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Revision of the Constitution of the Kingdom of Belgium by Using the "Implicit" Method

Keywords: Belgium, Constitution, revision
Słowa kluczowe: Belgia, konstytucja, rewizja

Abstract

This paper focuses on the unique characteristics of revisions of the Constitution of the Kingdom of Belgium using the so-called "implicit" method. To the extent necessary, the paper outlines the ordinary, extremely difficult procedure defined in Art. 195 of the Constitution for amending the Constitution and then defines the implicit method as an informal method of implied revision of the Constitution designed to "circumvent" the procedure indicated in that Article. The author is critical of the method presented herein. In his opinion, a constitutional revision carried out in this manner contributes to a devaluation of the importance of the Constitution while demonstrating the need for a reform of its Art. 195.

Streszczenie

Rewizja Konstytucji Królestwa Belgii metodą *implicite*

Artykuł jest poświęcony specyfice rewizji Konstytucji Królestwa Belgii za pomocą tzw. metody *implicite*. W niezbędnym zakresie została w nim zarysowana zdefiniowana w art. 195 konstytucji zwyczajna, niezwykle trudna do przeprowadzenia procedura zmiany tej ust-

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awy zasadniczej, po czym zdefiniowana została metoda implicite jako nieformalna metoda dorozumianej rewizji konstytucji mająca na celu „obejście" trybu wskazanego w tym przepisie. Autor krytycznie ocenia prezentowaną metodę. Jego zdaniem, rewizja konstytucji dokonywana w ten sposób przyczynia się do dewaluacji znaczenia konstytucji, a jednocześnie świadczy o konieczności reformy art. 195.

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I.

The Constitution of the Kingdom of Belgium[2] is considered rigid and extremely difficult to change, yet it is one of those that are amended most frequently. The lion's share of these amendments is carried out following the strict procedure provided for in Art. 195 of the Constitution. However, some amendments to the Constitution are made using other methods, including the "implicit" method indicated in the title. Thus, the research problem presented in the paper is the unique characteristics of this way of revising the Belgian Constitution, presented against the background of the ordinary method of revision provided for in Art. 195 of the Belgian Constitution. The research objectives are to determine the content, nature, and admissibility of the legal structure of the "implicit" method in light of the views of Belgian legal science and determine the consequences of the use of this method. In order to address the research objective thus defined, the paper outlines, to the extent necessary, the unique characteristics of the procedure for revision of the Belgian Constitution and indicates the most spectacular case of its revision between 2012 and 2014 through a kind of trick, which, as it turns out, is also relevant in the formulation of the conclusion. The implicit method mentioned in the title is then defined, and its constitutionality is analyzed.

[2] Constitution belge du 7 février 1831, puis Constitution belge du 17 février 1994, M.B. 1994/021048, p. 4054, consolidated text from the government ICT system, http://www.ejustice.just.fgov.be/eli/constitution/1994/02/17/1994021048/justel (10.06.2021).

II.

The Belgian constitutional amendment procedure is defined in Art. 195, first sentence, of the Constitution. The revision procedure is very rigorous, sometimes considered the most difficult in the modern world, and requires political arrangements that go beyond the time frame of a single parliamentary term. The procedure consists of three phases: a declaration of revision, a parliamentary election, and the actual revision phase.

According to Art. 195, the first sentence of the Constitution, the first phase consists of a declaration by the Parliament that there are reasons to make specific amendments to the Constitution[3]. In practice, these are two declarations of revision of the Constitution. One is adopted by the respective houses of the Parliament by the absolute majority, under the rules of the legislative process, and the King signs the other with government countersignature (Art. 106 of the Constitution). The purpose of the declarations is to indicate which provisions should be amended, thus delineating the potential breadth of the constitutional revision[4]. The provisions to be amended are referred to in Belgian constitutional law as open to amendment (French "*ouvertes à révision*", Dutch "*voor herziening vatbaar*"). If, on the other hand, the intention is to add certain provisions, it is necessary to declare what these provisions are to concern[5]. In the context of the implicit method, it should be emphasized that the declaration must specify both the scope of the potential revision and the provisions that should not be revised[6].

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[3] R. Grabowski, *Zasady zmiany Konstytucji Królestwa Belgii w świetle postanowień przejściowych z 2012 r.*, "Przegląd Prawa Konstytucyjnego" 2013, No. 4 (16), pp. 44–45.

