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Maciej Berek
University of Warsaw, Poland
ORCID: 0000-0001-8882-4116
m.berek@wpia.uw.edu.pl

The Senate and the Council of Ministers – a Systemic Framework and Parliamentary Practice

Senat a Rada Ministrów – ramy ustrojowe i praktyka parlamentarna

ABSTRACT

The presented scientific research article covers the legal scope and legal basis for the Polish Senate to carry out activities whose characteristics may indicate that they are identical to activities that, in a typical situation, serve to perform a controlling function. In the Polish political system, it is the Sejm which exercises the controlling function over the activities of the Council of Ministers. However, both the statutory provisions and the Rules of Procedure of the Senate form the legal basis for the Senate, its bodies and senators to perform a whole range of activities showing significant similarity, and in some cases essentially identical with the activities carried out by the Sejm, its bodies and members (deputies) as part of their controlling activity. So far, research on this issue has been conducted primarily in order to look for answers to the question about the legal classification of the provisions on which the various activities of the upper house of the Parliament are based. Presenting the most important views to date allows the author to deepen the analysis seeking the source of the Senate's competences in its representative character. It is particularly important to consider this aspect in the current situation where the political groupings that make up the minority in the Sejm constitute the majority in the Senate. In addition, the specific form of political decision-making centres (outside the Parliament) significantly restricts the controlling function by the Sejm or even makes the performance of this function illusory. This circumstance, crucial in the context of the functioning of the entire political system of the state, makes it particularly important to verify the admissibility and legal nature of para-controlling activities undertaken by the Senate. In the adopted research perspective, the Parliament, which is an emanation of the Nation, should not be deprived of the insight and the possibility to address, through its members, the activities within the responsibility of the Council of Ministers. The adoption of such a perspective, in view of the adopted hypothesis

CORRESPONDENCE ADDRESS: Maciej Berek, PhD, Assistant Professor, Department of Constitutional Law, University of Warsaw, Faculty of Law and Administration, Krakowskie Przedmieście 26/28, 00-927 Warsaw, Poland.

of at least limited effectiveness in the performance of the controlling function by the Sejm, in turn requires verification of the effectiveness of the tools used by the Senate, its bodies and senators. The conclusions to be formulated should be valid not only for the state of scientific reflection, but also for parliamentary practice, which in this regard continues to develop appropriate tools falling within the constitutional framework.

Keywords: Council of Ministers; Senate; controlling function; principle of sovereignty of the Nation; parliamentary mandate

INTRODUCTION

The Senate does not participate in the procedure of appointing the Council of Ministers, nor does it have the power to enforce the collective political responsibility of the Council of Ministers or individual responsibility of members of the Council of Ministers. The Constitution of the Republic of Poland[1] also clearly states that the control over the activities of the Council of Ministers is exercised by the Sejm – the provision constituting the basis for exercising the controlling function points only to the lower house of parliament. This does not, of course, mean that there is no cooperation between the Senate and its bodies and the Council of Ministers. The basic area of such cooperation is the legislative process in the Senate. The legal nature and systemic importance of individual activities undertaken in this process and other activities undertaken by the Senate, its bodies and senators under the Rules of Procedure of the Senate[2] or laws may vary. The subject of the study is the scope and admissibility of the use of legal instruments, the nature and purpose of which would also suggest their controlling function. The use of such legal instruments in parliamentary practice entails asking about their systemic classification. This would mean that the Senate performs the controlling function to a certain limited extent or would require demonstrating that these activities should be seen as serving other Senate's functions (primarily the legislative function, but also the appointing function). This question is also asked to verify the hypothesis that the individual activities of the Senate cannot be assigned to functions considered separately. Selected legal institutions and factual activities may, to some extent, be common to more than one function performed by a house of Parliament.

An additional, particularly topical justification for the study is the assumption that the controlling function of the Sejm is performed incompletely or inefficiently

[1] Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws 1997, no. 78, item 483, as amended). English translation of the Constitution at: https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm (access: 10.12.2022).

[2] Resolution of the Senate of the Republic of Poland of 23 November 1990 – Rules of Procedure of the Senate (Official Gazette of the Republic of Poland "Monitor Polski" 2018, item 846, as amended).

in the circumstance that public bodies are actually subordinated to a unified centre of political power, moreover a centre located outside the system of constitutional bodies. This assumption makes it reasonable to verify the admissibility of the wider use by the Senate of tools having the characteristics of controlling tools. The possibility for the Senate to take such action is particularly likely when in the Senate a majority has formed, composed of the groups which make up the opposition against those supporting the Council of Ministers in the Sejm.[3] These circumstances should also be perceived in the context of the principle of representing the nation as a sovereign by the houses of parliament, which is fundamental to parliamentary democracy. The effectiveness of performance of parliamentary functions, including controlling functions, affects the fulfilment of parliamentarians' obligations towards the sovereign.

So far, the scholarly opinion on these issues has focused on attempts to classify the para-controlling activities carried out by the Senate, its bodies and senators, as well as on different approaches to their systemic source. The period, in which the most important statements of scholars in the field were formulated so far, did not bring particularly interesting examples from parliamentary practice. This article presents a slightly different research approach – the basis for the theoretical construct is the assumption of the indispensability of effectiveness of the exercise of parliamentary scrutiny of the executive authorities by the legislature. In the situation of a significant limitation of the effectiveness of performance of this function by the lower house of Parliament, a kind of takeover of this function by the upper house, but within the limits that do not violate the letter of the Constitution, appears to be a systemic obligation of a state organ. Indeed, in the parliamentary term commencing in 2019 in Poland, there are majority groups in the Senate which in the lower house constitute the opposition to the groupings that have formed the Cabinet. This new, systemically significant phenomenon and the resulting search by the Senate and its bodies for the limits of para-controlling activities provide sufficient sole grounds to re-examine the issues under discussion.

