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WORKING PAPER

Kevin Fredy Hinterberger

**Parliamentary
Committees of Inquiry
as an Effective Tool to
Enhance Democracy
and Fight Corruption in
Austria?**

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Abstract

The Working Paper takes a closer look at the challenges of rule of law and democracy in Austria, in particular corruption, and links it to one of the main democratic instruments for fighting corruption: Parliamentary Committees of Inquiry (PCIs). This instrument was fully reformed in 2015, structuring it as a minority right and introducing a competence of the Austrian Constitutional Court to rule on disputes concerning PCIs. By analysing the subject matter of the investigation and the obligation to provide information of PCIs it is assessed if PCIs are enhancing democracy and the fight against corruption in Austria. Those two topics are interrelated and core essentials of PCIs and their functioning. Thereby, the focus is on the case law of the Austrian Constitutional Court.

Keywords: Austria; Constitutional Court; Corruption; Democracy; Committees of Inquiry; Parliament; Populism; Rule of Law

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Parliamentary Committees of Inquiry as an Effective Tool to Enhance Democracy and Fight Corruption in Austria?

Kevin Fredy Hinterberger¹

1. The Rule of Law and Democracy under Pressure in Austria²

Rule of Law and democracy are under pressure – not only in the EU and its Member States, but also on a global scale. A key challenge in this regard is (political) corruption, a complex phenomenon that can be defined as ‘the abuse of entrusted power for private gain.’³ If government officials embezzle State money or government jobs are obtained through paying bribes, democratic procedures and institutions as well as the rule of law are weakened.

In Austria, the rule of law and democracy have faced several challenges over the last few years and the various problems, as well as the reasons for them, are closely linked.⁴ The increasing instability of the federal government triggered by corruption could be observed to have the greatest impact on Austrian democracy, with the underlying issue here being the resurrection of populism. Corruption also plays a key role in the concept of populism. Populism has

¹ Kevin Fredy Hinterberger is a research assistant on Asylum and Migration Law at the Austrian Federal Chamber of Labour and a Postdoctoral Fellow at the Ars Iuris Vienna – Doctoral School of the University of Vienna. He was a re:constitution Fellow 2021/22. During the course of his re:constitution fellowship, the author co-organized a conference on ‘Rechtsstaat und Demokratie unter Druck – Perspektiven in der sozialen und ökologischen Krise’ (*The Rule of Law and Democracy under Pressure – Perspectives in the Social and Ecological Crisis*, see <https://www.rechtsstaat-unter-druck.at/>) in March 2022 at the University of Vienna. It aimed at deciphering and visualizing global authoritarian trends that put democratic principles or/and the rule of law under pressure, with a specific focus on Austria.

His doctoral thesis deals with regularisations of irregularly staying migrants and compares the existing regularisations established in the domestic laws of Austria, Germany and Spain (Open-Access in German 2019, see <https://www.nomos-elibrary.de/10.5771/9783748902720/regularisierungen-irregulaer-aufhaeltiger-migrantinnen-und-migranten?page=1>; Open-Access in English 2023, see <https://www.nomos-elibrary.de/10.5771/9783748912798/regularisations-of-irregularly-staying-migrants-in-the-eu?page=1>). He publishes widely on issues of Public Law, EU Law and International Law (see <https://deicl.univie.ac.at/en/team/further-staff/hinterberger-kevin-fredy/>). He is teaching at the University of Vienna.

² Sections and ideas of the introduction have been published in K.F. Hinterberger and K. Lachmayer, ‘Crisis of Liberal Democracy in Austria. Lessons Learned from Current Government Crises’ in B. Mathieu and G. Katrougalos (eds), *The crisis of liberal democracy, diagnostics and therapies*, Intersentia, Cambridge 2023, pp. 127–138.

³ <https://www.transparency.org/en/what-is-corruption> (last access 13.10.2023) and see also <https://www.transparency.org/en/corruptionary/political-corruption> (last access 13.10.2023).

⁴ G. Lienbacher, ‘Autokratieresistenz der österreichischen Bundesverfassung’ (2020) 75 *Zeitschrift für öffentliches Recht* 1 pp. 67–97, at 91f; K. Lachmayer, ‘Verfassungsrechtliche Dimensionen der Vielfachkrise’ (2021) *juridikum* pp. 367–376, at 371ff; <https://antikorruptionsbegehren.at/> (last access 13.10.2023).

intensified the polarisation of society in Austria,⁵ a phenomenon which can also be detected in many other countries. Crises, such as the COVID-19 crisis since 2019 or the so-called migration/refugee crisis in 2015,⁶ highlight the fragility of society, though they do also demonstrate its resilience.⁷ Meanwhile, a factor underlying these developments has become visible, namely the role of globalisation for the Austrian society. Overall, the negative effects of (perceived) corruption on the stability and effectiveness of government, the public trust in – and by expansion the legitimacy of – the state and the erosion of social interpersonal trust thus become visible.

After taking a closer look at the challenges of rule of law and democracy in Austria in this Section, one of the main democratic instruments for fighting corruption is analysed in Section 2: Parliamentary Committees of Inquiry (PCIs). This instrument was fully reformed in 2015, structuring it as a minority right and introducing a competence of the Austrian Constitutional Court (*Verfassungsgerichtshof*, VfGH) to rule on disputes concerning PCIs. The reform has produced a lot of findings and case law, however a legal analysis is missing so far. Hence, Section 3 deals then with the subject matter of the investigation and Section 4 with the obligation to provide information of PCIs to assess if PCIs are enhancing democracy and the fight against corruption in Austria. Thereby, the focus is on the analysis of case law of the VfGH.

1.1 Increased corruption in Austrian politics

In 2019, the Ibiza scandal,⁸ which revealed the corrupt fantasies of the Vice-Chancellor at the time, Heinz-Christian Strache, shocked Austrian society and triggered a series of governmental crises over the last three years.⁹ The subsequent investigations by the public prosecutors and the findings of the PCIs brought various forms of corruption and misconduct to light.¹⁰ As a result, the population has increasingly lost trust in politics and the long-term impact on

⁵ See R. Simsa, F. Mayer, S. Muckenhuber and T. Schweinschwaller, *Framework Conditions of Austria's Civil Society*, Maecenata Institut für Philanthropie und Zivilgesellschaft, Berlin 2021.