[4] However, this cannot be an amendment of the entire content of the Constitution. F. Delpérée, *The Process for Amending the Belgian Constitution*, "Canadian Parliamentary Review" 1991, vol. 14, No. 3, p. 19; La Chambre des représentants. La Constitution belge. Information materials of the House of Representatives of June 1, 2014, No. 04.00; W. Skrzydło, *Zasady zmiany konstytucji Królestwa Belgii*, [in:] *Zasady zmiany konstytucji w państwach europejskich*, eds. R. Grabowski, S. Grabowska, Warsaw 2008, p. 41.

[5] More information can be found in, e.g., Y. Lejeune, *Droit constitutionnel belge: Fondements et institutions*, Brussels 2017, par. 81; C. Behrendt, *The process of constitutional amendment in Belgium*, [in:] *Engineering Constitutional Change: A Comparative Perspective on Europe, Canada and the USA*, ed. X. Contiades, New York 2013, pp. 7–8.

[6] F. Delpérée, op.cit., p. 19.

The second phase is to shape the composition of the houses of the Parliament that will be empowered to conduct the revision. After the publication of the declaration in the *Moniteur Belge*, the houses of the Parliament dissolve by law. A new election for the House of Representatives should be held within 40 days. At the same time, the procedure for appointment of senators by authorized entities, following Art. 67 of the Constitution, commences in time for the Senate to convene within the constitutional time limit of three months outlined in Art. 46 *in fine*. Both houses should be convened within three months (Art. 195, sent. 3 of the Constitution in conjunction with Art. 46, sent. 4, 5 of the Constitution).

The final phase is the actual revision. Deputies, Senators and the federal government may propose specific changes to the possible breadth of the revision previously specified in the declarations. The review itself is carried out by both houses of the Parliament. A revision of the Constitution may be made on the condition that at least two-thirds of the House of Representatives are present, and a majority of two-thirds of votes must adopt a resolution on this matter. The same requirements apply to the Senate (Art. 195, sent. 5 of the Constitution). Amendments adopted according to this procedure are subject to countersignature by the King and published in the *Moniteur Belge*[7].

III.

In light of the constitutional revision procedure, the declared scope of permissible constitutional revision is binding on the newly elected Parliament. Such a restrictive understanding of the rigidity of the Constitution is often criticized in Belgian constitutional law science[8], and the Belgian constitu-

[7] Y. Lejeune, op.cit., par. 83.

[8] C. Behrendt, op.cit., p. 37; B. Blero, *L'article 195 de la constitution, une pierre angulaire a retailler?*, [in:] *Scharnier- of sleutelelementen in het grondwettelijk recht*, eds. De Becker and Vandenbossche, Brugge 2011, p. 15; J. Van Nieuwenhove, *De nieuwe 'overgangsbepaling' bij artikel 195 van de Grondwet. Een herbruikbare tijdelijke afwijking van de herzieningsprocedure?*, "Tijdschrift voor Wetgeving" 2012, No. 3, p. 156; R. Van Crombrugge, *Belgium and Democratic Constitution-Making: Prospects for the Future?*, "Netherlands Journal of Legal Philosophy" 2017, No. (46)1, p. 17; J. Goossens, P. Cannoot, *Belgian Federalism after the Sixth State Reform*, "Perspectives on Federalism" 2015, No. 7 (2), pp. 32–33; C. Romainville, *Dynamics of Belgian*

tional practice indicates various attempts to mitigate the rigor of this procedure. The most spectacular example is the constitutional revision made between 2012 and 2014 to implement the so-called "Butterfly Agreement". A political crisis that could only be resolved by amending the Constitution to an extent not covered by constitutional declarations was resolved by a political agreement reached after as many as 541 days during which no government could be formed[9]. This solution consisted in the fact that, since the constitutional provisions covered by the declarations included Art. 195, which sets forth the constitutional revision procedure, a decision was made to add to it transitional provisions that would be valid only during the current term of the Parliament, which made it possible to amend the indicated provisions of the Constitution without having to carry out the constitutional revision declaration phase and without holding an election. This non-standard – "transitional" – procedure required the adoption of amendments by two-thirds of votes, with at least two-thirds of the members of each house of the Parliament present (following the standard requirements outlined in Art. 195). As assessed by Céline Romainville, the transitional provisions related to Art. 195 of the Constitution were thus treated as a mandate to modify *a posteriori* the declarations of the Parliament of the previous term, specifically to add a new procedure for an amendment that was limited in content as well as in time to the current term of office[10]. This procedure was used (not without controversy) to revise the Constitution referred to as the Sixth Reform of the State[11].

