The 2022 I·CONnect Global Review of Constitutional Law

Grand-Duchy of Luxembourg

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I. Introduction

In 2022 Luxembourg’s constitutional law was mainly influenced by the adoption of four constitutional amendment acts and some interesting cases decided by the Constitutional Court.

II. Major Constitutional Developments

The major constitutional development in Luxembourg during the year 2022 was clearly the final vote by the Chamber (*Chambre des deputés*) of four constitutional amendment acts on December 22nd, 2022. Thus, the constitutional amendment procedure which had been officially launched in 2009 when the parliamentary commission on institutions and constitutional revision (CIRC) tabled a fully-fledged amendment draft, registered as parliamentary document no. 6030, came finally to a fruitful end. As the preliminary work within the CIRC started already back to 2005, the whole amendment procedure ran over 18 years.

These are the main changes in the revised text of the Constitution:

The four constitutional revision acts (parliamentary documents no. 7575, 7755, 7700 and 7777) have taken over most of the provisions of the original revision proposal (doc. parl. no. 6030). However, on the one hand there are some adaptations (e.g. the right to found a family and respect for family life or the provision on the interests of the child are not just an objective of constitutional value but have been transferred to the public liberties section), and on the other hand there are some novelties, such as the principle of presumption of innocence and a specific reference to the fight against climate change.

From a structural point of view, the revised Constitution now contains 132 articles, compared to 121 in the current text. There is also a greater structuring than in the current text. Chapter II, devoted to rights and freedoms, now contains four sections dealing with nationality and political rights, fundamental rights, public freedoms (*libertés publiques*) and objectives of constitutional value. Chapter III incorporates provisions relating to the Grand Duke previously included in Chapter I, and the chapter is divided into two sections: one relating to his 'function' (he now has constitutional attributions and no longer 'prerogatives') as Head of State, and the other relating to the constitutional monarchy. Chapter IV deals with the Chamber of Deputies, which is now divided into five sections. The fourth section deals with the ‘other powers of the Chamber of Deputies’*,* including the right of petition and enquiry, the new right of parliamentary initiative and the new institution of an Ombudsman;

Chapter VII on justice contains five sections: the first deals with its organization, the second with the status of 'magistrates', the third with the (new) National Council of Justice, the fourth with the guarantees for the justiciable (in particular procedural guarantees, which are now integrated into the body of the Constitution), and the sixth with the Constitutional Court, which receives additional powers. Chapters XI and XII deal with constitutional amendments and transitional provisions.

From the point of view of substance, the following points can be noted, among others. The Constitution now includes the symbols of the State (anthem, coat of arms, emblems) and enshrines the Luxembourg language as the language of the Grand Duchy of Luxembourg. The form of the State and the founding principles are also included in the constitutional text (constitutional monarchy, respect for the rule of law and human rights). The participation of the Grand Duchy in European integration is included in Article 5.

A qualified majority of two-thirds is now required for certain votes with a significant constitutional impact, apart from constitutional revision laws as such:

In Chapter 2, the catalogue of rights and freedoms is expanded and structured into political rights, fundamental rights, public freedoms and objectives of constitutional value (which do not constitute invocable subjective individual rights). The definition of the precise scope of rights and freedoms is one of the matters reserved for the law.

The catalogue of rights and freedoms now includes additional rights and freedoms that are not included in the text of the current Constitution, such as : new ‘fundamental rights’ as there are human dignity (Art. 12), respect for physical and mental integrity and the prohibition of torture and degrading treatment (Art. 13). Among the public freedoms, the right to found a family and respect for family life and the interests of the child (Art. 15(4) and (5)), the equality of persons with disabilities (Art. 11(6)), the principle of the presumption of innocence (Art. 17(4)) and the right to informational self-determination (Art. 31) were enshrined. Finally, among the new objectives of constitutional value, we find social dialogue (Art. 39), the right to a dignified life and adequate housing (Art. 40), the fight against climate change (Art. 41 para. 2), culture and its heritage and the promotion of freedom of scientific research (Art. 42 and 43).

