Federal Constitutional Court Defines the Power of Parliamentary Minorities in the Constitutionally Established, Parliamentary Investigative Committees

By Volker Röben

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A. Introduction

[1] The *Untersuchungsausschuss-Fall* (Parliamentary Committee Case) 2 BvE 2/01, decided by the *Bundesverfassungsgericht* (BVerfG – Federal Constitutional Court) on 8 April 2002, (1) concerns the so-called right of *enquête*, a central function of Parliament under the parliamentary system designed by the German Basic Law. The right of *enquête*, the investigation by Parliament by taking evidence complete with the subpoena powers normally reserved to criminal investigations, has been an integral part of both the Weimar and the Bonn Constitutions. Max Weber, in the era of the Bismarck-Constitution for the German state founded in 1871, made a forceful pitch for the equality of the Parliament and Executive. (2) He argued that members of Parliament needed to be professionals and to have full access to the information that, traditionally, was the source of power of the executive. Instituting committees of investigation with the power to take evidence was the means to do so. In fact, Weber went further, arguing that the right to call for an investigative parliamentary committee needed to be vested in a (qualified) minority of the members of Parliament. There is no equivalent of this specific aspect in the other European parliamentary systems. Article 34 of the Weimar Constitution provided that one fifth of the members of Parliament could ask for the institution of a committee of investigation. The same quorum had the right to move for the hearing of specific evidence by the committee. Article 44 of the Basic Law raises the quorum needed to institute such proceedings to one-quarter of the membership of parliament:

[2] Article 44 of the Basic Law provides:

1. The Bundestag shall have the right, and on the motion of one quarter of its Members the duty, to establish an investigative committee, which shall take the requisite evidence at public hearings. The public may be excluded.

2. The rules of criminal procedure shall apply mutatis mutandis to the taking of evidence. The secrecy of correspondence, posts and telecommunications shall not be affected.

3. Courts and administrative authorities shall be required to provide legal and administrative assistance.

4. The decisions of investigative committees shall not be subject to judicial review. The courts shall be free to evaluate and rule upon the facts that were the subject of the investigation.

[3] Article 44 of the Basic Law is one of the most litigated institutional provisions of the Constitution. Cases that come up under this provision tend to be high profile simply because the parliamentary investigation will concern a scandal of high political visibility. Most often the investigation is triggered by alleged misconduct, including parliamentary and executive scandals. The obvious interest of the parliamentary majority will then be to protect "its Government" against the opposition. The first such case arose under the constitution of the *Land* (Federal State) of Schleswig-Holstein. (3) The Federal Constitutional Court had jurisdiction over the case pursuant to Article 99 of the Basic Law, which provides that a *Land* may use the Federal Constitutional Court as its constitutional court. There the Federal Constitutional Court decided that the parliamentary minority's right to initiate an investigative committee was protected from the efforts of the parliamentary majority to add matters to the committee's mandate in an effort to slow down and possibly divert the investigation as originally defined by the parliamentary minority. The Court also found, in a case concerning the role and nature of an investigative committee pursuant to the Federal Constitution, that the Executive's privilege not to disclose evidence subpoenaed by an investigative committee was strictly limited. (4) The executive privilege, the Court held, extended only to ongoing processes and not the past. In another case involving the Federal Constitution, the Court decided that the fundamental right of privacy had to be balanced with the constitutional interest in an effective parliamentary investigation. (5) The Court suggested certain modes of processing sensitive information, such as a screening the information by the committee chairpersons. Finally, the Court was confronted with the question of the authority of the majority on an investigative committee to reject the minority's request to take specific evidence concerning the purchase of plutonium by the *Bundesnachrichtendienst* (the Federal Intelligence Service) under the administration of Chancellor Kohl. (6) This case did not reach the merits phase; the case was settled after the Court, in declining to issue the requested injunction for lack of urgency, had given strong hints that it thought that the evidence demanded by the committee's minority should be taken.

