

## Historical Development of Conscientious Objection and its system: An Analysis from the Perspective of Aporia

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### Abstract

Conscientious objectors have been regarded as deviating from the image of a “true citizen”, because they do not bear the obligation which the state required them to. But, by grasping military refusal from the perspective of aporia, it becomes clear that this perception is fundamentally wrong. A state should respect the inner freedom of individuals, then it cannot intervene in people's conscience. Where religion or beliefs are concerned, an individual and a state can be seen as theoretically equal. Therefore, a state policy of conscription has inherently unavoidable serious aporia (dilemma/antinomy). There have been people who have tried to resolve aporia by refusing military service. Their behavior has contributed to the approval of the right of conscientious objection. At the same time, however, guarantee of this right means the internalization of conscientious objection within the conscription system. And it has also taken away opportunities to raise objection related to military service as aporias. Furthermore, nowadays the privatization of military is rapidly expanding. By being separated from the state in the form of a business contract, the state has succeeded in liberating itself from the aporia and obscuring its responsibility to protect its citizens. In the situation where it is said that “there is no aporia”, it is necessary to have clear eye to find which aporia is ignored and hidden<sup>1</sup>.

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<sup>1</sup> This article is a translation of an article, Heiekikyohi no Aporia(The Aporias of Conscientious Objection), *Kyojo Hougaku (Kyojo Journal of Law and Politics)*, 16, 2019, pp.1-31.

## 1. Introduction

Under the system of military conscription, those who cannot take up arms for conscientious reasons (due to their religious or personal convictions) fall into serious aporia. Anyone who refuses military service must stand alone against the immense power of the state. Conscientious objectors appear to be utterly powerless, as they cannot escape obligations imposed upon them by the state, much less change its policies through their actions alone.

And yet, by looking back on the history of conscientious objectors who have followed their conscience, we can see how their decisions have created opportunities to change the system. There have been those who have sought to resolve their aporia by confronting it through their actions; and even if they haven't been able to alter the social conditions that produced this aporia, they have, by facing their own doubts and anguish, made it impossible to dismiss it as something that somehow cannot be changed. It was precisely because there is a fundamental aporia (antinomy) inherent in the fact that freedom of conscience is a value promoted by the state.

Regarding conscientious objection, it is possible to discover a lot of aporias (dilemmas, antinomies) for both individuals and state. However, not all of them are recognized as such. In accordance with certain intentions, only some of aporias are acknowledged as aporia in a society. Moreover, some accepted aporias are not genuine, but are pseudo-aporias.

A situation that one person may think of as an aporia may actually be a pseudo-aporia contrived by someone else. If the person becomes aware of the artificiality of the aporia situation that they were convinced they were in, they can be released from its grip. By discovering who created this situation, and with what intention, it may become possible to reach its essence. A real aporia can be avoided, mitigated, or resolved by such means as excluding, shifting away from, or compromising with the conditions that gave rise to it. In a condition of aporia such as a dilemma or antinomy, it is not possible to decide which is correct. An individual may overcome this situation through sheer determination, but a society cannot make this choice. Because the fundamental dilemma will persist, a practical means of mitigating the aporia must be sought. There is a way to do this by taking the conflict within the actual aporia to another level. Or the aporia can be resolved by grasping it within a larger framework than that at which the conflict exists.

This paper discusses the issue by looking at it from the perspective of who acknowledges or ignores the aporia; for whom it is, in fact, an aporia; and whether it can be resolved or mitigated. The unavoidable aporias that could not be solved have been provided the impetus for the development of the system of conscientious objection, which in turn gave rise to new aporias.

## 2. What is conscientious objection?

In a narrow sense, conscientious objection refers to an individual's refusal to serve in the military based upon their religious faith or convictions. Historically, it can be traced back to the example of Christians refusing to serve in the Imperial Army during the Roman era, but it only emerged as a social problem during the two world wars of the twentieth century. In Western countries, tens of thousands of people have been sentenced to imprisonment with hard labor for refusing to take up arms, and many have been executed. Because of this experience, it was thought after the second world war that conscientious objection should be respected as a right based on the Universal Declaration of Human Rights and the International Covenant on Human Rights. Furthermore, regarding international law, each soldier on active duty also has a right and obligation to refuse unlawful or inhumane orders<sup>2</sup>.

The system of military refusal varies according to history, culture, and times, but can be organized into the following four types (Table 1)<sup>3</sup>. Broadly divided, there is liberal refusal of military service, which seeks to respect freedom of thought under conscription, and selective objection by soldiers and other military personnel. To briefly explain each type of refusal of military service, (1) exemption from military service means that the conscientious objectors is exempt from service, while (2) alternative service allows the conscientious objectors to request an alternative, non-combat form of military service. If the alternative form of service is in a non-military field (such as social work), it is a form of (3) civilian service. When soldiers or other military personnel exercise their right/obligation to disobey a command they regard as unlawful, it is (4) selective military refusal.

We can examine these four types of military refusal by looking at the example of Germany. Military service was an important theme for both East and West Germans, as the country's division into two halves for 45 years. It was a result of Germany's atrocities in the world wars. Article 4(3) of the Basic Law for the Federal Republic of Germany, under which West Germany was founded in 1949, states that "Nobody may be forced against their conscience into military service involving armed combat." Thus, before West Germany's rearmament, the right to refuse military service was guaranteed as a basic constitutional right. And this was for the first time in world history. In 1964, two years after introduction of conscription, a construction corps (Baueinheit) was established within the National People's Army, East Germany became the only Eastern Bloc country to introduce a system that would allow military refusal. After the reunification of the two Germanys, there have also been cases of selective military refusal. In this paper, the example of Germany will be central to our discussion of the dynamism by which an aporia of individual conscience can be

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<sup>2</sup> The idea and practice of refusing military service have arisen and developed within the Christian traditions of modern Western nations and are historically and geographically limited. Since the end of the Second World War, non-Western countries such as South Korea have come to recognize military refusal as a social problem.

