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NOTE ON PARLIAMENTARY INQUIRIES INTO JUDICIAL ACTIVITIES

BOSNIA AND HERZEGOVINA

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EXECUTIVE SUMMARY

Parliamentary committees of inquiry (PCIs), when established and undertaken in accordance with existing law and good practices, represent an important tool in the functioning of a healthy democracy. Where such inquiries examine the work of the judicial branch, they should adhere to established rules that preserve the separation of powers and uphold the independence of the judiciary. In spite of the wide existence of legislation across the OSCE region governing the establishment and procedure of PCIs – including in Bosnia and Herzegovina (BiH) – few have clearly established guidelines for the work of an inquiry into the judicial branch. While the rules and practices that exist across the OSCE region vary in some respects, the comparative study of the jurisdictions examined in this Note reveals that any PCI looking into the judiciary must carefully balance the public interest and the general mandate of the Parliament on the one hand, and the separation of powers and the independence of the judiciary on the other. Furthermore, the lack of regulations does not relieve the state from the obligation to respect norms and standards of international law.

The international standards, recommendations and country practices set forth in this Note demonstrate that PCIs can, and at times should, directly engage with members of the judicial branch in order to develop a clear understanding of systemic challenges and develop appropriate legislative solutions in accordance with their mandate. Under some circumstances, members of the judicial branch have a right and even a duty to play an active role in providing assessments and proposals for systemic improvements that are in the public interest. However, in such cases, PCIs must exercise particular care to ensure that their activities do not infringe upon judicial independence, including by respecting clear rules for the questioning of members of the judiciary. The essential functions of a PCI – a body charged with identifying systemic issues in public institutions and proposing measures for correcting such deficiencies – is clearly distinct from those of the judicial branch, which is charged with investigating and determining individual liability for specific actions and determining appropriate sanctions.

The inquiry work of a PCI may, in exceptional circumstances, encompass matters subject to an ongoing parallel judicial proceeding. However, in such cases PCIs must ensure that their actions do not risk exercising any real or perceived undue influence upon *sub judice* matters, that is, PCIs must refrain from commenting or taking actions or pursuing lines of inquiry that could prejudice or influence the outcome of ongoing 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.

The following principles, drafted in line with international standards, recommendations and good practices while taking into account the BiH Law on Parliamentary Oversight (BiH LoPO), are proposed in order to guide the work of the BiH Parliamentary Assembly House of Representatives Interim Investigative Committee (IIC) for Inquiry into the State of the Judiciary of BiH:

- (1) The inquiry should be established in accordance with rules of procedure and should have clear terms of reference, both of which should be made publicly available, in accordance with international good practices also reflected in the BiH LoPO.

- (2) To promote openness and transparency and strengthen public confidence in the oversight process, the IIC should open hearings to the public whenever possible and ensure the publication of the PCI reports on the official website of the Parliamentary Assembly, as well as of other inquiry-related documents, including agendas, witness testimonies, transcripts and records of committee actions, except when they contain confidential information or information covered by judges' professional secrecy or protected by the right to respect for private and family life.
- (3) In line with its mandate and the BiH LoPO, the IIC should seek to gather information on the functioning of the judiciary from a broad range of appropriate sources in order to develop and recommend effective interventions to the government. The inquiry should conduct inclusive consultation on these matters from all relevant stakeholders, including members of the judicial administration as well as individual members of the judiciary, when appropriate, and civil society organizations, to ensure a comprehensive and accurate assessment.
- (4) In its activities, the IIC should adhere to principles designed to uphold respect for the independence of the judiciary and to preserve the separation of powers. If the inquiry gives rise to a criminal or civil investigation and a case is brought before a court and found admissible, the IIC inquiry may continue; however, in order to avoid any real and/or perceived interference in the judicial proceedings, the inquiry should comply with the *sub judice* rule, which holds that parliamentary inquiries must never exert undue influence in matters in ongoing judicial proceedings. To ensure respect for these principles, the IIC and its members should:
- focus exclusively, in the calling and questioning of witnesses and the request of appropriate documentation, on examining procedural, structural and systemic issues in the judiciary;
 - in assessing systemic issues or trends illustrated by prior judicial and prosecutorial actions and decisions, refrain from:
 - direct criticism of individual judicial office-holders and other authorized officials and the merits of individual decisions;
 - questioning the personalities or abilities of individual judicial office-holders and other authorized officials;
 - encouraging disrespect or disobedience of judicial decisions;
 - actions, statements or other forms of expression which may amount to an attack, undue pressure or undue criticism or insult, against the judiciary and/or individual judges, for instance by criticising specific judicial decisions in a way that undermines judicial authority, expressing unfounded destructive attacks, or encouraging violence or other unlawful actions against judges;
 - refrain from expressing opinions or making statements, or questioning or allowing testimony from any witness, on the merits, legality, or appropriateness of individual judgments and court proceedings;
 - cease any activities upon determination that such activities have or could have a prejudicial effect on ongoing judicial proceedings, including the

procedural status or presumption of innocence of any person who is accused or witness in criminal court proceedings; and

- refrain from any other action that may have the deliberate or inadvertent effect of exerting an actual or perceived influence on any judicial decision.

(5) In accordance with international recommendations, good country practices and the BiH LoPO, and in order to appropriately inform its inquiry with a broad range of relevant data, the IIC may call witnesses from any institution in BiH, including members of the judicial branch. However, in order to ensure respect for judicial independence and the separation of powers, the IIC should take special care to ensure that testimony of individual judges, prosecutors, and other authorized officials exclusively relate to procedural, structural and systemic issues, even when discussing individual cases. For this reason, the IIC should not require or compel a judge or a prosecutor to discuss and answer questions on any of the following matters:

- issues covered by professional secrecy, the right to respect for private and family life or data protection laws or confidential data acquired in the course of their duties, including secret information from ongoing or completed proceedings;
- the merits of ongoing or completed investigation or trial - whether or not the judge giving evidence has adjudicated on that case, including for example but not limited to:
 - the merits, legality, or appropriateness of a particular preliminary or ongoing investigation, including on the quality or legality of evidence;
 - the accuracy and coherence of charges in a specific criminal report or indictment;
 - the performance of any individual investigator, legal officer, prosecutor, judge, or other authorized official in a particular proceeding;
 - the quality of argumentation by a specific prosecutor or other authorized official during the course of particular judicial proceedings;
 - the quality of reasoning or legal accuracy of any specific decision by a court, including but not limited to: orders for special investigative measures, pre-trial detention orders, prohibitive measures, verdicts, sentencing determinations, and appeal judgements; and
- the quality or procedure of any specific judicial or prosecutorial appointment (as opposed to systemic problems in appointment processes if by virtue of one's particular functions, leadership responsibilities, and representative role, the said judge or prosecutor may have cause to comment on such issue).

(6) It is, however, generally not inappropriate for a judge to refer to concluded cases as examples of practice when discussing or explaining general principles of law or practice; or, to comment on the merit of a draft policy or law which directly affects the operation of the courts or the independence of the judiciary or aspects of the administration of justice within the judge's particular area of judicial responsibility or expertise. In certain circumstances, judges even have a duty to speak out even on a politically controversial topic if this is in defense of the constitutional order and the restoration of democracy where

democracy, the integrity and independence of the judiciary and the rule of law are threatened.

- (7) The IIC may request information or documents from judges in order to substantiate its findings, in which case information and documents covered by professional secrecy shall not be communicated.
- (8) The results and recommendations developed through the inquiry should be made public as well as submitted to the whole Parliament and the executive. The submission should include a deadline by which the executive ought to respond and make its response publicly available.

These guiding principles, as highlighted in bold, are included throughout the text of this Note.

As part of its mandate to assist OSCE participating States in implementing OSCE commitments, the OSCE/ODIHR reviews, upon request, draft and existing legislation to assess their compliance with international human rights standards and OSCE commitments and provides concrete recommendations for improvement.

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I. INTRODUCTION

1. In May 2020, the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina (BiH) established an Interim Investigative Committee (IIC), pursuant to the BiH Law on Parliamentary Oversight (BiH LoPO),¹ for inquiring into the state of the judiciary in BiH. The stated objective of the IIC is to identify systemic deficiencies in the judicial system of BiH and propose steps to address these shortcomings. In June 2020, the IIC adopted its Rules of Procedure,² which indicated its main areas of activities, including the analysis of the Law on the High Judicial and Prosecutorial Council (HJPC), the “[s]afeguarding [of] the complete independence of the judiciary and complete elimination of political influence on the judiciary”, and the assessment of the BiH system of judicial appointment, among other goals relating to the institutional response to corruption. In its workplan, the IIC further indicated its intention to “analyze individual cases only to the extent and measure necessary to determine systemic problems facing the judiciary in BiH”, referring to six specific ongoing cases and one ongoing matter – the “political pressure on the BiH Chief Prosecutor” – as falling within the scope of its scrutiny.
2. In July 2020, the OSCE Mission to BiH, in light of its programmatic focus on the justice sector reform in BiH and on strengthening capacities with regard to parliamentary oversight, requested ODIHR to provide an overview of relevant international standards and OSCE commitments and comparative good practices pertaining to parliamentary inquiries into the work of the judiciary.
3. This Note was prepared in response to the above request. ODIHR conducted this review within its mandate to assist OSCE participating States in the implementation of key OSCE commitments in the human dimension.

II. SCOPE OF THE NOTE

4. The scope of this Note deals exclusively with the issue of parliamentary inquiries into the work of the judiciary with a view to identifying relevant international standards and OSCE human dimension commitments. Thus limited, it does not constitute a full and comprehensive review of the BiH Law on Parliamentary Oversight nor of the entire legal and institutional framework regulating the work of the Parliament and of the judiciary in BiH, Poland.

¹ Such an inquiry may be established per the BiH Law on Parliamentary Oversight (BiH LoPO), Official gazette of BiH 25/58. Article 6(1) of the Law provides: “Parliamentary oversight shall be conducted by the Parliamentary Assembly of BiH through its Houses, permanent working bodies and, if necessary, ad hoc working bodies that have certain tasks in conducting oversight (hereinafter: Parliamentary Oversight Body).” Article 28 provides: “1) A Parliamentary Oversight Body may carry out public inquiries; 2) As part of Parliamentary Oversight Bodies and due to specific needs, a special inquiry commission, sub-commissions and working groups may be established on a temporary basis.” (emphasis added.)

² The main areas of the IIC’s activities mentioned in the Rules of Procedure are: (i) the analysis of the Law on the High Judicial and Prosecutorial Council (HJPC) [which is currently under review at the BiH Ministry of Justice] to assess its adequacy; (ii) the determination of regulations and penalties relating to conflict of interest for judicial office holders and their family members; (iii) the analysis of the adequacy of the BiH Criminal Procedure Code and the BiH Criminal Code in the fight against corruption and organized crime; (iv) “[s]afeguarding the complete independence of the judiciary and complete elimination of political influence on the judiciary”; (v) the establishment of cooperation with international organizations such as the OSCE (including ODIHR), the CoE (including GRECO and the Venetian Commission), the EUSR, and CSOs active in the areas of prevention of corruption and rule of law; and (vi) the comparative assessment of the BiH system of judicial appointment.

