SERVING IN SILENCE

LGBTI PEOPLE IN SOUTH KOREA'S MILITARY

AMNESTY INTERNATIONAL

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GLOSSARY

WORD	DESCRIPTION
CISGENDER	Refers to people whose gender expression and/or gender identity accords with conventional expectations based on the sex they were assigned at birth.
GENDER	Socially constructed characteristics of people commonly predicated on their biological sex. This varies from society to society and can change or be changed. When individuals or groups do not "fit" established gender norms, they often face stigma, discriminatory practices or social exclusion.
GENDER CONFIRMATION TREATMENT	Range of medical or non-medical treatments that a transgender person may wish to undergo. Treatments may include hormone therapy, sex or gender reassignment surgery including facial surgery, chest surgery, genital or gonad surgery, and can include (voluntary) sterilization.
GENDER EXPRESSION	Refers to how individuals express their gender identity. This may or may not include dress, make-up, speech, mannerisms, surgical or hormonal treatment
GENDER IDENTITY	Refers to a person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body.
GENDER MARKER	A gendered designator that appears on an official document, such as a passport or an identification card. It may be an explicit designation such as "male" or "female", a gendered title such as "Mr" or "Ms", a professional title, a gendered pronoun or a numerical code that (as in South Korea) uses particular numbers to identify men and women.
INTERSEX	An umbrella term used to describe a person whose genital, gonadal, chromosomal or hormonal characteristics do not correspond to the given standard for male or female categories of sexual or reproductive anatomy. Intersex variations may take different forms and cover a wide range of traits. Intersex-bodied, intersexed or intersexuality can also be ways of naming diversity of sex characteristics.
LGBTI PEOPLE	Lesbian, gay, bisexual, transgender and intersex people
MILITARY MANPOWER ADMINISTRATION	A government agency in charge of conscripting and managing soldiers in South Korea.
NON-BINARY	Describes a person whose gender identity is other than entirely male or entirely female, including people whose gender is between, beyond or fluctuates between male and female, or who identify as neither.
SEX	Physical traits or organs that can be indicative of an individual's biological sex

CHARACTERISTICS	and are distinguished into primary and secondary sex characteristics.
SEXUAL ORIENTATION	Refers to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.

EXECUTIVE SUMMARY

> **"Article 92-6 of the Military Criminal Act provides justification for who you can and cannot hate."**
>
> "Lee So", an LGBTI activist who previously served in the military

In May 2017, social media buzzed with news that soldiers were being investigated for violations under Article 92-6 of the Republic of Korea (South Korea) Military Criminal Act, which prohibits sex between men. In all, more than 20 soldiers were charged after military investigators carried out inquiries. One soldier known as "Captain A" was sentenced to six months in prison with the judge suspending the execution of the punishment for a year.

However, the unprecedented scale of the 2017 search for male soldiers violating Article 92-6 was a wake-up call for many South Koreans. Active-duty soldiers came to realize that they too could be investigated even if they were not engaged in consensual same-sex sexual activity or just perceived to be gay men. A former soldier, who talked with Amnesty International and identifies himself as a gay man, was on active duty when this incident occurred. He was shocked to read about the investigations in a military publication because he thought military authorities did not enforce Article 92-6 since they had rarely used it previously.

In South Korea, it is compulsory for all men to perform at minimum 21 months of military service, for which no civilian alternative is currently available. While there is no law criminalizing same-sex sexual activity in the country between civilians, Article 92-6 of the Military Criminal Act, punishes sexual activity between men in the military with up to two years in prison under an "indecent acts" clause.

This report demonstrates how soldiers experience discrimination, intimidation, violence, isolation and impunity as the direct or indirect result of the criminalization of sex between men in the military. It also examines how diversity based on sexual orientation and gender identity are actively discouraged in the military, bringing difficulties to those who do not conform to gender norms.

The criminalization of sex between men is not a new issue for South Korea, as it has existed since the enactment of the Military Criminal Act in 1962. The Constitutional Court ruled the clause to be constitutional in 2002, 2011 and 2016, even though other jurisdictions and the UN have found that laws criminalizing consensual same-sex sexual activity violate human rights. A new collective case is currently being reviewed by the Constitutional Court after the Incheon District Court made a request for adjudication of constitutionality in February 2017. Despite this on-going case at the Constitutional Court, South Korean naval authorities acknowledged another investigation of violations under Article 92-6 in late 2018.

South Korea's military code allows the invasion of privacy of soldiers allegedly engaging in sex between men both on and off base and on or off duty. For instance, the two cases examined by the Incheon District Court in 2017 were allegations of acts of sexual activity between active-duty male soldiers that took place in their homes.

Criminalization contributes to an environment where soldiers who do not conform to existing gender norms – including gay men, bisexual men, transgender women and non-binary people – find it extremely difficult to fulfil compulsory military service free from bullying, harassment, discrimination and violence at the hands of their commanding officers and their peers.

According to former and active-duty soldiers interviewed for this report, it is common for conscripts to hide their sexual orientation while performing their military service. Despite this, several also mentioned they wanted to serve their country and only wished that the military would improve its acceptance of lesbian, gay, bisexual, transgender or intersex (LGBTI) people.

Military power structures create fear of reprisals and deter many victims, men and women, from reporting violence especially when it is carried out by those of a higher rank.

Do hoon Kim, a gay man who previously served in the military, said: "It's all about power and rank. Soldiers harass others with a lower rank just to show off their power." These power relations also make reporting abuse even more difficult.

The UN Human Rights Committee, the body responsible for reviewing states' compliance with the International Covenant on Civil and Political Rights (ICCPR) noted in its Concluding Observations on South Korea in 2015 that it was "concerned about the high number of cases of sexual, physical and verbal abuse in the military, and that only a small number of such cases are recorded and lead to indictment". People interviewed for this report confirmed that power dynamics in the military made it difficult for individuals to report their superiors and Article 92-6 of the Military Criminal Act means male survivors of rape and other sexual violence may be even more reluctant to reclaim their rights due to fear of prosecution. Survivors could be penalized – and according to NGOs, have been in some cases – if the authorities determine the sexual act to have been consensual.

Criminalization of same-sex consensual sexual activity – and its enforcement through prosecution and sentencing – is a human rights violation. The rights to privacy and to be free from discrimination, among others, ensure that adults are free to have consensual same-sex sexual activity. Prosecution and prison sentences represent only a fraction of the damage that such criminalization inflicts on perceived and actual gay men.

Interviewees stated that LGBTI people in South Korea face pervasive discrimination and many hide their sexual orientation and/or gender identity from their families. Same-sex couples are not recognized under the law or by the judiciary. "Conversion therapy", which claims to change a person's sexual orientation, based upon the incorrect assumption that homosexuality is a mental disorder requiring treatment, is common according to one interviewee who experienced it.

Though criminalization is only applicable within the military and therefore to a small segment of society, the fact that approximately half of the population goes through compulsory military service early in life means that criminalization has a significant impact. Criminalization creates an environment where discrimination is tolerated, and even encouraged, based solely on who someone is. Many former and current soldiers consider this to be toxic.

Homophobic and transphobic individuals can view this law as tacit permission to target LGBTI people inside and outside the military. Discrimination and harassment can and does extend to South Korean organizations and events supporting LGBTI rights.

During interviews for this report, gay men often told Amnesty International that they were unsure if they should participate in an interview because they had not experienced any direct violence since they had been hiding their sexual orientation while in the military. Several described being the subject of jokes and pranks during their service. Yet, once interviews began, soldiers shared experiences of abuse and violence that cannot merely be dismissed as "jokes". Such descriptions are a manifestation of how gay men become numb to abusive situations as part of their coping mechanism for survival.

The pervasive discrimination and hostile environment for LGBTI individuals make many incredibly reluctant to share their stories and even to publicly acknowledge their sexual orientation and/or gender identity. The limited number of testimonies gathered for this report from former and active-duty soldiers are not intended to generate broad conclusions about trends in the military. Instead, the goal was to elicit specific examples of how the criminalization of same-sex consensual sexual activity affects LGBTI people's enjoyment of their human rights in and out of the South Korean military.

Many interviewees agreed that sexual violence committed against actual or perceived gay men usually occurs as a form of punishment for "not being masculine enough". Soldiers risk being targeted not only based on their actual sexual orientation and gender identity, but even for not conforming to the expected gender expression or appearance, such as walking in an "effeminate" manner, having fairer skin or speaking in a higher-pitched voice. On top of being subjected to severe violence in the military, authorities isolated several gay soldiers, either in barracks or mental health treatment facilities.

The military code also denies people who are gay or bisexual or otherwise gender non-conforming the freedom to pursue love, relationships and/or sexual fulfilment freely. In the words of one former soldier, the "atmosphere is suffocating".

KEY RECOMMENDATIONS

By criminalizing sex between men in the military, the South Korean government fails to uphold a wide range of human rights including the rights to privacy, to freedom of expression and assembly, to thought, conscience and religion and to equality and non-discrimination.

Criminalization does not prevent sex between men and decriminalization would not end the discrimination and abuse. But decriminalization is a crucial first step towards respecting, protecting and fulfilling the human rights of LGBTI people in the military and beyond.

In addition to the repeal of Article 92-6 of the military code, authorities in South Korea need to make other changes in law and policy, including a comprehensive anti-discrimination act that protects the rights of LGBTI people. Active duty and former soldiers also felt the military needs to do more to combat the pervasive, discriminatory culture through transparency, education and new policies.

KEY RECOMMENDATIONS

- Repeal Article 92-6 of the Military Criminal Act, which prohibits and punishes sex between men in the military;
- Ensure those committing human rights violations and crimes against LGBTI individuals serving in the military are held accountable including in trials with fair trial guarantees;
- Immediately and unconditionally stop investigating, detaining or prosecuting soldiers for consensual same-sex sexual activity;
- Expunge the records of any conviction, indictment or military discharge based on same-sex sexual activity, sexual orientation or gender identity;
- Establish an independent and impartial mechanism to investigate allegations of abuse and violence in the military, including against LGBTI individuals. Ensure all military personnel have effective, private and secure methods to raise such allegations, without fear of reprisal, and that investigators have both the power and access to carry out investigations;
- Adopt a comprehensive Anti-Discrimination Act which prohibits discrimination on a wide range of grounds including sexual orientation, gender identity and sex characteristics;
- Protect all people from violence and advocacy of hatred that constitutes incitement to discrimination, hostility or violence regardless of ethnicity, gender, real or perceived sexual orientation or gender identity;

ACKNOWLEDGMENT

Amnesty International is particularly grateful to those current, former and future soldiers and LGBTI people who agreed to speak with us despite the hostile environment surrounding them and the painful nature of the personal experiences they were sharing. We are also grateful to the many LGBTI organizations, NGOs, academics, lawyers and others who met with us and shared their research and work. As English-Korean interpretation and translation were essential for the success of this research, we are also grateful for committed interpreters and translators.

On 20 September 2018, a transgender activist based in Seoul took their life. The activist, who contributed to this report, was considerate, kind-hearted and had a promising future.

Beyond an array of day-to-day challenges – from using public restrooms to being the target of judgemental glances by members of the public for just walking on the street – this activist also experienced considerable fear when called up for military service. By advocating for a society where people can live as they are, regardless of sexual orientation, gender identity and sex characteristics, Amnesty International hopes that transgender people like this activist will no longer have to live facing constant hostility.

METHODOLOGY

This report is based on field research conducted in South Korea by Amnesty International researchers in June–July 2018 and May 2019. The research team worked closely with the staff of Amnesty International Korea.

Researchers conducted 21 in-depth interviews with current, former or future soldiers. Among them, 14 interviewees identified themselves as gay men either now or at the time of their military service. The others identified themselves as transgender women, bisexual, gender-fluid, non-binary, queer or pansexual.

Interviews were conducted face-to-face or by phone using English or Korean with the assistance of interpreters. Interviewees came from Seoul, Busan and Daegu. Some were very active in the LGBTI movement, but others had no connection to LGBTI organizations and had never previously spoken to others about their experiences of discrimination and homophobia or transphobia in the military.

