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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT AMICUS CURIAE BRIEF
In the case of
Rywin v. Poland
(Applications Nos 6091/06, 4047/07, 4070/07)
pending before
THE EUROPEAN COURT OF HUMAN RIGHTS

(ON PARLIAMENTARY COMMITTEES OF INQUIRY)

on the basis of comments by

Mr Michael FRENDO (Member, Malta)
Mr Jean-Claude SCHOLSEM (Substitute Member, Belgium)
Mr Fredrik SEJERSTED (Substitute Member, Norway)

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I. Introduction

1. By a letter of 28 January 2014, the European Court of Human Rights requested the Venice Commission, pursuant to Rule 44 § 3 (a) of the Rules of Court in regard to the pending case of *Rywin v. Poland* (Applications nos 6091/06, 4047/07, 4070/07) to give its opinion on the following two questions:

> *1. In case of the discovery – in the course of proceedings conducted by a parliamentary committee of inquiry – of elements which would suggest that a criminal offence has been committed, what would be the proper course of action?*
>
> *2. In the hypothetical situation that the proceedings conducted by a parliamentary committee of inquiry should concern activities of a person not performing any official duties as a part of public authority, to what extent and at what stage should those proceedings be open to the public?*

2. A working group composed of Messrs Frendo, Scholsem and Sejersted was subsequently set up. It used the following sources on national legislation:

- The responses to the European Centre for Parliamentary Research & Documentation (ECPRD) request No. 1867 (2011) on "parliamentary inquiry";
- A survey on "Parliamentary Committees of Inquiry" from the European Parliament (2007), as updated and extended by "Parliamentary committees of inquiry in national systems: a comparative survey of EU Member States";[1]
- Information provided by the Moscow Institute for Legislation and Comparative Law.[2]

3. *The present amicus curiae brief, which draws up on the basis of the comments of the rapporteurs, was adopted by the Venice Commission at its ... Plenary Session (Venice, ... 2014).*

II. Scope of the present brief

4. It is not for the Venice Commission to go into the facts of the case, or into the interpretation and application of the ECHR. The two questions posed are of a general nature, and inquire into issues of general comparative constitutional law. This is the basis on which the Venice Commission will respond.

5. In order to place the issue in its context, it seems however of interest to report the following facts, as related in the Court's request:

> "The applicant, a renowned cinema producer, was involved in a large corruption scandal during parliamentary work on the draft amendment to the law on public broadcasting. Apart

[1] European Parliament, 2010, http://www.europarl.europa.eu/RegData/etudes/note/join/2011/462427/IPOL-AFCO_NT(2011)462427_EN.pdf.

[2] Information from these various sources was therefore available on the following countries: Armenia, Austria, Azerbaijan, Belarus, Belgium, Bulgaria, Cyprus, the Czech Republic, Denmark, ,Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Luxemburg, Malta, Moldova, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, Switzerland, "the former Yugoslav Republic of Macedonia", Ukraine, United Kingdom.

from the applicant, a number of highly placed public figures, including the Prime Minister, were allegedly involved in the case.

The case led to criminal proceedings against the applicant. At the same time, the Polish Parliament established a committee of inquiry to investigate alleged cases of corruption around the government. Both procedures were carried out in parallel and attracted great media interest.

Parliament endorsed the report of the committee of inquiry, stating that five members of the government, including the Prime Minister, were guilty of corruption through the applicant. The report recommended the initiation of criminal proceedings against the persons concerned.

About three months later, the applicant was convicted of complicity in influence peddling and sentenced to two years imprisonment.

Before the Court, the applicant complained that his right to a fair trial guaranteed by Article 6 of the Convention had been violated by the proceedings before the parliamentary committee of inquiry conducted alongside the trial. He alleged in particular a violation of his right to the presumption of innocence because of the adoption by Parliament of the report of the committee of inquiry "convicting" him for deeds for which he had not yet been tried at the time."[3]

III. Preliminary remarks

6. Before answering the questions put by the Court, a few general remarks on the context and nature of parliamentary committees (or "commissions") of inquiry appear useful.

