

CONSCIENCE AND PEACE TAX INTERNATIONAL

UPR SUBMISSION

REPUBLIC OF KOREA

42nd SESSION
(Jan/Feb 2023)

Executive Summary

1. This submission, prepared in July 2022, deals with the situation in the Republic of Korea with regard to conscientious objection to military service.
2. Since the last UPR Cycle, the Republic of Korea has taken a praiseworthy step forward by at last recognising the right and by ceasing the automatic imprisonment of conscientious objectors, for which it formerly had, numerically, the worst record of any State.
3. The latest provisions however fall short of international standards in a number of respects.

A. BACKGROUND

4. Military service, now of 18 months is obligatory for all male citizens of the Republic of Korea.
5. For many years, the Republic of Korea refused to acknowledge the right of conscientious objection to military service, arguing that the security situation necessitated that all able-bodied males, without exception, should bear arms in the defence of the State. In a series of rulings, the Constitutional Court had upheld the supremacy of the duty of national defence over the freedom of conscience.
6. All conscientious objectors were formerly tried under Article 88.1 of the Military Service Act, which stipulates that “If a person who has received a draft notice for active duty (...), without justifiable cause, does not report for service within the period specified (...) 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. From 2001, trials took place in civilian courts, and those who served sentences of 18 months or more were released from the obligation to perform military service; thereafter almost all were sentenced to exactly eighteen months' imprisonment.
7. In most years, upwards of 500 conscientious objectors, most but not all Jehovah's Witnesses,¹ were sentenced, with the result that at any one time the Republic of Korea had more currently-imprisoned conscientious objectors than the rest of the world together. The Jehovah's Witnesses calculated that since 1950 over 19,000 of their members alone suffered imprisonment for their conscientious objection.

Legislative developments

¹ Of the first 237 current “draft evaders” whose details were notoriously made public by the Government in 2016, 160 were known to be Jehovah's Witnesses.

8. In June 2018 the Constitutional Court of the Republic of Korea, dramatically overturning its previous jurisprudence, ruled that the failure to offer alternative forms of civilian service to conscientious objectors was unconstitutional. Furthermore, in November that year, the Supreme Court rendered a decision which decriminalized conscientious objection, holding that moral and religious beliefs are valid reasons to object to military service.

9. In response, the National Assembly in December 2019 amended the Military Service Act and passed a new Act on the Transfer and Service of Alternative Service, which came into effect at the beginning of 2020. Under Article 3 , a person wishing to apply for alternative service on grounds of conscience must apply for “transfer to an alternative role”. Applications are examined by a commission set up for the purpose.

10. The UN Special Rapporteurs on Freedom of Opinion and Expression and Freedom of Religion or Belief, in a communication of 28th November 2019² expressed concern that the new legislation does not unequivocally guarantee the right of conscientious objection to military service:

11. “First, there is a concern on the terminology used. Nowhere does the draft bill recognise a right to alternative service. Instead, [Article 5] gives conscientious objectors a right to apply for alternative service. A plain reading of the draft bill therefore suggests that there could be circumstances where an individual is a conscientious objector but nevertheless is denied the right to perform alternative service.”

12. “Second, (...) Article 13 (2) seems to allow the Alternative Service Committee to disregard the opinions of the individual himself or herself by a vote. This competence is not subject to further conditions. (...) The standard set by the Human Rights Committee is that the belief is genuinely held. Therefore, giving the Alternative Service Committee competence to disregard testimony by the individual concerned is likely to lead to results contrary to [ICCPR] Article 18 (1).”

13. Moreover, “Article 6 (1) of the draft bill precludes individuals who have previously withdrawn their application from resubmitting an application. There might be many reasons for individuals to withdraw their application, one of which is the persistent and well-documented stigma regarding conscientious objection in the Republic of Korea”.

14. They also “raise particular concerns with respect to Article 25 of the draft bill, which provides for cancellation of transfer to alternative service. Out of the 7 circumstances in [Article 25 (1)] which determine when a transfer shall be cancelled, only one of them raises no concerns, namely the voluntary cancellation in subparagraph 7. The rest (...) provide for cancellation of transfer where the individual has breached the rules of procedure and/or the rules applicable, but where the individual might legitimately be a conscientious objector.”

² KOR 4/2019, page 4.