B. Facts

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[4] The investigation at issue in the Court's most recent consideration of the nature and role of parliamentary investigative committees originally arose out of the scandal that had emerged after the electoral defeat of the Kohl administration. Underlying the scandal was the financing of the political parties, in particular unreported contributions by private donors that rocked first the Christian Democrats (CDU) but which later also hit the Social Democrats (SPD). Upon motion supported by the factions of the Social Democratic Party and the Greens, the 14th German *Bundestag* (Federal Parliament) instituted an investigative committee with a rather broad mandate: the committee, to consist of 15 members, was to examine whether party contributions, provisions or any other financial instruments were given to the government or to the political parties supporting them with the intention of influencing political decision-making. (7) The mandate contained a list of cases that had given rise to the investigation, among them the sale of the former GDR's state-owned chain of petrol stations, and the sale of helicopters and other armaments. The mandate was later amended to permit investigation into any irregular financial activities of any political party. (8) The Parliament decided that the committee should proceed according to the so-called "*IPA-Regeln*," i.e. the draft rules elaborated by a cross-party parliamentary working group.

[5] The committee took extensive evidence, hearing a large number of witnesses. The committee's final report to Parliament runs some 800 pages. (9) However, the investigation was hampered by parallel criminal proceedings based on the same alleged financial misconduct. The case at the Constitutional Court arose out of the requests by the minority members of the committee to hear certain witnesses, among them the then (and current) Chancellor Schroeder, on an alleged deal with the Minol corporation, and to take evidence relating to the real estate property and print publishing interests of the Social Democrats. The majority rebuffed the requests of the committee's minority claiming that the proposed evidence did not address the committee's mandate.

[6] There was thus a reversal of the usual fronts: the investigation was originally started by the then-current majority and was meant to concern an alleged scandal under the previous government. But the then-current opposition relied on the committee's mandate to look into some of the dealings of both the previous parliamentary minority (the SPD during the Kohl Government) and the current parliamentary majority (the SPD as controlling majority of the then, and current, Schroeder Government).

[7] The application instituting the proceedings in this case was brought by the CDU/CSU factions in the *Bundestag* and the Members of Parliament of those factions serving on the committee. The applicants also lodged an application for interim relief praying that the Court order the committee to take the evidence. In the present case, the Court followed an avenue different from the Plutonium case. It proceeded directly to hearing the merits, thus rendering the question of interim relief moot.

C. Admissibility

[8] The Second Senate of the Federal Constitutional Court decided that the applications were mostly admissible with the exception of one that did not meet the applicable statutory limitations period.

[9] The Federal Constitutional Court has jurisdiction over disputes between the organs of the federal government to defend their competencies against alleged infringement by another organ. (10) Pursuant to this jurisdictional heading, federal constitutional organs, and any constituent parts of such organs in which the Basic Law or the organ's internal organizational rules vest rights *in abstracto*, have the capacity to bring a claim. The crucial question then becomes standing, which depends on the nature of the organ, or that part of it, having a right *in concreto*. In this respect, the case was one of first impression, since the Court had ruled on the issue of inter-branch disputes, but not on intra-branch disputes: whether a (minority) *part* (or faction) of parliament generally or as represented on a parliamentary investigative committee had standing to bring an action over the opposition of the parliamentary majority in general or as represented on the committee. This constellation presented a number of bases for resolving the standing issue. First, the right of the *Bundestag* to have the committee carry out its mandate under Article 44 of the Basic Law. In addition, Article 44 of the Basic Law empowered a part of the *Bundestag*, one quarter of its members, to call on Parliament to set up a committee of investigation. Upon such request, Parliament has no discretion whether to set up the committee. Under both theories, the Court decided, the CDU faction in Parliament had the right to bring the action. (11) The Court reconfirmed its understanding that a faction of Parliament could claim the rights of Parliament vis-à-vis the other constitutional organs under a specific doctrine of *Prozeßstandschaft*. This construction of general German procedural law provides that a party to a dispute can invoke the substantive right belonging to another person. In private law litigation, such *Prozeßstandschaft* (capacity to sue or be sued) can be freely agreed upon and thus conferred on apparent non-parties. In a public law setting, it is presupposed that the principle of *Prozeßstandschaft* is provided for by law. The Federal Constitutional Court had previously integrated this construction into the constitutional procedural law in the interest of the protection of the political minority in the Bundestag. (12) The Court found that the parliamentary minority faction could also invoke the minority right provided for, arguably if not specifically, in Article 44. The wording of Article 44 does not, however, directly speak to the issue at hand, *i.e.* can

