

The Grand Duchy of Luxembourg

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1. The previous edition of this chapter was edited by Luc Frieden.

I. Constitutional development

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 "own" constitution was only granted on 12 October 1841. This "Constitution of Estates" concluded a pre-constitutional historical development lasting almost a thousand years.

Luxembourg was first mentioned as a geographic entity in 963² as part of what was later to become the Holy Roman Empire. Having grown in size and significance, it became a duchy under Wenceslas I in 1354 and was soon attracting the interest of the then major powers. After 1443 – the year in which Philip III the Good, duke of Burgundy, took the town of Luxembourg – Luxembourg belonged successively to Burgundy (1443-1506), Spain (1506-1684), France (1684-1698), Spain (1698-1714), Austria (1714-1795) and again France (1795-1815).

In this age of dependence on the most powerful royal dynasties of Europe, Luxembourg lost important parts of its territory. By the Treaty of the Pyrenees (1659), Spain gave the southern part of Luxembourg (including the towns of Thionville and Montmédy) to France. Though the Final Act of the Congress of Vienna (1815) raised Luxembourg to the status of a grand duchy, it ceded at the same time the eastern part of the country, with the towns of Bitbourg and St. Vith, to Prussia.

Most authors who have analysed Luxembourg's constitutional history divide the process into two main phases. There was a first phase of instability from 1815 to 1868 during which the country was consecutively governed by five different constitutional documents, only the three most recent being genuinely Luxembourgish. The second phase starts with the Constitution of 1868 which is, after numerous amendments, still in place today.

The Final Act of the Congress of Vienna declared Luxembourg a member of the German Confederation and conferred ownership and sovereignty on William I, King of the Netherlands and grand duke of Luxembourg. In practice and due to this personal union, the Constitution of the Netherlands, the *Grondwet* from 24 August 1815, was applied to the Grand Duchy of Luxembourg, which was administered by the King Grand Duke, as if it was part of the Kingdom of the Netherlands like the (other) 17 Dutch provinces. From 1830 to 1839, during the Belgian Revolution, Luxembourg experienced a remarkable legal division. The fortress and town of Luxembourg remained occupied by troops of the German Confederation and governed by the Dutch Constitution, while the rest of the country became the Belgian province of Luxemburg, subject to the new and liberal Belgian Constitution of 7 February 1831. This situation of "constitutional dualism" continued until 1839.

In 1839, the Treaty of London – although recognizing the independence of both the Kingdom of Belgium and the Grand Duchy of Luxembourg – allotted the French-speaking

2. *Lucilinburhuc* is mentioned for the first time in a document from 963 certifying that Sigefroy, the future first count of Luxembourg, obtained it from the abbey of Saint-Maximin de Trèves in exchange for some land in the Ardennes.

part of the Grand Duchy, in fact three-fifths of its territory, to Belgium while also definitively determining Luxembourg's present-day borders. There was a degree of uncertainty as to whether this meant the re-entry into force of the Dutch *Grondwet* or the application of a transitional regime under the Royal Grand Ducal Order of takeover of possession of 11 June 1839.³

Today the Grand Duchy covers an area of 2,586 square kilometres and has a resident population of 510,000, of whom 43 per cent are foreigners.

I. THE 1841 CONSTITUTION OF ESTATES

On 12 October 1841, William II granted the first Luxembourg Constitution in accordance with the principles of the German Confederation. This "chartered constitution", *constitution octroyée*, greatly resembled the Dutch Constitution, the *Grondwet* of 1815, and gave the country administrative autonomy.

The grand duke was given sovereignty and all powers vested in him. An *Assemblée des Etats* (Assembly of Estates) was established as a permanent legislative body, whose members were indirectly elected for a period of six years, renewable for half of them for again three years. However, the powers of the Assembly were limited. Its consent was required only for amendments of tax and criminal laws as well as for tariff regulations; for any other legislation only its opinion was required. Furthermore, the Assembly voted yearly on the extraordinary budget whilst the ordinary budget had to be adopted during its first meeting.

The *Conseil de Gouvernement* or government council was the executive body of the State. It was of limited significance and primarily had an advisory role in the administration.

Justice was administered by courts designated by law. The Constitution did not contain any provisions on fundamental political rights. It did however guarantee elementary civil rights such as equality before the law, personal liberty, the inviolability of property and the home, and freedom of conscience and religion.

Though the Charter of 12 October 1841 did at least acknowledge the administrative autonomy of the country, it took no account of the actual situation there. To develop, the Luxembourg economy and in particular the steel industry needed economic and political freedoms. And indeed, the authoritarian regime enshrined in the 1841 Charter was not accepted by all sections of society.

2. THE LIBERAL CONSTITUTION OF 1848

Soon after the promulgation of the 1841 Charter, many Luxembourgers desired its revision. William II initially refused, but had to give way under the pressure of international events, in particular the revolutions in France and Germany of 1848, and a social crisis in Luxembourg caused by two difficult years of hunger, prices increases and a high rate of unemployment. The government therefore convoked an *Assemblée*

3. Cf. On this period Paul Eyschen, *Das Staatsrecht des Grossherzogtums Luxemburg*, 1890, p. 10, Pierre Majerus, *L'Etat luxembourgeois*, 1990, p. 26, Alex Bonn, "L'évolution de la pensée démocratique dans la constitution luxembourgeoise : 150 ans de vie constitutionnelle", in "Mémorial 1989 : La société luxembourgeoise de 1839 à 1989", les Publications mosellans, 1989, p. 33 and Luc Hommel, "Les étapes constitutionnelles du Grand-Duché de Luxembourg", L'édition universelle, Bruxelles 1935, p. 11.

constituante (constituent assembly) within the Assembly of Estates which adopted a new Constitution on 23 June 1848. Most of the new constitutional provisions were copied from the very liberal Belgian Constitution of 1831 and was received enthusiastically by the population.

Article 1 of this Constitution provided that the Grand Duchy was an independent, indivisible and inalienable state that formed part of the German Confederation. Sovereignty resided in the Nation. The existence of a legislature, an executive and a judiciary was explicitly confirmed. Legislative power was vested jointly in the grand duke and the *Chambre des Députés* (Chamber of Deputies). Both had the right of initiative. The grand duke was required to promulgate laws within three months after the Chamber had accepted them. Deputies were elected for six years. Each year they considered both the ordinary and extraordinary budgets. Members of the government were appointed and dismissed by the grand duke. His decisions had to be countersigned by a member of the government who bore political, criminal and civil responsibility. Justice was administered by courts whose judgments were enforced in the name of the grand duke. The most important procedural law safeguards were incorporated in the Constitution. Political freedoms, such as freedom of the press and freedom of assembly and association were recognized.

Though very popular with the Luxembourgers, the 1848 Constitution was not appreciated by William III who succeeded his father on 17 March 1849. The young sovereign proved to be a defender of the royal prerogatives against “parliamentary omnipotence”. The winds of Restoration were blowing throughout Europe. In Germany, the Frankfurt National Assembly had been disbanded in 1849. In France, the revolution was consigned to history: the Emperor Napoleon’s nephew had been, first, elected President of the Republic and, after a bloody *coup d’état* in 1851, had then established personal rule proclaiming himself emperor Napoleon III.

3. THE *COUP D’ÉTAT* OF 1856

In 1853, William III instructed the government to prepare a revision of the Constitution with the intention to restore monarchy. However, the Chamber refused to cooperate, was dissolved on 15 May 1854 and the subsequent elections resulted in a majority of deputies loyal to the crown. However, as the complementary elections in 1855/66 of half of the deputies of the Chamber produced again a majority that was hostile to the amendments the sovereign proposed, the king/grand duke staged a coup. He dissolved the Chamber in November 1856 and promulgated the revised text of the Constitution that had originally been put before the Chamber and had been rejected. The new Constitution restored monarchy and abolished the parliamentary system. Though this Constitution was clearly adopted in breach of the formal requirements of amendment of the 1848 Constitution, it was presented as an amendment and was published by a Royal Ordinance from 27 November 1856 “carrying revision of the Constitution”.

Sovereignty was again conferred on the grand duke, the Chamber of Deputies became again an Assembly of Estates and its sessions were limited to forty days. Both the grand duke and the Assembly retained the right to initiate legislation, but all laws required the consent of the Assembly. The budget was no longer debated annually by the Assembly; only the extraordinary budget was adopted each year. In order to counterbalance the “legislative power” of the Assembly, a *Conseil d’État* (Council of State) was established

which assisted in the preparation of laws and advised on all bills and amendments. Its members were appointed and dismissed by the grand duke.

The grand duke had sole responsibility for the composition and organization of the government. He appointed and dismissed its members, who were stripped of any political responsibility. All decisions of the grand duke had to be countersigned by a counsellor of the Crown (member of the government), who bore criminal and civil liability. The concept of “the judiciary” did not appear in the Constitution. Though courts administered justice in the name of the grand duke, their powers were limited. The power to review the legality of *arrêtés* (orders) and *règlements* (regulations) was conferred on the newly created Council of State which, in addition, was entrusted with deciding conflicts of jurisdiction and administrative disputes. Thereby, the Council of State had not only a legislative but also a judicial function. With respect to human rights, civil rights were maintained, but fundamental political rights, such as freedom of the press and of assembly, were subject to restrictions and their scope curtailed.

4. THE 1868 CONSTITUTION

The 1856 Constitution remained in force for only twelve years. In the aftermath of the dissolution of the German Confederation in 1866 and the London Conference in 1867, which had confirmed the independence and permanent neutrality of the Grand Duchy, a revision of the Constitution became essential and William III consented in accordance with the Assembly to grant a more liberal constitution. The formal revision act of 17 October 1868, “carrying revision of the Constitution of 27 November 1856”, declares in Article III that the revised text “constitutes for the future the text of the Constitution of the Grand Duchy”. Again, the document dating from 1868 is in fact not a new constitution, but a revised version of the Constitution of 1856.⁴

The new Constitution confirmed the new international status of Luxembourg. It became an “independent, indivisible, inalienable and eternally neutral” state. If the throne was vacant, the Chamber would provide first for a regency and then for succession to the throne. The grand duke was to exercise his power according to the Constitution and the laws of the land. His decisions were subject to countersignature by a member of the government, who bore political, criminal and civil responsibility. The most important constitutional changes concerned the strengthening of the position of the Chamber, restoring the previous balance between itself and the grand duke in legislative matters. The Assembly of Estates was renamed Chamber of Deputies and an act of parliament determined the number of deputies. Deputies were elected for six years. The Chamber adopted its own rules of order and appointed its own chairman and vice-chairman. Sessions were no longer of limited duration. Though the grand duke could close a session at will, a minimum term was guaranteed because both the extraordinary and the ordinary budgets had to be adopted each year. All bills had to be voted twice – the second vote had to take place after a minimum period of three months – unless the Chamber agreed with the Council of State to omit the second vote. The grand duke assented to laws, promulgated them and had to announce his decision within six months of the vote in the Chamber.

The grand duke still determined the composition and organization of his government which consisted of at least three members. The Council of State, established by the 1856 Constitution, was retained. However, its judicial powers were curtailed. Although the

4. See Georges Ravarani, “La Constitution luxembourgeoise au fil du temps”, *Annales du droit luxembourgeois* n° 17-18 (2007-2008), p. 66 in footnote.

Council of State kept the authority to decide administrative disputes, the courts were again given power to examine the legality of *arrêtés* and *règlements*, while the *Cour Supérieure de Justice* (Superior Court of Justice) decided conflicts of jurisdiction.

As to human rights, the new Constitution guaranteed again fundamental political rights by strengthening the freedoms of press and of assembly.

The 1868 Constitution confirmed the principle of constitutional monarchy. It contributed, by the freedoms it conferred on Luxembourgers, to the economic and industrial development of the country. It was adapted to the needs of the time, which also explains why, although it has been revised, it is still in force today.

A closer look at the historic dates of successive Constitutions reveals that besides the first Constitution of 1841, the three following documents of 1848, 1856 and 1868 were either the result of formal revision procedures (1848 and 1868) or at least presented as such, whereas in fact major formal requirements had not been observed (1856). Even the rupture of constitutional legality in 1856 should not be overrated, since several core elements of the 1856 Constitution, for example the Council of State and the double constitutional vote, were retained in the 1868 Constitution.

5. THE 1919 AMENDMENT

In 1919, after the First World War and in the aftermath of a referendum in September confirming the will of the population to remain a constitutional monarchy, the Chamber decided to consolidate the parliamentary democracy of the Grand Duchy. Sovereignty was thus explicitly conferred on the Nation; the grand duke – in fact, the grand duchess Charlotte had just taken over the reign from her sister Adélaïde – retained no powers other than those explicitly conferred on him by the Constitution itself or by laws in implementation of the Constitution. Secret treaties were abolished and all international treaties concluded by the grand duke had to be approved by law. 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. To qualify for election, a person had to be 25 on the day of the elections. The Constitution now explicitly stated that voters could express their views by referendum in cases and under conditions determined by law.

6. THE 1948 AMENDMENTS

The Constitution was not amended in the period between the two world wars, and it was not until after the Second World War that the Constitution underwent a thorough overhaul. This time, the main focus was on incorporating into the Constitution the social and economic changes that had taken place in the country in the meantime. Rights and freedoms such as the right to work, the right to social security and the freedom to form and join trade unions were henceforth included in the revised Constitution, as was the protection of the family and the promotion of education (primary education was made compulsory and free of charge). However, most of the social and economic rights are only declarations of principle with no precise legal significance. They require the legislature to carry out a legislative programme, but cannot be applied or enforced by the courts until a range of legislative measures have been implemented. The other significant changes to

the Constitution concerned the abolition of Luxembourg's neutrality (the Second World War had shown that a mere declaration of neutrality was in no case sufficient to protect from occupation), the grand duke's assent to laws (the period for promulgation was reduced from six months to three months), the civil list, the language to be used in administrative and judicial matters⁵ and the legal position of deputies (including a longer list of "incompatibilities").

7. THE 1956 AMENDMENTS

Luxembourg was one of the first members of the European Coal and Steel Community, but the ECSC Treaty and later the European Defence Community Treaty raised a number of constitutional issues within the Grand Duchy. After all, these treaties were based on the premise that Community organs would exercise powers which the Luxembourg Constitution conferred on the legislature, executive and judiciary. It was therefore necessary to revise the Constitution, all the more so given that the ECSC was a success and that the formation of similar communities was being considered.

Consequently, Article 49bis was inserted into the Constitution, which provides that the exercise of powers reserved to the legislature, executive and judiciary may temporarily be vested by treaty in institutions governed by international law. Furthermore, the term for which deputies are elected was reduced from six to five years.

8. THE 26 AMENDMENTS ADOPTED SINCE 1972

In 1972, the Chamber of Deputies reduced the minimum voting age to 18 years and the minimum age for election to 21 years. The residency requirement in relation to electoral rights was abolished.

The 1979 constitutional amendment was intended to confirm municipal autonomy and the role of local government. On the one hand, it specified more clearly the powers of the municipal council, on the other, those of the municipal executive. It also established the principle and limits of supervision of the municipal administration.

In 1983, the text of the oath the grand duke, the regent, deputies and civil servants have to take when they accept office was amended.

The 1988 amendment set the number of deputies at sixty. Before that, the number depended on the size of the population.

Eleven articles were amended in 1989. The main change was that the Council of State was given constitutional status as an independent office. Until then the Constitution mentioned the Council of State in the section on the government and referred to it as a "council advising the government".

In 1994, the Constitution was adapted in accordance with the Maastricht Treaty in order to enable non-Luxembourgers to exercise political rights.

The major 1996 amendment modified the administrative jurisdiction to the core. The Council of State (*Comité du contentieux*) lost its competence to decide administrative

5. The national language of Luxembourg is Luxembourgish (also called Letzeburgesch). Laws and other regulations are drafted in French; if a translation is provided, only the French text is authentic. Unless special laws apply, French, German and Luxembourgish may all be used in the administration and in the judicial system. If a petition or appeal is written in Luxembourgish, French or German, the administration must, if at all possible, respond in the same language.

disputes. Instead, administrative courts were set up and a newly created Constitutional Court has since been responsible for verifying that laws are not unconstitutional.

In 1998, the grand duke's function as head of state and guarantor of the independence of the nation was finally explicitly included in the Constitution.

