

# The process of constitutional amendment in Belgium

Christian BEHENDT\*

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## I. History and evolution of the national constitutional amendment procedure

In September 1830, the Belgian revolution broke out and on October 4, the Provisional Government proclaimed the independence of the new state<sup>1</sup>. Two days later, on October 6, a fourteen-member Commission was entrusted with the preparation of a draft Constitution, which could serve as a basis for the discussions of the future Constitution-making Assembly, the *National Congress*.

The elections to the National Congress, i.e. the first national votes in the history of Belgium, took place on 3 November 1830 ; and the Congress held its opening session on 10 November.

Within less than three months time, the National Congress adopted the new Constitution. This impressive speed is mainly due to the fact that the Congress quite closely followed the draft text of the Fourteen-member Commission and only departed from it when he found serious reasons to do so. Formally promulgated on 7 February 1831, the Constitution came into force two weeks later, on 25 February<sup>2</sup>.

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\* LL.M. (Yale), M.Jur. (Oxon), Dr. iur. (Paris 1). Professor of Public and Constitutional Law, University of Liège, Belgium. The author can be reached at [christian.behrendt@ulg.ac.be](mailto:christian.behrendt@ulg.ac.be). The present publication was finalized on December 29, 2011.

<sup>1</sup> *Official Bulletin of the Belgian Provisional Government*, n° 4.

<sup>2</sup> Xavier MABILLE, *Histoire politique de la Belgique, Facteurs et acteurs de changement*, Bruxelles, CRISP, 4<sup>th</sup> edn., 2000, p. 108.

In addition to the text of the Constitution itself, the Belgian National Congress of 1830-1831 also adopted two Decrees with constitutional value (i.e. the decrees of 18 and 24 November 1830), which are, as the Constitution *sensu stricto*, still in force today.

With her Constitution of 7 February 1831, Belgium currently counts among the countries in the world with one of the oldest Constitutions still operating : to our knowledge, Belgium is in fourth position, after San Marino (her Constitution was enacted in 1600), the United States of America (Constitution enacted in 1787) and Norway (Constitution enacted in 1814).

Since, over the decades, the original text of the 1831 Constitution underwent numerous changes, it was decided in 1994 to *re-number* the whole text, without however altering its substance. This re-numbering operation was called “*the co-ordination of the Constitution*”<sup>3</sup>. To a certain extent, this change is analogous to the re-numbering of the EC-Treaty (which was renumbered twice since 1957).

The co-ordination procedure is set out in article 198 (formerly 132) of the Belgian Constitution, which provides :

“In agreement with the King, the Houses of Parliament may change the numerical order of articles and of sub-articles of the Constitution, in addition to sub-divisions of the latter into titles, chapters and sections, modify the terminology of provisions not submitted for revision in order to harmonise them with the terminology of new provisions and to ensure the concordance of the Dutch, French and German texts of the Constitution.

In this case, the Houses may debate provided that at least two-thirds of the members composing each House are present ; and no change may be made unless it is supported at least by a two-thirds majority.”

Every article of the Constitution which already existed prior to the renumbering operation in 1994 is thus known under two numbers : under its old one, applicable until February 16, 1994, and under its new one, applicable since February 17, 1994. This remark is important when one wishes to consult literature or case-law in Belgian constitutional law : in reading a comment written in the 1950’s, on, for example, article 68 of the Constitution (which lays down the treaty-making power of the King), one has to bear in mind that, in terms of the *current* Constitution, this text is now vested in article 167. And the same is true for the constitutional amendment procedure : originally located in article 131 (old numbering), the provision – which has, since then, never been amended – is today lodged in article 195.

On the moment on which the re-numbering operation came into effect (i.e. on February 17, 1994), it was quite inappropriately also decided to abolish the title of the Constitution (which was “Constitution of February 7, 1831”) and to replace it by a new one, being “Co-ordinated Constitution of February 17, 1994”. This change of denomination is however misleading, since the constitutional text of 1831 is, legally speaking, still in force : the renumbering operation of 1994 does not amount to the creation of a new Constitution. Therefore is it correct to state that the current Belgian Constitution was enacted in 1831 – even if the title of the Constitution as it is published in today’s statute books seems to suggest that it was created in 1994.

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<sup>3</sup> *La coordination de la Constitution* in French and *de coördinatie van de Grondwet* in Dutch).

## I.1. Birth of the amendment procedure : article 195 (ex-article 131) of the Belgian Constitution

On February 4, 1831, the National Congress agreed upon the final version of Title VII of the new Constitution. This title, which included only one article (Article 131), is dedicated to the amendment procedure of the Constitution<sup>4</sup>. The enactment of this provision did not generate a long discussion. Indeed, at that time, the Constitution makers' attention was mainly focused on the choice of a King and a royal family for the newly created state (because Belgium did not have a pre-existing dynasty which could have been naturally called on the throne).

More generally, the Belgian Constitution of 1831 largely borrows from the French and Dutch constitutional texts which existed at that time<sup>5</sup>. The new article 131 is no exception to that rule. It is drafted on the model of the Dutch Constitution of 1815<sup>6</sup>, except for one point : the new Belgian article imposes, prior to any constitutional amendment, the *dissolution of Parliament*. Quite paradoxically, it is today precisely *this* feature of the Belgian amendment procedure – the automatic dissolution of both Houses of Parliament – that is the most exposed to criticism<sup>7</sup>.

Article 131 (nowadays article 195) is still in force today and it figures, together with the American procedure of article V of the Constitution of 17 September 1787, among the most rigid amendment rules in the contemporary legal world. It provides :

“The [federal]<sup>8</sup> legislative power has the right to declare that there are reasons to amend those constitutional provisions it determines.

After such declaration, the two Houses of Parliament are automatically dissolved.

Two new Houses are elected, in accordance with the provisions of Article 46.

These Houses then decide, in agreement with the King, on the points submitted for revision.

In this case, the Houses may discuss provided that at least two-thirds of the members who compose them are present ; and no change to the Constitution may be made unless it is supported by at least two-thirds of the votes cast”.

