Even the decisions to appoint or dismiss individual ministers and the entire government (article 12) follow this scheme, as a consequence of the facts that the monarch enjoys full legal immunity (article 5) and that the country should always have a responsible government. Once the identity of a new government has been identified, the King in Council would typically meet in the morning in order to dismiss the outgoing team and to appoint the new government. The dismissal would be given effect from noon of the same day, when a new council meeting with the newcomers will gather. The new government then 'apportions the business' among its members (article 12 paragraph 2) by deciding who should be Minister of Foreign Affairs, Finance and so on. Similarly, new Secretaries of State (that are not members of the government) are appointed (article 14).

According to the text of the Constitution, the appointment of a government and the distribution of ministerial responsibilities are decided the way the King himself 'deems appropriate'. Even these provisions must be read in conjunction with article 27-31 of the Constitution, however. This implies that the monarch has no freedom to appoint ministers or to distribute the portfolios between them in a way not accepted by the government itself. On the role of the monarch during government formation, see in chapter 4 on his political role.

In political terms, therefore, we easily discern the leading political actor among the two under present day conditions: *de facto*, the monarch's role at the Council meetings is to approve and give legal effect to proposals of which the politically responsible element has already defined the substance.

The Constitution of Norway no longer leaves it to the monarch to summon Parliament. Instead, it specifies on which day of the year it shall assemble (article 68); it sits until the next session is assembled. Once the Parliament has finished the necessary internal business (such as electing its Presidents and distribution of seats in the permanent commissions), it remains for the monarch to conduct the formal opening of the annual sessions (article 74 paragraph 1). At this occasion, he even gives the speech from the throne in which Parliament shall be informed 'of the state of the realm and of the issues to which he particularly desires to call the attention of the *Storting*'. Since 1905, the Prime Minister prepares the text and hands it over to the monarch during the solemn ceremony itself.

Unlike any other parliament in parliamentary democracies, it has never been possible to dissolve the *Storting* during its four year electoral term (article 71).

3.8. LUXEMBOURG: GRAND DUKE HENRI'S REFUSAL, IN 2008, TO SIGN THE BILL LEGALISING EUTHANASIA

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In his play *King Charles III*, the British author Mike Bartlett imagined how Charles, once crowned, would refuse his assent to a bill restricting press freedom. In Luxembourg, this hypothesis became real in 2008. In European 'neutralised' monarchies, where monarchs are not supposed to play any major political role (exceptions: Liechtenstein and Monaco), such refusal has become extremely rare since the end of the (long) nineteenth century.

In 1912, after decades of political abstinence of the previous Grand Dukes Adolphe and Guillaume IV, the young Grand Duchess of Luxembourg Marie-Adélaïde wished to become more involved in politics. Being a devout Catholic, she considered in 1912 refusing her assent to the bill secularising schools, but, eventually, signed it. She did refuse, however, various appointments of civil servants and mayors. In 1915, after appointing a Catholic government against the wishes of the Chamber of Deputies dominated by a coalition of liberals and socialists, she dissolved Parliament. In 1919, although she was legally covered by immunity (article 4 Constitution), Marie-Adélaïde was forced to abdicate (the main reason was her perceived support for the German occupying forces during the First World War and her previous political actions). Abroad, since the end of WWI, there are only two cases where a monarch, in a 'neutralised' European monarchy, has refused royal assent: in Belgium in 1990, with King Baudouin's famous refusal of the bill on abortion (see chapter 3.6); and in the Netherlands in 1972, when Queen Juliana resisted a bill limiting membership of the royal house, leading the government to drop the proposal (see chapter 3.5 above). Given the close links of Luxembourg to both countries, those precedents may have played an essential part in Grand Duke Henri's reasoning in 2008.

Henri's (in)action must be placed in the broader context of his reign. From the start, in a famous interview given with his wife in 2000, Henri announced his will (or even 'their' will) to reshape the monarchical tradition going back to Charlotte and Jean. He introduced a series of major changes, some of which were consensual, being in line with the Zeitgeist; others were rather startling, and others were highly controversial. These reforms, or revolutions, included the abolition, in all legal texts, of the outdated formula 'Grand Duke of Luxembourg *by God's Grace*', the much more active role of his wife Grand Duchess Maria Teresa, the more popular style of public communication, the unearthing of the totally forgotten prerogative of the Grand Duke to open, in person, the parliamentary session, the claim in 2004 of the right to vote in the referendum on the EU Constitution, the reform and publication in 2011/12 of the previously secret house laws and, in 2008, the refusal of the bill on euthanasia.

