

# INTERNATIONAL FELLOWSHIP OF RECONCILIATION

Submission to the 115<sup>th</sup> Session of the Human Rights Committee

## REPUBLIC OF KOREA

(Military service, conscientious objection and related issues)

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Contact:

Derek BRETT

International Fellowship of Reconciliation

Main Representative to the UN, Geneva

derek.brett@ifor.com

Tel: (41) 77 462 9825

Background: the issue in the Human Rights Committee

In its concluding observations on the Third Periodic Report of the Republic of Korea under the International Covenant on Civil and Political Rights (ICCPR), the Human Rights Committee expresses its concern “that: (a) under the Military Service Act of 2003 the penalty for refusal of active military service is imprisonment for a maximum of three years and that there is no legislative limit on the number of times they may be recalled and subjected to fresh penalties; (b) those who have not satisfied military service requirements are excluded from employment in government or public organisations and that (c) convicted conscientious objectors bear the stigma of a criminal record,” and recommends: “The State party should take all necessary measures to recognize the right of conscientious objectors to be exempted from military service. It is encouraged to bring legislation into line with article 18 of the Covenant. In this regard, the Committee draws the attention of the State party to the paragraph 11 of its general comment No. 22 (1993) on article 18 (freedom of thought, conscience and religion).”<sup>1</sup>

At the same Session (the 88<sup>th</sup>) the Committee agreed its “Views” on the first Communications it had received under the Optional Protocol to the ICCPR from conscientious objectors in the Republic of Korea, finding in the cases of Yeo-Bum Yoon and Myung-Jin Choi a violation of Article 18 of the Covenant (Freedom of thought, conscience, and religion).

In its Views, the Committee:

“observes that while the right to manifest one’s religion or belief does not as such imply the right to refuse all obligations imposed by law, it provides certain protection, consistent with article 18, paragraph 3, against being forced to act against genuinely-held religious belief. The Committee also recalls its general view expressed in General Comment 22 that to compel a person to use lethal force, although such use would serious conflict with the requirements of his conscience or religious beliefs, falls within the ambit of article 18. The Committee notes, in the instant case, that the authors’ refusal to be drafted for compulsory service was a direct expression of their religious beliefs, which it is uncontested were genuinely held. The authors’ conviction and sentence, accordingly, amounts to a restriction on their ability to manifest their religion or belief. Such restriction must be justified by the permissible limits described in paragraph 3 of article 18, that is, that any restriction must be prescribed by law and be necessary to protect public safety, order, health

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1 CCPR/C/KOR/CO/3, 28 November 2006, para 17.

or morals or the fundamental rights and freedoms of others. However, such restriction must not impair the very essence of the right in question.”<sup>2</sup>

The Committee noted “that under the laws of the State party there is no procedure for recognition of conscientious objections against military service.” and took note of the State party's argument “that this restriction is necessary for public safety, in order to maintain its national defensive capacities and to preserve social cohesion.” It however observed “that an increasing number of those States parties to the Covenant which have retained compulsory military service have introduced alternatives to compulsory military service, and considers that the State party has failed to show what special disadvantage would be involved for it if the rights of the authors’ under article 18 would be fully respected. As to the issue of social cohesion and equitability, the Committee considers that respect on the part of the State for conscientious beliefs and manifestations thereof is itself an important factor in ensuring cohesive and stable pluralism in society. It likewise observes that it is in principle possible, and in practice common, to conceive alternatives to compulsory military service that do not erode the basis of the principle of universal conscription but render equivalent social good and make equivalent demands on the individual, eliminating unfair disparities between those engaged in compulsory military service and those in alternative service,” and concludes, “that the State party has not demonstrated that in the present case the restriction in question is necessary, within the meaning of article 18, paragraph 3, of the Covenant.”<sup>3</sup>

Two “dissenting opinions” were appended. In fact, that by Mr. Hipólito Solari-Yrigoyen would, under subsequent practice, have been listed as an individual concurring opinion. He agreed “with the majority’s conclusion in paragraph 9 that the facts before the Committee reveal a violation of article 18, paragraph 1,” but felt that they had not stated strongly enough that the “fundamental human right to conscientious objection entitles any individual to an exemption from compulsory military service if this cannot be reconciled with that individual’s religion or beliefs. The right must not be impaired by coercion. Given that the State party does not recognize this right, the present communication should be considered under paragraph 1 of article 18” (ie alone, not read in conjunction with paragraph 3).

