

Mandates of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity; the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; the Special Rapporteur on the right to privacy; and the Working Group on discrimination against women and girls

REFERENCE:
AL KOR 4/2020

29 July 2020

Excellency,

We have the honour to address you in our capacities as Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity; Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; Special Rapporteur on the right to privacy; and Working Group on discrimination against women and girls, pursuant to Human Rights Council resolutions 41/18, 42/16, 37/2 and 41/6.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning **the dismissal of a soldier, Staff Sergeant Byun Hui-Su, following surgery to affirm her gender identity.**

According to the information received:

After having completed a high school for future military officers, Byun Hui-su joined the ranks of the Republic of Korea's army as an officer in March 2017. Due to deepening depression, Ms Byun sought support and counselling at the military hospital. Her doctor recommended gender affirmation treatment and she started receiving hormonal therapy in May 2019.

In July 2019, Ms Byun notified her unit of her wish to undergo sex reassignment surgery. In August 2019, she and her unit agreed on the schedule of the surgery, based on which she applied to seek permission to travel overseas on 8 October 2019. In the submission, she explained that she wanted to go to Thailand for medical treatment. On 14 October 2019, the Army 5th Armoured Brigade approved the submission.

On 23 December 2019, after Ms Byun underwent sex reassignment surgery in Thailand and returned to the Republic of Korea and was hospitalized in the Armed Forces Capital Hospital and started to receive medical treatment from the Department of Urology.

Reportedly, her unit and superiors have been supportive of her decision to have surgery. For instance, one of her superior officers visited her in hospital and was discussing with her the possibility to be redeployed to a different unit/troop after her treatment, if she wished so.

On 26 December 2019, Ms Byun applied to the Cheongju District Court for legal recognition of her gender identity in the Family Relations Registration Book, which was approved on 10 February 2020.

Between 6 -10 January 2020, the case of Ms Byun was examined by the following three different committees:

- 6 January: The Committee for Medical Probe started reviewing the degree of her physical or psychological “disorder”, as well as her needs of continuing treatment, including whether to discharge her from the hospital. Later, the Committee found that her case fell under Disorder Grade 3 of Table 2 under Article 53 of the Enforcement Rule of the Military Personnel Act (“the Enforcement Rule”) due to her loss of testicles (Tier 5) and phallus (Tier 5).
- 9 January: The Army Headquarters General Committee for Examination of Death or Wound in Action and Death or Injury in the Line of Duty decided that she was not injured in the line of duty.
- 10 January: The Committee for Examination on Discharge started reviewing whether she was still competent for active service in light of her physical or mental “disorder”, and therefore, should be discharged from the army according to Article 37 (1) of the Military Personnel Act.

Under Article 37 (1) of the Military Personnel Act, a person incompetent for active service due to a mental or physical disorder may be discharged from active service. Article 53 (1) of the Enforcement Rule provides the criteria above in deciding the degree of mental and physical disorder, which is not caused in the line of duty. If a person who is subject to Article 53 (1) of the Enforcement Rule wishes to remain in the army, he/she may be able to continue serving unless if he/she (i) caused the concerned disorder by unlawful acts or deliberately, or (ii) is deemed to have difficulty performing tasks, training or operation required by his or her military branch or who needs another person’s aids to complete a mission (Items (i) and (ii) of Article 53 (3) of the Enforcement Rule).

On 21 January 2020, the National Human Rights Commission of Korea (NHRCK), which had been seized of the case, took urgent action and recommended the Army Headquarters to hold the process of the Committee for Examination on Discharge for three months until the NHRCK makes a final decision of the case.

On 22 January, however, the Committee for Examination on Discharge decided to discharge Ms Byun despite her wish to stay. The Committee noted that, based on the review by the Committee for Medical Probe, the loss of male genitals was classified as Disorder Grade 3. Also, her case fell under Items (i) and (ii) of Article 53 (3) of the Enforcement Rule. It further noted that the case was

determined to avoid “reverse discrimination” in relation to other female soldiers since the process of becoming female soldiers are more competitive than that of male soldiers.

