
Korean Legal System and the Human Rights of Persons with Mental Disorders: Current State and Challenges

*Kyong-Whan Ahn**

Abstract

Medical and social statistics present the alarming reality that one in four people will suffer from mental illness at some point in their lives. Yet, in most countries, mental health is one of the least cared about issues. Korea is no exception. Here people with mental disorders have been subject to prejudice, stigma, discrimination and marginalization in all aspects of their social lives. Korean legal schemes and practices reveal a grave injustice in the treatment of patients and the administration of the mental health system. Yet, to this date, the Korean legal community has not shown the slightest of interests in this matter. This paper, which is long overdue, aims at bringing this painful issue to public attention, with a plea for attentive care for this vulnerable group of people. The current status of persons with mental illnesses is analyzed critically and suggestions for improvement are made with a special emphasis on the necessity for a comprehensive national report, as undertaken in both Australia and U.S.A.

I. Introduction

According to a WHO report in 2001, mental health affects 450 million people and one in four of us will suffer from mental illness at some time in our lifetimes.¹⁾ Human rights abuses of mentally disordered people, particularly those who lack sufficient social capital to stand up for themselves against mistreatment for the reason of their illness and who are retained voluntarily or involuntarily in

* Chairperson, National Human Rights Commission of Korea; Professor of Law, Seoul National University.

1) MENTAL HEALTH — GLOBAL POLICIES AND HUMAN RIGHTS, at xi (Peter Morrall & Mike Hazelton eds., Whurr Publishers 2002).

unregulated establishments, can be extremely serious and brutal.²⁾ A mental health care system should be ensured for the protection of the rights of people with mental disorders, who are among the world's most vulnerable groups. They are often subjected to stigma, discrimination and marginalization in all societies, which increases the likelihood of violations of their human rights. Mental disorders can sometimes impair decision-making or legal capacity, and the affected-people may not always seek or accept medical treatment for their problems. Rarely, people with mental illness may put themselves or others at risk because of their impaired decision-making ability. In fact, the risk of violence or harm associated with mental disorders is relatively small.³⁾ Common misconceptions on this matter should not be allowed to influence legislation of mental health laws.⁴⁾ The lives of people with mental disorders have been one of the least addressed issues in the contemporary Korean society, even in comparison to persons with physical disabilities whose difficulties and hardships have come into spotlight in recent years.

This article aims to bring this topic into the arena of 'law and society' with a plea for attentive care of the fellow jurists to these unduly neglected people in our society. Part II of the article briefly overviews the international and domestic legal frameworks on mental health care. In Part III, the article highlights current status of the mentally disabled persons with selected statistics. Part IV discusses the roles of the National Human Rights Commission of Korea in the promotion and protection of the rights of the citizens with mental disorders, and Part V analyses flaws and shortcomings in the legal system and practice of mental health care in Korea, as have been repeatedly raised in recent years. Part VI concludes with a suggestion for a comprehensive national report on the conditions of the mentally disordered, based on models preceded in a few advanced countries.

2) *Id.* at xv.

3) Cho, Sung-Nam, *A Study on the Criminal Psychotics — Crime Rates and Crime Motives*, 3 JOURNAL OF KOREAN NEUROPSYCHIATRIC ASSOCIATION 1025-35 (1992) (available only in Korean).

4) WORLD HEALTH ORGANIZATION, *MENTAL HEALTH LEGISLATION AND HUMAN RIGHTS: MENTAL HEALTH POLICY AND SERVICE GUIDANCE PACKAGE 2* (2003).

II. Frameworks of Mental Health Law

1. *International Framework*

Concerns about human protection, respect, dignity, and tolerance have a long history dating back to ancient Greece or China, even further to the very beginnings of social gatherings. However, it was not until the mid-twentieth century that such humanitarian concerns became formalized principles for universal application, with the creation of the United Nations (1945) and the Universal Declaration of Human Rights (1948).⁵⁾ The Universal Declaration makes reference to universal human rights of access to adequate health care in Article 25(1). Nonetheless, it was as late as 1991 that the principles for the protection and treatment of people suffering from mental disorders have been proclaimed by the General Assembly of the U.N.⁶⁾ The United Nations Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care, often called ‘MI Principles’, enunciate that all persons with a mental illness shall be entitled to have access to the best available medical care appropriate to their health needs and be diagnosed without any political interference and shielded from exploitation, discrimination and social stigma.⁷⁾ However, it should be noted that the adoption of the principles had not only been much overdue but also the United Nations still tolerates involuntary incarceration, enforced treatment (possibly psycho-surgical), restraint and seclusion in some circumstances.⁸⁾ As is easily understood, there is more to be done in practical rather than theoretical terms.

The WHO Guidelines for the Promotion of Human Rights of Persons with

5) Morrall & Hazelton, *supra* note 1, at xi-xii.

6) The U.N. Principles for the Persons with Mental Illness and the Improvement of Mental Health Care, General Assembly Resolution 46/119, 17 Dec. 1991 (hereinafter referred to as “MI Principles”).

7) Principle 1 (Fundamental Freedoms and Basic Rights)

(1) All persons have the right to the best available mental health care, which shall be part of health and social care system; (5) Every person with a mental illness shall have the right to exercise all civil, political, economic, social and cultural rights as recognized in the UDHR, ICESCR, ICCPR, and in other relevant instruments such as Declaration on the Rights of Disabled Persons and the Body of Principles for the Protection of All Persons under Any Form of Detention and Imprisonment.

8) Morrall & Hazelton, *supra* note 1, at xiv.

Mental Disorders⁹⁾ is a supplementary document designed for an easier application of the MI Principles to concrete actions. Other international instruments applicable to the protection of rights of the mentally ill include the Declaration on the Rights of Disabled Persons,¹⁰⁾ the U.N. Convention on the Rights of Persons with Disabilities (2006); and the Declaration of Hawaii/II as approved by General Assembly of World Psychiatric Association in Vienna, Austria on July 10, 1983. These documents are instrumental in formulating both policy and mechanical devices.

2. Legal Schemes of Korea

Like many other countries, mental health legislation in Korea is characterized as a combination of an ‘integration approach’ and a ‘dispersion approach.’ In other words, a specific statute on mental health is complemented by various general legal instruments in which mental health issues are addressed.

