

HISTORY AND CONSTITUTIONALISM OF THE GRAND DUCHY OF LUXEMBOURG: BRIEF NOTES*

HISTÓRIA E CONSTITUCIONALISMO DO GRÃO-DUCADO DE LUXEMBURGO: BREVES NOTAS

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ABSTRACT

The text provides a brief and general approach to the formation history of Luxembourg, emphasizing the constitutional landscape of the country, presented in three sections. The first one highlights the historical and formal events that lead to modern Luxembourg. In the second, the more important constitutional moments in the XIX century are exposed, with commentaries regarding the Constitutions of 1841, 1848, 1856, and 1868. In the third, the political and constitutional reforms of the XX century, considering the I and II World Wars, are commented upon, with the intention to expose some of the main characteristics of the Grand-Duché, such as its openness to the international sphere, constitutional actions for the integration of Europe, and the main normative diploma that shows the compromise with Human and Fundamental rights, considering specific dynamics of the relations of the powers of the state.

KEYWORDS: Luxembourg Constitutionalism. History of Luxembourg. Human and Fundamental Rights.

RESUMO

O texto fornece uma abordagem breve e geral da história da formação do Luxemburgo, enfatizando o cenário constitucional do país, apresentado em três seções. O primeiro destaca os eventos históricos e formais que levaram ao Luxemburgo moderno. No segundo, são expostos os momentos constitucionais mais importantes do século XIX, com comentários sobre as Constituições de 1841, 1848, 1856 e 1868. No terceiro, comentam-se as reformas políticas e constitucionais do século XX, considerando as I e II Guerras Mundiais, com a intenção de expor algumas das principais características do Grão-Ducado, como a sua abertura à esfera internacional, ações constitucionais para a integração da Europa, e os principais diplomas normativos, que exibem o compromisso com os Direitos Humanos e Fundamentais, considerando dinâmicas específicas das relações dos poderes do Estado.

PALAVRAS-CHAVE: Constitucionalismo do Luxemburgo. História do Luxemburgo. Direitos Humanos e Fundamentais.

INTRODUCTION

Luxembourg is currently a Grand Duchy in the centre of Europe, bordering Germany, France and Belgium. Its leading role on the European

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continent, especially in the aftermath of the Second World War, is characterised and symbolised by being one of the founding countries of the Council of Europe and also of the European Coal and Steel Community (ECSC - 1951), the embryonic organisation of what is now known as the European Union, and home to many of its institutions, such as the Court of Justice of the European Union (CJEU).

The aim of this text is to develop a few lines on Luxembourg history and constitutionalism. In particular, the intention is to highlight its historical formation, as well as to present the main constitutional-formal moments that constitute it, which, in a certain sense, are moulded into its culture and integrated into the country's contemporary constitutional dogma and structure.

To this end, the aim is to produce a general account of relevant constitutional moments in Luxembourg's history, in general terms, but understood as sufficient to outline the symbolic contexts and the constitutional, social and political initiatives that, in a complex way, were able to bring about the development of a unique constitutional system, from which lessons can be learnt, or at least constitutional-dogmatic understandings that are different from the best-known traditions in constitutional law studies.

The work is therefore divided into three sections, the first of which provides a formative historical overview of the Grand Duchy of Luxembourg, followed by an account of the country's main constitutional moments, highlighting the events that took place during the 19th and early 20th centuries, and concluding in the third section, with certain notes on the existing and present historical interconnections with the current normative text of the 1868 Constitution, with constitutional dogma, in the structuring of powers, and in the grammar linked to the Law of Human and Fundamental Rights, largely associated with a project of integration with the European continent, and of broad openness to the international-global scenario.

1. LUXEMBOURG: HISTORICAL-FORMATIVE NOTES

The Grand Duchy of Luxembourg only established itself as a nation-state during the second half of the 19th century, and it is understood (the position adopted in the text) that it was only with the Constitution of 1868 - still in force - and the creation of a 'dynasty of its own' in 1890, when its new international status was confirmed, that the country effectively became an "*indépendant, indivisible and inaliénable and perpetually neutral*" state, according to the original wording of art. 1 of the aforementioned Constitutional Charter¹.

1 CONSTITUTION DU GRAND-DUCHÉ DE LUXEMBOURG. With the subsequent constitutional reforms, the final part regarding perpetual neutrality was removed. Currently, it reads: Article 1: The Grand Duchy of Luxembourg is a democratic, free, independent, and indivisible state.

However, its history - like that of all other countries and societies - is not formed in a unilinear fashion. Luxembourg, considering only documentary sources, is cited as a geographical entity delimited for the first time in 963, in a document of transaction and confirmation of ownership of a small castle, acquired by Siegfried (Sigefroi of Arras), which later became part of the Holy Roman Empire (it is common to understand this document as a founding act of "modern" Luxembourg, even though there is no explicit anticipation in its content), having, at its peak, a territorial extension four times larger than the current one².

In 1060, the region was ruled by Count Conrad, founder of the House of Luxembourg, which provided the Holy Roman Empire with four emperors between the 14th and 15th centuries, until it was replaced by the Habsburg dynasty³. It is curious that Luxembourg's pre-modern heyday has as its 'closing' milestone the same foundation as what is considered the milestone (or one of the milestones) of its modern conception, namely the absence of male heir-successors, with the death of Emperor Sigismund of Luxembourg in 1437, which ended the rule of the Luxembourg dynasty in Germany and central Europe.

