

# Supreme Court of Korea

## Decision

Case 2004Do2965, Violation of the Military Service Act  
Defendant Myung-Jin Choi (810527-1018116), Unemployed  
Address: 1060, 2-Ka, Kumho-Dong, Seongdong-Ku, Seoul  
Petitioner Defendant  
Counsel Listed on the Addendum  
Trial Court Holding Eastern District Court of Seoul 2004.4.28. Judgment 2004No79 Decision  
Date of Judgment July 15, 2004

### The Court Order

Petition is denied. (Affirmed.)

### Opinion of the Court

#### 1. On the existence of a “justifiable cause” in the Article 88, Section 1 of the Military Service Act

##### 1.1. The meaning of “justifiable cause”

Article 88, Section 1 of the Military Service Act (“Clause”) is a clause that penalizes draft evasion. The actual duty to perform military service arises when the Director of the Military Manpower Administration (“MMA”) decides and implements a draft. The Clause penalizes persons who have received a draft notice for active duty or a Notice of Summons and fails to report for service without any “justifiable cause.” By punishing such malfeasance, the Clause seeks to prevent draft evasion and secure necessary personnel to ensure national security. If a “justifiable cause” exists, however, draft evasion does not lead to a violation of the Military Service Act.

The Clause assumes the existence of an abstract duty of military service and the performance of such duty. Thus, we should interpret “justifiable cause”, as stated in the Clause, to mean a cause that can justify non-performance of that duty which has been actualized and implemented by the Director of the MMA. Such cause would include illness and other reasons where we could not hold a person responsible for failing to perform the duty of military service. (See, Supreme Court of Korea 1967.6.17. Judgment 67Do677 Decision, 2003.12.26 Judgment 2003Do5365 Decision)

On the other hand, if a person refuses to perform the actual duty of military service based on a claim of right that is protected by our Constitution and if such right is determined to have a higher constitutional value than the legislative purpose of the Clause, prosecution under the Clause will lead to an unjustified infringement of the person's constitutional rights. In order to prevent such constitutional violation, it would be proper to rule that a "justifiable cause" exists for such persons to refuse military service.

## 1.2. The existence of a "justifiable cause" and determining unjustified infringements of basic constitutional rights

Article 19 of the Constitution provides that "all citizens have the freedom of conscience." The conscience that the Constitution seeks to protect is the "powerful and serious voice of the heart – an intense and concrete conscience – that calls out when determining right from wrong where failure to listen would lead to the destruction of the person's sense of self worth." Freedom of conscience includes the freedom in formation of the conscience as well as the freedom to make conscientious decisions and express and realize them externally. This would include the freedom from being forced to perform an act that conflicts with a person's conscientious decisions. (See Constitutional Court of Korea 1997.3.27. Judgment 96HunGa11 Decision, 1998.7.16 Judgment 96HunBa35 Decision.) Thus, freedom of conscience is basically a request to the nation asking not to impose an unjustified restrictive legal mechanism in the formation and the realization of a person's conscience. It has the character of a passive right of self-defense.

The holding of the trial court and the record indicates that the petitioner has exercised his faith as one of Jehovah's Witnesses since childhood due to the influence of his parents. It appears that he has sought to maintain the personal integrity of his conscience that has been formed and shaped by his religious tenets by refusing to enter active military duty. Applying the Clause in the instant case and imposing penalty for such acts by the petitioner indirectly compels active military duty in conflict with the petitioner's conscientious decision. Such application restricts the "right not to be compelled to act in conflict with one's conscientious decision" protected by Article 19 of the Constitution and as long as the motive for the petitioner's conscientious decision is based on his religion, it also restricts the freedom of religion under Article 20 Section 1 of the Constitution. (Under this meaning, the foregoing analysis on the infringement of freedom of conscience incorporates the determination on the infringement of the freedom of religion.)