The research methods include, first of all, dogmatic analysis of the legal acts: the Constitution, statutory laws and the rules of procedure of the Sejm and the Senate, as well as a critical analysis of papers on the subject published to date. The presentation of selected examples of the mechanisms of interaction between the Senate (and its bodies) and the Council of Ministers and the formulation of conclusions on this practice to the presented research hypotheses is of a complementary nature, but still important.

[3] This is the situation at the moment this article was being written, where the groupings constituting at that time the opposition in the Sejm of the 8th term obtained a majority in the Senate of the 10th term (which began in 2019).

CONTROLLING FUNCTION – THE CONCEPT AND LEGAL BASIS

The exercise of the controlling function by the Sejm, within the meaning of Article 95 (2) of the Constitution, is assigned to the Council of Ministers as a collegial public authority and to members of the Council of Ministers in the sense in which the composition of the Council of Ministers is defined by Article 147 of the Constitution. Indirectly, however, the scope of this control will cover the activities of the entire executive administration in the broad sense, over which the Council of Ministers exercises supervision or control.[4] Controlling is exercised by the Sejm *in pleno*, but also by the bodies of the Sejm, in particular the Sejm committees, and to some extent also by deputies.

The substantive scope of this control covers all matters falling within the scope of the Cabinet's activities. The activity of the Council of Ministers as an object of scrutiny should be understood as any activity of the Cabinet[5] and its members, both those carried out in the form specified by law, as well as any other, e.g. communication activity. The broad approach to the object of control exercised by the Sejm is related to the conditions of political responsibility of the Council of Ministers towards the Sejm. After all, the grounds for a motion of no confidence against a minister or the Council of Ministers do not have to be of a legal nature. All activities of the Council of Ministers are subject to parliamentary control, and consequently may form the basis of the political responsibility of the Cabinet.[6]

The content of Article 95 (2) of the Constitution covers another important element: the Sejm exercises control over the activities of the Council of Ministers to the extent specified by the provisions of the Constitution and laws. However, that indication must refer to the forms of exercise of that control and not to its scope. The control may be performed in the forms defined by constitutional or statutory regulations, and such control may encompass any Cabinet's activity, also outside the legal sphere.[7] The indication that the controlling measures taken by the Sejm, its bodies and its members in relation to the activities of the Council of Ministers in the broad sense adopted here must have a specific legal basis, leads to the conclusion that this part of the aforementioned provision constitutes a sort

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[4] Cf. P. Radziewicz, *Komentarz do art. 95*, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, ed. P. Tuleja, Warszawa 2019, p. 309. This author states that "the control is exercised over the whole system of administration of central government, at the top of which is the Council of Ministers".

[5] The terms "Cabinet" and "Council of Ministers" are used alternatively as synonyms as far as the problems discussed herein are concerned.

[6] For example, cf. R. Mojak, *Funkcja parlamentarnej kontroli działalności rządu*, [in:] *Parlament. Model konstytucyjny a praktyka ustrojowa*, ed. Z. Jarosz, Warszawa 2006, p. 124; L. Garlicki, *Rada Ministrów: powoływanie – kontrola – odpowiedzialność*, [in:] *Rada Ministrów. Organizacja i funkcjonowanie*, ed. A. Bałaban, Kraków 2002, p. 146, 148.

[7] This view is shared by, e.g., R. Mojak, *Funkcja…*, pp. 124–125.

of *superfluum*, because the obligation to act under and within the limits set by law when a public authority takes sovereign action is the essence of the constitutional principle of legality enshrined in Article 7 of the Constitution.

It is not the purpose of this study to classify and discuss all the tools of parliamentary scrutiny, but pointing to the most important and typical of them is necessary as a reference point for describing and assessing the relationship between the Senate and the Council of Ministers. Typical controlling measures are therefore in particular the consideration of the Cabinet's report on the implementation of the Budget Act, the activities of an investigative committee, the demanding by permanent and extraordinary Sejm committees to provide them with information and explanations, the desiderata of the committees, parliamentary interpellations.

Controlling in the sense discussed herein consists primarily of activities aimed at establishing the facts and obtaining information on the activities subject to the scrutiny in question. However, controlling also involves the possibility of exerting influence on the activities of the controlled body,[8] and this influence should be understood as the power to formulate assessments and present conclusion the controlled entities are obliged to respond to.[9] However, the Sejm and its bodies also have powers that go beyond these typical controlling tools. Although it is necessary to obtain the consent of the Sejm or a parliamentary committee for a specific action of the Cabinet, the formulation by the Sejm or a committee of a binding expectation that the Cabinet will undertake a specific action or achieve the result expected by parliamentarians is inspired by data obtained as part of the controlling function, but no longer constitutes an institution serving the controlling function. This is because controlling, by its very nature, cannot turn into a tool for forcing certain actions, as the controlling entity cannot encroach on the responsibilities of the controlled entity. In the area under discussion, this would mean intervention of the legislative authority into the executive's responsibility and thus lead to undermining the principle of separation of powers. An exception to such a principle, safeguarded in the Constitution, would also have to have the rank of a constitutional provision.[10]

However, apart from collecting necessary information, parliamentary scrutiny allows the political accountability of the Cabinet and its members to be enforced. Parliamentary control thus implies the right of the legislature to obtain information on the activities of certain public bodies and institutions and the right to express an assessment of these activities.[11] Moreover, this control is also intended to inform the

[8] *Ibidem*. Similarly idem, *Parlamentarna kontrola Rady Ministrów i ministrów w świetle Konstytucji RP*, "Przegląd Sejmowy" 2008, no. 3, pp. 156–157.

