The Process for Amending the Belgian Constitution

by Francis Delpérée

In a Constitution no provision is more important than any other, all contribute equally to the dignity of the constitutional rule. There is however one provision, and perhaps only one, which warrants closer examination: that which specifies how a Constitution may be amended.

The insertion of an amending formula into the Constitution is a most striking phenomenon, one whose full import is not always appreciated. In this instance the Constitution does not regulate the exercise of public powers, nor does it specify the rights of members of the political establishment. In a more straightforward way, the Constitution talks about itself and establishes its own status.

In other words, in one or several provisions that have constitutional force, the Constitution describes its own nature and purpose and how it can be amended. From both a political and a technical standpoint, no government or citizen can ignore this message.

From a political standpoint, the provision prescribing the amending formula summarizes the State's basic principles and values. For its own transformation, the Constitution requires the respect of what it holds most dear. Not that the Constitution intends to dictate its laws to future generations, this would be preposterous. It simply wishes to safeguard the interests under its care.

For instance, the amending provision will reveal whether the Constitution is rigid or flexible. In adopting a flexible Constitution, the State expresses its wish to adjust without delay to economic or social changes. On the other hand, the adoption of a rigid Constitution reflects the State's will to remain true to its initial concerns and to avoid sudden institutional upheavals.

From a more technical standpoint, the provision that lays down the conditions, pertaining both to form and content, under which the political organization of a State may be altered leads to other constitutional provisions. The Constitution's adoption procedure foreshadows the political system's main characteristics, the amending procedure confirms them.

As another example, the provision may stipulate that one or several legislative assemblies are to be involved in the Constitution-framing process. In such case, the State directly signifies its adherence to a parliamentary system of government. It may, on the other hand, opt for procedures in which the various communities have their say. In such case, the State views itself as a composite society and its institutions as one element.

> ***Article 131 of the Belgian Constitution is no exception to the rule. It is the key provision, some might be tempted to call it the "lock and key" provision of a particularly rigid Constitution. Adopted on February 7, 1831, it has never been amended.***

Recent reforms of the Belgian state, which are designed to gradually transform the unitary character of the State into a federal one, have led to the introduction of indirect methods of revising the Constitution. Since 1970 special laws have been enacted through procedures similar to those used to amend the Constitution.

The Amending Process

Article 131 of the Belgian Constitution reads as follows:

> The legislative power has the right to declare that it is necessary to revise such constitutional provision as it shall designate. After this statement, both Chambers are automatically dissolved. Two new Chambers will be convened in accordance with article 71.
>
> These Chambers, in agreement with the King, shall decide the points submitted for revision.
>
> In this case, the Chambers may not debate unless at least two-thirds of the members of each of them are present and no change shall be adopted unless it secures at least two-thirds of the total votes cast.

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The text provides an answer to three simple but fundamental questions: Who undertakes the revision of the Constitution? What is amendable? What is the procedure for amending the Constitution?

Initiator of amendment

The wording of the article is clear: the constituent assemblies, in agreement with the King, decide the points submitted for revision. In other words, the constituent power is made up of three branches: the House of Representatives, the Senate and the King. The concurrence of these three public authorities – a common agreement, as specified in paragraph 4 – is required for any change.

This rule is significant, both for what is excluded and what is prescribed.

The Belgian Constitution does not resort to a national convention system, under which an *ad hoc* assembly is elected for the sole purpose of altering the constitution. It is wary of an institution that might challenge and even supersede the Legislative Chambers.[1]

For the same reason, the Belgian Constitution does not call on the population, via a referendum, to amend the Constitution. Since it prohibits legislative referendums,[2] it has all the more reasons to oppose referendums on the Constitution.