Amnesty International also interviewed more than 23 others, including representatives and activists of LGBTI organizations based in Seoul, Daegu, Jeonju and Jeju, academics and lawyers, including a former military judge. Researchers also interviewed officials from the Ministry of National Defense and staff of the National Human Rights Commission of Korea. Additional information was sought in writing from the Ministry of National Defense and the Military Manpower Administration. Replies received in May 2019 are incorporated in this report and were again shared with the Ministry of National Defense ahead of publication.

The names and identifying details of the individuals who asked not to be identified have been withheld to protect their privacy and safety and pseudonyms are designated by quotation marks. The majority of individuals referenced in this report are identified either by their chosen pseudonyms, first names or activist names used in their LGBTI activism. Some interviewees consented to their full names being used. Where specific spelling and transliteration format of names was preferred we used these and where not specified we presented family names last and separated two syllable given names with a hyphen. The terms used to describe individual's sexual orientation and gender identity were their own preferences. Further details, such as exact years, unit or location of military service are also omitted when requested by the interviewee. All those interviewed were informed of the purpose of the interview, its voluntary nature and how the information would be used. All interviewees provided verbal or written consent to be interviewed and were told that they could decline to answer questions and end the interview at any time.

1. LGBTI RIGHTS IN SOUTH KOREA

> **"The State is deciding if you are a man or a woman based on your appearance."**
>
> Edhi Park, a transgender woman who served in the military from 2007-2009

Lesbian, gay, bisexual, transgender or intersex (LGBTI) people are becoming increasingly visible in South Korea. Public events, such as Pride, to celebrate LGBTI identities, culture and experience are held across the nation in major cities, including in Itaewon located in Seoul, where the country's first Drag Parade was held in May 2018.[1] At that event, dozens of drag queens and kings (cross-dressed men and women) marched for awareness of LGBTI rights.

The South Korean Criminal Code does not criminalize same-sex sexual acts between consenting adults. South Korea voted in favour of all the UN Human Rights Council resolutions on Human Rights, Sexual Orientation and Gender Identity in 2011, 2014 and 2016.[2] In its communication with the UN Human Rights Committee, the government stated that the right to equality is guaranteed in the Constitution and noted specific prohibition of discrimination based on sexual orientation and gender identity in the National Human Rights Commission Act, which established the National Human Rights Commission of Korea in November 2001.[3] But aside from this prohibition in the Commission Act, which still lacks protection on the ground of gender identity, there is no comprehensive anti-discrimination law in South Korea that provides the necessary full list of protected grounds from discrimination.

South Korean same-sex couples are not recognized under the law or by the judiciary.[4]

"Conversion therapy" to change a person's sexual orientation, based upon the incorrect assumption that homosexuality is a mental disorder requiring treatment, still takes place in South Korea.[5] For instance "HS",

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[1] "South Korea's First Drag Parade Was a Win for Queer Visibility", *them.us*, 1 June 2018, www.them.us/story/south-korea-drag-parade-seoul.
[2] UN Human Rights Council, Resolution on Protection against violence and discrimination based on sexual orientation and gender identity, UN Doc. A/HRC/RES/32/2; Resolution on Human rights, sexual orientation and gender identity, UN Doc. A/HRC/RES/17/19; Resolution on Human rights, sexual orientation and gender identity, UN Doc. A/HRC/RES/27/32.
[3] Concluding Observations of Human Rights Committee: Republic of Korea, Addendum: Information received from the Republic of Korea on follow-up to the concluding observations (hereafter: Concluding observations, Addendum), UN Doc. CCPR/C/KOR/CO/4/Add. (15 August 2017) para. 3.
[4] "South Korean court rejects film director's same-sex marriage case", *The Guardian,* 25 May 2016, www.theguardian.com/society/2016/may/25/south-korea-rejects-film-director-kim-jho-gwang-so-same-sex-marriage-case.
[5] The latest version of the International Statistical Classification of Diseases and Related Health Problems (ICD-11) endorsed in 1990, replaces "Gender Identity Disorder" with "Gender Incongruence of Adolescence and Adulthood" and no longer classifies it as a mental disorder.

a gay man who served in the military from 2013-2015, disclosed his sexual orientation to his parents for the first time when he was in the second year of high school and they responded by signing him up for conversation therapy aimed at changing his sexual orientation.[6] His father condemned him, saying: "You are not my son if you are gay". "HS" had to pretend to be dating a girl to demonstrate that he was "cured".

The reality is that many LGBTI people in South Korea face pervasive discrimination in their daily lives, especially in rural areas, and this leads them to simply hide their identities and dissuades them from claiming their rights. Jiin, a founder of Parents, Families, and Friends of Lesbians and Gays (PFLAG Korea) explained:

"Parents want their children to be happy, but given the strong phobia against LGBTI people, they are often devastated when finding out that their children are LGBTI because they think their children will not enjoy happiness. I thought the same when my son told me [that he was gay], but I was wrong."[7]

Article 92-6 of the South Korea Military Criminal Act punishes sexual activity between men with up to two years in prison under an "indecent acts" clause. By institutionalizing discrimination, the Military Criminal Act reinforces the systematic stigmatization of LGBTI people.

While LGBTI communities are becoming more visible, voices opposed to LGBTI rights are also growing louder. Well-organized groups of protesters, many from conservative churches, can be found at Pride events in cities like Seoul and Daegu, a smaller city in southwestern South Korea. Some cities have eliminated sexual orientation and gender identity from the protected grounds of discrimination.

The UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity has expressed concern about the weakening legal and institutional human rights framework in South Korea. His concerns included: the recent decision of the Council of South Chungcheong Province to repeal the Human Rights Ordinance; calls from some religious groups for other cities and provinces to repeal human rights ordinances; and the amendment proposed to remove reference to "sexual orientation" as a ground for protection in the National Human Rights Commission Act.[8]

The Korean Society of Law and Policy on Sexual Orientation and Gender Identity (SOGILAW), a group of human rights lawyers and researchers advocating for the rights of LGBTI individuals, published its 2018 annual report on 16 May 2019. Applying the criteria used by the International Lesbian and Gay Association (ILGA), it reports that the human rights situation for LGBTI individuals in South Korea has deteriorated since 2017. One example cited to explain this negative trend was the deletion of measures to protect LGBTI rights from the Ministry of Justice's Third National Action Plan for the Promotion and Protection of Human Rights (NAP) 2018–2022, even though such measures appeared in the two previous action plans for 2007–2011 and 2012–2016.[9]

1.1 MILITARY CONSCRIPTION

Though an armistice ended the hostilities of the 1950–1953 Korean War, the Democratic People's Republic of Korea (North Korea) and the Republic of Korea (South Korea) technically remain at war. During the subsequent decades of fluctuating tension between the two sides, the South Korean military's goal has been to overcome any threats that come from North Korea, including nuclear and missile threats.[10]

According to a Ministry of National Defense White Paper, South Korea maintained approximately 599,000 standing troops in 2018, which they aim to reduce to 500,000 by 2022.[11] However the total defence budget

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[6] Interview with "HS" in July 2018 (name has been changed to respect the interviewee's anonymity).
[7] Interview with Jiin in June 2018.
[8] Victor Madrigal-Borloz, Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, Communication to the government of Republic of Korea, 5 April 2018, www.ohchr.org/Documents/Issues/SexualOrientation/Legislation/OL-KOR-1-2018.pdf.
[9] Park Ui-rae, "South Korean LGBTI human rights at 11.7% on index – slight decrease from a year ago", Yonhap News Agency, 16 May 2019, www.yna.co.kr/view/AKR20190516149500004 (in Korean).
[10] Ministry of National Defense, "Inauguration speech given by the 45th Minister of National Defense", 21 August 2018, www.mnd.go.kr/user/boardList.action?command=view&page=1&boardId=O_47210&boardSeq=O_173738&titleId=null&siteId=mndEN&id=mndEN_010102000000.
[11] The figure of 599,000 includes 464,000 in the army, 70,000 in the navy (including 29,000 marines) and 65,000 in the air force. Ministry of National Defense, *2018 Defense White Paper*, December 2018, www.mnd.go.kr/user/mnd/upload/pblictn/PBLICTNEBOOK_201901160236460390.pdf, p. 87 (in Korean); "S. Korea shortens military service", *The Korean Times*, 4 September 2018, www.koreatimes.co.kr/www/nation/2018/09/356_255035.html.

in 2018 was 43.1 trillion KRW (US$38.4 billion), a 6.9% increase over the previous year "amid all-out efforts to reinforce firepower against North Korea".[12]

All men between the ages of 18 and 35 are required to perform at least 21 months of active-duty military service.[13] Gender for conscription is determined by the gender listed in the family registry and reflected on official identification cards. Accordingly, cisgender men, as well as transgender women who have not officially changed gender markers in the family registry, will be called up to serve in the military.

Cisgender women, on the other hand, have the option to serve voluntarily.[14] According to the Ministry of National Defense, the number of female soldiers in South Korea exceeded 10,000 in 2017.[15] At present, women make up less than 10% of both commissioned and non-commissioned officers.[16] If authorities determine that transgender men have not completed the gender confirmation surgery required for the change of gender maker, they are classified as female and therefore not conscripted. They are also prohibited from volunteering as men in the armed forces.

LGBTI PEOPLE AND EXEMPTION FROM MILITARY SERVICE

According to the Military Service Act, every man eligible for military service shall undergo a draft physical examination in the year when he turns 19 years old to determine whether he is suitable for military service.[17] The draft physical examination is divided into a physical examination and a psychological test.[18]

Several soldiers interviewed for this report said they were asked in the computerized questionnaire for the draft physical examination the question "are you attracted to men?" The Military Service Act provides for the classification of physical grades, based at least in part on information collected during the draft physical examination, and provides alternatives for those deemed incapable of entering active service.[19]

Several of the people interviewed by Amnesty International referred to individuals who were deemed "unfit" due to their sexual orientation and/or gender identity or who were urged to allow themselves to be declared, or act "unfit" so they could be discharged. Often this was a temporary discharge and did not relieve the individual from the obligation to complete military service at a later date. Job applications frequently require submission of the applicant's public record, which includes any military discharge. According to research conducted for a report on conscientious objectors in South Korea in 2015, Amnesty International found that it can be difficult for men to find employment without completing military service.[20]

Transgender women whose official documents show them as men are still required to serve because eligibility for conscription and exemption is determined by the gender marker on official documents. Transgender women who are in the middle of gender confirmation treatment and who have not yet changed gender marker may or may not have to serve depending on the progress of the treatment and the classification they receive during the conscription process.

