

科技部補助專題研究計畫成果報告 期末報告

代孕制度公民審議會議：生育自由、身體自主與性別影響

計畫類別：個別型計畫
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執行期間：102年08月01日至103年07月31日
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報告附件：出席國際會議研究心得報告及發表論文

處理方式：

1. 公開資訊：本計畫涉及專利或其他智慧財產權，2年後可公開查詢
2. 「本研究」是否已有嚴重損及公共利益之發現：否
3. 「本報告」是否建議提供政府單位施政參考：是，衛生福利部

中華民國 103 年 10 月 31 日

中文摘要：人工助孕科技的發展雖然快速，然而人工生殖法所規範之助孕科技，卻無法解決所有不孕夫妻面臨的無子問題。此即，當受述妻無法自己懷孕生產、而必須藉由另一位女性來承擔懷孕生產的過程之情形。代孕法制化與否，原本於人工生殖法立法之初時一併提出討論，然因其涉及法律、醫療以及倫理等面向，爭論不休而無法取得共識，後乃將其與人工生殖法脫鉤處理。迄今代理孕母其立法與政策，仍在組織與專家學者間的研擬討論中，其法制化之進程中乃相當緩慢的在進行當中。

我國對代孕議題除了聽取各專家學者等組成之討論意見之外，衛生署為了解一般社會大眾對於代理孕母此爭議問題的觀點，分別於2004年和2012年委由台灣大學社會系協助，召開代理孕母公民共識會議，徵求來自社會中不同階層領域的民眾參加。該共識會議藉由先前提供相關資料和各界專家學者意見之預備會議和專家座談，讓小組成員經由理解代理孕母涉及之相關爭議問題後，自主制訂會議之討論主題，在正式會議中就此進行意見的交流與辯論，而後再對外發布其結論。此公民會議之結論，可謂代表了社會大眾在深思熟慮後的觀點，可提供讓權責機關及立法機關作為參考。

本研究計劃即是著眼於此兩次代理孕母公民共識會議中，由非專家的公民小組所發表之結論，以及其作成結論的過程，作為研究的主要分析資料。討論代理孕母的制度是否應予法制化，而其是否有相關的限制與條件，代孕者其權利與利益的保障，以及父母子女關係應該如何為處理。除此之外，採行公民共識會議此一方式所可能遇到的障礙，以及討論此高度涉即性別爭議之代孕議題，於小組中其討論是否有存有性別盲點，此亦是本計劃欲與深度研討與回應的要點之一。

是以，本研究計劃之目的乃對於兩次代孕公民審議會議予以比較分析，即近用代孕之限制、代孕者的權利與利益和代孕制度下父母子女關係之處理。藉由比較法、法釋義以及內容分析的研究方法，比較討論這些代孕之重要爭議議題，於會議中之討論的狀況，和其中參與者，尤其是女性對代孕議題決策之影響程度。期望由資料分析中，對於立法草案和公民會議的結論相為比較，從中探尋我國代孕法制化的更佳解決途徑，並深度思考當中的性別議題。

中文關鍵詞：代孕、生育權、身體自主、公民審議會議、性別觀點

英文摘要：Practices of different kinds of artificial reproductive technologies are allowed in Taiwan in

accordance to the Artificial Reproduction Act. On the contrary, surrogacy motherhood has not been legally granted since it was banned in 1996. However, there are infertile people who need help to have children of their own, particularly when they do not fit in the requirements in Artificial Reproduction Act to use artificial reproductive technologies. In response to the urgent requests for legal surrogacy, the Department of Health (renamed as the Department of Health and Welfare since 2013) had held two civil conference to develop and improve a draft of surrogacy legislation. Nevertheless, no promulgated legislation has been designed for surrogacy until now.

In the context of surrogacy, controversies and challenges from the aspects of law, ethics, and gender are intertwined. How could, or how did, the civil conference help clarify the complex case of surrogacy? Although the scheme of civil conference is developed along the theory of deliberative democracy and is designed for providing solutions to controversial issues, would such scheme satisfy the challenge from surrogacy issue? On the other hand, the theory of communication and action by Juergen Habermas is often employed to analyze the interactions and opinions in a civil conference, and it could generally probe into the linchpin. But when it comes to analysis of an issue highly relevant to gender, such as legislation and practice of surrogacy, how should we adopt the theory of communication and action?

Key Words

This research has found out that the civil conference could represent the legal and moral consciousness shared by lay people, and thus provide important guidance to the legislators. Furthermore, when an ideal and valid civil conference pictured in the theory from Habermas should be built in an environment where provides every participants equal opportunities to communicate, the environment of a civil conference about surrogacy should be more gender-aware to be an ideal and valid one.

英文關鍵詞： Gestational Surrogacy, Right to Procreate, Autonomy,
Consensus Conference, Gender Perspectives

科技部補助性別與科技研究計畫成果報告

(期中進度報告/期末報告)

代孕制度公民審議會：生育自由、身體自主與性別影響

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計畫參與人員：呂欣樺、廖英帆

本計畫除繳交成果報告外，另含下列出國報告，共 1 份：

執行國際合作與移地研究心得報告

出席國際學術會議心得報告

期末報告處理方式：

1. 公開方式：

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涉及專利或其他智慧財產權，一年二年後可公開查詢

2. 「本研究」是否已有嚴重損及公共利益之發現：否是

3. 「本報告」是否建議提供政府單位施政參考：否是，
衛生福利部（請列舉提供之單位；本部不經審議，依勾選逕予轉送）

中 華 民 國 103 年 10 月

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中文摘要

人工助孕科技的發展雖然快速，然而人工生殖法所規範之助孕科技，卻無法解決所有不孕夫妻面臨的無子問題。此即，當受述妻無法自己懷孕生產、而必須藉由另一位女性來承擔懷孕生產的過程之情形。代孕法制化與否，原本於人工生殖法立法之初時一併提出討論，然因其涉及法律、醫療以及倫理等面向，爭論不休而無法取得共識，後乃將其與人工生殖法脫鉤處理。迄今代理孕母其立法與政策，仍在組織與專家學者間的研擬討論中，其法制化之進程中乃相當緩慢的在進行當中。

我國對代孕議題除了聽取各專家學者等組成之討論意見之外，衛生署為了解一般社會大眾對於代理孕母此爭議問題的觀點，分別於2004年和2012年委由台灣大學社會系協助，召開代理孕母公民共識會議，徵求來自社會中不同階層領域的民眾參加。該共識會議藉由先前提提供相關資料和各界專家學者意見之預備會議和專家座談，讓小組成員經由理解代理孕母涉及之相關爭議問題後，自主制訂會議之討論主題，在正式會議中就此進行意見的交流與辯論，而後再對外發布其結論。此公民會議之結論，可謂代表了社會大眾在深思熟慮後的觀點，可提供讓權責機關及立法機關作為參考。

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中文關鍵詞

代孕、生育權、身體自主、公民審議會議、性別觀點

Abstract

Practices of different kinds of artificial reproductive technologies are allowed in Taiwan in accordance to the Artificial Reproduction Act. On the contrary, surrogacy motherhood has not been legally granted since it was banned in 1996. However, there are infertile people who need help to have children of their own, particularly when they do not fit in the requirements in Artificial Reproduction Act to use artificial reproductive technologies. In response to the urgent requests for legal surrogacy, the Department of Health (renamed as the Department of Health and Welfare since 2013) had held two civil conference to develop and improve a draft of surrogacy legislation. Nevertheless, no promulgated legislation has been designed for surrogacy until now.

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Key Words

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一、前言

計畫主持人期望藉本次研究計劃之進行，延續並擴展計畫主持人近年來對於「人工助孕科技」之法制化相關研究成果。本研究計劃涉及之面向橫跨法學、性別倫理與社會學之領域，先行分析代孕議題於現今立法政策上所面臨之爭論後，主軸乃聚焦於兩次公民審議會中，小組成員討論資料之內容比較分析，並討論公民審議會中此模式之影響。

人工助孕科技之技術發展，於現今已是相當成熟，而在我國《人工生殖法》通過之後，不孕夫妻藉由該法允許之相關助孕技術孕育下一代，於社會上已非罕事。然而，在現行法規範下所允許之助孕技術，仍無法涵括解決所有不孕夫妻之無子問題。蓋人類孕育之過程，乃不可或缺三項要素：精子、卵子以及孕育胎兒之女性之子宮，觀乎現今技術發展可知，孕育並產下胎兒此一過程乃需要透過子宮進行。是以，因身體因素不適合孕育或因子宮於生理上有所欠缺之不孕夫妻之婦女，綜其己身具有精卵，但因缺發孕育之能力，而無法孕有下一代。此一問題乃是現行人工生殖法所無法解決的。

代理孕母此爭議議題，乃是將該孕育並產下胎兒之過程，委由另外一位婦女行之。其於技術操作層面上顯已可達成且並非難事，然其法制化與否實已在我國立法政策上已經有長久之爭辯。此乃因涉及到須藉由第三人之子宮來孕育。在委託方、代孕者和該將出生之胎兒，三方間的關係相互牽扯。此議題除了要面對來自傳統社會倫理觀念之疑慮，更牽扯到的彼此間權利義務的調和應對，彼此間應該如何調和，而委託出生之子女之父母子女關係又為何。

二、研究目的與研究方法

誠如前述，代理孕母法制化於立法政策的討論，時來已久。然而，這些討論見解的形成，多是由各領域的專家學者等權威人士主導組成之研討論或委員會中而形成。這樣專門化的分工，由上而下的政令形成，精英式主導已身產生了難以突破之瓶頸：過於專門的取向而使得難以聽取一般社會公民的聲音。是以，衛生署為了解社會對於代孕議題而舉辦的兩次公民審議會，該由下而上對爭議問題提出想法，進而影響代孕政策形成的模式，是對於了解公民對於代孕議題具相當重要性的研究資料。於文中，首先整理代理孕母於我國立法政策之歷程，以及整理目前法界、社會及醫療等領域，對於代理孕母此議題所提出之討論後，即進入本計劃之主軸：於2004年即2012年所舉辦之代理孕母公民共識會議之資料分析和討論。

有別於傳統政治決定係由專家所主導而成，於審議式民主理論下所提倡的公眾論壇模式，是近年我國於討論許多爭議問題所採用的另一種切入點。蓋代議式民主所表達的意見，並非可謂是代表真正全部公眾的總體意志，此乃因代議者乃是借選舉投票選出，故其結果僅可說是多數選票意見下的集體總結。對此，審議式民主提倡藉由公眾論壇的舉辦，鼓勵社會大眾其參與和審議，在充分溝通討論與理性思辨下，建立由下而上的意見管道。此除了可以建立社會共識，讓決策的結果品質更具相當性外，同時亦可達成教育公民對該議題理性思辨能力。而於2000年我國受到審議式民主風潮之影響，係於全國各地廣泛地舉辦對各項政策議題之公民審議會。本計劃研究之兩次代理孕母公民共識會議，乃產物之一。

本研究計畫目的即在呈現兩次代理孕母公民共識會議中，討論主題的選擇與做出的結論有何重大差異，以及各自對於代孕政策的形成產生哪些影響。並比較在相同議題上，所表達之觀點是否有所轉變，為何轉變。此外，不容忽視者，乃代理孕母此議題內容涉及女性身體使用，改此一高度帶有性別色彩之生育和女性身體使用的議題，藉由公民審議會的方式為處理是否妥當，此亦是本計劃所著重之點。

本研究計畫所採行之研究方式為比較法、法釋義學以及內容分析法。針對本研究之重心—2004及2012兩次代理孕母公民共識會議，本研究係以法釋義以及內容分析來對會議資料做分析，並再進一步對兩會議議題有所交集的部分，對其做比較並討論其異同點。於2004年所舉辦的共識會議，大體上係對於代理孕母之法制化採取有條件開放的結論，而2012年所舉行的共識會議則是在2004年此論為前提下，對代孕的議題進行相關的討論。而在兩次會議中，均共同關注之代理孕母涉及爭議問題，為代孕技術的近用、代孕者其權益保障以及父母子女關係的處理。

三、文獻探討

公民審議會在我國運作下，主要依循四個步驟：首先，執行委員會之召集，其負責協助引導會議之組織和流程之進行。再者，公民小組之成員，係在志願者中以電腦亂數挑選而出，但須在性別比例、年齡、學歷與地區分布方面具有代表性。在第一階段預備會議，由主辦單位聘請醫療、法律、倫理學、社會學等領域之專家，為公民小組成員授課解說，也讓公民先閱讀有關該議題之書面資料，以充分了解爭點之所在。最後，在第二階段的正式會議中互相討論，以審議的方式得出共識、做出會議結論。

本計畫將2004及2012兩次公民會議的背景、成員資料、程序、重要議題、會議結論及對政策之影響，製成比較表如下：

	2004年公民會議	2012年公民會議
會議背景	政府機關已初步決定將代孕與人工生殖脫鉤，婦女團體經國民健康局局長建請衛生署以公民會議形式討論代孕議題。 ¹	衛生署擬具之代孕生殖法草案已見雛型，但仍有許多問題留有爭議。為尋求社會共識，探求合理解決之道，爰再度委託台灣大學社會系召開本次「代孕制度公民審議會」。 ²
會議時間	8/28(六)、8/29(日)召開預備會議；9/11(六)、9/12(日)、9/18(六)召開正式會議。 ³	9/8(六)、9/9(日)召開預備會議；9/21(五)、9/22(六)、9/29(六)召開正式會議。
參與資格	年滿20歲者皆可傳真或郵寄報名； ⁴ 或由抽樣選中的村里長推薦。 ⁵	年滿20歲以上皆可至會議網站網路報名； 主辦單位藉電話隨機抽樣訪談邀請。 ⁶
報名人數及態樣	92人。多是讀過報紙報導（招募公民前舉行過一次記者會）而報名，將近七成是婦女，多數教育程度為大專以上，居住地以台北市和台北縣為主，年紀以三、四十歲最多。 職業包含：學生、家庭主婦、工商業者、媒體業者、醫生等。 ⁷ 報名者的動機包括：想更了解代理孕母、想「善盡公民義務」、想表達不孕婦女的心聲、言明是代理孕母的支持者。 ⁸	未公布數據。
抽選方式	分層抽樣，類型包括性別、年齡、居住地區等 ⁹ 。	分層抽樣

¹ 黃世團，《公民會議與代議民主的制度連結—以「代理孕母」為分析個案》，台灣大學國家發展研究所碩士論文，頁146。（2009）

² 1010929代孕制度公民審議會公民結論報告.pdf，國民健康局，頁1。（2012.09.29）

³ 林國明，〈第二章 公民共識會議的籌備工作〉，《審議式民主公民會議操作手冊》，行政院青年輔導委員會，頁15。（2004年03月）

⁴ 林國明，前揭註3。

⁵ 黃世團，前揭註1，頁154。

⁶ 林國明，預備會議公民問題與回應，頁5。（2012）

⁷ 張璦文，〈第一遭 代理孕母公民預備會議 廿人代表〉，中國時報。（2004.08.25）

⁸ 張璦文，前揭註7。

⁹ 葉欣怡，〈附錄 代理孕母公民共識會議辦理心得〉，《審議式民主公民會議操作手冊》，行政院青年輔導委員會，頁66。

參與人數	18人，十二名女性、八名男性，其中有二位不孕症婦女。 ¹⁰ 年齡自22至62歲，平均39.2歲；職業以服務業（5人）最多，家管（2人）次之。 ¹¹	20人，十一名女性、九名男性。 ¹²
執行委員會組成	台灣大學社會學系陳東升教授、林國明副教授、馬偕醫院婦產部李國光主任、政治大學法律系陳惠馨教授、台灣大學社會醫學科蔡甫昌主任、陽明大學社區護理研究所盧葦豔教授。 ¹³	指導委員會：何弘能（台大醫學院副院長）、蔡甫昌（台大醫學院社會醫學科主任）、盧葦豔（陽明大學臨床暨社區護理研究所教授）、侯英冷（成大法律系教授）、官曉薇（台北大學法律系助理教授）、陳瑤華（東吳大學哲學系教授） 執行單位與計畫團隊： 計畫主持人：林國明，台大社會系副教授 協同主持人：吳嘉苓，台大社會系副教授， 雷文政，陽明大學公共衛生研究所副教授 ¹⁴
預備會議進行方式	自我介紹、議程解說、相關專題講座、分組座談、提出正式會議問題及對正式會議專家名單提出建議。 ¹⁵	自我介紹、議程解說、問卷填寫、專題講座
正式會議進行方式	9/11-12：確定議事規則與工作分工、依三大主題與專家進行對談、綜合討論與形成初步共識。 9/18：結論報告認可、專家澄清事實性問題、確認結論報告及對外公布結論。 ¹⁶	9/21-22：議程安排說明、確定議事規則及工作分工、依三大議題與專家對談、形成初步共識 9/29：認可結論報告、專家澄清事實性問題、公布結論報告 ¹⁷

