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POSSIBILITIES OF PARLIAMENTARY OVERSIGHT OF INDEPENDENT JUDICIARY WITH A FOCUS ON THE *SUB JUDICE* DOCTRINE**

ABSTRACT: In functional democracies, the existence of an efficient system of mutual checks and balances and respect for the rule of law are crucial to ensure the appropriate balance between the three pillars of power: the judicial, executive, and legislative branches.

The concept of parliamentary oversight also arises from the broader principles of democracy and the rule of law, as well as the principle of the separation of powers. Parliamentary oversight is a fundamental component of the system of checks and balances that aims to ensure justice and the rule of law in democratic societies. The primary purpose of all courts is to provide fair justice to all citizens. Thus, there is a need to ensure that only one court handles a particular matter at a time in accordance with respecting the sub judice doctrine.

Recently, this doctrine has become more significant as it plays a vital role in the proper functioning of the judiciary machinery in the country. Sub judice essentially means “a matter that is still under consideration by the court” or an ongoing lawsuit. The principle also

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represents a guarantee of judicial independence as well as a framework for achieving effective parliamentary oversight and balance.

Keywords: *sub judice*, rule of law, independence, accountability of judicial authority, parliamentary oversight

INTRODUCTION

An autonomous and independent judiciary is the *condicio sine qua non* for establishing democracy, the rule of law, and vice versa, as there is no rule of law or democracy without an autonomous and independent judiciary. According to Prof. Tasić, what a state of law brings are the subjective public rights of the citizen against the state authority and their protection against the administrative authority. Without effective judicial protection, human rights are not safeguarded, hence there is no rule of law. In other words, no rights are realized without guarantees, and guarantees should be provided by the court.¹ Judicial independence is a dynamic, complex idea that encompasses many settings and requirements. However, this does not mean that questions cannot be raised about judicial independence, for example: from whom should the judiciary be independent, and why should this concern anyone other than the judges themselves? The question is also whether there really are any threats to judicial independence.²

On the other hand, an independent and autonomous judiciary does not mean granting professional privileges for the sake of achieving some sort of prestige. The purpose of an independent judiciary is that it represents a basic condition for respecting the corpus of human rights. International standards, recommendations, and practices of countries that have developed the principle of parliamentary oversight of the judiciary show that legally established mechanisms should occasionally be used to engage in direct contact with members of the judicial authority, in order to develop a clear understanding of systemic challenges and appropriate legislative solutions in accordance with their mandate. In some circumstances, members of the judicial authority have the right, and even the duty, to play an active role in providing assessments and proposals for systemic improvements that are in the public interest. However, in such cases, it is necessary to ensure that such activities do not undermine the independence of the judiciary, including respecting the guarantees of the *sub judice* principle.

¹ Pavlović, Z. S. (2001). Razmatranja o samostalnom i nezavisnom rasuđivanju. *Glasnik of the Bar Association of Vojvodina*, 73 (7–8), 373.

² Ninian, S. (1989). *Judicial Independence — a fragile bastion*. Chapter 49 of *Judicial Independence*. Melbourne: Australian Institute of Judicial Administration, 529.

THE PRINCIPLE OF SEPARATION OF POWERS

The essence of the separation of powers lies in creating a functional state where the separated powers remain within the framework of the constitution and, without abuse, perform their functions within the boundaries of the law. The state acts in three ways: it legislates, creates law, and executes it or adjudicates how it is executed. Terms more fitting than separation of powers might be the division or allocation of segments of state power to various government bodies. The power itself is fundamentally unitary and should be sovereign. Widespread political practice today bases state power on popular sovereignty, which is one and indivisible, and its functions remain within the same authority.³

The aim of this system is established on the principle of “checks and balances,” according to which, all three branches of power are balanced, equal, and mutually controlled.

“All would be lost if the same man, or body of rulers, whether of nobles or of the people, exercised all three powers: the power to legislate, the power to execute state acts, and the power to judge crimes or disputes among individuals,”

says Montesquieu in his work *The Spirit of the Laws* (1748). The essence of this principle lies in mutual independence but also in balance.⁴

The separation of powers serves not only to limit power but is simultaneously a mechanism of its efficiency.⁵ Accordingly, legal theory does not reduce the concept of the separation of powers to a complete distinction between legislative, executive, and judicial powers; rather, the terminologically defined concept of the separation of powers substantively incorporates cooperation, joint action, connectivity, interdependence, control, and balance of the three branches of power. By achieving interdependence within the concept of separation of powers, the state realizes a balance of power and authority, which will ultimately ensure the highest degree of respect for basic human freedoms and rights guaranteed by the Constitution. A system of governance that enables the three fundamental pillars of the state to act jointly, limit each other, and thus maintain a constant balance, can prevent one from dominating over the others.