As one can see, the amendment procedure of the Belgian Constitution contains thus three distinct phases (we will expound them more detail *infra*, under point II.3).

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<sup>4</sup> During the co-ordination operation of 1994, Title VII was renumbered and became Title VIII.

<sup>5</sup> Only a dozen of articles are genuinely new. They mainly concerned the appointment of senators, the relationships between Church and State and the people's right to assemble (Xavier MABILLE, *Histoire politique de la Belgique, Facteurs et acteurs de changement, o.c.*, p. 116).

<sup>6</sup> To be precise, on Articles 229 to 232 of the Constitution of the Kingdom of the United Netherlands of 24 August 1815, *Official Journal of the Netherlands*, n° xxix (the territory of Kingdom of the United Netherlands is nowadays divided into three states, i.e. the Netherlands, Belgium and Luxembourg).

<sup>7</sup> Christian BEHRENDT, « Les propositions émises dans le passé en vue de modifier l'article 195 de la Constitution belge », in : Francis DELPÉRÉE (dir.), *La procédure de révision de la Constitution*, Brussels, Bruylant, 2003, p. 115.

<sup>8</sup> The adjective “federal” was added during the co-ordination operation in 1994, as a matter of clarification. It is the sole alteration of the provision since 1831.

## I.2. Evolution of the amendment procedure

As already pointed out, the revision procedure, even though criticised, has never been modified. At several occasions, proposals have been made to replace the current version of article 195 in order to reduce its rigidity and make it more subtle, but they were all abandoned<sup>9</sup>. Today (in December 2011), the debate seems to have died out, under more because of the recent institutional difficulties with which the country has struggled : after the last general elections of June 13, 2010, the different political parties of the country needed more than 540 days in order to agree upon the installation of a new government (which was finally sworn in on December 6, 2011). These institutional difficulties have shown the need for – and the usefulness of – a highly rigid amendment procedure.

In this context, one should also not forget that recent opinion polls show that in the Dutch-speaking part of the country (Flanders), the Flemish independence party N-VA is credited with approximately 35 pc of the votes<sup>10</sup>, and the Flemish extremist right wing party *Vlaams Belang* with 11 pc of the votes<sup>11</sup>. Put together, these two parties, both in favour of the independence of Flanders as sovereign country (though traditional enemies on many other political issues), unite 46 pc of the Flemish voters.

It is thus no surprise that currently a vast majority of academics and politicians consider the fact that Belgian constitution is endowed with a particularly rigid amendment procedure rather as an advantage.

## I.3. Selective overview of constitutional amendments

The *first* amendment ever of the Belgian Constitution was enacted in 1893<sup>12</sup> (between 1831 and 1893, no amendment took thus place) and concerned the extension of voting rights in national elections.

The *second* phase of amendments intervened in 1920-1921<sup>13</sup> and was also related to the right to vote in national elections.

In order to proceed to the third phase of amendments, one has to advance more than 40 years, to 1967. In other words, if one considers the first century of the existence of the Belgian state (1831-1931), the Constitution was, in that period, only modified twice.

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<sup>9</sup> For a more complete overview on these abandoned proposals in the history of Belgian constitutional law, see Christian BEHRENDT, « Les propositions émises dans le passé en vue de modifier l'article 195 de la Constitution belge », *o.c.*, pp. 113-135.

<sup>10</sup> Poll realized by the *Ipsos* demographic institute, published in the newspaper *Le Soir* of December 3, 2011.

<sup>11</sup> *Idem*.

<sup>12</sup> Amendment of 7 September 1893, *Belgian Official Journal*, 9 September.

<sup>13</sup> Amendments of 15 November 1920 (*Belgian Official Journal*, 3 December), 7 February 1921 (*Belgian Official Journal*, 10 February), 24 August 1921 (*Belgian Official Journal*, 31 August) and 15 October 1921 (*Belgian Official Journal*, 24-25 October).

The *third* period of amendment took place between 1967 and 1971. It is also known “The first State reform” (in total, there have been so far five State reforms, and the sixth one is currently in process<sup>14</sup>).

The *fourth* period of amendment occurred between 1980-1985 (second State reform), and the *fifth* period between 1988-1992 (third State reform). The *sixth* period of amendment (fourth State reform) occurred in 1993-1994 (as to the fifth State reform, which took place in 2001, it did not require an amendment of the Constitution).

The sixth State reform, which is about to start, will thus lead to a *seventh* period of amendment of the Constitution.

## II. The process of constitutional amendment

### II.1. Formal Constitution – Substantive Constitution

In analyzing the “Constitutions” of different legal systems (as it is the case in the present book), it is important to distinguish the word “Constitution” in its *formal* meaning (*Constitution formelle* in French, *formele Grondwet* in Dutch) from its *substantive* meaning (*Constitution matérielle* in French, *materiële Grondwet* in Dutch)<sup>15</sup>.

In its formal meaning, a Constitution can be defined as a written document which sets out the basic rules which give the State its main characteristics and which endow its citizens with fundamental rights. Within the Kelsenian pyramid of legal norms, the Constitution in its formal meaning is located at the highest level of domestic norms ; no norm of the national legal system in question can claim to have a higher hierarchical status<sup>16</sup>.

In its substantive meaning, a Constitution includes the entire body of essential rules that govern the socio-political entity, and this without taking into consideration their hierarchical importance. One considers generally as pertaining to the substantive Constitution the body of law that attributes power to state organs, regulates their mutual relations and the relations between them and the citizens. The procedures applicable for the revision of the rules of the substantive Constitution depend on their respective hierarchical value : in so far as they are also part of the Constitution in its *formal* meaning, their change will be subject to the formal amendment procedure of the Constitution.

In Belgium, outside the formal Constitution, a lot of important provisions regarding the country’s institutional structure are laid down in so-called “special laws” (*lois spéciales* in French, *bijzondere wetten* in Dutch). In political terms, these statutes are as difficult to change as the

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<sup>14</sup> See the *Institutional agreement on the sixth State reform* of October 11, 2011.