<sup>3</sup> Regarding the historical development of military service refusal, see Ichikawa (2007), pp.80-103.

Table 1: Types of Conscientious Objection

	Liberal Refusal of Military Service under Conscription (Respecting Freedom of Thought/Freedom from State Control)*			Selective objection within the Military
Type	(1) Exemption from military service	(2) Alternative service	(3) Civilian service	(4) Selective objection to service/orders
Applicable Rights/Obligations	Freedom of conscience (religious beliefs/convictions)	Freedom of conscience (religious beliefs/convictions)	Freedom of conscience (religious beliefs/convictions)	Freedom of conscience (religious beliefs/convictions) Right/duty to disobey
Motivation	Religious belief Pacifism Non-violence	Religious belief Pacifism Non-violence	Religious belief Pacifism Non-violence	Skepticism about the lawfulness of a particular order
Conditions	Outside the army	Within and outside the army Non-combat services	Outside the army Civilian service	Within the army Orders judged individually
Attitude regarding the use of force	Denial of use of force	Solidarity with soldiers Cooperation with the execution of war	Critical of war	Not opposed to war or use of force, but critical of methods or purpose
Relationship with politics/society	Keep as much distance as possible	Actively related	Actively related	Actively related
Critical of the legitimacy of policies/orders	No	No	No	Yes

\* Since a person's conscience (beliefs/principles) may change after entering military service, some military allow personnel to transfer to non-combat positions or leave the active service even after joining the military.

transformed.

### 3. Acknowledging, ignoring, and embellishing aporias

#### 3-1. Ignoring, and embellishing aporias

Based on the logic that the defense of one's homeland is both an obligation and a noble calling, the aporia of military conscription has long been unacknowledged. In a modern state, only those who are able to bear the burden of state defense are regarded as "full citizens" entitled to the protection of the state. The fact that women, disabled, and minorities are not conscripted may be used as justification for treating them like second-class citizens. However, as first-class citizens, soldiers are forced into harsh conditions in the military, especially on the battlefield. To be citizens worthy of the protection of the state, soldiers must carry out their duties, but in fulfilling that obligation, their own security cannot be guaranteed. And when soldiers lay down their lives in the execution of their mission, they fall into the paradox of creating a predicament for their own families, who they wanted to protect.

**Individual level**    **Obligation as a citizen ↔ Danger to life**

**State level**            **State security ↔ Lives of citizens**

This aporia is ignored/concealed/embellished by viewing soldiers as heroes and extoling the glory of death in battle. Soldiers are praised as “heroes who protect their homeland and their families,” and military service, which involves mental, physical, and social hardships, is portrayed as a noble mission. By praising soldiers as heroes, the state has exempted itself from its obligation to protect them as citizens. The aporia between protecting the lives of citizens and ensuring national security is thus rendered invisible by embellishing it [ignoring/embellishing aporia]. If military force is used as a matter of state policy, this aporia cannot be resolved. It is for this reason that the state cannot acknowledge it.

This ignoring and embellishing of aporia is also strengthened by those who are consumed by state policy using military force. And there are many bereaved who accept the fiction of hero soldiers. Even if the “noble mission” is regarded with suspicion, there are many who will go along with it because of the difficulty of resisting state policies. They will act as if they do not see the real aporia and instead try to accommodate the discourse of a contrived aporia. The affected persons, pushed into a corner, will try to convince themselves that the situation they are in is not an aporia.

A typical example of this can be seen in the case of the so-called “Special Attack Units (Tokko-tai)” that were deployed by the Japanese Imperial Army at the end of the Asia Pacific War. Soldiers of this attack units were called on not to fight, but to die. They had to attack into the enemy with bomb and die so that they would be “military God (Gun-shin)”. Therefore, they were not allowed to come back alive in any situation. Since the tokko operation was a guarantee of death, the top military officers decided to make the operation not an official part of the Imperial Navy or Army, whose orders were issued under the name of the emperor (Morimoto:1992, p.117). Thus, Tokko attack units were “voluntarily” formed. However, it was, only in name. Soldiers were strongly urged to “volunteer” in many ways<sup>4</sup>.

So soldiers of tokko units were faced with the dilemma of choosing between the orders of their superiors and their own lives. But many of the soldiers tried to sublimate the real aporia they had been forced into by engaging with it as not “for the sake of the nation” but “for the sake of my family”<sup>5</sup>. By allowing themselves to be sacrificed, they endorsed the state’s efforts to ignore and

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<sup>4</sup> Morioka reveals how soldiers were forced to “volunteer” for tokko tai from their diaries and letters left behind. Morioka: 1995. See also, Ohnuki-Tierney: 2002, pp.166-175.

<sup>5</sup> The first pilot of the “Special Attack Units (Tokko-tai)”, Yukio SEKI a Japanese Imperial Navy lieutenant said to the reporter the day before his attack, “I am not going for Ten-no or the Japanese Empire. I will go for my beloved wife. If that’s the order, I will go. If Japan loses, she might be raped by Americans. I am dying to protect her. I die for my loved one. How wonderful it is.” Onoda:1971, pp.28-29.

embellish the aporia. And by doing so, they forced others to face the same aporia.

