



TURKEY

Single ECtHR Case Study Report

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Ercep v. Turkey (43965/04)

- 1. Basic details:** Case name, date of submission, date of ECtHR judgment, full list of applicants, core issue addressed by the case

Ercep v. Turkey (43965/04)

This case concerned the failure to recognize the right to conscientious objection in Turkey. Yunus Ercep, the applicant, was a Jehovah's Witness, who refused to perform his military service for reasons of conscience. The application was submitted to the ECtHR in 2004, and was the first application by the Jehovah's Witness community in Turkey that reached the Court.

Ercep claimed that the Turkish courts, by refusing to grant the right to conscientious objection, violated ECHR Articles 5, 6, 7, 9, and 13. Specifically, he complained about his successive convictions by the Turkish military courts for refusing to serve in the armed forces. He also challenged the fairness of the proceedings before the military court, which, he claimed, could not be regarded as an independent and impartial tribunal. Lastly, and most importantly for the case, Ercep argued that Turkish courts violated his right to freedom of religion under Article 9 of the European Convention of Human Rights.

The ECtHR delivered its judgment on 22 November 2011. It was a Chamber judgment. For the first time, the Court found the Turkish government guilty of a breach of Article 9 of the European Convention on Human Rights regarding the right to freedom of thought, conscience and religion. The Court noted in particular that the applicant was a member of the Jehovah's Witnesses, a religious group whose beliefs included opposition to military service, irrespective of any requirement to carry weapons. It was the second time in its history that the Court decided for the breach of Article 9 in a case regarding conscientious objection. The *Bayatyan* case was the first case in which the Court has examined the issue of the applicability of Article 9 of the Convention to conscientious objectors.

The Court also concluded that there had been a violation of Article 3 of the Convention, as the applicant had been subjected to degrading treatment, and a violation of Article 6 § 1 (right to a fair trial), given that the applicant, as a conscientious objector, had been required to appear before a military court that was incompatible with the principle of the independence and impartiality of the courts. Because of the nature of the legislation, the applicant ran the risk of an interminable series of prosecutions and criminal convictions. The constant alternation between prosecutions and terms of imprisonment, together with the possibility that the applicant would be liable to prosecution for the rest of his life, had been disproportionate to the aim of ensuring that he did his military service. Also, under Article 41 (just satisfaction) of the Convention, the Court held that Turkey was to pay the applicant 10,000 euros (EUR) in respect of non-pecuniary damage and EUR 5,000 in respect of costs and expenses.

2. Context of the issue: Socio-legal, political and historical background to the issue at hand and/or practices that prompted the litigation, in the given country. (Max 1000 words).

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 (Relevant law: 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. There are approximately 89 conscientious objectors who are not Jehovah's Witnesses, according to the war resister savaskarsitlari.org web site. About 30 conscientious objectors are Jehovah's Witnesses.

According to the report of Forum 18, on 1 June 2008 the Minister of National Defense stated that approximately 1,000,000 men had either postponed military service or evaded the draft. Objectors often prefer to evade military service by postponing service (for example by continuing their education), working abroad, or desertion. (Forum18, 2010)

In its *Ercep* decision, the ECtHR observed that "the violation of the applicant's rights had its origins in a structural problem linked to the inadequacy of the existing legal framework governing the status of conscientious objectors and to the absence of an alternative form of service, the Court further held that a reform of the law, which was necessary in order to prevent further similar violations of the Convention, combined with the introduction of an alternative form of service, might constitute an appropriate means of redress by which to put an end to the violation found."

The other relevant context for the case is Article 9 of the Convention. As the *Bayatyan* judgment states:

"Article 9 of the European Convention on Human Rights does not explicitly refer to a right to conscientious objection. However, [the European Court of Human Rights] considers that opposition to military service, where it is motivated by a serious and insurmountable conflict between the obligation to serve in the army and a person's conscience or *his deeply and genuinely held religious or other beliefs*, constitutes a conviction or belief of sufficient cogency, seriousness, cohesion and importance to attract the guarantees of Article 9 ... Whether and to what extent objection to military service falls within the ambit of that provision must be assessed in the light of the particular circumstances of the case" (*Bayatyan v. Armenia*, Grand Chamber judgment of 7 July 2011, § 110; italics mine).

