

The ‘sudden eagerness’ to consult the Luxembourgish people on constitutional change*

The Grand Duchy of Luxembourg is certainly not renowned for making frequent use of direct popular consultations in the field of constitutional change. Its current Constitution, dating back to 1868, has been amended some thirty-seven times between 1919 and 2009. None of these amendments has ever been submitted to direct popular consent. Looking for characteristic elements of the country’s constitutional culture, one would rather think of: ‘constitutional stability’, ‘search for across-party political consensus’, ‘legal pragmatism’, ‘attachment to monarchy’ and ‘strong commitment to the model of representative democracy’.

Referenda as instruments to consult the people on legislative, international or constitutional issues however are not fully unknown to the Luxembourgish Constitutional landscape. First introduced in 1919, to allow consultations of the voters in cases determined by legislative acts and, second in 2003, to give the people the final saying on constitutional amendments, they have yet remained exceptional. Only three referenda have in fact been organized on different matters and in different circumstances in 1919, 1937 and 2005.

For the very first time in the country’s constitutional history the current coalition government with its slim majority in the *Chambre des députés* (hereafter ‘*the Chambre*’) now intend to hold two further referenda in order to accomplish far-reaching constitutional revisions initiated in 2009. The first one, meant to be merely consultative, is scheduled on 7 June 2015. Voters will have to answer three questions regarding specific constitutional orientations, which remain disputed after the course of the general amendment procedure. The outcome would subsequently have to be transformed into fully-fledged articles of the draft Constitution. The second referendum is currently planned for October 2017. Intended to take place after an obligatory first reading of the draft Constitution in the *Chambre*, it will allow the people to ratify - or to reject - the complete final document.

The question *a propos* the role of the people in constitutional change is thus extremely topical regarding present-day constitutional practice in the Grand Duchy. In order to allow a proper study of the state of affairs in Luxembourg and to facilitate the comparative analysis, the present contribution is structured in five sections. The first section explores the double legal basis of referenda. Section two recalls the three historic precedents of popular consultations in Luxembourg.

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By contrast, section three then tends to explain how the current constitutional revision draft can be submitted to popular consultations twice and section four will deal with the signification of this ‘sudden eagerness’. Section five will finally discuss the merits of popular consent to constitutional amendments in a traditional parliamentary system like the Luxembourgish one based on the principle of representative democracy.

1. The constitution allows to call for two different types of referenda

The initial text of the 1868 Constitution did not contain any element of direct democracy. Moreover it did not even make a clear choice between the democratic and the monarchical form of government. The formal democratization of Luxembourg’s political system was realized by three subsequent constitutional amendments that took place in 1919, 1948 and 1998. Since 15 May 1919 Article 32 indicates indeed: “the sovereign power resides in the Nation“, the Amendment Act of 21 May 1948 added in Article 51 a mention that “the Grand Duchy of Luxembourg is ruled by a system of parliamentary democracy“ and since the Amendment of 12 January 1998 the first article of the Constitution specifies furthermore that the Grand-Duchy of Luxembourg is “a democratic state”.

In addition to this democratisation process, which in fact mainly strengthened the position of the *Chambre*, two distinct Amendments of 15 May 1919 and 19 December 2003 introduced the possibility to consult the people through referenda.¹ As will be shown, both amendments reserve however a predominant place to the *Chambre* notably with regard to the launching of any popular consultation. Nevertheless, the two procedures differ very broadly when it comes to their scope and effects.

The Amendment of 1919 did indeed establish a procedure, which can be described as a ‘Consultation-Referendum’ whereas the Amendment of 2003 introduced the possibility for the people to vote on constitutional amendments previously adopted by the *Chambre*, which can be understood as a ‘Ratification-Referendum’. Regarding the settlement of further organisational questions, both procedures rely quite extensively on ordinary legislation.

¹ Furthermore by virtue of article 35 of the ‘Municipalities Act’ of 13 December 1988, referenda can be held within the municipalities. Cf. Memorial A n° 64, 13.12.1988, p. 1222.

1.1. The ‘Consultation-Referendum’

After the First World War, the *Chambre*, which had been elected, according to Article 114 of the Constitution with the power to revise a small number of constitutional provisions,² decided to further democratize the organs of the state. This led on 15 May 1919 to the very first constitutional amendment.³ Sovereignty was explicitly conferred on the Nation and the Grand Duke retained no powers other than those explicitly conferred to him by the Constitution itself – or by legislative acts implementing the Constitution – (Article 32). Secret treaties were abolished. Article 52 of the Constitution conferred the right to a direct, single vote. Women, like men, were entitled to vote; restricted suffrage, based on a property or income qualification was ruled out. The electoral system was based on proportional representation. The minimum voting age was reduced from 25 to 21 years, and to qualify for election a person had to be 25 on the day of the elections. Four articles were amended: Article 32 (sovereignty of the nation and constitutional powers of the Grand-Duke), Article 37 (treaty making power), Article 52 (elections of members of the *Chambre*) and Article 75 (allowances of members of the *Chambre*).

