

## Student Note

# Unpatriotic Heretics or Conscientious Objectors: Difficulties Which Jehovah Witnesses Face in Taiwan and South Korea

Chien-Chih Lin\*

### ABSTRACT

*In Taiwan and in South Korea, Jehovah's Witnesses were incarcerated in the prison for many years because they violated respectively the two countries' Military Act. They argued that the laws at issue violated their freedom of religious belief, which is clearly written and protected in the Constitutions of the two countries. They petitioned the court for constitutional review. For some unknown reasons, the holdings and the reasoning of two cases are almost identical. This article wants to figure out why the decisions of the two countries with different political and socio-economical contexts are incredibly similar. The author believes that there must be some reasons not written in the published documents. In a nutshell, the history of the two countries, the judicial review system, and the domestic need for strong national defense are the most possible reasons interwoven together to generate this resemblance. Although the two majority opinions both reached conservative conclusions, it is worthwhile to note that the aftermaths of the two cases are quite different. After the Interpretation No. 490, the provision at issue was amended and the replacement service has been formally recognized as one kind of military service ever since. On the other hand, the replacement service or other alternative is still*

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\* Ph.D. Student, College of Law, National Taiwan University. Email: d98a21009@ntu.edu.tw. The author deeply appreciates constructive comments and suggestions of anonymous reviewers. In addition, the author sincerely thanks Professor Jau-Yuan Hwang, Professor Jiunn-Rong Yeh and Professor Wen-Chen Chang for their inspiration and encouragement.

*not available in South Korea. It is still a harsh and solitary way for the Jehovah's Witnesses and other conscientious objectors in South Korea to move on.*

**Keywords:** *Jehovah's Witnesses, Freedom of Conscience, Freedom of Religious Belief, Interpretation No. 490*

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## I. INTRODUCTION

“And he will judge between the nations, and will decide concerning many peoples; and they shall beat their swords into plowshares, and their spears into pruning-hooks; nation shall not lift up sword against nation, neither shall they learn war anymore.”<sup>1</sup> This is what the Bible tells us. Worldwide peace without any wars or armed conflicts is always a dream we yearn for. In recent decades, however, thousands of people have been imprisoned in jail simply because they, including but not limited to Jehovah’s Witnesses, deeply believe that it is wrong to serve in the army. Among them, Jehovah’s Witnesses are the most well-known conscientious dissenters around the world, using non-cooperative but peaceful means to convey their belief. They are often labeled as unorthodox Christians and therefore subjected to severe discrimination.<sup>2</sup> According to their interpretations of the Bible, Jehovah’s Witnesses refuse to take part in any kind of armed forces.<sup>3</sup> Such belief gives birth to many constitutional issues and, not surprisingly, leads to many contentious cases both in Taiwan and South Korea.

In Taiwan, Judicial Yuan Interpretation No. 490<sup>4</sup> was precisely the case, just like the Conscientious Objection of Military Service Case<sup>5</sup> in South Korea. In both cases, Jehovah’s Witnesses were incarcerated in the prison for many years because they violated respectively the two countries’ Act of Military Service System Military Service Act<sup>6</sup> of Taiwan and Military Service Act of South Korea. As will be discussed in depth later, the Jehovah’s Witnesses in both countries received their draft cards but chose to ignore or disobey them. Consequently, they were accused and sentenced. They argued that the laws at issue violated their freedom of religious belief, which is clearly written and protected in the Constitutions of the two countries. Both the Constitution Courts granted certiorari. For some

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1. *Isaiah* 2: 4.

2. For more concrete stories, see PETER IRONS, *THE COURAGE OF THEIR CONVICTIONS* 13-35 (1988).

3. These interpretations of the scriptures are, in fact, not unique to Jehovah’s Witnesses. For more details, see Karen Musalo, *Swords to Plowshares: Why the United States Should Provide Refuge to Young Men Who Refuse to Bear Arms for Reasons of Conscience*, 26 *SAN DIEGO L. REV.* 849, 859-67 (1989).

4. J.Y. Interpretation No. 490 (1999), available at [http://www.judicial.gov.tw/constitutionalcourt/en/p03\\_01.asp?expno=490](http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=490).

5. Conscientious Objection of Military Service Case, Judgment of Aug. 26, 2004, 16-2(A) KCCR 141, 2002 Hun-Ka 1 (Const. Ct.) (S. Korea), available at [http://english.court.go.kr/home/view2/xml\\_content\\_view02.jsp?seq=10078&cname=영문판례&eventNo=2002Hun-Ka1&pubflag=0&eventnum=&sch\\_keyword=&cid=01040002](http://english.court.go.kr/home/view2/xml_content_view02.jsp?seq=10078&cname=영문판례&eventNo=2002Hun-Ka1&pubflag=0&eventnum=&sch_keyword=&cid=01040002).

6. Pingifa [Act of Military Service System Military Service Act] (Taiwan), available at <http://law.mnd.gov.tw/FLAWDAT0201.asp?lsid=FL005457>. Please be reminded that Pinifa is translated into Conscription Act in the English version of Interpretation No. 490.

unknown reasons, the holdings and the reasoning of two cases are almost identical.

Therefore, this article wants to figure out why the decisions of the two countries with different political and socio-economical contexts are incredibly similar. I believe that there must be some reasons not written in the published documents. I want to figure out the reasons for the resemblances of the two majority opinions. Why are they so conservative and even merciless if freedom of religion and conscience are undoubtedly protected under the Constitution? Should constitutional rights be compromised when in conflict with the constitutional duty? I will introduce the two cases first and focus on the issue of conflict between freedom of religion and compulsory military service. Other issues, such as the guarantee against double jeopardy, will be omitted. I try to analyze the two majority opinions methodically from many possible angles, such as the judicial review system, the historical context of the two cases, and so on.

This article will be divided into four parts. The first part relates to the research purpose and research method. The second part will be the introduction of the two cases, including the majority opinions and the concurring opinions. The dissenting opinions will also be included, if possible. In the third part, which is the main body, I will compare the two cases and provide my own analyses. The last part will be the conclusion, which concerns about the possible alternative service options, such as replacement service,<sup>7</sup> for those conscientious objectors.

