Anna Rytel-Warzocha¹

**Parliamentary Review of the Constitutionality of Bills –
Some Remarks on the Background of the Article
34 p. 8 of the Standing Orders of the Sejm**

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Słowa kluczowe: parlamentarna kontrola konstytucyjności, prawo inicjatywy ustawodawczej, Marszałek Sejmu, Komisja Ustawodawcza

Abstract

According to the Standing Orders of the Sejm the Speaker of the Sejm, after seeking the opinion of the Presidium of the Sejm, may refer any bills which raise doubts as to their consistency with law, in particular with the Constitution, to the Legislative Committee for its opinion. If the Committee finds the bill unconstitutional and therefore inadmissible, the Speaker can refuse to initiate the legislative procedure. The above regulation has for many years raised doubts as to its consistency with the Constitution, in particular the constitutional right to legislative initiative (Article 118) or the rule of considering statutes in three readings by the Sejm (Article 119, Article 120). The article presents the genesis and the analysis of the current regulation of the parliamentary review of the constitutionality of bills in Poland at the very beginning of the legislative procedure, the controversies that arise on that background and the discussion on that issue among the representative of the doctrine as well as conclusions *de lege lata* and *de lege ferenda*.

¹ ORCID ID: 0000-0001-8972-4088, Ph.D., D.Sc., Department of Constitutional Law and Political Institutions, University of Gdańsk, e-mail: anna.rytel@prawo.ug.edu.pl.

Streszczenie**Parlamentarna kontrola konstytucyjności projektów ustaw –
kilka uwag na tle art. 34 p. 8 Regulaminu Sejmu**

Zgodnie z art. 34 ust. 8 Regulaminu Sejmu Marszałek Sejmu po uzyskaniu opinii Prezydium Sejmu może skierować projekt ustawy, wobec którego istnieje wątpliwość o ich sprzeczności z obowiązującym prawem, w tym z Konstytucją, do Komisji Ustawodawczej celem wyrażenia opinii. W przypadku, gdy Komisja zaopiniuje projekt jako niedopuszczalny, Marszałek może nie nadać mu dalszego biegu. Powyższa regulacja od dawna wzbudza wątpliwości dotyczące jej zgodności z Konstytucją, w szczególności z konstytucyjnym prawem inicjatywy ustawodawczej (art. 118), zasadą rozpatrzenia projektu ustawy przez Sejm w trzech czytaniach (art. 119) oraz podejmowania ostatecznej decyzji w sprawie uchwalenia ustawy przez Sejm *in pleno* (art. 120). W artykule przedstawiono genezę i analizę obowiązujących rozwiązań prawnych w zakresie parlamentarnej kontroli konstytucyjności prawa w Polsce w ramach kontroli wstępnej, kontrowersje powstałe na tym tle i związaną z tym dyskusję w doktrynie, jak również wnioski *de lege lata* i *de lege ferenda*.

The Polish solutions concerning the constitutional review of law is based on the centralized Kelsenian model². The competence to review law has been entrusted to the Constitutional Tribunal which adjudicates on the conformity of statutes, international agreements and legal provisions issued by central State organs to the Constitution and other acts of higher legal force. The constitutional review by the Constitutional Tribunal can have both *a posteriori* and *a priori* nature but even if the review is conducted before the enforcement of the statute at the request of the President of the Republic (according to the Article 122 p. 3 of the Constitution³) it can only concern acts that have already been adopted by the parliament. Therefore, according to Polish law, the Constitutional Tribunal cannot adjudicate on acts which are still be-

² Leksykon wiedzy politologicznej, eds. J. Marszałek-Kawa, D. Plecka, Toruń 2018, pp. 544.

³ Constitution of the Republic of Poland of 2 April 1997 (Dz.U. No. 78, item 483, with later amendments).

ing proceeded by the parliament before their adoption. There is no possibility to request such review during the legislative process neither by deputies, nor the internal parliamentary bodies such as parliamentary committees or the Speaker. In Poland, there are also no other independent authorities responsible for the constitutional review of legislative proposals being proceeded by the parliament before their enactment, such as e.g. the Swedish Council on Legislation (Lagrådet).

