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**South Korea and the Lack of  
Protection of LGBTI Rights**

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## **TABLE OF ABBREVIATIONS**

**ACHR:** *American Convention on Human Rights*

**ASEAN:** *Association of Southeast Asian Nations*

**CCK:** *Christian Council of Korea*

**CEDAW:** *Convention on the Elimination of all Forms of Discrimination Against Women*

**CFREU:** *Charter of the Fundamental Rights of the European Union*

**CRC:** *Convention on the Right of the Child*

**ECHR:** *European Convention on Human Rights*

**ECtHR:** *European Court of Human Rights*

**ECOSOC:** *United Nations Economic and Social Council*

**IACHR:** *Inter-American Commission of Human Rights*

**IACtHR:** *Inter-American Court of Human Rights*

**ICCPR:** *International Covenant on Civil and Political Rights*

**ICESCR:** *International Covenant on Economic, Social and Cultural Rights*

**ILGA:** *International Lesbian and Gay Association*

**LGBTI:** *Lesbian, Gay, Transsexual, Intersex*

**MMA:** *Military Manpower Administration*

**NHRCK:** *National Human Rights Commission of Korea*

**OAS:** *Organization of American States*

**SOGI:** *Sexual Orientation and Gender identity*

**STD:** *Sexually Transmittable Disease*

**TEC:** *Treaty Establishing the European Community*

**UDHR:** *Universal Declaration of Human Rights*

**UNESCO:** *United Nations Educational, Scientific and Cultural Organization*

**UNHRC:** *United Nations Human Rights Commission*

**WGAD:** *Working Group on Arbitrary Detention*

**YP:** *Yogyakarta principles*

**YP+10:** *Yogyakarta Principles Plus 10*



## ABSTRACT

Così come si evince dal titolo “South Korea and the Lack of Protection of LGBTI Rights”, questa tesi verterà sull’analisi della mancata protezione dei diritti delle minoranze sessuali in Corea del Sud.

Nel primo capitolo, la tesi si concentrerà sull’analizzare il rapporto tra tre elementi che esercitano grande influenza sulla società coreana e l’omosessualità. In particolare, il primo capitolo si concentrerà sul confucianesimo, il protestantesimo e la rappresentazione queer nei media, il cinema e nella così detta “hallyu”.

In particolare, il focus sul confucianesimo e sul protestantesimo sarà di particolare importanza per capire, almeno in parte, le origini del disinteresse che la società coreana sembra avere nei confronti della sua comunità LGBTI. Confucianesimo e protestantesimo esercitano infatti una grande influenza sulla società coreana. In particolare, alcune delle tradizioni confuciane riguardanti il rispetto della gerarchia sono ancora mantenute in alcuni dei comportamenti sociali che è possibile osservare in Corea.

Oltre che alla gerarchia, il confucianesimo dà anche grande importanza alla pietà filiale, all’unione familiare e ai ruoli, ben distinti, tra uomo e donna. In particolare, l’importanza della famiglia e dei ruoli di genere accomunano confucianesimo e protestantesimo che, con il suo arrivo nel Paese nel XIX secolo, ha rafforzato tali valori.

Come si osserverà in maniera più dettagliata nella tesi, nonostante le sue rigide regole, il Confucianesimo non condanna aspramente l’omosessualità, risultando quindi essere meno intollerante rispetto al protestantesimo. Infatti, le comunità protestanti conservatrici operanti in Corea ostacolano l’ottenimento di diritti LGBTI, condannando apertamente le minoranze sessuali. L’astio che tali gruppi provano nei confronti della comunità LGBTI è chiaro anche dalla fervente opposizione che il così detto “anti-discrimination bill” (disegno di legge contro la discriminazione, N.d.T.) ha suscitato nelle comunità evangeliche che, nonostante le proteste dei gruppi a sostegno di tale legge, sono riuscite a bloccarne la promulgazione

per ben tre volte, fino a che il governo sudcoreano non ha deciso di non riproporre più la legge. Forti di pochi e selezionati passi della Bibbia e della loro grande influenza sulla società coreana, questi gruppi religiosi si oppongono a qualsiasi riferimento alle minoranze sessuali nel sistema scolastico e in quello militare dove, tutt'oggi, esiste il reato di sodomia ("atti indecenti"). Il primo capitolo di questa tesi proporrà anche una breve analisi della rappresentazione dei queer nei media, nel cinema e nella così detta "hallyu", che ha esportato la cultura pop coreana nel mondo. I media giocano un ruolo fondamentale nell'influenzare l'opinione pubblica. Come infatti si noterà, sarà proprio tramite i media che le comunità evangeliche protestanti riusciranno a bloccare l'anti-discrimination bill, e saranno sempre i media che invece aiuteranno la comunità LGBTI a contrastare i messaggi omofobi lanciati dai gruppi protestanti dopo la messa in onda del primo episodio di *Life is Beautiful*, una serie televisiva in cui compare una coppia omosessuale. Successivamente, il capitolo analizzerà come il mondo del cinema e dell'intrattenimento hanno fatto largo uso di immagini "queer" che non rispecchiano i canoni di virilità che invece vengono proposti nella società. Un esempio è quello dei *flower boys*, termine usato per indicare un ragazzo che non corrisponde ai canoni di mascolinità coreani. La popolarità di tale figura, tutt'ora molto in uso, comincerà nel 2005, quando il film *The King and The Clown* verrà rilasciato nelle sale cinematografiche coreane, riscuotendo grande successo.

Nella sua seconda parte, il capitolo offrirà una breve analisi sulla nascita delle prime comunità ed organizzazioni LGBTI. Gli anni 90 rappresenteranno un momento di svolta per la comunità LGBTI coreana, che nella prima metà del decennio vedrà la nascita dei suoi primi movimenti, mentre nella seconda vedrà lo svilupparsi di vere e proprie comunità, grazie anche al diffondersi di internet. Il mondo virtuale, infatti, rappresenta un elemento importante nella nascita dei movimenti e comunità LGBTI, in quanto rappresenta un porto sicuro dove incontrarsi e parlare. Nella sua ultima parte, il capitolo parlerà invece dei primi anni 2000, momento che vedrà la creazione del Korean Queer Culture Festival e che vedrà la

comunità queer manifestare a favore dell'anti-discrimination bill e contro lo youth protection act (legge sulla protezione della gioventù, N.d.T.)

Il secondo capitolo di questa tesi offrirà invece un'analisi di come la protezione dei diritti delle minoranze sessuali si sia sviluppata nel diritto internazionale prendendo in considerazione, nello specifico, le Nazioni Unite, La Corte europea dei Diritti dell'uomo, la Commissione e la Corte Inter-Americana dei diritti dell'Uomo e l'ASEAN. Il capitolo fornirà inoltre delle informazioni sui principi di Yogyakarta, per poi passare ad illustrare alcune delle violazioni dei diritti LGBTI attutate nel mondo.

La Corte Europea per i Diritti dell'Uomo, ad oggi, è la corte più avanzata in materia di protezione dei diritti delle minoranze sessuali. Infatti, fu proprio questa corte che, nel 1981, stabilì che la legge anti-sodomia nordirlandese violava l'articolo 8 della Convenzione Europea per i Diritti dell'Uomo, relativo al diritto al rispetto della vita privata. Questa prima sentenza sarà poi seguita da molte altre sentenze, che permetteranno il riconoscimento dei diritti LGBTI. Tra le altre sentenze della CEDU, si ricordano *Smith e Grady contro il Regno Unito*, riguardo al divieto agli omosessuali di servire nell'esercito, *Goodwin contro Regno Unito*, prima sentenza a favore di un transessuale, *Salgueiro contro Portogallo*, in riferimento alla potestà genitoriale di un uomo omosessuale, e *Ogliari e Altri contro Italia*, in riferimento alle unioni same-sex. Diversi sviluppi sono stati effettuati anche alle Nazioni Unite, soprattutto grazie alla Commissione per i Diritti Umani, che nel 1993 nel caso *Toonen contro Australia*, ritenne che le leggi anti-omosessualità in vigore in Tasmania rappresentavano una violazione dell'articolo 26 della Convenzione Internazionale sui Diritti Civili e Politici. In seguito, La Commissione si espresse sul caso *Young contro Australia* nel 2003, riguardante il rigetto di una richiesta del sig. Young per l'ottenimento dei sussidi statali concessi ai partner dei veterani di guerra. Di nuovo, la Commissione stabilì che il rigetto della richiesta del sig. Young violava l'articolo 26 della Convenzione.

Un altro evento importante per la tutela dei diritti LGBTI fu l'adozione della risoluzione 17/19 del 2011, la prima in materia. Questa prima

risoluzione fu poi seguita da una seconda nel 2014. Nonostante i progressi fatti, nel seguente elaborato si vedrà anche come il processo del riconoscimento dei diritti delle minoranze sessuali sia ostacolato dai Paesi più conservatori, che invocano la protezione dei loro valori tradizionali per motivare il loro costante rifiuto nel riconoscere i diritti di questa comunità.

la Commissione e la Corte Inter-Americana, a loro volta, hanno fatto diversi passi avanti nella protezione degli individui LGBTI. Il primo traguardo è costituito dal caso *Marta Lucía Álvarez Giraldo contro Colombia*, riguardante il trattamento discriminatorio, in materia di visite coniugali, subito dalla sig.ra Alvarez Giraldo mentre era incarcerata nel carcere de “la badea”. La Commissione stabilì che il trattamento riservato alla sig.ra Álvarez Giraldo era in violazione degli articoli 1 e 5 della Convenzione Inter-Americana sui Diritti dell’Uomo. Il caso *Marta Lucía Álvarez Giraldo contro Colombia*, risalente al 1999, è stato poi seguito da quello di *Atala Riffo e Figlie contro Chile* del 2003. Su tale caso, si espressero sia la Commissione che la Corte Inter-Americana, ed entrambe stabilirono che la rimozione della custodia delle figlie ai danni della sig.ra Atala Riffo violava diversi articoli della convenzione, in quanto basata esclusivamente sull’omosessualità della donna.

Come sarà possibile notare, tra quelli analizzati, il sistema ASEAN è quello che mostra meno progresso. Infatti, i diritti LGBTI sono spesso ignorati, nonostante gli sforzi dei gruppi civili nel promuovere tali diritti.

Nonostante i progressi effettuati nella promozione e promozione dei diritti delle minoranze sessuali, le violazioni di tali diritti sono ancora diffusi in tutto il mondo. Le violazioni analizzate in questa tesi riguarderanno il diritto alla vita, il divieto di tortura, il divieto di detenzione arbitraria e il divieto di arbitraria privazione della libertà, e la libertà d’espressione e di assemblea.

Il terzo capitolo tratterà più specificatamente delle violazioni dei diritti LGBTI in Corea del Sud che, nonostante non criminalizzi l’omosessualità, non vieta nemmeno la sua discriminazione. Le violazioni che verranno analizzate riguardano i diritti civili delle minoranze sessuali, quali diritto a

sposarsi, diritto d'assemblea e il riconoscimento di genere, le discriminazioni subite nel sistema scolastico e il loro impatto negativo sui giovani appartenenti alla comunità LGBTI, le discriminazioni subite dai pazienti sieropositivi nel sistema sanitario e alla mancata proibizione e criminalizzazione delle così chiamate "terapie di conversione", e alle discriminazioni subite nella sfera militare, soprattutto causate dall'articolo 92(6) del codice penale militare che criminalizza l'omosessualità e gli atti sessuali, anche consenzienti, tra due persone dello stesso sesso. Questo capitolo illustrerà anche come tali discriminazioni influiscano negativamente sulla salute mentale degli individui LGBTI, soprattutto su quella degli adolescenti che vengono spesso discriminati e derisi sia dai coetanei, che dagli insegnanti.

Nella sua ultima parte, il terzo capitolo illustrerà inoltre come il fenomeno definito da Anne-Marie Sluaghter come "transjudicial communication" (comunicazione inter-giudiziale, N.d.T.) potrebbe rappresentare una strategia ottimale per la promozione dei diritti LGBTI nel Paese. Sarà infatti illustrato come, sin dalla sua stesura, la Costituzione coreana sia stata fortemente influenzata dal diritto internazionale, e come la stessa corte costituzionale faccia spesso riferimento agli strumenti internazionali per la promozione dei diritti umani.



## INTRODUCTION

The Republic of Korea, also known as South Korea, is surely one of the Asian Countries that is increasingly acquiring importance internationally. Nowadays, this Country is mostly known to be one of the most technologically advanced countries in the world. As a matter of fact, Korea is very well known to be the home country of one of the most famous IT brands in the world, Samsung Electronics, and recently it was the very first State to introduce 5G technology in the market.

Apart from its level of technological advancement, in the last 30 years Korea has been able to increase the quality of life of its citizens, as also shown by the increase of its life expectancy rate, going from an average of 52 years in 1960, to 80 years in 2009, and the lowering of infant mortality.<sup>1</sup> Furthermore, this Country was able to become one of the donors and supporters of the World Food Program, after having been one of its recipients.<sup>2</sup>

More recently, the South Korean government, led by President Moon Jae-In, has enacted a series of acts in order to further increase the quality of Korean people's lives. Indeed, in 2018 the government has reduced the weekly working hours and raised the minimum wage.<sup>3</sup>

Recently, the Constitutional Court of Korea has also hit the spotlight, following a series of landmark judgements. Indeed, in 2018 the Court recognized the legitimacy of conscientious objection to compulsory military

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<sup>1</sup>Sung S., Pascal G., "Gender and Welfare States in East Asia", *Gender and Welfare States in East Asia Confucianism or Gender Equality?* Palgrave Macmillan, p.16 (2014).

<sup>2</sup>WFP, "From recipient to donor: Republic of Korea makes its largest ever contribution to WFP", February 18, 2018 (visited on June 27, 2019): <https://www1.wfp.org/news/recipient-donor-republic-korea-makes-its-largest-ever-contribution-wfp>

<sup>3</sup> The Telegraph "South Koreans forced to relax under new overtime rules limiting working week to 52 hours", July 2, 2018 (visited on October 11, 2019): <https://www.telegraph.co.uk/news/2018/07/02/south-koreans-forced-relax-new-overtime-rules-limiting-working/>

service,<sup>4</sup> while in 2019 it has finally ruled the illegitimacy of the abortion laws, which had been into act for 66 years.<sup>5</sup>

However, similarly to numerous other Asian Countries, South Korea is also known for its internal contradictions. In truth, rapid technological and economic advancement has not been followed by a rapid transformation of South Korean society, which is still struggling in numerous areas, such as gender equality. As a matter of fact, according to an OECD report, in 2017 the South Korean wage gap was the highest among the organization member states, with women earning only 63% of men's wages. Moreover, in the same year, only 56.2% of South Korean women were employed, while numerous others withdrew from work because of maternity.<sup>6</sup>

Several issues are also given by the implemented laws regarding the reduction of the weekly working hours and the raise of the minimum wage, which have negatively affected the unemployment rate and widening the gap between rich and the poor.<sup>7</sup> South Korean economy was also affected by the tense trade friction between China and the United States, which have brought to a slowdown in South Korean exports of semiconductors, one of the major productions of the Country.<sup>8</sup>

Several issues are also related to the alternative military service. Indeed, even though the Constitutional Court has ruled the legitimacy of conscientious objection, the international community has highlighted different issues regarding the alternative program that the South Korean government seems to be creating. As written by Amnesty International in an open letter, the main critical issues seem to be linked to the length of the

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<sup>4</sup> The Korea Herald, "South Korea to offer alternative service for conscientious objectors", June 28, 2018 (visited on June 27, 2019):

[http://www.koreaherald.com/view.php?ud=20180628000835&ACE\\_SEARCH=1](http://www.koreaherald.com/view.php?ud=20180628000835&ACE_SEARCH=1)

<sup>5</sup> The Korea Herald, "Constitutional Court rules abortion ban is against the Constitution, calls for amendment", April 11, 2019 (visited on October 11, 2019):

[http://www.koreaherald.com/view.php?ud=20190411000679&ACE\\_SEARCH=1](http://www.koreaherald.com/view.php?ud=20190411000679&ACE_SEARCH=1)

<sup>6</sup> OECD, "The Pursuit of Gender Equality: An Uphill Battle", 2017 (Accessed on October 11, 2019): <http://www.oecd.org/gender/the-pursuit-of-gender-equality-9789264281318-en.htm>

<sup>7</sup> The Korea Times, "Income-led growth drive at crossroads", latest update May 12, 2019 (visited on June 27, 2019):

[http://www.koreatimes.co.kr/www/biz/2019/06/488\\_268561.html](http://www.koreatimes.co.kr/www/biz/2019/06/488_268561.html)

<sup>8</sup> The Korea Times, "Trade friction burdening Korean economy", latest update June 10, 2019 (visited on June 27, 2019):

[http://www.koreatimes.co.kr/www/biz/2019/06/488\\_270306.html](http://www.koreatimes.co.kr/www/biz/2019/06/488_270306.html)



service, its form, and the form of control of the service. To briefly sum up what Amnesty International wrote, the alternative system, as it is, will last longer than the actual military service (36 months against 18 months of military service), will prescribe only one specific type of service, and will be under military control<sup>9</sup>.

To the above-listed issues, the protection of the LGBTI community has to be added. The community, in fact, is still victim of numerous human rights violations in the country, where conservative groups exercise strong opposition to any form of protection of sexual minorities.

This dissertation will deal with the issue of the lack of protection of the LGBTI community in South Korea. In particular, the first chapter will deal with some of the elements that may be considered major influencers in shaping the perception of Koreans on sexual minorities.

As it will be shown, Confucianism is one of those elements. Indeed, South Korea presents strong Confucian values that are deeply embedded in its society. as a matter of fact, it will be noticed how its strictly defined gender roles still have a great impact on society, with women still considered the main caregivers and housekeepers while men are still seen as caregivers.

In the first part, this thesis will thus analyse whether or not Confucian values do also have an impact on the perception of homosexuality in Korea. Then, it will be discussed how the strong oppositions and homophobic positions of the Protestant conservative religious groups affect the promotion of LGBTI rights in the Country. As a matter of fact, conservative groups have ostracized every attempt to recognize sexual minorities rights, forcing the government to withdraw the anti-discrimination bill and to actively seek the revision of some school textbooks that cited homosexuality.

The great success that the anti-LGBTI propaganda has had up until now is also due to the strong influence that conservative groups have on traditional media, which were often used as a means to promote their

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<sup>9</sup> Amnesty International, “*open letter: alternatives to military service for conscientious objectors*”, December 4, 2018.

homophobic messages. Thus, the third part of the first chapter will deal with the queer representation in traditional media, cinema and the entertainment industry. It will be noticed how, despite the lack of representation in traditional media, the cinema and entertainment industries have largely exploited queerness as a tool for success.

The final part of this first chapter will provide a general overview on the creation of the LGBTI communities and movements in the Country.

The second chapter will provide an overview on the evolution of LGBTI rights in international law. The evolution of sexual minorities' rights will be analysed in different contexts, namely the UN system, the European Court of Human Rights, the ASEAN system, and the Inter-American Commission and the Inter-American Court of Human Rights. It will be explained how, since the 1980s, LGBTI rights have gained the spotlight and how their protection has been improving thanks to these bodies. The second part of the chapter will deal with some of the violations perpetuated against sexual minorities all around the world. The list of violations that will be discussed will include violations of the right to life, the prohibition of torture or ill-treatment and violations of the freedom of association. The list, however, is by any means exhaustive

The third chapter will deal with violations. that are perpetuated specifically in South Korea. In particular, this chapter will deal with the violation of the right to marry, freedom of association and the difficulties that transgender people face in order to obtain their legal gender recognition.

The chapter will also deal with violations perpetuated in the school system and how such violations negatively affect the LGBTI youth, which is more inclined to withdraw from school, and develop depression and/or suicidal thoughts. Violations of LGBTI rights are also perpetuated in the healthcare system, where HIV/AIDS positive patients are highly discriminated and mistreated. This part of the chapter will also deal with the violation of the right to health of sexual minorities in the form of "conversion

therapies”, which are often organized by religious conservative congregations and that entail physical and psychological violence. Such “therapies” aim at making the “sinner” deem him/herself.

The last sphere that will be analysed is the military life, where Article 92(6) of the Military Criminal Act still criminalize homosexual sexual acts (even when consensual), which are defined “indecent acts” in the Article.

On its last part, the third chapter will discuss how the Constitutional Court of Korea has cited international human rights instruments in order to support its judgements. This phenomenon is defined as “transjudicial communication” between courts and will be analysed as a possible tool for the promotion of LGBTI rights in Korea.



## CHAPTER 1: SOCIETY, HOMOSEXUALITY AND LGBTI MOVEMENTS IN SOUTH KOREA

In recent years, East Asian countries have gained the spotlight in the international community thanks to their rapid economic growth. As a matter of fact, said countries were able to build a solid economy, which was able to better resist the 2007-2012 economic crisis in comparison to western economies.<sup>1</sup> South Korea (Korea) is without any doubt among the aforementioned Countries: In truth, nowadays this state is mostly known to be the home country of one of the most famous IT brands, Samsung Electronics, and it was the first State to introduce the 5g internet technology.<sup>2</sup>

Economic growth, however, has not been paired with social advancement. Indeed, South Korean society is still dealing with numerous issues, including gender inequality. As a matter of fact, according to a 2017 OECD report, South Korea has the highest wage gap among its member states, with women earning only 63% of men's wages.<sup>3</sup>

Furthermore, Koreans are also struggling with mental health, with its suicide rate being the 10<sup>th</sup> highest in the world.<sup>4</sup> Suicide seems to be a major issue especially for elderly people and teenagers.<sup>5</sup> Despite the efforts of the government to provide the population with proper assistance, the phenomenon is still a plague for South Korea, as also proved by the recent

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<sup>1</sup> Sung S., Pascal G., "Gender and Welfare States in East Asia", *Gender and Welfare States in East Asia Confucianism or Gender Equality?*, p.2 (2014).

<sup>2</sup> The Korea Times "Korea launches world's first 5G networks", April 4th, 2019 (accessed, October 17, 2019): [http://www.koreatimes.co.kr/www/tech/2019/04/129\\_266600.html](http://www.koreatimes.co.kr/www/tech/2019/04/129_266600.html)

<sup>3</sup> OECD, "The Pursuit of Gender Equality: An Uphill Battle", 2017 (Accessed on October 11, 2019): <http://www.oecd.org/gender/the-pursuit-of-gender-equality-9789264281318-en.htm>

<sup>4</sup> World Population Review: "Suicide Rate by Country Population", August 28<sup>th</sup>, 2019 (accessed October 17, 2019): <http://worldpopulationreview.com/countries/suicide-rate-by-country/>

<sup>5</sup> *Ibidem*; Korea Herald, "Suicide No. 1 cause of death for S. Korean teens, youths", May 1<sup>st</sup>, 2019 (Accessed October 17, 2019):

<http://www.koreaherald.com/view.php?ud=20190501000216>

death of Pop Star Sulli, who has allegedly committed suicide after years of online persecution.<sup>6</sup>

Social issues in Korea are also related to sexual minorities. Despite homosexuality is not criminalised, sexual minorities are still struggling to make the government and the overall society recognise their rights. It seems that Korean society is blind to non-heterosexual community's needs and rights. According to Seo Dong-Jin:

Paradoxically, one might say that in Korean society, "homosexuality" is a term without its own referent [...] In modern Korean society, however, homosexuality does not seem to be "that love whose name one dare not utter" but rather "that love whose name does not refer to anything."<sup>7</sup>

In truth, non-heterosexual people are facing discrimination, as also proven by the infamous case of actor and comedian Hong Seok-cheon who, in 2000, came out as gay. Being the first celebrity to come out caused Hong to lose his job. Only in 2003, the actor was able to appear in television again.<sup>8</sup>

Discrimination, however, does also touch younger generations. As a matter of fact, in 2017, the newspaper *The Hankyoreh* reported a case of discrimination perpetrated by a counsellor of the Youth Hotline 1388 against a young lesbian teen who was under treatment because of depression. Allegedly, the counsellor told the young girl to "get more counselling and choose not to live as a homosexual."<sup>9</sup>

It is clear that despite the enormous economic and technological advancement, South Korea is still struggling to solve its societal problems, including the ones related to sexual minorities.

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<sup>6</sup>The Korea Times, "K-pop star Sulli found dead: police", October 15<sup>th</sup>, 2019 (accessed October 17, 2019): [http://www.koreatimes.co.kr/www/art/2019/10/732\\_277112.html](http://www.koreatimes.co.kr/www/art/2019/10/732_277112.html)

<sup>7</sup>Seo D.J., "Mapping the Vicissitudes of Homosexual Identities in South Korea", *Journal of Homosexuality*, 40:3-4, p.66 (2001).

<sup>8</sup>Pettid M.J., "Cyberspace and a Space for Gays in South Korea", *Sitings: Critical Approaches to Korean Geography*, Eds. Timothy R.T. and Sallie Y., University of Hawaii Press, p.179 (2008).

<sup>9</sup>The Hankyoreh, "Depressed LGBT youth told by counselor, "Choose not to be gay"", February 24<sup>th</sup>, 2017 (accessed October 17<sup>th</sup>, 2019): [http://english.hani.co.kr/arti/english\\_edition/e\\_national/784066.html](http://english.hani.co.kr/arti/english_edition/e_national/784066.html)

In order to have a better overview of the Korean society and its relation to homosexuality, the following paragraphs will try to analyse the relation between homosexuality and Confucianism and Korean Protestantism. It will also deal with queer representation in Korean media and cinema. The last part of the chapter will try to provide a general overview of the development of LGBTI movements in the Country until the early 2000s.

## **1. Homosexuality in South Korea**

### **1.1 Confucianism and homosexuality: Hostility or Manipulation of the Doctrine?**

Confucianism has played a fundamental role in shaping East Asian societies and their values. As a matter of fact, after its establishment in China, Confucianism started spreading in different Countries, such as Singapore, Taiwan, Japan, Vietnam and, of course, Korea.

Confucianism developed in the fifth century BCE and was first established by *Kongfuzi* (Master Kong), better known with the western transliteration of his name, "Confucius".<sup>10</sup>

The Confucianist doctrine gives great importance to tradition and social hierarchy, whose respect is at the base of social integration and stability.<sup>11</sup> According to Confucius himself, following tradition would bring a person to become a *junzi* (gentleman).<sup>12</sup> The doctrine also emphasises the

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<sup>10</sup> Nyitray V.L., "Fundamentalism and the Position of Women in Confucianism", *Fundamentalism and Women in World Religions*, Eds. Arvind S. and Katherine K.Y., T&T Clark, p. 50 (2007).

<sup>11</sup>Zhang Y.B., Lin M.C., Nonaka A. and Beom K., "Harmony, Hierarchy and Conservatism: A Cross-Cultural Comparison of Confucian Values in China, Korea, Japan, and Taiwan", *Communication Research Reports* 22:2, p.108 (2005).

<sup>12</sup>According to the Encyclopedia Britannica: "Until the late-20th century, many Western scholars and Chinese scholars writing in Western languages translated the term as "superior man" or "superior person." From the mid-20th century, however, it was increasingly common to use such translations as "exemplary person," "gentleman," or "gentleperson," which highlight Confucius's point that the junzi is not a commander or ruler over inferior subjects but rather a moral person who leads by his character and conduct." (Accessed January 2020): <https://www.britannica.com/topic/junzi>

importance of family, which is the place where people, as human beings, are formed.<sup>13</sup> Family is fundamental as it is attested by the fact that three of the five most important relationships are created in it. As a matter of fact, Confucianism establishes five cardinal and reciprocal relations that symbolize the *ying-yang* complementarity,<sup>14</sup> which is at the base of the order of the universe.<sup>15</sup> The five relations are:

- For father and son there was family feeling;
- for prince and minister there was propriety;
- for husband and wife there was distinction of function;
- for elder and younger there was orderly sequence;
- for friends there was good<sup>1617</sup>

Throughout time and history, Confucianism was reformed and influenced by other doctrines, especially by Buddhism between the third and tenth century.<sup>18</sup> The influence of Buddhism in China brought several Confucian scholars to “defend Confucianism against the challenge of Buddhism.”<sup>19</sup> The newfound interest of such scholars in the classic Confucian thought brought to the establishment of what it is now called Neo-Confucianism. Neo Confucianism helped reinforcing the Confucian doctrine that had spread all over East Asia.<sup>20</sup> Indeed, in Korea traditional Confucian values affected society way before the arrival of Neo-Confucianism. However, it is only during the Chosŏn Era (1392-1910), with the arrival of

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<sup>13</sup>Berthrong J., “Transmitting the Dao: Chinese Confucianism”, in *Confucianism in Context: Classic Philosophy and Contemporary Issues, East Asia and Beyond*, Suny Press, p. 15 (2010).

<sup>14</sup> Nyitray V.L., “Fundamentalism and the Position of Women in Confucianism”, *Fundamentalism and Women in World Religions*, p. 51 (2007).

<sup>15</sup> Choi H., “Constructions of Marriage and Sexuality in Modern Korea”, *Routledge Handbook of Sexuality Studies in East Asia*, eds. Mark M. and Vera M., Routledge p. 88 (2014).

<sup>16</sup>Cited in Hsu D.L., “The Myth of the “Five Human Relations” of Confucius”, *Monumenta Serica*, 29, p. 28 (1970-71).

<sup>17</sup>Confucius himself had never mentioned the “five relations”. Indeed, he only spoke of the importance of the first two relations (father-son and prince- minister). Mencius was the first to mention these five relations (See Hsu D.L., “The Myth of the “Five Human Relations” of Confucius, p.28).

<sup>18</sup>Berthrong J., “Transmitting the Dao: Chinese Confucianism”, p. 11 (2010).

<sup>19</sup>*ibidem*.

<sup>20</sup>*Ibidem*, p.21.



Neo-Confucianism, that Korea would largely transform and become a true Confucian Society.<sup>21</sup>

Since the end of the Chosŏn Era, the Country has experienced a decrease of the Confucian influence in its society.<sup>22</sup> However, Korea is still highly influenced by Confucianism, and maintains some of the characteristics of the doctrine. An example of how this doctrine is still influencing South Korean society and culture is given by Korean Language, in which honorifics are used also between friends.<sup>23</sup> The usage of honorifics could be linked to the importance that Confucianism gives to the respect of authority and status.<sup>24</sup> The usage of honorifics is not the only element that may show the great influence that the Confucian doctrine is exercising on Korean society. Another example may be provided by how Korean people bow in order to greet and show respect to someone.

Confucianism has also influenced gender equality in the Country. Sure enough, Confucius thought that women were less refined in comparison to men and utilised the term *xiaoren* (little man) to indicate women.<sup>25</sup> During the Chosŏn era, the adoption of Neo-Confucianist values established a strictly patriarchal and sexist society. Women were bound to strict hierarchy norms, which gave great importance to pureness and chastity, since women purity would have influenced their husbands' family reputation. As a matter of fact, upon marriage women were supposed to

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<sup>21</sup>Choi Y., "The History of Confucianism in Korea", *Confucianism in Context: Classic Philosophy and Contemporary Issues, East Asia and Beyond*, Suny Press, p. 33-34 (2010).

<sup>22</sup>Zhang Y.B., Lin M.C., Nonaka A. and Beom K., "Harmony, Hierarchy and Conservatism: A Cross-Cultural Comparison of Confucian Values in China, Korea, Japan, and Taiwan", *Communication Research Reports*, 22:2, p. 108 (2005).

<sup>23</sup>Korean, Chinese and Japanese all use honorifics. Honorifics are words used to show respect to someone who is older than you. They vary based on the register of the speech. Using informal Honorifics, or completely omitting them, without explicit consent of the other person is considered to be extremely rude.

<sup>24</sup>Zhang Y.B., Lin M.C., Nonaka A. and Beom K., "Harmony, Hierarchy and Conservatism: A Cross-Cultural Comparison of Confucian Values in China, Korea, Japan, and Taiwan", p.108 (2005).

<sup>25</sup> Nyitray V.L., "Fundamentalism and the Position of Women in Confucianism", *Fundamentalism and Women in World Religions*, p. 51 (2007).

abandon their birth families, so to become part of their husbands'.<sup>26</sup> After marriage, women were treated differently based on their status in the household. In truth, men were allowed to have "secondary wives" who, however, had a lower status compared to the "primary wife". Such difference in status, would also be reflected on the wives' children, who were treated differently based on their mothers' role in the household.<sup>27</sup>

Confucian views in terms of family and of the role of women was reflected in the Korean Civil Law through the *ho-ju* system, introduced in 1898 and modelled on the Japanese Civil Law.<sup>28</sup> The system established the dominance of the man in the family. At the death of the man, another man belonging to any generation (usually the oldest son) was recognised as the new head of the family. Such system was abolished only in 2008, following a reform of the Korean Family Law.<sup>29</sup> Such legal recognition, however, was not a solely Korean prerogative. In fact, a similar system was also found in Taiwan, where men had a privileged position in terms of property and guardianship of minors in case of divorce. Only in 2002, men supremacy in the Taiwanese family law was reduced.<sup>30</sup>

Despite both South Korea and Taiwan reformed their laws, gender equality is yet to be achieved. As stated above, South Korean wage gap is rather high.<sup>31</sup> Wage gap apart, retirement after pregnancy is another issue that needs to be solved. According to the same OECD report, numerous Korean women withdraw from work because of maternity. Moreover, the Organization has estimated that in 2017 only 56.2% of South Korean women were employed<sup>32</sup> These data may symbolize the attachment South

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<sup>26</sup> Choi H., "Constructions of Marriage and Sexuality in Modern Korea", *Routledge Handbook of Sexuality Studies in East Asia*, eds. Mark M. and Vera M, Routledge, p. 88 (2014).

<sup>27</sup> *Ibidem*.

<sup>28</sup> The Law Office of Jeremy d. Morley, "Korea's Revised Civil Code Concerning Family System" (Accessed January 2020): <https://www.international-divorce.com/korea-s-revised-civil-code-concerning-family-system>

<sup>29</sup> Sung S., Pascal G., "Gender and Welfare States in East Asia", Palgrave Macmillan, p.7 (2014).

<sup>30</sup> *Ibidem*.

<sup>31</sup> See note 3, p.1.

<sup>32</sup> OECD, "The Pursuit of Gender Equality: An Uphill Battle", 2017.

Korea is still experiencing to traditional gender roles, where women are meant to be the caregivers, while men the breadwinners.

There may be a correlation between the support of traditional gender roles and the reluctance to recognise sexual minorities rights. As a matter of fact, in a society still bound to traditional roles, the LGBTI community may be perceived as a challenge to said traditions.<sup>33</sup> Indeed, as also showed above, Korean society seems to still be bound to the stereotypical ideas of women taking care of the children, while men go to work. Furthermore, Homosexuality may be seen as a threat to the family and to the concept of filial piety. It could also be possible that individuals with a strong sense of obedience may be more reluctant to accept homosexuality, or non-heterosexuality in general, since such relations may be considered as a challenge to the status quo.<sup>34</sup> Hence, it is possible that Confucianism, which deeply values traditional gender roles and the obedience to hierarchy and the status quo, influences how the LGBTI community in south Korea is perceived. Furthermore, the constant loss of influence that such a doctrine is experiencing because of globalisation may be a plausible explanation on why the community is acquiring more and more acceptance in South Korean society, especially among younger generations.

Another point that may prove the influence of Confucianism in the acceptance of sexual minorities could be given by the importance that this doctrine gives to marriage and procreation. As a matter of fact, Marriage and procreation are related to the duty of filial piety, since sons are supposed to grant continuity of the family lineage and are supposed to take care of their parents once they grow old.<sup>35</sup> Hence, non-heterosexuality may be perceived as a direct attack to the value of filial piety, since it does not allow the continuation of family lineage.

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<sup>33</sup>Adamczyk A. and Yen-hsin A. C., "Explaining attitudes about homosexuality in Confucian and non-Confucian nations: Is there a 'cultural' influence?", *Social Science Research*, 51, p.278 (2015).

<sup>34</sup>*Ibidem*.

<sup>35</sup>Kim Y.G. and Hahn S.J, "Homosexuality in Ancient and Modern Korea", *Culture, Health & Sexuality*, p. 60 (2006).

It is indeed true that, in a research carried out in 2015, individuals in Confucian societies were found to give great importance to the family, being especially concerned on how to keep it united and intact.<sup>36</sup> As clearly mentioned above, Confucianism greatly stresses the importance of family, which has a pivotal role in shaping us as human beings.

However, interestingly enough, it seems that in ancient Korea homosexuality was not as condemned as one could think. Indeed, the figure of the *Hwarang*<sup>37</sup> is considered to be an example of homosexuality in the Country.<sup>38</sup> The proofs of the *hwarang* homosexual tendencies are included in the *Sam-Guk-Yu-Sa*, a traditional book illustrating Korean history<sup>39</sup>, in which it is possible to find numerous references to *hwarang*, such as the following verses, which are thought to illustrate these soldiers homosexual practices:

#### **Song of Yearning for the Flower Boy Taemara<sup>40</sup>**

The whole world weeps sadly  
The departing Spring.  
Wrinkles lance  
Your once handsome face,  
For the space of a glance  
May we meet again.  
Fair Lord, what hope for my burning heart?  
How can I sleep in my alley hovel?

#### **Song in Praise of the Flower Boy Kilbo<sup>41</sup>**

Moon  
Appearing fitfully  
Trailing the white clouds,

<sup>36</sup>Adamczyk A. and Yen-hsin A. C., "Explaining attitudes about homosexuality in Confucian and non-Confucian nations: Is there a 'cultural' influence?", p.287 (2015).

<sup>37</sup>"Flower boys". During the Silla Dynasty, *Hwarang* was "an elite corps d'armée which provided the state with well-trained warriors in times of emergency." (Vladimir T., "Hwarang Organization: Its Functions and Ethics", Korea Journal, p.319 (1998)).

<sup>38</sup>Kim Y.G. and Hahn S.J., "Homosexuality in Ancient and Modern Korea", Culture, Health & Sexuality, p. 62 (2006).

<sup>39</sup>*Ibidem*.

<sup>40</sup>This song was written by the senior hwarang, Taemara, during the reign of King Hyoso (A.D. 692–702) (Kim Y.G. and Hahn S.J., "Homosexuality in Ancient and Modern Korea" (2006)).

<sup>41</sup>This song dates from the same reign and was written by the monk Chungdam. It praises one of the hwarang bands. (Kim Y.G. and Hahn S.J., "Homosexuality in Ancient and Modern Korea" (2006)).

Whither do you go?

The face of the Flower Boy Kilbo  
Was reflected in the pale green water,  
Here among the pebbles of the stream  
I seek the bounds of the heart he bore.

Ah, ah! Flower Boy here,  
Noble pine that fears no frost!

### **Ch'oyong's Song<sup>42</sup>**

Playing in the moonlight of the capital  
Till the morning comes,  
I return home  
To see four legs in my bed.  
Two belong to me.  
Whose are the other two?  
But what was my own  
Has been taken from me, what now?

Homosexuality in Korea was also recorded in other historical periods, such as in the Koryo Dynasty. It is in fact reported that King Kongmin used to have several catamites.<sup>43</sup> King Hyeogong, from the Silla Dynasty, was instead known for wearing feminine clothes and preferring men.<sup>45</sup>

Even during the Chosŏn Dynasty, despite condemned by the upper-class, homosexuality was reported to be spread both among upper and lower classes.<sup>46</sup> It also seems that the Grand Prince Jean, son of King Yejong, had a particular distaste for women and had always preferred men. Even though this alleged distaste was criticized for being “idiotic” since “the desire between men and women is something that is present from birth”, the Grand Prince was never censored.<sup>47</sup>

Korea, however, was not the only Confucian country where homosexual practices were registered. Indeed, between the third and the

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<sup>42</sup>This last song is possibly the most famous of all in terms of its direct description of homosexual practices. It dates from the time of King Hongang (A.D. 875–886) (Kim Y.G. and Hahn S.J., “Homosexuality in Ancient and Modern Korea” (2006)).

<sup>43</sup>In ancient Greece and Rome, a catamite was a young boy who used to have intimate encounters with another man.

<sup>44</sup>Kim Y.G. and Hahn S.J., “Homosexuality in Ancient and Modern Korea”, p.62.

<sup>45</sup>Lee J., “Remembered Branches”, *Journal of Homosexuality*, 39:3-4, p.274 (2000).

<sup>46</sup>Kim Y.G. and Hahn S.J., “Homosexuality in Ancient and Modern Korea”. p.62 (2006).

<sup>47</sup>Pettid M.J., “Cyberspace and a Space for Gays in South Korea”, p.175 (2008).

fifth century, Chinese literati and upper class were known to entertain sexual relationships with catamites.<sup>48</sup> Furthermore, in imperial China, both official documents and works of fiction depicted a vast range of sexualities.<sup>49</sup> Also Japan has provided evidences of how homosexuality was widely practiced among Buddhist monks and samurais, and was widely depicted in works of fiction.<sup>50</sup>

Ancient practices apart, it seems that Confucianism per se does not explicitly condemn homosexual behaviour and does not strongly oppose non-heterosexuality as much as Christianity does.<sup>51</sup> Indeed, *“the sexual encounter between two men, is never immoral per se; homosexuality does not violate the Confucian ethical system as long as it respects the boundaries of propriety assigned to it—the hierarchies of the social pact.”*<sup>52</sup> Hence, Confucianism does not entirely condemn homosexuality, as long as it does not interfere with other values. However, it is important to state that despite Confucianism does not harshly condemn same-sex relationships between men, it does condemn same-sex relationships between women, which are considered to *“violate women’s natural duty to procreate”*.<sup>53</sup> It is also important to notice that the lack of a strong condemnation of homosexuality is not to be intended as a complete acceptance of such sexual orientation.

The Confucian opposition to lesbianism may explain why Lady Bong, second consort of the Crown Prince Munjong of Joseon, was deposed for allegedly lying with a maidservant.<sup>54</sup>

The lack of an actual condemnation of homosexuality by Confucianism may explain why Confucian countries have different positions

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<sup>48</sup>Wu C.C., “Homoerotic Sensibilities in Late Imperial China”, Routledge Curzon, p.3 (2004).

<sup>49</sup>*Ibidem*, p. 26.

<sup>50</sup>Leupp G., “Male Colors: The Construction of Homosexuality in Tokugawa Japan”, University of California Press (1996).

<sup>51</sup>Lee P.H., “LGBT Rights Versus Asian Values: de/re-constructing the Universality of Human Rights”, *International. Journal of Human Rights*, 20:7, p. 983 (2016).

<sup>52</sup>Cited in Wu C.C., “Homoerotic Sensibilities in Late Imperial China”, p. 21 (2004).