5. The ensuing Note is based on international and regional standards, norms and recommendations as well as relevant OSCE human dimension commitments, and also provides an overview of good practices from other OSCE participating States in this field.
6. Moreover, in accordance with the *Convention on the Elimination of All Forms of Discrimination against Women*³ (hereinafter “CEDAW”) and the *2004 OSCE Action Plan for the Promotion of Gender Equality*⁴ and commitments to mainstream a gender perspective into OSCE activities, programmes and projects, the Note integrates, as appropriate, a gender and diversity perspective.
7. In view of the above, ODIHR would like to stress that this review does not prevent ODIHR from formulating additional written or oral recommendations or comments on this subject matter in the future.

III. RELEVANT INTERNATIONAL STANDARDS AND OSCE COMMITMENTS

8. In a functioning democracy, the existence of an effective system of checks and balances and respect for the rule of law are essential to ensure the appropriate balance between the three pillars of power, that is the judiciary, the executive and the legislative. The European Commission’s “*2020 Rule of Law Report: The rule of law situation in the European Union*” states that “[e]ffective justice systems and robust institutional checks and balances are at the heart of the respect for the rule of law in our democracies” but that the rule of law also “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”.⁵ Already the *OSCE Copenhagen Document 1990* emphasizes 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” (par 2). OSCE participating States have agreed that it is a “duty of the government and public authorities to comply with the constitution and to act in a manner consistent with law” and that “the activity of the government and the administration as well as that of the judiciary will be exercised in accordance with the system established by law”.⁶
9. The independence of the judiciary is a fundamental principle and an essential element of any democratic state based on the rule of law and an integral part of the fundamental democratic principle of the separation of powers.⁷ The principle of the independence of the judiciary is also crucial to upholding other international human rights standards,⁸ including the right to a fair trial.

³ *UN Convention on the Elimination of All Forms of Discrimination against Women* (hereinafter “CEDAW”), adopted by General Assembly resolution 34/180 on 18 December 1979. Ukraine deposited its instrument of ratification of this Convention on 12 March 1981.

⁴ See *OSCE Action Plan for the Promotion of Gender Equality*, adopted by Decision No. 14/04, MC.DEC/14/04 (2004), par 32.

⁵ European Union, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *2020 Rule of Law Report - The rule of law situation in the European Union*, Brussels, 30 September 2020, COM(2020) 580 final, page 4.

⁶ CSCE/OSCE, *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE*, Copenhagen, 29 June 1990, pars 5.3 and 5.5 respectively.

⁷ *ibid.* CSCE/OSCE, *Copenhagen Document 1990*, par 2.

⁸ See e.g., *OSCE Ministerial Council Decision No. 12/05 on Upholding Human Rights and the Rule of Law in Criminal Justice Systems*, 6 December 2005.

10. The right to an independent and impartial tribunal is guaranteed by Article 14 of the International Covenant on Civil and Political Rights (ICCPR) and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The institutional relationships and mechanisms required for establishing and maintaining an independent judiciary are the subject of the [UN Basic Principles on the Independence of the Judiciary](#) (1985),⁹ and have been further elaborated in the [Bangalore Principles of Judicial Conduct](#) (2002).¹⁰ Understanding of the practical requirements of judicial independence continues to be shaped by the work of international bodies, including the UN Human Rights Committee¹¹ and the UN Special Rapporteur on the independence of judges and lawyers. At the European level, the European Court of Human Rights (ECtHR) has also emphasized the special role of the judiciary in society as “*the guarantor of justice, a fundamental value in a law-governed State, [which] must enjoy public confidence if it is to be successful in carrying out its duties*”.¹² To determine whether a body can be considered “*independent*” according to Article 6 par 1 of the ECHR, the ECtHR considers various elements, including the existence of guarantees against outside pressure (including against the direct or indirect interference from the executive) and whether the body presents an *appearance of independence*.¹³ The Council of Europe’s Committee of Ministers also formulated important and fundamental judicial independence principles in its *Recommendation CM/Rec(2010)12 on Judges: Independence, Efficiency and Responsibilities*.¹⁴
11. Judicial independence means that both the judiciary as a branch of powers, but also individual judges must be able to exercise their professional responsibilities without being influenced by or fearful of arbitrary disciplinary investigations, proceedings and/or sanctions by the executive or legislative branches or other external sources. In that respect, ensuring accountability,¹⁵ transparency and integrity in the judiciary constitutes “*an essential element of judicial independence and a concept inherent to the rule of law*”, providing it is implemented in line with human rights norms, principles and standards.¹⁶

⁹ [UN Basic Principles on the Independence of the Judiciary](#), endorsed by UN General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

¹⁰ [Bangalore Principles of Judicial Conduct](#), adopted by the Judicial Group on Strengthening Judicial Integrity, which is an independent, autonomous, not-for-profit and voluntary entity composed of heads of the judiciary or senior judges from various countries, as revised at the Round Table Meeting of Chief Justices in the Hague (25-26 November 2002), and endorsed by the UN Economic and Social Council in its Resolution 2006/23 of 27 July 2006. See also [Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct](#) (2010), prepared by the Judicial Group on Strengthening Judicial Integrity (hereinafter “[Bangalore Implementation Measures](#)”).

¹¹ See especially, UN Human Rights Committee (CCPR), [General Comment no. 32 on Article 14 of the ICCPR: Right to Equality before Courts and Tribunals and to Fair Trial](#), 23 August 2007, par 19, where the Committee specifically provided that States should ensure “*the actual independence of the judiciary from political interference by the executive branch and legislature*” and “*take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the constitution or adoption of laws*”.

¹² See e.g., ECtHR, [Mustafa Erdoğan and Others v. Turkey](#) (Application nos. 346/04 and 39779/04, judgment of 27 May 2014), par 42.

¹³ See European Court of Human Rights (ECtHR), [Ramos Nunes de Carvalho e Sá v. Portugal](#) [GC] (Applications nos. 55391/13, 57728/13 and 74041/13, judgment of 6 November 2018), par 144; [Campbell and Fell v. the United Kingdom](#) (Application no. 7819/77, 7878/77, judgment of 28 June 1984), par 78; and [Incal v. Turkey](#) [GC] (Application no. 22678/93, judgment of 9 June 1998), par 71, where the ECtHR held that “[e]ven appearances may be of a certain importance [since] [w]hat is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused (...)”. See also [Olujic v. Croatia](#) (Application no. 22330/05, judgment of 5 May 2009), par 38; and [Oleksandr Volkov v. Ukraine](#) (Application no. 21722/11, judgment of 25 May 2013), par 103.

¹⁴ Council of Europe, [Recommendation CM/Rec\(2010\)12 of the Committee of Ministers to Member States on Judges: Independence, Efficiency and Responsibilities](#), 17 November 2010.

¹⁵ As emphasized by the Consultative Council of European Judges (CCJE), “[i]n the judicial context, ‘accountable’ must be understood as being required to give an account, that is: to give reasons and to explain decisions and conduct in relation to cases that the judges must decide. ‘Accountable’ does not mean that the judiciary is responsible to or subordinate to any other power of the state because that would betray its constitutional role of being an independent body whose function is to decide cases independently, impartially and according to the law” (see CCJE, [Opinion no. 18 \(2015\) on the Position of the Judiciary and its Relation with the Other Powers of State in a Modern Democracy](#), 16 October 2015, par 20). The accountability of the judiciary is required only at two levels: (i) it is required in relation to the particular litigants who seek justice in particular judicial proceedings (ii) and in relation to society at large, through the other powers of the state (but not, again, in a way which makes the judiciary subordinate to them); see *op. cit.* footnote 19, pars 25-26 (CCJE [Opinion no. 18 \(2015\)](#)).

¹⁶ See e.g., UN Human Rights Council, [Resolution on the Independence and Impartiality of the Judiciary, Jurors and Assessors, and the Independence of Lawyers](#), A/HRC/29/L.11, 30 June 2015, which stresses “*the importance of ensuring accountability, transparency and integrity in the judiciary as an essential element of judicial independence and a concept inherent to the rule of law, when it is implemented in line with the Basic Principles on the Independence of the Judiciary and other relevant human rights norms, principles and standards*”.

12. The concept of parliamentary oversight also derives from the broad principles of democracy and the rule of law and the principle of the separation of powers.¹⁷ Parliamentary oversight is an essential component of the system of checks and balances which characterizes democratic regimes based on the rule of law.¹⁸
13. In its *Opinion no. 18 (2015) on the Position of the Judiciary and its Relation with the Other Powers of State in a Modern Democracy*, the Consultative Council of European Judges (CCJE) emphasizes that the relationship between the three powers has been transformed and discussion between the three branches of powers “*is crucial to improve the effectiveness of each power and its cooperation with the other two powers*”.¹⁹ The CCJE specifically underlined the importance of judges participating in debates concerning national judicial policy, and playing an active part in the preparation of any legislation concerning their status and the functioning of the judicial system,²⁰ which is also in line with recommendations made by the UN Special Rapporteur on the independence of judges and lawyers.²¹
14. In its Opinion no. 18, the CCJE also stressed that the executive and legislative branches **should not “criticise judicial decisions in a way that undermines judicial authority and encourages disobedience and even violence against judges”**.²² Moreover, politicians **must refrain from “disrespect and undue pressure against the judiciary”, and “must never encourage disobedience to judicial decisions let alone violence against judges”**.²³ This includes **refraining from direct criticism of individual judges**,²⁴ failing what they risk seriously undermining the independence and “appearance” of independence of the judiciary.
15. In addition, the CCJE has specifically considered the establishment of parliamentary committees of inquiry (PCIs) in order to investigate social phenomena or alleged breaches of the law, or a poor application of it. The CCJE underlined that parliamentary inquiries and other similar processes “*must never be used to influence a particular judicial decision or to encourage disrespect or disobedience to judicial decisions*”²⁵ and **should be exercised “having regard to the limits imposed by judicial independence and (where provided for by law) by the secrecy of judicial investigations”**.²⁶ Moreover, in order to respect the principle of separation of powers, the CCJE recommends that “*in general the reports of committees of inquiry should never interfere with investigations or trials that have been or are about to be initiated by judicial authorities*” and that “[*if such reports must comment on existing judicial decisions in individual cases, they must do so with proper respect and should refrain from expressing any criticism in terms that would amount to a revision of decisions made*”].²⁷ It further states that **individual**

¹⁷ As the European Commission for Democracy through Law (Venice Commission) points out, the rule of law is “*a concept of universal validity*” (Venice Commission, [Rule of Law Checklist](#), 11-12 March 2016, par 9). For an overview of international and regional instruments referring to the principle of the rule of law, see pars 9-23.