As in 1918 the Grand-Duchy went across turbulent political circumstances, which appeared to threaten the monarchy, the government and the Grand Duchesse Marie-Adelaide agreed in November 1918 to hold a referendum in order “to decide on the form of the Luxembourgish state according to the peoples’ right of self-determination”.⁴ This decision and the following legislative Act of 3 April 1919 “instituting a referendum on the dynastic question and the form of the state” were adopted in absence on any constitutional basis. At the same period the *Chambre* was however discussing the above-mentioned constitutional amendments. It decided to introduce a brief reference on the possibility to hold referenda. This mention was added as a final subsection to Article 52 dealing with, among other things, the election of the members of the *Chambre*. The decision in favour of Article 52, one of the few provisions declared amendable by the previous *Chambre*, was motivated by a member of the *Chambre* arguing that a referendum was merely an extension of the

² The revision procedure of article 114 required at that time the adoption of a ‘declaration of revision’ by the *Chambre* and the Grand-Duchesse in order to designate the provisions of the Constitution, which should be amended. Such a declaration was followed by the dissolution of the *Chambre* and the election of a new *Chambre* entitled to proceed to the amendments.

³ Constitutional Amendment Act (*loi de révision constitutionnelle*) of 15 May 1919, Mém. 33, 16 May 1919, p. 529.

⁴ See Ben Fayot, *Les quatre référendums du Grand-Duché de Luxembourg*, Essai, Ed. de la petite Amérique, Luxembourg, 2006, p. 7.

electors' voting rights.⁵ A further amendment, adopted in 1948, transferred the content of Article 52 to Article 51, where it has since remained unchanged.

Consequently Article 51 (7) states:

"The electors may be requested to pronounce themselves by way of a referendum in cases and under conditions to be determined by law".⁶

The provision is part of chapter IV of the Constitution "On the *Chambre des Députés*", and situated as a seventh and last subsection of a provision that is mainly dealing with the composition and election of the *Chambre*.

For these reasons it has to be read in conjunction with the provisions that require the assent of the *Chambre* for each legislative act (Art. 46), reserve the initiative for these acts to the *Chambre* and the Grand Duke (Art. 47) and prohibit any imperative mandate given to the members of the *Chambre* (Art. 50). Placed 'under the regime of parliamentary democracy' (art. 51 (1)), the Grand Duchy conferred in truth a rather marginal place to the referendum in its political system. It is the *Chambre* that decides whether or not a referendum will be held. It decides when it will be held and what questions will be put to the electors. Nonetheless, the constitution does not limit this capacity to specific matters.

Electors cannot request a referendum. Moreover, referenda organized under Article 51(7) are considered to have only consultative force. Although Article 51 (7) does not explicitly say so, the predominant opinion in Luxembourg is indeed that the electorate does not decide the matter in question but only gives its opinion leaving the final decision to the legislature, which is only bound in political terms but not legally.⁷ The *Conseil d'Etat*, the main advisory organ, who understands its proper role as 'guardian of the Constitution' and exercises within the parliamentary procedure a moderating function similar to that of a second chamber, has strongly contributed to this reading of article 51 (7) through its various opinions.⁸ In a recent study, Luc Heuschling shows however that

⁵ Cf. the thorough study of Luc Heuschling, *Le discours sur la valeur consultative du référendum (art. 51 § 7 Const.)*, *Une déconstruction historique*, forthcoming, Pasicrisie luxembourgeoise 2015, quoting Auguste Thorn. Manuscript available at <http://orbi.lu/uni.lu/handle/10993/20296> (May 2015), p. 27.

⁶ Original French text : 'Les électeurs pourront être appelés à se prononcer par la voie du référendum dans les cas et sous les conditions à déterminer par la loi'.

⁷ Cp. Paul Schmit, Emmanuel Servais, *Précis de droit constitutionnel, Commentaire de la Constitution luxembourgeoise*, Ed. Saint-Paul, Luxembourg 2009, p. 43; Pierre Majerus, *L'Etat luxembourgeois*, 6ème édition mise à jour par Michel Majerus, Editpress, Esch-sur-Alzette, 1990, p. 135; Conseil d'Etat, *Le Conseil d'Etat gardien de la Constitution et de droits et libertés fondamentaux*, Luxembourg, 2006, p. 213.

⁸ See Victor Gillen, *Le Conseil d'Etat et le référendum*, in *Le Conseil d'Etat face à l'évolution de la société luxembourgeoise*, Luxembourg 2006, p. 223 ff.

this predominant interpretation, born in a specific historical context and confirmed by the *Chambre's practice*, suffers from a number of inconsistencies.⁹ We will see in section 2 that the Luxembourgish practice of referenda allows indeed a more nuanced lecture.

1.2. The 'Ratification-Referendum' on constitutional amendment

In 2003, more than eighty years after the first introduction of the referendum, the *Chambre* adopted an amendment of the amendment procedure established by Article 114 of the Constitution.¹⁰

Article 114 as modified in 2003 states at present:

"Any revision of the Constitution must be adopted in identical terms by the Chamber of Deputies in two successive votes, separated by an interval of at least three months.

No revision will be adopted, if it doesn't meet at least a two-thirds vote of the members of the Chamber; proxy votes not being admitted.

The text adopted on first reading by the Chamber of Deputies is put to a referendum, which replaces the second vote of the House, if within two months following the first vote request is made either by over a quarter of the members of the Chamber or by twenty-five thousand registered voters on the electoral lists for elections. The revision is adopted, if it receives a majority of valid votes. The law shall regulate the details of the referendum."

In addition to the 'consultation-referendum' of Article 51 (7), the new amendment procedure of the Constitution creates the possibility of a true decision-making referendum on constitutional amendment. The option to bring about a referendum on the text of the revision draft as adopted on first reading by the *Chambre* is definitely the most important innovation of this amendment. It requires that at least 16 members of the *Chambre* or 25,000 voters registered on the electoral lists for the parliamentary elections ask for it. The right to initiate the organization of a referendum on constitutional revision has thus been assigned to two different groups: a parliamentary minority, and a relatively large group of citizens.

