Radosław Grabowski¹

**Only the flexible and rigid?
The problem of differentiation of procedures
for amending the constitution of modern European states**

Keywords: amend the constitution, flexible constitution, rigid constitution

Słowa kluczowe: zmiany Konstytucji, konstytucja elastyczna, konstytucja sztywna

Summary

The article refers to the problem of inadequacy of the classification of the constitution due to the mode amend them. The purpose of the analysis was to determine the scope of the diversity of procedures for the amendment of constitutions as well as to create a typology of such procedures, with consideration to their individual components, their functions and effects of their use. To this end, I conducted a review of applicable solutions in terms of grouping related institutions. Considerations begin with indication of systemic importance of amendment procedures, the reasons for the use of stringent solutions and low popularity of flexible acts. For this purpose, it was necessary to present the origin and foundations of the division into rigid and flexible constitutions. Two-step classification proposed by JB Bryce over 130 years ago is not applicable to modern constitutions. The new three-step classification takes into account hedging instruments, which are used in the constitutions created in the twentieth century. The analysis included the following stages of work on the revision modern European constitution. As a result, they managed to identify different types of instruments intended to ensure the functionality and stabili-

¹ The author is an Associate Professor in Institut of Political Science on the Faculty of Sociology and History of University of Rzeszow, e-mail: drgrabowski@wp.pl.

ty of the political system. Because of its universal nature it can be applied to all of the constitution historical and current, regardless of the provisions made for their protection.

Streszczenie

Tylko elastyczne i sztywne? Problem zróżnicowania procedur zmiany konstytucji nowoczesnych państw europejskich

Artykuł odnosi się do problemu nieadekwatności stosowanych w nauce prawa konstytucyjnego klasyfikacji konstytucji ze względu na tryb ich zmiany. Klasyfikacja dwustopniowa, zaproponowane przez J.B. Bryce'a ponad 130 lat temu nie da się zastosować do nowoczesnych konstytucji. Nowa klasyfikacja trzystopniowa uwzględnia instrumenty zabezpieczające, jakie są stosowane w konstytucjach stworzonych w XX w. Analiza objęła kolejne etapy prac nad zmianą współczesnych konstytucji europejskich, poczynając od inicjowania zmiany, poprzez jej opracowanie, uchwalenie, aż do ogłoszenia. Dzięki temu udało się wskazać różne rodzaje zabezpieczeń, mających zagwarantować ich funkcjonalność oraz stabilność ustroju państwa, a także dokonać ich pogrupowania. Pozwoliło to na stworzenie nowej klasyfikacji progresywnej. Ze względu na swój uniwersalny charakter może być stosowana do wszystkich konstytucji: historycznych i współczesnych, niezależnie od wprowadzonych do ich przepisów zabezpieczeń.

I.

It is impossible to prove that the increase in the degree of difficulty to amend the constitution contributes to the extension of its durability. There is also no evidence of the longevity of the constitutions amended in the legislative procedure². Leaving the key political decisions in the hands of the legislature, which could make changes without much difficulty, raises doubts, though this solution works in the Anglo-Saxon system. Paradoxically, the attempt to consolidate structural solutions through the introduction of strin-

² "Such a constitution is called a rigid, stationary, or inelastic constitution, in contradistinction to a flexible, movable, or elastic one, which may be altered in the same way as ordinary law". H. Kelsen, *General Theory of Law and State*, translated by A. Wedberg, The Lawbook Exchange Ltd, 2009, p. 265.

gent procedures for amending constitutions can be ineffective and even lead to attempts to change its provisions in other methods. A number of systems is familiar with the term of transformation of the constitution, i.e. the reinterpretation of its provisions, but even this – relatively little controversial – method may raise objections³. If the constitution is to be set in reality, and not remain a dead law, must be subject to changes. The role of the legislator is to create instruments of change of the constitution, so that – in the case of political necessity – one could use them to extend the state's particular structural shape or to transform it⁴. One should note that due to the political nature of the decision relating to amend the constitution, the concept of flexibility and rigidity of the constitution may in practice be subject to far-reaching relativization. This forces comparative legal research primarily in the formal and dogmatic field.

