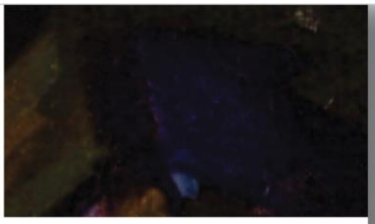

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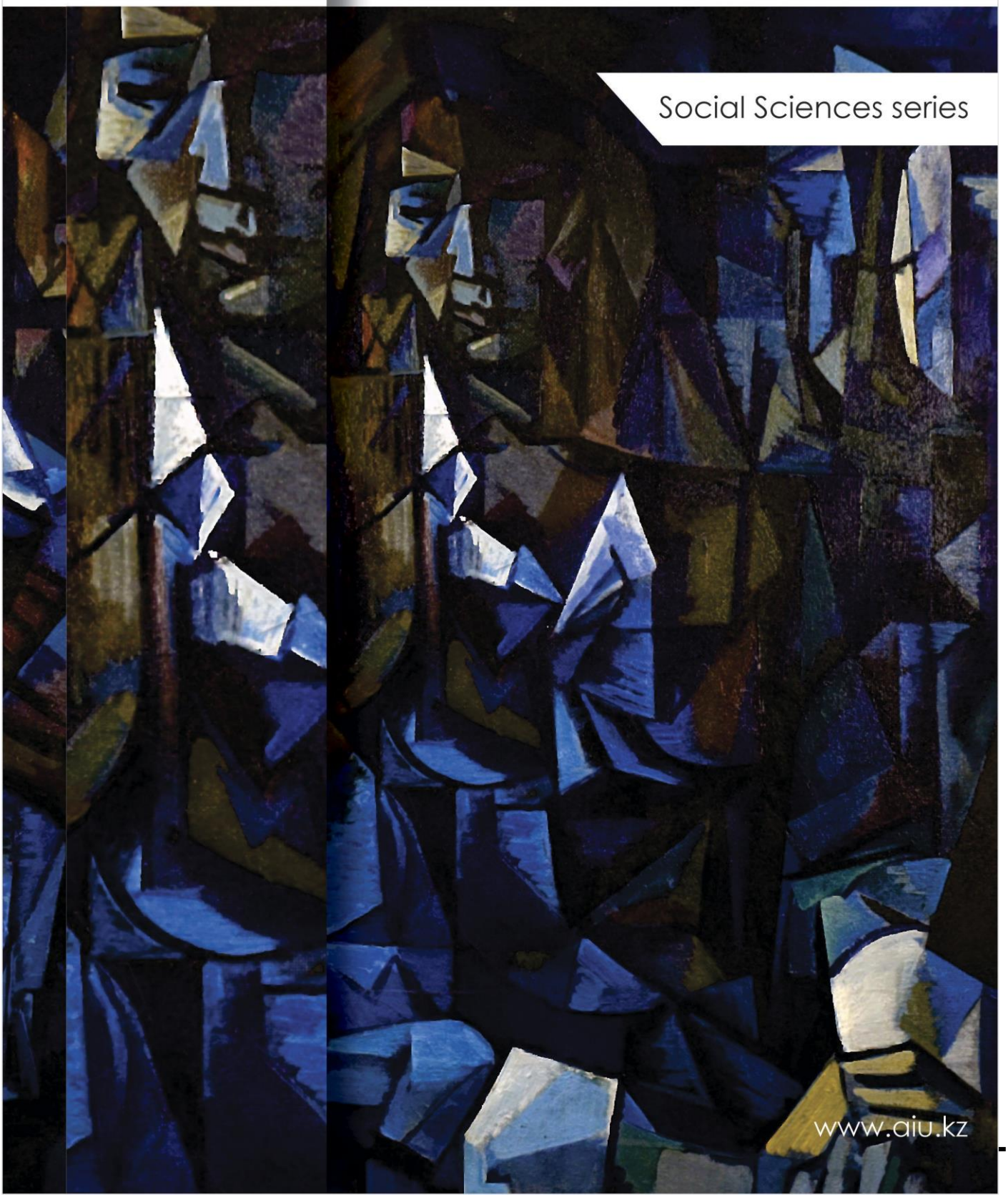

