Korean Law Relevant to Bioethical Issues and Its Problems

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Abstract

This paper explains current Korean law related to several main issues in bioethics such as a legal status of an embryo, abortion, criteria of death, euthanasia, refusal of life-sustaining treatment, human subject research, and assisted reproductive technology. I presents some problems of acts relevant to bioethical issues in Korea referring to Civil Act, Criminal Act, Bioethics and Safety Act, Mother and Child Health Act, and Internal Organs, etc. Transplant Act.

For embryonic research, Bioethics and Safety Act allows research on spare embryos. This means that an embryo does not have the same status as a person. The Act allows the production of SCNT embryos only for research. This shows that SCNT embryos are considered to be different from spare embryos. Mother and Child Health Act presents justification for which abortion is allowed and does not accept social and economic reasons. But some justification has problems. Mother and Child Health Act does not reflect current genetic test. Korea adopts still the criteria of cardiopulmonary death even though a patient with whole brain death may give their organs

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after the judgment of whole brian death. This paper argues that the discussion of criteria of death should be separated from organ donation. Grandma Kim's case made an important landmark in Korean discussion of euthanasia and the refusal of life-sustaining treatment. However, this case also shows that it is hard to discern hastening death from not prolonging natural death. I emphasize that any legislated act will be abused without the improvement of medical insurance for palliative care. Korea does not have any comprehensive act to cover human subject research in general. Especially there is no law to regulate non-genetic research using human material as well as non-invasive human subject research. We have to legislate regulations for human subject research in general.

Keywords

Korean law, a legal status of an embryo, abortion, brain death, euthanasia, life-sustaining treatment, human subject research, assisted reproductive technology

I. Introduction

There may be two ways to analyse Korean law relevant to bioethical issues. One is to deal with relevant particular acts and regulations one by one. The other is to deal with them according to several bioethical issues. I choose the latter in this paper. The reasons are as follows. Most of Korean acts relevant to bioethical issues do not deal with those issues alone. There is no Korean act to cover all of bioethical issues.

In this paper, I will explain what position Korean acts take about several main issues in bioethics. In addition, I will point out problems of those acts rather than their merits compared to other countries'.

I choose issues of embryo's legal status, abortion, criteria of death, euthanasia, human subject research, and assisted reproductive technology. The reason for choosing the above issues is that they are the fundamental issues to be reviewed from philosophical and/or metaphysical perspectives. Other issues such as compensation in donating oocytes, problems of informed consent form for genetic test or research, IRB issues on personal information protection, registry system of embryonic stem cell lines are also valuable for our discussion. These are, however, relatively sophisticated issues that are not quite fit to this paper I intend to provide an overview.

For the main bioethical issues, I will review Korean Civil Act, Criminal Act, Bioethics and Safety Act, Mother and Child Health Act, Internal Organs, etc. Transplant Act.

II. Legal Status of Embryos

Lots of Korean philosophers have actively discussed a status of an embryos or a fetus. But there is no overwhelming argument enough to persuade everyone. In addition, this issue is so closely related to a metaphysical issue that we may not be able to reach an agreement. Despite hot philosophical debates, there is little change in law. Korean legal system slowly responds to new legal issues among bioethical ones.

For the starting point when the status of a person is legally given, the majority view in civil law is so-called "the theory of a whole body shown-up." It argues that the starting point of a person is the time a new born baby is entirely separated alive from a body of her mother. This view is based on the interpretation of article 3 and article 762 of Civil Act. Article 3 says, "All persons shall be subjects of rights and duties throughout their

lives."[1] and article 762, "An embryo or fetus shall, in respect of the claim for damages, be deemed to have been already born." Thus, Civil Act has a view that the starting point of "throughout their lives" is the time to be born.

In addition, Civil Act keeps a conservative ontological distinction, that is, a dichotomy of a person and a thing. There are a person and a juristic person. There are no legal entities between persons and things. Such a dichotomy has a problem in that it does not let us treat properly such an entity as an embryo and a fetus.

Such a legal problem is a challenge to the framework of civil law. However, most scholars of law does not seem to seriously recognize such a challenge.

