

3. Case on Compelling Attendance at Religious Ceremonies in Korea Army Training Center

[2019Hun-Ma941, November 24, 2022]

Complainants

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2. J.H. (attorney-at-law)
3. J.E. (attorney-at-law)
4. J.J. (attorney-at-law)
5. P.J. (attorney-at-law)

Respondent

Head of the Korea Army Training Center

Decided

November 24, 2022

Holding

The Court confirms that the June 2, 2019 conduct by Respondent of requiring Complainants to attend either a Protestant, Buddhist, Catholic, or Won Buddhist ceremony held at a religious facility in the Korea Army Training Center infringed the freedom of religion of Complainants, and thus was unconstitutional.

Reasoning

I. Overview of the Case

Complainants are persons with a law license who were admitted to the 8th Bar Examination on April 26, 2019; they all do not have a religion. On May 30, 2019, they entered the Korea Army Training Center in Nonsan, South Chungcheong Province, and were assigned to Regiment 25, Company 4, Platoon 3 (public-service advocacy platoon). They received basic military training until June 27, 2019, and assumed the office of public-service advocate on

August 1, 2019.

At around 8:30 a.m. on Sunday, June 2, 2019, in the first week of basic military training, J.D., a squad commander of the Korea Army Training Center, said to trainees, “Choose and attend one of the religious ceremonies held in the Korea Army Training Center—Protestant, Buddhist, Catholic, or Won Buddhist.” In response, Complainants went to the squad commander, expressing their desire not to attend any religious ceremonies because they did not have a religion. The above squad commander then said, to the effect, “Even though you don’t have a religion, try attending it once as an experiment. If your mind doesn’t change after reconsideration, come by again to explicitly express your desire not to attend.” Thereafter, Complainants did not again manifest their desire not to attend, and attended the religious ceremonies conducted at religious facilities in the Korea Army Training Center.

On August 23, 2019, Complainants filed the constitutional complaint in this case, arguing that the June 2, 2019 conduct by Respondent of requiring them to attend religious ceremonies held at religious facilities in the Korea Army Training Center had infringed their freedom of religion and had violated the principle of separation of religion and politics.

II. Subject Matter of Review

The subject matter of review in this case is whether the June 2, 2019 conduct by Respondent of requiring Complainants to attend either a Protestant, Buddhist, Catholic, or Won Buddhist ceremony held at a religious facility in the Korea Army Training Center infringed the freedom of religion of Complainants (such conduct hereinafter referred to as the “Requiring of Attendance”). The related provisions read as follows:

Related Provisions

Framework Act on Military Status and Service (amended by Act No. 16034 on December 24, 2018)

Article 15 (Protection of Religious Life)

- (1) A commander shall guarantee soldiers’ right to religious life, to the extent of not adversely affecting the relevant military unit in the performance of its duties.
- (2) A soldier who is obliged to reside in barracks may attend any religious ceremony

conducted at a religious facility or other place designated by his/her commander (such facility or place hereinafter referred to as “Religious Facility”), and where he/she intends to attend a religious ceremony outside of Religious Facility, he/she shall obtain his/her commander’s permission therefor.

- (3) All soldiers shall not be coerced to attend religious ceremonies nor be restricted from attendance against their will.

III. Arguments of Complainants

The Requiring of Attendance is an authoritative factual act. Although it has already been terminated, since there is a risk of recurrence and since it is a matter of significance requiring constitutional clarification, the claim in this case is justiciable.

Because the Requiring of Attendance had a missionary purpose, the legitimacy of its purpose cannot be recognized, and compelling attendance at a religious ceremony amounts to an unreasonable and unfair means. Not adopting less restrictive alternatives, such as allowing exceptions for not attending religious ceremonies, fails to satisfy the least restrictive means test. Compelling attendance at a religious ceremony fails to satisfy the balance of interests test, because of its adverse effect upon the public interest, which is a breakdown in military discipline. Therefore, the Requiring of Attendance violated the rule against excessive restriction, thus infringing the negative freedom of religious activity of Complainants, and violated the principle of separation of religion and politics as provided in Article 20, Section (2) of the Constitution.