<sup>53</sup>Cited in Cho M.A., “The Other Side of the Zeal”, *Theology and sexuality*, 17:3, p.301 (2011).

<sup>54</sup>Pettid M.J., “Cyberspace and a Space for Gays in South Korea”, p.175-176 (2008).

on the matter. The Confucian Taiwan, for example, is the most advanced Asian Country in terms of sexual minorities rights. In fact, Taiwan is the first Asian Country to have recognized, on the 24<sup>th</sup> of May 2019, same sex marriage. On the contrary, other States, such as China and Singapore, are notoriously more conservative.

Despite the different approaches, homosexuals living in today's Confucian Countries seem not to seek governmental intervention for solving the problem of intolerance, since the issue is perceived as being rooted into the familial and cultural sphere.<sup>55</sup> Such attitude also influences the way Asian homosexuals living in Confucian Countries decide to "come out." Indeed, in some States, such as Hong Kong and Singapore, homosexuals do not explicitly "come out", but they "come home", in the sense that they introduce their partners to their family without overtly declaring their sexual orientation.<sup>56</sup>

The difference between Taiwanese approach to homosexuality and the Chinese and Singaporean one may be understandable if other factors are kept in consideration. In fact, the presence of other religions, such as Christianity and Islam, may have an impact on how homosexuality is perceived. As already mentioned, Christianity (and Islam as well) has a stricter opinion on sexual minorities, which are harshly condemned.<sup>57</sup> Keeping this in mind, it is then more understandable why Confucian societies have different opinions on homosexuality. Taiwan, in fact, has a less complicated socio-political context in comparison to, for example, Singapore,<sup>58</sup> whose society is also influenced by Christianity and Islam.

In conservative Confucian Singapore, the protection of the "Asian conservatism" has been cited as the main cause of animosity towards the

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<sup>55</sup>Yi J. and Phillips J, "Paths of Integration of Sexual Minorities in Korea", *Pacific Affairs*, 88:1, p.128 (2015).

<sup>56</sup>*Ibidem*.

<sup>57</sup>See note 51.

<sup>58</sup>Lee P.H., "LGBT Rights Versus Asian Values: de/re-constructing the Universality of Human Rights", p. 981 (2016).

LGBTI community.<sup>59</sup> Such conservatism is based on a set of Asian values, whose fundament is Confucianism.<sup>60</sup> However, it was already stated how Confucianism does not explicitly condemn homosexual practices. Indeed, according to the results of a research carried out in 2015<sup>61</sup>, it is possible to notice how numerous Confucian values, namely filial piety, obedience, conformity and traditional gender roles do not actually play a pivotal role in shaping societies' attitude towards homosexuality.<sup>62</sup> The research has also noticed how, in Chinese heritage Countries, perception of divorce and prostitution do have a role in the acceptance of homosexuality. Such opinions, however, do play an important role for western individuals as well, such as Americans, Canadians and Australians.<sup>63</sup> Hence, it is safe to say that, while Countries with a Confucian heritage are, indeed, less supportive of homosexuality, Confucian values are not the main cause of such intolerance.<sup>64</sup>

It is then possible that such "Asian values" are in reality the result of Confucianism interacting with western religions, especially Christianity.<sup>65</sup>

In his article "Gay Sexuality in Singaporean Chinese Popular Culture: Where Have All the Boys Gone?", Kenneth Chan states that:

While I aver a representation of this phenomenon as a simple "Westernization" of "Chinese" values and reject a simplistic linear causality, I am suggesting that one must problematize the way Chineseness is essentialized through selective historicism (for instance, picking and choosing what aspects of Chinese culture and history to include or exclude) and the conflation of various strands of cultural lineages (for example, appropriating fundamentalist Christian values and rewriting them as Asian ones) all for a specific cultural political agenda: in this case, the perpetuation of homophobic laws<sup>66</sup>

If that was the case, the narrative of "protecting Asian Values against western influences" would be nullified, since the very same values that are

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<sup>59</sup>Chan K., "Gay Sexuality in Singaporean Chinese Popular Culture: Where Have All the Boys Gone?", *China Information* XXII:2, p.308-309 (2008).

<sup>60</sup>Lee P.H., "LGBT Rights Versus Asian Values: de/re-constructing the Universality of Human Rights", p. 983 (2016).

<sup>61</sup>See note 30.

<sup>62</sup>Adamczyk A. and Yen-hsin A. C., "Explaining attitudes about homosexuality in Confucian and non-Confucian nations: Is there a 'cultural' influence?", p.287 (2015).

<sup>63</sup>*Ibidem.*

<sup>64</sup>*Ibidem.*

<sup>65</sup>*Ibidem.*

<sup>66</sup>Chan K., "Gay Sexuality in Singaporean Chinese Popular Culture: Where Have All the Boys Gone?", p. 309 (2008).



meant to be “protected”, would be the result of western culture interacting and influencing the Confucian culture. In particular, it would prove the great influence that Christianity has had in these societies ever since its first introduction in the XVIII century.<sup>67</sup> In other words, such “Asian values” would not be the result of the Confucian tradition, but of globalization. Such interaction between Confucianism and Christianity, which present some common values,<sup>68</sup> may also explain the reluctance of South Korea to recognize LGBTI rights. indeed, Korea is deeply influenced by Christianity (especially by Protestantism), which had a fundamental role in the process of modernization and economic development of the Country.

### *1.2 Homosexuality and Korean Protestant Christianity*

Confucianism in South Korea was revived around 1990s. Such newfound interest for the Confucian tradition brought to the restoration of graves and memorial stones and to the establishment of museums dedicated to local scholars.<sup>69</sup> However, this time around Confucianism was submitted to the influence of Christianity, which have previously entered Korean society. As a matter of fact, despite its population is mainly composed by individuals without a specific religion,<sup>70</sup> religious cults do play an important role in Korea. In particular, Protestantism is the major cult, being followed by 45% of religious people,<sup>71</sup> distributed in 77 thousand

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<sup>67</sup>Catholicism was the first type of Christian religion to reach Korea in the XVIII century. Protestantism, then, was introduced in the late XIX Century.

<sup>68</sup>While Confucianism may not be considered a religion, it shares common values with Christianity, such as the importance of family and the specific roles that men and women have.

<sup>69</sup>Levi N., “The Impact of Confucianism in South Korea and Japan”, *Acta Asiatica Varsoviensia*, 26, p.11 (2013).

<sup>70</sup>According to the 2015 census on population and housing, religious people represent the 43.9% of the population, registering a 9% decrease in comparison to 2005. For further information, visit “Statistics Korea - Results of the 2015 Population and Housing Census (population, household and housing)”:

<http://kostat.go.kr/portal/eng/pressReleases/1/index.board?bmode=read&aSeq=361147> (Accessed October 23<sup>rd</sup>, 2019)

<sup>71</sup>Korea.net (Accessed October 23<sup>rd</sup>, 2019):

<http://www.korea.net/AboutKorea/Korean-Life/Religion>

churches all over the territory (one every 660 individuals).<sup>72</sup> The great amount of churches edified in the country, could make South Korea “The most Christianized” non-Western Country.<sup>73</sup>

Protestantism emerged in South Korea during the late XIX century, after the forced end of the Korean self-imposed isolation, and during a time in which Confucianism was highly criticised.<sup>74</sup> Differently from catholic missionaries, who had several disputes with the government, protestant missionaries were very careful not to enter in conflict with the local government and population. Such attitude, helped them being more accepted in the Country.<sup>75</sup>

The cult then found its final validation among the population thanks to the establishment of numerous hospitals and schools in the Country.<sup>76</sup> Despite the difficulties in attracting young people, Protestant schools have had a huge impact on Korea. Such schools were, in fact, the first institutions providing a complete and modern education to kids belonging to the marginalized parts of society.<sup>77</sup> As a matter of fact, up until that point, schools were only accessible to children who were part of the ruling class.

The new cult challenged Confucianism, debunking its traditional views on men being defined by their social status. Such challenge installed a sense of equity in Korean society, which also started to question the given social order.<sup>78</sup>

Protestantism has also had a pivotal role after the end of the Japanese colonial rule over Korea. After Korea gained its independence in 1945, Protestant Christianity became the leading political force in Korea,

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<sup>72</sup>Joseph Y., Gowoon J., Saul S.S., Joe P. and Jerry Z. P., “Gay Seouls: Expanding Religious Spaces for Non-Heterosexuals in South Korea”, *Journal of Homosexuality*, 65:11, p.1458 (2017).

<sup>73</sup>Kim A.E., “Christianity, Shamanism, and Modernization in South Korea”, *Cross Currents*, 50:1-2, p.112 (2000).

<sup>74</sup>Park Y.S., “Protestant Christianity and its Place in a Changing Korea”, *Social Compass*, 47:4, p.508-510 (2000).

<sup>75</sup>*Ibidem*, p. 511.

<sup>76</sup>*Ibidem*.

<sup>77</sup>Cho K., “Protestantism, Education, and the Nation: The Shifting Location of Protestant Schools in Modern Korea”, *Acta Koreana*, 19:1, p.101 (2016).

<sup>78</sup>Park Y.S., “Protestant Christianity and its Place in a Changing Korea”, p.514-515 (2000).

also thanks to the fact that Syngman Rhee, the first President of the liberated Korea, was, indeed, Christian.<sup>79</sup>

Despite the important role Protestantism has had in Korean modern history, it is also important to notice its downsides. Indeed, Protestantism did not completely eliminate Confucianism and its established gender roles. Instead, it interacted with the existent doctrine, as also shown by the emergence of the “wise mother, good wife” ideology.<sup>80</sup> This ideology was heavily emphasised by American women missionaries, as also shown by the words of a veteran missionary woman who stated “*the ideal woman of Korea to-day is, as it should be, the ideal wife and mother*”.<sup>81</sup> In other words, Christianity helped to confirm the submission of women to men.

Christianity in Korea has been playing an important role as an antagonist to the recognition of LGBTI rights in Korea. Indeed, while homosexuality is not illegal, sexual minorities are still struggling in Korea, also because of the strong opposition showed by evangelical protestant congregations. These congregations are able to put great pressure on the government so to impede the recognition of LGBTI rights. A proof of such pressure is given by the strong opposition expressed by said congregations to the anti-discrimination bill. The anti-discrimination bill was first proposed by the Ministry of Justice in 2007, and prohibited discrimination against individuals on the ground of disability, language, race and sexual orientation.<sup>82</sup> Evangelical groups vehemently opposed the proposed legislation, which was accused of limiting freedom of expression and religion. In the end, the Ministry withdraw the bill. The anti-discrimination bill was then re-proposed in 2010 and 2013, but conservative forces protested again.<sup>83</sup> In the end, the term “sexual orientation” was eliminated from the

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<sup>79</sup>Park Y.S., “Protestant Christianity and its Place in a Changing Korea”, p.518 (2000).

<sup>80</sup>Choi H., “Constructions of Marriage and Sexuality in Modern Korea”, *Routledge Handbook of Sexuality Studies in East Asia*, eds. Mark M. and Vera M., Routledge, p. 90 (2014).

<sup>81</sup>Cited in *Ibidem*, p.91.

<sup>82</sup>Kim N., “Asian Christianity in the Diaspora: The Gendered Politics of the Korean Protestant Right – Hegemonic Masculinity”, Springer, p. 85 (2016).

<sup>83</sup>*Ibidem*.

final draft. Yet, because of the great protests organised by sexual minorities groups, the bill was withdrawn once again and never resubmitted.<sup>84</sup>

The Korean anti-gay Christian movement started during the 1990s, when the so-called *Iban*<sup>85</sup> movements were rising and acquiring importance.<sup>86</sup> One of the main actors and leader of such movement is the Christian Council of Korea, founded in 1989 and representing an umbrella organisation of Christian Fundamentalist churches in Korea.<sup>87</sup> Since its creation, the CCK has been highly vocal about its opposition to everything that regards LGBTI rights, since recognising those rights would bring to the decadence of Korean society. Such narrative is directly linked to patriotic nationalism, one of the main characteristics of Korean Christianity. Indeed, Korea seems to be "God's Chosen Nation", where "God has granted special blessings and commitment to Korean churches. Churches in the world look upon Korean churches with expectation and envy."<sup>88</sup> Hence, since Korea is God's Chosen Nation, homosexuality cannot be accepted, since it would taint society.

Moreover, evangelical groups have also used the victimization narrative to show how the recognition of LGBTI rights would undermine freedom of religion and expression in Korea. This strategy was also used in 2016, right before the election of the Korean National Assembly. The Christian Liberal Party, in fact, emphasised how Christians all around the World were "persecuted" because of their beliefs in terms of LGBTI rights.<sup>89</sup> Such narrative was proven successful that same year, when the Christian Liberal Party almost reached the 3% requirement to win a seat in the National Assembly.<sup>90</sup> This very same technique was also used during

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<sup>84</sup>Sanders D., "What's Law Got to Do with It? Sex and Gender Diversity in East Asia", *Routledge Handbook of Sexualities Studies in East Asia*, eds. Mark M. and Vera M., Routledge, p.138 (2014).

<sup>85</sup>"*Iban*" is the Korean equivalent of the English term "Queer". This term may be also translated as "second class people", in opposition to "*Ilban*" (Default first class). Another possible translation could be "out of alignment".

<sup>86</sup>Cho M.A., "The Other Side of the Zeal", p. 301 (2011).

<sup>87</sup>*Ibidem*, p.303.

<sup>88</sup>Cited in *Ibidem*, p.306.

<sup>89</sup>Yi J., Jung G. and Phillips J., , "Evangelical Christian Discourse in South Korea on the LGBT: The Politics of Cross Border Learning", *Society*, 54:1, p.29 (2017).

<sup>90</sup>*Ibidem*.

the protests against the Anti-discrimination bill, as also shown by the words of a Korean blogger:

. . . (R)egardless of what “homosexuals” do, whether we are in the home, at work, in society or in any religious groups, we won’t be able to express our opposition to homosexuality and will be prosecuted if we do or say anything which discriminates against them.<sup>91</sup>

Korean protestant views on homosexuality may be divided in two main ideas: the first one, which is more moderate, can be summarized as “hate the sin, but love the sinner”; the second one, which is the most extremist, is based on the concept that “God hates the Fag.”<sup>92</sup>

Few evangelical congregations, such as Next Generation Ministry (NGM), are more moderate in their perception of homosexuality. These congregations’ approach could be summarized as “hate the sin, love the sinner.” Under this, more lenient, approach Protestants state that every human being is a sinner, nonetheless God does not hate human beings. Homosexuality is a sin from which homosexuals should refrain.<sup>93</sup> “Love the sin, Hate the sinner” can be divided into three more categories, namely “homosexuality is a chosen behaviour, equally tempting to all”, “homosexuality is caused by a dysfunction or a pathology”, and “homosexuality is an inherent disposition that is not sinful by itself, but it can present a temptation for sinful behaviour.”<sup>94</sup>

Taking into consideration this division, it is noticeable how this approach makes great difference between the sin and the sinner.

According to this narrative, Christians should respond to LGBTI anger towards religion with love, so that LGBTI members can find the “wholeness of the Lord.”<sup>95</sup> This vision seems to be confirmed by “gay evangelicals”, such as Christopher Yuan, a Chinese- American best-selling

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<sup>91</sup>Cited in Chase T., “Problems of Publicity: Online Activism and Discussion of Same-Sex Sexuality in South Korea and China”, *Asian Studies Review*, 36:2, p.156 (2012).

<sup>92</sup>Kim N., “Asian Christianity in the Diaspora: The Gendered Politics of the Korean Protestant Right – Hegemonic Masculinity”, p.89 (2016).

<sup>93</sup>Dawne M., “Beyond the Dichotomy: Six Religious Views of Homosexuality”, *Journal of Homosexuality*,61:9, p. 1220 (2014).

<sup>94</sup>*Ibidem*.

<sup>95</sup>Yi J., Jung G. and Phillips J., , “Evangelical Christian Discourse in South Korea on the LGBT: The Politics of Cross Border Learning”, p.32 (2017).

author, who in his book stressed the importance of obeying to the Bible: “Holy sexuality is not focused on becoming straight [...] but on obedience.”<sup>96</sup> In another article, Yuan wrote that religious parents should not be ashamed of their homosexual children. On the contrary, they should love them, share the gospel and pray, as his parents did, so that their children will decide to obey the scripture by themselves.<sup>97</sup>

Another, similar, story was shared by David, a Korean- American man that through his blogs shows his life as a gay Christian living in Seoul with his loving wife and children.<sup>98</sup> According to his testimony, David had always felt same-sex attraction but, with the help of God, he fell in love with his wife. He also admits that his wife and he struggle daily with his homosexuality, but they are happy and grateful for their children.<sup>99</sup>

This approach to homosexuality, however, is not only promoted by gay Christians, but from Pastors as well. Indeed, Pastor James, the Founder of Next-Generation Ministry, has stated that “Every fiber of my body tells me that there is something really wrong in mistreating [LGBTI persons].”<sup>100</sup>

There are different issues related to this approach. For instance, “Love the sin, Hate the sinner” requires a distinction between the act and the person. Such a distinction is often difficult to do, since the vast majority of people directly links the terms “gay” and “lesbian” to the sexual activity, rather than to sexual orientation.<sup>101</sup> Moreover, according to a research carried out in 2008, high intrinsic religious people tend to be more bound to believe to what they *think* their religious group is teaching.<sup>102</sup> Hence, while a congregation may be more open to homosexuality, it is possible for its

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<sup>96</sup>*Ibidem*.

<sup>97</sup>*Ibidem*, Joseph Y., Gowoon J., Saul S.S., Joe P. and Jerry Z. P., “Gay Seouls: Expanding Religious Spaces for Non-Heterosexuals in South Korea”, p.1461 (2017).

<sup>98</sup>Yi J., Jung G. and Phillips J., , “Evangelical Christian Discourse in South Korea on the LGBT: The Politics of Cross Border Learning”, p.33 (2017).

<sup>99</sup>Joseph Y., Gowoon J., Saul S.S., Joe P. and Jerry Z. P., “Gay Seouls: Expanding Religious Spaces for Non-Heterosexuals in South Korea”, p.1470 (2017).

<sup>100</sup>Cited in *Ibidem*, p. 12.

<sup>101</sup> Scott G. V., “Intrinsic Religious Orientation and Religious Teaching: Differential Judgements Toward Same-Gender Sexual Behavior and Gay Men and Lesbians”. *The International Journal for. the Psychology of Religion*, 18:1, p.56 (2008).

<sup>102</sup>*Ibidem*, p.63.

followers to be less approving of non-heterosexual orientations. Furthermore, as long as Pastors who tend to be less intolerant of sexual minorities will not speak up for fear of repercussions, LGBTI people will never be completely accepted. Such a case is also reported by Joseph Kim and Joe Phillips in their article “Paths of Integration of Sexual Minorities in Korea”, in which it is possible to read a statement of a young pastor:

As far as [older] pastors are concerned, no Koreans are gay, even though statistics say that our youth group is filled with some kids who are having homosexual tendencies. There’s nothing to be gained by addressing those issues and a lot to be lost. If you say the wrong thing, you can actually close down the whole [church] building.<sup>103</sup>

The silence to which this kind of pastors are complying may be considered as a symptom of a lack of freedom of opinion and expression, since it seems that every idea that diverges from the total denial of homosexuality is not accepted, nor contemplated. It is indeed quite ironic to notice how, despite evangelical groups accuse the LGBTI community of limiting their freedoms of opinion and expression, such rights are actually being repressed by the evangelical groups themselves.

Another problem is linked to the “gay Christians”. Indeed, while their experiences denote that a certain degree of compromise between homosexuality and Christianity is possible, in a way they are also reinforcing the idea of heteronormativity<sup>104</sup> with regards to family and gender roles.<sup>105</sup> Hence, they are still contributing to instil the idea of homosexuality being wrong and heterosexuality being right.

The second idea is that “God Hates the Fag”. Such vision is quite explanatory by itself: homosexual people are sinners, homosexuality is a chosen behaviour, an “inconvertible sin” and the Bible “unambiguously

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<sup>103</sup>Cited in Yi J. and Phillips J, “Paths of Integration of Sexual Minorities in Korea”, *Pacific Affairs*, 88:1, p.127 (2015).

<sup>104</sup> In Edward. J. S. and Douglas P. S: “Heteronormativity is a way of thinking that may promote and justify socially created inequality between women and men and between heterosexuals and sexual minorities”.

<sup>105</sup> Edward. J. S., Douglas P. S., ““It’s Important to Show Your Colors” - Counter-Heteronormativity in a Metropolitan Community Church”, *Embodied resistance – Challenging the Norms, Breaking the Rules*, Eds. Chris B. and Samantha K., p. 100 (2011)

condemns all homosexual acts”.<sup>106</sup> According to this view, AIDS is spreading because of this “sinful” act, as a sign that God is condemning such behaviours. To put it simply, every sexual behaviour that does not comply with the canons of heteronormativity is abnormal.<sup>107</sup> At the core of such insinuations, there are a few, selected biblical passages.<sup>108109</sup>

This extremist vision is proven by Reverend Kim Hong-do, one of the leaders of the CCK who, right after the hurricane that destroyed New Orleans in 2005, stated that:

New Orleans was well known for homo sex. The State was planning a big homosexual festival, but two days before the festival, God wiped out the State. [...] We should be alarmed. Homo sex is the proof of Satan intervening in our history, too. We should pray, fast, and repent.<sup>110</sup>

Homosexuality, then, is considered as a product of Satan, and those who fall for such temptation, are bound to be damned. It is also a challenge “to God’s creation order” and “against the family that is the foundation of a society, and cause the breakdown of the institution of marriage.”<sup>111</sup> In this particular aspect, it is possible to also notice how Protestantism maintains one of the core values of Confucianism, namely the family as foundation of society. Hence, homosexuality is not only a sin to God, but also a threat to tradition. Indeed, it is quite interesting to notice how homosexuality has been also criticized and attacked for being a “product of the West”, something that does not belong to Korean tradition.<sup>112</sup> Homosexuality was brought to Korea by foreigners trying to negatively affect Korean traditions. In this narrative, evangelicals systematically choose to blatantly ignore the existent proofs of homosexual practices in ancient Korea and other Confucian Countries, so to validate their ideals.

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<sup>106</sup> Cho M.A., “The Other Side of the Zeal”, p. 305 (2011).

<sup>107</sup> Edward. J. S., Douglas P. S., ““It’s Important to Show Your Colors” - Counter-Heteronormativity in a Metropolitan Community Church”, p. 100 (2011).

<sup>108</sup> Sodom and Gomorra, in the book of Genesis, passages 18:22 and 20:13 in the book of Leviticus and passage 1:26-27 in the book of Romans.

<sup>109</sup> Kim N., “Asian Christianity in the Diaspora: The Gendered Politics of the Korean Protestant Right – Hegemonic Masculinity”, p.89 (2016).

<sup>110</sup> Cited in Cho M.A., “The Other Side of the Zeal”, p. 309 (2011).

<sup>111</sup> Kim N., “Asian Christianity in the Diaspora: The Gendered Politics of the Korean Protestant Right – Hegemonic Masculinity”, p.88 (2016).

<sup>112</sup> *Ibidem*, p.93.



The vision of homosexuality as “a western product”, is also what brought protestant congregations to accuse the US Embassy to “interfere with domestic affairs” for participating to the 15<sup>th</sup> Korea Queer Culture Festival in 2014.<sup>113</sup> Interestingly enough, the very same KQCF was accused by the protestant groups of being a threat to the alliance between South Korea and the USA.<sup>114</sup>

Even more interesting is how Protestant groups can define homosexuality as an example of “western dehumanization” that is trying to attack Korean traditions, without keeping in mind how Protestantism itself *is* a product of the west. Moreover, paradoxically, such groups continuously claim that Korean society must resist to such westernization, while Korean Protestantism is deeply bound to American evangelical groups. As a matter of fact, Korean Fundamentalist evangelism imitates the religious rhetoric of American Christian fundamentalists,<sup>115</sup> while various Korean evangelical activists claim that Koreans should learn how to resist homosexuality from western countries.<sup>116</sup> Even the link between patriotic nationalism and anti-gay propaganda is an American product, where homosexuality was defined one of the biggest threats endangering America.<sup>117</sup> It may then be possible to consider Korean Fundamentalist evangelism as a westernization of Korean society.

This extreme denial of homosexuality is also extended to the military. Protestant congregations have strongly opposed the elimination of article 92(6) of the Military Criminal Law on “indecent acts”, arguing how accepting homosexuality in the military would actually favour the birth of a communist state. In fact, allowing homosexuals to serve in the military would increase the cases of sexual assault registered among the soldiers and would also increase the exposure of soldiers to AIDS, leading to the decline of the

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<sup>113</sup>*Ibidem.*

<sup>114</sup>*Ibidem.*

<sup>115</sup>Cho M.A., “The Other Side of the Zeal”, p. 308 (2011).

<sup>116</sup>Yi J., Jung G. and Phillips J., , “Evangelical Christian Discourse in South Korea on the LGBT: The Politics of Cross Border Learning”, p.31 (2017).

<sup>117</sup>*Ibidem.*

military morale.<sup>118</sup> According to a CCK member article, allowing homosexuals in the military “could create a butterfly effect that would result in the destruction of South Korea.”<sup>119</sup> Homosexuality, then, is considered a threat to national security, which would disrupt South Korean military forces, in favour of the communist North Korea.<sup>120</sup> Also, the admission of homosexual men in the military would promote a negative image of military service. Such negative image could lead young Korean men to not serve in the military and would damage the system itself.<sup>121</sup>

It is important to notice, however, that homosexuals are still serving in the military. In fact, even though Article 92(6) of the Military Criminal Law prohibits homosexual sexual relations and the Military Manpower Service does recognise homosexuality as a “behavioural disability” or a “personality disorder”,<sup>122</sup> homosexual individuals are still completing their mandatory service while being closeted. It is clear that homosexuals in the military can face discrimination if their sexual orientation was to be unveiled, such as institutionalisation or dishonourable discharge.<sup>123</sup> However, Protestants worries may be considered unfounded, since homosexuals are already serving and, probably, also having consensual homosexual sex while doing it. Yet, Korean young men are still serving, and the military system has not been damaged.

According to conservative groups, homosexuality is also dangerous for the Youth. For this reason, said groups strongly opposed to the revision of the Youth Protection Act. Based on said act, in 2001 the Ministry of Information and Communication Ethics Committee obscured numerous LGBTI websites. After several years of protests and fights, in 2003 the National Human Rights Commission of Korea officially declared that the

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<sup>118</sup>Kim N., “Asian Christianity in the Diaspora: The Gendered Politics of the Korean Protestant Right – Hegemonic Masculinity”, p. 104 (2016).

<sup>119</sup>Cho M.A., “The Other Side of the Zeal”, p. 304 (2011).

<sup>120</sup>*Ibidem*.

<sup>121</sup>*Ibidem*.

<sup>122</sup>*Ibidem*, p. 314.

<sup>123</sup>*Ibidem*.

ensorship of said websites was a violation of human rights.<sup>124</sup> Despite its decision was not binding, the censorship was removed.<sup>125</sup>

The decision of the National Human Rights Commission was not well accepted by protestant groups. In fact, Reverend Choi Nak-jun, Chairperson of the CCK's Children Committee, strongly criticized the NHRCK, urging them not to eliminate LGBTI websites from the list of harmful media.<sup>126</sup> According to the reverend, the elimination of the ban would have caused confusion in young people's minds, since they would be confused about their sexual identity.<sup>127</sup>

Education is yet another field in which Protestant groups have argued the "dangerousness" of homosexuality. Indeed, when the city of Seoul decided to adopt the Ordinance on the Protection of Students' Human Rights, Protestants groups opposed again. The ordinance was adopted at the end of 2011 and gave students the right to protest and to express themselves through clothing and hairstyle (even though schools can still give guidelines on the dress code and the length of the hair); corporal punishments and discrimination against pregnant and LGBTI teens are prohibited. Moreover, it imposed the electivity of religious classes.<sup>128</sup> In 2017, the ordinance was amended so to include a clause prohibiting hate speech on the grounds of sexual orientation and gender identity.<sup>129</sup> The ordinance itself represents a huge step forward for LGBTI communities and their rights.

Conservative groups and the same Ministry of Education however, contested the ordinance, since it would cause the loss of power from the

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<sup>124</sup>National Human Rights Commission of Korea, "Annual Report 2003", July 30<sup>th</sup>,2004 (Accessed November 2019):

<https://www.humanrights.go.kr/site/program/board/basicboard/view?currentpage=2&menuid=002003003001&pagesize=10&boardtypeid=7017&boardid=7000297>

<sup>125</sup>Sanders D., "What's Law Got to Do with It? Sex and Gender Diversity in East Asia", p.134 (2014).

<sup>126</sup>Kim N., "Asian Christianity in the Diaspora: The Gendered Politics of the Korean Protestant Right – Hegemonic Masculinity", p. 100 (2016).

<sup>127</sup>*Ibidem*.

<sup>128</sup>The Korea Herald, "Seoul Council passes student rights ordinance", December 20<sup>th</sup>, 2011 (Accessed, November 3<sup>rd</sup>, 2019):

<http://www.koreaherald.com/view.php?ud=20111220000760>

<sup>129</sup>Sogilaw, "Human Rights Situation of LGBTI in South Korea 2017", p.104.

part of teachers. Reportedly, a member of a Mega Church in Seoul, had stated through a text message that the introduction of the Ordinance would increase the number of homosexual students.<sup>130</sup> Homosexuality is considered, again, a learned behaviour, which would damage Korean Society and benefitting North Korean interests. indeed, using Reverend Kim Hong-do's words:

The people who seek to pass the Ordinance are leftists. Who are the leftists? They are those who create chaos in society, and such social disarray will benefit North Korea, including those who support communism without even realizing.<sup>131</sup>

Once again, the anti-communist narrative is brought to the spotlight. Since schools are at the base of young people's education, allowing students to freely express their sexual orientation and/or gender identity without fear of repercussions would disrupt the system, favouring the arrival of communism in the Country and putting an end to a free South Korea.

Despite evangelical religious groups try to strongly oppose to homosexuality, Koreans seems to become more accepting towards sexual minorities, especially young generations. However, with Protestantism being the religion of almost 10 million citizens,<sup>132</sup> It is safe to state that evangelical congregations still have a great influence on the matter. Indeed, religion in Korea seems to be the best predictor of attitude towards homosexuality.<sup>133</sup> Hence, with Korean Evangelical Protestant churches being particularly open in their homonegative views, it does not surprise that, in general, religious people tend to be less accepting of homosexuality. Despite the moderate approach that few churches, such as NGM, have adopted, Korean Conservative Protestant congregations are still rather hostile toward the LGBTI community and its members.

In order to be increasingly accepted into the Korean society, LGBTI groups will have to elaborate new strategies so to debunk all the false myths

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<sup>130</sup>Kim N., "Asian Christianity in the Diaspora: The Gendered Politics of the Korean Protestant Right – Hegemonic Masculinity", p. 102 (2016).

<sup>131</sup>Cited in *Ibidem*.

<sup>132</sup>The data refer to 2015.

<sup>133</sup>Youn G., "Attitudinal Changes Toward Homosexuality During the Past Two Decades (1994–2014) in Korea", *Journal of Homosexuality*, 65:1,p.113 (2018).

linked to homosexuality and gender identity, especially among young people, who seem to be the most open-minded part of society. In particular, media could be a resourceful asset for LGBTI groups, since they have been already useful in rising the visibility of sexual minorities on a national level.

### *1.3 Queer Representation in Korean Newspapers, Movies and Pop Music*

Nowadays, Internet is becoming more and more important in our everyday lives, and is becoming a tool we generally use to share our stories, identities, and everyday life. This is also true for the queer community, who is increasingly active on the net, which has become a powerful ally for queer representation. This is also true for the LGBTI community in South Korea that, before the increase in popularity of internet, was highly underrepresented. As a matter of fact, apart from the 1920s, when the issue of “same-sex love” in girls’ schools arose, and the 1930s, when several newspapers depicted homosexuality as a pathology,<sup>134</sup> the LGBTI community remained fairly hidden and underrepresented in Korean media, which tended to consider queer-related matters as a “passing fad” or “individual choice.”<sup>135</sup>

The lack of queer representation in Korean media may have favoured the growth of a feeling of apathy (and, in some cases, intolerance) towards LGBTI people. Such indifference has been a major obstacle for the community in their goal to reach the recognition and protection of sexual minorities rights.<sup>136</sup>

It is only around 1998 that queers started gaining more recognition and space in the media, especially thanks to telephone bulletin boards and

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<sup>134</sup> Choi H., “Constructions of Marriage and Sexuality in Modern Korea”, *Routledge Handbook of Sexuality Studies in East Asia*, p.94 (2014).

<sup>135</sup> Kim J. Translated by Hong S., “Queer Cultural Movement and Local Counterpublics of Sexuality: A Case of Seoul Queer Films and Videos Festival”, *Inter-Asia Cultural Studies*, 8:4, p.622 (2007).

<sup>136</sup> Yi J. and Phillips J, “Paths of Integration of Sexual Minorities in Korea”, p.124 (2015)

the internet, which became a safe place for Korean queers, who could gather information and “meet” other queers in anonymity.<sup>137</sup> Moreover, around 1996 and 1997, gay and lesbian bars and clubs begun to be established in Itaewon, Seoul.<sup>138</sup> Around these physical and digital spaces, Korean queers started to communicate with each other, diminishing the sense of isolation created in the previous years, in which LGBTI individuals did not have any space.

The LGBTI internet community grew especially between 1999 and 2000, when numerous queer websites started to be created. Such online communities were a great way for queers to acquire more information and knowledge on their own community.<sup>139</sup> Such spaces also helped to instil a better sense of empowerment, and a better knowledge of political rights, which favoured the creation of various LGBTI groups.<sup>140</sup>

Despite the great help that the cyberspace has given to Korean queers, it is impossible to deny the much greater impact that representation on traditional media would have on the community. Indeed, a major obstacle for the recognition of LGBTI rights in Korea, is the influence that Conservative Christians have on society. Such influence is solidified by their representation in Korean traditional media, where queers have yet to gain major exposure. An example of the importance of representation in media is the anti-discrimination bill, which was dismissed several times and, up until today, has yet to be passed. In this occasion, the great representation of Conservative Christians helped them spreading their anti-gay ideas, which was based on exaggerated claims that saw the bill limiting freedom of religion and expression.<sup>141</sup> Even though queer communities did use the web to counter object such allegations, the lack of usage of traditional media

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<sup>137</sup>Chase T., “Problems of Publicity: Online Activism and Discussion of Same-Sex Sexuality in South Korea and China”, p. 152 (2012).

<sup>138</sup>Kim J. Translated by Hong S., “Queer Cultural Movement and Local Counterpublics of Sexuality: A Case of Seoul Queer Films and Videos Festival”, p.622 (2007).

<sup>139</sup>Pettid M.J., “Cyberspace and a Space for Gays in South Korea”, p.183 (2008).

<sup>140</sup>*Ibidem*.

<sup>141</sup>Chase T., “Problems of Publicity: Online Activism and Discussion of Same-Sex Sexuality in South Korea and China”, p. 155 (2012).

represented a major obstacle in creating public interest.<sup>142</sup> Another example of the efficacy of traditional media is also given by the unsuccess of Christian congregations to stop the drama *Life is Beautiful* from being aired. The program was aired in 2010, and its history revolved around four generations of the same family living in Cheju Island. Among the characters, there was also Tae-seob who had a male partner called Gyeong-su. The depiction of a same-sex relation in the drama caused the outraged response of conservative congregations that started a campaign for the cancellation of the program. Congregations started buying spaces on major newspapers to protest against *Life is Beautiful*. Among the various advertisements, the one published on the *Chosun Ilbo* on the 29<sup>th</sup> of September 2010 was the most controversial. The advertisement was entitled “If my son watches *Life is Beautiful*, turns gay and dies from AIDS, SBS must take responsibility!” The statement was immediately condemned by pro-LGBTI groups online. However, what made the difference was the involvement of pro-LGBTI people who were also famous through traditional media. Indeed, both gay actor Hong Seok-Chon and *Life is Beautiful* writer Kim Su-Hyeon used their social media accounts to publicly state their disapproval for the advertisement. However, because of their established roles in traditional media, several newspapers did report their statements, hence amplifying their effects. In the end, numerous people condemned the harsh words used by Christian congregations, stating how the advertisement “lacked any common sense” and made them “feel ashamed”.<sup>143</sup> *Life is Beautiful*, however, did more than simply bringing the queer discourse on the newspapers. In fact, it also helped changing the audience perception of the LGBTI community. For example, some viewers expressed how watching the drama gave them the opportunity to understand that LGBTI individuals are “just the same as regular people”, gave them the opportunity to “think about my own views and prejudices regarding gays and lesbians”, and to “feel

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<sup>142</sup>*Ibidem*.

<sup>143</sup>*Ibidem*, p. 163.

sorry for having unthinkingly held prejudices against them as being strange or abnormal.”<sup>144</sup>

The Korean queer community may deeply benefit from a higher exposure to traditional media. This is particularly true when the figure of model and singer Harisu is taken into consideration. She became famous in 2001, after her “unusual” campaign for DoDo Cosmetics. Indeed, thanks to the commercial, Harisu, whose real name is Lee Kyung-eun, became the first declared Male-to-Female transsexual celebrity in Korea.

The commercial, in which she shows her pronounced Adam’s apple, captured the attention of media and launched her career as model, singer and actress. However, the advertisement was also useful to queer communities in Korea, since Harisu, who is now known as a representative for transsexual rights in Asia, was also able to publicly discuss the queer- and trans-phobic attitudes in Korea, hence putting a light on LGBTI related issues, also thanks to her own struggles with the Incheon District Court that, in the end, legally changed her name from Lee Kyung-yeop to Lee Kyung-eun.<sup>145</sup> While it is safe to say that DoDo Cosmetics brilliantly used Harisu as a means to promote its products, the great resonance that the campaign had on traditional media represented the perfect opportunity to bring queer-related issues to the general knowledge.

Such episodes underline the fundamental importance that traditional media still have on public opinion. Unfortunately, queer representation is still very low, blocked especially by the fear of queer individuals of being discriminated. Indeed, it is important to underline how the aforementioned Hong Seok-Cheon lost all his contracts after coming out publicly in 2000 and was able to go back in television only in 2003.<sup>146</sup> Such fear is also what brought numerous queers not to attend the first edition of the Seoul Queer Films and Video Festival, which was mainly attended by heterosexual

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<sup>144</sup>Citations in *Ibidem*, p.163-164.

<sup>145</sup>Patty J.A., “Harisu: South Korean Cosmetic Media and the Paradox of Transgendered Neoliberal Embodiment”, *Discourse*, 31:3, p. 248-249 (2009).

<sup>146</sup>See note 8.



people. Few LGBTI attended the event, and those who actually went, only stayed for the movie, disappearing right after its end.<sup>147</sup>

While queer individuals seem to be frightened by the possibility of being discriminated once they come out, the Korean entertainment industry has largely used homosexuality and gender fluidity as tools for attracting the audience. Indeed, ever since the 1970s, queer characters started appearing in movies. The film that is considered as “the first gay film in Korea”, is *The Pollen of Flowers (Hwabun)*, directed by Ha Kil-jong in 1972.<sup>148</sup> The movie depicts the relation between the young man Hyun-ma and businessman Dan-joo, who is also the master of a mansion named “The Blue House”. Apart from being considered the first homosexual film, *Pollen* is also considered to present clear political remarks, since “The Blue House” is also the name of the Korean Presidential residence that, at that time, was occupied by dictator Park Chung-hee.<sup>149</sup> Despite the lack of clear homosexuality, the sexual tension between the two male characters is clear and undeniable.<sup>150</sup>

After *Hwabun*, *Ascetic: Woman and Woman (Kumyok: Yoja wa Yoja)*, directed by Kim Su-hyeong in 1976, is considered the second Korean queer movie. The film is focused on the story of Yong-hui, an aspiring model with a traumatic past, and the artist Noh Mi-ae. Despite the rigid regulations on censorship dictating the Korean movie industry, *Ascetic* was able to clearly depict the type of relation that is developed between the two women, while also showing a more toxic side of masculinity. In fact, both women experienced rape, abuse and betrayal from men. Even though the movie was rewarded in 1976, *Ascetic* remained fairly unknown and widely criticized by the Lesbian and Feminist communities both for not being too

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<sup>147</sup>Kim J. Translated by Hong S., “Queer Cultural Movement and Local Counterpublics of Sexuality: A Case of Seoul Queer Films and Videos Festival”, p.624 (2007).

<sup>148</sup>Kim P.H. and Singer C.C, “Three Periods of Korean Queer Cinema: Invisible, Camouflage, and Blockbuster”, *Acta Koreana*, 14:1, p.119 (2011).

<sup>149</sup>Park Chun-hee ruled from 1962 to 1979. He became President after orchestrating a Coup d'état in 1961. He was assassinated in 1979 by Kim Jae-gyu, President of the National Intelligence Service.

<sup>150</sup>Lee J., “Remembered Branches”, *Journal of Homosexuality*, 39:3-4, p.278-279 (2000)

critical of the male-dominated society and for not being explicit enough in depicting the two protagonists' homosexual relation.<sup>151</sup>

Other movies dealing with queer themes were *Broken Branches* (1995), *Memento Mori* (1999) and *Bungee Jumping of Their Own* (2001). All these movies, however, were produced by independent filmmakers. Indeed, it would be necessary to wait until 2002, when *Road Movie* came out, to see a queer movie being produced and distributed by major names in the movie industry. However, even though moviemaker Kim In-sik won several awards for the film, *Road Movie* did not captivate the audience, selling only 16 000 tickets in Seoul.<sup>152</sup> In order to see a queer-themed movie become a real blockbuster, it would be necessary to wait until 2005, and the release of *The King and The Clown*. The story is set in the Joseon Dynasty and revolves around Gon-gil and Jang-Saeng who are childhood friends and work as clowns. The two friends find themselves working for the royal court, led by King Yonsan. During the story, the relation between Kong-gil and King Yonsan develops to the point where the two have a sexual intercourse. In the end, Jang-seng receives a death sentence for insulting the king and a political turmoil takes over the court.

Many have questioned whether *The King and The Clown* really represents a homosexual relation, since Kong-gil, played by actor Yi Chun-gi, is rather feminine and does not represent the classical and stereotypical man. Because of Kong-gil's *Midong*<sup>153</sup> appearance, it is possible for some people to perceive the King and the clown's relation as closer to heterosexual.<sup>154</sup> Despite this discourse, *The King and The Clown* is considered to be the first queer blockbuster in Korea.<sup>155</sup>

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<sup>151</sup>*Ibidem*, p. 276; Kim P.H. and Singer C.C, "Three Periods of Korean Queer Cinema: Invisible, Camouflage, and Blockbuster", p.120 (2011).