7. Parliamentary committees of inquiry are an instrument for what is usually referred to as the "control" or "supervision" function of parliament, the essence of which is to oversee and scrutinise the work of the executive branch. The main purpose of this supervision is to ensure democratic political accountability and to improve the transparency and efficiency of the government and the administration. But the supervision function may also provide parliament with information of relevance to its own legislative and budgetary procedures.

8. This basic democratic function is common to all parliamentary systems, as well as to most presidential ones. There are however great variations as to the nature and scope of parliamentary control and supervision in different countries, including as to the institutions and procedures used, as well as to the constitutional and legal framework.

9. Parliamentary committees of inquiry are to be found in most European countries – albeit not in all of them – but they appear in many different forms, and there is no single main model, and there is no single main model.[4]

10. Some parliaments have *standing committees* on control (or "supervision"), which differ from the other (sectorial) standing committees in that they may scrutinise the whole of the administration. Other parliaments leave the day-to-day scrutiny of the executive to the ordinary standing committees but may appoint *special committees (or "commissions") of inquiry* on an *ad hoc* basis to look into a specific case (or "scandal"). In some countries such special committees

[3] Unofficial translation.
[4] For a brief comparative overview of selected EU member states, see *Parliamentary Committees of Inquiry: A Survey*, from the Directorate-General Internal Policies of the European Parliament (2007).

are composed of MPs, while in others they are composed of outside experts, acting on behalf of and reporting back to parliament.

11. The competences and powers of investigation of parliamentary committees of inquiry also differ widely. Some are provided with the same powers of investigation as other parliamentary committees. In other countries – the majority of those examined – these committees of inquiry may be provided with some or all of the usual powers of investigating judges. Some will have the formal power to summon witnesses and demand documents and other forms of evidence that are similar to a judicial procedure, while others merely have the possibility to ask for information, without the formal power to enforce their demands.

12. In some countries there are constitutional and statutory rules that lay down in detail the competences and mandate of the committee, while in others this is just regulated in the parliamentary rules of procedure, and sometimes only in a very rudimental way.

13. Parliamentary committees of inquiry will usually have the possibility of conducting *hearings*, which will then most often be open to the public, and sometimes be directly transmitted by the media. However, it is not uncommon that such committees may wholly or partially conduct their hearings and inquire behind closed doors, depending on the nature of the case and the sensitivity and confidentiality of the information sought.

14. There are also differences with regard to the persons who may be subject to a parliamentary inquiry. Committees of inquiry can always look into (and summon) persons holding public power, such as government ministers and (most often) civil servants. This is the core function. To what extent private individuals can be made to appear before a committee of inquiry differ somewhat more from country to country, although in all countries under consideration but one the inquiry may also apply to such persons.[5] The relationship between parliamentary commission of inquiry and judicial authorities are also settled in rather different ways.

15. The country's history and experience in the field of parliamentary committees of inquiry clearly play a big role. In France, for example, the limited role initially given to the parliamentary committees of inquiry in the parliamentary practice of the Fifth Republic (before the constitutional revision of 23 July 2008) can be partially explained by the abuses committed by these commissions in previous French political history.[6]

16. Despite this heterogeneity, most countries use the technique of parliamentary committees of inquiry.[7] The justifications for these committees, especially in countries where they have quasi-judicial investigative powers, are broadly comparable. Firstly, it is to strengthen parliamentary control over the government and the administration. The main focus is usually the supervision (supervisory) function of parliament on the executive branch. Alongside this main justification, parliamentary inquiries may in some countries also be used as part of the legislative function by collecting data of use for new legislation, or checking whether existing legislation functions as intended. If so, this may significantly broaden the substantive scope of the inquiry – so that it does not only concern itself with the relationship between parliament and the executive but all sorts of issues concerning society at large. Examples to be found in recent years include parliamentary committees of inquiry looking into such diverse issues as that of religious sects, the presence of animal flour in fodder and its impact on human health, the heat wave and the bankruptcy of a large bank. The usual question in such inquiries is whether the government has correctly respond to the problem at hand. The potential scope of parliamentary inquiries may therefore in many countries be very wide.

