UCLA
UCLA Pacific Basin Law Journal

Title
The Evolution of Abortion Rights in Taiwan: Toward Rights-Based Framing

Permalink
https://escholarship.org/uc/item/5bd8166q

Journal
UCLA Pacific Basin Law Journal, 41(1)

Author
Chen, Suzy Szu-Yu

Publication Date
2024-12-12

DOI
10.5070/P8.61620

Peer reviewed

eScholarship.org Powered by the California Digital Library
University of California

The Evolution of Abortion Rights in Taiwan: Toward Rights-Based Framing

Suzy Szu-Yu Chen

About the Author

Suzy Szu-Yu Chen (suzy.s.y.chen@gmail.com) is a practicing attorney based in Taiwan, specializing in constitutional and administrative litigation. She serves as a member of the Executive Committee of the Judicial Reform Foundation and the Human Rights Committees of both the Taipei Bar Association and the Taiwan Bar Association. This article was completed during her pursuit of an LL.M. degree at Harvard Law School in 2023.

Table of Contents

I. Introduction 2
II. Theoretical Model: Finding Framings 6
  A. *Habermas's Theory of Communicative Actions* 6
    1. Discourses and Formation of Law 6
    2. Classifications of Discourses 7
    3. Categories of Discourses 8
    4. Contributions and Limitations 10
  B. *Theoretical Classifications of Abortion-Related Discourses* 12
    1. Demographic Approach 13
    2. Health-Based Approach 14
    3. Rights-Based Approach 15
      a. Bodily Integrity and Privacy Right 15
      b. Right to Life 15
      c. Right to Health 16
      d. Gender Equality 17
      e. Autonomy 18
III. The Evolution of Abortion Rights in Taiwan 19
  A. *Normative Framework of Abortion in Taiwan* 19
    1. Legal Aspect 19
    2. Religious Aspect 21
    3. Cultural Aspect 23
    4. Evaluations 24
  B. *Throwback to the Initiation of Legalization* 26
  C. *Change of Framing: The Growth of Rights-Based Approach* 29

© 2024 Suzy Szu-Yu Chen. All rights reserved.

1. Legislature 29
a. Pro-Abortion Approach 30
b. Anti-Abortion Approach 33
2. Public Opinion 35
a. Social Movements by Civic Groups 36
b. National Conference in Judicial Reform 37
c. Public Policy Participation Platform (Join Platform) 39
3. Executive 40
a. MOHW's Consultation Meeting 41
b. MOHW's Responses on the Join Platform 42
c. MOHW's EHA Draft Bill and Collaborative Meeting 42
4. Judiciary 46
IV. Conclusion 49

I. Introduction

Reproductive rights and freedoms have been incorporated into a wide range of existing rights under international human rights law. These rights are considered to be composite rights that stem from individual autonomy and are viewed as both economic and social in nature, with a focus on health. These rights are also viewed as grounded in important civil rights, such as the right to bodily autonomy, private and family life, and freedom from cruel or degrading treatment.[1] In this context, access to timely, safe and legal abortion lies at the heart of the emerging approach to reproductive autonomy, which places women's interests in autonomy and bodily integrity at its core.[2]

At the domestic level, however, different countries vary significantly in how access to abortion is framed. In Canada, for example, the Supreme Court viewed abortion as part of a woman's right to security of their person and ruled that procedural restrictions on abortion were unconstitutional.[3] In Ireland, upon recognizing that pregnant women have an equal right to life as the unborn, the Constitution was amended to repeal a restriction that made abortion illegal except in cases where the pregnancy threatened the mother's life.[4] The United States was a pioneer in the development of abortion rights, as exemplified by the

1. Maria Sjöholm, *Gender-Sensitive Norm Interpretation by Regional Human Rights Law Systems*, 121 Int'l Stud. Hum. Rts. 283, 510 (2017).

2. Erin Nelson, Law, Policy and Reproductive Autonomy 113, 133 (2013).

3. R. v. Morgentaler, [1988] S.C.R. 30 (Can.). Supreme Court of Canada struck down Section 251 of the Criminal Code, which required that an abortion surgery only be performed in officially recognized hospitals and with approvals from the hospital's abortion committee.

4. The Thirty-sixth Amendment of the Constitution changed Article 40.3.3 of the Constitution, which previously provided, "The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right." *See* Constitution of Ireland 1937 art. 40, amend. 36, https://www.irishstatutebook.ie/eli/cons/en/html.

landmark decision of *Roe v. Wade* where the Supreme Court determined that the right to abortion was grounded in the right to privacy.[5] While the decision was groundbreaking and became a global symbol encouraging legislative liberalization of abortion around the world,[6] it was also subject to legal critiques and political backlash, leading to repeated challenges before the court bench that culminated in its overturning in *Dobbs v. Jackson Women's Health Organization* in 2022.[7]

The demise of abortion rights has been attributed to the manner in which it emerged, as the *Roe* decision has been censured for espousing an erroneous framing for abortion access and for indulging in undue judicial activism. On one hand, the selection of norms that advocates choose to use to frame issues around abortion assumes paramount importance in the exercise of judicial power to safeguard the normative protection of abortion rights, and interpretations that are either too broad or too narrow may raise concerns about inadequate protection and miscarriage of justice.[8] On the other hand, the advancement of the protection of new human rights outside the courtroom carries equal significance. While the judiciary is often expected to secure human rights using its considerable power, it is only one actor in a complex legal landscape. In other words, relying solely on unilateral judicial intervention may backfire and trigger larger waves of opposition.[9] Rather, it is essential that the entire constitutional community maintains a certain degree of consensus.[10] To this end, this article recognizes that the choice of framing for abortion access is of great significance, and correspondingly, the forums for

5. *Roe v. Wade*, 410 U.S. 113 (1973).

6. Rachel Rebouché, *A Functionalist Approach to Comparative Abortion Law*, *in* Abortion Law in Transnational Perspective 98, 99 (Bernard M. Dickens, Joanna N. Erdman & Rebecca J. Cook eds., 2014).

7. *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022). The Court in *Dobbs* stated that abortion is not an enumerated right provided in the Constitution, nor is it "deeply rooted" in American "history and tradition," or essential to the American "scheme of ordered liberty." *Id.* at 250. As a result, the Court concluded that the Constitution does not confer a right to abortion.

8. Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. Rev. 375, 386 (1985); Jack M. Balkin, *Part I: Roe v. Wade—An Engine of Controversy*, *in* What Roe v. Wade Should Have said: The Nation's Top Legal Experts Rewrite America's Most Controversial Decision 1, 10–11, 22 (Jack M. Balkin ed., 2005). The decision of *Roe* was criticized normatively "weakened" for lacking a sex-equality perspective and venturing too far for in advance of legislature.

9. Ginsburg, *supra* note 8, at 376, 381. Justice Ginsburg perceived that "Roe ventured too far in the change it ordered" and attributed "the mobilization of a right-to-life movement and an attendant reaction in Congress and state legislatures" to "the sweep and detail of the opinion stimulated." *Id.* at 381.

10. Yen-Tu Su (蘇彥圖), *Jichu Quanli De Xianfa Yu ZhengZhi: Dangdai Meiguo Shiti Zhengdang Chengxu De Sifa Lilun Zhengyi Ji Qi Qishi* (*基礎權利的憲法與政治：當代美國實體正當程序的司法理論爭議及其啟示*) *[The Constitutional Law and Politics of Fundamental Rights: Lessons from the Contemporary Substantive Due Process Jurisprudence in the United States]*, 51(4) Nat'l Taiwan U. L.J. (臺大法學論叢) 1385, 1427, 1432 (2022).

exploring such framing are also of great significance. This acknowledgment serves as a gateway for the integration of Habermas's theory of communication actions and discourse analysis, which facilitates an in-depth comprehension of how individuals within the societal milieu perceive the issue of abortion access. In this regard, Habermas's theory can provide an explanation for the development of legal legitimacy by bridging the gap between legal norms and societal perceptions, which is particularly crucial when one considers Habermas's viewpoint that the legitimacy of the law arises from the deliberations of the populace, rather than being determined through the value judgments of the Constitutional Court.[11]

Drawing from these insights, this article now turns to the jurisdiction of Taiwan, where the issue of abortion has become increasingly contentious in recent times. Within the framework of the Taiwanese legal system, abortion remains a criminal offense, thereby exposing both pregnant women and abortion providers to potential criminal sanctions.[12] The only way that individuals can avoid criminal liability is by meeting the exceptional grounds prescribed under the Eugenic Health Act (EHA).[13] Despite this legal framework, the practice of abortion is widespread in Taiwan. In fact, abortion has become such a common medical practice that it has even been described as "a natural aspect of life" of Taiwanese people.[14] While official statistics estimate abortions at approximately 240,000 per year, the estimated number of abortions in Taiwan could be as high as 500,000 per year.[15] The existence of such a discrepancy raises doubts about the legitimacy of Taiwan's legal framework around abortion, which appears to be disconnected from societal norms and expectations. This discrepancy and the resulting contentiousness highlight the necessity

11. Li Lin (林立), *Hā bó mǎ sī fǎlǜ zhéxué de zhuǎnzhé fāzhǎn jí qí tǐxì zhōng dàodé yǔ fǎlǜ zhī guānxì de shìqiè xìng (哈伯瑪斯法律哲學的轉折發展及其體系中道德與法律之關係的適切性) [On the Turn in the Development of the Legal Philosophy of Jürgen Habermas and the Adequacy for the Relationship between Moral and Law]*, 53(1) Thought & Words: J. Human. & Soc. Sci. (思與言：人文與社會科學期刊) 151, 197 (2015)

12. Zhonghua Mingo Xingfa (中華民國刑法) [Criminal Code of the Republic of China] arts. 288 – 292 [hereinafter Taiwan Criminal Code].

13. You Sheng Bao Jian Fa (優生保健法) [Eugenic Health Act] art. 9 [hereinafter EHA].

14. Marc Moskowitz, The Haunting Fetus: Abortion, Sexuality, and the Spirit World in Taiwan 10 (2001); Anrea Whittaker, *Abortion in Asia: An Overview, in* Abortion in Asia: Local Dilemmas, Global Politics 1, 10 (Anrea Whittaker ed. 2010). Early statistics from the 1990s reveal that nearly one-third of all pregnancies were terminated. In 2017, almost 30,000 abortions were reported, equivalent to one-sixth of the 180,000 births recorded in that same year.

15. Ing-Wen Wang (王映文), Bu Bei Qidai de Huaiyun Xiaoshi De Duotai Shuju Tongji (不被期待的懷孕 消失的墮胎數據統計) [Unwanted Pregnancies Vanishing Abortion Statistics] (Mandarin), Xiao Shi Jie Jou Bao (小世界週報) [Newsweek] (April 6, 2019) http://shuj.shu.edu.tw/blog/2019/04/06/不被期待的懷孕-消失的墮胎數據統計 [https://perma.cc/G6Z9-LDVZ] (last visited May 1, 2023).

for the application of Habermas's theory, which has been employed in a prior prestigious study on the issue of abortion in Taiwan.[16]

This article is structured as follows. Following the introduction in Part I, Part II introduces theoretical classifications of common abortion-related discourses and identifies platforms where legal discourses and framings of abortion can be found. Part III conducts an in-depth examination on pro- and anti-abortion discourses employed in the domains of the legislature, public opinion, the executive, and the judiciary, revealing a significant shift in the framing of abortion access in the past forty years.[17] Part IV concludes with three significant discoveries: 1) the abortion controversy in Taiwan defies a simple pro-life versus pro-choice dichotomy but reflects the lingering influence of traditional patriarchal ideology, framing women as instruments of fertility and undermining their autonomy in reproductive choices; 2) pro- and anti-abortion discourses within the constitutional community indicate polarized approaches, with the former emphasizing rights-based framing and the latter employing a pluralistic approach; and 3) abortion has gained conceptual acceptance as a legal right across the legislative, public, executive, and judicial spheres, evolving through civic participation from an initial population control objective towards a dominant rights-based framework rooted in constitutional and international human rights provisions.

This article endeavors to make three distinct contributions. *First*, this article focuses specifically on the perspective of Taiwan. The meanings of abortion vary in deferring cultural systems, and the norms vary significantly between countries.[18] Nonetheless, in Taiwan, most scholars have a tendency to scrutinize and denounce domestic law through the lens of Western law, overlooking the disparities in the social and cultural foundations on which these two legal systems are built.[19] To prevent replication of the previous research pattern of viewing Taiwan through a Western perspective, the legal system must be reexamined by taking into

---

16. Hsiao-Wei Kuan (官曉薇), *Gōutōng xíngdòng yǔ lìfǎ yántán—táiwān réngōng liúchǎn fǎzhì zhī lìfǎ jí xiūfǎ lìchéng fēnxī (溝通行動與立法言談–臺灣人工流產法制之立法及修法歷程分析) [Communicative Action and Legislative Discourse: The Legislative Analysis of Abortion Law in Taiwan]*, 6 ACAD. SINICA L.J. (中研院法學期刊) 61 (2010).

17. This article primarily focuses on pro-abortion discourses and also touches upon anti-abortion discourses with no intent to imply that either approach is the only voice from Taiwan society. More importantly, rather than rendering a value judgment between the two, this article endeavors to explore how abortion-related arguments are framed, which is an indispensable piece of puzzles for a comprehensive deliberation on abortion issues.

18. Whittaker, *supra* note 14, at 9; Amy Adamczyk et. al, *Examining Public Opinion about Abortion: A Mixed-Methods Systematic Review of Research over the Last 15 Years*, 90(4) SOCIO. INQUIRY 920, 937 (2020).

19. Hsiao-Wei Kuan (官曉薇), *Fanshen de Ningshi: Taiwan Rengong Liuchan Fazhi Ji Qi Fa Shehui Beijing De Fenxi (反身的凝視：台灣人工流產法制及其法社會背景的分析) [Turning the Gaze Back on Itself: The Socio-Legal Background of Taiwan Abortion Law],* 47(4) THOUGHT & WORDS: J. HUMAN. & SOC. SCI. (思與言：人文與社會科學期刊) 135, 138 (2009)

account Taiwan's social and cultural backgrounds.[20] Therefore, this article chooses to focus on the locality of Taiwan. *Second*, this article wishes to present Taiwan's experience and ongoing approach to addressing abortion issues as a model for other nations in the international community. Due to statehood disputes, Taiwan has not been featured or discussed in any international reports or documents pertaining to the legal framework of abortion, rendering it a crucial missing piece in the worldwide jigsaw puzzle of abortion laws.[21] This article strives to remedy this gap by sharing Taiwan's experience and progress in this field. *Finally*, Taiwan's uniqueness lies in its foundation of Confucian culture as a social norm, while also embracing a strong emphasis on freedom and human rights. Through the development of the concept of abortion rights by the Taiwanese government and society and the context of discourse surrounding it, Taiwan showcases the feasibility of integrating Eastern traditional values with Western contemporary liberalism, allowing for coexistence and harmony.

II. Theoretical Model: Finding Framings

Part II serves as a mapping section for the article. The initial segment introduces Habermas's theory of Communicative Actions, which offers a theoretical perspective to understand the formation of law, classifications, and categories of discourses. The latter segment outlines primary approaches of abortion-related discourses.

A. *Habermas's Theory of Communicative Actions*

In 1981, Jürgen Habermas, a German philosopher and sociologist, published the book "The Theory of Communicative Action." The theory has had a significant impact on legal theory, particularly in the area of discourse ethics. To be more precise, complex and contentious issues like abortion may benefit from the application of Habermas's theory, which emphasizes the importance of reaching a final consensus through rational communication and deliberation.

1. Discourses and Formation of Law

According to Habermas, the "lifeworld" is "socially integrated" by shared norms and values.[22] Under this context, communicative actions, which refer to the process of social interaction in which individuals engage in mutual understanding and reach a shared understanding of the world, contribute to coordinate actions and integrate our society. Particularly, these communicative actions, mostly in the form of discourses, create the legitimacy of the formation of law and guarantee the function of social integration, preventing the modern legal orders from hanging in

20. *Id.* at 178.
21. *Id.* at 142.
22. Hugh Baxter, Habermas: The Discourse Theory of Law and Democracy 4, 60 (2011).

mid-air.[23] In one way, the legitimacy of a democratic decision depends on the quality of communication among participants. It asserts that the democratic process should be guided by rational discourse, where individuals engage in open and respectful discussion with each other in order to reach a mutual understanding and make informed decisions. Rather than being led by the top-down power of the state or other specific groups, the discourse principle ensures that the formation of law is based on a public and transparent process of debate and negotiation, reflecting core features of democratic decision-making. Additionally, rational discourse and communication play a critical role in promoting social integration and fostering a sense of community among citizens. When people engage in rational discourse, they develop a shared understanding of the world and their values and interests, leading society to be governed by valid norms and thereby achieving the goal of a moral community.[24]

2. Classifications of Discourses

Habermas's theory of communicative action involves three types of discourse, namely, moral discourse,[25] ethnic-political discourse,[26] and pragmatic discourse.[27] According to Habermas, these three types of discourse are interconnected and interdependent. They play a crucial role in establishing social norms, resolving conflicts, and promoting social cohesion. In order for a society to function effectively, all three types of discourse must be present and balanced.