<sup>152</sup>*Ibidem*, p.125.

<sup>153</sup>Term indicating a young boy engaging in pederasty. It was also used to indicate young catamites who often dressed as girls.

<sup>154</sup>Kwon J., "Co-mmodifying the Gay Body: Globalization, the Film Industry, and Female prosumers in the Contemporary Korean Mediascape", *International Journal of communication*, 10,p.1569 (2016).

<sup>155</sup> Kim P.H. and Singer C.C, "Three Periods of Korean Queer Cinema: Invisible, Camouflage, and Blockbuster", p.126 (2011).

The character of Kong-gil is also the starting point of what Kim and Singer call “gay man= gorgeous beauty formula”, which is now widely used in Korean Media. Indeed, Movies, dramas and also the music scene are full of the so called *kkonminam* (flower boy or pretty boy), which represent a type of masculinity in total contraposition to the Korean traditional one.

The image of the Korean “flower boy” started to spread also abroad, thanks to the great success that the K-Drama *Winter Sonata* has had, especially in Japan. The enormous success of this drama allowed the international (especially Japanese) audience to get in touch with a different kind of masculinity, the one portrayed by Kang Jun-sang, played by actor Bae Yong-joon. Exactly like *Life is Beautiful* changed the audience perception of queerness, *Winter Sonata* soft masculinity changed the way the Japanese audience perceived Korean Men. As a matter of fact, the Japanese perception of Korean Masculinity switched from being “scary” to be tender and gentlemanly.<sup>156</sup>

The *kkonminam* syndrome, through which numerous boys considered to be pretty and feminine became popular, started to spread particularly in the 1990s, deeply influencing Korean media and entertainment industry.<sup>157</sup> It is quite interesting to notice that the start of this “syndrome” coincides with the development and spread of the *Iban* movements. It is then possible that the “coming out” of the queer community, together with the queer movies released in that period, have in some ways influenced the popularity of the *flower boys*.

The South Korean entertainment industry still widely use the image of flower boys, especially in the K-pop industry. Despite a number of *Idols*, such as Rain and 2PM, still represent a more macho masculinity, it is possible to notice how numerous others do not abide by the rules of the classic notion of masculinity, representing instead the more fluid and soft side of masculinity itself. This masculine fluidity is noticeable, for example, in the various festivals and award shows held at the end of 2009, when male

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<sup>156</sup>Sung J., “Korean Masculinities and Transcultural Consumption: Yonsama, Rain Oldboy K-pop Idols”, Hong Kong University Press, p.45 (2011).

<sup>157</sup>*Ibidem*, p.58.

k-pop idols dressed as girls so to perform some dances and songs from girl groups and vice-versa.<sup>158</sup> This kind of inversed role-play is still spread, as also shown by the numerous results provided by Google search. Fluidity, however, is not only visible through cross-dressing and *Aegyo*<sup>159</sup>, but it is also portrayed by the *Idols* appearance. Indeed, several idols are known for their androgyny, such as Shinee's Taemin, BTS' Jimin, former F(x) member Amber and Seventeen's Jeonghan.

Korean music industry, however, has recently showed a more direct approach to queerness. Indeed, the entertainment company Starship Ent. has used queer themes for its artists' music videos several times. In 2012, for example, K Will's *Please Don't* shocked numerous fans for the unexpected ending of the song's music video (MV).<sup>160</sup> Indeed, while the audience was brought to believe that the main protagonist of the video was in love with his best friend's wife, with an incredible plot twist, the viewers find out the truth: the man was actually in love with his best friend. After K. Will, it was Sisters' *One More Day* music video to make use of queer themes.<sup>161</sup> In fact, the video illustrates the birth of a love relationship between two girls, while one of them tries to deal with her abusive boyfriend. The video ends with the two girls burning the corpse of the dead and abusive ex-boyfriend. In some ways, this particular video shows some similarities with *Ascetic*. Indeed, in both stories, women are suffering because of abusive men, who represent the evil and toxic heteronormative masculinity.

Starship Ent., however, is not the only company experimenting with queerness and non-heterosexual relationships. As a matter of fact, the now disbanded group Triple H (Cube Ent.) was known for its extravagant MVs, in which the three members of the group hinted to a polyamorous relationship.

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<sup>158</sup>*Ibidem*, p 163.

<sup>159</sup>Korean word depicting someone acting cute.

<sup>160</sup>K. Will, "Please Don't", October 10<sup>th</sup>, 2012 (Accessed November 12<sup>th</sup>, 2019):

<https://www.youtube.com/watch?v=PdUjCJnRptk>

<sup>161</sup>Sistar, Giorgio Moroder, "Just One More Day", November 21<sup>st</sup>, 2016(Accessed November 12<sup>th</sup>,2019):

<https://www.youtube.com/watch?v=E4TygUpWUTQ>

More significant, and providing a more explicit depiction of queerness, is the debut of indie artist Holland, in 2018. He debuted with his single *Neverland* whose Music Video shows the singer enjoying his relationship with another boy. In the video, the couple is also depicted while kissing. Because of the homosexual kiss, the MV was rated PG 18.<sup>162</sup>

It is important to notice, however, that queer representation in movies and music is more a representation of female desires and not of actual support of the queer community.<sup>163</sup> As a matter of fact, the female audience is usually the most active and present, also creating their own queer content through the so called *Fanfics (Fan Fictions)* that consist in creative texts whose story usually revolves around a homosexual relation between celebrities.<sup>164</sup> Queer individuals, again, tend not to publicly watch queer-related content, for fear of being exposed and being ridiculed.<sup>165</sup>

As Thomas Chase has noticed, Queer communities in Korea were able to gain the spotlight in Korean traditional media, they were able to put the light on LGTBI issue, originating a debate among the general public.<sup>166</sup> On the contrary, when sexual minorities confined themselves to online advocacy, their result were lackluster.<sup>167</sup> It is then possible to state that sexual minorities in Korea should focus on representation in traditional media, which are “better at focusing collective public attention than their endlessly diverse, attention diffusing, new media cousins”.<sup>168</sup> However, as it will be better explained in the next chapters, it is easier said than done, since Korean LGBTI individuals do still face discrimination and are subjected to hate speech, while their needs are often ignored. Indeed, it is

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<sup>162</sup>La Repubblica, “Corea del Sud, il cantante gay Holland debutta con Neverland: il video è vietato per un bacio”, January 22nd, 2018 (Accessed November 12<sup>th</sup>, 2019) (In Italian): [https://www.repubblica.it/tecnologia/social-networ/2018/01/22/news/fenomeno\\_holland\\_idolo\\_gay\\_coreano-187031537/](https://www.repubblica.it/tecnologia/social-networ/2018/01/22/news/fenomeno_holland_idolo_gay_coreano-187031537/)

<sup>163</sup>Kwon J., “Co-modifying the Gay Body: Globalization, the Film Industry, and Female Prosumers in the Contemporary Korean Mediascape”, p.1575 (2016).

<sup>164</sup>*Ibidem*, p. 1570.

<sup>165</sup>*Ibidem*, p. 1573.

<sup>166</sup>Chase T., “Problems of Publicity: Online Activism and Discussion of Same-Sex Sexuality in South Korea and China”, p. 167 (2012).

<sup>167</sup>*Ibidem*.

<sup>168</sup>*Ibidem*.

quite safe to state that we are witnessing a vicious cycle, where LGBTI individuals decide to “stay closeted” for fear of discrimination. Their fear is reflected in a lack of proper representation in Korean media, which contributes to the creation of a sense of apathy (if not intolerance) towards LGBTI people. Such attitude towards sexual minorities feeds the feeling of fear in queer groups, letting them live in a sort of limbo, where Korean media utilize queer themes for heterosexual entertainment, while never really accepting sexual minorities.

## ***2. Of Bars and Communities: The Rise of LGBTI Communities and Activism in South Korea***

### *2.1 The Beginning of Democratization and the Creation of the First LGBTI Groups*

The development of LGBTI movements in South Korea is fairly recent. Indeed, while LGBTI activism started spreading in the West especially after the 1969 Stonewall Riots, in Korea the so called *Iban* movements were created only in the 1990s. Before such period homosexuality was hardly spoken of since it was considered, both from heterosexuals and queers, “a problem of the west.” Such conviction was confirmed even during the epidemic of AIDS that hit the West in the 1980s, when a Korean news Anchor stated “South Korea has nothing to worry about since we have no homosexuals.”<sup>169</sup> Moreover, before 1987, the military authoritarianism that ruled the Country let little to no space to sexual minorities.<sup>170</sup>

In absence of acknowledgment and of spaces where to find other queers, LGBTI people lived closeted and in isolation, with no possibility to acquire the necessary information about their own community (especially

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<sup>169</sup>Kwon Kim H.Y. and Cho J., “The Korean Gay and Lesbian Movement 1993-2008”, *South Korean Social Movements: From Democracy to Civil Society*, Routledge, p.207 (2011).

<sup>170</sup>Bong Y.D. ,”The Gay Rights Movement in Democratizing South Korea”, *Korean Studies*, 32:1, p.88 (2008).

since the education system in Korea has yet to include queer-related subjects in its programs and textbooks) and with scarce possibility to meet other queers.

The situation shifted in 1987, when South Korea started its democratization process thanks to the amendment of its Constitution, previously amended by Dictator Park Chung-hee in order to acquire full powers.<sup>171</sup> Such turn of events in the Korean political scenario, represented the perfect opportunity for the LGBTI community to become more open. Between the end of 1980s and 1990s, numerous Gay and Lesbian bars and dance clubs started to be opened around *Itaweon*, an area in Seoul which is notoriously known for being frequented by the US Army soldiers and, more in general, foreigners. Gay and Lesbian bars also opened in Jongro and Mapo.<sup>172</sup> Another important area for queers was Nakwon, a district of Seoul where few bars solely for gay men started appearing during the second half of the 1980s. Supposedly, terms like *Pogal* and *Iban* were first used around this specific area.<sup>173</sup> Such places gave the opportunity to queers to gather and to share their experiences. However, around this period, gay spaces were solely frequented by middle-aged men belonging to the upper-middle class.<sup>174</sup> It would in fact be necessary to wait until the second half of the century to witness the involvement of young homosexuals in the gay and lesbian scene.

The first half of the 1990s saw the establishment of the first Korean queer movements. In 1991, *Sappho* was the first one to be created by Toni, a lesbian American woman serving in the army. This first group was heterogenic, with both Korean and Foreigners joining the group. After meeting through *Sappho*, two Korean Lesbian women and one Korean

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<sup>171</sup> *Ibidem*.

<sup>172</sup> Kwon Kim H.Y. and Cho J., "The Korean Gay and Lesbian Movement 1993-2008", p.210 (2011).

<sup>173</sup> Seo D.J., "Mapping the Vicissitudes of Homosexual Identities in South Korea", p.69 (2001).

<sup>174</sup> *Ibidem*.

American gay man decided to create the first Korean association for pan-sexual minorities.<sup>175</sup> Such association, named *Ch'odonghae*, however, had a short life. Indeed, the association was dissolved only two months after its creation in 1993, seemingly because Lesbians' members lamented frustration caused by the gays' sexism. In fact, it was usual for the association to devolve the donations collected during fund-raising events to gay bars, hence prioritizing gay-dedicated projects.<sup>176</sup> From the division of *Ch'odonghae*, two new associations were created: the first one, created in February 1994, was the gay men's organization *Chingusai*; the second one, created in November 1994, was *Kirikiri*, the lesbian counterpart of *Chingusai*. While both organizations advocated for the same broad objectives, their ideologies and specific goals were different. As a matter of fact, while Gay men were more focused on demonstrating that homosexuals were not different from heterosexuals, lesbian organizations had to deal with a highly patriarchal society, which did not (and, in a way, still does not) conceive women as sexual entities.<sup>177</sup> Women were supposed to stay chaste up until marriage, then they had to take care of their husbands and children. Taking this into consideration, it is understandable why lesbians try to seek collaboration with feminist movements. However, their efforts were often disregarded by feminists, who were more focused on *heterosexual* women needs, completely leaving out criticism against *heterosexism*. Moreover, most of the feminist organizations were ignorant, or even intolerant, of Lesbian women.<sup>178</sup>

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<sup>175</sup>Bong Y.D. , "The Gay Rights Movement in Democratizing South Korea", p.88 (2008)

<sup>176</sup>Park-Kim S.J., Lee-Kim S.Y. and Kwon-Lee E.J., "The Lesbian Rights Movement and Feminism in South Korea", *Journal of Lesbian Studies*, 10:3-4, p.168 (2007).

<sup>177</sup>Kwon Kim H.Y. and Cho J., "The Korean Gay and Lesbian Movement 1993-2008", p.211 (2011).

<sup>178</sup>Soo-Jin P.K. and Soo Youn L.K., "The Lesbian Rights Movement and Feminism in South Korea", p.168 (2007).



## 2.2 *The Second Half of the 1990s: University Organizations, Online Communities and Protests*

Even though the first half of 1990s witnesses the rise of the first Queer organizations, their development was rather slow.<sup>179</sup> It was only during the second half of the same decade that the LGBTI community started acquiring increasing visibility in society. Indeed, queer organizations started spreading in universities, hence exiting the marginalized areas of the city where gay and lesbian bars were located. In 1995, Pioneers of the homosexual student organizations were Yonsei University student Seo Dong-jin, and Seoul University student Lee Jung-woo, who founded respectively *Come Together* and *Maum001*. Other University homosexual groups were *Hwarang* at Kunkook University and *Saram and Saram* at Korea University.<sup>180</sup> Seo Dong-jin's *Come Together* would be at the center of an animated discussion after the organization of a Sexual Politics Exhibition on Yonsei Campus, in 1995. The exhibition was interrupted by Christian students who, enacting a passage of the book of Joshua, surrounded the event while praying, waiting for God to destroy their "enemy". When nothing happened, religious students tried to destroy the exhibition using their crosses. The event was reported by all national news.<sup>181</sup>

Due to their student position in two of the most renowned Universities of Korea, Seo and Lee both became symbols of the gay struggle to the public. The two students became instant celebrities and were invited in TV talk shows and to give University lectures.<sup>182</sup> Seo and Lee were deeply involved in activism, and also contributed to the creation of the *Korean Lesbian and Gay Human Rights Alliance*, which organized the first lesbian and gay summer youth camp.<sup>183</sup>

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<sup>179</sup>Seo D.J., "Mapping the Vicissitudes of Homosexual Identities in South Korea", p.73. (2001).

<sup>180</sup>Kwon Kim H.Y. and Cho J., "The Korean Gay and Lesbian Movement 1993-2008", p.212 (2011).

<sup>181</sup>Sanders D., "Mujigae Korea", unpublished paper, p.21 (2009).

<sup>182</sup>Kwon Kim H.Y. and Cho J., "The Korean Gay and Lesbian Movement 1993-2008", p.212 (2011).

<sup>183</sup>*Ibidem*, p. 19.

The second half of 1990s represents the period in which LGBTI people started being more and more visible, abandoning their seclusion in the gay-friendly areas to become more active in promoting their rights.

One factor that helped the development of queer groups and activism was the spread of internet. Indeed, internet has represented the perfect opportunity for gays and lesbians to meet other LGBTI people.<sup>184</sup>

In 1995, small queer groups were created on the Bulletin Board Systems of the three major Internet servers: Hitel, Chollian. and Nownuri.<sup>185</sup> Such online communities granted anonymity and protection to queers, who could also communicate and share their experiences with other queer individuals. The newfound connection between Korean non-heterosexuals allowed them to gather more information about shared issues, such as HIV and AIDS, which were still considered “gay disease.” These online communities also became physical communities. As a matter of fact, Bulletin groups held offline meeting called Chongmo. These events were used to gather all together, but also to spread more awareness on homosexual activism and on HIV/AIDS.<sup>186</sup>

Online bulletins, however, did prevent homosexual people from introducing themselves, hence establishing a censorship over the community. For this reason, in 1997 the first gay website was created, under the name *Exzone*.<sup>187</sup> The site became immediately popular among gay men, who were able to easily communicate with other homosexuals without fear while maintaining anonymity.<sup>188</sup>

1997 represents an important year for LGBTI groups. While online queer groups kept growing, offline representation was quite stagnant, with only few activist groups representing the community. However, in 1997 said

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<sup>184</sup>Chase T., “Problems of Publicity: Online Activism and Discussion of Same-Sex Sexuality in South Korea and China”, p. 152 (2012).

<sup>185</sup> Kwon Kim H.Y. and Cho J., “The Korean Gay and Lesbian Movement 1993-2008”, p.213-214 (2011).

<sup>186</sup>*Ibidem*.

<sup>187</sup>Song Pae C., “Faceless things: South Korean gay men, internet, and sexual citizenship”, Ph.D. Dissertation, Univeristy of Illinois, p.70 (2011).

<sup>188</sup> Kwon Kim H.Y. and Cho J., “The Korean Gay and Lesbian Movement 1993-2008”, p.213-214 (2011).

groups became braver and organized several protests. One of those was organized in T'apgol Park.<sup>189</sup> The manifestation was held in June and criticized high school textbooks discriminating homosexuality, depicted as part of the collapse of societal morals (along with AIDS and prostitution) and as the main cause of several “side-effects”, such as AIDS. The increased number of protests, however, was sided with fear of coming out. In fact, homosexuals participating in protests wore sunglasses and hats in order to not be recognized.<sup>190</sup>

Among the numerous protests, a special remark should go to the one organized to protest against the shutdown of the first Seoul Queer Films and Culture Festival. The festival was created by Seo Dong-jin and was first planned to be held on November 1997, at Yonsei University.<sup>191</sup> However, the day of the opening the University literally took the light off of the Festival and blocked the entrance to the auditorium. such decision was taken upon the fact that the movies that the organizers planned to show were censored by the Korea Public Performance Ethics Committee, on the grounds that homosexuality went against their “sentiments”.<sup>192</sup> The shutdown of the Festival, together with the censorship of the movie *Happy Together*, brought to the creation of a petition concerning the enhancement of homosexual human rights. The petition was spread in both Korean and English and was signed by more than 10 thousand people.<sup>193</sup> Thanks to these efforts, the clause on homosexuality was revised to “only” prohibiting excessive display of homosexuality. The revision of the clause was also facilitated by the Presidential elections of 1997, which saw former South Korean President and Nobel Peace Prize winner Kim Dae-jung winning. During the election campaign, President Kim had in fact stated that he did not “agree with

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<sup>189</sup>*Ibidem*, p.215.

<sup>190</sup>*Ibidem*, p.216.

<sup>191</sup>Sanders D., “Mujigae Korea”, p.24 (2009).

<sup>192</sup>Kim J. Translated by Hong S., “Queer Cultural Movement and Local Counterpublics of Sexuality: A Case of Seoul Queer Films and Videos Festival”, p.620 (2007).

<sup>193</sup>Sanders D., “Mujigae Korea”, p.24(2009).

homosexuality, but we should not view it as heresy since homosexuals, just like heterosexuals, engage in human love [...].”<sup>194</sup>

The revision of the clause, however, did still affect the Festival. Indeed, 15 movies that were projected during the event were limited to a “professional” audience, hence limiting what the audience could and could not watch.<sup>195</sup> Fear and underrepresentation of the queer community affected the event as well. As a matter of fact, the audience of this first edition was, for the bigger part, composed by heterosexual people (especially young women). Queers were frightened by the possibility of being outed while participating, hence preferring to continue to join queer clubs that were more secluded and protected from the public eye.

### *2.3 The Early 2000s: Pride Parades, The Anti-discrimination Act and The Youth Protection Act*

The early 2000s were equally important for the LGBTI community. Indeed, several events have taken place during this period. One of those is the institution of the Korean Queer Culture Festival. The event was first created in September 2000 and lasted two days.<sup>196</sup> It reunited all queer groups established in Seoul and was held, once again, at Yonsei University Campus. Its second edition was held in 2001 at Hongik University. In only one year, the affluence to the final parade change drastically, passing from 20 participants in 2000, to 250 in 2001. Both editions of the Queer festival received high media coverage.

Pride parades in Seoul are usually accompanied by police forces that not only control the parade, but also divide participants of the Pride parade from people protesting against the parade and homosexuality. As a matter

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<sup>194</sup>Cited in Kwon Kim H.Y. and Cho J., “The Korean Gay and Lesbian Movement 1993-2008”, p.217 (2011).

<sup>195</sup>Kim J. Translated by Hong S., “Queer Cultural Movement and Local Counterpublics of Sexuality: A Case of Seoul Queer Films and Videos Festival”, p.623. (2007).

<sup>196</sup>Sanders D., “Mujigae Korea”, p.27 (2009).

of fact, the Seoul Queer Culture Festival is sided with a counter-event, hosted by anti-homosexuality groups, which aims at guiding homosexuals toward the “right path.” Despite the opposition, the Seoul Queer Culture Festival has become a major event in Korea. Indeed, the 20<sup>th</sup> edition of the Festival has recorded a record number of 80 thousand participants,<sup>197</sup> and seems to have been joined by numerous young people. Apart from younger generations, several videos and interviews show parents of queer individuals participating to the parade, in support of their children.<sup>198</sup>

Apart from the launch of the first pride parade, in 2000 homosexual activists also sided with Hong Seok-cheon after he was fired for coming out.

Hong was first asked about his sexual orientation while starring in a TV program. When his answer was cut out during the editing process, the actor then admitted his homosexuality in another interview for a magazine, which should have been released three months later, so to give Hong time to prepare to the public announcement. However, the article was printed only two days after the interview; hence, Hong could not do nothing but confirm the statement.<sup>199</sup> After his outing, Hong Seok-cheon was immediately fired from MBC and SBS, the two national broadcasting systems, for being a “negative influence for teenagers.”

Hong’s layoff caused a great uproar, with the news being reported by international media as well. Gay activist groups formed a support group for the actor, and also the Korean Confederation of Trade Unions created a coalition to help him. Three years after his coming out, Hong was able to go back to television, even though he was not as busy as he was before. Apparently, his former partner, an American teacher working for a university in Seoul, was also threatened to break up with the actor if he wanted to

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<sup>197</sup>Arirang Culture, “Two Views of the Seoul Queer Culture Festival 2019 서울퀴어축제 현장 속 두가지 시선”, June 13th 2019 (Accessed November 20th,2019):

[https://www.youtube.com/watch?v=xMkHDIn\\_mXw](https://www.youtube.com/watch?v=xMkHDIn_mXw)

<sup>198</sup>Asian Boss, “Do Koreans Support LGBTQ+? (Ft. Seoul Queer Parade)”, July 20<sup>th</sup>, 2018 (Accessed November 20<sup>th</sup>, 2019): [https://www.youtube.com/watch?v=p\\_vsIEs72p8](https://www.youtube.com/watch?v=p_vsIEs72p8)

<sup>199</sup>Sanders D., “Mujigae Korea”, p. 29 (2009).

maintain his job.<sup>200</sup> Interestingly enough, in 2001 celebrity *Harisu* shocked everyone with her DoDo cosmetics campaign, in which she revealed her transsexuality. However, instead of being discriminated, her “revelation” became the starting point of her career.

This dramatic coming out is a clear evidence of the issues that sexual minorities have to deal with. Despite Hong came out in 2000, there are numerous testimonies regarding the discrimination the LGBTI community faces every day. Indeed, despite the growing acceptance from the part of society, queers are still highly stigmatized and are often fired from their jobs or abandoned by their families.<sup>201</sup>

The ongoing discriminations against the LGBTI community have been greatly contested in this year’s Queer Culture Festival, during which the participants have called for the approval of the anti-discrimination bill. This bill was first endorsed by the Korean National Human Rights Commission and its drafting process lasted 4 years (from 2001 to 2005), requiring the collaboration of numerous NGOs, including those on sexual minorities.<sup>202</sup> The bill prohibited discrimination under 20 different grounds, such as language, race and, of course, sexual orientation.<sup>203</sup> The Ministry of Justice endorsed the bill with only minor changes, and the Anti-discrimination Bill was first introduced in 2007.

The Bill was greatly opposed by conservative groups, mainly religious groups, who claimed that the endorsement of such bill would have compromised their freedom of religion. Furthermore, they claimed that through the act “homosexuals would try to seduce everyone, including adolescents; victims will be forced to become homosexuals; and sexual

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<sup>200</sup>*Ibidem*, p. 30.

<sup>201</sup>BBC, “Gay in South Korea: ‘She said I don’t need a son like you’”, September 20<sup>th</sup>, 2019 (Accessed November 20, 2019): <https://www.bbc.com/news/world-asia-49751410>

<sup>202</sup>Sanders D., “What’s Law Got to Do with It? Sex and Gender Diversity in East Asia”, p.138 (2014).

<sup>203</sup>Kim N., “Asian Christianity in the Diaspora: The Gendered Politics of the Korean Protestant Right – Hegemonic Masculinity”, p.85 (2016).

harassment by homosexuals will increase.”<sup>204</sup> Despite the clearly aleatory accusations, conservative groups managed to reach their goal when the Ministry of Justice dropped any reference to sexual orientation. The elimination of sexual orientation, however, triggered the reaction of queer groups. Indeed, even though they had previously criticised the Bill for not including gender identity and transgenders, these groups called for an international protest in defence of the bill, since it was their only possibility to (at least) reduce discrimination against queers.<sup>205</sup> The International Gay and Lesbian Human Rights Commission supported the protests, and numerous Korean activists and members of the labour party asked to conservative Christians groups to “stop their witch hunt on sexual minorities.”<sup>206</sup>

The Anti-discrimination bill was again introduced in 2010 and 2013 but was never approved.<sup>207</sup> Despite the failure of the protests of sexual minorities groups, such mobilization is still remarkable since several queers, who usually preferred not to be filmed for fear of being recognized, decided to speak on camera.<sup>208</sup>

While the Queer Culture Festival participants were asking for the approval of the Bill, Conservative groups were instead preaching for the exact opposite. In fact, one of the protesters who joined the anti-homosexuality parade stated that the bill does not simply give homosexuals the possibility to advocate for their rights but also “shut[s] down and penalise the opponents, whose freedom of speech is protected by the Constitution.”<sup>209</sup>

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<sup>204</sup>Cited in Sanders D., “What’s Law Got to Do with It? Sex and Gender Diversity in East Asia”, p.138 (2014).

<sup>205</sup>*Ibidem*, p. 139.

<sup>206</sup>*Ibidem*.

<sup>207</sup>Kim N., “Asian Christianity in the Diaspora: The Gendered Politics of the Korean Protestant Right – Hegemonic Masculinity”, p.85 (2016)

<sup>208</sup>Douglas S., “What’s Law Got to Do with It? Sex and Gender Diversity in East Asia”, p.139(2014)

<sup>209</sup>Arirang Culture, “Two Views of the Seoul Queer Culture Festival 2019 서울퀴어축제 현장 속 두가지 시선”, June 13<sup>th</sup>, 2019 (Accessed November 20<sup>th</sup>,2019)

Among the numerous preconceptions against homosexuality that conservative groups have, there is the conviction that homosexuality may “taint” young people, confusing them over their own sexuality and bringing them on the way of “temptation”. Based on these preconceptions, in 1997 the Ministry of Information and Communication Ethics Committee drafted the Youth Protection Act, which aimed at controlling the spread of “harmful media” among younger generations, including content “promoting perverted sexual acts such as bestiality, group sex, incest, homosexuality, sadomasochism.”<sup>210</sup> Based on said act, the Committee for Ethics of Information and Communication obscured numerous LGBTI websites between 2000 and 2001, including the famous website *Exzone*.<sup>211</sup> The decision of obscuring such websites caused a great uproar, since internet has always been the major media outlet for queers. Among others, the International Lesbian and Gay Association website was inserted in the list of the risky and prohibited websites.<sup>212</sup>

In 2001, sexual minority groups submitted a petition to the Korean Constitutional Court, claiming that the provision represented a violation of the freedom of expression and that violated the State’s obligations based on Article 26 of the International Covenant on Civil and Political Rights. In 2002, then, gay and lesbian groups protested against the main search engine providers that had closed numerous LGBTI websites and placed words such as “gay” and “homosexual” under the “adults only” category.<sup>213</sup> The turning point was 2003, when the National Human Rights Commission of Korea issued a recommendation on the matter. In the recommendation, The NHRCK assessed that the Youth Protection Act was indeed violating the right to pursue happiness based on sexual orientation. The commission also recognized a violation of Article 11 and 21 of the Constitution, related respectively to right to equality and freedom of expression. Moreover, the recommendation reads:

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<sup>210</sup>Sanders D., “What’s Law Got to Do with It? Sex and Gender Diversity in East Asia”, p.134 (2014)

<sup>211</sup>Bong Y.D. , “The Gay Rights Movement in Democratizing South Korea”, p.92 (2008)

<sup>212</sup>*Ibidem*.

<sup>213</sup>*Ibidem*.



In the past, homosexuality was regarded as a mental disease. However, in 1972, the American Psychological Association deleted homosexuality from the category of pathological diseases, and now homosexuality is seen as one of several natural sexual orientations.<sup>214</sup>

In the end, the Commission recommended the amendment of the Youth Protection Act. The Youth Protection Commission accepted the recommendation, eliminating the censorship on LGBTI websites.

Despite the growing recognition that the Korean LGBTI community is gaining, a lot more work needs to be done. For sure, an essential goal is promoting the adoption of the Anti-discrimination bill, which would facilitate queers' everyday lives. Legal recognition of same-sex partnership is for sure another important issue to be addressed. Indeed, South Korea has yet to recognize any form of same-sex relation. This lack of recognition may cause several issues to non-heterosexual couples, especially in relation to alimony and medical insurance.

Military service is yet another field in which homosexuals are discriminated. As a matter of fact, the Military criminal law still includes the crime of sodomy, while the Regulation on Physical Examinations of Recruits define homosexuality a mental disease, despite the international community does not consider non-heterosexuality as a mental illness. Even after their enrollment in the military, homosexuals who want to be granted a discharge for medical and family reasons may be required to submit photographs or videos showing themselves in a homosexual act.<sup>215</sup> Apart from being a clear violation of privacy, submitting such material may also be extremely embarrassing and humiliating for homosexuals.

A major obstacle to the achievement of such goals is surely represented by conservative religious groups, which are still highly influential, also thanks to their vast representation in Korean traditional media. In fact, thanks to the media, said groups are able to spread misinformation on homosexuality and other queer-related topics.

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<sup>214</sup>National Human Rights Commission of Korea, "Annual Report 2003", July 30<sup>th</sup>,2004

<sup>215</sup>Bong Y.D. , "The Gay Rights Movement in Democratizing South Korea", p.91 (2008).

Such religious groups also influence political parties. Indeed, during his election campaign, South Korean President Moon Jae-in, had stated that while he does not think that the LGBTI community should be discriminated, he had no intention of recognizing same-sex relations.<sup>216</sup>

Interestingly enough, at that time same-sex marriage was not at the center of LGBTI activists' agenda due to a lack of interests. Hence, it is possible that the unexpected statement was a calculated move not to lose the approval of conservative religious groups, who have always opposed the idea.<sup>217</sup>

As previously mentioned, "the preservation of traditions", which is a recurring theme among every conservative groups all around the world, seem to be the main reason behind the great opposition of conservative groups to the recognition of LGBTI rights. The major importance that the institution of the family has on Korean society is at the base of such traditions, which Korean society has to protect from "the western influence". It is not easy to debunk such myths, especially since LGBTI individuals and community are highly underrepresented in traditional media and, more in general, in society. In this scenario, it is fundamental to educate people to LGBTI-related issues and it is especially important to communicate with younger generations. As also stated in a research conducted in 2015, activists should try and debunk the myth of homosexuality being a threat to the "traditional family", which seems to be one of the major arguments of conservative groups and also the major worry of Confucian societies in relation to homosexuality.<sup>218</sup>

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<sup>216</sup>The Korea Times, Moon bashes gay rights for church votes, December 14<sup>th</sup>, 2012 (Accessed November 21<sup>st</sup>, 2019):

[http://www.koreatimes.co.kr/www/news/opinion/2012/12/264\\_126896.html](http://www.koreatimes.co.kr/www/news/opinion/2012/12/264_126896.html)

<sup>217</sup>*Ibidem*.

<sup>218</sup>Adamczyk A. and Yen-hsin A. C., "Explaining attitudes about homosexuality in Confucian and non-Confucian nations: Is there a 'cultural' influence?", p.287 (2015).

## CHAPTER 2: LGBTI RIGHTS IN INTERNATIONAL LAW

### ***1. The Evolution of LGBTI Rights in International Law: The Prohibition of Discrimination on the Grounds of Sexual Orientation and the Right to Private Life***

The international human rights protection system is relatively recent. In fact, before 1945, States commitment to the protection of human rights was based on a limited number of treaties and declarations of intent.<sup>1</sup> The outbreak of the Second World War, however, outlined the necessity to create an effective system for the protection of human rights. Hence, at the end of the conflict, states increased their commitment to the protection of said rights, signing a series of international treaties tackling the issue.<sup>2</sup> The first formal international documents dealing with the protection of human rights were the United Nations Charter, the Universal Declaration of Human Rights, the European Convention on Human Rights, and the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural life.<sup>3</sup> Since then, States have signed an increasing number of international treaties on human rights, creating a system that, nowadays, is still improving and evolving.

The developing of the human right protection system also includes the developing of LGBTI<sup>4</sup> rights. The first steps towards an adequate protection of the LGBTI rights date back to the end of the 20th century, when discrimination based on sexual orientation was acquiring increasing

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<sup>1</sup> Hafner-Burton E.M. and Tsutsui K., "Human Rights in a Globalizing World: The Paradox of Empty Promises", *American Journal of Sociology* 110:5,1373-1374 (2005).

<sup>2</sup>*Ibidem*.

<sup>3</sup>Sanders D., "Human Rights and Sexual Orientation in International Law", *International Journal of Public Administration*, 25:1, p.13-14 (2002).

<sup>4</sup>The term LGBTI stands for "Lesbian, Gay, Bisexual, Transgender and Intersex". Other known abbreviations are LGBT (Lesbian, gay, Bisexual and Transgender) and LGBTQ (Lesbian, Gay, Bisexual, Transgender and Queer).

recognition in national legal systems and in international law, and when Non-Governmental Organisations started tackling the issue.<sup>5</sup>

The starting point for the evolution of sexual minorities rights in international human rights law is the 1981 judgement of the case *Dudgeon V. the United Kingdom*,<sup>6</sup> in which Mr. Dudgeon argued that the Northern Irish buggery laws represented a violation of his right to privacy. This was the first case regarding homosexuality to be heard by the European Court of Human Rights.<sup>7</sup> The ECtHR ruled in favour of Dudgeon, stating that such laws were, in fact, violating Article 8 of the ECHR. Since then, sexual minorities increasingly acquired recognition in the international community, gradually tackling new and different issues related, for example, to gender identity, same-sex marriage, and same-sex adoptions.

However, the LGBTI discourse in International Human Rights Law has always found significant obstacles in the form of reluctant States not willing to recognize sexual minorities rights. An example of such reluctance is given by the significant opposition that the UN Resolution 17/19 on Human Rights, Sexual Orientation, and Gender Identity has faced. In fact, such resolution narrowly passed by 23 votes against 19.<sup>8</sup> The lack of an actual treaty on the protection of sexual minorities could be seen as another evidence of the persistent reluctance of several States to recognize LGBTI rights.

The Yogyakarta Principles represent an attempt to fill in the gap. This document establishes 29 principles that delineate States' obligations concerning sexual orientation and gender identity. Despite representing an essential step towards the recognition of sexual minorities rights, these principles are not binding, since they have never been drafted into a formal convention.<sup>9</sup>

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<sup>5</sup>Sanders D., "Human Rights and Sexual Orientation in International Law", p.2 (2002).

<sup>6</sup>Case *Dudgeon v The United Kingdom*, application no. 7525/76, October 22<sup>nd</sup>, 1981.

<sup>7</sup>Sanders D., "Human Rights and Sexual Orientation in International Law", p.2 (2002).

<sup>8</sup>McGoldrick D., "The Development and Status of Sexual Orientation Discrimination Under International Human Rights Law", *Human Rights Law Review* 16, p. 619(2016).

<sup>9</sup>Scaffidi Ruchella L., "Il Riconoscimento delle Unioni Same-sex nel Diritto Internazionale Privato Italiano", *Jovene Editore*, p.108-109 (2012) (in Italian) .

The following paragraphs will be focused on analysing how LGBTI rights evolved throughout time in different contexts, namely the UN system, the European Court of Human Rights, the Inter-American system, and the ASEAN system. It will also deal with the analysis of the Yogyakarta Principles.

The chapter will proposedly omit the analysis of the development of LGBTI rights in the African Commission on Human and Peoples' Rights. While such omission brings to an incomplete analysis of the development of SOGI rights in regional bodies, the little progress shown with regards to the topic at hand makes its analysis not relevant to the aim of this chapter.

This chapter will also provide the reader with the analysis of some of the major violations of LGBTI rights. The list that will be provided is without any doubt insufficient to really depict the entirety of the problems related to the protection of these rights. However, the last part of this chapter will be linked to the third, and last, chapter of this thesis, which will analyse some of the major violations of LGBTI rights registered in South Korea.

## *1.1 LGBTI Rights in the UN System*

For sure, the recognition of sexual minorities rights in the UN system has met numerous obstacles, in the form of the strong opposition of right-wing Catholics and fundamentalist Islamic States to the recognition of said rights.<sup>10</sup>

For numerous years, LGBTI rights were not recognised by the UN system, as also noticeable by the UN Human Right Committee's opinion on the case *Hertzberg v Finland*.<sup>11</sup> The Human Rights Committee upheld the decision of the Finnish Broadcasting Company that decided that radio and

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<sup>10</sup>Swiebel J., "Lesbian, Gay, Bisexual and Transgender Human Rights: The search for an International Strategy", *Contemporary Politics*, 15:1, p.25 (2009).

<sup>11</sup>*Hertzberg v. Finland*, Comm. 61/1979, U.N. Doc. A/37/40, (HRC 1982).

TV were not the appropriate place to discuss homosexuality.<sup>12</sup> In the opinion, it was stated that:

*“The Committee finds that it cannot question the decision of the responsible organs of the Finnish Broadcasting Corporation that radio and TV are not the appropriate forums to discuss issues related to homosexuality, as far as a programme could be judged as encouraging homosexual behaviour. [...] As far as radio and TV programmes are concerned, the audience cannot be controlled, in particular, harmful effects on minors cannot be excluded.”*<sup>13</sup>

The Dutch Minister Annelien Kappeyne van de Coppello was the first speaker to introduce the issue to a formal UN meeting. Indeed, during her speech for the Third UN World Conference on Women in Nairobi, she pleaded for lesbian rights.<sup>14</sup> The affirmation of LGBTI rights in the UN system, however, only started in 1993, when the United Nations Human Rights Committee stated its view on the case *Toonen v. Australia*,<sup>15</sup> declaring Tasmanian anti-gay laws a violation of Article 26<sup>16</sup> of the International Covenant on Civil and Political Rights.<sup>17</sup> In the case of *Toonen v. Australia*, Mr. Toonen had reported to the Committee that articles 122<sup>18</sup> and 123<sup>19</sup> of the Tasmanian Criminal Code represented a violation of his right to privacy. Following the release of the Committee’s opinions, the Tasmanian government refused to comply with the decision, also refusing to recognise that its anti-homosexuality laws were “an arbitrary interference

<sup>12</sup>Conte A. and Burchill R., “Defining Civil and Political Rights: The Jurisprudence of the United Nations Human Rights Committee”, University of Hull, p.88 (2009).

<sup>13</sup>Hertzberg v. Finland, 161 [10.4] (HRC 1982).

<sup>14</sup>Swiebel J., “Lesbian, Gay, Bisexual and Transgender Human Rights: The Search for an International Strategy”, p.25 (2009).

<sup>15</sup>*Toonen v Australia*, UN Doc. CCPR/C/WG/44/D/488/1992 (The Decision) (1992)

<sup>16</sup>Article 26 of the ICCPR: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

<sup>17</sup>Wayne M. “Identifying Evil for What It Is: Tasmania, Sexual Perversity and the United Nations”, Melbourne University Law Review 19:3, p. 741 (1994).

<sup>18</sup>Article 122 (now amended): Any person who (a) has sexual intercourse with any person against the order of nature; (b) has sexual intercourse with an animal or; (c) consents to a male person having sexual intercourse with him or her against the order of nature, is guilty of a crime. Charge: Unnatural sexual intercourse.”

<sup>19</sup>Article 123 (now repealed): “Any male person who, whether in public or private, commits any indecent assault upon, or other acts of gross indecency with, another male person, or procures another male person to commit any act of gross indecency upon himself or any other male person, is guilty of a crime. Charge: Indecent practice between male persons.”

with the right to privacy.”<sup>20</sup> The matter was also brought before the Australian High Court but, before reaching a final decision, the Tasmanian criminal code was amended in 1997, repealing part of article 122 and the totality of article 123.<sup>21</sup>

On that same period, discrimination based on sexual orientation was being also discussed in the preparatory conferences for the Fourth World Conference on Women, which would have been held in Beijing in 1995. At the beginning of the Beijing Conference, the term “sexual orientation” was referenced four times. However, because of the internal division caused by the inclusion of such term, any reference was in the end omitted. Despite such omission, the Beijing Conference represented the first time that State parties substantively discussed the issue in a UN forum.<sup>22</sup> Moreover, in 1993, the LGBTI organization ILGA-Europe was granted the consultative status with the United Nations Economic and Social Council.<sup>23</sup> Such status was then suspended in 1994, after media reported that among ILGA members there also was the North American Man/Boy Love Association. Following the report, ILGA immediately expelled the paedophile organization. However, in 1994, the organization got its consultative status suspended by unanimity.<sup>24</sup> the following year, ILGA passed a new general resolution in which was stated that the association was not seeking recognition of paedophilia. Its consultative status was reintegrated only in 2011.<sup>25</sup>

A further development came in 2003, when the UN Human Rights Committee stated its view on the case *Young v Australia*,<sup>26</sup> concerning the access to a war veteran’s dependant pension. As a matter of fact, following the death of his long-time partner, who was indeed a war veteran, Mr. Young

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<sup>20</sup> Sanders D., “Human Rights and Sexual Orientation in International Law”, p.20 (2002).

<sup>21</sup>For the complete Amendment Act, visit:

<https://www.legislation.tas.gov.au/view/whole/html/asmade/act-1997-012>

<sup>22</sup>Sanders D., “Human Rights and Sexual Orientation in International Law”, p. 15(2002)

<sup>23</sup>Baisley E., “Reaching the Tipping Point? Emerging International Human Rights Norms Pertaining to Sexual Orientation and Gender Identity”, *Human Rights quarterly*, 38:1, p. 144 (2016).

