

STOP GAY SOLDIER WITCH-HUNT IN KOREA

Background

Korea, Rep. of, is a northern east Asian country with 30 years of military dictatorship and over 1,000 years of Confucianism, resulting in lack of understanding of sexual orientation and gender identity. Although it does not criminalize ordinary LGBTIQ+ people, yet the homosexual relationship is strongly tabooed. Especially, the military punishes same-sex relationship between soldiers up to 2 years of imprisonment with labor.

Article 92-6 (Indecent Act) 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 years.

<Examination Criteria for Conscript Physical Examination, etc.>'s **Appendix 3** [Criteria for Assessment and Degree of Diseases, and Physical and Mental Disorders]'s **102-3** Sexual Identity Disorder and Sexual Preference Disorder

Current Situation¹

The table is based on the date provided by the Ministry of National Defense. It shows the number of soldiers who were either investigated or brought to trial.

Year	Sum	Non-indict	Imprison	Susp. Exe	Fine	Susp. Sent	Acquit	Tranf	Other*
2014	2	2	0	0	0	0	0	0	0
2015	6	0	0	2	0	2	0	2	0
2016	8	0	0	1	0	2	0	5	0
2017	28	16	1	5	0	1	0	1	4
2018	6	0	0	0	0	0	0	0	6

*: 'Other' is assumed to include ongoing investigations and trials.

Case Briefing

So far, about 50 soldiers were witch-hunted from 2017; at least 31 of them were investigated by the military police, and 7 are convicted for a crime of sodomy (indecent act). **There are 5 pending lawsuits before the Supreme Court and the Seoul District High Court. While 16 victims were not indicted, they also suffer from secondary and tertiary damages except for**

¹ It is prepared by the Ministry of National Defense for closed "Conference for Review of Implementation of the fourth Concluding Observations of the HRCtee (4th CCPR Conference)" with civil societies (hosted by the Ministry of Justice and the NHRCK on 8 April 2019).

2 who were set free (not guilty) because the disposition of “suspension of indictment” may affect their career in terms of administrative and personnel management. They are even considered as “sex offenders” even though their relationship was consensual. Although there have been many voices demanding repeal of the sodomy law, the military authority has been insisting that it is necessary for “the sound/ wholesome life of the military community and military discipline”.

However, the military utilizes the provision to oppress LGBTIQA+ soldiers. In 2017, one gay soldier was investigated for a violation of <Telecommunication Act>, but he was threatened with the forceful outing, insult and humiliation as his sexual orientation were discovered during the military police investigation. They literally used all sorts of illegal techniques to search out every gay soldier in the Army under the instruction of General Jang who was then-Army Chief of Staff.

The investigators, headed by Warrant Officer Hong, seduced or threatened victims to submit their mobiles phones and coerced them to point out who is gay soldiers whom they know. Furthermore, they asked victims to demonstrate how to use a gay dating app on their smartphones. They even faked an account to lure others so that they can apply the sodomy law. The fact that the investigators could have entered all levels of units nationwide so freely implies that there was the Chief of Staff behind all of these tactics. The High Prosecutor’s Office under the Army Headquarters also made a guideline on application of the sodomy law (art. 92-6 of the Military Criminal Act) on 2 March 2017.² It is needless to say that the Chief of Staff was a fundamental Christian.³

In addition, at the end of 2018, a seaman visited a Professional Counselor for Barrack Life to have a consult about his sexual orientation. He told the counselor his private experience, and that was reported to his commander, resulting in becoming a criminal suspect under article 92-6 of the Military Criminal Act. Starting from him, another three were more detected, and two are being investigated. When the CMHRK revealed this, the Navy Headquarters officially threatened with “unintended” outing of victims

On the other hand, on 22 February 2018, a judge of Seoul Northern District Court acquitted one of the victims from 2017 witch-hunt. It was the first acquittal in 70 years. However, the civil prosecutors appealed the case, and the Seoul High Court’s ruling is pending (suspended until the decision of the Constitutional Court). Both the military and civilian authorities are persecuting LGBTIQA+.

² Right before the witch-hunt in 2017, a newspaper made a series of reporting about gay soldiers, depicting them as promiscuous perverts and asserting that they are undermining the military manpower. This connotes that they can “rape” other “normal” soldiers (*Kukmin Ilbo*. 1 Jul. 2016. <http://bitly.kr/QZBrZE>; 3 Jul. 2016. <http://bitly.kr/1Ymx8i>; 9 Jul. 2016. <http://bitly.kr/f9mFUw>; 11 Jul. 2016. <http://bitly.kr/v4xhz1>; 4 Oct. 2016. <http://bitly.kr/DZV7pB>; 29 May 2017. <http://bitly.kr/AliNEd>). Upon such articles, a preacher even demanded an overall investigation (*Kukmin Ilbo*. 3 Jul. 2016. <http://bitly.kr/u7MLD9>). The largest shareholder/ founder of the newspaper company is Christian corporate.

³ Korean Christianity is somewhat predisposed to the American Evangelic or Bible Fundamentalists.

Alleged Perpetrations

Moreover, the investigation team led by Warrant Officer Hong asked of sexual position during each intercourse, preference of a position (top/ bottom), use of condoms, number of the shower, location of ejaculation, etc. all of which are completely unrelated to the application of article 92-6.

They further asked of porn taste, ideal type, number of “anal” relationship with civilians, the time of first intercourse, the way of distressing sexual urges in ordinary days, the time of awareness of sexual identity, a name of favorite gay bar/ club.

They humiliated with degrading and discriminative remarks such as: “I’m just curious, does it feel good to do with men? I don’t know, I’ve only been with girls.” “How do you divide the preferences (top/ bottom)?” “I hope that you will re-discover your sexual identity.” “It seems somewhat odd that you as a soldier are with homosexuals.”

Similarly, in the Navy, another investigation team asked victims of whether they are bisexuals or homosexuals, sex position and techniques. They also demanded them to demonstrate how to use a gay dating app. The whole process was even filmed.

The goal of the Project

The project aims to help victims of an ongoing witch-hunt, repeal the sodomy law and put an end to discrimination against LGBTIQ+ in the Korean military.

Detailed Project Programmes

The project broadly consists of two parts:

- 1-a) Provide legal assistance to five victims whose criminal cases are pending: Supreme Court – 4; High Court – 1.
- 1-b) Provide legal assistance to four victims who are suffering from personnel management disadvantages such as promotion (based on seniority), selection of long-term service, etc.: administrative lawsuit may take years to have a first ruling.
- 1-c) Provide legal assistance to eleven constitutional appeals (10 victims).
- 2-a) Organize a street campaign to raise awareness about LGBTIQ+ in general and in the military
- 2-b) Produce pamphlets to notify citizens with the current situations of gay soldiers, reminding them that it is not over
- 2-c) Establish a position to watch and manage military LGBTIQ+ issues in the long run.

Budget

Programme	Amount	Others
Criminal Legal Procedures	\$16,500	5 victims * \$2,200 * per trial 2 victims * \$2,200 (investigation) 1 victim * \$1,100 (conscript) * per trial
Administrative Legal Procedures	\$8,800	4 victims * \$2,200 * per trial
Citizen Engagement Campaign	\$4,500	1 Full/ part-time activist with experience (temp.) \$750 * 6 mths
Public Relations	\$2,000	Social Media, etc. \$1,000 Pamphlet Publication \$2 * 500 pieces
Sum	\$31,800	

N.B. the budget above is contingent to changes of situations as administrative lawsuits may linger much longer or would require other prior steps such as mediation. Also, other various costs such as conference fee, rentals, equipment purchase, etc. are all not included in this fundraising as the CMHRK would pay.

Please, bear in mind that the decision to pay attorneys instead of acquiring pro bono cases was to ensure the accountability and enhance the engagement of both attorneys and victims.

Expected Long-term Effect

- Abolition of Article 92-6 of the Military Criminal Act
- An apology from the Military and the National Human Rights Commission of Korea: the military authorities need to acknowledge their fault and crime of gay witch-hunt. The Commission closed eye before this crime.
- Education for Trainees about Sexual Orientation and Sexual Identity Understanding
- Stabilization and Specialization of Monitoring LGBTIQA+ issues in the Military along with Recording and Archiving: androcentrism prevails in Korea. Young LGBTIQA+ people have not many places to get help or advice. When they join the military and get isolated from the society, it is considerably difficult for an individual to survive in a closet or out as one is likely to be branded as a sexual pervert, resulting in collective bullying, etc. This will may also help those who apply for refugee status overseas.
- Legislation of Comprehensive Anti-Discrimination Act

The following pages are abridged from a report to the Special Envoy on LGBT Rights of the USA in 2016.

There are several sections: the decision of the Constitutional Court in 2012, the United Nations Human Rights Council's Universal Periodic Review recommendations and responses of the Korean Government as well. Lastly, there is a short essay on sodomy law, written by one of the Steering Member of the CMHRK.