Plurinational Federalism: A Small State Under Pressure, "Boston College International and Comparative Law Review" 2015, vol. 38, No. 2, pp. 241–243; P. Popelier, *De truc met artikel 195: een lapje voor het bloeden met de zegen van Venetië*, "Chroniques de Droit Public" 2012, No. 3, p. 425.

[9] For a more extensive discussion of this crisis, the details of its resolution, and the constitutional-legal aspects of the procedure used at the time, see: A. Jackiewicz, *Kontrowersje proceduralne wokół ekstraordynaryjnego trybu rewizji Konstytucji Królestwa Belgii w latach 2012–2014*, "Przegląd Sejmowy" 2020, No. 4, pp. 63–83.

[10] C. Romainville, op.cit., pp. 241–243, and the publications referred to therein.

[11] A. Jackiewicz, *Sixth State Reform – A Belgian Copernican Revolution or a Missed Opportunity?*, "Przegląd Prawa Konstytucyjnego" 2019, No. 6 (52), pp. 237–251.

IV.

The implicit method is defined as an informal method of implied constitutional revision. Two versions of this method can be identified. First, the term denotes a situation in which a constitutional provision is not formally amended, but its scope is indirectly modified (e.g., limited or expanded) by a formal amendment of another constitutional provision. In other words, an amendment to the scope of a provision, which is the final object of the amendment, but is not covered by a declaration of a constitutional amendment, is an incidental consequence of a formal amendment of another provision that is included in a declaration adopted during a previous parliamentary term. The second version of this method (sometimes referred to in French as *la greffe* or "implantation") consists in changing the content of a constitutional provision subject to a revision to alter the normative content derived from another provision. Formally, therefore, the content of the provision not covered by a declaration does not change, and the provision retains the same wording, but the norm constructed based on this provision considers the content of the formally amended provision. Thus, the first version can be referred to as the implicit scope method, while the second version can be the implicit content method[12].

Both versions of this method constitute special legal tricks to "circumvent" the constitutional amendment procedure outlined in the Belgian constitutional order. Situations that require it arise when provision A is not mentioned in the declaration concerning a revision of the Constitution and, therefore, cannot be formally amended, whereas provision B is mentioned in the declaration and can be amended, and the ultimate aim of the legislature is to amend provision A[13]. Thus, it is a matter of going beyond the substantive limits of the amendment set following the letter of Art. 195 of the Constitution, i.e., going beyond the formally defined matter subject to revision[14]. From a formal

[12] J. Van Nieuwenhove, *De herziening en de coördinatie van de Grondwet*, [in:] *Parlementair Recht. Commentaar en Teksten*, eds. M. Van der Hulst, L. Veny, Ghent 1998, pp. 61–78.

[13] C. Behrendt, op.cit., p. 39.

[14] A. Alen, F. 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 1992, p. 263; X. Delgrange, H. Dumont, *Le rythme des révisions constitutionnelles et l'hypothèse de l'accélération du temps juridique*, [in:] *L'accélération du temps juridique*, eds. P. Gerard, F. Ost, M. Van De Kerchov, Brussels 2000, p. 446.

point of view, a revision carried out using the implicit method falls within limits set under Art. 195, that is, within the scope of a declaration, since, after all, it literally modifies only the provision covered by the scope of the declaration. Doubts arise, however, with the material assessment of the scope of the revision, which goes beyond the framework imposed by the Parliament of the previous term, by amending another constitutional provision that formally (explicitly) is not subject to revision.

In the history of Belgian constitutionalism, there are examples of revisions carried out using the implicit method[15]. With the most spectacular use of this method taking place with the reform of the Constitution carried out in 1970, of which it has been written that faced with the choice of conforming to the declaration of the previous Parliament or acting following the will expressed in the election of March 31, 1968, the Parliament, as the entity expressing the will of the people, chose a realistic solution instead of a strictly legal one. The 1970 state reform could never have taken place if the strictly formal interpretation of a declaration of revision of the Constitution had been followed[16].

