Przegląd Prawa Konstytucyjnego
-----ISSN 2082-1212-----
DOI 10.15804/ppk.2019.06.03
-----No. 6 (52)/2019-----

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"Legislative Veto" of Senate – The Controversial Element of the Legislative Procedure Under the Rules of the Constitution of Republic of Poland of 1921

Keywords: Sejm, Senate, bicameralism, constitution, parliamentarism
Słowa kluczowe: Sejm, Senat, bikameralizm, konstytucja, parlamentaryzm

Abstract

The Polish Constitution from 1921 established the bicameral model of the parliament composed of Sejm and Senate. The Article 35 para. 2 of the Constitution clearly sanctioned the right of the Senate to reject the whole draft of the bill adopted by the Sejm. However, neither this rule nor any other rule of the Constitution precised the consequences of such practice. This loophole in the constitutional rules caused controversies among constitutional law experts from that time and remains controversial even at present. The main aim of the article written within the constitutional-legal perspective is to present the position of the most prominent legal experts and the position of the author on the analyzed issue.

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Streszczenie

„Weta legislacyjne" Senatu – kontrowersyjny element procedury ustawodawczej na podstawie przepisów Konstytucji Rzeczypospolitej Polskiej z 1921 r.

Polska Konstytucja z 1921 r. przewidywała dwuizbowy model parlamentu składającego się z Sejmu i Senatu. Artykuł 35 ust. 2 Konstytucji wyraźnie ustanowił prawo Senatu do odrzucenia całego projektu ustawy uchwalonego przez Sejm. Jednakże, ani ten ani *żaden* inny przepis Konstytucji nie precyzował konsekwencji takiego działania. Ta luka prawna w przepisach Konstytucji wywołała kontrowersje wśród *ówczesnych* konstytucjonalistów i pozostaje przedmiotem kontrowersji nawet obecnie. Głównym celem artykułu pisanego z perspektywy prawno-ustrojowej jest prezentacja stanowisk najważniejszych prawników oraz autora odnośnie do analizowanego zagadnienia.

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I. Introductory Remarks

The main research aim of the article is to present the legal controversies concerning the consequences of the rejection by the Senate of the draft of the bill passed by the Sejm in the light of the rules of the 1921 Constitution of the Republic of Poland[2] (March Constitution) and an attempt to solve the problem of the legal consequences of exercising such right by the Senate. The basic research question is: did the rejection of the draft of the bill by the Senate mean the end of the legislative process concerning the draft or could such Senate resolution be effectively rejected by the Sejm using the legal mode to reject the Senate amendments. This research question has been reflected in the dominant views on the analyzed matter presented by constitutional law researchers at that time and nowadays. The main research hypothesis assumes that none of the presented views is right and although the Sejm could reject such Senate resolution, it should not use the procedure of Senate's amendment re-

[2] The Act of March 17, 1921, the Constitution of the Republic of Poland (Dz.U. RP No. 44, item 267).

jection from the Article 35 of the March Constitution but should use the general procedure to adopt Sejm's resolutions based on the Article 32. This article has been written within the constitutional-legal research perspective. The subject of research is the analysis of the rules of the March Constitution using the dogmatic-legal approach and language-legal, teleological, systematic and historical-legal methods of legal interpretation.

According to the Constitution of 1921, the Polish parliament was composed of the two chambers the Sejm and the Senate. The legislative procedure started in Sejm. The draft of the bill introduced to the Sejm, if passed in that chamber, was submitted to the Senate. The rules of the Constitution clearly declared the right of Senate to reject such draft of the bill (the legislative veto), however they did not predict the consequences of such action. This legal loophole was the source of the dispute on the application of the rules of the March Constitution and has divided the constitutional law researchers of that past and modern times.

In this article I use the terms "Senate's legislative veto" and "Senate's absolute legislative veto" only for stylistic reasons. The terms "legislative veto" or "absolute legislative veto" are generally used to describe the competences of the president in the legislative procedure to delay or block entrance into force of a law adopted by the parliament. I am not making any analogies between the competences of the second chamber and the president.