### **3-2. False aporias**

The most basic aporia of conscription, the fact that it comes at the cost of consuming the lives of citizen is embellished by the fiction that soldiers are heroes. Conscientious objectors are regarded with such hostility, precisely because they undermine this fiction. If they do not accept the state's image of soldiers as heroes, they are punished as non-citizens unworthy of protection by the state [rejection of aporia]. The conscientious objector is attacked as one who has failed to fulfill his obligations as a citizen and as a coward who shirks hard work that must be borne by others. It is taken as a given that it is necessary to secure military personnel through conscription.

Based on the premise that there is a relation of antinomy between the military refuser's freedom of thought and the sacrifices of others, the individual person whose conscience does not permit them to take up arms falls into a dilemma. They has to worry about whether it is right to follow his conscience if it means placing someone else in harm's way.

#### **Individual level**

##### **Freedom of conscience/belief ↔ Sacrifice of others sent to the battlefield**

This is a false aporia that there is a dilemma between military refuser's freedom of thought or sacrifices of other citizens. This claim is based on the premises that it is necessary to guarantee the security of the state to ensure the security of citizens; that this requires a large army; that it is necessary for citizens to assume military duties and that all citizens are equally obligated.

However, it is not self-evident that these assumptions are true. If neighboring countries come to see the creation of a large army of conscripts as a threat and feel pressured to enhance their own military readiness, this may result in a "security paradox." Or a conscript army may be not effective for state security and defeated in war. Any way in a war, soldiers may be killed or injured. Whenever a state uses force, it always faces the dilemma that it cannot guarantee the security of soldiers, who are citizens that the state is supposed to protect. This aporia goes unstated [ignoring aporia]; and, rather than acknowledging this as a conflict between the state and the individual, it is treated as an aporia between soldiers and conscientious objectors.

This false aporia is set by the state, but it is strengthened in collaboration with the public. Those who have family members serving in the army take a harsh view of those who refuse military service. In fact, however, it is not the case that a conscientious objector forces another person onto the battlefield. This pseudo-aporia, paired with the previous embellished aporia (the portrayal of fallen soldiers as heroes), has the function of demonstrating how those who do not fall in line with state policy will be punished.

A person involved in this pseudo-aporia may be released from it by becoming aware of its artificial nature. Refusing military service does not force someone else onto the battlefield and does not involve taking responsibility for that person. Decision to war is done by the state, not by conscientious objectors.

#### **4. Aporias in the system of conscription**

Conscription presents a serious problem for anyone on whom it is imposed, as it requires them to put their lives at risk. For those who are opposed to taking up arms as a matter of conscience, military service also creates a crisis of personality. Such individuals face a profound aporia when forced to choose between following their own conscience or fulfilling their duties as citizens.

**Individual level**    **Obligation as a citizen  $\Leftrightarrow$  Conscience (faith/creed)**

**State level**        **Policy implementation  $\Leftrightarrow$  Guarantee of the rights of citizens**  
**(fairness of obligations)    (inner freedom)**

**State security  $\Leftrightarrow$  Lives of citizens**

If no system of conscientious objection is available, it falls to the conscientious objector to “overcome” the aporia of having to “choose” between following his conscience or fulfilling his duties as a citizen. Going back in the history of conscientious objection to the Roman era, many Christians chose to “make an early return to their Maker.” In Nazi Germany, hundreds of Jehovah’s Witnesses who refused to serve in the military overcame this aporia by choosing to follow their conscience resulting in being executed. If the conscription system has a provision for exemption from military service, those who are subject to conscription can use it to avoid this aporia. During Cold War era, in West Germany, conscientious objectors could legally avoid military service by moving to West Berlin or apply for alternative/civil service. In the absence of a legal means of escaping military service, those who cannot choose between entering the army or facing punishment will try to resolve this aporia by going into hiding. To escape this aporia, during the Vietnam War era, many young American conscripts fled to Canada where they could be free from the US judicial system. However, if you are within the area where the conscription system is in effect, there is always a danger of being pulled back into the aporia. In Japan, during the war era, hiding in the forest was a way to temporarily avoid the risk of arrest and the associated aporia. Looking at it from the side of the state, dealing with conscientious objectors as fugitives makes it possible to ignore the original aporia [elimination of aporia].

#### 4-1. A conscientious objection system as a method of avoiding, mitigating, and eliminating aporia

If the state respects the rights of citizens and sees their welfare as its very reason for existing, it faces an aporia when it violates their citizen's rights by forcing them to act against their conscience. Therefore, from a liberal perspective, a special exemption must be made for members of certain religious groups to avoid violation of a citizen's rights to force them to serve in the military against their conscience.

In European history, until world wars, people who adhere to strictly non-violent, pacifist views are always in the minority and are usually good citizens who bear no hostility to authority. For religious reasons, they just cannot bring themselves to use weapons against those deemed to be "enemies." They do not criticize the state for going to war or rebel against its power, but merely wish to follow the tenets of their faith. Therefore, it is not a problem for those in power to respect their freedom of conscience, and by doing so they can even enhance their own legitimacy by demonstrating their commitment to liberal principles, and so "evade" the aporia.

During world wars in Europe and the US, thousands of people refused to enter military service (Ichikawa: 2017, pp.86-88). So, systems were put in place that enabled them to join missions that do not involve the use of weapons. Such alternative forms of service are neither an exemption nor a form of punishment, but rather a way of "shifting" away from armed military service that offers a compromise to both the state and the individual.

