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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

OPINION

ON THE BALANCE OF POWERS

IN THE CONSTITUTION AND THE LEGISLATION

OF THE PRINCIPALITY OF MONACO

Adopted by the Venice Commission
at its 95th Plenary Session
(Venice, 14-15 June 2013)

on the basis of comments by

Mr Jean-Claude SCHOLSEM (Substitute Member, Belgium)
Mr Jorgen Steen SORENSEN (Member, Denmark)
Mr Laszlo TROCSANYI (Substitute Member, Hungary)
Mr Ben VERMEULEN (Member, Netherlands)

TABLE OF CONTENTS

I. Introduction

1. By a letter dated 19 December 2012, the President of the Monitoring Committee of the Parliamentary Assembly of the Council of Europe requested the opinion of the Venice Commission on the Constitution of Monaco (CDL-REF(2013)021) "*in order to examine more in particular the compatibility with the democratic standards of the constitutional provisions concerning the National Council, taking into account the specificities of Monaco."*

2. Messrs. Jean-Claude Scholsem, Jorgen Steen Sorensen, Laszlo Trocsanyi and Ben Vermeulen acted as rapporteurs.

3. On 11 and 12 April 2013, a delegation of the Venice Commission composed of Messrs. Sorensen and Trocsanyi as well as Mr Gianni Buquicchio, President of the Commission, Ms Simona Granata-Menghini, Deputy Secretary General of the Commission and Ms Charlotte de Broutelles, Administrator, travelled to Monaco where they had meetings with:

- H.E. Mr Michel Roger, Minister of State
- Mr José Badia, Government Counsellor for External Relations
- Mr Robert Colle, Secretary General of the State Ministry
- Mr Laurent Anselmi, Head of the Legal Affairs Department of the Government
- Ms Mireille Pettiti, Director General of the Department of External Relations
- H. E. Mr Philippe Narmino, Director of the Judicial Services
- Mr Jean-Pierre Dreno, Prosecutor General
- Ms Brigitte Grinda-Gambarini, First President of the Court of Appeal
- Mr Didier Linotte, President of the Supreme Court
- Mr Laurent Nouvion, Speaker of the National Council
- Mr Christophe Steiner, Deputy Speaker of the National Council
- Mr Jean-Charles Allavena, Chairman of the External Relations Committee
- Mr Michel-Yves Mourou, President of the Crown Council
- Mr Georges Marsan, Mayor of Monaco and his two Deputies, Ms Camille Svara and Ms Crovetto-Harroch

4. This opinion takes into account the information provided during these meetings. The Venice Commission is grateful to the Monegasque authorities for their welcome and the open dialogue during the visit.

5. The present opinion was discussed at the meeting of the Sub-Commission on Democratic Institutions on Thursday 13 June 2013 and was subsequently adopted by the Commission at its 95th Plenary Session (Venice, 14-15 June 2013).

II. Scope of the opinion

6. This opinion focuses on the balance of the executive, legislative and judiciary powers established by the Constitution and the legislation of Monaco, in the light of European and international standards on democracy and the rule of law and of the common constitutional heritage of the European monarchies. As is the case for all Venice Commission opinions, the legal analysis will duly take the specific features of the country concerned into account.

III. European standards on democracy and the rule of law

A. International principles on democracy

7. International law does not prescribe a specific form of government. However, democracy is a fundamental feature of the European public order, and - within the context of the European Convention on Human Rights (ECHR) - is the only acceptable form of government.[1] Democracy is a condition for membership of the Council of Europe and the European Union[2] and is regarded as 'the only system of government of our nations' in the 1990 OSCE Charter of Paris for a New Europe.

8. While there is no generally accepted concept of what constitutes a democracy and while there is a large variety of political systems and practices across states that are considered democracies, there is a European consensus on the core components of what a democracy is.

9. Article 21 of the Universal Declaration of Human Rights of 1948, which may be considered to reflect customary international law, provides that "the will of the people shall be the basis of the authority of government".

10. The Preamble of the ECHR states that the members of the Council of Europe reaffirm 'their profound belief in those Fundamental Freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy'. Several limitation clauses in the ECHR presume the existence of a democratic regime, requiring that restrictions on fundamental rights are 'necessary in a democratic society' (cf. Articles 8-11 ECHR; Article 2 of the Forth Protocol 4 to the ECHR).[3] Furthermore, according to Article 3 of the First Protocol to the ECHR "(t)he High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature". This provision 'presupposes the existence of a representative legislature, elected at reasonable intervals, as the basis of a democratic society'.[4] As the Venice Commission has stated, this representative legislature 'should not only be a pluralistic parliament, representing the opinions of the voters, but an effective parliament which decides on political matters with no internal political interference from other political bodies'.[5]

11. In the same vein, Article 25 of the International Covenant on Civil and Political Rights declares that '(e)very citizen shall have the right and the opportunity […] (a) to take part in the conduct of public affairs, directly or through freely chosen representatives; (b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors […]'.

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[1] ECtHR (Grand Chamber) 16 March 2006, *Zdanoka vs. Latvia*, para. 98: '*Democracy constitutes a fundamental element of the "European public order" […] thus, the Court has pointed out on many occasions that the Convention was in fact designed to maintain and promote the ideals and values of a democratic society. In other words, democracy is the only political model contemplated by the Convention and, accordingly, the only one compatible with it*.'

[2] See the second paragraph of the Preamble and Article 6, paragraph 1 of the Treaty establishing the European Union.

[3] Venice Commission Opinion on the Constitutional Amendments proposed by the Princely House of Liechtenstein and on the Constitutional Amendments proposed by the 'Citizens' initiative for Constitutional Peace', 13-14 December 2002, CDL-AD (2002) 32, para. 8

[4] EComHR, Report of 5 November 1969, *The Greek Case*, para. 319; Van Dijk/Van Hoof et al., *Theory and Practice of the European Convention on Human Rights*, Antwerp/New York 2006, p. 912.

[5] Venice Commission Opinion on Liechtenstein (supra note 3), para. 8.