In 1999, more than twenty years after the death penalty was abolished by law, an article was inserted into the Constitution providing that the death penalty cannot be reintroduced. Other amendments concerned the admissibility of non-Luxembourgers to public functions, access to free primary education for any person living in Luxembourg and, finally, the activities of the *Cour des Comptes* (Court of Auditors, Art. 105).

To enable approval of the statute of the International Criminal Court, the 2000 amendment included an article (Art. 118) which provided that the provisions of the Constitution would not constrain the approval and implementation of the statute.

The amendment of February 2003 reduced the minimum age for election to 18 years while the amendment of December 2003 considerably changed the procedure to revise the Constitution in order to make it more flexible.

In 2004, minor modifications were made to Articles 24 (freedom of the press) and 65 (modalities of voting in the Chamber). Another amendment reorganized regulatory power between the grand duke, the ministers and certain public institutions. This became urgent because of a judgment of the Constitutional Court which censured a practice contrary to the strict wording of the Constitution.

In 2005, a technical amendment had to be added to Articles 37, 51 and 107 taking into account the 2003 amendment of Article 114 to which these provisions refer in order to fix a qualified majority constraint for four types of specific laws. This had been overlooked during the December 2003 amendment procedure.

The 2006 amendments concerned, on the one hand, a reformulation of the rules regarding immunity of members of the Chamber and the conditions for waiving immunity (Arts. 68 and 69) and, on the other hand, an amendment of Article 11(2) in order to insert the principle of equality between men and women.

In March 2007, Articles 11 and 11bis were amended in order to strengthen several human rights and to introduce new constitutional objectives such as protection of the environment. In October 2007, as a consequence of several judgments of the Constitutional Court, Article 16 on expropriation in the public interest was amended so that financial compensation no longer needs to precede the expropriation itself.

Minor amendments were made in 2008, introducing a new Article 32bis on the role of political parties and simplifying the conditions for naturalization of foreigners (Art. 9 and erasure of Art. 10).

Finally, in 2009, Article 34 was amended and the grand duke lost the power to "sanction" acts of Parliament, including constitutional revision acts. His involvement in the legislative process is therefore now limited to the promulgation of those acts, and this is considered a pure formality.⁶

The quantitative impact of revisions to the text of the Constitution is not as great as might be expected. Altogether, 70 of 121 articles of the original text of the Constitution have never been amended. Forty-seven articles have been revised one or more times. Articles 11 (social and economic rights of the individual person and the family) and 51 (Chamber of Deputies), for instance, have each been modified five times. Articles 10, 63, 73 and 121 have been abolished. And eight new articles have been inserted. Despite the many

6. Cf. Luc Frieden, "Luxembourg: Parliament abolishes royal confirmation of laws", *Int J Constitutional Law* 2009, p. 539-543.

constitutional amendments that have taken place since promulgation, the current Constitution still very much corresponds to the 1868 text.

From a qualitative perspective, the main amendments can be grouped into four categories: strengthening parliamentary democracy, adapting the Constitution to the needs of European integration, completing the catalogue of fundamental rights, and modernizing the Constitution according to the principle of “rule of law”. None of these four objectives has yet been fully achieved, and the general revision procedure, currently in progress, aims to do that and to erase a number of old formulations and incoherencies, which have resulted from the sum of limited modifications in the past.

9. THE GENERAL REVISION PROPOSAL OF 21 APRIL 2009

Currently, the Constitution of the Grand Duchy of Luxembourg is undergoing extensive revision, which should in due course – maybe still in 2013, but more likely in 2014 – result in a general “re-casting” (in French: “refonte”) or overhaul of the ancient text of 1868.⁷

Between 1919 and 2009 no fewer than 37 specific constitutional revisions are listed, the last dated 12 March 2009. As they occurred at different times and concerned various matters, they did not always contribute to strengthening the coherence of the Constitution. In short, the present Constitution, whose provisions mostly date back 160 years or more, and which has been repeatedly modified and patched, has in many ways been superseded by international law and institutional practice. It lacks transparency and consistency.

It is therefore understandable that the Parliamentary Committee on Institutions and Constitutional Revision, under the chairmanship of Paul-Henri Meyers, has chosen the path of a full overhaul. The proposed revision “amending and reordering the Constitution”, submitted on 21 April 2009, constitutes an important step in this direction. Under the terms of its explanatory memorandum, true reform has become inevitable now, especially regarding the chapters that have not undergone any modification since 1868.

The reasons for this are multiple. First, there are some obvious motives, explicitly put forward by the drafters. One of the primary reasons is to modernize the somewhat antiquated terminology. Second, there is the need to adapt the legal text to political reality by making the newly written constitution coincide with the “living” constitution as reflected in the functioning of the institutions. In other words, to eliminate the “fictions”. Third, those provisions relating to succession to the throne, currently contained in a document with uncertain legal status, namely the Family Compact of the House of Nassau (Nassauischer Erbfolgeverein) of 1783, need to be incorporated into the written constitution.

Beyond these reasons, highlighted in the explanatory memorandum, which undoubtedly argue for a more in-depth revision of the Constitution, further important reasons emerge from a thorough analysis of the text of the proposal. In its opinion of 9 December 2008 on the draft of the *ad hoc* revision of Article 34 of the Constitution, the Council of State had indeed criticized the tendency of repeated *ad hoc* revisions of the Constitution, following too easily the needs of the policy of the moment. Sharing this analysis, the parliamentary Committee on Institutions and Constitutional Revision wishes to break with the practice of repeated revisions and stop the trivialization of constitutional

7. See “Proposition de révision portant modification et nouvel ordonnancement de la Constitution” of April, 21 2009, doc. parl. N° 6030.

revisions. In this respect the proposal can help restore the principle of constitutional rigidity.

The planned overhaul is therefore also a reform that is likely to enhance the authority of the Constitution. It is important the Constitution is taken seriously. As its authority may suffer from the existence of significant differences between text and practice, it is essential to ensure the superiority of the Constitution over ordinary law.

According to the explicit will of the parliamentary committee concerned, this revision procedure will in the end give birth to a “new” constitution, and a revised and consolidated edition of the constitution will be published in the national official journal (*Le Mémorial*). This overhaul will then be considered the Constitution of 2013/14 and no longer the Constitution of 1868, which is to be repealed.

In March 2013, the revision procedure, initiated on April 21, 2009, was still in progress. The European Commission for Democracy through Law, better known as the “Venice Commission” issued an interim opinion on the draft constitutional amendments in December 2009.⁸ This opinion was the subject of a number of meetings of the parliamentary committee in 2010. Several other opinions from the Bar Association as well as the main courts, mostly concerning the reform of the judiciary, have also been discussed within the committee. In July 2011, the government made a major contribution to the revision procedure by taking an official position, whose structure follows that of the parliamentary proposal.

An important document, certainly decisive for the current revision process, is the opinion of the Council of State. It had initially been announced for autumn 2011 but was finally delivered only on June 6 2012. The delay is to be seen as a sign of a serious debate and an in-depth analysis of the revision proposal within the Council. Throughout the 216 pages of the printed text of its opinion the Council expresses in general a broad agreement with the revision proposal. It also issued however quite a number of points where it disagrees with the wording of the proposal or suggests further amendments of the present Constitution. In two annexes the Council added its own version of the revision proposal as well as a comparative table juxtaposing the present text of the Constitution, the revision proposal of 2009, its own revision proposals as well as the position of the government. Altogether the Council seems to encourage the committee to achieve a true and complete overhaul rather than limiting itself to a mere facelift of the Constitution. Since June 2012 the parliamentary committee has dedicated some 25 meetings on the discussion of the opinion of the Council. In January 2013 it drafted a new consolidated working document following the structure and the numbering, as well as in many points the content, of the opinion of the Council of State.

It is difficult to predict the final impact of the ongoing revision procedure. There will be numerous technical modifications designed to modernize outdated terminology, to tailor the text to the way powers are actually exercised, and to include in the Constitution provisions on customary practice which are included in other texts falling outside the ambit of the legislature. However, there will also be modifications of a more substantial nature. These will concern the powers of the grand duke, relations between government and Parliament, the catalogue of fundamental rights and the organization of the judiciary. As far as reasonably predictable, these proposed modifications will be mentioned in the following chapters.

8. Opinion No. 544 / 2009 (CDL-AD(2009)057) EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION), Interim Opinion On the Draft Constitutional Amendments of Luxembourg, Adopted by the Venice Commission at its 81st Plenary Session (Venice, 11-12 December 2009).

II. The Constitution

The Grand Duchy's political system is determined by its Constitution which lays down the principles on which the state is based, regulates the powers of the organs of state and guarantees fundamental rights. Although it possesses all the features of an ordinary law and has the same legal consequences, it has characteristics and entails consequences which cause it to rank amongst the highest norms within the national legal order. The Constitution is generally binding as an ordinary law. But unlike ordinary law that can be easily modified by the political majority in the Chamber, the Constitution is binding on the Chamber itself and can only be changed by following a special procedure requiring a qualified majority. It is a written rule of positive law which can serve as a basis upon which legal proceedings might be conducted and it has to be directly applied by the courts. The Constitution is thus more than a mere statement of principles. Its observance by the legislative power can be reviewed, since 1997, by the Constitutional Court, whose judgments do not, however, oblige the Chamber to withdraw or to modify a law which was found contrary to the Constitution.

The Constitution consists of 125 articles, divided into 13 chapters. This subdivision is to be maintained in the course of the current revision process carrying the total number of provisions to 145.

Unlike many other constitutions, the Constitution of the Grand Duchy of Luxembourg does not contain a special chapter on international relations, neither does it contain any provision on the membership of the European Union. The only relevant clause is Article 49bis, on "international powers", which was introduced into the Constitution in 1956 providing that "the exercise of powers reserved to the legislature, executive and judiciary may temporarily be vested by treaty in institutions governed by international law". For the rest, the conclusion of international treaties as well as their effects and execution in the internal legal order is provided for in Article 37, which is part of a paragraph on "the grand duke's prerogative".

I. SUBSTANTIVE SUPERIORITY

The Constitution is silent about its status as supreme law in the national legal system. It does, however, exhibit many characteristics which demonstrate its supremacy. It confers powers on the organs of state and therefore necessarily has superior force in relation to the organs which exercise those powers. If they act in violation of constitutional provisions, their acts would lack a legal basis. Moreover, the Constitutional Court reviews any ordinary statute law for conformity with the Constitution (Art. 95ter). Finally, as final evidence of its supremacy, Article 113 states that none of its provisions may be suspended.

The Constitution does not contain any explicit rule on the legal value of international or European Law within the legal order. Nonetheless, according to well-settled case law

and Luxembourgish scholars, self-executing international treaties enjoy primacy with regard to the provisions of internal law, including the Constitution itself.⁹

2. FORMAL SUPERIORITY

The Constitution possesses a certain inflexibility which ensures that it cannot be amended as simply as an ordinary law. The reason for this rigidity is to ensure greater stability of constitutional law. Nevertheless, there can be no absolute immutability: amending the Constitution allows it to adapt to changes in society. Otherwise, the supreme law would easily be overtaken by practice and informal constitutional change and would risk losing its importance. The rigidity of the Constitution does however ensure that it is not subject to the whim of the day. The existence of special formal rules ensures that the Constitution is amended only after careful deliberation.

In November 2003, the Chamber of Deputies adopted a new amendment procedure, with the aim of making it easier to amend the Constitution while at the same time retaining its rigidity and value. To this end, it is no longer necessary to dissolve the Chamber before amending the Constitution. According to the new Article 114, an amendment is adopted by two successive votes of the Chamber, separated by a period of not less than three months. Special voting procedures must be observed. Thus, an amendment can only be adopted if two-thirds of the deputies vote in favour of it; proxy votes are not permitted.

If within two months following the first vote of the Chamber a quarter of the members of the Chamber or 25,000 registered voters request it, the amendment text is put to a referendum instead of a second vote. In that case, the majority of electors must vote in favour of the amendment. Until the end of 2011, this new procedure has been applied ten times. Once, in 2009, an attempt was made by voters to request for a referendum. The required number of twenty-five thousand signatures, however, could not be assembled by far.

The practice of constitutional revision between 2003 and 2009 has shown that the new procedure is leading to an accumulation and, to some extent, a trivialization of revisions. Thus, in the course of the ongoing general revision procedure proposals have been made to return to a more rigid procedure.¹⁰ In fact, the formal distinction between constitutional revision laws and ordinary laws is somewhat blurred by the existence of specific laws which can only be adopted in accordance with the special majority requirement of Article 114 (2). The Constitution provides for four such cases: ratification of treaties transferring sovereign competences (Art. 37 in combination with Art. 49bis), declaration of war (Art. 37), determination of the number of MPs to be elected in each district (Art. 51) and a nationality condition for mayors and their deputies (Art. 107).

3. JUDICIAL REVIEW OF CONSTITUTIONALITY

The constitutional amendment of 12 July 1996 and an Act of 27 July 1997¹¹ created a Constitutional Court with the authority to review laws *a posteriori* in the light of the

9. Patrick Kinsch, *Le rôle du droit international dans l'ordre juridique luxembourgeois*, Pasirisie no. 1-2/2010, pp. 383-399.

10. Jörg Gerkrath, "Le mécanisme de la révision constitutionnelle au Grand-Duché de Luxembourg", *Journal des tribunaux – Luxembourg*, 2009, pp. 174-180.

11. Loi du 27.7.1997 portant organisation de la Cour Constitutionnelle.

Constitution. Before this amendment, examination of the constitutionality of laws resided solely with the political organs, the Chamber of Deputies and the Council of State. 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. If the Council of State identifies a conflict with such a rule of higher law it formulates a so-called formal opposition. The Chamber of Deputies then has to override the opposition of the Council by observing the constitutional requirement of a “second vote” (Art. 59). There must be an interval of at least three months between the two votes. In general this obligation can be dispensed with if the Council grants its approval. Such approval is frequently given by a decision of the Council of State after the Chamber’s first vote.

The sole function of the Constitutional Court 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 Constitutional Court has rejected preliminary questions referring to the Constitution as a whole or to constitutional principles without specifying the relevant constitutional provisions. It should be noted that 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 March 2013 the Constitutional Court delivered some 75 judgments. Most of them concerned the principle of equal treatment enshrined in Article 10bis of the Constitution.¹²

The effects of judgments of the Constitutional Court are in principle limited to the litigation which raised the preliminary question. The Chamber therefore remains free in its response to adverse judgments of the Court.

Surprisingly, on two occasions the Chamber decided to revise the Constitution rather than modify the law in question.¹³ According to the Law of 1997 on the Constitutional Court, its judgments do not interfere with the legislative power and the court does not have the power to invalidate Acts of Parliament. It is up to the Chamber to decide on the matter. For the future, the current procedure of constitutional revision should result in the introduction of a strict obligation for the Chamber to modify a law declared unconstitutional by the Court within a certain time limit. If the Chamber were not to respond at all, the law would become void at the end of the given period.

The recent debates between the parliamentary committee for constitutional revision and the government in the ongoing revision procedure might ultimately lead to abolition of the Constitutional Court after only sixteen years of existence. Plans are being prepared to create a new Supreme Court which would be the highest court for both ordinary and administrative jurisdictions. At the same time the preliminary question would disappear

12. Jörg Gerkrath (Ed), *La jurisprudence de la Cour Constitutionnelle du Luxembourg 1997 – 2007*, Pasricrisie luxembourgeoise, 2008, 275 p.

13. Constitutional revisions of 19 Nov. 2004 (Arts. 32 and 76) and of 24 Oct. 2007 (Art. 16).

together with the Constitutional Court and all ordinary judges would acquire the competence to decide on the constitutionality of enacted laws. Such a solution would indeed make sense, as ordinary judges are already entitled to review the compatibility of Luxembourgish laws with provisions of binding international treaties.

4. CONSTITUTIONAL LAW BEYOND THE WRITTEN CONSTITUTION

It is certainly necessary to concede a significant place to custom within the constitutional law of Luxembourg. This is due to the age of the Constitution and the conditions of its adoption in 1868, when a compromise was made between the monarchical principle, which was maintained, and the democratic principle that had prevailed in 1848. Though the existence of customary rules *contra legem* is inconceivable and would conflict with Article 114, according to which “no provision of the Constitution may be suspended”, constitutional practice has given rise to customs *praeter legem*. This is notably the case in the field of parliamentary practice. For instance, the well-established prerogative of the Chamber of Deputies to obtain the dismissal of the government by a no-confidence vote is not provided for by the Constitution. The same is true for the crucial role of political parties and the parliamentary majority within the process of forming a new government. According to the written constitution (Art. 76) this would still appear to be a pure privilege of the grand duke.