As long as they remain internal, the freedom to form a conscience and the freedom to make decisions based on conscience are said to be absolute as they cannot be restricted and there is no need for such restrictions. However, the freedom to exercise one's conscience through passive malfeasance, as claimed by the petitioner, may conflict with other legal benefits. Although such case may necessitate a restriction on the freedom to exercise one's conscience through passive malfeasance, one cannot claim that such restriction directly leads to an infringement of the fundamental aspects of the freedom of conscience. The limitation on the exercise of basic rights- including the freedom of conscience- is that basic constitutional rights must be exercised in a manner that enables harmonious way of life in the national collective and does not endanger other constitutional values and the nation's law and order. Thus, the freedom of to exercise one's conscience must be a relative freedom. It can be limited under Article 37 Section 2 when constitutional legal benefits exist that would justify a

restriction. (See Supreme Court of Korea 1982.7.13. Judgment 82Do1219 Decision)

However, our Constitution provides in Article 5 Section 2 that “the sacred duty of the nation army is the preservation of national security and the defense of national territory while remaining politically neutral.” Article 39 Section 1 provides that “all citizens shall have the duty of national defense as imposed by law.” The sovereign in a modern democratic nation is its citizens. The imposition of a constitutional duty of national defense on its citizens is justified under the premise that it is something that the citizens need. By performing this constitutional duty, the citizens themselves can maintain national existence and safety, which is a condition precedent for exercise and protection of basic rights. Thus, the duty of national defense as imposed by Article 39 Section 1 is the duty to defend the nation from foreign enemies to ensure the national political autonomy and territorial integrity. Along with the duty to pay taxes, it is the most fundamental duty that enables the existence of the nation. Considering the instability and the unpredictability of the region created by special security situation concerning North and South Korea, one cannot over-emphasize the importance of the duty of national defense.

The Clause in the instant case was designed to crystallize this most basic duty of citizens-duty of national defense. If national security cannot be ensured due to the failure to perform the duty of military service, it is clear that a citizen’s human dignity and self worth cannot be protected. Thus the ultimate purpose of the duty of military service is ensuring the dignity and value of its citizens and thus we cannot say that the value of petitioner’s freedom of conscience exceeds these constitutional legal benefits. Consequently even if the petitioner’s freedom of conscience is restricted pursuant to Article 37 Section 2 of the Constitution, it would be a constitutionally permitted restriction.

Thus, we do not accept the petitioner’s claim that the Clause, as it applies to the petitioner, unfairly infringes his right to enjoy the freedom of the conscience and freedom of religion. We also do not accept the petitioner’s claim that his refusal to perform military service based on freedom of conscience and religion serves as “justifiable cause” under the Clause.

Although Article 10 of the Constitution states that “all citizens shall have human dignity and value and the right to pursue happiness”, this basic constitutional right is a supplementary right that applies only when other distinct basic rights do not apply. The law of the free exercise clause in Article 10 crystallized in the areas of freedom of conscience and religion. Since we view that the application of the Clause did not result in unjustified infringement of the petitioner’s right to freedom of conscience and religion, and that there was no “justifiable cause” for the petitioner to refuse military service, we do not accept the petitioner’s claim that the application of the Clause resulted in the loss of dignity and value and infringement of his right to pursue happiness. We also do not accept his claim that refusal of military service based on basic rights should be a “justifiable cause” as it has no basis.

Article 18 of the “International Covenant on Civil and Political Rights” (also known as “Covenant B”), which our nation has adopted, appears to provide essentially the same laws and protections for freedom of conscience (Article 19 of our Constitution) and freedom of religion (Article 20 of our Constitution) as our Constitution. Thus, a right to receive an exemption from the Clause does not arise from Article 18 of the “International Covenant on Civil and Political Rights.”

The legislature has a wide discretion to decide whether to impose a penalty on those who refuse military service or to provide alternative service. The current Military Service Act provides exemptions for illness, physical disability, and system of special exceptions exist for

public service worker, professional researchers, industrial technical experts while no accommodations are made for those who refuse active duty due to conscientious or religious reasons. However, considering the legislative discretion, we cannot say that such exemptions and special treatments violate the principle of equal protection, prohibition on excessive prosecution, and prohibition of religious discrimination. Thus, we do not accept the petitioner's claim in this regard.