The majority position on a starting point of a person in criminal law is so-called "the theory of contraction," which holds that the starting point is when a fetus starts to be separated from placenta with regular repetitive labor pains.[2] Thus, this view argues that the starting point is the time a delivery starts. Article 269 and article 270 of Criminal Act regulate abortion. We can infer from these articles that Korean legal system gives to a fetus a status of an entity to be legally protected although she does not have the same status as a person from legal perspective. Here we have to notice that "a fetus" is not one who is biologically defined because "embryos after implantation" has been also called "a fetus" in Korean legal cases.[3]

What attitude toward an entity before implantation, that is, an embryo, is taken by Korean law? There are no clear articles in Civil Act and Criminal Act. Bioethics and Safety Act regulates an embryo before implantation. We cannot find any clue to indicate the view that an embryo has the same status as a person. From the article that the production of embryos for research is prohibited,[4] however, it is clear that an embryo is

not treated merely as a thing.

However, Bioethics and Safety Act allows research on embryos remained after reproduction(hereafter 'spare embryos'). This means that an embryo does not the same status as a person. Furthermore, the Act allows the production of somatic cell nuclear transplantation(SCNT) embryos. This shows that a SCNT embryo is considered to be different from spare embryos because the production of embryos for research is not allowed.[5]

SCNT embryos are the same as spare embryos in their potentialities to develop into human individuals from a philosophical perspective.[6] The argument for potentiality is, of course, not so philosophically strong to provide a successful argument for the view that an embryo has the same status as a person. However, we need to focus on the current features of both embryos. Both are the same in that they are human beings although they may not be persons. Therefore, the reason should be given why the one is legally considered to be different from the other. For me, the production of SCNT embryos is more unethical than the use of spare embryos because SCNT embryos are human beings made for destruction.[7]

Korean law does not have clear position on a human being in the early stage of its life. Korean law does not have consistency for different kinds of embryos. This problem is also applied to regulations of other countries in which the production of SCNT embryos is legally allowed.

In addition, there is another criticism that Bioethics and Safety Act loses its consistency in SCNT embryo research. While the Act allows SCNT embryo research, it limits oocytes for this research to oocytes remained after reproduction under the Enforcement Decree of the Act. From a researcher's perspective, the Enforcement Decree prohibits the use of oocytes needed for good outcomes, so-called "fresh eggs." Because of this limitation, the Act and its Enforcement Decree cannot satisfy persons

who favor SCNT embryo research. The Act cannot satisfy persons who are against SCNT embryo research because it allows SCNT embryo research,

However, I think that such regulation may be natural and should be tolerated in the situation where there is a disagreement on ethical issues in a plural society. I argue that "bioethics policy" as an interdisciplinary research area should study how to resolve ethical disagreements on bioethical issues. Such regulation may be an outcome of compromise rather than inconsistency or conflict. This shows that law may not obtain its authority in traditional ways when it deals with ethical issues. Legal authority in such issues may depend on whether our society sufficiently deliberates them, whether we discuss them with publicity, and whether decision-making process obtains procedural justice. The issue of a status of an embryo or a fetus is an example to show that legal approaches for regulation must be changed.

III. Abortion

Article 269 of Criminal Act is about abortion and article 270 is about abortion by physicians or abortion without consent.[8)] However, Mother and Child Health Act indicates several justification for abortion until 24 weeks in pregnancy.[9)] Abortion is legally allowed with the satisfaction of such justification. Mother and Child Health Act, however, does not allow abortion on the basis of social and economic reasons even though most of abortion in Korea are taken for social and economic reasons. Unfortunately Korea is one of the countries with high rates of abortion.

Here I would like to point out some problems of justification legally accepted and of the period to allow abortion. Article 14 of Mother and Child Health Act says:

A doctor may conduct an induced abortion operation with the consent of pregnant woman herself and her spouse(including a person having a de facto marital relation; hereinafter the same shall apply) only in the following cases:

1. Where she or her spouse suffers from any eugenic or genetic mental handicap or physical disease as prescribed by Presidential Decree;
2. Where she or her spouse suffers from any infectious disease as prescribed by Presidential Decree;
3. Where she is impregnated by rape or quasi-rape;
4. Where pregnancy is taken place between blood relatives or matrimonial relatives who are legally unable to marry; and
5. Where the maintenance of pregnancy injures or might injure the health of pregnant woman for health or medical reasons.

In addition, Article 15-(1) of the Enforcement Decree of the Mother and Child Health Act says that this abortion is allowed within 24 weeks in pregnancy. About eugenic or genetic mental handicap or physical disease, article 15-(2) of the Enforcement Decree of Mother and Child Health Act lists "genetic schizophrenia, genetic bipolar disorder, genetic stromatosis, genetic mental weakness, genetic motor neuron diseases, genetic hemophillia, genetic mental illness having considerable criminal disposition, other considerable genetic diseases posing high risk to a fetus." Here "genetic mental illness having considerable criminal disposition" is so vague that it may be easy to be abused.