The political situation in December 2008, in the midst of the global financial crisis, was all but simple. First, in contrast to King Baudouin, Henri did not clarify, and justify, in public his own position at the crucial moment when the constitutional conflict was disclosed by Prime Minister Jean-Claude Juncker in his famous, but also short press conference of 2 December(Juncker 2008). At the time, it was public knowledge that Henri invoked *moral* grounds, based on his Catholic faith (he did not mobilise any *legal* argument such as the infringement, by the bill, of a higher legal norm such as a constitutional norm, or a European or international norm as did some citizens: Jacobs et al 2008). What was not, and even today is still not, clear, is whether he wished (a) to block, definitely, the reform on euthanasia or (b) to allow this reform to go through, but without him being involved. Whereas in Belgium Baudouin's action fell clearly under the second hypothesis, and was held in high esteem by people, in Luxembourg the first reading, put forward in the prime minister's statement to the press, largely prevailed in public opinion, which led to a major legitimacy crisis of the monarchy. The support for a republic suddenly rose to 36 per cent in an opinion poll made just after the announcement of Henri's refusal; 31 per cent wanted Henri to abdicate (Le Jeudi 2008). In his later Christmas speech of 2008, Henri presented a totally different narrative: just like Baudouin, whose words he almost literally copied, Henri asserted that he did not have, and never claimed to have, any right

to veto a bill (reading (b); Grand Duke Henri 2008). But this message, which came rather late, failed to convince. Public confidence was lost. Second, by putting forward his moral scruples as a Catholic, Henri not only took sides in a highly controversial debate which risked dividing society; he also put in an uncomfortable position the Christian-Social Party, which was leading the government, but which had allowed its coalition partner (the socialists) to propose this reform and to pass it through Parliament with the help of the opposition. Third, although most people agreed to qualify Henri's action as unwise, especially against the historical backdrop of Marie-Adélaïde's tragic fate, its legal assessment was less easy.

The Tricky Distinction between the Still Vast Prerogatives of the State Organ 'Grand Duke of Luxembourg' and the Shrinking Discretion of its Main Incumbent (the Individual Monarch)

In 2008, as in most other monarchies with the famous exception of Sweden, the 1868 Constitution of Luxembourg continued to vest a long list of prerogatives, especially the so-called 'executive power', not in the Council of Government but in the state organ called 'Grand Duke of Luxembourg'. The powers to negotiate and ratify a treaty (article 37 § 1), to submit an ordinary bill or constitutional amendment to parliament (article 47; article 114), to sanction and promulgate bills and constitutional amendments (article 34; article 114), to enact regulations (article 32 § 3; article 36; article 37 § 4; article 76), to declare and implement a state of emergency (article 32 § 4), to appoint ministers and civil servants (article 77; article 35 § 1), to supervise the actions of local authorities (article 107 § 3) were all granted by the Constitution to the head of state. However, in order to get a full picture of the situation, one had to combine this first series of legal norms with other norms, either legal or non-legal, a state of affairs I have called '*normativité à deux voix*' (Heuschling 2013). The two-voices-normativity technique consists in the coexistence of two sets of contradictory norms which, together, are supposed to define what remains of the monarch's personal discretion. Classically, the first set of norms, which are all legal norms, grant a long list of state competencies to the state organ 'Grand Duke / King / Emperor', and seemingly bestow on its main or most visible incumbent (the monarch as physical person) a very large discretion: it is he, or she, who is supposed to decide how to use these powers. The aim of the second set of norms, which may be legal or even non-legal (the 'constitutional conventions' in the UK, the 'custom' and/or 'political practice' in other countries, including Luxembourg), is to reduce or even abolish this discretion by various means. A classic example in Luxembourg (article 45) and in many other continental monarchies is the rule of countersignature: a norm taken by the organ 'Grand Duke of Luxembourg' is only valid if it is signed both by the monarch and a minister (according to my theoretical understanding, the minister, in this context, should be considered as the second, less visible incumbent of the state organ 'Grand-Duke', and not as the incumbent of another state organ whose approval would be necessary to the organ 'Grand-Duke').