Alternatives such as civilian service allow the state to avoid its aporia by giving it a way to impose obligations upon citizens fairly while also protecting their inner freedom. For those who refuse to serve in the military, being able to take on duties with a low conscience burden has the effect of easing or eliminating the aporia they face in having to choose between following their conscience or fulfilling their obligations as citizens. Army medic Desmond Doss was able to mitigate and resolve this aporia by contributing to his country without taking up arms and became the first conscientious objector in US history to win the Medal of Honor for his distinguished service in the Battle of Okinawa during the Second World War<sup>6</sup>.

However, if the examination for determining conscientious objectors' sincerity is harsh, or if the alternative is punitive (for example, if the period of civilian service is longer than that of military service), then the dilemma remains. Also, when conscientious objectors are subject to punishment for declining civilian service, their aporia is not resolved.

Many countries that currently employ conscription have developed alternative civilian services<sup>7</sup>. For those refusing military service, this allows them to follow their conscience without breaking the law; and by incorporating criticism of the national policy of conscription into the

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<sup>6</sup> Desmond Doss, a US Army medic, was awarded the Medal of Honor for his "brave action" in the Battle of Okinawa. See also <https://www.desmondoss.com/index.php>(accessed 13 September 2021)

<sup>7</sup> However, in many cases, conscientious objectors must be prepared to undergo complicated procedures and severe interrogations and may have to serve longer in civilian service than they would in the military.



system, the state can guarantee citizens' right to freedom of thought, conscience, and religion. At the same time, the state is able to impose an obligation on all members of the target group and thereby stabilize and maintain order. A system of conscientious objection that guarantees civil liberties also serves as a filter to keep out potential "rebels" or "weaklings" or anyone else who might become "a grain of sand in the wheel" of the army. It also aims to prevent the emergence of rebels and martyrs in the army and contributes to a stable order (Bröckling: 2009, pp.57).

#### **4-2. New aporias**

Recognizing the liberal right of conscientious objection, which prevents the state from interfering with the individual's inner freedoms, enabled the state to present an image of itself as liberal and fair as to respect rights of minorities. For the state, this should not have produced any aporia. For any citizen spared from a situation that would plunge them into a crisis of conscience because of their religious or personal belief in non-violence, it should also eliminate any aporia. However, this was only tolerated when the number of military refusers was small; when it increased, this system of "privileges" could no longer be maintained.

During the First World War, European states were under pressure to secure sufficient troops to fight in the war, so they introduced conscription systems. When large numbers of people became subject to conscription, it wasn't only members of small religious groups who refused military service, but also many socialists who objected to war on the grounds that it profited capitalists at the expense of workers. Those who refuse military service by non-religious reasons were not recognized as "conscientious objectors" and so individuals and states faced aporias.

If some people have a "special right" that exempts them from military service, while others are obliged to serve in times of war — it is a matter of life or death — it undermines the very notion of military service as a "sacred duty." All citizens of a state should bear the same obligations. For that reason, it was necessary to subject conscientious objectors to rigorous examinations. Often, this was done in a way that was so harsh that it inflicted real harm on the personalities of applicants. Thus, a system that aimed to respect citizens' rights threatened their inner freedoms [continuation of aporia].

From the outset, there is a fundamental contradiction in the thinking that the state can judge whether an individual's "inner thoughts" are legitimate or not, as this inevitably violates the idea that a state power should not interfere with the individual's inner freedoms. Moreover, this deliberately overlooks the logical impasse inherent in the fact that freedom of thought means that the individual's conscience is not subject to interference by the state, it is up to state agencies to decide, based on applications and hearings, whether somebody is acting on their "true" or "significant" conscience [ignoring/embellishing aporia]. Inner freedom can be protected only when the state does not interfere with the individual's thoughts or religion. And so, the state examination

system itself has an aporia.

For those who win recognition as conscientious objectors, their own aporia, between their conscience and their social obligations, is resolved. Depending on how easy it is to gain recognition, this can be regarded as a mitigation of the aporia [mitigation / resolution of aporia]. However, if examinations are conducted in a punitive manner, or if the alternative service is military in nature, the aporia of the conscientious objector will not be resolved, and in some cases, may even be deepened. For example, even though the East German military established a military refusal system by creating a construction unit (Baueinheit) within the People’s Army, those who served in it were routinely treated in an insulting manner by their superior officers and their religious life was not respected [continuation of aporia].

For the state, the conscription army is the reason that it faces an aporia(antinomy) between

Table 2: Aporias inherent in the conscription system

	Individual level	State level	
Dilemmas Antinomies	Duties as a citizen ↔ Conscience (faith/creed)	Policy execution (fairness of obligation) ↔ Guarantee of right	National security ↔ Lives of citizens
Punishment/ execution	<b>“Overcoming” of Aporia</b> “Overcome” by choosing one or the other (e.g., Jehovah’s Witnesses during the Nazi era)	<b>Rejection of Aporia</b> Maintain the fiction that the aporia doesn’t exist	<b>Continuation of Aporia</b>
Institutional exemption	<b>Avoiding Aporia</b> Legal loophole (e.g., moving to Berlin during the West German era)	<b>Continuation of Aporia</b> Doubt and damage to the fairness of the system	
Evasion (Absence without leave/ desertion)	<b>Eliminating the Aporia</b> Escape from the situation that created the aporia (e.g., U.S. military recruits who fled to Canada during the Vietnam War)  <b>Temporary Resolution of Aporia</b> Risk of execution/punishment unless one escapes the situation that created the aporia (e.g., Japanese conscripts who went into hiding during WWII)	<b>Eliminating the Aporia</b> Treat military refuser as a fugitive, not as someone with a conscience that should be respected (no questions raised about inadequate human rights guarantees)	
Exemption from military service  System of alternative/ civilian service	<b>Mitigation/Elimination of Aporia</b> If exemption is approved, alternative/ civilian service that does not go against conscience is available (e.g., Hacksaw Ridge medic)  <b>Continuation of Aporia</b> Alternative/civilian service is also refused (complete military service refusal); application for exemption is denied; imposition of military alternative services/ punitive conscience examination/service period (e.g., East German National People’s Army construction soldiers)	<b>“Avoidance” of Aporia</b> Appearance of avoiding aporia by allowing some exceptions  Interference in matters of conscience continues by means of investigations	

