



TURKEY

National Courts Study Report

Ceren Ozgul

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Background Information on the National Legal Order in Turkey

1. Locating the national court(s) studied within the broader national legal order

The judicial system of Turkey is composed of general law courts, specialized heavy penal courts, military courts, three high courts (Yargıtay, Danıştay and Sayıştay), and the Constitutional Court, the nation's highest court. ¹ The general law courts are civil courts of first instance (e.g. justice courts, criminal courts, and appeal courts) and administrative courts. Their jurisdiction covers all civil cases, and there is one in every city and district. ² Administrative courts solve cases involving probate, bankruptcy, citizenship matters and labor related issues. Yargıtay, the Court of Cassation, or the Supreme Court of Appeals is the last instance for reviewing rulings and judgments rendered by civil courts. It renders verdicts upon appeal. The opinions rendered by the Court of Cassation are taken as precedents for legal rulings in the first instance courts throughout the country. It is also able to modify its own ruling upon request. The highest administrative court in Turkey is Danıştay, the Turkish Council of State (also called Supreme Administrative Court), which works with similar principles as that of Yargıtay. (Sayıştay is not included in this study.)

With the constitutional amendment adopted by the public referendum on 12 September 2010, the Turkish Constitutional Court was authorized to accept individual applications. The Court started to receive individual applications as of 23 September 2012. Individuals can lodge applications to claim that they are suffering from "a violation of any of their fundamental rights and freedoms in the Constitution and secured under the ECHR and its additional Protocols ratified by Turkey." ³ Individuals have to apply to the Constitutional Court as the last national court before taking the case to the ECtHR, since "the individual application to the Constitutional Court has become a part of domestic law, it is considered as a remedy that should be exhausted before applying to the ECtHR." ⁴ This amendment was introduced to implement one more step in the domestic law before a case can reach the ECtHR.

2. Locating the ECtHR within the broader national legal order

Turkey is a founding member of the Council of Europe and a signatory of the European Convention on Human Rights (ECHR). In 1987, it accepted the right of individuals to bring their human rights complaints directly to the ECtHR. In 1990, the country committed itself to the binding jurisdiction of the Strasbourg court. In 2004, Article 90 of the Turkish Constitution was amended to recognize the supremacy of ratified international treaties over domestic legislation in the sphere of human rights. Article 90 reads,

¹ Articles 138 to 160 of the 1982 Constitution.

² There are two forms of judicial courts, the other one being the (civil) peace courts (Sulh mahkemeleri). Its jurisdiction covers all cases assigned to the court by the Code of Civil Procedure and other laws.

³ From the "Individual Application to the Turkish Constitutional Court" by Dr Hüseyin Ekinci, Chief Rapporteur of the Turkish Constitutional Court.

⁴ *Ibid.*

“In the case of a conflict between international agreements in the area of fundamental rights and freedoms duly put into effect and the domestic laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail.”

3. The de facto situation of the status of international jurisprudence (and specifically, that of the ECtHR) at the domestic level

Legally, not only do Turkey's international human rights commitments constitute the principal standard, but they are also recognized, as such, explicitly as having precedence over domestic standards that are found in the Turkish Constitution and other legislation. The place of the ECtHR's judgments in the domestic courts are, however, limited and subject to a wide sphere of discretion granted to the judiciary without much guidance as to the application of this norm. The cases I choose to study here discuss various problems with the inclusion of ECtHR jurisprudence in the domestic legal precedence. After the amendment in the Constitutional Court, an individual application must be lodged with the Turkish Constitutional Court before the case can be taken to Strasbourg.

There were (now discontinued) vocational training seminars for the judges on how to include ECtHR judgments in their decisions, as part of the EU accession process. Bar associations continue to hold seminars and certificate programs for lawyers on how to apply to the ECtHR and how to include this precedence in their petitions to the courts.

Individual appeals to the Constitutional Court regarding freedom of religion are limited in number. Only three cases reached the Court in the post-reform period on the issue and two of these were on the headscarf ban. After the legal amendments that lifted the ban of the headscarf in public and private workplaces (including courts and schools) and for pupils in almost every grade of Turkish schools and universities, there are no more applications on this issue. The only remaining case on freedom of religion is the case on the conscientious objection of a Jehovah's Witness, which is included in this report.

CASES:

Case #1

1. Name of case selected: '**Foreign Protestant Pastor**'
2. Court(s) in which it played out: **Local Criminal court of appeals, local administrative court of appeals in Gaziantep, Danistay, the Council of the State**
3. Date of submission for Danistay (the Council of the State): **2010**; Date of judgment: **2014**.

For both local courts - Date of submission: **2014**; Date of judgment: **2015**

4. Whether the ECtHR case law or ECHR are cited: **YES**
-- ECtHR decisions are referenced in four places in the file. First the petition of the defendant, second in the decisions of the local administrative court of appeals, third in the local criminal court of appeals, and fourth in a Danistay, the Council of the State, verdict included in the file to support the claimant's argument.
5. Whether the case eventually reached the ECtHR: **NO**

Case #2

1. Name of case selected: **Jehovah's Witnesses ("B.S.Ö") Conscientious Objection Case in the Constitutional Court]**
2. Court(s) in which it played out: **Constitutional Court, local Administrative Court**
3. Date of submission: **7 January 2013 (Not completed)**
4. Whether the ECtHR case law or ECHR are cited: **YES**
5. Whether the case eventually reached the ECtHR: **NO**

Case #3

1. Name of case selected: The case against '**Compulsory Religion Classes**'
2. Court(s) in which it played out: **Danistay and a local Administrative Court**
3. Danistay (Council of the State) Date of submission: **2007**; Date of judgment: **2008 (Esas No: 2007/679 - Karar No: 2008/1461)**
Local Court: Date of submission: **2014**; Date of judgment: **2015**
4. Whether the ECtHR case law or ECHR are cited: **YES**
-- The ECtHR is referenced in the petition of the claimant and in the local court's decision. Also, as for the case in the Danistay, the ECtHR was referenced both in the petition of the claimant and in the Danistay's decision
5. Whether the case eventually reached the ECtHR: **NO**

