Fundusze Europejskie dla Rozwoju Społecznego
Rzeczpospolita Polska
Dofinansowane przez Unię Europejską

Mikołaj Wolanin
Master's student
University of Warsaw
Cardinal Stefan Wyszyński University in Warsaw
ORCID: 0000-0003-3574-6999

Amending the Constitution by Correcting a Clerical Error
Outline

The document presented here aims to be an outline of the speech that will be given at the *3rd Graduate Conference on Constitutional Change* in Austin, TX. Therefore, it will not have a form of a scientific article, since it is "just" an outline.

Our goal is to deliberate on the phenomenon of the *de facto* amending the constitution by using the clerical error correction path (sometimes also named as a scrivener's error correction). And while the conclusions will be universally applicable, the author will present the case of Poland and the correction of two clerical errors in its Constitution done in 2001 as an example that shows that the topic of this speech is also vital for the practice.

Generally, the procedure for amending the constitution of a state is indicated in this constitution itself or is the same as in the case of any other statute. However, this is only the typical way of its amendment. It is also possible to point out examples of amending the constitution beyond this procedure, i.e. through the extra-ordinary path.

One of such ways is to change the text of the constitution by correcting a clerical error that was noticed there. This is most commonly done by means of another procedure which is provided for legal acts in general, e.g. in a statute concerning the promulgation of the legal acts. However, should such a statutory route also be allowed to amend the text of the constitution (even if only clerical errors are corrected)?

In the author's view, it is not without reason that constitutions have a special procedure for their amendment, very often involving the higher majority necessary to pass such an

amendment. This is, after all, based on the power that the constitution has and its position in the legal system. Hence, in the author's opinion, any other routes of amending the content of the constitution outside the formal amendment procedure should be unacceptable.

Moreover, it does not matter that the mode of correcting clerical errors concerns only minor matters, most often typos. It is still an interference in the text of the constitution; it is still its modification, despite the lack of change on the normative level. This is why the author believes that even typos should be corrected by amending the constitution in the formal procedure provided for its amendment (thus, with acheiveing the necessary majority and complying will all the other stages and rules).

It is, also, noteworthy that otherwise there would be a systemic inconsistency. For if it would be permissible to change the text of the constitution by correcting clerical errors, such a procedure would not be provided for in the constitution, but, most often, in a statute. Why, then, should a procedure provided for in the statute – a hierarchically lower act – be able to affect the content of a hierarchically higher act? This is systemically inconsistency. Hence, the author's conclusion that such a potential procedure should be unacceptable and that the only way to change the text of the constitution is to amend it in the manner provided for in this legal act.

And this is not just an abstract deliberation. The prime minister of Poland, for example, used such procedure in 2001 and changed the two paragraphs of the Polish Constitution. And while they were only the typos, the text of the Constitution indeed changed. What is more, while the government in Poland may introduce the bills into the parliament, it is not permitted to do so with the projects changing the Constitution. Such a bill may introduce only: the President, the group of the MPs of the Sejm (first chamber), as well as the Senate (*in gremio*).

Therefore, issuing by the Polish Prime Minister a “notification” (as it is called) on the basis of a statute that there are two clerical errors in the Constitution and they are changed on the basis of such notification should be assessed negatively. After all, if the government cannot even formally propose an amendment to the Constitution, why can it interfere with its content without parliamentary scrutiny? This seems systemically inconsistent and, in the author's

view, also not compatible with the mode of amending the Constitution (that needs an appropriate majority etc.).

All in all, any interference with the text of the state's constitution should only be done in the ordinary procedure and not through extra-ordinary procedures that stem from, for example, statutes (hierarchically lower than the constitution). This is because the significance of an amendment (whether it is a typo or a change of most chapters) does not matter. Every time, when there is a correction of a clerical error, an amendment of some kind to the text of the constitution (even if it does not affect the content of the norm) is done.

