ICCPR Case Digest

Young-kwan Kim et al. v. Republic of Korea

Imprisonment for conscientious objection to military service on religious grounds violates the Covenant.

Facts

The authors are 50 nationals of the Republic of Korea, each sentenced to 18 months imprisonment for refusing, on the basis of their Jehovah’s Witness religious beliefs, to be drafted for military service. The State party does not provide an alternative to compulsory military service, meaning failure to perform military service will result in criminal prosecution and imprisonment. Following their prosecution and imprisonment the authors consequently claimed violations by the State party of their rights under articles 9 (arbitrary detention) and 18 (freedom of religion) of the Covenant.

The authors claimed that the State party’s refusal to recognise their right to conscientious objection to military service, under penalty of imprisonment, constituted a violation of their freedom of conscience. The authors further claimed that their imprisonment as penalty for their conscientious objection to military service amounts to arbitrary detention in violation of the Covenant. The authors requested that the State party expunge their criminal records, provide them with adequate compensation and take necessary measures to avoid similar violations of the Covenant in the future.

The State party pointed to heightened security situations and a desire to ensure social cohesion as justification for compulsory military service.

Committee’s View
The Committee found the alleged violations of Articles 18 and 9 were sufficiently substantiated for the purposes of admissibility, finding a direct correlation between the authors’ detention and their conscientious objection to military service. As all authors had unsuccessfully appealed their convictions the Committee found that domestic remedies had been exhausted. The communication was thus found admissible.

In consideration of the merits the Committee recalled General Comment No. 22 in which it considers that the fundamental character of the freedoms enshrined in article 18(1) are reflected by the fact that the provision cannot be derogated from, even in times of public emergency.

The Committee disagreed with the State Party’s submission that conscientious objection to military service does not fall within the scope of the Covenant’s protection under article 18 of freedom of thought, religion and conscience, finding that the obligation to use lethal force may seriously conflict with an individual’s freedom of conscience. The Committee recalls its prior jurisprudence that, although the Covenant does not explicitly refer to a right of conscientious objection, such a right derives from article 18, inasmuch as the obligation to be involved in the use of lethal force may seriously conflict with the freedom of conscience.\(^1\) According to its prior jurisprudence, the Committee noted that in such circumstances, the State may compel an objector to undertake a non-punitive alternative to compulsory military service, compatible with human rights.\(^2\) The State party had argued that allowing an exemption to compulsory military service on the grounds of conscience, could be extended to mandatory schooling, or collection of taxes. However, the Committee noted, that the nature of military service, unlike the examples of schooling and taxes provided by the State party, was much likely to involve exposing those participating in such service to the risk of depriving others of the right to life.

The State party argued that the authors were not arbitrarily detained but were rather detained according to independent and fair court judgments that apply legal boundaries that limit basic rights for the protection of national security. The Committee recalled that the notion of “arbitrariness” is broad, including elements of inappropriateness, injustice, lack of predictability and due process of law, rather than merely “against the law”.\(^3\) In this sense, the Committee

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\(^1\) See Yeo-Bum Yoon and Myung-Jin Choi v. the Republic of Korea, (communication no.1321-1322/2004), para. 8.3; and Jong-nam Kim et al. v. the Republic of Korea, (communication no. 1786/2008), para 7.3.

\(^2\) See Min-kyo Jeong et al. v. the Republic of Korea, (communication no. 1642-1741/2007), para. 7.3; and Jong-nam Kim et al. v. the Republic of Korea, (communication no. 1786/2008), para 7.4.

\(^3\) See Gorji-Dinka v. Cameroon (communication no. 1134/2002), para. 5.1; and Van Alphen v. The Netherlands,(communication no. 305/1988), para. 5.8.
considered the detention of the authors as punishment for their legitimate exercise of their freedom of conscience, was arbitrary in violation of article 9(1) of the Covenant.

**Separate Opinions**
The joint opinion of Committee members Iwasawa, Neuman, Seibert-Fohr, Shany and Vardzelashvili concurred with the Committee’s views, yet considered the authors’ right to conscientious objection to military service should be analysed as a manifestation of the belief, which is subject to limitations under paragraph 3. The joint opinion disagreed with the majority’s view that the right to conscientious objection is part of the absolutely protected right to hold a belief, as decided by the Committee in 2011.\(^4\)

The separate opinion of Committee member Salvioli, concurred with the Committee’s views, and sought to further advocate the position of the Committee that the right to conscientious objection forms part of the absolute right to freedom of thought, rather than being characterised as a manifestation of a belief or religion. Salvioli stated that human rights bodies should at all times work to expand the scope of international protection, rather than embracing interpretations that reduce standards of protection.

**Recommendation**
The Human Rights Committee therefore decided:
(a) That the communication is admissible under article 2 of the Optional Protocol;
(b) That the State party has violated Articles 18 and 9 with regard to all 50 authors.

In accordance with Article 2(3) of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, including:
(a) expunging the criminal records of the authors;
(b) providing adequate compensation.

The State Party is also under an obligation to avoid similar future violations, including adopting legislative measures guaranteeing the right to conscientious objection.

**Deadline to Submit the Report on the Implementation of the Recommendations**

180 days from the adoption of the views: 13/04/2015

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\(^{4}\) See Min-kyu Jeong et al. v. the Republic of Korea, (communication no. 1642-1741/2007).