¹⁰ 張璿文，前揭註7。

¹¹ 黃世團，前揭註1，頁155-156。該論文第156頁並列有公民名單，列出與會公民姓名、性別、年齡與職業別。

¹² 代孕生殖法草案公民審議會會議紀錄0922-23.doc，頁2。

¹³ 黃世團，前揭註1，頁152。

¹⁴ 〈主辦單位介紹〉，<http://2012surrogacydd.blogspot.tw/p/1.html>

¹⁵ 黃世團，前揭註1，頁1，註1。

¹⁶ 黃世團，前揭註1，頁2，註1。

¹⁷ 20120920_代孕制度公民審議會會議 正式會議議程.pdf

<p>討論議題</p>	<p>主題一：不孕的預防、治療與健保給付</p> <p>子題一：如何改善不孕的預防與治療？</p> <p>子題二：人工協助生殖是否應納入健保給付？</p> <p>子題三：如果開放代理孕母，代理懷孕的施術過程是否應納入健保給付？</p> <p>主題二：收養制度</p> <p>子題一：現行的收養制度有何問題？如何改善？</p> <p>子題二：收養是否成為代理孕母的替代選擇？</p> <p>主題三：合法化及相關議題</p> <p>子題一：代理孕母應該開放或禁止？</p> <p>子題二：如果要禁止，政府該如何進行管制？如果要開放，政府的介入程度和角色為何？</p> <p>子題三：如果要開放代理孕母，相關的資格條件、權益保障和爭議處理機制該如何設計？</p> <p>(1) 委託者和被委託者的資格條件之認定標準、認定程序與主管機關為何？</p> <p>(2) 委託者和醫師的關係如何規範以保障委託者的權益？</p> <p>(3) 如何保障代理懷孕者的權益與尊嚴？</p> <p>(4) 從懷孕到生產過程中嬰兒如有身心障礙，其責任歸屬該如何認定？</p> <p>(5) 代孕契約如何訂定？糾紛發生時如何處理？</p> <p>子題四：如果要開放代理孕母，需要哪些法律、醫療與社會的配套措施？</p>	<p>議題一：不孕夫妻一定要提供自己的精子、卵子，才能委託代孕嗎？代孕者可否同時提供卵子？</p> <p>議題二：懷孕期間，委託者、代孕者和胎兒的權益該如何保障？</p> <p>議題三：- 除了必要費用外，代孕者應該獲得報酬或補償嗎？是否需要居間代孕服務制度？該如何運作？</p>
<p>¹⁸ 林國明，〈</p>	<p>那些相關法條需要檢討與增修？¹⁸</p>	<p>審議式民主公民會議操作手冊》，行政院</p>

個別公民參與狀況	其餘小組成員較為重視一位曾就讀公共行政博士班、服務於經濟部的中高階公務人員的意見。讓他成為公民小組中的意見領袖，並在最後擔任結論報告主筆之一。 ^{19 20}	一位畢業於台大法律系之公民在討論時間極為活躍，並於討論時間以外亦積極遊說其他公民，故其意見極受其他公民重視與認同。 ²¹
重要結論	形成「不禁止，但是有條件開放代理孕母」之基本共識，並以此為結論報告基調。 ²² 認為代孕生殖應為有償。 ²³ 應當制定規範親子關係與代孕方式的特別法：代理孕母法。 ²⁴	借腹型、借精／借卵型代孕皆應儘速開放；國家應訂定定型化契約以保障各方權益；代孕應當無償，但仍可補償代孕者必要費用。 ²⁵
政策上影響	獲當時衛生署長陳建仁口頭讚賞，認為對代孕問題提供重要參考。 ²⁶ 使得原本奔走推動代孕政策之立法委員反而不再積極。 ²⁷	尚未有具體結果。
法規上影響	衛生署委託學者於2005年十月完成「擬定代理孕母法草案」之計劃。 ²⁸	尚未有具體結果。
備註	係我國政府機關首次就全國性公共政策議題進行之正式公民會議。 ²⁹ 有與會公民在會議結束後投書報紙，認為審議式民主可能僅是「形式上的民主」。 ³⁰	

- 青年輔導委員會，頁33-34。
- ¹⁹ 林祐聖，〈公共審議中討論風格的建構：社會關係與社會技能的影響〉，台灣社會學刊，51期，頁91。（2012年12月）
- ²⁰ 林祐聖，從歧見到共識—公民審議中的網絡平衡，台灣民主季刊，7卷2期，頁197。（2010年6月）
- ²¹ 代孕生殖法草案公民審議會會議紀錄0922-23.doc，頁2。
- ²² 「代理孕母公民共識會議」小組結論報告，國民健康局，頁2。（2004.09.18）
- ²³ 「代理孕母公民共識會議」小組結論報告，頁10。
- ²⁴ 「代理孕母公民共識會議」小組結論報告，頁11。
- ²⁵ 1010929代孕制度公民審議會會議公民結論報告.pdf，頁3-12。
- ²⁶ 黃世團，前揭註1，頁166。
- ²⁷ 黃世團，前揭註1，頁175。
- ²⁸ 黃世團，前揭註1，頁176。
- ²⁹ 黃世團，前揭註1，頁145。
- ³⁰ 黃啟榮，〈公民會議 形式民主〉，聯合報（2004.09.23）

公民共識會議的結論並無強制力，但卻足以作為經過深思熟慮的民意，提供權責機關作為施政及立法之參考。緊接著兩次代孕公民審議會之後，衛生署(今衛生福利部)均產生了新的立法草案，本計畫將兩次的草案重點彙整並比較如下：

	2005代理孕母法草案	2012代孕生殖法草案
§1	為健全代孕生殖之發展，保護代孕子女、代孕者及委託夫妻之權益， <u>並維護國民之倫理與健康</u> ，特制定本法。 <u>有關代孕生殖相關之規範與保護，依本法之規定，本法未規定者，適用其他相關法律。</u>	為因應不孕夫妻生育需求， <u>保障人權</u> ，保護代孕子女、代孕者及委託夫妻之權益，特制定本法。 <u>(第二項刪除)</u>
§3	<u>本法之主管機關為行政院衛生署。</u>	<u>本法所稱主管機關：在中央為衛生主管機關；在直轄市為直轄市政府；在縣(市)為縣(市)政府。</u>
§4	主管機關 <u>應</u> 邀集相關學者專家及民間團體代表，斟酌社會倫理觀念、醫學之發展及公共衛生之維護， <u>成立諮詢委員會，定期研討本法執行之情形。</u> <u>前項委員會成員之女性人數不得少於全體委員人數二分之一。</u>	中央主管機關 <u>得</u> 邀集相關學者專家及民間團體代表，斟酌社會倫理觀念、醫學之發展及公共衛生之維護， <u>提供本法相關事項之研議及諮詢。</u> <u>前項學者專家及民間團體代表之女性人數不得少於全體人數二分之一。</u>
第二章 醫療機構 實施代孕 生殖之管 理		<u>(刪除章節名稱)</u>
§5	依人工生殖法第六條許可實施人工生殖之醫療機構，始得實施代孕生殖。 <u>前項許可之有效期限為三年；期限屆滿仍欲繼續實施前項行為者，應於屆滿三個月前申請許</u>	依人工生殖法第六條許可實施人工生殖之醫療機構，始得實施代孕生殖。 <u>(第二項刪除)</u>

	可；其申請許可之條件、申請程序及其他應遵行事項之辦法，由主管機關定之。	
第三章 代孕生殖 之條件		第二章 代孕生殖之條件 (次後章節位置皆與04版相同， 唯有章節數不同。)
§6	夫妻雙方均有生殖細胞，無須接受他人捐贈，且經醫學評估無任何會透過懷孕 <u>傳染代孕者或胎兒而影響其健康之傳染性疾病</u> ，並有下列情形之一者，醫療機構始得為其實施代孕生殖： 一、妻無子宮者。 二、妻因子宮疾病難以孕育子女者。 三、妻 <u>因疾病</u> 懷孕或分娩會嚴重危及生命者。 前項各款情形，須先經主管機關許可得實施人工生殖之 <u>二家教學醫院證明屬實</u> 。 <u>前項教學醫院不含施術機構。</u>	夫妻雙方均有生殖細胞，無須接受他人捐贈，且經醫學評估無任何會透過懷孕而 <u>影響代孕者或胎兒健康之傳染性疾病</u> ，並有下列情形之一者，醫療機構始得為其實施代孕生殖： 一、妻無子宮者。 二、妻因子宮、 <u>免疫疾病</u> 或其他相類情形難以孕育子女者。 三、妻因懷孕或分娩會嚴重危及生命者。 前項各款情形，須先經主管機關許可得實施人工生殖之 <u>二家醫院評鑑為特優醫院證明屬實</u> 。 <u>(第三項刪除)</u>
§7	醫療機構實施代孕生殖前，對代孕者應為下列之檢查及評估： 一、一般心理、生理狀況。 二、有不適合懷孕或生產之疾病、傳染性疾病或其他經主管機關公告之疾病。 前項之檢查及評估，應製作紀錄。	醫療機構實施代孕生殖前，對代孕者應為下列之檢查及評估： 一、一般心理、生理狀況。 二、有不適合懷孕或生產之疾病、傳染性疾病或其他經主管機關公告之疾病。 前項之 <u>檢查及評估機構，不得為施術機構</u> ，檢查及評估內容應製作紀錄。
§8	符合下列各款情形者，醫療機構始得接受其為代孕者： 一、 <u>限本國籍</u> 。 二、二十歲以上、未滿四十歲以	符合下列各款情形者，醫療機構始得接受其為代孕者： 一、 <u>限具中華民國身分證者</u> 。 二、二十歲以上、未滿四十歲之

	<p>下之婦女。</p> <p>三、曾有生產之經驗者。</p> <p>四、經前條評估適合為代孕者。</p>	<p>婦女。</p> <p>三、曾有生產之經驗者。</p> <p>四、經前條評估適合為代孕者。</p>
§12	<p>委託妻年齡<u>三十五歲以下</u>者，醫療機構施行胚胎植入手術，每次僅能植入一個胚胎。委託妻年齡三十五歲至四十歲者，最多二個胚胎。委託妻年齡超過四十歲者，最多三個胚胎。</p>	<p>委託妻年齡<u>未滿三十五歲</u>者，醫療機構施行胚胎植入手術，每次僅能植入一個胚胎。委託妻年齡三十五歲至四十歲者，最多二個胚胎。委託妻年齡超過四十歲者，最多三個胚胎。</p>
§15	<p>代孕生殖所生之子女，從受精卵著床開始即視為委託夫妻之婚生子女。雖有事實足認代孕子女與委託夫妻無血緣關係，委託夫妻不得提起子女婚生否認之訴。但該子女與代孕者有血緣關係者，不在此限，其父母子女之關係適用民法規定。</p> <p>前項否認之訴應於該子女出生滿一年內為之。</p> <p>代孕子女依第一項規定為委託夫妻之子女者，委託夫妻應於代孕子女出生後六十日內持子女出生證明書與經法院認可之代孕契約，向戶政主管機關申請登記代孕子女為婚生子女。</p> <p>委託夫妻未依第三項規定於<u>一個月內</u>提出申請登記者，代孕者、主管機關、檢察官或社福團體得持第三項規定之文件申請登記代孕子女為委託夫妻之婚生子女。</p> <p>委託夫妻依第一項不得提起子女婚生否認之訴者，主管機關或當地社會福利主管機關應適時為心理輔導。</p>	<p>代孕生殖所生之子女，從受精卵著床開始即視為委託夫妻之婚生子女。雖有事實足認代孕子女與委託夫妻無血緣關係，委託夫妻不得提起子女婚生否認之訴。但該子女與代孕者有血緣關係者，不在此限，其父母子女之關係適用民法規定。</p> <p>前項否認之訴應於該子女出生滿一年內為之。</p> <p>代孕子女依第一項規定為委託夫妻之子女者，委託夫妻應於代孕子女出生後六十日內持子女出生證明書與經法院認可之代孕契約，向戶政主管機關申請登記代孕子女為婚生子女。</p> <p>委託夫妻未依第三項規定於<u>期限內</u>提出申請登記者，代孕者、主管機關、檢察官或社福團體得持第三項規定之文件申請登記代孕子女為委託夫妻之婚生子女。</p> <p>委託夫妻依第一項不得提起子女婚生否認之訴者，主管機關或當地社會福利主管機關應適時為心理輔導。</p>
§33	<p>非第五條第一項所定之醫療機</p>	<p>(已刪除。以下條文依序前移。)</p>

(2004年會議時已決議刪除合併至§35)	<u>構施行代孕生殖手術者，處新台幣十萬元以上五十萬元以下罰鍰。</u>	
§40/§39	醫療機構受第三十三條或 <u>第三十六條</u> 規定之處罰者，主管機關得 <u>限定</u> 其於一定期間停止實施代孕生殖業務。 醫療機構依前項規定受廢止許可處分者，自受廢止之日起 <u>二年內</u> ，不得重新依第五條第一項規定申請許可。	醫療機構受第三十三條或 <u>第三十五條</u> 規定之處罰者，主管機關得 <u>令</u> 其於一定期間停止實施代孕生殖業務。 <u>(第二項刪除)</u>

四、結論與建議

於研究組織上，本研究計劃首先梳理代孕議題於我國立法政策的討論歷程，並組織各領域專家所之討論爭點。於該部分可以看出，不論是於法學領域、社會團體討論或是醫藥學界的專家，其討論的重心均圍繞在委託夫妻、代孕者以及該出生子女，三方之間相互纏繞交錯而生的各種問題。而公民共識會議中，是否亦對這些問題做出討論而得出共識，又小組成員其是否足專業知識為支撐其討論，這正是下一部分所要討論的部分之一。

於代孕技術近用的議題，2004年會議中之討論乃多於2012年，而其結論鑒於醫療資源之利用和保障工序良俗的觀點，乃做出有條件限制之開放代孕技術。2012之會議，誠如前述，其係根據前次會議之結論，是以對於代孕技術近用的問題之討論，乃是更進一步的考量其應該處於怎樣的條件限制下開放較為適妥，其結論基於同人工生殖法相似的考量下，認為使用捐贈配子此型態之代孕亦可以開放之，期相較2004年做出者更加開放。而於考量代孕者其權益保障方面，2004年會議中乃由隱私權和身體自主權為核心考量，認為其資料非經同意不可外泄，且於非必要之時不可干擾其日常生活，並須提供專家為諮詢。在2012年會議對此項目的討論，乃是較巨觀地由如何衡平委託者、代孕者與該子女三方之權利與利益來做討論。其呼籲政府應於代孕制度的運作中，扮演積極介入的角色，並建議設置專家委員會或由具專業之非營利組織為審閱代孕契約的簽訂。

最後，借代孕者之腹出生子女，該子女之法定父母為何此一議題之，係是關係到子女法律上權益保障。首先，觀乎我國現行民法規範下，父母子女關係之認定，係是採分娩者為母之主義，而父子關係則是再觀其與母之婚姻關係而定。是以，於民法親屬之體系下，父母子女關係即根據懷孕分娩此一事實，去認定子女法律上之母親。蓋當時制定民法的立法環境下，殊難想像懷孕女性和該子女間並

無基因上的連結關係，是已採取依分娩此一事實，明確快速地認定子女其法律上母親，而給予該子女法律地位上之保障。

然而，於現行人工生殖技術之運用下，懷孕者和其所懷之子女之間，不具備基因上之連結乃有可能，因此於這樣的情狀下，直接適用民法親屬編之原則並非妥當。是以代孕制度下，該出生子女其法定父母之決定，究竟是應該另令他法規範，又或是修正民法規定之分娩者為母此一原則而為因應。根據兩次會議的討論結果，可知其意見多認為另立新法，處理於代孕制度下出生子女之父母子女關係。2004年會議之討論後之共識，係建議於子女出生後直接視為委託夫妻之子女，然於代孕期間該子女之法定父母未明確釐清，將有可能造成於懷孕期間當中，代孕者和該子女之利益發生衝突時，無人可替該子女之權益為主張。而2012年會議之討論，卻並未對此議題達成共識，蓋有一支持當時草案中之規定，另一則認應以子女出生時為界，階段性之劃分，即懷孕時為代孕者而子女出生則為委託夫妻為當。

兩次公民共識會議所提出之結論報告，都是讓上位的立法者了解到，現今社會大眾對於代理孕母此議題的想法究竟為何。正如在結論報告所指出：「公民審議會議是民主社會尋求共識的一種模式，但並非唯一的模式。公民審議結論並非從此一槌定音，謹希望這份報告能有拋磚引玉之效，刺激社會各界理性討論代孕制度之各種爭議。」

五、參考文獻

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研究報告

侯英冷, 探討人工生殖、基因篩檢與人工生殖相關法律問題, 國科會研究報告。

侯英冷, 代理孕母法草案研擬, 行政院衛生署國民健康局研究報告。

六、自評報告

科技部補助專題研究計畫成果報告自評表

<p>請就研究內容與原計畫相符程度、達成預期目標情況、研究成果之學術或應用價值（簡要敘述成果所代表之意義、價值、影響或進一步發展之可能性）、是否適合在學術期刊發表或申請專利、主要發現（簡要敘述成果是否有嚴重損及公共利益之發現）或其他有關價值等，作一綜合評估。</p>
<p>1. 請就研究內容與原計畫相符程度、達成預期目標情況作一綜合評估</p> <p>■達成目標</p>
<p>2. 研究成果在學術期刊發表或申請專利等情形：</p> <p>論文：■已發表 □未發表之文稿 □撰寫中 □無</p>
<p>3. 請依學術成就、技術創新、社會影響等方面，評估研究成果之學術或應用價值（簡要敘述成果所代表之意義、價值、影響或進一步發展之可能性），如已有嚴重損及公共利益之發現，請簡述可能損及之相關程度。</p> <p>在本研究計畫執行過程中，計畫主持人參與了數場國內外研討會並發表論文。透過研討會與法學、生命倫理學、性別研究等領域的學者交流意見，對於有關人工助孕科技、女性生育自主、以及代孕的法律規範和政策方針都有更深入的瞭解。研討會之後，計畫主持人對於會議中發表的論文進行補充和修正，並在論文全文完成後，選擇適合該文主題之國內外著名期刊投稿。</p> <p>除了部分會議論文仍在投稿審查中，本人執行中之性別與科技研究計畫「非醫療因素冷凍卵子之法律與生命倫理議題研究(103-2629-H-007-001-)」已於匿名雙外審之後，刊登於新加坡國立大學(National University of Singapore)所發行的期刊<i>Asian Bioethics Review</i>。以下謹列出本計畫執行期間已出版論文及已發表的研討會論文：</p> <ol style="list-style-type: none">1. Benjamin Capps, Yun-Hsien Diana Lin, Voo Teck Chuan, 2014.9, "Of Human Elective Egg Freezing (人類卵子冷凍保存之法律與倫理學分析)", <i>Asian Bioethics Review</i>, Vol. 6, Issue 5, p.1-64. (本刊物由 National University of Singapore 發行)2. 林昀嫻, 2013.9, 「基因產品法律與倫理—DNA 親子鑑定服務之規範」, 「第三屆兩岸清華法學論壇」(北京清華大學法學院、國立清華大學科技法律研究所主辦), 北京。3. 林昀嫻, 2013.10, 「台灣女同志母職研究：法律議題及最新進展」, 「性別正義：探索家庭、校園與職場的重構機制研討會」(國立清華大學歷史研究所、台灣文學研究所、亞太文化研究中心、性別研究室、台聯大文化研究學程主辦)。4. 林昀嫻, 2014.4, 「人工助孕科技下的女性生育自主：性別正義、科技

