

Chapter 4

Constitutionalism in Korea and Colombia: Comparing Decisions of Their Constitutional Courts that Affect National Security and Defense*

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Abstract: Two geographically distant States, united by the 1950 War, have undergone recent democratic constitutional transformations: South Korea in 1987 and Colombia in 1991. Korea ratified its constitution through a popular referendum, while Colombia did so via a National Constituent Assembly. In both cases, constitutional courts were established to resolve cases related to the promotion and protection of fundamental rights in recent decades. However, in Korea, the Court has been conservative when faced with conflicts between rights and national security and defense, supporting norms that address the threat posed by North Korea. In contrast, decisions in Colombia are progressive, aligning with the theory of new constitutionalism, without weighing the potential impact on national security and defense rights to ensure the State's survival. Constitutional Courts have facilitated the maintenance of an open economy and the respect and promotion of civil, political, economic, social, and cultural rights, even as decisions concerning security and defense have been made with varying levels of caution.

Keywords: constitutional law; comparative law; legal relations; fundamental rights; security; national defense

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Introduction

The decisions of the Korean Constitutional Court regarding civil liberties, particularly when they impact legal norms that restrict national defense and security, hold significant political importance and relevance. The security conditions of the Peninsula have historically been precarious, especially since the Korean people were divided into two States. Therefore, this chapter presents a study on the constitutional changes and reforms undertaken by the South Korean State during its recent period of republican life. Throughout this time, the fundamental rights of its citizens have been bolstered by the decisions of the Constitutional Court, without this recognition undermining aspects of national security and defense. When a conflict of rights arises, the Court has opted to thoroughly examine the implications that amending laws, which empower the Government to counteract external threats from its northern neighbor, would have on defense.

This constitutional evolution in South Korea occurred before the end of the Cold War, which largely led to the political division of the Korean people in 1950, due to the legitimate claims of the Korean people against the authoritarianism of the previous decades. At another time, it would not have been possible to grant the constitutional guarantees of fundamental rights in the manner achieved with the 1987 Constitution, which recognized civil, political, social, economic, and cultural rights with greater legal force. In the Colombian case, the National Constituent Assembly of 1991 facilitated a significant advancement in the protection of rights by incorporating a legal and political framework aligned with the needs of the people and by developing legal mechanisms and institutions for the promotion, protection, and guarantee of fundamental rights, without issues of scope and projection concerning social and economic rights. The two States pursue a path that the theory of new constitutionalism refers to as the *constitutional State*.

Colombia established its permanent relations with South Korea after participating in the Korean War from 1950 to 1953 by deploying troops. It later strengthened its commercial ties and cooperation in defense and cultural exchange. In terms of legal relations, there are similarities and affinities regarding the creation of constitutional courts at the end of the twentieth century, resulting from constitutional reform processes that have positively impacted fundamental guarantees and the development of legal norms and interpretations through constitutional case law.

This chapter presents the scope and consequences of the constitutional decisions on national security and defense, analyzing each court's decisions regarding conscription and conscientious objection. The goal is to examine and present conclusions about the differences between the courts, highlighting the conservative stance of the Korean court and the progressive nature of the Colombian court in cases where legal decisions impact national security.

A contrast is presented between the conservative decisions of Korea and the progressive decisions of the Colombian Constitutional Court, which may have future implications for the security and defense of the Colombian State, especially due to the ongoing violence in various parts of its territory, despite multiple peace processes undertaken over the past 20 years, particularly as the total peace concept is pursued now. This divergence is largely due to the persistent threat faced by South Korea from North Korea, an external adversary that truly jeopardizes its survival, primarily because of North Korea's nuclear development. Conversely, in Colombia, the threat is internal; within its borders, there are limited dangers centered on several regions of the country involved in drug trafficking, co-optation of state power, and organized crime that control various illegal revenues.

This legal analysis examines the intersection of Korean and Colombian constitutionalism to address the question: *Should the legal reasoning of the South Korean Constitutional Court's decisions be applied in cases where individual fundamental rights conflict with the right to national security and defense?*

As a working hypothesis, it is proposed that the Constitutional Court of South Korea, being more consistent with decisions of this type, produces results in economic development, political stability, and social benefits for its citizens. This is due to its greater sensitivity to decisions that may affect state security, considering the threat posed by North Korea, while also protecting fundamental rights, as long as it does not compromise national security regarding general and collective guarantees. Therefore, there is potential for the Colombian Court to utilize the legal argument of the Korean Court through appropriate contextualization, in order to

prevent progressive decisions from undermining the State's security and defense structure. This is critical, as there is a mistaken belief that, since they are internal threats, they do not pose a risk to the State's survival when individual rights are prioritized over the collective right to national security and defense.

The chapter is organized as follows: first, the theoretical framework describes the theories on which the research is based to understand the decisions of the Korean Constitutional Court regarding national security and defense. The research method is then outlined. Subsequently, the results are presented, where the reader will find the historical evolution of Korean constitutionalism, along with a brief description of the constitutional reforms implemented by the Republic of Korea leading up to the 1987 reform. Next, we analyze the case law of the Constitutional Court regarding conscription and conscientious objection, identifying the argumentative differences in the decisions, particularly in relation to national security and defense. Lastly, we discuss how these decisions in Korea may be relevant to reviewing the decisions of the Colombian Constitutional Court concerning national security.

