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INDEPENDENT INVESTIGATION OF VIOLATIONS OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS ATTRIBUTABLE TO POLICE ACTIVITIES

Abstract

In the course of last two decades some European countries have created independent police complaints bodies with investigative powers, which were originally established in Canada and Australia. The creation of these bodies is in line with the independent investigation standards which have been determined by the European Court of Human Rights in its extensive body of case law as well as by the Commissioner for Human Rights in his Opinion concerning Independent and Effective Determination of Complaints against the Police.

This article argues that the reluctance of many European states to comply with the specific independent investigation standards is a consequence of inconsistent and insufficiently clear case law of the European Court of Human Rights as well as of the incomplete wording of the Commissioner's Opinion when it comes to the investigation of human rights violations which are allegedly attributable to police activities.

Key words: *independent investigation, independent police complaints bodies, European Court of Human Rights, Commissioner for Human Rights.*

1. Introduction

There is a clear tendency of so called „proceduralisation” of substantive rights which are guaranteed by a number of articles of the European Convention on Human Rights (ECHR). Namely, the European Court of Human Rights (ECtHR) distinguishes between the substantive and procedural aspects of various ECHR articles, such as Article 2, Article 3,

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Article 4, Article 5, Article 8 and Article 10.³ However, the procedural limbs are detachable and autonomous from the articles' substantive obligations. Thus, in certain circumstances, the ECtHR may have temporal jurisdiction over a party's procedural obligation to investigate, but not over a party's substantive obligations.⁴ The procedural limbs concern positive state obligations which include but are not limited to investigation of anticipated violations of the ECtHR as well as to provision of remedies for the alleged violations.⁵

The ECtHR has developed the procedural obligations through its specific interpretation of the ECHR, which is based on the states' general duty under Article 1 of the ECHR "to secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention."⁶ A common justification for this judicial creativity has been to ensure that the relevant rights guaranteed under the ECHR are "practical and effective" in their exercise and not "theoretical or illusory".⁷

However, the mere introductions of the procedural rights cannot provide sufficient safeguards of effective human rights protections unless guarantees of a fair procedure are clearly and consistently developed and applied by the ECtHR case law. These guarantees include but are not limited to effectiveness, independence, promptness and victim involvement.⁸

In the following sections, analysis will be focused on the examination of the aforementioned requirement of independence applied in one specific area where its application should sanction the widespread practice of police investigating police without any external civilian oversight provided. Thus, although the independence principle as one of safeguards of fair procedures is applicable in much broader context involving various types of state agents and different procedures, authors will analyze only ECtHR case law and related international instruments which are relevant for the independent investigation in this particular field.

More specifically, after the determination of the scope of application of the standards of independence in the ECtHR case law and in the Opinion

³ E. Brems, „Procedural Protection: An Examination of Procedural Safeguards Read Into Substantive Convention Rights” in: *Shaping Rights in the ECHR: The Role of the European Court of Human Rights* (eds. E. Brems, J. Gerards), Cambridge University Press, New York 2014, 141-158.

⁴ J. Coch, „The Difficulty of Temporal Jurisdiction in *Janowiec and Others v. Russia*“, *Boston College International and Comparative Law Review*, vol. 38, 3/2015, 48; *Silih v. Slovenia*, App. No. 71463/01, Judgment of 9 April 2009 (ECtHR), p. 159 (2009).

⁵ E. Brems, 159.

⁶ *Ibid.*, 142.

⁷ *Ilhan v Turkey*, App. No. 22277/93, Judgment of 9 November 2004 (ECtHR), para. 91, taken from: A. Mowbray, *The Development of Positive Obligations Under the European Convention on Human Rights by the European Court of Human Rights*, Hart Publishing, Oxford 2004, 29.

⁸ E. Brems, 156-160.

of the Commissioner for Human Rights concerning Independent and Effective Determination of Complaints against the Police (Commissioner's Opinion), the authors will provide a short overview of the European countries which created independent police complaints bodies (IPCBs) with investigative powers. Finally, the authors will try to identify the reasons for the reluctance of many European countries to comply with the existing independent investigation standards pertaining to violations of the ECHR which are attributable to police activities.

