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RIGHT TO COMPENSATION FOR UNLAWFUL DEPRIVATION OF LIBERTY: THE LEGISLATION OF AZERBAIJAN IN THE LIGHT OF INTERNATIONAL AND EUROPEAN STANDARDS

Abstract:

The Republic of Azerbaijan is a developing European country which regained its independence following the collapse of the USSR in 1991. As a young country Azerbaijan may face particular challenges with regard to human rights, above and beyond the more mainstream problems. However, it should be stressed that Azerbaijan has striven to improve the situation by enacting substantial legal and institutional reforms, as well as by becoming party to numerous international and regional treaties aimed at protection and promotion of human rights. According to the Constitution of Azerbaijan international treaties to which Azerbaijan is party become an indivisible part of the domestic legislature, and should have direct applicability. However, these treaties should be incorporated into domestic legislation for their better understanding and due application and such incorporation should be applied consistently and continuously, taking into consideration the jurisprudence of the relevant treaty bodies.

The paper aims to illuminate the existing situation of ensuring the right to compensation as a procedural guarantee for legitimate deprivation of liberty for the purposes of criminal justice in the Republic of Azerbaijan and to determine the existing challenges. As the right to compensation is one of the core rights of persons deprived of liberty, which, as international standards require, must be ensured for the legitimacy of detention. Particular attention is paid to the compliance of domestic legislation with international and European standards, and the shortcomings, collisions and paradoxes of the national legislative system itself.

Given that the relative paucity of legal-scientific research in this field in Azerbaijan, particularly with regard to compliance with international and European standards, this paper seeks to contribute to the existing body of knowledge.

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International treaties and domestic legislation

The Constitution of the Republic of Azerbaijan (Constitution) engendered serious legal and institutional reforms, leading the transition from the negative aspects of the country's Soviet "heritage" in all fields of life, particularly in the spheres of the legal-judicial administration. The adoption of serial laws and other legislative acts ultimately resulted in the consolidation of democratic and legal statehood, as well as protection and promotion of human rights, as the Constitution proclaims¹ that ensuring the rights and liberties is the highest objective of the State (Constitution of Azerbaijan 1995, Art.12(I)). Along with the continuous consolidation of its national legislation, Azerbaijan has become party to numerous international and regional treaties aimed at protection and promotion of human rights. In relation to the current work, the International Covenant on Civil and Political Rights (Covenant) (Decision of the National Assembly of Azerbaijan on the Ratification of the 'International Covenant on Civil and Political Rights 1992) and the European Convention on Human Rights (ECHR) (Law of the Republic of Azerbaijan on the ratification of the 'Convention for the Protection of Human Rights and Fundamental Freedoms' and its Protocols No. 1, 4, 6 and 7 2001) are particularly important. Furthermore, Article 12 of the Constitution, which declares the "highest priority objective of the State", requires that the '[r]ights and liberties of a person and citizen listed in [that] Constitution are implemented in accordance with international treaties wherein the Republic of Azerbaijan is one of the parties' (Constitution of Azerbaijan 1995, Art.12(II)). It is also stated in the article enumerating the legal acts constituting the national legislative system that '[i]nternational agreements wherein the Republic of Azerbaijan is one of the parties constitute an integral part of the legislative system of the Republic of Azerbaijan' (Constitution of Azerbaijan 1995, Art.148(II)).

It should also be underlined that under the Constitution, international treaties to which Azerbaijan is party have legal primacy within the national system. Thus, Article 151 of the Constitution on the legal force of international treaties reads:

In case there is a disagreement between normative-legal acts in the legislative system of the Republic of Azerbaijan (except the Constitution and the acts adopted in a referendum) and international agreements the Republic of Azerbaijan is party to, provisions of the international agreements shall dominate (Constitution of Azerbaijan 1995, Art.151).

The above provisions of the Constitution mean that ratified international treaties become an indivisible part of the domestic legislature, and should have direct applicability. It may be claimed that international treaties on the rights and liberties of a person have equal force with the Constitution, if Article 151 is read in conjunction with Article 12. Thus, if there is a disagreement between international acts on human rights and the Constitution, the Constitution dominates. However, thanks to the specific rule

¹ Translations of provisions of national legislation are the author's own.

in Article 12, the Constitution still has to be applied in accordance with these treaties (Draft Opinion on the Draft Constitutional Law 2001, paras.16, 18).