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the qualified minority also demand that the committee raise certain evidence. In keeping with its general doctrinal approach, the Court was satisfied at this point that the applicants had substantiated their case, and that it was possible that their rights had been violated. (13) The Court found that individual members of Parliament could not invoke the rights under Article 44 of the Basic Law. (14) Thus, the individual members of Parliament serving on the committee have no right to bring the application. The applicants had argued that they had such individual rights, relying on the status of the individual member of Parliament under Article 38 of the Basic Law to argue that an individual parliamentarian also constituted a constitutional organ with standing. The Court's ruling has to be understood as rejecting that very notion, saying that the law of parliamentary investigation is part of *Parliament's* specific status in the Basic Law's specific separation of powers scheme. However, the Court found that the members of Parliament could bring the action as a group, representative of the parliamentary minority, in their capacity as the minority on the committee. (15) This so-called "faction in the committee" has certain rights conferred upon it by the *IPA-Rules*. Thus, the minority faction may invoke the rights of the parliamentary minority provided for by Article 44, since it represents the qualified parliamentary minority in the committee. But, drawing a fine line, the Court held that this group could not invoke the right of Parliament generally.

[10] The Court also found that the applications were to a large extent well-founded. (16)

[11] Developing the substantive standard, the Court pointed out that the *Einsetzungsminderheit* (the qualified parliamentary minority entitled under Article 44.1(1) of the Basic Law to set up a committee) has the right to take evidence in the investigative committee. The Court put that power in its constitutional context: (17) Article 44.1(1) of the Basic Law gave the *Bundestag* the right to establish committees of investigation. Herewith the Parliament had the opportunity to inform itself over matters, knowledge of which it considers necessary to carry out its tasks, without participation of the Government or the Administration. As a rule, the weight of investigation lay within the parliamentary control of the Government and the Administration. While under the old system of constitutional monarchy the right to investigation was still primarily an instrument of the elected Parliament against the monarchical Executive, under the conditions of a parliamentary system of government it had developed decisively into a right of the opposition to pursue an explanation of facts independent of the Government and independent of the parliamentary majority which supports the Government. The Constitution thus not only granted the Bundestag the right to establish a committee of investigation, but made it a requirement if a quarter of the representatives so move.

[12] Then, in addressing the first crucial question on the merits the Court held as follows: The rule contained in Article 44.1(1) of the Basic Law was not exhausted by the duty of the *Bundestag* to establish a committee of investigation upon the request of a quarter of its members. (18) The constitutional tension between the parliamentary majority and the qualified parliamentary minority that exists in establishing a committee thus continues in the process of investigation. The Court concluded that the minority must be able, within the framework of the investigative mandate and the majority principle, to take part in deciding on the taking of evidence. Although the scope of the parliamentary minority's claim to participate cannot extend beyond that of the majority, fundamentally it is to be considered of equal weight. The majority and the qualified minority must both be able adequately to assert their concept of a proper investigation.

[13] The Court arrived at this conclusion by way of functional or teleological interpretation. But the Court then emphasized that this interpretation of the meaning and purpose of Article 44 of the Basic Law does not contradict the will of the historical drafters of the Constitution. (19) The Court noted that the express right of the minority to move for the admission of evidence (*Beweisantragsrecht*) as contained in Article 34.1 of the Weimar Constitution was not included the wording of Article 44.1 of the Basic Law. The Court concluded, however, that in this regard there was no recognizable intent to deviate in substance from the legal situation of the Weimar Constitution. The Court points out that the express guarantee of the minority's right to move for the admission of evidence was excluded as early as Article 57 of the Draft Constitution prepared by the *Herrenchiemsee Konvent* (West Germany's post-war Constitutional Convention) and that the reasons for this cannot be determined from the protocols. Nor did the *Parlamentarische Rat* (Parliamentary Council) make any express statement on this question. In fact, the Organizational Committee of the Parliamentary Council based the increase in the quorum needed to reach a qualified minority to one quarter - as opposed to the one fifth requirement of the Weimar Constitution – on the fact that the radical parties had abused the investigative apparatus in the Weimar period. But, at the same time, there was consensus in the Organizational Committee in favor of protecting the power and role of the minority in the investigative committee.