<sup>24</sup>*Ibidem*.

<sup>25</sup>*Ibidem*.

<sup>26</sup>*Young v Australia*, Comm. 941/2000, UN Doc CCPR/C/78/D/941/2000 (2003).

had applied for a pension benefit, which was denied because of the homosexual nature of his previous relation.<sup>27</sup> The Committee found a violation of Article 26 of the ICCPR, recalling what was already established in the case of Toonen: “the prohibition against discrimination under article 26 comprises also discrimination based on sexual orientation”.<sup>28</sup> The Committee also stated that, while discrimination based on objective criteria does not violate the Covenant, “The State party provides no arguments on how this distinction between same-sex partners,[...] and unmarried heterosexual partners [...] is reasonable and objective, and no evidence which would point to the existence of factors justifying such a distinction has been advanced.”<sup>29</sup>

Always in 2003, Brazil introduced the UNHRC resolution on “Sexual Orientation and Human Rights”, also known as the Brazil Resolution. Said resolution had the aim of affirming that the existing rights, protected by the foundational documents, were to be granted regardless of sexual orientation.<sup>30</sup> The proposed resolution caused the immediate reaction of Southern States, which drafted a counterstatement declaring that SOGI related issues did not concern them.<sup>31</sup> The proposal, however, was also criticized by some of the twenty-six States that joined Brazil in sponsoring the Resolution.<sup>32</sup> Indeed, Brazil was criticized for not consulting civil society organizations nor potential allies. Moreover, some of the Countries willing to ally with Brazil would have wanted a broader approach to the issue, so to include sexual rights and gender identity.<sup>33</sup> In the end, the consideration of the resolution was postponed to 2004, only to be postponed again to 2005,

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<sup>27</sup> International Commission of Jurists, “Sexual Orientation, Gender Identity and International Human Rights Law, Practitioners Guide No.4”, p. 34 (2009).

<sup>28</sup> *Young v Australia* [10.4] (2003).

<sup>29</sup> *Ibidem*.

<sup>30</sup> Lau H., “Sexual Orientation: Testing the Universality of International. Human Rights Law”, *The University of Chicago Law Review*, p.1703 (2004).

<sup>31</sup> MacArthur G., “Securing sexual Orientation and Gender Identity Rights within the United Nations Framework and System: Past, Present and Future”, *The Equal Rights Review*, 15, p.33 (2015).

<sup>32</sup> Baisley E., “Reaching the Tipping Point? Emerging International Human Rights Norms Pertaining to Sexual Orientation and Gender Identity”, p.149 (2016).

<sup>33</sup> *Ibidem*.



when Brazil decided not to proceed with the Resolution.<sup>34</sup> Despite the failure of the Brazil Resolution, that same year New Zealand delivered a joint statement, asserting the evidence of human rights violations on the grounds of sexual orientation.<sup>35</sup> Among the states who joined the statement, there was also South Korea, which became the first Asian government to endorse non-discrimination based on sexual orientation.<sup>36</sup>

From 2006 to 2008, further developments were made when several LGBTI organizations were granted with the consultative status.<sup>37</sup> Furthermore, that same year, 54 States (rose to 60 in 2008) supported a statement made by Norway during the third meeting of the Human Rights Council, which sought to include SOGI rights in the Council's agenda.<sup>38</sup>

A significant milestone was then reached in June 2011, when the Human Rights Council finally adopted its first Resolution concerning sexual orientation and gender identity.<sup>39</sup> Even though the Resolution 17/19 was adopted only by narrow margin, with 23 votes in favour and 19 opposed,<sup>40</sup> It still received approval by states belonging to all regions. Such resolution brought to the drafting of the first report on SOGI rights, which underlined "a pattern of systematic violence and discrimination in all regions."<sup>41</sup> A second resolution on the matter was also adopted in 2014. The Resolution condemned once again discrimination based on sexual orientation and gender identity. Its adoption met a limited increase in support, with 24 votes in favour, 14 against, and 7 abstentions. It also required (exactly as Resolution 17/19) the reports from the High Commissioner for Human

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<sup>34</sup>*Ibidem*, p.150.

<sup>35</sup>O'Flaherty M. and Fisher J., "Sexual Orientation, Gender Identity and International Human Rights Law: Contextualizing the Yogyakarta Principles", *Human Rights Law Review*, 8:2, p. 230 (2008).

<sup>36</sup>Baisley E., "Reaching the Tipping Point? Emerging International Human Rights Norms Pertaining to Sexual Orientation and Gender Identity", p.150 (2016).

<sup>37</sup>Swiebel J., "Lesbian, Gay, Bisexual and Transgender Human Rights: The Search for an International Strategy", p.25 (2009).

<sup>38</sup>*Ibidem*, p.26.

<sup>39</sup>Office of the High Commissioner, "Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law", New York and Geneva, p.9 (2012).

<sup>40</sup>McGoldrick D., "The Development and Status of Sexual Orientation Discrimination Under International Human Rights Law", p. 619(2016).

<sup>41</sup>Office of the High Commissioner, "Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law", p.9 (2012).

Rights. 42 In 2016, the Council created a special procedures mandate, creating the Independent Expert on protection from violence and discrimination based on sexual orientation and gender identity.<sup>43</sup> The expert is in charge of assessing “the implementation of existing international human rights instruments with regard to ways to overcome violence and discrimination against persons on the basis of their sexual orientation or gender identity, and to identify and address the root causes of violence and discrimination.”<sup>44</sup>

Recently, the UN bodies have also been invested in ending human rights violations against intersex children. In fact, in 2015 the first United Nations Expert meeting on ending human rights violations against intersex persons was held while, in 2016, a joint call by the United Nations and regional human rights expert was released, in order to request to governments to prohibit violence against intersex children.<sup>45</sup> Moreover, numerous UN treaty bodies have expressed their concern regarding the discrimination of intersex individuals. To cite a few examples, the Committee on Economic, Social and Cultural Rights and the Committee on the Rights of the Child have affirmed that the non-discrimination clauses included in the ICESCR and the CRC also include intersex individuals, while the Committee against Torture has recognised that States’ obligations with regards the prohibition of torture are to be applied also regardless of sex characteristics.<sup>46</sup>

Despite the numerous milestones that UN bodies have achieved in protecting SOGI rights from discrimination, it is undeniable that a lot has yet to be done. Clearly, the main obstacle is represented by conservative State

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<sup>42</sup>MacArthur G., “Securing sexual Orientation and Gender Identity Rights within the United Nations Framework and System: Past, Present and Future”, p.35 (2015).

<sup>43</sup>Office of the High Commissioner, “Born Free and Equal: Sexual Orientation, Gender Identity and sex Characteristics in International Human Rights Law”, New York and Geneva, p.1 (2019).

<sup>44</sup>*Ibidem*.

<sup>45</sup>*Ibidem*, p.2.

<sup>46</sup>*Ibidem*, p.10-11.

parties, which do not seem willing to collaborate with the more progressive countries. As a matter of fact, numerous African and Asian states have been advocating for a relativist approach to human rights, which would bend such rights to the Countries' "culture" and "traditions". Such definition of human rights as been used, for example, by Islamist states who opposed the CEDAW, since women's rights, as presented in the convention, would not respect the Sharia.<sup>47</sup> Another example is given by China, who has justified its political oppression on the population though "Chinese values".<sup>48</sup> Applying relativism to human rights, would mean to bend such rights to local "traditions" and "values". Relativism of human rights was also used as a trade-off during the Beijing Conference, when the Holy See and its allies had asked to either keep the universal value of human rights or keeping the four references to sexual orientation in the draft Platform of Action.<sup>49</sup> Even though relativism of human rights is usually advocated by non-western countries, Henry Lau explained how, at least at the very beginning, also the United States have applied relativism on SOGI rights, as also noticeable from the proposed legislation on marriage of 2004. Indeed, that year former President George W. Bush had proposed a Federal Marriage Amendment, in which legal recognition of same-sex marriage would have been rendered unconstitutional.<sup>50</sup> Nowadays the USA are great promoters of SOGI rights, but their initial relativist position over the matter (completely in contrast with the universalist approach the Country had been using regarding all other human rights-related issues), has for sure created a negative impact on the development of LGBTI rights.

A further issue is given by the concept of SOGI as a "complex and sensible" issue. Indeed, according to Eric Heinze, SOGI rights are not excluded by international law because they represent a complex issue, but

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<sup>47</sup>Lau H., "Sexual Orientation: Testing the Universality of International. Human Rights Law", *The University of Chicago Law Review*, p.1694 (2004).

<sup>48</sup>*Ibidem*.

<sup>49</sup>Baisley E., "Reaching the Tipping Point? Emerging International Human Rights Norms Pertaining to Sexual Orientation and Gender Identity", p.146 (2016).

<sup>50</sup>Lau H., "Sexual Orientation: Testing the Universality of International. Human Rights Law", *The University of Chicago Law Review*, p.1705 (2004).

rather the opposite, since their systematic exclusion from the international agenda promotes the “sensitivity” discourse, hence contributing to their mystification and alienation.<sup>51</sup> Clearly, after the publication of Heinze’s article in 2001, numerous steps toward sexual minorities recognition have been made. However, it is also true that an international covenant or convention on sexual minorities rights has yet to be drafted. While the two resolutions adopted respectively in 2011 and 2016 do represent important milestones, they are nonbinding instruments, hence their violation by State Parties does not challenge their international responsibility. It is important to state, however, that one of the fundamental documents for the protection of human rights is nonbinding. As a matter of fact, the Universal Declaration on Human Rights was actually declared by a General Assembly resolution in 1948.<sup>52</sup> Yet, this document is still considered at the core of human rights protection. However, while the Declaration itself is nonbinding, it is important to notice how, throughout time, its core values have been codified in numerous international covenants and conventions that, on the contrary, are legally binding.

While the so-called soft law is still fundamental in international law, the lack of binding instruments in the protection of SOGI rights does represent an important obstacle in protecting sexual minorities. For sure, the UN will have to further improve its approach to SOGI right

## *1.2 LGBTI Rights in the European Court of Human Rights*

Up until now, the European Court of Human rights is probably the most advanced body in terms of recognition of LGBTI rights. As a matter of fact, this regional court was the first one to rule the violation of rights in relation to discrimination against homosexuality. The ground-breaking

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<sup>51</sup>Heinze E., “Sexual Orientation and International Law: A Study in the Manufacture of Cross-Cultural Sensitivity”, *Michigan Journal of International Law*, 22:2, p.284 (2001).

<sup>52</sup>United Nations, “Universal Declaration of Human Rights” (Accessed December 2019): <https://www.un.org/en/universal-declaration-human-rights/>

judgment dates back to 1981, when the Court was presented with the case *Dudgeon v. The United Kingdom*, dealing with the Northern Irish buggery laws, which criminalized homosexuality. Because of such laws, Mr. Dudgeon lamented a violation of his right to privacy, while the UK justified the provisions as “a necessity in a democratic society, in order to protect morals.”<sup>53</sup>

The Court ruled in favour of the applicant, recognizing that the Buggery laws were indeed a violation of Article 8 of the European Convention of Human Rights.<sup>54</sup> More specifically, the Court ruled that “the Court cannot overlook the marked changes which have occurred in this regard in the domestic law of the member States.”<sup>55</sup>

While the case of Mr. Dudgeon is the first case in which the Court’s judgement was in favour of the applicant, it was not the first case dealing with homosexuality ever presented to the regional body. Indeed, between 1955 and 1980 numerous cases were brought before the European Commission of Human Rights,<sup>56</sup> in an attempt of finding recognition for LGBTI rights.<sup>57</sup> The very first case dated back to 1955, when the case of *W.B. v The Federal Republic of Germany*<sup>58</sup> was brought in front of the Commission with regards to paragraph 175 of the Criminal Code of The Federal Republic of Germany, which criminalized “unnatural fornication”

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<sup>53</sup>Berger V., “Jurisprudence de la Cour Européenne des Droits de l’Homme, 13e Édition”, Sirey, p.522-528 (2014) (In French).

<sup>54</sup>Article 8 of the ECHR: “Everyone has the right to respect for his private and family life, his home and his correspondence.

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others” .

<sup>55</sup>*Dudgeon v The United Kingdom*, 1981

<sup>56</sup>Before the adoption of Protocol 11 in 1998, the European Commission of Human Rights was in charge of evaluating the admissibility of the applications. If an application was considered admissible, it was then presented to the Court, which evaluated the presence of an actual violation of the European Convention on Human Rights.

<sup>57</sup> International Commission of Jurists, “Sexual Orientation, Gender Identity and International Human Rights Law, Practitioners Guide No.4”, (2009).

<sup>58</sup>*W.B. v The Federal Republic of Germany*, application no.104/55, commission decision December 7, 1955

and “lewd act” between men.<sup>59</sup> The Commission declared the case inadmissible, since “the Convention permits a high contracting party to legislate to make homosexuality a punishable offence”. In the following years, paragraph 175 was contested in numerous other cases, but the Commission maintained its stance, denying their admissibility.

The Commission reiterated its stance in 1962, in the case *G.W. v The Federal Republic of Germany*.<sup>60</sup> Mr G.W. had already submitted five other complaints to the Commission between 1957 and 1961, two of which raised the same issue of his sixth application.<sup>61</sup> As already happened for the five previous cases, The Commission denied the admissibility of the case and stated that the past applications were “proof of a querulous and abusive exercise of the right of petition”.<sup>62</sup>

The case of *Dudgeon v. The United Kingdom* truly represented a milestone decision, since several other cases, such as *Norris v. Ireland*<sup>63</sup> in 1988, and *Modinos v Cyprus*<sup>64</sup> in 1993, were judged in a similar way. Indeed, in both cases the Court rejected the argument of the “protection of morals” as a sufficient reason to criminalize consensual sexual relations between same-sex adults.<sup>65</sup> A similar reasoning was also applied in 1997, when the Court found that the unequal age of consent between homosexuals and heterosexuals established by The United Kingdom violated Article 8 of the Convention.

*Dudgeon v The United Kingdom* had great resonance in the European Union, where the judgement influenced the drafting of the Squarcialupi report in 1984. Through the report, in fact, the European Parliament asked for the decriminalisation of homosexuality, the abolition of the discriminatory laws imposing a different age of consent for same-sex

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<sup>59</sup> Johnson P., “Homosexuality and the European Court of Human Rights”, Routledge, p.22 (2014).

<sup>60</sup> *Ibidem*, p.27; *GW v The Federal Republic of Germany*, application no. 1307/61, commission decision October 4<sup>th</sup>, 1962.

<sup>61</sup> *GW v The Federal Republic of Germany* (1962)

<sup>62</sup> Cited in Johnson P., “Homosexuality and the European Court of Human Rights”, p.28 (2014).

<sup>63</sup> *Norris v. Ireland*, application no. 10581/83, October 26, 1988

<sup>64</sup> *Modinos v. Cyprus*, application no. 15070/89, April 22, 1993

<sup>65</sup> Sanders D., “Human Rights and Sexual Orientation in International Law” (2002).

relations, and the rejection of the World Health organisation's classification of homosexuality as a mental illness.<sup>66</sup> Moreover, the report asked for the European Commission to table a proposal to deal with the issue of discrimination of homosexuals in employment.<sup>67</sup>

The Squarcialupi report failed in creating any effect outside the Parliament itself because of the great opposition it met, specifically from the conservative wing of the European Parliament, which argued the lack of legal competence of the Parliament itself to decide on moral issues and national criminal laws.<sup>68</sup> For both this reason, and the fear that the European Commission would not have accepted the proposal, the Commissioner for Employment and Social Affairs, Ivor Richard, decided he was both "unwilling" and "unable" to act.<sup>69</sup> This first report, however, brought to the drafting of the Roth Report in 1994, which has been a fundamental document in the development of LGBTI rights, especially because it contributed to the drafting of the Treaty of Amsterdam, which amended the Treaty Establishing the European Community that now includes article 13,<sup>70</sup> which explicitly prohibits discrimination on the grounds of sexual orientation.

in 1999, the Court took another landmark decision in the cases *Lusting Prean and Beckett v. the United Kingdom*<sup>71</sup> and *Smith and Grady v. the United Kingdom*.<sup>7273</sup> In both cases, the applicants argued that the British

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<sup>66</sup>Mos M., "Of Gay Rights and Christmas Ornaments: The Political History of Sexual Orientation Non-Discrimination in the Treaty of Amsterdam", *Journal of Common Market Studies* 52:3, p. 637 (2014).

<sup>67</sup>Swiebel J., "Lesbian, Gay, Bisexual and Transgender Human Rights: The Search for an International Strategy, p.22 (2009).

<sup>68</sup>*Ibidem*.

<sup>69</sup>*Ibidem*; Mos M., "Of Gay Rights and Christmas Ornaments: The Political History of Sexual Orientation Non-Discrimination in the Treaty of Amsterdam", p. 639 (2014).

<sup>70</sup>Article 13 (ex Article 6a) of the TEC: "Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."

<sup>71</sup>*Lusting Prean and Beckett v. the United Kingdom*, Applications nos. 31417/96 and 32377/96, September 27, 1999

<sup>72</sup>*Smith and Grady v. the United Kingdom*, Applications nos. 33985/96 and 33986/96, September 27, 1999

<sup>73</sup>International Commission of Jurists, "Sexual Orientation, Gender Identity and International Human Rights Law, Practitioners Guide No.4" (2009).

laws preventing homosexual people from joining the military were a violation of their right to privacy. The Court ruled in favour of the applicants, since:

European countries operating a blanket legal ban on homosexuals in their armed forces are now in a small minority. It considers that, even if relatively recent, the Court cannot overlook the widespread and consistently developing views and associated legal changes to the domestic laws of Contracting States on this issue [...] <sup>74</sup>

That very same year, the ECtHR officially declared “sexual orientation” as a prohibited category of discrimination.<sup>75</sup> Indeed, in its reasoning for the case *Salgueiro V. Portugal*, the Court found a breach in Article 8, striking down the decision of a Portuguese court sentencing the loss of paternal custody based on the man’s homosexuality.<sup>76</sup>

Of great importance is the contribution that the Council of Europe is providing in affirming transgender and intersex rights. As a matter of fact, the Istanbul Convention is one of the few international treaties to prohibit discrimination on the base of gender identity.<sup>77</sup> Moreover, in 2010 In the case *PV v Spain*,<sup>78</sup> the Court established that “transsexuality is a notion which is, without doubt, covered by Article 14 of the Convention”,<sup>79</sup> hence widening the scope of said Article. The case specifically dealt with the restrictions applied to a Male-to-Female transsexual with regards to her visitations with her son, following her divorce from the mother of the child.<sup>80</sup>

The first relevant case related to transsexual rights dates back to 2000, when the Court ruled in favour of the applicant Christine Goodwin,

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<sup>74</sup>Sanders D., “Human Rights and Sexual Orientation in International Law” (2002).

<sup>75</sup> International Commission of Jurists, “Sexual Orientation, Gender Identity and International Human Rights Law, Practitioners Guide No.4” (2009).

<sup>76</sup>*Ibidem*.

<sup>77</sup>Article 4 [3] of the Istanbul Convention: “ The implementation of the provisions of this Convention by the Parties, in particular measures to protect the rights of victims, shall be secured without discrimination on any ground such as sex, gender, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, sexual orientation, gender identity, age, state of health, disability, marital status, migrant or refugee status, or other status.”

<sup>78</sup>Affaire *PV c Espagne*, application no. 35159/09 [37], November 30th, 2010 (in French)

<sup>79</sup>Cited in Van den Brink M. and Dunne P., “Trans and Intersex Equality Rights in Europe, A Comparative Analysis”, Luxembourg: Publications Office of the European Union, p.40 (2018).

<sup>80</sup>Affaire *PV c Espagne*, application no. 35159/09 [37], November 30th, 2010 (in French)



who lamented a violation of Article 8, Article 12<sup>81</sup> and Article 14<sup>82</sup> of the Convention, because of the unwillingness of the United Kingdom to issue a new birth certificate following her sexual reassignment surgery. Despite the landmark judgement, the Court has yet to decide on a case focused on discrimination based on sex characteristics.<sup>83</sup> Indeed, even though Mrs. Goodwin had filed a complaint regarding the violation of Article 8, 12 and 14 of the Convention, the Court found that the issues analysed in the case “[...] have been examined under Article 8 and resulted in the finding of a violation of that provision. In the circumstances, the Court considers that no separate issue arises under Article 14 of the Convention and makes no separate finding.”<sup>84</sup>

Moreover, in the case *P.V. v Spain*, while observing that discrimination of transsexuals does indeed fall under Article 14, the Court also ruled that “the restriction of the visiting arrangements were not the results of discrimination based on the applicant’s transsexuality. The Court concludes that there has not been a violation of Article 8 in combination to Article 14.”<sup>85</sup>

The scope of Article 14 was widened once again in the case *Identoba and Others v Georgia*, in which the Court found that “the prohibition of discrimination under Article 14 of the Convention duly covers questions related to sexual orientation and gender identity.”<sup>86</sup> The case, however, did not regard gender identity and sex characteristics, but dealt with the lack of police intervention against, and subsequent investigation of, the physical

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<sup>81</sup>Article 12 of the ECHR: Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

<sup>82</sup>Article 14 of the ECHR: “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

<sup>83</sup>Van den Brink M. and Dunne P., “Trans and Intersex Equality Rights in Europe, A Comparative Analysis”, p.40 (2018).

<sup>84</sup>Case Christine Goodwin V. The United Kingdom, application no. 28957/95 [108], November 11<sup>th</sup>, 2002.

<sup>85</sup> PV c Espagne (2010) (in French)

<sup>86</sup>Cited in Van den Brink M. and Dunne P., “Trans and Intersex Equality Rights in Europe, A Comparative Analysis”, p.40-41 (2018).

assaults and verbal offenses from individuals belonging to two specific religious groups against the participants of an anti-homophobia parade held in Tbilisi.

Despite the great role that the Court is playing in the recognition of LGBTI rights, it is undeniable that numerous issues have yet to be solved. Such issues emerge, for example, with regards to the right to marry, protected by Article 12 of the Convention. In fact, while in *Schalk and Kopf v Austria*, the Court found that “the Court would no longer consider that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex. Consequently, it cannot be said that Article 12 is inapplicable to the applicants’ complaint”,<sup>87</sup> it also established that “the question whether or not to allow same-sex marriage is left to regulation by the national law of the Contracting State.”<sup>88</sup>, hence giving wide margin of appreciation to the member States.

The same problem is presented with regards to transsexual rights, as also shown in the case *Hämäläinen v Finland*.<sup>89</sup> The case dealt with the requirements that the Finnish law establishes in order to obtain a legal change of sex. According to the Finnish law, in fact, married individuals willing to confirm their new status as male or female individuals, have to either divorce or convert their union into a registered partnership. The Court upheld the validity of the aforementioned laws, ruling that even though such matter does fall under Article 12, it “cannot be construed as imposing an obligation on the Contracting States to grant access to marriage to same-sex couples.”<sup>90</sup>

In relation to transgender and transsexual rights, the Court has also yet to recognise the validity of the right to self-determined legal gender, as instead regulated by the Yogyakarta Principles.<sup>91</sup> The Court has indeed

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<sup>87</sup>Case *Schalk and Kopf v Austria*, Application no. 30141/04 [61], June 24<sup>th</sup>, 2010.

<sup>88</sup>*Ibidem*.

<sup>89</sup>Case *Hämäläinen v Finland*, Application no. 37359/09 [96], July 16<sup>th</sup>, 2014.

<sup>90</sup>*Ibidem*.

<sup>91</sup>Van den Brink M. and Dunne P., “Trans and Intersex Equality Rights in Europe, A Comparative Analysis”, p.42 (2018).

ruled that the member States' "quasi unanimity" in requiring a formal diagnosis before the recognition of legal gender recognition, guarantees a wide margin of appreciation on the matter.<sup>92</sup>

### *1.3 LGBTI Rights in the Inter-American Commission and Court of Human Rights*

The European Convention on Human Rights, together with the International Covenant on Civil and Political Rights influenced the drafting of another important tool for the protection of human rights, namely the American Convention on Human Rights.<sup>93</sup> This Convention was drafted in 1969 and, seemingly to the ECHR, established the Inter-American Court of Human Rights in 1978. The aim of the court, together with the Inter-American Commission of Human Rights,<sup>94</sup> is to safeguard the implementation of the rights granted by the ACHR.<sup>95</sup>

The American Convention, seemingly to all the other Conventions on human rights, does not explicitly condemn discrimination on the base of sexual orientation and/or gender identity.<sup>96</sup> Despite the lack of an explicit condemnation of such discrimination, both the Inter-American Commission and the Inter-American Court have declared the illegitimacy of such violation. In 1999, the IACHR made a first step towards the recognition of SOGI rights, when it declared the case of *Marta Lucía Álvarez Giraldo v Colombia*<sup>97</sup>

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<sup>92</sup>*Ibidem.*

<sup>93</sup>Shelton D., "The Jurisprudence of the Inter-American Court of Human Rights", *American University International Law Review*, 10:1, p. 335 (1994).

<sup>94</sup>The Inter-American Commission of Human Rights was established in 1959, during the Fifth Meeting of Consultation of Ministers of Foreign Affairs. Its statute was then revised after the entry into force of the American Convention on Human Rights.

<sup>95</sup>Shelton D., "The Jurisprudence of the Inter-American Court of Human Rights", p. 335 (1994).

<sup>96</sup> Article 1 of the ACHR [1]: "The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition".

<sup>97</sup>*Marta Lucía Álvarez Giraldo v Colombia*, informe no. 122/18, Caso 11.656, Informe de fondo (publicación) (2018) (in Spanish).

admissible.<sup>98</sup> The case dealt with the denial of Colombian authorities to recognize intimate visitations between Mrs. Alvarez, detained in "La Badea" detention centre, and her same-sex partner.<sup>99</sup> In its report, the Commission stated that the petition presented refers to "facts that could involve, *Inter alia*, a violation of Article 11(2) of the American Convention."<sup>100</sup> In its report on the merits of the case, the Commission found an actual violation of the ACHR, since "[...] While she was deprived of her liberty, the State of Colombia has violated Marta Álvarez's rights to personal integrity and fair treatment, granted by article 5.1 in relation to Article 1.1 of the American Convention."<sup>101</sup>

A fundamental case for the protection of SOGI rights was *Atala Riffo and daughters v. Chile*.<sup>102</sup> Mrs. Atala had filed a petition to the Inter-American Commission with regards to her loss of custody over her three daughters. The applicant had divorced her ex-husband in March 2002, and by common agreement, she was recognized the custody of their three daughters. In November of that same year, Mrs. Atala's same-sex partner began living with the applicant and her daughters. On January 2003, Mrs. Atala's ex-husband filed a custody suit, which he won in 2004, when the Chilean Supreme Court overturned the decision of the lower courts. After Mrs Atala's petition to the IACHR, the parties involved tried to reach an amicable settlement. In 2007, however, the applicant requested the admissibility of the case to the Commission, which admitted it.<sup>103</sup> The Commission, then, approved the report on merits in 2009, concluding that:

"In light of the considerations of fact and law set out in this report, [...] the State of Chile did violate the right of Karen Atala to live free from discrimination provided for in Article 24 of the American Convention, in relation to articles 1.1 and 2 of the same instrument. The State also violated articles 11.2, 17.4, 19, 8.1, and 25.1 of

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<sup>98</sup> International Commission of Jurists, "Sexual Orientation, Gender Identity and International Human Rights Law, Practitioners Guide No.4", p.38 (2009).

<sup>99</sup>Marta Lucía Álvarez Giraldo v Colombia, caso 11.656, informe no.71/99, May 4<sup>th</sup>, 1999 (admissibility) (in Spanish).

<sup>100</sup>*Ibidem* [21].

<sup>101</sup>Marta Lucía Álvarez Giraldo v Colombia [226] (2018) (in Spanish).

<sup>102</sup>case of *Atala Riffo and daughters v. Chile* Merits, Reparations and Costs, Series C No. 239, Judgement of February 24<sup>th</sup>, 2012.

<sup>103</sup>Stern J., "Creating Legacy Today: The First LGBT Ruling by the Inter-American Court of Human Rights", *City University of New York Law Review*, 15:2, p.250 (2012).

the American Convention, in conjunction with Article 1.1 thereof, with respect to the individuals identified in the corresponding sections.”<sup>104</sup>

The Chilean government, however, did not comply with the recommendations of the Commission that file an application before the Inter-American Court of Human Rights, in order to establish the international responsibility of Chile. In its final judgement, the IACtHR confirmed that Chile did, in fact, violate the American Convention and also explicitly stated that “the Inter-American Court establishes that the sexual orientation and gender identity of persons is a category protected by the Convention”<sup>105</sup>, hence establishing that discrimination based on sexual orientation is prohibited. Such decision is important not only because it explicitly prohibits discrimination of homosexuality, but also because it provides the notion of “family” with a broad meaning, including unmarried and non-heterosexual families.<sup>106</sup>

Seemingly to the European Court of Human Rights, The IACtHR considers the American Convention a living instrument, whose interpretation is adapted to the current living conditions. A major difference, however, lays in referencing the margin of appreciation of member states and regional consensus.<sup>107</sup> For instance, while the ECtHR did implicitly cite regional consensus in the case of *Dudgeon*<sup>108</sup>, the IACtHR, in the case of *Atala*, simply stated that sexual orientation was a category included in the American Convention on Human Rights.

Among the other important milestones in the Inter-American System, there is the establishment, by the IACHR, of the Rapporteur on the Rights

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<sup>104</sup>Cited in Inter-American Commission on Human Rights, “Application before the Inter-American Court of Human Rights In the case of Karen Atala and daughters (Case 12.502) Against the State of Chile”, September 17<sup>th</sup>,2012.

<sup>105</sup>Atala Riffo and daughters v. Chile Merits [91] (2012).

<sup>106</sup>Sáez M., “In the Right Direction, Family Diversity in the Inter-American System of Human Rights”, North Carolina Journal of International Law, 44:2, p.330 (2019).

<sup>107</sup>McGoldrick D., “The Development and Status of Sexual Orientation Discrimination Under International Human Rights Law”, p. 641 (2016).

<sup>108</sup>*Dudgeon v The United Kingdom* [60].

of Lesbian, Gay Bisexual, Trans and Intersex persons.<sup>109</sup> The rapporteur, established in 2013, has the function of processing petitions and cases, providing technical assistance to OAS Member States and OAS political organs on this area, preparing reports with recommendations aimed at OAS States in the areas of legislation, public policy, and judicial interpretation on the human rights of these persons, and general monitoring of human rights violations of LGBTI persons in the Americas and promoting their visibility.<sup>110</sup>

Always in 2013, the Organization of American States adopted the Inter-American Convention Against all Forms of Discrimination and Intolerance, which explicitly includes the prohibition of discrimination on the grounds of sexual orientation.<sup>111</sup> Unfortunately, such convention has been signed only by 12 out of 35 OAS member states. Even more regretful is that out of the 12 signatories, only Uruguay did actually ratify and deposit the instrument of ratification.<sup>112</sup>

Because of the lack of extensive jurisprudence on the matter, both the IACHR and the IACtHR still have to deal with numerous other issues related to sexual orientation and gender identity. It will be hence interesting to analyze future cases, so to see the further developments and milestones related to SOGI.

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<sup>109</sup>McGoldrick D., "The Development and Status of Sexual Orientation Discrimination Under International Human Rights Law", p. 641(2016).

<sup>110</sup> Retrieved from: <https://www.oas.org/en/iachr/lgtbi/mandate/mandate.asp> (Accessed December 2019).

<sup>111</sup>McGoldrick D., "The Development and Status of Sexual Orientation Discrimination Under International Human Rights Law", p. 641 (2016).

<sup>112</sup>For further information, visit: [http://www.oas.org/en/sla/dil/inter\\_american\\_treaties\\_A-69\\_discrimination\\_intolerance\\_signatories.asp](http://www.oas.org/en/sla/dil/inter_american_treaties_A-69_discrimination_intolerance_signatories.asp) (Accessed December 2019).

## 1.4 LGBTI Rights in the ASEAN

In 2012, The Association of Southeast Asian Nations<sup>113</sup> has drafted the ASEAN Human Rights Declaration, under the claim that such declaration would “*help establish a framework for human rights cooperation in the region and contribute to the ASEAN community building process.*”<sup>114</sup> The construction of an ASEAN community seems to be fundamental, as also depicted by the words of Singapore’s Prime Minister Lee Hsien Loong, who has explained how making progress in the ASEAN is difficult because of the lack of a strong sense of ASEAN-identity.<sup>115</sup>

Despite the aim of the declaration and the “rules-based, people-oriented and people-centered” rhetoric at the base of this regional association,<sup>116</sup> human rights seem to still play a limited role in the ASEAN. A plausible evidence of such statement may be represented by the limited role that ASEAN Intergovernmental Commission of Human Rights has been covering since its establishment in 2009. Indeed, while its goal would be to “promote and protect human rights and fundamental freedoms of the peoples of ASEAN” and “uphold the right of the peoples of ASEAN to live in peace, dignity and prosperity”<sup>117</sup>, the Commission only has a consultative role and cannot sanction nor punishing member states for their violations.<sup>118</sup> Another example of such limited role that human rights have in the ASEAN is the relativist approach that the ASEAN Human Rights Declaration. In fact, while the first part of Article 7 recognizes the universality of human rights, in its second part the same Article recognizes that “the realization of human rights must be considered in the regional and national context bearing in mind different political, economic, legal, social, cultural, historical and

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<sup>113</sup> The association was established in 1967 and counts 10 member states: Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam.

<sup>114</sup> ASEAN Human Rights Declaration.

<sup>115</sup> Langlois A.J., Wilkinson C., Gerber P. and Offord B. “Community, identity, orientation: sexuality, gender and rights in ASEAN”, *The Pacific Review*, 30:5, p.712 (2017).

<sup>116</sup> *Ibidem*, p.711 (2017).

<sup>117</sup> ASEAN Intergovernmental Commission of Human Rights, Terms of Reference.

<sup>118</sup> Yessi O., “Will the ASEAN Intergovernmental Commission of Human Rights (AICHR) Grow Its Teeth?”, *Jurnal Hubungan Internasional*, 3:2, p.150 (2014).

religious backgrounds.”<sup>119</sup> A third evidence that may underline the secondary role that human rights have in the ASEAN is how sexual minorities’ rights have been often ignored. As a matter of fact, despite ASEAN itself has been proactive in promoting the creation of an “ASEAN Identity”,<sup>120</sup> the LGBTI community seems not to be considered as a part of the ASEAN community. This seems to be true when the constant omission of SOGI right is taken into consideration. In 2013 in occasion of the the 23<sup>rd</sup> ASEAN Summit, SOGI rights were omitted from the Declaration on the Elimination of Violence Against Women and Children, which was adopted during that summit<sup>121</sup> LGBTI individuals’ rights were also omitted from the Human Rights Declaration.<sup>122</sup>

While ASEAN itself seems to ignore LGBTI rights, on a national level, ASEAN member states adopt contradictory approaches to the issue, as also proved by Malaysia where, in 2014, the Constitutional Court ruled the unconstitutionality of the ban on cross-dressing. That same year, however, the Malaysia’s Islamic police conducted a “morality raid” that ended with the arrest of two women accused of having a same-sex relation.<sup>123</sup> Malaysia is not the only ASEAN country where such contradictory events have taken place. In fact, before the abolition of the related law in 2019, India criminalized homosexuality, even though in 2014 the government granted full legal recognition to Hijras, hence recognizing a third gender.<sup>124</sup>

The lack of progress in ASEAN in terms of the promotion of SOGI rights is sided with the actions of LGBTI civil groups that have been demanding the recognition of their rights. For instance, the ASEAN SOGIE Caucus, a network of human rights activists promoting the inclusion of

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<sup>119</sup>Article 7 of the ASEAN Human Rights Declaration.

<sup>120</sup>Langlois A.J., Wilkinson C., Gerber P. and Offord B. “Community, identity, orientation: sexuality, gender and rights in ASEAN”, *The Pacific Review*, 30:5, p.716 (2017).

<sup>121</sup>*Ibidem* (2017).

<sup>122</sup>McGoldrick D., “The Development and Status of Sexual Orientation Discrimination Under International Human Rights Law”, p. 646 (2016).

<sup>123</sup>Wilkinson. C., Gerber P., Offord B. and Langlois A.J., “LGBT Rights in Southeast Asia: One Step Forward, Two Steps Back?”, *IAFOR Journal of Asian Studies*, 3:1, p.7 (2017).

<sup>124</sup>*Ibidem*.



sexual orientation and gender identity has been addressing numerous of the violations committed by ASEAN states against LGBTI people, urging ASEAN to intervene. ASC has, for example, addressed the reintroduction of death penalty against homosexuals in Brunei, asking the Intergovernmental commission to release a statement over the matter.<sup>125</sup> The group has also released a statement on the occasion of the 50<sup>th</sup> anniversary of ASEAN, denouncing once again the continuous omissions of LGBTI people on the base of “cultural sensitivity.”<sup>126</sup>

In 2015, ASEAN has launched “ASEAN 2025”. This 10-year project aims at creating more cohesiveness and consolidation between the Association’s member states. The plan has said to have numerous aspirations, such as the construction of a “A rules-based, people-oriented, people-centred ASEAN in a region of peace, stability and prosperity.”<sup>127</sup> It will then be interesting to observe whether or not the inclusion and protection LGBTI individuals will be promoted during the realization of this project.

## **2 The Yogyakarta Principles**

Despite the efforts of the International bodies and courts, LGBTI people are still oppressed and their rights violated. For instance, homosexuality is criminalized in 72 Countries,<sup>128</sup> while 6 of them also apply death penalty for homosexual conducts.<sup>129</sup> The lack of an explicit prohibition

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<sup>125</sup>ASEAN SOGIE Caucus, “Regional groups urged AICHR to address human rights concerns arising from Brunei's Syariah Penal Code”, April 12, 2019 (Accessed January 2020): <https://aseansogiecawcus.org/statements/asc-statements/133-regional-groups-urged-aichr-to-address-human-rights-concerns-arising-from-brunei-s-syariah-penal-code>

<sup>126</sup>ASEAN SOGIE Caucus, “Statement on the occasion of the 50th ASEAN Ministerial Meeting (4-8 August 2017)”, August 8, 2017 (Accessed January 2020): <https://aseansogiecawcus.org/statements/asc-statements/107-statement-on-the-occasion-of-the-50th-asean-ministerial-meeting-4-8-august-2017>

<sup>127</sup>ASEAN, “ASEAN 2025 at A Glance” (Accessed January 2020): <https://asean.org/asean-2025-at-a-glance/>

<sup>128</sup><https://antigaylaws.org/> (Accessed December 2019).

<sup>129</sup>Office of the High Commissioner, “Born Free and Equal: Sexual Orientation, Gender Identity and sex Characteristics in International Human Rights Law”, p. 46 (2019).

of discrimination of SOGI surely affected the issue, since this systematic omission has been used by Numerous States as a justification for SOGI rights violations. This is also proven by the fact that, while the UNHRC has already stated that arbitrary discrimination against SOGI individuals is prohibited by the ICCPR, 53 out of the 72 Countries criminalizing homosexuality have ratified the covenant. 26 of these have also ratified the First Optional Protocol to the ICCPR.<sup>130</sup>

In an environment of constant violations of SOGI rights, a group of 29 experts gathered to Yogyakarta (Indonesia) to finalize a 12-month process that brought to the creation of the so-called Yogyakarta Principles. the document was presented in 2007, In a series of events held between march and November. Among others, it is important to remember the two-days event held in March, coinciding with a session of the UN Human Rights Council.<sup>131</sup> After this first launch, The Czech Republic, Switzerland, Denmark, Finland, Iceland, Sweden and Norway explicitly referred to said Principles.<sup>132</sup> Another important event was then held in November, in New York, and was hosted by the Brazilian, Argentinian and Uruguayan governments. This launch coincided with a meeting of the Third Committee of the General Assembly and saw the intervention of Mary Robinson, former UN High Commissioner for Human Rights.<sup>133</sup>

The document included 29 principles that, according to Michael O’Flaherty and John Fisher, could be summarized as such:

- Principles 1-3: universality of human rights and their application without discrimination against sexual orientation and gender identity;
- Principles 4-11: rights to life, freedom from violence and torture, privacy, access to justice and freedom from arbitrary detention
- Principles 12-18: non-discrimination related to economic, social and cultural rights;
- Principles 19-21: freedom of expressing one’s identity and/or sexuality, without the interference of the State based on SOGI;
- Principles 22-23: right to asylum based on SOGI;

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<sup>130</sup><https://antigaylaws.org/> (Accessed December 2019).

<sup>131</sup>O’ Flaherty M., “The Yogyakarta Principles at Ten”, p.286 (2015).

<sup>132</sup>Sanders D., “The Role of the Yogyakarta Principles”, International Gay and Lesbian Human Rights Commission, p. 6(2009), retrieved at: <https://outrightinternational.org/content/international-role-yogyakarta-principles> (Accessed December 2019).

<sup>133</sup>*ibidem*, p.7.

- Principles 24-26: right to participate in family life, public affairs and cultural life of one's community;
- Principle 27: right to defend and promote human rights and the State's obligation to ensure protection of human rights promoters;
- Principles 28-29: importance of holding violators accountable, ensuring appropriate redress for those who face violations.<sup>134</sup>

Despite their non-binding nature, the principles were widely accepted, with numerous States and international bodies recognizing their importance and citing them. The great success of the YP is given by what Ryan Richard Thoreson defines as “modest Demands”. Indeed, differently from other attempts to acquire recognition of LGBTI rights, the Principles do not advocate for the creation of a new set of tailor-made rights, rather they point out the universality of human rights, and only rely on pre-existing declarations and treaties, demanding States to comply with the obligations they committed to by their own will.<sup>135</sup> The gender-neutral wording is used to support the universality of human rights, which are not limited to certain groups of individuals. Indeed, every principle is supposed to be applicable to all people, without discrimination based on sexual orientation and/or gender identity.<sup>136</sup> Such wording, however, brought to the invisibility of issues typically concerning for women, since the gender-neutral wording fails in addressing problems that lesbians face.<sup>137</sup>

The success of the Principles is also shown by the numerous translations made throughout time. Among others, the document was translated in German, Portuguese, Japanese, Bengali and Quechua, Aymara and Guarania, three South American indigenous languages.