[9] Even broader scope is proposed by M. Stębelski (*Pojęcie kontroli parlamentarnej na tle ustrojowym*, "Przegląd Sejmowy" 2008, no. 3, pp. 38–42).

[10] Cf. L. Garlicki, *Rada Ministrów*..., pp. 146–147, 150–152.

[11] Judgment of the Polish Constitutional Tribunal of 14 April 1999, K8/99, OTK 1999, no. 3, item 41.

public about the functioning of state organs and ensures that the state apparatus is subject to scrutiny by the public.[12] These aspects are important for the assessments and conclusions formulated further in the text.

POWERS OF CONTROLLING CHARACTER EXERCISED BY THE SENATE, BODIES OF THE SENATE AND SENATORS

Pursuant to the provision of Article 95 (2) of the Constitution, the Senate has not been indicated as a body exercising control over the activities of the Council of Ministers, but the provisions of other legal acts and the parliamentary practice based on them indicate that the Senate, its bodies and senators perform activities that meet the characteristics of control activities.

Senators exercise the right to request information from members of the Council of Ministers, primarily in connection with legislative work in the Senate. Consideration of acts adopted by the Sejm, i.e. making a decision by the Senate, and earlier by the relevant Senate committees, on the advisability of adopting an act without amendments, its rejection or amendment in the case of work on the vast majority of normative acts, requires discussing the functioning of the legal solutions currently in force, including the assessment of the manner in which the existing provisions are applied by the executive power. It is difficult to imagine and it would be difficult to justify the expectation that there will be no discussion after the senators have obtained information as requested, including a discussion that may be based on a critical assessment of the Cabinet's actions to date. Defining the manner of implementing acts and any related problems should be the basis for amendment of the legislation.[13] In this sense, the performance of controlling activities is related to the exercise of the legislative function,[14] serves the implementation of the legislative function, and should even be perceived as a condition for the proper performance of the latter.

A similar situation applies to the consideration by Senate committees (and then by the Senate) of a bill which is to constitute a Senate's legislative initiative. Also in this case, a standard element of the legislative process is an analysis of the functioning of the existing legal regulations, which in a significant number of cases

[12] Judgment of the Polish Constitutional Tribunal of 22 September 2006, U4/06, OTK 2006, no. 8A, item 109, as cited in: *Konstytucja III RP w tezach orzeczniczych Trybunału Konstytucyjnego i wybranych sądów*, ed. M. Zubik, Warszawa 2008, p. 537.

[13] M. Haładyj, *Od liniowego do ciągłego procesu stanowienia regulacji*, "ThinkTank" 2013, no. 1, pp. 138–144.

[14] Similarly P. Czarny, *Komentarz do art. 95*, [in:] *Konstytucja RP*, vol. 2: *Komentarz. Art. 87–243*, eds. M. Safjan, L. Bosek, Warszawa 2016, p. 236 and the literature cited therein. This author notes that the exercise of the controlling function is complementary to the legislative function.

concerns activities carried out by entities subordinate to or supervised by the Cabinet and is inseparably connected with a critical analysis of the current legal status and the activities of the executive carried out on the basis of these existing regulations.

Thus, although the activities taking place during a meeting of a Senate committee or at the plenary session of the Senate will in most cases be directly related to the ongoing legislative proceedings, and thus will serve the implementation of the parliament's legislative function,[15] it is difficult to overlook their features that significantly approximate them or even make them identical with activities performed as part of the controlling function. Obtaining information from the Council of Ministers and formulating an assessment on this basis, sometimes also associated with articulating expectations or conclusions, was presented above as the essence of controlling activities carried out by the Sejm. Such conclusions and the expectations formulated by Senators or recommendations of Senate bodies may also be a result of the legislative process conducted in the Senate. Therefore, if we refer only to the content of the activities themselves, and to their features, then in many cases it is not possible to draw a boundary between the activities serving the implementation of the legislative function and the activities serving the controlling function. This boundary can only be set by referring to the formal purpose of these activities, with noting their identical content or at least significant similarity in contents.

A different, but even closer connection with the control function exercised by the Sejm can be seen in the case of the so-called senatorial statements. Their legal basis is Article 49 of the Rules of Procedure of the Senate. A senatorial statement may cover matters relating to the performance of the senator's mandate, but it must not concern matters on the agenda of the Senate meeting during which the statement is presented or submitted for the record. If a senatorial statement contains requests, comments or questions addressed, i.a., to members of the Council of Ministers, representatives of central or local government bodies or institutions, it shall be immediately forwarded by the Marshall of the Senate (Speaker) to specified addressees to respond. A statement of this type may also be made by a senator outside a meeting of the Senate and it is also forwarded by the Marshall of the Senate to the specified addressee. Significantly, the Rules of Procedure of the Senate formulate an obligation of responding to a senatorial statement within a period not exceeding 30 days from the date it was forwarded. The provision specifies the time limit for responding, but also formulates the expectation that an adequate answer must be provided. In the event that the time limit is exceeded or that the response is "manifestly inadequate", the Rules of Procedure provide for the application of provisions authorising and at the same time requiring the Marshall of the Senate to:

[15] Adopting the broad meaning of the concept as covering also any work before proposing the bill to the Sejm.

