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Significance of the Constitutional Public Interest Clause for the Process of Amending the Constitution of Republic of Poland

Keywords: public interest, general clause, constitution, constitutional amendment

Słowa kluczowe: interes publiczny, klauzula generalna, konstytucja, zmiana konstytucji

Abstract

The purpose of the article is to conduct an axiological reflection using the notion of public interest, on preparation and the procedure for amending the constitution. The article provides a theoretical attempt to capture and place public interest in the broadly socially and publicly understood process of constitutional change. This attempt is not dictated solely by the desire to conduct theoretical – legal and intellectual speculation. This is supported by the increasing voices of the need to amend the existing constitution, which are often superficial, populist and *de facto* formulated from the position of the supremacy of the state over the individual. The time-varying connotations of the general public interest clause are related to the axiology of selected constitutional principles. The public interest, understood at a given moment in the development of social life, should be a determinant of the process broadly, i.e. both the social and the legislative sense of the constitutional amendment. Similarly, the very direction of constitutional changes should be an expression of social interest.

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Streszczenie**Znaczenie konstytucyjnej klauzuli interesu publicznego
w procesie zmiany Konstytucji Rzeczypospolitej Polskiej**

Celem artykułu jest przeprowadzenie aksjologicznej refleksji z wykorzystaniem pojęcia interesu publicznego, nad przygotowaniem i procedurą zmiany konstytucji. Nie jest nim natomiast rozwinięcie komentarza do konstytucyjnej regulacji trybu zmiany konstytucji. Artykuł dostarcza teoretycznej próby ujęcia i ulokowania interesu publicznego w szeroko, społecznie i publicznie pojętym procesie zmiany konstytucji. Podjęcie tej próby nie jest dyktowane wyłącznie chęcią przeprowadzenia teoretyczno-prawnej i intelektualnej spekulacji. Przemawiają za tym podnoszące się głosy o potrzebie zmiany obowiązującej konstytucji, które często mają charakter powierzchowny, populistyczny i *de facto* są formułowane z pozycji nadrzędności państwa względem jednostki. Zmienne w czasie konotacje generalnej klauzuli interesu publicznego pozostają w związkach z aksjologią wybranych zasad naczelnych konstytucji. Interes publiczny pojmowany w danym momencie rozwoju życia społecznego powinien stanowić determinantę procesu szeroko, to jest zarówno społecznie, jak i legislacyjnie pojętego sposobu zmiany konstytucji. Podobnie sam kierunek zmian konstytucji powinien stanowić wyraz interesu społecznego.

Public interest is a general clause of a constitutional nature. Only for this reason its constitutional significance is indisputable. Essentially, ambiguous, legal categorization of this clause is impossible; it is also often expressed in political, social and sociological categories². In broader categories of a legal system, the public interest clause is semantically close to the social interest clause. Sometimes these clauses are equated with each other and treated interchangeably in the doctrine of law and in the process of its application.

The concept of public interest should not be equated with the interest of the state, as the connotation related to the first concept is wider, because it includes a broadly understood factor of self-governance, including territorial

² A. Żurawik, „*Interes publiczny*”, „*interes społeczny*” i „*interes społecznie uzasadniony*”, „*Ruch Prawniczy, Ekonomiczny i Socjologiczny*” 2013, vol. LXXV, No. 2, p. 57; E. Modliński, *Pojęcie interesu publicznego w prawie administracyjnym*, Warsaw 1932, p. 3.

self-governance and other types of self-governance. The process of establishing the content-related elements of the constitutional public interest clause by way of enquiries of the doctrine of law and in various practical frames of reference seems to be permanent, considering the dynamics of social life. The content of general clauses may be and is time-varying, and this fact regards the constitutional public interest general clause. It should be emphasized that the role of the doctrine of law is, among other things, to develop proposals concerning the minimum certainty of general clauses, including the public interest clause³. In the case of the constitutional general clause, this is particularly important for the stability of the constitutional content in the case of the petrification of the considerations of the doctrine by way of the case-law of the constitutional court.