As the basic norm, Article 10 of the Constitution declares that “every citizen shall enjoy the right to human dignity and worth and to pursue happiness.” In the same provision, the Constitution manifests the state’s general duty to protect the rights of the citizen. This duty is reiterated in the Constitution with specific reference to health.¹¹⁾ Based on these constitutional authorities, a barrage of statutes related to mental health has been enacted. Particularly, the Mental Practice Act (1951) sets out the ground scheme and rules. The Mental Health Act serves as a specification of the Medical Practice Act attuned to its sub-category. The Mental Health Act was first enacted in 1995 and entered into force in 1996 (Law No. 5133). Since then, it has been amended a few times, lastly in 2006.¹²⁾ It was the product from the increased public awareness of mental health problems. A series of debates over the mistreatment or ill-treatment of patients played an important part in shaping the public agenda on mental health reform. In fact, since 1983, there has been only

9) Doc. WHO/MNH/MND/95.4 (1996).

10) UN General Assembly Resolution 3227 (XXX), 9 Dec. 1975.

11) Article 36, Section 3.

“Every citizen shall enjoy the protection of the State regarding their health.”

12) Ironically enough, an earlier legislation attempt was made in 1985 under the authoritarian regime, mainly for regulating the ‘the undesirables’ under the pretext of ‘social protection.’ However, faced with ferocious opposition from social workers and human rights activists, the government was forced to withdraw the legislative attempt.

intermittent media coverage on the inhumane conditions of mental health facilities.¹³⁾

In the preparatory stages for the legislation of the Mental Health Act, the World Health Organization provided technical assistance by arranging international experts to participate in workshops held in Seoul. Korean psychiatrists and administrators started to draft a bill modeled on a Japanese law of 1987. It was October 1993 that the then Ministry of Health and Social Affairs submitted the final draft to the National Assembly. At the invitation of the Korean government, the WHO representatives reviewed the draft bill before its final passage by the National Assembly in 1994. According to the WHO appraisal, as contrasted with cases in western countries where the individual's free will is strongly protected, the law gives an important role to members of the family of a person with a mental illness, allowing involuntary admission of such people to a mental health facility on the grounds of the agreement between family members and certified psychiatrists.¹⁴⁾

The Act contains a few provisions addressing the rights of a patient. Article 2 protects the right to human dignity and worth (Sec. 1). It also minds the right to physical integrity by articulating that the principle of voluntarism should be observed in the entire process of treatment.¹⁵⁾ The Act further ensures several social rights such as the right to best available treatment, the right to education for a minor patient (Article 2, Sec. 2 and 4), and the right to petition (Article 29). Despite such provisions, the Act is regulatory rather than protective in character, from the perspective of a patient.¹⁶⁾ The Act mainly sets out basic working mechanisms of a mental care system with a permissive attitude towards the tightened control over mental patients. Therefore, it could hardly be recognized as a Bill of Rights for the patient citizens.¹⁷⁾

The Mental Health Act carries both characteristics of health law and welfare law. On the health side, as mentioned earlier, the Act is a special extension of the Medical

13) Seo, Dongwoo, *The Protection of Human Rights of Persons with Mental Disabilities*, presented in Public Hearing on the Human Rights Situation in the Mental Health Facilities held by the National Human Rights Commission of Korea, 20 Nov. 2004, at 10 (available only in Korean).

14) WORLD HEALTH ORGANIZATION, *supra* note 4, at 42.

15) For example, under Article 2 (Sections 5 and 6) of the Mental Health Act, involuntary admission of a patient should be limited to exceptional situations.

16) Seo, *supra* note 13, at 12-13.

17) *Id.*

Practice Act.¹⁸⁾ The Social Welfare Law, the basic statute on this front, lists the Mental Health Act as one of its major sister legislations (Article 2). In the same vein, the Welfare of Disabled Persons Act (Article 2) includes persons with mental illness in its coverage. Based on these provisions, the mentally ill are entitled to social welfare benefits (Article 13).

A newly enacted statute, The Act for the Prevention of Discrimination against Disabled Persons and Protection of Their Rights, etc. (2007)¹⁹⁾ also reiterates mental impairments in the definition of ‘disability’ on equal footing with physical impairments (Article 2). Further, Article 37 of the Act explicitly proscribes discrimination against persons with mental impairment and imposes special affirmative duty on the state and local governments to make their best efforts to organize preventive and educational activities.

Notwithstanding these firm principles of equality and non-discrimination, *de jure* discrimination against persons with mental illness exists in many areas.²⁰⁾ For example, a constitutional right to occupation for the mentally ill is severely curtailed. There are at least 21 statutes as well that deny a license or authorization to a person with mental illness. Specifically, anyone with a history of mental illness is ineligible for being a medical doctor,²¹⁾ pharmacist,²²⁾ medical technician, paramedic, barber, beautician, veterinarian, hygienist, construction equipment operator, or even mortician.²³⁾ Similarly, driver’s licenses for motor vehicles or motor boats are categorically denied to mentally ill citizens.²⁴⁾ Further, such citizens are denied access to the most basic of public services including public libraries²⁵⁾ and art museums.²⁶⁾

18) See *supra* note 12 and accompanying texts.

19) Law No. 8341, 11 Apr. 2007

20) Park, Jong Ik et al., *Discrimination of Mentally Ill Persons in Korean Legislative System*, 43-2 JOURNAL OF KOREAN NEUROPSYCHIATRIC ASSOCIATION 237-41 (2004).

21) Article 8, The Medical Service Act, Law No.221, 25 Sep. 1951, as amended as Law No. 8559, 27 Jul. 2007.

22) Article 4, The Pharmacist Act, Law No. 300, 18 Dec. 1953, as amended as Law No. 8558, 27 Jul. 2007.

23) SHIN, YOUNGJEON ET AL., LEGISLATIVE STUDY ON THE IMPROVEMENT OF HUMAN RIGHTS FOR PEOPLE WITH MENTAL ILLNESS 78, (National Human Rights Commission of Korea 2006) (available only in Korean).

24) Article 70(2), Road Transportation Act, Law No. 941, 31 Dec. 1961, as amended as Law No. 7969, 19 Jul. 2006 and Article 5, Navigational Leisure Act, Law No. 5910, 8 Feb. 1999, as amended as Law No. 8621, 3 Aug. 2007.

25) Article 7(1), Rules for the Use of National Central Library, Decree of Ministry of Culture No. 8, 16 Jul. 1991, as amended as Decree No. 83, 10 Dec. 2003.

