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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

AMENDMENT TO ARTICLE 195 OF THE CONSTITUTION OF BELGIUM

MEMORANDUM FOR THE ATTENTION OF THE VENICE COMMISSION

16 MAY 2012

POSITION OF THE BELGIAN GOVERNMENT

Memorandum for the attention of the Venice Commission

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I. EXECUTIVE SUMMARY

Article 195 of the Belgian Constitution sets out the procedure for amending the Constitution. This Article was recently the subject of an amendment made by the Belgian Constituent Assembly.

Following a complaint of the Parliamentary Assembly of the Council of Europe, the Venice Commission is requested to give advice on the matter.

This memorandum demonstrates that the amendment to Article 195 of the Belgian Constitution complies with the Belgian Constitution and with the Rule of Law.

After the elections of 13th June 2010, Belgium experienced the longest political crisis of its history: for 541 days (i.e. until 13th December 2011), the country remained without a government with the Parliament's confidence.

The main reason for this impasse lay in the difficulty in reaching an institutional agreement which, for the sixth time, would reform the structure of the Belgian State in depth (and which, in particular, would find a solution regarding the consequences of a ruling by the Belgian Constitutional Court, n° 73/2003, concerning the federal elections).

On 11th October 2011, an agreement was reached between eight political parties (two of which belong to the opposition). To implement this agreement, the Constitution must now be amended.

The Preconstituent Assembly of 2010 had specifically opened Article 195 of the Constitution to amendment for the purpose of allowing the modification of Articles in the Constitution that were not included in the declaration to amend. Changes to these Articles were essential in order for the political agreement to be implemented. As a result, an amendment to Article 195 of the Constitution was adopted along these lines.

The amendment to Article 195 of the Constitution complies with both Article 195 (i) and Article 187 of the Belgian Constitution (ii). Finally, this amendment complies with the Rule of Law (iii).

(i) Compliance with Article 195 of the Belgian Constitution

Pursuant to Article 195 of the Belgian Constitution, the procedure to amend the Constitution is divided into **three stages**:

- **First stage**: adoption of a declaration to amend the Constitution by the King and the legislative chambers;
- **Second stage**: dissolution of the legislative chambers and their renewal by an election;
- **Third stage**: adoption by the newly constituted legislative chambers, and by the King, of the amendment to the Constitution, by modifying the provisions declared for amendment by way of special attendance and voting quorums.

Article 195 was opened to amendment in the context of the declaration to amend the Constitution made on 7th May 2010 (**first stage**). Elections were held on 13th June 2010 (**second stage**). A proposal to amend this Article was submitted to the House of Representatives on 15th February 2012 and was adopted by the House on 15th March 2012 and by the Senate on 22nd March 2012 (**third stage**). This was published in the *Belgian State Gazette* on 6th April 2012 and came into

effect on that date.

It is therefore in compliance with the current procedure defined by Article 195, that this Article has been amended. The lawfulness of this amendment to Article 195 has been confirmed by numerous constitutionalists and political experts.

(ii) Compliance with Article 187 of the Belgian Constitution

The amendment to Article 195 of the Constitution complies with Article 187 of the Belgian Constitution, which states that: *"The Constitution may not be suspended in full or in part"*.

First of all, the amendment to Article 195 of the Constitution does not "suspend" either the whole constitution or part of it. Article 195 of the Constitution remains in effect for cases not covered by the amendment to Article 195. This means that the Article remains applicable to those Articles already opened to amendment by the declaration in 2010. Those Articles of the Constitution not included either in the 2010 declaration or in the amendment to Article 195 cannot be modified under the current legislature.

Second, Article 187 is first and foremost aimed at avoiding excesses of the executive and is further addressed to the legislative and judicial powers. Yet the claimed suspension of the Constitution through the amendment to Article 195 is the work of the Constituent Assembly itself.

Finally, numerous Belgian constitutional experts have confirmed that the amendment to Article 195 of the Constitution complies with Belgian constitutional law.

(iii) Compliance with the Rule of Law

The amendment to Article 195 of the Constitution was adopted in conformity with the applicable procedures, while respecting the general principles of law.

None of the essential components of the Rule of Law, as identified by the Venice Commission, is breached in this amendment to the Constitution.

The Belgian Government therefore requests the Venice Commission to declare the complaint that it has received with regard to the amendment to Article 195 of the Belgian Constitution, unfounded.

II. ARTICLE 195 OF THE CONSTITUTION

1. Article 195 of the Belgian Constitution sets out the procedure for amending the Constitution. It is worded as follows:

> *"The federal legislative power has the right to state that there is a case for amending any provision of the Constitution that it should designate.*
>
> *After this statement has been made, the two chambers are automatically dissolved.*
>
> *Two new chambers will then be convened, in accordance with Article 46.*
>
> *These chambers will vote, in mutual agreement with the King, on the points submitted for the amendment.*
>
> *If this should be the case, the chambers may only deliberate if at least two-thirds of the members who make up each of the chambers are in attendance; no change will be adopted if there are fewer than two-thirds of the votes present*".

2. The procedure to amend the Constitution is divided into **three stages**:

   - **First stage**: adoption of a declaration to amend the Constitution by the King and the legislative chambers;
   - **Second stage**: dissolution of the legislative chambers and their renewal by an election;
   - **Third stage**: adoption by the newly constituted legislative chambers, and by the King, of the amendment to the Constitution, by modifying the provisions declared for amendment by way of special attendance and voting quorums.

3. This Article was recently the subject of an amendment made by the Belgian Constituent Assembly.

III. THE POLITICAL CONTEXT IN WHICH THE AMENDMENT TO ARTICLE 195 WAS ADOPTED

Since 2007: On-going negotiations about state reforms

4. After the elections of June 13th 2010, Belgium faced the longest political crisis of its history. For 541 days, the country remained without a government with the Parliament's confidence. The inability to form a government with full powers was caused by deeply entrenched diverging opinions between French and Dutch-speaking politicians about institutional reforms that would, for the sixth time, fundamentally reform the structure of the Belgian state and increase autonomy of the communities and the regions.

5. The discussion about state reforms focussed on more powers to Belgium's communities and regions, increased fiscal autonomy and accountability of the Regions and the problem of the electoral district "Brussels-Halle-Vilvoorde". This problem became apparent after the 2002 electoral reform and the judgment of the Belgian Constitutional Court in 2003 (nr. 73/2003).

6. The negotiations after the elections for the federal parliament in 2010 were the continuation of the talks that had been going on since the previous elections of the federal parliament on June 10th, 2007. Since 2007, negotiations had been taking place between the political parties of the federal government as well as opposition parties, and between the communities to achieve an agreement on state reforms. The formation of the government of 2007 was, although not as significant as the formation process of 2010, of considerable length and not without difficulties. The consecutive governments (interim-government Verhofstadt, governments Leterme I, Van Rompuy and Leterme II) were not able to reach an agreement on state reforms. The government Leterme II even fell over the discussions (regarding the scission of the constituency Brussels-Halle-Vilvoorde), leading to the elections of June 13th, 2010 and the longest and most difficult formation period in Belgium's history.

7. At the end of the Parliaments' term of 2007, the Parliament (the "Preconstituent Assembly") listed the Articles of the Constitution that would be open for amendment. Having regard to the ongoing negotiations and the failed agreement to resolve the institutional problems that the country was facing, the Parliament was well aware of the fact that state reforms were necessary and that the Constitution would have to be modified during the legislature after the elections of 2010. However, in 2010, the exact list of Articles of the Constitution that would have to be amended, was not clear yet, since the eventual constitutional amendments would depend on the result of the negotiations between the political parties after the elections of June 2010.

8. Because of the particular uncertainty about the exact scope of institutional reforms and the amendments to the Constitution necessary for these reforms, the Parliament chose to open Article 195 of the Constitution for revision. This would allow the subsequent parliament to amend the constitutional Articles necessary to implement the political agreement that would be reached after the elections of 2010.

9. With the "Institutional Agreement of October 11th 2011" an agreement was reached about important state reforms and a solution for the problem of Brussels-Halle-Vilvoorde.