Ms. Ruth Wedgwood, while agreeing “that a State party wishing to apply the principles of the International Covenant on Civil and Political Rights with a generous spirit should respect the claims of individuals who object to national military service on grounds of religious belief or other consistent and conscientious beliefs”, and observing that the “sanctity of religious belief, including teachings about a duty of non-violence, is something that a democratic and liberal state should wish to protect,” did not agree that this was “strictly required by the terms of the Covenant”.

It should be noted that Ms Wedgwood's own position subsequently developed. When the Committee next considered a group of Communications from conscientious objectors in the Republic of Korea, she joined in an unanimous finding of a violation, in which the Committee noted that the State merely reiterated the arguments it had put forward in *Yoon & Choi* and therefore “found no reason to depart from its earlier position.”<sup>4</sup> Noting “that the authors' refusal to be drafted for compulsory military service was a direct expression of their religious beliefs which, it is uncontested, were genuinely held and that the authors’ subsequent conviction and sentence amounted to an infringement of their freedom of conscience and a restriction on their ability to

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2 Human Rights Committee, Views adopted 3<sup>rd</sup> November 2006, Communications Nos. 1321/2004 and 1322/2004; *Mr. Yeo-Bum Yoon and Mr. Myung-Jin Choi v Republic of Korea* (CCPR/C/88/D/1321-1322/2004, 23<sup>rd</sup> January 2007), para 8.3.

3 Ibid, para 8.4

4 Human Rights Committee, Views adopted 23<sup>rd</sup> March 2010, Communications Nos. 1593 to 1603/2007; *Eu min Jung et al v Republic of Korea* (CCPR/C/98/D/1593-1603/2007, 14<sup>th</sup> April 2010), para 7.3.

manifest their religion or belief.”<sup>5</sup> The significance of this finding was that the authors of this group of Communications were a Catholic, a Buddhist, and nine others who cited no religious allegiance; Yoon and Choi had both objected as Jehovah's Witnesses, whose doctrine in this area is well known.

The next group of communications, *Min-Kyu Yeong et al v Republic of Korea*<sup>6</sup>, concerned one hundred further conscientious objectors, all Jehovah's Witnesses, and was considered by the Committee one year later. In this case, the Committee found that “the right to conscientious objection to military service inheres in the right to freedom of thought, conscience and religion. It entitles any individual to exemption from compulsory military service if the latter cannot be reconciled with the individual’s religion or beliefs. The right must not be impaired by coercion,” - in effect endorsing the minority opinion by Solari-Yrigoyen in *Yoon v Choi*. Four members signed concurring individual opinions, which favoured following the reasoning of the majority in that case.

As with *Yoon & Choi*, the Committee had found with relation to *Jung et al* that “the State party is under an obligation to provide the authors with an effective remedy, including compensation. The State party is under an obligation to avoid similar violations of the Covenant in the future.”<sup>7</sup> In *Yeong et al*, the equivalent finding was more specific: “the State party is under an obligation to provide the authors with an effective remedy, including expunging their criminal records and providing them with adequate compensation. The State party is under an obligation to avoid similar violations of the Covenant in the future, which includes the adoption of legislative measures guaranteeing the right to conscientious objection.”<sup>8</sup>

In October 2012, the Committee considered a communication submitted on behalf of a further 388 Jehovah's Witness conscientious objectors, and re-iterated its previous finding.<sup>9</sup> The same four members as before signed concurring individual opinions favouring a decision based on *Yoon and Choi* – a further concurring individual opinion challenged this position.

