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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

INTERIM OPINION ON THE DRAFT CONSTITUTIONAL AMENDMENTS OF LUXEMBOURG

Adopted by the Venice Commission at its 81st Plenary Session (Venice, 11-12 December 2009)

on the basis of comments by
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Introduction

1. In a letter of 2 June 2009 Mr Paul-Henri Meyers, Chairperson of the Luxembourg Commission on Institutions and Constitutional Review, acting on behalf of this Commission and through the intermediary of Mr Lucien Weiler, President of the Chamber of Deputies, requested an opinion from the Venice Commission on its proposed constitutional review, geared to amending and reorganising the Constitution (CDL(2009)131).

2. The Venice Commission instructed a Working Group comprising Mr Chagnollaud, Mr Colliard, Mr van Dijk, Mr Jowell, Mr Trocsanyi and Mr Velaers to prepare an opinion on this matter. The individual comments by the rapporteurs are reproduced in documents CDL(2009)129, 130, 158, 160 and 161.

3. On 14 October 2009 the Working Group held a meeting in Luxembourg with the Commission on Institutions and Constitutional Review and the Luxembourg Conseil d'Etat*.*

4. The present opinion, which is based on the rapporteurs' individual comments and information gleaned at the meeting on 14 October 2009, was adopted by the Venice Commission at its 81st plenary session (Venice, 11 and 12 December 2009).

General remarks

5. The Constitution of the Grand Duchy of Luxembourg dates from 1868, is mainly based on the 1848 Constitution, and retains some of the innovations of the 1856 Constitution.

6. The Luxembourg Constitution has undergone several amendments since, particularly in 1919, when universal suffrage was introduced and the democratic principle adopted to the effect that the sovereign power resides in the nation. Nine amendments ensued between 1945 and 1988, and a further 24 from 1988 to 2008, following a relaxation of the constitutional review procedure. In 2004 the requirement of prior (formal) Grand Ducal assent to constitutional reviews was abolished[1].

7. In short, *the Constitution, most of whose provisions are 160 years old and which has been repeatedly amended and "repaired", has in many ways been overtaken by international law and institutional practice. It lacks the necessary transparency and consistency*[2]*.* The *praeter legem* custom plays a considerable role here[3]. In particular, the Grand Duke's powers are much more limited than the text might suggest[4].

8. The request for an opinion from the Venice Commission originated in the Luxembourg constitutional review procedure. This procedure has already led to the 12 March 2009 review following the Grand Duke's refusal to approve a law adopted by Parliament on the right to die with dignity. With admirable statesmanship, the Grand Duke himself requested the abolition of his competence to approve the law in order to prevent the recurrence of any similar deadlock in the future.

9. This incident led to the review of 12 March 2009, which settled this problem by establishing a formal distinction between "approval" and "promulgation" of laws.

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[1] See explanatory memorandum; Paul Schmit (in co-operation with Emmanuel Servais) *Précis de droit constitutionnel – Commentaire de la Constitution Luxembourgeoise*, Luxembourg, Editions Saint-Paul 2009, p. 90.
[2] Schmit, p. 13.
[3] Schmit, pp. 83 and 84.
[4] Schmit, pp. 148 and 149.

10. The proposed review is intended to rewrite the Constitution. The explanatory memorandum summarised the three goals pursued: *modernising outdated terminology, tailoring the texts to the actual mode of exercise of powers,* and *including in the Constitution provisions on customary practice which are included in other texts falling outside the ambit of the legislature.*

11. All of which points to the advisability of comprehensively rewriting a text which has been amended under repeated reviews, in order to ensure its coherency, as proposed in the text under consideration today. The Constitution is currently being overhauled with an eye to bringing it into line with realities and removing all "fictions". The goal of the constitutional review is to revise and modernise the text, not to amend the existing constitutional structure. It therefore does not attempt to effect any major substantive changes. The aim of ensuring textual coherency would seem largely to have been achieved.

12. Nevertheless, since the proposal suggests a complete revision of the Constitution, the question arises whether this is in fact a new Constitution, even though some provisions of the current Constitution are incorporated into the text. The word "revision" also refers to the constitutional writers' wish to introduce major changes without giving them the form of a new Constitution, which raises yet another question: "what is the relationship between the new Constitution, which is to be adopted, with the Preamble to the current Constitution, which recalls the amendments made to date?" These amendments are not mentioned in the present draft. What date would figure on the new Constitution? Is it desirable to retain the year 1868 as the date of the Constitution? These questions are not addressed in the "Commentaire" appended to the draft.

