

Abstract

The Article 19 of the constitution in the Republic of Korea stipulates that “All the people have the freedom of conscience,” Clause 1 of Article 20 stipulates that “All the people have the freedom of religion,” and Clause 2 of the same article stipulates that “The national religion shall not be admitted and the religion and politics are separated.” In addition Article 18 of “International Convent on Civil and Political Rights (hereinafter ‘Convent B’) of UN stipulates that “All the people have the rights to enjoy the freedom of thought, conscience and religion.” In relation to the interpretation of Article 18 of Convent B, UNCHR requested for each country to “admit any conscientious denial of military service based on the profound belief that occurs at a religious, ethical, moral or similar motivation with this” as to the rights to deny military service at first time in Issue 46 of the resolution it selected in 1987.

Meanwhile, Clause 2 of Article 37 of the constitution in the Republic of Korea stipulates that “All the freedoms and rights of the people can be limited by the law only in case the limitation is required for the security of national safety, keeping order or public welfare, and even in case they are limited, the essential contents of freedom and rights cannot be impeded.”

The Republic of Korea is the only separated country in the world, and is one of a few countries that have (mandatory) conscription system. In the Republic of Korea, there are many people who are conscientiously denying military services that are denying military services according to their conscience and religious belief, and most of them are denying military services according to their religious belief.

This theme will mainly discuss how the issues of the freedom of religion and conscientious denial on military service are viewed at the courts in the Republic of Korea, and additionally, look at the precedents of the Republic of Korea in relation to the freedom of religion.

2. Conscientious objection

(1) Provisions of Military Service Act

In the Military Service Act Article 88-1, “If anyone who has an Entry on Active Duty (EAD) or Call-up Paper (included Enlistment Notice) does not enter the army or follow call-up without any justifiable reason up to the legislated deadline (2-3 days after Enlistment Date or Call-up Date), he shall be sentenced to less than 3 years” are specified.

(2) Advent of Conscientious objection Case to reject Military Service because of Religious Reason, etc.

As the advent of conscientious objectors who are against wars or reject drills to decimate because of a religious or conscientious reason, issues have been raised concerning penalty under Military Service Act.

(3) Judicial Precedent of Supreme Court

Supreme Court disallows conscientious objection as a justifiable reason of conscription exemption specified in Military Service Act and gives punishments to conscientious objectors without any change regarding judicial precedent of Supreme Court. Determinations of Supreme Court are as follows;

1 Concerning Freedom of Religion & Conscience (Adjudication 2004DO2965 sentenced by Supreme Court on 7. 15. 2004)

In a constitutional Law intended to protect conscience, as stated 'an urgent and specific type of conscience as sounds from a strong and serious mind that self-characteristic existence value might be ruined if not act in such a way at a right or wrong judgment', in Freedom of Conscience, there are an internal freedom included freedoms of conscience formation and determination as well as an external expression and realization freedom by passive forbearance, in other words, freedom should not be forced against determination of conscience; therefore, Freedom of Conscience has features as a passive defense right that required to not be under unjust legal compulsion concerning the formation & realization process of personal conscience by the nation basically.

On Constitutional Law, the principal limitation of all basic human right exercises including Freedom of Conscience should make a possible to live with others in communities and be achieved within the scope of no critical influence towards other constitutional values & national law and order; therefore, Realization of Conscience Freedom might be a relative freedom according to Constitutional Law Article 37-2 if there is any constitutional benefit and protection justified the limitation.

2 Concerning the Relation between Conscientious objection & Penalty Provision (Adjudication 2004do2965 sentenced by Supreme Court on 7. 15. 2004)

In Military Service Act Article 88-1, 'a justifiable reason' as a penalty clause regarding evasion of enlistment means principally the premised existence and performance about the abstract interpretation of military duty, but do not blame the responsibility of military defaulters as long as one has any justifiable reason such as diseases specified by the determination of Military Manpower Administration Commissioner; On the other hand, if anyone is punished by Military Service Act Article 88-1, his constitutional right is violated unjustly even if the reason of objection is guaranteed by Constitutional Law and acknowledged constitutional values superior to the legislative purpose of the above law clause; therefore, for exclusion of any violated situation, it should be exceptionally interpreted there is a justifiable reason to reject military duty.