IV. Assessment of Justiciability

A. Subject of Constitutional Complaint

A factual act of an administrative agency is divided into two types, a “non-authoritative factual act,” which refers to a non-binding act of providing information, including warnings, recommendations, and implicit notice, or a non-binding act of mere administrative guidance intending to produce factual effects through noncompulsory cooperation; and an “authoritative factual act,” which is unilaterally forced by an administrative agency having a superior status. Between these, the authoritative factual act amounts to an exercise of

governmental power which is subject to a constitutional complaint. Generally, whether an act amounts to a governmental power exercise subject to a constitutional complaint should be decided individually, by considering together the specific circumstances in which the act was performed, including the relationship between the competent administrative actor and the aggrieved party; that party's wish, degree of involvement, and attitude as to the factual act concerned; the purpose and progress of the factual act concerned; and whether orders or compulsory means were issued under statutes and regulations (*see* Constitutional Court 2011Hun-Ma429, October 25, 2012; Constitutional Court 2016Hun-Ma503, November 30, 2017).

Respondent was the highest supervisor in the Korea Army Training Center, where Complainants received basic military training. As such, he had a superior status with respect to Complainants' life in the training center. Respondent, on February 28, 2019, during a weekly situation assessment meeting, reiterated efforts to use faith for military power, so as to enhance the military combat capability through the accommodation for religious activities. Also, the "Guidelines on the Discipline and the Instructions for the Military Life" guarantee choosing religious activities according to one's will, while stating that "one religion for each person" is recommended for cultivation of moral character and reinforcement of mental combat capabilities through chaplaincy activities, and stipulating that "the matter involving the attendance at a religious ceremony and other matters shall be conducted through the chain of command and through those on staff duty or charge of quarters duty."

The Requiring of Attendance was carried out through the squad commander J.D., who led Complainants. Although the day when the Requiring of Attendance occurred was a holiday, Complainants made an inquiry to squad commander J.D. about whether they were allowed not to attend the religious ceremonies. It can be determined that squad commander J.D. delivered an official response reflecting the above guidelines of Respondent. There is no room to find that squad commander J.D. expressed his personal opinion on the basis of his status as an individual, as opposed to a squad commander of the Korea Army Training Center.

Further, the materials Respondent submitted in relation to this case indicate the following facts: the center trainees in this case were encouraged to attend, for experience, any ceremony of the four religions in the first week (fourth day) at the military training center; they were

informed that they may, of their accord, attend the ceremonies or take a rest from the second week to the graduation week; and the center trainees who believed in minority religions or had no religion were allowed to not attend the religious ceremonies at their own wish. In addition, the statistics materials Respondent submitted indicate the following facts: in the first week at the training center, everyone attended the religious ceremonies held in the morning and no one stayed behind, while some did not attend the religious ceremonies held in the afternoon; and from the second week, both in the morning and afternoon, substantial numbers of trainees did not attend religious ceremonies. With these facts, it can be said that, at least as to the morning religious ceremonies in the first week at the training center, not attending them was in effect not permitted.

Taken together, the above considerations lead us to conclude that the Requiring of Attendance was unilaterally forced upon Complainants by Respondent having a superior status, exceeding the limits of mere administrative guidance such as non-authoritative recommendations and advice that are given in expectation of noncompulsory cooperation of Complainants. As such, the Requiring of Attendance constituted an authoritative factual act, which is subject to a constitutional complaint.

B. Protectable Justiciable Interest

Because Complainants have completed basic military training in the Korea Army Training Center and left the center already, their fundamental rights are no longer limited. Thus, even if the claim of Complainants is upheld, this would not be of help to them in remedying their subjective rights. However, even if a constitutional complaint is not of much help in remedying subjective rights, if there is a risk of recurrence of the violation or if the resolution of the given dispute is a matter critical to the preservation and maintenance of the constitutional order and thus its clarification has significant constitutional implications, the Court may recognize there is a justiciable interest with respect to the constitutional complaint (*see* Constitutional Court 2000Hun-Ma327, July 18, 2002).

