

Report

Issues Related to the Assisted Reproductive
Technologies Centered on Surrogate Pregnancy
--Toward a Social Consensus--



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Assisted Reproductive Technologies Review Committee

Science Council of Japan

This report compiles and makes public the results of deliberations by the Assisted Reproductive Technologies Review Committee, Science Council of Japan.

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Summary

1. Background

There have been many arguments about assisted reproductive technologies (ART) and the legal treatment of children born through such technologies. Moreover, in recent years, with several judicial decisions concerning the acceptance of registrations of birth through ART, and with the publication of these procedures being performed by a medical doctor, there has been growing public opinion that a clear direction should be defined for surrogate pregnancy.

In light of these circumstances, the Minister of Justice and the Minister of Health, Labour and Welfare made a joint request to the President of the Science Council of Japan for deliberation on the problems pertaining to ART. This report has been compiled in consideration of that careful deliberation.

2. Current status and problems

In Japan, the actual state of surrogate pregnancy has not been objectively ascertained, and the medical safety, certainty, and the long-term effects on children born through surrogate pregnancy are unclear. Meanwhile, there have been various arguments related to surrogate pregnancy such as ethical issues of placing physical and psychological burdens and risks of pregnancy and childbirth onto a third person, and the legal issues surrounding mother-child relationships. Although reviews on these problems have been advanced by government agencies, academic societies and specialists, the result of these reviews has not been enshrined into law. Amid these circumstances, some medical doctors have proceeded to perform surrogate pregnancy. There have also been an increasing number of cases in which people travel overseas for this purpose.

For these reasons, the Assisted Reproductive Technologies Review Committee conducted a minute examination on the rights and wrongs of regulating surrogate pregnancy from medical, ethical, social and legal aspects. And from the viewpoint of respecting the protection of maternal health and the welfare of children to be born, the Committee reached the conclusions such as proposals (1) through (4) mentioned below.

Even in the case that, as a general rule, surrogate pregnancy is to be prohibited by law, as long as there is the potential for children to be born through surrogate pregnancy, rules of establishing the legal status of these children from the perspective of their welfare need to be clarified. Thus, the Committee, giving consideration to the decision of the Supreme Court, March 23, 2007, examined topics including the legal parenthood, and reached the conclusions such as proposals (5) and (6) mentioned below.

In addition to the rights and wrongs of surrogate pregnancy and the legal status of children, there are also mounting issues for future examination related to ART including a child's right to obtain identifying information and problems on egg donation. Although the Committee also examined these issues, it decided not to include these examinations as report items in the present report, and made proposals (7) through (10) mentioned below.

3. Proposals

The Committee makes the following proposals with regard to issues related to ART centered on surrogate pregnancy.

- (1) Surrogate pregnancy is needed to be regulated by law (for example, the Assisted Reproductive Technologies Act (provisional name)), and, in principle, surrogate pregnancy should be prohibited in accordance with this regulation.
- (2) Surrogate pregnancy arranged for profit should be dealt with by the imposition of punishments. Punishments should apply to the medical doctor providing the treatment, the mediators, and the commissioning persons.
- (3) Respecting the protection of maternal health and the rights and welfare of the child to be born, and bearing in mind the need to grasp medical, ethical, legal and social issues, consideration may be given to the trial implementation of surrogate pregnancies (clinical trials) under strict control, with exclusively limiting the targets to the women with congenital absence of the uterus and to the women who have undergone a hysterectomy as a form of treatment.
- (4) In conducting the trial of surrogate pregnancies, a public administrative organization comprised of medical, welfare, legal, counseling and other specialists should be established. After a certain period of time, the medical safety and the social and ethical validity of surrogate pregnancy should be examined. When no problems are found, the law should be amended and surrogate pregnancy will be permitted under certain guidelines. If numerous harmful effects are found, the trial should be discontinued.
- (5) With respect to the legal status of the child born as a result of a surrogate pregnancy, the surrogate mother shall be regarded as the mother.
- (6) With respect to a married couple commissioning a surrogate pregnancy and the child born as a result of that pregnancy, parenthood is established by way of an adoption or special adoption.
- (7) The right to obtain identifying information should be respected as much as possible from the perspective of emphasizing the welfare of the child. This child's right attached to the surrogate pregnancy, however, should be assessed only after

full examination on the same right of the child in the cases of artificial insemination with donor semen (AID) and the like which have been practiced for many years. This is an important issue for future examination.

- (8) There remain issues which have not been thoroughly discussed such as the cases using donor eggs and the pregnancy using the frozen sperm of a dead husband, and further, there is a possibility that new problems may emerge in the future. Thus, the examination of ART needs to be ongoing.
- (9) Concerning the various problems related to bioethics, in view of the importance of these problems, a new public research institute should be founded, and a new public standing committee should be established in order to deal with these problems including planning policies.
- (10) When discussing surrogate pregnancy and other ART, the welfare of the child should be given the highest priority.

Contents

Introduction.....	1
1. Background to the Report	4
(1) Definition of surrogate pregnancy	4
(2) Advances in ART, and the repercussions thereof.....	4
(3) Previous studies by relevant ministries, agencies and academic societies	5
(4) Efforts by the Science Council of Japan	6
(5) Circumstances in other countries	7
(i) Bioethics and the law	7
(ii) Overview of regulations surrounding surrogate pregnancy	8
2. Request for Deliberation and Report Items.....	9
(1) Basic policy of the study	9
(2) Permissibility of surrogate pregnancy using a married couple's sperm and eggs	9
(3) Other problems related to ART; and in particular, donor eggs and the right to identifying information	10
3. Issues related to Surrogate Pregnancy, and the Regulation Thereof	12
(1) From medical aspects.....	12
(i) Medical issues related to surrogate pregnancy	12
(a) Risks and burdens for the gestational mother	12
(b) Impacts on the fetus/child.....	13
(ii) Medical indications for surrogate pregnancy	14
(a) Medical indications of the commissioning female	14
(b) Age restrictions of the gestational female	14
(2) From ethical and social aspects	15
(i) Rights and interests of the child, commissioning person(s), and the gestational mother	15
(a) Self-determination of the commissioning person(s) and the gestational mother, and the limits thereof.....	15
(b) Welfare of the child.....	17
(ii) Problems related to biological order.....	18
(iii) Confusion in medical ethics and healthcare.....	19
(3) From legal aspects	20
(i) Need for regulation	20
(ii) Self-regulation by healthcare providers	20
(iii) Legal regulation.....	21

(a) Administrative ethical guidelines and the law	21
(b) Legal regulation	22
(c) ART and legal regulation	22
(iv) Non-criminal legal restrictions.....	23
(a) Legal restrictions and punishment	23
(b) Administrative punishment	23
(c) Effects of making surrogate pregnancy illegal.....	24
(v) Punishment for surrogate pregnancy arranged for profit	24
(a) Cases where surrogate pregnancy should be punished.....	24
(b) Punishment of the commissioning person(s)	25
(vi) In-principle prohibition and trial implementation.....	26
(a) Partial allowance	26
(b) Trial implementation of surrogate pregnancy	26
(c) Institutional design for trial implementation.....	28
4. Legal parenthood —Legal status Of the born child.....	30
(1) Need for establishing the child’s legal status	30
(i) Relationship with the prohibition of surrogate pregnancy	30
(ii) Decision of the Supreme Court, - March 23, 2007	31
(2) Legal status of the born child	31
(i) Significance of the legal parenthood - natural children versus adopted children-.....	31
(ii) Establishment of legal status based on the Civil Code	32
(iii) Relationship of the born child with the surrogate mother and the commissioning married couple.....	33
(a) Legal parents for the born child.....	33
(b) Adoption between the born child and the commissioning married couple.....	35
(iv) Legal status of children born in foreign countries	35
(a) Legal parenthood	35
(b) Citizenship.....	37
(3) Cases of the trial implemetation	37
5. Proposals.....	39
Conclusion	41
Supplementary Notes.....	42

Introduction

With incessant advances and developments being made in science and technology, as we enter the 21st century, above all, is the remarkable rapid progress being made in research into the life sciences. In the field of medical science and treatment, innovative and revolutionary technologies are being developed one after another, and are being applied in clinical situations. One of the most notable areas is assisted reproductive technologies in infertility treatment. In Japan as well, in-vitro fertilization has already found general acceptance and is widely practiced. Each year, about 20,000 babies are born using this technique. Furthermore, advances in technology have also enabled humans to achieve things never experienced before, including: embryo transfers, where an embryo formed by in-vitro fertilization using the gamete of a third person is returned to the uterus; and surrogate pregnancies, where a woman without a uterus commissions the birth of a child by “borrowing” the uterus of a third person. In May 2001, Japan’s first birth of a child to a surrogate mother was reported.

However, despite being a new issue in bioethics, there has not yet been sufficient exhaustive discussion, and a social consensus has not yet been reached, on the fundamental question of to what extent is this kind of artificial manipulation of human life permissible. Previously, the Japan Society of Obstetrics and Gynecology announced guidelines prohibiting surrogate pregnancy based on the results of careful deliberation by their Ethics Committee; but in actual fact, a small number of medical doctors have since assisted in such pregnancies in disregard of these guidelines. Furthermore, the cases of Japanese citizens having commissioned surrogate pregnancies overseas are said to have already exceeded 100. The case of a Japanese married couple, who had children born to a surrogate mother in the United States using their own sperm and egg, has generated new discussions; a lawsuit concerning the parenthood was raised, and in March 2007, the Supreme Court reached a decision to not recognize a parenthood, appending a concurring opinion to encourage the development of legal provisions.

Given that public attention had become focused on surrogate pregnancy in this way, and that there had been growing public opinion for a clear direction to be defined, on November 30, 2006, the Minister of Justice and the Minister of Health, Labour and Welfare made a joint request to the President of the Science Council of Japan for deliberation on the various issues related to the assisted reproductive technologies (ART), with a focus on surrogate pregnancy (see the attachment to Reference Material 2).

The Science Council of Japan represents scientists from all fields of learning, from humanities and the social sciences to the natural sciences. On receipt of this request, the council decided to establish the “Assisted Reproductive Technologies Review

Committee” (hereinafter referred to as “the Committee”), comprised of specialists from not only healthcare and law, but also from a broad range of disciplines including bioethics. The Committee was to summarize the past discussions on various issues related to ART, with a focus on surrogate pregnancy, including whether surrogate pregnancy should be allowed as an assisted reproductive technology, and to deliberate on how surrogate pregnancy ought to be in the future while also taking international perspectives into consideration.

However, since Japan is made up of people with a diverse sense of values and different ethical views and views of life, etc., it is not easy to reach a social consensus on various bioethical issues, such as the rights and wrongs of surrogate pregnancy.

To start with, is surrogate pregnancy something that can be approved as a medical treatment? Even if it were approved, it is unlikely there would be people who would consider it a desirable form of treatment. Just because some medical treatment can be done, does not necessarily mean it is allowed: naturally, moderation will be needed. There are also many fundamentally opposing views that consider something which is so contrary to the providence of nature should not be done. On the other hand, however, it is understandable that women, who are born without a uterus, or who have had their uterus removed because of a tumor or some other disorder, may want to have a child that would inherit their own genes. Nevertheless, opinion is greatly divided over whether permission should go as far as allowing a third person to be commissioned to conceive and give birth to a child for this purpose. Can this act be pleaded as the right to pursue happiness under Article 13 of the Constitution? Does it run counter to public policy? Does it not result in the impairment of human dignity? Such arguments are set to continue. Even if there is a contract between the commissioning person(s) and the surrogate mother, there are still many points in doubt: Who will assume responsibility for the child that is born, and to what extent? Can they still fulfill their responsibilities even if the child is born with a disability? Furthermore, supposing surrogate pregnancy is permitted, no matter how strictly provisions are stipulated covering the persons involved, it might not be asserted with certainty that a climate will not possibly arise in the future where people evade the responsibility of pregnancy and childbirth.

In Japan, there is a registration system for in-vitro fertilization, microinsemination, and frozen embryo transfer, which is administered by the Japan Society of Obstetrics and Gynecology, but its follow-up studies are exceedingly insufficient. As for the actual state of ART involving third persons, including surrogate pregnancy, this remains even more uncertain, with only the number of cases of artificial insemination with donor semen (hereinafter referred to as “AID”) being identified.

