

CONSTITUTIONAL BOUNDARIES OF THE PARLIAMENTARY INVESTIGATION POWER

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ABSTRACT: *The Parliament's functional activity is subjected to restrictions set forth in the Constitution. These restrictions, serving the rule of law, may be of a procedural or substantive character. In addition to the typical legislative function, the Constitution attributes to the Parliament a controlling function, which supports the balance between powers (checks and balances), accountability and transparency. To fulfill this function, the Parliament may use various instruments, provided by the Constitution, laws and Parliament's Regulation. In this context, the parliamentary inquiry instrument has a special importance. This article highlights, in brief, constitutional standards elaborated and analyzed by constitutional jurisprudence, some controversial issues related to the meaning of these standards and the implications arising in regard to the separation and balance of powers' principle, focusing on Parliament's relations with the Prosecution and the Judiciary. In a more general overview, the article seeks to assert that the idea of parliamentary sovereignty is no longer in harmony with the Albanian Constitution.*

KEYWORDS: *Constitution of Albania, Parliament sovereignty, Separation and balance of power, Constitutional review, Parliamentary Investigation power, Accountability*

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1. INTRODUCTION

The Parliament is one of the state authority organs. Its competences – and consequently, the scope of its activity – have been defined by the Constitution and laws. While exercising its activity, the Parliament is subject to restrictions provided for by the Constitution. These restrictions, which contribute to the preservation of the rule of law, might be of a procedural or substantial character. Within the limits foreseen by the Constitution, the Parliament enjoys a significant autonomy with regard to decisions taken during the lawmaking process. The degree of this kind of autonomy is higher compared to the one the Parliament has in other areas falling under its competences because of its position as the lawmaking organ of the state. Despite the primary function as a lawmaker, the Constitution has assigned to the Parliament the controlling function aiming at striking a balance between powers (*checks and balances*), as well as achieving accountability and

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transparency. The function of parliamentary control implies the right of the legislative power to be informed and perform the supervision, within the limits defined by the Constitution. An important aspect of this parliamentary function is manifested by its competences to appoint and discharge from duty the high state officials, based on constitutional and legal provisions.¹ To perform this function, the Parliament could make use of several instruments, which have been defined by the Constitution, laws and the Rules of Parliament. In this framework, the instrument of parliamentary investigation is of special importance.

In some cases, parliamentary investigations have been subjected to constitutional review. The case law of the Constitutional Court has elaborated a number of constitutional principles and standards related to the parliamentary control in general, and the establishment and activity of parliamentary investigative committees, in particular. During this review process have been encountered several standpoints reflecting the idea of parliamentary sovereignty, which, as explained below, is no longer in harmony with our Constitution². The ongoing part of this presentation will summarize in brief the constitutional standards elaborated and explained by the constitutional case law; some problems, open to discussion, related to the meaning of such standards; as well as the implications involved with regard to the principle of separation and balance of powers, with a focus on the relations between the Parliament, the Prosecutors' Office and the Judiciary.

2. PARLIAMENTARY SOVEREIGNTY AND CONSTITUTIONAL REVIEW

According to article 1 of the Constitution, Albania is a parliamentary republic. This system of government, based on the classical theory of the constitutional law, unlike the presidential system, where the separation of powers is more rigid, is characterized by a leveled separation between legislative and executive powers, as well as by the political responsibility of the latter before the Parliament elected by the people³. As a notion, the parliamentary system does not necessary imply the adoption of the British model of parliamentary sovereignty. According to the doctrine of parliamentary sovereignty, the Parliament is free to approve any laws it deems necessary, it is unbounded by the previous legislative decisions and the courts cannot put in doubt the validity of laws nor invalidate them.⁴ Our parliamentary system, unlike the British model, has been inspired by the idea of constitutionalism, which is mainly expressed by the written Constitution, separation of

¹ Decisions nos.19/2007 and 12/2008 of the Constitutional Court of Albania (CCA), CCA bound volumes [2007] p.141, [2008] p.130.