Expecially, article 14 of Mother and Child Health Act mentions "she(pregnant woman) or her spouse suffers" while it does not mention any diseases suffered by a fetus. The Act does not reflect current genetic test technology. The Act is not consistent with Bioethics and Safety Act

because Bioethics and Safety Act lists genetic tests allowed for an embryo and a fetus. This problem lies in the reasons that Mother and Child Health Act was made in 1973 and it cannot be modified because of acute conflicts between pro-life and pro-choice groups in Korea. As soon as any modification is tried, each group tries to reflect its own view without any compromise.

In addition, we have to note that the act allows abortion for "where pregnancy is taken place between blood relatives or matrimonial relatives who are legally unable to marry." This reveals the problematic view that the priority should be given to Korean traditional convention in forming a family, not to the value of a fetus' life. There are no process or system to distinguish a physician practicing abortion from one giving consultation about abortion. A physician may practice abortion with serious and sufficient consultation.

Finally, the 2009 amendment of the Enforcement Decree of Mother and Child Health Act changed the abortion-allowable period from until 28 weeks to until 24 weeks in pregnancy. Even 24 weeks are still long from my perspective when we consider advanced technology relevant to genetic tests and any other diagnosis technique.

IV. The Criteria of Death

Criteria of death play an important role in our lives. They are important in that death means the end of all legal relationships with other persons. Korea legally adopts cardiopulmonary death while many Western countries including U.S.A. legally adopt whole brain death.

Internal Organs, etc. Transplant Act requires the judgment of brain death determination committee only for those who will donate their

organs. Judgments must be made twice. After the committee judges whole brain death, organs can be extracted. Some argues from these regulations that Korea adopts whole brain death only in the case of organ donation and that Korea has double criteria of death.

However, this view is not correct. According to Article 3-(4) of Internal Organs, etc. Transplant Act, a person is divided into a living person and a brain-dead person. Article 18-(3) uses the different expressions of "brain-dead persons" and "deceased persons." Thus, it is valid that Korean law still adopts cardiopulmonary death as the criteria of death.

In addition, I would like to point out the problem of the social context in which criteria of death are discussed with the relation to organ transplantation in Western countries as well as in Korea. The discussion of whole brain death started with organ transplantation in Western countries. However, criteria of death in themselves are important in that they define the end of life even without any relation to organ donation. There may be lots of persons who accept the criteria of whole brain death even though they do not want to donate their organs. Furthermore, philosophers have discussed higher brain death without any relation to organ donation. I recognize we do not have yet accurate medical test for higher brain death. However, neuroscience will provide scientific criteria of higher brain death in the future. Thus higher brain death is likely to be discussed in public soon. If this situation is considered, it is problematic that the discussion of criteria of death is limited to the cases of organ donation in Korea. My worry is that people may think any discussion of criteria of death presupposes the purpose of improving organ donation. This may hinder any reasonable discussion of criteria of death in our society.

V. Euthanasia and Refusal of Life-sustaining Treatment

There are no acts and regulations covering euthanasia or withholding /withdrawing life-sustaining treatment in Korea. I define euthanasia to be "hastening death for a patient in order to reduce her pain and/or suffering." Euthanasia may be categorized into for types according to many texts of medical ethics: voluntary active, voluntary passive, non-voluntary active, non-voluntary passive euthanasia.

As we know, the Netherlands allows voluntary active euthanasia. Oregon in U.S.A. allows physician-assisted suicide. Voluntary passive euthanasia is not prohibited through the federal Patient Self-Determination Act in U.S.A.

Korea, as I mentioned in the above, does not have any clear acts to legally allow the above types of euthanasia. About a patient's refusal of life-sustaining treatment, some argue that this refusal is allowed because medical treatment basically belongs to contract according to Civil Act. However, I wonder if this refusal will not be accepted by physicians because they may tend to think that a patient who refuses life-sustaining treatment is not competent.[10] Although Boramae hospital's case should be distinguished from any types of euthanasia, it has made physicians' attitude toward the refusal of life-sustaining treatment become conservative.

