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LEGAL REMEDIES AGAINST FACTUAL ACTS BY POLICE FORCE THE SERBIAN AND THE AUSTRIAN APPROACH

In democratic countries founded on the rule of law, individuals' remedies against factual acts by police officers are crucial for the legal system. Different legal systems provide different concepts for the external control of the police. This paper compares the Serbian and the Austrian system and identifies every system's advantages and weaknesses. Their identification allows the author to suggest a reform of both current systems. As to the major reform proposals, the Austrian legislator could adopt the fast Serbian first instance proceeding before the head of the police unit concerned by an act, whereas Serbia should establish an independent authority where complaints against the police could be filed with. In general, the comparison of both systems facilitates the understanding of the remedy system against factual acts by the police and enables the readers to consider their home country's remedy system from a different perspective.

Key words: *Serbian Law on Police. Austrian Security Police Act. Legal remedies. Factual acts. Police. Comparative study.*

1. INTRODUCTION

As a legal principle, every legal entity apart from individuals can only act by its representatives. This principle is particularly true for the State that acts by a myriad of state officials to fulfill a variety of tasks.¹ One of these tasks is to ensure the rights and freedoms of its people, which requires an effective legislative power as well as efficient law en-

¹ Arno Kahl and Karl Weber, *Allgemeines Verwaltungsrecht* (3rd edn, facultas. wuv 2011) para 241.

enforcement bodies. One of these law enforcement bodies is the police. It is the police's responsibility to preserve public order and safety², and in line with the courts and other administrative units, to ensure the rule of law in a democratic society.

In everyday life, there is probably no other public entity that represents the State's authority in the same way as police forces do. If they are performing in accordance with the law without violating individuals' rights, citizens are more willing to accept the State's authority. Autocratic regimes, however, tend to exploit the police for their interests and to use its forces to ensure their power. This has a huge impact on the conduct of police officers and is often the reason for poor condition of police in post-conflict countries. The Yugoslavian police under the Milosevic regime may therefore serve as an example.³

When such a regime is brought down, one of the first steps in a new democratic era is a police reform to restore the citizens' confidence in the police as well as in the State's authority. Apart from setting new standards for the education of police officers and combating corruption within the police, a critical step is the adoption of an efficient remedy system. Citizens will even more rely on the work of the police, if they know that every action performed by a police officer can be appealed before independent courts.

There are many good reasons for an analysis of the remedy system against acts carried out by the police. The particular interest to compare Serbia and Austria is based on the fact that Serbia's legal and political system has undergone some substantial changes in the last twenty years while the Austrian system has been stable since 1945. In addition, Serbia and Austria are two countries that are not only linked by its political history. It should also not be neglected that Austria's administrative law has been a role model for Serbia to some extent.⁴ A few years ago, the Serbian legislator has adopted a new law on police and thereby modified the remedy system. Given its lately modification, the new system has not been addressed by many Serbian scientists and any comparative work is, as far as I see, completely missing. This gap shall be closed by the following analysis. After some necessary definitions and a brief historical overview, every system's advantages and weaknesses are described and its major differences are identified. This approach allows making specific

² Slobodan Miletić, *Policijsko pravo*, vol 1 (Policijska akademija 1997) 14; Dieter Kolonovits, 'Sicherheitspolizeirecht' in Stefan Hammer and others (eds), *Besonderes Verwaltungsrecht* (facultas.wuv 2012) 47.

³ Richard Monk, 'Study on Policing in the Federal Republic of Yugoslavia' (OSCE 2001) <http://www.osce.org/spmu/17676> accessed 15 April 2013.

⁴ Dragan Milkov, *Upravno pravo: Upravna delatnost*, vol 2 (3rd edition, Pravni fakultet Univerziteta u Novom Sadu 2003) 67.

suggestions to improve both remedy systems to guarantee the highest level of protection for individual's rights and freedoms in a democratic society.

1.1. Definitions

Subject of the comparison are factual acts by police officers. To facilitate the comprehension of both the Serbian and the Austrian legal provisions, the following definitions will specify which kinds of actions are meant by the used terms.

1.1.1. Factual acts

Factual acts comprise every action by the police that does not take the form of an administrative decision or of general legal acts as regulations. Not included are acts carried out by the police to enforce a decision by a court or any other comparable preliminary act. The acts have to be assigned to the police as own acts. This condition is not met if the police intervene on behalf of the public prosecutor or on behalf of a criminal court. Classic examples of factual acts are the issuance of orders, the temporary seizure of objects, or the detention of persons.

1.1.2. Police officers

In general terms, a police officer is every person employed by the police performing law enforcement functions. Police employees only responsible for the inner administration and maintenance of police buildings as secretaries or cleaning ladies are not covered by this definition. The Serbian Law on Police (LoP)⁵ and the Austrian Security Police Act (SPA)⁶ contain provisions that explicitly indicate the police employees in charge with law enforcement.