Case #4

1. Name of case selected: **Syriac Monastery in Mardin**
2. Court(s) in which it played out: **Turkish Constitutional Court**
3. Date of submission: **2013 (No: 2013/757)**; Date of judgment: **13 June 2013 (Inadmissible)**
4. Whether the ECtHR case law or ECHR are cited: **NO**
5. Whether the case eventually reached the ECtHR: **YES**

Case #5

1. Name of case selected: '**Muslim Conscientious Objector Muhammed Serdar Delice**'
2. Court(s) in which it played out: **Malatya Military Court (Case no: 2012/99; Decision No: 2012/40)**
3. Decision Date: **24 February 2012**
4. Whether the ECtHR case law or ECHR are cited: **YES -- by the court**
5. Whether the case eventually reached the ECtHR: **NO**

PART I

a. Who were the people involved in triggering the selected case? A network of lawyers/NGOs? Was there a transnational dimension to the process?

Case #1. It was a criminal defense case on charges for working illegally. No transnational dimensions. This is an *ad hoc* mobilization case triggered by the local police actions, a local court decision and the Interior Ministry's order of deportation. On 28 Aug. 2014, during an inspection, local police officials sealed the premises of a Protestant church, New Life Church, in Gaziantep, Southeastern Turkey. The church is a member of the Protestant Churches Association, an umbrella organization for the Protestant Churches founded by converted Turkish citizens. The police also cancelled its US-citizen pastor Patrick Jensen's long-term residence permit and fined him on charges of "working illegally." Two weeks later, the pastor was detained with orders from the Interior Ministry for his immediate deportation.

Case #2. The case is the first individual application to the Turkish Constitutional Court by a conscientious objector, a Jehovah's Witness (B.S.Ö) claiming exemption from military service due to his religious belief. The applicant was previously tried by the local court and sentenced to a fine for draft evasion. He appealed this decision of the local court in Yargıtay, the Court of Cassation. Yargıtay sent the file back to the local court for reconsideration, but the local court held to its initial decision. The applicant's petition in this last stage summarizes this process, and the case file includes judgments issued by different courts, and the applicant's petitions on different stages of the case. A comprehensive and multi-layered analysis of references to ECtHR case law in different instance courts is thus possible by an analysis of this single case.

Case #3. This case is one of 8 applications to a local court in Antalya, southern Turkey. 8 parents of kids in local elementary schools submitted petitions to the district governorship requesting to have their children, attending the fourth grade, to be exempted from the compulsory religious course exemption for their children. The family in this particular case stated in their initial petition that they are atheists. The district governorship rejected their demand for exemption, and applicants appealed to Antalya 1st Administrative Court against both the district governorship and the Ministry of Education for the annulment of the decision of local authorities.

In March 2016, the court decided in favor of the 6 out of 8 families, including the case in focus here, and ruled that the children of atheist families should be exempted from compulsory religious education classes, as it is the case with non-Muslim minorities. At the time of the writing of this report, the remaining two cases were still under consideration by the court.

It is widely published in the national dailies that the local branch of an educator's trade union, Egitim-Sen, provided legal aid for the families to open these cases.

In the current state of the case, a union representative informed me that Ministry of Education could still apply to the Danıştay, the Council of State, to appeal the decision.

Case #4. A non-Muslim minority, Syriac Christians, are the main claimants in this case.

The applicant, Foundation of the Syriac Monastery of St. Gabriel in Midyat, is a foundation established under Turkish law. Following the adoption of Act No. 2762 of 13 June 1935 on foundations, it acquired legal personality. It has been one of the foundations of religious community (vakf) since 2002. Its status is in conformity with the provisions of the Treaty of Lausanne concerning foundations belonging to religious minorities. The facts of the case, as set out by the applicant, may be summarized as follows: In 1935 the applicant submitted a declaration (beyanname) in accordance with Article 44 of Act No. 2762 indicating its objectives and property. The applicant states that the present application relates to two lots situated in the vicinity of the monastery of Mor Gabriel. During a land survey conducted in 2008, two neighbouring villages claimed rights at the Mor Gabriel Monastery, and the Forestry Ministry, the Land Registry Office and the villages sued the monastery for allegedly occupying their fields. The court decided in the favor of the villagers and Land Registry Office. Subsequently, the monastery's lawyers applied to court to overturn the decision.⁵

The complainant contested the classification of the lands in the forest estate and, on the basis of the acquisitive prescription, the right to property. To this end, it maintained that since the declaration deposited in 1935 the land in question had been included in its heritage and had paid property taxes since 1937. By two judgments handed down on 24 June 2009, the court of the land register disqualified the applicant from its application; on the basis of the Forest Expertise Report dated 13 April 2009, which found that the lands in question were part of the forest estate. Subsequently, the applicant lodged an appeal on points of law against the two judgments. In November 2009, the Court of Cassation rejected both appeals filed by the applicant and upheld the judgments. The Court argued that the lands in question were part of the forest estate and could not therefore be acquired by the applicant by way of acquisitive prescription. The Court also considered that the applicant should be regarded as having renounced its ownership rights in the disputed land to the extent that it had not applied for its registration in its name in a proceeding initiated in 1964. In addition, part of the land was uncultivated and could not be the subject of uninterrupted possession. The applicant lodged an application for rectification against these judgments.⁶ However, in January 2011, the Turkish Supreme Court of Appeals (Yargıtay) overturned the lower court's decision and granted substantial parts of the monastery's land to the Turkish Treasury.⁷

The legal struggle between Mor Gabriel and the Treasury had come to a dead end in the national courts by this decisions of the Supreme Court of Appeals. Subsequently, the representatives of the Syriac community have filed a petition with the ECtHR in 2011 for the full return and control of the territory where the Monastery was located.⁸ (*Foundation of the Syriac Monastery of St. Gabriel in Midyat v. Turkey*).