<sup>15</sup> Marc UYTENDAELE, *Trente leçons de droit constitutionnel*, Brussels, Bruylant, 2011, pp. 65-66 ; Christian BEHRENDT and Frédéric BOUHON, *Introduction à la Théorie générale de l’État – Manuel*, 2<sup>nd</sup> edn., Brussels, Larcier, 2011, pp. 199-201.

<sup>16</sup> Christian BEHRENDT and Frédéric BOUHON, *Introduction à la Théorie générale de l’État – Manuel*, 2<sup>nd</sup> edn., o.c., pp. 190-191.

Constitution itself ; under more, they also require a two-thirds majority in both Houses of Parliament<sup>17</sup>.

In the Belgian context, it is highly important to notice that the largest part of the successive State reforms – and also nearly all rules regarding the allocation of competencies, and of monies to the federate entities – are written down in these Special Laws. In other words, and in slightly stretching the point, one could say : as far as the organisation of Belgium’s institutional structure is concerned, the essential provisions are not to be found in the category of formally constitutional norms, but *outside* the Constitution, in the category of Special Laws (this is why they are considered to be part of the Constitution in its substantive meaning).

Of these Special Laws, four are of particular relevance :

- the *Special Law of 8 August 1980 of Institutional Reforms* (as amended since then),
- the *Special Law of 6 January 1989 on the Constitutional Court* (as amended since then),
- the *Special Law of 12 January 1989 on the Institutions of Brussels* (as amended since then), and
- the *Special Law of 16 January 1989 on the Financing of the Federate Entities* (as amended since then).

Despite their high importance, it remains however true that, formally speaking, Special Laws belong to the category of legislative – and not constitutional – enactments. It is thus coherent that the Constitutional Court<sup>18</sup> is competent to review them against the Constitution<sup>19</sup> and, if she finds an unconstitutionality, she can annul them.

## II.2. Informal methods of constitutional change

### a) *Judicial interpretation*

In Belgium, the Constitution can be interpreted by every judge in the country, if a lawsuit brought before him requires him to do so. For instance, every judge can assess whether an administrative order issued by the executive power does abide by the fundamental rights enshrined in the Belgian Constitution. Article 159 of the Constitution will allow him to set aside every administrative rule – issued by the central government, a federate entity or a local municipality – if, in his view, the latter is not in accordance with the provisions of the Constitution.

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<sup>17</sup> Special laws are a mechanism designed to protect the French-speaking minority of the country (roughly 60 pc of the Belgian population is Dutch-speaking and 40 pc is French-speaking ; there is also a tiny German-speaking minority, counting for less than 0,8 pc of the national population).

<sup>18</sup> In French *Cour constitutionnelle* and in Dutch *Grondwettelijke Hof*. The Court changed its name in 2007 ; before that date, its was called “Court of Arbitration” (*Cour d’Arbitrage* in French and *Arbitragehof* in Dutch).

<sup>19</sup> See under more Constitutional Court, decisions 8/90 of 7 February 1990, and 17/94 of 3 March 1994.

To this extent, one can say that every judge in the country (and not only the Supreme Court<sup>20</sup>, the State Council<sup>21</sup> or the Constitutional Court) is an authentic interpreter of the constitutional text ; every time the interpreter's perception of the text changes, we are thus *de facto* faced with a case of informal constitutional change.

#### *b) Implicit revisions*

Another informal method of constitutional change is the *implicit revision* of the Constitution. This expression designates the situation in which a constitutional provision is not formally amended but in which its scope is indirectly modified (reduced or extended) by the formal amendment of *another* constitutional provision. In other words, the implicit revision of a provision A is an incidental consequence of the formal amendment of a provision.

This situation can under more occur when provision A is not listed on the Declaration for revision of the Constitution<sup>22</sup> and can therefore not be formally amended, whereas provision B *is* mentioned in the Declaration.

There are numerous examples of implicit revisions in Belgian constitutional history which can be found elsewhere<sup>23</sup> ; exposing them here would oblige us to present a long number of isolated legal situations which would drive unnecessarily away from the main thread of the paper.

### **II.3. Formal constitutional amendment process**

Article 195 of the Belgian Constitution sets out the *formal conditions* of the constitutional amendment process. Let us now turn to this provision and to submit it to a closer analysis. As already pointed out earlier, the procedure is highly rigid – it counts among the most cumbersome in the contemporary legal world.

#### *a) The revision procedure : three distinct stages*

In Belgium, in order to amend the Constitution, Parliament is required to pass through three separate and successive stages. The rationale for this phased procedure is to make the Members of Parliament aware of the high normative importance of any constitutional amendment ; moreover, the Constitution-maker of 1831 wanted to make sure that there would

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<sup>20</sup> In French *Cour de Cassation* and in Dutch *Hof van Cassatie*.

<sup>21</sup> The State Council is the Supreme administrative Court of the country (in French *Conseil d'État* and in Dutch *Raad van State*).

<sup>22</sup> I will explain the precise functioning of the 'Declaration for revision' in a moment; see *infra*, point II.3., a.

<sup>23</sup> André ALEN and Frank MEERSSCHAUT, « De 'impliciete' herziening van de grondwet », *Présence du droit public et des droit de l'homme – Mélanges offerts à Jacques Velu*, vol. 1, Brussels, Bruylant, 1992, pp. 259 sq.

be sufficient time for the maturing of the amendment proposal, so that no change to the Constitution would be made without careful reflection<sup>24</sup>.

In this respect, the principal stage which induces the ‘slowing down’ of the procedure is the second one : the compulsory dissolution of both Houses of Parliament before any amendment to the Constitution.

But let us go through the process in detail.

1. The legislative power approves a *Declaration of revision* of the Constitution : Article 195, § 1, of the Constitution

The first step of any constitutional amendment consists in passing, in both Houses of Parliament, a *Declaration*, approved by an *absolute majority of votes* in each House<sup>25</sup>, affirming that “it is requisite to amend the Constitution”.