⁶ See A.T. Müller and J. Prantl, 'The COVID-19 Pandemic as "Public Emergency"'. Health Emergencies as Triggers for Derogation Clauses in International Human Rights Treaties' (2021) *juridikum* pp. 386–94 and regarding the use of the term 'crisis' with regard to migration movements M. Krzyżanowski, A. Triandafyllidou and R. Wodak, 'The Mediatization and the Politicization of the "Refugee Crisis" in Europe' (2018) 16 *Journal of Immigrant & Refugee Studies* pp. 1–14.

⁷ See in particular the foreword of the Special Issue on crises (Krise) by J. Fitz and K.F. Hinterberger, 'Vorwort der Gastherausgeber:innen' (2021) *juridikum* pp. 354–56 and the contribution by J. Kienast, '„Krise“. Rechtsbegriff oder politisches Instrumentarium?' (2021) *juridikum* pp. 357–66.

⁸ See F.-S. Gady, 'The Fall of Sebastian Kurz? After a Shocking Scandal, Austria's Conservative Wunderkind Is Down but Not Out' (18.06.2019) *Foreign Affairs* <https://www.foreignaffairs.com/articles/austria/2019-06-18/fall-sebastian-kurz> (last access 13.10.2023).

⁹ See K. Lachmayer, 'Effective Accountability Mechanisms in Austrian Constitutional Culture. The Long-lasting Effects of Austria's Brief Governmental Crisis' (20.12.2021) *Verfassungsblog on constitutional matters* <https://verfassungsblog.de/accountability-aus-crisis/> (last access 13.10.2023).; K. Lachmayer, 'An Austrian Abyss of Cronyism and Corruption. Fighting for the Rule of Law in Austria' (01.06.2021) *Verfassungsblog on constitutional matters* <https://verfassungsblog.de/an-austrian-abyss-of-cronyism-and-corruption/> (last access 13.10.2023); K. Lachmayer and L. Wieser, 'Entering into New Constitutional Territory in Austria' (3.6.2019) *Verfassungsblog on constitutional matters* <https://verfassungsblog.de/entering-into-new-constitutional-territory-in-austria/> (last access 13.10.2023).

¹⁰ See below Section 2.

Austrian democracy cannot even be imagined.¹¹ Adjustments to the constitutional framework in the last 15 years, for example the empowering of parliamentary minorities to establish PCs¹² or the strengthening of public prosecutions, have been necessary preconditions for the effectiveness of the constitutional provisions in the last years. Empowering parliamentary *minorities* seems particularly important considering that corruption is or can be most prevalent among the ruling *majority* since they are the ones in power and making the decisions.

1.2 Rising populism

The increased corruption in Austrian politics can be linked to the rise of populism in Austria.¹³ Populism is often defined as ‘an ideology that considers society to be ultimately separated into two homogeneous and antagonistic groups, “the pure people” versus “the corrupt elite”, and which argues that politics should be an expression of the *volonté générale* (general will) of the people.’¹⁴ Corruption is a core element in the concept of populism, and thus (perceived) increased corruption might well be related to increasing success of populist parties and politicians.

The first wave of populism in Austria dates back more than 20 years to when the EU’s 14 imposed sanctions on the (in)famous coalition between the conservative party (ÖVP) and Jörg Haider’s right-wing Freedom Party (FPÖ).¹⁵ While the sanctions seemed to fizzle out, the consequences of Haider’s populism have not been investigated.¹⁶ The collapse of the Carinthian Hypo bank caused by massive mismanagement and corruption led to the largest Austrian state bailout at a cost of more than 10 billion euros.¹⁷

¹¹ According to a survey from June 2021, around 87% of respondents said that they considered corruption to be widespread in Austrian politics; N.N., ‘87% glauben, dass Korruption in Österreichs Politik verbreitet ist’ (16.06.2021) *Profil* <https://www.profil.at/oesterreich/umfrage-87-glauben-dass-korruption-in-oesterreichs-politik-verbreitet-ist/401425389> (last access 13.10.2023). See also the Corruptions Perception Index of Transparency International at <https://www.transparency.org/en/cpi/2021> (last access 13.10.2023).

¹² See below Section 2.

¹³ See K. Liebhart, ‘25 years later – Austria’s shift to the populist right: national characteristics of a pan-European trend’ (2020) 16 *Politics in Central Europe* pp. 399–417.

¹⁴ See C. Mudde ‘The Populist Zeitgeist’ (2004) 39 *Government and Opposition* 4, pp. 541–563, at 543.

¹⁵ See K. Lachmayer, ‘Formalism and Judicial Self-Restraint as Tools Against Populism? Considerations regarding Recent Developments of the Austrian Constitutional Court’ in F. Gárdos-Orosz and Z. Szenté (eds), *Populist Challenges to Constitutional Interpretation in Europe and Beyond*, Routledge Publishing, Oxford 2021, pp. 75–94; K. Lachmayer, ‘Questioning the Basic Values I – Austria and Jörg Haider’ in A. Jakab and D. Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States’ Compliance*, Oxford University Press, Oxford 2017, pp. 436–55.

¹⁶ See R. Wodak, ‘“Anything Goes” – The Haiderization of Europe’ in R. Wodak, M. Khosravinik and B. Mral (eds), *Rightwing Populism in Europe: Politics and Discourse*, Bloomsbury, London 2013, pp. 23–38.

¹⁷ C. Gandrud, ‘A bank bailout lesson from Austria’ (9.3.2015) *World Economic Forum* <https://www.weforum.org/agenda/2015/03/a-bank-bailout-lesson-from-austria/> (last access 13.10.2023); F. Meyer, E. Schneider and S. Schröcker, ‘Gläubiger mit blauem Auge davongekommen. Die Abwicklung der Hypo Alpe Adria und die Konflikte im Block an der Macht’ (2014) 28 *Kurswechsel* pp. 71–84.

