

# 宗教良心自由與服役正義 ——釋字第 490 號解釋與社會役

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司法院大法官對於耶和華證人會的信徒以宗教信仰與良知理由，而履履拒絕入伍（「良心拒絕服兵役」）的違憲爭議作出第 490 號解釋，在此解釋中述及宗教自由及服役正義的概念。本文先就宗教「內在」及「派生」自由的二分概念予以簡權，同時確立宗教自由的界限，其次討論拒絕兵役的處罰制度是否構成「一事二罰」，再就比例原則檢討該解釋的妥當性。

最後本文就本案應有的解決之道，亦即「社會役」制度予以介紹，並對此制度可以如何解決該爭議予以說明。而後以此制度的憲法理論基礎對第 490 號解釋的不當之處提出建議及解決方案。

**關鍵詞：**釋字 490 號、宗教良心自由、社會役、一事不二罰、兵役法、替代役、社會役

## 壹、前言

司法院大法官在 88 年 10 月 1 日公布了釋字第 490 號解釋，針對耶和華證人會的信徒以宗教信仰與良知理由不從事參與任何有關戰爭與殺人的事

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# **Freedom of Belief and the Equity of Compulsory Military Service: The 490<sup>th</sup> Decision of the Grand Justices and Substitute Service**

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## **ABSTRACT**

In their 490<sup>th</sup> decision concerning the refusal (conscientious objection) of Jehovah Witnesses to serve in the army, the grand justices of the Judicial Yuan have explicated the conceptions of “freedom of belief” and “army service justice.” This article will discuss the “inner” and “derivative” aspects of, along with the limitations concerning, the “freedom of belief.” It will then take up the question of whether punishing “conscientious objection” would constitute “the punishment of one act twice.” Based on “Der Grundsatz der Verhältnismässigkeit,” the article will then determine whether or not the 490<sup>th</sup> decision is appropriate.

The article will then introduce the “social service” system and explain how it can constitute a resolution to the problem. Finally, it will examine the 490<sup>th</sup> decision in terms of the constitutional basis of the “social service” system and raise suggestions for improvement.

**Key Words:** the 490<sup>th</sup> decision of the grand justices, freedom of belief, social service, ‘not to punish one act twice’, military service law, substitute service.