Military Service Act Article 88-1 is established to specify the most basic people's military duty, if duty of military service is not fulfilled properly and put a national safety in a danger, dignity and value as a human being might not be guaranteed; therefore, duty of military service is ultimately to guarantee dignity and value for all the people, Conscience Freedom of conscientious objector might not be a superior value to the above constitutional benefit and protection of the law, so for the benefit and protection of the above constitutional law, this is the a just limitation by Constitutional Law even if the Conscience Freedom of defendant is limited by Constitutional Law Article 37-2.

§ Concerning Military Service Act Article disallowed Substitute Military Service (Adjudication 2007do7941 sentenced by Supreme Court on 12. 27. 2007)

Conscientious objection right does not draw naturally from 'International Covenant on Civil and Political Rights', and freedoms to express and realize determinations by religions or beliefs are included clearly on the contents of the above Covenant Article 18-1. On the other hand, military enlistment refusals by the order of conscience to protect a characteristic identity formed by own religious doctrine are applicable to the announce of conscience by at least passive

forbearance; therefore, the punishment subject is only for the evasion of enlistment without a justifiable reason after receiving a Entry on Active Duty (EAD) Notice, and Military Service Act Article 88-1 Article 1 which has no exceptional article allows any exemption or substitute for enlistment objectors with any reason against conscience is applicable to the announce of conscience freedom in the above Covenant 18-3. However, it is hard to say that legislator's judgment adopted substitute military service system might not be assumed considerably unreasonable or clearly wrong because substitute military service system has not been evaluated as a covenant violation and the adopt should be granted at a broad discretion of legislators in the member nation. Furthermore, punishment regarding violation according to Military Service Act Article 88-1 without providing exemption of military duty or opportunity of military service substitute might not be interpreted as being against Covenant.

(4) Judicial Precedent of Constitutional Court (2002hunga1 by Constitutional Amendment on 8. 26. 2004)

Through this case article (Military Service Act Article 88), the public interest to achieve through this case article is a prerequisite of the national existence and all freedom as a very important public interest, 'national safety', if the benefit and protection of the law has any problem, an excessive legislative test should not be demanded to harm the national safety to guarantee personal freedom to the maximum.

As considering several conditional factors such as situation of national safety, social demand regarding equity of military service, adopt of substitute military service system, there is not concluded currently national safety without serious damage on the benefit and protection of the Constitutional law at the adopt of substitute military service system. As settlement of peaceful relationship between North and South Korea, elimination of military service evasion factor through the improvement of military service condition, settlement of understanding and generosity for conscientious objector in our society, permission of substitute

military service should be formed the consensus of social community member to realize duty equity in the fulfillment of military duty and to harm a social unification. However, it is hard to say that legislator's judgment adopted substitute military service system might not be assumed considerably unreasonable or clearly wrong because these preconditions have not fulfilled yet.

(5) Lower Instance Judicial Precedent

1 Trend of Lower Instance Judicial Precedent

From the first acquittal sentence for conscientious objection in 2014 at lower instance, there are 9 acquittal adjudications during one and three months as of Aug. 23, 2016. Among them, some cases are under lawsuits by prosecutor appeals and some are given guilty verdicts by Supreme Court. In other words, Supreme Court still pronounces guilt for conscientious objection.

2 Reason to Sentence Lower Instance as Acquittal

For conscientious objector, there is a necessary to treat military duty rather than evasion, so it is sentenced actual penalty over one and six months as criminal punishment which is the strongest sanctions. Through criminal punishment for conscientious objectors, the general & special prevention influences are hard to be expected over the past half of the century. Criminal punishment is hard to say as necessary means to confirm fulfilling military duty.

Substitute military service system is adopted in Germany, Denmark, France, Australia, Italia, Spain, Finland, Hungary, Norway, Sweden, Brazil, and Taiwan, etc. and recommended by European Court of Human Rights. Nevertheless, nation neglects these situation over a half of an century and ignore constitutional serious conflicts since the execution of conscription system without minimum efforts for finding alternatives such as the adopt of substitute military service system for conscientious objectors, system improvement for unrelated considerable manual or combat exercises, or reduction or exemption of punishment or penalty for duty violations. Making an alternative is needed to guarantee a basic human right and possible to execute, but criminal punishment endures for conscientious objector

conformed to Military Service Act Article 88-1 unilaterally without any effort and it leads to unjust infringement of Conscience Freedom against the principle of the proportion in Constitutional Law Article 37-2.

(6) Raising Methodology to solve Conscientious Objection (Substitute Military Service System)

Position to punish conscientious objection is based on the national safety as a divided nation, emotion & equity of people, absence of judging standard about Conscience. On the other hand, Position not to punish conscientious objection is based on guarantee of Conscience Freedom, various alternatives, excessive mass production of criminals, and realization of practical democracy etc.