³ Orlović, S. (2008). *Načelo podele vlasti u ustavnom razvoju Srbije*. Belgrade: Faculty of Law, University of Belgrade, 15.

⁴ *Ibid.*

⁵ Trkulja, J. (1993). *Osvajanje demokratije – ogled o postkomunizmu*. Belgrade: Publishing Agency “Draganić”, 144.

A limited and controlled government in a democracy aims to effectively protect the fundamental rights and freedoms of citizens. Otherwise, any unlimited power could partly nullify the functions of another power. To prevent abuse of power, it should be accepted that power stops power.⁶

In functional democracies, the existence of an effective system of mutual checks and balances and respect for the rule of law are essential to ensure the proper balance between the three pillars of power: the judiciary, executive, and legislative branches. The European Commission in its 2020 Rule of Law Report: The Rule of Law Situation in the European Union stated that

“...effective justice systems and robust institutional checks and balances are at the heart of the principles of respect for the rule of law in our democracies,”

but that the rule of law, too

“...requires an enabling ecosystem based on respect for judicial independence, effective anti-corruption policies, free and pluralistic media, a transparent and high-quality public administration, and a free and active civil society.”⁷

In the OSCE Copenhagen Document of 1990, it was emphasized that

“...the rule of law does not mean merely a formal legality which assures regularity and consistency in the achievement and enforcement of democratic order, but justice based on the recognition and full acceptance of the supreme value of the human personality and guaranteed by institutions providing a framework for its fullest expression” (para. 2).

OSCE member countries agreed that it is

“...the duty of the government and public authorities to comply with the constitution and to act in a manner consistent with law.”⁸

Regarding the balance between the right to freedom of expression and the protection of judicial independence, the European Court of Human Rights specifically noted that

“...members of the judiciary acting in an official capacity [...] may [...] be subject to wider limits of acceptable criticism than ordinary citizens,”

⁶ Montesquieu, C. de (1977). *The Spirit of Laws*. University of California Press, 151.

⁷ European Union, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the European Committee of the Regions. (2020). *Report on the Rule of Law in 2020 - The rule of law situation in the European Union*, Brussels, 4.

⁸ CSCE/OSCE. (1990). *Document of the meeting of the Conference on the Human Dimension of CSCE in Copenhagen*. Copenhagen, paras. 5.3 and 5.5.

thus emphasizing that their special role justifies that they are protected “from destructive attacks which are essentially unfounded,” including “any form of expression [which sole intent] is to insult a court, or members of that court.”⁹

Practice in various countries suggests that committees of inquiry as legal mechanisms for implementing parliamentary oversight can, and even should, cooperate with the judicial sector to gain a clear understanding of procedural, structural, and systemic issues and challenges in the judiciary, and to find appropriate strategic and legislative solutions.¹⁰ Rules and good practices regarding committees of inquiry, especially those examining the state of the judiciary (but also other issues) must at all times ensure respect for the sub judice principle.

JUDICIAL INDEPENDENCE

Judicial independence is an integral part of the fundamental democratic principle of the separation of powers and a basic element of every democratic state based on the rule of law.¹¹ The principle of judicial independence is also crucial for respecting other international human rights standards, including the right to a fair trial.¹²

The accountability of courts and judges to the public is a necessary basis for public trust in the judiciary. Courts can only function as institutions for resolving societal disputes if the process for resolving these disputes is fair, efficient, and expedient. Public trust, which is foundational for building judicial independence and logically precedes it, is achieved by adhering to numerous principles, such as the principle that judicial decisions are publicly announced and the principle of providing reasons for judicial decisions. The importance of public trust in courts is well reflected in the maxim that “justice must not only be done, but must also be seen to be done.”

In the 1990s, special citizens’ charters were developed for the judiciary, which led to improved access to justice, and particular attention was given to certain categories of users (witnesses, jurors, victims). Monitoring the delay

⁹ OSCE Office for Democratic Institutions and Human Rights. (2020). Note on Parliamentary Inquiries into Judicial Activities, Note No.: JUD-BiH/389/2020 [AIC], Warsaw, 10.

¹⁰ See the answers to the questionnaire as part of the preparation of CCJE Opinion no. 18 (2015), available at <https://www.coe.int/en/web/ccje/opinion-n-18-on-the-position-of-the-judiciary-and-its-relation-with-the-other-powers-of-state-in-a-modern-democracy>

¹¹ CSCE/OSCE. (1990). *Document of the meeting of the Conference on the Human Dimension of CSCE in Copenhagen*. Copenhagen, para. 2.

