

Member States' Constitutions and EU Integration

Country report on Luxembourg

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Abstract

Luxembourg is a well-integrated member state whose EU membership relies however on poorly developed constitutional foundations. This is yet to be changed by a major constitutional overhaul that is expected to come to an end in 2018. Three patterns must be born in mind to understand the country's constitutional culture: the Constitution had been somewhat forgotten, its political system functions according to the idea of a 'consensus democracy' and its leading political principle is pragmatism. The only limit to further steps of EU integration is the requirement of a 2/3 majority within Parliament in order to approve any competence transferring treaty. In the pure monistic tradition the domestic legal order is conceived in a way to avoid conflicts with international or EU law. EU norms enjoy full primacy even vis-à-vis constitutional rules.

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The Grand Duchy of Luxembourg is a strongly integrated member state whose EU membership relies however on poorly developed constitutional foundations. This is yet to be changed by a major constitutional overhaul that started in 2009 and is expected to come to an end in 2018. The following lines will thus refer to the current Constitution, dating back to 1868¹, as well as to the draft of the new Constitution, available as a working document of the parliamentary committee in charge of constitutional amendments².

I. Main characteristics of the national constitutional system

Luxembourg’s constitutional system may be succinctly presented referring to its five predominant qualities, as there are: a system relying on a 19th century document (A.), a small state longing for integration (B.), a monarchy (C.), a political system based on parliamentary democracy (D.) and a judiciary in need of reform (D.).

A. A constitutional system based on a charter dating back to 1868

Luxembourg’s constitutional history as an independent state begins in the first half of the 19th century. Although the political existence of the Grand Duchy is usually considered as a result of the treaty of Vienna of 1815, its first ‘home-grown’ constitution was only granted on 12 October 1841. First, there was a phase of instability from 1815 to 1868 during which the country was consecutively governed by five different constitutional documents, only the three most recent (1841, 1848, 1856) being genuinely Luxembourgish. A second phase of constitutional stability started with the Constitution of 1868, which is, after some 37 amendments, still in place today.

¹ The Constitution can be accessed on : <http://www.legilux.public.lu/leg/textescoordonnes/recueils/Constitution/> An up to date English version is available on : https://www.constituteproject.org/constitution/Luxembourg_2009.pdf All luxembourgish legal documents are accessible in French : www.legilux.public.lu/ All quoted websites accessed as of 31.12.2015.

² See the « Texte coordonné proposé par la Commission des institutions et de la révision constitutionnelle », as of 30 June 2015, http://www.referendum.lu/Uploads/Nouvelle_Constitution/Doc/1_1_6030%20version%2030.06.15.pdf

Despite these various amendments the current Constitution still very much resembles to the 1868 text that carried over many provisions of the liberal Constitution of 1848, itself widely inspired by the Belgian Constitution of 1831. The impact of amendments was lower than one might expect. Altogether 70 out of 121 articles of the original text of the constitution have never been revised. 47 articles have been revised once or several times. Articles 11 (social and economic rights of the individual person and the family) and 51 (*Chambre des Députés*) for instance have been modified five times each. Articles 10, 63, 73 and 121 have been abolished. And 8 new articles have been inserted.

From a qualitative perspective, the main revisions sought to strengthen parliamentary democracy, to adapt the constitution to the needs of European integration, to complete the catalogue of fundamental rights, and to modernize the constitution according to the principle of “rule of law”. None of these four objectives has however been fully achieved.

As a result, the Constitution of 1868 appears as somewhat out-dated. While several initiatives for a general revision of the Constitution have been undertaken since the 1970’s, none has indeed been successful. Only fractional revisions were adopted in a century and a half. Occurred at different times and on various aspects, they have to some extent undermined the coherence of the initial text. Finally, in April 2009 the *Chambre* initiated formally an amendment procedure designed to realize a complete overhaul of the Constitution, to modernize its out-dated terminology, to erase a number of old formulations and incoherencies, which have resulted from the punctual modifications in the past, to adapt the legal text to the political reality and to make it coincide with the “living constitution” as reflected in the functioning of institutions. The current state of this amendment procedure will be analysed in part VII.

B. A small state seeking for integration

The Grand Duchy is the second smallest member state within the Union. It covers an area of 2,586 square kilometres and has a resident population of about 537,000 inhabitants, of whom 46 per cent are foreigners. More than 80% of these foreigners are EU citizens.³ According to the statistical growth of the past years it is very likely that Luxembourgers will become a minority in their country in the near future.

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 helped it to acquire the experience indispensable for being prepared for the legal implications of its membership of the European Communities and the European Union. All the state organs and the major political parties as well as a vast majority of the population share the opinion that the economical and political interests of the Grand Duchy plead in favour of an ever-closer integration within the Union Benelux, the Council of Europe and the EU.

They also foster the development of the ‘Greater Region’, which includes: Lorraine in France, Saarland and Rhineland-Palatinate in Germany, the Walloon Region and the French and German-speaking communities of Belgium. The Grand Duchy of Luxembourg is the only sovereign state member of the Greater Region and its institutional framework. Though Luxembourg’s population accounts for less than 5% of the total population of this cross-border space, it boasts the most dynamic growth. Cross-border or ‘frontier workers’ represent 44% of all employed persons on its domestic labour market. All in all there are some 160 thousand cross-border workers employed in

³ Figures published by the statistical agency for 2015. www.statec.lu.

Luxembourg. Amongst them, one half comes from France, one quarter from Belgium and one quarter from Germany. The Grand Duchy is thus highly interested in all efforts to imagine new forms of governance for the internationalized labour market.

C. A constitutional monarchy

Given that Luxembourg is a constitutional monarchy, the grand duke, being the head of state, the symbol of its unity and the guarantor of national independence (Art. 33), only detains those powers that are explicitly conferred on him by the Constitution and the laws (Art. 32). By virtue of Article 3 of the Constitution, the crown of the Grand Duchy is hereditary in the house of Nassau in accordance with the Family Compact of the House of Nassau of 30 June 1783, Article 71 of the Treaty of Vienna of 9 June 1815 and Article 1 of the Treaty of London of 11 May 1867.

The currently pending constitutional revision aims to clarify the position of the grand duke as head of state, “symbol of its unity and guarantor of national independence” and to adapt the provisions of the Constitution that might create confusion as to his responsibility for political decisions, which have to be endorsed by other constitutional bodies. He will therefore lose some of his remaining formal competences in the fields of legislative and executive powers. Furthermore, all provisions relating to succession to the throne, to the regency and the lieutenancy, which the Family Compact of the House of Nassau currently provides for, will be integrated into the Constitution in an adapted form.

The attachment of the Luxembourgish people to its monarchy has been proven by the very first referendum that was held in The Grand Duchy on 28 September 1919 on the dynastic question and the form of the state. This so-called ‘political’ 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’ but 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.⁴ Since then the monarchical form of government was never challenged again.

Though he is the head of state, 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 *Chambre des Députés* or to the citizens of Luxembourg.⁵ The hereditary nature of his function is even difficult to reconcile with one of the principles of the Union’s constitutional system, which makes the equality of all citizens a central rule.⁶ And, as Luc Heuschling demonstrated convincingly: behind the body of the monarch is the citizen, able to demand rights on this basis.⁷ In any event, Union membership of a

⁴ Cp. *Fayot Ben*, Les quatre référendums du Grand-Duché de Luxembourg, Essai (2006) at p. 35.