- ensure that constitutional and statutory duties towards the Senate, Senate bodies and senators are performed,
- assess the performance by bodies of central government and local government of their duties towards the Senate, Senate bodies and senators and present such assessments to senators.

The powers and, at the same time, the duties of the Marshall are obviously not of such a nature as to force an entirely effective response to the senator that is satisfactory in the formal sense and substantive sense. However, these regulations make it clear that responding to the senator, and thus the acquisition by the senator of the requested information, is treated by the Rules of Procedure of the Senate as obligatory. In view of the above, this institution is indeed similar to those used in the lower house of Parliament in the exercise of the controlling function, in particular in the form of a parliamentary interpellation.

The source of specific powers to obtain information by Senate committees and senators is also provided for in the Act of 9 May 1996 on the exercise of the mandates of deputy and senator.[16] Article 16 of this Act stipulates that senators are entitled to obtain, i.a., information and explanations from the Council of Ministers on matters arising from the performance of their senatorial duties. The provision also indicates that members of the Council of Ministers are obliged to provide information and explanations at the request of standing and extraordinary Senate committees on matters within their scope of action. As regards the powers of senators, the statutory regulation is further developed in the institution of senatorial statements discussed above. Senate committees, on the other hand, relatively often debate at their meetings on matters which are not directly connected with the legislative procedure under way, but remain within the subject-matter jurisdiction of a given committee as specified in the annex to the Rules of Procedure of the Senate, or in the resolution on the appointment of a committee for an extraordinary committee. In the vast majority of cases, the consideration of matters involving the acquisition of data and information, the analysis and evaluation of such data and information, and the subsequent formulation of conclusions requires cooperation with representatives of the Council of Ministers, from whom the committee would request the necessary data or information, but may also expect to participate in the process of analysing the acquired data. Then assessments or conclusions formulated on this basis will often be directed to Cabinet representatives.

Consistent with the above-mentioned provisions are the solutions included in the Rules of Work of the Council of Ministers.[17] Pursuant to § 161 (1) of this act, the Council of Ministers, members of the Council of Ministers and other compe-

[16] Journal of Laws 2018, item 1799, as amended.

[17] Resolution No. 190 of the Council of Ministers of 29 October 2013 – Rules of Work of the Council of Ministers (Official Gazette of the Republic of Poland "Monitor Polski" 2022, item 348).

tent central government administration bodies shall reliably and timely fulfil their obligations towards the Senate resulting from laws and the Rules of Procedure of the Senate. On the other hand, § 162 (2) indicates that members of the Council of Ministers are obliged to respond to senatorial statements in the manner and on the terms set out in the Rules of Procedure of the Senate. These provisions indicate that the Council of Ministers has made the provisions of the Rules of Procedure of the Senate (and respectively also the provisions of the Rules of Procedure of the Sejm) binding on itself.[18]

The legal regulations setting out mechanisms of cooperation between the Cabinet and the Parliament on matters concerning Poland's membership of the European Union (EU)[19] also provide for the participation of both the Sejm and the Senate (and their respective bodies) in a number of activities undertaken as part of this cooperation, including information obligations on the part of the Council of Ministers, or cooperation with the Sejm and the Senate in the field of EU presidency held by Poland (more precisely: representatives of the Polish Government). Therefore, also in this particular area, which is largely the responsibility of the Council of Ministers, the Senate and its bodies are involved in a process covering both obtaining information and influencing the position presented by the Cabinet in the EU bodies. Thus, there are a number of activities whose content is substantially similar to those carried out in the context of the controlling function, although it essentially serves to carry out a different function, depending on the legislative classification adopted in its broader sense or a separate one referring to specific task s of this kind.

To sum up, the statutory and regulatory mechanisms that are of our interest include in particular:

- demand that Cabinet representatives be present at plenary and committee meetings,
- request for information (answer to questions from senators) from those representatives during plenary and committee meetings,
- resolutions, statements, appeals and opinions adopted by the Senate,
- committee opinions,
- requests for information, explanations, opinions in writing or on a suitable medium and requests for materials formulated during committee meetings,
- senatorial statements.

[18] As proposed by P. Sarnecki (*Senat RP a Sejm i Zgromadzenie Narodowe*, Warszawa 1999, p. 84) which refers to the wording of the Rules of Work of the Council of Ministers of 25 February 1997, but these comments are still valid for the currently applicable Rules of Work of the Council of Ministers.

[19] Act of 8 October 2010 on the cooperation of the Council of Ministers with the Sejm and the Senate in matters related to the EU membership of Poland (Journal of Laws 2010, no. 213, item 1395).

All of these tools can have features associated with the exercise of control, and some of them – particularly senatorial statements – are essentially of that nature only. This significant similarity, or even identity, of the tools used by the Sejm to carry out its controlling function and the tools used by both the Sejm and the Senate to perform other functions, in particular the legislative function, is of course noted in the literature.[20] The constitutional legitimacy of these Senate activities will be discussed later in this article.