In Chapter III, the ‘*prerogatives’ of* the Grand Duke are replaced by his *function* and his constitutional powers, in particular the executive power which he exercises jointly with the Government (Art. 44). From the point of view of his regulatory power (Art. 45), it is expressly provided that he shall issue regulations for the direct application of the legal acts of the European Union. With regard to treaties in general, the reference to secret treaties disappears, and the effect of the denunciation of treaties, as with their conclusion, now occurs only after parliamentary approval. The status of civil servants is now determined by law (with the exception of civil servants of the Chamber of Deputies). The Grand Duke's right of pardon is determined by law, the budget of the Grand Ducal House is the subject of an allocation fixed by a budgetary law, and the Grand Duke must take account of the public interest when organizing his administration, an administration which now enjoys (for reasons of independence and legal certainty, according to the authors of the text), civil personality (art. 54). Finally, substantial additions are made to the part relating to the constitutional monarchy, particularly with regard to succession, regency and the abdication of the Grand Duke, where the powers of the Chamber are strengthened (see Art. 60 etc.);

In Chapter IV, the role of the Chamber in the control of government action is emphasized. Disqualification from voting and from standing for election may, in certain cases, be ordered by the courts (Article 64(3)). An appeal may be lodged with the Constitutional Court against decisions of ineligibility or incompatibility taken by the Chamber (Art. 67 (3)). It may be noted that the internal organization of the Chamber, including the status of its officials (in principle regulated by law), is organized by its Standing Orders (Sec. 68). Early elections are held in case of a motion of censure or rejection of a motion of confidence of the Government (Sec. 73), the powers of enquiry of the Chamber over the Government are reinforced (Sec. 75, 81). A right of popular initiative and an Ombudsman are introduced (Sec. 79 and 83).

With regard to the Government, Chapter V makes a distinction between the exercise of governmental power in Council or individually for matters for which they are responsible (art. 90). Article 91 does not mention the Prime Minister as head of Government but specifies his coordinating function for the unity of governmental action to the exclusion of any hierarchical power. The Government determines its organization by means of internal regulations, except for matters reserved to the law. The responsibility of the members of the government is also modified, integrating, in addition to collective responsibility, an individual criminal responsibility of ministers, and in article 94 (3), it is henceforth the public prosecutor's office which intervenes to initiate and direct the proceedings.

Chapter VII on Justice undergoes numerous modifications. From an organizational point of view, the general nature of the competences of the courts of the judicial order is specified and the competences and jurisdictional role of all the different courts are detailed (Art. 98 to 103), integrating (following the Constitutional Court's judgment 150/19) the precision of the absolute effect of the annulment of a regulation and the possibility of modulation by the administrative judge of this effect (Art. 103). This chapter also incorporates a constitutional status for magistrates (now a unified term, who may be of the judiciary or of the public prosecution service). In order to strengthen their independence (Art. 104 to 106), a National Council of Justice is established to ensure the proper functioning of the judiciary and its independence, by being in charge of disciplinary procedures. Section 4 enshrines in the body of the Constitution certain procedural guarantees enshrined in treaty law (Article 6 ECHR) or European law: the impartiality of the judge, the fair and equitable trial, the reasonable time limit, respect for the adversarial process and the rights of the defense (Article 110). Finally, in addition to its judging function, the Constitutional Court is now given the task of settling conflicts of jurisdiction between the various courts, particularly those of the judicial and administrative orders, and its powers may be extended by a qualified majority vote of the Chamber of Deputies;

Chapter X incorporates into the Constitution not only the conditions for the creation by law of public agencies (*établissements publics*) and their organization and competences, but also those concerning professional chambers and bodies of regulated professions with legal personality. Their regulatory power within the framework of their object shall respect the law and the grand-ducal regulations (Art. 129).

III. Constitutional Cases

The Constitutional Court (CC) adjudicated seven cases in 2022. This low number of cases, which corresponds more or less to the average number since 1998, stems from the fact that the only competence of the Court under the current text of article 95ter of the Constitution is to “rule, by way of judgment, on the conformity of laws with the Constitution”. The Constitutional Court can only be seized, “on a preliminary basis (…) by any court to rule on the conformity of laws, with the exception of laws approving treaties, with the Constitution”.

The 2022 decisions are numbered from 169/22 to 175/22. The names of the parties are anonymized. As usual the vast majority (six) of these judgments have been rendered solely or partly based on article 10*bis*, par. 1, of the Constitution, which states that “Luxembourgers are equal before the law”. One decision (173/22) is based on article 11, par. 5, stating “The law regulates the principles of social security, health protection, workers' rights, the fight against poverty and the social integration of citizens with disabilities”. Three of the 2022 decisions are particularly interesting. They deal, on the one hand, with the constitutionality of restrictive measures adopted in 2020 to fight the COVID 19 pandemic, and, on the other hand, with the interpretation of the Constitution in light of the ECHR.