¹⁸ See e.g., OSCE Parliamentary Assembly, [St. Petersburg Declaration – Resolution on Correcting the Democratic Deficit of the OSCE](#) (1999), page 5, pars 2-3, which stress “*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 underline that “*democratic oversight and accountability are essential elements of transparency, credibility and efficiency*”.

¹⁹ See Consultative Council of European Judges (CCJE), [Opinion no. 18 \(2015\) on the Position of the Judiciary and its Relation with the Other Powers of State in a Modern Democracy](#), 16 October 2015, par 1.

²⁰ *Op. cit.* footnote 19, par 31 (CCJE Opinion no. 18 (2015)), emphasizing that “*by giving evidence to parliamentary committees, representatives of the judiciary (e.g. the highest authority of the judiciary or the High Council of Justice) can raise concerns about legislative projects and give the perspective of the judiciary on various practical questions. Some member states reported positive experiences with such exchanges*”.

²¹ See, UN Special Rapporteur on the independence of judges and lawyers, [2019 Report on the exercise of the rights to freedom of expression, association and peaceful assembly by judges and prosecutors](#), A/HRC/41/48, 29 April 2019, par 69.

²² *Op. cit.* footnote 19, par 36 (CCJE Opinion no. 18 (2015)).

²³ *ibid.* par 52 (CCJE Opinion no. 18 (2015)).

²⁴ *ibid.* par 52 (CCJE Opinion no. 18 (2015)).

²⁵ *ibid.* par 36 (CCJE Opinion no. 18 (2015)).

²⁶ *ibid.* par 49 (CCJE Opinion no. 18 (2015)).

²⁷ *ibid.* par 46 (CCJE Opinion no. 18 (2015)).

judges should never be the subject of personal attacks.²⁸ However, if the inquiry is “*investigating possible defects in the administration of justice which have been highlighted by a particular case, those proceedings can, with due care, be examined*”.²⁹ Therefore, in order to uphold the independence of the judiciary, a PCI needs to take into account the need to avoid the perception (or reality) of interference with judicial independence. However, in line with the principle of separation of powers, parliaments are also autonomous institutions that cannot be prevented from carrying out their own inquiries.³⁰

16. On the balance between the right to freedom of expression and the protection of judicial independence, the ECtHR specifically noted that “*members of the judiciary acting in an official capacity [...] may [...] be subject to wider limits of acceptable criticism than ordinary citizens*” though emphasizing that its special role also justifies that they are **protected “against destructive attacks which are essentially unfounded”, including “any form of expression [which sole intent] is to insult a court, or members of that court”**.³¹
17. It may happen that the same facts are simultaneously subject to both a parliamentary inquiry and judicial proceedings, though the aim of each process is different. The judicial proceedings aim to determine an individual’s criminal, administrative or civil liability and will lead to an individual legal measure, while the outcome of the PCIs’ work is to inform the work of the Parliament, and ultimately to ensure that the public is informed of matters of public interest, but never to determine individuals’ liability.³² When such processes happen in parallel, **the parliamentary inquiry should comply with the *sub judice* rule that is, refraining from commenting or taking actions or pursuing lines of inquiry that could prejudice or influence the outcome of the ongoing case or investigations or trials that are about to be initiated.**³³
18. In that respect, the European Court of Human Rights has held that “*where a judicial procedure is opened concerning the same facts as those being examined by a [PCI], the latter must maintain the requisite distance between its own investigations and the parallel procedure*” and in particular “*it must refrain from making any statements as to the merits of decisions taken by the courts or as to how the judicial proceedings are being conducted*”.³⁴ The Court further emphasized that the PCI **should not “address [one]’s criminal liability and ma[ke] finding that breach[es] [one]’s right to be presumed innocent”**.³⁵ In that respect, the European Commission for Democracy through Law (Venice Commission) has considered as a good practice that “*the discovery of possible criminal offences should not in itself stop an otherwise legitimate parliamentary process of inquiry*” and “*the committee should continue to look into the case and to make its own (political) assessments*”, while being “*free to continue to examine the facts of the case, even if these facts may also be of relevance to the criminal proceedings*”.³⁶ However, this general principle is subject to an important caveat: PCI members **must exercise caution so as not to make assessments or statements on the issue of guilt or in other ways infringing on the principle of presumption of innocence**, in particular by “*tak[ing] great care and mak[ing] sure its inquiries do not obstruct or in any other way unduly*

²⁸ *ibid.* par 52 (CCJE Opinion no. 18 (2015)).

²⁹ *ibid.* par 46 (CCJE Opinion no. 18 (2015)).

³⁰ Venice Commission, *Amicus Curiae brief in the case of Rywin v. Poland before the ECtHR (on Parliamentary Committees of Inquiry)* (2014), CDL-AD(2014)013.

³¹ See ECtHR, *Mustafa Erdoğan and Others v. Turkey* (Application nos. 346/04 and 39779/04, judgment of 27 May 2014), pars 42 and 44. *ibid.* pars 28-30 (2014 Venice Commission’s Amicus Curiae Brief in the case of *Rywin v. Poland*).

³² *ibid.* i.e., a rule limiting comment and disclosure relating to judicial proceedings, in order not to prejudice or influence the outcome of a particular case or matter, which is under trial or being considered by a judge or court.

³³ ECtHR, *Rywin v. Poland* (Applications nos. 6091/06, 4047/07 and 4070/07, judgment of 18 February 2016), par 225.

³⁴ *ibid.* pars 114 and 118 and 226 (2016 ECtHR *Rywin v. Poland*).

³⁵ Venice Commission, *Amicus Curiae brief in the case of Rywin v. Poland before the ECtHR (on Parliamentary Committees of Inquiry)* (2014), CDL-AD(2014)013, par 31.

interfere with the criminal investigations or proceedings".³⁷ At the same time, it must be highlighted that when the Venice Commission outlined its position, it was reviewing the operation of a PCI examining a corruption scandal within the executive branch, and not investigating the functioning of the judiciary itself.

19. In the context of a parliament's investigation of an ongoing first instance corruption trial against a sitting politician, the Council of Europe Group of States against Corruption (GRECO) has acknowledged that "*the setting up of a parliamentary enquiry commission can function as a form of parliamentary control over issues of public importance*".³⁸ However, GRECO further emphasized that when directed towards the judiciary in ongoing individual cases, it "*may potentially interfere with the separation of powers and respect for judicial independence*" with "*the risk of a chilling effect on judicial independence in the pending proceedings, as well as in future similar proceedings, and the potential impact on criminal investigations and proceedings relating to corruption against influential or politically connected persons*".³⁹
20. In any case, when judges are called before a PCI to testify, as emphasized by the [UN Basic Principles on the Independence of the Judiciary](#) (1985), **they should not be compelled to testify on matters covered by professional secrecy with regard to their deliberations and confidential information acquired in the course of their duties other than in public proceedings.**⁴⁰ Similar principles may also be relevant, as appropriate, in order to protect prosecutorial independence.
21. Concerning the open or closed nature of PCI hearings, that is, open or closed to the public, it has been 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.*"⁴¹
22. Finally, OSCE participating States have committed to provide "*for specific measures to achieve the goal of gender balance [...] in all judicial and executive bodies*" (Athens 2009)⁴² and to ensure "*that judges are properly qualified, trained and selected on a non-discriminatory basis*" (Moscow 1991).⁴³ In that respect, organizational diversity of the judiciary has been linked to diminished corruption.⁴⁴ The Inter-Parliamentary Union (IPU) *Plan of Action for Gender-sensitive Parliaments* also specifically recommends that gender equality should be mainstreamed "*throughout all parliamentary work*" and "*throughout all parliamentary committees, so that all committee members – men and women – are mandated to address the gender implications of the policy, legislative or budgetary matters under their consideration*".⁴⁵ These objective and principles should be guiding the work of the IIC, especially when identifying existing shortcomings in terms of gender balance and diversity considerations concerning selection and

³⁷ *ibid.* par 31.

³⁸ GRECO, *Ad Hoc Report on Slovenia* (Rule 34), adopted by GRECO at its 84th Plenary Meeting (Strasbourg, 2- 6 December 2019) Greco-AdHocRep(2019)3, par 16.

³⁹ *ibid.* par 17 (2019 GRECO's *Ad Hoc Report on Slovenia*).

⁴⁰ [UN Basic Principles on the Independence of the Judiciary](#), endorsed by UN General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, par 15.

⁴¹ Venice Commission, *Amicus Curiae brief in the case of Rywin v. Poland before the ECtHR (on Parliamentary Committees of Inquiry)* (2014), CDL-AD(2014)013, par 44.

⁴² OSCE Ministerial Council, *Decision No. 7/09*, "Women's Participation in Political and Public Life", Athens, 2 December 2009, par 1.

⁴³ CSCE/OSCE, *Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE*, Moscow, 10 September to 4 October 1991, par 19.2 (iv).

⁴⁴ See e.g., UN Economic and Social Commission for Western Asia, *Policy Brief on Women in the Judiciary - A Stepping Stone towards Gender Justice* (2018), page 4.

⁴⁵ Inter-Parliamentary Union (IPU), *Plan of Action for Gender-sensitive Parliaments* (2012), page 15.

recruitment, retention, promotion and working environment and culture⁴⁶ and prevention of corruption within the judiciary. It is also important that **inquiries into the functioning of the judiciary involve inclusive consultation with all relevant stakeholders, including members of the judicial administration as well as individual members of the judiciary, when appropriate, and civil society organizations**, to ensure a comprehensive and accurate assessment.⁴⁷

IV. OVERVIEW OF GOOD STATE PRACTICES

1. GENERAL REMARKS ABOUT PARLIAMENTARY OVERSIGHT AND PARLIAMENTARY COMMITTEES OF INQUIRY (PCIs)

23. At the outset, it is important to emphasize that due to differing institutional frameworks and histories, domestic legal systems may have developed diverse types of checks and balances, however, all with a view to and ultimate goal of meeting international standards. The IPU defines parliamentary oversight as “*the review, monitoring and supervision of government and public agencies, including the implementation of policy and legislation*”.⁴⁸ This constitutes an essential element of democratic governance, the rule of law and accountability for the actions of public bodies. At the national level, the foundations of parliamentary oversight (i.e., a democratically elected parliament as the legislative branch of the government, the supremacy of law, checks and balances in the relationship between the three branches of government) and, often, some of its modalities, are usually laid down in the constitution. However, it is primary legislation and/or the parliamentary rules of procedure and similar regulations that most commonly provide a more detailed, relatively comprehensive framework for oversight activities,⁴⁹ though often without explicitly referring to the concept of “parliamentary oversight”.
24. Parliamentary oversight may take different forms, such as permanent or *ad hoc* committees, plenary debates, question time, questions and interpellations, etc. In many parliaments, permanent parliamentary committees usually conduct the bulk of oversight activities. As noted by ODIHR, the practice of resorting to the creation of *ad hoc* committees should be approached with caution as it may strain a parliament’s resources and fragment and divert the expertise available in its permanent committees, and should therefore be the exception.⁵⁰

⁴⁶ See ODIHR, [Gender, Diversity and Justice](#) (2019).