I. LGBTIQ within the Korean Military

A. General LGBTIQ conditions

In 2006, the National Human Rights Commission of Korea recommended the Ministry of National Defense should revise instructions regarding human rights infringement of homosexual soldiers, the punishment of responsible figures and preventive sex education; it recommended revising the title of the document into 'Guidelines on Protection of Human Rights of Homosexuals within Barracks'. In 2006, the Ministry of National Defense made 'Guidelines on Management of Homosexuals within Barracks', and it was changed into 'Instructions on Management of Homosexual Soldiers within Barracks' in 2009.

Later on, the Ministry of National Defense enacted 'Instructions on Unit Management' regulating LGBTIQ soldier's service in Chapter 7 in 2009; strangely, this regulation covers soldiers only – the chapter's title is "Service of Homosexual Soldiers (conscripted)".

1. *Article 253 states some principles of management of "homosexual conscripts". It stipulated the principle of equality and non-discrimination against sexual orientation. In addition, the wording used 'tendency' instead of 'orientation'. At the same time, the provision forbids any sexual activities of homosexual soldiers within barracks. It also requires personnel management officers, military surgeons, "chaplain" officers, legal affairs officers, administrative quartermasters (i.e. commanders) who record and manage gay soldiers to "endeavor" to protect human rights of gay soldiers. Lastly, it bans commanders from discharging gay soldiers on the basis of their sexual orientation only.*
2. *Article 254 states that commanders cannot "actively" discern homosexuals by surveying sexual orientation. In addition, here 'orientation' is employed instead of 'tendency'. Also, commanders cannot ask sex-experience or any privacy. Furthermore, commanders cannot indicate 'homosexuality' on their personnel record – instead, gays are classified as 'battalion commander's attention-required group'; for sure, the record related to homosexuality must be confidential. Lastly, it clearly states that commanders cannot ask gay soldiers to "prove" their sexual orientation.*
3. *Article 255 bans forceful "outing". It defines 'outing' as "revealing of homosexuality by someone else rather than oneself". It also prohibits notifying a gay soldier's homosexuality to his parents, friends and his unit except under the suicidal condition.*
4. *Article 256 forbids beating, brutal treating, mocking, insulting, sexual*

harassment and violence against homosexuals. In addition, it used 'homosexuals' as general instead of 'homosexual soldiers'. It obliges reporting of discriminative action as well. It bans commanders from forcibly discharge gay soldiers and from taking AIDS test. It further prohibits misuse of rehabilitation, 'green camp', and hospitalization as a tool of segregation of gay soldiers.

However, the instruction does not have any effective power. In fact, torturing is prevailing. Some military authorities classify gays into 'suicidal group' on the basis of their sexual orientation alone. Some even forced gays to submit 'homosexual photos' i.e. actual photo of his anal intercourse scene or kissing with his partner. Some failed to keep the confidentiality of a gay soldier's coming-out, by which he only revealed his identity to the selected members of commanders, not to everyone. Some commanders even committed 'outing'. Plus, the 'green camp' runs useless therapy program with non-experts; there are chaplain officers instead of counselors and they play some documentaries or films. Soldiers may stay briefly only and had to return to the original unit without having any radical solution. Along with this 'carelessness', some commanders forced a gay soldier to go through HIV/AIDS blood test and incarcerate them into a military mental hospital as well.

What is more concerned about this issue is that the authorities have a lack of understanding of sexual minorities in general. The Ministry of National Defense and the Manpower Administration defined homosexuality as a type of mental disorder,⁴ and disapprove of non-surgical MTF transgender's sex change in 2013, ordering mandatory military service. The situation is not different in the case of conscripted police.

Furthermore, according to LGBTIQ Activist *Jeong Yol*, the Ministry of National Defense in 2003 referred homosexuals as 'abnormal sexual orientation' in its Comprehensive Countermeasure for Prevention of Sexual Violence, which was enacted after late PFC Kim's death leap who had been sexually harassed by his senior soldiers. The Ministry set "controlling joining of abnormal sexual tendency soldiers" as a way to prevent sex crimes in the military. Additionally, the current Chairperson of the National Human Rights Commission of Korea, Mr. *Lee, Seongho*, once ordered a transgender who raised a sex revision in the government record to submit the photo of his/her sexual organ in 2013 when he was a judge, thus he had to apologize in public in 2015 before inauguration.

Due to these concerned situations, in 2011, the Immigration and Refugee Board of Canada granted refugee status to Mr. Kim who is a Korean gay conscientious objector. In 2013, the Australia government granted refugee status to another objector.

On the other hands, the anti-discrimination act has not been enacted because of persisting dissenting demonstration of Christians and conservatives; they insist that comprehensive anti-discrimination law may "empower, encourage and advocate"

⁴ **Table 2 of Conscription Physical Examination Regulation**, *Examination Criteria of Disease, Item 102. Degree of Mental and Physical Disorder: Sexual Identity Disorder and Sexual Preference Disorder*

homosexuality and will make the youth into homosexuals eventually. Additionally, the discriminative provision criminalizing homosexual intercourse remains alive in the Military Criminal Act. This is against the concluding observations of the previous UN Human Rights Committee.⁵

B. Sodomy Laws

Historically Article 92-6 (sodomy) of the Korean Military Criminal Act is originated from the UCMJ in the 1960s. It is *per se* discriminative, yet the Constitutional Court decided in 2002 and 2011 that it is constitutional. Under the review of constitutionality, two terminologies, “chicken’s copulation” and “other disgraceful conduct”, *inter alia*, were at controversy, but the Court decided that it is not discriminative and it is not ambiguous. Please, refer to **Appendices A.** for the original version of its latest decision. While not punishing heterosexual relationship (though the revised provision now *de facto* does not distinguish heterosexual or homosexual), criminalizing and punishing a particular type of intimate relationship is unjust and may induce hatred and prejudice.

The Act was amended in 2009 once, but the discriminative factor remained unflinching. The penalty was doubled. In 2012, as this problem continued, the ROK government received a recommendation from the US government in the UPR. Please refer to **Appendices B** to see the original version of recommendation and replies. However, the government refused.

In 2013, another revision was made to the provision; but with strong opposition of the Ministry of National Defense, it retrogressed more seriously by creating completely new problems. The National Assembly was to delete the provision at first; nonetheless, many protestors raised concerns over ‘world without sodomy law’ with HIV/AIDS, promiscuous sex life, sinful life, and damnation, etc.

However, the discussion went slightly off the road. The National Assembly somehow felt satisfied with altering the word ‘chicken’s copulation’ to ‘anal intercourse’, believing the provision’s only flaw was the wrong word choice. For your information, until now, none of the sex crimes have been applied by the newly revised provision yet – besides, this provision was not very actively used anyway.

The current sodomy law reads as follows:

Article 92-6 (Disgraceful Conduct) A person who commits anal intercourse or other disgraceful conduct to the persons defined from Article 1 Paragraph 1 to 3 shall be punished by imprisonment with prison labor for not more than two years.

It contains numerous defects. After all, the wording sounds discriminative still. Besides,

⁵ Toonen v. Australia, Communication No. 488/1992(CCPR/C/50/D/488/1992)(1994), Concluding Observations: Lesotho, (CCPR/C/79/Add.106), para. 13(1999); United Republic of Tanzania, (CCPR/C/79/Add.97), para.23 (1998); Egypt, (CCPR/CO/76/EGY), para.19(2002)

there is no distinction between male or female, and when and where. Plus, the terminology 'other disgraceful conduct' appears quite ambiguous. Also, it does not concern the agent's consent either – if it were not discriminating homosexual relationship, then it should not punish 'consented' relationship of adults. Lastly, it criminalizes a very specific type of sexual activity that is 'anal intercourse' – which is a substitution of 'chicken's copulation'.

Hence, it may be possible to punish a female staff sergeant commits 'other disgraceful conduct' with a male private or a general in her or his home with consent. The law became so much more unclear and unsure. In conclusion, two heterosexuals committing anal intercourse at their private house outside of the barrack with each other's consent shall be imprisoned for 2 years at maximum in accordance with the current law logically.

N.B. History of Sodomy Law

Article 92 (Molestation) A person who commits sodomy or other disgraceful conduct shall be punished by imprisonment with prison labor for not more than one year. (1962~)

Article 92-5 (Disgraceful Conduct) A person who commits sodomy⁶ or other disgraceful conduct shall be punished by imprisonment with prison labor for not more than two years. (2009~)

Article 92-6 (Disgraceful Conduct) A person who commits anal intercourse or other disgraceful conduct to the persons defined from Article 1 Paragraph 1 to 3 shall be punished by imprisonment with prison labor for not more than two years. (2013~)

United States of America's Uniform Codes of Military Justice (a) Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense. **(b)** Any person found guilty of sodomy shall be punished as a court-martial may direct

The Ministry of National Defense has asserted that it will be impossible to punish same-sex superior who commits sexual violence if Article 92-6 is repealed during the latest revision process in the National Assembly. The Christian and conservative groups insisted that abolishing this article equals 'promoting or encouraging homosexuals that is sinful and promiscuous' so that the military personnel will be homosexual. Nevertheless, none of these allegations sound reasonable or logical.