## **2. On the fact that there is no possibility that the petitioner will ever comply with the Clause**

To determine whether there is a possibility that the petitioner will act in a way that goes against his conscientious decision, the average person test- whether there is a possibility that an average in the petitioner's specific situation will comply with the law- must be applied. Although the petitioner's conscientious decision will strongly pressure the petitioner to act in violation of the Clause, we cannot say that a change in his decision is impossible. The law, as a principle, requires the individual to yield on those rare occasions when the exercise of one's conscience conflicts with constitutional law. Thus, we do not accept the petitioner's claims on this issue.

## **3. Conclusion**

Thus, we hereby order a denial of the petition. Aside from Justice Gang-Gook Lee's dissenting opinion, and Justice Ji-Dam Yoo, Jae-Shik Yoon, Gi-Won Bae and Yong-Dam Kim's concurring opinion, the remaining justices join to render this opinion of the Court.

## **4. Justice Gang-Gook Lee, dissenting**

### **4.1. On the constitutional problems**

#### **4.1.1. The legal effect of basic rights**

The constitutionally protected basic rights of citizens ("basic rights") are not only the subjective rights of individuals but also an element in the objective basic order of social unity. Basic rights of citizens serve a function in founding a nation. It also serves a function in uniting a social collective through assimilation. Thus, all exercise of governmental powers must ultimately contribute to the realization of the values of basic rights. A nation's governmental function must respect these basic rights and has the burden of carrying out its constitutional duties to protect such rights.

#### 4.1.2. Freedom of conscience and duty of military service

Clause 10 of the Constitution has clearly stipulated that “Every citizen has his dignity and value as a human and rights to pursue happiness. The state shall bear the duty to confirm the basic human rights not to be infringed upon those individuals have and to protect and guarantee them [the basic human rights].” Thereby, it makes clear that the ‘dignity and value as a human’ are the value core index of all Basic Rights and also makes clear the obligation of the state to respect, protect and guarantee Basic Rights.

And Clause 19 of the Constitution has stipulated that “every citizen has the freedom of conscience,” and the ‘conscience’ which is to be protected under the Constitution means a sincere, pressing and concrete conscience.” And the freedom of conscience herein includes not only the freedom for forming a conscience and making decisions but also the freedom for realizing conscientious decisions by means of negative nonfeasance or positive feasance. What is said that the freedom of conscience includes the freedom for realizing conscientious decisions by means of negative nonfeasance means that every citizen has the freedom the he shall not be directly or indirectly compelled to do an act against his conscience, that is, the right of defense to demand the freedom from any undue legal coercion on him to do an act against his conscience.

The intention of Clause 19 of the Constitution to protect the Basic Rights for forming conscientious decisions and realizing them is to protect the identity of individuals’ character [personality] which is the foundation of the dignity and value of a human on which the Constitution puts the highest value and furthermore to embrace minorities of citizens who have different ethical views of value from those of the majority of citizens of the society and thereby to raise the ideological rightfulness of liberal democracy.

However, it is obvious that such freedom for realizing conscience is also a relative freedom which can be restricted by Paragraph 2, Clause 37 of the Constitution. (See Decision 82Do1219 announced on July 13, 1982 by the Supreme Court)

On the other hand, also the duty of national defense under Paragraph 1, Clause 39 of the Constitution, is imposed as a basic duty of citizens for the existence and security of the state as being recognized only by the Constitution which is the assimilative integral order of a community, and the military service law applied to the defendant can be said to have been materialized by legislators.

#### 4.1.3. Conflict and harmonization between constitutional value and legal benefits

In case constitutional basic rights conflict each other or the Basic Rights of citizens and a constitutional value or benefits such as a duty of citizen conflict each other, a state which must respect and protect the value core of all the Basic Rights should not choose one, or abandon, or sacrifice the other easily by a haste bridging of legal benefits or an amount of abstract value penalty like selecting one alternative, but should try to find a point or boundary to harmonize in which the conflicting values or legal benefits can be realized as best as possible, and such a harmonizing point or boundary should be sought out individually and in proportion in a specific case. And such a principle of interpretation be applied not only when interpreting and applying constitutional values or legal benefits conflict each other but also when interpreting and applying their subordinate laws so that constitutional values or legal

benefits can always be noted and realized to secure agreement with the constitution in their reality and content.