In addition, lacunae within the text of the written constitution needed to be bridged by institutional practice as well as by case law. The Constitution does not, for example, explicitly deal with important matters such as the effect and hierarchical ranking of international law. Furthermore, Luxembourg’s membership of the European Communities since the 1950s and its integration in the European Union certainly constitutes a major constitutional change for the country, but has not been formalized by a revision of the Constitution.

Concerning the hereditary succession to the Throne, Article 3 of the Constitution refers to the Nassau Family Pact of 30 June 1783 (*Nassauischer Erbverein*). This family agreement has become a kind of “extra Constitution” having – at least in the opinion of the government – constitutional nature and value. Its content is determined, of his own accord, by the grand duke, and modifications fall under the rules of the family pact itself and are not within the scope of the formal revision procedure. This paradoxical situation will come to an end with the current constitutional revision which notably intends to integrate all the rules on succession within the Constitution itself.

Ordinary statute law in fact lays down many of the rules, principles and institutions, which are, from a substantive point of view, part of the constitution. Especially in the field of fundamental rights the Constitution expresses great confidence in the legislature. Indeed, several provisions assign exclusive competence to the legislature for setting possible restrictions on rights and freedoms. Such references to acts of parliament reflect a general principle that underpins the whole of Chapter 2 of the Constitution.

III. Basic constitutional principles and values

In accordance with the core principles of the Council of Europe and the founding values of the European Union, which express a common European constitutional heritage, the Constitution of the Grand Duchy of Luxembourg is based on democracy, the rule of law and the separation of powers doctrine as well as on the respect of fundamental human rights (treated hereafter under point IV).

A. Representative democracy

Without any doubt, the Grand Duchy is a constitutional monarchy and at the same time a “representative” or “parliamentary” democracy. This situation, which Luxembourg shares with several other member states of the European Union, is not contradictory in itself but may create difficulties in the future.¹⁴

I. A 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 Chamber that “represents the country” (Art. 50). Thus the political system is clearly of a representative nature. Strictly speaking, the theory of the sovereignty of the “nation personified” rules out, or at any rate limits, direct consultation of the people. Consequently, the referendum does not fit in with the logic of the parliamentary system, which is based on the idea of representation. The referendum is regarded as expressing a lack of confidence in the parliament and it is therefore not surprising that parliamentarians generally regard it with reserve.

2. ELEMENTS OF DIRECT DEMOCRACY

a. *Referendums*

Since 1919 the Constitution has allowed for the possibility of a referendum. The relevant provision, currently Article 51(7), provides that electors may be called to express their opinion in cases and under conditions to be determined by law.¹⁵ However, the referendum occupies a marginal place in the system. It is the legislature 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. Electors cannot request a referendum. Moreover, referendums organized under Article 51(7) have only consultative force. The electorate

14. See on this question Wim Roobol, *Twilight of the European Monarchy*, EuConst 2011, pp 272 – 286.

15. The law of February 4th 2005, “loi du 4 février 2005 relative au référendum au niveau national” determines the general framework for holding a referendum under Articles 51, paragraph 7, and 114 of the Constitution.

does not decide the matter in question but only gives its opinion; the legislature has the final say. The fact that only four referendums have been held in the constitutional history of Luxembourg – two in 1919, one in 1937 and the last in 2005 – is sufficient indication of the limited role it plays in the system.

In addition to this “legislative” referendum, the procedure for amendment of the Constitution under Article 114 as amended in 2003 creates the possibility of a true decision-making referendum on constitutional amendment. The right to initiate the organization of such a referendum has been conferred on two different groups: a parliamentary minority (16 deputies) and a relatively large group of citizens (25,000 signatures to be collected in two months). However, the option to initiate a referendum is subject to rather strict conditions and therefore unlikely to be exercised in the course of limited amendments. The ongoing revision process will show whether the electorate will be consulted through a referendum in the course of a more general revision. In January 2009, a claim for a referendum procedure was launched for the first time by a citizens committee: 25,000 of about 230,000 listed voters were asked to sign a petition calling for a referendum in their own town halls. As only some 500 signatures were given, the quorum was not met by a long way and the referendum was not held.

b. Towards a popular initiative

The introduction in the pending revision draft of a popular initiative in legislative matters will enable the Chamber of Deputies to resume discussions on the establishment of a right for citizens to introduce legislative proposals. Indeed, the Prime minister tabled a bill on the legislative popular initiative and the referendum (Doc. parl. 5132) on 20 May 2003, intending to introduce such a right. However, this aspect of the bill was held in abeyance after the Council of State formally opposed it for lack of a constitutional basis. The detailed procedure for such an initiative will be regulated by statute.

The future constitutional basis for such 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.

B. Rule of law (état de droit)

One of the most prominent changes that will result from the pending revision draft is the introduction in Article 2 of the Constitution of the concept of the rule of law. Henceforth, the Grand Duchy of Luxembourg will be qualified as being founded on the principles of an “*État de droit*” and the respect of human rights. The Commentary, attached to the revision proposal, merely observes that “the state itself and the bodies participating in the exercise of power must act according to the law (*Rechtsstaat*) as opposed to a state ruled by whim or arbitrariness.” The reference to the democratic character of the state is maintained in the first article. As has been noted, “a fully democratic society implies a legal system complying with the precepts of the rule of law.”¹⁶

The concept of the rule of law, however, useful as it may be, is daunting in its complexity, its vagueness and the multitude of essential components that are deduced from it. The

¹⁶ Rusen Ergec, *Deux concepts constitutionnels nouveaux : l'État de droit et la dignité humaine*, Journal des tribunaux – Luxembourg, 2009, p.181, referring to Philippe Lauvaux, *Les grandes démocraties contemporaines*, Paris, PUF 2004, p.37

various Member States of the Council of Europe view its meaning differently, as was observed by the Parliamentary Assembly in its Resolution 1594 (2007) on “The principle of the rule of law”. The constitutional implications are not the same, depending on the reference model chosen, the English rule of law, the German *Rechtsstaatsprinzip* or the French concept of *Etat de droit*.¹⁷ Taken seriously, the central idea of the rule of law requires at least two things: the normative character of the constitution and a form of judicial review of the constitutionality of laws. The rule of law is indeed first and foremost a rule of constitutional law. Entrusted to the Constitutional Courts, the review of the constitutionality of laws must be considered an “essential component” of the rule of law. Of course, the essential ingredients of the rule of law (principle of legality, a legislature that observes the Constitution, constitutional entrenchment of rights and freedoms, separation of powers, independence of the courts and full judicial control of constitutionality of laws) are undoubtedly present in the constitutional system of Luxembourg. Still, progress is always possible and inclusion of the principle of the rule of law in the first provision of the Constitution should encourage all constitutional bodies to work in this direction.

C. Separation of powers

The fact that a country’s Constitution lays down the principle of national sovereignty and embraces a representative system is in itself insufficient to characterize the country’s political system. A modern democracy requires clarification of the manner in which powers are distributed among the various organs of state, the relations that exist between them and the way they monitor one another. This is where the theory of the separation of powers must be mentioned.

None of the Luxembourg Constitutions refers explicitly to the separation of powers. The 1848 Constitution made a clear distinction between legislative, executive and judicial powers. Executive power resided in the king/grand duke; legislative power in the king/grand duke and the Chamber of Deputies together; judicial power in the courts. There can be no doubt that the constituent Assembly of 1848 believed that these three powers should, to some extent, be independent of one another. The 1856 Constitution made no direct reference at all to legislative and judicial powers. Only executive power was mentioned and its exercise was entrusted to the grand duke. Neither the 1868 Constitution nor the later amendments contained any provision from which the existence of three distinct, equal and independent powers could be deduced. The present Constitution refers to executive power, which it confers on the grand duke. The term *pouvoir législatif* (legislative power) is used in Article 10 on naturalization and in Article 114 on amendment of the Constitution. Article 49*bis* refers only to legislative, executive and judicial powers in the context of international relations.

This lack of clarity in the text of the Constitution may give rise to doubt as to whether the Constitution acknowledges the principle of the separation of powers. However, both its structure and a consideration of the Belgian Constitution which served as an example for the Luxembourgish Constitution remove any doubt in this respect. It should be added that neither legal writers nor the courts have ever hesitated, at least since the 1919 amendment, to confirm the undisputed reality of constitutional recognition of the Trias and that the organs of state are required to observe it.

17. Cf. Luc Heuschling, *Etat de droit, Rechtsstaat, Rule of Law*, Dalloz, 2002 and Constance Grewe et Hélène Ruiz Fabri, *Droits constitutionnels européens*, Paris, PUF 1995, p. 21 ss.

Even if it is clear that the Constitution does implicitly embrace the principle of the separation of powers, it is equally clear that it has created a system of interdependence between the three traditional functions of government, in particular between the legislature and the executive, by establishing numerous links between them. Each of the powers has a mitigating effect on the others and thus contributes to maintain the unity of the state.

The Chamber, the organ of legislative power, has various means at its disposal to influence the government (executive power). It provides for the regency if the throne becomes vacant. It may bring charges against members of the government. Each year it votes on the budget and authorizes the government to collect taxes and make expenditures. Property belonging to the state may only be alienated with the approval of the Chamber. Finally, the Chamber can oblige the government to resign by withdrawing its confidence.

The grand duke, formally an organ of executive power for his part, may convene an extraordinary session of the Chamber, he may adjourn a session and he may dissolve the Chamber. Together with the Chamber he also exercises legislative power; he has the right of initiative and assents to laws. His right of pardon enables him to remit or reduce penalties imposed by the courts (organs of judicial power).

Occasionally, one or more organs of state may be unable to function normally due to extraordinary circumstances. This was, for example, the case during the Second World War. Despite the fact that sovereign power resided in the Nation, the German occupation made it impossible for the legislature and judiciary to function properly. Only the executive, formed by the grand duchess and the government, was able to operate freely. Nevertheless, the defence and continued existence of the state of Luxembourg demanded that measures were to be taken very quickly which would normally be the prerogative of the legislature. The unwritten principle that one organ of state may take the place of another helped resolve this dilemma. In the absence of the legislature, the executive acted.

The government is thus competent to legislate if the Chamber is not in a position to do so. Equally, the Chamber is competent to govern if the government itself is unable to. Under Article 72, the grand duke opens both ordinary and extraordinary sessions of the Chamber. In 1890, the king/grand duke was unable to perform his duties; he could not convene the Chamber nor appoint someone else to do this. Given the fact that there was a state of emergency, the Chamber met despite the lack of the formal act opening the session.

IV. Fundamental rights

In the current state of the Constitution “Public Freedoms and Fundamental Rights” are enshrined in Articles 9 to 31, forming chapter 2. The *libertés publiques* (public freedoms) emerged in the nineteenth and twentieth centuries. These are rights, which the Constitution confers on citizens to protect them against the possible misuse of state power and to ensure the free development of their personality. Initially, these rights were confined to the elementary human rights, such as personal liberty, equality before the law, inviolability of the home, secrecy of correspondence, inviolability of property, and freedom of religion and of conscience (1841 Constitution). Gradually, these elementary rights were expanded to include *libertés politiques* (political rights). Thus, the 1848 Constitution recognized the right to vote, freedom of the press, and the right of association and assembly. Later, especially after the Second World War, economic and social fundamental rights were added, namely the right to work, the right to form and join trade unions, and the protection of the family (1948 amendment).

Originally, Chapter II was entitled “On Luxembourgers and their rights.” This wording respected a certain consistency with the earlier Constitutions but became confusing since the Constitution conferred rights and freedoms not only on Luxembourgers, but also on foreigners. The current title of Chapter II is the result of a laborious compromise between the Parliamentary Committee on Institutions and Constitutional Revision and the Council of State.

The Constitutions of 1848, 1856 and 1868 contained only “liberty rights”, also referred to as “first generation rights”, as enshrined in the French Declaration of the Rights of Man and Citizen of 1789. These rights require the State not to intervene in the sphere of action of the citizen, except to protect him against interference from other individuals. Article 11, which in its original formulation established the principle of equality of Luxembourgers before the law, fell within this category of rights.

The constitutional revision of 21 May 1948 inserted a series of new rights in Article 11, called “claim rights”, “economic and social rights” or “second generation rights”. These rights create an obligation for the state to ensure that citizens, though not all residents, enjoy certain benefits for which the community provides the funding (rights to education, culture, social welfare, etc.). While these are rights conferred on individuals, their repeatedly imprecise formulation leaves the State with a broad discretion and – obviously – affects their justiciability.

The right to a healthy environment as well as the protection of animals, as introduced in 2007 in Article 11bis of the Constitution, form a new or third generation of human rights. Unlike the traditional fundamental rights, the holder is not the individual currently living, but the community of human beings. Even more than the second generation rights, this new category of rights focuses on the obligations of public authorities, especially of the legislature which bears responsibility for implementation of these new rights.

The Council of State has attempted to highlight the difference between fundamental rights (“Grundrechte”) and objectives of constitutional value (“Staatsaufträge”) in an

opinion of 14 February 2006. Thus, objectives of constitutional value are binding as regards the legislature but are not considered to be directly enforceable, either as between citizens or as against the administration. Consequently, citizens cannot directly rely on them in the courts.

The distinction between fundamental rights and constitutional objectives is often difficult to make, both as regards the determination of the rights holder (individual or community) and their enforcement (justiciable or non-justiciable), and as regards the obligations assumed by the state. For example, some social rights introduced in Article 11 in 1948, including the right to work or health protection, can also be described as constitutional objectives, insofar as the individual does not have a right which he could enforce before the courts.

Clearly, not all the rights mentioned in Chapter II deserve the attribute “fundamental”. This is not the case, for example, with the right of professional bodies, endowed with legal personality, to make regulations (Art. 11 (6)).

In its supplementary opinion of 27 April 1999 on the draft revision of Article 11 of the Constitution, the Council of State ruled, “the fundamental values contained in a Constitution should be worded so that the Constitutional Court finds legal concepts as clear and consistent as possible. (...) It is not only about introducing ideas in the Constitution. Such ideas that have achieved political agreement must be expressed in a manner to correspond to precise legal concepts.” The actual – ambiguous – wording of Chapter II of the Constitution is mainly due to the coexistence of texts from the nineteenth century and provisions that were added after the end of World War II.

The Constitutional Court, created in 1997, was indeed rapidly confronted with the difficulty of interpreting the fundamental rights provisions of the Constitution. Though most of its case law is on the principle of equality before the law (Art. 10bis), the Court also rendered some judgements on other fundamental rights, for instance on “the natural rights of the individual and of the family” (Art. 11) and the principle *nulla poena sine lege* (Art. 14).¹⁸

In addition to the somewhat out-of-date guarantee of fundamental rights by the Constitution, it should be noted that Luxembourg is one of the signatories of the Universal Declaration of Human Rights (1948) and bound by the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) and all of its protocols granting rights. Furthermore Luxembourg has ratified most of the relevant international treaties on human rights. In practice the ordinary courts as well as the Council of State refer primarily to these international instruments rather than to the Constitution.

Since 1 December 2009 The Charter of Fundamental Rights of the European Union has become binding on Luxembourg as it has on all other member states insofar as “they are implementing Union law”.

In the pending revision proposal, the proposed changes aimed initially to structure the existing Chapter 2 of the Constitution akin to the EU Charter of Fundamental Rights, including the use of the keywords Dignity, Equality, Freedoms, Solidarity and Citizens’ Rights. Following the opinion of the Council of State of June 2012, the parliamentary committee decided eventually to abandon this idea and to make a subdivision between fundamental rights, public freedoms and (state) objectives of constitutional value. Undeniably, the Council criticizes with good reason the lack of a clear distinction between

18. See on these two subjects Mark Cole, *Der Schutz der Grundrechte*, in: Gerkrath (ed.), *La Jurisprudence de la Cour Constitutionnelle du Luxembourg 1997-2007*, Pasicrisie, Luxembourg 2008, pp. 59-75 and Stefan Braum, *Das Prinzip der Strafgesetzmäßigkeit*, *ibidem*, pp. 77-83.

directly effective fundamental rights and freedoms and mere constitutional objectives that do not immediately create rights of the individual.