The conclusions emphasize that the legal and political evolution of Korea has enabled the country, over the past three decades, to move away from the historical period of authoritarianism and enter a legal framework that respects the Constitution. This shift has increased the guarantees for citizens through the decisions of the Constitutional Court, which, despite its significant regulatory development in defense of fundamental rights, still considers national security to be such an important juridical right that it must be protected from potential undermining and the discomfort this causes to citizens, who experience certain limitations on their rights. This consideration acknowledges Korea's geographical location and geopolitical circumstances, in addition to the ongoing war that began in 1950, which still poses a threat to its survival as a free, republican, and democratic State with a capitalist economic model.

Theoretical Framework

To advance the research, the epistemological status of the philosophy of law was examined, which prescribes the need for a fundamental norm that accommodates various complementary interpretations. The first perspective is through political philosophy, which determines the degree of legitimacy. The second is through legal theory, which assesses the degree of validity. The third is through legal sociology,

which evaluates the degree of effectiveness. Thus, national constitutions require an analysis of the legitimacy, validity, and effectiveness of legal norms. To understand Korean and Colombian constitutionalism, it is essential to consider these three epistemological aspects.

In various research works, articles, and books, Oscar Mejía Quintana discusses the epistemological status of the philosophy of law. For example, the book *Filosofía y teoría del derecho* studies the “ius-philosophical and ius-theoretical paradigms throughout modernity” through a historical exploration of different cultures and “contemporary legal schools,” facilitating the analysis of the Constitution, democracy, and peace, as seen in this research. Additionally, legal theory can reconstruct legal philosophy through a dialogue that also aligns with constitutional theory, drawing on the transdisciplinarity that connects three issues: legitimacy, validity, and effectiveness. These issues are examined, in turn, through complementary social sciences, making it crucial to understand the relationship among political theory, legal theory, and sociology, while establishing normative levels of acceptance in modern society. This *threefold* relationship addresses the constitutional norm to genuinely produce the necessary impact on people and on social and political organization. An appropriate balance of these aspects will enable society to achieve, to a greater or lesser extent, its national interests, social welfare, and happiness (Mejía, 2016).

When studying national constitutions comparatively, it is essential to outline the theoretical framework that supports this approach. The *theory of new constitutionalism* explains the decisions of the Constitutional Courts of Korea and Colombia regarding the conflicts between individual fundamental rights and the right to national security and defense. New constitutionalism emerged at the end of the twentieth century in various parts of the world, particularly in Latin America, as the global bipolarity of the Cold War came to a close.

Martínez Dalmau argues that the evolution of modern constitutionalism requires direct participation from the people in significant societal decisions. While the constituent power can shape the people's stance through interpretation and reform, it is also crucial that, in modern societies, individuals have the ability to define power and make decisions that directly impact their lives. This research considers *modern legal and constitutional theory*, which developed in the nineteenth century and was adopted by States with republican political organizations, as seen in Korea and Colombia.

To understand the decisions of the Korean and Colombian Constitutional Courts and to establish the reasoning for prioritizing one principle/right over another

concerning national security and other human and fundamental rights, the *theory of legal argumentation* by Robert Alexy was employed. This theory allows for the recognition of similarities or differences between the decisions of each court. It should be noted that the development of the theory of legal argumentation within the Constitutional Courts involves a process of weighing values and rights. This process enables magistrates to make the best decision for the specific historical context, considering both national and international political circumstances that influence such determinations. Therefore, the theory of legal argumentation is crucial to this study, through which the rulings related to conscientious objection in each State regarding conscription for national security will be analyzed.

Through analyzing the aforementioned rulings, we can determine whether there has been a legal transnationalization or if it is required. This will provide important elements to strengthen the proposed working hypothesis, which suggests a hybrid transplant from Korea to Colombia. This is contingent on the research concluding that there is divergence in case law decisions regarding the guarantee of national security and defense. Furthermore, it aims to identify how a Korean norm could be adapted in the Colombian context to enhance security and more effectively address issues of violence and human rights abuses, appropriately aligning these norms with our own culture, society, and economy.

In conclusion, this study encompasses three theoretical elements that will be considered in the corresponding results and discussion presented later. These are the theory of new constitutionalism, the theory of legal argumentation, and the transnational theory of law.

Methods

This chapter, the result of research conducted by the Escuela Superior de Guerra (ESDEG) of Colombia as part of the Master's Program in Strategy and Geopolitics, examines the connections between Colombia and Korea and suggests ways to strengthen their cooperation and understanding. Despite the geographical distance, the efforts go beyond simply identifying similarities and shared values; through detailed and sensitive inquiry, we discover convergence in various social, political, economic, military, and legal aspects. When these aspects are correctly analyzed, understood, and applied, they can lead to better solutions for current and future challenges faced by both nations. This chapter focuses on the constitutional and legal aspects. The aim of this research is to present initial findings that compare

the constitutional rulings of the Korean Court with those of the Colombian Court, providing a significant perspective on the themes outlined in the introduction. Further development of these results will occur in the discussion section.

The research approach is qualitative-interpretive, involving the collection of information through documentary searches and consultations of various bibliographic references that report on significant aspects of legal thought and the constitutional paths of Colombia and Korea. The case law from Korea and Colombia related to conscientious objection and conscription was also examined to identify the similarities and differences in this type of legal decision and how these similarities or differences could impact national security. This analysis enabled a comparison of both cases and the drawing of conclusions regarding the legal assessment that each State makes of these types of rights and values. The sources—mostly primary—were consulted directly from the work of their authors. However, several are indirect citations or translations, particularly those from Korean texts.