10. This agreement was concluded between eight political parties, of which two parties belong to the opposition, which have a two-thirds majority and a majority within each language group of federal parliament.

11. To implement the Institutional Agreement, constitutional changes are necessary, that could not have been foreseen by the Parliament of 2007, which had to open the Articles for revision.

12. Applying the will of the "Preconstituent assembly", and in full conformity with the procedure to amend the Constitution, the Constituent Assembly amended the procedure provided for by Article 195 of the Constitution to enable the implementation of the Institutional Agreement.

IV. ANTECEDENTS

13. According to Article 195 of the Belgian Constitution, the procedure for making amendments to the Constitution is divided into **three stages**:

- **First stage**: adoption of a declaration to amend the Constitution by the King and the legislative chambers;
- **Second stage**: dissolution of the legislative chambers and their renewal by election;
- **Third stage**: adoption by the newly constituted chambers and by the King of the amendment to the constitution, by modifying the provisions stated to be amended by way of special attendance and voting quorums.

14. Article 195 was opened to amendment as part of the declaration to amend the Constitution dated 7th May 2010 (*Belgian State Gazette*, 7th May 2010) (**first stage**).

15. Elections were held on 13th June 2010 (**second stage**).

16. A proposal to amend this Article was submitted to the House of Representatives on 15th February 2012 (*Doc. parl.*, House of Representatives, 2011-2012, n° 53-2064/001, See Annexe II). (**third stage**).

17. This proposal was lodged by eight political parties, who together hold a two-thirds majority in each Chamber, as well as a majority within each language group[1]. In contrast to what the complainants are claiming, these eight parties include the six parties of the government majority and two opposition parties.[2]

18. A complaint was lodged with the Council of Europe in relation to this proposal to amend Article 195 of the Constitution by several members of the Council of Europe at the behest of the Belgian member who was a member of a Flemish nationalist political party (the "N-VA"), which belongs to the opposition.

19. On 12th March 2012, the Council of Europe's commission for legal issues and human rights questions decided to put the matter to the Council of Europe's Parliamentary Assembly Bureau to have it rule on the appropriateness of submitting this question to the Venice Commission.

20. The amendment to Article 195 of the Constitution was adopted by a plenary sitting of the House of Representatives on 15th March 2012 by 103 for and 39 against (House of Representatives, *Doc.* n° 53-2064/005) and by a plenary sitting of the Senate on 22nd March 2012 by 51 for and 14 against (Senate, *Doc.* 5-1532/5). Each vote was taken after discussion in the Commission for the Amendment to the Constitution and the Reform of Institutions, and the Commission of Institutional Affairs

[1] These 8 parties are: PS (French-speaking socialist party), sp.a (Dutch-speaking socialist party), CD&V (Dutch-speaking Christian Democrat party), cdH (French-speaking centrist party), MR (French-speaking liberal party), Open VLD (Dutch-speaking liberal party), Ecolo (French-speaking ecologist party) and Groen (Dutch-speaking ecologist party).

[2] Two political parties in opposition (ECOLO and GROEN) support State reforms and hence the amendment to Article 195 of the Constitution, although they are not part of the government majority.

respectively. It was published in the *Belgian State Gazette* on 6th April 2012 and took effect from that date. (See Annexe I)

21. In terms of content, the amendment to Article 195 of the Constitution enables the following changes to be made to the Constitution:

- An improvement to the protection of basic rights (constitutional incorporation of the fundamental right concerning the entitlement to family allowances) (point 2 of Annexe I);
- Improved protection regarding administrative and judicial disputes in the six municipalities around Brussels and the judicial district of Brussels (points 10 and 13 of Annexe I);
- The solution for the consequences of ruling n° 73/2003 of the Constitutional Court in relation to the federal elections(points 6 and 14 of Annexe I);
- Incorporate the principle regarding election legislation, as recommended by the Code of Good Practice in Electoral Matters of the Venice Commission (point 3 of Annexe I);
- The reform to the Senate whereby members of parliament of the communities and regions are able to take part in the amendment to the Constitution and the modification of the state structure (point 4 of Annexe I);
- Modification of the rules regarding the concurrence of the federal legislative elections and elections for the European Parliament (point 5 of Annexe I);
- Extension of the powers of the communities and regions (points 1, 7, 12, 15 of Annexe I);
- Simplification of cooperation between the entities of the Belgian State (point 8 of Annexe I);
- The exclusion of conflicts of interest introduced by the communities and regions against certain aspects of federal fiscal legislation (point 9 of Annexe I)

22. It involves an exhaustive list of Articles in which the sense of the amendment is indicated in an obligatory manner. In any event, the list does not relate to and cannot in any case lead to:

- A restriction or suspension of the rights and freedoms guaranteed under the Constitution;
- Fundamental voting rights, such as the principle of the general right of a single vote;
- The relationship between federal legislative and executive power, or the position of the monarchy.

The procedure introduced by the amendment to Article 195 of the Constitution is applicable until the next federal elections (in principle in 2014).

23. Nor does the amendment mean any change to the majority requirements for amending the Constitution.

24. The Council of Europe's Parliamentary Assembly Board decided on 23rd April 2012 to ask the opinion of the Venice Commission.

V. LAWFULNESS OF THE AMENDMENT TO ARTICLE 195 OF THE CONSTITUTION

25. The complainants are of the opinion that the provisional amendment to Article 195 of the Constitution:

1) would be a breach of the procedure to amend Article 195 of the Constitution (point A);
2) would be a breach of Article 187 of the Constitution (point B);
3) would be a breach of the Rule of law (point C).

26. As demonstrated below, the arguments put forward by the complainants are unfounded.

A. An amendment to Article 195 in compliance with the current procedure laid down by this Article

a) Reminder of the argument being put forward by the complainants

27. In the opinion of the complainants, by deciding to opening Articles other than those declared to be open to amendment by the "Preconstituent Assembly", the "Constituent Assembly" has breached the Constitution.

b) Refutation

28. Article 195 of the Belgian Constitution sets out the procedure for amending the Constitution. It is worded as follows:

> *"The federal legislative power has the right to state that there is a case for amending any provision of the Constitution that it should designate.*
>
> *After this statement has been made, the two chambers are automatically dissolved.*
>
> *Two new chambers will then be convened, in accordance with Article 46.*
>
> *These chambers will vote, in mutual agreement with the King, on the points submitted for the amendment.*
>
> *If this should be the case, the chambers may only deliberate if at least two-thirds of the members who make up each of the chambers are in attendance; no change will be adopted if there are fewer than two-thirds of the votes present*".

29. First and foremost, as shown above, the three stages of the current procedure to amend the Constitution have been complied with:

1) In the context of the declaration to amend the Constitution dated 7th May 2010, Article 195 was opened to amendment by 106 members out of 138 (**first stage**);
2) The Chambers were dissolved and elections were held on 13th June 2010 (**second stage**);

3) The newly constituted Chambers adopted the proposal to amend Article 195 of the Constitution (**third stage**). It was adopted with the required two third majority.

30. Hence the procedure to amend this Article was followed **in compliance with the current procedure set out in Article 195**.

31. Since 2003, when Article 195 was first opened to amendment, the question was asked as to whether opening Article 195 to amendment would allow for an amendment to Article 195 during the next legislature with a view to amending, during this same legislature, any Articles not mentioned in the declaration to amend the Constitution adopted by the Preconstituent Assembly.

32. During the parliamentary works that preceded the adoption of the three most recent statements to amend the Constitution (2003, 2007 and 2010), several parliamentarians answered this question affirmatively. Numerous members emphasized that opening this provision to amendment would make it possible, if the Constituent Assembly wished, to amend provisions other than those designated in the context of the declaration to amend. (See Annexe III containing the statements of these parliamentarians).

33. In 2010, several parliamentarians, like their predecessors, stated that opening Article 195 to amendment per se also meant there was a possibility that all of the provisions of the Constitution could be amended. But, in addition, several of them also stated that opening this provision to amendment precisely meant allowing extensive reforms to be made to the State, given the institutional discussions gripping Belgium, by allowing provisions not subject to amendment to be amended.