## II. CONSTITUTIONAL CASES CONCERNING JEHOVAH'S WITNESSES

### A. *Judicial Yuan Interpretation No. 490*

#### 1. *Facts*

According to Act of Military Service System Military Service Act,<sup>8</sup> male citizens of the Republic of China are obligated to do military service. A man who is eighteen starts his military service day from January first of the proceeding year<sup>9</sup> if there are no special reasons.<sup>10</sup> There are, however, still some exceptions. For example, a man who is mentally or physically disabled or seriously ill to the point of not reaching the service standard is exempted

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7. It should be noted that the official English translation of the possible alternative service is confusing in Taiwan. "Replacement service" is used in Act of Military Service System Military Service Act, while "substitutive service" is adopted by Conscription Agency, Ministry of Interior. In this article, both refer to the same thing.

8. Pingyifa, art. 1.

9. *Id.* art. 3.

10. *Id.* art. 3.

from military service.<sup>11</sup> Besides, Punishment Act for Violation to Military Service System<sup>12</sup> regulates that people will be sentenced to a no-more-than-five-year imprisonment, for those who are supposed to be enlisted into a military camp but have exceeded five days limit without any reason, and who have tried to avoid recruitment of active service, and refused to accept a recruitment order.<sup>13</sup>

Several Jehovah's Witnesses in Taiwan received their draft cards but refused to accept any military training out of their conscience and belief. They were sentenced to the minimum term of imprisonment because of their non-violent rejection. But it doesn't change the fact that they are still obligated for an enlistment. Nevertheless, they would continue to resist the second draft card and the military training thereof. This might, at least in theory, lead to a life imprisonment.

After exhausting all normal remedies available,<sup>14</sup> they submitted their appeal in 1998 to the Justice of Constitutional Court, Judicial Yuan, which is responsible for interpreting the Constitution of Republic of China and unifying the interpretations of laws and orders in Taiwan. The Justice of Constitutional Court, Judicial Yuan, in a 13: 2 opinion, made Judicial Yuan Interpretation No. 490 [hereinafter Interpretation No. 490] in 1999. Two Honorable Justices, Ho-Hsiung Wang and Tieh-Cheng Liu, issued their own dissenting opinions.

## 2. *Main Issues*

Article 1 of the Act of Military Service System Military Service Act provides that all eligible males shall be drafted for military service, and Article 59, Paragraph 2, of the Enforcement Act of the Conscription Act further prescribes that the person sentenced to imprisonment who is eventually given pardon, commutation, probation or parole shall not be relieved from military service if he has served less than four years in prison, with no exception to be made for conscientious objectors. Do the said provisions violate Article 13 of the Constitution guaranteeing the freedom of religious belief, thus being null and void?<sup>15</sup>

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11. *Id.* art. 4.

12. Fanghai Pingi Chihtsui Tiaoli [Punishment Act for Violation to Military Service System], art. 4 (Taiwan), available at <http://law.mnd.gov.tw/FLAWDAT0202.asp?lsid=FL005601>.

13. Fanghai Pingi Chihtsui Tiaoli [Punishment Act for Violation to Military Service System], art. 4 (Taiwan), available at <http://law.mnd.gov.tw/FLAWDAT0202.asp?lsid=FL005601>.

14. Ssufayuen Tafakuan Shenlianchienfa [Constitutional Interpretation Procedure Act], § 5, sec. 1, subsec. 2 (Taiwan).

15. J.Y. Interpretation No. 490 (1999).

### 3. *Holding and Reasoning*

Many disputes emerged in this case, including but not limited to freedom of religious belief, equal protection of religion, and freedom of conscience. In Interpretation No. 490, the majority first elaborated that freedom of religious belief<sup>16</sup> “shall include freedom of personal religious belief, freedom of religious practices, as well as freedom of religious association. Freedom of personal religious beliefs, in which each individual’s own ideas, speech, beliefs, and spirit are involved, is an absolute right that shall not be infringed upon. The derived freedoms of religious acts and religious association, which may affect others’ freedoms and rights or impair public order, virtuous customs, social morality, or integrity, are, hence, relative rights. Except for the freedom of personal religious belief that shall be absolutely protected and never be infringed upon or suspended, it is permissible for relevant state laws to constrain, if necessary and to the least restrictive effect, freedoms of religious practices and association.”<sup>17</sup>

That is to say, freedom of religion can be divided into two kinds: the inner/ essential kind and the outer/derived one. The inner part is absolutely protected without any exception or compromise. The derived freedoms of religious acts and association may, however, be restricted in order to protect other rights or values enshrined in the Constitution. When the derived part is restricted, it is unconstitutional only if the statute in question infringes the propositional principle bestowed in Article 23 of the Constitution of Republic of China.

The Court further emphasized that freedom of religion is not an absolute right. It can be restricted for the following reasons: to prevent infringement upon the freedoms of other persons, to avert an imminent crisis, to maintain social order or to advance public welfare.<sup>18</sup> In this Jehovah’s Witnesses case, the majority find it compelling as a legislative purpose to defend the country. Thus, the freedom of religion shall give way to national security since the latter is considered to be the foundation of all freedoms in majority opinion. As to the means, the majority averred that such military service duty is an essential measure to protect the people and to guarantee national security. Furthermore, “prescribing a male citizen’s duty to render military service does not violate human dignity, nor does it undermine the fundamental values in the Constitution.”<sup>19</sup> Hence, the freedom of religious belief with which those Jehovah’s Witnesses were vested is not unconstitutionally prohibited.

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16. ZHONGHUA MINGUO XIANFA [The Constitution of the Republic of China], art. 13 (1947).

17. J.Y. Interpretation No. 490, para. 2.

18. ZHONGHUA MINGUO XIANFA [The Constitution of the Republic of China], art. 23 (1947).

19. J.Y. Interpretation No. 490 (1999).

As to the dispute of equal protection of religion, the majority argued that “[t]he State shall neither forbid nor endorse any particular religion and shall never extend any privileges or disadvantages to people on the basis of their particular religious belief.”<sup>20</sup> The majority contended that the Act of Military Service System Military Service Act did not violate the equal protection clause enshrined in the Constitution because it did not intend to suppress the Jehovah’s Witnesses, though it might in effect seriously contradict with their belief.

In short, the majority believed that there was a compelling state interest and that the means to that end was sustainable. The statute, therefore, neither infringed the freedom of religious belief nor violated the equal protection of religion.

