Constitutional Court of Korea

Decision

Case 2002 HeonGa1, Alleging Unconstitutionality of Article 88, Section 1, Clause 1 of Military Service Act
Appealing Court District Court, Southern District of Seoul
Appellant Kyung-Soo Lee
Address: B02, Daewon Villa, 392-42, Hwakok-8-Dong, Gangseo-Ku, Seoul
Counsel Listed on the Addendum
Original Case Seoul Southern District Court 2001GoDan5819 Violation of Military Service Act

Text

Article 88, Section 1, Clause 1 of the Military Service Act (Amended as Clause 5757 on February 5, 1999) is not in violation of the Constitution.

Rationale

.1 Case Summary and Subject in Consideration

1.1. Case Summary

The defendant and appellant in the present case is a candidate for enlistment into active duty who, upon receiving a written draft notice for active duty from the Military Manpower Administration, did not within five days of reporting date, and is on trial for being in violation of Article 88 Section 1 Clause 1 of the Military Service Act.

In response, the appellant raised the claim that the law with which he is charged with being in violation of, Article 88 Section 1 Clause 1 of the Military Service Act, violates the freedom of conscience of those who object to the draft on basis of their religiously motivated conscience and appealed to the above mentioned court to examine the constitutionality of the said law (2002ChoKi54). The court granted the appeal and asked for the recommendation of the Constitutional Court on the said regulation on January 29, 2002.

1.2. Subject in Consideration

The subject in consideration is Article 88 Section 1 Clause 1 of the Military Service Act (Amended as Clause 5757 on February 5, 1999), hereinafter 'the clause pertaining to this case.' Its content is as follows.

Military Service Act Article 88 (Draft Evasion) ① If a person who has received a draft notice for active duty or Notice of Summons (including Notice of Summons for voluntary enlistment), 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. However, if a person who receives a notice summoning him to get a physical checkup as a part of a wartime draft fails to participate in a one-time checkup, then he will be sentenced to a prison term of no more than six months, a fine of no more than two million won, or be detained.

1. For active duty, within five days of reporting date.

.2 Reason for District Court's Request for Recommendation on Issue of Unconstitutionality and Opinions from Concerned Parties

1.3. Reason for District Court's Request for Recommendation on Issue of Unconstitutionality

1.3.1. Cases involving so-called conscientious/religious objection to military service (hereinafter, 'conscientious objection to military service'), where a party objects to carrying out his obligation to serve in the military due to an ideology, conscience, or religious doctrine, must deal with a conflict between the obligation of military service, a fundamental responsibility according to the Constitution, and the freedom of thought, conscience, and religion, fundamental rights central to a democratic order. Therefore, there is a need to allow these two principles to be in harmony and coexistence, within the confines of not damaging the essential content of either one.

However, the current Military Service Act criminally prosecutes, without exception, even conscientious objectors, those who object to the draft due to a conscience-based decision, and therefore, there is a strong possibility that it violates the freedom of thought, conscience, and religion, and furthermore, the dignity and respect as human beings, the right to seek happiness, and the right to equal treatment.

1.3.2. Most developed nations including Germany and the US and Eastern European countries recognize conscientious objection to military service as a constitutional or statutory right and international bodies such as the United Nations Human Rights Committee recommend or require their member states to recognize this right. However, the situation of our country is such that the right to conscientious objection to military service is not recognized, choosing instead to criminally prosecute all such objectors; therefore, there is a need to analyze the law at the Constitutional level.

1.4. Reason for Appellant's Request for Recommendation on Issue of Unconstitutionality

1.4.1. Considering that Article 10 of the Constitution provides for dignity and respect as human beings and Article 37 Section 1 stipulates that citizens' liberties and rights unspecified in the Constitution are not to be neglected, and considering that in living a finite life while pursuing truth, goodness, and beauty [the three central values according to traditional thinking], religion and conscience are factors that are essential to preserving one's dignity and respect as a human being, placing restrictions on objectors to military service motivated by religious conscience by punishing them is a violation of these clauses.

1.4.2. Considering that Article 11 of the Constitution prohibits discriminatory treatment based on religious preference, it is against the principle of equal treatment to carry out compulsory drafts or to impose criminal punishment upon those who object to military service motivated by sincere religious conscience. Excluding conscientious objectors from those who are required to perform military service, similar to how women and those with certain

diseases and physical or psychological disabilities are excluded, can be said to be within the bounds of reasonable differentiation, provided that they are required to perform alternative services; and when the past damages suffered by conscientious objectors are considered, the matter should be considered from the standpoint of actively seeking to bring them equal treatment.

1.4.3. Freedom of conscience and freedom of religion are essential preconditions for one to be free from oppression of the mind and is an indispensable catalyst for a free democratic order, which has its roots in a diversity of ideas. While forcing military service upon them by imposing penalties intrinsically places a substantial burden on conscience and religion, the benefits to the country arising from compulsory military service can be fulfilled without forcibly drafting conscientious objectors. In cases such as this, where it would be better for the nation's system of law to make a concession, using penalties to force objectors to accept the draft is a violation of their rights, including the freedom of conscience.

1.4.4. Although the freedom to exercise one's religious beliefs may be restricted within the bounds set by Article 37 Section 2, the standard used to determine whether it is necessary to place such restrictions would be that of clear and present danger or prohibiting excessive restrictions; conscientious objectors to military service comprise only a small minority of the population and therefore their actions would not lead to a clear and present danger for national security and immediately imposing penalties without offering them an opportunity to perform alternative services is against the principle of prohibiting excessive restrictions.

1.4.5. Although recognizing a system of alternative services may cause problems such as violation of right to equal treatment or increase in evasion of military services, such problems can be addressed by implementing an alternative service system that is comparable to active duty in terms of length of service, amount of hard labor required, or living with a group, and when one considers the fact that conscientious objectors to military service comprise of only 0.2% of all who are drafted and that modern war is becoming increasingly scientific in nature, implementing an alternative service system, rather than causing harm to national security, would instead be an appropriate use of human resources.

1.5. Opinion from the Seoul, Southern Branch, District Attorney's Office.

1.5.1. Performance of the duty to serve in the military is indispensable for securing the right of citizens to live peacefully and to pursue happiness, and if the right of conscientious objection to military service is recognized, the number of people who will voluntarily perform military service will decrease, resulting in a grave danger to the preservation of the nation; therefore, not recognizing such a right cannot be said to violate the right to pursue happiness.

1.5.2. Conscientious objectors to military service cannot be given the same treatment as physically disabled persons for whom an objective diagnosis revealing their inability to be in active duty can be obtained. Rather, there is a worry that providing exceptions to conscientious objectors would violate the right to equal treatment for the majority of citizens. Therefore, unless military service is being enforced only on members of a specific religion because of their beliefs, it cannot be said that the right to equal treatment is being violated.

1.5.3. Even if conscientious objection to military service is included within the freedom to exercise one's conscience, this is a right that is subject to restrictions based on Article 37 Section 2 of the Constitution, and since such external expressions or exercises are bounded

by an individual's fundamental duties to the country, the individual cannot refuse military service even if it is against his conscience, and therefore, it cannot be said that this provision is in violation of the freedom of conscience.

1.5.4. Since conscientious objectors to military service motivated by religious faith are refusing to participate in acts of war, even if they are forced to perform their military duties due to the unique security circumstances that our nation is under, military training in itself is not forcing them to participate in acts of war, and therefore, this cannot be said to be in violation of an individual's freedom of religion.

1.6. Opinion from the Defense Minister

1.6.1. Conscientious objection to military service is not a naturally arising Constitutional right; rather, it is a legal right that is recognized only through legislation by lawmakers. Assuming arguendo that the right of conscientious objection to military service falls within the bounds of freedom to exercise one's conscience, it is nevertheless a right that can be restricted through Article 37 Section 2 of the Constitution. Compelling an individual, who has been drafted in order restrain the warmongering of armed groups hostile to our nation and for purposes of justified self-defense at a national level, to bear arms does not violate a third party's right to life, and therefore, the nation requiring an individual who holds antiwar beliefs to perform military service duties in time of peace cannot be said to be a fundamental violation of the freedom of conscience which threatens one's basic beliefs.

1.6.2. The provision for alternative service raised by conscientious objectors is a request to be exempted from basic combat training, training for reserve forces totaling eight weeks, and duty to respond during wartime mobilization, and since this is different in nature to the currently existing system of supplementary service, it is in fact a request to be exempted from military service duties altogether, and allowing for the choice of alternative service in a nation that employs a system of conscription goes against principles of uniformity and equality, the basic tenets of a conscription system, and leads to the discriminatory treatment against not only members of other religions but also against those who perform their military service duties or potential objectors to military service currently within the armed forces.

1.6.3. If alternative service is allowed in a country like ours, where present conditions for life as a serviceman within the military is poor, there is a concern that the number of objectors to military service will increase rapidly. Additionally, in a situation where it is difficult to ensure a strict screening process to determine conscientious objectors to military service, there is a concern that the uniformity and unity of the conscription system will be harmed to the point of collapse. Furthermore, since it is difficult to find a service outside the military which entails a similar amount of hard labor as required in active service duty, alternatives service cannot be seen as a system that is in harmony with ensuring national security, and considering the fact that currently, the term for active duty is two years to two years and four months, setting the sentence for those who refuse the draft, for purposes of ensuring functionality of military service duty, at up to three years and after serving a sentence of eighteen months or more, allowing them to be classified as second class citizens who no longer are required to perform military service duties, cannot not be said to violate the principle of prohibiting excessive restrictions.

1.7. Opinion from Military Manpower Administration

Generally similar to the opinion of Defense Minister.

.3 Holding

1.8. Constitutional Meaning and Protection of Freedom of Conscience

1.8.1. Article 19 of the Constitution provides that "All citizens have the freedom of conscience," securing the freedom of conscience as a fundamental right for its citizens. Therefore, in cases where the country's legal system conflicts with the individual's internal, moral decision—his conscience—the Constitution stipulates that the country should protect the individual's conscience. When a minority group calls upon their freedom of conscience to refuse to submit to a legal system that has been decided upon by the majority, clashes between the nation's legal system and the individual's conscience can always arise.

The conscience protected by the Constitution is a strong and earnest voice from the heart that, in determining what is right and wrong, if not followed, would mean the collapse of an individual's very meaning of existence, an urgent and specific conscience. (Constitutional Court 1997. 3. 27. 96HunGa11, Case Reporter 9-1, 245, 263; Constitutional Court 2001. 8. 30. 99HunBa92 etc, Case Reporter 13-2, 174, 203; Constitutional Court 2002. 4. 25. 98 HunMa425 etc, Case Reporter 14-1, 351, 363). In other words, a 'conscientious decision' is an earnest ethical decision, where an individual, faced with a certain situation, accepts this decision as something binding that must be followed unconditionally, and as such cannot act against it without a serious conflict in conscience.

Under our Constitution's structure of fundamental rights, which places human dignity and free expression of personal character as its most important value, the functionality of freedom of conscience depends on the preserving for individuals the identity and homogeneity of their own personal character.

1.8.2. The 'conscience' that 'freedom of conscience' seeks to guarantee is a personal condition that is very subjective, and not necessarily something that is in accord with the perception or values of a democratic majority. Conscience cannot be judged by its subject, content, or motivation, and whether a conscientious decision is rational/logical, proper or whether it is in line with a system of law, social norm, or moral code can never be a standard to determine whether or not a conscience exists.

Ordinarily, since the democratic majority formulates the legal system and social order according to its political views and moral standards, it is only in exceptional cases where members from this class experience a conflict between the country's legal system or social moral code with their own conscience. The point at issue for freedom of conscience, in real life, is not the conscience of the social majority but the conscience of the minority who seek to remove themselves from the country's legal system or social moral code. Therefore, all forms of conscientious decisions, regardless of what religious view, world view or other system of values a conscientious decision is founded on, are guaranteed by the freedom of conscience.

1.8.3. Since freedom of conscience expressed in Article 19 of the Constitution can be broadly classified into the internal realm where conscience is formed and the external realm where the formed conscience is exercised, the matter of how to guarantee the right in specific situations is also classified into the 'freedom to form conscience'—freedom of the internal mind—and the 'freedom to realize conscience'—external expression or realization of the conscientious decision. Freedom to form conscience indicates the freedom to form and

make a conscientious decision within one's internal realm without improper external interference or duress, and freedom to exercise conscience signifies the freedom to externally express a formed conscience and shape one's life around it, and specifically includes the freedom to express or not be forced to express one's conscience (free expression of conscience), freedom to not be compelled to act against one's conscience (free exercise of conscience through non-feasance), and freedom to act according to one's conscience (free exercise of conscience through feasance).

While freedom to form conscience, provided that it remains within the internal realm, can be said to be an absolutely protected fundamental right, freedom to express conscience, which is the right to express and exercise a conscientious decision externally, can go against the legal system or encroach upon the right of another, and therefore is a relative freedom that can be restricted by law. (Constitutional Court 1998. 7. 16. Compare 96HunBa 35, Case Reporter 10-2 159, 166).

