

# The Constructive Vote Of No Confidence In Comparative Perspective – Lessons To Be Learned?

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## I. Introduction

Parliamentary democracies which nowadays consider the introduction of constructive vote of no confidence (CVNC) procedures into their own constitutional systems can draw on rich experiences from those which already operate it in theirs. This article will argue that not only from looking to the obvious examples of Germany, Spain or Belgium and more recent adapters of CVNC-rules like Georgia and Israel lessons can be learned, but that also the debates in countries which so far only discussed the introduction of CVNC-rules, but in the end did not adapt them, can provide useful insights. The latter group includes for instance India, the Czech Republic and Canada. A third trove of experience, into which countries considering the adoption of a CVNC (and political scientists who want to assess the impact of such a procedure) might tap, is the sub-national level. Federal States, especially Germany, and to a lesser extent Belgium, have a lot of long-term experiences to add from the CVNC-rules operated in some of their State systems. Point in case, the first ever successful CVNC happened in North-Rhine-Westphalia a quarter century before one was successfully used on the national level in Germany.

This article wants to highlight some of the lessons which can be drawn from those three sources and in addition will also present some findings from current academic research from different fields<sup>1</sup> and historical debates on CVNC rules.<sup>2</sup> The hope is that a condensed presentation of those facts and scholarly insights might help actors in Mongolia and in other countries which debate the introduction of CVNC rules in the present or future to make more informed decisions, when pondering the question if this instrument would be a useful addition to their own parliamentary systems.

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<sup>1</sup> The debate on CVNC-procedures is currently dominated by political scientists, but clearly would benefit from more comparative constitutional law insights.

<sup>2</sup> This text was developed from a talk the author gave at the “Prof. Chimid – The father of the Constitution”-conference on 28<sup>th</sup> of November 2019 in Ulan Baator, Mongolia. The author thanks the Hanns Seidel Foundation and the Law School of Charles University for making his conference participation possible.

To achieve this aim, the article will be structured in the following way:

1. Introduction
2. The (C)VNC
3. The origins of the CVNC in Germany
4. The current provision of Art. 67 in the German Constitution and practice
5. the CVNC on the level of the German Federal States (*Bundesländer*)
6. the CVNC in the constitution and practice of other countries
7. CVNC debates in other parliamentary democracies
8. Conclusion

## 2. The (C)VNC

When we refer to votes of no confidence, understood as votes through which a government can be dismissed, we can begin with the statement of *Laver* that,

“[i]f such a provision is not in the constitution, then the country concerned does not have a parliamentary government system”.<sup>3</sup>

But this defining principle of parliamentary systems differs in its concrete form and procedural rules from country to country and *Müller* and *Sieberer* add with regard to this wide variety:

“The most fundamental difference runs between the ordinary and the constructive vote of no confidence. Under ordinary no confidence procedures, a cabinet can be forced out of office simply by the majority of (voting) MPs voting against it. In contrast, the constructive no-confidence rules require the election of a new prime minister in order to replace the old one.”<sup>4</sup>

This article will entirely focus on the latter.<sup>5</sup> Before we can turn to the differences in the details of existing CVNC-systems we should take a step back and look at the intellectual origins of this instrument which is enshrined in an ever-growing number of constitutions of parliamentary systems all across the globe.

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<sup>3</sup> Laver, *Legislatures and Parliaments in Comparative Context*, in: *Oxford Handbook of Political Economy*, p. 121 (122).

<sup>4</sup> Müller/Sieberer, *Procedure and Rules in Legislatures*, in: *Oxford Handbook of Legislative Studies*, p. 311 (318).

<sup>5</sup> When we look at the development in Israel, we will see that also in-between states of ordinary and constructive votes of no confidence have been tried. For a general introduction to the legal aspects of votes of no confidence, see only Dziedzic, *No Confidence Votes*, in: *Max Planck Encyclopedia of Comparative Constitutional Law*, Article last updated: January 2017.

### 3. The origins of the CVNC in Germany

It is doubtful if it will ever be possible to identify a mastermind behind the idea of the CVNC. Even the somewhat easier question of who was the decisive person behind the specific rule adopted in Art 67 GG, – on which several articles have been written –<sup>6</sup> cannot, in my opinion, be answered without further research. Even though the intellectual ownership is not of paramount importance for the assessment of current-day CVNC-procedures a look at the German debate during the Weimar Republic and the first years after the Second World War is nonetheless useful. This is not so much due to the fact that Germany was the first country to ever adopt a CVNC, but because in several countries which adopted this instrument afterwards it was not debated in similar depth before it was added to the constitution.<sup>7</sup>

Germany is currently in the middle of celebrating 100 years of the Weimar Constitution and 70 years of its still valid current Constitution or Grundgesetz (GG). In many of the big festive speeches and publications a focus is put on the destructive effect the rule of ordinary vote of no confidence had on the Weimar political system.<sup>8</sup> The norm at issue was Art. 54 of the Weimar Republic Constitution (WRV) which was placed in the third chapter titled “The Reich President and Reich Government”:

“The Reich chancellor and the Reich ministers, in order to exercise their mandates, require the confidence of the Reichstag. Any one of them has to resign, if the Reichstag votes by explicit decision to withdraw its confidence.”

This is a textbook example of an ordinary vote of no confidence. Leaving aside the interesting opportunity to display no-confidence also in individual ministers, it is somewhat surprising – when considering its prominence in the public recollection of the failure of the Weimar Republic – that it was only effectively

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<sup>6</sup> See only Berthold, Das konstruktive Misstrauensvotum und seine Ursprünge in der Weimarer Staatsrechtslehre, Der Staat 1997, p. 81ff. and the discussions during the 8th annual meeting of the „Vereinigung der deutschen Staatsrechtslehrer“ with presentations by Jellinek and Schneider, VVDStRL 1950.

<sup>7</sup> This is for instance claimed by Jose Juan Gonzales Encinar, Das konstruktive Mißtrauensvotum in Spanien, Zeitschrift für Parlamentsfragen 1988, p. 334 (334f.).