In addition to the foregoing three types of discourses, there is another increasingly important new type of discourse, namely, right discourse. Under Habermas's theory, rights are produced through the mutual negotiation, granting, and recognition of citizens acting as legal subjects, and are delimited by norms established through cooperation.[28] Functionally speaking, in a democratic and rule of law society, rights serve to maintain a private sphere of autonomy free from state interference, while in the legislative process of the political sphere, legislative bodies make decisions within the bounds of rights and may not act arbitrarily.[29] In the public sphere, citizens mutually grant each other equal rights, while in the private sphere, individuals strategically employ rights as weapons to contend against others.[30]

---

23. *Id.* at 148; Kuan, *supra* note 16, at 67–69.

24. J. Donald Moon, *Practical Discourse and Communicative Ethics*, *in* Communicative Rationality 143, 143 (Stephen K. White ed. 2006).

25. Lin, *supra* note 11, at 188; Kuan, *supra* note 16, at 73. Moral discourse considers universal standards of interests and values in conflict among humanity.

26. Lin, *supra* note 11, at 188. Ethnic-political discourse considers the collective identification perceived within a specific society or community in which they reside.

27. *Id.* Pragmatic discourse considers rational choices in balancing calculations of interests and preferences for values.

28. Kuan, *supra* note 16, at 79.

29. *Id.*

30. *Id.*

Habermas' categorization of discourse can serve as a theoretical framework for observing abortion-related discourses. When viewing abortion-related issues as public issues, such issues often involve different aspects such as ethics, politics, morality, and practicality. For instance, from a practical perspective, the legalization of abortion is discussed in terms of whether it can effectively achieve the goal of population control. From a moral perspective, one might evaluate whether abortion legalization is in line with society's preferred values from a moral standpoint. From a rights-based perspective, discussions around abortion center around whether women, as the subject of pregnancy and childbirth, have the right to receive abortion, whether they are entitled to equal status as a result, and how to exercise such rights in opposition to the state or other third parties.

3. Categories of Discourses

Clearly, Habermas's theory places great emphasis on the utterances and language involved in making and applying legitimate law.[31] However, what utterances, in what specific fields, should we look for to explore the foundation of the formation of laws? Habermas suggests that legal norms come to be generated through "legally prescribed procedures that differentiate legal from moral norms."[32] In light of this, some scholars have suggested that communicative power circulated in the legislative process is regarded to be the true source of legal legitimacy.[33] In this context, while the formation of public opinion in civil society can certainly generate "social power," this power can only "influence" the course of legal development and does not directly constitute the legitimacy of the law. Only when such social power is "filtered" through the legislative process can it be transformed into a legitimate basis for legal norms.[34] In other words, participants in the legislative process play a role in connecting the formal legal system and public debate, "translating" non-legal discourses such as pragmatic discourse, ethical-political discourse, and moral discourse into legal discourses.[35]

Nonetheless, this article posits a more extensive perspective in construing the sources of legal norms. Habermas seemingly held a relatively broad interpretation on the term "legally prescribed procedures," as he suggested that political legislation from the standpoint of legislators, agencies, citizens and interest groups can also be brought into the analysis as evidence of the law's effects (or lack of effects) outside the courtroom.[36] While Habermas's discourse theory provides a general narrative prescribing how discourse articulated in the formation of law bridges the lifeworld and the legal system, the theory requires necessary

31. Baxter, *supra* note 22, at 61.
32. *Id.* at 66.
33. Kuan, *supra* note 16, at 69–73.
34. *Id.* at 69.
35. *Id.* at 73.
36. Baxter, *supra* note 22, at 106.

modifications to accommodate varying law-making features between different jurisdictions. In other words, other political branches besides the legislature may also have a role in the formation of laws. Even though the legislature is typically the primary organ in charging of the law-making mission, other branches sometimes also come into play to a lesser or even equivalent extent. In this regard, in addition to the legislature, this article suggests that utterances in the realms of public opinion, the judiciary, and the executive branch also contribute to the law-making process and undergirds the legitimacy of the formation of law, especially under the legal paradigm employed by Taiwan.

First and foremost, as Habermas suggested, the functioning of democratic politics should be complemented by the institutional political system and the non-institutional civil society.[37] Civil society consists of voluntary associations, organizations, and movements, where all citizens can voice their personal experiences of dissatisfaction or injustice in the private sphere, and transmit them to the political public sphere.[38] In addition, in light of rapid technological advancements, the pervasive use of digital platforms has significantly influenced democracy and the social system in the past three decades, giving birth to the concept of digital democracy.[39] In this context, public-forum discourses have emerged as an indispensable foundation for the creation of norms over the last few decades, and Taiwan is no exception as an outstanding model of moving towards digital democracy, leveraging digital tools to empower civic engagement, and facilitating collaboration between citizens and the government in shaping and implementing policy decisions.[40] Specifically, Taiwan's digital democracy takes pride in the "wisdom of the crowd" approach, which seeks to amplify Taiwan's visibility and voice in the world not through a top-down approach but from a democratic approach.[41] In light of this, public opinion based on civic engagement and participation has gained even greater significance, driving the law-making actions taken by Taiwanese governmental agencies.

Moreover, discourse exploration in Taiwan's law-making cannot be complete without considering the secondary law-making function of the governmental branches. In this regard, the executive and judicial branches are also crucial in the search for framing. The executive

---

37. Po-Jung Su (蘇柏榮), *Gōutōng yǔ mínzhǔ: Píng "hā bó mǎ sī de mínzhǔ lǐlùn" (溝通與民主：評《哈伯馬斯的民主理論》) [Review Work: Habermas's Democratic Theory by Richard Ruey-Chyi Hwang and Min-Siang Chen]*, 75 J. Phil. Stud. Pub. Aff. (政治與社會哲學評論) 235, 237–238 (2021).

38. *Id.*

39. Sebastian Berg & Jeanette Hofmann, *Digital Democracy*, 10(4) Internet Policy Rev. 1, 2–3 (2021).

40. Audrey Tang, *A Strong Democracy Is a Digital Democracy*, N.Y. Times (Oct. 15 2019) https://www.nytimes.com/2019/10/15/opinion/taiwan-digital-democracy.html. (last visited May 1, 2023) [https://perma.cc/ERV8–5NLD].

41. Anita Wen-Shin Chang, *Making Our Best Move with Audrey Tang and Taiwan's Digital Democracy*, 73(2) Am. Q. 363, 368 (2021).

branch's secondary law-making function consists of two stages. During the pre-legislation stage, the competent administrative agency typically drafts the legislation or amendment proposal, presents the articles and reasoning, announces and solicits public opinions for revision, and then submits the proposal to congressional deliberation. In the post-legislation stage, the administrative agency further supplements the technical details and matters of execution by issuing administrative orders. Importantly, the administrative agency's act of proposing a draft also conveys the ruling party's stance on the issue and may influence the passage of law. Without the support of administrative power, debates in the Legislative Yuan may sometimes yield no progress, no matter how intense they may be. Furthermore, the judiciary may also act as a secondary lawmaker. Courts interpret statutes and regulations and provide guidance on their meaning and scope. This is particularly significant when statutes are unclear, ensuring consistent application of the law across different cases.

As such, under the Taiwan's paradigm, communicative actions in the realms of public opinion, the judiciary, and the executive branch play law-making roles concurrently with the legislature. Consequently, in examining the normative picture of abortion laws, the communicative discourses within each of the foregoing dimensions should all be considered so as to depict a comprehensive image.

4. Contributions and Limitations

When it comes to contentious issues such as abortion, there are some critiques that question the efficacy of Habermas's theory. Firstly, Habermas's theory implies that societal consensus can be reached through rational communication. However, when it comes to the decision on abortion access, leaving it up to collective consensus may be risky since the will of the majority would govern, rather than the rule of law.[42] In this sense, Habermas's theory seems to overlap with critical legal studies and feminist jurisprudence, which reduce law to politics and could lead to majority violence against a minority.[43]

To be more specific, a significant challenge in the abortion debate is the opposing camps' complete divergence in perspective. The pro-abortion camp tends to seek legal protection of reproductive rights, while the anti-abortion camp focuses on ethical and moral concerns. This fundamental discrepancy not only creates a lack of common ground for discussion but also exacerbates polarization over time, decreasing the likelihood of achieving a consensus on the issue. Under these circumstances, the extremely polarized camps may no longer expect to reach a consensus through dialogue and communication and may instead come to rely on authoritative government decisions that carry normative

42. Michel Rosenfeld, *Law as Discourse: Bridging the Gap between Democracy and Rights*, 108 Harv. L. Rev. 1163, 1177 (1995).

43. *Id.*

power. Undoubtedly, the judiciary is one of the decision-making bodies expected to legitimize abortion rights through constitutional interpretation, which is often considered a desirable option. However, it is essential to note that the court's evaluation of specific rights may change over time, and its decisions can be overturned by the dynamic development of politics, society, and culture.[44] The rise and fall of abortion rights in the U.S. under *Roe v. Wade* and *Dobbs v. Jackson Women's Health Organization* are excellent examples of this issue. Therefore, setting common ground as starting points for discussion is a prerequisite for achieving consensus, and it presents a challenge for applying Habermas's theory in the abortion debate.

Additionally, critics may challenge Habermas's theory by questioning whether rational communications can result in consensus.[45] By Habermas's definition, consensus refers to the consequence that everyone's rationality is persuaded by the same rationale.[46] However, given the deeply entrenched divisions surrounding the issue of abortion, it may seem that there is no principled basis for reaching a mutually agreeable solution regarding the legal status of abortion.[47] For those who firmly believe that a woman's right to abortion is crucial to her autonomy, privacy, and equality, the absence of a constitutional guarantee of that right would make it impossible to achieve genuine deliberative democracy, as women would not be able to fully participate as equals in the relevant discourse.[48] Conversely, for those who sincerely believe that abortion is equivalent to murder, the lack of a constitutional ban on abortion would preclude the kind of mutual recognition and respect that Habermas's dialogical approach to democracy requires.[49] Lurking beneath the abortion controversy, there is such a sharp clash in value preferences and interests that no dialogical compromise or balancing seems plausible.[50] As a result, Habermas's theory appears to be unreliable in fostering constructive criticism of existing institutional arrangements or suggesting creative solutions to divisive social conflicts in the abortion context.[51]

Nonetheless, this article suggests that Habermas's theory can still contribute to the progress of debates around abortion. While achieving a moral consensus on the topic of abortion in modern societies may be difficult, it is still possible to reach a resolution through discourse within the legal framework.[52] Abortion-related debates encompass various perspectives, including cultural, ethical, rights-based, religious, and pragmatic viewpoints, and the principle of discourse allows for compromises

44. Su, *supra* note 10, at 1427–32.
45. Lin, *supra* note 11, at 189.
46. *Id.*
47. Rosenfeld, *supra* note 42, at 1179.
48. *Id.*
49. *Id.*
50. *Id.* at 1178.
51. *Id.* at 1179.
52. *Id.* at 1178.

and fair agreements within the context of the law.[53] Such compromises are considered legitimate as long as they are acceptable to all parties involved in principle.[54] To be more precise, Habermas acknowledges that it may be challenging to persuade all parties involved to reach a consensus on some issues.[55] In such cases, the community may strive to attain a shared understanding through compromise or majority vote, which differs from the concept of consensus. Compromise entails each party finding a middle ground by assessing its competitiveness, and it is not related to rationality.[56] Conversely, a majority vote is a means of achieving a halfway settlement when there is insufficient time to obtain consensus.[57] Therefore, the result of a majority vote neither ends communication nor rejects the possibility of consensus. Instead, it acts as a temporary relay station on the path towards a final consensus.[58]

Moreover, achieving consensus depends on mutual understanding, and subjecting all existing perspectives on abortion to the process of considering other perspectives may lead to enhanced mutual understanding and empathy.[59] Even though reaching a final consensus on the issue of abortion can be challenging and time-consuming, an exploration of the framing of arguments can help understand how particular arguments are constructed, how they influence the dynamics of debate, and how they shape understanding of the issue. This is why some scholars have started to explore abortion-related discourses.[60] Through a deliberative process of full exchange of opinions, it is hoped that a minimum consensus can be gradually reached at different stages and used as a baseline to further the discussion. To this end, this article suggests that the debate around abortion can still benefit from Habermas's theory by exploring the discursive framings.

B. *Theoretical Classifications of Abortion-Related Discourses*

Before delving into the examination of contemporary abortion-related framing in Taiwan, it is important to establish a foundational understanding of the primary discourses at play. The subsequent sections outline four main approaches that have been utilized. It is worth noting

53. *Id.*
54. *Id.*
55. Lin, *supra* note 11, at 189.
56. *Id.*
57. *Id.* at 190.
58. *Id.*
59. Rosenfeld, *supra* note 42, at 1178.
60. *See, e.g.*, Sally Sheldon, *The Medical Framework and Early Medical Abortion in the U.K.: How Can a State Control Swallowing?, in* Abortion Law in Transnational Perspective 189 (Bernard M. Dickens, Joanna N. Erdman & Rebecca J. Cook eds., 2014); Luís Roberto Barroso, *Bringing Abortion into the Brazilian Public Debate: Legal Strategies for Anencephalic Pregnancy, in* Abortion Law in Transnat'l Perspective 258–59 (Bernard M. Dickens, Joanna N. Erdman & Rebecca J. Cook eds., 2014). *See also* Kuan, *supra* note 16.

that the list is not exhaustive, nor are the approaches mutually exclusive in their application.

1. Demographic Approach

The demographic aspect of abortion has been a longstanding consideration in the discourse surrounding abortion, particularly as it pertains to procreation and national population policy. The demographic approach considers both the quantity and quality of the population, with the eugenic approach having once been an advocated policy goal in the realm of population quality. By definition, eugenic approach abortion refers to the selective termination of a pregnancy based on the genetic characteristics or traits of the fetus, with the aim of improving the genetic makeup of the population. This approach is based on the belief that some traits or conditions are undesirable and should be eliminated from the gene pool through selective abortion on factors such as genetic disorders, disabilities, or certain physical or mental characteristics.[61]

During the early stages of legalizing access to abortion, the driving force behind such measures was often a response to demographic needs as exemplified in Asian region.[62] In certain jurisdictions, advocates for liberalization expressed concerns over issues related to overpopulation.[63] These concerns often manifested in the form of selective abortion, which refers to the abortion of an otherwise desired pregnancy due to a particular fetal characteristic, such as a congenital or genetic abnormality.[64] For instance, Japan passed the Eugenic Protection Law in 1948, which implemented eugenic ideologies and played a pivotal role in the significant reduction of Japan's birth rate during the 1950s.

However, the eugenic approach suffers from two major inadequacies and is no longer considered a legitimate or appropriate framework. On one hand, this approach suggests that the state views women primarily as "baby-making machines" to be activated or deactivated based on changes in the national interest.[65] In that sense, recognizing the eugenic approach as a legitimate framework implies that access to abortion can be subject to national interests, which conversely implies that the state can rescind this privilege when it is no longer needed. This was exemplified by Japan's reproductive policies during and after World War II, which banned abortion to boost population growth during the war and later legalized abortion to curb population growth in the post-war era.[66] On the other hand, eugenic approaches to abortion implicate

61. Nelson, *supra* note 2, at 154.

62. Kuan, *supra* note 19, at 138.

63. Reva B. Siegel, *The Constitutionalization of Abortion*, *in* Abortion Law in Transnational Perspective 13, 17 (Bernard M. Dickens, Joanna N. Erdman & Rebecca J. Cook eds., 2014).

64. Nelson, *supra* note 2, at 153.

65. Christiana Norgren, Abortion Before Birth Control: The Politics of Reproduction in Postwar Japan 134 (2001).

66. *Id.*

discrimination against people with disabilities. Eugenic approaches to abortion, which involve the selective termination of pregnancies based on certain characteristics such as genetic disorders or disabilities, are widely considered to be unethical and discriminatory.[67] It discriminates against people with disabilities by perpetuating the notion that their lives are somehow less valuable or desirable than those without disabilities. This reinforces harmful stereotypes and creates a culture that devalues the lives and experiences of people with disabilities.

2. Health-Based Approach

Health-based abortion places emphasis on women's mortality.[68] To be more specific, it recognizes that access to safe and legal abortion is an essential component of reproductive health care.

From a pragmatic perspective, the health-based approach can be articulated in two contrasting ways. On one hand, the approach can be applied to justify the necessity of having abortion, creating an exceptional leeway from the criminal code. For example, in the U.K., abortion may be legal where necessary to preserve the life or health of the pregnant woman, even though abortion is generally a criminal offence.[69] Additionally, the health-based approach is one of the common strategies advocated by supporters of abortion legalization.[70] Abortion criminalization or prohibition would leave women with no choice but to seek out illegal medical providers of abortion, creating greater health risks.[71] However, this approach could also imply an ideological danger that abortion should be seen as "a technical medical problem placed in the hands of the medical profession."[72] In this context, women's rights, desires, and expectations regarding abortion decisions could be overlooked or undervalued.

On the other hand, the health-based approach has also been utilized as a rhetoric against abortion legalization. Some anti-abortion advocates have argued to ban abortion access because it is detrimental to women's physical and mental health. As applied in this context, the health-based approach places emphasis on the national obligation to protect motherhood, but overlooks women's wishes on childbearing. In this regard, the health-based approach differs from the rationale of right to health in that the latter views women as an empowered individual with

67. *See generally* Claire McKinney, *Selective Abortion as Moral Failure? Revaluation of the Feminist Case for Reproductive Rights in a Disability Context*, 36(1) Disab. Stud. Q. (2016)

68. Whittaker, *supra* note 14, at 24.

69. Nelson, *supra* note 2, at 131.

70. Whittaker, *supra* note 14, at 24.

71. Laura Briggs, *Making Abortion Illegal Does Not Lead to More Adoptions*, 10(2) Adoption & Culture 251, 252 (2022); Ana Langer, *The Negative Health Implications of Restricting Abortion Access*, Newsletter on Harvard School of Public Health https://www.hsph.harvard.edu/news/features/abortion-restrictions-health-implications (last visited May 1, 2023) [https://perma.cc/A5QC-47KZ]

72. Whittaker, *supra* note 14, at 24.

the right to choose, while the former emphasizes the mortality of women to argue that society should make a decision on abortion for women, regardless of the and wills of the women at issue.

