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Redrafting of a Proposal in the Polish Legislative Procedure

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Słowa kluczowe: autopoprawka do projektu ustawy, postępowanie ustawodawcze, źródła prawa

Abstract

The main goal of article is to evaluate the functioning of a redraft of a legislative proposal in the Polish legal order, particularly whether this mechanism may be considered as making the legislative procedure more flexible and improving the quality of the legislative works of the Polish Parliament, or whether the constitutional shape of a redraft and its use leads to conclusions that this solution is misguided and negatively affects parliamentary legislative proceedings. Both normative analysis and systemic practice lead to the conclusion that the regulation of a redraft by the Sejm's Rules cannot be considered optimal. From my point of view, it is necessary to make such corrections to Art. 36 par. 1a-1c that will prevent from abusing this instrument. However, the critical assessment of the redraft standardization does not change the generally positive assessment of the institution itself, because the specific self-correction of the proposal, often resulting from the reflection of the initiator of the legislative proceedings (resulting from both internal and external factors), is fully desirable, primarily from the perspective of implementing the postulate of the legal system coherence and its completeness.

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Streszczenie

Autopoprawka w polskim postępowaniu ustawodawczym

Celem niniejszego artykułu jest dokonanie oceny funkcjonowania autopoprawki w polskim porządku prawnym, w szczególności tego, czy mechanizm ten można uznać za rozwiązanie uelastyczniające postępowanie ustawodawcze i poprawiające jakość prac legislacyjnych polskiego parlamentu, czy też kształt ustrojowy autopoprawki i jej wykorzystywania prowadzi do wniosków, które pozwalają stwierdzić, że rozwiązanie to jest chybione i negatywnie wpływa na parlamentarne postępowanie prawodawcze. Zarówno analiza normatywna, jak praktyka ustrojowa prowadzą do wniosku, że regulacja regulaminowa instytucji autopoprawki nie może być uznana za optymalną. W mojej ocenie konieczne jest dokonanie takich korekt art. 36 ust. 1a-1c, które doprowadzą do tego, że instrument ten nie będzie nadużywany. Krytyczna ocena unormowania autopoprawki nie zmienia jednak generalnie pozytywnej oceny samej instytucji, gdyż swoista autokorekta projektu, często będąca wynikiem refleksji inicjatora postępowania ustawodawczego (wynikającej zarówno z czynników wewnętrznych, jak i zewnętrznych), jest w pełni pożądana, przede wszystkim z perspektywy realizacji postulatu spójności systemu prawnego i jego kompletności.

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The amendment to the Sejm's Rules of 19 December 2008[2] introduced into the Polish legal order the institution of a redraft of a proposal, allowing the entities who carried out a legislative initiative to amend the submitted draft before the first reading. Over ten years of practice of using this institution makes it possible to assess it, particularly whether this mechanism may be considered as making the legislative procedure more flexible and improving the quality of the legislative works of the Polish Parliament, or whether the constitutional shape of a redraft and its use leads to conclusions that this solution is misguided and negatively affects parliamentary legislative proceedings in the Polish legal order.

[2] Resolution of the Sejm of the Republic of Poland of 19 December 2008 regarding amendments to the Regulations of the Sejm of the Republic of Poland (M.P. 2009, No. 2, item 9).

At the beginning, it must be noted that a 'redraft' did not belong the legal language and used to be employed by the Polish doctrine of constitutional law in a slightly different sense. The concept was used to refer to amendments submitted by the applicant during the legislative procedure[3]. In effect, the name encompassed only those amendments that were submitted by the applicant, even though from a legal point of view, they were not characterized by differences that would distinguish them from redrafts submitted by other authorized entities, which was actually in conformity with the lexical meaning of the concept of a redraft[4]. However, the current legal status excludes the possibility to use this name for defining other forms of legal proposals than those designated with this term[5].