<sup>8</sup> See only Norbert Seitz, Die Konstruktionsfehler der Weimarer Reichsverfassung, available online: [https://www.deutschlandfunk.de/100-jahre-nationalversammlung-die-konstruktionsfehler-der.724.de.html?dram:article\\_id=440235](https://www.deutschlandfunk.de/100-jahre-nationalversammlung-die-konstruktionsfehler-der.724.de.html?dram:article_id=440235): “[Die WRV] schrieb mit ihren Konstruktionsfehlern im institutionellen Hauptteil eine verhängnisvolle Negativgeschichte. Dazu zählen vor allem die zu starke Stellung des Reichspräsidenten, sowie die Möglichkeit eines negativen Misstrauensvotums des Reichstags gegenüber dem Kanzler und seinen Ministern. Beides trug entscheidend dazu bei, das politische System erst in fataler Weise zu lähmen und am Ende die Republik – durch die Ernennung Hitlers zum Reichskanzler – in eine Präsidialdiktatur umzuwandeln.” For a good overview of the many other problems of the Weimar system see Wirsching, Die Weimarer Republik – Politik und Gesellschaft, p. 1-23 and in English, Stolleis, A History of Public Law in Germany 1914 - 1945. See also Research Service of the Federal Diet, Stärken und Schwächen der Weimarer Reichsverfassung, WD 1 – 3000-034/12, p. 8.

used twice, both times in the year 1926. But this should not lead one to the premature conclusion that it was not at all relevant for the woes of Weimar democracy. Such a reading would not take into account the fact that several cabinets stepped down preemptively when facing a likely vote of no confidence and in the last years of the Weimar Republic a way was found to have the Presidents appoint cabinets and dissolve parliaments with the help of Art. 48 WRV.<sup>9</sup>

Already in 1926, during and after the two successful uses of the ordinary vote of no confidence in the Weimar years the wisdom of Art. 54 WRV was debated intensively. At this point the debate focused on *non-legally* binding claims that this article should only be used politically if enough members of the Reichstag were willing to support an alternative majority government. Two years later, in 1928, *Carl Schmitt* argued that if a vote of no-confidence is just used as obstruction and cannot bring to power a new government it should be considered not *legally* valid under Art. 54 WRV.<sup>10</sup> Most other scholars disagreed that one could read this into Art. 54 WRV – even though many, like *Anschütz* and *Thoma* disliked the vote of confidence as it was.<sup>11</sup> As far as the author is aware, no one wanted to change the wording of the constitution in a way which would have explicitly connected the voting out of office with the voting into office before 1932. This idea can first be found in a proposal by *Ernst Fraenkel* in his article “Verfassungsreform und Sozialdemokratie”.<sup>12</sup>

After the Second World War one can turn from academic debates and proposals to the process of drafting the post-war Constitutions. While those drafting the Grundgesetz (GG) and the State Constitutions were aware of the earlier debates the main study by *Birke* on the origin of Art. 67 GG and the corresponding articles in the State Constitutions claims that those new debates did not refer much outright to the preceding debates in the Weimar Republic. *Birke* distinguished three important steps towards Art. 67 GG after 1945:<sup>13</sup>

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<sup>9</sup> See only *Wirsching*, *Die Weimarer Republik – Politik und Gesellschaft*, p. 11.

<sup>10</sup> *Schmitt*, *Verfassungslehre*, 5<sup>th</sup> unchanged edition, p. 344f. A similar claim was made by *Heinrich Herrfahrdt* even one year earlier. See in more detail *Müller*, *Das konstruktive Mißtrauensvotum. Chronik und Anmerkungen zum ersten Anwendungsfall des Art. 67 GG*, *Zeitschrift für Parlamentsfragen* 1972, p. 275 (283).

<sup>11</sup> *Berthold*, *Das konstruktive Misstrauensvotum und seine Ursprünge in der Weimarer Staatsrechtslehre*, *Der Staat* 1997, p. 81 (87).

<sup>12</sup> *Fraenkel*, *Verfassungsreform und Sozialdemokratie* [1932], cited from *Ernst Fraenkel*, *Gesammelte Schriften*, Band 1, *Recht und Politik in der Weimarer Republik*, p. 516ff.: „Stellen wir die Forderung auf, daß ein Parlament, das zur Approbation nicht fähig ist, das Recht zur Reprobation verwirkt“. He refers in this part to *Erich Kaufmann*, who made political remarks in this direction, but did not suggest concrete constitutional changes. For more historical details (and some critical remarks about *Fraenkels* role) *Berthold*, *Das konstruktive Misstrauensvotum und seine Ursprünge in der Weimarer Staatsrechtslehre*, *Der Staat* 1997, p. 81ff. can be recommended.

<sup>13</sup> *Birke*, *Das konstruktive Misstrauensvotum in den Verfassungsverhandlungen*, *Zeitschrift für Parlamentsfragen* 1977, p. 77ff.

First the **debates on the earliest Länder constitutions**, during which the CVNC was first added in Wuerttemberg-Baden. Bavaria at this time opted under the influence of Swiss-inspired *Hans Hoegner* and *Wilhelm Nawiasky* for a “government for time”<sup>14</sup> approach and pushed this as an opposing option in the later GG talks as well.<sup>15</sup>

The second focal point was the **constitutional convention of Herrenchiemsee** which had the role of developing a discussion proposal for the debates at the *Parlamentarischer Rat* or Parliamentary Council, the body to adopt the later GG. During the *Herrenchiemsee* conference the idea of the strict connection between the vote of no confidence and formation of the new government was explicitly supported by some delegates but saw pushback from others. Criticism came from supporters of a “government for time” approach but also from the opposite end of the spectrum. For example, *Otto Suhr* from Berlin criticized that a CVNC would make it too complicated to get rid of a government and therefore would not fit into a true parliamentary system.<sup>16</sup> Finally, the CVNC made it into Art. 90 of the *Herrenchiemsee* draft.<sup>17</sup>

The CVNC survived also during the sessions of the *Parlamentarischer Rat* in Bonn. Here the CVNC-idea was supported mostly by the Social Democratic Party of Germany (SPD) and especially by minister *Rudolf Katz* from Schleswig-Holstein.<sup>18</sup> Also Art. 68 GG, to which we will return below, was added at this stage.