² E.g., the report of parliamentary investigative committee "On the examination of application of a group of deputies regarding the initiation of procedure for the discharge from duty of the General Prosecutor" in 2007, page 13, has stated: "... It is the duty of the Parliament of Albania, in its quality of sovereign, to take the necessary measures and to control the functioning of constitutional organs, to check if they are capable to accomplish their legal and professional duties and responsibilities, (Recommendation of CE 2000/19), and in case it verifies that they have failed to accomplish their mission, to interfere in order to ensure the system well-functioning."

³ Philippe Lauvaux, *Les grandes démocraties contemporaines*, third edition, Puf, Press Universitaire de France, 2004, pg.191-192.

⁴ Albert V. Dicey, *The law of the constitution*, third edition, 1915.

powers (article 7), rule of law (article 4) and constitutional review of laws by the Constitutional Court (articles 124, 131).

Western European countries and other consolidated democracies uphold the idea that democracy should protect itself from the tyranny of the majority power by means of constitutionalism and judicial control.⁵ The concept of limited government is not in harmony with the idea of parliamentary sovereignty.⁶

The principle stated in article 2 of the Constitution that “the people exercise sovereignty through their representatives or directly” should not be understood as an intention of the Constitution drafters to attribute to the Parliament the status of the supreme/superior organ in relation to other constitutional powers. The Constitution has not recognized the superiority of a certain constitutional organ or power over the other state powers. The Constitutional Court has stated that in a constitutional state all the organs are bound by obligations and limitations imposed by the Constitution, including the people whilst exercising the direct sovereignty. The people’s sovereignty, placed within the framework of a constitutional and legal system, is not to be confused with the essential power, and the requirement to follow some special procedures during its exercise is entirely in conformity with the people’s sovereignty. The Constitution of Albania has linked the exercise of people’s sovereignty with the observance of some specific rules.⁷ In the constitutional context, it should obviously be acknowledged the concept that the state authority of all constitutional organs derives by the people itself who have adopted said Constitution. This model has been reflected by the constitutions of some western European countries⁸.

3. THE SUPERVISING ROLE OF THE PARLIAMENT

Parliamentary control, as one of the classical functions of the Parliament, entails the right of the legislative power to be informed and achieve the supervision of implementation of laws by the public organs, in order to take the necessary measures for preventing the unlawfulness and identify the respective responsibilities on a case by case basis. Moreover, this kind of control offers the possibility to exercise the public control over the functioning of state administration.⁹

Based on the principle of separation and balance of powers, a parliamentary democracy is not a system where the Parliament could exercise its control over any

⁵ Ronald Dworkin, *A bill of Rights for Britain*, 13-14 (1990).

⁶ See Paul W. Kahn, *The Reign of law: Marbury v. Madison and the Constriction of America*, Yale University Press, 1997, f.215.

⁷ Decision no. 25/2009 of the CCA, [2009] p.303.

⁸ See for example article 20 of the German Fundamental Law stating that “State authority derives from the people. It should be exercised by the people through elections and other votes, as well as through other special organs of legislative, executive and judiciary”; article 1 of the Spanish Constitution, which has stated that “National sovereignty belongs to the people from whom derive the state powers”; article 3 of Portuguese Constitution providing that “Sovereignty, as one and undivided, belongs to the people who exercise it in conformity with the forms stated by the Constitution.” In addition, article 113 provides that “(1) Organs of the supreme authority are the President of the Republic, Parliament of the Republic, Government and Courts. (2) The establishment, membership, competencies and functioning of the organs of supreme authority are regulated by the Constitution.”

⁹ Decisions nos. 22/2010 and 18/2003 of the CCA, [2010] p. 462, [2003] p. 84.

institutional decision, initiate procedures for imposing sanctions against them, or take decisions on behalf of the other competent institutions. A different interpretation of this controlling competence, recognized to the Parliament, would lead to the denial of the constitutional principles of the rule of law and separation and balance of powers.¹⁰

In reference to the separation and balance of powers, the Constitutional Court has examined, in some of its decisions, the role of the Parliament with regard to the exercise of its control over the other powers, to the extent this competence is applied, within the limits defined by the Constitution and the laws. It has underlined that the parliamentary control should be exercised in such a way as to not interfere without restraint with the activity of other powers.¹¹