Nevertheless, due to the constitutional principles such as the rule of law (Article 2, Article 8) or the supremacy of the Constitution in the system of law (Article 8), every entity taking part in the procedure of adopting law is obliged to act according with the Constitution and also should ensure that the content of proposed or proceeded acts is compliant with the Constitution. Such approach was also shared by the Constitutional Tribunal, which indicated in its rulings that each authority participating in the legislative process shall assess the constitutionality of its own behavior⁴. Also, the doctrine pointed out that the need to review the constitutionality of bills during the legislative proceedings is determined by the legislator's obligation to organize legislative proceedings in a way that guarantees that the law that is being adopted is constitutional⁵.

That is why several mechanisms have been introduced to the legislative procedure at its different stages that aim to fulfil the above requirement. The most important of them and the most formalized at the same time is the competence of the Legislative Committee of the Sejm to decide whether the legislative proposal to be proceeded by the Sejm is constitutional or not. The possibility of conducting a constitutional review of a legislative proposals at the very beginning of the legislative process has not been provided in the constitutional provisions regulating the frames and essential elements of the legislative process. However, such a possibility has been explicitly provided by the Sejm's Standing Orders⁶ that is a resolution adopted by the Sejm specifying

⁴ Decision of the Constitutional Tribunal of November 23, 1993, case No. K 5/93.

⁵ A. Szmyt, *Tryb stanowienia ustaw – szanse i zagrożenia*, [in:] *Materiały z XLVIII Ogólnopolskiego Zjazdu Katedr i Zakładów Prawa Konstytucyjnego (on the rights of a manuscript)*, Serock, 1–3.06.2006, p. 15.

⁶ Resolution of the Sejm of the Republic of Poland of June 30, 1992 – Standing Orders of the Sejm of the Republic of Poland (unified text: "Monitor Polski" 2019, item 1028)

the internal organization and conduct of work of the Sejm (Article 112 of the Constitution).

Pursuant to the Article 34 p. 8 of the Standing Orders, “the Speaker of the Sejm, after seeking the opinion of the Presidium of the Sejm, may refer any bills or draft resolutions which raise doubts as to their consistency with law, including European Union law or basic principles of legislative technique, to the Legislative Committee for its opinion. The Committee may, by a 3/5 majority vote in the presence of at least half of the members of the Committee, find the bill (draft resolution) inadmissible. The Speaker of the Sejm shall be free not to initiate the proceedings in relation to any bill (draft resolution) which has been found inadmissible”.

The above regulation is not new in the Polish legal order as the provision corresponding to the current Article 34 p. 8 was introduced to the Sejm’s Standing Orders already at the moment of its adoption on July 30, 1992 (then as Article 31 p. 6). Its genesis was directly related to the adoption by the Sejm of an unlawful lustration resolution on May 28, 1992⁷. However, it should be noted that the content of the above provision has been subject to several modifications since its adoption in 1992. First of all, in the years 1993–1997, it was not the Speaker but the Presidium of the Sejm entitled to refer to the Legislative Committee with the request to review the constitutionality of a draft law. Then, for a long time, the provisions of the Sejm’s Standing Orders have not directly determined a very important issue, namely the consequences of adopting by the Legislative Committee a resolution on the inadmissibility of the draft due to its non-compliance with the Constitution. The lack of such regulation caused disputes in the doctrine whether the negative opinion of the Legislative Committee shall be binding on the Presidium of the Sejm so shall the legislative proceedings regarding the questioned act be continued (referred to the first reading) or not (returned to the initiator)⁸. From the very

⁷ W. Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe*, Dordrecht–Heidelberg–New York–London 2014, p. 355; G. Sanford, *Democratic Government in Poland: Constitutional Politics since 1989*, London 2002, p. 221; J. Jaskiernia, *Zasady demokratycznego państwa prawnego w sejmowym postępowaniu ustawodawczym*, Warsaw 1999, p. 240; A. Szmyt, *Badanie dopuszczalności projektu ustawy w trybie art. 34 ust. 8 Regulaminu Sejmu*, “Przegląd Sejmowy” 2012, No. 5 (112), p. 12.