Separation of individual elements of the amendment procedures, as well as indication of those which should be treated as integral elements of particular procedures, and those which are ancillary, allowed to determine the usefulness of the discovered diversity for the classification of the constitutions. The implementation of the aforementioned assumptions has enabled me to complete the main objective, i.e. creation of a classification that takes into account the possible number of elements of procedures for the amendment of constitutions, applied in modern European states. The knowledge obtained in the course of my analysis allowed for identification of factors determining the rigidity of the Constitution. It should be noted that the concept of rigidity means, in this case, smaller or bigger impediment to change the constitution⁵. To this end, I subjected to my analysis the following matters: the list of entities having the initiative to amend the constitution, the formal requirements accompanying the performance of the initiative, restrictions on amendments of particular constitutional norms, the authorities examining the draft amendment to the Constitution, the requirements

³ P. Lerche, *Stiller Verfassungswandel als Aktuelles Politikum*, [w:] *Festgabe für Theodor Maunz zum 70. Geburtstag*, ed. H. Spanner, München 1971, p. 285.

⁴ W. Sokolewicz, *Konstytucja w fazie przemian*, [w:] *Wokół konstytucji. Dzieła wybrane. Wojciech Sokolewicz*, eds. J. Wawrzyniak, J. Kielin-Maziarz, Warsaw 2011, p. 321.

⁵ K. Loewenstein, *Über Wesen, Technik Und Grenzen der Verfassungsänderung*, [w:] *Vortrag, gehalten vor der Berliner Juristischen Gesellschaft AM 30 Juni 1960*, Berlin 1961, p. 21.

for approval of amendment of the Constitution, the restrictions associated with the adoption of amendments to the constitution, the powers of the entities participating in the promulgation of amendments to the constitution, the participation of the nation in the procedure for the amendment of the constitution, as well as the control of the constitutionality of the amendments to the constitution.

II.

Authors of analysis in the field of constitutional law use a two-step classification⁶ created by J.B. Bryce and proclaimed in 1884⁷. The division of the constitutions due to their amendment procedures has been adopted and used ever since, despite numerous criticisms⁸. The distinction between flexible and rigid constitution is characterized by a low degree of complexity, allowing for easy use both in science and in the teaching process⁹. Low complexity of the assumptions of the two-stage classification causes that the classification has a series of shortcomings that are typical for all dichotomies. It imposes a focus on extreme cases, in no way exploiting a number of differences, not less important than the vague statement about the use of legislative mode, or a different procedure. The polarity of the ratings used in this classification makes the term “classification” seem to be too sophisticated. In addition, the classification of J.B. Bryce does not include those constitu-

⁶ A. Busch, *The Grundgesetz after 50 years: Analysing Changes In the German Constitution*, “German Politics” (April 2000), vol. 9, no. 1, pp. 41–60; C. Bezemek, *Constitutional Core(s): Amendments, Entrenchments, Entrenities and Beyond Prolegomena to a Theory of Normative Volatility*, “The Journal Jurisprudence” 2011, p. 517; P. Pasquino, *Classifying Constitutions: Preliminary Conceptual Analysis*, “Cardozo Law Review” 1999, vol. 34, pp. 1007–1009.

⁷ J.B. Bryce, *Constitutions*, Reprinted, 2010, Memphis, Tennessee, USA.

⁸ L. Wolf-Philips, *Constitutions of Modern States*, 1968, s. VIII; K.C. Wheare, *Modern Constitutions*, 1966, p. 16.

⁹ “But the constitution of the United States or of Germany, or Belgium or France, is written down in a single document (plus of course amendments which may be added to it later). Generally speaking, the fact that the constitution is so written down will mean that its authors will endeavour to make it rigid as well: but there is no necessity for a written constitution to be rigid or for an unwritten one to be flexible”. E.F. Bowman, *An Introduction to Political Science*, London 1927, p. 36.

tions which are amended neither in legislative procedure nor in other constitutional mode.

