Strasbourg, 20 June 2012

CDL-AD(2012)010

Opinion No. 679 / 2012

Or. Engl.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

OPINION

ON THE REVISION OF THE CONSTITUTION

OF BELGIUM

adopted by the Venice Commission
at its 91st Plenary Session
(Venice, 15-16 June 2012)

on the basis of comments by

Mr Christoph GRABENWARTER (Member, Austria)
Mr Peter PACZOLAY (Member, Hungary)
Ms Anne PETERS (Substitute Member, Germany)

I. Introduction

1. On 23 April 2012, after members of a political party belonging to the opposition brought the matter to the attention of the Council of Europe, the Parliamentary Assembly of the Council of Europe asked the Venice Commission to provide an opinion on the recent constitutional amendment procedure in Belgium, more particularly concerning the amendment to Article 195 of the Constitution relating to the revision of the Constitution.

2. Mr Christoph Grabenwarter, Mr Peter Paczolay and Ms Anne Peters were appointed as rapporteurs.

3. The present opinion was adopted by the Venice Commission at its 91st plenary session on 15-16 June 2012.

II. The amendment procedure of the Belgian Constitution

4. In the Constitution promulgated on 7th February 1831 the constituent power created a decentralised and unitary State in Belgium. This form of State existed until 1970 when a gradual and comprehensive State reform started.[1] The present amendment of the Constitution was aimed at opening the way for the sixth stage of the State reform that should also contribute to the solution of the governmental and political crisis of the country.

A. The amendment procedure according to Article 195

5. Article 195 of the Belgian Constitution sets out the formal conditions of the constitutional amendment process. There are three distinct stages:

(1) The first step of any constitutional amendment consists in a corresponding *Declaration of revision of the Constitution* by both Houses of Parliament and the King. The declaration needs an absolute majority of votes in each House. The declarations of revision must indicate the constitutional provisions that will be amendable. The Parliament is automatically dissolved with the publication of the aforesaid declaration in the Official Journal.
(2) After that, in a second step, a new parliament is elected within forty days. The newly elected chambers are obliged to convene on the latest two months after the dissolution of the former Houses.
(3) In the third step, the newly elected Houses of Parliament have the permission to revise the Constitution as contemplated in the Declaration for revision by the former parliament and King. This revision is subject to the requirement of a two-thirds majority in both Houses as far as voting and presentation is concerned.

6. Article 195 of the Belgian Constitution has not been so far subject to any of the amendments which the Constitution has undergone up to now. Therefore its wording is identical to the original text of Article 131 of the Belgian Constitution of 7 February 1831.[2]

---

[1] André Alen et Rusen Ergec, La Belgique fédérale après la quatrième réforme de l'Etat de 1993 (deuxième édition), Ministère des Affaires étrangères, du Commerce extérieur et de la Coopération au Développement, Bruxelles, août 1998.

[2] For a detailed explanation see Christian Behrendt, The process of constitutional amendment in Belgium [To be published in: Xenophon CONTIADES (ed.), Comparative constitutional Amendment – Europe, Canada and the USA, Florence (Kentucky), Routledge, 2012 (forthcoming).]. Article 195 has been declared open for amendment in 2003, but the amendment was not realised by the subsequet parliament. Christian Behrendt, La possible modification de la procédure de révision de la Constitution belge, Revue française de droit Constitutionnel 54 (2003), 279-308, para. 11.

B. The new procedure for constitutional amendment according to Article 195 - transitional provision

7. The adoption of Article 195 - transitional provision is therefore the first revision of the constitutional revision procedure. This provision is however only applicable to the legislature elected on 13 June 2010.

8. On 7th May 2010, the Belgian Parliament (*pre*-constituante) adopted a declaration to open for amendment some provisions of the Constitution, notably to open Article 195 on the procedure of constitutional revision for amendment. This was a declaration in the sense of Article 195. It was the first stage of the constitutional amendment procedure under Article 195.

9. The exact list of articles which would have to be amended was not clear, because this would depend on negotiations between parties after the elections of 13th June 2010. This type of uncertainty is however inbuilt in the revision procedure of Article 195 (see in detail below).

10. The Parliament apparently did not openly state on 7th May 2010 that the fact of opening for amendment Article 195 itself would have as a possible effect that – after the elections - *more articles would maybe be subject to amendment by the new parliament* (the one to be elected on 13th June 2010).

11. On 13th June 2010, Parliamentary elections were held. This conforms to the second stage of constitutional amendment in the sense of Article 195.

12. After the parliamentary elections of 13th June 2010, Belgium had a caretaker government without the confidence of parliament until 14th December 2011.

13. On 11th October 2011, a political „institutional agreement" between eight political parties was reached about the state reform including future amendments of the Constitution. The constitutional articles affected by this reform had not all been mentioned in the declaration of the Parliament (*pre-constituante*) of 7th May 2010.

