finally aims to incorporate into it the rule – which has always been respected in

⁴⁰ Cf. Georges Ravarani, *Rapport luxembourgeois au Colloque des Conseils d'État du Benelux*, 10 Oct. 2013, *La transposition et la mise en œuvre des actes normatifs de l'Union européenne en droit national*, <www.conseil-État.public.lu/fr/actualites/2013/10/C_Colloque_Benelux/index.html>.

⁴¹ In the fifty years from 1963 to October 2013, 87 preliminary rulings were introduced by Luxembourg courts. Cf. also Jean-Paul Hoffmann, 'Les questions préjudicielles posées par les juridictions luxembourgeoises à la CJCE', in Mélanges F. Schockweiler, II *Bulletin du Cercle F. Laurent* (Luxembourg 1998), p. 5-79; and Manou Weirich, 'L'application du droit communautaire au Grand-Duché de Luxembourg', in *Livre jubilaire de la Conférence Saint-Yves* (Luxembourg, Saint Paul 1986), p. 965-1004, p. 982.

⁴² The rules of such participation are set down in annex 2 of the Rules of the Chamber, 'Aide-mémoire on cooperation between the Chamber of Deputies and the Government of the Grand Duchy of Luxembourg in European politics', cf. coordinated text updated on July 31, 2013 Text, A Mémorial [Official Journal of Luxembourg] No. 172 of 20 Sept. 2013, p. 3295 et seq.

practice – of prohibiting anyone holding office as both a deputy in the Chamber of Deputies and a member of the European Parliament.⁴³ This incompatibility results, in fact, from the Act of 20 September 1976 as amended by a decision of the Council of 25 June and 23 September 2002, concerning the election by direct universal suffrage of representatives to the European Parliament.

The new Article 7(2), first subparagraph, of the Act lays down that as from the 2004 election, being a member of the European Parliament is incompatible with being a member of a national parliament. Thus, the Luxembourg regime of parliamentary incompatibilities is currently the result of a combination of constitutional, legal and European provisions. As part of the pending revision of the Constitution, it is planned to include this rule in a new Article 66 laying down that 'the mandate to be a deputy is incompatible with the functions of being a member of the Government, being a member of the European Parliament and being a member of the Council of State'. Other incompatibilities clearly arise from the appointment of Luxembourg nationals as members of other Union institutions, be they the Court of Justice, the Commission, the European Central Bank or the Court of Auditors.⁴⁴

THE PROTECTION OF FUNDAMENTAL RIGHTS IS GUARANTEED IN THE EUROPEAN AREA

In Europe, the protection of fundamental rights is no longer the prerogative of national constitutions and declarations. For the Union and its member states, the relevant legal sources are now listed in Article 6 of the TEU. The State of Luxembourg must, therefore, respect not only the rights and liberties guaranteed in Chapter 2 of its Constitution but also those enshrined in the European Convention of Human Rights and the EU Charter of Fundamental Rights, as well as those enshrined as general principles of the Union's law.

The European Court of Human Rights (ECHR) has been mandatory for the Grand Duchy since 3 September 1953.⁴⁵ It can certainly be said with no exaggeration that in view of the age and incomplete nature of the constitutional catalogue, it is the primary source of fundamental rights in Luxembourg.⁴⁶ With regard to Article 6 guaranteeing the right to a fair trial, the High Court of Justice rightly points out that 'directly applicable and of higher value than domestic law', this article constitutes 'the reference text with regard to the guarantee of the rights

⁴³ Cf. Bill No. 6571 (2 May 2013) amending the amended electoral law of 18 Feb. 2003.

⁴⁴ Former minister François Biltgen was careful to resign from the government even before accepting its decision to propose him as a Luxembourg judge at the Court of Justice.

⁴⁵ By virtue of its ratification by the law of 29 Aug. 1953.

⁴⁶ Cf. Wivenes, *supra* n. 16, p. 17.

of persons before a court'.⁴⁷ Given the profusion of rights guaranteed at the European and international levels, the present author once raised the question whether constitutional protection has not become superfluous.⁴⁸

In the 'European area of fundamental rights',⁴⁹ characterised by the overlaying of legal sources and a complex regime of jurisdictional competences, the protection of rights raises difficult issues of coordination.