Transgender women are classified as having a "gender identity disorder"[21] according to the Regulations on Examination Such as Draft Physical Examination, issued by the Ministry of National Defense. Based on Article 102-3 of the Third Addendum of the regulations, individuals are further classified as follows:

a. Observation is needed for a certain period of time

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[12] "S. Korea's defense budget to rise 6.9 pct in 2018", Yonhap News Agency, 28 August 2018, english.yonhapnews.co.kr/news/2017/08/28/0200000000AEN20170828013400315.html.
[13] Article 18 (Active Duty Service) of the Military Service Act; however, in September 2018 the Cabinet approved the plan to reduce the term of service in the army, but not the other branches of service, to 18 months by 2020. See "S. Korea shortens military service", *The Korea Times*, 4 September 2018, www.koreatimes.co.kr/www/nation/2018/09/356_255035.html.
[14] Article 3 (Military Obligation) of the Military Service Act.
[15] By military branch, there were 6,915 in the army, 1264 in the navy, 1694 in the air force and 390 in the marine corps. Ministry of National Defense, *Seoul Defense Dialogue*, 26 January 2017, www.mnd.go.kr/user/boardList.action?command=view&page=11&boardId=O_47261&boardSeq=O_158869&titleId=null&siteId=mndEN&id=mndEN_030100000000.
[16] The Ministry of National Defense has met the goal to increase commissioned female soldiers to 7% of officers' quota in 2015, and the achievement of the remaining goal of 5% of non-commissioned officers' quota is planned to be shifted to 2017, three years ahead of schedule. Ministry of National Defense, *Seoul Defense Dialogue*, 26 January 2017, www.mnd.go.kr/user/boardList.action?command=view&page=11&boardId=O_47261&boardSeq=O_158869&titleId=null&siteId=mndEN&id=mndEN_030100000000.
[17] Article 11 (1) of the Military Service Act.
[18] Article 11 (3) of the Military Service Act.
[19] Article 12 of the Military Service Act.
[20] Amnesty International, *Sentenced to Life: Conscientious Objectors in South Korea*, (Index: ASA 25/1512/2015).
[21] ICD 11 removes "gender identity disorder" from the mental health category. World Health Organization, *ICD-11: Classifying disease to map the way we live and die*, 18 June 2018, www.who.int/health- topics/international-classification-of-diseases.

b. **Mild** – the person has a history of treatment for six months or more, or a history of hospitalization for one month or more, for mental health conditions, and has social and occupational functioning impairment.

c. **Severe** - the person meets mild disorder criteria and has a number of severe symptoms or is considered to suffer significant difficulties during military service .[22]

The Military Manpower Administration has charged several transgender women with evasion of military service, claiming that they are using their gender identity as an excuse. According to SOGILAW the courts acquitted the individuals and reinstated their exemptions from service.[23] Yet South Korean LGBTI organizations have documented other cases of transgender women who claim that they felt compelled to undergo irreversible surgeries against their wishes – including orchiectomy (testicle removal) and gender confirmation surgeries whose results are "externally visible" – in order to receive lawful exemptions from military service.[24]

Since a person's obligation to perform military service is based on the gender markers on official documents, transgender men should also be called up for service if they have completed the gender change in their identification document. These transgender men who legally change their gender identity are however assigned a "second eligible conscription status" and are not considered to be "able-bodied men" by the military. The military considers transgender men "disabled and impaired" and thus not fit for military service, even though some transgender men may wish to serve.[25]

Additionally, transgender men who may have received gender confirmation treatment but have not changed their gender marker officially are exempt from military service for being transgender and also prohibited from volunteering as career soldiers. As noted above, transgender men who have not received the gender confirmation surgery required for the change of gender maker are classified as female.

It is difficult to document the treatment of intersex individuals in the South Korean military because of the marginalization they face both in military service and in South Korean society as a whole. Because the military operates under the assumption that conscripts are cisgender heterosexual men, it may overlook differences based on sex characteristics.

LEGAL GENDER RECOGNITION

South Korea's Act on the Registration, etc. of Family Relationships governs the South Korean Family Registry. The Supreme Court holds the power to administer the Act but delegates decision making on changes to the registry to local courts and authorities. Both changes of gender marker on official identification documents and changes of name are possible but transgender people must first meet certain criteria.[26]

According to the 2017 government reply to the concluding observations of the UN Human Rights Committee, South Korean courts exercise the authority to decide whether gender reassignment shall be legally recognized or not.[27] The reply also noted that the Supreme Court's Guidelines on Handling Application for Permission of Gender Correction for Gender Reassignment (Supreme Court Guidelines), introduced in accordance with the Supreme Court's judgment in 2006, require that the applicant must: "(i) have received sex reassignment surgery; (ii) have the body of the opposite sex including external sexual organs; (iii) not have underage children; and (iv) not be in the state of matrimony in order for gender correction to be recognized".[28]

The Supreme Court Guidelines also provide in Article 3 a list of documents that should be attached to applications for gender recognition, including a written report from the surgeon who performed gender reassignment surgery and written consent from parents.

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[22] Regulations on Examination such as Draft Physical Examination, Ordinance of Minister of National Defense No. 968, revised on 17 September 2018, bit.ly/2BF8fLv (in Korean).
[23] Korean Society of Law and Policy on Sexual Orientation and Gender Identity (SOGILAW), *Annual Review 2016*, annual.sogilaw.org/review/review_2016_en/1900, Section 7 (Military).
[24] SOGILAW, *Annual Review 2014*, annual.sogilaw.org/review/review_2014_en/509.
[25] Horim Yi and Timothy Gitzen, "Sex/Gender Insecurities: Trans Bodies and the South Korean Military", *TSQ: Transgender Studies Quarterly* 5(3), 2018, p. 385.
[26] Article 6 (Matters for Investigation) of the Guidelines on the Clerical Processing of Cases of Transgender People's Application for Legal Gender Recognition states: "To examine a case applying for legal gender recognition, the court is to investigate the following grounds regarding the applicant: 1. Whether the applicant, as a national of the Republic of Korea, is a person of legal capacity aged 19 or above, is currently married, or has (a) minor child(ren)."
[27] Concluding observations of UN Human Rights Committee: Addendum, UN Doc. CCPR/C/KOR/CO/4/Add.1 (2017) para. 9.
[28] Concluding observations of UN Human Rights Committee: Addendum, UN Doc. CCPR/C/KOR/CO/4/Add.1 (2017) para. 9.

The government reply to the UN Human Rights Committee further stated, however, that: "The guidelines are not legally binding regulations but reference materials for judges when deciding about reassignment. The decision regarding the legal recognition of gender correction is made by the individual judge, who takes into consideration all the circumstances of each case."[29]

For instance, there are cases when the courts authorized a change of gender marker for transgender people without the completion of genital surgery. In 2013, the Seoul Western District Court authorized legal gender change of a transgender man who had not received external genital reconstruction.[30] This was followed by a decision of the Yeongdong Branch of the Cheongju District Court in 2017, which authorized a legal gender change for a transgender woman who likewise had not received external genital reconstruction.[31]

However, South Korean NGOs noted that transgender people who either do not want to or cannot for health reasons undergo all the necessary medical treatments, as well as those who are deemed not to have fulfilled the criteria of the psychiatric diagnosis, have been prevented from obtaining documents that reflect their gender as result of a decision of individual judges.[32]

Those willing to go through a change of gender marker face a severe financial burden as the treatment is excluded from coverage under the national health insurance. In 2017 the cost of genital reconstruction surgeries averaged 15,148,000 KRW (US$12,750) for gender affirming feminizing surgeries and 20,571,000 KRW (US$17,300) for gender affirming masculinizing surgeries.[33] The requirement in the Supreme Court Guidelines that an individual be single without underage children means that married individuals may feel forced to divorce their spouses if they wish to have their gender marker officially changed. This could lead to the loss of child custody, inheritance or state welfare benefits, and violates the right to have a family.[34]

If an individual is unable to obtain a legal change of gender in the family registry, they are also unable to change the gender associated with their national identification card number, which is a unique 13-digit all-purpose lifetime number. Registration numbers beginning with "1" identify a person as male, while numbers starting with "2" indicate female. It is very easy therefore to identify an individual's gender from their official identification card.[35]

The change of national identification number is critical as it is essential to lead a life in South Korea. It is required for obtaining official documents and accessing essential services, in job hunting and in purchasing accommodation. When the gender and picture on the identification card appear to be very different from the person using that number, it is easy to assume that the identification card is compromised. This could lead to a job application being turned down, for example. Transgender people may also hesitate to access services because people will notice that the gender they identify with is different from the gender by birth.[36]

Although there is an opportunity in South Korea to change a person's gender marker on official identification documents, the criteria to make this change can violate transgender people's rights to privacy, health and to have a family. Transgender people should be able to obtain legal gender recognition through quick, accessible and transparent procedures and in accordance with their own perception of gender identity.[37] States must ensure that transgender people can obtain documents reflecting their gender identity without being required to satisfy criteria that in themselves violate their human rights. For that purpose, legal gender recognition should not be contingent on psychiatric diagnosis, medical treatments, relationship status or blanket age requirements.

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[29] Concluding observations of UN Human Rights Committee: Addendum, UN Doc. CCPR/C/KOR/CO/4/Add (2017) para. 9.
[30] Seoul Western District Court, Case no. 2012Ho-Pa4225 (15 March 2013); "Landmark legal ruling for South Korean transgenders", *Hankyoreh,* 16 March 2013, www.hani.co.kr/arti/english_edition/e_national/578323.html.
[31] Cheongju District Court, Yeongdong Branch, Case no. 2015Ho-Gi302 (14 February 2017); SOGILAW, *Human Rights Situation of LGBTI in South Korea 2017*, 14 July 2018, p. 122.
[32] Rainbow Action against Sexual Minority Discrimination, *Human Rights Violations on the Basis of Sexual Orientation, Gender Identity, and HIV Status in the Republic of Korea,* March 2017, p.17.
[33] Hyemin Lee et al., "Experiences of and barriers to transition-related healthcare among Korean transgender adults: focus on gender identity disorder diagnosis, hormone therapy, and sex reassignment surgery", *Epidemiology and Health* 40 (2018), www.ncbi.nlm.nih.gov/pmc/articles/PMC6060334/.
[34] Amnesty International, *The state decides who I am* (Index: EUR O1/001/2014), p. 16; *I need my parents' consent to be myself: barriers to gender-affirming treatments for transgender people in China* (Index: ASA 17/0269/2019).
[35] Beginning in 2000, the government changed the system so that numbers beginning with a "3" indicate that a person is male, while numbers beginning with a "4" indicate female.
[36] "For transgenders, sex change not about organs, but 'a question of life and death'", *Hankyoreh*, 23 May 2013, english.hani.co.kr/arti/english_edition/e_national/579384.html.
[37] Transgender Europe (TGEU), *Human Rights and Gender Identity: Best Practice Catalogue,* December 2016, tgeu.org/wp-content/uploads/2017/02/2.11-TGEU_BestPracticeCatalogue.pdf and Principle 31 of Yogyakarta Principles Plus 10 yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf, para. C.

DENIAL OF OTHER RIGHTS UNDER THE NAME OF SECURITY

The South Korean government continues to use "the special situation of the Korean peninsula", meaning the continuation of the state of war, to justify various measures that curtail human rights. The National Security Law came into force in 1948 as a temporary measure to counter the threat posed by North Korea and continues to be enforced today.[38] This law undermines citizens' enjoyment of the right to freedom of expression and association and a number of people have been prosecuted for "praising North Korea's ideology" under this law.[39]

Though South Korea and North Korea are technically at war, states have the same obligations to protect human rights in wartime as in peacetime. International human rights laws and standards apply to both civilian and military laws and, while certain rights could be subject to derogations or exemptions in states of emergency, these derogations would have to be explicitly declared and temporary.

The right to conscientious objection – which is part of the right to freedom of thought, conscience and religion, provided for in Article 18(1) of the International Covenant on Civil and Political Rights (ICCPR) – is also violated in the name of this ongoing state of war. The government has claimed that introducing an alternative service for conscientious objectors would jeopardize national security.[40] Conscientious objectors who refuse to serve on the basis of thought, conscience or religion are typically sentenced to 18 months in jail.[41] Beyond the jail time itself, conscientious objectors face the social stigma of having a criminal record.[42] Some South Korea men have been granted refugee status in other countries due to their conscientious objector status and based on their sexual orientation or gender identity, but that is rare.[43]

On 28 June 2018, the Constitutional Court of South Korea determined that a lack of an alternative to serving in the military is unconstitutional and ordered the government to set up an alternative service by the end of 2019.[44] At the time of writing this report, the Military Service Act remains unchanged and conscientious objectors can still be jailed.

1.2 CRIMINALIZATION OF SAME-SEX SEXUAL ACTIVITY IN THE MILITARY

Article 11(1) of the Constitution of South Korea states: "All citizens are equal before the law, and there may be no discrimination in political, economic, social or cultural life on account of sex, religion or social status." Contrary to that provision, the criminalization of consensual same-sex sexual activity under Article 92-6 of the Military Criminal Act continues to discriminate against men who engage in consensual sexual activity with other men.[45]

This prohibition has existed since the enactment of the Military Criminal Act in 1962. One of the main revisions to the clause occurred in 2009 and increased the maximum sentence of imprisonment with labour from one to two years.