⁴⁷ See e.g., ODIHR, [Opinion on Certain Provisions of the Bill on the Supreme Court of Poland](#) (as of 26 September 2017), 13 November 2017, pars 145-146; [Opinion on Certain Provisions of the Bill on the Supreme Court of Poland](#), 30 August 2017, pars 134-135 and 142; and [Final Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland](#), 5 May 2017, par 92. See also *op. cit.* footnote 19, par 31 ([CCJE Opinion no. 18 \(2015\)](#)), which states that “*the judiciary should be consulted and play an active part in the preparation of any legislation concerning their status and the functioning of the judicial system*”; [European Charter on the Statute for Judges](#) (Strasbourg, 8-10 July 1998), adopted by the European Association of Judges, DAJ/DOC (98)23, par 1.8. See also CCJE, [Magna Carta of Judges](#) (2010), par 9, which states that “[*t*he judiciary shall be involved in all decisions which affect the practice of judicial functions (organisation of courts, procedures, other legislation)”; and ENCJ, [2011 Vilnius Declaration on Challenges and Opportunities for the Judiciary in the Current Economic Climate](#), Recommendation 5, which states that “[*f*]Judiciaries and judges should be involved in the necessary reforms”. See also European Union, [Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law](#), COM(2017) 835 final, 2017/0360(NLE), Article 2 (d) that recommends to Poland to “*ensure that any justice reform is prepared in close cooperation with the judiciary and all interested parties*”.

⁴⁸ See IPU, [Tools for Parliamentary Oversight](#) (2007), page 9.

⁴⁹ In BiH, this is governed by the provisions of the BiH LoPO. Article 4(a) defines “oversight” as “*a set of measures and procedures described in [the BiH LoPO] and in the corresponding by-laws, which shall be conducted with the aim of exercising the oversight and corrective role and function of the Parliamentary Assembly of BiH*.” Article 5 goes on to define its principles, stating that “[*c*]onduct of the parliamentary oversight shall be based on the principles of constitutionality, legality, democracy and the respect for human rights and freedoms.”

⁵⁰ See e.g., ODIHR, [Opinion on the Draft Law on Parliamentary Oversight of Bosnia and Herzegovina](#) (29 March 2017), par 23.

25. Most parliaments in countries of the OSCE region have such oversight powers and can establish PCIs.⁵¹ In a few countries however, the legal framework does not foresee the establishment of PCIs.⁵² In spite of the wide existence of legislation across the OSCE region governing the establishment and procedure of PCIs, few have clearly established guidelines for the work of a parliamentary inquiry into the judicial branch. One common practice in most national parliaments within the European Union is that the PCIs can continue an ongoing inquiry investigation even though legal proceedings on the same matter have been initiated.⁵³ While there is no one standard model for PCIs, a number of similarities do exist.
26. First and foremost, the main purpose of PCIs in most systems consists of supervising the actions of the government or the administration, and constitutes an important part of democratic oversight. In many parliaments, committees of inquiry are set up by a qualified minority of members of parliament rather than by a majority decision.⁵⁴ This approach is designed to empower the parliamentary opposition which, in turn, helps strengthen the effectiveness of oversight tools to scrutinize governmental policies and activities. The Parliamentary Assembly of the Council of Europe even recommends a quorum of one quarter of all members of parliament for this type of decisions.⁵⁵ It is usual practice for parliaments to ensure that the membership of committees of inquiry reflect the representation of political groups in the chamber.⁵⁶ Some parliaments even go beyond merely equitable representation and seek to enhance the presence of the opposition, for instance by guaranteeing the majority and the opposition equal representation within the PCI or the positions of chair and deputy chair of the said committee.⁵⁷ In some states,

⁵¹ See e.g., European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs, *Committees of Inquiry in National Parliaments – Comparative Survey* (March 2020) (hereinafter "2020 European Parliament's Comparative Survey on PCIs"); and IPU, *Tools for parliamentary oversight - A comparative study of 88 national parliaments* (2007), page 39, which notes that 76 of the 88 parliaments surveyed have procedures to set up committees of inquiry, which can be either permanent committees that function as committees of inquiry for certain problems, or *ad hoc* committees that are specially created to conduct parliamentary inquiries, while in 10 of those 76 parliaments, committees of inquiry may be established in the form of either permanent or *ad hoc* committees. In BiH, as noted above, the establishment of PCIs is explicitly provided for under Article 6(1) of the BiH LoPO and the activities of such a committee are not limited to non-judicial public bodies.

⁵² See e.g., in **Slovakia**, where there was a possibility to establish committee of inquiry until 1996 but it was repealed by the Constitutional Court's judgement, which found it to be unconstitutional due to the absence of authorisation (within the Constitution) to establish such body (see *ibid.* page 27 (2020 European Parliament's Comparative Survey on PCIs)).

⁵³ See e.g., **Bulgaria, Croatia, France and Romania**; see *ibid.* page 15 (2020 European Parliament's Comparative Survey on PCIs). Moreover, in **Romania**, PCIs cannot investigate the judicial branch or the conduct of judges and prosecutors; see *ibid.* page 27 (2020 European Parliament's Comparative Survey on PCIs).

⁵⁴ See e.g., ODIHR, *Opinion on the Draft Law on Parliamentary Oversight of Bosnia and Herzegovina* (29 March 2017), par 43. See also PACE, *Report by Mr. Karim van Overmeire - Procedural guidelines on the rights and the responsibilities of the opposition in a democratic parliament*, Doc. 11465 rev., 3 January 2008, par 67. For example, commissions of inquiry may be proposed by one tenth of the total of MPs and are established by majority vote of all MPs (e.g., in **Croatia**, Article 5 of the *Act on Commissions of Inquiry*); PCIs are established upon the request of one fifth of the members of the chamber (in **Portugal** (Article 2 of *Law No. 5/93 of 1 March 1993 on the Legal Regime governing Parliamentary Inquiries*), **Czech Republic** (Article 48 of the Rules of Procedure of the Chamber of Deputies); **Hungary** (Section 24(2) of the *Act XXXVI of 2012 on the National Assembly*); or one quarter of the members of the chamber (**Albania** (Article 25 of the *Rules of Procedure of the Assembly of the Republic of Albania*), **Armenia** (Article 20 of the *Rules of Procedure of the National Assembly*), **German Bundestag** (Article 53 of *Bundes-Verfassungsgesetz/Federal Constitutional Law*); or one third of the members of the chamber (**Slovenia, Norway** (one third of the members of the Committee on Scrutiny and Constitutional Affairs), **Montenegro** (Article 79 of the *Rules of Procedure of the Parliament of Montenegro*), **Latvia** (Article 26 of the Constitution), **Romania** (Articles 73-79 of the *Rules of Procedure of the Romanian Chamber of Deputies*)); 20 members out of 123 (**North Macedonia**); 15 members (Sejm of **Poland**).

⁵⁵ See Parliamentary Assembly of the Council of Europe (PACE), *Resolution 1601(2008) on "Procedural guidelines on the rights and responsibilities of the opposition in a democratic parliament"*, par 2.2.8.

⁵⁶ See IPU, *Tools for Parliamentary Oversight* (2007), page 41; and PACE, *Report by Mr. Karim van Overmeire - Procedural guidelines on the rights and the responsibilities of the opposition in a democratic parliament*, Doc. 11465 rev., 3 January 2008, par 68. See also ODIHR, *Opinion on the Draft Law on Parliamentary Oversight of Bosnia and Herzegovina* (29 March 2017), par 44. For instance, in **BiH**, Article 28(4) of the BiH LoPO provides that "[w]hile establishing an inquiry commission as part of the Parliamentary Oversight Body, care shall be taken of adequate representation of constituent peoples, members of opposition and of gender-based balance"; in **Croatia**, Article 8 of the *Act on Commissions of Inquiry of Croatia*; in **Denmark**, Section 52 of the Constitutional Act; in **France**, Articles 142 and 143 of the *Rules of Procedure of the National Assembly of France*; in **Italy**, Article 141 of the *Rules of Procedure of the Chamber of Deputies of Italy*.

⁵⁷ See *op. cit.* footnote 55, par 2.2.8 (2008 PACE Resolution 1601(2008)), which states that "a member of the opposition shall be appointed either chairperson or rapporteur of every committee of inquiry or mission of information successfully requested by opposition members or political groups". See also *ibid.* par 68 (2008 PACE Report by Mr. Karim van Overmeire) referring to the examples of **Georgian** and **Estonian** parliaments where the opposition and the majority are guaranteed equal representation on committees of inquiry; in **France** and in **Slovenia** the political group which has successfully requested the formation of a committee of inquiry obtains the position of chair or

PCIs have the additional duty to ensure respect of the Constitution or other legal provisions.⁵⁸ These checks are put in place to ensure that the composition and function of PCIs reflect its essential function as a democratic oversight mechanism. The work of PCIs is also not judicial in essence, even if some examples of PCIs having been granted strong quasi-judicial powers can be found.⁵⁹

27. The legal frameworks regarding the creation of PCIs tend to derive from constitutional provisions, parliamentary rules of procedure, or statutory law. In some countries, the legal bases encompass all three levels.
28. PCIs are generally empowered to conduct hearings and summon witnesses and experts.⁶⁰ Not all PCIs are, however, empowered to adopt sanctions when a witness is summoned or documents are requested and neither are made available to the PCI.⁶¹ As far as witnesses are concerned, some states have the power to enforce appearance at a hearing, while others opted for allowing for voluntary appearance before the PCI.⁶² In any event, the summons of witnesses usually refers to government officials and the requested documentation also usually originates from the government.
29. The mandates of the PCIs are sometimes defined in the underlying legislation in very broad terms, potentially covering any issue of public interest,⁶³ which in practice have been used by parliaments to investigate a variety of matters, including corruption or other

of rapporteur. See also Article 79 of the [Rules of Procedure of the Parliament of Montenegro](#) (chair shall be from the opposition); Article 143 of the [Rules of Procedure of the National Assembly of France](#).

⁵⁸ See e.g., *op. cit.* footnote 51, page 6 (2020 European Parliament's Comparative Survey on PCIs).

⁵⁹ For example, in **Greece**, Investigative powers similar to those of the courts (Article 145 of the Rules of Procedure, which provides that PCIs have all powers of investigative judicial authorities as well as those of the public prosecutor); **Ireland**, PCIs have investigative powers similar to those of the courts; **Italy**, PCIs, whether consisting of members of one Chamber or both Chambers, conduct their investigations and examinations with the same powers and the same constraints as judicial authorities (see https://en.camera.it/4?scheda_informazioni=12); **Portugal**, Article 178 (5) of the Constitution of the Portuguese Republic, expressly states that PCIs have the investigative powers of the judicial authorities.