¹² OSCE Ministerial Council. (2005). Decision no. 12/05 on Upholding Human Rights and the Rule of Law in Criminal Justice Systems. Ljubljana.

of trials and the speed of case resolution was introduced.¹³ A similar idea came to life in France in 2003, when the French Government introduced the *Charte Marianne*.¹⁴ Other European countries have also recognized the need to consider other elements such as the expectations and satisfaction of users of judicial services when assessing the quality of the judiciary. For example, in Switzerland in 1996, a report on the quality of the judiciary was published, which included research on user satisfaction with judicial services.¹⁵

In many countries, judicial reforms and comprehensive amendments to regulations are being implemented as part of the national development program and the establishment of an effective and impartial system of enforcing laws.¹⁶ To overcome the aforementioned problems, governments around the world are beginning the process of judicial reform. In order to improve access to justice by increasing the fairness and efficiency of dispute resolution, states are seeking ways to better understand the existing weaknesses of the judicial system and the effects of previous reforms. To achieve this, states are collecting qualitative and quantitative data on the outcomes of the work of the judicial system and comparing the results of reforms to tailor future plans. Monitoring the outcomes of reform involves making comparisons within a single country over a certain period of time, as well as making comparisons with the results of other countries. Both types of comparisons can be useful in assessing the expected progress of judicial performance in a particular country.¹⁷

No institution can operate without some accountability to society. The judiciary, especially an independent judiciary, cannot exist without judicial accountability for failures, errors, and abuses. Thus, it is possible to identify legal, public, social, and even informal accountability of judges. The first involves disciplinary oversight over judges, appellate review of their decisions, along with civil and criminal liability. The second involves control over judges by parliament or another legislative body that exists in every society. Public accountability is the accountability before society and its instruments are most often the press and other means of public information. There is also so-called non-public accountability in the form of informal pressure groups – lobbies, as well as control also of an informal nature within the profession by peers.

¹³ Matić Bošković, M. (2017). Upravljanje rezultatima rada kao deo odgovornosti pravosuđa. *Strani pravni život*, 61 (2), 79.

¹⁴ *French Republic, Charte Marianne: pour université meilleur accueil*. Paris, 2003.

¹⁵ CEPEJ, Working Group on Quality of Justice (2010). *Report – Conducting satisfaction surveys of court users in Council of Europe member states*, <https://rm.coe.int/european-commission-for-the-efficiency-of-justice-cepej-working-group-/1680748265>.

¹⁶ R. M. Sherwood et al. (1994). Judicial Systems and Economic Performance. *Quarterly Review of Economics and Finance*, vol. 34, 1/1994, 101–116.

¹⁷ Matić Bošković, M. (2017). *Op. cit.*, 79.

The discussion about the outcomes of the work of the courts is always sensitive due to issues of judicial independence and the difficulty of comparing judicial work with administrative work. The aforementioned views raise the question of whether the independence of judges is a sufficient argument not to measure the outcomes of their work.¹⁸ Meanwhile, public criticism can be directed at all aspects of administering justice, including making judicial decisions, judges' behavior, appointment of judges, judicial procedure, and maintenance of the court. Publicly criticizing courts is part of a general trend of growing public interest in all social and governmental institutions of an open, democratic society.¹⁹

In its Opinion No. 18 (2015) on the position of the judiciary and its relationship with the other branches of state power in a modern democracy, the Consultative Council of European Judges (CCJE) emphasizes that the relationship between the three powers has transformed and that communication between the three branches of power “is crucial for improving the effectiveness of each branch of power and its cooperation with the other two branches.”²⁰ The CCJE particularly emphasized the importance of judges participating in discussions on national judiciary policy and playing an active role in drafting laws that relate to their status and functioning of the judicial system,²¹ which is also in line with the recommendations of the UN Special Rapporteur on the Independence of Judges and Lawyers.²²

In its Opinion No. 18, the CCJE also emphasized that the executive and legislative powers should not “criticize judicial decisions in a way that undermines judicial authority and encourages disobedience and even violence against judges.” Furthermore, politicians must refrain from “disrespect and undue pressure on the judiciary,” and “must never encourage disobedience to judicial decisions, let alone violence against judges.” This includes refraining from directly criticizing individual judges, risking seriously undermining judicial independence and the “image” of judicial independence.²³ The committee of inquiry must not be used to demonstrate the failure of judicial institutions

¹⁸ Matić Bošković, M. (2017). Upravljanje rezultatima rada kao deo odgovornosti pravosuđa. *Strani pravni život*, 61 (2), 79.

¹⁹ Mršević, Z. (1990). Izazovi nezavisnog pravosuđa. *Annals of the Faculty of Law, University of Belgrade*, 38, 6/1990, 713–724.