3. Rights-Based Approach

The rights-based approach has gained prominence as a means to promote and protect access to abortion. Viewing the issue of abortion through a legal lens typically involves framing it as a matter of rights, wherein the right to terminate a pregnancy is recognized as a fundamental human right.[73] Consequently, numerous rights-based framings have emerged to support the abortion legalization, with the most prevalent including bodily autonomy, privacy, health, gender equality, and autonomy. Each framing offers a distinct perspective, and collectively they underscore the multi-faceted nature and intricate complexity of the abortion issue. On the other hand, some anti-abortion advocators have also shifted to make rights-centered arguments, claiming that the unborn fetus should be free from abortion under the protection of right to life.

a. Bodily Integrity and Privacy Right

The right to choose whether to terminate a pregnancy is fundamentally linked to one's bodily rights. This notion is based on the concept of bodily integrity, which posits that any attempt to limit a woman's ability to make decisions about her own body is a violation of her personal choice.[74] The bodily integrity approach is often intertwined with the right to privacy, forming the foundation of the pro-choice stance. As seen in the landmark case of *Roe v. Wade*, the right to privacy has been interpreted broadly to encompass a woman's decision to terminate a pregnancy. However, relying solely on the right to privacy and bodily autonomy may pose risks, such as allowing state interests to supersede an individual's decision-making, particularly in cases where public morality is at issue.[75] Moreover, the focus on bodily autonomy and privacy has been criticized for ignoring the gender equality dimension of the issue, which ultimately weakens the pro-abortion argument. It is important to recognize the multi-dimensional nature of the abortion issue and acknowledge the need to incorporate all relevant perspectives in order to develop a comprehensive and effective legal framework.[76]

b. Right to Life

Generally, anti-abortion advocates frame their arguments in connection with the right to life of the unborn fetus. Due to the public perception that life is supreme and considered much more fundamental than freedom or choice, pro-life arguments are inherently compelling.[77]

---

73. *Id.*
74. Nelson, *supra* note 2, at 113
75. *Id.* at 512–513; Roe, *supra* note 5, at 184.
76. Ginsburg, *supra* note 8, at 383, 385–386.
77. Mark A. Graber, Rethinking Abortion: Equal Choice, the Constitution, and Reproductive Politics 157 (1999).

In both academia and jurisprudence, the right to life has been asserted as a legal basis for conferring protections on the unborn fetus.[78]

However, it is noteworthy that the international human rights framework does not hold the same position, instead endorsing the right to life as one of the bases for guaranteeing abortion access. The latest interpretation on the right to life, as enunciated in General Comment No. 36 of the International Covenant on Civil and Political Rights (ICCPR) by the Human Rights Committee (HRC), does not make any reference to the right to life of a fetus. The comment fails to clarify the point at which the right to life is vested in a fetus beyond asserting that the right to life belongs to all human beings.[79] Instead, the HRC emphasizes the protection of pregnant women from unsafe abortions, affirming that the right to life confers protection upon the pregnant woman and obligates state parties to provide access to safe, legal, and effective abortion services in circumstances where the life and health of the pregnant woman or girl is at risk.[80] Some scholars have argued that the General Comment No. 36 constitutes a resounding reaffirmation of the position that the right to life under the ICCPR commences at birth and does not extend to the fetus.[81]

c. Right to Health

At the international level, the issue of abortion rights has been predominantly approached through the lens of the right to health.[82] The United Nations Committee on Economic, Social and Cultural Rights (UNCESCR) has determined that abortion access is encompassed by the right to health, as articulated in Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).[83] Specifically, in its General Comment No. 22 on the Right to Sexual and Reproductive Health, the Committee has recognized that ensuring the availability, accessibility, and quality of abortion services is essential, including access to essential medicines for abortion and post-abortion

78. *See, e.g.*, Ai-er Chen (陳愛娥), *Xiànfǎ duì wèi chūshēng tāi'ér de bǎohù——zuòwéi jīběn quán bǎohù yìwù de yīlì lái guānchá (憲法對未出生胎兒的保護—作為基本權保護義務的一例來觀察) [The Protection of the Unborn Fetus by the Constitution——Observed as an Example of the Obligation to Protect Fundamental Rights]*, 58 Chengchi L. Rev. (政大法學評論) 65–78 (1997); *See also* BVerfGE 39, 1 (1975) cited in Dieter Grimm, Constitutionalism: Past, Present and Future 176 (2016).

79. Hum. Rts. Comm., *General Comment 36: Article 6 (Right to Life)*, U.N. Doc. CCPR/C/GC/36 (Sep. 3, 2019).

80. Sarah Joseph, *Extending the Right to Life Under the International Covenant on Civil and Political Rights: General Comment 36*, 19(2) Hum. Rts. L. R. 347–351 (2019).

81. Livio Zilli, *The UN Human Rights Committee's General Comment 36 on the Right to Life and the Right to Abortion*, Opinio Juris (March 6, 2019), http://opiniojuris.org/2019/03/06/the-un-human-rights-committees-general-comment-36-on-the-right-to-life-and-the-right-to-abortion [https://perma.cc/ZR7R-ZJU4] (last visited May 1, 2023).

82. Sjöholm, *supra* note 1, at 510 (2017).

83. *Id.*

care and evidence-based information of high quality.[84] Consequently, State Parties are under a legal obligation to respect the right to health, which includes decriminalizing abortion and repealing or refraining from enacting laws and policies that impose third-party authorization requirements for access to abortion services and information, such as parental, spousal, or judicial authorization.[85] State Parties are also required to fulfill their obligations by adopting appropriate legislative, administrative, budgetary, judicial, promotional, and other measures to guarantee universal access to a full range of safe abortion care for all individuals without discrimination.[86]

d. Gender Equality

Moreover, considering that pregnancy is a physical experience that is exclusive to women due to their unique biological characteristics, a decision to terminate pregnancy may offend traditional and religious precepts of reproduction as a natural human experience and, in turn, could be linked to views upholding traditional gender roles.[87] In that sense, the incorporation of gender equality considerations is not only desirable but indispensable.[88] At the domestic level, for example, Columbia has adopted a pro-abortion paradigm adopting a sex-equality-right-based approach. In liberalizing the Colombian law, the Constitutional Court stated that "sexual and reproductive rights [. . .] have finally been recognized as human rights" and recognized that these rights "promote gender equality in particular and the emancipation of women and girls as essential to society."[89] At the international level, the CEDAW Convention offers another example of strong emphasis on the gender-related connotations of the right to abortion. In support of the right to abortion, CEDAW General Recommendations No. 21 and No. 24 recognize that women are the ones who carry and breastfeed children and are often the primary caregivers for their children, pregnancy and childbirth directly affect their opportunities to continue their education, advance in their careers, and plan for their future.[90] In addition, the number of children

84. ECOSOC, *Comment no. 22 (2016) on the Right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, ¶¶ 13, 18 & 21, U.N. Doc. E/C.12/GC/22 (May 2, 2016).

85. *Id.* at ¶¶ 40–41.

86. *Id.* at ¶ 45.

87. Sjöholm, *supra* note 1, at 519

88. *See* Chao-Ju Chen (陳昭如), *Dazao Duotai Quan — Jieyan qian Duotai Hefa Hua De Fu Yun Falu Dongyuan yu QUanli Gou Kuang (打造墮胎權—解嚴前墮胎合法化的婦運法律動員與權利構框) [Producing the Right to Abortion: Legal Mobilization and Right Framing of the Women's Movement for the Legalization of Abortion in Marial-law Taiwan]*, 15 Acad. Sinica L.J. (中研院法學期刊) 1, 64–65 (2014).

89. Rebouche, *supra* note 6, at 105.

90. U.N. Comm. on the CEDAW, *General Recommendation No. 21: Equality in Marriage and Family Relations* (1994); U.N. Comm. on the CEDAW, *General Recommendation No. 24: Article 12 of the Convention (Women and Health)*, A/54/38/Rev.1, chap. I (1999).

and spacing between births can also directly affect women's physical and mental health, as well as their future. Therefore, the CEDAW Convention adopts the position that any external interference, such as criminalization or the requirement of spousal or parental consent, should be eliminated.

While the principle of gender equality has been generally framed as supporting the right to abortion, the principle of gender equality can also be cited as a basis to prohibit sex-selective abortion. Sex-selective abortion is prevalent in societies where a preference for male children is deeply ingrained.[91] Such cultures have historically marginalized female children, leading to high rates of female mortality.[92] In particular, countries in South and East Asia have been grappling with the issue of sex-selective abortion since the advent of ultrasound and abortion technologies that enable women and couples to determine the sex of the fetus early in pregnancy and terminate pregnancies if the fetus is female.[93] To address the problem of sex ratio imbalances, several Asian nations have taken measures to ban sex-selective abortion and prevent the use of prenatal technologies to determine fetal sex.[94] The typical legal basis for such measures is the promotion of gender equality, as exemplified by the Taiwanese government's ban on sex-selective abortion in 2012.[95]

e. Autonomy

Another emerging rights-based rationale is autonomy, which often takes the form of reproductive autonomy, bodily autonomy, and other forms of autonomy. While the notion of autonomy is often expressed in the language of other rights, it is also a distinct stand-alone rationale. The term "autonomy" refers to the freedom or liberty to make decisions and act accordingly.[96] According to most theorists, there are two fundamental requirements of autonomy: 1) "agency," or the capacity for intentional action; and 2) "liberty," or independence from controlling influences.[97]

Within this context, the characterization of abortion as simply the "choice to abort" or "choice not to abort" falls short in providing a comprehensive understanding of autonomy.[98] A more appropriate approach towards defining abortion rights through autonomy is to include the principles of equality into the concept of self-determination in reproductive issues.[99] In other words, respecting an individual's decision to

91. Nelson, *supra* note 2, at 154.

92. *Id.*

93. *Id.*

94. *Id.*

95. You Sheng Bao Jian Fa Shi Shing Shi Tse (優生保健法施行細則) [Enforcement Rules of Eugenic Health Act] art. 13–1 (stating that phycological/economical exception to abortion ban does not apply to the selection on "fetal gender differences.") [hereinafter EHA Enforcement Rules].

96. Nelson, *supra* note 2, at 13.

97. Elizabeth Wicks, The State and the Body: Legal Regulation of Bodily Autonomy 4 (2016).

98. Sjöholm, *supra* note 1, at 512–513.

99. Nelson, *supra* note 2, at 51–52. *See also* Chen, *supra* note 88, at 64.

terminate pregnancy is not just about prohibiting inappropriate third-party intrusion into the woman's decision on abortion or eliminating external obstacles that prevent women from following their preferences, but should also involve providing resources and services to improve and consolidate their decision-making capacity.[100] As such, the autonomy approach not only incorporates ideas of equality into the notion of self-determination in reproductive matters, but also exerts a pragmatic influence on the State by providing a theoretical basis for governments to bear the duty to fulfill their affirmative obligation to guarantee accessibility to methods of family planning and to provide healthcare services that will permit meaningful exercise of the right to abortion.[101]

Having discussed Habermas's theory of discourse principles and the theoretical classification of abortion-related framings, this article now moves to examine the evolution of abortion rights in Taiwan by analyzing both pro-abortion and anti-abortion discourses to gain a comprehensive understanding of the issue.

III. The Evolution of Abortion Rights in Taiwan

To fully understand the development of abortion framing in Taiwan, the following sections begin with an overview of the current legal framework, followed by a discussion of the history of abortion legalization, before finally diving into an in-depth exploration of abortion-related framing in the realms of the legislature, public opinion, the executive and the judiciary.

A. *Normative Framework of Abortion in Taiwan*

Abortion laws vary between different countries,[102] owing to the intricate interplay of numerous social norms. These normative factors influence value judgments on abortion, which leads to substantial variations in abortion laws across different jurisdictions. Against this backdrop, this discussion offers a succinct overview of the normative framework governing abortion in Taiwan, covering the dimensions of law, religion, and culture.

1. Legal Aspect

Legal reception, commonly defined as the transference of a legal phenomenon from a legal culture or system, typically originating from another region or historical period, is frequently observed in Asia due to the fact that many countries were colonies prior to World War II. The abortion law in Taiwan is not an exception to this regard.[103] Taiwan's Criminal Code was modelled on Japan's code during Japanese

100. Emily Jackson, In Defence of Reproductive Autonomy, Regulating Reproduction: Law, Technology and Autonomy 7–8 (2001)

101. Nelson, *supra* note 2, at 51–52.

102. Kuan, *supra* note 19, at 141.

103. Chien-Chih Lin, *Global Constitutionalism in Taiwan*, 10(2) Global Const. 275–277 (2021).

colonization, which was in turn influenced by European countries (such as France and Germany), and abortion has been criminalized since then.[104] Under Taiwan's Criminal Code, the offenders of abortion crime include: (1) A pregnant woman who causes her abortion or permits another to cause her abortion (Article 288);[105] (2) A person who causes an abortion of a pregnant woman (Articles 289, 290 and 291);[106] and (3) A person who publicly advertises a method or thing to be used for abortion or who offers the services of himself or of another for abortion (Article 292).[107] Under that original legal framework, relief from criminal liability for abortion was available only when the commission of an offense is necessary because of sickness or for averting danger to life.[108]

Subsequently, the EHA was introduced into legislation in 1984 and officially entered into force on January 1, 1985. The EHA legalized the abortion to a limited extent with three types of restrictions.[109] *First*, there is a *time restraint*. Except for necessary medical treatments, abortion can only be performed within twenty-four weeks of pregnancy. (Enforcement Rules of the EHA, Article 15(1).[110] *Second*, there are restrictions on the *grounds* for legal abortions. Pursuant to Article 9.1 of the EHA, there are four categories of exceptions where the abortion can be lawfully performed, which can be categorized as: (1) Eugenic-concern Exceptions (Articles 9.1.1, 9.1.2 and 9.1.4);[111] (2) Medical-concern Exceptions (Article

104. Kuan, *supra* note 19, at 154; Kuan, *supra* note 16, at 81–82; Grace Cheng-Ying Lin, *The Evolving Personhood of the Foetus in Taiwan Within the Transnational Flow*, *in* Debates Around Abortion in the Global North: Europe, North America, Russia and Asia 129, 130 (Fabienne Portier-Le Cocq ed., 2023).

105. Taiwan Criminal Code, arts. 288.1 and 288.2 (stating that "(1) a pregnant woman who by taking drugs or by other means causes her abortion shall be sentenced to imprisonment for not more than six months, short-term imprisonment, or a fine of not more than three thousand dollars. (2) a pregnant woman who permits another to cause her abortion shall be subject to same punishment.").

106. *Id.* arts. 289–291.

107. *Id.* art. 292 (stating that "a person who by writing, drawing or other means publicly advertises a method or thing to be used for abortion or who offers the services of himself or of another for abortion shall be sentenced to imprisonment for not more than one year or short-term imprisonment; in lieu thereof, or in addition thereto, a fine of not more than thirty thousand dollars may be imposed.").

108. *Id.* art. 288.3 (stating that "(3) if the commission of an offense specified in one of the two preceding paragraphs is necessary because of sickness or for averting danger to life, the punishment shall be remitted.").

109. *See* Kuan, *supra* note 19, at 143–146.

110. EHA Enforcement Rules, art. 15.1.

111. EHA arts. 9.1.1, 9.1.2 and 9.1.4 (stating that "induced abortion may be conducted for a pregnant woman, subject to her own *accord*, if she has been diagnosed or proven to meet any one of the following: 1. she or her spouse acquires genetic, infectious or psychiatric disease detrimental to reproductive health. 2. anyone within the fourth degree of kin relative of herself or her spouse acquires a genetic disease detrimental to reproductive health. [. . .] 4. by medical consideration, risk of teratogenesis may present for the fetus.").

9.1.3[112]); (3) Rape/Incest Exceptions (Article 9.1.5[113]); and (4) Phycological/economical Exception (Article 9.1.6[114]). *Third*, some of the exceptions are further contingent upon a *third-party consent requirement* (Article 9.2). For example, where the pregnant woman makes a request for abortion on the basis of phycological/economical exception, she must acquire spousal consent unless her husband is missing, unconscious or deranged, which is commonly referred as the "spousal consent requirement." Likewise, where the pregnant woman is a minor or one under guardianship, she must acquire her statutory agent's consent, which is commonly referred to as the "parent/Guardian Consent Requirement."[115]

2. Religious Aspect

In relation to abortion issues, it appears that religion plays a less dominant role in Taiwanese society than in Western countries. This phenomenon can be largely attributed to the high degree of religious diversity in Taiwan, which is ranked second globally.[116] According to a sociological study made in 2019, 49.3 percent of Taiwanese people adhered to traditional folk religions, 14 percent to Buddhism, 12.4 percent to Taoism, and 13.2 percent claimed no religious affiliation. The remaining population mainly followed Protestantism (5.5 percent), Yiguandao (2.1 percent), and Catholicism (1.3 percent).[117] This religious heterogeneity creates a challenging environment for any one religious group, regardless of their position on abortion access, to influence legislative decisions. In essence, it is only when the alignment between religion and nationhood

112. *Id.* art. 9.1.3 (stating that "induced abortion may be conducted for a pregnant woman, subject to her own *accord*, if she has been diagnosed or proven to meet any one of the following: [. . .] 3. by medical consideration, pregnancy or delivery is may cause life threatening risk or detrimental to her physical and mental health.").