Amid the diverse range of views and arguments on ART, and in particular on surrogate pregnancy, rather than producing a simple answer to the question of whether surrogate pregnancy is right, the Committee determined that its mission is to: organize

the issues from the perspectives of specialists from many different areas, including healthcare, law, ethics and the life sciences; give direction in a way that is convincing to the most number of people; create opportunities for future national debate to develop; and to provide evidence for judgments on this subject to be made.

At first, there were major differences in the basic views held by the members, from advocating absolute prohibition against surrogate pregnancy to permitting them but with conditions, and to viewing the current situation with no legal regulations as sufficient. There were also varying opinions on individual specific problems: Supposing surrogate pregnancy is prohibited, should it be based on law, and should punishment be imposed? Supposing surrogate pregnancy is permitted, what conditions should there be, and to what extent should they be permitted? In order to first gain a common understanding and perception of the current situation, once the briefing on the past government findings had been heard from the Ministry of Justice and the Ministry of Health, Labour and Welfare, the Committee's basic policy was determined, and a series of discussions was held with the members presenting their own views from their respective standpoints. The Committee then held hearings with external experts from various fields, and it also heard the opinions of the groups concerned, including medical doctors who conducted surrogate pregnancy, women who had commissioned surrogate pregnancies overseas, and women who suffer from infertility. Hearings were also held to solicit opinions from disinterested viewpoints, including with specialists and with people involved in the media. Furthermore, with respect to a public opinion poll conducted by the Ministry of Health, Labour and Welfare, a direct hearing was also held with the survey coordinators with regard to the media report that "54% of respondents are receptive to surrogate pregnancy." Hearings on other supplementary matters were included, and the Committee also sought to ascertain the current circumstances in various foreign countries. Once these activities were complete, the Committee began preparing a draft report. On January 31, 2008, a public lecture organized by the Science Council of Japan was held (see Reference material 3), where an overview of the draft report was presented, and views and opinions were exchanged with participants. The results of the written questions, views and surveys submitted by the participants were also taken into account as bases for judgment in the preparation of this report.

Following are the details of the investigation, which spanned a little more than one year, plus the conclusions and proposals.

1. Background to the Report

(1) Definition of surrogate pregnancy

Surrogate pregnancy refers to a woman who wants a child (the commissioning female) requesting another female to conceive using reproductive treatment technology and to continue that pregnancy and give birth to a child, and for the commissioning female to then receive that child. Even in cases where, for various reasons, the female receiving the request does not go as far as giving birth to a child, an act amounting to surrogate pregnancy is regarded as having being committed at the stage where that female's pregnancy is established.

There are two types of surrogate pregnancy depending on whether a surrogate mother or a host mother is used. Generally, the "surrogate mother" system is where a husband's sperm is injected into the uterus of a third person using the technique of artificial insemination to cause fertilization, and where that third person then carries and gives birth to a child on behalf of the wife. In contrast, the "host mother" system is generally where the wife's egg is extracted using the technique of oocyte collection, which is conducted in in-vitro fertilization, this egg is then fertilized with the husband's sperm, and the resulting embryo is transplanted into the uterus of a third person causing her to conceive, and where this third person then carries and gives birth to a child on behalf of the wife.

The third person is also called a "host mother" in cases where eggs are used which have been donated by a female other than the commissioning female and the surrogate. In cases where eggs are received from a donor other than the wife, the various issues related to donor eggs must also be included in discussions. This report primarily examines instances where a host mother uses an egg extracted from the wife, who is the commissioning female.

(2) Advances in ART, and the repercussions thereof

AID using donated sperm was first conducted in Japan 60 years ago, and has since been continued as a treatment for male infertility without sufficient social debate. In the wake of subsequent advances in technology, babies were first born in Japan using in-vitro fertilization in 1983, and using microinsemination in 1992; and these have since come to be widely used as important means of infertility treatment. In 2005, 1.8% of all babies were born as a result of in-vitro fertilization.¹ With respect to female infertility, there have been reports in the media of surrogate pregnancies where Japanese couples have traveled to the United States and had U.S. women artificially inseminated with the husbands' sperm, and instances of Japanese couples giving birth to children having received

¹ The total number of babies born is based on the 2006 Vital Statistics, and the number of babies born as a result of assisted reproductive technologies is based on investigations by the Japan Society of Obstetrics and Gynecology.

donor eggs from U.S. women. As for examples from within Japan, since 2001, there have been reports in the media of surrogate pregnancies to sisters, sisters-in-law and mothers.

At the same time, advances in ART have created serious legal issues surrounding legal status of children, and the following three cases have come under the spotlight as examples in Japan that have resulted in lawsuits.

- 1) In a case that was filed seeking the establishment of parenthood for a child born as a result of in-vitro fertilization using the frozen sperm of a dead husband, in 2002, the Supreme Court made a decision not to recognize a the status of a child born in wedlock, and in 2006, it also decided not to recognize the status of a child born out of wedlock to the husband.²
- 2) With regard to the application for objection against the refusal to accept the registration of birth of a legitimate child for a child born to a surrogate mother in the U.S. using the husband's sperm and an egg donated by another U.S. woman, in 2005, the Osaka High Court handed down a decision not to recognize a mother-child relationship between the commissioning female and the child,³ and the Supreme Court upheld this decision.⁴
- 3) With regard to the application for objection against the refusal to accept the registration of birth to which commissioning married couple's name is written as parent name child for a child born to a surrogate mother in the U.S. using the married couple's sperm and egg, in 2006, the Tokyo High Court ruled that the commissioning female should be regarded as the legal mother of the child,⁵ but in 2007, the Supreme Court reversed this decision, and judged that the woman giving birth to the child should be regarded as the legal mother.⁶

(3) Previous studies by relevant ministries, agencies and academic societies

In the past, investigations into the domestic treatment of ART have been conducted at the Ministry of Justice and at the Ministry of Health, Labour and Welfare (including the former Ministry of Health and Welfare).

First, the Special Committee on Medical Technology for Reproductive Treatment (of the Assessment Subcommittee for Advanced Medical Care within the Ministry of Health and Welfare's Health Sciences Council) presented the "Report on Ideal Reproductive Treatment Using Donor Sperm, Eggs and Embryos" (December 2000; hereinafter referred to as the "Special Committee Report"), which concluded that the Ministry of Health and Welfare recognize ART

² Decision of the Supreme Court, April 24, 2002(-not recorded in law reports); Judgment of the Supreme Court, September 4, 2006, Minshu (the Supreme Court Reporter (Civil Cases)) Vol. 60, No. 7, Page 2563.

³ Decision of the Osaka High Court, May 20, 2005, Hanrei Jiho (Law Cases Reports) No. 1919, Page 107.

⁴ Decision of the Supreme Court, November 24, 2005 (not recorded in law reports).

⁵ Decision of the Tokyo High Court, September 29, 2006 Hanrei Jiho (Law Cases Reports) No. 1957, Page 20.

⁶ Decision of the Supreme Court, March 23, 2007, Minshu (the Supreme Court Reporter (Civil Cases)) Vol. 61, No. 2, Page 619.

using donor sperm, eggs and embryos, but prohibit surrogate pregnancy.

Based on this report, the Committee on Assisted Reproductive Technology Treatment (within the Health Sciences Council of the Ministry of Health, Labour and Welfare) conducted an investigation for the purpose of giving concrete form to system improvements, and summarized its findings into the “Report on Development of the System for Assisted Reproductive Technology Treatment Using Donor Sperm, Eggs, and Embryos” (April 2003; hereinafter referred to as the “Committee Report”), which included the prohibition of sperm, eggs and embryos being donated from siblings and so forth, and the recognition of the right to identifying information, including information enabling the identification of donors.

At the same time, the Committee on Legislation, Parenthood Relating to Assisted Reproductive Technology Treatment (within the Legislative Council of the Ministry of Justice) released its report on assisted reproductive technologies that use the eggs of other females. The “Interim Draft Summary on Special Cases of the Civil Code related to Parenthood of Children Born through Assisted Reproductive Technologies such as those using Donor Sperm, Eggs or Embryos” (July 2003; hereinafter referred to as the “Interim Draft Summary”) includes the notion that the person who gives birth to a child shall be the legal mother of that child.

However, at present, the results of these studies have not led to any bills being passed into law.

Furthermore, with regard to surrogate pregnancy in particular, the Japan Society of Obstetrics and Gynecology proposes in its “View on Surrogate Pregnancy” guidelines (April 12, 2003; hereinafter referred to as the “Guidelines”) that: “Facilitation of surrogate pregnancy is not permitted. Regardless of whether or not consideration is transferred, members of the Society must not facilitate in surrogate pregnancy for those who so desire, nor must they be involved in the facilitation thereof. Moreover, members must not mediate surrogate pregnancy.”

Furthermore, investigations have also been conducted and opinions expressed respectively, by the Japan Federation of Bar Associations from a perspective of the need and ideal form for the legal regulation of ART, and by the Japan Medical Association from a medical and bioethical perspective.

(4) Efforts by the Science Council of Japan

As discussed in “(2) Advances in ART, and the repercussions thereof,” in the past, many issues have been raised with regard to ART and to the legal status of children born through ART. These issues have also been taken up at the Science Council of Japan, holding various multilateral discussions led by specialists. The “Bioethics and the Advance of Reproductive Medical Technology”⁷ public

⁷ “Bioethics and the Advance of Reproductive Medical Technology,” edited by the Genitourinary

symposium was held on November 4, 1992; the “Reproductive Treatment and Bioethics”⁸ public lecture was held on February 24, 1999; and the “Transnational Reproductive Treatment and the Law”⁹ symposium was held on December 6, 2004.

Furthermore, in view of the fact that the significance of the various issues related to bioethics is growing year by year, the Science Council of Japan established a special committee on the “Image of the Life Sciences and Bioethics” during the 18th term (2000-2003), and on the “Life Sciences and Bioethics: Guiding Principles for the 21st Century” during the 19th term (2003-2005). Each committee conducted investigations and published a report: “Image of the Life Sciences and Bioethics -- for the Proper Development of the Life Sciences and Biotechnology” (July 15, 2003), and “A New Social System for the Construction of a Bioethical Value System -- Focused on the Dignity of ‘Life’ and the Respect for the ‘Spirit’” (August 29, 2005). These two reports outline the establishment of a new public bioethics research institute to stem uncontrolled developments in science and technology and to dispel the “public distrust of bioethics.”

(5) Circumstances in other countries

(i) Bioethics and the law

Assisted reproductive technology entails various fundamental bioethical issues related to human dignity: not only the importance of newly created life, but also the rights and wrongs of the artificial manipulation of reproductive cells and the involvement of third persons such as gamete donors and surrogate mothers. Whilst there are some lines of thought that pregnancy and childbirth should be left to the providence of nature and to the mysteries of life, without being lent to artificial and technological intervention; on the other hand, the fact is that in the real world of infertility treatment, the use of ART has progressed in response to the wishes of people who want to have children.

This leads to individual countries legislating regulatory policy on the use of technology. Accordingly, the selection of certain values has become a policy issue, resulting in various debates on regulation in legal and political arena. After the first in-vitro fertilization baby was born in England in 1978, legislation proceeded in various countries from the beginning of the 1990s, including in England¹⁰ and Germany¹¹. In particular, in France, after a series of reviews conducted for more than a decade from 1983, a comprehensive bioethics law

Medical Research Liaison Committee, Science Council of Japan, Medical View Co., Ltd., 2003.
⁸ Hiroyuki Yoshikawa, et al., “Science Council of Japan Library 1: Reproductive Treatment and Bioethics -- The Worries of Infertility: Opinions of Scientists,” Science Council of Japan Secretariat and the Japan Science Support Foundation, 1999.
⁹ “Trends in the Sciences” Editorial Committee (ed.), “Trends in the Sciences” 2005 No. 5
¹⁰ Human Fertilisation and Embryology Act 1990, HFEA.
¹¹ *Gesetz zum Schutz von Embryonen* (The Embryo Protection Act), 1990.

comprised of three acts was enacted in 1994.¹² Even after the acts were amended in 2004, France has continued to make constant efforts to rework the acts. The European Union, as well, placed bioethics provisions into its 2000 Charter of Fundamental Rights, and is in the process of basing issues of reproductive rights and bioethics on international and national legal regulations.

