

INDEPENDENT POLICE COMPLAINT MECHANISM

A. Police Violence - Stocktaking

In cases of violence committed by police officers against citizens, the police itself usually investigates crimes allegedly committed by their colleagues. Often camaraderie reigns and police officers protect each other. As a result, most of the cases are dismissed. In addition, in the very few cases that go to court, judges hold police officers as highly credible and they often end with an acquittal. If a complaint against a police officer is filed, the response is often that the police files a counter-complaint against the victim of police violence for resistance or other offences.

Moreover, the broad majority of cases remain unreported. The estimated number of unreported cases is as high as five times the reported cases.¹

To build trust in the rule of law, to end impunity and to prosecute cases of police violence properly, experts have suggested that the establishment of an independent mechanism, which is not part of the police but well equipped with sufficient powers and resources, is an adequate response.

B. The Legal Background and the Obligations of EU Member States

1. The Jurisprudence of the European Court for Human Rights

Article 2, 3 and 13 of the Europe Convention for Human Rights:

The European Court of Human Rights has developed five principles for the effective investigation of complaints against the police that engage Article 2 or 3 of the European Convention on Human Rights:

¹ For Germany, see Singelstein 2019 at: https://kviapol.rub.de/images/pdf/KviAPol_Zwischenbericht.pdf.

- Independence: there should not be institutional or hierarchical connections between the investigators and the officer complained against and there should be practical independence;²
- Adequacy: the investigation should be capable of gathering evidence to determine whether police behaviour complained of was unlawful and to identify and punish those responsible;³
- Promptness: the investigation should be conducted promptly and in an expeditious manner in order to maintain confidence in the rule of law;⁴
- Public scrutiny: procedures and decision-making should be open and transparent in order to ensure accountability;⁵ and
- Victim involvement: the complainant should be involved in the complaints process in order to safeguard his or her legitimate interests.⁶

2. UN Human Rights Committee, International Covenant on Civil and Political Rights (Article 2, 3 and 7); General Comment 31⁷

The ICCPR states: "[E]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political, or other opinion, national or social origin, property, birth or other status." (Article 2.1)

Article 6 of the ICCPR states: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

Article 7 states, "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment...."

Article 10 requires that all persons "deprived of their liberty should be treated with humanity and with respect for the inherent dignity of the human person."

²See, for example, *Ramsahai v The Netherlands* (Application no. 52391/99), Judgment 15 May 2007; *Bati v Turkey* (Application nos. 33097/96 and 57834/00), Judgment 3 June 2004.

³See, for example, *Nachova v Bulgaria* (Application nos. 43577/98 and 43579/98), Judgment 6 July 2005; *Aksoy v Turkey* (100/1995/606/694), Judgment 18 December 1996.

⁴See, for example, *Isayeva v Russia* (Application nos. 5794/00, 57948/00 and 57949/00), Judgment 24 February 2005; *Aydin v Turkey* (57/1996/676/866), Judgment 25 September 1997.

⁵See, for example, *Ognyanova v Bulgaria* (Application no. 46317/99), Judgment 23 February 2006; *Chitayev v Russia* (Application no. 59334/00), Judgment 18 January 2007.

⁶See, for example, *McKerr v UK* (Application no. 28883/95), Judgment 4 May 2001.

⁷<https://www.refworld.org/docid/478b26ae2.html>, para. 15.

Article 26 asserts, "all persons are equal before the law and are entitled without any discrimination to the equal protection of the law."

The UN Human Rights Committee has stated that member states are obliged to "take all necessary measures to prevent any excessive use of force by the police; that rules and regulations governing the use of weapons by the police and security forces be in full conformity with the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials; that any violations of these rules be systematically investigated in order to bring those found to have committed such acts before the courts; and that those found guilty be punished and the victims be compensated".⁸

3. UN Convention against Torture

Article 4 of the CAT provides that States Parties must ensure that all forms of torture are punishable offences under their criminal law. This also applies to cases where the alleged offender is a subject of the State.⁹ Article 5 § 1 of the CAT requires that each State Party take any necessary measures to

establish jurisdiction in its national laws regarding the offence of torture, as referred to in Article 4. The phrase "take such measures as may be necessary to establish its jurisdiction in cases where the alleged offender is present" includes legislative measures, but it is not limited to such measures. It includes executive and judicial steps to arrest, investigate, prosecute, or extradite.¹⁰

States Parties are obliged to take immediate action when they have reasonable grounds to believe that torture and other acts of cruel, inhuman, and degrading treatment have been committed within their jurisdiction.