The study and analysis of judicial decisions from the Constitutional Court in each country, particularly those concerning a conflict between individual fundamental rights, such as conscientious objection, and the right to national security, is the focus of this research. Given the legal nature of the issue, it is noteworthy that, in reviewing constitutional rulings, a descriptive, qualitative methodological approach was combined with legal comparison and the analytical method pertinent to the subject matter.

Through an analysis of the normative decisions of the case law of the Korean Constitutional Court on conscientious objection related to national security, we can understand the path taken since the late 1980s that now allows for adequate conditions of social sustainability and respect for, guarantee, and protection of fundamental rights, without their interest in survival being threatened by the North. Additionally, comparing this case law with the decisions of the Colombian Constitutional Court on the same issue serves as the key method, supported by legal and political history, to obtain the results and discussions that follow.

Considering the output of law through constitutional interpretation decisions has an impact on the social process of any State and obliges us to incorporate historical elements as a method of analysis. Historical-legal references from the past enable us to partially understand the legal-political actions and decisions of the present, clarifying and delimiting the facts and concepts discussed in each of the cases analyzed by the constitutional courts. Highlighting these aspects is important because it shifts our perspective on rights from a static and immutable

concept to one that requires, as has been demonstrated over the past half-century, interpretation and argumentation as a specific case of general practical discourse. In this context, the grounds for judicial decisions are revisited as a legal methodology, enabling the substantiation of fundamental rights and human rights and forming the basic theory of the “democratic constitutional State” (Alexy, 1995).

The law is not merely the product of straightforward legislative action or the case law of magistrates and judges; rather, it requires a broader and more constructive perspective on its social relationships. Therefore, this research examines the connections between legal theory and the real social issues faced by Colombian and Korean societies through an analysis of case law, using conscientious objection as a case to highlight aspects of autonomous will and the commitment to State security. Additionally, there are legal concepts that significantly impact society, such as nationalism and the militarization of public order, which are prevalent in both Korea and Colombia, and which create links between war and peace.

In summary, this is a descriptive, qualitative study grounded in the philosophy of law that examines social problems requiring constitutional interpretation and argumentation. Additionally, it conducts a legal comparison to contrast the decisions of the constitutional courts of Korea and Colombia regarding conscientious objection and national security, aiming to identify legal convergences or divergences in recent constitutional case law. It also relies upon constitutional history, as it is essential to delve into the facts under study based on social reality and integrate different branches of science. Using the historical method, conclusions are drawn by analyzing and synthesizing the contexts of each country, examining how both countries advanced in constitutionalism to provide the necessary context in each case. From there, the synthesis clarifies the relevant facts regarding national security and defense through interpreting constitutional rulings in each country.

Results

Relations between Colombia and Korea have evolved through various stages since Colombia, in the mid-twentieth century, sought to strengthen its ties with the United States and the international community by militarily supporting South Korea in its war against North Korea. The internal situation in the country was problematic due to the violent political process; therefore, President Gomez viewed the Korean case as an opportunity to join the multinational force defending South Korea from the Northern invasion, aligning himself with the United States, the natural leader at

the onset of the Cold War. This decision allowed Colombia to enhance its internal political standing, in addition to achieving the professionalization of the National Army, which would subsequently enable a better security service to consolidate the national territory.

The beginning of these relationships resulted from war circumstances mediated by third parties, but their subsequent relations have evolved through a slow yet consistent process of diplomatic approaches centered on commercial exchange. This approach requires navigating cultural, academic, scientific, and social contexts that can benefit both States. Therefore, this chapter emphasizes the need to implement, based on international public law, the necessary tools for this to occur, one of which is the comparative study of constitutional court decisions. Consequently, one particular aspect has been chosen: the decisions of both States regarding conscription, to determine how such decisions impact national security and defense in each of the countries under study.

The results obtained in the study, as mentioned in the introduction, are as follows: first, the historical evolution of Korean constitutionalism; second, a brief description of the constitutional reforms of the Republic of Korea leading up to the 1987 reform; and finally, an analysis of two courts' rulings related to conscientious objection to conscription, highlighting the argumentative differences in decisions regarding national security and defense.

Before starting the constitutional historical overview, it is important to note that the Korean people are ancestral, with their own culture; they have preserved their traditions and language, as well as political independence, despite having been a Vassal Monarchy of China for centuries and enduring Japanese colonialism in the early twentieth century and American influence after World War II. Similarly, the Code of Ethics and Confucian behavior, compiled in the Analects, have been reflected in Korean constitutional history, influencing the interpretation and analysis of current legal decisions. This is because it incorporated social and bureaucratic norms of behavior into the people's way of thinking and their national identity, structured elements of the State, and proposed methods to navigate political processes, thus shaping much of Korean history (Chung, 1997).

Korea adopted Confucianism in the tenth century, a philosophy that aims to improve the world by establishing filial norms. These norms, along with the traditions and respect for ancestors, create a hierarchy and reproduce patterns of authority within society and government systems. This philosophy supported the consolidation of political and social processes that had been initiated centuries earlier on the Peninsula. It was further strengthened by the rise of the Joseon Dynasty in 1392, which, with clear and organized authority, laid the foundations

of the Korean kingdom, altering customs, religious practices, and social relations down to the family level (Kuhn, 2018); subsequently, it evolved into Chu Hsi's neo-Confucianism, which introduced new aspects of a social and political nature (Cumings, 2004).

As Kuhn (2018) states, legal regulations are the fruit of norms created by many generations that consolidate a certain legal system for an established society or several societies over time. The historical process that led to the current Korean constitutional rights began several centuries ago, when the Korean Peninsula was a Confucian and hermit kingdom (p. 22).