14. On 15th February 2012, the concrete proposal to amend Article 195 was submitted, and adopted by both Houses (*constituante*) on 15th March 2012 (Representatives) and 22rd March 2012 (Senate). This corresponds to the third stage of the amendment procedure. The majority (2/3 of the votes) and the quorum (2/3 of the members) requirements as prescribed by the original Article 195 were fulfilled.

15. The amendment was published in the *Moniteur belge* on 6th April 2012, and entered into force on that day.

16. The only Article of that amendment was that Article 195 would be „complemented by a transitional provision...". In substance, the transitional article (Article 195 - transitional provision) allows for reforms without the second stage (dissolution of Parliament) concerning notably the autonomy of the regions, the right to child allowance, federal elections, reform of the bicameral system, powers of the Region Brussels capital, the use of languages in judicial matters, public prosecutions, conflict of interest regulation in tax matters, elections to the European parliament.

17. Article 195 - transitional provision states:

"The **Houses, as they were constituted following their full renewal on 13 June 2010**, **may** however, in common consent with the King, **pronounce on the revision of the following provisions, articles and groups of articles, but only to the effect as indicated hereafter**:

(1) Articles 5, second paragraph 11bis, 41, fifth paragraph, 159 and 190, in order to guarantee the full exercise of the **Regions' autonomy** towards the provinces without prejudice neither to the present specific provisions of the law of 9 August 1988 modifying the law on municipalities, the electoral law for municipalities, the law organising public centres for social welfare, the law on provinces, the electoral Code, the electoral law for provinces and the law organising simultaneous elections for the Legislative Houses and the provincial councils, nor to those relating to the office of governor, and in order to limit the meaning of the word "province" used in the Constitution to its sole territorial meaning, to the exclusion of any institutional meaning;

(2) Article 23, in order to guarantee **the right to child allowances**;

(3) Title III, in order to insert in it a provision aimed at prohibiting to modify **election laws** less than one year before the date when elections are to be held;

(4) Articles 43, paragraph 1, 44, second paragraph, 46, fifth paragraph, 69, 71, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83 and 168, in order to implement the **reform of the bicameral system** and entrust the residual legislative powers to the House of Representatives;

(5) Articles 46 and 117, in order to provide that the **parliamentary elections at federal level** will take place the **same day as the election of the European Parliament** and that, in case the Federal Parliament is dissolved before its term expires, the new Federal Parliament's term may not extend beyond the day when the election of the European Parliament following this dissolution is held, as well as in order to permit a law passed by a majority as described in Article 4, last paragraph to entitle the Regions 59 and Communities to determine, by special decree or special ordinance, the duration of the term for which their Parliaments are elected and the date for the election of these Parliaments, and to provide that a law, passed by a majority as described in Article 4, last paragraph, fixes the date when the new rules laid down in this division with regard to elections will enter into force;

(6) Article 63, paragraph 4, in order to supplement it with a sub-paragraph providing that, for the election of the House of Representatives, the law establishes special rules with a view to protecting the **legitimate interests of French and Dutch-speaking people in the former province of Brabant**, and also providing that the provisions which establish these special rules can only be amended by a law passed by a majority as described in Article 4, last paragraph;

(7) Title III, Chapter IV, Section II, Sub-section III, in order to insert in it an article permitting a law passed by a majority as described in Article 4, last paragraph to **attribute to the Region of Brussels-Capital**, for the bilingual region of Brussels-Capital, **powers** that have not been assigned to the Communities in the matters referred to in Article 127, paragraph 1, first paragraph, 1° and in the same paragraph, 3°, insofar as this 3° concerns matters referred to in the aforesaid 1°;

(8) Title III, Chapter IV, Section II, Sub-section III, in order to permit a law passed by a majority as described in Article 4, last paragraph to **simplify the procedures for cooperation between entities**;

(9) Article 143, in order to supplement it with a paragraph that **precludes the procedure relating to conflicts of interest from being initiated** with respect to a law or decision of the federal authority which modifies the basis of taxation, the tax rate,

exemptions or any other element playing a role in the computation of the personal income tax;

(10) Title III, Chapter VI, in order to insert in it a provision according to which any **modification to essential features of the reform regarding the use of languages in judicial matters** in the judicial district of Brussels, as well as any modification of features relating to this issue and concerning the public prosecutor's office, the Bench and the extent of jurisdiction, may only be made by a law passed by a majority as described in Article 4, last paragraph;

(11) Article 144, in order to provide that the **Council of State** and, as the case may be, federal administrative courts may rule on the effects that their decisions have with respect to private law;

(12) Article 151, paragraph 1, in order to provide that the Communities and the Regions are entitled to order **prosecutions** regarding matters falling under their responsibility through the Minister of Justice, who immediately carries out the prosecutions, and in order to permit a law passed by a majority as described in Article 4, last paragraph to provide for the participation by the Communities and the Regions, in matters falling under their responsibility, in decisions concerning the investigation and prosecution policy of public prosecutors, the binding guidelines with respect to criminal policy, the representation in the College of Public Prosecutors General, and in decisions concerning the Guide Note on Full Security and the National Security Scheme;

