

## WHY JAPAN SHOULD LEGALIZE SURROGACY

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*Abstract:* Beyond a recommendation from the Japanese Society of Obstetrics and Gynecology to not work with patients who want to engage in surrogacy contracts, no legal framework exists for regulating surrogacy in Japan. Because of this recommendation, as of December 2013, only one doctor in the entire country will work with families using surrogates. Therefore, Japanese families often travel abroad to use surrogates, generally to the United States, India, or Thailand. Surrogacy tourism creates a number of problems. Babies born to surrogates have been considered stateless because neither the surrogate's country nor Japan recognizes them as citizens. Furthermore, Japan's complex family registry system makes it difficult to adopt children. Finally, surrogates in India are often very poor women forced to live in abject conditions during their pregnancies. Because recently passed regulations in India may prevent Japanese couples from entering into surrogacy agreements there, the Japanese government should get serious about establishing a legal framework for surrogacy, potentially using Israel's system as a model, in order to ensure that Japanese women have a safe and regulated way of engaging in surrogacy.

### I. INTRODUCTION

In 2008, a Japanese mother helped her daughter achieve a lifelong dream—having a baby of her own.<sup>1</sup> The daughter was born without a womb, preventing her from carrying a child.<sup>2</sup> The mother agreed to serve as her surrogate and both mother and daughter were filled with obvious joy once a healthy boy was born.<sup>3</sup> Unfortunately, this rarely occurs in Japan. As of December 2013, only one doctor in Japan is willing to work with families that use surrogates, a practice that has never been legislated in the country.<sup>4</sup>

Instead, surrogacy in Japan makes headlines for the wrong reasons. For example, Japanese television personality Aki Mukai engaged in a nearly four year legal battle to be named the mother of her twin sons.<sup>5</sup> Although Mukai was biologically related to her children, they were born using a gestational surrogate.<sup>6</sup> The Supreme Court of Japan eventually ordered that

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<sup>1</sup> Rachel Brehm King, Comment, *Redefining Motherhood: Discrimination in Legal Parenthood in Japan*, 18 PAC. RIM L. & POL'Y J. 189, 189-90 (2009).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Marcelo de Alcantara, *Surrogacy in Japan: Legal Implications for Parentage and Citizenship*, 48 FAM. CT. REV. 417, 421, 424 (2010).

<sup>5</sup> *Id.* at 417-19, 421-22.

<sup>6</sup> *Id.*

the surrogate be listed on the birth certificate and compelled Mukai to adopt her biological children.<sup>7</sup> In a different case, a Japanese baby born through a gestational surrogate in India had to receive a humanitarian visa to enter Japan.<sup>8</sup> In this case, the Japanese couple divorced before the child was born.<sup>9</sup> The intended mother was not biologically related to the child, had no parental rights, and did not attempt to lay a parental claim to the child.<sup>10</sup> The intended and biological father, however, attempted to bring the child back to Japan. Ultimately, the baby was considered motherless, making it impossible for her to receive a Japanese passport or Indian citizenship.<sup>11</sup> The family was trapped in India for two months before a humanitarian visa was issued.<sup>12</sup>

These examples illustrate many of the issues surrounding surrogacy in Japan. Japanese families largely cannot enter into domestic surrogacy contracts.<sup>13</sup> Furthermore, children born to surrogates in foreign countries have uncertain legal status in Japan.<sup>14</sup> Finally, surrogacy tourism has exploited women in countries such as India and Thailand.<sup>15</sup> This has led to babies being stateless and intended parents having difficulties gaining parental rights.<sup>16</sup> Moreover, recent legislation in India may make it difficult for Japanese couples to continue to use surrogates there, pushing them into the surrogacy market in Thailand, where neither the rights of the intended parents nor the surrogate are protected.<sup>17</sup>

This comment suggests that Japan should establish a framework to legalize and regulate surrogacy in order to avoid these parentage and citizenship problems, especially in light of India's new laws, as well as to avoid the exploitation of surrogates in poorer countries. Part II will define key terms related to surrogacy, summarize the history of and current policy relating to surrogacy in Japan, and discuss the country's complex registration system. Part III will show how the issues described in Part II have caused

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<sup>7</sup> *Id.* In the United States, the intended parents are usually allowed to be listed on the birth certificate via court order. See generally Darra L. Hofman, "Mama's Baby, Daddy's Maybe: A State-by-State Survey of Surrogacy Laws and Their Disparate Gender Impact," 35 WM. MITCHELL L. REV. 449 (2009) (providing an overview of different surrogacy laws throughout the United States).

<sup>8</sup> Usha Rengachary Smerdon, *Crossing Bodies, Crossing Borders: International Surrogacy Between the United States and India*, 39 CUMB. L. REV. 15, 69-71 (2008-2009).

<sup>9</sup> *Id.*

<sup>10</sup> Sarah Mortazavi, Note, *It Takes a Village to Make a Child: Creating Guidelines for International Surrogacy*, 100 GEO. L.J. 2249, 2274-75 (2012).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> See *infra* Part II.B.

<sup>14</sup> See *infra* Part III.A.-B.

<sup>15</sup> See *infra* Part III.C.-D.

<sup>16</sup> See *infra* Part III.A.-B.

<sup>17</sup> See *infra* Part III.C.-D.

significant issues for Japanese families involved in international surrogacy agreements. This section will also discuss the abuse that surrogates in India face as well as the growing surrogacy market in Thailand. Part IV will suggest the most prudent models to use when drafting legislation to legalize surrogacy in Japan. Finally, Part V summarizes the previous analysis and recommendations.

## II. SURROGACY IN JAPAN

Before entering into a prolonged discussion of issues impacting surrogacy in Japan, it is important to understand the different terminology used when discussing surrogacy and the history of surrogacy in Japan.

### A. *Key Terminology Relating to Surrogacy*

Surrogacy is a type of assisted reproductive technology (“ART”) that allows an infertile woman (the intended mother) to enter into a contract with another woman (the surrogate) to carry a baby to term for the intended mother. There are two different types of surrogacy agreements—traditional surrogacy contracts and gestational surrogacy contracts. In a traditional surrogacy contract, the surrogate is artificially inseminated with the intended father’s sperm.<sup>18</sup> Although the surrogate is biologically related to the baby, she agrees to terminate her parental rights after birth, allowing the intended mother to adopt the child.<sup>19</sup> In a gestational surrogacy contract, the surrogate is not biologically related to the baby.<sup>20</sup> Instead, the egg is fertilized outside of the uterus using in vitro fertilization (“IVF”) and then implanted into the surrogate.<sup>21</sup> The egg and sperm used, also known as gametes,<sup>22</sup> can come from the intended parents or anonymous donors, making it possible that up to five different parties are involved in the conception and birth of the child.<sup>23</sup> In both types of contracts, surrogates can be, but are not always, paid.<sup>24</sup> Traditional surrogacy contracts are generally disfavored everywhere and rarely enforced in courts because of the

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<sup>18</sup> Amanda Mechell Holliday, Comment, *Who’s Your Daddy (and Mommy)? Creating Certainty for Texas Couples Entering into Surrogacy Contracts*, 34 TEX. TECH L. REV. 1101, 1102 (2003).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> THOMAS L. CRANDELL & GEORGE R. BIEGER, HUMAN DEVELOPMENT 207 (6th ed. 1995).

<sup>23</sup> Hofman, *supra* note 7, at 451.

<sup>24</sup> Christine L. Kerian, *Surrogacy: A Last Resort Alternative for Infertile Women or a Commodification of Women’s Bodies and Children?*, 12 WIS. WOMEN’S L.J. 113, 114 (1997); *see generally* Hofman, *supra* note 7.

biological relationship between the surrogate and baby.<sup>25</sup> Gestational surrogacy contracts are more commonly upheld throughout the world.<sup>26</sup> For this reason, this piece will only suggest legalizing gestational surrogacy in Japan. Unless specified, all surrogacies discussed and suggestions relating to surrogacy will exclusively involve gestational surrogacy agreements.

### B. *The History of ART and Surrogacy in Japan*

Japanese physicians have traditionally been very sympathetic towards couples who struggle to conceive and have practiced different forms of ART for decades.<sup>27</sup> Artificial insemination was first performed in Japan in 1949 and IVF has been a widespread practice since 1983.<sup>28</sup> This open acceptance of ART led an American lawyer to open the Infertility and Surrogate Mother Information Center (hereinafter “Center”), a commercial surrogate matching service agency that paired infertile Japanese women with American surrogates in Tokyo in 1991.<sup>29</sup> As of 2010, the Center was still active and received 300-400 inquiries a year.<sup>30</sup> Japanese physicians, however, have been hesitant to expand beyond artificial insemination and IVF with the parents’ gametes. For example, in 1997, Dr. Yahiro Netsu began performing IVF using donor eggs and/or sperm.<sup>31</sup> This practice violated Japanese Society of Obstetrics and Gynecology (“JSOG”) guidelines that require using only a couple’s own gametes in IVF,<sup>32</sup> leading to the revocation of Dr. Netsu’s JSOG membership but not his license to practice medicine.<sup>33</sup> He was readmitted to JSOG following a settlement in 2004.<sup>34</sup> JSOG’s restrictions on IVF and surrogacy have caused Japanese couples to travel to

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<sup>25</sup> See generally Hofman, *supra* note 7.

<sup>26</sup> See, e.g., *Johnson v. Calvert*, 19 Cal. Rptr.2d 494 (Cal. Sup. Ct. 1993) (holding that the child’s natural parents were the biological parents as opposed to the gestational surrogate); NEV. REV. STAT. §126.720 (1) (1979) (amended 2013) (stating that a gestational carrier is not a child’s legal parent); 750 Ill. Comp. Stat. § 47/15 (2005) (granting parental rights to the intended parents and not to the gestational surrogate); Fla. Stat. § 742.16 (1993) (amended 1997) (establishing a procedure to ensure that the intended parents gain parental rights).

<sup>27</sup> See generally Naoki Takeshita et al., *Regulating Assisted Reproductive Technologies in Japan*, 20 J. ASSISTED REPROD. & GENETICS 260 (2003).

<sup>28</sup> Jennifer Gunning, *Regulation of Assisted Reproductive Technology: A Case Study of Japan*, 22 MED. & L. 751, 753 (2003).

<sup>29</sup> Yasuka Shirai, *Japanese Attitudes Toward Assisted Procreation*, 21 J.L. MED. & ETHICS 43, 43 (1993).

<sup>30</sup> Yukari Semba et al., *Surrogacy: Donor Conception Regulation in Japan*, 24 BIOETHICS 348, 349 (2010).

<sup>31</sup> Gunning, *supra* note 28, at 756.

<sup>32</sup> Membership to medical societies is generally required to be board certified, which is generally a *de facto* requirement to practice medicine. As seen here, there are obviously some exceptions.

<sup>33</sup> Gunning, *supra* note 28, at 756.