Given the high number of signatures that must be collected, the success of a popular claim for a constitutional referendum seems quite unlikely. After the Amendment of December 2003, thirteen further amendments took place according to the new procedure but none of it was put to a referendum. The future will show whether Parliament in actuality, set the conditions too severe. In January 2009 a claim for a referendum procedure was launched for the first time by a citizens

⁹ Cf. Luc Heuschling, *Le discours sur la valeur consultative du referendum*, op. cit.

¹⁰ Constitutional Amendment Act of 19 December 2003, *Mémorial A-185*, 31.12.2003, p. 3969.

committee: 25,000 of about 230,000 listed voters were asked to sign in their local town halls the petition calling for a referendum. As only around 500 signatures were gathered, the necessary quorum was not met by far and the referendum did not take place.

With regard to the outcome of a hypothetical referendum by constitutional amendment, Article 114 states: “the revision is adopted if it receives a majority of valid votes cast”. This is clearly a legal basis for a decision-making referendum, and not just an advisory one. The choice of the citizens will replace the vote of the *Chambre* whether to ratify the text adopted on first reading or whether to reject it.

1.3. Organizational questions are settled by legislative acts

Both, Article 51 (7) and Article 114 refer to ordinary legislative acts in order to determine, in the first case, the ‘cases and conditions’ or respectively, in the second case, ‘the details’ of a referendum. These rules have been fixed by the ‘Act of 4 February 2005 on the national referendum’, which applies to both types of referenda.¹¹ Whereas the organization of a consultative referendum (Art. 51 (7)) requires furthermore the adoption of a specific legislative act containing the question and fixing the date of the consultation, ratification-referenda falling under Article 114 are already fully organised by the legislative Act of 4 February 2005.

It notably establishes the conditions for the collection of the 25,000 signatures required by Article 114. The beginning of the collecting of signatures is decided by the Prime Minister on demand of “an initiative committee consisting of five voters at least, no later than the fourteenth day following the adoption of the text of the constitutional revision in the first reading by the Chamber of Deputies”. The maximum period of two months, reserved by the Constitution to collect signatures, is partly consumed by several preparatory operations for which the act sets specific deadlines each.

In addition the Act of 4 February 2005 contains many mostly technical details on the organisation of referenda namely on the presentation of the voting papers, the voting modalities and the counting of the votes. No quorum of participation is required. Article 37 declares the vote compulsory according to the relevant provisions of the electoral act.¹² Voting is indeed compulsory in the Grand Duchy since 1924 for all registered voters. Exceptions exist for elder people and Luxembourgers living abroad.

¹¹ Loi du 4 février 2005 relative au référendum au niveau national, Memorial A, n° 27 of 3 March 2005, p. 548.

¹² Loi électorale of 18 February 2003, consolidated version published in Mémorial A-31, 17.02.2011.

The Act of 4 February 2005 does not contain any further indication on the effects of a referendum. It simply provides in Article 58 that the referendum would be successful if a majority of voters having issued a valid ballot have voted in favour of the question.

2. The use of referenda has remained exceptional in Luxembourg's history

Though the possibility to hold referenda was introduced in Luxembourg's constitution almost a century ago, the possibility offered by Article 51 (7) of the Constitution has only been used at three - rather extraordinary - occasions. None of the three referenda that took place in 1919, 1937 and 2005 was held in order to consult the people on a constitutional amendment. But as we will see all three of them were organized on questions, which can be considered of constitutional relevance or which are about constitutional change in the broadest sense.

The first referendum was held on 28 September 1919 against the backdrop of internal and external tensions. It consisted in fact of two separate consultations that had been convened by two separate legislative acts adopted on 3 April 1919 and 4 July 1919. The first one touched the dynastic question and the form of the state and the second one on was about a possible economic union to be concluded with France or Belgium. Both referenda were finally held the same day and organized by a single grand-ducal decision of 19 September 1919.

Both, the so-called 'political' and the so-called 'economic' referendum allowed the voters to make a real choice between several options. They did not only consist of a single question to be answered by 'yes' or 'no'. The 'political' referendum offered the voters the possibility to choose between four options: to keep the Grand Duchess Charlotte, who took over the throne a few months before; to retain the dynasty, but replace Charlotte; to retain the monarchy, but replace the dynasty; to change the form of state to a Republic. Though the vote was not yet compulsory at that time, there was an electoral turnout of over 72 %. The vast majority of almost 78 % of valid votes chose the first option, to retain the Grand Duchess in function. Almost 20 % were in favour of establishing a Republic.¹³ As the outcome of the referendum confirmed both the dynasty and the form of the state in place, no constitutional reform was needed to be implemented. The 'economic' referendum required the electors to indicate their preference with regard to an Economic Union to be concluded either with France or with Belgium. Almost 73% of the valid votes turned out to be in favour of entering into an Economic Union with France rather than with Belgium (27 %).¹⁴ The French

¹³ Cp. Ben Fayot, op. cit., p. 35.

¹⁴ Ibid. p. 36.

Republic refused however to negotiate such a union with Luxembourg and finally in 1922 the *Chambre* approved the treaty on the ‘*Union économique belgo-luxembourgeoise*’ (UEBL). Thus the vote of the Luxembourgish people did not produce the desired effect.