It can be recognized that, by holding religious ceremonies, Respondent not only guarantees the freedom of religion of center trainees but further “recommends one religion for each person” to use faith for military power. In this connection, an act as this, which goes beyond recommending attendance at religious ceremonies such that it practically compels such

attendance, would in all likelihood be repeated. Additionally, given the importance of both the protection of freedom of religion, including negative freedom, and the principle of separation of religion and politics, since whether the Requiring of Attendance is constitutionally justified represents a matter whose constitutional clarification is critical to the preservation and maintenance of the constitutional order, there is a justiciable interest with respect to the constitutional complaint in this case.

V. Assessment of Merits

A. Fundamental Rights Restricted

Article 20 of our Constitution provides in Section (1) that all citizens shall enjoy freedom of religion, and in Section (2) that no state religion shall be recognized, and religion and politics shall be separated. It thereby affirms both freedom of religion and the principle of separation of religion and politics. Generally, the three facets of freedom of religion are freedom of faith, freedom of religious practice, and freedom of religious assembly and association (Constitutional Court 2000Hun-Ma159, September 27, 2001). Freedom of religion also includes freedom of irreligion (Constitutional Court 2007Hun-Ba131, etc., February 25, 2010), and protects the negative freedom not to hold a faith and attend a religious practice and assembly.

The Requiring of Attendance compelled Complainants to choose and attend one of the four religious ceremonies—Protestant, Buddhist, Catholic, or Won Buddhist—held at religious facilities in the Korea Army Training Center. The religious ceremonies in this case are a religious assembly conducted by each religion (*see* Instructions on Military Chaplaincy Work, Article 2, Item 6) and, as such, are held to enable soldiers of faiths to attend the religious ceremonies of their religion, thus guaranteeing freedom of religious ceremonies (Framework Act on Military Status and Service [hereinafter referred to as the “Military Service Framework Act”], Article 15, Sections (1) and (2)). In this connection, the religious ceremonies in this case have the nature of religious assemblies in which religions practice is envisaged.

Imposing a religion or faith on others is eventually only possible through external religious actions, i.e. a profession of faith, recitation of prayers, attendance at worship services, etc.

Thus, it can be determined that compelling attendance at religious ceremonies held in religious facilities, by itself, limits Complainants' freedom not to hold a faith and attend a religious assembly, irrespective of whether there is an actual change in their state of mind or faith. Therefore, the Requiring of Attendance limits the freedom of religion of Complainants.

B. Whether Freedom of Religion Was Violated

1. Whether the Principle of Separation of Religion and Politics Was Violated

(a) Meaning

The principle of separation of religion and politics, provided by Article 20, Section (2) of the Constitution, describes the separation of religion and politics where there is no interference with or influence upon each other, and means State neutrality to religion. In compliance with this principle, the State should not recognize a privilege for a particular religion and should maintain neutrality toward religion. The religious neutrality of the State is necessary to fully realize freedom of religion, and in this regard, the promotion of a particular religion by the State could constitute an infringement of freedom of another religion or of irreligion (*see* Constitutional Court 2007Hun-Ba131, etc., February 25, 2010).

(b) Freedom of religion in the military

Even as for a soldier, his or her freedom of religion should be guaranteed; religion would have more significant meaning for soldiers especially when their horrors of death peak, including when casualties occur, in situations where they are mobilized in actual armed conflicts in times of national emergency, such as war and disaster (*see* Constitutional Court 2002Hun-Ba35, March 27, 2003). Further, it can be recognized that, given the continuance of military community life even during the training period in peacetime, religious conviction would also play a positive role in maintaining a sound military life and establishing ethics or values that would control the use of military physical force that could otherwise be unrestrained or abused.

To ensure the fundamental rights of soldiers, whose mission is national defense and citizen protection, the Military Service Framework Act guarantees in Article 15, Sections (1) and (2) the religious life of soldiers to the extent of not adversely affecting the relevant military unit in the performance of its duties. This Act also allows soldiers to attend religious ceremonies

held at Religious Facility. However, under the principle of separation of religion and politics, the State may neither promote a particular religion nor interfere with the religious choice of an individual nor require mandatory attendance at a religious ceremony against his or her will to an extent going beyond the guarantee of voluntary and autonomous religious activity for soldiers. This point is expressly affirmed in Article 15, Section (3) of the Military Service Framework Act, which specified the principle of separation of religion and politics in relation to the operation of religious ceremonies in the military.