The *Ercep* case draws attention to the significance of Article 9 for the Turkish context and brings a freedom of religion aspect to the ongoing struggle against compulsory military service.¹ In this sense, the case is of crucial importance for the theoretical discussions and practical implications of the difference the Court observes for the two parts of Article 9, namely that of conscience and belief/religion. The decision of the Court in this case suggests that Article 9 specifically refers to religion, not just *any* belief – such as pacifism and anti-militarism as defended by previous conscientious objectors. In its *Bayatyan* judgment, the

¹ For a discussion of conscientious objection within the framework of international treaties and Turkey's obligation regarding freedom of religion see, Mine Yildirim (2010). Conscientious Objection to Military Service: International Human Rights Law and the Case of Turkey. *Religion and Human Rights* 5, 65-91.

Court referred to “deeply and genuinely held religious or other beliefs” as the reason for regarding Article 9 as securing the right to conscientious objection:

“Article 9 [of the European Convention on Human Rights] does not explicitly refer to a right to conscientious objection. However, [the European Court of Human Rights] considers that opposition to military service, where it is motivated by a serious and insurmountable conflict between the obligation to serve in the army and a person's conscience or his deeply and genuinely held religious or other beliefs, constitutes a conviction or belief of sufficient cogency, seriousness, cohesion and importance to attract the guarantees of Article 9 ... Whether and to what extent objection to military service falls within the ambit of that provision must be assessed in the light of the particular circumstances of the case” (*Bayatyan v. Armenia*, Grand Chamber judgment of 7 July 2011, § 110).

However, the Court did not explain why it did not consider the previous conscientious objection cases by pacifist activist as a breach of Article 9, when the litigants also argued for “strong beliefs” albeit not of religious nature. In its *Ercep* judgment, the Court reinforced this understanding of Article 9 where belief referred to religion exclusively:

The Court held that there had been a violation of Article 9 (freedom of thought, conscience and religion) of the Convention in the present case. It noted in particular that the applicant was a member of the Jehovah's Witnesses, a religious group whose beliefs included opposition to military service, irrespective of any requirement to carry weapons. The applicant's objections *had therefore been motivated by genuinely held religious beliefs*, which were in serious and insurmountable conflict with his obligations in that regard. Conscientious objectors having no option but to refuse to enroll in the army if they wished to remain true to their beliefs, in doing so they further laid themselves open to a kind of “civil death” because of the numerous prosecutions which the authorities invariably brought against them and the cumulative effects of the resulting criminal convictions, the continuing cycle of prosecutions and prison sentences and the possibility of facing prosecution for the rest of their lives. Such a system failed to strike a fair balance between the interests of society as a whole and those of conscientious objectors. Accordingly, the penalties imposed on the applicant, without any allowances being made for the dictates of his conscience and beliefs, could not be regarded as a measure necessary in a democratic society (*Ercep* judgment; italics mine).

3. Nature of litigation: Strategic or not? (Elaborate). At its inception was the ECtHR an aim or was it conceived as a local/national case originally?

The case was strategic litigation in the sense that it aimed to bring about significant changes in the law and practice concerning conscientious objection to compulsory military service for a religious group, namely Jehovah's Witnesses (JWs). It is the first case in Turkey by JWs that reached ECtHR and was followed by other cases (listed below). Moreover, Muslim conscientious objectors also started legal mobilization after the success of the JW cases in the ECtHR.

Although there were two other high profile conscientious objection cases in the ECtHR on the issue of conscientious objection (*Tarhan* and *Ülke*, see below), the *Ercep* case was the first case brought to the attention of the court by a religious group from Turkey. Male JWs have been arrested for objection to military service, a problem suffered by many others in the country. Yet, JW litigation was not aimed to bring change for the suffering of all, yet it was strategic in the sense that it was internationally coordinated to solve the problems of

JWs in many countries regarding conscientious objection to the military service through the jurisdiction of the ECtHR.