²⁰ CCJE. (2015). *Opinion no. 18 on the position of the judiciary and its relationship with the other powers of state in a modern democracy*, para. 1.

²¹ *Ibid.*, footnote 19, para. 31.

²² Special Rapporteur on the independence of judges and lawyers. (2019). *Report on the Exercise of the Right to Freedom of Expression, Association and Peaceful Assembly by Judges and Prosecutors from 2019*, A/HRC/41/48, para. 69.

²³ CCJE. (2015). *Op. cit.*, footnote 19, para. 36.

for which there may be various reasons, including when the legislative power adopts amendments to a law without ensuring adequate public discussion involving the public and judicial officials.

In functional democracies, the existence of an effective system of mutual checks and balances and respect for the rule of law are essential to ensure the proper balance between the three pillars of power: the judiciary, executive, and legislative branches. The conflict between the judiciary and executive power arose from a mutual misunderstanding of the principle of independence, which implies non-interference in individual and specific cases. This independence fundamentally applies to both the judicial and prosecutorial systems. The executive and judicial powers usually do not understand that they have the same goals and share a joint responsibility for building an independent judiciary. Also, it is often not understood that independence is not a privilege of judges and prosecutors, or judicial institutions, but a right of the citizens. All three powers have a responsibility to respect this right.²⁴ Also, it should be kept in mind that ensuring accountability, transparency, and integrity in the judiciary represents “an essential element of the independence of the judiciary and a concept inherent in the rule of law,” provided it is carried out in accordance with the norms, principles, and standards of human rights. In this sense, certain legal systems allow and implement parliamentary oversight of the judicial authority with a guarantee of respecting the sub judice principle.

The concept of parliamentary oversight also arises from broader principles of democracy and the rule of law, as well as the principle of the separation of powers. Parliamentary oversight is a fundamental component of the system of checks and balances, characteristic of democratic regimes based on the rule of law.²⁵ Parliamentary oversight represents an essential element of democratic governance, the rule of law, and accountability for the actions of state authorities.

The Inter-Parliamentary Union defines parliamentary oversight as “the review, monitoring and supervision of government and public agencies, including the implementation of policy and legislation.”²⁶ At the national level,

²⁴ Perić, B. (2013). Tenzije između pravosuđa i politike: da li najavljene izmjene zakona o VSTV rješavaju probleme?. *Sveske za javno pravo*, 12/2013. Sarajevo, 5.

²⁵ See e.g. Parliamentary Assembly OSCE. (1999). *St. Petersburg Declaration - Resolution on correcting the democratic deficit of the OSCE*, 5, paras. 2–3, which stresses “the crucial role Parliaments and Parliamentarians play as guardians of democracy, the rule of law and the respect of human rights at both the national and international levels” and underlines that “democratic oversight and accountability are essential elements of transparency, credibility and efficiency.”

²⁶ Inter-Parliamentary Union. (2007). *Tools for Parliamentary Oversight – A Comparative Study of 88 National Parliaments*. Switzerland, <http://archive.ipu.org/PDF/publications/oversight08-e.pdf>, 9.

the foundations of parliamentary oversight and some of its modalities are usually established by the constitution. However, primary legislation and/or parliamentary rules of procedure and similar regulations most often provide a more detailed, relatively comprehensive framework for conducting oversight, although often without explicit reference to the concept of “parliamentary oversight.”²⁷

PARLIAMENTARY FUNCTION OF OVERSIGHT

In all parliamentary systems, parliament plays a limited role in the development phase of new national security policy. This task primarily belongs to the competent government ministries and agencies. However, parliament can play a key role in ensuring that existing policies align with the people’s needs and aspirations and in demanding their revision when necessary. Ideally, the role of the assembly should not be limited to merely receiving documents that it can only adopt or reject. Its competent committees should be consulted at the beginning of the process, to influence – expressing the diversity of political visions within the assembly – the preparation of policy documents and laws. In this spirit, parliament should be able to propose changes to the documents presented.²⁸

Most countries implement some degree of formal oversight, particularly in the form of parliamentary oversight committees or special committees of inquiry whose powers are determined by the Constitution or the Rules of Procedure of these committees.