113. *Id.* art. 9.1.5 (stating that "induced abortion may be conducted for a pregnant woman, subject to her own *accord*, if she has been diagnosed or proven to meet any one of the following: [. . .] 5. pregnancy as a result of being raped, lured into sex intercourse or in sex intercourse with a man prohibited to lawfully marry her.").

114. *Id.* art. 9.1.6 (stating that "induced abortion may be conducted for a pregnant woman, subject to her own *accord*, if she has been diagnosed or proven to meet any one of the following: [. . .] 6. pregnancy or childbirth is likely to affect her mental health or family life.").

115. *Id.* art. 9.2 (stating that "induced abortion to an unmarried minor or a woman under guardianship or assistance according to the preceding provisions shall be subject to her statutory agent's or assistant's consent. Induced abortion to a married woman according to subparagraph 6 above shall be subject to her husband's consent unless her husband is missing, unconscious or deranged.").

116. Stacy Hsu, *Taiwan has second-highest religious diversity in the world, US report says*, Taipei Times (April 18, 2014), https://www.taipeitimes.com/News/taiwan/archives/2014/04/18/2003588325 [https://perma.cc/D7SU-C6DW] (last visited May 1, 2023).

117. *2021 International Religious Freedom Report: Taiwan Part*, American Institute in Taiwan (June 2, 2022), https://www.ait.org.tw/2021-international-religious-freedom-report-taiwan-part [https://perma.cc/5TR5-HNVU] (last visited May 1, 2023).

is symbiotic that one can anticipate the enforcement of restrictive abortion laws and severe sanctions against abortion.[118]

However, religious opposition to abortion has gained momentum in Taiwan over time. This religiously rooted objection to abortion is evident in the anti-abortion movements that have emerged, with three distinct waves of such movements launched by religious groups. *The first wave* emerged during the 1980 at the same time when both the government and feminist camp was promoting the legalization of abortion. In response to the promulgation of the Population Policy Guideline in 1969, Christians communities held three symposiums to express their objections to the proposed abortion legalization.[119] However, this endeavor was unsuccessful in the face of the government's vigorous attempts to push population transformation.

After the passage of the EHA, the debates of abortion access continued and was followed by the *second-wave anti-abortion movement* during the 2000s. A key religious leader in this movement was Father Louis Aldrich. In 2002, Father Louis Aldrich was alarmed by the high rates of abortion in Taiwan. He gathered around 1300 leaders from various religious groups in Taiwan, including Buddhists and Taoists. Together, they formed an alliance called the Great Coalition and People's Movement for the Respect for Life (尊重生命全民運動大聯盟).[120] This religious alliance targeted Article 9.1.6 of the EHA, vigorously seeking to narrow down the scope of the grounds for legal abortion to avoid "excessive abortion" through congressional lobbying, street protesting, and petitions to governmental officers.[121] They successfully sent bills restricting the abortion access to the Legislative Yuan, though no bills proceeded to substantive discussion procedures.[122]

The *third-wave movement* against abortion in Taiwan was characterized by a stronger and more influential presence in the political arena. A group of Christians founded a political party called the "United Action Alliance" (合一行動聯盟).[123] Inspired by the 2018 Heartbeat Bill passed

---

118. Whittaker, *supra* note 14, at 10. Interestingly, some argue that countries with Mahayana Buddhist traditions, such as Japan, Korea, China, Taiwan, and Vietnam, tend to be more tolerant towards abortion.

119. Chen, *supra* note 88, at 35.

120. Lin, *supra* note 104, at 132.

121. Zun Cong Shengming Quanmin Yundong Da Lianmeng Jiuzhu Taier Weihu Shengming (尊重生命全民運動大聯盟，救助胎兒 維護生命) [Rescue fetus, preserve life] (Mandarin), https://theology.catholic.org.tw/klife/aboutus.html [https://perma.cc/PR2S-CEC9](last visited May 1, 2023).

122. Kuan, *supra* note 19, at 178.

123. Hu Jia Fawei? Jidujiao Han Zu Dang "Rang Shen Zhang Lifayuan" Wang Hong: Lie Wu Jihua (護家發威？基督教喊組黨「讓神掌立法院」 網轟：獵巫計劃) [Protecting the family to show off? Christians call out to form a party "Let God control the Legislative Yuan" Internet bombardment: witch hunt plan] (Mandarin), San Li Xinwen Wang (三立新聞網) [SETN.COM] (Nov. 26, 2018) https://www.setn.com/News.aspx?NewsID=462098 [https://perma.cc/KS9V-GVH5] (last visited May 1, 2023); 20 Wèi jīdū tú zhèngzhì shùmín cān xuǎn lì wěi hé yī xíngdòng liánméng tuī liù dà zhèngcè (20位基

in some U.S. states, the party chairperson, Chia-Chi Peng (彭迦智), filed two referendum proposals in 2019 to introduce similar legislation in Taiwan, aiming to impose further restrictions on access to abortion.[124] To be more specific, the proposals called for a ban on abortions after the detection of an embryonic heartbeat[125] ("*Heartbeat Bill Proposal*") and the implementation of a mandatory six-day reflection period and consultation ("*Reflection Period Proposal*") (collectively referred as "*Referendum Proposals*").[126] The proposals were dismissed by the Central Election Commission ("*CEC*"; the governmental agency in charge of referendum matters) since the proposer failed to correct and clarify the unclearness of the Heartbeat Bill Proposal as requested and failed to timely respond to the CEC's request for clarifying Reflection Period Proposal. These waves in Taiwan echo a larger global trend of the targeting of abortion rights by conservative religious movements and their political allies.[127]

3. Cultural Aspect

The meanings of abortion vary in different cultural systems where the social value of women depends upon their ability to bear children, or the sex of those children.[128] In this regard, Confucian values still have a pervasive influence on abortion issues in Taiwan society, as

---

督徒政治庶民參選立委　合一行動聯盟推六大政策) [20 Christian political commoners stand for election as legislators; Oneness Action Alliance promotes six major policies] (Mandarin), Jidujiao Lun Tan Bao (基督教論壇報) [IMPACT] (Nov. 25, 2019) https://ct.org.tw/html/news/3–3.php?cat=10&article=1352840 [https://perma.cc/7A22-L2RQ] (last visited May 1, 2023).

124. Lin, *supra* note 104, at 132–133.

125. Péng jiā zhì lǐngxián tíchū `nǐ shìfǒu tóngyì `yōushēng bǎojiàn fǎ shīxíng xìzé dì shíwǔ tiáo dì yī xiàng běnwén: Réngōng liúchǎn yīng yú rènshēn èrshísì zhōu nèi shīxíng.'Xiūzhèng wèi `réngōng liúchǎn yīng yú rènshēn bā zhōu nèi shīxíng.'Dàn shǔyú yōushēng bǎojiàn fǎ dì jiǔ tiáo suǒ dìng nèiróng (lìrú: Yīliáo xíngwéi, shòu xìng qīn, luànlún zhě . . . děng) bùzài cǐ xiàn.'Quánguó xìng gōngmín tóupiào àn (彭迦智領銜提出「你是否同意「優生保健法施行細則第十五條第一項本文：人工流產應於妊娠二十四週內施行。」修正為「人工流產應於妊娠八週內施行。」但屬於優生保健法第九條所訂內容（例如：醫療行為、受性侵、亂倫者 . . . 等）不在此限。」全國性公民投票案) [A National Referendum Proposal filed by Peng Jia-Zhi: "Do you agree to amend Article 15(1) of the Enforcement Rules of the EHA to read 'abortion should be performed within eight weeks of pregnancy' instead of 'within twenty-four weeks of pregnancy' yet which does not apply to the circumstances specified in Article 9 of the EHA (such as medical procedures, victims of sexual assault, incest, etc.)."] (Mandarin), Zhongyang Xuanju Weiyuanhui (中央選舉委員會) [Central Election Commission] (Aug. 29, 2019), https://web.cec.gov.tw/referendum/cms/proposal/31024 [https://perma.cc/V6A2-CL5R] (last visited May 1, 2023).

126. 彭迦智領銜提出之「你是否同意，將優生保健法第三章第九條第一項第六款本文「因懷孕或生產，將影響其心理健康或家庭生活者。」修正為：「因懷孕或生產，將影響其心理健康或家庭生活者，並經六日思考後，醫師得依其自願，施行人工流產。」全國性公民投票案 (Mandarin), Central Election Commission (Nov. 11, 2019), https://web.cec.gov.tw/referendum/cms/proposal/31749 [https://perma.cc/UDZ9-H5SU] (last visited May 1, 2023).

127. Whittaker, *supra* note 14, at 25.

128. *Id.* at 9.

Confucian values are impactful constituent elements that form the cultural background.[129]

Under Confucianism ideology, a person's social role and status are defined by norms governing the social order that surrounds their position, and such hierarchical relations are believed to maintain a harmonious social order.[130] In this context, the woman's role in families and society is closely linked to obligations of producing heirs, which is encompassed within the family unit and serves the purposes of family continuation, succession, and name transmission.[131] As abortion terminates the process of carrying offspring, it is seen as an act defying Confucian ideals of filial responsibility to continue the family line, which challenges dominant Taiwanese cultural ideals of women as nurturers.[132] In this context, opponents of abortion access often develop their arguments on the basis of Confucian ideologies, arguing to ban abortion access in order to prevent the moral corruption of the nation-state and to secure "Asian values."[133] As such, it is important to note that while abortion seems to be common in Taiwan, the frequency of abortion does not imply it is an easy choice. Rather, it should be understood that women in Taiwan are placed in a structural position within their culture that may make bearing a particular pregnancy difficult. For example, a pregnant woman is likely to face the challenges of being a single mother, the pressure to bear a male heir or economic difficulties.[134]

It is also worth noting that the pro-life arguments are also inconsistent with Confucian values in some ways. Confucian culture considers a life to begin at birth and regards children as the property of the family, and the children's life and career planning is seen as completely governed by their parents.[135] In that sense, family interests are prioritized over children's lives, not to mention that of the unborn fetus.[136]

4. Evaluations

Laws flow and change in response to social, political, and cultural evolution in their respective societies, as has the interpretation and application of such laws thereof.[137] Indeed, the enactment of the EHA has enabled greater access to legal abortion, providing significant relief for pregnant women seeking abortion. Statistics show that abortion rates

129. Ngoc Son Bui, *Social Movements and Constitutionalism in Japan, South Korea, and Taiwan*, 14 Asian J. Comp. L. S51, S52 (2019).

130. Kuan, *supra* note 19, at 157; Nigel N. T. Li, *Asian Values, Confucian Tradition and Human Rights*, *in* Taiwan and International Human Rights: A Story of Transformation 33, 36–37 (Jerome A. Cohen, William P. Alford & Chang-Fa Lo eds., 2019).

131. Moskowitz, *supra* note 14, at 11, 24–25.

132. Whittaker, *supra* note 14, at 17.

133. *Id.* at 25.

134. Moskowitz, *supra* note 14, at 11.

135. Kuan, *supra* note 19, at 156–157.

136. *Id.* at 157.

137. *Id.* at 153.

have risen since its legalization, and the number of defendants charged with an abortion crime in recent years is extremely few.[138] Also, in practice, hospitals and clinics are fairly loose in their interpretation of the psychological/economical exception and will essentially perform abortions on demand.[139] The public regards abortion as a natural part of life. Some have attribute this change to the phycological/economical exception in Article 9.1.6 of the EHA, which has, arguably, made Taiwan almost "the most liberal in the world in terms of abortion rules."[140]

Nevertheless, it is important to note that the accessibility of abortion surgery is not equivalent to recognizing it as a right, freedom, or autonomy. Academics consider the EHA to merely offer exceptional justifications for abortion in certain circumstances, rather than conferring an explicit right to abort.[141] The current statutory framework, explicitly or impliedly, denies the status of a legal right to abortion, leaving it uncertain as to whether pregnant women have the autonomy to make independent decisions regarding the termination of their pregnancy.

To begin with, the passage of the EHA did not abolish the abortion crime under the Criminal Code. Accordingly, some practitioners and academics interpret the EHA, as merely serving as a deterrent to illegal procedures, rather than a law which confers upon women the right to have an abortion.[142] Additionally, leaving abortion subject to criminal punishment indicates that the government, in principle, stands against the decision to terminate a pregnancy. When a state criminalizes abortion, it is inherently portraying it as wrong and harmful to society. This social construction of abortion as a criminal act creates a negative connotation that will cast a negative shadow over abortions, even abortions that are legal under mitigating circumstances.[143] Also, abortion criminalization

---

138. Moskowitz, *supra* note 14, at 20. Chih-Chieh Lin (林志潔) & Jia-Chu Lo (羅家曲), *Duòtāi zuì de cún fèi yǔ táiwān shēngyù zìzhǔ quán de tiǎozhàn——yǐ 2019 hé 2020 nián de liǎng gōngtóu tí'àn wèi fēnxī (墮胎罪的存廢與臺灣生育自主權的挑戰——以2019和2020年的兩公投提案為分析) [The Abolition of Abortion Crime and the Challenge of Reproductive Autonomy in Taiwan——Analysis of the Two Referendum Proposals in 2019 and 2020]*, in The Waves and Sounds of Criminal Law: Criminal Law (刑事法學的浪潮與濤聲：刑法學) 814 (Yuan-Sheng Huang (黃源盛) et al. eds 2021).

139. *Id.* at 21.

140. *Id.* at 10. According to the statistical findings of the investigation conducted in the year 2002 of the Republic of China, a staggering 96 percent of women utilized the sixth provision to carry out abortion. *See* Chao-Hui Shi (釋昭慧), Huīzhī bù qù de fù quán mèngyǎn—píngshù `yōushēng bǎojiàn fǎ'xiūzhèng àn zhī zhēngyì (揮之不去的父權夢魘–評述「優生保健法」修正案之爭議) [Inescapable Patriarchal Nightmare: A discussion of the debate regarding the amendment of The Pregnant Women's Health Protection Act], 31 Newsl. Res. Applied Ethics (應用倫理研究通訊) 23, 23 (2004).

141. Kuan, *supra* note 19, at 150.

142. *Id.*

143. *See* Rebecca J. Cook, *Stigmatized Meanings of Criminal Abortion Law*, *in* Abortion Law in Transnational Perspective 347, 347 (Bernard M. Dickens, Joanna N. Erdman & Rebecca J. Cook eds., 2014).

causes health problems for women, which affect people of different social classes inequitably.[144]

In addition, the enactment of the EHA does not fully exempt women from the threat of criminal prosecution. Currently, the Criminal Code and EHA are concurrently applicable, with the EHA serving as a *lex specialis* justification.[145] This means that abortions that fall outside the EHA's scope could still result in criminal penalties. Additionally, such circumstances offer an effective means of sexual surveillance for law enforcement officials, who may investigate women's sexual relationships by examining abortion cases. Abortion providers are then cast as moral gatekeepers, and the mandatory requirement of spousal consent provides husbands with authority over sexual surveillance rights.[146]

Moreover, as implied by the statutory requirement of the EHA as well as from the societal reality, there is still a strong patriarchal bias stemming from Confucianism. This bias creates invisible barriers for women in need of an abortion. Such obsolete ideologies have been translated into the EHA, where eugenics and sexual morality are considerably valued.[147] For instance, spousal consent is required under the psychological/economic exception, and the Act also obligates doctors to urge pregnant women to have an abortion if the fetus is found to be abnormal during prenatal examinations.[148] In other words, the decision whether to perform an abortion surgery or not is not solely subject to the pregnant women's willingness, but also to the intrusive opinions of her doctor and her spouse on things having nothing to do with the wishes of the pregnant woman.

B. *Throwback to the Initiation of Legalization*

Initially, legalization of abortion arose in connection with the government's intention to secure population control, which had nothing to do with right-rationales. Since the 1950s, population has been used as an indicator of national prosperity. The control of population, and thereby of contraception and reproduction, gained public attention. The Taiwanese government first embarked on abortion legalization in 1969, when the Executive Yuan first published the Population Policy Guidelines (人口政策綱領).[149] Subsequently, debates around abortion legalization began

144. Siegel, *supra* note 63, at 17.

145. Taiwan Supreme Court Criminal Judgment 99-Tai-Shang-7588 (2010) (最高法院99年台上字第7588號刑事判決).

146. Chen, *supra* note 88, at 32.

147. Wen-May Rey (雷文玫), *Jiegou woguo peitai baohu guifan tixi: Faxian Fumu Shengyu Zizhu Di Diwei (解構我國胚胎保護規範體系：發現父母生育自主的地位) [Deconstructing the Legal Norms of Taiwan's Embryo Protection: A Discovery of Parent's Freedom of Procreation]*, 33(4) Nat'l Taiwan U. L.J. (臺大法學論叢) 1, 23 (2004).

148. EHA, arts. 9(2) and 11(2). Art. 11(2) reads: "When a doctor finds an abnormal fetus during prenatal examination, she or her spouse shall be truly informed and *advised* to receive induced abortion if induced abortion is considered necessary."