As a result of these contradictory norms, the legal question of whether Henri could veto a bill, was not as clear as one might have wished in 2008. At the time, article 34 of the Constitution still provided, just as in the nineteenth century: 'The Grand Duke

sanctions and promulgates the laws within three months of the vote of the Chamber'. A bill adopted by the Chamber of Deputies only became a legal norm when 'sanctioned' by the state organ 'Grand Duke of Luxembourg'. In the nineteenth century, it was clear that the monarch (physical person) could refuse to sanction (he or she did not need a ministerial countersignature for withholding it). Let's call this historical model solution (a). But to what extent was this solution still valid in 2008? Did there exist any legal (or extra-legal?) norm which ran against it? If so, what was its exact content? In the abstract, one can envisage three new possible outcomes (b, c, d). Solution (b): The state organ 'Grand Duke' is still entitled to say either 'yes' or 'no', but the exercise of that discretion would need to derive from a co-decision of both incumbents, both monarch and minister having to agree freely. Solution (c): The state organ 'Grand Duke' is still entitled to veto, but it is the minister (subject to the guidelines of the government) who decides; the monarch is simply executing (his/her 'no' is not free any more). Solution (d): The Grand Duke, as state organ, has lost in law any discretion to refuse on moral or political grounds the assent to bills (the organ's answer must be 'yes'): hence, both incumbents (monarch and minister) are obliged to sign.

In the pre-2008 legal literature, the most influential scholars, who were all close to the monarchist Christian-Social party (Pierre Majerus, Pierre Pescatore and Marc Thewes; for a critical analysis see Heuschling 2013: 123 ff), considered that, according to law, notwithstanding all democratic reforms of the 1868 Constitution since 1919, the state organ 'Grand Duke' was still endowed by article 34 with an 'absolute veto right'. They did not clarify, however, whether, in law, solution (a), (b) or (c) prevailed, as they omitted to discuss the impact of article 45 (countersignature) or of any other legal norm. But, according to these scholars, it would have been politically inconceivable for the monarch to use this prerogative. In its influential commentary on the Constitution, the Council of State maintained this absolute veto right, but, in light of article 45, excluded option (a) (Conseil d'État 2006: 149 ff). Whether this implied solution (b) or (c) remained obscure. A different path had been taken by the jurist Léon Metzler who, already in 1949, stated that the veto right in article 34 had been abolished by recent customary norms, given the overall democratisation of the system (solution d; Metzler 1949: 299). But this reasoning implied that custom could abrogate written constitutional norms, a thesis which was and is highly contestable in Luxembourg (see Heuschling 2014: part 2). In 2008, one could have argued, however, that the veto power in article 34 was abrogated implicitly (solution d) not by custom, but by some new abstract provision of the constitutional text: in 1919, there was enshrined the principle of 'sovereignty of the nation' (article 32 § 1), in 1948 the principle of 'parliamentary democracy' (article 51 § 1), in 1998 the principle of 'democracy' (article 1) and the general definition of the 'symbolic' role of the head of state (article 33). Yet, in the literature, these principles were rarely quoted in relation to article 34.

In his press conference of 2 December 2008, when announcing Henri's refusal, Prime Minister Jean-Claude Juncker remained extremely vague on legal arguments: all he said was that 'constitutional practice' would argue against Henri's view (Juncker 2008; also ambiguous: Frieden 2008). Later, in 2009, the Minister of Justice Luc Frieden asserted, without further details, that the government had always defended solution (d) (Frieden 2009). Public statements of prominent socialist politicians, very critical of Henri, oscillated implicitly between theses (d), (c) and (b) (Bodry 2008; Goebbels 2008).

The Commission on the Constitution of the Chamber of Deputies put forward thesis (c), but also, ambiguously, thesis (b) (CIRC 2008: 2). The opinion of the Council of State of 9 December 2008 can be read, mostly, as a defence of solution (d), in contrast to its 2006 commentary (Conseil d'État 2008).

But none of these various arguments made Henri change his mind. Nor did the government resign in order to 'force' the monarch to comply (this classic, nineteenth century solution is totally inadequate, in case of inertia of the monarch; furthermore it punishes society, and the people, rather than the monarch). The government had even proposed to Henri: (a) to sign the bill *and* (b) to make a public statement recording his moral criticisms; yet he refused (Frieden 2009: 541).

The Outcome of the 2008 Crisis: Towards a Swedish Model in Luxembourg?

The crisis was overcome by a common decision of all political parties to amend the Constitution and to delete the term 'sanction' in article 34 of the Constitution (Loi de révision du 12 mars 2009; parl. doc. n°5967). Thereafter, the bill on euthanasia was definitively adopted by the Chamber of Deputies and was 'promulgated' by Henri. During the debate on the constitutional revision, the Council of State took the time to clarify that the state organ 'Grand Duke' had no discretion regarding 'promulgation', an issue which was not beyond all doubt (Conseil d'État 2008).

