
J.Y. Interpretation No. 490 (October 1, 1999)*

Obligation to Perform Military Service Case

Issue

Article 1 of the Conscription Act provides that all eligible males are to be drafted for military service, and Article 59, Paragraph 2 of the Enforcement Act of the Conscription Act further prescribes that a person sentenced to imprisonment who is eventually given pardon, commutation, probation or parole shall not be relieved from military service if he has served less than four years in prison, with no exception to be made for conscientious objectors. Do the said provisions violate Article 13 of the Constitution guaranteeing the freedom of religious belief, thus rendering null and void?

Holding

Article 20 of the Constitution prescribes that the people shall have the duty to perform military service in accordance with the laws. The Constitution, however, does not specify the ways in which people should render such a duty. Important matters regarding military service are to be specified in laws and solely left to the legislature's discretion with due consideration of national security and needs of social development. Article 13 of the Constitution ensuring that people shall have the freedom of religious belief means that people shall have the freedom to believe in any religion and to participate in any religious activities. The State shall neither forbid nor endorse any particular religion and shall never extend any privileges or disadvantages to people on the basis of their particular religious beliefs. Nonetheless, given the physical differences between males and

* Translation by Jiunn-Rong YEH

females and the derived role differentiation in their respective social functions and lives, the Legislature enacted Article 1 of the Conscription Act indicating that, pursuant to laws, only eligible male citizens have the duty to perform military service. This role differentiation has been made to incarnate both the national goals and constitutionally prescribed basic duties of the people and, thus, is of a legislative policy nature. It does not encourage, endorse, or prohibit any religion, nor does it have such effects. Moreover, prescribing a male citizen's duty to render military service does not violate human dignity, nor does it undermine the fundamental values of the Constitution. Most nations also prescribe such duty in their respective laws. Requiring such duty is a necessary measure to protect the people and to defend national security. As a result, it does not violate the equal protection principle of Article 7 or the protection of freedom of religious belief of Article 13 of the Constitution. In addition, Article 59, Paragraph 2 of the Enforcement Act of the Conscription Act prescribes that those males sentenced to prison according to Paragraph 1 but later given commutation, probation or parole, whose military service has been deferred but who have served less than four years in prison, shall still have to fulfill their military obligation. Thus, eligible males whose duty of rendering military service has been deferred shall not be freed from such service, should they still be within the age limit for such service. Article 59, Paragraph 2 of the Enforcement Act of the Conscription Act thus requires that each judicial organ inform the respective county (city) government within the same jurisdiction for further disposition. Any violations of the Conscription Act that also warrant punishment prescribed in the Act Governing the Punishment of Offences against Military Service shall be disposed of accordingly. This does not contradict the guarantee against double jeopardy, nor does it infringe upon the freedom of religious belief prescribed in Article 13 of the Constitution or undermine the principle of proportionality bestowed in Article 23 of the Constitution.

Reasoning

[1] Freedom of religious belief, one of the fundamental rights of the people, shall be protected by the constitution of a modern state governed by the rule of law (Rechtsstaat). Such freedom ensures that the people shall have the freedom to believe in any religion and to participate in any religious activities. The State shall neither forbid nor endorse any particular religion and shall never extend any privileges or disadvantages to people on the basis of their particular religious beliefs. The guarantee of freedom of religious belief shall include freedom of personal religious belief, freedom of religious practices and freedom of religious association. Freedom of personal religious beliefs, in which each individual's own ideas, speech, beliefs, and spirit are involved, is an absolute right that shall not be infringed upon. The derived freedoms of religious acts and religious association, which may affect others' freedoms and rights or impair public order, virtuous customs, social morality, or integrity, are, hence, relative rights. Freedom of religious belief, like other fundamental rights, shall be protected in the Constitution while being governed by it. Except for the freedom of personal religious belief that shall be absolutely protected and never be infringed upon or suspended, it is permissible for relevant state laws to constrain, if necessary and to the least restrictive effect, freedoms of religious practices and association. For no one shall renounce the state and laws simply because of his/her religious belief. Thus, because believers of all religions are still people of the state, their basic responsibilities and duties to the state are not to be relieved because of their respective religious beliefs.

[2] Protection of the people's fundamental rights, such as their life and property, is one of the most important functions and purposes of a state. The achievement of such function and purpose lies in the people's rendering of their basic duties to the state. In order to defend national security, it is very common for states with a conscription system to prescribe the people's duty to render military service.

Article 20 of the Constitution requiring the people to perform military service pursuant to laws is precisely such type of enactment. The Constitution, however, does not specify the ways in which people should render such a duty. Important matters regarding people's military service shall be specified in laws and solely left to the Legislature's discretion with due consideration of national security and the needs of social development. Given the physical differences between males and females and the derived role differentiation in their respective social functions and lives, the Legislature enacted relevant Articles in the Conscription Act. Article 1 indicates that only male citizens have the duty to perform military service in accordance with laws. Article 3, Paragraph 1 prescribes that the period of rendering military service starts on January 1 of the year after male citizens reach the age of eighteen and ends on December 31 of the year in which male citizens reach the age of forty-five. Article 4 reads that people with physical abnormalities, disabilities, or diseases that would prevent them from rendering military service shall be relieved from performing military service. Article 5 states that those who have been sentenced to a prison term of more than seven years shall be relieved from military service. These aforementioned Articles have been made to incarnate both national goals and constitutionally prescribed basic duties of the people and, therefore, are of a legislative policy nature. They do not encourage, endorse or prohibit any religions, nor do they have such effects. Moreover, prescribing a male citizen's duty to render military service does not violate human dignity, nor does it undermine the fundamental values of the Constitution. Most nations also prescribe such duty in their respective laws. Requiring such duty is a necessary measure to protect the people and to defend national security. As a result, it does not violate the equal protection principle of Article 7 or the protection of freedom of religious belief of Article 13. Article 59, Paragraph 2 of the Enforcement Act of the Conscription Act prescribes that those sentenced to prison according to Paragraph 1 but later given commutation, probation or parole, whose military service has been deferred but who have served less than four years in prison, shall

