

Assessing the Korean Military’s Gay Sex Ban in the International Context*

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* This Article was awarded Harvard Law School’s inaugural LGBTQ Writing Prize in 2009.

† © 2010 Alvin Lee. J.D. 2009, Harvard Law School. The author would like to thank Professors Kuk Cho and Jeannie Suk for their guidance, his friends at the National Human Rights Commission of Korea for their support, and Chenie Yoon for her invaluable assistance, without which this project would not have been possible.

** The Journal thanks Byunghoon Lee for his excellent translation work during the editing process.

I. INTRODUCTION

For several months in early 2008, two men in the Korean¹ military were involved in a sexual relationship with each other.² According to all available evidence, the sex was consensual and private.³ In spite of this, one of the men was indicted under article 92 of the Korean Military Penal Code,⁴ which criminally punishes male-male sexual activity between military servicemembers.⁵ If ultimately convicted, he could face up to one year of imprisonment, dishonorable discharge from the military, and damaging social sanction for the rest of his life.⁶

The military court in which the defendant is being prosecuted has, for the time being, suspended the proceedings against him and recommended that article 92's constitutionality be reviewed by the Korean Constitutional Court.⁷ The military court's evaluation of article 92 is that the statute is indeed violative of several key provisions of the Korean Constitution, including those mandating that criminal laws not be impermissibly vague as well as those guaranteeing personal liberty rights and equal treatment under the law.⁸ The case has been accepted for review by the Constitutional Court and is currently pending final resolution.⁹

While certainly intriguing as a study in the doctrinal contours of Korean constitutional law, this recent challenge to article 92 sheds light on a broader set of human rights issues connecting Korean law, militarism, and the interaction between national institutions and private

1. Unless otherwise indicated, the words "Korea" and "Korean" will be used throughout this Article in reference to the Republic of Korea, known colloquially in English-speaking countries as South Korea.

2. 2008Go10, 2 (Je 22 Sadan Botong Gunsu Bub-won [Normal Military Court for the 22nd Division]), [hereinafter 2008Go10] (available only in Korean) (on file with author).

3. *Id.*

4. *Id.*

5. Gun Hyeong Bub Je 92 Jo [Military Penal Code article 92] [hereinafter Article 92] (available only in Korean) (on file with author); *see infra* Part II.B.

6. Article 92. *See infra* Part II.

7. *See* 2008Go10, *supra* note 2. In the Korean system of constitutional review, lower courts are authorized to request that the Constitutional Court review the constitutionality of a statute essential to the outcome of a proceeding. While the Constitutional Court reviews the constitutionality of the statute in question, the proceeding is suspended until resolution of the constitutional issue in question. *See* Hun Bub [Constitution] art. 107 (available in English, available at <http://english.ccourt.go.kr/home/english/welcome/republic.jsp>); *see also* Gavin Healy, Note, *Judicial Activism in the New Constitutional Court of Korea*, 14 COLUMB. J. ASIAN L. 213, 219-20 (2000).

8. *See* 2008Go10, *supra* note 2, at 3-13.

9. A search for 2008Go10 on the Constitutional Court's Web site shows that the case is now "simli jung" [pending]. The case has been assigned a new case number at the Constitutional Court: 2008Hun-Ga21. *See* <http://minwon.ccourt.go.kr/> (Constitutional Court of Korea).

sexuality. Set against the backdrop of an ongoing civil war,¹⁰ article 92 raises questions about the extent to which Korean men, who are required to forfeit at least two years of their lives to compulsory military service,¹¹ can or should be subject to the State's authority in matters concerning sexuality and sexual conduct. Further, the normative and social implications that stem from article 92's punitive nature raise even more complex questions regarding the relationship among private sexual conduct, military service, and the realization of male adulthood and fully participatory citizenship in modern Korea.

Beyond these issues that are specific to Korea, article 92 also presents a series of important questions in the international and comparative human rights context. What do international human rights norms say about states' authority to police the sexual status or private sexual conduct of their military servicemen? How do Korea's attempts to regulate sexual conduct within its military compare to other nations' past and present attempts to regulate military sexuality? And does Korea's distinctively sensitive politico-military situation have implications for the degree to which article 92 might or might not represent a violation of international human rights norms?

This Article will explore these issues, ultimately arguing that, when viewed in light of certain unique aspects of Korean law and culture, article 92 stands alone in the international community, representing an exceptionally flagrant violation of the rights of the men it seeks to punish. Part II will offer a background of Korean military conscription as well as the military's legal treatment of gays. Part II.A will discuss the nature of mandatory military service in Korea, including the social and legal ramifications for failing to complete service. Part II.B will discuss the Korean military's attempts to regulate sexuality, including article 92 and its past and present applications to gay men. Part III will explore past and present methods employed by other nations' militaries for the purposes of regulating sexuality and sexual conduct. Part III.A will discuss regulation of sexual *status* through military personnel bans, such as the policy colloquially known as "Don't Ask, Don't Tell" in the United States. Part III.B will discuss regulation of sexual *conduct* within the military, paying special attention to the context of same-sex sexual activity. Part IV will argue that article 92 is a gross violation of human rights that is indeed singular throughout the world. Part IV.A will compare article 92 to other states' regulations of sexuality and sexual

10. HYUNG GU LYNN, BIPOLAR ORDERS: THE TWO KOREAS SINCE 1989, at 21 (2007).

11. See *infra* Part II.B.

conduct in the military, showing that it is unlike what is found in any other peer nation. Part IV.B will argue that article 92 could be construed to represent a violation of international human rights precedent that proscribes prohibitions against same-sex sexual conduct generally, placing Korea in violation of its treaty obligations with respect to human rights accords. Part IV.C will argue that unique aspects of Korean law and culture make it such that article 92 denies gay men the ability to realize fully participatory adult male citizenship in Korean society.

II. THE KOREAN MILITARY AND ITS LEGAL TREATMENT OF GAYS

A. *Mandatory Military Service in Korea*

Under the Military Service Act of Korea, all men between the ages of twenty-one and thirty must perform active military service for a period of at least twenty-four months.¹² While exemptions are sometimes made in certain exceptional circumstances, such as those involving physical or mental incapacity,¹³ the system is essentially a mandatory one in which those who do not serve can be criminally punished.¹⁴

Korean society's collective, national dedication to its universal conscription system originated in the late 1940s, when, upon the conclusion of World War II as well as Japan's thirty-five-year colonial reign over the Korean peninsula, the United States and the Soviet Union politically and geographically split the Korean nation in half.¹⁵ The divide resulted in the formation of the Soviet-influenced Democratic People's Republic of Korea in the northern part of the peninsula and the American-influenced Republic of Korea in the South.¹⁶ As tensions between the two new polities mounted, and as the ideological battle between the United States and the Soviet Union escalated, military conflict seemed inevitable.¹⁷ Thus, both Koreas bolstered processes of intense militarization, employing and promoting universal conscription

12. Republic of Korea Military Service Act.

13. For example, "men who have physical or mental deficiencies, special family circumstances, or skill in a special or unusual profession" can "perform supplementary military service, which can be fulfilled through public interest work, such as service activities at national or local government agencies." Christine Choi, Note, *Military Conscription and Human Rights in the Republic of Korea: The Right of Conscientious Objection*, 20 TEMP. INT'L & COMP. L.J. 133, 133 (2006). Legally and socially, performing such alternative service is the functional equivalent of completing active military service. *See id.*

14. *See* Military Service Act, *supra* note 12.

15. *See* CARTER J. ECKERT ET AL., *KOREA OLD AND NEW: A HISTORY* 254, 326, 333-35 (1990).

16. *Id.* at 343.