12. In the OSCE Charter of Paris, the key elements of democracy are defined as representation, pluralism, a constitutionally guaranteed separation of powers and the rule of law. Finally, in 2004, the United Nations General Assembly adopted a resolution, building on the ICCPR, which lays out seven 'essential elements' of democracy.[6] These elements are:

- Separation and balance of power
- Independence of the judiciary
- A pluralistic system of political parties and organisations
- Respect for the rule of law
- Accountability and transparency
- Free, independent and pluralistic media
- Respect for human and political rights.

13. The concept of democracy concerns both the issue of 'vertical accountability' - how a state interacts with its people - and the issue of 'horizontal accountability' - the interaction between the state institutions, how they control each other through checks and balances. These two aspects are closely interconnected. Vertical accountability – accountability towards the people - requires that legislative power rests with representative and democratically elected institutions, in order to guarantee that citizens through their votes can determine the composition of those legislative bodies.

Separation and balance of powers

14. The principles of 'separation of powers' and 'balance of powers' demand that the three functions of the democratic state should not be concentrated in one branch, but should be distributed amongst different institutions.

15. The concept of the separation of powers is most clearly achieved with respect to the judiciary, which must be independent from the two other branches.

16. When it comes to the separation and balance between the executive and the legislative branches, their relationship is more complex. The extent of separation depends on the political system as determined by the Constitution. In general, there are three models. In presidential systems there is a clear separation, where directly elected presidents do not depend on the confidence of the legislature. In semi-presidential systems, government has to answer both to a directly elected president and to the legislature. In parliamentary systems, the separation is usually less marked because the executive (government) is appointed from a parliamentary majority. This implies that the executive is dependent on parliamentary approval.[7]

17. International consensus on the essential elements of democracy is not conclusive as to the acceptable model for the relation between these two branches. As the UN Human Rights Commission's Resolution 'Promotion of the Right to Democracy' affirms, it is 'the right of citizens to choose their governmental system through constitutional or other democratic means'.[8] However, when a state has opted for the parliamentary model, it is imperative that the elected body – Parliament – should have sufficient competencies to exercise legislative power and to hold government accountable.

[6] Resolution A/RES/59/201, adopted on 20 December 2004.

[7] See M.S. Shugart (2008), 'Comparative Executive-Legislative Relations' in R.A.W. Rhodes, S.A. Binder and B.A. Rockman (eds.), *The Oxford Handbook of Political Institutions*.

[8] UN Doc E/CN.4/Res/1999/57.

18. The need for parliaments to play a meaningful role logically follows from the right to vote and to stand in elections, which is enshrined in Article 3 of Protocol I to the ECHR, as well as in Article 25 of the International Covenant on Civil and Political Rights (ICCPR). In its General Comment of the UN Human Rights Committee on Article 25 ICCPR, the Committee noted: 'Where citizens participate in the conduct of public affairs through freely chosen representatives, it is implicit in Article 25 that those representatives do in fact exercise governmental power and that they are accountable through the electoral process for the exercise of that power'.[9] In various concluding observations on States' reports, the Committee pointed out that one of the main requirements flowing from Article 25 ICCPR is that there should be no concentration of power in the executive branch: the risk of an over-concentration of power in the government is one of the most significant concerns of democratic governance.[10]

Legislative power and autonomy

19. In a democracy, one key aspect is a properly functioning and directly elected legislature. Democracy and the rule of law require that, in principle, all of the important legislation be adopted by this legislature. Article 3 of the First Protocol to the ECHR requires that for a body to be regarded as a legislature ('corps legislatif'), it needs to have primary rulemaking power.[11]

20. In order to adequately represent the people, legislatures must be free to organise their work. This means that the legislature should be able to adopt and amend its own rules of procedures on an independent basis. Also, the legislature should be free to schedule its sessions, to set its own pace and to determine how much time is needed to draft, review or amend proposed legislation.

21. Most importantly, however, the legislature should have independent competence and authority to wield the power of legislation. The legislature must have the right to discuss, amend and adopt or rescind proposals for legislation, as well as the right to initiate new legislation.[12] This does not mean that the executive is not allowed to adopt legally binding acts, but it must be entitled to do so by the Constitution or through delegation by the legislature. Transfer of legislative power to the executive should be limited in scope, with strictly defined conditions.[13]

22. Finally, political parties are a necessary component of a democracy. As the European Court of Human Rights stated, '*political parties should be considered as a form of association essential to the proper functioning of democracy. (…) By the proposals for an overall societal model which they put before the electorate and by their capacity to implement those proposals once they come to power, political parties differ from other organizations which intervene in the political arena.*'[14]

Accountability

23. Accountability implies both answerability (the obligation to provide information, explanation and justification by the government and the corresponding right of Parliament to ask for accountability) and enforcement (the capacity to hold those who are responsible to account for their actions). In addition to the accountability of government towards the people, the

[9] CCPR/C/21/Rev.1/Add.7, 1996.

[10] HRC, *Concluding Observations, Slovakia* (1997), para. 3, and *Concluding Observations, Iraq* (1997), para. 7.

[11] Van Dijk/Van Hoof 2006 (supra note 4), p. 929.

[12] *Venice Commission Opinion on Liechtenstein* (supra note 3), para. 10.

[13] *Venice Commission Opinion on the Draft amendments to the constitution of Kyrgyzstan*, 13-14 December 2002.

[14] ECtHR (Grand Chamber), 13 February 2003, *Refah Partisi (The Welfare Party) vs. Turkey*, para. 87.

accountability between public institutions is crucial. While the exact answer to the question of who is accountable to whom depends on each individual political system, the international consensus points to some minimum requirements when it comes to the executive branch. For instance, the OSCE's participating States committed themselves to a '*form of government that is representative in character, in which the executive is accountable to the elected legislature or the electorate*'.[15]

24. With respect to the accountability to Parliament, this consensus states that the legislature has the right to ask questions that the executive must answer. The right of sanction depends on the political system that is in place. In presidential systems, the electorate has the primary right of sanction. The people can exercise this right by voting a president out of office in the next election. In parliamentary systems, the legislature has the right of sanction by passing a no-confidence vote, thereby forcing the resignation of the government. In all cases however, the final accountability is to the electorate, either in a direct way, or an indirect way through parliamentary control.

25. The right of Parliament to adopt the state budget is a necessary precondition to exercise effective supervision[16] and has historically been a key characteristic of independent parliaments ('no taxation without representation'). Accordingly, it is essential in a parliamentary democracy that it can survey and adopt the state budget.