Considering the constitutional status of the Parliament, the Court has appraised that, in principle, the parliamentary control is addressed to the whole state activity and to all public authorities. However, such competence does not transform the Parliament into a super-organ of the state power. The parliamentary control is exercised in the context of the citizens' constitutional right to receive information about issues of public interest. Above all, parliamentary control is a mechanism which serves to identify the responsibilities of organs subjected to its control for specific issues and to raise the accountability of these organs during the exercise of their functions, strengthening in this way people's trust in the Parliament. In view of parliamentary control, the principle of separation and balance of powers plays a dual role; on one hand, it constitutes the basis from which the right to exercise the parliamentary control originates, whereas on the other hand, it restricts this controlling right itself within well-defined limits established by the Constitution and the laws.

4. PARLIAMENTARY INVESTIGATION AND CONSTITUTIONAL LIMITATIONS

4.1. Meaning and importance

Investigatory committees, in the context of article 77 of the Constitution, represent an instrument through which parliamentary control is exercised. The Parliament's right to establish investigatory committees is a prerogative and an indispensable tool needed to exercise and improve its legislative power. These are important instruments of the Parliament in order to perform its control over the executive power, and not only, in terms of reviewing a particular issue. The court has stated that the purpose of establishment an investigatory committees is to examine in detail and verify a phenomenon, event or activity, with the aim of drawing conclusions on the need to improve, complete or correct specific laws, as well as identifying responsibilities on the way of governance.¹²

4.2. Legal and constitutional base

Parliamentary investigatory committees have constitutional basis; article 77 of the Constitution defines that "The Parliament has the right and, upon the request of one fourth (1/4) of its members, is obliged to designate investigatory committees to review a particular issue. Their conclusions are not binding on the courts, but they may be made

¹⁰ Decision no. 22/2010 of the CCA, [2010] p. 462.

¹¹ Decision no.18/2003 of the CCA, [2003] p. 84.

¹² Decision no.26/2006 of the CCA, [2006], p.249.

known to the Prosecutors' Office, which evaluates them according to the legal procedure." Besides constitutional provisions, the organization and functioning of parliamentary investigatory committees is regulated by the respective legal framework (the Law).¹³

The Law, which is based on the Constitution, has specified two procedures for the establishment of parliamentary investigatory committees. Firstly, upon the request of one fourth (1/4) of all its members (35 deputies), the Parliament is obliged to establish such a committee. The establishment of a committee with the "vote of minority" as it may be called, amounts to a democratic "progress" of our Constitution in this aspect. Secondly, it has been foreseen that the Parliament has the right to establish an investigatory committee upon the request of a permanent committee or not less than 5 deputies.¹⁴

As it is foreseen by article 77/2 of the Constitution, parliamentary investigatory committees are established "to review a particular issue." The evaluation in this case is left to the Parliament or 1/4 of its deputies to appraise if it is necessary to establish a parliamentary investigatory committee. The Law has defined some other cases when the establishment of investigatory committees becomes necessary.¹⁵ Article 3 of the Law states that "the investigatory committee of the Parliament is established to investigate on officials with immunity, who are related to the subject matter of investigation." This provision includes cases when, during the parliamentary investigation, doubts have arisen towards implications of officials with immunity in the subject matter of investigation. Officials with immunity are those subjects defined as such by the Constitution. But, even in this case "the committee can neither raise criminal charges nor exercise the attributes of courts."¹⁶ The above-mentioned case should be distinct from the case when the Parliament is put into motion by the General Prosecutor for removal of immunity.

The Law has provided that "the Parliament has the right to designate an investigatory committee any time it initiates the procedure for the discharge from duty of high state officials, foreseen by articles 62, 73/3, 90/2, 128, 140, 149/2 and 162 of the Constitution, as well as in cases when the law gives to the Parliament the right to discharge other officials from duty." The constitutional subjects referred to by the aforementioned provisions are as follows: the President of the Republic, deputies, People's Advocate, judges of the Constitutional Court, judges of the Supreme Court, General Prosecutor and the Head of High State Audit. Taking into consideration the constitutional status of these organs it may be necessary to point out some distinguishable elements among the ranks of these subjects as to "the procedure of discharge from duty of high state officials." *Firstly*, in the case of deputies we cannot speak of a discharging procedure, but only of removal of immunity from criminal prosecution. *Secondly*, as to the organs of People's Advocate and Head of High State Audit, in the case of their discharge from duty, the Constitution has not provided any specific reason for which a particular investigation should be requested. These constitutional organs have "the immunity of a judge of the Supreme Court" and, according to the constitutional provisions, they would be criminally prosecuted only with the authorization of the Parliament.¹⁷ *Thirdly*, in case of initiation of the procedure for the

¹³ Law no.8891, dated 02.05.2002 "On the organization and functioning of parliamentary investigatory committees."