17. *See id.* at 343-44.

as a means of recruiting the manpower necessary to wage large-scale battle.¹⁸

Active military conflict between the two Koreas, which resulted in nearly three million deaths, ended in 1953 with a cease-fire agreement.¹⁹ As no final resolution of the War was ever reached, however, the Korean Civil War never officially ended and, at least technically, still persists today.²⁰ Because of this somewhat unique politico-military context, the Korean peninsula remains embroiled in a highly tense security situation whereby its two nations' governments continue to maintain high levels of militarization, including systems of universal conscription, owing to the concern that armed conflict could resume at any time.²¹

Korean men who do not satisfactorily complete their military service can be subject to criminal punishment as well as institutionalized social sanction.²² A well-documented example of the Korean government's criminalization of failure to complete compulsory service involves Jehovah's Witnesses, who constitute a small but substantial religious minority group in Korea.²³ As Jehovah's Witnesses object to violence on religious grounds, many male adherents of the religion simply refuse to serve in the military.²⁴ But because Korean law does not offer exemptions from military service on the grounds of religious opposition or conscientious objection, such men are routinely prosecuted and forced to serve jail sentences of up to three years for failing to comply with the country's mandatory service requirement.²⁵

In addition to the threat of criminal punishment that Korean men face for failing to complete their military service, they also face the prospect of institutionalized discrimination in areas such as employment and government benefits.²⁶ Due in part to the fact that healthy adult identity for men is so intertwined with military service in Korea, many private employers actively discriminate against those who have not

18. *Id.*

19. *See id.* at 345.

20. LYNN, *supra* note 10, at 21.

21. The tense politico-military situation between the two Koreas has been well documented. *See generally* DON OBERDORFER, *THE TWO KOREAS: A CONTEMPORARY HISTORY* (2001).

22. *See infra* notes 23-30 and accompanying text.

23. *See* Kuk Cho, *Conscientious Objection to Military Service in Korea: The Rocky Path from Being an Unpatriotic Crime to a Human Right*, 9 OR. REV. INT'L L. 187, 190, 192-94 (2007).

24. *See id.* at 190-91.

25. *Id.* at 190.

26. *See id.* at 191 (“[Those who fail to complete compulsory military service] are also prohibited from getting a job in any state agency, local autonomous entity, or public organization. Furthermore, they are deprived of their licenses and official business permits.”).

successfully completed their mandatory service.²⁷ In fact, the government previously levied fines and other punishments on an employer if it hired a male employee who had not successfully completed his military service.²⁸ One can imagine that there are many methods that employers use to informally or formally police job applicants' military status, including something as simple as asking about an applicant's service during a job interview as well as something as formal as requesting an applicant's official military service record along with his job application. In Korea, there are no legal protections against discrimination on the basis of military status,²⁹ so such screening is entirely legal and, indeed, part and parcel of Korean employment culture.³⁰

B. The Korean Military's Legal Treatment of Gays and Same-Sex Sexual Acts

Due in part to the collective sense that every man, without exception, must serve in the military, the Korean National Defense Ministry no longer bars gays from service.³¹ There is a military administrative regulation that states that those with a "sexual preference disorder" are unfit to serve,³² and this previously may have been used, pursuant to military officials' discretion, to discharge gays from the military on the basis of their sexual orientation.³³ The regulation does not state explicitly that homosexual identity falls under the label of sexual preference disorder, however, and the National Defense Ministry made an affirmative decision in 2006 *not* to discharge gay servicemen based solely on their sexual orientation.³⁴ Indeed, empirical evidence suggests

27. See *id.*; Choi, *supra* note 13, at 135 ("[T]hose who fail to serve in the military often have trouble finding employment, and are forbidden from serving in any government capacity.").

28. SEUNGSOOK MOON, MILITARIZED MODERNITY AND GENDERED CITIZENSHIP IN SOUTH KOREA 52 (2005).

29. Human Rights Watch, Letter: Exclusion Undermines Landmark Bill (Nov. 4, 2007), <http://hrw.org/en/news/2007/11/04/letter-exclusion-undermines-landmark-bill> (explaining that military status was removed from a recently proposed national anti-discrimination law).

30. See *supra* note 27 and accompanying text.

31. See Brian Lee & Kwon Seok-cheon, *Military Gives Gay Sex Taboo a Second Look*, JOONGANG DAILY, Nov. 18, 2008, available at <http://joongangdaily.joins.com/article/view.asp?aid=2897483>.

32. National Defense Ministry Regulation 645, "Physical Examination Regulations, Table 2" (in Korean, 국방부령 제 645호 징병 신체 검사 등 검사규칙 별표 2 [Gug Bang Bu Lyeong Je 645 Ho Jingbyung Sinche Geomsa Deung Geomsa Gyuchik Byeolpyo 2]) (available only in Korean).

33. See Lee & Kwon, *supra* note 31 (reporting that according to the Defense Ministry, twenty-five soldiers were discharged for their sexual orientation in 2003).

34. See *id.*

that gays are not discharged from the military even after they come out of the closet to their superiors.³⁵

Unlike the United States and many other nations throughout the world,³⁶ Korea has never criminalized same-sex sexual activity.³⁷ Such conduct is, however, criminalized in the military context.³⁸ Article 92 of the Military Penal Code states that servicemembers who engage in “gye-gan” (in Korean, 계간) or other sexual misconduct can be subject to up to one year of imprisonment.³⁹ The word “gye-gan” literally means “sex between chickens,” but it is used in article 92 to denote male-male sexual conduct.⁴⁰ Some Korean-English dictionaries translate the word gye-gan as “sodomy,” but because sodomy can technically occur between members of the opposite sex,⁴¹ this is an inaccurate translation. As gye-gan specifically refers to sexual conduct between *men*,⁴² a more accurate translation of the word would simply be “sexual conduct between men” or “male-male sexual activity.” Thus, all opposite-sex and female-female sexual activities are not explicitly covered by article 92, whereas the statute’s reference to gye-gan encompasses *all* male-male sexual activity, even if it is private and consensual.

The provision against male-male sexual activity and other sexual misconduct has been a part of the Military Penal Code since it was first enacted in 1962.⁴³ Historical scholarship indicates that the prohibition was carried over from Japanese codes that governed the Korean military in the early twentieth century when Japan maintained colonial rule over the Korean peninsula.⁴⁴ Numerous attempts have been made to reform

35. Gundae Nae Seong Sosuja Ingweon Jeungin Project Team [Project Team for the Promotion of the Human Rights of Sexual Minorities in the Military], *Woori Nara Gundae Neun Dongseongaeja Reul Eoddeokhae Baraboneun Ga* [How Does Our Country's Military View Homosexuals?], conference memorandum from the conference Gundae Wah Gay, Bulpyeon Han Gwangye Sokeseo Ingweon Ui Gil-eul Chadda [The Military and Gays: Finding the Road to Human Rights Amidst an Uncomfortable Relationship] (Nov. 11, 2008) (available only in Korean) (on file with author) (explaining that military life can be difficult for soldiers who choose to come out).

36. See *infra* Part IV.B.

37. Holning Lau, *Sexual Orientation & Gender Identity: American Law in Light of East Asian Developments*, 31 HARV. J. L. & GENDER 67, 92 (2008).

38. Article 92, *supra* note 5, § 92.3.

39. *Id.*

40. See Lee Kyeong Hwan, *Gundae Nae Dongseongae Haengwee Cheobeol e Daehayeo* [Regarding Punishment of Homosexual Activity Within the Military], 5:1 GONGIK GWA INGWEON [PUB. INT. & HUM. RTS.], 65, 69 (available in Korean only) (on file with author).