Sometimes *Carlo Schmid*, who was the leading person behind the Wuerttemberg-Baden constitution, member at the *Herrenchiemsee* talks and later Head of the Main Committee responsible for the GG draft in the *Parlamentarischer Rat*, is presented as father of Art. 67 GG.<sup>19</sup> But others deserve credit as well. *Birke* points out that for instance *Otto Küster* played a big role as he added *Fraenkel's*

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<sup>14</sup> Birke, Das konstruktive Misstrauensvotum in den Verfassungsverhandlungen, Zeitschrift für Parlamentsfragen 1977, p. 77 (p. 86). See also Oberreuter, Landesparlamentarismus in Bayern, in: Immerfall, Parteien, Kulturen und Konflikte, p. 144f.

<sup>15</sup> The State Constitutions which got adopted after the GG all contained a CVNC, whereas in the State Constitutions before the adoption of the GG a wider variety of solutions existed. See also Pfetsch, Ursprünge der Zweiten Republik, p. 318.

<sup>16</sup> Birke, Das konstruktive Misstrauensvotum in den Verfassungsverhandlungen, Zeitschrift für Parlamentsfragen 1977, p. 77 (p. 90). Interestingly, for Berlin *Otto Suhr* argued in favor of a CVNC according to Pfetsch, Ursprünge der Zweiten Republik, p. 319.

<sup>17</sup> The exact wording of Art. 90 Herrenchiemsee draft was: “Der Bundestag kann dem Bundeskanzler sein Mißtrauen nur dadurch aussprechen, daß er den Bundespräsidenten unter Benennung eines Nachfolgers ersucht, den Bundeskanzler zu entlassen.”

<sup>18</sup> Vgl. Müller, Das konstruktive Mißtrauensvotum. Chronik und Anmerkungen zum ersten Anwendungsfall des Art. 67 GG, Zeitschrift für Parlamentsfragen 1972, p. 275 (287).

<sup>19</sup> See for example Müller, Das konstruktive Mißtrauensvotum. Chronik und Anmerkungen zum ersten Anwendungsfall des Art. 67 GG, Zeitschrift für Parlamentsfragen 1972, p. 275 (285f.) who claims this notion was in part pushed by *Carlo Schmid* himself.

idea almost word for word to the *Herrenchiemsee* draft, while it is unclear if he was even aware of *Fraenkel's* 1932 proposal.<sup>20</sup>

#### **4. The current provision of Art. 67 in the German Constitution and practice**

After this brief overview of the development towards a CVNC procedure we can now turn to the final product of these debates in Art. 67 GG:

“The Bundestag may express its lack of confidence in the Federal Chancellor only by electing a successor by the vote of a majority of its Members and requesting the Federal President to dismiss the Federal Chancellor. The Federal President must comply with the request and appoint the person elected.

Forty-eight hours shall elapse between the motion and the election.”

It should be pointed out that this article has to be seen in relation with several other constitutional norms, in particular the election of the chancellor (*Bundeskanzler*) in Art. 63 GG and the above mentioned Art. 68 GG which contains a question of confidence, which can be asked by the chancellor and is often seen as the “twin norm” of Art. 67 GG.<sup>21</sup>

While compared to other countries’ constitutional provisions on the CVNC the wording of Art. 67 GG is quite brief. But it also has to be considered that the constitutional provision is further fleshed out in § 97 of the Procedural Rules of the Federal Diet titled: “Vote of no confidence in the Federal Chancellor”:

“On a motion in accordance with Article 67, paragraph (1) of the Basic Law, the Bundestag may express its lack of confidence in the Federal Chancellor. The motion shall be signed by one quarter of the Members of the Bundestag or a parliamentary group comprising at least one quarter of the Members of the Bundestag and shall be worded in such a way as to propose a successor by name for election by the Bundestag. Motions that do not fulfil these conditions may not be placed on the agenda.

A successor shall be elected in a single secret ballot (Rule 49), even where several candidates have been proposed. The successor shall be considered elected only if he or she receives the votes of the majority of the Members of the Bundestag.

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<sup>20</sup> Birke, Das konstruktive Misstrauensvotum in den Verfassungsverhandlungen, Zeitschrift für Parlamentsfragen 1977, p. 77 (p. 89f.).

<sup>21</sup> Leicht, Mißtrauensvotum und Vertrauensfrage — eine konstruktive Alternative, Zeitschrift für Rechtspolitik 1972, p. 204ff. had a reform idea which would condense Art. 67 GG and Art. 68 GG and *de facto* return to an ordinary vote of no confidence.

The time of the election shall be determined in accordance with Article 67, paragraph (2) of the Basic Law.”

In this provision the threshold for initiating the CVNC deserves to be pointed out. Another interesting aspect – from the comparative perspective – is that the vote is supposed to be anonymous as seen in paragraph 2. This, of course, might make it somewhat more likely that members of the previous governing coalition are willing to break ranks as would be the case with an open ballot.<sup>22</sup>

The solution which made its way into Art. 67 GG, its corresponding constitutional norms and the procedural rules – while already criticized in the drafting process as seen above – was also attacked by some in the first years of its existence. For our purposes it suffices to quote *Loewenstein* who was very critical and wrote in his *Verfassungslehre*:

“A high price was paid for the stability of the cabinet, the democratic process got its throat constricted.”<sup>23</sup>

He made this judgment when he still believed Germany would develop towards a two-party system in which any success of a CVNC would be quite unlikely. While this assumption was wrong, he indeed was right that it took quite a while until the first practical use of the CVNC procedure took place in the German Federal Diet. In 1972 *Rainer Barzel* from the CDU tried to oust *Willy Brandt*, who at the time was chancellor of a Social-Liberal SPD- FDP coalition.<sup>24</sup> When it came to the vote counting, the challengers were lacking enough votes to make *Barzel* chancellor under the Art. 67 GG procedure. Later it surfaced that East German spy agencies had influenced some votes.<sup>25</sup> As was mentioned before, the vote is not cast by name in Germany, unlike in some other countries with a CVNC, which makes such incidents or claims even more complicated to investigate after the fact (and arguably also more likely to happen at all).

Ten years later, in 1982, Germany witnessed its first successful use of the CVNC-procedure when conservative CDU-candidate *Helmut Kohl* successfully challenged SPD-chancellor *Helmut Schmidt*, after enough liberal-FDP delegates broke coalition ranks this time. But *Kohl* did not serve the whole rest of the term, he deemed it politically necessary to go for a General Election, which his party controversially triggered shortly afterwards through the “twin norm” of Art. 68 GG (the question of confidence).