(ii) Overview of regulations surrounding surrogate pregnancy

The modes of regulation for ART, including surrogate pregnancy, differ from country to country, including non-regulation, self-regulation by healthcare providers, and regulation based on law or precedent. Nevertheless, the following kinds of characteristics can be seen regarding the permissibility of surrogate pregnancy.¹³

In such places as Germany, Italy and Austria, and in some U.S. states, surrogate pregnancy is completely prohibited; in France, based on such principles as the respect for the human body and the inviolability and inalienability of the human body, regulations have been prescribed voiding surrogacy contracts and prohibiting and punishing acts of intermediation; and in Switzerland, regulations have been established prohibiting surrogate pregnancy according to the Constitution. In these countries and states, in cases where a child has been born as a result of a surrogate pregnancy, usually, the surrogate mother is regarded as the legal mother of the child.

On the other hand, in such places as England, the Netherlands, Belgium, Canada, Hungary, Finland and Israel, as well as in some Australian states, and in almost half of the U.S. states,¹⁴ surrogate pregnancy is permitted under certain conditions, such as being without consideration for instance. Of these, there are a number of places, such as some of the U.S. states, where the commissioning mother rather than the surrogate mother is regarded as the child's legal mother, and there are other places, such as England, where although the surrogate mother is regarded as the child's mother and the commissioning male as the child's legal father at first, there are arrangements in place for the child to be regarded as the biological child of the commissioning married couple by the couple applying to court for a "parent order".

¹² *Loi No. 94-653 du 29 juillet 1994 relative au respect du corps humain* (law on respect for the human body), *Loi No. 94-654 du 29 juillet 1994 relative au don et à l'utilisation des éléments et produits du corps humain, l'assistance médicale à la procréation et au diagnostic prénatal* (law on the donation and use of elements and products of the human body, medically assisted reproduction, and prenatal diagnosis), and *Loi No. 94-548 du le premier juillet 1994 relative au traitement de données nominatives ayant pour fin la recherche dans le domaine de la santé et modifiant la loi n°78-17 du 6 janvier 1978 relative à l'informatique, aux fichiers et aux libertés* (law on the processing of nominative data).

¹³ For further details, see the Ministry of Health, Labour and Welfare's "Investigative Report on the Current Situation of Surrogate Pregnancy in Foreign Countries" (November 2007).

¹⁴ Including cases based on precedent. In the U.S., there is no regulation at the Federal level. The Uniform Parentage Act 2000 (amended 2002), which was prepared by the National Conference of Commissioners on Uniform State Laws (NCCUSL) includes provisions for instances where surrogate pregnancy is recognized, and prescribes requirements for surrogate pregnancy contracts to be recognized as being valid, and methods for establishing parent-child relationships; however, the adoption of this act is left up to the individual states.

2. Request for Deliberation and Report Items

(1) Basic policy of the study

On receiving the joint request for deliberation from the Minister of Justice and the Minister of Health, Labour and Welfare, on the whole, the Committee adopted the following three points as the basic policy for proceeding with its investigation.

- 1) Although the study will be focused on surrogate pregnancy, it shall not be limited to only this.
- 2) While discussions shall be held from the perspective of human rights, and in particular the rights and interests (welfare) of children and parents, investigations shall be conducted multilaterally and comprehensively, with consideration given to basic principles and values.
- 3) There is no need to consolidate findings into a single conclusion; rather the provision of several options shall be acceptable, but the advantages, disadvantages and points of issue shall be clarified for each option.

As mentioned previously, the only regulation for surrogate pregnancy that exists at present is the Guidelines of the Japan Society of Obstetrics and Gynecology. To begin with, since there has been virtually no clarification of an accurate picture of surrogate pregnancy in Japan, the Science Council of Japan decided to endeavor to better ascertain the actual state of surrogate pregnancies in Japan,¹⁵ and to consider and summarize as report items the need and ideal form of further regulation on surrogate pregnancy, by examining these points while referring to the circumstances in other countries.

(2) Permissibility of surrogate pregnancy using a married couple's sperm and eggs

The following four points are given as the reasons why the Guidelines of the Japan Society of Obstetrics and Gynecology prohibit surrogate pregnancy:

- 1) The welfare of the child should be assigned the highest priority.
- 2) Surrogate pregnancy involves physical risks and psychological burdens.
- 3) Family relationships become complicated.
- 4) It cannot be acknowledged that surrogacy contracts are ethically tolerated by society as a whole.

The Committee Report also prohibits surrogate pregnancy, but uses the following three points as its basis.

- 1) People are used solely as a means of reproduction (contrary to human dignity).
- 2) Enormous risks are placed upon a third person.
- 3) Undesirable from the viewpoint of the welfare of the child.

¹⁵ References include the "Overview of the Results Collected from an Attitude Survey on Assisted Reproductive Technologies," Ministry of Health, Labour and Welfare (November 2007).

On the other hand, there is also an opinion that surrogacy contracts are contrary to the spirit of Article 35¹⁶ of the Convention on the Rights of the Child¹⁷ which calls for the prevention of the sale of or traffic in children. Moreover, the possibility has been raised of problems arising between the commissioning person(s) and the gestational mother, such as the refusal to hand over or accept the child; and in fact, in the United States, such problems have developed into litigation in the past. Since the legal status of children born as a result of surrogate pregnancy is unclear, there is also an aspect of a child's social environment, upbringing and other circumstances becoming unstable.

While giving due consideration to the above points, the Committee will deliberate on the validity of the bases for prohibiting or allowing surrogate pregnancy, and will report those findings. The Committee will also deliberate and report on parent-child relationships, and in particular mother-child relationships, as well as on the problems related to citizenship in the cases of surrogate pregnancies in foreign countries, from a perspective of the legal protection of the child.

Unless otherwise noted, hereinafter, the term "surrogate pregnancy" shall refer to the method of a host mother using the gametes of a married Japanese couple who have commissioned the pregnancy.

(3) Other problems related to ART; and in particular, donor eggs and the right to identifying information

The right to identifying information is claimed as the right of a child born as the result of ART, but on the other hand, there is also a claim for the rights of parents, donors and gestational mothers who want to protect their own anonymity. Situations can be envisaged where these two claims will clash. With AID, which has already been conducted for many years, anonymity of the sperm donor is the general rule; and according to a survey,¹⁸ 80% of fathers do not want to inform their child about the AID.

This issue entails many problems that should be clarified institutionally. To start with, should children be guaranteed the right to identifying information? Supposing that children have that right, how should parents inform their children? What age should children be before they are able to exercise that right? Who has the right to request disclosure? What details can be made known?

Although the Committee did examine this issue, in view of the fact that there are many further issues for which there should be more in-depth study from

¹⁶ "States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form."

¹⁷ Adopted by the United Nations in November 1989; and ratified by Japan on May 20, 1994.

¹⁸ "Emotional Reaction of Male Partners to Donor-Insemination Pregnancy," Japanese Journal of Fertility and Sterility, Vol. 45, No. 3, Pages 219-225, 2000.

perspectives other than surrogate pregnancy, the Committee decided not to indicate them as report items in this report.

Whereas AID applies to instances where establishing pregnancy using a male's own sperm is thought to be unfeasible, conception using a donor egg is a possible means to adopt in instances where pregnancy using a female's own egg is thought to be unfeasible. Possible examples of potential donor egg recipients include females with congenital gonadal dysgenesis, premature ovarian failure, or loss of ovarian function due to chemotherapy. Based on the fundamental principle of excluding the concept of eugenics and commercialism, the Committee Report takes a stance of permitting the practice of this technology on the basis of donor anonymity. Despite this stance, no legislation has resulted, and neither has the Japan Society of Obstetrics and Gynecology indicated its view on the rights and wrongs of this technology. Amid an absence of any clear guidelines, some medical doctors in Japan have facilitated egg donation, and groups of reproductive treatment specialists have submitted written requests for the practice of egg donation from sisters and friends. As such, the Committee determined that there is a need for consideration into the permissibility and guidelines for this technology.

However, given that, being the other gamete, the issue of egg donation is inseparable from sperm donation, namely from the consideration of AID, the Committee considered that deliberation on this should be conducted together with an examination into the right to identifying information and the rights and wrongs of donations being made by siblings and friends; and as such, the Committee decided not to indicate this as a report item in this report.

The Committee believes that the Science Council of Japan needs to continue its examination of these issues.

3. Issues related to Surrogate Pregnancy, and the Regulation Thereof

(1) From medical aspects

(i) Medical issues related to surrogate pregnancy

(a) Risks and burdens for the gestational mother

The maternal mortality rate in Japan is 4.9 per 100,000 births,¹ and demonstrates the high level of the country's world-class perinatal care. In contrast, the global maternal mortality rate (estimate) is 400 per 100,000 births.² However, there are also other investigative reports³ that claim that, in Japan, the ratio of expectant and nursing mothers who could have died without appropriate medical intervention is, even now, approximately 420 per 100,000 births; and so attention must also be given to the risks that include other outcomes apart from death.

Even in cases where pregnancy and childbirth have proceeded normally, it is not uncommon for there to be hyperemesis or for the burden during pregnancy to be otherwise large, or for a variety of disorders to arise after childbirth (puerperium), such as wound pain, hematoma, infectious diseases, hemorrhoids, urinary incontinence, postpartum depression, puerperal galactorrhea, or descent or prolapse of the uterus. Although most of these are only temporary, some may result in a prolonged disorder. Moreover, during the period following childbirth, in some cases, critical disorders develop, such as endocarditis, thrombosis, puerperal cardiomyopathy, or puerperal psychosis. Consideration also needs to be given to the fact that pregnancy and childbirth may have a significant impact on a woman's later life.

With surrogacy, pregnancy and childbirth, which entail these kinds of risks and burdens, are imposed onto a third person, namely the gestational mother, and it is this point which is one of the major issues facing surrogate pregnancy.

Furthermore, studies are also needed regarding the existence of risks that are inherent to surrogate pregnancy. There are very few reports on surrogate pregnancy that mention how the risks involved in pregnancy and childbirth change when compared to ordinary pregnancies. There is a report⁴ overseas which compares researches with different backgrounds, and asserts that the frequencies of antenatal hypertension and abnormal genital bleeding during pregnancy in surrogate mothers is lower than that for cases of ordinary in-vitro fertilization. However, it could hardly be described as a comparative study

¹ Mothers' and Children's Health and Welfare Association (ed.), "Maternal and Child Health Statistics of Japan 2007," Mothers' and Children's Health Organization, 2008.

² 2000 data. Monitoring and Evaluation, Department of Reproductive Health and Research (RHR), WHO, Database update as of 31 July 2006.

³ Takahiko Kubo, "Study on the Critical Care of Expectant and Nursing Mothers, including Maternal Deaths"; Health and Labour Sciences Research Grant: Research on Health Technology Assessment, (FY2006 General and Group Research Report) Analysis and Preventive Measures for Medical Accidents in Obstetrics, Pages 26-40, Senior Researcher: Masao Nakabayashi, March 2007.

⁴ Parkinson J, Tran C, Tan T, Nelson J, Batzofin J, Serafini P: Perinatal outcome after in-vitro fertilization-surrogacy. *Hum Reprod* 14(3): 671-676, 1999.

with a sufficiently high degree of scientific evidence. Other than this, there have been barely any careful comparative studies founded on scientific bases.

In Japan, there have been reports in the media of some medical doctors facilitating in surrogate pregnancies in disregard of the Guidelines; however, the details are unclear, and so there is practically nothing that could be regarded as medical data.