#### 4. *Dissenting Opinions*

In his dissenting opinion, Justice Ho-Hsiung Wang mentioned that the division of essential freedom of religious belief and derived freedoms of religious acts and association was too superficial. Some religious acts concerned the nucleus of religions. It might be unconstitutional to punish those people who intentionally chose to disobey the secular statutes on account of their religious tenets and conscience. Besides, the replacement service would be a less restrictive way to achieve the same purpose. Forcing those conscientious objectors to render military service was by no means useful to secure the citizens’ lives and national security.

Justice Tieh-Cheng Liu issued another dissenting opinion. He harshly criticized that the majority opinion misunderstood not only the procedural regulations but also the Constitution itself. In his opinion, these provisions in Act of Military Service System Military Service Act and Punishment Act for Violation to Military Service System, which led to a cycle of lifetime punishment, might be regarded as cruel and unusual to those conscientious objectors. He argued that Article 22 of the Constitution, which prescribed that “all other freedoms and rights of the people that are not detrimental to social order or public welfare shall be guaranteed under the Constitution,”<sup>21</sup> would not permit this kind of punishment. The state should tolerate all kinds of religion as much as possible unless there is clear and present danger. Finally, he also asked the legislators to consider the possibility of including replacement service as one kind of military service.

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20. *Id.*

21. *Id.* art. 22.



5. *Aftermath*

Although Interpretation No. 490 confirmed the constitutionality of Act of Military Service System Military Service Act, the Article 2<sup>22</sup> of that was finally amended in 2000 and replacement service was regarded as one kind of military service since then. In addition, those conscientious objectors were pardoned by the former President Chen Shui-bian. Now, according to the statistics, which was made by Conscription Agency, Ministry of Interior, listed below, 196 Jehovah's Witnesses have already rendered replacement service until 2007.<sup>23</sup> Taiwan has become the first Asian country to adopt a program which provides its draft age citizens with the option of completing their constitutional obligation through performing replacement service as military service.<sup>24</sup>

**Table 1 Numbers of Replacement Servicemen: For Religious Reasons**

Sect Year	Jehovah's Witnesses	Mennonite <sup>25</sup>	Buddhism	Ikuantao <sup>26</sup>	Totality
2000	28	0	3	0	31
2001	16	0	4	0	20
2002	14	0	4	1	19
2003	8	0	2	0	10
2004	27	0	6	0	33
2005	26	0	6	0	32
2006	40	1	4	0	45
2007	37	0	4	0	41
Totality	196	1	33	1	231

Source: Conscription Agency, Ministry of Interior, Taiwan.

22. Art. 2 enumerates the definition of military service. The military services in the Act now refer to military Officer Service, non commission officer service, enlisted man, and replacement service. The last is not included before 2000.

23. Conscription Agency, Ministry of Interior, Numbers of Replacement Servicemen: For Religious Reasons, <http://www.nca.gov.tw/> (last visited Jan. 5, 2010).

24. Carolyn R. Wah, *The Teachings of Confucius: A Basis and Justification for Alternative Nonmilitary Civilian Service*, 2 RUTGERS J.L. & RELIGION 1, 13 (2001).

25. For more information about Mennonite, see Mennonite Information Source, <http://info.mennolink.org/menno.html> (last visited Feb. 27, 2010).

26. For more information about Ikuantao, see YiGuanDao, <http://www.yiguandao.com/main.htm> (last visited Feb. 27, 2010).

## B. *Conscientious Objection of Military Service Case in South Korea*

### 1. *Facts*

In the Chapter II of the Constitution of Republic of Korea [hereinafter Constitution of ROK],<sup>27</sup> which concerns with the rights and duties of Korean citizens, Article 10 stipulates that “[a]ll citizens shall be assured of human dignity and worth and have the right to pursue happiness. It shall be the duty of the State to confirm and guarantee the fundamental and inviolable human rights of individuals.” Article 19 guarantees that “[a]ll citizens shall enjoy freedom of conscience.”<sup>28</sup> The first paragraph of Article 20 ensures that all citizens enjoy the freedom of religion, and the second paragraph asks that no state religion may be recognized, and church and state are to be separated.<sup>29</sup>

Nevertheless, Article 37, Paragraph 2 clearly regulates that the “freedoms and rights of citizens may be restricted by law only when necessary for *national security*, the maintenance of law and order, or for public welfare. Even when such restriction is imposed, no essential aspect of the freedom or right shall be violated (emphasis added).”<sup>30</sup> Furthermore, Article 39, Paragraph 1 prescribes that all citizens have the duty of national defense under the conditions as prescribed by law. In its second paragraph, no citizen may be treated partially on account of the fulfillment of his obligation to military service.<sup>31</sup>

Meanwhile, the Military Service Act provides that any man, who is a national of the Republic of Korea, shall faithfully perform military service under the conditions as prescribed by the Constitution of the Republic of Korea and the Act. Besides, no special exception to the military service may be prescribed except as provided by the Military Service Act itself.

Article 88 of the Military Service Act,<sup>32</sup> Section 1 stipulates that persons who have received a notice of enlistment in the active service or a notice of call (including a notice of enlistment through recruitment), and fail to enlist in the army or to comply with the call, even after the expiration of the following report period from the date of enlistment or call, without any justifiable reason, shall be punished by imprisonment for not more than three years.<sup>33</sup>

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27. CONSTITUTION OF THE REPUBLIC OF KOREA, art. 2, available at [http://korea.na.go.kr/res/low\\_01\\_read.jsp](http://korea.na.go.kr/res/low_01_read.jsp).

28. *Id.* art. 19.

29. *Id.* art. 20.

30. *Id.* art. 37, para. 2.

31. *Id.* art. 39.

32. Military Service Act, art. 88 (S. Korea).

33. Conscientious Objection of Military Service Case, Judgment of Aug. 26, 2006, 16-2(A)

Several Jehovah's Witnesses were accused of violating the Military Service Act for failure to enroll for military service. They petitioned the court for constitutional review, claiming that the Military Service Act applicable to the accused facts of the underlying case had infringed the freedom of conscience and freedom of religion of those who objected to military service on the ground of their religious conscience. The court thereupon accepted the petition and filed a request for constitutional review with the Constitutional Court.<sup>34</sup>

## 2. *Main Issues*

Do the said provisions of Military Service Act violate Articles 10, 19, and 20 of the Constitution of ROK guaranteeing the freedom of conscience and freedom of religion, thus being null and void?