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LIMITATION OF THE LEGISLATIVE POWER OF PARLIAMENT AS A PRECONDITION FOR THE RULE OF A BALANCED POWER. HISTORICAL AND CONSTITUTIONAL CONSIDERATIONS1

Jacek Zaleśny, Jarosław Szymanek

Poland

Annotation. The present text reviews and assesses the establishment and development of constitutional review of bill. Concentrations on the consequences of this process take place which follow from the special importance of the bill as a parliamentary act identified with the expression of the sovereign's will. The origin of the process of constitutional review of bill and its main stages are analyzed and the accompanying political controversies are also explained.

Keywords: formation and development of control over the constitutionality of laws, European countries, law as an act of parliamentary, balance of power.

Introduction

Control over the legislative activity of parliament is regarded in contemporary states as a constitutional standard: an indispensable and obvious condition of the protection of the citizens' rights and freedoms against the risk of parliament's unconstitutional activity. The need to introduce this kind of assessment was expressed at the end of the 18th century. It was formulated in connection with the shaping of modern parliaments created on the basis of the contemporary understanding of the sovereign's political representation, the increasing importance of political fractions and in connection with the spread of the right to vote for parliament. It was believed that the legislative activity of the parliament should be checked for its compatibility with the fundamental laws of the state. Nevertheless, the establishment of this kind of control encountered obstacles for a long time. The first and the most important was the opinion that parliament, as the representative of the will of the sovereign themselves, could not be subject to any control since that would indirectly mean controlling the nation itself, which would in turn undermine the latter's sovereign character. That – for principal reasons – could not be accepted. The entity which was to control the compatibility of bill with the constitution was to posses a similar political legitimacy to that of the creator of the bill. *De facto* this condition was only fulfilled by parliament itself and the only legitimized form of controlling the bill was parliamentary self-control (A.S. Sweet, p. 83).

Another arguments that was frequently used against controlling the legislative activity of parliament was the position of parliament in the structure of state bodies. In the classical constitutional law this position was exceptional, which was explained by its representative nature and the fact that it does not express its own will but the will of the sovereign nation. It was believed that if expressing this will was to be complete and effective at the same time, the organ which expressed it – which is parliament – had to occupy the dominating position among all other organs constituting the so-called state apparatus. In some systems, for example in France or Great Britain of the 19th c., this point of view went even further since treating the parliament as the highest, and hence the most importance organ of the state ultimately generated the rule of the parliament's sovereignty, in accordance with the idea that "there is no will but the will of the

[1] The article is written as a part of NCN (National Science Centre Poland) project: «Constitutional courts in post-Soviet states: between the model of a state of law and its local application» (id 2016/23/B/HS5/03648).

parliament", which was at that time supported by the absence of the institution of direct democracy. As a consequence, the standard procedure was a lack of any reviewing procedures and the will of the parliament, expressed for example in the content of a law, was not subject to anybody's control. This construction was complemented by the definition of a law, according to which the latter was "a manifestation of common ill", which even more obviously did not encounter any barrier, for instance in the form of reviewing procedures.

With time, however, it was acknowledged that the activity of the parliament should also be limited by reviewing procedures. It was rightly argued that departing from absolutism should be followed by the establishment of verifying mechanisms also in relation to parliament. Parliaments were also noticed to be the source of threats for civil rights and freedoms. As said by James Madison during the work on the American constitution, and those were not only his reflections, an individual, a group as well as a few hundred deputies of the legislative might be the absolute tyrant if there was no verifying and restraining instance above it.

Discussion. A more and more articulated postulate to introduce a controlling mechanism as a consequence generated the correction of the legislative procedure including the reviewing mechanisms. Consequently, the parliament was still a monopolist and its legislative activity was not controlled by anybody from the outside. However, from the theoretical point of view it was a significant change since the law adopted by the parliament was perceived not only as an expression of the common (sovereign's) will but also as an effect of reviewing activities which were aimed at assessing whether the legislative procedure was observed and whether the content of the law was compatible with the top-down accepted assumptions (treated either as the common will, as the sense of justice or as the activity in accordance with the reason of state or, finally, as the activity compatible with the constitution).