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附錄一 第12屆世界生命倫理學大會出國心得報告

一、目的

本次出國的目的有二：首先是前往墨西哥城參加第十二屆世界生命倫理學大會(12th World Congress of Bioethics)，本人擔任口頭報告人，發表了研究論文一篇，標題為「代理孕母公民共識會議：生育自主、生育權與性別觀點(“Consensus conferences on gestational surrogacy: autonomy, procreative rights and gender”)」。而於研討會結束後即前往舊金山，因為本次出國的第二個目的，是針對有關「性別歧視紛爭解決機制」對二位美國學者進行深度訪談。分別為柏克萊加州大學法學院(School of Law, University of California, Berkeley)的Herma Hill Kay教授及舊金山加州大學醫學中心(Medical Center, University of California, San Francisco)的Carroll Brodsky教授。

二、過程

本人於2014年6月24日深夜從桃園機場啟程，在舊金山轉機飛往墨西哥的首都墨西哥城(Mexico City)，抵達時為6月25日清晨。之後立即前往世界生命倫理學大會的會場報到，領取會議資料。本次會場位於改革大道的希爾頓飯店(Hilton Mexico City Reforma hotel)，在6月25~28日的會議期間，每天早上八點半起均緊密安排一連串的大會演講(keynote speeches)、工作坊(workshop)及研討場次(sessions)。由於參與情形相當熱烈，每一時段均有10個以上的研討場次同步舉行(parallel symposia)，一直到晚間八點才結束，議程相當充實而豐富。

本人的報告場次係6月27日下午4:45~6:15舉行，場次名稱為「性別與生育(Gender and Reproduction)」，由知名的生命倫理學家Farhat Moazam教授主持。同場報告的除了本人以外，還有來自荷蘭馬斯垂特大學(Maastricht University)的Hens Kristien教授、巴西里約熱內盧聯邦大學(Federal University of Rio de Janeiro)的Fabio Oliveira教授，以及來自英國曼徹斯特大學(University of Manchester)的年輕學者Rachel Warren。報告人連同主持人一共五人，均為女性學者。6月29日參加了由墨西哥的主辦團隊所組織的文化活動之後，30日便起程前往美國舊金山，展開另一段工作行程。本次會議攜回資料為會議摘要一冊及議程一冊。

本人於6月30日晚間抵達舊金山，隔天(7月1日)立即拜訪柏克萊加州大學法學院的前院長，Herma Hill Kay教授。本次的拜訪主要係因執行「季風亞洲與多元文化」第三階段第二年子計畫，特別針對性別歧視案件的紛爭解決方式，希望能了解美國加州的作法，以便與東亞各國進行比較研究。緊接著7月3日前往拜訪

舊金山加州大學醫學中心的Carroll Brodsky教授，針對工作場所性騷擾的性別歧視類型，進行深度訪談。Brodsky教授並將他的著作"The Harassed Worker"致贈本人。

三、心得

本人早在2012年於吉隆坡舉行的亞洲生命倫理學大會(Asian Bioethics Conference)即與本場次主持人Farhat Moazam教授有一面之緣，當時是在報告後回答她的提問，並在會後繼續討論。這次在墨西哥的會議上再度相見，彼此都很高興。尤其這次為本人為第一次參加世界生命倫理學大會，以往僅參加過亞洲生命倫理學研討會，因此格外珍惜。本會議的性質為跨領域研究，主要涉及的科目有醫療倫理、健康法制、醫療疏失的紛爭處理、生命倫理與哲學、生命倫理與宗教、藥學與法律等，相當多元。與會者多半為醫師、法學教授、倫理學或哲學教授、醫院社工師、律師、法官、醫療相關學會領導人等。依據大會統計，本次與會學者高達1200人，來自72個國家或地區。

本人報告之後，引發多位學者提問與評論，均對於我國以公民共識會議的方式，試圖為代孕政策找出可行對策而感到印象深刻。由於參與「第12屆世界生命倫理學大會」，有了與歐美地區學者交流的舞台，也藉此機會了解最新的研究議題及進展，更提升了台灣學術研究的能見度，本人相當珍惜並感謝科技部與教育部的補助！

有關二位美國教授的訪談，則為本人多年來一直想完成的工作。性別歧視相關的紛爭是否適合以法院為解決場域？訴訟是否能為當事人帶來正義？訴訟外的紛爭解決方式，例如調解或商談，是否比訴訟更能有效解決性別歧視或工作場所的性騷擾案件？本次訪談的美國教授均為本議題之知名學者，深度訪談的收穫豐碩，期待能展現在研究成果中。

四、報告建議事項

在本人研究助孕科技的法律與倫理議題之時，深感學科之間整合的研究環境與研究方法至為重要。透過與其他國家的學者與實務工作者的交流切磋，對於尋找更為開闊的研究視野和更有效的問題解決方式，實有助益。另一方面，本人也藉由報告及參與討論，有效地讓國外學者與實務工作者了解我國相關研究的進展，有助於提升我國在國際學術舞台上的能見度及影響力。盼能持續受到政府及學校支持參與科際整合國際研討會，非常感謝科技部及教育部的經費支持，讓這樣交流與學習成為可能！

Consensus Conferences on Gestational Surrogacy: Autonomy, Procreative Rights and Gender

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I. Introduction: History of Surrogacy Legislation in Taiwan

The second Sunday in May is the Mother's Day in Taiwan. On this day, many people celebrate with their mothers and honor motherhood. But not every woman has the chance to spend the Mother's Day with their own children. A few days before the Mother's Day in 1996, two infertile women suffered from uterine hypoplasia petitioned to the Congress, asking for the legalization of surrogacy in Taiwan. One of them, Zhao-Zi Chen is a famous proponent of surrogacy in Taiwan, who had hold that surrogacy is a support of the infertile people's human right and admitted that she herself had tried to use surrogacy for a dozen times while it was not legalized.³¹ And the other one, an anonymous woman, even wept in front of the media, saying that "is a woman who is not able to bear her own child for the sake of uterine hypoplasia excluded from the possibilities of having intimate relationships or marriage? Can she have any choices other than being a nun, a sister, or a mistress?"³² It has been nearly 20 years after the couple of infertile women let their voices be heard, but the legalization of surrogacy in Taiwan is still underway and unable to solve the legal and ethical disputes in the way. To understand the whole story of surrogacy in Taiwan, we should study the history of practice and legislation artificial reproduction here.

³¹ Chenzhaozi cu lifa "buyun zhende hentongku (陳昭姿促立法「不孕真的很痛苦」), PINGGUORIBAO (蘋果日報) [THE APPLES DAILY], Aug. 23, 2009.

³² Chen Meihua (陳美華), Wuhua huo Jiefang: Nüxingzhuyizhe guanyu Dailiyunmu de Zhenglun (物化或解放——女性主義者關於代理孕母的爭論) [Objection or Liberation: A Debate over Surrogacy by Feminists], YUEDANFAXUEZAZHI (月旦法學雜誌) [THE TAIWAN LAW REVIEW], No. 52, April 1999, at 20.

First of all, the history of laws and practices of artificial reproduction in Taiwan should be explored in general. Not only because surrogacy is one aspect of artificial reproduction practice, but also because the discussions and disputes of surrogacy and artificial reproduction have been tangled in Taiwan for over decades. To better understand the issue of surrogacy in Taiwan, the tie of surrogacy and artificial reproduction here should definitely be noted.

Medical science in Taiwan has been well developed for decades, and most advanced technology or treatments are thus often practiced here. For instance, artificial reproductive technology (ART) in Taiwan has developed just along the front of global trend. The first test tube baby in Taiwan was born in April, 1985, not quite long after the very first case in England in 1978. However, as the scientific researches and practical technologies have been improved more and more rapidly, those most edge-cutting medical technologies are often practiced without proper corresponding regulations. And ART in Taiwan would again be an example.

To begin with, there had not been any regulation for ART in Taiwan until a year later after that the first case of test tube baby was successfully practiced. In concern of the moral and legal issues involved in practice of ART, the Department of Health (renamed as the Ministry of Health and Welfare since 2013) had set up a consultant group in 1986 to formulate regulations and policies on and of ART in Taiwan. Several months later, Guidance of Artificial Reproduction was composed by the consultant group and was promulgated by the Department of Health. Anonymous donation of sperm and eggs was officially allowed according to this Guidance; on the other hand, clone and surrogacy were banned by it.

However, this Guidance was composed and announced in a rush of few months of preparation, and flaws could be found both in substantial and procedural aspects of it. It was not clear that how those who act against the Guidance would be punished, and furthermore, the regulation status of such administrative directions or guidance were lower than codes and laws and thus made the normative force of the mentioned Guidance rather weak. What is worse is that, the Guidance was not even promulgated through a proper procedure, which requires any ordinance to be reviewed and approved by the Congress before it is promulgated. Thus it would not be a surprise that this Guidance was out of effect after a short while for such procedural defect. Though the Department of Health composed another ordinance, Administrative Regulation of Artificial Reproduction Technology, afterwards, and promulgated it in 1994, urges and demands of a more precisely tailored set of regulations had risen from different concerning fields. The Department of Health therefore started to compose a draft act for artificial reproduction in 1996. However, the Artificial

Reproduction Act has not been promulgated until the year of 2007.

According to Artificial Reproduction Act, practices of different kinds of artificial reproductive technology are allowed in Taiwan under certain circumstances. On the contrary, surrogacy has not been legally granted since it was banned in 1996 due to multiple controversies surrogacy triggers in ethical, legal, social respects. In fact, the debates over whether or not to allow surrogacy could be taken as the main obstacle in the legislative process of Artificial Reproduction Act. The Act might not even be approved by the Congress in 2007 if the articles about surrogacy were not pulled out in 2004.

Though surrogacy has not been legally approved since the 1996 ordinances, there are infertile people still need surrogacies to help them having a child of their own, as when they are those who do not fit in the requirements in Artificial Reproduction Act to use artificial reproductive technologies. Certain opinions from professional fields and request from the mentioned infertile patients have been urging the authority concerned to approve the practice of surrogacy. In response to the requests for legal surrogacy, the Department of Health had held two civil conferences in 2004 and 2012 to collect opinions from professionals and lay people, in order to develop and improve a draft of surrogacy legislation. Nevertheless, the debates have not been entirely closed by the civil conferences and no promulgated legislation has been designed for surrogacy until now.

Still, the surrogacy civil conferences in Taiwan might be considered a significant and special benchmark in both practice of deliberative democracy and legal discussion of surrogacy. Surrogacy is an issue where medical, legal, gender, ethical controversies meet. Is it truly an appropriate situation deliberative democracy to apply in? How would the theories of deliberative democracy be lived out in the real practices in surrogacy civil conferences? By examining the debates about surrogacy from professionals and in civil conferences, this present research hopes to make some inspection into the surrogacy legislation process in Taiwan and practice of deliberative democracy during the process.

II. The Present Policy and Controversies of Surrogacy

In the context of surrogacy, controversies and challenges from the aspects of law, ethics, and gender are intertwined. How could, or how did, the civil conference help clarify the complex case of surrogacy? Although the scheme of civil conference is developed along the theory of deliberative democracy and is designed for providing

solutions to controversial issues, would such scheme satisfy the challenge from surrogacy issue? On the other hand, the theory of communication and action by Jürgen Habermas is often employed to analyze the interactions and opinions in a civil conference, and it could generally probe into the linchpin. But when it comes to analysis of an issue highly relevant to gender, such as legislation and practice of surrogacy, how should we adopt the theory of communication and action?

A. Legal Obstacles and Discussions

We've known how surrogacy reproduction is clinically operated. The risks and difficulties in the practice of surrogacy would be better and better prevented, as modern medical technology progresses. Nevertheless, the legitimacy obstacles which occur in the way, where surrogacy reproduction is legally performed, are not that easy to clear or even circumvent by.

First of all, some would say that the surrogacy technology itself is already at odds with the basic value of the whole legal system. Human dignity is dominant and essential in Taiwan's legislations, in which the subjectivity of every single person shall be equally respected. Yet as the surrogacy contract signed by the surrogate and the infertile couple seems to transform the idea of pregnancy into "manufacture process of person" which could be the subject of a contract and undermine the concept of human dignity.³³ While a person becomes something which could be "manufactured," and a womb something where the manufacture process takes place, both the surrogate and the child would be under objection and alienation. The potential damage to human dignity caused by surrogacy contract should be prevented, and surrogacy should not be legally permitted under such context.³⁴

However, surrogacy could still be substantially practiced even when the technology is not permitted by the law, and legal disputes occurs therefrom would be more difficult under such circumstance.³⁵ The legal analysis of surrogacy contracts is

³³ Li Zhenshan (李震山), *Cong Xianfa Baozhang Shengmingquan ji Renxingzunyan zhi Guandian Lun Rengongshengzhi* (從憲法保障生命權及人性尊嚴之觀點論人工生殖) [Discourses on Artificial Reproduction from the Viewpoints of Constitutional Protection over Lives and Dignity], YUEDANFAXUEZAZHI (月旦法學雜誌) [THE TAIWAN LAW REVIEW], No. 2, June 1995, at 21.

³⁴ Li Zhenshan (李震山), *Cong Xianfa Baozhang Shengmingquan ji Renxingzunyan zhi Guandian Lun Rengongshengzhi* (從憲法保障生命權及人性尊嚴之觀點論人工生殖) [Discourses on Artificial Reproduction from the Viewpoints of Constitutional Protection over Lives and Dignity], YUEDANFAXUEZAZHI (月旦法學雜誌) [THE TAIWAN LAW REVIEW], No. 2, June 1995, at 21.

³⁵ Lei Wenmei (雷文玫), *Liangdui Fumuqin de Bahe: Cong Fumuzinüguanxi zhi Rending kan Jinlai Dailiyunmuhefahua Zhengyi* (兩對父母親的拔河：從父母子女關係之認定看近來代理孕母合法化爭議) [Push-Pull between two couple of parents: Inspect into the Disputes about Legalization of Surrogacy from the View of Recognition of Legal Parentage], YUEDANFAXUEZAZHI (月旦法學雜誌) [THE TAIWAN LAW REVIEW], No. 52, April 1999, at 48-49.

thus very important. It is necessary to understand how the current legal system response to disputes triggered in a surrogacy context, and if there is any need of explicit legislation for surrogacy.³⁶ The surrogacy contract could bring disputes and new perspectives to family law and contract law, and it should thus be studied under respective contexts.

For example, the woman gives birth to a child would be assumed as the birth mother and legal mother of the said child under Taiwan Civil Code. Nevertheless, the woman gives birth to and the one who is genetically connected to a child could be different if technology of surrogacy is applied. Such condition is still unthinkable in 1940, when the Taiwan Civil Code is promulgated, and it challenges the legal concept of parentage altogether. Therefore, it is suggested the definition of parentage should be decided according to a new principle which differs from childbirth facts or genetic connections in the context of surrogacy.³⁷ On the other hand, the principle of “best interest of the child” is suggested to solve the mentioned problem by some, but the interest of the child would be hard to assess when the said child is not even born yet.³⁸ And if the legal parentage could be freely decided by the signing parties of a surrogacy contract, the power of such contract would be too overwhelming to be explained on a legal basis, and the structure of legal relationships built by Taiwan Civil Code would be definitely be challenged.

Furthermore, legal parentage of the child is not the only legal dilemma which could occur in a surrogacy contract. Legitimacy and limit of the contract itself, in fact, are still controversial. First of all, is a surrogacy contract a contract that could exploit the body and autonomy of the surrogate? When the applicant and the surrogate have consulted with professionals and are informed of the risks in a surrogacy, some would say that the contract is therefore signed in the proper balance of both parties’ interest and free will. Exploitation of the surrogate would not thusly occur. The surrogate

³⁶ Lei Wenmei (雷文玫), Liangdui Fumuqin de Bahe: Cong Fumuzinüguanxi zhi Rending kan Jinlai Dailiyunmuhefahua Zhengyi (兩對父母親的拔河：從父母子女關係之認定看近來代理孕母合法化爭議) [Push-Pull between two couple of parents: Inspect into the Disputes about Legalization of Surrogacy from the View of Recognition of Legal Parentage], YUEDANFAXUEZAZHI (月旦法學雜誌) [THE TAIWAN LAW REVIEW], No. 52, April 1999, at 49.

³⁷ Lei Wenmei (雷文玫), Liangdui Fumuqin de Bahe: Cong Fumuzinüguanxi zhi Rending kan Jinlai Dailiyunmuhefahua Zhengyi (兩對父母親的拔河：從父母子女關係之認定看近來代理孕母合法化爭議) [Push-Pull between two couple of parents: Inspect into the Disputes about Legalization of Surrogacy from the View of Recognition of Legal Parentage], YUEDANFAXUEZAZHI (月旦法學雜誌) [THE TAIWAN LAW REVIEW], No. 52, April 1999, at 51.