According to the Belgian Constitution, only the branches which customarily exercise legislative authority, that is under article 26 of the Constitution the House of Representatives, the Senate and the King, may amend the Constitution. It is understood that any one of these branches may take constitutional initiatives, as it may take legislative initiatives.[3]

This rule raises a fundamental question. In Belgian law, are the Constitution-framer and the lawmaker one and the same authority? With the exception of the special majorities required in order to take effective constitutional action, the constituent power appears to be identified with the legislative power. To put it in different terms, the legislative authority appears to be vested with a legislative function, its customary function, and with a constituent function in exception cases.

In fact, this is only an optical illusion. As will be shown, the bicameral parliament, which made up of elected representatives, can only undertake the revision of the Constitution as such after two new Chambers have been formed.

Thus amending authority is vested in the two new Legislative Chambers, made up of "freshly elected members" in the words of Georges Burdeau, and in the King.[4]

Object of Amendment

Article 131 of the Belgian Constitution lays down two principles. In the first place, any constitutional provision may be amended; there are no supra-constitutional texts that are beyond the jurisdiction of the amending authority;[5] no article is taboo[6]. In the second place, the whole Constitution cannot be revised at once, this is inconceivable. Only partial revisions may be carried out.

A secondary question should be addressed here: can the provisions of article 131, which lay down the rules for amending the Constitution, themselves be amended? Undoubtedly, the answer is yes. The practice[7] is indeed to that effect. Articles 84 and 131[8] of the Constitution specify when a revision may not be undertaken, thereby amending, at least indirectly, article 131 of the Constitution. However two clarifications are essential.

The first relates to procedure, "131 shall be amended in accordance with 131"[9]. To be less cryptic, this means that the amending procedure can only be amended according to the rules laid down in the prevailing Constitution and not according to the rules set forth in the amendment proposal.

The second relates to content. In my opinion, the provision which institutes the constitutional amendment procedure cannot be repealed, nor can it be altered in such a way as to abolish any distinction between constitutional rule and the rules established by constituted authorities. Reforms cannot be introduced with a view to establishing an on-going constitutional amendment process.

The Constitution-framing authority cannot destroy the very basis of its own competence. To use an image, this would amount to sawing off the branch on which one is sitting.

Amending Procedure

The Belgian State favours only partial and gradual revisions of its Constitution. For this reason, it has devised a procedure which includes three separate phases: the initiative, the dissolution and the revision proper.

1. Initiative

Any member of the bicameral parliament may file a *proposal* to declare the need for the revision of such-and-such an article in the Constitution; similarly, the King may submit a *project* to declare the need for a revision. The proposal or project is then reviewed according to a procedure similar to that used for legislative purposes.

The constitutional amendment process as such cannot be undertaken unless the initiative results in the joint

formulation of *declarations of the need for a revision* by the two Chambers, on the one hand, and by the King on the other[10]. In doing so, the three branches express their common will to amend a particular constitutional provision. The declarations are published in the *Moniteur belge.*

We should specify that at the *preconstituent* stage, the Legislative Chambers proceed according to their customary rules, that is by absolute majority. At the constituent stage, they proceed according to the two-thirds majority rule.

The declaration of the need for a revision must meet a formal condition: it must *designate* the constitutional provisions that will be subject to a revision. A general reference to a heading, chapter or section is considered too vague. The declaration should refer specifically to an article, and even to a subsection, paragraph or sentence member.

Can the declaration go beyond the constitutional prescription and specify not only the need for a revision but also how the Constitution should be revised? Such an initiative would be incorrect[11]. Preconstituent assemblies are not empowered to do the work of constituent assemblies. Were the declaration to ignore this prescription and specify the orientation of the revision, obviously the amending authority would not be bound by the stipulation.

2. Dissolution

Upon publication of joint declarations of the need for constitutional revision, the Legislative Chambers are dissolved. As specified in article 131, paragraph 2, "both Chambers are automatically dissolved". The executive branch does not set the date of their replacement: "in accordance with article 71", there is a convocation of the electorate within forty days, and to the new Chambers which are now constituent within two months.