II. The Regulation of the Senate's Legislative Veto in the Article 35 of the March Constitution

The Article 35 of March Constitution introduced two basic rules concerning the right of the Senate to reject the whole draft of the bill adopted by the Sejm. First of all, every draft of the bill passed by the Sejm had to be considered by the Senate. Secondly, the Senate had, as Article 35 para. 2 clearly expressed, the right to reject the draft of the bill. However, the execution of that right was limited by an established period of time. The Senate had to "announce the objection" concerning such draft of the bill during first 30 days from the day of delivering it to the Senate. It is not clear how the term "objections" should be understood and whether the Senate had to declare particular action (introduction of

amendment or rejection of the bill) it would undertake. Article 35 para. 2 also did not describe precisely the beginning of the 30-day period for returning the draft of the bill to the Sejm. This period could be counted from the day of the announcement of the Senate's decision/objections or from the day when the 30-day period for these actions expires. According to J. Czajowski, the Senate did not have to declare during the first 30-day period if it would reject the bill or adopt amendments. After expiration of the mentioned 30-day period the Senate should return the rejected bill to the Sejm during the following 30 days, therefore the Senate would have 60 days to work on the draft of the bill adopted by the Sejm. Other interpretation would mean that the Senate would have different amount of time to work on the draft depending on when it would raise the objection. In such situation it would be better for Senate to delay the announcement of the decision on the draft to have more time to consider it. Moreover, the term "following thirty days" is connected with the term "aforesaid thirty days", so the end of the one term is the beginning of the other term[3]. The consequence of overrunning of any of the two 30-days periods would be that the President could sign the bill and publish it as law according to the wording adopted by the Sejm. The main problem with the interpretation of the Article 35 were consequences of the rejection by the Senate of the draft of the bill. It does not precisely explain what should happen next, in contrast to para. 3 of that article describing the procedure following Senate' amendments introduced to the draft of the bill passed by the Sejm.

The Senate rejected for the first time the whole draft of the bill in 1923. During the 61st sitting of the Sejm on August 1, 1923, Marshal of Sejm Maciej Rataj announced to the Sejm that the Senate rejected the draft of the bill on the extension of rules of the bill on academic schools to the Academy of Fine Arts in Kraków. Then he stated that in his opinion the rejection was equivalent to introduction of the maximal number of amendments to the draft. His next step was directing the draft to the Committee of Education. During the 65th sitting of the Sejm the reviewer of the bill declared on behalf of the Committee that the rejection of the draft should be regarded as the introduction of an amendment to every article tantamount to the erasure of the par-

[3] J. Czajowski, *Senat Rzeczypospolitej Polskiej pierwszej kadencji 1922–1927. Pozycja prawnokonstytucyjna i praktyka ustrojowa*, Warsaw 1999, pp. 119, 124–127.

ticular article. Therefore, each article was voted separately. Of five articles of the draft, four were adopted in the wording passed by the Sejm and the Senate veto was rejected. The Senate's position was accepted only toward one article. Such action of Sejm caused very strong protest of the Marshal of Senate, which was supported by the Prime Minister and President who refused to sign the bill. The problem of the legal status of the Academy of Fine Arts was solved by the governmental legislative initiative. The submitted draft of the bill, which amended the bill on academic schools, concerned the matters which were subject of the Senate veto and was finally adopted with a few Sejm's amendments and without objections of the Senate[4]. On December 1924 the Sejm authorized government not to publish the bill which was rejected by Senate.

The analysis of this case shows a rivalry between chambers. The Sejm adopted the draft of the bill against the Senate and the Senate did not want to allow to adopt the bill, even though it really had little meaning. Rataj in his memoirs criticized the Marshal's of Senate action, which in his opinion was "brutal" and "aggravated the conflict" only to "increase the position of Senate". These events had serious repercussions. The Senate gained a strong "weapon" in his relations with the Sejm: its "absolute veto" toward drafts of the bills passed by Sejm and it was effectively used a few times with the acceptance of such practice by Sejm leading to substantial strengthening of the Senate's position[5].