Furthermore, four substantial innovations were proposed from the beginning: First, Chapter 2 is to be supplemented by two new provisions on the inviolability of human dignity and on the prohibition of torture and cruel, inhuman and degrading treatment.¹⁹ Second, the secrecy of correspondence is extended to all forms of personal communications. Third, the State is required to ensure that each person is able to live in appropriate housing. Finally, the proposed amendment would mention the Luxembourgish language in the Constitution.

The Venice Commission raised the question whether the pending revision of the Constitution should make more radical changes so that the text would meet all the requirements of an up-to-date catalogue of rights. A comparison of the proposed text of Chapter 2 with the provisions of the European Convention on Human Rights (ECHR) shows two remaining deficits. First, the conditions set out by the ECHR for any restriction of a fundamental right go beyond the conditions set out in the Constitution. Second, some classic human rights, such as the right to life and general guarantees concerning a fair trial, are not mentioned in the Constitution of Luxembourg. Evidently, there is no obligation for any state to incorporate the provisions of international human rights conventions into the text of its Constitution. Besides, the very number of such conventions and the variety of rights and freedoms they contain would make such a requirement unrealistic. Furthermore, case law has already recognized the direct applicability of the substantive provisions of the European Convention on Human Rights in the Grand Duchy. Yet, it still seems appropriate to update more radically the wording of Chapter 2.²⁰

This is also the explicit wish of the Council of State. Regarding the human rights chapter, its opinion of June 2012 contains a considerable number of amendments that have meanwhile been carried over by the parliamentary committee. In effect, the latest consolidated version of the proposal that the committee has been working on since the end of January 2013 integrates new provisions on human rights, such as for instance the right of asylum, the protection of personal data as well as a general provision on the possible limitations of rights and freedoms.

19. See Rusen Ergec, *Deux concepts constitutionnels nouveaux: l'État de droit et la dignité humaine*, Journal des tribunaux Luxembourg, 2009, pp. 180-184 and Dean Spielmann, *Quels droits fondamentaux pour la Constitution luxembourgeoise? Au sujet d'une réforme rassurante mais peu ambitieuse*, in J. Gerkrath (ed.), *La refonte de la constitution luxembourgeoise en débat*, Larcier 2010, pp. 27-43.

20. Cp. Dean Spielmann, op. cit. and Jörg Gerkrath, *La proposition de révision dans le contexte international: la garantie des droits fondamentaux serait-elle devenue superflue?*, in: *Réforme de la constitution: où en sommes-nous?*, Luxembourg 2011, pp. 197-219 (Actes de la section des sciences morales politiques de l'Institut grand-ducal).

V. The grand duke

The grand duke is the head of state, the symbol of its unity and the guarantor of national independence (Art. 33). Given that Luxembourg is a constitutional monarchy, the grand duke only has those powers that are explicitly conferred on him by the Constitution and the laws (Art. 32). The currently proposed 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 currently is provided for by the Family Compact of the House of Nassau 1783, will be integrated into the Constitution in an adapted form.

I. SUCCESSION

By virtue of Article 3, the crown of the Grand Duchy is hereditary in the house of Nassau in accordance with the Nassau Succession Pact 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. In its written answer to a question asked by a member of the Chamber, Prime Minister Jean-Claude Juncker recently explicitly confirmed that, in the opinion of the government, the Nassau Family Pact is to be regarded as being constitutional in nature and value. Its content is determined *proprio motu* by the grand duke, and modifications fall under the rules of the family pact itself.²¹ According to the currently pending revision proposal, all existing rules on succession in the family pact will be integrated in the Constitution.

Traditionally, the crown passed to the first-born male heir, to the exclusion of women, except in the complete absence of a male heir. If there were no male heirs in the direct line or the collateral line of one branch of the House of Nassau, the crown would pass to the male heirs of the other branch. Only if there were no male heirs in either branch would the crown pass to the first born female heir of the ruling House. This rule ensured that the crown of the Grand Duchy passed to Adolf, duke of Nassau, on the death of William III in 1890.

William IV (1905-1912) altered the Pact on 6 April 1907. The new provisions, approved by Law of 10 July 1907,²² provided that after the death of the sovereign his oldest daughter, Marie-Adelaide, would succeed him if there were no male heirs. If she were to abdicate or die without leaving an heir, her younger sisters would succeed in order of birth. These arrangements enabled Grand Duchess Charlotte to ascend the throne after Marie-Adelaide’s abdication in 1919.

21. Réponse à la question parlementaire n° 1538 du 21 juin 2011 de Monsieur le député Alex Bodry en date du 25 juillet 2011.

22. Loi du 10.7.1907 conférant force de loi au statut de la Maison de Nassau du 16 avril 1907.

In 2009, Grand Duke Henri, as Head of the House, began a process of revision of the family pact, giving high priority to equality between men and women in the order of succession to the throne.

By decree of 16 September 2010 the Grand Duke has implemented this equality by appropriate modifications of the relevant clauses of the internal regulations of the House of Luxembourg-Nassau. Therefore, any first-born has now the right to inherit the crown, regardless of gender. This new succession system shall be applicable for the first time to the descendants of Grand Duke Henri.

If the person bearing the crown abdicates or dies, the presumptive heir succeeds him, if he has reached the age of majority. Succession does not depend on the oath having been taken.

Regency

Articles 6 to 8 of the Constitution concern the regency. A regency is necessary in three cases, namely if the heir is still minor when the grand duke dies, if the grand duke is unable to reign or if the throne is vacant because the reigning family cannot provide a heir.

In case the heir is still a minor on the death of the grand duke, the mother and legal guardian of the minor grand duke exercises the regency. However, she has to be assisted by a “co-regent”, namely a male descendant of the family of Nassau. The same applies if the grand duke is unable to reign. The succession pact regulates the manner in which the regent takes office. The designated regent addresses a *message* (communication) to the Chamber of Deputies, which replies by declaring itself ready to hear the taking of the oath. The regent only takes office after taking the oath and temporarily takes the place of the grand duke during the regency. The regent has all the grand duke’s powers and is inviolable.

If the throne is vacant – in other words, if the line becomes extinct – the Chamber temporarily appoints a regent. After the regent has been appointed, the Chamber is dissolved and a new Chamber is convened within thirty days, with twice the usual number of members, to fill the vacancy by appointing a new successor to the throne.

Lieutenancy

Article 42 of the Constitution provides that the grand duke may have himself represented by a prince of the blood, who shall bear the title Lieutenant-du-Grand-Duc (Lieutenant of the grand duke) and reside in the Grand Duchy. This is a peculiarity of Luxembourg constitutional law. In situations in which the grand duke is unable to represent the interests of the Grand Duchy, he may delegate all or some of his powers to his Lieutenant. The last time there was a lieutenancy, the heir grand duke Henri was nominated Lieutenant-Representative of grand duke Jean from 4 March 1998 until 7 October 2000, the day Grand Duke Jean abdicated in favour of his son.

The Lieutenant must take the oath to respect the Constitution before he can exercise his powers. Within the limits of his mandate, he has the same powers as the grand duke and his decisions have the same legal force. He is inviolable.

The reigning sovereign can end the lieutenancy at any time by taking back the powers he has delegated to his representative.

2. INVIOABILITY OF THE SOVEREIGN

Article 4 of the Constitution provides that the person of the grand duke is inviolable. The sovereign cannot be prosecuted or taken into custody or convicted by any court. Inviolability is a personal right of the sovereign and does not apply to any other member of his family. It implies full immunity in criminal, civil and political matters. Criminal laws do not apply to the sovereign either in relation to official acts or in relation to acts as a private person. This absolute exemption from criminal responsibility is however tempered by Article 118 which states that no provision of the Constitution may hinder approval of the statute of the International Criminal Court. As regards civil matters, no penalty can be imposed on the grand duke and he cannot be held to have committed a tort or to be in breach of contract. The person who manages the grand duke's assets is liable in law for the grand duke's civil obligations. Politically, the Constitution places the sovereign above the parties and the political arena. The members of the government countersign all his decisions and are responsible for them.

3. POWERS OF THE GRAND DUKE

According to the Constitution the grand duke has legislative and executive powers. However, as he does not bear political responsibility, the government must consent to the exercise of his powers. This consent is given through the formality of a counter signature. Article 45 of the Constitution provides: "All provisions of the grand duke require the countersignature of a responsible member of the Government".

By virtue of the current revision procedure the grand duke is likely to lose most of the legislative and executive powers still formally vested in him by the present Constitution.

a. Legislative powers

The grand duke has the right of initiative like the Chamber. In practice however, it is up to the government to submit bills to the Chamber after authorization by the grand duke. In most cases, it is indeed the government to initiate the legislative process. Deputies only rarely submit bills. Within three months after the Chamber has definitely passed a bill or legislative proposal, the grand duke has to promulgate the new law (Art. 34). Bills (*projets*, tabled by the government) and legislative proposals (*propositions*, tabled by the Chamber) are only presented to the sovereign when they have finally been adopted by the Chamber. The grand duke does not have the right to amend legislation.

The fact that the grand duke now only has to promulgate new laws and no longer has to assent to them is due to an amendment of Article 34 of the Constitution in 2009. After the grand duke had announced that he would refuse to approve a possible law on euthanasia that the Chamber was about to adopt, the government and Chamber decided unanimously to abolish the royal assent to laws, which had existed in the Luxembourg Constitution since 1848. As a result, the grand duke lost the power to "sanction" acts of the Chamber. His involvement in the legislative process is therefore now limited to the promulgation of these acts, which is considered a pure formality.

b. Executive powers

According to Article 33 paragraph 2 of the Constitution it is the grand duke who “exercises the executive power in conformity with the Constitution and the laws of the country”.

1. The promulgation of laws

The promulgation is the executive act whereby the sovereign establishes the content of the law, publishes it and orders its implementation. The right of initiative enables the grand duke to take part in the exercise of legislative power; promulgation is an element of his executive power. It expresses the command to all it may concern that they must implement and comply with the law.

2. Dissolution of the Chamber

The parliamentary system is characterized, among other things, by the fact that the executive can dissolve the parliament. Article 74 of the Constitution provides that the grand duke may dissolve the Chamber of Deputies. Of course, this dissolution order needs to be countersigned by the government like any other decision of the grand duke. If the Chamber is dissolved, new elections must be held within three months of the dissolution. The Chamber is dissolved in the event of a conflict between the government and the Chamber. As the government generally has the support of a relatively stable parliamentary majority, dissolution is rare. The Chamber has only been dissolved six times since 1848, namely on 15 May 1854, 27 November 1856, 11 November 1915, 14 June 1918, 18 January 1925 and 23 December 1958.

The right to dissolve the Chamber was initially seen as a way of safeguarding the authority and powers of the grand duke against possible infringements by the Chamber. Subsequently, it became a weapon in the hands of the executive. It is regarded as one of the necessary conditions for maintaining a certain balance between the powers, particularly the legislature and the executive. It may serve as a means for holding an early election if, for instance, a new government cannot command a majority in the Chamber.

3. The adoption of regulations and orders

The grand duke has *pouvoir réglementaire d'exécution*, that is to say the power to issue regulations or orders to implement laws, generally in the form of a grand ducal regulation. Such regulations have general force. The grand duke exercises this power in cooperation with the government.

- i. Constitutionally, the legislature cannot instruct the council of ministers, an individual minister or other organs to adopt implementing regulations. It must respect the prerogatives the Constitution confers on the head of state. Any provision in contravention of this would be unconstitutional. Furthermore, the power to issue regulations or orders is limited to matters in which the Constitution does not prescribe formal laws.
- ii. For the same reason and *a fortiori*, neither members of the government nor the council of ministers can adopt regulations on their own initiative in the sovereign's place. Regulations issued by ministers or by the council of ministers – circulars, instructions, orders and notices – are unconstitutional if they aim to replace grand ducal regulations implementing the laws.
- iii. However, by virtue of Article 76(2), the grand duke may, in matters he has to define, delegate the power to issue execution measures to members of the government. This possibility was introduced by amendment of the relevant article in 2004.

- iv. The regulatory power is an inherent power; no explicit statutory authorization is required for the grand duke to be able to adopt an implementing regulation. For him to exercise this power, it is necessary and at the same time sufficient that a statutory provision requires implementation. And because the power is a power to implement a law, the subject matter requiring implementation must already have been determined by the law beforehand. Nevertheless, even though the law is an essential condition for the exercise of the grand duke's power in this respect, it is not the law that confers this power on him, but the Constitution.

4. *Foreign relations*

The grand duke as head of state acts on behalf of the state in international relations. He represents the country abroad and watches over the interests of the state and the Luxembourg people. He fulfils this task with the aid of diplomats and consuls. He concludes treaties (Art. 37).

A *traité* (treaty) is any agreement or arrangement between states intended to have legal consequences.

- a. The process of drafting and concluding a treaty starts when negotiations are opened. The representatives of the interested states draft a text after either oral consultation or an exchange of letters. Negotiations end with the signature of a particular text. Signature serves to establish the text as authentic and definitive. It establishes that an agreement has been reached between the representatives of the states, but the treaty does not yet bind the states at this stage.
- b. In Luxembourg, the signed text must then be approved by the legislative power. Article 37 provides that approval must be given in the form of a law and that this law must be ratified, promulgated and published within three months of the final vote in the Chamber. If this period is not respected, the law would not be considered adopted and the treaty would have to be deemed not to have been approved. Article 37 requires not only publication of the law of approval, but also of the full text of the treaty itself in the *Mémorial*. The treaty does not however have to be promulgated; it is necessary and sufficient that it is published. Treaties are generally published as an annexe to the law approving them. However, they may be published separately at a time determined by the grand duke. No treaty can take effect within the national legal order if it is not published in its entirety in the *Mémorial*.
- c. The grand duke is authorized to ratify the treaty at any time after it has been approved. Ratification requires countersignature by a minister.
- d. The process of formation of a treaty ends with the exchange or deposit of the ratification instruments. The date of its entry into force is published in the *Mémorial*. The law approving the treaty does not transform it into a national law. The treaty continues to be governed by the rules of international law. Its provisions may have direct effect (meaning that they create rights and duties and are directly applied by national courts), if the provision in question is sufficiently clear and precisely stated and confers a specific right for the citizen.

5. *Appointments to public office*

The grand duke makes appointments to civil and military posts in accordance with and subject to any exceptions made by the law (Art. 35). He is commander-in-chief of the armed forces and is in charge of the administration. Nevertheless, he may only make appointments to existing positions and cannot himself create new positions. According to

the second paragraph of Article 35 of the Constitution, this power resides in the legislature.

However, Article 76(1) provides that the grand duke regulates the organization of his government, and that it shall consist of at least three members. This means that the grand duke is free to determine the number of ministers and can establish those ministries and departments that are needed for effective administration.

6. Enforcement of judicial decisions

Article 49 of the Constitution provides that justice is done in the name of the grand duke. In conformity with the doctrine of the separation of powers, enforcement of judicial decisions has to be ensured by the executive. To this end, a *formule exécutoire* (writ of execution) is appended to judicial decisions, in the form of a grand ducal *arrêté* (order) countersigned by a minister (generally the minister of justice). This writ authorizes enforcement of the judgment.

c. The prerogatives of the grand duke

Articles 38 to 41 of the Constitution confer a number of prerogatives on the grand duke which would normally be the prerogative of the sovereign in a monarchic system. These prerogatives have been maintained in the parliamentary system, though any decisions arising out of them require countersignature by a minister. There are four such prerogatives, namely the right to grant pardons, to mint money, to bestow titles of nobility and to confer civil and military orders.

The most important of the prerogatives is without doubt the right of pardon. Article 83 contains a slight restriction of this right. It provides that the sovereign may not pardon members of the government who have been convicted, except at the explicit request of the Chamber. The grand duke decides requests for a pardon in the form of a grand ducal *arrêté* (order), which must be countersigned by a minister, generally the minister of justice.