respect for the inner freedoms of individuals and its imposition of obligations upon them; a volunteer army can, therefore, resolve this aporia. However, even those who did not have a crisis of conscience when they entered the army may change their beliefs because of their experiences in the army or on the battlefield. In such cases, it becomes a dilemma between a superior officer's orders and the human rights (inner freedoms) of the soldier. If soldiers can be freely discharged, however, they will not fall into this dilemma.

#### **4-3. Dynamisms of aporia that cannot be avoided, mitigated, or resolved**

When East Germany introduced conscription in 1961, there were no provisions for the protection of citizens' freedom of conscience. 518 people in 1962 and 644 people in 1963 refused military service when recruit (Schicketanz: 1994, S.6ff). Those who refused to enter the army were placed at a considerable disadvantage when seeking further education or employment for the rest of their lives. Their presence led to the establishment of construction units in 1964, the only military refusal system in all east European countries. However, as mentioned before, the system was so inadequate and punitive that the consciences of those who refused military service were not respected. That forced them into activities outside the army. For the most part, these were ordinary people who would not otherwise have engaged in anti-establishment activities, but who felt obliged to do so to protect their religious and personal convictions.

After their discharge from the construction units, they worked in their respective communities throughout the country, on the issues of peace and human rights. This continued from the mid-sixties and began to link with activists dealing with issues such as women's rights and environmental problems. In an East German society where activities contrary to the policies of the Socialist Unity Party (Sozialistische Einheitspartei Deutschlands, or SED) were severely restricted. Nevertheless, they continued their activities, and that became the foundation of the citizens' groups that spread widely in the latter half of the 1980s, which led to the regime change "Die Wende" in 1989 (Ichikawa: 1997, pp.82-91, Ichikawa: 2016, pp.166-192).

The original intention of the SED setting up a kind of alternative service in the army was to stabilize the socialist system by segregating young people who had ideas that differed from the policies of the SED and putting them into the construction units. Contrary to that aim, however, the construction units gave young people from all over the country a place to meet others who also wanted a non-violent society. And even if only a small number of people were involved, forcing them into a profound aporia provided an opportunity for the formation of citizens' groups. That is to say, the state created the conditions for the emergence of a civil-society movement by forcing a small number of people into a profound aporia.

## **5. Aporias inherent in the army**

### **5-1. Selective military service (command) refusal as a method to resolve aporia**

There is an aporia inherent in the army, whether it is one based on conscription or a volunteer force. In the military, subordinates are required to submit to the orders of their superiors. This is essential for organizations that can exercise destructive and lethal power, and strict command-obedience relations are a fundamental principle for military order. However, even soldiers or military personnel<sup>8</sup> who have entered military service cannot obey every order. When they are given an order that their conscience tells them is unlawful, they fall into an aporia.

**Individual level** Inner freedom ⇔ Obligation required by superior

**State level** Command obedience relationship ⇔ Human rights of soldiers

This dilemma is resolved by recognizing the right to selective objection, which is the right of soldiers to refuse to follow particular orders that violate their conscience. This selective command obedience implies potential criticism of the government policies, as each soldier determines whether the war is justified, the order violates international law, or the tactics employed are inhumane.

When an order is illegal or inhumane, selective command obedience protects soldiers' conscience. At the same time, disobedience to an illegal order is regarded as a legitimate response to the order — the act of a good soldier who performs their duties. If the order is unlawful or inhumane, soldiers have both the right and the obligation to disobey it (Bundesministerium der Verteidigung).

### **5-2. Right and duty to disobey = Critical obedience**

The right and duty to disobey have been institutionalized as guiding principles of the German Federal Defense Forces (Bundeswehr), which had to distinguish itself from Weimar-era Reichswehr — the imperial defense force that operated as a “state within a state” — and the Nazi-era Wehrmacht. This was to show that it had broken with these two traditions to become a “democratic” army. To that end, when the Bundeswehr was established in 1955, it was with the idea that citizens should be free and responsible individuals even within the military. The guiding principle of the Bundeswehr was that the soldier should be “a citizen in uniform”.

“In principle, with the same rights and obligations as other citizens, with no other constraints than those necessary for the performance of their duties.” And “Specialists serving as military personnel should obey in accordance with their abilities and conscience, that is, they must exercise

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<sup>8</sup> In this paper, a distinction is made between soldiers and military personnel in situations in which orders are being given.

their judgment in following orders”<sup>9</sup>.

While Article 11(1) of the Legal Status of Military Personnel Law (Soldatengesetz)<sup>10</sup> states that, “The soldier shall obey his/her superiors. He/she shall carry out their orders completely, conscientiously, and immediately, to the best of his/her ability,” it also states: “It shall not be deemed disobedience to ignore an order that violates human dignity or that is not given for service purposes. The erroneous assumption that an order of this kind has been given relieves him/her of the responsibility only if the error could not be avoided, or if it could not be avoided, or if it could not be expected of him/her, under the circumstances known to him/her, to reject the order by resorting to legal remedies<sup>11</sup>.” In this way, the Bundeswehr requires soldiers to exercise “critical obedience” (“*mitdenkenden Gehorsam*”). As “citizens in uniforms,” soldiers are urged to examine the meaning of orders handed down to them and whether they can be carried out, and also to offer dissenting opinions about how they can be amended.