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<sup>22</sup> Later we will turn to some further consequences.

<sup>23</sup> Loewenstein, *Verfassungslehre*, 4<sup>th</sup> edition, p. 92 (own translation).

<sup>24</sup> For a more detailed description see only Müller, *Das konstruktive Mißtrauensvotum. Chronik und Anmerkungen zum ersten Anwendungsfall des Art. 67 GG*, *Zeitschrift für Parlamentsfragen* 1972, p. 275ff.

<sup>25</sup> Grau, *Auf der Suche nach den fehlenden Stimmen 1972. Zu den Nachwirkungen des gescheiterten Mißtrauensvotums Barzel/Brandt*, *Historisch-Politische Mitteilungen* 2009, S.1 ff. (in particular p. 15ff.).

Despite having been used only twice, and successfully even only once, in the general scholarship and in public wisdom the CVNC is still perceived as a success story, being sometimes even described as “the core of the new political system”<sup>26</sup>. It is beyond the scope of this article to judge to what extent the general success of the West German and later unified German political system is indeed connected with the existence of the CVNC.<sup>27</sup> But what can be said is that if one looks deeper into the scholarship on the CVNC or research on political legitimacy the opinions about its usefulness certainly become more diverse.

Few attempts to use the instrument in practice also mean few cases which could provide us further insights from the judicial branch. The most relevant case from the Federal Constitutional Court on the matter of the CVNC came in the aftermath of Chancellor *Kohl* using Art. 68 GG in collaboration with his own parties’ MPs abstaining from the vote to force a new election as mentioned before. While in this case from 1983 the German Constitutional Court had mainly to ponder the question if this was a legitimate use of Art. 68 GG, the Karlsruhe Justices also dealt with the question of legitimacy of a government which came into power through a constructive vote of no confidence. Not surprisingly, the German Constitutional Court made clear that from a constitutional point of view such a government has the same legitimacy as one which came into power immediately after a general election.<sup>28</sup>

## 5. CVNC in the State practice

While the 1982 case was the first successful use of Art. 67 on the national level in Germany, the first ever case of a CVNC already happened under Art. 61 of the State Constitution of North-Rhine-Westphalia in February 1956, when the SPD and FDP were successful in breaking the old CDU-led government of *Karl Arnold* and putting SPD-politician *Fritz Steinhoff* into power. Some of the points we already identified as problematic in CVNC-systems surfaced already in this initial use of the CVNC-procedure. Because such a vote can only be successful if some erstwhile government backing MPs break the coalition trust,<sup>29</sup> those cases regularly lead to talk about “backstabbing”, “execution” and worse. More importantly, and somewhat in sync with the first case on the Federal level in Germany, there were some rumors about “not honorable ways” of trying to

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<sup>26</sup> See quotation in Birke, Das konstruktive Misstrauensvotum in den Verfassungsverhandlungen, Zeitschrift für Parlamentsfragen 1977, p. 77 (p. 78 Fn. 3). For another positive assessment see Mußnug, in: Handbuch des Staatsrechts, § 8 Rn. 66 (p. 338).

<sup>27</sup> Sceptical for instance M. Schröder, in: Handbuch des Staatsrechts, § 65 Rn. 44 (p. 1150) or Böckenförde, Bonn ist nicht Weimar, Archiv des öffentlichen Rechts 1967, p. 253f.

<sup>28</sup> BVerfGE, 62, 1 (43).

<sup>29</sup> When we get to Poland and Hungary, we will see how a CVNC procedure can also be used by a government to change the PM without having elections.



influence members of the State Diet. One member of parliament, *Wolfram Dorn*, later informed the public he was offered 100.000 Deutschmark to vote against the secret vote of no-confidence by business lobbyists, which he refused. In later interviews he said that he knew 3 more members of parliament who got this offer but refused to name them.<sup>30</sup>

This first ever use is but one example that it might be worthwhile to include the CVNC on the State Level in Germany and in other Federal States into studies about the impact of CVNC. Especially number crunching quantitative studies by political scientists get more reliable results the larger their case numbers are.<sup>31</sup> As most German States have CVNC-procedures in their State Constitutions their inclusion into comparative studies would almost double the analyzable case number.<sup>32</sup> The exceptions on German State level include Bavaria, which stayed close to the idea of “government for time” which it also pushed for the national level in the pre-GG-talks. The Bavarian constitution to this day merely stipulates in Art. 44 III 2 that the prime minister (*Ministerpräsident*) needs to step down if he or she cannot work trustfully with the parliament. Other States without CVNC rules are Rhineland-Palatinate and Hesse.<sup>33</sup> Also the rules of procedure differ from State to State. Just one example: Lower Saxony stands out with having adopted a three-week period between the initiation and the actual vote.<sup>34</sup>

While this article cannot highlight other uses of the CVNC procedure on the State level in detail,<sup>35</sup> an interesting situation from Schleswig-Holstein in the end of the 1980s deserves to be mentioned. In 1987/88 during a CVNC in the State parliament in Kiel it came to a stalemate between both sides with the obvious effect that the constructive vote of no confidence did not succeed and the government stayed in power.<sup>36</sup>

To finish our brief detour to State practice let us get back to the question of legitimacy of prime ministers coming into power through successful CVNCs.

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<sup>30</sup> For the discussion of this first case see in great detail Düding, *Parlamentarismus in Nordrhein-Westfalen 1946-1980*, p. 255ff. and p. 382ff. For the bribery allegation see in particular p. 385.

<sup>31</sup> For a particular “number-crunchy” political science study in this area of research see Diermeier/Feddersen, *Cohesion in Legislatures and the Vote of Confidence Procedure*, *The American Political Science Review* 1998, p. 611ff.

<sup>32</sup> There are of course some differences which would have to be controlled for. Most important the irrelevance or at least lower importance of foreign policy questions.

<sup>33</sup> Art. 114 Constitution of Hesse and Art. 99 of the Constitution of Rhineland-Palatinate. Others like Berlin and Bremen might look more like ordinary votes of no confidence, but those become only legally binding with a new person voted into office and therefore get close to those CVNCs in which both aspects are combined in one Article/step.