41. See *infra* Part III.B.

42. See Lee Kyeong Hwan, *supra* note 40 and accompanying text.

43. Lee, *supra* note 40, at 71.

44. *Id.* at 72.

article 92 in recent years, but they have yet to meet with any success.⁴⁵ In fact, the provision has been challenged in court on previous occasions, with litigants arguing that the provision was unconstitutionally vague and violative of personal liberty protections, but no authoritative court has yet to declare it unconstitutional.⁴⁶ Instead, courts have claimed that the provision is sufficiently clear in its language such that “an individual with common sense and ordinary sensibilities . . . could easily predict what conduct would be prohibited under the law”⁴⁷ and that the country’s interests in military morale and national security trump individuals’ rights to sexual freedom.⁴⁸

The vast majority of article 92 prosecutions today occur in cases of sexual misconduct involving the use of force.⁴⁹ In fact, between 2004 and 2007, there were 176 indictments brought under article 92, and of these, 172 involved some aspect of coercion, whether physical, such as violent rape, or psychological, such as the abuse of military seniority to pressure a lower-ranked serviceperson to engage in sex.⁵⁰

As these statistics indicate, however, there are several instances of men being prosecuted for engaging in *consensual* sex with other men.⁵¹ Indeed, over the past ten years or so, there have been several applications of article 92 that would appear to run contrary to liberal notions of personal liberty and privacy that inform thinking about international human rights today.⁵² For example, in 1999, two men were prosecuted for having consensual anal sex with each other even though the men were of the same military rank and engaged in sexual activity *off* of the military base while they were on vacation.⁵³ The men both served one year in prison.⁵⁴ More recently, in 2006 and 2007, several men were prosecuted under article 92 for consensual sex on base, although the available information in these cases indicates that the sex was performed

45. *Id.*

46. See 2008Do2222 (Supreme Court case partially involving article 92) (available only in Korean); *Indecent Sexual Acts Under the Military Act Case*, 2001Hun-Ba70, p. 133 (June 27, 2002), English summary, available at http://www.court.go.kr/home/english/download/decision_2002.pdf. (constitutional court case involving a direct constitutional challenge to article 92).

47. 2001Hun-Ba70, *supra* note 46.

48. 2008Do2222, *supra* note 46.

49. Lee, *supra* note 40, at 73.

50. *Id.* at 73; 2008G010, *supra* note 2, at 3-13.

51. See Lee, *supra* note 40, at 73.

52. See *infra* notes 53-55 and accompanying text.

53. 99Go276 (Je 2 Gundan Botong Gunsu Bubweon [Normal Military Court for the Second Corps]).

54. Lee, *supra* note 40, at 69.

entirely in private.⁵⁵ Such seemingly undetectable cases that occur in private spaces are apparently brought to the attention of military authorities by the sexual participants themselves, although it is unclear why they choose to self-report.⁵⁶

Men who are convicted under article 92 are, in addition to being sentenced to prison, dishonorably discharged from the military.⁵⁷ Dishonorable discharge from the military results in an incomplete military service record, thereby subjecting those who are convicted under article 92 to the institutionalized social sanction mentioned above.⁵⁸

III. OTHER NATIONS' REGULATIONS OF SAME-SEX SEXUALITY AND CONDUCT IN THE MILITARY

In assessing the severity of article 92 as a violation of human rights, it is useful to undertake a comparative analysis of the legal situation of gays in the Korean military to the legal situation of gays in the militaries of other countries throughout the world. There are essentially two categories of antigay military legal provisions that are relevant to a comparative analysis of article 92. The first involves military regulations of homosexual *status*: a *personnel ban* that bars gays from serving in the military altogether.⁵⁹ The second involves military regulations of homosexual *conduct*: criminal punishment of same-sex sexual *activity* within the military.⁶⁰ Both will be discussed in turn.

A. *Military Regulations of Homosexual Status: Personnel Bans Against Gays*

Several countries' militaries have personnel bans against gay men and women, meaning that gay men and women cannot serve in those countries' militaries even if they want to do so.⁶¹ Although it is difficult to conduct accurate, comprehensive research on the personnel policies of each and every military throughout the world, recent scholarship indicates that, as of 2006, there were at least thirteen countries that

55. 2006Go4 (Je 17 Bobyong Sadan Botong Gunsa Bubweon [Normal Military Court for the 17th Infantry Division]) (available only in Korean); Je 9 Bobyong Sadan Botong Geomchalbu 2006 nyeon Hyeongje 44Ho Sageon [Case Number 44 of the Year 2006, Investigation Division of the 9th Infantry Division]) (available only in Korean).

56. Lee, *supra* note 40, at 67-68.

57. *See supra* Part II.A.

58. *See supra* Part II.A.

59. *See infra* Part III.A.

60. *See infra* Part III.B.

61. *See infra* note 64 and accompanying text.

prohibited gay men and women from serving in their militaries.⁶² Further, this scholarship indicates that, as of 2006, there were at least thirty-two countries that allowed gay men and women to serve in their militaries.⁶³ These countries are as follows:

ALLOW: Australia, Austria, Bahamas, Bulgaria, Canada, Colombia, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Ireland, Israel, Italy, Lithuania, Luxembourg, Netherlands, New Zealand, Norway, Peru, Portugal, Slovenia, South Africa, Spain, Sweden, Switzerland, Taiwan, Thailand, United Kingdom.

PROHIBIT: Argentina, Belarus, Brazil, Cyprus, Greece, Libya, Philippines, Russia, Serbia, Singapore, Turkey, United States.⁶⁴

As it would be both practically difficult and substantively not very useful to present detailed studies of each country's military personnel policies, the rest of this Part will analyze a select number of past and present personnel bans in detail. The countries presented were chosen for various reasons, including the availability of relevant research materials and the countries' relevance for Korean comparison.

1. Canada and Australia

Canada and Australia both have relatively well-respected human rights records;⁶⁵ therefore, an analysis of their respective histories relating to gay military personnel bans can shed light on the international human rights community's judgment of such bans.

Canada's military, referred to as the Canadian Forces (CF), formerly maintained an administrative regulation that stated that "service policy does not allow homosexual members or members with a sexual abnormality to be retained in the Canadian forces."⁶⁶ Thus, the policy essentially constituted a personnel ban directed at policing the homosexual status of servicemembers. As Canada bolstered its human rights record in the 1970s and 1980s, however, the ban came under heavy scrutiny from both the public and politicians.⁶⁷ In response to such

62. See INT'L LESBIAN & GAY ASS'N, LGBT WORLD LEGAL WRAP UP SURVEY (2006), <http://www.ilga-europe.org/content/download/6444/39689/version/1/file/world+legal+wrap+up+survey++November2006.pdf>.

63. *Id.*

64. *Id.*

65. See U.S. DEP'T OF STATE, 2008 HUMAN RIGHTS REPORTS: CANADA (2009), <http://www.state.gov/g/drl/rls/hrrpt/2008/wha/119151.htm>; U.S. DEP'T OF STATE, 2008 HUMAN RIGHTS REPORTS: AUSTRALIA (2009), <http://www.state.gov/g/drl/rls/hrrpt/2008/eap/119033.htm>.

66. Aaron Belkin & Melissa Sheridan Embser-Herbert, *The International Experience, in THE U.S. MILITARY'S "DON'T ASK, DON'T TELL" POLICY: A REFERENCE HANDBOOK* 59, 60 (Melissa Sheridan Embser-Herbert ed., 2007).