The justification for the houses of the Parliament to make these amendments is twofold. First, in such situations, members of the Parliament argue that, as members of newly elected assemblies, they enjoy greater – due to being current – democratic legitimacy, which explains their prerogative to go beyond the framework established by the previous Parliament[17]. Second, members of the Parliament believe that they fulfill the legislative objectives set by the previous Parliament, even if the Article in question is not formally mentioned in the revision declaration. In other words, a view is presented, which is unpersuasive and not supported by the Constitution, that the Parliament is bound by the objectives of the previous Parliament and not by the list of articles listed in the declaration. Even though it was pointed out (both in 1970 and at other times) that the use of this method of revision leads to the omission of the first two phases of constitutional revi-

[15] A. Alen, F. Meersschaut, op.cit., p. 259.

[16] W. Van Assche, *De grondwetgever van 24 december 1970 en het dilemma van de Preconstituante-Volkswil*, "Tijdschrift voor bestuurswetenschappen en publiekrecht" 1970, p. 378; A. Mast, *De recente grondwetsherziening en de door artikel 131 van de grondwet opgelegde procedure*, "Rechtskundig Weekblad" 1973, No. 31, pp. 1474–1486.

[17] A. Alen, F. Meersschaut, op.cit., pp. 271–272; X. Delgrange, H. Dumont, op.cit., p. 440.

sion, the houses of the Parliament did not hesitate to implicitly amend the constitutional provisions that had not been declared as subject to revision, as a legal implementation of the institutional reform projects resulting from political agreements[18].

The doctrine of Belgian constitutional law assesses the implicit method critically, considering it an impermissible interference of the Parliament in the constitutional substance that should not be amended during a given parliamentary term. The majority of authors believe that implicit revisions of articles not considered open to revision are unconstitutional[19]. Others argue that the Parliament of a given term of office cannot change these provisions, regardless of whether it does so expressly or implicitly, because either way, this ultimately results in a revision of the Constitution. The Constitution can only be amended under the procedure outlined in Art. 195.

Three solutions are given in the literature to prevent the use of the criticized implicit method. The first proposed solution is to introduce an a priori control of constitutionality of amendment proposals (in terms of the procedure or content), which the Council of State would carry out (obligatorily or upon request). The second solution is an a posteriori control carried out by the Constitutional Court, adjudicating in a parity composition with as many judges from among lawyers as from among politicians. The third solution is simply to make the revision procedure more flexible, i.e., to amend Art. 195 of the Constitution, which would eliminate the root cause of the various tricks used to amend the Constitution that are questionable from the point of view of this procedure[20].

In the context of the set research objective, it is necessary to complete the picture of the Belgian efforts to circumvent the rigid revision procedure

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[18] L.A. Bertin, *L'article 195 de la Constitution: une Constitution intangible dans un Etat en pleine métamorphose? État des lieux et perspectives d'avenir,* prom., Y. Lejeune, de Louvain 2015, pp. 63–64.

[19] M. Van der Hulst, A. Vander Stichele, *Is de herzieningsbevoegdheid van de grondwetgever beperkt?,* "Tijdschrift voor bestuurswetenschappen en publiekrecht" 1991, p. 516; A. Alen, F. Meersschaut, op.cit., pp. 259–281; J. Velaers, *De Grondwet en de Raad van State, Vijftig jaar adviezen aan wetgevende vergaderingen, in het licht van de rechtspraak van het Arbitragehof,* Antwepen 1999, pp. 661–665; Ch. Carette, *La problématique de la 'rigidité' de la Constitution,* "La Revue politique" 1992, No. 2, p. 41; A. Alen, F. Meersschaut, op.cit., pp. 259–281.

[20] L.A. Bertin, op.cit., pp. 63–64.

by mentioning the so-called deconstitutionalization method, which consists in assigning to the legislature taking a legislative decision by qualified majority the competence to adopt a norm that, from a substantive point of view, should find its place in the Constitution. This legislative technique eliminates the need to change the legal order within a certain scope according to the procedure provided for in Art. 195 of the Constitution in favor of an easier procedure for the enactment of so-called special laws, introduced in 1970 with the amendment of the then Art. 107 of the Constitution[21].

V.

The nature of the implicit method of constitutional revision, in the context of the deconstitutionalization and the trick employed to enact the transitional provisions (2012–2014) warrant the conclusion that the Belgian system of constitutional revision is outdated and has not met the political needs for a long time, which is particularly relevant in this bipolarized federal-state due to the successive systemic reforms that allow the preservation of Belgian statehood. Constitutional practice thus proves that the formal and immensely restrictive rules of constitutional revision are not an obstacle to constitutional amendments when confronted with political will and a current need to implement reforms. It also supports the claim that an overly rigid procedure for amending the Constitution does not defend the Constitution against modification and, in fact, reduces the value of the Constitution as the act with the highest legal force.