The Constituent Assembly of 2010 thus exercised a competence which was granted explicitly to the Constituent Assembly by the Preconstituent Assembly.

34. It should also be noted that in its opinion of the preliminary draft of the Bill assenting to the Treaty of Lisbon[3], the legislative section of the Council of State itself suggested, since Article 195 of the Constitution was open to amendment, introducing a more flexible procedure for amending the Constitution for modifications of the Constitution aimed, on the one hand, at agreeing to a treaty relating to the European Union and its ratification and, on the other, at the execution of obligations arising from European Union law:

> *"Article 195 of the Constitution governs the procedure for amending the Constitution. The Council of State suggests examining whether or not it would be appropriate to supplement Article 195 with a provision focusing specifically on adaptations to the Constitution aimed, on the one hand, at approving a treaty relating to the European Union and its ratification (or, where appropriate and more extensively, to an international treaty in general) and, on the other hand, at fulfilling obligations arising from European Union law (or, where appropriate and more extensively, the fulfilment of obligations arising from supranational or international law in general). A more flexible procedure could, for example, be provided for such modifications to the Constitution. It should be noted in this regard that Article 195 of the Constitution figure is one of the provisions designated in the declaration to amend the Constitution adopted at the end of the previous legislature".*

[3] C.S., Opinion n° 44.028/AV, *Doc. parl.*, Senate, sitting 2007-2008, n° 4-568/1.

35. Numerous constitutional experts confirmed the conformity of the amendment to Article 195 of the Constitution with the amending procedure.
See in Annexe IV:

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36. Finally, the amendment to Article 195 of the constitution is a measure that is limited in time (until the next federal elections). Currently, no two third majority can be found in the federal parliament to permanently modify the procedure to amend the Constitution. The Constituent Assembly therefore had recourse to a valid alternative.

37. **To conclude**, the constitutional amendment being attacked is in line with the Belgian Constitution for the following reasons:

1) Article 195 of the Constitution is subject to amendment;
2) Article 195 of the Constitution can therefore be amended in full or in part;
3) Article 195 of the Constitution can therefore be amended permanently or temporarily.

B. An amendment to Article 195 of the Constitution in compliance with Article 187 of the Constitution

a) Reminder of the arguments put forward by the complainants

38. The complainants believe that the proposal to amend Article 195 of the Constitution would be incompatible with Article 187 of the Constitution, which states that the Constitution may never be suspended in full or in part.

b) Refutation

39. The arguments put forward by the complainants are unfounded for the reasons set out below.

40. First of all, the amendment to Article 195 of the Constitution does not "suspend" either the whole constitution, or a part of it.

The addition of the new provisions in Article 195 of the Constitution is an amendment to the Constitution, as set out above (see nrs. 13-16 and 28-30) and not a suspension of the Article. Article

195 of the Constitution thus remains applicable for the Articles that are not covered by the amendment. This means that the Article continues to apply to those Articles that were already open to amendment by the declaration in 2010. Those Articles of the Constitution that were not included in either the declaration of 2010 or in the amendment to Article 195 are not open to amendment during the current legislature and hence cannot be modified. (See *Doc. parl.*, *House of Representatives*, ord. sess. 2011-2012, n° 2064/001, Annexe II).

41. Secondly, the *ratio legis* and historical context are important to correctly interpret Article 187 of the Constitution.

42. Article 187 was included in the original Belgian Constitution of 1831 as Article 130 of the Constitution. It has not been amended since. Only the number of the Article was adjusted when the Constitution was coordinated in 1994.

43. The Article was introduced in the Constitution on the initiative of the member of parliament VAN SNICK. The reason for introducing the Articles were the French decrees that had recently been proclaimed by King Charles X of France on July 25th, 1830. These decrees, amongst others, suspended the freedom of the press. The Article was aimed to avoid similar cases.

44. The preparatory works of the National Congress dated 5th February 1831[4] state the following:

"Van Snick develops this further: Gentlemen, the idea for my proposal is not my own; I borrowed it from the great writer, from the distinguished publicist upon whose death a short time ago we expressed such sincere regrets; and surely you can see the value of a provision that Benjamin Constant believed necessary to include in this draft constitution.

You are aware, gentlemen, that all the powers that have succeeded one another in France have all, one by one, violated and suspended the constitutions that should have immutably governed that country, each time invoking that great law: Salus populi suprema lex esto (The welfare of the people shall be the supreme law). As if the welfare of the people were not still bound to the inflexible execution of the laws and of the fundamental law in particular. The proposal that I have submitted to you, upon whose merits you will express your opinion, has no other purpose than to prevent these breaches, these suspensions and these coups d'état, of which I have just spoken. As for its writing, I make no claim, it is not my work; it is, as I had the honour of stating when I began, a constitutional provision that I have taken in its entirety from Benjamin Constant.

...

Van Snick: "The aim of the proposal is to prevent what has happened in France under the republic. More than once the constitution has been suspended in several départements designated in an act of law.

...

[4] *Exposé des motifs de la Constitution belge par un docteur en droit*, Bruxelles, Goemaere, 1864, p. 674. Of the same opinion : R. Ergec, "L'état de nécessité en droit constitutionnel belge », in *Le nouveau droit constitutionnel*, Centre universitaire de droit public, Academia, Bruylant, 1987, p. 167 ; A. Mast & Dujardin, *Overzicht van het Belgisch Grondwettelijk Recht*, 9th edition, 1987, Brussels, 1987, p. 487.

Mr Lebeau states clearly that he is in favour of adopting the amendment. We must not, he says, neglect any guarantee and take precautions to prevent even the possibility of a violation. If the French charter had contained a similar Article, never would the ministers of Charles X been able to find an excuse for suspending the charter."

This analysis is confirmed by E. Van Hooydonck, in his paper entitled "Article 130 of the Constitution as a general foundation for the principle of continuity in administrative law".

"The events that occurred in France, to which VAN SNICK alluded, appear to be the notorious July Edicts introduced by the hard-pressed DE POLIGNAC government. Under the auspices of King CHARLES X, this government implemented a number of draconian regulations on 25h July 1830, dissolving the Chamber, changing the election system, convening the electoral colleges immediately and, particularly, suspending the freedom of the press. The judgment of legal historians about these edicts is crushing: "Taking away any notion of right, they imposed on the country a régime of arbitrariness and doing as the government wished, which constituted a genuine dictatorship".[5]

45. Article 187 is thus first and foremost aimed at avoiding excesses of the executive and is further addressed to the legislative and the judicial power. It does not deal with an amendment to the Constitution by the Constituent Assembly itself.

46. This analysis is confirmed by François Tulkens in his "Note relative to the interim provision about to be inserted into Article 195 of the Belgian Constitution":

> *"Article 187 defends suspending the Constitution in full or in part, but this rule is addressed to powers other than the Constituent Assembly itself, in this case the Legislative, Executive and Judicial Powers. It is not addressed to the Constituent Assembly itself.*
>
> *Yet the claimed suspension of the Constitution by the interim provision of Article 195 is the work of the Constituent Assembly itself.*
>
> *Finally, it is illogical to claim that the Constitution would defend the Constituent Assembly in suspending the Constitution itself, all the more so because it is generally admitted that the Belgian Constitution does not have any provisions that cannot be changed (unlike other countries in Europe)".*

This position is also shared by Bernard Blero, Professor of Public Law at the Open University of Brussels in his contribution entitled "Revamping Article 195 of the Constitution: no future?":

> *"The process [...] is not contrary to any rule of law. In particular, it is not possible to see in it any violation of Article 187 of the Constitution, since the "suspension" is the doing, not of the constituted powers, but of the Constituent Assembly itself, acting within the limits of the mandate granted to it by the declaration of May 2010".*

47. Thirdly, it must be emphasized that the Belgian Constitution does not contain an "eternity clause" comparable to e.g. Article 79, paragraph 3, of the German Constitution, that limits the autonomy of the

[5] *T.B.P.*(75) 8.1

constitutional power content-wise. The only rule applicable to the constitutional power in the Belgian Constitution, is the procedural Article 195.