The expression "euthanasia" in itself is avoided in Korea because it is often understood to be the same as active euthanasia. These days "refusal of life-sustaining treatment" is often used instead of the expression "euthanasia" or "death with dignity." The title of ruling on Grandma Kim's case uses the expression "withdrawing futile life-sustaining treatment." This case makes an important landmark in Korea through the Supreme Court's ruling.[11]

There was a hot debate over whether withholding/withdrawing life-sustaining treatment can be considered to be a type of voluntary passive euthanasia or it belongs to a category different from euthanasia. Those who favor the latter view argue that withholding/withdrawing life-sustaining treatment claims "do not prolong natural death rather than "hasten death."

Seoul High Court's ruling on Grandma Kim's case can be interpreted to consider withholding/withdrawing life-sustaining treatment to be different from euthanasia on the basis of the concept of "natural death." The ruling indicates some criteria to accept refusal of life-sustaining treatment. First, a patient must be in a irreversible terminally ill phase in which no medical treatment was feasible. Second, there must be rational and serious intention to withdraw life-sustaining treatment by a patient. Third, treatment to be withdrawn must be one to prolong the process to reach death, not to improve the condition of a patient. Fourth, withdrawing must be accomplished by physicians. The ruling says that if all of these criteria are satisfied, withdrawing life-sustaining treatment is allowed even without any legislation and that such withdrawing does not constitute murder or aid of suicide.[12] The Supreme Court has the same ruling as Seoul High Court although the former does not present the above requirements.[13]

In fact, Grandma Kim was survived for 201 days after withdrawing life-sustaining treatment despite the medical judgment that she had already been in irreversible terminally ill phase in which no medical treatment was feasible and that her death was just prolonged. This makes us think about several points. It shows that medical judgment of such phase is not easy to be made. In addition, if such judgment is not easy, the distinction between hastening death and prolonging natural death is tough and just conceptual.

During the trial of Grandma Kim's case, several proposals for legislation were presented. However, any of them have not yet legislated. Although I am not against the legislation itself, I would like to emphasize the following points that we have to seriously consider before the legislation.

First, what scope of life-sustaining treatment is defined as an allowable treatment to be refused? In other words, what treatments will be treatments that may be allowed to be refused through a patient's self-determination? What about aggressive treatment? What about anticancer treatment whose effect cannot be guaranteed? What about normal treatment like antibiotics? What about even feeding tube? I wonder if there may be an agreement on the refusal of antibiotics or feeding tube.

Second, any legislated act will be abused without the improvement of medical insurance that serves palliative care for terminally ill patients. They are likely to say that their decisions are autonomous although their decisions are actually based on economic factors. The poor are vulnerable to misuse such an act and are likely to be faced with unwanted death under the name of "respecting autonomy."

VI. Issues of Human Subject Research

Finally, I deal with regulations related to human subject research in Korea. Human subject research may be roughly divided into invasive and non-invasive research.

In U.S.A. 45 CFR 46 is applied to the following research, which should be reviewed by institutional review board: research that obtains identifiable personal data as well as data obtained through intervention and interaction.

Research using directly human material can be classified into research that obtains data through intervention. Research using directly human material can be divided into genetic research and non-genetic research. Both types of research belong to human subject research according to the declaration of Helsinki(2008).

Current Korean regulations are as follows if embryonic research may be also considered.

Types		Name of IRB	Relevant act or guideline
research through physical intervention(inva-sive research)	research through intervention using drug, etc.	IRB for clinical trial in hospital.	Standard for the Control of Drug Clinical Trial
		IRB(or IBC)[14] for genetic therapy	Bioethics and Safety Act
research using directly human material (intervention in the case of obtaining human material)	genetic research using human material	IRB(or IBC) for genetic research	Bioethics and Safety Act
	embryonic research	IRB(or IBC) for embryonic research and SCNT embryonic research	Bioethics and Safety Act
	non-genetic research using human material	IRB for clinical trial in hospital. But this is not legal required.	none
research through interaction or using identifiable personal datat(non-invasive research)	research using medical record, survey, interview, and observation accomplished in hospital	IRB for clinical trial in hospital. But this is not legal required.	none

research through interaction or using identifiable personal datat(non-invasive research)	research using survey, interview, and observation in academic area like universities except for hospital and medical school	Bioethics Review Committee or IRB (There is no legal proper name to call this committee in Korea)	none

As we can see in the above table, Korea does not have any comprehensive act to cover human subject research in general. Clinical trials to develop new drugs are regulated by Standard for the Control of Drug Clinical Trial made by Korean FDA. Because this is an official announcement, however, there is no punishment. Therefore, we need to legislate an act to protect a human subject involved in research including clinical trials.