According to Article 4 para 2 LoP, law enforcement officers are uniformed and plainclothes officers exercising law enforcement powers (No. 1), and personnel on special duty whose tasks pertain directly to police work and who are authorized to perform certain police tasks by the Minister of Interior (No. 2). On the other hand, community police officers must always be in uniforms when exercising their law enforcement powers (Article 39 of the Serbian Law on Community Police⁷).

§ 5 SPA para 2 SPA lists as law enforcement officers the members of the Federal Police (No. 1), the members of community police services

⁵ Official Gazette of the RS No. 101/2005, 63/2009 and 92/2011.

⁶ Federal Law Gazette No. 1991/566 as amended by: Federal Law Gazette I No. 2012/50.

⁷ Official Gazette of the RS No. 51/2009.

(No. 2), and explicitly authorized employees in legal service at the security authorities (No. 3).⁸

These definitions will generally comply with the public understanding of police forces even if in everyday life people are confronted only with uniformed police officers.⁹ One thing that is striking in the comparison of the two definitions is that the SPA in contrast to LoP mentions community police forces. This is due to the fact that a special law on community police exists in Serbia, whereas in Austria their competences and duties are regulated in the SPA.

2. HISTORICAL BACKGROUND

Before the analysis of the current remedy system starts, this section outlines how both remedy systems have developed over the last centuries.

2.1. Serbia

Whereas the Serbian legal system has traditionally internally controlled factual acts of police officers upon citizen's complaints¹⁰, judicial control thereof has been introduced recently. A first step was the introduction of the constitutional complaint in the Constitution of the Republic of Serbia in 2006¹¹ (Article 170). This is a legal remedy that can be used against any legal or factual act of state authorities, including factual acts of the police, provided that all other remedies have been exhausted or that legal remedies are not prescribed at all. Constitutional complaint is submitted to the Constitutional Court. Another form of judicial control of factual acts has been introduced by the new Administrative Disputes Act (ADA)¹² in 2009. Before, administrative acts only could be challenged in a judicial court proceeding if they were rendered in administrative matters. Whether decisions on citizens' complaints against factual acts are rendered in administrative matters, could have been debatable pursuant to Serbian administrative law.¹³ However, the new ADA widened the scope

⁸ The German term for these groups of officials is *Organe des öffentlichen Sicherheitsdienstes*.

⁹ In Austria, those are the forces of the *Bundespolizei* (federal police).

¹⁰ Interview with Dragan Vasiljević, Associate Professor, Serbian Police Academy (Belgrade, Serbia, 20 November 2012).

¹¹ Official Gazette of the RS No. 98/2006.

¹² Official Gazette of the RS No. 11/2009.

¹³ Miloš Prica, *Pojam i pravna priroda upravne stvari* (Pravni fakultet Univerziteta u Nisu, 2005).

of judicial control, by including all acts containing a decision on the rights or duties of citizens that were rendered in a particular case.

2.2. Austria

There has been a long tradition for remedies against factual acts by (police) administration in the Austrian legal system. Even in the days of the Austro-Hungarian monarchy, the Reichsgericht as predecessor of the Constitutional Court of the Austrian Republic provided some protection against factual acts affecting constitutionally guaranteed rights of individuals.¹⁴ The Constitutional Court pursued this jurisdiction after 1918 based on an excessive interpretation of its competences in accordance with the new constitution. The Administrative Court, however, did not accept complaints against factual acts until the constitutional reform in 1975. The new provisions then explicitly enabled individuals to file complaints against factual acts with the Administrative Court for illegality and at the Constitutional Court for infringement of constitutionally guaranteed rights.¹⁵ In 1988, the independent administrative tribunals¹⁶ were established.¹⁷ This reform affected again the remedy system; complaints against factual acts may now be filed with these tribunals. Their decisions are subject to judicial review by the Administrative Court and the Constitutional Court.¹⁸

2.3. Comparison

The Serbian and the Austrian remedy system have not had a lot in common in the last century. While Serbia focused on internal control within the police administration, acts by the Austrian police were subject to judicial control by the Constitutional Court as well as the Administrative Court. With the introduction of the independent administrative tribunals in Austria, the situation has changed. They provide now a preliminary administrative control in Austria. However, their decisions can still be appealed before the independent courts. The other way round, Serbia has lately adopted new possibilities for judicial control of acts by the police before the Administrative and the Constitutional Court.

¹⁴ Bernd Christian Funk, *Der verfahrensfreie Verwaltungsakt* (Springer, 1975) 39.

¹⁵ Art 131a, Art 144 para 1 Federal Constitutional Act Federal Law Gazette No. 1930/1 as amended by: Federal Law Gazette No. 1975/302.

¹⁶ The German term is *Unabhängige Verwaltungssenate*.

¹⁷ Arno Kahl and Karl Weber, *Allgemeines Verwaltungsrecht* (3rd edn, facultas. wuv 2011) para 357.

¹⁸ See 3.2 for a more details.