## 3. *Holding and Reasoning*

The majority opinion first acknowledged that freedom of conscience, which is the most powerful and earnest voice of one's heart, is protected by the Constitution. The majority opinion also correctly understood that "[w]hat becomes an issue in reality under the freedom of conscience is not the conscience of the majority of society, but the conscience of the minority intending to deviate from the legal order of the nation or the ethical rules of the society."<sup>35</sup> It further contended that regardless of what forms the basis of the conscientious decisions, be they religious decisions, the view of the world or other value systems, the conscientious decisions of all substance are protected by the freedom of conscience.

Like the Interpretation No. 490 in Taiwan, the majority then distinguished internal realm of the formation of the conscience from the external realm of the exercise of the conscience that has been formed.<sup>36</sup> It anatomized that the former is the freedom deeply inherent to everyone's heart, which is an absolutely protected fundamental right so long as it stays within one's heart. On the contrary, the latter is the freedom to express the conscience. To be more specific, the freedom to act pursuant to the conscience and the freedom not to be forced to act against the conscience. It was, compared to the former one, simply a relative freedom that may be restricted or prohibited by the statute as it may violate the legal order or endanger the national security.

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KCCR 141, 2002 Hun-Ka 1 (Const. Ct.) (S. Korea).

34. *Id.* at 14.

35. *Id.* at 20.

36. *See id.*

As mentioned above, Article 39 of the Constitution of ROK prescribes that all citizens have the duty of national defense. This constitutional duty would inescapably conflict with Jehovah's Witnesses' freedom to act pursuant to the conscience. The Court recognized that national security is not only a momentous state interest but also "an indispensable prerequisite for the existence of the nation, preservation of the national territory, protection of the life and safety of the citizens, and also as a basic prerequisite for the exercise of the freedom by all citizens."<sup>37</sup> In other words, since the national security is the prerequisite of the existence of Republic of Korea, it becomes the limit of all fundamental rights.

Besides, under the principle of proportionality, the majority did do some balancing between national defense and the freedom to exercise conscience in this case. In order to realize whether the freedom of religion and freedom of conscience were unduly restricted, the Court tried to figure out the cost and benefit of the military service. Since the expression of religious belief in this case was at the cost of unforeseeable national hazard, the question at issue became a question of "judging whether the public interest intended to be achieved by the imposition of the duty of military service may still be achieved notwithstanding the exception provided by the legislators in consideration of the freedom of conscience."<sup>38</sup> The Court then discussed an alternative service solution and agreed that it might effectively resolve the conflict in this case. The adoption of alternative service system was, unfortunately, by no means the task of the judges of the Constitutional Court. The legislators have a wide and full authority in specifying the constitutionally imposed duty of national defense. Due to the intensifying antagonism between North Korea and South Korea, it should not be deemed unreasonable, or even unconstitutional<sup>39</sup> that the time is not ripe for the adoption of an alternative service system according to legislative judgment.

Consequently, the freedom of conscience endowed by the Article 19 of the Constitution of ROK does not vest the Jehovah's Witnesses with the privilege to refuse their performing the duty of military service.

#### 4. *Dissenting Opinion*<sup>40</sup>

There was one dissenting opinion written together by Justices Kim kyung-il and Jeon Hyo-sook. The two Justices agreed with the majority opinion that national defense was of great significance considering the social and political context in South Korea. Nevertheless, they thought that

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37. *See id.* at 23-24.

38. *Id.* at 26.

39. *See id.* at 31.

40. *See id.* at 38-48.

conscientious objection is based upon an ideology of pacifism which is also embodied in the Preamble of the Constitution of ROK by declaring “contribution to perpetual world peace and common prosperity of the human race.”<sup>41</sup>

Besides, the conflict between constitutional duty of military service and constitutional right of freedom of religion, however, was not unavoidable. The legislators had the obligation to harmonize the antagonism by providing alternative service system, which would neither hinder the equal performance of the duty of military service nor harm the national defense power based on mandatory conscription.

In conclusion, the dissenting opinion believed that the provision at issue was unconstitutional in this case.

### 5. *Aftermath*

Like the Interpretation No. 490 in Taiwan, the constitutionality of Military Service Act of South Korea was upheld. Since South Korea acceded to the ICCPR in September 1990,<sup>42</sup> the Jehovah’s Witnesses thereupon sought relief from the United Nations Human Rights Commission.<sup>43</sup> They claimed that the compulsory nature of military service and the criminal punishments had deprived their rights of freedom of conscience and religion under Article 18(1) of the ICCPR.<sup>44</sup>

The Committee observes that while the right to manifest one’s religion or belief does not as such imply the right to refuse all obligations imposed by law, it provides certain protection, consistent with Article 18, Paragraph 3, against being forced to act against genuinely-held religious belief.<sup>45</sup> The Committee also notes that the authors’ refusal to be drafted for compulsory service was a direct expression of their religious beliefs.<sup>46</sup> As to the national security, social cohesion and equitability arguments held by South Korea, the Committee notes that an increasing number of those States parties to the Covenant which have retained compulsory military service have introduced alternatives to compulsory military service, and considers that South Korea has failed to show what special disadvantage would be involved for it if the rights of the Jehovah’s Witnesses’ under Article 18 would be fully

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41. CONSTITUTION OF THE REPUBLIC OF KOREA, pmbl.

42. Christin Choi, *Military Conscription And and Human Rights in the Republic of Korea: The Right of Conscientious Objection*, 20 TEMP. INT’L & COMP. L.J. 133, 135 (2006).

43. *Id.*

44. Sarah Joseph, *Human Rights Committee: Recent Jurisprudence*, 7 HUM. RTS. L. REV. 567, 575 (2007).

45. U.N. CCPR/C/88/D/1321-1322/2004 (Jan. 23, 2007), available at <http://www.unhcr.ch/tbs/doc.nsf/%28Symbol%29/26a8e9722d0cdadac1257279004c1b4e?Opendocument>.