¹⁴ Ibid art 5.

¹⁵ Ibid art 3.

¹⁶ Ibid art 3, para 4.

¹⁷ The Constitution art 61, para 3, arts 137 and 165.

discharge from duty of the President of the Republic, judges of the Constitutional Court, judges of the Supreme Court and General Prosecutor, the establishment of an investigatory committee would be compulsory in order to confirm the discharging motivations required by the Constitution. The case law of the Constitutional Court regarding the discharge from duty of the General Prosecutor may be consulted for reference purposes.¹⁸

4.3. The object and ambit of parliamentary investigatory committees

The scope of activity of investigatory committees is extensive and includes gaining of information on “problems or issues of general interest” or “issues of general importance.” Thus, if we abide strictly by this formulation, investigatory committees would practically have the right to investigate in all the fields. But, as it has been reiterated by the constitutional case law, the principle of separation and balance of powers imposes some restrictions on the exercise of controlling and investigatory functions of the Parliament. This means that the issues, which do not fall under the constitutional responsibilities of the Parliament, cannot be the object of investigation. In this case, the activity of investigatory committees should not lead to a transfer of competences not defined by law and, consequently, to a confusion of powers. A parliamentary investigation should not take the place or duplicate the prerogatives of other independent state organs.

Constitutional case law has identified some constitutional standards and restrictions to which the Parliament should adhere to when establishing an investigatory committee for a particular issue: *firstly*, the investigation on this issue should aim at gaining the necessary information for the lawmaking process or for other functions pertaining to the Parliament and, *secondly*, the object of investigation should be focused on a particular issue (there must be sufficient indications or evidence that prove the existence of an issue of particular public interest which makes the investigation necessary).¹⁹ From the viewpoint of these standards, the right to exercise parliamentary investigation should not be unlimited. Its restriction is related to the obligation that the object of investigation must respect the constitutional principles, particularly that of separation of powers; it should not be used abusively and beyond the controlling sphere that the Constitution has recognized to the Parliament. However, the above-mentioned standards may lead to some misunderstandings concerning the extension of constitutional review exercised by the Constitutional Court and the demarcation line between this constitutional jurisdiction and the ambit where Parliament exercises its parliamentary and political discretion. The importance and public interest of the issue in question, as well as the existence or not of “sufficient indications and evidence” for a particular issue, should not be object of constitutional review. The reasoning behind this is that these requirements are of a political character and their evaluation cannot be based on the criteria and methods of interpretation of constitutional judgment. Otherwise, there would be a violation of the separation of powers in terms of parliamentary discretion and autonomy. For these reasons, the Court, during the exercise of constitutional review of an application regarding the establishment of an investigatory committee, should demonstrate self-restraint and appraise whether the object of investigation respects the constitutional

¹⁸ Decisions nos.75/2002, 76/2002, 26/2006, 12/2008 of the CCA, [2002] p.95, [2002] p.107, [2006] p.249, [2008] p.130.

¹⁹ Decision no.20/2007 of the CCA, [2007] p.162.

principles of separation and balance of powers, rule of law and the requirements and obligations entailed by human rights.