⁶⁰ See e.g., *op. cit.* footnote 51, pages 72-87 (2020 European Parliament's Comparative Survey on PCIs). In **BiH**, the BiH LoPO explicitly allows for such activities; Article 11 provides that “1) A Parliamentary Oversight Body may summon and hear witnesses from any institution in BiH and may request them to answer all questions and to present all facts and any information, including the facts deemed classified. 2) Upon invitation by a Parliamentary Oversight Body, any person from a supervised institution shall be obliged to respond to the summons and attend sessions of the Parliamentary Oversight Body and, within the scope of the person's authority, provide information to and answer questions from members of the Parliamentary Oversight Body. 3) Within the scope of one's authority, the summoned person shall be obliged to tell the truth, submit requested documentation, provide information to and answer questions from members of the Parliamentary Oversight Body. 4) In case the summoned person is unable to attend the session, he/she shall be obliged to inform the Parliamentary Oversight Body in writing about the reasons for not being able to attend, no later than 48 hours prior to the beginning of the session.”

⁶¹ *ibid.* pages 72-87 (2020 European Parliament's Comparative Survey on PCIs). In **BiH**, the BiH LoPO does provide for such sanctions; see Article 64, which provides for the levying of fines against authorized persons in supervised institutions and against such institutions themselves upon failure to appear, provide requested documentation or responses, or otherwise fail to co-operate with the Parliamentary Oversight Body in a range of other enumerated ways.

⁶² *ibid.* pages 72-87 (2020 European Parliament's Comparative Survey on PCIs). In **BiH**, Article 11(1) of the BiH LoPO provides that: “A Parliamentary Oversight Body may summon and hear witnesses from any institution in BiH and may request them to answer all questions and to present all facts and any information, including the facts deemed classified” and Article 16 that “A Parliamentary Oversight Body shall be authorised to gain access and insight into all the available information and documents in reference to the work of supervised institutions, developed by any person in a supervised institution.”

⁶³ See e.g., in **Belgium**, Article 56 of the Constitution refers to inquiries on “an issue that also has repercussions on the competences of the Communities or Regions”; in **Bulgaria**, Article 37 of the Rules of Organization and Procedure of the National Assembly, provides that ad hoc committees “shall be formed on a specific occasion, to survey particular matters and conduct inquiries”; in **Croatia**, Article 2 of the Act on Commissions of Inquiry refers to “any issue of public interest”, which are further detailed as being “in particular, the realization of the fundamental values of the Constitution of the Republic of Croatia determined by Article 3 of the Constitution, fundamental freedoms and human and civil rights from Chapter III of the Constitution, legality of work of state bodies, public services and legal entities of public law and issues related to public morality”; in the **Czech Republic**, Article 30 of the Constitution refers to investigations into “matters of public interest” as does Article 48 of the Rules of Procedure of the Chamber of Deputies; in **Denmark**, Section 51 of the Constitutional Act refers to investigations of “matters of general importance”; in **Estonia**, Article 20 (1) of the Riigikogu Rules of Procedure and Internal Rules Act provides that a PCI may be formed in order to investigate the circumstances of events of public interest; in **Hungary**, Section 24 of the Act XXXVI of 2012 on the National Assembly refers to “any matter of public interest revealed within the National Assembly's supervisory powers if the clarification of the case is not feasible by way of an interpellation or question (prompt question)”; in **Italy**, Article 82 of the Constitution refers to inquiries on “matters of public interest”; in **Latvia**, Article 26 of the Constitution refers to PCIs for “specified matters”; in **Poland**, Article 111 paragraph 1 of the Constitution provides that PCIs are appointed “to examine a particular matter”; in **Romania**, Article 73 of the Rules of Procedure of the Romanian Chamber of Deputies which provides that PCIs are established “where clarification is deemed necessary of the causes of and the circumstances under which events or actions with harmful effect have occurred, as well as to establish the conclusions, liabilities and steps to be taken”; in **Slovenia**, Article 93 of the Constitution and Article 1 (2) and Articles 4 (2) and (3) of the Rules on Parliamentary Inquiry provide that the National Assembly may order inquiries on “matters of public importance”; in **Spain**, Article 76.1 of the Constitution provides that PCIs may be appointed to deal with “any matter of public interest”.

irregularities in the functioning of state bodies, “scandals”, the review of legislation, health and safety standards, climate issues, bank default and bankruptcy to name but a few.⁶⁴ Less frequently, PCIs may be empowered to look into specific issues which concern the scrutiny of government and/or compliance with the Constitution and legislation and/or the efficiency and adequacy of the work of government institutions.⁶⁵ In any case, **it is essential that the mandate of a PCI be established in accordance with the applicable legislation or rules of procedure and be clearly established in terms of reference, which should be made publicly available.**

30. Importantly, PCIs investigate issues which are in the public interest and should never aim at establishing the criminal, administrative or civil liability of an individual, which are for the courts to determine. PCIs cannot establish criminal liability although the information gathered by PCIs may lead to the initiation of criminal cases by prosecutors. As mentioned above, when there are parallel processes before a court and before a PCI, the *sub judice* rule should be respected and this puts “*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*”.⁶⁶

2. OVERALL MANDATE OF PCIS

31. In most countries where PCIs may be established, there is an explicit or implicit understanding that the role of PCIs must be distinguished from the role of courts, even if PCIs often have quasi-judicial powers for guaranteeing their operation,⁶⁷ though such coercive powers are only auxiliary to the main focus of PCIs.
32. For instance, in Italy, the Constitutional Court has held that the task of the PCIs “*is not to judge, but only to gather news and data necessary for the exercise of the functions of the Chambers*”.⁶⁸
33. The Danish commissions of inquiry, though having certain powers similar to those of courts, e.g., as regards compelling testimony and written statements from witnesses, and to demanding the production of tangible and documentary evidence, is not considered a court and does not have powers to pass judgment on any person or entity.⁶⁹

⁶⁴ See e.g., Venice Commission, *Amicus Curiae brief in the case of Rywin v. Poland before the ECtHR (on Parliamentary Committees of Inquiry)* (2014), CDL-AD(2014)013, par 10. See also, for instance, the PCIs established in **France**, under the V Republic here: <http://www.assemblee-nationale.fr/connaissance/enquetes_Ve.asp>; in the **Netherlands** here: <<https://www.houseofrepresentatives.nl/how-parliament-works/parliamentary-inquiry>>; in **Belgium** here: <https://www.senate.be/english/onderzoekcommissies_en.html>.

⁶⁵ See e.g., in **BiH**, Article 9(1) of the BiH LoPO enumerates all of the competences of a Parliamentary Oversight Body: “*a) Conduct oversight over the general legality of work of an institution or a public administration body in BiH, or over the legality of actions of a responsible person or an authorised person in those bodies and institutions; b) Conduct oversight over the degree of implementation of a particular law by institutions or public administration bodies in BiH; c) Conduct oversight with the aim of determining the situation in a particular area; d) Conduct oversight with the aim of controlling the legality of expenditure of financial and material resources earmarked for the supervised bodies or institutions; e) Discuss and adopt reports on the work of supervised institutions in reference to the subject of either an ongoing oversight or a previously conducted oversight; f) Launch initiatives and submit proposals for adoption of new laws or amendments to the existing laws from the jurisdiction of the supervised institutions; g) Discuss proposals and petitions sent to the Parliamentary Oversight Body in reference to the work of supervised institutions*”; in **France**, where Article 51-2, read together with Article 24, of the Constitution refers to the scrutiny of “*the action of the government*” and the assessment of “*public policies*”, while Article 6 of the Order no. 58-1100 of 17 November 1958 on the functioning of the parliamentary assemblies provides that PCIs “*shall be formed to collect information on specific matters or on the management of public services or State-owned companies with a view to submitting their findings to the assembly which set them up*”; in **Portugal**, Article 233 of the Rules of Procedure of the Assembly of the Republic, which provide that “*[t]he object of parliamentary inquiries shall be to assess compliance with the Constitution and the laws and to consider the acts of the Government and the Public Administration*”, though Article 1 of Law No 5/933 (Legal Regime governing Parliamentary Inquiries) also refers to “*any matter of public interest*”.

⁶⁶ Venice Commission, *Amicus Curiae brief in the case of Rywin v. Poland before the ECtHR (on Parliamentary Committees of Inquiry)* (2014), CDL-AD(2014)013, par 30.

⁶⁷ See e.g., in **Portugal**, Article 13 pars 1 and 2 of the *Law No. 5/93 of 1 March 1993 on the Legal Regime for Parliamentary Inquiries* provides that PCIs “*enjoy all investigative powers of the judicial authorities*” and “*are entitled to the assistance of criminal police bodies and administrative authorities on the same terms as the courts*”; in **Belgium**, Articles 4-8 of the *Law of 3 May 1880 on Parliamentary Inquiries*; in **Italy**, Article 141 of the *Rules of Procedure of the Chamber of Deputies of Italy*.

⁶⁸ See Constitutional Court of **Italy**, judgement No. 231 of 1975.

⁶⁹ See *op. cit.* footnote 51, page 10 (2020 European Parliament’s Comparative Survey on PCIs).

34. In Slovenia, the distinctive roles of PCIs and court proceedings is emphasized in the Parliamentary Inquiry Act, which Article 1 defines the purpose of a parliamentary inquiry as to determine and assess the state of facts which can serve as the basis for the National Assembly to decide on the political responsibility of bearers of public functions, on amending legislation, or on other decisions within its constitutional power. The constitutional basis for restriction of parliamentary inquiries in relation to the Judiciary lies in the principle of independence of the Judiciary provided in Article 125 of the Constitution, which means that the subject of a parliamentary inquiry cannot interfere with the (exclusive) powers of the Judiciary. Article 2 of the Parliamentary Inquiry Act allows a parliamentary inquiry into a case already being dealt with in criminal court proceedings as in each of these proceedings the state plays a significantly different role.⁷⁰ While problems in the functioning of the judiciary as a whole and the development trends thereof may be the subject of a parliamentary inquiry, the National Assembly of Slovenia in its response to the European Parliament’s Comparative Survey on PCIs, emphasized that the principle of judicial independence “*means that it is prohibited that another branch of government takes decisions relating to open court proceedings that could have any influence on the formation of opinion in an individual case*” and that “*the subject of a parliamentary inquiry cannot be the legality and appropriateness of individual judgments and court proceedings*”.⁷¹
35. A PCI should not be used as a show-case of failings of judicial administration which can be the result of a variety of reasons, including the legislature itself in a situation where legislative changes may have been rushed and adopted without meaningful consultation of the public and the judiciary itself.⁷² Finally, PCIs should also not serve as a substitute for appropriate mechanisms for performance evaluation and disciplinary proceedings against individual judges or prosecutors.

3. RULES AND GOOD PRACTICES FOR PCIs’ WORK RELATING TO THE JUDICIARY

36. Country practices suggest that **PCIs can and even should engage with members of the judicial branch in order to develop a clear understanding of procedural, structural and systemic issues and challenges in the judiciary and develop appropriate policy and legislative solutions.**⁷³
37. The rules and good practices for PCIs which deal specifically with investigation of the state of the judiciary itself (but also other cases) can be distilled as follows:
- (1) The *Sub judice* rule;
 - (2) Rules on request for documents, and appearance of judges before PCIs; and
 - (3) The openness and transparency of the PCI’s work and hearings.