This first Declaration is to be completed by a *second* one, of identical terms, issued by the King. The King’s declaration will naturally need a Ministerial counter-signature<sup>26</sup>.

These two *declarations for revision* (*déclarations de revision / herzieningsverklaringen*) must indicate *which precise articles* of the Constitution are intended to be amended (e.g. : “article 167” or, even more precisely, “the second paragraph of article 151”). In other words, it is not possible to pass a declaration declaring that the Constitution *as such*, without any further precision, ought to be amended.

If Parliament wishes to amend the Constitution *in order to insert a new* article, the Declaration for revision must indicate the *approximate content* of the new provision and *the Title of the Constitution* into which it should be placed (the declaration will thus say : “The amendment of the Constitution is requisite in order to insert in it a new article *forbidding capital punishment, to be placed into Title II of the Constitution*”).

Only the articles mentioned in the two Declarations for revision can be amended ; in Belgian constitutional law, one says that these provisions are, thanks to the vote of the Declarations, “opened up for amendment”<sup>27</sup>.

If, for any reason, the King’s Declaration is not identical to the one issued by Parliament, the lowest common denominator prevails : in other words, in such case, only the provisions listed in *both* Declarations are amendable.

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<sup>24</sup> Xavier DELGRANGE and Hugues DUMONT, « Le rythme des révisions constitutionnelles et l’hypothèse de l’accélération du temps juridique », *Administration publique trimestrielle*, 1999, p. 212.

<sup>25</sup> At that stage of the procedure, a two-thirds majority is thus not required.

<sup>26</sup> Article 106 of the Constitution.

<sup>27</sup> ‘*Ouvertes à révision*’ in French and ‘*voor herziening vatbaar*’ in Dutch.

The two Declarations are to be published in the *Official Journal*<sup>28</sup>. The principal – and very important – legal consequence of this requirement is that on the very moment that the Declarations are published in the *Official Journal*, Parliament is automatically dissolved and general elections are called.

It is thus evident that no Member of Parliament would vote in favour of a declaration for revision if he does not have a very good reason to do so : the approval of the declaration entails the *termination of all parliamentary mandates*, the legislature comes to a sudden end, and no MP is happy to lose his seat (and losing the seat also means losing the rather comfortable salary and the immunities which are part of any the parliamentary function).

The dissolution of the Houses of Parliament has a double purpose. The first is, as already seen, the intention to slow down the constitutional revision process and to guarantee sufficient time for reflection. In other words, it prevents taking constitutional revision not seriously.

The second purpose is the installation of an element of representative democratic legitimacy. The People, via their vote, are enabled to express their opinion on the necessity of the intended amendment, and (if affirmative on this question) on the substantive orientation they think the amendment should have<sup>29</sup>.

However, nowadays, this second preoccupation seems to have become a legal fiction<sup>30</sup>. Indeed, in practice, issues of constitutional amendment have nearly no influence on the election campaign (even if, formally speaking, the elections are called because a Declaration for revision has been voted). Furthermore, over the decades, the Declarations for revision have become increasingly long (and this although many provisions ‘opened up for amendment’ are finally not be changed and are only included in the Declaration in order to enlarge the possibilities of political bargaining). One can thus say that the requirement of general elections is less and less pertinent if its rationale, in line of what the Constitution-maker of 1830 thought, is to secure the amendment procedure with an element of fresh representative legitimacy<sup>31</sup>.

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<sup>28</sup> The journal is called *Moniteur belge* in French and *Belgisch Staatsblad* in Dutch. It is available online, under [www.moniteur.be](http://www.moniteur.be) or [www.staatsblad.be](http://www.staatsblad.be). Since January 1<sup>st</sup>, 2003, the paper version of the Journal is stopped ; it is henceforth only available online (except for three paper copies which are still printed for archiving purposes of the Federal administration).

<sup>29</sup> Jean-Claude SCHOLSEM, « Brèves réflexions sur une éventuelle révision de l'article 195 de la Constitution », *Revue belge de droit constitutionnel*, 1999, p.101.

<sup>30</sup> Marc UYTENDAELE, *Trente leçons de droit constitutionnel*, *op. cit.*, p. 74.

<sup>31</sup> Xavier DELGRANGE and Hugues DUMONT, « Le rythme des révisions constitutionnelles et l'hypothèse de l'accélération du temps juridique », *op. cit.*, p. 217.

Since 1831, 15 Declarations of revision were passed by successive Parliaments :

n°	Date of vote by the Chamber of representatives	Date of vote by the Senate	Date of Royal assent	Date of publication in the <i>Official Journal</i> (at that date, Houses of Parliament are dissolved)
1	10 May 1892	19 May 1892	23 May 1892	23-24 May 1892
2	8 October 1919	15 October 1919	22 October 1919	23 October 1919
3	14 October 1953	25 February 1954	12 March 1954	14 March 1954
4	16 April 1958	24 April 1958	29 April 1958	30 April 1958
5	6 April 1965	1 April 1965	16 April 1965	17 April 1965
6	28 February 1968	29 February 1968	1 March 1968	2 March 1968
7	13 November 1978	9 November 1978	14 November 1978	15 November 1978
8	1 October 1981	2 October 1981	5 October 1981	6 October 1981
9	3 November 1987	31 October 1987	8 November 1987	9 November 1987
10	17 October 1991	17 October 1991	17 October 1991	18 October 1991
11	7 April 1995	7 April 1995	12 April 1995	12 April 1995
12	29 April 1999	30 April 1999	4 Mai 1999	5 Mai 1999
13	4 April 2003	4 April 2003	9 April 2003	10 April 2003
14	25 April 2007	27 April 2007	1 May 2007	2 May 2007
15	6 May 2010	6 May 2010	7 May 2010	7 May 2010

2. The legislative Chambers are dissolved and re-elected: Article 195, §§ 2 and 3, and Article 46 of the Constitution

With the publication of the two declarations in the *Official Journal* and the automatic dissolution of both Houses of Parliament, a period of 40 days begins<sup>32</sup> in which general elections have to take place (in Belgium, general elections are always organized on a Sunday morning<sup>33</sup>). The newly elected Houses are then obliged to convene on the latest two months after the dissolution of the former Houses<sup>34</sup>.