46. *Id.*

respected.<sup>47</sup> It is in principle possible, and in practice common, to conceive alternatives to compulsory military service that do not erode the basis of the principle of universal conscription but render equivalent social good and make equivalent demands on the individual, eliminating unfair disparities between those engaged in compulsory military service and those in alternative service.<sup>48</sup> The Committee, therefore, considers that the South Korea has not demonstrated that in the present case the restriction in question is necessary.<sup>49</sup>

Although the Committee publishes its views of the situation, its ultimate decision is not binding and parties have no legal obligation to abide by the Committee's view.<sup>50</sup>

### III. ANALYSES OF THE TWO CASES

As mentioned above, the Interpretation No. 490 in Taiwan and the Conscientious Objection of Military Service Case in South Korea are much alike. The holding and reasoning are analogous in the two cases. In short, the majority opinions from both countries emphasize the importance of the national security, which is regarded to be the foundation of all liberties and rights in the two decision-making processes. Furthermore, the majority opinions aver that the compulsory military system is indispensable to secure the national security and social order. Since national security is prior to any liberties and fundamental rights, fulfilling one's constitutional obligation seems to become a prerequisite for enjoying any constitutional rights. The Justices of Constitutional Courts of the two countries also have elaborated on the meaning and scope of the freedom of religion, which is expressly protected in their Constitutions that they take oath to obey. They contend that the freedom of religion should be divided into two parts. The inner part, which concerns what one thinks or believes in mind, is absolutely protected. The outer part, which concerns how one acts according to his belief in mind, is conditionally protected because it may influence other rights or liberties. In the following paragraphs, I will try to compare the two cases and provide possible reasons about why the two majority opinions are so much alike.

#### A. *Comparison Between the Two Cases*

What causes the two different Constitutional Courts to make the same decisions? I am of the opinion that the reasons for the resemblance may be

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47. *Id.*

48. *Id.*

49. *Id.*

50. Choi, *supra* note 42, at 147.

categorized into the following two factors: facts and norms. The factual factors can be further divided into two facets: the background facts of the two cases and the factual circumstances these two constitutional courts face in their social, political and international contexts. The normative factors include the constitutional norms, the compulsory military systems, and the judicial review systems.

### 1. *Facts*

First, the backgrounds of the two cases are almost the same. Both Taiwan and South Korea remain compulsory military service system. The petitioners in these two cases are Jehovah's Witnesses who refuse to render that military service because of their conscientious belief. Their objection causes criminal penalty for a few years which may ironically lead to a cycle of lifetime punishment.

Besides, the social and political backgrounds are also similar. Both of the two places were once occupied by Japan and underwent a period of authoritarian regime for a long time. After the World War II, Taiwan was ruled by Chiang Kai-shek and his Kuomintang (hereinafter KMT) followers for more than twenty-five years.<sup>51</sup> After Chiang Kai-shek's death, his son, Chiang Ching-kuo, became the successor. During the ruling of former President Chiang Kai-shek and Chiang Ching-kuo, Taiwan was still a party-state country, if not an authoritarian one. Though Taiwan had rapid economic growth, later regarded as a miracle, the fundamental rights listed on the Constitution of ROC were not guaranteed in reality. The creation of Constitutional Court, Judicial Yuan, can be traced back to the late 1940s. Unfortunately, the Court can be seen as an instrument of the KMT regime, labeled as only the rubber stamp of the government and hardly exercised meaningful constitutional review.<sup>52</sup> Following the economic growth, the political transition and democratization in Taiwan gradually emerged in the 1980s and 1990s. The abolition of martial law in 1987 and the first-ever direct presidential election in the Republic of China in 1996 were two significant watersheds. After the abolition of the martial law, the ban on political party was lifted in 1988 as well. Since then, the Constitutional Court has also begun to function more aggressively and the ratio of unconstitutional rulings has risen rather amazingly.<sup>53</sup> The percentage of

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51. Office of the President, Founding Father and Former Presidents: Chiang Kai-shek, <http://www.president.gov.tw/en/> (last visited Jan. 13, 2010)

52. Jiunn-Rong Yeh, *Democracy-driven Transformation to Regulatory State: The Case of Taiwan*, 3(2) NTU L. REV. 31, 37-38 (2008); Tom Ginsburg, *Confucian Constitutionalism? The Emergence of Constitutional Review in Korea and Taiwan*, 27 L. & SOC'Y INQUIRY 763, 768 (2002).

53. Yeh, *supra* note 52, at 44.

unconstitutional rulings has been rising from 1.7% of the first term to more than 40% of the latest term.<sup>54</sup> It is conceivable that the Constitutional Court has had “a strong and salient defense of due process, religious freedom, property right and freedom of contract.”<sup>55</sup>

In South Korea, the democratization was facilitated in the 1980s and 1990s as well after the Kwangju massacre. Since its independence after the World War II, Korea has had six Republics but only the second and the current Sixth Republic have been democracy in complete sense. The other five Republics were corruptive and authoritarian. The elections at that time were manipulated and controlled by military generals.<sup>56</sup> In 1979, the assassination of former President Park Chung Hee finally gave birth to a coup d'état led by Chun Doo Hwan.<sup>57</sup> Protestors assembled and demonstrated in Kwangju, where they had been repressed and attacked by the army. The repression ignited the ardor and aggravated the tension between the protestors and government, which finally brought about the Kwangju massacre. This tragedy further eroded the legitimacy of this authoritarian regime and the government sought to recover its legitimacy by amending the Constitution of ROK. The key issue of the constitutional reform was to create a direct presidential election.<sup>58</sup> Therefore, another protest rose when Chun Doo Hwan announced to postpone the constitutional reform on April 13, 1987. His military colleague as well as his successor Roh Tae-woo later declared a series of political liberalization, including the direct presidential election and new parliamentary election.<sup>59</sup> Finally, the crucial part of the 1987 Constitution, with many political compromises between the main parties,<sup>60</sup> is the direct presidential election. In 1992, Kim Young-sam was inaugurated as the fourteenth president,<sup>61</sup> who is conceived as the first civilian president.<sup>62</sup> “Now that the new military personnel have been charged and tried in court, and now that the military authorities have disappeared from the political arena, the majority of Koreans see the

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54. See Wen-Cheng Chang, *The Role of Judicial Review in Consolidating Democracies: The Case of Taiwan*, 2 ASIA L. REV. 73, 85 (2005).

55. *Id.* at 87.

56. TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 209 (2003).

57. JOHN KIE-CHIANG OH, KOREAN POLITICS: THE QUEST FOR DEMOCRATIZATION AND ECONOMIC DEVELOPMENT 75-80 (1999).

58. GINSBURG, *supra* note 56, at 213.

59. *Id.* at 214.