The Court has stated that the exercise of the function of parliamentary investigation cannot be realized by interfering with the activity of independent state organs. The nature of parliamentary investigation is diverse and could not be equated with the investigation carried out by other independent or specialized state organs assigned by law to perform such function.²⁰

The Parliament can perform an investigation, through its committees concerning officials of constitutional institutions in the cases provided for by the Constitution. However, such an investigation could not take the place or duplicate the prerogatives of other independent organs. Defining the object of investigation is the first step that would also determine the further proceeding of the parliamentary investigation. The object of investigation, clearly and properly stated, should contain facts or group of facts, which have been the reason for the initiation of parliamentary investigation, and should also explain the purpose of this investigation. Furthermore, the object of investigation must be sufficiently defined, being this the prerequisite for respecting the rule of law principle, fundamental human rights and the principle of separation and balance of powers.²¹

4.4. Competences and instruments of parliamentary investigation

The Constitution has not specifically foreseen the competences of parliamentary investigatory committees. The law provides that “The rules stipulated by the Criminal Procedure Code are directly applicable by the parliamentary investigatory committees, except as otherwise provided by law”²². In the constitutions of some European countries²³ is enshrined that parliamentary investigatory committees have the procedural competences of prosecution organs with regard to gathering of evidence. By referring to the practice of European Union countries, it is observed that, despite being provided or not by the respective constitutions, procedural competences of prosecution organs, as regards the gathering of evidence, are recognized to the parliamentary investigatory committees. It should be emphasized that, in spite of the fact that the investigatory committee acts as a prosecution organ (the Prosecutor’s Office) for the gathering of evidence, it is not a prosecution organ and, in this context, it cannot take or duplicate the competences of the Prosecution Office.

4.5. Conclusions drawn by a parliamentary investigatory committee and relationships with the Prosecutor’s Office and the Judiciary

When parliamentary investigations are carried out an important element is the evaluation of the link between the reached conclusions by the investigatory committee and the initiation/continuation of criminal prosecution by the Prosecutor’s Office and the court. Article 77 of the Constitution stipulates that “the conclusions of the investigatory committee are not binding on the courts, but they may be made known to the Prosecutor’s Office, which evaluates them according to legal procedures.” In this case, the relationship with the General Prosecutor should be interpreted in such a way as to not violate the above-mentioned principle of separation of powers and to avoid an institutional conflict.

²⁰ Ibid.

²¹ Ibid..

²² The Law no. 8891, art 4.

²³ The Italian Constitution art 82, the German Fundamental Law art 44.

Undoubtedly, it would more appropriate for the institutional cooperation between the investigatory committee and the judicial and prosecution authorities to be regulated by the law itself, particularly with regard to cases concerning the citizens' fundamental rights for which a court decision is required.

In terms of a comparative overview, some EU member states take on different approaches as to the issue whether a court procedure, still pending or to be resolved very quickly, excludes or restricts a parliamentary investigatory procedure. The majority part of member states regard both kinds of procedures entirely independent from each other, upholding the idea that a parliamentary investigatory committee is designated only to make a political evaluation of incriminating facts, whereas the court procedure is initiated only on legal evaluation basis. Based on the principle of separation of powers, the inclusion of two completely different branches of public authority in investigatory activity results in a situation where, from the start of this activity, neither the investigatory committees nor the courts are bound by the evaluations made by each of them.

On the contrary, according to the French law, investigatory committees cannot handle cases that belong to the judicial investigation or that are pending before the court. The opening of judicial procedures marks the end of the mission of an existing committee. However, in the French parliamentary practice, this rigid provision has been slightly moderated to avoid an obstruction in the work of investigatory committees. In Ireland, in cases when the object of investigation is identical, it is also observed a certain degree of flexibility regarding the establishment of investigatory committees at the same time as ongoing court proceedings. In practice, the exemption cases bring about this prohibition.²⁴

4.6. Conflict of competences between the Parliament and the Prosecutor's Office: constitutional case law

The Constitutional Court has reviewed several cases regarding the investigatory committees established by the Parliament in order to exercise its controlling function over the other powers.

The controlling activity of the Parliament over the Prosecutor's Office is of special importance, as well as the relationship that exists between the Parliament and the Prosecutor's Office in these cases.