The Turkish lawyer of the case, Tulin Alsancak told the online daily *Bianet*, "The European court gave a very clear decision. With this decision the court told Turkey that conscientious objection is a right".²

In its political nature, this comment is very rare since JWs especially stay away from commenting on political reasons or consequences of their legal mobilization. A representative I interviewed put it in these words: "We are not interested in politics, it is not our issue. What we are interested in is the grace of our God. If I fell out of His favor (by doing something against his rules) I won't be able to have peace. Military service is against God's orders. ... "

His words pointed to the way conscientious objection is framed by JWs, as a religious belief issue first and foremost and not as a political issue. Similarly, he mentioned that they are not against serving to the Turkish state, and proved their sincerity on the issue by offering to conduct the compulsory military service as a civic service that does not require the JWs to hold guns.

In this non-political vein, JW legal mobilization did not consist of any public aspects such as press releases or appearances in the rallies against compulsory military service, and was contained by its legal aspect only. However, the number of cases JWs brought to the court and the experience of the JW lawyers that they gained from international struggle and in the ECtHR also consisted strategic mobilization that aimed to use international and legal experience for a freedom of religion cause.

- 4. Pre-ECtHR history of case:** Through which local and national courts (or other administrative bodies and procedures) did the case pass; what year did the process start locally/nationally? If strategic litigation, was it prompted by any particular event?

The information we have on the pre-history of the case is the standard information on conscientious objection cases in Turkey. The process started in 1998 when he first refused to serve in the military and called to the court as a "deserter." Each time a new call-up for the military service period began criminal proceedings for failure to report for duty were brought against him. Until the case reached ECtHR in 2004, Erçep faced over 25 trials. He was sentenced to several terms of imprisonment. In 2004 the military court decided to impose an aggregate sentence of 7 months and 15 days' imprisonment. After serving five months in prison, the applicant was released conditionally.

- 5. External influences:** Was the claim supported by other local, national or transnational influences (funding, legal advice, other NGO support)? IF so, please elaborate (indicate also at what stage – e.g., from its inception or only when it reached the ECtHR?)

JWs in Turkey, similar to other countries they have an existence; have limited connections with other faith-based and grassroots groups.

Another JW legal mobilization, *Bayatyan v. Armenia* (23459/03) should be noted here as the most important external –international- influence (Decision of Grand Chamber, court

² <http://m.bianet.org/bianet/insan-haklari/134217-turkiye-ilk-kez-vicdani-ret-mahkumu>

decision 27.10.2009). In my interviews, it also turned out that JWs are centrally organized and from the inception of the cases in local courts until after the case reached ECtHR, this central monitoring continues.

I am planning to fill the rest of the information by literature search and hopefully by more interviews at one point.

- 6. Pre-case mobilisations:** Give a full account of mobilisations around the case from its inception up to its airing at the ECtHR, including the initiating organization(s), alliances (pro and con) which may have taken shape around the issue, claims made at various point, etc.

The struggle for the right of conscientious objection to the compulsory military service has a long history in Turkey that dates back to the 80s. However, this struggle mainly remained as pacifist struggle of anti-war activists and belief groups weren't part of it.

There was a previous high-profile conscientious objection case in the ECtHR regarding Turkey, by a pacifist human rights activist, Osman Murat Ülke.³

The applicant refused to do his military service, on the ground that he had firm pacifist beliefs, and publicly burned his call-up papers at a press conference. He was initially convicted of inciting conscripts to evade military service and, repeatedly convicted for his refusals to wear a military uniform. He served almost two years in prison and later hid from the authorities. The European Court of Human Rights found a violation of Article 3 (prohibition of inhuman or degrading treatment) of the Convention, holding in particular that the applicable legal framework did not provide an appropriate means of dealing with situations arising from the refusal to perform military service on account of one's beliefs. However, although the applicant claimed violation based on Art. 9 of the Convention, the Court excluded Ülke's conscientious objection case from the scope of the aforementioned article. The Court concluded that "it was not necessary to give a separate ruling on the [other] complaints", meaning Art. 9. This fact resulted in claims that the Court "misunderstood" Art. 9. Starting with its *Bayatyan* judgment in which it stated "Article 9 does not guarantee the right to conscientious objection to military service."⁴

Ülke, represented a case of strategic litigation in which an individual case by a pacifist activist created awareness to conscientious objection (public burning of call-up papers, press conferences, etc.) and brought to the Court in order to bring about legal and policy changes for pacifists and anti-militarist community in the field of conscientious objection to compulsory military service. The following anti-military human rights and LGBT mobilization - such as *Savda v. Turkey*⁵ - all continued along pacifist/ anti-militarist lines without incorporation of the religious reasons in the struggle against compulsory military service.

