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TURKEY: Selective progress on conscientious objection

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Two recent Turkish military court decisions concerning conscientious objection claims have shown recognition of the right to conscientious objection to military service as a human right but a selective application. These come amid contradictory Turkish government responses to Council of Europe pressure backing European Court of Human Rights (ECtHR) judgments requiring Turkey to bring its laws into line with international human rights standards. The military court judgments should be read carefully, as they show the limits of the right to conscientious objection currently recognised in Turkey, Forum 18 News Service notes. In particular, the courts suggest that ECtHR judgments on conscientious objection uphold the right to conscientious objection only of objectors who are members of groups that object to military service on intellectual, religious or political grounds. The courts also use selective theological judgments to back this, and appear to question the right to change one's convictions in relation to conscientious objection. The need for a comprehensive legal framework remains urgent. As Muslim conscientious objector Muhammed Serdar Delice stated, "regardless of one's religion, conscientious objection is everyone's right".

Two recent Turkish military court decisions concerning conscientious objection claims have shown a partial recognition of the right to conscientious objection to military service as a human right. This right is protected under, among other human rights standards by which Turkey is bound, Article 9 ("Freedom of thought, conscience and religion") of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The military court decisions came despite no specific Turkish legislation either recognising this right or regulating its implementation.

Yet these court judgments should be read carefully, as they show the limits of the right to conscientious objection currently recognised in Turkey. Two current requirements stand out: first, the courts require that the religion held by the conscientious objector is known to reject military service; and secondly, that the conscientious objector's "sole and undivided" motivation for rejecting military service is his conscientious objection declared at the start of compulsory military service, which applies to men between 20 and 41 years old. Women are not liable for conscription.

Council of Europe pressure

Yet prior developments in Turkey have pointed against recognition of this right. The Council of Europe Committee of Ministers has in recent months been expressing grave concern at Turkey's response to the case of conscientious objector Osman Murat Ülke (Application no. 39437/98), who had been arrested in 1996 and subsequently sentenced many times. The European Court of Human Rights (ECtHR) in Strasbourg ruled in his favour in January 2006, and after the ruling Turkey informed the Committee of Ministers that regulations concerning conscientious objection will be made in due course. However, nothing has to date been done to fulfil the requirements of the Ülke judgment (see F18News 17 March 2010 http://www.forum18.org/Archive.php?article_id=1423).

Unlike the two recent cases before military courts, Ülke based his stand on his pacifism, not on any organised religion. In international law his pacifist beliefs would still fall within the exercise of freedom of religion or belief in relation to conscientious objection.

The Committee of Ministers has repeatedly expressed its concern that Turkey has not executed the ECtHR judgment, including changing the law. Ülke has been in hiding since 2007, because the authorities are seeking to arrest him. At its 6-8 March 2012 meeting, the Committee of Ministers noted among other things that "there was a valid arrest warrant against the applicant for desertion", "that the Court's judgment leaves no scope for any new arrest of the applicant [Ülke]", and "strongly urged" Turkey to withdraw the arrest warrant and give "a clear time-table for the adoption of the general [legislative] measures envisaged to execute the judgment" (see).

In response to this pressure, the Turkish Government has given contradictory signals. Justice Minister Sadullah Ergin declared on 15 November 2011 that the Defence Ministry was working on a legal regulation pertaining to conscientious objection. (On 2 June 2008, after the Ülke judgment, the Defence Ministry also claimed this – see F18News 17 March 2010 http://www.forum18.org/Archive.php?article_id=1423.) Justice Minister Ergin's statement aroused much heated debate. It was then reported on 17 November that conscientious objection would be regulated as a crime.

On 22 November the ECtHR found in the case of Jehovah's Witness conscientious objector Yunus Ercep v. Turkey (Application 43965/04) that denying the right to conscientious objection to military service breaks Article 9 ("Freedom of thought, conscience and religion"). This was the first time that the ECtHR had made an Article 9 judgment in relation to Turkish conscientious objectors. However, the same day Prime Minister Recep Tayyip Erdogan said that "what is called 'conscientious objection' has never been in our agenda" (see F18News 30 November 2011 http://www.forum18.org/Archive.php?article_id=1641).

The Ercep judgment followed the ECtHR's Bayatyan v. Armenia judgment in July 2011 (Application no. 23459/03), in which the Court for the first time unequivocally recognised that conscientious objection to military service is protected under Article 9 (see F18News 26 July 2011 http://www.forum18.org/Archive.php?article_id=1597).

A Justice Ministry official, who wished to remain anonymous, declined to comment to Forum 18 on 12 April 2012 on the Government's current approach to the issue of conscientious objection.

Will conscientious objection be protected in the new Constitution?

Campaigners for conscientious objection are lobbying for the planned new Constitution to include a specific commitment to this right (see F18News 30 November 2011 http://www.forum18.org/Archive.php?article_id=1641). The Conscientious Objectors Platform, a Turkish advocacy group, made a presentation to the parliamentary Constitutional Reconciliation Commission on 9 April 2012. They called for the right to conscientious objection to compulsory military service to be protected in the new Constitution. They explicitly drew on the ECtHR cases in arguing for the recognition of the right to object to military service based on an individual's religious, political and philosophical beliefs.