149. Renkou Zhengce Gangling (人口政策綱領) [Population Policy Guidelines]

in the Legislative Yuan (i.e., Taiwan Congress). Throughout the legislative process, there was a conspicuous absence of discussions concerning women's rights or fetal life, with much attention instead being focused on perceived issues of national importance at the time, such as population policy, social needs, medical management, economic development, and maintenance of the legal system. Although there were some voices of opposition during the debate, following the ruling party's directive to vigorously promote the bill's passage in the Legislative Yuan, the majority of legislators showed their support for the EHA as a firmly established national policy and collaborated to pass the bill.[150]

Particularly, the legislative deliberation surrounding the initial legalization of abortion in Taiwan in 1984 was grounded in population concerns, rather than a-rights-based approach. According to the previous empirical study conducted by Professor Kuan, the majority of legislative discussions focused on state-level concerns. The most frequently cited discourses in support of the legalization were "population policy," "the protection of women's health," and "eugenic reasons," with each term occupying around 10 percent of all pro-abortion discourses.[151] The following excerpts well exemplify each approach respectively.

> **Congress Member Jin-Lan Wen**: "The *population pressure* in Taiwan is extremely severe [. . .], mainly due to the traditional belief of valuing males over females and the desire for large number of offspring [. . .] To *control birth rates and reduce population growth*, it is actually necessary to allow for the use of induced abortions, and therefore, support should be given to the legalization of abortion."[152] [Emphasis added]

> **Congress Member Wen-Dong Hong**: "In Taiwan, approximately 250,000 to 300,000 induced abortions are performed each year. The percentage of married women who have experienced induced abortions is as high as 30% to 39%, which means that about one-third of married women have undergone induced abortions. In the case of illegal abortions, these women undergo the procedure in unqualified hospitals by doctors who lack professional training, *which is very*

(1969), Section 6: "[P]regnant women or their spouses who suffer from malignant genetics, infectious diseases, or hereditary mental illnesses, or who are in danger of life due to diseases or other life-threatening conditions, and who are confirmed to be necessary by public or government-designated medical institutions may request artificial abortion."

150. Kuan, *supra* note 19, at 175–176.

151. Hsiao-Wei Kuan, *Abortion Law and Abortion Discourse in Taiwan: Rights, Social Movements and Democratization* (April 23, 2008), https://ssrn.com/abstract=1125070 or http://dx.doi.org/10.2139/ssrn.1125070 [https://perma.cc/LM7E-4JK2] (last visited May 1, 2023), at 141.

152. 立法院第一屆第七十三會期第十七次會議 [Legislative Yuan 1st Cong., 73th Sess., 17th Mtg., General Meeting Minutes] (Mandarin), 立法院議事及發言系統 (Apr. 20, 1984), at 24.

> *dangerous and puts the health of the mothers at risk without proper protection*."[153] [Emphasis added]

> **Congress Member Yu-Chin Hong**: "While the focus has been on controlling the quantity of population growth, it is important to also pay attention to *improving the quality of the population* in the future. To *prevent the birth of individuals with hereditary diseases and to improve the quality of the population*, there are multiple ways, [. . .] requiring the implementation of laws."[154] [Emphasis added]

Similarly, from the anti-abortion side, the majority of legislative discussions against the legalization of abortion also emphasized state-level concerns. There, the most frequently mentioned concerns were "social moral declination" and "sexual promiscuity," as exemplified in the following excerpts:[155]

> **Congress Member Han-Sheng Wang**: "If this Act is passed, it will certainly lead to *an expansion of sexual licentiousness*. [. . .] As the ancients said, "All evils stem from sexual licentiousness," because it is not just a sexual issue, but also a *social problem*."[156] [Emphasis added]

> **Congress Member Te-Jeng Wang**: "[The EHA] is tantamount to encouraging incestuous pregnancies between men and women, even disregarding morality. [. . .] In this way, it will inevitably lead to a flood of *pornography*, with unrestrained desires flowing, violating the spirit of ethical governance that our country has upheld for thousands of years, and damaging the image of our great cultural nation."[157] [Emphasis added]

Furthermore, during the same period of time, a grassroots social movement comprised of various interest groups also emerged around abortion. Both para-statal and private feminists groups concurred with those in favor of in legalizing abortion, but their discourses and reasonings greatly differed. Para-statal feminist groups mainly followed the government's discourse, emphasizing the social role of motherhood and female's contribution toward the society by "breeding eugenic offspring."[158] By contrast, private feminists NGOs took a more advanced position in highlighting the right-framing discourse. While introducing the U.S. experience of legalizing abortion (e.g., *Roe v. Wade*), they endorsed the perspective of gender equality with a comprehensive and deep consideration of women's roles in families, workplaces, and political arenas, where an unequal power division in gender relationship manifested.[159] These activists spearheaded the fight to decriminalize abortion and emphasized that the conceptual obligation of carrying offspring restricted women's

153. *Id.* at 34.
154. *Id.* at 25–26.
155. Kuan, *supra* note 23 at 93–94.
156. Legislative Yuan General Meeting Minutes, *supra* note 152, at 10–11.
157. *Id.* at 11–12.
158. Chen, *supra* note 88, at 1.
159. *Id.* at 36–47.

reproductive autonomy.[160] After the passage of the EHA, the push to expand abortion access continued, evolving into a right-based framing of abortion over time. From 1985 to 2006, the primary focus of efforts to legalize abortion shifted to the approach of individual-level interests. Among all the pro-abortion discourses, the most frequently contended arguments were "protecting women's rights," which occupied around 40 percent among all the other pro-abortion discourses.[161]

To sum up, abortion legalization, introduced by the EHA during the 1980s, was a top-down policy decision process, wherein family planning, population, and abortion policies were discussed and debated within the state's elite group, under the strong leadership of the government.[162] The legalization movement was initiated by the government to control population amounts, lacking any right-rationale or right-framing considerations. Although some demands were made by social movements endeavoring to advocate a right-framing discourse, they barely found their way into the legislative realm.[163] Overall, the history of the EHA indicates a denial of a legal right status to abortion, at least at the time of the EHA's passage.

C. *Change of Framing: The Growth of Rights-Based Approach*

Recent developments in favor of abortion rights demonstrate a significant shift in perception, reflecting the growing acceptance of a new rights-based rationale for access to abortion. This trend of framing is evident in each branch of government and the civic forum - the legislature, public opinion, executive, and judiciary - albeit with slight variations. Additionally, anti-abortion discourses in each dimension are also presented so as to provide a more comprehensive understanding of the complex issue of abortion.

1. Legislature

This portion of this article focuses on subsequent developments from 2008 to 2023, which reflects a stronger trend toward the emphasis on rights-based framing. From an exploration of a total of twenty-three bills of the EHA presented during the course of seventh to tenth

160. *Id.* at 50–51. Meanwhile, a few Christians communities expressed their objections to the proposed abortion legalization but did not get to overturn the trend. *Id.* at 35.

161. Kuan, *supra* note 16, at 93 and 110–111. Specifically, an increasing number of discourses framed abortion as "autonomy" (including general autonomy, bodily autonomy and reproductive autonomy), indicating a conceptual difference from how abortion was categorized as "right of choice" or "right to privacy" in Germany or the U.S.

162. Kuan, *supra* note 19, at 175–176.

163. Nonetheless, this does not preclude the women's movement from making a substantial contribution to the discourse. One of their significant contributions is altering the tenor of the discourse on the legalization of abortion, emphasizing the importance of safeguarding women's rights and sexual autonomy. *Id.* at 174.

congressional terms (i.e., the years 2008 through 2023), two significant takeaways can be gleaned.

One of the notable developments in this field is the remarkable surge in the recognition of the importance of abortion accessibility, increasingly justified by reference to rights-based discourses. Proposed amendments to the EHA can be summarily classified into three categories: (1) *expanding abortion access* (e.g., removing the spousal consent requirement and the doctor's obligation to urge abortion); (2) *restricting abortion access* (e.g., adding mandatory consultation requirement and reflection period requirement); and (3) *both* (i.e., expanding and restricting abortion access in different ways). Under this classification system, the draft bills indicate an apparent trend towards expansion of abortion access, as the majority of draft bills tend towards expanding abortion access. In particular, in the latest congressional term, seven draft bills were submitted, with six of them proposing the expansion of abortion access. It can be said that, at least within the latest congressional term, the vast majority of congress members are attempting to advocate for expansion of abortion access.

a. Pro-Abortion Approach

Of greater significance, and building on the previous stage's proliferation of rights-based framing, the autonomy-based rationale not only dominates as the primary foundation for support of abortion, but considerably replaces state-level considerations. State-level considerations have been completely abandoned within the pro-abortion discourses. That is to say, all pro-abortion bills rely on advocacy for women's rights, rather than any other non-individual consideration. Under this context, the most frequently used right-framing discourse is that of "bodily autonomy" (身體自主權), which appears in nearly every pro-abortion draft bill. The following excerpts are presented as examples for reference.

> **EHA Draft Bill proposed by Congress Member Jing-Yi Lin et. al**: "Pregnant women are independent legal entities with the *bodily autonomy* to decide whether or not they want to involve offspring in their future lives. This decision should not be constrained by marriage, and is therefore legally free. The current provision in Article 9(2) of the Act, which requires the spouse's consent, may pose a conflict between spousal consent rights and *women's autonomy*."[164] [Emphasis added]

164. 立法院第9屆第5會期第7次會議院總第1140號/委員提案第21788號議案關係文書 [Legislative Yuan 9th Cong., 5th Sess., 7th Mtg., Agenda Related Documents General No. 1140/Member Proposition No. 21788] (Mandarin), 立法院議事及發言系統 (Apr. 4, 2018), at 45. *See also* 立法院第9屆第6會期第2次會議院總第1140號/委員提案第22282號議案關係文書 [Legislative Yuan 9th Cong., 6th Sess., 2nd Mtg., Agenda Related Documents General No. 1140/ Member Proposition No. 22282] (Mandarin), 立法院議事及發言系統 (Sep. 26, 2018), at 71, 73; 立法院第10屆第3會期第11次會議院總第1140號/委員提案第26500號議案關係文書 [Legislative Yuan 10th Cong., 3rd Sess., 11th Mtg., Agenda Related Documents General No. 1140/Member Proposition No. 26500] (Mandarin), 立法院議事及發言系統 (May 5, 2021), at 31,34; 立法院第10屆第5會期第5次會議院總第1140號/委員提案第28159號議案關係文書 [Legislative Yuan

> **EHA Draft Bill proposed by Congress Member Ji-Fen Su et. al**: "Among the countries that have passed abortion bills globally, fewer than 10 explicitly require spousal consent. This indicates that spousal consent is not a reasonable restriction, as it limits *women's bodily autonomy*. Pregnancy involves significant physiological and psychological changes that last for ten months. However, spousal refusal may prevent women from having abortion, leading to the inhumane situation of carrying a child under psychological pressure. To safeguard *women's bodily autonomy*, an amendment to Article 9 of the Act is hereby proposed."[165] [Emphasis added]

Additionally, the rights of choice and reproductive rights/autonomy also make occasional appearances.

> **EHA Draft Bill proposed by Congress Member Shu-Ing Huang et. al**: "Respect women's *right to choose* to have an abortion [. . .] Women are the subjects of pregnancy and childbirth, and they bear the health risks associated with them. In addition, the psychological distress, life stress, and career planning problems that women face when raising a child, they did not intend to have cannot be ignored. Therefore, the decision to have an abortion should be respected and made by women based on their own beliefs, values, physical and mental health, and life conditions."[166] [Emphasis added]

> **EHA Draft Bill proposed by Congress Member Yun Fan et al.**: "In order to safeguard women's bodily autonomy and *reproductive rights*, pregnant women should have the right to make independent decisions about whether or not to give birth, without being influenced by others. Therefore, the spousal consent requirement should be abolished."[167] [Emphasis added]

> **EHA Draft Bill proposed by Taiwan People's Party (TPP)**: "Improving the quality of the population and safeguarding maternal and child health cannot be achieved by requiring spousal consent. Family and social issues are difficult to be determined by physicians. Therefore, the provision of spousal consent in this article is not in line with

---

10th Cong., 5th Sess., 5th Mtg., Agenda Related Documents General No. 1140/Member Proposition No. 28159] (Mandarin), 立法院議事及發言系統 (Mar. 23, 2022), at 485, 487.

165. 立法院第10屆第2會期第8次會議院總第1140號/委員提案第25750號議案關係文書[Legislative Yuan 10th Cong., 2nd Sess., 8th Mtg., Agenda Related Documents General No. 1140/ Member Proposition No. 25750] (Mandarin), 立法院議事及發言系統 (Dec. 16, 2020), at 323.

166. 立法院第7屆第1會期第19次會議院總第1140號/委員提案第8330號議案文書 [Legislative Yuan 7th Cong., 1st Sess., 19th Mtg., Agenda Related Documents General No. 1140/Member Proposition No. 8330] (Mandarin), 立法院議事及發言系統 (July. 16, 2008), at 116, 120; *See also* 立法院第8屆第2會期第2次會議院總第1140號/委員提案第13893號議案關係文書 [Legislative Yuan 8th Cong., 2nd Sess., 2nd Mtg., Agenda Related Documents General No. 1140/Member Proposition No. 13893] (Mandarin), 立法院議事及發言系統 (Sep. 26, 2012), at 311, 315.

167. 立法院第10屆第5會期第14次會議院總第1140號/委員提案第28821號議案關係文書 [Legislative Yuan 10th Cong., 5th Sess., 14th Mtg., Agenda Related Documents General No. 1140/Member Proposition No. 28821] (Mandarin), 立法院議事及發言系統 (May 27, 2022), at 427–8.

> legislative purposes. Moreover, spousal refusal and its reasons are not required to be explained, which creates an inappropriate limitation on the *reproductive autonomy* of married women under the current law."[168] [Emphasis added]

Another groundbreaking progression to note is the increasingly prevalent use of constitutional and international human rights norms to establish a rights-based foundation for discourse. Specifically, in the latest congressional term, most pro-abortion draft bills have explicitly leveraged international human right instruments, in particular the CEDAW Convention and its General Recommendations, to support their proposed changes. Some draft bills cite Article 10(6) of the Additional Articles of the Constitution (*AAC*), which provides that "the State shall protect the dignity of women, safeguard their personal safety, eliminate sexual discrimination, and further substantive gender equality."

> **EHA Draft Bill proposed by Bi-Ling Guan et. al**: "Starting from January 1, 2012, Taiwan promulgated the *Implementation Act of the CEDAW Convention*, which gives the CEDAW's articles of the legal effect of domestic laws. *General Recommendation No. 24* suggests that the public and private health sectors of the contracting countries should ensure women's right to health, including not limiting women's access to health services on the grounds of their husband's, partner's, parents' or health authorities' consent."[169] [Emphasis added]

> **EHA Draft Bill proposed by Yun Fan et. al**: "[Spousal consent requirement] restricts on a woman's reproductive rights is in violation of Articles 12, and 16, and General Recommendations No. 21 and No. 24 of the CEDAW Convention, which pertains to maternal and reproductive health care. [. . .] Therefore, the requirement for spousal consent in the second paragraph will be abolished."[170] [Emphasis added]

> **EHA Draft Bill proposed by TPP**: "The Implementation Act of the CEDAW Convention established the effect of CEDAW as domestic law in Taiwan on May 20, 2011. Also, General Recommendation No. 24, Point 14 indicates that: 'In order to respect rights, the Contracting States have the obligation to remove barriers to women seeking health action. Contracting States should provide reports on how public and private health sectors fulfill their responsibility to respect women's right to health care. [. . .]' Additionally, Article 10(6) of the AAC [. . .] provides that the state has the obligation

168. 立法院第10屆第3會期第11次會議院總第1140號/委員提案第26569號議案關係文書[Legislative Yuan 10th Cong., 3rd Sess., 11th Mtg., Agenda Related Documents General No. 1140/Member Proposition No. 26569] (Mandarin), 立法院議事及發言系統 (May 5, 2021), at 497.

169. 立法院第10屆第3會期第11次會議院總第1140號/委員提案第26500號議案關係文書[Legislative Yuan 10th Cong., 3rd Sess., 11th Mtg., Agenda Related Documents General No. 1140/Member Proposition No. 26500] (Mandarin), 立法院議事及發言系統 (May 5, 2021), at 31.

170. Legislative Yuan Agenda Related Documents, *supra* note 167, at 427–28.

> to eliminate discrimination against women and promote substantive gender equality. Article 9 of the Act requiring spousal consent, which creates obstacles for women to receive such services, is therefore in violation the aforementioned convention and the provision under the AAC."[171] [Emphasis added]
>
> **EHA Draft Bill proposed by New Power Party (NPP)**: "According to the Article 10(6) of the AAC, the state shall uphold the dignity of women, ensure their personal safety, eliminate gender discrimination, and promote substantive equality between the sexes. However, the current provision requiring spousal consent creates obstacles to women's reproductive decision-making and violates the CEDAW Convention, including Articles 12 and 16 and General Recommendations No. 21 and No. 24 on maternal health care. [. . .] However, requiring explicit spousal consent or notification actually gives spouses veto power over the bodily autonomy of vulnerable women, preventing them from enjoying substantive equality and protection of their fundamental rights under the Constitution."[172] [Emphasis added]

To this end, over the past 40 years, the pro-abortion discussions surrounding the legislative process have shown a flourishing development of human rights awareness. The original motivation for legalization, which was government-led and based on national interests such as population policy and eugenics considerations, has completely disappeared from contemporary discussions. In its place is a tenacious focus on protecting individual rights, with an emphasis on advocating for autonomy as the core principle. Particularly in the ongoing reform, multiple draft bills are grounded in the constitutional and international human rights obligations of the state, thereby providing legal protection for women's autonomy. Such changes evidence the continuing evolution of abortion access in Taiwan, changing from a conceptual idea to a legal right.

b. Anti-Abortion Approach

The anti-abortion movement has undergone significant changes in recent years. While the initial focus was on social and moral decline and the promotion of sexual promiscuity, the movement has since evolved to encompass demographic, health-based, and rights-based arguments. One common argument made by anti-abortion advocates is that the original motivation behind legalizing abortion was to address overpopulation. However, with declining birth rates, an aging population, and imbalanced sex ratios, these advocates now argue that abortion contributes to a host of social and economic problems. As a result, many anti-abortion bills seek to restrict access to abortion.