26) Article 8(1), Rules for the Entrance to the National Museum of Contemporary Art, Ministry of Culture

As such, basic freedom of movement of persons with mental disorders is severely restricted. In a similar vein, the Immigration Control Act²⁷⁾ in its Article 11 prohibits the entry of a foreigner who is “mentally handicapped and void of a capacity of discriminating sense and has no person to assist his or her sojourn activities in the Republic of Korea.” Moreover, despite the Article 42 of Mental Health Act prohibiting disclosure of the personal information of mental patients,²⁸⁾ a breach of such provision takes place almost routinely, oftentimes by the governmental entities.

Property rights of persons with mental disorders are easily infringed upon as well. Article 22 of the Mental Health Act obligates family members of a mental health patient to protect the patient’s property rights. Nevertheless, incompetency provisions of the Civil Code carry an inherent possibility of abuses against the mentally ill. Traditionally, Articles 9 (quasi-incompetency) and 12 (incompetency) have been misused by the family members as handy tools to eliminate or restrict the property rights of their “less competent” family members.²⁹⁾

III. Current State of the Mentally Ill

All the pertinent statistical information highlights an alarming situation for the mental health of Korean people. According to a survey conducted by the Ministry of Health and Welfare in 2001, 14.4 percent of Koreans between the ages of 18 and 64 were diagnosed of a mental disorder or of a kind of mental illness.³⁰⁾ It also indicated that the majority of patients (68.7%) who were determined to have a mental illness were aged between 20 and 49. The statistics of the Ministry of Health and Welfare of 2005 showed that total number of hospitalized patients steadily increased at the average annual rate of 7.8 percent between the years 2000 and 2005: 51,757 in 2000 and 60,279 in 2005.³¹⁾ According to a report of the National Human Rights

Decree No. 46, 1 May 1975, as amended as Decree No. 138, 30 Jun. 2006. This provision was repealed in 2004.

27) Law No. 1289, 5 Mar. 1963, as amended as Law No. 7655, 4 Aug. 2005.

28) “A person who was or is performing duties in relation to a person with mental illness as prescribed by this Act shall not disclose or announce the secrets of other persons acquired in relation to the performance of such duties except as specially prescribed in this Act or other Acts and subordinate statutes.”

29) The terms “lost mind” or “incompetency” typically indicate or remind the persons with mental disorders.

30) MINISTRY OF HEALTH AND PUBLIC WELFARE, A GUIDE TO THE MENTAL HEALTH BUSINESS 3 (2005).

31) 51,747(2002); 56,514 (2001); 58,218(2002); 62,154 (2003); 67,896 (2004)

Commission of 2006, in less than a decade, the total number of hospital beds almost tripled from 21,513 in 1996 to 62,554 in 2004.³²⁾ In 2004, only 8.4 percent of patients were admitted to mental health care facilities on their own will.³³⁾ As high as 91.6 percent of patients were institutionalized involuntarily: 76.8 percent by the arrangement of a family member bearing legal duty of guardianship and 13.3 percent by initiative of governmental authorities.³⁴⁾ On average, a patient was institutionalized for 267 days,³⁵⁾ as sharply contrasted with the figures in other OEDC countries: for example, 26.9 days in Germany, 52 days in the U.K., 35.7 days in France, and 13.4 days in Italy.³⁶⁾ In the case of mental sanatoriums established for the care of chronic and long-term patients who are not cared for by their own family members, the figure went up to as high as 2,485 days.³⁷⁾

IV. The Role of National Human Rights Commission

Established in 2001, the National Human Rights Commission emerged as one of the high-profile national agencies of Korea. Its organic statute declares that its

Source from Ministry of Health and Welfare and National Health Insurance Corporation

32) SHIN ET AL., *supra* note 23, at 68.

33) *Id.* at 6.

34) *Id.*

Under the Act, a mental patient may be institutionalized in 4 ways: (1) A patient may be hospitalized under Article 23 by filing a written request himself (voluntary admission); (2) The hospital may accept a patient with the consent of a person legally responsible for the protection of the patient. In the case, the diagnoses of a psychiatrist should be accompanied (Article 24); (3) On the report and request from a psychiatrist, the head of a local government may cause a patient to be committed to a mental hospital, when there is a danger that he might harm himself or others (Article 25); and (4) (Emergency measure arranged by police officer and psychiatrist) Those who discover a person assumed to have psychopathy and who presents a significant risk of harm to himself or others, may request emergency hospitalization of the person concerned to a medical institution for mental illness with the consent of a doctor and a police officer when the situation is very urgent and the hospitalization as provided for in Articles 23 through 25 cannot be executed (Article 26).

35) NATIONAL HUMAN RIGHTS COMMISSION OF KOREA, REPORT OF STUDY VISIT TO THE UNITED KINGDOM AND GERMANY: RESEARCH OF HUMAN RIGHTS PROTECTION OF PERSONS WITH MENTAL DISABILITIES 48 (2006) (available only in Korean).

36) BAE, JEONGGYU, SURVEY ON THE PERFORMANCE OF MENTAL HEALTH CARE IN THE LOCAL GOVERNMENTS 66-67 (National Human Rights Commission of Korea 2006) (available only in Korean).

37) NATIONAL HUMAN RIGHTS COMMISSION OF KOREA, *supra* note 35, at 48 (Mental Health Care Facilities)

purpose is to “contribute to the realization of human dignity and worth and [...] to ensure the protection of the inviolable and fundamental human rights of all individuals.”³⁸⁾ The Commission is a ‘quasi-judicial’ body to address human rights violations. Citizens or foreign nationals in Korea may file a complaint alleging abuses of human rights including discrimination. The Commission’s law governs the acts of governmental entities as well as private actors.³⁹⁾ Based on a complaint or by its own initiation, the Commission conducts a wide range of activities: most chiefly, the investigation of the alleged acts and the recommendation for remedies to respondent parties. The recommendation of the Commission does not legally bind the parties concerned and thus it lacks enforceability. However, its influence is enormous. The acceptance rate of the recommendations for remedies exceeds 80 percent.⁴⁰⁾

The Commission has jurisdiction to consider the complaints of detainees in the “detention or protective facilities” which include institutes for medical service as provided in Section 2(a), Article 2 of the Commission Act. For the period between November 2001 and June 2006, the Commission received 1,126 complaints alleging human rights violations on the grounds of mental impairment. This figure comprises 5.6 percent of total complaints filed with the Commission during the same period.⁴¹⁾ The number of such complaints steadily grew in its first three years, and the Commission was met with huge increase in pleas for help notably during 2004 and 2005. In response, the Commission installed petition boxes within health facilities, in addition to enhancing public awareness of the Commission’s activities. Such efforts seem to have substantially induced active complaint filings from the patients. The Commission found substantive human rights violations in approximately 10 percent of the complaints and issued recommendations for remedies. Private-run institutions were found to be major violators. Violations were found in the process of admission to a mental facility (24%), extension of the retention period and discharge (15%) and

38) Article 1, The National Human Rights Commission Act, Law No. 6481, 24 Mar. 2001, as amended as Law No. 7796, 25 Dec. 2005.