2. Scope of the application of the independent investigation standards

According to the case law of the ECtHR, the requirement to conduct an effective investigation means, *inter alia*, that it is necessary for the investigators to be independent from those who were allegedly implicated in the violations of human rights.⁹

The procedural obligation to undertake effective investigation under Article 2 was rapidly developed in the mid 1990s.¹⁰ This period has been referred to as the final era of the ECtHR development of states positive obligations, as the process of development of some other positive obligations already started in 1970s.¹¹ Soon after, the analogous investigation obligations had been developed under Articles 3 and Article 5 through the ECtHR jurisprudence.¹² However, some authors warn that the ECtHR has not been entirely consistent in applying the obligation to conduct independent investigations under Article 3 and that more explicit standards should be tailored as to enable a robust application of the effective investigation obligations.¹³

The obligation to conduct independent investigation thus arises in the context of alleged violations of various substantive articles of the

⁹ *Gulec v. Turkey*, App. No. 54/1997, Judgment of 27 July 1998 (ECtHR), para. 81-82; *Al-Skeini and Others v. the United Kingdom*, App. No. 55721/07, Judgment of 7 July 2011 (ECtHR), para. 167; *Shanaghan v. the United Kingdom*, App. No. 37715/97, Judgment of 4 May 2011 (ECtHR), para. 89.

¹⁰ This obligation was recognized for the first time by the ECtHR in its case *McCann v. United Kingdom*. See *McCann v. United Kingdom*, App.No. 18984/91, Judgment of 27 September 1995 (ECtHR). para. 161, taken from J. Coch, 48; *Šilih v. Slovenia*, App. No. 71463/01, Judgment of 9 April 2009 (ECtHR).

¹¹ *Luedicke, Belkacem and Koc v. Germany*, App. No. 6210/73, 6877/75 and 7132/75, Judgment of 10 March 1980, (ECtHR), taken from A. Mowbray, 228.

¹² For Article 5 related obligations see: *Akdeniz v. Turkey*, App. No. 25165/94, Judgment of 31 May 2001 (ECtHR) and *Kurt v. Turkey*, App. No. 24276/94, Judgment of 25 May 1998 (ECtHR), while for Article 3 see *Assenov v. Bulgaria*, App. No.90/1997/874/1086, Judgment of 28 October 1998.

¹³ See for instance the case: *Ilhan v. Turkey*, App.No. 22277/93, Judgment of 27 June 2000 (ECtHR), taken from A. Mowbray, 227-228.

ECHR such as Article 2, Article 3 and Article 5. The requirement of independent investigation will be satisfied in cases where do not exist any institutional or personal connection between the decision-makers and the relevant state agents who are implicated in the alleged ECHR violations. Both members of the police and armed forces come under the notion of state agents.¹⁴

According to the ECtHR case law, which is also reflected in the Commissioner's Opinion, independent investigation requires not only a lack of hierarchical or institutional connection but also a practical independence between the investigators and persons who are implicated in the events.¹⁵ The ECtHR has developed an extensive body of case law elaborating when the violation of obligation to conduct independent investigation is attributable to existence of institutional or hierarchical connection.¹⁶

On the contrary, the Commissioner did not sufficiently clarify the notion of institutional or hierarchical connection in its opinion apart from making a mere reference to the list of some ECtHR cases which are relevant in that regard. It only specified that in accordance with the ECHR independence principle, a member state through its primary legislation should create fully-fledged independent bodies with general responsibilities for oversight of the police complaints system and express responsibility for investigating Article 2 and Article 3 complaints in accordance with the ECHR independence principle.¹⁷

Commissioner further states in its Opinion that in accordance to the *Khan v. UK* judgment, the IPCBs should be appointed by and answerable to a legislative assembly or a committee of elected representatives in order to satisfy ECHR principle of independent police complaints investigation.¹⁸ Commissioner's Opinion thus excludes any role of other two branches of government from the process of its creation, although it does not provide a sound argumentation for its stance. Namely, in coming up with a justification

¹⁴ H. van der Wilt, „Procedural Obligations under the European Convention on Human Rights: Useful Guidelines for the Assessment of ‘Unwillingness’ and ‘Inability’ in the Context of the Complementarity Principle“, *International Criminal Law Review* 9/2009, 52.

¹⁵ *Shanaghan v. the United Kingdom*, App. No. 37715/97, judgment of 4 May 2001, (ECtHR), para 89; *Ramsahai and Others v. the Netherlands*, App. No. 52391/99, Judgment of 15 May 2007 (ECtHR), para 325; *Bati v Turkey*, App.Nos. 33097/96 and 57834/00, Judgment of 3 June 2004 (ECtHR).

¹⁶ *Kelly and Others v. the United Kingdom*, App.No.30054/96 para 95, Judgment of 4 May 2001, (ECtHR); *Ramsahai and Others v. the Netherlands*, App.No. 52391/99, Judgment of 15 May 2007 (ECtHR), para 325.