Chapter 1 – The State, its territory and its inhabitants

Article 1

13. The reference to 'Etat de droit' is useful. However, this concept 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".

14. It may well be that the concept does have a clear and univocal meaning in Luxembourg case-law 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.

15. It might also be observed that other recent constitutions have gone further to include additional values such as dignity, equality, freedom and/or the advancement of human rights.

Article 2

16. As written in the *Commentaire*, Article 2 makes clear that the Grand Duke's powers are subject to the regime of parliamentary democracy.

Article 3

17. Article 3 provides that "Sovereign power resides in the Nation". The provision further lays down that sovereign power is exercised in accordance with the Constitution and the laws. This provision is based on self-determination, from which it may be inferred that the Grand Duchy is a parliamentary democracy whose main institution is the Chamber of Deputies, drawing on the principle of representative democracy. For reasons of coherency, the order of Articles 2 and 3 should be reversed. It would also be logical to incorporate at least part of Article 122, which currently appears in the section on international relations, into the clause on sovereignty, since

Article 122 permits transfers of sovereignty. The participation of the State, as a member, in European integration necessarily affects the sovereignty issue, which necessitates mentioning the possibility of restricting sovereignty.

Article 4

18. Article 4 makes it clear that the powers of the Grand Duke are confined to those of Head of State, rather than Head of Government. Article 52 makes it clear that his powers are subject to the Constitution and laws made under it.

19. However, that is not to say that he has no executive powers. For example, Article 55 gives him power in cases of international crisis. The *Commentaire* to Article 4 also mentions three powers mentioned in the 1998 Revision. These 'moral' or 'persuasive' powers are common in constitutional monarchies (such as the UK). Do they need to be spelled out in the text?

Article 5

20. Article 5 on political parties places the latter on the constitutional level, which is exactly in line with modern constitutional developments.

21. Constitutions which attempt to define the role of political parties usually do so in very broad terms[5]. Article 5 of the draft is also set out in very broad terms.

22. It does not seem that this provision could be interpreted as providing a monopoly to political parties to participate in elections and to have seats in representative bodies. However, the explanatory memorandum might at least clarify why this is the case. Owing to the importance given to political parties by the Constitution, it would be useful to define them in this memorandum with reference to any relevant law(s), if not in the Constitution.

23. It would also be preferable to link up this provision with Article 2. Moreover, it would be logical to move this article from its present place just after the constitutional provision on the Head of State, as there is no logical link between Articles 4 and 5.

24. Several articles of the draft Constitution provide that a given question should be governed "by a law". Other articles lay down that a question may be settled "by virtue of a law". This distinction probably means that in the first case the legislature must deal exhaustively with the subject itself, whereas in the second case the Grand Duke may be empowered to deal with the subject, in compliance with the framework established by the law.

25. We would advise verifying whether the draft Constitution really does use the expressions "by a law" and "by virtue of a law" in the aforementioned sense. How, for instance, should the expression "by virtue of a law" in Article 7 be interpreted?

Article 6

26. It seems rather surprising that a cession or change of territory may be effected by ordinary law and does not require a special majority. One would think that in certain cases the

[5] Cf. also Article 21 Verfassung Deutschland (1) "Die Parteien wirken bei der politischen Willensbildung des Volkes mit. Ihre Gründung ist frei. Ihre innere Ordnung muß demokratischen Grundsätzen entsprechen. Sie müssen über die Herkunft und Verwendung ihrer Mittel sowie über ihr Vermögen öffentlich Rechenschaft geben." Article 6 Spanish Constitution: "Political parties express democratic pluralism, assist in the formulation and manifestation of the popular will, and are a basic instrument for political participation. Their creation and the exercise of their activity are free within the observance of the Constitution and the laws. Their internal structure and operation must be democratic." Article 117.1 Portuguese Constitution: "Political parties participate in the organs based on direct universal suffrage in accordance with their electoral representation."

population of the territory concerned deserves special legal protection. Furthermore, it might be useful to prescribe that the boundaries of the State can only be changed under an international treaty.

Article 8

27. Article 8 establishes the headquarters of the Chamber of Deputies and the Government, while Article 60 concerns the residence of the Grand Duke, which is less specific. It would be useful to use the same wording in both cases and, more generally, to devote a single article to designating the headquarters of the main State institutions.

28. 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.