The second referendum took place on 6 June 1937 in a context of heated political debate. Following an initiative of the government, the *Chambre* had adopted on 23 April 1937 the so-called ‘muzzle bill’, an act ‘on the defence of the political and social order’ allowing de facto to dissolve the communist party as well as other associations considered to militate violently against the Constitution. In the *Chambre* the bill passed with a broad majority of 34 against 19. Under the pressure from trade unions and at the demand of the liberal party, the *Chambre* decided very rapidly, on 7 May 1937, to submit this act to a referendum in order to ask the people whether it ‘agreed to its entry into force’. With a very slim majority of 50,67%, the electors answered this question by ‘no’. The difference between the number of negative and positive votes was only 1929.

The legal nature of this consultation is difficult to appreciate. According to the predominant interpretation of Article 51 (7) it could have had a consultative value only. This time the referendum took however place after the final vote of the bill by the *Chambre*. The ‘muzzle bill’ only needed to be enacted by the Grand Duchesse and to be published in the official journal (*Mémorial*) in order to come into force.¹⁵ The question was thus not so much whether - in a representative democracy such as Luxembourg - a ‘decision’ of the people could bind the *Chambre* but whether it could bind the executive power. In this sense the outcome of the 1937 referendum was certainly considered binding by all actors. Consequently the bill was apparently never enacted by the Grand Duchesse, certainly never published in the official journal and the government resigned.

After these two national referenda, which had been convened during the period between the two wars, it took more than seventy years before the third one was organized on a matter of EU integration. The referendum on the ratification of the treaty establishing a Constitution for Europe was held on 10 July 2005 shortly after the negative votes of the French and the Dutch people.¹⁶ As a result, 56.52% of the voters said ‘yes’. Luxembourg is indeed regarded as one of the EU’s most enthusiastic Member States, and most prominent political figures supported the Constitution for Europe, with both the governing coalition and the main opposition parties campaigning for a ‘yes’

¹⁵ Cp. Luc Heuschling, *Le discours sur la valeur consultative du referendum*, op. cit., p. 21 ff.

¹⁶ La loi du 14 avril 2005 portant organisation d’un referendum national sur Traité établissant une Constitution pour l’Europe, signé à Rome, le 29 octobre 2004. On the discussion concerning this referendum see Dumont P, Fehlen F, Kies R, Poirier P (2012), *Le référendum sur le Traité établissant une Constitution pour l’Europe, Rapport élaboré pour la Chambre des Députés*, STADE - Études sociologiques et politiques sur le Luxembourg Université du Luxembourg, Luxembourg, février 2007, 212 p..

vote. On 28 June 2005, the *Chambre* had already approved the ratification of the treaty in its first reading. The poll was consultative in nature but the *Chambre* agreed – before its second reading – to abide by the people’s majority vote. The then Prime Minister Jean-Claude Juncker said he would resign if the referendum resulted in a ‘no’ vote.

In connection with this referendum a question arose as to whether EU citizens other than Luxembourgish were allowed to vote, to which it was replied by the negative.¹⁷ The statement of reasons of the act organizing the latter referendum does not refer to any specific rationale as to the constitutional procedure chosen to approve the Treaty establishing a Constitution for Europe. However, the draft act concerning this referendum notes that: ‘If the referendum is, from the legal point of view, of advisory character, the legislature will nevertheless feel politically bound by the popular verdict. Therefore, it is necessary to measure the challenges raised by the consultation to be held on 10 July 2005. Due to the exceptional nature of referenda in our history, the results will leave lasting imprint on the political life of our country.’

Are there any conclusions to be drawn from these three precedents? At first glance the differences in terms of historical context, subject matter, type of question, outcome and effect seem to prevail. The only thing they have in common is that they have been organized in times of heated political debates. It appears notably difficult to detect any consistent practice especially with regard to their consultative or decisional effect. The question has never been subject to any Luxembourgish case law either.

None of the three (or four) referenda was linked to formal amendments of the Constitution, still all them were held on matters of constitutional change in the broadest sense. The ‘political’ referendum of 1919 would indeed have required a major constitutional reform if the people had voted in favour of the Republic or in favour of another grand ducal dynasty. The three other consultations were held on questions, which formally belong to the field of ordinary legislation. The 1937 referendum prevented a major breach of public freedoms while no constitutional court existed to censure the legislative power. The ‘economic’ referendum of 1919 and the 2005 referendum on the ‘EU Constitution’ touched upon the question of international integration, which is crucial for a small state as Luxembourg and certainly constitutes a matter of constitutional nature.

The Luxembourgish tradition of referenda does not allow an easy conclusion on the question whether a referendum held on the basis of Article 51 (7) can only be of consultative force or

¹⁷ Cf. p. 3 of the Projet de loi portant organisation d'un référendum national sur le Traité établissant une Constitution pour l'Europe, signé à Rome, le 29 octobre 2004, parl. doc. no. 5443.

whether it could under some conditions have a decisional character. One should not overestimate the fact that the ‘economic’ referendum of 1919 and the EU referendum of 2005 have not been followed by the effect desired by the Luxembourgish people. In the field of international treaties, national referenda can understandably only influence the position of one of the concluding parties.