The investigation be prompt and impartial. The decision on whether to conduct an investigation is not discretionary. In order to ensure impartiality, it is necessary to avoid entrusting the investigation to persons who have close personal or professional links with those suspected of having committed such acts, or who may have an interest in protecting those suspects or the particular entity to which they belong.¹¹

Art. 13 CAT obliges state parties to ensure that any individual who claims to have been subjected to torture or treated or punished in a cruel, inhuman, or degrading way has a right

⁸Concluding observations of the Human Rights Committee: United States of America. 03/10/95, A/50/40, para. 297.

⁹ Herman Burgers & Hans Danelius, "The United Nations Convention against Torture—A Handbook on the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment", Martinus Nijhoff Publishers, 1988.

¹⁰ Herman Burgers & Hans Danelius, *ibid.*, p. 131).

¹¹ Herman Burgers & Hans Danelius, *ibid.*, p. 145.

to lodge a complaint. All persons have a right to lodge a complaint without any hindrance or discrimination. The individual's right under Article 13 is two-fold : it consists of the right to lodge a complaint to the competent authorities, and of the right to have the complaint investigated by the authorities promptly and impartially.

4. Opinion of the Commissioner for Human Rights Concerning Independent and Effective Determination of Complaints against the Police.¹²

Thomas Hammarberg has stated in 2009: An independent and effective complaints system is essential for securing and maintaining public trust and confidence in the police, and will serve as a fundamental protection against ill-treatment and misconduct. An independent police complaints body (IPCB) should form a pivotal part of such a system.”¹³ His Opinion explains the ways that should be taken to avoid violations of Art. 2 and 3 ECHR, that can only be avoided through independent complaints mechanisms.

5. Human Rights Comment by European Commissioner for Human Rights¹⁴

In 2014, then residing European Commissioner for Human Rights Nils Muižnieks renewed this approach and highlighted existing European independent complaint mechanisms that existed in Ireland, Denmark and the United Kingdom.

C. Legal Basis for an EU Legislative Act: Directive on Minimum Standards of a Complaints Body for Police Violence

For every legislative action of the EU, a basis of competence in primary law is required.

The approximation of legal norms within the framework of judicial cooperation in criminal matters is governed by Art. 82 (1) of the Treaty on the Functioning of the European Union (TFEU) in accordance with Art. 82 (2) and Art. 83 TFEU. Art. 82 (2) TFEU constitutes a legal basis for Directives adopted in the ordinary legislative procedure pursuant to Art. 289 (1)¹⁵, Art. 294 TFEU.

¹²<https://rm.coe.int/opinion-of-the-commissioner-for-human-rights-thomas-hammarberg-concern/16806daa54>.

¹³Opinion, p. 7.

¹⁴<https://www.coe.int/en/web/commissioner/-/police-abuse-a-serious-threat-to-the-rule-of-l-1>

¹⁵Art. 289 (1): “The ordinary legislative procedure shall consist in the joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission. This procedure is defined in Article 294.”

Art.294 regulates the procedure of the legislative act.

The establishment of minimum rules must be "necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters with a cross-border dimension", Article 82 (2) TFEU. Directives lay down minimum provisions, which, *inter alia*, shall concern victims of crimes, Article 82 (2) (c).

As far as can be seen, neither the case law of the European Court of Justice (ECJ) nor that of the European Court of First Instance (CFI) has so far been available to interpret the requirements of the legal basis of Art. 82 (2) (c) TFEU.

The requirements of Art. 82 (2) (c) TFEU are as follows:

1. Necessity

Any legislative acts in criminal matters can be taken "to the extent necessary", Article 82 (2).

The EU has already made use of the legal basis of Art. 82 (2) (c) TFEU. Reference is made by way of example to Directive 2012/29/EU (Victim Protection Directive)¹⁶, which sets minimum standards for the protection, assistance and rights of victims of crime, in particular information rights and access to victim support services.

With regard to the *necessity criterion* of Art. 82 (2) TFEU, the Commission (COM) merely states in the explanatory memorandum to its proposal for a Directive that the harmonisation and strengthening of victims' rights within the EU will increase mutual trust between the Member States into their legal systems and thus promote the principle of mutual recognition, thereby improving judicial cooperation in criminal matters. This broad interpretation of the **necessity criterion** in EU legislative practice is also taken up by the Commission in proposals for Directives on the basis of Article 82(2)(b) TFEU, which have meanwhile also been adopted without the Parliament and Council having contradicted the broad understanding.