[5] Austria seems to be the only real exception amongst the countries under consideration in that parliamentary investigation committees cannot request information from private persons.
[6] Jean Gicquel, *Droit constitutionnel et institutions politiques*, Montchrestien, Paris, 11ème éd. 1991, p. 774.
[7] For example, This is not the case in Slovakia.

17. Through the creation of a committee of inquiry, parliament presents itself as the first of the state powers, the one which ultimately takes care of the concerns of citizens. This symbolic (and sometimes very real) position of power of parliament is further enhanced by the publicity of some committees of inquiry, in particular if their proceedings are broadcast. In some cases this can stir the whole society. It can be a powerful tool, but also a dangerous one.

18. The result of the work of parliamentary committees of inquiry will always be *a report to parliament*, which will then usually be debated in the plenary. It will then be for parliament to decide whether the process should lead to political sanctions (such as a vote of no-confidence) or legislative or budgetary reforms.

19. Parliamentary committees of inquiry conduct processes that are essentially of a political nature, and which should not be confused with criminal investigations and proceedings. Such committees should not assess or pronounce themselves on the question of criminal responsibility of the persons covered by the inquiry, which should be for the public prosecutor and the courts alone to assess.

20. At the same time, it is in the nature of (alleged) political "scandals" that they may often give rise to parallel processes, so that a case which is under parliamentary inquiry may at the same time be subject both to administrative inquiries and to legal investigations or proceedings. There is in itself nothing unusual or illegitimate in this. But it does put extra responsibility on all parties involved to ensure that proper distance is kept between the parliamentary (political) inquiry and the criminal investigations and legal proceedings before the courts. This is further discussed below with regard to question 1.

21. The procedures of parliamentary committees of inquiry clearly do not fall under Article 6 of the ECHR, as stated by the Court in *Montera v. Italy* (2002) and other cases. For such procedures to unduly interfere with the rights protected under Article 6 they would have to interfere with and in some way unduly influence the proceedings before the courts, which is in principle a very different test, and which can only be assessed on the basis of the individual case at hand.

22. A general principle to be taken into consideration is moreover that the proceedings of a parliament should as a matter of principle be open to the public, unless there are specific considerations such as for example national security or the right of privacy that would justify proceedings to take place behind closed doors and subject to confidentiality.

23. This is the background against which the Venice Commission will answer the two questions posed by the Court.

IV. The first question

24. The first question is the following: in case of the discovery – in the course of proceedings conducted by a parliamentary committee of inquiry – of elements which would suggest that a criminal offence has been committed, what would be the proper course of action?

25. The Venice Commission considers that this can be answered quite briefly. In such a case the proper course of action will, under normal circumstances, be for the parliamentary committee to inform the ordinary prosecuting services. It should then be for the public prosecutor, acting with complete independence and autonomy, to decide whether or not to initiate criminal investigations and proceedings.

26. The more difficult follow-up question is whether and to what extent the discovery of elements suggesting a criminal offence should influence the course and nature of the already pending parliamentary inquiry.

27. When discussing this question it is important to distinguish between ethical, political and legal dimensions. It may well be argued from a political or ethical perspective that the suspicion of a criminal offence should make the parliamentary committee more cautious in its approach and that it may be wise and prudent to leave those parts of the case tinged with criminal suspicion to the prosecutor and the courts. But this certainly does not mean that the parliamentary committee has any legal duty, either under international or European law, to pull back. However, some countries prohibit the coexistence of a committee of inquiry and prosecution on the same object (France, Romania). Others, such as Poland, explicitly allow the committee of inquiry to suspend its work until the judicial inquiry comes to an end.