The idea to introduce a redraft into the Sejm's Rules was presented in an extremely laconic manner. In the explanatory statement to the bill amending the Sejm's Rules, there was solely the statement that – together with other modifications included in the proposal – a redraft is intended to solve practical problems related to "the lack of specific regulations in the current wording of the Rules"[6]. It is beyond question that this institution was not only supposed to improve the course of legislative proceedings but also to allow the applicants, especially those of governmental bills, to make a simplified correction of errors and inadequacies in the proposals that were not noticed during the creation procedure. Therefore, it is beyond doubt that rational reasons pleaded in favor of introducing a redraft.

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[3] A. Patrzałek, A. Szmyt, *Skutki prawne wniesienia projektu ustawy*, [in:] *Postępowanie ustawodawcze w polskim prawie konstytucyjnym*, ed. J. Trzciński, Warsaw 1994, p. 155; J. Mordwiłko, *Wybrane zagadnienia legislacyjne w świetle regulaminu i praktyki sejmowej*, „Państwo i Prawo" 1992, No. 6, p. 44.

[4] As P. Chybalski underlines, it happened in the Sejm's works that the submission of amendments by the initiator was allowed in the phase preceding the first reading. "Consequently, if a redraft was submitted in the early phase of the proceedings, it was accepted that the acceptance of the Sejm's committee or Sejm was not necessary, but the redraft «automatically» led to the modification of the content of a given proposal". See: P. Chybalski, *Opinia prawna w sprawie autopoprawki do poselskiego projektu ustawy o zmianie ustawy o świadczeniach rodzinnych oraz ustawy o systemie ubezpieczeń społecznych*, „Zeszyty Prawnicze BAS" 2004, No. 4, pp. 97–98.

[5] E. Gierach, *Uwaga 5 do art. 36*, [in:] *Komentarz do Regulaminu Sejmu Rzeczypospolitej Polskiej*, ed. A. Szmyt, Warsaw 2018, p. 232.

[6] Druk nr 988/Sejm Rzeczypospolitej Polskiej, VI kadencja.

A redraft has been defined in Art. 36 par. 1a of the Sejm's Rules[7]. Pursuant to the mentioned provision, "the applicant, by the time of the first reading, may submit a redraft to the submitted proposal. The text of the redraft is introduced to the submitted proposal, without the necessity of voting thereon". There are at least a few significant conclusions deriving from this article. First of all, any entity having a competence of legislative initiative can submit a redraft, except for those who have expressly been deprived of this right. In the current legal status, redrafts cannot be brought only by a group of citizens who initiated the legislative proceedings, which is actually justified by general ambiguities related to the possibility of amending a citizens' proposal by its initiators, and – if the right was recognized – uncertainty as to the subject that would be able to do so. Furthermore, this limitation is justified by the fact that the introduction of changes by means of a redraft, even before the commencement of a substantive examination by the First Chamber, would allow the initiators to manipulate the content of a proposal supported in the defined version by at least 100.000 persons having the right to elect the Sejm[8].

Second of all, a redraft can only be submitted by the initiator, so only by a subject that used a legislative initiative. Therefore, there is no doubt that redrafts can be submitted only in the same way as bills, and not only by a representative of the applicant, since this goes beyond the scope of his power of attorney, while to a certain extent granting him a specific right of non-constitutional legislative initiative[9]. The slightest doubts in this regard relate to redrafts submitted by the President of the Republic of Poland, since – as a monocratic organ – he does so autonomously, in the form of a resolution (decision)[10].

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[7] Resolution of the Sejm of the Republic of Poland of 30 July 1992. Regulations of the Sejm of the Republic of Poland (M.P. 2019, poz. 660).

[8] Cf.P. Czarny, *Opinia prawna w sprawie interpretacji art. 14 ust. 2 ustawy o wykonywaniu inicjatywy ustawodawczej przez obywateli*, „Zeszyty Prawnicze BAS" 2012, No. 3, p. 64.