⁵ Summeryzed from "Communiquée le 16 octobre 2014, Requête no 61412/11 FONDATION DU MONASTERE SYRIAQUE DE SAINT-GABRIEL A MIDYAT v. la Turquie introduite le 18 août 2011."

⁶ For a detailed account of the history of the case in Turkish national courts see, Atra Hanna (2013) "The Legal Battle over Monastery of Mor Gabriel in Southeast Turkey." Unpublished master's thesis, University of Amsterdam.

⁷ Also, the Supreme Court of Appeals rejected a petition by the Mor Gabriel Foundation asking for a review of the judgment issued by the 20th chamber of the same court in June 2012.

⁸ Its wider context is the lack of legal status of religious minorities and religious groups in Turkey. Since religious communities or belief groups do not have legal personality in Turkey, these communities cannot own, transfer or register their property. Thus, the lands of Mor Gabriel, a Syriac Monastery in

Two national developments intervened with legal mobilization at this point: The adoption of Article 11 (provisional) of Law No 5737 on foundations and Decree Law no. 651 in 2008 and 2011 respectively, relating to the restitution of property belonging to Community foundations.⁹ Following these laws, Turkish courts decided to recognize the monastery as an "occupier." Also, the community returned to Turkish national courts and applied to Turkish Constitutional Court. However, the Court found their case inadmissible in 2013, bringing the issue to an impasse once again in the domestic system.

Case #5. Defendant Delice's imprisonment by the military court triggered the case.¹⁰ The submission to the national court is pretty standard since it is a plea of defence for the crime of deserting the army. The case concerns Muhammed Serdar Delice, a Muslim conscientious objector. Delice declared his conscientious objection approximately five months after he had been conscripted based on his Islamic and nationalist beliefs in 2010 and was consequently imprisoned. He was charged for desertion, insubordination and alienating the people from military service. He was tried for the first of these crimes, desertion, in 2012, and the court ruled that his imprisonment should continue. The case under study here considers his third trial on the same subject.

b. What are the relative roles of individual actors – lawyers, claimants, NGOs, etc., in the selected case?

Case #1. The defendant's lawyer appealed these two charges (fine and deportation) in two separate courts, Administrative and Criminal Court in Gaziantep, by submitting the same petition. The Protestant Churches Association, of which the Gaziantep Church is a member, and its lawyers filed these joint cases to address the problems of belief groups and the rulings regarding work permits of foreign clergy due to lack of legal status.¹¹

Case #2. The individual claimant, although he is the person who is charged criminally, did not play a central role in the case. It is a case by Jehovah's Witness and the case is the last in a series of litigation in national courts and supra national courts on conscientious objection.

Mardin, Southeastern Turkey were not registered in the National Land Registry to the Foundation of the Syriac Monastery and was considered empty grazing land for the sheep.

⁹ "5737 sayılı Vakıflar Kanunu'nun Geçici 11'inci Maddesinin Uygulanmasına İlişkin Yönetmelik" [Regulation on the Implementation of Law no. 5737 on Foundation's Provisional Article 11], Official Gazette, no 28071, October 11, 2011 and "Decree law no 651", Official Gazette, no 28038, August 27, 2011.

¹⁰ Military service is compulsory for every male citizen from 20 to 41 years of age in Turkey. Under the relevant law, persons who failed to report for duty when called for military service were regarded as deserters (Military Service Law (No. 1111) 17 June 1927). Also, Turkey does not recognize the right to conscientious objection to military service. Conscientious objectors to this service fall mainly into two groups: pacifists who consider themselves 'total objectors' to any compulsory state service, including any or fully civilian service, and Jehovah's Witnesses, who reject military service but are willing to serve within a strictly civilian alternative service regime.

¹¹ The Turkish state doesn't grant legal status for religious groups. Accordingly, municipalities fail to provide zoning for building non-Muslim worship places and prohibits religious groups from theological training of their foreign and local priests. Believers who assemble in their place of worship run the risk of interference by public authorities for worship in premises that are not recognized by public authorities as such.

Case #3. This case is the result of legal mobilization by a trade union together with claimant families. The claimant family stated that their kid was having psychological problems because of the class' heavy content on Sunni Islam. They applied to the trade union for legal help. The union reached other families in the same condition and they filed similar cases in the court.

The lawyer played the biggest role in this case of legal mobilization. He stated that these recent court cases were the last instance in an on-going struggle in the national courts regarding compulsory religion classes. He mentioned that in 2009 they lost a similar case in the local court in Antalya, and Danistay, overturned their subsequent appeal later in 2012. If they lose any of the remaining cases in the local courts, they expressed intent to take the case to the ECtHR; however the legal process is taking a long time in the local courts.

Case #4. The board members of the Mor Gabriel Church Foundation, the only allowed form of institutional body for minorities and belief groups in Turkey, decided to litigate in the ECtHR and TCC¹² after they were rejected by the lower level Turkish courts. No expert lawyer involvement.

Case #5. Two NGOs involved with Delice's court proceedings played a central role after the decision of the court to disseminate the judgment and push forward for freedom of religion in the field of conscientious objection. These are Vicdani Ret Dernegi (the Association for Conscientious Objection) the pacifist, anti-militarist organization that also works in coordination with War Resisters International, and Mazlumder (Association of Human Rights and Solidarity for Oppressed People), the main Islamist NGO in Turkey for human rights. Post-case legal mobilization: Several Muslim conscripts declared their conscientious objection after Delice's case, and some of their cases are still under review in the military court.

c. Role played by experience with ECtHR case law in mobilizing groups and individuals to litigate (in general and, where appropriate, at the ECtHR)?