⁵ Cf. Reestman Jan-Herman, The state of the European Union’s monarchies. An introduction to the series, in *EuConst* 7 (2011) 270.

⁶ Cf. *Roobol Wim*, Twilight of the European Monarchy, in *EuConst* 7 (2011) 286.

⁷ *Heuschling Luc*, Le citoyen monarque. Réflexions sur le Grand-Duc, la famille grand-ducale et le droit de vote (2013).

constitutional monarchy does not come without creating frictions, which could adversely affect its constitutional law.⁸

D. A political system based on parliamentary democracy

According to Article 51(1) of the Constitution, the Grand Duchy of Luxembourg is “ruled by a system of parliamentary democracy”. Consequently it is the *Chambre* that “represents the country” (Art. 50). Thus the political system is clearly of a representative nature. The use of referenda has remained exceptional.

Legislative power is vested in the *Chambre*, the members of which are elected directly to 5-year terms. The *Chambre* includes 60 deputies elected from lists submitted by different political parties. Since 20th October 2013, following the last legislative elections, the *Chambre des Députés* is composed of: 23 seats for the CSV (Social Christian Party), 13 seats for the LSAP (Luxembourg Socialist Worker Party), 13 seats for the DP (Democratic Party), 6 seats for Déi Gréng (the Green Party), 3 for l’Alternativ Demokratesch Reformpartei (ADR), 2 for Déi Lénk (left-wing).

Any constitutional revision requiring at least 40 votes within the *Chambre*, it needs currently to be accepted by MPs coming from at least three different groups. The last constitutional reform, which took place from December 2008 to March 2009 in Luxembourg, is an interesting illustration of how the political system influences revision of the constitution. After the Grand Duke had announced that he would refuse to approve a bill on euthanasia that the *Chambre* was about to adopt, the government and Parliament decided unanimously to abolish the royal assent to laws that had existed in the Luxembourg constitution since 1848.⁹ More in detail that meant that the second constitutional vote on the law on euthanasia was postponed until the modification of the constitution took place. Then the law was finally adopted by the *Chambre* and simply promulgated by the Grand Duke.

In Luxembourg’s unicameral system, all laws are subject to a second vote by the *Chambre*, an interval of at least three months to be located between the two votes. However, the *Chambre* may decide in accordance with the *Conseil d’État*, sitting in public, there is no need for this second “constitutional vote”. It may be however that the *Conseil d’État* decides to use its suspending veto, refusing to grant the waiver of the second constitutional vote. This body, composed of citizens appointed by the Grand Duke, advises the *Chambre* in the drafting of legislation. The *Conseil’s* opinions have no binding effect but are widely followed. In practice it’s role is that of a second chamber.

The *Conseil* comprises twenty-one members, including at least eleven holders of a doctoral degree in law or of a foreign higher education degree in law. The responsibilities of its members are in addition to their normal professional duties. To be appointed candidates must be Luxembourgish, enjoy civil rights, reside in the Grand Duchy and be at least 30 years of age. In addition, the Grand Duke heir may be appointed as soon as this title was conferred.

The Grand Duke and the Government exercise the executive power in conjunction. The latter includes the prime minister who serves as head of government. He is the leader of the political party or coalition of parties having the majority of seats in the *Chambre*.

⁸ See *Jessurun d’Oliveira Hans Ulrich*, The EU and Its Monarchies: Influences and Frictions, in *EuConst* 8 (2012), 63.

⁹ Cf. *Frieden Luc*, Luxembourg: Parliament abolishes royal confirmation of laws, in *Int J Constitutional Law* 7 (2009) 539.

E. A judiciary in need of reform

At present the judiciary is divided into two main branches: on the one hand, the ordinary courts, and, on the other hand the administrative courts. In addition there are also specialised courts in the field of social security. The Superior Court of Justice, comprising the Court of appeal and a *Cour de cassation*, heads the branch of ordinary courts as well as the social security courts.

Re-organizing this judicial system is an additional goal introduced into the current revision process by the government under the responsibility of its ministry of justice. In addition it is also intended to institute a National Justice Council (*Conseil National de la Justice*) who would carry the responsibility to warrant the independence of judges and to ensure good judicial conduct. In the course of the debates that took place during the meetings of the parliamentary committee, the government and the committee members discussed already the possibility of transforming the present highest court, the Superior Court of Justice, into a Supreme Court for both the ordinary and the administrative courts. This implies a closing down of the Constitutional Court and a transfer of power to the ordinary judges who will from then on review the conformity of laws with the Constitution. Hence, ordinary judges will be able in the future to combine the review of conventionality of acts of parliament with the review of their constitutionality, which appears to be an appropriate solution for Luxembourg.

The Constitutional Court was created only recently by a constitutional amendment of 12 July 1996 and an Act of 27 July 1997¹⁰ to review laws *a posteriori* in the light of the Constitution. Its function is to examine the constitutionality of ordinary statute law, apart from laws approving treaties, which are explicitly excluded from judicial review. If a party questions the constitutionality of a law before an ordinary or administrative court, and if the issue of constitutionality is deemed vital to the solution of a dispute, the court must refer the matter - explicitly citing the legal norm in question - to the Constitutional Court. The public has no direct recourse to the Constitutional Court. The review technique applied by the Constitutional Court leads to a rather narrow and abstract way of reviewing the constitutionality of enacted laws. The Court confines itself to reviewing the legal disposition referred to it against the articles of the Constitution specified in the preliminary question. It does not review the constitutionality of the law in question as a whole nor does it extend its review to other Articles or principles of the Constitution that have not been explicitly cited. Furthermore, the Court adheres to a rather literal interpretation of the wording of the Constitution.

From 1998 until January 2016 the Constitutional Court delivered some 120 judgments. Most of them concern the principle of equal treatment enshrined in Article 10bis of the Constitution.¹¹ The effects of judgments of the Constitutional Court are in principle limited to the litigation, which raised the preliminary question. The *Chambre* therefore remains free in its response to adverse judgments of the Court. In fact several legal provisions declared contrary to the Constitution remain in place.

II. Constitutional culture

The Constitution of Luxembourg falls within the category of constitutions tending to be more 'evolutionary' in nature. Although it is clearly part of the positive law in force, it is at the same time

¹⁰ Loi du 27.7.1997 portant organisation de la Cour Constitutionnelle.

¹¹ Jörg Gerkrath (ed.), *La jurisprudence de la Cour Constitutionnelle du Luxembourg 1997 – 2007*, (2008).

considered rather a historic and political document than a truly normative one. Consequently there is quite a difference between the written document and the ‘living constitution’, for instance regarding the relations between the main political organs of the state. To understand the country’s constitutional culture three patterns must be taken into account: the Constitution had been somewhat forgotten, at least until 1997 (A.); its political system functions according to the idea of a ‘consensus democracy’ (B.); its leading political and legal principle is pragmatism (C.).¹²

A. The somewhat ‘forgotten Constitution’

A first distinguishing element of Luxembourg’s constitutional culture is that political and legal actors lack interest in constitutional law. Though many efforts were made to modernize branches of law such as banking or media law, the Constitution had been to some extent forgotten.¹³ Several reasons may explain this.