For a Directive, which regulates minimum standards of an independent complaint body for police violence, it can be argued that such independent bodies increase mutual trust between the Member States into their legal systems and thus promote the principle of mutual recognition, thereby improving judicial cooperation in criminal matters.

Thus, such a Directive is **necessary**.

2. Cross-border Dimension

Art. 82 (2) TFEU does not contain any concrete definitions of this concept. When distinguishing between "purely national" criminal cases, the focus should be on the nationality of the victim.

¹⁶<https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32012L0029>.

In the case of the Directive on Victims' Protection, the Commission refers to the nationality of victims: "People in Europe frequently travel to other Member States, and the risk of becoming a victim of a crime or a traffic accident is just as great as at home".¹⁷

For a Directive, which regulates minimum standards of an independent complaint body for police violence, it can be similarly argued that people in Europe travel to other Member States and are at risk of becoming a victim of police violence. This is often the case in Europe – wide demonstrations and sport events. In cases of police violence, the victims must have the right to access effective investigations through an independent body that properly deals with such cases. It is common experience in all Member States that police violence is highly underreported and not properly investigated by police officers.

Thus, the requirement of a cross-border dimension is also fulfilled for an envisaged Directive on minimum standards of an independent complaint body for police violence.

3. The rights of individuals in criminal proceeding

It is also discussed whether the systematic interpretation of Art. 82 para. 2 lit. b ("the rights of the individual in criminal proceedings") and lit. d TFEU ("other specific aspects of criminal proceedings") shows that lit. c also covers victims' rights outside criminal proceedings.

Since the independent body would investigate criminal offences, it can be argued that such independent complaint bodies are additional bodies for cases of police violence, which, depending on their further development, supplement criminal proceedings, and their bodies.

This characteristic of concerning "the rights of the individual in criminal proceedings" is also widely understood, so that a corresponding content does not appear to be excluded.

4. Compliance with the principles of subsidiarity and proportionality

The shared competence of the EU pursuant to Art. 4 (2) lit. j TFEU is subject to the **subsidiarity** principle pursuant to Art. 5 (1) sentence 2, (3) TFEU.¹⁸ The principle of **proportionality** under Art. 5 (4) TFEU must also be observed.

According to the subsidiarity principle, there are two cumulative prerequisites for EU action in this area: on the one hand, the objectives of the envisaged measure must not be

¹⁷See the Commission's statement „Strengthening victims' rights in the EU", at <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52011DC0274&from=EN>

¹⁸See Article 69 of the TFEU: „National Parliaments ensure that the proposals and legislative initiatives submitted under Chapters 4 and 5 comply with the principle of subsidiarity, in accordance with the arrangements laid down by the Protocol on the application of the principles of subsidiarity and proportionality."



sufficiently achieved by the Member States (negative criterion); on the other hand, the objectives must be better achieved at EU level (positive criterion).

The latest study in Germany showed that there are 12,000 estimated cases of police violence per year, while only 2,000 are reported and only 2% of those go to court. This shows the dimension in one Member State. The numbers may be similar in all Member States. Without an independent complaint body, police violence cannot be properly addressed.

D. Summary

Article 82(2)(c) TFEU can be considered as the legal basis for the adoption of minimum standards for the establishment by the EU of a Directive on minimum standards of independent complaint bodies for cases of police violence. The TFEU allows the EU to adopt minimum rules to regulate the rights of victims of criminal offences to the extent necessary to facilitate mutual recognition of judicial decisions and judgements and police and judicial cooperation in criminal matters with a cross-border dimension. In the case of a broad interpretation, which has so far also shaped EU legislative practice in this area, the adoption of corresponding EU provisions is possible.

Founded in 1987, the Association of European Democratic Lawyers (AED) is a confederation of trade unions and lawyers' organizations with the same democratic, modern and humane ideals in Europe.

The AED intends to defend the rights of citizens by preserving the independence of lawyers with regard to any political, social, economic or ordinal power.

As a professional organization, its international purpose is to ensure respect for the rights of the defense and, in particular, to safeguard the physical integrity and political and economic freedom of lawyers.

The association also works to ensure that all individuals have access to national and international judicial appeals, particularly those who are in the most precarious situations and whose basic rights are not recognized or poorly recognized.

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