For sure, the document has had a great influence on the UN system where, mere days after the launching of the principles, 30 States released a statement in favour of SOGI. 3 of these Countries explicitly cited the

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<sup>134</sup>O’Flaherty M. and Fisher J., “Sexual Orientation, Gender Identity and International Human Rights Law: Contextualizing the Yogyakarta Principles”, p. 234-235 (2008).

<sup>135</sup>Thoreson R.R., “Queering Human Rights: The Yogyakarta Principles and the Norm That Dare Not Speak Its Name”, *Journal. of Human Rights*, 8:4, p.328-329 (2009).

<sup>136</sup>O’ Flaherty M., “The Yogyakarta Principles at Ten”, *Nordic Journal of Human Rights*, 33:4, p.284 (2015).

<sup>137</sup>O’Flaherty M. and Fisher J., “Sexual Orientation, Gender Identity and International Human Rights Law: Contextualizing the Yogyakarta Principles”, p. 236 (2008)

Yogyakarta Principles.<sup>138</sup> More significantly, the launch of this document also influenced the Universal Periodic Review that, during the first cycle of review, was presented with 13 submissions drafted by various NGOs dealing with SOGI, several of them citing the Principles.<sup>139</sup> During the period between 2007 and 2010, 17 recommendations regarding the YP were made, with 5 States accepting the recommendation, either explicitly or implicitly. In 2015, it was noted how the explicit reference to the Principles in the UPR has diminished. However, this diminishing explicit reference to the document seems to be sided with an increasing in recommendations with regards to sexual orientation and gender identity.<sup>140</sup>

The Yogyakarta Principles were also endorsed by several UN bodies, such as the Un Office on Drugs and Crime UN AIDS, and the UNHCR that, in 2008, released its *Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*, explicitly citing the document and its definition of sexual orientation,<sup>141</sup> and stating that that “It is now well established that LGBT persons are entitled to all human rights on an equal basis with others ... The Yogyakarta Principles reflect binding international legal standards with regard to sexual orientation which are derived from key human rights instrument”<sup>142</sup>

The YP also influenced the release of the first statement during a General Assembly to deal with the protection of sexual minorities. The statement was released on the behalf of 66 States.<sup>143</sup> Moreover, according to O’Flaherty, the YP played a fundamental role in the case *Fedotova v Russian Federation*, which dealt with freedom of expression and was brought before the United Nations Human Rights Committee in 2012.<sup>144</sup>

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<sup>138</sup>*Ibidem*, p.23).

<sup>139</sup>*Ibidem*, p.240.

<sup>140</sup>O’ Flaherty M., “The Yogyakarta Principles at Ten”, *Nordic Journal of Human Rights*, 33:4, p.289 (2015).

<sup>141</sup> According to the principles, *Sexual Orientation* is: “to refer to each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender”.

<sup>142</sup> Cited in O’ Flaherty M., “The Yogyakarta Principles at Ten”, p.290 (2015).

<sup>143</sup>*Ibidem*, p. 288.

<sup>144</sup>*Ibidem*, p.290-291.

The Yogyakarta Principles resonated on a regional level as well, especially in Europe. The European Agency for Fundamental Rights, for example, has referenced the principles and their definition of sexual orientation and gender identity<sup>145</sup> in its EU LGBT survey in 2012,<sup>146</sup> also mentioning how such definitions had been also used by UN Committee on Economic, Social and Cultural Rights and the UN High Commissioner for Human Rights.<sup>147</sup>

Other references were made by the European Court on Human Rights<sup>148</sup>, the European Court of Justice<sup>149</sup> and the Inter-American Court of Human Rights.<sup>150</sup><sup>151</sup>

Since their creation, the experts anticipated the need of an eventual update, since the Principles are adapted to the current state of the international law.<sup>152</sup> For instance, in order to celebrate the first 10 years from the creation of the Yogyakarta Principles, in 2017 the experts added new Principles to the existing ones. These new additions are also known as “the Yogyakarta Principles Plus 10”, so to remember the important event during which they were created.<sup>153</sup>

The additional principles are:

- Principle 30 The Right to State Protection;
- Principle 31 The Right to Legal Recognition;
- Principle 32 The Right to Bodily and Mental Integrity;
- Principle 33 The Right to Freedom from Criminalisation and Sanction on the Basis of Sexual Orientation, Gender Identity, Gender Expression or Sex Characteristics;

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<sup>145</sup>According to the principles, gender identity is “to refer to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms”.

<sup>146</sup>O’ Flaherty M., “The Yogyakarta Principles at Ten”, p.291 (2015).

<sup>147</sup>Fundamental Rights Agency, “EU LGBT survey European Union lesbian, gay, bisexual and transgender survey: Main results”, p.19 (2012), retrieved at: [https://fra.europa.eu/sites/default/files/fra-eu-lgbt-survey-main-results\\_tk3113640enc\\_1.pdf](https://fra.europa.eu/sites/default/files/fra-eu-lgbt-survey-main-results_tk3113640enc_1.pdf) (Accessed December 2019).

<sup>148</sup>Hämäläinen v Finland, dissenting opinion of Judges Sajó, Keller, and Lemmens

<sup>149</sup>Minister voor Imigratie en Asiel v X, Y and Z (2013).

<sup>150</sup>Homero Flor Freire v Ecuador (2013).

<sup>151</sup>O’ Flaherty M., “The Yogyakarta Principles at Ten”, *Nordic Journal of Human Rights*, 33:4, p.292 (2015).

<sup>152</sup>Park A., “Yogyakarta Plus 10: A Demand for Recognition of SOGIESC”, *North Carolina Journal of International Law*, 44:2, p. 227 (2019).

<sup>153</sup>*Ibidem*, p. 228.

- Principle 34 The Right to Protection from Poverty;
- Principle 35 The Right to Sanitation;
- Principle 36 The Right to the Enjoyment of Human Rights in Relation to Information and Communication Technologies;
- Principle 37 The Right to Truth;
- Principle 38 The Right to Practise, Protect, Preserve and Revive Cultural Diversity.<sup>154</sup>

Even though, overall, the Principles have been widely accepted by the international community, it is also important to underline the dissent that the same document has originated. As a matter of fact, while 2008 is marked by the first statement in favour of SOGI during a General Assembly, it is also important to notice how, during the same seat, a counterstatement supported by 57 States was released.<sup>155</sup> In the statement, the States argued how the Yogyakarta principles could lead to the “social normalization, and possibly the legitimating, of many deplorable acts including paedophilia.”<sup>156</sup>

Furthermore, in an article released in 2007, Piero A. Tozzi, J.D. describes the Principles as reflecting “only the views of a narrow group of self-identified “experts”” and representing “an attempt by activists to present an aspirational, radical social policy vision as a binding norm”.<sup>157</sup> Moreover, he identifies “six areas of concern” that emerge from the analysis of the document, related to parental and familial authority, freedom of speech, religious freedom, national sovereignty and national democratic institutions, promotion of “unhealthy” choices and the lack of objective standards for evaluating conduct.

In particular, I would like to focus on his critique related to freedom of speech and religious freedom.

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<sup>154</sup>The Yogyakarta Principles Plus 10: 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 (2017), Retrieved at:

[http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5\\_yogyakartaWEB-2.pdf](http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf) (Accessed December 2019).

<sup>155</sup>O’ Flaherty M., “The Yogyakarta Principles at Ten”, *Nordic Journal of Human Rights*, 33:4, p.288 (2015).

<sup>156</sup>Cited in *Ibidem*.

<sup>157</sup>Cited in Tozzi P., J.D., “Six Problems with the “Yogyakarta Principles”, *International Organizations Research Groups*, 1:2, p.1 (2007), retrieved at: [https://c-fam.org/briefing\\_paper/six-problems-with-the-yogyakarta-principles-1/](https://c-fam.org/briefing_paper/six-problems-with-the-yogyakarta-principles-1/) (Accessed December 2019).

Tozzi explains how Principle 19 of the YP<sup>158</sup> may be used to “suppress dissenting opinion that, for example, questions the morality of homosexual conduct”. However, a similar concern could be expressed with regards to the prohibition of discrimination on the grounds of religion. Indeed, it may be possible that such prohibition is used to “suppress dissenting opinions that, for example, questions religious dogmas.” There is no doubt that, to a certain extent, prohibiting hate speech against SOGI means to limit freedom of speech. However, doesn’t the same thing happen when international human rights law prohibits hate speech against religious groups? If freedom of speech has to be granted in every case, does that mean that neo-Nazi groups should be able to express their (clearly wrong) anti-Semite views without any repercussion?

In order for individuals to live in what it is called “a civil society”, certain limits have to be established with regards to freedom of opinion and speech since one’s freedoms cannot damage another individual’s rights.

Tozzi also states that the Yogyakarta Principles undermine religious freedom, since the principles explicitly state that freedom of thought, conscience and religion “may not be invoked by the State to justify laws, policies or practices which deny equal protection of the law, or discriminate, on the basis of sexual orientation or gender identity”<sup>159</sup> and “Principle 21<sup>160</sup> advocates governmental action that would suppress the free exercise of religion”.<sup>161</sup> Tozzi’s concerns related to freedom of religion, however, are once again unfounded. For once, the vast majority of States do define

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<sup>158</sup>Principle 19: “Everyone has the right to freedom of opinion and expression, regardless of sexual orientation or gender identity. This includes the expression of identity or personhood through speech, deportment, dress, bodily characteristics, choice of name, or any other means, as well as the freedom to seek, receive and impart information and ideas of all kinds, including with regard to human rights, sexual orientation and gender identity, through any medium and regardless of frontiers.”

<sup>159</sup>Cited in Tozzi P., J.D., “Six Problems with the ”Yogyakarta Principles”, International Organizations Research Groups, 1:2, p.3 (2007).

<sup>160</sup>Principle 21: “Everyone has the right to freedom of thought, conscience and religion, regardless of sexual orientation or gender identity. These rights may not be invoked by the State to justify laws, policies or practices which deny equal protection of the law, or discriminate, on the basis of sexual orientation or gender identity.”

<sup>161</sup>*Ibidem*.

themselves as secular; hence, religious beliefs are not to be considered as a valuable motivation for the creation of laws. Moreover, while discrimination against SOGI has been largely prohibited in international law, religious objection is recognized and protected by the same laws. A clear example of such recognition of religious objection is the American Supreme Court's ruling concerning the case of baker Jack Phillips and gay couple Charlie Craig and David Mullins, in which was ruled that:

The laws and the Constitution can, and in some instances must, protect gay persons and gay couples in the exercise of their civil rights, but religious and philosophical objections to gay marriage are protected views and, in some instances, protected forms of expression.<sup>162</sup>

while the Yogyakarta Principles represent an important milestone in the protection of SOGI rights, it is undeniable that more work has to be done. For sure, a codification of the principles would be an important step forward into the right direction. However, due to the strong opposition of the most conservative states, such important milestone seems still far to be achieved.

It is for sure true that, in recent years, sexual minorities have been acquiring important rights in numerous states, such as the right to marry and to adopt. Such progress is nonetheless sided with continuous criminalization of homosexuality and numerous violations of the community's rights happening all over the world.

### **3 *The Violation of LGBTI Rights***

#### **3.1 *Right to life***

The right to life is a fundamental right, if not the most fundamental. It is widely recognised in numerous conventions, and it is widely considered at the very base of the international human rights protection system. Indeed, the Universal Declaration on Human Rights recognizes the universality of

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<sup>162</sup>Supreme Court of the United States, *Masterpiece Cakeshop, Ltd., Et Al. V. Colorado Civil Rights Commission Et Al.*, No. 16-111, p.1, Argued December 5, 2017—Decided June 4, 2018.



the right to life, liberty and security.<sup>163</sup> Such right, however, is not only protected by the UDHR, but also by the International Covenant on Civil and Political Rights, which clearly states that “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”<sup>164</sup> It is also included in Article 2 of the European Convention on Human Rights,<sup>165</sup> and Article 4 of the American Convention on Human rights.<sup>166</sup>

Because of its nature, human rights bodies do not permit the derogation of the right, if not in case of conflict.

According to the UN Human Rights Committee, the right to life is the “supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the Nation.”<sup>167</sup> The very same position has been adopted by the Inter-American Court of Human Rights, while the European Court on Human Rights has stated that its limitation should be “strictly construed.”<sup>168</sup>

Apart from prohibiting States from arbitrarily depriving individuals of their right to life, international law also requires States to “exercise due diligence in preventing, punishing and redressing deprivations of life, by public and private parties.”<sup>169</sup> In other words, Countries are to ensure the respect of individuals’ right to life, by taking effective measures for the protection of said right.

A major issue related to the right to life is the legitimization of death penalty in numerous states. Among the aforementioned instruments, only the ECHR prohibits death penalty, admitting it only “in time of war or of

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<sup>163</sup> Article 3 of the UDHR.

<sup>164</sup>Article 6[1] of the ICCPR.

<sup>165</sup>Article 2[1] of the ECHR: “1. Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.”

<sup>166</sup>Article 4[1] of the ACHR: “Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.”

<sup>167</sup>Cited in International Commission of Jurists, “Sexual Orientation, Gender Identity and International Human Rights Law, Practitioners Guide No.4”, p.87 (2009).

<sup>168</sup>Ibidem, p.87-88.

<sup>169</sup>Office of the High Commissioner, “Born Free and Equal: Sexual Orientation, Gender Identity and sex Characteristics in International Human Rights Law”, p. 14(2019).

imminent threat of war” and only “in the instances laid down in the law and in accordance with its provisions.”<sup>170</sup> The ICCPR and the ACHR, instead, do recognize the legitimacy of death penalty “only for the most serious crimes”<sup>171</sup> and only in accordance with “the law in force at the time of the commission of the crime and [...] to the Convention on the Prevention and Punishment of the Crime of Genocide.”<sup>172</sup> While these two instruments do allow death penalty, they are clear in not allowing its re-establishment after prohibition. Indeed, the American Convention, at Article 4[3], explicitly prohibits its re-establishment once it is prohibited. The International Covenant on Civil and Political Rights, instead, establishes that the Covenant itself should not be invoked to “delay or prevent the abolition of capital punishment” (Article 6[6]) and that death sentences are not to be imposed against minors or carried out on pregnant women (Article 6[5]). Furthermore, the Second Optional Protocol to the ICCPR promotes the abolition of death penalty, stating that “No one within the jurisdiction of a State Party to the present Protocol shall be executed”<sup>173</sup> and that “Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.”<sup>174</sup>

Principle 4 of the Yogyakarta Principles extends the protection of the right to life to SOGI people, also declaring that death penalty shall not be “imposed on any person on the basis of consensual sexual activity among persons who are over the age of consent or on the basis of sexual orientation or gender identity.” Apart from the YP, international human rights bodies have declared how SOGI people have to be included in the protection of individuals’ right to life, and how their arbitrary killing and lack of investigation over such killings are to be considered as a breach of a State’s obligations under international law.<sup>175</sup> In its website, the Council of

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<sup>170</sup>Protocol No. 6 of the ECHR, Article 2.

<sup>171</sup>Article 4[2] of the ACHR and 6[2] of the ICCPR.

<sup>172</sup>Article 6[2] of the ICCPR.

<sup>173</sup>Article 1[1] of the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty.

<sup>174</sup>*Ibidem*, Article 1[2].

<sup>175</sup>Office of the High Commissioner, “Born Free and Equal: Sexual Orientation, Gender Identity and sex Characteristics in International Human Rights Law”, p. 14(2019).

Europe indicates that “Member states should ensure effective, prompt and impartial investigations into alleged cases of crimes and other incidents, where the sexual orientation or gender identity of the victim is reasonably suspected to have constituted a motive for the perpetrator.”<sup>176</sup> In the website, it is also reported that states must ensure that the violence allegedly committed by law enforcement officials are “effectively brought to justice and, where appropriate, punished in order to avoid impunity.”<sup>177</sup>

The UN General Assembly expressed its concern over arbitrary SOGI killings in its resolution no. 57/214 on extrajudicial, summary or arbitrary executions, in which it has reiterated the Governments’ obligations to the protection of the right to life, asking states to properly investigate every case of killings “committed for any discriminatory reason, including sexual orientation.”

A serious violation of the right to life of SOGI is given by death sentence. Indeed, while both the ICCPR and the ACHR admit death penalty only for the most serious crimes, homosexuality is punishable by death in 12 Countries, 6 of those actually implementing the capital punishment.<sup>178</sup> Among these 12 States, Brunei is also counted, since earlier this year it reintroduced death penalty for the “crime” of homosexuality. However, in a slightly optimistic view, the Sultan extended a moratorium on the death penalty against LGBTI individuals after international backlash.<sup>179</sup> Seemingly, the Ugandan Ethics and Integrity Minister Simon Lokodo tried to reintroduce such punishment into the national criminal law. The government, however, seems to have denied the willingness to reintroduce the so-called “Kill the

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<sup>176</sup>Retrieved at (Accessed December 2019): <https://www.coe.int/en/web/sogi/right-to-life>

<sup>177</sup>*Ibidem.*

<sup>178</sup>Mendos L.R, “ILGA World: State-Sponsored Homophobia 2019: Global Legislation Overview Update” Geneva, p. 48-52 (December 2019), retrieved at: <https://ilga.org/state-sponsored-homophobia-report> (Accessed December 2019).

<sup>179</sup>Reuters, “Brunei says it won't enforce gay death penalty after backlash”, May 5, 2019 (Accessed December 2019): <https://www.reuters.com/article/us-brunei-lgbt-sultan/brunei-says-it-wont-enforce-gay-death-penalty-after-backlash-idUSKCN1SB0FS>

Gays Bill”.<sup>180</sup> Concerningly enough, however, the reintroduction of such bill was welcomed by several MPs.<sup>181</sup>

The protection of the right to life of LGBTI people does also include preventing any type of violence to be perpetuated by the State or by privates. Such violence includes targeted killings, sexual violence, and hate speech. In particular, rape is a major issue for the community. As a matter of fact, the UN reported numerous cases of rape regarding transgender people and lesbian women, who are thought to be “curable” through rape.<sup>182</sup> Sexual violence, however, can be also perpetuated against homosexual men.

Sexual violence, however, is not only perpetuated by civilians, but it is perpetuated with “the consent or acquiescence of public officials”,<sup>183</sup> signalling a silent approval of the State to such unlawful practices.

Applying death penalty to homosexuality is another unlawful practice. In this case, death penalty does not only represent a violation of the right to life of sexual minorities, but also represent a violation of the universality principle at the base of human rights. For instance, SOGI individuals are, first and foremost, human beings; hence, their right to life must be preserved.

While States that criminalize homosexuality and impose capital punishment for such a “crime” argue that homosexuality is a threat to the Country’s morale, the ICCPR and the ACHR state that capital punishment is acceptable only for the most serious crimes. One may argue that there is no clear definition of what must be considered as a “serious crime”. However, it is safe to say that homosexuality does not for sure fall into such category.<sup>184</sup>

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<sup>180</sup>Reuters, “Uganda denies plans to impose death penalty for gay sex amid global concern”, October 15, 2019 (Accessed December 2019): <https://www.reuters.com/article/uganda-lgbt-rights/update-1-uganda-denies-plans-to-impose-death-penalty-for-gay-sex-amid-global-concern-idUSL5N26Z530>

<sup>181</sup>Mendos L.R., “ILGA World: State-Sponsored Homophobia 2019: Global Legislation Overview Update” p.11 (December 2019).

<sup>182</sup>Office of the High Commissioner, “Born Free and Equal: Sexual Orientation, Gender Identity and sex Characteristics in International Human Rights Law”, p. 18 (2019).

<sup>183</sup>*Ibidem*, p. 19.

<sup>184</sup> International Commission of Jurists, “Sexual Orientation, Gender Identity and International Human Rights Law, Practitioners Guide No.4”, p.95 (2009).

### 3.2 Torture and ill-treatment

International law prohibits torture and ill-treatment. The Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights, the American Convention on Human Rights and the European Convention on Human Rights all condemn torture and ill-treatment of human beings, respectively at Article 5, Article 7, Article 5[2], and Article 3. All the aforementioned documents do not allow derogation from the prohibition of torture and ill and degrading treatment in any case, not even in case of public emergency. Indeed, the UN Committee Against Torture and Other Cruel, Inhuman or Degrading Treatment has stated that:

The obligations contained in articles 2 [of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment] (whereby ‘no exceptional circumstances whatsoever [...] may be invoked as a justification of torture’), 15 (prohibiting confessions extorted by torture being admitted in evidence, except against the torturer), and 16 (prohibiting cruel, inhuman or degrading treatment or punishment) are three such provisions and must be observed in all circumstances.<sup>185</sup>

Under international law, States have the obligation to protect individuals from violence and ill-treatment perpetuated by both state and non-state parties. Such obligation also includes the protection of LGBTI individuals from unlawful practices that could harm them either physically or psychologically, which could “arouse in the victim feelings of fear, anguish, and inferiority capable of humiliating and debasing them.”<sup>186</sup> In relation to the prohibition of torture, States have a series of positive obligations, namely training the law-enforcement personnel so to ensure the enforcement of such prohibition, investigate cases regarding torture and ill-treatment, and providing an effective remedy to such acts.<sup>187</sup>

In many occasions, international bodies have recognized that rape does indeed fall under torture and ill-treatment, since “sexual violence

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<sup>185</sup>Cited in *Ibidem*, p. 100.

<sup>186</sup>Cited in Johnson P., “Homosexuality and the European Court of Human Rights”, p.197 (2014).

<sup>187</sup> International Commission of Jurists, “Sexual Orientation, Gender Identity and International Human Rights Law, Practitioners Guide No.4”, p.104 (2009).

necessarily gives rise to severe pain or suffering whether physical or mental, and in this way justifies its characterization as an act of torture.”<sup>188</sup>

Torture and ill-treatment related to SOGI a various array of forms of violence, including but not limited to rape, targeted arrests and police violence, physical violence, examinations and unnecessary surgeries on transgender and intersex individuals.

As also mentioned above, the LGBTI community is often subjected to physical and sexual violence, sometimes perpetuated by family members in an attempt to “cure” homosexuality. Such violence, however, is not only limited to family members. Indeed, there are reported cases of sexual harassment being perpetuated in jails all over the world, both by inmates and by police officers. An example was registered in Nepal, where the police was found to use physical violence against “metis” (Nepalese term used for MtF individuals), who allegedly asked for money and sex.<sup>189</sup> Moreover, it was also noted that in other cases:

The lack of institutional policies and methods to adequately address self-identification, classification, risk assessment and placement leads in some cases to transgender women being placed in male-only prisons, where they are exposed to a high risk of rape, often with the complicity of prison personnel.<sup>190</sup>

Moreover, the Subcommittee has noted that during their incarceration transgenders are often beaten and forced to enact sex scenes in front of fellow inmates. Such practices are often sponsored by guards who charge for viewings.<sup>191</sup>

The Inter-American Commission on Human Rights has taken notice of various forms of violence against SOGI as well. In a report concerning violence against LGBTI people, the IACHR has in fact described the abuse of power perpetuated by police forces in the form of frequent stops and

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<sup>188</sup>Cited in *Ibidem*, p.102.

<sup>189</sup>Office of the High Commissioner, “Born Free and Equal: Sexual Orientation, Gender Identity and sex Characteristics in International Human Rights Law”, p. 30 (2019).

<sup>190</sup>Committee against Torture, Ninth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, CAT/C/57/4 [66] (March 2016).

<sup>191</sup>*Ibidem*.

searches of transgender women for suspicion of prostitution.<sup>192</sup> Indeed, according to a trans woman “to the police, all transgenders are prostitutes.” The same report describes how trans individuals were often arrested with no reason, threatened of rape and forced to strip.<sup>193</sup> Police officers have also used homophobic language, for example “faggots, we are taking you because dressing up as women is immoral” or that being “faggot” is worse than being a criminal.<sup>194</sup> Another major problem is represented by “conversion therapies”, through which LGBTI people are forcedly detained in structures where they are supposed to be “cured” from their deviant behaviour. Such therapies can include electroshock, castration and sexual abuse.<sup>195</sup><sup>196</sup>

Strikingly enough, even though the European Court of Human Rights is, in general, the most advanced body in terms of the protection of the LGBTI rights, said court has yet to decide on a case actually violating Article 3 of the ECHR. Indeed, even though various complaints have been submitted on this regard, The Curt has never ruled in favour of those applicants. Because of this reluctance of applying Article 3 to SOGI-related issues, applicants have started to rely on such article with less frequency.<sup>197</sup>

Among the cases citing Article 3, *Smith and Grady v The United Kingdom* is worth citing. As a matter of fact, while the Court did not recognize a violation of Article 3 because the two applicants’ treatment did not reach “the minimum level of severity”, it also stated that “[...] the Court would not exclude that treatment which is grounded upon a predisposed bias on the part of a heterosexual majority against a homosexual minority of the nature described above could, in principle, fall within the scope of Article 3.”<sup>198</sup>

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<sup>192</sup>Inter-American Commission on Human Rights, “Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas”, OAS/Ser.L/V/II.rev.1, p.91 [131] (2015).

<sup>193</sup>*ibidem*, [132].

<sup>194</sup>*ibidem*, p.92 [135-136]

<sup>195</sup><http://www.nclrights.org/bornperfect-the-facts-about-conversion-therapy/> (Accessed. December 2019).

<sup>196</sup>Office of the High Commissioner, “Born Free and Equal: Sexual Orientation, Gender Identity and sex Characteristics in International Human Rights Law”, p. 38 (2019).

<sup>197</sup>Johnson P., “Homosexuality and the European Court of Human Rights”, p.195 (2014).

<sup>198</sup>*Smith and Grady v. the United Kingdom*, [121].

Through this decision, the Court has explicitly stated that discriminating acts based on sexual orientation may fall under Article 3. However, it has yet to rule in favour of an actual violation of said article.

An interesting case regarding Article 3 is *Ladner v Austria*,<sup>199</sup> in which Mr. Ladner lamented a violation of Article 3 caused by the statements of an Austrian minister with regards to the applicant's request for pardon after the abrogation of article 209 of the Austrian criminal law, criminalizing homosexuality.<sup>200</sup> The Minister of Justice had stated that Mr. Ladner's request was rejected because his conduct would still fall under the newly introduced article 207b, since the applicant would have taken advantage of an adolescent who, at the time, was living with him following an argument with his parents. The Court established that Article 3 was not violated since, the Minister "did not mention the applicant's name."<sup>201</sup> Apparently, the mere omission of the name of the applicant was considered enough to not find a violation of article 3 of the Convention.

Even though international courts and bodies have been making numerous progress with regards the protection of SOGI individuals against torture and ill treatment, the lack of successful applications with regards such prohibition is for sure a major issue, which leave sexual minorities exposed to continuous violations of their rights of living in a safe environment and of being rightfully protected by police forces and lawmakers who, in numerous cases, remain unpunished and, I must say, protected from the States whose first goal should be ensuring safety to individuals.

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<sup>199</sup>Ladner v Austria, Application no. 18297/03, May 3, 2005.

<sup>200</sup>*Ibidem*, [4-12].

<sup>201</sup>*Ibidem*, [28].



### 3.4 Arbitrary deprivation of liberty

As previously stated, there are numerous cases of unjustified arrests of LGBTI people. The right to be free from arbitrary deprivation of liberty, which is the right to liberty and security, is protected by Article 3 of the UDHR, Article 9 of the ICCPR, Article 7 of the ACHR, and by Article 5 of the ECHR. Such right may also be correlated to the prohibition of torture and ill-treatment, since the arbitrary deprivation of one's liberty may be considered, *per se*, a form of ill-treatment.

For an arrest to be considered lawful, the international law has established a series of standards and requirements that must be met. Indeed, according to a UN committee, an arrest must be considered arbitrary when "It is on grounds or in accordance with procedures other than those established by law, [or] It is under the provisions of a law the purpose of which is incompatible with respect for the right to liberty and security of a person"<sup>202</sup> As a consequence, an arrest is lawful when it has procedural and substantive legality, is legitimate in its purpose, is necessary, proportional, and Human rights are guaranteed.<sup>203</sup>

Other requirements are then established by the aforementioned human rights treaties, which clearly explain the preconditions of a lawful deprivation of liberty. For example, the European convention on Human rights says that people shall be deprived of their liberty only in when

- the lawful detention of a person after conviction by a competent court;
- the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
- the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
- the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
- the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

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<sup>202</sup>Cited in International Commission of Jurists, "Sexual Orientation, Gender Identity and International Human Rights Law, Practitioners Guide No.4", p.72 (2009).

<sup>203</sup>*Ibidem*.

- the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.”<sup>204</sup>

As also noticeable from the aforementioned requirements, states are allowed to arrest individuals to prevent the “spreading of infectious diseases”, or to arrest people with “unsound minds”. It is well known that homosexuality was considered a mental illness until 1972, when the American Psychological Association first removed homosexuality from the category of pathological diseases (it was then followed by the World Health Organization in 1990). Such categorisation brought to the detention of numerous homosexuals and HIV/AIDS positive patients in hospitals. In this regard, *Enhorn v Sweden* is a key case. In 1995, Mr. Enhorn found out to be HIV positive and of having affected a 19-year-old boy after a sexual intercourse. The applicant was then sentenced to forced isolation in a hospital. Such detention should have been no longer than three months. However, due to a following sentence prolonging Mr. Enhorn detention for three additional months, and to the applicant’s continuous escaping, his detention would last, intermittently, one year and a half.<sup>205</sup> The Court’s judgment on this case is particularly important because, while the Court itself recognized the dangerousness of Mr. Enhorn’s disease, it also established that his detention was indeed arbitrary, since the authorities had not taken any alternative measure into consideration. Moreover, the increasing of the isolation period was judged to be unproportioned compared to the necessity of limiting the spread of HIV.<sup>206</sup>

The United Nations’ Human Rights Council has also dealt with arbitrary detention. on the grounds of discrimination of sexual orientation and gender identity. Indeed, in 2017, The Report of the Working Group on Arbitrary Detention has underlined that:

The Working Group has consistently found such discrimination when it is apparent that persons have been deprived of their liberty specifically on the basis of their

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<sup>204</sup>Article 5 of the ECHR.

<sup>205</sup> *Affaire Enhorn c. Suède, Berger V.*, “*Jurisprudence de la Cour Européenne des Droits de l’Homme, 13e Édition*”, p.140-141 (2014) (In French).

<sup>206</sup>*Ibidem*.

own or perceived distinguishing characteristics or because of their real or suspected membership of a distinct (and often minority) group. [...]”<sup>207</sup>

Among said minorities, lesbian, gay, bisexual, transgender and intersex persons, and HIV/AIDS positive patients were taken into consideration.

In an earlier report, the same working group had reported arbitrary detentions involving drug addicts, prostitutes, homosexuals and people suffering from AIDS. According to the report, such people were considered “a risk to society.”<sup>208</sup> Moreover, it was underlined that AIDS positive patients, disabled individuals and drugs addicts were “detained in places that are incompatible with their state of health, sometimes without treatment and without it having been established that their detention is justified on medical or public health grounds.”<sup>209</sup> The working group was said to be concerned, because “it is vulnerable persons that are involved, people who are often stigmatized by social stereotypes; [...] often such administrative detention is not subject to judicial supervision.”<sup>210</sup> Brief references to sexual orientation were made in the group’s reports of 2011, 2012, 2015 and 2016.<sup>211</sup>

The first reference to arbitrary detention regarding sexual minority was brought to the UN attention by the WGAD in 2003, when it questioned Egypt with regards to the arrest of 55 people on the grounds of sexual orientation.<sup>212</sup> Despite the government justified the arrest of those people on the grounds of national laws criminalizing the perpetration of immoral acts and acts against public decency, the WGAD noticed that 53 out of 55 people were indeed “prosecuted on charges of homosexuality, as is attested by the legal examination ordered by the Procurator’s Office on the grounds

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<sup>207</sup>Human Rights Council, Report of the Working Group on Arbitrary Detention, UN Doc. A/HRC/36/37 [48] (2017).

<sup>208</sup>Human Rights Council, Report of the Working Group on Arbitrary Detention, UN Doc. E/CN.4/2004/3 [73] (2003).

<sup>209</sup>*Ibidem* [74].

<sup>210</sup>*Ibidem*.

<sup>211</sup>[https://ilga.org/downloads/SP\\_factsheet\\_arbitrary\\_detention.pdf](https://ilga.org/downloads/SP_factsheet_arbitrary_detention.pdf) (Accessed December 2019).

<sup>212</sup> International Commission of Jurists, “Sexual Orientation, Gender Identity and International Human Rights Law, Practitioners Guide No.4”, p.77 (2009).

that homosexuality, as a sexual orientation, is a source of “social dissensions [...]”<sup>213</sup> and that their arbitrary detention was in contravention of article 2 [1] of the Universal Declaration of Human Rights, and articles 2[1] and 26 of the International Covenant on Civil and Political Rights.<sup>214</sup>

The Inter-American Commission in Human Rights has also expressly prohibited arbitrary detention based on sexual orientation and gender identity. Indeed, in the Principles on the Protection of Persons Deprived of Liberty in the Americas, the Commission listed a series of social conditions under which discrimination of people deprived of their liberty are not to be discriminated. While the list is non-exhaustive (as also shown by the term “or any other social condition” used at the end of the long list), sexual orientation and gender identity are clearly and expressively mentioned.<sup>215</sup> Moreover, the commission has made clear that access to medical assistance is a fundamental right of detainees, which does not allow derogation.<sup>216</sup>

Despite the numerous attempts of international bodies to protect SOGI people from arbitrary detention on the base of discrimination or of unfounded pathologizing of homosexuality or transsexualism/transgenderism, numerous Countries still justify their illegitimate acts against the LGBTI community. As a matter of fact, the pathologizing and criminalization of SOGI people are not only cause of arbitrary detention, but are also the cause of stigmatization, torture and ill-treatment of LGBTI individuals, legitimating atrocious conducts, such as the aforementioned “conversion therapies”, and expose sexual minorities to a higher risks of being victims of sexual offenses.<sup>217</sup>

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<sup>213</sup>Working Group on Arbitrary Detention, opinion No. 7/2002 (Egypt), p. 71 [25] (2003).

<sup>214</sup>*Ibidem*, p.73 [28].

<sup>215</sup>Principle II, Equality and Non-Discrimination.

<sup>216</sup> International Commission of Jurists, “Sexual Orientation, Gender Identity and International Human Rights Law, Practitioners Guide No.4”, p.83 (2009).

<sup>217</sup>Office of the High Commissioner, “Born Free and Equal: Sexual Orientation, Gender Identity and sex Characteristics in International Human Rights Law”, p. 60-61 (2019).

Every State has the duty to grant every individual a safe environment, and to ensure the right to liberty. Despite, once again, the principle of universality of human rights, LGBTI people are not properly protected by arbitrary detentions and, even in case of a lawful detention, their rights to safety is being violated, since the authorities do not effectively protect SOGI people for continuous sexual abuses, leaving the perpetrators unpunished.<sup>218</sup>

### *3.1 Rights of freedom of expression, assembly and association*

Freedom of expression is an important right in a democratic State, since it allows individuals to express their opinions and views without suffering from unlawful repercussions. The right to freedom of expression does not simply include hold opinions, but it also includes the right to “receive and impart information and ideas without interference of the public authorities.”<sup>219</sup> An individual has the right to express themselves “either orally, in writing, in print, in the form of art, or through any other medium of one's choice.”<sup>220</sup> Such right is then directly related to the right of assembly and association, which may be a means through which expressing one's opinion.

In terms of obligations, Countries not only does they have to avoid any unlawful restriction of such right, but they also have the duty to grant individuals the enjoyment of such rights by, for example, ensuring that those who are enjoying their right to assembly are not victims of violence either from police forces, or private individuals.

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<sup>218</sup> International Commission of Jurists, “Sexual Orientation, Gender Identity and International Human Rights Law, Practitioners Guide No.4”, p.75 (2009).

<sup>219</sup>Article 10 of the ECHR.

<sup>220</sup>Article 13 of the ACHR.

Both rights can be subjected to limitation, as regulated by the international law. However, their limitation is to be considered legitimate only in the cases prescribed by law. For example, restrictions of the freedom of assembly and association must “be provided for by law, be only imposed for the protection of the interests of national security of public safety, public order, the protection of public health or morals or the protection of the rights and freedom of others, and be necessary in a democratic society for achieve one of the aforementioned purposes.”<sup>221</sup>

In terms of restrictions of the freedom of expression, a State may limit such right so to avoid the spread of hate speech that, for example, could target religious communities, ethnic minorities or, more in general, a specific group of people. A good example of a restriction of the freedom of expression may be the recent establishment of a special commission on racism, Anti-Semitism and incitement to hatred and violence in Italy.<sup>222</sup>

With regards to LGBTI people, international bodies have recognised the importance of safeguarding the freedom of expression of this community. Despite this, numerous States have been restricting these rights in the name of the “protection of public morals” the protection of “public order” and the “protection of the rights of the children”, as also reported by several reports drafted by the UN Commissioner for Human Rights.<sup>223</sup> An emblematic case of such unlawful restrictions is given by the endorsement, back in 2011, of a bill prohibiting “public actions aimed at propaganda of sodomy, lesbianism, bisexuality, and transgenderism among minors” by the Legislative Assembly

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<sup>221</sup> International Commission of Jurists, “Sexual Orientation, Gender Identity and International Human Rights Law, Practitioners Guide No.4”, p.117 (2009).

<sup>222</sup>La Repubblica, “Antisemitismo e odio razziale, via libera alla ‘commissione segre’, ma è polemica per l’astensione del centro destra” (In Italian), October 30, 2019, retrieved at: [https://www.repubblica.it/politica/2019/10/30/news/antisemitismo\\_ok\\_del\\_senato\\_alla\\_mozione-segre\\_su\\_commissione\\_straordinaria-239898481/](https://www.repubblica.it/politica/2019/10/30/news/antisemitismo_ok_del_senato_alla_mozione-segre_su_commissione_straordinaria-239898481/) (Accessed December, 2019).

<sup>223</sup>Office of the High Commissioner, “Born Free and Equal: Sexual Orientation, Gender Identity and sex Characteristics in International Human Rights Law”, p. 79-80 (2019).

of St. Petersburg.<sup>224</sup> Such ban on the “propaganda of homosexuality” was then expanded at a federal level.<sup>225</sup>

As of now, the jurisprudence of the European Court on Human Rights regarding the protection of the rights of expression and association and assembly of LGBTI people has been rather recent, with the first case successfully dealing with the right of assembly and association dating back to 2007. The Court found a violation of Article 11 of the Convention with regards to the case of *Bączkowski and Others v. Poland*,<sup>226</sup> in which the applicants, members of the group “Foundation for Equality”, were denied the permission to hold stationary assemblies, aimed at protesting against the discrimination of various minorities, on the base of Article 65 (a) of the Road Traffic Act. The refusal of the Mayor of Warsaw to authorize the assembly came after the release of an interview with the Mayor himself, in which he stated that “I haven't read the application. But I will ban the demonstration regardless of what they have written. I am not for discrimination on the ground of sexual orientation, for example by ruining people's professional careers. But there will be no public propaganda about homosexuality.”<sup>227</sup> Based on such declarations, the Court assessed the Violation of Article 14 in conjunction to Article 11, stating that it was impossible to “disregard the strong personal opinions publicly expressed by the Mayor on issues directly relevant to the decisions regarding the exercise of freedom of assembly.”<sup>228</sup> Such opinions were said to have influenced the actions of the authorities who were acting on the Mayor's behalf. Furthermore, the Court noted that “the Mayor expressed these views when a request for permission to hold the assemblies was already pending before the municipal authorities.”<sup>229</sup> Thus, it was “reasonably surmised that his opinions could have affected the decision-making process in the present

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<sup>224</sup>Johnson P., “Homosexuality and the European Court of Human Rights”, p.167 (2014).

<sup>225</sup> Human Rights Council, Communications report of Special Procedures, UN Doc. A/HRC/23/51, p.20 (May 2013).

<sup>226</sup>*Bączkowski and Others v. Poland, Application no. 1543/06, 3 May 2007*

<sup>227</sup>*Ibidem*, [27].

<sup>228</sup>*Ibidem*, [73].

<sup>229</sup>*Ibidem*.

case and, as a result, impinged on the applicants' right to freedom of assembly in a discriminatory manner."<sup>230</sup>

With regards to the protection of freedom of expression, protected by Article 10 of the ECHR, a key case is *Bayev and Others v. Russia*. Mr Bayev was found guilty of a breach of section 3.10 of the Ryazan Law on Administrative Offences, which establishes administrative liability for public activities aimed at the promotion of homosexuality among minors. Two years later, the other two applicants were found guilty of a breach of section 2.13 of the Arkhangelsk Law on Administrative Offences, which prohibited public activities aimed at the promotion of homosexuality among minors. According to the case merits, the government considered the ban on "propaganda of homosexuality" as "in a democratic society for the protection of health and morals and the rights of others", also citing the wide margin of appreciation usually recognized to States parties with regards "matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion."<sup>231</sup> The government also pointed out that by specifically targeting an underage audience, the applicants were trying to impose and promote the "homosexual lifestyle" in the minds of minors, corrupting their image of a traditional family.<sup>232</sup> Moreover, it was stated that "according to the Government, statements such as "homosexuality is natural", "homosexuality is normal" or "homosexuality is good" placed psychological pressure on children, influenced their self-identification and intruded into their private lives."<sup>233</sup>

Despite the government's submission, the Court found a violation of Article 10, and assessed that the Court has "consistently declined to endorse policies and decisions which embodied a predisposed bias on the

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<sup>230</sup>*Ibidem*.

<sup>231</sup>Case of *Bayev and Others v. Russia*, Applications nos. 67667/09 and 2 others, 20 June, 2017 [45].

<sup>232</sup>*Ibidem*, [46].

<sup>233</sup>*Ibidem*.



part of a heterosexual majority against a homosexual minority.”<sup>234</sup> Indeed, the Court held that homonegative attitudes and references to the Country’s traditions or general assumptions “cannot of themselves be considered by the Court to amount to sufficient justification for the differential treatment, any more than similar negative attitudes towards those of a different race, origin or colour.”<sup>235</sup>

It was also established that “The legislation at hand is an example of such predisposed bias, unambiguously highlighted by its domestic interpretation and enforcement, and embodied in formulas such as “to create a distorted image of the social equivalence of traditional and non-traditional sexual relationships”.”<sup>236</sup> The Court also stated that it considered unacceptable to create a relation between homosexuality and paedophilia.<sup>237</sup>

The situation of LGBTI rights in Russia has been a matter of concern for the UN as well. In fact, the Human Rights Committee has expressed concern regarding the ban of LGBTI marches adopted by Moscow.<sup>238</sup> The Special Rapporteur on Freedom of Association and Assembly has also expressed concern over the undue delays in the registration of an NGO working LGBTI, intersex and sex workers in Zambia.<sup>239</sup>

The Inter-American system has recognized that the ACHR does include the protection of the right to expression and assembly of LGBTI individuals. Indeed, the IACHR’s Office of the Special Rapporteur for Freedom of Expression “has stated that Article 13 of the American Convention encompasses the right to express one’s own sexual orientation

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<sup>234</sup>*Ibidem* [68].