Due to different institutional frameworks, national judicial systems have developed various types systems of checks and balances of the different branches of power, but the purpose of each and its ultimate goal is to respect international standards. At the national level, the foundations of parliamentary oversight (i.e., democratically elected parliament as the legislative branch of power, the rule of law, the system of checks and balances between the three branches of power), and often, some of its modalities, are usually established by the constitution. However, primary legislation and/or parliamentary rules of procedure and similar regulations most often provide a more detailed, relatively comprehensive framework for conducting oversight, although often

²⁷ OSCE Office for Democratic Institutions and Human Rights. (2020). *Note on Parliamentary Inquiries into Judicial Activities*, Note No.: JUD-BiH/389/2020 [AIC], Warsaw, 12

²⁸ Born, H. (2003). *Parlamentarni nadzor bezbednosnog sektora*. Geneva: Interparliamentary Union; Belgrade: Geneva Centre for Security Sector Governance, 33.

without explicit reference to the concept of “parliamentary oversight.” Most parliaments in OSCE member states have such oversight powers and can establish parliamentary committees of inquiry.²⁹

However, in several countries, the legislative framework does not provide for the establishment of parliamentary committees of inquiry. In Slovakia, there was a possibility of establishing a committee of inquiry until 1996, but it was abolished by a Constitutional Court ruling, which declared it unconstitutional due to the lack of constitutional authority to establish such a body.³⁰ Despite the existence of laws in almost all OSCE member states regulating the establishment and procedure of parliamentary committees of inquiry, few have clearly established guidelines for conducting parliamentary investigations into the judiciary. One practice common to most national parliaments within the European Union is that parliamentary committees of inquiry may continue an investigation that is underway, even if a judicial proceeding on the same subject has been initiated. Additionally, in Romania, committees of inquiry cannot investigate the judicial sector or the conduct of judges and prosecutors.

Adopted international standards and recommendations, and primarily the practices of countries that have established an effective oversight system, show that in some cases direct contact between committees of inquiry and representatives of the judicial authority is necessary to analyze and identify systemic challenges, and based on this, develop appropriate legislative solutions and public policies.

In this sense, the scope of responsibilities of committees of inquiry is clearly distinguished in terms of identifying systemic problems in public institutions and creating appropriate public policies and measures to correct such situations from the function of the judicial authority, which is tasked with investigating and determining individual responsibility.

The work of committees of inquiry may at times involve issues related to a parallel judicial proceeding; however, in such cases, they must ensure that their actions do not risk exerting any actual or potential influence on *sub judice* matters.

“PCIs must refrain from commenting or taking actions or pursuing lines of inquiry that could prejudice or influence the outcome of ongoing

²⁹ European Parliament, Policy Department for Citizens’ Rights and Constitutional Affairs (2020), Committees of Inquiry in National Parliaments – Comparative Survey. [https://www.europarl.europa.eu/RegData/etudes/STUD/2020/649524/IPOL_STU\(2020\)649524_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/649524/IPOL_STU(2020)649524_EN.pdf) and Inter-Parliamentary Union. (2007). Tools for Parliamentary Oversight - A Comparative Study of 88 National Parliaments, Switzerland <http://archive.ipu.org/PDF/publications/oversight08-e.pdf>.

³⁰ European Parliament (2020). *Op. cit.*, 27

cases or investigations or trials that are about to be initiated. The ultimate touchstone for a PCI is whether its activities could result in undue influence on the outcome of an ongoing proceeding; at this threshold, the PCI must cease such activities and potentially the inquiry in its entirety.”³¹

The legislative framework regulating the establishment of committees of inquiry usually arises from constitutional provisions, parliamentary rules of procedure, or laws. In some countries, the legal basis encompasses all three levels. The powers of committees of inquiry in some countries include the powers of judicial bodies. In Greece, Ireland, and Italy³² committees of inquiry have powers similar to those of courts, while in Portugal, the Constitution³³ explicitly provides that committees of inquiry have investigative powers of judicial bodies.

The mandates of committees of inquiry are sometimes defined very broadly in basic legislation, potentially covering any issue of public interest, which parliaments in practice use to conduct investigations on various issues, including corruption or other irregularities in the functioning of state organs, “scandals,” law revision, health and safety standards, climate issues, failure to meet banking obligations and bankruptcy, among others. It is less common for committees of inquiry to have the power to investigate specific issues concerning government oversight and adherence to the Constitution and laws or the effectiveness and adequacy of the work of government institutions.³⁴

In most countries with committees of inquiry, there is an explicit or implicit understanding that the role of the committees must be distinguished from the role of the courts, although committees often have quasi-judicial powers that guarantee their functioning, although these binding powers would be only auxiliary in relation to the main focus of the committees. Such is the case in Italy, Belgium,³⁵ and Portugal. The law on parliamentary powers in Portugal explicitly defines that committees of inquiry “have all the investigative powers of judicial bodies” and that “they have the right to receive

³¹ OSCE Office for Democratic Institutions and Human Rights. (2020). *Op. cit.* <https://www.osce.org/files/f/documents/e/4/473511.pdf>

³² https://en.camera.it/4?scheda_informazioni=12 (Accessed on November 1, 2022).

