



Strasbourg, 26 August 2009

**CDL(2009)129\***

**Opinion No. 544 / 2009**

Engl. only

**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**COMMENTS**  
**ON THE DRAFT CONSTITUTIONAL AMENDMENTS**  
**OF LUXEMBOURG**

by  
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*\*This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

In my observations I follow the order of the Articles of the Draft Revised Constitution.

**Article 1.** The concept of "Etat de droit" is not totally clear and has no identical meaning in all member States of the Council of Europe, as was observed by the Parliamentary Assembly in its resolution 1594 (2007) on "The principle of the Rule of Law".

It may well be that the concept does have a clear and univocal meaning in Luxembourg jurisprudence and legal doctrine, but even in that case it might be useful to provide a more detailed description in the Explanatory Memorandum than the present "Commentaire" does. It might also be explained how this part of Article 1 relates to the second sentence of Article 3.

**Article 5.** The provision could be interpreted as providing a monopoly to political parties to participate in the elections and to have seats in representative bodies. If that is intended, the definition of "political party" and the requirements they have to meet, become very important. If no express provision to that effect will be included in the Constitution, it would be useful to define "political party" in the Explanatory memorandum with references to any relevant law(s).

**Article 6.** It seems rather surprising that a cession or change of territory may be effectuated by ordinary law and does not require a special majority. One would think that in certain cases the population of the territory concerned deserves special legal protection.

**Article 8.** Should not also the official residence of the Grand Duke be regulated in the Constitution – either in the present article or in Article 60 - to avoid any possible problem in the future? In any case, it would seem logical to provide that the Grand Duke shall reside within the Grand Duchy of Luxembourg as is provided in Article 49 for the regent.

**Article 9.** The third sentence raises the issue of the relationship between domestic law and international legal obligations: what will be the situation if international law, and especially the law of the European Union, stipulates that a certain political right be also accorded to non-citizens while the law does not provide for such extension? The "Commentaire" states in relation to article 10 that a reference to international treaties was deemed not to be necessary, but no reasoning for that is given.

**Article 10.** It would seem desirable that this provision expressly states equal protection for everyone before the law, especially because Article 16 only deals with equal protection for men and women while Article 17 provides for equal protection before the law only for citizens. This omission would seem not to be in conformity with Article 14 of the European Convention on Human Rights nor with Protocol 12 to that Convention. Therefore, here again, an argument for not referring to Luxembourg's international obligations is missing.

**Article 11.** Although the "Commentaire" refers to the right to life as a vital element of human dignity, this right has found no express provision in the draft other than that concerning the prohibition of capital punishment.

**Article 14.** The meaning and scope of the restriction of the protection to "les droits naturels" is not clear without explanation. Article 8 of the European Convention on Human Rights protects the private and family life without any such restriction. Moreover, it would seem advisable to expressly mention the right to protection of privacy, since this right is also linked to several international legal obligations, *inter alia* Article 8 of the European Convention on Human Rights and several obligations resulting from the law of the European Union.

**Article 15.** A provision of such a general character is not uncommon in member States of the Council of Europe. However, in a modern Constitution it might be desirable to restrict the possibilities to limit the protection of the right to privacy to the ones listed in the second paragraph of Article 8 of the European Convention on Human Rights.

**Article 17.** See the observation in relation to Article 10. A general equality principle does not exclude that certain public functions and certain political rights are reserved for citizens, because the inequality may serve a legitimate aim and be proportional to that aim.

**Article 18.** It would seem desirable that the Constitution provides that a detained person has access to court at regular intervals to have the legitimacy of the detention reviewed ("habeas corpus"); such a provision would be in conformity with paragraph 4 of Article 5 of the European Convention on Human Rights.

In addition, it should also be laid down that the person arrested is entitled to be informed promptly of the reasons of his or her arrest, in conformity with the second paragraph of the same article.

**Article 20.** The legality principle requires that the law was already in force at the moment the act to be punished was committed.

**Article 22.** Although Article 8 of the European Convention does not expressly require a court order, in several legal systems a visit of the home without the permission of the inhabitant is allowed only on the basis of a court order.

**Article 24.** The right to hold an opinion should be guaranteed separately and expressly, since this right may not be subjected to any limitation. With respect to the right to manifest one's opinion the question arises whether the limitation "répression des délits commis à l'occasion de l'exercice de ces libertés" is sufficiently transparent, sufficiently narrowly delineated and in conformity with the second paragraph of Article 10 of the European Convention on Human Rights. It might be considered to follow more closely the wording of the latter provision.