Meanwhile, according to comparative studies⁵ on in-vitro fertilization using donor eggs - which, medically, has a point in common in that conception uses another person's egg - abnormal bleeding during pregnancy, pregnancy-induced hypertension, intrauterine growth retardation and premature birth are observed more frequently than for ordinary pregnancies. Possible causes could be sexual dysfunction of the gestational mother or incompatibility attributable to the fetus having absolutely no common genetic factors with the gestational mother. It is conceivable that the latter cause is just as likely with surrogate pregnancy, and therefore, it can be presumed that the antenatal abnormalities mentioned above also have the potential to develop in surrogate pregnancy at a higher rate than ordinary pregnancies.

As described above, at present, there is no medical data from which it is possible to determine whether pregnancy and childbirth in surrogate pregnancy involves any inherent physical risks. On the other hand, although it is feasible to infer that the same abnormalities as pregnancies derived from donor eggs will occur in surrogate pregnancy as well, there is far from sufficient medical data on this either.

(b) Impacts on the fetus/child

There are also scarcely any clear-cut research reports on the effects of surrogate pregnancy on fetuses, and there are many unclear points.

In recent years, basic research, including experiments using animals, has suggested that the postnatal health of children is affected by changes in genetic information (epigenetic mutation) which arises from the transfer of substances from the mother to the child during pregnancy but which is unaccompanied by any direct action of the transferred substances or changes in DNA sequence. It has been indicated that quite a number of the effects principally caused by epigenetic mutation are late onset, such as lifestyle-related illnesses; and so in many cases, observations need to be conducted over a long period. Furthermore, intrauterine infections caused by viruses and other pathogens (including unknown pathogens) and the exposure of fetuses to chemical

⁵ Söderström-Anttila V: Pregnancy and child outcome after oocyte donation. *Hum Reprod Update* 7(1):28-32, 2001; Abdalla HI, Billett A, Kan AK, Baig S, Wren M, Korea L, Studd JW: Obstetric outcome in 232 ovum donation pregnancy. *Br J Obstet Gynaecol* 105(3):332-337, 1998; Salha O, Sharma V, Dada T, Nugent D, Rutherford AJ, Tomlinson AJ, Philips S, Allgar V, Walker JJ: The influence of donated gametes on the incidence of hypertensive disorders of pregnancy. *Hum Reprod* 14(9): 2268-2273, 1999.

substances via the mother are already well-known facts.

In the case of surrogate pregnancy, children are affected via the gestational mother. We will have to wait for future long-term studies for the specific types of effects and the extent of those effects.

(ii) Medical indications for surrogate pregnancy

Supposing surrogate pregnancy is conducted under certain medical conditions, the challenge would be in the details, and in particular, what to do with the scope of the commissioning female and the gestational female; that is, the medical indications of the commissioning female, and the age restrictions of the gestational female.

(a) Medical indications of the commissioning female

Indications for surrogacy can be divided into absolute indications and relative indications. Women who are an absolute indication are those who do not have a uterus, and consist of cases of congenital abnormalities where a woman is born without a uterus as with Rokitansky syndrome, and cases where a woman no longer has a uterus as a result of having had a hysterectomy as treatment for some kind of disease. Determining whether a commissioning female falls under an absolute indication is not all that difficult.

However, even some women who have a uterus could be regarded as being an indication for surrogate pregnancy, including: women considered unable to conceive themselves; women for whom it is believed their life and/or that of their child may be put into extreme danger if they were to conceive by themselves; women for whom it is believed, while not life-threatening, their state of health would subsequently deteriorate if they were to conceive by themselves; and women who repeatedly miscarry if they conceive by themselves. These are referred to as “relative indications” (see Note 1). Unlike cases of absolute indication, it is extremely difficult to clearly determine with reasonable medical basis whether a commissioning female who has a uterus falls under a relative indication.

Even supposing that the scope of medical indications is stipulated, there is no denying the possibility of the scope being broadened or surrogate pregnancy being used by women who want to have a child without going through pregnancy themselves.

(b) Age restrictions of the gestational female

Not only is it widely known that the incidence of prenatal abnormalities increases with the advanced age of the gestational mother in ordinary

pregnancies, but it has also been reported for donor eggs as well.⁶ With surrogate pregnancies, in cases where it is relatively older women that conceive, it is expected that prenatal abnormalities will further increase by reason of the pregnancy being later in life. There are statistics⁷ that show that the maternal mortality rate for women in Japan aged 40 or over is about ten times that for women in their twenties. For this reason, when approving the conduct of surrogate pregnancies, some believe that an upper age limit should be set for surrogate mothers. However, in terms of consistency with the age at which women can conceive naturally, this line of thinking is open to question. Moreover, rather than being a risk factor having a threshold, age factor is a risk factor that has continuity. Viewed from this kind of perspective, it would be difficult to give an objective and rational medical basis for uniformly setting an age restriction.

(2) From ethical and social aspects

(i) Rights and interests of the child, commissioning person(s), and the gestational mother

(a) Self-determination of the commissioning person(s) and the gestational mother, and the limits thereof

Autonomy is one of the basic principles of ethics, and self-determination is regarded as part of this. Furthermore, the right to self-determination is regarded as being included within the right to pursue happiness which is guaranteed under Article 13 of the Constitution. For this reason, some people assert that requesting and accepting surrogacy must be permitted as a “right.” However, even supposing that commissioning persons had this kind of “right,” to begin with, there is the question of whether this “self-determination” really is made completely of one’s own will and with perfectly free choice. First, on the one hand, points have been raised which cast doubt on whether both parties concerned would make a decision with a full understanding at all times of possible occurrences and their serious implications, including the physical and psychological burdens and risks accompanying the act of surrogate pregnancy, which is fundamentally different from merely the lending and borrowing of property and from ordinary labor (see “(1) (i) (a) Risks and burdens for the gestational mother”), as well as an understanding of the sense of loss felt by the surrogate mother when she hands over the child, the psychological conflict felt by both parties, and the possibility that the child will not be born. On the other hand, even supposing that self-determination independent of cultural and

⁶ Soares SR, Troncoso C, Bosch E, Serra V, Simón C, Remohí J, Pellicer A: Age and uterine receptiveness: Predicting the outcome of oocyte donation cycles. *J Clin Endocrinol Metab* 90 (7): 4399-4404, 2005.

⁷ Mothers’ and Children’s Health and Welfare Association (ed.), “Maternal and Child Health Statistics of Japan 2001-2005,” Mothers’ and Children’s Health Organization, 2002-2006.

social backgrounds was beyond the realm of possibility, it is conceivable that, rather than one's own wishes, the wishes of families and other people around the parties would act decisively when requesting or accepting a surrogate pregnancy. In particular, in current Japan, where there is a tendency to emphasize the "Ie (family)", it is feared that these types of situations would transpire in surrogate pregnancies arranged between sisters (in-law) or between a woman and her mother. Moreover, if this were repeated, it could be treated as human kindness or as a virtue, and this in itself could become a considerable social pressure.

Furthermore, even if the various pressures surrounding the decision-making were removed, and even if true self-determination could be achieved through extensive information provision and informed consent, we must also bear in mind the fact that there are rights and interests of others and interests of society as a whole which are at odds with the "right" to request and accept surrogate pregnancy.

First, more than anything else, the existence of a third person, namely the "child," cannot be ignored. The likeness of surrogate pregnancy and living donor organ transplantations is often talked about: surrogate pregnancy is a medical treatment where risks are imposed upon a third person, namely the gestational mother; and living donor organ transplantations are similarly conducted with the cooperation of a third person, namely the donor, with risks being imposed upon this person. However, with surrogate pregnancy and other ART that are conducted with the cooperation of a third person, the fact that a child - that is, a new character aside from the parties to the contract - is created is inseparable from this practice, and rather it is the objective. It is this point that is the fundamental difference between ART and living donor organ transplantations, and the rights and welfare of the child born as a result are an issue that surpasses the self-determination of the person(s) commissioning the surrogate pregnancy and the surrogate mother.

Second, we cannot overlook the risks involved in pregnancy and childbirth. Even supposing that a surrogate mother has accepted those risks, in reality, if the risks were to extend to threatening her life or physical well-being, then in present-day Japan, the impact on the people around her and on society and the nation would be extremely great. This goes beyond just differences in systems of care, including medical treatment and counseling: they are an issue intimately connected to social and cultural backgrounds in a broad sense, including the social view on ART, and they differ greatly from region to region and from country to country.

Third, we must also pay attention to the fact that surrogate pregnancy is fraught with risks linked to the commercialization of the female body. In the

case where surrogate pregnancies involve compensation, it is likely that this will also act as an incentive for women to accept such pregnancies, and it is expected that intermediation and commissioning of these pregnancies which exploit the disparity between the rich and the poor will be conducted in Japan and overseas. The problematic nature of this has been pointed out, not only from the perspective of equality, but also from the perspective that new social issues could be generated, such as the exploitation of the underprivileged classes by the wealthy. That is why intervention from a paternalistic perspective is stressed.

(b) Welfare of the child

The welfare of the child must be respected to the maximum extent possible. Naturally, the child is unable to either express its own will regarding its birth into this world, or speak of its own wishes or interests before it is born. Therefore, as bearers of the responsibility for the next generation, the very least we need to do is to carefully examine the effects that being born as a result of a surrogate pregnancy and the resulting issues have on the mind and body of the child.

First, a fetus is born after being placed in a womb - an intrauterine environment from which they cannot escape. Particularly in the case of surrogate pregnancies that involve compensation, it would be hard to say that there will not be prospective surrogate mothers who conceal some sickness or the like. The fact that the ways in which a fetus may be affected by the mother and the types of risks it may be burdened with are unclear is as stated in “(1) (ii) (b) Impacts on the fetus/child.”

Second, it is also believed that the views expressed by children born as a result of AID suggest that the psychological burden on children of being born through surrogate pregnancy will by no means be small. Even though there is a difference in the fact that a surrogate child is genetically the offspring of the commissioning couple, it is envisaged that the child will be similarly affected by the circumstances of the birth in itself or by the parents trying to conceal the facts. Particularly in cases where the surrogate pregnancy was for profit, even if the compensation was to cover the pregnancy and childbirth, the child may still feel that they were made the object of a trade. Furthermore, surrogate pregnancy means that the child is separated from its birth mother in infancy. This is said to be the same as for adopted children; but in a surrogacy contract which is entrusted only to the parties concerned, unlike the adoption of a minor for which court involvement is expected (Articles 798 and 817-2 of the Civil Code), usually, the contract can be effected far more easily, without going through the guardianship-related decisions regarding the competence as

parents and the welfare of the child. Worldwide, research into the effects these have on the development of a child's mind and body and on its relationship with the commissioning couple has only just begun. The effects appear to be different depending on the historical and cultural backgrounds to parent-child relationships; but in Japan, even the importance of this kind of research is far from being recognized.

Third, one of the more realistic issues appears to be the refusal to hand over or accept the child. For example, in cases where the child is born with a disability, there are fears that the commissioning person(s) will refuse to accept the child. Even supposing that this point is clearly stipulated when coming to a contract for the surrogate pregnancy, and even supposing the contract is executed as agreed, when faced with disparity between the reality at the time of the contract and the reality after the birth, it cannot be denied that there is a possibility that abuse and various other issues may surface in a form that is much more complex than for natural reproductions. It is this that is the most worrying matter when considering the welfare of the child. In other words, in addition to the considerable damage to the child from the very fact that a dispute arose, even if, legally, the guardian of the child can be established (see "4. Legal parenthood—Legal status of the born child"), we must not forget that this in itself may not necessarily guarantee the stability and continuation of an upbringing filled with love.

(ii) Problems related to biological order

From a biological perspective, the act of reproduction for all forms of life is one of the most important behaviors for the survival of individual species, and for many animals, reproduction is an act on which individual animals stake their lives. With mammals, after giving birth, the parent lives together with their offspring to look after them, but it is only humans who have evolved such that they are able to continue living well beyond their reproductive age. It could be argued that, for humans in their capacity as mammals, in-vitro fertilization is already a departure from natural reproductive behavior, in that a gamete is fertilized outside the body; but surrogate pregnancy is an even greater departure from reproductive behavior as a natural action, in that all processes from conception to childbirth, which account for most of the reproductive period, are passed on to someone else together with the inherent risks and various burdens, and in a manner of speaking, the commissioning person becomes a mere bystander.