<sup>34</sup> Alcantara, *supra* note 4, at 427.

countries such as the United States and India to look for solutions to infertility not available in Japan.<sup>35</sup>

Surrogacy in Japan has faced the same uphill battle. Dr. Netsu showed a willingness to buck authority again in 2001 when he allowed two sisters to enter into a surrogacy agreement.<sup>36</sup> He then decided to continue performing IVF on women serving as surrogates.<sup>37</sup> At the time, surrogacy was neither explicitly legal nor illegal in Japan, though JSOG recommended that its members not work with couples that wanted to use surrogates.<sup>38</sup> Although it lacks the force of law, JSOG formally issued guidelines banning the use of surrogates in 2003, supporting its ban by stating that surrogacy harms children, involves significant mental and physical risk, complicates family relationships, and does not promote acceptable social ethics.<sup>39</sup> The Evaluation Section for Advanced Medical Care, a committee governed by the Health Sciences Council, supported JSOG's position with findings that centered on the well-being of unborn children, valuing people for more than their reproductive abilities, safety, avoiding eugenics and commercialism, and protecting human dignity.<sup>40</sup> Dr. Netsu, however, continued to work with surrogates and by 2010 had fertilized fifteen surrogates via IVF, which resulted in eight births.<sup>41</sup> Furthermore, as of 2008, over 100 infertile couples sought his advice.<sup>42</sup> Because of this practice, JSOG issued a second major violation against Dr. Netsu in 2009.<sup>43</sup>

Though Dr. Netsu has continued to work with patients who want to enter into surrogacy agreements, he will only do so in very specific circumstances. He requires that his patients meet the following conditions:

- (1) women who have no uterus and cannot carry a pregnancy to term;
- (2) intended couple must be legally married and both able to donate sperm and eggs;
- (3) surrogates also have to be married and already have children of their own;
- (4) surrogates,

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<sup>35</sup> Gunning, *supra* note 28, at 756.

<sup>36</sup> Semba et al., *supra* note 30, at 349.

<sup>37</sup> Alcantara, *supra* note 4, at 424.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* JSOG's direct reasons were as follows: 1) priority should be given to the welfare of the child and surrogacy offends it, 2) surrogacy is associated with the burden of mental and physical risk, 3) surrogacy makes family relationships complex, and 4) surrogacy contracts are not acceptable in terms of social ethics. Shiro Nozawa & Kouji Banno, *Surrogacy*, 47 J. JAPAN MED. ASSOC. 192, 194 (2004).

<sup>40</sup> Nozawa & Banno, *supra* note 39, at 194. The committee's direct findings were as follows: 1) the well-being of the unborn child will be given the highest priority, 2) human should not be treated solely as a means of reproduction, 3) safety must be adequately considered, 4) the concepts of eugenics will not be allowed, 5) commercialism will not be allowed, and 6) human dignity will be protected. *Id.*

<sup>41</sup> Alcantara, *supra* note 4, at 426.

<sup>42</sup> Semba et al., *supra* note 30, at 350.

<sup>43</sup> Alcantara, *supra* note 4, at 427.

who usually are the wife's mother or sister, serve on a voluntary basis and receive no financial remuneration; (5) surrogates will be registered as the mother of the child and then the child will be adopted by the intended couple.<sup>44</sup>

Dr. Netsu's restrictions help to streamline surrogacy and minimize the legal complications that parents face when entering into surrogacy agreements. However, there are still several problems with these requirements. Most significantly, forcing the intended mother to adopt the child and the surrogate to temporarily be the legal mother of the child violates the nature of the agreement. It also discriminates against women, something more fully discussed in the next section.<sup>45</sup>

Despite increasing international acceptance, Japan remains hesitant to adopt more progressive ART policies. In 2003, the Committee on Assisted Reproductive Technology Treatment issued a report suggesting a prohibition on the donation of sperm, eggs, and embryos among family members.<sup>46</sup> The committee felt that intra-family donations complicate family relationships and that offspring should have the legal right to know if they were conceived through donated gametes.<sup>47</sup> Ultimately, the committee recommended banning surrogacy.<sup>48</sup> In 2006, the Japanese Ministries of Justice and Health requested that the Science Council of Japan form a committee to provide the government with policy recommendations regarding surrogacy.<sup>49</sup> In 2008, the Assisted Reproductive Technologies Review Committee gave ten recommendations:

(1) surrogacy should be prohibited by specific law; (2) commercial surrogacy should be made an offense, punishing doctors and intermediaries; (3) surrogacy may be exceptionally permitted on a trial basis; (4) a regulatory agency responsible for administering [clinical trials for surrogacy] should be established; (5) surrogates should be the legal mother of the child even in the above-mentioned experimental surrogacy cases or cases of surrogacy performed overseas; (6) the child may be adopted by the intended parents in order to establish the parent-child relationship, including the above-mentioned experimental surrogacy cases and cases of surrogacy performed

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<sup>44</sup> *Id.* at 424.

<sup>45</sup> *See infra* Part II.C.

<sup>46</sup> Semba et al., *supra* note 30, at 350.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> Alcantara, *supra* note 4, at 425.

overseas; (7) the right to know one's origins should be guaranteed when considering the child's welfare; (8) discussions should continue, especially regarding the issues not covered by the report, such as egg donations and post-mortem reproduction; (9) a public institute and a public standing committee to deal with bioethics and policy planning should be established; (10) the child's welfare should always be given high priority when discussing assisted reproductive technology.<sup>50</sup>

The committee further felt that surrogacy should be banned because “it treats an individual solely as a tool for reproduction” and creates considerable health risks for the surrogate while she is pregnant.<sup>51</sup>

Although a bill banning surrogacy was later proposed in the *Diet* (Japan's Parliament), it was shelved due to lack of support and is not expected to come to fruition in the near future.<sup>52</sup> The fact that this bill probably will not become law is particularly helpful to Dr. Netsu and women who travel abroad to enter into surrogacy agreements because, under these proposed guidelines, “persons who engage in commercial surrogacy, such as clients, doctors, and surrogate agencies or brokers offering services domestically or overseas should be subject to criminal punishment.”<sup>53</sup>

Attitudes have continued to evolve in Japan. In 2012, the Liberal Democratic Party (“LDP”) created a panel to draft an outline for a bill that would amend the Civil Code and allow for third party egg donation.<sup>54</sup> The proposed bill would also allow for uncompensated surrogacy when medical

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<sup>50</sup> ASSISTED REPROD. TECH. REVIEW COMM., SCI. COUNCIL OF JAPAN, ISSUES RELATED TO THE ASSISTED REPRODUCTIVE TECHNOLOGIES CENTERED ON SURROGATE PREGNANCY: TOWARD A SOCIAL CONSENSUS iii-v, 39-40 (2008), available at <http://www.scj.go.jp/ja/info/kohyo/pdf/kohyo-20-t56-1e.pdf>; Alcantara, *supra* note 4, at 426.

<sup>51</sup> Junko Minai et al., *There are Gender Differences in Attitudes Towards Surrogacy when Information on this Technique is Provided*, 132 EUR. J. OF OBSTETRICS & GYNECOLOGY & REPROD. BIOLOGY 193, 197 (2007). The committee thought that women who did not have wombs should be able to use surrogates, the only exception to a complete ban. See Iori Kisu et al., *Current Status of Surrogacy in Japan and Uterine Transplantation Research*, 158 EUR. J. OF OBSTETRICS & GYNECOLOGY & REPROD. BIOLOGY 135, 136 (2011).

<sup>52</sup> King, *supra* note 1, at 213-14.

<sup>53</sup> Semba et al., *supra* note 30, at 351.

<sup>54</sup> Radhika Seth, *Bill on Conditional Approval for Surrogacy Being Drafted by Japan's LDP*, JAPAN DAILY PRESS (Jun. 12, 2012), <http://japandailynews.com/bill-on-conditional-approval-for-surrogacy-being-drafted-by-japans-ldp-124009> (last visited Mar. 1, 2014).

conditions prevent women from carrying their own children.<sup>55</sup> The bill was proposed for a second time in 2013.<sup>56</sup>

Japanese couples have had mixed attitudes regarding surrogacy. According to a 1990-1991 survey, about 14% of 210 participating married individuals approved of gestational surrogacy.<sup>57</sup> Among infertile couples, 40% of men and 23.8% of women approved of the practice.<sup>58</sup> By 1999, 52% of the 2,568 people who responded to a national survey approved of gestational surrogacy.<sup>59</sup> When looking at a survey of just infertile women, this increased to 70% approving of gestational surrogacy.<sup>60</sup> Though less than 50% of all respondents in a similar 2003 survey approved of surrogacy, 77% of infertile women approved of using gestational surrogacy.<sup>61</sup> Finally, in 2007, 54% of respondents approved of surrogacy.<sup>62</sup> In 2000, 70% of women and 60% of men preferred to use unrelated surrogates because of the increased level of confidentiality, the increased business-like atmosphere, and the lack of personal attachment.<sup>63</sup> However, by 2003, half of the people surveyed favored using relatives while the other half favored using unrelated surrogates.<sup>64</sup> These approval rates will probably continue to rise as more people in Japan learn more about surrogacy and come to understand that it can work well and provide a good solution to some cases of infertility.

The Japanese government, in contrast, has consistently favored surrogacy restrictions, stating that surrogacy leads to “increased risks, danger of custody battles, complication of family relationships, fear of commercialization, lack of social consensus, and the usage of humans as a tool.”<sup>65</sup> The government’s negative spin on surrogacy, however, might actually be what is contributing to the practice’s poor reception. Surrogates

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<sup>55</sup> Andrew Vorzimer, *Japan Considering a Bill that Would Legalize Surrogacy and Egg Donation*, EGG DONOR (June 11, 2012), <http://www.eggdonor.com/blog/2012/06/11/japan-bill-legalize-surrogacy-egg-donation/> (last visited Mar. 1, 2014).

<sup>56</sup> *LDP Lawmakers Accept Surrogate Birth*, THE JAPAN NEWS, Nov. 12, 2013, available at WestlawNext, 2013 WLNR 28374505. No additional coverage of this proposal has been available.

<sup>57</sup> Shirai, *supra* note 29, at 47-48.

<sup>58</sup> *Id.*

<sup>59</sup> Kohta Suzuki et al., *Analysis of National Representative Opinion Surveys Concerning Gestational Surrogacy in Japan*, 126 EUR. J. OF OBSTETRICS & GYNECOLOGY & REPROD. BIOLOGY 39, 40-41 (2006).

<sup>60</sup> Yoshiko Saito & Hiroya Matsuo, *Survey of Japanese Infertile Couples’ Attitudes Toward Surrogacy*, 30 J. PSYCHOSOMATIC OBSTETRICS & GYNECOLOGY 156, 157 (2009).

<sup>61</sup> *Id.*; Suzuki et al., *supra* note 59.

<sup>62</sup> Kohta Suzuki et al., *Risk Perception of Pregnancy Promotes Disapproval of Gestational Surrogacy: Analysis of a Nationally Representative Opinion Survey in Japan*, 5 INT’L J. OF FERTILITY & STERILITY 78, 78-80 (2011).

<sup>63</sup> Saito & Matsuo, *supra* note 60, at 159.

<sup>64</sup> *Id.* at 157.

<sup>65</sup> Mayumi Mayeda, *Present State of Reproductive Medicine in Japan—Ethical Issues with a Focus on Those Seen in Court Cases*, 7 BMC MEDICAL ETHICS 1, 14 (2006).

face no greater risks than any pregnant women, and in 2000, only 0.04% of surrogacy agreements resulted in custody battles.<sup>66</sup> Surrogacy's lack of legal status and availability may limit the degree to which people are familiar with the practice in Japan. Furthermore, much of the general public's knowledge may come from controversies such as the Baby Manji and Aki Mukai cases discussed below,<sup>67</sup> which may further dissuade people from wanting to learn about the practice.