(c) The Requiring of Attendance

1) Since the beginning of its inception, the military of our country has operated military chaplaincy, and since the 1970s, it has adopted the work guidelines of the “use of faith for military power,” which regards religious belief as intangible combat capability. Under the current statutes and regulations, the use of faith for military power refers to enhancing intangible combat capability—that is to say, enabling military personnel to complete, through religious work, their assigned duty with heightened faith and views on life and death, the State, and values (Instructions on Military Chaplaincy Work, Article 2, Item 12). Considering that the religious belief of an individual is conducive to building stronger mental strength necessary for the armed services, guaranteeing to the fullest the freedom of religion in the military and encouraging religious activity to the extent of not adversely affecting the relevant military unit in the performance of its duties, serves the purpose of enhancing intangible combat capability involving a soldier’s value system or mental strength, which is no less important than tangible combat capability. In this sense, it can be said that such guaranteeing and encouraging reflects the acceptance of a positive social role of religion.

Nevertheless, even if the military chaplaincy and “use of faith for military power” as stated above are necessary for the enhancement of intangible combat capability, the religious activity in the military cannot depart from the constitutionally affirmed principles of non-establishment of State religion and separation of religion and politics, i.e. from the limits that the State shall be neutral toward all religions.

2) It can be recognized that, as seen above, the religious ceremonies in this case have the nature of religious assemblies in which religious practice is envisaged. The conduct of Respondent in requiring Complainants to attend religious ceremonies constitutes, in itself,

compelling of religious practice, which contravenes the express prohibition clause of Article 15, Section (3) of the Military Service Framework Act.

Importantly, it can be noted that the requiring by Respondent of Complainants' attendance at either a Protestant, Buddhist, Catholic, or Won Buddhist ceremony demonstrates that Respondent officially acknowledged and encouraged the four religions and preferred them to other religions or irreligion. The Court notes in this connection that the constitutional principle of the separation of religion and politics serves the purpose of guaranteeing the diversity laying the foundation of a democratic society. In the context of this principle, the State maintains a neutral position, acknowledging the possibility of eclectic religious convictions, atheism, etc. The conduct of Respondent cannot be permitted under the principle of separation of religion and politics as it amounts to favorable treatment of particular religions in violation of State neutrality to religion.

Further, even though the Requiring of Attendance was made by Respondent for the eventual, secular purpose of strengthening military forces, such requiring provides the State with an opportunity to reduce religion to nothing more than a means of achieving that purpose, or conversely, offers a religious group an opportunity to interfere with the State power of the military and proselytize or to otherwise exercise influence. Therefore, such requiring leads to the close entanglement between the State and religion. In this respect, enhancing the mental combat skills of a soldier by way of Respondent compelling the soldier's attendance at a religious ceremony against his or her will to an extent going beyond the guarantee of his or her voluntary and autonomous life of faith or religious activity, is in direct contravention of the principle of separation of religion and politics and, thus, infringes freedom of religion.

2. Whether the Rule against Excessive Restriction Was Violated

Because the Court can observe that Respondent eventually intended to strengthen the mental combat skills of soldiers by the Requiring of Attendance, there is presumptively room to acknowledge the legitimacy of its purpose. However, compelling attendance at religious ceremonies by a person of no religion, which extends far beyond recognizing and actively embracing the positive aspect of a religious belief autonomously held by an individual or the positive aspect of his or her voluntary attendance at religious ceremonies, is highly likely to

arouse opposition to or resentment against the relevant religions and the military life and create an adverse effect, rather than contributing to the strengthening of mental combat skills necessary for the armed services. Thus, the Court cannot recognize the appropriateness of means of the Requiring of Attendance, which intended to enhance the mental combat skills of soldiers by way of requiring Complainants to attend Protestant, Buddhist, Catholic, and Won Buddhist ceremonies against their will.