3. THE PRESENT REMEDY SYSTEM

The historical overview should facilitate the understanding of the present remedy system. In the following section, Serbia's and Austria's remedy system will be described from the first instance proceeding before administrative authorities to a final judicial review by independent national – not international – courts. Given that Serbia and Austria have both ratified the European Convention on Human Rights¹⁹ and are therefore bound to the same rules, remedies before the European Court of Human Rights are not taken into account in this comparative study.

3.1. Serbia

3.1.1. General facts

Individuals can trigger external control of police work by the means of Article 180 LoP. According to Article 180 para 1 LoP, individuals shall have the right to file a complaint against a police officer if the individual believe that the police officer has violated their rights or freedoms by unlawful or improper action. This offers affected individuals a remedy against any form of factual acts by the police as far as their rights are violated.²⁰

Pursuant to Article 12 para 5 LoP, the Government has also adopted a Code of Police Ethics²¹ comprising, for example, provisions on the organization and functioning of the police force, on police officers' rights and duties and on the exercise of power. This Code, as an educational material, is included in the program of professional training and improvement of police officers²², but does not constitute any subjective rights for individuals. Hence, Article 180 LoP does not offer a complaint against infringements of the Code. Given that no other special complaint procedure is provided by law, individuals cannot appeal infringements of the Code in a formal proceeding.

Complaints may be filed with the police or with the Ministry of Interior. The Minister of Interior has therefore established a Bureau for Complaints and Grievances within the Ministry.²³ This Bureau plays a

¹⁹ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended by Protocols Nos. 11 and 14) (ECHR).

²⁰ Dragan Vasiljević, 'Normativni okviri kontrole rada policije' (2008) 10 *Pravni zivot* 789, 803.

²¹ Kodeks Policijske Etike, Official Gazette of the RS No. 92/2006.

²² Art 48 Code of Police Ethics.

²³ Dragan Cvetković, 'Makroorganizacija Ministarstva unutrašnjih poslova Republike Srbije' (2010) 1 *NBP Zurnal za kriminalistiku i pravo* 177, 190; Republic of

fundamental role in the resolving of complaints; its tasks are described at the relevant stage of procedure.

The remedy system is divided into a two-tier procedure. Every complaint is first considered by the head of the unit in which the implicated officer is employed. If complainants are not satisfied by the result of the proceeding before the head of the unit, they may in a next step address a commission.

The Minister of Interior has, in accordance with Article 180 para 7 LoP, determined further details of the procedure in a Rulebook on complaint procedure.²⁴

3.1.2. Proceeding before the head of the unit

According to Article 180 para 2 LoP, complainants may file their complaint against a police officer with the competent police authority or with the Ministry within thirty days as of the alleged violation. Complaints filed with the Ministry are received by the Bureau for Complaints and Grievances. The Bureau keeps records and provides the Cabinet of the Minister with reports pertaining to submitted complaints.²⁵

Every complaint against a police officer must first be considered by the head of the unit in which the implicated officer is employed.²⁶ The head of the unit may additionally authorize another member of the unit to act in his place. In this stage of proceeding, the head of the unit has to collect all necessary information trying to clarify the facts of the case. This includes the consultation of the accused officer.²⁷

If the head of the unit agrees with the complainants after the verification of the complaint, the procedure may be considered concluded.²⁸ The head of unit records the complaint procedure and arranges a meeting with the complainants to inform them about the result. If the complainants agree with the findings of the head of the unit, the procedure is concluded (Article 180 para 3 LoP).

Serbia, Ministry of Interior, 'Bureau for Complaints and Grievances' http://www.mup.gov.rs/cms_eng/home.nsf/MOI_BCAG.h accessed 15 April 2013.

²⁴ Pravilnik o postupku rešavanja pritužbi, Official Gazette of the RS No. 54/2006.

²⁵ Republic of Serbia, Ministry of Interior, 'Bureau for Complaints and Grievances' http://www.mup.gov.rs/cms_eng/home.nsf/MOI_BCAG.h accessed 15 April 2013.

²⁶ Dragan Vasiljević, *Zakonitost uprave i diskreciona ocena* (Kriminalističko Policijska akademija 2012) 139.

²⁷ Art 9 Rulebook on complaint procedure.

²⁸ Dragan Vasiljević, 'Normativni okviri kontrole rada policije' (2008) 10 *Pravni zivot* 789, 803.

The head of the unit has to hand over all documents to a commission which then conducts further proceedings in the following cases²⁹:

- If the complainants fail to respond to the request for a meeting.
- If the complainants respond but disagree with the findings of the head of the unit.
- If the procedure before the head of the unit cannot be concluded within 15 days after the complaint has been filed.
- If there are indications that a criminal act subject to public prosecution is being committed.