VI. The Chamber of Deputies

Legislative power resides in the *Chambre des Députés* (Chamber of Deputies) and the grand duke jointly. The sovereign has the right of initiative; the Chamber has the right of initiative and adopts laws. In most cases the sovereign – in practice, the government – initiates the legislative procedure. Deputies rarely use their right of initiative. Their primary duties consist of debating, amending and adopting bills. Once adopted, bills are put to the sovereign to be promulgated. The parliamentary system of the Grand Duchy is in some way original in comparison with other representative democracies: there is only a single Chamber whereas most other democratic states have a bicameral system. The legal framework of the Chamber of Deputies is provided by Articles 50 to 75 of the Constitution. Three major laws complete the framework: the 2003 Electoral Act,²³ the 2007 Act on financing of political parties,²⁴ and the 1911 Act on parliamentary enquiries.²⁵ For the rest, according to Article 70 of the Constitution, “the Chamber determines in its rules of procedure the manner in which it exercises its powers”.

I. ELECTIONS

a. General

The Grand Duchy is divided into four electoral districts. As has already been mentioned, since the constitutional revision of 1988 there have been sixty deputies. Elections are held *de jure* every five years. Because of the fact that since the introduction of the direct election of members of the European Parliament in 1979, elections for the European Parliament and the Chamber always take place – by coincidence – in the same year, elections for the Chamber of Deputies are held on the same day as those for the European Parliament and always on a Sunday. If the Chamber is dissolved, elections are held within three months of its dissolution.

b. Universal suffrage

Deputies are elected by universal suffrage, according to the system of proportional representation, on a party-list system. Proxy votes are not allowed; voting by mail has been possible since 1984 in the cases determined by law. Voters are required to vote and are fined if they fail to do so. Anyone who is unable to take part in voting must notify the *juge de paix* (justice of the peace) in his *arrondissement* (district), giving reasons. If the judge considers the reasons sufficient, in agreement with the public prosecutor, the person will not be prosecuted. Voters over seventy years of age and those who were, at the time of the elections, living in a municipality other than the one where they were called to vote, are automatically excused.

23. Loi électorale du 18 février 2003.

24. Loi du 21 décembre 2007 portant réglementation du financement des partis politiques.

25. Loi du 18 avril 1911 sur les enquêtes parlementaires.

c. Electoral requirements

In order to establish who qualifies as an elector, it is necessary to check whether the requirements for the possession of electoral rights, and the conditions under which they may be exercised, are met (Art. 52(1), of the Constitution).

1. Possession of electoral rights

The requirements to qualify as a voter are threefold:

- a. It is necessary to be a Luxembourger. Naturalized Luxembourgers have the same rights as Luxembourgers by birth. Women have the right to vote since the 1919 amendment of the Constitution.
- b. The second requirement concerns age. It is necessary to be at least eighteen years of age. This condition must be fulfilled on the first of January following the year in which the voter is placed on the electoral register.
- c. It is necessary to possess one's civil and political rights.

2. Exercise of electoral rights

Whether or not a person qualifies as a voter is established on the basis of their registration in the electoral register. To be able to vote, a person who has electoral rights must be registered in the electoral register. These registers provide a faithful record of voters within a municipality. They are prepared for each electoral district, which may in turn be subdivided into smaller units determined by the municipal executive.

2. DEPUTIES

Together with the grand duke the deputies represent the Nation in the exercise of legislative power. They embody the Nation as a unit distinct from the individuals of which it consists. Their primary responsibility lies not to the electorate, nor a constituency, nor a political party, but to the Grand Duchy as a whole. Article 50 expresses this as follows: "Deputies vote without referring to their electors and may have in mind only the general interests of the Grand Duchy."

a. Requirements to be elected

To qualify for election a person must be suitable to be elected. Article 52 of the Constitution, paragraph 2, gives the requirements for election. There are four. No further requirements may be added. To be elected a person must:

1. be a Luxembourger. Naturalized Luxembourgers are eligible for election in the same way as Luxembourgers by birth;
2. enjoy civil and political rights;
3. be domiciled in the Grand Duchy; and
4. be at least eighteen years of age. It is not sufficient for a candidate to be eighteen on the date they take the oath. Candidates must have attained this age on the day of the elections.

b. Disqualification

Certain circumstances may disqualify a person from passive and active election (Art. 53 of the Constitution and section 4 of the Electoral Act). The candidacy of a person who is disqualified from election must be refused by the main polling station in the electoral

district in question. The fact that a person is disqualified from election cannot be negated by an otherwise lawful election.

c. Incompatibilities

Certain activities are incompatible with membership of the Chamber. They might adversely affect the position that deputies fulfil as representatives of the Nation. Article 54 of the Constitution and sections 100 and 102 of the Electoral Act and certain other laws regulate what is regarded as incompatible:

- i. Public office based on election is in principle compatible with membership of the Chamber. A member of a municipal council may also be a deputy.
- ii. Public office not based on election is in principle incompatible with membership of the Chamber. The following may not be a deputy: members of the government, of the Council of State, of the judiciary, of the Court of Auditors, district commissioners, state tax collectors and accounting officers, professional soldiers on active service (Art. 54 Constitution), government advisers appointed by the grand duke under Article 76, ministers of religion, if they are paid by the state, public servants and other employees whose main occupation is paid for by the state, primary school teachers and members of the Social and Economic Council.
- iii. Some incompatibilities follow from blood or family ties. Deputies may not be related by blood or marriage up to the second degree, nor may they be married to one another. If such persons should be elected at the same time, the oldest takes precedence.
- iv. Private occupations are in principle compatible with membership of the Chamber.

d. Parliamentary immunities

The parliamentary immunities serve to ensure the deputies' freedom to fulfil their mandate independently. However, distinction has to be made between freedom from liability and inviolability.

1. Freedom from liability

Article 68 provides that no deputy may be prosecuted or investigated on account of opinions expressed or votes cast in the course of his duties. It is due to the interest of democracy that deputies are free to express their views without fear of civil or criminal liability. This immunity is permanent and protects the deputy both during and outside parliamentary sessions. Even if his mandate has ended, he is not liable for opinions expressed during the exercise of his mandate. It is a general immunity in the sense that it protects the deputy against both criminal prosecution and civil actions. It rules out any action for reparation.

Freedom from liability applies to acts of the deputy to the extent these relate to the performance of his parliamentary duties and covers votes, speeches, reports and parliamentary inquiries. It must be interpreted strictly. It does not affect acts or opinions which do not relate directly to the performance of his duties. Though aspersions, slanders or defaming or insulting acts may not be prosecuted, this immunity does not cover conduct such as hitting or injuring a deputy, insulting an official of the Chamber or a visitor on the public gallery. The same applies to opinions expressed outside the meeting rooms, whether orally or in writing.

2. Inviolability

Article 69 of the Constitution provides that no deputy may be arrested or prosecuted during a session without the Chamber's consent, unless he is caught in the act of

committing an offence. Nor may a deputy be deprived of his liberty during a session without the Chamber's consent. The detention or prosecution of a deputy will be suspended during the session, for its duration, if the Chamber so requests.

Parliamentary inviolability safeguards the proper and normal functioning of the Chamber of Deputies. It ensures that no deputy is deprived of his mandate on account of criminal prosecution. It extends only to conduct that is not protected by his freedom from liability. It protects him from prosecution for *crimes* (serious offences), *délits* (offences) and *contraventions* (minor offences).

Inviolability is not absolute. In the first place, it applies only during sessions. But because in practice each session lasts twelve months, the deputy is protected against prosecution during the entire period for which he has been elected. In the second place, inviolability does not apply if the deputy is caught in the act. And, finally, the Chamber can waive a deputy's inviolability. In that case the *Procureur Général* (Attorney-General) may request the chairman of the Chamber, through the prime minister, to waive the deputy's inviolability and the Chamber then votes on the request. In this case, the Chamber is not acting as a judicial body; it only examines whether or not the prosecution is designed to make it impossible for the deputy to exercise his parliamentary mandate.

The Chamber may also request the termination of a deputy's detention or prosecution during a session. This provision is designed to ensure that the government does not circumvent a deputy's inviolability by having him imprisoned or prosecuted when the Parliament is not in session.

e. Reimbursement

Article 75 of the Constitution provides that deputies may be reimbursed for certain expenses. The Law of 28 November 1979 awards them a monthly allowance, of which half is not liable to taxation.²⁶

3. POLITICAL PARTIES

a. Legal position

Since the 1989 elections, seven political parties have been represented in the Chamber (see below). Political parties as such were not recognized constitutionally until the Revision of 31 March 2008. The new Article 32bis declares since then that "[p]olitical parties contribute to the formation of the popular will and the expression of universal suffrage. They express democratic pluralism". The former reluctance to mention political parties specifically in the Constitution resulted from the fact that political parties are associations, and thus have their foundation in the right of association, governed by Article 26 of the Constitution.²⁷ This remains valid even though the Constitution now devotes a specific text to political parties. Consequently, the right to associate in political parties is not subject to prior authorization. Any inclination to subject political parties to conditions limiting this fundamental freedom would be unconstitutional. In any event, the activities of political parties remain subject to the law. The right of association applies to the parties as it applies to all other forms of associations, such as trade unions. Political parties are, however, different from other associations in the sense that their particular function is to select and nominate candidates for election to the exercise of mandates in

26. Loi du 28.11.1979 portant fixation de l'indemnité des membres de la Chambre des Députés et des représentants luxembourgeois au Parlement Européen.

27. Details are provided by the Loi du 21.4.1928 relative aux associations sans but lucratif et aux fondations.

public institutions. Article 32bis should also be seen as complementary to Article 24 of the Constitution, which deals with freedom of expression.

Political parties have been able to take on legal personality in the guise of an association since 1928. Even so, only two political parties are non-profit associations. The reluctance of political parties to take on this corporate form probably arises because this would compel them to disclose the number and identity of their members and the extent and origin of their income.

A Law of 21 December 2007 governs the financing of political parties. Public funding, in addition to private funding, is intended to guarantee their independence. The law sets strict rules for party funding and ensures transparency. It is for the Court of Auditors to control whether the different modalities of the Law of 21 December 2007 have been met. By virtue of Article 8 of this Law, only individuals are allowed to make donations to political parties and their components. Donations from a corporation are not allowed. The same applies to donations made by associations, groups or organizations that do not enjoy legal personality. Anonymous donations are prohibited.

The *règlement d'ordre intérieur de la Chambre* (Rules of Procedure of the Chamber) does acknowledge the existence of political groups (parliamentary groups). However, this does not imply the recognition of political parties. The link between parliamentary groups and political parties is of a purely factual nature; parliamentary groups may exist independently of any party. Nor do the rules of procedure, where they mention the parliamentary groups, establish any connection at all with the parties with which they might correspond.

It is worth noting that, since an amendment of 1 January 1991, the rules of procedure have allowed the creation of so-called *groupes techniques* in addition to parliamentary groups. These may be formed by five deputies who are not part of a parliamentary group. These groups consist of deputies of diverse political plumage and their only purpose is to afford the members of the group jointly certain powers and privileges, which they would not otherwise enjoy.

b. The role of political parties

Political parties play an important part in a parliamentary democracy. They form the link between the citizens and the machinery of state. The preparatory works for the constitutional revision of March 2008 have shown a broad consensus to regard political parties as an indispensable tool in the functioning of parliamentary democracy. Essential to the democratic system and to the expression and manifestation of political pluralism, parties allow citizens to integrate into the political system. They structure the flow of ideas into political action programmes, raise political awareness in the public sphere and play a vital role in preparing elections by selecting and presenting candidates for public office. The new Article 32bis is also an expression of the political will to modernize the text of the Constitution by keeping in line with institutional practice.

1. Parties and the electors

Political parties make the ideas and desires of the various layers of the population explicit by drafting a programme. They represent the pluralism of democracy. They provide citizens with the information that enables them to consider political issues and to make a political choice, particularly at election time. Rather than merely nominating members of parliament, electors vote for the programme of the party which most corresponds with their own views. The information the political parties supply is all the more comprehensive and valuable in the light of the variety of political parties within the parliamentary system and, consequently, the variety of information available.

2. *Parties and the elected*

The electoral system provided for in Article 51(5) of the Constitution (direct universal suffrage, according to the system of proportional representation, on a party-list system) and sections 104 and 106 of the Electoral Act (a party-list system in electoral districts) promotes the formation of political parties. Independent candidates can stand for election but they stand little chance of a satisfactory result. Only groups of candidates, supported by powerful organizations with plentiful financial resources, are sufficiently able to publicize their programmes and win over voters. It is clear that parties, once they have chosen their candidates, attempt to maintain some sort of control over them. Although Article 50 states clearly that deputies shall vote without referring to their electors and may have in mind only the general interests of the Grand Duchy, it cannot be denied that deputies must observe the guidelines of their party if they want to be re-elected.

Through the deputies, parties intervene more and more in the legislative procedure. Party executive committees, which include both parliamentarians and non-parliamentarians, review and discuss bills and legislative proposals and determine the party line on each one: the line that deputies will defend both in committees and in the public assembly. Moreover, representatives of the government parties sometimes meet to discuss problems which arise concerning a certain bill in order to reach agreement on the text before the meeting of the Chamber.

3. *Parties and the formation of government*

As stated above, the formation of a government is, in theory, at the discretion of the grand duke. In practice however, the grand duke does no more than accept proposals from the political parties that will support the government. After the previous government has tendered its resignation, the sovereign receives the chairmen of the political parties to obtain their advice concerning the formation of a new government. He then appoints a person to explore the options. The person he appoints first exchanges views with the representatives of the political parties and then produces a report. On the basis of this report, the sovereign appoints a person to form a government. If the election results clearly show that one party dominates the political scene, the grand duke may sometimes appoint a person to form a government immediately without first exploring alternative options. This happened after the 1989 election, when the outgoing prime minister was immediately entrusted with forming a new government.

The person entrusted to form a new government presides over a number of meetings with representatives of the parties with which he wants to form a government in order to negotiate agreement on a programme of government. Political parties appoint the negotiators; being party members they do not have to be members of the Chamber. Whether or not a party participates in the government and agrees to the programme of government is a matter for its executive committee. If a number of parties are to form a coalition government they have to concur with the results achieved. Only when the parties have agreed on the programme of government and the names of potential ministers does the sovereign appoint the members of the government on the basis of the advice of the person forming the government.

4. POWERS OF THE CHAMBER OF DEPUTIES

Under the Constitution, the Chamber of Deputies has two main “internal” powers: it passes laws and it scrutinizes the government. In addition it has powers in the field of European affairs.

A. Legislation

a. Laws

“From a constitutional point of view, which is also that of positive law, laws are not characterized by their substance, but by the organs that create them and by the procedure that has to be followed to that end. Subjecting a certain matter to the law means subjecting it to the opinion of certain organs in accordance with strict procedural rules” (Opinion, Council of State, 15 January 1946). A law is an act adopted by the Chamber, having consulted the Council of State, and promulgated by the grand duke.

Within the bounds of the Constitution the legislature is free to give laws whatever substance it thinks appropriate. It makes little difference whether the law, in a constitutional sense, contains provisions having universal effect or a specific effect, or whether it has permanent or temporary force. The law is a formal framework that can support any substance whatever.

b. The legislative process

1. The right of initiative

Both the grand duke and the Chamber of Deputies have the right to initiate laws (Art. 47 Constitution). The Constitution does not confer this right on any other organ. Though a number of special laws have created a kind of right for the Council of State, the Social and Economic Council and the commercial and professional chambers to propose laws, these must be introduced in the Chamber by means of a proposal from the grand duke. This implies that the executive has consented to the proposed texts.

2. Drafting

i. (Projets de loi) Bills

One or more departments, generally through a committee which may include people other than departmental civil servants, draft a draft bill. An *exposé des motifs* (explanatory note) sets out the considerations upon which the draft is based and a section-by-section commentary accompanies the proper text. The draft bill is put to the council of ministers and, if the council concurs with it, the final draft bill is sent to the Council of State for its opinion. The Council of State presents its opinion to the government, which lays the draft bill before the grand duke, together with the opinion, and asks his consent to lay the bill – as it becomes after he has given his consent – before the Chamber of Deputies.

ii. (Propositions de loi) Legislative proposals

Any deputy may present legislative proposals. Such a proposal is submitted to the Chamber’s *bureau*. The chairman forwards the proposal to the working committee of

the Chamber.²⁸ If the committee takes the view that the proposal can be given a reading in the Chamber it is printed and laid before the deputies. The initiator of the proposal requests the chairman of the Chamber to place it on the agenda of the public meeting of the Chamber following its laying before the deputies. He reads out the text of the proposal at the meeting and explains the considerations on which it is based. The chairman consults the Chamber about whether it desires to consider the proposal, suspend its passage through the Chamber or whether it takes the view that there is no reason to debate the proposal.