Case #1. The association involved in the case, Protestant Churches Association, has a certain amount of experience in the ECtHR, given their wide-ranging problems regarding the lack of legal status, such as the status of worship places. This experience is reflected in their defense plea where they cite all relevant ECtHR case law. This experience did not lead individuals to the court as the question frames the issue, however it is still important since the intervention of the Association representatives and lawyers turned the case into a freedom of religion case.

A representative of the Association of Protestant Churches commented on the problem by relating it to the larger issue of lack of legal status for belief groups in Turkey: "Foreign clergy

¹² With the constitutional amendment adopted by the public referendum in 2010, Turkish Constitutional Court was authorized to conclude and finalize individual applications. All Turkish citizens gained the right to lodge applications in this highest court of the country "upon violation of any of their fundamental rights and freedoms as protected by the European Convention on Human Rights (ECHR) and guaranteed under the Turkish Constitution." The Court started to receive applications in 2012.

are experiencing problems with work permits ... It is not clear according to which criteria they say yes or no. Currently only four Protestant church leaders have been able to obtain this visa status. ... Since we lack legal status, here is no open, simple and clear way to bring these people [foreign clergy] here officially. As a result...with whatever excuse, officials can easily punish people, marginalizing them by calling them illegal workers." He also stated that these links between this case and the community's wider problems due to non-recognition of the status of their worship places, led them to frame this case as a freedom of religion case and to mobilize on the issue.

Case #2. In this case, more experience with the ECtHR helped to frame this case in the highest national court as a freedom of religion case, and lead it to the Constitutional Court.

Case #3. The lawyer of the case does not have any experience with the ECtHR but in our interview he stated that ECtHR case law encouraged him and the parents involved in the cases to litigate. The lawyers of the union, who had followed cases in the Court previously, although not in the field of freedom of religion, also helped with the case. In this sense, although he did not have first-hand experience in bringing a case to the ECtHR, both the previous experiences of the union lawyers and the ECtHR case law regarding Turkey in religious education helped mobilizing parents and taking their cases to the court.

Case #4. A lawyer I spoke about the case stated that they needed to push the Turkish courts to recognize the wider problems due to lack of legal personality of their community. In this case, legal mobilization in the TCC and ECtHR did not grant the desired results.

Case #5. Delice's lawyer, who is not connected to an NGO, but is a local lawyer in the city where Delice was sent to perform his military duty, did not have any experience in the ECtHR. However, the lawyers of Mazlum-Der and Vicdani Ret Dernegi, the NGOs that were involved in Delice's case, have a high level of expertise in ECtHR case law, especially on the issues of freedom of religion and conscientious objection, respectively.

d. What lawyers and representatives of NGOs that are legally active around religion say about whether they invoke the ECHR/ECtHR and when they do, what the reaction of judges tends to be.

Case #1. The lawyers and Association representatives, who jointly prepared the defence plea, gave a central place to both the ECHR and ECtHR case law regarding freedom of religion in their argument (although they did not refer to specific ECtHR decisions but rather cited ECtHR and ECHR in general terms). The lawyers of the Association filed two court appeals to annul the order of deportation and fine for "working illegally." The petition given to the criminal court for the annulment of the fine, stated that the pastor declined to pay the fine, contending he was a volunteer serving in the church, which he said an inspection board under the Labor Ministry had mistakenly classified as a place of business. Both petitions stated that these cases (fine and deportation) were in fact not about work permits and labor laws, as it is stated in the documents filed against the pastor by Turkish authorities. The defense plea of the pastor argued that the defendant was punished due to his religious belief: "This

punishment is against the universal legal values, and freedom of religion." This argument, they stated to me, steered the course of the case from a "work permit" issue to the issue of freedom of religion, and the judges in both courts accepted this claim and decided accordingly. (Also see the answer for Question (e) Part II).

Case #2. The Jehovah's Witnesses representative I interviewed on the case told me that the process took longer than they expected. One explanation for this, he offered, was that the current political situation in Turkey delays the Court's functions, especially on issues such as conscientious objection and freedom of religion.

Case #3. One legal scholar I interviewed about the issue stated that this decision and the reference to the ECtHR in this decision is a very important one for the legal mobilization around the issue since the decision signalled that the court is reverting "to the European standards" which was also supported by the Danistay's pre-2012 perspective on the issue of compulsory religion class. In this sense, legal scholars' and lawyers' interpretation of the judge's decision was positive that emphasized the importance of national courts' acknowledging and following ECtHR case law.

Case #4. The Foundation of the Monastery of Mor Gabriel claimed, in both the ECtHR and in the TCC that the monastery has been "in service for prayers for over 1,600 years. (...) It has been continuously a place for Syriacs to perform their religious commitments," and presented the case as a freedom of religion case. The TCC rejected the case on these grounds and stated that the confiscation of the monastery's lands by the Treasury doesn't constitute a breach for freedom of religion.

In its decision of rejection, the Constitutional court stated the litigants claimed injury due to the land survey, but did not mention a specific obstruction of their freedom of religion by a public authority. Also, the court stated that there is a large parcel of land has been already used for "religious rituals and events" that clearly shows that there is "no violation of freedom of religion and consciousness" by a public authority.

Case #5. In this case, the case lawyer did not invoke the ECHR/ECtHR in the petition but only asked for the recognition of the defendant's right for conscientious objection based on religious convictions. Delice's lawyer and Delice himself were not available to comment.

Delice's case is outstanding in the sense that his case forced the Turkish national courts to comment on the ECtHR jurisprudence on Jehovah's Witness conscientious objectors (*Bayatyan* and *Ercep*) that ruled for the violation of Article 9 that guarantees freedom of religion and conscience in the context of conscientious objection. Delice case thus brought up the issue of the role religious belief plays in the conscientious objection to military service cases once again for the Turkish national court, yet this time in the context of the majority religion, Islam.

A representative of the Istanbul branch of Mazlumder relayed to me that in their press conference on the Delice decision of the military court, Delice's lawyer complained that Malatya Military Court "developed a new stalling method by saying that there is no conscientious objection in Islam". (Also see, the answer to Part II, Question e).

e. Do we see a tension between the collective strategies of stakeholder organisations and the individual claimant who is interested in taking his/her own case to court?¹³

Case #1. No.