(13) Article 160, in order to add a paragraph providing that any modification to the new powers granted to the general assembly of the **Council of State's Administrative Litigation Section** and any modification to the rules for deliberation in this assembly may only be made by a law passed by a majority as described in Article 4, last paragraph;

(14) Title IV, in order to insert in it an article providing that, with respect to the **election of the European Parliament**, the law determines special rules with a view to protecting the legitimate interests of French and Dutch-speaking people in the former province of Brabant, and that the provisions which establish these special rules can only be amended by a law passed by a majority as described in Article 4, last paragraph;

(15) Article 180, in order to provide that assemblies which legislate through federate laws or rules referred to in Article 134 may entrust tasks to the Court of Audit, for which a fee may be charged.

The Houses can only debate on the items mentioned in the first paragraph provided that at least **two thirds of the members who make up each House are present** and no change is adopted unless it is supported by at least **two thirds of the votes cast**.

This transitional provision is not to be considered as a declaration in the sense of Article 195, second paragraph."

III. Legal opinion

A. On the amendment procedure established by Article 195

Rigidity of the amendment procedure

18. The current version of Article 195 figures, together with the procedure of article V of the United States Constitution of 17 September 1787 and Article 137 of the Dutch Constitution, among the most rigid amendment rules in the contemporary legal world.

19. This constitutional revision procedure is rigid in particular as it requires consent in two consecutive legislative periods. This feature is specifically Belgian to the extent that the other elements of Article 195 are owed to its ancestor, the Constitution of the Netherlands of 24 August 1815. Only this element had been added in the Belgian Constitution of 1831.[3] Therefore, in view of the fact that the initiation of the constitutional amendment procedure by the declaration of the pre-constituante brings about dissolution of parliament and in consequence a new parliamentary election, it may be said that it strengthens the democratic legitimacy of the constitutional revision. However, it may in many situations turn out to be a severe impediment to sometimes urgent reforms and/or necessary fundamental reforms of the state.[4]

Rationale for the rigid amendment procedure

20. The – partly overlapping – rationales of the requirement to dissolve parliament between the opening for revision and the actual amendments are the following:

(1) Parliamentarians should be rendered very attentive to the issue of constitutional amendment.
(2) The protracted process allows for maturing of proposals and prevents the adoption of hasty amendments.
(3) Reflection on the projected constitutional amendment should form part of the electoral campaign for the elections to parliament. Candidates should be able to form a position on the amendments, and the electorate would be invited to consider these proposals. The assumption is that the citizens will vote accordingly. Thus, the people would give an „indirect" vote on the projected amendment. The constitutional amendment would thereby obtain a specific democratic basis of legitimacy.[5]
(4) A new legislator which would be „fresh" and would easily tackle the constitutional amendment.[6]
(5) The parliamentary elections would thereby assume the specific function of constituting a new *constituante* (i.e. a new parliament which – when deciding with the qualified and heightened majority) would operate as a *constituante* (in the sense of Constitution-reviser).[7]

[3] Christian Behrendt, Les propositions émises dans le passé en vue de modifier l'article 195 de la Constitution belge, Collection centre d'études Constitutionelles et adminstratives no. 26 (2003), 113-135, para. 6. The Dutch Constitution in turn adopted this (Belgian) feature – consent in two consecutive legislative periods and intervening dissolution of parliament and elections – in 1848.
[4] The terms « excessivement lourd » have been used by Christian Behrendt, La possible modification de la procédure de revision de la Constitution belge, Revue française de droit Constitutionnel 54 (2003), 279-308, para. 25.
[5] Francis Delpérée, Le droit constitutionnel de la Belgique (Bruxelles: Bruylant 2000) 76; Christian Behrendt, La possible modification de la procédure de revision de la Constitution belge, Revue française de droit Constitutionnel 54 (2003), 279-308, n. 107; Venice Commission, Report on constitutional Amendment, study no. 469/2008, Strasbourg 19 January 2010, CDL-AD(2010)001, para. 95.
[6] Delpérée 2000, 76.
[7] Delpérée 2000, 76.

21. However, these justifications have apparently not been formulated at the time of the adoption of the provision. In contrast, there was virtually no debate on the requirement to dissolve parliament in 1831; the materials of Constitution-making of 1831 contain no commentary whatsoever on this specific element.[8] The feature was hence not reflected at the time of its inception, but has been rationalised only afterwards.[9]

22. In addition, the functions which are in theory supposed to be performed by the requirement of a dissolution of parliament are in reality only fulfilled in part:

> First, the dissolution of parliament has in practice acquired a different significance: Many politicians consider that Article 195 enables them (by making a declaration of constitutional amendment) to determine the date of the next elections so as to suit them.[10]
> Second, the idea that the announced constitutional amendment will play a part in the electoral campaign and will influence the decision of the voters does not reflect reality. Normally, planned constitutional amendments play no or only a minor role in parliamentary elections. So the idea to allow for a public debate of constitutional amendment matters during the electoral campaign has turned out to be unrealistic; it is a „legal fiction".[11]

B. On the conformity with the Belgian Constitution

Is the revision of the amendment procedure in conformity with the letter of the Constitution?