B. Monarchy and Democracy

26. Just as there is not only one system of separation and balance between the legislative and executive branches '(t)here is no single model for monarchies in Europe. The constitutional provisions of the countries which have retained monarchies diverge particularly in respect of the specific rights and/or powers which monarchs can (still) exercise, under their Government's' political responsibility. The choice of one of the various possible monarchic models is not open to criticism, *provided* that such choice is compatible with the principles of democracy and the rule of law'.[17]

27. The requirement that a monarchy operates within the principles of democracy and the rule of law sets fundamental restrictions to the position as Head of State of the monarch, who is neither directly nor indirectly elected. In most monarchies in Europe, this has resulted in that position (a) being mainly of a symbolic and ceremonial character, representing the unity of the nation, or (b) being executed within a system of ministerial responsibility, the government being responsible to the democratically elected representative body – Parliament – for the acts of the monarch.[18] Should any independent legislative and/or executive power with real impact be in the sole hands of the monarch, this would make the fact that he is not democratically elected, and not under parliamentary or judicial control, problematic. It can even be argued that the possibility of exercising important legislative and executive powers and of vetoing proposed legislation, without being controlled by the democratically elected body, contradicts the aim of Article 3 of Protocol I to the European Convention[19] and Article 25 of the ICCPR.

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[15] Document of the Copenhagen meeting of the conference on the Human Dimension of the CSCE, 1990.

[16] Association of Secretaries General of Parliaments, 'The administrative and financial autonomy of parliamentary assemblies,' (1999).

[17] Venice Commission Interim Opinion on the Draft Constitutional Amendments of Luxembourg, 11-12 December 2009, CDL-AD (2009)057, paras. 69 and 70.

[18] *Venice Commission Opinion on Liechtenstein* (supra note 3), paras. 11-17.

[19] Pastor Ridruejo and Ress, *Rapport sur la conformité de l'ordre juridique de la Principauté de Monaco,* (supra note 2), para. 167, repeated in the *Venice Commission Opinion on Liechtenstein* (supra note 8), para. 24. See also ECtHR, decision 2 September 2004, *Boskoski vs. "the former Yugoslav Republic of Macedonia"*: '*Should it be established that the office of the Head of State had been given the power to initiate and adopt legislation or*

IV. The specific features of the Principality of Monaco

28. The Principality of Monaco presents an undeniable specific situation, in the first place domestically: the size of its territory is 2 km ², making it the second smallest state in the world. This territory, which is surrounded by French territory, is made up of only one city. The population of Monaco consists of 8,400 Monegasque citizens and 35,000 residents (including many inactive) representing 120 nationalities; 46,000 foreigners come to work every morning in Monaco. The Monegasque are thus a small minority in their own country.

29. The links between the sovereign and the Monegasque Family are very close. The monarchy of Monaco is based on the union between the Prince and the national community; in the history of Monaco there have never been any uprising of the population against its sovereign, or antagonism between the people and the Sovereign; "*the nation was not made against the Princes, but with them*" and the Prince "*embodies*" the Monaco nation.[20]

30. With respect to external relations, Monaco maintains "managed" relations with France[21] and exercises sovereignty" within the framework of the general principles of international law and the particular conventions with France" (Article 1 of the Constitution of Monaco).

31. These very old ties were formalised in successive treaties. Today Monaco is linked to France by the "Treaty aimed at adapting and confirming friendship and co-operation relations between the Principality of Monaco and the French Republic" of 24 October 2002. This treaty was supplemented by the Convention of 8 November 2005 aimed at adapting and developing administrative co-operation between the French Republic and the Principality of Monaco, which officially came into force on 1 January 2009. This agreement lays down that public employment in the Principality of Monaco is open to nationals but, notwithstanding this principle, it can be filled by nationals of France or third countries.

V. The balance of powers in the constitution and the legislation of Monaco

A. General remarks

32. On 5 January 1911 Monaco became a constitutional monarchy, when Prince Albert 1st granted the Constitutional Act, which, although it did not provide for any method of revision, was later amended through ordinances.

33. On 17 December 1962, Prince Rainier III provided the Principality of Monaco with a new Constitution, which is a perfect example of a 'granted charter' even if the way in which it was drafted was much more democratic and consensual in reality. This is clear from its Preamble:

> *'Considering that the institutions of the Principality need to be improved, not only to meet the requirements of a Country's good governance but also to satisfy the new needs emerged from the population's social evolution.*
>
> *'We have decided to endow the State with a new Constitution, which, under Our Sovereign Will, shall henceforth be considered as the State's basic law and shall not be subject to amendment but with the wording that We have settled.'*

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enjoyed wide powers to control the passage of legislation or the power to censure the principle legislation-setting authorities, then it could arguably be considered to be a "legislature" within the meaning of Article 3 of Protocol No. 1.'

[20] GRINDA, *La Principauté de Monaco*, deuxième édition, préface de Pr. Weil, Ed. Pedone, Paris, 2009, p. 10.

[21] For more details on this matter see AS/Bur/Monaco (1999) 1 rev.2 Report on the conformity of the legal order of the Principality of Monaco with the fundamental principles of the Council of Europe, pp. 4 to 10.

The Constitution thus originates from the Prince, who restricts his powers of his own accord. 'The Prince exercises His sovereign authority in full compliance with the provisions of the Constitution and laws' (Article 12). This is by its nature a limited monarchy or, as stated in Article 2, paragraph 1, 'a hereditary and constitutional monarchy'.

34. The Constitution thus originates from the Prince, who voluntarily accepts legal restriction of his sovereign powers. 'The Prince exercises His sovereign authority in full compliance with the provisions of the Constitution and laws' (Article 12). This is by its nature a limited monarchy or, as stated in Article 2, paragraph 1, 'a hereditary and constitutional monarchy'.

35. The concepts of the people, the will of the people and popular sovereignty do not appear anywhere in terms of principles. We are thus looking at a Constitution that is ancient, or even archaic, in style (although some of its content is very modern). Power originates from the Prince, as does the Constitution itself. The Constitution of 1962 presented itself as deriving from an original constitutive act[22] and repealed the Constitution of 5 January 1911. There is thus a discontinuity between the two texts, with the 1962 Constitution containing the basic innovation of revision through legislation.