Due to its prominence and growth under Duke Wenceslas I in 1354, it was already a key point of interest for many of the ruling families on the old continent. After 1433, when Philip III the Good, Duke of Burgundy, took the city of Luxembourg, the duchy was successively 'subjugated' by Burgundy (1443-1506), Spain (1506-1684), France (1684-1698), Spain (1698-1714), Austria (1714-1795) and again France (1795-1815). During this period, called the *age of dependence* by Thill and Gerkrath, Luxembourg lost an important part of its territory, including the Treaty of the Pyrenees (1659), in which Spain granted part of the south to France, and even with the Final Act of the Congress of Vienna of 1815, in which Luxembourg was established as a Grand Duchy, at the same time ceding part of the east of the country - the cities of Bitbourg and Saint Vith - to Prussia⁴.

With the end of the Napoleonic Wars in 1815, the territories of Luxembourg and Belgium were formally unified with the Kingdom of the Netherlands, with the purpose of creating a strengthened proto-state order against France, while Luxembourg remained a territorial entity that would be part of the German Confederation. At the Congress of Vienna, in addition to the aforementioned measures, it was determined the cession of Luxembourg,

In Luxembourgish: De Grand-Duché vu Lëtzebuerg ass en demokrateschen, fräien, onofhängegen an ondeelbare Staat. In ordinary German: Das Großherzogtum Luxemburg ist ein demokratischer, freier, unabhängiger und unteilbarer Staat.

2 SOBCZYNSKI, 2011, p. 88.

3 HENDRIKS, GOOSSENS, 2021, p. 39.

4 GERKRATH; THILL, 2014, p.1087.

"as a personal property to the King of the Netherlands," the then William I of Orange-Nassau⁵.

The 'stability' of the international negotiations anticipated in 1815 did not last long. In 1830, the Belgian provinces rebelled and the now Grand Duchy joined them. At the end of the same year, Belgium became an autonomous kingdom, and Luxembourg remained an integral part of the new nation until 1839, with both Belgian and Dutch government plans coexisting, when a western part of the territory was ceded to Belgium, and the rest was eventually recognised as a sovereign and independent state. This period is referred to as the Two Luxembourgs: i) The Grand Duchy of Luxembourg - Rule of Orange - Nassau; ii) the Belgian Luxembourg, which became a province of Belgium - even though a personal union with the Dutch crown lasted until 1890, with the death of King William III, and Luxembourg remained a member of the German Confederation until 1866⁶.

It is also important to note that, during this period, two international treaties were essential for the consolidation of Luxembourg's autonomy and independence. Following its separation from the Kingdom of Belgium in 1839, the Treaty of London of the same year - also known as the First Treaty of London - was the determining legal instrument for the development of the country's internal constitutional structure. On 11 May 1867, with the Second Treaty of London, at the end of the Austro-Prussian War and the "Luxembourg Crisis"⁷, Luxembourg's territorial integrity was ratified, as well as its political autonomy as foreseen in the Treaty of 1839. It was with the Second Treaty of 11 May 1867 that "[...] Luxembourg was declared perpetually neutral, and the great powers agreed to guarantee and to protect the neutrality of the Grand Duchy"⁸.

The treaty took place in the context of the Austro-Prussian War of 1866, which resulted in the dissolution of the *German Confederation*, at the same time as France turned its attention to Luxembourg in an attempt to incorporate it into its territory as a strategy to halt the advance of the Prussian Empire. Napoleon III, by the way, made an offer of five million francs to William III in order to acquire the Grand Duchy, which the latter accepted, but at the same time the Prussian garrison was still present in the fortress of Luxembourg, which generated opposition - 'Luxembourg's crisis' - that could have resulted

5 For example, in Articles 53, 54, 55 and 56, the English version explicitly quotes the final part of Article 53, [...] The Emperor of Austria and the King of Prussia [...] The King of Denmark for the Duchy of Holstein, and the King of the Netherlands for the Grand Duchy of Luxembourg, establish among themselves a perpetual Confederation, which shall be called "the Germanic Confederation". FINAL ACT OF THE CONGRESS OF VIENNA/GENERAL TREATY, 1815.

6 KMEC; JONGE, 2019.

7 VANDENBOSCH, 1959.

8 HENDRIKS; GOOSSENS, 2021, p. 40.

in a conflict on a continental scale. The Second Treaty of London thus forged a process of appeasement to the conflict, with Prussia eventually withdrawing its garrisons from the fortress of Luxembourg, the latter being declared perpetually neutral by the signatory powers and France renouncing its territorial claims^{9 10}.

In this historical process, even with the aforementioned Treaties and Constitutional movements, especially the one of 1868, there remains an understanding that it was only in 1890 that the country effectively freed itself from 'external' powers, when William III died. This was because, leaving no male descendants, his daughter Wilhelmina succeeded him to the Dutch throne, although she was unable to do so in Luxembourg, due to the application of the Salic Law and in accordance with the Nassau Family Pact (*Nassauischer Erbverein*) of 1783, thus founding a new dynastic line, which is preserved to this day (Art. 3 of the Constitution of 1868; Family Law). Article 3 of the Constitution of 1868; Family Pact of 30 June 1783; Article 71 of the Treaty of Vienna of 9 June 1815; and Article 1 of the Treaty of London of 11 May 1867).

With these brief general points, we can see that modern Luxembourg is the result of a continuous fragmentation and defragmentation, and not because of its own sovereign decisions - on the contrary, its 'sovereignty' was constituted late. The state and its society have constantly been the object of disputes, of external rather than internal movements to determine its constitutional architecture, not to mention the last two offences during World War I and World War II, with the latter invasion and domination being the main foundation of a period that has, in a sense, lasted since 1815, with regard to its perpetual neutrality, institutionally extinguished in 1948 and expressed in the constitutional reform of the same year by the Law of 28 April 1948¹¹.