The article presents an attempt to notice and include public interest in the broadly, socially and publicly, understood process of amending the constitution. It is not important whether it is a partial or complete amendment of the constitution. What is important are relations between any amendment of the constitution and public interest. In other words, in this case, the amendment of the constitution should be broadly understood, considering all types of amendments of the constitution by way of formalized procedures established for this purpose, irrespective of a number of amendments and their extensiveness, that is their quality and significance⁴.

According with doctrinal assumptions, the procedure for amending the constitution constitutes the necessary element of the complete constitution. The level of the detailed constitutional regulation of the manner of amending the constitution is not so important in this case. It is significant to regulate this issue in a constitutional manner. Furthermore, the manner of amending the constitution as a constitutional issue is affected by specific fundamental principles of the constitution. In fact, it is related to the certain fundamental principles of the constitution and thus creates grounds for their influence.

The constitutional nature of the public interest clause serves it not only because of using the term 'public interest' in particular articles of the consti-

³ M. Wyrzykowski, *Pojęcie interesu społecznego w prawie administracyjnym*, Warsaw 1986, p. 47 et seq.

⁴ W. Sokolewicz, *Comment to Article 235*, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, vol. II, ed. L. Garlicki, Warsaw 2001, p. 2.

tution *expressis verbis*⁵, but also due to the connotation relations of this term with the content of the certain fundamental principles of the current Constitution of the Republic of Poland⁶. I believe that noticing and doctrinal petrification of these relations constitutes a particularly significant factor allowing to include public interest in the broadly understood process of amending the constitution, that is the most significant public law act which provides models of examination of constitutionality of norms for both segments of a legal system, that is public and private law. In the case of public law, what I have in mind here, is administrative law⁷, in which the public interest clause serves important restrictive functions.

I believe that the fundamental principles of the constitution the content of which should *inter alia* determine the view on the manner of the socially understood process of amending the constitution and influence the interpretation of the constitutional regulation of the amendment of the constitution, and the principles which are content-related with the constitutional social interest clause are the principle of common good, the principle of the sovereignty of the nation, the principle of a democratic lawful state and the principle of civil society. It concerns the current Constitution of the Republic of Poland. In the content of the mentioned principles I notice fields which are simultaneously penetrated by public interest, which constitutes the subject matter of further considerations.

The constitutional principle of common good provides ideological background for the general social interest clause⁸, and it is difficult to imagine that the social interest connotation could be established without bearing in mind its axiological relations to this principle. In the context of constitutional law, it is not easy to point out clear and strong differences in the common good and public interest clause connotations. Thus, according with the majority

⁵ They include the following Articles of the Constitution of the Republic of Poland: Art. 17(1) (professional self-government), Art. 22 (restriction on the freedom of business activity), Art. 63 (the right to petition), Art. 213(1) (the National Broadcasting Council) and Art. 31(3) in the context of the principle of proportionality (restriction on constitutional freedoms and rights).

⁶ The Constitution of the Republic of Poland of April 2, 1997 (Dz.U. No. 78, item 483).

⁷ H. Maurer, *Ogólne prawo administracyjne*, Wrocław 2002, p. 28.

⁸ M. Woźniak, *Interes publiczny i dobro publiczne w prawie administracyjnym na tle konstytucyjnej zasady dobra wspólnego*, "Przegląd Prawa Konstytucyjnego" 2017, No. 4, p. 153.

view, the concepts of common good and public interest are treated as the same concepts⁹; however, one should note that there are opinions according to which they should be understood differently. The concept of common good was developed by the Catholic social science. Despite the fact that the constitutional principle of common good is related to the idea of the state, it is not limited to the state, as common good should be also used to serve the human being¹⁰. Thomas Aquinas combined the category of common good with creation of law. Therefore, law in its content and its application should constitute instruments of realization of common good equated with public interest¹¹.