48. Finally, as stated above, numerous constitutional experts confirmed the conformity of the amendment to Article 195 of the Constitution with the Belgian Constitution.

See in Annexe IV:

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49. **To conclude**, the amendment to Article 195 of the Constitution
    - does not suspend the Constitution, either in full or in part;
    - in no way breaches Article 187 of the Constitution.

C. ***Compliance with the Rule of Law***

a) Reminder of the arguments put forward by the complainants

50. While stressing the fact that the Rule of Law is "a pillar to all member states", the complainants argue that the amendment to Article 195 of the Constitution would be contrary to this principle.

b) Refutation

51. The amendment to Article 195 of the Constitution complies with the Rule of Law.

52. In the report on the Rule of Law of March 25-26, 2011[6], the Venice Commission has – while noting the absence of a general standardised definition of the Rule of Law – listed its separate fundamental elements. These fundamental elements are the following :

1. *Legality (supremacy of the law)*
2. *Legal certainty*
3. *Prohibition of arbitrariness*
4. *Access to Justice before independent and impartial courts*
5. *Respect for human rights*
6. *Non-discrimination and equality before the law*

53. One cannot but notice that, in the light of the foregoing, none of these elements is breached by the amendment to Article 195 of the Constitution.

1. *Legality (supremacy of the law)*

In revising Article 195 of the Constitution, the Constituent Assembly acted within the limits of the powers conferred upon it. The process of revising Article 195 of the Constitution was indeed conducted in accordance with the current procedure defined under that Article (*see above*).

2. In the course of this exercise the Constituent Assembly did not in any manner "suspend" the Constitution either in whole or in part, and thus by consequence, did not breach Article 187 of the Consitution (*see above*).*Legal certainty*

The text of the amendment to Article 195 of the Constitution is readily accessible, having been published in the Belgian State Gazette on April 6th, 2012. This amendment is drafted in a clear and predictable form and does not have retroactive effects.

3. *Prohibition of arbitrariness*

The present amendment to Article 195 of the Constitution makes no departure from this prohibition.

4. *Access to Justice before independent and impartial courts*

[6] CDL-AD (2011)003.

54. In Belgium constitutional amendments are indeed not subject to judicial review (a priori or a posteriori).

However, it is not true to say that the Venice Commission would impose any such review when making constitutional amendments. In its "Report on constitutional Amendment", the Commission of Venice to the contrary states that a priori review is a "fairly rare procedural mechanism" and that even if a posteriori review is more widespread, it cannot be considered as a general rule[7]. Belgium stands in the tradition of countries such as France, which firmly rejected judicial review of constitutional amendment. The Constitutional Council argued that "because the constitutional legislator is sovereign, therefore constitutional amendments cannot be subject to review by other bodies (themselves created by the constitution)"[8].

It is also untrue to state that constitutional amendments would escape any form of control and would, in doing so, not respect the Rule of Law. As François Tulkens stresses correctly in his "Note relative to the interim provision about to be inserted into Article 195 of the Belgian Constitution", *"It often occurs that constitutional amendments are not subject to controls by a jurisdiction, because the express the Constituent Assembly sovereignty. However, this sovereignty does not mean a lack of submission to the Rule of Law. Indeed, the Constituent Assembly may, where necessary, be controlled not by national bodies, but by international ones, particularly if real violations or threats of violation to human rights are at stake".*

55. In any case, one cannot but notice that the questions on the absence of the internal judicial review are strange to the present request as they are not a consequence of the amendment but have always been existing in the Belgian internal legal order.

5. Respect for human rights

56. Contrary to what is stated by the complainants, the present amendment to Article 195 of the Constitution does not affect the protection of human rights, listed in Title II of the Constitution, in any way. To the contrary, one of its aims is to include a new fundamental right in the Constitution, to ensure the entitlement to family allowances (see supra, nr. 18).

57. The complainants also pretend that the amendment to the Constitution would breach Article 3 of the first Protocol to the European Convention of Human Rights. The complainants, however, do not indicate how the amendment to Article 195 of the Constitution would breach Article 3 of the First Protocol to the European Convention of Human Rights.

58. Article 3 states:
« The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."

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[7] CDL-AD(2010)001, § 229.

[8] Cf. the French Constitutional Council No 92 – 312 of 2 September 1992, § 34: "*Considérant que, dans les limites précédemment indiquées, le pouvoir constituant est souverain ; qu'il lui est loisible d'abroger, de modifier ou de compléter des dispositions de valeur constitutionnelle dans la forme qu'il estime appropriée*". (Free translation : « *Considering that, within the limits previously mentioned, the Constituent is sovereign ; that he may repeal, modify of complete dispositions of constitutional value in the form that he deems appropriate* ».

59. According to the Code of Good Practices in electoral matters of the Venice Commission, adopted by the Council for Democratic Elections at its 2nd and 3rd Meetings (Venice, 3rd July and 16 October 2002), p. 23:

"Elections must be held at regular intervals; a legislative assembly's term of office must not exceed five years."

60. In Belgium, elections for the federal parliament are held at least every four years.

61. The last elections were held on June 13th, 2010. The next elections will consequently at the latest be held in June 2014.

62. One can therefore not see why Article 3 of Protocol 1 to the European Convention of Human Rights would be breached.

6. Non-discrimination and equality before the law

63. The present amendment to the Constitution applies to all without exceptions, in a general and consistent way.

64. **In conclusion**, the amendment to Article 195 of the Belgian Constitution is wholly consistent with the Rule of Law.

VI. CONCLUSION

As it has been demonstrated in this memorandum, the amendment to Article 195 of the Belgian Constitution:

1) was adopted in conformity with the procedure to amend the Constitution (Article 195), as the amendment was adopted following the three stages of the amending procedure to the Constitution;

2) does not entail a suspension of the Constitution or a part of it; Hence, it does not violate Article 187 of the Constitution;

3) does not violate the Rule of Law.

Also, the amendment must be seen in the context of ongoing political crises about the necessary institutional reforms.

The Belgian Government therefore requests the Venice Commission to declare the complaint unfounded.

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ANNEXE I. Amendment to Article 195 of the Constitution translation

CHANCELLERY OF THE PRIME MINISTER FPS (FEDERAL PUBLIC SERVICE), F. 2012 — 1035 [2012/201995]

29 MARCH 2012. — Revision of Article 195 of the Constitution (1) (2)

ALBERT II, King of the Belgians.
To all those present now and in the future, Greetings.
The Chambers have adopted, subject to the conditions set forth in Article 195 of the Constitution, and we sanction the following:

Single Article. Article 195 of the Constitution shall be supplemented by a transitional provision worded as follows:

"Transitional provision

However, the Chambers, constituted subsequent to the renewal of the Chambers on 13 June 2010, may, by means of a mutual agreement with the King, adopt a decision on the revision of the following provisions, Articles and groups of Articles, solely along the lines specified below:

1° Articles 5, subparagraph 2, 11a, 41, subparagraph 5, 159 and 190 to ensure the full exercise of the regions' autonomy vis à vis the provinces without prejudice to the present specific provisions in the Law of 9 August 1988 on amending the municipal law, the municipal elections law, the organic law for public social welfare centres, the provincial law, the electoral code, the organic law for provincial elections and the law on holding elections at the same time for the legislative chambers and the provincial councils and those concerning the offices of governors, and restrict the meaning of the word "province" used in the Constitution solely to its territorial meaning, to the exclusion of any institutional meaning;

2° Article 23 to ensure the entitlement to family allowances;

3° Title III to introduce a provision to prohibit the amendment to electoral legislation less than one year before the date planned for the elections;

4° Articles 43, § 1, 44, subparagraph 2, 46, subparagraph 5, 69, 71, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83 and168 to carry out the reform of the twin-chamber system and to assign the House of Representatives the residual legislative powers;