The moment on which a referendum is scheduled seems an important element for the appreciation of its effects. In Luxembourg’s constitutional practice there have been three different scenarios. Either the referendum was held at a preparatory stage, well before the *Chambre* could take a formal decision on the issue (1919), or the consultation took place after the final vote of the *Chambre* and allowed the people to veto the entry into force of an approved bill (1937), or the referendum was inserted between the first and second reading in the *Chambre* (2005), which only makes sense if the latter declares to be bound by the outcome. According to the chosen scenario, the referendum can therefore be considered purely consultative as in the first case (1919), legally binding on the executive power as in the second case (1937) and, at least, politically binding on the *Chambre* as in the third case (2005).

3. The pending proposal of a new Constitution shall be submitted to referendum twice

The Constitution of the Grand Duchy, one of the oldest constitutional documents in Europe still in force, is currently undergoing a far-reaching revision procedure aiming at a general overhaul.¹⁸ According to the parliamentary committee in charge, this revision will finally give birth to a “new” constitution, meaning that a modified and updated edition of the constitution shall be published in the official journal and the current constitution be repealed.

The present amendment procedure started officially in April 2009 with the submission of a formal revision proposal by the parliamentary committee on constitutional amendment.¹⁹ The proposal aspires to realize a general renovation of the constitution and to re-arrange the whole document. It has been evaluated in depth by the Venice Commission, which delivered an opinion in December 2009, and by the *Conseil d’Etat*, which published its extensive opinion in June 2012.²⁰ This text of 216 pages appears like a true ‘counter proposal’ completed by a comparative table confronting the

¹⁸ Cp. Jörg Gerkrath, Some remarks on the pending constitutional change in the Grand Duchy of Luxembourg, European Public Law, 2013, pp. 449-459.

¹⁹ See « Proposition de révision portant modification et nouvel ordonnancement de la Constitution » of April, 21 2009, doc. parl. N° 6030, available at www.chd.lu.

²⁰ Avis du Conseil d’Etat du 6 juin 2012, no. 48.433, doc. parl. 6030/06.

current wording of the Constitution with the initial revision proposal on the one hand and the version favoured by the *Conseil d'Etat* on the other hand.

In the light of this opinion the parliamentary committee profoundly modified its initial proposal and established in January 2013 an internal working document containing a first consolidated version containing all the future amendments to the Constitution.

After the breaking up of the coalition government formed by the conservative Christian Democrats of Jean-Claude Juncker (CSV) and the Social Democrats (LSAP), the *Chambre* was dissolved by the Grand Duke and parliamentary elections took place on 20 October 2013. Though the CSV remained, with 23 seats, the strongest party in the *Chambre*, three smaller parties formed a new coalition government. This coalition of the Democratic Party (DP), led by the new Prime Minister Xavier Bettel, the LSAP and the Green party (*Dei Greng*) is supported by a slim majority of 32 seats out of 60.

Under the new majority, the renewed committee on constitutional revision went back to work and managed to agree on most of the chapters and provisions of the draft Constitution during the year 2014. In March 2015 the committee's draft has finally been published on the website of the *Chambre* within a special page dedicated to the referendum to be held on 7 June 2015.²¹

It must be emphasized that there was absolutely no direct popular implication during the drafting process of the new Constitution until this stage. The work of the parliamentary committee could be followed based on the minutes of its numerous meetings, which are regularly published on the *Chambre's* website.²² These minutes show a strong tendency of the committee to find solutions agreeable to a large majority within the *Chambre*. The document, which had the highest impact on the work of the committee was clearly the opinion delivered by the *Conseil d'Etat* in June 2012. Opinions and positions introduced by other bodies such as the judiciary, the Venice Commission or the professional chambers only played a secondary role.

The question whether the amended constitution should be submitted to a referendum was often raised in the past but the different political parties changed their positions over time. In 1999 Prime Minister Juncker (CSV) still considered that a more participatory society was needed: "We have therefore decided that, in the case of a substantial revision of the Constitution, we would proceed to a referendum. A fundamental and substantial revision of the Constitution represents a historical

²¹ See http://www.referendum.lu/Uploads/Nouvelle_Constitution/Doc/1_1_PropositionNouvelleConstitution.pdf

²² Cf. <http://www.chd.lu/wps/portal/public/RoleEtendu?action=doDocpaDetails&backto=/wps/portal/public&id=6030>

work and would need the consent of the sovereign people".²³ Ten years later, in 2009, the coalition agreement concluded between the Christian Democrats (CSV) and the Social Democrats (LSAP) did not mention this ambition anymore. In November 2010, the chairman of the committee on constitutional revision, Paul-Henri Meyers (CSV), openly expressed his doubts on whether the instrument of a referendum would be appropriate. In January 2011, Prime Minister Juncker himself considered that it is "not as a good idea". Since December 2013, the project to consult the Luxembourgish people on the new Constitution reappeared however vigorously on the agenda of the new coalition government.

A first referendum has thus recently been scheduled on 7 June 2015 by an Act of 27 February 2015 'on the organization of a national referendum on different questions related to the working out of a new Constitution'.²⁴ The members of the parliamentary majority, which authored the proposal of this Act, justify this first referendum, based on Article 51(7) of the Constitution, by the need to consult the people on several essential questions that have remained controversial during the preparatory work of the draft Constitution.²⁵

Both, the authors of the proposal and the *Conseil d'Etat* insist on the point that this referendum is purely consultative and must not be confused with the referendum foreseen by Article 114 of the Constitution.²⁶ It is a consultative referendum scheduled well before the first vote of the *Chambre* on the final text. Though the outcome of this referendum will not be legally binding on the *Chambre*, it will strongly influence the final discussions within the parliamentary committee on constitutional amendment, which has to 'translate' this outcome into constitutional provisions.