During its first term, the Senate rejected six drafts of the bills passed by the Sejm[6] in general regarding these drafts as aimless or pointless, not adjusted to the present conditions, worse than the draft concerning the same matter that is considered in Sejm or repeating the substance of the other bills. The last Senate's veto under the rules of the March Constitution was adopted during the Senate's second term and it concerned the draft of the bill concern-

[4] Act of July 16, 1924 amending some provisions of the Act of July 13, 1920 on academic schools (Dz.U.R.P. No. 72, item. 494) (Dz.U. 1925, No. 2, item 10).

[5] M. Rataj, *Pamiętniki 1918–1927*, Warsaw 1965, p. 285; J. Czajowski, op.cit., pp. 125–126; Z. Cybichowski, *Polskie prawo państwowe*, vol. 3, Warsaw 1933, pp. 176–178; S. Krukowski, *Konstytucja Rzeczypospolitej Polskiej z 1921 r.*, [in:] *Konstytucje Polski. Studia monograficzne z dziejów polskiego konstytucjonalizmu*, vol. 2, ed. M. Kallas, Warsaw 1990, pp. 81–82.

[6] The list of such rejected draft of the bills was presented by: A. Gwiżdż, *Burżuazyjno-obszarnicza Konstytucja z 1921 r. w praktyce*, Warsaw 1956, pp. 209–210.

ing the delaying of the entrance into force date of the order of the President of the Republic of Poland from February 26, 1928 on Law on the structural organization of the common courts. The rejection of the draft was caused by the doubts concerning the accordance of the draft with the Constitution and by the fact that Sejm's Legal Committee adopted the draft of a bill concerning similar matter.

III. The Opinions of Constitutional Law Experts on the Senate's Legislative Veto under the Rules of the March Constitution

The constitutional law experts of that time agreed that under the rules of the March Constitution the Senate had the right to reject the whole draft of the bill. However, the source of the dispute among them were consequences of exercising this right by the Senate. Some of them shared the opinion that the Sejm had the right to reject Senate's veto. Others regarded it as absolute, i.e. ending the legislative procedure concerning the draft of the bill.

W.L. Jaworski and A. Peretiatkowicz were the main supporters of the view that Sejm has the right to reject Senate's legislative veto. According to Jaworski, the rejection of the draft of the bill should be treated as introduction of the maximal number of "changes". There is a logical connection between the second and the third paragraph of the Article 35 which means that the "rejection of the draft of the bill" should be regarded as the "change proposed by the Senate". Moreover, Article 35 para. 1 states that the draft of the bill is submitted to Senate for "consideration". The establishment of the practice of Senate's absolute legislative veto would be an infringement of the constitutional competences of the Senate[7].

In the opinion of A. Peretiatkowicz, the language-grammatical interpretation of the Article 35 para. 2 could lead to the assumption that the term "proposed changes" means both, the Senate's amendments or rejection of the draft of the bill. However, he also stated that the argument of the supporters of Senate's absolute veto that terms "changes" and "rejection" mean different things could also be regarded as right. Then Peretiatkowicz analyzed the Article 35 of

[7] W. L. Jaworski, *Konflikt między Sejmem a Senatem*, [in:] *Ankieta o Konstytucji z 17 marca 1921*, ed. W.L. Jaworski, Kraków 1924, pp. 114–116.