During the election campaign, candidates and their parties have the opportunity of taking a stand on the constitutional issues that will be debated by the newly-elected representatives. At the polls, private citizens have the opportunity of making political choices by voting for the candidates who will put forward their views during the constitutional debates.

Thus the dissolution has a particular consequence, that of involving, if only very indirectly, the electorate in the revision of the Constitution[12].

3. Revision

As described in paragraphs 4 and 5 of the Constitution, the amending process has three main characteristics.

First, the process is optional. The declaration of the need for a revision does not mandatorily require the constituent assemblies nor the government in power to take constitutional initiatives. It is purely an enabling declaration, an authorization to revise the Constitution. Based on the political situation and the parliamentary majorities it enjoys, the government will decide whether or not to bring before the constituent assemblies concrete *projects.* Members in either assembly may also choose to submit concrete *proposals.*

Second, the process has limitations. The newly-elected representatives have a maximum of four years – their term of office – in which to take effective action. In addition, there are limitations with regard to the object of the revision. The constituent authorities may only decide "the points submitted for revision" (paragraph 4). They cannot as a matter of course review issues which, in their opinion, should be settled. It is absolutely prohibited to amend articles which do not appear in the declaration of the need for a constitutional revision[13].

Third, the process is exceptional. This explains why the procedures for amending the Constitution are so complex. Each constituent assembly may decide the points submitted for revision only if it secures a two-thirds majority at two successive stages. At the first stage, a *quorum of attendance* is required: at least two-thirds of the members must be present at the debate. At the second stage, a *quorum of votes* is required: at least two-thirds of the total votes cast (abstentions need not be taken into consideration at this point) must be secured in order to adopt a provision.

Finally the King decides, "in common agreement with" the constituent assemblies, the points submitted for revision. He sanctions resolutions amending articles in the Constitution, promulgates the new provisions and sees to their publication in the *Moniteur belge.* Revised provisions are effective from the date of revision.

Assessment of Amending Process

It goes without saying that in assessing an amending process, as instituted by the Constitution of a given State, the political and social context must be taken into consideration. Consequently, the following assessment of the strengths and weaknesses of the process for amending the Belgian Constitution will take into account the distinctive characteristics of Belgian society.

Advantages

With regard to amending authorities, Belgium's constitutional system appears satisfactory. Involved in the amending process are the legislative assemblies, which are made up of the nation's representatives, the government, which defines the general directions of the body politic, and finally even the electorate[14], the primary recipient of new constitutional standards. Thus

all parties concerned are invited to take part in an operation which is essential in the life of the State.

With regard to what is amendable, Belgium's constitutional system also appears adequate. Any constitutional provision may be amended if necessary. New articles may also be inserted so that the Constitution may keep abreast of developments in the economic, social or cultural field, for instance, and reflect the current concerns of the political establishment.

With regard to amending procedures, Belgium's constitutional system is discussed more extensively. During periods of intense political discussions, it has the advantage of "calming things down". It is impossible to "get everything and to get it now". The staggering of the amending process over three successive phases, the suspension of government and parliamentary activity, and the chronological development the process supposes all contribute to funnel the evolution of ideas and facts. Decisions are not taken abruptly, solutions are developed gradually and passions and emotions cool down in the process.

In this sense, the Belgian Constitution – a particularly rigid Constitution – is designed so as to preserve the equilibrium which provided the basis for the foundation and organization of the Belgian State. It has built-in barriers to upheavals whose consequences would be unforeseeable.

Drawbacks

With regard to amending authorities, one question arises: how is it that the Constitution of a State that has been borrowing for over twenty years certain characteristics of federalism[15] has not seen fit to give collectivities, that is the Communities and Regions, the opportunity of voicing their concerns when the Constitution is being amended? This despite the fact that the main purpose of a Constitution is to lay down rules for the sharing of powers and the distribution of means among the various political institutions.

There are two possible explanations for this anomaly.