It is not by chance that its contemporary expression in the central region of Europe not only finds space in the materiality of its narrative and multicultural process of self-construction¹² but also in its geographical and institutional actions on the European continent, with Belgium, and between Germany and France, the two largest powers on the continent. It also formulates itself as a systemic psychological and cultural condition of closure in its traditional pluralism, represented by the country's official languages, Luxembourgish, French, and ordinary German, with openness to other movements, represented by the highly present languages of Portuguese and Italian, emerging from two central concepts, in particularism and mixed culture/*Mischkultur*¹³, and advancing to a

9 KMEC; JONGE, 2019, p. 1.

10 Luxembourg. A Contry's Renaissance, 2024.

11 LUXEMBOURG. Révision de la Constitution. 1948.

12 PÉPORTÉ; KMEC; MAJERUS;; MARGUE, 2010.

13 Batty Weber, in 1909, produces a conceptual development from this locution, *Mischkultur*, which, in its historiographical unfolding, is based on the differences and linguistic productions

contingent social and narrative dispute with plural and hybrid social elements that vary over time.

However, still, its constitutional formation deserves attention, because it is able to show these processes with another lens, especially in the formatting of its independence and autonomy, and its openness to the international scene, in organized legal stationality, which is imprinted on the country's motto, *Mir wëlle bleiwe Wat Mir sin*, in Luxembourgish, meaning, in English, "We want to remain what we are" motto this taken from the poem and music of 1859, authored by Michel Lentz, *De Feierwon*, of the period mentioned, and of the events briefly reported above, constitutes a national manifestation, identity and politics of autonomy and independence, which is completed, "come here from France, Belgium, Prussia, we want to show you our homeland, question from all sides, we want to remain what we are¹⁴".

2. THE CONSTITUTIONS OF LUXEMBOURG

With this section, it is intended to make some comments about the constitutions of Luxembourg, 1841, 1848, 1856 and 1868. General notes will be made, which must be considered together what was previously weighted.

2.1 THE CONSTITUTION OF 1841 - THE CONSTITUTION OF STATES¹⁵

Luxembourg's first constitution of 1841 is the result of a complex network of historical causes¹⁶. Among many that could be named, and from what has already been anticipated in the previous section, the Belgian revolution of 1830, the coronation of Leopold as King of Belgium, and the successive war against the Netherlands of 1831, which led to a crushing defeat of the Belgian forces, there was the London Conference of 1831, at which Belgium was obliged to accept the division of the lands of Luxembourg, ceding part of the Grand Duchy to the Netherlands. Considering other relevant circumstances, however, only on 14 March 1838 did William of Orange ratify the Treaty of Luxembourg, between the Belgian (Walloon) and Dutch (present-day Grand Duchy) sides. It is said that Luxembourg lost part of its population from the period (175 thousand inhabitants) and almost two thirds of its territory (4,300 km²). The Treaty

realized/ occurred in Luxembourg during the time. WEBER, Batty. Über Mischkultur in Luxemburg. *Luxemburger Zeitung*, 11-12, fev. 1911.

14 Free translation of Luxembourgish: *Kommt hier aus Frankräich, Belgie, Preisen, Mir wëllen iech ons Heemecht weisen, Frot dir no alle Säiten hin, Mir wëlle bleiwe wat mir sinn. Frot dir no alle Säiten hin, Wéi mir esou zefridde sinn.*

15 LUXEMBOURG, 1941.

16 Just as a reminder, Luxembourg was constitutionally governed by the Constitution of the Netherlands of 1815, Grondwet, as a result of the consensus at the Congress of Vienna of 1815, in which it declared its integration into the German Confederation. In practice, Luxembourg was administered in this period as one of the 17 Dutch provinces.

of London of 1839, elsewhere referred to, came into force only on 14 April, formally guaranteeing the autonomy of Luxembourg. In fact, it is described that the Dutch, in part, had the intention of taking revenge on the personal sympathies of the people to the Belgians, and there was no promulgation of the promised constitution. On the contrary, a constant withdrawal from the protective joints of Luxembourg has been extended, with regard to the subjugations perpetrated by the German Confederation to its detriment. The treaty of 1839, therefore, is also considered the "third partition of Luxembourg"¹⁷.

It was only in 1841 that Luxembourg's first Constitution was proclaimed, on October 12, following the principles of the German Confederation, closely resembling the Constitutional Charter of the Netherlands from 1815 (Grondwet), thus closing the period also known as constitutional dualism, which remained present from 1830 until 1839¹⁸. The proclamation of the 1841 Constitution, consisting of 52 articles, is an institutional event that extends over the period from 1840 to 1849, during the government of William II. The 1841 Constitution is considered the cornerstone of modern Luxembourgish statehood. In addition to internalizing its own constitution, many state reforms were promoted, even though they were embedded in controversies surrounding the 'Prussian constellations' adhered to by the monarchy, albeit with resistance from the people due to fears of affecting trade relations with Belgium.

One of the main features of the aforementioned Charter is the foundation of a federalized state. Its own title, Constitution of States (Constitution d'Etats), expresses this organizational model. The Political Rights (art. 3^o) and the administrative-political organization demonstrates the symbolic point of an embryonic statiality in the process of constitutionalization. In addition, there are other rights in the constitutional text mentioned, and can be cited those characteristically incorporated in a liberal grammar, of first dimension/generation. Article 41 mentions the equality of Luxembourgers before the law, irrespective of religious creed, class or birth (1), freedom of opinion and religious worship (2), the individual freedom not to be arrested and persecuted, the principle of the natural judge (3), the inviolability of domicile (4), property, possession and peaceful enjoyment of property (5), and the admissibility of only Luxembourg nationals or their counterparts, in public jobs (6).