Case #2. No.

Case #3. No.

Case #4. No.

Case #5. No.

f. Do we have examples of isolated individuals litigating in parallel but not connected to one another, and others where we have examples of a more global strategy (whether legal or political)?

Case #1. No.

Case #2. See, case no. 5.

Case #3. We have examples of two different national strategies on the issue. The first strategy is aimed to use religious education cases to defend secularism in Turkey; this strategy is adopted by the lawyer of the *Eylem Zengin* case, and by the lawyers of subsequent case in Turkish local and high courts. The second strategy is aimed to push the Turkish state to recognize the Alevi minority as a religious minority. CEM Vakfi pursued this strategy in *Mansur Yalcin and Others*.

Case #4. Syriac Catholics will also be litigating in the ECtHR about their own land and the historic monastery on it (Mor Efraim Monastery). Their lawyer informed me that the two communities (Orthodox and Catholic Syriacs) are not in touch about the issue with the Orthodox Syriac community. (However, he stated, they will be in close contact with the lawyers of the Greek Patriarchate in Istanbul when developing their legal argument).

Case #5. Not individuals, but Jehovah's Witnesses are litigating for the right of conscientious objection with a global strategy (see case #2). This is a good example of "parallel litigation" sine these two groups of actors (Jehovah's Witnesses and Muslim conscientious objectors) are not collaboration or connected to each other in any way.

¹³ Here we explore those cases where individual claimants were discouraged by related interest-group organisations/NGOs from taking the case to court (whether local, national, or the ECtHR) and/or in which the aims of the groups and individuals in question were divergent. The direct relation to our study's aims may not be clear but it may yield interesting results to look into such examples, where they arise in our research. Sometimes inter-organisational politics may influence how and to what effects the ECtHR case law is employed – e.g., in the *Oliari* case, the competition between two LGBT-related groups.

g. ECtHR cases which were referenced in relation to this case

Case #1. *Feldek v. Slovakia*, no. 29032/95, ECtHR, 12 July 2001; *Van Den Dungen v. the Netherlands* 22838/93, decision 22 February 1995; *Hoffman v. Austria*, decision 23 June 1993; *Canea Catholic Church v. Greece*, ECtHR judgment, 16 December 1997; *Sidiropoulos and Others v. Greece*, ECtHR, 10 July 1998; *Campbell and Cosans v. the United Kingdom*, ECtHR, 25 February 1982, *Pretty v. UK* 2002; *The Metropolitan Church of Bessarabia v. Moldova* 45701/99; and *Supreme Holy Council of the Muslim Community v. Bulgaria*, ECtHR 16 December 2004); *Kokkinakis v. Greece*.

Case #2. The lawyers' petition did not refer to specific ECtHR decisions but rather cited ECtHR and ECHR in general terms.

Case #3. *Eylem Zengin and Mansur Yalçın*.

Case #4. None.

Case #5. *Bayatyan v. Armenia* and *Ercep v Turkey*.

h. Obvious ECtHR cases which could have been referenced in relation to this case (researchers' own assessment)

Case #1. The decision of the local criminal court cites 9 ECtHR judgments in the justification part of its verdict (See, the answer for Question (e) Part II for a complete list of these decisions). *Kokkinakis* is not one of them. Considering that the Danistay cited *Kokkinakis* and Danistay decisions establish precedence for local courts, the absence of a citation for this ECtHR decision in the local criminal court's verdict raises questions. In this sense, all cases that could be referenced have been already cited.

Also, as I stated in the answer for Question (b) in this part, the defense plea refers to both the ECHR and ECtHR case law, yet does not specify.

Case #2. Although ECtHR case law is a very significant part of the narrative, the petition chooses to refer only to cases regarding the Jehovah's Witnesses community in Turkey. There is no reference to *Bayatyan* in the petition or in other documents included in the file to support claimant's case.

Similarly, high profile conscientious objection cases of non-Jehovah's Witness objectors, most prominently *Ülke* and *Tarhan*¹⁴ were not cited in the claimant's petition. This strategy might be aimed to distinguish Jehovah's Witnesses' cases from the rest of the conscientious objection cases in the ECtHR regarding Turkey, which had been politicized by the national press as cases of peace and LGBT activists against the Turkish state (media study report).

¹⁴ Application no. 9078/06. Date: 17/07/2012

Case #3. Only relevant religious education cases related to Turkey are referenced in these petitions and in the decision of the court; in both texts other relevant judgments of ECtHR, such as *Folgero* or *Grzelak*, were not included among the references.

Case #4. By deciding that the case is not on freedom of religion, the TCC did not refer to ECtHR case law regarding the confiscated properties of religious minorities in Turkey. (Also see the answer for Question (b) in Part II). (The researcher did not have access to the claimant's petition to the court at the time of writing of this report.)

Case #5. *Ercep* and *Demirtas* - two successful conscientious objection cases by Jehovah's Witnesses in the ECtHR against Turkey.

i. Interviewees' explanations for the lack of reference to the ECtHR, where applicable (And/or to the specific relevant ECtHR cases identified by the researcher)

Case #1. Question not applicable to this case.

Case #2. The spokesperson of the Jehovah's Witnesses in Turkey stated that their approach to the rejection of military service stems from religious belief; otherwise they are completely respecting the rules and regulations of the Turkish state. He emphasized the "sincerity" of the Jehovah's Witness objectors on their loyalty to the Turkish state, and stated that they are asking for alternative civilian service, and willing to serve the country by any other means than military service.

The spokesperson also stated that they write these petitions to make clear in the court that the applicant's objection is an issue of freedom of religion. Thus, they base their argument on religious conscience and cite related ECtHR jurisprudence that considers military objection of the JWs as an act of religious belief. Accordingly, the petition emphasizes JW objectors "good intentions" and "genuine belief" multiple times.