67. *Id.*

scrutiny, the Canadian “Department of National Defence conducted a survey of 6,580 soldiers to assess the potential impact of a removal of the ban on homosexual soldiers.”⁶⁸ The survey’s results indicated that “military personnel, particularly men, were strongly against removing the ban.”⁶⁹ Thus, the Department of National Defence ultimately issued a recommendation to keep the ban in place.⁷⁰

In spite of this recommendation, however, public pressure to eliminate the personnel ban continued to mount, and several members of the CF filed suit to invalidate the ban in court.⁷¹ In the course of this litigation, the Department of National Defence conceded that it would be unable to justify the ban under any legal or empirical grounds, thereby consenting to the immediate repeal of the policy in 1992.⁷²

Empirical studies on the effects of the ban’s repeal have since been conducted, and none have uncovered any detrimental effects.⁷³ Some researchers found that “heterosexual service members were unhappy with the removal of the ban, [but that] they responded professionally in the months following the policy change.”⁷⁴ Further, these researchers found that the lifting of the ban did not result in a significant increase in the number of gay servicemen and women who chose to declare publicly their sexual orientation to their military colleagues.⁷⁵

The Australian Defence Forces (ADF) maintained an official antigay personnel ban from 1986 to 1992.⁷⁶ Even before 1986, however, gay service people were sometimes removed from duty on the grounds of state and federal laws prohibiting sodomy and same-sex sexual relations.⁷⁷

Throughout the 1980s and 1990s, “Australia adopted several human rights measures into its laws and codes including the International Covenant on Civil and Political Rights.”⁷⁸ Because of this, Australia exhibited a heightened sensitivity to human rights issues in the years that the ADF’s antigay personnel ban was in place.⁷⁹ In this context, a

68. *Id.* at 60-61.

69. *Id.* at 61.

70. *Id.*

71. *Id.*

72. *Id.* at 61-62.

73. *Id.* at 61-66.

74. *Id.* at 62-66.

75. *Id.*

76. *Id.* at 66.

77. *Id.*

78. *Id.* at 66-67.

79. *See id.*

servicewoman filed a formal complaint against the ban in 1990.⁸⁰ The complaint, which was filed with the Australian Human Rights and Equal Opportunities Commission (HREOC), “contended that her discharge [from the ADF] had been partially based upon the fact that she was a lesbian.”⁸¹ With this public spotlight on the issue, various government officials disagreed as to the advisability of lifting the ban: specifically, the Defense Minister and the service chiefs (all military-related government officials) were opposed to lifting the ban while the Prime Minister, the Health Minister, and the Attorney General all supported lifting the ban.⁸² Ultimately, the ban was lifted in 1992, the same year that the Canadian ban was dismantled, and a new provision prohibiting “sexual misconduct” regardless of sexual orientation was put in its place.⁸³

Various political groups, including several veterans groups, immediately “condemned the policy change and argued that allowing open homosexuals to serve would shatter unit cohesion and lead to a deterioration of trust among soldiers, thus undermining the forces’ fighting effectiveness.”⁸⁴ Empirical studies that have analyzed the aftermath of the lifting of the ban, however, have not uncovered any “adverse effects on the capability or functioning of the Defence forces.”⁸⁵ Further, these studies have shown that the lifting of the ban did not lead to an increase in the number of gay soldiers openly declaring their sexual orientation.⁸⁶

2. The United Kingdom and Europe

Like Australia and Canada, the United Kingdom is generally thought to have a strong record relating to the protection of human rights;⁸⁷ the United Kingdom’s antigay military personnel ban was repealed in 2000 as the result of litigation that ultimately ended in the European Court of Human Rights (ECHR).⁸⁸ As such, the United Kingdom’s history relating to its gay military personnel ban has ramifications for all forty-seven nations who are Contracting Parties to

80. *Id.* at 68.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 69.

85. *Id.* at 70.

86. *Id.* at 70-71.

87. See U.S. DEP’T OF STATE, 2008 HUMAN RIGHTS REPORTS: UNITED KINGDOM (2009), <http://www.state.gov/g/drl/rls/hrrpt/2008/eur/119111.htm>.

88. See *infra* notes 89-99 and accompanying text.

the European Convention on Human Rights and who are, therefore, under the jurisdiction of the ECHR.⁸⁹ Thus, the U.K. and European stances on such bans, which are relevant for the purposes of assessing the international community's appraisal of military regulation of same-sex sexuality generally, will be discussed in conjunction with each other.

The United Kingdom's antigay military personnel ban has existed for quite some time in several different forms.⁹⁰ Most recently, the British Ministry of Defense in 1994 issued regulations barring homosexual military service,⁹¹ thus constituting a personnel ban aimed at policing servicemembers' homosexuality. The policy was immediately challenged in court by four servicemembers who alleged that their privacy rights were violated when they were discharged on the basis of their homosexuality.⁹² The ensuing litigation took place over five years, ultimately culminating in a final appeal to the ECHR.⁹³ In late 1999, "the ECHR ruled unanimously that the ban on homosexual military service violated the privacy rights" of those gay servicemembers who were discharged under it.⁹⁴ Specifically, the ECHR held that investigations conducted into servicemembers' sex lives were exceedingly intrusive.⁹⁵ The ruling effectively precluded any of the forty-seven nations who are Contracting Parties to the European Convention on Human Rights from enacting or maintaining similar personnel bans.⁹⁶

To date, in place of the personnel ban, the U.K. military prohibits soldiers, regardless of their sexual orientation, "from engaging in social behavior that undermines, or may potentially undermine, the trust and cohesion, and therefore the operational effectiveness, of the services."⁹⁷ This new policy lists specific types of behavior that are construed as violations, including "unwelcome physical or verbal sexual attention, overfamiliarity with the spouses of other service personnel, displays of affection which might cause offense to others, taking sexual advantage of subordinates, and behavior which damages the marriage or personal

89. See Human Rights, Democracy, Rule of Law, http://www.coe.int/AboutCoe/media/interface/publications/Glossy_en.pdf (last visited Mar. 4, 2010).

90. Belkin & Embser-Herbert, *supra* note 66, at 72.

91. *Id.*

92. *Id.* at 72-73.

93. *Id.* at 73.

94. *Id.*

95. Scott Morris, *Europe Enters a New Millennium with Gays in the Military While the United States Drowns in Don't Ask, Don't Tell: Twin Decisions by the European Court of Human Rights*, 9 AM. U. J. GENDER SOC. POL'Y & L. 423, 438-39 (2001).

96. *Id.* at 427.

97. Belkin & Embser-Herbert, *supra* note 66, at 74.

relationship of other service personnel.”⁹⁸ The policy does not, however, make any specific reference to sexual orientation.⁹⁹

Empirical research conducted after the ban was lifted and after the new policy was put into effect revealed that “[t]here [was] no perceived effect on morale, unit cohesion, or operational effectiveness” as a result of the changes.¹⁰⁰ “The new policy was being well received by soldiers, and the policy change was characterized by a ‘marked lack of reaction.’”¹⁰¹ Finally, this research uncovered that there was no reported increase in the number of gay servicemen and women disclosing their sexual orientation after the ban was lifted.¹⁰²

3. Taiwan and Japan

Although not many English-language research materials are available regarding East Asian military personnel policies, what little is available can shed light on the East Asian human rights community’s stance on gay military bans, which is obviously relevant for Korean comparison. Like Korea, Taiwan has a system of mandatory military service, wherein all adult men are required to perform at least one year of service in the Taiwanese military.¹⁰³ The mandatory nature of military service in Taiwan likely stems from similar factors that resulted in mandatory service in Korea, namely the unstable politico-military situation that persists with regard to mainland China and the unresolved civil war between Taiwan and China.

In Taiwan, the personnel regulation that had been employed previously to screen out gays referred to “sexual orientation impairment” as the reason they were deemed unfit for service or promotion to higher level positions.¹⁰⁴ In 2002, however, the Taiwanese military announced a new interpretation of the phrase “sexual orientation impairment” such that gays were no longer included in that term.¹⁰⁵

Japan currently maintains no official personnel policy regarding gays in its defense forces.¹⁰⁶

98. *Id.*

99. *Id.*

100. *Id.* at 75.

101. *Id.* at 75-76.

102. *See id.* at 76.

103. Military Service Law of the People’s Republic of China.

104. Press Release, Palm Ctr., Asia’s Silence on Gays in Military Broken by Taiwan’s New Policy, May 15, 2002, http://www.palmcenter.org/press/dadt/releases/asias_silence_on_gays_in_military_broken_by_taiwan.