The Platform also called for alternative forms of service to be introduced, under which an individual could either refuse to bear arms in carrying out military service, or carry out a completely civilian alternative service.

Following the meeting, two opposition political parties, the Republican People's Party (CHP) and the Peace and Democracy Party (BDP), made statements noting that the right to conscientious objection to military service must be recognised to comply with Turkey's international human rights commitments.

Whether or not the right to conscientious objection will be recognised in Turkey's new Constitution remains to be seen. However, the Justice and Development Party (AKP) Government's reluctance so far to create a legislative framework for conscientious objection is not a positive sign.

Landmark rulings on conscientious objection against Turkey

Following the ECtHR November 2011 judgment in the Ercep case, on 17 January 2012 the Court made a similar judgment against Turkey in the case of another Jehovah's Witness conscientious objector Feti Demirtas (Application No. 5260/07). The ECtHR again held that the Turkish government violated Article 9 of the ECHR, stating that "the absence of an alternative to military service in Turkey is in breach of the right to conscientious objection".

The ECtHR also reiterated its finding in the Ülke case, considering that the situation of conscientious objectors in Turkey - prosecution, criminal proceedings and "civil death" - was not compatible with the rule of law in a democratic society. The Court found that Turkey had broken Article 3 ("Prohibition of inhuman or degrading treatment") and Article 9, as well as Article 6 ("Right to a fair trial") because Demirtas was forced as a civilian to appear before a military court (<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=5260/07&sessionid=93878125&skin=hudoc-en>).

The Turkish government defended its position, claiming that the right to freedom of religion and conscience should not be applied to conscientious objection. The ECtHR, however, referred to its new jurisprudence established with the July 2011 Bayatyan case (see F18News 26 July 2011 http://www.forum18.org/Archive.php?article_id=1597)

Military court recognises right to conscientious objection

As noted above, the Turkish Government has long lacked the political will to recognise the right to conscientious objection. At the same time, the Council of Europe has long urged Turkey to make the necessary legislative changes to both prevent new violations and stop existing violations against conscientious objectors in Turkey.

However, two recent – surprising – military court decisions changed Turkey's legal practice in relation to conscientious objection. One concerns a Jehovah's Witness conscientious objector, Baris Görmez, the other a Muslim conscientious objector, Muhammed Serdar Delice. In both cases military courts to some degree relied on the changed jurisprudence of the ECtHR on conscientious objection following the Bayatyan v. Armenia case. However, in both cases a key factor was the declared religions of the conscientious objectors.

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. This provision was applied in both military court judgments.

Conscientious objection based on a group's or individual's convictions?

Malatya Military Court's 7 March Delice decision outlines the Turkish military judiciary's interpretation of the right to conscientious objection to military service. Delice declared his conscientious objection approximately five months after he had been conscripted. He declared that his conscientious objection was based on his Islamic and nationalist beliefs. The decision includes some general points about the Military Court's interpretation of conscientious objection to military service, as well as some points specific to Delice's case.

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 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".

Selective theological assessment

Based on this understanding, a young man claiming conscientious objection to military service would have to be a member of a religious group considered by a court to be categorically opposed to military service. In the Malatya Military Court's view, Delice belonged to "Islam which is not a belief or ideological movement that rejects the performance of military service".

This view of Islam was a theological statement by the court. But when Delice wanted to bring in the mufti of Malatya as an expert witness, the court rejected his request. In excluding the mufti, the court cited Law No. 5271 ("On Criminal Procedure"). Article 62 of this Law states that 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".

This explanation seems to contradict the Court's view that Islam does not reject the performance of military service. On the one hand, the Court maintains that religious views cannot be presented in proceedings by experts, as they are not scientific and include subjective elements. Yet on the other, it bases its decision on its own theological assessment.

"One and undivided purpose"

According to the Military Court, Delice had Islamic and nationalist views when he was conscripted. According to the Court, he only declared his conscientious objection to military service after he "saw wrongs and deficient aspects of military service for himself and thus declared his conscientious objection".

The Court also argued that Delice did not from the beginning of his military service have a "one and undivided purpose" of conscientious objection. The Court thus ignored in relation to conscientious objection a key part of international law's understanding of freedom of religion or belief, which is also found in the ECHR's Article 9 – the right to change beliefs.

Under this ruling, a conscientious objector must demonstrate that his objection exists before conscription, and that it is his "one and undivided purpose" - i.e. that he has no other reasons for wanting to leave military service. According to the Court, in Delice's statement to the Prosecutor he said that he wanted to leave military service for a number of reasons. According to his statement, these included financial difficulties and the hostile reactions of some of his fellow-soldiers and commanders towards him because he was performing namaz (Muslim prayers) in the military.

Military or civil courts for conscientious objectors?

The Delice decision also touches on the question of whether a conscientious objector is tried by a military or a civil court. Since Delice was already performing his military service when he declared his conscientious objection, the Court noted that according to Article 9 of Law No 353 ("On the Establishment of Military Courts and Tribunal Procedure") he was under the jurisdiction of the military courts. This reasoning seems to imply that if a person objects to being conscripted before he joins the military he may be tried by a civil court. It will be interesting to see how and in which courts newer conscientious objection claims lodged before conscription will be dealt with.