In October 2014, at its 112<sup>th</sup> Session, the Committee found a violation in respect of a further communication under the Optional Protocol from Korean conscientious objectors,<sup>10</sup>

In its Fourth Periodic Report the Republic of Korea refers to the previous concluding observation, but not to the Committee's jurisprudence in individual cases. It reiterates the arguments concerning national security which were put forward in the Third Periodic Report and in the State's comments on the various cases under the Optional Protocol. It reports that a decision by the Ministry of Defence following its consideration of the possible institution of an alternative civilian service for conscientious objectors had been “deferred” following an opinion poll in December 2008 which indicated little public support for this proposal. Decisions of the Constitutional and Supreme Court from 2004 are reported, and useful statistics are provided regarding the prosecution and imprisonment of conscientious objectors for the refusal of military service during the years 2005 to 2010, inclusive. No developments in 2011 or subsequently are reported, indicating that this section was probably drafted long before the submission of the report.<sup>11</sup>

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5 Ibid, para 7.4.

6 Human Rights Committee, Views adopted 24<sup>th</sup> March 2011, Communications Nos. 1642-1741/2007 (CCPR/C/101/D/1642-1741/2007, 5<sup>th</sup> April 2011)

7 CCPR/C/98/D/1593-1603/2007, para 9.

8 CCPR/C/101/D/1642-1741/2007, para 9.

9 Human Rights Committee, Views adopted 25<sup>th</sup> October 2012, Communication No. 1786/2008; *Jong-nam Kim et al v Republic of Korea* (CCPR/C/106/D/1786/2008, 21<sup>st</sup> December 2012), para 9.

10 Human Rights Committee, Views adopted October 2014, Communication No. 2179/2012; *Young-kwan Kim et al. v Rep. of Korea* (CCPR/C/112/D/2179/1741/2012)

11 CCPR/C/KOR/4, 19<sup>th</sup> August 2013, paras. 265 – 271.

In the List of Issues, the Committee asked “With reference to the Committee's previous recommendation (...) please report on the progress made with respect to the introduction of alternative civilian service for conscientious objectors. Please also report on the status of proposed legislation aimed at publishing on the Internet the names of those who refuse to serve in the military.”<sup>12</sup>

The State Party's replies are at least frank:

“The Government's position on introducing alternative services for the conscientious objectors remains unchanged as stated in the state report. In November 2014, after the submission of the state report, the Military Manpower Administration conducted a national survey on the conscientious objectors and the result shows that 58.3% of the public opposes the introduction of alternative service. It is still hard to envisage introducing an alternative service in the midst of the continuing insecure situation of the country.

“Article 81-2 of *Military Service Act* was newly established in July 2015, allowing the Commissioner of the Military Manpower Administration to publish on the internet website the personal information of those who evade military service, without justifiable grounds except for disease or imprisonment, by staying abroad or refusing physical examination or enlistment, and matters concerning non-compliance with the duty. To this end, the Committee for Deliberation on Cases of Evasion of Military Service is established in the regional military manpower offices. The Committee notifies tentative persons that their personal information will be disclosed, gives them an opportunity to explain, deliberates after 6 months of notification considering the status of their military service fulfillment, and decides whose personal information will be disclosed.”<sup>13</sup>

To comment briefly, supplementing the fuller information to follow: There is a general feeling that the popular mood in the Republic of Korea is (partly aided by the efforts of international human rights and religious organisations) becoming less hostile towards conscientious objectors. Some recent opinion polls, perhaps using slightly differently phrased questions, have for the first time shown a majority in favour of introducing a civilian alternative service. That said, the underlying assumption that the implementation of international human rights obligations should be subject to plebiscite is of course false and dangerous. Meanwhile, the honest description of the new paragraph in the Military Service Act leaves no doubt about the implications on the right to privacy.

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12 CCPR/C/KOR/Q4, 28<sup>th</sup> April 2015, para 21.

