

Lech Jamróz¹

**A Few Remarks on the Audit Activity of the
Senate of the Republic of Poland**

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Słowa kluczowe: parlament, Senat, funkcja kontrolna

Abstract

In its activities, the Senate uses a number of control powers defined by statutes and regulations, although this is not directly based on the provisions of the Polish Constitution. Such a practice is justified, if one considers the nature of the Senate as a representative body and the nature of the senatorial mandate, which does not differ from the nature of the deputy mandate. The role of the Senate, also in the scope of the indicated powers of a controlling nature, may increase when a different political majority in the Senate than in the Sejm is formed. As a result of the post-election agreement in 2019, the political majority in the Senate is different from the political majority in the Sejm. This new phenomenon in the Polish political system creates the possibility of a wider use of the Senate's "soft" control tools. The presented paper attempts to synthetically present the reasons for considering the Senate's control powers and their impact on ensuring systemic stability.

¹ ORCID ID: 0000-0001-7409-6525, Assoc. Prof., Department of Constitutional Law and Political Systems, Faculty of Law, University of Białystok. E-mail: l.jamroz@uwb.edu.pl.

Streszczenie**O działalności kontrolnej Senatu RP – kilka uwag**

W swej działalności Senat korzysta z szeregu określonych przepisami ustaw i swojego regulaminu uprawnień kontrolnych, chociaż nie znajduje to bezpośredniego oparcia w przepisach Konstytucji RP. Taka praktyka znajduje uzasadnienie, jeśli uwzględnimy charakter Senatu jako organu przedstawicielskiego oraz charakter mandatu senatorskiego, który nie odbiega od charakteru mandatu poselskiego. Rola Senatu, także w zakresie wskazanych uprawnień o charakterze kontrolnym może wzrosnąć, gdy w Senacie wyłoni się inna większość polityczna niż w Sejmie. W wyniku porozumienia powyborczego w roku 2019 większość polityczna w Senacie jest odmienna od większości politycznej w Sejmie. To nowe zjawisko w polskim systemie politycznym, które stwarza możliwość szerszego zastosowania przysługujących Senatowi „miękkich” instrumentów kontroli wobec rządu. W prezentowanym tekście podjęta jest próba syntetycznej prezentacji racji przemawiających za uwzględnieniem uprawnień kontrolnych Senatu oraz ich wpływu na zapewnienie stabilności ustrojowej.

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I.

As a representative body, the Senate can and should constitute a forum for substantive discussion on the functioning of the state, including, in particular, the activity of the Council of Ministers as the body responsible for conducting state policy. This may be more important in a situation in which the majority in the Senate are represented by parties that are not the parliament's political supporters. This situation has aroused after the parliamentary elections in 2019, and it prompts reflection on the essence and role of the Senate's controlling powers².

² On the control function under the constitutional provisions of the early 1990s. P. Sarnecki, *Senat RP i jego relacje z Sejmem (lata 1989–1993)*, Warsaw 1995, pp. 124–138; J. Marszałek-Kawa, *The Institutional Position of the Sejm of the Republic of Poland after the Accession to the European Union*, Toruń 2016.

This year, 20 years have passed since the publication of two scientific articles known in the literature, the authors of which, professors Paweł Sarnecki and Lech Garlicki, discussed the control competences of the Senate of the Republic of Poland (including their legal bases, essence and legitimation)³. Although a long time has passed, the arrangements made by both authors remain valid: the constitutional foundations for the functioning of the Senate, including its competences, have not changed, and the Senate's control activity is continued regardless of the changing political structure. However, the mentioned element of the parliament's political structure (i.e. each chamber separately) has recently become very important: since 2019, the Senate represents a different political majority than the Sejm, which significantly influenced the activation of the Senate both in its legislative function (much more frequent resolutions rejecting acts of the Sejm), as well as – not explicitly stated in the constitutional provisions – the control function (e.g. more frequent consideration of government information on the implementation of policies in specific areas of life). Thus, the chambers operate in a kind of cohabitation, which – as evidenced by one-year practice – creates additional tensions between them in the legislative process, but also in other areas of operation.

I am assuming that the ratio of the existence of the Senate in the last thirty years has not been abolished, even in spite of the constant questions about the sense of the existence of a two-part parliamentary structure, even despite the phenomenon of the second chamber becoming similar to the first (especially politicization, with all its manifestations and consequences). It is known that the proposal to reactivate the Senate in 1989 was submitted at the final stage of the work of the “round table”, which was not conducive to the development of a specific vision of this body. Nevertheless, from the beginning, the role of the Senate was perceived in terms of the “chamber of reflection”, “chamber of prudence”, “chamber caring for the quality of the law passed” and the chamber ensuring balance in the system of authorities in the difficult time of political transformations⁴.