29. Moreover, the notion "raisons graves" should be defined more precisely.

Articles 9, 10 and 17

30. It would seem desirable that a provision of the Constitution expressly require 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 of Luxembourg. The draft does not mention inequalities vis-à-vis or among aliens. Like Article 26 of the International Covenant on Civil and Political Rights (ICCPR), Protocol No. 12 to the European Convention on Human Rights (ECHR) and Articles 20 and 21 of the EU European Charter of Fundamental Rights, the Luxembourg Constitution should confirm the general principle of non-discrimination.

31. Article 9 (3) concerns the political rights of non-Luxembourg citizens, without referring to European citizenship. A reference to the specific rights of European citizens might be appropriate.

32. The chapter on fundamental rights below will go into the question of the priority of international human rights standards[6].

Chapter 2 – Public liberties and fundamental rights

33. In the proposed review, the *revision* of Chapter 2 on *Public Liberties and Fundamental Rights* is confined to restructuring the chapter on the basis of the EU Charter of Fundamental Rights, including the use of the keywords *Dignity, Equality, Liberties* and *Solidarity and citizenship.* Furthermore, four selective modifications are proposed. It was most judicious to alter the structure of this chapter because it makes the Constitution more readable and immediately highlights the specific safeguards provided by the Luxembourg Constitution regarding the rights and freedoms also mentioned in the European Charter.

34. The current text of the Constitution is based on a 19th-century conception of fundamental rights. This raises the question whether the "revision" of the Luxembourg Constitution should not also endeavour to make more radical changes to the chapter on public liberties and fundamental rights so that the text meets all the requirements of an up-to-date catalogue of fundamental rights[7]. We can draw two conclusions from a comparison of the text of Chapter 2 as proposed with the provisions of most current human rights conventions, particularly the European Convention on Human Rights (ECHR). Firstly, the conditions generally set out in international conventions restricting fundamental rights and freedoms (see eg ECHR Articles 8

[6] See para. 35 below.
[7] Cf. Schmit, p. 99, and references to the *Conseil d'Etat*.

(2), 9 (2), 10 (2) and 11 (2)) differ from the conditions set out in the Luxembourg Constitution. Clearly, when a Constitution is being revised, there is no obligation to incorporate blindly the provisions of any particular international human rights conventions into the text. Besides, the number of such conventions and the variety of rights and freedoms which they contain would make such a requirement unrealistic. Furthermore, Luxembourg case-law recognises the direct applicability of the substantive provisions of the European Convention on Human Rights. This means that the provisions of this Convention are directly applicable in Luxembourg domestic courts, in the sense that individuals can rely on them to adduce non-compliance by the Luxembourg State with its obligations under the Convention[8]. Nevertheless, notwithstanding the existence of international human rights conventions, it might be appropriate to update the reading of Chapter 2 of the Luxembourg Constitution from the angles both of human rights (A) and of the clauses limiting such rights (B).

35. It should therefore be stressed that in Luxembourg, the substantive provisions of the international conventions are directly applicable and take precedence over all domestic legislation[9]. In order to prevent any further ambiguity and debate about the conformity of Luxembourg law and practice to the international human rights texts and case-law, it would be preferable to specify this point in the Constitution.

36. A. A national constitution should guarantee the human rights and public freedoms which are designated as "fundamental" at State level. This is why the Luxembourg Constitution has already been amended in the past with a view to adding such rights as that to respect for private life. It is important that such updating of the Constitution be effected coherently. In the current Luxembourg Constitution, this coherence would seem to be lacking, because, for instance, such incontrovertibly fundamental rights as the right to life, safeguards in cases of deprivation of liberty and general guarantees relating to a fair trial are not mentioned. Moreover, constitutionalising these rights would have the effect of placing them under the jurisdiction of the Constitutional Court.

37. Now that Luxembourg is envisaging an overhaul of its Constitution, it would be useful to consider the possible benefits of updating Chapter 2 in greater depth. Such updating would capitalise on the work carried out by incorporating a number of additional guarantees specific to the Luxembourg legal system.

38. The constitutional writers might draw on the report entitled *Les droits fondamentaux garantis par la Constitution au regard des instruments internationaux de protection des droits fondamentaux* (The fundamental rights secured by the Constitution in the light of the international instruments protecting the fundamental rights), prepared by a working group of the Belgian Chamber of Representatives[10].