The concept of parliament's legislative self-control took shape in this way. According to it, if the parliament finally accepted the bill, at the same time it acknowledged that it was correctly adopted from the procedural point of view and that it was correct from the material point of view (considering the content). This was first of all connected with restricting and specifying the statutory conditions of the legislative process, which for this reason required, for example, more and more detailed norms and increasingly more stages on the level of parliamentary work (work in commissions, work during the plenary sittings of the chamber). Secondly, the concept of parliament's self-control caused a re-orientation of the political status of the second chamber of parliament, which since then started to be perceived the chamber having a special duty to take care about the quality of the law established by parliament. As a result, the second chamber began to be called the "reviewing chamber", "the chamber of legislative restraint", "the control chamber", or "the chamber of reflection and prudence", with the characteristic division of tasks of both chambers becoming a spontaneous reason for a two-chamber parliament. The task of the first chamber was to adopt the law in a definite shape, while the second one was to control it in formal and material respects. The law finally accepted by parliament was perceived not only as an act of will of the sovereign, represented by parliament, but also as acompleted, legally "perfect" act, also in the sense that it corresponded to the requirements of constitutional correctness.

However, certain objections were raised to the so-formulated concept of controlling parliament's legislative rights. One of the basic and most frequently formulated ones was that control organized in this way was in fact self-control, which in turn, undermined its objective character. It was observed that it violated the rule *nemo iudex in causa sua* (no one ought to be a judge in his own cause), which led the critics of this situation to the conclusion that as long as control is self-control, it is actually no control. Moreover, the insufficient professionalism of parliamentary control and its mainly political character was pointed out. It was also indicated that in the basic system marking the rhythm of parliamentary work, i.e. government – opposition,

legislative control is by definition ineffective in a sense since the parliamentary opposition, by being the parliamentary opposition, can only criticize while the ruling majority will do what they wish.

It is worth emphasizing that although the model of self-control was abandoned later, some of its solutions remained. The first is the assumption that in spite of the fact that at present the organ controlling the legislative activity is situated outside the parliament, in the procedures of their regulations the chambers still have an obligation to establish such solutions whose aim is marked by the control of the adopted law from the point of view of its compatibility with the constitution. The second one is the correlated concept of legislative duties of the parliament. According to this concept, two kinds of duties are laid on the parliament, namely 1) so-called positive obligation, coming down to the order to develop and specify constitutional regulations, which takes place mainly through the establishment of laws, largely aimed to make the indications of the constitutional more precise, and 2) so-called negative obligation, consisting in a ban on establishing a law incompatible with the constitution. The third solution, which remains after the former competence of the parliament to self-control the law it established itself, is the rule adopted today of presumed constitutionality of the laws. In accordance with it, the law passed by the parliament is treated as being compatible with the law of a higher rank until this compatibility is questioned by another organ (e.g. constitutional court) equipped with the right for legislative assessment of the activity of the chamber (chambers).

The wave of criticism encountered by the parliamentary model of control (self-control) of the legislative activity gave rise to a search for another kind of mechanisms of effective (i.e. objective and possibly professional) verification of legislative activities of the chambers. Their assumption was to place the controlling entity outside the parliament. Chronologically, the first such proposition was put forward in 1795 in France in the times of the revolution by Emmanuel Joseph Sieyès (during constitutional work). He suggested entrusting constitutional control of the laws to the elite *Constitutional Jury* (*jurie constitutionnaire*). It was supposed to be a separated and independent organ of the state. The first composition of the *Jury* was to be chosen by parliamentary deputies from among themselves. Every year the *Jury* was to resign. The choice of their successors was to be made by the *Jury* from the among the deputies finishing their term of office. The *Constitutional Jury* was first of all expected to investigate the constitutionality of the acts of public authority and then repeal those that were not compatible with the constitution (J. Szymanek; M.M. Wiszowaty). It was also supposed to play the role of the law-maker through formulating propositions of amendments to the constitution in order to guarantee its inner coherence. E. J. Sieyès was aware that the control of legislation was not a typically judicial activity, which is why he proposed to call the organ which he suggested should be established a *jury* and not a *court.* He saw that it was the activity with political consequences. Therefore, the organ performing it is placed between the powers. It has the features of a court, it concerns legislation and in its consequences it influences the constitution, that is law making. E. J. Sieyès' project was criticized and rejected as threatening the rights of the Convent. As argued by Antoine Claire Thibaudeau: "This monstrous power would be first of all in the state. Giving the public authorities a guard would mean giving them a master who would bind them to have a better watch on them" (G. Burdeau, p. 374).