Moreover, since Respondent can employ other alternatives, such as general ethics education, than the religious means to strengthen the mental combat skills of center trainees of no religion, the Requiring of Attendance was not an inevitable means to that end and failed to meet the least restrictive means test. Further, attendance at religious ceremonies was imposed on Complainants during their military service by conscription, and it cannot be said in this context that they could have possibly avoided such imposition. Nor can it be said that the infringement of freedom of religion, which already occurred, would be remedied or reduced, even though attendance at religious ceremonies was imposed only in the first week of training and was voluntary from the second week.

Because religion could lie at the very core of personality of an individual, governmental imposition of religion constitutes a serious infringement of fundamental rights and cannot be afforded a preference to enhance the mental combat skills of soldiers. Therefore, the Requiring of Attendance failed to meet the balance of interests test.

C. Sub-conclusion

For this reason, the Requiring of Attendance violated both the principle of separation of religion and politics and the rule against excessive restriction, and thus, infringed the freedom of religion of Complainants.

VI. Conclusion

Accordingly, the June 2, 2019 conduct by Respondent of requiring Complainants to attend either a Protestant, Buddhist, Catholic, or Won Buddhist ceremony held at a religious facility in the Korea Army Training Center must be annulled as violative of their freedom of religion, yet, since Respondent's conduct already terminated, the Court renders its decision as set forth in Holding and confirms the unconstitutionality of such conduct in a declaratory sense, so as

to avoid a recurrence of the same or a similar violation. This decision was made with a unanimous opinion of participating Justices except Justices Lee Seon-ae, Lee Eunae, and Lee Youngjin, who filed a dissenting opinion, as set forth in VII below.

VII. Dissenting Opinion of Justices Lee Seon-ae, Lee Eunae, and Lee Youngjin

We believe that Complainants' claim against the Requiring of Attendance is nonjusticiable because this requiring does not constitute an exercise of governmental power which is subject to a constitutional complaint, and because no protectable justiciable interest exists with respect to their claim, and thus, express our dissenting opinion below.

A. Subject of Constitutional Complaint

1. The Constitutional Court Act, Article 68, Section (1) prescribes that "Any person whose fundamental rights guaranteed by the Constitution are infringed due to exercise or non-exercise of the governmental power" may file a constitutional complaint. Here, "governmental power" means sovereign action by any governmental body and public entity which exercise judicial, executive and legislative power; also, the exercise or non-exercise of the governmental power should have legal effects to a citizen's rights and duties and consequently cause an unfavorable change in the legal relation and status of complainant (*see* 2017Hun-Ma1384, etc., November 25, 2021).

2. It is true that Respondent, as a superior of Complainants (*see* Military Service Framework Act, Article 25), had a superior status with respect to their life in the training center. However, whether an act amounts to a governmental power exercise subject to a constitutional complaint should be decided, by considering, in addition to the general relationship between the competent administrative actor and the aggrieved party, the specific circumstances in which the particular factual act was performed, including the aggrieved party's wish, degree of involvement, and attitude as to the factual act concerned; the purpose and progress of the factual act concerned; and whether orders or compulsory means were issued under statutes and regulations (*see* Constitutional Court 89Hun-Ma35, May 6, 1994; Constitutional Court 2016Hun-Ma46, etc., April 26, 2018). Not all actions of Respondent constitute authoritative factual acts only by the mere fact that he has a status superior to that of Complainants.

Because Article 15, Section (3) of the Military Service Framework Act expressly states that “All soldiers shall not be coerced to attend religious ceremonies nor be restricted from attendance against their will.” Respondent has no authority to command Complainants to attend religious ceremonies against their will. In this situation, if Respondent recommends attendance at religious ceremonies only in the first week, this does not constitute a command or coercion unless special circumstances exist. The “Guidelines on the Discipline and the Instructions for the Military Life” of the Korea Army Training Center simply indicate that one religion for each person is recommended; nowhere in them do we find that one must inevitably have one religion regardless of one’s will, or attend a religious ceremony once or more than once. On the contrary, the guidelines expressly state that “A person who does not attend a religious ceremony shall be guaranteed time for personal care and free time.” When looking at the content of the statement of the squad commander, we find that he simply responded to the desire of Complainants not to attend, saying to the effect, “If your mind doesn’t change after reconsideration, come by again to explicitly indicate your desire not to attend.”; he did not make a categorical order that they attend religious ceremonies by all means. Even if it is possible that Complainants felt burdened to express their desire not to attend, that subjective possibility alone is insufficient to assess the Requiring of Attendance as going beyond a simple recommendation as to be compelling.