#### 4.2. Interpretation of Item 1, Paragraph 1, Clause 88 of Military Service Law

- 4.2.1. Precedents of the Supreme Court limited the meaning of ‘due reason’ under the Relevant Clause to the reason why a man who could not carry out the duty of military service which was materialized by the chief of Military Manpower Administration although he had an intention to carry out the abstract military service duty which is stipulated under the military service law without being responsible for the non-performance, for example, a reason why he could not enter into the military training camp due to an abrupt occurrence of disease on the date specified and so forth (See Decision 67Do677 announced on June 13, 1967, Decision 88Do2285 announced on February 27, 1990, Decision 2003Do5365 announced on December 2003, by the Supreme Court). Accordingly an act of objecting to entering into a military training camp for active military service due to a religious and conscientious decision could not be applied to the above-mentioned ‘due reason’ at all (See Decision 69Do934 announced on July 22, 1969 by the Supreme Court).

However, such interpretation was a result of considering the military service law itself without taking into account the relation of the military service law with the order of the entire body of laws, especially its relation with the Constitution or resulted in unilaterally sacrificing the freedom of conscience which is protected under the Constitution but imposing a full performance of the duty of military service by not excluding the application of the Relevant Clause to an defendant by reason of that the constitutional value which the Relevant Clause pursues is superior to or at least equal to the constitutional value of the freedom of conscience that the defendant claims by imposing the amount of an abstract value penalty, and moreover, resulted in neglecting the constitutional demand that constitutional legal benefits or values which conflict each other be all interpreted harmoniously so that they all can be realized as best as possible. Of course, it seems that there is no other room for the ‘due reason’ to be interpreted differently if it is only limited to the military service law itself, namely, interpreted only within the military service law. However, it is deemed that such interpretation is nothing more than a single-dimensional interpretation which has not taken into account the facts that the Constitution is the basis of validating the law, of giving authority to it and the gauge for recognizing it. It is more important than anything else to make it sure that there should be realistic content agreement between the superordinate and subordinate laws in the interpreting of the military service law, especially the penalty clause of the military service law, as it is true of interpreting other laws, the value and direction of the Constitution which is superordinate to the law, especially the binding force of Basic Rights on the power of the state should be noted, and the constitutional meaning and content of the basic rights should be realized and accomplished as best as possible, and furthermore, efforts should be followed to find out a harmonizing point which can realize as best as possible at the same time the constitutional values and legal benefits which are the freedom of conscience and the duty of national defense that are conflicting each other. Even if the legislators could not expect the result, there is a reason why the freedom of conscience, which is a constitutional basic right and must be protected and realized by the Constitution which is superordinate to the military service law, must be protected further than, or at least equally to, the military service law and its penalty clause, and if it is needed to limit the application of the Relevant Clause to a certain scope by means of a law-harmonious interpretation with the duty of military service, such a reason can be said to be embraced into the above-mentioned ‘due reason.’

- 4.2.2. In order for that to be accomplished, there should be made a general consideration of the process and content of the formation of the conscience of the defendant, the concrete appearance of conscience realization, the extent of the conscientious conflict which generates in collision of the conscience with the law and order, whether the fulfillment of the conscience of the defendant can result in impairing the fundamental legislative objective of the Relevant Clause or not, whether there exists a possibility for imposing an alternative service duty and the imposition of penalty on the defendant can fundamentally and completely fulfill the original meaning of penalty.