Literature

Alen A., Meersschaut F., *De 'impliciete' herziening van de grondwet, Présence du droit public et des droit de l'homme – Mélanges offerts à Jacques Velu*, vol. 1, Brussels 1992.

Van Assche W., *De grondwetgever van 24 december 1970 en het dilemma van de Preconstituante-Volkswil*, "Tijdschrift voor bestuurswetenschappen en publiekrecht" 1970.

[21] X. Delgrange, H. Dumont, op.cit., pp. 449–450.

Behrendt C., *The process of constitutional amendment in Belgium*, [in:] *Engineering Constitutional Change: A Comparative Perspective on Europe, Canada and the USA*, ed. X. Contiades, New York 2013.

Bertin L.A., *L'article 195 de la Constitution: une Constitution intangible dans un Etat en pleine métamorphose? État des lieux et perspectives d'avenir*, prom., Y. Lejeune, de Louvain 2015.

Blero B., *L'article 195 de la constitution, une pierre angulaire a retailler?*, [in:] *Scharnier-of sleutelelementen in het grondwettelijk recht*, eds. De Becker and Vandenbossche, Brugge 2011.

Carette Ch., *La problématique de la 'rigidité' de la Constitution*, "La Revue politique" 1992, No. 2.

Van Crombrugge R., *Belgium and Democratic Constitution-Making: Prospects for the Future?*, "Netherlands Journal of Legal Philosophy" 2017, No. (46)1.

Delgrange X., Dumont H., *Le rythme des révisions constitutionnelles et l'hypothèse de l'accélération du temps juridique*, [in:] *L'accélération du temps juridique*, eds. P. Gerard, F. Ost, M. Van De Kerchov, Brussels 2000.

Delpérée F., *The Process for Amending the Belgian Constitution*, "Canadian Parliamentary Review" 1991, vol. 14, No. 3.

Goossens J., Cannoot P., *Belgian Federalism after the Sixth State Reform*, "Perspectives on Federalism" 2015, No. 7 (2).

Grabowski R., *Zasady zmiany Konstytucji Królestwa Belgii w świetle postanowień przejściowych z 2012 r.*, "Przegląd Prawa Konstytucyjnego" 2013, No. 4 (16).

Van der Hulst M., Vander Stichele A., *Is de herzieningsbevoegdheid van de grondwetgever beperkt?*, "Tijdschrift voor bestuurswetenschappen en publiekrecht" 1991.

Jackiewicz A., *Kontrowersje proceduralne wokół ekstraordynaryjnego trybu rewizji Konstytucji Królestwa Belgii w latach 2012–2014*, "Przegląd Sejmowy" 2020, No. 4.

Jackiewicz A., *Sixth State Reform – A Belgian Copernican Revolution or a Missed Opportunity?*, "Przegląd Prawa Konstytucyjnego" 2019, No. 6 (52).

Lejeune Y., *Droit constitutionnel belge: Fondements et institutions*, Brussels 2017.

Mast A., *De recente grondwetsherziening en de door artikel 131 van de grondwet opgelegde procedure*, "Rechtskundig Weekblad" 1973, No. 31.

Van Nieuwenhove J., *De herziening en de coördinatie van de Grondwet*, [in:] *Parlementair Recht. Commentaar en Teksten*, eds. M. Van der Hulst, L. Veny, Ghent 1998.

Van Nieuwenhove J., *De nieuwe 'overgangsbepaling' bij artikel 195 van de Grondwet. Een herbruikbare tijdelijke afwijking van de herzieningsprocedure?*, "Tijdschrift voor Wetgeving" 2012, No. 3.

Popelier P., *De truc met artikel 195: een lapje voor het bloeden met de zegen van Venetië*, "Chroniques de Droit Public" 2012, No. 3.

Romainville C., *Dynamics of Belgian Plurinational Federalism: A Small State Under Pressure*, "Boston College International and Comparative Law Review" 2015, vol. 38, No. 2.

Skrzydło W., *Zasady zmiany konstytucji Królestwa Belgii*, [in:] *Zasady zmiany konstytucji w państwach europejskich*, eds. R. Grabowski, S. Grabowska, Warsaw 2008.

Velaers J., *De Grondwet en de Raad van State, Vijftig jaar adviezen aan wetgevende vergaderingen, in het licht van de rechtspraak van het Arbitragehof,* Antwepen 1999.