After the collapse of the Freedom Party and its spin-offs, it was another 10 years until in 2017 a new version of the now neo-conservative party and the Freedom Party formed a new coalition, which again collapsed after two years in the already mentioned Ibiza scandal.¹⁸

Austrian populism was not only related to corruption but also rooted in xenophobic developments. While Haider's Freedom Party had gained support in the 1990s after the wars in the former Yugoslavia had led to an influx of refugees from that region,¹⁹ the rise of populism in the conservative party and the coalition in 2017 was related to the aforementioned migration/refugee crisis in 2015.²⁰ The subsequent populist governments tightened asylum, migration and citizenship laws – as in the years before.²¹

1.3 Polarisation of Society and the Role of Globalisation

Election analysis shows the increased polarisation in Austrian society, specifically between certain urban and rural areas.²² While certain, limited urban sections of society are considered to be profiting from globalisation, more and more social groups are less able to benefit. The different socially deprived sections of the population (for example workers and migrants) are played off against each other by populists.²³ Wealthier citizens are keen to enjoy the benefits of globalisation (new technological gadgets, long-distance journeys, stock market gains, etc.), but have no wish to show solidarity with refugees (for example those from areas which have been adversely affected by globalisation). Actual societal challenges, like the COVID-19 health crisis or climate change, furthermore, illustrate the increasing polarisation in society and the lack of global solidarity.²⁴

¹⁸ See K. Liebhart, '25 years later – Austria's shift to the populist right: national characteristics of a pan-European trend' (2020) 16 *Politics in Central Europe* pp. 399–417.

¹⁹ See, for the anti-immigrant policies of the FPÖ, D. Schmuck, J. Matthes and H. Boomgaarden, 'Austria: Candidate-Centered and Anti-Immigrant Right-Wing Populism' in T. Aalberg et al (eds), *Populist Political Communication in Europe*, Routledge, Oxford 2016, pp. 85–98 and F. Hafez, R. Heinisch, and E. Miklin, 'The new right: Austria's Freedom Party and changing perceptions of Islam' (24.07.2019) *Brookings* <https://www.brookings.edu/research/the-new-right-austrias-freedom-party-and-changing-perceptions-of-islam/> (last access 13.10.2023).

²⁰ See K. Liebhart, '25 years later – Austria's shift to the populist right: national characteristics of a pan-European trend' (2020) 16 *Politics in Central Europe* pp. 399–417.

²¹ For an overview, see J. Peyrl, T. Neugschwendtner and C. Schmaus (eds), *Fremdenrecht*, 7th ed., ÖGB Verlag, Vienna 2018, pp. 15ff; K.F. Hinterberger, *Regularisations of Irregularly Staying Migrants. A Comparative Legal Analysis of Austria, Germany and Spain*, Nomos, Baden-Baden 2023, pp. 137ff.

²² See M. Kenny and D. Luca, 'The urban-rural polarisation of political disenchantment: an investigation of social and political attitudes in 30 European countries' (2021) 14 *Cambridge Journal of Regions, Economy and Society* pp. 565–82 and regarding Austria N.N., 'Stadt-Land-Gefälle: "Dann hätte ÖVP keine Chance auf Platz eins gehabt"' (19.10.2017) *Die Presse* <https://www.diepresse.com/5305550/stadt-land-gefaelle-dann-haette-oevp-keine-chance-auf-platz-eins-gehabt> (last access 13.10.2023) and N.N., 'Wieder starke Stadt-Land-Unterschied' (30.9.2019) *Wiener Zeitung* <https://www.wienerzeitung.at/nachrichten/wahlen/nationalratswahl-2019/2031452-Wieder-starke-Stadt-Land-Unterschiede.html> (last access 13.10.2023).

²³ See B. Spruyt, G. Keppens and F. Van Droogenbroeck, 'Who Supports Populism and What Attracts People to It?' (2016) 69 *Political Research Quarterly* pp. 335–46.

²⁴ See only S. Jungkunz, 'Political Polarization During the COVID-19 Pandemic' (2021) 3 *Frontiers in Political Science* pp. 1–8 or C. Jaffe, 'Melting the Polarization Around Climate Change Politics' (2018) 30 *Georgetown International Environmental Law Review* pp. 455–497.

2. General Remarks on Parliamentary Committees of Inquiry and the 2015 Reform

Even though Austria achieved a good 13th place (of 180 states) and the EU is generally the highest performing region on the Corruption Perception Index of Transparency International,²⁵ political corruption exists on the national and regional level as has been demonstrated above. Hence, the Austrian example is used as a corner stone of my analysis. Besides the criminal law framework in general and mechanisms to enforce the right to information like Parliamentary Questions (Interpellation), PCIs have become one of the main democratic instruments to tackle and reveal political corruption in practice. One reason for this is that PCIs are set up by the Parliament to hold executive actors politically accountable.²⁶

PCIs are guardians of the public interest. The function of parliamentary control is based on the principle of democracy and belongs to the rights of the political opposition.²⁷ The ‘sharpest sword’²⁸ of parliamentarism is intended to contribute to the establishment of transparency and political accountability.²⁹ PCIs can be used to investigate certain complex processes of the executive branch, especially of the government.³⁰

From a structural viewpoint of how a State is organised, PCIs are part of the legislative branch and an inherent part of checks and balances and the separation of powers among the legislative, executive and judicial branch. According to the Constitutional Court, PCIs are ‘organisationally as well as functionally assigned to the legislative power’ pursuant to Article 53(1) B-VG.³¹ The existence of a parliament and this right of control presupposes – in the words of A. Gamper – that there is ‘a government as well as subordinate administration [which] must be subject to parliamentary control primarily for democratic reasons, but also

²⁵ <https://www.transparency.org/en/cpi/2021/index/aut> (last access 13.10.2023) and see also <https://www.transparency.org/en/blog/cpi-2021-corruption-watch-list-australia-austria-el-salvador-kazakhstan> (last access 13.10.2023).