⁸ The opinions in this regard were presented, among others, by: M. Kudej, *Instytucje polskiego prawa parlamentarnego z zakresu legislacji*, Katowice 1995, p. 23; A. Szmyt, *Badanie dopuszczalności...*, p. 14.

beginning, the resolution on the inadmissibility of the draft law could be undertaken by at least 3/5 of votes, however, the quorum requirement initially was lower as it was not half but 1/3 of the number of all committee members.

Two important changes were introduced by the amendment to the Sejm's Standing Order of October 28, 1997⁹. First, the right to initiate the review was transferred from the Presidium of the Sejm to the Speaker, with the proviso that the Speaker must first consult the Presidium. Second, the competence to conduct the review was entrusted to the parliamentary Committee of Justice and Human Rights in connection with the liquidation of the Legislative Committee. However, when in October 2001¹⁰ the Legislative Committee was restored it regained the above competence.

The provisions of the Sejm's Standing Orders have not specified which draft laws may be subject to the review of their compliance with the Constitution, therefore it should be assumed that such a possibility applies to all kinds of bills submitted to the Speaker, including the drafts of budget acts, bills expressing consent for the ratification of international agreements (listed in the Article 89 and Article 90 of the Constitution) by the President. It should also be noted that, apart from European law that is explicitly mentioned in the Article 34 p. 8 of the Standing Orders also the Constitution and international agreements which ratification required the prior consent of the parliament can serve as the model of the review. It directly results from the hierarchical construction of the system of sources of law in Poland. As Z. Czeszejko-Sochacki pointed out, in the context of the Article 34 p. 8 of the Standing Orders, a contradiction with the law is a very broad concept and may refer to both non-compliance with the Constitution and other act of a higher legal force¹¹.

According to the Sejm's Standing Orders, a draft may be subject to the review procedure when it raises "doubts" of the Speaker, however, since there are no other conditions determined, recognition of such doubts in relation to a given draft depends on the Speaker's subjective assessment. As it has been already mentioned, before referring the draft to the Legislative Committee, the Speaker is obliged to con-

⁹ Resolution of the Sejm of the Republic of Poland of October 28, 1997 on the amendment of the Standing Orders of the Sejm of the Republic of Poland (M.P. No. 80, item 779).

¹⁰ Resolution of the Sejm of the Republic of Poland of October 19, 2001 on the amendment of the Standing Orders of the Sejm of the Republic of Poland (M.P. No. 37, item 586).

¹¹ Z. Czeszejko-Sochacki, *Prawo parlamentarne w Polsce*, Warsaw 1997, p. 228.

sult the Presidium of the Sejm. This solution aims to make the decision to refer the draft to the Legislative Committee for review more objective, because the Presidium of the Sejm, apart from the Speaker appointed by the Speaker, also includes Deputy Speaker representing other parliamentary parties. It should be noted, however, that the opinion of the Presidium is purely advisory, so the final decision on submitting a draft to the Legislative Committee always belongs to the Speaker¹².

There are divergent opinions presented in the doctrine of constitutional law in regard to the constitutionality of the Article 34 p. 8 of the Sejm's Standing Orders. It may be pointed out, however, that the controversy is not so much the Legislative Committee's competence to issue opinions on the constitutionality of draft bills, but the legal effect of the Committee's recognition of the inadmissibility of a draft. In other words, this provision raises doubts as it allows the Speaker of the Sejm not to proceed a legislative proposal deemed inadmissible by the Legislative Committee. However, it should be emphasized that such a negative opinion does not always mean the interruption of the legislative process and returning the draft to its promoter¹³.