the Constitution by the historical-legal method. He reminded that the draft of the constitution prepared for the second reading contained the rule that clearly allowed Sejm to reject Senate's amendments or veto by three-fifths majority vote. Such proposition caused strong protests of the left political groups in the Legislative Sejm. Then the draft of the constitution was sent to the Constitutional Committee which constructed its final wording. The aim of the modification of the draft was to diminish the competences of the Senate and even the draft of the constitution presented in the second reading did not establish the Senate's right of the absolute veto concerning the drafts of the bills. Therefore, according to the rules of this method of the legal interpretation the Article 35 of the March Constitution could not be interpreted as favoring extension of the Senate's competences. However, this historical-legal interpretation was not fully accepted by constitutional law experts, hence Peretiatkowicz analyzed the Article 35 using the systematic method. He stated that the Constitution privileged the Sejm over the Senate. The government was politically responsible only before the Sejm, the Sejm had the legislative initiative that the Senate did not have. Generally, both chambers of the Polish parliament had equal rights in the procedure of amending the Constitution, however, the Article 125 para. 3 entitled the next term Sejm to amend the Constitution without participation of the Senate. Peretiatkowicz also claimed that although according to the Article 2: "The organs of the nation are: in the domain of legislation, the Sejm and the Senate", Article 3 para. 2 stated that: "There can be no statute without the consent of the Sejm, expressed in a manner conforming to the Standing Orders". The latter rule did not mention the Senate, so the competences of the Senate include correction of the drafts of the bills passed by Sejm, but not their definitive rejection. He concluded that the historical-legal and systematic interpretation of the Article 35 of the Constitution did not grant Senate a right of the absolute legislative veto[8].

The main supporters of regarding Senate's veto as absolute were: Z. Cybichowski, M. Rostworowski and S. Starzyński. Cybichowski stated that the relations of chambers of a bicameral parliament could be based on the principle of equality or on the principle of subordination of one chamber to the other.

[8] A. Peretiatkowicz, *Władza Senatu (art. 35-ty Konstytucji)*, "Gazeta Sądowa Warszawska", October 13, 1923, pp. 365–367.

In his opinion any of these principles was included consistently in the construction of the model of the Polish bicameral parliament. Although the Sejm had the right to reject the Senate amendments, the position of both chambers could be regarded as equal in the procedure of amending the Constitution. Therefore, none of these principles could be used to solve this legal problem. He also stated that rejection of the draft of the bill by the Senate could not be regarded as the "maximal number of amendments". In his opinion such legal construction was only hypothetical. Cybichowski concluded that Senate's legislative veto was absolute because the rules of the March Constitution did not include any procedure concerning its rejection and regarded such situation as an analogy to a situation when the Sejm rejects Senate's amendments by majority lower than required. The rules of the Constitution did not describe such situation, however the practice and the rules of the standing orders of Sejm made such draft of the bill nullified[9].

In the opinion of M. Rostworowski, the historical-legal interpretation of the rules of the March Constitution led to the conclusion that the Senate gained right of the absolute legislative veto. Rostworowski stated that the draft of the Constitution clearly established the right of the Sejm to reject Senate's veto. However, the final wording of the Constitution did not include such right. Therefore, it would mean that the Sejm lost that competence. He also claimed that different terms "rejection" and "change" were used in the Article 35 of the Constitution on purpose. If "rejection" could be treated as "stronger/maximal change" it would mean that the use of the term "rejection" in the Article 35 was unnecessary. Rostworowski also emphasized that the analyzed terms have different meanings. When a legal text is changed (amended), its part that is not amended is still binding and the amended text gains new and "positive" wording. On the contrary to that, the "rejection" of the draft of the bill causes its nullification. This would mean that the terms "change" and "rejection" used in the Article 35 of the March Constitution should be treated as different but equal terms. Rostworowski concludes that he finds "justified" the position of the Marshal of Senate, regarding the legislative veto of Senate as absolute[10].

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[9] Z. Cybichowski, *Polskie prawo…*, pp. 177–178; *idem*, *Sejm a Senat*, "Gazeta Administracji i Policji Państwowej", April 28, 1923, pp. 284–285.

[10] M. Rostworowski, *W sprawie konfliktu między Sejmem a Senatem*, [in:] *Ankieta o Konstytucji…*, pp. 117–118.

Starzyński supported the position of Rostworowski and added that in general the bicameral model of the parliament should be based on the presumption of equal rights and positions of chambers. Therefore, when there are doubts concerning the competences of the chambers regarding their relations, they should be interpreted regarding that presumption[11].