It is hard to say how *Ülke* case affected JW legal mobilization on the issue, considering the lack of collaboration between JWs and any other grassroots actors on common issue areas. JW legal mobilization before the Ercep case was mainly limited to national courts. Based on the statements of the representative of the JW community in Turkey, we can argue that starting with *Bayatyan* (filed in 2003) there has been a central decision for the JW

³ *Ülke v. Turkey* **39437/98** (24 January 2006, Chamber judgment).

⁴ Derek Brett (2009) "The European Court of Human Rights - Out of step on conscientious objection" *Forum 18*

http://www.forum18.org/archive.php?article_id=1377

⁵ Application no: 4273/05 - Chamber judgment, Decision date 12.06.2012

communities in several countries (including Armenia and Turkey) to bring the cases to the attention of the ECtHR and thus expand legal mobilization towards the supranational level.

- 7. Post-case mobilisations:** Trace any mobilisations taking place in the aftermath of the case (including impact of this case on other local/national/ECtHR cases emerging in the national context).

Again, legal mobilization is the prominent strategy in the post-*Ercep* mobilization of the JWs. In this phase, however, it also affected other religious actors, namely Muslim conscientious objectors, positively, and for the first time

Thus, we can talk about two different varieties of post-case mobilizations:

I - JW legal mobilization:

IA - ECtHR Cases

JWs brought 3 more cases to the Court, in all of which they were successful in getting decisions against Turkey for the violation of Article 9. In all these cases the representatives of the litigants were the same lawyers as in *Ercep*. These cases are:

12.01.2012

1 - *Feti Demirtaş v. Turkey* (5260/07)

2 - *Buldu, Görmez and Others v. Turkey* (14017/08)

(Litigants: Çağlar Buldu, Barış Görmez, Ersin Ölgün, and Nevzat Umdü) In this decision, the Court again stated that “objection to military service motivated by a serious and insurmountable conflict between the obligation to serve and a sincere and deep conviction of conscience – whether religious or otherwise – reached a sufficient degree of cogency, seriousness, cohesion and importance to attract the guarantees of Article 9.”

The Court also stated the litigants' proposal to perform alternative civilian service, as also stated by my interlocutor, as an indication of their sincerity:

“The Court also noted that the applicants had expressed themselves willing to perform some alternative *civilian* service but that option had not been available to them. In short, the measures taken against them because of their refusal to perform military service were not “necessary in a democratic society” within the meaning of Article 9 and their rights under the Article had therefore been violated.”

3 - *Baydar v. Turkey* (25632/13)

IB - UN's Human Rights Committee

Communication Submitted to the UN's Human Rights Committee by Cenk Atasoy (1853/2008), and Arda Sarkut (1854/2008) vs Turkey⁶

- The litigants are Cenk Atasoy (No. 1853/2008) and Arda Sarkut (No. 1854/2008), both Jehovah's Witnesses and Turkish nationals. They claim to be victims of a violation by the Republic of Turkey of article 18, paragraph 1, of the International Covenant on Civil and

⁶ Communication nos. 1853/2008 and 1854/2008, 29 March 2012, UN Doc. CCPR/C/104/D/18531854/2008.

Political Rights that mandates freedom of religion or belief. Counsel James E. Andrik, from the New York headquarters of the JW community, represented the litigants in their application.

IC - Turkish Constitutional Court. (This was one of the cases I studied for the National Courts Case Study)

As the most recent instance of legal mobilization by the JWs in the realm of conscientious objection, the community submitted a petition to the Turkish Constitutional Court.