The framework of the article does not allow for a full presentation and analysis of the practice of applying the provisions in question and the legal tools enshrined in them, however, it is necessary to cite at least selected crucial examples. The first example concerns a meeting of a Senate committee which discussed at the meeting issues unrelated to the current legislative work. The Senate Committee on Foreign Affairs and the European Union held a meeting whose subject was the state of Polish-American relations (current developments in this area). At the beginning of the meeting, the chairman of the Committee informed that, for the first time in the work of the Committee so far, no representative of the Minister of Foreign Affairs, either at the political (deputy minister) or official level, attended the meeting.[21] In principle, the subject-matter of the session covered only issues that were within the responsibility of the Council of Ministers and the Minister of Foreign Affairs. Political comments preceding the meeting of the Committee, and then the course of the meeting of the Committee reflected the critical assessment of most of the Cabinet's actions by the Senate. This circumstance, however, has no bearing on the conclusion that the absence of the Minister (or his representative) at the meeting violated the provisions discussed above, obliging members of the Cabinet to cooperate with the Senate and its bodies. From the point of view of the issues discussed, it is important, however, to assess the actual state of affairs in the context of the classification of activities carried out by the Committee at this type of meeting. *Prima facie*, it is possible to conclude that the subject matter of the Committee's work enters the area that should be within responsibility of legal institutions competent for the controlling function. It is difficult, however, to assume that a Senate committee with such a scope of jurisdiction[22]

[20] For example, see R. Mojak, *Funkcja…*, p. 125 who states: "The closest to the meaning of parliamentary control is the category of means of control aimed at information about the activities of the Cabinet and ministers and means of evaluating these activities" and listing as these "means of control for information", i.a., the right of Sejm deputies and senators to obtain information and explanations from members of the Council of Ministers on matters arising from the performance of parliamentary duties, and the right of permanent and extraordinary Sejm and Senate committees to demand information and explanations by members of the Council of Ministers.

[21] See *Zapis stenograficzny z posiedzenia Komisji Spraw Zagranicznych i Unii Europejskiej (78.) z dnia 21 lipca 2021 r.*, https://www.senat.gov.pl/prace/komisje-senackie/posiedzenia,188,3,komisja-spraw-zagranicznych-i-unii-europejskiej.html (access: 10.12.2022), p. 3.

[22] See point 13 of the Annex to the Rules of Procedure of the Senate – Subjective Scope of activity of Senate committees, which points to, among others, foreign policy of the State.

would be deprived of the right to address matters which essentially require dialogue with the Cabinet, including one which takes the form of evaluation, also critical, of the Cabinet's actions. Therefore, one should reject a thesis that the convening of a Senate committee meeting to tackle issues such as in the above-mentioned case or similar, falling within the scope of the committee's responsibility and relating to the areas for which the Cabinet is responsible, would be inadmissible only because of the theoretical positioning of such meetings as part of the controlling function of the Parliament. Senators, as elected representatives of the sovereign, have the right to obtain information about the activities of the Cabinet and to evaluate such activities. Obtaining such information by a senator is necessary for the proper exercise of his or her mandate in the framework of all constitutionally permissible activities, specified in detail in statutory and regulatory acts. The flow of information from representatives of the executive power to parliamentarians (but also the feedback) must be seen as a rudimentary feature of the mutual relationship between the two powers.

In the above-described case, apart from violating the formal conditions, failure of representatives of the Council of Ministers to cooperate with the Senate committee, however, also took place in the substantive area. This area concerns the effectiveness of the functioning of public bodies. An element of effective operation is the ability to interact with other public authorities. The discussion on a selected foreign policy issue conducted by a Senate committee with the participation of experts and without the participation of a representative of the Cabinet is obviously poorer and carries the risk of error resulting from the lack of full knowledge about the actions implemented by the Cabinet and planned as part of this policy. In this way, not only the discussion itself becomes deficient for its participants, but also Cabinet representatives lose the opportunity to verify the views presented, to listen to critical opinions that may be objectively useful. Ultimately, the foreign policy suffers due to the lack of cooperation, which does not have to mean unanimity in all or even most views.

A possible reason for failure of Cabinet representatives to attend the committee meeting was a kind of political demonstration and deliberate violation of applicable rules. The assumption that this was not the case and that the attitude of the Cabinet was rooted in the lack of acceptance for participation in the Senate procedure, which may be perceived as a para-controlling procedure, allows us to illustrate the negative effect of the attempt to assign specific legal institutions, including procedural and factual solutions, as attributed to only one of the parliamentary functions. This issue will be developed in the concluding part hereof.

Even more significant for the issues under analysis is the example concerning the establishment by the Senate of an extraordinary committee, the area of responsibility of which covers both typical legislative tasks and tasks that can be perceived as similar to those carried out as part of the controlling function. In January 2022, after the media had made public the information about the possible use of spyware by secret services, including against the political opposition during the

election campaign, the Senate set up an Extraordinary Committee to investigate cases of illegal surveillance, their impact on the electoral process in the Republic of Poland and the reform of the secret services.[23] The tasks of the Committee are defined as follows:

1. Examination of uncovered cases of illegal surveillance using, i.a., Pegasus spyware and violations of the law where the special services applied operational surveillance.
2. Assessment of the impact of uncovered cases of illegal surveillance on the electoral process in the Republic of Poland.
3. Drafting, submitting and participating in the consideration by the Senate of a legislative initiative aimed at reforming the activities of the special services on the basis of, i.a., the guidelines set out by the Commissioner for Civil Rights Protection and the expert group working for the Commissioner.