First, the monistic tradition of the Grand Duchy’s legal order and the principle of primacy of international law led judges and lawyers to invoke and apply human rights based on international treaties rather than stemming from the Constitution. Thus the main source of human rights in Luxembourg is the ECHR.

Second, many practices and usages have developed *praeter legem* besides the old Constitution. The political actors thus often prefer to refer to such practices than to the formal rules of the Constitution that proved furthermore to be difficult to revise because of a very strict amendment procedure in place until 2003. The great difference between the written and the living constitution stresses the importance of the current revision procedure aiming to modernize the outdated and, on some aspects, fragmentary constitution. Subject to many amendments in the past, the Constitution needs a « restatement » in order to reconcile the written with the living constitution.

Third, before the amendment of 1996, any constitutional review of parliamentary acts resided solely with the political organs, namely the *Chambre des Députés* and the *Conseil d’État*. The latter still exercises a kind of *a priori* review of the conformity of any draft bill with rules of higher law, including general principles of law, international treaties and the provisions of the Constitution. A constitutional court with limited powers was only established in 1997. It does not have the power to invalidate legislative acts, which can only be submitted to it by ordinary courts through a preliminary ruling procedure.

B. A ‘consensus democracy’

The Grand-Duchy of Luxemburg being a small monarchy with a parliamentary form of government has developed a particular model of consensus democracy sometimes referred to as the “Luxemburgish model”. This model of a “*Konsensdemokratie*” functions very well in a small country like Luxemburg where, in addition to the political parties and trade unions, the different interest groups are well organized through a system of professional chambers.

¹² The following considerations are widely inspired by a paper written in French by my colleague Luc Heuschling who summarized in a very convincing way the main characteristics of Luxembourg’s political culture. See *Heuschling Luc, Poirier Philippe, L’opposition politique au Grand-duché de Luxembourg. Regards croisés, de science juridique et de science politique, sur une démocratie consociative*, in Derosier (ed.), *L’opposition politique*, (2016 in press).

¹³ *Bonn Alain, La Constitution oubliée*, (1968).

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 (40/60) and are very often taken unanimously.

The political culture favours consensus, and parties share a broad agreement on key issues, including the value of European integration. Consequently Luxembourg experienced until now a remarkable governmental stability. Six political parties exist for the moment. The Christian Social People's Party (CSV) resembles Christian democratic parties in other west European countries and enjoys broad popular support. Its former leader, Prime Minister Jean-Claude Juncker, in power from 1995 to 2013, was the longest-serving head of government in the European Union. The Socialist Party (LSAP) is a centre-left party similar to most social democratic parties in Europe. The LSAP defends state intervention in the economy and the sustainability of the welfare system. Part of the government from 1984 to 1999, it currently participates to the government coalition with the Democratic Party and the Greens. The centre-right Democratic Party (DP) draws much of its support from civil servants, the professions, and urban middle class. Like other West European liberal (i.e., libertarian) parties, it advocates both social legislation and minimum government involvement in the economy. In the opposition from 1984 to 1999, the DP overcame the LSAP to claim the role of junior partner in the government from 1999-2004. It is currently heading the coalition government with prime minister Xavier Bettel. The Green Party has received growing support since it was officially formed in 1983. Other notable parties are the ADR (Alternative Democratic Reform Party), a right wing party defending the national identity, and the Left (former communist), which occupy currently three respectively two seats in the 60-member *Chambre des Députés*.

The functioning of the Luxembourgish political system in the way of a consensus democracy is to some extent facilitated by the role of the so-called 'professional chambers', which represent corporative interests. Five commercial and professional chambers were indeed established by a Law of 4 April 1924, namely one for agriculture, one for the crafts, one for trade, one for private employees and one for labour (*chambre d'agriculture, des métiers, de commerce, des employés privés, and de travail* respectively).¹⁴ A Law of 12 February 1964 added a sixth chamber for public servants (*chambre des fonctionnaires et employés publics*).¹⁵ The number was reduced to five again when the chamber of employees took office on 5 January 2009, following a merger of the Chamber of Private Employees and the Chamber of Labour.

The chambers are public bodies with civil law legal personality. They consist of five ordinary members and the same number of substitutes, elected every five years. Their primary task is to protect the professional interests of their members. The *Chambre des Députés* and the government must request the opinion of the chambers on all bills and legislative proposals and on all grand ducal and ministerial regulations which are primarily concerned with the trades and professions represented in the chambers. The government can dissolve the chambers if there are serious reasons for doing so. In that case, new elections must be held within three months after their dissolution.

All political actors also share a strong attachment to the 'Luxembourgish social model'. This model is based on a 'index' mechanism of automatic salary rises according to the inflation rate, powerful

¹⁴ Loi du 4 avril 1924, portant création de chambres professionnelles à base électorale.

¹⁵ Loi du 12 février 1964 ayant pour objet de compléter la loi du 4 avril 1924, portant création de chambres professionnelles à base électorale par la création d'une chambre des fonctionnaires et employés publics.

trade unions, a tradition to negotiate important reforms - touching e.g. the labour market, the pensions system or the social security policy - within the so-called 'Tripartite', an encounter of representatives of the government, the trade unions and the employers.

C. Pragmatism as a leading principle of policy and legal philosophy

In the Grand Duchy's legal order, law is considered as a toolbox, an instrument to regulate the social sphere. Written mainly in French at present, the applicable law results from a blend of a multiplicity of legal transfers. Constitutional law is rooted, in large part, in the Belgian constitutional law of the nineteenth century, while including some elements from the model of the German constitutional monarchy. If there is something specific in the Luxembourg legal culture, it is possibly this uninhibited attitude consisting, in case of problems, to look beyond the immediate boundaries to seek for the appropriate legal solution. Without falling into blind adulation of solutions of a country in particular the usual approach is: to compare, to evaluate, to choose and to combine foreign legal solution in order to make them work in Luxembourg.

In addition there is a certain distrust vis-à-vis abstract legal constructs that appear too intellectual. Until 2003, the Luxembourg's legal system had to do without the presence of a university and law professors. It relied exclusively on practitioners trained either in Belgium or in France. Legal rules are supposed to solve real problems. Thus, some trends of constitutionalism in Europe and in the world (rationalization of parliamentarism from the 1920s, the development of constitutional courts since 1945, the tendency, in the last 20 years, to admit material limits to the power of constitutional amendment) produced no echo at all or only a reduced echo in Luxembourg. Some problems did simply not occur (the threat of government instability, the risk of a shift towards a dictatorship) or were not perceived at fair measure (the risk of violation of rights and freedoms by the legislator).

III. Constitutional Foundations of EU-Membership

The current Constitution does not contain any explicit reference to EU membership. Since an amendment of 1956 article 49bis allows simply for "the exercise of powers reserved by the Constitution to the legislative, executive, and judiciary branches to be temporarily vested, by treaty, in institutions of international law". According to article 37 and 114, such treaties are to be approved by a law meeting the qualified (2/3) majority requirements established for constitutional amendments. The *Chambre* approved the ratification of the Rome, Maastricht, Nice, Amsterdam and Lisbon treaties by adopting each time such a law.