The early version of the clause referred to the act as *gyegan* (鶏姦, which literally means "sexual acts between fowls" and refers specifically to anal sex between men). Amid criticism that the term *gyegan* was a derogatory slur that denigrated sexual acts between men, the term was revised in 2013 and replaced with the term "anal intercourse".[46]

The current article states: "A person who commits anal intercourse with any person prescribed in Article 1 (1) through (3) or any other indecent act shall be punished by imprisonment with labor for not more than two

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[38] Amnesty International, *South Korea: The National Security Law* (Index: ASA 25/006/2012).
[39] Amnesty International, *South Korea: National Security Law Continues to Restrict Freedom of Expression* (Index: ASA 25/001/2015).
[40] Republic of Korea, Fourth periodic report under Article 40 of the Covenant (ICCPR), UN Doc. CCPR/C/KOR/4, paras 268–269.
[41] Amnesty International, *South Korea: Sentenced to Life: Conscientious Objectors in South Korea* (Index: ASA 25/1512/2015).
[42] Amnesty International, *South Korea: Sentenced to Life: Conscientious Objectors in South Korea* (Index: ASA 25/1512/2015).
[43] "Fleeing discrimination at home, S. Koreans seek asylum abroad", *Hankyoreh*, 7 November 2014, english.hani.co.kr/arti/english_edition/e_international/610223.html.
[44] On 29 June 2018, the Constitutional Court of South Korea determined that the lack of alternative service was unconstitutional and ordered the government to establish an alternative by the end of 2019. "South Koreans may no longer face jail if they refuse to serve in the military", CNN, 29 June 2018, edition.cnn.com/2018/06/29/asia/south-korea-military-service-intl/index.html.
[45] Prior to amendments made in 2009 and subsequent renumbering, the "indecent acts" clause was Article 92-5.
[46] SOGILAW, *Human Rights Situation of LGBTI people in South Korea 2015*, 19 August 2016, annual.sogilaw.org/review/review_2015_en/1576.

years."[47] Article 1 (1) through (3) describes military or paramilitary personnel such as warrant and non-commissioned officers, enlisted soldiers in active or reserve service, civilian employees of the military, students who are registered in the military register and officer candidates.[48]

Article 92-6 is problematic because it does not differentiate whether the act was consensual or not, whether the sexual activity was between same-sex or different-sex individuals or whether it was conducted inside the military base or outside when soldiers are off-duty or on leave.

In practice, as documented in this report, the government considers the clause only to refer to sexual activity between men, including consensual sex. Various statements made by authorities further confirmed this, including in the summary of the decision in the 2016 Constitutional Court case on the "indecent acts clause", which noted that the Article was an "illustrative type of legislation" and in this illustrative provision "means anal intercourse between males".[49]

Responding to Amnesty International's request for information concerning statistics on the gender of individuals investigated and punished under Article 92-6, the Ministry of National Defense stated that although two women were part of the investigations in 2017, there were no confirmed cases of consensual sexual acts between soldiers of the opposite sex being punished as crimes of indecent acts (Article 92-6) under the Military Criminal Act.[50]

In its state report during the Universal Periodic Review in 2017, the South Korean government explained that Article 92-6 of the Military Criminal Act does not intend to criminally punish sexual orientation; instead, the government justifies the necessity of this clause to uphold military order and discipline, taking into account the nature of communal living in barracks.[51]

South Korea's Constitutional Court issued decisions on the criminalization of same-sex sexual activity in the military in 2002, 2011 and 2016. However, the number of judges ruling against the criminalization is increasing. Among the nine judges, the court ruled 6-2 to uphold criminalization in 2002, but only 5-4 to uphold in 2011 and 2016.[52]

In its most recent ruling in 2016, the Court stated: "The army's closed, same-sex society bears a high possibility of abnormal sexual acts taking place between the same sex … So even if this may lead to discrimination against soldiers of the same sex in comparison to soldiers of the opposite sex, we recognize this restriction is imposed to preserve the distinctiveness and combat power of the army, and thus constitutes a reasonable cause."[53]

In February 2017, the Incheon District Court filed a request for adjudication on the constitutionality of criminalization in the military. The Incheon District Court stated that the provision in the military code is unclear and the punishment of consensual sexual activities between persons of the same sex is an infringement of fundamental rights, such as the right to sexual self-determination, and added that it is also discrimination without reasonable grounds based on gender, sexual orientation and gender identity, which goes against the principle of equality.[54] At the time of writing, this decision remained pending.

Article 92-6, even when it is not actively being implemented, helps to construct societal attitudes. It sends the clear message that people who identify as gay, bisexual or transgender – or anyone who engages in any form of same-sex consensual sexual activity or whose self-defined gender identity or gender expression differs from acceptable "norms" of gender and sexuality – can be treated differently. It is, in other words, not just the conduct that is censured but also the individual who engages in it. Article 92-6 encourages private and state actors to perpetrate violence and creates impunity for that violence and should be repealed.[55]

The consequence of this discriminatory clause in South Korea's military code can be seen in the experiences described by the current and former soldiers cited in this report. A military code that criminalizes same-sex

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[47] Article 92-6 of the Military Criminal Act.
[48] Article 1 (1) to (3) of the Military Criminal Act.
[49] Constitutional Court of the Republic of Korea, *Summary of the Decision of Case on the Constitutional Complaint against Article 92-5 of the Former Military Criminal Act Which Prescribes Punishment by Imprisonment for 'Other Indecent Conduct',* Case no. 2012Hun-Ba258 (28 July 2016).
[50] Ministry of National Defense response to Amnesty International, 29 May 2019.
[51] UN Human Rights Council, "National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21 (Universal Periodic Review): Republic of Korea", UN Doc. A/HRC/WG.6/28/KOR/1, 4 September 2017.
[52] Constitutional Court of the Republic of Korea, Case no. 2001Hun-Ba70 (27 June 2002); Case no. 2008Hun-Ga21 (31 March 2011); Case no. 2012Hun-Ba258 (28 July 2016) (all in Korean).
[53] Constitutional Court of Republic of Korea, Case no. 2012Hun-Ba258 (28 July 2016), pp. 145–152 (official English translation).
[54] Incheon District Court, Case no. 2016Go-Dan4070 (17 February 2017).
[55] Amnesty International, *Africa: Making love a crime: Criminalization of same-sex conduct in Sub-Saharan Africa* (Index: AFR 01/001/2013) and *Body politics: A primer on criminalization of sexuality and reproduction* (Index: POL 40/7763/2018).

consensual sexual activity does more than simply legislate against particular sexual acts; it institutionalizes discrimination, reinforces systematic disadvantages for gay, bisexual and transgender people and risks inciting or justifying violence against them, both inside the military and in the broader society.

RAPE AND ACCOUNTABILITY

The rationalization that Article 92-6 is needed to maintain discipline is questionable. There are already separate clauses in the military code under Article 92 that punish acts including rape and "rape-like acts", and these provisions apply regardless of the gender of the soldiers involved.[56]

For example, Article 92, which punishes rape, states: "A person who, by violence or threat, rapes a person falling under any provision of Article 1 (1) through (3) shall be punished by imprisonment with labor for a limited term of not less than five years." Also, Article 92-2 on "Rape-Like Acts" states: "A person who, by violence or threat, penetrates mouth, anus, or any other part of the body (excluding genital organ) of any person prescribed in Article 1 (1) through (3) with his/her genital organ, or who penetrates genital organ or anus with any part of his/her body, such as fingers, (excluding genital organ) or with any object shall be punished by imprisonment with labour for a limited term of not less than three years."

According to international human rights law, the acts referred to in Article 92-2 are still rape and should be punished equally with the other acts prohibited under Article 92. In addition, because these definitions are based on the use of force, violence or threat and not on the lack of consent, they therefore do not cover all potential acts of rape. A comprehensive definition of rape should include all non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object. South Korea's Military Code should be amended to bring it into line with international human rights law and standards.[57]

Civil society organizations have raised concerns about the overall level of violence in the military and difficulties soldiers have in pursuing charges against superiors.[58] In its concluding observations on South Korea's report in 2017, the UN Committee Against Torture noted its concern about the large number of cases of violence and abuse in the military, including those of a sexual nature, and about the small number of cases that have resulted in indictments.[59] Recently, South Korean media reported a case in the military courts in which a lower court found two officers guilty of raping a female subordinate; however, the Armed Forces High Court overturned the ruling in November 2018, citing lack of proof of assault or threat.[60] The crimes described in Article 92, except for Article 92-6, are applicable to all genders and could be used to prosecute sexual assault and rape if applied.

1.3 PROTECTION OF LGBTI RIGHTS IN THE MILITARY

The Ministry of National Defense Military Management Directive, enacted in 2009 and subsequently amended several times, includes a section entitled "Welfare of Homosexual Soldiers". Article 256 in this section of the Directive prohibits "beatings, harsh acts, insults, abuses, sexual harassment and sexual violence against homosexuals".[61] It also prohibits commanding officers from forcibly transferring or hospitalizing soldiers, subjecting them to blood tests or admitting them to "green camps" because they are "homosexuals".

In addition, a Military Human Rights Obligations Directive introduced in 2011 enumerates educational content on human rights for soldiers and management personnel. In an amendment enacted on 18 January 2017, the scope of the educational subject matter was expanded to include content on protecting the rights of LGBTI individuals. According to the Ministry of National Defense, since 2017 a course titled "The Military and Human Rights" includes an explanation of the ban on discrimination against "homosexuals" and

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[56] Article 92 of the Military Criminal Act deals with rape and Article 92-2 deals with "Rape-like Acts".
[57] Article 36 (1)(a) of the Istanbul Convention. See also International Criminal Court, "Elements of Crimes" (2011), Elements 1 and 2 of the Elements of Crimes relating to the crime against humanity of rape under Article 7(1)(g)-1, p. 8, and the war crime of rape in international and non-international armed conflicts under Article 8(2)(b)(xxii)-1, p. 28, and Article 8(2)(e)(vi)-1, pp. 36–37.
[58] *Korean NGO Report on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 20 March 2017, tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCAT%2fCSS%2fKOR%2f26966&Lang=en (submissions by 64 non-governmental organizations); Rainbow Action against Sexual Minority Discrimination, *Human Rights Violations on the Basis of Sexual Orientation, Gender Identity, and HIV Status in the Republic of Korea,* March 2017, tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCAT%2fCSS%2fKOR%2f27029&Lang=en , p. 17.
[59] Concluding Observations of the UN Committee Against Torture: Republic of Korea, UN Doc. CAT/C/KOR/CO/3-5 (2017) para. 35.
[60] "Two Navy officers acquitted of rape in High Military Court", *The Korea Herald*, 20 November 2018, www.koreaherald.com/view.php?ud=20181120000687.
[61] Article 256 (Anti-Discrimination) of the Ministry of National Defense Military Management Directive No.2273, amended 4 April 2019.

training for military human rights instructors (including company commanders, management personnel and superiors) is conducted 12 times per year, reaching a total of 720 people.[62]

Garam Han, an attorney with Korean Lawyers for Public Interest and Human Rights (Hope and Law), told Amnesty International that despite these changes to the Military Management Directive he "does not think the military knows about the human rights protections for gay individuals in the Directive".[63] He referred to a recent call from an officer asking for advice about what to do with a gay soldier. The officer wanted to know if he could discharge the soldier. Garam Ham told him about the Directive and told him he should implement the protections in the Directive.

The government has also explained other measures that are being undertaken to address human rights abuses in the military. In information submitted to the UN Committee Against Torture in March 2019, South Korean authorities highlighted the establishment of the office of military Ombudsman on the list of 100 priority tasks under the five-year National Policy Agenda announced in 2017.[64] They also noted a wide range of internal remedy mechanisms in the Ministry of National Defense to address human rights abuses, including formation of a Military Human Rights Advisory Committee that includes external experts. At the time of writing this report, measures to implement the Ombudsman role were still being considered in the National Assembly.