Accordingly I distinguished not two, but three types of constitution: flexible, rigid and semi-rigid, which cannot be classified as flexible or rigid. The first group includes flexible constitutions which do not introduce a separate mode of changes, nor make modifications in the legislative mode for the purpose of changing the Constitution. The second group are rigid constitutions that include a separate amendment procedure. This involves the establishment of a procedure which introduces new elements, unknown to the legislative mode, such as e.g. different scope of powers of parliament, multiple enactment, slowing down mechanisms, the involvement of two consecutive parliamentary terms of office, etc. However, it cannot consist in a mere modification of elements already introduced in the legislative procedure. The third group are semi-rigid constitutions, which for the purposes of constitutional amendments only modify existing elements of the legislative mode, such as the list of initiative entities or quantitative requirements, i.e. quorum and majority.

Three-step classification, created on the grounds of Bryce's scale, allows to classify 2 constitutions as flexible¹⁰ and 26 as rigid¹¹. Constitutions of 17 European states could not be classified as rigid or flexible without serious reservations¹². These constitutions were classified within special category of semi-rigid constitution, which constitutes another argument in favor of taking into account more factors, not just exploit the distinction between amendment procedures of ordinary law and constitutions. Assuming that

¹⁰ United Kingdom, Vatican City.

¹¹ Principality of Andorra, Republic of Belarus, Kingdom of Belgium, Bosnia and Herzegovina, Republic of Bulgaria, Kingdom of Denmark, Republic of Estonia, Republic of Finland, French Republic, Hellenic Republic, Ireland, Republic of Iceland, Italian Republic, Republic of Lithuania, Republic of Macedonia, Republic of Moldova, Montenegro, Kingdom of Netherlands, Kingdom of Norway, Republic of Poland, Portuguese Republic, Romania, Russian Federation, Kingdom of Spain, Kingdom of Sweden, Ukraine.

¹² Republic of Albania, Republic of Austria, Republic of Croatia, Republic of Cyprus, Czech Republic, Federal Republic of Germany, Hungary, Republic of Latvia, Principality of Liechtenstein, Grand Duchy of Luxembourg, Republic of Malta, Principality of Monaco, Republic of San Marino, Republic of Serbia, Slovak Republic, Republic of Slovenia, Swiss Confederation.

rigid constitution is characterized by an amendment procedure different from the ordinary legislative mode leads to the conclusion that the vast majority (43 of 45) of the Constitutions of contemporary European countries are not flexible. This disqualifies the classification of J.B. Bryce in its classic formula.

III.

Modification of a popular classification of constitutions and introduction of a division including flexible, semi-rigid and rigid constitutions, does not exhaust the problem of classification of constitutions due to the amendment procedure. This is proved by the fact that a number of different instruments are applied at various stages of the amendment procedure. The rule is that the legislative initiative – including the initiative concerning the Constitution – is subject to rationing, but in the case of procedure of constitutional amendment more rigor can be noticed. The analyzed initiative subjects usually include bodies and entities located within the legislative and the executive power, and sometimes others, which cannot be qualified to any of these groups.

Participation of the legislature in initiation of amendments to the constitution can be guaranteed by the allocation of rights in this regard to the group of parliamentarians, single member of parliament, chamber of parliament or to other parliamentary entities (fraction, group). In the case of the executive power, the right of initiative may in European countries belong to the government, the president or monarch. Regarding the participation of other entities, the right of initiative is entrusted to a group of citizens, entity of a federation, the body of a region or of a local government. The configuration of a catalogue of entities having the right of initiative to amend the constitution has an impact on facilitating or impeding changes. It is important to take into account the issue of formal requirements that accompany the implementation of the right of initiative, such as the requirement of submitting a project (the so-called formulated initiative) and additional requirements¹³.