3.1.3. Proceeding before the commission

If the complaint cannot be resolved within the first instance proceeding, it is passed to a three-member commission. There are no permanent commissions for this purpose. An ad hoc commission meets if complaints are submitted to it.³⁰ The commission is composed of an Internal Affairs officer, a representative of the police and a representative of the public. The representative of the public is appointed to a four year term with the possibility of a renewed mandate by the Minister.³¹ The Minister appoints the representative of the public upon suggestion from the local government, or expert groups and non-governmental organizations (Article 180 para 5 LoP). The members of the commission are independent in their decision. Their membership in the commission, however, does not affect their normal work within the police force where they are still bound to directions.³²

In the proceeding before the commission, complainants can be invited to explain the reasons why they have filed their complaint. The commission has to establish and scrutinize all facts; if necessary authorized experts may also be consulted for this purpose.³³ The Bureau for Complaints and Grievances provides professional and administrative support to the commissions based within the Ministry Headquarter and provides professional assistance to the authorized personnel and commis-

²⁹ Art 180 paras 3 and 4 LoP.

³⁰ Dragan Vasiljević, *Zakonitost uprave i diskreciona ocena* (Kriminalističko Policijska akademija 2012) 139.

³¹ According to Art 18 Rulebook on complaint procedure, for this time period their names are included in a list of representatives for a certain area to be able to quickly form a commission if necessary.

³² Dragan Vasiljević, *Zakonitost uprave i diskreciona ocena* (Kriminalističko Policijska akademija 2012) 140.

³³ Art 21, 22 Rulebook on complaint procedure.

sions within other organizational units.³⁴ The commission decides with a majority vote; this means at least two members have to agree. The representative of the public may add a dissenting opinion if the representative has been outvoted by the two other members.³⁵

The complaint procedure ends by providing the complainants a written response within thirty days of the final proceedings by the head of the unit. The response to the complainants concludes only the proceeding before the commission; the complainants still have the right to pursue other legal redress, for example, claim for damages before the civil courts (Article 180 para 6 LoP). The commission's decision is subject to judicial review by the Administrative Court and the Constitutional Court.

3.1.4. Remedies against the decision of the commission

The decision of the commission is non-appealable. All non-appealable administrative acts can be challenged before the Administrative Court, except where other forms of judicial protection are provided (for example before a regular court in the civil proceeding).³⁶

In the judicial review proceeding, an administrative act can be challenged only on the basis of illegality.³⁷ The court either rejects the suit as unfounded or finds that it is well grounded and annuls the challenged act (Article 42 ADA). If the Administrative Court annuls the challenged act, it shall return the case to the issuing authority, which is now obliged to conduct a new proceeding and issue a new act in accordance with the legal opinion of the Administrative Court and its remarks with respect to the previously conducted proceeding (Article 69 ADA). In addition, Article 9 ADA would also offer an extraordinary legal remedy that can be used for challenging judgments of the Administrative Court before the Supreme Court of Cassation, the highest court in the country.³⁸ However, the so-called request for reconsideration of judicial decision (Article 49 ADA) does not apply in this special case; hence, the decision of the Administrative Court is final.

Since the new constitution has been adopted in 2006, individuals may in accordance with Article 170 Serbian Constitution also challenge

³⁴ Republic of Serbia, Ministry of Interior, 'Bureau for Complaints and Grievances' http://www.mup.gov.rs/cms_eng/home.nsf/MOI_BCAG.h accessed 15 April 2013.

³⁵ Art 23 Rulebook on complaint procedure.

³⁶ This is provided by Art 3 ADA; Zoran Tomić, *Opšte upravno pravo* (7th edn, Pravni fakultet Univerziteta u Beogradu 2012) 373-74.

³⁷ Dragan Vasiljević, *Upravno pravo* (Kriminalističko Policijska akademija 2011) 238.

³⁸ Vuk Cucić, 'Administrative Appeal in Serbian Law' (2011) 32 *Transylvanian Review of Administrative Sciences* 50, 54.

the decision of the commission before the Constitutional Court.³⁹ This only applies if the complainants' human or minority rights and freedoms guaranteed by the Constitution are violated and if all other legal remedies have been exhausted.⁴⁰ However, according to the Bureau for Complaints and Grievances⁴¹ nobody has ever challenged the decision of the commission before a court. The above-mentioned system of judicial review of factual acts by the police remains therefore for now theoretical.

3.2. Austria

The SPA includes several provisions on remedies against factual acts by the police. § 88 para 1 SPA regulates in accordance with Article 129a para 1 No. 2 Federal Constitutional Act⁴² and § 67a No. 2 General Administrative Procedure Act 1991 (GAPA)⁴³ the complaints of individuals against the infringement of their rights through acts of immediate administrative instruction and compulsion⁴⁴ by police officers. § 88 para 2 SPA additionally provides that a person may file complaints against any other act⁴⁵ by police officers that is not covered by § 88 para 1 SPA. If a police officer has disregarded the guidelines for interaction with individuals, the thereby affected person can also file a complaint (§ 89 SPA).

3.2.1. Immediate administrative instruction and compulsion

Persons who allege infringement of their rights through acts of immediate administrative instruction and compulsion by police officers file their complaints with the independent administrative tribunals in the *Länder*.⁴⁶ One of these special administrative tribunals is established in every *Land*. Its members are independent and not bound by directions in their decision. They must be jurists and are appointed for at least six years by the *Land* Government. For their period of office, they are perma-

³⁹ Dragan Vasiljević, *Upravno pravo* (Kriminalističko Policijska akademija 2011) 238.