23. The transitional provisions allow for amendments of a number of constitutional provisions by a 2/3 majority with a 2/3 quorum.

24. In terms of form, two aspects deviate from the ordinary amendment procedure:

(1) The second stage - dissolution of Parliament and new elections - will be omitted.
(2) This „simplified" amendment procedure (omitting step 2) will be in place only during the period of parliament elected on 13th June 2010 (in principle until elections regularly expected for 2014).[12]

25. The three-stage amendment procedure was followed formally, by announcing the amendment of the article before the parliamentary elections. The announcement was related only to the numbering of the article, and did not specify what kind of substantial amendment

---

[8] Christian Behrendt, Les propositions émises dans le passé en vue de modifier l'article 195 de la Constitution belge, Collection centre d'études constitutionelles et administratives no. 26 (2003), 113-135, para. 7, with further references.
[9] Ibid, para. 8.
[10] Christian Behrendt, The process of constitutional amendment in Belgium in: Xenophon Contiades (ed.), Comparative constitutional Amendment – Europe, Canada and the USA, Florence (Kentucky: Routledge, 2012 forthcoming), p. 18.
[11] Christian Behrendt, The process of constitutional amendment in Belgium in: Xenophon Contiades (ed.), Comparative constitutional Amendment – Europe, Canada and the USA, Florence (Kentucky: Routledge, 2012 forthcoming), p. 9. This conclusion is even true for amendments of the Dutch Constitution, where (1) the text of the amendments is already adopted in the first stage, (2) these texts cannot be altered in the third stage, and (3) the elections after the dissolution of parliament were indeed intended to function as a 'referendum' about the amendments. In practice this 'constitutional referendum' always is combined with regular elections, in which the amendment(s) do not play any significant role. For instance in the elections after which the fundamental restructuring of the Dutch Constitution – enacted in 1983 – took place the amendments rewriting the Constitution had no relevance at all.
[12] The limited life-span of the amendment is made clear by the title „Transitional provision", and by the opening clause of the complementary part: „The Houses, as they were constituted following their full renewal on 13 June 2010, ... may ..., pronounce on the revision of the following provisions, articles and groups of articles, but only to the effect as indicated hereafter ...".

would be envisaged. Despite the very short procedure, the constitutional amendment procedure was formally complied with.

.

Is the revision of the amendment procedure in conformity with the spirit of the Constitution?

26. As stated above, the rationale for the rigid amendment procedure cannot be inferred from a historical interpretation, but was developed afterwards. Practice did not correspond to this rationale as developed by the literature. For example, constitutional revision rarely plays a major role in the electoral campaign and the declaration provided for by Article 195 is often used in order to cause new elections. The respect of this rationale cannot therefore be considered as a condition for the validity of the revision.

27. The text of the amendment became known only in the third stage of the amendment procedure. The proposal for the amendment was submitted to the parliamentary commission on February 27th, 2012, and after a short discussion it was voted on March 15th in the House of Representatives and on March 22nd in the Senate.

28. The modification of the procedure as effected by the current amendment of Article 195 concerns only step 2, the dissolution of parliament. It leaves untouched the other elements of the revision procedure which distinguish a constitutional amendment from ordinary law making, namely the requirement of a qualified majority and quorum. Against the background of ongoing criticism and partial disfunctionality of the requirement of intervening elections, it cannot be said that the abandonment of step 2, realised in full compliance with the formal requirements, is contrary to the spirit of the Constitution.

29. Furthermore, a composition of Parliament allowing amending Article 195 of the Constitution could have completely modified the amendment procedure, and in particular it could have suppressed the requirement of dissolution of Parliament (stage 2) definitively, as well as stage 1 concerning the enumeration of the provisions to be revised. It only abandoned stage 2 provisionally and enumerated the provisions to be revised. According to the principle *a maiore ad minus*, this is admissible.

Was there an inadmissible complete revision of the Constitution?

30. One legal barrier to revisions has been formulated in scholarship, namely the (unwritten) prohibition of a complete or total amendment of the Constitution. Francis Delpérée points out that a „complete revision“ (as for example allowed by the Swiss Constitution) is not allowed under Belgian constitutional law. A „complete revision“ would in reality be a „révolution Constitutionelle“, which would be in contradiction with the principles now enshrined in Article 195. [13]

31. Therefore, Article 195 may not be *abrogated*. It is however not contested that it may be amended. It could be said that „le constituant scie alors la branche sur laquelle il est assis“ only if Article 195 were abrogated during a revision process.[14]

32. The current amendment of Article 195 is not an abrogation of the provision. The prohibition of a complete revision of the Constitution (as postulated by Belgian constitutional scholarship) does not apply.