1.9. Fundamental Right Restricted by Legal Provision in the Instant Case

The Constitution, in Article 39, establishes the duty to defend the country as a duty required of all citizens, and Article 3 of Military Service Act, which provides the details for this duty, levies military service duties on all males who are citizens of the Republic of Korea. The legal provision challenged in the instant case, in order to compel performance of military service duty, administers punishment to candidates for active duty who, without reasonable cause, do not report for duty within five days of appointed enlistment date, and thereby imposes the threat of criminal prosecution to draft evaders. Although the legal clause in this case provides for the prosecution of only those who evade the draft 'without reasonable cause,' since objection to military service based on a conscientious decision is not considered a "reasonable cause," (See 2004Do2965 Supreme Court, decided 2004. 7. 15.) conscientious objectors, just like ordinary draft evaders, are criminally prosecuted according to this legal provision.

If an earnest conscience that opposes war and the killing of human beings that accompany it has been formed according to one's religious view, values, world view, etc, then the decision of the individual that he cannot perform duties for military service is a strong and earnest ethical decision that is impossible to act against without a conflict in conscience, and any circumstance that requires the performance of military service duties presents a crisis for the individual's ethical identity. Granting the opportunity for an individual to follow the voice of his conscience in situations like this where two opposing commands, 'command from one's conscience' and 'command from the legal system,' clash against one another is the representative domain that freedom of conscience seeks to secure.

Since the legal provision in this case compels conscientious objectors to act against their conscience by imposing sanctions through criminal prosecution, it is a provision that restricts the 'freedom to not be compelled by the nation to act against one's conscience,' 'freedom to not perform a legal duty that is in disagreement with one's conscience,' that is, the free exercise of conscience through non-feasance,.

On one hand, since Article 20 Section 1 of the Constitution guarantees religious freedom separately, if conscientious objection to military service is formed according to a religious doctrine or faith, then the conscientious objector's religious freedom is also restricted by the legal clause in the instant case. However, since freedom of conscience is an all-encompassing fundamental right that includes not only conscience based on religious faith but also nonreligious conscience, we will consider the case as it relates to freedom of conscience.

1.10. Objective of Legislation for Legal Clause in the Instant Case

The Constitution, in Article 5 Section 2, establishes 'preservation of national security' and defense of national territory as the sacred duty of the national army, and in Article 39 Section 1, expressly stipulates the duty to defend the nation as an important measure to realize the objective of preserving national security. Also, the Constitution recognizes 'preservation of national security' as a vital interest, clarifying through Article 37 Section 2 that all freedoms enjoyed by citizens can be restricted to preserve national security, in Article 76 Section 1, granting the state of national emergency power to the president for the purpose of preserving national security, and in Article 91, directing that a National Security Council be established as a consulting bureau for the president.

National Security is an indispensable precondition for the survival of the nation, preservation of its territories, and the protection of its citizens' life and security and is a basic precondition for the free exercise of freedom for all citizens, and as such, regardless whether it is specified expressly or not, is a vital interest recognized by the Constitution, and the duty to protect the country is an important measure that the Constitution has chosen to realize the objective of national security. The legal provision examined in the instant case realizes and enforces the performance of the civil duty of 'duty to defend the nation,' and thereby secures military manpower and aids in the equitable sharing of the burden of service under a conscription-based military service system, and seeks to realize the Constitutional interest of national security as its end.

1.11. Issue of Guaranteeing Freedom to Exercise Conscience

1.11.1. Freedom to Exercise Conscience as a part of the Constitutional Order

1.11.1.1. Since freedom of conscience relates not only to the freedom to form conscience within the individual's internal realm but also the freedom to exercise the conscience in the external realm, freedom of conscience can clash with the legal system or interests of others and therefore requires limitations. Even though a law may not intentionally restrict the freedom of conscience, a law that applies generally to all citizens always has the potential to clash with the conscience of some individual citizen.

Freedom of conscience is a freedom protected as a fundamental right according to the Constitution and is an element of the existing legal system. Freedoms based on fundamental rights are legally based freedoms, and legally based freedoms cannot be guaranteed absolute or unlimited protection. Survival of the nation and law and order are basic preconditions necessary to allow the exercise of freedom for all members of a national community. Exercise of fundamental rights being limited to the extent that living with others within the national community remains possible and does not endanger the law and order of the nation is a basic restriction placed on all fundamental rights, and freedom of conscience, by taking its place within the sphere of Constitutional order, is in subjection to this established restrict that applies to all Constitutional interests.

Therefore, being guaranteed the freedom of conscience does not mean that an individual, on the basis of his conscience, is granted the right to refuse to be in subjection to the system of law. All individuals could conceivably assert their freedom of conscience and refuse to obey the law, and considering that an individual's conscience is a very subjective condition, and all forms of conscience, even those that are irrational/unethical/antisocial are included in the freedom of conscience, the rationale that 'a nation's system of law is valid only as long as it does not go against an individual's conscience' signifies the dismantling of the legal system and furthermore, the dismantling of society itself. But no fundamental right can be a basis to dismantle a nations system of law and can never be interpreted as such.

1.11.1.2. Therefore, in the instant case, freedom of conscience as expressed in Article 19 of the Constitution does not grant an individual the right to refuse the duty to perform military service. Freedom of conscience is merely a right to make a request to the nation to consider and protect, if possible, an individual's conscience, and therefore is not a right that allows for the refusal of one's military service duties for reasons of conscience nor does it allow one to demand an alternative service arrangement to replace the performance of a legal duty. Therefore, the right to request alternative service arrangement cannot be deduced from the freedom of conscience. Our Constitution makes no normative expression that grants freedom of conscience a position of absolute superiority in relation to military service duty. Conscientious objection to the performance of military service can be recognized as a valid right if and only if the Constitution itself expressly provides for such a right.

1.11.2. Conflict of Interest between Duty to Defend and Freedom to Exercise Conscience

The issue of free exercise of conscience is an issue of harmonizing 'freedom of conscience' with the 'Constitutional interest' and 'law and order of the nation' sought by limiting the freedom, and an issue of determining which interest among the two competing interests, is the greater.

But in the case of free exercise of conscience, the intersection between legal interests takes on a unique form. The customary standard of review of weighing the interests, which includes examining the fitness of methodology and whether the least restrictive means was used in order to determine to what extent a basic right must yield for the public good, does not directly apply on the issue of freedom of conscience. On this issue, treating conscience in a relative [not absolute] sense by weighing the interests of free conscience against public good can not fit with the intended meaning of freedom of conscience. If, through the process of weighting legal interests, a conscientious decision is reduced or substantively altered or bent to take on a form that does not conflict with the public good, then the resulting form is no long a 'conscience.' In the instant case, exempting those who object to military service because of religious conscience from half of the military service duties or exempting them with the condition that they would only be required to serve during a state of emergency can not be a solution that respects the conscience of objectors to military service.

Therefore, in discussing issue of free conscience, it is not a matter of how to harmonize and find a balance to protect both the interests of free conscience and public good; rather, it is an issue of choosing either 'freedom of conscience' or 'public good,' or in other words, whether feasance or non-feasance that violates one's conscience is to be 'compelled or not compelled' by the system of law.

1.12. Whether the Legal Clause in this case Violates Free Exercise of Conscience

1.12.1. When an individual claims a law violated his right to exercise conscience, he claims that a law that creates a duty applicable to all citizens without special consideration for his unique circumstance of conflict in ethics, or in other words, not arranging for special regulations such as special exceptions from the duty or alternative service arrangements, his problematical.

Whether or not the country guarantees free exercise of conscience is an issue of whether it is possible for the legal society to reduce the conflict in conscience by respecting an individual's conscience. Therefore, the issue of guaranteeing the free exercise of conscience is an issue of 'how the country provides consideration for the minority group of citizens that thinks and attempts to act differently from the majority decision of the democratic community,' an issue of national/social tolerance for the minority, and a question of 'whether the country can present an alternative plan that protects individual conscience while maintaining its existence and legal order.'

Freedom of conscience, as a primary step, is a basic right to request to the legislator, giving rise to a duty to create, if possible, a system of law that guarantees freedom of conscience. When a legal duty and individual conscience conflict with one another, if it is possible to present another method to replace the legal duty or raise alternative plans such as case-by-case exemption from the duty to eliminate this conflict in conscience while not endangering the attainment of public good and legal order, then the legislator has the duty to use these methods to minimize the possibility of conflict between the individual conscience and national legal order.

1.12.2. Therefore, whether or not the legal clause at issue violates the freedom of conscience is a determination of 'whether or not the legislator can still accomplish the public good sought through the actualization of the duty to serve in the military even if he arranges for an exemption provision that takes into account the freedom of conscience.' If the legislator can present an alternative plan without impeding public good or legal order but does not

present such an alternative plan, then it would be a one-sided requirement to sacrifice conscience, and therefore, unconstitutional.

However, providing an individual who claims freedom of conscience an exemption to a duty required of all citizens without imposing an alternative duty would be akin to granting him a constitutionally impermissible privilege.

Therefore, when the freedom of conscience requests for an exemption from a duty, then the nation must, if possible, offset such factors of inequality by imposing alternative duties so that the nation's tolerance and allowance for exemptions does not become a privilege for a special minority.

With regard to the duty of military service, as a method to eliminate as much as possible factors of inequality while considering individual conscience, that is, as a device to provide for an ideal harmonization of the conflicting legal interests of conscience and military service duty, we consider the system of alternative civilian service (hereinafter 'alternative service').

Alternative service is a system that allows the conscientious objector to replace his military service duties by performing public service in places such as national institutions, community groups, social welfare institutions, and is a system that is now constitutionally or legally instituted in many countries to resolve the conflict between military service duties and conscience.

1.12.3. Then, whether the legal clause at issue is unconstitutional is a determination of 'whether the legislator can efficiently carry out the public interest of national security even if an exception to the duty of military service through the institution of alternative service is allowed.'

In determining whether to institute a system of alternative service, the legislator must consider the following factors collectively: the country's overall status in terms of security, the country's combat abilities, size of its army, the number and quality of its manpower in terms of those who are available to be drafted, the change expected in combat abilities should a system of alternative service be instituted, the meaning and importance duty of military service has under Korea's situation in terms of security, the people's and society's request for an equitable distribution in the performance of military service duty, realistic evaluation of the current condition of military service. In consideration of these factors, on the issue of whether, under our current status in terms of security, there would be no interference with carrying out the important public interest of national security even if a system of alternative service is instituted, it is possible to make the following contrasting assessments and determinations.

1.12.3.1. On one hand, the following optimistic outcome may be predicted:

Firstly, the importance of manpower resources has decreased in a relative sense, not only because the proportion of conscientious objectors is small compared to the entire population of those who are eligible to be drafted but also since the military might of today's forces is no longer determined primarily by its combat abilities, with modern wars turning into informational and technological warfare.

When exceptions to military service are recognized, the claim of inequality in levying the duty of military service is raised; however, the option of alternative service system, as an alternative plan that can resolve both the problems of protecting conscience and preserving equal treatment, is realistically possible and has already been in place for a long time in many countries.

If a system of alternative service is operated so that the burden required of alternative service is comparable to that of active duty, taking into account such factors as length of service term and amount of labor required, then the equitable performance of duty to defend can be secured and the problem of abusing this provision to evade the draft can also be addressed. Also, as can be confirmed through the examination of numerous countries that have instituted a system of alternative service, it is possible, through a strict screening process and post-screening supervision, to determine whether an individual genuinely objects to military service because of his conscience; therefore, there would be no damage done to the nation's military might even if the plan of alternative service is adopted.

1.12.3.2. On the other hand, the following pessimistic outcome may also be predicted.

Ours is the only state in the world that is divided and at a cease-fire, and the North and South, both with strong militaries built up through the arms race with one another, are still at a hostile standoff. Under such unique circumstances, the duty of military service and equitableness in the burden of the duty bear an importance that cannot be matched in any other country in the world. Although it is true that the concept of national defense and the form of modern warfare have changed somewhat, the importance of manpower to the strength of the military still cannot be ignored and the drop in manpower as a result of the recent decrease in birth rates must also be taken into account.

When the harsh circumstances of our country's active duty is considered, it is not easy to establish a comparable burden to it through alternative service, and there is a danger that alternative service, as a result of an attempt to make it sufficiently burdensome, can turn into a method of punishment against the exercise of conscience.

Furthermore, even if the proportion of conscientious objectors is small compared to the entire population of those eligible to be drafted, we cannot dismiss the possibility that the preventative effect of restraining draft evasion through punishments could rapidly collapse if a system of alternative service is instituted. Based on our society's past experience of incessant draft evasion schemes and the presence of a draft-evasion ethos, it is overly optimistic to predict that attempts to take advantage of the alternative service system to intentionally evade the draft can be stopped completely through systematic provisions. If an exception to military service duty is allowed in our society where social demand for the equitable sharing of military service duty is strong and absolute, and as a result, equitable performance of the duty develops into a society-wide issue, then instituting alternative service arrangement can have a decisive negative impact on social unity and cause serious damage to the capacity of the nation, and furthermore, threaten the entire military service system, which is founded on a universal conscription system.