First, punishing sexual offenders is indeed possible with other provisions in the Criminal Act and the Military Criminal Act. Besides, the ROK has already prepared several special laws regulating sex offenses. Comparing the cases applied by Article 92-5 (now 92-6) to the other paragraphs of Article 92, Article 92-5 had no reason to exist. From 1 Jan 2004 to 31 Dec

⁶ The government translation employed 'sodomy' in English, but the direct translation of the Korean word used in the Act is 'chicken's copulation' (鷄姦). It refer to anal intercourse.

2007, total of 176 cases were applied by Article 92. Only 4 cases were related to Article 92-5. In other words, 98% of the cases applied by Article 92 could be applied by the provision of sexual assault in the Criminal Law or Act on the Prevention of Sexual Assault and Protection, etc. of Victims Thereof.

On 17 June 2011, at the 17th Session of the UN Human Rights Council, a resolution that expressed concerns about the infringement of human rights based on sexual orientation and gender identity was adopted,⁷ and the ROK voted in favor along with the other 23 nations. Thus, the ROK government should immediately nullify Article 92-6 of the Military Criminal Act and provide soldiers with human right training programs to prevent discrimination against LGBTIQ soldiers within the military.

Cf. Other Anti-LGBTIQ Laws

Enforcement Regulation of Military Personnel Management Act Article 56 (Criteria for Incongruity of Active Duty)

Para. 2 Persons regulated in Item 2 of Paragraph 1 of Article 49 of Enforcement Ordinance⁸ are one of the items below:

Item 4 a sexual pervert

Conscription Physical Examination Regulation Table 2 (Examination Criteria of Disease)

Item 102. Degree of Mental and Physical Disorder: Sexual Identity Disorder and Sexual Preference Disorder

C. Case Studies

Types of LGBTIQ Human Rights Infringements:

- 1. Outing or leakage of personal information*
- 2. Bullying, Insulting, Beating, Brutal treatment, Sexual assaults, Suicide*
- 3. Forced blood test (HIV/AIDS, etc.)*
- 4. Forcible expropriation in a mental hospital*
- 5. Proving his sexual identity by submitting a photo/ video of carnal intercourse*
- 6. Forced discharge from the military (it may be disadvantageous in the future social life,*

⁷ **Resolution 17/19** “Human rights, sexual orientation and gender identity” (A/HRC/RES/17/19)

⁸ **Item 2** Inappropriate for active duty due to defects in personality

especially when one looks for a job)

7. *Imprisonment with prison labor (sodomy or conscientious objection).*

8. *Not acknowledging nonsurgical sex change*

Cf. the numbering has no meaning but listing

Cases of Insulting and Expropriation in 2000:

According to a journalist, Mr. *Park, Suchan*, of the *Defense 21+*, a magazine, in 2000, a gay soldier who believed a promise of confidentiality made 'coming-out'. However, he was hospitalized by force. In the military hospital, he was beaten by medics (conscripted) who and was forced to imitate homosexual relationship. He was returned to his original unit because of his 'not-enough-gay-looking' eventually. Even the military surgeons who are officers insulted him by saying "Here comes a homo-fxxxer; take care of shit." to medics. He had to sleep alone because the surgeon thought he may harm other patients if he cannot resolve his sexual desire every night.

Cases of Conscientious Objection in 2003, 2007, 2009(~2011), 2013 and 2015:

According to MHRCK, in 2004, Mr. *Lim Taehoon*, the current Representative of the MHRCK, objected to the military service on the basis of his sexual orientation and discriminative policies of the Ministry of National Defense. He was sentenced to imprisonment with prison labor with a year and a half. He was nominated as a conscientious objector by the Amnesty International; this was mentioned in the Country Report of the US State Dept. in 2004.

According to the *Hankyoreh*, in 2007, Mr. *Yu-jeong Minseok*, a conscripted police, came out in the military and objected to the service ended up with imprisonment.

According to the MHRCK, in 2009, Mr. *Kim Kyeonghwan*, 28, a gay, applied for refugee status to Canada. The Board of Canada stated as below(RPD file/ No. dossier SPR: MA6-04286):

"... overwhelmingly that hazing is a serious problem in the military and that the situation is particularly harsh for gays. ... the case of a gay soldier that was harassed by his commanders and military medics and eventually driven into severe depression and suicidal mood gay conscripts are very relevant and troubling and enough to constitute in this case specifically a well-founded fear of persecution."

In 2013, according to the *Hankyoreh 21*, a magazine, the Australian Refugee Review Tribunal granted refugee status to a gay Korean man, Mr. Kim, 34. He has disliked violence ever since. He objected to the military service 10 years ago already, but he was released on bail and relinquished his conscience. After joining the military, he tried to commit suicides. He had to hide his identity, and he submitted several medical diagnoses to the military proving his

psychological troubles. However, the service continued and instead of discharge, he was designated as 'attention-required group', which eventually spared him from shooting exercises due to high risk of accidents. He believes that the Australian tribunal acknowledged the political oppression over conscientious objectors and discrimination against homosexuality in the ROK.

In 2015, according to *The Hankyoreh*, a gay movie director, Mr. *Kim Kyeongmuk*, 29, was sentenced to a year and half of imprisonment due to his conscientious objection to the military service. He insisted that the military has been the largest discipline institute to tame youth to learn the military hierarchy and the taste of the establishment.

Cases of Forced HIV/AIDS test and Syphilis Test in 2005:

According to the National Human Rights Commission of Korea, a gay youth joined the Army in June 2005 and entered to recruit training center in July. During the new-recruit counseling time with a vice-platoon sergeant, he disclosed his sexual identity to talk about difficulty. After coming-out, irrelevant to his will, his identity became gossip. Moreover, he was forced to submit a photo of him kissing with another man as proof of his homosexuality, which was used for the review of the incongruity of active duty. More terribly, he had to submit a photo of homosexual carnal intercourse of himself. He was under psychological pressure rooted from the notice of the person in charge of the unit saying that the 'kissing' does not suffice clarity of his identity. Plus, the unit ran HIV/AIDS and syphilis blood test without the consent of the victim. He was sexually assaulted and harassed by his colleagues and superiors constantly. The victim asked for discharge to a military surgeon, but the answer was "bring me videotaped evidence of sexual relationship" to prove his sexual identity. He filed a complaint to the Commission in Jan 2006. He was diagnosed with depression, social phobia and PTSD requiring about 6 months of psychological treatment; he was discharged in May 2006. However, as the victim could not handle traumas and agonies, the investigation was stopped and the Commission dismissed the case.

Case of Brutal Treatment and Verbal Abuses in 2007:

According to the *Hankyoreh*, Mr. *Kim Hyeonjong*, riot police (conscripted – riot police is abolished in 2012), publically came out at the end of 2007. He interviewed that "From now on, I will not run away or lie, and I will complete my military service with dignity, fighting for the LGBT human rights within the police." Actually, he had no intention of coming-out at first. By coincidence, one of his colleagues saw a note of him with homosexual hints. Although one of his senior advised him to deny his identity forsake, he decided to come-out with reminding of Mr. *Yujeong*, who objected to the military service after coming out. The victim had to confront with mocking and hate speech after coming-out. For instance, "(He) must go to see a mental doctor", or "Disgusting", or "Don't come near me". He did not reject the service itself, thus he was not imprisoned.

Case of Gang Rapes in 2007:

According to Activist *Jang Byeonggwon* of Solidarity for LGBT Human Rights of Korea, in 2007, a gay soldier was physically and verbally harassed by senior soldiers and executive military personnel over 40 times. The victim had to hear such as “You seem ready to sleep with me”, and one platoon leader laid the victim on the bed, biting and licking the victim’s neck. The victim reported this incident to the other military personnel, and he had to reveal his sexual orientation. Unlike his expectation of help and protection, he had to make a testimony of his gay lifestyle ever since his coming-out. He ended up with 4 times of self-mutilation due to heavy stress.

Cases of suicide in 2009, 2013 and 2014:

According to the *Yonhap News Agency*, in 2009, a gay Army soldier, late Mr. Kim, burnt himself to death with jet aircraft fuel. He had a third-degree burn and moved to a hospital, but was deceased. He joined the military in August 2009, and he came out to a commander during the initial placement counseling. He said, “I have been gay since the second grade of the middle school”. Hence, he was classified as ‘attention-required group’. In fact, he had tried to commit suicide before this burning by taking poison as well. After the initial try, the unit raised the level of attention grade to a higher rank. Nevertheless, there was no extra helps followed. Undergoing verbal abuses from his senior soldiers, the victim poured oil onto his body and fired himself.

According to the MHRCK, late PFC Sohn hanged himself in a boiler room of the bathhouse in his unit after finishing his night-duty in 2013. He wrote a suicide note saying “It is meaningless and consumptive controversy to discuss its (homosexuality) naturalness as it is observed among animals as well”, and he further wrote as “It (being a gay) is a shameful sin; how could I live with my chin lifted honorably. A sinner like me does not need a funeral or anything.” In fact, he called a ‘hot-line for life’ operated by the Ministry of National Defense several times for help a week before committing suicide. He asked help to the counselor telling the fact that he had attempted to commit suicide 3 days ago and had notified this to the unit already, but no help had been provided from the unit except for short counseling with the battalion commander a week ago. The deceased knew he was gay since 17, but could not talk this with his parents.