105. *Id.*

106. *Id.*

4. Israel

The Israeli military shares much in common with the Korean military and, as such, is highly relevant for purposes of comparative analysis. Like Korea, Israel has a system of mandatory military service, wherein all adult men must serve three years *and* all adult women must serve just under two years in the Israel Defense Forces (IDF).¹⁰⁷ Like the Korean military, the IDF serves as “an important agent of socialization” and represents a common gateway into adulthood for young Israelis.¹⁰⁸ Indeed, scholars have commented that the IDF “play[s] a central role in the daily life and identity of the Israeli people” and that “the boundaries between civilian and military culture ‘remain porous or, according to some views, virtually nonexistent.’”¹⁰⁹

Due in part to this system of mandatory service, the IDF is considered to be an incredibly active and highly elite military. Its operations in the Middle East are well-documented: in the past sixty or so years, “Israel has fought five major wars, conducted numerous major operations against hostile neighbors, and supplied an army of occupation in the West Bank and Gaza for more than 30 years.”¹¹⁰ The physical security of the Israeli territory is, much like the physical security of the Korean peninsula, always under threat of military violence.

Historically, the IDF touted a nonexclusionary conscription policy, whereby all able-bodied citizens, regardless of sexual orientation, were expected to participate in military service.¹¹¹ Notwithstanding this, prior to 1980, known gays were generally discharged from the military,¹¹² and in 1983, the IDF promulgated formal regulations that “required officers to refer suspected homosexuals to a mental health evaluation center to determine whether they were security risks and maintained sufficient ‘mental strength and maturity’ for military service.”¹¹³ Based on such evaluations, gay servicemen and—women could be discharged from the military altogether, limited in the types of positions that they could serve, and subjected to extensive security investigations.¹¹⁴ As such, the regulations appropriately can be classified as a personnel ban.

107. Aaron Belkin & Melissa Levitt, *Homosexuality and the Israel Defense Forces: Did Lifting the Gay Ban Undermine Military Performance?*, 27:4 ARMED FORCES & SOC'Y 541, 542 (2001), available at <http://afs.sagepub.com/cgi/reprint/27/4/541>.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *See id.* at 543.

113. *Id.*

114. *Id.*

The public first began calling for repeal of the regulations in 1993, when a well-known chemistry professor who had been working on highly classified military research made public that he had been “stripped of his rank of officer . . . because of his sexual orientation.”¹¹⁵ The ensuing media storm created a wave of sympathy for the professor as well as a general consensus that the restrictive policy was illogical and should be repealed.¹¹⁶ A military committee quickly convened at the behest of then Prime Minister Yitzhak Rabin, and the regulations were officially amended such that they no longer distinguished between heterosexual and homosexual servicepeople.¹¹⁷

Empirical researchers have studied the effect that the repeal of the personnel ban has had on the IDF.¹¹⁸ In conclusion, the researchers found that there is no evidence that repealing the personnel ban has had a negative effect on the IDF with regard to “military performance, cohesion, readiness, or morale.”¹¹⁹ If anything, these studies have shown the opposite, stating that “[i]n the context of a country continuously at war, lack of service is considered suspect. Unrestricted participation in military by sexual minorities therefore serves to bolster the core Israeli value of common defense of the nation rather than threaten military cohesion or morale.”¹²⁰

Such findings are not predicated on the fact that Israeli society is open, tolerant, and accepting of gays and lesbians. In fact, these studies have found that the opposite is true: the LGBT rights movement in Israel is, relatively speaking, quite young and quite small and is almost certainly outnumbered by religious groups that oppose LGBT equality.¹²¹ These studies have further found that, contrary to popular opinion, the repeal of the antigay personnel ban did not result in a dramatic increase in gay servicepeople disclosing their sexual orientations within the military.¹²² In fact, this number and its gradual increase remained relatively steady in the years preceding and following the ban’s repeal.¹²³ Thus, these studies concluded that tolerance of gay people has little to do

115. *Id.*

116. *Id.*

117. *Id.* at 543-44.

118. *See id.* at 544-58.

119. *Id.* at 544.

120. *Id.* at 547.

121. *See id.* at 555-57.

122. *See id.* at 549-50.

123. *See id.* at 549-51.

with whether the repeal of a military personnel ban ultimately undermines the effectiveness of that particular military.¹²⁴

5. The United States: “Don’t Ask, Don’t Tell”

Due to the United States’ central role in global relations, including issues regarding human rights, no discussion of the international context of military sexuality would be complete without an analysis of U.S. policy. The United States currently bars openly gay men and women from serving in its military.¹²⁵ The statutory ban, known colloquially as “Don’t Ask, Don’t Tell” (DADT), was first enacted in 1993,¹²⁶ but the U.S. military had prohibited gay men and women from serving in the military since World War II.¹²⁷ DADT was the product of a political compromise: while campaigning for the White House in the early 1990s, President Bill Clinton promised that he would end the personnel ban, but military leaders were vehemently opposed to the idea, believing that “homosexuality was incompatible with military service.”¹²⁸ The result of this disagreement was DADT, which President Clinton touted as “a reasonable compromise between full integration and complete exclusion” as it supposedly allowed gay servicemembers to serve as long as they simply kept quiet about their sexual orientations.¹²⁹

In reality, however, DADT is a complete and total personnel ban against gays from serving in the military. Servicemembers can be discharged for engaging in same-sex sexual conduct or for simply making a statement that they are gay, lesbian, or bisexual.¹³⁰ Further, military officials need not prove with absolute certainty that a servicemember has engaged in same-sex sexual conduct in order to initiate discharge proceedings; as long as there is “credible evidence, from a reliable source” to support an allegation that a particular servicemember has engaged in such conduct, military officials can initiate the inquiry leading to that individual’s discharge from the military.¹³¹

124. *See id.* at 558.

125. 10 U.S.C. § 654 (2006).

126. Robert I. Correales, *Don’t Ask, Don’t Tell: A Dying Policy on the Precipice*, 44 CAL. W. L. REV. 413, 417-18 (2008).

127. Pamela Lundquist, *Essential to the National Security: An Executive Ban on “Don’t Ask, Don’t Tell,”* 16 AM. U. J. GENDER SOC. POL’Y & L. 115, 118 (2007).

128. *Id.* at 119; Correales, *supra* note 126, at 417.

129. Correales, *supra* note 126, at 417.

130. *See* 10 U.S.C. § 654(b) (2006).

131. Emily B. Hecht, *Debating the Ban: The Past, Present and Future of Don’t Ask, Don’t Tell*, 246 N.J. LAW. 51, 52 (2007).

Since DADT was enacted in 1993, at least 10,000 members of the U.S. military have been discharged on the basis of their sexual orientation.¹³² Several discharged servicemen and -women have filed lawsuits challenging DADT on constitutional grounds; these litigants typically argue that DADT infringes on individuals' rights to sexual privacy and also denies them equal protection of the law.¹³³ To date, however, none of these lawsuits has succeeded.¹³⁴ Courts have thus far been highly deferential to military judgment, saying that they are unwilling to enter into a deep exploration of the rationales that are offered by military officials for the policy.¹³⁵ Instead, courts routinely say that they have no basis for undermining the opinions of these military officials.¹³⁶

Public opinion against DADT is immense.¹³⁷ Many former military leaders have publicly commented that DADT is simply ineffective and needs to be repealed.¹³⁸ Public opinion polls consistently show that between 70-80% of Americans believe that DADT should be repealed.¹³⁹ The current President of the United States, Barack Obama, has publicly announced that he is opposed to DADT and supports its repeal.¹⁴⁰ The Government Accountability Office, an administrative agency dealing with budgetary calculations, has estimated that DADT has cost the United States approximately \$350 million since its enactment.¹⁴¹ Members of Congress have begun rallying behind legislation aimed at repealing DADT.¹⁴² As research in this Part has shown, the United States is the only developed Western nation that still maintains a ban on gay

132. Thom Shanker & Patrick Healy, *A New Push To Roll Back "Don't Ask, Don't Tell,"* N.Y. TIMES, Nov. 30, 2007, at A-14, available at <http://www.nytimes.com/2007/11/30/us/30/military.html>.