³³ Constitution of the Republic of Portugal, Art. 178(5), <https://dre.pt/dre/legislacao-consolidada/decreto-aprovacao-constituicao/1976-34520775> (Accessed on November 6, 2022).

³⁴ OSCE Office for Democratic Institutions and Human Rights. (2020). *Op. cit.* <https://www.osce.org/files/f/documents/e/4/473511.pdf>, 14.

³⁵ Law on Parliamentary Investigations, May 3, 1880, Art. 4–8. http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=1880050330&table_name=loi (Accessed on November 6, 2022).

assistance from law enforcement and administrative bodies under the same conditions as the courts.”³⁶

THE *SUB JUDICE* PRINCIPLE

An important rule that has developed and is applied in many jurisdictions is the *sub judice* rule. In the Rules of Procedure of the House of Lords of Great Britain, the rule is described as follows:

“The privilege of freedom of speech in Parliament places a corresponding duty on members to use the freedom responsibly. This is the basis of the *sub judice* rule. Under the rule both Houses abstain from discussing the merits of disputes about to be tried and decided in the courts of law.”³⁷

Depending on the actual orientation of the system of power, there are different approaches to the application of the *sub judice* rule. The results of the Comparative Examination by the European Parliament on committees of inquiry in 2020 showed that there are differences among the member states of the European Union regarding the permissibility of parallel investigations, with the majority of states allowing them. Of the 18 states that responded to the survey, 13 confirmed that their system allows

“...continuation of an ongoing inquiry investigation when legal proceedings on the same facts are initiated after the setting up of the committee”

(it should be kept in mind that the issue does not relate to the establishment of a parliamentary committee of inquiry after the initiation of a judicial proceeding). Conversely, in Croatia, France, Bulgaria, and Romania, such parallel proceedings are explicitly prohibited and in these countries, it is mandatory to suspend the investigation of the parliamentary committee of inquiry immediately after the initiation of a judicial proceeding on the same matter.³⁸

In many countries, a parliamentary investigation of the same matter can still continue if the committee of inquiry deals with a specific issue of public interest, and not with a judicial proceeding concerning an individual. It can also happen that during its work, a committee of inquiry discovers evidence for which the prosecution needs to take certain steps and possibly initiate a

³⁶ Law on Parliamentary Investigations 5/93, Art. 13, paragraph 1 and 2, <https://dre.pt/dre/detalhe/lei/5-1993-626806>

³⁷ OSCE Office for Democratic Institutions and Human Rights. (2020). *Note on Parliamentary Inquiries into Judicial Activities*, Note No.: JUD-BiH/389/2020 [AIC], Warsaw, 10.

³⁸ *Ibid*, 16

proceeding, in which case the regulations of some countries allow some forms of cooperation with the prosecution. Generally speaking, where the national system allows committees of inquiry to conduct an investigation parallel to an ongoing judicial proceeding, the imperative of respecting the principle of separation of powers is often emphasized.³⁹

Legislation at national levels largely respects the sub judice rule and accordingly, in most countries, the process of parliamentary oversight and the work of committees within legislative bodies remain completely independent and separate from the judicial process and cannot interfere with judicial proceedings or meddle in judicial investigations in any way.

PARLIAMENTARY OVERSIGHT IN BOSNIA AND HERZEGOVINA

Parliamentary committees of inquiry, formed and established in accordance with existing legislation and good practices, represent a significant mechanism in the functioning of a healthy democracy. Despite various legal solutions when it comes to the system of oversight functions of parliaments in the region, few countries have established clear guidelines for the operation of parliamentary committees of inquiry.⁴⁰

In Bosnia and Herzegovina, parliamentary oversight is regulated by the Law on Parliamentary Oversight, which, in accordance with international standards, recommendations, and good practices, establishes principles aimed at directing the work of the Temporary Committee of Inquiry of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina to determine the state of judicial institutions in Bosnia and Herzegovina.

The implementation of parliamentary oversight is based on the principles of constitutionality, legality, democracy, and respect for human rights and freedoms.⁴¹

Parliamentary oversight is conducted by the Parliamentary Assembly of Bosnia and Herzegovina through its chambers, permanent working bodies,

³⁹ OSCE Office for Democratic Institutions and Human Rights. (2020). *Note on Parliamentary Inquiries into Judicial Activities*, Note No.: JUD-BiH/389/2020 [AIC], Warsaw, 10..

⁴⁰ OSCE Office for Democratic Institutions and Human Rights. (2020). *Op. cit.* <https://www.osce.org/files/f/documents/e/4/473511.pdf>, 14.