Case #3. The lawyer of the case did not perceive the lack of reference for ECtHR cases regarding other countries as an issue. The general understanding I gathered from my interviews that these cases on religious education are seen as a national problem without international dimensions, both by grassroots actors, lawyers and by the courts. Thus references to other cases regarding other countries are not considered relevant.

Case #4. Since I was not able to interview the judges of the case, I have no data to answer this question.

Still, NGO representatives I interviewed on the issue stated that this case emerged as a litmus case for the TCC regarding freedom of religion and property rights of religious minorities in Turkey. According to my interlocutors, by declaring the case inadmissible, and not referring to ECtHR case law in its decision, TCC implied that individual applications regarding issues around freedom of religion on no-Muslim minorities and other belief groups will not be "welcomed" and also "clearly stated its unfriendly approach to ECtHR case law and indicated that it does not consider it as establishing precedence for Turkey's highest court." (Also see case #2 on the issue)

Case #5. My interviewees did not comment on this issue.

j. Do we have cases in which ECtHR case law is invoked by *both* sides in the given case (by both the defendant and claimant), in support of their positions?

Case #1. Yes.

Case #2. No.

Case #3. Yes.

Case #4. Question not relevant for this case.

Case #5. No.

k. Within such examples (where ECtHR case law is invoked by both sides), examples of cases where the *same* case law is invoked by both sides

Case #1. The defence pleas did not refer to particular cases, whereas the courts cited specific cases, so the answer is “no,” although the general frame of reference is freedom of religion case law of the ECtHR.

Case #2. No.

Case #3. Yes. See the answer for Question (b) Part II.

Case #4. Question not relevant for this case.

Case #5. Question not applicable to this case.

PART II

Please provide your analysis of:

a. The source of references to the ECHR/ECtHR case law (where applicable): claimant, defendant, or judge?

Case #1. See answer for (b).

Case #2. ECtHR case law is referenced in the context of the petition of the claimant.

Case #3. Claimant and judge.

Case #4. In the petition of the claimant.

Case #5. The judge's justified decision.

b. Context in which the Court is referenced: in defense of the claimant or of the defendant?

Case #1. ECtHR decisions are referenced in four places in the file. First in the petition of the defendant, second in the decisions of the local administrative court of appeals, third in the local criminal court of appeals, and fourth in a Danistay, the Council of the State, verdict included in the file to support the claimant's argument. While the petition mentions the ECtHR and ECHR in very broad terms as components of "the universal legal standards of freedom of religion" to support defendant's claims, the verdicts of the local administrative court and that of Danistay include the exact same text where they give a single reference to *Kokkinakis*¹⁵. The decision of the local criminal court cites 9 ECtHR judgments in the justification part of its verdict.

Case #2. Claimant's petition cites *Erçep*¹⁶ and *Demirtas*.¹⁷ To support the defendant's case, the file also includes a letter of opinion by the Ministry of Justice sent to a military court in a Jehovah's Witness draft evasion case that cites *Ulke*¹⁸ in favor of the defendant of the case. Also included in the file is a verdict by a local court in Ankara on the case of another Jehovah's Witness conscientious objector that cites ECtHR case law, albeit without referencing to a specific case.

The petition draws a full picture of the Jehovah's Witness related conscientious objection cases in the domestic courts as well as in international ones (ECtHR and HRC), and gives a picture of the full extent of the Jehovah's Witnesses' legal mobilization on the issue in Turkey. It starts by citing the precedence of the international courts and then moves on to cite domestic precedence. In two other cases analyzed in this report, the court or the claimant/lawyer start with the Turkish Constitution, later cite domestic precedence and last move to the international cases. This petition stands out in the ultimate importance it attributes to ECtHR jurisprudence. References to the ECtHR cases were included in the petition together with another case by two Jehovah's Witness conscientious objectors, Atasoy and Sarkut, submitted to the UN's Human Rights Committee,¹⁹ in an apparent effort to cover all international legal precedence regarding Jehovah's Witnesses in Turkey on the issue. In the same vein, the claimant and his lawyer state in the petition that the local court violated Article 90 of the Turkish Constitution²⁰ by disregarding ECtHR's jurisprudence on the

¹⁵ App. no 14307/88

¹⁶ 43965/01.

¹⁷ 5260107.

¹⁸ 39437/98.

¹⁹ Communication nos. 1853/2008 and 1854/2008, 29 March 2012, UN Doc. CCPR/C/104/D/18531854/2008.

²⁰ Article 90 of the Turkish Constitution states that in cases of conflict between international agreements in the area of fundamental rights and domestic laws, the provisions of international agreements will prevail.

issue and the principles of ECHR. Thus we can argue that the petition makes a clear effort to emphasize ECtHR jurisprudence power over domestic courts on the constitutional level.

Case #3. The ECtHR is referenced both in the petition of the claimant and in the court's decision. Both documents base its claim and justification, respectively on *Eylem Zengin*²¹ and *Mansur Yalcin*²² cases. Thus we can argue that both the petition and the decision are mirroring each other in the way they reference ECtHR as part of relevant legal precedence. The place where the petition and the decision give a reference to the related ECtHR case law in the text is pretty standard. In general, we can argue that petitions to the local courts are standard in Turkey, in the sense that they simply cite the relevant national and international law. ECtHR case law was referenced as part of the other relevant precedence that favors the claimant's demands for exemption.

Case #4. The ECtHR is referenced *only* in the petition of the claimant but not in the TCC's decision. The claimant's petition based its claim of the monastery land on the previous three property cases of the non-Muslim minorities in the ECtHR against Turkey. These cases are Greek Orthodox and Armenian Apostolic Foundations' confiscated religious property cases: *Fener Rum Patrikliği (Ekuümenik Patriklik) v. Türkiye*²³, *Bozcaada Kimisis Teodoku Rum Ortodoks Kilisesi Vakfi v. Turkey*²⁴ and *Samatya Surp Kevork Ermeni Kilisesi, Mektebi ve Mezarlığı Vakfı Yönetim Kurulu v. Turkey*²⁵ all were decided against Turkey.