A. No specific provision on EU membership

With regard to EU membership, Luxembourg has pursued a strategy of minimal constitutional adjustments. The Grand Duchy ratified the ECSC and EDC treaties in absence of any constitutional provision on the transfer or delegation of powers to international organisations. Contrary to the opinion of the Government, which thought that the Constitution implicitly allowed such a transfer, the *Conseil d'État* assumed that the Constitution did not. For reasons of expediency, the *Conseil d'État* however did not oppose the legislature's approval of both treaties, but urged an immediate constitutional amendment to correct the perceived lacuna.

Thus, on 25 October 1956, the Constitution was amended to add Art. 49*bis*. Simultaneously, Art. 37 was modified to require such treaties to be approved by a law meeting the voting requirements established for a constitutional amendment in Art. 114. The regrettable wording of Art. 49*bis*, allowing only ‘temporary’ transfer of competences, is to be modified in the course of the current revision procedure. In the past this provision has always been construed very widely and has not hampered any ratification of subsequent EC/EU founding, revision or enlargement treaties. A proposal made in 2009 to introduce an entire new chapter on the European Union was ultimately withdrawn without debate.

Luxembourg’s constitutional culture also explains to some extent the sentiment, that EU related amendments are superfluous. In addition, the level of public support for the EU has always been one of the highest throughout the Union and is shared by all political parties in Parliament. European integration has never been conceptualised in Luxembourg as a threat to constitutional rules, principles or values. Thus, only constitutional rules that have become explicitly contrary to requirements of EU law have been amended.

Constitutionalising Luxembourg’s EU membership has been put on the agenda by the opinion of the *Conseil d’État* of June 2012 on the pending constitutional amendment proposal from April 2009. Although the Grand Duchy is one of the founding states of the European Union, its present Constitution does not contain any reference to this membership or to its constitutional foundations and implications.

A previous parliamentary proposal made by an MP in 2009 to introduce a completely new chapter on the European Union has never been discussed in substance. It was withdrawn from the registry of the *Chambre* without explanation when the Committee on Institutions and Constitutional Amendment started working on the more general proposal of restatement of the Constitution in November 2009.

In its opinion of June 2012, the *Conseil d’État* recommends constitutionalising Luxembourg’s participation in the process of European integration via a new Art. 5. Furthermore, the *Conseil* suggests further insertions: a reference to the voting rights of European citizens, an adoption of the ECJ’s formula with respect to access to public employment, and codification of the Grand Duke’s power to adopt regulations in order to assure compliance with the legal instruments adopted by the European Union, rather than proceeding by parliamentary statute. As previously mentioned, the 2009 Revision Proposal has yet to come to fruition, but a version thereof is expected to be approved by referendum sometime in early 2018.

The Working Draft as it stands in January 2016 contains several proposals for EU-related amendments. A new Art. 5 reads: ‘The Grand-Duchy of Luxembourg participates in European integration. The exercise of powers of the state may be transferred to the European Union and to international institutions by an Act of Parliament adopted by qualified majority’. Article 11 contains a reference to the ECJ’s well-established case law regarding access to public employment. It provides that: ‘The law determines access to public employment. It may reserve for Luxembourgers public employment including direct or indirect participation in the exercise of public authority and in the functions having as their object the safeguard of the general interests of the state’. Article 47(3) allows the Grand Duke to ‘adopt the necessary regulations for application of the legal acts of the European Union’. Finally, the draft provides for the *ex ante* control (through consultative opinions of the *Conseil d’État*, art. 88) and *ex post* review (by binding decisions of the courts, art. 96) of Acts of Parliament and regulations with regard to ‘higher law’, namely the Constitution,

international treaties, EU legislation and the general principles of law. According to Art. 96, '[t]he courts shall apply Acts and regulations only in so far as they conform to the norms of higher law'.

With regard to judicial control, it must be recalled that the jurisdiction of the Constitutional Court is strictly limited. Acts of the *Chambre* approving international treaties are explicitly excluded from the competence of the Constitutional Court (Art. 95ter(2)). In Luxembourg, this is considered as a consequence of the primacy of international treaties. In effect this means that cases such as *Lisbon* and *ESM* in Germany cannot arise in Luxembourg. Acts of the *Chambre* transposing or executing obligations deriving from secondary EU legislation are not explicitly excluded from the Constitutional Court's competence. Until now, no such Act has however been submitted to the Constitutional Court as a preliminary question by an ordinary court. The opinion seems to prevail that the 'immunity' of Acts approving treaties also covers Acts implementing secondary EU legislation.

B. Continued relevance of general provisions on international treaties

In absence of any specific 'EU clause' in the Constitution, Luxembourg's membership within the EU as well as its participation to any further steps of EU integration are currently governed by the general constitutional provisions on international treaties.

Regarding the ratification of international treaties, Art. 37 of the Constitution provides that treaties are operative after having been approved by law and published in the form specified for the publication of laws. Secret treaties are abolished. International treaties that transfer powers to international institutions need to be approved by Parliament, according to a special majority requirement of two thirds, similarly to the constitutional amending procedure as provided by Art. 114. Reservations to international treaties by Luxembourg require legislative approval as well.¹⁶ Article 95ter(2) explicitly prohibits the Constitutional Court from reviewing Acts of Parliament, which transpose international treaties in the domestic legal order. There is no reference to international customary law in the current Constitution nor in the draft of the future Constitution, which is under consideration.

Luxembourg's experience as one of the EU founding members shows, if necessary, that it is also feasible to participate successfully in the process of European integration for more than sixty years without any amendment of the constitution referring explicitly to the EU or EU law and on the foundation of a constitutional provision that allows only temporary delegation of powers to international institutions. The absence of a Europe clause has never been considered as a lacuna endangering constitutional values or fundamental rights standards. The intended amendments within the current revision procedure are rather seen as a commitment to European integration and an overdue adaptation of the Constitution to the legal reality.

C. Practice and doctrinal debate on these provisions

When Article 49bis was introduced in 1956 by a constitutional amendment this provision essentially raised two controversial questions: the position of the article in the Constitution's structure and its content. Regarding the first question, the *Conseil d'État* opined that this provision

¹⁶ See 'Approbation des traites' in *Besch Marc*, *Traité de légistique formelle* (2005) p. 143.

needs a distinct position in the Constitution because it introduces a derogation to the exercise of the sovereign powers (executive, legislative and judicial) that are also regulated in Arts. 33-49. Moreover, this provision deals with the exercise of a new type of power, which is also linked to sovereignty. For these reasons the *Conseil d'État* proposed the addition of a new article, 49bis, instead of incorporating a new paragraph in the existing provisions. As for the choice of the wording 'institutions of international law', the *Conseil d'État* had originally proposed the phrase 'international institutions'. This proposal, however, was not retained by the Parliamentary Committee, which opted for the term 'institutions of international law' in order to encompass not only international but supranational institutions as well.¹⁷

Drawing inspiration from the Belgian Constitution of 1831, Art. 37 was last modified by the 1956 constitutional amendment. During the revision, Art. 37 was at the centre of a debate between the Government and the *Conseil d'État*. The Parliament declared its intention to systemise and integrate all the constitutional provisions on international relations in one chapter, while the Government proposed the addition of a series of new articles to Art. 37 in order to exhaustively consolidate all the constitutional provisions on international relations. These proposals were weighed with care by the *Conseil d'État*, which opted for the solution of adding only a new Art. 49bis, leaving the structure of the Constitution intact.