As changes of society, substitute measures are considered and the adopt measure of substitute military service system is raised in community services as social and public interests for the necessary areas without punishment to conscientious objectors.

ROK ministry of national defense (ROKMND) established 2007. 9. “social service system adopt measure for minors related with performing military service” as society changes. Basic measures propelled by the ministry of national defense are ① substitute military service of objector by any religious reason included a 「military alternative social worker system」 scope, ② service field is for the seniors under dementia or the heavy disabled needed 24 hours close protections and the most is social service deployment fields having difficulty values, ③ service method & duration stayed in a camp in a service facility without commutes, and twice of military service people is the primary subject. Furthermore, an objective and stiff screening system is operated and misuse issue of system by thorough service maintenance is basically eliminated.

However, the above measures are in a review stage until now and have not been realized specifically.

(7) Simple Conclusion

Constitutional Court gives a decision as prerequisites regarding substitute military service “As settlement of peaceful relationship between North and South Korea, elimination of military service evasion factor through improvements of military service condition, settlement of understanding and generosity for conscientious objector in our society, permission of substitute military service should be formed the consensus of

social community member to realize duty equity in the fulfillment of military service duty and to harm a social unification.”

Lower instance seems to reflect the flow of this generation which allows Freedom of Conscience gradually regarding conscientious objection and judicial precedent of Supreme Court seems to be changed over the long term period.

3. Judicial Precedents Concerning Freedom of Other Religion

(1) Freedom of Religion in Private University (Adjudication 96da37268 sentenced by Supreme Court on 11. 10. 1998)

Private schools are different from the national and public schools and provide religious educations or publicities as contents of religious freedom, schools have basics to give students education as an education facility included personal and physical functions; especially, colleges are granted autonomy on Constitutional Law, so private colleges can establish matters of administration, admission & graduation or school facility use if there is no prohibition on law in order to maintain an education facility and clarify attendance matters as school rules etc., and the previous Education Act regulations Article 55 regulates school rules as one of required documents for school establishment permission application, Article 56-1 regulates 'matters regarding curriculum and school days', 'matters regarding exam (or examination) and program completion ', and 'matters regarding admission · transfer · expel · leave of absence · completion · graduation and punishments & awards' as listing matters in school rules, so private colleges establish school regulations as graduation requirements to have religious educations of certain contents within the scope of no violation for student's irreligion freedom for religious educations or religion publicities.

(2) Freedom of Religion in Private High School (Adjudication 2008da38288 sentenced by Supreme Court on 4. 22. 2010)

If religious schools (private schools established by religious organizations) provide

religious domination type education to spread specific religious creeds as mission foundations of school over the scope of religious educations as universal liberal arts to maintain religious neutrality to allow student's admission regardless own religion according to standardization policy of high school, in sound common senses and feelings of law light in a social community without any specific content and degree of religious educations, whether religious educations are temporary or continuous, whether agreement ask after enough previous explanations to students about religious educations, and student's attitude or disadvantage about religious educations, illegality is acknowledged if it seems religious educations over acceptable limitations considering overall specific matters of freely selected an alternative subject or reject attendance in the religious education.

(3) Concerning the Internal Relationship of Church (Adjudication 2009do32386 Adjudication sentenced by Supreme Court on 10. 27. 2011)

Unless internal regulations (discipline trials) of a religious organization impose sanctions on anyone having position as a believer by a religious method, action on corporate law to affect the personal position in a religious organization lead to exempt from juridical review subjects or deny litigation interests definitely.

Having said that, religious organizations should be guaranteed to the maximum empower to establish creed and maintain religious order based on religious freedom and the separation from government and religion on Constitutional Law, and jurisdiction participation of decision making should be controlled even though decision making influences a personal position in a religious organization if the decision making of religious organization is related to the religious creed or interpretation in depth.

(4) Case reject Transfusion as a Religious Reason (Adjudication 79do1387 sentenced by Supreme Court on 9. 24. 1980)

If doctor suggests mother's transfusion as the best therapy for daughter under a critical situation but the biological mother strongly rejects and interrupts by own religious belief

or sequel outbreak concern reason, the mother's refusal are still in illegality even if 11 years old patient reject transfusion because daughter are in the age who does not have a mature discernment. (Case: A believer of Jehovah's Witnesses rejects transfusion to her daughter as a religious belief reason and then lead to death, it is relevant to neglect disgrace criminal act)