39) Article 30, The National Human Rights Commission Act, Law No. 6481, 24 May 2001, as amended as Law No. 7796, 25 Dec. 2005.

40) “Because of the increased respect for the Commission, in the legal and political communities, many of the recommendations of the Commission are reported in the media, explored by scholars, seriously considered by politicians and often adopted by the nation.” *See* Sean Hayes, *THE KOREA TIMES*, 10 Aug. 2007, at 21.

41) The Commission received 20,057 complaints in total between 1 November 2001 and 30 June 2006.

excessive use of force or confinement (18%), and they included the invasion of privacy and other forms of rights infringement.⁴²⁾

In addition, since 2002, the Commission has hosted a series of workshops and seminars on mental disabilities at both the domestic and international levels. This has resulted in several recommendations presented to the government. The Commission has also been engaged in various activities raising public awareness of the hardships that these underprivileged people with mental illness endure. Particularly, in 2006, the Commission took the issue of the rights of people with mental illness as one of its top ten priority concerns, and it continued to do so in 2007.

V. Challenges in Korean Legal Framework for Mental Health Care

Many humanitarian-minded psychiatrists, lawyers, and social workers have pointed out serious flaws in the Korean legal framework of mental health care in terms of both policy and practice.

1. The Principles of Separation and Discrimination

Fundamental criticism is that the current system is based on arcane philosophical residue — the principles of separation and discrimination. Public ignorance and prejudice by and large condone or even approve of such policies.

As one English scholar argued, until recently in the history of western civilization, the determination of insanity was based on the notion that the mad were categorically distinguished from the rest of humanity. They were a *genus* distinctive from that of “normal” people, essentially ‘wild beasts’ to be excluded from the jurisdiction of the courts or dealt with by separate laws and forms of discipline.⁴³⁾ In criminal law, insanity was a prime cause of incompetency to commit a crime, assuming that the perpetrator lacked *mens rea* (criminal intent).⁴⁴⁾ There is a

42) BAE, *supra* note 36, at 8.

43) ROBINSON, D.N., *WILD BEASTS AND IDLE HUMORS: THE INSANITY DEFENSE FROM ANTIQUITY TO THE PRESENT*, (Harvard University Press 1966).

44) Article 10, Criminal Code (1).

“The act of a person who, because of mental disorder, is unable to make distinction or to control his or her own

prevailing ‘culturally normative prejudice’ associated with mental illness, which is as constraining and brutal as political suppression.⁴⁵⁾

Overt prejudice of the mass media has been reflected in news reports of the crimes supposedly committed by someone with a history of mental disorder, however slight it might have been. The Korean press is notorious for its sensationalism, where TVs and on-line media compete among one another for the highest ratings.⁴⁶⁾ In a country where community concerns over terror are widespread, any effort to protect human rights could arouse public demand for increased control of the people with mental disorders.⁴⁷⁾ In Korea where incidents of organized terrorism are relatively rare, any isolated case of ‘unmanly’ crime tends to wage public paranoia against these perceived “semi-beasts.” Under such a backdrop, government policy basically tends to favor building up demarcating walls between the sane and “insane” of society.⁴⁸⁾

2. *The Principles of Community-Based Treatment and Rehabilitation*

In a landmark decision, *Olmstead v. L.C.*,⁴⁹⁾ the Supreme Court of the United States declared that the Americans with Disabilities Act (ADA) prohibits the unnecessary institutionalization of persons with mental disabilities. In the words of the Supreme Court, services to persons with disabilities must be provided “in the most integrated setting possible.”⁵⁰⁾ The *Olmstead* rule is hardly an invention of the U.S. Supreme Court. Earlier in 1991, the MI Principles manifested the rights of

will shall not be punished.”

45) Johnstone M.J., *Stigma, Social Justice, and the Rights of Mentally Ill: Challenging the Status Quo*, 10-4 AUSTRALIAN AND NEW ZEALAND MENTAL HEALTH JOURNAL 201 (2001).

46) Park, Heonsoo, *Human Rights Situation of Persons with Mental Disabilities and the Necessary Actions and Responses*, presented in Public Forum on the Human Rights of Persons with Mental Disabilities held by Korea Family Association for Mental Health, 13 May 2005, at 45 (available only in Korean).

47) PETER MORRALL, *MADNESS AND MURDER*, (Whurr Publishers 2000).

48) SHIN ET AL. *supra* note 23, at 8-9; Peter Morrall, *U.K. Mental Health Policy: Chaos and Control*, in *MENTAL HEALTH — GLOBAL POLICIES AND HUMAN RIGHT* (Peter Morrall & Mike Hazelton, eds, Whurr Publishers 2002), at 16.

49) 527 U.S. 581 (1999).

50) The Americans With Disabilities Act, Title II, Section 302 (b)(1)(B).

“Goods, services, facilities, privileges, advantages, and accommodations shall be afforded to an individual with a disability in the most integrated setting appropriate to the needs of the individual.”

persons with mental illness to be integrated into the community as one of its cardinal rules.⁵¹⁾ The principles have been repeated in succeeding international documents to be reconfirmed in the most recent U.N. Convention of Rights of Persons with Disabilities (2006).

The policy of community-based mental health care is enshrined in Korean legislations as well. The ideal of community-based rehabilitation is incorporated in Articles 15 and 16 of the Mental Health Act.⁵²⁾ However, this proclaimed policy largely remains a declarative norm. The Korean government has consistently taken the opposite route, as evidenced by its records.⁵³⁾ During the last decade, there has been a steady increase in the numbers of hospitals and beds.⁵⁴⁾

The MI principles and Olmstead rule encourage the community-based treatment

51) "Every person with a mental illness has the right to live and work, as far as possible, in the community." (Principle 3); "Every patient shall have the right to be treated and cared for, as far as possible, in the community in which he or she lives." (Principle 7, Item 1).