To the Grand Duke, the powers of a then emerging constitutional sovereignty were delegated. To the Assembly of the States, institutionalized as a permanent legislative body, whose members were indirectly elected, the

17 SOBCZYNSKI, 2011, p. 93.

18 From 1830 to 1839 the following situation would characterize the aforementioned constitutional duality: after the Belgian revolution, the fortress and the city of Luxembourg were governed by the German Confederation, being governed by the Constitution of the Netherlands, while the rest of the country had become a Luxembourg province of Belgium, subject to the Belgian Constitution of 1831.

established powers were limited, but they already pointed a path to the future (six-year terms; renewed by half, three years. Approval of legal changes: only in tax and criminal laws and tariff regulations; for other laws, only their opinion was required).

The issue, however, surrounding the 1841 Charter, lies in the formalization of an initial constitutional structure, administrative autonomy for the country, and a grammatical inauguration of constitutional rights; however, it does not address the real situation materialized in the region, referred to by Gerkrath and Thill¹⁹ as an authoritarian regime encapsulated in its normative diploma, which is why its acceptability was unable to penetrate all sections of society.

In view of these situations, and even shortly after its entry into force in 1841, many parts of Luxembourgish society were already seeking its reform, which was initially rejected by William II. However, by the end of the 1840s, with revolutions in France and Germany in 1848, with social problems on the rise within the country such as unemployment, inflation, and famine, a preparatory process for an "authentic" constituent assembly was forged, held in the year 1848²⁰.

2.3 THE CONSTITUTION OF 1848 - A LIBERAL CONSTITUTION

In the year 1848, a correlation of revolutionary social movements succeeded in Europe, eminently, in the central region of the continent (France and Germany, to name only those). It was not different in Luxembourg²¹, even if at times one criticizes the little attention given to this important movement, by the national historiography of monarchist inspiration. However, interest grows in the events that preceded the constituent assembly of 1848²². In March 1848, reports Thewes, riots broke out in different localities of the Grand Duchy of Luxembourg, and it is recorded, on March 8, someone shouting, "Long live the Republic!" while, the next day, in the fortress, the gendarmes arrest a person who shouts in the streets, "Damn the Prussians!"²³. The question cannot be covered in this text, but it is quoted that, in many communes, social unrest was

19 GERKRATH; THILL, 2014, p. 1088.

20 The 'circumstantial' question is also delineated in the Netherlands, where William II cedes to the liberals, establishing a new regime, with the Constitution of 1848, still in force.

21 CALMES, 1958.

22 The government itself, in 2023, carried out a myriad of actions to remember and spread knowledge about the events of the time. In the exhibition "1848 - Revolutioun zu Lëtzebuerg" images and stories about the subject were exposed. Also, in this context, the book "1848 - Revolutioun zu Lëtzebuerg" was organized, containing sixteen texts that address specific points of events that characterize the historical moment. Available:

ARCHIVES PORTALEUROPE, 2023.

THIELE, 2023.

ARCHIVES NATIONALES DE LUXEMBOURG, 2023.

23 THEWES, Guy, 2015, p. 80-82.

organized, standing out as a point of gravity, the commune of Ettelbruck, being, by the way, the site of the first seat of the Constituent Assembly on April 25, 1848.

To put it briefly, the issue is resolved with a strategic action by the then Grand Duke William II, who yields to the people's demands (as he also does in the Netherlands), although creating an alliance with the bourgeois leadership of the country. On March 15, censorship in the Grand Duchy is abolished. Still in late March 1848, on the 24th, a Grand Ducal decree is established to form a commission to examine and propose a government preservation plan. On March 30, approval is voted in the legislature (Assembly of the States, preserved in the 1841 Constitution), to proclaim a new constituent assembly, which is accepted by the Grand Duke on April 1. Elections for the assembly were held on April 19, 1848. The first meeting takes place on April 25 in Ettelbruck. Subsequently, the Constituent Assembly moves from Ettelbruck to Luxembourg City, eventually being held and completed in the municipal building of the city and seat of government²⁴. The assembly, concluding its work in a few months, adopts the new constitution on June 23, 1848, with the consent of William II on July 9 and 10²⁵, and it comes into effect on August 1, 1848²⁶, comprising 127 articles.

As mentioned earlier, the 1848 Constitution symbolizes a process of continuity²⁷ rather than fracture, the result of a 'revolution', although social upheavals have assisted in the alteration and constitutional structure of the Luxembourgish State, such as in the maturation of an institutional idea of separation of powers, and the textual anticipation of new rights for its citizens, as well as an equalization of the Grand Duchy with the Kingdom of the Netherlands.