When considering the following reasons as recognized by the record, namely, that the defendant came to form an absolute conscientious decision according to his religious beliefs which require him not to accept any type of weapon-bearing as he came to naturally have the same religious beliefs as his elder brother when young being affected by his parents who were Jehovah's Witnesses, especially as he saw that his elder brother had been sentenced to a jail term because of violating the military service law and served the jail term, we cannot but say that the reason why the defendant objected to the entering into the military training camp for active military service was his pressing and strong sense of duty that his value of personal existence itself would be destroyed unless implicitly following the command of his religious conscience which is higher than that of general laws. The sincere and pressing binding force or internal compelling power of such a conscientious decision of the defendant is the demonstration of the typical characteristic of the conscience that must be protected under Clause 19 of the Constitution. The defendant is also clearly distinguished from other convinced or conscientious criminals that do not have absolute ethical binding force. In addition, because the defendant is only negatively objecting to the performance of the duty of armed military service which is against his own conscientious decision with a clear intention to do the duty of national defense under the Constitution if at least it is not armed military service in form and content, it should not be overlooked that the conscientious objector is not directly infringing upon the legal benefits of other people in the national community nor has decisively damaged the fundamental legislative objective of the Relevant Clause. Taking all of these into account, it cannot be said that the binding force of the penalty clause of the military service law does not reach the defendant, but if imposing penalty which is the strongest penalty means of a state upon the defendant who has objected to the duty of military service according to his absolute, sincere, religious conscientious decision, it would result in a serious infringement upon the human dignity of the defendant and also in an excessive action which is overly deviated in the proportional relation in balance with the responsibility of an actor which is a major basis for imposing penalty. In addition, it seems to be obvious that the penalty cannot fulfill its original objective in any aspect of the punishment for a crime, the prevention of it or the education of the defendant, regardless of the extent of the penalty on the defendant, and it especially seems to be difficult to expect a possibility for the defendant, who has followed the pressing and unconditional command of his religious conscience under the serious situation of his mental stress because of the conflict between the duty of armed military service reflecting a universal value and the command of his religious conscience, to do a legal act which is in agreement with the present military service law. (It is well known that most of religious conscientious objectors often willingly request for the sentence of a prison term of one year and six months or more which enables them to be exempted from the duty of military service). Therefore, in such a case as that of the defendant, it can be said to be proper that the penalty-imposing power of the state withdraw one step to make

the freedom of conscience of individuals be respected and guaranteed more because the state must guarantee the freedom of conscience, which is a basic right of citizens, as most as possible, and tolerate accordingly, and bear a constitutional duty to refrain from exercising its penalty-imposing power which is against the proportional principle. Moreover, it is more proper in that the defendant has no other alternative means but has to accept the execution of the punishment in order to realize his own conscientious decision in this case but the state has its constitutional duty to rationally coordinate the freedom of conscience and the duty of military service, such power and possibility as well. Therefore, if the state has not exercised the power fully, it must bear all the disadvantages which are resulted accordingly but must not let them go to the defendant.

Of course, this judgment is not accepting the conscientious decision of the defendant at all because the content of the command of his conscience is right. This interpretation notes a constitutional request that the operation of all the power of the state should contribute to the realization of the values of the Basic Rights and that the freedom of conscience and the duty of national defense which are conflicting each other under the Constitution should be interpreted in a harmonious legal way. And as mentioned earlier, if a penalty is imposed upon the defendant pursuant to the Relevant Clause, it will be an excessive action and not fit to the original objective of penalty. And because it is evident that there is especially no possibility for the defendant to be expected to do a lawful act concerning this case, in such an exceptional case as this, the penalty-imposing power of the state can withdraw a step not to give the defendant the responsibility for a crime which is a requirement for the establishment of a crime. In this regard, this interpretation means that there exists a 'due reason' for the defendant to be excluded from the application of the Relevant Clause.

#### 4.3. Necessity for discussion about the introduction of an alternative measure

- 4.3.1. Concerning the issue of conscientious objection, the U.N. Commission on Human Rights has urged the states which do not recognize the rights for conscientious objection not to discriminate the essence of the beliefs of conscientious objectors but to implement an alternative service system which does not have a penalty-characteristic through resolutions in 1987, 1989, 1993, 1995, 1998 and 2004, especially to take action not to imprison conscientious objectors. The E.U. Conference too has urged for the recognition of the right for conscientious objection through resolutions in 1983, 1989, 1993, and 1994 several times. Also among the states which have been enforcing a draft system, about 25 countries around the world including not only Western countries such as Germany, France, Italy but also Eastern countries such as Bulgaria, Ukraine, Poland, the Czech Republic and Hungary, are recognizing an alternative service system for conscientious objectors, and even Taiwan which is under a serious national security situation like the Republic of Korea has recently legislated a law of recognizing it and has been successfully implementing it.