While pregnancy and childbirth are major parts of the reproductive behavior of mammals, the act of nursing after birth is also a part of their reproductive behavior. During pregnancy, hormone secretion and various other changes occur

to the endocrine system, and based on this, the mother undergoes various physical and psychological changes. These changes could also be described as preparation for the subsequent act of nursing. Motherhood, which is more or less the emotional foundation of nursing, is formed throughout the pregnancy through the involvement of the endocrine system. If we consider that the state of gestation does not simply end with childbirth, but is rather a series of biological phenomena that link with subsequent actions, then, not only do we need to pay attention to the relationship between a child born as a result of a surrogate pregnancy and the commissioning person(s), but we must also pay attention to the relationship between the gestational mother, who in a sense has finished her role, and the child who has been handed over to the commissioning person(s).

(iii) Confusion in medical ethics and healthcare

Concerns have been pointed out that surrogate pregnancy gives rise to a completely different nature and causes confusion in doctor-patient relationships and medical ethics.

Normally, medical treatment is effected based on a bilateral relationship between a healthcare provider and the recipient of the treatment; but in the case of surrogate pregnancy, in addition to these two parties, there is also a third party, namely, the person commissioning the surrogate pregnancy. As a result, there is potential for the medical treatment considered best for the gestational mother to not necessarily accord with the medical treatment preferred by the commissioning person, or for the gestational mother not to consent to the medical treatment preferred by the commissioning person. As long as a recipient of medical treatment is able to express their wishes, healthcare providers ought to provide care based on those wishes. However, in cases where there is discord between the wishes of the commissioning person and those of the person receiving the medical treatment, rather than merely being a bystander, the commissioning person becomes an obstructor who intervenes inappropriately in the treatment. Consequently, it is feared that the execution of medical treatment, which is usually formed on the basis of medical judgment and with the consent of the recipient, will end up being greatly distorted (see Note 2).

In cases where a child born through a surrogate pregnancy has some kind of disability which is diagnosed during the pregnancy, there are concerns over whether the commissioning person will be able to accept this diagnosis. It is possible that the commissioning person may request a procedure to terminate the gestational mother's pregnancy. Further, depending on the degree of the disability, in such cases as where the disability is medically determined to be slight, it is also possible that this decision will be contradictory to the determination of the healthcare provider. As well as congenital disabilities, some

disabilities in children are activated by pregnancy or childbirth. In these cases, movements to pursue the cause of the disability may increase, causing the issue to become even more complicated.

It would be both difficult and inappropriate to resolve these issues solely by means of prior contract between the parties concerned; there are also issues from a medical ethics aspect.

(3) From legal aspects

(i) Need for regulation

As seen in “(1) From medical aspects” and “(2) From ethical and social aspects,” surrogate pregnancy entails both medical and ethical/social issues. The existence of harmful effects, including the infringement of people’s interests, is justification for taking the issues of surrogate pregnancy beyond merely the field of ethics and making it subject to social regulation. Violation of bioethics; considerable departure from natural reproduction; going beyond the limits of medical care; offensive to public policy... by themselves, reasons like these do not justify social intervention. However, the burden on surrogate mothers; the serious impact of this burden on life and health; the expected psychological effects on the child; the encroachment on the discretionary power of healthcare providers... if we take into account the existence of the harmful effects brought about by surrogate pregnancy, then we cannot confine surrogate pregnancy to an issue of ethics and an contract between the parties concerned. Even presuming that the right to reproduce and the right to form a family exist, and even presuming that there are women who aspire to become surrogate mothers purely from a sense of benevolence, altruism and empathy for the commissioning persons, it would be inappropriate to entrust surrogacy to only the self-determination and wishes of the commissioning person and gestational mother and to the consideration of healthcare providers.

(ii) Self-regulation by healthcare providers

In accordance with its Guidelines, the Japan Society of Obstetrics and Gynecology prohibits its members from facilitating in or being involved in any surrogate pregnancy (“1. (3) Previous studies by relevant ministries, agencies and academic societies”). At the same time, given that women have the “right” to have a child to inherit their own genes, some people are of the opinion that self-regulation by medical organizations like the one above are unreasonable; but viewed from the perspective mentioned above, it is reasonable that the society has regulated surrogate pregnancy using the Guidelines that it has established of its own accord as a code of ethics.

Rather, what is being questioned at present is whether the above Guidelines

alone are sufficient.

So far, the number of medical doctors that have taken it upon themselves to conduct surrogate pregnancies in violation of the Guidelines remains at a small minority. Given this, there is also opinion that surrogate pregnancy should be dealt with by the society further strengthening its self-regulation, and that greater measures should not be taken. From a perspective of the reserved nature, this opinion is worth paying attention to.

However, the Guidelines lack any binding force outside of the members of the Japan Society of Obstetrics and Gynecology, and what is more, the only guarantee for the binding power of the Guidelines is the society's internal sanctions, namely, punishment of violating medical doctors meted out by the society. In Japan, doctor associations, such as the Japan Medical Association, are voluntary organizations, and as such, nothing more can be asked of them in the way of the autonomous treatment of doctors. The current situation is habitually fraught with the risk where surrogate pregnancies been conducted without self-restraint. One line of thought is to respect the autonomy of healthcare providers and resign ourselves to these risks; but it seems that the issue of surrogate pregnancy has already surpassed the stage of being able to leave it to the autonomy and responsibility of healthcare providers.

(iii) Legal regulation

(a) Administrative ethical guidelines and the law

Even if surrogate pregnancy is regulated, it is likely that some people would be of the view that the administrative ethical guidelines established by the Ministry of Health, Labour and Welfare and other ministries are sufficient and there is no need for any regulation based on law. Guidelines already in existence in Japan include the "Guidelines for Clinical Research on Gene Therapy,"⁸ the "Ethical Guidelines for Clinical Research,"⁹ the "Guideline for Clinical Research Using Human Stem Cells,"¹⁰ and the "Guidelines for the Decision-Making Process in Caring for Terminally Ill Patients"¹¹.

Nevertheless, these kinds of administrative guidelines are nothing more than a type of administrative guidance with no legal basis, and cannot have any enforceability. Moreover, it seems inappropriate to entrust an administration with policy decisions on the issue of surrogate pregnancy -- an ethically, legally and socially important issue that goes beyond just the category of medical care. If surrogacy is to be regulated, then rather than one based on administrative guidance, it seems that it should be founded on laws

⁸ Enacted March 27, 2002; amended in full December 28, 2004.

⁹ Enacted July 30, 2003; amended in full December 28, 2004.

¹⁰ July 3, 2006.

¹¹ May 2007.

created by the national diet as an organ representative of the people.

(b) Legal regulation

Even supposing that “surrogate pregnancies of convenience” are legally regulated (that is, having another woman go through pregnancy and childbirth for you even though you are able to yourself), some of the Committee was opposed to legally regulating all surrogate pregnancies. This opinion was based on two reasons: first, the greatest risks brought about by a surrogate pregnancy are the risks associated with an ordinary pregnancy and childbirth, and therefore legal regulating this cannot be justified because these are risks that are accepted by a surrogate mother; and second, the scientific basis for the existence of other risks is unclear.

However, as mentioned above, the former type of risks cannot be left up to the self-determination of the gestational mother (see “(2) (i) (a) Self-determination of the commissioning person(s) and the gestational mother, and the limits thereof”). Further, although it is true that there is no hard evidence concerning the latter type of risk (“(1) (i) Medical issues related to surrogate pregnancy,” and “(2) (ii) Problems related to biological order”), it could be argued that estimating those risks is reasonable. Therefore, if this dangerous situation cannot be satisfactorily dealt with without a legal basis, then legal regulation should be permitted.

When law intervenes in medical care, it must be kept within a scope that is reasonably necessary, without unduly restricting the health care freedom. In the past, there has sometimes been a tendency to demand legal intervention, and at times, punishment, as a consequence of a single disturbance of the bioethical order, and there is no doubt that this has had its own problems. We must avoid regarding ethics in the same light as law. However, with surrogacy, seeing as there is someone else who suffers realistic damage - namely, the surrogate mother who provides her body as an instrument of pregnancy and childbirth - this gives justification for legal regulation. With due consideration of this fact, we must examine and carefully ascertain what kind of legal restrictions would be reasonable and appropriate.

(c) ART and legal regulation

The law on surrogate pregnancy should be like the “Assisted Reproductive Technologies Act” which regulates within a framework of all ART. The proposal in the Ministry of Health, Labour and Welfare’s Committee Report was also like this (see “1. (3) Previous studies by relevant ministries, agencies and academic societies”). Some people advocate a more comprehensive “Basic Law on Bioethics”; but when considering the realistic need for legislation on

surrogate pregnancy, it is felt that the law should be limited to ART. Consensus-building across all bioethics and the creation of a new law based on this are issues for the future.

(iv) Non-criminal legal restrictions

(a) Legal restrictions and punishment

Supposing that surrogate pregnancy should be regulated by law, they should basically be kept to non-criminal legal restrictions.

Both the Special Committee Report and the Committee Report stated that “performing medical treatment for the purpose of surrogate pregnancy, or arranging such treatment” should be regulated by “law with penal provisions.” Although it is not proposed that crimes committed by citizens outside Japan be punished, as in the case of organ trafficking (Articles 11 and 20 of the Law on Organ Transplantation, and Article 3 of the Penal Code), we must be mindful that persons are punished who have conducted acts of intermediation in Japan for surrogate pregnancy conducted abroad; and, where provisions are not established that explicitly exclude them from punishment, we must also be mindful that the possibility is left open for persons, who have requested intermediation for treatment, to be punished as accessories to acts of intermediation.

However, with surrogate pregnancy, even supposing that there are risks to the surrogate mother and to the child, we could not describe them as being risks of exceedingly high degree; nor are they actions that cause great harm to people like ordinary crimes. In view of these facts, punishing all surrogate pregnancies and all involved actions would appear to be excessively broad.

On the other hand, even though the laws would not have penal provisions, the following effective ways of dealing with infringements of the law are possible, and so, in terms of legally handling surrogate pregnancy, these by themselves are considered sufficient. We must also be mindful of the fact that surrogate pregnancy will not be completely suppressed simply by stipulating penal provisions. When using the law to regulate surrogate pregnancy, we must consider a reasonable response based on the “reserved nature of criminal law.”

(b) Administrative punishment

The Medical Practitioners Law stipulates that, in the event a medical doctor commits “wrongdoings related to medical matters,” or in the event there has been an “act that compromises the dignity of medical doctors,” the Minister of Health, Labour and Welfare shall take certain disciplinary action after hearing the opinion the Medical Ethics Council (Article 7, Paragraphs 2

and 4, and Article 4 of the Medical Practitioners Law). If a law prohibiting surrogate pregnancy comes into being, medical doctors, who conduct surrogate pregnancy in violation of that law, will receive such punishment. Furthermore, according to the Health Insurance Law, in the event there has been a violation of a “law pertaining to national healthcare” that is designated by government ordinance (Article 33-3, Paragraph 2 of the Health Insurance Law Enforcement Ordinance), the Minister of Health, Labour and Welfare shall be able to revoke the registration of any “*hoken'i*” (medical doctors who accepts health insurance patients) (Article 81, Item 6, and Article 82, Paragraph 2 of the Health Insurance Law). At present, such laws as the Medical Practitioners Law, the Medical Service Law, and the Pharmaceutical Affairs Law are designated by government ordinance; and by designating a law that prohibits surrogate pregnancy as a “law pertaining to national healthcare,” it will become possible for the ministry to revoke the *hoken'i* registration for any medical doctor who violate this.

At present, the two administrative punishments outlined above are not being implemented all that actively. Therefore, it seems that, in the future, consideration should be given to more actively applying these administrative punishments, in adherence with the intended spirit of each.