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 petition starts by citing the precedence of the international courts and then moves on to cite domestic precedence. This instance of legal mobilization by the JWs 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 JW conscientious objectors, Atasoy and Sarkut, submitted to the UN's Human Rights Committee, in an apparent effort to cover all international legal precedence regarding JWs 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 Constitution by disregarding ECtHR's jurisprudence on the 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.

This petition to the TCC is important for our purposes since *Erçep* and *Demirtas* judgments of the ECtHR is the main reference point for the litigant's claims in the highest national court.

In the file submitted to the TCC, I also acquired a letter of opinion by the Ministry of Justice sent to a military court in a JW draft evasion case that cites another ECtHR case, *Ulke*, in favor of the defendant. Also included in the file is a verdict by a local court in Ankara on the case of another JW conscientious objector that cites ECtHR case law, albeit without referencing to a specific case. Yet again, although ECtHR case law is a very significant part of the narrative, this petition chooses to refer only to cases regarding the JW community in Turkey, that points to a "national" mobilization strategy specifically designed for the applications to TCC as different from the applications to the UN Human Rights Committee and ECtHR. For example, there is no reference to *Bayatyan* in the petition or in other documents included in the file to support claimant's case.

II - Muslim Conscientious Objection Cases: The success of the JWs led to Muslim conscientious objectors' cases in the national courts. Until these cases all conscientious objection cases were by pacifist human rights activists. With these two religiously motivated cases, for the first time two activists, Enver Aydemir and Muhammet Serdar Delice,⁷ declined to serve in Turkey's military due to the country's secular identity in separate cases.

Enver Aydemir is the first Turkish citizen to object to military service on Muslim religious grounds. His case started in 2007 and reached the European Court of Human Rights in 2011. In June 7, 2016, the ECHR ruled for a violation of the convention's Article 3 on the prohibition of inhuman or degrading treatment.⁸

On the other hand, the court said Turkey did not violate Article 9 on freedom of thought, conscience and religion, as Aydemir's rejection was not based on religious beliefs preventing

⁷ Also see, Güzide Ceyhan "Conscientious objection a test of Turkish religious freedom" *Forum 18* (17 March 2010) URL: http://www.forum18.org/archive.php?article_id=1423&printer=Y

⁸ App no 26012/11, Chamber decision, 07.06.2016.

him from performing military service but his political opinions against the secular Republic of Turkey. Here I am quoting from the Court's decision:

"[Aydemir] would be able to [perform military service] under a system based on the Quran and subject to its rules," the ECHR said, stressing Aydemir's views did not stem from a pacifist and anti-militarist philosophy.

"Mr. Aydemir's complaints did not involve a form of manifestation of a religion or belief through worship, teaching, practice or observance within the meaning of Article 9 § 1," it said, adding that the relevant article was not applicable in his case.

Turkey has been ordered to pay Aydemir a total of 15,000 euros for non-pecuniary damages in addition to 3,000 euros to cover his costs and expenses.

Thus we can argue that in this case of a Muslim conscientious objector, the Court reverted from its decision to consider conscientious objection under Art. 9 and examined it as an Art. 3 case, as in *Ülke* and *Tarhan*, although the litigant was also "religiously motivated" as it was the case in *Ercep* and other JWs. I am still in the process of trying to reach the lawyers of the Muslim objectors' cases and collect court documents.

Ongoing mobilization: Muhammet Serdar Delice, is the second Muslim conscientious objector. His case hasn't reached the Court yet since he is still waiting for the national court processes to end.

Both Aydemir and Delice cases are important mobilizations since they serve as points of contact between religiously motivated conscientious objection and pacifism of the earlier cases. Both litigants are working with the lawyers of the previous pacifist activists (*Ülke* and *Tarhan*) and collaborating with the NGOs such as *Savaskarsitlari Dernegi*. In an interview, Delice stated, "regardless of one's religion, conscientious objection is everyone's right" which was later quoted in a report on the issue by the *Inanc Özgürlüğü Girişimi* (IÖG, Freedom of Belief Initiative) as an indication that two parts of the Article 9 ("religious" belief and "secular" conscience) are coming together for the first time in the history of mobilization against conscientious objection in Turkey.⁹

⁹ http://www.forum18.org/archive.php?article_id=1696