---

171. Legislative Yuan Agenda Related Documents, *supra* note 168, at 499.

172. 立法院第10屆第6會期第14次會議院總第1140號/委員提案第29708號議案關係文書 [Legislative Yuan 10th Cong., 6th Sess., 14th Mtg., Agenda Related Documents General No. 1140/Member Proposition No. 29708] (Mandarin), 立法院議事及發言系統 (Dec. 28, 2022), at 148–149.

> **EHA Draft Bill proposed by Congress Member Li-Huan Yang et. al**: "Since the implementation of the Act in Taiwan in 1985, approximately twenty years have passed, during which time Taiwanese society has undergone many changes. The most notable of these changes are a significant decline in birth rates, sexual promiscuity, and high divorce rates. [. . .] As the birth rate continues to decline and the elderly population continues to increase, along with an imbalanced gender ratio, Taiwan is facing a significant demographic challenge that is becoming a growing concern for government agencies. These demographic issues are expected to have far-reaching effects on economic development, educational balance, and increased social burden."[173]

> **EHA Draft Bill proposed by Congress Member Shih-Bao Lai et. al**: "One of the reasons for the low birth rate in our country is due to induced abortions. In recent years, Taiwan's fertility rate has reached an all-time low. In 2009, the average number of children born to each woman was 0.895, making Taiwan the country with the lowest fertility rate in the world. [. . .] approximately 20% of women choose induced abortion during their first unplanned pregnancy, and up to 40% choose induced abortion during their fourth unplanned pregnancy."[174]

Additionally, proponents of the anti-abortion stance have argued for the restriction of abortion access as a means to safeguard women's health, given the view that abortion can have negative medical consequences.

> **EHA Draft Bill proposed by Congress Member Li-Huan Yang et. al**: "Many overseas studies have reported on the physical and psychological harm caused to women by abortion. For instance, women who have undergone abortions are at an increased risk of infertility, miscarriage, and other complications. Furthermore, due to mental health issues or emotional distress, the rates of suicide and accidents among women who have had abortions are much higher than among the general population of women."[175]

Finally, the latest trend among anti-abortion advocates is an increasing emphasis on the subjectivity of the fetus as an entity entitled to the

173. 立法院第7屆第1會期第7次會議院總第1140號/委員提案第7989號議案關係文書 [Legislative Yuan 7th Cong., 1st Sess., 7th Mtg., Agenda Related Documents General No. 1140/Member Proposition No. 7989] (Mandarin), 立法院議事及發言系統 (April 19, 2008), at 485–486; *see also* 立法院第8屆第2會期第3次會議院總第1140號/委員提案第13946號議案關係文書 [Legislative Yuan 8th Cong., 2nd Sess., 3rd Mtg., Agenda Related Documents General No. 1140/Member Proposition No. 13946] (Mandarin), 立法院議事及發言系統 (Oct. 4, 2012), at 31–32.

174. 立法院第8屆第1會期第3次會議院總第1140號/委員提案第12947號議案關係文書[Legislative Yuan 8th Cong., 1st Sess., 3rd Mtg., Agenda Related Documents General No. 1140/Member Proposition No. 12947] (Mandarin), 立法院議事及發言系統 (March 9, 2012), at 219–20.

175. 立法院第8屆第2會期第3次會議院總第1140號/委員提案第13946號議案關係文書[Legislative Yuan 8th Cong., 2nd Sess., 3rd Mtg., Agenda Related Documents General No. 1140/Member Proposition No. 13946] (Mandarin), 立法院議事及發言系統 (Oct. 4, 2012), at 31.

right to life and protection from sex-selective abortion. Consequently, more stringent requirements have been proposed to regulate access to abortion.

> **EHA Draft Bill proposed by Congress Member Yi-Chieh Chen**: "Due to the influence of traditional concepts such as 'continuing the family line' and 'favoring sons over daughters,' a small number of families in our country still choose to have abortions upon learning that the fetus is female. In order to rectify this situation and protect *the right to life of the fetus*, [. . .] the parents of the fetus may not use *the sex of the fetus* as a reason for abortion, and increases penalties for medical institutions and doctors who violate this provision, in order to achieve a deterrent effect."[176] [Emphasis added]

> **EHA Draft Bill proposed by Congress Member Wan-Ru Liao**: "[. . .] in order to reduce serious family and social problems and maintain the health of mothers and children, the conditions should be subject to stricter regulation to *protect the right to life of the fetus*. [. . .] it is necessary to stipulate that after counseling or consultation, it must be confirmed that the impact caused by pregnancy or childbirth will be 'severe' before such termination may be carried out."[177] [Emphasis added]

2. Public Opinion

Public opinion often exerts a significant influence on the formation and implementation of laws and policies.[178] This is particularly true for emerging democracies such as Taiwan, where the government has demonstrated a swift response to social protests and public demands. The political elites and governmental agencies in Taiwan are highly motivated to remain attuned to public sentiment through information and polls and to be more agile in their responses than their counterparts in established democracies, in order to secure popular support.[179]

The passage of legislation such as the EHA does not automatically create the concept of rights in a society. The concept of rights must already exist in people's lives and be present in the discourse surrounding the legislative process for legal rights to emerge. In that sense, the influence of social forces and communication is crucial in forming legal

---

176. 立法院第9屆第2會期第17次會議院總第1140號/委員提案第20132號議案文書 [Legislative Yuan 9th Cong., 2nd Sess., 17rd Mtg., Agenda Related Documents General No. 1140/Member Proposition No. 20132] (Mandarin), 立法院議事及發言系統 (Dec. 28, 2016), at 147.

177. 立法院第10屆第3會期第4次會議院總第1140號/委員提案第26010號議案關係文書[Legislative Yuan 10th Cong., 3nd Sess., 4th Mtg., Agenda Related Documents General No. 1140/Member Proposition No. 26010] (Mandarin), 立法院議事及發言系統 (Mar. 17, 2021), at 82.

178. Amy Adamczyk et. al, *Examining Public Opinion about Abortion: A Mixed-Methods Systematic Review of Research over the Last 15 Years*, 90(4) Socio. Inquiry 920, 921 (2020).

179. Charles K.S. Wu, *How Public Opinion Shapes Taiwan's Sunflower Movement*, 19 J. E. Asian Stud. 289, 292 (2019).

rights.[180] Therefore, in exploring the evolution of abortion rights, it is essential not to overlook the exchange of opinions among citizens in the public forum. Women's civic groups have led powerful social movements on the issue of abortion, vigorously debating the topic on two prominent platforms, the NCJR and the Join Platform, which this paper discusses in greater detail in later sections. These discussions have adopted a rights-based framing to support the expansion of abortion access. Conversely, anti-abortion advocates have also sought to realize their beliefs through social movements and public opinion platforms, though they have been relatively disadvantaged in these efforts thus far.

a. Social Movements by Civic Groups

Since the lifting of martial law in Taiwan in 1987, civil society organizations have been actively advocating for human rights, with gender-related groups playing a significant role in pushing for significant legal reforms in recent decades.[181] In the context of abortion, social movements have been instrumental in framing it as a rights-based issue, as explained in the previous section. Among the most active organizations in recent years are the Awakening Foundation[182] and Taiwan Women's Link.[183] For instance, the Awakening Foundation, founded by a group of female lawyers, has issued responses to the Ministry of Health and Welfare's ("MOHW"; the governmental agency in charge of the EHA) EHA draft bill announced in 2022,[184] where it has pursued the same theme previously adopted in legislative discussions, namely, autonomy-based and CEDAW-centered framing. This can be observed from the following excerpt:

---

180. Kuan, *supra* note 16,, at 105, 108.

181. Jiunn Rong Yeh, *Marching Towards Civic Constitutionalism with Sunflowers*, 45 H.K.L.J. 315, 325–326 (2015).

182. Funu Xinzhi Jijin Hui (婦女新知基金會) [Awakening Foundation] (Mandarin), https://www.awakening.org.tw [https://perma.cc/47CY-LZ5G] (last visited May 1, 2023).

183. Taiwan Nuren Lian Xian (台灣女人連線) [Taiwan Women's Link] (Mandarin), https://twl.ngo.org.tw [https://perma.cc/5NXU-FAEK] (last visited May 1, 2023).

184. Yeh, *supra* note 181; *【聲明】女人的子宮，女人決定！回應「限縮終止懷孕期限」公投提案 [Statement: Women's uterus, women's decision! Response to the proposal of "restricting the termination of pregnancy period" referendum]* (Mandarin), 婦女新知基金會 (Oct. 9, 2019), https://www.awakening.org.tw/news/5314 [https://perma.cc/ZHR5–5YPL] (last visited May 1, 2023); *【婦女新知基金會 聲明稿】 莫以保護女性健康為名，控制女人的自主權與人生–回應人工流產強制思考期與強制諮商公投提案 [Statement by the Taiwan Women's Knowledge Foundation: Do not use the pretext of protecting women's health to control women's autonomy and life decisions - Response to the Referendum Proposals on Mandatory Waiting Periods and Counseling for Abortion]* (Mandarin), 婦女新知基金會 (Mar. 27, 2020), https://www.awakening.org.tw/news/5379 [https://perma.cc/K5WC-PG7R] (last visited May 1, 2023); *【發言稿】優生保健法修法座談會 [Speech Script: Symposium on the Amendment of the EHA]* (Mandarin), 婦女新知基金會 (Mar. 10, 2022) https://www.awakening.org.tw/news/5746 [https://perma.cc/U5Z8-CBCF] (last visited May 1, 2023).

> We affirm the amendment proposed by the MOHW to remove the requirement for married women to obtain their spouse's consent before terminating a pregnancy, which restores the protection of *women's bodily autonomy and reproductive rights.* In addition to the EHA discussed today, such amendment, if seen as an echo to the *CEDAW Convention*, should also review and abolish the criminal offense of abortion under the Criminal Code, which punishes women who terminate their pregnancies. This is necessary to comply with the *international treaties such as the CEDAW*, which aim to *protect women's health and reproductive autonomy*.[185][Emphasis added]

By contrast, certain civil society organizations, primarily those with religious affiliations, have been advocating for restrictions on abortion access and have taken roles in leading the second-wave anti-abortion movement. Since 2003, the Alliance for Life has actively promoted ethical issues in different fields, specifically promoting the amendment of the EHA with the aim of removing Article 9.1.6. The Alliance has suggested adding a clause requiring a "counseling and contemplation period" before abortion, meaning that when a citizen applies for an abortion this specific provision, they must undergo a six-day statutory contemplation period, receive counseling assistance, and they cannot terminate the pregnancy based on the sex of the fetus, to protect the fetus's dignity and right to life.[186] According to its website, from 1999 to 2009, the Alliance organized seminars, produced DVDs, published newspaper editorials, conducted legislative lobbying, and advocated for life education on campuses as various means to actively promote anti-abortion campaigns. However, the website has not been updated since 2009.[187]

b. National Conference in Judicial Reform

The National Conference in Judicial Reform ("**NCJR**" or "**Conference**") is a public forum holding great importance in promoting the reform of EHA in recent years. The Conference is a biennial event that aims to bring together legal professionals, scholars, government officials, and other stakeholders to discuss and propose ways to improve the country's judicial system. With the participation of a diverse range of stakeholders, its recommendations reflect the views and opinions of certain segments of the public, which shows that there is at least some level of public interest and engagement in reproductive autonomy issues.

With President Tsai's commitment to advance judicial reform by "allowing public participation and letting in social forces," the government initiated preparations for the Conference in July 2016, inviting members of the public to send in reform suggestions that would be used to set an agenda with the principle of "diverse voices and broad popular

185. *See* Speech Script: Symposium on the Amendment of the EHA.

186. Jiuzhu Taier Weihu Shengming (救助胎兒 維護生命) [Rescue fetus, preserve life] (Mandarin), https://theology.catholic.org.tw/klife/aboutus.html [https://perma.cc/CEM6–6QA8] (last visited May 1, 2023).

187. *Id.*

participation."[188] With 101 attendants in attendance (over half of whom had no legal background), the conference was conducted in a three-step process: 1) gathering opinions from the public; 2) having experts analyze and convert the opinions into discussion topics; and 3) turning the opinions into concrete proposals.[189] Eventually, five conference panels,[190] each serving as subcommittees to discuss areas of reform, adopted multiple resolutions, in which the fifth panel advised revision of Article 9 of the EHA. Specifically, the panel adopted the right-framing discourse of "women's autonomy" and "reproductive autonomy" and recommended that the government reconsider and revise the procedural requirements of spousal consent and parent/guardian consent.[191] The primary resolution suggested "revising the relevant provisions of Article 9 of the EHA regarding the decision-making power of minors and married women for abortion, in order to realize *women's autonomy.*" [Emphasis added]

188. Neil Chisholm, Judicial Reform in Taiwan: Democratization and the Diffusion of Law 287–288 (2021).

189. *Id.* at 288–289.

190. *Main Policies: Briefing of Judicial Reform*, Ministry of Justice (June 11, 2019), https://www.moj.gov.tw/2832/2833/2844/2845/24802 [https://perma.cc/YW5G-3AUW] (last visited May 1, 2023). The conference was divided into 5 groups, whose respective themes are specified as follows: (1) Human rights: A justice system that protects victims and underprivileged groups; (2) Trust: A justice system that is fair, professional, and trusted by the people; (3) Efficiency: An efficient justice system in which power conforms with accountability; (4) Friendliness: A justice system that is participatory, transparent, and accessible; and (5) Security: A justice system that protects social security.

191. 總統府司法改革國是會議第五分組第六次會議 [National Conference of Judicial Reform, The Fifth Group, The Sixth Meeting] (Mandarin), 總統府司法改革國是會議 (May 17, 2017) https://justice.president.gov.tw/meeting/48 [https://perma.cc/ZD9C-EKJJ] (last visited May 1, 2023). The resolution came with two explanations: "Explanations: (1) Currently, according to Article 9(2) of the EHA, if a person under the age of 20 becomes pregnant and wants to have an artificial abortion, without exception, they must obtain the consent of their legal representative. This will force minors to seek illegal doctors or other illegal channels if they want to have an artificial abortion without the consent of their legal representative, violating the protection of children's physical and mental health and international norms. The competent authority should immediately study this issue and allow minors over the age of 18 to make their own decisions. For minors under the age of 18 whose legal representatives disagree with the decision to have an artificial abortion, a judicial or administrative mechanism should be introduced to assist them in making a decision and protecting their physical and mental health; (2) According to the Article 9(2) of the EHA, when a married woman wants to have an artificial abortion under the Article 9.1.6 (pregnancy or childbirth affects her psychological health or family life), she must obtain the consent of her spouse without exception. This provision completely ignores whether the woman has suffered from domestic violence or other marital problems, and forces women who have been abused or are already in the process of divorce may not be able to have an artificial abortion or may face other disadvantages. It is recommended that exceptions be added so that the consent of the spouse is not required, and even in the absence of exceptions, when opinions differ between the pregnant woman and her spouse on whether the sixth item applies, a judicial or administrative dispute resolution mechanism should be established to protect the *reproductive autonomy* of pregnant women in marriage." [Emphasis added]

However, the final resolution ultimately took a relatively reserved position. Rather than recommending the deletion of the spousal consent requirement, the resolution merely suggested adding exceptions exempting pregnant women under certain circumstances from such procedural requirements, or introducing processes for third-party mediation such as judicial or administrative dispute resolution mechanisms to mediate conflicting opinions between husbands and wives.[192]

c. Public Policy Participation Platform (Join Platform)

The Public Policy Participation Platform (公共政策網路參與平臺; also known as the ("**Join Platform**")[193] is another public forum profoundly propelling the EHA amendment. After the Sunflower Movement, the Taiwanese government set up the Join Platform in response to societal demand for citizens to have a direct role in public participation. A core feature of this platform is the "Idea Proposal" (提點子) function, which has an electronic petition mechanism. This allows citizens to propose their own ideas for policymaking, which the government must respond to within a certain period of time.[194]

On November 21, 2020, a citizen submitted a Join Platform proposal to reform the spousal consent requirement under Article 9 of the EHA. In particular, the proposal relied on the right-framing discourse:

> According to Article 9 of the EHA, unmarried girls can refer to Subparagraph 6 which allows them to decide whether or not to give birth to a child when their mental health or family life is affected by pregnancy or childbirth. However, what about married girls? According to the provision of the proviso, the consent of the spouse is required to apply this clause. [. . .] The proviso in Article 9 of the EHA must be amended as it deprives women of their *right to autonomy* over their bodies. If unmarried girls can apply the provisions of Subparagraph 6 without any consent from others, then the same should apply to married girls. There should not be a requirement for the spouse's consent, especially in such personal matters as pregnancy and childbirth. [. . .] [Emphasis added]

Upon receiving around seven thousand and five hundred registrations of support, the proposal was officially passed on December 2,

---

192. *Id.*

193. Gonggong Zhengce Wang Lu Canyu Pintai (公共政策網路參與平台) [Public Policy Online Participation Platform], https://join.gov.tw/ [https://perma.cc/S2NF-JV8E] (last visit May 11, 2023) [hereinafter Joint Platform].