¹² For a more complete picture of the constitutional practice in regard to the institution provided for in Article 34 p. 8 of the Sejm's Standing Orders, it is worth quoting some statistical data. The Legislative Committee of the Sejm of the third term of office (1997–2001) issued 3 opinions as part of the preliminary assessment of the constitutionality of draft bills (one draft was declared “inadmissible”). In the next fourth term of the Sejm (2001–2005) the Legislative Committee issued 23 opinions (6 bills were considered “inadmissible” and therefore not proceeded). In the fifth shortened parliamentary term (2005–2007), the Legislative Committee issued 19 opinions and during the sixth term (2007–2011) there were 46 opinions issued. During the seventh term of office of the Sejm (2011–2015), the above numbers significantly increased, as during this period the Legislative Committee was referred to 115 times (the Committee issued 74 positive opinions, indicating that the proposed provisions did not infringe the provisions of the Constitution, and 21 negative opinions, in 20 cases, the applicants decided to withdraw the project, which followed the negative opinions of the experts – mainly from the Parliamentary Analysis Bureau – before the voting on their constitutionality and therefore admissibility). In the eighth term of office (2015–2019) the Speaker submitted 29 draft to the Legislative Committee in order to assess the constitutionality till May 2018. The Commission issued 24 positive opinions, while in 5 cases the bills were withdrawn by the applicants. The lists of cases referred by the Speaker according to the Article 34 p. 8 of the Sejm's Standing Orders are unpublished materials in the resources of the Chancellery of the Sejm.

¹³ E.g. in 2012, despite the fact that the Legislative Committee issued a negative opinion on two bills on partnerships, the then Speaker Mrs. E. Kopacz decided to give these bills a run by assigning them numbers of Sejm document.

It should be noted that the review of the constitutionality of drafts by the Legislative Committee also was criticized in the media. In 2012 a series of articles were published in which the above instrument was called a “shredder” of bills inconvenient for the parliamentary majority, which allows the Speaker “to throw it (a bill) into the wastepaper basket without subjecting it to the first reading by the Sejm”¹⁴. These negative opinions as well as the increased number of drafts referred to the Legislative Committee for review resulted in the then Deputy Speaker’s request submitted to Speaker in June 2012 to obtain by the Presidium of the Sejm a legal opinion on the compliance of the Article 34 sec. 8 of the Sejm’s Standing Orders with the Constitution. The main allegation which questioned the constitutionality of the above provision was the arbitrary decision of the Speaker who is a “one-man” internal body of the Sejm not to proceed with a draft due to substantive reservations and thus bypass the entire Sejm in the legislative process¹⁵.

In view of the above, the main problem with the constitutionality of the Article 34 p. 8 of the Sejm’s Standing Orders to answer the question whether, in the light of the Constitution of 1997, the Speaker, who is the internal body of the Sejm, may not give way to a legislative initiative that meets all formal requirements. The opinions presented by the representatives of the Polish doctrine of constitutional law were divergent.

On the one hand, some professors were of the opinion that the structure of the preliminary constitutional review of a draft provided for in the Sejm’s Standing Orders does not violate the provisions of the Constitution relating to the role of the Sejm *in pleno* in the legislative process. For example, A. Szmyt pointed out that “from the sequence of regulations, it follows that the referral of a bill by the Speaker of the Sejm to the Legislative Committee and the is-

¹⁴ E. Siedlecka, *Projekt ustaw o związkach partnerskich nie dla sejmowej niszczarki*, 12.07.2012, http://wyborcza.pl/1,76842,12113312,Projekty_ustaw_o_zwiazkach_partnerskich_nie_dla_sejmowej.html (17.11.2019); idem, *Sejmowa niszczarka stop?*, *Gazeta Wyborcza*, 4 lipca 2012 r., p. 3; idem, *Zdemontować „niszczarkę”*, http://wyborcza.pl/1,75968,12086890,Zdemontowac_niszczarke_.html (17.11.2019); idem, *Co zamiast niszczarki?*, 5.07.2012, http://wyborcza.pl/1,75398,12071894,Co_zamiast_niszczarki.html (17.11.2019); idem, *Niszczarka sejmowa osłabia opozycję, a zamrazarka nadal działa*, 6.07.2012, http://wyborcza.pl/1,76842,12079573,Niszcarka_sejmowa_oslabia_opozycje__a_zamrazarka.html (17.11.2019).