133. See Lundquist, *supra* note 127, at 122-23.

134. *Id.* at 123-25.

135. *Id.* at 125.

136. *Id.*

137. See *infra* note 139 and accompanying text.

138. 104 Retired Military Brass Against 'Don't Ask—Don't Tell,' CNN.com, <http://www.cnn.com/2008/POLITICS/11/17/dont.ask.dont.tell/index.html> (last visited Mar. 4, 2010).

139. Kyle Dropp & Jon Cohen, *Acceptance of Gay People in Military Grows Dramatically*, WASH. POST, July 19, 2008, at A-3, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/07/18/AR2008071802561.html>.

140. Alex Spillius, *Barack Obama To End U.S. Army's "Don't Ask, Don't Tell" Policy Towards Gays*, TELEGRAPH (U.K.) (Jan. 15, 2009), available at <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/barackobama/4241873/Barack-Obama-to-end-US-armys-dont-ask-dont-tell-policy-towards-gays.html>.

141. See *Report: "Don't Ask, Don't Tell" Costs \$363M* (Feb. 14, 2006), http://www.usatoday.com/news/washington/2006-02-14-dont-ask-report_x.htm.

142. Lundquist, *supra* note 127, at 146-47.

men and women serving in the military.¹⁴³ In this context, it is almost impossible to imagine that DADT will be around for much longer; its repeal is imminent.¹⁴⁴

B. Military Regulations of Homosexual Conduct: Criminal Punishment of Same-Sex Sexual Activity Within the Military

Very little has been written in English about countries that punish consensual same-sex sexual activity within the military. What research is readily available uncovers that such a prohibition previously existed in Peru, but that it was ruled unconstitutional in 2004.¹⁴⁵ Further, Brazil has a similar provision that is currently being reviewed in a constitutional challenge in its Supreme Court.¹⁴⁶

Between 1967 and 1992, the United Kingdom maintained such a provision: during this time period, consensual same-sex sexual activity between civilians was *not* illegal, but such activity between individuals in the military *was* illegal.¹⁴⁷ In the early 1990s, however, the government acknowledged that there was no real rationale for punishing military personnel for something that civilians were entirely unpunished for doing.¹⁴⁸ Thus, in 1992, “the Ministry of Defense announced an administrative order to immediately halt criminal prosecution for sexual activities that were legal for civilians.”¹⁴⁹

The United States currently has a criminal prohibition against “sodomy,” which includes any anal or oral sexual activity, within the military.¹⁵⁰ The prohibition, found in article 125 of the Uniform Code of Military Justice (article 125), forbids even private, consensual sexual activity, much like article 92 in Korea.¹⁵¹ Unlike article 92, however, article 125 applies *equally* to heterosexual and homosexual servicemembers.¹⁵² Further, unlike Korea’s article 92, the American

143. *See supra* Parts III.A.1-5.

144. Lundquist, *supra* note 127, at 117 (“Along with the unabashedly discriminatory nature of the policy, these facts indicate that the law’s end is near.”).

145. *Peru Gives Green Light for Gays in Military to Have Sex*, AGENCE FRANCE PRESSE (Nov. 11, 2004), [http://www.asylumlaw.org/docs/sexualminorities/Peru%20CU%20\(OD\).pdf](http://www.asylumlaw.org/docs/sexualminorities/Peru%20CU%20(OD).pdf).

146. *See* Conor Foley, *Outing Brazil’s Military Secrets*, THE GUARDIAN, June 16, 2008, available at <http://www.guardian.co.uk/commentisfree/2008/jun/16/gayrights.brazil>; *see also* Brazilian Military Code Article 235, DL 1.001/69-.

147. Belkin & Embser-Herbert, *supra* note 66, at 72.

148. *Id.*

149. *Id.*

150. 10 U.S.C. § 925 (2006).

151. *See id.*; Article 92, *supra* note 5.

152. *See* 10 U.S.C. § 925(a); Article 92, *supra* note 5.

military's sodomy prohibition is very rarely enforced.¹⁵³ In fact, in recent years, there have been zero prosecutions involving members of the same rank who engaged in consensual, private sexual activity.¹⁵⁴

American legal scholars frequently comment that if such a prosecution were to be brought, article 125 would be ruled unconstitutional because the United States Supreme Court, ever since its 2003 ruling in *Lawrence v. Texas*, now recognizes personal liberty and privacy interests in sexual intimacy.¹⁵⁵ Indeed, two lower military courts have rejected prosecutions under article 125 in recent years, holding that the Supreme Court's decision in *Lawrence* bars these types of prosecutions.¹⁵⁶

It should be noted that many nations that maintain bans on consensual same-sex sexual activity *outside* of the military (that is, for everyday civilians) may also be able to punish servicemen who engage in such activity, prosecuting them under the respective nation's general criminal code.

IV. ASSESSING ARTICLE 92 IN THE INTERNATIONAL CONTEXT

A. *Article 92's Unique Position and Logic*

As the previous section indicates, most antigay military personnel policies throughout the world are aimed at policing sexual *status* rather than sexual *conduct*.¹⁵⁷ An explanation for why this is the case may be that those states that have enacted antigay military personnel policies enforce those policies through evidence that a particular servicemember has engaged in same-sex sexual conduct; thus, enforcement of such sexual status regulations effectively encompass conduct regulations as well. As such, separate provisions regulating sexual conduct would be redundant and unnecessary.

An example of this would be DADT in the United States: because allegations of homosexual conduct are often sufficient to trigger the policing of a servicemember's sexual status,¹⁵⁸ regulation of sexual

153. See Walter T. Cox, III, *Consensual Sex Crimes in the Armed Forces: A Primer for the Uninformed*, 14 DUKE J. GENDER L. & POL'Y 791, 800 (2007).

154. See *id.*

155. See *id.* at 802; Jeremy J. Gray, *The Military's Ban on Consensual Sodomy in a Post-Lawrence World*, 21 WASH. U. L.J. & POL'Y 379, 379 (2006).

156. *United States v. Bullock*, Army No. 20030534, *4 (A. Ct. Crim. App. Nov. 30, 2004), available at http://sldn.3cdn.net/d6b14f304ea2ac3439_sbm6bxf9.pdf; *United States v. Meno*, Army No. 20000733, *2 (A. Ct. Crim. App. June 22, 2005), available at <http://sldn.bluestatedigital.com/page/-/Website/In%20the%20Courts/2309.pdf>.

157. See *supra* Part III.

158. See *supra* note 132 and accompanying text.

conduct automatically triggers, and thus is not independent of, regulation of sexual status. Although the empirical studies mentioned above have uniformly demonstrated that same-sex sexuality is not incompatible with or detrimental to an effective military,¹⁵⁹ most nations that police sexuality in the military have done so in a somewhat logically consistent manner, deeming sexuality itself, as *manifested by* same-sex sexual conduct, to be detrimental to military cohesiveness.¹⁶⁰

The Korean situation, therefore, is quite unique. Like military officials in other countries who have promulgated anti-gay policies, officials in the Korean National Defense Ministry have stated that the rationale behind keeping article 92 intact is to maintain military cohesion and morale.¹⁶¹ But unlike the militaries of these other countries, the Korean military has officially declared that it does not engage in the policing of sexual status¹⁶² though it *does* engage in the policing of same-sex sexual *conduct*.¹⁶³

In this sense, the military officials defending article 92 appear to assert the seemingly illogical proposition that a gay servicemember's homosexual status, even if made public, is *not* detrimental to military cohesion whereas his same-sex sexual act, even when private, *is* detrimental to military cohesion. Indeed, because conduct is policed while status is not, Korean military officials somewhat illogically conclude that *private* same-sex sexual acts are more detrimental to military cohesion than a servicemember's *public* declaration that he is gay. The illogicality of this conclusion becomes apparent when considering both types of regulations and their implications in the public and private spheres. It is difficult to imagine how a private act, unknown to anyone unless self-reported, could be detrimental to military cohesion while a public declaration regarding one's propensity to engage in such private acts is deemed altogether innocuous.