This Committee's responsibility thus formulated must be considered as a whole. In this sense, the implementation of the tasks specified in items 1 and 2 is intended for the subsequent drafting of the bill referred to in item 3. At the same time, however, the content of items 1 and 2 indicates the need for the Committee to take measures which are of a controlling nature to a significant extent. The mere establishment of the facts in the areas described, let alone the assessment of the facts established, will serve as an example for carrying out similar checks and at least some of the Committee's activities had such characteristics.[24] It is worth noting that the Committee's work has been boycotted by representatives of the Cabinet.[25] The possible legal justifications for refusing to participate in the Committee's

[23] Resolution of the Senate of the Republic of Poland of 12 January 2022 on the establishment of an Extraordinary Committee to investigate cases of illegal surveillance, their impact on the electoral process in the Republic of Poland and the reform of the secret services.

[24] Of such a multifaceted nature is, e.g., the opinion requested in connection with the work of the Committee and published by the Senate Chancellery, which focuses on a critical analysis of the law currently in force, but also includes an analysis of the practice of the use or abuse of certain legal solutions by the special services (see P. Litwiński, *Opinia prawna w sprawie naruszeń w związku z ujawnionymi przypadkami użycia oprogramowania szpiegującego Pegasus w świetle prawa ochrony danych osobowych, przepisów Karty Praw Podstawowych UE i Konstytucji RP*, Opinie i ekspertyzy OE-390, Warszawa 2022, https://www.senat.gov.pl/gfx/senat/pl/senateksperty zy/6283/plik/oe-390.pdf, access: 10.12.2022). Another opinion in support of the Committee's work is an openly critical assessment of the application (infringement) of the law by executive authorities (see M. Bidziński, *Ekspertyza w przedmiocie: legalność zakupu i wykorzystywania na terytorium Rzeczypospolitej Polskiej systemu „Pegasus"*, Opinie i ekspertyzy OE-381, Warszawa 2022, https://www.senat.gov.pl/gfx/senat/pl/senateksperty zy/6220/plik/oe-381.pdf, access: 10.12.2022).

[25] For example, see the position of the Minister of the Interior and Administration, the special services coordinator, who referring to the Committee's purely political (in his opinion) motivation, which could harm the functioning of the special services, stated that he "did not plan participating in the work of the Senate committee at any stage". For example, see the following media reports: *Minister Kamiński nie stawi się przed senacką komisją. „Państwo chcą prowadzić antyrządową*

work and the material effects of such an omission should be adequately addressed by the comments made above concerning the absence of representatives of the Council of Ministers at the meeting of the Committee on Foreign Affairs and the European Union.

LEGAL BASIS FOR SENATE'S POWERS OF CONTROLLING NATURE

Both the two examples discussed, as well as the analysis of statutory and regulatory provisions, clearly indicate that the Senate, its bodies and senators perform a number of activities that may be characteristic of the controlling function. These activities are carried out both as part of processes that are quite easy to situate in the classification of the parliamentary functions serving the performance of a function other than controlling, but also as part of processes whose unambiguous classification by category of functions is difficult. A question about the systemic basis of these specific competences of the Senate should be asked.

It is undisputed that the source of the activities exercised by the upper house of the parliament cannot be the controlling function in the sense ascribed to that concept in Article 95 (2) of the Constitution. The fundamental question boils down to an assessment as to whether these powers have their direct constitutional source or they derive exclusively from the statutory and regulatory provisions referred to above. The thesis of a direct constitutional source of the powers in question as stemming from the representative character of the Senate should be considered most appropriate.[26] In order for the senatorial mandate to be exercised effectively in a manner adequate to the representative character of the Senate, it is necessary for the Senate, its bodies and senators to enter into an area which involves the assessment of the Cabinet's activity.[27] The logic of the parliamentary-cabinet system assumes that it is the political majority in the Parliament that establishes the Cabinet, which entails

kampanię", 26.01.2022, https://www.rp.pl/polityka/art19325791-minister-kaminski-nie-stawi-sie-przed-senacka-komisja-panstwo-chca-prowadzic-antyrzadowa-kampanie (access: 10.12.2022).

[26] For example, see A. Bisztyga, *O upodmiotowieniu Senatu Rzeczypospolitej Polskiej*, [in:] *Kierunki zmian pozycji ustrojowej i funkcji Senatu RP*, eds. A. Bisztyga, P. Zientarski, Warszawa 2014, p. 7. This author is in favour of the first concept of the source of controlling powers of the Senate, while asserting that both concepts are not mutually exclusive. Similarly, the very nature of the Senate as a representative body was pointed out as a source of these powers by P. Sarnecki (*Senat RP*..., pp. 82–83), but he stipulates at the same time that such type of actions may be admitted due to the non-sovereign character of the controlling function.

[27] At the same time, this position was supported in the text, fundamental for the issue discussed, by P. Sarnecki (*Kompetencje kontrolne Senatu Rzeczypospolitej Polskiej*, "Przegląd Sejmowy" 2000, no. 6, pp. 14–16), who also emphasized the non-sovereign character of the controlling function in the meaning attributable to the Senate. See also a contrary position: L. Garlicki, *Kompetencje kontrolne Senatu Rzeczypospolitej Polskiej? Uwagi na marginesie artykułu prof. Pawła Sarneckiego*, "Przegląd

