Caviar, Corruption and Compliance - New Challenges for the Council of Europe

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Compliance with judicial decisions often poses challenges, all the more so when international courts such as the European Court of Human Rights are involved. How to react to a failure to abide by judgments of the ECHR has been a question for the Council of Europe for some time. But the suspicious background of a currently unfolding episode involving Azerbaijan may offer an unusually clear justification for a strong reaction even to a single case of non-compliance.

In December 2017, the Committee of Ministers made its first ever use of Art. 46 (4) ECHR, referring a case back to the Court for non-compliance. The judgment in question concerned a fairly straightforward case of political imprisonment, in which the ECHR had found the conviction and imprisonment of an opposition leader in Azerbaijan, Ilgar Mammadov, to be in violation of several Convention rights. If – as seems likely – the Court will now declare the non-compliance with its judgment another violation of the Convention, the case will be sent back to the Committee of Ministers for further measures which could include a suspension of Azerbaijan's rights of representation and a request for withdrawal from the Convention (see Art. 8 of the Statute of the Council of Europe). This has happened before – first in the case of Greece when it became an authoritarian dictatorship in the 1970s – but never in response to non-compliance with an individual judgment. (This is distinct from the Parliamentary Assembly's own ability to suspend the voting rights of certain members as it has done in the case of Russia for example, for an overview see here.)

What the right reaction to non-compliance should be is of course not an easy question, but much suggests that a speedy and strong response is necessary in this particular case. The reasons for that have little to do with the specific facts of the case, however, even though it helps that the Mammadov judgment does not require Azerbaijan to engage in potentially difficult tasks of coordination and policy-making, but simply to release a political prisoner. More importantly, a political scandal is currently developing in the Parliamentary Assembly of the Council of Europe (PACE). Widely described as "Caviargate", it involves the dodgy and potentially corrupt dealings of several assembly members with Azerbaijan's government, first uncovered by two think tanks. A lengthy report released this April by an Investigative Committee of three former ECHR judges has found several violations of the Assembly's Code of Ethics by Assembly members, including several rapporteurs on Azerbaijan within the Assembly's Monitoring Committee. (A criminal suit for corruption charges against one of the delegates involved, Luca Volontè from Italy, is still ongoing.) Witness statements, including testimony of the former Ambassador to the Council from Azerbaijan who has since become a dissident, paint a dirty picture in which Azerbaijan's government regularly provided expensive gifts such as caviar and rugs to Assembly members. The investigation report also concludes that it is highly probable that former PACE president, Pedro Agramunt, was aware of and condoned Azerbaijani efforts to shore up support in the assembly for his candidature by bribing other assembly members (see report, p. 143, para. 743). In exchange, Mr. Agramunt and others would soften the tone of several reports on Azerbaijan and successfully lobby against the adoption of a critical report (the Strässer report) on political prisoners in Azerbaijan by the Assembly. (Agramunt was forced to resign in 2017 following an unprecedented vote of no-confidence in him in reaction to his traveling to Syria to meet Assad there, as well as to the evolving scandal over Azerbaijan.)

What does all this imply in the context of the Convention's role in Europe in protecting and strengthening human rights? It is not news that the European Court of Human Rights is increasingly seen as an institution for combatting systemic and structural human rights failures (see e.g. the Copenhagen declaration of last month), rather than serving as a final appeals court on European human rights. This shift in the ECHR's role entails in many ways a return to the European human rights' system's original function as a bulwark against totalitarianism in Europe, as emphasized, for example, in Ed Bates' historical account of the ECHR. Bates quotes the French politician and co-founder of the parents of the European Convention Teitgen:

> *Democracies do not become Nazi countries overnight. …One by one, freedoms are suppressed, in one sphere then another. Public opinion is smothered, the worldwide conscience is dulled and the national conscience asphyxiated. And then, when everything fits in place, the Führer is installed and this evolution continues right on to the deadly gas ovens of the crematorium. Intervention is needed before it becomes too late. A conscience must exist somewhere which will sound the alarm to the minds of a nation threatened by this spreading gangrene, to warn them of the peril and to show them that they are committing themselves to a crooked road leading far, sometimes even to Buchenwald or to Dachau. An international jurisdiction within the Council of Europe, a system of surveillance and guarantee, could be this conscience, of which other countries also maybe have special need"(Bates, p. 7).*

This original task of the Convention system seems more relevant today than ever, but things have nevertheless changed in the intervening years. Ringing an alarm bell by issuing a judgment has become more difficult, not only generally in the age of internet and fake news, but also particularly for a court that has come to issue over a thousand judgments each year, nearly 90% of which find at least one violation of the Convention (see stats for 2017, p. 173). 908 alarm bells are a lot, causing a general background noise rather than actually waking anyone up. This is therefore where Art. 46 (4) ECHR with its option to refer cases back to the Court for non-compliance might become useful: as a way of sounding an alarm bell in a context where an adverse ECHR finding on its own has become too routine to generate special attention.

For the Mammadov case this means two things. First, if the Convention's human rights system is to serve as a "European conscience", the institutions safeguarding it cannot themselves be corrupt. It is thus encouraging that some of the Assembly Members named in the investigative report were temporarily deprived of certain membership rights last week. Secondly, the corrupt or-close-to-corrupt relationship between Azerbaijan and Assembly members makes this a particularly suitable case for a harsh response to Azerbaijan's failure to abide by ECHR judgments, even though it is the Committee of Ministers (rather than the Assembly) that will have to react to an ECHR judgment finding Azerbaijan in breach for its obligations to abide by its previous judgment by not releasing Ilgar Mammadov. The context also permits the Committee to set a precedent at once firm and flexible. A harsh reaction, such as a suspension of Azerbaijan's Council membership, establishes suspension as a credible threat in the eyes of other states contemplating non-compliance. At the same time, the broader corruption concerns in this case give the Committee useful political wiggle room in applying that precedent in future.

Overall, the European Convention and the Court have gone through an admirable reform process to better address structural and systemic human rights deficits. The last two decades have seen the development of the pilot judgment procedure, a newly procedural approach to interpretation, and the setting of clear priorities for dealing with its backlog of cases. The question how to address cases of non-compliance adds an additional challenge, and the design and supervision of remedies will likely be one of the ECHR's and the Committee's key tasks in the future.

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