[9] Similarly P. Chybalski, *Opinia w sprawie statusu i uprawnień osoby upoważnionej do reprezentowania wnioskodawców w pracach nad poselskim projektem ustawy*, „Przegląd Sejmowy" 2014, No. 2, p. 129.

[10] It is difficult to agree with the opinion that granting the President with the possibility to submit a redraft under Art. 36 par. 1a excludes his right to submit amendments to his own bills, see: P. Błasiak, *Uprawnienia Prezydenta Rzeczypospolitej Polskiej w procesie ustawodawczym*, „Gubernaculum et Administratio. Zeszyty Naukowe Instytutu Administracji AJD w Częstochowie" 2016, No. 2, p. 95.

Seemingly, certain ambiguities may concern collective bodies, i.e. the Council of Ministers, the Senat and parliamentary committees regarding the identity of members of these bodies supporting a proposal and a redraft. However, due to the fact that all of the above-listed subjects have a legislative initiative in the form of a resolution, in both cases, it does not matter whether individual persons voted in the same way. Passing a resolution that modifies a proposal will state about submitting a redraft, provided, however, that this has been carried out in accordance with a procedure analogous to the one provided for by law for the exercise of a legislative initiative by a given entity[11].

However, the problem of the identity of persons supporting a legislative proposal and a redraft appears in the case of a group of deputies. They are also, in the number of at least 15, granted legislative initiative. This raises the question of whether everyone who has signed the proposal should also sign under the redraft. In my opinion, this is a necessary condition. In effect, the lack of a signature under the redraft by any of the signatories of the proposal excludes the possibility of recognizing it as effective[12]. Otherwise, if the signature of only 15 deputies from among those who signed the proposal was possible, it could – at least theoretically – lead to a situation, in which at least two redrafts with different content were submitted to the proposal, or a situation where deputies who did not accept the redrafts would have to accept it if it was submitted, or – alternatively – withdraw the submitted support for the legislative proposal. In a completely extreme case, this would encourage deputies who are against the proposal to sign it only to later destroy its assumptions by submitting the redraft to such a proposal that would completely change its assumptions.

The third significant problem related to a redraft concerns its scope. As P. Chybalski states, "the substance of redrafts is not related to requirements developed in the doctrine and in the jurisprudence of the Constitutional Tribunal that narrow down the admissible substance of amendments submitted in the course of legislative proceedings. This conclusion is mostly based on

[11] However, as E. Gierach emphasizes, the parliamentary practice has gone in a completely different direction, which means that redrafts are often submitted by the applicant's representative, see E. Gierach, *Uwaga 5 do artykuł 36...*, p. 233.

[12] In systemic practice, the list of deputies supporting a redraft is not attached to this redraft, *ibidem*.

the belief that in the current legal state, a redraft is functionally linked to the legislative initiative and not to the amendment"[13]. The author also emphasizes that there are no obstacles for a redraft to make significant modifications to the proposal because in the current legal status it can only be submitted before the first reading. Referring to numerous statements of the Constitutional Tribunal, it should be concluded that the submission of a redraft will not lead to a situation where the "base element" of the proposal will be subject to a less careful investigation by the Sejm than it would be in a situation without submitting the redraft thereto[14].

In my opinion, the view expressed above must be considered as fully acceptable. This is supported by the fact that the Rules do not indicate any substantive restrictions of such a redraft. *A contrario*, it can be assumed that, in principle, a redraft may not only introduce changes to a bill that will go beyond its original content but also even introduce a completely new proposal, which contradicts the one that was submitted to the Speaker of the Sejm. Therefore, the scope of changes and supplements submitted in the form of a redraft depends exclusively on the initiator's will. It may be agreed with the view of P. Chybalski that the only limitation of the scope of a redraft is the material scope of a permitted law[15], thus a redraft cannot concern the issues regulated by the Rules, European Union regulations as well as those that have been exclusively reserved to certain entities, such as in the case of budgetary acts or acts regulating relations between the state and churches other than the Roman Catholic Church[16]. Finally – from a substantive point of view – changes resulting from a redraft must remain in conformity with higher acts, including the Constitution of the Republic of Poland.