39. B. The constitutional writers should also determine the restrictions on fundamental rights, or at least define the conditions to be met in order to justify such restrictions. The system of restrictions set out in Chapter 2 of the draft Luxembourg Constitution has two main features. First of all, the Constitution expresses great confidence in the legislature, in that several provisions of the draft Luxembourg Constitution ascribe to the law exclusive competence for setting possible restrictions on rights and freedoms (see Articles 15, 18, 19, 20, 22, 23, 25, 26, 27, 32, 33, 34 and 35). This reference to formal laws reflects a general principle that underpins the whole of Chapter 2 of the draft Constitution.

[8] See Spielmann, Weitzel, *La Convention européenne des droits de l'homme et le droit luxembourgeois*, pp. 95 ff.
[9] Schmit, pp. 86-87 and 106.
[10] Parl. Doc., 2006-2007, 51 2867/001.

40. The second outstanding feature is undoubtedly the fact that the draft Luxembourg Constitution generally prohibits preventive measures. Several articles in Chapter 2 prohibit preventive measures explicitly (Articles 25 and 26) or implicitly, only authorising punishment *of offences committed during the exercise of these freedoms* (Articles 24 and 26).

41. These two guarantees – the legality principle and the prohibition of preventive measures – are very important. However, the international human rights conventions and, following their example, several national constitutions contain limitation clauses laying down conditions to be respected by all national bodies, including the legislature, which can be used by the European Court of Human Rights and national constitutional courts as criteria for verifying the conformity of law to the fundamental rights secured by the ECHR and the national constitutions.

42. For example, Article 15 of the draft Luxembourg Constitution provides that *the State guarantees the protection of private life, with exceptions as established by law.* As Luxembourg is a party to the ECHR, a formal law is not sufficient. In order to comply with Article 8 of the ECHR, the restriction must be not only *in accordance with the law* – a legal standards sufficiently accessible and predictable in its effects – but also *necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

43. A literal interpretation of other provisions in the draft Constitution might prompt broader restrictions than those authorised by the European Convention on Human Rights (see Articles 17, 24, 25, 26, 27 and 28).

44. A revision of the Luxembourg Constitution might involve "constitutionalising" the contractual principles currently in force governing restrictions on fundamental rights. The constitutional writers must ensure that the level of national human rights protection is not below the international level and that the Constitution confirms the generally recognised standards and faithfully reflects the possibilities for restricting human rights.

45. Given that including these contractual principles in every article of the Constitution is liable to disrupt the specific provisions of the Luxembourg Constitution, which still retain their raison d'être and also possess added value as compared with the international conventions, consideration might be given to inserting cross-referencing clauses establishing the general conditions for restricting the enjoyment of fundamental rights, without prejudice to the specific conditions set out in the various articles of Chapter 2.

46. Accordingly, the Luxembourg constitutional writers might draw on a series of recent constitutional provisions such as Article 36 of the Swiss Constitution and Article 52.1 of the Charter of Fundamental Rights of the European Union (EU).

Article 36 of the Swiss Constitution:

"*Restrictions on fundamental rights*
1. Restrictions on fundamental rights must have a legal basis. Significant restrictions must have their basis in a federal act. The foregoing does not apply in cases of serious and immediate danger where no other course of action is possible.
2. Restrictions on fundamental rights must be justified in the public interest or for the protection of the fundamental rights of others.
3. Any restrictions on fundamental rights must be proportionate.
4. The essence of fundamental rights is inviolable."

Article 52.1 of the EU Charter of Fundamental Rights:

"*Scope of guaranteed rights:*
1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others."

47. The Luxembourg constitutional writers might also consider adopting cross-referencing clauses on:

- **interpreting fundamental rights**: see eg Article 52.3 of the EU Charter of Fundamental Rights:

"In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."

- **guaranteeing fundamental rights:** see eg Article 35 of the Swiss Constitution:

"Article 35 Upholding of fundamental rights
1. Fundamental rights must be upheld throughout the legal system.
2. Whoever acts on behalf of the state is bound by fundamental rights and is under a duty to contribute to their implementation.
3. The authorities shall ensure that fundamental rights, where appropriate, apply to relationships among private persons."

- prohibiting the abuse of fundamental rights: see eg Article 17 ECHR, Article 5 (1) ICCPR, Article 54 EU Charter of Fundamental Rights:

"Nothing in this Charter shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognised in this Charter or at their limitation to a greater extent than is provided for herein."