<sup>34</sup> Compare Art. 32 Constitution of Lower Saxony. In some of the debates on the State Constitutions the KPD pushed for the right to extend the vote of no confidence also on individual ministers. The other parties pushed – with the argument of government stability – against this, comp. Pfetsch, *Ursprünge der Zweiten Republik*, p. 318.

<sup>35</sup> Even before the first one on the national level happened, another one was tried in NRW in 1966.

<sup>36</sup> Reutter, *Vertrauensfrage und Parlamentsauflösung. Anmerkungen zur verfassungspolitischen Debatte und zur Verfassungspraxis in den Ländern*, *Politische Vierteljahresschrift* 2005, p. 655ff.

While the Federal Constitutional Court had no doubts about the constitutional legitimacy, we already saw that *Kohl's* political instinct went the other way. While in the case of the first CVNC in North-Rhine-Westphalia the new coalition stayed in power for a bit more than a year after the successful vote, *Werner Reutter* comes to the following conclusion with regard to all CVNCs on the State level until 2005:

“The constitutional practice in the states does not confirm the assumption of the Federal Constitutional Court (BVerfGE 62,1 43) that a government which comes into power through the CVNC has the same legitimacy as one which comes to power through immediate elections. Practice seems to show that even though from the constitutional point of view the court is obviously right, in practice a confirmation through elections seems to be warranted in most cases.”<sup>37</sup>

In my opinion this last finding should make clear that CVNC is no wonderous cure against government instability and while it might help in some political systems to ensure stability this can hardly be constitutionally ordered. A way larger role is played by the political culture, the role and number of political parties and the acceptance of coalition governments. This becomes clearer when we bring a broader group of countries with CVNC procedures into our focus.

## 6. Other countries with CVNC

While this overview article can by no means provide in-depth analysis of other countries with CVNC-procedures, for our purposes it will suffice to highlight some differences compared to the German procedures and mention some findings from previous scholarship which do not surface in studies focused exclusively on Germany.

Let us begin with **Spain**. Art. 113 of the Spanish Constitution includes a version of a CVNC as well.<sup>38</sup> It was introduced after the end of the *Franco* dictatorship and compared to Germany was much less debated before its adoption.<sup>39</sup> First of all, Spain seems to be a good example to prove the last argument from the previous section that a CVNC-procedure on its own is no guarantee for government stability even though such stability is usually assumed to be the

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<sup>37</sup> Reutter, Vertrauensfrage und Parlamentsauflösung. Anmerkungen zur verfassungspolitischen Debatte und zur Verfassungspraxis in den Ländern, Politische Vierteljahresschrift 2005, p. 655 (p. 668).

<sup>38</sup> A list of several relevant constitutional provisions can be found in Lento/Hazan, The Vote Of No-Confidence: Towards An Analytical Framework For Analyzing Parliaments and Government Termination, Paper prepared for the ECPR Workshop on “Parliaments and Government Termination”, Mons, Belgium, April 2019 (kindly provided by R. Hazan), p. 25: Germany Art. 67, Israel Art. 28, Slovenia Art. 116, Hungary Art. 21, Poland Art. 115, Belgium Art. 46. There article also provides al list of the relevant procedural rules which flesh out the constitutional provisions.

<sup>39</sup> Encinar, Das konstruktive Mißtrauensvotum in Spanien, Zeitschrift für Parlamentsfragen 1988, p. 384 (384f.).

main consequence of a CVNC-system. Just note that the Spaniards had to vote for the national parliament four times in the last four years. A main problem in Spain seems to be that the parties are not willing to enter coalitions. That is a more general political culture problem and not alone a question of constitutional design. While it is a common line of reasoning for scholars in Germany to acknowledge that CVNC curtails parliaments' control of the government more than is desirable but still deem this acceptable in the end because the CVNC-procedure helps to avoid more problematic governmental crisis, the literature on Spain points out that nothing stops the opposition to vote someone into office who does not really have their confidence and therefore instability would only be prolonged. Though it has to be said that so far this seems to be a theoretical concern. The connection between the voting into office and the voting out of office is sometimes also used as one of the arguments against the CVNC. For instance, in Spain it has been argued that two different things are artificially tied together: the vote of no confidence and the finding of a new government. The problem that *Encinar* sees with this is that this could result in the focus of the parliamentary debate being only on the new prime minister and not so much on the reasons to vote the old government out of office. He claims that happened in Spain in 1980 when there was not a proper debate on the CVNC and the reasons why the old government should fall, but only debate about the possible new person.<sup>40</sup> While this in fact will be in most cases the result, it is hard to see why this should be a strong argument against CVNC procedures.

An interesting aspect from **Poland** is that for some time the country had both a regular vote of no confidence and CVNC avenue at the same time. If the ordinary vote of no confidence was successful, the President could dissolve the Sejm and early elections would follow. Since a constitutional change in 1997 Poland has only the CVNC option left.<sup>41</sup>

**Slovenia** has already witnessed two successful CVNC-usages in 1992 and 2000. As the success rate and also the rate of initiated CVNCs are so low in general, this already puts Slovenia in the top spot regarding CVNC-government changes. Slovenia is also interesting in another respect; it is the only CVNC system with the ability to just expel one minister out of the government. This instrument exists in some modern regular vote of no confidence systems as well and was also included in the Weimar Constitution as was already mentioned before.

As the last of the post-communist countries which adopted a CVNC procedure in the early 1990s, **Hungary** also has a constitutional practice that provides

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<sup>40</sup> Encinar, Das konstruktive Mißtrauensvotum in Spanien, Zeitschrift für Parlamentsfragen 1988, p. 334 (388).

<sup>41</sup> Just, Constructive Motion of No Confidence as a Tool for Parliamentary Control of Government: The Czech Republic in a European Comparison, Revues des Sciences Politiques 2015, p. 169 (172).

guidance for a general assessment of CVNC rules. The procedure was only successfully used once, but in a way which differs from the so far mentioned usages. Then prime minister *Ferenc Gyurcsány* and his left-wing party MSZP used it in 2009 to make his economy minister the new prime minister. They did not use the other avenue of a General Election because the opposition was at that time riding high in the polls.<sup>42</sup> Something similar before had happened in Poland in 1995 as well.<sup>43</sup>

**Belgium** until 1995 had a regular vote of no-confidence but afterwards adopted a CVNC system and, like Germany, Belgium also has the CVNC on the State level.