36. 'The principle of government is a hereditary and constitutional monarchy' (Article 2, para. 1). This is a monarchy limited by a Constitution originating from the Prince. Not once does the Constitution use the term 'Parliament' or 'parliamentary'. This reflects the legal reality: the Principality's constitutional system is not parliamentary.

37. At the same time, the Principality claims to be 'a State under the rule of law, committed to fundamental freedoms and rights' (Article 2, para. 2).

38. These rights and freedoms are detailed in Chapter III (Articles 17 to 32). Foreigners enjoy all these rights in the Principality (Article 32) apart from those expressly restricted to nationals (Articles 25, 26, 27 and 29).[23] These freedoms and rights are protected by the courts, even when infringed by legislation, since the Supreme Court has jurisdiction in 'appeals on petitions for annulment, petitions to review validity[24] and actions for damages arising from violations of these rights and freedoms prescribed in Chapter III of the Constitution' (Article 90, A, 2). In this respect the Supreme Court, established by the 1911 Constitution, can probably be considered one of the oldest constitutional courts in the world.[25]

39. Provision is also made for separation of powers: 'The separation of the administrative, legislative and judiciary functions is guaranteed' (Article 6). Executive power 'is exercised by the highest authority of the Prince' (Article 3), although he has to exercise it under the Constitution and the country's laws through the bodies laid down by the latter. Judiciary power is also vested in the Prince, who under the Constitution irrevocably delegates its full exercise to the courts (Article 88, para. 1, and Article 5). Finally, legislative power is exercised jointly by the Prince and the National Council under the very distinctive mechanisms laid down by the Constitution.

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[22] See Preamble: *'new Constitution'*.

[23] The principle of equality is only guaranteed to Monegasque citizens (Article 17). This raises the question of a possible conflict between the wording of the Constitution which permits discrimination based on national origin, notably in respect of the right to (primary) education and for freedom of assembly, and the provisions of the European Convention on Human Rights and its Protocols. Ratification of the ECHR has led to complete the catalogue of fundamental rights set out in the constitution of Monaco, but cannot solve an explicit contradiction between the two texts. This question does not appear to have been raised, probably because in fact foreigners appear to enjoy most of the rights which the Constitution formally reserves to Monegasque citizens.

[24] If the matter is referred to the Supreme Court by another court as a preliminary point of law.

[25] Grinda, p. 183.

B. The executive power

40. The constitutional monarchy of Monaco is not a form of government that is representative in character, in which the executive is accountable to the elected legislature or the electorate.

41. 'Executive power is exercised by the highest authority of the Prince' (Article 3 para. 1). 'The Prince's person is inviolable' (Article 3, para. 2), meaning, for example, that no civil or criminal *proceedings can be brought against him and he cannot be challenged politically. This immunity exists in* all monarchical systems, but in parliamentary monarchies it is counterbalanced by the minister who countersigns for the monarch and takes responsibility for the latter's decisions both legally and politically.

42. Nothing of this sort happens in the Monegasque system. *By law*, the Prince exercises actual power insofar as it is not restricted either by the Constitution or by the law, since '[g]overnment is exercised, under the gracious authority of the Prince, by a Minister of State, assisted by a Government Council' (Article 43).

43. The Minister of State, like the Government Counsellors, is appointed and removed from office by the Prince[26] and is accountable only to him (Article 50) and not to the National Council.

44. The government nevertheless enjoys a certain degree of autonomy, since it normally debates the sovereign ordinances presented to the Prince with the Minister of State's signature (Article 45). It may therefore be argued that there is some differentiation in the exercise of executive power between the Prince and the government, which constitutes a separate body.[27] The government's autonomy is nonetheless *relative* in that both the Minister of State and the Counsellors can be relieved of their duties by the Prince.

45. A certain separation of functions has thus been established (preparation and submission of a decision to the Prince on the one hand, and the Prince's decision on the other) that promises restraint.

46. Unlike a parliamentary monarchy, the position of Head of State is not endorsed by the countersignature of a minister who bears legal and political responsibility for the latter. The Prince can only act, at least in theory, *on the basis of proposals* from the government. Nevertheless, the ordinance comes from the Prince, even if his freedom of action is restricted by the need for a government bill. This is a genuine limitation – so much so that some ordinances are exempted from this requirement: this is the case, for example, for ordinances appointing the Minister of State, Government Councillors, judges and public prosecutors or dissolving the National Council (Article 46). In the latter case the Prince must consult the Crown Council (Article 74), an advisory body in which the National Council's influence may make itself felt.[28] There is thus a subtle system of interlocking mechanisms restraining the exercise of power.

47. However, as Article 43 of the Constitution points out, the Prince has *ultimate control* of executive power. Ministerial decrees are thus debated in the Government Council and signed by the Minister of State (Article 47). Apportionment of subject-matter between sovereign ordinances and ministerial decrees is determined by sovereign ordinance unless the law provides otherwise (Article 48). The Prince also has ultimate control over these ministerial

[26] The Minister of State may be a foreign national.

[27] Grinda, p. 94.

[28] The Crown Council consists of seven members: its president and three of its members are appointed directly by the Prince; the other three members are also appointed by the Prince but at the suggestion of the National Council and from outside its members.

decrees, which must be notified to him within twenty-four hours and to which he may formally object within ten days (Article 47).[29] The Prince's power therefore remains legally intact, even with regard to implementing measures.

48. The Prince thus has *sole sovereignty:* he has 'granted' a Constitution and limited his 'gracious authority' (Article 43) through a variety of restraining mechanisms. These restraining mechanisms *are not those of parliamentary democracy:* the ministers do not take responsibility for the monarch's decisions by their countersignature and are not accountable to an elected assembly. Neither is the government consulted on the dissolution of the National Council. The decisions remain the Prince's, legally speaking, even if they are usually prepared by the government. The ultimate aim may be the same or at least very similar, but the *legal mechanisms* are different.

C. The legislative power

49. In the legislative field, instead, there exists a *dual internal sovereignty*, which the Prince and the National Council share: 'The instigation of law implies the agreement of wills of both the Prince and the National Council' (Article 66, para. 1).

50. The legislative power is thus exercised jointly by the Prince and the National Council. The National Council comprises twenty-four members, elected for five years by direct universal suffrage and by the list system (Art. 53 amended by Law n°1.249 of 2 April 2002).