As a consequence of this crisis, the Chamber of Deputies decided, in 2009, to launch a total reform of the old 1868 Constitution, in order to adapt the largely outdated text to political reality, to establish more transparent formulations and to reform, in depth, the monarchy. The initial version of this project (Meyers 2009) opted for a radical solution: the Swedish model. The state organ called now officially 'head of state', instead of 'Grand Duke', was stripped of almost all competencies, which were vested directly in the state organ 'government'. Furthermore, the monarch as an individual person, who would still wear the title of Grand Duke or Grand Duchess, lost part of his/her immunity: in exceptional circumstances, he/she could be held accountable for 'infringement of his/her constitutional functions' by the Chamber of Deputies and be forced to abdicate by a vote of two thirds of all deputies (for a first, analogous precedent to this extremely rare solution, see French Constitution of 1791, title III, chap II, articles 5-7). Later, however, due to the pressure of the Court and of the Council of State, which were afraid that the Swedish model would ultimately lead to the introduction of a republic, the Chamber changed its mind. The Commission on the Constitution (CIRC) reintroduced largely the classic two-voices-normativity technique; yet, it still kept the new rule of accountability of the monarch, which may make things even more complicated in the future (once the monarch is personally accountable, the meaning of the provision on countersignature will change; its grip on the monarch will weaken). The text of this reform project is currently still under discussion; its future is rather uncertain, as it must be approved by the opposition which, in 2019, became increasingly reluctant to do so. At the end the reform would also be submitted to referendum. Thus, the long term consequences, on a constitutional level, of the 2008 crisis are still not settled. The Swedish model is, definitely, off the table. The question is whether Luxembourg will keep the current, and old, two-voices-normativity system or opt for a slightly new two-voices-normativity system.

In either case, the classic legal issue of the monarch's power will remain a tricky question in Luxembourg.

How Risky is it, for a Monarch, to Refuse Royal Assent? A Comparative Conclusion

On a more general, comparative, level, the study of the 'neutralised' monarchies which have recently experienced a royal veto for moral or political reasons – the Netherlands in 1972, Belgium in 1990, Luxembourg in 2008 – shows that the very frequent political and scholarly discourse, asserting that a refusal of royal assent would be highly improbable because it would inevitably lead to a crisis of the monarchy must be seriously reconsidered. The empirical data tends to prove rather the contrary. None of the three cited monarchs, not even Henri who was involved in the worst of all three scenarios, has been forced to abdicate. None of the three regimes has become a republic. In two of the three examples (Netherlands, Belgium), the veto has generated no major constitutional shift. In Luxembourg, the final outcome is still unknown: the constitutional caesura could be far less dramatic than initially foreseen, the Swedish solution being definitely discarded. Thus, for an activist monarch, to dare to veto a bill appears far less risky than is generally assumed. This conclusion may be rather uncomfortable for constitutionalists and citizens living under a system in which the royal veto may still be legal, but whose use, at the same time, is downplayed as 'unreasonable and highly improbable'. Such discourse belittles how dangerous such an outdated legal situation may be – not so much for the monarchy, but for democracy.

3.9. SPAIN: THE COUP OF FEBRUARY 1981

Charles Powell, Director of the Elcano Royal Institute, Madrid

Juan Carlos I of Spain resolutely performed his function as guardian of the Constitution during the country's turbulent transition from Francoist authoritarianism to incipient democracy between the years 1975-81. The new constitutional and democratic order was met with unrest by sections of the military, unhappy with reforms which, in their calculation, amounted to emasculation and a loss of control. This unrest found expression in a series of failed plots in the late 1970s and early 1980s, culminating in the audacious attempted coup of 1981. The King, far from oblivious to such agitation, sought to placate those figures most uneasy about what democracy in Spain meant for the military, all the while emphasising his duty and commitment to upholding the Constitution. In conversations with disgruntled military men during 1979-80, the King made this commitment clear, anticipating his response to the 1981 coup:

> I listened to them carefully, and when their arguments struck me as departing too far from reality, I tried to make them see reason. But I also made it clear that in no case could they count on me to cover up for the slightest action against a constitutional government like our own. Any such action, I told them, would be regarded by the King as a direct attack on the Crown (de Villalonga 1994: 125).

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