

# 從兒童權利公約 談代理孕母之修法

Discussion of Surrogacy from the United  
Nations Convention on the Rights of the Child

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## 摘要

代理孕母之立法辯論已經超過20年，代孕對子代有長遠的社會和法律等各層面影響。我國自2014年實施「兒童權利公約」，課責國家改善法規和流程，以維護兒童權利，本文從兒童權利公約之角度，探討代理孕母制度中兒童權利之立法考量。在我國未將代孕合法化之現況下，跨國代理孕母衍生的問題，是最複雜但也最常見的，各國法令對國籍、親屬認定和公民權認定不同，我國應修法避免遺棄之發生，並保障子代取得身世資料，對其長遠的身心健康具重要性。因此，本文主張，為維護兒童最佳利益，不論國家政府對於代理孕母之立場為何，國家都需要在法律和制度

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關鍵詞：人工生殖法 (Assisted Reproduction Act)、代理孕母 (Surrogacy)、兒童 (child)、兒童權利公約 (United Nations Convention on the Rights of the Child)

DOI：10.53106/241553062023040078012

上，考量因跨國代理孕母出生之潛在國民，保障其權利，除了人工生殖法、民法、兒童及少年福利與權益保障法、國籍法與人口販運防制法等均應考量跨國代孕子女進行調整。最後，本文也對代理孕母在國內合法化進行討論。

The debates of the legalization of surrogacy has been going on for over two decades in Taiwan, and it has a profound social and legal impact on children, a key stakeholder in surrogacy. The Taiwanese government implemented the United Nations Convention on the Rights of the Child (UNCRC) in 2014, which requires the government to improve policies and procedures. This paper discusses children's rights in surrogacy from the perspective of the UNCRC, and its implications to domestic laws. Before legalizing surrogacy, the most common and urgent issue for the government is cross-border surrogacy, in which children's identity, nationality and citizenship could be problematic due to different ways of recognition of a parent-child relationship among countries. Taiwanese government should improve the regulations to avoid abandonment. Also, ensuring Children's right to access birth information has a long-term impact on the child's mental and physical health. Hence, this paper argues that no matter government's position on surrogacy, the government should establish laws to protect the rights of children born in this way and consider the different impacts caused by various surrogacy systems as best interests of children shall be a primary consideration. The discussion of surrogacy should not be limited to the Assisted Reproduction Act. The government needs to amend the Civil Code, the Nationality Act, the Protection of Children and Youths Welfare and

Rights Act, and the Human Trafficking Prevention Act to protect children's rights. Lastly, this paper discusses the legalization of surrogacy in Taiwan.

## 壹、前言

代理孕母之立法在臺灣已經辯論超過20年，其法制化於2020年5月因為立法院一讀通過人工生殖法之部分條文修訂，而再度引起關注。即便國內法規禁止代理孕母，依舊有子代因跨國代孕出生，對子代造成影響，2021年發生國人使用跨國代理孕母，在孩子出生後反悔的事件，對新生兒之影響甚大<sup>1</sup>。另外，2011年有國人涉入在泰國詐騙越南人之國際代理孕母和販賣嬰兒之「BABY 101」<sup>2</sup>案件，國際間已經累積不少跨國代理孕母之爭議案例<sup>34</sup>，包括國籍和親屬認定問題，形成「法律迷宮」<sup>5</sup>，或以代理孕母診所掩蓋非法販賣嬰兒之案例，使委託人、代理孕母和嬰兒成為受害者，更影響兒童之權利。

代理孕母制度之源起，始自1980年第一位由代理孕母生產

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- 2 BBC News, Thailand Police Investigate Baby Sales Ring, Feb. 25, 2011, <https://www.bbc.com/news/world-asia-pacific-12575566> (last visited Mar. 3, 2022).
- 3 Clara Watson, *Womb Rentals and Baby-Selling: Does Surrogacy Undermine the Human Dignity and Rights of the Surrogate Mother and Child?*, 22(3) THE NEW BIOETHICS 212-228 (2016).
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