52) Article 15 (Creation and Operation of Rehabilitation Establishments)

(1) The State and local governments may create and operate rehabilitation establishments.

(2) In the event that any person other than the persons referred to in paragraph (1) intends to create and operate a rehabilitation establishment, he shall make a report thereon to the head of Si/Gun/Gu having jurisdiction over the location of such rehabilitation establishment. The same shall apply to a case where he intends to change important matters that are prescribed by the Ordinance of the Ministry of Health and Welfare from among the reported matters.

(3) The head of every rehabilitation establishment shall conduct rehabilitation training for psychopaths under the conditions as prescribed by the Minister of Health and Welfare.

(4) Necessary matters concerning the standards for establishments, the number of psychopaths to be accommodated therein, the number of employees and their qualifications, the report on the creation and operation, the report on alteration, the use and operation of rehabilitation establishments shall be prescribed by the Ordinance of the Ministry of Health and Welfare.

Article 16 (Kinds of Rehabilitation Establishment)

The kinds of rehabilitation establishments shall be as follows:

1. Life training facilities for psychopaths: facilities for psychopaths who have difficulties in daily lives at home because of their psychopathy, and of which the purpose is to promote rehabilitation of psychopaths by enabling them to use a living room or other facility at a discounted fee and providing them with necessary training and guidance so that they may adapt themselves to a daily life at home;
2. Work training facilities for psychopaths: facilities of which the purpose is to promote rehabilitation of psychopaths who have difficulties for employment through allowing them to use a living room or other facility at a discounted fee and providing necessary training and mediating their jobs; and
3. Other facilities as prescribed by the Ordinance of the Ministry of Health and Welfare.

53) See *supra* note 30.

54) See *supra* note 32.

system. One of the core devices of this system is a community treatment order, oftentimes associated with the judiciary. The Community treatment order is a civil commitment system which makes it mandatory for certain kinds of long-term mental patients, such as schizophrenia and mania patients, to be treated under the community health care schemes rather than in mental hospitals.⁵⁵⁾ It is claimed that this system has been proven very effective in reducing the number of chronic patients.⁵⁶⁾

In Australia, mental health services are provided in both institutional and community settings.⁵⁷⁾ Community-based mental health care services include assessment, crisis intervention, case management and rehabilitation.⁵⁸⁾ In Australia, between the 1960s and 1990s, the transition from institution-based care to community-based care saw a decline in the availability of psychiatric beds from 287 per 100,000 populations to 40 beds per 100,000.⁵⁹⁾ Within a policy context of balancing between the protection for the rights of the people with mental illnesses in need of treatment and the community's legitimate expectation to be protected from harm, much of the reform direction continues to be shaped by the needs of specialist psychiatric services and the compulsory end of the treatment spectrum.⁶⁰⁾

Local governments in Korea, which are both administrators and protectors of patients under the Mental Health Act, are not fully equipped with either human resources nor professional knowledge to handle these newly emerging issues effectively. Moreover, to date, only one provincial government enacted ordinance related to this subject, and none has established a long-term policy plan.⁶¹⁾ Considering such unreadiness of the local governments, coupled with the apathetic attitude that the Korean judiciary has maintained on the matters of mental health, it is unrealistic that a Korean version of Olmstead will be born in the near future.

55) This system is called in various names such as IOC (Involuntary Outpatient Commitment), AOT (Assisted Outpatient Treatment) and CAT (Compulsory Ambulatory Treatment).

56) SHIN ET AL. *supra* note 23, at 62.

57) Mike Hazelton & Michael Clinton, *Human Rights, Citizenship and Mental Health in Australia*, in MENTAL HEALTH — GLOBAL POLICIES AND HUMAN RIGHTS 43 (Peter Morrall & Mike Hazelton, eds., Whurr Publishers 2002). Psychiatric hospitals and wards in acute hospitals provide specialized psychiatric care.

58) *Id.*

59) *Id.* at 46.

60) *Id.* at 48.

61) BAE, *supra* note 36, at 57.

3. *Involuntary Admission to Mental Health Facilities*

Under the MI Principles, an agent should act in the best interest of the patient, and in no case a person whose interest is in conflict with the patient should be allowed to act on his behalf.⁶²⁾ As a special notion was made by the WHO, the Mental Health Act of Korea presupposes the major role of the family members of the patient throughout the entire process of medical treatment.⁶³⁾ As the statistics vividly demonstrates, the majority of cases of involuntary hospitalization are heralded by the family.⁶⁴⁾

In contemporary Korean society, the extended family is becoming a rarity. The evaporation of traditional family values associated with the extended family has entailed serious impacts on Korean society.⁶⁵⁾ The vacuum of neglect that was created in the demise of traditional family values has not been properly filled, either by the State or other social mechanisms.⁶⁶⁾ Under the Mental Health Act, duty bearers of family support under the Civil Code hold and bear primary rights and duties as a person responsible for guardianship and representation of a mental patient. Given the dramatic changes in the attitude of the contemporary Koreans, the legal scheme based on the outgoing traditional values needs serious reconsideration. There is an ever increasing danger of conflicting interests among family members, which is likely to be intensified when the family members fail to share comparable status.

Some have argued for implementing a ‘public guardian system’ as an alternative.⁶⁷⁾ This may deserve policy consideration. However, if the system presupposes active involvement of the court, the likelihood of success is flimsy at best.

62) “In any decision affecting the rights of the patient, representation must be done by a person who has no conflict of interests with the patient.” (Principle 6)

63) See *supra* note 12 and accompanying texts.

64) See *supra* note 34.

65) Support of helpless parents is no more an unchallengeable customary law, much less for the care of the siblings. Older generations accustomed to traditional ways of life suffer emotional distress. Many have also been deprived of economic means.

66) Elderly Koreans with mental illness are virtually abandoned.

67) PAMELA B. TEASTER ET AL., *WARD OF THE STATES: A NATIONAL STUDY OF PUBLIC GUARDIANSHIP* (University of Kentucky Press 2005).