In response to questions from Amnesty International, the Ministry of National Defense noted additional steps being taken to address human rights abuses in the military. These include operating counselling services, such as a Helpline and a group for establishing work boundaries to ensure gender equality, a phone line for reporting abuse, a counselling chatroom, an email address for receiving complaints and a smartphone app that victims can use to report incidents of sexual violence. The Ministry also pointed to revisions in July 2018 to the Military and Civilian Employees Handling Disciplinary Matters Directive that establishes a system to allow victims to report complaints safely as part of the duty to protect complainants and by regulating disciplinary measures standards.[65]

[62] Ministry of National Defense response to Amnesty International, 29 May 2019.
[63] Interview with Hope and Law attorneys, Garam Han and Minhee Ryu, in Seoul, 2 May 2019.
[64] UN Committee against Torture, Information received from the Republic of Korea on follow-up to the concluding observations, UN Doc. CAT/C/KOR/CO/3-5/Add.1 (2019), paras 10–11.
[65] Ministry of National Defense response to Amnesty International, 29 May 2019.

2. ABUSE AND HARASSMENT IN THE MILITARY AND BEYOND

> **"Gay men in South Korea are so skilled at hiding their sexual orientation. They have been practicing that all their lives."**
>
> "John Kim", a bisexual man who served in the military from 2013 to 2015

Gay men recounting their experience of military service included those who managed to withhold their identity and did not suffer adverse treatment directly as well as those who suffered violence, abuse and threats for the duration of their military service.

During interviews, several people told Amnesty International that many gay men successfully complete their military service in South Korea, often while keeping their sexual orientation private, and are proud to serve their country. However, when private choices about whom to share intimate moments with is a criminal offence, it can have very public consequences. Soldiers may face prosecution, harassment, violence, isolation, discrimination and stigmatization.

Even if they are not enforced in a manner that affects a large number of soldiers, laws that criminalize sex between men in the military allow discrimination against individuals who identify as gay, bisexual or transgender, as well as anyone whose self-defined gender identity or gender expression differs from acceptable "norms". Individuals can be arbitrarily arrested in the military merely on the basis of allegations about sexual orientation, rumours of sexual behaviours or objection to gender expression.

Although the Military Management Directive enacted by the Ministry of National Defense in 2009 codifies equal treatment and other anti-discrimination measures for LGBTI people, serving soldiers still face the unequal and incomplete implementation of these measures and the continued use of Article 92-6 to investigate and indict men who have sex with men. This discrepancy creates a confusing environment in which gay soldiers must try to carry out their military service.

2.1 INVASION OF PRIVACY

Privacy is essential to individuals' sense of dignity and self and is a human right guaranteed under Article 17 of the ICCPR. Adult consensual sexual activity in private is covered by the concept of "privacy". The criminalization of same-sex consensual sexual activity is a violation of the right to privacy and allows law enforcement officials to invade the privacy of individuals alleged to be engaging in such activity. In addition,

when states punish people for sexual activity or gender expression, or otherwise arbitrarily interfere with their private lives, it sends a message that others are free to do the same. These violations of privacy affect other human rights, including the right to equality before the law and non-discrimination.

In 2017, the military authorities carried out an investigation that invaded the right to privacy of dozens of active duty soldiers. While Article 92-6 of the South Korea military code has existed since the 1960s, many people only came to understand what criminalization of same-sex sexual activity in the military entails when this Article was used to carry out an unprecedentedly aggressive investigation to identify and punish men engaging in such activity.

In all, 23 active-duty soldiers were charged with violating Article 92-6 of the Military Criminal Act.[66] Currently, 10 of the cases have been submitted to the Constitutional Court as constitutional complaints and several others are in various appeal stages. A soldier known as "Captain A" was taken into custody less than a month before being discharged from the army and was sentenced to six months in prison with the judge suspending the execution of the punishment for a year. None of the soldiers have served time in prison to date, but several who are still on active duty have been denied promotions and are suffering other penalties while their cases are pending.[67]

The tactics used during the investigation invaded privacy, according to the advocacy group Military Human Rights Center of Korea (MHRCK). MHRCK published screenshots of dating application conversations that the group said were a result of military authorities pressuring targeted men to identify and communicate with other allegedly gay men on social media.[68] The group reported that the R.O.K. Army Investigation Command (ROKA CID) investigated as many as 50 soldiers suspected of being gay and they were asked to identify other gay men on their contact lists. The group raised concerns regarding allegedly illegal searches and investigations forcing soldiers to "confess".[69] MHRCK also announced in March 2019 that another investigation into three navy sailors for alleged violations under Article 92-6 had begun in late 2018.[70]

The investigations in 2017 demonstrate that as long as the law exists, it could be used against soldiers engaged in or suspected of engaging in sex between men even if it is not routinely or even frequently used. Responding to written questions from Amnesty International, the Ministry of National Defense provided data on the use of Article 92-6. For most years between 2009 and 2018, the number of individuals charged under this article remained in single digits.[71] In 2011, there were 13 charged and there were 14 in 2012. However, the numbers jumped to 28 charged in 2017, including the 23 cases noted above and in the first half of 2018, there were already 10 individuals charged. Though the specific reason for this unusually high number in a single year is unknown, it seems to point to a conscious decision to pursue investigations in 2017 and highlights that implementation of Article 92-6 may well be subject to individual decisions to prosecute made by current military authorities.

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[66] Response of the Government of the Republic of Korea on the Joint Urgent Appeal from Special Procedures, 2 February 2018, KOR 2/2017, spcommreports.ohchr.org/TMResultsBase/DownLoadFile?gId=33890.
[67] Interview with Lim Tae-hoon, Director of the Military Human Rights Center of Korea, in Seoul on 2 May 2019.
[68] Military Human Rights Center of Korea (MHRCK), "Briefing to Release Evidence in the Gay Army Soldier Witch-hunt", 17 April 2017, mhrk.org/news/?no=3270 (in Korean).
[69] MHRCK, "Homophobic Army Chief of Staff GEN Jang Junkyu should step down", 13 April 2017, mhrk.org/news/?no=3257
[70] MHRCK, "Gay Witch-hunt Rebooted", 12 March 2019, mhrk.org/news/?no=6094&fbclid=IwAR3jxPM1g8A3CbOsEYDYWHgE3hlqCBYYqs1BGvVkDYr2leH0_3CM_dtMeS8.
[71] Ministry of National Defense response to Amnesty International, 29 May 2019. In 2009 and 2010 there were two individuals charged each year; in 2011, 13 individuals were charged; in 2012, 14; in 2013, three; in 2014, four; in 2015, six; in 2016, eight; in 2017, 28; and in 2018, 10 individuals had been charged up until 30 June.

CASE OF "YEO-JUN KIM", FORMER OFFICER WHO SERVED FROM 2016 TO 2018

Yeo-jun Kim was a successful officer in the Army in the spring of 2017. [72] *He described to Amnesty International the dramatic turn his military career took after he became part of the larger 2017 investigation.*

"I answered "no" to the question "are you attracted to men" when I took the computerized draft examination before I was commissioned in 2016. I knew that to answer "yes" would mean I got pulled out and only asked more questions which could negatively impact my military service.

My superior officer verbally abused soldiers under his command regularly, but I thought this was common across the military and believed it had nothing to do with sexual orientation. I remember my superior telling me the best way to get through service was to understand exactly what your supervisor wants and obey – he said: "If your superior officer is Catholic, become Catholic".

I don't think anyone knew my sexual orientation. But I was asked to come meet in person with the R.O.K. Army Central Investigation Department in March 2017. When I arrived, there were three individuals and digital forensic equipment in the room.

They started by asking me if I knew "Jun-seo", an ex-lover that I had broken up with a year before. When I answered "no", the investigators began screaming and threatening me. Still, I denied knowing him.

One investigator then said, "Why don't you have a conversation with 'Jun-seo' face to face?" They called "Jun-seo's" commanding officer on a video call. "Jun-seo", who had already had his mobile phone confiscated by the investigators, was with his commanding officer. I was also outed to his commanding officer through the video call. My ex-lover told the investigators he knew me and we had a relationship but I kept denying I knew him. Then the investigators asked me to hand over my phone for digital forensic examination.

I refused, and the investigators made more threats, saying: "If you don't submit your phone, we will confiscate it and your unit will find out about you." I still did not give consent for my phone to be examined by digital forensics.

I was finally able to leave and sought some help from an acquaintance of mine who was a lawyer. He suggested that I cooperate a bit and that things might go more smoothly for me if I did. So, I contacted the investigators again the same day.

I went back and admitted to the R.O.K. Army Central Investigation Department that "Jun-seo" was my ex-lover. After that, the investigators barraged me with outrageous questions, questions about what sex positions I used and "where did I ejaculate". I handed in my mobile phone, and they did a digital forensic examination of it.

The investigators looked through my phone and asked me to identify other LGBTI people. They claimed they already knew about some of these people. I maintained that everyone in my phone were all friends.

Later in the year, after I had been charged, I was told at a meeting with the military prosecutor that my degree of contrition would affect my punishment. But when they asked me if I saw myself as a criminal, I couldn't bring myself to say yes. In the end, I did admit to violating Article 92-6 and my indictment was suspended. My unit found out about the investigation, however, and demanded that I be subjected to disciplinary action.

My superiors called for disciplinary action against me to be suspended until the Constitutional Court ruling is made, and I have not been punished, Yet I still feel the investigation's impact even after leaving the military in 2018. After my ex-lover turned me in and other people turned against me and the others who were investigated in 2017, I felt exposed.

The authorities came to me like peeping Toms. They should have maintained confidentiality. I have lost faith and trust in people."

[72] Interview with "Yeo-jun Kim" in May 2019 (name has been changed to respect the interviewee's anonymity).

"OUTING" OF SOLDIERS

"Outing" – the exposure of a person's sexual orientation or gender identity against his or her will – is an abuse of the right to privacy and puts people at risk of discrimination.

Collecting information is necessary for authorities to take measures that embrace diversity and should be encouraged as long as that information is handled properly. Yet, Amnesty International interviews for this report made clear that information was being handled unprofessionally and inappropriately by government authorities, including involuntary disclosures of information about sexual orientation and gender identity.

According to Jeram, a gay man who served in the military from 2008 to 2009, a non-commissioned officer offered him assistance when he saw Jeram's distress. Jeram told the officer about the difficulties he was experiencing and revealed his sexual orientation. However, the officer placed Jeram's counselling record where everyone could see it: "From the very next day, people began to know that I was gay and soon the whole unit was aware."[73]

In the case of "Kim Myunghak", who was an active-duty soldier when interviewed in July 2018, his commanding officer outed him and said to the whole unit: "Did you know he is gay? If you want me to kick him out, I can."[74] This occurred despite the prohibition against "outing" another soldier in Article 255 in the "Welfare of Homosexual Soldiers" section in the Military Management Directive.

"Outing" can be extended to family members as well. Do hoon Kim, a gay man who served between 1996 and 1998, said that when his friend disclosed his own sexual orientation to an officer, that officer reported the information to the man's family without his knowledge. When the man returned home, his mother reportedly refused to cook meals for him for a year. Do hoon Kim expressed concern that this could have also happened to him.[75]

2.2 VIOLENCE AND DISCRIMINATION

Criminalization allows discrimination against individuals based on their actual or perceived sexual orientation. It also contributes to a culture of impunity in which military officials and members of the general public feel justified when they mistreat actual or perceived gay individuals.

Many soldiers and NGOs interviewed by Amnesty International spoke about the hostile atmosphere gay men face in the military. In addition to criminalization, South Korean military culture does not accept diversity and does not provide a safe environment for LGBTI people to express their sexual orientation and/or gender identity safely.

Interviewees emphasized to Amnesty International that incidents of violence are often precipitated by a person's perceived refusal to conform to gender norms, rather than by a person's actual sexual orientation. In other words, people are targeted not just for their sexuality, but also when they transgress gender norms and fail to fit in with the prescribed environment in the South Korean military.

Do hoon Kim told Amnesty International:

"I was a little feminine and shorter. It was like child's play. I was harassed a lot. I might have been assaulted if I had fewer social skills and was less determined."[76]

"John Kim", a bisexual man who served in the military from 2013 to 2015, described the draft physical examination:

"There were questions like 'Are you attracted to the same sex?' I just rolled my eyes. The question was kind of expected though."

He elaborated on his choice to mark no in response to the question and to hide his gender identity:

"I thought, what are they [the military] going to do with this information? I just tried to fit into a straight face and be polite"[77]

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[73] Interview with Jeram in July 2018.
[74] Interview with "Kim Myunghak" in July 2018 (name has been changed to respect the interviewee's anonymity).
[75] Interview with Do hoon Kim in July 2018.
[76] Interview with Do hoon Kim in July 2018.
[77] Interview with "John Kim" in July 2018 (name has been changed to respect the interviewee's anonymity).