- 4.3.2. Because the legislators have a wide range of discretionary rights about the methods and ways to make the constitutional duty of national defense concrete so as to realize the constitutional legal benefits such as the existence and security of the state and the fair imposing of military service duty and at the same time to guarantee the freedom of conscience together, now it is the time to find out what is the best way to solve this issue and to discuss and review all the related issues such as the time of implementation and standards of an alternative service system and those qualified for it and the procedures and methods for the implementation of the system if such an alternative system is adopted.

According to the record, the number of conscientious objectors in Korea is estimated to be about 600 a year. This number is only about 0.2% of the yearly drafted men, about 300,000. If the clear standards for the alternative service system are provided and the contents of the alternative service are equal to or heavier than the duty of military service, the constitutional legal benefits which are the security of national defense and the fair imposing of the duty of military service will be able to be fulfilled.

The adoption of such an alternative system is realizing the principle of toleration for the assimilative integration of the state toward minorities who have different thoughts and values from those of the majority of the members of the community.

#### 4.4. Conclusion

Therefore, I am in opposition to the opinion of the majority of the justices of the Supreme Court who claim that the conscientious objection to the performance of the duty of military service does not apply to the 'due reason' stipulated in Paragraph 1, Clause 88 of Military Service Law, and thus, I claim that the judicial precedents with the same intention should be changed and that the initial judicial decision on the defendant made according to the precedents should be cancelled and that the case should therefore be returned to the initial court because the interpretation and application of Paragraph 1, Clause 88 of Military Service law has affected the initial judicial decision and has resulted in misinterpreting the method of interpretation as to its relationship with the freedom of conscience under Clause 19 of the Constitution and as to the case where constitutional values and legal benefits conflict each other, thereby resulting in an illegality in interpreting the Relevant Clause.

#### **5. The opinions of the majority about the supplementary opinions of Justice Ji-Dam Yoo, Justice Jae-Sik Yoon, Justice Gi-Weon Bae and Justice Yong-Dam Kim**

The majority of justices agree to the opinion of the minority in that there is a need to adopt an alternative service system as a substitute for military service for those like the defendant who strongly object to military service with a sincere and firm will to keep their religious conscience even by accepting a punishment willingly which enable them willingly to perform a different content of nation defense duty which can be comparable to armed military service

while not relieving their conscientious conflict rather than to coerce armed military service on them unconditionally. If the legislators provides an legal act with such an import to which a majority of citizens can agree by taking into consideration examples of foreign countries and our present conditions, the toleration of the state and our society toward minorities will be verified and thereby the rightfulness of the ideology of liberal democracy will be elevated more.

However, although the adoption of such an alternative service system is desirable on a legislative policy, it hardly seems a constitutional duty of the state. As the opinion of the majority pointed out earlier, concretely forming the duty of national defense which is one of basic duties of every citizen by law is directly related to the national security in its objective and is an area which requires a purposive coping with changing domestic and overseas security situations in composing a military force equipped with the best national defense power in an accurate reflection of the situations, wherein it can be said that a wide range of legislating right to the legislators in this regard. Therefore, it cannot be said that the military service law which imposes a concrete military service duty while not does not provide any alternative for relieving such conscientious conflicts as some citizens come to have due to religious reason, etc. is infringing upon the freedom of conscience and religion or against the principle of equality and thus is unconstitutional, therefore, the interpretation that there is a due reason why the application of the Relevant Clause is excluded on the premise that the state has not fulfilled its constitutional duties to coordinate the freedom of conscience and the military service duty rationally cannot be accepted. In this regard, it can be said that it is impossible to apply the Relevant Clause to the case of the defendant.

**6. The supplementary opinion of Justice Moo-Jae Cho about the opinion of the majority of justices**

- 6.1. The opinion of the majority that punishing the defendant on the violation of the duty of entering into the military training camp which is part of the military service duty because of his beliefs and his conscientious decision according to Paragraph 1, Clause 88 of Military Service Law is not against Clause 10, Clause 11, Clause 19, Clause 20, Paragraph 2 of Clause 37 and related international convention nor applicable to the due reason stipulated under the clause of the military service law and also the expectability of the concrete legal act which is entering into a military training camp, in that case, cannot be denied and the supplementary opinion in the fifth paragraph herein regarding the interpretation theory for an alternative service system should be supported.