²⁶ See C. Syrier, *The Investigative Function of the European Parliament*, Wolf Legal Publisher, The Hague 2013 and for Austria AB 439 BlgNR 25. GP, p. 5 and IA 718/A BlgNR 25. GP, p. 14 as well as VfSlg 20.370/2020, para. 166 mwN; VfGH 18.1.2021, UA 4/2020, para. 38. The decisions of the VfGH can be found at www.ris.bka.gv.at.

²⁷ Cf. T. Öhlinger, ‘Die Bedeutung von Untersuchungsausschüssen als besonderes Instrument parlamentarischer Kontrolle’ in P. Bußjäger (ed), *Die Zukunft der parlamentarischen Kontrolle*, Braumüller, Vienna 2008, pp. 107–116, at 107 and K. Pabel, *Die Kontrollfunktion des Parlaments*, Habilitation, Wirtschaftsuniversität Wien 2009, p. 12 as well as VfSlg 20.370/2020, para. 166.

²⁸ D. Engels, *Parlamentarische Untersuchungsausschüsse*, Decker & Müller, Heidelberg 1991, p. 9; see also P. Bußjäger, ‘Untersuchungsausschüsse im Bund und bei den Ländern’ (2016) 50 Österreichische Juristen-Zeitung 8 pp. 348–355, at 348 with further references.

²⁹ Cf. IA 718/A BlgNR 25. GP, p. 14; in this direction also VwGH 8.2.2021, Ra 2021/03/0001.

³⁰ In contrast to the rights to ask Parliamentary Questions (Interpellation) laid down in Article 52 B-VG; cf. IA 718/A BlgNR 25. GP, 13 and AB 439 BlgNR 25. GP, pp. 2, 4.

³¹ VfGH 6.3.2008, B 1535/07, VfSlg 18.406/2008 (translation of the author) with reference to A. Kahl, ‘Artikel 53 B-VG’ in K. Korinek et al (eds), *Österreichisches Bundesverfassungsrecht*, 7th ed., Verlag Österreich, Vienna 2005, mn 9; H. Mayer, ‘Verfassungsrechtliche Probleme der Tätigkeit von parlamentarischen Untersuchungsausschüssen’ in H. Mayer, W. Platzgummer and W. Brandstetter (eds), *Untersuchungsausschüsse und Rechtsstaat*, Manz, Vienna 1989, pp. 1–23, at 2 and H. Widder, *Parlamentarische Untersuchungsausschüsse im Rechtsstaat*, Niederösterreichisches Pressehaus, St. Pölten 1983, pp. 8 and 19. See also VfSlg 13.450/1993 and VfSlg 19.112/2010 as well as VwGH 27.1.2016, Ro 2015/03/0042 and 8.2.2021, Ra 2021/03/0001.

for reasons of the rule of law and the division of powers.³² After all, it is precisely the executive organs that implement or apply state legislation.³³

Austria is a representative example as a PCI has been recently dealing with highly charged issues, in particular with the clarification of corruption allegations against government members of the conservative party (ÖVP), the so-called ‘ÖVP-Korruptions-Untersuchungsausschuss’.³⁴ This is already the sixth PCI at the federal level since the reform in 2015.³⁵ The previous PCI investigated the Ibiza affair that led to the fall of the conservative-far-right ÖVP-FPÖ government in 2019 and shed light on the presumed corruption of said government, the so-called ‘Ibiza-Untersuchungsausschuss’.³⁶

The right of the National Council to establish PCIs is laid down in Article 53 Federal Constitutional Law (*Bundes-Verfassungsgesetz*, B-VG) and in the Rules of Procedure for Parliamentary Investigating Committees (*Verfahrensordnung für parlamentarische Untersuchungsausschüsse*, VO-UA) and was fundamentally reformed on 1 January 2015.³⁷ Since then, it has been structured as a minority right which means that one quarter of the members of the National Council may set up a PCI.³⁸

Since the PCI reform in 2015, the VfGH has also ruled on disputes concerning PCIs in numerous proceedings – a competence that was only granted to the highest court in the course of this reform.³⁹ This underlines the topicality⁴⁰ and importance of taking a closer look at this central democratic instrument from a legal perspective.⁴¹ Hence, both the subject matter of the

³² A. Gamper, ‘Untersuchungsausschüsse der Landtage – Rechtslage, Problemstellungen und Perspektiven’ in ÖJT (ed), *Parlamentarische Untersuchungsausschüsse: Erfahrungen und Perspektiven*, Manz, Vienna 2017, pp. 20–47, at 21 (translation of the author).

³³ W. Berka, *Verfassungsrecht*, 8th ed., Verlag Österreich, Vienna 2021, mn 380.

³⁴ https://www.parlament.gv.at/PAKT/VHG/XXVII/US/US_00004/index.shtml (last access 13.10.2023); 4/US 27. GP – Verlangen gem § 33 Abs 1 GOG-NR, 3ff.

³⁵ https://www.parlament.gv.at/PAKT/PR/JAHR_2021/PK1390/index.shtml (last access 13.10.2023).

³⁶ https://www.parlament.gv.at/PAKT/VHG/XXVII/US/US_00001/index.shtml (last access 13.10.2023). See also M. Karnitschnig, ‘The House of Kurz scandal, explained’ (19.05.2021) *Politico* <https://www.politico.eu/article/the-house-of-sebastian-kurz-scandal-explained-austria-chancellor-perjury-allegations/> (last access 13.10.2023). I. Mijnsen, ‘«Vergiftung des Klimas»: Der Ibiza-Untersuchungsausschuss prägt und spaltet Österreichs Politik’ (5.7.2021) *Neue Zürcher Zeitung* <https://www.nzz.ch/international/ibiza-ausschuss-oesterreich-streit-um-korruption-und-privatsphaere-ld.1635517?reduced=true> (last access 13.10.2023); to the effects of the Ibiza PCI see C. Böhmer and I. Metzger, ‘869 Seiten U-Ausschuss. Der Abschlussbericht und die Folgen’ (6.8.2021) *Kurier* p. 8.