⁴¹ Law on Parliamentary Oversight of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina*, No. 25), Art. 3. <https://advokat-prnjavorac.com/zakoni/Zakon-o-parlamentarnom-nadzoru-BiH.pdf>

and, as needed, ad hoc working bodies which have specific tasks in conducting oversight. Members of parliament and delegates carry out parliamentary oversight by posing parliamentary or delegate questions.⁴²

The law defines that oversight is conducted with the aim of improving accountability, effectiveness, efficiency, economy, justification of operations or only parts of operations of institutions, verification of reports, transparency, and functionality of the institutions under oversight, as well as preventive protection against illegal actions, abuse of position and authority, and material and financial resources, collecting information and facts about events related to the operation of institutions and administrative bodies of Bosnia and Herzegovina.⁴³

By adopting the law, Bosnia and Herzegovina has established the possibility of conducting public inquiries within the framework of parliamentary oversight as well as the principles of operation of the Parliamentary Committee of Inquiry. The stated principles imply that the committee conducts the investigation exclusively in accordance with the rules of procedure and must have clear tasks, which should be publicly accessible, in line with the international good practices established by the text of the law.

One of the primary principles of the work of committees of inquiry is transparency. To promote openness and strengthen public trust in the oversight process, the committee of inquiry should open discussions to the public whenever possible and ensure the publication of investigation reports on the official website of the Parliamentary Assembly, as well as other documents related to investigations, including agendas of meetings, witness testimonies, transcripts, and records of committee activities, unless they contain confidential information or information covered by the professional secrecy of the judiciary or are protected by the right to respect for private and family life.

In accordance with its mandate, the committee of inquiry will endeavor to collect information on the functioning of the judiciary from as wide a range of relevant sources as possible to compose and recommend effective measures to the government. Through the investigation, extensive consultations on these issues should be conducted with all relevant actors, including members of judicial administrative bodies, as well as individual members of the judiciary, when appropriate, and civil society organizations, to ensure a comprehensive and accurate assessment.

⁴² Law on Parliamentary Oversight of Bosnia and Herzegovina, *Op. cit.*, art. 6.

⁴³ *Ibid.*

If parliamentary committees examine the work of judicial bodies, they must, first and foremost, adhere to established rules that do not disrupt the separation of powers and support the principle of judicial independence.⁴⁴

Respecting the principle of independence implies that the members of the committee of inquiry:

- When summoning and examining witnesses and requesting appropriate documentation, will focus exclusively on examining procedural, structural, and systemic issues in the judiciary;

- In assessing systemic issues or trends illustrated through previous judicial and prosecutorial actions and decisions, will refrain from direct criticism of individual judicial functionaries and other authorized officials, as well as the merits of individual decisions, questioning the character or abilities of individual judicial functionaries and other authorized officials, encouraging disrespect or non-compliance with judicial decisions, actions, statements, or other forms of expression that may represent an attack, undue pressure, or undue criticism or insult directed at judicial bodies and/or individual judges, for example, by criticizing individual judicial decisions in a way that undermines judicial authority, expressing unfounded destructive attacks or inciting violence or other illegal actions against judges, and will refrain from expressing opinions or making statements and challenging or approving the testimony of any witness in relation to the merits, legality, and appropriateness of individual judgments and judicial proceedings;

- Will cease all activities that are determined to have or may have a detrimental impact on ongoing judicial proceedings, including the procedural status or presumption of innocence for any person who is a suspect or a witness in a criminal proceeding; and

- Will refrain from any other activity that may have the intentional or unintentional effect of exerting actual or perceived influence on any judicial decision.

In line with international recommendations, good practices from other countries, and the Law on Parliamentary Oversight of Bosnia and Herzegovina, and in order to appropriately support the investigation with a wide range of relevant data, the committee of inquiry may summon witnesses from any institution in Bosnia and Herzegovina, including members of the judicial authority. However, to ensure respect for judicial independence and the separation of powers, the committee should take special care to ensure that the testimonies of individual judges, prosecutors, and other authorized officials relate exclusively to procedural, structural, and systemic issues, even when

⁴⁴ OSCE Office for Democratic Institutions and Human Rights. (2020). *Op. cit.* <https://www.osce.org/files/f/documents/e/4/473511.pdf>, 14.

discussing individual cases. For this reason, the committee of inquiry should not require or compel a judge or prosecutor to discuss and respond to questions about any of the following:

- Issues covered by professional secrecy, the right to respect for private and family life or data protection law or confidential data obtained during the performance of their duties, including secret data from ongoing or completed proceedings;

- The merits of an ongoing or concluded investigation or trial – regardless of whether the judge who testified ruled on that case, including, for example, but not limited to, the merits, legality, or appropriateness of a particular preliminary or ongoing investigation, including the quality or legality of evidence, accuracy, and consistency of charges in a specific criminal complaint or indictment, the performance of any individual investigator, legal officer, prosecutor, judge, or other authorized official in a particular procedure.