13 CCPR/C/KOR/Q4/Add.1, 31<sup>st</sup> July 2015, paras 67, 68.

## Military service in the Republic of Korea

Military service is obligatory for all male citizens of the Republic of Korea. In September 2007, the Ministry of Defence announced plans to gradually reduce the duration of service in the army from 24 months to 18 months. (Conscripts in other branches of the armed forces serve for two or three months longer.) However following an escalation of tensions in the region in November 2010, consideration was briefly given to reverting to 24 months, and it was decided to “freeze” the period of service at the current level of 21 months.<sup>14</sup>

There are no provisions regarding conscientious objection to military service; the only grounds specified in the Military Service Act on which a person may be excused obligatory military service are physical or mental disability.

Article 88.1 of the Military Service Act stipulates that “If a person who has received a draft notice for active duty or Notice of Summons (...), without justifiable cause, does not report for service within the period specified in the following clauses or refuses the summons, then he shall be sentenced to a prison term of three years or less...”. Until the year 2001, those charged under this article were tried in military courts and following imprisonment could face repeated call-up and conviction. This is no longer the case; trials now take place in civilian courts and the Enforcement Decree (Article 136.2) of the Military Service Act now stipulates that those who have served sentences of 18 months or more are released from the obligation to perform military service. All those who refuse military service on grounds of conscientious objection are prosecuted under this article; since 2001 most have been sentenced to exactly eighteen months' imprisonment.

## Legislative developments

On 18<sup>th</sup> September 2007, the Republic of Korea announced its intention to amend the Military Service Act in the course of 2008 in order to make alternative civilian service available for conscientious objectors from January 2009, and this was reported in May 2008 to the Working Group in the first cycle of the Universal Periodic Review (UPR) process of the Human Rights Council, where it had received recommendations on the subject from Slovenia and the United Kingdom.

On 16<sup>th</sup> June 2008, however, the Government revealed that this timetable would not be followed, stating that “the issue of conscientious objection to military service required further study and the forging of a broad national consensus”.<sup>15</sup>

On 21<sup>st</sup> July, the National Human Rights Commission reiterated its recommendation of 26<sup>th</sup> December 2005 calling on the Government to institute a system for recognising conscientious objectors and providing alternative service.

On 22<sup>nd</sup> August, the Military Manpower Administration commissioned Professor Jin Seok-yong of Daejeon University to conduct a study of the feasibility of implementing a civilian alternative service system for conscientious objectors. The final report, incorporating the results of various consultation exercises, and recommending the adoption of such a scheme, was published on 19<sup>th</sup> December. The Ministry of Defence however seized upon the result of a simple opinion poll conducted as part of the study, in which 68.1% of respondents – a figure much higher than in any

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14 The Cholsunilbo, English edition, (<http://english.chosun.com>) 22<sup>nd</sup> December 2010.

15 The chronology reported here is largely based on MIMBYUN (Lawyers for a Democratic Society) and KSCO (Korea Solidarity for Conscientious Objection, [Korean Government cancelled Alternative Civilian Service: Briefing paper on Conscientious Objection issues in the Republic of Korea](#), March 2009, pp 8 - 10 .

other recent survey on the issue - had indicated opposition to such a scheme. On that basis it announced on 24<sup>th</sup> December that it was therefore “still too early to allow alternative forms of military service for conscientious objectors.”<sup>16</sup>

When the Republic of Korea was reviewed in the second cycle of the UPR, in October 2012, no fewer than seven States<sup>17</sup> made recommendations regarding its non-recognition of conscientious objection to military service and the imprisonment of conscientious objectors, all of which were combined in recommendation no. 53. An eighth State (Hungary), without making a formal recommendation, “encouraged the Republic of Korea ... to introduce alternative service for conscientious objectors before the next UPR cycle”.<sup>18</sup> Recommendation 53 was not listed as enjoying the support of the Republic of Korea, although the Government did undertake to examine the issue “while taking into consideration the future changes in the security situation and formation of popular consensus.”<sup>19</sup>