Case #5. The military judge cited *Bayatyan* case and the European Convention of Human Right's Article 9 in its justified decision. There is no reference to the ECtHR in the defendant's lawyer's petition to the court.

c. 'Weight' of the reference for this case: central to the argument or not?

Case #1. The reference in the claimant's petition serves the purpose of grounding his argument on freedom of religion, although no specific case was cited. This brief mention of ECtHR states that the defendant's freedom of religion "stemming from universal principles determined by the ECHR and the jurisprudence of the ECtHR" were breached by the local administrative authorities and security forces.

ECtHR references are also central in all three courts' decisions. The *Kokkinakis* case in two separate decisions and all 9 references in the criminal court's verdict all come in the reasoning section, the most significant section of the decision. All references are cited only once in all these documents.

²¹ *Hasan ve Eylem Zengin v. Turkey*, 14448/04, 09/10/2007.

²² *Mansur Yalcin and Other v. Turkey*, 21163/11, 09/16/2014.

²³ Application No: 14340/05

²⁴ Application Nos: 37639/03, 37655/03, 26736/04 and 42670/04

²⁵ Application no.: 1480/03

Case #2. ECtHR cases are of central importance in the claimant's petition. In the section of "justification for the claim of violation of the applicant's individual rights," the document argues that lower courts violated the "hierarchy of the relevant laws" by disregarding ECtHR jurisprudence on the issue, and thus establishing the main reason for the individual application to the Constitutional Court.

Case #3. The reference to the ECtHR is not marginal to the argument in the claimant's petition, yet we cannot say it is absolutely of central importance. Rather, we can argue that the lawyer and the claimant included the reference as another piece of legal precedence to support their case. The family sued the district governorship and the Ministry of Education by stating that exemption is a right for every pupil –not only recognized non-Muslim minorities– based on Turkish Constitution and previous decisions of the national courts besides the reference to the ECtHR.

Case #4. The litigants' references to the previous ECtHR cases regarding confiscated properties of religious minority communities by the Turkish state are central in their petition.

Case #5. In the justified decision of the court, the reference to the ECtHR case law is central to the argument that is in favor of the defendant.

d. Ultimate effect of the reference: to the extent possible, an ascertainment of whether the reference swayed the decision or not.

Case #1. The references to ECtHR in all three verdicts led to a favorable decision for the claimant.

A lawyer, commenting on my question of the "function" of the references to ECtHR argued that if a court includes a reference to the ECtHR in the justification of its verdict, this reference always sways the verdict in the defendants favor. The lack of references to ECtHR jurisprudence is the problem, he added, "I am yet to see a case where the court cites an ECtHR case to counter the demands for freedom of religion by a claimant."

Case #2. In the documents by the Ankara Court and by the Justice Ministry references to the ECtHR were cited to support the defendant's claims. In the Ankara court's verdict, the ECtHR is mentioned in the reasoning part that supports the defendant's claim. The Justice Ministry mentions *Ulke* as a case that Turkey lost in the ECtHR and as a violation of ECHR, Article 3.

Case #3. The verdict of the Antalya 1st Administrative Court was based on several legal provisions stemming from both the Turkish Constitution and the international agreements. The Court also made reference to the case of *Zengin* and *Mansur Yalcin* judgments of the ECtHR together with the 2005 report of the European Commission against Racism and Intolerance (ECRI) in the justification part of its decision, and accordingly reached the conclusion that "in Turkey today, classes on religious culture and ethics education are not taught according to the principles of pluralism and from an objective and rational perspective."²⁶

²⁶ Antalya 1. İdare Mahkemesi, E. 2014/1777, K. 2015/1550, T. 30/12/2015.

As is also true for other two cases under discussion in this report, when the court refers to the ECtHR's case law, it is usually to agree with the claimant and the reference occupies a central place in terms of its effects for the final judgment. Just like the case of the claimant's petition, the reference to the ECtHR occupies a fairly important place in the decision text as *part of a wider legal canon*. In this sense, we can argue that the reference to the ECtHR is central in the court's decision as a part of a body of law but is not the single central element that causes the decision to sway the court in favor of the claimant.

Case #4. The TCC did not cite ECtHR case law or the ECHR in its inadmissibility decision. The decision of the TCC, therefore, is an example of “non-use” by the relevant national court. Being a religious property case by a non-Muslim minority in Turkey in the highest national court of the country, where litigants pointedly refer to the previous legal precedence of the ECtHR case law, the absence of any reference to the ECtHR case law (in favor or otherwise) in the court's decision points to a conspicuous absence that points to the court's stance towards the ECtHR.

Thus we can state that the reference in the petition did not have an effect on the decision since the Court declined to consider the case.

Case #5. In its decision, the Military Court cited on Article 9 of the European Convention on Human Rights and discussed European Court of Human Rights (ECHR) case law as the basis for evaluating the defendant's claims on conscientious objection. Based on the case law, the court argued that the defendant's claims on his individual Muslim belief does not constitute an acceptable basis for his conscientious objection.

Yet, in a contradictory move, in the second part of its reasoned decision, the court stated that, regardless of the court's doubts about Delice's being a conscientious objector and Islam's perspective on conscientious objection that the decisions of the ECHR that recognized conscientious objection should be applied to domestic law within the scope of Article 90 of the Constitution; and argued in favor of the defendant. (see also e.5.)

e. Nature of the reference: to the extent possible, an ascertainment of whether the reference reflects the thrust of the ECtHR case/judgment referenced.