¹⁵ The Sejm’s document GMS-WP-112-227/12.

suing of an opinion by the Committee on the admissibility (inadmissibility) of the draft constitutes the phase »preceding« the moment of the »initiation« of the proceedings”, which would place this review as a “»verification« phase of the legislative initiative carried out, the outcome of which will determine the proper initiation and conduct of the legislative proceedings or its inadmissibility”. The conclusion of the above reasoning is that an entity constitutionally entitled to implement a legislative initiative has the right to expect the initiation of parliamentary work on a submitted bill, provided that its initiative is “lawful”. Thus, the constitutional right of legislative initiative obliges the Sejm to initiate legislative proceedings only if it is legally permissible¹⁶.

Also, others pointed out that the admissibility of initial substantive review of drafts prior to the initiation of the legislative procedure was justified by the fact that its preventive nature allows for eliminating the work of the parliament *in pleno* in relation to drafts that should be considered inadmissible and thus make it more effective¹⁷.

On the other hand, there are also critical opinions presented. The main charge of unconstitutionality that has been raised against the regulation in question was that the Speaker’s right to refuse proceeding the bill as a result of the initial constitutional review made by the Legislative Committee violates the right to legislative initiative specified in the Article 118 of the Constitution. The right of legislative initiative is a constitutional right to submit a bill to the parliament. This entitlement correlates with the Sejm’s obligation to consider the bill in accordance with a specific legislative procedure. As K. Kubuj has pointed out, in the light of applicable legal regulations, the submission of a bill to the Sejm by an authorized entity automatically initiates the legislative procedure. Therefore, the possibility of declaring the bill inadmissible due to its non-compliance with Constitution at that stage of legislative proceedings violates the “constitutional concept of the right of legislative initiative”, the consequence of which should be the consideration of a draft that

¹⁶ A. Szmyt, *Badanie dopuszczalności...*, p. 27; idem, *Zgodność z Konstytucją RP przepisów art. 34 ust. 8 Regulaminu Sejmu*, [in:] *Prace Sejmu RP VI i VII kadencji*, ed. A. Rytel-Warzocha, Gdańsk 2015, p. 149; 416; J. Marszałek-Kawa, D. Plecka, *Social Security as a Factor Contributing to the Evolution of the Political System in Poland after the Parliamentary Elections of 2015*, “Środkowoeuropejskie Studia Polityczne” 2017, No. 4, pp. 79–94.

¹⁷ M. Kudej, *op. cit.*, p. 24; J. Jaskiernia, *op. cit.*, p. 241.

meets all formal requirements by its addressee, i.e. the Sejm *in pleno*. Such a solution would not only ensure the compliance of parliamentary practice with the constitutional right of legislative initiative, but also would emphasize the role of the entire parliamentary chamber in legislative proceedings¹⁸. J. Ciemniowski emphasized that the process of reviewing the constitutionality of draft laws should be shaped in a manner consistent with parliamentary principles, in particular “the final decisions not to refer the draft for further proceedings should be taken by the entire chamber”¹⁹. R. Piotrowski presented the opinion that the provision of the Article 34 p. 8 of the Standing Orders creates a “non-constitutional basis for the competence to deprive certain entities the right to legislative initiative, granted to them by the Article 118 of the Polish Constitution”²⁰. The above opinions were supported by the Constitutional Tribunal which indicated that “the right of legislative initiative resulting from the Constitution corresponds to the obligation of the Sejm to consider the submitted draft” and “the formula »considers a bill« used in the Article 119 p. 1 of the Constitution, means that the Sejm should respond to any properly submitted bill”²¹.