51. In a parliamentary system, the government must retain the confidence of Parliament or, at the very least, not be challenged by it. As a rule, government bills are passed as a result of party discipline, to avoid sparking a political crisis. Non-government bills and amendments do not generally have much chance of success unless approved, or at least not opposed, by the government. The latter's role is therefore politically crucial. The official assent by the Head of State that legally concludes a law is usually just a formality.[30] As the Venice Commission study on Liechtenstein discovered, this is particularly the case in parliamentary monarchies.[31]

52. The situation is very different in Monaco. The composition of the government does not depend on how the National Council is made up. The government does not know in advance (at least in theory) how its bills will be received. One thing is certain, however: a law cannot be passed without the National Council's consent. It therefore has an 'ultimate' power of veto. But, since the Prince also enjoys 'ultimate' power in legislative matters, the only way the system can work is through prolonged negotiation and bargaining, which hampers speedy adoption of laws. Moreover, the lack of ministerial accountability and parliamentary confidence means that, in principle, the National Council cannot hold the government accountable for their decisions. It follows that political parties in the National Council do not meet the criterion of being able to implement the proposals they have put forward during the electoral campaign, once they come to power. The electorate therefore has no real option of holding the government accountable through the election of the National Council.

53. A certain autonomy of the National Council is guaranteed by standard mechanisms: court review of the lawfulness of elections (Article 55), adoption of rules of procedure, subject to review by the Supreme Court (Article 61), and parliamentary immunity (Article 56). However,

[29] Except when the Prince informs the Minister of State that he is not intending to exercise this right of objection for certain decrees or some types of decree (Article 47, para. 2).

[30] On rare occasions, for example where ethical issues are concerned, the government allows its members a free vote in accordance with their consciences. It is in such cases that assent by the government or Head of State may be a problem.

[31] *Venice Commission Opinion on Liechtenstein* (supra note 3), CDL-AD (2002) 32, §§ 21-24.

the National Council has no legal personality and does not possess budgetary independence: it has to request Government authorisation to use the funds allocated to it, as well as authorisation on how it may spend them[32]. Nevertheless, the National Council has the possibility to negotiate the State budget, including its own budget.

54. The National Council meets *ipso jure* in two annual ordinary sessions (art. 58). It meets in extraordinary session, convened either by the Prince or on the request of at least two thirds of the members, by the President (Article 59). The National Council sets its agenda (with the exception of extraordinary sessions convened by the Prince); however, it is required, at the government's request, to devote at least one session out of two to debating bills tabled by the Prince (Article 62). This provision actually strengthens the position of the National Council, since, by implication, it entitles it to devote a maximum of half its sessions to its own bills. This system is just as propitious as that of some parliamentary assemblies, if not more so.[33]

55. The Prince alone has the right to initiate legislation (Article 66, para. 2).[34] This does not mean that the National Council is not a 'legislature' within the meaning of Article 3 of Protocol No. 1 to the ECHR.[35] This is all the more true in that since the constitutional reform of 2002 which was prompted by Monaco's wish to become a member of the Council of Europe, the National Council has the right to initiate legislation indirectly,[36] albeit under the continual supervision of the executive.

56. The National Council can draft "bill proposals" (*propositions de loi*). The Minister of State must make his position known within six months of receiving such a bill proposal. He can either make it a government bill (amended if necessary),[37] which must then be tabled within a year,[38] or he can decide to halt the legislative process. 'This decision is explained with a declaration placed on the agenda of an ordinary session public meeting anticipated within the period. This declaration can be followed by a debate' (Article 67, para. 2.b). It has emerged during discussions with the various Monegasque authorities that not only "can" this declaration be followed by a debate, but it "is" in fact followed by a debate.

57. The Minister of State and the Government Counsellors, who may not be forced by the National Council to resign, must *explain themselves* and answer questions. The debate that follows the explanation may reveal new National Council positions and may alter the government's stance. In the course of the visit of the Venice Commission delegation, some MPs indicated that questioning the government has proved a very effective means of dialogue and that they intended to improve this system.

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[32] Parliamentary Assembly of the Council of Europe, Report on The state of democracy in Europe and the progress of the Assembly's monitoring procedure", 2 June 2010, Doc. 12275, para. 107.

[33] Article 48, subparagraph 2, of the French Constitution as amended by the 23 July 2008 revision reads: "During two weeks of sittings out of four, priority shall be given, in the order determined by the Government, to the consideration of texts and to debates which it requests to be included on the agenda".

[34] Cf. Article 16 of the Constitutional Charter of 4 June 1814.

[35] European Court of Human Rights, judgment of 18 February 1999, Matthews v. United Kingdom, § 51.

[36] Cf. Article 19 of the Constitutional Charter of 4 June 1814: 'The Chambers have the right of supplicating the King to propose a law upon any object whatsoever, and to point out what appears to them fit that the law should contain.'

[37] If the government takes no action, the bill becomes a government bill ipso jure after six months (Art. 67, para. 3).

[38] If the government takes no action, the bill is automatically tabled after a year.

58. After the expiration of the above mentioned six month period, if the Government has not notified the outcome intended for this bill proposal, the latter becomes *ipso jure* a bill. The same procedure applies if the Government has made the bill proposal a bill but has not introduced it before the National Council within a one-year period.

59. During the visit, the Government of Monaco provided the Venice Commission delegation with the following statistics:

- Number of laws adopted during the parliamentary terms of office 2008-2013: 52
- Bill proposals transformed into bills (2002-2012): 22
- Bill proposals halted by the government but having had a legislative follow-up (2002-2012): 7
- Bill proposals halted by the government with no legislative follow-up (2002-2012): 1
- Bill proposals under examination by the government: 2

60. A high percentage of bill proposals presented by the National Council have thus been transformed into bills or have had a legislative follow-up. This shows that what is accomplished 'naturally' by *government unity* and *party discipline* in a parliamentary system is achieved here by specific legal provisions.

61. It was explained, during the meetings with the Monegasque authorities, that not only does the sorting of bill proposals carried out by the government serve the purpose of fulfilling opportunity criteria but it also has the function of a control of constitutionality. It should be noted in this respect that no control of constitutionality over bills or over laws adopted by the National Council is stipulated, besides the appeals on petitions for annulment before the Supreme Court for violation of rights and freedoms guaranteed by the Constitution. This asymmetry, which shows a certain distrust in the National Council, does not seem justified at the constitutional level.