The history of Korean constitutionalism is relatively recent, dating back to its independence from China in 1895, which was marked by the presence of monarchical and imperial elements. We can affirm that this constitutional moment was not popular and, within a few years, led to Japanese interference that significantly influenced the region following Japan's victory over Russia in the 1904 war. This, in turn, allowed for the annexation of the Peninsula as a protectorate in 1910, lasting until the end of World War II, at which point the Soviet Union and the United States managed the process of Japanese surrender, partitioning the Peninsula and dividing Korea into two: the north, supported by the Soviets, and the south, supported by the United States. This situation replicated one of the early episodes of the Cold War, albeit with limited characteristics, as it manifested at the borders of the influence of the two superpowers, particularly in internal conflicts (Hsü, 2000).

In 1948, South Korea, with the support of the emerging United Nations System, carried out its first constituent process by promulgating the Constitution on June 17, electing its first president on July 20, and finally proclaiming the Republic of Korea on August 15. This marked the beginning of its main challenge with the invasion of North Korea, which sparked the war in 1950 and continued until the signing of an armistice in 1953, which remains in effect to this day.

The inception of the Republic of Korea coincided with the end of the war and the adoption of a liberal, constitutional framework, marked by the promulgation of the 1948 Constitution. However, the influence of the two victorious powers in World War II was already apparent when the 38th parallel was established as a de facto ideological boundary. Consequently, this republican foundation was marred by the Korean War of 1950, which resulted in the division into two States: one under Soviet influence, characterized by a dictatorial and absolutist government system, and the other under U.S. influence, adopting a democratic and capitalist system with liberal principles. In both instances, the impact of the Confucian system came to an end (Kuhn, 2018). Military tensions persisted for seven decades after the war; the truce remains in effect, albeit constrained by an armistice (Montville, 2006).

The historical process surrounding the birth of the Republic of Korea is fraught with threats to its survival, resulting in its democratic institutions never having the opportunity for tranquility and peace to consolidate their structures and engage the people in decision-making. Consequently, its political process was characterized by weakness, which permitted authoritarian regimes, such as the one that emerged after the 1961 military coup, to seize power. This regime transformed the legislature and judiciary into instruments that endorsed and supported government policies, a situation that persisted until the democratic transition of 1987 (Gonzales, 2013).

Following the 1961 military coup, there was discussion regarding the country's concentrated militarization, which was viewed as a response to citizen control and authoritarian policies aimed at securing a geopolitical position in the event of the imminent continuation of the war with the north. This authoritarianism led to the enactment of the Anti-Communist Act, which constrained the enjoyment and promotion of fundamental rights, as the principles of national security were considered to be of greater importance (Gonzalez, 2013). Compton (2000) states that the potential communist threat from North Korea became a manipulable symbol to justify a strong army and the declaration of martial law, thus serving as a reason not to tolerate the characteristic polarization of democratic and parliamentary regimes (pp. 149–159).

With the arrival of the 1972 Constitution, notorious violations of fundamental rights emerged, particularly regarding Article 32, which is discordant in its two subsections. The first states that “the existence of liberties and rights cannot be denied, under the pretext that they are not contained in the Constitution.” The second claims that “the restrictive laws of rights and liberties will be approved only for reasons of national security,” thereby imposing the duty of national defense on all citizens (Article 34). In practice, the Constitution established a *de facto* dictatorship in which President Park justified his draconian measures—resulting in violations of human and labor rights—as necessary in light of the unstable situation in East Asia (González, 2013, p. 234).

In the 1980 constitutional reform, the legislature became unicameral. The president's political powers were reduced, and the form of election was made indirect. At that time, General Chun Doo-hwan rose to power, recognized as a president who helped drive economic growth through support for foreign trade and the implementation of rights, which improved the living conditions of citizens. However, authoritarianism continued to be rooted in the restriction of liberties (Juárez, 2021).

The Chun government repressed, above all, unionized workers, students, politicians, and journalists who opposed the current power. In April 1980, Chun

declared himself the head of the National Intelligence Service, and in May, he established martial law, which resulted in the closure of universities, the dissolution of legislative power, and the prohibition of political party creation (León, 2006). According to the general pronouncement, in May 1980, many people took to the streets to demonstrate against the authoritarian government, and these protests had implications for human rights, leading to the deaths of thousands in the Kwangju region, located in the southwest of the country (Compton, 2000).

These events were justified by laws that impacted the effectiveness of protecting the fundamental rights of citizens. For example, the National Security Act and the Anti-Communist Act were both established long ago during the regime. However, opponents argued that these laws did not serve as effective instruments against potential aggression from North Korea. Instead, they were seen as legal tools to maintain authoritarianism and to punish those who opposed the government, particularly those accused of taking actions advantageous to the north, the so-called “violent radical” South Koreans (Cho, 2003, p. 51).

Table 1. *Laws of South Korea Considered Authoritative*

KOREAN LAW	ENACTMENT DATE
National Security Act	December 1948
Anti-Communist Act	July 1961
*These two laws were merged in 1980.	

Source: Own elaboration based on Gonzáles (2013).

In 1987, thanks to the constant protests, a door was opened for a new Constitution in Korea, which initiated a stage of protection for fundamental rights and liberties. This period was notable for the impact of the case law from the newly established Korean Constitutional Court, which created a balance between fundamental rights and national security (Gonzáles, 2013).