Nonetheless the author believes that international human rights treaties to which the State is party should be incorporated into domestic legislation for the following reasons:

- it will allow better understanding of these norms by both persons directly affected and authorities applying this or another law;
- it will guarantee the proper application of these norms, in a standardised manner throughout the country;
- it will eliminate all disagreements (i.e. clashes between legal norms);
- it will engage officials who are reluctant to refer to international norms;
- it will mean that the standards are accepted as a national obligation rather than an obligation before the international community;
- it will endow these norms with a more “user friendly” character; if all international standards are incorporated in the national legislature, it will be more accessible to the primary users;
- it will be better suited to legal-educational purposes;
- it will improve accessibility for the general public.

It is also worth mentioning that this incorporation should be applied consistently and continuously, taking into consideration the jurisprudence of the relevant treaty bodies, as the interpretation of this or another treaty may evolve over time.

Right to Compensation

The right to compensation is one of the core rights of persons deprived of liberty, which must be ensured for the legitimacy of detention. ‘Given the importance attached to liberty and security of person by international human rights law, it is perhaps not surprising that compensation is due to those victims of unlawful deprivation of liberty’ (Smith, 2007, p231). Article 9(5) of the Covenant provides all persons unlawfully arrested or detained the enforceable right to compensation. As Manfred Nowak accurately states, ‘[t]he claim to compensation for unlawful deprivation of liberty is comparable to that for erroneous conviction pursuant to [Article] 14(6), and despite its direct applicability and its immediately binding nature, it is a legal remedy that, practically speaking, is oriented toward the future’ (Nowak, 2005, p237).

In this context, it is worth mentioning that although Article 5(5) of the ECHR also provides for this right, its scope of applicability is relatively narrow, as it is limited to the

infringement of the precise terms of Article 5 of the ECHR, while Article 9(5) is also applicable to breaches of domestic laws. In other words, this 'obviously governs the granting of compensation for detention that is "unlawful" either under the terms of domestic law or within the meaning of the Covenant' (*A. v. Australia* 1997, para.9.5). It to be understood that a person can submit a communication to the Human Rights Committee (Committee) either 1) if he successfully obtains a domestic remedy based on the unlawfulness of detention – the Committee will not need review a violation of Article 9(1)-9(4); or 2) if the detention is in accordance with domestic laws, but unlawful according to international standards (Nowak, 2005, p238).

In this context it has to be noted that Article 9(5) does not imply any guarantee to compensation for innocent pre-trial detainees after they are acquitted, provided the deprivation of liberty was applied in adherence with domestic and international law. In *W.B.E. v. The Netherlands*, the Committee observed that 'the fact that the author was subsequently acquitted does not in and of itself render the pre-trial detention unlawful' (*W.B.E. v. The Netherlands* 1992, para.6.5). However, national laws can provide for the right to compensation for innocent persons deprived of their liberty, as 'a longer period of pre-trial detention might cause considerable pecuniary damages and moral suffering to innocent persons' (Nowak, 2005, p239).

It is worth noting that Article 9(5) of the Covenant leaves open the question of implementation of claims on compensation, as it refers merely to an "enforceable right". It to be understood that such a claim can be successfully submitted before a national authority; this is usually a civil law claim against either the State (legal person) or against the responsible organ or private person. The amount of compensation also depends on a national legislation, though it goes without saying that Article 9(5) also covers non-pecuniary damage (Nowak, 2005, p239).

It should also be taken into consideration that, according to the case law of the European Court of Human Rights, granting a very low amount of compensation can be considered a violation of Article 5(5) of the ECHR, based on a proportionality test (*Harris et al.*, 2009, p197; *Cumber v. UK* 1996; *Attard v. Malta* 2000).