A significant meaning for the recognition of such wide possibilities of the scope of a redraft derives from the fact that the legislator decided to cover a redraft with the same legal regime as bills submitted by the entities who have a legislative initiative. In relation to redrafts, the provisions of Art. 34 of the Sejm's Rules apply. First and foremost, this means that a redraft is supple-

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[13] P. Chybalski, *Opinia prawna w sprawie...*, p. 100.

[14] Ibidem, p. 101.

[15] Ibidem.

[16] M. Kruk, *Prawo inicjatywy ustawodawczej w nowej konstytucji RP*, „Przegląd Sejmowy" 1998, No. 2, p. 23.

mented by a justification, which should include the same elements as a justification for a bill. Thus, it is necessary that the justification includes the following: explanation of the need and purpose of issuing the act, presentation of the actual state of affairs in the field to be regulated, demonstration of differences between the current and proposed legal status, presentation of the anticipated social, economic, financial and legal effects, indication of the sources of financing, if the proposal entails a burden of the state budget or budgets of local government units, presentation of the assumptions of draft basic implementing acts, statement on the compliance of the proposal with European Union law or statement that the subject of the proposal is not covered by European Union law[17]. Further requirements appear in situations when we deal with proposals other than those emanating from deputies or committees. In those cases, it is also necessary to present the results of consultations and information on the options and opinions presented, in particular, if the obligation to seek such opinions derives from statutory provisions[18].

However, the scope of the abovementioned elements included in such a justification depends on the redraft nature. If it only aims to correct an original proposal, in particular, in terms of its editorial content, the justification can be limited only to explaining the necessity of making such corrections. On the other hand, if it is of substantive nature, the requirements for the justification of a redraft will be further reaching. Consequently, if – as a result of a redraft – a completely new legislative proposal has been developed, it should be accompanied by a full justification, which will be subject to an analysis of its correctness by the Speaker of the Sejm.

As in the case of bills, the Marshal of the Sejm may, in the framework of preliminary proceedings, verify the formal and substantive correctness of

[17] According to the Art. 34 par. 2a of the Sejm's Rules, "in the justification to a bill that regards the property rights and obligations of entrepreneurs or the rights and obligations of entrepreneurs in relation to public administration bodies, an assessment of the expected impact of the bill on the activities of micro, small and medium-sized entrepreneurs is presented, as a separate part of the justification".

[18] In the case of proposals submitted by the Council of Ministers, the justification should also include draft basic implementing acts, assessment of the effects of the regulations, and – in the case of a bill implementing European Union law – draft implementing acts whose obligation to issue is provided for in the bill, as well as a table of compliance of the proposed provisions with European Union law (see the Art. 34 par. 4 and 4a of the Sejm's Rules).

a submitted redraft. If he decides that the justification attached to the redraft does not meet the requirements of the Rules, he may decide to return it to the applicant. In this case, however, the question arises whether the returning of the redraft means that the original version is also thereby returned, or whether such a proposal will be subject to further consideration by the Sejm, although it will not fully correspond to the intentions of the entity benefiting from the legislative initiative. Theoretically, the second option seems to be irrational, even though – in my opinion – significant procedural arguments plead in favor of the continuation of the legislative works. Firstly, the applicant can, until the end of the second reading of the legislative proposal, decide to withdraw it. Thus, if he decides that further parliamentary work is pointless without a redraft, he only needs to exercise this right. Secondly, the applicant – in the course of parliamentary works – can decide to submit amendments to the proposal, which will be identical to those included in the redraft. It is true that in this situation he will be limited by the substantive content of the amendments, but this right will be used if he has not decided to withdraw the proposal. Thirdly and finally, due to the nature of the legislative procedure, the submission of a redraft does not guarantee that the law adopted by Parliament will be adopted in the version proposed by the applicant. This follows from the fact that possible changes introduced in the Sejm proceedings and even in the Senate proceedings may shape the final version of the act in the way that it will not correspond to the content submitted in the proposal[19].