1. Covid 19 pandemic measures, judgements in cases 170/22 (September 30, 2022) and 172/22 (November 25, 2022)

The two cases were brought before the Constitutional Court by preliminary questions submitted by two Luxembourg Police Courts (*tribunal de police d’Esch-sur-Alzette, tribunal de police de Luxembourg*) all of which relate to the amended law of 17 July 2020 introducing a series of measures to combat the Covid-19 pandemic (hereinafter "the law of 17 July 2020").

By its questions the Luxembourg Police Courts asked the CC if the restrictive measures imposed by the law of 17 July 2020 respect different fundamental rights and freedoms as the principle of equality of all persons before the law as enshrined in Article 10a(1) of the Constitution, article 11(1) of the Constitution guaranteeing the natural rights of the human person, article 11(3) of the Constitution guaranteeing the protection of privacy, article 12 of the Constitution, guaranteeing individual freedom and article 24 of the Constitution guaranteeing the freedom to express one's opinions.

The CC recalled that “the guarantee of the "natural rights of the human person and the family" encompasses all the rights that have their basis in natural law, to the exclusion of those that have their basis in positive law. Article 11(1) of the Constitution establishes the natural rights of the human person as a guarantee of positive constitutional law; they coexist with, but do not replace, the constitutional provisions that constitute special expressions of them”.

Examining the different legal restrictions established in 2020 the Court considered in general that “restrictions on rights and freedoms imposed to protect others, given the nature of the pandemic, are likely to be justified in a spirit of solidarity among members of the same society and should be accepted provided that proportionality between the risks to some and the restrictions imposed on others is respected”. No breach of the Constitution was thus identified.

1. Judgement in case 175/22, December 9, 2022

In this case, the Court of Appeal referred four questions to the Constitutional Court for a preliminary ruling. These questions can be summarized as “does Article 448 of the New Code of Civil Procedure, insofar as it establishes a derogation from the public nature of the proceedings, comply with Articles 10bis (1) and 88 of the Constitution, read alone or in combination with Article 6 of the ECHR?” According to the CC’s judgment, “The principle of publicity of court hearings guaranteed by both Article 88 of the Constitution and Article 6(1) of the ECHR is not absolute but may be subject to derogation by a court decision ordering the hearing to be held in camera, in cases where such publicity would be dangerous to public order or morality, where the needs of protection of the interests involved so require”. *In casu*, the Court did not find any contrariety to the Constitution, considering that the litigious legal clause (Art. 448 of the NCPC) was by nature alien to both Article 88 of the Constitution and article 6 ECHR. The main interest of this decision is the confirmed willingness of the CC to read the Constitution in the light of relevant international treaty provisions following thus the case law of the Belgian Constitutional Court. The latter considers indeed in its stable case law that fundamental rights provisions of the Belgian Constitution which are also enshrined in an international treaty must be considered as “an inseparable whole”. The finding in case 175/22 is rather laconic as the CC simply declares “that the questions referred for a preliminary ruling do not entail non-compliance with Articles 10bis (1) and 88 of the Constitution, taken together with Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms”.

IV. Looking Ahead

The amended Luxembourgish constitution from 1868 will come into force on July 1st, 2023. This will very likely trigger political discussion and constitutional litigation as many of the numerous “small” changes in wording of the constitutional document have not yet been exhaustively considered.

One major case is already pending at the *tribunal administratif* which will have to decide whether individual members of Parliament have a right to obtain documents detained by the government regarding the ordering of COVID vaccines in cooperation the European Commission.

Parliamentary elections will also take place in October 2023.

V. Further Reading

Pauly, Michel, *Une Constitution entre lutte des classes et nationalisme*, Forum für Politik, Gesellschaft und Kultur Luxembourg Nr. 425 (Mai 2022), p. 15-17.

Gerkrath, Jörg, *Chapter 16 -* *Luxembourg,* *in* Griller, Papadopoulou, Puff (eds) National Constitution and EU Integration, Hart Publishing, 2022, 864 p., pp. 459-481.

Submission by an Initiative Committee of a Request to Hold a Referendum on the Proposed Revision of Chapters IV and Vbis of the Constitution, MENA Report, London 2022, Provided by SyndiGate Media Inc. (Syndigate.info).

Stoppioni, Edoardo, *L’état de droit luxembourgeois malade du covid : réflexions en marge de l’état de crise*, RLDP no. 13, 2022, p. 39