4. Inadequate Treatment

In all the relevant legislations, mental illness is included in the definition of disability. For example, Section 1, Article 2 of the Welfare of Persons with Disabilities Act defines the term ‘disabled person’ to include ‘mental disabilities’ on equal footing with physical disabilities.⁶⁸⁾ The Article 3 (1) of the Mental Health Act defines the term of mental illness, and by the revision of 2000, alcoholism is also included as a form of mental illness.⁶⁹⁾

The concept of mental illness is diverse in character.⁷⁰⁾ Therefore, different methods and skills of treatment should be employed depending on the patient’s health needs. On this front, the Scottish experience may provide a valuable reference. Scotland adopted the “four populations policy” as its basic framework for the treatment of mental patients. Scotland applies the following policy respectively to people in four categories:

- (1) Prevention policy targets the general public to prevent potential harm on its mental health with a special attention to the young generation;
- (2) Psychological therapies are prioritized for a population group having mild to moderate mental health problems, namely depression, stress and anxiety;
- (3) A central focus of mental health policy is put on those who suffer severe and enduring mental illnesses such as schizophrenia, bi-polar disorder and dementia; and
- (4) Extra safety mechanisms are to be implemented for those who have severe

68) (1) For the purpose of this Act, the term “disabled person” means those who are considerably restricted in their daily and social life for a long period of time due to their physical or mental disabilities. Under Article 2, Section (2)-2, the term “mental disabilities” means the disabilities caused by mental retardation and mental diseases. The UN Convention on the Rights of Persons with Disabilities (2006) provides similar definition: “Persons with disabilities include those with who have long-term physical, mental, intellectual or sensory impairment which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.” (Article 1)

69) “The term ‘psychopath’ means a person with a mental illness (including an organic mental illness), personality disorder, alcoholism and medicinal poisoning and other non-psychopathic mental disorders.”

70) It includes depression, anxiety disorder, dysthymic disorder, and obsessive compulsive disorder (OCD).

mental illnesses coupled with criminal history.⁷¹⁾

The principle of treatment by least restrictive means, as proclaimed by the MI Principles has been firmly established at the international level.⁷²⁾ This principle is pronounced in the mental health legislations of Korea accordingly.⁷³⁾ In response to the recommendation of the National Human Rights Commission on December 30, 2003, the Ministry of Health and Welfare issued a guideline on the ‘segregation and restraint’ in the treatment of the mental patients. The guideline, although not fully compatible with the MI principles, serves as an important working norm in the field. National health policy seems to spell out the place of mental health in the overall planning of health care. However, integrating mental health into primary health care has not become a policy focus. The health insurance system discriminates against mental health care patients by applying different rules to the medical treatment of the mentally ill.⁷⁴⁾

The Mental Health Adjudication Committee under Article 27 of the Mental Health Act may fall into the category of “review body” as envisioned by the MI Principles.⁷⁵⁾ The Committee is authorized with expansive powers ranging from

71) Geoff Huggins, *Feature and Merits of Scottish Mental Health Law and Major Issues in the Legislation Process*, presented in International Symposium on Human Rights of Mentally Challenged, Nov. 2006, at 87-100.

72) Principle 8 (1).

“Every patient shall have the right to be treated in the least restrictive environment and with least restrictive or intrusive treatment.”

73) Mental Health Act, Law No. 5133, 30 Dec. 1995, as amended as Law No. 7849, 21 Feb. 2006

Article 45 (Prohibition on Movement Restriction)

(1) The director of a medical institution for mental illness shall not restrict the freedom of communication, the freedom of interviews, and other freedom of movements with respect to psychopaths as prescribed by the Presidential Decree.

(2) In case where the director of a medical institution for mental illness is restricting movements with respect to matters provided for in paragraph (1), the restriction shall be conducted in the minimum extent, and the reasons for restriction shall be recorded in a record of treatment.

74) Seo, *supra* note 13, at 14-15.

75) Principle 17 (Review Body)

1. The review body shall be a judicial or other independent and impartial body established by domestic law and functioning in accordance with procedures laid down by domestic law. It shall, in formulating its decisions, have the assistance of one or more qualified and independent mental health practitioners and take their advice into account.

2. The review body’s initial review, as required by paragraph 2 of Principle 16, of a decision to admit or retain a person as an involuntary patient shall take place as soon as possible after that decision and shall be conducted

policy deliberation to the specific decisions on the admission or discharge of an individual patient.⁷⁶⁾ The reality shows, however, that the Committee does not

in accordance with simple and expeditious procedures as specified by domestic law.

3. The review body shall periodically review the cases of involuntary patients at reasonable intervals as specified by domestic law.
4. An involuntary patient may apply to the review body for release or voluntary status, at reasonable intervals as specified by domestic law.
5. At each review, the review body shall consider whether the criteria for involuntary admission set out in paragraph 1 of Principle 16 are still satisfied, and, if not, the patient shall be discharged as an involuntary patient.
6. If at any time the mental health practitioner responsible for the case is satisfied that the conditions for the retention of a person as an involuntary patient are no longer satisfied, he or she shall order the discharge of that person as such a patient.
7. A patient or his personal representative or any interested person shall have the right to appeal to a higher court against a decision that the patient be admitted to, or be retained in, a mental health facility.

76) Article 28 (Duties of Mental Health Deliberative Committee)

- (1) The Central Mental Health Deliberative Committee shall deliberate the matters falling under one of the following subparagraphs:
 1. Matters pertaining to mental health policies;
 2. Matters pertaining to standards of mental health facilities;
 3. Various kinds of standards of hospitalization and treatment of psychopaths;
 4. Offering of medical opinions pertaining to the consent for treatment; and
 5. Cases of application for re-examination.
- (2) The Local Mental Health Deliberative Committee shall deliberate the matters falling under one of the following subparagraphs:
 1. Supervision and correction on mental health facilities;
 2. Assessment on mental health facilities;
 3. Review on treatment procedures to which objections have been raised;
 4. Review on improvement in treatments; and
 5. Review on discharge and continuative hospitalization.
- (3) The number of members of the Central Mental Health Deliberative Committee and the Local Mental Health Deliberation Committee (hereinafter referred to as each "Mental Health Deliberative Committee") shall be not less than five and not more than fifteen and the tenure shall be two years, with an opportunity for reappointment.
- (4) The members of each Mental Health Deliberative Committee shall be appointed or entrusted by the Minister of Health and Welfare and the Mayor/Do governor respectively from among the psychiatrists, persons with qualifications as a judge, public prosecutor or a lawyer, the specialists of mental health and persons with expert knowledge and experience in mental health.
- (5) The Mental Health Adjudication Committee shall consist of the number of members ranging from not less than 5 to not more than 10 who are appointed by the Minister of Health and Welfare and the Mayor/Do governor from among members of the Mental Health Deliberative Committee and shall review cases in the