The amendment of 1956 did not alter the principle of the approval of international treaties by Parliament. The constitutional amendment only specified the form that this approval would take, by adding the requirement of approval by a law. In its Opinion of 10 July 1956 the *Conseil d'État* underlined the distinction between the enforceability of the approving law and of the international treaty. They are two different procedures, which may take place simultaneously or separately, but both need to be compatible with the corresponding constitutional provisions. The *Conseil d'État* adopted, finally, one formal requirement, that of the publication of the approving law.

Article 46 of the proposed draft Constitution contains a similar provision to the current Art. 37 regarding the ratification of international treaties. Instead of naming the Grand Duke, the provision states that the 'Head of State' shall be responsible for concluding international treaties. The draft provision includes a reference to the procedure for the termination of an international treaty, similar to the procedure foreseen for the conclusion of a treaty, which is not included in the current version of Art. 37. The new draft article also states explicitly that the Head of State shall adopt all necessary regulations for the application of EU law in Luxembourg.

D. Constitutional amendments due to EU integration

1. Explicit amendments

As the principle of primacy of international law is taken very serious in the Grand Duchy, the *Chambre* has repeatedly affirmed its will to prevent discrepancies between international and internal law by adapting the respective domestic rules – including if necessary by an amendment of the Constitution. The following four examples hereafter illustrate to which extent EU integration has provoked constitutional amendments in Luxembourg.

¹⁷ Doc. Parl. No 25 (516), p. CCIV.

a. Introduction of article 49bis and revision of article 37 in 1956

Article 49bis has been introduced into the Constitution in 1956 in the context of the European integration process.

The ECSC Treaty as well as the European Defence Community Treaty raised the pivotal question whether the Luxembourgish legislature, executive, and judiciary may transfer powers to international institutions. The government considered that the existing Constitution would cover the transfer of powers. The *Conseil d'État* disagreed but decided not to oppose the approval of the Treaties as a “matter of expediency”, although it urged the necessity of immediate revision of the Constitution. Thereupon, both Treaties were approved respectively the 23rd of June 1952 and the 24th of April 1954 whilst the Constitution was revised only in 1956 with the introduction of Article 49bis: ”The exercise of the powers reserved by the Constitution to the legislature, executive, and judiciary may be temporarily vested by treaty in institutions governed by international law”. A proposal made in 2009 to introduce a complete new chapter on the European Union was finally not adopted.

b. Articles 9 and 107(2) and (4): Right to active and passive voting in municipal and European elections granted to all EU-citizens

In order not to risk the dissolution of the *Chambre* because of a revision of the Constitution pursuant to Article 114, the *Conseil d'État* argued that Article 8B(1) Maastricht Treaty would not be in conflict with the Constitution because it would not immediately grant rights individuals could directly invoke before any tribunal (see the second sentence of the Article: “This right shall be exercised subject to detailed arrangements to be adopted before 31 December 1994 by the Council, acting unanimously ...”).

Articles 9 and 107 were only revised in 1994. Consequently there have been 2 years of incompatibility between European and constitutional law entailing discussions about the compatibility of the Maastricht-Treaty with the Constitution and the procedure of the revision of the Constitution in virtue of Article 114.

Article 9 was completed with a new paragraph (3): “the law may confer the exercise of political rights to non-Luxembourgers”. Article 9 (3) confers henceforth to non-Luxembourger the exercise of political rights, i.e. the “cardinal political right” of active and passive voting.

c. Former Article 11(2), now Article 10bis(2): Access to all posts in the public sector for EU-citizens

The Constitutional legislator decided to revise the Constitution in the aftermath of a decision of the ECJ in 1996. The ECJ held indeed that the general prohibition for non-Luxembourger to work in the public service exceeded the limits of exception provided for in Article 48 (4) EC. In not complying with its obligation “to open the areas in question to nationals of other Member States by restricting application of the nationality condition to only those posts which actually involve direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interest of the State or of other public authorities”, Luxembourg failed its obligations under the Treaty.

In reaction to a revision draft introduced by the President of the *Commission for constitutional Revision*, the *Conseil d'État* did not agree that a revision would be necessary because the Constitution would not formally restrict the access of non-Luxembourgers to employment in public

service and, hence, would not be in contradiction of Article 48 (4) of the (Maastricht) Treaty. So, no revision was adopted.

However, in the context of the release of its recommendation relating to the project of law opening the public service to EU-citizens, the *Conseil d'État* accepted the argument that this project would necessitate a previous revision of Article 11 (2) (now Article 10bis, par. 2). As a result, Article 11 (2) was then revised in April 1999.

d. Article 114: Constitutional Revision Procedure

In the context of the 1994 revision, there was an attempt to change the procedure of constitutional revision pleading in favour of a duality of procedures: where an article of the constitution would be in conflict with international treaties' provision, an alleviated procedure should apply. However, the *Conseil d'État* argued in favour of a unique revision procedure. In 2003, Article 114 was finally revised (following the argument of uniqueness of the procedure), i.e. renouncing the requirement of dissolution of the *Chambre*.

2. Implicit amendments

The constitution does not determine the value of international treaties within the domestic legal order. Courts and scholars acknowledge however full primacy of treaties over internal law including the constitution.¹⁸ According to its founding statute, the *Conseil d'État* consequently monitors each draft bill on its compliance with all rules of "higher law". The latter category includes the constitution, international treaties and general principles of law. In addition, the statute of the Constitutional Court explicitly excludes treaty-approving laws from constitutional review. This is often justified with reference to the primacy of treaties. As a result, the conclusion of a treaty by the Grand Duchy may therefore induce constitutional change without revising the constitution. This is for instance the case with human right treaties adding rights to those guaranteed by the constitution itself or modifying their scope.

Treaties conferring competences, which the Constitution vested in domestic constitutional bodies, to international organisations obey to a special regime. Their parliamentary approval requires – due to article 37 – the same qualified majority (of two-thirds) within the *Chambre* as the vote of a constitutional revision act. Each conferral of competences to the European Union amounts thus to an informal change of the constitution.

E. Limits to European Integration outside the EU legal order

There are strictly no material limits to any enterprises of European Integration outside the existing treaty framework. The only formal limit foreseen by the Constitution is the requirement of a qualified majority within the *Chambre* if powers need to be transferred to international bodies. The national laws approving the participation in the rescue mechanisms (EFSM, EFSF, ESM) all passed by a large majority in the *Chambre* with the only exception of the Fiscal Compact that raised more debate and passed by a smaller majority (of still 46 out of 60 MP's). Luxembourg even gained some 'benefits' from the euro crisis. First, the EFSF was indeed established as a public limited liability company under the laws of the Grand-Duchy of Luxembourg and, second, the EFSF as well as the European Stability Mechanism (ESM), which is an intergovernmental organization, are both located in Luxembourg City.

¹⁸ See *Kinsch Patrick*, Le rôle du droit international dans l'ordre juridique luxembourgeois, in *Pasicrisie luxembourgeoise* 36 (2010) 383.

IV. Constitutional limits to EU-integration

There are no limits *ratione materiae* with regard to the extent to which powers can be transferred to the EU and there are no such limits to constitutional amendments in general. Neither the text of the Constitution nor case law nor constitutional commentary refers to such limits under Luxembourgish law.

If the Constitution of Luxemburg does not formulate any explicit material restriction to the *Chambre*'s power of constitutional revision, there are, however, two provisions of the constitution that ought to be mentioned.