- derogation to human rights in time of war or other public emergency: see Article 4.1 ICCPR and Article 15 ECHR:

"1. *In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.*
2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.
3. Any High Contacting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed".[11]

[11] The Luxembourg Constitutional writers might draw on the report entitled *Les clauses transversales en matière des droits et libertés* (cross-referencing clauses in the field of rights and freedoms), drawn up on behalf of a working group of the Belgian Chamber of Representatives responsible for examining Title II of the Belgian Constitution (Parl. Doc., Chamber, 2004-2005, Doc. 51 2304/001).

Article 12

48. 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, and therefore does not comprise all the guarantees set out in Article 2 ECHR. It remains to be seen whether constitutionalising the right to life would clarify the situation, in the light of the debates which have already taken place on this subject in Luxembourg.

Article 14

49. The reference to “droits naturels” is not clear without explanation[12]. Article 8 of the European Convention on Human Rights protects the private and family life without any such restriction.

Article 16

50. The expression *l’Etat veille à promouvoir activement l’élimination des entraves pouvant exister en matière d’égalité entre femmes et hommes* (the State actively promotes the elimination of any obstacles to equality between women and men) is rather general. A phrase to the effect that the law may set out the requisite measures to achieve this goal would help flesh out the provision.

51. It would be logical to reverse the order of Articles 16 and 17 as equal rights in general should take precedence over gender equality. In parallel to the provision on non-discrimination, a constitutional provision on equal opportunities might be added, in view of the development of constitutional law on this point.

Article 17

52. 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.

53. Article 17 (2) provides that it is incumbent on the national legislature to determine the admissibility of non-Luxembourgers to civilian and military public posts. According to the Court of Justice of the European Communities, only *posts involving direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State or of other public authorities* can be reserved for nationals to the exclusion of other EU citizens (see eg CJEC, 2 July 1996, Com. v. Luxembourg, C-473/93, ECR 1996, I-3207).

Article 18

54. This Article should be in conformity with Articles 5 and 6 ECHR. In particular, 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.

55. 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.

[12] See Schmit, p. 111.

Article 20

56. The legality principle requires that the law was already in force at the moment the act to be punished was committed (cf. Article 7 ECHR).

Article 22

57. 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. This could be considered.

Articles 24-27

58. 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 expression "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.

59. The general nature of the expression *all forms of personal communications are inviolable* (Article 27) would suggest that the provision covers not only letters and telephone conversations, but also emails; if so, this is a welcome innovation, making the Luxembourg Constitution the first so to provide.

Article 28

60. From the wording it is not sufficiently clear that the freedom of thought, conscience and to have a religious belief 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.

61. 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.

Article 30

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

Article 31

63. 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

64. The detailed provisions on access to education are to be warmly welcomed.

65. 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.

66. 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 could be enshrined in the Constitution, but this is not mandatory.

Section 4 – Articles 33-41

67. Where this section "guarantees" social and economic rights, account may be taken of constitutions where all or some of these are specified as being 'subject to available resources'. Alternatively, some greater form of specification may be necessary to prevent unreasonable claims on state resources and to enhance legal certainty.

Article 33

68. 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.

Chapter 3 – The Grand Duke

69. There 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 Governments' political responsibility.

70. 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.

71. In the proposed review, major powers are still assigned to the Grand Duke (Articles 52, 54, 55, 56, 57, 58, 78 and 94). Article 52.3 states that *All provisions of the Grand Duke require the countersignature of a responsible member of the Government.* This provision is apparently general in scope, requiring all powers assigned to the Grand Duke to be exercised under the political responsibility of a minister.

72. The explanatory memorandum to the draft clarifies the review of the articles of the Constitution referring to the Grand Duke as follows:

The constitutional texts proposed attempt to reinforce the Grand Duke's status as the Head of the State, the symbol of its unity and the guarantee of national independence, *and consequently to modify the provisions of the Constitution which are liable to involve the Head of State in political decisions responsibility for which must be taken by other constitutional bodies.*

73. This explanation would appear too broad for the actual amendments, which are confined to the Grand Duke's participation in the exercise of legislative and judicial power. On the other hand, they cover neither the Grand Duke's participation in the executive nor his role as guardian of the institutions (Articles 78 and 94), which also involve participation in political

decision-making. More detailed explanations are needed in order to improve the citizen's understanding of the logic behind the review and to ensure the coherency of the latter.

74. To the extent that the constitutional writers are endeavouring to stress the supremacy of Parliament, the provisions on this latter institution might be made to precede those on the Grand Duke in the structure of the Constitution, although this is not actually vital.