Fortunately, according to research and surveys conducted by Japanese scientists, surrogacy is becoming widely accepted by those who support medical technology development and "who argue that having children (particularly genetically related children) is the right of women."<sup>68</sup> Japanese citizens who support surrogacy also feel that surrogacy "reinforces traditional family values" and "counteract[s] the decrease in the number of children [in Japan]."<sup>69</sup> Despite these shifts in opinion, it is important to note that, although many Japanese citizens prefer to use unrelated surrogates, no physician in the country will engage in that type of agreement.<sup>70</sup> The lack of surrogacy in Japan has resulted in an increased number of people traveling abroad to enter into surrogacy agreements,<sup>71</sup> which could ultimately help to spur policy change within Japan as more people begin to understand the nature of surrogacy. These different factors could mean that the practice is likely to gain support in coming years. Ultimately, legalizing surrogacy would help to correct some of the gender discrimination that has emerged because of the practice's lack of accessibility.

### C. *Japan's Family Registration System*

Despite the limits placed on ART in Japan, Japanese women feel pressure to reproduce. These pressures come from society as a whole and the government, and include "social pressure to maintain the family line, government pressure to curb the declining birth rate, and legal pressure to conform to outdated definitions of parenthood."<sup>72</sup> Women in Japan are often

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<sup>66</sup> *Id.*

<sup>67</sup> *See infra* Part III.A.-B.

<sup>68</sup> Mayeda, *supra* note 65; Suzuki et al., *supra* note 59, at 45.

<sup>69</sup> Mayeda, *supra* note 65.

<sup>70</sup> *See supra* Part II.B.

<sup>71</sup> Philip Brator & Masako Tsubuku, *Childless Japanese Couples Look for Bargains in Asia*, JAPAN TIMES (Mar. 8, 2011), <http://blog.japantimes.co.jp/yen-for-living/childless-japanese-couples-look-for-bargains-in-asia/> (last visited Mar. 1, 2014).

<sup>72</sup> King, *supra* note 1, at 198.

greeted by asking if they are married and if they have children.<sup>73</sup> Because of the importance of having heirs to bear the family name and continue the family registry, senior citizens criticize childless women because they are perceived as the cause of the declining birth rate.<sup>74</sup> Women who have not been able to have children feel “deeply tormented . . . depress[ed] and worthless.”<sup>75</sup> Beyond social pressures, government officials fear that the country’s declining birthrate will harm economic growth and increase the costs of social welfare programs and have responded with campaigns calling women “birth machines.”<sup>76</sup>

The definitions of family relationship found in the Japanese Civil Code are based on Roman law definitions.<sup>77</sup> When a couple is married, paternity is based on presumptions founded on marriage;<sup>78</sup> when a couple is not married, paternity must be acknowledged to establish a legal parental relationship.<sup>79</sup> The standards for women are different. The woman who gives birth to a child in Japan is considered to be that child’s legal mother, regardless of the genetic relationship.<sup>80</sup>

Citizenship in Japan is gained *ius sanguinis*, meaning that children are Japanese nationals if their mother or father is a Japanese national at the time of the child’s birth.<sup>81</sup> The Family Registration Law requires that all Japanese nationals be registered in their family *koseki*, a registry that gives individuals legal status and Japanese nationality.<sup>82</sup> Individuals highly value having a pure registry, which is often scrutinized when applying to schools, for loans, and when getting married.<sup>83</sup> Adoption, which must be noted in both the registry of the birth parents and the adoptive parents,<sup>84</sup> is considered to show an “undesirable irregularity in family background that raises doubts about whether the individual has been properly socialized and about the strength of the bond between that individual and others in the family.”<sup>85</sup> Any potential

<sup>73</sup> Hidehiko Matsubayashi et al., *Emotional Distress of Infertile Women in Japan*, 16 HUM. REPROD. 966, 966 (2001).

<sup>74</sup> *Id.*

<sup>75</sup> King, *supra* note 1, at 198.

<sup>76</sup> Kozo Mizoguchi, *Japan’s Health Minister Rebuked for Calling Women “Birth Machines,”* SEATTLE TIMES (Jan. 30, 2007), [http://seattletimes.com/html/nationworld/2003547747\\_webbirth30.html](http://seattletimes.com/html/nationworld/2003547747_webbirth30.html) (last visited Mar. 1, 2014).

<sup>77</sup> Alcantara, *supra* note 4, at 419.

<sup>78</sup> MINPŌ [MINPŌ] [Civ. C.] art. 772(1) (Japan).

<sup>79</sup> Alcantara, *supra* note 4, at 419.

<sup>80</sup> Kisu et al., *supra* note 51, at 138.

<sup>81</sup> Alcantara, *supra* note 4, at 420-21.

<sup>82</sup> King, *supra* note 1, at 201; Melissa Ahlefeldt, *Less than Family: Surrogate Birth and Legal Parent-Child Relationships in Japan*, 32 J. JAPANESE L. 65, 69 (2012).

<sup>83</sup> King, *supra* note 1, at 203.

<sup>84</sup> Koseki hō [Family Registration Law], Law No. 224 of 1947, art. 15 (Japan).

<sup>85</sup> King, *supra* note 1, at 201.

infertility found in a *koseki* also leads to stigmatization.<sup>86</sup> Surrogacy without requiring adoption would allow couples to avoid reporting surrogacy events in the *koseki* and prevent stigmatization later in life.

Often, people who enter into surrogacy agreements abroad can circumvent the system by reporting that the intended mother gave birth to the child while traveling.<sup>87</sup> Officials have generally accepted these statements at face value except when it was very obvious that the intended mother had not given birth to the child,<sup>88</sup> such as in high profile cases like Baby Manji and Aki Mukai.<sup>89</sup> This, however, leaves couples at the whim of *koseki* officers and does not provide an effective long-term solution for an ongoing issue.

Even as more Japanese women have engaged in surrogacy agreements, the Science Council of Japan has determined that the current definitions in the Japanese Civil Code are still the appropriate standards for determining legal parenthood because “the primary protector of the child can be uniformly determined simultaneously with childbirth . . . the mental basis of nursing behavior (motherhood) grows during pregnancy . . . [and] by being regarded as the mother, surrogate mothers are required to be responsible for the pregnancy and delivery.”<sup>90</sup> Adoption is required for the intended mother to gain legal parental rights.<sup>91</sup> Contrastingly, artificial insemination and the use of third party sperm are legal in Japan.<sup>92</sup> This situation creates a double standard: men are allowed to engage in a full spectrum of ART if they have fertility problems and can gain parental rights for children that are not genetically related to them.<sup>93</sup> Women, however, may not even be able to gain parental rights for children that are genetically their own; surrogates might be stuck as the legal mothers of children they never intended or desired to raise.<sup>94</sup>

The discrepancy of rights between genders is very problematic because the Japanese Constitution prohibits discrimination based on gender through both fundamental individual rights and equal protection guarantees.<sup>95</sup> Furthermore, Japan is a member of the Convention on the

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<sup>86</sup> *Id.*

<sup>87</sup> Semba et al., *supra* note 30, at 350.

<sup>88</sup> *Id.*

<sup>89</sup> See, e.g., Ahlefeldt, *supra* note 82, at 74 (discussing surrogacy and legal parent-child relationships in Japan).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> King, *supra* note 1, at 200.

<sup>93</sup> *Id.* at 200, 209.

<sup>94</sup> *Id.* at 209.

<sup>95</sup> *Id.* at 193.

Elimination of All Forms of Discrimination Against Women (“CEDAW”), which mandates that member states eliminate “all legal, political, social, and cultural structures that cause discrimination against women” to achieve actual gender equality.<sup>96</sup> This situation leaves Japan with two options: legalize surrogacy or make donor sperm illegal. Legalizing surrogacy would be the most progressive and practical option for a country that wants its citizens to have children.

### III. THE USE OF INTERNATIONAL SURROGATES BY JAPANESE CITIZENS

Controversies surrounding the use of international surrogates may have soured attitudes towards surrogacy in Japan, further demonstrating the need to legalize the practice domestically. A small study conducted in 2000 found that 17% of women and 23% of men expected to actually engage in gestational surrogacy agreements.<sup>97</sup> However, because surrogacy is virtually nonexistent in Japan, these couples must travel abroad to use surrogates, complicating the situation.<sup>98</sup> As of 2009, “17% . . . of women and 23% . . . of men in infertile couples would be willing to use gestational . . . surrogacy.”<sup>99</sup> This data, along with the cases discussed below and the lack of regulation in India, show why developing surrogacy practices within Japan is important. Regulating surrogacy within Japan will help to prevent exploitation and drawn out legal battles. Furthermore, Japan has a maternal mortality rate of only 4.9 in 100,000, meaning that it is one of the safest places in the world to be pregnant and give birth to a child.<sup>100</sup> Legalizing surrogacy would put an end to some of the reproductive health-related controversies that have been prominent in the country in recent years. This section will first explore the Baby Manji case. It will then discuss Aki Mukai’s journey to have her own children. It next details surrogacy in India, focusing on how the lack of regulation harms both babies and surrogates. Finally, it postulates on the future of Japanese surrogacy tourism in Japan and highlights Thailand’s potential to become the next major forum for international surrogacy.

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<sup>96</sup> *Id.* at 194.

<sup>97</sup> Saito & Matsuo, *supra* note 60, at 158. Close to 300 people participated in this study. *Id.*

<sup>98</sup> See generally Alcantara, *supra* note 4 (providing an overview of surrogacy in Japan).

<sup>99</sup> Kisu et al., *supra* note 51, at 137.

<sup>100</sup> *Id.*

A. *Statelessness and the Baby Manji Case*

One of the most famous cases related to surrogacy in Japan involves an international surrogacy contract gone awry known as the Baby Manji Case. The case centers on a baby born in India in July of 2008 to Japanese parents via an Indian surrogate.<sup>101</sup> Manji's intended parents, Ikufumi and Yuki Yamada, entered into a gestational surrogacy contract through an Indian clinic with an Indian woman named Pritiben Mehta in November of 2007.<sup>102</sup> Mr. Yamada was genetically related to the child, but they used a third party donated ovum, so his wife was not.<sup>103</sup> Mehta was paid USD8,200 for her services and an agreement to terminate her parental rights.<sup>104</sup> The Yamadas divorced one month before Manji was born.<sup>105</sup> Mr. Yamada, the intended father, still wanted to raise Manji while the intended (but genetically unrelated) mother did not.<sup>106</sup> The anonymous egg donor had no rights and responsibilities to Manji, and Mehta's parental rights terminated when Manji was born.<sup>107</sup> This left no woman with parental rights to Manji.<sup>108</sup> Though, as discussed below,<sup>109</sup> Aki Mukai's twins were given Japanese citizenship based on their father's nationality, when Mr. Yamada tried to bring Manji back to Japan, the Japanese embassy would not issue a passport and said that it would use the birth mother's nationality to determine the nationality of the child.<sup>110</sup> India also refused to issue a passport because, under the Guardians and Wards Act of 1890, the country does not recognize a single man adopting a female child and only issues passports based on the mother's citizenship.<sup>111</sup> Furthermore, the baby had no Indian parents, making her ineligible for Indian citizenship.<sup>112</sup>

Officials in Anand, a city in Gujarat where Manji was born, issued a provisional birth certificate for Manji, leaving the line for "mother's name"

<sup>101</sup> Mortazavi, *supra* note 10, at 2274.

<sup>102</sup> Seema Mohapatra, *Stateless Babies & Adoption Scams: A Bioethical Analysis of International Commercial Surrogacy*, 30 BERKELEY J. INT'L L. 412, 418 (2012); Smerdon, *supra* note 8, at 69.

<sup>103</sup> Mortazavi, *supra* note 10, at 2274.

<sup>104</sup> *Id.*

<sup>105</sup> Mohapatra, *supra* note 102, at 418.

<sup>106</sup> Mortazavi, *supra* note 10, at 2274.