1.12.4. When the constitutionality of a law that restricts a fundamental right is based on its future effects as in the instant case, the constitutional court can make an assessment of the legislator's potential determination on the matter, and the issue of whether the uncertain

potential determination of the legislator can be substituted with its own is raised.

1.12.4.1. The degree of authority accorded to the legislator to predict future effects differs according to the importance of the public good sought by the law and the import of the infringement in legal interest, characteristics of the area of regulation, and the realistic probability of making an accurate determination. The larger the importance of the public good sought by the law, the larger the effect that an individual's exercise of his fundamental right will affect others and the national community, that is, the more social relevancy an exercise of an individual's fundamental right has, the broader the authority that the legislator is accorded, and therefore, in that case, we limit ourselves to reviewing whether the legislator's prediction of future effects can be clearly refuted or is grossly mistaken. Within this boundary, the determination of how to accomplish the public good must be left up to the authority of the legislator. (Constitutional Court 2002. 10. 31. Compare 99HunBa76 etc, Case Reporter 14-2, 410, 432-433).

In the instant case, although the freedom of conscience is a very important fundamental right in an individual's manifestation of personality and realization of human dignity, when it is considered that the essence of freedom of conscience is not the right to refuse to submit to legal order, rather, that it is the right to request to the state to consider the individual's conflict in conscience and to protect his conscience to the extent manageable by the national community and the corresponding duty of the state, it can be said that the legislator has broad authority to determine whether he will carry out the duty to protect conscience that arises from the freedom of conscience and in what manner he will do so.

The public interest sought by the legal clause in this case is that of 'national security,' a very important interest that functions as a precondition to the existence of the nation and all freedoms, and when such a vital interest is involved, it can not be requested that an unreasonable legislative experiment that can compromise national security be attempted in order to guarantee an individual's freedom to the fullest extent possible. In addition, when one seeks to exercise his conscience by refusing to perform military service duties, he makes a request to be exempt from a duty required of everyone, and therefore, from the position of seeking to equitably allocate the burden of military service duty, the ripple effects that it has on others and the social community as a whole may be considerable, and thus it is recognized that the exercise of the fundamental right has a strong social link.

Consequently, from this vantage point, the determination of 'whether the nation's decision to not adopt a system of alternative service despite the fact that it can still accomplish its public interest of national security even when such a system is adopted amounts to a violation of freedom of conscience' must be limited to the review of 'whether the legislator's determination was grossly mistaken.'

1.12.5. As a matter of principle, it is the role of the legislator to make decisions on important policy matters dealing with national security. The legislator's determination about national security circumstances should be respected, and the legislator has broad freedom, on the basis of such factual determination, to specify and codify into law the Constitutionally imposed duty of national defense.

When Korea's security status, social demand for equitability in conscription, and various restricting factors that can accompany the adoption of a system of alternative service are considered, it can be said that under present circumstances, it is not possible to conclude

that there will be no damage done to the important Constitutional interest of national security even if a system of alternative service is introduced and that in order to adopt alternative service, a peaceful state of coexistence must be established between North and South Koreas, the culture of draft evasion must be removed by improving conditions within military life, and furthermore, an understanding and tolerance for conscientious objectors must be established in our society to the extent that even if alternative service allowed, members of the social community would agree that equal allocation of burden for military service duties is being carried out and social unity is not hampered. Therefore, under the present circumstances where such preconditions are not satisfied, it cannot be said that the legislature was grossly mistaken in determining that it would be difficult to adopt a system of alternative service at this stage.

When duty of military service and freedom of conscience clash with one another, the legislator, after weighing the competing interests, has a duty to promote the freedom of conscience to the extent that is manageable for the state, but if the legislator chose not to provide the opportunity of alternative service as a substitute for military service duty because after weighing the competing interests, he determined that the free exercise of conscience cannot be realized without threatening the interest of national security, then this legislative decision is justifiable in light of the gravity of the interest of national security, and therefore, cannot be considered 'a violation' by the legislator 'of his duty to protect the freedom of conscience.' Then, the legal clause in the instant case cannot be considered a violation of the conscientious objector's freedom of conscience or freedom of religion.

1.13. Whether the principle of equal treatment is violated

Since the legal clause at issue makes no distinction for conscientious objectors in treatment or punishment, even though they object to military service for a fundamentally different reason than ordinary draft evaders, the issue of violation of equal treatment is raised; however, this also comes back to the determination of whether 'it is unconstitutional to not recognize an exception to the duty of military service for conscientious objectors,' it can not be stated that not providing an exception to the legal clause at issue for conscientious objectors is a violation of equal treatment, for reasons discussed supra.

Although the appellant claims that the punishment of those who object to military service based on their religious conscience is religion-based discrimination and a violation of Article 11 of the Constitution, the legal clause at issue regulates matters uniformly regardless of whether the objection is based on conscience or not, and whether that conscience is motivated by religion or not, and therefore, it is not religion-based discrimination.

The appellant goes on to claims that conscientious objectors are unable to perform military service duties just like it is impossible for someone with a physical or mental disability or ailment, or that there is a violation of equal treatment when compared to how supplemental service is allowed or how those with special talent in the arts or sports perform their duties by working in public service jobs; however, but because from the perspective of performing military service, there is a fundamental difference between conscientious objectors and the class of people the appellant raises as comparisons, it does not violate the principle of equal treatment to treat the two groups of people differently.

1.14. Recommendation to the Legislature

1.14.1. Conscientious objection to military service has now become an important current issue for our national community. Objection to military service based on religious conscience has

existed for a long time, with Jehovah's Witnesses being at the center of the phenomenon, and recently, we have seen this phenomenon spreading to Buddhist pacifists. Draft evaders not only are criminally prosecuted according to the legal provision considered in this case, they become socially disadvantaged—they are under restriction when applying to be a government official or employee, cannot receive permits, authorizations, licenses to practice various trades that require government permission (Article 76 of Military Service Act), and even after the criminal process is over, must forfeit the right to apply or be appointed to a government job (Article 33 of State Public Officials Act).

Although conscientious objectors are yet few in number, the legislature has had ample opportunity to recognize and confirm that conflict in conscience occurs en masse through the execution of this legal clause, and therefore, now, rather than neglecting or leaving alone the distressing and conflicting conditions of conscientious objectors, it is now time to engage in an earnest social discussion about how to provide consideration for them and to find a national solution of our own.

Internationally too, since 1967, the European community and the United Nations have repeated passed resolutions stating that conscientious objection to military service must be recognized, and according to a survey done by the UN in 1997, among the 93 countries that have a conscription system, only about half do not recognize conscientious objection at all, showing that already in many countries, this problem is being solved through legislation.

1.14.2. The legislator has the duty to relieve the conflict in conscience by providing, to the extent that freedom of conscience specified in Article 19 of the Constitution does not damage public interests or legal order, alternative plans such as other possible options that can take the place of the legal duty or case-by-case exemptions from the legal duty, and if he can not provide such options, then he should at least consider if mitigation or exemption in punishments and penalties imposed for violating the duty can be permitted in order to protect the freedom of conscience.

Therefore, the legislator should earnestly consider whether there is a plan that can relieve the conflict between freedom of conscience and the public interest of national security and make the two interests coexist in harmony, whether there is an alternative plan that can protect the conscience of objectors to military service while preserving the public interest of national security, and whether our society has matured to the point where it can now show understanding and tolerance toward conscientious objectors, and even if the legislator decides, upon further review, to not adopt a system of alternative service, it should be considered whether the legislature would move in a direction to help protect conscience by having organizations that apply the law act in a manner that is legally more friendly to conscience.

.4 Conclusion

Therefore, since the legal clause at issue in this case is not unconstitutional, we hold as stated supra in the body of the opinion.

This decision is the opinion of all the justices present, with the exception of separate opinions of Justice Kyung-Il Kim and Hyo-sook Jeon, dissenting, 5. infra, Justice Sung Kwon, concurring, 6. infra, and Justice Sang-Kyung Lee, concurring, infra.

.5 Justice Kyung-il Kim, Justice Hyo-sook Jeon, dissenting.

Although we are in agreement with the majority opinion on the Constitutional meaning and importance of national security and political, social reality that our country is faced with today, we believe that the legislator has not put forth the necessary, minimum possible effort to search for an alternative plan to resolve the conflict between the freedom of conscience of conscientious objectors and the Constitutional value of duty to defend even though we have now reached a stage where such steps are necessary, and therefore have reached a different conclusion from the majority and present the following opinion of unconstitutionality.

1.15. The Meaning of Freedom of Conscience

1.15.1. In today's major democratic states, freedom of conscience is recognized as a basic, fundamental freedom of thought. This is because freedom of conscience signifies that an individual can establish his self identity and live according to the earnest and strong voice from the heart in searching for his place in the surrounding world and deciding on a course of action, and as such, is a precondition to the realization of democracy, for it goes hand in hand with establishing human dignity and allows for unobstructed formation and sharing of diverse thoughts with respect for different values and unbiased global mindset at its core, and without it, it is difficult to realistically guarantee liberties such as freedom of academic/artistic expression and political activity.

Our Constitution, in Article 19, also guarantees freedom of conscience as an independent liberty. What acts to form such conscience are an individual's world view, life philosophy, principle, or belief, but it can also be a religious faith, and it can be a value or ethical judgment that relates to the formation of the individual's personality. In cases like this where religious conscience is involved, the issue becomes overlapped with protection provided through freedom of religion. But regardless of what source it is founded on, conscience must be serious to the extent that if not acted according to it, the individual's meaning of personal existence would collapse, and whether a conscience is that strong or earnest must be determined case by case.

1.15.2. An external appraisal of the content of a conscience cannot determine whether it is a conscience or the worth that conscience. As long as it is a strong and earnest voice from the heart, there should not be an attempt to assess its worth. If it is a strong and earnest voice from the heart, then it must be considered a conscience, and whether it is beneficial for the society, nation, or humanity, or whether it is a conscience that is subject to protection is not pertinent in determining whether it is a conscience or not. Appraisal of the content can only be done at the level of what effect the permission of free exercise of conscience will have on national security, social order, or public welfare. In this regard, it can be said that conscience that remains within the internal realm is recognized as an absolute freedom while the exercise of conscience through expression or feasance/non-feasance is, like most other freedoms, subject to restriction under Article 37 Section 2 of the Constitution.

Of course, the fact that an action is based on a conscience subject to limitations does not mean it can be treated lightly. Humans do not live only within their internal realm, living, rather, in association with the surrounding world, and since thought and action are connected to one another, one's thought can be preserved only when it can be enacted to be in accord with his actions. It is just that thoughts expressed through actions, compared to thoughts that remain within the internal realm, have greater social implications in the sense that they have the 'potential to cause damage to another person's fundamental right or

social order,' and therefore, can be restricted in a relative sense.

1.15.3. In cases of laws that apply generally with no intention of restricting freedom of conscience, conscience that cannot be harmonized with the requirements of that law is addressed by determining whether an exception will be allowed to the legal order or not. In such cases, the 'exception or exemption' may be seen as a form of preferential treatment, and therefore, be determined that free exercise of conscience should not be guaranteed as a right.

However, it can not be assumed that the value chosen by a minority is odd or inferior only because it is different from that which is shared by a majority, and conscience is still a fundamental right must be protected. Therefore, even in situations such as those mentioned above, it does not start with the assumption that majority decisions must be given full priority, looking then to see if standards should be mitigated based on the viewpoint of 'whether benefits should be provided.' In such cases, as with other determinations of fundamental rights violations, the review of constitutionality is done according to the principle of fundamental rights restrictions as provided in Article 37 Section 2 of the Constitution.

1.16. Conflict of Constitutional Interests and Legislator's Duty

1.16.1. In general, when Constitutional interests of similar importance conflict with one another, the legislator must find a solution that allows the Constitutional interests to coexist, each interest being realized to its optimum degree, in harmony with one another. Similarly, when there is a clash or conflict between a fundamental right and other Constitutional interests, the legislator should not seek to realize only those other Constitutional interests; rather, he should search for an alternative plan to avoid such clashing or conflicting situation, and even in situations where alternative plans are impossible and therefore fundamental rights must be restricted, the restrictions must be limited proportionally to what is absolutely necessary for accomplishing the purpose of the restrictions. Such provisions are included within the principle of fundamental rights restrictions provided in Article 37 Section 2 of the Constitution.

Therefore, if the legislator, despite the fact that an alternative arrangement is both necessary and possible, has not put forth even the minimum efforts to implement it, then he has failed to observe the principle of fundamental rights restrictions as mentioned supra.

1.16.2. Article 39 of the Constitution imposes the duty of national defense on all citizens, and at the same time, grants to the legislator, in principle, the authority and responsibility to specify the duty of national defense after considering the current practical circumstances of national security and amount of military might necessary to preserve the state. Especially, even within the national security system, the range of those who are draft-eligible is an item that requires adaptability to circumstances inside and outside the nation, maintaining the 'proper military might,' and therefore, broad formative power is given to the legislator in making that determination. (See Constitutional Court 2002. 11. 28. 2002HunBa45, Case Reporter 14-2, 704, 710). However, the fact that 'national security' is directly or abstractly involved does not always imply that such authority in formation of law is recognized.