3. The revision *sensu stricto* : Article 195, §§ 4 and 5, of the Constitution

Finally, the newly elected Houses of Parliament may, if they wish, revise the article(s) that have been indicated in the Declaration for revision (and which are therefore amendable). Generally speaking, only a small minority of them articles will be effectively changed : the Declaration operates as a *permission* to amend, not as an *obligation*. In Belgian constitutional history, there have even been Declarations of which, after the renewal of both Houses of Parliament, not a single article was finally amended<sup>35</sup>.

<sup>32</sup> Article 46, last paragraph, of the Constitution.

<sup>33</sup> Although article 106 of the Electoral Code of 12 April 1894 not requires this ; in theory, the elections could take place on another day. But since 1894, this has never been the case ; the vote has always taken place on a Sunday.

<sup>34</sup> Article 46, last paragraph, of the Constitution.

<sup>35</sup> See the Declarations for revision of 1953 and 1958.

The revision *sensu stricto* is subject to a two-thirds majority in both Houses : at least two-thirds of the members of each of the Houses must be present, and a majority of two-thirds of the votes is necessary to adopt any modification<sup>36</sup>.

After being agreed upon by both Houses of Parliament, the text is sent to the Royal Palace in order to receive the King's assent (with ministerial counter-signature) and to be promulgated.

Finally, the constitutional amendment is published in the *Official Journal*. It comes into force one the very day of its publication, unless the new constitutional provision expressly indicates another date<sup>37</sup>.

#### b) *Uniform procedure*

Belgium has a one single constitutional revision procedure, which is thus identical in all circumstances.

Some scholars have however pleaded in favour of the creation of a *second* procedure, more flexible, and reserved for one particular constellation. This more subtle amendment procedure would, according to their proposal, be applicable if the Kingdom wishes to ratify a Treaty which is incompatible with the Constitution<sup>38</sup>. The main idea is to avoid in this specific case any conflict of norms by permitting a speedy change of the incompatible domestic constitutional provisions *without the obligation to dissolve Parliament*<sup>39</sup>.

Also, these authors have suggested a systematic *preventive* verification of the constitutional compatibility of treaties Belgium intends to ratify<sup>40</sup>. In case of inconsistency between the treaty and the Constitution, the ratification procedure would be suspended until the Constitution is adapted.

#### c) *Intangibility of certain elements of the Constitution*

If one realises an overview in comparative constitutional law, one will see that some Constitutions do contain un-amendable provisions, i.e. provisions that are legally precluded from revision. Among the most striking examples in the contemporary world are Article 1 of

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<sup>36</sup> Abstentions are taken into account to calculate the quorum of presence, but not to determine the majority of votes.

<sup>37</sup> Concurring : André ALEN and Koen MUYLLE, *Compendium van het Belgisch Staatsrecht, Syllabusuitgave*, 2<sup>nd</sup> edn., vol. 1, Mechelen, Kluwer, 2008, p. 122 ; see also Constitutional Court, decision 5/2004 of 14 January 2004.

<sup>38</sup> Francis DELPÉRIÉ, « La déclaration de révision de la Constitution : le 195, certainement pas, un 195bis, pourquoi pas ? », *Journal des Procès*, n° 450, 10 janvier 2003, pp. 16-17.

<sup>39</sup> Francis DELPÉRIÉ, « Le contrôle de constitutionnalité des traités internationaux », *Revue belge de droit constitutionnel*, 1999, pp. 97-98.

<sup>40</sup> Henri SIMONART, « La procédure de révision : Présentation du problème », in Francis DELPÉRIÉ (dir.), *La procédure de révision de la Constitution*, Brussels, Bruylant, 2003, p. 23.

the German Basic Law<sup>41</sup> and Article 139 of the Italian Constitution<sup>42</sup>.

Let us now turn to the situation in Belgium.

### 1. Articles 17, 18 and 25 of the Constitution

Articles 17, 18 and 25 of the Belgian Constitution read as follows :

“Article 17. – The punishment of Confiscation of assets cannot be introduced.

Article 18. – Civil death is abolished ; it cannot be re-established.

Article 25. – The press is free ; censorship an never be introduced. (...)”

All three articles are related to forms of state action which were commonly used in the *Ancien Régime*, and of which the Constitution-maker of 1831 wanted to make sure that they would not make part of the legal system of the new Belgian state. In order to underline the high importance of these prohibitions, the three provisions are formulated in a way that makes them appear unalterable. However, legal writing has consistently considered that the provisions in question are *not* intangible, so that they could, in theory, be amended<sup>43</sup>.

Let us notice in passing that the three articles have never been modified since 1831 and that, some decades later, they were nearly literally taken over by the Luxembourgish constitution-maker<sup>44</sup>.

### 2. Decrees of the National Congress

In addition to the constitutional text *sensu stricto*, the Constitution-maker of 1830-1831 also approved two other texts of constitutional value. The first, a decree issued by the National Congress on 18 November 1830, proclaims the Independence of the Belgian provinces<sup>45</sup>. The second, also a decree, but issued one week later, on 24 November, excludes the members of the Dutch royal family “for all times to come from any power” in Belgium.

Scholars are divided on the question whether these two constitutional decrees voted by the National Congress can be subject to amendment. In other words, in law, the question is whether the amendment procedure laid down in Article 195 of the Constitution can be applied to them.

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<sup>41</sup> See *infra*, the German report written by Markus KOTZUR.

<sup>42</sup> See *infra*, the Italian report written by Tania GROPPPI.

<sup>43</sup> Concurring : André ALEN, *Handboek van het Belgisch Staatsrecht*, Deurne, Kluwer, 1995, pp. 70-71, Francis DELPÉRÉE, *Le Droit constitutionnel de la Belgique*, Bruxelles and Paris, Bruylant and LGDJ, 2000, pp. 77-78, Marc UYTENDAELE, *Précis de droit constitutionnel belge*, 3<sup>rd</sup> edn., Brussels, Bruylant, 2005, p. 123.

