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COMMUNICATION

In accordance with Rule 9.2. of the Rules of the Committee of Ministers regarding the supervision of the execution of judgments and of terms of friendly settlements byLife Memory Freedom Association

 **in Taştan v. Turkey**

**(Application no. 63748/00)**

**Introduction**

1. The present Rule 9.2 submission concerns general measures and updated information concerning the following case: Taştan v. Turkey (Application no. 63748/00).

2. Life Memory Freedom Association [Yaşam Bellek Özgürlük Derneği] is a non-governmental organization working in the field of human rights. The Association made applications to the Constitutional Court and the European Court of Human Rights regarding restrictions to the freedom of expression. Among the members of the Association are lawyers who have experience in human rights cases and academics who are specialized in human rights law and other related legislations.[[1]](#footnote-1)

**1.Case Description**

3. The case concerns a violation of the applicant’s right not to be subjected to degrading treatment on account of having to perform military service at the age of 71 (violation of Article 3). The case further concerns a violation of the applicant’s right to have an effective remedy in conjunction with his complaints under Article 3 (violation of Article 13).

**2. Comments on the Government’s Action Plan**

4. In paragraph 6 of the Government's opinion it was stated that the case had an isolated character and that a similar problem could not arise in the current legislation. It is not possible to agree with these explanations. **In the Military Recruitment Law No. 7179, which entered into force on June 26th, 2019, there is no regulation regarding the exemption of elderly people from military service. (Appendix 1: Military Recruitment Law No. 7179).[[2]](#endnote-1) Health problems are grounds for exemption from conscription. In addition, the other exemption conditions shown below are not related to age. Healthy elderly people are still obliged to do military service according to the current legislation.**

5. In paragraph 7 of the Government's opinion, it was stated that the Military Service Law No. 1111 was repealed. **The repeal of the Military Service Law No. 1111 did not make any difference in terms of conscription of older persons. In the Military Recruitment Law No. 7179, there is no regulation regarding the exemption of elderly people from military service.**

6. In paragraphs 8 and 9 of the Government's opinion, it was determined that the health reports were decisive in recruitment and that the persons with health problems were not drafted into the military or were discharged. It cannot be said that this practice completely eliminated the problem in the Taştan case. **Older people who do not have health problems are obliged to do military service. On the other hand, there are problems with health reports related to military eligibility.** In a specialty thesis accepted in 1999, it is stated that “…[t]he information to be obtained from the final roll-call examinations and periodic examinations during military service in accordance with the Turkish Armed Forces Health Competence Regulation can be a remarkable and reliable source for the health statistics of the young adult male population of our country. Since these examinations are not carried out with the necessary seriousness, there are doubts about the accuracy and completeness of the information.”[[3]](#endnote-2) In a MD thesis accepted in 2021, it is stated that “… [i]n our study, it was found that there were thousands of cases categorized as "not suitable for military service" due to intellectual disability, severe refractive errors and short stature (n=1,221, n=3,995, n=126 respectively). It is possible to make these diagnoses earlier during the health examinations made in the military service councils or by being referred to the military hospital before starting the military service. It is considered that the care to be taken at these stages will prevent unnecessary procedures and time loss in the future.”[[4]](#endnote-3) **The problems regarding the health reports on military eligibility continue. Information about people who are not eligible for military service is not shared with the public. However, due to the size of the population subject to compulsory military service, we estimate that these problems are enormous.**

7. In paragraph 10 of the Government's opinion, it was stated that the Central Civil Registration System started and the entire population was registered. **There are problems with the Central Civil Registration System. According to Hacettepe University Institute of Population Studies, Turkey Demographic and Health Survey 2018, 2% of children under the age of 5 could not be registered in 2018.[[5]](#endnote-4) According to the data[[6]](#endnote-5) of the Turkish Statistical Institute, the population of children under the age of 5 is 6,484,986 in 2018. Accordingly, 129,699 children are not registered. Serious problems related to the lack of birth records of individuals still continue. It has been determined that the registration of children in communities living in poor households, having a religious marriage or speaking Kurdish is very low compared to the country in general.** In a study on this subject, it is stated that “…[h]owever, it is observed that the transition in the registration process takes longer time among the children of religious marriage families, of mothers whose mother tongue is Kurdish, and children living in poor households. While the median registration period for children in the population in Turkey is 32 months, this period increases to 38 months for children whose mother tongue is Kurdish and for children living in poor households, and to 50 months for children whose parents have a religious marriage. These results show that 8 percent of children aged 0-4, living in poor households, 10 percent of children whose mother tongue is Kurdish, and 12 percent of the children whose parents have religious marriage are still not registered in the population.”[[7]](#endnote-6) **There is no data shared with the public regarding the unregistered population.**