still have to fulfill their military obligation. Thus, persons whose duty to render military service has been deferred shall not be freed from military service, should they still be within the age limit of such service. Article 59, Paragraph 2 of the Act thus requires that each judicial organ inform the respective county (city) government within the same jurisdiction for further disposition. Any violations of the Conscription Act that also warrant punishment prescribed in the Act Governing the Punishment of Offences against Military Service shall be disposed of accordingly. This does not contradict the guarantee against double jeopardy, nor does it infringe upon the freedom of religious belief prescribed in Article 13 of the Constitution or undermine the principle of proportionality bestowed in Article 23. Moreover, Article 20, Paragraph 1, Subparagraph 2, Second Sentence and Paragraph 2 of the Conscription Act prescribe that, while persons are serving a prison term, their military service shall be deferred. When the causes of the deferment have ended, they must fulfill their military obligation. Regarding the procedure for military recall, Article 25, Paragraph 1, Subparagraphs 1 and 2 of the Conscription Act merely prescribe that a regular captain, sergeant, soldier or member of the supplementary forces whose military service has been deferred shall be transferred to the reserve forces and shall be under the control of the reserves. The said clauses do not primarily address the detailed procedure for military recall. However, military recall, by its nature, is similar to military reserve force that is supplementary to regular service in peacetime and may be drafted on specific occasions according to Article 38, Paragraph 1, Subparagraph 2 of the Conscription Act. Therefore, Article 19, Paragraph 1, Subparagraph 4 of the Regulations Governing the Military Array enacted by the Executive Yuan dictates that the military service of soldiers, whose causes of interrupted military service have been dissolved, shall be recalled, and such soldiers may be drafted on specific occasions. This rule does not go beyond the delegation by Article 38, Paragraph 1, Subparagraph 1 of the Conscription Act, nor does it impose an additional burden on the people; therefore, it is consistent with the principle of

rule of law prescribed in the Constitution. By the same token, it shall also be made clear that Article 19, Paragraph 1, Subparagraph 5 of the Regulations Governing the Military Array with regard to drafting on specific occasions for those who have been recalled does not infringe upon the people's rights ensured in the Constitution.

Background Note by Yun-Ru CHEN

The Petitioners Tsung-Hsien WU, Chien HSU, Chien-Hua CHEN and Tung-Jung LI are all members of the Jehovah's Witnesses. The Petitioners WU, HSU and CHEN refused military training during their military service due to their religion and were respectively sentenced by final Military Court judgments to punishment of imprisonment for committing crimes specified in Article 64, Paragraph 3 of the Criminal Code of the Armed Forces. The Petitioner LI, who also refused military service due to his religion, was sentenced by final court judgment to punishment of imprisonment for committing crimes specified in Article 4, Paragraph 5 of Punishment Act for violation of the Military Service System. After exhausting all remedies at all levels of courts, the Petitioners filed petitions to the Constitutional Court, claiming that Article 1 of the Act of Military Service System and Article 59, Paragraph 2 of the Enforcement Act of Act of Military Service System were not consistent with Articles 7, 13 and 23 of the Constitution.

The Constitutional Court states in J.Y. Interpretation No.490 that the guarantee of freedom of religious belief shall include freedom of personal religious belief, freedom of religious practice, as well as freedom of religious association. On the one hand, freedom of personal religious belief, in which each individual's own ideas, speech, belief, and spirit are involved, is an absolute right that shall not be infringed upon. On the other hand, the derived freedoms of religious acts and religious association, which may affect others' freedoms and

rights or impair public order, virtuous customs, social morality, or integrity, are, hence, relative rights, which can be infringed upon by the State. Thus, the existence of secular norms cannot be denied and refused on the grounds of religious belief when involving religious acts and religious association.

However, later, in *J.Y. Interpretation No. 573*, the Constitutional Court stated that it is impossible to completely separate the religious activities engaged in and religious association formed by the people from the heartfelt, devout religious convictions held by the same. Autonomy should be given to a religious association as far as its internal organization and structure, personnel and financial administration are concerned. Any religious regulations, if not made to maintain the freedom of religion or any significant public interest, or if not made to the minimum extent necessary, should be deemed to be in conflict with the constitutional intent to protect the people's freedom of belief. Thus, the regulations governing certain types of temples' real property were unconstitutional. *J.Y. Interpretation No. 573* continued to uphold the principles of religious neutrality and religious equality but made two slightly different interpretations about the extent to which the State can intervene in religious acts. Building upon *J.Y. Interpretation No. 490*, *J.Y. Interpretation No. 573* gave autonomy to a religious association as far as its internal organization and structure, personnel and financial administration were concerned, whereas *J.Y. Interpretation No. 490* had only stated that these were merely relative rights that could be infringed upon by the State.