³⁷ Federal Law Gazette I 101/2014 and I 99/2014. An English version of the B-VG can be found at https://www.ris.bka.gv.at/Dokumente/Erv/ERV_1930_1/ERV_1930_1.pdf (last access 13.10.2023) and of the VO-UA at https://www.ris.bka.gv.at/Dokumente/Erv/ERV_1975_410/ERV_1975_410.pdf (last access 13.10.2023). According to C. Konrath the expansion of parliamentary control rights represents one of four decisive development paths of the parliamentary opposition in Austria; C. Konrath, ‘Parlamentarische Opposition in Österreich: Recht und Praxis in Zeiten eines fragmentierten Parteiensystems’ (2017) 48 *Zeitschrift für Parlamentsfragen* 3 pp. 557–574, at 563 and 565f.

³⁸ AB 439 BlgNR 25. GP, p. 2. Cf. W. Zögnitz, ‘Der parlamentarische Untersuchungsausschuss als Kontroll- und Minderheitsrecht’ in G. Baumgartner (ed), *Jahrbuch Öffentliches Recht*, NVW, Vienna 2015, pp. 53–84, at 53ff.

³⁹ See only VfGH 6.10.2021, UA 2/2021; 25.9.2021, UA 6/2021; 18.1.2021, UA 4/2020.

⁴⁰ In this context, it is also worth mentioning the almost daily reporting during an ongoing PCI.

⁴¹ The ‘dynamic nature’ of PCIs was already addressed by Zweig in 1913; E. Zweig, ‘Die parlamentarische Enquete nach deutschem und österreichischem Recht’ (1913) 6 *Zeitschrift für Politik* pp. 265–345, at 267.

investigation (Section 3) and the obligation to provide information of PCIs (Section 4) are analysed in this Working Paper to assess if PCIs are enhancing democracy and the fight against corruption in Austria. Those two topics are interrelated and core essentials of PCIs and their functioning.

3. Subject Matter of the Investigation

The subject matter of the investigation is defined in Article 53(2) B-VG and is decisive for the scope of activities of the PCI. According to the Constitutional Court, the subject matter of the investigation binds the PCI ‘and at the same time constitutes the limitation of the coercive powers conferred on it.’⁴² This is particularly significant with regard to the question of which organs are obliged to submit documents and to what extent, which will be discussed in Section 4.

Article 53(2) B-VG stipulates that ‘the subject matter of the investigation is a certain completed process regarding matters in which the Federation is responsible for implementing the laws.’⁴³ According to the systematic understanding of the B-VG, both the administration (‘*Verwaltung*’) and the jurisdiction (‘*Gerichtbarkeit*’) may be investigated,⁴⁴ whereby jurisprudence (‘*Rechtsprechung*’) is expressly excluded from the subject matter of the investigation.⁴⁵ With regard to the administration, both sovereign and private economic administration of the federal government are covered.⁴⁶ The activities of all supreme administrative bodies of the Federation are a potential object of investigation.⁴⁷ These are the Federal President, the Federal Government as well as the Federal Ministers and State Secretaries.⁴⁸

The term ‘process’ is – as the materials state – already used in Article 52b B-VG and describes ‘complex and comprehensive facts’,⁴⁹ which the PCI is to clarify. According to the

⁴² VfSlg 20.370/2020, para. 172 (translation of the author).

⁴³ Cf. VfSlg 20.370/2020, para. 174 (translation of the author).

⁴⁴ See Articles 10-12, 14f and 19 B-VG as well as that the third main section of the B-VG is entitled ‘Federal Execution’ and regulates the ‘Administration’ in Articles 60ff B-VG and the ‘Jurisdiction of the Courts of Justice’ in Articles 82ff B-VG; cf. W. Berka, *Verfassungsrecht*, 8th ed., Verlag Österreich, Vienna 2021, mn 380; VfSlg 15.762/2000. Furthermore, the principle of separation of the judiciary from the administration, which is stipulated in Article 94(1) B-VG, should be pointed out.

⁴⁵ Article 53(2) B-VG; cf. VfSlg 19.973/2015, para. 59 and G. Muzak, *B-VG Kommentar*, 6th ed. 1.10.2020 rdb.at, Manz, Article 53 B-VG mn 2f.

⁴⁶ AB 439 BlgNR 25. GP, p. 3; confirming S. Scholz, ‘Zum zulässigen Gegenstand parlamentarischer Untersuchungsausschüsse nach der Untersuchungsausschuss-Reform 2014’ (2015) 23 *Journal für Rechtspolitik* 3 pp. 232–244, at 235.

⁴⁷ S. Scholz, ‘Zum zulässigen Gegenstand parlamentarischer Untersuchungsausschüsse nach der Untersuchungsausschuss-Reform 2014’ (2015) 23 *Journal für Rechtspolitik* 3 pp. 232–244, at 236f. Regarding the legislation before the reform of the PCIs in 2015 see K. Pabel, *Die Kontrollfunktion des Parlaments*, Habilitation, Wirtschaftsuniversität Wien 2009, pp. 76ff.

⁴⁸ Articles 19(1), 60ff and 69ff B-VG.

⁴⁹ AB 439 BlgNR 25. GP, p. 4 (translation of the author); confirming VfSlg 20.370/2020, para. 171 with reference to C. Konrath, C. Neugebauer and R. Posnik, ‘Das neue Untersuchungsausschussverfahren im Nationalrat’ (2015) 23 *Journal für Rechtspolitik* 3 pp. 216–231, at 218.

Constitutional Court, ‘the subject matter of the investigation must be sufficiently defined, especially for reasons of the rule of law,’⁵⁰ as the scope of the PCIs activities is bound to it, the limits of the obligation to provide information result from it and the Constitutional Court must be able to review the latter. ‘It is therefore incumbent on the minority to provide a sufficiently clearly defined work programme for the committee of enquiry,’⁵¹ from which compliance with the requirements of constitutional law, in particular Article 53(2 and 3) B-VG, results. ‘From these regulations [Article 53(2 and 3) B-VG], a temporal dimension arises in factual terms, to which a subject matter of the investigation and, building on this, the obligation to provide information can relate.’⁵² Consequently, the Constitutional Court develops a factual dimension and, building on this, a temporal dimension of the subject matter of investigation in its case law.