³⁸ Lei Wenmei (雷文玫), Liangdui Fumuqin de Bahe: Cong Fumuzinüguanxi zhi Rending kan Jinlai Dailiyunmuhefahua Zhengyi (兩對父母親的拔河：從父母子女關係之認定看近來代理孕母合法化爭議) [Push-Pull between two couple of parents: Inspect into the Disputes about Legalization of Surrogacy from the View of Recognition of Legal Parentage], YUEDANFAXUEZAZHI (月旦法學雜誌) [THE TAIWAN LAW REVIEW], No. 52, April 1999, at 51-52.

could rescind the contract if she signed it under threats or frauds.³⁹

On the other hand, whether a surrogacy contract is a kind of contract which is already against public orders or morals is also at debate. Some suggest that surrogacy contract is actually commercialization of children, and make adoption, which has to be gratuitous, a comparative example. However, there are also opinions indicates that a gratuitous surrogacy contract might be unfair to the surrogate who undertakes discomfort and risks of pregnancy.⁴⁰ While on the opposites, some others indicate that, the payment in a surrogacy contract is to cover the burden taken by the surrogate during pregnancy, and the payment itself would not belittle the idea of childbirth and the child as a person.⁴¹

Moreover, due to the specialness of surrogacy contract, the limit and the enforceability of it are also highly arguable. How much can the applicant restrict the diet, behaviors, or whereabouts of the surrogate during the pregnancy or even during medical emergencies? If any restriction is put onto the surrogate by the contract, would it be enforceable? And without doubt, the enforceability of the contract would be very important when it comes to the condition that the surrogate refuses to give the child to the applicant couple. All in all, the legal basis and the technical detail of a surrogacy contract is still an impasse while the medical technique of surrogacy has been well developed.

B. Social Perspectives

Many legislative obstacles and disagreements are on the way to a consensual set of regulations for surrogacy, not to mention that there are still many complicated issues disputed other than the legal ones. Though the legislation details have been heatedly discussed, there are voices from scholars or even legislators⁴² reminding

³⁹ Lei Wenmei (雷文玫), *Liangdui Fumuqin de Bahe: Cong Fumuzinüguanxi zhi Rending kan Jinlai Dailiyunmuhefahua Zhengyi* (兩對父母親的拔河：從父母子女關係之認定看近來代理孕母合法化爭議) [Push-Pull between two couple of parents: Inspect into the Disputes about Legalization of Surrogacy from the View of Recognition of Legal Parentage], *YUEDANFAXUEZAZHI* (月旦法學雜誌) [THE TAIWAN LAW REVIEW], No. 52, April 1999, at 52-53.

⁴⁰ Chen Miaofen (陳妙芬), *Fulan de Pingdeng? Tan Dailiyunmu de Faliwenti* (浮濫的平等？談代理孕母的法理問題) [Excessive Equality? Some Issues about Surrogacy in Legal Principles], *YUEDANFAXUEZAZHI* (月旦法學雜誌) [THE TAIWAN LAW REVIEW], No. 52, April 1999, at 10.

⁴¹ Lei Wenmei (雷文玫), *Liangdui Fumuqin de Bahe: Cong Fumuzinüguanxi zhi Rending kan Jinlai Dailiyunmuhefahua Zhengyi* (兩對父母親的拔河：從父母子女關係之認定看近來代理孕母合法化爭議) [Push-Pull between two couple of parents: Inspect into the Disputes about Legalization of Surrogacy from the View of Recognition of Legal Parentage], *YUEDANFAXUEZAZHI* (月旦法學雜誌) [THE TAIWAN LAW REVIEW], No. 52, April 1999, at 53-54.

⁴² Jian Xixie (簡錫偕), *Dailiyunmu Falü Waiyizhang* (”代理孕母”法律外一章) [Surrogacy: A Chapter out of the Legislation], *Funü yu Liangxingyanjiu Tongxun* (婦女與兩性研究通訊) [Bulletin of Women and Gender Studies], No. 44, October 1997, at 9.

people of the importance of issues which could not be simply dealt with by regulations. The needs and disputes of surrogacy should be concerned delicately from different aspects, for example, opinions from social perspectives have been playing important roles in the debate over surrogacy in Taiwan.

Ever since the Department of Health announced its policy of legalizing surrogacy, the viewpoints from feminists and female rights' groups have participated in the debate, and those points of views, which are more gender-sensitive than others, are highly valued in such an issue in which subjectivity of women can never be neglected. However, it should be noted that different positions are taken in these arguments. For instance, Taipei Association for the Promotion of Women's Rights had firmly pronounced its opposition to legalization of surrogacy and its concern of that the surrogacy technology is adopted by patriarchal domination to strengthen the exploitation over women.⁴³ Arguments in assent with such position consider that the technology of surrogacy is actually spawned by the traditional and patriarchal concept of "passing the family name through bloodline" in which the reproductive autonomy of women is ignored, and the legalization of surrogacy could only further consolidate oppression over women by employing them as "procreation tools." Furthermore, as surrogacy being legalized, it would somehow be commercialized too and becomes a mechanism in which the body autonomy of socially vulnerable women could be marketable.⁴⁴

On the other hand, there have been feminism voices pronounced in positive position for surrogacy. Opinions from such perspective indicate that, surrogacy should loosen the tie between every woman and the idea of maternity, and therefore release women from the traditional expectation.⁴⁵ To be exact, it is the reason why surrogacy triggers tremendous controversies that the conventional images of birth and of maternity have been repainted by such technology.⁴⁶ According to scholar Mei-Hua

⁴³ Huang Shituan (黃世團), *Gongminhuiyi yu Daiyiminzhu de Zhidulianjie: yi Dailiyunmu wei Fenxigean* (公民會議與代議民主的制度連結—以「代理孕母」為分析個案) [The Institutional Connection of Consensus Conference and Representative Democracy—A Case Study of Surrogate Motherhood in Taiwan] 139 (2009). (Unpublished Master Thesis, Graduate Institute of National Development, National Taiwan University) (copy on file with the Graduate Institute of National Development, National Taiwan University). The original author provided an English title for the thesis, but all the other parts of this thesis are written in Chinese.

⁴⁴ Jian Xixie (簡錫偕), *Dailiyunmu Falü Waiyizhang* ("代理孕母"法律外一章) [Surrogacy: A Chapter out of the Legislation], *Funü yu Liangxingyanjiu Tongxun* (婦女與兩性研究通訊) [Bulletin of Women and Gender Studies], No. 44, October 1997, at 9-10.

⁴⁵ Liao Yici (廖怡慈), *Shengyuzhengce Guifan de Hefazhengdangxing Yanjiu: Nüxingzhuyifaxue de Guandian* (生育政策規範的合法正當性研究—女性主義法學的觀點) [Legitimacy of Policy in Reproduction: A Viewpoint from Feminism Jurisprudence] 93 (2006). (Master Thesis, Institute of Law for Science, Technology, National Tsinghua University, 2008) (copy on file with Main Library, National Tsinghua University).

⁴⁶ Liao Yici (廖怡慈), *Shengyuzhengce Guifan de Hefazhengdangxing Yanjiu: Nüxingzhuyifaxue de*

Chen, the practices of maternity differs by person, and what surrogacy does is simply providing a new way to experience it, in which the process of insemination, pregnancy, and laboring is not necessarily combined in one person, and the patriarchal sovereignty of bloodline would also be challenged by this change.⁴⁷

There are also viewpoints from different perspectives. For example, some discourses take a sentimental approach to illustrate the positive effect of reproductive technology and infertility treatment,⁴⁸ indicating that most of the female patients choose to adopt surrogacy as when they've gone through all the other infertility treatments as they could, yet the child born in surrogacy could still "take away the grief and bring to them delight" and therefore "complete the patients' beloved family."⁴⁹

C. Opinions from Medical Experts and the Patients

Surrogacy was expressly banned in the Administrative Regulation of Assisted Reproductive Technology, yet it was not even mentioned in the current Assisted Reproduction Act. However, surrogacy may not be regulated at present, but it does not mean that this technique could be adopted at will since there are somewhat legal and ethical obstacles around.

The Department of Justice just published a judicial interpretation, declaring that children born through surrogacy should not be recognized as the legitimate children of the delegators in accordance with Taiwan Civil Code and Assisted Reproduction Act.⁵⁰ If the delegator tries to adopt the children born through surrogacy, legal disputes and custody litigations would possibly occur therefrom.⁵¹ Despite the blur

Guandian (生育政策規範的合法正當性研究—女性主義法學的觀點) [Legitimacy of Policy in Reproduction: A Viewpoint from Feminism Jurisprudence] 89 (2006). (Master Thesis, Institute of Law for Science, Technology, National Tsinghua University, 2008) (copy on file with Main Library, National Tsinghua University).

⁴⁷ Chen Meihua (陳美華), Wuhua huo Jiefang: Nüxingzhuyizhe guanyu Dailiyunmu de Zhenglun (物化或解放——女性主義者關於代理孕母的爭論) [Objection or Liberation: A Debate over Surrogacy by Feminists], YUEDANFAXUEZAZHI (月旦法學雜誌) [THE TAIWAN LAW REVIEW], No. 52, April 1999, at 18-28.

⁴⁸ Zeng Qirui (曾啟瑞), Buyun Shengzhijishu Mianmianguan yu Dailiyunmu (不孕、生殖技術面面觀與代理孕母) [Introductions to Infertility, Reproductive Technology and Surrogacy], YILIAOPINZHIZAZHI (醫療品質雜誌) [JOURNAL OF HEALTHCARE QUALITY], No. 3, Vol. 4, May 2010, at 38.

⁴⁹ Zeng Qirui (曾啟瑞), Buyun Shengzhijishu Mianmianguan yu Dailiyunmu (不孕、生殖技術面面觀與代理孕母) [Introductions to Infertility, Reproductive Technology and Surrogacy], YILIAOPINZHIZAZHI (醫療品質雜誌) [JOURNAL OF HEALTHCARE QUALITY], No. 3, Vol. 4, May 2010, at 41.

⁵⁰ Fawubu Falüzi di 10100573820 hao Han (法務部法律字第 10100573820 號函) [Judicial Interpretation No. 10100573820, Ministry of Justice Jun. 18, 2012].

⁵¹ Shilin Difangfayuan Minshi Panjue 100 niandu Qinzi di 83 hao (臺灣士林地方法院民事判決100年度親字第83號) [Shilin Dist. Ct. May 24 2012].

legitimacy of surrogacy, from the medical aspects, there are yet issues about surrogacy which should be dealt with before any legal movement.

For instance, since India legally allows surrogacy, foreign people who live where surrogacy is not legalized yet have started to have “surrogacy trips” to India. By observation of the India experiences, some medical professional would reflect on and give suggestions to Taiwan’s surrogacy. The cost of surrogacy is lower in India than in some other country, concerning the inexpensive medical expenses in Taiwan, what India is facing would possibly be the future issue in Taiwan. However, the medical risk, ethical controversies, management of medical services could all become serious problems. If the supportive legislations or policies are not schemed properly, permitting surrogacy might be just as building a “baby farm.”⁵²

Moreover, legalizing surrogacy would not only bring legal and social change to Taiwan, but would also weave new texture into the related medical practices. For instance, maternal-child nursing is a kind of nursing treatment provided to strengthen the pregnant woman’s emotional linking with the child she carries, but whether surrogate should be treated with maternal-child nursing and how the nursing professionals treat the surrogate and the infertile delegator would be important issues in the nursing profession.⁵³

Nevertheless, some medical professionals approve the legalization of surrogacy and consider it as benefit to the infertile patients, especially the female ones. Some indicate that the reproductive technology could not free women from patriarchy if parentage is still considered as the personal responsibility of women rather than responsibility of the whole society,⁵⁴ yet in the same time, reproductive technology could be a way to achieve the reproductive autonomy of the infertile people, and the surrogacy could still be seemed as an helping occupation under such contexts.⁵⁵

⁵² Wang Jiaqi (王嘉琦), Yindu “Waibaochanye” Xinyizhang Dailiyunmu Shangye Pengbofazhan (印度「外包產業」新一章 代理孕母商業蓬勃發展) [A New Chapter in Outsourcing in India: Surrogacy Thrives as an Industry], *JIANKANGSHIJIE (健康世界) [HEALTH WORLD]*, No. 266, Feb. 2008, at 78.

⁵³ Cai Xiumei & Chen Zhanghui (蔡秀美、陳彰惠), Cong Muyuhuli tan Dailiyunmu Hefahua (從母育護理談代理孕母合法化) [Legitimizing Surrogate Mothers: A Maternal-Child Nursing Perspective], *HULIZAZHI (護理雜誌) [THE JOURNAL OF NURSING]*, No. 3, Vol. 45, June 1997, at 23-24.

⁵⁴ Li Jiayan (李佳燕), Cong Xingbieguandian Pouxu Funü yu Rengongshengzhijishu (從性別觀點剖析婦女與人工生殖技術) [Analysis of Women and ART: From A Gender Viewpoint], *YILIAOPINZHIZAZHI (醫療品質雜誌) [JOURNAL OF HEALTHCARE QUALITY]*, No. 3, Vol. 5, May 2011, at 77

⁵⁵ Li Jiayan (李佳燕), Cong Xingbieguandian Pouxu Funü yu Rengongshengzhijishu (從性別觀點剖析婦女與人工生殖技術) [Analysis of Women and ART: From A Gender Viewpoint], *YILIAOPINZHIZAZHI (醫療品質雜誌) [JOURNAL OF HEALTHCARE QUALITY]*, No. 3, Vol.

Furthermore, there are also arguments which are based on very technical grounds. For example, objection of uterus or woman's body has always be considered as a controversial ethical effect brought by surrogacy, yet some opinions claims that an uterus is basically "an organ/tool to bear children" and the surrogate could absolutely "use" it under free will. Moreover, the moral impacts brought by reproductive technology have already been accepted in modern society, and legalization of surrogacy should be admitted therefore, as it could ensure the happiness of women and would not actually bring more confusions than adoption does.

III. Debates among "the People": The Civil conferences

The civil conference lives out the core idea of deliberative democracy, which brings more power and possibilities to the people in making of policy or public decision. The civil conference is a vivid way to represent the legal and moral consciousness shared by lay people, and thus provide important guidance to the legislators.⁵⁶

An ideal and valid civil conference in accordance with the theory of Jürgen Habermas should be built in an environment where every participant is provided with essential information and are able to understand the issues and communicate with each other,⁵⁷ and the participants should ameliorate their disputes and reach agreement on the issue with the information.⁵⁸ Yet the real condition in the civil conferences may not be as ideal. Surrogacy is an issue arouses debates in law, medical science, feminism, and common people. The different viewpoints and the backgrounds of participants and the issue itself are complicated enough to stir the balance in an assumed environment of civil conference. In the following sections, this research would make an introduction to the two civil conferences held in 2004 and

5, May 2011, at 79.

⁵⁶ Lin Kuoming & Chen Dongsheng (林國明、陳東升), *Gongminhuiyi yu Senyiminzhu: Quanminjianbao de Gongmincanyu Jingyan* (公民會議與審議民主：全民健保的公民參與經驗) [Consensus Conference and Deliberative Democracy: Citizen Participation in Taiwan's National Health Insurance Policies], *TAIWAN SHEHUIXUE* (台灣社會學) [TAIWAN SOCIOLOGY], No. 6, December 2003, at 68.

⁵⁷ Lin Kuoming & Chen Dongsheng (林國明、陳東升), *Gongminhuiyi yu Senyiminzhu: Quanminjianbao de Gongmincanyu Jingyan* (公民會議與審議民主：全民健保的公民參與經驗) [Consensus Conference and Deliberative Democracy: Citizen Participation in Taiwan's National Health Insurance Policies], *TAIWAN SHEHUIXUE* (台灣社會學) [TAIWAN SOCIOLOGY], No. 6, December 2003, at 65.

⁵⁸ Lin Kuoming & Chen Dongsheng (林國明、陳東升), *Gongminhuiyi yu Senyiminzhu: Quanminjianbao de Gongmincanyu Jingyan* (公民會議與審議民主：全民健保的公民參與經驗) [Consensus Conference and Deliberative Democracy: Citizen Participation in Taiwan's National Health Insurance Policies], *TAIWAN SHEHUIXUE* (台灣社會學) [TAIWAN SOCIOLOGY], No. 6, December 2003, at 74-75.

2012, and reveal the debates and messages in the conferences.

A. Practice of Deliberative Democracy in Taiwan

As the copulation and balance between the theory of direct democracy and representative democracy, deliberative democracy is a practicable way to make the people's will and concerns be heard by the government and also the government's information and policy be understood by the people. By receiving necessary information and communicating with each other, the people in deliberative democracy should finally weigh "common good" over personal interest and make public decision by negotiation in concern of common interest.⁵⁹ And civil conference is the most vivid practice of deliberative democracy.

Focusing on the reciprocity and communication of the participants, the institute of civil conference is designed to solve controversial issues.⁶⁰ While the participants are randomly selected and are representative from different social status, gender, points of view of the theme issue, it is believed that, the participants could equally interact and negotiate with each other and make the final conclusion while reaching a consensus based on common interest. The civil conference is therefore taken into the process of public policy making in the western countries for a long time.⁶¹ The first civil conference in Taiwan was held in 2001. It was a conference about the institute National Health Insurance, the advance insurance institute developed in Taiwan. Civil conferences about different issues were held for over a dozen of times afterwards. About 30 civil conferences were held afterwards during just a few years, most of which were either held or sponsored by governmental organs or institutes, and it had made Taiwan the country where the most civil conferences are held in total.⁶² The intensive civil conferences was explained as a composition of government's intention to encourage politics participation in order to ease the political deadlock then,⁶³

⁵⁹ Lin Yousheng (林祐聖), Women meiyou Taishang Taixia zhifen: Dailiyunmu Gongmingongshihuiyi zhong de Zhuanjia yu Changmin Guanxi (我們沒有台上台下之分—代理孕母公民共識會議中的專家與常民關係), TAIWANMINZHUIKAN (臺灣民主季刊) [TAIWAN DEMOCRACY QUARTERLY], No. 3, Vol. 4, September 2007, at 3.

⁶⁰ Carrie Menkel-Meadow, Scaling up Deliberative Democracy as Dispute Resolution in Healthcare Reform: A Work in Progress, 74 LCPR 1, 9.

⁶¹ Li Zhongbin & Huang Dongyi (李仲彬、黃東益), Shenyishiminzhu zai Taiwan Shiwutuidong de Dingwei yu Jiazhi (審議式民主在臺灣實務推動的定位與價值) [The Practical Value and Status of Deliberative Democracy in Taiwan: An Exploratory Case Analysis of Citizen Conference], JINGZHENGLIPINGLUN (競爭力評論) [COMPETITIVENESS CRITICS], No. 14, March 2011, at 59-60.