62. The National Council also has the right of *amendment* (Article 67, para. 5). However, here again, the government retains control, since '[t]he vote takes place on the amended bill, as the case may be unless the Government withdraws the bill before the final vote' (Article 67, para. 5). This provision opens the way to a situation of give and take, where adoption of an amendment may lead to a bill's withdrawal and is obviously conducive to negotiation and lengthy discussion. However the process also illustrates how the phrase 'the instigation of law implies the agreement of wills of both the Prince and the National Council' is a perfect reflection of the Monegasque Constitution as it works in reality. At every stage (initiation, amendment), a law is the joint work of the Prince and the National Council.

63. This being so, the Prince's assent (Article 66, para. 4) loses much of its importance and can probably be considered a pure formality. It will therefore come as no surprise that there are no recorded instances of refusal of or delayed assent.[39] In the highly consensual climate of Monegasque politics, refusal of assent would bring the Prince and the National Council into direct conflict. Above all it would be a glaring admission of incompetence if, despite all the powers at his disposal to prevent a law coming into being or to shape its content to his liking, the Prince's only recourse were the dramatic weapon of refusal of assent.

64. The National Council also has *power over the budget* (Article 70).'Budget is voted upon chapter by chapter. Transfers from one chapter to another are forbidden unless authorised by law' (Article 72). However, budgetary matters are not covered by the right of amendment (Article 67, para. 6), since the budget is considered to be a whole.

[39] Grinda, pp. 118-119.

65. What happens in practice seems to be more flexible, however. The budget is first voted section by section. According to G. Grinda, the National Council has already rejected some sections of the budget, although a vote to reject a particular section is, in actual fact, merely indicative, or purely political, when – as is usually the case – the Budget Act is finally adopted, since in this case the disputed section is then approved at the same time as the overall budget.[40]

66. According to the information provided by the Monegasque authorities, numerous questions are put to the government in writing within the framework of the discussion of the budget (180 on the 2012 forecast budget, 150 on the amending budget), and each question receives a reply. Two private sessions and two public sessions (which on the other hand are broadcast live) are devoted to the budgetary debate.

67. Thus, *in point of fact*, the situation seems fairly similar to that in the legislative field. Since the National Council 'holds the purse strings', extensive bargaining takes place and the government may fall in with the assembly's 'amendments'. This is the result of a convention allowing the strictness of the procedure to be adapted to the range of problems arising.[41] In comparison with laws, however, there is a key element working in the National Council's favour: the government cannot do without a budget.

68. In a system where the Sovereign and the parliament share the legislative power and check each other, the apportionment of the respective competences is crucial. Should the Sovereign be allowed to dispense with parliament having recourse to a regulation, the balance of power-sharing would be altered and the negotiating power of parliament would be reduced.

69. It is not clear how subject-matter is apportioned between *legislation* and regulations (ordinances and ministerial decrees). The sphere to be covered by ordinances and that covered by ministerial decrees are generally determined by ordinance (Article 48). But it is only the Constitution that can decide what belongs to the legislative sphere and what belongs to the regulatory sphere.

70. Legislation is clearly necessary where the Constitution so requires. It also seems to be accepted that legislation is needed for issues that have been covered by legislative acts in the past.[42]

71. Regulations, on the other hand, are reserved for matters that the Constitution determines should be covered by them (such as the organisation of the Council of State, Article 52) as well as for implementing provisions for laws and treaties (Article 68) and all provisions that, under the general remit of government, concern the functioning of public authorities and law enforcement.[43]

72. The Constitution is silent on how to solve new issues or in case of doubt.[44] There are two possible answers. Either we start from the idea of a granted constitution and infer that all powers not specifically granted by the sovereign remain his exclusive domain, a very common

[40] Grinda, p.124.

[41] Grinda, p. 124.

[42] Grinda, p. 96.

[43] Grinda, p. 96.

[44] In the 1911 Constitution, Article 21-2 provided the answer: in the event of a difference of interpretation as to whether a subject-matter should come under a law or an ordinance, the Prince would decide the question by ordinance with the consent of the Council of State.

line of argument in the era of granted constitutions,[45] or, on the contrary, we assume that the legislative sphere is not specified,[46] although the occasions on which either the Prince or the government may act are clearly specified. In this case, a new issue or a question of interpretation will be covered by legislation.

73. The latter solution is very much to be preferred for a state governed by the rule of law. When the Constitution is revised, this matter should be addressed and decided accordingly.

74. This point is also important with regard to treaties that can be ratified only by an act of Parliament. At present Article 14, paragraph 2.2, refers to treaties entailing 'modification of the *existing* legal provisions'. If the legislative sphere is to be determined by the Constitution, this provision would have to be amended to cover treaties affecting matters within Parliament's jurisdiction (or, alternatively, matters *not* falling within the regulatory sphere).

75. It should also be pointed out that it is true that applications to the Supreme Court to set aside decisions by the executive are possible in principle (Article 90-B) and that sovereign ordinances are subject to such judicial review.[47] However, there is an exception to this rule: the ordinances required to enforce international treaties and agreements, which thus assume the character of an *act of state*.[48] This is an important exception. The Monegasque government pointed out[49] that an implementing Sovereign Order is issued both in the case of treaties or agreements ratified solely by the Prince and in the case of those requiring a law where certain provisions call for implementing measures. Whether or not ratification is subject to the enactment of a law has no legal bearing on the need for issuing a Sovereign Order. A law is a measure preceding ratification, whereas the issuance of an implementing Sovereign Order is subsequent to ratification. As a consequence, where a law is not necessary, new offences and criminal penalties can be created by the sole means of a Sovereign Order implementing an international treaty that provides for such offences and penalties,[50] whereas Article 20 of the Constitution provides that no penalty may be imposed or applied except in accordance with the law.

76. Exemption of ordinances required to enforce international treaties and agreements from the control of the Supreme Court seems unwarranted. Moreover, with respect to the rule of law, the concept of an "act of state" ought to be defined as rigorously as possible.

77. The revision of the Constitution also depends on the joint consent of the Prince and the National Council (Article 94). The Constitution cannot be suspended (Article 93).