3.1. The *Sub Judice* Rule

38. One important rule which has evolved and which can be found in many jurisdictions is the *sub judice* rule.⁷⁴ In the *UK House of Lords Standing Orders*, the rule is described as

⁷⁰ *ibid.* pages 108-109 (2020 European Parliament’s Comparative Survey on PCIs).

⁷¹ *ibid.* page 70 (2020 European Parliament’s Comparative Survey on PCIs).

⁷² See e.g., *ibid.* par 45 ([CCJE Opinion no. 18 \(2015\)](#)).

⁷³ See the responses to the questionnaires in preparation of the 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>; and *op. cit.* footnote 19, pars 31 and 41 (CCJE Opinion no. 18 (2015)).

⁷⁴ *ibid.* pages 15 and 103-109 (2020 European Parliament’s Comparative Survey on PCIs). See also e.g., in the **United Kingdom**, Judicial Executive Board, [Guidance to Judges on Appearances before Select Committees](#) (October 2012), page 2, which states that, “[a]lthough

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.*”⁷⁵

39. A recent study commissioned by the European Parliament⁷⁶ on PCIs found a divide among EU member states as to the permissibility of parallel investigations,⁷⁷ with a majority allowing them.⁷⁸ Of the 18 states that responded to the survey, 13 confirmed that their system permits “*continuation of an ongoing inquiry investigation when legal proceedings on the same facts are initiated after the setting up of the committee*”⁷⁹ (note that the question does not refer to the establishment of a parliamentary inquiry following the initiation of judicial proceedings). By contrast, in Croatia, France,⁸⁰ Bulgaria, and Romania, such parallel proceedings are expressly prohibited with these countries requiring the immediate cessation of parliamentary committee inquiries upon initiation of judicial proceedings into the same matter.⁸¹ In the respondent countries allowing for such parallel investigations, the principle of separation of powers is the key consideration. Generally, **if the parliamentary inquiry has or could have a prejudicial effect on the ongoing judicial proceedings, it must cease.**⁸² Such prejudicial effect may result from statements by the PCI, its members or public officials called as witnesses, or the PCI’s findings/report, which may reflect the opinion that the person subject to judicial proceedings is guilty, thus infringing on the presumption of innocence,⁸³ including when an acquittal has become final,⁸⁴ or which prejudge the assessment of the facts by the competent judicial authority,⁸⁵ or where there are tangible evidence, for instance in a court’s reasoning, that the court was influenced by the work of the PCI, thus questioning the court’s impartiality.⁸⁶ In such systems, relevant legislation and/or case law also generally either explicitly or implicitly bar parliamentary committees from infringing upon the duties and responsibilities reserved for the judicial branch, or impeding the conduct of judicial proceedings.⁸⁷
40. However, there are different approaches when it comes to the implementation of the *sub judice* rule, the intention of which is **to avoid the real or perceived interference with**

either House is entitled by virtue of privilege to discuss any subject, the rule applies to prevent either House from debating a subject and possibly influencing, or being perceived to influence, the outcome of such a case. As the then Speaker explained in 1976, “it is...an important principle that Parliament shall not influence, or seem to be seeking to influence, the administration of justice. The sub judice rule is therefore a self-denying ordinance instituted by the House in order to protect that principle”. In BiH, while the legislation does not explicitly cover the issue of parallel proceedings, from a plain reading of the BiH LoPO parallel investigations are allowed provided that matters falling within the competence of the prosecution are treated as such; Article 23(3) of the BiH LoPO provides: “*If the report [prepared by the Parliamentary Oversight Body and submitted to the relevant House on the hearing] includes a suspicion concerning the commission of a criminal act, the Parliamentary Oversight Body must forward the report to the relevant Office of the Prosecutor*”.

⁷⁵ See UK House of Lords, [Companion to Standing Orders](#), par 4.60.

⁷⁶ See *op. cit.* footnote 51, page 10 (2020 European Parliament’s Comparative Survey on PCIs).

⁷⁷ Except Sweden, which does not have rules on PCIs

⁷⁸ See *op. cit.* footnote 51, page 10 (2020 European Parliament’s Comparative Survey on PCIs).

⁷⁹ *ibid.* page 10 (2020 European Parliament’s Comparative Survey on PCIs).

⁸⁰ In France, Ordinance No 58-1100 of 17 November 1958 on the functioning of the parliamentary assemblies provides the following: “*A committee of inquiry may not be set up to investigate matters which have given rise to legal proceedings, so long as those proceedings are pending. If a committee has already been set up, its remit shall end upon the launch of a judicial investigation into the matters that it has been instructed to inquire into*”. Article 139 of the Rules of Procedure of the French National Assembly further establishes a procedure for prior consultation of the Minister of Justice by the assembly concerned before a committee of inquiry is set up, in order to avoid this type of confusion, which is considered to undermine the separation of powers between the judiciary and the legislature.

⁸¹ See *op. cit.* footnote 51, page 15 (2020 European Parliament’s Comparative Survey on PCIs). The same applies, for instance, in Montenegro (see Article 79 of the [Rules of Procedure of the Parliament of Montenegro](#)).

⁸² For example, in Estonia, parliamentary committees of inquiry in the Riigikogu may investigate matters “*if the parliamentary investigation does not interfere in any way with the judicial investigation*”; see *ibid.* page 105 (2020 European Parliament’s Comparative Survey on PCIs).

⁸³ See e.g., ECtHR, [Rywin v. Poland](#) (Applications nos. 6091/06, 4047/07 and 4070/07, judgment of 18 February 2016), pars 203-219; and [Wloch v. Poland](#) (Application no. 27785/95, decision of 30 March 2000).

⁸⁴ See e.g., ECtHR, [Rushiti v. Austria](#) (Application no. 28389/95, judgment of 21 March 2000), par 31.

⁸⁵ See e.g., ECtHR, [Butkevičius v. Lithuania](#) (Application no. 48297/99, judgment of 26 March 2002), par 53; [Allenet de Ribemont v. France](#), (Application no. 15175/89, judgment of 10 February 1995), par 41.

⁸⁶ See e.g., ECtHR, [Rywin v. Poland](#) (Applications nos. 6091/06, 4047/07 and 4070/07, judgment of 18 February 2016), par 238.

⁸⁷ See e.g., in Belgium, Article 1(2) of the 1880 Law states that “[i]nvestigations carried out by the House of Representatives shall not replace investigations carried out by the courts, with which they may exist in parallel without, however, impeding their conduct”.

an ongoing case by political bodies. In many countries, a PCI on the same matter may still go ahead, where the PCI addresses a specific matter of public interest, rather than a judicial proceeding which concerns the individual (discussed further below).⁸⁸ It may also be the case that during the course of its work, a PCI discovers evidence that would warrant the attention of the prosecution and a potential instigation of proceedings, in which case the regulations of some states allow for some forms of co-operation with the prosecution.⁸⁹

41. Overall, where national systems allow PCIs to act in parallel with an ongoing judicial proceedings, the imperative to respect of the principle of separation of powers is often highlighted. The principles developed at the national level largely reflect the *sub judice* rule (see par 17 *supra*) and the above-mentioned principles stated at the international level. Accordingly, in most countries, **the work of the PCI remains fully independent and separated from legal proceedings, and it cannot obstruct judicial proceedings or interfere with judicial investigations in any way, including by expressing opinions on issues discussed in judicial investigations, or prejudging the decision of the court or affecting the procedural status of a person who is accused in criminal court proceedings.**⁹⁰

3.2. Rules on the Request for Documents and Appearance of Judges before PCIs

42. Comparative studies have revealed that PCIs have generally the competence to demand access to documentation held by the executive and summon individuals to provide testimonies and be subject to questioning.⁹¹ In certain countries, it is specifically stated that courts shall communicate documents upon request of PCIs.⁹²

⁸⁸ See *op. cit.* footnote 51, page 10 (2020 European Parliament’s Comparative Survey on PCIs).

⁸⁹ See e.g., in **BiH**, Article 23(3) of the BiH LoPO provides that “[i]f the report [prepared by the Parliamentary Oversight Body and submitted to the relevant House on the hearing] includes a suspicion concerning the commission of a criminal act, the Parliamentary Oversight Body must forward the report to the relevant Office of the Prosecutor”; in **Spain**, Article 76.1 of the Constitution provides that “the results of investigations may be referred to the Public Prosecutor for the exercise of appropriate action whenever necessary”; see also **Estonia** and **France**, where the conclusions of PCIs may be remitted to the prosecutor’s office for criminal proceedings to be initiated; **Czech Republic**, where the PCI may inform law enforcement authorities if any facts obtained during the investigation indicate that a criminal offence may have been committed; and **Slovenia**, where the findings of the report can be used to assert criminal, tort and disciplinary liability which to be further investigated and determined by other competent public authorities (*op. cit.* footnote 51, page 16 (2020 European Parliament’s Comparative Survey on PCIs)). See e.g., in **Latvia**, the prosecutor might be involved with the permission of the chair (Sections 8-10 of the *Law on Parliamentary investigatory committees*); in **Poland**, Articles 14 (3) of the *Parliamentary Commissions of Inquiry Act* provides that “[a]t the request of the court or the public prosecutor, the [PCI] shall make the materials it has gathered available to these authorities, if they are related to pending criminal proceedings; the commission, with the consent of the Marshal of the Sejm, may make the collected materials available if it deems it necessary for the benefit of the proceedings conducted by other organs of public authority”.

⁹⁰ See *op. cit.* footnote 51, pages 15, 17, 70-71, 103-109 (2020 European Parliament’s Comparative Survey on PCIs): in **Estonia**, in its response to the survey, the Riigikogu (unicameral parliament) noted that PCIs “**avoid expressing opinions on issues discussed in judicial investigations in view of the principle of separation of powers and the principle of justice being administered exclusively by the courts**” and that “[a] PCI may act in parallel with a judicial investigation **only if the parliamentary investigation does not interfere in any way with the judicial investigation**” (pages 15 and 105); in **Austria**, the *Rules of Procedure for Parliamentary Investigating Committees* provide for a special consultation mechanism if the investigations by a PCI and judicial authorities overlap (in such a case, the PCI Chair communicates to the Federal Minister of Justice the requests for evidence and the summonses of informants; if the Federal Minister of Justice considers that these requests and summonses affect the activities of the prosecuting authorities, s/he may require the Chair to enter a consultation procedure, to be conducted by the Chair and assisted by the Procedural Judge; parliamentary groups are also involved in the consultation procedure) (page 15 of the Report); in the **Czech Republic**, in its response to the survey, the Chancellery of the Chamber of Deputies notes that “**the work of the PCIs and the work of authorities involved in criminal proceedings are independent of each other and PCI’s work must not interfere in criminal proceedings in any way**”, specifying that the PCI “**can request information on the matter from the authorities involved in criminal proceedings, mainly the public prosecutor’s office, they can co-operate, but the requests cannot be of such kind that they would interfere in the criminal proceedings**” (page 104); in **Slovenia**, in its response to the survey, Slovenia’s National Assembly (Drzavni Zbor) highlighted the necessity “**to ensure that the parliamentary inquiry procedure does not prejudge the decision of the court in the case running on the same state of affairs and that it does not affect the procedural status of a person who is accused in criminal court proceedings**” (pages 70-71).