(c) Effects of making surrogate pregnancy illegal

Any contract which is against “public policy” is void (Article 90 of the Civil Code). Although some people believe that, even now, a contract for the purpose of a surrogate pregnancy is void by virtue of this; if surrogate pregnancy is made illegal by law, even if penalties for violations of this is not prescribed, the infringing nature of surrogacy contracts against public policy would become even clearer, and it appears evident that this would make such contracts void. In this case, all contractual rights and obligations would legally cease to exist -- including, the payment by the commissioning person(s) for costs associated with the surrogate pregnancy, the continuation of the pregnancy and the childbirth by the gestational mother, and the handing over of the child to the commissioning person(s) -- and as such, this could be a deterrent against efforts to conduct surrogate pregnancy.

(v) Punishment for surrogate pregnancy arranged for profit

(a) Cases where surrogate pregnancy should be punished

As described above, basically, even if laws prohibit surrogate pregnancy and associated acts, they should not go as far as inflicting penalties. However, as far as the burdens assumed by the gestational mother are concerned, it is considered both necessary and reasonable to punish acts that realize profit and

acts that exploit the gestational mother.

Furthermore, in order to deter so-called “surrogate tourism” -- where impoverished people in foreign countries are commissioned to accept surrogate pregnancy in exchange for financial compensation -- just as the abovementioned Law on Organ Transplantation attempted to deal with “organ transplant tourism,” laws that regulate surrogate pregnancy should also punish overseas crimes committed by Japanese citizens.

Given this perspective, without limiting ourselves to surrogate pregnancies that use the gametes of the commissioning married couple (which are the immediate object of this report), other forms of surrogate pregnancies, such as surrogate pregnancies that use a donor egg and the husband’s sperm, would also be similarly punished if arranged for profit. Moreover, as mentioned earlier, seeing that the presence of the risk of the surrogate mother being exploited is the basis for punishing surrogate pregnancies arranged for profit, basically, all persons involved in the surrogate pregnancy, such as the medical doctors and the mediators, would be punished. However, the surrogate mother is the victim who has taken on the burden of pregnancy and childbirth, and as such, would be excluded from punishment.

(b) Punishment of the commissioning person(s)

Some members of the Committee also had a negative view toward punishing the commissioning persons. The reasons given for this view were that: punishing the commissioning persons is severe when considering their sentiment of desperately wanting a surrogate pregnancy; and law in some foreign countries excludes the commissioning persons from punishment. It was also pointed out that punishing the commissioning persons may also result in the child being branded the “child of a criminal” or a “child born as the consequence of a crime (criminal act).” However, counterarguments against this included that: a person who wants a child does not have the right to participate in the exploitation of others by commissioning a surrogate pregnancy arranged for profit; without punishing the commissioning persons, we cannot prevent the “surrogate tourism” mentioned above; and commissioning persons do not need to be excluded if we limit the scope of punishment to surrogate pregnancies arranged for profit.

While recognizing that there is still room for argument, the Committee thus reached the conclusion that commissioning persons should also be subject to punishment for surrogate pregnancies arranged for profit.

(vi) In-principle prohibition and trial implementation

(a) Partial allowance

Rather than insisting that all surrogate pregnancies should be liberalized, or that all surrogate pregnancies other than “those of convenience” should be liberalized, most people who are of the view that surrogate pregnancy should be permitted, believe that the only surrogate pregnancies that should be allowed are those arranged as a last resort in cases where the commissioning person wants a child to inherit their own genes.

However, even supposing that the scope was restricted in this way, this would not completely eliminate such harmful effects as: the physical and psychological risks and burdens that a surrogate pregnancy poses on the gestational mother; the effects that a surrogate pregnancy has on the fetus and born child; the hindrances to the formation of motherhood; the issues regarding the welfare of the child; and the disturbances to the ethical position of medical doctors. Moreover, as discussed in “(1) (ii) (a) Medical indications of the commissioning female,” it is feared that allowing only some surrogate pregnancies would lead to a complete lifting of the ban: it would be like “standing on a slippery slope” or “a levee collapsing from a single ant hole.”

In short, being able to freely conduct surrogate pregnancies within a certain scope using contracts between the parties concerned -- that is, the commissioning person, the surrogate mother, and the healthcare providers -- is inappropriate; and as such, an approach of “partial allowance” in this sense should not be adopted.

(b) Trial implementation of surrogate pregnancy

On the other hand, it appears that there is room for considering surrogate pregnancies conducted on a limited trial basis, with strict conditions, and under public management. By adopting this method, we can clarify the consequences that surrogate pregnancy has on the persons concerned, their families and on society, while maximizing the protection of the interests and welfare of the children, the surrogate mothers and the commissioning persons. It should also allow for basic research on the effects that the intrauterine environment has on implantation and embryonic development, the perinatal management of the mother and the fetus, ensuring safety during pregnancy for patients suffering various disorders, and information with a high degree of scientific credibility to be obtained on such subjects as the long-term effects on the mind and body of the child.

Surrogate pregnancy places the risks and burdens that are inevitably associated with pregnancy and childbirth upon the surrogate mother. Even supposing the surrogate mother has given her consent, this is not something

that can be approved socially as it stands; and as has been stated already, it is this point which is the major rationale for prohibiting surrogate pregnancy (“(2) (i) (a) Self-determination of the commissioning person(s) and the gestational mother, and the limits thereof”). However, if the surrogate mother willingly consents, and if a public organization approves the surrogate pregnancy under certain conditions, then this should also be approved by society. On the other hand, there is little data in Japan as well as overseas with a high degree of scientific credibility that includes surrogate pregnancies and the long-term effects on the mind and body of children born as a result of such pregnancies. Under such circumstances, it would appear that surrogate pregnancies need to be conducted on a limited trial basis with strict conditions under public management, and surrogate pregnancy as an ART need to be verified in cooperation with relevant parties from various fields. The results of this should be waited for before making policy decisions on surrogate pregnancy on another occasion.

Since a “trial implementation” like the one above has a strong tinge of being a clinical trial, it must be implemented based on the following conditions.

- 1) Prior to implementation, the clinical trial shall be presented in its entirety to a public ethics committee, and approval shall be obtained;
- 2) In conducting the trial implementation, the clinical trial shall be fully explained to the parties concerned, and their consent shall be obtained;
- 3) The privacy of the parties concerned and of the children born as a result of surrogate pregnancy shall be protected;
- 4) Data management shall be conducted by a third party;
- 5) The results of the clinical trial shall be publicly announced at an appropriate time, and shall be evaluated by a third party;
- 6) During the trial implementation, if a serious event occurs to the parties concerned and the child born as a result of a surrogate pregnancy, it shall be publicly announced and evaluated without delay, and appropriate action shall be taken.

In a clinical trial conducted under these kinds of conditions, it is possible to protect the rights and interests of the patient. Rather than the abovementioned “partial allowance,” where the conduct of surrogate pregnancy is left to the parties concerned under certain conditions, this trial refers to surrogate pregnancies being conducted within a certain scope and under public management. It is thought that this approach should prevent surrogate pregnancy from gradually expanding without proper debate.

(c) Institutional design for trial implementation

In the event surrogate pregnancies are to be trialed, in addition to the abovementioned conditions required for the clinical trial, there are a number of other points that need to be taken into account. For example, rather than just clearly stipulating in legislation the requirements and procedures needed to conduct the trial, it is believed that clear provisions regarding the legal status of the child will also be needed. Although further examination of the details should be conducted when enacting the legislation, below are listed all the issues that are able to be identified at this stage.

As a minimum, the required conditions are:

- 1) The trial implementation shall be restricted to absolute indications, and this point shall be rigorously examined;
- 2) The psychological and physical risks to the woman who acts as the gestational mother shall be kept under control as much as possible, and medical treatment and care that is advanced enough to deal with the effects associated with surrogate pregnancy shall be provided to the gestational mother;
- 3) The woman who will act as the gestational mother shall have a full understanding of the risks involved in the surrogate pregnancy, and based on self-determination free from coercion, she shall consent to becoming the gestational mother without compensation;
- 4) Full consideration shall be given to the child to be born, including for its legal status.

As already observed (see “(1) (ii) Medical indications for surrogate pregnancy”), many difficult problems exist regarding the question of how these conditions should be specifically prescribed, in particular, for instance, the scope of indications.

As a further procedural requirement, it is necessary to establish a public third-party organization to acknowledge the existence of the conditions for the trial implementation of surrogate pregnancy, and to authorize the implementation. Entrusting this to the medical doctors facilitating the surrogate pregnancy would place excessive responsibility on medical doctors, and would not be socially acceptable. The members making up this type of organization would not only make comprehensive judgments on healthcare, welfare and law, but would also counsel the parties concerned. As such, in addition to obstetricians, gynecologists, pediatricians, nurses, lawyers and bioethicists, it is thought that genetic counselors, psychological counselors and other such professionals would also be needed.

In short, even though it would be on a trial basis, if ART are to be administered under public management, an overall system that includes as far as the

verification process would need to be built after careful examination: it would not be sufficient just to merely decide on the requirements for conducting surrogate pregnancy.

In Japan, with no social rules on surrogacy having yet been formed, surrogate pregnancies are being overtly conducted by a very small number of medical doctors without providing enough medical information. This creates the danger of rules being formed de facto through the accumulation of a number of faits accomplis. In contrast, in a trial of surrogate pregnancy premised on strict scientific management and the accumulation of information, there is anticipation of the possibility of institutionalizing surrogate pregnancy on an improved scientific basis. We believe that a trial implementation of surrogate pregnancy, like the one described above, will enable ethical standards on surrogate pregnancy issues to be formed which are socially allowable, and will enable contributions to be made to the sound development of ART.

Conclusions of this chapter

- 1) Surrogate pregnancy should be prohibited in principle by law.
- 2) It is worth considering a trial implementation of surrogate pregnancies (clinical trial). In this case, the trial should be implemented under the management of a public organization, and in accordance with the provisions prescribed by law.
- 3) Surrogate pregnancy arranged for profit should be punished. Punishment should be given to the medical doctor provided the treatment, mediators, and commissioning persons, but surrogate mothers should be excluded.

4. Legal parenthood —Legal status Of the born child

(1) Need for establishing the child's legal status

Ordinarily, a child born to a woman is derived from that woman's egg, and is brought up by that woman as her own child. However, in the case of a surrogate pregnancy where the egg of the commissioning female is used, although the genetic mother and the social mother —(the intended mother/ the woman who will raise the child) are one in the same person, the birth (gestational) mother is someone different. This leads to the question of who in law should be regarded as parents of this child.

As we examined in Chapter 3, surrogate pregnancy must, in principle, be prohibited by law. However, even supposing that surrogate pregnancy is prohibited, as long as there is the potential for children to be born through surrogate pregnancy, from the perspective of the children's welfare, ways for establishing the legal status of these children need to be clarified.

(i) Relationship with the prohibition of surrogate pregnancy

To allow surrogate pregnancy would be to recognize the legal motherhood between the commissioning female and the child. There is also a tendency to think that to prohibit such pregnancies would lead to that legal motherhood being denied. For example, the Interim Draft Summary supported making the gestational mother the "mother" of the child, partly on the grounds that, in view of the line adopted by the Committee on Assisted Reproductive Technology Treatment (Ministry of Health, Labour and Welfare) to prohibit surrogate pregnancy, establishing the commissioning female as the mother of the child would be unjustifiable as it would be the same as allowing surrogate pregnancy.

However, it seems that linking these two thoughts in this way is not inevitable. When viewed from the perspective of the welfare of a child already born as a result of a surrogate pregnancy, actively affirming the fact that circumstances unknown to a child impacts on its legal status could be criticized for using the legal status of the child as a means of "regulation imposed on a behavior," that is, prohibiting surrogate pregnancy, thereby making a victim of the child.

Therefore, the Committee decided to separate itself from a basic stance of prohibiting surrogate pregnancy, and examine the legal status of children born as a result of surrogate pregnancy.

(ii) Decision of the Supreme Court, - March 23, 2007

Decision of the Supreme Court, March 23, 2007¹ (Minshu (the Supreme Court Reporter (Civil Cases)) Vol. 61, No. 2, Page 619; hereinafter referred to as the “2007 Decision”) stated that, “as an interpretation of the current Civil Code,” it was compelled to construe the birth mother as the “mother” of the child, thereby negating the validity in Japan of the foreign court ruling that the commissioning married couple, who were both the social and genetic parents mother, are legal parents.