78. 'In case of initiative on the part of the National Council, proceedings may be taken only by a two-thirds majority vote of the normal number of members elected at the assembly' (Article 95). This provision, construed literally, means that an initiative on the Prince's part would need only a *relative majority* and therefore the Prince could amend the Constitution by means of law. This

[45] This was the interpretation applied to the Dutch Constitution of 1815, which was one of the causes of the Belgian revolution and led to the division of what was then the Netherlands.

[46] The Constitution states how legislation is made but says nothing of its content.

[47] Grinda, p. 186.

[48] Grinda, p. 186.

[49] Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee), Report on the Honouring of obligations and commitments by Monaco, Doc. 14 September 2009, paras. 35-36.

[50] See Sovereign Order No. 605 of 1 August 2006 implementing the United Nations Convention against Transnational Organised Crime and its protocols on trafficking in human beings and the smuggling of migrants or Sovereign Order No. 653 of 25 August 2006 on the taxing of profits and on VAT, which prescribes fines and prison sentences for tax evasion.

is what appears to have happened in the case of Law No. 1249 of 2 April 2002.[51] This imbalance is regrettable and ought to be rectified.

79. As concerns the Law on the organisation and functioning of the National Council[52] and the Rules of Procedure of the National Council,[53] the Venice Commission notes that these texts have still not been harmonised with the constitutional amendments of 2 April 2002, and it stresses that this should be done by way of urgency.

80. No provision for referendums has been included in the Constitution. This is a very positive feature which should be welcomed, as in such a closely knit society as the Principality of Monaco, any referendum would quickly turn into a plebiscite.

D. Judicial power

81. Under Article 5 of the Constitution, the judicial power is exercised by the courts and tribunals of Monaco by virtue of a full delegation by the Prince: under Article 88, judicial power "vests in the Prince, who, by the present Constitution, delegates its full exercise to the courts and tribunals". This flows from the fact that sovereignty belongs to the Prince (and not to the people), so that the judicial power belongs to and is administered in the name of the Prince (and not of the people).

82. Article 88 is an original provision of the Constitution adopted in 1962 and may be regarded as consistent with the nature of "granted charter" of that text; it has not been amended since. However, fifty years later, this provision does not appear to fit in to a modern European constitution. Indeed, other European constitutions make some reference to the Head of State in their chapters of the judiciary, but in very different terms. For example, under Article 117 of the Constitution of Spain, justice "emanates from the people and is administered on behalf of the King". This might be a purely formal matter, but it is an important one in terms of principles. In the context of a constitutional revision, Article 88 should be rephrased.

83. The Prince, as is usual for Heads of State, has the power to grant pardon and amnesties after consulting the Crown Council (Article 15). But courts and tribunals are responsible neither to the Prince nor to the government. Under Article 6 of the Constitution, the separation of the administrative, legislative and judiciary functions is guaranteed. The independence of the judges[54] is also "guaranteed" (Article 88). The Law[55] guarantees in particular their immovability (for French judges seconded to Monaco, this is stipulated in an agreement).

84. There is no Minister of Justice in Monaco. The administration of justice is provided by the Directorate of the Judicial Services, which has been set up as separate from the government in order to ensure its autonomy.[56] Regrettably, the Directorate of the Judicial Services does not have a basis in the Constitution, nor in a law; however, the Venice Commission has been informed that bill no. 778 on the judicial organization and administration is scheduled to be examined and adopted very shortly, which would be a very positive development. The Director

[51] Grinda, p. 66.

[52] Law no. 771 of 25/07/1964

[53] Adopted in 1964 et revised in 1965

[54] Public prosecutors are part of the judiciary: Law 783 of 15 July 1965 (CL. 52.25). The Public Prosecution Department of the Principality of Monaco has the particularity of being the single Public Prosecution Department for all of the Monegasque courts, before which the Public Prosecution Department is represented, which is where its French name 'Parquet Général' (meaning General Public Prosecution Department) comes from. The rules described as to the independence of the judges also apply to prosecutors.

[55] Law 1364 of 16/11/2009 on the status of judges. The judicial system is regulated by Law 783 of 15 July 1965.

[56] Ordinance of 9 March 1918 (CD(52-12) ; ordinance of 18 November 1917 (CL 41-23). GRINDA, p. 165

of the Judicial Services is appointed by the Prince (with the consent of the French government), but is not a member of the Monegasque government: he is responsible only to the Prince; the sovereign ordinances relating to the Directorate of the Judicial Services are exempted from decision by the government and presentation by the Minister of State (Article 46 of the Constitution). The Director of the Judicial Services is responsible for overseeing the magistrates, defense lawyers and barristers, police officers and ministerial officials. However, the oversight of defense lawyers and barristers is exercised in the first place by the Prosecutor General, who also directs the judicial police.

85. The Director of the Judicial Services, not being a member of the government, does not have any institutional relations with the National Council. The administration of justice is therefore totally removed from parliamentary supervision and even consultation, and is decided exclusively by the Prince (possibly after consulting the High Council of Judges and Prosecutors[57]).

86. In Monaco, a considerable number of judges are in fact not Monegasque but French nationals. While it is usually a fundamental principle that a country cannot have foreign nationals serving as judges, this is one of the areas where the specificities of a very small country such as Monaco need to be taken into consideration: it is, even today, not possible to recruit only Monegasque nationals to all judges' positions, as there are not enough qualified candidates. There are currently 24 permanent judges in Monaco. About 50% are Monegasque nationals and 50% French nationals. This represents a significant and welcome progress in the representation of Monegasque nationals in the judiciary,[58] which appears more a consequence of "natural evolution" than of the 2005 Convention between Monaco and France.

87. Monegasque nationals are appointed as judges with a permanent mandate. French nationals are appointed as judges with a three-year mandate, which is renewable once (although there are apparently exceptions to this). They are under the authority of both the High Council of Judges and Prosecutors of Monaco and the French High Council of the Judiciary.

88. The Constitution is silent as to the basis of appointments of ordinary judges (unlike judges of the Supreme Court), and thus seems in principle to give the Prince unlimited influence on appointments.

89. However, nowadays appointments of (Monegasque) judges are made upon the advice of the High Council of Judges and Prosecutors, which was instituted in 2009[59] with the tasks of supervising the careers of judges and prosecutors and of exercising disciplinary powers.