**Article 25.** The right of peaceful assembly would seem to be subject to too broad a restriction. Both the words " dans le respect des lois qui règlent l'exercice de ce droit" and "restent entièrement soumis aux lois et règlements de police" may allow for broader limitations than are provided in the second paragraph of Article 11 of the European Convention on Human Rights. It might be considered to follow more closely the wording of the latter provision.

**Article 26.** The same applies here as was observed in respect of Article 25.

**Article 27.** Idem.

**Article 28.** From the wording it is not sufficiently clear that the freedom of thought, conscience and religion is of an absolute character and may not be subjected to any limitation. In addition, it may be considered to also expressly guarantee the freedom to change one's religion, since in multi-religious societies as they have developed in European States, it cannot be taken for granted that this freedom is implied in the freedom of religion.

Moreover, as was observed with respect to Article 24, the question arises whether the limitation "répression des délits commis à l'occasion de l'exercice de ces libertés" is sufficiently transparent, sufficiently narrowly delineated and in conformity with the second paragraph of Article 9 of the European Convention on Human Rights. It might be considered to follow more closely the wording of the latter provision.

**Article 30.** This provision, as worded, might create the impression that "la bénédiction nuptiale" is also a requirement for a legitimate marriage. It is recommended to include the words "le cas échéant" or words to the same effect.

**Article 31.** This provision would seem to leave too much room for the Chamber of Deputies to regulate the internal affairs of religious institutions. Such things as the nomination and installation of ministers and their relations with their superiors should, leaving apart very exceptional situations, be fully left to the internal hierarchy of the institution concerned. Therefore, it is recommended that "les dispositions qui nécessitent son intervention" be more strictly defined.

**Article 32.** This provision seems to regulate public education only. It does not address the right of parents to ensure education and teaching in conformity with their own religious and philosophical convictions, as laid down in Article 2 of the First Protocol to the European Convention on Human Rights.

Although there is no international legal obligation for States to finance private education and teaching, in some member States of the Council of Europe some form of financial support is laid down in the Constitution, sometimes on an equal footing with public education and teaching. If there is any regulation under Luxembourg law or in Luxembourg practice, it is not reflected in the present draft provision.

**Article 33.** For the sake of legal certainty it would seem desirable that legal implications of the words "garantit" and "veille à assurer" are specified in the Explanatory Memorandum.

**Article 43.** It seems that a provision is lacking concerning the appointment of a temporary regent for the period the throne remains vacant.

In this respect the relationship between Articles 43 and 46 is not clear, because the issue addressed in Article 43 will arise precisely after the death or abdication of the Grand Duke. It is therefore also not clear why the period mentioned in Article 43 differs from that of Article 46.

**Articles 46, 47 and 48.** The relationship between the two articles is not clear. Article 46 also refers to a possible regent after the death of the Grand Duke. Since Article 47 deals with two situations in which a regent will have to be elected by the Chamber of Deputies, the question arises to which (other) situation Article 46 relates to. If it relates to the same situations, then the reference in Article 47 to the maximum of ten days of Article 46 would mean that the regent would have to be elected and sworn in within that same period. Article 48 again deals with another situation in which a regent will be elected but does not mention a period within which the regent will have to be sworn in, nor does Article 49, second sentence.

It is difficult to understand why the moment of the termination of the regency and the power to decide on the termination are not regulated in Articles 47 and 48 for the two different situations concerned, while the "Commentaire" in a clear way indicates those terminations.

**Article 50.** The "Commentaire" refers to the Council of Ministers as "le mieux placé" for the interregnum. However, one may wonder whether the Dutch model, that designates the Council of State for that function, is not more appropriate, since that Council of State represents the whole population and is not only composed of members of the ruling party or parties. Moreover, the quality of inviolability conferred upon the Grand Duke in Article 53 and which, as may be assumed, is also extended to those who temporarily exercise the constitutional powers of the Grand Duke, is not appropriate for the Council of Ministers, since the members of Government remain responsible for their exercise.

**Article 55.** This provision concerning the state of emergency raises the question who decides that there is a "cas de crise internationale" and according to which criteria.

**Article 63.** The last sentence raises the issue whether it is appropriate for the legislature by simple majority to establish conditions for the right to vote additional to those laid down in the

Constitution. This might well lead to a situation where the minority is put at an disadvantage for the next elections.