8. In paragraph 11 of the Government's opinion, it was stated that there was a regulation on the evaluation of old age in terms of eligibility for military service, and in paragraph 12, statistics regarding those who were not recruited on the grounds that they were too old to do military service were shared. **First of all, an objective definition of advanced age is not given in the aforementioned regulation provision. It is not clear which age is considered advanced age. It cannot be said that this regulation automatically prevents older people from doing military service. According to the evaluation of the persons who prepare the health report on military eligibility, there may or may not be exemption from military service due to old age. On the other hand, statistics about the ages of those who have done their military service and the ages of those who have not done their military service yet but have military service obligations are not shared with the public. We believe that if these statistics are shared, the true dimensions and continuity of the problem will be understood.**

9. Paragraph 13 of the Government's opinion mentions the practice of paid military service. **This is only possible for people who have the ability to pay. For 2021, this amount is 43,151.00 TL.[[8]](#endnote-7) It is not possible to apply this method for people who cannot afford the military service fee. It cannot be said that this option eliminated the problem in the Taştan case.**

10. In paragraph 15 of the Government's opinion, it has been argued that the individual application to the Constitutional Court is an effective domestic remedy for similar complaints. It is not possible to agree with this opinion. **According to the established case-law of the Constitutional Court, the decision to enlist in the military cannot be considered within the scope of an individual application, and the Constitutional Court has no jurisdiction in terms of applications related to the decision to recruit.**

In a decision of the Constitutional Court in 2018, it is stated that “… 18. [t]he applicant claimed that he had to do military service, although he was unfit for it, and that his situation could not be determined because the administration did not carry out adequate examinations, and for this reason, the dismissal of the lawsuit he filed for compensation for the damage he suffered due to the statute of limitations was against equity. Expressing that the court has given different decisions in disputes of the same nature, the applicant claimed that his right to access to the court was violated. … 30. Accordingly, the fact that led to the filing of the lawsuit based on the individual application is that a person who is alleged to be unfit for military service is held liable for military service. The main issue to be discussed in the solution of the case is the ‘decision to recruit in the military’. Therefore, it is understood that the essence of the dispute is related to the use of the state's conscription authority. In this respect, it is clear that this dispute, which is directly related to the conscription authority, which is the manifestation of the use of the state's purely sovereign power, and which requires discussion of the ‘conscription decision’, cannot be considered within the scope of civil rights and obligations. 31. On the other hand, apart from the natural consequences of military service, the applicant does not have any allegation that his physical or mental integrity has been damaged. According to all these evaluations, it is concluded that the dispute, which is understood to be related to military service obligation, which is not within the scope of civil rights and obligations, falls outside the common protection area of ​​the Constitution and the Convention. For the reasons explained, it should be decided that it is inadmissible due to lack of jurisdiction in terms of the subject, without examining the application in terms of other admissibility conditions.”[[9]](#endnote-8) The applicant claimed that he was conscripted although he was unfit for military service. In this case, it means that the applicant claimed that he is physically or mentally unfit for military service. The Constitutional Court should have examined this claim. It is clear that the decision does not meet the standards of the European Court of Human Rights.

In another decision in 2017, the Constitutional Court reached the same conclusion.[[10]](#endnote-9) In this decision, it is stated that “… 28. [a]ccordingly, the fact that led to the filing of the lawsuit based on the individual application is that a person claiming to be exempted from military service was obliged to do military service. In other words, the main issue to be discussed in the solution of the case is the decision to recruit in the military. Therefore, it is understood that the essence of the dispute is related to the use of the state's conscription authority. In this respect, it is clear that this dispute, which is directly related to the conscription authority, which is the manifestation of the use of the state's purely sovereign power, and which requires discussion of the decision to recruit, cannot be considered within the scope of civil rights and obligations. 29. According to all these evaluations, it is concluded that the dispute, which is understood to be related to military service obligation, which is not within the scope of civil rights and obligations, falls outside the common protection area of ​​the Constitution and the Convention. 30. For the reasons explained, it should be decided that the application is inadmissible due to lack of jurisdiction in terms of the subject, without examining it in terms of other admissibility conditions.”