On the temporary character of the revision procedure – no partial suspension of the Constitution in the sense of Article 187

[13] Francis Delpérée, Le droit constitutionnel de la Belgique (Bruxelles: Bruylant 2000), 79.
[14] Ibid., 79.

33. The fact that the simplified amendment procedure is foreseen only as a transitional one, not as a permanent one, does not seem to raise any additional legal problem. The criticism has been made that this denies the right to amend the Constitution in one single legislative period (by one and the same parliament) to the subsequent parliaments. However, the current parliament could legally revise Article 195 by a permanent amendment. It could also open Article 195 for amendment again, and the next parliament could then again resort to an amendment procedure in one single parliamentary period. The temporary character of the revision does not make the legal problems created by the amendment more serious.

34. Critics of the amendment of Article 195 have stated that the amendment amounts to a temporary *suspension of the Constitution, in violation of its Article 187*.[15]

35. Article 187, in its English translation, states: „The Constitution cannot be wholly or partially suspended." The historical background of this provision is the Belgian reminiscence of the suspension of the Constitution by Charles X in France. The purpose of the provision is to prevent that during a constitutional crisis, the government resorts to illegitimate measures by circumventing the constitutional framework and its safeguards.

36. A suspension is the (formal) declaration of inapplicability of the Constitution (or parts of it). A suspension must be distinguished from an amendment. In contrast to an amendment, a suspension creates a legal vacuum, whereas through an amendment, a provision is modified.

37. Article 187 does not prohibit that the constitutional provisions are amended or that new additional provisions are inserted into the Constitution. Article 195 - transitional provision does not suspend the current Article 195, it only amends this article by inserting in the Constitution a new temporary provision for precisely defined articles introducing a more flexible procedure, alongside the existing procedure in Article 195. It should however be clear that, during the period when Article 195 - transitional provision applies, the general rule of Article 195 will not be applied to the amendment of the Articles mentioned in the transitional provision.

38. In conclusion, with the current amendment of Article 195, no part of the Constitution has been suspended. The prohibition of suspension (Article 187) is not at stake, neither textually nor in its spirit.

C. Is the revision procedure in conformity with European rules and standards?

On the conformity with the democratic principles

- The right to free elections (Article 3 Protocol 1 to the ECHR)

39. It has been asserted that spreading the revision of the Constitution over two legislatures is a democratic minimum. The supporters of the revision within a single legislature demonstrate an authoritarian tendency „[l]e fait d'étaler la révision de la Constitution sur deux législatures est un minimum démocratique. Les partisans de la révision au sein d'une seule et même législature font preuve d'une dérive autoritariste."[16]

[15] Hans van De Cauter, Plainte concernant la révision de la Constitution belge, 13 March 2012, www.unionbelge.be, p. 6.
[16] Hans van De Cauter, Plainte concernant la révision de la Constitution belge, 13 March 2012, www.unionbelge.be, p. 3, citing Hugo Vanderberghe.

40. This assertion is not correct in the light of a comparative review of the European procedures of constitutional amendment.[17] Only very few other Constitutions of the world possess such a requirement.[18] It can thus not be held to constitute a democratic minimum.

41. Generally speaking, the right to regular, free, and fair elections, as guaranteed in Article 3 of Protocol 1 to the ECHR, does not encompass a right of elections specifically as part of the constitutional amendment process. Under Article 3, elections must be held "at appropriate intervals". The provision does not prescribe specific elections to be held for special occasions. The current amendment procedure does not seem to violate Article 3 Protocol 1.

- *Other aspects*

42. The critique has been formulated that the amendment resembles the taking of power by Hitler in the German Weimar Republic.[19]

43. The amendment of Article 195 is not comparable to a „legalist" (or pseudo-legal) usurpation in the style of Hitler's scheme in Germany in 1933. That usurpation came about through a transfer of legislative power (including the power to amend the Constitution) from parliament **to the executive branch**, the government of the German Reich.

44. This transfer was brought about by the „Ermächtigungsgesetz" („the Empowerment Act") of 24 March 1933. That Act formally amended the Constitution. Article 1 of that law foresaw that, besides the ordinary legislative procedure, Acts could in the future be passed by the executive.

45. The adoption of the German „Empowerment Act" was only superficially legal, but in reality already flawed in formal terms: The necessary 2/3 quorum was reached only through a manipulation of the rules of procedure of parliament (*Geschäftsordnung*). The rules had been amended so as to create a legal fiction that members of parliament (who had been imprisoned) were deemed present because they had not excused themselves.[20]

46. The Belgian amendment is neither in respect of the proceedings (no manipulation of the rules of proceedings to reach the necessary quorum) nor in substance (no transfer of legislative powers to the executive) comparable to this historical act which is often cited as the prototype of a democracy abolishing itself.