<sup>235</sup>*Ibidem*.

<sup>236</sup>*Ibidem* [69].

<sup>237</sup>*Ibidem*.

<sup>238</sup>Office of the High Commissioner, “Born Free and Equal: Sexual Orientation, Gender Identity and sex Characteristics in International Human Rights Law”, p. 82 (2019).

<sup>239</sup>*Ibidem*, p. 82-83.

and gender identity and that this kind of expression enjoys a special level of protection under InterAmerican instruments, because it conveys an integral element of personal identity and dignity.”<sup>240</sup>

The IACHR has also stated the importance of eliminating hate speech against LGBTI individuals. This goal, however, is not to be reached only by legal prohibition of such speech, but also through “preventive and educational mechanisms and measures implemented by States, media, and society in general.”<sup>241</sup>

In its Annual Report of the Inter-American Commission on Human Rights, the Commission has indicated that speeches sexual orientation and gender identity are surely among the forms of speech that “should enjoy a special level or protection.”<sup>242</sup> Sexual orientation was also often cited in the 2018 Annual Report of The Office of the Special Rapporteur for Freedom of Expression, where it was reiterated that hate speech against sexual orientation gender identity, or body diversity that constitutes incitement to violence or “any other similar illegal action” falls within the scope of Article 13.5 of the American Convention on Human Rights.<sup>243244</sup>

It is undeniable that LGBTI human rights are still being violated all over the world, despite the great efforts that the international community has been doing. In general, however, SOGI individuals have been increasingly more recognized and protected by international law ever since the first milestones that date back to the 1980s, showing the positive impact that international bodies could apply on States.

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<sup>240</sup>Inter-American Commission on Human Rights, “Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas, p.129 [217] (2015).

<sup>241</sup>*Ibidem*, p.135 [233].

<sup>242</sup>Inter-American Commission on Human Rights, “Annual Report of The Inter-American Commission on Human Rights 2009 - Report of The Special Rapporteur for Freedom of Expression”, OEA/Ser.L/V/II. Doc. 5,p.243 [57] (December 2009).

<sup>243</sup>Inter-American Commission on Human Rights, “Annual Report of The Inter-American Commission on Human Rights 2018 – Annual Report of the Office of the Special Rapporteur for Freedom of Expression”, OEA/Ser.L/V/II, p.221 [80] (March 2019).

<sup>244</sup>Article 13.5 ACHR: “Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punish by law.”

This chapter has offered only brief analysis of the commitment that the international community has been showing for the protection of LGBTI people; Hence, it does not provide an exhaustive framework of all the violations of human rights perpetuated against sexual minorities all over the world. The omission of the unmentioned violations is not to be intended as underestimating their gravity.



## CHAPTER 3: VIOLATIONS OF LGBTI RIGHTS IN SOUTH KOREA

As previously mentioned, South Korea has been the first Asian Country to endorse non-discrimination based on sexual orientation when, in 2005, it joined the statement made by New Zealand, asserting the evidence of human rights violations on the grounds of sexual orientation.<sup>1</sup> However, the Country's international position over the matter seems not to be reflected nation-wide. Indeed, while homosexuality is not directly criminalized, neither it is legally protected from discrimination. The anti-discrimination bill has yet to be put into act, since its citation of sexual orientation as a prohibited ground of discrimination has caused a great uproar, especially between conservative religious groups.<sup>2</sup> The lack of an actual law in terms of protection of sexual minorities, undermine LGBTI individuals' safety. As a matter of fact, numerous people are still afraid of coming out, fearing serious repercussions, such as losing their jobs, being abandoned by their families, or being bullied by others. Such discrimination is present in all spheres of Korean society, penetrating the education system, the civil society, and also the military, and it is also responsible for the great number of suicides involving LGBTI individuals in the Country. Indeed, while Korea is unfortunately known for its high suicide rate, data are even more concerning when the LGBTI community is taken into consideration. For instance, according to a recent survey, 45% of under-18 LGBTI individuals have attempted suicide, while 53% attempted self-harm.<sup>3</sup>

A major concern is also given by the sodomy law, still present in the South Korean Military Criminal Act. Said law has been widely criticized and

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<sup>1</sup>See note 36, p.59.

<sup>2</sup>See note 82, p.21.

<sup>3</sup>BBC, "Gay in South Korea: 'She said I don't need a son like you'", September 20, 2019.

also brought before the Korean Constitutional Court three times, without any positive results.<sup>4</sup>

This chapter will tackle some of the human rights violations perpetuated against the LGBTI community in South Korea. More Specifically, the chapter will deal with the lack of LGBTI protection in the civil society, the school system, the healthcare system and the military. The following list of violations is by any means exhaustive, since it does not take into consideration the entirety of the violence suffered from sexual minorities in the mentioned spheres. Moreover, the chapter will not deal with violations committed in the workplace. The omission of such acts is not to be intended as an underestimation of their impact on the Korean LGBTI community.

Lastly, the author will also discuss a possible strategy that could be implemented in order to promote LGBTI rights, namely the so called “transjudicial communication” between courts.

## ***1. LGBTI and Civil Rights: Recognition of Non-Heterosexual Couples, Freedom of Association, and Legal Gender Recognition***

### ***1.1 The recognition of same-sex couples***

In recent years, States all over the world have been approving laws allowing same-sex couples to marry. The first state to recognize same-sex marriage were The Netherlands, where same-sex unions have been recognized in 2001.<sup>5</sup> Recently, this trend has reached Asia as well. Indeed, in 2017 the Taiwanese Constitutional Court has reached a landmark

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<sup>4</sup>The legitimacy of Article 92-5 of the Military Criminal Act has been questioned in 2002, 2011, and 2016. In 2016, the Constitutional Court upheld its previous decisions by 5 votes to 4.

<sup>5</sup>CNN, “Gay Marriage Goes Dutch”, April 1, 2001 (Accessed January 2020): <https://www.cbsnews.com/news/gay-marriage-goes-dutch/>

decision, declaring that marriage should be opened to same-sex couples.<sup>6</sup> Two years later, Taiwan has become the first Asian state to recognize same-sex unions.<sup>7</sup>

Despite the hopes of Seoul Mayor Park Won-soon for South Korea to be “‘the first’ Asian country to legalize same-sex marriage”<sup>8</sup>, this positive trend has yet to reach South Korea, where same-sex unions are not recognized. As a matter of fact, while Korea has been the first Asian State to join a statement in favour of LGBTI rights in 2005, the Country has no law protecting sexual minorities and non-heterosexual couples from discrimination.

The major opposers to the legal recognition of homosexual unions are religious conservative groups, which have also ostracized the promulgation of the anti-discrimination bill, arguing that the bill would represent a violation of their right to opinion. Obstacles to the recognition of same-sex marriage come from the political sphere as well, which does not seem to be ready to promulgate such important law. Indeed, former human rights lawyer and now South Korean President Moon Jae-in has received a lot of criticism when he publicly stated his aversion to discrimination of homosexuals, but his contrariety to same-sex unions and the elimination of the ban against homosexuals in the Military.<sup>9</sup> President Moon has also argued that, in order to recognize same-sex marriage, general consensus must be reached. This very same reasoning was provided by the Seoul

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<sup>6</sup>Ho M.S., “Taiwan’s Road to Marriage Equality: Politics of Legalizing Same-sex Marriage”, *The China Quarterly*, 238, p.482 (2019).

<sup>7</sup>The Guardian, “Thousands attend Taiwan’s first pride since legalization of gay marriage”, October 26, 2019 (Accessed January 2020): <https://www.theguardian.com/world/2019/oct/26/thousands-attend-taiwan-first-pride-since-legalisation-of-gay-marriage>

<sup>8</sup>The Asan Institute for Policy Studies, “Over the Rainbow: Public Attitude Toward LGBT in South Korea”, April 17 2015 (Accessed January 2020): <http://en.asaninst.org/contents/over-the-rainbow-public-attitude-toward-lgbt-in-south-korea/>

<sup>9</sup>Rainbow Action Against Sexual Minority Discrimination, “Human Rights Violations against Lesbian, Bisexual Women, Transgender and Intersex People on the Basis of Sexual Orientation, Gender Identity, and HIV Status in the Republic of Korea”, Joint Civil Society Submission to the Committee on the Elimination of Discrimination against Women (CEDAW) for State Compliance with the Convention on the Elimination of All Forms of Discrimination against Women- 69th Session, p.10[6] (February 2018).

Western District Court that, in 2016 dismissed the first case regarding same-sex marriage. The Court stated that

“marriage, provided in the Constitution, Civil Act, and the Act on the Registration, etc. of Family Relationship etc., can be interpreted as referring to the “morally and customarily justified union between two persons of the opposite sex for the purposes of lifelong cohabitation based on affection”, and cannot be extensively interpreted as “a union between two persons, regardless of their sex, for the purpose of lifelong cohabitation based on affection”<sup>10</sup>

The District Court has also stated that the lack of recognition of homosexual marriage in Korea cannot be considered contrary to the principle of equality, since heterosexual and homosexual unions present several differences, for example in relation to childbirth.<sup>11</sup>

While general consensus seems to be the deal breaker in terms of recognition of same-sex unions in the Country, it has not stopped the government from granting the same legal protection given to heterosexual spouses to same-sex spouses of the US military personnel.<sup>12</sup> Even more recently, the Korean authorities issued a spouse visa for the husband of the New Zealander Ambassador to Korea who, indeed, is married to another man.<sup>13</sup> This news was well received by LGBTI groups since, in the past, Korea did not recognize the “spouse” status for same-sex diplomatic partners, who were required to enter the Country under a status akin to “employees.”<sup>14</sup>

The immediate question that comes to mind in relation to these events is surely why the government should comply with the conservative wills when considering the approval of a law allowing same-sex marriage in

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<sup>10</sup>Seoul Western District Court, 2014HoPa1842, May 25, 2016, p.3, English translation retrieved at (Accessed January 2020): <http://gagoonet.org/wp-content/uploads/2019/11/Seoul-Western-District-Court-2014HoPa1842.pdf>

<sup>11</sup>*Ibidem*, p.6.

<sup>12</sup>Military Times, “South Korea gives same-sex U.S. military spouses legal protection”, April 17, 2016 (Accessed January 2020): <https://www.militarytimes.com/news/your-military/2016/04/17/south-korea-gives-same-sex-u-s-military-spouses-legal-protection/>

<sup>13</sup>The Korea Herald, “Korean Air recognizes same-sex Korean couple as family”, December 12, 2019 (Accessed January 2020): [http://www.koreaherald.com/view.php?ud=20191212000757&ACE\\_SEARCH=1](http://www.koreaherald.com/view.php?ud=20191212000757&ACE_SEARCH=1)

<sup>14</sup>The Hankyoreh, “Openly gay New Zealand ambassador to S. Korea attends reception with husband”, October 23, 2019 (Accessed January 2020): [http://english.hani.co.kr/arti/english\\_edition/e\\_international/914316.html](http://english.hani.co.kr/arti/english_edition/e_international/914316.html)



the Country, if it did not question public opinion while recognizing same-sex couples in the US military personnel and recognizing the spouse status for the husband of the New Zealander ambassador. Surely enough, these cases may be considered “special” cases, since they were related to the military and diplomatic sphere. However, if public opinion is as opposed to homosexual marriage as the government has been declaring, how was it possible for the government to actually provide recognition to same-sex unions registered abroad? Why is it not possible to provide legal recognition to same-sex couples living in Korea?

The lack of legal recognition of same-sex relations causes numerous problems for homosexual couples, in terms of access to healthcare, alimony and workplace. Indeed, a survey conducted by a coalition of civic groups on 380 cohabiting homosexual couples has shown how such couples are often discriminated in society. In fact, 81,7% of the sample declared of having been subjected to discrimination in healthcare, workplace and housing (especially with regards to the low-cost housing rents available for newlyweds.)<sup>1516</sup>

Legally recognizing same-sex partnership, however, is not only a matter of the enjoyment of rights, but it is also a matter of suicide prevention. As a matter of fact, the OECD has noticed how, in the United States, suicide rates among LGBTI adolescents decreased by 15% after the legalization of same-sex marriage.<sup>17</sup> Korean society is deeply affected by suicide rates, which are among the highest in the world. Suicide attempts are especially diffused among young LGBTI people, as also provided by a 2014 survey by the National Human Rights Commission of Korea, in which 19,4% of the sample has declared of having attempted suicide.<sup>18</sup>

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<sup>15</sup>The Korea Herald, “Sexual minorities, activists call for legalization of gay marriage”, November 13, 2019 (Accessed January 2020):

<http://www.koreaherald.com/view.php?ud=20191113000798>

<sup>16</sup>UPI, “In South Korea, LGBT activists push for marriage equality”, November 13, 2019 (Accessed January 2020): [https://www.upi.com/Top\\_News/World-News/2019/11/13/In-South-Korea-LGBT-activists-push-for-marriage-equality/8641573630204/](https://www.upi.com/Top_News/World-News/2019/11/13/In-South-Korea-LGBT-activists-push-for-marriage-equality/8641573630204/)

<sup>17</sup>The OECD, “Society at Glance 2019: A Spotlight on LGBT People – How Does Korea Compare?”, March 27, 2019.

<sup>18</sup>*Ibidem*.

As already noticed, social consensus is often cited with regards to same-sex marriage. According to the Asan Institute for Policy Studies, however, public opinion is steadily shifting, signalling that Korean citizens are more and more accepting of same-sex relations. Indeed, according to the Asan Institute, people who support same-sex unions rose from 16,9% in 2010 to 28,5% in 2014.<sup>19</sup> The positive trend seems to still be ongoing, with the percentage of people supporting same-sex marriage raising to 34% in 2017.<sup>20</sup> According to this latest research, younger generations seem to be more supportive of legalization, with 2 out of 3 people aged between 19 and 29 years old responding “I agree that same-sex couples should be given the legal right to marry.”<sup>21</sup>

While it would be interesting to observe how social consensus regarding LGBTI marriage has shifted in these two years, due to the positive trend registered in the previous years, it is reasonable to think that public consensus over same-sex unions has increased compared to 2017. Is it, then, still possible to use the “lack of public consensus” as an excuse to not legalize same-sex unions?

## *1.2 Queer People and Freedom of Expression and Association*

Recently, queer events in Korea have been attracting an increasing number of participants. Indeed, the latest Seoul Queer Culture Festival registered the record amount of 120 thousand participants.<sup>22</sup> Moreover, other cities such as Jeonju and Gwanju have organized their first queer

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<sup>19</sup>The Asan Institute for Policy Studies, “Over the Rainbow: Public Attitude Toward LGBT in South Korea”, April 17, 2015.

<sup>20</sup>Equaldex, “LGBT Rights in South Korea” (Accessed January 2020): <https://www.equaldex.com/region/south-korea>

<sup>21</sup>Sogilaw, “Human Rights Situation of LGBTI in South Korea 2017”, p.133 (2018).

<sup>22</sup>The Diplomat, “Anti-LGBT Protesters Derail Incheon’s First-Ever Queer Culture Festival”, September 11, 2018 (Accessed January 2020): <https://thediplomat.com/2018/09/anti-lgbt-protesters-derail-incheons-first-ever-queer-culture-festival/>

festivals.<sup>23</sup> However, this positive trend is ostracized by anti-LGBTI groups, who impede sexual minorities to enjoy their freedom of expression and association. In fact, the right of association of sexual minorities has been violated several times, as also provided by the events that took place during the first Incheon Queer Culture Festival. In 2018, in fact, the first Incheon Queer Culture Festival was subjected to delays and blocked by anti-LGBTI groups. According to the media, the 300 participants to the festival, were physically and verbally attacked and injured by 1000 anti-LGBTI people,<sup>24</sup> who also illegally took pictures and videos of the participants to the festival. Among other things, the anti-gay protesters were reported to have stated “leave Incheon for good” and “stop wasting tax money on AIDS treatment.”<sup>25</sup> While the event was severely delayed, with the parade lasting 5 hours instead of 20 minutes, people supporting the LGBTI community were not even able to eat or using restrooms.<sup>26</sup> According to the organizers of the event and the representatives of the Rainbow Action Against Sexual Minority Discrimination, the counter-protesters had also illegally occupied the location of the Festival the day prior to the event, holding an all-night prayer meeting.<sup>27</sup> Eight individuals who were part of the conservative anti-LGBTI groups present that day were indicted. Despite the arrests, the police forces were highly criticized for not blocking the counter-event, opting instead for isolating and blocking the 300 people participating to the queer festival.<sup>28</sup>

the aforementioned case, however, is not isolated. In fact, in 2014 the Korea Queer Festival Organizing Committee was revoked of the needed authorizations to use the scheduled location where the Korea Queer Festival was supposed to be held. Apparently, the Seodaemun-gu Office revoked the approval 2 weeks prior to the parade, citing “strong public

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<sup>23</sup>Sogilaw, “Human Rights Situation of LGBTI in South Korea 2018”, p. 45 (2019).

<sup>24</sup>The Diplomat, “Anti-LGBT Protesters Derail Incheon’s First-Ever Queer Culture Festival”

<sup>25</sup>The Korea Herald, “Queer festival severely delayed by violent anti-gay protests in Korean port city”, September 10, 2018 (Accessed January 2020):

<http://www.koreaherald.com/view.php?ud=20180909000245>

<sup>26</sup>*Ibidem.*

<sup>27</sup>Sogilaw, “Human Rights Situation of LGBTI in South Korea 2018”, p. 44-45 (2019).

<sup>28</sup>*Ibidem.*

opposition to the Korean Queer Festival.”<sup>29</sup> The office then granted that same location to homophobic groups for the organization of cultural events.<sup>30</sup> The following year, Seoul police denied the authorization for the organization of the Pride event, because there was a “possibility of inconvenience to pedestrian and vehicle traffic”, since the intended route of the parade would have overlapped with the parade organized by anti-LGBTI groups.<sup>31</sup> The Korea Queer Festival Organizing Committee filed a complaint to the Seoul Administrative Court, which declared that the ban on the parade was indeed invalid. In the end, the event took place on a later date than the one that was previously planned.<sup>32</sup>

In 2015, the Beyond the Rainbow Foundation, a LGBTI association, was denied its legal personality by the Ministry of Justice. The Ministry justified its decision stating that it could only register groups that work on “general human rights themes”, while Beyond the Rainbow was specifically dedicated to the protection of sexual minorities’ rights.<sup>33</sup>

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<sup>29</sup>Catholic Human Rights Committee, Korea Center for United Nations Human Rights Policy, Korean Confederation of Trade Unions, Korean Lawyers for Public Interest and Human Rights, Korean Public Interest Lawyers` Group GONG-GAM, MINBYUN-Lawyers for a Democratic Society, People’s Solidarity for Participatory Democracy, Rainbow Action against Sexual-Minority Discrimination, SARANGBANG group for human rights, South Korean NGOs Coalition for Law Enforcement Watch, “Situation of Freedom of Peaceful Assembly and Association in the Republic of Korea”, p.27 (2016).

<sup>30</sup>*Ibidem*.

<sup>31</sup>Human Rights Watch, “Dispatches: No Parade, but Pride Perseveres in South Korea”, June 1, 2015 (Accessed January 2020):<https://www.hrw.org/news/2015/06/01/dispatches-no-parade-pride-perseveres-south-korea>.

<sup>32</sup>Catholic Human Rights Committee, Korea Center for United Nations Human Rights Policy, Korean Confederation of Trade Unions, Korean Lawyers for Public Interest and Human Rights, Korean Public Interest Lawyers` Group GONG-GAM, MINBYUN-Lawyers for a Democratic Society, People’s Solidarity for Participatory Democracy, Rainbow Action against Sexual-Minority Discrimination, SARANGBANG group for human rights, South Korean NGOs Coalition for Law Enforcement Watch, “Situation of Freedom of Peaceful Assembly and Association in the Republic of Korea”, p.27 (2016).

<sup>33</sup>Human Rights Council, “Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association on his mission to the Republic of Korea”, UN Doc A/HRC/32/36/Add.2, p.11[49] (2016).

A similar rejection was faced by the 4.16 Sewol Families for Truth and a Safer Society, an association with the aim of investigating the Sewol Ferry Tragedy.<sup>3435</sup>

The Beyond the Rainbow Foundation successfully filed a lawsuit against the Ministry of Justice and was finally able of being recognized its legal personality.<sup>36</sup>

Even when organized, Queer events are often sided with anti-LGBTI counter-events, that usually take place nearby the location of queer parades. An example could be the Seoul pride parades, which are often sided with these kinds of counter-events where, while the participants want to “help” homosexuals go back “to their religious values”,<sup>37</sup> banners state that homosexuality is a “sin”.<sup>38</sup>

The Anti-gay events are also used to advocate against the anti-discrimination bill and the promotion of sexual minorities rights, since “sexual minorities advocating for their human rights are infringing upon the human rights of the majority.”<sup>39</sup> Thus, these counter-events become yet another way to discriminate and deny LGBTI rights, protecting what such conservative groups define their freedom of speech. However, as already mentioned, while the freedom of thought and speech is fundamental and must be granted to every individual, it is undeniable that some limitations

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<sup>34</sup>On April 16, 2014, a ferry carrying 459 people sank off the coast of Jindo Island, killing 304 people. On board there were 324 students and 14 staff from Danwon High School who were on a school trip. In 2015, the April 16 Solidarity asked for the reinvestigation of the tragedy, since the Captain of the Coast Guard vessel 123 was the only one being held accountable for the events. The group demanded the punishment of 17 government officials, including former president Park Geun-hye and former Justice Minister Hwang Kyo-ahn.

<sup>35</sup>Human Rights Council, “Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association on his mission to the Republic of Korea”, UN Doc A/HRC/32/36/Add.2, p.11[49].

<sup>36</sup>Rainbow Action Against Sexual Minority Discrimination, “Human Rights Violations on the Basis of Sexual Orientation, Gender Identity, and HIV Status in the Republic of Korea- Joint Civil Society Submission to United Nations Universal Periodic Review on the situation of LGBTI persons and persons with HIV”, p. 9[14] (March 2017).

<sup>37</sup>Asian Boss, Do Koreans Support LGBTQ+? (Ft. Seoul Queer Parade).

<sup>38</sup>Korea Herald, ““Love is love”: Korea celebrates LGBT pride”, June 2 2019 (Accessed January 2020): <https://www.youtube.com/watch?v=PaL3eBStx2k&t=110s>

<sup>39</sup>Arirang Culture, “Two Views of the Seoul Queer Culture Festival 2019 서울퀴어축제 현장 속 두가지 시선”.

must be placed, in order to safeguard everyone's freedom of thought without promoting hate speech against a specific group of people. Bearing this in mind and listening to what the Anti-gay events promote, it is impossible not to question the legitimacy of such events and what should be defined as "hate speech", if sentences such as "homosexuality is a sin" do fall under the protection of freedom of thought and speech. Moreover, if promoting sexual minorities' rights damages the majority's human rights, does that mean that advocating for every minority's rights should be seen as damaging the majority? Does that mean that religious minorities should not be granted human rights? It is also interesting to notice how, according to the 2015 census on population and housing, religious people represent 43.9% of the Korean population.<sup>40</sup> Thus, even though religious people do still represent a good portion of the Korean population, they could be considered as part of the "minority groups." Does that mean that people joining religious groups should be deprived of their human rights, in the name of preserving the majority's?

The lack of a position of the government over the matter is surely worrisome. A government has the duty to promote and achieve the wellbeing of all its citizens, without discrimination. Allowing this uncontrolled and continuous hatred and ostracization of sexual minorities does not only represent a discrepancy with the role this country has internationally, but it also means failing to protect and grant the rights of a portion of the population.

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<sup>40</sup>Statistics Korea - Results of the 2015 Population and Housing Census (population, household and housing)":  
<http://kostat.go.kr/portal/eng/pressReleases/1/index.board?bmode=read&aSeq=361147>

### *1.3 Trans people, Legal Gender Recognition and Forced Sterilization*

Transgender people are highly discriminated. A major issue for trans individuals is given by the procedure for obtaining the legal gender recognition, which is regulated by the Guidelines on the Clerical Processing of Cases of Transsexuals', established in 2007. Such guidelines include prohibitive requirements that, overall, render the process of legal gender recognition lengthy and complicated. Indeed, according to a 2018 survey, transgender individuals who have either undergone the process or are preparing for it, found that it was difficult to gather the needed information, and that the process requires too many documents.<sup>4142</sup>

The requirements include:

1. "Two psychiatric diagnoses of transsexualism
2. Surgeon's letter confirming gender reassignment surgery and the applicant now has external genitals of the sex opposite to their biological sex,
3. If no surgeon's letter, a letter from another qualified physician after physical examination
4. If surgery performed overseas, a written diagnosis (physical appraisal, report of opinion and findings) from a South Korean plastic surgeon, gynecologist and obstetrician, that applicant has the external genitals of the sex opposite to their biological sex,
5. Applicant is sterile now or in the future,
6. applicant's statement of his or her growth environment and letters of guarantee from two or more references [...]
7. Written consent from parents."<sup>43</sup>

The issue of the Guidelines on the Clerical Processing of Cases of Transsexuals was also tackled by the UN Human Rights Committee that, in its Concluding observations on the fourth periodic report of the Country, has expressed concern for "the restrictive requirements for legal recognition of gender reassignment (arts. 2,17 and 26)."<sup>44</sup>

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<sup>41</sup> Out of the 70 transgender people who were interviewed, 41,1% responded that information on legal gender recognition were "not available", while 37,1% stated that "there are too many documents to submit".

<sup>42</sup> SOGILAW, "Human Rights Situation of LGBTI in South Korea 2018", p. 52.

<sup>43</sup> ILGA, "Trans Legal Mapping Report", p.39 (2017) (Accessed January 2020): [https://ilga.org/downloads/ILGA\\_Trans\\_Legal\\_Mapping\\_Report\\_2017\\_ENG.pdf](https://ilga.org/downloads/ILGA_Trans_Legal_Mapping_Report_2017_ENG.pdf)

<sup>44</sup> Human Rights Committee, "Concluding observations on the fourth periodic report of the Republic of Korea", UN DOC CCPR/C/KOR/CO/4, p.3 [14e] (2015).

The Government has responded to such concern, indicating that “the guidelines are not legally binding regulations but reference materials for the judges when making a judgement.”<sup>45</sup> Even though the guidelines are not binding, numerous transgenders’ requests for legal gender recognition are being rejected on the base of such “reference material”, causing major problems to transsexual people, who cannot fully enjoy their rights. Indeed, Transgender people who do not obtain legal gender recognition cannot obtain a new ID card; Hence, they are not able to fully enjoy their rights, having difficulties in finding a job, accessing healthcare services, or even exercising their right to vote.<sup>46</sup> In fact, Indeed, Korean ID numbers also provide the legal gender of an individual.<sup>47</sup> However, when a transgender individual is denied legal gender recognition, their ID number will not change, providing a discrepancy between the individual appearance and their legal gender, also providing everyone the information that the individual is, indeed, transgender. Such discrepancy causes the impossibility for transgenders to apply, for example, for a job opening in a company requiring a resident number.<sup>48</sup> Transgenders may also be discriminated while applying for a job position, as also proven by the experience of a trans man who, after doing an interview, was rejected by the employer solely on the base of his transgender status. Indeed, the employer, after noticing the man’s ID number on his driver license, decided not to employ him because he “*would disgust costumers.*”<sup>49</sup> Such statement also shows the great difficulties that trans people face in their everyday lives, and how difficult it is for them to find a job and be economically independent. Ironically enough, according to a recent survey, the Korean general public seems to be accepting of

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<sup>45</sup>Human Rights Committee, “Concluding observations on the fourth periodic report of the Republic of Korea – Addendum: Information Received from the Republic of Korea on Follow-up to the Concluding Observations”, UN DOC CCPR/C/KOR/CO/\$/Add.1, p.3 [9] (2017).

<sup>46</sup>The Hankyoreh, “Landmark legal ruling for South Korean transgenders”, March 16, 2013

<sup>47</sup> A registration number either begins with “1”, identifying a male individual, or “2”, identifying a female individual.

<sup>48</sup>The Hankyoreh, “Landmark legal ruling for South Korean transgenders”, March 16, 2013.

<sup>49</sup>Na T.Y. and Choo H.Y., “Becoming a Female-To-Male Transgender (FTM) in South Korea”, *Embodied Resistance- Challenging the Norms, Breaking the Rules.* p. 51 (2011)



transgender people, with 47,6% of the sample<sup>50</sup> agreeing that trans people are a “natural occurrence” and 47,9% agreeing that trans individuals are brave.<sup>51</sup> Always according to the same survey, 13,4% stated that trans people are “committing a sin”, while 25,3% think they have “a form of mental illness.”<sup>52</sup>

Other problems may be related to accessing the healthcare system, as provided by Tari Yoingjung Na and Hae Yeon Choo who, in their contribution for the book *Embodied Resistance- Challenging the Norm, Breaking the Rules*, have reported the experience of an FTM individual who, following an accident, was admitted in a gender-segregated hospital. The Man, whose legal gender was still “female”, was in the end given a private room because his “ID number begins with number two, [...] but we can’t send you to women’s room. We can’t send you to a men’s either, because of the paperwork.”<sup>53</sup> While this specific episode is not negative, it still shows the difficulties that trans people may encounter when accessing healthcare.

The guidelines represent a major issue for several reasons, including requiring the written consent from parents (or a close family member) in order to obtain the legal gender recognition. Such requirement is in total violation of human rights of trans people and, in a Conservative society as Korea, it may be hard for a transgender person to obtain written permission of parents, who may be opposed to their child’s wishes. A controversial case regarding this specific requirement was reported in 2014, when a transgender woman was denied with the legal change of sex because her family did not give their consent. Among the family members who were asked for permission, there was also the woman’s adult son, who asked the

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<sup>50</sup>The sample was composed of 500 participants, with similar percentages of males and females. 40,1% of the sample was composed by individuals aged 35 to 49 years old.

<sup>51</sup>Yi H., Luhur W., Brown T. N.T., “Public Opinion of Transgender Rights in South Korea”, UCLA- Williams Institute School of Law, p.7 (2019).

<sup>52</sup>*Ibidem*.

<sup>53</sup>T.Y. and Choo H.Y., “Becoming a Female-To-Male Transgender (FTM) in South Korea”, p. 52 (2011).

Incheon District Court not to recognize his father's change of sex for fear of repercussions in his career.<sup>54</sup>

Few steps forward were made when several Courts established that sex reassignment surgery was not a fundamental requirement in order to obtain the legal change of sex.<sup>55</sup> The first ruling came in 2013, when the Seoul Western District Court allowed an FTM transgender to legally change his gender without undergoing genital surgery. In its reasoning, the Court stated that said surgery "should not be a requirement because it is not medically necessary and is a difficult procedure with a strong risk of side effects and other negative consequences."<sup>56</sup> Despite these important decisions, the guidelines have not been revised.

The Guidelines also include forced sterilization of transgender people as a requirement to obtain legal gender recognition. This is yet another violation of their human rights, specifically of their reproductive rights. Sterilization may also be imposed by the Military Manpower Administration, which is responsible for issuing the exemption to the mandatory military service. Indeed, according to the 2014 SOGILAW annual report on LGBTI Rights in South Korea, the MMA seems to also have required transgender individuals to forcibly undergo genital surgery, so to provide evidence of their transgenderism. SOGILAW reported a case of an MTF individual who was forced to undergo orchiectomy in order to receive exemption.<sup>57</sup>

The Military Manpower Administration has also repeatedly revoked exemptions that were previously granted to transgender individuals, accusing them of having faked their transsexualism so to avoid the

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<sup>54</sup>The Korea Herald, "Court denies father's sex change to protect adult son", April 3, 2014. (Accessed January 2020):

<http://www.koreaherald.com/view.php?ud=20140403001473>

<sup>55</sup>Up until 2014, the Seoul Western District Court, the Ulsan District Court, the Daegu Family Court and Incheon District Court permitted legal gender recognition without genital surgery.

<sup>56</sup>Seoul Western District Court, 2012Ho-Pa4225, March 15, 2013; The Hankyoreh, "Landmark legal ruling for South Korean transgenders", March 16, 2013 (Accessed January 2020):

[http://english.hani.co.kr/arti/english\\_edition/e\\_national/578323.html](http://english.hani.co.kr/arti/english_edition/e_national/578323.html)

<sup>57</sup>SOGILAW, "Human Rights Situation of LGBTI in South Korea – Annual Report 2014", p.48 (2015)

mandatory military service. An example of such impositions regards an MTF transgender who got exempted in 2005, only for her exemption to be revoked in 2014. The woman was then charged of having taken female hormones under false pretences, so to avoid military service.<sup>58</sup> The Seoul Military Manpower Administration decided that she had to serve, since she had proposedly dodged the service. The MTF transgender was however once again “diagnosed” with a sexual identity disorder, but the MMA refused to give her the exemption, since “*an exemption can be given for military service when it is objectively shown that someone has become a woman.*”<sup>59</sup> The sentence made reference to the fact that the woman had yet to undergo her sexual reassignment surgery hence, according to the MMA, she could not provide “physical proofs” of her transsexuality. The Seoul District Court declared that the revocation of the exemption was unlawful. the Appeal Court upheld the decision, stating that “The claim that a man would take hormone injections and abandon his masculinity for a year for the sole purpose of getting out of military service does not match what precedent teaches us.”<sup>60</sup>

With regards to this topic, recently South Korean media have reported a case regarding an on-duty Korean soldier who underwent sexual reassignment surgery during her leave. The staff sergeant has expressed her intention of continuing serving the in the military as a woman.<sup>61</sup> Following her examination, she was declared unfit to serve. The decision was announced on the 22<sup>nd</sup> of January the military, despite recommendation of the NHRCK to postpone the decision in order for the staff sergeant to obtain her legal gender recognition. The military authorities declared that their decision “had been made based on the result of a medical check-up in accordance with related laws, regardless of the status of her application for

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<sup>58</sup>The Hankyoreh, “Transgender conscript avoids compulsory military service”, August 1, 2014 (Accessed January 2020):

[http://english.hani.co.kr/arti/english\\_edition/e\\_national/649415.html](http://english.hani.co.kr/arti/english_edition/e_national/649415.html)

<sup>59</sup>*Ibidem.*

<sup>60</sup>*Ibidem.*

<sup>61</sup>The Hankyoreh, “S. Korea’s 1st transgender soldier announces intention to continue serving after transition”, January 17, 2020 (Accessed January 2020):

[http://english.hani.co.kr/arti/english\\_edition/e\\_national/924853.html](http://english.hani.co.kr/arti/english_edition/e_national/924853.html)

a legal sex change.”<sup>62</sup> Indeed, on a scale that goes from 1 to 11 on mental and physical disabilities, the staff sergeant received a 3 because of the removal of her genitalia. It would be interesting to understand why her sexual reassignment surgery would have caused such a big impact on her mental or physical health that she was declared unfit to serve.

Physical appearances, however, do not only count in the military. In fact, they can also affect transgender communities. In their contribution to the book *Embodied resistance – Challenging the Norms, Breaking the Rules*, Tari Youngjung Na and Hae Yeon Choo describe how physical appearance determines the “social hierarchy” in FTM communities, where Trans people who already underwent all the necessary surgeries have more authority to set the community’s rules and to decide whether an individual is an FTM or not.<sup>63</sup> Such hierarchy, based on physical appearance, is very detrimental, since other members are often pressured to “follow certain masculine norms.”<sup>64</sup> The authors have also reported the words of an FTM trans, affirming that “there are people who say, “I don’t walk around with people who didn’t have the top [chest] surgery because I don’t want to be suspected.” They say, when they are with normal men, they get less suspicion.”<sup>65</sup>

Such attitudes, which clearly do not represent the entirety of the South Korean Trans community, are a clear evidence on how the narrative of “physical proofs”, perpetuated by both the MMA and the government (through the guidelines) by imposing forced surgery on trans people, does have a great effect on the community. Because of such attitudes, trans communities, which should be a safe haven for trans people, become a

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<sup>62</sup>The Korea Herald, “Transgender sergeant forcibly discharged from military”, January 22, 2020 (Accessed January 2020): <http://m.koreaherald.com/view.php?ud=20200122000800#cb>

<sup>63</sup>Na T.Y. and Choo H.Y., “Becoming a Female-To-Male Transgender (FTM) in South Korea”, *Embodied Resistance- Challenging the Norms, Breaking the Rules*. p. 55 (2011).

<sup>64</sup>*Ibidem*.

<sup>65</sup>Cited in *Ibidem*.

means to reinforce gender stereotypes, for fear of being discovered by people outside the community.

## **2. Queering Youth: Sex Education, Discrimination and Bullying in Korean Education System**

### *2.1 Sexual Education in Schools*

Without any doubt, the school system plays a pivotal role in teens' lives. Indeed, through schools, students socialize with their peers, create bonds, and are faced with a system made of norms that should be followed. Clearly, however, the main role of the system is to provide students with knowledge over a vast array of subjects, including sexual education. Indeed, young students must be educated on sexuality-related matters, so to avoid the increase of Sexually Transmittable Diseases (STDs), but also to avoid unplanned pregnancies. According to UNESCO

“A significant body of evidence shows that CSE enables children and young people to develop accurate and age-appropriate knowledge, attitudes and skills; positive values, including respect for human rights, gender equality and diversity, and attitudes and skills that contribute to safe, healthy, positive relationships.”<sup>66</sup>

UNESCO, in its International technical guidance on sexuality education, specifies how a “Comprehensive Sexuality Education” should be based on a human rights approach; hence, it should promote the universality of human rights, teaching young people the importance of “the rights to health, education, information, equality and non-discrimination.”<sup>67</sup>

It is clear that the right of non-discrimination also includes sexual minorities. Hence, according to UNESCO, young people should learn about the difference between biological sex and gender, so to also understand

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<sup>66</sup> UNESCO, “International technical guidance on sexuality education: An evidence-informed approach”, p.12 (2018).

<sup>67</sup> *Ibidem*, p. 16.

that “homophobia and transphobia are harmful to people of diverse sexual orientation and gender identity.”<sup>68</sup>

In South Korea, sex education is mandatory, and students must take a 15-hour course per year, from elementary school to high school.<sup>69</sup> In 2015, the Ministry of education released its guidelines with regards to this topic. However, such guidelines were harshly criticized for both being highly sexist<sup>70</sup> and for prohibiting any reference to sexual minorities. The Ministry revised the guidelines in 2017. However, any reference to the LGBTI community was once again omitted. As a matter of fact, the Ministry of Education refused to include homosexuality in the guidelines, because of the lack of “social consensus” concerning the inclusion of such themes in sex education.<sup>71</sup> Moreover, according to a statement released by the ministry, individuals younger than 20 are considered “too young” to learn about homosexuality.<sup>72</sup> The ministry justified its omission also by stating that the non-inclusion of homosexuality in the guidelines “does not necessarily mean that teachers should not do the related lessons.”<sup>73</sup> while the Ministry of education seems to believe that teens are too young to learn about homosexuality, teens themselves seems not to be so bothered or flustered by the theme since, according to another survey conducted in 2017, 80% of the interviewed teens stated that finding out that a peer was homosexual

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<sup>68</sup>*Ibidem*, p.50.

<sup>69</sup>Quartz, “South Korea’s sexist sex-ed curriculum is spurring a private sex-ed industry”, December 29, 2018 (Accessed January 2020): <https://qz.com/1511349/south-koreas-problematic-sex-ed-spurs-private-sex-ed-industry/>

<sup>70</sup>Among other things, the guidelines stated that: “(male) sexual desire can arise quickly on impulse, regardless of time or place”; “from the perspective of a man who spends a lot of money on dates, it is natural that he would want a commensurate compensation from the woman. In such conditions, unwanted date rape can occur”, and “People of the opposite sex should not be alone together by themselves”

(Retrieved from: <http://www.koreaherald.com/view.php?ud=20150827001012> – Accessed January 2020).

<sup>71</sup>The Korea Times, “Homosexuality missing from sex education”, January 23, 2017 (Accessed January 2020):

[https://www.koreatimes.co.kr/www/news/nation/2017/01/181\\_222534.html](https://www.koreatimes.co.kr/www/news/nation/2017/01/181_222534.html)

<sup>72</sup>*Ibidem*.

<sup>73</sup>Cited in Human Rights Watch, “South Korea Backslides on Sex Education: Excluding LGBT Topics from Curriculum Risks Health, Education”, February 17, 2017 (Accessed January 2020):

<https://www.hrw.org/news/2017/02/17/south-korea-backslides-sex-education>

would not affect their relationship.<sup>74</sup> Moreover, while teens are considered to be “too young” to learn about homosexuality, they are still able to be involved in sexual activities. As a matter of fact, according to a research conducted in 2016 by the Korea Centers for Disease Control and Prevention, young teens in Korea become sexually active at around 13 years of age.<sup>75</sup> A comprehensive sexual education is hence fundamental for the safety of young Koreans who, without proper and complete information, are exposed to a number of risks, including STDs and early pregnancy.

## *2.2 Bullying of LGBTI Youth, Conservative Opposition and the Revision of Textbooks*

The lack of education on sexual minorities brings to the continuation of misconceptions regarding this community. Indeed, in some cases, the term *gay* has been utilized to indicate transgender people, while *same-sex love* is usually intended to indicate male homosexuality, if not specified otherwise.<sup>76</sup> Such misconceptions do also affect LGBTI youth in education, where these individuals are often bullied and are victims to hate speech from both students and, even more worrisomely, teachers. For instance, in a 2014 report of the National Human Rights Commission of Korea, 80% of the 200 surveyed LGBTI teens admitted of having suffered from hate speech by teachers.<sup>77</sup> A case that was brought to the attention of the general public dates back to 2017, when it was reported that a Korean language teacher working in a middle school in Seoul had made

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<sup>74</sup>The Korea Times, “Eighty percent of Korean middle school students do not mind homosexuality”, December 3, 2017 (Accessed January 2020): [https://www.koreatimes.co.kr/www/nation/2017/12/181\\_240274.html](https://www.koreatimes.co.kr/www/nation/2017/12/181_240274.html)

<sup>75</sup>The Korea Times, “Time for sex education to face reality”, January 24, 2018 (Accessed January 2020): [https://www.koreatimes.co.kr/www/nation/2018/10/181\\_256991.html](https://www.koreatimes.co.kr/www/nation/2018/10/181_256991.html)

<sup>76</sup>Naaranoja K.R., “South Korean University Students’ Attitudes toward Homosexuality and LGBT Issues”, Master Thesis, University of Helsinki, p.3 (2016).