On the one hand, a new constitutional provision can be adopted only if, in each legislative assembly, there is a two-thirds majority vote in its favour. In a political context where one community (the Flemish community) represents 58% of the population, the 66%-majority requirement provides a kind of guarantee for the minority community (the French-speaking minority); it does not, however, provide any guarantee whatsoever for the third community (the German-speaking community – which numbers 65,000 people in a country with 10 million inhabitants.

On the other hand, constitutional amendments require government input – the latter may either submit its projects to the parliamentary assemblies or reserve the right to sanction the assemblies' proposals. In a State where, pursuant to article 86 of the Constitution, the two major linguistic communities must be equally represented on the Council of Ministers[16], this amounts to giving the two communities represented in the central government the equal right of participation in the amending process.

With regard to what is amendable, Belgium's constitutional system does not give rise to any criticism.

With regard to amending procedures, the system is generally considered excessively rigid, in at least three respects.

First, because the amending process is in three separate phases, procedures tend to be lengthy. It may prove impossible for Belgian authorities to expedite revisions that are urgently required.

Second, the fact that the legislative assemblies have to be dissolved jeopardizes the smooth running of the government and parliament. Let us illustrate this point: say the government, at the opening of the legislature, decides that such-and-such a provision in the Constitution should be revised. It immediately submits a declaration of the need for a revision and if the Chambers decide to adopt it, then the latter are automatically dissolved and a general election is called. Nothing guarantees that the Chambers will be returned with the same majority. This might force the government to resign.

In other words, in declaring the need for a revision, the government and parliamentary majority are in fact committing "hara-kiri". Faced with such a prospect, they may well decide not to undertake a revision even though it might be absolutely necessary.

Third, the requirement for a series of different majorities also jeopardizes the adoption of a new amendment. Preconstituent assemblies follow the absolute majority rule while constituent assemblies follow the two-thirds majority rule. As a result of the elections, the government may no longer enjoy the two-thirds majority required in order to take effective action. In other words, these redoubled political hazards may jeopardize the revision of the Constitution.

This series of drawbacks has affected the political system. As early as 1831, Joseph Lebeau warned the National Congress that "if changes to the Constitution cannot be made as soon as the consensus turns against it, it will be infringed or scorned". An unduly rigid Constitution may lead those in power to bypass its prescriptions.

Proposals for Reform

There have been numerous proposals to amend article 131 of the Belgian Constitution. The following does not claim to be an exhaustive list of all the proposals put forth by the various political parties; it does, however, give a general idea of the thinking in this area.

Some proposals are extremely radical. According to some, article 131 of the Constitution must be revised since "the constituent elements of the sovereign Flemish nation will control the future implementation and revisions of the Constitution".

Others advocate the institution of an on-going amending process. According to the Volksunie, for instance, article 131 of the Constitution must be amended so that "the Constitution may be amended at any given time, as long as a two-thirds majority is secured". The rule would not apply to "articles pertaining to fundamental rights and freedoms".

Yet others advocate a reform based on the principles of a more participatory democracy. In the opinion of the ecological movement, the "procedure for amending constitution provisions should be more flexible" and provision should be made for a revision "based on a referendum to vote on a people's initiative".

The French Socialists favour a different approach. They believe, in particular, that article 131 of the Constitution should be revised so that it would be possible to amend the Constitution without any preliminaries and by introducing a special "dual majority procedure" (among the French elected representatives and among the Flemish elected representatives). This rule would not apply to provisions pertaining to fundamental rights and freedoms.

In commenting on these various proposals in 1975, I stated the following: "The procedures described in article 131 differentiate the Constitution from both ordinary and special laws. To modify and simplify constitutional amendment rules would lower the value of constitutional prescriptions. No doubt, in one way or another, the Communities should be involved in the amending process. For instance, a majority in each linguistic groups could be required under paragraph 5 of article 131. As to the rest, it seems inappropriate to suggest the ongoing revision of a document which must benefit from the stability conferred upon it by the support of the majority. In reviewing this ill-prepared file, I do not see the need to change one iota of article 131 of the Constitution"[17].