75. Article 4 stipulates that *the Grand Duke is the head of the State, the symbol of its unity and the guarantor of national independence.* According to the "Commentaire", the 1998 constitutional review vested the Grand Duke with the following duties: the *symbolical function,* that of *guardian of the institutions* and *arbitrating duties.* The question is whether the current draft too assigns the Grand Duke these three functions or whether he is only to retain the "symbolical" and "arbitrating" functions. Article 52 states that the Grand Duke *exercises the executive power in conformity with the Constitution and the laws of the country.* It would appear that the constitutional writers did not wish to change the Grand Duke's constitutional prerogatives vis-à-vis the Government; on the other hand, his powers vis-à-vis Parliament have been considerably weakened. Nor does the "Commentaire" make clear whether the Grand Duke retains his status as "guardian of the institutions" under the rationale of the proposed new Constitution.

76. Article 42 deals with the Grand Duke's constitutional powers. Chapter 3, section 2 is entitled "The powers of the Grand Duke", although Article 143 comprises the expression "the Grand Duke's constitutional prerogatives". In the light of Articles 52 and 53 – the provisions of the Grand Duke must be countersigned, and the person of the Grand Duke is inviolable – the word "prerogative" would appear more appropriate, but in any case some coherency should be given to the terminology used.

77. The formula "natural and legitimate" should be understood as excluding adoptive and illegitimate descent.

Article 43

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

79. 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 unclear why the period mentioned in Article 43 differs from that of Article 46.

Articles 46 ff

80. The relationship between Articles 46 and 47 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. 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.

81. 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" clearly indicates those terminations.

Article 48

82. Article 48 governs emergency situations. It does facilitate the management of such situations, but in order to avert any uncertainty, it would be useful to settle the matter at constitutional level, not simply to explain in the "Commentaire" who is to decide when the regency period should be terminated. According to the "Commentaire", the body empowered to take the decision is the *Conseil de Gouvernement*.

Article 55

83. 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. Moreover, the very terms of 'international crisis' lacks clarity and it is not made clear whether the state of emergency can be challenged.

84. The statement that in the event of an international crisis the Grand Duke issues regulations would appear to contradict the loss of his power of legislative promulgation. Moreover, as such regulations might be contrary to existing legal provisions, procedural guarantees should be provided, eg consultation of the Constitutional Court.

85. Where Article 60 is concerned, see the remarks on Article 8.

Chapter 4 – The Chamber of Deputies

Article 63

86. The last sentence raises the issue whether it is appropriate for the legislature to establish by simple majority 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

87. As mentioned in the *Commentaire*, the ECHR has held in the judgment of the European Court of Human Rights of 30 March 2004, *Hirst v. United Kingdom (No. 2)* that denying prisoners the right to vote may offend Article 3 of Protocol 1 of the Convention. It is doubtful that this Article sufficiently takes that judgment into account and is in conformity with the principle of proportionality. Moreover, 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.

88. The right to vote has therefore been excessively restricted. We would therefore recommend observing the following provisions of the Code of Good Conduct in Electoral Matters[13]:

i. Provision may be made for depriving individuals of their right to vote and to be elected, but only subject to the following cumulative conditions:
ii. It must be provided for by law.
iii. The proportionality principle must be observed; conditions for depriving individuals of the right to stand for election may be less strict than for disenfranchising them.
iv. The deprivation must be based on mental incapacity or a criminal conviction for a serious offence.

[13] CDL(2002)023rev, I.1.1.d.

v. Furthermore, the withdrawal of political rights or finding of mental incapacity may only be imposed by express decision of a court of law.

Article 69

89. 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 incompatibilities 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.

90. It seems that this Article may allow the constitutional provisions set out in Articles 66-68 to be overridden by a Law. Is this necessary?

Articles 71-72

91. 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 76

92. Article 76 fails to define any special constitutional rules on convening and composing the Chamber of Deputies following fresh elections: the person or body responsible for convening it, the period within which it must be convened and the procedure for the first sitting (any special role to be played by the Grand Duke in convening such a first sitting, etc). It would be useful to settle this matter at the constitutional rather than the statutory level.

93. The Grand Duke may both dissolve the Chamber of Deputies (which power is specified in Article 78, fortunately regulated by Article 99 (3)) and summon it to meet when it has been dissolved. The Commission understands this as meaning that the dissolved Chamber of Deputies may be invited to legislate in cases of emergency, but not to debate its own dissolution.

94. The wording is a great improvement on that of the former Article 47, which seemed to make the Grand Duke the arbiter of the admissibility of proposals and, even more strangely, of bills of law.