¹⁷ Commissioner for Human Rights, Opinion of the Commissioner for Human Rights concerning Independent and Effective Determination of Complaints against the Police, CommDH(2009)4, 12 March 2009, 8, para. 34, <https://wcd.coe.int/ViewDoc.jsp?p=&id=1417857&direct=true>, last visited 29 November 2016.

¹⁸ *Ibid.*, 8, para. 36.

it mentioned only one ECtHR case without even literally invoking the concrete text of that judgment. In doing so, it did not contribute to the better understanding of these notions.

While the determination of the hierarchical or institutional connection should not constitute a complex task in practice, the same does not apply to the determination whether or not the standard of practical independence was fulfilled. In the absence of the clear hierarchical or institutional connection, it might be quite difficult to determine in some cases whether certain investigations can be qualified as reaching the practical independence threshold as this standard is vague and implies various forms of personal connections. Practical independence is **not** easily measurable concept and thus it is not always clear to determine a degree of practical dependence which would constitute a violation of the requirement of independent investigation.

However, neither ECtHR in its judgments, nor the Commissioner in its Opinion made any additional effort to clearly explain when certain conducted investigations do not fulfill the requirement of practical independence. Some indicators were provided by the ECtHR in the case of *Ergi v Turkey*. The ECtHR found in this case that the threshold of independent investigation was not met due to heavy reliance of the public prosecutor on the information provided by the gendarmes implicated in the incident in the course of investigation conducted by the public prosecutor.¹⁹

Mowbray is more explicit in determining the meaning of the requirement of the practical independence. He explains that in order satisfy the requirement of practical independence, investigators must exercise a critical professional and independent assessment of evidence obtained from all sources and conduct further relevant inquiries, without automatically accepting the veracity and accuracy of reports or statements by state agents.²⁰ The incorporation of this clarification of the concept of practical independence in the Commissioner's opinion as well as in the ECtHR case law would be welcome as it would remove any doubts concerning its exact content.

While a risk of conducting investigation which does not meet the standard of "practical investigation" is almost unavoidable as it depends on the human factor, it seems that violations of the ECHR attributable to investigations not meeting the independent standards due to existence of institutional or hierarchical connections could be easily avoided through the introduction of an adequate regulatory and institutional framework. However, the quickly evolving line of jurisprudence of the ECtHR sanctioning the police misconduct and the related absence of independent

¹⁹ See para. 33-34, *Ergi v Turkey*, App.No. 40/1993/435/514, Judgment of 28 July 1998 (ECtHR).

²⁰ A. Mowbray, 31-33.

investigations did not sufficiently triggered the regulatory and institutional reforms within the state parties of the Council of Europe (CoE).

3. Low impact of the Commissioner's Opinion and its main causes

In response to the immanent risk of further violations of the procedural obligations of the CoE member states to effectively investigate certain alleged violations of human rights, the Commissioner for Human Rights launched a police complaints initiative in 2008. Apart from the Commissioner for Human Rights and ECtHR, the Committee for the Prevention of Torture also represents relevant institution of the CoE in this regard.²¹ The Committee for the Prevention of Torture has found it necessary to make recommendations on combating police impunity for ill-treatment and misconduct following visits to various member states. Similarly to the Opinion of the Commissioner for Human Rights, the Committee for the Prevention of Torture recommends that the creation of a fully-fledged independent investigating body would be the most welcome development.²² In some of its judgments, the ECtHR acknowledges the recommendations of the Committee for the Prevention of Torture pointing to a state's need to create a fully independent body in charge of investigating the ECHR violations attributable to police activity.²³

Emerging of international human rights law in this regard was not limited only to Europe. Beyond the Europe, the Inter-American Court of Human Rights also emerged as a significant driver of development of the standard of independent investigation in the context of the police complaints reform. In the course of last decade, significant roles were played also by, the United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions, the Amnesty International and the Human Rights Watch, which have been especially vocal on the subject of police impunity for misconduct and the need to investigate complaints.²⁴

Some authors argue that recent case-law of supranational courts and acts of the aforementioned bodies strongly influenced the creation

²¹ G. Smith, „Every Complaint Matters: Human Rights Commissioner's Opinion concerning independent and effective determination of complaints against the police“, *International Journal of Law, Crime and Justice*, Vol. 38, 2/ 2010, 60-61.

²² J. Harrison, M. Cunneen, *An Independent Police Complaints Commission*, London 2000, 1.

²³ See the judgment in *Kelly and Others v. the United Kingdom*, App.No. 30054/96 para 95, Judgment of 4 May 2001, (ECtHR), para. 114, taken from: A. Mowbray, 32.