One of the “interpretations of the current Civil Code” that supports this decision is the Supreme Court judgment, April 27, 1962 (Minshu Vol. 16, No. 7, Page 1247; hereinafter referred to as the “1962 Judgment”) on the mother of a child born out of, which is said to have established the so-called “birth mother = mother” rule. Apart from the affiliation of a child born out of wedlock (Articles 779 and 787, etc of the Civil Code), the Civil Code does not contain any direct provisions pertaining to the establishment of the legal motherhood. This 1962 Judgment made Article 779 of the Civil Code, etc. dead letters, adopting the precedent of, in principle, regarding birth mother as the legal mother of the child. The 2007 Decision followed suit, ruling out the commissioning female as the mother. However, the same decision adds the qualification that this is merely an “interpretation of the current Civil Code,” and it strongly urges “prompt action based on legislation.”

(2) Legal status of the born child²

(i) Significance of the legal parenthood - natural children versus adopted children-

Legal parenthood (legal motherhood and fatherhood) is not only prerequisite of having parental authority (parental responsibility / child custody), but determine who has parental authority and is the guardian of a child, but they also serve as the standard for the surname that the child will acquire, and they give rise to mutual rights of inheritance, duty to support dependent family members, and other such rights and obligations between the person regarded as the parent and the person regarded as the child. Furthermore, legal parenthood is also the most basic important relationship of identity closely linked to public interest,

¹ For commentary and notes on this decision, see: Noriko Kadohiro, *Hogaku Seminar Special Edition* (Sokuho: Hanrei Kaisetsu Vol. 1), Page 135; Fumihiko Sato, *Koseki Jiho* Vol. 614, Page 51; Yuko Tsuchiya, *Jurist* Vol. 1341, Page 165; Mari Nagata, *Horitsu Jiho* Vol. 79, No. 11, Page 45; Shinichiro Hayakawa, *Horitsu No Hiroba* Vol. 61, No. 3, Page 58; Keiichi Murashige, *Koseki Jiho* Vol. 616, Page 62, etc. For the original decision - Decision of the Tokyo Appellate Court, September 29, 2006 (Hanrei Jiho (Law Cases Reports) No. 1957, Page 20), see Waichiro Iwashii, *Nenpo Ijihogaku* Vol. 22, Page 207; Yuko Okano, *FY2006 Juyo Hanrei Kaisetsu* (Jurist Vol. 1332), Page 304; Shinichiro Hayakawa, *Hanrei Times* Vol. 1225, Page 58; Keiichi Murashige, *Koseki Jiho* Vol. 611, Page 53, etc.

² The following items (i) through (iii) take into account instances where Japanese law can be applied with respect to legal parenthood of child born in Japan to a Japanese surrogate mother based on a request by a Japanese married couple. Separate consideration may be needed for cases where any of the concerned parties are foreign citizens. In particular, with respect to instances where, according to the Act on the General Rules of the Application of Laws, a foreign law becomes the governing law, there is still room for consideration whether such instances should be dealt with according to interpretation of the Act on the General Rules of the Application of Laws (including public policy provisions), or whether some other kind of legislative measures should be adopted.

which is recorded in the family register, and which forms the basis for the rights and obligations to the state.

In terms of the types of legal parenthood, the Civil Code provides for two types: a “natural children” and a “adopted children.” The “natural children” type of legal parenthood is described as generally being based on blood tie or genetic link; whereas, the “adopted children” type is divided between (ordinary) adoptions which are formed with the agreement of the parties concerned, and special adoptions which are formed according to the ruling a family court on application of the person to be the adoptive parent. In the (ordinary) adoption system, the legal relationship between the adopted child and his/her natural parents continues concurrently even after the adoption, and parties to the adoption may agree to dissolve the adoptive relationship. On the other hand, in the special adoption system - which was established in 1987 as a type akin to the natural children in order to protect children in need of protective care - the legal relationship between the adopted child and his/her natural parents shall be extinguished by a ruling of special adoption, and dissolution of the adoptive relationship on the application of adoptive parents is not permitted. Although there are differences between the natural children, adopted children, and special adopted children with regard to what is recorded on the family register, there are basically no differences with regard to surnames, parental authority, mutual rights of inheritance (including portions of inheritance) and the duty to support dependent family members, etc.

(ii) Establishment of legal status based on the Civil Code

Given that children born as a result of surrogate pregnancy are not envisaged by the Civil Code, there could be points of view that new type of legal parenthood should be established rather than basing considerations on the types of legal parenthood of the civil law. Without doubt, it is true that children born as a result of surrogate pregnancy did not exist during the time that the Civil Code was established. However, civil law, which includes law of precedents, exists both historically and structurally as law that is constantly able to respond to events that were inconceivable when established; and indeed, it has responded. The idea and principle of civil law also has universal aspects. Likewise, it cannot be acknowledged that a special system is needed like when the new special adoption system was established. Accordingly, the legal status of children born as a result of surrogate pregnancy should also be considered within the types of legal parenthood provided for by the Civil Code.

(iii) Relationship of the born child with the surrogate mother and the commissioning married couple

(a) Legal parents for the born child

In conclusion, the Committee believes that, even in the case of surrogate pregnancy, it is appropriate to regard the birth mother as the legal mother.

Without doubt, in the past, an important basis of the “birth mother = mother” rule has been the fact that the birth mother has also been the genetic mother. Based on this perspective, to regard a woman who is not the genetic mother as the “mother” in the case of pregnancies and childbirth that use donor eggs, and to not regard a woman (commissioning female) who is a genetic mother as the “mother” in the case of surrogate pregnancy that use the eggs of the commissioning females is both an irrational and inequitable line of thinking.

Naturally, the Civil Code acknowledges, in essence, the fact that there are instances where the parentage (those who are genetically related to the child) and the legal parenthood do not match (see Articles 776, 777, 782, 783 and 785, etc. of the Civil Code) in the case of the natural children, and precedents have repeatedly confirmed this stance of the Civil Code.³ Although parenthood in the Civil Code are founded on blood tie, this is determined by taking such factors into account as the need to provide a legal parent for the child and the certainty of the child’s social status; and does not mean that a genetic parent will simply be regarded as the legal parent. Nevertheless, leaving aside instances where the identity of the genetic mother is uncertain, there could also be the view that it is not necessarily evident whether the intent of the conventional “birth mother = mother” rule goes as far as instances where the existence of a genetic mother who is not the birth mother is known, and where that genetic mother intends to raise the child.

Therefore, examining anew, regarding the woman who gives birth to a child as the mother regardless of whether or not there is a blood tie appears to have the following advantages.

First, by regarding the birth mother as the legal mother, this enables the primary guardian of the child to be determined indiscriminately using externally indisputable facts at the same time as the birth of the child, in a similar way to a child born through natural reproduction. In contrast, if “mother” is determined based on genetic-related medical certificates, then confirming the legal motherhood at the moment the child is born would become difficult without some kind of verification. Regarding the woman who

³ Judgment of the Supreme Court, July 20, 1955, Minshu (the Supreme Court Reporter (Civil Cases)) Vol. 9, No. 9, Page 1122; Judgment of the Supreme Court, July 7, 2006, Minshu (the Supreme Court Reporter (Civil Cases)) Vol. 60, No. 6, Page 2307; etc.

gives birth to a child as the mother also has the significance of giving the child at least one caretaker with certainty, for the father-child relationship which cannot always be definite. Furthermore, the structure of Civil Code is so that the legal father of a child born in wedlock is determined on the basis of the legal motherhood (see Article 772 of the Civil Code); and therefore, it could be said that stable, definite standards are needed for legal motherhood more so than for fatherhood.

Given that there has been no conspicuous confusion in the various foreign countries that have adopted dual certification standards -- that is, regarding the woman who gives birth to a child as the legal mother in the case of natural reproduction, and the genetic mother as the legal mother in the case of surrogate pregnancy -- there is also the argument that it would not be impossible to design a system in Japan for recognizing the commissioning female as the legal mother. However, we need to be mindful of the fact that legal parenthood in Japan, including differentiation of the meanings of the words "natural children" and "adopted children," is not identical with that in other countries, and also that the same results may not necessarily be realized if a similar system was built in Japan. Under the present circumstances in Japan, it seems that we should not underrate the function of using uniform standards to avoid differentiation and to stabilize the legal status of children born through ART.

Second, as discussed in "3. (2) (ii) Problems related to biological order," given that aspects of motherhood (maternal affection/ sense of responsibility as a mother), which is more or less the emotional foundation of nursing, are nurtured during gestation, there is a certain logic in recognizing the woman who has conceived and given birth to a child as its legal mother.

Third, by regarding the woman who gives birth to a child as the legal mother, this calls on the surrogate mother to be a responsible pregnant and birth mother. The physical and psychological conditions of the mother during pregnancy as well as the living environment have a considerable impact on the development of the fetus. From the perspective of the fetus developing in a better intrauterine environment, it is also preferred that it spend nine months in the womb of a person who feels a responsibility for the life and development of the fetus, and who is prepared to accept being the mother of that child. In view of the above points, even in the case of surrogate pregnancy, the birth mother should be regarded as the legal mother of a child just as in the case of natural reproduction, meaning that the surrogate mother would be the legal mother.

(b) Adoption between the born child and the commissioning married couple

Within the Committee, a view was also contended that, to ensure the effectiveness of the prohibition of surrogate pregnancy, absolutely no legal parenthood, including adoption arrangements, should be recognized between a child born as a result of a surrogate pregnancy and the commissioning married couple. As a matter of fact, certain countries have taken this approach.

However, from the perspective of not necessarily linking the prohibition of surrogate pregnancy with legal status of the child (see “(1) (i) Relationship with the prohibition of surrogate pregnancy”), it can also be argued that, the welfare of the child will be best served by ultimately giving the responsibilities as a parent, rather than the rights as a parent, to a person who has strong feelings of affection for the child and who is worthy to accept the upbringing of that child into the future. Accordingly, it is thought that establishing, by way of adoption or special adoption, legal parenthood between children born as a result of surrogate pregnancy and the commissioning married couples should be permitted. To be more precise, presuming a surrogate mother is regarded as the legal mother, in cases where the surrogate mother wishes to relinquish her responsibilities and rights for the child after childbirth, and where the commissioning married couple intend to nurture that child, establishment of a legal parenthood by means of an adoption or a special adoption should be permitted at infancy, via the order of a family court taken from the perspective of the welfare of the child.

The dissolution of an adoptive relation according to the wishes of the commissioning married couple should not be sanctioned. In terms of this point, special adoption is better for the child, although there are certain conditions, including “if [both parents of a person to be adopted] are incapable or unfit to care for the child or there are any other special circumstances, and it is found that the special adoption is especially necessary for the interests of the child” (Article 817-7 of the Civil Code), considering such facts that normally the surrogate mother and her partner do not intend to nurture the child, it appears that this condition does not constitute an interpretive impediment.

(iv) Legal status of children born in foreign countries

(a) Legal parenthood

With regard to the legal parenthood of a child born to a foreign surrogate mother at the request of a married Japanese couple who have traveled overseas, in circumstances where there are no decisions of the foreign courts, the legal parenthood is determined according to the provisions of Japan’s private international law (Act on the General Rules of the Application of Laws). Accordingly, Japanese law will apply (Articles 28 and 29 of the Act on the

General Rules of the Application of Laws), and the legal motherhood between the commissioning female and the child born as a result of a surrogate pregnancy will not be recognized.

In actual fact, many of the overseas countries and states to which Japanese couples travel allow, through court decisions, etc., a child born as a result of a surrogate pregnancy to be regarded as the child in wedlock of the commissioning married couple. Registrations of birth to which commissioning married couple's name is written as parent's name are being submitted and accepted by attaching a birth certificate, which has been issued at the order of the foreign court, confirming the child is the natural child of the commissioning married couple. However, in the 2007 Decision, the validity of these court decisions in Japan was denied, stating, "A decision rendered by a foreign court acknowledging the establishment of a legal parenthood between persons who are not eligible for such relationship under the Civil Code is incompatible with the fundamental principle or fundamental philosophy of the rules of law in Japan, and therefore it should be deemed to be contrary to public policy as prescribed in Article 118, item 3 of the Code of Civil Procedure."