The Constitution of 1987 of South Korea not only strengthened the protection of fundamental rights but also paved the way for democracy by enabling the election of the President through direct popular vote, granting a five-year mandate to ensure the Executive Power, and establishing the Constitutional Court in 1988. The Constitutional Court allowed for the creation of laws to be subordinated to it, ensuring that these laws are compatible with the Constitution. The development

of South Korean constitutional law, viewed as a process led by the Constitutional Court, has been remarkable, with its origins rooted in the democratic transition and the adoption of the 1987 Constitution (González, 2013, pp. 227–228).

González (2013) raises the thesis that when any element related to national security is present in a dispute to be decided by the Court, it prioritizes the notions of legal order and national security over the protection of human rights (p. 228). Due to its permanent state of risk—characterized by an ongoing conflict, despite an armistice being signed, the war did not officially end—it necessitates addressing national security with vehemence and great care. Consequently, its military forces emerged as the most respected and affluent institution following these agreements. This dynamic causes the Constitutional Court to carefully monitor aspects related to the National Security Act and the Anti-Communist Act in its decisions. It is essential to recall that Korea's geopolitical condition, due to its location on a peninsula surrounded by China and Japan, has led to approximately 900 invasions throughout its history (Gonzales, 2013, pp. 229–230).

By the time the constitutional reform process began in 1987, a Special Committee for Constitutional Revision had been appointed, consisting of four lawmakers from the ruling party and four from the opposition parties. The key proposals focused on strengthening the legislature, implementing direct presidential elections, and establishing an effective constitutional control system through the Constitutional Court. The draft reform was presented to Parliament in September and approved in October. It was then put to a popular referendum on October 27, 1987, where 93 % of voters supported the reform. The new constitutional text was promulgated on October 29, and since then, the 1987 Constitution has served as a symbol of the transition to democracy after three decades of authoritarian rule (Saxer, 2002, p. 66).

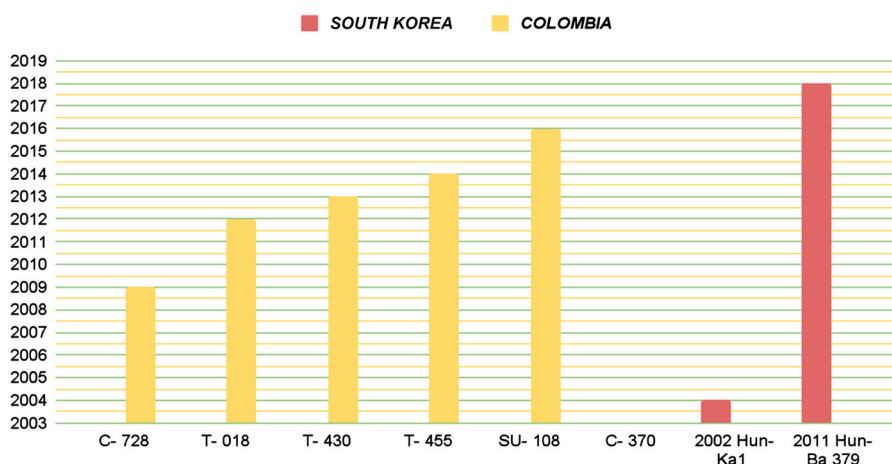
On June 29, 1987, presidential candidate Roh made a public statement in which he promised to promote constitutional reforms that would lead to greater democratic openness (Saxer, 2002). Specifically, the then-candidate, who was later elected president for the period 1988–1993, pledged to eliminate the obstacles that South Koreans faced in participating in the electoral process; in other words, he promised to facilitate direct presidential elections. The new Constitution, resulting from the agreement between the government and its opponents, symbolizes the transition and progress in South Korea, as it marked the first step toward overcoming three decades of authoritarianism and also toward protecting constitutional rights through the Court.

In 1997, with the onset of the economic crisis, the political democratization of South Korea was impacted, and during the presidential election, Kim Dae-jung emerged victorious. These elections marked the beginning of the transformation of the State through economic liberation, bureaucratic reform, and the pursuit of an economic and political approach with North Korea, a policy referred to as the "Sunshine Policy" (León, 2006).

In 1999, Kim Dae-jung published the article "Loyalty and Filial Piety: Thought and Twenty-First Century Korea," in which he stated that the object of piety and filial loyalty can no longer be the authoritarian officials, rulers, and patriarchs that thrived in South Korea's past, but rather the citizens who are part of a modern democratic society (Oropeza, 2021).

Considering the historical context of South Korea, we encounter two rulings from the Constitutional Court that shed light on conscientious objection to conscription: 2002 Hun-Ka 1 and 2011 Hun-BA 379. In Colombia, several rulings have been issued over the years, thanks to the new constitutionalism, including C-728/09, T-018/2018, T-430/13, T-45/14, and SU-108/16; some of these will be analyzed in depth later in the discussion.

Figure 1. *Case Law on Conscientious Objection to Conscription in South Korea and Colombia*



Source: Own elaboration.

Note. The figure highlights the differences between the case law of Colombia and South Korea, establishing that Colombia has a variety of rulings regarding conscientious objection to conscription, while Korea's decisions in this area are limited.

Discussion

Legal and constitutional decisions can affect a State's safety and defense, as highlighted in this study regarding Korea: its court, which is conservative and a guarantor of rights, has decided to take a strong stance against conscription established in its laws, due to the potential impact of regional threats on national security and defense, particularly those posed by North Korea.