<sup>107</sup> KARI POINTS, THE KENAN INSTITUTE FOR ETHICS AT DUKE UNIVERSITY, COMMERCIAL SURROGACY AND FERTILITY TOURISM IN INDIA: THE CASE OF BABY MANJI 5, available at <https://kenan.ethics.duke.edu/wp-content/uploads/2012/07/Case-Study-Surrogacy.pdf>.

<sup>108</sup> Mortazavi, *supra* note 10, at 2274.

<sup>109</sup> *See infra* Part III.B.

<sup>110</sup> Mortazavi, *supra* note 10, at 2274. The Japanese Civil Code does not recognize surrogacy. POINTS, *supra* note 107, at 5.

<sup>111</sup> POINTS, *supra* note 107; Mohapatra, *supra* note 102, at 419.

<sup>112</sup> Mortazavi, *supra* note 10, at 2274.

blank, but this was not enough to bring her to Japan.<sup>113</sup> Furthermore, Gujarat fell into political turmoil and experienced bombings a day after Manji's birth, and she was moved to a hospital in Jaipur, Rajasthan.<sup>114</sup> Because of her long hospital stay, she developed several hospital-borne illnesses including septicemia.<sup>115</sup> After, Mr. Yamada's friend temporarily housed and breastfed the baby.<sup>116</sup> Ultimately, it took three months to sort out Manji's citizenship and to issue her a visa to enter Japan.<sup>117</sup>

During that three-month period, Mr. Yamada's Indian tourist visa expired, requiring him to return to Japan.<sup>118</sup> He left Manji in the care of his mother, Emiko Yamada.<sup>119</sup> While he was gone, Satya, a human rights non-governmental organization, sued the surrogacy facilitator in Rajasthan High Court, arguing that it was engaging in child trafficking.<sup>120</sup> The petition alleged that "in the absence of a surrogacy law in India, the legitimacy of the baby could not be claimed by anyone," preventing the grandmother or father from gaining custody.<sup>121</sup> The petition further alleged that the clinic where Manji was born and Dr. Naya Patel, its founder, were "engaged in the illegal trade [of] infants and selling them to foreigners."<sup>122</sup> Emiko Yamada petitioned the Supreme Court of India to adopt the child.<sup>123</sup> Two months after Manji was born, the Supreme Court granted the grandmother temporary custody, preventing police from forcing Manji's appearance in court in Rajasthan.<sup>124</sup> The Supreme Court also validated surrogacy in India, stating that "[commercial surrogacy] is legal in several countries including India where, due to excellent medical infrastructure, higher international demand and ready availability of poor surrogates, it is reaching industry proportions."<sup>125</sup>

Eventually, India issued Manji a certificate of identity, a document given to people who are stateless or unable to get a passport from their

<sup>113</sup> Mohapatra, *supra* note 102, at 419; Smerdon, *supra* note 8, at 70.

<sup>114</sup> Mohapatra, *supra* note 102, at 419; POINTS, *supra* note 107.

<sup>115</sup> Mohapatra, *supra* note 102, at 419.

<sup>116</sup> *Id.*

<sup>117</sup> POINTS, *supra* note 107, at 7.

<sup>118</sup> Mohapatra, *supra* note 102, at 419.

<sup>119</sup> *Id.* at 419-20.

<sup>120</sup> Mortazavi, *supra* note 10, at 2274; Smerdon, *supra* note 8, at 70.

<sup>121</sup> Smerdon, *supra* note 8, at 70-71; Mortazavi, *supra* note 10, at 2274-75.

<sup>122</sup> Smerdon, *supra* note 8, at 71.

<sup>123</sup> Baby Manji Yamada v. Union of India & Another, A.I.R. 2009 S.C. 84 (India), available at <http://judis.nic.in/supremecourt/imgs1.aspx?filename=32597>; Mohapatra, *supra* note 102, at 419-20.

<sup>124</sup> Baby Manji Yamada v. Union of India & Another, A.I.R. 2009 S.C. 84 (India); Smerdon, *supra* note 8, at 71; POINTS, *supra* note 107, at 6.

<sup>125</sup> Baby Manji Yamada v. Union of India & Another, A.I.R. 2009 S.C. 84 (India); Smerdon, *supra* note 8, at 71. The court also said that Satya should have petitioned the court directly. *Id.*

country.<sup>126</sup> No nationality or mother was listed on the certificate.<sup>127</sup> Japanese authorities also agreed to issue a humanitarian visa to Manji, which allowed her to enter Japan.<sup>128</sup> Furthermore, the Japanese government promised to grant her citizenship once Mr. Yamada was formally established as her biological father.<sup>129</sup> Manji and her grandmother arrived in Japan on November 2, 2008.<sup>130</sup> Although citizenship was promised, Manji has since disappeared from sight, and no evidence of a change in her legal circumstances has surfaced, which could lead to difficulties when doing things such as enrolling in school in the future.<sup>131</sup> Though there might have still been issues surrounding the parenthood of Baby Manji because of the Yamadas' divorce, many of the citizenship issues could have been avoided if surrogacy was legal in Japan. Most importantly, if legalized, the Japanese Civil Code would set rules for establishing citizenship for babies born under surrogacy agreements. Furthermore, couples would not have to travel abroad and babies would be born in Japan to a Japanese intended mother, surrogate, and egg donor. These factors would have allowed Manji to be a citizen of Japan without much controversy and would prevent future difficulties from arising, such as Manji's ability to attend school. Below are other situations in Japan that also highlight the importance of legalizing surrogacy.

#### B. *Adoption and Aki Mukai*

Aki Mukai, a notable Japanese television personality married to former professional wrestler Nobuhiko Takada, was at the center of another major surrogacy controversy in Japan. In September of 2000, shortly after learning she was pregnant for the first time, Mukai was diagnosed with cervical cancer.<sup>132</sup> She underwent two unsuccessful operations aimed at treating the cancer without terminating the pregnancy but eventually agreed to terminate the pregnancy and undergo a hysterectomy that would leave her

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<sup>126</sup> Mohapatra, *supra* note 102, at 420. This marked the first time India had ever issued such a document. Sreeja Jaiswal, *Commercial Surrogacy in India: An Ethical Assessment of Existing Legal Scenario from the Perspective of Women's Autonomy and Reproductive Rights*, 16 GENDER, TECH. & DEV. 1, 17 (2012).

<sup>127</sup> Mortazavi, *supra* note 10, at 2275.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> Smerdon, *supra* note 8, at 72.

<sup>131</sup> POINTS, *supra* note 107, at 7.

<sup>132</sup> Tōkyō Kōtō Saibansho [Tōkyō High Court] Mar. 23, 2007, Hei 18 (kyo) no. 47, 61 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 619 (Japan), <http://www.courts.go.jp/english/judgments/text/2007.03.23-2006.-Kyo-.No.47.html> (Japan); Alcantara, *supra* note 4, at 418.

ovaries intact.<sup>133</sup> She went public with these initial details in December of the same year and continued to keep her story public as it progressed.<sup>134</sup> In 2002, she traveled to Nevada and had her eggs retrieved for IVF.<sup>135</sup> A gestational surrogate there twice attempted to get pregnant, but neither attempt succeeded.<sup>136</sup> Mukai returned to Nevada in 2003 to work with a different gestational surrogate.<sup>137</sup> This time, IVF was successful and the surrogate gave birth to twin boys, Banri and Yuta, in November 2003.<sup>138</sup>

Although a Nevada court listed Mukai and Takada as the legal parents of the twins on their birth certificates, Japanese law mandates that the woman who gives birth to a child is his/her legal mother.<sup>139</sup> The twins entered Japan in January 2004 using United States passports, receiving certificates of alien registration.<sup>140</sup> When trying to register the twins' birth certificates, Japanese officials required that Mukai list the American surrogate as the mother and Takada as the father because of a 1962 Japanese Supreme Court Decision stating that "a person who delivers a child shall be the mother."<sup>141</sup> Under this situation, the twins would gain Japanese citizenship through Takada, but Mukai would be required to formally adopt the children.<sup>142</sup> Mukai decided to sue to force the government to register the birth certificates to avoid the stigma of adoption.<sup>143</sup>

The case, aimed at compelling the Shinagawa District to register the twins' birth consistent with the Nevada birth certificate, was first heard in Tokyo Family Court in November 2005.<sup>144</sup> The Court held that Japanese law should apply, meaning that the surrogate was the twins' mother and that Mukai would be forced to adopt the babies.<sup>145</sup> The couple appealed to the Tokyo High Court, which reversed the lower court's decision in September 2006, stating that foreign judgments related to private international law should be enforced in Japan unless they violate Japanese public policy.<sup>146</sup> The Court found that recognizing Mukai as the twins' legal mother did not violate public policy and further stressed that Mukai and Takada were the

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<sup>133</sup> Alcantara, *supra* note 4, at 418.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 419.

<sup>140</sup> *Id.*

<sup>141</sup> Mayeda, *supra* note 65, at 10.

<sup>142</sup> Alcantara, *supra* note 4, at 419.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 422.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

twins' genetic parents and that this was the only way they could have children.<sup>147</sup> Furthermore, the Court said that it was in the best interest of the children for Mukai to be their legal mother and to be listed as such on their birth certificates.<sup>148</sup> In March 2007, the Japanese Supreme Court reversed the Tokyo High Court's judgment, finding that surrogacy violated Japanese public policy and went against the nature of the Japanese Civil Code.<sup>149</sup> The Court said that surrogacy violated the fundamental, foundational "natural parent-child relationship."<sup>150</sup> Three judges stressed the importance of legislation to clarify matters concerning surrogacy, recognizing that foreign surrogacy would not stop.<sup>151</sup> The Court also said that adoption was the best mechanism for Mukai to gain a formal maternal relationship with her children.<sup>152</sup> This case again illustrates the double standard that exists in Japan, as Takada was automatically named the twins' natural and legal father. Contrastingly, women who are the intended mothers in surrogacy contracts are required to adopt their own children even when there is a biological relationship. Because of Japan's reliance on foreign surrogates, this will continue to be an issue.

### C. *Abuses Faced by Surrogates in India*

Many Japanese couples currently travel to India to enter into surrogacy agreements, where surrogates have few legal protections and live in abject conditions.<sup>153</sup> Because of international reproductive tourism, even if Japan formally bans surrogacy, the practice would never truly leave Japan. Japanese families would still contribute to the abuse that surrogates in India face by continuing to enter into surrogacy agreements there. Ultimately, some people desperately want to have children, and there is a large market for fertility tourism. It can be found in countries that ban the practice (such as France), do not restrict the practice (such as South Korea), and only allow non-commercial surrogacy (such as the United Kingdom).<sup>154</sup> Legalizing the practice in-country will create regulatory structures that will prevent citizenship and parentage from becoming major issues, maximizing the

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<sup>147</sup> *Id.*

<sup>148</sup> King, *supra* note 1, at 208.

<sup>149</sup> Tōkyō Kōtō Saibansho [Tōkyō High Court] Mar. 23, 2007, Hei 18 (kyo) no. 47, 61 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 619 (Japan), <http://www.courts.go.jp/english/judgments/text/2007.03.23-2006.-Kyo-.No.47.html> (Japan).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *See infra* Part III.C.

<sup>154</sup> Semba et al., *supra* note 30, at 353.

amount of protection in place for all contracting parties as well as the resulting children. This section will discuss the history of surrogacy in India, current pending legislation, and the lives of surrogates in India.