Alternative service arrangements

15. Conscientious objectors accepted for alternative service are assigned for 36 months to an “alternative service training centre” within a “correctional facility”. In effect they are still sent to prison, with only their nominal status distinguishing them and their work from convicts. It has been argued that the service is thus in its very nature punitive.³

16. In the communication already quoted, the Special Rapporteurs express concerns about the nature of the alternative service:

“As indicated by the Human Rights Committee, the alternative service must be a real service to the community and compatible with respect for human rights. While it is not contested that service in penitentiaries, detention centers, [etc] constitutes work of real service to the community, we express certain concerns relating to the exclusive emphasis on places of detention. In particular because many conscientious objectors might be transferred from a situation of incarceration to a situation where they perform service in prisons. Furthermore, despite draft article 17 (2) 1 excluding activities which require the use of arms or weapons, activities which entail the use of force against other individuals is not excluded. [In its reply dated 12th February 2020, the State answered this by reference to Article 16.2.] We note that in order to ensure that alternative service is of real service to the community and ensure the dignity of alternative service members, alternative service should take into consideration the competencies and preferences of the alternative service member.

17. We therefore suggest that Article 17 be amended, for example in the following way:

“(1) Alternative service members shall perform services in the public interest. These services shall not entail the use or management of weapons or the use of force, or that would otherwise be contrary to international human rights law.
(2) In the assessment of the placement of alternative service members, including the agency and post of the service member, the competencies and preferences of the alternative service member shall be taken into consideration.
(3) Agencies which may receive alternative servicemen shall be designated by Presidential Decree”

18. They note also that the duration of alternative service, twice that of military service, is also punitive. “There does not seem to be any objective justification [for this discrepancy] To be compatible with the Covenant, any unequal treatment on the basis of belief must be based on objective grounds, and be necessary and proportionate. The failure to provide such a justification is not only contrary to Article 26 of the Covenant, but also considered a punitive measure in violation of Article 18 (1).”⁴

18. The State justifies the duration by reference to the non-military service already performed by, for instance, medical personnel. This would seem to imply rather that the duration of such service is also discriminatory and punitive, and ought to be reconsidered.

19. Various aspects of the conditions of service are also questionable. Everyone is

³ Amnesty international, “South Korea: Alternative to military service is new punishment for conscientious objectors”, 27th December, 2019.

accommodated in dormitories, without the exceptions made for the health difficulties or family responsibilities of those performing military service.. There are very strict restrictions on freedom of movement; during the first month objectors may not leave the facility at any time - thereafter limited numbers may be granted a few hours leave, but in no case beyond 9.30pm. Their access to communication with the outside world is severely restricted, and they have no right to privacy – even during medical consultations a prison official must be present. It is also unclear what, if any remuneration is attached to the service, or what facilities there are for receiving visits.

20. Although objectors are assigned to the prison service, not the armed forces, the arrangements are not free from military control. Applications are considered by the Military Manpower Administration of the Ministry of Defence. Moreover, those performing alternative service are required to wear uniforms similar to those of prison staff. Many objectors view such requirements as detracting from the exclusively civilian nature of the service.

21. Finally, the procedures for assignment to alternative service are to be suspended in a time of general mobilisation. It is not clear what practical effect this would have, but it is worth recalling the observation of UN Human Rights Committee member Sir Nigel Rodley, in an individual case from the Republic of Korea, “...It is precisely in time of armed conflict, when the community interests in question are most likely to be under greatest threat, that the right to conscientious objection is most in need of protection, most likely to be invoked and most likely to fail to be respected in practice...”⁵

22 The first centre opened on 26th October 2020; by the end of that year the first 106 objectors had started alternative service, from a total of 1,962 applicants, 730 of whom had been recognised. By the end of the year 2021, 2,022 conscientious objectors had been recognised, from a cumulative total of 2,536 applications and 654 had commenced alternative service⁶ (By 1st March 2022, according to the Jehovah’s Witnesses, 749 of their members had been assigned to seventeen facilities.⁷) It is not reported how many of the 514 applications unaccounted for were still pending and how many had been definitively rejected. However the Jehovah’s Witnesses point out a structural flaw in that the number of placements is far from adequate for the number of applicants; they estimate that by 2023 only about half of some 3,200 applicants can be accommodated.

23. As of 1st March 2022, according to the Jehovah’s Witnesses, a total of 44 complaints against the alternative service arrangements had been lodged with the Constitutional Court and seven others submitted to the National human Rights Commission.