⁴⁰ Dragan Vasiljević, *Upravno pravo* (Kriminalističko Policijska akademija 2011) 239.

⁴¹ Telephone Interview, 22 November 2012.

⁴² Federal Law Gazette No. 1930/1 as amended by: Federal Law Gazette I No. 2012/65.

⁴³ Federal Law Gazette No. 1991/51 as amended by: Federal Law Gazette I No. 2011/100.

⁴⁴ The German term is *Akte unmittelbarer verwaltungsbehördlicher Befehls und Zwangsgewalt*.

⁴⁵ Considering the specific remedies against administrative decisions and regulations, these acts are excluded.

⁴⁶ Austria is a federal state comprising nine provinces with legislative power called *Länder*.

nently employed and may not practice any activity liable to evoke doubts as to the independent conduct of their office. The decisions of these tribunals are generally delivered by one or more members. In the case of complaints against acts of immediate administrative instruction and compulsion – the tribunals are also competent in other administrative matters like administrative penal proceedings – the tribunals decide by a single member (§ 67a GAPA, § 88 para 4 SPA).

An act by police officers is an act of immediate administrative instruction and compulsion if they act for an administrative authority, not for the courts or a legislative body. Another requirement is that the police act in the framework of state authority, not on the basis of private law. The police have to exercise their power immediately; enforcement measures of preliminary acts (for example administrative decisions) are therefore not comprised. The exercise of immediate administrative instruction and compulsion must be clear. A clear and valuable instruction requires that the addressees are threatened by a physical sanction if they fail to follow it.⁴⁷

Complaints shall be filed with the independent administrative tribunal within a period of six weeks. This is to be counted from the date when the complainants obtained information of the infringement of their rights. If they were prevented by the ongoing police measure to make use of their right to complain, it is to be counted from the termination of this measure (§ 67a GAPA). No specific time period is set for the decision of the tribunals. However, if the tribunals fail to resolve a complaint within six months, the affected individuals may file a complaint for inaction with the Administrative Court.⁴⁸

The independent administrative tribunal determines whether the act of the police has constituted an infringement of the rights of the complainants or not. The complainants and the administrative authority responsible for the act of a police officer are party in the proceeding.⁴⁹ The civil courts are competent for claims for damages; these claims are not admissible in the procedure before the tribunals. The independent administrative tribunal's decision is subject to judicial review by the Administrative Court and the Constitutional Court.

⁴⁷ This has been explicitly determined by the Constitutional Court (VfSlg 10.848/1986) as well as by the Administrative Court (VwSlg 15.443 A/2000) in many of their decisions.

⁴⁸ Theo Öhlinger and Harald Eberhard, *Verfassungsrecht* (9th edn, facultas.wuv 2012) para 654.

⁴⁹ Andreas Hauer and Rudolf Keplinger, *Sicherheitspolizeigesetz* (4th edn, Linde 2011) § 88 para 22.

3.2.2. *Acts in accordance with § 88 para 2 SPA*

§ 88 para 2 SPA offers a subsidiary remedy of individuals against acts by the police that do not constitute acts of immediate administrative instruction and compulsion, administrative decisions or regulations. The provision amplifies the protection of individuals in the field of police administration. Complaints against acts by police officers operating in other areas of administrative law like traffic law, however, are not admissible.⁵⁰

§ 88 para 2 SPA aims at unlawful police conduct that does not affect an individual's freedom sufficiently to be considered acts of immediate administrative instruction and compulsion. For example, if a police officer checks the identity of a person in an imperative way without reaching the level of an immediate instruction, the affected person can file a complaint in accordance with § 88 para 2 SPA. Even if the police refrain from protecting an assembly (Article 11 ECHR) from a violent interruption, § 88 para 2 SPA is applicable.⁵¹

According to § 88 para 4 SPA, complaints in accordance with § 88 para 2 SPA follow the same procedure as those in accordance with § 88 para 1 SPA. For a detailed analysis of the procedure refer therefore to subsection 3.2.1.

3.2.3. *Guidelines for interaction with individuals (§ 89 SPA)*

§ 89 SPA establishes a remedy for individuals against acts by police officers that do not infringe their rights but are not in accordance with specific guidelines for interaction. The Minister of Interior has set these guidelines⁵² to ensure certain standards in every-day police work. These guidelines are instituted in the form of a regulation⁵³; they contain a Code of Conduct for police officers and shall guarantee that the officers respect human dignity and their notification and information obligations, if they are interacting with individuals. For example, police officers are obliged to address individuals in a polite way avoiding any behavior that might imply any form of discrimination (§ 5 Guidelines for interaction).

⁵⁰ Andreas Hauer and Rudolf Keplinger, *Sicherheitspolizeigesetz* (4th edn, Linde 2011) § 88 para 17.2. criticize this limitation as unconstitutional.