Regarding the factual dimension, there are no limits to the subject matter of PCIs, as long as the requirements of Article 53(2) B-VG are met.⁵³ Thus, the requesting minority may freely choose the subject, whereby the majority may not interfere with it, otherwise this right would not be ‘effective’ in the sense of ‘effective parliamentary control’.⁵⁴ According to the Constitutional Court, the freedom of content even correctly goes so far that the subject matter of the investigation requires ‘neither suspicion nor cause’.⁵⁵ Consequently, the effective parliamentary control is at the forefront of the Constitutional Court's case law.

Regarding the temporal dimension, the process must also be ‘completed’.⁵⁶ The constitutional text does not define the term in more detail. The process is in any case completed ‘if the investigation relates to a clearly delimited area in the past.’⁵⁷ The materials further point out the difference to the rights of control under Article 52 B-VG is that the decision-making and will-forming processes of law enforcement must not be impaired.⁵⁸ This expresses the system of separation of powers that is inherent in the B-VG, which only knows individual elements linking the powers.⁵⁹ The independent areas of responsibility and powers of the executive branch are to be clearly delimited (‘completed’) from those of legislation. Without such a clear separation or division, it would not be possible to assign legal and political responsibility to one body alone.⁶⁰

⁵⁰ VfSlg 20.370/2020, para. 172 (translation of the author).

⁵¹ VfSlg 20.370/2020, para. 174 (translation of the author) and in particular para. 171.

⁵² VfGH 14.9.20218, UA 1/2018, para. 86 (translation of the author).

⁵³ VfSlg 20.370/2020, paras. 167f. See also § 1(5) Sent. 2 VO-UA and in this regard paras. 170 and 182.

⁵⁴ VfSlg 20.370/2020, paras. 166f (translation of the author).

⁵⁵ VfSlg 20.370/2020, para. 167 (translation of the author).

⁵⁶ Cf. C. Konrath, C. Neugebauer and R. Posnik, ‘Das neue Untersuchungsausschussverfahren im Nationalrat’ (2015) 23 *Journal für Rechtspolitik* 3 pp. 216–231, at 218 that reference the criteria established by the Constitutional Court in VfSlg 1454/1932.

⁵⁷ AB 439 BlgNR 25. GP, p. 4 (translation of the author); cf. C. Konrath, C. Neugebauer and R. Posnik, ‘Das neue Untersuchungsausschussverfahren im Nationalrat’ (2015) 23 *Journal für Rechtspolitik* 3 pp. 216–231, at 218 with further references.

⁵⁸ AB 439 BlgNR 25. GP, p. 4.

⁵⁹ AB 439 BlgNR 25. GP, p. 4.

⁶⁰ Cf. C. Konrath, C. Neugebauer and R. Posnik, ‘Das neue Untersuchungsausschussverfahren im Nationalrat’ (2015) 23 *Journal für Rechtspolitik* 3 pp. 216–231, at 218.

4. Obligation to Provide Information

Article 53(3) Sent. 1 B-VG lays down an obligation to provide information of the organ concerned or, in other words, a so-called right to information⁶¹ of the PCI: ‘All executive bodies or officers of the Federation, the provinces, the municipalities and the municipal associations and of the other self-administering bodies shall submit to a committee of inquiry, on demand, their files and documents to the extent to which these relate to the subject matter of the investigation and shall comply with the request of a committee of inquiry to take evidence in connection with the subject matter of the investigation.’

The obligation to provide information pursuant to Article 53(3) B-VG is limited to the subject matter of the investigation as defined in Article 53(2) B-VG (see already Section 3). According to the Constitutional Court, this results in ‘a temporal dimension in terms of the subject matter to which an object of investigation and, based on it, the obligation to provide information can relate.’⁶² Thus, the subject matter of the investigation substantiates the obligation to provide information.⁶³ From the point of view of the organs obliged to provide information, it is therefore particularly important that the subject matter of the investigation is sufficiently defined, as this defines the limits of the obligation to provide information.⁶⁴

The obligation to provide information pursuant to Article 53 (3) B-VG is comprehensive.⁶⁵ In a systematic analysis of the federal constitutional law, the Constitutional Court emphasises that the National Council, and consequently also the PCI, are granted special possibilities in Section E of the second main section of the B-VG ‘to obtain information through the activities of a Committee of Inquiry which is necessary for the exercise of the control and legislative function assigned to the legislative body by the Constitution.’⁶⁶ ‘Without knowledge of all files and documents “to the extent of the subject matter of the investigation” (Article 53(3) B-VG), the fulfilment of the control mandate constitutionally conferred on the committee of enquiry is not possible.’⁶⁷ This is accordingly necessary for and an essential feature of an effective parliamentary control.

The addressees of the obligation to provide information documents are ‘organs’ as defined in Article 53(3) B-VG.⁶⁸ According to the Constitutional Court, these must submit all ‘files and documents available at that time’⁶⁹ when the obligation arises. The term files and documents includes emails, minutes and the like.⁷⁰ Sound and image material such as the ‘Ibiza video’ are

⁶¹ Cf. AB 439 BlgNR 25. GP, p. 6 and VfSlg 20.304/2018, para. 182.

⁶² VfGH 14.9.20218, UA 1/2018, para. 86 (translation of the author).

⁶³ VfSlg 20.370/2020, para. 172.

⁶⁴ VfSlg 20.370/2020, para. 172 and see Section 3.

⁶⁵ VfSlg 19.973/2015, paras. 60, 65. Siehe auch VfSlg 20.425/2020, para. 148; VfGH 10.5.2021, UA 4/2021, para. 131.

⁶⁶ VfSlg 19.973/2015, para. 61 (translation of the author); VfSlg 20.425/2020, para. 143. See also VwGH 8.2.2021, Ra 2021/03/0001 with reference to IA 718/A BlgNR 25. GP, p. 13.

⁶⁷ VfSlg 19.973/2015, para. 62 (translation of the author); VfSlg 20.425/2020, para. 143.