⁶² Lin Kuoming (林國明), Guojia, Gongminshehui yu Shenyiminzhu: Gongminhuiyi zai Taiwan de Fazhanjingyan (國家、公民社會與審議民主：公民會議在臺灣的發展經驗) [State, Civil Society, and Deliberative Democracy: The Practices of Consensus Conferences in Taiwan], TAIWAN SHEHUIXUE (台灣社會學) [TAIWAN SOCIOLOGY], No. 17, June 2009, 163-164.

⁶³ Lin Kuoming (林國明), Guojia, Gongminshehui yu Shenyiminzhu: Gongminhuiyi zai Taiwan de Fazhanjingyan (國家、公民社會與審議民主：公民會議在臺灣的發展經驗) [State, Civil

strong request of democratic participation in policy making from activist groups,⁶⁴ and approval of deliberative democracy from scholars.⁶⁵

Anyway, not all civil conferences make a well consensual conclusion in the end, neither were all the conclusions from the conferences wholly taken by the authority concerned since it was not mandatory for the authority to follow the opinion from civil conference in Taiwan.⁶⁶ For instance, though both the two conferences of surrogacy have published their conclusion report on the surrogacy issue, the disputes in the society and in the congress did not cease for that. Still, the civil opinion about surrogacy could be observed in these two conferences. Furthermore, to study from a feminism viewpoint, the special dialogue situation in the conferences is also very fascinating.

B. 2004 Civil conference

Since surrogacy is a highly controversial issue, the authority concerned held a civil conference to encourage a rational discussion over it.⁶⁷ The citizens who participated this conference are from different backgrounds and they reached the conclusion that “surrogacy should be allowed in certain conditions” after days of discussion.⁶⁸ The opinion leads to the draft of Surrogacy Reproduction Act, and the conference itself has become subject in many researches since the issue is so critical yet difficult.

1. Composition and Operation

In fact, at the time before the 2004 conference was held, the Department of

Society, and Deliberative Democracy: The Practices of Consensus Conferences in Taiwan], TAIWAN SHEHUIXUE (台灣社會學) [TAIWAN SOCIOLOGY], No. 17, June 2009, 184.

⁶⁴ Lin Kuoming (林國明), Guojia, Gongminshehui yu Shenyiminzhu: Gongminhuiyi zai Taiwan de Fazhanjingyan (國家、公民社會與審議民主：公民會議在台灣的發展經驗) [State, Civil Society, and Deliberative Democracy: The Practices of Consensus Conferences in Taiwan], TAIWAN SHEHUIXUE (台灣社會學) [TAIWAN SOCIOLOGY], No. 17, June 2009, 188-189.

⁶⁵ Lin Kuoming (林國明), Guojia, Gongminshehui yu Shenyiminzhu: Gongminhuiyi zai Taiwan de Fazhanjingyan (國家、公民社會與審議民主：公民會議在台灣的發展經驗) [State, Civil Society, and Deliberative Democracy: The Practices of Consensus Conferences in Taiwan], TAIWAN SHEHUIXUE (台灣社會學) [TAIWAN SOCIOLOGY], No. 17, June 2009, 189.

⁶⁶ Liu Zhengshan (劉正山), Dangqian Shenyishiminzhu de Kunjing ji Kenengde Chulu (當前審議式民主的困境及可能的出路) [The Challenges of Practicing Deliberative Democracy in Taiwan and a Possible Solution], ZHONGGUOXINGZHENGPIGLUN (中國行政評論) [THE CHINESE PUBLIC ADMINISTRATION REVIEW], No. 2, Vol. 17, December 2009, at121-122.

⁶⁷ Lin Kuoming (林國明), Cong Dailiyunmu kan Gongminhuiyi (從代理孕母看公民會議) [Observation of Civil Conference for Surrogacy], Sifagaigezazhi (司法改革雜誌) [Reform on Jurisprudence], No. 53, October 2004, at 11.

⁶⁸ Dailiyunmu Gongmingongshihuiyi Gongminxiaozu Jielunbaogao (代理孕母公民共識會議公民小組結論報告) [the Report Concluded by the Participants in 2004 Civil Conference for Surrogacy], at 6-7.

Health had just made the decision to pull out all the articles related to surrogacy from the draft of Artificial Reproduction Act, since the disputes over surrogacy were heated while the regulation of ART was really in need.⁶⁹ However, whether surrogacy should be legally allowed in Taiwan should also be decided. A civil conference was therefore convened.⁷⁰

It was in the early years when civil conferences had been practiced in Taiwan, yet surrogacy had been an issue highly concerned and debated among medical, legal, feminism professionals or groups, furthermore, it was the first civil conference in Taiwan discussing over a national legal or policy issue. Therefore the 2004 surrogacy civil conference certainly received massive attention: A press conference was held beforehand and the call for this conference is announced nationwide, people are free to mail or fax to the organizer institute (which was the Sociology Department of National Taiwan University) to apply for participation, also some administrative regions would be randomly selected and the representatives of the region could recommend their residents to the organizer.⁷¹

In total, the 2004 civil conference had collected 92 headstrong of application, and most of the applicators were volunteers sent their information after reading the news about this conference. Most applicators attained education of college or higher, 70 percent of the applicators are female, and the age of most of them are around 30s or 40s. On the other hand, the applicators were in different occupations and came with different motivations. Students, housewives, doctors, and people from industrial, commercial, or media business volunteered to participate this civil conference. Some of the simply wanted to know more about surrogacy, while some other of them considered joining this civil conference as part of their “civil obligation.”⁷²

There were some of applicators explicitly shows their intention to support surrogacy legalization, and there were even some applicators clearly indicated that they are infertile themselves and wished to make their viewpoints heard in this

⁶⁹ Xingzhengyuan Weishengshu Guominjiankangju Weituoanjiujihua “Daiyunshengzhi Yiti zhi Shenyishi Gongmincanyu Yanjiujihua” Xuqiushuomingshu (行政院衛生署國民健康局委託研究計畫「代孕生殖議題之審議式公民參與研究計畫」需求說明書) [The Requirements Description of the Research Project Granted by Department of Health, Ministry of Public Health, Executive Yuan], at 1.

⁷⁰ ISSUE BOOK FOR 2004 SURROGACY CIVIL CONFERENCE 5.

⁷¹ Zhang Liwen (張璿文), Diyizao Dailiyunmu Gongminyubeihuiyi Ershirendaibiao (第一遭 代理孕母公民預備會議 廿人代表) [The First Civil Conference for Surrogacy with 20 Headstrong of Participants], ZHONGGUOSHIBAO (中國時報) [THE CHINA TIMES], Aug. 25, 2004.

⁷² Zhang Liwen (張璿文), Diyizao Dailiyunmu Gongminyubeihuiyi Ershirendaibiao (第一遭 代理孕母公民預備會議 廿人代表) [The First Civil Conference for Surrogacy with 20 Headstrong of Participants], ZHONGGUOSHIBAO (中國時報) [THE CHINA TIMES], Aug. 25, 2004.

conference.⁷³

In the end, 18 participants were select out of the 92 applicators. 12 of them are female and 2 of the 12 were diagnosed infertile. Age of the participants varied from 22 to 62 years old with the average age of 39.2.⁷⁴ These 18 participants had to attend a two-day preparation conference in late August in 2004, and information and controversies of surrogacy would be introduced in the preparation conference by professionals in related fields. Participants could also raise any question they wished to discuss in the formal conference at the time.

Later, in a two-day formal conference held in September in 2004, three main issues about surrogacy were discussed by the participants in civil conference.⁷⁵ They reached a general consensus after this formal conference, and leave the confirmation of final conclusion in another formal conference which was held a week later.

The first theme to discussion in the conference was about the improvement of prevention and treatment of infertility as a public health policy, and whether the National Health Insurance should cover the treatment of artificial reproduction and surrogacy (if it would be legally permitted).⁷⁶ The second round of discussion then went around the institute of adoption at the time. Opinions of whether adoption could be a substitution for surrogacy and review of the institute were shared in the conference.⁷⁷

The last and most important corners of discussion in this conference were, of course, all about surrogacy. The discussion began from the question of whether surrogacy should be legally allowed in Taiwan, and how should the authority

⁷³ Zhang Liwen (張瓊文), *Diyizao Dailiyunmu Gongminyubehuiyi Ershirendaibiao* (第一遭 代理孕母公民預備會議 廿人代表) [The First Civil Conference for Surrogacy with 20 Headstrong of Participants], *ZHONGGUOSHIBAO* (中國時報) [THE CHINA TIMES], Aug. 25, 2004.

⁷⁴ Huang Shituan (黃世團), *Gongminhuiyi yu Daiyiminzhu de Zhidulianjie: yi Dailiyunmu wei Fenxigean* (公民會議與代議民主的制度連結—以「代理孕母」為分析個案) [The Institutional Connection of Consensus Conference and Representative Democracy—A Case Study of Surrogate Motherhood in Taiwan] 146 (2009). (Unpublished Master Thesis, Graduate Institute of National Development, National Taiwan University) (copy on file with the Graduate Institute of National Development, National Taiwan University). The original author provided an English title for the thesis, but all the other parts of this thesis are written in Chinese.

⁷⁵ Lin Kuoming (林國明), *Gongmingongshihuiyi de Choubeigongzuo* (公民共識會議的籌備工作) [*Preparation of a Civil Conference*], *Shenyishiminzhu Gongminhuiyi Caozuoshouce* (審議式民主公民會議操作手冊) [A Manual For A Civil Conference in Deliberative Democracy] 10, 15 (2004).

⁷⁶ *Dailiyunmu Gongmingongshihuiyi Gongminxiaozu Jielunbaogao* (代理孕母公民共識會議公民小組結論報告) [the Report Concluded by the Participants in 2004 Civil Conference for Surrogacy], at 3.

⁷⁷ *Dailiyunmu Gongmingongshihuiyi Gongminxiaozu Jielunbaogao* (代理孕母公民共識會議公民小組結論報告) [the Report Concluded by the Participants in 2004 Civil Conference for Surrogacy], at 5.

concerned manage the restriction or permission over it. Afterwards, the possible regulation of practice of surrogacy, protection of interest of infertile couple and the surrogate, and the detail of surrogacy contract were all reviewed and argued.⁷⁸

2. Conclusion and Subsequent Effects

The 2004 surrogacy civil conference announced the conclusion made by the participants through a report, in which the conference suggested that surrogacy should be legally permitted under certain circumstances.⁷⁹ For example, the conference supported that the surrogacy contract should be an onerous one to guarantee protection of interest of the surrogate.⁸⁰ Yet the conclusion report also agreed with the opinion of Department of Health that, a special act other than the Artificial Reproduction Act should be designed for surrogacy, and the legal parentage and methods of surrogacy should be regulated in this act.⁸¹

As a response to the conclusion made by the 2004 conference, a draft act of surrogacy was designed by a group of concerned experts under the invitation from the Department of Health in 2005.⁸² Though the legislation of surrogacy has been still during debate and discussion till now, this detailed tailored draft act has been the basis of nearly every later version.

In according to this draft act, a surrogate should be qualified with following conditions: she should be first of all a Taiwan citizen aged from 20 to 40, and had previously been pregnant and labored; furthermore, she should passed the evaluation prepared by medical institutions to prove that she is physically and mentally healthy enough to be a surrogate.⁸³

The right to access to surrogacy was also designed in this act. In accordance with

⁷⁸ Dailiyunmu Gongmingongshihuiyi Gongminxiao zu Jielunbaogao (代理孕母公民共識會議公民小組結論報告) [the Report Concluded by the Participants in 2004 Civil Conference for Surrogacy], at 6.

⁷⁹ Dailiyunmu Gongmingongshihuiyi Gongminxiao zu Jielunbaogao (代理孕母公民共識會議公民小組結論報告) [the Report Concluded by the Participants in 2004 Civil Conference for Surrogacy], at 2.

⁸⁰ Dailiyunmu Gongmingongshihuiyi Gongminxiao zu Jielunbaogao (代理孕母公民共識會議公民小組結論報告) [the Report Concluded by the Participants in 2004 Civil Conference for Surrogacy], at 10.

⁸¹ Dailiyunmu Gongmingongshihuiyi Gongminxiao zu Jielunbaogao (代理孕母公民共識會議公民小組結論報告) [the Report Concluded by the Participants in 2004 Civil Conference for Surrogacy], at 11.

⁸² Liao Yici (廖怡慈), Shengyuzhengce Guifan de Hefazhengdangxing Yanjiu: Nüxingzhuyifaxue de Guandian (生育政策規範的合法正當性研究—女性主義法學的觀點) [Legitimacy of Policy in Reproduction: A Viewpoint from Feminism Jurisprudence] 87 (2006). (Master Thesis, Institute of Law for Science, Technology, National Tsinghua University, 2008) (copy on file with Main Library, National Tsinghua University).

⁸³ DRAFT OF SURROGACY ACT (designed by scholar Hou Yingling in 2005) art. 8.

Artificial Reproduction Act, this draft act of surrogacy also set limit on the marriage status of those who wish to apply for practice of surrogacy. According to this draft act, only when both parties of a married couple have their own fertile gametes but the wife has no uterus or could not or should not be pregnant or give birth in health concerns, can such couple qualified to apply for practice of surrogacy.⁸⁴

Despite the conclusion of civil conference suggested an onerous surrogacy contract, a gratuitous surrogacy contract is proposed by this draft act, yet the applicant couple should still cover the necessary fees for medical check, traffic transfer, compensation for the loss of wage, and maintenance of health.⁸⁵ And if the surrogate is married, her spouse of surrogate should be informed of matter of the surrogacy and join the contract.⁸⁶ The surrogacy should not be made under coercion or fraud. This draft act claims to protect the privacy and body autonomy of the surrogate,⁸⁷ yet the surrogate has obligation to report to the applicant couple about the condition of pregnancy⁸⁸ and might be responsible for loss or damage to the fetus or to the applicant couple.⁸⁹ And the medical check or treatment during the pregnancy could be previously designed in the contract under the condition that the surrogate's autonomy and privacy would not be injured.⁹⁰

Legal parentage and related disputes are always a highly controversial part of surrogacy issue. In this draft act, the applicant couple has begun to be the legal parents and legal representative of the fetus, as soon as the previous fertilized egg implants in the uterus of the surrogate.⁹¹ And as the legal representatives of the fetus should made decision for the fetus in concern of its interest, the decision that the applicant couple make might conflict with the interest or decision of the surrogate. However, such dilemma wasn't dealt with by the draft act very clearly.

C. 2012 Civil conference

Eight years after the first civil conference on surrogacy, the Surrogacy Reproduction Act is still shelved. Along with a slightly amended draft act, the second civil conference was held in 2012. This late conference discussed more details in the regulation of the surrogacy, and it demanded more protection and better balance of the interest of parties involved. A new draft of Surrogacy Reproduction Act is announced

⁸⁴ DRAFT OF SURROGACY ACT (designed by scholar Hou Yingling in 2005) art. 6.

⁸⁵ DRAFT OF SURROGACY ACT (designed by scholar Hou Yingling in 2005) art. 20.

⁸⁶ DRAFT OF SURROGACY ACT (designed by scholar Hou Yingling in 2005) art. 18, para. 2, subparagraph 5.

⁸⁷ DRAFT OF SURROGACY ACT (designed by scholar Hou Yingling in 2005) art. 1.

⁸⁸ DRAFT OF SURROGACY ACT (designed by scholar Hou Yingling in 2005) art. 21, para 1.

⁸⁹ DRAFT OF SURROGACY ACT (designed by scholar Hou Yingling in 2005) art. 23, para 2.

⁹⁰ DRAFT OF SURROGACY ACT (designed by scholar Hou Yingling in 2005) art. 16, para 1.

⁹¹ DRAFT OF SURROGACY ACT (designed by scholar Hou Yingling in 2005) art. 16, para 2.

before this conference.

1. Conclusion

Since this 2012 civil conference is convened under the premise that surrogacy is going to be legally allowed in Taiwan, the discussions in the conference are made in such context.⁹² Three main issues were discussed and debated over by the 20 participants composed of 11 female participants and other 9 male ones. The process of preparation conference and formal conferences are basically identical with the ones in 2004.

First of all, the 2004 draft act of surrogacy requires fertile gametes from both parties of the applicant couple, yet this requirement was questioned in the 2012 civil conference. In the conference, there were four kinds of surrogacy were mentioned and discussed: the kind mentioned in 2004 draft act, the two kinds of surrogacy use donated sperm or egg from anonymous donor, and the most controversial kind in which the surrogate's egg is used.⁹³

The 2012 conference made the conclusion that the kind of surrogacy uses gametes from both sides of applicant couple should surely be allowed, and the ones uses donated sperm or eggs should also be permitted under more strict scrutiny and support institutes.⁹⁴ However, to avoid legal or moral disputes as possible, the surrogate's egg should not be used in practice of surrogacy.⁹⁵

Furthermore, since the surrogacy is assumed to be legalized in this conference, the protection of the interest of applicant couple, surrogate, and the fetus was also debated in detailed. At the end of the conference, the participants concluded that, in order to balance all the parties in surrogacy practice, there should be a standardized form of surrogacy contract designed by the authority concerned, and professional opinions should be concerned in a superior priority than the surrogacy contract during the surrogacy.⁹⁶

Moreover, the 2012 conference inspected more deeply into the detail of surrogacy legalization. The final discussion focuses on whether the surrogacy contract should be onerous or gratuitous, and whether intermediary institutes of surrogacy

⁹² Daiyunzhidu Gongminshenyihuiyi Gongminjielunbaogao (代孕制度公民審議會會議公民結論報告) [the Report Concluded by the Participants in 2012 Civil Conference for Surrogacy], at 1.

⁹³ ISSUE BOOK FOR 2012 SURROGACY CIVIL CONFERENCE 31-32.

⁹⁴ Daiyunzhidu Gongminshenyihuiyi Gongminjielunbaogao (代孕制度公民審議會會議公民結論報告) [the Report Concluded by the Participants in 2012 Civil Conference for Surrogacy], at 3.