The constitutional connotation of the concept of public interest corresponds with the connotation of the principle of the sovereignty of the nation. The function of the constitution, as the paramount source of public law, is to guarantee forms of expression of the sovereign's will. It concerns in particular the process of amending the constitution. The constitution can be amended only in the public interest which is broader than the interest of the state, and it is impossible to imagine a different situation. Moreover, the broadly understood manner of amending the constitution itself cannot be contradictory with public interest. On the contrary, both the manner of preparing the constitutional amendments and the procedure for amending the constitution itself should consider public interest. It should be emphasized that nowadays public interest should not be equated with a reason of state understood as primacy of national interest over the interest of the individual. Public interest should also not be perceived as a mathematical sum of individual interests¹², since it would result in vulgarization and backwardness in understanding the principles of democracy. I perceive public interest differently. Public interest and the interest of the individual should not be contrasted

⁹ R. Sowiński, *Interes publiczny - dobro wspólne. Wartości uniwersalne jako kategorie kształtujące pojęcie administracji*, [in:] *Prawo do dobrej administracji. Materiały ze Zjazdu Katedr Prawa i Postępowania Administracyjnego*, Warsaw-Dębe 2002, p. 564; J. Oniszczyk, *Konstytucja Rzeczypospolitej Polskiej w orzecznictwie TK*, Cracow 2000, p. 34.

¹⁰ M. Woźniak, *op.cit.*, p. 155.

¹¹ R. Sobański, *Dobro wspólne w definicji ustawy Tomasz z Akwinu*, [in:] *Prawo a wartości. Księga jubileuszowa Profesora Józefa Nowackiego*, eds. I. Bogucka, Z. Tobor, Cracow 2003, p. 251 et seq.; M. Woźniak, *op.cit.*, p. 155.

¹² A. Wilczyńska, *Interes publiczny w prawie stanowionym i orzecznictwie Trybunału Konstytucyjnego*, "Przegląd Prawa Handlowego" 2009, No. 6, p. 50; A. Żurawik, *op.cit.*, p. 60.

with each other categorically; the interest of the individual should be included in the interpretation of public interest by way of their balancing, and even the protection of the individual should be incorporated in the public interest connotation. This opinion corresponds with the constitutional principle of a democratic lawful state.

Objectified assessment of the functioning of the current constitution should constitute the grounds for the decision on admissibility of its amendments. Such an assessment should be the effect of control – a specific overview of consequences of the validity and application of particular norms of the constitution. Only if we agree that the current constitutional practice is based on a given norm, or that given constitutional forms are not objectively the best practice, and that introduction of solutions the quality of which is objectively better is highly probable, can we consider the review of a given constitutional norm or norms¹³. In other words, if we want to change something, then only for better, meaning: something which serves common good and public interest in a better way.

The amendments to the constitution cannot be considered the way the amendment to the act of Parliament is. The amendment of the constitution always constitutes a change of keystone of a system of sources of law, and it may open various new possibilities of action for the legislator. The constitution-maker who decides to amend the constitution should always predict the directions of changes in the case-law caused by the amendment to the Constitution. The participant of the legislative process who does not make at least an attempt to predict the directions of these changes does not act for the benefit of public interest. While amending the Constitution, the constitution-maker always modifies the grounds for the work of the constitutional court¹⁴, and thus modifies also the shape of the Constitution in action. Hence, prior to the amendment to the Constitution, the constitution-maker should make an attempt to assess the scope and nature of general consequences caused by making a given amendment, which is required by the principles of decent legisla-

¹³ A. Bisztyga, *Czy potrzebne są zmiany w Konstytucji Rzeczypospolitej Polskiej?*, "Zeszyty Naukowe, Górnośląska Wyższa Szkoła Handlowa im. Wojciecha Korfańtego, Zeszyt Naukowy Katedry Prawa i Administracji" 2007, ed. A. Bisztyga, No. 32, p. 22.

¹⁴ A. Bisztyga, *Nowa Konstytucja. Spotkanie z Wicemarszałkiem Sejmu RP Markiem Borowskim*, "Humanistyczne Zeszyty Naukowe – Prawa Człowieka" 1997, No. 4, p. 195.

tion. The assessment should be developed by way of a social dialogue, which would allow society to present its views and articulate its position regarding the issue of constitutional significance. A social dialogue regarding such a publicly significant issue is consistent with the constitutional principle of the sovereignty of the nation.