Imprisonments

24. By December 2018, all but thirteen of more than five hundred conscientious objectors in prison earlier that year had been released. The thirteen were those of whose conscientious motivation the State was, rightly or wrongly, not convinced. Anticipating the Constitutional Court ruling, lower courts had already put on hold many pending cases, and the Supreme Court had unprecedentedly found for two conscientious objectors on appeal. The State was subsequently able

⁵ Views adopted on Communications 1642/2007 to 1741/2007, *Min-Kyu Jeong et al v Republic of Korea*, 24th March, 2011 (CCPR/C/101/D/1642-1741/2007, issued 5th April 2011, Appendix II, paras 14,15

⁶ Submission (dated 24th March, 2022), from the Republic of Korea for the report of the High Commissioner for Human Rights to the 50th Session of the Human Rights Council on conscientious objection to military service (A/HRC/50/43)

⁷ Submission from the Jehovah’s Witnesses for A/HRC/50/43

to report that in November 2019 there were no conscientious objectors .in prison.⁸

25. Nevertheless, conscientious objectors whose claims are not accepted by the Commission continue to face imprisonment if they persist with their refusal of military service, and it is alleged that those whose objections are not of a religious nature are particularly at risk. As of March 2022, however, even two Jehovah's Witnesses remained in prison as conscientious objectors and the cases of ten more were still pending.

26. The Republic of Korea also criminalises the refusal of reserve service. The penalty for such refusal may be a short prison sentence, but is usually a fine. However this 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. As the Human Rights Committee has observed, this "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*.⁹ Twenty such Jehovah's Witnesses cases were pending in March 2022.

27. In its List of Issues prior to the Republic of Korea's Fifth Periodic Report under the International Covenant for Civil and Political Rights,¹⁰ the Human Rights Committee refers back to its previous Concluding Observations and as well as asking for information on progress with the then current proposed legislation on alternative service, asked the State to report on the steps taken to "expunge the criminal records of conscientious objectors, provide compensation to those individuals and ensure that their personal information is not publicly disclosed"

28. The State reply was relatively encouraging: "The Government has taken necessary measures including expunging criminal records under the applicable laws such as the *Act on the Lapse of Criminal Sentences*. When a case is finalized with acquittal, the suspect may claim compensation for the detention period against the Government and apply for the announcement on the intent of the not guilty decision to restore his impaired reputation via Internet, etc. under the procedure provided in the *Act on Criminal Compensation and Restoration of Impaired Reputation*. "The Government granted 1,879 conscientious objectors a special parole (...) releasing [them] 1,878 from disqualification for appointment as an executive or a public official."¹¹ This had previously been precluded under Article 76 of the Military Service Law. These numbers must however be seen in the context of the tens of thousands who had over the years been imprisoned as conscientious objectors.

28. Finally, without stating whether Article 81.2 of the Military Service Law, introduced in 2015, has been repealed, it reports that "The Military Manpower Administration (...) no longer discloses the list of conscientious objectors."¹²

⁸ CCPR/C/KOR/5, 21st August, 2021, para 169.

⁹ Human Rights Committee, General Comment No. 32 (CCPR/C/GC/32, 23 August 2007), para 55.

¹⁰ CCPR/C/KOR/QPR/5, 21st August 2019, para 21.

¹¹ CCPR/C/KOR/5, paras 170 and 171. (The Human Rights Committee is not due to examine the report until after the forthcoming UPR Session.)

¹² Ibid, para 174.

UPR Recommendations

29. In its examination during the Third Cycle of the UPR, the Republic of Korea received a total of thirteen recommendations on this issue from twelve States:¹³

Decriminalise conscientious objection (Germany, USA, Argentina, Portugal)

Introduce alternative service (Mexico, Panama), of a genuinely civilian nature (Germany, USA), under civilian control (Australia, Switzerland), compatible with the reasons for conscientious objection, of a non-combatant or civilian character, in the public interest and not of a punitive nature (Croatia) and of a non-punitive length (Canada, Australia, France)

Release those imprisoned for refusing to perform military service (Germany, Panama ; and consider expunging the corresponding charges from their criminal records (Croatia, Costa Rica / examine the situation of individuals who are currently imprisoned (...) with a view to offering them an alternative civilian service (France);

30. Although at the time the State expressed support only for expunging of criminal records,¹⁴ it subsequently acted on all of these recommendations. Nevertheless, as reported above, there are concerns about the nature and duration of the alternative service, and that, although far fewer than in the past, imprisonments of conscientious objectors have not completely ceased.

Suggested recommendations:

31. While applauding the progress made by the Republic of Korea since the last review with regard to recognising and implementing the right of conscientious objection to military service, recommendations might be made:

i) that, taking into accounts the comments of the Special Rapporteurs on Freedom of Opinion and Expression and Freedom of Religion and Belief in their communication of November 2019, it review the current alternative service provisions with a view to ensuring that they all aspects of the arrangements are completely civilian in nature and control, compatible in each case with the reasons for the objection, available without discrimination to all conscientious objectors, irrespective of the grounds of the objection, and that by comparison with military service alternative service is neither punitive no discriminatory in any way, and

¹³ A/HRC/37/11, 27th December 2017, paras 94 – 106, inclusive.

¹⁴ A/HRC/28/11, 28th February 2018.