On the same date, the decision to discharge Ms Byun became effective. The army instructed her to directly go back to her private home instead of her military residence where most of her personal belongings were, therefore preventing her from having contact with her unit. Usually, a decision to discharge military members becomes effective after a period of up to three months.

On 18 February, Ms Byun submitted a petition to the Army Headquarters Committee for Examination of Petitions on Military Personal to argue the legality of the dismissal. On 29 June, the army acknowledged that the original decision did not take into account that her gender identity is female. On 3 July, however, the Committee dismissed the petition since her loss of male genitals was considered to be a “mental or physical disorder” under Article 37 (1) of the Military Personnel Act.

While we do not wish to prejudge the accuracy of the information made available to us, we are concerned that the Korean army may have considered the removal of Ms Byun’s male genitals as a physical or mental “disorder” giving ground for her discharge from the army under article 37 (1) of the Military Personnel Act. The conception of gender diversity as pathology is contrary to the eleventh revision of the International Classification of Diseases. Moreover, the dismissal of Ms Byun would violate the right to work and the prohibition of discrimination based on gender identity under international human rights law. We are also concerned that, if the dispute between the Army and Ms Byun is prolonged, she might lose opportunities to apply for a tenure in the army, which may put not only her job security, but her livelihood at greater risk.

In connection with the above-alleged facts and concerns, please refer to the Annex on Reference to international human rights law attached to this letter which cites international human rights instruments and standards relevant to these allegations.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the allegations mentioned above.
2. Please explain why the Committee for Examination on Discharge decided to discharge Ms Byun.
3. Please explain why the Committee for Examination on Discharge did not hold its process to discharge Ms Byun as recommended by the NHRCK.

4. Please provide information on the measures taken to redefine gender identity-related health within the Korean army's health entities and across the national public health care system with the eleventh revision of the International Classification of Diseases. In particular, please explain measures taken to ensure that trans-related and gender-diverse identities are not conditions of mental ill health and that diagnostics of gender incongruence give transgender people's access to gender-affirming health care.
5. Please explain the legal grounds for classifying the removal of male genitals as a "mental or physical disorder".
6. Please provide information on the measures taken by your Excellency's Government to provide training on gender diversity in order to guarantee the right of privacy and gender identity and ensure that trans and gender diverse members of the military are protected from discrimination or violence.

We would appreciate receiving a response within 60 days. Passed this delay, this communication and any response received from your Excellency's Government will be made public via the communications reporting [website](#). They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

While awaiting a reply, we urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations.

Please accept, Excellency, the assurances of our highest consideration.

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orientation and gender identity

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Annex

Reference to international human rights law

The principles of equality and non-discrimination are part of the foundations of the rule of law and human rights. Under articles 1 and 2 of the Universal Declaration of Human Rights (“UDHR”), “[a]ll human beings are born free and equal in dignity and rights”, and “[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”. This principle is reaffirmed by other human rights treaties, including article 2 (1) of the International Covenant on Civil and Political Rights (“ICCPR”), acceded to by the Republic of Korea on 10 April 1990, and article 2 (2) of the International Covenant on Economic, Social and Cultural Rights (“ICESCR”), acceded to by the Republic of Korea on 10 April 1990.

The jurisprudence, general comments and concluding observations of United Nations treaty bodies consistently held that gender identity is a prohibited ground of discrimination under international law. The Committee on Economic, Social and Cultural Rights, for instance, established that gender identity is recognized among the prohibited grounds for discrimination under article 2 (2) of ICESCR (E/C.12/GC/20, para. 32). The Committee further noted that article 2 (2) of ICESCR is directly applicable to all aspects of the right to work, and the failure to protect workers against unlawful dismissal consists violation of the right (E/C.12/GC/18, paras. 33 and 35).

In its Concluding Observations of 19 October 2017, the Committee recommended that the Republic of Korea take effective measures to eliminate de jure and de facto discrimination against lesbian, gay, bisexual and trans (“LGBT”) persons by, among others, ensuring that the comprehensive anti-discriminatory law to be adopted also prohibits discrimination on the grounds of sexual orientation and gender identity (E/C.12/KOR/CO/4, para. 25 (c)).

Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”) (ratified by the Republic of Korea on 27 December 1984) sets out that States Parties condemn discrimination against women in all its forms and agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women. In this regard, the Committee on the Elimination of Discrimination against Women (“CEDAW Committee”) stated in its general recommendation No. 28 that the discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as gender identity. Therefore, States parties must legally recognize such intersecting forms of discrimination and their compounded negative impact on the women concerned and prohibit them. They also need to adopt and pursue policies and programmes designed to eliminate such occurrences (CEDAW/C/GC/28, para. 18).

In this regard, we would like to recall Concluding Observations of 14 March 2018 of CEDAW Committee in which it recommends that the Republic of Korea adopt a comprehensive anti-discrimination law that prohibits discrimination against women,

including direct, indirect and intersecting forms of discrimination affecting disadvantaged groups of women, such as sexual minority groups, as defined in article 1 of the Convention and in line with the Committee's general recommendation No. 28 (2010) on the core obligations of States parties under article 2 of CEDAW (CEDAW/C/KOR/CO/8, para. 13).

We believe it is also pertinent to refer to the Concluding Observations of 3 December 2015 of the Human Rights Committee, in which it recommended the Republic of Korea to clearly and officially state that it does not tolerate any form of social stigmatization of, or discrimination against, persons based on their sexual orientation or gender identity. It further noted that the Republic of Korea should strengthen the legal framework to protect LGBT individuals (CCPR/C/KOR/CO/4, para. 15)

The Human Rights Council expressed grave concern at acts of violence and discrimination, in all regions of the world, committed against individuals because of their sexual orientation and gender identity (A/HRC/RES/17/19, 27/32, 32/2 and 41/18). In this connection, we wish to draw your attention to the United Nations High Commissioner for Human Rights reports to the Human Rights Council on violence and discrimination based on sexual orientation and gender identity (A/HRC/19/41 and A/HRC/29/23). In his reports, the High Commissioner emphasized that, under international human rights law, States are obligated to protect individuals from any discrimination in access to and maintenance of employment and recommended States to enact comprehensive anti-discrimination legislation that includes sexual orientation and gender identity among the prohibited grounds of discrimination (A/HRC/19/41, paras. 51-53, 84 (e), A/HRC/29/23, paras. 58, 79 (c)).

LGBT people's right to work is also highlighted in the Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles. Under Principle 12, everyone has the right to protection against unemployment, without discrimination on the basis of sexual orientation or gender identity. Also, States shall take all necessary legislative, administrative and other measures to eliminate and prohibit discrimination on the basis of sexual orientation and gender identity in public and private employment in relation to dismissal, among others (Principle 12 (a)).

We would also like to draw your attention to the right to privacy, which is enshrined in article 12 of UDHR and article 17 of ICCPR. In relation to the military service, the Special Rapporteur on the right to privacy recommended States to design and implement a protocol for the military service of LGBT and intersex individuals in which their gender identities are identified, military service is enabled and there is protection from discrimination and violence (A/HRC/43/52, para. 37 (p)). We take this opportunity to remind the Government that in the broader human rights context, not limited to the Military, the Government has a duty to uphold the right to privacy in relation to gender identity (A/HRC/RES/34/7, para. 5 (g)). This was the conclusion of the UN Human

Rights Committee, which reiterated that the right to privacy covers gender identity (CCPR/C119/D/2172/2012).

Regarding the pathologization of the trans people, the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity noted that pathologization had had a deep impact on public policy, legislation and jurisprudence, thus penetrating all realms of State action in all regions of the world and permeating the collective conscience (A/73/152, para 14). To that end, he urged States to move swiftly to adopt and implement the elements in the eleventh revision of the International Classification of Diseases that relate to the removal of the trans categories from the chapter on mental and behavioural disorders, including the adoption of all measures conducive to eradicating the conception of gender diversity as a pathology from all aspects of everyday life (*Ibid.*, para. 77 (a)).