60. Kyoung Whan Ann, *The Influence of American Constitutionalism on South Korea*, 22 S. ILL. U. L.J. 71, 98 (1997-1998).

61. Office of the President, Former Presidents: Kim Young-sam, [http://english.president.go.kr/president/past\\_presidents/past\\_7th.php](http://english.president.go.kr/president/past_presidents/past_7th.php) (last visited Mar. 14, 2010).

62. Jong-Sup Chong, *Political Power and Constitutionalism*, in RECENT TRANSFORMATIONS IN KOREAN LAW AND SOCIETY 11, 12 (Dae-Kyu Yoon ed., 2000).



Kwangju Uprising as a victory for democracy.”<sup>63</sup>

In addition to the political and social similarities, the two countries both face national security intimidation from their neighboring countries: People’s Republic of China and North Korea. The former consistently announces that Taiwan is one of its provinces and would be attacked if daring to declare independence, while the latter has already caused several serious armed conflicts on the Korean peninsula in recent years. Hence, the security commitment of USA to Taiwan and South Korea undeniably plays a cardinal role concerning the regional stability in East Asia. “Both countries found themselves as United States allies engaged in political-ideological confrontation with Communist regimes that claimed to be the legitimate government of their peoples.”<sup>64</sup> Take Taiwan for an example. After the 1949 retreat of Kuomintang government from mainland China, PRC never gives up exercising whatever means available to preserve its one-China policy and the so-called “territorial sovereignty.” During the 1950s, the United States became involved in the cross-strait disputes, such as the signature of 1954 Mutual Defense Treaty.<sup>65</sup> As to the Korean peninsula, North Korea espouses a “military first” strategy and, just like what PRC does to Taiwan, claims to reunite the Korean peninsula under its control.<sup>66</sup>

We may observe that there are some similarities during the development of Taiwan and South Korea. In the domestic context, the two countries both underwent a period of authoritarian regime for more than forty years. The reelection of parliament and the direct presidential election were the major appeals of their democratization movements. On the other hand, the two countries both face the threat of war from other countries. This international situation not only escalates their need to national security but also serves as the propaganda for the authoritarian government to prolong its reign.

## 2. Norms

As to the normative factors, freedom of religion is plainly protected in article 13 of the Constitution of ROC and Article 20, Paragraph 1 of the Constitution of ROK. The religion-neutral policy is also guaranteed in Article 20, Paragraph 2 of the Constitution of ROK. In Taiwan, this

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63. Ann Jean, *The Socio-Economic Background of the Gwangju Uprising*, 25 NEW POL. SCI. 159, 176 (2003).

64. GINSBURG, *supra* note 56, at 790.

65. See Emerson M. S. Niou, *U.S. Security Commitments to South Korea and Taiwan: Extended Deterrence Versus Dual Deterrence*, in A CHANGING KOREA IN REGIONAL AND GLOBAL CONTEXTS 251, 265 (Lee-Jay Cho ed., 2004).

66. See Sonya Finley, *Democratic America in Northeast Asia: US Strategy, Theater Missile Defense, and Allied Relationships*, in A CHANGING KOREA IN REGIONAL AND GLOBAL CONTEXTS, *supra* note 65, at 75, 89.

religion-neutral policy<sup>67</sup> is entrenched by the Interpretation No. 490, which has the same binding force as the Constitution of ROC itself. That is to say, no religion shall be especially privileged or recognized as state religion in secular countries, such as Taiwan and South Korea. On the other hand, no religion shall be discriminated arbitrarily by the state from the point of religious equality.

In addition, the constitutional review systems in the two countries are similar to the extent that only the Constitutional Court has the authority to declare the statute at issue unconstitutional. Generally speaking, the two systems are both abstract review systems as well as centered ones.<sup>68</sup> In Taiwan, Articles 78 and 79 of the Constitution of ROC entrust the Justices of the Constitutional Court with the exclusive authority to interpret the Constitution. Interpretation No. 371<sup>69</sup> further articulates that “[a] judge shall have no capacity to hold a statute unconstitutional, and shall not refuse to apply a statute for that reason. . . . Therefore, in trying a case where a judge, with reasonable assurance, has suspected that the statute applicable to the case is unconstitutional, he shall surely be allowed to petition for interpretation of its constitutionality.”<sup>70</sup> In South Korea, Article 111 of the Constitution of ROK stipulates that the Constitutional Court is competent to adjudicate the unconstitutionality of law upon the request of the courts.<sup>71</sup> This article and other relating provisions are regarded to give the Constitutional Court “expansive powers to provide a check on over-reaching governmental authority.”<sup>72</sup> In other words, judges of ordinary courts, even the Supreme Courts, are not permitted to exercise constitutional review of any statutes in the two countries. They simply have the right to file constitutional petitions.<sup>73</sup>

As to the compulsory military systems issues, the duty to render military service is distinctly prescribed in the Constitutions. Article 20 of the Constitution of ROC stipulates that people shall have the duty of performing military service in accordance with law.<sup>74</sup> Article 39, Paragraph 1 of the Constitution of ROK, as mentioned above, stipulates that all citizens have

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67. As to the religion-neutral disputes in Taiwan, see Jau-Yuan Hwang, *Shih Chia Mou Ni Sheng Jih Kuai Le [Happy Birthday to Buddha]*, 58 TAIWAN L. REV. 16, 16-17 (2000).

68. For more in-depth analysis of the types of the constitutional review in Taiwan, see Chang, *supra* note 54, at 78-83. In South Korea, the Constitutional Court has the power to rule that the law at issue is “unconstitutional in certain context” or “constitutional in certain context.” Gavin Healy, *Judicial Activism in the New Constitutional Court of Korea*, 14 COLUM. J. ASIAN L. 213, 224 (2000).

69. J.Y. Interpretation No. 371 (Jan. 20, 1995), available at [http://www.judicial.gov.tw/CONSTITUTIONALCOURT/en/p03\\_01.asp?expno=371](http://www.judicial.gov.tw/CONSTITUTIONALCOURT/en/p03_01.asp?expno=371).

70. J.Y. Interpretation No. 371 (1995), available at [http://www.judicial.gov.tw/CONSTITUTIONALCOURT/en/p03\\_01.asp?expno=371](http://www.judicial.gov.tw/CONSTITUTIONALCOURT/en/p03_01.asp?expno=371).