Instead, Colombia is more progressive regarding conscription, as it allows individuals to decide whether to enlist in the armed forces. Therefore, we conclude, amid the discussion, that the Colombian Court best protects the fundamental rights of its citizens and, in turn, maintains national security. We will compare the decisions of the constitutional courts of the two countries regarding the conflict between conscientious objection and conscription, based on the security situations in their respective geopolitical contexts.

Compulsory enlistment in South Korea is outlined in the Conscription Act, which was enacted after the truce in the Korean War in 1953 and has been in effect since then. However, there are several exceptions to conscription in this country, such as individuals with physical or mental health issues that prevent them from fulfilling their military obligations, as well as musicians or athletes who have won international competitions. Additionally, conscientious objection was recognized as an exception after 2018.

Ruling 2002 Hun-Ka 1¹ of August 2004, issued by the Constitutional Court of Korea, addresses conscription and conscientious objection. The Court's decision was based on the argument that conscription is an irreplaceable duty of its citizens, as the Republic must uphold national security and defense capabilities due to the ongoing threat from North Korea, a nation that possesses nuclear weapons. This situation represents a significant risk if the commitment to civic duty weakens, as South Koreans must fight for the general interests of their society and protect their shared values (Corte Constitucional de Corea del Sur, 2004).

According to the Conscription Act, any person who fails to enlist may be fined and could face a prison sentence of up to 18 months. Consequently, a citizen submitted a petition to review the law, claiming it contradicts freedom of conscience and the State's duty to protect individual expression, as provided in Article 19 of the Constitution of this country. The petition was accepted and

¹ According to the case law of the Constitutional Court of Korea, the Hun-Ka rulings refer to constitutional revisions of regulations.

examined by the Constitutional Court, which emphasized that the right to freedom of conscience must be assessed in two ways: it is first an absolute right, but when a citizen expresses it through personal actions, it becomes a relative right, as this could impact the rights of others. Accordingly, the Court noted the lack of priority that freedom of conscience holds in relation to national security regarding the obligation of South Korean citizens to enlist in the armed forces (Constitución de Corea del Sur, 1989).

The Court also reiterated that the purpose of the questioned law, as previously mentioned, is to ensure the country's national security, which is constantly at risk due to the possibility of an external war with North Korea. This purpose is considered a pre-constitutional value since its positive manifestation is not necessary to guarantee this security. Therefore, as established in Article 37 of the Constitution, the liberties and rights of citizens can only be restricted by law when necessary for national security, public order, or public welfare. Even when this restriction is imposed, no essential aspect of freedom or law will be violated.

That is, no fundamental right can be contrary to the State and the legal system. Finally, this law was considered constitutional (Constitución de Corea del Sur, 1989).

According to the decision, a few years later, the Human Rights Committee intervened, which has the function of applying the so-called International Covenant on Civil and Political Rights. This committee observed that the right to freedom of conscience, enshrined in Article 19 of the South Korean Constitution, must be respected by the State, as it believes that respecting this right promotes a stable and cohesive pluralism in society, and the use of compulsory force can seriously conflict with freedom of conscience and every human being's right to express individual beliefs (Naciones Unidas, 2012).

In 2018, the Constitutional Court issued a ruling that many consider historical regarding conscientious objection: Ruling 2011 Hun-Ba 379 of June 28, 2011, in which the plaintiff, Park Sang-hak, challenged the Conscription Act on constitutional grounds after being sentenced to prison for opposing enlistment based on his religious beliefs (Corte Constitucional de Corea del Sur, 2018).²

In this ruling, the Court recognizes conscientious objection as a fundamental right protected by the Constitution and established that Article 5 of the Conscription Act was unconstitutional because it did not permit alternative options to enlistment. Therefore, it ordered the government to introduce an alternative civil service for

² According to the case law repository of the Korean Constitutional Court, Hun-Ba sentences refer to the appeal for unconstitutionality under Article 68(2) of the Constitutional Court Act.

conscientious objectors and also directed the legislature to amend the law by the end of 2019, which reflected the aforementioned ruling of 2004. Not only was the Constitutional Court responsible for this ruling, but the Supreme Court of Justice of South Korea also weighed in, with its chair emphasizing that punishing those who reject conscription due to their religious faith—or, in other words, their freedom of conscience—constitutes an excessive restriction on individuals' freedom of conscience (Myeong-su, 2018, para. 7).

This ruling clearly states that conscientious objection will not be a reason for South Korean men to avoid enlistment; rather, they may be required to fulfill national defense obligations through alternative forms of service, such as non-traditional military training. In addition, the final decision allowed for the resolution of the constitutional issue regarding the criminal punishment imposed on conscientious objectors and addressed the legislative and interpretive challenges arising from the amendments to the Conscription Act concerning its incompatibility with the Constitution and the punishment of conscientious objectors (In-hyeok, 2019).

Conversely, Colombia has experienced progressive constitutional evolution over the years. Regarding conscription, the country has leaned more towards recognizing its citizens' right to conscientious objection than prioritizing national security, grounded in the social rule of law; that is, it is legitimized by anthropocentrism, which places humans at the center of the State and ensures their rights, thereby serving as a guarantor.

Article 165 of the 1886 Constitution stated that enlistment was mandatory for all Colombian men, who were required to take up arms when public security demanded it to “defend national independence and institutions.” This article was further developed in Law 1/1945. Article 17 of this law established that every Colombian man was obliged to enlist in the military upon turning 19 and to provide a bail of COP 300 to ensure compliance. Additionally, men between the ages of 20 and 50 were obligated to enlist in the armed forces; likewise, according to Article 32, Colombians must pay a military compensation fee to the National Treasury if they do not enlist (Ley 1, 1945).