On the other hand, as suggested by the concurring opinion in the 2007 Decision, just as with the case of a child born as a result of a surrogate pregnancy in Japan ("(iii) (b) Adoption between the born child and the commissioning married couple"), the establishment of a legal parenthood between the commissioning married couple and the child born as a result of a surrogate pregnancy should be recognized by way of an adoption or a special adoption.

In cases where a married Japanese couple attempts to adopt a foreign national child born through a surrogate pregnancy, the adoption shall be governed by Japanese law (Article 31, first part of Paragraph 1 of the Act on the General Rules of the Application of Laws). For this reason, in the case of a special adoption, consent of the "parents" of the child to be adopted is needed (Article 817-6 of the Civil Code). Furthermore, in circumstances where the national law of the child to be adopted requires the agreement or consent of the child or a third party, or the approval, etc. of a public organization, this requirement must also be satisfied (Article 31, second part of Paragraph 1 of the Act on the General Rules of the Application of Laws). Since many countries and states require the consent of the natural parents when adopting a minor, it is considered that there is room for doubt as to whether special adoption, including the relationship with surrogate pregnancy contracts, is possible. However, from the perspective of the welfare of the child, in effect, there could be a good chance for an interpretation that the making of special

adoption is recognized in cases where the surrogate mother is unable to give her consent.

(b) Citizenship

Citizenship refers to the qualification for a person to be a member of a specific country. A person with Japanese citizenship is obliged to comply with the Constitution of Japan and other Japanese laws, and is afforded such rights as the right to enter and leave Japan, the right of residence, the right to vote, and the right to receive social security. Furthermore, acquisition of Japanese citizenship is a requirement for being recorded on a family register, and is also the basis for the principle of national law related to identity. Thus, citizenship has extremely significant implications in the various types of relationships in social life.

Japan's Nationality Law has conventionally adopted the principle of *jus sanguinis*, and at present, it is considered that, in general, Japanese citizenship is in principle given to the natural children of Japanese people. Therefore, in cases where the surrogate mother is a foreign national, not only is recognition not given to the legal parenthood between the child born as a result of the surrogate pregnancy and the Japanese couple who have commissioned the pregnancy, it also becomes difficult for the child to acquire Japanese citizenship by birth.⁴

In contrast, in cases where a legal parenthood has been established between a commissioning married couple and the child born as a result of a surrogate pregnancy by way of either an adoption or a special adoption, it is possible for the child to acquire Japanese citizenship through naturalization. Under current law, regardless of whether there has been an (ordinary) adoption or special adoption, the requirement is for the child to have had domicile in Japan for one year (Article 8, Item 2 of the Nationality Law). At present, from the perspective of the welfare of the child, an adoption should be made, and citizenship should be acquired by means of this type of naturalization system.

(3) Cases of the trial implementation

The fact that there is not necessarily a connection between the permissibility of surrogate pregnancy and the legal status of children born through surrogate pregnancy is as discussed in “(1) (i) Relationship with the prohibition of surrogate pregnancy.” Accordingly, even in cases where surrogate pregnancies are conducted on a trial basis (see “3. (3) (vi) In-principle prohibition and trial

⁴ However, in cases where affiliation of an unborn child by the Japanese father (Article 783, Paragraph 1 of the Civil Code, and Article 29 of the Act on the General Rules of the Application of Laws) has been effected, and in equivalent cases (see Judgment of the Supreme Court, October 17, 1997, *Minshu* (the Supreme Court Reporter (Civil Cases)) Vol. 51, No. 9, Page 3925), acquisition of Japanese citizenship by birth shall be possible.

implementation”), we must be circumspect about revising the principle of the surrogate mother being regarded as the legal mother of the child.

Conclusions of this chapter

- 1) The birth mother should be regarded as being the legal mother of a child born as a result of a surrogate pregnancy.
- 2) Establishment of a legal parenthood between a child born as a result of a surrogate pregnancy and the commissioning married couple by way of an adoption or a special adoption should be recognized.
- 3) Surrogate pregnancy conducted by traveling overseas should also be considered pursuant to 1) and 2).
- 4) In principle, even in circumstances where a trial implementation of surrogate pregnancy is being contemplated, they should also be considered in the same way as 1) and 2).

5. Proposals

In Japan, the actual state of surrogate pregnancy has not been objectively ascertained, and the medical safety, certainty and the long-term prognosis of children born through surrogate pregnancy is unclear, and it would be fair to say that there is a lack of medical information on surrogate pregnancy. Meanwhile, there have been various arguments related to surrogate pregnancy such as issues related human dignity and ethics of placing physical and psychological burdens and risks of pregnancy and childbirth onto a third person, and the legal aspects regarding legal status of children. Despite these arguments, it would be hard to say that a social consensus has yet been reached. Although reviews on these problems have been advanced by administrative government agencies, academic societies and specialists, the result of these reviews has not been enshrined into law. Amid these circumstances, some medical doctors have proceeded to assist in surrogate pregnancy, and there have also been an increasing number of cases in which people travel overseas for this purpose.

The Committee hereby makes the following proposals based on the results of examination over a period of one year and three months described in this report;

- (1) Regulation of surrogate pregnancy is needed as it is unacceptable that the issue of surrogate pregnancy be left as it currently stands. Regulation should be based on the law, and new legislation, for instance, the Assisted Reproductive Technologies Act (provisional name) is thought to be needed. Further, in principle, surrogate pregnancy should be prohibited in accordance with this regulation.
- (2) Surrogate pregnancy arranged for profit should be dealt with by the imposition of punishments. Punishments should apply to the medical doctors providing the treatment, the mediators, and the commissioning persons.
- (3) while respecting the protection of maternal health and the rights and welfare of the child, bearing in mind the need for long-term observations related to the medical issues surrounding surrogate pregnancy -- specifically, checks on the risks to the gestational mother and to the fetus/child, and in particular, the postnatal mental development of the child --, and bearing in mind the need to identify ethical, legal and social issues and other possible harmful effects, consideration may be given to the trial implementation of surrogate pregnancies (clinical trials) under strict control, with exclusively limiting the targets to the women with congenital absence of the uterus and to the women who have undergone a hysterectomy as a form of treatment (these are examples of absolute indication).

- (4) In conducting the trial of surrogate pregnancies, a public administrative organization which fairly conducts duties such as registration, follow-up studies, guidance, and evaluation should be established. The organization should be comprised of medical, welfare, legal, counseling and other specialists. After a certain period of time, the medical safety and the social and ethical validity of surrogate pregnancy should be fully examined. When no problems are found, the law should be amended and surrogate pregnancy will be permitted under certain guidelines. If numerous harmful effects are found, the trial should be discontinued.
- (5) With respect to the legal status of the born child as a result of surrogate pregnancy, the surrogate mother shall be regarded as the mother. The same shall also hold during the trial. Further, this shall also apply to instances where a surrogate pregnancy is conducted overseas.
- (6) With respect to a married couple commissioning a surrogate pregnancy and the child born as a result of that pregnancy, parenthood is established by way of an adoption or special adoption. The same shall also hold during the trial. Further, this shall also apply to instances where the surrogate pregnancy is conducted overseas.
- (7) The right to obtain identifying information should be respected as much as possible from the perspective of emphasizing the welfare of the child. This child's right attached to the surrogate pregnancy, however, should be assessed only after full examination on the same right of the child in the cases of AID and the like, which have been practiced for many years. This is an important issue for future examination.
- (8) There remain issues which have not been thoroughly discussed, such as the cases using donor eggs and the cases using the frozen sperm of a dead husband, and further, there is a possibility that new problems emerge in the future. Thus, the examination of ART needs to be ongoing.
- (9) Concerning the various problems related to bioethics, in view of the importance of a new public research institute should be founded, and a new public standing committee should be established in order to deal with these problems including policy planning.
- (10) When discussing surrogate pregnancy and other ART, the welfare of the child should be given the highest priority.

Conclusion

The Committee was established by the Science Council of Japan in response to a joint request for deliberation made by the Minister of Justice and the Minister of Health, Labour and Welfare. The Committee met a total of 17 times over a period of one year and three months, and examined the issue of ART, with a focus on surrogate pregnancy. At its inception, there were significant differences of opinion between the members. On several subsequent occasions, opinions continued to be so bitterly divided that some members even voiced concerns that the Committee would be dissolved without a report being compiled. However, many differences of opinion were overcome, and while not perfect, the Committee was able to issue this report. In many European countries, legislation and measures on surrogate pregnancy have already been in place for ten years, and in some cases, 15 years. In contrast, Japan is close to becoming painfully aware of our backwardness in this respect.

Rather than completely prohibiting surrogate pregnancy, the conclusion of the Committee at present was to leave open an opportunity for a trial implementation. The Committee decided to wait a certain period for the evaluation of the trial results from medical, ethical, legal and social aspects, before handing down its final decision. By no means did all members agree with this conclusion: individually, some members stood firm in their stance for absolute prohibition, while others thought that the acceptance should be slightly broader. Each of the minority views has also been included in this text. Nevertheless, the fact that there has been this diversity of opinion shows the difficulty of this issue, and it only reflects the true image of how, academically, surrogate pregnancy is currently perceived.

The terms “ethics” and “morals” are said to be derived from the Greek and Latin words for “customs.” Medical ethics are also not perpetual; instead, they are able to change with the times and with technological progress. That having been said, surrogate pregnancy is not merely an issue of medical technology; it includes the most fundamental questions in bioethics and for human existence. Viewed from medical, ethical, legal and social aspects, serious studies and discussion on this must continue in the future. In particular, deep insight is also needed into the effects that manipulating reproductive cells has on future generations.

In conclusion, it is hoped that this report facilitates people’s appreciation of the gravity of the problem, and brings us even one step closer to reaching a social consensus, inspiring as many people as possible to take an interest in ART, including surrogate pregnancy. At the same time, we sincerely hope that wide-ranging debate will unfold in the Diet, preparations will begin for the necessary legislation, and that action will begin all over Japan aimed at solving this problem.

Supplementary Notes

Note 1: Examples of relative indication (page 15)

“Women considered unable to conceive themselves”:

- A woman who exhibits congenital defective development of the uterus, as with Turner’s syndrome, and for whom it is considered that, even supposing that an egg was able to be successfully collected, continuing the pregnancy in her own uterus would be difficult
- A woman who cannot conceive even after trying various infertility treatments up to in-vitro fertilization, and for whom, despite fertilization, segmentation and blastocyst formation being observed, it seems is experiencing a dysfunction after the implantation process

“Women for whom it is believed their life and/or that of their child may be put into extreme danger if they were to conceive by themselves”:

- A woman who has had several abdominal operations in the past, in particular myomectomies, Cesarean sections or other operations in which the uterus is incised, and for whom it is feared may experience, or has experienced, a uterine rupture as a result of pregnancy
- A woman who is affected by a severe heart disease or collagen disease, etc., and, on medical examination, is not given approval to become pregnant
- A woman thought likely to experience a complicated birth due to her older age

“Women for whom it is believed, while not life-threatening, their state of health would subsequently deteriorate if they were to conceive by themselves”:

- A woman who is affected by diabetes or a kidney disease, etc., and for whom it is predicted pregnancy would exacerbate her condition

“Women who repeatedly miscarry if they conceive by themselves”:

- A woman, whose habitual abortion is caused not by a factor on the part of the fetus, but rather by an immunological factor or a factor on the part of the mother’s body, such as abnormal uterine morphology

Note 2: Examples of discord between the interests and wishes of the commissioning person and those of the gestational mother (page 20)

- The rights and wrongs of treatment, and decisions on the timing of that treatment in cases where it has been determined that the pregnancy must be terminated due to complications during the gestational mother’s pregnancy. This includes decisions for all weeks of pregnancy, but in particular is predicted to be most serious in cases where an infant of extremely low birth weight is expected to be delivered immediately after the 22nd week of pregnancy.
- The rights and wrongs of treatment, and decisions on the timing of that treatment for cases considered an indication for Cesarean section during delivery. This will be particularly problematic during times of emergency.