a relative unity of political objectives. This significantly weakens the willingness to perform the controlling function and objectivity of the house of parliament, in which the groupings supporting the Cabinet have a majority, and this house will always be the Sejm, except in cases of minority government. The political homogeneity of the parliamentary majority and the Cabinet, typical of a stable political system, blurs the differences between them and brings to the fore the means of political influence, without the need for legal intervention.[28] The political reality in Poland of the last dozen years or so clearly shows that the centre of political power associated with the executive authority is beginning to dominate in the area of decision-making over the parliamentary centre, which is actually becoming an implementer of the intentions expressed by the executive authority. Such a practice obviously weakens the systemic position of the legislature and, consequently, leads to the erosion of the system based on the mutual balancing of powers. In such circumstances, the exercise of the controlling function by the Sejm also has a superficial or even an ostensible form.[29] One cannot also underestimate the influence of the centre of political power, in the Polish reality often situated outside the formal structures of the organs of public authority, the effect of which is to further limit the effectiveness of the exercise of the controlling function using the traditional mechanisms attributable to the Sejm. In this context, the controlling function of the Sejm is exercised in practice by the opposition,[30] which in the current political situation, where in the Senate of the 10th term a majority has formed of groupings that constitute the opposition block in the lower house clearly illustrates the negative effect of the constitutional exclusion of the Senate from the exercise of the controlling function.

The indication of the representative nature of the Senate as the source of the limited, but undoubtedly controlling powers of the Senate[31] should not be perceived as inconsistent with the wording of the above-mentioned Article 95 (2) of the Constitution. This provision should be seen as related to the constitutional provisions entrusting the Sejm with the implementation of the most important powers performed as part of its controlling function.[32] Thus, this provision does

Sejmowy" 2000, no. 6, pp. 30–31. This author considers it impossible to invoke constitutional grounds for the Senate's controlling function.

[28] Idem, *Komentarz do art. 95*, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, ed. L. Garlicki, vol. 1, Warszawa 1999.

[29] Cf. P. Radziewicz, *op. cit.*, p. 309.

[30] P. Czarny, *op. cit.*, p. 237.

[31] M. Dobrowolski, *Zasada dwuizbowości w polskim prawie parlamentarnym*, Warszawa 2003, pp. 270–272. This author argues that since the Act on the exercise of the mandates of deputy and senator grants the same rights to deputies and senators, this solution is based on their equal status stemming from the representative nature of their mandates. Therefore, the representative nature of the Senate may be considered the source of its controlling powers (in the broad sense). This concept has been criticised by R. Mojak (*Parlamentarna kontrola…*, p. 165).

[32] As a "summary" of these regulations, as referred to by P. Czarny (*op. cit.*, p. 239).

not preclude granting the Senate certain powers in the field of controlling "if it does not formally and materially violate the primacy of parliamentary scrutiny".[33] From this perspective, the discussed statutory and regulatory provisions should be perceived as setting out the forms in which activities are performed whose formal source are constitutional principles, and not as an independent source of these powers. Of course, it is important that these detailed regulations respect the boundaries resulting from the constitutional structure which assigns the Sejm the controlling function and determines the most important forms of its implementation.

Only as a side note, it can be stated that the significantly asymmetrical position of both parliamentary houses in the discussed areas has been an element of the Senate's systemic structure since its rebirth.[34] Therefore, these competences were limited from the very beginning, and what is more, they were further limited in the course of changes in the regulations shaping the state political system.[35] In recent years, however, we have observed their expansion – as evidenced by the inclusion of the Senate in the above-described mechanism of cooperation between the Cabinet and the parliament on matters relating to Poland's membership in the European Union.

CONCLUSIONS

The conferral of controlling function on the Sejm in the Constitution does not mean that the Senate does not have any controlling powers exercised in relation to the Council of Ministers, but these are very limited. The most powerful forms of controlling (motion of confidence, motion of no confidence, examination of the report of the Council of Ministers on the implementation of the state budget, discharge)

[33] *Ibidem*. Cf. also a different, critical position by L. Garlicki (*Komentarz do art. 95…*), in which he notes that Article 95 (2) does not grant the Senate any controlling powers, and leaving the provisions on investigative committees, interpellations, deputy's inquiries outside the scope of the provisions relating to the Senate and senators – reinforces the conclusion about the inadmissibility of considering Article 95 (2) as a basis for granting controlling powers to the Senate. Conferring such powers in laws or in the Rules of Procedure of the Senate should therefore be treated with great caution.

[34] The genesis of the scope of the Senate's controlling powers thus defined, referring to the content of the Round Table Agreements and the practice of the Senate of the 1st term of office is discussed in W. Orłowski, *Senat Rzeczypospolitej Polskiej w latach 1989–1991. Geneza instytucji*, Warszawa 2009, pp. 246–256.

[35] See a brief description of the legal conditions resulting from the amendment of the provisions of the Constitution of 1952 and the wording of the provisions of the Small Constitution of 1992 and then in the course of work on the draft Constitution of 1997: M. Dobrowolski, *op. cit.*, pp. 189–190, as well as the account of the most important voices of the members of the Constitutional Commission and the experts of the Commission in the course of work on the wording of Article 95 of the Polish Constitution: R. Chruściak, *Sejm i Senat w Konstytucji RP z 1997 r. Powstawanie przepisów*, Warszawa 2002, pp. 44–49.

are reserved by the Constitution to the Sejm.[36] It is therefore clear that the Senate may not exercise its parliamentary controlling function in the area reserved to the Sejm – the Senate could not, therefore, use directly those mechanisms which were not assigned to it, but even the use of these other distributed powers may not result in an attempt to replace the institutions which are reserved to the Sejm in the political system of the state.