Although the concept of a constitutional jury as seen by Sieyès was not realized, the problem of dangers associated with the risk of the parliament's legislative arbitrariness remained. Therefore, it was decided that the proper solution was to grant the control of laws to the head of state, which was reflected in the institution of the promulgation of a law. The activities of the head of state, entitled to sign the law and have it announced in an official publication was perceived in the categories of checking whether the law accepted by the parliament fulfilled the proper requirements. The disputable issue, however, was to establish the criteria of the review of the law by the head of state. It was undisputable that before signing the law and directing it for

publication, the head of state could assess whether it was adopted with all the procedures kept (referring to the constitution, the laws and the rules and regulations). The so-called formal (procedural) control was then obvious. However, the dispute referred to whether the head of state had the competence of substantive verification (pertaining to the content). Finally, it was decided that the head of state controlled only the procedural aspects of the law established by the parliament and, in case they decided the procedures were violated, they could direct the law to the parliament again to be passed once more, thus repairing all possible procedural shortcomings taking place when it was accepted originally. At the same time, it was settled that there was no possibility to assess in the promulgation act the compatibility of the content of the law with the constitution, if only because passing the law again was not after all connected with introducing any new content to it.

The control of the legislative activity of the parliament performed by the head of state was highly appreciated. It was thought that it was definitely better than the model of the parliament's self-control practiced earlier and that was for a few reasons. Firstly, because it stopped being a self-control. Secondly, while realizing the controlling competences, the head of state, who were expected to be politically impartial, behaved, or at least were supposed to behave in an objective way, which improved the effectiveness of the control. Thirdly, it provided good doctrinal basis for the presence of the head of state in the process of the law coming into effect. It deserves to be remarked that a trace of this doctrinal reinterpretation of the head of state's presence is the function of the guard of the constitution still ascribed to the head of state which goes back to the times when the head of state was seen as the controller of the parliament's legislative activity. Nevertheless, the control by the head of state also had its significant drawbacks. The most important was its fragmentary character and the fact that beyond its area it left out the material (objective) aspect of the controlled acts, which *de facto* meant only a partial control. Another disadvantage was a lack of professionalism. Still another was the objection that the Republican head of state (at that time most frequently coming from the election by the parliament) did not necessarily have to be a really impartial and fully objective organ. Referring to the Republican head of state from the parliamentary election it was pointed out that it was not an organ completely independent from the parliament (which was well highlighted by the 3rd French Republic) and that another entity should be rather sought which would control legislative acts adopted by the chamber (chambers) better. That was so even more because while acting as the promulgating organ, the head of state was involved in the legislative process, which – according to the critics of this situation – still kept the internal character of that control in the sense it took place within the legislative process the monarch or the president was an integral part of. It was for this reason why still another controlling mechanism was sought.

In the first three decades of the 20th century it was stated that such an ideal solution would be to entrust the control over the parliament's legislative activity to courts or other bodies similar to the former in political respects. That was first of all because it placed the controlling body beyond the legislative process, in addition to assuming its full professionalism. It was also of importance that courts were equipped with the attribute of a separate and independent power, which guaranteed full objectivism of its controlling activities. Certain experiences were provided by the American practice (where the model of judicial constitutional review by courts began to be executed since the middle of the 19th c., especially by the Supreme Court), with the doctrine of constitutional law developing on the European ground also having its share.