194. Kun-Yi Chen (陳坤毅) & Hsini Huang (黃心怡), *Mínzhòng diànzǐ liánshǔ nèiróng yǔ zhèngfǔ huíyīng fāngshì: Yǐ tí diǎn zi píngtái wéi lì (民眾電子連署內容與政府回應方式：以提點子平臺為例) [What Predicts government Responsiveness: A Study of the E-Petition Platform in Taiwan]*, 7(2) J. Democ. & Govern. (民主與治理) 1, 1 (2020); *Teng-Wen Chang & Pei-Ching Wu, Shíjiàn gōng bùmén xiànshàng xiélì shì zhèngcè cānyù zhī yánjiū: Yǐ jīguān huíyīng tài yàng yǔ juécè xíngwéi héxīn de jiǎnshì (實踐公部門線上協力式政策參與之研究：以機關回應態樣與決策行為核心的檢視) [The Practices of E-Collaborative Policy Involvement in Taiwanese Public Sector: An Inspection of Agency's Response patterns and Decision-Making Behaviors]* 60 J. Public Admin. (公共行政學報) 47, 61–62 (2021).

2020. Consequently, the MOHW undertook appropriate action, culminating in the birth of the latest draft bill of the EHA (see below). The pro-abortion deliberations on the proposal reflect the dominant use of rights-based framing, and as part of this trend, both the NCJR forum and Join Platform have propelled the executive branch to move forward to the pro-abortion approach by taking further steps.

3. Executive

Between 2008 and 2012, the Executive Yuan proposed two versions of a draft bill to amend the EHA, neither of which adopted a pure pro-abortion or anti-abortion stance.[195] Rather, both drafts recommended changes that would expand abortion access in certain ways and restrict abortion access in other ways. For instance, both drafts proposed deletion of the spousal consent requirement and the physician's duty to discourage abortion in the interest of protecting women's bodily autonomy.[196] Simultaneously, however, both drafts also proposed the addition of mandatory counseling and reflection periods before abortion as measures to protect women's mental health and prevent adverse impacts on family life.[197] This ambivalent attitude can be interpreted as an attempt by the Executive Yuan to accommodate both pro-abortion and anti-abortion views.[198]

However, upon closer examination of recent developments concerning the executive branch's stance on abortion issues, it appears that

195. 立法院第7屆第1會期第2次會議院總第1140號/政府提案第11169號議案關係文書 [Legislative Yuan 7th Cong., 1St Sess., 2nd Mtg., Agenda Related Documents General No. 1140/Government Proposition No. 11169] (Mandarin) (Feb. 27, 2008); 立法院第8屆第1會期第2次會議院總第1140號/政府提案第13031號議議案關係文書 [Legislative Yuan 8th Cong., 1St Sess., 2nd Mtg., Agenda Related Documents General No. 1140/Government Proposition No. 13031] (Mandarin) (Feb. 29, 2012).

196. *See, e.g.*, 立法院第8屆第1會期第2次會議院總第1140號/政府提案第13031號議議案關係文書 [Legislative Yuan 8th Cong., 1St Sess., 2nd Mtg., Agenda Related Documents General No. 1140/Government Proposition No. 13031] (Mandarin), at 169 (March 2, 2012) (stating that "In light of respecting women's bodily autonomy and considering that women are the ones who bear the greatest risk in pregnancy and childbirth, the requirement for spousal consent for abortion should be amended to "informing the spouse before signing the consent form.").

197. *See, e.g.*, 立法院第7屆第1會期第2次會議院總第1140號/政府提案第11169號議案關係文書 [Legislative Yuan 7th Cong., 1St Sess., 2nd Mtg., Agenda Related Documents General No. 1140/Government Proposition No. 11169] (Mandarin) (Feb. 29, 2008), at 182–183 (stating: "Medical institutions should provide counseling services that include, before the surgery: the timing of abortion, risks associated with childbirth and surgery, and options for adoption or fostering. After the surgery: physical care, contraceptive measures, and mental health support. To allow pregnant women to make informed decisions after counseling, a buffer period should be provided. After convening multiple meetings with representatives from relevant fields, it was determined that medical institutions should provide counseling and wait for the pregnant woman to sign a consent form three days later before performing the procedure.").

198. However, it can also suggest an unclear stance on the issue of abortion. While acknowledging women's autonomy and willing to relax certain restrictions, the government still imposes additional procedural barriers to restrict that right.

their position has gradually shifted towards a pro-abortion stance. This shift is likely driven by increased civic engagement and advocacy efforts. As the authority responsible for EHA matters, the MOHW has made notable progress in advancing legal reform. This was achieved through two key strategies. First, by hosting public consultations, the MOHW served as a central hub for collecting and reconciling diverse civic opinions. Second, it actively disseminated the latest version of the EHA draft bill to the public.

a. MOHW's Consultation Meeting

In contrast to the NCJR's recommendation that statutory exceptions be added to the spousal consent requirement, the MOHW took a more decisive approach by advocating for the removal of the spousal consent requirement entirely. In line with the NCJR's resolution to reform the EHA, the MOHW held consultation meetings (研商會議) with professionals from various fields, including medicine, ethics, law, gender equality, and child welfare. Initially, the discussions centered around designing normative exceptions to the spousal consent requirement, such as for women who had suffered from domestic violence or were going through divorce proceedings. However, after several rounds of deliberation, the participants ultimately agreed that the spousal consent requirement should be eliminated altogether, citing three reasons.[199]

First, regardless of the exceptions established, women would be required to provide substantial, objective, and clear evidence within a limited timeframe due to the time-sensitive nature of abortion. Such a requirement could create an undue burden for these women and increase the difficulty of physician verification in practice.[200] *Second*, the spousal consent requirement is not in compliance with the CEDAW, and only a few countries around the world continue to impose such a restriction (*e.g.*, only Japan, Taiwan and South Korea in Asia).[201] *Finally*, the spousal consent requirement is in conflict with the principle of equality. In a marriage based on equality and harmony, decisions regarding childbirth should be made jointly by both spouses.[202] Legislation that mandates spousal consent or notification could potentially lead to the denial of a woman's bodily autonomy by her spouse, thereby violating the principle of equality. Consequently, the majority of participants in MOHW's consultation meetings concluded that "the spousal consent requirement should be removed, in accordance with the spirit of the CEDAW Convention, in order to respect women's reproductive autonomy.[203]"

199. Weisheng Fuli Bu Huiying Shuoming (衛生福利部 回應說明) [MOHW's Reply and Explanations] (Mandarin), Join Platform (Feb. 1, 2021), https://join.gov.tw/idea/detail/ad9d14d9–1fa2–4741–928e-9070fdefc01c/ [https://perma.cc/FU9Q-B8PB] (last visited May 1, 2023).

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

b. MOHW's Responses on the Join Platform

As to the proposal on the Join Platform, the MOHW also took a series of steps to propel the legal reform of the EHA. First, the MOHW held a video conference with the author of the proposal on December 13, 2020, requesting for clarification on how they wished to amend the spousal consent requirement.[204] After learning that the proposer suggested deletion of the spousal consent requirement, the MOHW posted a written reply to the proposal on the same platform, echoing the proposal with two primary rationales: (1) the idea that the spousal consent requirement is inconsistent with Articles 12 and 16(1)(e) of the CEDAW and should be amended pursuant to the CEDAW Implementation Act; and (2) a line of reasoning based on J.Y. Interpretation No. 791 where the TCC recognized individual autonomy (including sexual autonomy) in the marriage relationship and the state's affirmative obligation to promote substantive gender equality under Article 10(6) of the AAC.[205] As such, the MOHW committed itself to prepare a draft bill of the EHA specifically to revise the provision of spousal consent requirement and concluded that:

> A marriage relationship that is equal and harmonious naturally invites both spouses to jointly decide on matters related to reproduction. However, mandating explicit legislative requirements for spousal consent or notification may result in the denial of the *bodily autonomy* of vulnerable women by their spouses, thereby failing to guarantee substantive equality under constitutional basic rights.[206] [Emphasis added]

c. MOHW's EHA Draft Bill and Collaborative Meeting

The MOHW announced its EHA draft bill on January 4, 2022, which proposed ten primary amendment directions, including the revision of procedural requirements for abortion.[207] Following the shared understanding of rights-based approach from the public opinion, the draft bill deleted the spousal consent requirement, reasoning that "the requirement for explicit consent or notification from the spouse can lead to the veto power of the spouse over the *bodily autonomy* of vulnera-

204. Tian Ren Suqui Liqing Shixun Huiyi Jilu (《提案人訴求釐清》視訊會議紀錄) ["Clarification of Proposer's Request" Video Conference Minutes] (Mandarin), Join Platform (Dec. 13, 2020), https://join.gov.tw/attachments/ef4fd6d9-ab8f-43f7-ba80-cc2d89688431/download/%E3%80%8C%E5%B7%B2%E5%A9%9A%E5%A5%B3%E5%AD%90%E6%8D%8D%E8%A1%9B%E8%87%AA%E5%B7%B1%E7%9A%84%E6%AC%8A%E7%9B%8A%E3%80%8D%E8%A8%B4%E6%B1%82%E9%87%90%E6%B8%85%E6%9C%83%E8%AD%B0%E7%B4%80%E9%8C%84.pdf [https://perma.cc/MV6T-BCFS] (last visited May 1, 2023).

205. MOHW's Reply and Explanations, *supra* note 199.

206. *Id.*

207. Yugao Xiuzheng You Sheng Bao Jian Fa Cao An, Mingcheng Bing Xiuzheng Wei Shengyu Bao Jian Fa (預告修正「優生保健法」草案，名稱並修正為「生育保健法」) [Announcement of the draft amendment to the EHA, and the name was revised to the "Reproductive Health Act"] (Mandarin), 公共政策網路平台：法令草案預告 (Jan. 14, 2022), https://join.gov.tw/policies/detail/374cf7af-6dfb-4219-a9df-edb7f286062f [https://perma.cc/PSG6-WBKE] (last visited May 1, 2023).

ble women, thereby undermining their fundamental rights to substantive equality guaranteed by the Constitution."[208] The explanations of the amendment drew from a wide variety of sources of law, including Article 10(6) of the AAC, Articles 12 and 16 of the CEDAW Convention and its General Recommendations No. 21 and No. 24, and the NCJR resolutions.[209]

After announcing the EHA draft bill, the MOHW convened a collaborative meeting on March 10, 2022.[210] The March 2022 meeting focused on MOHW's proposed amendment to the EHA. In addition to inviting relevant government officials, experts, scholars, and civic groups to participate on-site, MOHW also utilized digital tools to facilitate two-way communication and collaboration. This method allowed citizens to not only participate in the meeting online via live streaming, but also provide feedback and comments in real-time through the platform.

As a result of this collaborative meeting, the MOHW amassed a diverse array of perspectives on abortion access, both in favor of and opposed to the expansion of abortion access. Notably, the remarks from attendees advocating for expanding access to abortion evince a robust commitment to a rights-based approach. The following excerpts from the meeting's minutes serve as powerful illustrations of a rights-based framework for abortion access:

> **Division Chief Guei-Chin Tseng (MOHW)**: "Based on the obligation of the state to eliminate gender discrimination and promote substantive gender equality, as well as to consider the equal and harmonious relationship of marriage, the decision regarding childbirth should be jointly made by the spouses. However, the requirement for explicit consent or notification from the spouse can lead to the veto power of the spouse over the *bodily autonomy* of vulnerable women, thereby undermining their fundamental rights to substantive equality guaranteed by the Constitution. The amendment of the law is aimed at implementing the constitutional provisions, *eliminating gender discrimination as the state's obligation, promoting substantive gender equality*, in line with the spirit of international human rights

208. You Sheng Bao Jian Fa Xiu Zheng Cao An Zong Shuoming Ji Duizhao Biao (優生保健法修正草案總說明及對照表) [General Explanation and Comparison Table of the Draft Amendment to the EHA] (Mandarin), art. 8, https://join.gov.tw/policies/detail/374cf7af-6dfb-4219-a9df-edb7f286062f [https://perma.cc/4LKF-PWWJ] (last visited May 1, 2023).

209. *Id.*

210. Kaifang Zhengfu Di 88 Ci Xiezuo Huiyi: You Sheng Bao Jian Fa Xiu Zheng Cao An Xiu Fa Zuo Tan Hui (開放政府第 88 次協作會議：優生保健法修正草案修法座談會) [The 88th Collaborative Meeting of Open Government: Symposium on Amending the Draft Amendment to the Eugenics and Health Care Act] (Mandarin), SayIt (Mar. 8, 2022), https://sayit.pdis.nat.gov.tw/2022–03–10-%E9%96%8B%E6%94%BE%E6%94%BF%E5%BA%9C%E7%AC%AC-88-%E6%AC%A1%E5%8D%94%E4%BD%9C%E6%9C%83%E8%AD%B0 [https://perma.cc/3Z7X-UHRL] (last visited May 1, 2023).

> conventions, improving reproductive health services, and *safeguarding women's reproductive autonomy*."[211] [Emphasis added]
>
> **Division Chief Yi-Jing Lin (MOHW)**: "The advocacy of this petition is primarily for the sake of society and ourselves. [. . .] However, in today's society, there are still families with traditional ideologies, such as favoring boys over girls and adhering to a patriarchal system, which results in women being unable to fully exercise their *bodily autonomy*."[212] [Emphasis added]
>
> **Committee Member Ming-Yuan He (Youth Advisory Committee of Executive Yuan)**: "If there is good communication between spouses, that's great. But if there are special reasons why they cannot communicate, it's understandable. However, in situations where communication is impossible, requiring the approval of the spouse actually violates women's autonomy."[213] [Emphasis added]

The preceding excerpts demonstrate how MOHW, representing the executive branch, has played an indispensable role in pushing regulatory reform and shaping public opinion on abortion access. The MOHW clearly endorses a rights-based framework that relies explicitly on constitutional and international human right norms as a discursive tool to expand abortion access. This position is preserved in the MOHW's draft EHA bill, which is expected to serve as the discursive foundation for the upcoming stage of legislative works.

Notably, both pro- and anti-abortion advocates were present and vocal during the meeting on the draft amendments. The pro-abortion advocates presented their support of the EHA amendments via an autonomy-based rhetoric grounded in CEDAW-centered framing.

> **Ms. Lu-Hong Lin (Attendee)**: "In a democratic country, any adult woman should be respected for making her own medical decisions as long as she is conscious and aware of the consequences, because she alone will bear all the subsequent responsibilities. Therefore, she should have *complete autonomy* over what medical decision to make, and others should not use a negative approach to decide that she cannot do so."[214] [Emphasis added]
>
> **Ms. Shu-Fen Wang (Attendee)**: "I am a representative of the Garden of Hope Foundation, which has been providing services to teenage pregnancy, sexual assault, and domestic violence victims for over 30 years. [. . .] We have seen women who have suffered from intimate partner violence, including physical, emotional, and sexual abuse. It's absurd that even in such situations, their reproductive decisions still require the consent of their abusers. That's why we have been advocating for *women's reproductive autonomy* for many years. We wholeheartedly support the amendment to the EHA, as it not only

211. *Id.*
212. *Id.*
213. *Id.*
214. *Id.*

> responds to the *CEDAW*, but also affirms *women's rights to decide on the number and spacing of their children.*"[215] [Emphasis added]

Conversely, the anti-abortion camp relied on a pluralistic approach that synthesized a variety of public policy perspectives on demographics, women's health, and protection of the fetus. Additionally, the anti-abortion advocates raised a new perspective framed around family values and marriage stability in opposing the draft amendments.

> **Ms. Huei-Jen Hsieh (Attendee)**: "To all friends who care about the safety of the next generation of women, greetings. I am a representative of the Salvation Army, a Christian organization. [. . .] While it is undoubtedly *fatal to the fetus*, why do I say it is not enough to ensure women's health and safety? This is because over the past decade, I have led and accompanied many women and their families who have been injured by abortion, and have suffered for decades. In such situations, many of them were young and unmarried, and some were due to their spouses or elders in their families. Of course, what we are talking about may not necessarily be domestic violence or agreement, but *the harm to women's physical, mental, and emotional health is absolutely real.*"[216] [Emphasis added]

> **Mr. Shu-Yu Chang (Attendee)**: "I would like to approach this from the perspective of Taiwan's population issue and *the right to life of the fetus*. Taiwan passed the EHA in 1984 when the total fertility rate dropped below 2.0. [. . .] These laws did have an impact on the reproductive behavior of the population. [. . .] We now know that the population is a national security issue, and we have already entered negative population growth in 2020. In this situation, should we continue to relax abortion laws?"[217] [Emphasis added]

> **Mr. Ching-Long Chen (Attendee)**: "I believe that abortion should be opposed because it causes *significant harm to both the new life and the family relationship.* Entering into marriage means respecting one another, and unauthorized abortion without respecting one another's opinions will cause spouses to lose trust in each other, threaten the loyalty of marriage, and ultimately lead to divorce. Therefore, the MOHW should not destroy other people's marriages and families. [. . .] After all, *abortion is killing a human life (the fetus)*, so it should be avoided."[218] [Emphasis added]

At the close of the collaborative meeting, the MOHW concluded that "the draft amendment to the EHA has deleted the provision of spouse consent for abortion (pursuant to the petition in this idea proposal), protecting women's right to reproductive autonomy and complying with the CEDAW."[219] Notwithstanding this significant amendment, MOHW's

---

215. *Id.*
216. *Id.*
217. *Id.*
218. *Id.*
219. Weisheng Fuli Bu Guomin Jiankang Shu Can Cai Qingxing (衛生福利部國民健康署 參採情形) [Health Promotion Administration of MOHW, Reference and Adoption] (Mandarin), 公共政策網路參與平台 (Apr. 6, 2022), https://join.gov.tw/idea/

draft legislation has yet to be submitted to the Legislative Yuan. This delay can be largely attributed to the replacement of MOHW's administration minister due to the ruling party alternation and prolonged efforts to communicate and collaborate with various stakeholder groups.[220] It also appears likely that raw political considerations will likely block the passage of the amendment during the current congressional term. A member of Congress candidly commented that "to be honest, with such a highly controversial issue in the year before the election, there is almost no chance of it being addressed [. . .] the biggest obstacle at the moment is the attitude and restrictions of religious groups towards abortion."[221] Given this opposition and delay, it is not likely that the EHA amendment and its expansion of abortion rights will become law in the near future.