⁹⁵ Daiyunzhidu Gongminshenyihuiyi Gongminjielunbaogao (代孕制度公民審議會會議公民結論報告) [the Report Concluded by the Participants in 2012 Civil Conference for Surrogacy], at 4-5.

⁹⁶ Daiyunzhidu Gongminshenyihuiyi Gongminjielunbaogao (代孕制度公民審議會會議公民結論報告) [the Report Concluded by the Participants in 2012 Civil Conference for Surrogacy], at 8.

should be allowed in Taiwan.⁹⁷ Most of the participants in 2012 conference agreed that the contract should be gratuitous,⁹⁸ but the conference was not able to reach a consensus on the issue of intermediary institutes.⁹⁹ However, the majority was more inclined to a mildly restricted condition, in which intermediary business of surrogacy should be strictly regulated, and the permission to practice such business should be assigned to nonprofit organizations (while some suggested that for-profit organization could be permitted after the legal and clinical surrogacy practice is stable in Taiwan).

2. Ongoing Effects

After the 2004 Civil Conference, an important decision was made that there should be an exclusive act for surrogacy. Concerning the controversy of surrogacy and the urgency of legalization of artificial reproduction, this seemed to be an effective and reasonable decision. The 2012 Civil Conference was also held on such basis that the Surrogacy Act should be a respective act than the current Artificial Reproduction Act. Yet the legislative aptitude looked to bend to the other way.

In 2013, two legislative proposals were drafted or submitted (to the Congress) and both proposals are designed to amend the present Artificial Reproduction Act rather than to build a separate act for surrogacy. Legislator Hui-Zhen Jiang had submitted her drafted amendments of Artificial Reproduction Act to the bill committee in Congress, while the Ministry of Health and Welfare designed another set of amendments to the same act and had sent it to the Bureau of Gender Equality in Administrative Yuan for gender equality review. The two proposals differ in certain details but both be claimed as the proper response to the conclusion of 2012 Civil Conference, which is that surrogacy should be legally permitted in Taiwan under certain conditions.

According to the amendments to Artificial Reproduction Act proposed by Hui-Zhen Jiang, intermediate agency of surrogacy could be run by non-profit legal entity.¹⁰⁰ A qualified surrogate should be aged in the range from 20 to 40, and had given birth to child before she serves as a surrogate.¹⁰¹ And a married couple could apply for practice of surrogacy if they meet the following requirements: physical and psychological conditions are reviewed and recognized as fit to receive practice of surrogacy, either party of the couple is infertile or with significant hereditary diseases

⁹⁷ ISSUE BOOK FOR 2012 SURROGACY CIVIL CONFERENCE 47.

⁹⁸ Daiyunzhidu Gongminshenyihuiyi Gongminjielunbaogao (代孕制度公民審議會會議公民結論報告) [the Report Concluded by the Participants in 2012 Civil Conference for Surrogacy], at 12-13.

⁹⁹ Daiyunzhidu Gongminshenyihuiyi Gongminjielunbaogao (代孕制度公民審議會會議公民結論報告) [the Report Concluded by the Participants in 2012 Civil Conference for Surrogacy], at 13.

¹⁰⁰ DRAFT OF SURROGACY ACT (proposed by Hui-Zhen Jiang in 2012) art. 6 para 2.

¹⁰¹ DRAFT OF SURROGACY ACT (proposed by Hui-Zhen Jiang in 2012) art. 8 para 2.

yet at least one party of the couple is capable to provide fertile gametes in practicing surrogacy, and the wife is unable to be pregnant because of disease, prior hysterectomy, or congenial lack of uterus.¹⁰² The child whom the surrogate gives birth to is regarded as the legitimate child of the applicant couple.¹⁰³ Briefly speaking, the amendments to Artificial Reproduction Act proposed by Jiang are slightly lenient to application, practice, and even intermediation of surrogacy than the Surrogacy Act provided in Civil Conferences.

The authority concerned should design a uniform contract for surrogacy, and define compulsory and proscribed clauses in a legal surrogacy contract.¹⁰⁴ Every surrogacy contract should be notarized.¹⁰⁵ However, it is already demonstrated in Jiang's amendments that the surrogate's right to take an abortion for the sake of her own life or health under Genetic Health Act should not be restricted by any clause in a surrogacy contract.¹⁰⁶

On the other hand, the amendments to Artificial Reproduction Act provided by the Ministry of Health and Welfare seem to restrict a little more on the qualification of surrogate and applicant couple. In this version of amendments, a legal surrogate should be a female Taiwan citizen and resident, and she should also be over 20 years old and had previous experience of pregnancy and labor. Before serving as a surrogate, reviews of her physical and psychological conditions would be practiced; a health review of her spouse would also be taken if she's married.¹⁰⁷ Though the requirements of access to surrogacy for applicant couple in this set of amendments is basically identical with the one proposed by Jiang, this version designed by the Ministry of Health and Welfare makes previous professional consultations and a written form of surrogacy contract compulsory. Both the applicant couple and the surrogate should be informed with possible risks and effects brought by surrogacy in the psychological, physical, familial and social aspects; and the compulsory and proscribed clauses of the written contract should be designed and announced by the authority concerned.¹⁰⁸

Pursuant to the proposal by the Ministry of Health and Welfare, the child born out of surrogacy is considered as the legitimate of the applicant couple. Yet in this version of amendments, more detailed regulations are invented. The applicant couple should register the born child in 60 days after the birth with birth certificate of the

¹⁰² DRAFT OF SURROGACY ACT (proposed by Hui-Zhen Jiang in 2012) art.11-1.

¹⁰³ DRAFT OF SURROGACY ACT (proposed by Hui-Zhen Jiang in 2012) art.24-1 para 1.

¹⁰⁴ DRAFT OF SURROGACY ACT (proposed by Hui-Zhen Jiang in 2012) art.12-2 para 3.

¹⁰⁵ DRAFT OF SURROGACY ACT (proposed by Hui-Zhen Jiang in 2012) art.12-2 para 1.

¹⁰⁶ DRAFT OF SURROGACY ACT (proposed by Hui-Zhen Jiang in 2012) art.12-2 para 6.

¹⁰⁷ DRAFT OF SURROGACY ACT (proposed by Ministry of Health and Welfare in 2012) art.7 para 2.

¹⁰⁸ DRAFT OF SURROGACY ACT (proposed by Ministry of Health and Welfare in 2012) art.12-1.

child, the pregnancy medical certificate¹⁰⁹, and the notarized surrogacy contracts.¹¹⁰ However, these two proposals do not imply the legal parentage of the fetus during pregnancy, and it might foreshadow legal disputes in the future.

Still, the controversies of surrogacy keep lingering on the way of legislation. The two sets of amendments to Artificial Reproduction Act are still stuck separately in the bill committee of Congress and in the Bureau of Gender Equality.¹¹¹ Some legislators consider it better to have an exclusive act for surrogacy to balance the difficult problems occurring in surrogacy in a more delicate way,¹¹² and some others do not think the current proposals give enough protects to the interests of surrogates and born children.¹¹³ The Bureau of Gender Equality also demands that, the Ministry of Health and Welfare should not design the amendments for benefits of the wealthy few and ignore the interests of involved professionals, surrogates, and the born children in surrogacy.¹¹⁴ A gender review and further evaluations over surrogates' and born children's interests are urged by the Bureau of Gender Equality.¹¹⁵ All in all, new legal arrangements were proposed, but the disputes over legitimacy of surrogacy legislation are not quelled yet.

D. Shared Concerns in the Two Civil Conferences

There are certain topics which are not explicitly listed in the discussion schedule in both civil conference but still have been earnestly debated by the participants. The opinions about those topics from the civil conferences might be different, yet the active exchange of opinions indicates that the sincere concerns about those topics are clearly shared by the participants in both conferences. Actually, those topics do not only interest the participants in civil conferences, but are very important in the legalization of surrogacy. In any further inspection into the legalization and civil participation of surrogacy in Taiwan, those topics should be seriously concerned and

¹⁰⁹ DRAFT OF SURROGACY ACT (proposed by Ministry of Health and Welfare in 2012) art.25-1.

¹¹⁰ DRAFT OF SURROGACY ACT (proposed by Ministry of Health and Welfare in 2012) art.25-2.

¹¹¹ Lin Sihui (林思慧), Rengongshengzhifa Xiuzhengcaoan Haikazhe (《人工生殖法》修正草案 還卡著) [The Amendments to Artificial Reproduction Act is Still Underway], ZHONGGUOSHIBAO (中國時報) [THE CHINA TIMES], Feb. 17, 2014.

¹¹² Fang Jiamin (方家敏), Daiyun ruque Peitao Litaxingwei Kongbiandiao (代孕如缺配套 利他行為恐變調) [Lacking of Complementary measures, the Altruism of Surrogacy might Get Sour], XINGBAO (醒報) [AWAKENING NEWS NETWORKS], Jan. 5, 2014.

¹¹³ Lifayuan Gongbao (立法院公報) [Communiqué from Legislative Yuan] Col. 103 Vol. 3 Weiyuanhui Jilu (委員會紀錄) [Congress Minutes] 399-400 (Jan. 7, 2014)

¹¹⁴ Xingzhengyuan Xingbiepingdenghui di 6 ci Weiyuanhuiyi Jilu (行政院性別平等會第6次委員會會議紀錄) [Committee Minutes of the 6th Meeting of Gender Equality Committee, Executive Yuan] 11 (Jan. 24, 2014).

¹¹⁵ Xingzhengyuan Xingbiepingdenghui di 6 ci Weiyuanhuiyi Jilu (行政院性別平等會第6次委員會會議紀錄) [Committee Minutes of the 6th Meeting of Gender Equality Committee, Executive Yuan] 14-15 (Jan. 24, 2014).

discussed.

1. The Access to Surrogacy

More details of the legal limits on infertile couples' access to surrogacy were discussed and presented in the 2004 civil conference than in the 2012 one, since the former civil conference was held to make a conclusion of whether surrogacy should be legalized¹¹⁶ and the latter one is held in the premise of legalization of surrogacy.¹¹⁷

The 2004 civil conference concluded that surrogacy should be legally permitted when certain requirements are fulfilled, in case to protect the reproductive autonomy of the infertile people, resolve the problem illegal surrogacy might bring up, and raise the declining birthrate all at the same time.¹¹⁸ According to the 2004 conference, the designs of limits on access to surrogacy should be able to prevent squandering of medical resources by controlling the quantity of surrogacy practice, uphold the interest and dignity of women, and manage public order and social moral.¹¹⁹ Therefore, the suggested access to surrogacy should only be open for those who are a married couple with fertile oocytes and sperm, but the wife could not carry a child by her own uterus or has no uterus, or a married couple who have taken multiple times of ART treatment yet failed; the mentioned couple could adopt surrogacy technology with the fetus made by their own gametes.¹²⁰

Furthermore, the legal qualification of a surrogate was also discussed, and the protections of body autonomy of the surrogate and the proper care of the child during pregnancy were specifically considered by the participants in 2004 civil conference.¹²¹ The requirements of a surrogate proposed accordingly are that, the surrogate should be a Taiwan citizen who is over 20 years old and has experience of

¹¹⁶ Dailiyunmu Gongmingongshihuiyi Gongminxiaozu Jielunbaogao (代理孕母公民共識會議公民小組結論報告) [the Report Concluded by the Participants in 2004 Civil Conference for Surrogacy], at 2.

¹¹⁷ Dailiyunmu Gongmingongshihuiyi Gongminxiaozu Jielunbaogao (代理孕母公民共識會議公民小組結論報告) [the Report Concluded by the Participants in 2004 Civil Conference for Surrogacy], at 1.

¹¹⁸ Dailiyunmu Gongmingongshihuiyi Gongminxiaozu Jielunbaogao (代理孕母公民共識會議公民小組結論報告) [the Report Concluded by the Participants in 2004 Civil Conference for Surrogacy], at 6-7.

¹¹⁹ Dailiyunmu Gongmingongshihuiyi Gongminxiaozu Jielunbaogao (代理孕母公民共識會議公民小組結論報告) [the Report Concluded by the Participants in 2004 Civil Conference for Surrogacy], at 8.

¹²⁰ Dailiyunmu Gongmingongshihuiyi Gongminxiaozu Jielunbaogao (代理孕母公民共識會議公民小組結論報告) [the Report Concluded by the Participants in 2004 Civil Conference for Surrogacy], at 8.

¹²¹ Dailiyunmu Gongmingongshihuiyi Gongminxiaozu Jielunbaogao (代理孕母公民共識會議公民小組結論報告) [the Report Concluded by the Participants in 2004 Civil Conference for Surrogacy], at 8.

pregnancy of and giving labor to a child.¹²²

In the contrary, the 2012 civil conference did not cover too much about the legal access to surrogacy or the qualification of a surrogate, because it was held on the basis that the surrogacy should be legalized¹²³ and a draft of surrogacy act was provided for reference in the conference. There were opinions which suggested that the access to surrogacy should be given to same-sex couple and single persons,¹²⁴ but the assumed regulation in draft of surrogacy act was still agreed in general, in which the access is open to a married couple with fertile gametes yet the wife is not able to carry a child due to her health condition or because of that she has no uterus.¹²⁵ Instead, the 2012 civil conference tried to reach consensus on a more subtle part in the regulation about access to surrogacy, that whether the access should be limited only to those couples who can provide fertile oocytes and sperms, and if donated of gametes or even oocytes from the surrogates could be used in surrogacy.¹²⁶

The same limit suggested by the 2004 civil conference, in which an applicant couple should use the fetus composed by their own gametes, was approved by the 2012 participants for the sake of its comparatively low ethical risks.¹²⁷ Moreover, the 2012 civil conference concluded that, the case in which the applicant couple provides either fertile sperm or oocyte and combines it with donated gametes should also be permitted, since the Artificial Reproduction Act allows people to practice artificial reproduction under the same condition.¹²⁸

2. Rights and Interests of the Surrogate

Whether one's pregnancy could be the object of a contract, and how one's rights and interests would be effected by said contract, are always one of the most controversial and important issues when it comes to surrogacy legislation. And it is not surprising that both the 2004 and 2012 civil conferences debated over related topics.

¹²² Dailiyunmu Gongmingongshihuiyi Gongminxiaozu Jielunbaogao (代理孕母公民共識會議公民小組結論報告) [the Report Concluded by the Participants in 2004 Civil Conference for Surrogacy], at 8.

¹²³ Daiyunzhidu Gongminshenyihuiyi Gongminjielunbaogao (代孕制度公民審議會議公民結論報告) [the Report Concluded by the Participants in 2012 Civil Conference for Surrogacy], at 3.

¹²⁴ Daiyunzhidu Gongminshenyihuiyi Gongminjielunbaogao (代孕制度公民審議會議公民結論報告) [the Report Concluded by the Participants in 2012 Civil Conference for Surrogacy], at 4.

¹²⁵ ISSUE BOOK FOR 2012 SURROGACY CIVIL CONFERENCE 72

¹²⁶ Daiyunzhidu Gongminshenyihuiyi Gongminjielunbaogao (代孕制度公民審議會議公民結論報告) [the Report Concluded by the Participants in 2012 Civil Conference for Surrogacy], at 3.

¹²⁷ Daiyunzhidu Gongminshenyihuiyi Gongminjielunbaogao (代孕制度公民審議會議公民結論報告) [the Report Concluded by the Participants in 2012 Civil Conference for Surrogacy], at 3.

¹²⁸ Daiyunzhidu Gongminshenyihuiyi Gongminjielunbaogao (代孕制度公民審議會議公民結論報告) [the Report Concluded by the Participants in 2012 Civil Conference for Surrogacy], at 3.

In discussion over the protection over the rights, interests, and human dignity of the surrogate, the 2004 civil conference emphasized that, privacy and body autonomy should be at the priority in concerning of protection.¹²⁹ Some exemplified regulations were proposed in the conference. For instance, the identifiable information of a surrogate should not be revealed to anyone without permission of that surrogate, the daily life of the surrogate should not be interfered unnecessarily or without her previous consent, and professional counseling should be provided to the surrogate.¹³⁰

Moreover, whether a surrogacy contract should be an onerous one or a gratuitous one was also discussed over by the participants of 2004 civil conference. Most of the participants considered surrogacy as a kind of labor and therefore, the surrogate should be paid as consideration of her labor and protection of her rights and interests should be seemed in the context of protection of labor rights.¹³¹ Yet the 2004 conference did not reach a consensus on whether and how the authority concerned should set limits or standards for the payment to the surrogate,¹³² and some of the participants preferred a gratuitous surrogacy contract, in order to reduce the incentives of being a surrogate and to less the possibility of economically invulnerable women becoming surrogates against their own will.¹³³

On the other hand, the 2012 civil conference took an overall discussion over the balance of protection of rights and interest of the applicant, the surrogate, and the result child all at once.¹³⁴ First of all, according to the 2012 civil conference, the government should play an active role in mechanism of surrogacy. For instance, the authorities concerned should study and learn from foreign experiences of surrogacy legalization and/or operation, design official templates of surrogacy contracts, and

¹²⁹ Dailiyunmu Gongmingongshihuiyi Gongminxiaozu Jielunbaogao (代理孕母公民共識會議公民小組結論報告) [the Report Concluded by the Participants in 2004 Civil Conference for Surrogacy], at 9.

¹³⁰ Dailiyunmu Gongmingongshihuiyi Gongminxiaozu Jielunbaogao (代理孕母公民共識會議公民小組結論報告) [the Report Concluded by the Participants in 2004 Civil Conference for Surrogacy], at 10.

¹³¹ Dailiyunmu Gongmingongshihuiyi Gongminxiaozu Jielunbaogao (代理孕母公民共識會議公民小組結論報告) [the Report Concluded by the Participants in 2004 Civil Conference for Surrogacy], at 10.

¹³² Dailiyunmu Gongmingongshihuiyi Gongminxiaozu Jielunbaogao (代理孕母公民共識會議公民小組結論報告) [the Report Concluded by the Participants in 2004 Civil Conference for Surrogacy], at 10.