Meanwhile, the materials Respondent submitted confirm the fact that all trainees attended religious ceremonies in a morning of the first week while some of them did not attend them in an afternoon thereof, and that starting from the second week, there was a great number of nonattendance. However, attendance status could have been influenced by a number of factors other than a recommendation by Respondent, including the voluntary judgment of trainees or the atmosphere among them. As a matter of fact, when looking at other training groups’ religious ceremony attendance status in the first week, we find the following facts: out of a total of 732 trainees of the 19-16th Training Group (trained from April 18, 2019 to May 16, 2019), which preceded that of Complainants, 579 attended during the day and 44 at night, with the nonattendance of at least 109 and at most 153 trainees; out of a total of 689 trainees of the subsequent 19-28th Training Group (trained from July 18, 2019 to August 14, 2019), 579 attended during the day and 28 at night, with the nonattendance of at least 82 and at most 110 trainees; and out of a total of 679 trainees of the 19-34th Training Group (trained

from August 29, 2019 to September 26, 2019), 579 attended during the day and 4 at night, with the nonattendance of at least 96 and at most 100 trainees. As such, it cannot be said that Respondent, by general policy of the Korea Army Training Center, compelled attendance at religious ceremonies in the first week; nor was there a special reason for Respondent to have a different policy for the training group of Complainants.

3. Moreover, when examining whether there was a means of discipline for nonimplementation of the Requiring of Attendance, we find that no notification was provided by Respondent and the squad commander that those not attending religious services would be placed at a certain disadvantage; and that no recognizable material indicates the possibility of adverse treatment in the case of noncompliance with the Requiring of Attendance. Instead, we find that compelling one's attendance at religious ceremonies against one's will constitutes a clearly unlawful activity prohibited by the Military Service Framework Act. Given this context, Complainants were sufficiently able to learn of both the possibility of disadvantage that may be imposed due to nonattendance and the fact that, if imposed, the unlawfulness of such disadvantage can be disputed. In this situation, it cannot be concluded that encouragement of attendance by Respondent had a *de facto* effect of compelling attendance of Complainants.

4. Accordingly, we do not find that the Requiring of Attendance constituted an exercise of governmental power which is subject to a constitutional complaint.

B. Protectable Justiciable Interest

1. Even if we do find that the Requiring of Attendance constituted an exercise of governmental power which is subject to a constitutional complaint, Complainants no longer have a protectable justiciable interest in their constitutional complaint, because they already completed basic military training and left the Korea Army Training Center as of June 27, 2019.

2. Moreover, not only does the Military Service Framework Act provide for the obligation of a commander to guarantee soldiers' right to religious life to the extent of not adversely affecting the relevant military unit in the performance of its duties, and provide for the right of a soldier to attend any religious ceremony conducted at Religious Facility designated by

his/her commander (*see* Article 15, Sections (1) and (2)), but this statute, as a result of amendment by Act No. 16034 on December 24, 2018, created an express provision stating that “All soldiers shall not be coerced to attend religious ceremonies nor be restricted from attendance against their will.” (Article 15, Section (3).) Thus, the statute already reflects the fact that compelling one’s attendance at a religious ritual against one’s will is impermissible as violative of freedom of religion. Therefore, we do not recognize that there is a risk of future occurrence of instances of activity compelling attendance at religious ceremonies in the Korea Army Training Center, or that there is a need for constitutional clarification on that activity.

3. Finally, we conclude that no subjective protectable justiciable interest exists with respect to Complainants’ claim in this case, and that no exceptional justiciable interest is recognized for constitutional clarification.

Justices Yoo Namseok (Presiding Justice), Lee Seon-ae, Lee Suk-tae, Lee Eunae, Lee Jongseok, Lee Youngjin, Kim Kiyong, Moon Hyungbae, and Lee Mison