⁵¹ For further examples Dieter Kolonovits, 'Sicherheitspolizeirecht' in Stefan Hammer and others (eds), *Besonderes Verwaltungsrecht* (facultas.wuv 2012) 74 f.

⁵² They were set in agreement with the Minister of Justice and the Minister of Economy and Traffic and apply therefore also in their area of jurisdiction (Andreas Hauer and Rudolf Keplinger, *Sicherheitspolizeigesetz* (4th edn, Linde 2011) § 89 para 5.).

⁵³ *Richtlinien Verordnung* Federal Law Gazette No. 1993/266 as amended by: Federal Law Gazette II No. 2012/155.

The remedy system in accordance with § 89 SPA consists of a two-tier procedure.⁵⁴ Individuals who consider that a police officer has not followed the guidelines for interaction, and who have been affected by this infringement, may file a complaint with the competent authority for Internal Affairs within six weeks.⁵⁵ Complaints can also be filed with the competent independent administrative tribunal and will be transferred to the authority for Internal Affairs (§ 89 para 1 SPA). The authority for Internal Affairs has to determine whether the police officer in charge has infringed the guidelines. If the authority agrees with the complaint, the complainants have to be informed about this result and the proceeding is closed.⁵⁶ In addition, a meeting of the complainants and the police officer in charge can be organized (§ 89 para 3 SPA).

If the authority does not agree with the complaint, the complainants can address the independent administrative tribunal within fourteen days (§ 89 para 4 SPA). This procedure – without time limit – also applies if the authority does not react within three months. The independent administrative tribunal has then to decide whether an infringement has been committed or not.⁵⁷ Its decision is subject to judicial review by the Administrative Court and the Constitutional Court.

3.2.4. Remedies against the decisions of the independent administrative tribunals

Complaints against decisions of the independent administrative tribunals are examined by the Administrative Court (Article 131 para 1 No. 1 Federal Constitutional Act) and the Constitutional Court (Article 144 para 1 Federal Constitutional Act).

The judicial review of administrative decisions that do not infringe constitutionally guaranteed rights is – apart a special court for asylum cases – centralized at the Administrative Court.⁵⁸ Complaints against illegal administrative decisions may be brought before the Administrative Court by any party to an administrative proceeding (for example before the independent administrative tribunals) that claims a violation of its rights within six weeks after the service of the decision. The Administra-

⁵⁴ Ewald Wiederin, *Einführung in das Sicherheitspolizeirecht* (Springer 1998) para 746.

⁵⁵ Dieter Kolonovits, 'Sicherheitspolizeirecht' in Stefan Hammer and others (eds), *Besonderes Verwaltungsrecht* (facultas.wuv 2012) 75.

⁵⁶ Andreas Hauer and Rudolf Keplinger, *Sicherheitspolizeigesetz* (4th edn, Linde 2011) § 89 para 13.

⁵⁷ Dieter Kolonovits, 'Sicherheitspolizeirecht' in Stefan Hammer and others (eds), *Besonderes Verwaltungsrecht* (facultas.wuv 2012) 76.

⁵⁸ Theo Öhlinger and Harald Eberhard, *Verfassungsrecht* (9th edn, facultas.wuv 2012) para 646.

tive Court provides a one-tier cassational judicial review⁵⁹; in case of illegality, the court annuls the decision of the independent administrative tribunal and remands the case to this authority, which is obligated to implement the opinion of the court.⁶⁰

The Constitutional Court pronounces on decisions by administrative authorities including the independent administrative tribunals in so far as the appellants demonstrate that the decision either violated their constitutionally guaranteed rights or was based on an unconstitutional statute or treaty, or on an illegal regulation or treaty, and violated their rights.⁶¹ Complaints against administrative decisions must be filed within a period of six weeks after the service of the decision.⁶² The Constitutional Court may annul the decision or dismiss the complaint.⁶³

3.2.5. Reform of the remedy system: adoption of administrative courts

The previous sections describe the current Austrian remedy system against acts by the police. Given the huge reform⁶⁴ of the Austrian administrative court system soon entering into force, the future legislation will be briefly presented.

In 2014, the independent administrative tribunals will be replaced as well as more than hundred other special administrative authorities by eleven administrative courts. One court will be established for every *Land*, and a federal administrative court as well as a federal financial court for the federal government. The administrative appeal will be replaced by a judicial review of a first level administrative court.⁶⁵

The administrative courts will decide on the illegality of administrative decisions, in cases of inaction of an administrative authority, and on complaints against acts of immediate administrative instruction and compulsion (Article 130 para 1 No. 2 Federal Constitutional Act [new version]). Further competences like the decision on complaints in accord-

⁵⁹ Arno Kahl and Karl Weber, *Allgemeines Verwaltungsrecht* (3rd edn, facultas.wuv 2011) para 519.

⁶⁰ Theo Öhlinger and Harald Eberhard, *Verfassungsrecht* (9th edn, facultas.wuv 2012) para 650.