²⁴ However, an initial platform for further initiatives against the police investigating police approach have been laid down, *inter alia*, in the Code of Conduct for Law Enforcement Officials (United Nations 1979) and subsequent European Code of Police Ethics (CoE 2001). Both of these acts include provision for effective and impartial complaints procedures (Art. 8 in the UN Code and para. 61 in the European Code) and recommend that states incorporate the principles laid down in their national legislation. G. Smith (2010), 61-63.

of the independent police complaints bodies (IPCBs) with powers to investigate the police within a number of countries around the globe.²⁵ However, the achievements look quite different when approached from the European standpoint. Namely, regardless of the extensive body of ECtHR jurisprudence and Commissioner's Opinion which calls for the creation of a fully-fledged independent investigative body, many European countries still did not create independent police complaints bodies (IPCBs) with powers to investigate the police.²⁶

Furthermore, it appears that the Commissioner's Opinion was not enough influential as even the countries which created IPCBs did that before the opinion was adopted (Belgium in 1993, the United Kingdom (for England and Wales in 2004, while for Northern Ireland in 2000), Ireland in 2007, Hungary in 2008, and Cyprus in 2007).²⁷ In addition, there are police complaints bodies operating in France (National Commission of Deontology of Security) and Hungary (Hungarian Independent Police Complaints Board). However, they are not fully in line with the model recommended by the ECtHR principles contained in the Commissioner's Opinion. They are not provided with express powers to investigate complaints, although they operate in a similar capacity. Moreover, the French National Commission of Deontology of Security members are designated by the three branches of the government, instead by only one as it has been recommended in the Commissioner's Opinion.²⁸

Actually, only Denmark and Scotland established the IPCBs after the Commissioner's Opinion was adopted. This clearly proves the low influence which the Commissioner's Opinion had on development of the institutional prerequisites for the achieving the independence of the police complaints investigations.

The causes of the states' poor response to the Commissioner's Opinion are twofold. While one group of reasons is attributable to the wording and structure of the Opinion, the other is attributable to the lack of consistency and clarity of the ECtHR case law on this matter.

Firstly, the Commissioner's Opinion aimed to distinguish the core duties that have to be fulfilled in each case as they do constitute the minimum requirement in line with ECtHR case law, from the institutional arrangements

²⁵ D. H. Bayley, *Changing the guard: Developing democratic police abroad*, Oxford University Press, 2006; G. Smith, *International Police Complaints Reform*, 2015, <http://www.cpt.coe.int/en/conferences/cpt25-Panell-Smith.pdf>, last visited 29 November 2016; Senior Police Adviser to the OSCE in Europe, *International Police Standards: Guidebook on Democratic Policing*. Geneva Centre for the Democratic Control of Armed Forces, 2009, <http://www.dcaf.ch/Publications/International-Standard-Guidebook-on-Democratic-Policing>, last visited 29 November 2016.

²⁶ G. Smith (2010), 65.

²⁷ *Ibid.*, 62.

²⁸ D. Wisler, *Police Governance: European Union Best Practices*, DCAF, Coginta, 2011, 30.

which are not mandatory, but only advisable.²⁹ In doing so, it seems that Commissioner did not make clear distinction as it did not address all relevant issues.

While it is clear from the Commissioner's Opinion that five ECtHR principles for the effective investigation of complaints against the police are applicable to the alleged violation of Article 2 or Article 3 of the ECHR, it remained silent whether in the case of alleged violations of substantive rights protected under some other articles (such as Article 5 or Article 8), there is also a strict duty to conduct the effective investigation in line with these five principles. Although the ECtHR case law explicitly specifies that the procedural dimension is not limited only to case of violations of Article 2 and Article 3 of the ECHR, the Commissioner's Opinion remained silent on this point.

Furthermore, the Commissioner's Opinion specifies five ECtHR principles for the effective investigation which are applicable in the context of complaints against the police. However, it does not substantially elaborate on their meaning and content, in particular when it comes to the independence principle. It neither explicitly clarifies the meaning of practical independence, nor it elaborates sufficiently on requirement of the lack of the existence of institutional or hierarchical connection.

The mere referral to the ECtHR judgment in *Khan v. UK* was aimed to provide justification for the creation of the independent body which shall be appointed by and answerable to a legislative assembly or a committee of elected representatives seems insufficient.³⁰ However, in order to provide a sound justification for such structure of the independent investigative body, the Commissioner's Opinion should have invoked more judgments which were relevant in this regard. Also, it had to make more specific reliance on the text of the concerned judgment as to provide a stronger legitimacy for its recommendations.