The original conception of legal consequences of Senate's legislative veto was presented by A. Miller. Miller criticized argumentation of both presented mainstream position on the consequences of Senate's legislative veto. He claimed that the historical analysis of the legislative process of adopting the March Constitution could lead to equivalent assumptions, supporting both opinions presented in the dispute. Miller found the historical analysis irrelevant because it concerned the draft of the Constitution presented in the second reading that did not become the subject of the final considerations. He agreed with the argumentation of M. Rostworowski that the term "changes" and "rejection" are different legal terms, however this argument could not lead to the assumption made by Rostworowski on Senate's absolute legislative veto. Such assumption could not be held because there were no clear legal rules establishing such effects of the rejection by the Senate the draft of the bill. Miller also did not agree with the view of Starzyński based on the presumption of equal position of both parliamentary chambers in the legislative procedure. He argued that in general the March Constitution established a privileged position of the Sejm over the Senate, which was also confirmed in the Article 3 para. 2 of the Constitution. He also did not agree with the opinion of W.L. Jaworski that the only role of the Senate in the ordinary legislative procedure is to "consider" the drafts of the bills passed by Sejm. Regarding the whole Article 35 of the Constitution Miller stated that the Senate not only could "consider" the draft of the bill but also could undertake a position supporting it or against it. These considerations led Miller to the conclusion that the Article 35 of the Constitution contained a legal loophole which could not be filled by any method of interpretation of the legal rules. The consequences of Senate legislative veto could only be established by the amendment of the Constitution or by the legal practice which would become something like British constitutional convention[12].

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[11] S. Starzyński, *Sejm a art. 35 Konstytucji*, "Kurjer Warszawski", 8.04.1923, pp. 5–6.

[12] A. Miller, *Sejm a Senat. Przyczynek do wykładni art. 35 Konstytucji z dn. 17 marca 1921 r.*, "Palestra" 1925, vol. 2, No. 6–7, pp. 826–834.

Modern day constitutional law experts are also divided in the interpretation of the Article 35 of the March Constitution. According to J. Czajowski, the Senate had to "announce" Sejm its intentions of "introducing the changes or rejection" concerning the draft of the bill. Such regulation did not force the Senate to declare its intentions specifically: whether it intends to amend or to reject the draft. If the Senate would decide to introduce the amendments, the Sejm could reject such amendments by eleven-twentieths majority vote. However, if the Senate would decide to veto the draft of the bill, the Sejm would not be able to reject such resolution of the Senate because it would not introduce any "changes" to the draft and the Constitution did not say anything about such situation. Therefore, there is nothing that Sejm could reject and the legislative procedure should begin from the start[13]. S. Krukowski who represented different position, polemized with the opinions of M. Rostworowski and S. Starzyński. He stated that the intention of the Legislative Sejm was to weaken the position of the Senate. The purpose for modification of the draft of the Constitution was to diminish the majority necessary to reject the Senate's resolution from three-fifths to eleven-twentieths. The final version of the Article 35 had in his opinion "accidental" character because the Senate's right of the absolute legislative veto concerning the drafts of the bills "was not intended by the majority of the Legislative Sejm"[14].

From the modern-day legal science perspective, the linguistic-logical interpretation of the Article 35 of the March Constitution leads to conclusion similar to those presented by Miller. The Article 35 that definitely ensures Senate the right to reject the whole draft of the bill contains a loophole concerning the consequences of exercising such action. However, his view that this loophole could be filled by practice is wrong because constitutional conventions are institutions of *common law* and the Polish legal system have been based on the *continental law*. Moreover, in such difficult cases it could be regarded as unconstitutional. Therefore, this legal problem can be solved only by using simultaneously a few methods of the legal interpretation. Such approach is based on the presumptions that the constitution as the most important legal act (Article 38 of the March Constitution) is total, i.e. relevant to every le-

[13] J. Czajowski, op.cit., pp. 124–126.