### 1. *The History of Surrogacy in India*

In the past decade, India has become a major destination for people wanting to enter into surrogacy agreements. In fact, it is estimated that more than 3,000 women in India have served as surrogates during that time period, helping to create a USD 445 million per year industry.<sup>155</sup> In 2012, an estimated 1,000 clinics in India focusing on surrogacy housed as many as 2,000 surrogates working with overseas families.<sup>156</sup>

A number of factors make India a particularly attractive destination to engage in surrogacy agreements. A number of doctors in the country have Western training, raising the quality of health care.<sup>157</sup> Furthermore, entering into a surrogacy agreement in India is much cheaper than entering into similar agreements in other countries where surrogacy is legal. For example, surrogacy agreements in India cost about USD 25,000.<sup>158</sup> Contrastingly, surrogacy costs in the United States can reach as much as USD 80,000.<sup>159</sup>

Another major reason Japanese couples seek surrogates in India is that the practice is completely legal but highly unregulated within the country. Though in 2005 the Indian Council of Medical Research (“ICMR”) drafted guidelines aimed at regulating services related to fertility, these guidelines are not legally binding.<sup>160</sup> A bill related to ART has been pending since 2008, but has yet to pass in the Indian Parliament.<sup>161</sup> The Delhi High Court has also refused to intervene in surrogacy cases because surrogacy is seen as a personal issue.<sup>162</sup> Doctors at private hospitals in India are therefore “willing to exercise reproductive options that are banned, heavily regulated, or difficult to obtain in many countries around the world.”<sup>163</sup> This,

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<sup>155</sup> Mortazavi, *supra* note 10, at 2250; Jennifer Rimm, *Booming Baby Business: Regulating Commercial Surrogacy in India*, 30 U. PA. J. INT’L L. 1429, 1432 (2009).

<sup>156</sup> Helen Roberts & Anand Raj, *India’s ‘Rent a Womb’ Industry is Booming*, GULF NEWS (Sept. 14, 2012), <http://gulfnews.com/life-style/general/india-s-rent-a-womb-industry-is-booming-1.1073056> (last visited Mar. 8, 2014).

<sup>157</sup> Rimm, *supra* note 155, at 1430.

<sup>158</sup> Mortazavi, *supra* note 10, at 2271-72.

<sup>159</sup> Rimm, *supra* note 155, at 1444.

<sup>160</sup> *Id.* at 1430-31.

<sup>161</sup> *Id.* at 1433.

<sup>162</sup> Ruby L. Lee, Note, *New Trends in Global Outsourcing of Commercial Surrogacy: A Call for Regulation*, 20 HASTINGS WOMEN’S L.J. 275, 282 (2009).

<sup>163</sup> Rimm, *supra* note 155, at 1431.

combined with the other factors mentioned above, has made India a particularly desirable place for people to engage in surrogacy agreements.

In January 2013, India began the process of regulating surrogacy. The Indian Home Ministry passed several new regulations to protect children born to surrogate mothers. They include limiting those that can apply for medical surrogacy visas to heterosexual couples who have been married for at least two years, are from countries that recognize surrogacy, and can provide documentation that their home country will accept the child.<sup>164</sup> The Ministry has since suggested that single people of either gender should be allowed to use surrogates.<sup>165</sup> This law is meant to codify the ICMR Guidelines.<sup>166</sup> However, the ICMR guidelines are “intended to protect the medical, social and legal rights of those involved in surrogacy transactions” and do not require couples to be married a certain length of time.<sup>167</sup> The 2013 bill also lacks several provisions that were part of 2010 draft bill, particularly those that focused on regulating practitioners and protecting the rights of surrogates. For example, standards for regulating and registering clinics and establishing state and national advisory boards are parts of the 2010 draft bill, but these regimes are not mentioned in the regulations that passed in 2013.<sup>168</sup> The draft bill also carefully delineates the procedures necessary for consent and parental rights, elements the 2013 regulations lack.<sup>169</sup> The regulations that accompany the bill include information about the processes people must go through to establish and register a clinic, as well as sample forms and contracts that surrogates, donors, and intended parents must sign.<sup>170</sup> Furthermore, the new law does very little to protect the rights of surrogate mothers. Though it does place an age limit on surrogates,

<sup>164</sup> MINISTRY OF HOME AFFAIRS, TYPES OF VISA FOR FOREIGN NATIONALS INTENDING TO VISIT INDIA FOR COMMISSIONING SURROGACY AND CONDITIONS FOR GRANT VISA FOR THE PURPOSE, available at <http://mha1.nic.in/pdfs/CS-GrntVISA-291112.pdf>; Robin Okuthe, *India Bans Surrogacy Among Foreign Gay Couples, Singles*, DIGITAL J. (Jan. 18, 2013), <http://www.digitaljournal.com/article/341588> (last visited Mar. 1, 2014); Nishat Hyder, *India Limits Surrogacy Visas to Married Couples*, BIONEWS (Jan. 21, 2013), [http://www.bionews.org.uk/page\\_242618.asp](http://www.bionews.org.uk/page_242618.asp) (last visited Mar. 1, 2014).

<sup>165</sup> Alope Tikku, *Single Foreigners May Get Surrogacy Option*, HINDUSTAN TIMES (May 13, 2013), <http://www.hindustantimes.com/storypage/print/1059225.aspx> (last visited Mar. 1, 2014); Rahul Tripathi, *Government Set to Allow Visas to Singles Too for Surrogacy*, THE INDIAN EXPRESS (May 28, 2013), <http://www.indianexpress.com/story-print/1121434> (last visited Mar. 1, 2014).

<sup>166</sup> *Rent-a-Womb Rule Haze; Ministries Pull in Different Directions*, THE TELEGRAPH (Jan. 21, 2013), [http://www.telegraphindia.com/1130121/jsp/nation/story\\_16466327.jsp#.Uw64CfldWSp](http://www.telegraphindia.com/1130121/jsp/nation/story_16466327.jsp#.Uw64CfldWSp) (last visited Mar. 1, 2014).

<sup>167</sup> *Id.*

<sup>168</sup> See INDIAN COUNCIL OF MEDICAL RESEARCH, MINISTRY OF HEALTH & FAMILY WELFARE, THE ASSISTED REPRODUCTIVE TECHNOLOGIES (REGULATIONS) BILL 2010 at 5-14, available at <http://icmr.nic.in/guide/ART%20REGULATION%20Draft%20Bill1.pdf>.

<sup>169</sup> See *id.* at ch. 4 & 7.

<sup>170</sup> See INDIAN COUNCIL OF MEDICAL RESEARCH, *supra* note 168.

it does not include a minimum pay provision or other types of legal protections that were a part of the 2010 draft bill.<sup>171</sup> By contrast, the rights of surrogates are prominently featured in the draft bill,<sup>172</sup> which includes regulations specifically related to compensating surrogates and caring for them before, during, and after pregnancy.<sup>173</sup>

No dates have been set for when the new regulations will apply or how they will be implemented and enforced.<sup>174</sup> Ultimately, the 2010 draft bill took a more holistic approach than the 2013 regulations. The 2013 regulations only protect the children born through surrogacy and do not take steps to protect surrogates or regulate clinics, which were both elements of the 2010 draft bill.

In August 2013, the Indian government began the process of filling in some of the gaps from the January 2013 regulations. Lawmakers hope to finally bring the ART Bill to the Cabinet before introducing it to Parliament.<sup>175</sup> However, when the 2013 Parliament session ended, the bill was still not ready to go to the cabinet.<sup>176</sup> The latest version of the draft bill regulates practices for both the surrogates and infertile couples. Under this draft bill, Indian women will not be able to act as a surrogate for more than three successive births (including their own children), there must be a two year gap between deliveries, the surrogate must be between the ages of twenty-one and thirty-five, the surrogate must be tested for sexually transmitted diseases including Human Immunodeficiency Virus (“HIV”), the surrogate cannot undergo embryo transfer more than three times for the same couple, and the surrogate has the right to terminate a pregnancy at any time, but must reimburse the infertile couple if done without a medical reason.<sup>177</sup> Furthermore, each foreign infertile couple must appoint a local

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<sup>171</sup> MANCHESTER SOLICITORS, SURROGACY LAW UPDATE: CHANGES TO SURROGACY RULES IN INDIA, MANCHESTER SOLICITORS (Mar. 22, 2013), <http://www.kuits.com/news/surrogacy-law-update-changes-to-indian-surrogacy-law> (last visited Mar. 1, 2014).

<sup>172</sup> *Rent-a-Womb Rule Haze; Ministries Pull in Different Directions*, *supra* note 166.

<sup>173</sup> See INDIAN COUNCIL OF MEDICAL RESEARCH, *supra* note 168, at 26-28.

<sup>174</sup> *Rent-a-Womb Rule Haze; Ministries Pull in Different Directions*, *supra* note 166; Prahlad, *Govt Bid to Regulate Thousand Crore Surrogate Motherhood*, ONEINDIA NEWS (Jan. 21, 2013), <http://news.oneindia.in/2013/01/19/govt-bid-regulate-thousand-crore-surrogate-motherhood-1133766.html> (last visited Mar. 1, 2014).

<sup>175</sup> *Government to Introduce Landmark Bill on Surrogacy in Cabinet*, IBN LIVE (Aug. 4, 2013), <http://ibnlive.in.com/news/government-to-introduce-landmark-bill-on-surrogacy-in-cabinet/411888-37.html> (last visited Mar. 1, 2014).

<sup>176</sup> Abantika Ghosh, *Bill Stuck, No Check on Surrogacy Business*, THE INDIAN EXPRESS (Dec. 26, 2013), <http://www.indianexpress.com/news/bill-stuck-no-check-on-surrogacy-business/1211735/0> (last visited Mar. 1, 2014).

<sup>177</sup> *Government to Introduce Landmark Bill on Surrogacy in Cabinet*, *supra* note 175; *Government to Introduce Landmark Bill on Surrogacy in India*, JAGRAN POST (Aug. 6, 2013),

guardian to care for the surrogate and baby until they are able to pick up the baby, use at least one of their own gametes, and pay all of the surrogate's expenses.<sup>178</sup> The Indian Directorate General of Health Services has even suggested banning foreigners from hiring surrogates in India unless they are of Indian origin.<sup>179</sup> Because of the lack of legal status of surrogacy in Japan highlighted by the Baby Manji case, the January and August regulations may further limit the opportunities for Japanese women to have children. This could cause them to enter into surrogacy agreements where the conditions are even riskier for all parties, such as Thailand or Nepal.<sup>180</sup> Because of the changing landscape of international surrogacy, the Japanese government should get serious about legalizing surrogacy domestically.

Many clinics in India currently engage in online advertising to help attract clients from developed countries such as Japan. These advertisements are very well targeted, helping to assuage women of the elements they most fear about surrogacy in general or in India—the training of the medical staff, some of the hassles of engaging in an international surrogacy contract, the fear of surrogate bonding, and the cost of surrogacy.<sup>181</sup> Although these websites attract clients by highlighting the benefits of Indian surrogacy practices and promising individualized services to each client, the advertisements gloss over many of the unsettling realities

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<http://post.jagran.com/government-to-introduce-landmark-bill-on-surrogacy-in-india-1375775274> (last visited Mar. 1, 2014).

<sup>178</sup> *Government to Introduce Landmark Bill on Surrogacy in Cabinet*, *supra* note 175.

<sup>179</sup> Abantika Ghosh, *No Surrogacy for Foreigners: Tough New Rules Planned*, THE INDIAN EXPRESS (Aug. 8, 2013), <http://www.inianexpress.com/story-print/1152699/> (last visited Mar. 1, 2014).