On the other hand, the situation is different when the Speaker of the Sejm decides that a redraft has substantive doubts. In such a case, the Art. 234 par. 8 of the Sejm's Rules applies. If the Speaker has doubts as to the conformity of the redraft "with law, including European Union law or the basic rules of the legislative technique [legislative drafting] [...], having consulted the Presidium of the Sejm, he may refer it to the Legislative Committee for consultation". As in the case of bills, the Committee may by a 3/5 majority

[19] In the Polish legal order, even government proposals do not enjoy the privilege of submitting them to vote in the version submitted by the Council of Ministers, without interference in their content by deputies. Such possibilities exist, for example, in French law or German law, E. Gdulewicz, *Postępowanie ustawodawcze w V Republice Francuskiej*, [in:] *Postępowanie ustawodawcze*, ed. E. Zwierzchowski, Warsaw 1993, p. 93; P. Sarnecki, *Ustroje konstytucyjne państw współczesnych*, Cracov 2005, p. 245.

vote in the presence of at least half of the members consider a redraft to be inadmissible, which allows the Speaker of the First Chamber not to proceed with it, although, of course, despite the negative opinion, he may still decide to continue the legislative works related to the content of the proposal emanating from the redraft. However, if he does not decide to give the redraft a further course, then the work on the proposal in its original wording may continue, which is supported by the same arguments that were brought above in relation to the situation in which the redraft was returned to the applicant.

In my opinion, a serious problem related to the submission of a redraft is the time in which this can be done[20]. The mentioned Art. 36 par. 1a only indicates that the applicant may do so until the commencement of the first reading. Therefore, no timeframe has been specified that must elapse between the submission of a redraft and the start of the first reading. One can imagine, which has actually been confirmed by the systemic practice, that redrafts, sometimes even far-reaching, are submitted a few hours before the start of this reading, which in practice may prevent or make it significantly more difficult for deputies to read the content of the new proposals of the initiators. Furthermore, the time needed for the Speaker of the Sejm to exercise his rights related to the formal and substantive verification of the redraft must also be added to this. For that reason, I think that the submission of a redraft should postpone the date of the first reading, thereby giving deputies the opportunity to examine the submitted proposals. This is particularly important in a situation where a redraft will concern proposals supported by a parliamentary majority (e.g. government or deputies' proposals), in relation to which the Speaker of the Sejm who represents such majority will not be particularly insightful[21]. At the same time, providing deputies with a real opportunity to make themselves familiar with the content of new legislative proposals should be considered as a form of ensuring the rights of the Sejm's opposition.

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[20] It is difficult to agree with the view of P. Chybalski who claims that although "in practice, some procedural problems may arise, e.g. when a redraft would be submitted a day before the planned first reading", they are not considered to be particularly important, P. Chybalski, *Opinia prawa w sprawie...*, p. 101.

[21] Cf.E. Gierach, *Parlamentarna kontrola konstytucyjności projektów uchwał Sejmu*, „Gdańskie Studia Prawnicze" 2014, t. XXXI, p. 555.

The Sejm's Rules also do not regulate whether a redraft should contain a uniform text of the bill, including the changes resulting therefrom, or be limited only to a list of modifications in relation to the original proposal. In accordance with the parliamentary practice that has developed over the last ten years, redrafts do not constitute harmonized versions of the proposals, but they only include the proposed changes (as mentioned above)[22], although there are also exceptions which – in my opinion – should be assessed positively[23]. Attaching the full text of the bill in a new wording would provide deputies with a much easier opportunity to analyze the submitted proposal, without having to look for links between the original bill and the redraft.