5° Articles 46 and 117 to provide for the federal legislative elections to be held on the same day as the elections for the European Parliament and in the event of an early dissolution, the new federal legislature may not last any longer than the day of the European Parliament elections following this dissolution while allowing a law adopted by the majority as provided for in Article 4, final subparagraph, to grant the communities and regions the power to determine, pursuant to a special decree or special order, the duration of the legislature of their parliaments and set the date for their election and to provide for a law, adopted by the majority as specified in Article 4, final subparagraph, to determine the date for the entry into force of the new rules featured in this point concerning elections;

6° Article 63, § 4, to add a subparagraph specifying that in the case of the elections for the House of Representatives, the law shall provide special procedures for the purpose of guaranteeing the legitimate interests of Dutch speakers and French speakers in the ancient province of Brabant, and that

the rules laying down these special procedures may be amended only by a law adopted by the majority as provided for in Article 4, final subparagraph;

7° Title III, chapter IV, section II, sub-section III, to introduce an Article to allow a law adopted by the majority as provided for in Article 4, final subparagraph, to grant bilingual Brussels Capital and the Brussels-Capital Region powers not assigned to the Communities in the matters referred to in Article 127, § 1,subparagraph 1, 1o and in the case of the matters referred to in 1o, 3o;

8° Title III, chapter IV, section II, sub-section III, to allow a law adopted by the majority as provided for in Article 4, final subparagraph, to simplify the cooperation procedures between the entities;

9° Article 143 to add a paragraph precluding the procedure relating to conflicts of interest from being initiated with respect to a law or decision of the federal authority which amends the basis of taxation, the tax rate, exemptions or any other element playing a role in the computation of personal income tax;

10° Title III, chapter VI, to include a provision according to which any amendment to essential features of the reform regarding the use of languages in judicial matters in the judicial district of Brussels, as well as any amendment to 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 provided for in Article 4,final subparagraph;

11° Article 144 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, § 1, to provide that the communities and the regions are entitled to order prosecutions regarding matters falling under their responsibility through the federal Minister of Justice, who shall immediately carry out the prosecutions, and in order to permit a law passed by a majority as provided for in Article 4, final subparagraph to provide for the participation by the communities and 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, to add a paragraph providing that any amendment to the new powers granted to the general assembly of the Council of State's administrative litigation section and any amendment to the rules for deliberation in this assembly may only be made by a law passed by a majority as provided for in Article 4, final subparagraph;

14° Title IV, to introduce an Article providing that, with respect to the election of the European Parliament, the law shall determine special rules with a view to protecting the legitimate interests of French and Dutch-speaking people in the ancient province of Brabant, and that the provisions which establish these special rules may be amended only by a law passed by a majority as provided for in Article 4, final subparagraph;

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

The Chambers may only deliberate in the case of the points mentioned in subparagraph 1 provided that at least two-thirds of the members who make up each Chamber are present and no change is adopted unless it is supported by at least two-thirds of the votes cast.

This transitional provision shall not be considered as a declaration within the meaning of Article 195, subparagraph 2.

We promulgate this provision and order that it shall carry the Seal of State and be published in the Belgian Official Gazette.

Done in Brussels, on 29 March 2012

ALBERT
For the King:

The Prime Minister,
E. DI RUPO

The Secretary of State for Institutional Reforms,

M. WATHELET

The Secretary of State for Institutional Reforms,

S. VERHERSTRAETEN

Sealed by the seal of the state:

The Minister of Justice,
A. TURTELBOOM

ANNEXE II. Revision Article 195 of the Constitution - Explanatory statement translation

BELGIAN HOUSE OF REPRESENTATIVES

15 February 2012

REVISION OF THE CONSTITUTION

Revision of Article 195 of the Constitution

(submitted by Messrs. Thierry Giet, Raf Terwingen and Daniel Bacquelaine, Ms Karin Temmerman, Messrs Olivier Deleuze, Stefaan Van Hecke and Patrick Dewael and Ms Catherine Fonck)

Explanatory statement

LADIES AND GENTLEMEN,

Article 195 of the Constitution sets forth the procedure for the revision of the Constitution. Pursuant to the Constitutional revision declaration of 7 May 2010, this Article shall be susceptible to a revision (*Belgian Official Gazette* 7 May 2010). This proposal shall supplement Article 195 of the Constitution by means of a transitional provision. This provision shall confine itself to implementing the 11 October institutional agreement on the sixth state reform.

Some Articles in the Constitution, in whole or in part, are not currently susceptible to a revision, although they must be revised for the implementation of the institutional agreement on the sixth state reform.

This proposal shall seek to institute a specific time-limited procedure to allow for a wholesale revision of all the provisions that are not wholly or partly susceptible to a revision, while a revision may be required for the full implementation of the institutional agreement on the sixth state reform.

As a result of making certain Articles and groups of Articles susceptible to a revision, the Constituting power shall not be taking any decision about the interpretation of the existing constitutional provisions.

The specific purpose of the procedure instituted by the transitional provision is such that this shall apply solely during the current legislature.

This shall also justify that the purpose of the revisions to be made shall be expressly established in the transitional provision hence solely the revisions consistent therewith shall be accepted. This is all the more understandable as it is the same Chambers which, with the same majorities, shall list the provisions susceptible to a revision and shall undertake the revision of these provisions.

The revision of the provisions listed in the transitional provision shall therefore be confined to the goal of implementing the institutional agreement on the sixth state reform and shall allow for its full implementation.

The other points in the institutional agreement on the sixth state reform shall not require any revision of the Constitution.

This specific procedure shall not replace the existing Constitutional revision procedure insofar as this shall continue to apply to the provisions susceptible to a revision pursuant to the 7 May 20102 revision declaration. Some of these provisions shall also have to be revised in order to implement the institutional agreement on the sixth state reform. Needless to say, the adoption of the transitional provision submitted to Parliament for deliberation shall not lead to the dissolution of the Chambers.

In the case of the revision of the designated provisions, the rules currently set forth in Article 195 of the Constitution with regard to quorum and majority requirements shall apply: the Chambers may deliberate only if at least two-thirds of the members who make up each chamber are present and no change is adopted unless it is supported by at least two thirds of the votes cast.

ANNEXE III. Parliamentary discussions: Opening Article 195 to amendment would allow for the amendment to Article 195 during the following legislature with a view to amending, during this same legislature, any Articles that may not have been mentioned in the declaration to amend the Constitution adopted by the Preconstituent Assembly.

- In 2003, Mrs **Willame-Boonen** emphasized that: "There is no point in going into greater detail on this declaration to amend because once Article 195 is put to amendment, the only interest in the rest of the list is to analyze the will of the parties subscribing to it. Indeed, according to Madam Speaker, **it would be sufficient for the Constituent Assembly to amend Article 195 to enable it to amend all of the terms of the Constitution as it sees fit**".

- At the time, *La Libre Belgique* and *Le Soir* both reported the statements made by Mr **Maingain, president of the Fédélalistes Démocrates Francophones (FDF) party**, according to which "**if Article 195 is amended, it opens up the possibility of modifying the whole Constitution, without admitting it. This will happen without us.** Constitutional stability represents protection for French-speaking Belgians and it is not in our interests in any way to weaken our defences. The institutional menu in Flanders is a known quantity. I do not wish to open the door to a confederal adventure in Belgium" (LLB-31st January 2003). As well as the statements made by Mr **Moureaux, vice president of the Parti Socialiste, (PS)** which, in *Le Soir* of 8th February 2003, said it was "totally decided to fight this idea of amending Article 195. (...) Faced with Flemish attacks, a certain stiffness is required. **We should avoid the adventures that could, in a single legislature, overturn all of the processes protecting French-speaking people and in particular Brussels and its facilities".**

- In 2007, Mrs **Van de Casteele** (Open-VLD) also indicated that: "The good thing about amending Article 195 is, as Mr Van den Brande has emphasized, that it would give the impression that everything is now possible, including things not included in the proposal to amend the Constitution that the government has made".