On the other hand, in another application regarding the conscription of a person with health problems, the Constitutional Court made a decision in 2019. It is stated that “… 52. [i]n this case, it is seen that the applicant's final roll call examination before military service was carried out within the scope of the Regulation. Pursuant to the aforementioned Regulation, it has been determined as a necessity for dependents to undergo a medical examination by a physician before the decision to conscript to military service (see § 27). According to the Regulation, during the examination, the physical and mental conditions of the dependents should be carefully reviewed, the heart rate should be counted, blood pressure should be measured, their height and weight should be determined, chest widths during inhalation and exhalation and their diseases should be recorded. In addition, it is foreseen as an obligation in accordance with the legislation to obtain a written statement from the dependents regarding their illnesses and dysfunctions. In this context, the form regarding whether there is any known disease or dysfunction and whether there is any health complaint during the examination should be filled in by the responsible person and a copy of the available medical documents regarding the declared illness or dysfunction should be kept together with the statement of the dependent. Similarly, in the Regulation, it is stated that it is not necessary to carry out further examinations such as laboratory or imaging examination for the detection or screening of diseases that are not declared by the dependent or those the signs and symptoms of which are not found during the examination, and that the dependent’s fitness for military service does not mean that they are in full health at the time of the examination.”[[11]](#endnote-10) **Examination measures foreseen for an activity that requires heavy physical and psychological competence, such as military service, are very inadequate. The case-law of the Constitutional Court ignored this inadequacy. It is estimated that many people with health problems started their military service and were discharged early due to health problems during their military service. Statistics on the number of people discharged from military service early due to health problems and on their health problems are not shared with the public. However, due to the size of the population subject to compulsory military service, we estimate that these problems are enormous.**

**An issue that can be associated with the Taştan case is conscientious objection. In a report published by the Conscientious Objection Association in 2021[[12]](#endnote-11), it was determined that the Constitutional Court did not make a decision on many applications related to conscientious objection, gave a decision of inadmissibility in terms of an application, and that the individual application remedy is not an effective domestic remedy.**

**11. Finally, an important issue in the Taştan case is that the applicant cannot speak Turkish. Considering the fact that the applicant cannot speak Turkish, the European Court of Human Rights decided that there was a violation in the Taştan case. There is no regulation in the Recruitment Law regarding people who cannot speak Turkish. This issue was not addressed in the Government's opinion.**

**3. General measures and recommendations**

12. The problems related to the recruitment of elderly people, which is the subject of the Taştan case, continue. A legal arrangement which objectively defines older persons and exempts them from military service should be made in the Military Recruitment Law. Additionally, arrangements should be made in the Recruitment Law regarding people who cannot speak the Turkish language.

13. In order to better assess whether the problem has been resolved or not, data on the number of conscripts, the number of people who have military service obligations but have not fulfilled their military service, the distribution of these people by age groups, the people who are obliged to serve in the military and those who are discharged early due to health problems, should be regularly shared with the public.

14. The population registration system should be improved and the unregistered population should be registered immediately.

15. The case-law of the Constitutional Court should be adapted to that of the European Court of Human Rights, and the decision to recruit in the military should be the subject of individual application review.

**4. Conclusion**

16. The problems dealt with in the Tastan case still continue. The problems are structural and also exist even at the level of the Constitutional Court. The aforementioned problems lead to serious violations of the right not to be subjected to degrading treatment on account of having to perform military service and right to have an effective remedy in conjunction. The continuity of the problems increases the possibility of adversely affecting the judicial activities in the future.

17. Given the seriousness of the issue and the fact that it is a long standing and reoccurring issue we respectfully request the Committee of Ministers to supervise the implementation of this case under enhanced procedure.