**Israel** is a particularly interesting case: first in 2001 a semi-constructive mechanism (e.g. the legislature had to propose a candidate to supervise the formation of a new government – a kind of *formateur* – rather than an alternative prime minister) was adopted. A later change in 2015 introduced a complete CVNC.<sup>44</sup> Due to its novelty there is a large trove of recent political science scholarship on the Israel case.<sup>45</sup> For our purpose the most interesting feature, which goes beyond the CVNC procedures of other countries, is that under the current Israeli rules it is not only necessary to combine a majority behind an alternative prime minister for a successful vote but instead a complete cabinet with policy platform must be approved to get the old government out of office.<sup>46</sup>

In recent years several countries in other world regions have adopted CVNC procedures as well, for instance Lesotho, Thailand, Papua-New Guinea and Georgia.

The last case is particularly interesting, so we will only have a closer look at the evolution of CVNC-rules in **Georgia**. The first attempt to include CVNC in its constitution resulted in the now outdated Art. 81 of the Georgian Constitution.<sup>47</sup> It suffered under an overly complicated process as it stipulated an important role for the President and resulted in a *de facto* veto power for the President with

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<sup>42</sup> See Just, Constructive Motion of No Confidence as a Tool for Parliamentary Control of Government: The Czech Republic in a European Comparison, *Revue des Sciences Politiques* 2015, p. 169 (172).

<sup>43</sup> This is noted by Piersing, Reconsidering Constructive Non-Confidence for Canada: Experiences from Six European Countries, *Canadian Parliamentary Review* 2016, p. 5 (p. 7).

<sup>44</sup> See in more detail Lento/Hazan, The Vote Of No-Confidence: Towards An Analytical Framework For Analyzing Parliaments and Government Termination, Paper prepared for the ECPR Workshop on “Parliaments and Government Termination”, Mons, Belgium, April 2019 (kindly provided by R. Hazan), p. 16. & p. 19ff.

<sup>45</sup> See amongst others only Hazan/Diskin, Plus ça Change, Plus C'est La Même Chose: The 2015 Israeli elections, *Electoral Studies* 2015, p. 411ff.

<sup>46</sup> Lento/Hazan, The Vote Of No-Confidence: Towards An Analytical Framework For Analyzing Parliaments and Government Termination, Paper prepared for the ECPR Workshop on “Parliaments and Government Termination”, Mons, Belgium, April 2019 (kindly provided by R. Hazan), p. 20.

<sup>47</sup> For an in-depth critique see Gegeneva, Georgian Model of Constructive Vote of No-Confidence: Gordian Knot in the Constitution of Georgia, *Journal of Law*, p. 289 (297).

further ways to over-rule such a veto.<sup>48</sup> Most staggering was the time frame: Parliament was supposed to discuss a motion no less than 30 and no more than 35 days after its submission by 2/5 of MPs. In case a motion was to be accepted a “lengthy and complex procedure”<sup>49</sup> would follow with the actual vote taking place potentially weeks later. In the CVNC process also several candidates would have been able to be voted on and if none received the necessary votes the President had the right to dissolve the parliament. This complex procedure was criticized by Venice Commission in 2010.<sup>50</sup> The arcane procedure with odd quorums, the presidential role and especially the time period of up to three months the process would take were the main concerns of the Venice Commission and Georgian local critics. The external and internal backlash led to constitutional reform and the adoption of Article 57 of the Georgian Constitution. This new Article stipulates that Parliament can pass a CVNC with 1/3 of MPs necessary to initiate the process. At this stage they already have to present their candidate for prime minister. The parliament afterwards is supposed to vote for or against the new government not earlier than seven and not later than fourteen days after the initiation of the process. This new procedure, which requires 1/2 of MPs for a successful CVNC also takes the President largely out of the process. If the vote of no confidence is not passed, then the same MPs cannot initiate the process for the next six months.<sup>51</sup>

The more detailed description of the new procedures in Georgia, which has been evaluated more favorably by the Venice Commission,<sup>52</sup> gives us a chance to finish the look at current CVNC countries by highlighting some differences in exactly these kind of procedures in a comparative perspective.<sup>53</sup>

One question with particularly great repercussions for the process is the question if the vote on the CVNC is held as a **closed or open vote**. As we saw some countries like Germany stipulate that the vote of no-confidence is to be taken on a secret ballot. Such a rule makes it a bit more likely to succeed, as an open vote somewhat strengthens the government as the risk for MPs which consider switching from the government majority is somewhat higher. As the early cases

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<sup>48</sup> For a closer explanation and critique see Gegeneva, Georgian Model of Constructive Vote of No-Confidence: Gordian Knot in the Constitution of Georgia, *Journal of Law*, p. 289

<sup>49</sup> In the words of the Venice Commission, Opinion no. 543/2009, p. 12.

<sup>50</sup> Venice Commission, Opinion no. 543/2009

<sup>51</sup> See Georgian Constitution. The author is grateful for helpful comments by *Tamara Oniani*.

<sup>52</sup> Venice Commission, Opinion no. 737/ 2013.

<sup>53</sup> Those differences in procedures enable political scientists to rank CVNC systems according to their hurdles for a government change. For an interesting example see only Lento/Hazan, The Vote Of No-Confidence: Towards An Analytical Framework For Analyzing Parliaments and Government Termination, Paper prepared for the ECPR Workshop on “Parliaments and Government Termination”, Mons, Belgium, April 2019 (kindly provided by R. Hazan), Table 2 p. 12 and p. 13: „The most permissive country with a CVNC is Slovenia [...] While Slovenia has a constructive mechanism combined with an absolute majority, it has a secret vote and does not place significant restrictions on the frequency nor a quorum.”

from Germany show a secret ballot also makes it harder to investigate potential attempts of bribery.

An additional factor in which the CVNC procedures differ is with regard to the numbers needed for both the initiation of the procedure and the final vote. Regarding the **quorum to initiate** the procedure many different solutions exist. For instance, Hungary requires twenty per cent of legislators. In Germany § 97 of the procedural rules requires that the motion shall be signed by one quarter of the Members of the Bundestag or a parliamentary group comprising at least one quarter of the Members of the Bundestag. Such a quorum can certainly be used a barrier against mere obstructive attempts without any chance of success. For such a final success of a CVNC, most countries require more than 50 % of MPs. But the **required majorities** still differ between the countries as both pluralities or absolute majority (as in Germany) are possible. Obviously, an absolute majority requirement strengthens the government position even more than is already the case with any CVNC system. It is also noteworthy that in Spain the PM can be voted into office with simple majority but needs absolute majority to be voted out of office (in Germany Art. 63 and Art. 68 GG are streamlined in this regard).

