

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

ISSUE: Article 1 of the Conscription Act provides that all eligible males shall be drafted for military service, and Article 59, Paragraph 2, of the Enforcement Act of the Conscription Act further prescribes that the 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 being null and void?

RELEVANT LAWS:

Articles 7, 13, 20 and 23 of the Constitution (憲法第七條、第十三條、第二十條、第二十三條); Articles 1, 3, Paragraph 1, 4, 5, 20, Paragraphs 1 and 2, 25, Paragraph 1, and 38, Paragraph 1, Subparagraph 2 of the Conscription Act (兵役法第一條、第三條第一項、第四條、第五條、第二十條第一項、第二項、第二十五條第一項、第三十八條第一項第二款); Article 59, Paragraphs 1 and 2 of the Enforcement Act of the Conscription Act (兵役法施行法第五十九條第一項、第二項); Article 19, Paragraph 1, Subparagraphs 4 and 5 of the Regulation Governing the Military Array (召集規則第十

* Translated by Jiunn-rong Yeh.

** Contents within frame, not part of the original text, are added for reference purpose only.

九條第一項第四款、第五款）。

KEYWORDS:

military service（服兵役），freedom of religious belief（宗教信仰自由），double jeopardy（一行為重複處罰、一事不再理），principle of proportionality（比例原則），national security（國家安全），equal protection principle（平等保護原則）。**

HOLDING: Article 20 of the Constitution prescribes that the people shall have the duty to perform military service in accordance with laws. The Constitution, however, does not specify the ways in which people should render such a duty. Important matters regarding military service shall 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

解釋文：人民有依法律服兵役之義務，為憲法第二十條所明定。惟人民如何履行兵役義務，憲法本身並無明文規定，有關人民服兵役之重要事項，應由立法者斟酌國家安全、社會發展之需要，以法律定之。憲法第十三條規定：「人民有信仰宗教之自由。」係指人民有信仰與不信仰任何宗教之自由，以及參與或不參與宗教活動之自由；國家不得對特定之宗教加以獎勵或禁制，或對人民特定信仰界予優待或不利益。立法者鑒於男女生理上之差異及因此種差異所生之社會生活功能角色之不同，於兵役法第一條規定：中華民國男子依法皆有服兵役之義務，係為實踐國家目的及憲法上人民之基本義務而為之規定，原屬立法政策之考量，非為助長、促進或限制宗教而設，且無助長、促進

extend any privileges or disadvantages to people on the basis of their particular religious beliefs. Nonetheless, given the physical differences between males and 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 of performing 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 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 in 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 beliefs of Article

或限制宗教之效果。復次，服兵役之義務，並無違反人性尊嚴亦未動搖憲法價值體系之基礎，且為大多數國家之法律所明定，更為保護人民，防衛國家之安全所必需，與憲法第七條平等原則及第十三條宗教信仰自由之保障，並無牴觸。又兵役法施行法第五十九條第二項規定：同條第一項判處徒刑人員，經依法赦免、減刑、緩刑、假釋後，其禁役者，如實際執行徒刑時間不滿四年時，免除禁役。故免除禁役者，倘仍在適役年齡，其服兵役之義務，並不因此而免除，兵役法施行法第五十九條第二項因而規定，由各該管轄司法機關通知其所屬縣（市）政府處理。若另有違反兵役法之規定而符合處罰之要件者，仍應依妨害兵役治罪條例之規定處斷，並不構成一行為重複處罰問題，亦與憲法第十三條宗教信仰自由之保障及第二十三條比例原則之規定，不相牴觸。

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 informs the respective county (city) government within the same jurisdiction for further disposition. Any violations of the Conscription Act that also amount to punishments prescribed in the Act Governing the Punishment of Offences Against Military Service shall be disposed 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: 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 a 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 a basis of their particular religious beliefs. The guarantee of freedom of religious belief shall include freedom of personal religious belief, freedom of religious practices, as well as 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 in-

解釋理由書：現代法治國家，宗教信仰之自由，乃人民之基本權利，應受憲法之保障。所謂宗教信仰之自由，係指人民有信仰與不信仰任何宗教之自由，以及參與或不參與宗教活動之自由；國家不得對特定之宗教加以獎勵或禁制，或對人民特定信仰畀予優待或不利益，其保障範圍包含內在信仰之自由、宗教行為之自由與宗教結社之自由。內在信仰之自由，涉及思想、言論、信念及精神之層次，應受絕對之保障；其由之而派生之宗教行為之自由與宗教結社之自由，則可能涉及他人之自由與權利，甚至可能影響公共秩序、善良風俗、社會道德與社會責任，因此，僅能受相對之保障。宗教信仰之自由與其他之基本權利，雖同受憲法之保障，亦同受憲法之規範，除內在信仰之自由應受絕對保障，不得加以侵犯或剝奪外，宗教行為之自由與宗教結社之自由，在必要之最小限度內，仍應受國家相關法律之約束，非可以宗教信仰為由而否定國家及法律之存在。因此，宗教之信仰者，既亦係國家之人民，其所應負對國家之基本義務與責任，並不得僅

tegrity, are, hence, relative rights. Freedom of religious belief, like other fundamental rights, shall be protected in the Constitution while 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 will not be relieved because of their respective religious beliefs. 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 and 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