According to the 2014 annual report of the Sexual Orientation and Gender Identity Research Society, the *Network for Reporting and Assisting Human Rights Infringement and Discrimination against Sexual Minorities in the Military* (<http://gunivan.net/>) mentioned that in 2010 a gay soldier committed suicide.

Also, the same report mentioned another case in the Army 28th Corps. A corporal agonized with his sexual identity and was under suicidal mood. He had 8 times of counseling with ‘counselor for barrack life’ that is sponsored by the military authority and saw a mental

doctor for 4 times. He was classified as 'high-attention required group' but ended up committing suicide with another soldier whom he met in the green camp, the military rehabilitation facility.

Cases of Unnecessary Surgeries in 2012 and 2015:

According to the *Yonhap News Agency* in 2012, an MTF transgender who went through conscription medical examination for exemption from the military service was enforced to operate orchiectomy in order to be exempted from the military obligation. The victim submitted hormone therapy schedule and diagnosis from a doctor, but none was admitted. He/she had no choice but to take the surgery in 2013. However, the victim raised a complaint to the National Human Rights Commission of Korea in 2014. For your information, the Western Branch of Seoul District Court ruled that "It contains factors against the constitutionality to require 'external genital surgery' in 2013.

According to Congressperson *Kim Kwangjin* of The Minjoo Party in 2015, one transgender heard "I will give you 10 months. If you want an exemption, then take some action within the period." from a military surgeon. He presented statistics showing that only 21 transgenders were exempted from the compulsory military service on the basis of psychiatric reasons while 104 were exempted on the basis of orchiectomy. The current regulation does not require orchiectomy as a necessity for an exemption for transgenders; however, in several cases, many had to take unnecessary and dangerous surgery to be exempted legally. In contrast, the Manpower Administration elucidated that it never asked anyone of anything.

Cf. Sex Change Procedure

In the ROK, currently, there is no quick or easy way to alter one's sex on a government record. Therefore, one has to raise a lawsuit (legal request) to an administrative court of his or her jurisdiction. The revision is ordered by the chief judge of a court. What is disturbing is that the current President of the National Human Rights Commission of Korea once made a deeply discriminative order in 2013. He ordered MTF transgender to submit a photo of his/ her genital as evidence of his transgender identity.



**Appendices A. Decision of the Constitutional Court
[abridged]**

**On the Request for Judgment on
the Constitutionality of Article 92 of
the Military Criminal Act⁹**

(2008HUNGA21)

31 March 2011

Syllabus

Allegations

Whether the concerned part, “other disgraceful conduct”¹⁰, in former Article 92 of Military Criminal Act, which is enacted by Act No. 1003 on 20 January 1962 and which is before amended by Act No. 9820 on 2 November 2009, stipulating that “A person who commits sodomy or other disgraceful conduct shall be punished by imprisonment with prison labor for not more than one year.”¹¹⁻¹², hereinafter ‘the concerned article’, has been:

[*passive*] Violation of the principle of clarity under the principle of *nulla*

⁹ Footnotes are editor’s comments; the original version does not have one.

¹⁰ In the original Korean text, the word seems more close to “disgraceful conduct” than “disgraceful conduct” considering the context that it is used in an Act under which regulates sexual crimes. Lexical-semantic meaning of the word may include all forms of disgraceful behaviors that are dirty, lustful or disgusting, etc.

¹¹ Official Translation of the Statutes of the Republic of Korea: Military Criminal Act Article 92-5 (Disgraceful Conduct) A person who commits sodomy or other disgraceful conduct shall be punished by imprisonment with prison labor for not more than two years. [This Article Wholly Amended by Act No. 9820, Nov. 2, 2009]

¹² Draft translation version of the CMHRK: Military Criminal Act Article 92(5) (Disgraceful conduct) A sodomite, who committed “copulation of chickens(sodomy)”, and anyone who committed any other form of disgraceful conduct are sentenced to up to 2 years of imprisonment. (Revised in 2009)

poena sine lege

[*passive*] Infringement of the freedom and privacy of personal life and the right to sexual self-determination by violating the principle of the proportion

[*passive*] Infringement of the right to equality of homosexuals

Summary of Decisions of the Court

1. The Court deems that the concerned article does not violate the principle of clarity under the principle of legality as:

it is possible to say that “other disgraceful conduct”¹³ means an act that violates the wholesome life of the community, i.e. military, and military discipline as it is an act of sexual satisfaction such as same-sexual intercourse that yet reached sodomy¹⁴ which objectively arouses an ordinary person’s aversion and is against good moral sense;

it shall be carefully decided whether one falls under the definition of “other disgraceful conduct” through considering various matters such as the will of agents, specific aspects of behavior, the relationship of agents, effects of the act to the community life or military discipline, and sexual moral sense of the time comprehensively;

if so, subjects of the Military Criminal Act with sound common sense and normal legal sense may apprehend sufficiently that which act corresponds to the composition of the concerned article; ‘sodomy’, the typical example of ‘disgraceful conduct’, provides an interpretation guideline for what is ‘disgraceful conduct’,

and concrete and comprehensive interpretation criterion are produced by rulings of the Supreme Court.

2. The Court deems that the concerned article cannot be regarded as an infringement of sexual self-determination or the freedom privacy of personal life of soldiers(it means “one who serves the military” including officials and noncoms but not civilian workers)¹⁵ as:

¹³ In the original Korean text, its wording is “other molestation”.

¹⁴ In the original Korean text, its wording is “chicken’s copulation” which is defined as “sexual intercourse among males” in a dictionary, and usually thought that anal insertion is necessary to compose the crime of sodomy. Thus the Courts apprehend that not having insertion is “disgraceful conduct”.

¹⁵ In the original Korean text, it is simply put in the word, “kun-in”, that conceptualizes “a person who serves military”; it does not necessarily mean “current” serviceperson, but it is usually thought to be so; still it not only

the legitimacy of legislative purpose and propriety of means are acknowledged since the concerned article prohibits and criminalizes acts of sexual satisfaction between same-sex soldiers in order to establish the wholesome communal society, i.e., military and military discipline;

also, hardly is it deemed that legislative discretionary power has been arbitrarily exercised just because not specifically distinguishing the type of disgraceful conduct or damages of the other party and stipulating en bloc punishment of less than one year of imprisonment with prison labor on all forms of disgraceful conduct that violates social legal interests, i.e., ‘the wholesome life of the military, communal society, and military discipline’;

it cannot be deemed as a violation of the principle of minimum losses considering the facts that it is difficult to effectively regulate disgraceful conduct with only administrative restrictions, and the penalty seems not excessively heavy compared with other laws, and it allows suspension of sentence;

moreover, its degree of limitation of sexual self-determination and freedom and privacy of personal life may not be regarded prior to public interest that is ‘the wholesome life of the military, communal society, and military discipline’, furthermore exceeding ‘national security’, so it is not deemed a deviation from balance of legal interests.

3. The Court deems that the concerned article is not regarded as a violation of the right to equality of homosexuals as:

the military has a notably high probability of abnormal sexual intimacy between same-sex individuals, and high possibility of the superior’s committing same-sex sexual intercourse on subordinates, and if neglected, there is great concern over direct harm to the preservation of combat power of the military;

its reasonability for discrimination is granted even when it is understood that the concerned article bans only sexual intercourse between same-sex individuals and criminalizes when it is violated.

means conscripts or soldiers but also noncoms and officers; however, it is usually understood that the word does not include civilian workers in the military.

Opinions

Supplementary Opinion

of Constitutional Judge Lee Dongheub to the Decisions of the Court :

As the primary benefit and protection of the concerned article is ‘the wholesome life of the military, communal society, and military discipline’, even if consented, it is interpreted that the concerned article does not require exercising of compulsive force after synthetically considering that it does not change the fact that sexual intimacy delivers negative influence on the wholesomeness of communal life and discipline of the military, that the concerned article does not prescribe components of crimes related to compulsions such as violence, threat or fraudulent means, and force, and that it accords with the purpose of legislation to interpret the concerned article that is before amendment on 2 November 2009 as to punish without distinction in statutory penalty depending on involvement of compulsion.

In addition, the concerned article is applied to only same-sex sexual intercourse like sodomy by reviewing that the concerned article prescribes ‘other disgraceful conduct’ in parallel with sodomy, which means sexual intimacy between same-sex individuals, and that possibility of occurrence of abnormal sexual intimacy between same-sex individuals arises within the military where persons have to share certain space with same-sex individuals, living a corporate life, yet it is proper to interpret that what the concerned article is applied to only same-sex sexual intercourse between ‘soldiers’, excluding (a soldier’s) sexual intercourse with a same-sex civilian in a relationship of private living.

Lastly, it is difficult to regard the concerned article, which is a criminal norm, clearly. It is because, to examine the concerned article’s limitation of time and space on application, the problem of applicability of the concerned article, when it comes to a detailed case, may be that of the regular procedure of legal interpretation and application of a court that requires synthetic consideration on effects of actions on the wholesome life of the military, i.e., communal society, and military discipline and sexual moral sense of the time. Also, it is because little questions on which action meets the elements of crime seems inevitable in the view of generality and abstractness of a criminal norm.