⁶¹ Theo Öhlinger and Harald Eberhard, *Verfassungsrecht* (9th edn, facultas.wuv 2012) para 1049ff.

⁶² Robert Walter, Heinz Mayer, Gabriele Kucsko Stadlmayer, *Grundriss des österreichischen Bundesverfassungsrechts* (10th edn, MANZ 2007) para 1211.

⁶³ Theo Öhlinger and Harald Eberhard, *Verfassungsrecht* (9th edn, facultas.wuv 2012) para 1058.

⁶⁴ Act on the reform of administrative court (*Verwaltungsgerichtsbarkeits Novelle 2012*) Federal Law Gazette No. I 2012/51.

⁶⁵ Theo Öhlinger and Harald Eberhard, *Verfassungsrecht* (9th edn, facultas.wuv 2012) para 662c.

ance with § 88 para 2 and § 89 SPA may be transferred to the courts by federal legislation or legislation by the *Länder*.⁶⁶

If a legal question of fundamental importance arises in the proceeding before the administrative court, a party may appeal the court's decision before the Administrative Court (Article 133 para 4 Federal Constitutional Act [new version]). Judicial review will then consist of a two-tier procedure.

The judicial review by the Constitutional Court is also affected by the reform. The Constitutional Court will no longer decide on complaints against decisions by administrative authorities. In the future, decisions by the administrative courts will be subject of judicial review. The criteria for a complaint, however, remain unchanged.⁶⁷

3.3. Comparison

In general, both the Serbian Law on Police and the Austrian Security Police Act⁶⁸ offer remedies against factual acts by the police. The two systems show some similarities, the analysis, however, has revealed a lot of differences.

Primarily, the legislative approach differs concerning the subject of complaints. Article 180 LoP is the basis for complaints against any factual acts by Serbian police officers. No difference is being made between acts of immediate administrative instruction and compulsion (§ 88 para 1 SPA) and other police conduct infringing individuals' rights (§ 88 para 2 SPA). The infringement of the Code of Police Ethics is, however, not integrated in the procedure in accordance with Article 180 LoP. Hence, the Austrian system provides a higher level of protection of individuals with the special complaint procedure for the infringement of the Austrian guidelines for interaction similar to the Serbian Code of Police Ethics.

Another striking difference is that the Serbian remedy system has a stronger link to the police force. This is shown by the fact that complaints against factual acts by the police are to be filed with the police or at least with a special organizational unit within the Ministry of Interior. Considering the risk that an authority probably affected by the complaint could let it disappear, this might not be the best and most transparent choice for the initiation of a complaint proceeding. If thereby an effective complaint is no longer guaranteed, the current system would not be in line with Ar-

⁶⁶ Theo Öhlinger and Harald Eberhard, *Verfassungsrecht* (9th edn, facultas.wuv 2012) para 662c.

⁶⁷ Theo Öhlinger and Harald Eberhard, *Verfassungsrecht* (9th edn, facultas.wuv 2012) para 1049.

⁶⁸ The complaint against acts of immediate administrative instruction and compulsion is also laid down in the Constitution.

ticle 13 ECHR.⁶⁹ In Austria, complaints are also filed with an administrative authority. The advantage of these authorities is, however, their independence. The so-called independent administrative tribunals are, as well, not responsible only for proceedings concerning police, but have other competences. This ensures that the members of the tribunals will not be concerned about the interests of the police and eliminates the before-mentioned risk.

The substantial role of the Serbian police in the remedy system is also indicated by the competences of police members within the two-tier procedure. In the first instance proceeding, the complaint against a certain police officer is considered by the head of the unit in which the implicated officer is employed. If the complainant agrees with the findings of the head of the unit, the procedure is closed without ever being passed to an independent administrative authority like in Austria. This enables the police to seek conciliation with the affected individuals on their own. Complainants are, however, not obliged to get into contact with the police if they do not want to. In this case, their complaint is passed to a commission.

In Austria, there is generally no comparable first instance proceeding governed by the police. Yet, the procedure in accordance with § 89 SPA follows similar rules. In a first instance, the authority for Internal Affairs is competent for any complaint alleging an infringement of the guidelines for interaction. It is to point out that even in this proceeding the complaint may be filed with the independent administrative tribunal that transfers it to the competent authority. The Serbian system is very simple and tends to solve many complaints without addressing an independent authority. As complainants are not forced to respond to the request for a meeting of the head of the unit without thereby discontinuing the proceeding, their rights as victims of police force are also respected. The only critical point is that the complaint may not be filed with an independent authority. Complainants should not be obliged to get in contact with the Ministry of Interior or a subordinate unit to file a complaint. Apart from that weakness, the Serbian first instance procedure seems therefore to be more efficient and less complicated than the Austrian system.