On the conformity with the principle of the rule of law

- *The absence of judicial review*

47. In the document submitted to the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe it is stated that the proposal inserting the new procedure in Article 195 is not in compliance with the principle of the "rule of law". In this context emphasis is put on the absence of any *a priori* or *a posteriori* control by an independent and impartial jurisdiction of the compliance of the temporary provision with the rules concerning the amending of the Constitution.

---

[17] Venice Commission, Report on constitutional Amendment, study no. 469/2008, Strasbourg 19 January 2010, CDL-AD(2010)001.

[18] Venice Commission, Report on constitutional Amendment, study no. 469/2008, Strasbourg 19 January 2010, CDL-AD(2010)001, paras. 42-43 mentions, besides Belgium: Denmark, Estonia, Finland, Greece, Iceland, Luxembourg, the Netherlands, Norway, Spain (only for special types of constitutional amendment). In Estonia and Finland, the requirement of intervening elections can be done away when certain conditions are fulfilled, notably in urgent cases.

[19] Hans van De Cauter, Plainte concernant la révision de la constitition belge, 13 March 2012, www.unionbelge.be, p. 3.

[20] See in detail Werner Frotscher/Bodo Pieroth, Verfassungsgeschichte (9th ed. München: Beck 2010), 293-295.

48. The Belgian constitutional system does not allow the judicial review of constitutional amendments. Neither the Council of State*, ex ante,* nor the Constitutional Court, *ex post,* has the right to exercise a control.

49. In its "Report on constitutional Amendments"[21], the Venice Commission however emphasised that only "in a few countries the Constitutional Court has been given a formal role in the constitutional amendment procedures"[22]. The Commission stated that an *a priori* review is a "fairly rare procedural mechanism"[23]. And although the Commission declared that *a posteriori* review by the Constitutional Court is "much more widespread", it cannot be seen as a general rule. Such control cannot therefore be considered as a requirement of the rule of law. Belgium stands in the tradition of countries such as France which firmly reject judicial review of constitutional amendment. The Conseil Constitutionnel argued "that because the constitutional legislator is sovereign, therefore constitutional amendments cannot be subject to review by other bodies (themselves created by the Constitution.)"[24] Although in Austria and Germany there exists the possibility of review, these cases do not stand for a common European standard.

50. Most constitutional systems operate on the assumption that all constitutional provisions have a similar normative rank, and that the authority which revises the Constitution has the authority to thereby modify pre-existing, other constitutional provisions. The result is that, in general, one constitutional provision cannot be „played out" against another one. The absence of a judicial scrutiny of constitutional revisions is owed to the idea that the constitutional revision is legitimised by the people itself and is an expression of popular sovereignty. The people is represented by parliament which acts as a *constituante.* The authority of the decision to amend the Constitution is increased by the specific requirements for constitutional amendment (qualified majority).

51. It is a matter of balancing the partly antagonist constitutional values of popular sovereignty and the rule of law whether to allow for rule-of-law induced barriers against constitutional revision, or for judicial scrutiny. Most Constitutions have placed a prime on popular sovereignty in this context. The Belgian proceedings are well within the corridor of diverse European approaches to this balancing exercise and do not overstep the limits of legitimate legal solutions.

- *Other aspects*

52. Another issue to be examined is *"the transparency, openness and inclusiveness, adequate timeframe and conditions allowing pluralism of views and proper debate of controversial issues"*.[25]

53. The rule of law requires legal certainty, and this in turn presupposes transparent legal procedures which the citizens can observe and understand. In accordance with this principle, Belgian scholarship highlights that any revision of Article 195 must be explicit. It is not allowed to amend Article 195 in an implicit fashion.[26]

---

[21] CDL-AD(2010)001.
[22] Idem, § 57, with a reference to Moldova, Ukraine, § 58 footnote 78, with reference to Azerbaijan and Turkey.
[23] Idem, § 194: "A fairly rare procedural mechanism, which is however to be found in some of the new democracies, is to include mandatory and systematic review by the national Constitutional Court before a proposal for constitutional amendment can be adopted by Parliament. Such a requirement is to be found in particular in Azerbaijan, the Kyrgyz Republic, Moldova and Ukraine."
[24] Idem, § 229.
[25] CDL-AD(2011)001, para 18.
[26] Christian Behrendt, Les propositions émises dans le passé en vue de modifier l'article 195 de la Constitution belge, Collection centre d'études constitutionnelles et administratives no. 26 (2003), 113-135, para. 14 with fruther references.