71. CONSTITUTION OF THE REPUBLIC OF KOREA, art. 111.

72. Healy, *supra* note 68, at 213.

73. Chang, *supra* note 54, at 76.

74. ZHONGHUA MINGUO XIANFA [The Constitution of the Republic of China], art. 20.

the duty of national defense under the conditions as prescribed by law. Accordingly, the two countries maintain their compulsory military systems. In South Korea, there are some exceptions to the compulsory military service, which is called supplemental service. The supplemental service is designed for those who have physical or mental deficiencies, special family circumstances, or skills in special or unusual professions. However, there is no exception for conscientious objectors.<sup>75</sup> In Taiwan, replacement service is not available until 2000. Only those with serious physical or mental deficiencies may be exempted from the compulsory military service.

#### B. *Possible Reasons of the Resemblance*

After the factual and normative comparison between the two countries, I believe that the resemblance of the two majority opinions is by no means a coincidence. The international and domestic situation as well as the judicial review system both contribute to the lamentable result.

##### 1. *Historical and International Factors*

To be more specific, the authoritarian history provides some hints. In the party-state era dictated by political strongmen, the Court was nothing more than a rubber stamp. Following this tradition, there remains a strong presumption of constitutionality of what the executives do.<sup>76</sup> Actually, many scholars have already criticized the majority opinion of the two cases as “remnants of stringent ideology,”<sup>77</sup> “institutional and cultural remnants of the authoritarian-military regime,”<sup>78</sup> and the like.<sup>79</sup>

During the party-state era, the suppression of religions, including but not limited to the Jehovah’s Witnesses, Mormonism, Ikuantao, Nichiren Shoshu,<sup>80</sup> was often used as a mean to maintain “social order” and stifle “anti-government” speech in Taiwan. In fact, the Jehovah’s Witnesses were labeled as anarchists and separatist in an official document.<sup>81</sup> In that

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75. See Choi, *supra* note 42, at 133.

76. See Healy, *supra* note 68, at 224.

77. See Choi, *supra* note 42, at 139.

78. See Kuk Cho, *Conscientious Objection to Military Service in Korea: The Rocky Path from Being an Unpatriotic Crime to a Human Right*, 9 OR. REV. INT’L L. 187, 222 (2007).

79. See Jau-Yuan Hwang, *Hsin Shang Ti Che Hsia Chien Yu? [Should Those Who Believe in God Be Sentenced to Jail?]*, 8 TAIWAN L.J. 30 *passim* (2000).

80. Nichiren Shoshu is a major school of Japanese Buddhism. For more information about the development of Nichiren Buddhism in Taiwan nowadays, see The Nichiren Shoshu Foundation of R.O.C., Introduction of Nichiren Shoshu Temples in Taiwan, [http://www.nichiren.org.tw/main/index.php?option=com\\_content&view=article&id=9&Itemid=9](http://www.nichiren.org.tw/main/index.php?option=com_content&view=article&id=9&Itemid=9) (last visited Jan. 27, 2010).

81. See DOCUMENTARY COLLECTION ON TAIWAN’S POLICE ADMINISTRATION: FOLKLORE AND RELIGION 554-55 (Fang-Jiau Ho ed., 1996).

document, the conscientious objection to military service and the anti-war speeches were regarded by the KMT government as cooperation with Communists.<sup>82</sup> The *Watchtower* magazine, which is published semimonthly by Jehovah's Witnesses, is branded as one kind of political propaganda for the Communist International.<sup>83</sup> It was seen as an illegal act that they quit from KMT in order to devote oneself to the God.<sup>84</sup> There was even a blacklist of the leaders of Jehovah's Witnesses!<sup>85</sup> From the document, we may realize that the conscientious objection to military service in Taiwan has occurred for more than forty years, which overlaps with the party-state era. Due to the fear toward the Communistic PRC and the thirst for prolonging its authoritarian regime, Jehovah's Witnesses were depicted as anarchists and, contradictorily, colleague of Communistic PRC by the KMT. And due to the Constitutional Court's deferential tradition to the executive branch, the Jehovah's Witnesses became the sacrifice to the irrational and blind patriotism.

Furthermore, the international intimidation from PRC and North Korea, at least partly, accounts for the deference to the Constitutional Court. We can see that the two majority opinions discussed in this paper both implicate that fulfilling the constitutional duty, especially the duty to render military service, is the prerequisite for exercising the constitutional rights. In South Korea, the tragic experience in Korean War, coupled with a strong anti-North ideology, diminished the anti-war pacifistic sentiment in South Korea, be it based on religious faith or not.<sup>86</sup> National defense is always the most overriding social value.

On the other hand, the cross-strait relation between PRC and Taiwan was severe in the 1990s. In 1991, the Constitution of ROC was first amended by the National Assembly, which in some extent unveiled the ambiguous status of Taiwan. In 1995-1996, the military rehearsals of PRC in Taiwan Strait caused serious tension. The first direct presidential election in 1996, which was a cardinal milestone in the democratization process of Taiwan, implied cleavage and even independence from the PRC's point of view. In July 9, 1999, the interview of former President Lee Teng-hui with *Deutsche Welle* radio further provoked PRC. In that interview, Lee argued that "[t]he 1991 constitutional amendments have designated cross-strait relations as a state-to-state relationship or at least a special state-to-state relationship, rather than an internal relationship between a legitimate government and a renegade group, or between a central government and a local government.

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82. *Id.* at 557-59.

83. *Id.*

84. *Id.*

85. *Id.* at 560-62.

86. Cho, *supra* note 78, at 193-94.

Thus, the Beijing authorities' characterization of Taiwan as a 'renegade province' is historically and legally untrue." Not surprisingly, this remark annoyed PRC thoroughly and resulted in the escalation of the national security level in Taiwan. No wonder that Interpretation No. 490, which was promulgated on October 1, 1999, stressed the inevitability of military service. The duty to defend the country, to some extent, becomes a sacred purpose which cannot be compromised by any reason. The constitutional rights enshrined in the constitutional provisions are, sorrowfully, ignored and sacrificed.