<sup>44</sup> See articles 17, 18 and 24 of the Luxembourgish Constitution of 17 October 1868. – See also *infra* the Luxembourgish report of Jörg GERKRATH.

<sup>45</sup> To be precise, it is actually a re-proclamation, because Independence had already been proclaimed some weeks earlier, on October 4.

According to some authors, *all* Belgian constitutional rules (and thus also the two decrees) can be subject to amendment<sup>46</sup>. In other words, this group of scholars considers that there are no intangible rules in Belgian constitutional law. It is worth noticing that an advisory note of the Legislative Section of the State Council, issued in 1993, supports this view<sup>47</sup>.

On the other hand, the debates of the National Congress of 1830-1831 show that the Constitution-maker had the clear intention to render these two decrees intangible and that he wanted to make sure that the constitutional amendment procedure of article 195 (formerly 131) *could not* be applied to them<sup>48</sup>. Very consistently, all early scholars of Belgian constitutional law (i.e. during the first century of the country's existence, between 1830 and the 1930) shared this view<sup>49</sup>; not a single author of that period can be found to affirm the contrary.

Elementary constraints of place preclude me from discussing this issue further in the setting of this essay, but I can refer the reader who wants to go further on this issue to some other writings I have published on the subject<sup>50</sup>. In any case, in my eyes, the two decrees in question *are* intangible – even if it is true that, given the process of European unification and the excellent relations which exist at present between Belgium and the Netherlands, a constitutional decree which precludes “for all times to come” any member of the Dutch royal family from any power whatsoever in Belgium seems, today, rather hostile and awkward.

But one must not forget the troubled times in which the text was written<sup>51</sup>, and it seems also methodologically questionable to interpret today a constitutional provision in a sense which is persistently contrary to the intention of the ‘founding fathers’ (as our American friends would say) : the founder's intention was to establish an unalterable rule.

I should also add that the practical consequences of the decrees of November 1830 are next to inexistent<sup>52</sup> ; they are, nowadays, of purely theoretical interest<sup>53</sup>.

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<sup>46</sup> Maurice VERSTRAËTE, « Observations au sujet du caractère révocable ou irrévocable du décret du 24 février 1831 proclamant l'indépendance du peuple belge », *Revue de l'Administration*, 1954, p. 129 ; André MAST, *Overzicht van het Belgisch Grondwettelijk recht*, 7<sup>th</sup> edn., Ghent, Story-Scientia, 1983, p. 480, André ALEN, *Handboek van het Belgisch Staatsrecht, o.c.*, pp. 70-71, and Francis DELPÉRÉE, *Le Droit constitutionnel de la Belgique, o.c.*, p. 77.

<sup>47</sup> State Council, Legislative Section, avis du 15 juillet 1993, published in : *Documents parlementaires*, Chambre des représentants, 48<sup>e</sup> législature, session ordinaire 1992-1993, n° 1036/2.

<sup>48</sup> Baron BEYTS, speech before the National Congress on 24 February 1831 (Émile HUYTTENS, *Discussions du Congrès national de Belgique*, Brussels, Société typographique belge, 1844, vol. 2, p. 590).

<sup>49</sup> Oscar ORBAN, *Le droit constitutionnel de la Belgique*, vol. 2, Liège and Paris, Dessain and Giard & Brière, 1908, p. 731, Paul ERRERA, *Traité de droit public belge*, Paris, Giard & Brière, 1918, p. 4, Georges DOR et Ad. BRAAS, « La Constitution », in : *Les Nouvelles*, vol. II, Brussels, Larcier, 1935, p. 138, n° 383.

<sup>50</sup> Christian BEHRENDT and Frédéric BOUHON, *Introduction à la Théorie générale de l'État – Manuel*, 2<sup>nd</sup> edn., *op. cit.*, p. 122 and pp. 181-184.

<sup>51</sup> In 1830, Belgium got independent in a revolution fought (and won) against the Dutch army, and in 1831, nine months after the Independence, Belgium was already faced with its first war ...launched by the Netherlands.

<sup>52</sup> For all the period from 1831 to 2011, I am not aware of a single case in which they have been applied, and know of no author who would have claimed to have found one.

<sup>53</sup> To give you the most speaking illustration of this : when I joined some years ago the scientific committee of a Belgian statute book series, I realised that, in these books, the decrees were not even published (I thus suggested to add them, which was done). But the statute books, which are edited annually, had been published for more than half a century without the two decrees – and nobody even noticed...

### 3. Article 197 of the Belgian Constitution : the period of a provisional regency

Article 197 provides :

“During regency, no changes may be brought to the Constitution regarding the constitutional powers of the King and Articles 85 to 88, 91 to 95, 106 and 197 of the Constitution.”

During Regency (i.e. when the King’s functions are temporarily exercised by a Regent), certain articles of the Constitution may not be modified. The provisions at hand are related to the constitutional powers of the King and to his status, to the succession to the throne and to the regency itself.

### 4. Article 196 of the Belgian Constitution : the Constitution cannot be amended in times of war, or when the Houses of Parliament are prevented from meeting freely on the federal territory

According to Article 196,

“[n]o constitutional revision may be undertaken or pursued during times of war or when the Chambers are prevented from meeting freely on federal territory.”

No revision of the Constitution may be initiated or pursued in time of war or when the Houses of Parliament are prevented from meeting freely on the national territory. This article has been inserted in 1965-1968 and is inspired by several foreign examples<sup>54</sup> where, in a period of trouble, a dictatorship was established in a perfectly “legal” manner (by “legal”, I mean the respect of all formal requirements for constitutional amendment<sup>55</sup>).

## III. The role of the people

Belgian constitutional law does not allow the organisation of referenda, were it at the constitutional or the legislative or level<sup>56</sup>.

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<sup>54</sup> For example the Czechoslovak coup d’état of 1948.