Adjusting the Amending Process

In 1970, due to the rigidity of the Belgian Constitution, a procedure to carry out institutional reforms was initiated. It may be useful to describe it here. The status of public institutions may be altered through the adoption of a special law, without having to resort to a constitutional amendment. We may well wonder whether the two procedures are not bound to draw nearer in the future.

Development of Special Laws

In several of its provisions, the Belgian Constitution simply lays down a few broad rules. For their implementation, the Constitution does not appeal to the law (that is to the legislator who makes a ruling based on absolute majority). Rather the Constitution relies on a special law (which can only be enacted if there is a two-thirds majority vote in is favour).

An example will illustrate the procedure. Article 107 quater of the Belgian Constitution lays down the following rule: "Belgium comprises three regions: the Walloon region, the Flemish region and the Brussels region". It makes no mention, however, of the regional authorities that will have to be created, nor does it specify their future duties, the administrative or financial resources that will be put at their disposal, their territorial jurisdiction.

Paragraph 2 then goes on to specify that a special law shall attribute "to the regional organs which it creates and which are composed of elected representatives, the power to regulate such matters which it determines, with the exception of those referred to in articles 23 and 59 bis, within the scope and manner as it determines".

This enabling provision was implemented through the adoption of the Special Law on Institutional Reforms on 8 August, 1980. The Law contains 98 articles subdivided into numerous subsections and paragraphs. The Law is an extension of the Constitution, it gives the Regions their effective status[18].

The procedure is used in ten or so constitutional provisions, all dealing with major issues related to the status of public institutions.

Every time a special law is required, a quorum of attendance as well as a quorum of votes must be reached. The quorum of attendance is 50% in each legislative assembly and half the members in each of the two linguistic groups must be present.[19] The quorum of votes is set at 66% in each legislative assembly – as it is set for constitutional matters but here again, half the members in each linguistic group must vote in favour of the project.

Significance of Special Laws

In certain respects, such as the manner and the political context in which it is evolved, a special law is very similar to a constitutional standard. Not that the special law can be classed as a constitutional standard: it does not fulfil all the formal conditions prescribed in article 131. It does

not have constitutional force and must therefore comply with the provisions of the Constitution.[20]

The fact remains, however, that the Constitution and the special law are complementary. Without the intervention of the special law the Constitution would remain a dead letter. Conversely, without the intervention of the Constitution, the special law would not be able to give a matter its precise outline.

Constitution and Special Laws

In several respects, the respective procedures used to promulgate the Constitution and special laws are similar. The matters dealt with are also similar.

A leaning in this direction can be detected already and the patterning of constitutional majorities on the model of special legislative majorities is being considered. Paragraph 5 of article 131 would have to be amended as follows:

"In this case, the Chambers shall not debate unless at least two-thirds of the members of each of them are present and *unless the majority of the members in each linguistic group are assembled*. No change shall be adopted unless it secures at least *a majority of the total votes cast in each linguistic group of each Chamber, as long as the total affirmative votes cast in the two linguistic groups corresponds* to two-thirds of all votes cast".

The proposed formula would have the advantage of showing, more clearly than it does now, that any revision of the Constitution is the fruit of a solid consensus between the two major communities that make up Belgium.

Conclusion

The Belgian Constitution is perhaps one of the most rigid in the world. Yet three major revisions were undertaken in the last twenty years: in 1970, 1980, and 1988. A few minor amendments were also carried out in 1991. This would indicate that there is no need to radically alter the procedures for amending the Constitution.

The Belgian Constitution is rooted in the notion of parliamentary sovereignty. Yet by prescribing general elections prior to the actual revision of the Constitution, it manages to consult Belgian citizens. In a dualistic society, a referendum on the Constitution would be much more ticklish.