- In 2003, Mr Van den Bossche, then Minister for the Public Service and Modernization of Government and responsible for answering questions from senators about the proposed declaration to amend the Constitution, stressed very clearly that **while the possibility to amend Article 195 of the Constitution so that other constitutional provisions could be amended in the same legislature will exist in theory of opening Article 195 to amendment, it is up to the Constituent Assembly to make a statement on the matter.** In response to the questions from Mr Vandenberghe, who is firmly opposed to the fact that opening Article 195 to amendment would allow the Constituent Assembly to amend provisions other than those included in the proposed statement submitted to the Senate, the minister indicated that: "**it will be up to the new Constituent Assembly to answer that question**" and that "**everything will depend on the future wording of Article 195**"[9].

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[9] See *Doc. parl.*, Senate, sitting 2002-2003, n° 2-1549/3. Mr Vandenberghe: *"The government's initial plan, which aimed at conducting the institutional reforms projected by opening only Article 195 of the Constitution to amendment, which would have allowed a genuine constitutional 'striptease', this plan has nevertheless come up against insurmountable legal*

- **Mr Mourcaux** issued the following opinion: "it must be possible to declare that all Articles of the Constitution are subject to amendment. Given the current crisis and the political context, it would be a matter of a more neutral choice. The option taken in the draft declaration to amend the Constitution submitted by the government, which is **to propose, among other things, that**

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objections, according to Mr Vandenberghe. Assuming this is the case, the next constituent assembly would have been able to amend the whole of the Constitution with no other obstacle. But even if we open Article 195 of the Constitution to amendment today, the current provisions of this same Article 195 remain applicable. In fact, the constituent assembly will be elected under the "rigour" of Article 195 of the Constitution. The electorate will vote on Article 195 of the Constitution. This is precisely the effect of the law over time. Article 195 of the Constitution will be applicable on 18th May 2003 (federal elections). The application of Article 195 of the Constitution implies that it can be amended during the next legislature, but if indication had not been made of other Articles open to amendment, the constituent assembly would only have been able to amend Article 195 and not the other Articles of the Constitution. In which case, it would have been necessary to wait for a subsequent legislature.

This is why the government has included a whole series of other Articles in the draft declaration to amend the Constitution, but Mr Vandenberghe wants the government to state whether it considers that the modification of Article 195 of the Constitution would allow a subsequent constituent assembly also to amend other Articles of the Constitution, even if they are not listed in the declaration to amend. Thus far, the government has not explicitly excluded this possibility. Mr Vandenberghe wishes to obtain details on this point from the minister.

The contributor believes it to be important that the members of the majority also be able to measure how far their voice carries. In other words, if they approve the proposal aimed at opening Article 195 of the Constitution to amendment, would it mean that Articles other than those currently included in the declaration to amend could also be amended and hence that they give their assent to a constitutional 'striptease'?

The only thing that the contributor can still be happy about is that the government has abandoned the path by which it would say that it is not subject to the amendment to Article 195. But if the aim of the government, after amending Article 195 of the Constitution during the next legislature, is further to amend Articles other than those mentioned in the declaration to amend, then this declaration barely has any sense and is but a smokescreen for the Parliament.

Mr Vandenberghe would like the minister to confirm to him whether he can deduce any intention from him, even if Article 195 of the Constitution is amended during the forthcoming legislature, the this openness to amendment would not mean that Articles of the Constitution other than those mentioned in the draft declaration to amend the Constitution might also be amended."

Mr Van den Bossche: *"The minister replies that it will be up to the new constituent assembly to answer this question. His personal opinion is rather dictated to by caution".*

Mr Vandenberghe: *"Mr Vandenberghe notes the fact that the minister is unable to give any confirmation; he now invites the senators from the majority to ask themselves whether, under these conditions, they are disposed to vote in favour of opening Article 195 of the Constitution to amendment.*

But according to the contributor, the only conclusion that can be drawn from the fact that the proposed declaration to amend the Constitution submits Article 195 of the Constitution to amendment, as well as a whole series of Articles from our fundamental law, is that those Articles of the Constitution that are not featured at the moment on the list of Articles subject to amendment cannot be amended by the next constituent assembly, except on the basis of a new Article 195 of the Constitution".

Mr Van den Bossche: *"To the question knowing whether an amendment to Article 195 during the next legislature would make it possible to amend Articles not mentioned in the declaration to amend the Constitution during the same legislature, the minister answers that everything will depend on the future wording of Article 195. But the question of knowing whether it would be desirable for this possibility to exist is another question. In the minister's opinion, it is not desirable that such a possibility should exist, insofar as it could threaten legal stability. But this possibility will not exist any the less in theory".*

Article 195 of the Constitution be declared subject to amendment, is but an outward solution. In actual fact, such a proposal opens the way to the possibility of an amendment to all of the Articles of the Constitution, because it is the amendment procedure of the Constitution itself that is under discussion".

And added that: "A word of explanation is required insofar as under the previous legislature, I had voted against putting this Article for amendment. I would like first of all to indicate that personally I was in favour of another method, which consisted of having a great many Articles under amendment and to do without Article 195. As that was not the choice of the government, or of the Chamber or of the Senate committee, **Article 195 has become the key Article for all of the discussions that we have just had. Taken to the extreme, in the end, all of our exchanges of views on the other Articles are only about adopting positions, whereas here, we are giving a key to open the lock on amending the whole of the Constitution, that is of course if the next Constituent Assembly so wishes.** It may be perilous, but the fact remains that we are faced with another danger: not taking any action, an inability to progress in the reform of the State that has become essential if we want Belgium to get out of trouble".

- **Mr Van Den Driessche** was, according to him, of the opinion that "we need to **declare Article 195 open to amendment if we want to avoid finding ourselves in an impasse again during the next legislature.** We need to **reform Belgium in depth** and as soon as possible. If we don't, our institutions risk becoming paralyzed permanently and our country will become unmanageable".

- **Mr Delpérée** stated that: "**If we declare Article 195 open to amendment, it will in fact render superfluous the Articles already retained by the commission with a view to a possible amendment**".

- **Mr Vande Lanotte** said that: "Although the role of the King is debatable for us, we will not support Mr Van Den Driessche's amendment. We take the same attitude as we do to other Articles that might be amended. **For us, the final piece of the statement is Article 195. If that Article is declared open to amendment, we will be able without any problem to conduct a discussion about the role of the King.** We also put this Article on the list in 2007, **because it enabled us to put through the changes we wanted to the Constitution at the appropriate time,** on condition that that majorities required under the Constitution were honoured. For that reason, we will be supporting the declaration to amend Article 195". **Mr Van Den Driessche** replied that: "I do not want to make an issue of the discussion. I am already satisfied with some of the responses I have heard. **If the role of the King is put up for discussion via Article 195, I of course also find that is a good thing**".

- **Mr Vande Lanotte** repeated that: "**First of all, Article 195 of the Constitution will have to be amended, after which other Articles of the Constitution can also be amended – naturally not by a simple majority, but with a two-thirds majority, so that the protective mechanisms remain in place**".

ANNEXE IV. Constitutionalists and political experts confirming the legality of the amendment to Article 195 of the Constitution

Numerous constitutionalists and political experts have confirmed the lawfulness of this amendment to Article 195. In fact, many of them consider that the declaration to amend Article 195 of the Constitution does not oppose a more **flexible** formula, allowing first of all for this Article to be amended, followed by amendments to be made to the Constitution resulting in reforms to the State, without having to go through fresh elections. Hence see:

- **Jeroen Van Nieuwenhoven,** (KULeuven) "The procedure for amending the Constitution: amendment or circumvention?", Tijdschrift voor bestuurswetenschappen en Publiekrecht, 2011/8-9, p. 531:

  "*Eerste mogelijkheid: de tijdelijke uitschakeling van de eerste twee fasen van de herzieningsprocedure voor specifieke grondwetsbepalingen: [...]*
  Juridisch-technisch is dit wel mogelijk: eerst moet artikel 195 worden gewijzigd, bijvoorbeeld door er een bepaling aan toe te voegen waarin wordt verduidelijkt gedurende welke periode en voor welke grondwetsbepalingen de grondwetgever kan optreden zonder voorafgaandelijke machtiging door de preconstituante. Van zodra deze grondwetswijzigingen in werking is getreden (...), kan de grondwetgever de beoogde grondwetsbepalingen herzien, voor zover dit binnen de vermelde periode gebeurt. In beginsel zou op die wijze eender welke grondwetsbepaling kunnen worden herzien op grond van een herzieningsverklaring waarin enkel artikel 195wordt vermeld."