However, it is not inappropriate for judges to refer to concluded cases as examples from case law when discussing or explaining general principles of law or practice or to comment on the merits of draft policy or law that directly affects the operation of courts or the independence of the judiciary or aspects of the administration of justice in a specific area of judicial responsibility or expertise. In certain circumstances, judges are even obligated to speak out on politically controversial topics if the goal is to defend the constitutional order and restore democracy in environments where democracy, integrity, and independence of the judiciary and the rule of law are at risk. The parliamentary committee of inquiry may require information and documents from judges to support its findings, in which case information and documents covered by professional secrecy are not provided.

The results and recommendations prepared during the investigation should be published and also submitted to the Parliament and the executive branch. The submission should contain a deadline by which the executive branch can respond and make its response publicly available.⁴⁵

In the opinion of the OSCE Mission to Bosnia and Herzegovina, it is noted that the draft Law on Parliamentary Oversight contains important oversight methods (e.g., public hearing and committee of inquiry), and generally strengthens and more effectively connects the oversight powers belonging to parliamentary committees (oversight bodies). Although parliamentary oversight is usually conducted through parliamentary rules of procedure, the value of adopting a special law on parliamentary oversight lies in the fact that it imposes

⁴⁵ OSCE Office for Democratic Institutions and Human Rights. (2020). Note on Parliamentary Inquiries into Judicial Activities, Note No.: JUD-BiH/389/2020 [AIC], Warsaw, 10

an obligation on officials of national executive bodies (possibly also other individuals) to respect the requests of parliamentary oversight bodies and, in general, cooperate with the Parliamentary Assembly in good faith. This cannot be achieved by the rules of procedure of the houses of the Parliamentary Assembly as they are not “laws.” At the same time, rules of procedure, which are easier to adopt and amend than laws, give the Parliamentary Assembly a greater degree of flexibility. Therefore, it is advisable to leave the regulation of some more specific procedural details, such as standards for reporting on supervised bodies, to the rules of procedure and practices of parliamentary committees.⁴⁶

CONCLUSION

One of the most important segments of criminal justice response to all types and forms of criminality and the protection of the human rights system is, undoubtedly, parliamentary oversight of the security system. Every well-ordered society must prioritize the development of this form of social oversight. Recent efforts in this direction are very visible, both in the realm of legal science and in the functioning of parliaments themselves. At the same time, the process of European integration, the dynamism, and the development of social relations in the modern world necessarily impose new obligations and new directions for the development of the judiciary. Parliamentary oversight and control of judicial institutions have very pronounced positive or negative consequences, making this process very significant for observing and analyzing the effectiveness of criminal procedures and security systems.

Respecting European standards of the rule of law and an independent and impartial judiciary, parliamentary oversight can significantly contribute to identifying systemic problems in the judiciary, analyzing the implementation of public policies, and through its primary legislative authority, correcting anomalies in social relations imposed by new, specific forms of organized crime. Parliamentary oversight prevents excessive amendments or supplements to laws or other regulations. This task of parliamentary oversight is most effectively achieved by analyzing systemic problems, which is a prerequisite for improving public policies in the field of security and the functioning of the judicial system in accordance with legal principles such as certainty, proportionality, and the applicability of procedural requirements.

⁴⁶ OSCE Office for Democratic Institutions and Human Rights. (2017). *Opinion On The Draft Law On Parliamentary Oversight In Bosnia And Herzegovina based on the unofficial English translation of the Draft Law provided by OSCE mission to Bosnia and Herzegovina*, Opinion No.: GEN-BiH/302/2017, Warsaw, 4. <http://www.legislationline.org/>

A lack of parliamentary oversight or inadequate parliamentary oversight leads to an uneven relationship in the system of separation of powers, where the judicial power gains too strong a role. Adequate parliamentary oversight improves accountability and transparency and reduces corruption.

In terms of the oversight function of the parliament in relation to the judiciary, the most important segment is the control of the results of enacted laws and the control of the implementation of judicial decisions.

A particular task of parliamentary oversight is to identify legal gaps which involves determining why legal gaps occur, that is the situation when a case arises that should be legally resolved, but there is no necessary legal norm. The most important reason for the need to approach the drafting of the Law on Oversight of Judicial Institutions lies in the fact that effective parliamentary oversight can be conducted only by imposing certain obligations on the representatives of the bodies under oversight, which cannot be regulated by the parliamentary rules of procedure. In the system of parliamentary oversight, the two most significant tasks are the alignment of legal norms relating to systemic issues and enabling the adequate incorporation of systemic problems identified in the analysis of judicial decisions into legislative processes.

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