The rules of procedure set out the procedure concerning the debates and votes in the Chamber. The rules that apply to the general consideration of bills and legislative proposals apply. If five deputies support the proposal and the Chamber decides that it is to be considered, it is sent to the Council of State for an opinion. Once the Council of State has issued its opinion, the chairman of the Chamber sends the proposal either to a permanent committee or a special committee. From then on the same procedure applies to the proposal in terms of preparatory examination, plenary consideration and voting as it applies to bills.

iii. Urgent cases (urgence)

If a bill about a matter of great urgency is tabled, the grand duke can authorize the government to present the bill to the Chamber without consulting the Council of State beforehand. The Chamber examines the reasons the government has given for urgency and if it shares the government's view, it may allow the bill to be sent to a committee directly. Similarly, the Chamber may decide that a legislative proposal is a matter of urgency. If the government agrees with the Chamber, the chairman of the Chamber will order the proposal to be sent to a committee. In both cases, the Chamber can proceed to publicly debate the bills and proposals even if the Council of State has not yet issued an opinion. However, the Chamber can never proceed to a final vote without having received the opinion of the Council of State. In recent years, the procedure for urgent cases has become the normal procedure the government follows for all legislative bills and proposals.

3. The opinion of the social and economic council and of the commercial and professional chambers

Except in urgent cases, the government must request the opinion of the *Conseil Economique et Social* (Social and Economic Council) concerning measures generally affecting various sectors of the economy or the national economy as a whole.²⁹ Similarly, the opinion of the *Chambres professionnelles* (commercial and professional chambers) is required concerning all laws that primarily concern trades and professions that these chambers are responsible for.

The opinions of the council and chambers are not binding. These organs are not considered by the Constitution to be involved in the legislative process. The requirement that their opinion must be obtained is based on ordinary law. This distinguishes their opinion from that of the Council of State, which is required by the Constitution. The validity of a law does not depend on whether or not the Social and Economic Council or the commercial and professional chambers have been consulted, nor is there any sanction for a failure to observe this formal requirement. After all, the legislature has no power to

28. Since 2002 this *commission de travail de la Chambre* has been known as the *Conférence des Présidents*, because it consists of the chairmen of all the parliamentary groups.

29. Art. 2 Loi du 21 mars 1966 portant institution d'un conseil économique et social.

add new requirements to the Constitution by establishing new advisory bodies and making the formation of laws subject to them.

4. *The preparatory examination*

The chairman of the Chamber sends legislative proposals and bills either to a special committee or to one or more permanent committees meeting together. Each committee appoints one or more of its members as *rapporteur* who prepares a reasoned draft report and presents it to the committee for approval. The committee adopts the report's conclusions after it has received the opinion of the Council of State. The committee's report is printed and sent to the deputies before the plenary debate.

5. *Plenary consideration*

The Chamber of Deputies first hears the committee's *rapporteur* and then sets a date for the plenary consideration. There must be at least one day between the presentation of the report and the start of the debate, unless the Chamber decides otherwise. The debate consists of two parts, namely a debate on the general principle of the bill and a debate on the individual sections. Each deputy may take part in the debate. He must however observe the speaking time he is allotted by the rules of procedure or by the Chamber in derogation of the rules.

Deputies are entitled to submit amendments. Their purpose is to amend the proposed text, either by adding new, or by altering or deleting proposed sections. Amendments must be made in writing and be supported by at least five deputies. If the Chamber decides to consider them, the amended texts are first sent to the Council of State for a complementary opinion and then to one or more parliamentary committees. The debate is suspended until the Council of State has published its opinion and the parliamentary committee concerned has prepared its supplementary report. Whatever happens, the Chamber may not proceed to a final vote until the Council of State has published its opinion.

6. *Voting*

Pursuant to Article 65, the Chamber of Deputies votes on the entire text of a bill. However, five deputies may ask for a separate vote on one or more articles of a bill prior to the vote on the entire text.

According to Article 59 of the Constitution, all laws are subject to a second, final vote, known as the "second constitutional vote", unless the Chamber, in agreement with the Council of State, decides otherwise. This requirement is meant to compensate for the absence of a second chamber of Parliament. There must be an interval of at least three months between the two votes. It is exceptional for the Council of State to force a second vote on the Chamber by refusing its consent. Nevertheless, the Council has occasionally used its suspensive veto, notably in order to highlight possible incompatibilities of the bill with general principles of law, the Constitution or international law'.

To be adopted, ordinary laws need to be supported by a simple majority. There are however four categories of Laws that may only be adopted following the qualified majority conditions (two-thirds of the Chamber members) which apply for constitutional revisions under Article 114 (2). Notably laws approving treaties transferring the exercise of sovereign competences to international institutions (Art. 49bis) fall under this requirement.

7. *Promulgation*

The grand duke promulgates laws. In 2009, Article 34 was amended and the grand duke lost the power to “sanction” acts of Parliament. Since then, his assent to new laws is no longer required. His involvement in the legislative process is therefore now limited to his right of legislative initiative and the promulgation of acts, which is considered a pure formality. The grand duke promulgates a law by adding his signature at the foot of the text and the formula of promulgation. In this context, it has to be emphasized again that, under Article 45 of the Constitution, a member of the government must countersign all decisions of the grand duke, including the signature of laws. In practice, they are countersigned by the minister in charge of the subject matter before they are signed by the grand duke.

8. *Publication*

Article 112 of the Constitution provides that no law is binding until it has been published in the form prescribed by law. The procedural and formal requirements for the publication of laws are contained in a grand ducal order of 22 October 1842, as amended.³⁰ Laws are published in the *Mémorial*, the official journal of the Grand Duchy of Luxembourg.

B. Scrutiny of the government

a. *Means available to the Chamber*

1. *Information from the government*

Article 80 of the Constitution provides that members of the government have access to the Chamber and that they must be heard if they so wish. The Chamber may also request their presence. It is customary for ministers to attend the majority of meetings of the Chamber. During debates on the budget and on bills and legislative proposals that concern their departments, ministers address the Chamber to explain their policies and inform the Chamber of their policy intentions. Apart from this information exchange, the Chamber has yet other specific means with which to obtain additional information, necessary to subject government policy to effective scrutiny.

2. *Parliamentary questions*

Deputies are entitled to put questions to the government. The text of these questions, which must be formulated briefly and without explanation, indicates their subject matter. The chairman of the Chamber decides whether the question is formally admissible and if there is any doubt he consults the committee of the chairmen of the parliamentary groups (the *Conférence des Présidents*). Unless the chairman of the Chamber indicates that a question is urgent, ministers generally answer questions in writing within a period of less than a month.

In addition, in matters of fundamental political significance, a deputy may question a member of the government in public session. This allows the deputy to develop the problem in front of all deputies, to question the respective member of government about his opinion on this subject and to encourage a debate on the theme.

30. Arrêté royal grand-ducal du 22 octobre 1842 réglant le mode de publication des lois.

3. *Parliamentary inquiries*

Moreover, Article 64 provides that the Chamber of the Deputies has a *droit d'enquête* (right to hold parliamentary inquiries). A law regulates the exercise of this power.³¹ A parliamentary inquiry gives the Chamber the opportunity to hear witnesses and appoint experts in order to obtain a better understanding of a certain matter and to subject government policy to effective scrutiny.

4. *Petitions*

In 1848, the constituent assembly included the right of petition in the Constitution. This right follows from the freedom of expression. It enables Luxembourgers to bring their proposals and criticisms to the attention of the deputies. In addition, the institution of an ombudsman (*Médiateur*) was created in 2003.³² Though linked to the Chamber of Deputies, he or she receives no instructions from any authority in the exercise of his or her functions. The ombudsman's mission is to receive the claims of persons relating to the functioning of government departments and municipalities as well as public institutions (*établissements publics*) of the state or the municipalities, to the exclusion of their industrial, financial and commercial activities.

b. *Ministerial responsibility*

One of the essential features of parliamentary democracy is the individual or collective responsibility of the members of the government to parliament. If the government no longer enjoys the confidence of the majority of members of parliament, it must resign. In Luxembourg, ministerial responsibility is effected in three ways: by an adverse vote of the Chamber following an interpellation, by the adoption of a motion of no confidence, or by the refusal of the Chamber to support the government during a debate in which the latter has directly or indirectly raised the issue of confidence.

1. *Interpellations*

As was stated above, any deputy has the power to interpellate or question the government, in other words to request a public debate on matters of fundamental political interest. An interpellation must be requested in writing and must indicate the subject matter. It is addressed to the chairman of the Chamber. Only one deputy may request an interpellation at any one time. After the request has been read out, and in agreement with the government, the Chamber decides when the debate on the interpellation will be held. Each interpellation must be brought to a close in one and the same meeting, unless the Chamber decides otherwise.

The vote accepting or rejecting the Chamber's order of business makes it clear whether the Chamber has confidence in the government, or in a member of government. If the government loses a vote on an important issue, there can be no doubt that it will be forced to tender its resignation.

2. *Motions*

Any deputy can table a motion addressed to the government or a resolution to the Chamber. Both are motivated proposals with respect to governmental actions or initiatives, which the Chamber debates and votes on and which can concern the widest possible range of, subject matters. It can also serve to express confidence or lack of confidence in the government or one of its members.

31. Loi du 18.4.1911 relative aux commissions d'enquête parlementaire.

32. Loi du 22 août 2003 instituant un médiateur.

C. *European affairs*

The Lisbon Treaty recognizes 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 Chamber of Deputies in the political sphere of the European Union is manifold.

National parliaments are indeed, first, involved by monitoring the activity of their respective national governments at the European level. A parliamentary committee invites the ministers before and after Council meetings. An agreement governing access of the Chamber of Deputies to internal documents relating to the European Union has been proposed to the government.

The Chamber, second, contributes to monitoring compliance with the subsidiarity principle laid down in the Treaty of Lisbon. An early warning system gives national parliaments eight weeks within which to review a draft legislative act available in all official languages of the European Union. If a majority of parliaments presents a reasoned opinion to the Council and the European Parliament and obtains the support of 55% of Member States or a majority of members of the European Parliament, the European Commission should reconsider the project.

A Memorandum on cooperation between the Chamber of Deputies and the Government of the Grand Duchy of Luxembourg in the field of EU policy, which is joined to the rules of procedure of the Chamber, governs the rights and duties of both institutions in this respect.

Beyond these two main powers, the Chamber participates in the inter-parliamentary cooperation within the Union. National parliaments have indeed created networks to cooperate on European issues. Inter-parliamentary meetings are held mainly in the framework of COSAC (*Conférence des Organes Spécialisés aux Affaires Communautaires et européennes*) 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 IPEX database.

VII. The government

In the course of the current revision process, the Constitution should be complemented by political practices which all democracies, including Luxembourg, have adopted and which concern the relationship between the government and the Chamber of Deputies. Most importantly, the government, before taking office, will have to ask for and obtain the confidence of the Chamber.

I. COMPOSITION AND ORGANIZATION

Article 76 provides: “the grand duke regulates the organization of his government, which shall consist of at least three members.”⁴⁴ From a formal viewpoint, the grand duke has direct regulatory power to organize his government at his discretion and to appoint the ministers of his choice. However, this power is limited by the democratic principle that the government needs the confidence of the parliament because, without it, the government’s actions would be blocked. The choice of ministers therefore depends on the coalition agreements which also serve as the basis for the parliamentary majority. Furthermore, the sovereign’s power is indirectly limited by the rules concerning the annual budget, in particular Article 104. Though the Chamber does not have any direct competence in relation to the composition and organization of the government, it does indirectly exercise influence by virtue of its right to vote on the budget.

2. THE FORMATION OF GOVERNMENT

The grand duke appoints and dismisses the members of the government (Art. 77). As stated above, the Constitution does not explicitly limit the sovereign’s power in this respect. In theory, he can appoint his ministers as he pleases. But under the system of parliamentary democracy, ministers must enjoy the confidence not only of the grand duke, but also and above all of the Chamber of Deputies. The grand duke’s choices are naturally influenced by this and are confined to qualified representatives of the parliamentary majority. The delegates are thus chosen either from one political party or – as is usually the case – from several political parties.

Members of the government derive their authority not only from their appointment by the grand duke, but above all from their membership of a political party. They hold a position which does not generally fall to citizens with no political allegiance.

The procedure that precedes the actual formation of a government – and which the Constitution leaves entirely at the discretion of the grand duke – has followed a fixed format since 1966. After the previous government has tendered its resignation, the sovereign consults the chairmen of the political parties. He then appoints a person to investigate the possibilities of forming a government. Based on this person’s report, the grand duke appoints a person to form a government. If this person succeeds, he submits a

list of candidate ministers to the grand duke for appointment. The executive committees of the political parties supporting the new government supply the names of the future ministers.

Members of the government do not hold office for a fixed term. In theory, the grand duke could dismiss them at any time (Art. 77), but in practice he only dismisses a government or a member of the government if it (or the member) no longer enjoys the confidence of the Chamber. However, as a last resort in the event of a conflict between himself and the national parliament, the grand duke can always dissolve the Chamber of Deputies and call for new elections.

3. THE LEGAL POSITION OF MINISTERS

Members of the government must have Luxembourg nationality (Art. 10*bis*). They accept office by taking the oath at the hands of the grand duke or his authorized representative.

Membership of the government is incompatible with membership of the Chamber of Deputies,³³ of the Council of State,³⁴ and of a municipal council. It is also incompatible with the office of mayor,³⁵ membership of the *Chambre des Comptes* (Court of Auditors) and judicial office.³⁶ Members of the government may not operate an inn, conduct a trade or business, or carry out any profession or commercial activity. Moreover, they may not take part in the management and administration of, or exercise supervision over, a trading company or an industrial or financial institution.³⁷

4. MINISTERIAL RESPONSIBILITY

The Constitution provides that members of the government are responsible. This responsibility is based both on Articles 4, 45 and 78 of the Constitution and on a grand ducal order of 9 July 1857.³⁸ The grand duke is not responsible because his person is inviolable. A minister, who bears full responsibility for them, must countersign his decisions. In addition, ministers are responsible for their own acts, either individually or as a group.

Responsibility for a decision made by the *Conseil de Gouvernement* (Council of Ministers) is borne by all ministers who took part in making the decision. Only a minister whose opposing vote is recorded in the minutes of the meeting of the council is relieved of all responsibility. Otherwise, each minister is responsible for the decisions he makes as head of his department(s).

Ministers are responsible in political, criminal and civil matters.

a. Political responsibility

If the Chamber disapproves of the policy of a member of the government or of the entire government, it generally does this by adopting a motion of no confidence or rejecting a bill. It is customary for the government (or minister) concerned to tender its (his)

33. Art. 54, paragraph 1, Constitution.

34. Art. 10 of the Loi modifiée du 12 juillet 1996 portant réforme du Conseil d'Etat.

35. Art. 9 Loi électorale.

36. Arts. 14 and 81, loi du 16 avril 1979 fixant le statut général des fonctionnaires de l'Etat, as amended.

37. Arts. 7 and 45, loi du 14.4.34.

38. Arrêté royal-grand-ducal du 9.7.1857 portant organisation du Gouvernement.

resignation on the first vote of no confidence by the Chamber. The Chamber has various means at its disposal with which to compel a government that no longer enjoys its confidence to resign, in particular the refusal to accept its budget.

b. Criminal responsibility

Members of the government may be held criminally responsible. In the first place, this responsibility is engaged if they commit an act which is prohibited by the criminal code or by a specific criminal provision. Apart from liability under the normal criminal law, they are responsible for acts and omissions committed in or further to the exercise of their office. In the latter case, even where no specific offence has been committed, the full Superior Court of Justice will determine the nature of the offence and the appropriate punishment.

Ministers may not be brought before a criminal court otherwise than on a charge brought by the Chamber of Deputies, which has a discretionary power in this respect. The public prosecution department plays no part in such matters; this would indeed be highly problematic, as it is subordinate to the minister of justice. Moreover, ministers cannot be prosecuted directly on the complaint of an injured party.