As explored infra, considering the fact that conscientious objectors have refused military service for a long period despite continuous punishments and disadvantages, the legal clause at issue has served more the function of taking care of the claim of unequal treatment associated with the recognition of conscientious objection to military service and

its negative ripple effects, rather than as a way to secure their participation in bearing arms. We are by no means suggesting that, under such circumstances, in order to solve the conflict, we should choose the side of protecting conscience even if our powers of national defense is weakened or equality in bearing the burden of military service is damaged. What should be done is to find an alternative plan that can solve the problem of equal treatment associated with the recognition of exceptions and its negative ripple effects while simultaneously realizing the protection of conscience for conscientious objectors. The search for such alternatives, unlike issues such as the range of those who are draft-eligible or reasonableness of the makeup of draft-eligible population, does not fall within the realm of national defense, where a very broad authority of legislation is recognized. Therefore, the fact that the search for alternatives with regard to the legal clause at issue is related to national defense does not, in itself, mean that the legislator has the broad discretion as mentioned supra.

1.16.3. Conscientious objection to military service, with members of Jehovah's Witnesses at the core, has been a constant issue for the past half-century, and they have attempted to adhere to their conscience throughout that period, despite suffering many disadvantages such as punishment through imprisonment. Consequently, since it is now difficult to argue that their conscience is an earnest and strong command from the heart that can never be forsaken, we can no longer deny that the conflict between it and the Constitutionally imposed military duty is at a critical stage.

Therefore, the constitutionality of the legal clause at issue will be determined depending on whether there would be no damage done to national security even if, to realize freedom of conscience, an exception from the law premised on the duty to defend that is generally applicable to all draft-eligible persons is recognized, whether the alternative service arrangement, which is being discussed as an alternative plan, is a suitable plan that can prevent negative ripple effects and quell the claim of unequal treatment, and whether, despite all such factors being recognized, the legislator did not put for the very minimum requisite effort on its behalf.

1.17. A Correct Understanding of Conscientious Objection to Military Service

1.17.1. Whether the ideology of conscientious objectors conforms with principles of justice from an objective point of view and whether it possesses a sufficient degree of theoretical/moral completion not subject to judgment. However, it cannot be denied that conscientious objection has at its roots a sincere hope and resolution for mankind's peaceful coexistence. Whether at an individual level or a national level, the ideology of refusal to kill under any circumstances has constantly been manifest throughout history, and the ideal of peace manifest through nonviolence, non-killing, and pacifism is what humanity has long sought for and respected regardless of its likelihood of fulfillment. Our Constitution also expresses a portion of this ideal in its Prologue, pronouncing that it seeks to "contribute to a lasting world peace and mutual prosperity for mankind." The fact that numerous states around the world have recognized conscientious objection and that international bodies, through various resolutions and decisions, have continued to confirm the need to protect it demonstrates that this issue is closely associated with the above mentioned mankind's universal ideal.

In that sense, conscientious objectors' refusal to engage in military service cannot be looked upon as an attempt to avoid the hard labor entailed in military service or seeking a free ride by requesting protection without performing their basic duties for the national

community. As members of the community, they do not object to the responsibility to perform various duties including paying taxes, and although they cannot bring themselves to perform the duty of bearing arms for military service, they are requesting that they be provided another service arrangement that is no less difficult than military service duties.

With regard to the fact that this is termed 'conscientious' objection to military service, it is asked whether this means "those who served in the military are not conscientious while those who objected are conscientious." However, here, conscience does not involves an assessment of moral justification, meaning simply that the individual, because of the irresistible command from his heart, has reached a decision to object to military service, and as such, it should not be considered a devaluation of the majority of citizens' mentality and hard work to recognize the sacredness of the duty of national defense and to willingly perform their military duties to protect the country and their families.

1.17.2. Although, as shown above, conscientious objection is not done to evade one's duty toward the national community, the disadvantages that they must suffer as a result of the criminal prosecution against draft evaders is serious.

First, most conscientious objectors are sentenced to a minimum of eighteen months or more in jail and even after the sentence has been completed, they are ineligible to be appointed as government workers. (State Public Officials Act Article 33 Section 1, Clause 3, Local Public Affairs Act Article 31 Clause 4). Also, regarded as draft evaders, if they had been employed as government workers or officials or employees of a corporation, they would be fired and lose their jobs, (Military Service Act Article 76 Section 1, Article 93 Section 1) and therefore, would need to find new employment upon being released from prison and would lose all previously acquired patents, permits, authorizations, and licenses related to all forms of government sanctioned professions. (Military Service Act Article 76 Section 2). Aside from such legal disadvantages, in their subsequent social lives, they must also suffer through various explicit/implicit forms of cold treatment and employment difficulties due to their criminal conviction records.

Especially in the many circumstances where members of a family share the religion and faith regarding objection to military service, convictions are imposed down the generations, from father to son, or brothers one by one, and as a result other members of the family are forced to suffer through even more grief. In fact, in one case, the father served four years in prison for objecting to military service in the past, has two sons imprisoned for the same reason, and a third son in line to be imprisoned for the same reason, and in another case, four brothers in a family were all imprisoned, one by one, for two years or one and a half years as conscientious objectors.

What do such chilling cases tell us? Indeed, how weighty is the conscience of these people, who seek to protect it despite punishments and enormous damages that they must suffer in social life? Are we perhaps dismissing lightly their desperate conscience or holding a prejudice against them?

1.18. The Need for and Possibility of a System of Alternative Service

Considering that freedom of conscience is one of the basic and important rights even among the freedoms of thought and that the freedom to exercise conscience should also not be considered less important, considering the seriousness of the conflict between conscience and the currently applied law pertaining to conscientious objection, reflecting on previously

accumulated discussions and experiences inside and outside the country related to this issue, and taking into account the amount of discretion accorded to the legislator on this issue, we believe that a duty has arisen for the legislator to search for a plan, through measures such as alternative arrangements, to relieve the conflict and bring harmony between freedom of conscience and equal performance of duty of military service, and that application of such measures is perfectly feasible.

1.18.1. First, we examine how much effect whether or not conscientious objectors serve in active armed duty has on military might as a whole.

According to materials provided by the Military Manpower Administration, the number of conscientious objectors who were criminally prosecuted was approximately 400 per year from 1992 to 2000 and approximately 600 per year from 2001 to 2003. Majority of these are members of Jehovah's Witnesses. Also, from 2001 to 2003, the combined number of those who as Buddhist or pacifist objectors refused the draft and have been on or is on trial is less than ten. On the other hand, the number of those who are classified as active servicemen is 300,000 to 350,000, and according to data from January 1, 2003, approximately 350,000 were classified as first class citizens, 40,000 annually, as a result of their physicals, were assigned to reserve forces to fill in when there are short-term shortages in manpower, and 30,000 annually are assigned to be public service workers. Therefore, in terms of numbers, the relative proportion occupied conscientious objection does not amount to a figure that merits discussion about a decrease in military might or combat abilities.

Also, the fact that they have, for the past half-century since the institution of the Military Service Act and Uniform Code of Military Justice, been consistently refusing the draft and bearing of arms despite criminal prosecution and the enormous explicit/implicit disadvantages that follow it lends practical support to the view that criminal prosecution, with regard to conscientious objection, cannot be expected to have a special or customary deterrence effect. If so, then it is difficult to see the criminal prosecution of conscientious objectors as a necessary means to secure fulfillment of duty from these or potential future conscientious objectors.

1.18.2. Therefore, if the legislator has cause for concern about recognizing exception for conscientious objectors, then it would have to do with equality in bearing the duty of military service. This is because there are concerns that if exceptions are recognized for them, then securing evenly balanced performance of duty to defend can be difficult and as a ripple effect, the system of military service as a whole can lose its trustworthiness and with an increasing number of draft evaders who claim to be conscientious objectors, the effectiveness of the entire military service system can be compromised. The claim that as a general preventative measure to avert a general trend of draft evasion, measures of criminal prosecution such as the one provided by the clause at issue are necessary is similarly grounded on the types of concerns mentioned supra.

Considering the strong public request for fair participation in performing the duty of military service due to reasons such as our state of security, the immensity of burden that the duty of defense places on the individual, the problem of draft evasion, problems with military facilities and army culture and welfare, and considering the fact that the culture of draft evasion is a constant and growing problem in our society, it is true that there is much reason for concern that the above mentioned problems can turn into grave phenomena in

the future.

However, this concern is preconditioned on the prediction that due to problems with securing equitable performance of military service duty and increasing draft evasion, it would be extremely difficult for the legislator to find a realistic solution; but this prediction was not after an earnest and sufficient scrutiny of alternative plans. An alternative plan that can simultaneously protect conscience and solve the equal treatment issue is possible in theory, and the fact that already for many years, numerous countries around the world have recognized conscientious objection while effectively resolving such issues to maintain a system of conscription strongly suggests that it is also possible in reality.

1.18.2.1. First, we consider the issue of equal treatment in carrying out the duty of defense.

Imposition of the duty to all citizens, as members of the state, to equally participate in defending the territories of the country is the nucleus of our system of national defense and an important factor that has allowed for the preservation of the national community and unification of the citizenry. On this point, the inequality in performance of the duty to defend that must accompany any exemption from military service duty bears a significant meaning, and will raise another issue of unconstitutionality.

However, since the duty to defend is not limited to the precise duty of forming armed forces, bearing arms and engaging in military activities according to the Military Service Act, (See Constitutional Court 1995. 12. 28. 91HunMa80, Case Reporter 7-2, 851, 860-861) it is not the case that equality in performance of defense duty can only be attained through compulsion of duty according to the clause at issue and punishment. Therefore, if an assessment is done on the performance of active service as a whole, including the length of term and burden required, and a duty that entails similar or heavier requirements is imposed, then equality in performing defense duty is possible, and this would also quell the allegation of improper special treatment.

Several alternative plans can be considered with regard to the specific makeup of that duty. For example, numerous countries around the world including Germany, Denmark, France, Austria, Italy, Spain, Brazil, and Taiwan have for a considerable period of time arranged for conscientious objectors to serve in non-combat units within the military or in civilian alternative service, thereby solving the problem of equal performance of military service duty and maintaining a conscription system with little difficulty. These countries, for the most part, have used civilian alternative service to perform work such as rescue operations, transporting patients, firefighting, serving the disabled, landscaping work, agricultural work, caring for refugees, work at youth protection centers, maintenance and protection of cultural heritage, and working at prisons and rehabilitation agencies.

Even under current law, we can find arrangements that can be plausible alternative plans with just a small adjustment in system. For example, for conscientious objectors who do not object to enlistment but do object to taking up arms, the legislator could arrange for systematic mechanisms to have them handle work that is not directly related to bearing arms or combat, and can also make partial adjustments to the current supplementary service system to make it applicable to conscientious objectors.

Especially, if conscientious objectors are made to perform public service to do support work needed by the national or public community or social welfare agencies, or in cases

of those with special skills or training, have them use these for public service duties, then it must be noted that this, in a broader sense, would be more beneficial for national security in a practical sense than compelling active, armed service and criminally prosecuting them. It can be said that the Military Service Act has a systematic arrangement where those who are physically capable of performing active duty are assigned to perform support work for public service, work as international delegates in artistic or athletic fields to contribute to the enhancement of national prestige or as support workers for developing nations, and provide legal services as public defenders precisely because of such considerations.

With the current supplementary service arrangement, one is required to go through a maximum of 60 days (ordinarily 30) of combat training (Military Service Act Article 55 Section 1, Enforcement Decree Section 108) and even after completion of service duty, is eligible to be drafted to be placed into combat unit or used for tactical purposes during times of war, disaster, or when a call for mobilization is proclaimed and in association with this, is required to receive "call for mobilization training" for not more than 30 days annually, (Military Service Act Article 44, Article 49); therefore, if such duties are not imposed on conscientious objectors, there can be a problem with equivalence in duty required. However, if instead of combat training, they are required to undergo for a certain period of time, physical training as seen in systems of alternative service in other countries, and if the length of term for service is set to be longer than active service duty taking into consideration the term required for "call for mobilization training," then this problem can also be resolved.

1.18.2.2. Next, we consider the claim of negative ripple effects that the increase in draft evaders will have on the entire military service system which has its roots on a universal conscription system.

The current circumstances, where draft dodging scandals and a culture of draft evasion continue unabated despite ceaseless efforts from Military Manpower Administration to make the system more fair, provide a strong basis for the prediction that recognizing conscientious objection would lead to additional forms of draft dodging or provide other factors for draft evasion, and it is also true that this has won the sympathy of a substantial number of citizens with similar concerns.

However, as discussed previously, the experience of many other states that have operating systems of alternative service shows that it is possible, through a strict screening process and post-screening supervision, to differentiate between those who are genuine conscientious objectors and those who are not.