<sup>55</sup> It is however obvious that the instauration of a dictatorship, even if one supposes that all *domestic* formal requirements were met, would violate numerous substantive provisions of *international* human rights law – unless, of course, one also supposes that the country in question were to denunciate all its international conventional obligations in this field.

<sup>56</sup> Marc UYTENDAELE, *Trente leçons de droit constitutionnel*, *op. cit.*, p. 110.

It is true that the idea to introduce referendary mechanisms into the framework of domestic public law was raised several times<sup>57</sup>. However, several powerful arguments exist within the Belgian context to oppose this idea, at least at the national level.

First, referenda – turning on binary questions, i.e. ‘yes’ or ‘no’ – *sharpen oppositions* and hinder the emergence of compromises. A referendum can bring a legislative reform cause to fall, without proposing a valid alternative : it suffices to vote ‘no’ – but the ‘no’ can be motivated by the consideration that the proposed bill goes much too far ...or that it does not go far enough. In this sense, a referendum can paralyse a reform proposal which appears to be the only possible compromise in a specific situation. In such a constellation, referendary techniques can constitute an obstacle to institutional pacification and lead right to the reverse : popular polarisation and paralysis<sup>58</sup>.

Secondly, in Belgium, a country with 60pc Dutch-speaking and 40pc French-speaking citizens, national referenda seem unsuited because they would allow the Dutch-speaking citizens, if they vote massively in one sense, to make their opinion systematically prevail. This objection is all the more serious since both linguistic communities *do effectively* diverge on a various amount of topics. As two leading scholars put it :

“[A] referendum would reveal the rift that exists between the two communities, risking to cause the final break-up of the country”<sup>59</sup>.

In summary, the suggestion to endow the Belgian constitutional amendment procedure (or the ordinary legislative process in Parliament) with nationwide referendary techniques has to be analysed with care ...and scepticism. We should bear in mind that Belgium has a fragile cohesion<sup>60</sup> and possesses an important tradition of legal norm-creation through politically negotiated compromises<sup>61</sup>.

#### **IV. How does International and European Law and Jurisprudence affect constitutional revision?**

Once the Belgian Parliament has given its consent to an international treaty, it becomes part of the national legal order (Belgium has thus a monistic vision of international law<sup>62</sup>). Moreover, it is also recognized that treaty provisions with direct effect (i.e. the directly applicable rules of

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<sup>57</sup> Already a century ago, in 1908, my predecessor at the chair of constitutional law in Liège, Oscar ORBAN, discussed such proposals (*Le droit constitutionnel de la Belgique*, *op. cit.*, vol. 2, pp. 727-728). See also the proposal of François PERIN, MP (*Parliamentary documents*, House of Representatives, ordinary session 1967-1968, n°563/1 (document of 23 February 1968).

<sup>58</sup> Marc UYTENDAELE, « Le referendum constitutionnel en Belgique ou une réponse inadaptée à une question pertinente », *op. cit.*, pp. 112-113.

<sup>59</sup> Xavier DELGRANGE and Hugues DUMONT, « Le rythme des révisions constitutionnelles et l'hypothèse de l'accélération du temps juridique », *op. cit.*, p. 232.

<sup>60</sup> See above, footnote 10 and related information in the main text.

<sup>61</sup> Jean-Claude SCHOLSEM, « Brèves réflexions sur une éventuelle révision de l'article 195 de la Constitution », *op. cit.*, p. 104.

<sup>62</sup> Christian BEHRENDT and Frédéric BOUHON, *Introduction à la Théorie générale de l'État – Manuel*, 2<sup>nd</sup> edn., *o.c.*, pp. 477-493.

conventional international law) prevail over national statutory norms (but there is a controversy on the question which norm should prevail if rule of conventional international law is inconsistent with the Constitution itself<sup>63</sup>).

If thus a national provision is contrary to an international rule which has direct effect, the national judge must apply the international rule and may not apply the domestic provision (unless the conflict concerns a treaty and a domestic rule of constitutional rank ; in this latter situation, the controversy persists).

International law has also influenced – and favoured – several constitutional revisions. In 1998, for example, it was primary EU law that led to a constitutional revision. Article 8 B, §1, of the Maastricht treaty provided that

“[e]very citizen of the Union residing in a member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State (...)”

However, article 8, § 2, of the Belgian Constitution provided at the time that the Belgian nationality was a necessary condition for the exercise of any political right (and according to Belgian law, the supreme political right is the *ius suffragii*, the right to participate as a voter or candidate in an election<sup>64</sup>).

These two provisions were patently incompatible.

On 11 December 1998 (i.e. before the municipal elections of October 2000), Article 8 of the Belgian Constitution was finally modified, in order to render possible, in Belgium, the extension of the *ius suffragii* to non-Belgian EU-citizens.

As seen in point II.3, c), it precisely in this context – a new obligation of international law which runs contrary to domestic constitutional law – that some scholars advocate the introduction of a second, an less rigid, amendment procedure (without the dissolution of Parliament), in order to ease the change of the Constitution and to make a rapid end to its inconsistency with the treaty.

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<sup>63</sup> The majority of writers (and also I) believe that in the case of an inconsistency between a norm of a Treaty with direct effect, ratified by Belgium, on the one hand, and a norm of the Belgian Constitution of the other, the latter should prevail : otherwise, the Constitution could be bypassed – and thus *de facto* revised – by simply agreeing into international treaties (and this although the such an agreement does not require a two-thirds majority in Parliament). The complete list of authors favorable to the position of preeminence of the Constitution in the case of a conflict with a norm of international law can be found in : Christian BEHRENDT and Frédéric BOUHON, *Introduction à la Théorie générale de l'État – Manuel*, 2<sup>nd</sup> edn., o.c., p. 492, footnote 1744. I would like to add that this position of constitutional preeminence is not based on any form of obsolete legal nationalism or exaggerated patriotism but on the simple consideration that, in a country abiding to the principles of democracy and the rule of law, it would not be acceptable to by-pass, via a simple-majority law agreeing to a treaty, the constitutional rule that any amendment made to the Constitution must be approved by a two-thirds majority in both Houses of Parliament (article 195 Const.). At footnote 1745 of the my book, I indicate the writers supporting the opposite view.