³ P. Sarnecki, *Kompetencje kontrolne Senatu Rzeczypospolitej Polskiej*, “Przegląd Sejmowy” 2000, No. 6; L. Garlicki, *Kompetencje kontrolne Senatu Rzeczypospolitej Polskiej? Uwagi na marginesie artykułu prof. Pawła Sarneckiego*, “Przegląd Sejmowy” 2000, No. 6.

⁴ The proposal to restore the Senate and create it in free elections was a response to the proposed “contractual” way of distributing seats in the Sejm.

II.

Let us recall that due to constitutional regulations, the Senate of the Republic of Poland operates in a system of extreme inequality (asymmetry) of the chambers of parliament. On the basis of the provisions of the Constitution, its powers in the field of the legislative function (but also the creative function) are significantly limited compared to the powers of the Sejm in this area. The constitutional status of the Senate has been the subject of many analyses and statements made by constitutionalists. The doctrine also presents numerous proposals for normative changes aimed at strengthening the Senate's systemic role⁵.

There is no doubt that the basic function of parliament, inextricably linked with the idea of parliamentarism, is the law-making function, i.e. the legislative function. That is why the participation in its implementation by each of the chambers on the basis of the applicable regulations is essential for the assessment of their systemic importance. In practice, the point is simply to answer the question whether the Senate has a significant influence on the content of passed laws⁶. The degree of actual participation in the implementation of the legislative function is ultimately not explained by the statistics of the Senate's activity in this respect (the amendments may, however, be symbolic or editorial), although its analysis proves that the Senate exercises its powers to "amend laws" in relation to at least half of bills passed by the Marshal of the Sejm, and the Senate's position is in most cases accepted by the Sejm⁷; there are also numerous legislative initiatives of the Senate (since the term

⁵ A. Bisztyga, P. Zientarski (eds.), *Kierunki zmian pozycji ustrojowej i funkcji Senatu*, Warsaw 2014; K. Skotnicki, *Senat III RP – nieprzemysłany czy niepotrzebny?*, [in:] *Dwadzieścia lat transformacji ustrojowej w Polsce*, ed. M. Zubik, Warsaw 2010.

⁶ The Senate exercises the power to initiate the legislative process (Art. 118) and to take a position on a "bill passed by the Sejm" (Art. 121, para. 2: adoption without changes, adopting amendments or rejecting in full).

⁷ By 2019 (Senate terms of office I-IX), the Sejm submitted 5,412 bills to the Senate, and the Senate proposed amendments to 2,343 of them, while the number of bills in which the Sejm accepted Senate amendments was 2,188. The effectiveness of amendments in this period was almost 79%. See numerical data included in the table on page 1 of the statistical material available at: https://www.senat.gov.pl/gfx/senat/userfiles/_public/senatrp/noty2020/08a.pdf (7.10.2020).

started in 2007, when a record number of 124 bills were submitted, the rule is at least several dozen such bills during the full term of office)⁸.

In turn, the second of the traditional functions assigned to parliaments – the control function exercised in relation to the Council of Ministers (and the government administration), is dedicated directly to the Sejm. It results from the Art. 95 sec. 2 of the Constitution and a number of constitutional competence norms, the most important of which are: giving a vote of confidence, expressing a vote of no confidence, and a resolution on discharge. Although the theory of constitutional law distinguishes at least several functions of the parliament, these two basic functions (legislative and control) constitute the pillars of institutional democracy based on the parliamentary system⁹.

The control activity of the Senate may take either a non-self-contained or independent form. We deal with unselfish control when the Senate takes a position on a bill passed by the Sejm. Basically, the power to adopt, reject or pass amendments manifests itself as participation in the implementation of the legislative function, but it cannot be noticed that influencing the content of the act, in fact, we are dealing with a specific form of controlling the legislative activities of the Sejm or even the activities of the than half the cases are in the government. The more so as the representative of the proposer of the bill usually participates in the work of the committees related to the consideration of the bill, and the government representative may also be invited to a plenary session. Therefore, in those cases in which the proposer of the bill was the government, one can speak of the inseparability of the legislative and supervisory functions¹⁰.