<sup>180</sup> Zvika Krieger, *Forget Marriage Equality; Israeli Gays Want Surrogacy Rights*, THE ATLANTIC (Apr. 5, 2013), <http://www.theatlantic.com/international/archive/2013/04/forget-marriage-equality-israeli-gays-want-surrogacy-rights/274639/> (last visited Mar. 1, 2014).

<sup>181</sup> Examples of advertising on Indian websites include:

The birth mother will deliver her baby at an excellent private hospital. If the surrogate is carrying twins, the mother will undergo caesarean delivery. The mother will not bond with the child but breast milk from the mother will be given to the baby (or babies).

PlanetHospital takes a lot of the guess work, stress and confusion out of the equation. Based on your medical history and doctor recommendation we prepare everything you need to make your surrogacy journey stress-free—from ordering your tests to arranging passports and visas for your children. When you arrive at the destination, a PlanetHospital concierge will be there to assist you every step of the way (for a small additional fee). So with PlanetHospital, all you have to do is show up . . . .

A high success rate in helping infertile couples build a family as well as the advantage of highly-skilled manpower and a substantially lower cost of treatment is making India the 'mother destination' for those seeking 'our own child.' And it costs a fraction of the amount which clinics in the West charge[.]

Smerdon, *supra* note 8, at 31 (citations omitted).

of international surrogacy.<sup>182</sup> They fail to discuss immigration issues some of the babies face, the side effects and medical complications that are a risk of any pregnancy, and the conditions in which surrogates live during their pregnancy.<sup>183</sup> These issues are discussed in detail in the next section.

## 2. *Surrogates in India*

Though the current situation in India has helped to create a system in which more people can afford to have children of their own, there are many downsides for surrogates under current circumstances in India. Many of these concerns center on the conditions in which surrogates currently live. Prior to 2009, there was already “evidence of a growing concern among doctors in India for the welfare of surrogates under this system.”<sup>184</sup> One major issue is that most surrogates in India come from impoverished backgrounds.<sup>185</sup> Many are also from lower castes.<sup>186</sup> Although surrogates in India are often only paid USD 3,000-7,000 (compared with USD 15,000 in the United States), the average income in India is only around USD 500 per year.<sup>187</sup> Therefore, many surrogates “will admit to being attracted by the opportunity to earn as much as fifteen years’ worth of their income in nine months.”<sup>188</sup> In some cases, women are paid more than they would have earned in their entire lifetime.<sup>189</sup> However, there is no formal payment structure in place to ensure that women actually get this money.<sup>190</sup> Most surrogacy advertising only occurs in poorer areas.<sup>191</sup> This has led to concerns that women only “enter these agreements out of economic necessity, without fully understanding the psychological and physical [sic] burdens that they stand to endure in the process.”<sup>192</sup> Research conducted by

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<sup>182</sup> *Id.* at 32.

<sup>183</sup> *Id.*

<sup>184</sup> Rimm, *supra* note 155, at 1434.

<sup>185</sup> *Id.* at 1444.

<sup>186</sup> Emily Stehr, Note, *International Surrogacy Contract Regulation: National Governments’ and International Bodies’ Misguided Quests to Prevent Exploitation*, 35 HASTINGS INT’L & COMP. L. REV. 253, 277 (2012). The caste system is a rigid social hierarchy in place in India. Traditionally, the castes consist of *Brahmins* (priests and teachers), *Kshatriyas* (warriors and rulers), *Vaishyas* (merchants), *Shudras* (laborers), and *Dalits* or *Harijans* (untouchables). Though it is still a prominent feature of life in India, it may be in the process of breaking down. See Lavanya Sankaran, *Caste Is Not Past*, N.Y. TIMES (June 15, 2013), <http://www.nytimes.com/2013/06/16/opinion/sunday/caste-is-not-past.html>.

<sup>187</sup> Smerdon, *supra* note 8, at 1444.

<sup>188</sup> *Id.*

<sup>189</sup> POINTS, *supra* note 107, at 4.

<sup>190</sup> *Lack of Legal Framework Harming Surrogate Mother and Child*, THE INDIAN EXPRESS (July 17, 2013), <http://archive.indianexpress.com/news/lack-of-legal-framework-harming-surrogate-mother-and-child/1143073/> (last visited Mar. 1, 2014).

<sup>191</sup> Smerdon, *supra* note 8, at 1444.

<sup>192</sup> *Id.*

sociologist Amrita Pande found that surrogates in India are typically “poor, live in rural area[s], [are] undereducated, married young, and [live] in an extended family that include in-laws.”<sup>193</sup> Fifty to sixty percent of surrogates and their husbands are illiterate, and literate parties are often asked to leave the room when the contract is being signed.<sup>194</sup>

These circumstances have exacerbated the unequal bargaining power between the surrogates and intended parents. Because the intended parents have more money and are in a position to receive better legal advice, the surrogates are more susceptible to manipulation and accepting a contract that is unfair to them.<sup>195</sup> Furthermore, even if surrogates can read and understand the contracts they sign, they are written almost exclusively in English as opposed to Indian languages.<sup>196</sup> Surrogates often do not get a hard copy of the contract.<sup>197</sup> Finally, because of the nature of the relationship, surrogates sometimes see themselves as the “sisters” of the intended mothers and think that the intended parents will continue to support the surrogate or keep her in the child’s life once the baby is born.<sup>198</sup>

The social habits common to many Indian women also make it a very attractive place to engage in surrogacy, especially when compared to the United States. For example, “Indian women are considered more trustworthy than American women because they are less likely to smoke, drink alcohol, or engage in drug use due to cultural and religious norms.”<sup>199</sup> Furthermore, the ICRM Guidelines require that surrogates be under forty-five, undergo HIV testing, agree to not engage in behavior that could lead to contracting HIV while pregnant, obtain consent from her spouse, and not serve as a surrogate more than three times, helping to allay the safety concerns of many of the couples looking to engage in surrogacy.<sup>200</sup>

Pregnancy, however, can prove to be a very difficult period for surrogates beyond the normal struggles any expectant woman may face.

<sup>193</sup> Seema Mohapatra, *Achieving Reproductive Justice in the International Surrogacy Market*, 21 ANNALS HEALTH L. 191, 198 (2012).

<sup>194</sup> Wesley J. Smith, *Gestational Serfdom of India’s Destitute Women*, NAT’L REV. (July 21, 2013), <http://www.nationalreview.com/node/354029/print> (last visited Mar. 1, 2014); Reema Gehi, *Womb Trade Relations*, TIMES OF INDIA (June 14, 2013), [http://articles.timesofindia.indiatimes.com/2013-06-14/health/39117676\\_1\\_surrogacy-american-film-festival-pyramid](http://articles.timesofindia.indiatimes.com/2013-06-14/health/39117676_1_surrogacy-american-film-festival-pyramid) (last visited Mar. 1, 2014).

<sup>195</sup> Rimm, *supra* note 155, at 1459.

<sup>196</sup> Amrita Pande, *Not an “Angel,” Not a “Whore”: Surrogates as “Dirty” Workers in India*, 16 INDIAN J. GENDER STUD. 141, 147 (2009).

<sup>197</sup> Smith, *supra*, note 194; *Lack of Legal Framework Harming Surrogate Mother and Child*, *supra* note 190.

<sup>198</sup> Kristiana Brugger, *International Law in the Gestational Surrogacy Debate*, 35 FORDHAM INT’L L.J. 665, 675 (2012).

<sup>199</sup> Lindsey Coffey, *A Rights-Based Claim to Surrogacy: Article 23 of the Convention on the Rights of Persons with Disabilities*, 20 MICH. ST. INT’L L. REV. 259, 277-78 (2012).

<sup>200</sup> Rimm, *supra* note 155, at 1442.

Though surrogates can increase their sense of self-worth from the service they provide, this happens at a high cost.<sup>201</sup> Surrogates often live in dormitory-like group homes at hospitals while they are pregnant.<sup>202</sup> This arrangement was created “to ensure that the women remain perfect surrogates . . . that the clients get the best deal . . . [and that] the management . . . [has] complete control over the surrogates during the nine months of pregnancy.”<sup>203</sup> The intended parents pay for the surrogate’s room and board.<sup>204</sup> However, the surrogates’ daily movements are restricted and they must seek permission to visit their own family.<sup>205</sup> Although the families of the surrogates are welcome at clinics, they usually cannot afford to visit, meaning that surrogates are apart from their families and children during their entire pregnancy.<sup>206</sup> This can increase the isolation that surrogates already feel. Surrogates describe the experience as a painful one, saying that they have “a lifetime’s worth of injections pumped into [them]” and that the “work is not ethical—it’s just something [they] have to do to survive.”<sup>207</sup> Finally, because of conservative attitudes towards sex and procreation in India, surrogates often feel the need to lie about their participation in surrogacy.<sup>208</sup> This means a surrogate will often tell people that she was away visiting relatives for months or that the baby she was carrying died, hence why she is not raising it.<sup>209</sup>

Surrogates have very little control over the risks associated with pregnancy. Doctors decide if selective reduction, the practice of aborting some fetuses in pregnancies with more than one fetus, is in the best interest of the pregnancy, not the surrogate.<sup>210</sup> A surrogate does not receive her full contractual compensation if she miscarries late in her pregnancy.<sup>211</sup> Furthermore, if the surrogate dies over the course of the pregnancy or in labor, her family is not entitled to compensation even if the child is born healthy.<sup>212</sup> Her surviving family members must hope that the intended

<sup>201</sup> *Supra* note 198, at 677.

<sup>202</sup> Mohapatra, *supra* note 193, at 194.

<sup>203</sup> Amrita Pande, *Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker*, 35 J. WOMEN IN CULT. & SOC. 969, 980 (2010).

<sup>204</sup> Mohapatra, *supra* note 193, at 194.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 194-95.

<sup>207</sup> Jaiswal, *supra* note 126, at 12.

<sup>208</sup> Smerdon, *supra* note 8, at 56.

<sup>209</sup> *Id.*; Amrita Pande, “At Least I am not Sleeping with Anyone:” *Resisting the Stigma of Commercial Surrogacy in India*, 36 FEMINIST STUD. 292, 298 (2010).

<sup>210</sup> Arlie Hochschild, *Childbirth at the Global Crossroads*, THE AM. PROSPECT (Sept. 19, 2009), <http://prospect.org/article/childbirth-global-crossroads-0> (last visited Mar. 1, 2014).

<sup>211</sup> Gehi, *supra* note 194.

<sup>212</sup> Holly Williams, *Are Indian Surrogacy Programs Exploiting Impoverished Women?*, CBS NEWS, (Apr. 11, 2013), [http://www.cbsnews.com/2102-18563\\_162-57579212.html](http://www.cbsnews.com/2102-18563_162-57579212.html), (last visited Mar. 1, 2014).

parents are generous enough to compensate them.<sup>213</sup> This shows how surrogates in India lose control of their own bodies during their pregnancies and may even leave their families in precarious situations.

The above factors illustrate why surrogacy can be exploitative towards women in India. Though there will likely still be economic and educational disparities between surrogates and intended parents in Japan, similar cultural values would most likely help to equalize bargaining power and create a surrogacy system that respects Japanese values.<sup>214</sup> Ultimately, if the Japanese government were to legalize surrogacy, it could do so in a way that respects Japanese cultural norms and mores. It could also ensure that measures were in place to make sure every party had equal legal representation, therefore minimizing the potential for exploitation.