[14] Next, the Court concluded that Article 44.1(1) of the Basic Law was designed as a provision to protect the minority and thus to balance the parliamentary majority (the rule contained in Article 42.2(2) of the Basic Law) with the right of the qualified minority (contained in Article 44.1(1) of the Basic Law). (20) The right of the qualified minority to adequate consideration of its motions for the admission of evidence thus also exists within the context of a majority *enquête*. In order to enjoy the procedural rights of Article 44.1(1) of the Basic Law the qualified minority needed not have moved for the investigation. (21) Were this to be required on constitutional grounds, the qualified minority would

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have to counter each majority *enquête* with its own minority *enquête*, either parallel to the establishment of the majority *enquête* or later, in case of a conflict over the taking of evidence. This would give rise to competing investigative committees for overlapping or identical fact situations, necessary only for the purpose of protecting rights but not otherwise politically justifiable. As a result, evidence would be taken twice, witnesses would have to testify before two investigative committees, and the committees would compete for access to files and other documents. Such dual-track investigations, considered equally necessary by both the majority and the opposition-minority, would lead to a fragmentation of parliamentary work and to the danger of a mutual obstruction in carrying out investigative mandates.

[15] The qualified minority thus receives its procedural rights from Article 44.1(1) of the Basic Law, the Court held, even if it first expressly voted against the establishment of a committee of investigation. (22) There could be many reasons to oppose an *enquête* that is not desired, but then later to choose to participate in the investigation. The danger could not be denied that, in the hands of the majority and in coordination with the government that the majority supports, the investigative right will be applied exclusively against the opposition. In this case the qualified minority must remain able to object to the establishment of the committee of investigation and, after these efforts have failed, nonetheless to actively participate in shaping its work, in order to secure an investigation that in its view is balanced.

[16] In principle, the minority's motion for admission of evidence must be accepted unless the right to move is not used properly or is abused. The committee, that is, the committee's majority, must accordingly base its denial of a motion by the minority for admission of evidence in a comprehensible manner. The Federal Constitutional Court thus has only limited review of justifiability.

[17] Pursuant to the Court's holding, the minority's motions for admission of evidence is fundamentally to be carried out to the extent the right is not improperly or abusively applied. (23) An order to take evidence provides clarity as to what belongs to the investigative program of the committee; this is also true for the formal denial of a motion for admission of evidence. (24) The majority's denial of the qualified minority's motion for admission of evidence may not rely solely on the majority principle of Article 42.4 of the Basic Law; it requires a statement of reasons. The committee majority may reject the qualified minority's motion for admission of evidence if it comprehensibly establishes that the minority is improperly applying its right. This could be the case if the request to take evidence falls outside the investigative mandate or is illegal, or if it only serves to delay the process or is obviously misused.

[18] Considering the parliamentary autonomy and the special nature of the committee of investigation as an instrument of clarification in the context of a political controversy, the Court, once called upon by the minority, is limited to determining whether the reasons stated by the majority are reasonable and whether the procedural autonomy available to the majority, especially in the interpretation of the investigative mandate, has not been overstepped. (25) Such could not be the case if the reasons for denial do not make clear the proof of the impropriety of the rejected motion for admission of evidence, or if an interpretation of the investigative mandate using legal interpretation methods is no longer comprehensible.

[19] Fundamentally, the committee must carry out orders to take evidence, once made, even if they are from a qualified minority. However, procedural control over the order of the taking of evidence and over the expediency of cessation of the committee's investigation are fundamentally in the hands of the respective committee's majority. The majority decides over the execution of an order to take evidence and ensures that the investigative mandate can be fulfilled. Its procedural control can, however, be limited by the right of the qualified minority to adequate participation. If, in the majority view, not all motions for taking of evidence can be processed, the majority must ensure by means of appropriate procedural rules, as contained e.g. in § 17.3 of the recently adopted *Gesetz über Parlamentarische Untersuchungsausschüsse* (PUAG – Parliamentary Investigative Committees Act) that the minority is adequately considered and heard.