On the other hand, the spontaneous control activities of the Senate are detached from the procedure of considering bills by this body and are – according to P. Sarnecki – justified by the representative character of the second chamber (it is identical to the first chamber) and, in fact, by bicameral-

⁸ Detailed data taking into account subsequent terms of office with a description of the most important bills are available in the appropriate tabs at: <https://www.senat.gov.pl/o-senacie/proces-legislacyjny> (7.10.2020).

⁹ The remaining functions include contemporary functions: constitutional, creative, co-participation in shaping the state policy, European and intra-organizational. B. Naleziński, *Funkcje Sejmu i Senatu*, [in:] *Prawo konstytucyjne RP*, ed. P. Sarnecki, Warsaw 2005, pp. 266–267.

¹⁰ P. Sarnecki, *Kompetencje kontrolne...*, pp. 10, 11–13, passim.

ism, which presupposes the presumption of equal rights for the functions of both chambers of parliament¹¹.

The scientific dispute between the authors of the articles mentioned in the introduction, however, focused on two main issues. First, the sources of legitimacy for the recognition of the Senate's controlling powers: L. Garlicki was skeptical about the concept of "extracting" functions and competences from the general principles of the system (the principle of representation), considering this interpretation as risky, but also questioned the presumption of equality between the chambers¹². According to this author, it is possible, however, to formulate certain control competences of the Senate on the basis of statutes, while the rules of the chamber should only allow for such competences (it cannot extend them)¹³. Secondly, it concerned the issue of recognizing the constitutional foundations of the control function (P. Sarnecki) or its denial (L. Garlicki).

What is, in my opinion, particularly important and undoubtedly an advantage of the works indicated in the introduction, is the emphasis put by the authors on the essence of the Senate's control (control activity) and its specific manifestations. It is a clear message that control is not only "hard" ("firm", "obliging") competence, but also – and in the case of the Senate: first of all – non-authoritative activity, not involving responsibility, and consisting in disclosing the shortcomings of action in the debate government. Senate control manifests itself in the specific powers of the entire chamber, its organs (in particular the committees, because, for example, pursuant to the Article 60 (3) of the Rules of Procedure, committees may request information, explanations and opinions, as well as active presence at the meeting) and individual powers of senators (statement 49 of the Senate bylaws and, for example, the right to demand information and explanations from representatives of the Council of Ministers under the Article 16 of the Act on the performance of the mandate of a deputy and senator).

¹¹ Ibidem, pp. 15–16.

¹² L. Garlicki, *Kompetencje kontrolne...*, pp. 30–33. J. Szymanek speaks in a similar vein, seeing elements of the Senate's control activity toward the government and does not identify them with the "control function". J. Szymanek, *Rola Senatu RP w wykonywaniu kontroli parlamentarnej (uwagi de lege lata i de lege ferenda)*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2004, No. 1, p. 30.

¹³ Ibidem, p. 34.

After all, the audit activity of the Senate is not only about demonstrating wrong political decisions (the political aspect often is the most important from the perspective of political gains), but about the implementation of the directives specified in the preamble to the Constitution: the reliability and efficiency of public institutions, cooperation between authorities, social dialogue (ensures stability of relations within the power apparatus, which translates into the stability of social relations). Anyway, interinstitutional dialogue based on the rule of law should be considered an indispensable element of the functioning of the system of state organs, and its skilful application may contribute to avoiding greater social tensions.

As mentioned, the 2019 elections to the Senate allowed for a politically different majority from the Sejm majority¹⁴. This was only the third case, after the votes in 2011 and 2015, of the application of the provisions of the Electoral Code on single-member constituencies to the Senate. However, for the first time such a situation occurred when the political structure of the Senate differed from the political structure in the Sejm – the coalition majority in the Sejm did not win the absolute majority of Senate seats¹⁵. Until now, the rule was to “duplicate” election results in elections to the first and second chambers¹⁶.

¹⁴ After the election the distribution of seats is as follows: 48 seats won candidates who entered the PiS parliamentary club, 1 senator enjoys the status of an unaffiliated parliamentarian and others (51, including 3 independent senators) belong to other clubs and groups.

¹⁵ I exclude from this the first two terms of parliament after the political changes, that is the period 1989–1993: the Senate of the first term – due to the so-called a political contract in elections to the Sejm (the Senate was made up of 99 senators belonging to the Civic Parliamentary Club and 1 independent senator; in the Sejm, the distribution of seats took into account the election result and the so-called political contract guaranteeing opposition candidates no more than 35% of seats, regardless of the political preferences articulated by voters); Second term Senate – due to the seat distribution system used in the 1991 elections to the Sejm and the resignation from the use of electoral thresholds, which translated into a significant political breakdown (there were 12 clubs and several non-attached senators in the Senate; in the Sejm, at the end of the term: 17 clubs and groups and a dozen or so non-attached deputies).