Hans Kelsen (A.A. Klishas, p. 104), who formulated a theoretical model of constitutional court which he believed was the optimal solution to the issue of the constitutionality of laws[2], had special merits in the establishment of an external model of the parliament's legislative

[2] One should also remember abort the earlier concept by Georg Jellinek, which accepted the relation between constitutional review of law with limitation of the parliament's power and which bound the review of laws with the mechanism of the protection of minority.

activity. It assumed that otherwise than in the American mode, the control of the parliament's legislative activity should not be given to common courts but that it should be granted to one special body of the state called the name of a constitutional court or tribunal (which was supposed to emphasize the profile of its activity similar to that of the court). Although H. Kelsen used the word «court», it needs to be emphasized that he did not treat the constitutional court like any other court. It was only supposed to give the sense of independence of activity, especially so because H. Kelsen realized that the area of activity of that organ was evidently political (L. Favoreu, p. 56). Hence, instead of speaking of the constitutional court (*cour constitutionnelle*) he often spoke of the political court (*cour politique*) since he perceived the activity of that court consisting in assessing the law-making activity of the parliament as political activity. For Kelsen, an additional element which made the constitutional court an evidently political organ was the way of appointing it, which either assumed appointment of its members by the parliament or at least by the parliament cooperating with another organ (e.g. the head of state).

The constitutional court, or the state's organ bearing another name and performing the function of the court, was supposed to be a special, political organ of the state which was supposed to exercise control over the legislative activity of the parliament in accordance with the principle of exclusiveness. What is more, in case the constitutional court found out the unconstitutionality of the examined law, its principal idea was to be repealing the faulty regulation. In H. Kelsen's opinion, this was to be the manifesttaion of the essense and originality of the the court in relation to the earlier forms of control over the law-making activity of the parliament. Nevertheless, H. Kelsen himself added that what should give the constitutional court the most important specific feature was also what made it a political organ even in a bigger degree. In addition, the issue of the possible derogation of the laws *nolens volens* made it transform into a law-making body, but acting in a specific manner consisting in repealing and taking out the laws from the system of the binding norms of law. That is why H. Kelsen called the constitutional court a „negative legislator" (*législateur négatif*), and he divided all law-making activity into that of positive character (performed by the parliament since the latter introduced new norms into the system) and that of negative character (realized by the constitutional court; the statement of unconstitutionality brought the effect of derogation).

H. Kelsen's idea was considered to be the "prototype" of the European model of the constitutionality of law (A.S. Sweet, p. 83). In the inter-war period it was in part realized in practice. Constitutional courts were provided for in Czechoslovakia, Austria and Spain. After World War II constitutional courts were already considered standard and today they are functioning in the majority of democratic countries (G.Kh. Nuriyev) although in many of them a dispute is going on about the range of rights belonging to the constitutional court and its political status (the point is mainly about their legitimacy and the judicial or non-judicial character). In some countries where the constitutional court has not been appointed according to H. Kelsen's concept, control over the legislative activity of the parliament was given to special organs (e.g. the French Constitutional Council, the Kazakhstan Constitutional Council), all common courts, or possibly the highest instances of common or administrative courts (USA, Belgium, Greece, Scandinavian countries).

Conclusion. Summing up, now it is assumed that the control of the parliament's legislative activity is of complex character involving a number of entities. This means that the following have their part in this control: 1) parliament, which – in the course of the legislative procedure – should provide for special solutions directed at checking the compatibility of law with the constitution; 2) head of state, who – as the guardian of the constitution – should also check whether the law adopted by the legislative refers to the constitutional standards; 3) constitutional courts (or other organs similar to them), which assess the constitutionality of laws and, additionally – in H. Kelsen's model – can decree on the loss of their binding force and take them

out from the system of norms. However, before that happened, for about 150 years the parliament was recognized as the sovereign power whose acts, on the one hand, should be compatible with the supreme law and, on the other, should not be submitted to non-parliamentary control of compatibility with it.

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