Dissenting Opinion

of Constitutional Judges Kim Jongdae, Mok Yeongjun and Song Duhwan to the Decisions of the Court :

The concerned article may be regarded as violating the Constitution as it offends the principle of clarity of criminal codes that is the substance of the principle of *nulla poena sine lege*.

Irrationality of equally punishing ‘voluntarily consented lewd act between the concerned persons’ with no compulsiveness employed and ‘disgraceful conduct by violence and threat’ with strong compulsiveness involved just because of application of the Military Criminal Act, comes from the interpretation of the Supreme Court that understands ‘sodomy and other disgraceful conduct’ includes noncompulsory acts under a premise of seeing the benefit and protection of the concerned article is ‘the wholesome life of the military, communal society, and military discipline’ not ‘sexual freedom of individuals’. As only stipulating ‘sodomy and other disgraceful conduct’ as components of crimes, the concerned article leaves legal interpretation organs with whether it includes only ‘actions involved with compulsiveness’ or otherwise ‘lewd act with no compulsiveness involved’.

For the next, because the concerned article is arranged in a form of an illustrative provision, to apprehend ‘the other conduct’ in the concerned article as at least ‘act of quasi-sodomy’ is proper. Nonetheless, rulings of the Supreme Court presented above, unlikely to that general interpretation ahead, view that ‘other disgraceful conduct’ means ‘same-sex sexual intercourse that has yet reached sodomy’, accepting that lower degree of lewdness is fine; therefore, ‘sodomy’ not only cannot be a criteria for judgment on whether an action falls under ‘other disgraceful conduct’ but also fails to provide any guideline when it comes to discerning to what degree that lewd act reaches meets ‘other disgraceful conduct’.

To see the purpose of legislation and benefit and protection of the concerned article, ‘disgraceful conduct’ in the concerned article should be confined to ‘lewd act between same-sex individuals inside a military camp’. However, it is ambiguous if ‘lewd act between opposite-sex soldiers in or outside of a military camp’ or ‘lewd act between a soldier and a non-soldier in a military camp’ corresponds to the concerned article due to the facts that the wording of the concerned article lacks in perspicuity and the concept of ‘the wholesome life of the military, communal society, and military discipline’ instructed by the previously mentioned judicial precedent of the Supreme Court, appears rather vast and inclusive.

Eventually, the concerned article employed simply ‘sodomy and other disgraceful conduct’ that is abstract, ambiguous and inclusive for its composition, resulting indefiniteness when it comes to if compulsory

factor, degree of action, subject and object of action and location of action are required for compositions of crimes. In consequence, it equally punishes actions having notably different nature of exert-ability of imposing a penalty, and it makes legislative intent of an offense subject to complaint in the Criminal Act nominal, and it seems contrary to the principle of self-responsibility by lowering possibility of foreknowledge, and it incurs arbitrary interpretation of law by the investigation agency, the indictment agency, and the trial organization.

Additional Supplementary Opinion

of Constitutional Judges Kim Jongdae, to the Dissenting Opinion to the Decisions of the Court :

Even though homosexuality within the military also needs to be prohibited in order to reinforce the spiritual combat power of the military, it may not be allowed to punish a national with the provision. Although, when exerting penalty on violations of prohibition, the principle of *nulla poena sine lege* should be followed, the part of the article of this Decision, ‘other disgraceful conduct’, lacks in clarity for a component of crimes.

The opinion of Restricted Unconstitutionality

of Constitutional Judge Jo Daehyeon :

It sounds hard to say that it is not applied to all disgraceful conducts of a soldier regardless of whether in or outside of a military camp, the status of, soldier or civilian, or the sex of, same or opposite, or one’s consent from an object. It is because the concerned article is for protecting a special communal society, the military, and former Article 92 of the Military Criminal Act only prescribes “a person who commits sodomy, other disgraceful conduct” but does not limits the object and location of “other disgraceful conduct”.

Nevertheless, it rather seems difficult to acknowledge the necessity of punishment since applying the concerned article to such cases, ‘when a soldier commits disgraceful conduct outside of a military camp’, exceeds the extent of the purpose of the legislation, protecting discipline of the military that is a special community.

It may apply indecent assault even when disgraceful conduct employed compulsory force, but it is thought that the application of the concerned article for military discipline appears unnecessary. Thus, interpreting that the concerned article may be applied to such cases, ‘when a soldier commits a civilian outside of a military camp’, shall be regarded as contrary to the Constitution, not mentioning that it not only restricts fundamental rights but also infringes a soldier’s sexual self-determination

and freedom to privacy.

The Concerned Provision hereof

Former Article 92 of the Military Criminal Act (Disgraceful Conduct) A person who commits sodomy, other disgraceful conduct shall be punished by imprisonment with labor for not more than one year.[Legislated by Act No.1003 on 20 January 1962 and before amended by Act No.9820 on 2 November 2009]

Referential Provisions and Precedents

Constitution Article 11¹⁶, 12¹⁷, 13¹⁸

Criminal Act Article 298 (Indecent Act by Compulsion)
<Amended by Act No. 5057, Dec. 29, 1995> A person who, through violence or intimidation, commits an indecent act on another shall be punished by imprisonment for not more than ten years or by a fine not exceeding fifteen million won.

Criminal Act Article 302 (Sexual Intercourse with Minor, etc.) <Amended by Act No. 5057, Dec. 29, 1995>
A person who, through fraudulent means or by the threat of force, has sexual intercourse or commits

¹⁶ **Article 11 (1)** All citizens shall be equal before the law, and there shall be no discrimination in political, economic, social or cultural life on account of sex, religion or social status. **(2)** No privileged caste shall be recognized or ever established in any form. **(3)** The awarding of decorations or distinctions of honor in any form shall be effective only for recipients, and no privileges shall ensue therefrom.

¹⁷ **Article 12 (1)** All citizens shall enjoy personal liberty. No person shall be arrested, detained, searched, seized or interrogated except as provided by Act. No person shall be punished, placed under preventive restrictions or subject to involuntary labor except as provided by Act and through lawful procedures. **(2)** No citizen shall be tortured or be compelled to testify against himself in criminal cases. **(3)** Warrants issued by a judge through due procedures upon the request of a prosecutor shall be presented in case of arrest, detention, seizure or search: Provided, That in a case where a criminal suspect is an apprehended flagrante delicto, or where there is danger that a person suspected of committing a crime punishable by imprisonment of three years or more may escape or destroy evidence, investigative authorities may request an ex post facto warrant. **(4)** Any person who is arrested or detained shall have the right to prompt assistance of counsel. When a criminal defendant is unable to secure counsel by his own efforts, the State shall assign counsel for the defendant as prescribed by Act. **(5)** No person shall be arrested or detained without being informed of the reason therefor and of his right to assistance of counsel. The family, etc., as designated by Act, of a person arrested or detained shall be notified without delay of the reason for and the time and place of the arrest or detention. **(6)** Any person who is arrested or detained, shall have the right to request the court to review the legality of the arrest or detention. **(7)** In a case where a confession is deemed to have been made against a defendant's will due to torture, violence, intimidation, unduly prolonged arrest, deceit or etc., or in a case where a confession is the only evidence against a defendant in a formal trial, such a confession shall not be admitted as evidence of guilt, nor shall a defendant be punished by reason of such a confession.

¹⁸ **Article 13 (1)** No citizen shall be prosecuted for an act which does not constitute a crime under the Act in force at the time it was committed, nor shall he be placed in double jeopardy. **(2)** No restriction shall be imposed upon the political rights of any citizen, nor shall any person be deprived of property rights by means of retroactive legislation. **(3)** No citizen shall suffer unfavorable treatment on account of an act not of his own doing but committed by a relative.

an indecent act on a minor or feeble-minded person, shall be punished by imprisonment for not more than five years.

Criminal Act Article 305 (Sexual Intercourse or Indecent Act with Minor) <Amended by Act No. 5057, Dec. 29, 1995> A person who has sexual intercourse with a female under thirteen years of age or commits an indecent act on such a person shall be punished in accordance with Articles 297, 298, 301 and 301-2.

Former Act on Punishment of Sexual Crimes and Protection, ETC. of Victims Thereof Article 11 (Indecent Act through Abuse of Occupational Authority, etc) <before Amended by Act No. 10258, Apr. 15, 2010> **(1)** A person who commits indecent act through fraudulent means or force against a person who is under his/ her protection of supervision by reason of business, employment or other relations shall be punished by imprisonment for not more than two years or by a fine of five million won.

(2) A person who commits an indecent act against another person held in his/her custody after being detained according to the provisions of any Act shall be punished by imprisonment for not more than three years or by a fine not exceeding fifteen million won.

(3) omitted.

Act on Special Cases Concerning the Punishment, ETC. of Sexual Crimes Article 10 (Indecent Act through Abuse of Occupational Authority, etc.)<legislated by Act No.10258, Apr. 15, 2010> **(1)** A person who, through fraudulent means or by a threat of force, commits an indecent act against another person who is under his/her protection or supervision by reason of his/her business, employment or other relationship shall be punished by imprisonment for not more than two years or by a fine not exceeding five million won.