[20] Applying this standard, the Court concluded that certain of the majority's decisions were constitutional while others were not. In particular, it was constitutional for the Committee not to hear from the Federal Chancellor. (26) In this case, the minority motion was not reasoned sufficiently. However, the Court concluded that the general dismissal of the minority's applications concerning the financing of the Social Democrats was unconstitutional since the applications fell within the committee's mandate. (27)

D. Conclusion

[21] The judgement seeks to strike a balance. While strengthening the opposition's powers in parliamentary investigations, the decision ensures that the majority's parliamentary investigation will not be derailed.

[22] It may also be noted that the Court took no longer than six months from the date of the filing of the application to

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hand down the decision. This may reflect the view that, in institutional matters, the Court will have to act quickly for the Constitution to have the proper effect on the actions of the political actors.

[23] The decision will also inform the interpretation of the above-mentioned Statute on parliamentary investigations passed by the *Bundestag* in 2001, which will be applicable to further *enquêtes*. The statute provides that the committee shall take evidence as requested by a qualified minority in the Committee unless the request is ostensibly not covered by the Committee's mandate or otherwise unconstitutional. (28) The statute also provides for first instance jurisdiction of the *Bundesgerichtshof* (Federal Court of Justice), which the minority may invoke if its request is denied. (29)

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(1) BVerfG, 2 BvE 2/01 of 8 April 2002, http://www.bverfg.de.

(2) Max Weber, PARLAMENT UND REGIERUNG IM NEUGEORDNETEN DEUTSCHLAND (1918).

(3) BVerfGE 49, 70.

(4) BVerfGE 67, 100.

(5) BVerfGE 69, 34.

(6) BVerfGE 96, 223.

(7) BTDrucks 14/2139, BT-Plenarprot 14/76, p. 6.

(8) BTDrucks 14/2686, BT-Plenarprot 14/88, p. 8201.

(9) Report of 13 June 2002, includes dissenting report by opposition committee members.

(10) Article 93(1) cl. 1, GG.

(11) BVerfG, 2 BvE 2/01 of 8 April 2002, Part B.I., II, http://www.bverfg.de.

(12) BVerfGE 20, 56, 104.

(13) BVerfG, 2 BvE 2/01 of 8 April 2002, Para. 97, http://www.bverfg.de.

(14) BVerfG, 2 BvE 2/01 of 8 April 2002, Para. 99, http://www.bverfg.de.

(15) BVerfG, 2 BvE 2/01 of 8 April 2002, Para. 98, http://www.bverfg.de.

(16) BVerfG, 2 BvE 2/01 of 8 April 2002, Part C, http://www.bverfg.de.

(17) BVerfG, 2 BvE 2/01 of 8 April 2002, Paras. 105-106, http://www.bverfg.de.

(18) BVerfG, 2 BvE 2/01 of 8 April 2002, Para. 107, http://www.bverfg.de.

(19) BVerfG, 2 BvE 2/01 of 8 April 2002, Para. 108, http://www.bverfg.de.

(20) BVerfG, 2 BvE 2/01 of 8 April 2002, Para. 109, http://www.bverfg.de.

(21) BVerfG, 2 BvE 2/01 of 8 April 2002, Para. 109, http://www.bverfg.de.

(22) BVerfG, 2 BvE 2/01 of 8 April 2002, Para. 110, http://www.bverfg.de.

(23) BVerfG, 2 BvE 2/01 of 8 April 2002, Para. 111, http://www.bverfg.de.

(24) BVerfG, 2 BvE 2/01 of 8 April 2002, Para. 113, http://www.bverfg.de.

(25) BVerfG, 2 BvE 2/01 of 8 April 2002, Para. 112, http://www.bverfg.de.

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(26) BVerfG, 2 BvE 2/01 of 8 April 2002, Para. 116-118, http://www.bverfg.de.

(27) BVerfG, 2 BvE 2/01 of 8 April 2002, Para. 130-145, http://www.bverfg.de.

(28) 19 June 2001, BGBl I p. 1142.

(29) § 36.

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