function effectively for the protection of mental patients. Typically, it is mostly composed of psychiatrists and disposes too many cases without serious deliberation, mainly due to time constraints.⁷⁷⁾ Statistics reveal that the denial of decision for renewal remained extremely rare (4.4 percent) in 2001.⁷⁸⁾ In one province, only 7 out of 1,156 patients were ordered to be discharged from the hospital.⁷⁹⁾ As such, free will of patients has been systematically neglected in the process of admission to and discharge from hospitals, extension of retention periods and medical treatment, and daily life.

Some have called for the active role of the judiciary in this field. Indian practice may be a case in point. In India, the judiciary led by the Supreme Court has been actively involved in matters of mental health care by granting various remedies and forcing reformation in favor of protecting the rights of people with mental illnesses.⁸⁰⁾ However, under Korean legal system and practice, the judiciary remains a largely irrelevant and remote institution in the mental health care business. The judiciary is basically an institution for remedial justice, not for preventive justice. It would be extremely costly to bring the court into the routine business of mental hospitals. Furthermore, public trust in the judiciary is not deep enough to invite its routine intervention. This agenda needs time long enough to ripen before being brought to the table.

Another complexity stems from the conflicting interests of the health professionals and related industry, such as mental hospitals and protection institutions. It has been repeatedly argued that health professionals are one group that displays adverse attitudes toward the mentally ill.⁸¹⁾ There exists an assertion that the health industry subtly reaps the public prejudice for its economic gains. Amidst serious competition in the health industry, the mental hospital has emerged as one of

collegiate court. In this case, the members shall include not less than one person having qualifications as a psychiatrist, judge, public prosecutor, or a lawyer, respectively.

77) Seo, MiKyung, *Measures to Improve the Human Rights Conditions in the Mental Health Facilities*, presented in Public Hearing on the Human Rights Situation in the Mental Health Facilities held by National Human Rights Commission of Korea, 20 Nov. 2004, at 19 (available only in Korean).

78) *Id.*

79) *Id.*

80) R. Srinivasa Murthy, *India: Towards Community Health Care*, in *MENTAL HEALTH — GLOBAL POLICIES AND HUMAN RIGHTS* (Peter Morrall and Mike Hazelton, eds., Whurr Publishers 2002), at 104.

81) Hazelton and Clinton, *supra* note 57, at 57.

the more lucrative medical businesses in recent years.⁸²⁾

5. Inadequate Funding: Problem of Social Costs

Equality and fairness are two core values that should be upheld in formulating policies for the mental health system. Mentally disordered people should not be discriminated against in such areas of civil life as education, employment, and access to health services, while those in most need are given the highest priority in health resources allocation. These two core values are emerging from high quality, comprehensive, and integrated services, which are focused on the needs of the user, and supported by evidence.⁸³⁾ As the financial cost of mental health care continues to escalate, so also does the human cost.⁸⁴⁾ It is nearly impossible to separate policy, economics, social status markers, education and genetic predispositions into clear areas of scientific or historical inquiry.⁸⁵⁾

There are several other issues in measuring economic costs of mental illness that are potentially large in magnitude and controversial in their conclusions. These are the costs of families caring for their mentally ill members, the labor market impact of mental illness and non-productivity losses due to illness.⁸⁶⁾ Other costs are those associated with improper measurements, unreliable diagnostic systems and inappropriate measures of reliability.⁸⁷⁾ These costs are acutely felt when resources and talents are used in a wasteful fashion.⁸⁸⁾ Physicians, policy makers and others struggle to strike a balance between the need to contain the costs and efforts to maintain or improve both access to services and the quality of care provided.⁸⁹⁾

82) Song, Sanggyo, *Human Rights of Persons with Mental Disabilities: From a Legal Perspective*, presented in Human Rights Workshop for Mental Health Practitioners held by National Human Rights Commission of Korea, 27 Oct. 2007, at 28 (available only in Korean).

83) Morrall, *supra* note 48, at 19.

84) Shirley A. Smoyak. *US Mental Health Policy: Progress and Continuing Problems*, in *MENTAL HEALTH — GLOBAL POLICIES AND HUMAN RIGHTS* (Peter Morrall & Mike Hazelton, eds., Whurr Publishers 2002), at 24

85) *Id.*

86) Ahmed Okasha, *Egypt: 5000 Years of Science and Care for Mental Patients*, in *MENTAL HEALTH — GLOBAL POLICIES AND HUMAN RIGHTS* (Peter Morrall and Mike Hazelton, eds., Whurr Publishers 2002), at 90.

87) *Id.*

88) *Id.*

89) *Id.*

6. Addendum: Aliens

“Every patient shall have the right to be treated suited to his or her cultural background” (MI Principle 7, para. 3). This provision has special relevance to the mental suffering of foreigners. The national health insurance system of Korea is open to non-nationals, albeit with some restrictions.⁹⁰⁾ However, a mental health care system is virtually non-existent for foreigners. A substantial portion of mental illness generates from emotional hardship. Foreigners are one of the most vulnerable groups to emotional distress, trauma, and mental illness.

In the notorious Chandra case,⁹¹⁾ a female migrant worker from Nepal was incarcerated in a mental sanatorium for nearly seven years with no proper channel of communication. Originally she was mistaken for a Korean due to her physical resemblance. But even after her true identity was confirmed, the case dragged until the National Human Rights Commission intervened. Both ignorance and aloofness of the Korean society were the cause of this tragedy.

An old adage has never been tarnished in Korea: “Blood is thicker than water.” Korea has lived proudly under the myth of being a “nation of single ethnicity.” This claim has just as much dubious historical justifications⁹²⁾ as the phrase regarding Korea’s “long history of five thousand years.” But it is sufficiently engrained enough to represent the public sentiment prevalent in the Korean society. In the 2006 state report submitted to the U.N. Committee on the Elimination of Racial Discrimination, Korean citizens were described as two groups: “pure-blooded” versus “mixed bloods.”⁹³⁾ Such descriptions may be indicative of the prejudice against foreigners

90) Article 5(2) of the National Basic Living Security Act (1999) by virtue of the revision in 2005 grants minimum aid to a foreigner only when he or she is a resident spouse with a minor child.