⁹¹ See the responses to the questionnaires in preparation of the 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>>; and *op. cit.* footnote 19, par 46 (CCJE Opinion no. 18 (2015)). In **BiH**, as noted above, Article 11 of the BiH LoPO allows a Parliamentary Oversight Body to summon and question witnesses and compel the submission of relevant documentation.

⁹² See e.g., in **Austria**, Section 25 of the *Rules of Procedure for Parliamentary Investigating Committees*; in **Belgium**, Section 7.1 of the *Internal rules of procedure for parliamentary committees of inquiry*.

43. For instance, in Bulgaria, Cyprus, Estonia, Greece, Hungary, Ireland, Latvia, Netherlands, Spain, Sweden, and the United Kingdom, PCIs can summon natural and legal persons. Some states provide PCIs with powers to sanction those entities which have not responded to the request for information or do not appear before the PCI,⁹³ though applicable legislation may explicitly provide that certain persons may refuse to testify if this would otherwise expose them to prosecution if they would and/or they have a legally recognized obligation to observe secrecy.⁹⁴
44. In the United Kingdom, unlike in other European countries, explicit guidance for judges who are summoned before PCIs to give testimony have been developed by the Judicial Executive Board.⁹⁵ Such guidance details the main determinants for the appropriateness of judicial testimony before a PCI, including whether they may be asked questions which it would be inappropriate for them to answer given the conventions to which they are subject and what options there are for answering questions which limit the risk of conflict with the judges' legitimate and proper judicial role, such as providing written evidence or giving oral evidence in private.⁹⁶ These guidelines also set forth principles on **what judges may not discuss before a PCI, particularly the merits of individual ongoing or concluded cases - whether or not the judge giving evidence has adjudicated on that case, the personalities or merits of judges and other public figures or more generally the quality of appointments**, and other matters relating to legislative proposals and pending legal issues before the judiciary.⁹⁷ At the same time, the Guidance provides some exceptions, noting that it *"it is generally not inappropriate for a judge to refer to concluded cases as examples of practice when discussing or explaining general principles of law or practice"* or that certain office-holders within the judiciary *"by virtue of their particular functions, leadership responsibilities, and representative roles, may have cause to comment on, for instance, the quality of judicial appointments"* or that **a judge may properly comment on the merit of a Bill or policy "which directly affects the operation of the courts [or the independence of the judiciary] or aspects of the administration of justice within the judge's particular area of judicial responsibility or expertise"**⁹⁸ (see par 13 *supra*).
45. It is important to reiterate that it is generally considered as a good practice that judges, judges' associations and judicial councils be consulted in the preparation of legislation concerning the status of judges, the administration of justice, procedural laws and more generally, all draft legislation likely to have an impact on the judiciary and the functioning of the judicial system.⁹⁹ As such, public consultations constitute a means of

⁹³ See e.g., **Croatia**, Article 25 of the [Act on Commissions of Inquiry](#); **Estonia**, Section 23 of the [Riigikogu Rules of Procedure and Internal Rules Act](#).

⁹⁴ See e.g., in **Croatia**, Article 16 of the [Act on Commissions of Inquiry](#), read together with Article 307 of the *Criminal Code of Croatia* on the violation of secrecy of proceedings; in **Germany**, Article 22 of the [Law regulating the law of the investigative committees of the German Bundestag](#); Section 7 par 1 of the *Rules of Procedure for Parliamentary Investigating Committees*. In **BiH**, as noted above, Article 64 of the BiH LoPO explicitly provides for sanctions against authorized officials and institutions who fail to appear before a Parliamentary Oversight Body following a summons, who do not provide requested documentation, or who do not cooperate with the inquiry in a range of other ways.

⁹⁵ **United Kingdom**, Judicial Executive Board, [Guidance to Judges on Appearances before Select Committees](#) (October 2012), page 6, par 23.

⁹⁶ *ibid.* page 6, par 23 (2012 UK Guidance to Judges).

⁹⁷ *ibid.* pages 2-5 (2012 UK Guidance to Judges).

⁹⁸ *ibid.* pars 7, 9 and 13 (2012 UK Guidance to Judges).

⁹⁹ See, UN Special Rapporteur on the independence of judges and lawyers, [2019 Report on the exercise of the rights to freedom of expression, association and peaceful assembly by judges and prosecutors](#), A/HRC/41/48, 29 April 2019, par 69; and CCJE, [Opinion no. 3 \(2002\) on Ethics and Liability of Judges](#), par 34; [Opinion no. 10 \(2007\) on "Council for the Judiciary in the Service of Society"](#), par 87; *op. cit.* footnote 19, par 31 (CCJE Opinion no. 18 (2015)), which states that *"the judiciary should be consulted and play an active part in the preparation of any legislation concerning their status and the functioning of the judicial system"*; 2010 CCJE [Magna Carta of Judges](#), par 9, which states that *"[t]he judiciary shall be involved in all decisions which affect the practice of judicial functions (organisation of courts, procedures, other legislation)"*; and European Association of Judges, [European Charter on the Statute for Judges](#) (Strasbourg, 8-10 July 1998), DAJ/DOC (98)23, par 1.8. See also e.g., ODIHR, [Opinion on Certain Provisions of the Bill on the Supreme Court of Poland](#) (as of 26 September 2017), 13 November 2017, pars 145-146; [Opinion on Certain Provisions of the Bill on the Supreme Court of Poland](#), 30 August 2017, pars 134-135 and 142; and [Final Opinion on Draft Amendments to the Act on the National Council of the](#)

open and democratic governance as they lead to higher transparency and accountability of public institutions and help ensure that potential controversies are identified before a law is adopted.¹⁰⁰ At the same time, there may be circumstances where any direct involvement of judges in the preparation of legislation may be sufficient to cast doubt on his/her judicial impartiality if s/he is subsequently called on to determine a dispute over the interpretation of the legislation or rules at issue or whether reasons exist to permit a variation from the wording of the said provisions.¹⁰¹ Moreover, in line with the [UN Basic Principles on the Independence of the Judiciary](#), when making any statement before parliamentary committees, “judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary” to avoid damaging the public’s perception of their impartiality and independence.¹⁰²

46. In some countries, there are clear limitations as to what may be asked to judges if they are summoned to appear before PCIs.¹⁰³ For instance, the National Assembly of Slovenia in its response to the European Parliament’s Comparative Survey on PCIs, emphasized that “*in a parliamentary inquiry, judges may not be heard on issues that are or have been the subject of decision-making in a court proceeding*” further noting that “[s]uch a prohibition derives from the first paragraph of Article 134 of the Constitution, which provides for the immunity of a judge in respect of opinions they make in court”.¹⁰⁴
47. Certain countries such as France and Portugal have specifically introduced **limits to investigative powers of PCIs to prevent jeopardizing judicial independence**.¹⁰⁵ This could involve instances when the said information are **covered by professional secrecy with regard to their deliberations or constitute confidential information acquired in the course of their duties**.
48. Another important practice regarding the conduct of PCIs is the manner of requesting documents and the calling of witnesses to hearings, including judges. While the practice varies among states, a common denominator in all systems is that generally, the

[Judiciary and Certain Other Acts of Poland](#), 5 May 2017, par 92. See also European Union, [Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law](#), COM(2017) 835 final, 2017/0360(NLE), Article 2 (d) that recommends to Poland to “ensure that any justice reform is prepared in close cooperation with the judiciary and all interested parties”.

¹⁰⁰ See *ibid.* ODIHR, [Opinion on Certain Provisions of the Bill on the Supreme Court of Poland](#) (as of 26 September 2017), 13 November 2017, pars 145-146; [Opinion on Certain Provisions of the Bill on the Supreme Court of Poland](#), 30 August 2017, pars 134-135 and 142; and [Final Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland](#), 5 May 2017, par 92.

¹⁰¹ See ODIHR, [Opinion on the Laws on Courts, on Judicial Administration and on the Legal Status of Judges of Mongolia](#), 3 March 2020, pars 28-29.

¹⁰² [UN Basic Principles on the Independence of the Judiciary](#), endorsed by UN General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, Principle 8.

¹⁰³ For instance, in **Slovenia**, in its response to the survey, Slovenia’s National Assembly (Drzavni Zbor) noted that “*during a parliamentary inquiry, judges may not be heard on issues that are or have been the subject of decision-making in a court proceeding*”, emphasizing that “[s]uch a prohibition derives from the first paragraph of Article 134 of the Constitution which determines the immunity of a judge in respect of opinions they make in court”. It further stated that “[c]ompliance with the principle of separation of powers and independence of the Judiciary is provided also in Article 2 of the Parliamentary Inquiry Act which allows a parliamentary inquiry into a case already dealt with in criminal proceedings”, noting the “*significantly different role [of these proceedings]*” i.e., that “[t]he aim of a parliamentary inquiry is to detect irregularities in various areas of social life and in the functioning of state bodies”, while “[c]ourt proceedings aim to prosecute and convict individuals for criminal conduct”, thus concluding that “*a parliamentary inquiry may not obstruct court proceedings*” and that “[i]t is necessary to ensure that the parliamentary procedure does not prejudice the decision of the court in the case running on the same state of affairs and that it does not affect the procedural status of a person who is accused in court proceedings”; “[e]ven the parliamentary commission of inquiry is therefore bound by the constitutional guarantees of human rights and fundamental freedoms” (see *op. cit.* footnote 51, pages 70-71 (2020 European Parliament’s Comparative Survey on PCIs).

¹⁰⁴ See *ibid.* pages 70-71 (2020 European Parliament’s Comparative Survey on PCIs).