54. The procedure has been criticised as non-transparent. Indeed, it has apparently not been made fully clear to the public on 7th May 2010 that the opening of Article 195 for amendment would allow for the possibility to create an amendment procedure which would give up the traditional step 2 of constitutional amendment, even if some indications were given about possible amendments to the Constitution going beyond the list adopted by the *preconstituante*

55. If we look at the time-table of the adoption of the amendment, it becomes evident that the procedure was rather quick. This may look strange as the possible amending of Article 195 has been an issue for long time both in the political and the scientific community. The very rigid way of the amendment procedure was more and more considered an obstacle to the efficiency of the constitutional system.[27]

56. However, the principle of transparency does not require that parliament announces legal steps which are factually unforeseeable. In the past, numerous declarations for constitutional amendment in Belgium have not resulted in any constitutional amendment at all after the renewal of both Houses of Parliament.[28] The uncertainty about the exact content and scope of future amendments is inbuilt in the protracted amendment process over two legislative periods, and does not seem to violate the principle of transparency.

57. The shortness of the formal debate does not mean that the issue was not properly considered. In fact, the substantive issues were discussed during the lengthy elaboration of the "institutional agreement". Given the long time this had already taken its implementation without delay was rational, if not indispensable.

On a qualified majority in Parliament as the only condition for the revision of the Constitution

58. This one stage concept of the provision – Article 195 - transitional provision – facilitates the political and democratic process when the Constitution is to be amended. Indeed, taking into comparison several other amendment procedures in Europe the temporary provision complies with the standard of amendment procedures in European Constitutions. In fact, Article 195 - transitional provision stipulates qualified majorities in the Parliament similarly to Article 79 par. 2 German Basic Law; Article 89 French Constitution; Article 138 Italian Constitution; Article 167 Spanish Constitution; Article 44 par. 2 Austrian Constitution.[29] Adoption of constitutional revisions through a heavier procedure, involving dissolution of Parliament, higher majorities and/or a referendum is not the rule and cannot be considered as a European standard.[30]

59. The extraordinary rigidity of the constitutional amendment procedure has drawbacks. It has therefore been frequently criticised in Belgian constitutional scholarship, and political attempts to revise the amendment clause by suppressing the need of intervening elections have been made since 1892, for example in 1908, 1919, 1968, 1985, and 1995, and 2003.[31]

---

[27] E.g. Christian Behrendtt, La Révision avant sa révision : réflexions sur une nouvelle formulation de l'article 195 de la Constitution belge (2002), in Actualités du droit, Kluwer, Bruxelles, Dec. 2002, p. 403-442.

[28] Christian Behrendt, The process of constitutional amendment in Belgium in: Xenophon Contiades (ed.), Comparative constitutional Amendment – Europe, Canada and the USA, Florence (Kentucky: Routledge, 2012 forthcoming) refers to the declarations of 1953 and 1958.

[29] See Groß, Zwei Kammer Parlamente in der Europäischen Union, Zeitschrift für ausländisches und öffentliches Recht 63 (2003) 29-57 (p. 41 et sqq).

[30] Cf. CDL-AD(2010)001. On the specific issue of the referendum, see Herdegen, Grenzen der Verfassungsgebung in Verfassungstheorie (Depenheuer/Grabenwarter, 2010) 349-371 (footnotes13 et seq.).

[31] Christian Behrendt, La possible modification de la procédure de revision de la Constitution belge, Revue française de droit Constitutionnel 54 (2003), 279-308, esp. at paras 27 and 40. See ibid, para. 25 for references to other Belgian writers who have proposed the same reform para. 25, with further references; ibid., Les propositions émises dans le passé en vue de modifier l'article 195 de la Constitution belge, Collection centre d'études Constitutionelles et administratives no. 26 (2003), 113-135, passim (with references).

60. First, as a general matter, the high hurdle risks to „freeze“ the Constitution and to prevent reforms.

61. Second, the requirement of dissolution of parliament creates an additional reluctance towards constitutional amendment: The parliamentarians know that when making a declaration to open the Constitution for amendment, they will inevitably face new elections and risk to lose their parliamentary seat.

62. Third, because of the different composition of parliament after the elections, the initially envisaged reforms might no longer appeal to the new parliamentarians and will therefore not take place at all. This is however implied in the system.

63. Moreover, the Venice Commission, in its report on constitutional amendment, concludes that “there are good reasons why constitutions should be both relatively rigid and flexible enough to be changed if necessary”.[32] Excessive rigidity has therefore to be avoided, as underlined in a number of specific opinions by the Commission.[33]

On the issue of intangible provisions

64. The Belgian Constitution does not contain any written or unwritten principle in the sense that Article 195 itself could never be subject to amendment. (Generally speaking, this Constitution does not contain any „textes supraconstitutionnels ou intangibles“; „*toute* disposition constitutionelle peut être révisée“.[34])

65. In fact, the reform of Article 195 itself has been frequently suggested in the political realm and has been debated in constitutional law scholarship. In particular, a facilitation of the revision procedure in order to adapt the Constitution to international treaties, e.g. to treaties of the EU, has been suggested.[35] This scholarship presupposes the revisability of Article 195.