28. A basic premise for the Venice Commission is that parliaments as autonomous institutions distinct from the judiciary cannot be impeded from carrying out their own inquiries. The composition of a parliamentary committee is always the result of a political choice. Its mandate is meant to be temporary. Even when they look into the possibly criminally relevant conduct of individual persons, parliamentary committees of inquiry conduct processes that are essentially of a political nature, and which should not be confused with criminal investigations and proceedings. The result of these activities does not alter the legal order. The report which closes its work is in itself only an incentive to parliamentary discussion. The ultimate aim of the committees' investigations is transparency with a view of ensuring that the public is informed of matters which affect the *res publica* (the public good).

29. The wording of the first question refers to the discovery of elements which would suggest that a criminal offence has been committed *"à l'occasion d'une procédure menée par une commission d'enquête parlementaire"* or "occasionally". Searching for offences cannot be the only goal of the inquiry conducted by a parliamentary committee, or even the main purpose of its creation. This would be unconstitutional, even if domestic law provides no sanction. Indeed, the means conferred to the committee must always serve the jurisdiction of the parliament in a system of separation of powers – either to establish the responsibility of government and ministers or to collect information necessary for more effective legislation.

30. Even if identical items may be subject to both criminal proceedings and a parliamentary inquiry, the aim should always be different. The criminal investigation should lead to an individual legal measure, the conviction or acquittal of the accused. The committee of inquiry has no power over individuals, except to call them to testify.

31. The Venice Commission considers that the following standards should be observed, as representing best practices, by a parliamentary committee that during the course of its inquiries discovers elements which would suggest that a criminal offence has been committed:

- First, the committee should inform the public prosecutor, and it should hand over to the prosecuting authorities the relevant information and documentation, to the extent that it is allowed to do so under national law.

- Second, the discovery of possible criminal offences should not in itself stop an otherwise legitimate parliamentary process of inquiry. The inquiry should go on, and the committee should continue to look into the case and to make its own (political) assessments. It should in particular be free to continue to examine the facts of the case, even if these facts may also be of relevance to the criminal proceedings.

- Third, proper procedures should be established for co-operation and exchange of information and evidence between the committee and the public prosecutor, while respecting the differences between the two processes as well as the procedural rights of the person suspected of having committed a criminal offence.

- Fourth, the parliamentary committee should during its inquiries, hearings and deliberations take into proper account the pending criminal investigations or proceedings, and the members should exercise caution so as not to make assessments or statements on the issue of guilt or in other ways infringe on the principle of presumption of innocence. The committee should take great care so that its inquiries do not obstruct or in any other way unduly interfere with the criminal investigations or proceedings.

- Fifth, when formulating its report, the parliamentary committee should take great care not to make any assessments of a criminal legal nature or pronounce itself on the criminal responsibility of the persons concerned. It should however remain free to describe and analyse all facts of the case and to assess these from a political perspective.

- Finally, the fact that persons not holding public powers are involved, should not restrain a parliamentary committee from enquiring into the behaviour of such persons to the effect that this is of relevance. Therefore if a public scandal is being scrutinised, the fact that a person is a private person and does not occupy any public role should not exempt such person from being summoned to appear in front of such a Commission.

32. The Venice Commission would however emphasise that whether or not these standards of best practice under comparative constitutional law are applied in a given case is a very different question from that of whether Article 6 of the ECHR is infringed.

V. The second question

33. The second question is the following: In the hypothetical situation that the proceedings conducted by a parliamentary committee of inquiry should concern activities of a person not performing any official duties as a part of public authority, to what extent and at what stage should those proceedings be open to the public?

34. The Venice Commission considers that it should primarily be a question for national law to determine to what extent hearings conducted by a parliamentary committee of inquiry should be open to the public or not. This applies regardless of whether the persons summoned to give testimony are official figures (ministers or civil servants) or whether they are private individuals.