  Translation:

  "*First possibility: the temporary switching off of the first two stages of the amendment procedure for specific constitutional stipulations: [...]*

  This is indeed possible from a legal and technical point of view: first of all, Article 195 has to be changed, for example by adding a clause to it clarifying the period in which and for what type of constitutional stipulations the legislators can act without prior authorization from the Preconstituent Assembly. Once these changes to the Constitution have been implemented (...), the constitutional lawyers can amend the parts of the Constitution in question, on condition that this is done within the period stated. In principle, any clause of the Constitution could be amended in this way on the grounds of a declaration to amend in which Article 195 is mentioned."

  In another contribution "Article 195 of the Constitution and the federal decision-making mechanisms – make it tighter or more relaxed?" (2012), Jeroen Van Nieuwenhoven again states that:

  "De techniek om de eerste en de tweede fase van de herzieningsprocedure (herzieningsverklaring en verkiezing van een constituante) tijdelijk uit te schakelen voor welbepaalde artikelen (of zelfs voldoende duidelijk omschreven aangelegenheden) is juridisch-technisch correct. Het is mogelijk om deze tijdelijke aanpassing onmiddellijk in werking te laten treden. De argumentatie van verscheidene juristen en politici dat deze operatie ongrondwettig zou zijn, neemt niet weg dat er formeel-juridisch geen bezwaren bestaan en dat

vanaf de inwerkingtreding van de nieuwe grondwetsbepaling (op de dag van de bekendmaking ervan in het Belgisch Staatsblad) voorstellen kunnen worden ingediend om de tijdelijke procedure te benutten".

Translation:

"The process used to switch off the first and second stages of the amendment procedure (statement of amendment and election of a constituent assembly) temporarily for specific Articles (or even for sufficiently well-defined circumstances) is legally and technically correct. It is possible to apply this temporary adjustment immediately. The argument by various lawyers and politicians that this operation would be unconstitutional does not detract from the fact that there are no formal or legal obstacles in the way and that from the time the new constitutional clauses came into effect (on the day they were published in the Belgian State Gazette) proposals could be put forward to make use of the temporary procedure".

- **Sébastien Van Drooghenbroeck** (University Faculties of Saint-Louis), "Article 35 of the Constitution: the end of the beginning or the beginning of the end? Fertility of constitutional entelechy", in *The principle of Constitutional Autonomy, Articles 35 and 195 of the Constitution*, Bruges, The Charter, Library of Constitutional Law, 2011, p. 92:

"Certes les déclarations de révision qui se sont succédées depuis 1999 [1] ont-elle systématiquement omis de permettre l'éventuelle insertion, dans le titre III de la Constitution, de la disposition qui, conformément à ce que prévoit le dispositif transitoire adjoint à l'Article 35, « listerait » les matières confiées à la compétence exclusive de l'État fédéral. Depuis 2003 cependant, l'Article 195 de la Constitution est ouvert à révision. À supposer qu'il soit effectivement révisé, et que l'on reconnaisse à la révision intervenue un « effet immédiat » sur la législature en cours, tous les carcans issus de la déclaration de révision du 7 mai 2010 pourraient alors être brisés [2] : le chantier constituant serait sans limites a priori"

Translation:

"Certainly the declarations to amend that have been made since 1999 [1] have systematically omitted to allow for the possible insertion, in Section III of the Constitution, of a provision that, pursuant to what is provided for by the interim provision appended to Article 35, 'would list' the matters entrust to the sole competence of the Federal State. Since 2003 however, Article 195 of the Constitution has been open to amendment. Suppose that it really was amended and that the amendment included recognition of an "immediate effect" on the current legislature, all of the shackles arising from the declaration to amend dated 7th May 2010 could then be broken [2]: the job for the constituent assembly would then be without restriction"

- **Jan Velaers** (University of Antwerp), "Article 35 of the Constitution: the 'beginning of the end' or the 'end of the beginning'", in the Principle of Constitutional Autonomy, Articles 35 and 195 of the Constitution, Bruges, The Charter, Library of Constitutional Law, 2011, p. 173.

" [...] Rebus sic stantibus is dat inderdaad juist. Aangezien de herzieningsverklaring van 2 mei 2010 ook artikel 195 van de Grondwet voor herziening vatbaar heeft verklaard, is het echter niet uitgesloten om al tijdens de huidige legislatuur artikel 35 van de Grondwet uit te voeren. Het is immers mogelijk de procedure tot herziening van de Grondwet in het algemeen te herzien of te voorzien in een bijzondere procedure om het nieuwe artikel over de

bevoegdheden van de federale overheid in te voegen. Zo zou men kunnen bepalen dat het nieuwe artikel kan worden ingevoegd in één fase, zonder dat een verklaring tot herziening van de Grondwet vereist is. Men zou ook kunnen bepalen dat de invoeging slechts zou kunnen gebeuren met een tweederdeemerderheid en een meerderheid in elke taalgroep.

Ook een latere wijziging van het artikel met de lijst van federale bevoegdheden zou aan die bijzondere procedure kunnen worden onderworpen."

Translation

"That is indeed correct, rebus sic stantibus. Because the declaration of May 2nd 2010 has declared that Article 195 of the Constitution is open for revision, it is however not excluded that Article 35 of the Constitution would be executed during the current legislature. It is possible to review the amending procedure of the Constitution in general or to introduce a special procedure concerning the competences of the federal state. One could determine that the new Article can be introduced in one stage, without having to establish a declaration to review the Constitution. One could also determine that the amendment would only be possible with a two-thirds majority and a majority in each language group.

Also each later amendment to the Article with the list of the federal competences would be subjected to this special procedure".

- **Hugues Dumont** (University Faculties of Saint-Louis), professor at the University Faculties of Saint-Louis, "The Keys for Understanding the Belgian Political Crisis", interview the *l'Echo* of 28th April 2010:

« *Une échappatoire, toutefois : dans la liste des Articles ouverts à la révision en 2007 figure l'Article 195 de la Constitution. Celui-ci détermine justement la procédure de révision de la Constitution. Pour mener une future réforme de nos institutions, il faudrait alors deux étapes. D'abord réviser cet Article pour permettre une révision immédiate de la Constitution (au lieu de la postposer à la législature suivante comme c'est le cas actuellement). Ensuite, dans la foulée, procéder à la réforme voulue.* »

Translation:

"There is one way out, however: the list of Articles opened for amendment in 2007 includes Article 195 of the Constitution. This Article sets out the procedure for amending the Constitution. To conduct any future reforms to our institutions, we would then require two stages. First of all to amend this Article to allow an immediate amendment to the Constitution (instead of postponing it to the next legislature, as is currently the case). Then, following on from that, proceed with the amendment required."

- **Carl Devos** (University of Ghent), interview in *Het Nieuwsblad* dated 20th February 2012:

« *De truc met artikel 195 wordt gesteund door de vereiste meerderheid, is legaal en pragmatisch, want nodig om een staatshervorming uit te voeren.* »

Translation:

"The trick with Article 195 is supported by the required majority, is legal and pragmatic, because there is a need to carry out State reforms."

- **Christian Behrendt** (University of Liège), *"We need to amend the Constitution based on an exceptional procedure"*, interview in *La Libre* dated 5th November 2011:

  « Prévoyons donc, sur une période extrêmement circonscrite, de disposer d'un mode de révision alternatif plus souple qui fait l'économie d'une dissolution préalable des Chambre ».

  Translation:

  "So let us allow, over an extremely confined period, for there to be an alternative and more flexible method of amendment that spares us the need to dissolve the Chambers beforehand."