Case #1. The verdict of the criminal court cites 9 decisions, without giving any particulars on individual cases. In a short paragraph, this decision states “ECHR's Article 9.1 as well as the jurisprudence of the ECtHR (*Feldek v. Slovakia*, no. 29032/95, ECtHR, 12 July 2001; *Van Den Dungen v. the Netherlands* 22838/93, decision 22 February 1995; *Hoffman v. Austria*, decision 23 June 1993; *Canea Catholic Church v. Greece*, ECtHR judgment, 16 December 1997; *Sidiropoulos and Others v. Greece*, ECtHR, 10 July 1998; *Campbell and Cosans v. the United Kingdom*, ECtHR, 25 February 1982, *Pretty v. UK* 2002; *The Metropolitan Church of Bessarabia v. Moldova* 45701/99; and *Supreme Holy Council of the Muslim Community v. Bulgaria*, ECtHR 16 December 2004) ...all emphasize that ‘freedom of religion is not only an individual right of individuals, but it also contains a collective dimension’ “ without giving a reference for its quotation.

The last paragraph of the decision starts by stating “Considering the Constitution, [Turkish] law, international agreement (ECHR) and the jurisprudence of ECtHR” and declares the

courts final verdict immediately afterwards, “the Gaziantep Labor Office's decision to fine the pastor of Yeni Hayat church was legally unfounded.”

Kokkinakis was discussed in a short paragraph in both the local administrative courts and in the Danistay's decision as “a case concerning a Jehovah's Witness who was convicted for proselytism. The verdict goes on to argue that “ECtHR hold that the sentence passed by the criminal court amounted to an interference with the exercise of the right to 'freedom to manifest one's religion or belief' “These decisions, thus, interpret *Kokkinakis* as an example of ECtHR's acknowledgment of the "right to manifest one's religion" as part of Article 9. Based on this interpretation, we can argue that these two decisions reflected the thrust of *Kokkinakis*.

Note: A comparison of the decision of the local administrative court in Gaziantep to that of the Danistay included in the file shows that 10 out of 18 paragraphs - that also include the reference to *Kokkinakis* - are exactly the same. A lawyer commenting on this issue said that he has seen similar instances and stated, as a possible reason, the lower court's perspective of precedence. Higher courts diffuse their selective judgments (*emsal karar*) in their quarterly journals and make them also available on their websites. Lower courts use this precedence in the way they use relevant domestic law, by copying it verbatim and using the higher court's verdict as blue print for their verdicts on similar issues.

Case #2. The petition neatly places ECtHR jurisprudence within the national order of courts, and relates it to other relevant decision by the national courts. The file has paragraph-long quotes from the ECtHR's decisions to include the key points of the ECtHR cases in detail. Further, the petition refers to these points in detail to support applicant's claims. We can argue that the petition makes a special effort to fully and in great detail, convey the position of the ECtHR on the issue to the Turkish constitutional court. These references reflect the thrust of ECtHR cases cited.

Case #3. The *Zengin* decision stated that compulsory religious education classes are against the Convention (Art. 9) due to their non-objective content that was written from a Sunni Muslim perspective. This first judgment also stated that opt out mechanism was inadequate. The *Mansur Yalcin* judgment repeated the findings of the *Zengin* case and added that the amendments made to the content of the class after the *Zengin* judgment were not adequate to solve the problem.

In line with the nature of the verdict of ECtHR in *Zengin*, the local court stated that there is no compliance to law to make this course compulsory with its current content, and had a verdict on the annulment of the decision by the district governorship and the Ministry of Education.

Case #4. Litigants' reference to the ECtHR' case law of the previous property cases by non-Muslim minorities aims to establish the basis of the breach of freedom of religion for the confiscation of the religious land by the Turkish state. However, since the ECtHR did not find a violation in terms of Article 9, but only under Art. 14 (rights to property) in these cited cases, there is a clear discrepancy between claimant's arguments (breach of freedom of religion) in reference to the ECtHR and the spirit of the ECtHR judgments on the issue. The Court, just

like the TCC, did not consider these confiscated property cases against Turkey as breaches to freedom of religion.

Case #5. In the first part of the decision, the Military Court interpreted the ECtHR's approach to the right to conscientious objection as one based on the theological position of a religious group, and excluded the beliefs of an individual as just cause for conscientious objection. The decision specifically referred to the example of the Jehovah's Witnesses, and the related ECtHR case of *Bayatyan*,²⁷ stating: "persons who are members of the Jehovah's Witnesses reject military service, because they are part of this group or institution which fundamentally rejects military service".

The court further stated that Delice belonged to "Islam which is not a belief or ideological movement that rejects the performance of military service" and thus declined to recognize Delice's conscientious objection on religious grounds.

Also related to the court's perspective on religion, in the justified decision of the court, it is stated that the defendant Delice wanted to bring in a local *mufiti* as an expert witness. The court rejected his request by citing the Law No. 5271 ("On Criminal Procedure") Article 62 that states, "Experts must take an oath saying that they will perform their tasks based on science." The Court stated that "the religious sphere is intrinsically related to beliefs and is dogmatic, hence any view expressed from this field cannot be based on science and includes subjective elements."

In the second part of its reasoned decision, the court stated that, regardless of the court's doubts about Delice's being a conscientious objector and Islam's perspective on conscientious objection that the decisions of the ECHR that recognized conscientious objection should be applied to domestic law within the scope of Article 90 of the Constitution; and argued in favor of the defendant.

The Malatya Military Court interpreted the ECtHR's approach to the right to conscientious objection as one based on the theological position of a religious group, and excluded the beliefs of the individual. It ruled out an individual rejecting military service according to his own views. Instead, the Military Court relied on the rejection of military service by an intellectual, religious or political group, as such. It referred to the example of Jehovah's Witnesses, stating: "persons who are members of the Jehovah's Witnesses reject military service, because they are part of this group or institution which fundamentally rejects military service." Military Court's Delice reference to ECtHR case law outlines the Turkish military judiciary's interpretation of the right to conscientious objection to military service and the role freedom of religion plays in the decisions regarding conscientious objection.

²⁷ *Bayatyan v. Armenia* (no. 23459/03, 7 July 2011)