The regulation of this right in the Republic of Azerbaijan is based upon the general provision provided for by the Constitution which states that the rights of victims of abuse of power are protected by law, and that everyone has the right to claim damages arising from state agencies or officials' unlawful activities from the State (Constitution of Azerbaijan 1995, Art.68(I)(II)). The Constitutional Law on the Regulation of the Application of Human Rights and Freedoms in the Republic of Azerbaijan (Constitutional Law), reproducing the core elements of Article 5 of the ECHR, envisages that anyone who has been detained or arrested in contravention of the provisions of Article 4.1 of the Constitutional Law, which guarantees lawful detention, arrest and deprivation of liberty, has the right to compensation, which is guaranteed by means of a civil law claim Constitutional Law of Azerbaijan on the Regulation of the Application of Human Rights and Freedoms in the Republic of Azerbaijan 2002, Art.4.5). It is an obvious shortcoming of the cited article that it stipulates the guarantee to

compensation merely via the detention, arrest and deprivation of liberty applied in contravention of Constitutional Law, omitting the Constitution, the international treaties to which the State is party, and other relevant domestic laws. This cannot be considered an appropriate means of regulation, and it is recommended that this be duly amended.

The right to compensation following unlawful detentions is also envisaged by the Criminal Procedure Code of the Republic of Azerbaijan (CPC): Article 48 states that if a person has been detained on remand during the pre-trial proceedings for a longer period than provided for by the CPC, he/she has the right to compensation for moral damage (CPC 2000, Art.48.4). As is clearly demonstrated, this legal norm displays an extremely narrow approach, stating merely a) detention on remand which was b) “longer” and c) applied during the pre-trial investigation and merely d) moral damage. Article 56.0.5 does complement this provision to some extent, indicating the element “unlawful”, and providing the right to compensation for persons subjected to unlawful detention on remand or unlawfully left in remand detention for a longer period of time than initially determined (CPC 2000, Art.56.0.5). Article 57.1 can also be considered as a complementing tool, as it takes a broader approach, envisaging that all moral, physical and pecuniary damage must be paid (CPC 2000, Art.57.1). However, it should be emphasised that these norms omit other forms of deprivation of liberty, for instance the initial detention – detention in custody which may last a maximum of 48 hours. Also, the term “physical damage” in the latter seems to be ambiguous, perhaps needing clarification. Furthermore, it is clearly stated by Article 48.4 that compensation shall be regulated through civil law proceedings, regardless of the final decision on a criminal case (CPC 2000, Art.48.4). However, other specific provisions on pecuniary and non-pecuniary compensations of the CPC, as well as the specific law in this field, seriously contradict this provision. The analyses of Articles 61 and 62, titled “Recognition of the right to claim a compensation for the damage” and “Explanation of the right to claim a compensation for the damage” respectively (CPC 2000, Art.61, 62), allow us to state that the CPC attaches this right only to persons who are acquitted. Moreover, in relation to the procedures of granting compensation, the CPC refers to the Law on Compensation for Unlawful Actions by the Preliminary Investigation, Investigation, Prosecution and Judicial Agencies Against Natural Persons (CPC 2000, Art.63), which also prevents any person not acquitted from getting compensation, enumerating the grounds engendering the right to compensation (Law of the Republic of Azerbaijan on Compensation for Unlawful Actions by the Preliminary Investigation, Investigation, Prosecution and Judicial Agencies Against Natural Persons 1998, Art.4).

The ways in which the right to compensation is regulated completely contradicts the standards enshrined in the Covenant, ECHR, and the requirements of the Constitution and Constitutional Law. Perhaps, one may argue that because these documents have a higher legal standing, ultimately they will take precedence. However, there is still a need to have an accessible and relevant procedural mechanism for this right to be

enforceable. Thus, it is recommended that an appropriate mechanism to implement this vital right be developed.

Conclusion

Reviewing how the right to compensation for unlawful deprivation of liberty is enshrined in the main human rights documents in Azerbaijan, this paper attempted to clarify the core elements of this guarantee, as well as to evaluate the conformity of domestic legislature with international standards.

The detailed analysis of the relevant norms gives rise to the conclusion that the situation with the right to compensation is in breach of the relevant standards. First of all, the Constitutional Law stipulates the guarantee to compensation merely in relation to cases in contravention of its provisions, omitting the Constitution, international treaties, and other domestic laws. Another problematic dimension of this regulation is that under domestic legislation, this right only attaches to persons who are acquitted.

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