In the constitutional history of Luxembourg, it is common to indicate that the 1848 Constitution is inspired by and closely resembles the Constitution of Belgium of 1831, due to its liberal implications. Article 1 ratifies that the Grand Ducal State is independent, indivisible, and inalienable, integrating into the German Confederation, an independence that was somewhat contained. In addition to a separation of powers explicitly laid out in the Constitution (Chapter III - Des Pouvoirs - arts. 33-77), a chapter with new constitutional

24 CHAMBRE DES DÉPUTÉS GRAND-DUCHÉ DE LUXEMBOURG, 2024.

25 LUXEMBOURG, 1848.

26 THEWES, 2011, p. 14.

27 As Thewes indicates, a significant portion of the men who had governed the country since the 1841 Charter managed to withstand “the storm of the 1848 revolution,” remaining in their positions even after the entry into force of the 1848 Constitution on August 1st. It is noteworthy that the Constituent Assembly was chaired by Théodore de la Fontaine, an iconic figure in the country's history, with extensive political connections to the Nassau family. THEWES, 2011., p. 13.

rights is established (Chapter II, Des Luxembourgeois et de leurs Droits - arts. 10-32). In addition to political and nationality rights, equality before the law (art. 12), individual freedom (art. 13), legality (art. 14-15), inviolability of the domicile (art. 16), protection of property (art. 17), freedom of worship, expression of religious opinions (art. 20), primary and secondary education, and freedom to study in the Grand Duchy or abroad, and attend universities of their choice (art. 24) are established. Freedom of expression, of the press (art. 25), association (art. 26-27), petition (art. 28), and secrecy of correspondence (art. 29) are also guaranteed.

Although highly accepted in the social environment of Luxembourg, and representing a democratic turn in its constitutional history, the restructuring and functioning of the constitutional powers established by the 1848 Charter were precisely one of the main reasons that, a few years later, produced the motivations for the *coup d'état* in 1856. Specifically, the inauguration of a coexistence among the three powers was able to diminish the arbitrariness previously accumulated in the hands of the Grand Duke. The legislative power began to be exercised jointly by the Grand Duke and the Chamber of Deputies (Chambre des Députés), where both would have the right of initiative. Greater control over the budget was also directed towards the Chamber of Deputies. There was, therefore, a drastic constitutional change, considering the country's monarchical tradition, even naming such a change as parliamentary omnipotence.

The point is that, with the 'winds of Restoration' blowing throughout Europe (the dismantling of the Frankfurt National Assembly in 1849 - the Republic of France led by Napoleon III, subsequently, with a *coup d'état* in 1851), and with the sudden death of William II in 1849, less than a year after the Constitution came into effect, and his heir and successor, William III, proved to be a defender of royal prerogatives²⁸ rather than in favor of the new liberal regime endorsed by his father and other Luxembourgish political leaders of the time.

2.4 THE COUP D'ÉTAT OF 1856 AND THE GRANTING OF A NEW CONSTITUTION (OR CONSTITUTIONAL "REFORM")

With the death of William II in 1849, his successor, William III, almost immediately begins a political action aimed at recovering the powers previously limited by the 1848 Constitution. In his conservative intention, supported by many sectors of society and also by the Catholic Church (Pope Pius IX - restoration of the episcopal hierarchy in the Netherlands - *ex qua die arcano*), the materialization occurs in 1853 of an instruction to the government aimed at

28 GERKRATH; THILL, 2014, 1089.

conceiving a constitutional reform to reintroduce the strong monarchical regime. However, the Chamber refuses to cooperate with the reform, ending up being dissolved on May 15, 1854. With the subsequent elections, an artificial majority allied with the Crown is created; however, in the complementary election of 1855/1856, half of the Chamber elected constitutes a majority opposed to the reforms proposed by William III, a fact that ultimately results in the coup d'état of 1856 and the complete dissolution of the Chamber in November 1856, and the enactment of the previously rejected Constitutional text.

In brief outlines, the Constitution of 1856 restores the monarchy, abolishing the parliamentary system and reintroducing the 'assembly of states'. The constitutional powers are reorganized, resulting in an accumulation of executive power. The Constitution of 1856, even in violation of the constitutional requirements provided in the Constitution of 1848, is formally presented as a constitutional amendment, namely, as a Grand-Ducal Royal Ordinance of November 27, 1856, entitled *Révision de la Constitution*²⁹.

A historical institution in the process of constitutionalizing the Luxembourgish State and society is established, the so-called Council of State (*Conseil d'État*), created to monitor the 'assembly of states', assist the government in legislative opinions, counterbalance the legislative power, and administer administrative justice in dispute resolution.

Sovereignty, previously introduced in the entity Nation, is once again conferred to the Grand Duke. The separation of powers, previously established in normative text, is diminished, especially with regard to the Judiciary, which is omitted from the new constitutional text. Many of the previously guaranteed rights are maintained, although political rights, freedom of the press, and association rights are redrawn and restricted within the normative scope imposed by an atmosphere of arbitrariness and limitation of public freedoms.

The new constitution, or the amendments produced by the 1858 reform, remained in force for twelve years. Apart from other external and internal factors that would deserve attention in a more detailed study, it is mentioned that, with the dismantling of the German Confederation in 1866, with the Luxembourg Crisis, and with the Second Treaty of London in 1867, previously mentioned, which ratifies and strengthens the independence and neutrality of Luxembourg, previously agreed upon, a new constitutional process is ordered internally, spreading throughout Luxembourg society and state, in which William III ends up complying, together with his brother, Duke Henry, the then governor of the Grand Duchy of Luxembourg.

29 LUXEMBOURG, 1856.

2.5 THE CONSTITUTION OF 1868

In Luxembourg's process of constitutionalization, the 1868 Charter represents a central step towards its genuinely independent and autonomous social and state organization, as in its background, national and international conditions, geopolitical dynamics, and among the aristocratic families of the European continent, efforts are made that end up projecting political and economic elements which resulted in these benefits, embodied in the Second Treaty of London of 1867. Among other circumstances that deserve to be mentioned, it is highlighted that, during negotiations between France, Belgium, Prussia (with the new North German Confederation - Norddeutscher Bund 1867-1870), Austria, and Russia, many proposals were discussed regarding the fate of Luxembourg (annexation to the North German Confederation, transfer of Luxembourg to France, accepted by William III, by the way), which ultimately culminated in its independence and autonomy, defended by then Duke Henri (brother of William III), governor of the Grand Duchy, although establishing its neutrality and demilitarization (Article 2 of the Treaty of London), ensuring such a situation by the pact produced between the aforementioned countries and the United Kingdom³⁰. In light of this international agreement, which granted Luxembourg a new state status, a new constitution also became indispensable.