With regard to the ECHR it is well known that the principle of its subsidiarity solves most of these problems. Although the Convention does not place an obligation on participating states to question the authority of *res judicata* of a domestic court ruling declared incompatible with the Convention by the European Court, Luxembourg has, nonetheless, introduced into its domestic legislation a procedure for the revision of such decisions. Article 443 of the Code of Criminal Procedure has, since 1981, provided a fifth ground for opening an application for revision, when it is the result of a ruling of the European Court made in application of the ECHR 'that a criminal conviction has been handed down in violation of this Convention'.⁵⁰

With regard to the Charter, it is the strict definition of its scope of application in Article 51 that is supposed to reduce any problems arising from the coexistence of national and European protections for human rights. After the Court of Justice's resounding rulings in the *Melloni* and *Åkerberg Fransson* cases of 26 February 2013, it is nevertheless clear that the Court does not intend to limit itself to a restrictive interpretation of the Charter's scope of application. Therefore, member states must respect the rights of the Charter when 'acting in the scope of Union law' and not only when they 'implement' it. Moreover, when implementing Union law, they may only apply national standards of protection of fundamental rights on condition that 'that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law are not thereby compromised'.⁵¹ One could bet that the consequence of this jurisprudence would be to reduce even more the recourse of litigants and their legal representatives to the fundamental rights guaranteed under the Constitution. It

⁴⁷ See the joint opinion of the High Court of Justice [...] on the proposed revision modifying and reordering the Constitution, doc. parl. No. 6030⁴, p. 7.

⁴⁸ Cf. Jörg Gerkrath, 'La proposition de révision dans le contexte international: la garantie constitutionnelle des droits fondamentaux serait-elle devenue superflue ? Quelques remarques à propos de la notion des droits fondamentaux, de leur formulation et de leur protection', in Institut Grand-Ducal, *Actes de la Section des sciences morales et politiques* (2011) p. 197-219.

⁴⁹ Expression borrowed from Viviane Reding, address of 18 Feb. 2010 in Interlaken, 'Towards a European Area of Fundamental Rights: The EU's Charter of Fundamental Rights and Accession to the European Convention of Human Rights', Speech/10/33.

⁵⁰ Law of 30 April 1981 on the revision of criminal and correctional trials and the compensation awarded to the victims of miscarriages of justice.

⁵¹ ECJ, 26 Feb. 2013, Stefano Melloni, Case C-399/11, para. 60.

also has the effect of reducing the role of the Luxembourg Constitutional Court in the protection of fundamental rights, and in this way of changing the attribution of powers desired by the drafters of the constitution.⁵² It is too early to have an idea about the fate that the courts of Luxembourg reserve for the Charter rights.⁵³ As part of the proposed general overhaul of the Constitution, it was nevertheless envisaged at an early stage to restructure Chapter 2 of the Constitution, following the model of the titles used in the Charter.⁵⁴

LUXEMBOURG'S LEGAL ORDER OPENS UP TO EUROPEAN UNION LAW

One of the particular characteristics of Luxembourg's domestic legal order lies in the fact that, unlike other European countries, it is founded on international law. Established as an independent state by the Final Act of the Congress of Vienna of 9 June 1815, the Grand Duchy's independence was confirmed by the Treaties of London of 19 April 1839 and 11 May 1867. Therefore, far from constituting a threat to national sovereignty, international law is understood in Luxembourg as a 'vital guarantee of the existence and survival of the state'.⁵⁵ Moreover, Luxembourg's courts have had no difficulty in recognising the pre-eminence of international law and the primacy of Community Law, including in respect of a constitutional provision.⁵⁶ This state of affairs also explains why it was not considered necessary to write a provision into the Constitution more explicitly authorising transfers of competences to the Union.

Under Luxembourg law the Constitution long ago ceased to be the only supreme law.⁵⁷ There is now a set of norms ranked supra-legislative and designated by the term 'higher law'. It is within the remit of the Council of State to monitor the

⁵²For the relevant case-law of the Constitutional Court, cf. Mark D. Cole, 'Der Schutz der Grundrechte', in J. Gerkrath (ed.), *La jurisprudence de la Cour constitutionnelle du Luxembourg. 1997-2007*, 1-2 *Pasicrisie* (2008) p. 59 et seq.