For individual soldiers, “critical obedience” can be a way to avoid the crisis of conscience caused by being forced to obey illegal and inhumane orders. For superiors and the whole military, it has the effect of confirming the authority of the order and preventing unintended violation of laws<sup>12</sup>.

This guiding principle of “critical obedience” was put into practice by Major Florian Pfaff of the Bundeswehr in 2003. He was involved in developing software to make battlefield information management more effective. Once this software was completed, it would be used by the US Army as well as the German Federal Army. In April 2003, he refused to engage in the development of

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<sup>9</sup> To that end, it is important to guarantee the basic rights of military personnel and soldiers (Article 17a). This concept came to be guaranteed by the Military Code. That is, (1) a guarantee of the civil rights, including the right to vote, of military personnel and soldiers, (2) restrictions on the command authority and disciplinary rights of superiors, (3) the abolition of military courts, (4) separation of work and leisure, (5) the right to examine orders issued, (6) the participation of arbitrators in the introduction of the Defense Inspectorate of the German Federal Parliament. See Mizushima (1995), pp.60-61.

<sup>10</sup> Legal Status of Military Personnel Act, Chapter 2 (Duties and Rights of Soldiers) Article 11 (Obedience): “(2) An order must not be obeyed if a crime or offense would thereby be committed. Should the subordinate, nevertheless, comply with the order, he/she is found guilty only if he/she realizes that a crime or offense is committed thereby, or if it is obvious from the circumstances known to him that such is the case.” Gesetz über die Rechtsstellung der Soldaten.

<sup>11</sup> Regarding this obligation of critical obedience, Clause 30 of the Code of Conduct on Politico-Military Aspects of Security, agreed upon at the 1994 Conference on Security and Cooperation in Europe (CSCE) in Budapest, states: “Each participating state will instruct its armed forces personnel in international humanitarian law, rules, conventions and commitments governing armed conflict and will ensure that such personnel are aware that they are individually accountable under national and international law for their actions.” Further, Clause 31 states: “The participating States will ensure that armed forces personnel vested with command authority exercise it in accordance with relevant national as well as international law and are made aware that they can be held individually accountable under those laws for the unlawful exercise of such authority and that orders contrary to national and international law must not be given. The responsibility of superiors does not exempt subordinates from any of their individual responsibilities.” Code of Conduct on Politico-Military Aspects of Security, 3 December 1994. This has become a common norm for more than 50 countries, including the United States, Canada, Russia, and European and Central Asian countries. OSCE (1994).

<sup>12</sup> One officer at Bundeswehr recruiting center at Friedrich street in Berlin said to the author in August 2017 as an example, when a soldier who does not have a driver’s license with them is ordered to drive.

this software, saying he could not support the US military's war in Iraq, which he considered illegal (Pfaff: 2008). Pfaff was first sent to a psychiatrist and was considered healthy after a week of testing. In February 2004, the Unit Service Court ruled that there was no causal relationship between the software project and the Iraq war, and that Pfaff would be demoted to captain for violating the order. In response, he appealed to the Federal Administrative Court under the Soldiers law, which requires soldiers not to comply with illegal orders. In June 2005, the court affirmed the right to refuse an order based on freedom of conscience, stating, "There are serious legal concerns about the war against Iraq in view of the use of force prohibited by the UN Charter and international laws<sup>13</sup>." The court ruled, as follows, that soldiers had to meet core obligations under the Soldiers law, but that "absolute" obedience was not required of them: "Based on the first two sentences of Article 11(1) of the he Soldiers law, the core obligation of every soldier in the Federal Army to carry out their orders conscientiously (to their utmost ability, completely, and immediately) does not entail unconditional obedience, but requires obedience within limits set by consideration of the consequences of executing an order — especially upon the right to one's conscience and the constraints of ethical limits."

In this way, by entrusting the final judgment to an administrative court, Pfaff was able to resolve the aporia in a way that he couldn't within the army<sup>14</sup>. For the state as well, the aporia was resolved by transferring it to a different level and grasping it within a larger framework [resolution of aporia].

However, it is difficult to examine and reject orders on the battlefield. Even though the German Federal Army takes critical obedience as its guiding principle, it is in practice extremely restrictive in applying it to soldiers and military personnel. Christiane Ernst-Zetl, a combat medic dispatched to Kunduz, Afghanistan, in 2002, was ordered to perform a security mission without the Red Cross armband. She questioned in writing an order to do armed guard duty, which in an emergency could involve the use of weapons, even though under wartime humanitarian law she was not, as a medic, supposed to engage in combat. In response, the Department of Defense stated that Kunduz was not in a state of war, and so there was no need to make a distinction between combatants and non-combatants [rejection of aporia]. As punishment, Ernst-Zetl was returned to Germany and fined 800 euros for endangering her superiors and acting without regard for her colleagues by questioning an order [continuation of aporia].

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<sup>13</sup> Urteil des 2. Wehrdienstsenats vom 21. Juni 2005 BVerwG 2 WD 12.04 (<http://www.bverwg.de/media/archive/3059.pdf>), Ichikawa(2009), pp.5-12.

<sup>14</sup> However, Pfaff continued to be harassed despite his court victory, including by not being promoted within the Federal Army. Interview with him in München on 8<sup>th</sup> of August 2013.