**Article 65.** Practice learns that persons under tutelage may be very capable to express their vote in a responsible way, depending on the grounds of their tutelage. Therefore, it may be considered to exclude them only if the court which has decided on the tutelage has also determined the incapability to vote.

Moreover, the Venice Commission expresses its doubt about the proportionality of the unqualified exclusion of detained persons for the duration of their detention as a limitation of the right to free elections laid down in Article 3 of the First Protocol to the European Convention on Human Rights. The "Commentaire" rightly refers to the judgment of the European Court of Human Rights of 30 March 2004, *Hirst v. United Kingdom (No. 2)*, but the draft does not take this judgment into account, except for the possibility of the detainee to be pardoned.

**Article 69.** This provision has the disadvantage that the legislature, by simple majority, may influence the right to be elected. It would seem that the necessity to introduce additional obstacles will be so rare that they may be taken into account at the occasion of a next amendment of the Constitution. Otherwise, it may be considered to require for the adoption of the law concerned a qualified majority.

**Articles 71 and 72.** Article 71(3) supposes that there is a President of the Chamber of deputies at the moment of the swearing in of the members. However, these same members will elect the President, presumably after they have been sworn in. This raises the question of order. Moreover, the procedure of the swearing in of the President, as president or at least as member, should be regulated.

**Article 91.** The second sentence refers to "arrestation" only and not also to "poursuite". It would seem desirable, in view of possible political implications, that it is expressly clarified in the Explanatory memorandum whether that means that a parliamentarian may be prosecuted, even for the most serious crimes, without previous permission of the Chamber of Deputies, if no arrest is involved.

**Article 95.** It is submitted that "toute autre activité professionnelle" might prove to be too strict for certain special cases, for instance giving lectures at a university, and that the wording in the "Commentaire": "toutes les activités pouvant être source de conflit avec leurs fonctions au sein du Gouvernement" might be more appropriate.

**Article 98.** This provision is not clear and has not been clarified in the "Commentaire". In which cases are governmental acts and decisions taken by the collectivity, and in which cases by the competent member of Government individually, and what are the consequences for the political responsibility laid down in Article 101(1)?

**Article 102.** Should the provision that the Chamber of Deputies may demand the presence of members of Government be supplemented by the provision that the members of the Chamber of Deputies are entitled to receive from them the information requested as a vital instrument of parliamentary control?

Would it not be more logical to transpose the second sentence of paragraph (2) into a new paragraph (4), since a motion of no-confidence may also be adopted in other situations than the two mentioned in paragraphs (2) and (3)?

**Article 105.** Should not also the impartiality of judges be stipulated in the first sentence? The "Commentaire" deals with impartiality as an element of independence. However, Article 6 of the European Convention on Human Rights refers to them as two separate requirements.

**Articles 106-108 and 110.** It is not clear why Article 104 refers to "cours et tribunaux" while Articles 106-108 and 110 refer to "tribunaux" only.

**Article 110.** "Dangereuse pour l'ordre ou les moeurs" may be too restrictive in practice. It might be considered to also include "les intérêts des mineurs ou la protection de la vie privée des parties au procès" mentioned in Article 6 of the European Convention on Human Rights.

**Article 112.** This provision concerning legal review does not also regulate constitutional review of laws and review for their conformity with international legal obligations and decisions of international organisations binding for Luxembourg, although this would seem the appropriate place.

**Article 114.** The reference to "conseillers de la Cour" would seem to be insufficiently precise, especially next to the "Cour administrative". Is the "Cour Supérieure de Justice" meant here?

It should be indicated which court or tribunal is competent to decide on the suspension or removal of a judge; is it the court or tribunal of which the judge concerned is a member, or a higher or other court or tribunal?

**Article 116.** From the point of view of independence and impartiality it might be desirable to add that the judge concerned will not continue his or her court function during the performance of the function assigned by the Government, unless the latter concerns an incidental or minor function, or a function that is in line with the judicial function.

**Article 117.** For "conseillers de la Cour" see the observation relating to Article 114.

The word "directement" might create the impression that any nomination by another authority, be it binding or not, is excluded. It is becoming more and more usual in member States of the Council of Europe that the selection of judges is made by some kind of a Judicial Council ("Conseil Supérieur de la Justice"). In fact, in the "Commentaire" in respect to Article 105, a proposal to institute such an authority is announced.