⁵³Cf. Giulia F. Jaeger, *Rapport Luxembourg*, The Protection of Fundamental Rights after Lisbon: The Interaction between the Charter of Fundamental Rights of the European Union, the ECHR and National Constitutions, XXV FIDE Congress, Tallin 2012, <www.fide2012.eu>.

⁵⁴Cf. draft revision of 21 April 2009, Parl. Doc. No. 6030. In the last version of the Parliamentary Constitutional Revision Commission's working document, it returned to a subdivision according to the nature of the rights guaranteed.

⁵⁵Wivenes, *supra* n. 16, p. 6.

⁵⁶Cf. Pierre Pescatore, 'L'autorité en droit interne, des traites internationaux', *Pasicrisie Luxembourgeoise* (1962) p. 97 ff, Wivenes, *supra* n. 16, p. 21, Patrick Kinsch, 'Le rôle du droit international dans l'ordre juridique luxembourgeois', 1-2 *Pasicrisie* (2010) p. 383-399.

⁵⁷At the time of ratification of the Maastricht Treaty, some lambasted the suspension of the Constitution occurring in that ratification of the Treaty took place before the constitutional revision allowing citizens of the Union the right to vote in communal elections. Cf. Alex Bonn, 'La Constitution suspendue', 24 *Letzebuurger Land*, 12 June 1992.

compliance of draft bills and draft regulations with the rules of higher law. The amended act of 12 July 1996, reforming the Council of State, states in its Article 2, paragraph 2, that 'if it considers a draft bill to be contrary to the Constitution, to international agreements and treaties, or to the general principles of law, the Council of State shall state this in its Opinion. It shall do the same, if it considers a draft regulation to be contrary to a rule of higher law.' As part of the revision procedure on track, it is planned to state this *ex ante* check on compliance with 'higher law' in Article 91, explicitly including within it the 'legally binding decisions of the European Union'. It is also intended to state in Article 99 that 'courts shall only apply acts and regulations to the extent that they comply with rules of higher law'.

If the Constitution is, therefore, challenged in its role of supreme law, parliamentary acts also lose some of their importance in national legislation because of the perceived need to streamline the procedures for the transposition and implementation of secondary EU legislation. Insofar as ever more important sections of national legislation are directly conditioned by Union law and legislators face often very short deadlines for the transposition of directives, the Luxembourg Parliament has adopted an Enabling Act conferring on the regulatory power the competence to proceed.⁵⁸

This law is, however limited in scope and has not really proven an 'appropriate and effective response' to the problems encountered.⁵⁹ The inclusion in the Constitution of a new Article 45, planned as part of the current overhaul, stating that the Head of State 'shall make the necessary regulations for the application of legally binding decisions of the European Union' will have the advantage of eradicating a number of legal uncertainties in this area. Membership of the Union also brings alterations to the domestic legal order in which the initial relationship between constitutional, legislative and regulatory norms is modified to the detriment of the first two of these categories.

The thesis of the emergence of a new type of constitutional law, that of the Integrated State, requires deeper analysis than that made in this contribution. There is, however, no doubt that European integration is exercising a determining influence not only on institutions but also on the concepts of member states' constitutional law. And the fact is, these member states are members of what one

⁵⁸Law (as amended) of 9 Aug. 1971 'on the execution and sanctioning of decisions and directives and the sanctioning of regulations of the European Communities in the economic, technical, agricultural, forestry, social and transport spheres'.

⁵⁹Paul Schmit, *Rapport du Conseil d'État*, Colloque des Conseils d'État du Benelux, 10 octobre 2013, *La transposition et la mise en œuvre des actes normatifs de l'Union européenne en droit national*, <www.conseil-État.public.lu/fr/actualites/2013/10/C_Colloque_Benelux/index.html>, p. 5; cf. Weirich, *supra* n. 41, p. 966.

could call a 'Union of Constitutionally Integrated States'. The entanglement of the Union's constitutional law with that of its member states is such that traditional frontiers are becoming fluid.