Under Article 20 of this law, members of the Catholic clergy, members of Catholic congregations, seminarians, theology students, and those who are absolutely unfit are exempt from paying the military compensation fee but are required to register. The sons of widows who support the household, fatherless sons, sons of parents who are disabled, over 60 or lack any livelihood, the brother or son of a man who died during conscription and whose work was essential for their family's livelihood, married men, as well as fatherless sons with single sisters

or minor siblings, are also exempt but only in times of peace. Lastly, at that time, the penalty for violating the conscription provisions ranged between COP 10.00 and COP 500.00, convertible into arrest (Ley 1, 1945, art. 20).

With the arrival of the Political Constitution of Colombia in 1991, conscription remained as established by the previous Constitution, which stated that “all Colombians are obliged to take arms when public needs demand it to defend national independence and public institutions” (Const., 2023, art. 216).

The emergence of the new Political Constitution and the establishment of the Constitutional Court in 1991 determined that the Colombian State serves as a guarantor of fundamental rights, such as freedom of conscience, as endorsed by Article 18, which provides the basis for objecting to conscription on the grounds of conscience. Consequently, citizens examined the laws that established conscription at that time and concluded that they do not align with the freedom of conscience. As a result, they commenced filing lawsuits for unconstitutionality to seek recognition that, due to their religious, ethical, social, and philosophical beliefs, they are unfit for conscription and bearing arms (Const., 2023).

The basis of the foregoing is Ruling C-728-09, in which the petitioners challenge the constitutionality of Article 27 of Law 48/1993. This article establishes that individuals who are physically and sensorially disabled, as well as Indigenous people residing in the territory and preserving their culture, are exempt at all times from conscription and from paying the military compensation fee (Ley 48, 1993).

The foundation of the petitioners' argument was that exempting only these two groups of Colombians violated their rights to freedom of conscience, religion, and equality; therefore, the legislator incurred a relative legislative omission by not including conscientious objectors in that group. The Court's decision was to declare the article feasible, because conscientious objectors are a group of people who have a constitutional right for reasons of “tribunal of conscience,” and not because they share common objective characteristics, like Indigenous people. Therefore, conscientious objection does not represent a relative legislative omission regarding the violation of the mentioned rights, and the Court urged the Congress of the Republic to enact laws that could regulate conscientious objection to conscription (Corte Constitucional Colombiana, C-729 de 2009).

On the other hand, Ruling T-455-14 showcases how citizens, through the tutela mechanism (an action for the protection of fundamental constitutional rights), assert their rights. In this case, the petitioners filed it because their rights to freedom of conscience and religion were violated. The first petitioner referenced his

active and permanent membership in a ministry of the Evangelical Church, whose situation was ignored by the National Army Recruitment and Reserve Control Division in his request for exemption. The second petitioner was approached at a public transportation station, even after expressing his Christian faith and his fear of wielding a weapon to take the life of another human being (Corte Constitucional Colombiana, T-455 de 2014).

The National Army Recruitment and Reserve Control Division stated that recruitment authorities ruling on situations based on assumptions not supported by legal provisions contradict the aims and principles of the administrative function (Corte Constitucional Colombiana, T-455 de 2014). In the same vein, the Court specified that the fundamental rights of freedom of conscience and religion were violated by the military authorities. It therefore revoked the rulings where those rights were not recognized and ensured their protection. Similarly, the Court ordered the Head of Recruitment of the National Army to initiate the necessary actions so that those in charge of recruitment receive directives pertaining to the process of conscientious objection, which may not be denied in any application, even if the citizen is already confined to barracks (Corte Constitucional Colombiana, T-455 de 2014).

Consequently, even when rulings exist that guarantee freedom of conscience in refusing conscription, many still violate the protection of this right because there is no legal framework compelling officials to respect each person's individual liberty. Therefore, in compliance with the Order of the Constitutional Court in C-728/09, the Congress of the Republic issued Law 1861 on June 14, 2017, which recognized conscientious objection as a right that exempts individuals from conscription in Article 4. This legislation emphasizes that individual convictions must be genuine and substantiated; that is, it establishes that enlistment is mandatory as a duty to serve the country when necessary, except for those who exercise the fundamental right to conscientious objection (Ley 1861, 2017, art. 4).

Article 12 of this law provides a lengthy list of reasons that exempt individuals from conscription: only children, motherless or fatherless sons who must support their siblings, sons of parents unable to work or over 60 years old, brothers or sons of a person who died in combat, sons of noncommissioned officers, soldiers, or others who have passed away due to their duty, clergymen and members of a religious order, married men or those in a domestic partnership, men with disabilities, Indigenous men who demonstrate to be so, individuals who are no longer identified as male on their birth certificate, and, of course, conscientious objectors, among others (Ley 1861, 2017, art. 12).

That is, it is now clear that the application for conscientious objection or any other type of exception must always be genuine and not merely an excuse to avoid fulfilling a duty to the homeland.

Based on previous law and current case law, we have C-370 of 2019, which challenges Articles 77, 78, 79, and 80 of Law 1861/2017 as unconstitutional. The Court's decision was to deem all the articles valid, as it is clear that conscientious objection is an autonomous and recognized right established in Article 18 of the Constitution. Although the legislator does not specify the characteristics that beliefs must possess, any sincere and deeply held conviction opposing conscription can be acknowledged and, therefore, exempt individuals from fulfilling that duty. This right also entails the protection of equality and the necessities of defense and security of the State (Corte Constitucional Colombiana, C-370 de 2019).