The principle of the sovereignty of the nation and the principle of a democratic lawful state, which are the principles of decent legislation, require having a wide, extended in time, social debate, before making any amendment to the constitution, which would allow the sovereign to familiarise itself with the objective and consequences of the proposed amendments. This assumption is also intended to guarantee the greatest possible expression of public interest. I believe that the amendment to the constitution cannot constitute only the result of arrangements made by politicians. Such a scenario is excluded due to the fact that the Constitution is treated as a social contract of the collective sovereign and not as a contract concluded only with the participation of the representatives of the sovereign.

Public interest in matters of such public significance as the amendment of the Constitution is expressed to the fullest extent possible by the sovereign itself – the nation in a social debate. This process should be carried out in compliance with the standards of a democratic lawful state. In my opinion, constitutional experts should play a significant role in making this postulate real.

We should add that the Constitution is by definition a relatively stable act, which logically results in the rigidity of the procedure for its amendment. Stability and the related certainty of law constitute elements of the constitutional principle of a democratic lawful state and at the same time their realization constitutes expression of public interest. Let us add that the connotation relation between two fundamental principles of the Constitution and a category of public interest becomes particularly important in relation to the Constitution as an act which is by definition valid for decades, not for years. The participant of the process of the amendment to the Constitution always faces a dilemma between respect for the stability of the principles and norms of the Constitution and the need to amend it. On the one hand, the concern for the stability of the Constitution protects the act against hasty and frequent amendments. On the other hand, stability should not result in the detach-

ment of its content from realities of social and political life¹⁵, as it creates the risk of constitutional fiction. According to Jan Wawrzyniak, the absolute stability must, sooner or later, become harmful¹⁶, since the constitution is supposed to serve citizens and the state, not otherwise¹⁷.

I perceive a social debate over the proposals regarding the amendments to the Constitution conducted with the participation of free media as *conditio sine qua non* of such amendments. Furthermore, I perceive such a debate as a necessary element of the broadly understood procedure for amending the Constitution. I believe that such reasoning corresponds with the real, not merely declared principle of the sovereignty of the nation in the process of amending the Constitution. In many countries the complete or even partial amendment to the Constitution is preceded by the conclusion of a social contract initiating and enabling performing works relating to this amendment¹⁸.

Articulation of public opinion with regard to the issue of the amendment of the Constitution constitutes expression of public interest with regard to the matter of a fundamental nature. Law-making opinion of society is expressed at this moment of a broadly understood, social and constitutional debate. British doctrine of constitutional law provides significant support for recognizing a social debate as the element of the amendment to the Constitution, despite the fact that there is no Constitution understood as an act of superior legal force in the United Kingdom. British constitutionalist A.V. Dicey understood a law-making opinion as public opinion exerting influence on a direction of creating law¹⁹. At the same time, he put emphasis on existence of a procedure enabling citizens to enforce performance of obligations from the state and its authorities. In British doctrine of law there is a firmly established view that British constitutional law

¹⁵ J. Wawrzyniak, *Stabilność a zmienność konstytucji (kilka refleksji)*, [in:] *Problemy zmiany konstytucji*, ed. R. Chruściak, Warsaw 2017, pp. 284–285.

¹⁶ Ibidem, p. 285.

¹⁷ M. Zubik, *Navigare necesse est. Lex fundamentalis semper reformanda. (Rzecz o niebalszalności stabilności tekstu ustawy zasadniczej)*, [in:] *Problemy zmiany konstytucji ...*, p. 236.

¹⁸ R.A. Goldwin, A. Kaufmann, *Constitution Makers on Constitution Making*, Washington 1988, p. 453; B. Banaszak, M. Jabłoński, *Determinanty zmiany konstytucji*, [in:] *Praktyczne i teoretyczne aspekty prawa konstytucyjnego*, eds. B. Banaszak, M. Bernaczyk, Wrocław 2006, p. 59.