The Belgian Constitution is a Constitution which, in most of its provisions, may appear very federalist – in the sense of autonomist – yet its amending procedure is primarily unitary in character. Undoubtedly, there is a need to shed this appearance and to model the majorities required for the adoption of a new Constitution on those required to enact a special law.●

Notes

1. Francis Delpérée, *Droit constitutionnel, vol. 1, Les données constitutionnelles*, (Brussells: Larcier, 1987, 2nd ed.), No. 48.
2. *Referendums* (under the direction of F. Delpérée), Brussells: Ed. CRISP, 1985). See in particular the reports on Belgium by Y. Lejeune and J. Regnier (p. 13) and on Canada by G.-A. Beaudoin (p.79).
3. Constitution, article 27: "The right of initiative is vested in each of the three branches of the legislative power."
4. The fact remains, of course, that when the Legislative Chambers are vested with constituent authority they are called upon to perform two separate duties.
5. See M.-F. Rigaux, *La théorie des limites matérielles à l'exercice de la fonction constituante*, with a foreword by P. De Visscher, (Brussells: Larcier, 1985).
6. Belgium has entered upon a series of international agreements, in the area of human rights for instance. It goes without saying that the State would not abolish or amend in a restrictive manner the provisions in its own Constitution that pertain to the matters covered in such agreements.
7. Constitution, article 84: "During a regency, no change can be made in the Constitution which concerns the constitutional powers of the King and the articles 60 to 64 and 80 to 85 of the Constitution".
8. Constitution, article 131bis: "No revision of the Constitution may be undertaken, nor pursued in time of war or when the Chambers are prevented from meeting freely on the national territory".
9. F. Delpérée, "Quelques aspects constitutionnels d'une crise politique", *Annales de droit de Liège*, 1974, p. 27.
10. The declarations remain separate documents. Only those provisions referred to in all the declarations are amendable. A provision mentioned in only one declaration is unamendable.
11. Unless the purpose is to insert a new provision into the Constitution in order to settle an issue not dealt with in any other provision.
12. F. Delpérée, "Ma Constitution et mon juge", *Le Vif-L'Express*, February 9, 1990.
13. We must also condemn the practice followed by the government and constituent assemblies which consists in amending in an article submitted for revision the provisions of another article itself not subject to revision. The use of such a "billiard technique" is in flagrant violation of the rules governing the amendment of the Constitution.
14. However is the electorate really aware of the constitutional issues at stake? The choice of voters could well be based on more immediate concerns, such as the government's overall policy or even the personality of the candidates running for election.
15. F. Delpérée, "La Belgique, État fédéral?", *Revue du droit public et de la science politique*, 1972, p. 607. By the same author: "L'organisation des communautés et des régions", *Revue générale de droit. Editions de l'Université d'Ottawa*, 1983, No. 1, p. 213; "La voie fédérale", *Journal des Tribunaux*, 1989, p. 2; "Le nouvel Etat belge", *Pouvoirs*, 1990, No. 54, p. 111.
16. Constitution, article 86: "With the possible exception of the Prime Minister, the Council of Ministers comprises an equal number of French-speaking and Dutch-speaking ministers".
17. F. Delpérée and F. Jongen, *Quelle révision constitutionnelle?* (Brussels: Bruylant, 1985), p. 207.
18. F. Delpérée, *Droit constitutionnel*... No. 40: "The Special Law does not only ensure the application of a broad rule. It is an extension of the Constitution and converts it into a reality. It is this law which concretely reorganizes public institutions and the balance of power".
19. Constitution, article 32: "For those cases determined in the Constitution, the elected members of each Chamber are divided into a French-language groups and a Dutch-language group in the manner established by the law".
20. F. Delpérée, "La Constitution, la loi, le décret et l'ordonnance", *Journal des Tribunaux*, 1990, p. 107.