The power of sanction/promulgation (see Article 85 of the draft)

95. According to Article 85, laws adopted by the Chamber of Deputies are promulgated and published by the Government. Promulgation is a formal act which attests the existence of the law, authenticates the text of the latter, confirms that the rules governing the adoption of the law were observed and makes the law enforceable. The constitutional writers must determine which institution is competent to promulgate laws. In most parliamentary monarchies, this duty is discharged by the sovereign, who exercises this power under the political responsibility of his or her government (see Article 109 of the Belgian Constitution, Article 22 of the Danish Constitution, Articles 47 and 87 of the Netherlands Constitution, Article 62 a) of the Spanish Constitution and Article 77 to 79 of the Norwegian Constitution). In the UK, the Royal Assent is a precondition for a bill becoming an Act of Parliament (and, by convention, is never in practice refused). However, nothing further in the way of promulgation is necessary for the Act's validity. Under a rather archaic rule (now codified under the Interpretation Act 1978, s 4(b)), an Act is deemed to come into operation at the beginning of the day on which the Royal Assent is

given (unless the commencement of the Act, or part of it, is deferred under its own provisions). After the Royal Assent is given, there is a formal procedure under which the Crown, acting through its officer the Clerk of the Parliaments, (a) settles the final text; (b) formally enters the text on the Parliament Roll and (c) ensures publication of the text by the Queen's Printer. However, the validity of an Act does not depend in any way on the carrying out of this procedure, nor on any other form of promulgation. In Sweden, Article 19 of the Constitution provides that laws are promulgated by the Government or else by the *Riksdag* in the case of laws directly concerning it. Given that the Grand Duke retains the symbolic function and that of guardian of the institutions, he might be granted the power to promulgate laws, still under ministerial responsibility. Furthermore, it might be considered appropriate, particularly in the light of recent events, to make the Government responsible for promulgating and publishing laws. Since this is a question of expediency, it is for the Luxembourg constitutional writers to decide. Moreover, the latter might provide for outside supervision of the compatibility of laws promulgated with the rules on their adoption.

96. The only methods of parliamentary supervision mentioned in Article 88 are commissions of inquiry and the right of petition. This provision might appear fairly modest in the light of modern developments in constitutional law, especially since the declining role of parliaments in the 21st century would rather necessitate stepping up the supervisory mechanisms available to Parliament.

Article 91

97. The second sentence does not refer 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.

Chapter 5 – Government

98. We cannot but welcome the recognition of the Prime Minister, whom the Constitution hitherto failed to mention despite his/her vital practical importance. However, in this case it might be useful to assign the Prime Minister a role in nominating members of the Government, and especially in terminating their periods of office, which is most certainly what happens in practice. Without such a provision the Constitution would continue to look rather outdated. Contrary to the assertion in the “Commentaire”, such a provision would be quite appropriate in the Constitution.

99. Article 95 seems excessively restrictive. It provides for no exceptions regarding, for instance, higher education or other activities protected by copyright. The statement in the “Commentaire” to the effect that any activity can be a source of conflict with duties within the Government is more apposite.

Article 98

100. 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 100

101. According to Article 100, the right of appointment to major posts is now one of the Government’s powers. In several other parliamentary monarchies this power formally

appertains to the Crown, which exercises it under ministerial responsibility. This, however, is a matter of political choice.

Article 101

102. Is the political responsibility of members of the Government individual or collective? This point should be clarified, as had been proposed in the Government text mentioned in the "Commentaire", drawing a distinction between individual and collective responsibility.

Article 101(1)

103. It is not certain that the term "political responsibility" is sufficiently clear to permit meaningful accountability of the Government for its actions that may be more in the nature of administrative rather than political (if that distinction has any meaning in this context).

Article 102

104. 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?

105. 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)?

Chapter 7 – Justice

Article 104

106. Article 104 provides that *Justice is rendered by the courts and the tribunals.* According to the "Commentaire", the fact that the proposal no longer provides that justice is rendered in the name of the Grand Duke helps stress the independence of justice and the judicial system. Nevertheless, it should be noted that since the Head of State represents a neutral power, the independence of justice was not affected by the fact that the court and tribunal judgments were delivered in the name of the Grand Duke. This provision has rather a symbolical significance, expressing the fact that the Grand Duke is the guardian of the institutions. It is, however, a matter of political choice.

107. The impartiality of judges should 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

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

Article 110

109. "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

110. 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 on Luxembourg, although this would seem the appropriate place.