Above all, if factors to avoid active service are eliminated by ensuring equivalency between active service and the alternative service that takes its place, this problem can be effectively solved. Those who would seek to evade active armed service on the pretext of conscientious objection would be doing so because they have determined that performing alternative service would be personally advantageous to them; therefore, the more burdensome and difficult alternative service becomes, the less draft evaders there would be. In the end, ensuring the equivalency of burden can be the ultimate means to both secure equal performance of duty to defend and solve the problem of draft evasion. In addition, advancement in treatment and welfare of servicemen, including improvement in military facilities, must certainly accompany such measures, and states that have actually

instituted alternative service arrangements have reportedly also reaped the additional benefit of improved military conditions.

Of course, it is possible for the length of term or labor required in alternative service can be so excessive that it would be difficult even for conscientious objectors to select it, turning it into a mere nominal arrangement or giving rise to another problem of unconstitutionality; however, that would be a determination of unreasonableness of the makeup of the alternative service arrangement, and does not lead to the conclusion that allowing for the choice of another form of service instead of active armed service in itself is unreasonable or that the unilateral compulsion to perform active armed service according to the legal clause at issue is reasonable.

Accordingly, if there is a way to deal with the problems that may arise from exempting conscientious objectors from enlistment into active duty such as equality in performance of military service duty and increase in draft evasion, then even if there may be practical difficulties that must be addressed in the implementation process, it is difficult to think that there is a definite need to compel active armed service and in doing so, punish with prison sentences, individuals who refuse military service on the basis of their conscience.

1.18.3. From an International Law standpoint, recognition of Conscientious Objection is highly needed.

Article 18 of the International Covenant on Civil and Political Rights, adopted by the UN in 1966, guarantees the freedom of thought, conscience, and religion, and in 1993, the Human Rights Committee, in its General Comment No. 22: the right to freedom of thought, conscience, and religion, stated that it "believes that such a right [to conscientious objection] can be derived from article 18, inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief"

The Commission on Human Rights, through repeated resolutions, has also expressed the same position. For example, In its resolution 1987/46, the Commission specified that it "recognizes conscientious objection to military service as a general right," and in its resolution 1993/84, in addition to reaffirming its ban against punishing conscientious objectors, emphasized that "such forms of alternative service should be of a non-combatant or civilian character, in the public interest and not of a punitive nature" Also, in resolution 1998/77, while reaffirming the right to conscientious objection, it declared that the right is recognized also for those who are currently serving in the military, requested, along with providing for a system of alternative services, to establish independent and impartial decision-making bodies with the task of determining whether a conscientious objection is genuinely held in a specific case, emphasized that States must refrain from subjecting conscientious objectors to imprisonment and to repeated punishment for failure to perform military service and that States must not discriminate against them in relation to any economic, social, cultural, civil or political rights, and encouraged States to grant asylum to those conscientious objectors compelled to leave their country of origin because they fear persecution owing to their refusal to perform military service.

In 1990, our country entered into the above mentioned Covenant without expressing reservation for Article 18 and has been a direct participant in recent resolutions, including the 2004 resolution, that state that the right to conscientious objection must be recognized.

Considering that not only is the right to conscientious objection already recognized in many States and that there are very few countries in which so many individuals have been punished for conscientious objection like there have been in our country, but also reflecting on how our laws and customs are in no way in harmony with international laws such as those mentioned above, this problem can no longer be neglected or put off, and there is a definite need to aggressively search for an alternative plan.

1.18.4. Despite this, however, when we examine our military service system and the legal clause at issue, we see no trace of the legislator taking these circumstances into account and giving even the minimum consideration on behalf of conscientious objectors.

With regard to supplementary service recognized currently under the Military Service Act, since eligibility is determined either through a physical condition score or possession of special training or skill, supplemental service arrangement for reason of conscience does not exist, and even if a conscientious objector is classified to be a supplementary serviceman based on one of the two approved reasons, he must under the provisions of the Military Service Act, receive less than 60 days of 'military training' and even after completion of service, must receive 'call to mobilization training,' making it difficult to accept for conscientious objectors who refuse to take up arms.

With active servicemen, there is the possibility that the Ministry of National Defense or commander in charge of the unit may exercise their discretion to exempt them from arms training and have them perform work such as medical services, but it is questionable whether the Ministry of National Defense or unit commander even has such discretionary power and whether, in a military organization which requires consistent, uniform regulations, it would be desirable to recognize such case-by-case acts of discretion. Even if it were possible under the current law for the judicial system to take into consideration the situation of conscientious objectors and show some flexibility when applying the legal clause at issue, this is not a provision that was meant to be a conscience protecting mechanism, and considering how the customary practice against them has been compelling active armed service and imposing punishments, there is little reason to expect the enforcement or judicial agency would suddenly adopt measures that shows more consideration towards them. (See S. Ct. 2004. 7. 15. 2004Do2965).

Above all, we cannot expect that a fair, objective, and consistent measure will result without a legislative solution, just by leaving it up to the case-by-case determinations or the discretion and decision of the judicial system. Such a method would give rise to other forms of draft dodging or inequality controversies and naturally is inadequate in terms of conscience protection, and therefore, cannot be a fundamental solution. It is worth noting on this point that States that recognize conscientious objection have detailed legislation clarifying it and that the UN Commission on Human Rights stated that States should establish independent and impartial decision-making bodies with the task of determining whether a conscientious objection is genuinely held in a specific case (Resolution 1993/84, 1998/77).

Therefore, there is no room left for the view that the current law provides for a conscience-protecting mechanism through law implementation agencies or that when the national legal system as a whole is examined, there is at least a minimum amount of adjustment mechanisms.

1.19. Conclusion

Within the system of democratic viewpoint determination that has majority decision at its roots, lending an ear to and reflecting the voice of the so-called 'minorities' who think differently from the majority is a central factor in the basic constitutional ideal of protecting as inviolable fundamental human rights and the establishment of basic democratic order. Furthermore, we believe that respecting, and to the extent possible, accommodating the belief of conscientious objectors, a minority group that is distinguishable from the society's majority, will help our society mature and move it toward a direction of improvement.

As examined above, we conclude that the legislator, while compelling the performance of military service duty as specified in the legal clause at issue, is not putting forth even the minimum requisite effort in seeking to settle the serious and long-term conflict the law has had with the conscientious objectors' freedom of conscience, and therefore, we believe that within the scope of its unilaterally compulsion of enlistment against these individuals and imposition of criminal punishments, the legal clause at issue cannot avoid being unconstitutional.

.6 Separate opinion of Justice Sung Kwon, concurring

Although I agree with the majority opinion's conclusion that the Military Service Act Article 88 Section 1 Clause 1 is not unconstitutional, I have different thoughts in terms of how I arrived at that conclusion and therefore, express them below.

1.20. The constitutionality of the legal clause at issue can be approached in two ways. The first is to discuss unconstitutionality in terms of non-feasance, the failure to legislate the option of the so-called civilian alternative service, and from this coming to the conclusion that the legal clause at issue, which punishes against draft evasion while blocking off any possibility of turning to a system of civilian alternative service, must also be unconstitutional; the second argument is based on the accumulated judicial precedent which has determined that dodging the draft to follow the command from one's conscience telling him to refuse to bear arms does not fall within the 'reasonable cause' under which draft refusal is justifiable, and that the legal clause at issue, which has been interpreted in such ways, infringes upon the freedom of conscience, and therefore, is unconstitutional.

1.20.1. First, it is examined whether or not the first method is proper.

The legal provision at issue is merely a punishment clause against draft evaders and does not, in itself, impose the duty of enlistment into active service. The duty of enlistment into active service arises from Military Service Act Article 3 (Duty of Military Service), Article 5 (Types of Military Service), Article 16 (Enlistment for Active Service) and Enforcement Ordinance Article 21 (Delivery of Draft Notice for Active Service). Therefore the duty of enlistment into active service arises at the moment that the draft notice for active service is delivered, and the legal clause at issue operates to punish any occurrence of failure to perform that duty of enlistment. Consequently, assuming arguendo the existence of a permission proviso for civil alternative service, it must be applied before the duty of enlistment for active service arises, that is, before the draft notice is delivered, through a process that includes petition, investigation, and judgment of the party. This is because the social status and the essence of the work required of active servicemen (See Military Service Act Article 18) differ from that of civilian alternative service workers, and therefore, those who have enlisted and are to serve as active servicemen cannot be assigned

to civilian alternative service work. If this means that there must be a regulation that permits a transfer to civilian alternative service after the duty of enlistment for active service has arisen, it would be an ex post extinguishment of the previously established duty to enlist, and therefore, is a de facto acknowledgement that the reason permitting civilian alternative service is a 'reasonable cause for refusing the draft,' and in that case, this relates to the second approach discussed supra. If this is a call for a regulation that permits transfer to civilian alternative service after enlistment into active service, then this is unrelated to the legal clause at issue which punishes individuals who have not complied with enlistment itself, and therefore is irrelevant to this discussion.

From this perspective, if we are to provide for a regulation that permits civilian alternative service, such a regulation should be of the type that provides an exception at the duty imposition stage, before the duty to enlist into active duty has arisen. Therefore, even if the non-legislation of a regulation that permits civilian alternative service is recognized as unconstitutional, that can only signify the unconstitutionality of the regulation that uniformly imposes military service duty (i.e. Military Service Act Article 3, Article 5, or Article 16) and cannot signify the unconstitutionality of an already established punishment regulation against noncompliance to the duty to enlist into active service (i.e. the legal clause at issue).

Therefore, contending the unconstitutionality of the legal clause at issue using the first approach discussed above (MAE), i.e. contending its unconstitutionality on the basis of whether or not the non-legislation of options to permit civilian alternative service was unconstitutional (WAN), amounts to a criticism of the clause at issue based on matters that have no logical cause and effect relationship with it, and therefore, is inappropriate. I am in support of the separate opinion of Justice Sang-Kyung Lee who first points this out and oppose the majority opinion which has pretermitted this point.

1.20.2. Next we consider the second approach mentioned above.

Since according to the previously accumulated case-law, "evading the draft in obeisance to the command from the conscience to refuse to bear arms" does not fall into the category of 'reasonable cause' for draft evasion as prescribed by the legal clause at issue, the clause must be treated as already having been firmly defined in such a way. And since with regard to whether the clause at issue, which holds this meaning, violates the appellant's freedom of religion or freedom of conscience, i.e. the second approach mentioned above, I hold a negative view as mentioned infra, and I will discuss this further in the following section.

1.21. Whether there is a violation of freedom of religion

1.21.1. Distinguishing between conscience and religion

Conscience is a feature of the human mind that causes him to think, decide, and act ethically, morally. Therefore, conscience is what exists in the inner realm of humans that makes them ethical, moral beings and is the axis that forms the basis for human dignity. Meanwhile, religion, which places internal trust in a god and entrance into nirvana or "the other side," is god's teachings delivered through our consciousness, is god's sound. Thus, if we call our conscience the voice of our heart, religion is the voice of god delivered through man's consciousness. Whether the two sides are of the same existence is ultimately a separate issue of a higher level, and as for the problem of this phenomenal world, grasping the idea that the two parts as above should be separately categorized is a reasonable starting point for

discussion. These distinctions correspond in meaning with our constitution which differentiates and regulates separately the freedom of conscience, freedom of religion, and freedom of education and art.

The consciences' fruitage of conviction and religion's fruitage of conviction have in many cases, similar outcomes. However, we cannot through this say that the two are the same. This is because the two have distinctly different origins.

If we analyze the claim of the appellant in this case and reflect on where it connects to, we see that it falls under a conviction which originates from the appellant's religion, Jehovah's Witness. (On page 1, case 1 abstract of the Unconstitutional Law Ruling Recommendation Application submitted by the appellant, the appellant claims that he did not respond to the summons notice because of his firmly held conscience formed through his life as one of Jehovah's Witnesses.) The appellant's claim clearly originates from God's voice, God's teachings within him. The majority opinion is that this case is a religious issue and simultaneously a conscience issue, and for the sake of holding a more comprehensive discussion, place the matter of freedom of conscience in the centerfold to be examined. However, as discussed above, although the fruitage of the conscience and that of religion may display the same exterior, the origin of their internal foundation is different, and as long as this holds true, we cannot view the two as being the same.

1.21.2. From this viewpoint, we will first look at the issue of whether or not the legal provision in this case infringes on the freedom of religion.

1.21.2.1. First, whether the appellant's refusal to take up arms because of his religious conviction or religious doctrine is right or wrong is not something that we can question. God teaches along the premise of his being an omnipotent, omniscient, perfect being, so for us as limited, imperfect humans to question his teachings' validity would be inappropriate. The State's noninvolvement principle in regards to this issue reflects man's wisdom that has been gained through history's lessons. Within this understanding, religious freedom is included in one of the fundamental freedoms under the constitution.

1.21.2.2. Therefore, what we can do in regards to the constitutional court is not to try and determine the validity of a religious conviction or the contents of its doctrines, but are limited to determining if the impact on the constitutional order that's caused through the societal upheaval from the issue is something that can realistically be accepted. If we state the issue differently, an act demonstrating religious doctrines or religious convictions (includes in its meaning acts to actualize doctrines or convictions) results in societal upheaval, and becomes a target of regulation by the law, which in effect problematically restricts fundamental rights, and Article 37 Section 2 of the Constitution is applied. The relationship between the need for national security assurance as designated in Article 37 Section 2 of the Constitution, and the obligation towards national defense as designated in Article 39 of the Constitution is as later examined when freedom of conscience is discussed.