The initial proposal intended to submit four questions to the referendum: first, whether the voting age should be lowered to 16; second, whether foreigners should be allowed to vote in the *Chambre* elections; third, whether mandates of members of the government should be limited to 10 years; and fourth, whether the obligation of the state to pay the salaries and pensions of religious officials should end. Due to an agreement reached between the state and the religious communities and a consensus reached within the parliamentary committee to introduce a new Article in the draft

²³ Jean-Claude Juncker, Government Declaration of 1999.

²⁴ Loi du 27 février 2015 portant organisation d'un référendum national sur différentes questions en relation avec l'élaboration d'une nouvelle Constitution, Mémorial A-35, 4 March 2015, p. 358.

²⁵ See Proposal of an act on the organization of a national referendum on issues related to the making of a new Constitution, doc. parl. 6738, p. 2.

²⁶ See the Opinion of the *Conseil d'Etat* of 13 January 2015, doc. parl. 6738/1, p. 2.

Constitution on the neutrality of the state in religious matters and the separation between the state and the religious communities, the fourth question was eventually withdrawn from the proposal.²⁷

The Act of 27 February 2015 ‘on the organization of a national referendum on different questions related to the working out of a new Constitution’ thus finally calls the voters to answer by ‘yes’ or ‘no’ the following three questions:

- “1. Do you agree with the idea that Luxembourgers aged between sixteen and eighteen have the right to optionally enrol in order to participate as voters in elections for the Chamber of Deputies, European and local elections as well as referenda?*
- 2. Do you agree with the idea that non-Luxembourgish residents have the right to optionally enrol in order to participate as voters in elections for the Chamber of Deputies, under the double particular condition of having resided for at least ten years in Luxembourg and to have previously participated in local or European elections in Luxembourg?*
- 3. Do you agree with the idea of restricting to ten years the maximum time a person can continuously be part of the government?”*

All three questions are replicated in French, Luxembourgish and German, the three official languages of the Grand Duchy. The referendum will be organised according to the conditions laid down in the Act of 4 February 2005 on the national referendum. As the questions refer to ‘ideas’ rather than to written draft articles, the *Chambre* and its committee on constitutional amendment conserve a margin of appreciation with regard to the outcome of the three questions. Once the drafting of the new Constitution is finished it will need to be approved in a first reading of the *Chambre* at a majority of two thirds of its members.

A second decisional referendum, planned in October 2017, will be organized in order to approve the new Constitution by a direct popular consultation rather than a second vote within the *Chambre*. As the governmental majority has announced this referendum, it is very likely that the members of the majority will vote in favour. The necessary number of at least sixteen members of the *Chambre* asking for it, as foreseen by Article 114 of the Constitution, should thus easily be reached.

4. The signification of this ‘sudden eagerness’ to consult on constitutional change

It is, first of all, remarkable that for the very first time in its constitutional history the Grand Duchy will proceed to a direct popular consultation on constitutional change in the sense of a formal

²⁷ See doc. parl. 6738/2 of 23 January 2015.

amendment of the Constitution. Considering the exceptional character of referenda in the past and the absence of any consistent practice, the current political situation seems to promote a renewed interest for the instruments of direct democracy. There is however a difference to be made between the eagerness to consult on the new Constitution and the coincident eagerness to broaden the scope of popular consultations within it. In the first case, it is the current governmental majority alone that decided to progress in this direction. In the second case, existed already a large consensus between the political parties.

4.1. Eagerness to consult on the new Constitution

The decision of the current political majority to achieve the current constitutional amendment process through the combination of a preceding consultative referendum and a conclusive decisional referendum seems at first appearance to be motivated by the will to strengthen the direct implication of the people. At second glance, the first referendum appears however, rather as an attempt to call on the people in order to overcome the controversy between the governmental coalition, DP-LSAP-Dei Greng and the main opposition party CSV. Within the parliamentary committee on constitutional amendment, no consensus and not even a majority of two-thirds could indeed be found on the three controversial points. Thus the referendum is used to put popular pressure notably on the Christian Democrats (CSV) who still hold 23 seats out of 60 within the *Chambre*.²⁸

This situation is rather unusual for Luxembourg. All precedent constitutional amendments have been adopted by consensus of a very broad majority in the *Chamber*. The political system is strongly characterized by stability, proximity to the citizens and a common desire to take decisions based on consensus. This is particularly true for decisions on constitutional revision, which are mostly supported by much stronger parliamentary majorities than necessary and are very often taken unanimously. The modification of the revision procedure was adopted in November 2003 for instance by 59 votes in favour and one abstention and the most recent amendment of Article 34, depriving the Grand Duke of his power to ‘sanction’ legislative acts, was adopted in March 2009 by unanimity.²⁹

One of the smaller opposition parties, the right wing ‘ADR’, argued that organizing a consultative referendum on constitutional questions before the first vote of the amendments by *Chambre* is

²⁸ The remaining five seats are held by two members of a left wing party (Dei Lenk) and three members of the right wing party ‘ADR’.