Article 114

111. 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?

112. 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

113. From the angle 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

114. According to Article 117, justices of the peace and judges of the courts are appointed by the Government, not the Grand Duke. Members of the Superior Court of Justice and presidents and vice-presidents of the district courts are appointed by the Government on nominations from the Superior Court of Justice. In several other parliamentary monarchies, the power to appoint judges appertains to the Crown, which exercises it under ministerial responsibility. However, it is a matter of political choice. Most States have a higher judicial council which nominates judges, who are subsequently appointed by the Head of State. Furthermore, the “Commentaire” proposes setting up such a body (see under Article 105). Whichever body is formally responsible for appointment (Grand Duke or Government), the necessary guarantees on judicial independence must be provided.

115. For "conseillers de la Cour" see the observation on Article 114.

116. The role of the Constitutional Court vis-à-vis the conformity of laws is addressed in very broad terms, given that a detailed law is devoted to this matter (the Law of 27 July 1997).

117. Nevertheless, the Constitution might clarify whether supervision of the law precedes or follows its adoption. Prior supervision might justify the three-month period stipulated in Article 85 … and dispel any fear arising from the waiver on the Grand Ducal power of sanction.

118. According to Article 126, *the Grand Duke is the supreme commander of the armed force.* It is unclear what the expression *placed under the authority* means. Obviously, the Grand Duke’s prerogative vis-à-vis the armed force is rather symbolical, but the current wording of this provision seems somewhat ambiguous.

119. Article 134 provides that *members of the Audit Chamber are appointed by the Grand Duke on nominations from the Chamber of Deputies.* The Audit Chamber must be independent on the same basis as the other courts and tribunals, which is why the remarks made concerning Article 117 must be repeated here.

120. Paragraph 8 entitles the Grand Duke to dissolve municipal councils. Even though this act must certainly obtain a ministerial countersignature, it seems somewhat excessive. It should probably be regulated by a governmental opinion or at least a governmental proposal.

Chapter 8 – International relations

121. The Luxembourg Constitution contains very few provisions on international and European law.

122. Certain fundamental aspects of the relationship between the Luxembourg legal system and the international and European legal systems are ignored by the Constitution itself, and have therefore been developed by the case-law of the Constitutional Court and the ordinary Luxembourg courts and tribunals. Other aspects may not yet have been unequivocally settled by case-law.

123. The "overhaul" of the Luxembourg Constitution might be an opportunity for taking time to reflect in depth on a series of major questions which should be answered by the Constitution itself, for instance:

- are international treaties directly applicable before the Luxembourg domestic courts in the sense that individuals can rely on them before the Luxembourg courts? To what extent and under what conditions?

- does Luxembourg law recognise the precedence of international law over national law, including the national Constitution? Is the Constitutional Court authorised to verify the constitutionality of laws consenting to international treaties? Should not the Constitution draw on its own Article 122 to provide that laws consenting to international treaties which contain provisions contrary to the Constitution can only be approved by a law under the conditions of Article 142 (2) (see also Article 91.3 of the Netherlands Constitution)?

- does European law, including secondary legislation, take precedence unreservedly over Luxembourg law, including the Luxembourg Constitution?

Conclusions

124. The constitutional writers' aim is to bring the text of the Constitution into line with constitutional practice and remove any obsolete provisions. The present constitutional review largely achieves this aim in terms of increased coherency.

125. The question once again is whether this is a new Constitution or a Constitution which is to retain the date 1868 after a process of comprehensive review and renumbering of articles.

126. The text of the Chapter on public freedoms and fundamental rights does not entirely correspond to the relevant international treaties applicable in Luxembourg, particularly in connection with restrictions on rights and freedoms. In order to avoid any ambiguity here, and if the constitutional writers do no wish to incorporate systematically the texts of the treaties in question, it might be worth considering inserting cross-referencing clauses corresponding to the contractual guarantees and clearly stating in the Constitution that the substantive provisions of international human rights conventions are directly applicable and take precedence over the whole domestic legal system.

127. The main changes affect the institutional structure, especially the Grand Duke's powers and prerogatives. In this field, it is for the Luxembourg constitutional writers to choose the type of monarchy that is best suited to Luxembourg society, provided that the principles of democracy and the rule of law are observed. It is incumbent on them to specify the extent to

which the Grand Duke remains vested with the duties conferred on him in 1998 (“symbolic function”, function of “guardian of the institutions” and “arbitrating function”).