According to article 113, "no provision of the Constitution may be suspended". This provision can be considered, on the one hand, as a kind of corollary of the principle that the constitution can only be revised following the procedure described by it in articles 114 and 115. On the other hand, it also tends to prohibit derogations to the constitutional functioning of the state and its organs during exceptional situations. Article 113 could also be construed as a prohibition to revise the revision procedure in such a way that it would be identical to the ordinary legislative procedure. The idea of a "suspended constitution" had also been mobilized in the context of the ratification of the Maastricht Treaty.¹⁹ It was criticized that ratification intervened without a prior revision (of Article 9 of the Constitution) introducing the right to vote for EU citizens. Some lawyers argued that the constitution should have been revised before the ratification of the treaty. The *Conseil d'État* considered that the treaty did not directly organize the exercise of these rights but required the adoption of a directive. Finally the constitution was revised in December 1994. During the period between the entry into force of the treaty and the final revision of the constitution, the latter was somehow suspended.

Article 115 provided initially that "no change in the Constitution can be done during a regency". It was revised in 1998 in the sense that from then on only changes in "the constitutional prerogatives of the Grand Duke, his status and the order of succession" are prohibited.

The restriction laid down in article 115 is simply a limitation *ratioae tempori* not *ratione materiae*. One can also wonder whether this provision has not lost its purpose since the revision of Article 34 of the Constitution, in which the Grand Duke's power to sanction laws was removed. Now the Grand Duke will never be able to oppose a revision of its powers neither during regency nor in ordinary times.

A. Limits to the (further) transfer of powers to the EU through Treaty amendments

The only hypothetical constitutional limit to EU membership is to be found in the 'Independence clause' of article 1 providing that Luxembourg is 'an independent state'.

1. 'Core competences'

The idea of 'core competences' whose exercise should remain in the hand of the domestic constitutional organs has never been introduced in the domestic constitutional law. Luxembourg's Constitution has never been based on a conception of absolute sovereignty. In the absence of any clause on the transfer or delegation of sovereignty, the *Conseil d'État* stated already in 1952 that 'a

¹⁹ Cf. *Bonn Alex*, La Constitution suspendue, in *Letzebuerger Land* No. 24 of 12 June 1992.

state may and must renounce certain parts of its sovereignty if the public good, the ultimate purpose of the state's organization, requires it'.²⁰ As the Constitutional Court may not review the constitutionality of Acts approving international treaties, there is no pertinent case law from this court.

One of the particular characteristics of Luxembourg's domestic legal order lies in the fact that its very existence results from 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'.²¹ Moreover, Luxembourg's courts have had no difficulty in recognizing the pre-eminence of international law and the primacy of EU Law, including in respect of a constitutional provision.²² This state of affairs also explains why it was not considered necessary to write a provision into the Constitution that would more explicitly authorize transfers of competences to the Union.

2. The 'independent' state clause

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."

This constitutional declaration 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.²³

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.

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." Luxembourg's 'member state status' will then be anchored in constitutional law. We can only regret that it is not in

²⁰ Opinion on the Ratification of the ECSC Treaty, doc. parl. n° 395/2, p. 3.

²¹ Cf. *Wivenes Georges*, Le droit européen et les constitutions nationales, Rapport luxembourgeois, in Lord Slynn of Hadley, Andenas (eds.), FIDE XX. Congress, (2002) 267.

²² Cf. *Kinsch Patrick*, Le rôle du droit international dans l'ordre juridique luxembourgeois, in *Pasicrisie luxembourgeoise* 36 (2010) 399, *Pescatore Pierre*, L'autorité en droit interne, des traites internationaux, in *Pasicrisie luxembourgeoise* 18 (1962) 97.

²³ Cf. *Wivenes Georges*, Le droit européen et les constitutions nationales, Rapport luxembourgeois, in Lord Slynn of Hadley, Andenas (eds.), FIDE XX. Congress, (2002) 267.

Article One that it is intended to write this European clause, as was the case in the past with membership of the German Confederation.

3. Respect of certain constitutional features at EU level

As a member state of the Council of Europe Luxembourg always made efforts to fully respect the basic principles of democracy, the rule of law and the protection of fundamental rights in its internal legal order. But due to the age of its constitution these principles have rather been implemented in Luxembourg as a result of its participation to European Integration in the widest sense than the other way around. Thus no requirements regarding the respect of these features by the EU institutions can be identified in the domestic law. The only elements that could become an issue are the preservation of the Luxembourgish social model and the multilingualism within the public sector. Both vehicle potential restrictions to free movement rights of EU citizens and the Grand Duchy considers them as part of its constitutional identity in the sense of article 4 TEU.

B. Scrutiny of secondary legislation, especially ultra-vires-doctrine.

1. Against the yardstick of national constitutional requirements.

The scrutiny of secondary legislation against the yardstick of constitutional requirements is made impossible in Luxembourg by means of the domestic rules of procedure.

In the case of conflict of an international or European engagement with the Constitution or legislative acts, the position of the domestic authorities is that national standards should be subject to revision or amendment before the international commitment is approved. Once approved, the respective international norms enjoy, in the pure monistic tradition, full primacy over rules of domestic law, even of constitutional value.²⁴

This rule also applies to the secondary legislation of the European Union.²⁵ All (civil and administrative) courts have accepted the full supremacy and direct effect of EU law in the very terms of the ECJ's case law, to which they regularly refer.

Acts of the *Chambre* approving international treaties are explicitly excluded from the competence of the Constitutional Court (Art. 95ter(2)). In Luxembourg, this is considered as a consequence of the primacy of international treaties. Acts of the *Chambre* transposing or executing obligations deriving from secondary EU legislation are not explicitly excluded from the Constitutional Court's jurisdiction. Until now, no such Act has however been submitted to the Constitutional Court as a preliminary question by an ordinary court. The opinion seems to prevail that the 'immunity' of Acts approving treaties also covers Acts implementing secondary EU legislation.

2. Against the yardstick of EU law.

There is no reported case where domestic courts would have directly scrutinized the legality of EU secondary legislation under rules of EU primary law. In case of doubt Luxembourg would initiate an action for annulment and/or the domestic courts would bring the matter before the ECJ as a preliminary question on validity. Actions of annulment have nonetheless remained very

²⁴ *Cour d'appel, arrêt du 13 novembre 2001*, n° 396/01V, *Annales du droit luxembourgeois*, 2002, éd. Bruylant, p. 456. *Cour supérieure de justice (assemblée générale), arrêt du 5 décembre 2002*, n° 337/02, *Annales du droit luxembourgeois*, 2003, éd. Bruylant, p. 683.

²⁵ Conseil d'Etat, 21 novembre 1984, *Pasicrisie lux.* 26, p. 174.

exceptional. The database of the ECJ contains only eight cases in which the Grand Duchy sought to obtain the annulment of EU secondary legislation.²⁶ Three of them concerned measures of the Parliament regarding its seat or working place. Two were directed against Commission decisions concerning the clearance of EAGGF accounts. Two were finally directed against EU directives.