In the case of establishment by the Parliament of an investigatory committee for the discharge from duty of the General Prosecutor, after emphasizing the particular relationship between the Parliament and the Prosecutor's Office, the Court has underlined that, in spite of the obligation of the General Prosecutor to give explanations and inform the Parliament on certain aspects related to his/her activity, and the fact that the Parliament gives the consent or proposes the discharge from duty of the General Prosecutor, it is not implied that this high state official is directly responsible before the Parliament. *In the constitutional context, the General Prosecutor does not have political responsibility before the Parliament, and such a solution serves the purpose of establishing a Prosecutor's Office characterized by professional independence.*

²⁴ These evaluations are cited from the paper "Les Commissions parlementaires d'enquête des Etats membres de la CE", *documentation et evaluation juridique comparative; document de travail; Direction General des Etudes, Parlement Europeen*", W-3, 1993. This study includes: Germany, Belgium, Luxembourg, France, Netherlands, United Kingdom, Ireland, Italy, Spain, Portugal, Greece, Denmark.

The instruments of parliamentary control over the Prosecutor's Office *could never be used as instruments for the examination and evaluation of decisions taken by the prosecutors on concrete cases*. The Parliament can have an impact on the Prosecutor's Office only through its *lawmaking* competences. In this case, the Court, after having examined the object of parliamentary investigation in the light of the constitutional principle of separation and balance of powers, has reached the conclusion that the investigatory committee activity went beyond the functions of the Parliament, violated the constitutional principles and interfered with the competences of the prosecution organ. The Court affirmed that the Parliament does not have the right to control and evaluate the decisions of prosecutors on concrete cases regarding the non-initiation of criminal proceedings, suspension of investigation, dismissal of criminal cases, taking of security measures, as well as other actions and decisions regarding the conduct of criminal investigations and the representation of the prosecution organ in court.²⁵

In another case related to the establishment of an investigatory committee for the discharge from duty of the General Prosecutor, the Court has reiterated that the instruments of parliamentary control over the prosecution organ could never be used as instruments for the examination and evaluation of decisions taken by the prosecutors on specific cases. The Court, after examining the issues, object of parliamentary investigation, based on the aforementioned constitutional standards related to the functions of parliamentary investigatory committees and the role and position of the prosecution organ, has concluded that even in this case the activity of investigatory committee went beyond the functions of the Parliament, violated the constitutional principles and interfered with the competences of the prosecution organ.

5. CONCLUSIONS

Our parliamentary system, in contrast with the British model, is inspired by the idea of constitutionalism, which is mainly expressed by the written constitution, separation of powers (article 7), rule of law (article 4) and constitutional review of laws by the Constitutional Court (articles 124, 131).

The Constitution does not recognize the superiority of any constitutional organ or power over the other state powers. The Constitutional Court has stated that, in a constitutional state, all the organs are bound by obligations and limitations imposed by the Constitution, including the people when they exercise direct sovereignty.

Within the limits foreseen by the Constitution, the Parliament enjoys a considerable autonomy with regard to the decisions related to the lawmaking process. The degree of such autonomy of the Parliament is higher compared to the one the Parliament has in other areas falling under its competences because of its position as the lawmaking organ of the state. Despite the primary function as a lawmaker, the Constitution has assigned to the Parliament the controlling function aiming at striking a balance between powers (*checks and balances*), as well as achieving accountability and transparency.

²⁵ Decision no.26/2006 of the CCA, [2006], p.249.

A parliamentary democracy is not a system where the Parliament could exercise its control over any institutional decision, initiate procedures for imposing sanctions against them, or take decisions on behalf of the other competent institutions.

By interpreting article 77 of the Constitution, the Constitutional Court has reiterated that parliamentary investigation cannot be absolutely unlimited. This restriction imposes the following obligations: the object of investigation must respect the constitutional principles; the parliamentary investigation must be related to the activity of the lawmaker; and the investigation must not be abusively used.

The right and effective use of this controlling instrument is related to the parliamentary and democratic culture and tradition of a certain country, but at the same time, to the legal base that regulates the organization and functioning of the investigatory committee.

The Court has underlined that notwithstanding the obligation of the General Prosecutor to give explanations and inform the Parliament on certain issues related to his/her activity, and the fact that the Parliament gives the consent or proposes the discharge from duty of the General Prosecutor, it is not implied that this high state official is directly responsible before the Parliament. In the constitutional context, the General Prosecutor does not have political responsibility before the Parliament, and such a solution serves the purpose of establishing a Prosecutor's Office characterized by professional independence.