Despite some substantial differences, the second instance proceeding before a commission in Serbia may better be compared to the proceeding before the independent administrative tribunals in Austria. Their decisions are both final, do not prevent the complainants from other legal redress (for example a claim for damages before civil courts) and are

⁶⁹ *Salman v Turkey* App no 21986/93 (ECtHR, 27 June 2000), para 121; Christoph Grabenwarter and Katharina Pabel, *Europäische Menschenrechtskonvention* (5th edn, C.H. Beck Helbing Lichtenhahn MANZ 2012) § 24 para 180.

subject to judicial review. However, the independent administrative tribunals are permanent authorities with a wider range of jurisdiction (not only in police matters) whereas ad hoc commissions decide only on complaints against police officers. The composition of the authorities also differs. The commissions have three members; the tribunals decide by a single member. The collegial approach to decision-making seems to be an advantage of the Serbian system. Considering that appellate and high courts generally decide in groups of several judges (senates), this approach emphasizes the importance of the commission's decision.

Regarding the composition, not only the number of members but their status is essential. Members of the Austrian tribunals are permanently employed and completely independent from the police or the Minister of Interior. The members of the Serbian commission, however, are not comparably independent, even if they are not bound by orders in their decision. One member is an Internal Affairs officer, that is a member of the police⁷⁰, and one is even a representative of the police force. The third member, a representative of the public, may diminish but not resolve doubts that the commission is factually not completely independent from the police or the Minister of Interior. This is aggravated by the fact that the commission decides with a majority vote so that the representative of the public may be outvoted.

The advantages of the Austrian system are not affected when the tribunals are replaced by administrative courts. Their independence will not be in question and their procedural powers even stronger than the tribunals'.

An asset of the Serbian system should be the time passed from the filing of a complaint to a final decision. Even in a two-tier proceeding, a complaint should be resolved within at least 45 days. In Austria, a time period is explicitly just set for the filing of a complaint so that the tribunals are only limited by a remedy against their inaction. Individuals may file their complaints in Austria within six weeks; in Serbia, they have only thirty days. These periods are both long enough; the slight difference should not have any impact.

Both the decisions of the commissions and the tribunals may be challenged before the Administrative Courts only on the basis of illegality. The Courts may reject the complaint as unfounded or annul the challenged decision. The judgment of the Austrian Administrative Court is always final, that of the Serbian Administrative Court only in certain defined matters like in the case of the commissions' decision. No other national judicial review of the Courts' judgment is then admissible.

⁷⁰ Dragan Cvetković, 'Makroorganizacija Ministarstva unutrašnjih poslova Republike Srbije' (2010) 1 NBP Zurnal za kriminalistiku i pravo 177, 189-90.

Under the new Austrian regime, the Administrative Court will only decide in exceptional cases, in other words if appeals against decisions of the first level administrative courts are admissible. Given the serious restrictions for appeals, the judicial review of factual acts of police officers will in practice not really consist of a two-tier procedure.

The final decisions of the administrative authorities may also be reviewed by the Serbian and the Austrian Constitutional Courts. The admission criteria are similar in both countries. The jurisdiction of the Constitutional Courts is strictly limited. They can only annul a decision if it violates the complainants' constitutionally guaranteed rights or freedoms.

4. CONCLUSION

This analysis has shown that both the Serbian and the Austrian legislators have been in the past and are still aware of the importance of remedies against factual acts by the police. In both countries, an elaborated remedy system is in force; only a few gaps in the protection of individuals could therefore have been identified.

One of these gaps is the lack of a complaint procedure for infringements of the Serbian Code of Police Ethics. The Austrian system might in this specific case serve as a role model for a new Serbian regulation. It is, however, to admit that a certain remedy ensures a very high level of protection and constitutes an advanced step to a very effective complaint system. The fact that this remedy is now missing in Serbia is therefore less of concern than the choice of the authority where complaints are to be filed with. The independence of that authority is crucial within the complaint procedure. If complaints are to be filed with the police, a transparent procedure is not guaranteed. Even the establishment of a special administrative unit based unit in the Ministry of Interior may not help to achieve the demanded standard. In the author's opinion, to acquire full transparency, the present remedy system must be at least adjusted in this point.

It should also not be neglected that the composition of the commissions in Serbia does not really ensure an independent decision. Individuals could get the impression that the commissions are under the influence of the Minister of Interior which would lower the legitimacy of their decision. With the integration of a civilian member, a first step has already been taken. Still, more steps should be taken to guarantee that justice also seems to be done.

However, the Serbian system could also be a role model for Austria. Regarding the duration of the complaint procedure, the Serbian pro-

cedure is much faster than the Austrian. In addition, the first instance proceeding directly before the police keeps the complaint procedure simple and short. A certain proceeding might also be adopted in Austria, if an independent authority is adopted, where individuals can file their complaints.

Comparative law is said to facilitate the improvement of national laws.⁷¹ The present analysis has shown advantages and weaknesses of both systems; it allows now the legislator to reconsider and to possibly adjust the Serbian Law on Police as well as the Austrian Security Police Act to ensure the highest level of protection for individuals' rights and freedoms in a democratic society.

⁷¹ Bernd Wieser, *Vergleichendes Verfassungsrecht* (Springer 2005) 33.