(2) A person who commits an indecent act against another person held in his/her custody after being detained according to the provisions of any Act shall be punished by imprisonment for not more than three years or by a fine not exceeding fifteen million won.

(3) A director or an employee of a facility for protection and education of the disabled commits adultery with a disabled under his/her protection and supervision through fraudulent means or by a threat of force shall be punished by imprisonment for not more than seven years, and in case of indecent act by imprisonment for not more than one year or a fine not exceeding thirty million won.

Act on Special Cases Concerning the Punishment, ETC. of Sexual Crimes Article 11 (Indecent Act at Crowded Public Place)<legislated by Act No.10258, Apr. 15, 2010>(1) A person who commits an indecent act on another person in any public transportation vehicle, public performance or assembly place, or other crowded public places shall be punished by imprisonment for not more than one year or by a fine not exceeding three million won.

Military Criminal Act Article 92-2 (Molestation) A person who, by violence or threat, molests another person falling under any provision of Article 1 (1) through (3) shall be punished by imprisonment with prison labor for not less than one year.[This Article Newly Inserted by Act No. 9820, Nov. 2, 2009]

Military Criminal Act Article 92-3 (Quasi-Rape, Quasi-Molestation) A person who commits adultery with or molests another person falling under any provision of Article 1 (1) through (3), taking advantage of the other person's insanity or inability to resist, shall be punished in accordance with Article 92 or 92-2.[This Article Newly Inserted by Act No. 9820, Nov. 2, 2009]

For the First Allegation:

Constitutional Court, “98HUNGA10”, *Law Report 12-1*, 29 Jun. 2000, p.741, 748.

Constitutional Court, “2001HUNBA70”, *Law Report 14-1*, 27 Jun. 2002, p.601, p.608.

Constitutional Court, “2004HUNBA35”, *Law Report 16-2 Second Vol.*, 25 Nov. 2004, p.381, 391.

Constitutional Court, “2002HUNBA83”, *Law Report 17-1*, 30 Jun. 2005, p.812, p.821.

Constitutional Court, “2007HUNBA72”, *Law Report 21-1 First Vol.*, 26 Mar. 2009, p.406, 418.

For the Second Allegation:

Constitutional Court, “91HUNBA11”, *Law Report 7-1*, 20 Apr. 1995, p.478.

Constitutional Court, “2001HUNGA16”, *Law Report 13-2*, 29 Nov. 2001, p.570.

For the Third Allegation:

Constitutional Court, “2005HUNBA1144”, *Law Report 19-1*, 29 Mar. 2007, p.335, 346.

Interested Parties hereof

Court Requested for Judgment:

General Military Court of the 22nd Division of the Army of the Republic of Korea

Concerned Case hereof:

Disgraceful Conduct, 2008GO10, General Military Court of the 22nd Division of the Army of the Republic of Korea

* * *

Concluding Decision of the Court

The Court holds the constitutionality of the part, “other disgraceful conduct”, of the former Article 92 of the Military Criminal Act that is enacted by Act No.1003 on 20 January 1962 and before amended by Act No.9820 on 2 November 2009.

So is decided.

Reasons

Outline of the Case and Subject to Decision

Outline of the Case

The General Military Court of the 22nd Division of the Army of the Republic of Korea, hereinafter ‘court requested’, raised a request this case hereof, judgment on the constitutionality of Article 92 of the former Military Criminal Act by its authority during the pendency of the first instance.

Defendant Kang X-Mo (age of twenty) of the case concerned, as a platoon deputy commander, around beginning of March in 2008, was accused of disgraceful conducts that he had the victim lay the victim’s head on the defendant’s arm in Room III of Bachelor Officers’ Quarters of his regiment where the victim came for helping his move, and for about thirty days, from beginning of May 2008 to around 4 June 2008, physically touched victim’s belly, bottom and sexual organ, and had his sexual organ brush against victim’s sexual organ for twenty to thirty minutes every day at the deputy picket’s office located in Geojin Picket.

With accusations thereof, the defendant was booked on the indecent act through abuse of occupational authority, etc., violating former ‘Act on Punishment of Sexual Crimes and Protection, ETC. of Victims Thereof’, but the accusation was withdrawn as from arrangement with the victim. After, the defendant was indicted under Article 92 of the former Military Criminal Act which was enacted by Act No.1003 on 20 January 1962 and before amended by Act No.9820.

Subject to the Decision

The court requested raised a request for a judgment of constitutionality of Article 92 of the former Military Criminal Act as a whole. Nevertheless, it is proper to confine subject to the decision to “other disgraceful conduct” from Article 92 of the former Military Criminal Act because the provision is divided into parts of “sodomy” and “other disgraceful conduct”, and because the defendant concerned was brought to trial for committing “other disgraceful conduct” not “sodomy”.

If so, the subject to the decision is in the violation of the constitutionality of the part, “other disgraceful conduct”, of Article 92 of the former Military Criminal Act which is enacted by Act No. 1003 on 20 January 1962 and before amended by Act No. 9820 (hereinafter ‘the article concerned’).

Then, subject provision and related provisions are as followed:

Concerned Provision

Former Article 92 of the Military Criminal Act (Disgraceful Conduct) A person who commits sodomy, other disgraceful conduct shall be punished by imprisonment with labor for not more than one year.[Legislated by Act No.1003 on 20 January 1962 and before amended by Act No.9820 on 2 November 2009]

Related Provisions

Former Act on Punishment of Sexual Crimes and Protection, ETC. of Victims Thereof Article 11 (Indecent Act through Abuse of Occupational Authority, etc)

Criminal Act Article 298 (Indecent Act by Compulsion), Article 302 (Sexual Intercourse with Minor, etc.), Article 305 (Sexual Intercourse or Indecent Act with Minor)

Military Criminal Act Article 92-2 (Molestation), Article 92-3 (Quasi-Rape, Quasi-Molestation)

Summary of Reasons for Judgment on the Constitutionality from the Court Requested

Article 92 of the former Military Criminal Act violates the principle of

clarity under the principle of *nulla poena sine lege*. It is not only due to its absence of stipulation of subject and object of disgraceful conduct and involvement of compulsory force, resulting in ambiguity for judging whether it means only disgraceful conduct between males or otherwise it also includes between females and, furthermore, opposite-sex individuals, and whether it includes disgraceful conduct with compulsive force, but also due to its failure in providing criteria for judgment concerning either relationship of agents or location of action.

Article 92 of the former Military Criminal Act infringes the right to sexual self-determination and freedom and privacy of personal life of homosexuals. As punishing sexual intercourse between same-sex individuals only by imprisonment with no confinement on subject, object, location, time and location and aspects of action seems to be inefficient means for protecting ‘the wholesome life of the military, communal society, and military discipline’ and violates the principle of proportion by exceeding the extent required for fulfilling the purpose of legislation.

Article 92 of the former Military Criminal Act violates the right to equality. Neither is rightful the purpose of legislation nor is granted the proportionality between its discriminative purpose and means if Article 92 of the former Military Criminal Act punishes sexual intercourse between same-sex individuals unlike sexual intercourse between opposite-sex individuals. Even if modified examination standards applied, no rational grounds found in discriminating homosexuals from heterosexuals.

Judgment

Concluding Decision

Then so is ordered in the concluding decision of the court that the concerned article does not violate the Constitution. On this decision, supplementary opinion of Constitutional Judge Lee Dongheub as stated below in Item 5., Dissenting Opinion of Constitutional Judges Kim Jongdae, Mok Yeongjun and Song Duhwan as stated below in Item 6., and Opinion of Restricted Unconstitutionality of Constitutional Judge Jo Daehyeon as stated below in Item 7.

Constitutional Judges

LEE, Kang-guk

(Presiding Judge)

LEE, Gonghyeon

(unable to sign due to retirement)

JO, Daehyeon KIM, Jongdae MIN, Hyeong-gi

MOK, Yeongjun SONG, Duhwan PARK, Hancheol

Appendices B. Recommendations from the UPR

The 2nd Universal Periodic Review (2012)

... Review the possibility of the repealing laws that criminalize on the basis of the sexual orientations in the military (**United States of America**);

Responses of the Ministry of National Defense of the Rep. of Korea

The Ministry of National Defense will talk about the LGBTs, the protection of LGBTs.

According to Article 92-5 of the Military Criminal Act which stipulates the sodomy and disgraceful conduct acts must be punished. This provision was indented not for discrimination of homosexuality but for the public interest that is to encourage wholesome environment and discipline in the military society; therefore, it is inappropriate to repeal or revise such provision at the point. Also, the Constitutional Court on two occasions, in June 2002 and March 2011, has given a decision at such provision was indeed constitutional. Considering that it was mended for military discipline, and sustenance of combat capabilities and only valid in case of an act taking place between militants within a barrack.