1. See the web page of the Association: <https://yasambellekozgurluk.org/> [↑](#footnote-ref-1)
2. Article 16 of Law No. 7179 states that: “(1) those who have undergone military enrollment are divided into the following categories: Those who are suitable for military service, those who have temporary illness and those who are not suitable for military service. Those who are not suitable for military service are not recruited.” Similarly, in Article 42 of Section 9 of the Law No. 7179, entitled Military Service Exemption it is stated that “(1) If a person dies, gets declared absent, gets disabled in a way that would require a disability pension during miltary service, or dies due to the cause and effect of military service after being discharged (a) One of the brothers chosen by the father and mother -or if one of the father or mother is dead, one of the siblings chosen by the survivor- is not recruited unless he is willing, or if he is in the army, he is discharged. (b) In case the father and mother cannot decide or both have died; first of all, if he has a brother who is in the army, he is discharged if he is willing. If there is no brother in the army or if the brother in the army does not want to be discharged, the first brother who comes for the military service is not recruited unless he is willing. (2) If a person lost his life within the scope of the Anti-Terror Law No. 3713 dated April 12th, 1991, the following are exempted from military service: a) All of the children of the dependents performing their military service and of the civilians who are under the scope of subparagraph (j) of the first paragraph of Article 21 of the Law No. 3713 and their siblings from the same mother and father, b) All of the sons and siblings of the same mother and father, of those who were martyred while resisting the coup attempt and the terrorist act on 15 July 2016 and the actions that follow this act; c) All of the children of public officials, including security guards, and one of their siblings, who are from the same mother and father, are not recruited unless they are willing, and those under the arms are discharged upon their request. Which of the siblings will be exempted from military service is determined according to the procedure set out in subparagraphs (a) and (b) of the first paragraph. For siblings who are not within the scope of exemption and those who do not want to benefit from this exemption, although they are within the scope of the exemption, the places where siblings will perform their military service shall be determined by the Ministry. (3) The provisions of this article do not apply in case of mobilization and war.” In Article 43, it is stated that “… (1) [t]hose who became Turkish citizens later do their military service the same way as obligatory persons who entered the military age in that year, according to their age and educational status at the time of citizenship. Those who certify that they did or are deemed to have fulfilled their military service in the countries they came from before they were granted Turkish citizenship, and those who are 22 years old or older in the year they become Turkish citizen, are considered to have served in the military. Their military service is postponed for two years from the date of their citizenship upon their request. They take the roll call in the year their postponemnet ends and they are subject to the conditions to those reach the military age by that year. In case of mobilization, they can be sent to the military as needed. (2) Military operations of those who regain Turkish citizenship after losing it for various reasons are carried out in accordance with the provisions of this Law, taking into account their previous military service phases. (3) Those who were subsequently acquired Turkish citizenship due to paternity cannot benefit from the provisions of this article.” In Article 44, it is stated that “ (1) Turkish citizens who certify that they have fulfilled their compulsory military service in accordance with the laws of the Turkish Republic of Northern Cyprus are deemed to have done their military service in accordance with the provisions of this Law.” In Article 45, it is stated that “… (1) [w]ithin the scope of bilateral agreements on military service performed in one of the two countries, the procedures of the obliged parties who will be exempted or postponed from military service are carried out in accordance with the provisions of the agreement. The procedures and principles regarding the exemption and postponement to be applied within the scope of the agreements are determined by the Ministry. (2) In peace, in a state of emergency or mobilization or in war, volunteers who are specially assigned by the President of the Republic upon the proposal of the Ministry in the fields deemed necessary by the National Security Council are exempted from military service if they comply with the conditions determined by the President.” In Article 46, it is stated that “… (1) [f]or military students of the National Defense University, other universities, faculties or colleges and vocational colleges, and for those dismissed from these schools, one-third of the time they study is counted as regular duty. In case the period counted as military service meets the service period of the non-commissioned officers and privates, they are deemed to have fulfilled their military service. (2) Among those within the scope of the first paragraph, those who have the right to become a reserve officer candidate or reserve non-commissioned officer candidate, are subject to the service period of reserve officer or reserve non-commissioned officer, regardless of their previous service period, if they are willing and elected.” [↑](#endnote-ref-1)
3. Kılıç Selim, Türk Silahli Kuvvetlerinde Askerliğe Elverişli Olmama Nedenleri [Reasons for Not Being Eligible for Military Service in the Turkish Armed Forces], Specialty Thesis, Ankara 1999 (Appendix 2). [↑](#endnote-ref-2)
4. Koçak Necmettin, Türk Silahli Kuvvetlerinde 2008-2010 Yillari Arasinda Askerliğe Elverişli Olmama Nedenleri [Reasons for Not Being Eligible for Military Service in the Turkish Armed Forces in Years 2008-2011], MD Thesis, Ankara 2012. (Appendix 3) [↑](#endnote-ref-3)
5. <http://www.hips.hacettepe.edu.tr/tr/2018_tnsa_analiz_ve_rapor-56> [↑](#endnote-ref-4)
6. <https://data.tuik.gov.tr/Bulten/Index?p=Istatistiklerle-Cocuk-2020-37228> [↑](#endnote-ref-5)
7. Koç İsmet and Eryurt Mehmet Ali, Türkiye’de beş yaş altındaki çocukların nüfusa kayıt olma durumları:1993-2008 [Registration status of children under the age of five in Turkey: 1993-2008]. Çocuk Sağlığı ve Hastalıkları Dergisi [Journal of Child Health and Diseases] 2010:53:114-121. (Appendix 4) [↑](#endnote-ref-6)
8. <https://www.aa.com.tr/tr/gundem/milli-savunma-bakanligindan-dovizle-ve-bedelli-askerlik-aciklamasi-/2306646> [↑](#endnote-ref-7)
9. The inadmissibility decision of the Constitutional Court, Second Section, dated February 22nd, 2018, in the individual application of Kadir Ayva 2015/19926 (Appendix 5). Similarly, the inadmissibility decision of the Constitutional Court, Plenary Assembly, dated October 18th, 2017, in the individual application of Yusuf Gürkan 2014/11067 (Appendix 6). The inadmissibility decision of the Constitutional Court, First Section, dated October 25th, 2017, in the individual application of Çağlar Yılmaz 2014/6835 (Appendix 7). The inadmissibility decision of the Constitutional Court, First Section, dated October 25th, 2017, in the individual application of Cafer Özay 2014/12067 (Appendix 8). The inadmissibility decision of the Constitutional Court, First Section, dated October 25th, 2017, in the individual application of Muammer Toyga 2014/13291 (Appendix 9). [↑](#endnote-ref-8)
10. The inadmissibility decision of the Constitutional Court, First Section, dated January 27th, 2017, in the individual application of Fatih Kısmet 2014/10582 (Appendix 10). [↑](#endnote-ref-9)
11. The inadmissibility decision of the Constitutional Court, First Section, dated September 11th, 2019, in the individual application of Halil Özkan 2015/17443 (Appendix 11). [↑](#endnote-ref-10)
12. Vicdani Ret Derneği [Conscientious Objection Association] Yıldırım Mine and Üçpınar Hülya, Türkiye’de Askerlik Hizmetine Karşı Vicdani Ret 2021 [Conscientious Objection to Military Service in Turkey 2021] (Appendix 12)