The Constitution of 1868 was thus projected on October 17, comprising 121 articles, bringing an end to the period of 'illegality' that began in 1856 and the concentration of constitutional powers. It is evident that the new constitution, like the previous one, is presented as a constitutional revision. This specificity is present, as seen, in the history of constitutionalization of Luxembourg, which, since the Constitution of 1841, and with the three subsequent ones of 1848, 1856, and 1868, either results from a formalized constitutional reform (1848 and 1868) or ends up being presented as if it were (1856).

This characteristic distinguishes the constitutional evolution of the Luxembourgish State and society, which, to some extent, is represented by the synthesis that constitutions projecting themselves as a new formalized societal pact never forged from a rupture with the preceding order and normative base. Instead, they present themselves as a new stage in pursuit of improvements and adaptations to historical circumstances and the needs arising from them (unlike many constitutional traditions in the Western world, in Europe or America, where a new constitution carries a spirit of discontinuity with the past normative order).

This is indeed seen in its first article (original version), which ratifies the agreement reached in London in the preceding year, where the Grand Duchy is an independent, indivisible, inalienable, and perpetually neutral

30 SOBCZYNSKI, 2011, p. 94.

state, simultaneously reaffirming its monarchical character in article 3, and establishing that the person of the Grand Duke is sacred and inviolable in article 4³¹. The constitutional text of 1868, or the constitutional reform, represents much of the normativity based on the Liberal Constitution of 1848, with textual and organizational similarities, while also closing the 'formal and material continuity' with the Constitution of 1841, determining in article 121 that the Constitution of the States of October 12, 1841 was abolished³².

In the process of maintenance and innovation that characterizes Luxembourgish constitutionalism, it is noted that many of the constitutional rights provided in previous constitutions are ratified in the new text, and a constitutional and social environment re-emerges in which citizens' political rights return to the public sphere, supplemented and reinforced by freedom of the press and assembly. A right that arises as a form of adaptation to new social and technological circumstances is added, linking in article 28 that the law will regulate the guarantee of secrecy of telegrams (in addition to the provision of 'secrecy of letters' mentioned in previous constitutions³³).

An institution that emerged with the coup d'état of the previous decade and with the Constitution of 1856 is preserved, namely the Council of State, although its adjudicating powers are limited (administratively still maintained, thus creating a jurisdictional duality, similar to what happened in France). The separation of constitutional powers is once again constitutionalized, even with the presence of the Council of State, but there is delegation to the Superior Court of Justice (Cour Supérieure de Justice) the competence to resolve potential jurisdictional conflicts.

What is termed in the constitutional doctrine of the country as the principle of constitutional monarchy is strengthened, however, in conjunction with the other powers and with the distribution and effectiveness of constitutional rights, set in a new political and social scenario of internal stabilization and considerable economic development in the second half of the 19th century.

The constitutional monarchy, internal stabilization, and the process of 'continuity' constitutionalization would only be strongly impacted again in the post-World War I period, precisely in September 1919³⁴, the year of a referendum aimed at confirming the people's will to remain a constitutional monarchy³⁵, albeit complemented by the 1919 amendment, in which the Chamber decided to consolidate a new character to this political tradition, inaugurating a parliamentary democracy in the Grand Duchy, transferring sovereignty back to

31 LUXEMBOURG, 1868.

32 LUXEMBOURG, 1868.

33 LUXEMBOURG, 1868.

34 RTL, 2021. LUXEMBOURG, 1919.

35 GERKRATH; THILL, 2014, p. 1091.

the "Nation³⁶," and extending the right to vote as universal suffrage, obtained by men and women (and abolishing census voting), with direct elections under the proportional representation system.

This historical description, although concise, provides an overview of Luxembourgish constitutionalism, which, in this part of the text, needs to be limited, making room for a final comment regarding its openness to the international integration scenario and its normative model connected to human and fundamental rights.

3. LUXEMBOURG IN INTEGRATION AND OPENNESS TO THE INTERNATIONAL SCENE AND THE RELEVANCY OF ITS NORMATIVE STRUCTURE FOR HUMAN AND FUNDAMENTAL RIGHTS

In the concise historical account outlined above, the process of Luxembourg's consolidation between 1815, 1868, and 1890 is summarized. These years respectively represent the Congress of Vienna in 1815, the Constitution of 1868, which marks an institutional return to 'constitutional normality' and the consolidation of a constitutional modern state, and in the year 1890, the death of William III, necessitating the creation of a new, 'solely Luxembourgish' dynastic line from the House of Nassau, as the Grand Duke had left no male heirs. His daughter, Wilhelmina, was crowned in the Netherlands; however, in Luxembourg, a new Grand Duke would be elected due to the application of the Salic Law, which prevented the succession of women (now revoked in the Grand Duchy), leading to the coronation of Adolphe of Nassau-Weilburg. The process of opening and predominant closing in the 19th century, mainly present until 1868, metamorphoses into the subproduct characterized in a period of stabilization of Luxembourg's constitutional life, which would be extremely impacted by the First and Second World Wars. The effects produced by both are briefly highlighted.