Article 13 of the Constitution states that “no-one may be reassigned against his will to a court other than that designated by law”. This includes the Court of Justice of the EU, which must be considered a “legal court” in the meaning of the 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 only remedy available under Luxembourg law would then be to introduce an action for liability against the State.²⁷ 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.²⁸ In the fifty-two years from 1963 to October 2015, Luxembourg courts introduced altogether 88 preliminary rulings but only one on validity (in case C-114/96).

There are unfortunately no reliable statistics available in Luxembourg concerning the number of cases in which the applicants have requested a preliminary ruling with regard to the validity of EU measures. Between 2000 and 2015, only two cases were identified after a thorough research of the case law of the respective civil, social and administrative courts.

First, in a case brought to the *Conseil supérieur des assurances sociales*, the applicant challenged the validity of Regulation 1408/71 (on the cooperation between social security systems) with regard to former Art. 48(2) EC (now Art. 45 (2) TFEU) on the free movement of workers. It was argued that the application of the residence clause in Art. 71 of that Regulation constitutes indirect discrimination on grounds of nationality with regard to unemployed frontier workers.²⁹

Second, in a case brought to the *tribunal administratif*, the applicants challenged the validity of Directive 2003/87/CE (from 13 October 2003, establishing a scheme for greenhouse gas emission allowance trading within the Community) based on the ground that the Directive would not sufficiently take into account the specific situation of the steel industry within global competition.³⁰ The courts did not submit a reference for a preliminary ruling to the ECJ in either of these cases.

V. Constitutional rules and/or practice on implementing EU law

As there are currently no constitutional rules regarding EU membership in general the reader will not be astonished to learn that there are no constitutional rules on implementing EU law neither. Ordinary law, practice and the internal rules of the *Chambre des Députés* deal with the matter.

²⁶ Cases C-230/81, C-49/83, C-108/83, C-213/88 jointe with C-39/89, C-168/98, C-158/00 and C-176/09.

²⁷ Cf. *Ravarani Georges*, Rapport luxembourgeois au Colloque des Conseils d’État du Benelux, 10 October 2013, La transposition et la mise en œuvre des actes normatifs de l’Union européenne en droit national, http://www.conseil-État.public.lu/fr/actualites/2013/10/C_Colloque_Benelux/index.html.

²⁸ Cf. also *Hoffmann Jean-Paul*, *Les questions préjudicielles posées par les juridictions luxembourgeoises à la CJCE*, in *Mélanges F. Schockweiler* (1998) 5; and *Weirich Manou*, *L’application du droit communautaire au Grand-Duché de Luxembourg*, in *Livre jubilaire de la Conférence Saint-Yves* (1986) 982.

²⁹ Arrêt du 3 décembre 2007, ADEM 2006/0094.

³⁰ Arrêt du 5 avril 2006, nos. 20372 et 20373 du rôle.

A. Binding (parliamentary or governmental) resolutions for the Ministers in the Council?

Luxembourg's Constitution does not contain specific provisions concerning the rules governing the participation of the *Chambre* in EU affairs. Although Prime Minister Juncker suggested such an amendment in the course of the ratification procedure of the Lisbon Treaty in 2008, the *Chambre* did not accept his proposal. It allegedly feared that it was not sufficiently staffed to face this responsibility.

Thus it is a simple 'Memorandum on Cooperation between the *Chambre* and the Government of the Grand Duchy of Luxembourg in the Field of EU Policy', which is annexed to the rules of procedure of the *Chambre* that governs the rights and duties of both institutions in this respect.³¹ Introduced on 2008, this memorandum contains in particular rules on the right of the *Chambre* to be informed on issues of European policy.

The Lisbon Treaty recognises the right of national parliaments to contribute actively to the good functioning of the Union (Art. 12 TEU). From the review of official documents of the European institutions to the transposition of directives into national law, the action of the *Chambre* in the political sphere of the European Union is thus manifold. National parliaments are indeed involved by monitoring the activity of their respective national governments on the European level. In the Grand Duchy of Luxembourg, a parliamentary committee invites the ministers to its sessions before and after Council meetings.

The *Chambre* contributes to the monitoring of respect of the subsidiarity principle laid down in the Treaty of Lisbon.³² Beyond these two main powers, the *Chambre* participates in inter-parliamentary cooperation within the Union. Inter-parliamentary meetings are held mainly within the framework of the Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union (COSAC) and the Conference of Presidents of Parliaments of the European Union. Information on the analysis of EU documents is transmitted between national Parliaments through the platform for EU Interparliamentary Exchange (IPEX) database.

The control exercised by the *Chambre* over the Government in the field of European affairs appears altogether rather modest compared to practices in other Member States. In EU affairs as in domestic affairs the *Chambre* monitors the Government's activities mostly by ordinary means of parliamentary questions, the scrutiny of government reports or, if necessary, by creating investigation committees on specific issues.

B. Participation of the national parliament in secondary law making

The participation of the *Chambre des Députés* in European affairs has developed outside of the Constitution. Its 'European function' is no less real for all that.³³ Under the new Article 12 of the

³¹ Aide-mémoire sur la coopération entre la Chambre des députés et le Gouvernement du Grand-Duché de Luxembourg en matière de politique européenne.

³² See *Gennart Martin*, *Le contrôle parlementaire du principe de subsidiarité. Droit belge, néerlandais et luxembourgeois* (2013).

³³ Cf. *Mayer Martina*, *Die Europafunktion der nationalen Parlamente in der Europäischen Union* (2012) and *Dumont Patrick* and *Spreitzer Astrid*, *The Europeanization of Domestic Legislation in Luxembourg*, in S. Brouard, O. Costa,

TEU, all 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".³⁴ 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.

C. Techniques of implementing secondary legislation

The transposition and implementation of EU measures can be realised in Luxembourg by acts of parliament or grand ducal decrees. Doing so by grand-ducal decrees is undeniably seen as a way to increase the speed of implementation, as well as the Grand Duchy's ranking on the European Commission's scoreboards. Every year, the Government as well as the *Chambre* proudly announce the progress made in this respect. The matter is currently determined by an Enabling Act (*loi d'habilitation*) adopted by the *Chambre* in 1971.³⁵ This Act, however, is limited in scope and has not really proven an 'appropriate and effective response' to the problems encountered.³⁶ The Working Draft of the current constitutional amendment procedure foresees the addition of an article to the Constitution that will explicitly give the executive power the competence to transpose and implement EU measures by grand-ducal decree. Parliamentary Acts will thus 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.

The inclusion of a new Art. 47 in the Constitution, set out in the 2015 Working Draft and which obligates the Head of State to adopt all the necessary regulations for the application of legally binding acts of the European Union, will eradicate a number of legal uncertainties in this area.

According to the memorandum on cooperation between the *Chambre des Députés* and the Government in European policy in force since 1 July 2008, the Government undertakes to submit annually, during the first semester, a report to the *Chambre* on the transposition of EU directives and the application of the law of the European Union. The 2015 report is the ninth report on the transposition of EU directives. This is, as in previous editions, a public report. Over the last decade, Luxembourg has gradually managed to improve its results in the transposition of EU directives. The transposition deficit of Luxembourg, which already showed a significant downward trend, from 4% (in May 2005) to 1.1 % (in May 2015), is currently turning around the 1 % goal set by the European Council in March 2007.

T. König (eds.), *The Europeanization of Domestic Legislatures, The Empirical Implications of the Delors' Myth in Nine Countries* (2012) 131.