¹³³ Dailiyunmu Gongmingongshihuiyi Gongminxiaozu Jielunbaogao (代理孕母公民共識會議公民小組結論報告) [the Report Concluded by the Participants in 2004 Civil Conference for Surrogacy], at 10.

¹³⁴ Daiyunzhidu Gongminshenyihuiyi Gongminjielunbaogao (代孕制度公民審議會議公民結論報告) [the Report Concluded by the Participants in 2012 Civil Conference for Surrogacy], at 8.

provides necessary institutes of insurances and trusts along with the surrogacy act.¹³⁵

Further, the 2012 civil conference suggested that a professional committee or an exclusive non-profitable organization should be summoned to review the surrogacy contracts, and a surrogacy contract should not enter into force until being both reviewed by such committee or organization and permitted by a court.¹³⁶ Also, estoppel clauses and grounds of termination of a surrogacy contract should be explained in the surrogacy act to protect the interests of the surrogate.¹³⁷ However, the operation of surrogacy should be practiced mainly in accordance with opinions from doctors, and the content of the surrogacy contract should only be practiced under review and supervision by the doctor.¹³⁸ The interests and opinions of the surrogate should be concerned prior that the ones of the applicants in dispute resolution in order to mediate the responsibilities resulted from surrogacy contracts.¹³⁹

3. Legal Parentage

To understand the importance of legal parentage in the context of surrogacy, we should first know who the legal parent is in the eyes of law. According to the Taiwan Civil Code, the legal mother is defined as the person “who gives birth to the child,”¹⁴⁰ instead of the one “who is genetically connected to the child.” The Civil Code was enacted in 1930; it was unbelievable then that the gestational and the genetic mother of one child could be different people. Also, pregnancy and labor were very apparent facts that can establish the identity of the mother in the convenience of proof.¹⁴¹ Similarly, legal fatherhood is established through something more apparent than biological connection: the mother’s marital status. The mother’s legal spouse at the time the child is conceived is presumed to be the father by law.¹⁴² In the situation where ART is practiced, the resulting embryos could only be implanted into the wife off the applicant couple though donated gametes might be used. Therefore, the child

¹³⁵ Daiyunzhidu Gongminshenyihuiyi Gongminjielunbaogao (代孕制度公民審議會議公民結論報告) [the Report Concluded by the Participants in 2012 Civil Conference for Surrogacy], at 8.

¹³⁶ Daiyunzhidu Gongminshenyihuiyi Gongminjielunbaogao (代孕制度公民審議會議公民結論報告) [the Report Concluded by the Participants in 2012 Civil Conference for Surrogacy], at 9.

¹³⁷ Daiyunzhidu Gongminshenyihuiyi Gongminjielunbaogao (代孕制度公民審議會議公民結論報告) [the Report Concluded by the Participants in 2012 Civil Conference for Surrogacy], at 9.

¹³⁸ Daiyunzhidu Gongminshenyihuiyi Gongminjielunbaogao (代孕制度公民審議會議公民結論報告) [the Report Concluded by the Participants in 2012 Civil Conference for Surrogacy], at 8.

¹³⁹ Daiyunzhidu Gongminshenyihuiyi Gongminjielunbaogao (代孕制度公民審議會議公民結論報告) [the Report Concluded by the Participants in 2012 Civil Conference for Surrogacy], at 8.

¹⁴⁰ DAI YANHUI (戴炎輝) ET AL., QINSHUFA (親屬法) [FAMILY LAW] 294 (14th ed. 2007).

¹⁴¹ TAIWAN CIVIL CODE art. 1063, ¶ 1 (“Where the wife conceives during the continuance of a marriage relationship, a child so born is presumed to be legitimate.”). Article 1063, along with Article 1062 of TAIWAN CIVIL CODE, which defines the way to determine the period of conception, establish that the recognition of legal motherhood should be established through the fact of conception and bearing of the child. See also DAI ET AL., *supra* note 140, at 295-6.

¹⁴² TAIWAN CIVIL CODE art. 1063, ¶ 1.

might not biologically related to both parents, he or she will be legally recognized as the marital child of the couple, provided that both parents consented to the use of ART.¹⁴³

However, when it comes to surrogacy, such principle which defines the legal mother as the one who gives birth to a child could not be directly applied. Generally speaking, the applicant couple should be recognized as the legal parents of the child due to their surrogacy contract and their reproductive autonomy, yet the time to admit the legal parentage could trigger disputes in surrogacy.

For example, the 2004 civil conference suggested a compulsory regulation that the resulting child in surrogacy should be recognized as the legal child of the applicant couple right after the child is delivered.¹⁴⁴ But who would be seemed as the legal parents of the child during the operation surrogacy in this condition is unclear, and might bring problems when the surrogate and the applicant couple have disagreements on medical treatments during pregnancy. The interests of the child could be at conflict with the interests or will of the surrogate in certain conditions, and the surrogate could speak for her own interests then, when the applicant couple might not be able to claim anything for the child because they have not been the child's legal parents yet.

On the contrary, the participants in the 2012 civil conference did not reach consensus on the topic of legal parentage in surrogacy. According to the draft of surrogacy act, which was prepared for all the participants as a basic material to discuss, the legal parentage should be assigned to the applicant couple since the zygote is implanted into the uterus of the surrogate.¹⁴⁵ Some participants in 2012 civil conference approved such regulation since it could assure that the resulting child would have legal parents as soon as he or she is born.¹⁴⁶ Still, some others suggest a two-phased regulation, by which the legal parentage would be first attributed to the surrogate during pregnancy and then be assigned to the applicant couple as soon as the child is delivered, in concern of the body autonomy of the surrogate during pregnancy.¹⁴⁷

¹⁴³ TAIWAN CIVIL CODE ARTIFICIAL REPRODUCTION ACT art. 23

¹⁴⁴ Dailiyunmu Gongmingongshihuiyi Gongminxiaozu Jielunbaogao (代理孕母公民共識會議公民小組結論報告) [the Report Concluded by the Participants in 2004 Civil Conference for Surrogacy], at 12

¹⁴⁵ Draft of Surrogacy Act, art. 15, para. 1. See ISSUE BOOK FOR 2012 SURROGACY CIVIL CONFERENCE 80.

¹⁴⁶ Daiyunzhidu Gongminshenyihuiyi Gongminjielunbaogao (代孕制度公民審議會議公民結論報告) [the Report Concluded by the Participants in 2012 Civil Conference for Surrogacy], at 8-9.

¹⁴⁷ Daiyunzhidu Gongminshenyihuiyi Gongminjielunbaogao (代孕制度公民審議會議公民結論報告) [the Report Concluded by the Participants in 2012 Civil Conference for Surrogacy], at 8.

IV. Inspection into the Deliberative Formation of Surrogacy Policy and Laws

A. Compared Taiwan's Experiences with Theory of Jürgen Habermas

A pilot experiment of civil conference in Taiwan was held on the subject of institute of National Health Insurance in 2002, and two years later, the 2004 civil conference for surrogacy was held as the first official and full civil conference in Taiwan.¹⁴⁸ Certain scholars who participated in the preparation of the National Health Insurance civil conference happened to be active in the female rights activities and are concerned about the legalization of surrogacy, and therefore, they suggested that the Ministry of Health and Welfare could adopt the institute of civil conference to ease the dilemma of surrogacy legalization a little.¹⁴⁹ It was around the early 2000s, that scholars and some government officials were impressed by the idea of deliberative democracy and institute of civil conference, and civil conferences had been encouraged to be hold nationwide.¹⁵⁰ The total count of civil conferences held in Taiwan had been therefore reaching to the top of the world ranking since it was introduced in Taiwan.¹⁵¹

The civil conferences in Taiwan are held in mainly four proper steps. First of all, an executive committee should be summoned. Considering that a civil conference should be held to debate over issues which are not only controversial but are still deeply concerned by the society and in need of policy correspondences, the executive committee should be designed very carefully. Experts from different professional fields with various viewpoints of the concerned issue should be invited.¹⁵² Second,

¹⁴⁸ Lin Kuoming (林國明), *Gongmingongshihuiyi* (公民共識會議) [A Consensus Conference for the Citizens], KOUZHONGZHIGUANG: SHENYIMINZHU DE LILUN YU SHIJIAN (口中之光：審議民主的理論與實踐) [LIGHT IN THE WORDS: THEORIES AND PRACTICES OF DELIBERATIVE DEMOCRACY] 65, 66 (2005).

¹⁴⁹ Lin Kuoming (林國明), *Gongmingongshihuiyi* (公民共識會議) [A Consensus Conference for the Citizens], KOUZHONGZHIGUANG: SHENYIMINZHU DE LILUN YU SHIJIAN (口中之光：審議民主的理論與實踐) [LIGHT IN THE WORDS: THEORIES AND PRACTICES OF DELIBERATIVE DEMOCRACY] 65, 66-67 (2005).

¹⁵⁰ Lin Kuoming (林國明), *Gongmingongshihuiyi* (公民共識會議) [A Consensus Conference for the Citizens], KOUZHONGZHIGUANG: SHENYIMINZHU DE LILUN YU SHIJIAN (口中之光：審議民主的理論與實踐) [LIGHT IN THE WORDS: THEORIES AND PRACTICES OF DELIBERATIVE DEMOCRACY] 65, 67 (2005).

¹⁵¹ Liao Jingui (廖錦桂), *Minzhu zhi Biyao, Shenyi zhi Biyao: yige Xingdongzhe de Sikaolujing* (民主之必要，審議之必要：一個行動者的思考路徑) [Necessity of Democracy and Deliberation: Thoughts of an Activist], KOUZHONGZHIGUANG: SHENYIMINZHU DE LILUN YU SHIJIAN (口中之光：審議民主的理論與實踐) [LIGHT IN THE WORDS: THEORIES AND PRACTICES OF DELIBERATIVE DEMOCRACY] 3, 12 (2005).

¹⁵² Lin Kuoming (林國明), *Gongmingongshihuiyi* (公民共識會議) [A Consensus Conference for the Citizens], KOUZHONGZHIGUANG: SHENYIMINZHU DE LILUN YU SHIJIAN (口中之光：審議民主的理

about participants to the conference should be selected, and the demographic characteristics should be represented in them as possible.¹⁵³ The third and fourth steps include the preparation of reading material for the participants, the preparation conference and the formal conference, and the final report concluded by the participants.¹⁵⁴ According to Kuo-Ming Lin, a scholar who studies and participates the preparation of many civil conferences in Taiwan, the civil conferences in Taiwan are mainly launched by the government, yet the government officials regards more about whether the participants supports the concerned issue than what the participants discuss and express in the conference.¹⁵⁵

The prototype of civil conference is mainly developed in accordance with the concept of deliberate political decision-making situation proposed by social and political philosopher Jürgen Habermas.¹⁵⁶ Legitimacy of the decision made through a way of deliberative democracy should be increased, according to such concept.¹⁵⁷ Habermas argues that decisions should be made on the ground in which all interested parties are able to communicate and persuade others for their own standing.¹⁵⁸ Habermas believes that “communicative rationality” is shared by people, which means that they would be able to share knowledge and information with others in order to reach mutual understanding or to persuade others with differing values to come to consensus.

In the two civil conferences for surrogacy in Taiwan, the participants are randomly drawn from stratified applicants, and the professionals or representatives from interest groups would be excluded.¹⁵⁹ Such arrangements could represent the

論與實踐) [LIGHT IN THE WORDS: THEORIES AND PRACTICES OF DELIBERATIVE DEMOCRACY] 65, 67-68.

¹⁵³ Lin Kuoming (林國明), *Gongmingongshihuiyi* (公民共識會議) [A Consensus Conference for the Citizens], KOUZHONGZHIGUANG: SHENYIMINZHU DE LILUN YU SHIJIAN (口中之光：審議民主的理論與實踐) [LIGHT IN THE WORDS: THEORIES AND PRACTICES OF DELIBERATIVE DEMOCRACY] 65, 68-69 (2005).

¹⁵⁴ Lin Kuoming (林國明), *Gongmingongshihuiyi* (公民共識會議) [A Consensus Conference for the Citizens], KOUZHONGZHIGUANG: SHENYIMINZHU DE LILUN YU SHIJIAN (口中之光：審議民主的理論與實踐) [LIGHT IN THE WORDS: THEORIES AND PRACTICES OF DELIBERATIVE DEMOCRACY] 65, 69-70 (2005).

¹⁵⁵ Lin Kuoming (林國明), *Gongmingongshihuiyi* (公民共識會議) [A Consensus Conference for the Citizens], KOUZHONGZHIGUANG: SHENYIMINZHU DE LILUN YU SHIJIAN (口中之光：審議民主的理論與實踐) [LIGHT IN THE WORDS: THEORIES AND PRACTICES OF DELIBERATIVE DEMOCRACY] 65, 71-72 (2005).

¹⁵⁶ Jürgen Habermas, *The Theory of Communicative Action: Reason and the Rationalization of Society* 177 (Thomas McCarthy trans., 1984).

¹⁵⁷ Zsuzsanna Chappell, *Deliberative Democracy: A Critical introduction*, 21.

¹⁵⁸ Jürgen Habermas, *The Theory of Communicative Action: Reason and the Rationalization of Society* 179 (Thomas McCarthy trans., 1984).

¹⁵⁹ Lin Kuoming (林國明), *Gongmingongshihuiyi* (公民共識會議) [A Consensus Conference for the Citizens], KOUZHONGZHIGUANG: SHENYIMINZHU DE LILUN YU SHIJIAN (口中之光：審議民主的理論與實踐)

opinions from lay people to the greatest extent, yet would member in such composition of a simulated “real society” be able to speak on equal grounds in the conference? In fact, the civil conferences in Taiwan are held with proper instruction from professionals, who not only provide information about the concerned issues of the conference but also deliver the concept and guidelines of civil conference to the participants. In other words, the situation where participants of the conference are in is indeed a simulation of the society, yet representatives with different backgrounds are all required to respect and consider what others are expressing.

According to Habermas, it should be an appropriate way to practice deliberative democracy. An epitome of our society is created under premises of communicative rationality, and the society members in the epitome are equipped with relevant knowledge and recognition of deliberative democracy. As how a title of a piece of news reporting observation of the 2004 civil conference for surrogacy described, the Taiwan experience in civil conferences reveal to the government and the whole community that, “do not underestimate the insight of the people.”¹⁶⁰ By understanding, communicating, and persuading each other with respect and rationality, the civil conferences in Taiwan might represent the society to answer those complicated and controversial issues, such as surrogacy legalization, in the most civil way as possible.

B. Observation from Gendered Viewpoints

However, surrogacy is a highly gender-related issue, and we should be more gender-sensitive when facing it. As when objectification of women and utilization of uterus is one of the most controversial topics when talking about surrogacy, some research has question that the institute of civil conference could be gender-blind¹⁶¹ and lead us to the question that if it would be appropriate to call for a civil conference for solution of surrogacy controversies. It is observed that the practice of artificial reproduction technology has been inclined to focus on women’s body as the subject for the medical treatment and has linked images of women and reproduction more

論與實踐) [LIGHT IN THE WORDS: THEORIES AND PRACTICES OF DELIBERATIVE DEMOCRACY] 65, 68 (2005).

¹⁶⁰ Lin Kuoming (林國明), *Gongmingongshihuiyi* (公民共識會議) [A Consensus Conference for the Citizens], KOUZHONGZHIGUANG: SHENYIMINZHU DE LILUN YU SHIJIAN (口中之光：審議民主的理論與實踐) [LIGHT IN THE WORDS: THEORIES AND PRACTICES OF DELIBERATIVE DEMOCRACY] 65, 66 (2005).

¹⁶¹ Huang Jingjuan (黃競涓), *Nüxingzhuyi dui Shenyishiminzhu de Zhichi yu Pipan* (女性主義對審議式民主的支持與批判) [Deliberative Democracy: The Feminist Pros and Cons], TAIWANMINZHUIKAN (臺灣民主季刊) [TAIWAN DEMOCRACY QUARTERLY], No. 3 Vol. 5, September 2008, at 46-48.

tightly,¹⁶² and such circumstances are more and more obvious since surrogacy become a popular issue. Yet what is intriguing is that, women, especially infertile women, seem to devote into the debate about surrogacy legalization quite zealously. For example, the petitioners in Mother's Day of 1996 and certain female applicants to the 2004 civil conference all had shown their own identity as an infertile woman. The Department of Health and Welfare had changed its attitude to surrogacy from "inappropriate to be legalized in concerns of complicated legal and ethical issues" to "considering the possibility of legalization of surrogacy," since the "call from infertile women made the officials understand such needs of the people."¹⁶³ It seems that those infertile women considered it as a way to increase the influence of their opinions, and it might truly be.

If women, especially infertile women, are the subject in the practice of modern artificial reproductive technology, or are treated as the subject of it, shouldn't we try to adopt a more gendered attitude when discussing the issues of and solving the problems in ART?

For example, in the theoretical model of civil conference built in accordance with concept of deliberative decision making proposed by Habermas, the environment of the conference should be rational and the participants should be reasoned. Such premises are criticized as unfriendly to women, who are not as competent in argument-making as men under social construction,¹⁶⁴ and it is also warned that the ideal environment might actually be affected by the misogyny and gender discrimination in the society.¹⁶⁵ Furthermore, the rationality shared in the Habermasian civil conference and guiding all the participants to voluntarily communicate to reach consensus, is rationality towards "common good" or "public interest," yet the said rationality is also questioned. Since women have been

¹⁶² Wu Jialing (吳嘉苓), *Taiwan de Xin Shengzhikeji yu Xingbie Zhengzhi, 1950-2000* (台灣的新生殖科技與性別政治, 1950-2000) [New Reproductive Technology and Gender Politics in Taiwan, from 1950 to 2000], *TAIWAN SHEHUI YANJUI JIKAN* (台灣社會研究季刊) [Taiwan: A Radical Quarterly in Social Studies], No. 45 March 2002, at 46.

¹⁶³ Chen Meihua (陳美華), *Wuhua huo Jiefang: Nüxingzhuyizhe guanyu Dailiyunmu de Zhenglun* (物化或解放——女性主義者關於代理孕母的爭論) [Objection or Liberation: A Debate over Surrogacy by Feminists], *YUEDANFAXUEZAZHI* (月旦法學雜誌) [THE TAIWAN LAW REVIEW], No. 52, April 1999, at 20.