Consequently, only the procedure provided for that by the constitution itself should be used in the situation described. Otherwise, an amendment to the constitution is made on the basis of the general procedures for correcting errors in legal acts determined by a statute. However, this is a systemically inconsistent solution. For the sake of legal certainty, therefore, it would be advisable to stick only to the formal procedure for amending the constitution, regardless of the fact that it requires time and gathering a higher majority (which should not be difficult when it comes to clerical errors).

Recommended literature:

1. Bagtas M.A.C., *Of Typos, Clerical Errors, and Change of Name: The Implications of R.A. 9048*, Ateneo Law Journal 46/2001-2002.
2. Buchanan G.S., *No Connecticut Yankee in the Texas Supreme Court*, Hous. Law Review 40/2003-2004.
3. Chappel H., *An Insurer's Liability for Mistakes in Its Policies: the Clerical Error*, Insurance Counsel Journal 24/1957.
4. Cross J.M., *The Staffer's Error Doctrine*, Harvard Journal on Legislation 56/2019.
5. deFuria J.W., *Mistakes in Wills Resulting from Scriveners' Errors: The Argument for Reformation*, Cath. U. Law Review 40/1990-1991.
6. Delson B.R., *Typography in the U.S. Reports and Supreme Court Voting Protocols*, New York University Law Review 76/2001.
7. Doerfler R., *The Scrivener's Error*, Northwestern University Law Review 110/2016.
8. Fried M.S., *A Theory of Scrivener's Error*, Rutgers Law Review 52/1999-2000.

9. Gold A.S., *Absurd Results, Scrivener's Error, and Statutory Interpretation*, U. Cin. Law Review 75/2006-2007.
10. Goldsworthy J., *Legislative Intentions in Antonin Scalia's and Bryan Garner's Textualism*, Connecticut Law Review 5/2021.
11. Jellum L.D., *But That is Absurd - Why Specific Absurdity Undermines Textualism*, Brook. Law Review 76/2010-2011.
12. Lemper T.A., Bruce J.R., *Beware the Scrivener's Error: Curing the Drafting Error in the Federal Registration Defense to Trademark Dilution Claims*, Tex. Intell. Propl. Law Journal 19/2010-2011.
13. Manning J.F., *Textualism and Legislative Intent*, Va. Law Review 91/2005.
14. Merriman J.E., *Scrivener's Errors and the Mischief They May Cause*, A.B.A. Sec. Ins. Negl. & Comp. L. Proc. 1969.
15. Nam Sihombing E., Hadita C., *The Ideal Mechanism of Clerical Errors Resolution in the Legislation in Indonesia (Comparison with United Kingdom, United States, and Singapore)*, Jurnal Penelitian Hukum De Jure 2/2023.
16. Ohlendorf J.D., *Textualism and the Problem of Scrivener's Error*, Me. Law. Review 64/2011-2012.
17. Rickless S.C., *A Synthetic Approach to Legal Adjudiction*, San Diego Law Review 42/2005.
18. Scalia A., Manning J.F., *A Dialogue on Constitutional and Statutory Interpretation*, Geo. Wash. Law Review 80/2012.
19. Seidenfeld M., *A Process Failure Theory of Statutory Interpretation*, Wm.&M. Law Review 56/2014-2015.
20. Siegel J.R., *What Statutory Drafting Errors Teach Us about Statutory Interpretation*, Geo. Wash. Law Review 69/2000-2001.
21. Solan L.M., *Linguistic Issues in Statutory Interpretation* [in:] L.M. Solan, P.M. Tiersma (eds.), *The Oxford Handbook of Language and Law*, Oxford 2012.
22. Sollors D.M., *The Scrivener's Error Doctrine and Textual Criticism: Confronting Errors in Statutes and Literary Texts*, Santa Clara Law Review 49/2009.
23. Somin I., *Is Textualism Doomed*, U.Pa. Law Review, PENNumbra 158/2009.
24. Stepanova V., *Legal Drafting and Editing in Academic Studies*, Procedia – Social and Behavioral Sciences 214/2015

25. Treanor W.M., *The Case of the Dishonest Scrivener: Gouverneur Morris and the Creation of the Federalist Constitution*, Michigan Law Review 120/2021-2022.