Appendices

	1. Recruitment Law No. 7179Kılıç Selim, Türk Silahli Kuvvetlerinde Askerliğe Elverişli Olmama Nedenleri [Reasons for Not Being Eligible for Military Service in the Turkish Armed Forces], MD Thesis, Ankara 1999.

Koçak Necmettin, Türk Silahli Kuvvetlerinde 2008-2010 Yillari Arasinda Askerliğe Elverişli Olmama Nedenleri [Reasons for Not Being Eligible for Military Service in the Turkish Armed Forces in Years 2008-2011], MD Thesis, Ankara 2012.

	1. Koç İsmet and Eryurt Mehmet Ali, Türkiye’de beş yaş altındaki çocukların nüfusa kayıt olma durumları:1993-2008 [Registration status of children under the age of five in Turkey: 1993-2008]. Çocuk Sağlığı ve Hastalıkları Dergisi [Journal of Child Health and Diseases] 2010:53:114-121.The inadmissibility decision of the Constitutional Court, Second Section, dated February 22nd, 2018, in the individual application of Kadir Ayva 2015/19926

The inadmissibility decision of the Constitutional Court, Plenary Assembly, dated October 18th, 2017, in the individual application of Yusuf Gürkan 2014/11067

The inadmissibility decision of the Constitutional Court, First Section, dated October 25th, 2017, in the individual application of Çağlar Yılmaz 2014/6835

The inadmissibility decision of the Constitutional Court, First Section, dated October 25th, 2017, in the individual application of Cafer Özay 2014/12067

The inadmissibility decision of the Constitutional Court, First Section, dated October 25th, 2017, in the individual application of Muammer Toyga 2014/13291

The inadmissibility decision of the Constitutional Court, First Section, dated January 27th, 2017, in the individual application of Fatih Kısmet 2014/10582

The inadmissibility decision of the Constitutional Court, First Section, dated September 11th, 2019, in the individual application of Halil Özkan 2015/17443

Vicdani Ret Derneği [Conscientious Objection Association] Yıldırım Mine and Üçpınar Hülya, Türkiye’de Askerlik Hizmetine Karşı Vicdani Ret 2021 [Conscientious Objection to Military Service in Turkey 2021] [↑](#endnote-ref-11)