Delice has appealed against the ruling, and the High Court of Appeals decision and its reasoning will be awaited with great interest by many in and outside Turkey.

Right to conscientious objection recognised - for Jehovah's Witnesses

Isparta Military Court recognised the right to conscientious objection to military service when it acquitted Jehovah's Witness Baris Görmez on 13 March 2012. He had spent a total of four years in prison from November 2007 and had been charged with "rejecting wearing of the uniform" and "rejecting orders". As in the Delice case, the Court relied on the changed jurisprudence of the ECtHR.

His fellow Jehovah's Witnesses maintain that Görmez faced very harsh conditions in prison, but never abandoned his insistence that his faith commands him not to take part in any military activity. They say he was slapped on the face, kicked and trodden on by Gendarmerie officers.

The decision to recognise Görmez's conscientious objection clearly does not constitute a remedy to the maltreatment he suffered. Whether he will pursue legal remedies for his maltreatment is not known.

Theological evaluations must be avoided

In the assessment of conscientious objection claims by public authorities, evaluations of theological views must be avoided. Otherwise – as in the Delice case – there is a grave risk of making decisions based on a court's or public authority's purely subjective views, and not based on the evidence of a particular case. There are naturally going to be diverse theological opinions – but it is important that they do not divert the course of justice and the rule of law.

Following a request by the Milli Gazete newspaper, the Diyanet, or Presidency of Religious Affairs under the Prime Minister, published its theological view on conscientious objection on 15 April 2012. According to the Diyanet, the right to conscientious objection does not exist in Islam. It argued that, in addition to worship rituals, everyone is responsible toward their family and state - including in the area of tax and military service.

The Diyanet's view has a special significance since it comes from a state body. Diyanet views have been consulted by the judiciary on cases involving freedom of religion or belief before, such as whether the Baha'i faith is a religion or not, and whether the Alevi cemevi is a place of worship or not – even if the Diyanet has no formal responsibilities in relation to the religion or belief concerned and its opinions are not binding on public authorities (see F18News 4 May 2011 http://www.forum18.org/Archive.php?article_id=1567).

Turkish writer Professor Ihsan Eliaçık believes that the right to conscientious objection is not contrary to Islam. He argued, in a 17 April commentary on Bianet, that the Diyanet excludes any Islamic views that support conscientious objection as a way to "provide a religious cover for state policies".

"Regardless of one's religion, conscientious objection is everyone's right"

The decisions concerning Görmez and Delice were received both as milestone decisions that recognise the right to conscientious objection and as disappointing – especially in the case of Delice. The Istanbul branch of Mazlumder (Association of Human Rights and Solidarity for Oppressed People) organised a 16 March press conference, at which Delice's lawyer Mahir Orak complained that Malatya Military Court "developed a new stalling method by saying that there is no conscientious objection in Islam". Orak also considered that the Delice and Görmez decisions were contradictory.

Delice, who was also present at the Mazlumder press conference, insisted that "regardless of one's religion, conscientious objection is everyone's right".

Oguz Sönmez, speaking on behalf of the Conscientious Objectors Platform, emphasised that a military court cannot assess a conscientious objection claim properly. He added that an individual's self-declaration must be the determining factor in deciding whether or not he is a conscientious objector.

On the other hand, Jehovah's Witnesses have welcomed the recognition of the right to conscientious objection. Jehovah's Witness spokesperson Ahmet Yorulmaz told Bianet on 13 March that in deciding Görmez's case, the military court took into consideration Turkey's conviction at the ECtHR in the Yunus case.

What needs to be done?

Military court decisions recognising the right to conscientious objection as an internationally protected human right bring Turkey closer to compliance with international human rights norms. But Turkey has not yet complied with its human rights obligations in relation to conscientious objection to military service.

The need for a comprehensive legal framework remains urgent. This must clearly recognise that human rights are individual rights that can be exercised alone or in community with others, and recognise the right to change beliefs. Theological evaluations by public authorities would not be compatible with the state's ECHR obligation to remain neutral, which ECtHR rulings have repeatedly stressed.

Such a comprehensive legal framework meeting international standards must also include: recognition of the right to conscientious objection and non-discriminatory regulations for its application; the establishment of a non-military assessment mechanism to fairly and impartially decide on claims of conscientious objection; and the establishment of a fully civilian alternative to military service. (END)

For more background, see Forum 18's Turkey religious freedom survey at http://www.forum18.org/Archive.php?article_id=1379.

More analyses and commentaries on freedom of thought, conscience and belief in Turkey can be found at <http://www.forum18.org/Archive.php?query=&religion=all&country=68>.

A compilation of Organisation for Security and Co-operation in Europe (OSCE) freedom of religion or belief commitments can be found at http://www.forum18.org/Archive.php?article_id=1351.

A printer-friendly map of Turkey is available at <http://education.nationalgeographic.com/education/mapping/outline-map/?map=Turkey>.

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