No more has subsequently been heard of any action on the subject on the part of the Ministry of Defence, but on 18<sup>th</sup> July 2013 a Bill<sup>20</sup> to revise the Military Service Act so as to introduce an alternative civilian service was introduced by Assemblyman Jeon, Hae-Cheol backed by eleven others. There have been no reports of the progress of this bill. Meanwhile a Gallup Poll held between 4<sup>th</sup> and 7<sup>th</sup> November 2013 produced an almost exact inversion of the 2008 result which the Government had used to justify its inaction.<sup>21</sup>

### Constitutional Court of the Republic of Korea

On 5<sup>th</sup> September 2008, the Appeal Court of Chungcheon District, Gaewong Province combined appeals by three Jehovah's Witnesses against their convictions for refusal of military service on grounds of conscience, and referred them to the the Constitutional Court for a ruling on the constitutionality of Article 88.1. To these were subsequently joined the case of a conscientious objector who had been acquitted at first instance but convicted on appeal.

The Constitutional Court ruled on these four cases on 30<sup>th</sup> August 2011. By a majority of 7 to 2, it reaffirmed its decision in the previous case on the issue, mentioned in the State Report, which had been decided on 26<sup>th</sup> August 2004.<sup>22</sup> In doing so, the Court would have appeared not only to have overlooked intervening developments in jurisprudence elsewhere, including in the European Court of Human Rights<sup>23</sup> and the Constitutional Court of Colombia<sup>24</sup>, but also to have failed to take account of the Republic of Korea's obligations under the ICCPR as spelled out by the Human Rights Committee.

Despite this recent ruling, an increasing number of District Court judges have expressed doubts about the compatibility of the mandatory sentencing of conscientious objectors with the

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16 Herskovitz, J. and Kim Junghzun, “South Korea rethinks alternative to conscription”, Euronews24, 24<sup>th</sup> December, 2008, reproduced at <http://wri-irg.org/node/6272>

17 Australia, France, Germany, Poland, Slovakia, Spain and the United States of America.

18 A/HRC/22/10, Para 44.

19 A/HRC/22/10/Add.1, Para 30.

20 No. 6042

21 Human Rights Without Frontiers International ([www.hrwf.net](http://www.hrwf.net)) “Gallup poll reveals shift in perception of conscientious objection in South Korea”, 26<sup>th</sup> February 2014.

22 See War Resisters' International, “South Korea: Constitutional court again denies right to conscientious objection”, in CO Update No 68, September 2011.

23 European Court of Human Rights, Grand Chamber. Case of Bayatyan v Armenia (Application no. 23459/03): Judgment Strasbourg, 7<sup>th</sup> July 2011.

24 Corte Constitucional de Colombia, Comunicado No.43 – Expediente D7685 Sentencia C-728/09, 14<sup>th</sup> October 2009.

constitutional guarantees of freedom of conscience and human dignity, and six cases<sup>25</sup> have been referred by District Courts to the Constitutional Court for review. It is believed that the Constitutional Court will consider the six cases jointly; IFOR has joined with Amnesty International, Friends World Committee for Consultation (Quakers), the International Commission of Jurists and War Resisters International in submitting an amicus brief to the Court outlining developments in international standards and jurisprudence and state practice world-wide.

Two other sets of cases currently before the Constitutional Court are in the nature of constitutional complaints. The 433 authors of the communications under the Optional Protocol to the ICCPR in the names of *Min-kyu Yeong et al*, and *Jong-nam Kim et al* have filed a complaint that the failure to provide a remedy through legislation is a violation of that Covenant. Twenty-one individuals have separately filed a complaint that the practice of uniformly sentencing conscientious objectors to eighteen months imprisonment, together with the failure to make available a civilian alternative to military service, is unconstitutional.