- **André Alen** (KULeuven) believes that in 2010, the Preconstituent Assembly was not able to take account of the important institutional agreement achieved today and that in view of the political circumstances, a single amendment to Article 195 is acceptable. He also says that holding elections two years from the end of the legislature is not a realistic solution (R. BOONE, "A Manual for the Belgian Institutional Labyrinth – interview by André Alen and Koen Muyle", *Juristenkrant*, 2012, n° 243, p.7):

  "De andere voorwaarden om de Grondwet te herzien, zoals de bijzondere meerderheden, blijven behouden. Als dat eenmalig blijft, heb ik daar geen probleem mee. Ik vind dat veel minder erg dan een nieuw permanent artikel 195 te maken, waarbij in geen parlementsontbinding meer voorzien zou zijn. Dat is veel minder democratisch. Men wordt hiertoe nu gedwongen door de omstandigheden, ik zie dat als de weg van het minste kwaad. »

  Translation:

  "The other conditions for amending the Constitution, such as special majorities, remain in place. If we were to resort to the technique of the interim provision just once, I would have no objection. I find that far less serious than introducing a new and permanent Article 195 that would no longer provide for the dissolution of Parliament. That would be much less democratic. At the present time, we are constrained by circumstances. I consider that to be the path of least evil" (trad.).

- **Francis Delpérée** (Catholic University of Louvain), carte blanche in *La Libre Belgique* dated 15th March 2012:

  « Je me félicite de la manière dont cette opération est poursuivie. Je ne me sens ni violé, ni bousculé par les procédures en cours. Je le dis comme un professeur de droit. Je le dis aussi comme sénateur. [...]

  Je suis serein. C'est la raison pour laquelle je veux, pour ma part, mettre l'accent sur trois données élémentaires.

  La première. L'Article 195 de la Constitution – celui qui organise la procédure de révision – est révisable. Juger la nouvelle disposition au regard des exigences de l'actuelle n'a évidemment aucun sens.

  Deux. L'Article 195 de la Constitution est révisable en tout ou en partie. Il l'est dans ses divers alinéas, ceux qui concernent la déclaration de révision, la discussion du texte ou la

réunion des majorités qualifiées. Considérer que le premier alinéa, celui qui touche à la déclaration, ne serait pas modifiable vise à figer arbitrairement certaines dispositions de l'ancien texte. Au nom de quoi ?

Trois. L'Article 195 de la Constitution est révisable de manière transitoire ou définitive. Que les choses soient claires ! La voie choisie en 2012 est celle d'une disposition transitoire. Celle-ci est correcte. Qui plus est, elle cessera de produire ses effets le jour où l'habilitation procurée sur un point ou un autre aura été utilisée et, au plus tard, en juin 2014. Etant entendu qu'à ce moment, la procédure actuellement en vigueur reprendra tous ses droits ».

Translation:

"I feel really good about the way this operation has gone forward. I don't feel either violated or jostled by the procedures underway. I can say that as a professor of law. I also say it as a senator. [...]

I am untroubled. That's why, for my part, I want to place the emphasis on three elementary facts.

One. Article 195 of the Constitution – the one that organizes how changes are made to it – can be amended. It makes no sense to judge the new provision given the requirements of the current one.

Two. Article 195 of the Constitution can be amended in full or in part. This can be done in various paragraphs – the ones that relate to the declaration to amend, discussing the wording or assembling the majorities required. Saying that the fist paragraph – the one that relates to the statement – would not be modifiable is designed to etch some of the provisions of the old wording arbitrarily in stone. What for?

Three. Article 195 of the Constitution can be amended on an interim basis or permanently. Let's just have things clear! The path chosen in 2012 is the one for an interim provision. It is also the correct one. Also, it will cease to have effect once the authority to move on one point or another has been used up – and at the latest in June 2014. On the understanding that at that time, the current procedure will resume all of its rights."

- **François Tulkens** (University Faculties of Saint-Louis), in his "Note relative to the interim provision about to be inserted into Article 195 of the Belgian Constitution", dated 12th March 2011:

  « Si donc en soi, le procédé n'est pas une surprise, car il a été envisagé depuis au moins 2010, et qu'il n'est pas critiqué par la très grande majorité des constitutionnalistes, il faut en outre et surtout constater que le texte transitoire en question offre les mêmes garanties, sinon plus, que celles de l'Article 195 de la Constitution.

  Quatre éléments retiennent l'attention.

  Tout d'abord, ce texte énonce explicitement que les quorums de présence et de vote parlementaire visés à l'Article 195 sont applicables pour l'adoption des révisions constitutionnelles autorisées par la disposition transitoire (cf. avant-dernier alinéa du texte adopté).

Ensuite, la disposition indique cette fois explicitement le sens exclusif des révisions à opérer. L'objectif est donc de lier le Constituant, en lui assignant l'objectif de mettre en œuvre, comme indiqué, l'accord institutionnel.

De plus, la disposition ne vaut que pour la présente législature. Elle est donc temporaire et ne pourra pas être reproduite.

Enfin, la procédure ne tend pas à supprimer, ni même à modifier, des droits fondamentaux inscrits au Titre II de la Constitution belge, mais uniquement à en ajouter un nouveau, i.e., le droit aux allocations familiales.

On peut donc, avec le Professeur et juge constitutionnel André Alen, considérer que cette mesure transitoire, « one shot », encadrée comme indiquée ci-dessus, ne suscite pas de problème ».

Translation:

"While the process is no surprise in itself, because it has been talked about since at least 2010, and it is not criticized by the vast majority of constitutionalists, it should also be stressed that the interim wording in question offers the same guarantees, if not more, as those in Article 195 of the Constitution.

Four elements hold our attention.

First of all, this wording clearly states that the attendance and parliamentary voting quorums dealt with by Article 195 are applicable for the adoption of any constitutional amendments authorized by the interim provision (see penultimate paragraph of the wording adopted).

Then, on this occasion, the provision indicates expressly the exclusive sense of the amendments to be made. The aim, therefore, is to bind the Constituent Assembly by giving it the target of implementing the institutional agreement, as indicated.

Also, the provision is only valid for this legislature. This makes it temporary and it cannot be repeated.

Finally, the procedure seeks not to suppress or even modify the fundamental rights stated in Section II of the Belgian Constitution, but solely to add a new one, i.e., the right to family allowances.

Hence this temporary measure can, along with the Professor and constitutional judge André Alen, be considered as a "one shot" item, and guided as indicated above, will not cause a problem".

- **Bernard Blero** (Open University of Brussels [ULB]), Professor of public law at the Open University of Brussels, "The revamp of Article 195 of the Constitution: no future?" (2012)

  « *Le procédé en tant que tel n'emporte pas de violation de la Constitution.*

  [...] Le constituant est une autorité publique normative qui statue selon des conditions de quorum et de majorité aggravées par rapport à la procédure ordinaire. A l'égal des autres autorités normatives, il peut consacrer des règles dont la validité dans le temps est limitée, dès

lors qu'il respecte les limites de sa propre compétence et que le procédé n'emporte aucune violation d'une norme de droit supérieure. En se libérant de manière provisoire de la condition de la déclaration-dissolution pour pouvoir réviser certaines dispositions constitutionnelles, alors que l'Article 195 est ouvert à révision, le Constituant n'outrepasse pas les limites de sa compétence.

[...] En adoptant la révision du 29 mars 2012, le Constituant a agi comme il en avait le pouvoir. Cette modification était par ailleurs indispensable : sans celle-ci, l'accord institutionnel n'aurait pas pu être mis en œuvre ».

Translation:

"*As such, the process is not a violation of the Constitution.*

[...] The constituent assembly is a prescriptive public authority that makes decisions based on conditions for forming a quorum and majority that are stricter than the ordinary procedure. Like other prescriptive authorities, it is allowed to set rules with a validity that is limited in time, provided it complies with the limits of its own powers and the process does not constitute a violation of any standard of higher law. By releasing itself temporarily from the condition of statement and dissolution in order to be able to amend certain constitutional provisions, while Article 195 is open to amendment, the Constituent Assembly is not overstepping the limits of its power.

[...] By adopting the amendment of 29th March 2012, the Constituent Assembly has acted within its powers. Apart from anything else, this modification was also essential: without it, the institutional agreement could not have been put in place."