Luxembourg's neutrality, agreed upon in 1815 and consolidated in 1867 (Second Treaty of London) and 1868 (Constitution of 1868), is violated by Germany in 1914 and 1940 during the invasions perpetrated during the First and Second World Wars. It is during the post-First World War period that Luxembourg begins a new movement of integration in Europe. Luxembourg, distancing itself from Germany and the economic integration (Zollverein) organized since 1834-1866-1919, formalizes in 1921 the Belgian-Luxembourg Economic Union (BLEU - Belgisch-Luxemburgse Economische Unie) - despite the opposite result in the preceding referendum, in which the people voted in favor of integration with France - being this an essential political action

36 LUXEMBOURG, 1919.

in its history, the embryonic formation of the Benelux Union, a basis for the subsequent European integration that currently delineates with the Council of Europe and the European Union, institutions of which it is a founding member.

The concurrent processes between new formats of international economic-political integration and a departure from its 'perpetual neutrality,' institutionalized with the constitutional reform of 1948 by the Law of 28.04.1948³⁷, and participation in the founding of the North Atlantic Treaty Organization (NATO) in 1949³⁸, are events that symbolically and materially arrange themselves in its constitutional normative order, in a quest for autonomy and independence, and with openness and cooperation for the integration of a legal, economic, social, and political environment in Europe (and with the Americas, the United States, Canada, and Brazil having a historical and close relationship with Luxembourg).

This form of integration and openness is shaped in the constitutional normative order in various ways, and for the purposes of this section, only some of them, believed to be essential, are commented upon, forming a particular system.

For example, the current wording of Article 5 of the 1868 Constitution is discussed, which consolidates with the reforms made after the Second World War. In addition to removing the constitutionalization of the 'perpetual neutrality of the country', Luxembourg reaffirms its commitment to actively participate in European integration, while also opening the possibility for the powers of the state (currently, a democratic, free, independent, and indivisible state) to be transferred to the European Union and/or international institutions, provided that it is done by law and in accordance with Article 131, paragraph 2, of the Constitution³⁹. This is a constitutional provision that demonstrates Luxembourg's commitment to a progressive formation of a European integration program, including preparing to deal with situations and risks of external attacks - which, contemporaneously, especially with the Russia-Ukraine War, emerges as convenient and timely.

Another element deserving attention, and its relevance to Human Rights Law, can be seen from three selected angles that overlap and coordinate. At the end of the Second World War, Luxembourg amended the 1868 Constitution on May 25, 1948, inserting into Article 11 the duty of the State to guarantee

37 LUXEMBOURG, 1948.

38 NORTH ATLANTIC TREATY ORGANIZATION, 2022.

39 LUXEMBOURG, 2023.

In French: L'exercice de pouvoirs de l'État peut être transféré à l'Union européenne et à des institutions internationales par une loi adoptée dans les conditions de l'article 131, alinéa 2, de la Constitution.
Luxemburgish: Den Exercice vu Staatsgewalte kann un d'Europäesch Unioun an un international Institutiounen iwwerdroe ginn duerch e Gesetz, dat no de Konditiounen vum Artikel 131, Alinea 2 vun der Verfassung ugeholl gëtt.

the natural rights of the human person (L'Etat garantit les droits naturels de la personne humaine et de la famille). This wording, for doctrinal, political, and jurisdictional reasons, ended up solidifying a certain grammar and an understanding that deemed it insufficient regarding the protection of human dignity. Consequently, it was widely reflected that, due to this deficit, the domestic legal framework was complemented by human rights treaties and conventions - accepted without much resistance internally, and self-executing. In response to these controversies, the Council of State, acting as the Superior Administrative Court at the time, and considering the absence of constitutional provision on the matter, in 1951, determined that in a normative conflict between domestic legal order and international legal order, the latter should prevail⁴⁰. In the words of Gerkrath and Pichou, commenting on the issue, “[...] an international treaty has a legal status, because its source is higher than the will of the common legislator (higher law doctrine)⁴¹”.

However, the matter would not be so easily summarized, as in 1956, a proposal to reform the constitution, with the purpose of incorporating into the constitutional text said position, ended up being disapproved in the Chamber. However, the matter was emphasized again in 1992, when the Council of State recognized the primacy of international legislation in the 1992 bill approving the Treaty of the European Union, and prompted the constitutional powers to internalize this position in the constitutional text, in order to facilitate integration with the Union and avoid incompatibilities with national laws.

Contemporarily, this matter is regulated by a network of constitutional provisions that preserve a monist position, therefore, a transposition of international treaties is unnecessary, although there is a need to comply with certain internal acts for their validity and effectiveness in the national environment, namely, ratification by the Grand Duke, approval by law, publication of the treaty approval law, and publication of the treaty, and obviously, its entry into force in the international environment. There are distinct procedures related to European Union directives and secondary legislation, which will not be commented on at this time. Of note on the issue is the provision of Article 112 of the Constitution, which limits the scope of constitutional review to be produced by the Judiciary, in this case, by the Constitutional Court, authorizing the court to rule on the conformity of laws with the Constitution (Article 112,

40 In French: Un traité international, incorporé dans la législation interne par une loi approbative, est une loi d'essence supérieure ayant une origine plus haute que la volonté d'un organe interne. Il s'en suit qu'en cas de conflit entre les dispositions d'un traité international et celles d'une loi nationale postérieure, la loi internationale doit prévaloir sur la loi nationale». (Conseil d'Etat, 28 juillet 1951, Pas. 15, p. 263; Cour (cass.), 8 juin 1950, Pas. 15, p. 41; Cour (cass.), 14 juillet 1954, Pas. 16, p. 151).

41 GERKRATH; PICHOU, 2017, p. 5.

1), however, the review of laws approving treaties is prohibited (Article 112, 2, [...])⁴².