90. The High Council of Judges and Prosecutors is composed of seven members:

- The Director of the Judicial Services, President
- The First President of the Court of Revision, Vice-President
- A full member of the Crown Council
- A full member appointed by the National Council, not from amongst its members
- A full member appointed, by the Supreme Court, not from amongst its members
- Two members elected by the judges.

[57] The High Council of Judges and Prosecutors may be consulted by the Prince on any question relating to the organisation and functioning of justice: Article 21 of the Law on the status of judges.

[58] The treaty between Monaco and France of 28 July 1930 had reserved the majority of the posts in the different courts, as well as the posts of Director of the Judicial Services, President of the Court of Appeal and Prosecutor General before this court, for French nationals. This treaty was amended by the treaty of 8 November 2005.

[59] By the Law No. 1364 of 16 November 2009 on the Status of the Judiciary

91. While under Article 27 of Recommendation CM(2010)12 of the Committee of Ministers of the Council of Europe "[n]ot less than half the members of such councils should be judges chosen by their peers from all levels of the judiciary and with respect for pluralism inside the judiciary", the exiguous number of judges in Monaco (24, half of which are French nationals) must be taken into account.

92. Appointments and promotions of Monegasque judges are under the competence of the High Council of Judges and Prosecutors. The opinions of the High Council are mandatory but not binding (with the exception of first appointments[60]), but both the Prince and the government have publicly committed themselves to follow its opinions and this has so far always been the case.

93. Disciplinary matters are decided by the High Judicial Council upon the initiative of the Director of the Judicial Services. In these cases, the Council is not chaired by the latter but by the highest sitting judge in the Principality (the President of the Court of Appeal sits as an additional member); the Director of the Judicial Services acts as prosecuting authority.

94. Dismissals of judges are decided by the High Judicial Council (under the supervision of the Supreme Court). There have so far been no such cases.

95. The composition and competences of the High Council of Judges and Prosecutors guarantee the independence of the Monegasque judiciary from the Executive. The Venice Commission has received no indication that the judiciary in Monaco does not, in practice, live up to European standards, including Venice Commission standards. However, the Venice Commission has expressed the view that the basic principles ensuring the independence of the judiciary should be set out in the Constitution or equivalent texts[61]. Therefore, it would recommend that the High Council of Judges and Prosecutors be vested in the Constitution.

96. The Constitution provides for a constitutional jurisdiction through Article 90-A. The Supreme Court is competent to rule in a sovereign fashion over "appeals on petitions for annulment, petitions to review validity and actions for damages arising from violations of rights and freedoms prescribed in chapter III of the Constitution". As previously stated, this is one of the oldest courts of its kind in the world, providing direct access to individuals and legal persons (as well as access through courts: exception of unconstitutionality) against laws alleged to violate the fundamental rights guaranteed by the Constitution. It represents an important guarantee of effective human rights' protection in Monaco.

97. The Supreme Court is also competent[62] in administrative matters, over "proceedings for annulment of ultra vires decisions taken by various administrative authorities or Sovereign Ordinances to enforce laws, and the award of related damages; appeals by way of quashing decisions of last resort taken by administrative jurisdictions; appeals for interpretation and petitions to review the validity of decisions of various administrative authorities or Sovereign Ordinances to enforce laws" (Article 90-B). This represents an important guarantee for the rule of law, as the individuals are afforded a remedy against unconstitutional, illegal or arbitrary administrative acts. Ordinances by the Prince may also be brought before the Supreme Court, with the exception however of those taken in the execution of international treaties or agreements. This exception does not appear to be justified.

[60] See Article 37 of the Law on the status of judges.

[61] See para 22 of the Report of the Independence of the Judicial System, art I: The Independence of Judges (CDL-AD(2010)004).

[62] The Supreme Court is also competent to rule over compliance of the National Council's rules of procedure with constitutional and legislative provisions and to rule over conflicts of jurisdiction.

VI. Conclusions

98. Monaco is not a parliamentary monarchy; it is not a representative system, in which the executive is accountable to the elected legislature or the electorate. It is a *sui generis* system of limited monarchy. There are certainly historical and geographical peculiarities, which have caused the development of Monaco to become a democracy to follow a slower path than the other monarchies in Europe.

99. The constitutional regime of Monaco is substantially respectful of the rule of law. The role of the Supreme Court as a sovereign constitutional and administrative court deserves to be commended in this respect. However, the extensive powers of the Prince *vis-à-vis* the limited powers of the National Council, coupled with the non-accountability of the government before the National Council, raise an obvious issue of democracy.

100. Since the adoption of the Constitution in 1962, a constitutional practice and a legislative framework have developed, which have enhanced the role and the powers of the National Council. A network of consultative bodies mitigates the powers of the Prince, and several mechanisms exist which push for dialogue, compromise, consensus: political struggles are replaced by a consociate functioning of the institutions. The functioning of this system is mostly left to the wisdom and good will of the Prince and of the other stakeholders, and this practice has not yet become part of written or unwritten (constitutional) law. The principle of ministerial accountability has not yet come to maturity. This can hardly be considered as satisfactory.

101. In Monaco, there is a strong reluctance to amend the Constitution and institutional stability is regarded as an imperative. It would nonetheless be necessary to enshrine in the constitution the democratic principles which have come to be accepted in the actual political life of Monaco. The latest constitutional reform, prompted, in 2002, by the procedure of accession to the Council of Europe, brought about significant, necessary and welcome democratic developments, even though, regrettably, this reform has not yet been fully achieved, the implementing legislation having failed to be adopted. The Venice Commission strongly urges Monaco to adopt a new law on the independent functioning and organisation of the National Council so as to reflect the changes to the Constitution in 2002, as was already recommended in the 2004 Resolution of the Parliamentary Assembly.

102. Even without envisaging a reform making Monaco a parliamentary system, the current institutional setting does not contain sufficient safeguards to provide for democratic accountability. It should therefore be improved. The Venice Commission would thus recommend defining more clearly the spheres of legislation and regulations, and amending the rules on constitutional amendment.

103. The Venice Commission remains at the disposal of the authorities of Monaco, notably should a thorough and more radical constitutional reform be envisaged in the future.