4. Judiciary

Viewed holistically, the civil and criminal justice systems generally reflect progress towards a position that is more open to abortion. In the criminal system, both the average number of defendants charged with abortion-related crimes and who is held criminally liable for abortion-related crimes has changed. First, since the enactment of the EHA in 1984, the number of defendants in abortion-related criminal cases has drastically decreased. In the past decade, the average number of defendants charged with abortion crimes has remained in the single digits per year.[222] For example, in 2019, only less than three defendants were charged at the first-instance level, and less than two defendants were charged at the second-instance level.[223] Second, abortion recipients are not the individuals facing criminal prosecution. Instead, defendants have solely consisted of obstetricians who performed the operation, with no women charged. The statistical shift is indicative of the significant impact that the abortion legalization has had on the criminal judgment system.[224]

The passage of the EHA has had an equal if not greater impact on the civil judgment system. Both Article 9 of the EHA and the doctor's obligation to urge abortion under Article 11 have been invoked as legal bases for damages claims in the case of prenatal inspection negligence.[225]

---

detail/ad9d14d9–1fa2–4741–928e-9070fdefc01c [https://perma.cc/FU9Q-B8PB] (last visited May 1, 2023).

220. Man-Ting Shan (單蔓婷), You Sheng Bao Jian Fa Xiufa Yandang! Nuxing Shengyu Zizhu Quan You De Deng Tuanti Yu Xin Neige Su Ti Zheng Yuan Ban (優生保健法修法延宕！女性生育自主權有得等 團體籲新內閣速提政院版) [Delay in amendment to EHA! Women's reproductive autonomy must wait as groups urge new cabinet to submit Executive Yuan version] (Mandarin), Yahoo News (Jan. 30, 2023), https://tw.news.yahoo.com/優生保健法修法延宕-女性生育自主權有得等-團體籲新內閣速提政院版-160000618.html [https://perma.cc/T95Y-4NB4] (last visited May 1, 2023).

221. *Id.*

222. Lin and Lo, *supra* note 138, at 812, 814–815.

223. *Id.*

224. *Id.*

225. *See, e.g.*, Taiwan High Court Civil Judgment 90-Chung-Shang-Geng-Yi

Such developments have resulted in the establishment of the concept of the "right" to abortion in the judicial system.

To better assess the impact of the EHA on the civil justice system, this paper reviewed Taiwan's civil judgment records for mentions of abortion. Upon conducting a search on the Judicial Yuan's Judgment Inquiry System using the terms "EHA" and "abortion," a total of 74 civil judgments were retrieved, comprising decisions from all levels of courts, including the Supreme Court, High Court and its four branches, and District Courts. Following a thorough review of each case and the exclusion of those not relevant to abortion, 43 judgments remained for analysis. These judgments all pertained to cases of prenatal inspection negligence, where medical providers failed to identify genetic, infectious, or psychiatric diseases or congenital malformations of the fetus during prenatal inspections. As a result, women who gave birth demanded compensation from the medical provider and its institution, alleging that the negligence constituted a tortious act that had infringed upon their rights under the EHA. In these cases, the court was tasked with determining the woman's rights under the EHA and the extent of such rights thereof.

Of the 43 judgments analyzed, 21 judgments dismissed the plaintiffs' claim outright without specifying whether the EHA confers any type of rights. The remaining 22 judgments all shared a primary theme, as the courts framed abortion as "the right to choose to remove the fetus" (選擇除去胎兒的權利Supreme Court Civil Judgment 92-Tai-Shang-Zi No. 1057 (2003) (最高法院 92 年度台上字第 1057 號民事判決) is the leading case on this rights-based approach to abortion and has set a precedent for a choice-based framing in abortion cases.[226] In this case, the Supreme Court held as follows:

No. 48 (2002) (臺灣高等法院 90 年度重上更㈠字第 48 號民事判決). In this case, the Court acknowledges that Articles 9 and 11 of the EHA establish the obligation for physicians to ""inform the pregnant woman or her spouse of the actual situation upon discovering fetal abnormalities" and, if necessary, "advise them to undergo induced abortion."" These provisions simultaneously confer the right (freedom) upon women to make choices. Consequently, the failure of medical service providers (the hospital and the physician) to detect Down syndrome and multiple severe disabilities in the fetus and inform the expectant mother prior to childbirth constitutes liability for damages.

226. *See, e.g.*, Taiwan High Court Taichung Branch Civil Judgment 104-Yi-Shang-Yi-Zi No. 2 (2015) (臺灣高等法院臺中分院104年度醫上易字第 2 號民事判決); Taiwan High Court Taichung Branch Civil Judgment 97-Yi-Shang-Zi No. 2 (2008) (臺灣高等法院 臺中分院 97 年度醫上字第 2 號民事判決); Taiwan Taipei District Court Civil Judgment 108-Yi-Zi No. 43 (2008) (臺灣臺北地方法院 108 年度醫字第 43 號民事判決); Taiwan Taipei District Court Civil Judgment 96-Yi-Zi No. 1 (2007) (臺灣臺北地方法院 96 年度醫字第 1 號民事判決); Taiwan Taipei District Court Civil Judgment 91-Su-Zi No. 768 (2002) (臺灣臺北地方法院 91 年度訴字第 768 號民事判決); Taiwan Taichung District Court Civil Judgment 102-Yi-Zi No. 3 (2013) (臺灣臺中地方法院 102 年度醫字第 3 號民事判決). It is worth noting that the recognition of "the right to choose to remove the fetus" does not guarantee the plaintiffs to win the case since they often fail on the requirement of causality.

> [Article 11(2) of the EHA] imposes an obligation on the medical provider to inform the woman and to advise her of the option of having an abortion. On the other hand, *the provision confers the right (or freedom) of choice.* That is to say, a woman has *the right to choose to remove an unhealthy fetu*s that has not formed an independent life *in her body* and suffers from congenital diseases that allow women to terminate pregnancy under the law. If the hospital and related personnel were negligent in failing to discover the situation and inform the pregnant woman in a timely manner, and as a result, the woman continued her pregnancy and gave birth to an abnormal baby, it would be considered *a violation of the woman's right to decide to have an abortion.*[227] [Emphasis added]

In contrast, very few judgments have provided additional rationale in support of the pro-choice approach that advocates for "the right to bodily integrity" (對身體內部機能完全之權利). One of the few cases that did so comes from the lower courts in Taiwan Taichung District Court Civil Judgment 100-Yi-Zi No. 16 (2011) (臺灣臺中地方法院 100 年度醫字第 16 號民事判決). While this judgment cited Supreme Court Civil Judgment 92-Tai-Shang-Zi No. 1057 (2003), it actually chose to depart from the Supreme Court's rights-based framing, instead adopting a pluralistic approach that aggregated bodily integrity, the right to health, and bodily autonomy. The relevant paragraph reads as follows:

> The defendant did not inform the plaintiff of the fact that the plaintiff's fetus was suffering from thalassemia at issue and violated Article 11(2) of the EHA, which provided that when a doctor "discovers that the fetus is abnormal," the doctor should inform the pregnant woman herself or her spouse of the discovery and advise the performance of abortion when it is considered necessary. The failure to inform infringed the plaintiff's right to make an early decision to receive abortion. *Such right is inherently a right of bodily integrity, which is one categorization under the right to health.*[228] [Emphasis added]

Notwithstanding the few civil cases which have not adopted a rights-based framing in their analysis, Taiwan's civil law system has generally continued to adopt a rights-based framework. Conversely, Taiwan's criminal justice system has rarely applied the rights-based framework in abortion-related cases. The only example of rights-based framing in a criminal case occurred in Taiwan High Court Criminal Judgment 91-Shang-Yi-407 (2002) (臺灣高等法院 91 年度上易字第 407 號刑事判決), which acknowledged rights-based framing as a potential perspective of analysis but also appeared to support restricting abortion access, framing such restrictions in the name of the protection of the health of the woman and the fetus. The court stated as follows:

---

227. Supreme Court Civil Judgment 92-Tai-Shang-Zi No. 1057 (2003) (最高法院 92 年度台上字第 1057 號民事判決).

228. Taiwan Taichung District Court Civil Judgment 100-Yi-Zi No. 16 (2011) (臺灣臺中地方法院 100 年度醫字第 16 號民事判決).

> In the legislative process of abortion crime and the EHA, there has been no consideration from the perspective of protecting the *rights of fetuses and women* guaranteed by the Constitution. In recent years, the United States has focused its thinking on abortion issues on the *protection of 'women's reproductive autonomy" and "fetal right to life.'* A deeper discussion of abortion crimes from the perspective of fundamental constitutional rights can be used as a reference for future legislative amendments in our country, balancing the interests of the two legal protections. [. . .] Furthermore, considering the long-standing social reality of abortion behavior in our cultural context, this court hopes to define the sixth clause of the first paragraph of Article 9 of the EHA through practical industry to make doctors exercise more caution when exercising the discretion, in order to protect the lives and physical health of fetuses and women.[229] [Emphasis added]

Overall, compared to the other three aspects of Taiwan's government analyzed in this paper, the judiciary exhibits a discernible framing trend that sets it apart. While the others demonstrate a promising trend towards rights-based framing, a vast majority of judgments in the judiciary have been more equivocal in their application of rights-based framing, even as the judiciary has generally taken an approach that is more open to abortion. The legal system in Taiwan is more receptive to rights-based framing in abortion-related civil cases, but has not embraced the rights-based framing in the majority of abortion-related criminal cases.

IV. Conclusion

Taiwan is presently undergoing a significant period of active and promising participation in the international human rights regime, and it has distinguished itself among other Asian nations based on its strong human rights record.[230] The root cause of this development is the Taiwanese people's tenacious belief in safeguarding human rights, with marginalized groups such as ethnic, religious, and sexual minorities advocating for equal rights and having increasing opportunities to express themselves freely.[231] The U.S. Supreme Court's recent *Dobbs* decision has triggered a reevaluation of Taiwan's domestic legal system regarding abortion, prompting the exploration of the evolution of abortion rights in Taiwan in this article.[232] The recognition of individual autonomy as a fun-

229. Taiwan High Court Criminal Judgment 91-Shang-Yi-407 (2002) (臺灣高等法院 91 年度上易字第 407 號刑事判決).

230. Jadques deLisle, *"All the World's a Stage": Taiwan's Human Rights Performance and Playing to International Norms*, in Taiwan and International Human Rights: A Story of Transformation 173, 179 (Jerome A. Cohen, William P. Alford & Chang-Fa Lo eds., 2019).

231. Ashley Esarey, *Overview: Democratization and Nation Building, in* Taiwan in Dynamic Transition 21, 21 (Thomas B. Gold, Ashley Esarey & Ryan Dunch eds., 2020)

232. 李念祖, 在台灣看美國最高法院人工流產判決推翻前例 [Watching the U.S. Supreme Court Abortion Decision Overturn Previous Cases in Taiwan] (Mandarin),

damental principle is a prominent characteristic of this evolution. After careful analysis, this article arrives at three definitive conclusions.

First, the abortion controversy in Taiwan does not fit neatly within a conflict between pro-life and pro-choice viewpoints. While the most recent discussion has resulted in a conflict between the pro-life and pro-choice camps, the initial intended purpose of legalized abortion in Taiwan as a measure to address population problems through controlling abortion access has never fully disappeared and still mildly pervades Taiwanese abortion discourse today. Such an idea conveys the patriarchal ideology inherent in traditional Confucian culture, which places the obsolete burden of reproductive obligations on women and implies that women are mere instruments in fertility-related matters. By seeking to control abortion access as a means of tackling population issues, this viewpoint instrumentalizes a woman's body and reinforces the view that women lack autonomy in their reproductive choices.

Second, relying upon Habermas's theory, this article explores both pro- and anti-abortion discourses prevalent in each dimension of the constitutional community. While the anti-abortion discourses advocate for their position with a pluralistic approach of demographic, health and fetus protection arguments, the pro-abortion discourse has adopted a rights-based framing position. Unfortunately, both sides have yet to engage in focused and constructive dialogue. To achieve consensus, it is necessary to promote more engaged dialogue between these two opposing sides. Despite the complex and highly polarized nature of the issue, exploring and observing framing is necessary to achieve consensus. As long as both sides continue to communicate and use rational arguments, the community is still on the road to achieving ultimate consensus. Continuing communication will only bring us closer to the end instead of pushing us further away.

Finally, notwithstanding the greater social divisions surrounding abortion, as a legal matter, abortion has been conceptually accepted as a legal right in the legislature, public opinion, the executive, and the judiciary. Although the government's original aim for legalizing abortion was population control, the dominant discussions in all spheres have shifted towards a rights-based framework, which emphasizes its reliance on constitutional and international human rights provisions. Of even greater importance is the role played by civic participation in driving this shift

---

風傳媒<https://www.storm.mg/article/4478445?page=1 [https://perma.cc/V5FZ-FANQ] (August 22, 2022) (last visited May 1, 2023); 李念祖, 美國墮胎法制翻轉的司法反思 [Judicial Reflections on the Reversal of Abortion Law in the United States] (Mandarin) 中國時報 https://www.chinatimes.com/newspapers/20220715000455–260109?chdtv [https://perma.cc/665N-SP84](July 15, 2022) (last visited May 1, 2023); "我的子宮，是我的嗎？(上) [My womb, is it mine? (I)] (Mandarin), 台灣教會公報, https://tcnn.org.tw/archives/121932 [https://perma.cc/4XSC-J7M7] (August 3, 2022) (last visited May 1, 2023); "我的子宮，是我的嗎？(下) [My womb, is it mine? (II)] (Mandarin), 台灣教會公報, https://tcnn.org.tw/archives/121933 [https://perma.cc/Q3CR-UJDV] (August 3, 2022) (last visited May 1, 2023).

in framing, with grassroots advocacy exerting pressure on the political sector and helping to advance the reform of abortion laws. In endorsing a rights-based framing, the community does not oversimplify the abortion right as merely a choice to terminate a pregnancy, but instead broadly advocates for bodily autonomy as a means of addressing the systematic gender inequality at the heart of the current abortion access regime.

Based on these findings, this article presents two considerations for future developments for academic researchers and practitioners. Both are derived from the exploration and understanding of the essence of autonomy. First, if autonomy means that an individual has the capacity to make the best decision for themselves based on their own beliefs and principles, then reviewing the reasons for terminating a pregnancy through legal regulation implies a lack of trust in the reproductive subject.[233] Under this context, the issue that needs to be further explored is not which reasons are legitimate for legal abortion, but rather what legitimacy the state has to intervene in decisions regarding reproduction. In other words, if there is consensus on the meaning of autonomy, which respects women's full decision-making power over their bodies and reproductive choices, the issue is not how to amend Article 9 of the EHA, but rather the legitimacy of the legal framework that relies on criminal penalties and the EHA as a special obstacle to the rule that generally makes abortion an illegal act. Therefore, in addition to focusing on promoting amendments to the EHA, the option of abortion decriminalization should not be overlooked.[234]

On the other hand, as mentioned earlier, protecting autonomy not only involves respecting decision-making outcomes, but also creating objective conditions for each individual to make autonomous decisions. That is to say, in addition to removing negative barriers that may hinder autonomous reproductive decision-making through legal regulation, efforts should also be made to establish a friendly environment for reproduction and improve the reproductive system, including friendly conditions for women's reproduction in the workplace, establishment and subsidies for childcare institutions, and so on. From this perspective, this not only conforms to the essence of autonomy, but also provides a common ground for both sides to further deliberate if the argument against legalizing abortion is that the state's policy should encourage reproduction to improve the population structure. Therefore, discussions on the legalization of abortion should not only focus on whether the government should allow or prohibit, expand, or restrict access to abortion, but should also emphasize the government's positive obligation to create a friendly reproductive environment in a timely manner in order to fully implement women's reproductive autonomy.

---

233. Nelson, *supra* note 2, at 116, 135.

234. Chen, *supra* note 88, at 65; *Speech Script: Symposium on the Amendment of the EHA, supra* note 184.

In conclusion, Taiwan's constitutional community has embarked upon a rights-based framework for abortion access, representing a shared understanding from political sectors, social communities, and legal norms. While the judiciary is often expected to realize emerging fundamental rights, the recognition and protection of these rights have always been a matter for the entire constitutional community.[235] The evolution towards a rights-based framing framework in Taiwan is a landmark in propelling the realization of abortion rights in Taiwan that helps to pave the way for further reform of Taiwan's abortion laws.

235. Su, *supra* note 10, at 1427, 1432, 1437–1438.