### Continuing convictions and imprisonment of conscientious objectors

As can be seen from the figures given in the State Report,<sup>26</sup> in 2008, in anticipation of the early introduction of an alternative civilian service, there was a slackening off of the rate of prosecution of conscientious objectors. The number of convictions, although still representing a figure much greater than the total number of declared conscientious objectors imprisoned in the rest of the world, was the lowest in the Republic of Korea since the early 1990's.<sup>27</sup> The numbers of imprisonments again rose rapidly from 2009 and by the end of 2010 over 900 Jehovah's Witnesses alone were serving prison sentences for their refusal, on grounds of conscience, to perform military service. The latest figures published by the Jehovah's Witnesses show that at 31<sup>st</sup> August 2014, 562 of their members were imprisoned for refusing military service on grounds of conscience. Since 1953 a total of over 18,000 Jehovah's Witnesses had been sentenced to, in aggregate, more than 34,800 years' imprisonment.<sup>28</sup>

Although Jehovah's Witnesses are by far the most numerous, as the table in the State Report indicates, they are not the only conscientious objectors in the Republic of Korea. As of December 2014, War Resisters International listed seven declared conscientious objectors who are not Jehovah's Witnesses currently serving 18-month sentences under Article 88.1.<sup>29</sup> One at least is a member of the anabaptist community in the Republic of Korea. It is extremely probable that there are further imprisoned conscientious objectors from a variety of religious backgrounds who are not known to War Resisters' International; many do not seek publicity, partly because of the stigma attached to the conviction and imprisonment.

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25 Cases Nos: 2013HunGa5, submitted to the Constitutional Court by Seoul Northern District Court; 2014HunGa8, submitted to the Constitutional Court by Seoul Eastern District Court; 2012HunGa17, submitted to the Constitutional Court by Masan Branch of Changwon District Court; 2013HunGa23, submitted to the Constitutional Court by Seoul Southern District Court; 2013HunGa27, submitted to the Constitutional Court by Ulsan District Court; 2013HunGa13, submitted to the Constitutional Court by Suwon District Court.

26 Para 271.

27 MIMBYUN and KSCO, *op cit* (footnote 6), p.6.

28 <http://www.jw.org/en/news/legal/by-region/south-korea/jehovahs-witnesses-in-prison/>

29 <http://wri-irg.org/programmes/pfp>, consulted 22<sup>nd</sup> April 2012. All five were convicted in 2011; four of the five will complete their sentences in 2012. .

### Repeated imprisonment of conscientious objectors

Although since 2001 first-time conscripts who have been convicted to sentences of 18 months or more have not been liable to repeated call-up, this is not the case with those who have developed conscientious objections only after having performed their initial period of military service, and have refused the call-up to reserve duty. The penalty for such refusal may be a short prison sentence, but it usually a fine. However it does not discharge the responsibility; conscientious objectors who are reservists may be subjected to repeated call-ups and repeated penalties over an eight-year period. It was estimated that in 2009, some 80 Jehovah's Witnesses, mainly men who had converted after their initial period of military service, were faced with this situation<sup>30</sup>, which, as the Human Rights Committee has observed, “may amount to punishment for the same crime if (the) subsequent refusal is based on the same constant resolve grounded in reasons of conscience,” thereby breaching the principle of *ne bis in idem*.<sup>31</sup>

### Civil disadvantages suffered by conscientious objectors

Under Article 76 of the Military Service Law, those who have not satisfied the military service requirements are precluded from employment by government or public organisations. Moreover, as the Human Rights Committee recognised in *Yeong et al* (see footnote 8, above), conscientious objectors are not only penalised for the exercise of the freedom of thought, conscience and religion guaranteed under Article 18 of the ICCPR, but also have to carry through life the stigma of a criminal record, which may cause them to suffer many forms of discrimination.

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30 MIMBYUN and KSCO, *op cit* (footnote 6), p.10.

31 Human Rights Committee, General Comment No. 32 (CCPR/C/GC/32, 23 August 2007), para 55.