<sup>77</sup>Cho K.H., “The Impact of Educational Intervention on the Attitudes of Korea International School High School Students towards the LGBT Community”, *International Journal of Recent Innovations in Academic Research*, 3:6, p.23 (2019).

discriminatory statements while in class, stating how “AIDS will spread if we don’t prevent sexual intercourse between men. Those who commit bestiality are also sexual minorities.”<sup>78</sup> That same year, three teachers operating in a daycare in Daegu had forced 18 teens, aged 11 to 12 years old, to watch a video promoting hatred and discrimination against LGBTI people. The video included images of corpses and animal carcasses, while the three teachers were reporting stating that “Sexual minorities engage in intercourse with animals and corpses.”<sup>79</sup> Such behavior reinforces stigmatization and promotes bullying of LGBTI youth, which is often underrated as “regular playground scuffles.”<sup>80</sup> In reality, queer teens are often victims of their peers, with also cases of young teenagers calling sexual minorities teens “infected” and physically assaulting them.<sup>81</sup> Bullying in schools is a major problem for South Korea that, according to the UNESCO Office Bangkok and Regional Bureau for Education in Asia and the Pacific, is one of the Pacific Asian Countries with the highest rate of bullying of LGBTI individuals at school, with 80% of LGBTI students declaring of having suffered from any sort of bullying.<sup>82</sup> An article of the Korea Herald has reported the words of a 21-year-old lesbian student explaining how “A gay kid once found his bags torn apart with a knife. There’s even something called a ‘pinning game,’ where students get points for hitting (a gay student) in certain parts of the body with pins.”<sup>83</sup> Such bullying, coming from both students and teachers, have detrimental effects on the education of LGBTI teens who, in numerous cases, have missed school, relinquished advancement to higher-level schools or withdrawn or transferred from school. Bullying could also bring young teenagers to commit suicide. Indeed, in 2013 a young homosexual teenager committed suicide because of the constant bullying he suffered in

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<sup>78</sup>Sogilaw, “Human Rights Situation of LGBTI in South Korea 2017”, p.104.

<sup>79</sup>*Ibidem*.

<sup>80</sup>The Korea Herald, “Taboo Stifles LGBT Teens”, June 3, 2015 (accessed January 2020): <http://www.koreaherald.com/view.php?ud=20150603000692>

<sup>81</sup>*Ibidem*.

<sup>82</sup>UNESCO Office Bangkok and Regional Bureau for Education in Asia and the Pacific, “Paving the road to education: a target-by-target analysis of SDG 4 for Asia and the Pacific”, p.102 (2018).

<sup>83</sup>The Korea Herald, “Taboo Stifles LGBT Teens”, June 3, 2015.



school and the lack of an appropriate response to the issue of the teachers. After a first judgement that recognized the school's responsibility for the events that took place, the Busan High Court reversed the judgement in 2014, only partly awarding damages because of the effects that bullying had on the boy's mental health.<sup>84</sup> The High Court acknowledged that the young teen was subjected to homophobic bullying during classes, and that the homeroom teacher had not responded appropriately. Indeed, the teacher had admitted of having simply scolded the bullies, referring the victim to a counselor who was not familiar with LGBTI issues and having suggested the victim to transfer schools. However, according to the Court, the teachers could have not anticipated the victim's suicide.<sup>85</sup>

Bullying can have detrimental effects on LGBTI teenagers. According to a 2014 survey of the NHRCK, 46,2% of the young queer individuals who took part to the survey experienced decreased motivation to learn.<sup>86</sup> The consequences of discrimination and bullying, however, can also entail more serious consequences. Indeed, according to the same survey, 58,1% of the young LGBTI people experienced depression, while 16,1% attempted self-harm and 19,4% attempted suicide.<sup>87</sup> In a further research, conducted in 2017, it is shown how Korean homosexual and bisexual adolescents have higher rates of smoking and alcohol abuse and a lower economic status, resulting from the isolation and homophobia they face.<sup>88</sup> While these data may be slightly outdated, they still provide an accurate evidence of the

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<sup>84</sup>Busan High Court, 2013Na51414, December 2,2014.

<sup>85</sup>SOGILAW, "Human Rights Situation of LGBTI in South Korea - Annual Review of Korean Society of Law and Policy on Sexual Orientation and Gender Identity" (Accessed January 2020): [http://annual.sogilaw.org/review/review\\_2014\\_en/511](http://annual.sogilaw.org/review/review_2014_en/511)

<sup>86</sup>Rainbow Action Against Sexual Minority Discrimination, "Human Rights Violations against Lesbian, Bisexual Women, Transgender and Intersex People on the Basis of Sexual Orientation, Gender Identity, and HIV Status in the Republic of Korea", Joint Civil Society Submission to the Committee on the Elimination of Discrimination against Women (CEDAW) for State Compliance with the Convention on the Elimination of All Forms of Discrimination against Women- 69th Session, p.10[6].

<sup>87</sup>*Ibidem*.

<sup>88</sup>Kwak Y. and Kim J.S., "Associations between Korean Adolescents' Sexual Orientation and Suicidal Ideation, Plans, Attempts, and Medically Serious Attempts", *Iran J Public Health*, 46:4 (2017), retrieved at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5439036/> (Accessed January 2020).

detrimental effects that uncontrolled bullying and hate speech against LGBTI youth may cause.

Recently, some municipalities have been trying to stop discrimination against LGBTI youth at least in schoolgrounds. Among these, there also is the already mentioned city of Seoul, where the Ordinance on the Protection of Students' Human Rights was adopted in 2011.<sup>89</sup> The ordinance, which had the aim of granting students' rights, was amended in 2017 so to include prohibiting hate speech on the grounds of sexual orientation and gender identity.<sup>90</sup> Seoul has not been the first city to adopt the ordinance. As a matter of fact, it was preceded from the Gyeonggi Province and Gwangju in South Jeolla Province. More recently, in 2018, the Gyeongsangnam-do Office of education announced the prospective legislation of the Gyeongsangnam-do Students Rights Ordinance, which would have included the prohibition of discrimination against "sexual identity and sexual orientation." Such ordinance, however, faced strong oppositions from conservative groups that did not want the enactment of the ordinance. In the case of Gyeongsangnam-do, anti-LGBTI groups distributed ANTI-LGBTI flyers in front of three primary schools in Yangsan.<sup>91</sup>

Conservative groups have always been highly vocal in their fight against the recognition of LGBTI rights and against any reference to sexual minorities in the school system. Indeed, in several cases conservative anti-LGBTI groups were able to influence the South Korean government, damaging LGBTI rights. Among others, it is important to cite once again the block of the Anti-discrimination bill, proposed for the first time in 2007, but never approved because of the pressure of conservative groups.

Another episode that confirms the great influence that such groups have on the government, dates back to 2014, when the Ministry of Education requested, through an official statement, the editing or complete

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<sup>89</sup>Sogilaw, "Human Rights Situation of LGBTI in South Korea 2017", p.104.

<sup>90</sup>*Ibidem*.

<sup>91</sup>Sogilaw, "Human Rights Situation of LGBTI in South Korea 2018", p. 36.

cancellation of 25 LGBTI-related passages in 15 different textbooks.<sup>92</sup> The official statement from the Ministry originated from a petition by the Countermeasure Committee for Homosexuality Problems, in which was stated that “homosexuality [was] abnormal sex acts going against nature” and that explaining LGBTI topic in textbooks “promote[d] students to become sexual minorities(homosexuals, transgenders).”<sup>93</sup> That same year, a protestant anti-LGBTI group managed to obtain the revision of the 2014 textbook *Daily Life and Ethics* published by Kyohaksa. For instance, in 2013 the conservative religious group had demanded that the publishing agency revised all LGBTI-related topics from its textbook. As a result Kyohaksa modified such references, deleting statements such as “It is not right to treat LGBTI people as people who are immoral, mentally problematic, or likely to cause diseases”, and adding “opposing opinions”, such as “Male homosexuals take up a large proportion of AIDS patients, and sexual orientation is not inborn,” “Sexual minorities can transmit contagious diseases and corrupt sexual culture,” and “If sexual minorities’ right to form families is recognized, there is the danger that not only the children adopted but also entire society will consider sexual minorities’ sexual orientation to be normal and imitate it.”<sup>94</sup>

Conservative groups were also able, in 2016, to influence the partial amendment bill of the "Single-Parent Family Support Act." As a matter of fact, the first proposed amendment stated that “the Minister of Education and the Superintendent of Education shall establish and implement measures to provide education, at all levels of school, to help the understanding of various family types including single-parent families.”<sup>95</sup> The Korean Association of Church Communication opposed the amendment, arguing that the inclusion of “various forms of family” in the bill would have promoted homosexuality. In the end, the amendment wording

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<sup>92</sup>Sogilaw, “Annual Review 2014: Human Rights Situation of LGBTI Korea”, p. 43.

<sup>93</sup>Cited in *Ibidem*.

<sup>94</sup>*Ibidem*, p.44.

<sup>95</sup>Sogilaw, “Human Rights Situation of LGBTI in South Korea 2016”, p.30 (2017).

was changed to “measures to provide education to help the understanding of single- parent families.”<sup>96</sup>

Discrimination and hate speech against LGBTI youth are not only a violation of international law, but also of the South Korean Constitution. As a matter of fact, Article 31 states that “All citizens shall have equal right to receive an education corresponding to their abilities.” If all citizens have the right of education, discrimination of LGBTI people is unconstitutional, since it forces sexual minorities to withdraw from school. The right to education of heterosexual teens is violated as well. Indeed, the sex education guidelines proposed by the Ministry of education have been highly criticized both from local activists and the international community, for its sexist remarks and lack of proper education on the topic. As a proof of the huge lack of the guidelines, in 2017 In a report by the Seoul Metropolitan Office of Education, 43,3% of 671 middle school students said sex education at school is not helpful.<sup>97</sup>

Issues in the education system do also affect the students’ right to health. Article 36 establishes that “the health of all citizens shall be protected by the State”; hence, the high rates of depression and suicide among LGBTI youth is a proof of the constant failure of the government to ensure the safeguarding of the health of all citizens. The students’ right to health is also affected by the insufficient information provided during sexual education, which expose all students to a higher risk of contracting STDs. Indeed, a 2017 study shows that teenagers’ risk of exposure to STDs is increasing in the Country, with Approximately 7.3% of Korean teenagers with sexual experience have STDs, including gonorrhoea, syphilis, and HIV/AIDS.<sup>98</sup> Homosexual and Heterosexual students had a higher risk of contracting any type of sexually transmitted disease.<sup>99</sup>

Finally, the continuous interference of religious groups, and the consequent and continuous compliance of the government to such,

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<sup>96</sup>*Ibidem.*

<sup>97</sup>The Korea Times, “Time for sex education to face reality”, October 24, 2018.

<sup>98</sup>Kim J.S., Kim K. and Kwak Y., “Differences in Risky Sexual Behavior According to Sexual Orientation in Korean Adolescents”, *Journal of Homosexuality*, 66:1, p.12.

<sup>99</sup>*Ibidem.*

religious-based, demands may entail that the division between state and religion, as established by article 20 of the Constitution, has yet to be completely achieved.<sup>100</sup>

As already stated, the lack of protection of LGBTI youth is also a violation of the Country's obligations under international law. In particular, the severe discrimination that sexual minorities face in the education system violates a number of articles of the Convention of the Right of the Child, including Articles 2,<sup>101</sup> 4,<sup>102</sup> 28[1]<sup>103</sup> and 29[1].<sup>104</sup>

Article 2, on the prohibition of discrimination, does not explicitly cite sexual orientation and gender identity. However, the current omission of such categories does not imply that sexual minorities are not protected by such article. Indeed, international law, as also explained in the previous chapter, does recognize sexual orientation and gender identity as prohibited grounds of discrimination. Moreover, Article 2 of the Convention does not provide a complete list of prohibited grounds of discrimination, as also noticeable by the expression "without discrimination of any kind". The committee of the rights of the child has recently exposed its concern with regards of the stalemate that has been created with regards of the anti-discrimination bill, stating that "cases of discrimination based on sexual orientation are persistent, a situation that the State party acknowledged by

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<sup>100</sup>Article 20[1]: No state religion shall be recognized and there should be separation of the State and of religion.

<sup>101</sup>"1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, [...] 2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members."

<sup>102</sup>"States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. [...]"

<sup>103</sup>"States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity [...]"

<sup>104</sup>" States Parties agree that the education of the child shall be directed to:

(a) The development of the child's personality, talents and mental and physical abilities to their fullest potential; (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations; [...] (d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin [...]"

stating that its policies regarding young lesbian, gay, bisexual, transgender and intersex persons is inadequate”<sup>105</sup>

On a positive note, as also explained in the aforementioned citation of the Committee on the Rights of the Child, the south Korean government seems to have acknowledged the lack of an adequate protection of LGBTI minors:

*“A survey of sexual-minority juveniles, age 13–18, conducted by the NHRCK in 2014, revealed cases where students were asked to submit to their school the names of their homosexual peers, same-sex relationships were prohibited at school, or students of sexual minority were sanctioned by school authorities or bullied by their fellow students. Current policies concerning sexual-minority juveniles leave much to be desired, calling for a thorough examination of, and measures against, discriminations that are being practiced against those young people.”<sup>106</sup>*

The Government is also trying to decrease the number of suicides that apart from sexual minorities, represent a major issue for the Korean society. The government has been trying to table effective proposals to tackle the issue, such as the promotions of suicide preventions campaigns, and the institution of Youth Companion Program, the Youth Call 1388 helpline, and cyber counselling centers for juveniles, run by the Ministry of Gender Equality and Family.<sup>107</sup> Of major importance and urgency, however, is surely the adoption of the anti-discrimination bill and the reform of the national guidelines on sexual education, which would, first and foremost, protect sexual minorities, but also help debunking all the misconceptions that are still linked to the LGBTI community. For sure, implementing such reforms would positively influence suicide rates, but would also help improving students’ sexual education and consequent health. While educating students on homosexuality is fundamental, it is also important for the Ministry of Education to guarantee the impartiality of teachers, who

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<sup>105</sup>Committee on the Rights of the Child, Concluding observations on the combined fifth and sixth periodic reports of the Republic of Korea, UN Doc. CRC/C/KOR/CO/5-6 (October 2019) p.4 [16].

<sup>106</sup>Committee on the Rights of the Child combined fifth and sixth periodic reports submitted by the Republic of Korea under article 44 of the Convention, due in 2017, UN Doc. CRC/C/KOR/5-6 (November 2018), p.10[36].

<sup>107</sup>*Ibidem*, p.10[40].

represent a role model for students. It is then unacceptable for teachers to spread false myths and misinformation regarding sexual minorities, further damaging these adolescents' lives and school experience.

### ***3. LGBTI people and the Right to Health: Discrimination of HIV/AIDS Positive Patients and Conversion Therapies***

#### *3.1 Mistreatment of HIV/AIDS Positive Patients*

HIV/AIDS positive patients are also subjected by discrimination. Discrimination in the healthcare system also includes discrimination of HIV/AIDS positive patients, which is strengthened by the lack of information about and subsequent stigmatization of the disease. Stigmatization of HIV and AIDS is also perpetuated by the healthcare system personnel, who seems to believe in numerous misconceptions regarding HIV/AIDS positive patients. For instance, the Rainbow Action Against Sexual Minority Discrimination has reported how 44% of the dentists surveyed by the Centre for Disease Control and Prevention believed that "Infection is possible when bitten by a mosquito that has [already] bitten an AIDS patient."<sup>108</sup> Such misconceptions causes great problems to HIV/AIDS positive individuals who are oftentimes denied access to healthcare services, including dental and surgical procedures.<sup>109110</sup> Such misconceptions are also extended to

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<sup>108</sup>Rainbow Action Against Sexual Minority Discrimination, "Human Rights Violations on the Basis of Sexual Orientation, Gender Identity, and HIV Status in the Republic of Korea- Joint Civil Society Submission to United Nations Universal Periodic Review on the situation of LGBTI persons and persons with HIV", p. 18[36] (March 2017).

<sup>109</sup>The Diplomat, "In South Korea, Being HIV Positive Might Prevent You from Accessing Healthcare", June 22, 2017 (accessed January 2020): <https://thediplomat.com/2017/06/in-south-korea-being-hiv-positive-might-prevent-you-from-accessing-healthcare/>

<sup>110</sup>KBS, "Rights Groups Fight Discrimination Against HIV/AIDS Sufferers", November 11, 2014 (accessed January 2020):

[http://world.kbs.co.kr/service/news\\_view.htm?lang=e&Seq\\_Code=106588](http://world.kbs.co.kr/service/news_view.htm?lang=e&Seq_Code=106588)

the correlation between homosexual sex and HIV/AIDS. In fact, in 2004 the NHRCK declared that the Blood Donation Questionnaire did discriminate LGBTI people. In particular, the questionnaire asked “Have you had sexual contact with someone of the same sex or indeterminate sex?”<sup>111</sup> The Question was related to item 15 of the annex of Enforcement Regulation of the Blood Management Act that stipulated that if the “Potential donor had sexual contact with a person of the same sex or of indeterminate sex,” the collection of the donor’s blood is prohibited, hence ignoring the known notion that “HIV infection does not depend on one’s sexual orientation and heterosexual persons could also contract AIDS”.<sup>112</sup> Thus, the questionnaire was considered to exclude “*LGBT persons* with no probability of carrying AIDS from donating blood.”<sup>113</sup> The Commission also concluded that “Not only does such a health history question deepen prejudice that wrongfully considers sexual orientation to cause AIDS, but it also does nothing to further AIDS prevention education among heterosexuals.”<sup>114</sup> Among other episodes, in its 2015 report on LGBTI situation in Korea, SOGILAW reported the case of a person living with HIV suffering from discrimination when a dentist studio had adopted “excessive infection control measures” while performing dental scaling. In particular, the excessive measures included receiving treatment in a separate room and covering the furniture with vinyl, despite the HIV Infection Control Guidelines stated that abiding to the Standard Prevention Guidelines was enough while performing dental treatment on an HIV positive patient.<sup>115</sup>

Up until December 2015, doctors cited Article 36(2) of the Enforcement Decree of the Medical Service Act in order to refuse HIV/AIDS positive patients. For instance, the Article established that “patients of

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<sup>111</sup>National Human Rights Commission of Korea, “Blood Donation Questionnaire Item Asking About Same-Sex Sexual Contact must be Made Rational”, August 9, 2004 (Accessed January 2020), retrieved at:

<https://www.humanrights.go.kr/site/program/board/basicboard/view?menuid=002002001&boardtypeid=7003&boardid=7000337>

<sup>112</sup>*Ibidem.*

<sup>113</sup>*Ibidem.*

<sup>114</sup>*Ibidem.*

<sup>115</sup>SOGILAW, “Human Rights Situation of LGBTI in South Korea – Annual Report 2015”, p.98 (2016).



infectious disease are not eligible for admission to intermediate care hospital.” In December 2015, the Ministry for Health and Welfare amended Article 36(2) of the Enforcement Decree of the Medical Service Act, changing the wording “patients of infectious disease” to “infectious disease publicly announced by the Minister of Health and Welfare in accordance with Article 41(1) of the Infectious Disease Control and Prevention Act.”<sup>116</sup> According to Article 41(1), AIDS is not considered to have a “particularly high risk of transmission.” Moreover, the Ministry for Health and Welfare has stated that AIDS does not fall under the provisions of Article 36(2).<sup>117</sup> However, as also reported by The Rainbow Action, the Korean Association of Geriatric Hospitals opposed to the admission of HIV/AIDS patients into hospitalization at sanitarium hospitals, stating that the Association “absolutely oppose[s] the hospitalization of AIDS patients at all sanitarium hospitals”, confirming once again the unfounded bias that numerous professionals have with regards to HIV/AIDS.<sup>118</sup>

Even though the amendment entered into force in December 2016, several cases of discrimination against HIV/AIDS patients were reported even in the SOGILAW annual report 2018. One of these cases involved an HIV positive patient in need of a comprehensive health check-up. Even though he/she had preventively notified the hospital about his/her condition, the patient was refused by the comprehensive health check-up centre of the hospital on the grounds that the ward lacked the needed protective equipment and could not prepare the medical procedure. The patient was told to go to the gastroenterology ward for his/her check-up. the National Commission on Human Rights has also reported a case, dated back to September 2018, in which a University hospital blatantly discriminated and violated HIV/AIDS positive patients’ rights by providing “food in a differently coloured tray, [using] individual medical devices, and [marking] the

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<sup>116</sup>*Ibidem*, p. 103.

<sup>117</sup>*Ibidem*, p. 104.

<sup>118</sup>Rainbow Action Against Sexual Minority Discrimination, “Human Rights Violations on the Basis of Sexual Orientation, Gender Identity, and HIV Status in the Republic of Korea- Joint Civil Society Submission to United Nations Universal Periodic Review on the situation of LGBTI persons and persons with HIV”, p. 18[38] (March 2017).

message handle blood with care on the bed and IV solution pack concerning a patient diagnosed with HIV and hospitalized in a four-person room after treatment.”<sup>119</sup> These episodes show how deep-rooted misconceptions towards HIV/AIDS patients are.

However, the violation of HIV/AIDS patients is perpetuated even before the actual diagnosis of the virus/condition. As a matter of fact, in a survey conducted in 2017, 61,5% of the surveyed individuals declared that they were tested for HIV/AIDS positivity during medical procedures and without their knowledge, while 2% admitted that they were coerced into getting tested.<sup>120</sup> The issue has also been tackled by the NHRCK, which has stated how testing without consent and the consequent careless notification of the results represent serious violations of human rights.<sup>121</sup> As a matter of fact, according to the aforementioned survey, 53,8% of the sample declared not to be sure that their results were handled with the due confidentiality, while 19,2% found it was obvious that confidentiality was not ensured. Moreover, 17,3% affirmed that their condition was disclosed by medical professionals to other people without their consent<sup>122</sup>

Discrimination against HIV/AIDS positive patients have detrimental effects on victims. indeed, according to the aforementioned survey, more than half of the sample declared of having quit their job because of their condition,<sup>123</sup> while 42% were living on less than the Republic of Korea's minimum household income.<sup>124</sup> Continuous discrimination of HIV/AIDS patients also have serious effects on their mental health, with 75% of the

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<sup>119</sup>National Human Rights Commission of Korea, “Annual Report 2018”, p.115 (2019).

<sup>120</sup>KNP+, “Unknown Lives: Initial Findings from the People Living with HIV Stigma Index in South Korea 2016-2017”, p.6 (2017).

<sup>121</sup>National Human Rights Commission of Korea, “Perception of HIV-Infected Persons Needs to be Changed”, March 29, 2007 (Accessed January 2020):

<https://www.humanrights.go.kr/site/program/board/basicboard/view?menuid=002002001&boardtypeid=7003&boardid=7000104>

<sup>122</sup>KNP+, “Unknown Lives: Initial Findings from the People Living with HIV Stigma Index in South Korea 2016-2017”, p.5 (2017).

<sup>123</sup>*Ibidem*, p.7.

<sup>124</sup>UNAIDS, “New survey finds high levels of HIV discrimination in Republic of Korea”, June 22, 2017 (Accessed January 2020):

[https://www.unaids.org/en/resources/presscentre/featurestories/2017/june/20170622\\_korea](https://www.unaids.org/en/resources/presscentre/featurestories/2017/june/20170622_korea)

respondents stating to feel self-blame, 59,6% having low-self-esteem, and 36,5%. having suicidal thoughts.<sup>125</sup>

### *3.3 LGBTI and the right to health: conversion therapies*

As provided in the second chapter of this thesis, conversion therapies are considered to be a violation of the prohibition of ill-treatment. Conversion therapies are still enacted in numerous places in the world and may also be considered a violation of the reproductive and health rights of LGBTI people who, during such inhuman treatments may undergo sexual abuse, sterilization and electroshock.<sup>126</sup>

Conversion therapies are also practiced in Korea. Indeed, Amnesty International has reported the case of a young homosexual Korean man who, after coming out to his family during high school, was sent to join a conversion therapy to “change his sexual orientation.”<sup>127</sup> The man also reported that he had to pretend to date a girl, so to make his parents believe he was cured.<sup>128</sup> Amnesty International is not the only organization to report a case of conversion therapy in Korea. Indeed, the Rainbow Action has also reported a case, which had also reached Korean media, of a transgender woman having escaped from a religious “conversion therapy” group where she was subjected to violence.<sup>129</sup>

Conversion therapies are based on the concept that homosexuality and transgenderism are mental illnesses, which can be cured. Even though younger generations may be more tolerant of LGBTI people, sexual

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<sup>125</sup>KNP+, “Unknown Lives: Initial Findings from the People Living with HIV Stigma Index in South Korea 2016-2017”, p.9 (2017).

<sup>126</sup>See note 169, p. 88.

<sup>127</sup>Amnesty International, *Serving in Silence - LGBTI People in South Korea’s Military*, p.11-12 (2019).

<sup>128</sup>*Ibidem*.

<sup>129</sup>Rainbow Action Against Sexual Minority Discrimination, “Human Rights Violations on the Basis of Sexual Orientation, Gender Identity, and HIV Status in the Republic of Korea- Joint Civil Society Submission to United Nations Universal Periodic Review on the situation of LGBTI persons and persons with HIV”, p. 10[16] (March 2017).

minorities are still greatly stigmatized, also thanks to the action of conservative anti-gay religious groups that are often the organizers of such “therapies”.

Korea does not recognise the legitimacy of conversion therapies. However, they are not criminalized, hence not taking a decisive stance over the matter. OutRight Action International has noticed how, in 2015, governmental buildings have hosted two seminars on conversion therapies, noting “that the allowance of the seminars to occur on state property could be considered state endorsement of conversion therapy and goes against South Korea’s commitment to international human rights and the LGBTIQ community.”<sup>130</sup> The UN Human Rights Commission has also expressed concern with regards to conversion therapies, but the Korean government has yet to release a comment on the matter.<sup>131</sup> OutRight has also pointed out how allowing such practices is in complete contraposition to the position adopted by South Korea on the international level, where the government has stated that “These groups, which make up a small minority of the Christian population in South Korea, are known to use religious rhetoric to encourage panic in families who are already worried about the stigma and discrimination they and their LGBT family members may face.”<sup>132</sup>

While the government has noticed how such practice is put into act by “a small minority of the Christian Population of South Korea”, it has yet to condemn the acts of such minorities. Instead of distancing itself from such positions, in 2018 the government has permitted to a religious group that openly promotes conversion therapy to organize an anti-LGBTI event “just hundreds of meters away” from where the Pride event was scheduled.<sup>133</sup> The counter-event hosted anti-LGBTI speakers, including pastors and

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<sup>130</sup>OutRight Action International, “State Endorsement of Conversion Therapy Must End”, March 1, 2017 (Accessed January 2020): <https://outrightinternational.org/content/state-endorsement-conversion-therapy-must-end>

<sup>131</sup>Human Rights Committee, “Concluding observations on the fourth periodic report of the Republic of Korea”, UN DOC CCPR/C/KOR/CO/4, p.3 [14c] (2015).

<sup>132</sup>OutRight Action International, “State Endorsement of Conversion Therapy Must End”, March 1, 2017.

<sup>133</sup>The Korea Herald, “Pro-conversion therapy group to stage event alongside Seoul Pride”, July 8, 2018 (Accessed January 2020):

<http://www.koreaherald.com/view.php?ud=20180708000115>

people who, allegedly, were cured from homosexuality.<sup>134</sup> While freedom of association must be ensured, allowing a manifestation that spreads such misinformation on homosexuality and sexual minorities is a grave act, which may also increase the stigmatization of LGBTI people.

#### **4. LGBTI People and the Military: The crime of “Indecent Acts”**

As already illustrated in the previous chapter, the International human rights system has been working on eliminating discrimination against homosexuality in every aspect of society, even in the military. For example, in 1999 in the cases *Lusting Prean and Beckett v. the United Kingdom* and *Smith and Grady v. the United Kingdom*, the European Court of Human Rights established that laws prohibiting homosexuals to join the military are a violation of the European Convention on Human Rights.

While in civil society South Korea does not criminalize homosexuality, the Military system is an exception to the rule. Indeed, According to Article 92(6) of the Military Criminal 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.”<sup>135</sup>

The international community has shown deep concern for the criminalization of homosexuality in the Korean Military. Indeed, in its Concluding observations on the fourth periodic report of the Republic of Korea, the UN Human Rights Committee has declared to be concerned about “the punishment of consensual same-sex sexual conduct between men in the military, pursuant to article 92-6 of the Military Criminal Act.”<sup>136</sup>

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<sup>134</sup>*Ibidem*.

<sup>135</sup>Military Criminal Act, Article 92(6).

<sup>136</sup>Human Rights Committee, UN DOC CCPR/C/KOR/CO/4, p.3 [14b] (2015).

Amnesty International, in its report named “Serving in Silence: LGBTI People in South Korea’s Military”, has reported how said article has been applied in 2017, causing 20 soldiers to be investigated. According to the report, a gay man who was not involved in the case, was “shocked to read about the investigations in a military publication because he thought military authorities did not enforce Article 92-6 since they had rarely used it previously.”<sup>137</sup>

The constitutionality of the ban of homosexuality in the military has been contested several times. Indeed, the Korean Constitutional Court has been consulted three times in total, in 2002, 2011 and 2016. Up until now, the Constitutional Court has not changed its position, stating that the ban is not a violation of the Korean Constitution, since the Article aims to protect “the social interest of the ‘sound conduct and military discipline of the army as a community’ [...]”<sup>138</sup> It was also stated that

“from an objective point of view, [a same-sex sexual relation] causes a sense of aversion in the general public and runs contrary to virtuous sexual moral ideals. It is also interpreted as an act that infringes on the sound conduct and military discipline of the army as a community”<sup>139</sup>

On a positive note, it is important to state that, in comparison to the first 2002 judgement, the judges have shown a more conflicting opinion between each other. Indeed, while in 2002 only two out of 9 judges presented dissenting opinions,<sup>140</sup> in 2016 the Constitutionality of Article 92(6) has been upheld only by five votes to 4,<sup>141</sup> showing a decreasing approval of the law. Apparently, another collective case regarding said law is now under review. As a matter of fact, in February 2017 the Incheon District Court made a request for adjudication of constitutionality.<sup>142</sup> While the fourth review of the article is ongoing, the Seoul Western District Court has, in an exceptional decision, acquitted the defendant in a case related to Article.

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<sup>137</sup>Amnesty International, *Serving in Silence - LGBTI People in South Korea’s Military*, p.6 (2019).

<sup>138</sup>Constitutional Court of Korea, 2012Hun-Ba258, July 28, 2016.

<sup>139</sup>*Ibidem*.

<sup>140</sup>Constitutional Court of Korea, 2001Hun-Ba70, June 27, 2002.

<sup>141</sup>Constitutional Court of Korea, 2012Hun-Ba258.

<sup>142</sup>Amnesty International, *Serving in Silence - LGBTI People in South Korea’s Military*, p.6 (2019).

92(6). In its verdict, the Court stated that “The legal interest of Article 92(6) of the Military Criminal Act is the social legal interest of ‘the health life and military discipline of the communal society of the military’” and that “If acts of sexual gratification between soldiers have been performed in private based on the parties’ consent, there is no danger that they will cause direct harm to the maintenance of military discipline or combat strength.”<sup>143</sup> The appeal of the Public Prosecutor is currently under way.<sup>144</sup>

Sodomy laws in the military do not only represent a severe violation of the prohibition of discrimination, but also violate the right to privacy of soldiers. Indeed, according to the report by Amnesty International, there has been cases in which soldiers have been persecuted for “indecent acts” for having engaged in same-sex sexual acts while off-duty.<sup>145</sup> Moreover, several soldiers have reported that, during their physical draft examination, they were asked whether or not they were “attracted to men”, and were reported “unfitted to serve” solely based on their sexual orientation and/or gender identity. The Article, then, not only damages soldiers’ privacy and right to not be discriminated, but also impede capable people, willing to serve, to join the military.<sup>146</sup> Exemption on the base of sexual orientation and/or gender identity may also damage homosexuals’ economic autonomy. Indeed, South Korean society deeply values mandatory military service, and it is not unusual for an employer to ask why a candidate for a job position has not enlisted.<sup>147</sup> The great importance given to mandatory enlistment, linked to the stigmatization that the LGBTI community still face, may represent an obstacle in someone’s search for a job.

Sodomy laws in the military have also been used to mistreat gay soldiers. In fact, in 2014, the 37th Infantry Division had applied “forced

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<sup>143</sup>Seoul Northern District Court, 2017GoDan3010, February 22, 2018 (in Korean), English translation retrieved from SOGILAW, “Human Rights Situation of LGBTI in South Korea 2018”, p. 41.

<sup>144</sup>SOGILAW, “Human Rights Situation of LGBTI in South Korea 2018”, p. 41.

<sup>145</sup>*Ibidem*, p.7.

<sup>146</sup>*Ibidem*, p.12.

<sup>147</sup>The Hankyoreh, “For transgenders, sex change not about organs, but ‘a question of life and death’”, March 23, 2013 (Accessed January 2020):

[http://english.hani.co.kr/arti/english\\_edition/e\\_national/579384.html](http://english.hani.co.kr/arti/english_edition/e_national/579384.html)

detention in the Division medical office, [deprivation] of day-pass, overnight leave, vacation, telephone and internet use, for five months” on a gay soldier under Article 92(6).<sup>148</sup> The soldier, together with another comrade, had been investigated for “indecent Acts” following a sexual act. While the first soldier was persecuted after revealing his homosexuality, his comrade was not, because he argued that he had been subject to involuntary sexual advances as a heterosexual. Despite the circumstantial evidences denying that the second soldier was forced into performing homosexual sexual acts, he was not persecuted.<sup>149</sup> The case was reported to the NHRCK that, however, dismissed the case because of the “particular nature” of the military.<sup>150</sup>

Rape victims are also penalized by sodomy laws. Indeed, in 2011 a gay man was suspended together with his heterosexual superior after said superior forced him to lick his genitalia. Despite the act being a real sexual abuse, it was treated as a consensual homosexual act, effectively criminalizing the victim of an abuse.<sup>151</sup>

The elimination of the homosexuality ban in the military system is a fundamental step for the protection of LGBTI rights. As already stated, the Constitutional Court seems to be divided on the matter. While the division in the Court may favour the abolition of the Article, there still is the possibility that the nine judges will uphold the previous decisions. The Constitutional Court has in fact repeatedly stated that the ban is necessary in order to protect the “values of the military.”<sup>152</sup> The Court has also declared that “If sodomy is allowed in garrisons, it would undermine soldiers’ readiness posture.”<sup>153</sup> Yet, is it not the same with heterosexual sexual relations?

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<sup>148</sup>SOGILAW, “Human Rights Situation of LGBTI in South Korea 2016”, p.25 (2017).

<sup>149</sup>*Ibidem*.

<sup>150</sup>Rainbow Action Against Sexual Minority Discrimination, “Human Rights Violations on the Basis of Sexual Orientation, Gender Identity, and HIV Status in the Republic of Korea- Joint Civil Society Submission to United Nations Universal Periodic Review on the situation of LGBTI persons and persons with HIV”, p.8[12] (March 2017).

<sup>151</sup>*Ibidem*, p.9[13].

<sup>152</sup>The Korea Herald, “Constitutional Court’s ruling on alternative service prompts debates over homosexuality in military”, July 2, 2018 (Accessed January 2020): <http://www.koreaherald.com/view.php?ud=20180702000834>

<sup>153</sup>*Ibidem*.



Surely enough, the military environment is generally more frequented by men. Yet this does not explain why soldiers performing heterosexual sexual acts would be more ready than homosexuals. If homosexual sexual relations (even when consensual) are banned in order to maintain the soldiers' readiness, how is it possible that heterosexual sexual acts are still allowed? As Victor-Madrigal Borloz, the UN independent expert on protection against violence and discrimination based on sexual orientation and gender identity, has noticed how discrimination of individuals on the grounds of their sexual orientation is nowhere endorsed in international law. The UN independent expert also stated "Some might say that this provision is designed to maintain military discipline, but there's no evidence that it has any effect on discipline. Is there a legal provision prohibiting men and women from having sexual relations while they're performing their military service?"<sup>154</sup>

While the abrogation of said law is uncertain, recent events have brought to major changes in the military system. In fact, in June 2018 the Constitutional Court allowed the creation of an alternative service to mandatory enlistment.<sup>155</sup> Conscientious objection and the lack of an alternative service to enlistment has represented a major issue to South Korea and has been tackled numerous times by international bodies.<sup>156</sup> Because of this landmark judgement, it may not be impossible to think that the same Court may decide to abolish the ban on homosexuality.

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<sup>154</sup>The Hankyoreh, "UN human rights expert addresses hate speech in South Korean politics", August 22, 2019 (Accessed January 2020):

[http://www.hani.co.kr/arti/english\\_edition/e\\_international/906729.html](http://www.hani.co.kr/arti/english_edition/e_international/906729.html)

<sup>155</sup>Constitutional Court of Korea, 2011Hun-Ba379, June 28, 2018.

<sup>156</sup>Human Rights Committee, Views - Communications Nos. 1593 to 1603/2007, UN DOC CCPR/C/98/D/1593-1603/2007, April 30, 2010;

Human Rights Committee, UN DOC CCPR/C/KOR/CO/4, p.2 [6] (2015);

Human Rights Council, "Opinions adopted by the Working Group on Arbitrary Detention at its eighty-second session", UN DOC A/HRC/WGAD/2018/40, September 17, 2018.

## **5. The South Korean Constitutional Court and the Protection of Human Rights**

### *5.1 The South Korean Constitutional Court and the European Court of Human Rights: Transjudicial Communication as a Tool for the Promotion of LGBTI Rights*

International instruments for the protection of human rights do not have authority only in the international community. They hold an authoritative power even in national Courts all over the world that often cite said instruments. Indeed, Anne Marie Slaughter cites how

“The Supreme Court of Zimbabwe cites decisions of the European Court of Human Rights to support its determination that corporal punishment of an adult constitutes cruel and unusual punishment and that corporal punishment of a juvenile is unconstitutional” and how the landmark judgements of the Supreme Court of the United States “are studied with as much attention in New Delhi or Strasbourg as they are in Washington, D.C., or the State of Washington, or Springfield, Illinois.”<sup>157</sup>

According to Slaughter herself, the tendency of national Courts to reference international law and bodies creates a “transjudicial communication” between Courts. Such communication is not only limited to Countries who have ratified a given instrument, but it also extends to Countries that are not a party of the given instrument. A striking example is given by the European Convention on Human Rights and its Court, the European Court of Human Rights, whose articles and jurisprudence are often cited worldwide. Indeed, it is shown how the South African Supreme Court has cited the ECtHR decisions in its landmark judgement to abolish death penalty.<sup>158</sup> Moreover, the Court reasoning and interpretative methodologies have also been also accepted by the Inter-American Court of Human Rights and the UN Human Rights Committee.<sup>159</sup>

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<sup>157</sup>Slaughter A.M., “A Typology of Transjudicial Communication”, *University of Richmond Law Review*, 29:1, p.99 (1994).

<sup>158</sup>Slaughter A.M., “Judicial Globalization”, *Virginia Journal of International Law*, 40, p.1110 (2000).

<sup>159</sup>*Ibidem*.

Ever since its establishment in 1959, the European Court of Human Rights has become a major actor for the protection of human rights. Indeed, in 2018 the Court was presented with 56 350 applications.<sup>160</sup> The fact that National Courts all around the world have been citing its judgements, shows how the ECtHR and the ECHR have become “a source of authoritative pronouncements on human rights law.”<sup>161</sup> Among the local Courts that have referenced the ECtHR there is also the South Korean Constitutional Court that, apart from the ECtHR and its Convention, has referenced numerous other instruments, such as the ICCPR, the ICESCR, the CEDAW, the Convention on International Trade in Endangered Species of Wild Fauna and Flora and the Paris Convention for the Protection of Industrial Property, and the main documents of the European Commission for Democracy Through Law (Venice Commission).<sup>162</sup> The South Korean Constitutional Court has not only cited international human rights instruments, but it has also cited foreign national Courts. For example, in a case regarding the right to vote of prisoners and probationers with suspended sentence, the Court has referenced the Supreme Courts of Canada, South Africa and Australia, together with the French Constitutional Council.<sup>163</sup> Such cross—citation is defined “cross-fertilization of the Courts”, a phenomenon that increased in popularity during the end of the 1990s, thanks to the end of the Cold War and the emergence of new democracies trying to follow the lead of other, long-lived, courts.<sup>164</sup> An example of cross-fertilization is given by the British Court of Appeal that, in 1993, barred a libel suit citing the American jurisprudence on the issue.<sup>165</sup>

In South Korea, the influence of international law is noticeable in its Constitution as well, since the South Korean Constitution itself has been

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<sup>160</sup>European Court of Human Rights, “The European Court of Human Rights in Facts & Figures - 2018” (2019), retrieved at:

[https://www.echr.coe.int/Documents/Facts\\_Figures\\_2018\\_ENG.pdf](https://www.echr.coe.int/Documents/Facts_Figures_2018_ENG.pdf)

<sup>161</sup>Slaughter A.M., “Judicial Globalization”, p.1109 (2000).

<sup>162</sup>Kang I.W., “The Constitutional Globalization in Korea”, *Global Constitutionalism and Multi-layered Protection of Human Rights - Exploring the Possibility of Establishing a Regional Human Rights Mechanism in Asia*, p.248-250 (2016).

<sup>163</sup>Constitutional Court of Korea, 2012Hun-Ma409, January 28, 2014.

<sup>164</sup>Salughter A.M. ., “Judicial Globalization”, p.1117 (2000).

<sup>165</sup>*Ibidem*.

deeply influenced by international law ever since its drafting in 1948. In fact, when the 198 members of the Constitution-drafting Committee were first given the task of drafting the first Constitution, they relied on the expertise of both local and foreign law experts since, among the members of the Committee itself, only five out of 198 members were lawyers or judges.<sup>166</sup>

The first version of the Korean Constitution has been drafted also under the auspices of the United Nations.<sup>167</sup> According to Kang Il-Won, Judge of the Constitutional Court of Korea,

“Since Koreans had little experience in western legal culture, Korea has consulted the experience of the western Countries for judicial reforms. It became a kind of tradition to consult the international and foreign law for the adjudication of cases in the Korean courts including the Constitutional Court.”<sup>168</sup> This consultation of international law is also confirmed by the 2018 empirical research conducted by Won Yoomin, who took into consideration 5545 cases between September 1988 and December 2015. He found that 65 cases mentioned at least one IHR, with the International Covenant on Civil and Political Rights being the most referenced.<sup>169</sup> However, The Constitutional Court has also cited a vast array of other conventions.<sup>170</sup> Indeed, interestingly enough, Won noticed that the Human Rights Instruments that were taken into consideration even without having been ratified by the Country were more frequently mentioned in comparison to the ratified instruments.<sup>171</sup> One of the most referenced was, indeed, the European Convention on Human Rights.<sup>172</sup> In fact, in its aforementioned judgement concerning the Restriction on the right to vote of prisoners and probationers with suspended sentence, the Korean Constitutional Court has

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<sup>166</sup>Henderson G., “Human Rights in South Korea 1945-1953”, *Human Rights in Korea – Historical and Policy Perspectives*, p.148 (1991).