//Likewise, the US military law states that a person who engages in unnatural carnal copulation with another person of the same or opposite sex is guilty of sodomy. We have related rules to protect the human rights of homosexual soldiers.//¹⁹

On the other hand, the Ministry of National Defense endeavors to protect the human rights of homosexual soldiers by revising Instruction on Unit Management that stipulates prohibition on discrimination against homosexual soldiers, insurance of personal information, limitation on outing, prohibition on compulsive discharge on the basis of homosexuality, prohibition on acts of discernment of homosexuality.²⁰

The 3rd Universal Periodic Review (2017)

... Repeal the provision of the Military Penal Code, which prohibits and punishes same-sex consensual sexual relations in the army (**France**);

... Repeal Article 92 (6) of the Military Criminal Act to end restrictions on consensual same-sex relations (**Ireland**);

Take further action to end discrimination based on gender or sexual orientation in all

¹⁹ Wording in between the former “//” is what the English interpreter of the United Nations officially spoke and the wordings after the latter “//” is what was only spoken in Korean by the official of the Ministry of National Defense at the session. It is assumed that there was miscommunication between the government of the Republic of Korea and the interpreter of the United Nations that the Ministry want.

²⁰ UN Web TV. <http://bitly.kr/wYBsi7> (from 2:43:00)

fields, including in the military (**United Kingdom**);

... Abolish Article 92-6 of the Military Criminal Act, which criminalizes consensual same-sex relations (**Canada**);

Repeal article 92-6 of the Military Criminal Code which criminalizes consensual sexual relations between people of the same sex in the army (**Costa Rica**);

Abolish Article 92-6 of the Military Criminal Act, which views consensual same-sex intimacy in the armed forces as a criminal offense, in order to comply with international human rights standards (**Netherlands**);

Repeal article 92(6) of the Military Criminal Act prohibiting and punishing consensual sexual activity between people of the same sex in the military (**Denmark**);

Responses of the Ministry of National Defense of the Rep. of Korea

The Article 92-6 of the Military Criminal Act is a provision to maintain military discipline considering the unique nature of the military barrack life which punishes abnormal sexual activities between soldiers not because a certain individual is a gay or lesbian. A bill to repeal that said provision has been submitted to and discussed in the National Assembly. Under the Military Criminal Act, there has been no report of a case of conviction in 2015 and 2016, and 10 people have been accused of violating the provision and are currently standing trial.

Appendices C. Script from the “Panel Discussion on the Sodomy Law”

/1/ Problem of 2013 Revision on the Sexual Molestation Provision (Article 92-5) of the Military Criminal Act

written by Mr. Lee Kyunghwan²¹

I. Premises of Discussion

1. Existing Controversies over Sexual Molestation of the Military Criminal Act

Repealing the Sexual Molestation provision (Article 92-5) of the Military Criminal Act (MCA) has been controversial as it was mixed up with pros and cons about homosexuality because the provision is the only article that punishes homosexual relationship in this country. Nonetheless, this sort of controversy failed to pinpoint the core of the problem as it was mixed up with religious prejudice against homosexuality and strong opinion on homosexuality itself.

That is, the Sexual Molestation of the MCA is not a provision that punishes same-sex sex crimes committed by a homosexual or that prohibits homosexuals from serving the military service but it punishes the consented (non-coercive) same-sex relationship between soldiers. In spite of this fact, the notion that the deletion of this provision may result in an increase of homosexuals in the military and the inability of punishing sexual attacks in the military is prevailing. This sort of idea is not just discussed on the internet but publically quoted and used as a reason by the Constitutional Court and by some congresspersons during the consideration process at the National Assembly.

Therefore, before beginning to examine the problem of the Sexual Molestation of MCA, we shall scope on the wrong allegations that blur our discussion in order to clarify the future discussion.

2. Repealing Sexual Molestation Provision Has Nothing to Do with Military Service

Currently, there is no regulation that prohibits homosexuals from serving in the military. One who is homosexual shall serve obligatory military service or serve as a professional soldier. Especially, the Instruction on Unit Management of the Ministry of National Defence (no. 1483) states several regulations under the name of “Homosexual

²¹ He is also a member of the steering committee of the Military Human Rights Center of Korea. He was a military advocate, serving as a military judge in the Army. He is one of 7 judges who raised a constitutional appeal in 2009 on the “seditious book” list.

Soldier's Military Service" in Chapter 6 of Book 4. Article 259 says, "This chapter aims to increase the efficiency of military service performance and enhancement of strategy of the military by protecting human rights of homosexual soldiers and ensuring conditions so that homosexual soldiers can serve military service as any others." Also, Article 26(1) says "Homosexual soldiers within the barracks shall be treated equally and shall not be discriminated on the basis of their homosexual orientation," which explicitly states the equal treatment of homosexual soldiers.

What is surprising is that the Ministry of National Defence (MND) submitted a written opinion that contained discriminative attitude against homosexuality to the Constitutional Court around 2010 during the public defence on the adjudication on the constitutionality of Article 92-5 was on-going. The MND's additional references were (1) "The Health Risks of Gay Sex" by John R. Diggs MD that was on a website (www.corporateresourcecouncil.org) and an article published via *Chosun Ilbo*. These recourses describe homosexuality as a 'curable' symptom, and that the possibility of infection of AIDS and other venereal diseases is high – even using an expression such as 'AIDS factory' and 'AIDS infection via promiscuous sexual relations'. Another reference submitted by the MND was made by the Alliance Defense Fund (ADF) and the conference scripts of Korean Christian lawyers. The MND's lawyer introduced ADF as an organization to take action against the laws that violate the natural order of God. The reference itself contained religious doctrine that homosexuality overturns the order of creation.

The fact that the MND submitted such references clearly reveals that the MND understands the provision on the basis of the very wrong understanding and prejudice about homosexuality, unlike their instructions to protect human rights of the homosexual soldiers and their own assertion that the provision is not for discriminating homosexuals. Moreover, connecting homosexuality with AIDS is against the position of the United Nations (UN) and World Health Organization (WHO), and a recommendation of the National Human Rights Commission of Korea. Especially, submitting a reference based on a specific religion's doctrine seems to violate Article 20 of the Constitution that clarifies the separation of church and state.

Even the Constitutional Court used the term "abnormal sexual intercourse between same-sexes" in its decision revealing the prejudice that "heterosexual" is "normal" and "homosexual" is "abnormal" (2008HunGa21). This symbolically shows the level of awareness about sexual minorities of our society.

3. Possibility of Punishing Same-Sex Sexual Attacks in the Military even after Repealing Article 92-5

Another wrong recognition in the discussion of repealing Sexual Molestation provision in the MCA is that difficulty of punishing same-sex sexual attacks in the military. However, the purpose of the provision (Article 92-5) is to punish non-coercive consented same-sex relationship. Sexual attacks within the military are punishable by applying the Criminal Act or other related laws.

Especially, as shown in the II. 1 below, though Article 92-5 had a complementary role to punish offenders without requiring the victim's complaints before this revision, after the revision that abolished the provision requiring victim's complaint, now it is reasonable to say that it purely works to punish consented sexual intercourse.

Some argue that this provision may act as "non-consented adultery" so that it may fill in the blanks of the laws. (*Written by translator: it means that the provision may punish the offenders who say that the victim did not explicitly deny or reject the sexual intercourse.*) However, actual cases in which the logic was applied cannot be found, and there are few cases that have difficulties in finding guilt in determining the coerciveness of sexual intercourse. Rather there are difficulties in determining the existence of sexual intercourse.

Furthermore, emphasizing the significance of sexual crimes in the military when it comes to discussing Sexual Molestation in the military is not desirable as it reinforces the implied prejudice that the offenders are mostly homosexuals. Nonetheless, according to the Survey Research conducted by the National Human Rights Commission of Korea in 2003 says there was no case that the offenders were homosexual. In fact, the offenders even showed homophobic reactions.

Hence, retaining or repealing the Sexual Molestation provision of the MCA and sexual crime issues are not related to each other, and they must be discussed separately.

4. Conclusion

The critical points remaining after putting forth wrong allegations are: 1. whether it is valid or not to discriminate heterosexual and homosexual relationship and punish only the latter, 2. whether it is rational to punish consented sexual relationships even considering the environmental factor, i.e., military, 3. whether the currently revised version of provision does not violate the principle of clarity. We will look into these in more detailed level later in this text.

II. The problem of Sexual Molestation Provision of the Military Criminal Act

1. The essence of Sexual Molestation of the Military Criminal Act

A. Benefits and Protections of Laws

The old version of Article 92 regulates that "A sodomite (one who committed "copulation of chickens") and anyone who committed any other form of sexual molestation is sentenced to up to 2 years of imprisonment." It was moved to Article 92-5 in 2009. There has been no change in the content for about 47 years since its first stipulation in 1962 until raising the statutory punishment of the article in 2009, not even once.

The MCA is a bill replacing the National Guards Act and Coast Guards Act. It was made based on Japan's old Military Criminal Code and added things from America's Law of War. Then the National Guards Act stipulated "chicken's copulation" as one of the "extra crimes" in Article 50 that an offender may be sentenced up to 5-year of imprisonment.

As shown above, the Law of War of the United States of America rooted in that of Great Britain. It is understood that religious background made an influence considering the term "sodomy". The Uniform Code of Military Justice (UCMJ) Article 125 bans "unnatural carnal copulation with another person of the same or opposite sex or with an animal", and it is still in use.