¹³ The analysis entitled: regulation of the right of initiative on amendments to the Constitution, is to determine which entities have the right of initiative on amendments to the

The work on the preparation of amendments to the constitution must fit into established time constraints. Some of them disable the possibility to change the constitution or to undertake necessary works heading in this direction, whilst the other part introduces time limits which slow the works down or make them more efficient. A specific type of restrictions are created by means of engaging the nation in the consideration of a draft amendment of the Constitution (referendum a priori on the draft amendments to the constitution or parliamentary elections preceding the consideration of the draft).

The legislators sometimes decide to exclude the possibility of changing constitutional norms or contents of special structural importance, establishing the so-called relatively unchangeable norms. Irrespective of introducing of the partial inability to change the constitution, consideration of the draft amendments to the constitution is accompanied – typically performed by parliament, and sometimes by an external body – by a control of the constitutionality of the draft. This is particularly important in states that have established material boundaries of the amendments to the Constitution. Introducing norms which cannot be subject to amendments, or include significant restrictions in this regard, imposes additional responsibilities on authorities involved in the procedure of amending the constitution. Additional responsibilities are related to the verification of the project in terms of non-interference in the catalogue of the unmodifiable values.

Additional restrictions may arise from the structure of the body considering the draft amendment to the Constitution. The requirement that the identical resolution must be adopted in a bicameral parliament may lead to the exclusion of one of the houses of parliament, confrontation of chambers, “sailing” of the draft (*navette*), intervention of a mediation body, or creating a procedure of reaching a compromise in terms of the content of the amendment¹⁴.

Constitution: R. Grabowski, *Zróżnicowanie trybu zmiany jako kryterium klasyfikacji konstytucji współczesnych państw europejskich*, Rzeszów 2013, pp. 94–98.

¹⁴ More about limitations to preparation of amendments to the constitution, discussed especially the diversity of entities considering the draft, such as parliament, constituent assembly or other entity, as well as legitimacy to amend the constitution, *ibidem*, p. 146–152.

A key issue crucial for the degree of rigidity of constitutional provisions was considered to be the possibility of using different procedures of adopting amendments, such as: basic, modification of particular norms, special (urgent, extraordinary), alternative and reserved. Moreover, the occurrence of specific requirements, which may accompany the adoption of constitutional amendments, such as: the reenactment, adoption of identical resolutions in bicameral parliament, was also recognized as important. Additional complications arise from the widespread use of the requirement to adopt unanimous resolutions.

The right to adopt amendments to the Constitution may not be granted to every so-called ordinary parliament. Sometimes this power is given only for a specified period of time, or belongs to a special parliament, or a constituent assembly. The analysis of the issue of parliamentary elections carried out after the initiation of the work on the draft and prior to final adoption of amendments to the constitution, leads to the conclusion that the elections perform an additional function of a referendum. Doubts arise in relation to a limited involvement of parliament in the process of adoption of amendments to the Constitution, i.e. when the institution of the referendum is used. The right of a president to send the adopted amendment back to the parliament should be treated as a phenomenon. The right to use a constitutional veto of a suspensive nature was introduced in three states, whilst of an absolute nature only in one.

Quantitative requirements associated with the adoption of amendments to the constitution are sometimes considered to be the most important issue related to the revision of the constitution, as evidenced by the strong interest manifested within the doctrine of constitutional law. Some European states have introduced modifications when it comes to a quorum required for constitutional amendments. More important, however, is a widely used increase of requirements in terms of the majority. Few countries allow adoption of a resolution amending the constitution by a simple or absolute majority. In most cases, the qualified majority is applicable, but there is a high

variation in terms of the required support, from 3/5 by 2/3, 3/4, 4/5, 5/6, until the unanimity¹⁵.

Far-reaching differentiation accompanies the ratification of the act amending the constitution. In this matter, a constant popularization of the institution of the approval referendum may be noticed in European states. Of the two variants of this institution one dominates, i.e. the facultative referendum, which is carried out at the request of authorized entities. Less popular is the obligatory referendum, accompanying every change, or only some changes referring to particular norms of the Basic Law. Occasionally used soluooption includes an approvement of the act amending the constitution by other bodies: parliament, a special body or bodies of federation.