To maintain discipline, conscripts are expected to be "hyper-masculine" and "strong men". "Lee So" told Amnesty International:

"It is a place where you have to erase who you are to fit in."[78]

For instance, Edhi Park, a transgender woman who served in the military from 2007 to 2009, said she was ordered to lower her voice and walk more "masculine" during her training.[79] She further described the abuse she suffered for not fitting in:

"A soldier joked around and said, 'Let me insert this in you' while showing me an umbrella. I don't know why I had to be treated this way, with regular harassment. I am more than qualified and effectively completed my duty."

Some of the gay men who recounted their experiences of military service said they had managed to withhold their identities and did not suffer negative treatment directly. Some were able to continue consensual same-sex sexual relationships while serving. Others suffered abuse and threats of violence for the duration of their military service, whether their sexual orientation was known or not.

[78] Interview with "Lee So" in June 2018 (name has been changed to respect the interviewee's anonymity).
[79] Interview with Edhi Park in July 2018.

CASE OF "KIM MYUNGHAK", AN ACTIVE-DUTY SOLDIER

Kim Myunghak was an active-duty soldier when Amnesty International interviewed him in July 2018.[80] *He spoke about the homophobic nature of the military, as well as unwanted "outing" and discriminatory remarks by his superior.*

"On numerous occasions during my military service, I received questions about my sexual orientation and gender identity, including at the initial physical examination at the recruitment stage and in subsequent mental health assessments.

On one occasion, I was given multiple-choice questions during a routine health assessment. I answered "strongly yes" to the question "Are you attracted to the same sex?" I also disclosed my sexual orientation to a psychiatrist hired by the military and told the psychiatrist that I was worried about whether I could adjust well to the military without being traditionally muscular. Because of these responses I was classified as a "soldier of special interest".

Afterwards, I read about the investigations in 2017 through a newspaper distributed only within the military. Although I had not encountered any verbal or physical harassment or differential treatment as a result of my answers to the multiple-choice questions, I could not stop feeling anxious about whether I would have the necessary protection as a gay man in the military.

I did not think that I would be charged under Military Criminal Act Article 92-6; however, I was particularly concerned about the homophobic nature of the military and the fact that laws could be selectively enforced if a military official so desired.

One day, a soldier junior in rank to me who I did not get along with and who knew my sexual orientation, decided to pull a prank on me to get me in trouble with the aim of insulting me based on my sexual orientation. This junior soldier found out the phone number of my civilian lover and had texted him more than 20 times. In those texts, he pretended to be me and asked my lover to call him back at a specific number at the military installation that we were not supposed to use for external phone calls. Surprised, my lover called the number back, and then the soldier called my lover a "dirty bastard".

When I was on a night shift one night, I received a surprise phone call from my lover at this number. My lover was concerned about so many text messages and was angry when he learned they were not actually from me and from being sworn at.

The commander of the unit found out about the phone call and investigated. Then the commander told everyone in the barracks and asked them: "Did you know Myunghak was gay? If you are not comfortable with his sexual orientation, I can transfer him to a different unit."

This commander not only "outed" me without my consent but also made discriminatory remarks about gays. I thought this response was unjust and that the junior soldier was not punished appropriately. Though I had done nothing wrong, I was made to feel the situation was my fault. I was shocked when my commander told me that he could understand the junior soldier's motivation and other soldiers in the unit told me they also supported the junior soldier.

[80] Interview with "Kim Myunghak" in July 2018.

Q. Are you attracted to same sex?
Strongly Yes
Strongly No

"HS", a gay man who served from 2013 to 2015 and who hid his sexual orientation while in the military said:

"If people in the military found out I am gay, it could end me."

He said that when reporting for duty, they were again asked about their sexual orientation and told that if you are "gay or transgender, you could be discharged".[81] When Jeram, who initially withheld his sexual orientation, was sexually assaulted by other soldiers in his squad, he felt it was because they perceived him not to be masculine enough.[82]

Several soldiers with recent military service mentioned that they received lectures emphasizing that LGBTI people should not be discriminated against in the military but also that same-sex consensual sexual activity was prohibited. Some officers even made sexual jokes to humiliate gay men and their sexual acts during the lectures.

A former soldier who completed his service in April 2018 said:

"It was very confusing. In the military law education we were taught every night before our bedtime curfew we were told that, 'While homosexuals should also be able to experience military life without difficulties', two homosexuals who had engaged in sexual relations were punished'."[83]

"Lee So's" own commander referenced Article 92-6 and said you could be punished if you were engaged in same-sex sexual activity. "That made me very uncomfortable," "Lee So" recalled.[84]

2.3 HIERARCHY AND IMPUNITY

> **"It's all about power and rank. Soldiers harass others with lower rank just to show off their power."**
>
> Do hoon Kim, a gay man who previously served in the military

Interviewees reported that in the extremely hierarchical environment of the military, power imbalances seemed to play a significant role in determining who gets targeted for abuse and harassment. These power relations also make reporting any abuse in the military even more difficult.

Several former soldiers who are gay men told Amnesty International that they had been subjected to sexual abuse and threatened in order to keep them quiet, often by commanding officers.

"Lee Seong-ju", a gay man who served from 2011 to 2012, talked about the fear he experienced while serving:

"Because I had just recently joined the military, all the people in the squad were higher-ranking than me. That means they could pressure and bully me, and they did. I was very scared. I was very anxious. Being together 24 hours a day for several months in the same space with those who were hostile toward me personally and my sexual orientation, made all people objects of fear for me." [85]

Several people interviewed said superiors threatened soldiers not to make reports to prevent any negative impact on their own promotions and that this applied to engaging in any consensual same-sex sexual activity as well.

"Kice", a gay man who completed his service in July 2018, said that his superior officer told the unit:

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[81] Interview with "HS" in July 2018.
[82] Interview with Jeram in July 2018.
[83] Interview with "Caffeine" in April 2018 (name has been changed to respect the interviewee's anonymity).
[84] Interview with "Lee So" in July 2018.
[85] Interview with "Lee Seong-ju" in July 2018 (name has been changed to respect the interviewee's anonymity).

"If you are going to have sex, don't have it inside the base. Do it secretly off base, and don't get found out, so there will be no trouble affecting my promotion."[86]

Interviewees reported that the hierarchical culture of the military enables superior soldiers and officers to abuse soldiers of lower ranks with impunity including through all types of bullying, harassment and violence. Perceived and actual gay men were among the targets because their difference makes them seen as needing "discipline" to force them to fit into the military culture.

This pattern was corroborated by research commissioned by the National Human Rights Commission of Korea in 2003–2004, which found that "Male-to-male sexual violence in the military was used to maintain ranking-based hierarchical order."[87]

CASE OF "U", A FORMER SOLDIER

"U", who served in the military about a decade ago, spoke to Amnesty International regarding the routine sexual violence he witnessed and experienced against men either perceived to be "feminine" or who did not fit into the conventional gender norms in the military.[88] *He told Amnesty International that the verbal and physical abuse, sexual assault, humiliation, violence and threats eventually led him and three other soldiers to self-harm.*

In my squad, there were many soldiers who were considered "feminine" and usually in the lowest or second-lowest ranks, that were ordered by higher-ranking soldiers to locations that were less conspicuous, such as laundry rooms or shower rooms. Once there, these soldiers were subjected to sexual abuse. On some occasions, officers ordered lower-ranking soldiers to nearby motels during night shifts and then raped them.

One night, I saw a soldier being sexually abused. When he got angry, the person abusing him who was his senior started to beat him fiercely and forced him to drink from the toilet bowl. A few days later, the abused soldier made up his mind to report the incident and approached me for my help.

When the superior heard about the possible report, he asked me: "Who are you to intervene in private business?" He told me: "If you make a report, I will beat you until you will not be able to recover." I was then subjected to physical violence and humiliation for three hours, which included being forced to have oral and anal sex with the original victim while the senior soldier made taunting remarks, such as: "Don't you want to have sex with a woman-like man?"

Rather than punishing the perpetrator of this sexual violence, higher-ranking officers who eventually heard about this incident instead came to view me with suspicion. They avoided interaction with me and the other victim as if we were "dirty" for having "perverted sex". The same senior soldier continued to engage in sexual abuse, frequently coming up to my bed during the night and hugging a fellow soldier throughout the night.

This was not an isolated incident. Three other soldiers and I were determined to kill ourselves because we were unable to endure the abuse. We went to the boiler room to cut ourselves and banged our heads against the wall. All four of us were eventually taken to a psychiatric hospital.

The three other soldiers were dishonourably discharged, but I was taken back to the same squad and labelled as a "soldier of interest", a term used frequently to designate soldiers who warrant special treatment. As the rumour spread about the incident, no one was willing to talk to me. The perpetrator was eventually sent to military prison for one month, but others of higher rank were not prosecuted for their inaction.

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[86] Interview with "Kice" in July 2018 (name has been changed to respect the interviewee's anonymity).
[87] Insook Kwon et al., "Sexual Violence Among Men in the Military in South Korea", *Journal of Interpersonal Violence* 22(8), 2007, p. 1040.
[88] Interview with "U" in July 2018 (name has been changed to respect the interviewee's anonymity).

2.4 HARMFUL ISOLATION AND MENTAL HEALTH

> **"A superior in the military told me 'Even if I shoot you here, it will simply get covered up as a suspicious death and that will be it. Then, the compensation your family would receive will be even lower than for a military dog.'"**
>
> Jeram, a gay man who served in the military from 2008 to 2009

During interviews, soldiers and former soldiers described the term "soldier of interest" or "special interest" and its use to single out soldiers who were suffering distress and deemed in need of counselling for a variety of reasons. These terms were formally replaced by the terms "soldier in need of consideration" and "soldier in need of help" in 2015, but the previous terms were still used by several interviewees.[89] Interviewees reported one could be labelled a "soldier of interest" for answering yes to questions about attraction to men at the draft physical examination. Some reported the terms were also used to label LGBTI soldiers and justify their consignment to medical facilities, "green camps" (facilities to train soldiers who are struggling to adjust to military life) or general isolation from other soldiers (despite a prohibition against this type of isolation in Article 256 of the Military Management Directive). Responding to Amnesty International, the Ministry of National Defense stated that to date they had not identified any case in which a unit applied for isolation of a "homosexual" soldier, or in which a soldier was so isolated, through admission to a green camp or hospital.[90]

It is still common for gay men in South Korea to conceal their sexual orientation, even outside the military. Yet the experience of hiding who you really are and living under constant fear in the military communal setting with very little privacy can impose severe stress on those who do not fit in.

Amnesty International interviewed several gay soldiers who had been sent to military mental health facilities or so-called "green camps" or "healing camps". "Lee Seong-ju", a gay man who served from 2011 to 2012, said he could not endure the stress of having to fit in and attempted to commit suicide. He was eventually sent to a military psychiatrist and then to a "green camp". He described his six weeks there:

"The place that I was in had poor conditions, it was created in a rush and there wasn't enough space. Counsellors came once a week. I have no idea what qualifications they had, but I was pretty sure they were not psychiatrists. There were about 20 soldiers in the green camp, and six more soldiers watching us. Once every three weeks, the high-ranking officers decide whether to discharge soldiers. They were not medical professionals, they just took the role in rotation.

During one of the meetings we had every three weeks, one of the high-ranking officers was inclined to let me go. They asked me why I was there. I told them I had attempted suicide, but they told me that they had never been told. They asked me to stay for three more weeks. I was frustrated that they didn't even have the right information."[91]

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[89] Kim Gui-geun, "Military abolishes 'protection of soldier of interest' terminology after 10 years", Yonhap News Agency, 16 February 2015, www.yna.co.kr/view/AKR20150216132800043 (in Korean).
[90] Ministry of National Defense response to Amnesty International, 29 May 2019.
[91] Interview with "Lee Seong-ju" in July 2018.