¹⁹ A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, London 1959, p. 202.

is not a source but a result of observing the rights of the individual toward the state in practice²⁰. This thesis stems from a historical conviction that freedom is an inherent right of every human being and that each Englishman has the right to take advantage of law established by English nation in previous centuries and in particular a right to protection which should be granted to them by the administration of justice²¹.

In the light of the foregoing, all amendments to the Constitution which disregard public interest by law-making public opinion should be regarded as unacceptable. Such interpretation of the process of amending the Constitution allows to include it in firm relations with the constitutional principles of the sovereignty of the nation. The highest possible degree of the compliance of the amendments to the Constitution with public interest expressed in a social debate should be the effect of democratism of the process of amending the Constitution.

In democracy, public interest requires lack of discriminatory exclusion of certain groups of citizens from the benefits of a legal system²². This requirement concerns participation in a social, constitutional debate and participation in formulating the directions and proposals of amendments to the Constitution. The Constitution should define values and solutions which would gather the general public, not only its part. Drift of the constitutional content toward expressing interest of only certain part of society in it must result in increase of merely particularist nature of the Constitution, which in practice usually results in the oligarchization of the state. It is not an accident that one of the principles of the Constitution of the Republic of Poland is the principle of political pluralism which constitutes the component of the constitutional principle of civil society. Lack of political pluralism means deprivation of a possibility to develop for civil society. Social pluralism, similarly to expert pluralism, and scientific pluralism which determines development of culture

²⁰ A. Bisztyga, *Oddziaływanie Europejskiej Konwencji Praw Człowieka na porządek prawny Zjednoczonego Królestwa*, Katowice 2008, p. 27.

²¹ W.M. Bartel, *Ochrona wolności osobistej na tle rozwoju państwowości anglosaskiej Brytanii (do roku 1966)*, Cracow 1965, p. 8.

²² M. Wyrzykowski, *Publiczne a prywatne w wykładni konstytucyjnej na przykładzie art. 18 Konstytucji RP*, [in:] *Interes publiczny a interes prywatny w prawie*, ed. T. Giaro, Warsaw 2012, p. 231.

and science, should be revealed in discussion over the direction and need of the potential amendments to the Constitution of the Republic of Poland.

Time-varying connotations pertaining to the general public interest clause are related to the axiology of the selected fundamental principles of the Constitution. The public interest at a given moment of development of social life should constitute the determinant of the process of the widely, socially and legislatively, understood manner of amending the Constitution.

One could also ask to what extent public interest, and thus broader interest than the interest of the state, containing in itself an element of the protection of the individual and the self-government element, restricts the constitution-maker. In my opinion, each participant of the broadly understood process of amending the Constitution is bound by human dignity, which has non-normative sources, as well as freedoms and rights of human being which stem from it. Therefore, the authority, including the constitution-making authority, does not have an absolute power, as it is restricted by natural freedoms and rights of the human being the respect for which constitutes grounds for just society²³.

For these reasons, the process of amending the Constitution, and the amendment itself, should constitute expression of public interest. This thesis imposes a responsible task on the constitution-maker, namely reading the content of the constitutional public interest general clause specific to the constitutional moment. This content cannot be determined by the inspirers and participants of the constitution-makers in any way they want. In my opinion, the minimum certainty of the content of public interest as the determinant of the nature of the process of amending the Constitution and the amendment itself should be determined along with the content of the specific fundamental principles of the act. As stated, the principles of common good and sovereignty of the nation, as well as the components of the principles of a democratic lawful state and civil society, should be used for this purpose in the first place.

The connotations of the public interest clause clarified in the content of the mentioned principles provide the valuable determinants of the nature of the constitution-making process, and thus affect, to certain extent, the nature and direction of these amendments. What I mean here is not only an influ-

²³ W.F. Murphy, *Constitutional Democracy*, Baltimore 2007, p. 7.

ence on the interpretation of the constitutional regulation of the amendment procedure, but also an influence of the broadly understood, social and political, process of a social discussion over it.

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