1.21.2.3. Following the order of logic, if we examine whether or not the legal provision in this case infringes on the appellant's freedom of religion, under our Constitution (Article 5 Section1) which denies war of aggression, the societal upheaval that results from refusing to take up arms for national safety and national defense is something difficult for our constitutional order to accommodate. This is because if we put together our nation's security circumstance, equity in the draft demanded from the society, and the many restricting factors that may accompany permitting refusal to take up arms and selecting an

alternative form of service, if refusal to take up arms is permitted, we cannot conclude that damage will not be inflicted on the gravely important constitutional law of national security.

In order to permit refusal to take up arms, we would at least need to have established a peaceful co-existing relationship between North and South Korea, and in the long run, be in the process of establishing an international safety guarantee procedure in which the support of a prosperous country's powerful army is not needed, but presently, it's difficult to hope to establish such conditions, so we cannot say that the legislator's decision (also the court's accumulated interpretation) that refusal to take up arms based on religious reasons cannot serve as legitimate grounds for evading conscription to be remarkably unreasonable or clearly wrong.

If this is so, the reason the legal provision in this case does not see refusal to take up arms motivated by what we call religious conviction as legitimate grounds for evading conscription is for the sake of national security, and thus, does not infringe on the appellant's religious freedom, and is not in violation of the constitution.

1.22. The freedom of conscience issue

We will finally discuss the hypothetical case in which the appellant refuses to take up arms in answer to the voice of his personal conscience and not in answer to the God.

1.22.1. If we say that religious conviction or doctrine is the voice of God, then the voice of the conscience is the voice of man, which is the manifestation of his moral resolution which coincides with his dignity. The point that man cannot question the validity of the what the voice of God speaks, only that the issue of whether or not it's realistically possible to accept societal upheaval is the reason the fundamental rights restriction issue has become the subject of constitutional ruling, as previously mentioned above.

On the other hand, the voice of the conscience is the voice of man, so the validity of its content or the existence of right or wrong in its content is something that can naturally be questioned. Of course, if the voice of one's conscience is at the level of remaining within the inner heart, in the sense that expression cannot be forced, absolute freedom can be guaranteed and allowed exemption from criticism, but once expression is publicly externalized, it can no longer be exempt from criticism. A conscience that has surfaced to expression is no longer ones' own, but becomes an existence in which oneself as well as others are objectively involved, and thus becomes open for criticism. This is different from saying that the voice of religion can only be criticized by an alternate name of god, and not by the voice of man.

1.22.2. There is no restriction to the way in which the voice of one's conscience can be expressed. Aside from lingual expression, expression through action is also possible. Also, the expression can be a manifestation of continual thought, or a spontaneous reaction. In the end, conscience actualizing action is a mode of conscience expression, and becomes an objective existence that makes a societal tie between oneself and others, and therefore, the freedom to act upon one's conscience can undergo criticism.

1.22.3. The criterion of criticism is universal validity

The voice of conscience is the outcome of the ethical determination that corresponds to a

person's dignity. Thus, the voice of conscience must have universal validity that can be accepted by human rationale. At its minimum, it must have the possibility to acquire universal validity even though its universal validity is not acknowledged today.

How can universal validity be obtained?

Unlike scholarship or ideology, conscience is the essence of ethical decision. Therefore, its universal validity can be boiled down to benevolence and righteousness. These two elements are the kernel propositions of ethics.

Although the approach and expression may vary depending on the era and the individual, one cannot deny that benevolence and righteousness are the concrete mark of good which the inherent human nature seeks. Benevolence and righteousness dignifies a person and provides the basis for making them ethical beings. Therefore, benevolent and righteous acts acquire universal validity while the non-benevolent and unrighteous acts have no possibility of acquiring universal validity. (See (6) for the definition of benevolence and righteousness within the instance case) If the voice of conscience has universal validity such voice be absolutely protected. If it is subject to absolute protection, Article 37 Section 2 cannot apply. Thus if the voice of conscience has universal validity, it cannot be restricted under Article 37 Section 2 even if it difficult to accommodate under the current positive law order due to resulting social repercussions. Under such meaning, it may be said that universal validity is the immanent limitation of the freedom of conscience.

If the voice of conscience does not have universal validity, however, the problem is different. First, even if the voice is wrong, it cannot be restricted under Article 37 Section 2 of the Constitution if the social repercussions are not problematic. It can be said that such matters are subject to tolerance.

On the other hand, if the social repercussions produced by voice of conscience that lacks universal validity cannot be accommodated by constitutional order, such voice can be regulated under Article 37 Section 2 of the Constitution. In that case, the voice of conscience receives constitutional protections as divided into the following categories. First internal existence receives absolute protection. There is no basis to apply Article 37, Section 2. Second, if the expressed voice of conscience has universal validity, it also receives absolute protection. Thus such voice cannot be restricted in the interest of national security, maintenance of order, or public welfare. Article 37 Section 2 of the Constitution does not apply. Third, expressed voice of conscience that lack universal validity is subject to Article 37 Section 2 of the Constitution. Thus, such voice can be restricted when necessary to preserve national security, maintenance of order, or public welfare. If such interests cannot be established, then the voice cannot be restricted.

Understanding the freedom of conscience in a categorical manner provides greater protection to such freedom in a way that matches its importance. Under the customary view, absolute protection was only afforded to conscience that remained in its internal phase. Under the graduated protection view, expressed conscience with universal validity also receives absolute protection.

As noted in the majority opinion, protection of the freedom of conscience has very little meaning if freedom of conscience merely refers to a nation urging tolerance of a minority's conscience or the imposition of the duty of tolerance. Such view cannot be balanced with the claim that the freedom of conscience is a fundamental right.

Therefore, it is appropriate to use the standard of universal validity to determine the level of

protection that will be provided to the freedom of conscience.

The determination on the issue of universal validity is made in two places. One is the court and the Constitutional Court. The other is the marketplace of ideas. Although both determinations should be mutually respectful of one another, in reality, they end up mutually penetrating one another.

1.22.4. Freedom of conscience, freedom of thought, and freedom of scholarship share a sense of commonality because they all have their roots in the mental faculties of the human mind. Thus, the foregoing analysis may generally apply also to the freedom of scholarship, and the freedom of thought.

The inquisition in the Middle Ages of Galileo's heliocentric theory can be adopted in to the context of the modern day constitutional court case as an explanatory device. Since the heliocentric theory does not reside in the realm of ethics or morals, it is neither the voice of conscience, the voice of God, nor an issue of religion. It falls in the category of natural sciences and the philosophical thought that is based on such science. In such case, expressions of heliocentric theory falls in the categories of freedom of scholarship and thought. If its claims are universally valid or have the possibility of acquiring universal validity, it must received absolute protection. The inquisition in the Middles Ages was incorrect in viewing both the heliocentric and the geocentric theory as an issue of religion. It was also incorrect in rejecting the heliocentric theory based on abstract and arbitrary manner without engaging in a rational review of its universal validity. A greater wrong was committed when the defendant was threatened into denying the heliocentric theory. Considering the scientific understanding that the general public had at the time and the elementary knowledge possessed by the judges, verification of the heliocentric theory must have been very difficult at the time. A historical lesson can be drawn from this. When verifying the universal validity related to issues of conscience, scholarship, and ideology, we must take into consideration future expansion of human enlightment, advancement of science, and social evolution. We must be prudent in deciding whether to reject a claim and must take a tolerant position in imposing restrictions considering the possibility of the claim acquiring universal validity in the future. This is a factor that can be taken into consideration by the Court in rendering judgment.

1.22.5. Voice of conscience that is eligible to receive absolute constitutional protection is limited to those that have universal validity or have the possibility of acquiring universal validity. Although obvious, seriousness in formation must also be proven. Consequently seriousness in formation and the universal validity of its claims become the requisite for constitutional protection of the voice of conscience. Problem in formation, for example, conscience resulting from mental illness cannot be protected. Also seriousness in formation is an indicator that enables distinction between freedom of conscience and freedom of action. Only serious decisions- intensive decisions that stands for the expression of an individual's identity, intensive decisions that show unity of knowledge and conduct, and decisions that require sacrifice- are expressions of conscience. If they are not based on serious decisions, they fall into the category of freedom of action.

1.22.6. A review of the instant case indicates that the possibility of refusing to take up arms to defends against an wrongful unjust aggressive war being judged as an ethical decision that goes to human dignity if very low. Common people of all time and places have naturally recognized that failure to take up arms to protect- and preparing to protect- the national territory, constitution, self, family, and loved ones against murderous aggression would

bring about shame. When our rational faculties are reasonable, we can acknowledge the propriety of such recognition.

Doing nothing when our parents, brothers, and spouses are slaughtered brings into question our benevolence that results from a lack of compassion. If we are not stirred up after seeing such killings our righteousness is questioned from a lack of hate of what is evil. Enjoying safety from other people's sacrifice and efforts questions our propriety from a lack of courtesy. Ignoring the danger of aggression by claiming that it is not imminent brings our wisdom into question.

It is difficult to acknowledge the universal validity of an act that is questionable in its benevolence, righteousness, propriety, and wisdom.

Therefore, it is difficult to recognize a refusal to take up arms to defend against an aggressive war or to prepare for defense as a voice of conscience that has universal validity.

When Yulgok Yiyi argued- 10 years before the Japanese Invasion of Korea in 1592- for a need in 1583 to raise an army of 100,000, it was not because Yulgok lacked a conscience or was belligerent. Obviously, when many young men join the army and endure the sacrifices and take up arms under the banner of the current universal conscription system, it is not because they lack a conscience or they are belligerent. When United Nations deploy peacekeepers to suppress cruel racial cleansing, it is not because they lack a conscience or enjoy warfare. Therefore, refusing to take arms for defensive purposes cannot possibly be a voice of conscience that has universal validity. Even after considering our future, we will repeatedly reach this same conclusion for an extensive period of time.

Then the constitutional protection provided to the refusal to take up arms- although it is based on the voice of conscience- can be limited unless it is done to carry out an aggressive war. It can be restricted by law in the interest of national security, maintenance of order, and public welfare.

1.22.7. Need for national security under Article 37 Section 2 of the Constitution and the duty of national defense under Article 39 of the Constitution

In the foregoing analysis of graduated protection of freedom of conscience, we stated that voice of conscience can be restricted by regulation when necessary in the interest of national security, maintenance of order, and public welfare. In the instant case, however, the core issue is the need for national security. Therefore, the need for maintenance of order and public welfare are not included in the issue. Therefore we limit our discussion to the matter of national security under Article 37 Section 2 of the Constitution.

In order to restrict the voice of conscience under Article 37 Section 2 of the Constitution, a need for national security must be acknowledged and the details of the restriction must be specified in a statute. Details of typical restrictions of fundamental rights must be specified in a statute and the basis- whether express or implied- must also be specified in a statute to indicate that the restriction was being imposed in the interest of national security. However, the duty of national defense and the duty of military service under Article 39 of the Constitution are in essence, a response to the need of national security. On the other hand, performance of all such duties inevitably involve a restriction on rights. Thus, the imposition of a duty of military service under Article 39 is an acknowledgement by the Constitution that imposition of duty of military service is necessary to ensure national security and the

performance of military service inevitably involve restrictions of fundamental rights. With regards to the imposition of military service and the resulting restrictions on fundamental rights, the need for national security is a constitutionally recognized need (a constitutional reservation) that does not require recognition by enactment of a statute. Since the need for national security is already recognized by the Constitution, there is no need to discuss its existence or absence.

Then, remaining issue in the application of Article 37 Section 2 of the Constitution on the voice of conscience that lacks universal validity is whether the content of the restriction- in the instant case, not recognizing conscientious refusal to take up arms as one of the justifiable causes- infringes the intrinsic elements of the freedom of conscience.

The essence of freedom of conscience lies in the nation's non-intervention of freedom of conscience formation and its free expression (whether active or passive). However, the statute in the instant case is not a law that interferes with the freedom of conscience formation and expression. The only issue is that the national does not actively accommodate the content of voice of conscience as claimed by the petitioner. Although penalizing the petitioner under this statute somewhat has a restraining effect on the petitioner's expression of his conscience, such indirect restraint does not have an effect on the essence of the freedom of conscience. Such is true because the law neither prosecutes the content of his conscience nor its expression. The penalty is imposed because his overt acts objectively violates a legal requirement that is imposed on the general public on a different dimension. The statute only requires external obedience. It does not force the petitioner to give up his voice of conscience or to internally affirm the propriety of the obedience. Therefore we can neither say that this statute infringes on the essence of the freedom of conscience nor that this statute is unconstitutional.

Determining the justifiable cause to avoid military service and the details of the duty of military service-achieving the purpose of national defense while providing accommodations to guarantee fundamental rights- is a task that should be left to the legislature. Since the statute in the instant case, which does not recognize conscientious refusal to take up arms as a justifiable cause, did not significantly deviate from or abuse the legislative discretion- as seen in Section 6.2.2.3 in the foregoing analysis- we cannot say that this statute infringes on the intrinsic elements of the freedom of conscience.