因宗教信仰之關係而免除。保護人民生命和財產等基本權利乃國家重要之功能與目的，而此功能與目的之達成，有賴於人民對國家盡其應盡之基本義務，始克實現。為防衛國家之安全，在實施徵兵制之國家，恆規定人民有服兵役之義務，我國憲法第二十條規定：人民有依法服兵役之義務，即係屬於此一類型之立法。惟人民如何履行兵役義務，憲法本身並無明文規定，有關人民服兵役之重要事項，應由立法者斟酌國家安全、社會發展之需要，以法律定之。立法者鑒於男女生理上之差異及因此種差異所生之社會生活功能角色之不同，於兵役法第一條規定：中華民國男子依法皆有服兵役之義務；第三條第一項規定：男子年滿十八歲之翌年一月一日起役，至屆滿四十五歲之年十二月三十一日除役；第四條規定：凡身體畸形、殘廢或有箇疾不堪服役者，免服兵役，稱為免役；第五條規定：凡曾判處七年以上有期徒刑者禁服兵役，稱為禁役。上開條文，係為實踐國家目的及憲法上人民之基本義務而為之規定，原屬立法政策之考量，非為助長、促進或限制宗教而設，且無助長、促進或限制宗教之效果。復次，男子服兵役之義務，並無違反人性尊嚴亦未動搖憲法價值體系之

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 in accordance with laws have the duty to perform military service. 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.

基礎，且為大多數國家之法律所明定，更為保護人民，防衛國家之安全所必需，與憲法第七條平等原則及第十三條宗教信仰自由之保障，並無抵觸。

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 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 in 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 beliefs 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

兵役法施行法第五十九條第二項規定：同條第一項判處徒刑人員，經依法赦免、減刑、緩刑、假釋後，其禁役者，如實際執行徒刑時間不滿四年時，免除禁役。故被免除禁役者，倘仍在適

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 amount to punishments prescribed in the Act Governing the Punishment of Offences Against Military Service shall be accordingly disposed. 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, the 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 defer-

役年齡，其服兵役之義務，並不因此而被免除，兵役法施行法第五十九條第二項因而規定，由各該管轄司法機關通知其所屬縣（市）政府處理。若另有違反兵役法之規定而符合處罰之要件者，仍應依妨害兵役治罪條例之規定處斷，並不構成一行為重複處罰問題，亦與憲法第十三條宗教信仰自由之保障及第二十三條比例原則之規定，不相牴觸。又犯罪判處徒刑在執行中者，停服現役，稱為停役。停役原因消滅時，回復現役，稱為回役。兵役法第二十條第一項第二款後段及同條第二項定有明文。至於回役之程序如何，兵役法第二十五條第一項第一款、第二款祇分別規定常備軍官、常備士官、常備兵、補充兵在現役期間停役者，為後備軍人，應受後備管理而已，初無關於回役之技術性之程序規定。惟回役核其實質，仍不失為後備軍人平時為現役補缺之性質，依兵役法第三十八條第一項第二款規定，自得對之臨時召集。行政院訂定發布之召集規則第十九條第一項第四款乃規定，停役原因消滅，回復現役，得對之臨時召集，並未逾越兵役法第三十八條第一項第二款規定之範圍，亦未增加人民之負擔，核與憲法法律保留之原則，並無不符。本於同一理由，同規則第十九條第

ment have ended, they have to 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 officer, 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 reserved military service that is supplementary to the 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 Regulation Governing the Military Array enacted by the Executive Yuan dictates that military services 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,

一項第五款，補服義務役期之臨時召集之規定，亦與憲法保障人民權利之意旨無違，併此指明。

of the Conscription Act, nor does it impose additional burdens 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 Regulation 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.

Justice Ho-Hsiung Wang filed dissenting opinion in part.

Justice Tieh-Cheng Liu filed dissenting opinion.

本號解釋王大法官和雄提出部分不同意見書；劉大法官鐵錚提出不同意見書。