But an counter argument is that there is not found an expectability that the defendant will go to perform his military service duty against his conscientious decision, so this is herein to supplementary the related part of the opinion of the majority concerning the claim as follows:

The counter argument states in an intention that there is no expectability at all for the defendant to do an act of entering into a military training camp because the religious, conscientious decision of the defendant is objecting to the performance of armed military service duty and he did not enter into the military training camp because it is a result from his pressing and strong sense of duty that the value of his personal existence will finally be destroyed if not obeying the command of his religious conscience implicitly to object to the performance of the duty.

- 6.2. The term 'expectability' herein means the possibility that an actor will do a certain act at a particular time when he must do. The expectability for a legal act should be judged based on an average person of the society under the specific situation where the actor is placed, and the judgment should be limited only to the particular act unless there is a special reason.

The abstract military service duty stipulated under Clause 39 of our Constitution is materialized as individual duty acts composing the contents of the military service duty by the provisions of the Military Service Law, the Military Criminal Law, the Reserve Force Establishment Law, etc. that are entrusted by the provisions of the Constitution, and the materialized individual acts are varied in content and nature that there are not the acts alone which are against the conscientious command that the defendant claims including armed military training to slaughter human lives or to afflict others.

What became an issue concerning this case was an act of entering into the military training camp, that is, going to the place of muster, which is part of the compulsory duty which imposes punishment under the military service law when violated and must be performed prior to acquiring the identity of a military serviceman. This act of entering into a military training camp is not greatly different in nature from other duty acts, for example, the duty of a moving-in notification when moving one's place of residence to other place (Clause 84), the duty of notification of leaving and arriving at the country (Clause 94), the duty of not damaging other person's body or not doing any defrauding act (Clause 86), the duty of draft or receiving physical examination (Clause 87), and it will be understandably similar in nature to the specific duty act that must be performed in an alternative service system in which the defendant is willing to serve.

Hence, even though given that the act of bearing a weapon, part of the duty of military service, is against the conscientious beliefs of the defendant, the specific act of 'entering into a military training camp' that the defendant must perform is a step of act prior to an armed military training (in this case, his act of objection is governed by the Military Criminal Law, not the Military Service Law) for the purpose of slaughtering human lives or afflict humans, but it cannot be concluded that the defendant cannot be expected to do the act of entering into a military training camp because the act of entering into a military training camp is against his religious, conscientious beliefs, on the ground that the defendant could not do, of course, the act of armed training itself or an act similar to this in nature.

Otherwise, there can be logically established a theory that the defendant too can object to other duties which belong to the abstract military service duty such as duties of a moving-in notification, the notification of leaving and arriving at the country, not damaging other person's body or not doing any defrauding, receiving physical examinations for draft, etc, reaching an undue conclusion.

Therefore, even though judging on the premise of the situation of the defendant that he must be faithful to his conscientious command that he must not slaughter or afflict human lives, in this case where a special reason is not recognized, it is difficult to deny the possibility that an average person of the society will do an act of entering into a military training camp on basis of the conscientious beliefs of the defendant.

After I do not agree to the counter argument which is intended to mean that the responsibility

of act of the defendant should be denied and the precedents of the Supreme Court and the initial decision on this case should be altered without the consideration of the nature of the specific individual acts which compose the abstract military service duty, on the standpoint that there cannot be found the expectability that the defendant will do an act of entering into a military training camp which is a concrete act of military service duty.

Chief Justice: President of the Supreme Court: Choi Jong-Yeong \_\_\_\_\_

Justice: Moo-Jae Cho \_\_\_\_\_

Justice: Jae-Seung Byeon \_\_\_\_\_

Justice: Ji-Dam Yoo \_\_\_\_\_

Presiding Justice: Jae-Sik Yoon \_\_\_\_\_

Justice: Yong-Woo Lee \_\_\_\_\_

Justice: Gi-Weon Bae \_\_\_\_\_

Justice: Sin-Wook Kang \_\_\_\_\_

Justice: Gang-Gook Lee \_\_\_\_\_

Justice: Jae-Yoon Park \_\_\_\_\_

Justice: Hyeon-Cheol Koh \_\_\_\_\_

Justice: Yong-Dam Kim \_\_\_\_\_

## **Addendum**

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