The issue of vital importance for the degree of rigidity of the Constitution is also the possibility to carry out preventive control of the constitutionality of the act amending the constitution and the scope of the control. In this respect, states subjected to my analysis use various solutions, from the prohibition of such a control, through lack of any regulations, up to its application in various stages of the procedure for amending the Constitution. In this context, one should also pay attention to the participation of the heads of state in approving and announcing the amendments and their powers at the final stage of the procedure for amending the Basic Law. The powers of the body entrusted with this task (president, monarch, chairman of parliament) can provide important information, particularly in those states where the procedure for amending the Constitution is not described in a precise manner. In exceptional cases, the head of state is excluded from this part of the procedure, and announcement is made by another body¹⁶.

¹⁵ Analysis of requirements accompanying the adoption of amendments: *ibidem*, pp. 197–202.

¹⁶ An analysis of solutions intended to: approve, conduct preventive control of constitutionality, as well as to announce an amendment to the Constitution, was presented: *ibidem*, pp. 243–247.

IV.

The findings made allows to conclude that separation of other types of constitutions, different than flexible, semi-rigid and rigid, is not possible, although one can indicate a number of basic laws including some instruments used in order to rigid the act, such as a special procedure, different from the constitutional mode, associated with amending selected norms (review clause). Stronger protection is provided by the establishment of constitutional norms relatively unmodifiable, which cannot be modified in any procedure known to the given act. Similar objectives may be achieved by means of entrusting the decision to amend the Basic Law to the nation, by introducing various forms of people's participation. Special purposes are connected with introduction of the possibility of adopting deviations from the constitution.

A common feature of the additional elements of the procedure for amending the constitution, is that they can occur in every type of constitution, regardless of its flexibility or rigidity. This is a situation different from that with which we are dealing in respect to the amendment procedure, because the legislative mode, the modified legislative mode, and constitutional mode mutually exclude themselves, i.e. only one of them can be treated as a basic procedure of amending the constitution, whilst in case of additional instruments mentioned in the dissertation – legislators often apply many of them in the same act.

The use of the proposed three-step classification of constitutions due to their amendment procedure (flexible – semi-rigid – rigid) allows to make a qualitative progress when it comes to a precise classification of Basic Laws. The optimal scale should take into account both the difficulty of changing the Basic Law (constitution type) as well as additional protection used by the legislator. Meanwhile the construction of a three-step scale required a number of elements used in particular European countries to be omitted. One should be aware that in almost every procedure applied for the purposes of constitutional amendments, various elements are jointly applied. Some of them are integral components of the amendments procedure, contributing to the classification of the Constitution as a flexible (type 1), semi-rigid (type 2) or rigid (type 3). Other elements were considered as additional, not related to the type of the Constitution.

Activities aimed at the development of the classification were accompanied by an attempt to use as many elements as possible, in order to perform diversification within the types of constitutions. However, not all of them could be used. As an example, elements such as unmodifiable norms or revision clauses may be mentioned. An attempt to isolate another type of constitution, which is characterized by the occurrence of one of these elements is ineffective, because sometimes they occur together in the same Basic Law. In connection with the aforementioned issue another research dilemma appeared. It led to the conclusion that the type of constitution – along with the factors which determine its classification – is a first class feature, while the presence of additional elements – not influencing the classification – are secondary features.

Elements considered as integral parts of the procedure for amending the Constitution are: modifications in the catalogue of initiative entities, formal requirements associated with implementation of the initiative, restriction in terms of the right to adopt amendment by a parliament, slowing down mechanisms, maximum time limits, modifications within the scope of the quantitative requirements, modifications in mutual position of the chambers in a bicameral parliament, the involvement of parliaments of two consecutive terms of office, optional forms of civic participation, constitutionality control carried out in different phases of the amendment procedure, modification of the power to approve and announce amendments. Additional elements of the procedure for amending the Constitution include: resignation from the requirement to formulate an initiative concerning amendments, introductions of norms relatively unmodifiable, introduction of revision clauses applies in relation to selected constitutional norms, entrusting the nation with enactment of the amendment in a referendum with a limited parliamentary involvement, mandatory forms of civic participation, alternative procedures, establishment of special procedures (i.e. temporary, extraordinary and urgent), ratification of the amendments by the federation subjects.