Another interesting factor is the so-called **cooling off periods**. In Poland seven days must pass before the actual CVNC vote can take place, in Spain as well almost a week needs to pass. Whereas, as mentioned before, the German Constitutional stipulates 48 hours in Art. 67 II GG, while in Lower Saxony the State Constitution stipulates in Art 32 three weeks in between initiation and the final vote. There are certainly good reasons to not have such a monumental vote for a parliamentary system totally out of the blue on the same day of the motion being introduced into parliament. Therefore, the main question which every country interested in a CVNC has to ponder with regard to this procedural rule is how long such a period between a successful motion and the formal CVNC vote should be. Allowing too much time might make the whole CVNC procedure more attractive to be misused as a mere tool of obstruction. In addition, a situation in which a CVNC has chances to succeed by definition also means a stressful crisis for the parliamentary system in question. Therefore, a good argument can be made to not artificially prolong such situations too much.

A last procedural rule which deserves to be mentioned is Section 175 of the Spanish procedural rules which demands that a **written reason** has to be given for the initiation of a CVNC.<sup>54</sup> Most other CVNC-systems do not include such a requirement.

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<sup>54</sup> STANDING ORDERS OF THE CONGRESS OF DEPUTIES, Part VIII, particular Chapter III.

## 7. CVNC debates in other countries

As we saw there seems to be a trend towards the introduction of CVNCs into parliamentary systems. Recent additions include Israel and Georgia, which both arrived at their current procedures after earlier experiments which were not deemed far-reaching enough or constitutional practice and expertise showed that they contained problematic elements. But interesting arguments for and against the adoption of CVNC procedures cannot only be found in those countries which have eventually adopted such rules but also in countries which experienced serious scientific or political debates about this procedure but in the end opted against such a change of their ordinary vote of no confidence procedures.

The first country which justifies a look is **Canada**. In some academic reform proposal the idea of CVNC adoption was included with the aim to enhance *parliamentary* stability.<sup>55</sup> Other academics criticized that as a country with a tendency of single-party majoritarian governments – in this regard similar to Spain – Canada might not be as good a fit for this procedure as for instance Germany with its proportional electoral system and consensus based politics. Therefore, *Piersing* concludes that in Canada the introduction of a CVNC would in fact only limit the responsiveness of government to parliament and thus to public opinion without creating more stability.<sup>56</sup>

While Canada is an example for a system with few political parties on the other end of the spectrum countries like **India** exist with an abundance of political parties. For India it was argued by *Pehl* that with 20 or more parties in opposition it would be impossible to find a new majority in advance of a vote.<sup>57</sup> He therefore arrives at the conclusion that:

„opting for a constructive vote of no confidence as a quick fix for India would render the executive virtually immune from a threat on the part of the legislature in practical terms, the lesson seems patently clear: Do not touch with a ten-foot pole!“<sup>58</sup>

This, of course, echoes the argument of *Loewenstein* made for the expected German two-party system we mentioned earlier. Indeed, it seems to be logical that CVNC fits best in political systems with a mid-range of parties (but of course no country knows for certain how its party system will develop).

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<sup>55</sup> Aucoin/Jarvis/Turnbull, *Democratizing the Constitution: Reforming Responsible Government*, 2011, p. 119.

<sup>56</sup> Piersing, *Reconsidering Constructive Non-Confidence for Canada: Experiences from Six European Countries*, *Canadian Parliamentary Review* 2016, p. 5 (p. 13).

<sup>57</sup> Pehl, *The Debate on the Constructive Vote of No Confidence in India – Trading in Accountability for Stability?*, *Verfassung und Recht in Übersee (VRÜ)* 2016, p. 16ff.

<sup>58</sup> Pehl, *The Debate on the Constructive Vote of No Confidence in India – Trading in Accountability for Stability?*, *Verfassung und Recht in Übersee (VRÜ)* 2016, p. 16 (p. 33).

In India debates about the CVNC happened at several steps in its constitutional history, for example in 2008 and 2012 (after votes of confidence / no confidence).<sup>59</sup> The same can be said about the **Czech Republic** where this debate popped up on several occasions (no wonder with Germany to the west and several other post-communist neighbors all using it)<sup>60</sup>. For our current purposes the 2009 debate is most interesting. At that point a successful conventional vote of no confidence was very controversial and echoes a bit the Weimar Republic problems described earlier in the historical section. This vote withdrew the confidence from *Mirek Topolánek's* government during the first ever EU presidency of the Czech Republic, when all external eyes were on the small country. The topplers of his government were so diverse that they could not agree on anything. In fact, the main leader of the opposition said in advance that he would not get involved in formation of another government. This is exactly the kind of situation a CVNC can avoid and therefore ignited the reform debate in the Czech Republic.<sup>61</sup>

But what becomes most apparent from the Czech Republic and other countries debating the introduction of CVNC rules is that different parties propose it for their own assumed political gains. Parties in power see it as a way of protecting their own government. Eying short term political gains is certainly no good way to assure long-term acceptance of new constitutional rules.<sup>62</sup> To avert this whiff of wrong motives it would in my opinion be important to build consensus and attempt long term reform, not changes which kick in immediately and benefit the government of the day.<sup>63</sup>

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<sup>59</sup> Pehl, The Debate on the Constructive Vote of No Confidence in India – Trading in Accountability for Stability?, *Verfassung und Recht in Übersee (VRÜ)* 2016, p. 16 (p. 16).

<sup>60</sup> For a broader study of government stability in the region see Harfst, *Regierungsstabilität in Osteuropa: der Einfluss von Parlamenten und Parteien*, Discussion Paper FS III 01-204, WZB. The part on votes of no confidence begins on p. 11.

<sup>61</sup> The whole incident is described in greater detail by Just, *Constructive Motion of No Confidence as a Tool for Parliamentary Control of Government: The Czech Republic in a European Comparison*, *Revue des Sciences Politiques* 2015, p. 169 (171).