Indeed, the Korean military's legal stance on homosexuality allows for irrational outcomes to occur: a man who publicly announces to everyone in his military unit that he is gay is deemed to have no detrimental effect on his unit's morale and cohesiveness, thereby evading any legal recourse, whereas a man who engages in private same-sex sexual conduct, which he chooses to self-report, is deemed to affect

159. See *supra* Parts III.A.1-4.

160. See *supra* Part III.A.

161. See Lee & Kwon, *supra* note 31 (showing that military officials defend article 92 on the grounds that eliminating it would lower military cohesion and morale).

162. See Lee & Kwon, *supra* note 31.

163. See *id.*

negatively the military's cohesiveness and morale, thereby subjecting him to criminal punishment. Thus, Korean military officials' understanding of the relationship between sexuality and military cohesion is, on its face, somewhat illogical and ultimately leads to logically inconsistent results.

Further, the fact that gay men are *compelled* to serve in the military, even while military officials defend the continued application of article 92, is quite unique in the international context. Very few of the other nations surveyed above have compulsory military service requirements, and of the ones that do, there is no evidence that they regulate the private, consensual sexual conduct of their servicemembers. Although military servicemembers in the United States are nominally subjected to the sexual conduct regulations found in article 125, American citizens can choose to evade the jurisdiction of article 125 by simply not joining the military. And, while militaries like the Israeli Defense Forces engage in universal conscription, there is no evidence that Israeli conscription is coupled with governmental regulation of private, consensual sexual activity.¹⁶⁴

Thus, the message communicated by Korean military officials is uniquely forcible *and* uniquely demeaning: gay Korean men are, through the criminal law, *coerced* into becoming nonsexual beings for the period that they are required to serve in the military. Indeed, gay men in Korea have no choice but to subject themselves to a heightened level of governmental intrusion into their sexual conduct no matter how private or consensual such conduct is. This gross policing of bodies constitutes a level of intrusion that is altogether not present in other conscription societies (such as Israel) and that gay Koreans cannot escape by simply choosing not to join the military (such as in the United States).

B. Article 92 as a Universal Sodomy Ban in Violation of Korea's International Human Rights Treaty Obligations

The previous discussion gives rise to the question of whether article 92 is, as Korean military officials would probably have us believe, simply a de minimis policing of sexuality limited to the military context or whether its reach goes beyond this narrow reading and approaches the level of a universal sodomy ban. Universal sodomy bans are present in countries that criminally punish same-sex sexual activity between civilians.¹⁶⁵

164. See *supra* Part III.A.

165. See SING. PENAL CODE ch. XVI, § 377A; MOROCCO PENAL CODE § 220.

While it is very difficult to conduct accurate, comprehensive research on the criminal laws of every country, recent scholarship indicates that the 107 countries or sovereign bodies listed in the table below have *no* prohibition on consensual same-sex sexual activity by civilians.¹⁶⁶

No Universal Sodomy Ban

Albania	Czech Republic	Kyrgyzstan	Portugal
Andorra	Denmark	Laos	Puerto Rico
Argentina	Dominican Republic	Latvia	Romania
Armenia	Ecuador	Liechtenstein	Russia
Australia	El Salvador	Lithuania	Rwanda
Austria	Equatorial Guinea	Luxembourg	San Marino
Azerbaijan	Estonia	Macedonia	Serbia
Bahamas	Fiji	Madagascar	Slovakia
Belarus	Finland	Mali	Slovenia
Belgium	France	Malta	South Africa
Bolivia	Gabon	Marshall Islands	South Korea
Bosnia & Herzegovina	Georgia	Mexico	Spain
Brazil	Germany	Micronesia	Suriname
Bulgaria	Greece	Moldova	Sweden
Burundi	Guatemala	Monaco	Switzerland
Cambodia	Haiti	Mongolia	Taiwan
Canada	Honduras	Montenegro	Tajikistan
Central African Republic	Hungary	Netherlands	Thailand
Cape Verde	Iceland	Netherlands Antilles	Timor-Leste
Chile	Ireland	New Zealand	Turkey
China	Israel	Nicaragua	Ukraine
Colombia	Italy	North Korea	United Kingdom
Congo	Japan	Norway	United States
Côte d'Ivoire	Jordan	Paraguay	Uruguay
Croatia	Kazakhstan	Peru	Vanuatu
Cuba	Kosovo	Philippines	Venezuela
Cyprus		Poland	Vietnam
			West Bank ¹⁶⁷

166. DANIEL OTTOSON, THE INTERNATIONAL LESBIAN AND GAY ASS'N STATE SPONSORED HOMOPHOBIA: A WORLD SURVEY OF LAWS PROHIBITING SAME SEX ACTIVITY BETWEEN CONSENTING ADULTS 45 (2008) http://www.ilga.org/statehomophobia/ILGA_State_Sponsored_Homophobia_2008.pdf.

167. *Id.*

This same scholarship indicates that the ninety countries or sovereign bodies listed in the following table *do* maintain a criminal prohibition against consensual same-sex sexual activity by civilians.

Universal Sodomy Ban

Afghanistan	Guinea	Nigeria	Swaziland
Algeria	Guinea-Bissau	Niue	Syria
Angola	Guyana	Oman	Tanzania
Antigua & Barbuda	India	Pakistan	Togo
Bahrain	Iran	Palau	Tokelau
Bangladesh	Jamaica	Panama	Tonga
Barbados	Kenya	Papua New Guinea	Trinidad & Tobago
Belize	Kiribati	Qatar	Tunisia
Benin	Kuwait	St. Kitts & Nevis	Turkish Republic of Northern Cyprus
Bhutan	Lebanon	St. Lucia	Turkmenistan
Botswana	Lesotho	St. Vincent & the Grenadines	Tuvalu
Brunei	Liberia	Sao Tome & Principe	Uganda
Cameroon	Libya	Saudi Arabia	United Arab Emirates
Comoros	Malawi	Senegal	Uzbekistan
Cook Islands	Malaysia	Seychelles	Western Samoa
Djibouti	Maldives	Sierra Leone	Yemen
Dominica	Maldive	Singapore	Zambia
Eritrea	Mauritania	Solomon Islands	Zimbabwe ¹⁶⁸
Ethiopia	Mauritius	Somalia	
Gambia	Morocco	Sri Lanka	
Gaza	Mozambique	Sudan	
Ghana	Myanmar/Burma		
Grenada	Namibia		
	Nauru		
	Nepal		

Several international bodies and tribunals have declared that such criminalization is highly violative of personal liberty rights.¹⁶⁹ For example, the European Court of Human Rights (EHCR) held, in the 1981 case *Dudgeon v. The United Kingdom*, that Ireland's criminal prohibition against consensual same-sex sexual activity violated article 8 of the European Convention on Human Rights, which protects individual liberties related to privacy.¹⁷⁰ In response to the EHCR's ruling, Ireland

168. *Id.*

169. See *infra* notes 170-176 and accompanying text.

170. See *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) at 14 (1981), available at <http://www.religlaw.org/template.php?id=115>.