Table 3: Aporias inherent in the military

	Individual level	State level	
Dilemmas	Superior command ↔	Command obedience relationship ↔	Survival of the nation ↔
Antinomies	Conscience (faith/creed)	Human rights of soldiers	Lives of citizens
Punishment	<b>“Overcoming” of Aporia</b> “Overcome” by choosing one or the other, or by being forced (e.g., Israeli Air Force Pilot who refuses to bomb the Occupied Territories)	<b>Rejection of Aporia</b> Maintain the fiction that the aporia doesn’t exist (Regarded all orders as legal)	<b>Continuation of Aporia</b>
Selective conscientious objection	<b>Elimination of Aporia</b> Recognize cases in which order refusal is justified (e.g., German Federal Army major who refused an order on the grounds that he considered the Iraq War illegal)	<b>Elimination of Aporia</b> Hold trials outside of the army to avoid one-sided interference by the state (on the condition that fair trials are guaranteed)	
Critical obedience	<b>Continuation of Aporia</b> Not recognized cases (e.g., German Federal Army medic who questioned the order and therefor punished)		

### 5-3. Aporia over the duty to disobey

Every soldier has a duty and responsibility to disobey illegal or inhumane orders. International humanitarian law requires soldiers to take personal risks rather than kill an innocent civilian. Soldiers are not allowed to sacrifice innocent civilians to increase their chances of survival. Self-protection cannot be used as a legal defense against violation of international humanitarian laws. This obligation is said to arise directly from the acts in which they are engaged, even if these were forced. Soldiers capable of killing people carry a heavy responsibility. Soldiers are not able to make decisions about wars and do not have the power to reverse the orders issued, but they are liable for their responsibilities as the subject of the use of force<sup>15</sup>. To elaborate, individuals have international obligations that go beyond those imposed by individual states (Sato, p.7).

Based on a precedent set during the initial stages of the International Criminal Tribunal for the former Yugoslavia (ICTY), in the case of war crimes, greater importance was placed on the normativity of international law than on general crimes. Soldiers were required to not comply

<sup>15</sup> Of course, those who give orders are also held liable. Superior officers are usually responsible for war crimes committed by subordinates under their command, if they are committed under his orders, or if he is aware of such planned actions but does nothing to prevent them being carried out. “A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces.” (Rome Statute of the International Criminal Court, Article 28 - Responsibility of commanders and other superiors)

with orders that would make them complicit in war crimes, even if their safety is jeopardized. Unlike civilians, even low-ranking soldiers should always be prepared to die, so even when they face a real possibility of dying, this should not be overestimated as a justification for their actions. Moreover, the higher the rank of the soldier, the more prepared they should be to face death, and so a threat to their life cannot be used in their defense. If the crime in question amounts to genocide, neither threats nor the use of force will exempt the perpetrator from prosecution but can at most be considered circumstances that might mitigate the defendant's sentence<sup>16</sup>. In other words, "when soldiers are ordered to shoot civilians, or face death themselves, they are obliged to die (Epps: pp.987-1013.)" in order not to become war criminals.

Japan's Self-Defense Forces(SDF) also require their members not to obey illegal orders. Article 57 of the Self-Defense Forces Law states that "members must obey the orders of their superiors in order to carry out their duties," and the order must relate to the duties of the person to whom it has been given and must be legal and executable. If the order is found to be plainly and substantially illegal, it must be considered invalid. The order must not only be legal under domestic military law but must also comply with the rules of international law, including international humanitarian law. If an SDF member carries out any criminal order knowing that it is illegal, or if it is evident from the circumstances that the order is illegal, they will be held criminally liable. In other words, if individual soldiers obey wrong or illegal orders, they cannot evade responsibility<sup>17</sup>.

However, even on the battlefield where soldiers are more likely to unintentionally commit war crimes, nobody takes responsibility for sending them into such situations. The war itself and the illegality of the strategy are not questioned, but individual soldiers are considered responsible. Soldiers at the end of the chain of command, who have virtually no authority over whether to execute the order, face heavy judgment. This can help those who make decisions related to the war — such as superior officers and policymakers — avoid responsibility. The state exempts itself by passing on the rules of engagement to soldiers, thus transferring responsibility to soldiers on the battlefield.

If the right of selective objection is not guaranteed, soldiers entrusted with executing an order fall into a dilemma: they endanger their own lives by refusing to follow the order but will also be held liable for criminal acts if they do carry it out. Dražen Erdemović was a soldier in the Republic

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<sup>16</sup> "Plea," as it is used in international law, is an Anglo-American criminal law term that generally has the effect of acquitting the accused, even if all the evidence presented satisfies the definition of the crime. To "not recognize a plea" means guilty but does not deny the possibility of a sentence reduction. Taya (2006) pp.139-140., See also, Sato (2010), pp.22-24.

<sup>17</sup> The documentary "Jieikan to sono Kazoku- senngo 71nenme no Natsu ni (Self-Defense Forces and their Families — One Summer 71 Years after the War)" (aired by Mainichi Broadcasting System, Osaka, in August 2016) includes a scene in a classroom at the National Defense Academy. In it, an instructor emphasizes the responsibility borne by those who give orders by telling a group of officer cadets that in an actual combat situation overseas, "If you give an order, your subordinates will follow it. If the order is wrong, they bear responsibility for it."



of Serbia when the “Srebrenica massacre” occurred in Bosnia. In 1995, he was ordered to shoot captive Muslims. He, along with other soldiers, lined up Muslim men and boys from Srebrenica, ranging in age from 17 to 60 years old, and proceeded to spend five hours at the Branjevo farm shooting them from behind, killing about 1,200 people. Erdemović himself killed between 70 and 100 people. He testified at ICTY in November 1996 as follows.