In addition, the ECtHR jurisprudence is not fully coherent on the issue of independent investigations what gives rise to legal insecurity and apparently undermines states' efforts to fully comply with the case law of the ECtHR as well as with the recommendations from the Commissioner's Opinion. Much of the confusion has been triggered by the approach taken by the ECtHR in some judgments, which may be interpreted as undermining the importance of the requirement of the existence of independent investigative bodies.

Namely, the ECtHR in certain judgments applies the test, according to which the initial deficiencies of the non-independent investigation are

²⁹ Commissioner for Human Rights, 8, para. 32.

³⁰ *Ibid.*, 8, para. 36.

capable to be remedied by the subsequent criminal proceedings.³¹ By allowing this subsequent correction of initially deficient investigation, the ECtHR shows disrespect towards the independent police complaints investigations standards when adjudicates on the violation of states' procedural obligations.

Furthermore, the ECtHR occasional avoidance to strictly apply general criteria and check lists when assessing the effectiveness of the investigation in question is also detrimental for the creation of the independent investigative bodies. Namely, the ECtHR view that the minimum threshold of the investigation's effectiveness (including thus its independency) should be tailored according to the circumstances of each particular case, leaves a wide margin of appreciation to the states and certainly demotivates them from the reform of their institutional frameworks.³² More consistent approach of the ECtHR will surely lead to more uniform application of independence principle when it comes to the reform of national bodies in charge of police complaints investigation.

4. Conclusion

The trend of "proceduralization" of substantive articles of ECHR partly coincides with the trend of the institutional reform aimed at creation of independent police complaints bodies with investigative powers in Europe. However, while the given "proceduralization" approach have produced widespread, substantial and far-reaching effects, the targeted institutional reform focused on the application of the ECtHR principle of independent police complaints investigation was thus far only of limited success.

The low impact of the Commissioner's Opinion on reform of institutional frameworks of European states can be explained by various deficiencies which were identified in the text of the Commissioner's Opinion as well as in the ECtHR case law pertaining to investigation of violations which are attributable to police activities. Neither the ECtHR case law nor the Commissioner's Opinion explained the notion of practical independence which constitutes the necessary prerequisite for reaching compliance with the independent investigation principle. The incorporation of this clarification would be welcome as it would remove any doubts concerning the content of not easily measurable concept of practical independence.

When it comes to sanctioning the existence of the hierarchical or institutional connection, the ECtHR developed extensive body of case

³¹ *Dekić and Others v. Serbia*, App. No. 32277/07, Judgment of 29 April 2014 (ECtHR), para. 38.

³² *Velikova v. Bulgaria*, App.No. 41488/98, Judgment of 18 May 2000 (ECtHR), para. 80.

law. However it did not take explicit and coherent approach regarding these components of the independent police complaints investigation. By avoiding to provide a specific and uniform answer about the structure of the investigative mechanism which is necessary for disabling the existence of hierarchical or institutional connection, the ECtHR contributed to development of a great variety of institutional investigative frameworks in Europe, which were only occasionally sanctioned by the ECtHR. The legal insecurity in this area is apparently a consequence of the lack of transparent and consistent ECtHR standards of effective police complaints investigation. The Commissioner, on its part, so far missed the opportunity to at least make more transparent those standards which are uniformly applied by the ECtHR in the given matter. On the other hand, it is up to the ECtHR to try to develop more explicit and consistent standards on independent police complaints investigation and by doing so to contribute to increase of legal certainty in this area.

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**NEZAVISNA ISTRAGA ZBOG POVREDA PRAVA
GARANTOVANIH EVROPSKOM KONVENCIJOM O
LJUDSKIM PRAVIMA KOJE SE PRIPISUJU DELOVANJU
POLICIJE**

Rezime

U toku poslednje dve decenije pojedine evropske države su osnovala nezavisna istražna tela za podnošenje pritužbi na rad policijskih službenika, koji su izvorno bila uspostavljena u Kanadi i Australiji. Ova tela formirana su u skladu sa standardima nezavisne istrage koje je razvio Evropski sud za ljudska prava kroz svoju bogatu praksu, kao i Komesar

za ljudska prava u svom mišljenju koje se odnosi na nezavisno i efikasno postupanje po pritužbama protiv policijskih službenika.

U radu se iznosi teza da je slaba primena pomenutih standarda posledica nedovoljno jasne i neusklađene prakse Evropskog suda za ljudska prava, kao i nepotpunih formulacija sadržanih u Mišljenju Komesara za ljudska prava u pogledu koncepta istrage zbog povreda ljudskih prava koje su navodno počinili policijski službenici.

Ključne reči: nezavisna istraga, nezavisna tela za podnošenje pritužbi protiv policijskih službenika, Evropski sud za ljudska prava, Komesar za ljudska prava.