<sup>167</sup>Lee S.T., “South Korea: Implementation and Application of Human Rights Covenants”, *Michigan Journal of International Law*, 14:4, p.706 (1993).

<sup>168</sup>Kang I.W., “The Constitutional Globalization in Korea”, p. 241 (2016).

<sup>169</sup>Won Y., “The Role of International Human Rights Law in South Korea Constitutional Court Practice: An Empirical Study of Decisions from 1988 to 2015”, *International Journal of Constitutional Law*, 16:2, p. 602 (2018).

<sup>170</sup>*Ibidem*.

<sup>171</sup>*Ibidem*, p. 604.

<sup>172</sup>*Ibidem*.

noticed how, among others, “the European Court of Human Rights, in 2005, declared that monolithic and blanket restriction on the right to vote, which is the core right under the European Convention on Human Rights, was in violation of Article 3 of the Protocol 1 to the European Convention on Human Rights.”<sup>173</sup>

The Constitutional Court has also cited the ECtHR in other cases. It has in fact referenced *Pretty v The United Kingdom* in a 2009 judgement regarding euthanasia, and *Golder v The United Kingdom*, *Feldbrugge v. Netherlands*, and *Airey v Ireland* in a 2001 judgement regarding the Legal Aid Act.<sup>174</sup> Even though South Korea has not signed nor ratified the European Convention on Human Rights, and the European Court of Human Rights cannot deal with violations perpetuated in South Korea, the Constitutional Court heavily relies on the court’s jurisprudence, since an Asian Court of Human Rights has yet to be established.<sup>175</sup> The reliance of the Constitutional Court on the ECtHR is an evidence of the persuasive authority that the Court and its Judgements have.<sup>176</sup> The Inter-American Court of Human Rights and the African Court of Human Rights, however, seem not to be referenced in any judgement of the Court. According to Won this could be attributed to the lack of familiarity with these two regional Courts.<sup>177</sup>

Transjudicial communication between the Constitutional Court of Korea and international human rights instruments, could have three distinct functions, namely adding new right to the ones already protected by the Constitution, providing persuasive arguments for the protection of existing

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<sup>173</sup>Constitutional Court of Korea, 2012Hun-Ma409, January 28, 2014.

<sup>174</sup>Kang I.W., “The Constitutional Globalization in Korea”, p.250 (2016).

<sup>175</sup>*Ibidem*.

<sup>176</sup>Slaughter A.M., “Judicial Globalization”, p.1111 (1994).

<sup>177</sup>Won Y., “The Role of International Human Rights Law in South Korea Constitutional Court Practice: An Empirical Study of Decisions from 1988 to 2015”, p. 604 (2018).

rights, and providing reasons for the limitation of constitutionally protected rights<sup>178</sup>

In Korea, according to Won, transjudicial communication is mostly used in support of the decision made by the Court, rather than representing a conclusive reason for the invalidation of a domestic law.<sup>179</sup> However, while the incorporation of new rights is not as prevalent, international human rights instruments may still be an important tool for the promotion and protection of human rights in the Country.

In particular, the reference to the ECtHR judgements may represent an important tool for the promotion and protection of LGBTI rights. Indeed, while the Court has yet to deal with numerous issues related to this community (especially related to the rights of transgender people), it is important to remind how this regional Court may be considered the most advanced one in relation to queer rights. Thus, even with the limited role that its references have in the outcome of a judgement of the Constitutional Court, the ECtHR and its judgements may still have an important role in protecting sexual minorities. As a matter of fact, ever since the 1980s, The ECtHR has been promoting queer rights, also dealing with many of the problems that are nowadays affecting the Korean LGBTI community, such as the ban on homosexuals in the military,<sup>180</sup> the discrimination of queer people<sup>181</sup> and same-sex unions.<sup>182</sup> The judgements of the European Court of Human rights may also provide reasons for the limitation of constitutionally protected rights,<sup>183</sup> which seems to be the main reason behind the strong opposition that conservative groups exercise against the promotion of queer rights.

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<sup>178</sup> Chang W.C., "The Convergence of Constitutions and International Human Rights: Taiwan and South Korea in Comparison", *North Carolina Journal of International Law and Commercial Regulation*, 36:3, p.608 (2011).

<sup>179</sup> Won Y., "The Role of International Human Rights Law in South Korea Constitutional Court Practice: An Empirical Study of Decisions from 1988 to 2015", p. 620 (2018).

<sup>180</sup> See *Lusting Prean and Beckett v. the United Kingdom* and *Smith and Grady v. the United Kingdom*.

<sup>181</sup> See *Dudgeon. v The United Kingdom*.

<sup>182</sup> See *Ogliari and Others v. Italy*.

<sup>183</sup> See *Vejdeland and Others v. Sweden*.

One may argue that South Korea has not ratified the ECHR and that its previous citations of both the Convention and its Court does not ensure that the Constitutional Court would judge in favour of the LGBTI community. However, its past reliance on such instruments that may be an evidence of the persuasive authority that the ECtHR has on the Constitutional Court, and its international position as the first Asian state to explicitly recognize the importance of the protection of sexual minorities, may represent an essential tool in the promotion of LGBTI rights. Furthermore, remembering the words of judge Kang, “It became a kind of tradition to consult the international and foreign law for the adjudication of cases in the Korean courts.”<sup>184</sup> Such sentence may entail that citing international human rights instruments for the protection of queer rights may be the right move to finally provide sexual minorities with the legal protection they need. Indeed, it is rather interesting to notice how the Constitutional Court, in its latest judgement concerning the ban on homosexuality in the military, does not cite either the ECtHR or any other international human right instrument and Court.<sup>185</sup> Since the ECtHR has already judged several cases regarding this issue,<sup>186</sup> and since the Korean Constitutional Court “traditionally” consults international and foreign law, it would be useful to understand why the Court has not consulted any human right instrument on the matter, and it would also be interesting to understand to what extent the citation of the ECtHR and other international courts may benefit the fight for the elimination of the ban.

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<sup>184</sup>See note 165, p.146.

<sup>185</sup>Constitutional Court of Korea, 2012Hun-Ba258, July 28, 2016.

<sup>186</sup>See *Lusting Prean and Beckett v. the United Kingdom* and *Smith and Grady v. the United Kingdom*.





## CONCLUSION

This thesis has dealt with the lack of protection of LGBTI rights in south Korea.

Overall, even though this Country does not directly criminalize homosexuality, the lack of a law prohibiting discrimination of such community leaves sexual minorities without any legal protection against the violation of their rights. An example of how LGBTI individuals' rights are violated is given by the lack of a law allowing same-sex unions to be recognised. Indeed, while the government has granted same legal protection given to heterosexual spouses to same-sex spouses of the US military personnel,<sup>1</sup> and has recently granted the "spouse" status to the same-sex husband of the recently-appointed New Zealander ambassador to South Korea,<sup>2</sup> same-sex couples living in Korea cannot register their unions. The lack of legal recognition of same-sex partnerships affects the couples' enjoyment of their rights in terms of healthcare, alimony and housing rents.<sup>3</sup>

Sexual minorities' right to assembly is also ostracized both by authorities, who have arbitrarily decided to revoke the authorization to the organization of said events and have not promptly stopped anti-gay demonstrators from blocking the events, and by the anti-queer protesters themselves, who have also used physical violence against queer individuals.

LGBTI teens also suffer from severe cases of discrimination in the school system. In fact, young teens are often bullied and ridiculed by both their peers and teachers, to the point where LGBTI teens experience a decrease in their motivation to learn and decide to withdraw from school. Discrimination in the education system, however, does also have more detrimental effects on the Korean queer youth, who also registers numerous

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<sup>1</sup>Military Times, "South Korea gives same-sex U.S. military spouses legal protection

<sup>2</sup>The Hankyoreh, "Openly gay New Zealand ambassador to S. Korea attends reception with husband".

<sup>3</sup>UPI, "In South Korea, LGBT activists push for marriage equality".

cases of depression, self-harm and attempted suicide. Discrimination in the school system is not only linked to bullying, but it is also perpetuated in other, more indirect, ways. For instance, the Korean guidelines for sex education in school completely omit any reference to sexual orientation and gender identity, since teenagers are considered “too young” to learn about the topic.<sup>4</sup> Teenagers, however, are not even provided with the fundamental information to have a healthy safe sexual life. Indeed, while a research has shown that young Koreans have their first sexual experience at the average age of 13 years old,<sup>5</sup> another study shows how approximately 7.3% of Korean teenagers with sexual experience have STDs, including gonorrhoea, syphilis, and HIV/AIDS.<sup>6</sup>

Discrimination is also found in the healthcare system against HIV/AIDS positive people. In fact, the healthcare system still presents prejudices and misconceptions against these patients. Such misconceptions often lead to discriminatory treatment of the patients in the healthcare system, where excessive precautions are taken when dealing with HIV/AIDS positive individuals. Discrimination of these individuals in the healthcare system is also perpetuated even before the diagnosis, with doctors testing their unaware patients to HIV/AIDS positivity and also divulging the results without the permission of their patients.

One of the most widespread misconceptions about HIV/AIDS positivity is that it is directly related to homosexuality. As a matter of fact, in 2004 the National Human Rights Commission of Korea has declared that the Blood Donation Questionnaire did discriminate LGBTI people, since one of the questions asked, “Have you had sexual contact with someone of the same sex or indeterminate sex?”, consequently refusing any blood donation from people who had had sexual intercourses with another individual of the same sex.<sup>7</sup> Misconceptions and discrimination against HIV/AIDS patients

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<sup>4</sup>The Korea Times, “Homosexuality missing from sex education”.

<sup>5</sup>The Korea Times, “Time for sex education to face reality”.

<sup>6</sup>Kim J.S., Kim K. and Kwak Y., “Differences in Risky Sexual Behavior According to Sexual Orientation in Korean Adolescents”.

<sup>7</sup>National Human Rights Commission of Korea, “Blood Donation Questionnaire Item Asking About Same-Sex Sexual Contact must be Made Rational”.

widely affect the individuals' lives. Indeed, it was reported how numerous HIV/AIDS patients experience self-blame, low self-esteem, and suicidal thoughts.<sup>8</sup>

A grave violation of LGBTI people's rights to health is given by conversion therapies that are practiced by some of the conservative Christian groups in the Country. Such "therapies", which include sexual abuse, sterilization and electroshock, are not legitimated in Korea. However, neither they are criminalized. The government's silence over the matter, together with the fact that in the past governmental buildings have hosted two seminars on conversion therapies, may be intended as a silent endorsement of such acts, despite the position adopted by Korea internationally, which condemns such "therapies".<sup>9</sup>

Legal gender recognition is another issue in Korea. In fact, the Korean guidelines for legal gender recognition are too strict and require a lengthy and difficult process, which can also result in the rejection of the application. One of the most controversial requirements inserted in the guidelines is that transgender people need to undergo sterilization and sexual reassignment surgery before applying for their legal gender recognition. Even though several Korean district courts allowed transgenders to legally change their gender without undergoing sexual reassignment surgery,<sup>10</sup> and the government has stated that the guidelines are not binding, numerous transgender people's applications have been rejected because of such requirements. The rejection of recognizing one's gender also entails a series of consequences that damage transgenders' lives. Indeed, without the legal gender recognition, transgenders cannot obtain a new ID card indicating their new gender; hence, they cannot enjoy

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<sup>8</sup>KNP+, "Unknown Lives: Initial Findings from the People Living with HIV Stigma Index in South Korea 2016-2017", p.9 (2017).

<sup>9</sup>OutRight Action International, "State Endorsement of Conversion Therapy Must End".

<sup>10</sup>The Hankyoreh, "Landmark legal ruling for South Korean transgenders".

their right to vote or even applying for certain jobs requiring the resident number.<sup>11</sup>

The guidelines also cause issues related to mandatory military service. For instance, including sterilization and sexual reassignment surgery in the guidelines has allowed the military manpower administration to demand transgender individuals to undergo such surgeries in order to obtain their exemption from mandatory military service.<sup>12</sup> In several cases, the military authorities have also withdrawn such exemptions because the lack of surgery would entail that the “transgender” condition was pretended.<sup>13</sup>

Obtaining the exemption is not the only issue related to the military. Indeed, LGBTI individuals willing to serve are also discriminated, since the Military Criminal Act criminalize homosexuality. Article 92(6) of the Criminal Military Act does not only criminalize consensual homosexual sex, but it was also used to criminalize a victim of sexual abuse, who was suspended, together with his superior, after he was forced by said superior to perform oral sex.<sup>14</sup> The ban on homosexuality also impedes LGBTI individuals willing to serve to actually joining the military. The only way for them to serve is to pretend their heterosexuality, running the risk of being outed and either being dishonorably discharged or institutionalised.<sup>15</sup>

At the base of the lack of protection of LGBTI rights, there is the strong opposition that Conservative Protestant congregations exercise with regard to the issue. Such congregations are indeed convinced that accepting homosexuality and the LGBTI community in Korea would bring to the collapse of the Country, which would be weakened by AIDS and HIV, favouring the Communist invasion. Such patriotic nationalism is also sided

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<sup>11</sup>The Hankyoreh, “Landmark legal ruling for South Korean transgenders”.

<sup>12</sup>SOGLAW, “Human Rights Situation of LGBTI in South Korea – Annual Report 2014”, p.48 (2015).

<sup>13</sup>The Hankyoreh, “Transgender conscript avoids compulsory military service”.

<sup>14</sup>Rainbow Action Against Sexual Minority Discrimination, “Human Rights Violations on the Basis of Sexual Orientation, Gender Identity, and HIV Status in the Republic of Korea- Joint Civil Society Submission to United Nations Universal Periodic Review on the situation of LGBTI persons and persons with HIV”, p.8[12] (March 2017).

<sup>15</sup>Cho M.A., “The Other Side of the Zeal”, p. 314 (2011).

with the victim narrative. As a matter of fact, conservative congregations argue that recognising LGBTI rights would undermine their right to opinion, and that religious people would be persecuted for being against homosexuality. Such arguments are also at the base of their opposition to the promulgation of the anti-discrimination bill, which has yet to be resubmitted after it was withdrawn three times. Religious congregations are also the main reason that brought to the revision of several school textbooks that included sexual orientation and gender identity. Because of their protests, in 2015 the Ministry of Education requested the cancellation of 25 LGBTI-related passages in 15 different textbooks.<sup>16</sup> The 2014 edition of the *Daily Life and Ethics* textbook was also revised, deleting LGBTI-friendly statements and adding instead homophobic sentences, such as “Male homosexuals take up a large proportion of AIDS patients, and sexual orientation is not inborn” and “Sexual minorities can transmit contagious diseases and corrupt sexual culture.”<sup>17</sup>

Conservative religious groups also advocate for the protection of Korean traditions, which would be under attack because of homosexuality, which is considered a product of the West. The institution of marriage and family would be undermined by homosexuality as well.

Despite what evangelical congregations have stated, Korean traditions are not as intolerant of homosexuality as conservatives may think. Indeed, if Confucianism is taken into consideration, it is possible to notice how such doctrine does not harshly condemn homosexuality. While it would be incorrect to state that Confucianism is accepting of homosexuality, it is safe to state that it still is less intolerant than Christianity and Islam.<sup>18</sup> Moreover, Korean history provides plenty of examples that would attest that homosexuality was indeed present in the Country. An example would be given by *Hwarang*, an élite corps d’armée of the Silla Dynasty that is considered to be an example of homosexuality in the history of Korea.<sup>19</sup>

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<sup>16</sup>Sogilaw, “Annual Review 2014: Human Rights Situation of LGBTI Korea”, p. 43.

<sup>17</sup>Sogilaw, “Human Rights Situation of LGBTI in South Korea 2016”, p.30 (2017).

<sup>18</sup>Lee P.H., “LGBT Rights Versus Asian Values: de/re-constructing the Universality of Human Rights”, p. 983 (2016).

<sup>19</sup>Kim Y.G. and Hahn S.J, “Homosexuality in Ancient and Modern Korea”, p. 62 (2006).

Other examples are given by several Korean Kings and Grand princes that had shown to prefer wearing feminine clothes or to favour the company of men instead of women. Korea, however, is proven not to be the only Confucian-heritage Country where proofs of homosexuality being practiced in the past were found. Indeed, both China and Japan provided evidences of homosexual practices being diffused in the past.<sup>2021</sup>

Government officials have often stated that, in order to promulgate the anti-discrimination bill and to allow same-sex unions, general public's support is essential. Thus, since Korean society seems not to be ready to accept homosexuality, it is not possible to promote LGBTI rights. However, such statement is proven to be incorrect when data and statistics are taken into account. For example, in 2017 same-sex marriage was approved by 34% of the respondents.<sup>22</sup> While the data show that the majority of Koreans do not approve same-sex unions, it is still important to notice that in 2014, only 28,5% of people supported it. Younger generations seem to be the most accepting, as also shown by a survey conducted in 2017, where 80% of the interviewed teens stated that finding out that a peer was homosexual would not affect their relationship.<sup>23</sup>

While Korea seems not to be ready to promote LGBTI rights, its entertainment industry has been exploiting queerness ever since the 1970s, in order to acquire audience, as also shown by the DoDo cosmetics advertisement starring transgender entertainer Harisu. Another example of how the Korean entertainment industry has been exploiting queer images is given by the *Flower boys*, a term used to indicate a man that do not fall into Korean traditional concepts of masculinity. Indeed, nowadays there are numerous entertainers who are known for their androgyny. Furthermore, more recently the so-called *K-pop* has been using queer topics for its music videos.

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<sup>20</sup>Wu C.C., "Homoerotic Sensibilities in Late Imperial China", p.3 (2004).

<sup>21</sup>Leupp G., "Male Colors: The Construction of Homosexuality in Tokugawa Japan", (1996).

<sup>22</sup>Equaldex, "LGBT Rights in South Korea" (Accessed January 2020):  
<https://www.equaldex.com/region/south-korea>

<sup>23</sup>The Korea Times, "Eighty percent of Korean middle school students do not mind homosexuality".

The South Korean Constitution has been deeply influenced by international and foreign law ever since its drafting. Such reliance on international and foreign law is also reflected in the South Korean Constitutional Court, which has been citing international human rights instruments ever since its establishment in 1988. International law has been promoting sexual minorities' rights since the 1980s, when the European Court of Human Rights was presented with the case *Dudgeon v. the United Kingdom*,<sup>24</sup> in which it was established that the Northern Irish buggery laws violated Article 8 of the European Convention on Human Rights. Since then, international law has been increasingly inclusive of LGBTI rights, even though a convention on the prohibition of discrimination on the grounds of sexual orientation and gender identity has yet to be drafted. Since the Constitutional Court of Korea greatly relies on international law, the great expertise that international courts have been acquiring over time with regards to the protection of LGBTI rights may represent a useful tool for the promotion of said rights. Indeed, it would have been interesting to notice how the Court's latest judgement on the constitutionality of Article 92(6) of the Military Criminal Act would have changed, if the Court had cited the cases of *Lusting Prean and Beckett v. the United Kingdom*<sup>25</sup> and *Smith and Grady v. the United Kingdom*<sup>26</sup> tackling the exact same issue. In particular, the ECtHR, which is the most advanced court in terms of protection of sexual minorities' rights, could be an important ally for the Korean LGBTI community, since it has already dealt with numerous violations which represent a major issue for the community in Korea.

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<sup>24</sup>Dudgeon v The United Kingdom, 1981.

<sup>25</sup>Lusting Prean and Beckett v. the United Kingdom, 1999.

<sup>26</sup>Smith and Grady v. the United Kingdom, 1999.





## BIBLIOGRAPHY

Adamczyk A. and Yen-hsin A. C., "Explaining attitudes about homosexuality in Confucian and non-Confucian nations: Is there a 'cultural' influence?", *Social Science Research*, 51, 276-289 (2015)

Ahn P.T., "Harisu: South Korean Cosmetic Media and the Paradox of Transgendered Neoliberal Embodiment", *Discourse*, 31:3, 248-272 (2009)

Amnesty International, *Serving in Silence - LGBTI People in South Korea's Military* (2019)

Baisley E., "Reaching the Tipping Point? Emerging International Human Rights Norms Pertaining to Sexual Orientation and Gender Identity", *Human Rights quarterly*, 38:1, 134-163 (2016)

Berger V., "Jurisprudence de la Cour Européenne des Droits de l'Homme, 13e Édition", Sirey (2014) (In French)

Bong Y.D. "The Gay Rights Movement in Democratizing South Korea", *Korean Studies*, 32:1, 86-103 (2008)

Catholic Human Rights Committee, Korea Center for United Nations Human Rights Policy, Korean Confederation of Trade Unions, Korean Lawyers for Public Interest and Human Rights, Korean Public Interest Lawyers` Group GONG-GAM, MINBYUN-Lawyers for a Democratic Society, People's Solidarity for Participatory Democracy, Rainbow Action against Sexual-Minority Discrimination, SARANGBANG group for human rights, South Korean NGOs Coalition for Law Enforcement Watch, "Situation of Freedom of Peaceful Assembly and Association in the Republic of Korea", (2016)

Chan K., "Gay Sexuality in Singaporean Chinese Popular Culture: Where Have All the Boys Gone?", *China Information* XXII:2, 305-329 (2008)

Chang W.C., "The Convergence of Constitutions and International Human Rights: Taiwan and South Korea in Comparison", *North Carolina Journal of International Law and Commercial Regulation*, 36:3, 593-624 (2011)

Chase T., "Problems of Publicity: Online Activism and Discussion of Same-Sex Sexuality in South Korea and China", *Asian Studies Review*, 36:2, p.151-170 (2012)

Cho K., "Protestantism, Education, and the Nation: The Shifting Location of Protestant Schools in Modern Korea", *Acta Koreana*, 19:1, 99-131(2016)

Cho K.H., "The Impact of Educational Intervention on the Attitudes of Korea International School High School Students towards the LGBT Community", *International Journal of Recent Innovations in Academic Research*, 3:6, 22-34 (2019)

Cho M.A., "The Other Side of the Zeal", *Theology and Sexuality*, 17:3, 297-318 (2011)

Cho S.P., "Faceless things: South Korean gay men, internet, and sexual citizenship", Ph.D. Dissertation, University of Illinois, (2011).

Conforti B., "Diritto Internazionale, X Edizione", Editoriale Scientifica (2014) (In Italian)

Conte A. and Burchill R., "Defining Civil and Political Rights: The Jurisprudence of the United Nations Human Rights Committee", University of Hull (2009)

Ed. Shaw W., "Human Rights in Korea – Historical and Policy Perspectives", The East Asia Legal Studies Program of the Harvard University College Hall (1991)

Eds. Bobel C. and Kwan S., "Embodied resistance – Challenging the Norms, Breaking the Rules", Vanderbilt University Press (2011)

Eds. Chang W. and Kalmanson L., "Confucianism in Context: Classic Philosophy and Contemporary Issues, East Asia and Beyond", Suny Press (2010)

Eds. Gi-wook S. and Paul Y.C., *South Korean Social Movements: From Democracy to Civil Society*, Routledge, (2011)

Eds. Mark M. and Vera M., "Routledge Handbook of Sexuality Studies in East Asia", Routledge (2014)

Eds. Sharma A. and Young K.K., "Fundamentalism and Women in World Religions", T&T Clark (2007)

Eds. Sung S. and Pascall G., "Gender and Welfare States in East Asia Confucianism or Gender Equality?", Palgrave Macmillan, (2014)

Eds. Timothy R.T. and Sallie Y., "Sittings: Critical Approaches to Korean Geography", University of Hawaii Press (2008)

European Court of Human Rights, "The European Court of Human Rights in Facts & Figures - 2018" (2019)

Hafner-Burton E.M. and Tsutsui K., "Human Rights in a Globalizing World: The Paradox of Empty Promises," *American Journal of Sociology* 110:5, 1373-1411 (2005).

Heinze E., "Sexual Orientation and International Law: A Study in the Manufacture of Cross-Cultural Sensitivity", *Michigan Journal of International Law*, 22:2, 283-309 (2001)

Hsu D.L., "The Myth of the "Five Human Relations" of Confucius", *Monumenta Serica*, 29, 27-37 (1970-71)

Inter-American Commission on Human Rights, "Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas", OAS/Ser.L/V/II.rev.1, (2015)

International Commission of Jurists, "Sexual Orientation, Gender Identity and International Human Rights Law, Practitioners Guide No.4", Geneva (2009)

Johnson P., "Homosexuality and the European Court of Human Rights", Routledge (2012)

Jung S., "Korean Masculinities and Transcultural Consumption: Yonsama, Rain Oldboy K-pop Idols", Hong Kong University Press, (2011)

Kim A.E., "Christianity, Shamanism, and Modernization in South Korea", *Cross Currents*, 50:1-2, 112-119 (2000)

Kim J. Translated by Hong S., "Queer Cultural Movement and Local Counterpublics of Sexuality: A Case of Seoul Queer Films and Videos Festival", *Inter-Asia Cultural Studies*, 8:4, 617-633 (2007)

Kim J.S., Kim K. and Kwak Y., "Differences in Risky Sexual Behavior According to Sexual Orientation in Korean Adolescents", *Journal of Homosexuality*, 66:1 (2017)

Kim N., "Asian Christianity in the Diaspora: The Gendered Politics of the Korean Protestant Right – Hegemonic Masculinity", Springer (2016)

Kim P.H. and Singer C.C., "Three Periods of Korean Queer Cinema: Invisible, Camouflage, and Blockbuster", *Acta Koreana*, 14:1, 117-136 (2011)

Kim Y.G. and Hahn S.J., "Homosexuality in Ancient and Modern Korea", *Culture, Health & Sexuality*, 8:1, 59-65 (2006)

KNP+, "Unknown Lives: Initial Findings from the People Living with HIV Stigma Index in South Korea 2016-2017", (2017)

Kwak Y. and Kim J.S., "Associations between Korean Adolescents' Sexual Orientation and Suicidal Ideation, Plans, Attempts, and Medically Serious Attempts", *Iran J Public Health*, 46:4 (2017)

Kwon J., "Co-mmodifying the Gay Body: Globalization, the Film Industry, and Female prosumers in the Contemporary Korean Mediascape", *International Journal of communication*, 10, 1563-1580 (2016)

Langlois A.J., Wilkinson C., Gerber P. and Offord B. "Community, identity, orientation: sexuality, gender and rights in ASEAN", *The Pacific Review*, 30:5, p.710-728 (2017)

Lau H., "Sexual Orientation: Testing the Universality of International Human Rights Law", *The University of Chicago Law Review*, 1689-1720 (2004)

Lee J., "Remembered Branches", *Journal of Homosexuality*, 39:3-4, 273-281 (2000)

Lee P.H., "LGBT Rights Versus Asian Values: de/re-constructing the Universality of Human Rights", *International Journal of Human Rights*, 20:7, 978-992 (2016)

Lee S.T., "South Korea: Implementation and Application of Human Rights Covenants", *Michigan Journal of International Law*, 14:4, 705-738 (1993)

Leupp G., "Male Colors: The Construction of Homosexuality in Tokugawa Japan", University of California Press (1996)

Levi N., "The Impact of Confucianism in South Korea and Japan", *Acta Asiatica Varsoviensia*, 26, 7-16 (2013)

Lucas Ramon Mendos, "ILGA World: State-Sponsored Homophobia 2019: Global Legislation Overview Update" Geneva, p. 48-52 (December 2019)

MacArthur G., "Securing sexual Orientation and Gender Identity Rights within the United Nations Framework and System: Past, Present and Future", *The Equal Rights Review*, 15, 25-54 (2015)

Marrella F. and Carreau D., "Diritto Internazionale", Giuffrè Editore (2016) (In Italian)

McGoldrick D., "The Development and Status of Sexual Orientation Discrimination Under International Human Rights Law", *Human Rights Law Review*, 16, 613-668 (2016)

Moon D., "Beyond the Dichotomy: Six Religious Views of Homosexuality", *Journal of Homosexuality*, 61:9, 1215-1241 (2014)

Mos M., "Of Gay Rights and Christmas Ornaments: The Political History of Sexual Orientation Non-Discrimination in the Treaty of Amsterdam", *Journal of Common Market Studies* 52:3, 632-649 (2014)

Naaranoja K.R., "South Korean University Students' Attitudes toward Homosexuality and LGBT Issues", Master Thesis, University of Helsinki, (2016)

National Human Rights Commission of Korea, "Annual Report 2018" (2019)

O' Flaherty M., "The Yogyakarta Principles at Ten", *Nordic Journal of Human Rights*, 33:4, 280-298 (2015)

O'Flaherty M. and Fisher J., "Sexual Orientation, Gender Identity and International Human Rights Law: Contextualizing the Yogyakarta Principles", *Human Rights Law Review*, 8:2, 207-248 (2008)

Office of the High Commissioner, "Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law", New York and Geneva, (2012)

Office of the High Commissioner, "Born Free and Equal: Sexual Orientation, Gender Identity and sex Characteristics in International Human Rights Law", New York and Geneva, (2019)

Park A., "Yogyakarta Plus 10: A Demand for Recognition of SOGIESC", *North Carolina Journal of International Law*, 44:2, 223-272 (2019)

Park Y.S., "Protestant Christianity and its Place in a Changing Korea", *Social Compass*, 47:4, 507-524 (2000)

Park-Kim S.J., Lee-Kim S.Y. and Kwon-Lee E.J., "The Lesbian Rights Movement and Feminism in South Korea", *Journal of Lesbian Studies*, 10:3-4, 161-190 (2007)

Rainbow Action Against Sexual Minority Discrimination, "Human Rights Violations against Lesbian, Bisexual Women, Transgender and Intersex People on the Basis of Sexual Orientation, Gender Identity, and HIV Status in the Republic of Korea", Joint Civil Society Submission to the Committee on the Elimination of Discrimination against Women (CEDAW) for State Compliance with the Convention on the Elimination of All Forms of Discrimination against Women-69th Session (February 2018)

Rainbow Action Against Sexual Minority Discrimination, "Human Rights Violations on the Basis of Sexual Orientation, Gender Identity, and HIV Status in the Republic of Korea- Joint Civil Society Submission to United Nations Universal Periodic Review on the situation of LGBTI persons and persons with HIV", (March 2017)

Sáez M., "In the Right Direction, Family Diversity in the Inter-American System of Human Rights", *North Carolina Journal of International Law*, 44:2, 317-352 (2019)

Sanders D., "Human Rights and Sexual Orientation in International Law", *International Journal of Public Administration*, 25:1, 13-44 (2002)

Sanders D., "Mujigae Korea", unpublished paper (2009)

Sanders D., "The Role of the Yogyakarta Principles", *International Gay and Lesbian Human Rights Commission*, 1-9 (2009)

Scaffidi Ruchella L., "Il Riconoscimento delle Unioni Same-sex nel Diritto Internazionale Privato Italiano", *Jovene Editore* (2012)

Seo D.J., "Mapping the Vicissitudes of Homosexual Identities in South Korea", *Journal of Homosexuality*, 40:3-4, 65-78 (2001)

Shelton D., "The Jurisprudence of the Inter-American Court of Human Rights", *American University International Law Review*, 10:1, 333-372 (1994)

Slaughter A.M., "A Typology of Transjudicial Communication", *University of Richmond Law Review*, 29:1,99-137 (1994)

Slaughter A.M., "Judicial Globalization", *Virginia Journal of International Law*, 40, 1103-1124 (2000)

SOGILAW, "Human Rights Situation of LGBTI in South Korea – Annual Report 2015"(2016)

SOGILAW, "Human Rights Situation of LGBTI in South Korea – Annual Report 2014" (2015)

SOGILAW, "Human Rights Situation of LGBTI in South Korea 2016" (2017)

SOGILAW, "Human Rights Situation of LGBTI in South Korea 2017" (2018)

SOGILAW, "Human Rights Situation of LGBTI in South Korea 2018" (2019)

Stern J., "Creating Legacy Today: The First LGBT Ruling by the Inter-American Court of Human Rights", *City University of New York Law Review*, 15:2, 247-253 (2012)

Swiebel J., "Lesbian, Gay, Bisexual and Transgender Human Rights: The Search for an International Strategy", *Contemporary Politics*, 15:1, 19-35 (2009)

The Constitutional Court of Korea Ed. SNU Asia Pacific Law Institute, "Global Constitutionalism and Multi-layered Protection of Human Rights - Exploring the Possibility of Establishing a Regional Human Rights Mechanism in Asia" (2016)

Thoreson R.R., "Queering Human Rights: The Yogyakarta Principles and the Norm That Dare Not Speak Its Name", *Journal of Human Rights*, 8:4, 323- 339 (2009)

Tikhonov V., "Hwarang Organization: Its Functions and Ethics", *Korea Journal*, 318-338 (1998)

UNESCO Office Bangkok and Regional Bureau for Education in Asia and the Pacific, "Paving the road to education: a target-by-target analysis of SDG 4 for Asia and the Pacific" (2018)

UNESCO, "International technical guidance on sexuality education: An evidence-informed approach" (2018)

Van den Brink M. and Dunne P., "Trans and Intersex Equality Rights in Europe, A Comparative Analysis", Luxembourg: Publications Office of the European Union, (2018)

Veenvliet S.G., "Intrinsic. Religious Orientation and Religious Teaching: Differential Judgements Toward Same-Gender Sexual Behavior and Gay Men and Lesbians". *The International Journal for the Psychology of Religion*, 18:1, 53-65 (2008)

Wayne M. "Identifying Evil for What It Is: Tasmania, Sexual Perversity and the United Nations", *Melbourne University Law Review* 19:3, 740-757 (1994)

Wilkinson. C., Gerber P., Offord B. and Langlois A.J., "LGBT Rights in Southeast Asia: One Step Forward, Two Steps Back?", *IAFOR Journal of Asian Studies*, 3:1, 5-17 (2017)

Won Y., "The Role of International Human Rights Law in South Korea Constitutional Court Practice: An Empirical Study of Decisions from 1988 to 2015", *International Journal of Constitutional Law*, 16:2, 596-624 (2018)

Wu C.C., "Homoerotic Sensibilities in Late Imperial China", *Routledge Curzon* (2004)

Yi H., Luhur W., Brown T. N.T., "Public Opinion of Transgender Rights in South Korea", *UCLA- Williams Institute School of Law*, p.7 (2019)

Yi J. and Phillips J., "Paths of Integration of Sexual Minorities in Korea", *Pacific Affairs*, 88:1, 123-134 (2015)

Yi J., Jung G. and Phillips J., "Evangelical Christian Discourse in South Korea on the LGBT: The Politics of Cross Border Learning", *Society*, 54:1, 29-33 (2017)

Yi J., Jung G., Serna Segura S., Phillips J. and Park J.Z., "Gay Seouls: Expanding Religious Spaces for Non-Heterosexuals in South Korea", *Journal of Homosexuality*, 65:11, 1457-1483 (2017)

Youn G., "Attitudinal Changes Toward Homosexuality During the Past Two Decades (1994–2014) in Korea", *Journal of Homosexuality*, 65:1, 100-116 (2018)

Zhang Y.B., Lin M.C., Nonaka A. and Beom K., "Harmony, Hierarchy and Conservatism: A Cross-Cultural Comparison of Confucian Values in China, Korea, Japan, and Taiwan", *Communication Research Reports*, 22:2, 107-115 (2005)



## **JURISPRUDENCE**

*(From the oldest to the most recent)*

### ***The European Court of Human Rights:***

W.B. v The Federal Republic of Germany, application no.104/55, commission decision December 7, 1955

GW v The Federal Republic of Germany, application no.1397/61, commission decision October 4, 1962

Dudgeon v The United Kingdom, application no.7525/76 October 22, 1981

Norris v Ireland, application no. 10581/83, October 26, 1988

Modinos v.Cyprus, application no. 15070/89, April 22, 1993

Lusting Prean and Beckett v. the United Kingdom, Applications nos. 31417/96 and 32377/96, September 27, 1999

Smith and Grady v. the United Kingdom, Applications nos. 33985/96 and 33986/96, September 27, 1999

Christine Goodwin V. The United Kingdom, application no.28957/95 November 11, 2002

Ladner v Austria, Application no. 18297/03, May 3, 2005

PV c Espagne, application no.35159/09, November 30, 2010 (in French)

Schalk and Kopf v Austria, Application no. 30141/04, June 24, 2010

Hämäläinen v Finland, Application no. 37359/09, judgement of the Grand Chamber, July 16, 2014

Affaire Enhorn c. Suède, Berger V., "Jurisprudence de la Cour Européenne des Droits de l'Homme, 13e Édition", p.140-141 (2014) (In French)

### ***The Inter-American Commission of Human Rights:***

Marta Lucía Álvarez Giraldo v Colombia, case no. 11.656, report no.71/99, May 4th, 1999 (admissibility) (in Spanish)

Inter-American Commission on Human Rights, "Annual Report of The Inter-American Commission on Human Rights 2009 - Report of The Special

Rapporteur for Freedom of Expression”, OEA/Ser.L/V/II. Doc. 51 (December 2009)

Application before the Inter-American Court of Human Rights In the case of Karen Atala and daughters (Case 12.502) Against the State of Chile”, September 17th,2012

Marta Lucía Álvarez Giraldo v Colombia, informe no. 122/18, Caso 11.656, Informe de fondo (publicación) (2018) (in Spanish)

Inter-American Commission on Human Rights, “; “Annual Report of The Inter-American Commission on Human Rights 2018 – Annual Report of the Office of the Special Rapporteur for Freedom of Expression”, OEA/Ser.L/V/II (March 2019)

### ***The Inter-American Court of Human Rights:***

Atala Riffo and daughters v. Chile Merits, Reparations and Costs, Series C No. 239, Judgement of February 24<sup>th</sup>, 2012

### ***Committee against Torture:***

Committee against Torture, Ninth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. CAT/C/57/4 (March 2016)

### ***Committee on the Rights of the Child:***

Committee on the Rights of the Child, combined fifth and sixth periodic reports submitted by the Republic of Korea under article 44 of the Convention, due in 2017, UN Doc. CRC/C/KOR/5-6 (November 2018)

Committee on the Rights of the Child, Concluding observations on the combined fifth and sixth periodic reports of the Republic of Korea, UN Doc. CRC/C/KOR/CO/5-6 (October 2019)

### ***United Nations Human Rights Committee:***

Toonen v Australia, UN Doc. CCPR/C/WG/44/D/488/1992 (The Decision) (1992)

Hertzberg v. Finland, Comm. 61/1979, U.N. Doc. A/37/40, at 161 (HRC 1982)

Young v Australia, Comm. 941/2000, UN Doc CCPR/C/78/D/941/2000, 10.4 (2003)

Human Rights Committee, Views - Communications Nos. 1593 to 1603/2007, UN DOC CCPR/C/98/D/1593-1603/2007 (2010)

Human Rights Committee, UN DOC CCPR/C/KOR/CO/4 (2015)

Concluding observations on the fourth periodic report of the Republic of Korea – Addendum: Information Received from the Republic of Korea on Follow-up to the Concluding Observations, UN DOC CCPR/C/KOR/CO/\$/Add.1 (2017)

### ***United Nations Human Rights Council:***

Working Group on Arbitrary Detention, opinion No. 7/2002 (Egypt) (2003)

Report of the Working Group on Arbitrary Detention, UN Doc. E/CN.4/2004/3 (2003)

Communications report of Special Procedures, UN Doc. A/HRC/23/51 (2013)

Report of the Working Group on Arbitrary Detention, UN Doc. A/HRC/36/37 (2017)

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-second session, UN DOC A/HRC/WGAD/2018/40 (2018)

## **INTERNATIONAL CHARTERS AND CONVENTIONS**

*(Alphabetical Order)*

American Convention on Human Rights (1969)

ASEAN Human Rights Declaration (2012)

Charter of Fundamental Rights of the European Union (2000)

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)

Convention on preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention) (2011)

Convention on the Rights of the Child (1989)

European Convention on Human Rights (1950)

International Covenant on Civil and Political Rights (1966)

Treaty Establishing the European Community (Consolidated Version) (1957)

Universal Declaration on Human Rights (1948)

Yogyakarta Principles (2007)

Yogyakarta Principles Plus 10 (2017)

## WEBSITES

*(Alphabetical Order)*

**Asan Institute for Policy Studies:** <http://en.asaninst.org/>

**Comisión Interamericana Derechos Humanos:**  
<http://www.oas.org/es/cidh/>

**Constitutional Court of Korea:**  
<http://english.ccourt.go.kr/cckhome/eng/dex.do>

**Equaldex:** <https://www.equaldex.com/region/south-korea>

**Europa.eu:** <https://ec.europa.eu>

**IATE:** <https://iate.europa.eu/home>

**ILGA:**  
<https://ilga.org/>

**Korean Law – Statutes of the Republic of Korea:**  
[https://elaw.klri.re.kr/eng\\_service/main.do](https://elaw.klri.re.kr/eng_service/main.do)

**Out Right Action International:**  
<https://outrightinternational.org>

**Refworld.org:**  
<https://www.refworld.org/docid/3ae6b39c0.html>

**Seoul Western District Court:** <http://slseobu.scourt.go.kr> (in Korean)

**SOGILAW:** <https://sogilaw.org/>

**Tasmanian Government – Tasmania’s Consolidated Legislation online:**  
<https://www.legislation.tas.gov.au>

**The Hankyoreh:**  
[http://english.hani.co.kr/arti/english\\_edition/e\\_national/784066.html](http://english.hani.co.kr/arti/english_edition/e_national/784066.html)

**The Inter-American Commission of Human Rights:**  
<https://www.oas.org/en/iachr>

**The Korea Herald:**  
<http://www.koreaherald.com>

**The Korea Times:**  
<http://www.koreatimes.co.kr>

**The OECD:**

<http://www.oecd.org/>

**The United Nations:**

<https://www.un.org/en/>

**The Yogyakarta Principles:**

<http://yogyakartaprinciples.org>

**United Nations Human Rights – Office of the High Commissioner:**

<https://www.ohchr.org>

**World Population Review:**

<http://worldpopulationreview.com>