²⁹ Cp. Luc Frieden, *Luxembourg : Parliament abolishes royal confirmation of laws*, Int. Journal of Constitutional law, 2009, pp. 539-543.

contrary to the spirit and the wording of the Constitution. According to this reasoning, Article 114, governing the referendum within the constitutional amendment procedure, constitutes a *lege speciale* prohibiting thus to apply the ‘legislative referendum’ in connection with an amendment of the Constitution. This is not a convincing interpretation. It must be admitted that a popular consultation under Article 51 (7) of the Constitution may be organized on any question that the *Chambre* decides to submit to the voters by adopting an ordinary legislative act.³⁰

It is true that the Constitution does not articulate the relationship between Articles 51 (7) and 114. On the other hand a referendum based on Article 51 (7) may certainly not violate the procedure of constitutional amendment. It has to respect in particular the competences that both provisions reserve exclusively to the *Chambre*. This is the case in the present situation. The *Chambre* elected to consult the people on three controversial questions, it will have to adopt the draft Constitution in a first reading by a majority of two thirds and after this first reading the decisional referendum can be held.

4.2. Eagerness to broaden the place of popular consultations within the new Constitution

The Luxembourgish people will not only be consulted twice on the new Constitution, the place of popular consultations will also be broadened within the new Constitution. The consolidated working document of the draft Constitution introduces indeed a constitutional basis for a citizens’ initiative and clarifies somewhat the rules on referenda. A large majority within the parliamentary committee in charge has agreed upon these amendments to the current Constitution.

The first innovation results from Article 74 of the draft Constitution. It reads as follows:

*“Voters may take the initiative to transmit a reasoned proposal to legislate to the Chamber of Deputies. The law determines the conditions and procedures of this citizens’ initiative.”*³¹

The introduction in the pending revision draft of a basis for popular initiatives in legislative matters will enable the *Chambre* to resume discussions on the establishment of a right for citizens to introduce legislative proposals. The detailed procedure for such an initiative will indeed have to be regulated by a legislative act. Prime Minister Juncker tabled a proposal on the legislative popular initiative and the referendum on 20 May 2003, intending to introduce such a right.³² However, this

³⁰ Cp. Opinion of the Conseil d’Etat of 13 January 2015, doc. parl. 6738/1, p. 2 and Luc Heuschling, *Illégal ? Consultatif ?, Deux questions juridiques à propos du premier référendum constituant*, Forum, November 2014, p. 7-12.

³¹ « Des électeurs peuvent prendre l’initiative de transmettre à la Chambre des Députés une proposition motivée aux fins de légiférer. La loi détermine les conditions et procédures de cette initiative citoyenne. »

³² Doc. parl. 5132.

aspect of the proposal was held in abeyance after the *Conseil d'Etat* formally opposed it for lack of a constitutional basis. The Act of 4 February 2005, which was adopted on the basis of this proposal, therefore only regulates the national referendum.

The future constitutional basis for a national popular initiative will at any rate coexist with the possibility for all European citizens living in Luxembourg to participate in a European citizen's initiative in accordance with Regulation (EU) No 211/2011 of the European Parliament and of the Council of 16 February 2011, which establishes the procedures and conditions required for a citizens' initiative as provided for in Article 11 TEU and Article 24 TFEU.

The second innovation results from a new Article 76 of the draft Constitution. Replacing the current article 51 (7) it states:

“The Chamber may decide to have recourse to referendum in the cases, under the conditions and with the effects to be determined by law.”³³

In comparison with the current Article 51 (7) three comments can be made. First, the new provision is still part of the Chapter dedicated to the *Chambre*. Second, the possibility to hold a referendum is explicitly designed as a faculty of the *Chambre*, who remains the responsible constitutional organ. Third, the *Chambre* is obviously invited to determine the effects of future referenda by ordinary legislation. This additional element can only be understood as a discretionary power given to the *Chambre* in order to decide on a case-by-case basis whether future referenda will be merely consultative or truly decisional.

The position of the ratification-referendum within the amendment procedure is transferred from the current Article 114 to Article 125 of the Constitution without any notable changes. Some questions remain however with regard to the exercise of the people's constituent power within a traditional parliamentary system.

5. The exercise of the people's constituent power in Luxembourg's parliamentary system

In a democratic state the source of sovereign power lies with the people. This is also the case in Luxembourg despite the formulation of the current Article 32 of the Constitution declaring that 'the sovereign power resides in the Nation'. Furthermore, such a small state offers good prerequisites to introduce elements of direct democracy.³⁴ The process of democratisation of its Constitution led to

³³ « La Chambre des Députés peut décider d'avoir recours au référendum dans les cas, sous les conditions et avec les effets à déterminer par la loi. »

³⁴ Cp. Carlo Hemmer, *Für das Referendum : mehr Direktdemokratie !*, Letzeburger Land, 24 July 1987, p. 10.

a clear choice in favour of a system of parliamentary democracy with a small dose of direct popular involvement. The objective to find a ‘third way’ between a purely representative system and a direct democracy had been announced by the very ambitious legislative proposal of 20 May 2003. This proposal of an act ‘on popular initiative in legislative matters and on the referendum’ aimed indeed not only to establish the legislative rules on referenda under Articles 51 (7) and 114, as it finally did, but also to allow popular initiatives of legislative acts and popular requests to hold referenda on the acts adopted on behalf of such an initiative.³⁵ The two latter elements have however been abandoned due to the opposition of the *Conseil d’Etat*, which rightly pointed out that there was no constitutional basis for their introduction.

As such a constitutional basis will probably be created by the draft Constitution, at least with regard to citizens’ initiatives, the idea to encourage direct participation of citizens within the traditional system of representative democracy is again on the agenda. The procedural combination of the *Chambre* retaining the power to amend the Constitution with the possibility of the people, first, to be consulted during the amendment procedure and, second, to claim actively a referendum in order to ratify or to veto the amendment finally adopted by the *Chambre*, raises challenging questions. The resulting coexistence of a representative system and elements of direct democracy has to be carefully organized especially when it comes to constitutional amendments.