By 2022, 18 congressmen from the Republic of Colombia finally introduced a bill that sought to eliminate conscription "in times of normality" and amend Article 216 of the Political Constitution, making enlistment mandatory only when the country is in a state of external war or civil commotion. The main objective of this bill was for Colombians to provide *universal national service* focused on public, social, and environmental work, intended to strengthen the sense of national belonging, construct democratic societies, and eradicate social inequality among Colombians, as underprivileged citizens are the ones required to serve, unable to afford the military compensation fee. Furthermore, eliminating conscription in times of normality allows citizens to enlist voluntarily by prohibiting forced recruitment (Congreso de la República, 2022).

In November 2022, Congress of the Republic enacted Law 2272/2022, which amends, adds to, and extends Law 418/1997, known as the "Total Peace Act," and guarantees human security through the resolution of the armed conflict in Colombia. Under the law, the national government may pursue two types of processes. The first involves negotiations with armed groups operating outside the law. The second entails engaging in talks with these armed groups or structures involved in high-impact crime. Additionally, Chapter Three of this law established the Social Service for Peace as an alternative to conscription, including promoting digital literacy in rural or urban areas, assisting victims of the conflict, supporting peace agreements, advancing peace policies, protecting the environment, and fostering ethnic and cultural peace, among other initiatives (Ley 2272, 2022).

Based on the above, the Centro Democrático party, represented by Senator María Fernanda Cabal, submitted a proposition to abolish social services, which

was approved by the Senate. This proposition asserts that Articles 10 and 11 of Law 2272/2022 violate the principle of conscription, which safeguards the nation's critical infrastructure, citizen security, and prison security. As a result, the legislative initiative has a negative impact on the institution (Cabal, 2022, p. 2).

Conclusion

The legal-political evolution of Korea has allowed the country to abandon its historical period of authoritarianism and enter a legal framework that respects the Constitution. This framework increases the guarantees for the people through the decisions of the Constitutional Court. Despite its significant normative development in defense of fundamental rights, the Court still considers national security a legally protected interest so vital that it must be defended against potential threats and challenges that may limit certain citizens' rights; this consideration is taken in light of its geographical location and geopolitical conditions.

Colombia, being a more "progressive" State compared to South Korea, has allowed for the primacy of fundamental rights justified by national security within the framework of the Social Rule of Law. This is despite knowing that there are several internal threats in the country, such as armed groups operating outside the law, which threaten, kill, kidnap, and displace many Colombians. This situation is caused by a context of violence that has persisted in the country for many years.

Therefore, in response to the legal issue raised in this research, it is essential to consider whether it is necessary to analyze the legal arguments underlying the decisions of the Korean Constitutional Court and apply them to Colombia to achieve suitable transnationalization. This aims to prevent progressive decisions from undermining the State's security and defense structure, given the mistaken belief that internal threats, such as armed groups in Colombia, will not jeopardize the State's survival, while prioritizing individual rights over the collective right to national security and defense.

Both in Korea and Colombia, issues like the absence of peace, political, social, and economic exclusion, and a lack of pluralism, among other democratic deficits, are evident. However, regarding conscription, there are several notable differences. For instance, the case law concerning the acceptance of conscientious objection as an exemption from military enlistment is highly diverse. In Colombia, conscientious objection has been permitted for years; therefore, every Colombian is exempt from

enlisting in the military due to their sincere and justified conscience, whether based on ethical, religious, cultural, or other grounds.

In Korea, on the other hand, there is only one ruling that permitted conscientious objection as an exemption, issued five years ago, which is considered historical for South Korean objectors. Nevertheless, the Court's decision at that time did not aim to prevent the objectors from enlisting in the armed forces, as it did in Colombia. Instead, it allowed them to provide alternative services, such as administrative and office work, without undermining the duty of national defense.

Colombia, both before the 1991 Constitution and today, allows Colombian men to be exempt from conscription in exchange for economic compensation, even if they do not qualify for exemption under one of the specified causes. South Korea does not have a military compensation fee, as the country prioritizes national security and ensures that its citizens feel a sense of belonging while recognizing the potential threat of attack from the North. Consequently, those who cannot enlist in the military can engage in alternative service, as previously mentioned.

As previously mentioned, the causes for exemption from conscription in Korea are quite limited: physical and sensory disabilities, international recognition, and conscientious objection, thanks to the 2018 ruling. Most exempted citizens are objectors due to their religious beliefs, but, generally, South Koreans prefer to enlist, viewing it as a sign of patriotism rather than merely a duty, because they recognize that the peace with North Korea is unstable and could lead to war at any moment. For example, the members of the K-Pop band BTS announced in 2022 that they would enlist. Although they were given the opportunity to postpone their enlistment due to their status as world-famous artists, the band members stated in a press release that it was an honor for them to serve their homeland.

In Colombia, however, there are many exemptions from conscription, in addition to the military compensation fee. This demonstrates its "progressive" side, due to the primacy of the fundamental rights of its citizens, including the Indigenous community, as a subject of protected rights in the country, which is crucial to ensuring the constitutional principle of pluralism. However, it overlooks national security and the well-being of its citizens.

Finally, the two States agree that freedom of conscience is a constitutionally protected fundamental right and that the recognition of this right should be amended through the constitutional courts and other mechanisms to enforce their rights, so that the convictions of individuals regarding conscription or other practices that contradict these beliefs prevail.

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