¹⁶ In 2015, the coalition operating under the name of the PiS party had the absolute majority of seats in the Sejm (239 deputies) and in the Senate (62 senators). Similar proportions occurred in previous terms, regardless of what coalition was the political support of the government (e.g. in 2011, the PO-PSL coalition had 235 MP and 65 senatorial seats; in 2007 – the same groups: 240 and 60 respectively), it happened that the proportions in the Senate were even more extreme (in 2001, the SLD-UP-PSL coalition had 258 MP seats and as many as

As a result, the activities of the Senate and its organs in the last year show the desire to emphasize the political separateness of the Senate from other state organs (especially the Sejm) and the tendency to emphasize its opposition to the actions of the government and its political base (the Sejm). In practice, this is evidenced by the number of bills and Senate amendments entirely rejected. As a result, this translates into a decrease in the effectiveness of the amendments, because the Sejm is prone to rejecting Senate amendments more often¹⁷. The actual implementation of control activities by the Senate is, of course, conditioned by the willingness to undertake such activities and capabilities in this regard, but the level of political culture is also decisive.

The essence of the bicameral structure of the parliament, within which each legislative body has a representative status and comes from general elections, is manifested in the fact that each of them performs a specific political role. This does not exclude the possibility of both chambers of parliament fulfilling the same role, e.g. on the basis of mutual complementation (an example may be the implementation of the so-called constitutional function understood as the power of the Sejm and the Senate to amend the Constitution under the provisions of Art. 235). The sense of adopting bicameralism cannot be based solely on historical premises (the political traditions of the Republic of Poland) – because it would be a manifestation of a formal approach to bicameralism, but it should assume the real influence of each chamber of the parliament on shaping matters important for the state (society), i.e. concrete action by each chamber of parliament, based on the law and within its limits.

The exercise of control powers by the Senate does not have to automatically cause conflicts in relations with other bodies. It also does not have to mean competition for the Sejm in this respect, moreover, the Sejm has much broader control powers within the constitutionally assigned control function toward the government and its administration. I share the view that the very existence of a second chamber may be an additional guarantee of the decon-

75 senators – the SLD-UP club). The statistical data comes from the website of the National Electoral Commission: <https://pkw.gov.pl> (7.10.2020).

¹⁷ This is just over 50%. See statistical data at: https://www.senat.gov.pl/gfx/senat/userfiles/_public/k8/statystyki/podstawowe_dane_10/02_info.pdf (7.10.2020).

centration of power – mainly legislative¹⁸ – but not only. All the more so, the functioning of politically diverse chambers not only weakens the omnipotence of the Sejm, but also constitutes an additional guarantee of the implementation of the principle of pluralism. The results of the last parliamentary elections in 2019 and the annual activity of the Senate and its organs prove that the Senate can be, more than symbolically, a body that weakens the concentration of power within one political majority.

III.

In conclusion, it is worth recalling the results of the constitutional survey conducted among constitutionalists in 2017. In the conclusion of the survey, its authors indicated that within the legislative authority (more precisely: the Senate), postulates to change the way of creating the second chamber of the parliament were raised. This would ensure a change in the nature of the Senate, depoliticize the Senate, ensuring the representation of “local government interests or “various interest groups”¹⁹. A frequent postulate was also a change in the electoral system for the Senate²⁰. This would allow this organ to play a more important role within the constitutional model of the legislature. The authors of the survey did not indicate whether any specific (more or less typical) changes to the Constitution were proposed in terms of the functions performed by the chambers of parliament.

One year of operation of parliamentary chambers, different in terms of the political majority, is not enough to formulate final conclusions about Senate’s control activities. However, it certainly shows a new perspective for the assessment of this activity and its impact on political and social life.

¹⁸ A. Bisztyga, *O upodmiotowieniu Senatu Rzeczypospolitej Polskiej*, [in:] *Kierunki zmian...*, pp. 13–14.

¹⁹ M. Florczak-Wątor, P. Radziejewicz, M.M. Wiszowaty, *Ankieta o Konstytucji Rzeczypospolitej Polskiej. Wyniki badań przeprowadzonych wśród przedstawicieli nauki prawa konstytucyjnego w 2017 r.*, “Państwo i Prawo” 2012, No. 6, p. 26.

²⁰ *Ibidem*, p. 28.

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