An analysis of the use of a redraft in the constitutional practice of the Sejm leads to interesting conclusions. Since the entry into force of the amendment to the Sejm's Rules, which introduced this institution into the legal order, until the end of August 2019, redrafts were submitted 66 times, of which as many as 30 times during the 6th term of the Sejm, 16 times during the 7th term, and 20 times during the 8th term[24], which allows to conclude that this mechanism is not overused in practice. It is also interesting that redrafts are first and foremost submitted by applicants from "within" the Sejm, i.e. by deputies and committees. During the 6th term of office, over 73% redrafts were submitted to such proposals, while less than 26% concerned government proposals. These proportions were even more unambiguous during the next term of office of the Sejm when all redrafts were submitted to deputies' proposals. Only the 8th term of office led to the increase in the number of redrafts to government proposals, which comprised as much as 35% of all redrafts, while deputies' and committees' proposals – 60% and 5%, respectively. It should be pointed out that a significant increase in the redrafts submitted by the Council of Ministers took place in the last dozen or so months of the current term. Moreover, in a few cases, redrafts *de facto* constituted new government proposals[25].

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[22] E. Gierach, *Uwaga 5 do artykuł 36...*, p. 233.

[23] A. Szmyt, *Opinia w sprawie projektu ustawy o Radzie Fiskalnej*, „Zeszyty Prawnicze BAS" 2014, No. 3, p. 112.

[24] Data taken from the website http://www.sejm.gov.pl.

[25] See the redraft of the government bill amending the act on excise tax and amending some other acts (Form 3112-A/Sejm of the Republic of Poland, VIII term) and the redraft of the government bill amending the act on personal income tax, act on corporate income tax and

There are two main reasons for this. First of all, it resulted from significant underdevelopment of government proposals submitted to the Sejm, including problems with assessing the effectiveness of the originally proposed regulation[26]. Secondly, it was a reaction to negative reception of these original proposals[27]. It should also be added that the submitted redrafts led to significant pathologies in the legislative proceedings, thus making it impossible for deputies to thoroughly make themselves familiar with the government proposals due to the submission of redrafts just before the beginning of the first reading of the bill[28].

Both normative analysis and systemic practice lead to the conclusion that the regulation of a redraft by the Sejm's Rules cannot be considered optimal. From my point of view, it is necessary to make such corrections to Art. 36 par. 1a-1c that will prevent from overusing this instrument. Therefore, in my opinion, two changes are necessary. The first should relate to the substance that may be affected by a redraft. It should not go beyond the substance that was regulated in the originally submitted proposal. Otherwise, we have *de facto* a new legislative initiative, which should, however, be submitted as a new bill. The second change should prevent from submitting a redraft just before the start of the first reading. In my opinion, redrafts should not be submitted after the expiry of the deadline for providing deputies with the content of a proposal before the start of the first reading, as regulated by the Rules. This deadline could be shorter only in the situation, when the changes in the substantive scope were made, about which I wrote above. However, the critical assessment of the redraft standardization does not change the generally positive assessment of the institution itself, because the specific self-correction of the proposal, often resulting from the reflection of the initiator of the

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the act on flat income tax on certain revenues generated by natural persons (Form 2291-A/Sejm of the Republic of Poland, VIII term).

[26] The aforementioned redraft of the government bill amending the act on excise tax and the redraft of the government bill amending acts on biocomponents and liquid biofuels and some other acts (Form 2411-A/Sejm of the Republic of Poland, VIII term).

[27] Redraft of the government bill amending the act – Family and Guardianship Code and some other acts (Form 3112-A/Sejm of the Republic of Poland, VIII term).

[28] Redraft of the government bill amending the act – Criminal Code was submitted two days before the beginning of the first reading, whereas the one of the government bill amending the act on excise tax and some other acts, a few hours before the start of the first reading.

legislative proceedings (resulting from both internal and external factors), is fully desirable, primarily from the perspective of implementing the postulate of the legal system coherence and its completeness.

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