To conclude, the problem of the constitutionality of the Article 34 p. 8 of the Sejm’s Standing Orders can be reduced to a conflict between two values – the right of specific entities to submit a legislative initiative provided for in the Article 118 of the Constitution of the Republic of Poland and the right of the Sejm as a legislative body not to engage in procedures concerning bills that are unlawful, as well as the prohibition of adopting acts contrary to the Constitution resulting from such constitutional principles as the principle of a democratic state of law (Article 2), the principle of the supremacy of the Constitution (Article 8) or the principle of legalism (Article 7). In addition, the Article 34 p. 8 of the Standing Orders also raises objections in the context of its compliance with the Article 119 p. 1 of the Constitution, which in-

¹⁸ K. Kubuj, *Marszałek Sejmu na straży jakości ustaw*, [in:] *Tryb ustawodawczy a jakość prawa*, ed. J. Wawrzyniak, Warszawa 2005, p. 67; idem, *Rola Marszałka Sejmu w postępowaniu ustawodawczym*, “Przegląd Legislacyjny” 2004, No. 2 (42), p. 19.

¹⁹ J. Ciemniowski, *Badanie zgodności ustaw z Konstytucją w procesie legislacyjnym*, [in:] *Tryb ustawodawczy a jakość prawa*, ed. J. Wawrzyniak, Warsaw 2005, p. 225.

²⁰ R. Piotrowski, *Uwagi o zgodności z konstytucją badania dopuszczalności inicjatywy ustawodawczej*, „Gdańskie Studia Prawnicze” 2014, t. XXXI, p. 663.

²¹ Decision of the Constitutional Tribunal of March 24, 2004, case No. K 37/03.

dicates that “the Sejm shall consider bills in the course of three readings” and the Article 120 of the Constitution, which clearly indicates that the Sejm acting *in pleno* is the only body authorized to adopt laws.

Bearing in mind the ambiguities that arise in the context of the constitutional review of bills by the Legislative Committee upon the request of the Speaker at the very beginning of the legislative procedure, some proposals for legislative changes should be considered. First, as there are certainly doubts as to the admissibility of conferring on the Speaker of the Sejm the competence specified in the Article 34 p. 8 of the Sejm’s Standing Orders if such regulation was to be maintained, it should be included directly in the Constitution. Second, an issue that is worth paying attention to is the final outcome of the Speaker’s decision not to proceed with the legislative initiative because of the inadmissibility of a bill declared incompatible with applicable law. If this competence was to be maintained, it would be worth considering the introduction of a mechanism allowing the applicant to appeal against such decision. This would provide the entities indicated in the Article 118 of the Constitution with the guarantees of the effective exercise of the right of legislative initiative. Third, in order to strengthen the review of the compliance of a bill with the Constitution during the legislative process, it is worth considering the introduction of the possibility to assess the bill in terms of its compliance with the Constitution also at further stages of the legislative procedure. The proposed change could assume maintaining the competence of the Speaker provided for in the Article 34 p. 8 of the Standing Orders. The Speaker could therefore refer to the Legislative Committee on his/her own initiative or at the request of deputies in the event of doubts as to the compliance of the provisions of the bill with the Constitution. The negative position of the Legislative Committee expressed in the resolution on the non-compliance of the bill with the Constitution would not, however, result in the interruption of the legislative process, but could be presented to deputies before voting on the adoption or rejection of the bill, or, going a step further, could oblige the Speaker to present during the first or a third reading the request to reject the entire bill, leaving the final decision on this matter to the Sejm as the whole chamber²².

²² See more on *de lege ferenda* conclusions and the parliamentary review of the constitutionality of bills at the initial stage of the parliamentary proceedings [in:] A. Rytel-Warzocho, *Przewidywana kontrola konstytucyjności prawa w Polsce na tle państw europejskich. Studium z prawa*

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konstytucyjnego, Gdańsk 2019, p. 114. Some theses included in the article were presented at the conference “Constitutional legislative principles: experience of implementation and challenges” that was held in the Lithuanian parliament in Vilnius on October 23, 2019.