³⁴ Cf. on this point, *Gennart Martin*, *Le contrôle parlementaire du principe de subsidiarité. Droit belge, néerlandais et luxembourgeois* (2013).

³⁵ Law (as amended) of 9 August 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."

³⁶ Cp. *Schmit Paul*, *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*, http://www.conseil-État.public.lu/fr/actualites/2013/10/C_Colloque_Benelux/index.html at p. 5 and *Weirich Manou*, *L'application du droit communautaire au Grand-Duché de Luxembourg*, in *Livre jubilaire de la Conférence Saint-Yves* (1986) 965.

D. Enforcement through the Courts, including the protection of the EU Charter of Fundamental Rights.

All courts have accepted the full supremacy and direct effect of EU law in the very terms of the ECJ. In the field of fundamental rights there is a long tradition to directly apply the provisions of the ECHR and since the entry into force of the Lisbon treaty the domestic courts frequently refer to the Charter. In a recent case the administrative court even proceeded to an *ex officio* application of the CFR.³⁷

VI. Relationship between EU law and national law

One of the 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”.³⁸ 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.³⁹ 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. There is now a set of norms ranked supra-legislative and designated by the term “higher law.” It is within the remit of the *Conseil d’État* to monitor the compliance of draft bills and draft regulations with the rules of higher law. The amended act of 12 July 1996, reforming the *Conseil d’État*, 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 *Conseil d’État* 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 88, explicitly including within it the “legally binding decisions of the European Union”. It is also intended to state in Article 96 that “courts shall only apply acts and regulations to the extent that they comply with rules of higher law”.

The Constitution does not contain any explicit rule on the legal value of international or European Law within the domestic legal order. Nonetheless, according to well-settled case law and the position of the *Conseil d’État* as well as Luxembourgish scholars, self-executing international

³⁷ Judgment of 17.12.2015, 36893C.

³⁸ *Wivenes Georges*, Le droit européen et les constitutions nationales, Rapport luxembourgeois, in Lord Slynn of Hadley, Andenas (eds.), FIDE XX. Congress, (2002) 267.

³⁹ Cf. *Pescatore Pierre*, L’autorité en droit interne, des traites internationaux, in Pasicrisie luxembourgeoise 18 (1962) 97 *Kinsch Patrick*, Le rôle du droit international dans l’ordre juridique luxembourgeois, in Pasicrisie luxembourgeoise 36 (2010) 383.

treaties enjoy full primacy with regard to the provisions of internal law, including the Constitution itself.⁴⁰

The case law on this point was developed from the early 1950s when first the *Cour de cassation* (the highest civil court) and subsequently the *Conseil d'État* (as the former highest administrative court) reversed the previously defended position that judicial control of the compliance of parliamentary Acts with international treaties was not possible because of the principle of separation of powers.⁴¹

According to the reference decision of the *Conseil d'État* in 1951, 'an international treaty incorporated into domestic law by a law of approval is law of superior essence having a higher origin than the will of an internal organ. It follows that in the case of conflict between the provisions of an international treaty and those of a subsequent national law, international law must prevail over national law'.⁴²

The wording of this decision is clearly very wide, as the judgment states without distinction that an international norm prevails over the will of any internal organ. It will be noted however that in 1956 the *Chambre* expressly rejected a governmental constitutional amendment bill, which provided that '[t]he rules of international law are part of the national legal order. They supersede all other law and national provisions'. According to this draft, primacy would have encompassed constitutional provisions.

The *Conseil d'État*, however, implicitly accepted such a general primacy in an opinion of 26 May 1992 on the draft Act Approving the EU Treaty. Indeed, it considered that "it should be borne in mind that under the rule of the hierarchy of legal norms, international law takes precedence before national law and, in the case of conflict, the courts shall dismiss domestic law in favour of the Treaty. As it is important to avoid a contradiction between national law and international law, the *Conseil d'État* insists that the related constitutional amendment take place within due time to prevent such a situation of incompatibility".⁴³

In the case of conflict of an international or European engagement with the Constitution or legislative acts, national standards should be subject to amendment before the competent national authorities approve the international commitment. Once approved, the respective international norms enjoy, in the pure monistic tradition, full primacy over rules of domestic law, even of constitutional value.⁴⁴ This rule also applies to the secondary legislation of the European Union.⁴⁵

⁴⁰ Cf. *Kinsch Patrick*, op. cit. p. 399.

⁴¹ *Cour de cassation, arrêts des 8 juin 1950*, Pasirisie lux. 15, p. 41, et 14 juillet 1954, *Chambre des métiers c. Pagani*, Pasirisie lux. 16, p. 151; JT 1954, p. 694, note Pescatore.

⁴² *Conseil d'Etat, (Comité du contentieux), 28 juillet 1951, Dieudonné c/ Administration des contributions*, Pas. lux. t. XV, p. 263.

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⁴⁴ *Cour d'appel, arrêt du 13 novembre 2001*, n° 396/01 V, *Annales du droit luxembourgeois*, 2002, éd. Bruylant, p. 456. *Cour supérieure de justice (assemblée générale), arrêt du 5 décembre 2002*, n° 337/02, *Annales du droit luxembourgeois*, 2003, éd. Bruylant, p. 683.

⁴⁵ *Conseil d'Etat*, 21 novembre 1984, Pasirisie lux. 26, p. 174.

VII. Miscellaneous: The current constitutional amendment procedure

As mentioned above, 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.⁴⁶ 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.⁴⁷ 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 2012.⁴⁸ This text of 216 pages appears like a true ‘counter proposal’ completed by a comparative table confronting the 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 2015.⁴⁹

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.⁵⁰ 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.

⁴⁶ Cp. *Gerkrath Jörg*, Some remarks on the pending constitutional change in the Grand Duchy of Luxembourg, in *European Public Law* 13 (2013) 449.

⁴⁷ 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.

⁴⁸ Avis du Conseil d’Etat du 6 juin 2012, no. 48.433, doc. parl. 6030/06.

⁴⁹ See http://www.referendum.lu/Uploads/Nouvelle_Constitution/Doc/1_1_PropositionNouvelleConstitution.pdf

⁵⁰ Cf. <http://www.chd.lu/wps/portal/public/RoleEtendu?action=doDocpaDetails&backto=/wps/portal/public&id=6030>

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. 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’.⁵¹ 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.⁵²

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.⁵³ 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 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.⁵⁴

A second decisional referendum, planned in 2018, 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.

⁵¹ 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.

⁵² 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.

⁵³ See the Opinion of the Conseil d’Etat of 13 January 2015, doc. parl. 6738/1, p. 2.

⁵⁴ See doc. parl. 6738/2 of 23 January 2015.

Key words

‘Consensus democracy’ - Constitutional monarchy - EU citizens - Frontier workers – ‘Higher Law’ - Independent state - Legal pragmatism - ‘Luxembourgish social model - Monism – Primacy – Referendum -

Legal norms

Transposition of directives :

Loi du 9 août 1971 concernant l’exécution et la sanction des décisions et des directives ainsi que la sanction des règlements des Communautés européennes en matière économique, technique, agricole, forestière, sociale et en matière de transports, Texte coordonné, in Code administratif, 2013, vol. 4.

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<http://www.chd.lu/wps/wcm/connect/a0c135804e295b92b693f7010df100bc/referendum2005.pdf?MOD=AJPERES>.

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