In addition, there is no law to regulate non-genetic research using human material in Korea as well as non-invasive human subject research. We have to legislate regulations to protect personal information. This problem arises because Bioethics and Safety Act regulates only human embryonic research and genetic test, research and therapy without covering human subject research in general.

VII. Concluding Remark

I dealt with Korean law related to some main bioethical issues. There are important issues not to be touched in this paper. First, one of serious and important issues is about assisted reproductive technology(ART). Korea

does not have law to regulate ART. There is no regulation about who can use ART. May IVF be used by a single woman? There is no regulation to cover surrogate mother, let alone commercial or non-commercial one. According to an interpretation of Article 844 of Civil Act, mother is a person who conceives a baby. Even if a surrogate mother provides only her uterus without her eggs, therefore, she must be legally a mother in Korea. Although this problem may be fixed through contract, there is no agreement on whether such contract is effective. Commercial surrogate mother may not be legally accepted because the contract of surrogacy may be considered to be "contrary to good morals and other social order" according to article 103 of Civil Act. Even if we may allow legally non-commercial surrogate mother, commercial surrogate mothers can disguise themselves as non-commercial surrogate mothers. Korea does not have any law to deal with who will be a legal father or mother of a baby who is born through donated egg or sperm.

Second, National Bioethics Committee established according to Bioethics and Safety Act may not review bioethical issues in general because the scope of its review is mainly involved in embryonic research and genetic issues. For other problems of Bioethics and Safety Act, the act requires to keep the result of genetic tests for 10 years even in the case of genetic research. This regulation is not reasonable because the result of genetic test for research must be distinguished from that of genetic test for diagnosis. The former may include information that has not been yet scientifically proved.

NOTES

1. For an English version of Korean acts, refer to http://elaw.klri.re.kr/

2. The Supreme Court ruling 81DO2621(1982. 10. 12 sentenced).
3. The Supreme Court ruling 84DO1958(1985. 6. 11 sentenced).
4. Bioethics and Safety Act, article 13-(1) says, "No one shall produce embryos other than for the purpose of pregnancy." According to article 13-(3), "No one shall provide or utilize sperm or oocytes, or induce or assist in providing or utilizing them for the purpose of receiving monetary benefits, property interests or other personal benefits in return." It is, however, problematic that embryos are not mentioned.
5) Bioethics and Safety Act, article 22.
6) Here "potentiality" means "potentiality to become." In this respect, embryos are not fundamentally different from sperm or egg which have potentiality to produce.
7) As long as IVF is available, we cannot prevent embryos remained after reproduction in the current level of technology.
8) Criminal Act article 269 says, "(1) A woman who procures her own miscarriage through the use of drugs or other means shall be punished by imprisonment for not more than one year or by a fine not exceeding two million won. (2) The provision of paragraph (1) shall apply to a person who procures the miscarriage of a female upon her request or with her consent. (3) A person who in consequence of the commission of the crime as referred to in paragraph (2), causes the injury of a woman, shall be punished by imprisonment for not more than three years. When one causes her death in consequence of the commission of the crime as referred to in paragraph (2), he shall be punished by imprisonment for not more than seven years." Criminal Act article 270 says, "(1) a doctor, herb doctor, midwife, pharmacist, or druggist who procures the miscarriage of a female upon her request or with her consent, shall be punished by imprisonment for not more than two years. (2) A person who procures the miscarriage of a female without request or consent, shall be punished by imprisonment for not more than three years. (3) When, in consequence of his commission of the crime as referred to in paragraph (1) or (2), the female is injured, he shall be punished by imprisonment for not more than five years. When she dies, he shall be punished by imprisonment for not more than ten years. (4) In the case of the preceding three paragraphs, suspension of qualifications for not more than seven years shall be concurrently imposed."
9) The Enforcement of Decree of Mother and Child Health Act 15.
10) The decision of the Supreme Court on the grandma Kim's case makes clear the

view that medical contract is basically founded on the right of self-determination and the relationship of confidence. However it still says, "whether treatment directly related to a patient's life is withdrawn or not should be extremely restrictively and seriously judged."

11) http://www.koreatimes.co.kr/www/news/nation/2009/05/117_45428.html
12) Seoul High Court's ruling 2008NA116869.
13) There are some points to be noticed from an objection view or a minority view in the Supreme Court's ruling. For example, there are opinions to suspect whether a patient was in a irreversible terminally ill phase in which no medical treatment was feasible and to argue that presumptive intention should be distinguished from hypothetic intention.
14) Bioethics and Safety Act calls this kind of IRB "IBC(Institutional Bioethics Committee)."