CASE OF JERAM

Upon completing initial training in 2008, Jeram was assigned to work as a driver.[92] Occupying the lowest rank in the military and considered by others in his unit to be rather "feminine" he became the subject of harassment. Superiors and others within his unit repeatedly groped Jeram, kissed his neck and pulled down his underwear.

I did not want to cause trouble, so I did not resist the sexual assaults at first. I felt I was harassed because I did not fit into the Army. Yet the situation got worse, reaching the point where I could no longer endure it. After I started to resist, my abuser assigned me to work night shifts at irregular hours in order to deprive me of sleep and forced me to clean the septic tank.

Lack of sleep and stress affected my health and productivity. I got sick and lost weight. My harassers told me: "You are lucky that you are in the military because if you were in jail, you would have been fucked." I fainted as soon as I heard that.

After my problems became visible, a non-commissioned officer approached me and asked how I was doing. I told the officer that I may not be masculine enough and deficient in some way. I also told the officer I was a sexual minority.

From the very next day, people began to know that I was gay and soon the whole unit was aware. On subsequent mornings when we were all gathered, our battalion commander would point to me and remark: "Who did you seduce last night?" I had to put a yellow "smiley face" label on my uniform, which indicated that I was a "soldier of interest" and I was removed from my duty as a driver as a result.

As the situation escalated, I was given the option of either entering a mental hospital within the military or remaining in a cell on my own with limited access to the outside.

Being unwell mentally and physically at that point, I chose to go to the mental hospital and was kept there for 116 days.

Because I didn't respond to the unfair requests of the hospital staff, I was considered rebellious and did not get access to my basic rights which there they consider 'privileges', such as being able to make outside phone calls or walk in the fresh air once a week. I was forced to take anti-depressants.

The hospital tried to diagnose me as "unfit for service", with staff members even instructing me how to act mentally incompetent so that I could get discharged.

I refused to be labelled in this way. I felt I had lived my life well prior to the military and knew that I was not the source of the problem. This whole experience led me to attempt suicide because I lost the will to live.

One panellist who was not a licensed medical professional said at the second review of my case in the hospital to determine whether I should be discharged: "You are so disobedient. Even if I shoot you here, it will simply get covered up as a suspicious death and that will be it. Then, the compensation your family would receive will be even lower than for a military dog, which is 2 million KRW (about US$2,000)." At that time, I could not hold back my tears.

As a condition for discharge, my mother was forced to sign a paper agreeing not to sue the military for ill-treatment. The official reason given for my early discharge and failure to complete military service was that I was "unfit … because I had a hysteric personal disorder and egodystonic homosexuality".[93]

Because there are official state documents that stigmatize you as a 'person with issues', I felt it would be difficult to speak out against that. I felt that society had abandoned me. In South Korea, it was no different outside of the military than it was in the military. I just really wanted to escape, and so the result was that I decided to move abroad.

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[92] Interview with Jeram in July 2018.

[93] Egodystonic homosexuality is defined as a psychological or psychiatric disorder in which a person experiences persistent distress associated with same-sex preference and a strong need to change the behaviour or, at least, to alleviate the distress associated with the homosexuality; *Farlex Partner Medical Dictionary* (2012), medical-dictionary.thefreedictionary.com/ego-dystonic+homosexuality.

It is possible to be discharged if military officials determine soldiers to be "unfit for service" during a review of mental health, and at least one interviewee implied that superiors feel soldiers seek out this diagnosis on purpose.

"Yeo-jun Kim" told Amnesty International about a subordinate in his unit who had already been receiving hormone treatment to reassign his gender before he started his service. The soldier was struggling with the lack of privacy and sought out his superior for help.[94]

But according to "Yeo-jun Kim" the military "would not accommodate the soldier and would not classify him as unfit for service". The soldier was prescribed anti-depressants but still attempted self-harm. He was eventually sent to a military hospital, legally determined to be unfit and discharged.

"Yeo-jun Kim's" own supervisor said if they let this soldier out of the military, it would feel like he was betraying them after all they did to help him. But "Yeo-jun Kim" felt they had not helped the soldier:

"In my view, we had not taken care of him. We could not give him the special care he needed. The atmosphere in the military makes it too hard to accommodate LGBTI people and I could not discuss this problem with others."[95]

"Do-yun Park", a pansexual who served about a decade ago, was also sent to a medical facility. He described being isolated and tied to his bed at night to protect him from self-harm. "Do-yun Park" believes he was discharged after six months partially due to his LGBTI status and partially due to his depression and other mental disorders.[96]

[94] Interview with "Yeo-jun Kim" in May 2019.
[95] Interview with "Yeo-jun Kim" in May 2019.
[96] Interview with "Do-yun Park" in July 2018 (name has been changed to respect the interviewee's anonymity).

3. LGBTI RIGHTS IN INTERNATIONAL LAW AND STANDARDS

The Universal Declaration of Human Rights declares that all human beings are born free and equal in dignity and rights.[97] Laws that criminalize sex between men not only discriminate against LGBTI people but also violate other rights guaranteed in international law and standards.

3.1 RIGHT TO EQUALITY AND NON-DISCRIMINATION

Under international law and standards, everyone has the right to be free from discrimination, including on the basis of their sexual orientation or gender identity. Prohibition of discrimination on grounds of "race, colour, sex, language, religion, political or other opinion, national or social origin, birth or other status" is enshrined in Article 2 of the Universal Declaration of Human Rights (UDHR) and in core international human rights treaties, including the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR), both of which South Korea has ratified. While sexual orientation and gender identity are not mentioned explicitly, these prohibitions conclude with the words "other status", which shows that the lists of protected grounds were intended to be open and illustrative. In other words, the grounds of discrimination are not exhaustive and have in practice been interpreted to include other types of discrimination.

For instance, the UN Human Rights Committee has interpreted Article 2 and Article 26 of the ICCPR, which prohibit discrimination and contain a generally inclusive "other status" clause, as being inclusive of sexual orientation.[98] In addition, Article 26 of the ICCPR provides that everyone is equal before the law and is entitled without discrimination to the equal protection of the law. Other binding UN instruments provide additional protection against discrimination for specific groups or on specific grounds. The International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of Persons with Disabilities – all of which have been ratified by South Korea – all contain free-standing provisions prohibiting discrimination in all areas on the grounds of respectively, "race, colour, descent, or national or ethnic origin", "gender" and "disability".

The UN High Commissioner for Human Rights has called for comprehensive anti-discrimination legislation that prohibits discrimination on the grounds of sexual orientation or gender identity.[99] Furthermore, the UN

[97] Article 1 of the Universal Declaration of Human Rights.
[98] *Toonen v. Australia*, UN Human Rights Committee, UN Doc. CCPR/C/50/D/488/92 (1992).
[99] Report of the United Nations High Commissioner for Human Rights on Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, UN Doc. A/HRC/19/41, para. 84(e).

High Commissioner for Human Rights makes it clear that even cultural or traditional values are not solid grounds for States Parties to evade their responsibilities to protect transgender people from discrimination.[100]

UN human rights bodies have repeatedly urged South Korea to consider repealing the law to criminalize same-sex consensual sexual activity in the military. This includes the UN Human Rights Committee in 2015, the Committee against Torture, the Committee on Economic, Social and Cultural Rights and the Universal Periodic Review in 2017.[101]

The South Korean Constitutional Court however, has held that Article 92-6 of the Military Criminal Code does not discriminate and further justified discrimination in its 2016 ruling, stating:

> The punishment is for an act of sexual gratification between same-sex soldiers that falls short of sodomy, which from an objective point of view, causes a sense of aversion in the general public and runs contrary to virtuous sexual moral ideals, and subsequently infringes upon the sound conduct and military discipline of the army as a community. So even if this may lead to discrimination against soldiers of the same sex in comparison to soldiers of the opposite sex, we recognize this restriction is imposed to preserve the distinctiveness and combat power of the army, and thus constitutes a reasonable cause.[102]

However, the argument to justify discrimination on moral grounds has been repeatedly rejected in other jurisdictions. In 2003, in *Lawrence v. Texas* which struck down the sodomy law in Texas, the US Supreme Court stated in its majority opinion: "Our obligation is to define the liberty of all, not to mandate our own moral code."[103] The Court elaborated further:

> The condemnation [of homosexuality] has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons, these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law.[104]

With specific reference to the human rights of lesbian, gay, bisexual and transgender people, the European Court of Human Rights declared in 1999 in a decision in *Smith and Grady v. United Kingdom* dealing with homosexuals in the Royal Navy, that:

> These attitudes, even if sincerely felt by those who expressed them, ranged from stereotypical expressions of hostility to those of homosexual orientation, to vague expressions of unease about the presence of homosexual colleagues. To the extent that they represent a predisposed bias on the part of a heterosexual majority against a homosexual minority, these negative attitudes cannot, of themselves, be considered by the Court to amount to sufficient justification for the interferences with the applicants' rights outlined above any more than similar negative attitudes towards those of a different race, origin or colour.[105]

In the Committee on Economic, Social and Cultural Rights General Comment No. 20, gender identity is recognized among the prohibited grounds of discrimination. The Committee noted that "persons who are transgender, transsexual or intersex often face serious human rights violations, such as harassment in schools or in the workplace."[106]

The UN Human Rights Committee and the Committee on Economic, Social and Cultural Rights have repeatedly urged states to tackle both direct and indirect discrimination against all persons, including LGBTI persons. States have an obligation to ensure that laws, policies and programmes executed by state authorities do not discriminate against individuals. They also have an obligation to address discriminatory

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[100] Summary Report of the United Nations High Commissioner for Human Rights to the Human Rights Council of information from States Members of the United Nations and other relevant stakeholders on best practices in the application of traditional values while promoting and protecting human rights and upholding human dignity, UN Doc. A/HRC/24/22, ohchr.org/EN/HRBodies/HRC/RegularSessions/Session24/Documents/A-HRC-24-22_en.pdf.
[101] Concluding observations of the Human Rights Committee: Republic of Korea, UN Doc. CCPR/C/KOR/CO/4 (2015), Concluding observations of the Committee against Torture: Republic of Korea, UN Doc. CAT/C/KOR/CO/3-5 (2017); Concluding observations of the Committee on Economic, Social and Cultural Rights: Republic of Korea, UN Doc. E/C.12/KOR/CO/4 (2017); UN Human Rights Council, Report of the Working Group on the Universal Periodic Review: Republic of Korea, UN Doc. A/HRC/37/11 (2017).
[102] Constitutional Court of Korea, Case no, 2012Hun-Ba258 (28 July 2016).
[103] *Lawrence v. Texas*, 539 U.S. 558, Supreme Court of the United States (2003).
[104] *Lawrence v. Texas*, 539 U.S. 558, Supreme Court of the United States (2003).
[105] *Smith and Grady v. United Kingdom*, 29 EHRR 493, European Court of Human Rights (2000).
[106] Committee on Economic, Social and Cultural Rights (CESCR) General Comment 20, para. 32.

practices, including by private actors, and to take action to prevent, diminish and eliminate the conditions and attitudes that contribute to substantive or de facto discrimination.

3.2 THE RIGHT TO PRIVACY

By criminalizing sex between men, the state is invading people's privacy and prohibiting them from engaging in consensual sexual activity without state scrutiny or control. In addition, when states punish people for sexual activity or gender expression, or otherwise arbitrarily interfere with their private lives, it sends a message that others are free to do the same. These violations of privacy also affect other human rights, including the right to equality before the law and non-discrimination.