¹⁶⁴ Huang Jingjuan (黃競涓), *Nüxingzhuyi dui Shenyishiminzhu de Zhichi yu Pipan* (女性主義對審議式民主的支持與批判) [Deliberative Democracy: The Feminist Pros and Cons], *TAIWANMINZHUIKAN* (臺灣民主季刊) [TAIWAN DEMOCRACY QUARTERLY], No. 3 Vol. 5, September 2008, at 60-61.

¹⁶⁵ Huang Jingjuan (黃競涓), *Nüxingzhuyi dui Shenyishiminzhu de Zhichi yu Pipan* (女性主義對審議式民主的支持與批判) [Deliberative Democracy: The Feminist Pros and Cons], *TAIWANMINZHUIKAN* (臺灣民主季刊) [TAIWAN DEMOCRACY QUARTERLY], No. 3 Vol. 5, September 2008, at 61.

dominated under the social construction of patriarchy, would the “public” interest of the society be trustable for women?¹⁶⁶

On the other hand, there are also opinions suggesting that women tend to and should adopt distinctive ways in political participation, for that they have different natures or experiences.¹⁶⁷ Different from criticizing the institutional unfriendliness, this approach expects more on the specific and feminine way of political participation. There would be “ethics of caring” shown by the female political participants, which is different from what the “ethics of justice” shown in the traditional model of political participation, and politics could therefore be “humanized” by such novel way of participation.¹⁶⁸

Both of the mentioned critics to the institutes of deliberative democracy and other modern democratic political methods point out certain problems which the present institute should face in gendered aspects. However, both of them seem to be entrenching the essentialist notions of feminist.¹⁶⁹ Especially in the observation of civil conferences for surrogacy in Taiwan and relevant remarks from government officials, scholars, and the infertile patients, it could be found that the experiences of the infertile patients are significant when concerning the legalization of surrogacy; yet how should those experiences be evaluated in a process of political decision-making, or in a civil conference? In the latter situation, in what way and with what weight should the voices from those infertile women be heard by the epitome of this society?

In the general condition of political decision-making, gender quotas are often taken to ensure the opinions from women and other gender minorities. Though it is also commented as that it can at the same time integrated the minorities into the existing political structure while lessen their power and possibilities of more radical changes to social or culture norms¹⁷⁰ and it may makes change more obviously on the symbolic aspects rather than makes social change,¹⁷¹ it could still be seems as an inspiration into the adjustment to present institute of civil conference. To practice the theoretical model of Habermasian civil conference in the discussion of surrogacy, special quotas for the voices of the surrogacy experiences from the patients or even the surrogates could be weaved into the contexts. It is indicated that, reproduction is

¹⁶⁶ Huang Jingjuan (黃競涓), *Nüxingzhuyi dui Shenyishiminzhu de Zhichi yu Pipan* (女性主義對審議式民主的支持與批判) [Deliberative Democracy: The Feminist Pros and Cons], *TAIWANMINZHUIKAN* (臺灣民主季刊) [TAIWAN DEMOCRACY QUARTERLY], No. 3 Vol. 5, September 2008, at 62.

¹⁶⁷ ANNE PHILIPS, *THE POLITICS OF PRESENCE* 73 (1995).

¹⁶⁸ FIONA MACKAY, *LOVE AND POLITICS: WOMEN POLITICIANS AND THE ETHIC OF CARE* 123 (2001).

¹⁶⁹ JUDITH SQUIRES, *THE NEW POLITICS OF GENDER EQUALITY* 102 (2007).

¹⁷⁰ JUDITH SQUIRES, *THE NEW POLITICS OF GENDER EQUALITY* 104 (2007).

¹⁷¹ JUDITH SQUIRES, *THE NEW POLITICS OF GENDER EQUALITY* 58-59 (2007).

something that most people consider themselves as experts of, but in fact, the infertile ones are the one who are most involved by every relevant policy made.¹⁷² To illustrate, this present research considers that, women, fertile or not, married or not, are the most involved party in the policy and legislation of surrogacy. The diversity of female participants or the invited female professionals of future civil conferences about surrogacy could be enriched and let those alternative yet actually important opinions be heard. Nevertheless, how to balance the influence of those special experiences upon the participants requires more fine study in theories and sophisticated arrangement.

V. Conclusion

Medical science in Taiwan has been developed very well and very rapid for decades, and it brought many of the most advanced technology or treatments into Taiwan as soon as they have been invented in the world. Artificial reproductive technology, including surrogacy, is one good example. However, those most edge-cutting technologies often come with more unknown risks in medical, legal, or ethical aspects. The development of technology is striding toward, yet the legal principles, philosophical concepts, or political theories could not spin as fast. The new technologies therefore are often practiced without proper corresponding regulations or policies. And surrogacy in Taiwan would, again, be an example.

In the context of surrogacy, controversies and challenges from the aspects of law, ethics, and gender are intertwined, and the relevant legislation and policy has been incomplete in Taiwan. Aside from the conferences held in the Congress and among the experts, two civil conferences have been held to clarify the controversial issues and to illustrate the opinions from the society to legalization of surrogacy. Taking civil conference as one of the solution of disputes might work well in many controversial issues. However, there are still details could be further improved in the institute itself. How to alter design of the policy-making or law-making institute would be very important in the future develop of regulation of surrogacy in Taiwan.

This research tries to arrange the observation and analysis about the two civil conferences and relevant effects they've triggered in legislation or policies. The theoretical model of civil conferences which develops from the idea of deliberative

¹⁷² Chen Meihua (陳美華), *Wuhua huo Jiefang: Nüxingzhuyizhe guanyu Dailiyunmu de Zhenglun* (物化或解放——女性主義者關於代理孕母的爭論) [Objection or Liberation: A Debate over Surrogacy by Feminists], *YUEDANFAXUEZAZHI* (月旦法學雜誌) [THE TAIWAN LAW REVIEW], No. 52, April 1999, at 19.

policy-making proposed by Habermas seem to work very well in Taiwan, yet what this research want to remind is that surrogacy is a highly gender-sensitive issue and the voices from the gender minorities, the infertile women or the surrogates, who suffer most from the social stigma of infertility and who will be the subject of the surrogacy treatment, could be given a different light in the future design of civil conference and decision-making institutes.

出國報告（出國類別：會議）

第 12 屆世界生命倫理學大會
(the 12th World Bioethics Congress)
暨美國學者之深度訪談

服務機關：清華大學科技法律研究所

姓名職稱：林昀嫻 副教授

派赴國家：墨西哥、美國

出國期間：6/24~7/5，2014

報告日期：8/2

摘要

本次出國的目的有二，首先是前往墨西哥城參加第十二屆世界生命倫理學大會，之後前往舊金山對於二位美國學者進行訪談。參與國際會議及赴國外進行深度訪談研究，兩者俱收獲豐碩。感謝科技部及教育部的經費支持，使本人有機會接觸國際最新的研究議題，也讓國外學者及實務工作者能了解我國重要學術進展。

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一、目的

本次出國的目的有二：首先是前往墨西哥城參加第十二屆世界生命倫理學大會(12th World Congress of Bioethics)，本人擔任口頭報告人，發表了研究論文一篇，標題為「代理孕母公民共識會議：生育自主、生育權與性別觀點 (“ Consensus conferences on gestational surrogacy: autonomy, procreative rights and gender”)」。世界生命倫理學大會係由世界生命倫理學會(International Association of Bioethics)

研討會結束後即前往舊金山，因為本次出國的第二個目的，是針對有關「性別歧視紛爭解決機制」對二位美國學者進行深度訪談。分別為柏克萊加州大學法學院(School of Law, University of California, Berkeley)的 Herma Hill Kay 教授及舊金山加州大學醫學中心(Medical Center, University of California, San Francisco)的 Carroll Brodsky 教授。

二、 過程

本人於 2014 年 6 月 24 日深夜從桃園機場啟程，在舊金山轉機飛往墨西哥的首都墨西哥城(Mexico City)，抵達時為 6 月 25 日清晨。之後立即前往世界生命倫理學大會的會場報到，領取會議資料。本次會場位於改革大道的希爾頓飯店(Hilton Mexico City Reforma hotel)，在 6 月 25~28 日的會議期間，每天早上八點半起均緊密安排一連串的大會演講(keynote speeches)、工作坊(workshop)及研討場次(sessions)。由於參與情形相當熱烈，每一時段均有 10 個以上的研討場次同步舉行(parallel symposia)，一直到晚間八點才結束，議程相當充實而豐富。

本人的報告場次係6月27日下午4:45~6:15舉行，場次名稱為「性別與生育(Gender and Reproduction)」，由知名的生命倫理學家Farhat Moazam教授主持。同場報告的除了本人以外，還有來自荷蘭馬斯垂特大學(Maastricht University)的Hens Kristien教授、巴西里約熱內盧聯邦大學(Federal University of Rio de Janeiro)的Fabio Oliveira教授，以及來自英國曼徹斯特大學(University of Manchester)的年輕學者Rachel Warren。報告人連同主持人一共五人，均為女性學者。6月29日參加了由墨西哥的主辦團隊所組織的文化活動之後，30日便起程前往美國舊金山，展開另一段工作行程。本次會議攜回資料為會議摘要一冊及議程一冊。

本人於6月30日晚間抵達舊金山，隔天(7月1日)立即拜訪柏克萊加州大學法學院的前院長，Herma Hill Kay教授。本次的拜訪主要係因執行「季風亞洲與多元文化」第三階段第二年子計畫，特別針對性別歧視案件的紛爭解決方式，希望能了解美國加州的作法，以便與東亞各國進行比較研究。緊接著7月3日前往拜訪舊金山加州大學醫學中心的Carroll Brodsky教授，針對工作場所性騷擾的性別歧視類型，進行深度訪談。Brodsky教授並將他的著作"The Harassed Worker"致贈本人。

三、心得

本人早在2012年於吉隆坡舉行的亞洲生命倫理學大會(Asian Bioethics Conference)即與本場次主持人Farhat Moazam教授有一面之緣，當時是在報告後回答她的提問，並在會後繼續討論。這次在墨西哥的會議上再度相見，彼此都很高興。尤其這次為本人為第一次參加世界生命倫理學大會，以往僅參加過亞洲生命倫理學研討會，因此格外珍惜。本會議的性質為跨領域研究，主要涉及的科目有醫療倫理、健康法制、醫療疏失的紛爭處理、生命倫理與哲學、生命倫理與宗教、藥學與法律等，相當多元。與會者多半為醫師、法

學教授、倫理學或哲學教授、醫院社工師、律師、法官、醫療相關學會領導人等。依據大會統計，本次與會學者高達 1200 人，來自 72 個國家或地區。

本人報告之後，引發多位學者提問與評論，均對於我國以公民共識會議的方式，試圖為代孕政策找出可行對策而感到印象深刻。由於參與「第 12 屆世界生命倫理學大會」，有了與歐美地區學者交流的舞台，也藉此機會了解最新的研究議題及進展，更提升了台灣學術研究的能見度，本人相當珍惜並感謝科技部與教育部的補助！

有關二位美國教授的訪談，則為本人多年來一直想完成的工作。性別歧視相關的紛爭是否適合以法院為解決場域？訴訟是否能為當事人帶來正義？訴訟外的紛爭解決方式，例如調解或商談，是否比訴訟更能有效解決性別歧視或工作場所的性騷擾案件？本次訪談的美國教授均為本議題之知名學者，深度訪談的收穫豐碩，期待能展現在研究成果中。

四、報告建議事項

在本人研究助孕科技的法律與倫理議題之時，深感學科之間整合的研究環境與研究方法至為重要。透過與其他國家的學者與實務工作者的交流切磋，對於尋找更為開闊的研究視野和更有效的問題解決方式，實有助益。另一方面，本人也藉由報告及參與討論，有效地讓國外學者與實務工作者了解我國相關研究的進展，有助於提升我國在國際學術舞台上的能見度及影響力。盼能持續受到政府及學校支持參與科際整合國際研討會，非常感謝科技部及教育部的經費支持，讓這樣交流與學習成為可能！

五、附錄

無。

科技部補助計畫衍生研發成果推廣資料表

日期:2014/10/31

科技部補助計畫	計畫名稱: 代孕制度公民審議會議: 生育自由、身體自主與性別影響
	計畫主持人: 林昀嫻
	計畫編號: 102-2629-H-007-002- 學門領域: 性別研究
無研發成果推廣資料	

102 年度專題研究計畫研究成果彙整表

計畫主持人：林昀嫻		計畫編號：102-2629-H-007-002-					
計畫名稱：代孕制度公民審議會議：生育自由、身體自主與性別影響							
成果項目		量化			單位	備註（質化說明：如數個計畫共同成果、成果列為該期刊之封面故事...等）	
		實際已達成數（被接受或已發表）	預期總達成數（含實際已達成數）	本計畫實際貢獻百分比			
國內	論文著作	期刊論文	0	0	100%	篇	
		研究報告/技術報告	0	0	100%		
		研討會論文	3	3	100%		
		專書	0	0	100%		
	專利	申請中件數	0	0	100%	件	
		已獲得件數	0	0	100%		
	技術移轉	件數	0	0	100%	件	
		權利金	0	0	100%	千元	
	參與計畫人力 （本國籍）	碩士生	2	2	100%	人次	
		博士生	0	0	100%		
		博士後研究員	0	0	100%		
		專任助理	0	0	100%		
國外	論文著作	期刊論文	1	1	100%	篇	
		研究報告/技術報告	0	0	100%		
		研討會論文	1	1	100%		
		專書	0	0	100%		章/本
	專利	申請中件數	0	0	100%	件	
		已獲得件數	0	0	100%		
	技術移轉	件數	0	0	100%	件	
		權利金	0	0	100%	千元	
	參與計畫人力 （外國籍）	碩士生	0	0	100%	人次	
		博士生	0	0	100%		
		博士後研究員	0	0	100%		
		專任助理	0	0	100%		

<p style="text-align: center;">其他成果</p> <p>(無法以量化表達之成果如辦理學術活動、獲得獎項、重要國際合作、研究成果國際影響力及其他協助產業技術發展之具體效益事項等，請以文字敘述填列。)</p>	<p style="text-align: center;">無</p>
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	成果項目	量化	名稱或內容性質簡述
科 教 處 計 畫 加 填 項 目	測驗工具(含質性與量性)	0	
	課程/模組	0	
	電腦及網路系統或工具	0	
	教材	0	
	舉辦之活動/競賽	0	
	研討會/工作坊	0	
	電子報、網站	0	
	計畫成果推廣之參與(閱聽)人數	0	

科技部補助專題研究計畫成果報告自評表

請就研究內容與原計畫相符程度、達成預期目標情況、研究成果之學術或應用價值（簡要敘述成果所代表之意義、價值、影響或進一步發展之可能性）、是否適合在學術期刊發表或申請專利、主要發現或其他有關價值等，作一綜合評估。

1. 請就研究內容與原計畫相符程度、達成預期目標情況作一綜合評估

達成目標

未達成目標（請說明，以 100 字為限）

實驗失敗

因故實驗中斷

其他原因

說明：

2. 研究成果在學術期刊發表或申請專利等情形：

論文： 已發表 未發表之文稿 撰寫中 無

專利： 已獲得 申請中 無

技轉： 已技轉 洽談中 無

其他：（以 100 字為限）

3. 請依學術成就、技術創新、社會影響等方面，評估研究成果之學術或應用價值（簡要敘述成果所代表之意義、價值、影響或進一步發展之可能性）（以 500 字為限）

在本研究計畫執行過程中，計畫主持人參與了數場國內外研討會並發表論文。透過研討會與法學、生命倫理學、性別研究等領域的學者交流意見，對於有關人工助孕科技、女性生育自主、以及代孕的法律規範和政策方針都有更深入的瞭解。研討會之後，計畫主持人對於會議中發表的論文進行補充和修正，並在論文全文完成後，選擇適合該文主題之國內外著名期刊投稿。

除了部分會議論文仍在投稿審查中，本人執行中之性別與科技研究計畫「非醫療因素冷凍卵子之法律與生命倫理議題研究 (103-2629-H-007-001-)」已於匿名雙外審之後，刊登於新加坡國立大學(National University of Singapore)所發行的期刊 Asian Bioethics Review。以下謹列出本計畫執行期間已出版論文及已發表的研討會論文：

1. Benjamin Capps, Yun-Hsien Diana Lin, Voo Teck Chuan, 2014.9, ' ' Of Human Elective Egg Freezing (人類卵子冷凍保存之法律與倫理學分析)' ' , Asian Bioethics Review, Vol. 6, Issue 5, p.1-64. (本刊物由 National University of Singapore 發行)

2. 林昀嫻, 2013.9, 「基因產品法律與倫理—DNA 親子鑑定服務之規範」, 「第

三屆兩岸清華法學論壇」(北京清華大學法學院、國立清華大學科技法律研究所主辦)，北京。

3. 林昀嫻，2013.10，「台灣女同志母職研究：法律議題及最新進展」，「性別正義：探索家庭、校園與職場的重構機制研討會」(國立清華大學歷史研究所、台灣文學研究所、亞太文化研究中心、性別研究室、台聯大文化研究學程主辦)。

4. 林昀嫻，2014.4，「人工助孕科技下的女性生育自主：性別正義、科技發展與法律規範」，「103 年度科技部性別與科技計畫聯合成果討論會」(科技部主辦)。

5. LIN, Yun-Hsien Diana, 2014.6, ' ' Consensus Conferences on Gestational Surrogacy: Autonomy, Procreative Rights and Gender (代孕公民審議會：生育自主、生育權與性別議題) ' ' , the 12th World Congress of Bioethics (第 12 屆世界生命倫理學大會), Mexico City, Mexico.

6. 林昀嫻，2014.9，「身分法與生殖醫學的交會：配子捐贈者身分之保密與揭露」，「兩岸婚姻家庭法比較座談會」(國立政治大學法學院主辦)。