As the legislature has made no specific provision, the Superior Court of Justice is competent to try members of the government who have been charged by the Chamber. The penalty may not exceed imprisonment, without prejudice to those cases for which the criminal laws make express provision (Art. 116). There is no appeal.

In order to ensure that criminal responsibility does not become illusory, the Constitution provides that the grand duke may only grant a pardon if the Chamber explicitly requests it (Art. 83).

The Constitution does not go into more detail about whether the special regulation of criminal responsibility applies only to acts performed in or further to a minister's office or whether it also extends to acts in a private capacity. In the view of the majority of legal writers, Article 78, which is drafted in very general terms, must be interpreted broadly to refer to both official and private acts.

The protection that is thus conferred on ministers is above all connected with the independence of the executive. It is based on considerations of public interest. Rather than being a favour conferred on ministers, it is a prescription of public policy which is justified by the requirements of the function of government.

c. Civil liability

A minister's civil liability can be viewed from three perspectives. If the event causing the loss is not connected with his ministerial office but falls within the ambit of his private life, ordinary civil law rules apply. The minister is dealt with as a private person. If the loss-causing act was performed in or further to his ministerial office, civil liability will only apply on the basis of a complaint by the Chamber of Deputies. In that case, Article 82 regards civil liability as liability arising from a criminal act.

Finally, if the minister is held liable for an act performed in the course of his duties and there is no question of a criminal offence or of an offence the Superior Court of Justice deems criminal under Article 116, the state is liable instead of the minister, who was acting as an organ of state. In that case the Law of 1 September 1988 on the liability of the state and public authorities³⁹ applies.

39. Loi du 1.9.1988 relative à la responsabilité civile de l'Etat et des collectivités publiques. See, for further details, Georges Ravarani, *La responsabilité civile des personnes privées et publiques*, 2ème édition, Pasricrisie luxembourgeoise 2006.

5. GOVERNMENT POWERS AND PROCEDURE

Ministers assist the head of state in exercising executive power. Article 33 provides that the grand duke exercises executive power alone. However, this provision must be read in conjunction with Article 45, which states that a member of the government must countersign decisions of the grand duke. Countersignature serves two functions. In the first place it serves to authenticate the sovereign's decisions. In the second place it is the act whereby members of the government assume responsibility for these decisions.

Countersignature is both a requirement and discretionary. It is a requirement in the sense that any decision of the grand duke must be countersigned if it is to have legal consequences; it is discretionary in the sense that members of the government may refuse their signature. As was observed above, ministers who countersign a decision of the grand duke assume responsibility for it. It goes without saying that they can refuse to sign if they do not agree with the substance of the decision.

Although the grand duke is the most important element in decision-making according to the Constitution, in practice the minister is. In most cases, he takes the initiative and places his signature before the measure is put to the sovereign for signature.

6. THE COUNCIL OF MINISTERS

The government, which consists of all the ministers, deputy ministers and secretaries of State (*secrétaires d'Etat*), is obliged to consider all matters on which the grand duke has to take decisions. The same applies to matters about which the members of the government are able to decide independently, but about which the grand duke has decided that they must be considered in the *Conseil de Gouvernement* (Council of Ministers). Matters that concern more than one ministry must be considered in the council and the decision taken there. The prime minister has authority to raise any matter that affects the government of the Grand Duchy in the council of ministers. Similarly, each member of the government is competent to seek a decision of the council on matters affecting his department.

The council also considers and takes decisions on matters, which the law has provided that it should. Council decisions are adopted by majority vote. If there is an equality of votes on a matter which is within the competence of the sovereign, both positions are put to him. If there is an equality of votes on matters which it is for the council itself to decide, the prime minister has a casting vote. Nevertheless, the grand duke's vote is a casting vote, if the minister whose department is involved so requests, and the council takes the view that the decision can be delayed without objection.

Where delay would entail risk, two members of the government acting in agreement may take a decision; in cases of extreme urgency the prime minister acting alone can take decisions on matters which are within the competence of the council. In either case the council is informed at its next meeting of the decisions that have been taken.

The prime minister, as chairman of the council of ministers, is authorized to suspend implementation of decisions that have been taken, subject to the obligation to notify the sovereign of this immediately.

a. Prime minister

The government is headed by a chairman who bears the title of prime minister (Grand Ducal Order of 14 July 1989, amending Royal/Grand Ducal Order of 9 July 1857 on the

organization of the government).⁴⁰ In practice, he is the head of the government, as he is the person ultimately responsible for implementing the policies adopted by the government. He chairs the Council of Ministers, supervises the general conduct of affairs and ensures that the same principles are applied equally in the various parts of the machinery of state. The role of the Prime minister is likely to be strengthened as a result of the pending constitutional revision.

b. Ministers and secrétaires d'Etat

Departments are headed by a minister, sometimes assisted by a deputy minister (*Ministre délégué*) or a *secrétaire d'Etat*, who is subordinate to the minister. For the moment, the Constitution does not distinguish between ministers; it refers only in general terms to members of the government. Concerning the affairs of their departments, ministers exercise the powers conferred on the government by the Constitution, laws and regulations. Their powers are many and varied. They prepare bills and defend them in the Chamber of Deputies; they countersign decisions of the sovereign concerning their departments; they prepare draft regulations implementing the laws, which they then present to the sovereign through the prime minister; they adopt regulations where a special law gives them the power to do so and they determine the policies they wish to pursue, within the limits of their competence.

7. GOVERNMENT STABILITY

Stability of government is one of the main features of the Luxembourg parliamentary system. The Grand Duchy had twenty-nine governments between 1848 and 1888, with an average life of sixteen months. From 1888 until 1918, it had nine governments with an average life of three and a half years; between 1918 and 1937 seven governments with an average life of two years and eight months, and between 1937 and 1974 nine governments which remained in power for an average of four years. The majority of the ministers took part in various successive governments.

With the exception of the periods from 1848 to 1853 and from 1860 to 1866, when there were coalition governments, the governments from 1848 to 1915 consisted of members of a single political party. Conservatives were in power from 1853 to 1860 and from 1866 to 1867; liberals from 1867 to 1915. From 1915, with the exception of a period of four years between 1921 and 1925, coalition governments dominated the political stage. The Christian Social Party, which has generally commanded a large number of seats in the Chamber of Deputies, has formed the "backbone of all coalitions" since 1915, with the exception of the Prüm Government (1925 to 1926) and the Thorn Government (1974 to 1979). For more than 80 years, sometimes with the liberals, at other times with the socialists, the Christian Social Party has determined the fate of Luxembourg.

40. Arrêté grand-ducal du 14.7.1989 portant modification de l'arrêté royal grand-ducal du 9.7.1857 portant organisation du gouvernement.

VIII. The advisory organs

Of the organs that advise in the area of legislation, mention must first be made of the Council of State, followed by the Social and Economic Council and the commercial and professional chambers.

A. Council of State (*Conseil d'Etat*)

Created in 1856 as a council of the Crown, and preserved by the 1868 Constitution, the Council of State had a triple mission until the major reform of 1996. It delivered opinions on draft bills, gave advice to the government in regulatory matters and, through the judgments of the Litigation Committee, it dispensed administrative justice. Since the constitutional revision of 12 July 1996 and according to a reform Act of the same day, the Council lost its judicial function in order to comply with a decision of the European Court of Human Rights of 28 September 1995 in the *Procola* case.

I. COMPOSITION

The Council of State consists of twenty-one members. This does not include the members of the ruling House, who may form part of the council and increase its numbers.⁴¹ Currently, only Prince Guillaume, inheritor of the crown, is an “extra” council member.

The grand duke appoints the members of the Council of State either directly or on the nomination of the Chamber or of the council itself (cooptation). Members of the ruling House are always appointed directly. If the whole council is renewed, in other words, if it is dissolved, the grand duke appoints seven members directly, seven members from a nomination of ten persons put forward by the Chamber and seven members from a nomination of ten persons put forward by the members who have just been directly appointed or appointed upon the nomination of the Chamber.

If there is a vacancy, it is filled alternately by a direct appointment by the grand duke, by appointment from a nomination of three persons put forward by the Chamber or by appointment from a nomination of three persons put forward by the Council of State itself.

The council holds a plenary meeting to nominate candidates for a vacancy. Voting is secret. The nomination is made by a simple majority of the votes cast by the members present. If there is a tied vote the senior candidate by age takes precedence. At least eleven of the twenty-one members have to be trained as lawyers. The mandate of a council member lasts fifteen years (not renewable). In any case, membership of the council ends *de jure* when a member reaches the age of seventy-two.

41. Art. 4, loi du 12.7.1996 portant réforme du Conseil d'Etat.

The grand duke can dissolve the Council of State. In that case the whole council is renewed. This could occur if there was a conflict between the Chamber of Deputies and the council. The grand duke can also dismiss a member of the council; in that case he must first submit the reasons for dismissal to the full council for advice.

To be a member of the Council of State, a person must be a Luxembourger, have civil and political rights, be a resident of the Grand Duchy and at least thirty years old. Membership of the Council is in principle compatible with any other office or occupation. There are only three cases of incompatibility: deputies, members of the government, and members of the Administrative Court may not be appointed to the Council of State. If a member of the Council accepts one of these positions, his membership ends automatically.

2. PROCEDURE

The Council meets in plenary sittings. Meetings are not normally public. The plenary meeting consists of all the members of the Council who exercise the legislative and regulatory powers of the Council. Resolutions of the plenary meeting are adopted by a simple majority of the votes and are presented in the form of an opinion.

3. POWERS

In Luxembourg's unicameral system, the Council of State to some extent exerts the moderating influence of a second legislative assembly. Article 83bis of the Constitution states: "The Council of State is called to express its views on bills and legislative proposals and amendments that might be proposed to them, as well as on all other matters deferred to it by the Government or by the laws. The organization of the Council of State and the manner in which it exercises its powers are regulated by law."

a. Powers in respect of legislation

1. The right to make proposals

Before presenting a bill to the Council of State the government can request its opinion concerning the principles of the proposed legislation. For its part, the Council can draw the government's attention to the desirability of new laws or of amendments to existing laws. In either case, if the government and the Council of State are in agreement, the government can request the Council to prepare a bill. Article 3 of the Law of 12 July 1996 grants to the Council of State the right to make legislative proposals.⁴² This right differs from the right of initiative of the grand duke and of the Chamber in that it only exists in relationship to the government; it is the government that decides whether or not to implement the council's proposals.

2. Opinions concerning bills and amendments

The Council of State must give its opinion on bills and proposed amendments to bills. No bill is laid before the grand duke or introduced into the Chamber for debate before the Council of State has been heard.⁴³

42. Art. 3, loi du 12.7.1996 portant réforme du Conseil d'Etat.

43. Art. 83bis Constitution; Art. 2, loi du 12.7.1996 portant réforme du Conseil d'Etat.

If the government takes the view that a bill concerns a matter of urgency, it may be introduced into the Chamber without prior consultation of the Council of State. If the government and the Chamber are in agreement about the urgency, the parliamentary consideration of the bill can begin immediately. However, the final vote cannot be held before the Council of State has given its opinion.

The creation of a law therefore depends upon the leave of the Council, which determines its priorities independently. According to the Constitution, the Council is called to consider all bills and proposed amendments to bills. It is therefore out of the question that the Council, once it has been consulted, should have any choice in the matter of whether or not to issue an opinion. Neither the request for the Council's opinion nor the Council's consideration may be omitted, replaced by a different procedure or subjected to conditions. Delay or no delay, the Council of State must give its opinion before the Chamber votes upon a law, and it must be stated at the beginning of the law that the Council has been consulted.

The Council of State's intervention is required for laws to be valid. It is irrelevant whether its powers are advisory or decision-making; it is sufficient to note that both the requirement that it must be consulted and that it must consider legislation are mandatory requirements. Even if the Council drags its feet or refuses to give its opinion, the procedure must be followed.

If the legislature wanted to restrict the process of consultation or the Council's consideration of legislation, it could only do this by amending the text of Article 83*bis*, and to do this it would have to respect the procedure of constitutional amendment under Article 114, including the request for the opinion of the Council of State.

3. *The second vote under the Constitution*

Article 59 provides that all laws are subject to a second vote, unless the Chamber, in agreement with the Council of State, decides otherwise. There must be an interval of at least three months between the first vote and the second.

Refusing to allow the Chamber to avoid the second vote is a valuable weapon in the hands of the Council of State in order to prevent a refusal of the Chamber to take account of its opinions. The possibility that it will use this suspensive veto considerably increases the Council's influence, all the more so when a general election is close and the second vote would have to be held by the newly elected Chamber. In practice, however, the Council of State usually agrees to waive the second vote, which has therefore been transformed from a theoretical principle to an exception in practice.

b. Powers in respect of the administration

In administrative affairs, the Council of State gives its opinion on all matters the grand duke puts to it. The head of state is free to choose which matters he consults the Council on. Except when a matter is urgent, the grand duke must put all *règlements grand-ducaux* (grand ducal regulations) to the Council for an opinion. This does not however apply to regulations based on Article 76 (organization of the government) and those issued during a state of emergency. It is for the grand duke to decide whether a matter is urgent or not, and he enjoys discretionary power in this respect.

Opinions of the Council of State do not normally bind the sovereign. Nevertheless, some laws provide that the sovereign can only adopt some regulations (particularly those implementing primary legislation) following an *avis conforme*, in other words if they have been submitted to the Council of State for an opinion and if the Council has given a positive advice. Otherwise, any acts under these regulations will be voidable. Such laws

ignore the principle that the grand duke's power to issue such regulations is discretionary and may not be subjected to scrutiny by the Council of State, as this is not a requirement of the Constitution.

Each regulation must state at the beginning that the Council of State has been heard or that the grand duke has invoked urgency, otherwise any act under the regulation will be voidable.

Sometimes an opinion is given about only a part of a regulation and urgency invoked for the remainder. And sometimes a regulation is put to the Council of State for an opinion but, because it takes too long, the grand duke invokes urgency in order to effect the regulation anyway.

B. The Social and Economic Council (*Conseil Economique et Social*)

The Social and Economic Council was established by a Law of 21 March 1966, as amended.⁴⁴ It consists of thirty-nine members and the same number of substitutes, appointed for a renewable period of four years. The Social and Economic Council is an advisory body charged with studying, either of its own initiative or at the government's request, economic, financial and social issues concerning several sectors of the economy or the entire national economy. Except where a matter is urgent, the government asks the opinion of the Council on measures of a general nature concerning several trades or professions or the entire national economy. At the beginning of the first quarter of each year, the Council produces a document concerning the economic, financial and social development of the country. The government may also ask the Council for its opinion on all matters of general interest and all matters of principle on which the commercial and professional chambers have issued fundamentally divergent opinions. In that case, the Council must weigh the various positions against one another and coordinate them in a single opinion.

The Council must present its opinions within a period of time set by the government.

C. The commercial and professional chambers (*Chambres professionnelles*)

Five commercial and professional chambers were 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).⁴⁵ A Law of 12 February 1964 added a sixth chamber for public servants (*chambre des fonctionnaires et employés publics*).⁴⁶

The number of chambers 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, made necessary by the entry into force of "single status" within Luxembourgish labour law from 1 January 2009.

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

44. Loi du 21 mars 1966 portant institution d'un conseil économique et social.

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

46. 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.

primary task is to protect the professional interests of their members. The Chamber of Deputies 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.

IX. The administration of justice

According to the Constitution, justice is administered by the courts. It would, however, be wrong to assume that justice is only administered by the courts; the Constitution has established a system of administrative law in addition to the judiciary (Civil and Criminal Courts). By establishing two systems, the constituent assembly has tried to avoid the ordinary courts' trespassing on the territory of the executive and thus infringing the principle of the separation of powers.

A. The ordinary Courts

I. JURISDICTION

The courts have jurisdiction over all disputes which are not entrusted to other tribunals by the Constitution or by the law pursuant to the Constitution. They have exclusive jurisdiction in civil matters. Their jurisdiction is not affected by the nature of the parties, for example the fact that the State or a municipality is a party. It should be noted that, given the general wording of the Constitution, the legislature cannot remove these matters from the jurisdiction of the ordinary courts.