## 2. Normative Factors

As mentioned above, Taiwan and South Korea are both secular countries which favor no particular religion. State secularism means that the state does not recognize, finance or support any religion in any way.<sup>87</sup> Besides, the Constitutional Courts would not like to entangle themselves with religion affairs. They believe that "[g]ive to Caesar what is Caesar's, and to God what is God's."<sup>88</sup>

In addition, many religious leaders publicly oppose these conscientious objectors. Take South Korea for example, it is observed that the Korean Christian churches abhorred the religious doctrines of the objectors and considered them "heretic," caring nothing about their sufferings.<sup>89</sup> Besides, the Korean tradition of Nation Defending Buddhism encouraged Buddhists to fight against the foreign invaders in the Korean history.<sup>90</sup> That is, the attitudes toward the military service are quite different among these religious sects. It is conceivable that religious disputes will inevitably rise if Jehovah's Witnesses are exempted from military services. This will unavoidably force the Constitutional Courts to face more intricate puzzles, such as equality among religions. In the end, the Constitutional Courts would be besieged by these hot potatoes. The easiest way for the Constitutional Courts to avoid this problem is to uphold "formal equality" in the two cases. No wonder the two statutes at issue, which require compulsory military service without any exception for religious cause, were regarded as constitutional.

The written constitutional duty of performing military service and the constitutional requirement to defend the country also account for the anxiety of the Constitutional Courts to invalidate the provisions at issue. This is partly because the two countries both adopt the so-called "abstract judicial

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87. Alenka Kuhelj, *Religious Freedom in European Democracies*, 20 TUL. EUR. & CIV. L.F. 1, 17 (2005).

88. *Matthew* 22: 21.

89. Cho, *supra* note 78, at 194.

90. *Id.*

review system,”<sup>91</sup> which means it is the statutory provision itself, rather than the application of that in certain cases, that would be declared unconstitutional. Under abstract judicial review system, the Constitutional Courts may only declare in the abstract whether the impugned provision is unconstitutional when a law or regulation is challenged as unconstitutional.<sup>92</sup> Those background facts in certain cases are not relevant to the constitutionality of the provision at issue. Moreover, the actual interpretation made by the Constitutional Court need not be confined to the legal issues raised by the petition. Take Taiwan for example, the Constitutional Court may on their own initiative deal with other related issues on which it considers appropriate to express its views authoritatively in the form of a constitutional interpretation.<sup>93</sup> Interpretation No. 445 clearly manifests this principle.<sup>94</sup>

On the other hand, constitutional issues may be raised even without concrete case or controversy. This discretionary power may contrarily result in a situation that the Constitutional Courts would hesitate to declare a provision unconstitutional too quickly. Two simple reasons may account for this situation. First, the decision will universally annul the provision in question under abstract judicial review system. The impact and other unforeseeable side effects to the current legal order may be too comprehensive to control.<sup>95</sup> Secondly, the result—the universal nullification of an enactment—may be criticized as a transgression of judicial power and the Constitutional Courts would be forced to face the counter-majority difficulty.<sup>96</sup> In order to prevent the loophole, the Parliament often faces the prompt pressure to enact new provisions, which may escalate the tension between the Court and the Parliament. Due to these concerns, some judges may rather be self-restraint and this would inescapably fail to protect the human rights in some cases.<sup>97</sup>

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91. For more analyses about this categorization, see TZU-YI LIN ET AL., HSIENFA: CHUANLI FENLI [CONSTITUTIONAL LAW: SEPARATION OF POWERS] 33-34 (2008).

92. Albert H.Y. Chen, *A Tale of Two Islands: Comparative Reflections on Constitutionalism in Hong Kong and Taiwan*, 37 H.K.L.J. 647, 672 (2007).

93. *Id.* at 673.

94. J.Y. Interpretation No. 445 (1999), available at [http://www.judicial.gov.tw/CONSTITUTIONALCOURT/en/p03\\_01.asp?expno=445](http://www.judicial.gov.tw/CONSTITUTIONALCOURT/en/p03_01.asp?expno=445) (arguing that “[h]owever, in respect of the system under which the people petition for a constitutional interpretation, the purposes thereof are not only to protect the fundamental rights of the parties concerned, but also to elaborate on the genuine intent of the Constitution so as to safeguard the constitutional order. Therefore, the scope of interpretation may, of course, so extend as to review the constitutionality of the provisions of law relevant and necessary to a specific case).

95. See LIN ET AL., *supra* note 91, at 36.

96. ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16-22 (1986).

97. See Jau-Yuan Hwang, *Ssufa Weihsien Shencha te Chihtu Hsuantse yu Ssufayuen Tingwei [Choosing a New System of Judicial Review for Taiwan: Some Reflections on the Status of Judicial Yuan]*, 32(5) NTU L.J. 55, 91-92 (2003).

#### IV. CONCLUSION

Though the two cases at issue occurred in different countries with different petitioners, the Constitutional Courts in the two countries, nevertheless, held the same arguments. This is absolutely not a coincidence. Instead, the similarity is bound to happen. The likeness of the facts between the two cases cannot completely explain this situation. In my opinion, the history of the two countries, the judicial review system, and the domestic need for strong national defense are the most possible reasons interwoven together to generate this resemblance.

Although the two majority opinions both reached conservative conclusions, it is worthwhile to note that the aftermaths of the two cases are quite different. After the Interpretation No. 490, the provision at issue was amended and the replacement service has been formally recognized as one kind of military service ever since. Perhaps we can say the confrontation between the freedom of religion and the duty to render military service in Taiwan has been settled to the extent that replacement service seems to be an acceptable alternative to Jehovah's Witnesses and other conscientious objectors. On the other hand, the replacement service or other alternative is still not available in South Korea. The Jehovah's Witnesses in South Korea are in want of not only the consideration of the government but also the support from other religions, such as Buddhism, Korean Christians, Roman Catholics or Protestants.<sup>98</sup> According to the Korea Times, meanwhile, 70% of Koreans still oppose conscientious objection.<sup>99</sup> The alternative service system mentioned in the dissenting opinion is still not provided nowadays. This situation is gradually changing,<sup>100</sup> but it is still a harsh and solitary way for the Jehovah's Witnesses and other conscientious objectors in South Korea to move on.

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98. Cho, *supra* note 78, at 194.

99. The Korea Times, 70% of Koreans Oppose "Conscientious Objection", [http://www.koreatimes.co.kr/www/news/nation/2009/11/205\\_36653.html](http://www.koreatimes.co.kr/www/news/nation/2009/11/205_36653.html) (last visited Jan. 5, 2010).

100. For more information about the change of social and legal attitude after 2001 in South Korea, see Cho, *supra* note 78, at 195-98.

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