<sup>64</sup> Oscar ORBAN, *Le droit constitutionnel de la Belgique*, o.c., vol. 2, p. 565.

## V. Judicial review of constitutional amendments

In Belgium, there is no review on constitutional amendments ; constitutional amendments are subject to no judicial control whatsoever. This implies under more that the Constitutional Court is not competent to review them against the other provisions of the Constitution (which is quite logical, since amendments are of no lower rank than the other provisions of the Constitution).

One can however regret that, in contrast to all projects of legislative norms, projects for constitutional amendments are not even referred, for advice, to the Legislative Section of the State Council<sup>65</sup>. Indeed, such advice could be beneficial in order to ascertain that the amendment proposals are well formulated ; moreover, the State Council would be able, as he does it when it comes to projects of statute laws, to draw Parliament's attention to a possible conflict between the proposed text and current obligations of the realm under international and European law<sup>66</sup>.

## VI. Criticism of the amendment procedure

The Belgian constitutional revision procedure, like more or less every procedure of that kind in the world, can be appreciated both positively and negatively. In its current formulation, it offers a certain number of advantages<sup>67</sup>.

Most prominently, the current procedure involves three important institutions : the Houses of Parliament, the King (that is, in modern terms, the Federal Government), and the People (through the requirement of general elections). The successive intervention of these state organs is undoubtedly a security against extreme or too emotional proposals of amendment.

Moreover, the present process prevents the approval of modifications without sufficient discussion ; it imposes a maturing of solutions and leads to a moderate rhythm of the amendment procedure.

However, the current constitutional revision process as it is laid down in article 195 unfortunately also has some (very significant) inconveniences, which are principally due to its exceptionally rigid nature. Three of them can be pointed out in particular<sup>68</sup>.

First, the fact that the amendment process is divided into three distinct and successive phases entails the risk that important and necessary constitutional modifications are not started, because the political parties which would normally supporting them fear a possible defeat in the

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<sup>65</sup> The Belgian Council of State is composed of two Sections : the Section of Legislation (which has a purely advisory function) and the Section of administrative litigation (which constitutes the Supreme administrative court of Belgium).

<sup>66</sup> Hugues DUMONT, Xavier DELGRANGE and Sébastien VAN DROOGHENBROECK, « La procédure de révision de la Constitution : Suggestions », in Francis DELPÉREÉ (dir.), *La procédure de révision de la Constitution*, Brussels, Bruylant, 2003, p. 157.

<sup>67</sup> On this subject, see also Francis DELPÉREÉ and Sébastien DEPRÉ, *Le système constitutionnel de la Belgique*, Brussels, Larcier, 1998, p. 263.

<sup>68</sup> Francis DELPÉREÉ and Sébastien DEPRÉ, *Le système constitutionnel de la Belgique*, *op. cit.*, pp. 263-264.

next parliamentary election (since the procedure, if started, necessarily leads to an election). So, in the *beginning* of a legislature, a reform proposal (and even a highly advisable one), will most probably not lead to the vote of a Declaration for revision.

Secondly, the dissolution of both Houses impairs the normal action of the Parliament and Government : many politicians consider that the main virtue of article 195 resides in the fact that it allows the Government to determine the date of the next general elections<sup>69</sup>.

The third inconvenience of the procedure is that the new elected Houses may have another majority than the previous Houses. This disadvantage can be of two sorts : either the new Houses *do not* possess a two-thirds majority to amend a provision that *was* included in the Declaration for revision (in that case, the provision cannot be amended), or the new Houses *do possess* a two-thirds majority to amend a provision which *was not* included on the Declaration for revision (in that case, the provision cannot be amended either). Both situations are, from a democratic point of view, detrimental : in the first case, dissolution of Parliament has been triggered for nothing ; in the second, a two-thirds majority of validly elected MP's is precluded from altering the Constitution.

## VII. Modification of the constitutional revision procedure?

One can certainly state that the actual constitutional revision procedure has positive and negative aspects<sup>70</sup>.

At present, considering the Belgian situation and its linguistic tensions and divides, it does not seem that a modification of Article 195 of the Constitution (into a less rigid procedure) is desirable. However, some improvements, taking into consideration the evolution of the time and the evolutions that Belgium has lived, can be pointed out.

The first suggestion, as already seen, is the introduction of a more flexible procedure that would be used when Belgium intends to give assent to a European treaty that would be incompatible with the Constitution without a prior revision of the domestic Constitution. This specific procedure could avoid the (rather un-necessary) dissolution of the Houses of Parliament, which in its turn would allow a more speedy ratification of the treaty.

The second suggestion concerns the Special Law problematic. As already seen, it is incoherent that Special Laws, although subordinated to the Constitution, require a special linguistic majority that the Constitution, superior to them, does not contain. In other words, it is – at least under this aspect – more difficult to revise a Special Law than to modify the Constitution. In my eyes, it would thus be advisable to make an end to this situation (for which there are however historical reasons) and to extend the linguistic requirements applicable to Special Laws also to the procedure of constitutional amendments.

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<sup>69</sup> Jean-Claude SCHOLSEM, « Brèves réflexions sur une éventuelle révision de l'article 195 de la Constitution », *op. cit.*, p. 101.

<sup>70</sup> On this issue see also : Christian BEHRENDT, « La possible modification de la procédure de révision de la Constitution belge », *Revue française de droit constitutionnel*, 2003, pp. 279-308.

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Written in 1831, resisting numerous attempts to amend it, article 195 and its highly rigid character, amount nearly to a historic curiosity : far from perfect, their many inconveniences are too obvious.

But the evolution of the country in recent years (and especially the last domestic crisis, which lasted 20 months, from 26 April 2010 to 6 December 2011) has brought back to surface the main virtue of the procedure : it contributes to maintain some sort of stability in a country grounded on an increasingly fragile cohesion. Could it be that sometimes historical curiosities deploy a salvatory effect on contentious modernity ?

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