¹⁰⁵ See e.g., in **France**, Order No 58-1100 of 17 November 1958 on the functioning of the parliamentary assemblies sets limits to Members’ investigative powers by stating that “[t]hey shall be empowered to require communication to them of all service documents, except those covered by secrecy rules and concerning national defence, foreign affairs or the internal or external security of the State, and subject to compliance with the principle of separation between the judiciary and other powers”. In **Portugal**, Article 13 par 6 of the [Law No. 5/93 of 1 March 1993 on the Legal Regime for Parliamentary Inquiries](#) provides that “[i]n the course of the investigation, only refusal to provide documents or testimonies based on State secrecy or on secrecy of justice will be allowed”.

parliament can request and receive information in the form of documents and testimonies primarily from the executive and more rarely, from members of the judiciary.¹⁰⁶

49. The foregoing, however, does not mean that judges and prosecutors do not have a right to speak out and exercise their freedom of expression. There are legitimate restrictions to judges' right to freedom of expression, which primarily derive from the principle of confidentiality, binding judges to professional secrecy with regard to their deliberations and information obtained in the course of their functions.¹⁰⁷ Professional secrecy also means that judges must refrain from expressing their views or opinions in relation to cases currently or previously before the court, in order to maintain the perception of independence and impartiality.¹⁰⁸ Beyond the context of specific cases before them, legitimate restrictions of judges' freedom of expression result from the requirement in international law that courts and tribunals need to be "*independent and impartial*", which implies that in addition to being free of actual bias "*the tribunal must also appear to a reasonable observer to be impartial*".¹⁰⁹ Judges are therefore bound by "*a duty of loyalty, reserve and discretion*" to the public, which means that they are expected to "*show restraint in exercising their freedom of expression in all cases where the authority and impartiality of the judiciary are likely to be called in question*".¹¹⁰
50. In certain circumstances, **judges even have a duty to speak out even on a politically controversial topic if this is in defence of the constitutional order and the restoration of democracy where democracy, the integrity and independence of the judiciary and the rule of law are threatened.**¹¹¹ The Sofia Declaration of the European Network of Councils for the Judiciary (ENCJ) specifically states that "[t]he prudent convention that judges should remain silent on matters of political controversy should not apply when the integrity and independence of the judiciary is threatened" and "[t]here is now a collective duty on the European judiciary to state clearly and cogently its opposition to proposals from government which tend to undermine the independence of individual judges or Councils for the Judiciary".¹¹²
51. **Judges are also entitled to publicly criticize legal reforms and pieces of legislation, especially when they concern the functioning of the justice system and issues relating to the separation of powers,** even if this may have so-called political implications, all the more since the public would generally have a legitimate interest in being informed about it.¹¹³ The European Court of Rights in the case of *Kövesi v.*

¹⁰⁶ See e.g., United Kingdom, Judicial Executive Board, [Guidance to Judges on Appearances before Select Committees](#) (October 2012), page 2, which states: "For the most part parliamentary business, including the business of select committees, is conducted without the involvement of the judiciary, and without the appearances of judges before them. Such appearances should be regarded as exceptional. Indeed, until the last quarter of the twentieth century there were virtually no appearances by judges before parliamentary committees." See however in Georgia, where PCIs are allowed, with the consent of the Prosecutor General, to have access to the files of ongoing criminal cases if this is essential for the work of the committee (see Article 63 of the *Rules of Procedure of the Parliament of Georgia*).

¹⁰⁷ See UN Special Rapporteur on the independence of judges and lawyers, [2019 Report on the exercise of the rights to freedom of expression, association and peaceful assembly by judges and prosecutors](#), A/HRC/41/48, 29 April 2019, paras 53 and 89. See [UN Basic Principles on the Independence of the Judiciary](#), endorsed by UN General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, Principle 15.

¹⁰⁸ *ibid.* par 53 ([2019 Report of the UN Special Rapporteur on the independence of judges and lawyers](#)).

¹⁰⁹ See e.g., UN Human Rights Committee, [General Comment no. 32 on Article 14 of the ICCPR: Right to Equality before Courts and Tribunals and to Fair Trial](#), 23 August 2007, par 21; *op. cit.* footnote 19, par 42 ([CCJE Opinion no. 18 \(2015\)](#)); CCJE, [Opinion no. 3 \(2002\) on Ethics and Liability of Judges](#), paras 27-36; *op. cit.* footnote 107, Principle 8 (1985 [UN Basic Principles on the Independence of the Judiciary](#)); *ibid.* paras 66, 89 and 110-111 ([2019 Report of the UN Special Rapporteur on the independence of judges and lawyers](#)); and Venice Commission, [Report on the Freedom of Expression of Judges](#), 23 June 2015.

¹¹⁰ *ibid.* paras 33 and 101 ([2019 Report of the UN Special Rapporteur on the independence of judges and lawyers](#)).

¹¹¹ *ibid.* paras 90 and 102 ([2019 Report of the UN Special Rapporteur on the independence of judges and lawyers](#)). See also, for instance, for the purpose of comparison, Inter-American Court of Human Rights, [case of Lopez Lone et al. v. Honduras](#), judgment of 5 October 2015, paras 169-173, especially par 173. See also, ENCJ, [Sofia Declaration on Judicial Independence and Accountability](#), 7 June 2013, Principle (vii) and the Canadian [Ethical Principles for Judges](#).

¹¹² ENCJ, [Sofia Declaration on Judicial Independence and Accountability](#), 7 June 2013, Principle (vii).

¹¹³ *ibid.* par 89 ([2019 Report of the UN Special Rapporteur on the independence of judges and lawyers](#)). See also e.g., ODIHR, [Comments on the Commentary on the Code of Judicial Ethics of Kazakhstan \(2018\)](#), par 42. See also, for the purpose of comparison, *op. cit.* footnote 19, par 42 ([CCJE Opinion no. 18 \(2015\)](#)); and ECtHR, [Baka v. Hungary](#) [GC] (Application no. 20261/12, judgement of 23 June 2016), paras 162-167 and 171.

Romania stated that “[a]s regards freedom of expression of members of the judiciary, the Court has recognised that it can be expected of public officials serving in the judiciary that they should show restraint in exercising their freedom of expression in all cases where the authority and impartiality of the judiciary are likely to be called in question...***At the same time*** the Court has also stressed that **questions concerning the functioning of the justice system** fall within the public interest, the debate of which generally enjoys a high degree of protection under Article 10 [...] **Even if an issue under debate has political implications, that is not in itself sufficient to prevent, for example, a judge from making a statement on the matter** [...]. In a democratic system, the acts or omissions of government must be subject to the close scrutiny not only of the legislature and the judiciary but also of the media and public opinion”.¹¹⁴

3.3. Openness and Transparency of PCI’s Work and Hearings

52. Most parliamentary committees of inquiry **should conduct their hearings in public and in an open and transparent manner**, which may also mean TV and other media being present at the hearing.¹¹⁵ For instance, the House of Representatives of the Dutch Parliament considers the public nature of inquiries as one of their essential features.¹¹⁶ The principle of transparency also requires that **inquiry-related documents, including the final report** (see also par 55 *infra*) **are made public**, except when they contain classified information or information covered by judges’ professional secrecy or protected by the right to respect for private and family life.¹¹⁷ As recommended by ODIHR in its 2017 [Opinion on the Draft Law on Parliamentary Oversight of Bosnia and Herzegovina](#), beyond the **publication of the PCI reports on the official website of the Parliamentary Assembly, other documents related to the work of committees of inquiry should also be published, including agendas, witness testimonies, transcripts and records of committee actions**.¹¹⁸ For instance, the recent French Parliamentary Commission of Inquiry on Obstacles to the Independence of the Judiciary has organized open and closed meetings but has published all the meeting minutes on its website.¹¹⁹
53. Restricting publicity of PCI hearings should be exceptional and should only occur if special objectives are to be met such as national security or the protection of secret or confidential information. The Venice Commission has, however, indicated that *“this 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.”*¹²⁰
54. At the same time, the right of private individual to respect for private and family life protected by Article 8 of the ECHR and Article 17 of the ICCPR may more easily justify

¹¹⁴ ECtHR, [Kövesi v. Romania](#) (Application no. 3594/19, judgment of 5 May 2020), par 201.

¹¹⁵ In **BiH**, Article 8(b) of the BiH LoPO provides that “[a] Parliamentary Oversight Body may decide to discuss certain issues within its scope of authority in a closed session”, thereby allowing the PCI to open or close a hearing to the public at its own discretion.

¹¹⁶ See <<https://www.houseofrepresentatives.nl/how-parliament-works/parliamentary-inquiry>>.

¹¹⁷ See e.g., in **Portugal**, Article 15 par 4 (a) of the [Law No. 5/93 of 1 March 1993 on the Legal Regime for Parliamentary Inquiries](#) provides that “[t]he minutes of the commissions, as well as all documents in their possession, can be consulted after approval of the final report, under the following conditions: a) Do not reveal matters subject to State secrecy, to secrecy of justice or subject to secrecy for reasons of the privacy of persons; [...]”.

¹¹⁸ See e.g., OSCE/ODIHR, [Opinion on the Draft Law on Parliamentary Oversight of Bosnia and Herzegovina](#) (29 March 2017), par 49.

¹¹⁹ See e.g., in **France**, regarding the Parliamentary Commission of Inquiry on the Obstacles to the Independence of the Judiciary, established on 7 January 2020, all the minutes of the interviews are available online <[http://www2.assemblee-nationale.fr/15/autres-commissions/commissions-d-enquete/commission-d-enquete-sur-les-obstacles-a-l-independance-du-pouvoir-judiciaire/\(block\)/69211](http://www2.assemblee-nationale.fr/15/autres-commissions/commissions-d-enquete/commission-d-enquete-sur-les-obstacles-a-l-independance-du-pouvoir-judiciaire/(block)/69211)>.

¹²⁰ Venice Commission, [Amicus Curiae brief in the case of Rywin v. Poland before the ECtHR \(on Parliamentary Committees of Inquiry\)](#) (2014), CDL-AD(2014)013.

proceedings to be held behind closed doors. The best approach is to make this decision through a balance of interests. This should preferably be regulated explicitly in the procedures for the inquiry, whether laid down in statutory law or in parliamentary rules of procedure.

55. Finally, as to the outcome of the inquiry, the final report/findings should also be made public.¹²¹ Moreover, as stated above, based on the response from Council of Europe member states, the CCJE recommends that “*in general the reports of committees of inquiry should never interfere with investigations or trials that have been or are about to be initiated by judicial authorities*” and that “[*i*]f such reports must comment on existing judicial decisions in individual cases, they must do so with proper respect and should refrain from expressing any criticism in terms that would amount to a revision of decisions made”.¹²²

[END OF TEXT]

¹²¹ See e.g., in **Belgium**, Article 13 of the [Law of 3 May 1880 on Parliamentary Inquiries](#); in **BiH**, Article 23 of the BiH LoPO provides that: “1) A Parliamentary Oversight Body shall prepare and submit a report to the relevant House on the hearing, consisting of essential information presented at the hearing. 2) A Parliamentary Oversight Body must propose appropriate conclusions for adoption by the House [...] 4) The Report of the hearing, together with the conclusions specified in Paragraph (2) of this Article, shall be posted on the website of the Parliamentary Assembly of BiH and the website of the supervised institution, pursuant to the provisions of the Law on the Protection of Secret Data”; in **Albania**, Article 108 of the Rules of Procedure of the Assembly of the Republic of Albania, which provides that “reports of the inquiry committees are broadcast in full by the Albanian Public Television”; see also in **Spain**, Section 52 of the [Standing Orders of the Congress of Deputies](#).

¹²² *Op. cit.* footnote 19, par 46 (CCJE Opinion no. 18 (2015)).