66. An overview in comparative constitutional law shows that most Constitutions do not provide for unamendable provisions, and these are not required by international standards. Moreover, nearly all unamendable provisions are substantive, and therefore not related to the procedure for the revision of the Constitution.[36] Some Constitutions do contain “unamendable” (or intangible) provisions, i.e. provisions that are legally precluded from revision. Among the most striking examples are the principles mentioned in Article 79 par. 3 of the German Basic Law and Article 139 of the Italian Constitution. In German constitutional Law, however, Article 146 provides for the adoption of a new Constitution by the German people which would lead to the effect that the Constitution ceases to apply. In Austria it has been suggested that some core aspects, especially with a view to the democratic principle of the Constitution may not even be changed in the proceedings under Article 44.3 of the Federal Constitution for constitutional changes involving a total revision of the Constitution.[37] The prevailing opinion, however, does not question the fact that Article 44.3 could be amended in proceedings in which a referendum is held.[38]

On a constitutional revision which might go against a decision of the Constitutional Court

[32] CDL-AD(2010)001, par. 239.
[33] Ibid., par. 106, and references.
[34] Francis Delpérée, Le droit Constitutionnel de la Belgique (Bruxelles: Bruylant 2000), 77.
[35] See, e.g., Christian Behrendt, La possible modification de la procédure de révision de la Constitution belge, Revue française de droit Constitutionnel 54 (2003), 279-308; Delpérée 2010, 85-86.
[36] CDL-AD(2010)001, par. 206 ff.
[37] Pernthaler, Der Verfassungskern, 1998, 80 sq. and 85; and Oberndorfer, a.a.O., Rz 10, Art1 B-VG, in: Korinek/Holoubek (Hrsg), Bundesverfassungsrecht, Rz 10 (2000). On the issue see also Janko, Gesamtänderung der Bundesverfassung, 261 et sqq; Gamper, Die verfassungsrechtliche Grundordnung als Rechtsproblem, 102 et sqq.
[38] The Constitutional Court in a landmark decision of 2001 left the question open (VfSlg, 16327/2001).

67. The constitutional revision follows, *inter alia*, the judgment of the Belgian Constitutional Court No. 73/2003, of 26 May 2003. It might be considered as aiming in particular at reversing some effects of this judgment. There is however no general standard saying that a constitutional revision cannot go against a decision of a constitutional court. This would make the Constitution as interpreted by the Constitutional Court intangible. [39] Frequent constitutional amendments aimed at reversing decisions of the Constitutional Court would however undermine constitutional culture, the authority of the Constitutional Court, and thus the respect for the Constitution itself.

On the supremacy of the Constitution

68. The supremacy of the Constitution, a traditional feature of Continental European Constitutions, would be given up if the procedures for constitutional amendment were identical to the procedures for adopting laws. In that case, the Constitution could be amended by any „ordinary" law.

69. However, the amendment of the revision procedure does not change the other special features, notably the 2/3 majority and quorum requirements, and also the requirement of a preceding declaration to open specific articles of the Constitution for amendment. Therefore, the procedure for revising the Constitution is not rendered identical to the procedure of adopting laws. The character of the Constitution as „higher law" is left untouched.

70. In numerous Constitutions of the world, these features (qualified majority and quorum) are the only elements of the constitutional revision procedure (as opposed to the ordinary legislative procedure). The fact that through the revision of Article 195, future constitutional amendments will be possible without a prior dissolution of Parliament does not run counter to the principle of supremacy of the Constitution.

IV. Conclusion

71. The procedure which led to the adoption of Article 195 - transitional provision of the Belgian Constitution does not seem to have violated this Constitution. Nor did this constitutional revision go against international standards of democracy or the rule of law, as developed in a European and comparative perspective.

72. Taking into account more flexible constitutional amendment procedures throughout Europe and the fact that a Constitution should provide a framework for the proper functioning of a democratic state, the *temporary* provision as stipulated in Article 195 - transitional provision faces the ongoing crisis in Belgium in a democratic and legally correct way. This will allow the Government and the large majority in Parliament to realise the urgent sixth state reform.

73. It would however have been preferable for parliament to make it more explicit, in its declaration of 7th May 2010, in which Article 195 was opened for amendment, that this would, after the elections, create the possibility of amending the Constitution in one legislative session, also with regard to provisions which had not been mentioned in the declaration of 7th May 2010. More transparency would have been suitable. Moreover, the parliamentary procedure, including the debate before the parliamentary vote, was rather quick, even if the issue had been discussed for a long time in other forums and outside the formal parliamentary procedure. A longer formal procedure could have been envisaged in order to ensure proper debate.

[39] The Austrian Constitutional Court held that a constitutional revision aimed at excluding judicial review of a law by the Constitutional Court lead to a "suspension of the Constitution" *("Verfassungssuspension")* which was unconstitutional as it amended the principle of "rule of law" (Rechtsstaatsprinzip) and the democratic principle at the same time; a referendum would have been needed as it constituted a total revision of the Constitution (VfSlg. 16327/2001).

74. To conclude, it cannot be said that the procedure violated the Belgian Constitution or international standards.