⁶⁸ See Section 3.

⁶⁹ VfGH 14.9.20218, UA 1/2018, para. 92 (translation of the author); see also VfSlg 20.304/2018, para. 171; VfSlg 20.425/2020, para. 145.

⁷⁰ See only VfSlg 19.973/2015.

also covered.⁷¹ The Constitutional Court left open whether messages stored on a mobile phone are included,⁷² however, with recourse to the materials, this is to be affirmed, as the obligation to provide information exists ‘irrespective of the form of presentation and the data carriers.’⁷³

Since the obligation to provide information is comprehensive, the exceptions in Article 53(3 and 4) B-VG that ‘limit’⁷⁴ the right to information of the PCI are to be understood as exhaustive.⁷⁵ Other exceptions that exist apart from this cannot be successfully asserted by organs that are obliged to provide information. For example, in the first case decided on the merits pursuant to Article 138b(1) No.4 B-VG concerning the so-called ‘*Hypo-Untersuchungsausschuss*’, the Constitutional Court stated that constitutional provisions such as the fundamental right to data protection pursuant to Article 1 Federal Act concerning the Protection of Personal Data (DSG) or the right to respect for private and family life pursuant to Article 8 European Convention on Human Rights (or Article 7 Charter of Fundamental Rights) do not preclude the duty to provide information.⁷⁶ It can therefore be derived from the Constitutional Court’s case law that the constitutional obligation to provide information takes precedence over other constitutional (secrecy) obligations and rights as *lex specialis*. This applies equally to provisions of statutory law.⁷⁷

The organs obliged to provide information must not only assert the existence of such an exception (obligation to assert), but also substantiate it (obligation to substantiate). First, the obligation to provide information ‘does not apply to the submission of files and documents whose disclosure would endanger sources as referred to in’ Article 52a(2) B-VG.⁷⁸ Latter refers to the endangerment of ‘national security or the safety of individuals’. Second, Article 53(4) B-VG stipulates that the obligation to produce files and documents does not apply ‘if the lawful decision-making process of the Federal Government or of its individual members or the immediate preparation of the decision-making process is adversely affected.’ These are the two exceptions to the obligation to provide information. A systematic analysis of Article 53 B-VG and the corresponding case law of the Austrian Constitutional Court further shows that the organs obliged to provide information may also dispute the existence of the obligation to provide information.⁷⁹

Regarding the latter, the organ in question must – as with the exceptions – assert that the designated files and documents are not covered by the subject matter of the investigation at

⁷¹ VfSlg 20.425/2020.

⁷² VfGH 10.5.2021, UA 5/2021, paras. 40ff.

⁷³ AB 439 BlgNR 25. GP, p. 5 (translation of the author).

⁷⁴ Cf. VfSlg 20.304/2018, para. 179.

⁷⁵ VfSlg 19.973/2015, paras. 59, 62 and VfSlg 20.425/2020, para. 144.

⁷⁶ VfSlg 19.973/2015, para. 63; VfSlg 20.425/2020, para. 143.

⁷⁷ VfSlg 19.973/2015, para. 63 referencing VfSlg 15.130/1998; VfSlg 20.425/2020, para. 143; VfSlg 20.304/2018, para. 164; VfSlg 20.425/2020, para. 144, 148.

⁷⁸ Article 53(3) Sent. 2 B-VG.

⁷⁹ In this sense VfSlg 19.973/2015, para. 66; cf. VfGH 14.9.20218, UA 1/2018, para. 72 and 10.5.2021, UA 3/2021, para. 68.

all. The body must further substantiate this in sufficient detail, because the ‘mere assertion’⁸⁰ is not enough. Such an assertion could only be successful if it is evident ‘that specifically designated files and/or documents are (not) covered by the subject matter of the investigation.’⁸¹ However, such evidence is probably only given in absolute exceptional cases. For example, a submission concerning files in connection with ongoing court proceedings is to be considered here. Since the subject matter of the investigation does not cover ‘jurisprudence’,⁸² such files and documents are consequently not covered by the obligation to provide information.

Files and documents are covered by the subject matter of the investigation if they ‘have or may have at least an abstract relevance to the subject matter of the investigation.’⁸³ With regard to the ‘Eurofighter’ PCI, the Constitutional Court has further substantiated this line of case law and broken it down to a specific case. ‘In view of the broadly formulated subject matter of the investigation of the Eurofighter PCI, there is also no doubt that all files and documents submitted by the State Financial Procurator's Office concerning the “Task Force Eurofighter” have or can have at least an abstract relevance to the subject matter of the investigation [...]: It cannot be ruled out that these files and documents can serve the fulfilment of the control mandate assigned to the PCI with the subject matter of the investigation.’⁸⁴

Hence, all files and documents that have any relevance fall within the subject matter of the investigation. That this is to be understood very broadly is made clear by the wording ‘(potential) abstract relevance’.⁸⁵ The approach of the Constitutional Court thus underlines (again) the importance this has regarding an effective parliamentary control.⁸⁶

From a procedural point of view, this question must first be assessed by the organ subject to the obligation to provide information and, accordingly, after a request by the PCI or a quarter of its members pursuant to § 27(4) VO-UA, it must justify why it is of the opinion that the designated files and/or documents are not covered by the subject matter of the investigation.⁸⁷ This is a necessary prerequisite for the organ obliged to provide information and the PCI to enter into a dialogue and ‘mutual communication process’⁸⁸ regarding the files and documents subject to submission.

The central point is that it must be possible for the PCI to verify the existence of an exception to the obligation to provide information and to ‘enable any disputes about the argumentation

⁸⁰ Cf. VfSlg 19.973/2015, para. 67 (translation of the author); VfGH 14.9.20218, UA 1/2018, para. 72; VfSlg 20.425/2020, para. 153; VfGH 3.3.2021, UA 1/2021, para. 102.

⁸¹ VfSlg 19.973/2015, para. 67 (translation of the author); VfGH 14.9.20218, UA 1/2018, para. 72.

⁸² See Section 3.

⁸³ VfGH 14.9.20218, UA 1/2018, para. 80 (translation of the author); cf. VfSlg 19.910/2014, para. 57.