In Luxembourg’s parliamentary system it is the *Chambre* who ‘represents the country’ as stated in Article 50 of the current Constitution or rather ‘the Nation’ as foreseen by article 60 of the draft Constitution. The same provisions prohibit at present, as well as in the future, imperative mandates and indicate that the members of the *Chambre* vote on behalf of ‘the general interest’.³⁶ This provision has often been quoted to explain why referenda under Article 51 (7) can only have consultative value. It is however difficult to explain to the voters that their vote has no more than a consultative effect whereas voting is made compulsory by the electoral act. Article 76 of the draft Constitution will permit the *Chambre* to determine the effects of future referenda organised on this basis, including in theory the possibility to make them binding, at least, one might consider, if they are held after the final vote of the *Chambre*.

In the field of constitutional amendment, referenda preceding the vote of the *Chambre* will certainly remain consultative. Only a referendum based on Article 114 (art. 125 of the draft Constitution) gives the people the final word. Does the draft Constitution allow citizens’ initiative for

³⁵ See Projet de loi relative à l’initiative populaire en matière législative et au référendum, 205.2003, doc. parl. 5132.

³⁶ See Article 60 of the draft Constitution : « La Chambre des Députés représente la Nation. Elle exerce le pouvoir législatif. Les députés votent sans en référer à leurs commettants et ne peuvent avoir en vue que l’intérêt général. »

constitutional amendments? The answer must be negative. Article 74 of the draft explicitly confines the scope of these initiatives to proposals ‘to legislate’. It is true that, besides the majority requirements of the amendment procedure, revision acts follow in Luxembourg the legislative procedure. But amending the constitution is not the same than ‘to legislate’.

The future will show whether the practice of referenda and citizens’ initiatives will become less exceptional than in the past. As the role of *Chambre* in this context is still pivotal one might expect that it could persist in having a preference for consultative referenda, especially when it comes to constitutional amendments. Why should it take the risk at the end of a long and laborious amendment procedure to see the people reject by a slim majority a compromise that has been accepted by more than two thirds of its members?

The most challenging question with regard to popular implication in the constitutional amendment procedure touches the composition of the electorate. Luxembourg’s Constitution does not mention ‘the people’, it refers to the Nation (Art. 32), to Luxembourgers (Art. 9), to non-Luxembourgers (Art. 9), to foreigners (Art. 111) and to electors (Art. 51 (7) and 114). Only those who fulfil the conditions to vote in the elections of the *Chambre* are also entitled to vote at national referenda. The second question of the Referendum of 7 June 2015 touches therefore not only the question whether foreigners would be allowed to vote in the Chamber elections. Once they are allowed to register as electors on the national electoral lists, they would automatically be allowed to vote in referenda as well.

As the resident population of the Grand Duchy currently counts 54 % of Luxembourgers and 46 % of foreigners – with an ongoing increase of the latter – the issue is of outmost importance.³⁷ It seems unacceptable indeed that in a democratic state half of the population could be durably disqualified to vote in national elections and referenda. Only Luxembourgers will vote however on the three referendum questions and recent polls tend to show that there is a majority of ‘no’ votes.

³⁷ See Michèle Finck, *Towards an ever closer Union between résidents and citizens ? On the possible extension of voting rights to foreign résidents in Luxembourg*, forthcoming, EuConst, June 2015.

Literature:

Tony Biever, *Le référendum et ses succédanés*, Feuille de liaison de la Conférence St. Yves, 1990, n° 75, pp. 43-45.

Ben Fayot, *Les quatre référendums du Grand-Duché de Luxembourg*, Essai, Ed. de la petite Amérique, Luxembourg, 2006, 112 p.

Victor Gillen, *Le Conseil d'Etat et le référendum*, in *Le Conseil d'Etat face à l'évolution de la société luxembourgeoise*, Luxembourg 2006, p. 223 ff.

Luc Heuschling, *Illégal ? Consultatif ?, Deux questions juridiques à propos du premier référendum constituant*, Forum n° 345, November 2014, pp. 7-12.

Luc Heuschling, *Le discours sur la valeur consultative du référendum (art. 51 § 7 Const.)*, *Une deconstruction historique*, forthcoming, Pasicrisie luxembourgeoise 2015.

Alphonse Huss, 'Luxembourg', in F. Delpérée (dir.), *Référendums*, Centre de recherche et d'information socio-politiques, Brussels 1985, pp. 301-307.

Alphonse Huss, *L'accentuation des dispositions constitutionnelles visant le référendum*, Institut Grand-Ducal, *Réflexions sur la réforme de la Constitution du Grand-Duché de Luxembourg*, Luxembourg, 1988, p. 25 ff.

Pierre Majerus, *L'Etat luxembourgeois*, 6ème édition mise à jour par Michel Majerus, Editpress, Esch-sur-Alzette, 1990.

Ulrich Rommelfanger, *Das konsultative Referendum, Eine verfassungstheoretische, -rechtliche und -vergleichende Untersuchung*, (Schriften zum Öffentlichen Recht, Band 526), Duncker & Humblot, Berlin 1988, 330 p.

Paul Schmit, Emmanuel Servais, *Précis de droit constitutionnel, Commentaire de la Constitution luxembourgeoise*, Ed. Saint-Paul, Luxembourg 2009, 312 p.