repealed its criminalization of consensual same-sex sexual activity in 1982.¹⁷¹

Further, in the 1994 case of *Toonen v. Australia*, the United Nations Human Rights Committee (UNHCR) declared that Australia was in violation of the International Covenant on Civil and Political Rights (ICCPR),¹⁷² a treaty to which Korea acceded in 1990,¹⁷³ by virtue of one Australian province's criminal punishment of same-sex sexual activity between consenting adults.¹⁷⁴ In its decision, the UNHCR concluded that such criminal prohibitions were violative of article 17 of the ICCPR, which protects individuals' rights to privacy and rights to equality before the law.¹⁷⁵ In response to the UNHCR's decision, Australia passed a law overriding Tasmania's criminalization of consensual same-sex sexual activity.¹⁷⁶

In light of the EHCR's decision in *Dudgeon* and the UNHCR's decision in *Toonen*, it is unlikely that any state that maintains a criminal prohibition against consensual same-sex sexual activity would be deemed to be in accordance with either the European Convention on Human Rights or the ICCPR. Further, in 2003, the United States Supreme Court declared in *Lawrence* that criminal prohibition of consensual adult same-sex sexual activity was a severe violation of personal liberty and privacy rights such that such prohibitions could no longer withstand constitutional review.¹⁷⁷

Could article 92 be construed to constitute a universal sodomy ban? While it is true that article 92 is more limited in scope than the statute overturned in *Toonen*, as it does not apply to all men throughout their entire lives, article 92 technically *does* apply to *every* Korean man at some point in his life given that every Korean man *must* eventually serve in the military. In this sense, article 92 could be said to be "universal": no homosexual Korean man can escape the reach of article 92 and will,

171. The Homosexual Offences (Northern Ireland) Order, 1982, No. 1536 (N.I. 19), available at http://www.opsi.gov.uk/RevisedStatutes/Acts/nisi/1982/cnisi_19821536_en_1.

172. *Toonen v. Australia*, Comm. No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992, (U.N. Human Rights Committee 1994), available at <http://www.ilj.org/courses/documents/Toonenv.Australia.pdf>.

173. UNTC, <http://treaties.un.org/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-4.en.pdf>.

174. *Toonen*, Comm. No. 488/1992, U.N. Doc. CCPR/C/50/0/488/1992.

175. *Id.* § 9.

176. See AUSTRALIAN HUMAN RIGHTS COMM'N, CASE STUDIES: COMPLAINTS INVOLVING AUSTRALIA (2009), available at http://www.humanrights.gov.au/education/hr_explained/download/case_studies.pdf.

177. *Lawrence v. Texas*, 539 U.S. 558 (2003).

to a practical certainty, be subject to criminalization for same-sex sexual conduct for at least a two-year period of his life.

The universality of article 92 is even more apparent when its application to the real world is reviewed; as mentioned earlier, men have been prosecuted for article 92 violations even when the same-sex sexual conduct with which they were charged took place in a *private* residence, away from military property, and during *vacation* from the military.¹⁷⁸ Such policing arguably has very little to do with the military context at all and seems to lend credence to the argument that article 92 is indeed more universal rather than limited in scope.

In an academic sense, an argument that article 92 represents a universal sodomy ban in violation of the ICCPR may depend on the construction of the term “universal.” Must a universal sodomy ban apply to *all* men at *all* times, or is it sufficiently universal if a sodomy ban simply applies to *all* men? In a legal sense, such an argument may depend on international tribunals’ balancing of the provision’s universal application against its somewhat limited temporal and contextual framework. One thing that is certain, however, is that article 92 is much more “universal” than similar military sodomy bans throughout the world given that such bans, much like article 125 of the Uniform Code of Military Justice in the United States, are limited in both scope of application *and* temporal contexts.

If article 92 is successfully framed as a universal sodomy ban, this would place Korea in violation of its treaty obligations under the ICCPR. This could seriously undermine its credibility as a member of the international human rights community and subject it to serious consequences relating to international law.

C. Article 92 as a Bar to Male Adulthood and Fully Participatory Citizenship

Finally, there is a way in which article 92, when viewed in light of the cultural and social contexts that stem from Korea’s system of universal conscription, represents a barrier to the realization of adulthood, manhood, and fully participatory citizenship in Korea. Sociologists and political scientists have explored the nature and effects of universal conscription on notions of civic duty and citizenship and have argued that states that employ conscription identify military service as a citizen’s duty to the state, thereby constructing military service as a

178. See *supra* note 53 and accompanying text.

pre-condition to full citizenship.¹⁷⁹ The implication of such scholarship is that, within a conscription society, those who *fail* to complete compulsory military service are often deemed to be less than full citizens, not worthy of the politico-social benefits that are traditionally and unequivocally bestowed upon those who *do* complete compulsory military service.¹⁸⁰

Under Korea's inherently gendered Military Service Act, which mandates that men but not women complete military service, "universal conscription construct[s] military service as '*men's* national duty'" such that not only is citizenship contingent on successful completion of service but *manhood* is as well.¹⁸¹ As sociologist Seungsook Moon explains, this intensely gendered political notion of the military was cultivated throughout the Cold War era via nationalist social education and propaganda, media sensationalism of the North Korean threat, and government surveillance and policing of draft evaders.¹⁸² The ultimate result of this concerted campaign by the Korean government to universalize and masculinize its military is a cultural framework that scholars refer to as the hegemonic view of "military service as men's national duty," which is perhaps best manifested in the popularized saying that "a man has to serve in the military to play a man's role."¹⁸³

Thus, those men who are prosecuted under article 92 and subsequently thrown out of the Korean military are, in many ways, prevented from ever reaching fully participatory adult male citizenship in Korean society purely on the basis of their private, same-sex sexual activities. This obviously has grave consequences for men who are affected by article 92: along with the substantive punishment of imprisonment that results from an article 92 prosecution, those convicted under the provision are subject to a host of supplementary punishments, including difficulty in obtaining employment and social sanction and ostracization that will haunt them for the rest of their lives.

In a society in which military service serves as a gateway into male adulthood and fully participatory citizenship, it is repugnant to condition the acquisition and realization of such ends on adherence to sexual norms, particularly where the sexual conduct involved is entirely private. Indeed, the compulsory and innately cultural nature of military service in

179. See, e.g., ROGERS BRUBAKER, CITIZENSHIP AND NATIONHOOD IN FRANCE AND GERMANY 14-15 (1992).

180. See *id.*

181. MOON, *supra* note 28, at 46 (emphasis added).

182. See *id.* at 50-53.

183. *Id.* at 50, 53.

Korea simply serves to heighten the extent to which article 92 represents a gross violation of human rights in the international community.

V. CONCLUSION

Article 92 of the Korean Military Penal Code is indeed unique within the international community. While many States engage in sexual regulation of their military servicemembers, the unique contours of Korean law and society are such that article 92 represents a uniquely flagrant violation of human rights as constructed by international norms. Indeed, the coercive nature of the Korean military coupled with the active enforcement of article 92 results in a situation wherein gay men are rendered second-class citizens in Korean society, wholly incapable of attaining adult male citizenship, and living under the constant threat of criminalization and institutionalized social sanction stemming from their private sexual acts.

Korea currently finds itself trying to tackle two somewhat competing concerns. On the one hand, it must address its sensitive politico-military situation and not lose sight of the fact that it remains embroiled in a bitter, ideological civil war that could at any time lead to a reeruption of active military conflict. On the other hand, it continues to embark on a significant and serious campaign to improve its human rights record and gain the respect of other liberalized nations.

In resolving this apparent tension, the Korean government cannot simply ignore one concern for the benefit of the other. To be sure, militarization remains an important and necessary goal for the state, one that ultimately serves to protect the security of the Korean people. But illogical, arbitrary, and internationally unacceptable oppression of gay men will only serve to decrease Korea's credibility in the international community and will ultimately be a detriment to Korean society as a whole. Korea can no longer enact domestic policy in an isolationist vacuum and must instead allow its policy to be informed by normative frameworks from the broader, international community.