#### D. *The Future of International Surrogacy in Japan*

Even if the regulations in India are implemented successfully and Japanese couples are no longer allowed to enter into surrogacy agreements there, people will still continue to travel abroad to engage in surrogacy agreements. In recent years, many Japanese couples have entered into surrogacy agreements in the United States.<sup>215</sup> However, surrogacy in the United States is significantly more expensive than in India.<sup>216</sup> These financial constraints will most likely limit the number of Japanese families that can enter into surrogacy agreements in the United States.

Alternatively, Japanese couples might also start to look toward other surrogacy markets in developing countries such as Thailand. Japanese couples have been going to Thailand since 2008 to pursue surrogacy

<sup>213</sup> *Id.*; Nina Berglund, *Surrogate Mother Died After Birth*, NEWSINENGLISH.NO (Apr. 2, 2013), <http://www.newsinenglish.no/2013/04/02/surrogate-mother-died-after-birth/> (last visited Mar. 1, 2014).

<sup>214</sup> For more information about poverty in Japan, see Martin Fackler, *Japan Tries to Face Up to Growing Poverty Problems*, N.Y. TIMES (Apr. 21, 2010), [http://www.nytimes.com/2010/04/22/world/asia/22poverty.html?\\_r=0](http://www.nytimes.com/2010/04/22/world/asia/22poverty.html?_r=0) (last visited Mar. 1, 2014).

<sup>215</sup> See generally Alcantara, *supra* note 4 (describing the general landscape of surrogacy in Japan). Though there are obviously issues with poorer women serving as surrogates for richer women in the United States, the situations tend to be much less exploitive than in India or Thailand. Surrogates play more active roles in setting the terms of the surrogacy contract. State law varies as to whether or not surrogates can be compensated, but in states where compensation is allowed, surrogates tend to be more highly paid than in other countries. For an overview of surrogacy law in the United States, see Carla Spivak, *The Law of Surrogate Motherhood in the United States*, 58 AM. J. COMP. L. 97 (2010) and Hofman, *supra* note 7. For first-hand accounts of surrogacy in the United States, see Alex Kuczynski, *Her Body, My Baby*, N.Y. TIMES (Nov. 28 2008), <http://www.nytimes.com/2008/11/30/magazine/30Surrogate-t.html?pagewanted=all> (last visited Mar. 1, 2014), and Melanie Thernstrom, *Meet the Twiblings*, N.Y. TIMES (Dec. 29, 2010), [http://www.nytimes.com/2011/01/02/magazine/02babymaking-t.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2011/01/02/magazine/02babymaking-t.html?pagewanted=all&_r=0) (last visited Mar. 1, 2014). For more information about surrogacy and exploitation in India and Thailand, as well as price comparisons, see *infra* Part III.C.-D.

<sup>216</sup> See Mortazavi, *supra* note 10, at 2271-72; Rimm, *supra* note 155, at 1444.

agreements.<sup>217</sup> Though Thailand's surrogacy industry is not as big as India's, Thailand's IVF market is large and its surrogacy industry will presumably continue to grow if India implements surrogacy regulations, foreclosing India as a place to find surrogates and forcing Japanese couples to turn elsewhere.<sup>218</sup> In recent years, there has been a 54% increase in the use of surrogates in Thailand.<sup>219</sup> Moreover, surrogacy in Thailand is relatively affordable, costing between USD 38,000<sup>220</sup> and USD 50,000.<sup>221</sup>

The biggest issue with surrogacy in Thailand is that the Thai surrogacy law lacks the legal protections provided under surrogacy laws in the United States and India. Under guidelines issued by the Medical Council of Thailand in 1997 and 2001, medical practitioners are prohibited from being involved in surrogacy.<sup>222</sup> The Thai Cabinet approved these guidelines in 2010, but the National Assembly has not ratified them.<sup>223</sup> Government officials have said that surrogacy is illegal and is viewed as a form of human trafficking and exploitation.<sup>224</sup> In Thailand, the surrogate and her husband, if she is married, are listed as the parents on the baby's birth certificate.<sup>225</sup> The surrogate and her husband then must renounce their parental rights, which allow the court to appoint another guardian.<sup>226</sup> This process heightens the probability of intended parents having difficulties asserting their parental rights. For example, in January 2014, sixty-five babies born to Israeli couples who had entered into surrogacy agreements in Thailand were stuck in Thailand because the Israeli government considered the babies to be Thai

<sup>217</sup> Brasor & Tsubuku, *supra* note 71.

<sup>218</sup> Yuri Hibino & Yosuke Simazono, *Becoming a Surrogate Online: "Message Board" Surrogacy in Thailand*, 5 ASIAN BIOETHICS REV. 56, 56 (2013).

<sup>219</sup> Amy Corderoy, *More Parents Defy Law with Overseas Surrogacy*, THE SIDNEY MORNING HERALD (Sept. 14, 2013), <http://www.smh.com.au/national/more-parents-defy-law-with-overseas-surrogacy-20130913-2tq94.html> (last visited Mar. 1, 2014).

<sup>220</sup> *So Long Surrogacy in India, Hello Surrogacy in Mexico and Thailand*, PLANETHOSPITAL (Feb. 4, 2013), <http://blog.planethospital.com/2013/02/so-long-surrogacy-in-india-hello.html> (last visited Mar. 1, 2014).

<sup>221</sup> Kerri Ritchie, *Concern as Australians Turn to Thailand for Surrogates*, ABC NEWS (Apr. 13, 2013), <http://www.abc.net.au/news/2013-04-13/thai-surrogacy-concerns/4624388> (last visited Mar. 1, 2014).

<sup>222</sup> Hibino & Simazono, *supra* note 218, at 57.

<sup>223</sup> *Id.*

<sup>224</sup> Patrick Abboud, *Wombs for Hire: Aussie Couples Flock to Thailand to Find Surrogates*, THE FEED (Oct. 30, 2013), <http://www.sbs.com.au/news/article/2013/10/29/wombs-hire-aussie-couples-flock-thailand-find-surrogates> (last visited Mar. 1, 2014).

<sup>225</sup> Ritchie, *supra* note 221.

<sup>226</sup> ISAAN LAWYERS, SURROGACY DRAFT LAWS: A MOVE TOWARDS SAFE REGULATION (June 12, 2012), <http://www.thailand-surrogacy-law.com/surrogacy-draft-laws-a-move-towards-safe-regulation/> (last visited Mar. 1, 2014).

citizens and surrogates to have full parental rights.<sup>227</sup> Though after two weeks Israel agreed to issue passports to these children, Israel will no longer allow couples to enter into surrogacy agreements in Thailand after November 2014 because of these citizenship issues.<sup>228</sup> This situation helps to demonstrate how legal regimes in Thailand make it a far from ideal place to enter into surrogacy agreements. Furthermore, this process takes about four months and the intended parents must take physical custody of the child during that time period, necessitating that they spend a large amount of time in Thailand.<sup>229</sup> Thailand is in the process of drafting legislation that would require that the intended parents be legally married, unable to have kids, and able to care for kids, that genetic materials come from intended parents or donors, that surrogates be unpaid, and that children born to surrogates are the intended parents' legal children.<sup>230</sup> This would ultimately greatly change the surrogacy market in Thailand—though it would be easier for the intended parents to assert their rights, it will make it more difficult to get women to agree to be surrogates. Therefore, this avenue could also be cut off for Japanese women.

Though surrogates in Thailand are likely to be more educated and in a higher social strata than surrogates in India, they are still not in a position of power.<sup>231</sup> Most become surrogates to pay for their education, to pay off debts, or to support their families.<sup>232</sup> They are also likely to be insufficiently informed of the medical risks they will face during pregnancy and to have no legal means of collecting damages, because the contracts might not be legally valid.<sup>233</sup> There are even reports that women have been trafficked into Thailand to be forcibly impregnated as surrogates.<sup>234</sup> Ultimately, because the surrogate and her husband currently have legal rights to the baby she carries, engaging in surrogacy agreements in Thailand will most likely lead to more citizenship controversies like those faced by Baby Manji.

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<sup>227</sup> Gavriel Fiske, *65 Surrogate Babies Born to Israeli Gay Couples Stuck in Thailand*, THE TIMES OF ISRAEL (Jan. 19, 2014), <http://www.timesofisrael.com/65-surrogate-babies-born-to-israeli-gay-couples-stuck-in-thailand/> (last visited Mar. 1, 2014).

<sup>228</sup> Rebecca Carr, *Israeli Surrogacy Crisis Moves to Resolution While Health Ministry Supports Law Change for Gay Couples*, BIONEWS (Feb. 3, 2014), [http://www.bionews.org.uk/page\\_392661.asp](http://www.bionews.org.uk/page_392661.asp) (last visited Mar. 1, 2014).

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> Hibino & Shimazono, *supra* note 218, at 68.

<sup>232</sup> *Id.* at 59-63.

<sup>233</sup> *Id.* at 70.

<sup>234</sup> Debra Killalea, *SBS Journalist Patrick Abboud Investigates the Dark Side of Commercial Surrogacy in Thailand*, HERALD SUN (Nov. 3, 2013), <http://www.heraldsun.com.au/lifestyle/sbs-journalist-patrick-abboud-investigates-the-dark-side-of-commercial-surrogacy-in-thailand/story-fnixw28f-1226749000476> (last visited Mar. 1, 2014).

Japan should establish its own system for performing surrogacy. This will help to eliminate major issues with the citizenship of the children born to surrogates. It will also help Japanese women to achieve reproductive equality while reducing the exploitation of surrogates abroad. Finally, by establishing a system that reflects Japanese mores and values, surrogacy can be performed in an ethical manner that would most likely minimize the potential for major international controversies.

#### IV. A MODEL SURROGACY LAW FOR JAPAN

The Japanese government could use several different models when drafting surrogacy laws. Israel regulates surrogacy in a particularly logical way that serves as a good model.<sup>235</sup> The American Bar Association (“ABA”) has also developed a model act to deal with surrogacy that could be used for guidance.<sup>236</sup> Having clear surrogacy regulations in place will ensure that intended parents gain parental rights and are able to raise their children. This will also eliminate much of the uncertainty that can surround surrogacy and avoid the confusion that can make it a difficult practice. Should the government still decline to regulate the practice without making it officially legal or illegal, then a model where pre-birth surrogacy contracts are enforced would appear to be the most reasonable. However, comprehensive regulation would ultimately provide the uniformity that would be most beneficial to all parties involved in surrogacy agreements. Not only would this prevent confusion and provide clear cut rules for who are the legal parents, but it would also “filter out concerns of mental instability and economic exploitation,” which would greatly benefit Japan.<sup>237</sup>

##### A. *Surrogacy Regulation in Israel*

Israel regulates surrogacy in a straightforward manner. The country passed the Israeli Surrogate Motherhood Agreements Law in 1996 and the Surrogate Motherhood Regulations in 1998.<sup>238</sup> The law allows for parties to enter into gestational surrogacy agreements as long as the sperm is provided

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<sup>235</sup> See *infra* Part IV.A.

<sup>236</sup> See *infra* Part IV.B.

<sup>237</sup> Austin Caster, *Don't Split the Baby: How the U.S. Could Avoid Uncertainty and Unnecessary Litigation and Promote Equality by Emulating the British Surrogacy Law Regime*, 10 CONN. PUB. INT. L.J. 447, 514 (2011).