Another remaining issue is whether the general imposition of a prison sentence as the legal penalty for refusal to take up arms is excessive. This is also a question of legislative discretion and since we cannot acknowledge gross failure in the exercise of such discretion, we will state that it is not unconstitutional.

1.22.8. Even if we were to assume that the petitioner's refusal to take up arms did not result from his voice of conscience, this voice of conscience lacks universal validity while a need of national security exists that prohibits an accommodation of such voice. Therefore, even though the Clause in the instant case does not recognize the petitioner's refusal to take up arms as a justifiable cause for avoiding military service, we cannot say that such clause is an infringement of the freedom of conscience.

1.23. The problem of recommendations to the National Assembly

The recommendations in the majority opinion that include a review of civilian alternative service and a Congressional study on the need to statute amendments is not proper considering the principle of separation of powers and the risk of misinterpretation.

.7 Separate opinion of Justice Sang-Kyung Lee, concurring

1.24. Although I agree with the majority opinion's conclusion, I have different thoughts in terms of how I arrived at that conclusion and therefore, express them in the following separate opinion.

1.25. The legal characteristics of Article 39 Section 3 of the Constitution which regulates the duty of defense

Article 39 Section 1 of the Constitution regulates that "All citizens bear the duty of defense as provided by the law," and Section 2 regulates that "No one shall be disadvantaged because of their performance of military service duty." Therefore, the Constitution itself establishes the duty of defense as a duty for all citizens, for which the duty of military service is considered to be a core component.

The above mentioned Article 39 Section 1 of the Constitution is in the form of a duty-imposing regulatory provision and therefore does not specifically express the fundamental right that is subject to restriction, but since it is an obvious precondition that an individual's right must be limited in order to perform the duty of defense, the above regulation is one that places restrictions on fundamental rights such as bodily freedom and other related freedoms. And since the Constitution itself thus places restrictions on fundamental freedoms, it can be said that the above mentioned regulation is establishing a Constitutional limitation on the relevant fundamental freedom.

1.26. Standard for evaluating unconstitutionality in laws that deal with conflict of Constitutional interests

1.26.1. Article 39 Section 1 of the Constitution, which legally establishes the specific content of duty of defense, allows the Constitution to protect the state, the prerequisite to its own existence, from outside invasions, thereby reserving for it the power to restrict, within the bounds necessary to defend the people who are under its protection, their fundamental freedoms (Principle of Constitutional abeyance for matters of importance), and has assigned the National Assembly, the representative institution of the people, to establish the content (Intrinsic contents) of such reserved powers (Principle of National Assembly abeyance), and therefore, the Military Service Act, founded on the same clause, functions to realize the intrinsic contents of the Constitution that seeks to fulfill the values held by the Constitution. Therefore, the legal clause at issue, which bears such characteristics, establishes the details of the duty of defense provided for by the Constitution, and at the same time, specifies not only restrictions to physical freedoms relevant to the duty of defense but also restrictions on fundamental rights such as the freedom of conscience, at issue in the instant case. Consequently, although the clause at issue contains provisions that restrict fundamental rights of the people, this is not a case where the foundation for such content is the law itself; rather, it realizes the provisions of the Constitution by specifying in detail the intrinsic content of the Constitution regarding the restriction or limitation placed on fundamental rights as arranged for by the Constitution itself, and as such it holds Constitutional authority.

Therefore, the restriction that the clause at issue places on fundamental rights functions to set a practical boundary between the Constitutional interest of maintenance of military might to protect the nation, realized through the duty of defense and the Constitutional interest of fundamental freedom of the individual, and must be distinguished from the case where, as set out in Article 37 Section 2 of the Constitution, the law itself, in order to

realize the purpose of its legislation, places legal restrictions on fundamental freedoms.

1.26.2. Our Constitution does not enumerate the standard with which such conflict of Constitutional interests should be resolved. The dissenting opinion uses the principle of fundamental rights restrictions as provided in Article 37 Section 2 of the Constitution as the standard of review and determines whether the legal clause at issue violates the principle of proportionality or prohibition of excessive restrictions.

However, the principle of prohibition of excessive restrictions is a form of judgment that gives precedence to the Constitutional interest of fundamental freedoms in cases where it conflicts with the legal interest of legislative purpose and the means to realize the purpose. In other words, this is a constraining, passive standard of review under which, in order for the restrictions that a law places upon fundamental rights to be justified, the legitimacy of its legislative purpose must first be established, the appropriateness of the method used to accomplish this purpose must be recognized, and not only is it required to limit infringement on fundamental rights to an absolute minimum, it maintains as precondition principles such as the need for the public interest sought to be greater than the infringed private interests, so that in order to protect the fundamental right to the greatest extent possible, legislation that restricts it or public interests can be sacrificed. On the other hand, the principle of realistic harmonization is an example of a method to resolve the conflict between Constitutional interests which actively seeks to achieve the greatest effect that respects both of the fundamental freedoms (Constitutional interests) in conflict with on another, and therefore, there is a fundamental difference between the two standards of review.

Therefore, applying Article 37 Section 2 of the Constitution and principle of excessive restrictions in resolving problems of conflict between Constitutional interests where one cannot be ranked above another raises the risk of causing damage to one Constitutional interest, going against the intent of the enactor and value sought by the Constitution, and therefore this method cannot be accepted as is.

1.26.3. In seeking for a standard to resolve the conflict between Constitutional interests, it must first be clearly recognized that rather than being a matter of judicial review, that it is a subject of legislative formation with the purpose of protecting Constitutional values. The fact that the Constitution itself accommodates values that can conflict with one another without providing for a clear standard to resolve such conflicts is interpreted to mean that the legislator should accurately assess the circumstance regarding clashes of interests relevant to the conflict in values and take into account the political opinions of the members of the legal community, including their value inclinations, then set the boundaries between each pertinent realm as law. This Constitutional request is expressed even more clearly in cases where the Constitution holds in abeyance for statutes the formation of how specific matters shall be handled.

The legislator thus is granted the authority of legal establishment, to set reasonable boundaries between the realms where Constitutional interests collide, and therefore, with regard to assessing perceivable facts (objective determination), which forms the foundation of legislation, the legislator, as a matter of principle, is accorded a certain level of discretion in assessment, and with regard to determining the method/content/form (subjective determination) of legislation, he is similarly accorded a certain level of discretion in formation. This signifies that with regard to the legislator’s exercise of

authority, a broad legislative discretion is granted to him. Especially in cases where the Constitution itself provides for an enumerated regulation that places restrictions on a fundamental freedom for the realization of certain matters of public interest, it is interpreted that the will of the enactor of the Constitution to place ahead of the fundamental freedom the Constitutional interest that served as a foundation for that freedom (public interest) has been reflected, and in such cases, the legislator receives even broader discretionary power in legislation to realize the public interest requested by the Constitution.

However, the fact that legislative discretion is granted to the legislator does not mean that the freedoms and rights that citizens can enjoy, including the freedom of conscience, become merely nominal, limited to the range that the nation benevolently permits as a part of the hierarchical relationship in maintaining law and order. The legislative discretion enjoyed by the legislator also is subject to certain limitations. When the legislator establishes specific laws, judicial review is limited to whether the legislator's exercise of legislative discretion of went beyond the limitations that it is subject to, and the standard of review in this case is whether the exercise of legislative authority in that case went beyond the limit of prima facie rightfulness to the extent that the inconsistency between it and justice cannot be suffered, or in other words, whether it went beyond the limit of what is permitted by principles of justice, or how it fares when reviewed according to the restriction on arbitrary exercise, the principle that legislative authority cannot be exercised arbitrarily.

Such difference between standard of reviews can lead to a difference not only in the structure of argument within the review process but also lead to substantial differences in the burden of proof or persuasiveness in establishing unconstitutionality. While according to the principle of excessive restrictions, a law that restricts a fundamental right is unconstitutional unless it is established that it is not excessively restrictive (that the public interest sought is of more importance), if legislative discretion is recognized, a law is considered constitutional unless is established that the legislator, in exercising his legislative discretion, went beyond his discretionary limit, that is, exercised his legislative authority arbitrarily. For example, in cases where it is difficult to prove past facts or future prospects that served as the basis for legislation, it is possible that the two standards of review can lead to different conclusions.

1.26.4. The aforementioned Constitutional interpretation about issues such as standard of review is consistent with the position that the Constitutional Court has hitherto been taking. For example, In its holding on cases such as 1992. 4. 28. 90HunBa27, the Constitutional Court determined that State Public Officials Act Article 66 Section 1 and 2, which applying Article 33 Section 2 of the Constitution which places restrictions on the three basic rights of workers guaranteed by Section 1 of the same Article, limited the range of public workers who are covered by the three basic rights to "actual physical laborers," had not gone beyond the boundary of legislative discretion that Article 33 Section 2 of the Constitution grants to the legislator when it set the boundary of public workers that are subject to enjoy the three basic rights of workers, and therefore was not unconstitutional. The above holding not only recognized legislative discretion in a case where the Constitution itself sets limitations to a fundamental right, it also limited the review to whether the above legal clause runs counter to the purpose intrinsic to the legal abeyance in Article 33 Section 2 of the Constitution and whether the value system that needs to be realized by the guarantee of the three basic workers' rights and the purpose of public welfare, accomplished through

reasonable maintenance and improvements in a system of public workers, for all citizens, who are the sovereigns in this land, are in appropriate harmony with one another, and did not perform a strict review according to Article 37 Section 2 of the Constitution and principle of excessive restrictions.

Also, the Constitutional Court (Decided 1995. 12. 28.) 95HunBa3 has held that since State Compensation Act Article 2 Section 1 provision is directly based on and is essentially identical in content with Article 29 Section 2 of the Constitution which internally restricts the right to request state compensation, it is not unconstitutional, and this is also a clear articulation that in cases where the Constitution itself restricts fundamental rights, the review of whether the right has been violated cannot be identical to the case of restrictions on fundamental rights by general statutes.

1.26.5. Consequently, the dissenting opinion's use of Article 37 Section 2 of the Constitution and principle of excessive restrictions in evaluating the unconstitutionality of the legal clause at issue not only is a mistaken selection of standard of review that neglects to consider the unique characteristics of Constitutional abeyance and principle of National Assembly abeyance incorporated into Article 39 of the Constitution but also runs counter to the standard of review and method of review that this Court has hitherto been adopting, and therefore, cannot be accepted as it is.

1.27. Constitutionality of the legal clause at issue

1.27.1. As stated by the majority opinion, the legal clause at issue is a regulation that punishes individuals who are subject to enlistment into active duty that have not reported within five days of reporting date without reasonable cause, and by restricting the free exercise of conscience of conscientious objectors to military service, it places restrictions on the freedom of conscience established by Article 19 of the Constitution.

Thus, in this situation of compelling military service duty to conscientious objectors through criminal restrictions, the Constitutional interest sought by the duty of defense as established by Article 39 Section 1 and Article 5 Section 2 of the Constitution, that is, preservation of the state and its territories, protection of the life and safety of its citizens, or more specifically, the Constitutional interest of maintaining military might and the Constitutional interest of freedom of conscience, a fundamental right guaranteed to all citizens, are in conflict with one another.

Here, it can be said that Article 39 Section 1 of the Constitution, by expressing a restriction against fundamental rights, has given priority over fundamental rights the Constitutional interest of maintaining military might, and therefore, the legislator has very far-ranging legislative discretion in seeking to realize the Constitutional interest of maintaining military might. Consequently, in order for the legal clause at issue to become determined as unconstitutional, it must be shown that the clause has stepped beyond the boundary of legislative discretion by proving, for example, that the clause went beyond the limit of what is permitted by principle of justice or that the facts that serve as foundation for legislation or the choice in policy was clearly shown to have been arbitrary.

1.27.2. First, we discuss whether the clause at issue went beyond the limit of what is permitted by principles of justice.

We first consider whether the legal clause at issue, in imposing criminal prosecution to

conscientious objectors, violates the freedom of conscience to the extent that it goes beyond the limit of what is permitted by principles of justice.

There is a basic different between the freedom of conscience and other fundamental rights. Freedoms such as freedom of life, property, expression, association, and employment are guaranteed regardless of the personal, subjective internal circumstances of the subject for whom such freedoms apply, and they have the possibility of being violated by state authority. Therefore, if a legal regulation infringes upon the fundamental rights mentioned above of one individual, then when applied to other individuals, this legal regulation also violates their fundamental rights. In contrast, because the freedom of conscience is intrinsically subjective, the infringement against the freedom of conscience that arises from a clash between a conscientious decision and the legal order of the state must also be personal in nature, and it cannot be said that when a legal provision infringes upon the freedom of conscience of one individual, it has the general effect of infringing upon the freedom of conscience of other individuals. Consequently, we could not request that during the process of formation of a law, the legislator consider as preventative measure, the freedom of conscience for all situations where a conflict with such personal and non-generalizable conscience can possibly occur; a duty to provide alternative plans to take the place of a legal duty based on the countless, unpredictable possible occurrences of individual conflicts in conscience cannot, as a matter of principle, be imposed on the legislator, and even if nonlegislation, as in the case of the regulation mentioned supra, leads to violation in freedom of conscience, this does not make the law unconstitutional. (Vgl. Herdegen, Gewissensfreiheit und Normativitat des positiven Rechts, S. 286f).