Many relevant constitutional reforms could be discussed; however, partially highlighted is the one from January 17, 2023, which produced a revision to Chapter II of the 1868 Constitution. With said reform, a constitutional differentiation between fundamental rights and public freedoms is established (Section 2 - fundamental rights - arts. 12-14) (section 3 - public freedoms - arts. 15-37). The main change, for the topic addressed, lies in the modification of the wording of article 12 (10 of the reform), established in 1948, regarding the natural rights of the human person. A new grammar is advanced, explicitly stating that *la dignité humaine est inviolable* (human dignity is inviolable), including in article 13 the right to physical and mental integrity, the prohibition of torture, inhuman or degrading treatment or punishment, as well as the death penalty, and establishing in article 14 the right to freedom of thought, conscience, and religion.

In the case of public freedoms, the coordination between rights that are currently the subject of much discussion in a scenario of life digitization stands out, such as the inviolability of communications (art. 30), informational self-determination, and the protection of personal data (art. 31), aspects that reflect a thematic legal tradition already consolidated in Luxembourg, at least since the 1970s.

To provide a concluding comment and illustrate a contemporary constitutional moment in Luxembourg, which exposes a "not so stable" scenario between constitutional powers and Luxembourgish society (which, in a certain way, can be inferred from the last major constitutional reform of 2023 - which will not be discussed), we exemplify with the recent debate on controversial constitutional issues - which emerges worldwide, by the way - and their short-term results, revealed so far. Among the objects of constitutional controversies - in a predominantly Catholic monarchy - one can mention the legalization of abortion in 1978 (with restrictions and subsequent regulatory modifications)⁴³, the legalization of medicinal and recreational cannabis use since 1973 (also with limitations and subsequent changes, including a recent one in 2023, regarding residential cannabis⁴⁴ cultivation, and the reordering of public health policies), same-sex marriage, legalized since 2015, and it was in 2009, with the regulation

42 LUXEMBOURG, 2023. Original version: *à l'exception des lois portant approbation de traités (FRA) - mat Ausnam vun de Gesetzer, déi Traitéen approuvéieren, ze entscheeden (LUX) - mit Ausnahme der Gesetze zur Billigung von völkerrechtlichen Verträgen, befasst werden (GER).*

43 RTL, 2023.

44 LUXEMBOURG. FAQs. 2023. Available: <https://cannabis-information.lu/en/frequently-asked-questions/>. Accessed: 25 mar. 2024.

of euthanasia and assisted suicide, that a constitutional change became present within the established powers' order⁴⁵.

The Law of March 16, 2009, establishes a detailed and sophisticated regulation to deal with euthanasia and assisted suicide. However, until its publication and entry into force, a constitutional conflict ensued. The law, when passed by the Chamber, was not signed by Grand Duke Henri, who refused, for "reasons of conscience," even publicly stating during the bill's processing that he would not promulgate it. The Chamber, taking advantage of the situation, moved quickly and pushed through a constitutional amendment regarding legislative powers, limiting a tradition established since the constitution of 1848, which granted the Grand Duke the power to sanction laws (amend them, not sign them, among other things), known as royal assent to laws. With the amendment to Article 34 of the Constitution⁴⁶, royal assent became solely a formality, with the Grand Duke no longer having the power to alter laws approved by the Chamber, but only to promulgate them.

CONCLUSION

With the text, the aim was to present, in broad strokes, the historical characteristics and formation of constitutionalism in the Grand Duchy of Luxembourg, while also associating these expressions with the country's recent political-constitutional characteristics and some of its anticipations, especially those related to Human Rights and Fundamental Rights.

It was possible to outline, in three parts, the historical elements that formalize the formal structure of the country. Emphasis was placed on its modern formation during the 19th century, which began with the Congress of Vienna in 1815 and was consolidated with the Constitution of 1868 and the death of William III in 1890. Briefly pointing out its rearrangements post-World War I and II, the political actions that embryonically paved the way for a European integration project were revealed, which today, despite fluctuations and destabilizations, appears strengthened with the Council of Europe and the European Union. The invasions of Germany into the country, during the imperial (World War I) and Nazi-fascist (World War II) regimes, were to some extent what fueled a fervor for the cultural and constitutional construction of a Luxembourg that was effectively independent, thus ending the ties articulated in the 19th century, linked to its perpetual neutrality.

45 It is emphasized that in 2021, euthanasia ceased to be legally considered as suicide, being classified as natural death. This new legal stipulation, beyond being a symbolic change, benefited the insured (family) of people who were in the process of euthanasia, and ended up being prejudiced in subsequent negotiations related to life insurance.

46 LUXEMBOURG, 2009.

Regarding Human Rights and Fundamental Rights, certain constitutional provocations were mentioned that demonstrate an openness to the international scene, structuring powers capable of organizing a progressively favorable integration with the European continent, including the possibility of transferring state powers to the European Union or another international organization. Furthermore, constitutional changes demarcate new fundamental legal grammars, notably with the introduction of "la dignité humaine est inviolable." Nevertheless, it is worth noting that Luxembourg's stabilization also involves its opposite, as seen in the constitutional clash recorded in 2009 during the approval of the Law on euthanasia and assisted suicide. This constitutional moment marked the dissection of a traditional legislative power of Luxembourg constitutionalism related to the function of the Grand Duke, known as royal assent to laws, established since the Constitution of 1848.

At another time, more detailed observations on this important constitutional tradition are expected to be released. For now, it is hoped that this brief introduction will at least arouse curiosity about the constitutional history of the Grand Duchy of Luxembourg.

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