Additional elements, which cannot be assigned to any of the three aforementioned types of constitution, and do not allow for further expansion of the three-step scale, were considered to be introduced by the legislator in order to achieve certain goals. One can differentiate: 1) factors securing invariability of the Constitution, 2) factors securing variability of the Constitu-

tion 3) factors securing citizens' participation in the process of amending the constitution. The elements securing the invariability, which are applied in order to rigid the Constitution, include: relatively unmodifiable norms, revision clauses, ratification of amendments by the federation subjects. The use of safety factors corresponds to the views of the doctrine of constitutional law, perceiving the rigidity of the constitution as a desirable feature¹⁷.

V.

Susceptibility to changes, corresponding to historical, civilization or social processes, is no less important than durability of the constitution¹⁸. Progress in the range of "upgrading" amendments procedures usually leads to the increase of their rigidity whilst a balance between constitutional stability and variability seems optimal, which justifies the use of elements facilitating amendments. Factors securing variability of the Constitution are: resignation from formal requirements accompanying the implementation of initiatives to amend the constitution, alternative and reserve procedures, special procedures. The factors securing the nation's participation in the amendment procedure and thus allowing citizens to co-decide in structural matters the requirement of mandatory approval of amendments to the constitution by the people include obligatory approval of the amendment by the nation as well as the possibility of adopting amendments by the nation. The inclusion of such factors in the procedure of amendment to the Constitution is in line with the trend, requiring extensive use of institutions of participatory democracy.

¹⁷ More about diversity of procedures for the amendment of constitutions and a new typology modern constitutions of such procedures, with consideration to their individual components, their functions and effects of their use: R. Grabowski, *Zróżnicowanie trybu zmiany...*, op. cit., pp. 248–260.

¹⁸ "Nevertheless, few will doubt that there is in principle a need to adjust a constitution, for norms which may have been adequate at the time of its drafting may no longer be functional due to social, economic or political change, leading to a necessity to amend the constitution. The Grundgesetz has been changed 190 times in 50 years". A. Busch, *The Grundgesetz after 50 years: Analysing Changes In the German Constitution*, "German Politics" (April 2000), vol. 9, no. 1, p. 46.

The effectiveness of the abovementioned solutions is a separate issue. It is uncertain to what extent the factors included in the first category will contribute to impediment of amendments to the constitution, and at the same time serve its durability. Factors of the second group can help change the constitution and – though it is not a general rule – to contribute to the extension of its duration. In the case of the third group of factors, their neutral character (i.e. the lack of a clear rigid or flexible nature) can be determined with certainty, while there is no way to determine the long-term impact¹⁹.

The modification of the commonly used Bryce's scale through its expansion into the three-step variant, allows to determine the type of constitution due to the amendment procedure. Supplementation of the scale with information concerning factors securing: invariability, variability of the constitution as well as the nation's participation leads to the creation of a more "capacious" classification, which allows to determine not only the type, but also the subtype of a constitution. The new classification applies to basic laws of contemporary and historical states, both European and located in other parts of the world. Because of these features of the proposed classification, it should be treated as universal.

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¹⁹ “Constitutions are neither mere dead letters nor rigid unalterable norms. They require change in order to overcome deficiencies and to cope with new challenges. In general these necessary developments may occur by formal constitutional amendment or quiet constitutional change (stillter Verfassungswandel). This is understood as a change of the understanding of constitutional provisions without formal revision of the wording”. W. Heun, *The Constitution of Germany. A contextual Analysis*, Oxford – Portland Oregon 2011, p. 21.

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