They told us that a bus load of civilians would come from Srebrenica. I said immediately that I did not want to take part in that and I said, “Are you normal? Do you know what you are doing?” But nobody listened to me and they told me, “If you do not wish to, if you ... you can just go and stand in the line together with them. You can give us your rifle (United Nations,11).”

If I were alone, I would have run away, I would have tried to do something, just as they tried to flee into the forest or whatever. But what would happen to my child and to my wife? (United Nations,12).

He was sentenced to five years in prison in 1998. Erdemović, who chose to become a war criminal for the sake of his family, was found guilty by an international court<sup>18</sup> [deepening of aporia].

Guaranteeing the right to selective objection gives soldiers the right to examine the orders that have been handed down to them, which in turn means that subordinates are evaluating their superiors’ judgement. Of course, this is unacceptable for any army whose fundamental principle is strict obedience.

Table 4: Aporias inherent in the duty to disobey

	Individual level	State level	
Dilemmas	Danger to life/risk of punishment ↔ War crime (illegal order)	Command obedience relationship ↔ Human rights of soldiers	National security ↔ Lives of citizens
Selective conscientious objection (command refusal) system	<b>Elimination of Aporia</b> The refusal to obey is recognized as justified  <b>Deepening of Aporia</b> The refusal to obey is not recognized as justified (e.g., Serbian soldiers who could not refuse to take part in massacre of Muslims)	<b>Rejection of Aporia</b> Maintain the fiction that the aporia doesn’t exist (regard all orders as legal)  <b>Elimination of Aporia</b> Hold trials outside of the army to avoid one-sided interference by the state (on the condition that fair trials are guaranteed)	<b>Continuation of Aporia</b>

<sup>18</sup> After the massacre at the Branjevo farm, he refused to take part in the killings at the Pilitsa Cultural Center and was exonerated. Osa (2009), pp.165-166.

## 6. Aporias in a privatized army

A dilemma arises because the state orders the people to use force. A state can avoid aporia by privatizing military functions and no longer needs to order citizens to use force. Since it is a consignment contract, the work is done based on an “agreement” between the ordering state and the “civilian” who receives the order. Even if the work is the same as that of a soldier, there is no aporia because there is no direct employment relationship with the state if it is a private military company employee who is doing it. In addition, since locally recruited personnel on the battlefield are not citizens who the state is supposed to protect, they can be given tasks that would otherwise give rise to aporias [rejection of aporia].

Because individuals who undertake the work “agree” to the contract (under the fiction that both parties are equal), they believe that they are not in the situation of aporia [mistaking the aporia].

Table 5: Aporias in a privatized army

	<b>Individual level</b>	<b>State level</b>
Dilemmas	Order from employer ↔	National security ↔
Antinomies	Conscience (faith/creed)	Lives of citizens
	<b>Mistaking the Aporia</b> Believing that aporia cannot exist because it is a contractual relationship	<b>Rejection of Aporia</b> Maintain the fiction that the aporia doesn't exist (Evade the issue by treating it as a contract relationship)  <b>Rejection of Aporia (Citizens)</b> Not having a direct employment relationship with the military (e.g., US private military company employee)  <b>Rejection of Aporia (Non-Citizens)</b> The state is not obliged to protect non-citizens (e.g., personnel locally hired by US forces in Afghanistan)

## 7. Conclusion

Conscientious objectors are regarded as deviating from the image of a “true citizen”, because they do not bear the important obligation of citizens. But, by grasping military refusal from the perspective of aporia, it becomes clear that this perception is fundamentally wrong. If a state should respect the inner freedom of individuals, then it cannot intervene in people's conscience. According to this principle, an individual and a state can be seen as theoretically equal where religion or beliefs are concerned.

Since a person's conscience does not subordinate to the state, both the individual and the state face an unavoidable aporia (dilemma/antinomy) when it contradicts an obligation demanded by the state. There have been people who have tried to resolve the aporia. Their existence and actions have transformed the situation surrounding military service. Refusing to serve in the military once meant just one thing — execution — which created the dilemma of having to choose between one's life and one's conscience. Now, however, selective command obedience (Selective Conscientious Objection) has been institutionalized within the military of some states, though only in principle. This change was brought about by conscientious objectors who have demonstrated by their actions that a state policy of universal military service has inherently serious aporia. These people were forced to act because they were caught up in this aporia situation.

With the establishment of a system to guarantee the right to refuse military service, for many people the aporia has been mitigated or resolved. At the same time, however, the guarantee of a right of conscientious objection means the internalization of military refusal within the conscription system and has also taken away opportunities to raise protestation related to military service as aporias.

A state can escape from aporias by introducing a voluntary army. Moreover, many states urge privatization within an army, so that a state no longer must force an individual (as a citizen) to obey orders. Individuals who engage in military service through contractual agreements are thus separated from the state, and the real dilemmas that they face are recognized only as matters of personal responsibility.

By privatizing the execution of its most fundamental function — the defense of the state, which is its very *raison d'être* — the state has thus succeeded in obscuring its own responsibilities. Even at the level of individuals caught in this situation, there is an assumption that aporia cannot exist because of the contractual nature of the relationship, and so the opportunity to raise the issue is denied. This means that the state also succeeds in taking away any chance for people to raise objections.

Under such conditions, it is important to determine what should be regarded as aporia. It might be useful for us to recall that the Japanese military pretended that the soldiers of tokko unit had “volunteered” for the mission, though in fact they had followed “orders” and lost their lives.

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