91) Lee, Ranjoo, *Speak, Chandra — Stories of Foreign Migrant Workers in South Korea*, in WINDOW OF REFLECTING LIFE (Sam-Ie-Bo-Ie-Neun-Chang) (2003) (available only in Korean). Chandra’s case was also featured in a human rights film ‘*If You Were Me*’ made by the National Human Rights Commission of Korea.

92) “About 46 percent of the Korean’s family names originate from neighboring countries, especially from China. At least 20 percent of Koreans still use foreign surnames. This shows that people have cherished illusions about their ethnic origins and historical facts.” See “Multiracial Society-Nation Should Eliminate Discrimination Against Minorities,” THE KOREA TIMES, 21 Aug. 2007. See also Kim, Jungho, IMPORTED KOREAN FAMILY NAMES (Jisik-Sanup Publications 2003) (available only in Korean).

93) Paragraphs 43-46 (Ethnic Minorities).

deeply rooted in the Korean mindset. Foreigners are a ‘suspect’ class to be contained, regulated, and ultimately to be returned to their countries of origin. The concept of ‘citizenship’ is usually understood as a combination of social rights and obligations that determines legal identity, access to scarce resources and social membership.⁹⁴⁾ In general and in principle, non-citizens are outside the realms of social rights and national welfare schemes. Korea may be a manifest example loyal to this old regime of the ‘nation state’.

In recent years, Korean society has been in rapid transition. There has been an influx of migrant workers, predominantly from Asian countries. For the last few years, international marriage has been on the rapid increase, comprising up to 13 percent of the total number of newly weds.⁹⁵⁾ It has introduced a sudden revolution into a country with a strong tradition of ethnic homogeneity.⁹⁶⁾ Recently, the Basic Act for the Treatment of Foreigners in Korea came into effect. The Act includes provisions such as extending support for married migrants and their children to help with their social integration, assisting with education of the Korean language and culture, as well as providing child care.⁹⁷⁾

By its mandates, the National Human Rights Commission of Korea is one of the most foreigner-friendly national institutions in Korea.⁹⁸⁾ In response to the recommendation of the Commission, the Korean government is preparing a bill for a comprehensive anti-discrimination legislation, which would include specific references to discrimination⁹⁹⁾ on the ground of race as declared in the Constitution

94) Turner BS. *Outline of A Theory of Citizenship*, 24-2 SOCIOLOGY (1990) at 189-217.

95) According to “Statistics of Marriage and Divorce in 2005” of the Korea National Statistical Office, international marriage marked 13.6 percent of the total number of newly married couples in 2005.

96) For details, see the government report of Republic of Korea submitted to the Committee on the Elimination of Racial Discrimination (CERD/KOR/14, 10 Aug. 20007) available at www.unchr.ch/hurricane/hurricane.nsf/view01/

97) Article 12 (Treatment of Foreign Spouse Married to a Korean National and their Children)

1. The State and local governments can provide a foreign spouse married to a Korean national with the support of education of Korean language, culture and social construction as well as the support of child care and education for their children to facilitate quicker adjustment to Korean society.
2. The paragraph 1 applies to a foreign partner who is in a *de facto* marriage relationship with a Korean national and raises a child born in such relationship, and the child.

98) *Park Chung-hee Alive at Detention Center*, THE KOREA TIMES, 10 Aug. 2007, at 21.

99) The Bill is expected to be submitted to the National Assembly during its regular session commencing in September 2007.

and National Human Rights Commission Act.¹⁰⁰⁾ The nation is now experiencing unprecedented problems that are typical of multi-ethnic populations with episodes of racism and newly emerging chauvinistic inclination within some strata of society.¹⁰¹⁾

VI. Concluding Remarks

As is widely accepted, Korea presents a unique image in the mirror of the international community. Arguably it is the only state born after World War II that has successfully achieved both democratization and economic prosperity. Moreover, such achievement was made within an extremely short period of time. In the course of rapid transition, a *Serbonian bog* has been created where all kinds of social underdogs are placed. Among these underdogs, those with mental disorders can be found at the bottom.

In lieu of this conclusion, I wish to underscore the reality that Korea still lacks a comprehensive national study report on the overall situation of persons with mental illnesses, qualitatively comparable to the Bush Report of the United States (2003)¹⁰²⁾ or the Burdekin Report of Australia (1993).¹⁰³⁾ Notwithstanding Article 4-2(1) of the Mental Health Act that obliges the Government to conduct periodic surveys on the situation of people with mental disorders every five years,¹⁰⁴⁾ all legislation and government policies to date have been enforced on a piecemeal basis without a master plan. Such lack has naturally caused unavoidable inefficiency, confusion, and

100) Article 11 of the Constitution of the Republic of Korea and Article 2(4) of the National Human Rights Commission Act.

101) Lorenzo Burti, *Italy: Radical reform of mental health policy and its consequences*, in MENTAL HEALTH — GLOBAL POLICIES AND HUMAN RIGHT (Peter Morrall & Mike Hazelton, eds., Whurr Publishers 2002), at 68.

102) The President's New Freedom Commission on Mental Health, *Achieving the Promise: Transforming Mental Health Care in America* (July 2003), available at <http://www.mentalhealthcommission.gov/reports/FinalReport/downloads/downloads.html>

103) BRIAN BURDEKIN, HUMAN RIGHTS AND MENTAL ILLNESS: REPORT OF NATIONAL INQUIRY INTO THE HUMAN RIGHTS OF PEOPLE LIVING WITH MENTAL ILLNESS (Human Rights and Equal Opportunity Commission of Australia 1993).

104) The Article 4-2(1) of the Mental Health Act provides, "the Minister of Health and Welfare shall conduct a survey on actual status of psychopaths every 5 years for the adequate enforcement of this Act." However, the final reports have not come out with sufficient information to be a basis for long-term policy.

inconsistency. There is an urgent need for a comprehensive survey report before it is too late to avoid widespread discrimination against people with mental illnesses in Korea.

KEY WORDS: Mental Disorder, Mental Health, National Human Rights Commission