35. As earlier mentioned there is no main comparative model for this. While there is a basic common tradition that the plenary sessions of parliament should be open to the public unless there are compelling reasons to close the doors, the same does not apply to the sessions and hearings of committees, and in particular not to committees of inquiry. In some parliaments hearings are always open, while in others they may (or must) be closed, in particular when hearing testimony that might be of a sensitive or confidential nature.

36. To what extent hearings in parliamentary committees of inquiry should be open to the public or not is an issue that may be debated, and which may from a political perspective be controversial. From a legal perspective, however, this is only problematic if the process leads to the disclosure of secret or classified information, or if the persons summoned to give testimony

are forced to openly disclose information that is protected as confidential by law, or if their rights to privacy under national or European law is infringed.

37. From a comparative perspective the provisions relating to publicity of investigative commissions vary greatly from one country to another. However, some common features can be identified.

38. When a special committee of inquiry is established, this will be on the basis of a parliamentary decision, usually following an open discussion in parliament. The same goes for the final report, which will normally be open, and which will be discussed by parliament in open session.[8] In contrast, the internal discussions between the members of the committee (the preparation of the report) will by their nature be conducted behind closed doors.

39. The hearings of parliamentary committees of inquiry, where they receive evidence or expert reports, are in most countries usually open to the public, unless a decision is made to close the doors. A distinction must then be made according to whether or not these sessions can be broadcast by radio and television. This question is addressed in different ways by national legislation.

40. However, all countries studied provide for the possibility of in camera sessions.

41. Two main techniques are used. In some states, the decision to hold meetings in camera is taken by the committee on a case-by-case basis. It is so, for example, in Belgium, the Czech Republic, Italy and Malta. In other states, the exact circumstances in which closed sessions may be held are listed explicitly in the relevant law. This is the case in Germany and Portugal. The reasons for in camera sessions go well beyond the case of state secrecy. They also aim at protecting the fundamental rights to respect for private and family life or business secrets.[9] Even where legislation provides cases where sessions must be held in camera, it belongs to the committee of inquiry to interpret and apply them, apparently without judicial review.

42. Beyond these questions of principle, holding closed-door meetings of some sessions of the committee of inquiry may also contribute to the effectiveness of the latter. The witnesses are considered as freer if the proceedings are covered by secrecy.

43. When a decision is taken to hold proceedings in camera, parliamentarians who are members of the parliamentary committee of inquiry[10] will usually be bound by secrecy and punishable if they reveal an element of the proceedings. Documents transcribing their testimonies cannot be given to any authority and may not appear *as such* in the final report.

44. From a "best model" perspective, it may well be argued that persons entrusted with public authority should be prepared to accept a higher degree of openness and transparency than private individuals. This at least goes for government ministers and other politicians, if not necessarily for civil servants. Restricting publicity regarding these people should be exceptional and meet specific objectives, such as national security or the protection of secret or confidential information. This however does not mean that the parliamentary committee is under any legal obligation, under international or European law, to treat such cases differently. Furthermore, to the extent that private individuals are summoned to testify before parliamentary committees, it will usually be in order to give information about their relations and dealings with government figures. In such cases the public may well have a legitimate interest in full openness and transparency. At the same time private individuals' right to respect for private and family life may

[8] The only full exception that can be found is Greece. However, Article 19, § 3 of the Polish law on parliamentary committees of inquiry provides for specific modalities for discussing the report in specific cases (state of professional secrecy).

[9] See, for example, in Germany, § 14 Untersuchungsausschussgesetz.

[10] As well as any other person (usher, secretary, interpreter) who takes part in the meeting held in camera.

more easily justify proceedings to be held behind closed doors. The “best model” is clearly one under which a balance of interests is maintained on the basis of the case at hand, by the members of the committee. This should preferably be regulated explicitly in the procedures for the inquiry, whether laid down in statutory law or in parliamentary rules of procedure.;

45. It is not for the Venice Commission to assess the facts of the case at hand, or whether the degree of openness has been too excessive. The Venice Commission would however emphasise that even if that should be so, then this is not the same as to say that the rights of the applicant under the Convention have been infringed, which is a different legal test.