When such essential qualities of freedom of conscience is considered, even if the legislator did not, during the process of legislating the legal clause at issue, provide for general regulations to protect conscience, it cannot be concluded that it has deviated from what is allowed under prima facie justiciability and beyond the limit of what is permitted by principles of justice and therefore is unconstitutional.

Next, we consider whether the legal clause at issue runs counter to principles of justice by criminally prosecuting those who hold to a conscience that includes ideals of justice.

In other words, it is claimed that those conscientious objectors who are punished under the legal clause at issue are so-called conscientious criminals who strive for and seek to realize through passive means the righteous standard that this community should move towards, and a legal provision such as this which oppresses and applies sanctions against them is incompatible and at odds with notions of justice and absolutely unacceptable.

But the conscience that the Constitution seeks to protect is ‘a strong and earnest voice from the heart that, in determining what is right and wrong, if not followed, would mean the collapse of an individual’s very meaning of existence,’ an urgent and specific conscience rather than an abstract concept, and must also be a conscience for which its value judgment satisfies the conditions of consistency and generalizability.

The so-called conscientious objectors at issue with the legal clause considered in this case claim to be refusing enlistment in accordance with a command from their conscience, which is motivated by the doctrine of the religion they adhere to, so such conscience of objectors to military service, unless done for the purpose of simple draft evasion, should be

seen to prohibit all acts of violence including wars. Whether such a conscience falls under the type of conscience of which its value decision satisfies the conditions of consistency and generalizability is determined by whether the person with the conscience that respects non-violence, when faced with a threat against his life, body, or property from another person, would fully give up the protection from public authority that necessarily carries with it an exercise of force. It is especially worth noting that our Constitution renounces wars of invasion (Constitution Article 5 Section 1) which means maintenance of Korea's military powers must take on the characteristics of self-defense, and therefore, objection to military service duty must be associated with relinquishment of the right of self-defense.

If an objector to military such as the one above has relinquished all self-defense protections including that arising from the use of force through public authorities, then the consistency and generalizability of his conscience and ideals can be acknowledged, but the fact that he is maintaining his life and property within the realm of this nation itself is clear proof that he is receiving protection from the national public authority's use of force, or in other words, from a systemized form of violence. And it is difficult to find any data about such so-called conscientious objectors objecting to protection from the public authority's use of force. Thus, if they claim to be opposed to the performance of military service duties which is a major component of the national public authority while enjoying the protection through that public authority their life, body, and property, the conscience held by such so-called conscientious objectors can only be considered a contradiction that requires simultaneous exercise of mutually inconsistent values, and one cannot help but feel skeptical about what really is behind the conscience of these objectors to military service that claim to be pacifist, and whether it can be accepted as a sincere system of values that satisfies the conditions of consistency and generalizability. Such skepticism is of a fundamental nature and cannot be eliminated merely by showing that such objectors to military service advocated their conscience despite suffering through the enormous disadvantages of prison sentences and the accompanying handicap in work and life and social alienation and the fact that conscientious objection is widely recognized in other states and its acceptance is demanded at the international level. On the contrary, the conscience that wells up from deep inside our hearts moves us to more earnestly contemplate this issue with the future of our community in mind, despite the sympathetic social atmosphere and public opinion toward so-called conscientious objectors. However, at least with the current claims raised by conscientious objectors including the appellant, it is difficult to find even the trace of sincerely being concerned about, let alone a clear understanding and explanation of this issue, and therefore, it is difficult to accept what they claim as their conscience as a conscience that possesses an earnest value system that is consistent and generalizable.

Then, the conscience of these conscientious objectors is in itself a contradictory, hopeful fancy lacking in consistency and generalizability for which whether it should be included within the type of conscience protected by the Constitution at all is debatable, and at the very least, it is difficult to accept it as a standard of justice that regulates our community, and therefore, we cannot view the imposition of punishment against conscientious objectors as a persecution against earnest conscientious lawbreakers against whom the exercise of legislative authority goes beyond the limit of prima facie rightfulness to the extent that the inconsistency between it and justice cannot be suffered.

1.27.3. Next, we consider whether the legal clause at issue was a legislative measure that is clearly arbitrary.

First, the issue is whether the state imposing criminal sanctions on the nonperformance of military service duty is appropriate for accomplishing the legislative purpose set by the Constitution, that is, aims such as maintenance of military might, survival of the state and preservation of its territories, and safeguarding of its citizens' life and security. Even if the criminal sanction based on the legal clause at issue does not have the effect of persuading to participate in armed service those who have objected to the performance of military service duty and chose criminal prosecution because they could not reject the command from their conscience, since the general preventative effect of the criminal sanction could at the very least restrain from spreading, the use of conscience as an insincere pretext to evade the draft, one can easily assent to the appropriateness of the legislative purpose of the measures for criminal sanction. Especially, considering the fact that the penalty provided for by the Military Service Act is aimed at criminals of law rather than criminals of nature, it could even be said that such general preventative effect is the core function of the penalty measures set by the legal clause at issue.

Then, the core issue is whether the provision of such criminal sanctions are excessive considering that it punishes criminals of conscience who have caused no physical damage to others, and therefore, should be replaced by another approach.

The appellant demands for a resolution of the clash between conscience and military service duty by providing for an alternative civil service arrangement (hereinafter 'alternative service arrangement'). However, the legal clause at issue that is subject to a review of constitutionality does not in itself provide for the duty of military service; rather, it sets, on the basis of the duty of military service as provided in Articles 3 and 5 of the Military Service Act, regulations for imposing sanctions in situations where that duty is violated. Consequently, alternative service, which leads to a change in the system of military duty itself, seems to have little relation to the determination of unconstitutionality of the legal clause at issue which does not involve the review of the above mentioned clauses that establish the duty of military service, and therefore, the determination of this issue cannot fit within the scope of determinations to be made within this case (Such confusion seems to have sprung from the decision of the appealing court to request recommendation only on this particular clause while raising the right of conscientious objection to military service as an issue). If the system of alternative service is being suggested as a mitigated form of sanction, it must be understood that although alternative service, as considered supra, may bring changes in the duty itself, it cannot be looked upon as a sanction against the violation of the duty, and if the state were to impose this without amending first the duty of military service, then it would be doing so despite the fact that it has the responsibility of assessing for acts that are in violation of this duty, the negative value judgments of illegality and reproach, thereby setting through a regulatory request a clear standard of judgment, and if it instead vests as legal consequence, value-neutral volunteer service or alternative service, then the state itself is acting in an inconsistent manner, neglecting its position as a guardian of justice and norms. Therefore, it is difficult to agree with the position that considers the system of alternative service as a form of mitigated sanctions.

Then, we go on to consider whether the form of sanction is excessive. It can be said that criminal punishment is the strongest and harshest available form of sanction against the nonperformance of a public legal duty. The legal clause at issue, in particular, sets a prison sentence of less than three years with possibility of parole, so the resulting degree of

infringement against fundamental rights is considerable. Since forms of sanctions like administrative penalties such as payment of fines, that is sanctions other than criminal punishment, exist to punish the nonperformance of duty, one can question whether criminal punishment really needed to be chosen as the sanction against the violation of military service duty, whether a more mitigated form could not be have been chosen among the types of punishments available. However, active service, the subject of the legal clause at issue, can be imposed for a period ranging from two years to two years and four months (Military Service Act Article 18) and can be extended by up to one year should certain defense needs arise, (Article 19), and if the fact that such active duty is in the form of compulsory conscription and therefore limits individual freedom to a substantial degree is considered, then the prison sentence with possibility of parole and the violation of duty appear to be proportionate to one another.

Of course, should the circumstances be such that the need to maintain military might is reduced drastically and the situation no longer calls for such a strong sanction as criminal punishment, formation of a new, mitigated form of sanction may be considered. Of course, such mitigation in sanction would only be done on the precondition that it can be reasonably predicted that there would be no problems with the maintenance of military might even after that new system is instituted.

Regarding this matter, the appellant claims that although recognizing a system of alternative services may cause problems such as unequal treatment or increase in evasion of military services, such problems can be addressed by implementing an alternative service system that is comparable to active duty in terms of length of service, amount of hard labor required, or living with a group, and when one considers the fact that conscientious objectors to military service comprise of only 0.2% of all who are drafted and that modern war is becoming increasingly scientific in nature, implementing an alternative service system, rather than causing harm to national security, would instead be an appropriate use of human resources.

On the other hand, the Defense Minister and head of the Military Manpower Administration claim that if alternative service is allowed in a country like ours, where present conditions for life as a serviceman within the military is poor, there is a concern that the number of objectors to military service will increase rapidly, and additionally, in a situation where it is difficult to ensure a strict screening process to determine conscientious objectors to military service, there is a concern that the uniformity and unity of the conscription system will be harmed to the point that the system itself collapses, and furthermore, since it is difficult to find a service outside the military which entails a similar amount of hard labor as required in active service duty, alternatives service cannot be seen as a system that is in harmony with ensuring national security.

In this manner, each side, depending on their own position, presents opposing predictions with regard to military service duty and what may come about if the sanction were mitigated. When we consider points such as the fact that the number of those eligible to be drafted is decreasing as a result of lowered birth rates, that mitigation of sanctions can provide new motivation to object to military service on the pretext of conscience, that if a religious body that has some influence, perhaps as a part of an adjustment in doctrine, decides to object to bearing arms or a new religious organization that includes refusal to bear arms in its doctrine forms and its influence grows rapidly, then we cannot dismiss the

possibility that the number of conscientious objectors could multiply to the extent it goes beyond bearable capacity, the fact that modern warfare is turning more scientific does not necessarily mean the size of a military is less important and that relative balance against the size of army that hostile forces possess must also be considered, we cannot conclude, based on the fact that the percentage of conscientious objectors is low at this time, that there will be no significant effect on the maintenance of military might.

Therefore, when a legislator uses a hypothetical situation as the basis for formulating a legislation- at a time when future prospects are unclear on whether necessary national defense can be maintained when the restriction on the failure to perform the duty of military service is relaxed- we cannot criticize such decision and say that it is an arbitrary legislation that exceeded the bounds of legislative discretion.

In order to prove that the Clause in the instant case is unconstitutional, it must be proven that the legislator exceeded the bounds of legislative discretion to promulgate an arbitrary law even though national defense would not be affected if the restrictions imposed by the Clause in the instant case were relaxed. As noted in the foregoing analysis, a review of the surrounding circumstances indicates and unclear prospect for the matter while there was no basis to prove that the Clause resulted from arbitrary legislation.

Thus, we cannot say that Clause in the instant case that imposes a prison term of 3 years or less on conscientious objectors to military service is an arbitrary legislation that imposes an excessive penalty.

1.27.4. Sub-conclusion

Then- regardless of our vantage point- we cannot say that the Clause in the instant case is an unconstitutional statute that exceeded the bounds of legislative discretion.

1.28. The majority opinion takes one additional step by making recommendations to the legislature to seriously consider whether there is a way to relieve the tension between the freedom of conscience and the of national security and allow both legal benefits to co-exist, whether there is a way to secure the actualization of public benefit called national security while protecting the conscience of conscientious objectors, and whether our society has matured enough to understand and tolerate conscientious objectors to military service. It also recommends to the law applying institution to considering taking measures that supplement the legislation by pro-conscience application of the law even if alternative service is not adopted.

However, as noted in the foregoing analysis, conscientious objection to military service which is problematic at its current stage has an antinomic aspect that seeks two incompatible values. Answers to these questions of legal, philosophical, political, and ideological problems have not been provided. The question of whether their conscience is worthy of constitutional protection, and whether such conscience can be reconciled with notions of justice that can been tolerated by our society have not been adequately answered. We cannot agree with the position that classifies these objectors to military service as serious advocates of conscience and recommends a review of the accommodation of objectors to military service after considering opinions of social organizations and international trends.

Furthermore, we think that making the recommendations to the legislature with wide discretion in selecting policy measures to acknowledge legislative fact-findings and realize constitutional values has the danger of being viewed as an interference or a violation of the legislative authority by the judicial authority- especially when the future prospects of maintaining national defense is unclear when a change is implemented in the system.

We hereby note that recommendations made- when one cannot be confident of the justifiable legislative direction- on matter unrelated to the subject of judgment in the instant case to the legislature on legislative matters exceed the boundaries of judicial judgment and therefore are improper.

1.29. F. Conclusion

Based on the foregoing analysis we join the majority in upholding constitutionality of the Clause in the instant case. However, we issue a separate opinion as we disagree in the rationale that supports such decision.

2004. 8. 26.

Presiding Justice	Young-Chul Yoon
Chief Justice	Young-Il Kim
Justice	Sung Kwon
Justice	Hyo-Jong Kim
Justice	Kyung-Il

Kim
Justice In-Joon
Song
Justice Sun-Hwae
Joo
Justice Hyo-Sook
Jeon
Justice Sang-
Kyung Lee