[14] S. Krukowski, op.cit., pp. 80–82.

gal question and that it was constructed by the rational law-giver who made it logically complete. The hypothesis that the Senate did not have the right of absolute legislative veto is correct. First of all, as emphasized by Peretiatkowicz, the systematic interpretation of the rules leads to the conclusion that the Sejm was privileged over the Senate. Such model of bicameralism, where the first chamber has stronger position than the second chamber, was present at that time in other states and is still present in many countries. Moreover, although the Article 2 of the March Constitution declared Sejm and Senate as the organs of the legislative power, the Article 3 para. 2 clearly expressed the principle that "there cannot be a bill without consent of the Sejm". The language-legal, teleological and systematic interpretation of these rules using the *à contrario* approach leads to the conclusion that although the Senate was an organ of the legislative power, it was purposely omitted in the Article 3 para. 2, hence the bill can be adopted without its consent. Inequality of the positions of the chambers could also be confirmed by the historical legal approach, because the relatively weak position of the Senate was a condition for left parties to accept the March Constitution. It can be therefore concluded that the Sejm had the right to reject Senate's legislative veto. Nonetheless, the supporters of the absolute legislative veto of the Senate seemed to be right when they claimed that the "rejection" cannot be regarded as "changes". This consequently would mean that the Article 35 para 2 established two separate procedures concerning different Senate actions – rejection of the draft of the bill or introduction of amendments to the draft. This rule should be understood in such a way that the Senate in principle should finish its work on the draft of the bill during 30 days from the day of draft submission. However, only in case when the Senate decided to amend the draft and announced this decision, it could have extra 30 days to execute it. Such situation should be treated as extraordinary. It would be justified because it would be much easier for Senate to reject the draft than to introduce the amendments, so the Senate could have less time for the former action. Therefore, the common effect of both, rejection of the draft of the bill and its amendment should be "return" of the draft to the Sejm, as clearly stated in the Article 35 para. 2. However, the assumption that "rejection" of the draft cannot be regarded as "changes" means that Article 35 para. 3 could not be exercized toward rejection of the draft because it concerned only "changes" of the draft introduced by the Sen-

ate. This in turn would mean that according to the Article 35 para. 2 the rejected draft should have been returned to the Sejm for further consideration and the Sejm had the right to reject Senate's veto because only Sejm's acceptance was required to adopt the bill (Article 3 para. 2). However, the Constitution did not establish precisely the procedure of rejecting the Senate's veto. The only other rule of the Constitution that could be used in this case was Article 32 which stated that: "A valid adoption of the resolutions requires ordinary majority vote in the presence of at least one-third of the total statutory number of deputies, in so far as provisions of this constitution do not contain other rules". This solution seems to be the only one remaining fully compliant with the dogmatic-legal approach toward the interpretation of the rules of the March Constitution.

IV. Final remarks

The Constitution of Republic of Poland from 1921 contained a legal loophole concerning the consequences of the rejection by the Senate of the draft of the bill passed by the Sejm. This situation caused a conflict between the two chambers that was solved in favor of the Senate which gained the right of absolute veto on these drafts. The mentioned legal loophole also was the source of a dispute among the constitutional lawyers. Some of them regarded Senate's right to reject the draft of the bill as some sort of absolute veto, others presented the opinion that the Sejm has the right to reject such resolution of the Senate in a mode used to reject the Senate's amendments. However, a careful and comprehensive legal interpretation of the rules of the March Constitution leads to a different view: that although the Sejm had the right to reject the Senate's veto, it could be done by using the general mode of the adoption of the Sejm's resolution (Article 32) and not the mode of rejecting the Senate's amendments (Article 35).

The described episode from the history of the Polish parliamentarism leads to two conclusions. If there is a legal loophole concerning the relations between two chambers of a bicameral parliament, it would probably cause a conflict between the chambers. Such a conflict will be solved in a way sat-

isfying only one of the chambers, the one which in the particular situation has stronger position.

The other conclusion is that the conflict had the influence on the construction of the legal rules establishing the mutual relations between the chambers in the later constitutional acts that replaced the March Constitution. Therefore, the rules on whether and how could the Sejm consider the Senate's resolutions rejecting the draft of the bill were constructed precisely.

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