<sup>238</sup> Surrogate Motherhood Agreements (Approval of Agreement and Status of the Newborn) Law, 5756-1996 (Isr.), translated by Aryeh Greenfield (2010) (on file with Cardozo Sch. Of L.). For an authorized English translation see Law on Agreements for Carriage of Fetuses (Approval of Agreement and Status of Newborn), 5756-1996, SH No. 5756 p. 176 (Isr.).

by the intended father,<sup>239</sup> though this might be changing. In December 2013, Israel's Health Minister announced that she supported a public commission's recommendations to allow unmarried and homosexual men and women to access surrogacy services, though they will only be allowed to have one child, compared to two for heterosexual couples.<sup>240</sup> Under these changed regulations, the intended parent or parents' own egg or sperm must be used.<sup>241</sup> All parties must be of age and their domicile must be in Israel.<sup>242</sup> The law also guarantees that the intended parents will receive legal parental rights at the child's birth and that the gestational surrogate will not.<sup>243</sup> Surrogates are only allowed to withdraw from the contract if there are changed circumstances and the withdrawal will not harm the child.<sup>244</sup> A surrogate can never withdraw once a parentage order is issued.<sup>245</sup> The contract also cannot prevent the surrogate from receiving any medical treatment she wants, including abortion.<sup>246</sup> Under the Act, traditional surrogacy is strictly banned, meaning that the surrogate's eggs cannot be used.<sup>247</sup>

To protect the surrogates from exploitation, the law requires that all parties to surrogacy contracts undergo comprehensive screening to ensure "suitability of the parties, voluntary and informed consent, physical and mental health precautions . . . [and] financial safeguards."<sup>248</sup> Candidates also undergo extensive medical and psychological screenings.<sup>249</sup> An Approvals Committee then reviews several issues in the surrogacy contract, including:

[F]airness to both parties, full disclosure, adequate legal counsel for the surrogate, restrictions and requirements regarding the medical facility and type of treatment agreed to,

<sup>239</sup> Greenfield, *supra* note 238, at 5; Brock A. Patton, Note, *Buying a Newborn: Globalization and the Lack of Federal Regulation of Commercial Surrogacy Contracts*, 79 UMKC L. REV. 507, 527 (2010).

<sup>240</sup> Maria Victoria Rivas Llanos, *Israeli Health Minister Moves to Lift Surrogacy Restrictions for Singles and Gay Couples*, BIONEWS (Dec. 16, 2013), [http://www.bionews.org.uk/page\\_380021.asp](http://www.bionews.org.uk/page_380021.asp) (last visited Mar. 1, 2014).

<sup>241</sup> *Id.*

<sup>242</sup> David A. Frenkel, *Legal Regulation of Surrogate Motherhood in Israel*, 20 MED. & L. 605, 606 (2001).

<sup>243</sup> Patton, *supra* note 239, at 527.

<sup>244</sup> Greenfield, *supra* note 238, at 8.

<sup>245</sup> Greenfield, *supra* note 238, at 9.

<sup>246</sup> NUPHAR LIPKIN & ETTI SAMAMA, ISHA L'ISHA-HAIFA, SURROGACY IN ISRAEL: STATUS REPORT 2010 AND PROPOSALS FOR LEGISLATIVE AMENDMENT 9 (2010), [http://www.isha.org.il/upload/file/surrogacy\\_Eng00%5B1%5D.pdf](http://www.isha.org.il/upload/file/surrogacy_Eng00%5B1%5D.pdf) (last visited Mar. 1, 2014).

<sup>247</sup> Lee, *supra* note 162, at 296.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.* at 297; Greenfield, *supra* note 238, at 6.

the surrogate's right to refuse medical procedures during the process . . . psychological counseling for the surrogate for six months after she gives birth...[and assurance of] the protection of the surrogate's privacy.<sup>250</sup>

The Approval Committee is appointed by the Minister of Justice and is made up of seven members including two obstetricians/gynecologists, one internist, one clinical psychologist, one social worker, one lawyer, and one clergyman of the same religion as the parties involved.<sup>251</sup> Measures are also in place to ensure that the intended parents are not exploited.<sup>252</sup> A Welfare Officer is required to witness the transfer to the intended parents, which must occur as quickly as possible after birth.<sup>253</sup> The intended parents must then file for a parentage order that is automatically granted unless the Welfare Officer reports that the parentage order would put the child in danger.<sup>254</sup> These measures create a clear, certain, and effective system and minimize the risk of exploitation and coercion.<sup>255</sup>

A number of other regulations are part of the Israeli surrogacy law. There are limits on the age of the surrogate and the number of times a surrogate can give birth.<sup>256</sup> Women can serve as a surrogate no more than twice and both times must be for the same couple.<sup>257</sup> Currently only widowed or divorced women with two children can serve as surrogates, though under the new law, married women can serve as surrogates and the age limit is increased.<sup>258</sup> Only two-parent couples can use surrogates, though they do not need to be married.<sup>259</sup> Intended fathers can be no more than fifty-nine and intended mothers can be no more than forty-eight.<sup>260</sup> Finally, children are allowed to learn that they were born to surrogates once they reach the age of majority.<sup>261</sup> To prevent coercion, the law also forbids surrogacy contracts between people from the same family.<sup>262</sup> Under the

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<sup>250</sup> Lee, *supra* note 162, at 297.

<sup>251</sup> Greenfield, *supra* note 238, at 5.

<sup>252</sup> Lee, *supra* note 162, at 298.

<sup>253</sup> Greenfield, *supra* note 238, at 8.

<sup>254</sup> Greenfield, *supra* note 238 at 8.

<sup>255</sup> Lee, *supra* note 162, at 297.

<sup>256</sup> June Carbone, *Law, Politics, Religion, and the Creation of Norms for Market Transactions a Review of the Birth of Surrogacy in Israel* by D. Kelly Weisberg, 39 FAM. L.Q. 789, 800 (2005).

<sup>257</sup> *Id.*

<sup>258</sup> Rivas Llanos, *supra* note 240.

<sup>259</sup> Carbone, *supra* note 256, at 801.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> Greenfield, *supra* note 238 at 5; LIPKIN & SAMAMA, *supra* note 246, at 25.

proposed changes, surrogates can only undergo IVF three times and single people would be allowed to use surrogates.<sup>263</sup>

This type of system may work well in Japan with some changes. The Israeli regulatory scheme is particularly strong because parties can efficiently enter into surrogacy agreements that will be predictably enforced. Everyone involved has some degree of protection. However, requiring that the sperm come from the intended father potentially limits its application when working with same sex couples, heterosexual couples in which both parties struggle with fertility issues, or single women. Though the proposed changes help to lessen this problem, they still do not account for couples where both individuals struggle with fertility or where a single person is trying to have a child. Ideally, this would not be a part of Japanese regulations. Having the Japanese equivalent of a Welfare Officer present at all births may also disproportionately tax the system. Therefore, issuing a court order, as suggested in the ABA Model Act discussed below, is another strong alternative.

#### B. *The ABA's Model Surrogacy Act*

The ABA's Model Act Governing Assisted Reproductive Technology includes two different suggestions for regulating surrogacy agreements—Alternative A and Alternative B. Alternative A calls for judicial approval of the agreement, while Alternative B involves a self-executing contract.<sup>264</sup> Both Alternative A and Alternative B allow for the surrogate to be compensated. Compensation must be reasonable and cannot be conditional as to the outcome of the pregnancy.<sup>265</sup> As is the case in Israel, provisions of the Model Act are laid out in a logical manner that allow for the intended parents, the surrogate, and the child or children to receive strong legal protection. Although no states have adopted the Model Act, it provides a strong framework for surrogacy regulation.<sup>266</sup>

Under Alternative A, which is based on the Uniform Parentage Act, several requirements must be met before a court order will be granted to enforce the surrogacy contract.<sup>267</sup> These include a home study by a child welfare agency, voluntary entry into the agreement, provisions related to health care for the surrogate, and that compensation, if included in the

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<sup>263</sup> Rivas Llanos, *supra* note 240.

<sup>264</sup> Charles P. Kindregan, Jr., *Considering Mom: Maternity and the Model Act Governing Assisted Reproductive Technology*, 17 AM. U. J. GENDER SOC. POL'Y & L. 601, 610 (2009).

<sup>265</sup> *Id.* at 617.

<sup>266</sup> *Id.* at 614.

<sup>267</sup> *Id.* at 610.

agreement, is reasonable.<sup>268</sup> Termination is only allowed for good cause and notice of termination must be filed with the approving court.<sup>269</sup> The surrogate is not liable to the intended parents if termination occurs before becoming pregnant or is for good cause.<sup>270</sup> The intended parents must file notice to the court that the child has been born to the surrogate within three hundred days of assisted reproduction.<sup>271</sup> The court order will then confirm parentage and ensure that the intended parents are listed on the birth certificate.<sup>272</sup>

Under Alternative B, which is based on the Illinois Gestational Carrier Act,<sup>273</sup> certain requirements must be met before entering into the contract, including that the intended parents will be the legal parents and that the surrogate has no maternal interests.<sup>274</sup> At least one of the intended parents must be genetically related to the child (unless there is a laboratory error).<sup>275</sup> The intended parents become the legal parents immediately upon the birth of the child and have sole custody.<sup>276</sup> The surrogate must fulfill a number of set criteria, which include that she is at least twenty-one, has had a child before, receives both physical and mental health exams, receives legal consultation, and has health insurance that will cover the pregnancy.<sup>277</sup> In addition to the genetic relationship requirement, the intended parents must also meet several set criteria, which include having a medical need for a surrogate, undergoing a mental health evaluation, and undergoing a legal consultation.<sup>278</sup> The contract must be in writing, made before the pregnancy, and signed by both parties.<sup>279</sup> The parties must be represented by separate independent counsel and compensation must be kept in escrow.<sup>280</sup>

Ultimately, Alternative A appears to be more straightforward to enforce, which would likely make it a better system to adopt in Japan. Furthermore, Alternative A would allow couples in which both intended parents need to use gamete donors to have children that are their own. The importance of having children in Japanese culture makes this option particularly appealing.

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<sup>268</sup> MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 703(2) (2008).

<sup>269</sup> *Id.* at § 706(2)-(3).

<sup>270</sup> *Id.* at § 706(4).

<sup>271</sup> *Id.* at § 707(1).

<sup>272</sup> *Id.*

<sup>273</sup> Kindregan, *supra* note 264, at 610.

<sup>274</sup> *Id.*

<sup>275</sup> *Id.* at 610-11.; MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 701(3) (2008).

<sup>276</sup> MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 701(2) (2008).

<sup>277</sup> *Id.* at § 702(1).

<sup>278</sup> *Id.* at § 702(2).

<sup>279</sup> *Id.* at § 703(2).

<sup>280</sup> *Id.*

## V. CONCLUSION

Legalizing surrogacy would be a strong policy move in Japan. Japanese culture emphasizes the importance of having children, and banning surrogacy prevents many people from accomplishing this goal. Artificial insemination and IVF have long been standard practices in Japan and surrogacy is a continuation of these practices. Moreover, no good alternatives exist in Japan for infertile women. Adoption is stigmatized in the country. While a man can be recorded as the legal and natural father of a child to whom he is not genetically related in his family's *koseki*, a woman cannot—she must actually adopt the child even if she is that child's biological mother.

Even without legal status, surrogacy still exists in Japan because many families travel abroad to enter into surrogacy contracts. This has created many problems. Children born to surrogate mothers abroad often have problems entering Japan and gaining Japanese citizenship. Using Indian and Thai surrogates instead of creating a domestic market furthers the exploitation of impoverished women in those countries. Finally, Japan has a very developed health care system. The country has well-trained obstetricians, a history of using ART, and one of the lowest maternal mortality rates in the world. For these reasons, Japan should legalize surrogacy. The practices already in place in Israel and the guidelines found in the ABA Model Act Governing Assisted Reproductive Technology can help Japan determine the best regulations to enact when establishing a framework for legalized surrogacy within the country.