<sup>62</sup> I was very happy to learn in Ulaanbaator that Prof. Chmid oftentimes warned his countries lawmakers from exactly this danger, which lead him to oppose several suggested constitutional changes.

<sup>63</sup> Another country, albeit one with a classic vote of confidence – which is in interesting political waters right now – is the UK. Some of its woes are also tied to the fixed term parliamentary act and the result that nowadays two ways of no confidence motions, one statutory and the conventional form are available under UK law. This is beyond the scope of this article but a detailed description can be found in Schleiter/Evans, *The Changing Confidence Relationship Between the UK Executive and Parliament in Comparative Context*, *Parliamentary Affairs* 2019, p. 1ff.



## 8. Conclusion

Before we conclude by summing up some of the findings of this article we should turn to the question if CVNC-procedures do reach their main goal: to lead to more stable governments. Luckily, we can refer to political science studies which have tried to answer this question. The work of *Rubabshi* and *Hasson* shows that in countries with CVNC-procedures governments stay longer in power than in those with ordinary votes of no confidence. The average completion of term time of 74% compares to 57% per cent in parliamentary systems without CVNC rules.<sup>64</sup> Other studies have found that CVNC votes occur relatively rarely, for instance in six Western democracies studied by *Piersig* only one CVNC with a real change of power has ever led to a completely new government lasting longer than a year (Slovenia 2013).<sup>65</sup> To align those study results with each other, my assumption is that the higher average completion rate is due to the higher hurdles of toppling a government in the first place and not because the Governments which get voted into power in this way can stay in power particularly long.

While CVNC procedures might reach the main goal of their adopters we also saw that other factors, as for instance a country's political culture or the number and role of political parties, will have to be considered for a useful assessment of its usefulness in any country interested in introducing CVNC into its own constitutional system. Such a country focused approach should – among other things – also address the following points:

Under CVNC procedures a successful complete government change under this procedure needs a “switching” of some erstwhile supporters of the government, in practice very often the junior coalition partner. In the political debates this was often presented as “backstabbing” or worse. This leads to the question if such rules might not in the long run poison the well of political culture. Particularly if the vote happens in secret, there seems to be a danger of bribery as well. Of course, that would also be the case under a regular vote of no confidence but making the voting a government out of office more complicated and rare might amplify the power of each single MP (or the people who can buy an MP). All those factors remind us that the legitimacy of CVNC government changes seems to be a big practical issue. Through analyzing the practice in both the German States, the German national level and all other countries with CVNC

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<sup>64</sup> see: Rubabshi/Hasson, *The Effect Of The Constructive Vote Of No Confidence on Government Termination and Government Stability*, ECPR Workshop on Parliaments and Government Termination, April 2019 (Paper kindly provided by R. Hazan), p. 18. And this data already includes Spain which we discussed above.

<sup>65</sup> Study of Piersig of Belgium, Spain, Hungary, Poland, Germany and Slovenia. Some more cases of successful use, but those ones were cases like in Hungary and Poland where the government itself wanted to change the prime minister. Compare Piersig, *Reconsidering Constructive Non-Confidence for Canada: Experiences from Six European Countries*, *Canadian Parliamentary Review* 2016, p. 5 (p. 7).

rules, it became obvious that it is in fact very rare for someone coming into power through winning a CVNC to govern long-term without going back to the people and getting a legitimacy boost through a new General Election. These points (and others) of course need to be weighed in addition to the main problem of the CVNC, which is that this procedure somewhat detaches governments from the parliamentary control through the considerable weakening of the parliamentary sword of a vote of no confidence. Or as *Shugart* has put it:

“[T]he constructive vote [of no confidence] may permit a form of separated powers otherwise unthinkable in a parliamentary system: a government opposed by a majority in parliament but nonetheless able to remain in power. The government would thus be ‘stable’ despite lacking parliamentary support.”<sup>66</sup>

Another take-away from this article is that the rules on the CVNC can never be evaluated on its own as their successful implementation is always linked to other constitutional rules. Reforms therefore also need to address and streamline the way a new government comes into power (rules of investiture) and the other ways under which a government can be dissolved.<sup>67</sup>

The main take-away from this article on the CVNC is therefore that any country which considers adding this instrument to its constitution should only do so after carefully considering the experiences of other countries as well as the States in Federal systems. Some not so obvious aspects, like the Polish and Hungarian examples of putting into power another person from the governing party or the academic reminder from Spain, that nothing in most CVNC procedures stops a divided opposition to just vote one person into power without agreeing on anything else and thereby prolonging political instability, should also be considered additionally to the central question of whether a CVNC does not simply go too far in curtailing the parliamentary control of the government. Once a country has answered this last question negatively, weighted all the other pros and cons and wants to design its own CVNC procedure a lot of effort should be put into searching for the right procedural rules (e.g. what quorum should be needed for initiating a motion / should the vote be done by open or closed ballot / what majority is required / how long should the cool down period be / etc.). The design of those procedures might also to some extent counterbalance the central problem of removing accountability to the majority in parliament (e.g. through lower restrictions on CVNCs). In this regard there are certainly lessons to be learned from the countries touched upon above.

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<sup>66</sup> Shugart, Political-Institutional Reform in Israel: A Comparative Perspective, <https://en.idi.org.il/articles/9356>, p. 24

<sup>67</sup> Germany with its Art. 63, Art. 67 and Art. 68 GG is an example in case.

But is a CVNC also a preferable instrument to reach the aim of government stability? While one can clearly not design the danger of government instability out of one's constitutional system, this should be no excuse for not attempting reforms helpful to fulfill the aim of government stability which every constitution should aim for.<sup>68</sup> Nevertheless, the question mark behind the fundamental question of whether a CVNC is a positive addition to a constitution must remain. This question cannot be answered in the abstract, but needs a thorough analysis by experts of the constitutional history, political culture, likely party system and constitutional framework of the particular country in case. For some parliamentary democracies the answer might be yes, but for a lot of others the answer will be no.

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<sup>68</sup> For the role of government stability see for instance the German Constitutional Court decisions regarding parliamentary thresholds. E.g. BVerfGE 129, 300. From the literature see only M. Schröder, in: Handbuch des Staatsrechts, § 65 Rn. 35 (p 1146ff.).