Similarly, the courts have jurisdiction over disputes concerning political rights, apart from the exceptions laid down by law. In this field, too, their jurisdiction is universal. The legislature may however depart from the constitutional principle and entrust the resolution of certain disputes on political rights to other tribunals. Political rights, referred to in Article 85 of the Constitution, concern only those rights which enable a citizen to fulfil his civic responsibilities, such as the right to vote and the right to be elected. On the other hand, the rights and duties that flow from the administration of the community and which are vested in the *administré* (person affected by the administration), independently of his capacity as a *citoyen* (citizen), fall within the sphere of administrative law. Disputes relating to these matters fall within the jurisdiction of the administrative courts.

The jurisdiction of the courts is not confined to civil matters and disputes concerning political rights, but also extends to *contentieux de la légalité* (review of legality).

In the first place, the courts have jurisdiction in criminal matters. Their powers are regulated in the Criminal Code, the Code of Criminal Procedure, and special laws. The Constitution does not specifically refer to this jurisdiction; it is however deemed to a constitutional given. In the second place, the courts examine to what extent national and local regulations are binding. They exercise this control over all national and local regulations; regardless of the subject matter and regardless of whether they are of a civil or criminal nature.

Judicial control is exercised indirectly, by means of a decision as to a rule's applicability or non-applicability. It is impossible to directly request annulment of a regulation. The courts cannot annul a regulation even if it is unlawful. Their role is confined to determining whether or not the regulation in question is in accordance with the law. If

it is, they must apply it; if not, they must refuse to apply it. In any event, the courts may not substitute their opinion for that of the legislature; otherwise they would be violating the principle of the separation of powers.

Finally, the Superior Court of Justice reviews the legality of judicial decisions and thus, in the final instance, ensures the uniformity and legality of decisions of the courts.

In the course of the ongoing constitutional revision, the government and the parliamentary committee on constitutional revision agreed to transform the Superior Court of justice into a Supreme Court for both the ordinary and the administrative courts.

It is also intended to institute a National Justice Council (*Conseil National de la Justice*) whose responsibility it would be to warrant the independence of judges and to ensure good judicial conduct.

2. ORGANIZATION

a. General

The organization of the courts is governed by Article 86 which provides that “No court may be established except by virtue of a law” and that “No extraordinary commissions or tribunals may be established, under whatever name.” The executive cannot create courts; this is an exclusive power of the legislature. The Constitution also prohibits the legislature and the executive from establishing extraordinary commissions and tribunals. This prohibition applies both to permanent and temporary extraordinary tribunals. In other respects the judicial organization is characterized by certain principles, of which the most important are noted below.

b. A professional judiciary

The majority of courts consist of professional independent and impartial judges. After all, apart from the fact that judges are expected to know more and more these days, the judicial function presupposes many qualities, particularly independence and impartiality, which are more readily found in people who have been specially trained and who occupy a special legal position, than in others. Though the demands of modern society have made it inevitable that mixed courts should be established, consisting of both professional and non-professional judges, these are still the exception rather than the rule.

Legal writers also make a distinction between *juridictions ordinaires* (ordinary courts) and *juridictions particulières* (specialist courts). The ordinary courts consist entirely of professional judges, while the specialist courts consist of both professional and lay judges. The following are ordinary courts: the juge de paix, the district courts and the Superior Court of Justice, and consist solely of professional judges. The military courts, arbitral courts, the *tribunaux de travail* (labour courts), and a few others, which consist partly of professional judges and partly of lay judges, are specialist courts. The ordinary courts may either be courts of general jurisdiction, such as the district courts and the Superior Court of Justice, or courts of specialized jurisdiction, such as the juge de paix. The specialist courts are always courts of specialized jurisdiction.

c. Collegial courts

The principle of collegial, multi-judge courts is considered a guarantee for balanced and impartial decisions. For this reason, despite the fact that the legislature has been compelled by the demands of society to create new courts consisting at least partly of lay judges, it has never really embraced the idea of single-judge courts. It is true that there

are exceptions to this rule, such as the *juge de paix* (justice of the peace) and the *juge de la jeunesse* (juvenile court), but in general the legislature has remained faithful to a rule which has proved its worth and which can be regarded as one of the pillars of the judicial system.

d. A right of appeal

The Constitution does not explicitly guarantee the possibility of appeal. Nevertheless, proceedings can generally be conducted at various successive instances. The possibility of appeal enables a citizen to contest the decision of a lower court before a higher one; it affords a safeguard against mistakes and lack of impartiality on the part of the judges.

e. Universal jurisdiction

A distinction is made between *juridictions de droit commun* (courts of general jurisdiction) and *juridictions d'exception* (courts of specialized jurisdiction). The former, which include the *tribunaux d'arrondissements* (district courts) and the *Cour supérieure de justice* (Superior Court of Justice), have jurisdiction in all disputes except those which the law has conferred on other courts. The specialized courts – the *juge de paix*, the military courts, and the *tribunaux de travail* – only hear those cases where the law has explicitly given them jurisdiction.

f. The hierarchy

The rank or grade of a court within the judicial hierarchy depends on whether the court is a court of first instance or one of the courts that hears appeals. Some courts operate as a court of first instance in certain cases and as an appeal court in others. District courts are a typical example of this. They act as an appeal court in respect of most of the cases tried by the *juge de paix* and as a court of first instance in other cases; the Superior Court of Justice fulfils the role of appeal court in these cases.

g. Uniformity of justice

According to Article 87, a law will provide for the organization of a Superior Court of Justice. This corresponds with Article 147 of the Belgian Constitution, which provides that there is a Court of Cassation for the whole of Belgium, whose task is to ensure the uniformity and legality of justice. In Luxembourg, a Law of 18 February 1885 entrusts this task to the *Cour supérieure de justice* (Superior Court of Justice).⁴⁷ There are a large number of courts that hear disputes and these courts will occasionally give conflicting decisions. In order to resolve such conflicts the Constitution and the legislature have placed the Superior Court of Justice above the other courts. Its task is to quash decisions of courts of last resort for error of law. It thus ensures that the judiciary is subject to the law.

3. PROCEDURAL LAW

Procedural law is the complex of rules which govern the way justice is administered. The Constitution itself contains the most important procedural rules, namely the principle that hearings shall be held in public (Art. 88), that judicial decisions shall be given in public, and that they shall be reasoned (Art. 89). The other rules of procedural law are left

47. Loi du 18.2.1885 sur les pourvois et la procédure en cassation.

to the legislature and are included in the Code of Civil Procedure, the Code of Criminal Procedure and a number of special laws.

a. Hearings in public

Article 88 requires that hearings of the courts shall be public, unless this would endanger public order or morals, in which case the court will declare this in a judgment.

b. Judgments must be given in public

By virtue of Article 89, all judgments have to be given at a public hearing. This constitutional requirement is universal and does not admit exceptions. Even if the judge felt it necessary to hold a hearing in private, he must give his judgment in open court. This means that the judgment and the reasoning are subject – albeit sometimes theoretically – to control by public opinion.

c. Judgments must be reasoned

Article 89 also requires that all judgments must be reasoned. This rule requires the judge to explain the reasons that brought him to a certain decision, both as regards the facts and the law. This gives the parties the opportunity to become acquainted with the considerations that persuaded the judge. Consequently, they are better able to decide whether or not to appeal. It also makes it easier for the court hearing an appeal to review the decision.

B. The administrative courts

Since the amendment of the Constitution of 12 July 1996 and the implementation of the relevant legislation,⁴⁸ jurisdiction in administrative matters has been a matter for independent courts, consisting of full-time judges appointed for life. Before this amendment, administrative disputes were a matter for the *comité du contentieux* (litigation committee) of the Council of State. Since 1 January 1997, however, the Council of State no longer holds these judicial powers. Justice in administrative matters is now administered, at first instance, by an administrative court consisting of seven members and, at appeal, by an administrative appeal court consisting of five members. The administrative courts also have jurisdiction in disputes on direct taxation, which used to be decided at first instance by the director of the *administration des contributions directes* (tax office). The scope of jurisdiction in administrative matters and the appeals over which the Council of State used to have jurisdiction have remained unchanged, though they are now heard by the administrative courts.

In principle, all administrative decisions which affect a person's interests are open to appeal, normally irrespective of which branch of the administration made them. Moreover, the administrative appeal court now also hears appeals for the annulment of administrative decisions having general effect.

48. Loi du 7 novembre 1996 portant organisation des juridictions de l'ordre administratif.

I. APPEAL (*CONTENTIEUX D'APPEL*)

In these appellate proceedings, administrative courts can replace the original decision of the administration with a new decision. Appeal only lies in those cases for which provision is explicitly made by a special organic or ordinary law.

2. ANNULMENT (*CONTENTIEUX DE L'ANNULATION*)

This remedy is available against all administrative decisions and all decisions of the administrative courts against which, according to the laws and regulations, no other appeal lies. It is available even against decisions referred to by the laws and regulations as irrevocable, final or not open to appeal. However, it may only be instituted for reasons of *incompétence* (lack of jurisdiction), *excès de pouvoir* (excess of power), *détournement de pouvoir* (abuse of power), *violation de la loi* (violation of the law) and *violation des formes* (violation of formal requirements which are intended to protect private interests).

In these proceedings the court may annul the contested decision, but cannot replace it with a different one. It must refer the matter to the administration.

C. The Constitutional Court

The Constitutional Court is a specialized court that rules on the constitutionality of laws passed by the Chamber of Deputies. Established by the constitutional revision of 12 July 1996 and a law of 27 July 1997,⁴⁹ the Constitutional Court was given the authority to review laws *a posteriori* in the light of the Constitution (see also section II.3 above).

The Constitutional Court consists of nine independent career judges who cannot be removed from office. They are selected from the judges of the ordinary and administrative courts and continue to serve as ordinary judges. In a sense, they sit as “part time” constitutional judges.

The sole function of the Luxembourg Constitutional Court is to examine the constitutionality of ordinary statute law, except for the laws approving treaties, which are explicitly excluded from its review. If a party questions the constitutionality of a law before one of the ordinary or administrative courts, the court must refer the matter – explicitly stating the legal rule in question – to the Constitutional Court. The court may refrain from doing so if the issue of constitutionality is not deemed vital to the solution of a dispute. The Court systematically rejects preliminary questions referring to the Constitution as a whole or to constitutional principles without specifying the relevant constitutional provisions. Neither the public nor the other constitutional organs have direct access to the Constitutional Court.

The effects of the Constitutional Court's decisions are strictly limited to the case which gave rise to the preliminary question. Ordinary judges deciding in other cases are not, however, required to refer to the constitutional court a preliminary question about a legal provision on which it has already decided. The legislature has full discretion whether to amend or annul a law the Constitutional Court has declared inconsistent with the Constitution.

49. Loi du 27.7.1997 portant organisation de la Cour Constitutionnelle.

Until February 2013 the Constitutional Court had delivered 75 judgements. A large majority of these were about respecting the principle of equality before the law enshrined in Article 10bis.

In the current stage of the pending revision procedure, the parliamentary committee on constitutional revision and the government have reached agreement to close down the Constitutional Court and to give all ordinary judges the power to review the conformity of laws with the Constitution. Hence, ordinary judges will be able to combine review of conventionality of laws with review of their constitutionality. At the top of the judicial system a new Supreme Court is then to be established.

X. Decentralization

There are essentially two forms of decentralization. Public institutions reflect the principle of functional or administrative decentralization, while municipalities are an expression of territorial decentralization. Neither of these forms of decentralization contradicts the concept of a unitary state, as opposed to one with a federal character. Decentralized entities, while enjoying the autonomy granted them by the laws establishing them, remain subject to the tutelary authority of the state.

A. Territorial decentralization

Because of its small size, the state of Luxembourg is not divided into provinces or departments; the only form of territorial decentralization is the division into *communes* (municipalities). The Grand Duchy consists of 3 districts (Luxembourg, Diekirch and Grevenmacher), grouped into 12 cantons, which are finally subdivided into 106 municipalities. The boundaries of the municipalities can only be changed by law. The administration of the municipalities is in the hands of a municipal council – the decision-making organ – and a municipal executive.

I. THE MUNICIPAL COUNCIL (*CONSEIL COMMUNAL*)

a. Composition

The number of members of the municipal council depends on the population of the municipality. In municipalities with fewer than 1,000 residents the council, including the *bourgmestre* (mayor) and *échevins* (aldermen), who are also members of the council, consists of seven members; in larger municipalities (more than 19,999 residents) it consists of nineteen members. The council of the city of Luxembourg, for instance, has twenty-seven members.

Members of the council are elected for six years. Elections are held according to an absolute majority system, except in municipalities which have a municipal electoral district of more than 3,000 residents, or a population of over 3,500. These have a system of proportional representation. The grand duke can dissolve a municipal council; in that case new council elections are held within three months after the council's dissolution.

b. Powers

The municipal council represents the municipality. The council's powers vary depending on whether the matter in question is one of purely municipal interest or one that has been put to it by a higher authority. In the former case, the council's decisions are binding, in the latter only advisory. The broad wording of the *loi communale* (Municipalities Act) enables the council to take decisions on all matters, as long as they are not prohibited

from doing so, provided they affect the municipal interest. Thus the council adopts by-laws, takes decisions on municipal real estate and other property, adopts the budget and accounts and appoints municipal employees. It can even organize a referendum if it is competent to deal with the subject matter of the referendum.

2. THE MUNICIPAL EXECUTIVE (*COLLÈGE ÉCHEVINAL*)

a. Composition

The municipal executive of each municipality consists of the mayor and two aldermen who ensure the day-to-day administration. In larger municipalities the number of aldermen may be fixed at:

- three in a municipality with a population of between 10,001 and 25,000,
- four in a municipality with a population of between 25,001 and 50,000 and
- six in a municipality with a population of over 50,000.

The mayors and aldermen of the cities are appointed by the grand duke; the aldermen of the other municipalities by the home affairs minister. They must be appointed from among the members of the municipal council. The mayor and aldermen are members of the council and have a vote in it.

b. Powers

The municipal executive is both an organ of the state and an organ of the municipality. As an organ of the municipality it is charged with implementing and publishing council decisions, directing public works, managing revenue, authorizing expenditure, controlling the municipal reserves and accounts, supervising municipal employees, representing the municipality before the courts and issuing emergency orders, which must be confirmed by the council at its next meeting.

As an organ of the state the municipal executive is above all charged with implementing the laws and grand ducal and ministerial regulations, revising electoral lists, supervising hospitals, homes for the elderly and charitable institutions, and managing municipal archives, documents and records.

The mayor is a member of both the municipal executive and the municipal council. He signs official documents and the correspondence of the municipality, is charged with implementing by-laws, and has the power to require the assistance of the *gendarmerie* and the army. He is a member of the public prosecution department and a registrar of births, marriages and deaths. He may delegate these powers to an alderman.

3. ADMINISTRATIVE SUPERVISION (*TUTELLE ADMINISTRATIVE*)

The municipalities are autonomous. However, while recognizing this principle the constituent assembly sought to avoid the municipal administration detracting from the fundamental interests of the Nation. It therefore established a system of control known as *tutelle administrative*. This is reflected by the fact that a number of municipal decisions are subject to the approval of the grand duke or the home affairs minister. Approval is only required in those cases where the law explicitly requires it, and the law also regulates the form it should take. The grand duke can also suspend municipal decisions and even annul them if they are *ultra vires* or violate the law or are against the public interest. If a municipal administration refuses to comply with a request of the home affairs minister,

the minister can, after he has issued two written warnings, send one or more commissioners to implement the measures required by the laws, regulations or ministerial orders adopted pursuant to the law, at the personal expense of the municipal administrators in question.

B. Administrative decentralization

Administrative decentralization is realized by creating public institutions (“établissements publics”), referred to in Article 108bis of the Constitution.

The legislature may thus create such public institutions with legal personality, of which it determines the organization and the object. Within the limits of their specialty these institutions may receive power to make regulations. The founding law of each institution can also submit these regulatory powers to the approval of the supervisory authority or even provide, without prejudice to the powers of the courts, for the annulment or suspension in case of illegality.

In practice there is a tendency to establish more and more such public bodies. The Court of Auditors, which monitors their expenditures, mentions fourteen institutions in its 2011 special report on public institutions.

Four principles govern the functioning of all these institutions: they are public-law legal persons created by a special legislative act; they must obey the principle of speciality; they enjoy a degree of autonomy; and their founding act may vest special regulatory power in them.

XI. Bibliography

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