An important part of the competence of the Senate, its bodies and senators linked directly with the legislative work is also related to the exercise de facto of control over certain actions of the Cabinet. It would be an unreasonable simplification to state that these powers are solely for the Senate to perform its legislative role. The collection of information from obliged entities representing the Cabinet side may serve to exercise the legislative function, but these powers may also serve to acquire knowledge which is not directly related to the legislative process. It should be noted that it is not possible to attribute a specific power to the Senate solely for the exercise of a single parliamentary function. In the area under study, this means that controlling understood as collecting information, formulating assessments and making suggestions and proposals, is an important element in most of the parliamentary work of both houses and their bodies in the exercise of virtually all parliamentary functions.[37]

The reference to the representative nature of the senatorial mandate as a political-systemic source for the exercise by the Senate, its bodies and the senators of statutory and regulatory powers of controlling nature is crucial for delimiting the constitutional boundaries of this activity. It should be stated that any action that serves the performance of a mandate or, in other respects, for the performance of a parliamentary function, will be admissible unless it encroaches on the area of competence of the Sejm exercising the controlling function explicitly reserved in the Constitution. This approach allows for an affirmative assessment of the described practice of the Senate and Senate bodies, which request information from the Cabinet and expect the cooperation of representatives of the Council of Ministers as necessary to perform diverse parliamentary tasks. None of these tasks, however, serves and cannot substitute for (encroach on) the performance of forms that were explicitly reserved for the Sejm exercising the controlling function.

The systemic importance of the use by the upper house of these limited para-controlling powers grows in the situation of an actual significant limitation of the effectiveness of the performance of the controlling function by the Sejm. Entrusting this function solely to the lower house, which is directly involved in the

[36] J. Szymanek, *Senat RP. Uwagi de lege ferenda*, [in:] *Kierunki zmian pozycji ustrojowej i funkcji Senatu RP*, eds. A. Bisztyga, P. Zientarski, Warszawa 2014, p. 176. However, this author refers to as a sovereign form of control also to parliamentary interpellations, while their function does not differ significantly from senatorial statements.

[37] P. Sarnecki, *Kompetencje kontrolne…*, p. 158.

establishment of the Council of Ministers, whose activities are then to be subject to scrutiny should be critically assessed in retrospect and from the perspective of parliamentary practice. On the side of the parliamentary majority constituting the parliamentary block of the Cabinet, there would have to be a will to exercise this function effectively, not limited by the possible influence of the non-parliamentary centre of political power. The constitutional exclusion of the Senate from exercising this control, in which – as practice shows – a majority may be formed differently than that in the Sejm, restricts the effectiveness of the broadly understood parliamentary scrutiny of the executive authority. Meanwhile, this scrutiny is one of the important mechanisms securing a system based on the principle of a democratic state ruled by law. Of course, granting this type of powers to the lower house would require them to be built into a completely different system of mutual relations between the houses of parliament and between each of these houses and the Council of Ministers. However, a separate study would be necessary to discuss possible comprehensive systemic solutions other than the current ones.

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ABSTRAKT

Przedmiotem badania w niniejszym artykule o charakterze naukowo-badawczym jest zakres i podstawy prawne realizowania przez Senat czynności, których cechy mogą wskazywać na ich tożsamość z czynnościami, które w typowej sytuacji służą realizacji funkcji kontrolnej. W polskim systemie ustrojowym funkcję kontrolną w stosunku do działalności Rady Ministrów sprawuje Sejm. Jednak zarówno przepisy ustawowe, jak i przepisy Regulaminu Senatu stanowią dla Senatu, jego organów oraz senatorów podstawę prawną całego szeregu czynności wykazujących istotne podobieństwo, a w niektórych przypadkach w zasadzie tożsamość z czynnościami realizowanymi przez Sejm, jego organy oraz posłów w ramach aktywności kontrolnej. Dotychczasowe badania tego zagadnienia prowadzone były głównie w aspekcie poszukiwania odpowiedzi na pytanie o klasyfikację prawną przepisów, na których oparte są poszczególne działania izby wyższej. Dla autora zreferowanie dotychczasowych, najistotniejszych poglądów stanowi podstawę do pogłębienia analizy poszukującej źródła kompetencji Senatu w jego przedstawicielskim charakterze. Wzgląd na ten aspekt jest szczególnie istotny w zaistniałej sytuacji faktycznej ukształtowania się w Senacie większości spośród ugrupowań stanowiących mniejszość w Sejmie. Dodatkowo specyficzne ukształtowanie ośrodków decyzji politycznych (poza parlamentem) wpływa na istotne ograniczenie czy wręcz pozorność realizowania funkcji kontrolnej przez Sejm. Okoliczność ta, ważka w perspektywie funkcjonowania całego systemu ustrojowego państwa, czyni szczególnie ważną weryfikację dopuszczalności i charakteru prawnego działań parakontrolnych podejmowanych przez Senat. W przyjętej perspektywie badawczej parlament stanowi emanację Narodu, który nie powinien być pozbawiony wglądu oraz możliwości odniesienia się – przez swoich przedstawicieli – w działania, za które odpowiada Rada Ministrów. Przyjęcie takiej perspektywy, wobec przyjętej hipotezy o co najmniej ograniczonej skuteczności realizowania funkcji kontrolnej przez Sejm, nakazuje z kolei weryfikację skuteczności narzędzi stosowanych przez Senat, jego organy oraz senatorów. Formułowane wnioski powinny być istotne nie tylko dla stanu naukowej refleksji, lecz także dla praktyki parlamentarnej, która w tym zakresie nadal wypracowuje adekwatne i mieszczące się w konstytucyjnych ramach narzędzia.

Słowa kluczowe: Rada Ministrów; Senat; funkcja kontrolna; zasada suwerenności Narodu; mandat parlamentarny