⁸⁴ VfSlg 20.304/2018, para. 165 (translation of the author).

⁸⁵ See only VfGH 3.3.2021, UA 1/2021, para. 102.

⁸⁶ Cf. VfSlg 20.370/2020, paras. 166f, 190.

⁸⁷ VfSlg 19.973/2015, para. 66; VfGH 14.9.20218, UA 1/2018, para. 72; VfSlg 20.425/2020, para. 153; VfGH 3.3.2021, UA 1/2021, para. 102; VfGH 5.5.2021, UA 1/2021, para. 54; VfGH 10.5.2021, UA 4/2021, para. 113.

⁸⁸ VfGH 10.5.2021, UA 4/2021, para. 118 (translation of the author).

and to be able to subject it to a possible review by the Constitutional Court.⁸⁹ The Constitutional Court emphasises that the existence of the exception must be ‘substantiated in detail’ in order to be ‘comprehensible’⁹⁰ for the PCI and subsequently for the Constitutional Court. In the proceedings concerning the ‘Ibiza video’, the Constitutional Court further specified this ruling and for the first time spoke of a ‘substantiated obligation to give reasons for the lack of (potential) abstract relevance of the covered (blackened) passages.’⁹¹

In essence, the statement of reasons must enable the PCI or the requesting quarter to determine whether or not the files and documents in question belong to the subject matter of the investigation.⁹² The Constitutional Court found that the obligation to substantiate is not fulfilled if the organ obliged to provide information merely presents the internal search criteria by means of which the employees were instructed to carry out the search.⁹³ This is a consistent and coherent further development of the previous case law, since the internal search criteria do not provide a comprehensible reason for the refusal to submit the file.

Conclusion

The joint analysis of the subject matter of the investigation and the obligation to provide information of PCIs has shown that PCIs are used to tackle and reveal corruption and, hence, enhancing democracy in Austria, in particular since the PCI reform in 2015. All six PCIs – since the reform in 2015 – were set up by the parliamentary minority⁹⁴ and the ‘*Ibiza-Untersuchungsausschuss*’ and the ‘*ÖVP-Korruptions-Untersuchungsausschuss*’ are specific examples that the minority used PCIs to fight corruption. It seems that the concretising case law of the Constitutional Court takes a significant step into this direction. H. Eberhard rightly speaks of a ‘primacy of parliamentary control’⁹⁵ that is established by said case law. Such examples include that there are no limits to the subject matter of PCIs, as long as the requirements of Article 53(2) B-VG are met. Thus, the requesting minority may freely choose the subject, whereby the majority may not interfere with it, otherwise this right would not be ‘effective’ in the sense of ‘effective parliamentary control’.⁹⁶

In addition, an essential feature of an effective parliamentary control is that the PCI has knowledge of all files and documents ‘to the extent of the subject matter of the investigation’ to fulfil its control mandate pursuant to the Article 53(1) B-VG. The Constitutional Court

⁸⁹ VfSlg 20.304/2018, para. 180 (translation of the author) regarding Article 53(4) B-VG. See also VfSlg 20.425/2020, para. 154; VfGH 3.3.2021, UA 1/2021, para. 103; VfGH 5.5.2021, UA 1/2021, para. 55.

⁹⁰ VfSlg 20.304/2018, paras. 182, 180 (translation of the author) regarding Article 53(4) B-VG; VfGH 10.5.2021, UA 4/2021, para. 119.

⁹¹ VfSlg 20.425/2020, para. 153 (translation of the author).

⁹² VfGH 10.5.2021, UA 4/2021, paras. 119, 121.

⁹³ VfGH 10.5.2021, UA 4/2021, para. 126.

⁹⁴ https://www.parlament.gv.at/PAKT/PR/JAHR_2021/PK1390/index.shtml (last access 13.10.2023).

⁹⁵ H. Eberhard, ‘Lebendiges Verfassungsrecht (2015 und 2016)’ (2020) 142 *Juristische Blätter* 5 pp. 277–290, at 280 (translation of the author).

⁹⁶ VfSlg 20.370/2020, paras. 166f (translation of the author).

corroborates in this regard also that all files and documents that have any '(potential) abstract relevance'⁹⁷ fall within the subject matter of the investigation.

All in all, the PCI reform in 2015 has led to a very strong proceduralisation and strengthening of the Constitutional Court in particular,⁹⁸ as political control was juridified.⁹⁹ This also makes it seem as if democracy and the fight against corruption as a whole have been strengthened by the reform of the PCIs. However, further research from a legal but also political scientist perspective is necessary, in particular to what extent the right to set up PCIs is actually used, the (actual) effects and by whom. In any case, the checks and balance system in Austria has gained another weighty instrument with the reformed PCI.

⁹⁷ See only VfGH 3.3.2021, UA 1/2021, para. 102.

⁹⁸ Rightly advocating for this extension of the Constitutional Court's competence already in 2008 T. Öhlinger, 'Die Bedeutung von Untersuchungsausschüssen als besonderes Instrument parlamentarischer Kontrolle' in P. Bußjäger (ed), *Die Zukunft der parlamentarischen Kontrolle*, Braumüller, Vienna 2008, pp. 107–116, at 116.

⁹⁹ In this direction W. Berka, 'Untersuchungsausschüsse und Persönlichkeitsrechte. Zu einer neuen Kompetenz des Verfassungsgerichtshofs' in L.K. Adamovich et al (eds), *Festschrift für Gerhart Holzinger*, Verlag Österreich, Vienna 2017, pp. 155–168, at 156; M. Vašek, 'Vor §§ 56c bis 56k' in H. Eberhard et al (eds), *Kommentar zum Verfassungsgerichtshofgesetz 1953*, facultas, Vienna 2020, pp. 554–555, at mn 3; E. Pürgy, 'Artikel 138b B-VG' in A. Kahl, L. Khakzadeh and S. Schmid (eds), *Bundesverfassungsrecht Kommentar*, Jan Sramek, Vienna 2021, pp. 1436–1448, at mn 5.

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