The Supreme Court and the Constitutional Court both explain that the main benefits and protections of the Sexual Molestation provision of the MCA is not "individual's sexual freedom" but "military discipline, and sustenance of combat capabilities" (2008Do2222, 2001HunBa70, 2008HunGa21). The meaning of sexual molestation is "various forms that are contrasted with normal sexual behavior", which may alter throughout the time and space; still, the typical example is "sodomy", and its lexical meaning is "sexual intercourse between males", more specifically anal intercourse between males (2008HunGa21).

B. Actual Application of Sexual Molestation Provision

From 2004 to 2007, for 4 years, only 4 cases out of a total of 176 cases that were applied by the Sexual Molestation provision were the cases of a non-coercive homosexual relationship. In short, 98% of its usage was to avoid the provision requiring the victim's complaint.

Plus, all 4 cases ended up with the suspension of indictment or sentence. In other words, the punishment did not happen unless a case was an indecent act by force.

Conclusively, unlike its purpose of the legislation, the provision complements other sex crimes provisions and has acted as a provision that provides a ground for prosecution without the victim's complaint so far.

C. Conclusion

The discrepancy between the purpose of the legislation and actual application reveals that the alleged benefits and protections of the laws are void. So, it is thought that planting (and enhancing) the wrong recognition that homosexuality is perverse, even though the necessity for punishing same-sex relationship is not especially huge, disgusting and a taboo into the members of the military is the essence of this provision.

2. Violation of the Principle of Clarity

A. Indefiniteness

1) Regarding the range of molestation

It is not clear whether the provision would include sexual molestations that are accompanied by physical attacks or intimidation for crime's establishment or only indicates sexual molestations that are not accompanied by such factors.

However, it is discernable in a strict sense that the provision "does not require" forceful sexual relationship from "does not include" forced sexual relationship. The former just means that a consented sexual relationship without coerciveness is punishable, and it does not actually tell whether forceful molestation is included or not for sure. The latter means that only consented sexual relationship is possible under the Military Criminal Act so that forced sexual relationship must be punished by other laws. If the latter is followed then the previous cases applied by this provision are all based on the wrong interpretation of the Military Criminal Act.

2) Subject and Object

Although the phrase "any other form of sexual molestation" defined by the Constitution Court was unclear²², it is now more unclear whether heterosexual anal intercourse is also the object of punishment or not as the term "anal intercourse" is not only confined to behaviors between males. This interpretation makes it possible to see that the UCMJ explicitly bans abnormal (or unnatural) heterosexual intercourse as well.

3) Relationship between actors and location

In 1999, two soldiers had oral intercourse at one of their homes on vacation and were prosecuted. However, there was no consideration for the effect of their behavior on military discipline and the military community.

Another similar case. In 2005, two officers (lieutenant-major and sergeant first class) had homosexual relations (anal intercourse) at their bachelor enlisted quarters after work hours and prosecuted for that. However, there was no consideration for the time of the act or the location.

Another case is that of two soldiers from different units who met at a vision camp (a camp where maladjusted – or so-called – soldiers are collected) and had oral and anal intercourse in a restroom at night. The two were prosecuted because one of them felt guilty and reported it. However, there was no consideration of time or location.

Seeing the cases above, the location where the sexual act took place varies from a restroom to a boiler room. It is difficult to say which place may hinder the military discipline and the healthy life of the military community.

4) Degree of Act

The Supreme Court ruled that massaging a women's shoulder is also a form of sexual

²² See II. 1. A.

molestation (2004Do52). This decision was made by considering contextual factors such as time, space and notion; so, there is no criterion that tells us what sexual molestation is without considering the victim's intention and location.

Nonetheless, the phrase “any other form of sexual molestation” does not provide any criteria on to which degree an act can be regarded as sexual molestation.

5) Principle of proportionality

a. Justice in Aims and Means

The Constitutional Court thought that the provision was made to maintain sexual health and healthy public life in the military. The provision is thought to prevent harm to combat competence ultimately as it may decrease if the military is sexually promiscuous.

On the other hand, there is no proof that allowing homosexual relationships within the military results in prevailing promiscuous relationships. Besides, considering our society's prejudice against homosexuals, there is no chance that homosexuality will prevail within the military even if the provision is repealed.

According to the 2010 Report of the Ministry of National Defense of the United States of America, to see other countries that allowed homosexuals military service, even after allowing them, there was no increase in the number of coming-outs. As shown here, it is an unrealistic prediction that promiscuous relationships will increase while even the coming-outs, which is self-revelation, is not increasing.

Also, it is questionable whether allowing homosexual relationships directly harms combat competence. To see the actual scene of our military, prosecutors do not even care about whether a unit's administration, system of order or military discipline were harmed because of homosexual behavior when they prosecuted the case fell under Article 92-5.

b. Balance of Legal Interest

As we have discussed above, the interests of homosexuals are largely disregarded or violated as the principle of clarity is not guaranteed.

Plus, to see those 4 cases of sexual molestation accused of homosexual relations had all ended up not receiving an actual sentence, it is reasonable to conclude that there is no need for criminal punishment.

Also, though there are some regulations pertaining to the relationships between opposite sexes, the punishment is of administrative disposition not criminal punishment. Seeing this, the provision stated in the MCA is infringing on the balance of legal interest.

Although the Constitutional Court in 2011 said that “due to the special security situation of the country it is ineffective to control sexual molestation only via administrative disposition.” However, they did not provide any reason for this assertion. Besides, every other law punishing sexual molestation assumes “coerciveness”. Therefore, the decision of the Constitutional Court in 2011 is invalid.

4. Right to Equality

In 2010, a dispatched male and a dispatched female generals' wages were reduced because they had sexual intercourse within the barracks in Lebanon. They had relationships in an office, a VIP accommodation, a cathedral inside the barracks, and a women's restroom.

This case shows us that the Sexual Molestation provision is arbitrarily applied very well. The place where the act took place was a mission area, requiring the protection of military discipline and the healthy life of the military community at the most. However, even though excessive physical intercourses had taken place at numerous places and times, they were only disposed of reduction of wage, which is an administrative disposition, not a criminal punishment.

5. Conclusion

As we talked about so far, the Sexual Molestation provision of the MCA violates the principle of clarity, proportionality, and right to equality, i.e., unconstitutional provision. It is hard to understand the decision of the Constitutional Court's decision in 2011. Therefore, the revision had to remove the unconstitutionality, but it seems it still deteriorates the condition. From now on we will talk about this issue.

III. Latest Revision and Its Process

1. Process of Revision

From January to February 2013, three different draft revisions on the Military Criminal Act were proposed. See the table below.

Kim Gwangjin's	Nam-yun Insun's	Gwon Seongdong's
One who had committed sexual molestation to the person stated from Article 1(1) to (3) are sentenced up to 2-year imprisonment.	One who had committed sexual molestation coercively to the person stated from Article 1(1) to (3) are sentenced up to 2-year imprisonment.	One who had committed sexual molestation to the person stated from Article 1(1) to (3) are sentenced up to 2-year imprisonment.

The MND submitted a written opinion that it is appropriate to replace "chicken's copulation" into "anal intercourse", while Minority Committee of the Lawyers for Democratic Society submitted a written opinion saying that basically, it is desirable to just abolish the whole provision, and even if not, it is better to explicitly state "by power or rank" or

“coercively”. The Expert of the Legislation and Judiciary Committee said that leaving only sexual molestation may cause a controversy over the principle of clarity so that it is proper to change the term as the MND said; furthermore, as to Ms. Nam-yun’s draft, in relation to the Article 92-2 that already regulates “indecent act by force”, it requires deeper consideration.

On 4 March 2013, the Committee presented an Alternative Draft Revision on the MCA stating “One who had anal intercourse with or committed any other form of sexual molestation to the figures stated in from Article 1(1) to (3) are sentenced up to 2 years of imprisonment.” This Alternative Draft Revision was passed on 5 March 2013 at the Plenary Meeting of the National Assembly.

2. Problems

The process of passing the bill demonstrates to us that the National Assembly itself does not know this issue well enough. Though the term “anal intercourse” is indeed not degrading, this is a little portion of the actual problem. Besides, now it is unclear whether heterosexual anal intercourse is also the object of punishment or not.

In addition, the term “anal intercourse” has never been used as a legal term, so nobody knows whether inserting a finger, another part of the body or a tool instead of sexual organ is included in the meaning of “anal intercourse”. Though some might say it is still “other form of sexual molestation”, but it is true that it lacks clarity.

IV. Conclusion

The provision has rarely been used for its legislation purpose, and especially as the provision requiring victim’s complaint, it is thought that the provision will prove to be dead at fast speed. The provision’s existence encourages prejudice and hatred toward homosexuality while actual usage was void, and it violated the right to equality of homosexuals.

Although this revision was an excellent chance to solve this via legislation process, it is regrettable that it failed to do so. Including Ms. Nam-yun’s draft pending at the Committee, it is now time for us to discuss repealing the Sexual Molestation provision of the Military Criminal Act.



/This script is an abridged version of the original passage written in Korean/