In *Toonen v. Australia*, the UN Human Rights Committee found in 1992 that "adult consensual sexual activity in private is covered by the concept of privacy" under the ICCPR. According to the Committee, it is irrelevant whether laws criminalizing such conduct are enforced or not; their mere existence continuously and directly interferes with an individual's privacy.[107] Since *Toonen v. Australia*, the Committee, as well as other treaty bodies and special procedures, has repeatedly urged states to reform laws criminalizing consensual sexual activity between consenting adults of the same sex and has welcomed their repeal.[108]

3.3 THE RIGHT TO BODILY AND MENTAL INTEGRITY AND SELF-DETERMINATION

The Yogyakarta Principles (YP), which were developed in 2006 by lawyers, scholars, NGO activists and other experts, are an articulation of existing international human rights law as it pertains to gender identity and expression. Principle 1 states: "Human beings of all sexual orientations and gender identities are entitled to the full enjoyment of all human rights."[109] Principle 3 of the YP stipulates that self-defined sexual orientation and gender identity of each individual is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom. The ICCPR (Article 16) and CEDAW (Article 15) recognize the right to recognition before the law, and the inability to obtain official identification documents that reflect a transgender individual's gender identity and expression may violate this right.[110]

Also, Principle 31 in the Yogyakarta Principles Plus 10 (YP+10) provides that the right to legal recognition requires states to "ensure a quick, transparent, and accessible mechanism that legally recognizes and affirms each person's self-defined gender identity".[111] Principle 32 of YP+10 explicitly spells out that everyone shall enjoy the right to bodily and mental integrity, autonomy and self-determination regardless of their sexual orientation, gender identity, gender expression or sex characteristics.

Transgender people should be able to obtain legal gender recognition through quick, accessible and transparent procedures and in accordance with their own perceptions of gender identity.

3.4 RIGHT TO HEALTH

Article 12 of the ICESCR guarantees "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health". This requires health facilities, goods and services to be accessible

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[107] *Toonen v. Australia*, UN Human Rights Committee, UN Doc. CCPR/C/50/D/488/92 (1992).
[108] Report of the United Nations High Commissioner for Human Rights on Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, UN Doc. A/HRC/19/41, and Report of the United Nations Entity for Gender Equality and the Empowerment of Women on the activities of the United Nations Trust Fund in Support of Actions to Eliminate Violence against Women, UN Doc. A/HRC/29/23.
[109] Principle 1 of the Yogyakarta Principles, https://yogyakartaprinciples.org/.
[110] The Human Rights Committee found in several instances that the state's failure to issue birth certificates or to keep civil registries amounted to a violation of Article 16 and led to the violation of other rights included access to social services or education. See for example: UN Human Rights Committee, Concluding Observations on Albania, UN Doc. CCPR/CO/82/ALB (2004), para. 17; Concluding Observations on Bosnia and Herzegovina, UN Doc. CCPR/C/BIH/CO/1 (2006), para. 2; Concluding Observations on the Democratic Republic of Congo, UN Doc. CCPR/C/COD/CO/3 (2006), para. 25.
[111] Principle 31 of Yogyakarta Principles Plus 10, Yogyakarta Principles Plus 10 are additional principles and state obligations on the application on international human rights law in relation to sexual orientation, gender identity, gender expression and sex characteristics to complement the Yogyakarta Principles, http://yogyakartaprinciples.org/principles-en/yp10/.

to everyone without discrimination and be affordable for all persons, and includes states' obligations to combat transphobia, which can lead to discrimination.[112]

Classification of transgender people as suffering from a mental disorder – or pathologization – can result in discrimination. The Special Rapporteur on the right to health has noted: "While many people find diagnostic categories beneficial in allowing them to access services and better understand their mental health, others find them unhelpful and stigmatizing. Mental health diagnoses have been misused to pathologize identities and other diversities, including tendencies to medicalize human misery."[113]

The stigma associated with a diagnosis of mental disorder can be a cause of human rights violations against transgender people. In the latest version of the International Statistical Classification of Diseases and Related Health Problems (ICD-11), the existing diagnostic category of "Gender Identity Disorder" is to be replaced by "Gender Incongruence of Adolescence and Adulthood", which will be located in a new chapter titled "Conditions Related to Sexual Health" rather than the current "Mental Behavioural Disorders". The ICD-11 will go into effect on 1 January 2022 upon adoption by the World Health Assembly.[114] According to the World Health Organization, the reason to remove "gender incongruence" from the category of mental disorders is to address the enormous stigma currently faced by transgender people.[115]

The criminalization of same-sex consensual sexual activity acts as a barrier to the enjoyment of the right to health. It can compromise individuals' access to care by allowing, and in some cases encouraging, discrimination against them in provision of services by health care workers.[116] Discriminatory treatment by health care workers and the lack of privacy and confidentiality in health care settings, both of which can result in LGBTI people being "outed", can be a major reason for delaying treatment.

Yogyakarta Principle 18 on the protection against medical abuse requires that no person may be forced to undergo any form of medical or psychological treatment, procedure, testing, or be confined to a medical facility, based on sexual orientation or gender identity. It also provides that sexual orientation and gender identity are not medical conditions and are not to be "treated, cured or suppressed".

3.5 STATE OBLIGATION TO COMBAT STEREOTYPES BASED ON SEX AND GENDER

The criminalization of same-sex relationships, in addition to violating rights directly, legitimizes prejudice in society at large and exposes people to hate crimes, police abuse, torture and family violence.[117]

International human rights law requires states to combat stereotyping. Article 5(a) of CEDAW calls upon states to confront stereotyping by requiring them to take "all appropriate measures" to "modify the social and cultural patterns of conduct of men and women" in an effort to eliminate practices that "are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women".

The UN Committee on the Elimination of Discrimination against Women has confirmed that the protections under CEDAW and state obligations apply not only to cisgender women (that is, those who identify as female and were assigned female gender at birth) but also to transgender women – particularly given the specific forms of gender discrimination they face.

Criminalization also fuels discrimination against people who dress or behave in ways that challenge traditional gender norms. The existence of widespread homophobia and transphobia only makes more urgent the need for governments to fulfil their legal duty to protect LGBTI people from violence and discrimination.

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[112] Committee on Economic, Social and Cultural Rights, General Comment No. 22 (2016) on the Right to sexual and reproductive health, UN Doc. E/C.12/GC/22, paras 12, 23.
[113] Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, UN Doc. A/HRC/35/21, para. 48.
[114] *ICD-11* removes "gender identity disorder" from the mental health category. See World Health Organization, *ICD-11: Classifying disease to map the way we live and die*, 18 June 2018, www.who.int/health- topics/international-classification-of-diseases
[115] World Health Organization, *ICD-11: Classifying disease to map the way we live and die*, 18 June 2018, www.who.int/health-topics/international-classification-of-diseases.
[116] Amnesty International, *Body politics: A primer on criminalization of sexuality and reproduction* (Index: POL 40/7763/2018), p. 65.
[117] Amnesty International, *Body politics: A primer on criminalization of sexuality and reproduction* (Index: POL 40/7763/2018), p. 66.

4. CONCLUSION AND RECOMMENDATIONS

> **"Measures to protect gay soldiers' human rights have been established in the Military Management Directive, but because of Article 92-6, their identities and existence are still denied."**
>
> Jong Geol Lee, General Director of Korean Gay Men's Human Rights Group Chingusai, an LGBTI NGO

South Korea's military code does not comply with the international human rights obligations the state has signed on to and instead fuels further violence, discrimination and stigmatization, both within the military and in broader society. Criminalization in the military contributes to harassment, abuse and violence based on allegations about actual or perceived sexual orientation, or rumours of sexual behaviour.

By institutionalizing discrimination, laws criminalizing sex between men reinforce systematic prejudices toward gay men, bisexual men, transgender people and non-binary people, whether in the military or in the street or in the home. The military code in South Korea allows the invasion of privacy of soldiers alleged to be engaging in sex between men both on and off base, and on or off duty.

The military code also denies to people who are gay or bisexual or otherwise gender non-conforming the freedom to pursue love, relationships and consensual sexual activity freely. In some instances, those who are, or are suspected of being, transgender or intersex may also face criminalization or prejudice and discrimination under this law.

Decriminalization does not solve the entire issue, but it is a crucial first step towards respecting, protecting and fulfilling the human rights of LGBTI people.

"Danno", an LGBTI activist, told Amnesty International:

"The law must change first before there can be a social consensus."[118]

Amnesty International calls on the government of South Korea to reaffirm that exceptions to the universality of rights protections are unacceptable; to condemn human rights abuses on the basis of sexual orientation, gender identity and/or sex characteristics; and to respect, protect and fulfil the human rights of all persons, without discrimination of any kind.

[118] Amnesty International interview with "Danno" in June 2018 (name has been changed to respect the interviewee's anonymity).

Specifically, Amnesty International urges the:

NATIONAL ASSEMBLY TO

- Repeal Article 92-6 of the Military Criminal Act, which prohibits and punishes sex between men in the military;
- Adopt a comprehensive Anti-Discrimination Act that prohibits discrimination on a wide range of grounds, including sexual orientation, gender identity and sex characteristics;
- Bring definitions of rape in the law in line with international human rights law and standards – for example, the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) and the CEDAW General Recommendation 35 – and amend the definition of rape so that it is also based on the absence of consent; and
- Recognize same-sex marriage in law and ensure same-sex couples are protected against discrimination.

MINISTRY OF NATIONAL DEFENSE TO

- Immediately and unconditionally stop investigating, detaining or prosecuting soldiers for consensual same-sex sexual activity;
- Expunge the records of any conviction, indictment or military discharge based on same-sex sexual activity, sexual orientation or gender identity;
- Ensure those committing human rights violations and crimes against LGBTI individuals serving in the military are held accountable, including in trials with fair trial guarantees;
- Reinforce measures to prohibit and eliminate abuse, including sexual, physical and verbal abuse in the military, and ensure prompt, impartial and thorough investigations into all allegations of such abuse;
- Implement educational and awareness-raising programmes to ensure the anti-discrimination clauses in the Military Management Directive are recognized and implemented; and
- Ensure that anti-discrimination measures apply to all aspects of military service, including recruitment, promotion and discharge.

MINISTRY OF JUSTICE TO

- Protect all people from violence and advocacy of hatred that constitutes incitement to discrimination, hostility or violence regardless of ethnicity, gender, real or perceived sexual orientation or gender identity; and
- Introduce ongoing training for all levels of public officials, including police, prosecutors, judges and court officials, on human rights obligations in relation to sexual orientation and gender identity.

EXECUTIVE BRANCH TO

- Ensure legal gender recognition is not contingent on psychiatric diagnosis, medical treatments such as forced sterilization and genital reconstruction surgery or other abusive or discriminatory requirements such as marital status or not having children and is a quick, accessible and transparent administrative process based on individual self-declaration;
- Develop LGBTI-inclusive sex education programmes and incorporate content on anti-discrimination on a wide range of grounds, including sexual orientation and gender identity, into human rights education in schools;
- Establish an independent and impartial mechanism to investigate allegations of abuse and violence in the military, including against LGBTI individuals. Ensure all military personnel have effective, private and secure methods to raise such allegations, without fear of reprisal, and that investigators have both the power and access to carry out investigations;
- Stop treating gender incongruence as a mental health disorder by making plans to implement without delay the WHO ICD-11, which no longer classifies gender incongruence as a mental disorder; and
- Ensure that all gender-affirming treatments are included in the national health insurance system.

AMNESTY INTERNATIONAL IS A GLOBAL MOVEMENT FOR HUMAN RIGHTS. WHEN INJUSTICE HAPPENS TO ONE PERSON, IT MATTERS TO US ALL.

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LGBTI PEOPLE IN SOUTH KOREA'S MILITARY

There is no law criminalizing same-sex sexual activity between civilians in South Korea; however, Article 92-6 of the Military Criminal Act punishes sexual activity between men with up to two years in prison. The military code does more than legislate against particular sexual acts; it institutionalizes discrimination, reinforces systematic disadvantages for gay, bisexual and transgender people and risks inciting or justifying violence against them inside the military and in the broader society.

This report demonstrates how soldiers experience discrimination, intimidation, violence and isolation as the direct or indirect result of the criminalization of sex between men in the military. It examines how diversity based on sexual orientation and gender identity is discouraged in the military, bringing difficulties to those who do not conform to gender norms. By criminalizing sex between men in the military, the South Korean government fails to uphold protect a range of human rights obligations, including the rights to privacy, to freedom of expression and assembly, to thought, conscience and religion and to equality and non-discrimination.

Decriminalization would not end discrimination and abuse, but repealing Article 92-6 is a crucial first step towards respecting, protecting and fulfilling the human rights of LGBTI people in the South Korean military and beyond.

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